HOW TO SPECIFY?
VAGUENESS IN DEFINITIONS OF CRIMES IN CHINESE LAW
& RECEPTION OF WESTERN LEGAL CONCEPTS

by

Vincent Cheng Yang, LL. M.

DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY
in the School
of
Criminology

© Vincent Cheng Yang 1996

SIMON FRASER UNIVERSITY
April 1996

All rights reserved. This work may not be reproduced in whole or in part, by photocopy or other means, without permission of the author.
The author has granted an irrevocable non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of his/her thesis by any means and in any form or format, making this thesis available to interested persons.

The author retains ownership of the copyright in his/her thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without his/her permission.

L’auteur a accordé une licence irrévocable et non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de sa thèse de quelque manière et sous quelque forme que ce soit pour mettre des exemplaires de cette thèse à la disposition des personnes intéressées.

L’auteur conserve la propriété du droit d’auteur qui protège sa thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

ISBN 0-612-17186-8
PARTIAL COPYRIGHT LICENSE

I hereby grant to Simon Fraser University the right to lend my thesis, project or extended essay (the title of which is shown below) to users of the Simon Fraser University Library, and to make partial or single copies only for such users or in response to a request from the library of any other university, or other educational institution, on its own behalf or for one of its users. I further agree that permission for multiple copying of this work for scholarly purposes may be granted by me or the Dean of Graduate Studies. It is understood that copying or publication of this work for financial gain shall not be allowed without my written permission.

Title of Thesis/Project/Extended Essay

How to Specify? Vagueness in Definitions of Crimes in Chinese Law & Reception of Western Legal Concepts

Author:

Vincent Cheng Yang

(date)

16 April 1996
Name: Vincent Cheng Yang
Degree: Doctor of Philosophy
Title of Thesis: How to Specify? Vagueness in Definitions of Crimes in Chinese Law & Reception of Western Legal Concepts

Examining Committee:
Chair: Joan Brockman, LL.M.

Paul J. Brantingham, J.D.
Professor
Senior Supervisor

Simon Verdun-Jones, J.S.D.
Professor

Daniel C. Préfontaine, Q.C.,
Director, International Centre for Criminal Law Reform

Curt T. Griffiths, Ph.D.
Professor, School of Criminology
Internal Examiner

Richard A. Myren, J.D.
Professor Emeritus, American University, U.S.A.
External Examiner

Date Approved: April 9, 1996
Abstract

This dissertation is devoted to the ongoing reform of Chinese criminal law. Taking an integrated comparative approach, which is predominantly legal, the author explores the problem of vagueness in the definitions of crimes in Chinese law and proposes the borrowing of Western concepts to assist the process of specification.

By focusing on “How to Specify”, the author indicates that, although the post-Mao law reform has achieved tremendous success, there is excessive vagueness in the legal definitions of crime. Given that vagueness exists in the sources of Chinese law, the policy-and-law relationship and the law-making power of the judiciary should be clarified. Importation of research tools may also help to clarify the law.

The author presents a critical review of the historical, ideological and theoretical context. One could trace the ideological roots of the vagueness problems to the old version Classical Marxism. The humanistic spirit of the classical school and the neo-classical conceptual framework could, however, support the promotion of legality. It is desirable to de-politicize the law and develop an integrated criminal law theory for the specification of law. The various Western criminological perspectives should be critically studied in light of the balance of human rights protection and crime control.

The author then turns to the Special Part of the Criminal Law, indicating that brevity has caused excessive vagueness. This is followed by a discussion regarding the borderline between criminal and non-criminal offences, which is an important matter for legislative development, statutory interpretation, and international comparison of police-recorded crime rates.
The dissertation also presents a series of critical and comparative analyses regarding the specification of the elements of crime. The medical criteria of "mental illness" for legal insanity is addressed as an important issue; the legal definition of corporate crime is another. It is suggested that the power of psychiatrists should be subject to specific legal rules, and danwei crime should be replaced by company crime.

Western legislative models may help the specification of Chinese law, but the importation should cope with the Chinese situation, and the Chinese law reform should implement the UN criminal justice standards.
DEDICATION

To my beloved parents for their belief in liberty and justice.
ACKNOWLEDGMENTS

My first thanks go to Members of the Supervisory Committee: Professor Paul J. Brantingham (Senior Supervisor), Professor Simon Verdun-Jones, and Mr. Daniel Préfontaine, Q.C. and Director of ICCLR. It is fortunate to have this Committee, since all of them have a solid background both in law and in criminology/criminal justice, as well as a strong interest in the reform of law and justice in the world.

I have had the honor of having been examined by Dean Richard A. Myren, an eminent legal scholar in the field of criminal justice in North America. I thank him for his thorough understanding and gracious support. It was very kind of him to travel all the way from Florida to attend my half-day defence in Vancouver, British Columbia.

I thank Dr. Curt T. Griffiths, a leading expert in comparative criminal justice, for his invaluable support. I am also grateful to all the other professors and friends who have helped me during the past five years at Simon Fraser University, including Dr. Robert M. Gordon, Dr. John Lowman, Dr. Patricia L. Brantingham, and Ms. Aileen Sams.

This dissertation is based on my research during the past fourteen years in China, England, and Canada. I thank these colleagues for their assistance and friendship:

- the late Vice-President Chao Manzhi, President Shi Huanzhang, Mr. Ding Ke, Professors Zhu Huarong, Huang Dao and his wife, Gu Xiaorong, and You Wei in Shanghai;
- Professors Gao Mingxuan, Zhao Bingzhi, and Chen Xinglian in Beijing;
- Professors Nigel Walker, John Spencer, the late Mr. John Hall, and the late Mrs. Lenli Jackson in Cambridge University; and Mrs. Celia Hampton in London, England.

Lastly, I thank my wife, Mary Bing Tan, and son, Peter Guang Yang, for sharing the hard times with me during all these years of legal study and international travels.
Table of Contents

APPROVAL ........................................................................................................ ii
ABSTRACT ........................................................................................................ iii
DEDICATION ...................................................................................................... v
ACKNOWLEDGEMENTS ............................................................................... vi
TABLE OF CONTENTS .............................................................................. vii
LIST OF TABLES ........................................................................................... xii

CHAPTER I. INTRODUCTION .......................................................................... 1-25

1.1 The Research Question ........................................................................... 1
1.2 A Project to Fill in the Gap ..................................................................... 10
   1.2.1 Review of Literature ....................................................................... 10
   1.2.2 Development of Legal Theories .................................................... 14
   1.2.3 Reform of Criminal Law ............................................................... 16
1.3. Organisation of Thesis ......................................................................... 22

CHAPTER II. METHODS OF RESEARCH AND THE SYSTEM OF RULES .......... 26-63

2.1 Methodology and Jurisprudence ............................................................. 26
   2.1.1 The Law in Books ......................................................................... 26
   2.1.2 The Law in Reality ........................................................................ 31
   2.1.3 The Law in the Library ................................................................... 35
   2.1.4 Observation and Conversation ..................................................... 38
   2.1.5 The Limits of Comparison ............................................................. 41
2.2 The System of Rules ............................................................................... 44
   2.2.1 The Process and Tools ................................................................... 44
   2.2.2 Vagueness in Sources of Law ....................................................... 46
   2.2.3 Relevant Rules .............................................................................. 52
   2.2.4 Hierarchy of Legislation ................................................................. 56
Conclusion ........................................................................................................ 61
CHAPTER III. CRIMES AND PROLETARIAN DICTATORSHIP:

A THEORETICAL AND HISTORICAL REVIEW .......... 64-123

3.1 The Classics of Proletarian Dictatorship ......................... 64
   3.1.1 Ambiguities in the Entrenched Marxist Principles ....... 64
   3.1.2 The Dialectics of Proletarian Dictatorship ............ 75
   3.1.3 The Party’s Leadership .................................. 82
   3.1.4 Marxism as the Official Ideology ....................... 87
3.2 The Miseries in History .......................................... 92
   3.2.1 From Total Abolition to Total Rejection ............... 92
   3.2.2 The Enemies as the Criminals .......................... 100
   3.2.3 The Function of Crime and “Enemies” .................. 106
   3.2.4 The Rightists: The First on the Indefinite List
       of New Enemies ............................................ 108
   3.2.5 From Crimes against the Party to Crimes
       against the Leader .......................................... 114
Conclusion ..................................................................... 121

CHAPTER IV. SOCIALIST LEGALITY: A PARTIAL RECEPTION OF

THE CLASSICAL SCHOOL ........................................... 124-179

4.1 The Post-Mao Enlightenment ........................................ 124
   4.1.1 The Great Historic Turning Point ....................... 124
   4.1.2 The New Concepts of Four Cardinal Principles ....... 127
   4.1.3 The Liberation of “Enemies” ............................. 133
4.2 Classical School for Socialist Legality ......................... 139
   4.2.1 Why the Criminal Law ................................... 139
   4.2.2 What Classicism? ......................................... 142
   4.2.3 Legality vs. Feudalist Totalitarianism ............... 146
   4.2.4 The Theories of Law Revised ............................ 153
   4.2.5 The Pattern Shift .......................................... 156
4.3 Legality, Focus Shift, and Humanism ............................. 160
   4.3.1 The Growth of Legislation for Legality ............... 160
   4.3.2 The Exceptions to Legality .............................. 165
   4.3.3 The Humanistic Limits of Law ......................... 167
   4.3.4 From Crime to Punishment .............................. 172
Conclusion ..................................................................... 178
CHAPTER V. THE LEGAL DEFINITION OF CRIME ........... 180-225

5.1 Statutory Definiteness ............................................................. 180
   5.1.1 Crime as A Legal Entity ........................................... 180
   5.1.2 The Theme of Law and Theory ................................. 184
   5.1.3 Four Constituent Elements ..................................... 187
5.2 Specifying the Special Part ................................................... 194
   5.2.1 Brevity in the Special Part .................................. 194
   5.2.2 Recodifying the Special Part ................................ 198
5.3 The Theoretical Controversies ............................................... 209
   5.3.1 The Division of the “School” .................................. 209
   5.3.2 The Controversies ................................................. 213
   5.3.3 More Thoughts about the New School .................... 217
Conclusion ............................................................................. 224

CHAPTER VI. THE BORDERLINE OF CRIMINAL AND NON-CRIMINAL OFFENCES ............... 226-260

6.1 Statute and Statutory Interpretation ........................................ 226
   6.1.1 Harm and Circumstances ....................................... 226
   6.1.2 Judge-Made Law .................................................. 230
   6.1.3 Comparisons for Improvement ............................... 232
6.2 Crimes and Public Security Offences (PSOs) .............................. 238
   6.2.1 Quasi-Criminal Offences ..................................... 238
   6.2.2 The PSOs in Comparisons .................................. 242
6.3 From Legal Definition to Crime Data ...................................... 246
   6.3.1 Problems in Cross-National Comparison ............... 246
   6.3.2 The Dimensions of PSOs ..................................... 248
   6.3.3 The Penalised Population .................................... 252
   6.3.4 More Thoughts about the Data ............................ 254
Conclusion ............................................................................. 260
CHAPTER VII. THE INSANITY DEFENCE

AND SPECIFICATION OF LAW ............................................. 261-306

7.1 Insanity: Negation of the Mental Element of Crime .................. 261
  7.1.1 Why Discuss? ....................................................... 261
  7.1.2 Insanity as a Defence in Ancient Chinese Laws .................. 263
  7.1.3 The Dual-Incapacity Tests of Legal Insanity .................... 267
  7.1.4 Irresistible Impulse or Volitional Prong .......................... 273
  7.1.5 The Cognitive Element of Legal Insanity ....................... 277
  7.1.6 The Scope of Applying the Insanity Defence .................... 280

7.2 Psychiatric Experts in Criminal Proceedings .......................... 281
  7.2.1 Forensic Psychiatry Assessment under the 1989 Act ............... 281
  7.2.2 The Durham Rule Revisited ..................................... 285
  7.2.3 Restraints on Psychiatric Experts ................................ 288
  7.2.4 Psychiatrists as Court Called Experts ............................ 290

7.3 Controlling the Mentally Ill: What to Import ......................... 294
  7.3.1 The Chinese Disposition of Insanity Acquittees ................ 294
  7.3.2 Security Measures in European and Soviet Laws .................. 295
  7.3.3 Indefinite Incarceration in Common Law Countries ............... 298
  7.3.4 The GBMI & Diminished Responsibility ........................... 300
  7.3.5 The Issue of Prosecutor-Raised Insanity Defence ............... 302

Conclusion ........................................................................... 304

CHAPTER VIII. CORPORATE CRIME:

KEY ISSUES OF CONCEPTION .............................................. 307-337

8.1 The State and Its “Units” ................................................ 307
  8.1.1 A New Issue ....................................................... 307
  8.1.2 Vagueness in “Danwei (Unit) Crime” .............................. 311

8.2 Separation of State and Enterprise ..................................... 317
  8.2.1 Problems with Faren (Legal Person) Liability .................... 317
  8.2.2 Gongsi (Company) As An Independent Offender ................ 322

8.3 The Corporate Mind and the State ...................................... 327
  8.3.1 The Corporate Fault ............................................... 327
  8.3.2 The PC vs. the GM ................................................ 332

Conclusion ........................................................................... 336
CHAPTER IX. ENVIRONMENTAL CRIME:

ISSUES OF CRIMINALIZATION ........................................ 338-373

9.1 A Realm for Westernization ........................................ 338
  9.1.1 The Theoretical Issues ........................................ 338
  9.1.2 From Abolition to Importation ..................................... 339
9.2 Environmental Crime under Present Law ..................... 344
  9.2.1 The Borderline Issue ........................................ 344
  9.2.2 Relevant Criminal Offences ..................................... 347
9.3 How to Specify ..................................................... 354
  9.3.1 Crime against the Environment ................................... 354
  9.3.2 The Legislative Models ......................................... 357
  9.3.3 Corporate Liability for Pollution ................................ 362
  9.3.4 From Ultima Ratio to Self-Defence ............................ 368
Conclusion ........................................................................... 371

CHAPTER X. REFORM OF CRIMINAL LAW

AND UNITED NATIONS POLICIES .................................. 374-402

10.1 International Rules and Domestic Law ....................... 374
  10.1.1 A Broader Picture ........................................ 374
  10.1.2 The Principle of State Sovereignty ............................. 377
10.2 The Balancing of Goals .......................................... 379
  10.2.1 The Challenge and the Controversy .............................. 379
  10.2.2 From Confrontation to Collaboration ....................... 383
  10.2.3 Crime and Development ....................................... 386
10.3 Reform the System .............................................. 389
  10.3.1 From Crime Definition to System Reform .................... 389
  10.3.2 The Chinese Judiciary ......................................... 390
  10.3.3 Reunification and Constitutional Reform .................... 394
Conclusion ........................................................................... 399

BIBLIOGRAPHY ................................................................ 403

LIST OF STATUTES ......................................................... 443
LIST OF TABLES

Table 1.1 Distribution of Chinese (PRC) Scholars and University Students Trained Overseas, 1978-1995 ......................... 18
Table 1.2 Chinese publications on foreign criminal law, 1949-1991 ................. 20
Table 2.1 Criminal Law Sources in China .................................................. 62
Table 4.1 Classical (Traditional) Marxism vs. Classical School ......................... 143
Table 5.1 Chapters in the Special Part of the Chinese Criminal Law .................. 190
Table 5.2 The Division of Mental States in Chinese Criminal Law ....................... 193
Table 5.3 Number and Length of Articles in the Special Parts of Codes .............. 196
Table 5.4 Specific Changes to the Special Part of the Criminal Law ................... 201
Table 5.5 Comparison of the “Old” and the “New” Schools ............................... 211
Table 6.1 Recorded Crime Rates, 1986 ...................................................... 247
Table 6.2 Recorded Crime Rates, 1980 ...................................................... 247
Table 6.3 Criminal and PSO Cases, 1985-1988 ............................................ 248
Table 6.4 Criminal and Public Security Offences in 1986 and 1988 .................... 249
Table 6.5 Proportion of Selected Types of Crimes in All Police-Recorded Crimes, 1980 ................. 250
Table 6.6 Recorded PSOs ................................................................. 251
Table 6.7 Persons Penalized for Public Security Offences, 1986 and 1989 .......... 252
Table 6.8 Persons Arrested and Punished for Criminal Offences and PSOs ....... 253
Table 6.9 Persons Penalized for Criminal and Public Security Offences .......... 254
Table 6.10 Persons in Chinese Correctional Institutions ............................... 257
Chapter I
Introduction

1.1 The Research Question

The past fifteen years have witnessed a remarkable transition from a state-planned economy to a fast-growing market-oriented economy in the People's Republic of China (hereinafter PRC). The development of a "socialist market economy" (CCP Central Committee, 1993) appears to be a great merger of two ideological tracks -- socialism and capitalism. As Jiang Zheming, President of the State of the PRC and General Secretary of the Chinese Communist Party (hereinafter CCP), recently concluded, Western capitalism is “beneficial to the establishment and improvement of the system of socialist market economy” (Jiang, 1995). In 1994, the World Bank listed China as the world’s second largest recipient of foreign investment in the year. By October 1994, the total of contracted foreign investment in China had reached 275 billion U.S. dollars.¹ In the meantime, the entire superstructure of the Chinese society is open to the outside world. In this context, the Chinese legal system is moving closer towards well-recognised international standards.

As China opens its door to international capitalism, Chinese law makers and the legal profession are exposed to Western laws and legal concepts. Clearly, the law is still, but not entirely, oriental and socialist. In the process of modernising China’s legal system, an important aspect is to study the experience of the rule of law, primarily in the Western

---

jurisdictions, for the promotion of human rights, good governance, and sustainable development.²

The changes are fundamental. In early 1995, Tian Jiyuen, Vice-Chairman of the Standing Committee of the National People’s Congress (hereinafter NPC), announced that the Congress had decided to accomplish the “arduous legislative task” of establishing a “legal system of socialist market economy” by enacting a total of 53 important statutes during the period of 1993-1998.³ In business law, the Chinese reception of Western concepts has been consistent and straightforward. In criminal law, it would be desirable to see a main theme of reform being the implementation of the classical school’s principle of legality, in particular aiming at the reduction of vagueness in the legal definitions of crime. In the endeavour of developing a legal system based on the infrastructure of a “socialist market economy,” the Chinese legislature could use Western laws and concepts as important models for the preparation of new enactments, including a comprehensively revised Criminal Law (Code) that might be tabled in the NPC within the next two years. The Chinese government has publicised the legislative agenda to revise the 1979 Criminal Law. On 10 April 1995, during a meeting in Beijing, Mr. Gao Xijian (1995), Advisor at a rank of Deputy Minister with the Law Commission of the Standing Committee of the National People’s Congress, confirmed this agenda to a Canadian delegation from the United Nations’ affiliated International Centre for Criminal Law Reform and Criminal Justice Policy in Vancouver.

² In its 1987 report, Our Common Future, the World Commission on Environment and Development defined the concept of sustainable development was defined as meeting the needs of the present generation without compromising the benefits of future generations. See A/42/427, annex, Overview, para. 27.

Vagueness is not a unique feature of Chinese criminal law. It is a common problem in the laws of various countries, although its manifestation varies in different forms. For example, many years ago, the old vagrancy laws in the United States were declared unconstitutional because of their vagueness. In Canada, the Supreme Court has announced that, under sections 1 and 7 of the Canadian Charter of Rights and Freedoms (1982), it is a principle of fundamental justice that laws may not be excessively vague. Nonetheless, as Simon Verdun-Jones (1989) has noted, vagueness still exists in both the Criminal Code and the case law with respect to a variety of offences, such as the division of direct and indirect intention, the division between absolute and strict liability offences, and the so-called “reasonable person’s test” in relation to the definition of recklessness.

The definition of “obscenity” under subsection 163(8) of the Canadian Criminal Code provides another example of vagueness. This subsection defines obscenity as “undue exploitation of sex,” without specifying what constitutes such an “undue exploitation.” In Towne Cinema Theatres Ltd. v. R. (1985), the Supreme Court of Canada asserted that the test of undue obscenity is not what Canadians think is right for themselves but whether they would tolerate others viewing the material, the level of tolerance is determined by the test of “community standards.” In R. v. Wagner (1986), the Court decided that pornography exceeds community standards of tolerance when it is sexually explicit with violence, or sexually explicit without violence but dehumanising or degrading. Materials containing sexually explicit exposure of interaction between equal and consenting adults do not

---


exceed these standards. In *R. v. Video World Ltd.* (1987), the Court affirmed that a film viewed at home could still be obscene if it portrays degrading and dehumanising sexual acts. Then, in *R. v. Butler* (1992), the Court held that explicit sex with violence is undue; whereas explicit and degrading or dehumanising sex without violence may be undue if the risk of harm is substantial. However, it appears that there is a great deal of vagueness in the so-called “community standards,” given the lack of clear rules as to the proving of community tolerance. Similarly, there are difficulties to define “substantial harm” in this context.

Indeed, vagueness is a major issue in the codification or re-codification of criminal law in both Eastern and Western jurisdictions. A challenge to today’s law reformers is to define the various criminal offences in a legal terminology that is clear to ordinary citizens. In 1993, the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General (1993) published a Report, entitled *First Principles: Recodifying the General Part of the Criminal Code of Canada*. The Sub-Committee recommended a list of desirable changes to the General

---


11. For further discussion of the controversies on this subject, see Verdun-Jones, 1989, pp.386-417.
Part. On top of the list, was the reduction of vagueness by drafting the Code in plain language. The Report states that:

The Sub-Committee particularly agrees with Mr. Justice Létourneau’s suggestion that the General Part be recodified in understandable language. The current General Part is difficult to understand, in part because it is unduly complex in some areas and in part because it uses terminology that is not commonly used by Canadians. (p.4)

Therefore, exchange of experience as to the reduction of vagueness would be beneficial to law reformers throughout the world. This dissertation is devoted to the endeavour of dealing with the vagueness problem in Chinese criminal law. It considers the reduction of vagueness a central piece in the comprehensive amendment of the Criminal Law in the next phase of law reform in China. The reduction or prohibition of vagueness in law is the first requirement of the principle of legality in criminal law (Husak, 1987:8). From a legalist point of view, this dissertation regards the reduction of vagueness as an important indication of how successful criminal law reform in China could be. The theoretical significance of this discussion is also obvious. Vagueness is not just a problem of drafting. Rather, it is a reflection of the particular social and ideological context. Hence, the reduction of vagueness is not simply a change of the words. It reflects and assists changes to the context; that is, the ongoing Chinese reform in pursuit of a modernised, free and stable society. Furthermore, the reduction of vagueness is a key step toward implementation of internationally recognised standards of criminal justice in China. For many decades, the United Nations has considered vagueness in criminal justice a major threat to human rights. The International Bill of Human Rights stipulates that no

Following an overall recommendation of recodifying the General Part, the Report states in “Recommendation Two” that the General Part should be drafted to the extent possible in plain language.
one shall be held guilty of any criminal offence unless his act or omission constitutes an offence under the law, that no one shall be subjected to arbitrary deprivation of life, freedom, or property.\textsuperscript{13}

Specification of the legal definitions of crime has been a central theme in the evolution of Chinese criminal law since 1979, when the first-ever \textit{Criminal Law of the People's Republic} was enacted. At the time, the law \textit{per se} was a major achievement for the transition from the "rule of man" in the Great Proletarian Cultural Revolution (hereinafter Cultural Revolution) (1966-1976) to the present system that is partially based on the concept of the rule of law. Historically, the \textit{Criminal Law} was a loud declaration of intent to abolish the old system of suppression that relied on the use of arbitrary law and extralegal means. However, China has only experienced an early phase of a historic transition, and the law makers are making their efforts to apply a higher standard in the next phase of law reform. The law should not only be a system of norms, but also a system of skilfully articulated norms that is properly designed and implemented in light of the principle of legality, the spirit of the ongoing reforms, as well as the promotion of human rights and good governance. From this point of view, it is proposed in this dissertation that specification of the definitions of crime under the present \textit{Criminal Law} should continue to be a central theme for the next phase of criminal law reform in China.

So "How to Specify?" is the topic of this dissertation. It is a two-tier topic. First, although vagueness is a common problem in the criminal laws of various jurisdictions, what are the particular characteristic features and major issues of vagueness in the definitions of crimes in Chinese criminal law? Second, although there are various

\textsuperscript{13} See the \textit{Universal Declaration of Human Rights} (1949) Articles 9, 11, and 17; and the \textit{International Covenant on Civil and Political Rights} (1966), Articles 6, 9, and 15.
The dissertation addresses the topic, "How to Specify?,” from a legal and comparative perspective, looking at a series of interrelated aspects. They are:

- What are the problems in the Chinese sources of criminal law that are causing excessive vagueness in the definitions of crimes? From a legal perspective, how should the sources be streamlined?

- What are the ideological and historical origins of the vagueness problem in the Chinese definitions of crimes? From a legal perspective, how should the relevant changes in law be accomplished?

- In relation to the definitions of crimes, to what extent has the Chinese reform of criminal law and criminal justice during the post-Mao era been a reception of the Western classical school principle of legality? From a legal perspective, how should legislators proceed with further changes to reduce vagueness in this direction?

- To what extent has the reception of Western classical and neo-classical criminal law concepts, such as legality and Tatbestand, assisted the post-Mao criminal law reform? From a legal perspective, what are the remaining problems with respect to the formation of constituent elements of crime in the present Chinese law, and how should these problems be addressed?
There are a number of key realms of Chinese criminal law where there appears to be a great deal of vagueness in legal definitions. In these realms, what Western concepts might help the ongoing law reform process in terms of specifying definitions? What are the limits of this reception in the Chinese social context?

Hence, the dissertation explores "what is specified," proposes "what to specify," analyses "why specify," and provides advice regarding "how to specify" the Chinese definitions of criminal offences.

Apparently, in the English-speaking world there is little systematic research on these kinds of topics. Recent Western studies of Chinese law mostly concentrate on matters relevant to international trade, investment, intellectual property, taxation, and other commercial and business subjects. In general, most Western publications on Chinese criminal law are either presentations of old-fashioned, if not ancient, materials or introductory-level discussions. There is a paucity of current and detailed comparative studies in this area. It is time to fill this gap.

From a perspective of comparative law, the dissertation is designed to present a primarily legal study of definitions of crime in Chinese law. It systematically examines the

---

14 For examples of Western publications on Chinese business law, see: Cohen, 1990; Potter, 1992; Birden, 1994; Hill and Evans, 1993-94; Pax, 1990. It is unfortunate that not many experienced Western legal experts have engaged in research on Chinese criminal law and criminal justice. Some of those who did so before (e.g., Jerome A. Cohen) have shifted their interest to Chinese business law since the early years of the open-door policy.

15 For example, MacCormack's book Traditional Chinese Penal Law is a study of the penal codes of imperial China. See MacCormack, 1990. For a brief study of modern Chinese criminal law, see Leng and Chiu, 1985. This publication is only 330 pages long, but covers nearly all aspects of the Chinese criminal justice system and contains 16 translated Chinese legal documents.
law and legal theories in relation to a series of key subjects and compares the old and the new, the oriental and the occidental, as well as the existing and the emerging.

The dissertation is mainly a work of legal scholarship. To a practitioner, a legal research project is undertaken to find the legal authorities that are relevant to the specific legal problems or issues in a case. Wetter (cited in Baade, 1983:499) writes: "The practice of law is a business rather than a gentlemanly occupation.... The standards in measuring success are those of the clients. And the market is always right." This is not necessarily a valid statement to a legal scholar. The goals of this dissertation are multiple: Aside from what the law is, the dissertation emphasises the Chinese context and rationale of law so as to discuss what the law ought to be, why the law is like this, and how the law is going to change.

The dissertation is designed for both Western and Chinese readers. It is descriptive and normative, practical and academic. Focusing on a selected series of core subjects, it is intended to be a contribution to the comparative studies of criminal law, to the development of criminal law theory, to China's reform of criminal law, and to international understanding of China's system of criminal law and criminal justice.

This Chapter of Introduction, in its three parts, provides a general review of the relevant literature, addresses the importance of this study, and highlights the key issues and core subjects that will be discussed in the following chapters.
1.2 A Project to Fill in the Gap

1.2.1 Review of Literature

Understanding foreign law and foreign legal concepts has been at the core of comparative legal studies. For at least two thousand years, comparative studies have stimulated law reform and contributed to the international understanding of different legal systems in various parts of the world. Two thousand years ago, Aristotle (384-322 B.C.) wrote Politics by comparing 153 constitutions of Greek and other cities (See David and Brierley, 1978:1). In legal history, great thinkers such as Bacon (1561-1626), Grotius (1583-1645), Montesquieu (1689-1755), and Maine (1822-88) were all comparatists. In this century, Harold C. Gutteridge (1949), Konrad Zweigert and Hein Kotz (1977), Rene David and James L. Brierley (1978) are some of the distinctive comparatists.

There are many Western studies on Chinese law, but very few of them discuss the criminal law, let alone a systematic study of the vagueness issue. Jerome Cohen's early work (1968), Criminal Process in the People's Republic of China, 1949-1963, is perhaps still the most impressive English-language academic publication in this realm of legal studies. The book helps English readers to understand the pre-1970s legal history when

---

16 Among the various publications of these great pioneers in comparative law, Montesquieu's The Spirit of the Laws and Maine's Ancient Law are most well-known to Chinese legal scholars owing to the several translations published since the 1930s. For Chinese discussion of these important names, see Shen Zhongling, 1987, at pp. 8-25.

17 Among these modern figures, only Rene David and James L. Brierley have had their book published in the PRC. In the 1978 English edition of Major Legal Systems in the World Today, there are criticisms of the communist system. This part of the book disappeared in the Chinese edition of the 1980s.
Mao's little "red book," *Quotations of Chairman Mao* (Mao, 1966), was the highest law in China, but predates the major changes of the post-1979 era. The more recent English publication *Criminal Justice in Post-Mao China* (Leng and Chiu, 1985) provides an introduction to the Chinese criminal justice system, but gives very little discussion about the substantive criminal law, let alone the definitions of crime. Aside from these two books, there are a few English language books that present either a general picture of the Chinese legal system (Chan, 1983; Folsom and Minan, 1989; Cohen, 1970) or undertake detailed discussion of other branches of the law (e.g., Potter, 1992). Occasionally, English language law journals have published a few comparative studies on Chinese criminal law, but few of them provide a thorough and systematic discussion of the vagueness issue.\(^{18}\)

Among the limited number of Western journal publications, Donovan’s article, *The Structure of the Chinese Criminal Justice System: A Comparative Perspective* (Donovan, 1987), is an outstanding piece of comparative analysis of the Chinese legal structure. It is especially insightful in its assessment of the impacts of the Continental and Soviet legal traditions on China’s criminal justice system. The article presents a nine-page discussion of the Chinese *Criminal Law*, indicating that the "extreme generality and brevity of the provisions" are features of this code.\(^{19}\)

Chinese scholars have accomplished more in the study of foreign criminal laws. In April 1984, Ouyang Tao and three other scholars in Beijing published their *Introduction to Anglo-American Criminal Law and Law of Criminal Procedure*,\(^{20}\) the first Chinese book

\(^{18}\) For examples, see Vincent Cheng Yang, 1988a, 1994, and 1995a and 1995b.

\(^{19}\) See Donovan, 1987, at pp. 296-298.

\(^{20}\) For discussion of definitions of crime under Anglo-American laws, see the text at pp. 19-156.
on foreign criminal law in the post-1976 era (Ouyang et al., 1984). Interestingly, the book offers a fairly objective review of the criminal law in England and the United States, indicating a change to the traditional Marxist approach of labelling the Western criminal law as a tool of the “bourgeois dictatorship.” The “class essence” of Western criminal law is only briefly mentioned in the Postscript. The authors, however, do not offer a comparison between the Chinese and the Anglo-American laws, let alone a comparative analysis of the legal definitions of criminal offences.

Following this publication, a two-volume book entitled Foreign Criminal Law Studies was published, mainly focusing on laws in “the civil law family” (Gan and He, 1984, 1985). Both the authors, Gan Yupai and He Peng, received training in Japanese law. This text provides a comprehensive review of basic criminal law concepts in civil law jurisdictions. The theme of comparison, as the authors indicated in the Preface, is not between the Chinese and the Western, but between the “Old School” (i.e., the classical school and the neo-classical school) and the “New School” (i.e., biological, sociological theories of criminology, and so forth). This typology is used by scholars in the former Republic of China (now Taiwan) and Japan (Hong, 1977; Han, 1981; Fujiki, 1982; Kimura, 1991).21 The book also presents different models of legislation in relation to specific subject matters, including the essential elements of crime. On many occasions, however, the source jurisdiction and the source legislation of the models are curiously omitted.22 After all, China’s law reform is not a topic in this book.

21 Both Hong and Han are criminal law professors in Taiwan and received training in Japanese law.

22 This is a common problem in Chinese scholastic publications.
In 1985, Jing Kai’s *Comparative Criminal Law* (Jing Kai, 1985) was published. It offers a Sino-foreign comparison in respect to the subject matters in the “General Part” of criminal law. Applying the classical Marxist methods of “class analysis,” the author focuses on the division between “the bourgeois comparisons of criminal law” and “the proletarian comparisons of criminal law.” Accordingly, the author emphasises the "fundamental differences" between "socialist criminal law" vs. "bourgeois criminal law," or "Marxist criminal law theories" vs. "bourgeois theories.” In respect to legality, the author claims that there is a "bourgeois principle of absolute legality" and a "proletarian principle of relative legality" (Jing Kai, 1985:238-244). The book appears to be a simplistic application of the Marxist “class analysis method,” although it is said to be the “first book of comparative criminal law” in the PRC (Zhao Bingzhi, 1986a). The author indiscriminately attaches the label of "bourgeois" to all the legal concepts and theories that are developed in Western countries. This approach reminds people of the old years of the Cold War, and appears to be problematic in the context of China’s open-door policy. It could only lead to a crude and simplistic assumption of socialist supremacy and a rejection of learning from overseas.

A far more advanced study is undertaken by Gao Ge in *Comparative Criminal Law Studies* (Gao Ge, 1991). In this excellent textbook, Gao suggests that the classical model of "bourgeois laws vs. socialist laws" is only one of the many perspectives in comparative legal studies. In many aspects, he asserts (Gao Ge, 1991:6-12), Western laws and theories are "more advanced" than their Chinese counterparts. Yet, he does not provide a detailed discussion in this direction. A number of key issues in China’s criminal law reform, such as vagueness, are left untouched. In general, Chinese scholars have been discussing various Western laws (e.g., He Peng, 1984; Huang, 1987; Chu, 1983; He Qinghua, 1990), but there is a lack of efforts to apply Western concepts in a critical review.
of the Chinese law, let alone a comparative and critical analysis with regard to the applicability of these concepts in Chinese law reform.

For this dissertation, I have no intent to attach a political label to the law or legal theories in any jurisdiction, nor do I believe in the superiority of any existing law in one country over the others. The interest is to demonstrate how foreign laws, as many comparatists (David and Brierley, 1978; Grossfeld, 1990; Shen, 1987; Zweigert and Kotz, 1977; Cole et al., 1987) have suggested, can assist the reform of criminal law in the present Chinese context with respect to the specification of the definitions of crime.

1.2.2 Development of Legal Theories

Given the fact that Marxism is the official guiding theory of Chinese Criminal Law, any fundamental reform of the law would require a change or moderation of this system. During 1949-1979, Marxism-Leninism and Mao Tsetung Thought were the only theories taught in Chinese law schools. Now the monopoly of Classical Marxism is gradually withering away from Chinese legal studies. This dissertation explores the impacts of Classical Marxism on the definitions of crime in China and proposes a de-politicisation of the Chinese criminal law.

It is desirable to test legal theories and to generate new ideas during the ongoing process of the Chinese reform of criminal law. "The comparatist," Grossfeld (1990:7) writes, "has seen the world, figuratively speaking, he has a different approach to legal questions, perhaps even an altered awareness of law." The discussion of crime definitions also provides insights to the transnational study of crime phenomena. As the Brantinghams (1984:42) hold, "crime, ultimately, depends on a legal definition and the proscription of a specific form of behaviour." Vaguely articulated definitions of crime
generate misleading criminal statistics. This is tested in the dissertation by examining the
division of criminal and non-criminal "administrative" offences in Chinese law (also see
Yang, Cheng, 1994).

The study of theories is not subject to the limits of political or national borders. The importation of Western law and legal theories is justifiable in a socialist country. In 1922, for example, Lenin instructed the Soviet legislature to learn "useful things" from Western Europe (Shen, 1987:31). Merryman (1985:4) describes the development as:

One intention of the Soviet revolutionaries was to abolish the bourgeois civil law system and substitute a new socialist legal order. The actual effect of their reform was to impose certain principles of socialist ideology on existing civil law systems and on the civil law tradition.

This type of reform is often difficult due to the conflicts between the imported Western concepts (e.g., the classical school's criminal law theories) and Classical Marxist notions. This dissertation explores the ideological difficulties of China's criminal law reform, especially conflicts of the classical law's principles of legality and equality against the Classical Marxist notions of using the law as a weapon of class struggle and dictatorship. It is suggested that the Marxist theories of law, like other parts of the ideology, should be reformed to cope with the changing social context and the new course of social progress. The law should not prescribe an official ideology or use any concepts that are political in nature and difficult to specify in legal language.

Instead of trying to define the term "theory" in legal science, this dissertation employs three levels of theories. First of all, those that are systematic socio-legal explanations of broad issues such as the social functions, origins, and the political-economic factors affecting the legal definitions of criminal offences. Apparently, this
category includes Marxism and a number of other theories. Secondly, there are propositions of major theoretical schools of criminal law, and in particular the classical school's normative propositions as presented in Beccaria's *On Crimes and Punishments* (1963). Thirdly, there are important legal principles, doctrines, tests, reasons, or viewpoints regarding the definitions of crime, starting from the subjective elements of crime but including controversial concepts such as corporate liability and offences against the environment. At all three levels, however, the dissertation does not attempt to define the meaning of "theory" or find which theory is "scientific." Rather, the author looks at various kinds of explanations of crime definitions even if they are considered as "non-theories." Moreover, a theoretical contribution of this dissertation is to question the concepts of Classical Marxism in criminal law, although this powerful theory has had tremendous influence on almost all aspects of human history during the last 150 years.

### 1.2.3 Reform of Criminal Law

An objective of this dissertation is to assist China's comprehensive amendment of the 1979 Criminal Law. There have been, and will be, many changes to the body of criminal law. The roots of change are found in Chinese society, but foreign law and legal concepts can provide invaluable assistance. Through comparison, foreign concepts can be transplanted into a nation's legal system (Zweigert and Kotz, 1977:44), although similar black-letter rules may have different meanings in different nations. Indeed, as Wise (1990:5) has noticed:

Law develops mainly by borrowing.... The borrowing of legal rules and large parts of a legal system is extremely common. The history of law is characterised by a prodigious amount of borrowing.
Some centuries ago, China used to export its law and legal concepts to neighbouring countries. The last century, however, saw China importing numerous foreign law concepts (Pound, 1948; Gao Mingxuan, 1993a and b; Kan, 1994; Shen, 1987; Zhang Jingfan et al., 1983; Zhou Mi, 1985). Historically, the pattern of imports has changed three times. Starting from the late 19th century, the early sources of importation were mainly continental Europe and Japan. Then, the Soviet Union became the sole source in the 1950s. In the late 1970s, China began to slowly and gradually open the door to "the entire world," but the focus of attention is shifted to the West.

In the late 1970s, as Foster (1982:415) noted, codification in China was mainly designed "to produce legislation which melds Chinese and foreign laws with Communist Party policy, historical experiences ... and popular opinion." Apparently, the division between the "General Part" and the "Specific Part" in China's 1979 Criminal Law is borrowed from Europe. The Chinese general definition of crime under Article 10 of the Criminal Law and the classification of crime are learned from the former Soviet Union, which exported its system to the entire former socialist bloc.23

The present Chinese focus of cultural exchange is clearly on the Western world. During 1978-1995, China has sent approximately 220,000 scholars and university students to a total of 103 countries. Among them, 95 percent studied in the West (including Japan), and only 5 percent went to the former Soviet bloc or other regions of the world. The distribution is shown in Table 1.1.

23 There are striking similarities in the structure of criminal codes in the socialist countries. See the Criminal Code of the Russian Soviet Federated Socialist Republic; the Penal Code of the People's Republic of Mongolia; the Penal Code of the Polish People's Republic; the Criminal Code of the People's Democratic Korea; the Penal Code of the Romanian Socialist Republic.
Table 1.1. Distribution of Chinese (PRC) Scholars and University Students Trained Overseas, 1978-1995

<table>
<thead>
<tr>
<th>Countries</th>
<th>Number of scholars and students</th>
</tr>
</thead>
<tbody>
<tr>
<td>The United States</td>
<td>120,000</td>
</tr>
<tr>
<td>Japan</td>
<td>30,000</td>
</tr>
<tr>
<td>Canada</td>
<td>13,500</td>
</tr>
<tr>
<td>West Europe (including U.K.)</td>
<td>40,000</td>
</tr>
<tr>
<td>Australia and New Zealand</td>
<td>6,000</td>
</tr>
<tr>
<td>Other countries</td>
<td>10,500</td>
</tr>
<tr>
<td>Total</td>
<td>220,000</td>
</tr>
</tbody>
</table>


During the same period, about 60,000 foreign professionals were hired to work in various cultural exchange and training/research programs in China, mostly from Western countries (Cheng Yangjin, 1994).

The exchange in legal studies follows the same pattern. Given the collapse of the Soviet bloc, the Soviet legal heritage is no longer the most attractive to the Chinese law reformers. Laws in other Third World countries are hardly studied in China. In the meantime, the Western industrialised countries, particularly the United States, have been attracting a large number of Chinese bureaucrats to visit, establishing working relations with Chinese institutions of criminal justice, financing training programs for Chinese legal

---

24 In Chinese terminology, the “East” sometimes refers to the socialist countries and the other developing countries, whereas the “West” includes the Western industrialised countries and Japan.
scholars and law students, co-sponsoring symposiums and seminars in China, and sending a large number of experts to teach and work in China.

For instance, since the early 1980s, the United States has developed a number of training programs for Chinese legal professionals. Among them, the Committee on Legal Education Exchange with China (CLEEC), founded by R. Randle Edwards and his colleagues with core support from the Ford Foundation, has provided the largest one in post-Mao Sino-U.S. history. During 1983-1994, CLEEC arranged training for a total of 230 Chinese legal specialists at various law schools in the United States. In addition, CLEEC, in collaboration with Chinese authorities and several foundations in the United States, has created the China Centre for American Law Study as a summer training program in China, launched a library exchange program to provide newly published American legal materials to China, and even started a program to transfer legal information over the Internet to returned CLEEC scholars (Feinerman, 1994).

Other Sino-foreign legal exchange programs involve fewer people, but some of them might have direct impacts on the evolution of law in China. For example, in 1992, the United Nations Development Programme (UNDP) and Bureau of Legislative Affairs (BLA) launched the Legislative Drafting Programme to teach Chinese law drafters from the Central Government of the People’s Republic. American professors taught primarily American legislative theory and methodology to the trainees for the drafting of 22 laws in China (Seidman, 1994).

---

25 For information about U.S.-China legal exchange programs, see Committee on Scholarly Communication with China, 1994.
These programs have facilitated the shift of attention of Chinese legal professionals, including those in the area of criminal law and criminal justice, to the West. In Chinese criminal law, the increasing Western influence is clearly demonstrated in a recently published bibliography of selected Chinese publications, including books, articles, and translated books, legal texts and articles (Chai et al., 1993: 1320-1332). The bibliography is fairly inclusive and lists approximately 500 Chinese publications on foreign criminal laws. They are classified in Table 1.2 below.

Table 1.2 Chinese Publications on Foreign Criminal Law, 1949-1991

<table>
<thead>
<tr>
<th>Time period</th>
<th>1949-1965</th>
<th>1979-1991</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Publications on Western criminal law</td>
<td>26</td>
<td>300</td>
<td>326</td>
</tr>
<tr>
<td>Publications on Soviet-bloc criminal law</td>
<td>61</td>
<td>93</td>
<td>154</td>
</tr>
<tr>
<td>Publications on laws of other foreign countries</td>
<td>0</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Publications on laws of other foreign countries</td>
<td>0</td>
<td>13</td>
<td>13</td>
</tr>
<tr>
<td>Total</td>
<td>87</td>
<td>413</td>
<td>500</td>
</tr>
</tbody>
</table>

Source: Calculated by this author from Chai Cheng et al. (Eds.), 1993, Encyclopedia of the Science of Criminal Law, pp.1320-1332.

As Table 1.2 indicates, there was a massive increase (at least 1,000 percent) in the number of Chinese publications on Western criminal law during 1979-1991 from that of 1949-1965, and only an increase of about 50 percent in the publications on Soviet-bloc law. The nature of the publications has also been changed. For example, unlike in the 1950s, criminal law in the United States is no longer considered “reactionary.” The first edition of mainland China's Encyclopedia of Criminal Sciences (Yang Chunxian et al., 1990) and the 1993 edition of Encyclopedia of the Science of Criminal Law (Chai Cheng et al., 1993) both include a large number of items with regard to Western penal laws or legislative models such as the American Model Penal Code without attaching any political
label. In a 1989 Chinese publication, the author recommended the *Model Penal Code*, though not a red law, as an excellent example of legal scholars playing a leading role in criminal law reform (Yang Cheng, 1989).

Western concepts are often employed to justify proposals of law reform in China. By April 1995, the Association for the Research of Criminal Law (ARCL), China's leading academic organisation of criminal law jurists and an affiliated branch of the China Law Society, had held seven annual conferences and published six compiled collections of a total of 328 conference papers, mostly dealing with issues in the reform of the criminal law in China (Yang Duenxian et al., 1989; Yang Duenxian et al., 1990; Yang Duenxian et al., 1991; Yang Duenxian & Zhao Bingzhi, 1992; Yang Duenxian & Chao Zhidan, 1993; Su Huiyu and Shan Changzhong, 1994). In these publications, foreign laws and theories are used in various ways to support new legislative proposals.

This dissertation, from a comparative perspective, employs Western legal concepts to discuss the vagueness of crime definitions in both the General Part and the Specific Part of the 1979 *Criminal law*. In respect to specific crimes, the dissertation discusses problems in the definition of "counter-revolutionary crime," the introduction of corporate liability, certain types of economic crimes (e.g., illegal speculation and profiteering) and vice crimes (e.g., hooliganism). Apart from international comparisons, there is discussion at the "regional" level to cover special Chinese jurisdictions such as Hong Kong and Taiwan (Shao Shaping, 1990; Zheng Xianyi et al., 1992).

Moreover, this dissertation also assesses the importation of the mainly Western-proposed and internationally recognised principles of criminal law. The entire body of China's business law is quickly moving towards the international standards that are set forth for membership of GATT/WTO. The criminal law, though "strictly territorial"
(Williams and Castel, 1981: 436), also needs to implement relevant internationally recognised standards.

International criminal law and criminal policies can have major impacts on the domestic law of their member states. In particular, the relevant United Nations instruments of criminal justice can assist Chinese law reformers to determine the right direction of *how to specify* the law. Specifying the definitions of crime in Chinese criminal law is justified by the two major schemes of the United Nations' criminal justice standards and rules: law-and-order and human rights (Clark, 1992). Although it is still controversial whether there should be any "universal standards" in criminal justice, implementation of certain UN standards is highly feasible and beneficial to China.

1.3 Organisation of Dissertation

As indicated in Section 1.1 of this Chapter (The Research Question), the dissertation analyses the vagueness issue in the Chinese legal definitions of crime and proposes a variety of reforms for specification of the definitions in light of the principle of legality, the changing social context, the promotion of human rights and good governance. This discussion is presented in ten chapters, including this introductory chapter.

Chapter II explains the methodology, discussing legal research methods and especially methods for comparative legal studies. This Chapter also looks at an important aspect of the vagueness issue; that is, vagueness in the sources of Chinese criminal law with respect to the definitions of crime. Three key issues are discussed in relation to

---

26 For discussion of international criminal law and criminal policies, see Bassiouni, 1980 and 1986a; and Lopez-rey, 1985.
legislative positivism: first, policy-and-law relations with regard to definitions of crime (e.g., counter-revolution and illegal profiteering and speculation); second, the law-making power of the judiciary; and third, the roles of legal scholars. The intention of this author is to assist China's law reformers to streamline the sources. Moreover, this chapter could provide non-Chinese legal researchers a clear methodological guide to the Chinese sources of authority.

Chapter III presents an overview of the Marxist classics of proletarian dictatorship with respect to the targets of punishment. Under the 1979 Criminal Law, "proletarian dictatorship" is the key phrase to define the functions of criminal law and the essence of crime. This Chapter first traces problems in the old version of Classical Marxism so as to explore the ideological causes of vagueness in law. It then turns to the history of cracking down on various "class enemies" during Mao's era (1949-1976). It is proposed that, although the Marxist classical notions might still be powerful political slogans, some of them are hardly compatible with legality and should be removed from Chinese law.

Chapter IV discusses the principles of the classical school, particularly Beccaria's ideas of law reform, for the post-Mao transition to the rule of law. It analyses the Chinese partial reception of legality since the 1978 3rd Plenum of the 11th Central Committee of the Chinese Communist Party (CCP), that was a turning point in the legal history of the PRC. Taking into account the changing context, the Chapter explores major problems in implementing the relatively new concept of socialist legality within the old ideological context of the Classical Marxism and the Chinese feudalist tradition. The implementation of the principles of the classical school is therefore unfolded as part of the endeavour to reform the socio-ideological context.
Chapter V begins with a legalist overview of the general framework of China’s criminal law and the corresponding neo-classical theories regarding the conceptual structure and constituent elements of crime. This is followed by a critical review of the theoretical controversies between the “old school” and the “new school” of criminal law. The Chapter concludes that the classical and neo-classical principles of criminal law should continue to guide the specification of the definitions of crime in Chinese law, and the law reformers should take an integrative approach to embrace other Western theories in the realm of criminal law or criminal policy.

Chapters VI to VIII take a comparative perspective to address three specific subjects in respect to the specification of the definitions of criminal offences. These are also important issues of substantive criminal law where there appears to be excessive vagueness. In Chapter VI, the subject is vagueness in the Chinese division between criminal and administrative offences, its equivalents in other jurisdictions, as well as its impacts on the use of criminal statistics. Apparently, the present division in Chinese law is incompatible with the principle of legality.

Chapter VII looks at the mental capacity of the offender, which is an essential element of crime under Chinese law. Focusing on the insanity defence under the Chinese law, the dissertation discusses the various models of insanity defence in Western laws and explores the problems of vagueness in the Chinese laws with respect to the roles of psychiatric experts. This is followed by a series of recommendations that are based on a comparative study of relevant Western experience.

Chapter VIII turns to Chinese importation of the Western concept of corporate crime. It examines the vagueness in the legal definitions of corporate crime by focusing on the interrelation between the state and the state-owned enterprises. The Chapter proposes
a number of suggestions in light of the particular Chinese legal framework of business and non-business organisations.

Chapter IX examines an imported concept, environmental crime, in the criminal law. It provides a review of the recent development in law, analyses a number of primarily Western legislative models with respect to the definitions of environmental crime, and explores the possibility of creating a new criminal offence of pollution under the Chinese law. However, taking into consideration problems of enforcement, it is proposed that, while preparing to specify the law, it would be desirable to maintain a balance between the regulatory model and the use of other means for effectiveness and efficiency.

Chapter X looks at a broader picture of China’s reform of the criminal law. From a comparative perspective, the Chapter examines the applicability of relevant United Nations instruments (the United Nations, 1992; the Commission on Crime Prevention and Criminal Justice, 1993 and 1994) in the Chinese criminal process. It proposes that the implementation of these instruments might help determine the right direction for criminal law reform, including the specification of the law. Moreover, this is examined in the context of China’s reunification with Hong Kong. The Chapter concludes that, given the overall trend in the broad changing context, the various changes to the criminal law as proposed in this dissertation are likely to be part of the pending success of reform in China.

The selection of subjects as listed above is based on an understanding of key issues of China’s criminal law reform, the importance of the issues, the areas where the law or legal concepts are interestingly different or similar, the availability of data, the limits of comparative legal research, as well as the potential significance of the discussion to China’s criminal law reform.
Chapter II
Methods of Research and System of Rules

2.1 Methodology and Jurisprudence

2.1.1 The Law in Books

This dissertation is mainly based on legal research, focusing on the legal definitions of criminal offences and relying on legal research materials. Although it involves socio-legal analysis, the dissertation is not a primarily sociological study of criminal law and does not require the use of ordinary sociological research tools such as survey questionnaires.

Like the definitions of law and jurisprudence, there is no universal definition of "legal research method." To avoid controversy, the term legal research methods for this dissertation refers to the particular methods employed to identify, analyse, and use legal authorities that are printed in law books (e.g., statutes, cases, statutory interpretations, legislative reports, and publications of theories of law). These are different from the sociological methods that are used in the sociological study of law. The phrase research methods for the study of law, on the contrary, could include different types of methods that are employed in the study of law by a variety of researchers. Indeed, the diversity in methodology is a reflection of the differences in perspectives, research aims, levels of problems, and academic disciplines.

In the Western world, the division of the traditional analytical legal research methodology and the relatively new application of empirical research methodology in the study of law reflects two major approaches in jurisprudence, i.e., legal positivism on the
one side and *sociological jurisprudence*, *sociology of law*, or *socio-legal studies* on the other.

Legal positivism concentrates on the framework of the positive law, separating the law from its political, moral, and social context. This school of legal studies rooted in Jeremy Bentham’s ideas of “a law of the *state*” (Bentham, 1985), continued in John Austin’s separation of law and morals (Austin, 1995), elaborated in Hans Kelsen’s “pure theory of law” (Kelsen, 1992), and developed at modern times in H. L. A. Hart’s *Concept of Law* (Hart, 1994) and J. W. Harris’ concept of ‘legal reasoning’ (Harris, 1980). An underlying idea is simply that we must *take the positive law seriously*. Accordingly, from a positivist perspective, the methodology of legal study is a set of analytical methods to identify the various sources of state law, to examine the logical structure of the system of valid norms, and to explain the legal reasoning process. Hence, taking this approach, the comparison of law is primarily a comparison of black-letter rules that are found in legislation, judicial decisions, treaties, and in books of authorities. Issues concerning the social and cultural determinants of law and the diversity of “living law” are not the primarily concerns and could be temporarily set aside for the purity of *legal science*.

The foundation of legal research methodology in traditional Western legal science is found in legal positivism. In America, it is properly recognised that the "case method" was primarily developed by positivists (Merryman, 1985:79). As Langdell (cited in Stevens, 1983:52) said, legal research method is utilised as a tool to assist the legal profession to identify the "principles or doctrines" contained in the precedents, "master" them and "apply them with constant facility and certainty to the ever-tangled skein of human affairs." In Europe, the Kelsenite concepts are deeply embedded in German *legal science*, which relies on systematic classifications and formal logic. As Merryman (1985:64-65) has indicated:
[German] legal science attempts to be pure. Legal scientists deliberately focus their attention on pure legal phenomena and values, such as the "legal" value of certainty in the law, and exclude all others. Hence the data, insights, and theories of the social sciences, for example, are excluded as nonlegal. Even history is excluded as nonlegal ...

In the post-Mao era, legal positivism has been increasingly influential in Chinese legal studies due to China's own history of legalism and the reception of legal concepts from Germany, and via Japan and the Soviet Union. Under the Chinese principle of socialist legality, law has primarily been defined as a system of norms of the state, which is different from, though not necessarily separated from, moral rules and other kinds of informal rules. Mainstream Chinese jurists do not see the positive law as something derived from a natural law or the law of God, although they have never accepted the strict Austinian separation of law and morality either. Similarly, the criminal law in particular is taught as rules established by the power of the proletarian dictatorship. In this field of legal study, positivism has mainly demonstrated its increasing influence through the Chinese application of analytical methods. Most Chinese writers of criminal law textbooks

---

26 In ancient Chinese history, legalism (fa-jia) emerged as a school of legal theory in 475-221 B.C. and developed during the period of Qin Dynasty (221-206 B.C.) and Tang Dynasty (618-960 A.D.). At the time, a major effort of fa-jia was to build a formal and codified legal system presumably applicable to everyone in the country. The use of logical methods to make, interpret and apply provisions in a law code reached its climax in the Tang Dynasty when Tang Lu Shu Yi (Tang Code with Annotations) was accomplished. The last years of the Qing Dynasty (1644-1911 A.D.) saw the beginning of importation of law from Europe and Japan. See Qian and Xia, 1991; Zhang Jingfan et al., 1983; Zhang Jingfan et al., 1992.

27 See Teaching and Research Section of Jurisprudence, Beijing University Law Department, 1984; Sheng Zhongling, 1988. The Chinese concept of morality, however, is obviously different from the Western religiously-based concept.

28 This definition is a combination of the Austinian view that "law is the command of the sovereign" and the Marxist theories of class dictatorship. For more discussion of the Marxist theories, see Chapter III of the dissertation.
attempt to present a system of analytical explanation of black-letter rules without critically addressing whether the law is "good" or "bad." The 1979 *Criminal Law* is taught as a system of "scientifically prescribed" norms, and an important method for the Chinese research of criminal law is the German-Soviet legalistic analyses of the "constituent elements" (Criminal Law Section of USSR Moscow University, 1955; Ministry of Justice of the USSR, 1955; Tpannh, 1958; Gao Mingxuan, 1986, 1989, 1990, 1991, 1993a and b; Wang Zuofu, 1987). This however is not simply a development in the methodology of legal analysis. In a broader context, it indicates the desire of the Chinese legal profession to re-establish a formal criminal justice system on the basis of a set of rules that are legally promulgated by the state, logically structured, and understandable through legal construction. Apparently, positivism may represent different political preferences in different historic contexts. The goal of legal positivism in the current Chinese context is not to separate the law and the church, or the legal rules and the moral standards. Rather, it is mainly to clarify (rather than completely separate) the relation between the law and nonlegal rules, as well as the relation between legal science and political slogans.30

In standard textbooks of Western jurisprudence (Bodenheimer, 1974: 279-403), traditional legal research methods include three basic components: First, *legal concepts* formulated for the purpose of identifying typical situations which are characterised by identical or common elements; second, *analytical reasoning*, i.e., deduction (reasoning

---

30 As discussed in other Chapters, the use of analytical methods has never been plain and simple in China. It is only part of the methodology, subject to Marxist ideological guidelines.

30 In Mao's era, and particularly during the Great Proletarian Cultural Revolution (1966-1976), the highest law was not the Chinese Constitution, but Mao's words about what was revolutionary (right) and what was reactionary (wrong). However, some of the words were purely political, hardly demonstrating any kind of moralism or well-recognised moral standards of a civilized society. See discussion in Chapter III of the dissertation.
from general to particular), induction (reasoning from particular to general), and analogy (reasoning from one particular to another); and third, dialectical reasoning, i.e., a rational process that proceeds when formal logic becomes inadequate. Fletcher's *Rethinking Criminal Law* (1978) serves as an example of legalistic comparison, wherein he concentrates on legal concepts, rules and principles, without detailed exploration of the broader social context. This book presents a series of comparisons between the laws in the United States, Germany and a variety of other countries. In the book, Fletcher demonstrates how legal concepts, rules and principles could be compared analytically without going deeply into the social context of the different nations.31

But formal logic cannot find us all the right answers for the reform of law. Furthermore, the use of formal logic has to be subject to rationality. Lawyers, in Fassberg's view (1983:650), should treat legal rules as "forms" and using them rationally:

The certainty of law should be found not in the forms themselves but rather in our rational attitude towards them and towards the facts of the situations for which they provide.

A law reformer must understand the norms, but cannot, as Kelsen (1992) proposed, accept every existing norm as valid. A reform-oriented legal research not only describes, but also evaluates the law. Clearly, to a law reformer, being rational is to adhere to the fundamental values of a free and democratic society, such as legality, equality, human dignity, justice and fairness (Bodenheimer, 1974:398-400). Legal norms should be created, construed, and applied for the benefits of human society, be it the Benthamite version of "advantage and happiness," Cicero's "right reason in agreement

31 The book is in a delayed process of English-Chinese translation that was started in 1988 by a number of young Chinese legal scholars including this author.
with Nature," Finnis' "basic forms of human good," or the more contemporary fashions of "fundamental rights" and "good governance" that are prescribed in United Nations instruments and in the constitutions of many countries. Obviously, this kind of value judgment is based on "social propositions," which include well-established moral norms and public policies (Eisenberg, 1988: 26-42, 76). These, as Hohmann (1990) indicates, are different from legal "doctrinal propositions." At this level, the research can no longer be purely positivist.

2.1.2 The Law in Reality

The methodology for this dissertation is not purely legal or purely positivist. To a certain extent, analytical discussion of law is combined with socio-legal studies.

To critics in America, the traditional positivist approach of legal study is formalist and problematic given its "Blackstonian assumption" that law is a set of fixed rules applicable to a given state of facts through logical reasoning (Aichele, 1990:9). Although this dissertation should not be labelled as formalist or anti-formalist, the author would agree with what O. W. Holmes said: "The life of the law has not been logic; it has been experience" (cited in Aichele, 1990:15). American realists believe that law is what the courts do in fact. An application of this century-old notion in Chinese legal study could be a significant development. There has not been a realist-oriented study mainly concerning the true patterns of court adjudication in China. Obviously, it is unlikely that a scholar can discover these types of facts through the use of the German-Soviet methodology of "constituent element analyses."

As the title of the dissertation indicates, the patterns of court adjudication and the behaviours of judges are not the primary subjects of research. In this dissertation, the implementation of the anti-formalist perspective is mainly demonstrated in the discussion of the Chinese context, and particularly the Chinese political, ideological and economic systems, which influence the legal definitions of crime, their meaning in practice, their functions and changes. In the real world, every legal system has its roots in its own particular kind of history and society, and no law is an all-embracing, self-contained, timeless and absolutely logical system. Law copes, and interacts, with the social context. It changes in operation. Therefore, this dissertation examines the Chinese criminal law and its evolution in the Chinese context, although the discussion of the context mostly deals with factors that are directly relevant to the legal issues.

From an antiformalist approach, Roscoe Pound called for a shift from the study of legal reason to the study of the social context. As Aichele (1990:32) has described it:

In Pound's view, law like all of life was a continuing process of adjustment derived from experience. The duty of the student of the law was to know "not only what the courts decide, but quite as much the circumstances and conditions, social and economic, to which these principles are to be applied."

The law in action is different from the law in books. Taking this into consideration, this dissertation will present at least four important findings. First, as this Chapter indicates later, the true meaning of Chinese criminal law cannot be solely deduced from formally enacted sources of the law in books. Policy is an important part of the living law during the present transitional period. Second, as Chapter III shows, the living law in China operated virtually without law in books for many years, when "crime" was mainly defined by extralegal means. Further, a historical review of the practice of
“proletarian dictatorship” exposes problems of having a “guiding thought” in China’s Criminal Law. Third, as demonstrated in several Chapters, since many provisions in the Chinese written law are vague and ambiguous, their true meaning has to be defined through an analysis of their operation. Fourth, as described in the last three Chapters, China’s reform of the criminal law cannot simply be a change of words of the law in books. The reformers will have to ensure that the law in books can become the law in action.

Therefore, this dissertation embraces realism and a number of other socio-legal perspectives that are proposed by Western scholars (Pound, 1943; Ehrlich, 1936; Weber, 1954, 1978; Lemper and Sanders, 1986; Caputo et al., 1989; Lipson and Wheeler, 1986; Brickey and Comack, 1986; Black, 1976; Sampford, 1989; Smart, 1989; Saxton and Stansfield, 1990). R. Tomasic (1985:6) indicates that:

The focus of the sociology of law, however it is defined, needs to be seen as the study of “the law in action” rather the traditional lawyer’s concern of “the law in the books.”

After all, few Western publications on socialist law are purely legalistic. They usually include some kind of socio-legal analyses (e.g., Cohen, 1968; David and Brierley, 1978; Davis, 1988; Folsom and Minan, 1989; Huskey, 1986; Kim, 1981; Langer, 1988; Leng and Chiu, 1985; Zweigert & Kotz, 1977).

Indeed, comparative law does not have a tradition of pure formalism. The early Western pioneers of comparative studies, such as Montesquieu (1989) and Maine (1960), were antiformalists and encyclopedists. The division of legal families per se is socio-legal,

33 See Article 10, Criminal Law of the PRC.
dealing with both legal and non-legal factors (e.g., David and Brierley, 1978; Ehrmann, 1976; Merryman, 1985; Miraglia, 1968; Quigley, 1989; Shen, 1987; Wieacker, 1990; Zweigert and Kotz, 1977). Nonetheless, instead of being encyclopaedic, the primarily focus of discussion in this dissertation is the positive law. The dissertation analyses the social context as necessary but tries to keep the discussion of non-legal factors within reasonable and manageable limits. In this respect, Donovan’s essay serves as an example (Donovan, 1987). Focusing on the texts of several key Chinese statutes, Donovan analyses the concepts and the language of the texts, compares them with those in laws of other countries, explains their meaning in the particular Chinese context, and explores their origins in legal history and ideology.

Some part of this dissertation is devoted to the discussion of non-legal factors. For example, the next two Chapters discuss the impacts of Classical Marxism on the Chinese version of proletarian dictatorship on the “enemies” and propose a corresponding change to the general legal definition of crime under the present law. This discussion, however, only covers those Marxist principles that are most relevant to the vagueness issue in law.

Evaluating the major schools of Western jurisprudence would be a subject too vast to cover in this Chapter. The division between legal positivism and sociological jurisprudence (or “socio-legal studies”) is only relative. Both could be employed in a way as two wheels of one vehicle in the endeavour to understand more about the truth of law. As Lord Lloyd of Hampstead and M. D. A. Freeman (1985:694) rightfully suggest:

The Kelsenite, therefore, concentrates on his norms, the realist on his facts of society, each regarding the other’s activity patronisingly as a peripheral study on the fringe of his own central sphere. Yet, it may be suggested, both equally represent essential aspects of the legal process if an overall
picture is to be taken of law, which is both an intellectual conception and a function of human society.

Being aware of the overall picture is particularly important in comparative legal studies. A comparatist should reject the simplistic beliefs of formalism, but not its analytical methods. He should know the difference between what is written and what is real, but should not necessarily be sceptical of the law in books. His research is based on, but not concluded with, the positive law. After all, legal concepts, norms and rules per se are part of the reality. In general, they are taken seriously by the judiciary on a day-to-day basis. Analytical reasoning is important in the administration of justice. Positive law provides powerful rules for the protection of rights and freedoms in a civilised society.

Therefore, law is the centre of analysis in this dissertation. As Grossfeld (1990:73-74) said, "after all if one is to embark on comparative law ... one must first be a lawyer." Nonetheless, the dissertation is not simply a review of the law in books or a comparison of legal texts. It is a comparative legal analysis of the Chinese criminal law in books, taking into consideration its historic and ideological context, its dynamics in action, the transitional features of the Chinese society, as well as the impacts of relevant Western legal concepts.

2.1.3 The Law in the Library

Given its nature as described above, the dissertation is intended to address the legal authorities, use legal terminology, focus on legal issues, document the discussion with issues to the appropriate authorities, and explain the law and its changes by analysing the underlying legal doctrines, legal principles, directly related public policies, ends of
reform, the fundamental values that are embodied in law, and the social context where the law operates and changes.

This research, like many comparative legal studies conducted by legal scholars (Bander et al., 1987; Gorbin, 1989; Yogis and Christie, 1970; Statsky, 1982; Statsky and Wernet, 1984; MacEllven, 1983; David and Brierley, 1978; Ehrmann, 1976; Merryman, 1985; Miraglia, 1968; Quigley, 1989; Shen Zhongling, 1987; Wieacker, 1990; Zweigert and Kotz, 1977), draws primarily on the resources of the law library. The research is also based on the previous working experience of this author with the legal profession in China and long-term observation of the reform process. For this dissertation, however, the dissertation is not based on surveys or interviews. In the past, only a limited number of research-type studies - mostly primary and brief, if not misleading - were conducted by Western lawyers through interviews and surveys with a limited number of Chinese subjects (e.g., Cohen, 1970; Li, 1970).

The greater part of the dissertation looks at the Chinese, instead of the Western, legal authorities that are relevant to the vagueness issue. In general, these include five types of legal research materials:

1. Statutes. Specifically, this dissertation analyses China's 1979 Criminal Law, and the relevant supplementary statutes enacted in the post-1979 period, as well as some of the key statutes made before 1979. Also, a series of foreign codes (e.g., the Canadian Criminal Code, the Model Penal Code, the German Penal Code, the Japanese Penal Code, and the Soviet codes34) will be discussed in various occasions for comparative purposes.

34 In the former USSR, it was the responsibility of the central government to make the Fundamental Principles of Criminal Legislation of the USSR and the Union Republics,
2. Judicial documents. For the preparation of the dissertation, this author has collected approximately 5,000 Chinese criminal cases (e.g., Liu et al., 1992; Ouyang et al., 1985; Supreme People's Procuratorate Dept. 1, 1988; Supreme People's Procuratorate 'Series of Criminal Cases' Editorial Committee, 1992; The Shanghai Bar, 1985; Chao & Yu, 1993; Fan Bingzhong, 1990) and a large number of judicial documents that have been published in the past decades. A limited number of cases decided in English-speaking countries will also be discussed for comparative purposes.


that were binding on all the Union Republics. Under the guidance of these Principles, the Russian Socialist Federated Soviet Republic adopted its Penal Code, followed by the other Union Republics as a model for codification.
5. *Policy statements and other relevant official documents*, including statements of the Chinese Communist Party (CCP) Central Committee and its ideological and political leaders (e.g., Karl Marx, V. Lenin and Mao Tsetung). Indeed, the entire Chapter III of the dissertation is mainly based on these documents and writings due to the historic context of the analyses.

2.1.4 *Observation and Conversation*

This dissertation is based on a continuous research process that has been undertaken in the three countries where the author has lived. In this process, observation and conversation have been powerful means for understanding the law and for verifying some of the findings of library research. These means *per se* have their own limits. Therefore, they are only used to provide some supplementary materials with respect to a few of the subjects addressed in the dissertation. Caution is taken to ensure the materials are not subject to personal bias.

In Shanghai, the author was able to concentrate for some time on the international exchange of legal research as Director of Comparative Legal Studies at East China Institute of Political Sciences and Law, a leading law school with approximately 350 faculty members and 5,000 law students. For six years, the author also practised law as Member of the Shanghai Bar and as an attorney with Shanghai No 4 Law Firm.\(^{35}\) This combination of teaching and practice gave the author excellent opportunities of "on-the-ground" observation with regard to the actual operation of the criminal justice system.

\(^{35}\) Until the late 1980s, all Chinese law firms were government-owned. In recent years, however, lawyers have set up a large number of non-government-owned law firms. These firms are "collectively owned," rather than "privately owned," by partners. It is unclear whether or not the new Lawyers Law to be adopted in 1996 will reduce the confusion.
This working experience, although still limited, is crucial to the understanding of the living law in China, its evolution and problems.

More observation was conducted during the author's term of serving as Legal Counsel to the President of the Institute of Democracy and Law in Shanghai. This work allowed the author to access a large number of case materials, judicial reports, and conference minutes that came from various parts of the country. At the time, the journal *Min Zhu Yu Fa Zhi (Democracy and Law)* published by the Institute was the most popular non-governmental legal periodical in China. Its mandate was to promote the rule of law mainly in criminal justice.

Some important issues addressed in this dissertation were also discussed in conferences that the author attended in China. For example, the understanding regarding post-1997 conflicts between Chinese law and the law in Hong Kong originated in a consultation meeting for the drafting of the Basic Law of Hong Kong, a law made by the National People’s Congress (NPC) to be effective in 1997 when the colony returns to China.

In the late 1980s, the author participated in debates of some major cases, including China's first ever case of press freedom, *Du Rong vs. Sheng Yafu and Mu Chunling*; the

---

36 During the 1980s, the total subscription of *Min Zhu Yu Fa Zhi (Democracy and Law)* once reached a record of 1.5 million copies per issue.

37 *Du Rong vs. Sheng Yafu and Mu Chunling*, Shanghai Hong Kou District People's Court 1987; *Du Rong vs. Sheng Yafu and Mu Chunling* (appeal), Shanghai Intermediate People's Court, 1988; *Du Rong vs. Sheng Yafu and Mu Chunling* (complaint), Shanghai High People's Court, 1988. See discussion in Zhu, Huarong and Yang Cheng (Vincent Cheng Yang), "This Case Has To Be Reexamined," *Min Zhu Yu Fa Zhi (Democracy and Law)* 1988(8), pp.36-37; Zhu, Huarong and Yang Cheng, "Twenty-Two Comments on the Courts Decisions of the Libel Case of Shen Yafu & Mu Chunling," *Min Zhu Yu Fa Zhi*. 

39
alleged "Kanhua Corporation Scandal," which involved a family member of Deng Xiaoping (Yang and Jiang, 1989); and the Shenyang "September 21st Incident," where the police carried out a search, as an operation to crack down on illegal trafficking in cigarettes, of two railway cars of mailbags that was openly conducted in front of television cameras (Yang Cheng, 1988b). In these cases, a key issue was vagueness in the relevant criminal law definitions.

This author's understanding of the Anglo-American common law system is enriched through the visits to England in 1986-1987 and 1990 and study in Canada during 1991-1995, where the author was educated through many insightful conversations with English, American and Canadian legal scholars and practitioners.

In Canada, part of the data collection for the dissertation was carried out in the Library at Simon Fraser University, and in the Centre for Asian Studies and the Law Library at the University of British Columbia. In the meantime, conversation with many colleagues of the author in China has continued through all these years.

Data collection and exchange of ideas with the colleagues in China have continued since the day when the supervisory committee approved the prospectus. This author went to China twice in 1994-1995 to update the database and obtain new data regarding the ongoing reform of the criminal law. The materials obtained in both trips are more than twenty volumes of criminal cases, a large number of conference papers, judicial documents issued by the Supreme People's Court and the Supreme People's Procuratorate, and standard criminal law textbooks published in the 1990s. The discussion with Chinese

1989(2), pp.34-46. The "Twenty-Two Comments" is an article to rebut a Shanghai Intermediate People's Court case report, entitled "The True Facts of the Libel Case Involving Former Min Zhu Yu Fa Zhi Reporters Sheng Yafu and Mu Chunling."
colleagues in Shanghai and Beijing verified the author’s understanding that vagueness should continue to be a major concern of law reform. In particular, many insights were obtained through discussion of criminal law reform subjects with members of the Law Committee of the NPC Standing Committee, the Drafting Group of the new Criminal Law, the Drafting Group of the new Law of Criminal Procedure, as well as experts from the Ministry of Justice, the State Bureau of Foreign Experts, the Supreme People’s Procuratorate, the Chinese section of the International Association of Penal Law, the law schools, and various criminal justice agencies.

This discussion demonstrates that Chinese reformers are more than ever open to Western concepts of criminal law and criminal justice that may serve China’s interests and fit the Chinese situation. During the visit with experts from the International Centre for Criminal Law Reform and Criminal Justice Policy in April 1995, it was demonstrated that the Chinese reformers welcomed Western assistance in a variety of important realms of criminal law reform, including the drafting of China’s new Criminal Law and Law of Criminal Procedure, the implementation of international policies for the administration of criminal justice, the training of prosecutors and lawyers, as well as the protection of the economy and the environment (International Centre for Criminal Law Reform and Criminal Justice Policy, 1995).

2.1.5 The Limits of Comparison

A comparative study of law always has some limits. When comparing legal texts, there are linguistic and conceptual problems. The criminal law is made for people in the nation, not for translators in other jurisdictions. A concept in one language does not necessarily have an equivalent in another. For example,  fa-zhi in Chinese could be either rule by law or rule of law in English, and offence in English could be fan-zui (criminal
offence) or wei-fa (offence) in Chinese. New words sometimes have to be created for translation purpose. For example, the Chinese word mou-sha (planned homicide) is a word created for murder in English. Indeed, as Grossfeld (1990:52) has noticed, "the same words can mean different things." Words change the meanings when they are translated into a foreign language. For example, gu-yi is translated as "intent" in English but the Chinese term actually covers some kinds of "recklessness" - which equals to "indirect intent" in Chinese - as well as the concept of "intent" in English. Also, when liu-mang in Chinese becomes hooliganism in English, it changes its meaning substantively. In fact, the translated hooliganism in Chinese criminal law refers to violent activities of street gangsters and sexually indecent behaviours. 38 Furthermore, caution is required even when the concepts are equivalent in general linguistics. For example, thinking about the roles of public prosecutors in handling public interest cases, Langer (1988) notes that the word public has different meanings in law:

While the English word "public" in the legal connotation refers to groups intermediate between the state and individual, the corresponding word in French, German, Spanish or Italian includes intermediate groups as well as the general public. 39

Indeed, the entire enterprise of statutory interpretation is built to find the meaning of words in law. For centuries, jurists have been arguing about the meaning of basic words in jurisprudence, such as: law, rules, norms, principles, doctrines, and so forth. One sees various kinds of vagueness and ambiguities when one reads a law in one's own country. 40 One is confronted with double vagueness and ambiguity when one tries to read the laws outside.

38 See Article 160 of the 1979 Criminal Law.

Comparing the living law or the social context where law operates is even more difficult. The history of legal science has not seen many lawyers who can understand, let alone compare, the laws in action in several culturally differentiated countries. First of all, for any researcher, there are usually not enough opportunities to get to know the realities of law in several nations. The restraints include accessibility, time and resources. An outsider usually has to spend years working within the justice system before she or he gets a "sense" of what the law is. To understand the actual operation of a foreign law, the researcher needs to live in that country for a certain period, to receive training in that particular kind of law and to collect a sufficient amount of data. In addition, a researcher is usually considered troublesome, hostile, or even arrogant, if she or he is merely looking for the differences between what is written and what is real in a foreign country.

Therefore, the discussion in this dissertation will only be carried out in a way that is realistic and manageable for this author. The analyses of non-legal factors will focus on the Chinese society, with which the author is familiar. Law is determined by too many factors. One can become lost when he jumps into the sea of an unfamiliar culture. This is exactly as Grossfeld (1990:72) once observed:

The more we try to catch the foreign law in all its individuality, as we must, the more we appreciate its cultural and societal context, the less possible it seems to compare it with others.

In fact, it is also noteworthy that, world-wide, there is only a limited number of "truly" cross-national comparisons of criminal laws. Many studies focus on laws in a

---

40 The words "vagueness" and "ambiguity" per se could be subjects of several books. For an interesting discussion regarding the meaning of these words, see J. Evans, 1988, Statutory Interpretation: Problems of Communication, at pp.72-149.
single jurisdiction, or compile several single observations together, and simply leave the job of comparison to the readers. The dissertation will discuss the positive law in a number of different jurisdictions, as well as some of the UN instruments.

In the eyes of many theorists, this cautious approach is perhaps superficial. A comparatist however is not afraid of being superficial. As Grossfeld (1990:39) said, given the complexity of its nature, comparative legal study is “necessarily superficial”:

Let us admit this superficiality, and not boast of the 'eagle-eye of the comparatist'.

2.2 The System of Rules

2.2.1 The Process and Tools

As the earlier part of this Chapter has described, the focus of this dissertation is on the definitions of crime that are primarily found in the positive law, and legal research for this dissertation is primarily a law library research of these legal rules or authorities that are found in certain sources.

The search of legal sources can start with a legal issue by using both facts and legal key words (MacElven, 1983:8-9). This is followed by a procedure, which, as many Western scholars (Yogis and Christie, 1970:7; Statsky, 1982) have described, usually consists of several aspects. Although legal research methodology is not taught as a course

41 See e.g., Beer, 1992.
in Chinese law schools, the Chinese procedure of legal research also includes these aspects, i.e.:

- Examination of relevant items of legislation and consideration of the relation between them (e.g., the Constitution versus a statute, a statute versus a subordinate law);

- A search for relevant judicial opinions (i.e., *judicial interpretation* in China, and *ratio decidendi* in common law nations) in casebooks or judicial documents, followed by a weighting of opinions that are found at different levels of authorities; and

- Utilisation of secondary materials, such as dictionaries, digests, citators, law journals, and textbooks (e.g., Bilancia, 1981; Reynolds, 1986; Griffiths and Verdun-Jones, 1989; Mewett, 1988; Gao and Zhao, 1993; Tairo, 1985; Sun and Zhou, 1985) to find relevant background information, to build up theories, and to check out other relevant authorities (e.g., customary rules).

This process is not strikingly different from that followed in the West. In terms of research materials, however, there are some differences. Many of the tools accessible to researchers of common law (Statsky, 1982: 13-50, and 107-108) are not available to researchers of Chinese law. There are plenty of session laws, congress reports, advance sheets, law dictionaries, case books, bulletins and periodicals in China, but few legal citators, digests and legal literature index systems. Also, unlike Anglo-American publications, Chinese publications of law do not follow standard citation rules. Introduction of standardised indexes, citators, and citation systems should be an important part of the ongoing law reform in China.

---

42 For an inclusive list of these rules, see Statsky, 1982:57-65.
2.2.2 Vagueness in Sources of Law

The result of a legal research project is often ambiguous in the sense that it includes alternative solutions and never settles on any absolute answer. As Sacco (1991) has indicated, a researcher should not always assume that for each problem there is a single set of legal rules under a given legal system. Rather, there are often different rules from different sources. To a law reformer, this is also a valid statement.

Statsky (1982:2) holds that a good lawyer "is not frightened by ambiguities." However, the validity of this statement depends on what type of ambiguity or vagueness the lawyer has to deal with. In the Chinese context, a major problem to any lawyer is vagueness in the sources of law, rather than the ambiguity in the solution of legal issues. Specifically, there are three problems with the sources of Chinese criminal law: (1) the existence of "policies"; (2) the unclear nature of "judicial documents"; and (3) the ignorance of principles of legal theories in the rendering of judicial opinions.

As Zweigert and Kotz (1977:300) have indicated, "one must always remember that law in the socialist countries is subordinate to politics." In China, a policy (zheng-ce) is an important, if not supreme, authority, although many scholars insist that the ordinary kind of law "should be" superior to policies (Han and Kanter, 1984).43

---

43 A recent example of policy superiority is China's reform of land law. On 12 April 1988, the NPC enacted an Amendment to the Constitution of the PRC. The Amendment abolished the prohibition of land leasing under the old Article 10 of the 1982 Constitution. In practice, however, the country had already started to lease land to foreigners under a new policy many years before the amendment.
As an authority, a Chinese policy does not have to be written in an enactment. In official terminology, the word "policy" (zheng-ce) often refers to abstract guidelines made by the Party (in the name of the CPP Central Committee or a body of the Central Committee) and the state (often in the name of the State Council) to achieve important goals. Policies are sometimes - but not always - embodied in detailed regulations, cited in a legislative report, or mentioned in a judicial decision as a higher authority. They are definitely binding on the judiciary. Policies are particularly important with respect to the definitions and handling of two types of criminal offences: first, politically motivated offences, i.e., "counter-revolutionary offences"; and second, offences that are defined according to economic policies, e.g., offences of "illegal speculation and profiteering" and receiving bribes in business activities.

The meaning of counter-revolution has always been an issue of policy. In 1956, for example, the CCP Central Committee issued a policy document, entitled Provisional Provisions of Policy Guidelines regarding the Interpretation (of Definitions) and Handling of Counter-revolutionaries and Other Bad Elements. This document defines a series of counter-revolutionary elements such as "spies and special agents," "core-members of reactionary organizations," "leaders of reactionary secret societies," "local tyrants," "bandits," and so forth. Also, as Chapter III and IV of the dissertation describe, the definitions of "counter-revolution" evolve when the relevant policies change. Similarly, China's market-oriented reform has seen important changes in the definition of "illegal speculation and profiteering" and a partial legalisation of receiving "reasonable" kickbacks in business transactions. These changes are justified under the policy of "developing a socialist market economy" that simply requires that the law shall support,

\[\text{For the relevant text, see Ren et al., 1991, at pp.268-285}\]
rather than punish, those whose activities are ultimately "beneficial to the growth of productive forces."\textsuperscript{45}

Also, there are policies that are primarily criminal, rather than political or economic. For example, "severely and swiftly punishing serious crimes" has been a criminal justice policy implemented in China for many years, but the definition of what counts as a "serious crime" changes in different times. Originally, in 1981, only several types of violent offences (e.g., murder, rape, robbery) were listed as targets. In 1982, serious economic offences (e.g., smuggling, embezzlement, bribery) were added to the list (Lian et al., 1990: 12-14). In 1983, non-violent hooliganism (e.g., group sex) and "teaching criminal methods" were put on the list (Lian et al., 1990: 15-16). At present, the list has become so inclusive that most types of criminal offences are targeted, ranging from murder and taking bribes to theft, drug offences, pornography, prostitution, and even killing rare species.

Unlike an ordinary legal rule, a policy is often formulated in a non-standard way, with broad and flexible meaning, changes from time to time, usually written but not necessarily published, and interpreted by the policy makers. For example, apart from the law, what standards should the court apply to determine whether a particular act of speculation is "beneficial to productivity?" Indeed, given the existence of such policies, it is doubtful whether the concept of legislative supremacy is recognised in the present Chinese context.

Another problem with the sources of Chinese criminal law is the unclear nature of documents that are issued by the Chinese judiciary, containing judicial interpretation,

\textsuperscript{45} For discussion of these policies, see Su and Shan, 1994.
judicial opinions, judicial regulations, and cases. The Chinese judiciary do not formally make case law or precedents in the way common law judges do, but they render binding opinions in other forms.

The Chinese concept of judicial opinion is obviously different from the Anglo-American one. In common law, an opinion is a court's interpretation of the application of law to the specific facts of a case, and is sometimes simply called a case (Statsky, 1982:11). In China, the Supreme People's Court and the Supreme People's Procuratorate can render an opinion on the application of law to a case or a category of offences (e.g., all drug-related offences). Furthermore, their interpretation of law can take the form of statute, that stipulates section-type provisions to specify the relevant statutory definitions of criminal offences. It is debatable whether these opinions are only statutory interpretation or de facto supplementary statutes that are not enacted.

A solid case can be made for the idea that, given the extreme brevity of provisions in the 1979 Code, judicial documents containing section-type provisions specifying the code definitions of offences are de facto statutes. In many cases, the relation is: the Code only provides an extremely brief and vague definition, the judiciary make a far more specific one. For example, under Article 151 of the Code, theft is vaguely defined as "theft of a relatively large amount of public or private property." The specific definition is however provided by the SPC and the SPP in a document entitled Answers to Questions of Specific Application of Law in Handling Cases of Theft (1984), which provides a list of specific monetary values to clarify what "relatively large" means, requires prosecution of attempted theft, and defines what constitutes "habitual theft." In such cases, it is the

46 For a collection of SPC and SPP documents, see Ren et al., 1991; Lu, 1991.

47 The text of this judicial document is included in Ren et al., 1991, at pp.756-761.
judicial opinion, rather than the code section, which actually provides a working definition of the offence. Therefore, the judiciary are actually legislating, rather than just interpreting. 48 This, again, is questionable under the principle of legislative supremacy.

Apart from the interpretative documents, the Chinese judiciary also publish cases with or without comments. The most influential ones are published in the *Supreme People's Court Gazette (SPC Gazette)*. It is unclear however, whether or not these cases are binding to other courts or only published as "study materials for reference." 49 Furthermore, a great deal of vagueness is generated from the use of "internal documents" (i.e., unpublished regulations or judicial opinions) in the Chinese judicial process. As some Chinese scholars have argued, these "secret documents" cannot be openly cited in court judgments. 50 Obviously, this is against the principle of the rule of law.

In their discussion of the civil law and common law families, Zweigert and Kotz (1977:63) write:

> [C]ommon law comes from the court, continental law from the study; the great jurists of England were judges, on the continent professors. On the continent, lawyers, faced with a problem, even a new and unforeseen one, ask what solution the rule provides; in England and the United States they predict how the judge would deal with the problem, given existing decisions.

---

48 For more discussion of judicial interpretation, see Chapter IV of the dissertation.

49 This has been an issue for debate in China and abroad. For example, Zhou (1989) holds that the cases are "valid" but only "for reference," rather than case law. Donovan (1987) considers cases published by the SPC are *de facto* precedents. Liu Nanping (1989:302) insists that cases published on the *SPC Gazette* "carry the force of precedent for lower court."

50 For relevant discussion, see Shu and You, 1992, at pp.4-5.
Chinese legal reasoning, like continental legal reasoning, is mainly deductive rather than inductive. In practice, there is little evidence indicating that Chinese professors have an important role to play in the judicial process. Ignorance of theoretical principles is revealed in the simplistic style of Chinese judgments. As Donovan (1987:283) has observed, a Chinese judgment usually describes the facts of the case, but the legal reasoning is "so summary that it is almost nonexistent."

This ignorance of principles of legal theories in the rendering of judicial opinions is an important cause of vagueness in Chinese judicial decisions. In addition to legislative positivism, the Chinese judiciary should recognise the preeminence of law professors. The Chinese law professors are trainers of the judiciary. Their theories are practically oriented rather than purely academic. They have the best combined knowledge of theories and practice. Furthermore, they are now the drafters of the new Criminal Law to be enacted in the next three years.

There is no obvious reason why the judiciary cannot recognise some of the best written criminal law textbooks as books of authority. Nor is there a reason why the judiciary cannot cite some of the well-established legal concepts in rendering their opinions. After all, the court has to explain and justify the reasons for its judgment.

---

51 On the contrary, as Eisenberg (1988:50) indicates, "reasoning from precedent is perhaps the most characteristic mode of reasoning in common law countries."

52 Most law professors are part-time practising lawyers.

53 Drafters of the new Criminal Law include a group of law professors at the People's University.
2.2.3 Relevant Rules

From the perspective of legal positivism, a legal research project is undertaken to find relevant rules within the law of the state. For this part of the discussion, let us set aside the Chinese policies and concentrate on the ordinary sources of criminal law.

MacEllven (1993:1-3) holds that there are three requirements for what becomes "relevant" legal authority: first, the law is from the jurisdiction in which the legal problem arose; second, it deals with a factual subject matter similar to the one in the problem; third, it applies legal concepts similar to those involved in the problem. In general, these rules are applicable everywhere, including China.

With the first requirement, however, there is an important difference. The requirement of "same jurisdiction" is not strictly followed in common law countries. Courts in one jurisdiction sometimes cite the law of other common law jurisdictions. In Canada, for example, apart from old English cases that are recognised as precedents in Canadian courts, recent English law is sometimes cited as persuasive authority (Laskin, 1969; Gall, 1990). Also, law in the United States, Australia, and New Zealand is sometimes cited (Laskin, 1969; Verdun-Jones, 1989). On the contrary, the complete rejection of foreign criminal law in judicial process is common in countries with the continental civil law tradition. In a Chinese criminal court, the only authority is the Chinese law. No one cites a foreign law as a supportive material. Therefore, Chinese criminal lawyers simply would not bother to study any foreign law for practical purposes. In scholastic legal studies, however, citing Western materials is sometimes
encouraged, although leftist ideological watchdogs still condemn it as an indication of "bourgeois liberalism."55

Differences are also found when considering MacEllven's second and third requirements. The courts in common law jurisdictions usually recognise "reasoning by analogy" as a mode of reasoning which, as Eisenberg (1988:83-96) has demonstrated, allows "consistent extension" of the coverage of a precedent, i.e., a court can apply a rule to treat a matter that is different from the one originally determined in the precedent. Eisenberg (1988: 87) describes it as:

A precedent court has announced rule r, which in terms covers matter X. The deciding court is now faced with a case that concerns matter Y. Matter Y does not fall within the stated ambit of rule r. Since matters X and Y are not identical, treating them differently might be consistent as a matter of formal logic. However, the deciding court determines that treating matters X and Y differently would be inconsistent as a matter of adjudicative reasoning, because neither applicable social propositions nor a deep doctrinal distinction justifies different treatment of the two cases.

In a case of "reason by analogy," there is extension of a legal rule to a fact situation covered by the underlying policy, rather than the words, of the rule. However, contemporary Western jurisprudence of the criminal law considers crime-by-analogy an abuse of power, given the fact that crime-by-analogy was once a distinctive feature of the

54 There are exceptions to this general exclusion of foreign law in Chinese court. For example, under Articles 5 and 6 of the Criminal Law, in a case where the act of the person occurs outside the territory of China but falls into a definition of criminal offence under the Chinese law, the court shall consider whether or not the act is "punishable according to the law of the place where it was committed." Also, if the case involves an international crime, the court may consider the relevant foreign laws and treaties.

55 In 1989-1991, a large number of papers were published on Chinese newspapers and journals, blaming the young generation of legal scholars for the spread-out of "bourgeois liberalism" in Chinese legal studies. For example, see Gu, 1990.
laws in both Nazi Germany and the former Soviet Union. The Chinese *Criminal Law* still has a provision allowing conviction-by-analogy, i.e., conviction according to "the most similar provision" in the *Law*.\(^{36}\) Till now, this Article has only been employed for conviction in a limited number of cases, primarily because its use requires an approval from the Supreme People’s Court on a case-by-case basis. Still, the inclusion of such an Article alone could make the Chinese Code appear to be different from international standards.

"Nothing is more dangerous than someone walking around with out-of-date law" (Statsky, 1982:3). The authorities to be used in practice have to be relevant and updated. Therefore, it is the responsibility of the government to publish every new rule of the criminal law and to ensure that ordinary citizens have reasonable access to this information. A great deal of vagueness could be created if the access to the right information is made difficult.

Accessing published new statutes is easy in China. Given the growth of law and legal materials, however, streamlining the old and the new laws will be increasingly difficult. In this respect, China can learn a number of specific and useful techniques from the West. For example, as in Canada, a statute is either published individually, or bound in a sessional volume or a collection of statutes in China. However, most Chinese sessional volumes do not include a Canadian-type "Table of Public Statutes" as a quick access to all the latest statutes and amendments. The absence makes it difficult to locate the volume that contains the needed information. Also, it would be desirable that a Chinese sessional volume contain a subject index, given that the present ones usually only have a table of

\(^{36}\) Article 79 of the *Criminal Law*. 
contents. In addition, China needs to develop a computerised information system containing the various sources of legislation and important judicial decisions.

At present, to an ordinary Chinese law researcher, the most updated information on law is obtained in Chinese newspapers. Official Chinese newspapers often publish the full text of a new law. This is because such publication is a method of propaganda and education when published in this form, the text is relatively shorter in length, and the law usually becomes effective on the date of promulgation. Texts of important national legislation concerning criminal matters are usually published in the People’s Daily or the Legal Daily within days of promulgation. Texts of important local regulations usually appear in local official newspapers. Some texts appear in periodicals for the legal profession. The quarterly SPC Gazette is available to the public and contains important criminal legislation and their amendments. The China Law Yearbook (e.g., 1987, 1989, 1990, 1991, 1992, 1993 editions) is the best annual publication of Chinese legislation. Nonetheless, none of these publications guarantees that it includes every new law in the nation or the region; and there are few rules governing the choice of legal materials to be published in a newspaper or a periodical. To reduce vagueness, rules have to be created to specify the division of responsibility amongst the different levels of official newspapers and periodicals with respect to the publication of legal materials.

\[57\] E.g., the Liberation Daily and the Wen Hui Pao in Shanghai sometimes carry texts of local laws.

\[58\] E.g., the Lu Shi Zhi Liao (Lawyers’ Materials) compiled and distributed by the Shanghai Bar for its members.
2.2.4 Hierarchy of Legislation

The Criminal Law of the PRC is the most important and comprehensive law code in the Chinese system of substantive criminal law, but the system consists of at least three types of enactment at the national level, i.e., the Code, criminal law statutes separated from the Code, and criminal law provisions in non-criminal statutes.

The Criminal Law was enacted in 1979. A feature of this Law, as Donovan (1987) has noticed, is its extreme brevity. The degree of brevity, however, is lowered through other enactments. Since 1979, the Standing Committee of the NPC has enacted a total of twenty-three separated criminal law statutes and a large number of criminal law provisions in non-criminal statutes. Most of the statutes create, specify or alter the definitions of crimes and increase the maximum punishment that is stipulated in the Law.59

In a jurisdiction where the criminal law is codified, this system usually involves four types of relations: the Criminal Law versus other legislation, criminal legislation versus subordinate legislation or non-criminal regulations, national law versus local law, and domestic law versus international treaties.

The Chinese history of codification is thousands of years long, probably started in the Xia Dynasty (21st century - 16th century B.C.), which was the first recorded ancient dynasty in China.60 During 21st century B.C. - 1911, the power of making criminal

59 For a list of the statutes, see Chapter IV of the dissertation.

60 According to ancient Chinese literature, the Xia Dynasty made 3,000 articles in its criminal law. However, no one has unearthed the original text of these articles. The
legislation was always centralised. Each ancient Chinese dynasty had a unified law code as a cornerstone of the legal system (Chai Shuhen, 1983; Chang Shuen, 1983; Li Guangchang, 1986; Ning, 1986; Zhang Jingfan et al. 1983, 1992; Zhou Mi, 1985). The earlier years of the 20th century saw a merger of this ancient tradition with the imported European model of codification.⁶¹

The present Chinese Criminal Law has a structure similar to the European codes and different from their counterparts in common law countries. The Canadian and American codes, for example, cover both the substantial and the procedural rules. Like the European codes, China's criminal code is separated from the code of criminal procedure and is clearly divided into two parts, i.e., a "General Part" containing the doctrines and tests and a "Specific Part" providing definitions and sentencing alternatives for every specific type of crime.⁶² The use of a Specific Part provision has to be in conjunction with the relevant doctrines of the General Part.

In general, conflicts between legislation are handled according to one of the following maxims: first, a new rule is superior to an old one; second, a special rule is superior to a general one; third, the code is superior to other statutes; fourth, a national earliest unearthed ancient Chinese code is The Qin Lu (Qin Code) a code made by the Qin Dynasty during 4th - 3rd Centuries B.C. and excavated in Yuen Meng, China. See Zhang Jingfan et al., 1992, at pp. 25-64.

⁶¹ The same model was also imported to China via Japan and the former Soviet Union.

⁶² For European examples of this model, see the French Penal Code, Italian Penal Code; the Penal Code of the Federal Republic of Germany.
law is superior to a local law; lastly, a ratified international treaty is superior to a domestic law.\textsuperscript{63} However, the application of these principles is not always as clear-cut.

In West Europe, the overall structure of the criminal law is relatively stable, except in a few controversial areas (e.g., young offenders, drug offences, domestic violence, economic crimes, etc.). Some of the common law countries (e.g., Britain and Canada) are still going through a slow process of codification or re-codification, but the application of the maxims as listed above is no longer a big issue. The Chinese criminal law, however, like Chinese society, is going through fundamental changes. On several occasions, extraordinary measures have been taken in contradiction with the basic rules in the 1979 Criminal Law. For instance, in 1983, the Standing Committee of the NPC enacted the Resolution on Severely Punishing Offenders of Crimes Seriously Endangering Social Order to crack down on violent crimes. This Resolution, often cited as "September the 2nd Resolution," not only creates a new type of criminal offence and applies the new rule retroactively, but also increases the punishment for several crimes retroactively, apparently in conflict with the ex post facto clause in Article 9 of the 1979 Criminal Law.\textsuperscript{64}

To reduce vagueness and ambiguity in the sources of Chinese criminal legislation, it would be desirable to abolish and prohibit these extraordinary measures. Also, to streamline the amendments to the 1979 Criminal Law, the Chinese law makers can learn useful experience from both the Canadian system that consolidates the amendments


\textsuperscript{64} The Resolution was enacted on 2 September 1983, bearing a title of Resolution of the Standing Committee of the NPC on Severely Punishing Crimes Seriously Endangering Social Order.
periodically and the English system that continuously consolidates amendments into new statutes.\textsuperscript{65}

Different types of legislation should bear different titles. In Chinese law, legislation is called a "Law" (\textit{fa}) if it is adopted by the National People's Congress. If it is made by the NPC Standing Committee, it is often called a "Resolution" (\textit{jue-ding}) or "Regulations" (\textit{tiao-li} or \textit{guiding}). Laws made by the NPC or its Standing Committee are roughly equivalents to "statutes" in English. In addition to the 1979 \textit{Criminal Law} and the supplementary criminal resolutions and regulations, the Chinese NPC and its Standing Committee have also enacted a large number of non-criminal statutes that carry criminal law provisions. For example, Article 66 of the \textit{Patent Law} defines "violation of duty" by an official of a patent office as a criminal offence if "the circumstances are serious."\textsuperscript{66}

Legislation made or approved by the State Council (i.e., China's highest administrative body) are also referred to as "regulations." In essence, however, these are administrative regulations (\textit{xing-zheng fa-gui}) that are sometimes called \textit{subordinate legislation} in English (Yogis and Christie, 1974:51-53). In China, subordinate legislation usually deals with non-criminal (e.g., administrative or economic) matters, but sometimes carries a criminal law article, stating that "a violation of this legislation shall be handled through the judicial process, if it constitutes a crime due to the seriousness of circumstances."\textsuperscript{67} This may be considered as \textit{delegated legislation}. The problem is however the Chinese law has set no specific guidelines on the limits of delegation. Even a

\textsuperscript{65} For a brief introduction to the two systems, see Yogis and Christie, 1974, at pp. 53-63.

\textsuperscript{66} For more examples, see Gao Mingxuan, 1993c.

\textsuperscript{67} E.g., see Article 38, \textit{Road Traffic Regulations of the PRC}, promulgated by the State Council, 1987.
department of a local government can make regulations that actually specify the criminal law definitions.\textsuperscript{68} Also, there are a few items of Chinese subordinate legislation dealing with "administrative" offences that are equivalents to real crime in other countries.\textsuperscript{69} The limits of the power to create criminal offences in delegated legislation has to be clarified by the NPC or its Standing Committee.

Except in the area of regulatory offences, Canada's provincial governments do not make criminal law.\textsuperscript{70} In China, the "regulatory offence" is not a concept in practice, but local regulations may specify criminal code definitions of real crimes through local regulations. For example, the 1979 Criminal Law provides that a criminal theft must involve a "relatively large amount" of property (Article 151). This vague requirement is defined differently in various provinces and areas according to the living standards.\textsuperscript{71} This creates more vagueness in law, given the fact the accused persons have no knowledge about the specific standards, let alone their most recent changes.

---

\textsuperscript{68} E.g., see par. 4 of Article 31, \textit{Provisional Regulations of Medical Treatment Accidents of Shanghai}, promulgated by the Shanghai Municipal People's Government, 1985. This paragraph carries the phrase "if it constitutes a crime due to the seriousness of circumstances."

\textsuperscript{69} See, e.g., discussion of laws on non-criminal administrative security offences in Chapter VI of this dissertation.

\textsuperscript{70} E.g., dangerous driving under both s. 249 of the \textit{Criminal Code} and s. 149 of the \textit{Motor Vehicle Act of British Columbia}. See discussion in Verdun-Jones, 1989, at pp.5-9, 153.

\textsuperscript{71} See Supreme People's Court and Supreme People's Procuratorate, 1984, \textit{Answers to Questions Regarding the Specific Application of Law in Handling Theft Cases}. The text is in Ren et al., 1991, at pp.756-761.
According to the Constitution of the People's Republic of China, conflicts between the central and local laws are resolved in favour of the national legislature, i.e., the NPC and its Standing Committee. In reality, however, such conflict has never happened in criminal law. This legislative harmony may face a challenge when Hong Kong and Macao return to the jurisdiction of the PRC in the late 1990s. The veto power of the Central Government will thus become an important legal remedy to deal with such conflicts with the Special Administrative Regions.\(^2\)

\section*{Conclusion}

In conclusion, the dissertation is mainly a product of comparative legal research, employing the traditional legal analytical methods but taking into account the political, ideological and economic context and the actual operation of law. The research data have mostly been collected through research at law libraries, but have been supplemented by observation and communication. This product is both theoretically and practically oriented, but not all-embracing.

The hierarchical structure of Chinese criminal law involves various formal and informal sources or components as summarized in Table 2.1.

\footnote{The Special Administrative Region is a name in Chinese law for Hong Kong, Macao, and Taiwan once reunified with the mainland.}
Table 2.1. Criminal Law Sources in China

Formal Sources
- PRC Constitution
  - Criminal Law (Code)
    - Criminal Law provisions in non-criminal statutes
  - Legislative interpretation by the NPC or its Standing Committee
    - Judicial interpretation by the SPC and SPP (binding)
    - Other criminal law statutes

Informal Sources
- CCP Constitution
- Policy Documents of the CCP/State
  - Marxist Political/Ideological Principles/Theories
    - Case reports reference materials (by the SPC or SPP) (not binding)
    - Policies of Local Party Committee or Government
    - Local Cases and Materials for Reference issued by local courts or procuratorate
      - Opinions of the MPS or other Ministries
      - Local PS Bureaus or other bureaux
        - Opinions of local PS Bureaus or other bureaux
The structure as described in Table 2.1 is determined by the particular context of the Chinese society. Obviously, the Chinese sources of the criminal law have some important characteristic features in comparison with their Western counterparts. To reduce vagueness in this respect, this author would propose that:

- "policies" that are not embodied in formal enactment should no longer be used as a source of law;
- the function of the Chinese judiciary in law making should be specified in legislation;
- legal theories should play a more active role in legal reasoning;
- internal documents should no longer be used as a source of law;
- the various sources of law should be streamlined; and
- the various tools of legal research could be imported from the West.
Chapter III

Crimes and Proletarian Dictatorship:
A Theoretical and Historical Review

3.1 The Classics of Proletarian Dictatorship

3.1.1 Ambiguities in the Entrenched Marxist Principles

Streamlining the sources of Chinese law is only one of the major objectives for the specification of the definitions of crime. Another objective is to change the simplistic entrenchment of classical Marxist principles in the present Chinese Criminal Law.

As E.L. Johnson (1969:63-64) has observed, an almost unique feature of the traditional model of socialist law is its heavy reliance on the philosophy of Marxism. In the People's Republic of China, Marxism is not only the dominating theory in Chinese jurisprudence, but also directly prescribed in state law. The present Chinese constitutional law and criminal law share this feature in prescribing Marxism-Leninism and Mao Tsetung Thought as the “guiding thoughts”; that is to say, the official ideology.

The Preamble of the 1982 Constitution of the PRC states:

Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Tsetung Thought, the Chinese people of all

---

73 The official jurisprudence taught at Chinese law schools is defined as a “Marxist jurisprudence,” which, presumably, is distinctive from all the theories of the “exploiting classes.” See Teaching and Research Section of Jurisprudence, Beijing University Law Department, 1984; Shen Zhanling (Ed.), 1987; Sun Guoja and Shen Zhanling (Eds.), 1982.
nationalities will continue to adhere to the people's democratic dictatorship and follow the socialist road ... to turn China into a socialist country with high level of culture and democracy.

Explaining the Bill to the NPC in 1982, Peng Zhen, Chairman of the Standing Committee of the NPC, indicated that this Constitution was drafted according to “four cardinal principles,” i.e., the leadership of the Communist Party, the people's democratic dictatorship, the socialist system and the guidance of Marxism-Leninism and Mao Tsetung Thought (Peng, 1982:1261-1275). The term “four cardinal principles” was first proposed by Deng Xiaoping in March 1979, when the government was facing the challenge of the first post-Mao wave of the “bourgeois liberalisation.” With the statement in the Preamble, these Marxist concepts are entrenched as the fundamental principles of the Chinese Constitution.

A virtually similar statement of legislative intent is found in Article 1 of the Criminal Law and a number of other codes adopted in 1979. The Article reads:

The Criminal Law of the People's Republic of China, which takes Marxism-Leninism and Mao Tsetung Thought as its guide and the

74 In the Report, Peng, however, briefly indicates that the Party had made “serious errors” in applying these principles, especially in the Cultural Revolution (1966-1976). He also points out that the principles are enriched with new ideas during the era of reform.

75 See Deng Xiaoping, “Upholding the Four Cardinal Principles,” in Deng Xiaoping, 1983, pp. 144-170. In the article, at. pp.159-160, Deng noted that in 1979 there were people openly “demanding human rights” and denouncing “proletarian dictatorship” as “the root of ten thousand evils.” At the time, the government launched the first major crackdown on “activists of bourgeois liberalism” in the post-Mao era. This caused great controversies in the international community, since the Western media and governments assert some the arrested “counter-revolutionaries” are “political dissidents.”

76 See Articles 1 and 2 of the 1979 Law of Criminal Procedure; Article 3 of the 1979 Organic Law of the People's Courts; and Article 4 of the 1979 Organic Law of the People's Procuratorates.
Constitution as its basis, is enacted in accordance with the policy of combining punishment with leniency and in light of actual circumstances and the concrete experiences of all of this country's ethnic groups in carrying out the people's democratic dictatorship led by the proletariat and based on the worker-peasant alliance, that is the dictatorship of the proletariat, and in conducting socialist revolution and socialist construction.

The functions of the law are defined according to these principles. Article 1 of the Constitution provides:

The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants.

The socialist system is the basic system of the People's Republic of China. Sabotage of the socialist system by any organisation or individual is prohibited.

Similarly, Article 2 of the Criminal Law stipulates that the law is first of all enacted to use criminal punishment to crush counter-revolutionaries and other enemies so as to defend the system of the proletarian dictatorship and socialist revolution. In Chinese textbooks, it is pointed out that defending the proletarian dictatorship against the sabotage of counter-revolutionaries is "the most important task of the criminal law" (Gao and Zhao, 1993:16-18; He, 1993:15-16).

---

77 Article 2 reads:
The tasks of the Criminal Law of the People's Republic of China are to use criminal punishments to struggle against all counter-revolutionary and other criminal acts in order to defend the system of the dictatorship of the proletariat, to protect socialist property owned by the whole people and property collectively owned by the labouring masses, to protect citizens' rights of the person, democratic rights and other rights, to maintain social order, order in production, order in work, order in education and scientific research and order in the lives of the masses of people, and to safeguard the smooth progress of the cause of socialist revolution and socialist construction.
Subsequently, Article 10 of the Code defines crime as follows:

All acts that endanger the sovereignty and territorial integrity of the state, endanger the system of proletarian dictatorship, undermine the socialist revolution and socialist construction, undermine social order, violate property owned by the whole people or property collectively owned by the labouring masses, violate citizens' lawful rights of the person, democratic rights and other rights, and other acts that endanger society are crimes if according to law they should be criminally punished; but if the circumstances are clearly minor and the harm is not great, they are not to be deemed crimes.

In Chinese textbooks, the authors agree that the most dangerous targets of the criminal law are the counter-revolutionaries and other types of criminals who are similarly "enemies" of the socialist system (Gao and Zhao, 1993:16-18; He, 1993:15-16).

From a comparative perspective, this particular type of ideological statement is not inherited from ancient Chinese law, or imported from the civil law and the common law systems. Rather, it is indeed a characteristic feature borrowed from the early Soviet criminal codes. Essentially similar provisions are found in the 1919 Leading Principles of Criminal Legislation of the Russian Socialist Federated Soviet Republic (RSFSR), the 1924 Fundamental Principles of Criminal Legislation of the USSR and the Union Republics, as well as the 1922 and 1926 Criminal Codes of the RSFSR.  

78 See Preamble and Articles 1-3 of the 1919 Leading Principles of Criminal Legislation of the Russian Socialist Federated Soviet Republic (RSFSR), Article 1 the 1924 Fundamental Principles of Criminal Legislation of the USSR and the Union Republics, Articles 5 and 6 of the 1922 Criminal Code, and Articles 1 and 6 of the 1926 Criminal Codes of the RSFSR. Aside from the Chinese Code, the 1942 Criminal Code of the People's Republic of Mongolia (Article 1 and 6) also has such a statement.
Nonetheless, it is noteworthy that the former Soviet Union gradually removed some of the ideological statements from its criminal law during 1919-1960. The 1919 Leading Principles employs a full range of the Marxist concepts, including "ruling class," "proletarian law," "proletarian dictatorship," "class enemies," "class society," "capitalism" and "communism," and so forth. Both the 1922 Code and the 1926 Code define crime as an act against the "fundamentals" of the Soviet system and legal order established by "the political power of the workers and the peasants during the transition to communism." In the 1960 Criminal Code of the RSFSR, only the words "Soviet system" and "socialist legal order" remain, while the others disappeared.

In relation to the inclusiveness of entrenching the principles, although the 1979 Chinese Criminal Law has borrowed the most ancient Soviet style (i.e., the one in the 1919 Leading Principles), it is distinctive in terms of prescribing Marxism as the "guiding thoughts" of the criminal law. As Professor Gao Mingsxuan (1981:11) has indicated, this is the "most distinctive characteristic feature" of the 1979 Criminal Law, since no other country has this kind of provision. It is clear that the prescription of an ideology in the criminal law is not only an indication of the dominance of this ideology in the law-making process, but also a reflection of the particular Chinese context: first, the country has a Confucianist tradition of pursuing ideological harmony by every means; second, the 1979

---

79 In the 1919 Leading Principles of Criminal Legislation of the Russian Socialist Federated Soviet Republic (RSFSR), the Preamble is a classic statement of the Marxist propositions on the class struggle between the proletariat and the bourgeoisie, the abolition of the bourgeois legal system, and the class essence of law, and so forth. Articles 1-3 of the law provide that the criminal law is only an expression of the will of the ruling class and is to serve proletarian dictatorship.

80 Article 6 of the 1922 Code and the 1926 Code.

81 Both the words "Soviet system" and "socialist system" are found under Article 1 (Tasks of the Code) and 7 (The Concept of Crime) of the 1960 Code.
Criminal Law is mainly based on a draft that was accomplished in the 1960s when ideology was a life-and-death issue to the CCP;\textsuperscript{82} third, when the Criminal Law was enacted in the late 1970s, the CCP had just experienced a major ideological struggle to determine what true Marxism was;\textsuperscript{83} fourth, in the history of the CCP, it has been a tradition to legitimise every rule and decision by these Marxist principles; and fifth, the principles are believed to be essential to China’s social stability.

All these are understandable. Given the entrenchment of Marxist concepts in the Criminal Law, any legal analysis of the Chinese definition of crime has to start with these concepts. In this respect, a fundamental problem is that the concepts are political and ideological, not legally definable. For example, as many Chinese writers have acknowledged, the Chinese Criminal Law is based on the Marxist theories of class struggle and proletarian dictatorship (Zhang Zhihui, 1986a:87; Ying, 1993:381).\textsuperscript{84} However, it is impossible to find a clear definition of “class struggle” or “proletarian dictatorship” in any law that has ever been enacted.

In 1980, Deng Xiaoping wrote:

---

\textsuperscript{82} Accordingly to Cao Mingxuan, the articulation of this particular provision was “based on” a 1963 draft of the Criminal Law as well as the “new experience” obtained afterwards. In 1953 China had just recovered from the Great Leap Forward Movement and was in the eve of the “Four Clearance Campaign.” Internationally, it was fighting an ideological war against the Soviet Union to determine who the true Marxist-Leninist regime was, although the Chinese law drafters were still heavily relying on the Soviet legislative model.\textsuperscript{83}

\textsuperscript{83} The “struggle” refers to the 1978 debate on the issue “What is the criterion to determine a truth” between the Deng-led reformers and the Hua-led hard-liners in the CCP. See discussion in Chapter IV of the dissertation.

\textsuperscript{84} Both authors indicate that, by using terms such as “proletarian dictatorship,” the definition of crime under Article 10 has demonstrated its “obvious class nature.”
The socialist road, the people’s democratic dictatorship or the proletarian dictatorship, the leadership of the Party, and Marxism-Leninism Mao Tsetung Thought are four cardinal principles. We must uphold them, not to allow anyone to shake them, and prescribe them in a proper legal formation.85

On various occasions, Deng (1983; 1993) has insisted that these principles are the fundamentals to China’s reform and stability.86 In 1979, he told the Party that the principles should be written into the law in “a proper legal formation.”87 It appears that the formation to entrench the principles in the present law is straight forward, but simplistic, owing to the fact that no specification is made as to the meaning of “proletarian dictatorship,” “Marxism-Leninism and Mao Tsetung Thought,” and so forth. A provision like this in law is virtually a statement of a slogan, rather than a legally articulated norm. This kind of entrenchment was in fact a characteristic feature of Chinese constitutional enactment during the pre-Reform period.88 The formation generates a great deal of vagueness that could make the law incompatible with the ongoing socio-economic reform in China.


88 See e.g., the Constitution of the PRC 1978.
From a legal point of view, it is absolutely essential to transform the principles into specific legal concepts if they must be entrenched in law. This requires the politicians, not the jurists, to properly clarify the meaning of these political principles. Yet, given the transitional nature of the Chinese society, it is doubtful whether or not there could possibly be a clarification that would satisfy the requirement of the rule of law.

As indicated in Article 1 of the *Criminal Law*, Marxism, Leninism and Mao Tsetung Thought apparently guide the entire process of law making and operation (Gao, 1981:11). Yet, is there a legal language that could clearly define Marxism, let alone "Marxism, Leninism, and Mao Tsetung Thought"? After all, what is Marxism? In Western terminology, "Marxism" is associated with a variety of theories. For example, there are "Classical Marxism," "Western Marxism," "Soviet Marxism," "Orthodox Marxism," "Non-dogmatic Marxism," "Instrumental Marxism," "Structural Marxism," "Neo-Marxism," and "Post-Marxism" (Bottomore, 1983).

Further, Marxists disagree with each other. A Western Marxist may denounce Soviet or "oriental" Marxism as "Stalinism." An oriental Marxist may consider Western Marxism a revisionist mutation of the true classics. To some extent, the counter-criticism may be justified, since the theories of "Western Marxism" substantively differ from some of the classic theories of Marx and Engels. Looking at the differences, Mark Poster (1984:1-2) observes:

Broadly speaking, the Western Marxists sought to redefine the place of the subject in Marxist theory by confronting Marx's positions with recent intellectual developments such as psycho-analysis and existentialism. They also examined the epistemological difficulties in the Marxist dialectic by reassessing its Hegelian roots and restricting more than Marx had done the metaphysical scope of dialectical thought. Finally, they shifted the attention of critical theory away from the means and relations of

---

89 See Bottomore et al., 1983. In Western theory, there are mainly two types of Marxism, i.e., "instrumental Marxism" and "structural Marxism."
production toward issues of everyday life and culture. As every point a disturbing question pursued them: were they still Marxists or simply disgruntled intellectuals?

Again, looking for a true Marxism is outside the limits of this dissertation. After all, Western Marxism has only a minimal impact on Chinese law. In Chinese terminology, there is only one true Marxism, that is roughly an equivalent to Classical Marxism in Western terminology. This is essentially the theoretical system based on the classical writings of the two Great Teachers of the proletariat, Karl Marx and Friedrich Engels.90 Furthermore, officially speaking, the two greatest successors of Classical Marxism are Vladimir Ilich Lenin, the God Father of the Soviet Union, and Mao Tsetung, the founder of the People’s Republic of China.91 Marxism is considered an all-embracing world view consisting of three core theories: the philosophy of dialectical materialism and historical materialism; the theory of political economy; and scientific socialism.

90 To date, the most complete collection of these writings in translated Chinese language has been a fifty-volume Complete Works of Marx and Engels compiled by the CCP Central Committee Marx, Engels, Lenin and Stalin’s Works Editing and Translating Bureau and published by the People’s Press in Beijing in 1956. The core writings of Marx and Engels are found in a four-volume Selected Works of Marx and Engels compiled by the CCP Central Committee Marx, Engels, Lenin and Stalin’s Works Editing and Translating Bureau and published by the People’s Press in Beijing in 1966.

91 In 1991, the sixty-volume Complete Works of Lenin were compiled by the CCP Central Committee Marx, Engels, Lenin and Stalin’s Works Editing and Translating Bureau and published by the People’s Press in Beijing. The core writings of Vladimir Ilich Lenin are found in a four-volume Selected Works of Lenin compiled by the CCP Central Committee Marx, Engels, Lenin and Stalin’s Works Editing and Translating Bureau and published by the People’s Press in Beijing in 1972. Also, the CCP Central Committee has published five volumes of Mao Tsetung’s works. See Mao Tsetung, 1964, Selected Works of Mao Tsetung, compiled by the CCP Central Committee Chairman Mao’s Works Publishing Committee and published by the People’s Press in Beijing. This book contains the writings otherwise compiled in four volumes. The first edition of Selected Works of Mao Tsetung (the fifth volume) was compiled by the CCP Central Committee Chairman Mao Tsetung’s Works Editing and Publishing Committee and published by the People’s Press in Beijing in 1977.
Still, even in this simplified context, *Classical Marxism* has changed substantively. As discussed later, Deng Xiaoping, who proposed the provision of the "four cardinal principles" in law, was denounced as a "counter-revolutionary" and "anti-Marxist revisionist" only two decades ago. Also, Mao Tsetung's ideas about "continuous revolution under proletarian revolution," a theory developed in the last two decades of his life, are no longer officially recognized as part of "Mao Tsetung Thought." The last decades have seen two types (or two types of interpretation) of "Marxism, Leninism, and Mao Tsetung Thought" in China, or two facets of each one of the Marxist cardinal principles, both supported by the words of Marx, Engels, Lenin, Mao and even Stalin. One is old, primarily repressive, and learned from the Soviet Union; the other is relatively new, more humanistic, and mixed with ideas developed and imported during the post-Mao era. This chapter is devoted to the former, and the next chapter to the latter.

Let us focus on the difficulties of defining the "proletarian dictatorship" in the language of the criminal law, given that this classical Marxist concept underlies the traditional socialist criminal law and criminal justice system. The criminal law is usually said to be a weapon of the proletarian dictatorship, but this, in reality, means that the law is also a weapon under the other Marxist principles. The principles are so closely interrelated in a systemic way that each one of them includes the others. The entire system is usually called the dictatorship of the proletariat or socialism under proletarian dictatorship; the proletarian dictatorship is under the leadership of the Communist Party; the Party takes Marxism-Leninism and Mao Tsetung Thought as its official ideology to exercise the power of proletarian dictatorship; and this ideology defines the meaning of proletarian dictatorship, socialism and the leadership of the Party.

---

92 See discussion in this Chapter and Chapter IV.
To use the term "proletarian dictatorship" in the criminal law, a major difficulty is that the concept in Classical Marxism is originally repressive, primarily referring to the repression of the enemy class or class enemies, not ordinary criminals. Moreover, as history has demonstrated, in actual operation, the economic status is not the only criterion for defining a class enemy (i.e., an element of the enemy class). On numerous occasions, an individual may become a class enemy because he or she is somehow considered a political opponent of the government, a government policy, the Great Leader or the leadership, the ideology of Marxism or part of the ideological structure. Therefore, the concern is that, once used as a weapon of proletarian dictatorship, the criminal law might primarily serve the repression of political enemies.

The problem of using the law as a tool of political repression is fully demonstrated in the numerous miseries in the former Soviet Union, China, and many other socialist countries. Less than two decades ago, "proletarian dictatorship" were the words serving the brutality of the Cultural Revolution; "socialism" was the excuse to force the population to live in poverty; "Party's leadership" was the dictatorship of the Leader; and the words of "Marxism, Leninism, and Mao Tsetung Thought" were the highest laws in China. At the time, all the slogans helped the establishment of what Marshal Ye Jianying later called a regime of "feudalist fascism" de facto. Hence, to avoid more miseries in

---


94 In his "Speech to Expanded Central Committee Working Meeting" (1962), Mao Tsetung warned the CCP that once China became a "revisionist country," proletarian dictatorship would become "fascist dictatorship." See Mao Tsetung, 1986, pp.822-823. During the Cultural Revolution, the regime was always described as a proletarian
the future, Chinese reformers have to be very cautious and specific when entrenching these political concepts in the criminal law or using them as the guiding thoughts of criminal law theories.

3.1.2 The Dialectics of Proletarian Dictatorship

Vagueness in the entrenchment of political slogans in law can be very destructive to the rule of law owing to the particular historical context and nature of Classical Marxist philosophy. The old theoretical system of Classical Marxism was established during the extraordinary years of fierce struggles and revolutions in Europe; refined in the former Soviet Union during the difficult times of revolution, civil wars, starvation, forced collectivisation, endless power struggle within the Party, Stalin’s Great Purge, the World Wars; and, in China, developed during the bloody wars and the Cold War. Given this context, the theories were designed to direct, organise, and legitimise the suppression of political enemies.

Therefore, the entire ideology of Classical Marxism is based on a particular kind of dialectics that encourages and demands massive, violent and constant struggle between the major factions of a society. To address the practical meaning of this philosophy, let us start with the fundamental laws of Marxist dialectics that were borrowed from Hegel. Among them, the law of the unity of opposites is particularly important, since it is the fundamental of the Marxist outlook of the world. In his essay Anti-Duhring, Engels (1965:48) claims that:

dictatorship. See the 1975 Constitution of the PRC. However, in 1979, Marshal Ye Jianying, Chairman of the Standing Committee of the NPC, indicated that a fascist dictatorship was established in China during the Cultural Revolution. See Ye Jianying, 1979.
We find upon close investigation that the two poles of an antithesis, positive and negative, e.g., are as inseparable as they are opposed, and that despite all their opposition, they mutually interpenetrate.

Accordingly, in Russia, Lenin elaborates the same law in *On Dialectics* as "development as a unity of opposites (the division of the one into mutually exclusive opposites and their reciprocal relation)." Later, in China, Mao Tsetung wrote his essay *On Contradiction* in 1937 (Mao, 1964:274-312), prescribing "the law of contradiction" (i.e., the unity of opposites in things) as the basic law of Marxist materialist dialectics. He (1964:280) points out:

The universality or absoluteness of contradiction has a two-fold meaning. One is that contradiction exists in the process of development of all things and the other is that in the process of development of each thing a movement of opposites exists from beginning to end.

In the essay, Mao holds that dialectics are the methods to expose the various kinds of social contradictions rooted in the capitalist mode of production. He insists that only from this approach can the Chinese communists correctly understand class struggle during China’s revolution. In addition, Mao points out that "the struggle between the rightful thoughts and the wrongful thoughts in the Communist Party" is a reflection of class struggle within the Party. This kind of contradiction, he contends, can sometimes become "confrontation," which has to be settled by compulsory means. For example, he says, confrontation occurred in the struggle of Lenin and Stalin against Leon Trotsky and Nikolai Bukharin, and in the struggle of the "rightful thoughts" against the "wrongful thoughts" of Cheng Duxiou and Zhang Guotao (Mao, 1964:309).96


96 Cheng Duxiou was one of the co-founders of the CCP. In the early 1920s, he was the Party’s first General Secretary. He left the leadership due to his incompetence in fighting
From this perspective, the proletariat must seize the power of the state through class struggle, including a war against the ruling class; and once it is ruling, class struggle will become proletarian dictatorship against the enemies. The struggle between the capitalist class and the proletariat has to be continuous and tireless. According to the precepts of dialectical materialism, this kind of struggle is the basic social contradiction and the main driving force of progress in a modern society. Hence, human history is simply a history of class struggle (Mao, 1964: 1376), and the proletarian dictatorship is the final phase of this struggle. As Carew Hunt (1962:41) has observed:

Marx did not pretend to have discovered the class struggle; but he claimed to have proved that the existence of classes is bound up with a "particular historic phase in the history of production," that it must inevitably lead to the dictatorship of the proletariat, and that the dictatorship will be a transitional stage that will end with the abolition of all classes and the establishment of a classless society.

The proletarian dictatorship as a system has only been established in the East, although it has also been talked about in the West. Under the old Classical Marxism,
what is meant by “proletarian dictatorship” in relation to law? In *The Proletarian Revolution and the Renegade Kautsky* (1918), Lenin (1972, vol.3:623) defines proletarian dictatorship as *a political power directly relying on the use of force that is not subject to any limits in law*. This concept apparently rejects any law, let alone the rule of law. Interestingly, in some recent Chinese writings, it is still praised as a “scientific concept” (Ding Huining and Shong Nongchun, 1991:261). In Chinese jurisprudence, though, the validity of this concept is a subject for discussion. Wang Yongfei (1992a:367), a leading scholar, indicates that proletarian dictatorship is not subject to any legal limits, including socialist law. On the contrary, some scholars assert that Lenin’s proposition is only valid in a sense that the proletarian revolution is not subject to the limits of the bourgeois law.99

Obviously, applying this type of dialectics, the law *would be* primarily repressive and *would have* these features, that are very problematic in the current Chinese political-economic context:

First of all, this law *would become* a mechanism for the economic interest and political dominance of a ruling class. Socialist law is made by the socialist state, which, accordingly to both Marx and Lenin, is not neutral in class struggle, but a mechanism of the proletarian dictatorship.100 In *The Manifesto of the Communist Party*, Marx and Engels declare that the state is never a mediator of the conflicts of the bourgeoisie and the proletariat. The law is an institution of the superstructure for the protection of the economic infrastructure. The bourgeois law is only an expression of the will of the

---

99 For discussion of the different views, see Wang Yongfei, 1992a, at p.366-367.

bourgeoisie; and on the contrary, the proletarian dictatorship is "merely the organised power of one class for repressing another" (Marx and Engels, 1965:27). This kind of theory is incompatible with the present Chinese legal system which protects the fast growing private sector of the economy.

Moreover, under the old concept, the law would recognise - if not demand - the division of social classes. Proletarian dictatorship is a combination of two aspects: democracy for the proletariat and dictatorship against the bourgeoisie. In this respect, Mao Tsetung has elaborated in plain language the Marxist concepts of antagonistic classes. In his On People's Democratic Dictatorship (1949), Mao (1964:1357-1371) defines the Chinese version of proletarian dictatorship as a democracy for the people and dictatorship against the enemies. The criterion to distinguish the two, he offers, is simple: those classes who support socialism are the people, and those who oppose socialism are the enemies. At the time, he concluded that the people consisted of four classes, i.e., the workers, the peasants, the “city petty bourgeois class,” and the “national bourgeois class.”

On the contrary, the landlord class, the “bureaucratic capitalist class” and their Nationalist “representatives” were the enemies. Following this theory, the Chinese law would have to be repressive, rather than protective, to investors from Taiwan, Hong Kong, and the Western world.

Furthermore, applying the old concept of proletarian dictatorship, the law would be openly repressive against the enemy social groups (i.e., the enemy classes). Here, the

---

101 The term “city petty bourgeois class" refers to owners of home-based small business and intellectuals, whereas the “national bourgeois class" refers to the Chinese capitalists who were sympathetic to the communists before 1949.

102 The “bureaucratic bourgeois class" refers to the Chinese capitalists that were affiliated to the Nationalist government before 1949.
same problem arises again: What enemy class is the Chinese law going to suppress in the current context? Indeed, according to Marx, Engels, Lenin and Mao, during the interim period of proletarian dictatorship, the state and the law must crush the remnants of the enemy class. The oppression has to continue until the entire society achieves full communism, wherein the state and the law will both wither away. In *The Manifesto of the Communist Party*, Marx and Engels (1965:26) indicate that democracy for the proletariat during a socialist revolution is basically to raise the proletariat to the position of ruling class, and, once this is accomplished, the proletariat should "use its political supremacy" to oppress the bourgeoisie. From this point of view, both Lenin and Mao (1964:1357-1371) agreed that only by suppressing the enemies with no mercy could the people enjoy the most complete democracy. As Lenin (1965:98) said in *The State and Revolution*, when democracy:

> [F]or the first time becomes democracy for the poor, democracy for the people, and not democracy for the moneybags, the dictatorship of the proletariat imposes a series of restrictions on the freedom of the oppressors, the exploiters, the capitalists. We must suppress them.

However, in the post-Mao era, it has been difficult to officially identify an "enemy class" in China.

Following the same line of reasoning, a fourth but not last feature of the law, as proposed in the classics, *would be* its rejection to traditional principles of the bourgeois law.\(^{103}\) According to *The Manifesto of the Communist Party* (Marx & Engels, 1965:26-

---

\(^{103}\) Socialist law may however share some of the bourgeois ideas due to the economic inequalities in a socialist society. For example, during the Cultural Revolution, the Chinese government used to consider equal work for equal payment as an example of "bourgeois legal right," i.e., a concept inherited from the bourgeois society that will eventually be abolished. See Zhang Chunqiao, 1973.
27), the communist revolution is to abolish private property, abolish wage labour, abolish all right of inheritance, abolish the bourgeois family, centralise all instruments of production, centralise all means of communication and transport and establish industrial armies in the hands of the State. Hence, the law is to facilitate, rather than to limit, the power of a centralised semi-military type regime, which denies any private interests, acquires virtually free labour, and controls every aspect of life in the society. Nonetheless, this appears to be absurd in the present social context in China.

Apparently, the old concept of proletarian dictatorship was proposed to justify a system of massive repression, that would not be subject to any normal legal standard or limitations. Under this system, legality and equality would both become problematic, since the rule of law would be replaced by the rule of class, and equality before the law would be changed to the repression of class enemies. To crush the enemies, the people would prefer to maintain full discretion regarding whether or not to use any law as a weapon. If the law were to be employed, it would mainly target the enemies and define them as the worst type of criminals.

So the enemies are defined as counter-revolutionaries. In this respect, Article 46 of the 1926 Criminal Code of the RSFSR serves as an example. The Article classifies criminal code offences into two categories: “counter-revolutionary crimes” and “all other crimes.” Under this Article, “counter-revolution” is a crime against the foundations of the Soviet proletarian dictatorship and “therefore considered to be the most dangerous.” Similarly, in the criminal law of the PRC, “counter-revolution” has always been defined as

---

104 For provisions on counter-revolutionary crime, see Articles 46-58 of the 1926 Criminal Code of the Russian Socialist Federated Soviet Republic (1926) and Articles 90-103 of the present Criminal Law of the PRC.
a most dangerous type of crime against the proletarian dictatorship (He et al., 1993:15-17; Jia, 1993).^{105}

3.1.3 The Party's Leadership

In respect to the function of socialist criminal law, a fundamental issue has always been: Should the law be used to crush the enemies of the Party?

The principle of Party's leadership has its origins in The Manifesto of the Communist Party (Marx and Engels, 1965:18):

The Communists are distinguished from the other working-class parties by this only: 1. In the national struggles of the proletarians of the different countries, they point out and bring to the front the common interests of the entire proletariat, independently of all nationality. 2. In the various stages of development which the struggle of the working-class against the bourgeoisie has to pass through, they always and everywhere represent the interests of the movement as a whole.

The Communists, therefore, are on the one hand, practically, the most advanced and resolute section of the working-class parties of every country, that section which pushes forward all others; on the other hand, theoretically, they have over the great mass of the proletariat the advantage of clearly understanding the line of march, the conditions, and the ultimate general results of the proletarian movement.

^{105} For the legal definition of counter-revolution crime under present Chinese law, see Article 90 of the 1979 Criminal Law. For early definitions in the law of the PRC, see Article 2 of the Regulations on Punishing Counter-revolutionaries of the PRC (1951), promulgated by the Central People's Government Committee on 21 Feb. 1951. Both laws define counter-revolution as a crime directed against the proletarian (people's democratic) dictatorship.
It is a Marxist principle that the proletariat must be led by the Communist Party during the entire period of proletarian revolution and dictatorship, because the Communists are the only qualified representatives of their fundamental interests and the vanguards in the struggle against the bourgeoisie. In this respect, Marx and Engels laid down the primary blueprint, and Lenin and Mao Tsetung established the system. Under this system, the proletarian dictatorship materialises through the leadership of the Party.

In “The Problems of Leninism,” Stalin (1979, vol 1, 395-458) fully elaborated the concept of “system of proletarian dictatorship.” He (415) states that:

The proletarian dictatorship *in essence* is the “dictatorship” of the vanguard of the proletariat; that is, the “dictatorship” of the Party, i.e., of the main leading force of the proletariat.

According to Stalin, Lenin proposed this kind of “dictatorship of the organised and conscious minority of the proletariat”; that is, the “absolute leadership” of the Communist Party upon the proletariat and the various organisations, including the state machinery, the trade unions, the collective farms, and the communist youth leagues (411-419). This Stalinist model of proletarian dictatorship was introduced to all the socialist countries, including China. Interestingly, in the same essay, Stalin (419) attempts to argue that his model is not a “Party’s dictatorship,” since the “dictatorship” of the Party is only “in essence,” not in totality. As Soviet history has unfolded, however, what Stalin created was not only a dictatorship in totality, but also dictatorship by an individual dictator.

From a legal point of view, the issue is not whether the Party leads, but *whether the criminal law should intervene in this political realm*. In relation to the subject of this dissertation, the questions is: Could the law clearly define and thereby limit those

---

106 Stalin insists on putting the words “dictatorship” in quotation marks.
behaviours that are against the Party's leadership? Or, to put it in a different way, would there be excessive vagueness if the law were used to crack down on anti-Party activities?

If the law were designed to intervene, it might have to deal with a vast range of things, owing to the fact that the Party's leadership is all-embracing, covering all the powers of the government (the legislative branch, the executive branch, the judicial branch), the military, the various economic sectors, the mass media, the schools, the various organisations and individuals.

First, the Party leads the state and controls the various state mechanisms. The Party makes policies and decisions on important political, economic, legal, social, and cultural matters. In China, the Central Committee of the Party, its Secretariat and Political Bureau, the Standing Members of the Political Bureau and the Leader(s) have the policy-making power at the national level. A policy of the socialist state is primarily a policy of the Party (Wang Yongfei, 1992b:550). The Party committees at various local levels exercise the decision-making power on important local matters. The Party committees in various "working units," e.g., companies, farms, courts, police forces, army units, factories and schools, have the power to make decisions on any matters that are considered important by the committees. In this context, what kind of policies or decisions are under the protection of the criminal law?

Second, the Party leads the officials, i.e., the cadres. Senior state functionaries are usually selected, trained, educated, appointed or recommended to be appointed, removed or recommended for removal, by the Party or upon an approval of the Party. The Party

107 According to Wang, although a variety of organisations make their policies, the Party makes most of the important ones. In addition, he indicates, the state makes policies under the leadership of the Party.
committees at various levels and in various work units exercise this organisational power. In this context, would an act against a cadre become an act against the Party?

Third, the Party leads various kinds of official and semi-official organisations, such as trade unions, women's associations, youth leagues, and so forth. Stalin, in “The Problems of Leninism,” elaborated the concept of a “system of proletarian dictatorship.” According to him (1979, vol.1:411-414), this is a system of Party leadership over “all the various organisations of the masses,” including the trade unions, the collective farms, and the communist youth leagues.\textsuperscript{108} This concept was introduced to all the socialist countries, including China. Moreover, in China, there is a “united front” which includes non-Communist organisations and individuals. The Party’s “united front policies” determine the borderline between those who belong to the people and those who belong to the enemies. Being one of three "magic weapons" of the Party to achieve the success of revolution, the “united front” shifts the borderline from time to time. In this context, it remains a question whether or not the law also punishes those who are against a semi-official organisation. Furthermore, the application of the law might have to take into consideration factors such as a person’s “united front” status.

Therefore, the direct provision of the Marxist ideological principles in the Chinese law has created a dilemma: on the one hand, the law must punish the enemies of the Party so as to protect the Party’s leadership; on the other hand, it is almost impossible to define with clarity the enemies in law given the vast coverage of the Party’s leadership. For example, how is the law going to lay down a line between an attempt to sabotage the leadership of the Party and a challenge to the power of a Party committee or a Party Secretary? To constitute an act against the entire Party, does it have to challenge the

power of the CCP Central Committee or the Political Bureau, or could it simply be a criticism of a Party official, a Party-appointed official, a Party-led working unit or an association for a perceived “wicked intent”? Can the law specify what kind of attack on what aspect of the Party’s leadership (e.g., political, ideological, economical, cultural, or educational) and what level of the Party’s hierarchy (e.g., the Central Committee, a provincial committee, a county committee, a committee in a factory) constitutes a “counter-revolution crime” which is against the Party?

Furthermore, taking into consideration the ongoing reform in China, if the criminal law is a weapon of the dictatorship or leadership, where should it draw the line between an attempt to sabotage the Party’s leadership and a legitimate reform to the political system? Only two decades ago, Deng Xiaoping and many others who are now directing China’s reform were denounced as enemies of the Party. Their crime was to challenge Mao’s “absolute leadership.”109 Were Mao and his leftist allies still in power, Deng, then “the incorrigible capitalist roader,” would easily become a counter-revolutionary for reintroducing capitalism in China and decentralising the decision-making power of the Party.110 Similarly, if one consults Stalin or Mao Tsetung, the present CCP policy of allowing non-communist democratic parties to exist would be another attempt to sabotage the Party’s leadership.111

109 The last time Deng lost his freedom was in 1976, when he was under house arrest for engaging in an alleged incitement of “counter-revolutionary rebellion” that occurred in Beijing’s Tiananmen Square. See Li Yong et al., “The Incarceration of Deng Xiaoping, General Secretary of the CCP,” in Li Yong et al., 1993b, pp.19-40.

3.1.4 Marxism as the Official Ideology

Marxism, Leninism and Mao Tsetung Thought were the underlying theories in the legislative process leading to the 1979 Criminal Law.\textsuperscript{112} This ideology is an integral part and spiritual essence of proletarian dictatorship. As Mao Tsetung (1966:1) said:

The core force leading our cause is the Chinese Communist Party. The theoretical foundation of our thoughts is Marxism and Leninism.\textsuperscript{113}

Furthermore, as an official ideology, Marxism-Leninism and Mao Tsetung Thought are taught through a system of propaganda. Traditionally, this educational process is regarded as part of the dictatorship of the proletariat, given the perceived class struggle in ideology, i.e., the thought struggle against the bourgeois thoughts.\textsuperscript{114}

\textsuperscript{111} An opposition party does not exist under any period of Soviet or Chinese proletarian dictatorship. A probably unique feature of Chinese communism is, however, the "CCP-led multi-party co-operation system," i.e., political leadership of the CCP with a number of non-communist parties. At present, there are eight democratic parties (min-zhu dang-pai). The memberships of the CCP and the eight parties are not comparable: The CCP has a total of approximately 46 million memberships, the combined total of memberships in the eight democratic parties is approximately 300,000. As Fei Xiaotong (in Lu, 1988), Chairman of the China Democratic League (one of the eight parties), has described, China does not have an opposition party, simply because the people do not want "political turmoil" any more. The main function of these small parties is to help the CCP rather than to challenge its leadership. Still, the parties were virtually disbanded in the Cultural Revolution, when most of their leaders were persecuted.


\textsuperscript{113} This is a first citation in Mao's famous "little red book" that was the bible of every Chinese during the Cultural Revolution. See Mao Tsetung, 1966, at p.1.
Therefore, it remains a question to what extent the law should safeguard this official ideology and intervene in thought struggle.

The strict control of communication, information, and thought is a feature of the traditional model of proletarian dictatorship. As noted earlier, the centralisation of communication was first proposed by Marx and Engels in *The Manifesto of the Communist Party* as a component of the proletariat dictatorship. Lenin elaborated the idea and established a system of propaganda not only for class struggle, but also for the leadership of the working masses. In *What Is to Be Done*, Lenin proposes a concept of thought “instillation” and states that:

We have said that there could not yet be Social-Democratic consciousness among the workers. It could only be brought to them from the outside. The history of all countries shows that the working class, exclusively by its own effort, is able to develop only trade union consciousness, i.e., the conviction that it is necessary to combine in unions, fight the employers and strive to compel the government to pass necessary labour legislation, etc. The theory of socialism, however, grew out of the philosophic, historical and economic theories that were elaborated by the educated representative of the propertied classes, the intellectuals. According to their social status, the founders of modern scientific Socialism, Marx and Engels, themselves belonged to the bourgeois intelligentsia.115

---

114 In his essay, “On the Correct Handling of Contradictions within the People” (1957), Mao Tsetung indicates that the class struggle between the bourgeoisie and the proletariat in ideology will go on for a “very long” historic period. See Mao Tsetung, 1977, pp.363-402. Later, in “Speech at the CCP Propaganda Working Conference” (1957), Mao promised that only criticism should be used in the “thought struggle” against bourgeois and “petty bourgeois” thoughts and “anti-Marxist thoughts.” See Mao Tsetung, 1977, pp.403-418. However, only a few months later, he launched the Anti-Rightist Movement (1957), wherein an estimated total of approximately 300,000-500,000 intellectuals were punished for crimes of conscience. See discussion in section 3.2. of this dissertation.

115 See Lenin, in Daniels (Ed.), 1965, at pp.83-84.
This proposition is understandably suspicious to Western intellectuals, even the “Western Marxists.” It is contradictory, they argue, to challenge domination of one kind (i.e., the capitalist mode of production) and to advocate domination of another. Mark Poster (1984:58) questions what he called “the intellectual power over the liberation movement” and argues that:

The function of theory as "guide" for practice becomes in the course of history the direct domination of theory over practice. The division of mental and manual labour in the capitalist mode of production is mirrored in the anti-capitalist movement as the intellectual becomes the brain and the proletariat the muscles of the revolutionary body.

However, a seeming contradiction like this may exactly reflect the magical nature of dialectics. As Johnson (1969:70) has pointed out, any criticism of true Marxism on the ground of logical contradictions really "misses the whole point."

This brain-muscle relation is essential to the proletarian dictatorship. The power of propaganda is the power of the Marxist discourse to guide the thought of the people. In Problems of Leninism (1924), Stalin (1979:398-414) indicates that, according to Leninism, the Soviet power of proletarian dictatorship must, on the one hand, suppress the enemies and, on the other hand, “unite” and “lead” the masses. However, in the late 1980s, the collapse of the former Soviet-led socialist bloc was partially a result of the relaxation in this thought struggle.

However, should the state use the criminal law for the suppression of the “non-Marxists” and “anti-Marxists”? Even if we set aside the issue of "rights," there is still a

major problem of vagueness. After all, what exactly is meant by "Marxism-Leninism and Mao Tsetung Thought"? In the present transitional period, many of the fundamental propositions of Classical Marxism are critically reviewed. Could a challenge to an out-of-date classical concept somehow fall into the category of "counter-revolutionary propaganda" under Article 102 of the Criminal Law? When the political atmosphere becomes less tolerant, this particular Article in the Criminal Law might be used to create a new generation of prisoners of conscience who are most likely to be today's reformers.

Furthermore, even if history does not repeat itself, what view of Marx, Engels, Lenin or Mao is an essential part of the official ideology which underlines the laws of the state and policies of the Party, and, therefore, is under the protection of the law? If the term, "Marxism, Leninism, and Mao Tsetung Thought," only refers to the "rightful" views, who has the authority to determine the "right" and the "wrong"? Many Chinese thinkers have sacrificed their lives for challenging a few words of Classical Marxism.

In 1977-1978, for the first time in Chinese history, the CCP Central Committee split on a theoretical issue: Is every view of Mao Tsetung an absolute truth? The hard-line faction led by the Party Chairman, Hua Guofeng, insisted that the Party had to carry out Mao's "every decision" and "every instruction." On the contrary, the reformers led by Deng Xiaoping argued that decisions of Mao that had been proved to be mistakes in practice had to be "corrected," and "Marxism-Leninism and Mao Tsetung Thought" should be appreciated "completely and correctly."117 The reformers won the debate, 

which led to a change in the central leadership. Had the debate ended in the other way, many of the reformers would have become “counter-revolutionaries.”

Since then, Marxism has changed its meaning in China. Fifteen years ago, in his discussion of the four cardinal principles, Deng himself questioned whether or not class struggle would exist during the whole period of socialism. This sophisticated issue, he (1983) wrote, should not simply be answered by citing the Marxist classics. More obviously, the ongoing Chinese transition from a planned economy to a “socialist market economy” is an opposition to the centralised model of socialism proposed by Marx and Engels in The Manifesto of the Communist Party. In this changing context, it is actually impossible to specify in law what kind or part of “Marxism, Leninism, and Mao Tsetung Thought” is binding upon the 1.2 billion people in China.

In 1976, Deng once again became an “anti-Marxist” and “revisionist capitalist reader.” One of the alleged offences was his “cat theory” of the development of the Chinese economy. In his words, “no matter whether the cat is white or black, it is a good cat so long as it catches the mice.” This, to Mao Tsetung, was a clear indication that:

This man does not insist on class struggle. He never takes it as a guiding principle. [His idea] is always white cat or black cat, without distinguishing imperialism and Marxism.  

---

118 Deng, however, did not offer a specific opinion on the issue. Instead, he said, in a rather ambiguous fashion, that class struggle in a socialist society did exist, but it was “obviously different” from the struggle in previous societies. See Deng Xiaoping, “Upholding the Four Cardinal Principles,” in Deng Xiaoping, 1983, pp. 144-170, at pp.168-169.

Those who have experienced this part of Chinese history will not forget it. If a great Marxist like Mao could make such errors, it makes little sense to involve ordinary Chinese lawyers in this kind of controversy. Hence, it is desirable that a cautious and critical review is given to the legal provisions of “Marxism, Leninism, and Mao Tsetung Thought” as well as the proposition in mainstream Chinese theory that this ideology is “the” guiding thought of the criminal law.

3.2 The Miseries in History

3.2.1 From Total Abolition to Total Rejection

In the People’s Republic of China, as it was in Lenin’s Soviet Russia, the early history of the proletarian dictatorship saw a total abolition of the old legal system. This abolition was primarily justified by the brutality and ruthlessness of the former Kuomintang (Nationalist Party) regime that fled to Taiwan in 1949. At the time, however, the abolition was construed from the traditional propositions of Classical Marxism. This, among the many others, later became a significant ideological factor delaying the process of establishing a new legal system in China. The abolition in fact led to an unfortunate rejection of the rule of the law.

The idea of abolition is rooted in Marx and Engels’ discussion regarding the class essence of the legal system of their time. In *The Manifesto of the Communist Party*, Marx and Engels (1965:12) define the essence of bourgeois laws and jurisprudence as follows:
Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economical conditions of existence of your class.

Here, as Marxists in both the East and the West have noted (Gong, 1991a and b; Hall and Scraton, 1981), bourgeois law is defined as an expression of the will of the bourgeois class rather than the common will of the entire society; also, it is part of the bourgeois superstructure arising from, and corresponding, to the infrastructure of capitalism.

Furthermore, Marx and Engels hold that law is essentially an instrument of the ruling class. In The Origin of the Family, Private Property and the State, Engels indicates that law emerged at a certain stage of economical development, which was necessarily bound up with the cleavage of society into classes, when the state became a necessity. The history of law is virtually described as a history of class struggle: Law emerged at the end of the stage of the primary communism due to class antagonism; it changes in various class societies when the ruling class changes; and it eventually withers away with the state in full communism when all the classes no longer exist and the norms are no longer laws in the original sense (Luo, 1984; Yu, 1991a). Accordingly, Chinese law textbooks usually insist that the criminal law is a repressive instrument of the ruling class, that it protects the interests and order of the bourgeoisie in a capitalist society, and it serves the proletarian dictatorship under socialism (Yang Chunxian et al., 1981; Yang Duenxian et al., 1985; He, 1993).

---

In the terminology of Western Marxism, this may be a proposition of *instrumental* Marxism rather than *structural* Marxism. However, at this point, the distinction is hardly significant. The modern structuralists, as Engels did a century ago, see the factors which affect the law as multiple. They also appreciate that the bourgeois state and law sometimes may appear to be neutral in class struggle, and to some extent the structure of the state may be a product of elite interests and working class movements. The various Marxists, however, share the view that the political and ideological context of law is based on, though not necessarily wholly, contradictions in the mode of production, and the so-called "neutrality" of law is mainly a matter of appearance rather than substance. This neutrality is really a concession made for the long-term interest of the ruling class, rather than a demonstration of common interest of the antagonistic classes. In this sense, to the structuralists, the "neutral" provisions in law are also tools for the long-term and fundamental interests of the ruling class.

Logically, this proposition leads to a total abolition of the entire bourgeois legal system, not just its repressive components. In modern history, Marx and Engels were the first advocates of a total abolition. In *The Manifesto of the Communist Party*, they point out that, during a socialist revolution, the proletariat have nothing of their own to secure;

---

121 Indeed, Marx and Engels never claimed that law was solely determined by the economy. Rather, in their view, the infrastructure is only the ultimate determinant of the superstructure, but the various sectors of the political, legal, and ideological superstructure can influence each other and can have significant impacts on the development of the infrastructure. In a letter (1894), for example, Engels indicates that the political, legal, philosophical, religious, literature, and art sectors develop on the basis of economic development. Nonetheless, he writes, these sectors influence each other and have impacts on the economic base. See discussion in Yu Peiling, 1991b, at p.751.

122 For a brief introduction to structural Marxism, see Milovanovic, 1988, at pp.67-76. For Chinese discussion of the subject, see Criminal Law and Criminal Procedure Teaching and Research Section, Central Political and Legal Cadres School, 1980, at pp.9-10.
that their mission is to destroy all previous securities for individual property; and that they, as the lowest stratum of a capitalist society cannot achieve liberation "without the whole superincumbent strata of official society being sprung into the air."\(^{123}\) Later, in *The Civil War In France*, Marx discussed the experience of the 1871 Paris Commune and asserted that:

> From the very outset the Commune was compelled to recognise that the working class, once come to power, could not go on managing with the old state machine; that in order not to lose again its only just conquered supremacy this working class must, on the one hand, do away with all the old repressive machinery previously used against it itself... \(^{124}\)

Lenin elaborated this view in his essay *The State and Revolution*. He claimed that the bourgeois state does not 'wither away', but is 'abolished' by the proletariat in the course of the revolution. He wrote:

> [T]he 'special repressive force' for the suppression of the proletariat by the bourgeoisie, of the millions of toilers by handfuls of the rich, must be replaced by a 'special repressive force' for the suppression of the bourgeoisie by the proletariat (the dictatorship of the proletariat).\(^{125}\)

Thus, the Bolsheviks abolished the bourgeois legal system in Russia the next year after the October Revolution of 1917 and replaced it by the "red terror" of Cheka, an iron arm of proletarian dictatorship.

\(^{123}\) For an English extract of this statement, see Daniels (Ed.), 1965, at p.16. The statement later became a slogan of the Marxists on many occasions to blow up the existing law and order by revolutionary means.

\(^{124}\) For an English version of this statement, see Feuer (Ed.), 1989, at p.360.

\(^{125}\) For an English version of this statement, see Lenin, "The State and Revolution," in Andersho (Ed.), 1963, at p.81.
Following this example, in February 1949, the CCP issued the *Instructions of the Chinese Communist Party Central Committee to Abolish the Complete Six Laws of the Kuomintang and to Lay Down the Judicial Principles for the Liberated Areas*. In this document, the Party applied the Marxist principle of total abolition to the *Kuomintang* legal system. The justifications are articulated as follows:

First of all, the economic infrastructure of socialist law is fundamentally different from that of the *Kuomintang*. The socialist economy requires a socialist superstructure, which includes an entirely new legal system to protect and promote the development of the infrastructure. The collapse of the semi-capitalist and semi-feudalist infrastructure of the old China requires the abolition of the old superstructure that includes the entire *Kuomintang* legal system.

Second, it is a Marxist principle that the working class must abolish, rather than inherit and reform, the political and legal superstructure of the old society in order to achieve the success of socialist revolution. The working class, once it becomes the ruling class through class struggle, cannot use the old legal system to legitimise and secure the new revolutionary order. In China, the entire *Kuomintang* state machinery is a repressive system to the people.

Third, the proletarian dictatorship will establish its own system to repress the overthrown exploiting class. The new law of the proletariat is a tool of proletarian dictatorship against the overthrown class. The old law is therefore incompatible with the

---

revolutionary needs. The bourgeoisie attempts to deny the class basis of its law by claiming that the law represents the common will of the public. The proletariat, however, must openly declare the class-based nature of the new law, i.e., it is an instrument of the proletarian dictatorship.

So the old law of the Kuomintang was entirely abolished in the mainland. The new regime could have abolished the old law in the light of legality and democracy, rather than on the ground of imported Marxist ideas. The Kuomintang regime was totalitarian, brutal and corrupted. Its totalitarian nature is fully demonstrated in two laws that were adopted in 1928. In that year, the Central Committee of Kuomintang (Party) adopted the notorious Outlines of Directed Government (1928), proclaiming itself the highest organ of the Government of the Republic of China (ROC). The Party then led the Government to adopt the Organic Law of the Government of the ROC to confirm this announcement.127 The ROC had its first Constitution in 1946, when the civil war started once again. In the three-year war, as before, Jiang Kaishek was always the dictator of the Kuomintang, even after he had stepped down as the President of the State. In the area of criminal law, the Kuomintang enacted two Codes, but relied heavily on the use of the so called “special criminal statutes” to crack down on its political enemies.128 The Kuomintang regime was the first government in Chinese history to use the term of “counter-revolutionary crime” in


128 The two criminal codes were adopted in 1928 and 1935 respectively. For the texts, see Ministry of Justice of the ROC, 1980, pp. 1-220. The “special criminal statutes” include: Provisional Regulations on Punishing Bandits (1927); Provisional Law on Punishing Counter-revolutionary Crimes (1928); Emergency Law on Punishing Crimes Endangering the Republic (1931); Measures for the Handling of Problems of the Communist Party (1939); Measures for the Prevention of Deviant Party Activities (1939); Emergency Regulations on Punishing Crimes Endangering the Republic During the Period of Cracking Down on the Rebellion (1947), and so forth.
criminal law. In its *Provisional Law On Punishing Counter-revolutionary Crimes* (1928), the Kuomintang declared that activities that are designed to overthrow the Kuomintang Party and the Nationalist Government or to "sabotage" the official Kuomintang ideology are "counter-revolutionary offences." The regime also made some strange procedural rules. In a 1929 law, the regime demands that, if a counter-revolutionary case is tried by a jury, the jury must consist of six Party members of the Kuomintang. Further, the legal system had no control over the various Kuomintang secret services, that were notorious for routinely using torture, concentration camps, assassination and mass execution against their political opponents.

The 1949 abolition of the Kuomintang law ended a bloody phase of totalitarianism in Chinese legal history. This however was followed by a total rejection of all the concepts of ancient Chinese law and contemporary Western law (Zhang Guofu, 1992a:1-3). In this context, the differences between the brutality of the Kuomintang regime and the invaluable legacies of civilisation simply disappeared. The Marxist concept of "class analyses" became an ideological barrier blocking learning from the past and the outside.

129 See *Provisional Law on Punishing Counter-revolutionaries*, promulgated by the Nationalist Government on 7 March 1928. For citation and discussion, see Sun Ming, 1994, at p.246; and Zhang Jingfan et al., 1983, at pp.436-439.

130 See *Provisional Law on the Trial by Jury in Counter-revolutionary Cases* (1929), cited in Zhang Guofu, 1987, at p.290. Prior to World War II, the KMT regime was under heavily influence of ancient Chinese feudalism, Japanese and Nazi Germany totalitarianism, and, in its earlier years, some Soviet practice.


132 It is noteworthy however that there are a few records wherein Lenin personally suggested to learn some "useful stuff" from capitalist countries. See the relevant discussion in Chapter I of the dissertation. Nonetheless, the overall Marxist-Leninist evaluation of Western law is based on "class analyses."
In the early 1950s, when China was dragged into the Korean War and the Cold War, Soviet law became the only source of learning in Chinese legal studies. The Soviet Union sent its law professors to China to brainwash the new generation of young Chinese jurists. From 1949 to 1953, the Chinese study of the criminal law in the mainland was mainly based on translated Stalinist Soviet textbooks, whereas the concepts of laws in the Western jurisdictions were totally rejected. A few Chinese textbooks were produced in 1954 to 1956, systematically copying Soviet doctrines and concepts (Chen Xinglian, 1993a).

The copying process was disrupted in 1957-1965, when China fought the ideological war against the Soviet revisionist regime outside and launched a number of leftist campaigns inside. When the Soviet law was kicked out of Chinese law schools, there were nothing but political slogans left as Chinese “legal theories.” During this period, as Zhang Guicheng (1992:3-4) recalled, a large number of Chinese jurists were denounced as “Rightists” and punished as “targets of the dictatorship”; no one was allowed to discuss basic legal concepts such as the sources of law and the equality before the law; jurisprudence became “People’s Democratic Dictatorship and People’s Democratic Legal System,” mainly addressing “the Party’s leadership” and “the dictatorship against the enemies”; civil law became “civil policies”; and the Chinese studies of criminal law became a propaganda of “criminal policies” of the Party, such as “lenience for confession, and harshness for resistance.” Eventually, in the disastrous Cultural Revolution (1966-1976), legal study completely stopped, since no law, as Zhang Guicheng (1992:4) pointed out, could justify Mao Tsetung’s new “theories of continuous revolution under the proletarian dictatorship.”

133
3.2.2 The Enemies as the Criminals

Under the old repressive fashion of proletarian dictatorship, criminal is primarily a term that refers to the enemies. Further, the enemies are not scattered individuals. Rather, they are members of the enemy class, i.e., class enemies. Hence, punishing these enemies is only part of the class struggle, and if the criminal law is enacted as a weapon of this struggle, it will define the enemies as the worst kind of criminals (i.e., most likely “counter-revolutionaries”). The specific definition of “enemy” is first prescribed in Classical Marxist writings and in Party policies, and then, if the government of the proletarian dictatorship prefers, elaborated in the criminal law. In practice, when there is a lack of legal authorities, the definition of enemy will conveniently function as a definition of crime.

In the terminology of the CCP, a classical definition of “enemy” was found in Mao Tsetung’s essay On People’s Democratic Dictatorship (1949) (Mao Tsetung, 1964:1357-1371). In the essay, Mao announces that “enemies” are those who are against the socialist system. Specifically, he indicates, the enemies include the “running dogs of imperialism, i.e., the landlord class and the bureaucratic capitalist class, as well as the Kuomintang reactionaries and their accomplices who represent these classes.” On the contrary, he said, “within the time period” immediately following the 1949 communist victory, the

\[ \text{For a review of the history of Chinese criminal law studies during the 1949-1976, see Chen Xinglian, 1993a and b. In 1967, Mao allowed his leftist allies to name his ideas of class struggle as “Theories for the Continuous Revolution under the Proletarian Dictatorship.” In this “theory,” Mao announced that a large number of counter-revolutionary revisionists had occupied leading positions in the Party, the government, the army and the various professions. These enemies, he proclaimed, were the main targets of socialist revolution and proletarian dictatorship. See Ding Huining and Shong Nongchun, 1991: 347-348.} \]
“people” were the working class, the peasant class, the urban “petty bourgeoisie,” and the “national capitalist class.” The army, the police and the courts are the tools of one class to suppress another, Mao writes. They shall crush the enemies and punish them as criminals if they dare to cause any trouble by speech or action. Only the people shall enjoy the freedom of speech and the freedom of assembly, he concludes.

The classification of the enemies and the people has been an important subject in Chinese legal theories during both the Mao and the post-Mao eras. For at least thirty years (1949-1979), however, this life-and-death division was made far more complicated than Mao’s original description. A key point left extremely vague in this classification has always been: what is it meant by being “against the socialist system”? The term “socialist system,” as analysed earlier, could include the power of the proletarian dictatorship, the leadership of the Party, and the ideology of Marxism, Leninism, and Mao Tsetung Thought. During 1949-1976, the use of such a vague classification as a living law for criminal justice in fact gave Mao the power to determine what categories of the population should be the target of proletarian dictatorship.

134 At the time, the term “petty bourgeoisie” referred to owners of home based business, intellectuals and various professionals; whereas the “national capitalist class” included the Chinese capitalists who had been supportive to the communists and chosen to stay in the mainland rather than escaping to Taiwan with the Kuomintang in 1949.

135 In the same essay, Mao also indicates that a breach of the law by a member of the people shall also incur punishment. However, he insists rather vaguely, that this is exceptional and is “different from the repression of the entire reactionary class.” See Mao, 1964, at pp. 1412-1413. Here, nothing is made specific about what the difference is.

Things do change their nature when the historic context changes. In its revolution to seize power, the CCP obviously had no choice but to define the enemies politically, given the law was still in the hands of the Kuomintang government. But once the Party was in power, the continuation of this practice lost legitimacy in ordinary legal theories. In this respect, the old repressive type of Classical Marxism is an opposition to the rule of law. According to this theory, the socialist state may use the criminal law to define the enemies, but it is also free to define and punish them by extra-legal means. In essence, socialist law is considered only a tool rather than the limit of proletarian dictatorship. This proposition is offered by Lenin. Indeed, as Stalin cited, Lenin repeatedly insists that the only "scientific definition of dictatorship" is the political regime which "directly relies on violence" and is "not subject to any restriction in law or regulations."\(^{137}\)

After the abolition of the "old law," the Soviets and Chinese acted differently: the Soviets enacted a number of criminal codes, the Chinese primarily relied on "policies." This however does not mean any difference in substance: both the systems primarily targeted their enemies and utilised both legal and extra-legal means.

In Russia, as the Preamble of the 1919 Leading Principles of Criminal Legislation of the Russian Socialist Federated Soviet Republic (RSFSR) stated, the new Soviet criminal law was enacted to "impose sanctions on class enemies" and to "completely crush" the bourgeoisie.\(^{138}\) Accordingly, under the 1922 Criminal Code of the RSFSR,

---


138 See the People’s Commissariat of Justice of the RSFSR, Preamble of the 1919 Leading Principles of Criminal Legislation of the RSFSR (1919), in Criminal Law Section, Beijing University Law Department, 1979, at p.63.
crime is defined as “any act or omission that endangers the infrastructure of the Soviet system and the legal order established by the power of workers and peasants during the interim period to communist system.” Also, this Code provides that anyone who commits a “socially harmful act” or “whose activity is sufficient to prove that he is a major threat to social legal order” is a person of “harmfulness.” The provision of a “major threat to social legal order” is indeed vague, allowing the use of punishment on anyone who is in suspicion of being an enemy to the government.

Under these provisions, there are many unanswered questions: If the criminal law is primarily made for class struggle, does the proletariat have to use it? If the proletariat, as The Manifesto of the Communist Party said, is to abolish all the old traditions, why bother to legitimise the repression in a positive law? And, since class struggle changes all the time, would it be a better (or more convenient) approach to fight the enemies only by extra-legal means, so that there will be no self-imposed legal limits? Indeed, when the law becomes a tool of class dictatorship, any specific definitions of crimes could be redundant, obstructive, and useless to the revolutionary power.

This was exactly what Mao Tsetung saw during 1957-1976. To him, the interim period on the road to full communism is long and full of class struggles, and the working class must constantly and continuously fight the enemies to the eve of the final victory. This great Chinese Marxist was only temporarily supportive of the enactment of the first

139 Article 6 of the Criminal Code of RSFSR (1922).
140 Article 7 of the Criminal Code of RSFSR (1922).
141 It is understandable that Article 7 of the 1922 Code disappeared in the 2nd Soviet Criminal Code (1926). A provision similar to Article 6 of the 1922 Code however remained in Article 5 of the new Code.
Constitution of the PRC and a number of other laws.\textsuperscript{142} In 1958, based on his experience of the 1957 Anti-Rightists Movement, he openly turned to the “rule of man” and was proud of acting with “no law and no God” (\textit{wu-fa wu-tian}). As a senior Chinese legal scholar later recalled, Mao told the Party in 1958:

[We] want the rule of man rather than the rule of law. An editorial on the \textit{People's Daily} will be enforced throughout the country. What do we need law for?\textsuperscript{143}

Taking the approach of class struggle, the CCP at the time could either copy the Russian model or go straight to what Mao said in the \textit{People's Daily} editorials. In comparison, the strengths of defining the enemies in the “editorials” would be:

- The definitions could be aimed directly at the “enemies” instead of the “criminals.” There is no need to go through any formal legislative process. Nor is it necessary to publish the rules before the fact, since it will be ideal to catch the enemies by surprise.

- The definitions could be dialectical rather than logical and specific, if the strategy is to keep the enemies guessing.

\textsuperscript{142} E.g., \textit{Marriage Law} 1950, \textit{Regulations on Punishing Counter-revolutionaries} 1951, \textit{Regulations on Punishing Embezzlement} 1952, and so forth.

\textsuperscript{143} See Yu Haocheng, 1989. This citation has never been confirmed or denied by official Chinese sources. Its reliability is nevertheless high because: first, it appeared in a leading law journal \textit{Fa Xue (Law Science)} managed by a large government-owned law school (the East China Institute of Political Science and Law in Shanghai); second, in 1989, the author, Yu Haocheng, who cited this speech of Mao, was denounced for advocating “bourgeois liberalism,” but was never accused of citing a simulated speech of Mao.
- The editorials do not have to follow the ordinary rules on the “elements of crime,” and the definitions could be based on a guilty mind, a political opinion, a political attitude, an inherited class status, a marriage with an enemy, or some kind of suspicion, mistrust, or frustration that cannot be legally defined.

- The definitions could directly, rather than indirectly, be articulated as “crimes against the Party,” “crimes against Marxism,” or “crimes against the Great Leader,” and so forth.

- The definitions could change from time to time due to a change in the situation of “class struggle” or in the mind of a leader.

- The highest authority to construe the definitions would be a Great Leader rather than the National People’s Congress or the Supreme People’s Court, even if the Leader knows nothing about the tricks of legal construction.

- The task of enforcement could be assigned by the Leader to the various kinds of professional or mass organisations in a fashion that is more like fighting a “people’s war” than ordinary law enforcement.

- The definitions are mainly designed for the elimination of an entire enemy class, rather than targeting scattered individual criminals.
3.2.3 *The Function of Crime and “Enemies”*

Being the real criminals, the class enemies may be functional under the old repressive model of proletarian dictatorship. In this respect, the Marxists share Durkheim’s view that “crime is necessary.” Durkheim (1983:71-74) suggests crime is necessary because it is linked to the basic conditions of social life, which are indispensable to the normal evolution of morality and law, and is a factor in what he called “public health” or “an integral part of all healthy societies.” To the Marxists, crime is also necessary, because crime is linked to class struggle that is a basic condition of social progress in human history.

In the classical writings of Marx and Engels, crime is described as a phenomenon of class repression and class struggle. In *The Condition of the Working Class in England* (1845), Engels considers crime in a capitalist society “a most obvious and extreme contempt of the social order” mainly resulting from the exploitation of the impoverished working class (Marx and Engels, 1956, vol.2:416). In *The German Ideology* (1845-1846), Marx and Engels defined crime as a type of “isolated individuals’ struggle against the ruling relations” (Marx and Engels, 1956, vol.3: 379). To some Chinese jurists, these are really the Marxist classics on the class essence of crime (Ying, 1993). However, the meaning of these brief and scattered quotations is still questionable. Even if crime is mainly a result of poverty and exploitation, it does not necessarily become part of the struggle against the ruling class. Marx and Engels would not paint thieves as revolutionary fighters. Such an assumption is beyond common sense. Also, when

---

144 These quotations are frequently cited in Chinese writings on the Marxist concept of crime. See Ying Jiabao, 1993, at pp.376-381.
applying a "class analysis," where is the distinction between an individual activity of theft and a collective action of proletarian revolution? Further, the phrase "isolated individuals" seems in conflict with the assumption that crime is part of the class struggle.

The Marxist class analysis is only valid with respect to certain kinds of crime and the corresponding legal provisions. Such crimes should be politically motivated or defined in the law for the suppression and control of a class. Most ordinary street crimes have nothing to do with revolution or counter-revolution. Similarly, in general, even if many are indeed too poor to abide by the law, theft is usually not part of a revolution, and thieves are just thieves, no matter what class status they have. Similarly, apart from the provisions for the control of a class, an ordinary type of criminal law is primarily for the suppression of the ordinary kinds of criminals, not the political enemies.

It is noteworthy that the application of the Marxist class analyses in the first three decades of the PRC, as it was in the early Soviet history, was not to define the essence of crime in a capitalist society, but to justify the repression of "class enemies." When this repression becomes a continuation of the class struggle, the use of any means is somehow justified or, in terms of neo-Marxist theory, legitimised. The justification was simple: Crime is always a phenomenon of class struggle; under capitalism, crime is mainly committed by the poor against the rich; under socialism, crime demonstrates the attempt of the bourgeoisie to sabotage the proletarian dictatorship. Therefore, crime by the enemies indicates the continuation of class struggle and legitimises the continuous repression of the enemies. After all, if class struggle is the main driving force of progress in human history, the persistent repression of the enemy class should lead to an early materialisation of full communism. In this sense, unlike the sociological theory of Durkheim, the repressive concepts of Classical Marxism are powerful weapons for the ruling class.
The dialectical relation between the two poles of an antithesis (i.e., the proletarian vs. the bourgeois, or the people vs. the enemy) determines not only the continuance of class struggle during the interim phase of socialism, but also the very existence of the socialist state itself. In *The State and Revolution*, Lenin pointed out:

The state is the product and the manifestation of the irreconcilability of class antagonisms. The state arises when, where and to the extent that class antagonisms objectively cannot be reconciled. And, conversely, the existence of the state proves that the class antagonisms are irreconcilable.145

Thus, the dialectical law could be: whenever the class enemies exist, the state of the proletarian dictatorship exists; and so long as the state is there, there must be class enemies. So the definitions of enemies have to be flexible, and the list of enemies has to be indefinite. The first three decades of the PRC (1949-1979) saw how the various new types of enemies were found under this approach. At the time, to the believers of Mao’s “continuous revolution under the proletarian dictatorship,” there were always enemies, some exposed already, more hiding deep underground. The only question was when to dig whom out and how to label them in an editorial-type denouncement.

### 3.2.4 The Rightists: The First on the Indefinite List of New Enemies

In the history of the PRC, the old enemies (i.e., the landlords and followers of the Kuomintang regime) were crushed in the early 1950s. Prior to 1957, a limited number of laws were enacted by the Central People’s Government. The 1951 Regulations on Punishing Counter-revolutionaries were the first criminal law enactment in the history of

---

145 See Lenin, in Daniels (Ed.), 1965, at pp.95-96.
the People’s Republic. Based on the model of the 1919 Soviet Criminal Code, it defines a number of counter-revolutionary offences, but the definitions are brief, supplemented by a principle of crime by analogy. Nonetheless, many of the provisions in this statute require some kind of politically-motivated violent or espionage activities. A second enactment of the early 1950s was the 1951 Provisional Regulations on Crimes against State Currency. This law has 11 articles, mainly targeting counterfeiting. The law looks at different purposes or motivations and requires illegal conduct for conviction. A third criminal law enactment was the 1952 Regulations on Punishing Embezzlement, the first anti-corruption law in the People’s Republic. Similarly, this is a piece of enactment based on the notion of actus reus. Thus, in general, criminal act was an essential element of crime under these pre-1957 statutes.

Prior to 1957, apart from these enactments, a number of decrees were issued to classify and punish enemies for their class status. For example, the 1950 Resolution on the Classification of Class Status in Rural Areas classifies the rural population into five major

---

146 For the text, see Regulations on Punishing Counter-revolutionaries, in Supreme People’s Procuratorate “Series of Criminal Cases” Editorial Committee, 1992, Series of Criminal Cases (Counter-revolutionary Crime), Appendix IV, pp. 272-274. The statute has 21 articles, allowing death penalty for all the 11 categories of counter-revolutionaries.

147 See Articles 4, 5, 6, 7, 9, 12.

148 In this statute, there is a distinction of crimes for counter-revolutionary purpose and crimes for profit-seeking purpose. The law was publicised on 19 April 1951.

149 The law was publicised on 21 April 1952.

150 At the time, an “act” could be one committed prior to the enactment. For instance, according to Peng Zhen, the 1951 Regulations on Punishing Counter-revolutionaries was in fact made almost at the end of the 1950-1951 Campaign to Cracking Down on Counter-revolutionaries. See Peng Zhen, “On Legislative Work” (1985), in Peng Zhen, 1989, pp.246-248. Also, Article 18 of the law allows retroactive application.
classes: landlords, rich peasants, middle-class peasants, poor peasants, and workers. Among them, most landlords and rich peasants were considered as class enemies, a term equivalent to, if not worse than, ordinary criminals. In 1950-1957, there were mainly four categories of “enemies”: landlords, rich peasants, counter-revolutionaries who were mostly affiliated to the Kuomintang, and “bad elements” such as those who had “reactive” ideas or “hooligan behaviours.” At the time, the total population in all the four categories was approximately 20,000,000. At least 4,400,000 of the landlords and rich peasants alone carried the stigma to the end of 1979, when the CCP Central Committee issued a resolution to “remove the hats” from them. Also, the resolution indicates that from that time onward these people and their children shall no longer be discriminated against. What happened to the rest of the enemies has not been published.

In the mid-1950s, the old enemies were mostly exposed and repressed. The issue then became who were the new enemies? From this time, the big category people had to be divided and re-divided.

The Anti-Rightist Movement in 1957 was a first major campaign to dig out new enemies. For this purpose, a new category of enemy - the Rightists - was created. These were intellectuals denounced for committing fan-dang zui-xing (crime against the Party). During the Movement, a large number of intellectuals were denounced as “bourgeois rightists” for criticizing the Party or its officials, regardless of their economic status. The

151 See the Council of Political Affairs, Resolution on the Classification of Class Status in the Rural Areas, 20 May 1950.


way to dig them out was full of wit and humour. In February and March 1957, Mao and the Party called upon the intellectuals to speak out and criticise the Party's officials or mistakes so as "to let a hundred flowers bloom and a hundred schools of thought contend."

The intellectuals were told that the rule was "no crime for speaking out." On 15 May, when they had finally spoken out, Mao (1977:425) told the Party in an internal document that the "fish" had come to the surface, the "snakes" had been induced to leave their holes, and the time to catch them was coming soon. On 8 June, he issued another internal document, asking the Party to prepare a counter-attack against the Rightists. In this document, he told the Party to hold off for fifteen days so as to let the Rightists fully expose themselves. In the following months of 1957, a total of 300,000-500,000 "snakes" were caught soon after they had reached what Mao (1977:425) called "the climax" of enjoying the publication of their criticism. They were punished in various "struggle meetings," dismissed from their positions and sent to hard labour by the

---

154 In his speech "On Correctly Handling People's Internal Contradictions" (Feb. 1957), Mao Tsetung discussed the policy "to let a hundred flowers bloom and a hundred schools of thought contend." See Mao Tsetung, 1977, pp.363-402, at pp.388-393. This paper however is an 1977 edition, and the original version is not available.

155 A direct translation of this slogan is "the speakers could not be guilty, and the listeners ought to be admonished."


158 During 1959-1978, according the Chinese data, the Party took five occasions to "remove the hats off" - a Chinese term of rehabilitation - the "rightists." See People's Daily, 17 Nov. 1978, at p.1. In 1978, the Ministry of Public Security announced a decision to "remove the hats off all the rightists." Also see Zhou and Shao, 1990:405. It is now unofficially acknowledged that all the rightists were innocent and wrongfully convicted.

111
Party committees in their working units. In addition, many were sent to labour camps with or without trial. Most retained their enemy status for twenty years.

The words in the internal documents were far more readable than any Preamble in a Soviet criminal code. In one document, Mao (1977:425) wrote:

The rightists, both inside and outside the Party, know nothing about dialectics - things turn into their opposites when they reach the extreme. We shall let the Rightists run amuck for a time and let them reach their climax. The more they run amuck, the better for us. Some say they are afraid of being hooked like a fish, and others say they are afraid of being lured in deep, rounded up and annihilated. Now that a large number of fish have come to the surface by themselves, there is no need to bait the hook.

The Anti-Rightists Movement was the beginning of a new era of the “rule of man” in modern Chinese legal history. The campaign brought about several major changes in respect to the definitions of crime. These include:

- Starting from this campaign, the new definitions of crimes by the enemies were no longer based on any illegal conduct, but mostly based on expression of opinions. A large number of crimes of conscience were created. In The Bourgeois Direction of the Wen Hui Bao Should be Criticised (1957), Mao declared that the rule of “no crime for speaking out” was not applicable to the “anti-Communist, anti-people, and anti-socialist bourgeois Rightists” (1977:438).

- Most of the new enemies were accused of “attacking” the Party or the government by words. They were actually guilty of making critical comments on a specific policy of the Party, a proposition of the Party’s ideology or “guiding thoughts,” or the work of a Party official or committee in a working unit. Given the vastness of the Party’s
leadership, even an argument with a Party official in a working unit was considered as an attack on the Party, since the official represented the Party in the unit.

- The new enemies were no longer mainly the remnants of the Kuomintang regime, but former comrades and supporters of the Communist Party. Similar to Stalin’s Great Purge of the 1930s, the Chinese political movements in 1957-1976 were mostly aimed at enemies inside the revolutionary camp, including cadres of the Party.

- The disposition of the enemies was not based on the harm caused by the act, but mainly determined by the status and attitude of the individual. In *The Bourgeois Direction of the Wen Hui Bao Should be Criticised* (1957), Mao told the Party that the Rightists should be convicted as criminals if they “violated the criminal law” by “refusing to surrender and continuing their sabotage activities” (1977:438).  

- The new enemies no longer had to be found according to any definition. Applying the dialectics of contradiction in 1957, Mao (1977:428) proclaimed: “If there is a group of people, there must be a division of the Left, the Middle, and the Right.”  

---

159 Mao did not identify what law he was referring to. In fact, there was no law defining the so called Rightists. The only somehow related law would be Article 10 section 3 of the 1951 *Regulations on Punishing Counter-revolutionaries*, which provided for the crime of counter-revolutionary propaganda. Nonetheless, in 1957, most of the Rightists who were sent to prisons or labour camps were not convicted of counter-revolutionary crime under this statute, but simply as Rightists.

160 See Mao Tsetung, “Things Have Begun to Change” (15 May 1957), in Mao Tsetung, 1977, pp.423-429. In communist terminology, the “Left” refers to the revolutionaries, the “Right” refers to the reactionaries, and the “Middle” is those between them.
three percent” of all the students and ten percent of the professors in Beijing University (1977:440-441), five percent of all the Party members and ten percent of Communist Youth League members in the various schools in Beijing (1977:444-445). He (1977:445) then proclaimed, the more were found in the Party the better, even if the number became “twenty percent, thirty percent, or even forty percent.”161

3.2.5 From Crimes against the Party to Crimes against the Leader

Following the Anti-Rightist Movement, fan-dang zui-xing (crimes against the Party) soon became a term covering a vast variety of activities and opinions that were considered against the Great Leader, Mao Tsetung.

The last 20 years of Mao’s life were mostly devoted to the struggle of identifying and attacking new enemies. These were mainly officials who challenged or were suspected of challenging his absolute power. Following the purge in 1957, he launched the Campaign of Anti-Rightist-Tendency in 1959, when Marshal Peng Dehuai, a hero of the 1950-1952 Korean War and Minister of Defence, and a number of other senior officials were denounced as a “Right-Wing Anti-Party Clique” by the CCP Central Committee. Peng had criticised Mao for starting the campaign of the Great Leap Forward (1958-1960) (Zhou and Shao, 1990:248-250). He was punished for trying to stop this disastrous campaign where approximately ten million people starved to death (Li Yong et al., 1993a:301).162 Later, in the Great Proletarian Cultural Revolution (1966-1976), Peng was

161 The percentages were enforced in the Movement, so every unit (school, government department, newspaper editing house, etc.) was pushed to meet the quotas, even if no one had said anything to criticise anyone. In some occasions, if the Party Secretary refused to identify such a target, then he himself became the Rightist.
severely tortured by the Red Guards and then sentenced to life imprisonment by a CCP Special Case Team without a trial. In the prison, he was found dying of a very painful cancer. His request for pain killers was however brutally and deliberately refused. On 29 November 1974, after seven years' incarceration, this honest man died in starvation in a dark cell for speaking out for the starving peasants fifteen years earlier. He simply disappeared. The cremation was carried out secretly under a fake name “Wang Chuan” (Li Yong et al., 1993a:298-311).163

The Cultural Revolution was launched by Mao Tsetung; during this period, his dictatorship reached its climax. The campaign was wild and ruthless, attempting to eliminate all the old and new “cow evil spirits and snake demons.”164 A number of new terms were created for the new enemies, such as “capitalist roaders,” “black gangsters,” “counter-revolutionary revisionists,” “remnants of the old society,” “counter-revolutionary capitalist entrepreneurs,” “spy suspects,” “traitor suspects,” “elements connecting to overseas,” and “stinky No. 9” (a term referring to the intellectuals). To millions, the Cultural Revolution was a ten-year long nightmare. The net was so vast that it covered almost all government officials, enterprise managers, university professors, school teachers, doctors, artists, and other types of intellectuals and professionals who in the eyes

---

162 See Li Yong et al., “The Death of Peng Dehuai, Marshal of the Republic,” in Li Yong et al., 1993a, 298-311. The total of deaths caused by starvation during this campaign has never been officially disclosed. Also, according to unpublished sources, the total property damage/loss in the campaign of the Great Lead Forward accounted for about 500 billion yuan.

163 According to another source, in 1979, Peng was repeatedly tortured by the Red Guards, taking orders from Mao’s wife, Jiang Qing. In July-August 1967 only, Peng attended over 100 “struggle meetings.” One of them, held on 26 July, was attended by over 100,000 Red Guards. See Jing Shikai, 1993, pp.18-24.

164 This was a Chinese phrase referring to all the enemies.
of Mao’s leftist allies and the Red Guards were not loyal to the Great Leader, Mao Tsetung.

Unlike the Anti-Rightist Movement, the Cultural Revolution mainly targeted enemies within what Lenin called “the vanguards” of the working class, i.e., the Communist Party. In May 1966, the CCP Political Bureau issued the “May 16th Notice,” an order from Mao to launch the Cultural Revolution. In the document, Mao announced that there were “a large number of representatives of the bourgeoisie and counter-revolutionary revisionists” in the Party, the Government, the military, and various professions. Three months later, at the Eleventh Plenum in August 1966, Mao published his article Bombard the Headquarters - My First Big Character Poster, accusing “some leading comrades” in the CCP Political Bureau of “enforcing a bourgeois dictatorship.” Following this announcement, the CCP Central Committee immediately endorsed a resolution, entitled The Sixteen Points: Guidelines for the Great Proletarian Cultural Revolution. The resolution declared “a new stage in the socialist revolution” to crush the so called “capitalist roaders” in the Party and the “bourgeois academic authorities” outside. Furthermore, declaring that “Mao Tsetung’s Thought is the guide for action,” this document made Mao’s words the highest law in reality.

In August 1967, Mao told his Albanian visitors that this new stage of revolution in fact started in the winter of 1965, when Yao Wenyuan, a leftist propagandist, published an article with Mao’s secret authorisation to criticise the opera, Hai Rei’s Dismissal From

165 See CCP Central Committee, 1966, Notice of the CCP Central Committee, i.e., the so called “May 16th Notice.” The text is however no longer available in Chinese libraries.

Hai Rei, an eminent senior official of an ancient dynasty, was dismissed from the office by the emperor for pointing out the emperor's mistakes. The opera was, therefore, considered as a criticism to Mao's dismissal of Marshal Peng Dehuai in 1959. Since Liu Shaoqi, Vice Chairman of the CCP and Chairman of the State, and a large number of senior officials were enthusiastic about Peng, they were deemed as a force attempting to overrule the decision on Peng's dismissal.167

At the time, in the eyes of the "revolutionaries," anything critical of Mao was the most hideous crime, and anyone who attempted to challenge Mao's authority was the most dangerous criminal. Liu Shaoqi became the No.1 enemy for making a speech in 1962 criticizing Mao's Great Leap Forward and dissenting from Mao's theories of class struggle. In 1967, when he was still the Chairman of the State, he was arrested and sent to mass rallies of the Red Guards. In one occasion, as Li Yong et al. (1993a:224) recorded, Liu attempted to protect his body and dignity by arguing about his constitutional rights as the State Chairman and a citizen and showing the 1954 Chinese Constitution to the mobs. The CCP denounced him as a traitor and "counter-revolutionary revisionist" and accused him of a variety of terrible "crimes," including "crimes against Chairman Mao." Like Peng Dehuai and many others, he was brutally tortured, incarcerated in a secret prison without trial, and eventually died in a dark cell in 1969. When he died, the Chairman of the People's Republic had no cloth on his body, his hair was one foot long, and his ashes were secretly buried under a fake name, Liu Weihuang.168

167 See "A Talk by Chairman Mao with a Foreign Military Delegation," August 31, 1967. SCPRP 4200. For an English version, see Mark Selden and Patti Eggleston, 1979, at pp.556-560. Also see Li Yong et al., "The Death of Peng Dehuai, Marshal of the Republic," in Li Yong et al., 1993a, 298-311; Li Yong et al., "The Death of Deng Tuo, Secretary of the Beijing Party Secretariat," in Li Yong et al., 1993a, pp.1-14. Li Yong et al., "The Death of Wu Han, Vice Mayor of Beijing," in Li Yong et al., 1993a, pp.181-197.
The General Secretary of the Party, Deng Xiaoping, was denounced as the No. 2 worst “counter-revolutionary revisionist.” He lost his freedom without trial and was sent to a factory in Jiangxi province for several years. Aside from Liu and Deng, the Chairman (Marshal Zhu De) and all the 8 Vice Chairmen of the National People’s Congress (NPC) of the PRC, 60 out of the total of 115 Members of the Standing Committee of the NPC, 74 out of the total of 159 Members of Standing Committee of the Chinese People’s Political Consultation Conference, 12 Vice Premiers of the State Council, 22 Members of the Standing Committee of the CCP Political Bureau, 6 Vice Chairmen of the Central Military Committee, a large number of provincial governors, and various officials were also on the black list of names and persecuted (Special Procuratorate under the Supreme People’s Procuratorate of the PRC, 1981:20-28; Zhou and Shao, 1990:345-357).

During the Cultural Revolution, another astonishing category of new enemies was various “counter-revolutionaries” and “counter-revolutionary groups” found within the “systems of the proletarian dictatorship,” i.e., the justice system, the police and the armed forces. The purge was directed by Kan Sen, the chief of China’s intelligence service, and Xie Fuzhi, Minister of Public Security. According to an incomplete assessment, all the Deputy Ministers of Public Security were arrested as “counter-revolutionaries,” both the Presidents of the Supreme People’s Court and the Supreme People’s Procuratorate were persecuted, and at least 1,200 police officers were killed during the Cultural Revolution. The procuratorates were disbanded. The army took over the courts and police forces. In the mean time, however, at least 80,000 army officers were purged and about 1,169 were “persecuted to death” (Special Procuratorate under the Supreme People’s Procuratorate of the PRC, 1981:29-33; Zhou and Shao, 1990:345-357).

168 See Li Yong et al., “The Death of Liu Shaoqi, Chairman of the Republic,” in Li Yong et al., 1993, pp. 212-228.
So the definition of counter-revolutionary crime became extremely inclusive. In 1967, the CCP Central Committee and the State Council jointly issued the notorious *Provisions on Strengthening the Work of Public Security in the Great Proletarian Cultural Revolution* (often called the “Six Articles on Public Security”), defining any act or expression of opinion to “attack or defame Great Leader Chairman Mao or his close friend comrade Lin Biao” as an “active counter-revolutionary act.” This law also defined any expression of opinion against Mao’s wife, Jiang Qing, and her extremist allies a “reactionary conduct” subject to “punishment according to the law.” Numerous people were convicted, sentenced, tortured and executed under these provisions.

One of the most publicised cases is that of Zhang Zhixing, a lady executed as a counter-revolutionary for writing a few letters to the Party questioning the persecution of Liu Shaoqi and the other new enemies. She was sentenced to long-term imprisonment, routinely tortured, and eventually executed for refusing to admit the “crimes.” To prevent her from saying anything, the prison authority sliced her throat before they took her to a public rally where they announced her death sentence (Li Yong et al. 1993a:327-348).

---

169 See CCP Central Committee and the State Council, (13 January 1967), *Provisions on Strengthening the Work of Public Security in the Great Proletarian Cultural Revolution.* This document has only six articles and is therefore referred to as the “Six Articles on Public Security.” The text is however no longer available in ordinary Chinese law libraries.

170 For cases, see Li Yong et al., 1993a; Jing Shikai, 1993.

171 See Li Yong et al., “The Death of Zhang Zhixing, A Heroic Member of the Party,” in Li Yong et al., 1993a, pp. 327-347.
Mao’s last major crackdown on the various “counter-revolutionaries” and enemies was launched only several months prior to his death in 1976. On 5 April, more than three hundred Beijing residents were arrested as “counter-revolutionary mobs” for holding peaceful assemblies in Beijing’s Tiananmen Square to mourn for the late Premier Zhou Enlai, who was under suspicion of being a new “capitalist roader,” and for criticizing the “Gang of Four.”172

In the late 1930s, Stalin spent about three years carrying out his Great Purge. In 1939, when he had physically eliminated approximately 70 per cent of the previous Central Committee Members of the Party, he declared the end of his “class struggle.”173 Mao, however, never stopped his purge in his last years. By the end of the Cultural Revolution, an estimated total of approximately 100,000,000 innocent people, including various “enemies” and their relatives or friends, had been persecuted in one way or another during the various campaigns of so called “class struggles” in 1957-1976 (Li Yong et al., 1993a:101).174 Interestingly, the slogans that were used to justify the purges were exactly

172 See “A Counter-revolutionary Riot in Tiananmen Square,” People’s Daily, 5 April 1976, at p.1. The “Gang of Four” is a leftist clique headed by Mao’s wife Jiang Qing. For more discussion, see Chapter IV of the dissertation.

173 In 1939, Stalin reported to the Party’s 18th Congress that the Soviet Union had achieved “the most important development,” that was, in his words, it had been successful in its goal to “completely wipe out the remnants of the exploiting class.” Hence, he said, “there is no more person to be suppressed.” See Stalin, “Report to the Soviet Communist Party’s 18th Central Committee Congress,” in Stalin, 1979, vol.2, pp.455-474. In the Report, he acknowledged that the Party lost a total of 270,000 members during the Purge of 1933-1936. Some Chinese Marxists still hold that this declaration of the ending of class struggle was a mistake. See Ding Huining and Shong Nongchun, 1991, at pp.286-287.

174 This figure was released by the Sixth Plenum of the 11th CCP Central Committee in its 1981 Resolution on Several Problems in the History of the Party since the Founding of the Country. See Annotated Edition of the Resolution on Several Problems in the History of the Party since the Founding of the Country (revised edition), at p.392. Cited in Ding Huining and Shong Nongchun, 1991, at p.349.
"proletarian dictatorship," "Party's leadership," "socialism," "Marxism, Leninism, and Mao Tsetung Thought," as well as many more elaborate phrases, such as "continuous revolution under the proletarian dictatorship," "class struggle under socialism," "reflection of class struggle within the Party," "class struggle in ideology," and so on.

Conclusion

In the history of the PRC, the traditional model of Classical Marxism and the Marxist cardinal principles were imported from the Soviet Union and developed during the extraordinary years of wars and the Cold War. Consequently, the traditional type of proletarian dictatorship, as Marx and Engels strongly advocated, was established to organise and legitimise the total abolition of law and the open repression of political enemies. For many years, the enemies and the perceived enemies were treated as -- if not worse than -- criminals, no matter whether or not their behaviours or thoughts were formally prohibited in a criminal law.

As history has unfolded, the old repressive version of proletarian dictatorship was virtually the dictatorship of a Great Leader. Also, during the period of 1957-1976, the slogans were utilised to legitimise the massive suppression of the freedom of thought, the freedom of expression, and the democracy of the people. This kind of "mistake" is unfortunate, but not strange, given the similar events in almost every socialist country.

In this context, the definitions of "enemies" were excessively vague and indefinite, often determined by the Leader and his political allies. In the pre-1976 history of China, the "enemies" were first the landlord class and the Kuomintang supporters, then the "four categories of elements" (landlords, rich peasants, counter-revolutionaries, and "bad
elements”), the “Rightists,” the “Right-Wing Anti-Party Elements,” and eventually the “capitalist roaders,” the “counter-revolutionary revisionists,” and the “Stinky No.9s.” The Cultural Revolution shared striking similarities with the Soviet Great Purge and the same kind of terror in East Europe and South East Asia.\(^{175}\) The results were always disastrous: ruthless repression of generations of “enemies,” constant purges of various so-called “counter-revolutionaries,” massive creation of prisoners of conscience, conviction without trial, massive executions, and so forth.

The Marxist principles are mutually inclusive aspects of an all-embracing political, economical and ideological system. This system might be essential to China’s political stability, but the “four cardinal principles” have to be redefined to cope with the new context. For example, China has substituted for the classical Marxist model of “socialist planned economy” a “socialist market economy” which includes a fast growing private sector.\(^{176}\) In this context, the simplistic entrenchment of the Marxist principles in the 1979 Criminal Law is problematic. It provides for the Marxist principles as slogans that cannot be clearly defined in law.

A few Chinese jurists have proposed a change of the term, “people’s democratic dictatorship,” in the Chinese Constitution, to “people’s democratic constitutional government” or “socialist constitutional government,” since the true literal meaning of

\(^{175}\) During Stalin’s Great Purge in 1936-1939, 70 per cent of the Party Central Committee Members and 1,008 out of the total of 1,966 Representatives of the 17th Party’s Congress became “counter-revolutionaries,” many were executed. Nonetheless, in the eyes of some Chinese writers, these were only “mistakes of expanded class struggle,” and Stalin is still a “great Marxist-Leninist and brilliant proletarian revolutionary.” See Ding Huining and Shong Nongchun, 1991, at pp.286-287.

\(^{176}\) See e.g., Amendment to the Constitution of the PRC (1988), which recognises privately-owned economy.
"dictatorship" is totalitarianism or autocracy of the Dictator (China Law Yearbook 1993, p.56). To reduce the vagueness in China’s criminal law, the political slogans should be removed from Articles 1 (the political, ideological and economical nature of the Criminal Law), 2 (the tasks of the criminal law), 10 (the general definition of crime) and 90 (the general definition of counter-revolutionary crime) of the 1979 Criminal Law. Given all the changes to the political definitions of both “socialism” and “people,” it may be a good idea to use the term “constitutional government” and “constitutional democracy” to replace the Marxist slogans.
Chapter IV

Socialist Legality: A Partial Reception of the Classical School

4.1 The Post-Mao Enlightenment

4.1.1 The Great Historic Turning Point

For almost three decades, misled by the slogans of "continuous revolution under proletarian dictatorship," the People's Republic of China was gradually dragged into a chaotic situation of constant mass campaigns, ruthless persecution of one social group after another, deterioration of life standards, collapse of the economy and self-destruction of the nation's confidence. In October 1976, soon after the death of the late Chairman Mao Tsetung, Hua Guofeng, then the Acting Chairman of the CCP, and Marshal Ye Jianying of the People's Liberation Army, arrested the "Gang of Four," a clique of leftist officials including Jiang Qing, the widow of Mao, and her three top-ranking allies in the CCP Political Bureau. Ironically, the arrest of these extremists for what they did in

177 Mao believed that the campaigns he launched during 1957-1976 were part of a "continuous revolution under the proletarian dictatorship." In the Cultural Revolution, the relevant ideas of Mao were put in the theory of "continuous revolution under the proletarian dictatorship." This theory assumes that class struggle is the main contradiction of the Chinese society in the period of socialism, that class struggle also goes on within the Party, that there is a large number of enemies within the government, that the struggle between his version of Marxism and revisionism in ideology is part of the class struggle, that the most successful means of class struggle is to launch massive campaigns like the Cultural Revolution, and that such a campaign should be launched "every seven or eight years." The post-Mao CCP leadership has however refused to recognise this theory as part of the Mao Tsetung Thought. See Deng Xiaoping, "Upholding the Four Cardinal Principles" (1979), in Deng, 1983, 144-170, at p.169.

178 At the time, Jiang Qing was a Member of the Political Bureau. The other three leftist leaders arrested were Wang Hongwen, Vice Chairman of the CCP and Standing Member of the Political Bureau; Zhang Chunqiao, Standing Member of the Political Bureau; and
helping Mao to launch and continue the Cultural Revolution was declared as a “successful ending” of the notorious campaign.\textsuperscript{179}

During the first two years after the “Crush of the Gang of Four,” Hua Guofeng’s regime was reluctant to openly denounce Mao’s leftist ideas and policies.\textsuperscript{180} In 1978, with the support of the majority of the Political Bureau and the military, Deng Xiaoping for the first time became the top leader of the CCP.\textsuperscript{181} During the period of December 18-22th, 1978, the CCP held its 3rd Plenum of the 11th Central Committee, which became a great turning point in the history of the People’s Republic.

The Third Plenum adopted a Declaration to rectify the “leftist mistakes” of the CCP. The Plenum also launched a two-tier reform: first, to reform the highly centralised economic system by granting the Chinese enterprises management autonomy; second, to establish a formal system of “socialist democracy and law” (Zhou and Shao, 1990:416-418). Significantly, the Plenum partially revised the concepts of the four Marxist cardinal principles, proposing that the system of proletarian dictatorship should be subject to

---

\textsuperscript{179} See Zhou and Shao, 1990, at p.397.

\textsuperscript{180} Hua was the last hand-picked successor of Mao Tsetung.

\textsuperscript{181} At the time, Deng was rehabilitated and promoted to the position of Vice Chairman of the Party. Hua was still the Chairman in name, but lost his power. He was formally replaced as the CCP Chairman by Hu Yaoban in 1981.
certain legal and humanistic standards. In the Declaration of the Third Plenum, the new
CCP leadership announced that:

1. The "emphasis of the Party's work" is shifted from class struggle to economic
development. There will be no more Maoist "massive rainstorm-type campaign of
class struggle" in China, i.e., the lunatic circle of massive persecution is stopped.

2. The bourgeoisie and other exploiting classes no longer exist in China. Although
somehow "class struggle still exists within certain limits," the contradictions between
the enemy and the people should be handled according to legally prescribed
procedures. The system of investigation and incarceration by Zhuan An Zhu (Special
Case Teams) without going through any legal procedure is abolished.

3. The repressive state machinery should no longer be used against the people and to
suppress their thoughts. The State shall ensure that citizens can exercise their
Constitutional rights, such as the freedom of expression and the freedom to criticise
the officials.

4. The Party shall implement the principle of socialist legality and improve the socialist
legal system. To protect the people's democracy, the State shall prescribe democracy
in law and make the law stable, consistent, and the highest source of authority.

5. The principle of socialist legality requires that law is available, that it will be enforced,
that it will be enforced in a strict fashion, and that a violation of the law will be
prosecuted. The Party must abide by the law.

6. Equality before the law is recognised as a principle of socialist law. No one is allowed
to have any privilege above the law.

7. All the "wrongful convictions" shall be repealed, no matter when they were rendered
and who made them.

---

182 Previously, until 1978, "revolution under the dictatorship of the proletariat" had always
been the "emphasis of the Party's work." See the 11th CCP Central Committee,
Resolution on Several Post-Liberation Historic Issues of the Party, adopted by the 11th
CCP Central Committee in its 6th Plenum (27-29 June 1981), in CCP Central Committee

183 In Mao's era, numerous cases of political offences (e.g., counter-revolutionaries,
"revisionists," etc.) were handled by special teams assigned by the Party. These teams
could arrest, detain, search, interrogate, and recommend or decide the period and
conditions of incarceration without referring to any formal law.
8. The judicial system shall be independent. It shall be loyal to the law and make decisions based on the facts of the cases. \(^{184}\)

4.1.2 The New Concepts of Four Cardinal Principles

The *Declaration of the Third Plenum* started the ongoing reform to the political, economic, and ideological structures in China. The adoption of this landmark document was also the beginning of a process of redefining the basic concepts of Classical Marxism, including its basic principles.

The concept of "proletarian dictatorship" is somehow revised: on the one hand, owing to the "disappearance" of the bourgeois class, the Chinese proletarian dictatorship has in fact changed from the massive suppression of the enemy classes to the control of individual enemies; on the other hand, with the transfer of "emphasis," the primary function of proletarian dictatorship appears to be the protection of the economy rather than the suppression of enemies.

Gradually, the concept of "Party's leadership" has also changed. Under the *Declaration*, the Party still leads, but it has to operate within the limits of the law. China still has a long way to go for a "high-level socialist democracy," but the Leader of the Party can no longer act like a Mao Tsetung II or a "Party emperor." Further, between 1984 and 1988, a number of laws were enacted to transfer the power of the Party committees in the various Chinese enterprises to the managers. \(^{185}\) In 1986, Deng Xiaoping

proposed that the Party should be “separated” from the government and should not be in charge of “legal matters.”186 In 1987, the 13th CCP Congress defined the “Party’s basic line to build a socialism with Chinese characteristics” as: “focusing on economic development, upholding the four cardinal principles, insisting on reform and openness, and transfer China into a prosperous, democratic, and civilised socialist modernised country.”187 The CCP Congress held that the Western-style separation of powers should not be a model for China’s political reform, but that the Party shall separate itself from the government and promote democracy.188

Moreover, “socialism” is no longer what was described in the Manifesto of the Communist Party. Since the Third Plenum, dramatic changes have been made to the economic system of socialism. In 1979, the NPC adopted the Law on Sino-Foreign Equity Joint-Venture of the PRC, China’s first law on foreign investment. This law opened the door to Western capitalism. In 1984, the CCP Central Committee adopted its Resolution on the Reform of the Economic System.189 This Resolution provides a blueprint for China’s economic reform, proposing a “separation of the government and the

---


187 See Zhao Zhiyang, “Moving Forward along the Road of Socialism with Chinese Characteristics” (1987). In CCP Central Committee Document Research Section (Ed.), 1991, vol.1, pp.10-38, at p.15. This is a report of Zhao, then the General Secretary of the Party, to the 13th CCP Congress.

188 Ibid, at p.34.

enterprises,” the autonomy of management, and the opening of the coastal areas for foreign investment. Significantly, the Resolution proposed a “socialist commodity economy” to replace the old Marxist model of planned economy.

Then, in 1992, the CCP declared that “socialism with Chinese characteristics” was a “socialist market economy,” rather than the traditional “socialist planned economy” or even “planned market economy.” Interestingly, in his historic tour to South China in 1992, Deng Xiaoping (1993) urged the CCP to uphold the four cardinal principles but stop the debate about the concept of socialism. In his view, the Party should not “worry about capitalism,” because a reform to develop the Chinese economy is “ultimately beneficial to socialism.” Further, he indicates, “a planned economy is not equal to socialism, capitalism also has plans; nor is a market economy equal to capitalism, socialism has market too.” The essence of socialism, he (1993:373) said, is simply to develop the economy, and “eventually achieve common wealth.” To distinguish socialism and capitalism, he (1993:372) proposes, the criterion is “primarily” to see whether or not the system is “beneficial to the development of the force of productivity in a socialist society” and to “the improvement of people’s living standards.” By this time, the CCP has apparently abolished the old Marxist model of centralised socialist economy as prescribed in *The Manifesto of the Communist Party*.

---

190 Deng Xiaoping introduced the concept of “socialist market economy” to the CCP. See Deng Xiaoping, “Important Points of Speeches in Wuchang, Shenzhen, Zhuhai, Shanghai, etc.” In Deng Xiaoping, 1993, 371-383.

191 This tour was the beginning of the most recent phase in China’s market-oriented reform. During the tour, Deng for the first time proposed his concept of “socialist market economy” to replace the traditional concepts of “socialist planned economy” and “socialist planned market economy.” See Deng, Xiaoping, “Important Points of Speeches in Wuchang, Shenzhen, Zhuhai, Shanghai, etc.” (18 January - 21 February 1992), in Deng Xiaoping, 1993, pp. 370-383.
Accordingly, "Marxism, Leninism, and Mao Tsetung Thought" have changed their meaning. Most interestingly, "Mao Tsetung Thought" is no longer only the thoughts of Mao himself, but a joint club of the "collective wisdom" of the Party. It includes the thoughts of Liu Shaoqi and Deng Xiaoping, although these dignitaries were once persecuted as enemies by the Great Leader. For example, some Chinese authors (Xue Ruiling, 1993) suggest that there should be a differentiation between "Mao Tsetung's thoughts of criminal law," which, in their terminology, refers to Mao's "personal opinions" of the criminal law, and "Mao Tsetung's theories of criminal law," a term including the ideas of the entire "old generation of revolutionaries." Interestingly, under the new definitions, Mao's own ideas have to be "correctly" interpreted according to the collective wisdom. His leftist ideas, particularly the entire "theory of continuous revolution under the proletarian dictatorship," are excluded.192

With all the revisions, the "cardinal principles" are no longer unchangeable concepts subject to unified interpretations. We have seen two different types of "principles": a traditional one, which was employed in the difficult times of war and purges, very repressive, proposed for the legitimisation of massive suppression and even the rule of a dictator; a revised one, which is less repressive, more humanistic, focusing on the development of the economy and allowing more freedoms of the individuals. Both the old and the new are said to be based on the ideas of Marx, Engels, Lenin, and Mao Tsetung. It seems that Classical Marxism is no longer a unified system, but a mixture of different propositions. These propositions are not necessarily consistent with each other.

192 In 1981, the CCP adopted a resolution, that formally declared that Mao's "theory of continuous revolution under the proletarian dictatorship" was incompatible with Marxism and Leninism. See CCP Central Committee Resolution on Several Issues in the Party's History Since the Establishment of the PRC. In CCP Central Committee Document Research Section, 1982, vol.2, pp.778-846.
They serve completely different political courses in a socialist society, such as the Cultural Revolution and the ongoing reform in China. The vagueness and ambiguity are excessive and evident.

In 1979, Ye Jiangying (1982:227) indicated that the Marxist slogans had been used by Lin Biao and the “Gang of Four” during the Cultural Revolution for their “counter-revolutionary fascist dictatorship.” He said:

They talked about socialism, but that was phoney socialism under which a handful of people could enjoy every kind of luxury whereas the greatest majority of people had to suffer from long-term poverty; they also talked about proletarian dictatorship, but that was the most corrupted and darkest kind of feudalist and fascist dictatorship; they also talked about the Party’s leadership, but that was the rule of their counter-revolutionary clique; they also talked about Marxism, Leninism, and Mao Tsetung Thought, but that was misinterpreted and falsified Marxism, Leninism, and Mao Tsetung Thought.

In 1981, the CCP Central Committee went one step forward, declaring that the theories for the Cultural Revolution were not completely falsified by the “Gang of Four.” Rather, they were primarily Mao’s “misjudgment” of class struggle and “misunderstanding and dogmatization of some of the propositions of Marx, Engels, Lenin and Stalin.”

Three years later, Deng wrote: “What is socialism? What is Marxism? In the past, we did not have a completely clear understanding.”


Indeed, the confusion concerning the basic Marxist concepts has generated numerous miseries in the past, and is still threatening political stability and economic reform in the post-Mao era. Soon after the “June 4th Incidents” in 1989, Zhao Zhiyang was ousted from the position of General Secretary of the CCP Central Committee for his failure to uphold the “four cardinal principles” against the political unrest in Beijing. In 1992, during his discussion of the “socialist market economy,” Deng pointed out that the debates regarding the definition of “socialism” were slowing down China’s economic reform. Denouncing the leftist “theorists,” Deng told the Party that one did not have to read the “fat books” in order to know “the truth of Marxism.” Rather, one should “pursue the truth from the facts,” that is, from the practice of China’s reform. This simple approach, he said, is really “the pith of Marxism.”

A significant contribution of Deng Xiaoping is his success in leading the CCP to a more pragmatic road. His approach of reform is not necessarily compatible with the classical theories of Marx and Engels. The classics are more than one hundred years old, and were not proposed to address issues in China’s reform. Lenin was a great leader of revolution, but his course has been an unfortunate failure in his own country. Similarly, Mao Tsetung made too many terrible mistakes in his late years. A book of the former Great Teachers of the proletarian revolution is an instrument, not a Bible.

---


197 Ibid, at p.382.
Taking into account the different versions of the cardinal principles, one can see the difficulties in applying these principles in the legal definitions of crime. If the law is under the "guidance" of vaguely-defined political slogans, it could easily be misused for a "leftist" reversal in history. If the law must prescribe the principles in order to ensure its political correctness, it has to convert the new, rather than the old, concepts into specific legal language. As discussed in Chapter III of the thesis, this would require the politicians to specify the political definitions of these abstract principles. The law should be separated from political slogans.

4.1.3 The Liberation of "Enemies"

The separation of law and slogans is not a purely scholastic proposal. The ambiguity of political principles is a life-and-death issue in Chinese criminal justice. This is fully demonstrated in the dramatic campaign of "liberating" (jie-fang) the millions of so-called enemies in the late 1970s and the early 1980s. In this process, the various definitions of crimes by the enemies were revised and repealed substantively primarily due to a change of political standards.

In 1978, the CCP started a two-year process to repeal the hundreds of thousands of "wrongfully decided" cases, mostly involving "counter-revolutionaries" and various other types of "enemies." On 7 October 1978, the Ministry of Public Security took the lead in rehabilitating the wrongfully punished enemies in the Ministry (Zhou and Shao, 1990:441). One day later, the Beijing Municipal Police announced the release of all the 385 "counter-revolutionary mobs" arrested during the bloody 1976 Tiananmen Square Incidents in Beijing, saying that they had been wrongfully arrested, although the
crackdown was ordered by Mao Tsetung.\(^{198}\) In December 1978, the CCP Central Committee issued a document, approving a directive of the Supreme People’s Court to review all the cases decided by the courts in the Cultural Revolution and to “rectify” all the “wrongfully decided” ones before the end of 1979 (Zhou and Shao, 1990:420).

A large number of senior officials, who had been vaguely labelled as “traitors,” “capitalist roaders” and “counter-revolutionary revisionists” during the Cultural Revolution, were “liberated.” In early 1979, the CCP Central Committee repealed its own decision on the “Case of 61 Traitors,” liberating 61 former Members of the CCP Central Committee (Zhou and Shao, 1990:422).

The dimensions of the various kinds of “enemy classes” were also narrowed down. Significantly, on 11 January 1979, the CCP Central Committee ordered the “removal of the hats” from all the landlords, rich peasants and their children who “had not done anything bad” during the past thirty years.\(^{199}\) The Party in fact decided to drop the “landlords” and “rich peasants” from the list of enemies. In March 1979, the Government of Tibet Autonomous Region declared the “removal of the hats” from 6,000 Tibetans who took part in the 1959 rebellion (Zhou and Shao, 1990:426). In June-July 1979, in a

\(^{198}\) For the decision of rehabilitation, see “The Truth of the Tiananmen Events,” *People’s Daily*, 21 November 1978, p.1. The people were arrested in the Square for participating in the pro-Deng protest in spring 1976. The protest, as this author described in the last section of Chapter III, involved tens of thousands of protesters, and was crushed as a counter-revolutionary rebellion in April 1976. Mao personally issued the order to crush the protest upon a recommendation of his cousin. See Wen et al., 1993, “The Promotion of Mao Yuanxing, A Teacher at Harbin Military Engineering Institute,” in Wen et al., pp. 353-366.

speech to the Chinese People’s National Political Consultation Conference, Deng Xiaoping took another bold step by announcing that the bourgeoisie no longer existed as a class in China. After so many years of socialist revolution, he said, the Chinese intellectuals and the former capitalists had both become part of the working class (Li Youngchuan et al., 1987:50-51). By this time, the People’s Republic had finally abolished the concept of crime by class status.\(^{200}\)

A great number of \textit{de facto} offenders of conscience were “liberated.” On 17 November 1978, it was declared that most of the Rightists had been liberated (Zhou and Shao, 1990, 415). In July 1979, the CCP Central Committee issued a directive to rehabilitate thousands of officials who were persecuted as \textit{you qing feng zhizhi} (Right-Wing Elements) for criticising the disastrous campaign of the Great Leap Forward (Li Youngchuen et al., 1987:54).

In July 1979, Jiang Hua, President of the Supreme People’s Court, announced that by the end of June 1979, the courts throughout the country had overturned a total of 164,000 criminal cases decided in the Cultural Revolution. Approximately 40 per cent of all the counter-revolutionary cases decided during 1966-1976 were repealed. In “some regions,” Jiang reported, the rate of rectified counter-revolutionary cases was as high as 70 per cent (Zhou and Shao, 1990:432). Six months later, Jiang reported that the courts had reviewed a total of 241,000 criminal cases since the 3rd Plenum of the 11th CCP Central Committee, which accounted for 83 per cent of all the criminal cases decided in the Cultural Revolution. Among them, 131,300 (54\%) convictions were rectified. Also,\(^{200}\)

\(^{200}\) In fact, the CCP simply refuses to apply the Marxist dogmas of “class analysis” to the present Chinese society, wherein the new Chinese bourgeoisie and the foreign capitalists are both welcome.
he said, the courts were reviewing a large number of cases decided before the Cultural Revolution. Nationwide, he estimated, there were still about 46,000 counter-revolutionary cases to be reviewed (Li Youngchuen et al., 1987:67). By this time, with the liberation of the Rightists and the Right-Wing Elements, the landlords, the bourgeoisie, the capitalist roaders, the traitors, and the majority of the counter-revolutionaries, China’s reformers had, in reality, substantively changed the definitions of crime and abolished crimes by status.

In addition, a process was also started to review cases involving those who had been punished by extralegal means. A huge number of “counter-revolutionary organisations” and their alleged “members” labelled as such through non-judicial procedures were liberated. On 9 March 1979, the Inner Mongolia CCP Committee rehabilitated thousands of “members” of the so called “Wu Lanfu Anti-Party High Treason Group” and the “New Inner-Mongolia People’s Party,” many of them had been persecuted, jailed and killed without trial during the Cultural Revolution. Further, on 22 August 1979, it was declared that the newly established system of CCP Disciplinary Committees had received a total of approximately 3,850,000 appeals. These include numerous cases directly decided by the various “special case teams” and Party committees during the various pre-1976 campaigns.

The nationwide massive “liberation” ended with the repeal of the conviction of Liu Shaoqi. In February 1980, the 5th Plenum of the 11th CCP Central Committee adopted the Resolution on the Rehabilitation of Comrade Liu Shaoqi to repeal all the accusations

---


against the former Chairman of the State and Vice Chairman of the CCP. In the history of the CCP, Liu was the highest ranking official persecuted to death. Interestingly, the Resolution insists that to uphold a "true" Mao Tsetung Thought, the CCP must repeal the wrongful decision made by Mao and the Party during the 12th Plenum of the 8th CCP Central Committee.203 This case serves as a typical example of the system under which a conviction of a most hideous counter-revolutionary crime that was directly rendered by the Party has to be repealed by the Party rather than a court.

In the meantime, a limited number of leftist "revolutionaries" were arrested and put on trial one after another for committing "counter-revolutionary" offences during the Cultural Revolution. In June 1978, Liu Jieting and Zhang Xiting, both Chiefs of the Sichuan Provincial Revolutionary Committee (i.e., the Sichuan Provincial Government) at the time, were arrested for organising the persecution, torture and massacre of thousands of innocent people during the Cultural Revolution. According to official data, at least 100 officials at county-chief level or above were persecuted to death under their orders, more than 2,000 people were murdered, and about 8,000 were tortured. In February 1979, Sun Jingye, Deputy Secretary of the CCP Shangtou Regional Committee, was arrested for ordering the murder of the relatives of Peng Pai, a hero who died in the revolution against the Kuomintang. In the Cultural Revolution, his family members were brutally tortured to death in public as counter-revolutionaries (Zhou and Shao, 1990:423).

To some extent, justice prevailed. The pay-off of the debts of the Cultural Revolution reached its dramatic climax on 25 January 1981, when the "Lin Biao and Jiang Qing Counter-revolutionary Clique" was put on trial. Millions of people watched this dramatic event on the television. The clique includes Mao Tsetung's widow, Jiang Qing.

---

three CCP Vice Chairmen and their senior allies. Ten core members of the clique were put on trial, including the “Gang of Four.” The prosecution was unable to prosecute the deceased members of the clique, including former CCP Vice Chairman Lin Biao, former CCP Vice Chairman and chief of the intelligence service Kan Sheng, and former Minister of Public Security Xie Fuzhi. The ten clique members were convicted of multiple counts of “counter-revolutionary” offences for persecuting a large number of people and plotting an armed counter-revolutionary coup d’état and rebellion during the Cultural Revolution. Jiang Qing was sentenced to death with a two-year suspension. Later, the conviction was celebrated as a “judgment for justice,” a “victory of the people,” and a “major victory of socialist legality.”

The late 1970s and early 1980s saw numerous dramatic events where the former “counter-revolutionaries” became “true revolutionaries” overnight and vice versa. At the time, the liberation of the millions of innocent people was primarily based on political decisions, rather than judicial repeals. This raised a fundamental question: What are the criteria? After all these great changes, should the political principles continue to be the fundamental criteria in criminal law and criminal justice? Should the legal definitions of crimes still be written or interpreted in the ambiguous language of politics and ideology? There has been a great progress since the Third Plenum. For long term stability, however,

---

204 Lin, his wife and son died in a plane crash in 1971. Kan and Xie died of illness during the Cultural Revolution. The deceased ones were however condemned on both the indictment and the judgment as core members of the clique.

205 For a most inclusive collection of the documents of the trial, see Editorial Team of A Historic Trial, 1981, A Historic Trial.


the country needs the rule of law, a separation of law and politics, and a separation of law and ideology. For thousands of years, the traditional oriental concept of a good government has always been the rule of a good emperor or a great leader. This has to be changed.

4.2 Classical School for Socialist Legality

4.2.1 Why the Criminal Law

In the late 1970s, liberating the millions of innocent people persecuted during the Cultural Revolution was one step towards the rule of law; establishing a formal legal system was another. By the time of the Third Plenum, Deng and his allies had apparently realised that, without a formal legal system, the old system of "proletarian dictatorship" could easily become a regime of feudalist totalitarianism when the Leader became a dictator.

In his speech to the 1978 Third Plenum in December, Deng Xiaoping (1983:136) stated that:

To protect the people's democracy, [we] must strengthen the legal system. [We] must ensure that democracy is systematised and legalised, that the system and the law will not change simply because of a change of the Leader, or because of a change of the opinion and the attention of the Leader. A present problem is the serious lack of law. Many laws have not been enacted. So the words of the Leader are often considered as the "law," and the disputes with the words of the Leader are "against the law." When the Leader changes his words, the "law" also changes.

Having identified the obvious, Deng (1983:136) told the Party:
[We] should concentrate our attention to make the criminal law, the civil law, the procedural law and the other needed enactment ... Enact them through a democratic procedure and discussion. [We] must strengthen the procuratorates and the judiciary. [We] must insure that there are laws to follow, that the laws will be followed, that enforcement of the law is strict, and that violations of the law will be prosecuted. 209

In the history of the CCP, no one had raised the fundamental issue of “the law versus the Leader’s words” in such a straight fashion. Indeed, at the time, the primary purpose of enacting the 1979 Criminal Law was to ensure that crime would be defined in law, that law would be formally enacted by the legislature, that the words of the Great Leader(s) would no longer be used as the law, that no one would be punished for violating the leader(s)’ words, that the enacted law would be strictly implemented, that prosecution and adjudication would be the functions of the legal profession, and that everyone would be equal before the law, so that violation of the law would be prosecuted according to the law. In this sense, what Deng called “people’s democracy” may refer to the basic legal rights of the citizens, such as those prescribed in sections 7-12 of the 1982 Canadian Charter of Rights and Freedoms, rather than the Western type political democracy. The Third Plenum embodied Deng’s idea in its Declaration to initiate the endeavour for a formal legal system. It was in this context that the core concepts of the eighteenth century European classical school, such as legality and equality, became principles of the Chinese law.

209 See Deng Xiaoping, “Emancipate the Thoughts, Seek the Truth from the Facts, Unite and Look Forward” (1978), in Deng, 1983, 130-143. This speech was delivered to a working conference of the CCP Central Committee immediately before the 3rd Plenum and, according to a footnote in the speech, was in fact a speech to the Plenum. See Deng, 1983, footnote at p.130.
The recognition of *legality* and *equality* in the Third Plenum was primarily for the administration of criminal justice in China. Specifically, the CCP recognised, for the first time and in a serious manner, that no one should be punished by extralegal means; that no one’s words should have higher authority than the legislation; and that everyone, including the Leader, should be equal before the law. Equality before the law was once written into the 1954 Chinese Constitution, but was never taken seriously during Mao’s era. In fact, starting from the Anti-Rightist Movement, equality was denounced as a slogan of “bourgeois legalism” (Zhang, Gquicheng, 1992:3; Liu Jingguo, 1992:440-441), and the 1954 Constitution was never viewed as the highest law in China.

In the *Declaration* of the Third Plenum, the announcement, that both “class struggle” and the Party should operate within the limits of the state law, was another important development for legality. It was the first time that the CCP made such a specific commitment. This indicates a thunderously important difference between the Chinese *socialist legality* as opposed to Vyshinsky’s concept. In Vyshinsky’s view, as Ioffe and Maggs (1983:1-2) have noted, the socialist law is binding upon all except the power of the proletarian dictatorship, that is, the power of the Party. On the contrary, having experienced the Cultural Revolution, the Third Plenum rightfully appreciated that any minimum level of legality under socialism would require the Party to abide by the law. In particular, as Marshal Ye Jianying (1982:230-231) pointed out in 1979, the Leader shall not be the God above the law.

---

210 The 1954 *Constitution* was the first *Constitution of the PRC*.

211 In Vyshinsky’s words, “the formal law is subordinated to the law of revolution.” Cited in Ioffe and Maggs, 1983, at p.1. Vyshinsky was the most powerful theoretician and Chief Prosecutor in the USSR during Stalin’s years.
Using the law to protect democracy was a third issue of legality raised in the Declaration. Obviously, without the rule of law, this great nation may be destroyed from the inside, the process of five thousand years of Chinese civilisation may cease, and the people will lose all the basic rights of human beings. In Ye Jiangying’s words (1982:230-231), the post-Mao endeavour of establishing a legal system is in opposition to “the fascist dictatorship” in the Cultural Revolution. At the time of the Third Plenum, the most desirable rights were primarily the rights to sustain life, to think and express, to disagree with the words of the Great Teachers, to protect oneself against political persecution, against conviction without trial, against extralegal punishment, torture and arbitrary detention. In this context, China’s law reform shares the spirit of the classical reform in Europe.

Indeed, in law, what the Third Plenum has initiated is a process to receive the legacies of the classical school for the establishment of a legal system that is based on legality and humanism.

### 4.2.2 What Classicism

The classical school principles proposed by Beccaria are helpful to the reform of the traditional criminal law theories of Classical Marxism that were developed during the extraordinary years of revolutions, wars, the Cold War, Stalin’s Great Purge, and the various Maoist political campaigns. The classical school and traditional Classical Marxism are competing theories in law. With respect to the definition of crime and the essence of the criminal law, their differences are compared roughly in Table 4.1.

Given all the differences, any implementation of the classical school’s principles in China’s law reform would represent a retreat or substantive revision of the old Classical
Therefore, in the ongoing Chinese law reform, the definition of crime in Article 10 of the 1979 *Criminal Law* is only a halfway-house concept.\textsuperscript{212}

<table>
<thead>
<tr>
<th>Classical (Traditional) Marxism</th>
<th>Classical School (Beccaria)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crime is a phenomenon of class struggle. It is defined by the ruling class for the interest and benefits of the ruling class.</td>
<td>Crime is a violation of the criminal law. It should be defined for the greatest happiness shared by the greatest number of the population.</td>
</tr>
<tr>
<td>Crime is what the ruling class considers a danger to its interest.</td>
<td>Crime is an act that causes objective harm to the society.</td>
</tr>
<tr>
<td>The definitions of crimes under proletarian dictatorship shall be flexible and changeable.</td>
<td>The legal definitions of crime must be fixed, specific and shall not be applied retroactively.</td>
</tr>
<tr>
<td>In a socialist society, the definition of crime is determined by the ruling class with or without an enactment of the criminal law.</td>
<td>Crime can only be defined in criminal law, which is formally enacted and preferably codified by the elected legislature.</td>
</tr>
<tr>
<td>The proletariat can crush the enemies with or without a criminal law.</td>
<td>No punishment without provisions in law.</td>
</tr>
<tr>
<td>Proletarian dictatorship is not subject to legal limits. Criminal law is a tool to the ruling class. It controls the enemy class, not the ruling class.</td>
<td>Legality is a fundamental principle of any civilised government. Criminal law sets limits on state power. It protects the individuals against arbitrary state power.</td>
</tr>
<tr>
<td>Criminal law serves the dictatorship of the ruling class. Equality for antagonistic classes is only a fallacy of the bourgeois jurisprudence.</td>
<td>Criminal law must provide equal protection to all members of the society. Equality is a fundamental principle of law in a free and democratic society.</td>
</tr>
<tr>
<td>Criminal law only exists in class societies. It will wither away when all classes wither away.</td>
<td>Criminal law is enacted to settle serious disputes in civilised societies.</td>
</tr>
</tbody>
</table>

\textsuperscript{212} For the text of Article 10, see section 3.1.1 of this dissertation.
This Article attempts to have both a Marxist "substantive definition" and a classical school "formal definition" under one roof. The former is sociological in its nature, looking at the "substantial essence" rather than the legal formation of crime. On the contrary, the latter insists on the maxim *nulla poena sine lege*. Under Article 10, crime is an act that is socially harmful, and it is socially harmful because it "endangers the system of proletarian dictatorship, undermines the socialist revolution and socialist construction," and so forth. Further, the article states that, to constitute a criminal offence, a socially harmful act must be punishable "according to the law."

The *Criminal Law* was promulgated at a time when China's reform had just started. As Gao Mingxuan (1981:1-13) recalled in an excellent book, *The Preparation and Birth of the Criminal Law in the People's Republic of China*, the drafters of the Law, in fact, went through an arduous process of nearly thirty years. The process started in 1950 and was repeatedly disrupted by the leftist political campaigns, including the Anti-Rightist Movement and the Cultural Revolution. The process resumed in 1979. At the time, the CCP had just recognised legality and equality, and the Chinese legislature apparently had only several months to write them into the law. Indeed, as Gao indicated, the entire final text, including the political statement in Articles 1, 2 and 10, was based on a draft accomplished in 1963, that was once "examined" by Mao Tsetung. During the last phase of the drafting in 1979, although the legislature took into account of what Gao called the "bloody lessons from the lawless times," the guiding ideology was apparently still the repressive Marxist classics of "the class struggle and proletarian dictatorship in the period of socialism." Therefore, the *Criminal Law* was articulated "as a weapon of the proletarian dictatorship against the sabotages of the class enemies and primarily against the counter-revolutionaries." Accordingly, Article 10 was to "expose the class essence of"
The substantive definition is theoretically Marxist, but the legislative model was borrowed from Russia. From 1919 to the late 1980s, the provision of such a definition was an important characteristic feature of the Soviet criminal codes as compared with the Western law. In the 1919 Leading Principles of Criminal Legislation of the RSFSR, crime is defined as “an act which infringes the order of the social relations that are protected by the criminal law.” In the 1922 RSFSR Criminal Code, crime is “a socially dangerous action or omission to act which infringes the fundamentals of the Soviet system and the legal order established by the political power of the workers and the peasants during the transitional period to communism.” The 1926 RSFSR Criminal Code has a virtually similar provision. The 1960 RSFSR Criminal Code provides a more detailed definition in Article 7, that is almost similar to Article 10 of the Chinese Criminal Law. Article 7 provides:

The Concept of Crime. A socially dangerous act (an action or an omission to act) provided for by the Special Part of the present Code which infringes the Soviet social or state system, the socialist system of economy, socialist property, the person, or the political, labour, property or other rights of citizens, or any other socially dangerous act provided for by the Special Part of the present Code which infringes the socialist legal order, shall be deemed a crime.

An action or an omission to act shall not be a crime, although it formally contains the indicia of an act provided for by the Special Part of the present Code, if by reason of its insignificance it does not represent a social danger.

---

213 Article 5 of the RSFSR Leading Principles.

214 Article 6 of the 1922 RSFSR Criminal Code.
This kind of provision is problematic. The problem is not its Russian origin, but its vagueness. As discussed in Chapter III of the thesis, the political terminology of "proletarian dictatorship," "socialist revolution" and "socialist construction" are ambiguous in law. Their meaning depends on political, rather than legal, interpretation. On the contrary, the formal definition proposed by the classical school leaves less room for politics. The legal definition is not to impose limits on the sociological studies of crime, but to set limits on the actual use of punishment (Nettler, 1978:34). Indeed, it is awkward to label the formal definition as a "bourgeois fallacy" for ignoring the essence of crime.215 Besides, a substantive definition of crime may be helpful to the analyses of the causes of crime in criminology, but it is not a trade mark of Marxism. Many non-Marxist criminologists have also proposed their substantive definitions. For example, Sutherland (Sutherland and Cressey, 1974) treats crime as a "socially injurious behaviour."

4.2.3 Legality vs. Feudalist Totalitarianism

Legality in criminal law, in Beccaria’s On Crimes and Punishments (Dei deliti e delle pene), is in opposition to the arbitrary rules and the cruelty of the feudalist justice system in Medieval Europe. The Chinese recognition of legality apparently has a similar consideration. In his speech, Reform of the Leadership System of the Party and the State (1980), Deng indicates that the establishment of a legal system is part of the efforts to clear away the “remnants of feudalism” in the Chinese political and ideological structure. He (1983:292) points out:

Old China has left us more feudalist totalitarian traditions and very few legacies of democracy and law.

215 Chinese scholars used to share this critical opinion with the Russians. See Wei and Ouyang, 1962.
His comments on feudalism in socialist countries are comparative and interesting:

Stalin caused serious destruction to the socialist legal system. Comrade Mao Tsetung once said that this kind of incident could not possibly happen in Western countries like England, France and the United States. Although he realised this point, he did not actually solve the problems in the leadership system. This and some other factors led to the ten-year turmoil of the Cultural Revolution.

The existing Chinese political system has some major problems, he says. These include bureaucracy, the "highly and improperly centralised power" of the Party, and the Leader acting as the patriarch. All these problems, he asserts, are indications of "remnants of feudalism" (287-296). In his view, "the centralised Party’s leadership often becomes the leadership of an individual" primarily due to the impact of the traditional Chinese "feudalist totalitarianism" and the imported Soviet model of "highly centralised power of the individual Leader" (288-289). Therefore, he (295) proposes, although no one is allowed to "attack socialism" as feudalism, an important goal of China’s political reform is to "clear away the feudalist remnants" in the existing political and ideological structure.216 At this point, Deng has in fact changed the topic from "the law vs. the Leader’s words" to "legality vs. feudalist totalitarianism."

Indeed, China is a country with an ancient history of feudalist totalitarianism. As many Chinese scholars have observed, the ancient Chinese law had a number of unpleasant characteristic features:

216 For the entire text of this speech, see Deng, "The Reform of the Leadership System of the Party and the State" (1980), in Deng, 1983, pp. 280-302. This speech was adopted by the CCP Political Bureau as a blueprint for the reform of the political system.
• The law was always under the totalitarian power of the Emperor. The Emperor had the highest legislative, executive, and judicial powers. In essence, the law was a servant of the "rule of man."

• The law was primarily criminal law, cruel and repressive, mainly created for the totalitarian control of the population.

• The law was duty oriented, ignoring the independent status and the rights of the individuals.

• The law was based on a unified official ideology, i.e., Confucianism, which emphasized moral unity, social harmony, and the hierarchy of powers from the state down to the family. The Emperor was the dictator in the country; the father was the emperor to his wife and children.217

The legacy of Chinese feudalist totalitarianism or autocracy has always been influential in Chinese society. The Kuomintang regime was a demonstration of this tradition, the feudalist dictatorship in the Cultural Revolution was another. This ancient ideological legacy is so powerful that it keeps on assimilating modern concepts. The theories of Mao's so-called "continuous revolution under the proletarian dictatorship" is a striking example of such an assimilation. The Marxist ideas of class struggle and proletarian dictatorship were primarily proposed for the liberation of the working class from the exploitation of capitalism in Western countries. In the East, however, as demonstrated in Stalin's Great Purge and Mao's Cultural Revolution, the Marxist words

217 This list is a summary of the discussion of a number of leading scholars of Chinese legal history according to a literature review of Tan Guishen. See Tan Guishen, at pp.326-330.
were assimilated into a virtually feudalist ideological system and became the theoretical justification of autocracy. Only the most repressive part of Classical Marxism was assimilated, the relatively more humanistic elements were thrown away.

The ancient culture deserves more discussion. Both Confucianism (Ru Jia) and Legalism (Fa Jia) were pro-dictatorship. On the one hand, Confucianism is an ideology that emphasizes the moral roles of the Emperor and supports the “rule of man” in order to maintain the harmony of a society (Zhang Gguohua, 1991). On the other hand, the ancient Legalism, which emerged as an opposition to Confucianism, advocated the establishment of a formal legal system that took the words of the Emperor as its fundamentals (Yang Hegao, 1991; Liu Xing, 1991:151).\footnote{For a discussion of the totalitarian nature of ancient Chinese Legalism, see Herrlee G. Greel, “The Totalitarianism of the Legalism,” in Greel, 1953, pp.135-158. Interestingly, in this book, the author denounced Legalism as a theory of “counter-revolution.”}

The prescription of an ideology in criminal law or as the law per se, is rooted in ancient Chinese history. During the Han Dynasty (206B.C.--220), Confucianism was for the first time prescribed as an official ideology by the government. At the time, Dong Zhonshu, a leading scholar of Confucianism, discovered from his studies of the history of the collapsed Qin Dynasty (221-206B.C.) that the unification of thoughts was the foundation of political unity. Therefore, Dong proposed a power structure which combined the king de facto (i.e., the King of the Dynasty) and the king de jure (i.e., Confucius).\footnote{According to Fung Yu-lan, Dong asserted that Confucius was a king de jure because he had received the Mandate of Heaven to represent the Black Reign. See Fung Yu-lan, 1948, at pp.200-201.} In this way, the totalitarian power of the King became not only political, but also ideological. Taking this proposal, the Han Dynasty ordered the fei qu bai jia, du
zuin ru shu (to abolish the hundred schools of thoughts and to only respect Confucianism). Furthermore, the King took Dong’s proposal to make Confucius’ classical book Chun Qiu (Spring and Autumn Annals) an important source of the criminal law.\textsuperscript{220} In addition, as a master of Confucianism, Dong himself became an authoritative figure of law, often consulted by senior judges. As Fung Yu-lan (1948:201) recorded, Dong was so familiar with Chun Qiu that he could justify anything he said by quotations from it. This legacy was inherited by the later dynasties, and is still influential in modern Chinese times. The use of the little red book, Quotations of Chairman Mao (Mao, 1966), during the Cultural Revolution is indeed an astonishing example.

Implementing socialist legality is a difficult struggle against both the Chinese feudalist and the Soviet authoritarian legacies. This explains why the spirit of Beccaria is once again welcome in China, and why legality, a basic concept in modern law, is still a major issue in Chinese criminal law.

In China, soon after the Third Plenum, On Crimes and Punishments was reprinted and distributed in the re-opened Chinese law schools.\textsuperscript{221} Since then, the propositions of Beccaria have been discussed and taught in various Chinese criminal law textbooks and other publications, often as “progressive and revolutionary” ideas (Gao Mingxuan, 1989:8; Gao Mingxuan, 1993d:34; Wang Zuofu, 1987:20; Zhang, 1986:47-48; Huang, ...

\textsuperscript{220} The system of using this book as a source of law is called Chun Qiu Jue Yu (using Spring and Autumn Annals to decide the criminal cases). For discussion, see Yang Hegao, “Development of Legal Theories in Qin and Han, and Emerge of Official Feudalist Legal Thoughts,” in Yang Hegao and Duan Qiuguan (Eds.), 1988, pp.206-276, at pp.259-261; Qao Wei, “The Legal System of the Han Dynasty,” in Zhang Jingfan et al., 1983, pp.125-172, at pp. 169-171.

\textsuperscript{221} The Southwest China Institute of Political Science and Law printed the Chinese text of the book for research and educational purposes. It is not a formal publication and the name of the publisher was omitted.
1987; Yu Xiangtong, 1989; Li Haitong, 1987; Zhou Zhenxian, 1987; Zhao Bingzhi, 1985). Nonetheless, a further implementation of the classical principles, such as legality, equality, certain and proportionate punishments, utilitarianism, fairness and humanity, is still a desirable goal for the next phase of criminal law reform in China.

Beccaria’s elaboration of social contract theory, a theoretical fiction learned from Hobbes, Locke, Voltaire, and Rousseau, is a clear expression of a fundamental proposition that the state does not have unlimited power to punish its citizens (Beccaria, 1963:11-12). According to this proposition, the state can only punish when it is justified by the interests of the citizens. In China’s reform, few of us share the idea of social contract, but we clearly see the needs to set certain legal limits on the power of the government. The recognition of legality is a revision to the old Classical Marxist concept of law.

More could be learned from Beccaria. For two centuries, Beccaria has been the name of the "greatest criminal law reformer of modern times" in our world (Phillipson, 1970:vii). His principles are simple and straightforward in theory but fundamental to the reform of criminal law. As Maestro (1973:3) wrote:

Beccaria’s book dealt with the state of criminal law. His opposition to arbitrary rule, to cruelty and intolerance, and his belief that no man had the right to take away the life of another human being constituted the moral basis on which his principles were built. His ideas not only had an impact on all the cultivated people of Europe and America, but influenced the attitudes of statesmen and governments, and brought about needed reforms.

Under the principle of legality, specifying the rules of law should be a central theme for the next phase of the reform of criminal law in China. Ambiguity in the language of law is an evil (Beccaria, 1963:17). Law should not be written in a language
that is, as Beccaria (1963:17) said, foreign to the people. The law should not use ambiguous political language. Otherwise, the studies of the “words” may dominate the studies of the law, and the magic of dialectics may prevail over the legal definitions of crime, the lawyers may have to act like politicians, and China may have no reform because the ancient Marxist books said nothing about it.

A thorough implementation of legality requires a complete removal of the political slogans from the Code. After all, when Chinese law provides equal protection to the bourgeoisie and the proletariat, and safeguards domestic and foreign capitalism in the same way as it safeguards the “all-people-owned” (i.e., state-owned) industries, there can be no good reason why the law makers have to keep the ambiguous political statement in the Code. To fit in the context of the market-oriented reform, the language of the criminal law should be clear and neutral to all the members of the society, including the non-politicians. The political slogans should be replaced by specific legal terminology that is not subject to political interpretation, no matter what can be dug out from the Marxist classics.

It is also noteworthy that the ancient Chinese culture is not wholly a barrier to the rule of law. For example, equality before the law, of course with the exception of the emperor, is a concept deeply rooted in traditional Chinese culture. The ancient Legalism proposed a rigid system of law that, with the exception of the King, should be promulgated and strictly implemented. The violators, the Legalists believed, should be equally punished no matter what class status they have. Also, as Fung (1948:165) noticed, although Confucianism emphasized the distinction of jun-zi (the princely man or

---

gentleman) and xiao-ren (the small man), this distinction was based upon the moral worth of the individuals, rather than inherited class status.

4.2.4 The Theories of Law Revised

A challenge to Chinese jurists is to develop a theory of criminal law that can embrace both Classical Marxism and the classical school, or more specifically, a Marxist theory that recognizes the principles of legality, equality, proportionality, and humanism in criminal law.

In some post-Mao Chinese writings, Marx and Engels are described as advocates of the classical school principles (Li Guangchan, 1983; Li Guangchan et al., 1991). In an interesting essay, entitled The Guiding Thoughts of the Criminal Law, Zhou Zhenxian (1993a) indicates that, in 1849, when Marx and Engels were charged with libel for publishing an article on the Neue Rheinische Zeitung in Germany, they won the case by arguing that the charge did not fit with the legal definition of the offence under the 1810 French Penal Code. In another occasion, Zhou (1986a) writes, Marx argued that penalty could only be imposed according to the law. These, to Zhou, are “glorious examples” of “reforming the bourgeois principle of legality” for the interest of the proletariat.

Indeed, many Chinese jurists have found important pieces from the books of Marx and Engels that are supportive to legality (Zhu Huarong, 1983; Gao Ge, 1983; Li Guangchan, 1983; Chen Xinglian, 1985; Zhou Zhenxian, 1986b, 1993a; Yang Cheng, 1989a and 1989b; Li Guangchan et al., 1991). On several occasions, they (Zhu Huarong, 1983; Gao Ge, 1983; Yang Cheng, 1989a and 1989b; Zhou Zhenxian, 1993a) find, Marx wrote that punishment should be based on the criminal act, that a law should not punish a person for his “mode of thought,” that punishment should be in proportion with the
seriousness of the crime, that punishment should be imposed for crime prevention, and that criminals have free will. Marx and Engels even applied the concept of *Corpus Delicti* (constituents of criminal offence) to argue that only a person of the "necessary objective quality" (e.g., being above the minimum age and mentally capable to take criminal responsibility) could be prosecuted as a criminal offender (Zhou Zhenxian, 1993a). A similar kind of exploration has also been undertaken in relation to the writings of Mao Tsetung (China Law Society, 1991). On at least one occasion, the jurists recorded, Mao said that there had to be a criminal law. On another occasion, Mao said that "counter-revolutionaries" should be identified by reference to certain "criteria," presumably referring to provisions in law. Hence, it seems that legality has always been a principle of Classical Marxism, or at least approved by this ideology (Zhou Zhenxian, 1993a).

Nonetheless, there is a great deal of awkwardness and inconsistency. Apparently, Marx and Engels did not provide any clear idea on socialist legality, nor did they propose detailed blueprints of a socialist legal system. When Marx was a Young Hegelian, he was not advocating communism. Accordingly, what he wrote during 1835-1842 could hardly represent his communist ideas that were developed after 1846-1848. Also, when Marx and Engels were defending themselves in the courtroom in 1849 against a charge of

---

223 On 22 March 1962, Mao wrote: "[We] not only want a criminal law, but also want a civil law. Now there is no law and no heaven. No law is no good, so criminal law and civil law have to be made. [We] shall enact law, and compile cases." See *People's Daily*, "Speech in the Meeting of Establishing the Legal System," 29 October 1978, p.1. Also in China Law Society, 1991, at p.65.


225 For a collection of their ideas during these two periods, see Gong Peixiang., 1991, 27-265.
newspaper libel, they really said nothing about law under proletarian dictatorship. As Chapter III indicates, their ideas about socialism are mostly found in the core classics, such as *The Communist Manifesto, Anti-Duhring, The Class Struggles in France*, the *Eighteenth Brumaire of Louis Bonaparte*, the *Capital, The Civil War in France*, and *Critique of the Gotha Programme*. In these writings, one can hardly see anything directly in favour of legality.

Lenin, however, was once an advocate of legality. In 1918, as Wang Yongfei (1992a) recorded, Lenin urged “everyone” to abide by the Soviet law. At the time, he even proposed that a criminal offender should receive heavier punishment if he was a member of the Party. Nonetheless, Wang Yongfei indicates, the Soviet concept of socialist legality in the Lenin-Stalin period mainly referred to strict enforcement, but the Soviet law *per se* at the time was not based on “complete democracy.” In fact, the entire pre-1954 Soviet legal history does not provide much pleasant experience that is helpful to the implementation of legality in today’s China. Similarly, as history has unfolded, Mao Tsetung did not contribute much to the promotion of legality, since most of his late years were devoted to “class struggles.”

In the history of the CCP, the first truly powerful advocates of legality are Deng Xiaoping and his allies. Ignoring this is to deny the significance of the 1978 Third Plenum and the ongoing endeavour towards the rule of the law.

It appears that many of the traditional Classical Marxist ideas of law are no longer compatible with the present Chinese context. Many changes are taking place. In

---

226 In 1849, Marx and Engels were charged with libel as editors of the newspaper *Rheinische Zeitung*. See Zhao Changsheng., 1991, at pp.281-285.
mainstream Chinese theories, the phrase “Marxism-Leninism and Mao Tsetung Thought” in the 1979 Criminal Law still refers to the idea of using the law to fight the class struggle (Gao Mingxuan, 1993d:27-29). However, the targets are no longer the domestic or foreign bourgeoisie, but the “counter-revolutionaries,” such as Kuomintang spies and anti-Communist propagandists, and the other types of criminal offenders. Interestingly, apart from the counter-revolutionaries, the term enemy now refers to those individuals who committed “serious criminal offences or serious economic crimes,” such as murderers, rapists, robbers, habitual thieves, smugglers, and corrupted officials (Gao Mingxuan, 1993e:107-108). This kind of revision is apparently inconsistent in theory. Also, for practical purposes, the line between the “enemies” and the non-enemies is still vague. If the law does not punish the bourgeois class but instead protects their interests, it simply cannot be called a weapon of the proletarian dictatorship. After all, if capitalism is helping economic growth in China, why should the law suppress it?

Nonetheless, some of the general terms of Classical Marxism may still be useful for theoretical development. If the core of Marxism is simply, as Deng said, “to seek the truth from the facts,” this theory can indeed become a powerful tool for the reform of Chinese law and Chinese legal theories. Taking this perspective, one might be able to justify the removal of the old political slogans of class struggle and class dictatorship from Chinese law and Chinese legal theories, given all the miseries China experienced in the past.

4.2.5 The Pattern Shift

The 1979 Criminal Law still emphasizes its political function, but all the post-1979 enactments of the Chinese criminal law have a focus on non-political crimes.\textsuperscript{227} Also, the

\textsuperscript{227} For the relevant enactments, see later discussion in this Chapter.
1979 *Law* lists "counter-revolution" as the most dangerous crime, but these kinds of cases only count for less than one per cent of the annual total of criminal cases in the post-1979 years.\(^{228}\) In the meantime, the officially recorded cases of economic crime and violent crime have increased significantly. These developments indicate an important pattern shift in both the legislation and the actual functions of the Chinese criminal law and criminal justice system.\(^{229}\)

The *Law* provides "proletarian dictatorship" and "socialist revolution," but there is hardly any evidence indicating that the operation of the law in action targets the bourgeoisie or discriminates against the capitalists. In 1979, the Chinese legislature wrote the phrase "protecting the property collectively owned by the labouring masses" in Article 2 of the *Code* as a task of the criminal law, but excluded property "collectively owned by capitalists" (Gao, 1981:22). Now, many jurists are arguing that the protection of the capitalist sector is an agenda for the next phase of legislative reform. For example, Gao Mingxuan (1993e:102-103) holds that, to develop the infrastructure of the socialist market economy, the criminal law must protect the lawful property and interests of foreign investors. When a planned economy is substituted by a market economy, he and Chen Xinglian (1994:35) suggest, the criminal law "must provide equal protection to the various economic sectors."

---

\(^{228}\) See Gao Mingxuan, (1993f). "The Nature and Tasks of the Criminal Law in Our Country," in Gao and Zhao (Eds.), 1993, pp.12-21, at p.18. The author however does not identify the source and the year of this data.

\(^{229}\) This has been a relatively stable statistical pattern in the past fifteen years. See, e.g., Chinese judicial statistics in *China Law Yearbook 1992*, at p.854; *China Law Yearbook 1993*, at p.935.
The “emphasis shift” in the Third Plenum from class struggle to economic growth has significant impacts on the development of Chinese legal theories. Recently, this idea is enriched by the newly introduced concept of socialist market economy. An increasing number of Chinese scholastic publications support the idea of having “a function shift” in law from political repression to economic regulation, i.e., from fighting the “class enemies” to directing the market economy. For example, Zhang Guicheng (1992a) argues that the core concept of Marxist jurisprudence in China is no longer “class struggle,” but the protection of economic development. Zhao Changqing (1994) indicates that the provision of Article 2 in the Criminal Law is out of date owing to its emphasis on the political function. Zhao Bingzhi and Bao Shuixian (1994) propose that “the most important function” of the law is to protect the socialist market economy. Also, Zhang Zhihui (1994) holds that the law should provide equal protection to the poor and the rich, since equality is a fundamental principle of market economy. Further, Wang Zuofu and Sun Li (1994) contend that a “most desirable” reform to the Law is a systematic amendment of Chapter Three (Crimes against Socialist Economic Order) of the Special Part, so as to criminalize illegal activities that endanger the order of the market economy. Indeed, according to two senior law drafters, Gao Xijian (1995) and Li Chun (1994), the ongoing work to draft a new Code is taking this economic-oriented approach, focusing on economic crimes. Interestingly, legality also has the support of the socialist market economy. In a conference paper, Chen Zhexian (1994) argues that having a vague criminal law for the market economy is like regulating a freeway network by vague traffic signs. This kind of law, he said, can only cause “tragic accidents.”

The actual primary function of the criminal law has already changed in the past fifteen years. Aside from the “June 4th Incidents” of 1989, all the major crackdowns
launched in criminal justice in the past fifteen years were against non-political offenders. In 1981, a major campaign was launched to crack down on recidivists in urban areas. The next year saw the first war against corruption in the post-Mao era. In April 1982, Deng proposed a “two-hand” policy, urging the Party to fight corruption and economic crime when pursuing the goals of open policy. To justify the massive crackdown, however, the CCP declared that the rapid increase of corruption and other types of economic crime was “an important phenomenon of class struggle.” In 1983, another campaign of “class struggle” was launched to crush violent crime, sexually-related crime and criminal gangs. Obviously, it is debatable whether or not “class struggle” is an appropriate concept to explain the phenomenon of economic or violent crime in China. However, it is noteworthy that, unlike Mao’s campaigns, these crackdowns were not primarily targeting political opponents. This pattern continued in more recent years, wherein a variety of operations were launched to crack down on drug-related offences, trafficking in women and children, tax evasion, economic fraud, prostitution and pornography, corporate crimes and crimes against intellectual property. This pattern

230 The “June 4th Incidents” of 1989 were often referred to as the “Tiananmen Incidents” of 1989 or, in official Chinese terminology, the crackdown on the “counter-revolutionary rebellion in Beijing in Spring 1989.”


233 See Resolution of the Standing Committee of the NPC on Severely Punishing Criminals of Crimes Seriously Endangering the Economy (1982).

indicates that the primary function of the criminal law has shifted from the suppression of political enemies to the control of ordinary criminals.

With all the changes in Chinese legal theories and the actual function shift in law enforcement, the entire Criminal Law, including its definitions of crime, as well as the relevant mainstream legal theories, appears as if it will soon be depoliticized.

4.3 Legality, Focus Shift, and Humanism

4.3.1 The Growth of Legislation for Legality

Since the reception of legality, the Chinese law has been growing rapidly. In June 1979, only seven months after the CCP’s 3rd Plenum of 1978, the 2nd Plenum of the 5th National People’s Congress adopted a number of amendments to the Constitution and enacted seven important statutes, including the Organic Law of Local People’s Congresses of the PRC, the Election Law of the National People’s Congress and Local People’s Congresses of the PRC, the Organic Law of the People’s Courts of the PRC, the Organic Law of the People’s Procuratorates of the PRC, the first Criminal Law of the PRC, the first Law of Criminal Procedure of the PRC, and the first Law on Sino-foreign Joint Ventures of the PRC. These laws formally prescribe a number of core concepts regarding the rule of law, such as legality, equality, the right to defence, the prohibition of torture and illegal search, the prohibition of arbitrary detention, judicial independence, and separation of the police, the prosecution, and the court.

In law, the legislature and the judiciary are “separated” from the Party. The 1982 Constitution stipulates that the National People’s Congress, its Standing Committee, the
local people's congresses and their standing committees are the legislative bodies of the government. Thus, no one is allowed, as Mao proposed two decades ago, to declare a law by publishing an "editorial" in the People's Daily. The Constitution and the Organic Law of the People's Courts provide that the people's courts are the only judicial organs of the state and shall exercise exclusive power of adjudication. Hence, the CCP Central Committee can no longer, as it did during the Cultural Revolution, convict any one of a "crime against the Party" or a "crime against the Great Leader" by issuing a document of the Party. Furthermore, the Constitution, the Organic Law of the People's Courts, the Organic Law of the People's Procuratorates, and the Law of Criminal Procedure require the courts and procuratorates to independently perform their functions according to the principles of legality and equality. Therefore, discrimination based on class status is no longer legitimate in the administration of criminal justice.

Although the 1979 Code still prescribes the Marxist slogans, the enactment of the Code per se was an important step to materialise the classical principles of legality and equality. As Brantingham and Jeffery (1981:233) have pointed out, the legal definition of criminal acts is a major concern of the classical school. In substantive criminal law, the principle of legality refers to the maxim nulla poena sine lege (no punishment without law). Taking the Soviet model, Article 10 of the Law has partially adopted this principle, providing that a criminal offence is, in general, a violation of a provision in the criminal

---

235 Articles 58, 99, and 104 of the Constitution of the PRC.

236 Articles 123 and 127 of the Constitution of the PRC; Article 1 of the Organic Law of the People's Courts of the PRC; and Article 3 of the Law of Criminal Procedure of the PRC.

237 Articles 33 and 126 of the Constitution of the PRC; Articles 4 and 5 of the Organic Law of the People's Courts of the PRC; Articles 8 and 9 of the Organic Law of the People's Procuratorates of the PRC; and Article 4 of the Law of Criminal Procedure of the PRC.
In its wording, a violation of the words of a “Great Leader” alone seems insufficient to justify a conviction. The “words” still operate in reality, but there are now some legal limits.

The classical school’s definition of crime emphasizes the act and the harm. In Baccaria’s view, for example, the act is the ground of criminal liability, and the harm determines the seriousness of crime (1963: 64-65). Under Article 10 of the 1979 Criminal Law, crime is a “harmful act,” and an evil idea alone is presumably not a criminal offence. This proposition is now a consensus shared by Chinese jurists (Zhang Zhihui, 1986b:111-112; Zhao Bingzhi, 1993a:124), although an expression of a counter-revolutionary opinion may still be a matter for the criminal law.

Codification is an important approach of the classical school in the attempt to achieve legality. The 1979 Criminal Law has a total of 192 articles, consisting of five chapters of the “General Part” and eight chapters of the “Special Part.” Nonetheless, codification was only the first phase in the post-Mao development of Chinese criminal law. Furthermore, the Standing Committee of the NPC has enacted twenty-three criminal law statutes, mostly elaborating the definitions of crimes that are provided in the Law, providing definitions of new criminal offences that are not covered in the Law, raising the maximum punishment with respect to some of the crimes. These statutes are:

1. *Provisional Regulations of the PRC on Punishing Military Personnel’s Crime Against Duty* (1981);

---

238 There are, however, exceptions to this principle. See Article 79 of the Criminal Law.

239 Article 102 of the Criminal Law.
2. Resolution of the Standing Committee of the NPC on Handling Labour-Reform Offenders and Labour-Reeducation Subjects Who Escaped or Recommitted Crime (1981);

3. Resolution of the Standing Committee of the NPC on Severely Punishing Offenders of Crimes Seriously Endangering the Economy (1982);

4. Resolution of the Standing Committee of the NPC on Severely Punishing Criminals of Crimes Seriously Endangering Social Order (1983);

5. Resolution of the Standing Committee of the NPC Regarding the Jurisdiction on Criminal Offences Provided in International Treaties Signed or Joined by the PRC (1987);

6. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Smuggling (1988);

7. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Embezzlement and Bribery (1988);

8. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Leaking State Secrets (1988);

9. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Catching and Killing Wild Rare and Endangered Animals Specially Protected by the State (1988);

10. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Insulting the National Flag or National Emblem of the PRC (1990);

11. Resolution of the Standing Committee of the NPC on Prohibition of Narcotic Drugs (1990);

12. Resolution of the Standing Committee of the NPC on Punishing Criminals for Smuggling, Manufacturing, Selling or Distributing Pornographic Materials (1990);

13. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Illegally Excavating Ancient Cultural Scenes or Ancient Tombs (1991);

14. Resolution of the Standing Committee of the NPC on Strictly Prohibiting Prostitution and the Use of Prostitution (1991);

15. Resolution of the Standing Committee of the NPC on Severely Punishing Criminals for Crimes of Trafficking and Kidnapping Women and Children (1991);
16. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Tax Evasion and Refusal to Pay Tax (1992);

17. Resolution of the Standing Committee of the NPC on Severely Punishing Criminals of Crime of Hijacking Aircraft (1992);

18. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Using Fake Trademark (1993);

19. Resolution of the Standing Committee of the NPC on Severely Punishing Crimes of Manufacturing and Selling Imitation and Low-Quality Merchandise (1993);

20. Supplementary Provisions of the Standing Committee of the NPC on Severely Punishing Crimes of Organising and Transporting People Illegally Crossing the Border (1994);

21. Resolution of the Standing Committee of the NPC on Punishing Crimes Against Author's Rights (1994);

22. Resolution of the Standing Committee of the NPC on Punishing Crimes of Breaching the Company Law (1995);


It is noteworthy that none of the statutes employs, as the Criminal Law does, the terms, "proletarian dictatorship," "socialist revolution," and "Marxism-Leninism and Mao Tsetung Thought." Nor do they use the word "enemy" in their definitions of the crimes. Only four of them (i.e., items 3, 4, 11, and 12 on the list) use the phrase "socialist construction" in the statement of the legislative purpose, but not in a definition of a criminal offence. Most of the statutes, apart from these four, use a politically neutral language, such as "social order," to state their purposes.

This trend is interesting. Apparently, the Chinese legislature no longer insists that the Marxist slogans must be prescribed in the criminal law. Indeed, in the various laws
enacted since 1979, only the law codes made in 1979 and the 1982 Constitution have
prescribed the slogans. The language of the Criminal Law should be updated.

4.3.2 The Exceptions to Legality

Overall, the growth of the Chinese criminal law since 1979 has been a healthy
process for legality. Nonetheless, there are some exceptions. In Chapter II, three general
problems with the sources of Chinese criminal law were identified. In Chapter III and this
chapter, this author addressed the problems with the prescription of the Classical Marxist
principles in the 1979 Code. In addition, the Chinese law reformers need to deal with the
following problems for the specification of the legal definitions of crime, including:

First, there are unpublished "internal documents" that are sometimes issued as
authorities to specify the criminal code definitions of offences. The use of these
documents is partially the result of a lack of legislative experience in defining complicated
forms of criminality, the uncertainty of economic policies in the transitional period, as well
as the disparity of development in different regions. Some of the documents are issued for
experimental application. The purpose is to maintain the certainty of the law by testing
the new provisions in practice without making too many amendments. This, however,

\[240\] See the Preamble and the General Principles of the Constitution; Articles 1 and 2 of the
1979 Criminal Law and the 1979 Law of Criminal Procedure; Article 3 of the 1979
Organic Law of the People's Courts; and Article 4 of the 1979 Organic Law of the
People's Procuratorates.

\[241\] This fashion of law making, as Chapter III indicates, originated from the laws of the
Soviet Russia in the 1920s.

\[242\] For example, the Supplementary Provisions of the Standing Committee of the NPC on
Punishing Crimes of Embezzlement and Bribery was issued as an internal experimental
law before it was formally enacted in 1988.
makes the law invisible to the public. Further, the use of secret supplementary laws is more likely to cause disparities in the administration of justice, since their implementation is not subject to public scrutiny. It is noteworthy, though, that the government has publicised most of the formerly internal documents (Ren et al., 1991; Lian et al., 1991).

Second, the 1979 Criminal Law still makes provision for crime by analogy. Article 79 of the Law states that a person who commits an offence that is not explicitly defined in the specifics of the Law may be convicted and sentenced according to the most approximate article in the Law upon an approval of the Supreme People’s Court. This provision, although its use in practice has only been rare, generates vagueness in the application of the already extremely brief articles. Crime by analogy used to be a notorious feature of both the old Soviet law and the Nazi criminal law. The former Soviet Union abolished this provision as part of the legislative efforts to implement socialist legality in the post-Stalin era. Now, China almost stands alone with such a provision in law. Indeed, in the past decade, many Chinese jurists have suggested that this provision should be abolished for the sake of legality (Zhao and Bao, 1994).

Third, on at least one occasion, a retroactive law was adopted in China. When compared with laws in the outside world, this is obviously another unwanted feature of the Chinese criminal law. The 1983 Resolution of the Standing Committee of the NPC on Severely Punishing Offenders of Crimes Seriously Endangering Social Order is

---


244 See the 1958 Fundamental Principles of Criminal Legislation and the 1960 RSFSR Criminal Code.
retroactive. The Resolution creates a new definition of crime (i.e., “crime of teaching criminal methods) and raises the maximum penalty of a wide range of criminal offences to death, including the crimes of being the head of a gang, serious hooliganism, serious bodily injury, human trafficking, serious gun or explosive offences, organising secret societies, seducing, hosting, or forcing women to engage in prostitution, and so forth. Article 3 of the Resolution provides that the law applies to cases tried after the promulgation and hence allows a retroactive application to cases occurred prior to the date.

These are the exceptions to the principle of legality that must be repealed. All laws should be published, and the provisions of crime by analogy and the retroactive law should be abolished.

4.3.3 The Humanistic Limits of Law

The three thousand years’ history of Chinese law is primarily one of the rule by law, that is the “rule of man” through the use of law. In most parts of Chinese history, there were criminal codes, and sometimes codes with hundreds of definitions of crimes, but the laws were rarely binding upon the state. This tradition had been reinforced by the traditional Classical Marxism until 1978, when the Third Plenum adopted the concept of legality. The recognition was not a scholastic borrowing from the classical school. Rather, it was a reaction to the terror of the Cultural Revolution, a reaction based on the consensus amongst the new Chinese leadership to switch off the lunatic meat-mincing machine that had been sucking in more and more so-called “class enemies.” Therefore, from the beginning, the ongoing Chinese law reform has been sharing the humanitarian spirit of the classical school.
Humanism is the true essence of the classical school. "The right to punish," a starting point of On Crimes and Punishments, is something of extreme importance to Chinese law reformers. The state may have various reasons to declare certain conduct to be a criminal offence, but all the justifications, as Walker (1991) holds, must be subject to humanitarian limits. For the growth of Chinese criminal law, it is essential to keep this question in mind: What kind of right does the state have to punish its citizens for a particular kind of act?

Rousseau's "social contract," being an old individualist idea of the "vulgar bourgeois" in the eyes of Western Durkheinians and Marxians (Taylor, Walton & Young, 1973:67-69; 213-214), may be a fascinating concept in the Chinese endeavour for the promotion of legality and democracy. This concept expresses the belief that, as Beccaria (1963:10-12) said, the true right of the state to punish should be subject to the rights of its citizens; and the only reason to allow the state to punish is to protect the life and safety of the citizens. "Social contract" is not a fiction of law of a general consensus. Rather, what Rousseau and Beccaria promoted was the idea that rights were not granted by the state, that the repressive system of the Medieval Age was not legitimate even if it was written in the law, and that there should be humanistic limits to the use of punishment. Hence, with respect to the definitions of crime, legality should be achieved in conjunction with humanism. Making the law specific is only one goal of law reform, and making the law humanistic would be another.

The rule of the law does not naturally come with the increase of rules in law. For example, the Tang Code, that is recognised as the highest achievement of ancient Chinese law, contains 502 articles, each combined with a paragraph of detailed legislative
However, this brilliant piece of law, as many scholars (Qiao Wei, 1983; Qian and Qian, 1989; Qian and Xia, 1991; Wang Liming, 1993) have indicated, was based on the concept of feudalist totalitarianism.

It is noteworthy that, in recent years, many Chinese scholars have proposed replacing the term “counter-revolutionary crimes” with “crimes against the state” or “crimes against national security” (Li Chun, 1994). From a humanistic point of view, a change to the substance of the definitions may be more desirable. Article 90 of the 1979 Criminal Law provides:

All acts endangering the People’s Republic of China committed with the goal to overthrow the political power of the proletarian dictatorship and the socialist system are crimes of counter-revolution.

I would suggest that the entire article, if the legislature intends to keep it, be revised as:

Treason against the legally established Government, hate propaganda, espionage, crimes against national defence, and all other acts committed by the use, conspiracy, or advocacy of the use, of illegal and violent means against the constitutional rule of law are crimes against the national security of the People’s Republic of China.

In this way, it may be more difficult to use the law against the reformers of the Chinese socialist system or the peaceful expression of opinions. Further, this definition

---

245 The Tang Code was made and enforced in the Tang Dynasty during 618-908 A.D.

246 Recently published China textbooks of Criminal Law take different positions on this issue. For instance, see Li Jie, “Crimes Against National Security,” in Zhao and Wu (Eds.), 1993, pp.505-526; Yang Fusheng, “Counter-revolutionary Crime,” in He et al., 1993, pp.532-556.
may be employed to punish those who attempt to seize power by launching another Cultural Revolution and those who systematically abuse the constitutional rights of the citizens for a course of the so-called “class struggle.”

Much could be learned through the comparison of the relevant legislative models in foreign criminal codes. For instance, the present Japanese Penal Code classifies the relevant offences that are equivalent to crimes against national security into three major categories: crimes against the government, crimes against external security, and crimes against foreign relation.\textsuperscript{247} The 1975 German Penal Code (as amended to 1987) provides more categories, including crimes against peace, high treason and endangering the democratic rule of law; treason and endangering external security; crimes against foreign states; crimes against constitutional institutions as well as during elections and plebiscites; crimes against the national defence; and so forth.\textsuperscript{248} The Canadian Criminal Code assembles all the “offences against public order” together in Part II.\textsuperscript{249}

From a comparative point of view, the concept of “crimes against the state” (or “crimes against national security”) as proposed by Chinese scholars is imported from the 1960 Criminal Code of the RSFSR (as amended to 1972).\textsuperscript{250} This Code was introduced in a historic time in the former Soviet Union that shared many features of the Chinese post-Mao period in the late 1970s. Prior to the promulgation, as Berman (1972:37-39) has observed, the USSR abolished the notorious doctrine of analogy and added the protection

\textsuperscript{247} Chapters II, III, and IV of the Special Part of the Japanese Penal Code.

\textsuperscript{248} Sections I to V (§80-109k) of the Penal Code of the Federal Republic of Germany.

\textsuperscript{249} Sections 46-83 of the Canadian Criminal Code.

\textsuperscript{250} Chapter I of the Criminal Code of the RSFSR (Articles 64 — 88-2).
of the rights of citizens as one of the "tasks" in 1958 *Fundamental Principles of Criminal Legislation*. Also, the penalties were moderated in comparison with the previous Soviet codes. Subsequently, a number of changes were introduced by the enactment of the 1960 RSFSR *Code*, including the replacement of "counter-revolutionary crime" by "crimes against the state."

Unfortunately, as Soviet history later showed, the change did not stop the repressive Soviet regime from punishing innocent citizens. From a legal point of view, this was partially due to the fact that, in the 1960 RSFSR *Code*, the definitions of "crimes against the state" were still vague. Under Article 70, for example, the offence of "anti-Soviet agitation and propaganda" is defined, rather vaguely, as "agitation or propaganda carried on for the purpose of subverting or weakening the Soviet regime" or the circulation "for the same purpose of slanderous fabrications which defame the Soviet state and social system." The term "Soviet state and social system," at the time, was obviously a concept that could refer to the various components of the vast Soviet political, economic and ideological structure. The term "circulation," as Butler (1988:312) noticed, covered "conversation, speeches, reports, cinema, displaying flags, emblems, and the like." Hence, there was only a temporary relaxation in political repression following the death of Stalin.

Given the context and the goals of China's ongoing reform, it would be a great disappointment if the Chinese law makers follow the 1960 Soviet model of amendment. The amendment to "counter-revolutionary propaganda crime," as provided under Article 102, should be articulated in light of the humanistic spirit of socialist legality.

---

251 Article 1 of the 1958 *Fundamental Principles of Criminal Legislations of the USSR and the Union Republics.*
In Chapter One of the Special Part of the 1979 Criminal Law, most of the counter-revolutionary offences require the use of illegal violence. The present Article 102 is an exception. This article defines “counter-revolutionary propaganda” as a crime “for the purpose of counter-revolution” committed by either “(1) inciting the masses to resist or to sabotage the implementation of the state’s laws or decrees,” or “(2) through counter-revolutionary slogans, leaflets or other means, propagandizing for and inciting the overthrow of the political power of the proletarian dictatorship and the socialist system.” When this offence is changed to “propaganda against national security,” the definition can simply be put in one phrase: “inciting the overthrow of the legally established Government or the fundamental constitutional system by illegal violent means.” In this way, the citizens may enjoy more freedom of expression, whereas those intending to launch another Cultural Revolution may be prosecuted.

4.3.4 From Crime to Punishment

The significance of humanism goes well beyond the formation of the definitions of crimes. What the classical school proposed were two sets of humanistic limits on the power to punish: first, the establishment of legal definitions of crime; second, the utilitarian principle of punishment. Obviously, it is extremely dangerous to the rights of the citizens if harsh punishment is attached to vague definitions of crime.

To the classical school, as Beccaria (1963:42-43) held, the purpose of punishment is crime prevention, and the use of punishment must be in proportion to the seriousness of the crime. “All beyond this is superfluous and for that reason tyrannical,” he said.\(^\text{252}\) In

\(^{252}\) Another great thinker of the classical school, Bentham, developed a more systematic theory of utility to explain both the causes of crime and the meaning of justice. Utility, to
theory, these propositions are accepted by Chinese jurists. Prevention is recognised in Chinese writings as the purpose of punishment; that is, to prevent the criminal from recommitting crime and others from engaging in crime (Zhou, 1988:411; Wang Zuofu, 1987:218-219; Quo & Xu, 1988:69-112; Bao, 1993a:342-351; Lian, 1993:307-312). Also, proportionality is listed as the second most important principle of Chinese criminal law, following the principle of legality (Chen Xinglian, 1993c:168-201; Gao Mingxuan, 1993d:34-37; Bao, 1993b:32-40). Proportionality has also become a “Marxist principle,” simply due to the fact that, when Marx was a young lawyer, he made some favourable comments on it (Zhang Zhihui, 1986c:58-59).

Nonetheless, Chinese criminal law is not perfectly written in a fashion of proportionality, given the fact that many of the non-violent crimes, some of which are vaguely defined, are punishable by capital punishment. Indeed, the extensive use of capital punishment may be a characteristic feature of Chinese law. Early in this century, when China was under the rule of the last feudalist dynasty, the Minister of Law Reform, Sheng Jiaben (1988:227), wrote after his trip to Europe:

Today, countries around the world are all engaged in moderating their penal system. Some have already abolished death penalty. Those who still have death penalty, do not have many capital offences.... The only country where punishments are very heavy is China.

Since then, however, this distinction has remained almost unchanged. Furthermore, the past seventeen years saw a rapid increase in the number of legal provisions that permit the use of death penalty. Originally, the 1979 Criminal Law had 15

---

233 The specific Chinese implementation of these propositions, though, is different. See Chapter V of the thesis.
articles in the Special Part, each allowing the use of this penalty for one or more than one type of specific offences. Eighteen of the twenty-three criminal statutes enacted during 1979-1995 add or elaborate a number of capital offences on the list.\textsuperscript{254} In the original Code, capital punishment was attached, as the maximum penalty, to some 18 per cent of the various types of specific offences. At present, the rate is some 40 per cent, indicating an increase of at least 100 per cent. The actual statistics relating to the death sentence are never published.

In law, there are roughly two large categories of capital offences: "counter-revolutionary crime" and "other serious crimes." All the "counter-revolutionary crimes" of a "particularly heinous nature" are punishable by death, except "counter-revolutionary propaganda" and the offence of "leading counter-revolutionary organisations." Specifically, the death penalty can be imposed in cases of treason, political terrorism, defecting, armed rebellion, organised jail-breaks, espionage or supporting the enemy, organising secret counter-revolutionary societies, and so forth. Further, the non-political category includes various offences of "odious circumstances," covering both what Hagan (1984) called "consensus crimes" (e.g., murder) and "conflict crimes" (e.g., economic crimes and drug trafficking), as well as violent crimes (e.g., rape) and non-violent crimes (e.g., theft and hooliganism).

According to some Chinese authors (Zhou Zhenxian, 1986c: 420-421; Que & Xu, 1988; Song, 1994), there are primarily two theoretical justifications for the use of the death penalty in China. First, under Classical Marxism, the death penalty is only a weapon in class struggle. Hence, the proletariat can suppress its class enemies by executing them. Second, the death penalty deters. However, when "counter-revolution" only counts less than 1 per cent of the total of criminal cases, it is awkward to insist that the death penalty is mainly used against the class enemies. Also, it is unclear whether or not there is any empirical evidence in China to support this presumption of deterrence, although such data are rarely found in Western literature (Walker, 1991).256

255 Article 103 of the 1979 Criminal Law.

256 In one scholastic publication, the author indicates that, "to my knowledge," no one in China has carried out empirical research on the effectiveness of death penalty. See Bao Shuixian, 1993c, "Some Serious Thoughts About China's Death Penalty." In Yang Duexian and Chao Zhidan (Eds.), 1993, pp. 167-176, at p. 173.
Given the lack of published Chinese execution data, the system has to be evaluated on a philosophical basis. In this aspect, the classical school helps. From the humanistic and utilitarian perspective, one would ask: Is the death penalty a cruel and inhuman instrument of class struggle? It is obviously problematic to claim that, once in power, the proletariat shall be more cruel than the bourgeoisie, as it is demonstrated in a cross-nation comparisons of the numbers of capital offences. It is also questionable to say that the death penalty, even if it deters, is a proportional punishment to non-violent offences. Further, it is bizarre to defend the position that the death penalty, as the harshest punishment, should be attached to 40 per cent of the offences in the criminal law. After all, what right does the state have to execute human beings for the control of the economy or the control of deviant sexual behaviour? In the Chinese context, it may be too early to declare, as Beccaria (1963:45-50) did, that the death penalty "is not a right" and "cannot be useful." Nonetheless, when execution is considered a serious matter, we may wonder what exactly are the justifications to increase the number of capital offences. When China is entering the 21st century, should the law still be based on this type of value: The society is everything, the individual is nothing?

The numerous miseries that China experienced two decades ago demonstrate what kind of terror can be spread out when the death penalty openly becomes a weapon of "class struggle" and "dictatorship." Most Chinese jurists still remember the case of Zhang Zhixing, who was brutally executed during the Cultural Revolution as a counter-revolutionary.

---

257 This is cited from Auguste Comte, in Zeitlin, 1981, at p.68.

Recently, a number of Chinese scholars took a new approach to challenging the death penalty. Gao Mingxuan and Chen Xinglian (1994) contend that heavy punishment cannot wipe out crime in a socialist society, but may instead corrupt public morality. Therefore, "Heavy and Swift Punishment," a sentencing policy introduced in the early 1980s, should only be implemented temporarily.\textsuperscript{259} Chen Zhexian (1994) notes that China should join the international trend of penal reform, where monetary sanctions are the primary forms of punishment for economic crime. Furthermore, Zhao Changqing (1994) asserts that the treatment of offenders in criminal law is an issue of fundamental human rights. He (1994:152) contends:

In today's world, there is an extensive development of the awareness of human rights. In this context, the protection of human rights should be an emphasis of the legislation and enforcement of the criminal law. The level of human rights protection in law demonstrates the level of the rule of law in a country and the level of socialist civilisation. With the rapid growth of the economy and the improvement of citizens living environment in this country, the people will be requesting a better and stronger protection of human rights. However, how to implement the concept of human rights in the reform of the criminal law is still a new issue for discussion.

Indeed, in the reform of the Chinese law, the principle of socialist legality should be implemented in light of the fundamental values of human rights.

\textsuperscript{259} "Heavy and Swift Punishment" is a criminal policy introduced in 1983. See Resolution of the Standing Committee of the NPC on Severely Punishing Criminals of Crimes Seriously Endangering Social Order (1983). At the time, it was mainly a sentencing policy for serious violent crimes. However, it was then applied to a broad range of offences, including economic crimes, property crimes, counter-revolutionary crimes, drug offences, prostitution and pornography, etc.
Conclusions

Since the Third Plenum of 1978, China's reform has brought about substantive changes to the system of the proletarian dictatorship, and particularly its economic component. In ideology, the cardinal principles of Classical Marxism are being revised in light of the spirit of “truth-seeking” pragmatism. In this context, millions of innocent citizens have been liberated, and the basic principles of the classical school are partially implemented for the reform of Chinese law.

The recognition of legality and equality is a most significant development in the legal history of the PRC. It helps the endeavour to establish a legal system that is less repressive and more humanistic. Since the Third Plenum, the primary function of the criminal law has actually shifted from the suppression of political enemies to the protection of ordinary social order. With the introduction of the socialist market economy as a core concept in China's reform, the political statements in the 1979 Criminal Law can no longer cope with the desirable goals of social progress. With these simplistic statements, the law appears to be excessively vague and conflict with China's open-door policy.

The new Chinese version of socialist legality, as declared in the Third Plenum, shares the humanistic spirit of the classical school. Nonetheless, the reform of Chinese criminal law has just started. An important objective in the next phase of law reform should be the depolicization of the criminal law. This will smooth the way of specifying the law and enhancing the humanistic spirit of criminal justice.

For many years, whether the classical school is a critical or conservative approach has been an issue in Western criminology (Vold and Bernard, 1986: 33-34; Mueller, 1990; Phillipson, 1970:228-229; Keat and Urry, 1982:98; Taylor, Walton and Young, 1973:3-6;
Williams and McShane, 1988:17). Some years ago, the Brantinghams (1981a:9) indicated that the principles of the classical school were, in reality, "radical innovations that changed fundamental assumptions about crime and criminal justice." Obviously, in the Chinese context, an implementation of these principles would encourage critical and constructive thoughts regarding the existing criminal law and its ideological and cultural origins.

The humanistic spirit of classicism is not entirely foreign to the Chinese. Confucianism, for example, though in favour of a totalitarian government, was against brutality and tyranny. It recommended that the government should lead the people by virtue rather than by fear, maintain harmony through the moral conduct of the King and the officials, teach all the people to love and respect each other, tolerate deviance, only use punishment as the last resort, reduce the use of execution, and give lands to the peasants rather than tax too much.260 Indeed, to the great ancient Chinese thinkers, even the authoritarian power of the king is subject to certain humanistic limits.

In China, the ongoing economic reform is designed to achieve prosperity, and the reform of the criminal law is intended to ensure fairness, liberty, equality, and social order in a democratic society.261 These values should replace the old slogans of "class struggle" and "dictatorship" to be the normative basis for the next phase of law reform. Jointly, they will lead the specification of the definitions of crime to the right direction. Indeed, what China needs is not just a growth of law, but a growth of good law that is articulated according to these fundamental values.

260 See Duan Qiuguan, "The Legal Thoughts of Confucianism," in Yang and Duan (Eds.), 1988, pp.44-93. For a brief discussion in English, see Raymond Dawson, 1981, pp.73-75.

261 According to Michael Moore, the principle of legality is in reality a mixture of four values, i.e., fairness, liberty, equality and democracy. See Moore, 1993, at pp.239-240.
Chapter V
The Legal Definition of Crime

5.1 Statutory Definiteness

5.1.1 Crime as A Legal Entity

Apart from streamlining the sources and de-politicising the Chinese Criminal Law, another major objective for the specification of the definitions of crimes would be the clarification of the legal ingredients, or constituent elements, of crime in law.

Marc Ancel (1987:34) wrote: “Classical and neo-classical law was based on the concept of the crime, a legal entity.” The classical school promoted the principle of legality, which requires specified statutory definitions of crime. The neo-classical school, especially the German scholars, developed a conceptual structure for the specification during the 19th and the early 20th centuries. This analytical structure has exercised enormous influence on the codification of criminal law and the development of criminal law theories in countries in the Romano-Germanic tradition, including the People’s Republic of China.

With respect to the neo-classical school, the Chinese discussion has a focus different from that in some North American texts. For example, in Theoretical Criminology, Vold and Bernard (1986:26-27) only devoted one page, briefly describing the neo-classical school as a moderation of the rigorous French Penal Code of 1791, without even mentioning “Tabestand,” a German term referring to the elements of crime. The Chinese, apparently, have more interest in the neo-classical theories of “constituent
elements,” that were mainly developed by the German “old school of criminal law,” including such scholars as Anselm von Feuerbach, Karl Binding, Ernst von Beling, Edmund Mezger, M. E. Mayer and many others (Han Zhongmuo, 1981:13-44; Zhou Zhenxian, 1993b:437-440; He Peng, 1991:91-100; Gan Yupai et al., 1989; Gan and He, 1984:132-146).

For instance, Gan Yupai (1989:4-5) holds that the publication of Feuerbach’s *Textbook of Criminal Law* (1801) “marked the emergence of the modern science of criminal law founded on the principle of legality.” Zhou Zhenxian (1993b:438-443) asserts that Feuerbach changed Tatbestand from a concept in procedural law to a structure of crime, i.e., “a totality of essential elements” of crime; Beling developed a tripartite theoretical structure consisting of Tatbestandsmassigkeit, Rechtswidrigkeit, and Schuld; Japanese and Soviet jurists borrowed and refined the concepts; and Chinese scholars imported them from Germany, Japan, and the Soviet Union.

In this century, at least two generations of Chinese criminal law scholars have devoted their efforts to import and refine these concepts. Scholars under the Kuomintang regime systematically imported the concepts of Tatbestandsmassigkeit, Rechtswidrigkeit, and Schuld from Germany and, on a larger scale, from Japan. During the Meiji period (1868-1912), Japan accomplished the westernization of its law, replacing the Chinese-type system with a primarily Germanic one. Since then, a main theme of Japanese criminal

---

261 This set of concepts, as commonly recognised, was first proposed in a systematic fashion by Ernst von Beling in his classic book *Die Lehre Von Verbrechen* (1906), wherein he proposed an abstract crime “description” built on three foci of elements: Tatbestand (objective elements), Rechtswidrigkeit (unlawfulness), and Schuld (subjective elements). On the contrary, Edmund Mezger challenged Beling’s “value free” concept of Tatbestand, insisting on the “subjective element of the Tatbestand.” In China, the introduction of these ideas were originally carried out by scholars of the Kuomintang regime who were trained in Germany and Japan. See Han Zhongmuo, 1981, pp.81-97.
law theories has always been the Germanic neo-classical conceptual structure of crime.\footnote{263} This has been influential to the Chinese since the beginning of this century, when China initiated the process of westernizing its legal system.\footnote{264} At present, the mainstream criminal law theories in Taiwan are still based on the Germanic concepts of \textit{Tatbestandsmattigkeit}, \textit{Rechtswidrigkeit}, and \textit{Schuld}.\footnote{265} Overall, the German legal science, or "edifice of intellectual abstractions" as Joseph Darby (1987:xviii) calls it, apparently has a stronger influence in China than in common law jurisdictions.

In the 1950s, all the "old" legal theories imported during the Kuomintang era were "abolished" with the old law, but Soviet jurists brought the Chinese their version of \textit{the structure of crime} (Gao Ge, 1991:91-106). The Soviet structure, in essence, was a mixture of German techniques and revised Marxist ideology. A number of post-Stalin Soviet publications were translated in China, including A. H. Tpanhnh's book, \textit{General Theories of the Structure of Crime} (1958). In early 1957, only several months prior to the Anti-Rightist Movement, the People's University in Beijing published a textbook which

\footnote{262} Between the beginning of the Meiji period (1868-1912) and World War II, the Japanese law was primarily based on the reception of German law. Masami Ito (1992:131-132) recalls: "The general attitude of Japanese lawyers and academics after the mid-Meiji period was that 'any law other than German law is not law.'" This, he said, is owing to the logical consistency and preciseness of the German law and German legal theories. However, after the World War II, the Anglo-American law became influential in Japan due to the American presence. Nonetheless, as this author understands, the impacts are found in the Japanese Constitution and economic laws, not in the criminal law.

\footnote{263} See e.g., Kume Kimura, 1991; Eiyu Fujiki, 1982.

\footnote{264} During the first decade of this century, the Qing Dynasty made a number of new codes, including the 1908 \textit{Outline of Constitution} and the 1910 \textit{New Qing Penal Code}. These codes were virtually copied from Japan and Europe. In the 1910s, the new Chinese (Republic) government drafted a new \textit{Criminal Code} with the direct participation of Japanese experts. See Zhang Jingfan et al. (Eds.), 1983, at pp. 331-436.

\footnote{265} See e.g., Han Zhongmo, 1981; Lin Shantian, 1986; Hong Fuzhen, 1988; Wen Guoliang, 1980; Liu Qingbo, 1980; Chen Pushen, 1978.

182
for the first time in the PRC systematically taught the Germanic-Soviet *structure of crime* (*fanzui goucheng*) as part of the theory of the Chinese criminal law. Later, as Zhou Zhenxian (1993b:443) recalled, the process was soon disrupted and the *structure* became a "bourgeois" concept. The discussion of the *structure* resumed after the 1978 Third Plenum. Now, it is a central theme of the mainstream criminal law theory in China, although it is still under the guidance of Marxism.

During the past fifteen years, the re-introduction of the Germanic-Japanese-Soviet theories of the *structure of crime* has gradually turned the Chinese study of criminal law into a discipline of legal science. This kind of professionalism *per se* is an important achievement for an independent status of the legal science and a healthy growth of the criminal law. It is noteworthy that the classical school and the neo-classical school might have different views regarding this kind of development. In his essay, Beccaria (1963:17) proposed that the criminal law should be understandable to the public, not just the legal profession. However, he then went on to claim that "happy are the nations where the knowledge of law is not a science." This kind of idea of de-professionalism, or what Ancel (1987:27) later called "de-juridicization," is indeed problematic. The implementation of legality depends on various factors, but a well-developed legal science is vital and indispensable. To write the law skilfully, to articulate clear and reasonable rules in law, to construe the rules with unity and consistency, and to properly implement the rules in light of the fundamental values of justice, we need legal expertise and a legal profession. Every profession has its problems, but without a legal profession there will be more vague rules, disparities and injustice. China once had a system of "law without lawyers" in Mao’s years (Li, 1978). Yet, as recalled in Chapter III, those were not "happy" years. In the

---

266 See Criminal Law Section, Law Department of People’s University, 1957.
Chinese context, it is desirable to see that the knowledge of law develops as a science, so that the law will not be written as political slogans, the operation of the law will follow properly unified standards, litigation will be handled professionally, and lawyers will not be wasting their lives to “learn from the peasants.”

Therefore, the post-Mao re-importation of the legacy of the neo-classical German school is beneficial to the promotion of the rule of law in China.

5.1.2 The Theme of Law and Theory

The 1979 Chinese Criminal Law employs many political slogans, but its structure shares the general features of penal codes in the Romano-Germanic civil law tradition. This Law consists of a General Part and a Special Part. The General Part provides, in a fairly comprehensive fashion, the general principles, propositions and concepts of the criminal law, including the guiding thoughts of the law, the tasks of the law, application of the law, a general definition of crime, concepts of intent and negligence, insanity, criminal capacity, justification and excuse, punishment and the application of punishment. The Special Part provides the definitions of various criminal offences and the corresponding

[267] In an interesting book Law without Lawyers (1978), Victor Li described “how the Chinese achieve law without lawyers.” The author, however, failed to address the Cultural Revolution. Focusing on the pre-1966 period, he concludes (at page 97) that the Maoist version of “direct public involvement” in China can reduce “the need for lawyers and complex laws.”

[268] During 1950s-1978, the legal profession was gradually and wholly disbanded in China. A vast majority of Chinese lawyers changed their jobs. Like many other kinds of professionals, the majority of Chinese lawyers were sent to factories and the countryside to “learn from the workers and peasants.”

[269] See Articles 1-89 of the Criminal Law.
punishment. The provision of the constituent elements of crime is the central theme of the General and the Special Parts.

Most Chinese textbooks of criminal law follow the same structure (Gao, Ma and Gao, 1982, 1984; Teaching and Research Section of Criminal Law and the Law of Criminal Procedure, Central Cadres' College of Political Science and Law, 1982; Yang, Yang and Wu, 1983; Sun and Zhou, 1985; Yang Duexian, 1985; Gao Ge, 1987; Criminal Law Section, East China Institute of Political Science and Law, 1987; Lin, Gao and Shan, 1989; Gao Mingxuan, 1989, 1991; Gao and Zhao, 1993; He Bingshong et al., 1993; Zhao and Wu, 1993). Apart from a brief introductory section regarding the concept of criminal law and the system of criminal law theory, a textbook usually splits into two parts: a lengthy series of chapters to address the basic theories of the criminal law with respect to provisions of the General Part of the Criminal Law, and a number of chapters, usually arranged in the same order as the chapters in the Special Part, to discuss the definitions of specific crimes.

In comparison to standard Anglo-Saxon criminal law textbooks, the Chinese textbooks have some distinctive structural features. They have an almost identical structure, which is essentially similar to the structure of the Criminal Law. Therefore, a Chinese textbook covers a relatively broader range of subject matters. Given this coverage, however, there is often a lack of detailed discussion of some of the complicated issues, such as the insanity defence, intoxication, and the standards of negligence.

[270] Ibid, Articles 90-192.

[271] Similar features are also found in textbooks in Japan and Taiwan. See e.g., Lin Shantian, 1986; Wen Guoliang, 1980; Liu Qingbo, 1980; Chen Pushen, 1978.
Most updated Chinese textbooks of criminal law (Gao and Zhao, 1993; He Bingshong, 1993; Zhao and Wu, 1993) address issues of the General Part in three categories: (1) the essence, tasks, guiding ideas and basic principles of the criminal law; (2) the theories of crime; and (3) the theories of punishment. In the second category, the theories of crime are usually presented in an order familiar to non-Chinese legal scholars:

1. Concept of Crime (substantive and legal definition of crime)
2. Criminal Liability (the nature and forms of criminal liability)
3. Structure of Crime (the legal constituent elements of crime)
4. Object of Crime (the relation or interests)
5. Objective Aspects of Crime (conduct, consequence, and causation, etc.)
6. Subject of Crime (the person, age and ability to take criminal liability)
7. Subjective Aspects of Crime (intent and negligence, etc.)
8. Impediments to Social Harm (self-defence and necessity, etc.)
9. Inchoate Crime (preparation, attempt, and voluntary cease)
10. Joint Crime (parties to crime)

On this list, although a Marxist "class analysis" is included under both the "Concept of Crime" and the "Object of Crime," the main theme of the theories of crime appears to be the legal analyses of the constituent elements of crime. Interestingly, most Chinese authors agree that the "class analysis" is the most important characteristic feature of the Marxist and "proletarian theory" of criminal law, but the discussion of this doctrine usually takes no more than twenty pages in a standard textbook of eight hundred pages.272

272 See e.g., Gao and Zhao (Eds.), 1993; Zhao and Wu (Eds.), 1993; He Bingshong (Ed.), 1993.
This kind of arrangement makes the Chinese theories understandable to non-Chinese legal scholars.

The analysis of the constituent elements is an effective way to clarify the vague definitions of crime in the 1979 Chinese Criminal Law. The analysis also helps the Chinese law reformers to critically examine the problems in the legislation. In Chinese legal training, the constituent elements are taught as steps of legal reasoning for the practitioners. Through all these years' efforts, the Chinese criminal justice system, in general, has accepted a number of specific criteria that are essential to the rule of law, such as: crime is an act, rather than an evil idea; crime requires certain type of mental state (or state of mind); and the criminal must be over a certain age and have criminal capacity. Further, it is also a well-accepted idea that a vague crime definition in law should be construed according to these criteria.

5.1.3 Four Constituent Elements

The mainstream Chinese theory of the structure of crime is a Russian-style neoclassical theory. This theory, as demonstrated in standard Chinese textbooks of criminal law, defines the structure of crime as a unity of four categories of elements: ke ti (the object), ke guan fang mian (the objective aspects), zhu ti (the subject), and shu guan fang mian (the subjective aspects).273

Accordingly, in theory, a conviction must satisfy each and all of the four essential requirements:

---

273 See Gao and Zhao (Eds.), 1993, pp.101-198; He Bingshong (Ed.), 1993, pp.78-233; Zhao and Wu (Eds.), 1993, pp.75-178; Gao Mingxuan (Ed.), 1993b, pp.437-718.
• The crime must have caused a harm (damage or threat) to a legally protected social relation (ke ti).

• There must be a legally defined criminal conduct (act or omission). In most cases, to constitute a consummated crime, there must be a consequence, and a chain of causation between the conduct and the consequence. There may be other required elements, such as a specific kind of object (e.g., a female victim in a case of rape).

• The actor must be above a certain age in law, and have the legally defined capacity to incur criminal responsibility.

• The actor must have a legally required mental state, that is either an intention or a negligence. In some cases, a specific purpose is required (e.g., a political goal in a case of “counter-revolution” or a money-seeking goal in a case of gambling).  

This scheme helps to clarify the general and substantive definition under Article 10 of the 1979 Criminal Law. Overall, it appears to be a recognition of two important rules that, in both the civil law and the common law systems, are commonly considered as specific principles of legality in substantive criminal law: nullum crimen sine actu and nullum crimen sine culpa, that is, there must be no crime without a criminal conduct or fault. These kinds of propositions, as Fletcher (1978:394) indicates, are both descriptive and normative. Their descriptive function is to provide standard general rules of the criminal law that are applicable to the definitions of all the criminal offences. This description per se is also normative, indicating what elements are essential to a fair and just criminal law. In the Chinese context, the theoretical discussion of the propositions has brought about a consensus at least in the Chinese legal profession that it is no longer just to punish crimes of mere status or evil thoughts. Even to punish a “class enemy,” the state must prove a union of criminal conduct and the corresponding mental state of guilt. To

274 An exception, as this author indicated in previous discussion, is crime by analogy under Article 79 of the 1979 Criminal Law.

convict someone, it is not enough to claim that the conduct is “harmful” to the “ruling class.” Rather, the prosecution must satisfy all the legal requirements.

The legal concept of crime in the Soviet-Chinese theory, as it is in the West, is based on the unity of the criminal conduct and the guilty mind. Also, the Soviet and Chinese four-element formula appears to be a revision of Binding’s tripartite conceptual structure (Tatbestandsmassigkeit, Rechtswidrigkeit, Schuld), although the order is changed.

Some Chinese scholars have been arguing whether or not the concept of structure of crime is “directly imported from the Soviet Union and indirectly imported from German bourgeois scholars” (Xue, 1989). Scholars of the former USSR once claimed that their theory is in opposition to the “bourgeois theory,” but, as Gao Ge (1991:100) asserted, could not identify the specific origin of the Soviet theory. Nonetheless, the theories are different in some respects. For instance, the Soviet-style theory is distinctive with respect to the concept of ke ti, i.e., the first of the four constituent elements. In this theory, the term, ke ti, is not a specific object such as a twenty-dollar bill or a person, but the “ruling relation” by the crime.276 Hence, the Marxist “class analysis” once again becomes an underlying concept in this part of the criminal law theory. As one Chinese author (He Bingshong, 1993:115) recalls, Feuerbach and other early neo-classical jurists in Germany defined the objects of crime as the legal rights violated by the criminal conduct, but the Soviet scholars denounced this “bourgeois concept” and declared that the objects were “the social relations in a class society” or, in a socialist society, “the socialist social relations.” Some Chinese textbook authors still insist that ke ti “exposes the class nature

276 See Gao Mingxuan, 1993g, “The Object of Crime,” in Gao and Zhao (Eds.), 1993, pp.111-119.
of crime” and the “social political significance of fighting the crime” (Liu Shenrong, 1993:171).

Also, the classification of different kinds of “ruling relations” is said to be the criterion for the division of the eight chapters in the Special Part of the 1979 Chinese Criminal Law (Liu Shenrong, 1993:171-172). Accordingly, as Table 5.1 shows, the eight chapters protect eight categories of “ruling relations.”

**Table 5.1 Chapters in the Special Part of the Chinese Criminal Law**

<table>
<thead>
<tr>
<th>Title of Chapters (Chapters 1–8)</th>
<th>Category of Social Relations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Counter-revolutionary Crime</td>
<td>the political power of the people’s democratic dictatorship and the socialist system</td>
</tr>
<tr>
<td>Crimes against Public Security</td>
<td>public security</td>
</tr>
<tr>
<td>Crimes against Socialist Economic Order</td>
<td>socialist economic order</td>
</tr>
<tr>
<td>Crimes against Citizens’ Personal Rights and Democratic Rights</td>
<td>citizens personal rights and democratic rights</td>
</tr>
<tr>
<td>Crimes against Property</td>
<td>public and private property rights</td>
</tr>
<tr>
<td>Crimes against Social administrative Order</td>
<td>social administrative order</td>
</tr>
<tr>
<td>Crimes against Marriage and Family</td>
<td>marriage and family relations</td>
</tr>
<tr>
<td>Crimes against Public Duty</td>
<td>order in state and public institutions</td>
</tr>
</tbody>
</table>

In the list, what Chapter One handles is perhaps a typical kind of “ruling relation,” but it is awkward to argue that domestic violence and bigamy both violate this kind of relation. Similarly, it is very confusing to say that a robbery of a capitalist investor is
against the socialist ruling relation. In recent years, some Chinese scholars have questioned the Soviet concept on the ground that it overemphasizes the "social relation" and ignores the relationship between the law and economic development as well as environmental protection. Also, the Soviet concept is criticized for focusing on "socialist social relations" and excluding "non-socialist" relations. Therefore, it has been proposed that the objects of crime under Chinese law should be defined as "socialist social interests," including all the interests that are identified in Article 10 of the Criminal Law (He Bingshong, 1993:116-126). These are legitimate challenges to the Soviet concept. The old concept is politically oriented and incompatible with the present context of China's economic reform. We should simplify the issue and go back to the traditional legal concepts of rights and interests.

With respect to the "objective aspects," the Chinese reception of western concepts has been systematic. The phrase "objective aspects" in Soviet-Chinese theory is virtually identical to actus reus in the Anglo-Saxon terminology. Like their western counterparts, the Chinese jurists hold that conduct could be by act or omission. In addition, Chinese authors (He Bingshong, 1993:142-146; Gao Ge, 1991:111-130) have been writing about the German concepts of echtes Unterlassungsdelikt (pure omission, i.e., not to assume a legal duty to act and thus constitute a crime) and unechtes Unterlassungsdelikt (impure omission, i.e., to use omission as a method to commit a crime that is usually committed by an act). Also, in recent years, China has employed the western concept of crime by possession in the anti-narcotic drug legislation.²⁷⁷

²⁷⁷ See Article 3 of Resolution of the Standing Committee of the NPC on Prohibition of Narcotic Drugs (1990). Under this article, possession of narcotic drugs is a criminal offence.
In relation to "the subject of crime" and "the subjective aspects," the Chinese share most of the general ideas with the westerners. The 1979 *Criminal Law* divides the ages and provides the concept of not criminally responsible for mental illness.\(^{278}\) The *Criminal Law* recognizes the German-Japanese and Soviet concept of culpability, classifies the mental states, and rejects the concepts of corporate crime as well as strict and absolute liability.\(^{279}\)

Under the *Criminal Law*, the basic mental states are intent and negligence.\(^{280}\) In theory, they are further classified into four types: direct intent, indirect intent, advertent negligence, and inadvertent negligence (Zhao Bingzhi, 1993b:171-186; Jiang, 1993:12-118). According to Zhu Huarong (1989:72), the four types of mental states are simply divided in light of the cognitive and volitional elements. This is demonstrated in Table 5.2.

---

\(^{278}\) Articles 14-15 of the *Criminal Law*. For discussion of the insanity defence, see Chapter VII of the thesis.

\(^{279}\) For discussion on corporate crime, see Chapter III of the thesis.

\(^{280}\) Article 11-12 of the *Criminal Law*. 

192
Table 5.2 The Division of Mental States in Chinese Criminal Law

<table>
<thead>
<tr>
<th>Types of Mental States</th>
<th>Cognitive Element</th>
<th>Volitional Element</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct Intention</td>
<td>The actor clearly knows that the conduct can (will or may) cause harm.</td>
<td>The actor pursues this consequence.</td>
</tr>
<tr>
<td>Indirect Intention</td>
<td>The actor clearly knows that the conduct can (will or may) cause harm.</td>
<td>The actor tolerates this consequence.</td>
</tr>
<tr>
<td>Advertent Negligence</td>
<td>The actor knows that the conduct may cause harm.</td>
<td>The actor readily assumes that the consequence could be avoided.</td>
</tr>
<tr>
<td>Inadvertent Negligence</td>
<td>The actor should have known that the conduct may cause harm, but does not know.</td>
<td>The actor is careless.</td>
</tr>
</tbody>
</table>


This scheme is obviously European, not Anglo-American. The confusion in common law is mainly owing to the use of too many terms that are not in logically formulated pairs, such as deliberately, purposely, knowingly, wilfully, intentionally, recklessly, negligently, carelessly, etc. Fletcher (1987:398) contends: “There is no term fraught with greater ambiguity than that venerable Latin phrase that haunts Anglo-American criminal law: mens rea.” Moreover, as he indicates (396-401), the terms, such as mens rea, culpability, intent, recklessness, and so forth, are employed in different ways: the English jurists tend to use them as descriptions of fact regardless of blame, the California judges, however, emphasize their normative content by employing words such as “wanton disregard for human life,” and so forth. The meaning of “wanton disregard” is

---

281 For a discussion of these concepts in Canadian law, see Simon Verdun-Jones, 1989.
apparently vague. Similarly, as Verdun-Jones (1989:128-159) has observed, there is apparently a great deal of vagueness in the Canadian concept of "reasonable person" that is subject to various case law tests of "criminal negligence." This kind of controversy is a characteristic feature of the Anglo-American caselaw system.

In Chinese law, the descriptive terms of both intention and negligence are descriptive and normative. This demonstrates the ancient Chinese tradition of using the law to enforce moral rules,282 and the influence of the imported European and Soviet concepts. In this respect, Chen Xingliang has offered some interesting comparisons. Under the title of "subjective malignancy," Chen (1992:27-28) asserts that moral evaluation is an important function of culpability in continental Europe, of mens rea in Anglo-Saxon law, and of guilty mind in Soviet law. In fact, the German concept of Zumutbarkeit (i.e., the possibility of expecting the person to act lawfully) also appears to be descriptive and normative. Given the normative element, vagueness always exists in the concepts of the mental state, although its level may be lowered through logically articulated provisions.

5.2 Specifying the Special Part

5.2.1 Brevity in the Special Part

From a neo-classical analytical perspective, it appears that the Special Part of the 1979 Chinese Criminal Law has many problems. Hence, this part of the Criminal Law should be the focus of the ongoing Chinese recodification.

282 In this respect, however, the ancient Chinese law primarily emphasized the normative content of intent. See Zhang Jingfan, Lin Zhong and Wang Zhigan, 1992, at pp.305-318.
Brevity is a major characteristic feature of the Special Part of the Criminal Law. During the drafting process, it was clearly appreciated that the Criminal Law in the way it was drafted would become one of the shortest in the world. At the time, as Gao Mingxuan (1981:20) recalled, this was owing to several factors: first, the Chinese legislature did not have sufficient legislative experience to deal with regulatory crimes (*mala prohibita*); second, the law makers had to take into account of the division between criminal offences and disciplinary wrongdoings (e.g., infringement of the Party’s disciplinary regulations); and third, the concern of overcriminalization.

Another important factor was the underlying idea of making the law brief to ensure flexibility in its operation. The idea was to “combine the principles with flexibility.” Forty years ago, when the NPC was to enact the first Constitution of the PRC, Mao Tsetung (1977:126-128) praised the draft as a great success on the ground that it was a demonstration of a “combination of the principles and flexibility.”283 The idea is still considered a Marxist principle of law drafting (Gao, 1981:17-18). It is, however, unclear what exactly the limits of “flexibility” could be in legislation. In the history of the old version proletarian dictatorship, the true meaning of having “flexibility” in criminal law was to ensure the discretionary power to punish rather than to protect. In this sense, the combination of principles and flexibility appears to be similar to Vyshinsky’s concept of “socialist legality.”

A few years ago, Zhen Wei (1990:8) measured the sizes of the Special Parts (or the equivalent chapters) in some eighteen Criminal Codes by counting the number of

---

articles (or sections as in the Canadian *Criminal Code*) and comparing the average number of words (when translated into Chinese characters) in the articles. Table 5.3 shows the results of his research.

Table 5.3 Number and Length of Articles in the Special Parts of Codes

<table>
<thead>
<tr>
<th>Nation and Version (Year) of the Criminal Code</th>
<th>Number of Articles in the Special Part (or equivalent)</th>
<th>Average Length of Articles (in Chinese Characters)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada (1971)</td>
<td>375</td>
<td>288</td>
</tr>
<tr>
<td>France (1975)</td>
<td>406</td>
<td>203</td>
</tr>
<tr>
<td>Federal Republic of Germany (1976)</td>
<td>291</td>
<td>270</td>
</tr>
<tr>
<td>Italy (1968)</td>
<td>494</td>
<td>158</td>
</tr>
<tr>
<td>Spain (1971)</td>
<td>484</td>
<td>156</td>
</tr>
<tr>
<td>Austria (1974)</td>
<td>263</td>
<td>198</td>
</tr>
<tr>
<td>India (1953)</td>
<td>391</td>
<td>122</td>
</tr>
<tr>
<td>Albania (1952)</td>
<td>276</td>
<td>160</td>
</tr>
<tr>
<td>Brazil (1941)</td>
<td>239</td>
<td>166</td>
</tr>
<tr>
<td>Swaziland (1971)</td>
<td>222</td>
<td>176</td>
</tr>
<tr>
<td>USA (<em>Model Penal Code</em>)</td>
<td>108</td>
<td>356</td>
</tr>
<tr>
<td>Mongolia (1975)</td>
<td>177</td>
<td>210</td>
</tr>
<tr>
<td>Romania (1973)</td>
<td>207</td>
<td>165</td>
</tr>
<tr>
<td>Thailand (1956)</td>
<td>292</td>
<td>115</td>
</tr>
<tr>
<td>Republic of Korea (1975)</td>
<td>286</td>
<td>113</td>
</tr>
<tr>
<td>Japan (1968)</td>
<td>192</td>
<td>123</td>
</tr>
<tr>
<td>China (PRC) (1979)</td>
<td>103</td>
<td>93</td>
</tr>
</tbody>
</table>

*Source:* Zhen Wei, 1990, *Comparative Studies of Specific Offences in Criminal Law.* Table 2, at p.8.  

---

284 Although this "Code" is not a law, it is a model for legislation in the United States.  

285 Zhen's original Table has four columns, but I have deleted the third one "total characters in the Special Part," given it is unclear what instrument the author used to count the Chinese characters. After all, there is already a great deal of inaccuracy to measure the length by counting the translated characters.
The *Codes* listed here are articulated in diverse styles and translated by various translators in different writing styles. The translations are published in different years. The articles change their lengths in different editions. Also, it is unclear what methods Zhen employed to count the numbers.\(^{286}\) Apparently, *The American Series of Foreign Penal Codes*, which includes at least twenty-eight codes, is a better source for this kind of comparison, given the relatively unified translation and editorial criterion.\(^{287}\) Still, the general picture in Zhen's study is insightful for comparison. Obviously, as Gao Mingxuan (1981:20) said some fourteen years ago, the Chinese Special Part has the least number of articles when compared internationally.

It is worth noting that the twenty-three Chinese statutes enacted since the promulgation of the 1979 *Criminal Law* have in fact provided many specifics to supplement and improve the Special Part.\(^{288}\) The enactment of these statutes is a continuous process towards a comprehensive change to the Special Part.

---

\(^{286}\) Zhen does not specifically clarify his counting methods. In the case of the *Model Penal Code*, for example, I assume that the total of "108 articles" in his table actually refers to the subsections in Articles 210.0 - 251.4. However, it is relatively easy to count the number of articles in codes of the European style.

\(^{287}\) The Series is part of the Comparative Criminal Law Project conducted at Wayne State University Law School and directed by Edward M. Wise. It's production involves eminent figures in the field of comparative criminal law, such as Gerhard O. W. Mueller, Marc Ancel, and Hans-Heinrich Jescheck. This is apparently the best collection of criminal codes in English.

\(^{288}\) For a list of the statutes, see Chapter IV of the thesis.
5.2.2 Recodifying the Special Part

Having enacted the twenty-three statutes, the Chinese legislature is preparing to recodify the criminal law (Gao Xijian, 1995). According to Li Chun (1994), the Criminal Law Section of the Law Commission under the Chinese NPC Standing Committee has prepared a draft, that, in its 1993 version, has 28 chapters and 292 articles in the Special Part, up from the 8 chapters and 103 articles in the present Special Part.

Table 5.4 presents the differences between the present Special Part and the proposed 1993 legislative scheme. Apparently, the present Chapter Three “Crimes against Socialist Economic Order” has changed the most. It splits into 12 chapters (Chapters 7-18), and the total number of articles grows from 15 to 150, that is, a 900 percent increase. With this change, the new Criminal Law is to devote more than half of the articles in its Special Part for the protection of the “socialist market economy.” This, as it is discussed in Chapter IV of the thesis, is an important indication of the “emphasis shift” in the Chinese society.

The second most dramatic change is made to Chapter Six “Crimes against Social Administrative Order.” In the new scheme, it breaks into nine chapters (Chapters 19-

---

289 In the present Special Part of the Criminal Law, the term, “social administrative order” under Chapter Six refers to a wide range of “social relations” that do not fit properly under the titles of the other seven chapters. According to Chinese textbooks, this Chapter in fact includes eight categories of criminal offences: (1) obstructing the normal operation of the government or other “working units”; (2) obstructing the normal operation of the justice system; (3) breaching public order; (4) crimes against custom of the society; (5) crimes endangering public health; (6) crimes against the protection of cultural relics; (7) crimes against border control; and (8) “other crimes.” See Zhao Bingzhi and Bao Shuixian, “Crimes against Social Administrative Order,” in Gao and Zhao, 1993:658-718.
27), and the total of articles has increased from 22 to 82, that is, a rise of 273 percent. These massive changes are the results of the legislative development in the past fifteen years. On the list of the twenty-three criminal law statutes enacted after the promulgation of the 1979 Criminal Law, roughly seventeen of them were enacted to deal with crimes against the economy or against “social administrative order.” These statutes are:

1. Resolution of the Standing Committee of the NPC on Handling Labour-Reform Offenders and Labour-Reeducation Subjects Who Escaped or Recommitted Crime (1981);

Resolution of the Standing Committee of the NPC on Severely Punishing Offenders of Crimes Seriously Endangering the Economy (1982);

2. Resolution of the Standing Committee of the NPC on Severely Punishing Criminals of Crimes Seriously Endangering Social Order (1983);

3. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Smuggling (1988);

4. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Catching and Killing Wild Rare and Endangered Animals Specially Protected by the State (1988);

5. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Insulting the National Flag or National Emblem of the PRC (1990);

6. Resolution of the Standing Committee of the NPC on Prohibition of Narcotic Drugs (1990);

7. Resolution of the Standing Committee of the NPC on Punishing Criminals for Smuggling, Manufacturing, Selling or Distributing Pornographic Materials (1990);

8. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Illegally Excavating Ancient Cultural Scenes or Ancient Tombs (1991);

9. Resolution of the Standing Committee of the NPC on Strictly Prohibiting Prostitution and the Use of Prostitution (1991);

10. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Tax Evasion and Refusal to Pay Tax (1992);
11. Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Using Fake Trademark (1993);

12. Resolution of the Standing Committee of the NPC on Severely Punishing Crimes of Manufacturing and Selling Imitation and Low-Quality Merchandise (1993);

13. Supplementary Provisions of the Standing Committee of the NPC on Severely Punishing Crimes of Organising and Transporting People Illegally Crossing the Border (1994);

14. Resolution of the Standing Committee of the NPC on Punishing Crimes Against Author's Rights (1994);

15. Resolution of the Standing Committee of the NPC on Punishing Crimes of Breaching the Company Law (1995); and


Further, in the new scheme, Chapter Eight “Crimes against Public Duty” has changed substantively. It splits into two chapters, and has a 229 percent increase in the number of articles. This change apparently aims at providing for clearer rules for the war against corruption. The rest of the Chapters have relatively moderate changes. Chapter One “Counter-revolutionary Crimes” has a new title and a 19 percent increase in the number of articles. Chapter Two “Crimes against Public Security” has a 55 percent increase. Chapter Four “Crimes against Citizens' Personal Rights and Democratic Rights” has a new title and some 25 percent decrease of articles. Chapter Five “Crimes against Property” has a 43 percent increase. Chapter Seven “Crimes against Marriage and Family” virtually remains the same.
Table 5.4 Specific Changes to the Special Part of the Criminal Law

<table>
<thead>
<tr>
<th>Titles of Chapters &amp; Number of Articles in the Present Special Part</th>
<th>Titles of Chapters &amp; Number of Articles in the Draft Special Part (1993)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Counterrevolutionary Crimes (15 articles)</td>
<td>Crimes against National Security (19 articles)</td>
</tr>
<tr>
<td>Crimes against Public Security (11 articles)</td>
<td>Crimes against Public Security (17 articles)</td>
</tr>
<tr>
<td><strong>Crimes against Socialist Economic Order</strong></td>
<td></td>
</tr>
<tr>
<td>(15 articles)</td>
<td></td>
</tr>
<tr>
<td>Smuggling (14 articles)</td>
<td></td>
</tr>
<tr>
<td>Manufacturing and Selling Fake and Inferior Goods (12 articles)</td>
<td></td>
</tr>
<tr>
<td>Faking Trademark or Patent (10 articles)</td>
<td></td>
</tr>
<tr>
<td>Crimes against Financial Order (11 articles)</td>
<td></td>
</tr>
<tr>
<td>Crimes against Administration of Securities and Coupons (9 articles)</td>
<td></td>
</tr>
<tr>
<td>Crimes against Enterprise Management (9 articles)</td>
<td></td>
</tr>
<tr>
<td>Unfair Competition (9 articles)</td>
<td></td>
</tr>
<tr>
<td>Economic Fraud (7 articles)</td>
<td></td>
</tr>
<tr>
<td>Illegal Business Operation (7 articles)</td>
<td></td>
</tr>
<tr>
<td>Crimes against Taxation (8 articles)</td>
<td></td>
</tr>
<tr>
<td>Crimes against the Environment and Public Health (9 articles)</td>
<td></td>
</tr>
<tr>
<td>Crimes against Natural Resources (10 articles)</td>
<td></td>
</tr>
<tr>
<td>Crimes against Citizens' Personal Rights and Democratic Rights (19 articles)</td>
<td>Crimes against the Person and Rights of Citizens (14 articles)</td>
</tr>
<tr>
<td>Crimes against Property (7 articles)</td>
<td>Crimes against Property (10 articles)</td>
</tr>
<tr>
<td><strong>Crimes against Social Administrative Order</strong></td>
<td></td>
</tr>
<tr>
<td>(22 articles)</td>
<td></td>
</tr>
<tr>
<td>Obstructing Justice (13 articles)</td>
<td></td>
</tr>
<tr>
<td>Obstructing the Execution of Public Duty (5 articles)</td>
<td></td>
</tr>
<tr>
<td>Crimes against Border Control (9 articles)</td>
<td></td>
</tr>
<tr>
<td>Endangering Cultural Relics (5 articles)</td>
<td></td>
</tr>
<tr>
<td>Crimes against Public Order (13 articles)</td>
<td></td>
</tr>
<tr>
<td>Manufacturing or Trafficking in Narcotic Drugs (16 articles)</td>
<td></td>
</tr>
<tr>
<td>Manufacturing or Trafficking in Pornographic Materials (9 articles)</td>
<td></td>
</tr>
<tr>
<td>Organising Prostitution (11 articles)</td>
<td></td>
</tr>
<tr>
<td>Trafficking in Women or Children (7 articles)</td>
<td></td>
</tr>
<tr>
<td>Crimes against Marriage and Family (6 articles)</td>
<td>Crimes against Marriage and Family (6 articles)</td>
</tr>
<tr>
<td>Crimes against Public Duty (7 articles)</td>
<td></td>
</tr>
<tr>
<td>Embezzlement and Bribery (13 articles)</td>
<td>Crimias against Public Duty (10 articles)</td>
</tr>
<tr>
<td>Total: 8 chapters with 103 articles</td>
<td>Total: 28 chapters with 292 articles</td>
</tr>
</tbody>
</table>

In the new scheme, the numbers of chapters and articles appear very close to those in the Specific Part of the 1975 *Penal Code of Federal Republic of Germany* (StGB).\(^{290}\) Hopefully, this may enhance the specification of the constituent elements of crime in Chinese law. Nonetheless, apart from comparing the numbers of articles, one should also evaluate the draft on an article-by-article basis. In particular, it would be desirable to see that the new law specifies the oversimplified definitions and clarifies the vaguely defined "circumstantial" elements.

In the present Special Part, a major problem is the lack of factual description in the definitions. This, as Liu Shoufeng (1989) indicates, is due to the fact that the *Criminal Law* was drafted in accordance with a strange "guiding principle" of "better be crude, rather than specific." This might be another Chinese version of Vyshinsky's concept of "socialist legality."

Article 132, which is the only provision of intentional homicide in the Special Part, is an example of oversimplification. The Article reads:

Whoever intentionally kills another is to be sentenced to death, life imprisonment or not less than ten years of fixed-term imprisonment; if the circumstances are relatively minor, he is to be sentenced to not less than three years and not more than ten years of fixed-term imprisonment.

In this Article, the only description was the phrase "intentionally kills," but the scale of sentence is from three years imprisonment to death. In the general category of

intentional homicide, which includes all types of direct-intent and indirect-intent killings, the law does not differentiate those that deserve a death sentence and those do not, nor does it clarify the "relatively minor circumstances." This kind of brevity gives the judiciary too much discretionary power. It may generate disparities in sentencing practice and lead to injustice, although this kind of disparity is primarily an issue among Chinese legal scholars rather than practitioners.

The Chinese rules on intentional homicide might be specified by borrowing foreign concepts. The key point is to differentiate the various types of intentional homicide and their corresponding punishment. The law may provide a series of definitions of different kinds of intentional homicide (i.e., separated definitions of offences, such as first degree murder, murder, intentional homicide, aggravated intentional homicide) in light of the various levels of harm or dangerousness. If the law tends to keep all types of intentional homicide under one roof, it should at least identify the aggravating circumstances so as to limit the use of death penalty or life imprisonment.

In this respect, the legislature may consider the concept of first degree murder, that, as in the Canadian Criminal Code, includes planned and deliberate murder, murder for money, murder of a police officer, and killing during the course of hijacking, sexual assault, kidnapping and hostage taking. An alternative to this approach is found under §211 of the German Penal Code, that defines "murder" as a type of intentional homicide of aggravated liability, different from other intentional killing under §212. Under §211,

291 See section 231 of the Canadian Criminal Code.

292 In the English translation of the German Penal Code, the title of § 212 is translated as "Manslaughter." This might be an error. It seems to me what "manslaughter" refers to under this article is not killing by recklessness, but homicide with the intent to kill that is not covered by § 211(2) (murder). The German equivalent to "manslaughter" is perhaps
an intentional homicide is defined as "murder" on one of the three grounds: first, it is *motivated* by "a lust to kill," the murderer's "sex drive," and so forth.; second, it is committed by means that is "treacherous or cruel" or "dangerous" to the community; and third, it is for the purpose of making possible or concealing the commission of another crime. Also, there are other interesting models. For example, killing during the commission of another violent crime (e.g., robbery, rape) constitutes a "combined offence" (i.e., two offences combined together in one) under the *Japanese Penal Code*, the *Criminal Code* in Taiwan (i.e., the 1935 *Criminal Code of the Republic of China*), and the 1953 *Criminal Code of the Republic of Korea*. Further, the *Criminal Code* of the RSFSR provides a most inclusive list of "aggravating circumstances" of intentional homicide, including:

1. from mercenary motives;
2. from motives of hooliganism;
3. against the victim who was performing an official or social duty;
4. with special cruelty;
5. causing danger to the life of many persons;
6. for the purpose of concealing another crime or facilitating its commission, or in conjunction with rape;
7. against a woman known by the actor to be pregnant;
8. by two or more persons;
9. by a person who has previously committed intentional homicide;
10. committed because of a blood feud; and
11. by an especially dangerous recidivist.\(^{294}\)

\(^{294}\) included in the provision of § 222 (negligent homicide). §222 seems to cover both killings by advertent negligence and inadvertent negligence. In Taiwan, some German-trained Chinese lawyers have provided a Chinese translation that holds this position. See *West Germany Penal Law*, translated by Hu Qiaorong and Su Junxong, in Ministry of Justice of the ROC, 1980, Vol. 1, pp.661-874.

The inclusiveness of this list is an indication of the generally harsh nature of the Soviet-type socialist criminal law. Some of the words, such as "motives of hooliganism," are vague. Nonetheless, this kind of provision is better than the two-character description in the Chinese article. Hence, in this respect, the Russian law is still one of the models for the specification of the Chinese Criminal Law.

Taking the analytical approach of comparison, the formation of the intent, motivation, purpose, means, the status and number of the victim(s) and the actor(s), are important factors determining the gravity of intentional homicide in the various codes. Interestingly, the Japanese Penal Code identifies killing parents (elder relatives) as an aggravated type of intentional homicide. An almost similar provision is found in the 1935 Criminal Code of the Republic of China, the Criminal Code of the Republic of Korea, as well as the 1956 Penal Code of Thailand. This appears to be based on the oriental family-oriented values.

294 § 102 of the RSFSR Criminal Code.

295 See Article 220 of the Japanese Penal Code.

296 See Article 272 of the Criminal Code of the Republic of China. This article, however, provide both killings of parent and child as intentional homicide of aggravated liability.

297 Article 250 of the Criminal Code of the Republic of Korea (as revised in 1975).

298 Article 289 of the Penal Code of Thailand.

299 It is noteworthy, however, that both the Spanish Penal Codes (as revised in 1971) and Italian Penal Code (as revised in 1968) also provide killing of family members as an aggravated circumstance. See § 405 of the Spanish Penal Code and § 577 of the Italian Penal Code. Nonetheless, this kind of provision is not found in the 1975 German Penal Code, the 1974 Austrian Penal Code, the 1971 Swiss Penal Code, or the Canadian Criminal Code.
Given the provision of three-year imprisonment as the minimum sentence, the Chinese Criminal Law should also specify a number of circumstances of mitigated liability, such as: (1) provocation, as provided in the German Penal Code, the 1974 Austrian Penal Code, the 1971 Swiss Penal Code, the 1935 Code of the Republic of China, the RSFSR Criminal Code, the Model Penal Code, and the Canadian Criminal Code;\(^{300}\) (2) assistance to suicide, as in the German Penal Code, the Japanese Penal Code, the Austrian Penal Code, the Swiss Penal Code, the Korean Penal Code, the Thailand Penal Code, the Italian Penal Code, the 1935 Code of the Republic of China, the Model Penal Code, and the Canadian Criminal Code;\(^{301}\) and (3) infanticide, as in the German Penal Code, the Austrian Penal Code, the Swiss Penal Code, the Korean Penal Code, the Italian Penal Code, the Spanish Penal Code, the 1935 Code of the Republic of China, and the Canadian Criminal Code.\(^{302}\)

Hopefully, with the specific division of intentional homicide, the discretionary power of the judiciary can be reasonably limited. The same approach should also be


employed for the specification of other provisions in the Chinese Special Part, including
the definitions of assault and injury, rape, and robbery, and so forth.

There are other major problems in the Chinese Special Part generating a great deal
of vagueness in the definitions of crime. One of them is the provision of clustered
simplified definitions in an article. For example, Article 151 provides: "Whoever steals,
swindles, or grabs articles of public or private property of a relatively large amount" shall
be sentenced. This half-sentence description covers the definitions of three offences: theft,
fraud, and qiang duo (snatching). Indeed, they should be provided in separated articles.

The definition of theft is another example of extreme brevity. Apart from a
separate definition of embezzlement, the Criminal Law has only one additional
provision on theft, covering "habitual theft" and "theft of property of a huge amount." For
specification, the law may either provide a series of definitions of offences or specify
the aggravating and mitigating circumstances in light of the various constituent elements
and the other relevant factors, such as the value and nature of the object, the method and
instrument of the crime, the number of the actors, the victim, and so forth. There are
various enlightening models in foreign codes. The German Penal Code, for example,
provides a very detailed model, which classifies theft into some eight categories: (1) theft
(common theft); (2) aggravated theft; (3) armed theft and gang theft; (4) embezzlement;

303 The crime of qiang duo is an act to suddenly grab away an article of property from the
victim without using force or threat. Hence, it is different from robbery. A similar concept
is found under §145 of the RSFSR Criminal Code. The Russian concept of Grabiozb is
translated as "open stealing" in English by Harold J. Berman and James W. Spindler. See
Berman, 1972, at p.169.

304 Article 155.

305 Article 152.
(4) theft in the home and family; (7) joyriding; and (8) theft of electrical energy.306 The Spanish Code and the Italian Code also classify the various types of theft.307 A more simplified model is found in the Japanese Penal Code, that divides theft into two large categories: theft and embezzlement, each includes some further classification.308 The 1935 ROC Criminal Code follows the Japanese model.309 Further, the Law Reform Commission of Canada proposed a really simple model in its 1987 draft of a new Canadian Criminal Code. Clause 13(1) defines theft as a crime to "dishonestly appropriate another's property without his consent" without any further specification or classification. This, as the Commission commented, "radically simplifies" the provisions in the present Canadian Code.310

Taking into account the need of specification and the structure of the 1993 Chinese draft, the new Chinese Criminal Law might integrate the German and the Japanese models, keeping the division of theft and embezzlement, classifying both into

306 §242-248c.

307 See §514-516 (theft), 535 (embezzlement), 536 (theft of electricity), 394-400 (embezzlement by civil servant) of the Spanish Penal Code; §624 (theft), 625 (aggravated theft), 626 (mitigated theft), 627 (theft of jointly owned property), 631 (real estate theft), 632 (theft of water power), 646-647 (embezzlement), and 314-316 (embezzlement by civil servant) of the Italian Penal Code.

308 See §235 (common theft), 235.2 (real estate theft), 244 (theft in home and family), 252 (common embezzlement), 253 (occupational embezzlement), 254 (embezzlement of uncared property) of the Japanese Penal Code.

309 See §320 (common theft), 321 (aggravated theft), 324 (theft in home and family), 335 (common embezzlement), 336 (embezzlement by civil servant), 337 (embezzlement of jointly owned property), 338 (embezzlement of electricity, embezzlement in family) of the Criminal Code of the Republic of China.

sub-categories (e.g., embezzlement by layman and embezzlement by civil servant), and specifying the aggravating and mitigating circumstances.

The brevity in the Special Part of the *Criminal Law* gives the Chinese judiciary and the law enforcement agencies an enormous discretionary power to determine the line between crime and non-crime. This subject will be discussed in the next Chapter of the thesis in conjunction with Chinese criminal statistics. Also, it is noteworthy that during the past fifteen years the Chinese SPP and SPC have made tremendous efforts to specify the statutory definitions by issuing judicial opinions. This, however, has caused some new problems. Indeed, a new *Criminal Code* might be a better solution to the problem of vagueness.

5.3 The Theoretical Controversies

5.3.1 *The Division of the “Schools”*

Since the Italian school (Cesare Lombroso, Enrico Ferri and Raffaele Garofalo), the classical and the neo-classical criminal law have experienced constant challenges in the western world. Amongst the German scholars of criminal law, there were heated debates between Karl Binding's neo-classical group and Franz von Liszt's sector during the 1880s-1910s. Subsequently, in Japan and China, the various theories are divided into two large categories: “the old school of criminal law,” that is the classical and new-

---

311 For a brief review of the propositions of the Italian School, see Vold and Bernald, 1986:36-46.
classical school; and "the new school of criminal law," that is the Italian school and other criminological theories which favour the elimination of the classical law.

This kind of division is simplistic, given the various perspectives of the "new school" are so different from each other, ranging from biological and psychological theories to sociological approaches. Yet, to many comparatists, the division is simply to demonstrate some of the fundamental differences of the two "schools," such as: act orientation versus actor orientation, free will versus determinism, retribution versus rehabilitation; moral responsibility versus social responsibility; criminal law versus criminal policy and social policy.\(^{312}\)

In 1977, an eminent Japanese law professor, Eiyu Fujiki (1982), published an interesting table to summarise the competing ideas of the two "schools" with respect to the criminal law. The main points are included in Table 5.5.

\(^{312}\) At the time, the neo-classical German scholars were led by Karl Binding (1841-1920), and the "new school" were led by Franz von Liszt (1851-1919). For a discussion of the division of the "old" and the "new" schools, see Gan Yupai and He Peng, 1984, pp.110-190; Han Zhongmo, 1981, 13-44; Kame Kimura (Ed.), 1991, Dictionary of the Science of Criminal Law, pp. 14-23.
Table 5.5 Comparison of the “Old” and the “New” Schools

<table>
<thead>
<tr>
<th>Issue</th>
<th>The Old School</th>
<th>The New School</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crime</td>
<td>Crime is committed by a person with a free will. It is chosen for happiness.</td>
<td>The person who commits the crime does not have a free will. Crime is determined.</td>
</tr>
<tr>
<td>Reason to use punishment^3^3</td>
<td>moral responsibility: the criminal shall assume liability for his conduct.</td>
<td>social responsibility: sanction is used to redress the dangerous behaviour.</td>
</tr>
<tr>
<td>Nature of punishment</td>
<td>retribution.</td>
<td>rehabilitation.</td>
</tr>
<tr>
<td>Measure of punishment</td>
<td>proportionality with crime</td>
<td>the criminal’s dangerousness</td>
</tr>
<tr>
<td>Function of punishment</td>
<td>focus on general prevention</td>
<td>focus on special prevention</td>
</tr>
<tr>
<td>Elements of crime</td>
<td>objectivism: focus on act</td>
<td>subjectivism: focus on actor</td>
</tr>
<tr>
<td>Statutory interpretation</td>
<td>formalist approach</td>
<td>substantive approach</td>
</tr>
<tr>
<td>Concept of unlawfulness</td>
<td>violation of legal norms and infringement of interests</td>
<td>against the society</td>
</tr>
<tr>
<td>Essence of responsibility</td>
<td>blameworthiness</td>
<td>dangerous personality</td>
</tr>
<tr>
<td>Ability of responsibility</td>
<td>ability to appreciate right and wrong and to act accordingly</td>
<td>fitness to punishment or possibility of rehabilitation</td>
</tr>
<tr>
<td>Concept of intent</td>
<td>emphasize the volitional aspect</td>
<td>emphasise the cognitive aspect</td>
</tr>
<tr>
<td>Concept of negligence</td>
<td>subjective standard</td>
<td>objective standard</td>
</tr>
<tr>
<td>Attempt</td>
<td>mitigated punishment</td>
<td>no mitigation</td>
</tr>
<tr>
<td>Liability of parties to crime</td>
<td>derived from the perpetrator</td>
<td>direct</td>
</tr>
</tbody>
</table>


\^3\^3 In this context, the Chinese term xingfa may refer to both “punishment” and “sanctions in the criminal law.” In this Table, xingfa is translated as “punishment.”
Some of the controversies are directly relevant to the issue of vagueness in the legal definitions of crime. Indeed, to some of the new school advocates, the subject of "how to specify the criminal law" probably does not merit a discussion, since the true issue would be whether or not we need a criminal law in the first place. In their eyes, the classical and neo-classical law is simply a complete bankruptcy. For example, Ferri (1967:16) contended that instead of establishing a "less stupid" and "more humane" system, the classical reform had only made things worse:

[T]he criminal ... is put in prison and there, usually unemployed, charges the taxpayers with a new burden to maintain him in an idleness which brutalizes him, ruins his health, and makes him less fitted for social life.

Ferri's conclusion is debatable. The classical reform may be a failure to curb the growth of crime and reduce the population in prison, but crime control was only one of the goals of classicism. As Mueller (1990:10-11) has pointed out, the classical reform has been a great success in the promotion of human rights protection throughout the world. The classical principles are well recognised in some of the most important intentional criminal justice conventions, including the *International Bill of Human Rights*; the *United Nations Standard Minimum Rules for the Treatment of Prisoners*; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment*; the *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*; and the *Basic Principles on the Independence of the Judiciary* (UN, 1992). It may be difficult to assess the enormous significance of these conventions by empirical data, but ignoring it might lead the law reform into a wrong direction. The unfortunate relation between Ferri's criminal law reform and the fascist course in Italy is only one of the examples.
5.3.2 The Controversies

Let us approach the controversies in a more academic fashion. According to Ferri (1967:12-14), it is problematic to view crime as an abstract legal entity, since this indicates an ignorance of the "criminal" as well as the "conditions" in which crime is committed. At the time when he wrote the comments, this was probably the case of the "old school." However, defining a criminal offence in law and looking for its causes are completely different matters. The early classical advocates were probably ignorant of the complexity of the causes, but defining crime as an entity in law per se should not be blamed for this ignorance. The rule of law requires that all criminal offences must be defined in law, that the language of the law must satisfy certain standards of definiteness, and the law must be equal to the various kinds of individuals, no matter what has caused the criminal events.

Apart from those that have already been classified in the various constituent elements (e.g., criminal capacity, mental state, etc.), the legal definitions of crime can hardly go further to differentiate the criminals and the courses. In the past century, what has been established in the civilised world is really a two-tier system to achieve a balance of legality and crime control. The law defines the various criminal offences in light of the constituent elements as unified standards for prosecution and conviction. Moreover, it provides for alternatives to the traditional types of punishment and individualised guidelines of sentencing, parole, and the execution of sentence. There is no compelling evidence to prove that this is not the right direction for the next phase of China's reform of the criminal law.

There is a great deal of controversy in relation to the classical concepts of free will, retribution, and utilitarianism. The classical and neo-classical school, Phillipson
(1970:228-229) asserts, regard human beings as being rational, exactly alike, and designed to react similarly to the external force of punishment. It may be naive to assume that all criminals weigh pleasure against pain before they engage in criminal activities. Yet, the criminal law has to be formulated upon an expectation that human beings are capable of making rational choices for their action, that the vast majority of the population do have a reasonable sense of responsibility, that the brains of most normal and mature people do function and direct the body movement, although some of us may have problems in behaving rationally.

Moreover, the discussion of "pleasures and pains" clearly differentiates motivations. Bentham (1977:16-17) has identified at least fourteen different types of pleasures and twelve categories of pains. The differentiation is crude, but it is compatible with some of the modern classifications of criminals. For instance, one might ask: Do many street criminals steal and rob primarily for what Bentham called "the pleasures of senses?" Do white-collar criminals operate mainly for "the pleasures of wealth?" Are many delinquents lured into the gangs for the various kinds of "pleasures dependent on association?" Are many engaged in crimes of passion seeking for "the pleasures of relief?" So Gottfredson and Hirschi (1990:85) contend that the classical notions are "underdeveloped social control theories." Modern social control theories (Hirschi, 1979) assert that "bonds" are important in crime prevention. But is this due to the fact that the "bonds" bring us some of the pleasures that were listed by Bentham a long time ago, such as good names, amity, piety, benevolence and expectation?

Many criminals are not deterred by punishment, so Feuerbach's notion of "psychological compulsion" is not a universal truth. Still, many of us do think about the
legal consequences of our behaviours. Punishment is not only the sentence, but also the pre-trial procedure, the prosecution, the appearance in a courtroom, the record, the exposure, and so forth. Determinism is an important concept, but it may be too early to conclude, as Ferri (1967:203-298) did, that free will is already “denied by science.” Although modern science has explored the impacts of various factors on human behaviour, the actors mostly still go through a decision-making process before they act. In their discussion of “free-will environmental determinism,” Taylor, Walton and Young (1973:114) note:

... in particular, Edwin Sutherland with his theory of differential association, Oscar Lewis and the theory of the culture of poverty, and, finally, the subcultural theorists who now occupy such a central place in criminological discussion. All of them have in common a simple and essentially positivistic view of the relationship between men and society: the external constraints are 'influences' on social action and yet men somehow assert an ambiguous free will (e.g. to become criminal or not).

Moreover, Bandura’s studies of psychological reinforcement also support the classical propositions. He finds three forms of reinforcement control upon human behaviours: direct external reinforcement, vicarious or observed reinforcement, and self-reinforcement (Bandura, 1976:219-227). “Behaviour is extensively controlled by its consequences,” he contends, since “people repeatedly observe the actions of others and the occasions on which they are rewarded, ignored, or punished” (1976: 222). He continues:

[H]umans can, and do, regulate their own actions to some extent by self-produced consequences. They do things that give them self-satisfaction and a feeling of self-worth, and refrain from behaving in ways that result in self-criticism and other self-devaluative consequences.

314 This concept has been introduced to China. See, e.g., Han Zhongmu, 1981, at pp.25-26.
To me, this appears to be a modern elaboration of free will, utilitarianism and deterrence. Further, Bandura's concepts of "negative reinforcement" and "positive reinforcement" have obviously embraced Bentham's ideas of pains and pleasures. Also, Jeffery (1990:241-244) agrees that punishment can be effective if it is swift, certain, and overcomes the "positive reinforcement" (i.e., the pleasure of crime).

To many critics, another problem with the classical school is, as Taylor, Walton and Young (1973:3-6) put it, "concentrating on questions of legal order and disposition," but ignoring the fundamental social problems. The validity of this kind of comment depends on the social context. Two hundred years ago, as Williams and McShane (1988:17) observed, the classical school was a movement designed to reform society in the western world and was both conflict-oriented and structural. They held:

The conflict classification derives from the fact that reforms were aimed at existing social arrangements. The new philosophy of the common people was in conflict with religious and economic systems, the old governmental structure, and forms of knowledge based on religious revelation.

Williams and McShane went on to argue that the emphasis of the classical school on the criminal law is a characteristic of a fully structural approach for the promotion of fundamental social changes. Hall and the Brantinghams (Brantingham & Brantingham, 1981a:9) also hold that the classical propositions, such as codification and utility, were radical innovations which changed fundamental assumptions about crime and criminal justice. As indicated in the previous Chapters of the thesis, in the present Chinese context, the implementation of the principle of legality is an important way to resolve some of the fundamental problems of the society. In the ongoing Chinese law reform, the specification of the law is not just to facilitate the war against the crime. Rather, it is also to ensure that
the law will no longer be primarily used for political repression or, as Muller (1990) put it, simply be "imposed by those above to restrain those below."

5.3.3 More Thoughts about the New School

The "new school" has made major contributions by introducing the methods and concepts of biological, psychological and sociological sciences to the study of crime and criminal law. According to Kan Suhua (1994a:109-112), the Chinese started to translate and publish the writings of the various pioneers of criminology, including Lombroso and Ferri, and to teach the theories at Chinese universities in the early 1920s. During the 1950s to the late 1970s, criminology vanished in China when many believed in the imported Soviet slogan that socialism could eliminate crime (Kan, 1994a:112-113). In the past fifteen years, however, China has re-established the academic discipline of criminology, and imported a great volume of "new" concepts from the West (Kan, 1994; Chao Manzhi, 1988; Yang Chunxian et al., 1990). This is important for the growth of Chinese social science. Nonetheless, some of the "new" perspectives have serious theoretical and practical problems. In particular, their general scepticism towards the criminal law may be misleading to the law reformers in China.

Starting from Lombroso (1977),315 scepticism to law has been a characteristic feature in some of western criminological theories in the tradition of the early Italian school. Williams and McShane (1988:22) have observed that many criminologists simply had no interest in legal issues. In their eyes, as Brantingham and Jeffery (1981:233)

315 There may be earlier pioneers of scientific criminology, see Williams & McShane, 1988, at p.25.
pointed out, criminal law was criminologically irrelevant, and the only critical dimension of the criminal event became the offender:

Because the offender made no rational calculation of risks and gains before commission of a crime, three of the four dimensions of the crime became criminologically irrelevant. Law need not be studied by criminologists because offenders paid it no heed in committing a crime. The distribution of criminal opportunities -- the clustering of things to steal, the behaviour patterns of victims -- became irrelevant because the forces motivating an offender would push him until he found a victim or target. Similarly, the locations of crimes were incidental -- if they did not occur in one location, they would merely occur some where else.

In essence, the true mission of the Italian school and its followers was to identify the individual factors that might function as the causes of crime and wrongdoing (Ferri, 1967). The theories were primarily developed for social control and not for the promotion of human rights in criminal justice. Subsequently, the individual theories of this “new school,” and the biological perspective in particular, once served the fascist Italian regime and Nazi Germany. Given the totalitarian tradition in Chinese history, one has to be cautious in implementing these ideas in the reform of law.

The early positivist reform (Lombroso, 1977; Ferri, 1967; Garafalo, 1968) to the classical and neo-classical law was to replace the legal definitions of crime by the so-called scientific classification of criminals, and to substitute the retributive punishment by treatment and security measures, such as asylums for the criminal insane, execution for the born-criminals, indeterminate confinement for adult recidivists, overseas penal colonies for habitual or profession thieves, compulsory labour for criminals of "idleness, apathy or vagabondage," and so forth. The reform resulted in what Stanley Cohen (1985:30-32) called “categorization,” "professionalization" and the "victory of the asylum." However, since the end of the World War II, we have seen little success in the implementation of such techniques in crime prevention.
In particular, it has always been a question as to what exactly a regime can do in terms of implementing the biological and socio-biological theories, such as Hooten's ideas regarding the "organic inferior" (1977), Lange's twin theory, findings of XYY chromosomes, EEGs, GXE interactions, IQ, eugenics, and brain-environment interactions. A remaining problem is: Can the techniques be used for crime control without infringing upon human rights?

Biological and socio-biological positivism was once influential in the former Soviet Union. For instance, Soviet criminologist Avanesov (1982:126-127) wrote: "It is necessary to stress that consideration of biological (genetic) problems can largely predetermine the organisation of differentiated individual preventive action." Yet, it is still a mystery to the outside world what exactly the KGB had accomplished in terms of breaking the "dialectical" interconnections between the brains of their enemies and the social environment. Fortunately, no one in China has openly proposed the use of surgeons and medical experts to rehabilitate criminals. The impacts of the imported biological and socio-biological theories on the Chinese legal system are primarily found in juvenile justice and in the laws of sterilization for non-criminals suffering from serious genetic diseases.

316 For more discussion, see Jeffery, 1990, at pp. 166-211; and the relevant chapters in Vold & Bernard, 1986; Wilson & Herrnstein, 1985.

317 According to Lin Zhuin, Vice-President of the Supreme People Court, the juvenile justice system is established owing to the fact that juvenile offenders, given the "biological and psychological impacts of adolescence," are different from adults. The importance of this development in law, he says, is determined by the increasing rates of juvenile and young offenders under the age of 25. This percentage in the total of crimes, he indicates, has increased from about 30 per cent in the 1970s up to 50 or "even" 60 per cent. See China Law Yearbook, 1989, at pp. 774-775.

For examples of provisions on sterilization of people who are feebbleminded or have serious genetic diseases, see Birth Control Regulations of Gansu Province, Birth Control Regulations of Henegjiang Province, and Birth Control Regulations of Hebei Province.
With respect to the reform of Chinese criminal law, some of the biological concepts may be employed in the specification of sentencing and correction guidelines. For example, IQ may be a useful concept to define feeblemindedness for mitigation, if the technology of IQ assessment is available to the courts.

Similarly, the psychological concepts of "criminal psychopath," "psychopathic personality," "sociopath" and "antisocial personality" (Vold & Bernard, 1986; Meier, 1989) may be borrowed from the western world for specified sentencing and correction guidelines, but not for the definition of crime or conviction. In recent Chinese publications, there are clear indications of an increasing influence of these western concepts.318 For example, the Chinese concept of sociopathy (Liu Anqou, 1988:556-557) is virtually an imitation of the old-fashioned American Psychiatric Association’s definition in its 1968 edition of Diagnostic and Statistical Manual of Mental Disorders.319 One should, however, bear in mind that the criminal law can only intervene when a crime is committed. For the protection of human rights, China should be very cautious in implementing the ideas of preventive detention, no matter how many are believed to be sociopath.

318 An example of the recent efforts to introduce western psychological concepts into the Chinese legal studies is found in the Encyclopedia of Criminal Sciences, which holds that five types of abnormal personality "often cause criminal behaviour." They are paranoid personality, hysterical personality, antisocial personality (i.e., sociopathy), affective personality and labile personality. See Yang Chunxian et al., 1990:238.

319 The 1968 APA definition, as cited by Vold and Bernard (1986:122), reads:

The term is reserved for individuals who are basically unsocialized and whose behaviour pattern brings them repeatedly into conflicts with society. They are incapable of significant loyalty to individuals, groups, or social values. They are grossly selfish, callous, irresponsible, impulsive, and unable to feel guilt or to learn from experience and punishment. Frustration tolerance is low. They tend to blame others or offer plausible rationalization for their behaviour.
The western sociopsychological notions, such as interaction patterns, group membership, and association (Meier, 1989), may also assist China's law reform. For instance, the concept of secondary deviance in the labelling theory (Lemert, 1979) may be supportive to the relatively "informal" approach in the Chinese juvenile justice system. With respect to the reform of the 1979 Criminal Law, the theory may be supportive to the outcries of Chinese academics against overcriminalization.\textsuperscript{320} The criminal law should only be the last resort.

The concept of socialization, which asserts that a delay of moral development in one's life is a cause of criminal behaviour, is compatible with the traditional notion of moral responsibility.\textsuperscript{321} As Yu Haocheng (1988:12-13) has defined, socialization is a developing process from a "biological man" to a "social man," i.e., a process in which one adapts oneself in his interconnection with the social environment to the social reality and becomes a member of the given society. This, he argues, is a process to accept social norms that are legally and morally defined. Intent and negligence should continue to be the subjective elements of crime in Chinese law, and motivation should be considered in sentencing. Nonetheless, law and morality only partially overlap with each other, when the immoral behaviour is harmful to the society. The law should only enforce those moral standards that are well recognised in modern society, such as: one should not steal, kill, or

\begin{itemize}
  \item See, e.g., discussion of criminalization and decriminalization in Zhao Bingzhi and Bao Shuixian, 1994.
  \item Kohlberg, as cited by Jackson (1991:190), describes socialization as a moral development divided into three levels and six stages: the punishment and obedience orientation and the instrumental-relativist orientation at the preconventional level; the "good boy/nice girl" orientation and the "law and order" orientation at the conventional level; and the social-contract legalistic orientation and the universal-ethical orientation at the postconventional level. Those who get stuck at a low level of moral development are likely to commit crime. In this sense, crime can be considered an immoral behaviour.
\end{itemize}
rape for one's selfish desire. Also, morality should not be defined on basis of the so-called "class struggle."\textsuperscript{322}

The western learning theories deserve more attention. Applying Sutherland's differential association theory (Sutherland and Cressey, 1974), the criminal law should provide for effective means to control the social interaction between criminals. With respect to the Chinese Criminal Law, the definition of instigation should probably be specified, so that the instigator could be punished independently, no matter whether or not the offence is actually committed.\textsuperscript{323} However, the Chinese legislature should not be in a rush to implement Bandura's concept of symbolic modelling (1976) for any further control of the mass media in China. Already many are blaming the limited number of Western movies on the Chinese television for "poisoning" the Chinese youths.\textsuperscript{324} The accusation is, however, hardly supported by empirical studies.

Crime is a social problem, and the criminal law is only one of the means to contain it. This may be a most important point proposed by the various kinds of western social-structural theories. The Chinese importation of these theories might assist the policy

\textsuperscript{322} Taking the Marxist approach of class analysis, many Chinese scholars assume that a cause of crime is the influence of the corrosive western culture and the bourgeois values. See Yu Haochong, 1988; Shao Mingzhen, 1986; Wu, 1988.

\textsuperscript{323} In the present Chinese Criminal Code, Article 26 provides that the instigator shall be punished "in light of his role in the joint crime." Given the term "role" is vague, the liability of the instigator can be defined as independent or derivative. A number of criminal codes have special provisions of instigation. The German Penal Code provides some detailed rules in its §26 and 30. For comparison, also see §61 of the Japanese Penal Code, §24 of the Swiss Penal Code, §111 of the Italian Penal Code, §4 and 52 of the Spanish Penal Code, §29 of the ROC Criminal Code, §2.06, 5.02, and 5.04 of the Model Penal Code, and §21 of the Canadian Criminal Code.

\textsuperscript{324} See, e.g., Shao Daoshen, 1987, at pp.148-149.
makers to understand that harsh punishment cannot guarantee a decrease in crime rates. Criminalization and punishment are important, but society has to deal with the social factors of crime, including:

Different density of population, the state of public and religious opinion, the constitution of the family, the educational system, alcoholism, the economic and political organisation, organisation of public administration, justice, and judicial police, and finally the civil and penal legislative system in general (Ferri, 1967:187).

The past fifteen years have seen an increase of crime rates in China. In a transitional period, this is an inevitable phenomenon of social disorganization or a by-product of modernisation (Durkheim, 1979; Shelley, 1981). The old Chinese mechanical solidarity is weakened. Private enterprises are growing fast throughout the country. Economic disparity between the poor and the rich is obvious. Rules change frequently. To some extent, the Chinese society is experiencing both anomie and egoism. Even worse, there are increasing strains. Socialism can no longer guarantee a job and lifelong benefits to a worker. The inflation rate is high. So is the unemployment rate. All these changes may have had some impact on China's crime rates, although little empirical research has been carried out on this kind of subject. In this context, the law can only accomplish what it can, and leave the rest to other parts of the social control system. Let us recall what Franz von Liszt said a long time ago:

*The best social policy is the best criminal policy.*

---

325 Anomie is defined as a situational lack of social regulation. See Durkheim, 1979, at pp. 124-129. Egoism refers to a situation in which a value has been placed on the unrestricted pursuit of individual desires. See Taylor, Walton & Young, 1973, at p.87.

326 In recent years, China's GDP growth is about 10-14 per cent each year, whereas the inflation rate is around 20 per cent.
Conclusion

What China needs is an integrated criminal law theory to replace the old repressive Marxist slogans and to direct the reform of the criminal law, especially the specification of the definitions of crime. This new theory should assist the endeavour to achieve a proper balance between the rule of law and crime control. For this purpose, it has to embrace all the well-founded propositions of both the “old” and the “new” schools.

In this respect, Marc Ancel’s new social defence theory, as revised in his 1987 edition of *Social Defence: The Future of Penal Reform*, may be an example of integration. In this interesting book, Ancel (1987:137-140) challenges what he called the “metaphysical conceptions” of the classical and neo-classical school. It is a flaw, he (137) asserts, to view crime and punishment as “purely legal entities” that are only handled by legal experts. He suggests that crime is a manifestation or expression of the personality and has objective and subjective elements (138-139). Nonetheless, he is also critical of what he called the “old social defence.” He states that:

What must be thoroughly grasped is the reality of an intimately felt and natural sense of personal responsibility. Modern psychiatrists, psychologists, and criminologists stress this individual sense of responsibility which normally exists in every human being and which, as De Greeff used to say, gives a man “the certainty of inner freedom” and so constitutes “his own experience of free will.” Even psychoanalysts pay attention to culpability and to the reality of the feeling of responsibility. This feeling, in its psychological reality, connects man to his activities and to his prospects for growth as a person. The experience of freedom means that our acts “emanate from and express our whole personality.” Thus, in the new doctrine of social defence, the notion of responsibility appears as

---

327 Cited in Lin Jidong, 1969, at p.3.
the individual's awareness of his own personality, insofar as it finds expression in his acts (1987:204).

This appears to be an integrated concept of the "old school" idea of free will and the "new school" notion of personality. Accordingly to Ancel (149-152), the new social defence movement is against the so-called "subjective criminal law," let alone the "elimination of the criminal law." He (205-210) offers five points that are enlightening to the discussion of the definitions of crime:

- The law must take into account both the action and the actor, and both the intention and the motive.

- Action is most important. "The criminal event is always unquestionably the offence with which the defendant is charged." However, the action is not independent of its perpetrator and the social context. Man is not completely free.

- Both responsibility and dangerousness are social expressions of personality, and should be taken into account by the "criminal judge" for the use of punishment or security measures.

- Deterrence certainly works. What is clearly operative is "the fear of the social responses to one's behaviour," including punishment, prosecution, and so forth.

- The handling of a case in the criminal court is no longer purely a legal matter. Rather, it shall involve experts of other professions, especially in the sentencing process.

In conclusion, China's law reformers should continue to implement the principle of legality and specify the legal definitions of crime. In this endeavour, we should not reject the legacies of the classical and neo-classical school. Nor should we ignore the various biological, psychological and sociological theories of western criminology. The law reformers should remain open to various kinds of theories, instead of isolating themselves in any one of them. However, all the theories and concepts must be examined in light of the fundamental principles of legality, human rights and good governance.
Chapter VI
The Borderline Between Criminal and Non-Criminal Offences

6.1 Statute and Statutory Interpretation

6.1.1 Harm and Circumstances

In the Special Part of the 1979 Chinese Criminal Law, another major indication of vagueness is the provision of unspecified circumstantial elements of crime.

The Special Part has a total of 102 Articles. A total of 93 Articles lay down the definitions of crimes, and about 20 of them have circumstantial elements. First of all, a "relatively large amount" is a circumstantial element of theft, fraud, and snatching. Moreover, a "serious" or "odious" "circumstance" is provided for as an essential element of a variety of offences, including: smuggling, illegal speculation and profiteering, forgery and trafficking in planned supply coupons, tax evasion and forcible refusal of taxation, misusing state crisis relief supplies, unauthorised logging, illegal fishing.

328 Article 151.
329 Article 116.
330 Article 117.
331 Article 120.
332 Article 121.
333 Article 126.
334 Article 128.
illegal hunting,\textsuperscript{336} defaming and slander,\textsuperscript{337} illegal deprivation of the religious or ethnic minority rights,\textsuperscript{338} infringement of the freedom of correspondence,\textsuperscript{339} intentional destruction of property,\textsuperscript{340} group disturbing social order,\textsuperscript{341} group disturbing order in public place or traffic order,\textsuperscript{342} hooliganism,\textsuperscript{343} illegally crossing border,\textsuperscript{344} abusing a family member,\textsuperscript{345} abandoning family member,\textsuperscript{346} leaking state secrets,\textsuperscript{347} and mistreatment of an incarcerated person.\textsuperscript{348} Under these provisions, the actor cannot be convicted of the relevant criminal offence if the “amount” is “relatively” small or the “circumstances” are not “serious,” even if there is a union of the action and the mental state.

\textsuperscript{335} Article 129.

\textsuperscript{336} Article 130.

\textsuperscript{337} Article 145.

\textsuperscript{338} Article 147.

\textsuperscript{339} Article 149.

\textsuperscript{340} Article 156.

\textsuperscript{341} Article 158.

\textsuperscript{342} Article 159.

\textsuperscript{343} Article 160.

\textsuperscript{344} Article 176.

\textsuperscript{345} Article 182.

\textsuperscript{346} Article 183.

\textsuperscript{347} Article 186.

\textsuperscript{348} Article 189.
Since the circumstantial elements are not specified, one could name them as “soft constituent elements,” as opposed to the ordinary elements (“hard elements”). Furthermore, Article 192 provides a reversed circumstantial element. It reads:

For state personnel who commit a crime in this Chapter, if the circumstances are minor, the department in charge may take into account the circumstances and impose administrative sanctions.

The wording indicates that the provision applies in cases of: receiving and offering bribes, neglect of duty, abuse of justice, unauthorised release of prisoner, and unauthorised opening of mails. As many as 26 of the 97 Articles in the Special Part require an unspecified circumstance. In addition, under the supplementary statutes, “relatively large amount” and “serious circumstance” are essential elements of the crimes against trademark and author’s rights.

---

349 The term “Chapter” here refers to Chapter VIII of the Special Part, i.e., “Crimes against Public Duty.”

350 Article 185.

351 Article 187.

352 Article 188.

353 Article 190.

354 Article 191.

This kind of provision is rarely found in criminal codes in other jurisdictions. Under these provisions, vagueness in the Chinese definition of crime appears to be a borderline issue of criminal versus non-criminal offences.

In Chinese criminal law theory, the borderline is generally defined in the general definition of crime under Article 10 of the 1979 Criminal Law. In the previous chapters of the dissertation, this author has addressed almost all the aspects of this definition, except its notwithstanding clause. The Article reads:

All acts ... that endanger society are crimes if according to law they should be criminally punished; but if the circumstances are clearly minor and the harm is not great, they are not to be deemed crimes.

The notwithstanding clause, as Chinese scholars (Wang Zuofu, 1987: 39; Chen Xinglian, 1988: 134; Gao Mingxuan, 1993h:72-80; Liu Shenrong, 1993:62-74) often hold, shows the distinction between criminal and non-criminal offences. However, this kind of distinction is vague and incompatible with the principle of statutory definiteness. Under this clause, a criminal offence is not just a unity of the legally defined objective and subjective elements. Rather, in addition to this unity, it requires some kind of "circumstances" that are more serious than "minor" and a certain level of "social harm" that is "great," but the standards of being "minor" and "great" are unspecified. "Harm" in this context appears to be highly subjective, and its gravity is in fact determined in light of the needs of social control and public policy. Apparently, the wording of all the provisions listed above is a strong indication of the underlying legislative idea: combining principles...

356 See e.g., the Canadian Criminal Code, the German Penal Code, the Japanese Penal Code, the Swiss Federal Penal Code, the Penal Code of Austria, the Italian Penal Code, the Spanish Penal Code, the Penal Code of the Republic of Korea, the Penal Code of Thailand, and the RSFSR Penal Code.
with flexibility. Yet, the concern is about the enormous discretionary power of the judiciary and the police in defining crimes and non-crimes.

6.1.2 Judge-Made Law

In Chapter II of the dissertation, it is briefly indicated that the formally documented judicial opinions of the Supreme People's Court and the Supreme People’s Procuratorate are sources of Chinese law. Given the provisions of the circumstantial elements in the Code, the judiciary is often in a position to determine the specific borderlines between crimes and non-crimes. For instance, in 1984, the SPC and SPP jointly issued a document, entitled *Answers to Questions Regarding the Specific Application of Law in Handling Theft Cases*, which specifies the meaning of “relatively large amount” (of stolen property) in a criminal case of theft under Article 151. In 1985, they issued *Answers to Questions Regarding the Specific Application of Law in Handling Cases of Economic Crime*, which define the meaning of “relatively large amount” (of stolen property) in a criminal case of fraud under Article 151. The meaning of “odious circumstances” in a criminal case of hooliganism under Article 160 is defined by the SPC and SPP in their 1984 *Answers to Questions Regarding the Specific Application of Law in Handling Cases of Hooliganism*.

The power of statutory interpretation is granted to the SPC under the present *Organic Law of the People’s Courts*. The Law provides that the SPC has the power to

---

357 Article 2.

358 See Article 1 under the subtitle “Questions Regarding Fraud.”

359 Article 2.
“give explanations on questions concerning specific application of laws and decrees in judicial procedure.”

Further, in June 1981, the Standing Committee of the NPC adopted the Resolution on Strengthening the Work of Legal Interpretation, which grants the same power to both the SPC and the SPP. However, none of the authorities specifies what it is meant by “explanations on questions concerning specific application of laws and decrees.” Nor is it clear as to how the SPC and the SPP shall articulate and issue the “explanations.” Further, under the Chinese Constitution and the Organic Law of the People’s Court, the SPC shall “supervise” the administration of justice of the entire court system. Moreover, the Constitution and the Organic Law of the People’s Procuratorate require the SPP to “exercise leadership” upon the various local procuratorates. Therefore, the opinions of the SPC and SPP are presumably binding in practice.

Until now, numerous judicial “explanations” (opinions or interpretations) have been issued separately or jointly by the SPC and the SPP. A number of collections of the explanations have been compiled and published by publishing houses of the SPC and SPP. The editors are often senior judicial functionaries at the rank of Minister. For example, in 1990, the China Procuratorate Press, which is the publishing house of the SPP, published an excellent collection, entitled as Encyclopaedia of Judicial Interpretation in New China (Lian et al., 1990) The Editor-in-Chief, Lian Guoqing, is Vice President of the SPP.

360 Article 33.

361 Article 2.

362 Article 127 of the Constitution; Article 30 of the Organic Law of the People’s Court.

363 Article 132 of the Constitution; Article 10 of the Organic Law of the People’s Procuratorate.

364 e.g., Ren et al. (Eds.), 1991.
During the past fifteen years, the Chinese “judge-made laws” have played an important role for the specification of the vaguely articulated rules in the 1979 *Criminal Law* and the supplementary statutes. In particular, when the *Criminal Law* provides an unspecified circumstantial element, the borderline between crime and non-crime, or criminal offence and non-criminal offence, is often found in the judicial opinions. This part of Chinese law shares some of the traditional benefits of the common law, especially in terms of ensuring that the rules in the statutes can cope with the changing social context.

**6.1.3 Comparisons for Improvement**

In 1987, Donovan (1987:286-287) noted that China had a *de facto* system of precedent owing to the existence of judicial opinions. In the former Soviet Union, he said, the “guiding explanations” of the Soviet Supreme Court were similarly a *de facto* system of stare decisis. Indeed, this may be part of the global trend towards a merger of the different legal families. In a most interesting legal comparison of statutory interpretation, Summers and Taruffo (1991) observed that the previous difference with respect to the use of precedents is disappearing across the world. They (487) contend:

A very important remark must now be made: if one looks at the actual use of precedents in the opinions of the higher courts in the several countries, it can be observed that there are no great differences in their use between the so-called common law and civil law systems. It is true that, in the UK and USA, precedents must be used and that they have (under given conditions) a binding effect, while this is not so in other countries. But these other countries (with the exception of France) nonetheless make heavy use of precedent. Indeed in Argentina, Germany and Sweden precedents must be invoked when relevant for the case in issue (it being an error not to do so). In other countries, like Italy, Poland and Finland, the use of precedents is not something that must be done, yet it is quite common and, in the normal case, expected.
There is, however, at least one characteristic feature of the Chinese-Soviet system: the binding opinions of the judiciary are usually found in non-precedent documents. The most important cases are published on the SPC or SPP Gazettes, but there is no formal guideline for the use of these cases in legal practice. Clearly, no Chinese judgement cites a previously decided case as a precedent. In court hearings, some of SPC and SPP documents are used as authorities. Yet, to this author's knowledge, there is hardly any incident where a previous decided criminal case was cited even "for reference" in a court hearing during the six years of his legal practice in China, although numerous cases were taught in legal training and closed-door discussions. The Chinese judiciary are making the law, but mostly not a de facto system of precedent.

Compared with precedents in the common law system, the Chinese "judge-made laws" have a number of characteristic features:

First, in terms of formation, the Chinese "judge-made laws" bear various titles, such as "interpretation" (jieshi), "explanation" (jieda), "answer" (dafa), "written reply" (pifu), "notice" (tongzhi), "letter reply" (fuhan), and "opinion" (yijian). To this author's knowledge, there is no clear guideline directing the use of these titles. This might cause confusion as to which type of document in a case of conflicting judicial opinions has a higher authority than the others.

Second, the Chinese "judge-made laws" are issued by a variety of bodies. Su and You (1992) point out that, apart from the SPC and the SPP, the various departments and divisions of the SPC and the SPP are also making the laws. It seems to me that the Law

---

365 For examples, see e.g., Lian et al.(Eds.), 1990.
and Policy Research Office of the SPC, which, as Liu Nanping (1989:287) has indicated, is not an adjudicatory body *per se*, has made far more laws than the SPC. It is problematic that such a division of the SPC could act as the SPC in the “supervision” of the lower courts.

Third, in terms of the cases that are published in the *SPC Gazette*, as Liu Nanping (1989) has noted, some of them have *sua sponte* comments attached to them by the SPC, the others do not. The comments are either affirmative or neutral. As Liu has indicated, the former carries the force of precedent for lower courts. Nonetheless, it is unclear as to what kind of binding force they carry in reality given the cases are rarely cited as formal authorities in practice. The same problems also arise in cases published in the *SPP Gazette*.

Moreover, Chinese judicial documents, including the cases, never question the constitutionality of legislation or record opinions of the individual judges, let alone the dissenting opinions. The Marxist notion of “democratic centralism” demands unity of the various branches of the Government and unity of every official institution. The relative lack of training of the Chinese judiciary requires the use of “collective wisdom.” Further, the exclusion of dissenting opinions is also rooted in the pre-PRC system of interpreting the statutes in the name of a judicial committee. In this sense, the laws are in fact

---

366 For examples, see *ibid*.

367 “Democratic centralism” is a Leninist political notion transferred into the legal system. It holds that the various individuals may express their different opinions, but they must achieve and abide by a collective decision. Hence, once a collective decision is made, dissenting opinions are no longer important.

368 During the Kuomintang era, the Supreme Court usually rendered its binding opinions in the name of “Meeting of Justices.” This is still the system in today’s Taiwan.
“court-made,” rather than “judge-made.” This practice might reduce the difficulties for the lower judicial organs to understand and follow the rules.

Application of the Chinese doctrine of “stare decisis,” if we borrow the term from the common law, is usually simple and straightforward. The format and style of a Chinese case is completely different from its common law counterparts. A typical written Chinese case on the SPC Gazette is one or two pages long, with no citation of other cases, no foreign laws, no scholarly publications, and not even the opinions of the parties. Yet, when the complexity decreases, the line of reasoning appears to be too simplistic, and the rules may change inconsistently. In particular, when reading the cases, one often has difficulties to find out enough information about the legal reasoning process. This is indeed another problem of vagueness.

It is noteworthy that China has a history of both codification and case law which goes back more than two thousand years.369 The concept of legislative positivism was first imported from Europe (Berman, 1972; Feldbrugge, 1985), and then from the former Soviet Union which also followed the civil law tradition (Merryman, 1985:4). However, the reception of this concept is primarily in law books. It would be a major error to assume that the Chinese judiciary has no power to make law or is the weakest branch of the Government. There are four key facts: the Chinese legislative process usually starts with an accumulation of “judicial experience” by the judiciary; the judiciary often carries out “experimental implementation” of provisional internal laws before they are formally enacted; the judiciary interprets the law and sometimes creates new laws as interpretation; and, unlike the French courts whose interpretative decisions are only persuasive

369 See relevant discussions of ancient Chinese law from the Qin Dynasty (221-206 B.C.) onwards, in e.g., Zhang Jingfan et al., (Eds.), 1983; and Zhang Jingfan et al, 1992.
al. 1992:51-59), the Chinese SPC and SPP can interpret the legislation systematically in their documents that are mostly mandatory authorities to lower courts.

In recent years, a number of Chinese scholars (Qu and Yang, 1994; Zhang Shaoqian, 1989; Zhou Zhenxian, 1989) have suggested that China should establish a system of precedent by properly importing “advanced foreign experience” of case law. Many scholars are critical of the present system. For example, Su and You (1992) indicate that some of the Chinese judicial interpretations violate the doctrine of strict interpretation; the interpretations sometimes conflict with the legislative intention; and the judicial documents are sometimes kept secret for “internal use.” Cui and Wen (1992) contend that the practice of having the SPC and the SPP to issue joint-interpretations with a Ministry of the executive (e.g., the Ministry of Public Security) is problematic, since the 1981 NPC Standing Committee Resolution only allows the SPC and the SPP to render judicial interpretation. You (1989) points out that more confusion is caused by the local judicial bodies also making interpretations.

Yet, there are hardly any Chinese publications which present a detailed discussion regarding the questions of how to import the Anglo-American case law system and how to implant it into the present Chinese legal system. The Chinese government should determine what exactly is desirable between legislative supremacy and judicial activism. The power of statutory interpretation has to be exercised on a clearly defined constitutional basis. Under the present Constitution, the NPC Standing Committee should give its interpretation of the Criminal Law. During the last fifteen years, however, the Committee has rarely exercised this power. China needs a system of legislative interpretation. The Standing Committee should perform this function, or perform it

Article 67(4) of the Constitution.
through its Law Committee. Instead of having piecemeal changes, China should enact an *Interpretation Act* to specify the principles and rules of both legislative and judicial interpretation. Relevant foreign laws such as the Canadian federal *Interpretation Act* can be used as legislative models. Given the Chinese context, the Chinese *Interpretation Act* should provide for a number of basic guidelines for interpretation, such as strict interpretation and the prohibition of "internal" interpretation. This *Act* should also provide for standard forms of interpretation and rules for the handling of *ultra vires* and conflicting interpretations. Over the longer term, to reduce the vagueness, the Chinese *Constitution* should recognise the "void-for-vagueness" doctrine, which, as in the United States, allows the Court to stamp out a vague enactment for the protection of fundamental human rights.  

Further, a statute should be enacted to provide for standard structures of case judgement that are more informative to the public.

In the meantime, Chinese law schools and legal training institutes need to teach a course of statutory interpretation in addition to case methods. In fact, leading Chinese law schools have already been offering a few courses of "case studies." For instance, since the mid-1980's, "Criminal Law Cases" and a number of such courses have been taught at the East China Institute of Politics and Law in Shanghai. The students are required to study "typical cases" which, in the eyes of the professors, present a "correct" line of reasoning in legal practice. The students are also given a factual situation for a comparison, as Statsky and Wernet (1984:131) have described, between the "facts in opinion" and the "facts in the client's case." Also, for each fact difference, the students are occasionally encouraged

---

371 In Canada, the doctrine of vagueness is considered a principle of "fundamental justice" under section 7 of the *Charter of Rights and Freedoms*. See e.g., *R. v. Nova Scotia Pharmaceutical Society* (1992). 74 C.C.C. (3d) 289. Indeed, this doctrine should be taught to every new student of criminal law as an important implementation of the principle of the rule of law. For example, see Gardner and Anderson, 1992:19.
to alter the facts to match the difference, identify "key facts," and, as Statsky and Wernet put it, ask: "Given this altered fact, would the court in the opinion have reached the same holding?" Significantly, the SPP have compiled a 23-volume *Series of Criminal Cases* for training purposes (SPP Editorial Committee of Series of Criminal Cases, 1990-1992). This excellent series includes a total of 6,000 cases and the relevant statutes, interpretations, and regulations. Like other Chinese publications of cases, however, the quality of this kind of series might be improved if it would include:

- detailed arguments and different opinions that are presented in the trial;
- details of the legal reasoning process;
- critical commentaries;
- discussion of alternative approaches; and
- a more informative structure of the materials.

### 6.2 Crimes and PSOs

#### 6.2.1 Quasi-Criminal Offences

Apart from the Chinese "judge-made laws," there are numerous administrative laws or regulations that are relevant to the criminal law definitions of crimes and especially to the borderline between criminal and administrative offences. In particular, the 1986 *Regulations on Security Administration Punishment (RSAP)*, enacted by the Standing Committee of the NPC, is of great importance for the determination of the borderline. Article 2 of the *RSAP* provides for a general definition of "public security offences"
Under this Article, the PSOs are administrative offences that "breach social order, disrupt public security, infringe upon citizens' personal rights or public and private property" but "do not warrant a criminal punishment." Therefore, the borderline issue is settled under this Article in conjunction with the notwithstanding clause in Article 10 of the 1979 Criminal Law.

The Chinese concept of “administrative offence” covers a vast variety of violations, such as violations of taxation law, violation of foreign currency laws; violation of environmental protection laws; violation of health laws; violation of housing regulations; violation of labour laws; and violation of public security (police) laws. Unlike the other “non-criminal offences,” the PSOs are quasi-criminal and have three characteristics. First, they are administrative offences defined in an administrative law. Second, unlike those under the jurisdiction of other administrative agencies, this kind of administrative offence is primarily handled by the police. Third, most PSOs are in essence similar to criminal offences, although the “circumstances” might be less “serious.”

Under the RSAP, there are at least 73 specific types of PSOs. They could be classified into eight categories in accordance with the ordinary ways of classifying the corresponding criminal offences:

---

372 The term is sometimes translated as "security administrative offence."

373 Apparently, there is no clear line between the two large categories of non-criminal offences: administrative offences and non-criminal economic offences.

374 In China, administrative offences are under the jurisdiction of various government authorities, such as tax bureaux, price control bureaux, customs houses, foreign currency control administrations, administrative supervision bureaux, CPC discipline committees, as well as the police.
1. Offences against public order;\textsuperscript{375}
2. Offences against public safety;\textsuperscript{376}
3. Offences against the person;\textsuperscript{377}
4. Offences against property;\textsuperscript{378}
5. Offences against social order;\textsuperscript{379}
6. Offences against fire control regulations;\textsuperscript{380}
7. Offences against traffic control regulations;\textsuperscript{381}
8. Offences against residence control regulations.\textsuperscript{382}

\textsuperscript{375} e.g. breaching the peace at any public place, hooliganism, and obstructing justice without using force.

\textsuperscript{376} e.g., violations of gun control law and violations of public area security control law.

\textsuperscript{377} e.g., assault without injury, trespassing of a dwelling house, insulting another, libel and slander, maltreating family members, coercing or inducing a juvenile to perform a show which may cause injury to himself, illegal opening of other people’s mail, etc.

\textsuperscript{378} This category includes minor theft and fraud, extortion and blackmail, and vandalism.

\textsuperscript{379} This category includes a great variety of offences, e.g., knowingly purchasing stolen property, illegal profiteering through resale of tickets, violation of narcotic control regulations, cheating by superstition, using other person's car without authorisation, concealment of uncovered cultural relics, vandalism at public transportation or communication facilities, making nuisance in neighbourhoods, gambling, prostitution and pornography, etc.

\textsuperscript{380} e.g., smoking in prohibited areas, intentionally obstructing the passage of fire engines, causing a fire by negligence, etc.

\textsuperscript{381} e.g. drunken driving or driving without a licence, blocking traffic by assembly or demonstration, causing a traffic accident, speeding, parking violation, unauthorised use of special alarm lights, etc.

\textsuperscript{382} This category includes failure to register for a residence permit, making false statement in applying for a residence permit or a resident ID, etc.
Many of the PSOs in categories 1-6 have their criminal counterparts in western laws. For example, this author would provide a list of offences that, unless "the circumstances are serious" or "the amount is relatively large," are PSOs in Chinese law but crimes in the Canadian *Criminal Code* (1985):

1. Assault without injury;
2. Battery causing a slight injury;
3. False imprisonment or unlawful restraint of the physical liberty of another;
4. Defaming another person;
5. Dangerous operation of a motor vehicle or vessel, (e.g., drunken driving);
6. Illegal possession of offensive weapons and explosive substances;
7. Unlawful assembly and rout;
8. Breach of the peace or disturbing the peace;
9. Malicious destruction of property and vandalism;
10. Gambling;
11. Sexual harassment;
12. Indecent acts and nudity;
13. Common nuisance;
14. Insulting dead body;
15. Soliciting for prostitution;
16. Theft of a small value property including shoplifting;
17. Taking motor vehicle without consent;
18. Fraud of a small value property;
19. Snatching of a small value property;
20. Robbery with minor force;
21. Receiving stolen property;
22. Trespass of real property;
23. Extortion and blackmail for a small value of gain; and

The borderline between a Chinese criminal offence and a PSO is not based on differences in the essential ingredients. Standard Chinese textbooks of criminal law usually hold that the substantive difference between the two lies in the level of social harmfulness. Yet, it is difficult to see how this proposition justifies the differentiation.
between a criminal theft of 200 yuans and non-criminal (PSO) theft of 150 yuans, and why the PSOs on the list above are "less harmful" in China than they are in Canada. In this context, "harm" and the "level of harm" both appear to be subjective and policy-oriented concepts. The Chinese division between crimes and the PSOs is primarily based on policy considerations. The system is primarily designed to meet two goals of social control, i.e., to ensure that the police have enough discretionary power to independently dispose of a large number of cases, and to enable the judiciary to focus their manpower and resources for the crackdown on more serious offences.

6.2.2 The PSOs in Comparisons

This Chinese division has its origins in Soviet and European laws. The notwithstanding clause in Article 10 of China's Criminal Law has an almost identical counterpart in Article 7 of the 1960 Criminal Code of the RSFSR. Under Article 7 of the RSFSR Code, the line between criminal and non-criminal offences is drawn as follows:

The Concept of Crime. ...An action or an omission to act shall not be a crime, although it formally contains the indicia of an act provided for by the Special Part of the present, if by reason of its insignificance it does not represent a social danger.

A similar provision is also found in the penal codes of several other formerly socialist countries. Therefore, the Chinese differentiation appears to be an imported concept.

383 e.g., see discussion in Gao Mingxuan (1993h), "The Definition of Crime," In Gao and Zhao (Eds.), 1993, pp.67-80, at pp.72-80.

384 See Article 2 (1) in Supreme People's Court and Supreme People's Procuratorate, Answers to Questions Regarding the Specific Application of Law in Handling Theft Cases (1984). In Ren et al. (Eds.), 1991, at pp.756-757.
Ger Berg (1985:33-50) observed that the earliest Soviet differentiation between ordinary crimes and administrative infractions started in the 1920s. Later, administrative commissions were established to handle cases of administrative infractions. In the meantime, comrade courts were created to deal with minor criminal cases. Then there were "people's judges" and "people's courts" deciding cases of what Berg called "administrative crimes" that were less serious than ordinary crimes but more serious than administrative infractions. These judges had the power to impose a maximum punishment of administrative detention not exceeding 30 days or, after 1978, 15 days. In 1980, the USSR adopted the *Principles of Legislation on Administrative Violations*.

To some extent, the Chinese classification between crimes and PSOs is similar to that between felonies and misdemeanours or petty misdemeanours in common law countries. Harold J. Berman has noted that "administrative offences" in Soviet law are equivalents to misdemeanours and petty misdemeanours in U.S. laws. He (1972: 7) states that:

Various types of cases that would fall within criminal law and criminal procedure in the United States, at least, are considered to be "administrative" in the Soviet Union. Thus Soviet law imposes sanctions (other than civil sanctions) that are not classified as criminal punishment for offences that are not called crimes.

These administrative offences under the Soviet law include petty theft, causing light injury by negligence, vagrancy, house distilling of alcohol, and hooliganism. Moreover, Berg (1985:34-35) noted that the Soviet courts were given the power in 1977

---

385 e.g., §17 of the *Penal Code of the Romanian Socialist Republic* and §4 of the *Penal Code of the People's Republic of Mongolia*.

386 See, e.g., §1.04 of *Model Penal Code*. 

243
to change a criminal case into an administrative one, if the crime had a maximum penalty of one year's imprisonment and the accused person was not considered a social danger.

It is worth noting, however, that the concept of quasi-criminal administrative offence was not originally Soviet. Rather, it has been developed in various European jurisdictions, such as France, Germany, Italy, Austria, Belgium, and Switzerland (Von Bar 1916: 534-539; Foster, 1993:166-167; Certoma 1985: 308-311; Sheridan and Cameron, 1992:Belgium-27, France-29-30). In the 1810 French Penal Code, for instance, offences are divided into felonies, misdemeanours and "police violations."387 The 1930 Italian Penal Code not only provides "crime" and "police violations" as two separate categories of offences,388 but also has a Book III to define various specific police violations. In Belgium, according to Sheridan and Cameron (1992:Belgium-27), “criminal offences” are divided into three groups: “crimes,” “offences” (déits), and police offences (contravention). In some common law jurisdictions, such as Canada, quasi-criminal offences are usually regulatory and subject to the principle of strict liability.

Given its impacts on Japan and the pre-1949 China, the German law deserves more attention. German criminal law includes an Administrative Offences Act (Ordnungswidrigkeitsgesetz) that is separated from the Penal Code. Apart from ordinary criminal offences (Verbrechen and Vergehen),389 there is a category of “minor offences”

---

387 §1.

388 §39.

389 Foster has translated Verbrechen as felonies or “indictable offences,” and Vergehen as misdemeanours or “summary offences.” Under §12 of the German Penal Code (StGB), felonies are crimes which are punishable by imprisonment for one or more years, whereas misdemeanours are crimes the minimum punishment of which is less than one year’s imprisonment or a fine.
(Ordnungswidrigkeiten) for which a fine is applied and which do not have the stigma of criminality (Foster, 1993:166). This arrangement in law is probably based on the notion of decriminalisation. According to Jescheck (1987:6), the notion led to the exclusion of petty misdemeanours from the German Penal Code in 1975. Some previously "petty criminal offences," such as "false name" and "noise and gross mischief," were decriminalised and transformed into "petty infractions" and are now provided for in a new Petty Infractions Code.

Prior to the PRC, the European tradition in laws regarding "police violation" was very influential to Chinese law. In 1908, the Qing Dynasty promulgated China's first Law on Police Violations (wei jing lu). Later, the Republic of China adopted its Law on Police Violations in 1915, which was later amended in 1928 and 1943. The structure of the laws follows the European tradition of codification. Each of the laws provides a wide range of violations. For example, the Special Part of the 1943 Law provides seven chapters of violations, including:

1. offences against peaceful order;
2. violations of traffic regulation;
3. violations of public custom;
4. offences against public health;
5. offences against execution of public duty;
6. false charge, perjury, and destroying evidence; and
7. offences against person and property.

Although the idea of having a quasi-criminal statute to punish the so-called "police violations" is European, the present Chinese RSAP still has some important characteristic features. It appears that the RSAP emphasises offences that are mala in se (e.g., theft and

390 For the texts, see Law On Police Violations (1908), in Dai Hongying (compiles), 1985, pp.15-23, 76-85, 342-353, and 358-375.
assault) rather than *mala prohibita* (traffic violations) in nature. This focus is found not only in the legal provisions, but also in operation. It is also different from the early Chinese laws on police violations. For example, under the 1943 Law, theft, fraud, and snatching are not defined as police violations. Moreover, the Chinese division between specific criminal offences and PSOs is relatively vague, given the vaguely defined circumstantial elements in the criminal law. Further, the Chinese police have the authority to interpret the RSAP, but the rules of this kind of interpretation are not specified in law.

6.3 From Legal Definition to Crime Data

6.3.1 Problems in Cross-National Comparison

In the 1985-86 issue of the Interpol *International Crime Statistics*, as indicated on Table 6.1, China appears to be one of the nations with the lowest recorded crime rates.\(^{392}\) Moreover, as Table 6.2 shows, although the PRC rate of total criminality was relatively higher in the early 1980s, it was still one of the lowest in the world.\(^{393}\) Interestingly, Taiwan (under the name of the POC in the Interpol data) reported rates much lower than those in the West, but PRC rates are far lower than the Taiwanese.

---

\(^{391}\) The 1943 Law, however, provides that picking fruits or flowers from other persons' property without authorisation is a police violation. See Article 77.

\(^{392}\) See Interpol, *International Criminal Statistics* (1985-86). Among the 97 countries, only Nepal, Congo and Mali reported general crime rates lower than the Chinese. The Interpol statistics contain officially recorded crime data only and are reported by national authorities. They are, as the publisher has indicated in the ICS series, subject to different legal definitions of the particular offences in different countries. They have, therefore, always been seen as potentially flawed as measures of crime.

### Table 6.1 Recorded Crime Rates (volume of crime per 100,000 inhabitants), 1986

<table>
<thead>
<tr>
<th>Offence</th>
<th>Murder</th>
<th>Rape</th>
<th>Serious assault</th>
<th>Theft (all kinds of theft)</th>
<th>Robbery and violent theft</th>
<th>Fraud</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>China (PRC)</td>
<td>1.1</td>
<td>3.7</td>
<td>1.7</td>
<td>40.4</td>
<td>1.2</td>
<td>1.4</td>
<td>51.9</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>1.3</td>
<td>1.3</td>
<td>141.3</td>
<td>934.3</td>
<td>143.2</td>
<td>27.3</td>
<td>1,473.7</td>
</tr>
<tr>
<td>Singapore</td>
<td>2.6</td>
<td>4.3</td>
<td>4.3</td>
<td>973</td>
<td>64.8</td>
<td>97.3</td>
<td>1,551.8</td>
</tr>
<tr>
<td>Japan</td>
<td>1.4</td>
<td>1.4</td>
<td>17.4</td>
<td>1,131.8</td>
<td>1.6</td>
<td>53.2</td>
<td>1,409.5</td>
</tr>
<tr>
<td>S. Korea</td>
<td>1.4</td>
<td>9.5</td>
<td>60.3</td>
<td>254.5</td>
<td>7.3</td>
<td>189.2</td>
<td>1,989.1</td>
</tr>
<tr>
<td>Nepal</td>
<td>1.7</td>
<td>0.3</td>
<td>0.4</td>
<td>4.5</td>
<td>0.7</td>
<td>0.1</td>
<td>11.1</td>
</tr>
<tr>
<td>Indonesia</td>
<td>1.0</td>
<td>1.0</td>
<td>7.1</td>
<td>46.1</td>
<td>1.7</td>
<td>7.6</td>
<td>142.4</td>
</tr>
<tr>
<td>India(1985)</td>
<td>3.4</td>
<td>0.8</td>
<td></td>
<td>43.2</td>
<td>2.8</td>
<td>2.6</td>
<td>179.3</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>4.2</td>
<td>5.8</td>
<td>58.1</td>
<td>845.6</td>
<td>15.1</td>
<td>43.4</td>
<td>1,718.7</td>
</tr>
<tr>
<td>Yugoslavia</td>
<td>5.4</td>
<td>5.0</td>
<td>35.5</td>
<td>672.5</td>
<td>70.4</td>
<td>57.1</td>
<td>1,134.7</td>
</tr>
<tr>
<td>Switzerland</td>
<td>2.1</td>
<td>6.1</td>
<td>50.0</td>
<td>4,519.6</td>
<td>19.7</td>
<td>110.1</td>
<td>5,092.6</td>
</tr>
<tr>
<td>Australia</td>
<td>4.2</td>
<td>15.2</td>
<td>81.3</td>
<td>5,372.9</td>
<td>68.9</td>
<td>1,324.8</td>
<td>7,264.3</td>
</tr>
<tr>
<td>Canada</td>
<td>5.7</td>
<td>124.0</td>
<td>5,139.6</td>
<td>90.9</td>
<td>510.2</td>
<td>11,168.8</td>
<td></td>
</tr>
<tr>
<td>Philippines</td>
<td>38.7</td>
<td>2.4</td>
<td>46.4</td>
<td>64.2</td>
<td>31.0</td>
<td></td>
<td>126.3</td>
</tr>
<tr>
<td>Germany</td>
<td>4.5</td>
<td>9.2</td>
<td>105</td>
<td>4,502.5</td>
<td>46.8</td>
<td>691.7</td>
<td>7,153.6</td>
</tr>
<tr>
<td>France</td>
<td>4.1</td>
<td>5.3</td>
<td>66.1</td>
<td>3,784.4</td>
<td>91.8</td>
<td>1,075.5</td>
<td>5,955.6</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>1.6</td>
<td>4.6</td>
<td>244.7</td>
<td>5,949.8</td>
<td>60.1</td>
<td>267.3</td>
<td>7,706.6</td>
</tr>
<tr>
<td>US</td>
<td>8.6</td>
<td>37.5</td>
<td>346.1</td>
<td>5,087.8</td>
<td>225.1</td>
<td></td>
<td>5,479.9</td>
</tr>
</tbody>
</table>

Sources: Calculated from Interpol, 1985-6.

### Table 6.2 Recorded Crime Rates (volume of crime per 100,000 inhabitants), 1980

<table>
<thead>
<tr>
<th>Offence</th>
<th>Murder</th>
<th>Rape</th>
<th>Serious assault</th>
<th>Theft (all kinds of theft)</th>
<th>Robbery and violent theft</th>
<th>Fraud</th>
<th>Rate (total of all crimes)</th>
</tr>
</thead>
<tbody>
<tr>
<td>China(1981)</td>
<td>1.0</td>
<td>3.1</td>
<td>2.2</td>
<td>74.4</td>
<td>2.2</td>
<td>1.9</td>
<td>89.0</td>
</tr>
<tr>
<td>Taiwan (POC)</td>
<td>8.0</td>
<td>2.9</td>
<td>20.6</td>
<td>151.0</td>
<td>70.0</td>
<td>8.1</td>
<td>296.8</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>1.8</td>
<td>1.5</td>
<td>125.6</td>
<td>1,009.6</td>
<td>252.2</td>
<td>46.1</td>
<td>1,600.0</td>
</tr>
<tr>
<td>Singapore</td>
<td>2.6</td>
<td>2.8</td>
<td>12.3</td>
<td>662.7</td>
<td>52.0</td>
<td>60.5</td>
<td>1,030.8</td>
</tr>
<tr>
<td>Japan</td>
<td>1.4</td>
<td>2.2</td>
<td>22.4</td>
<td>997.6</td>
<td>1.9</td>
<td>68.6</td>
<td>1,293.6</td>
</tr>
<tr>
<td>S. Korea</td>
<td>1.4</td>
<td>8.0</td>
<td>305.8</td>
<td>244.3</td>
<td>7.2</td>
<td>163.6</td>
<td>1,657.5</td>
</tr>
<tr>
<td>Indonesia</td>
<td>1.2</td>
<td>1.5</td>
<td>11.1</td>
<td>81.0</td>
<td>8.2</td>
<td>9.5</td>
<td>192.6</td>
</tr>
<tr>
<td>India(1985)</td>
<td>3.3</td>
<td>0.7</td>
<td></td>
<td>63.8</td>
<td>3.5</td>
<td>2.4</td>
<td>206.2</td>
</tr>
<tr>
<td>Hungary</td>
<td>3.5</td>
<td>4.4</td>
<td>45.1</td>
<td>421.1</td>
<td>9.6</td>
<td>41.2</td>
<td>1,219.4</td>
</tr>
<tr>
<td>Australia</td>
<td>3.1</td>
<td>7.7</td>
<td>41.4</td>
<td>2,725.8</td>
<td>56.6</td>
<td>334.5</td>
<td>8,045.0</td>
</tr>
<tr>
<td>Canada</td>
<td>6.0</td>
<td>14.1</td>
<td>153.0</td>
<td>5,373.0</td>
<td>103.7</td>
<td>446.1</td>
<td>11,534.6</td>
</tr>
<tr>
<td>Germany</td>
<td>4.4</td>
<td>11.2</td>
<td>106.4</td>
<td>3,999.3</td>
<td>39.3</td>
<td>467.6</td>
<td>6,198.4</td>
</tr>
<tr>
<td>France</td>
<td>3.9</td>
<td>3.5</td>
<td>61.4</td>
<td>3,008.2</td>
<td>65.8</td>
<td>978.7</td>
<td>4,903.1</td>
</tr>
<tr>
<td>England &amp; Wales</td>
<td>1.6</td>
<td>2.5</td>
<td>193.0</td>
<td>4,236.3</td>
<td>30.5</td>
<td>213.7</td>
<td>5,459.0</td>
</tr>
<tr>
<td>US</td>
<td>10.0</td>
<td>39.0</td>
<td>291.0</td>
<td>5,563</td>
<td>244.0</td>
<td></td>
<td>5,900.0</td>
</tr>
</tbody>
</table>

Both tables show that the recorded Western rates of total crimes, and those of assaults and property crimes (i.e., thefts, robbery and violent theft, fraud) in particular, are roughly between one and two hundred times higher than the Chinese. For instance, in Table 6.1, the assault rates in Canada, Britain and the United States are between 70 and 200 times higher than the Chinese, and the theft rates in these three countries are at least one hundred times higher than the Chinese. However, the Chinese data are not that impressive in terms of murder and rape rates. Obviously, apart from other determinants, an important factor of the striking statistical differences is the different legal definitions of crime that underlies the police recorded crime rates. The significance of this difference in law on crime data is well noted by the Interpol\(^\text{394}\) and Western criminologists (Fattah 1991: 27; Brantingham and Brantingham 1984:42).

6.3.2 The Dimensions of PSOs

The exclusion of the various PSOs from the Chinese criminal statistics appears to be an important contribution to the extremely low crime rates. As Table 6.3 indicates, the annual total volumes of recorded PSO cases might be between 1.7 and 2 times the size of their criminal counterparts.

<table>
<thead>
<tr>
<th>Year</th>
<th>Criminal cases</th>
<th>PSO cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td>542,005</td>
<td>1,025,440</td>
</tr>
<tr>
<td>1986</td>
<td>547,115</td>
<td>1,112,068</td>
</tr>
<tr>
<td>1987</td>
<td>570,439</td>
<td>1,120,000</td>
</tr>
<tr>
<td>1988</td>
<td>827,594</td>
<td>1,410,044</td>
</tr>
</tbody>
</table>

Sources: China Law Yearbook(s), 1987: 604, 1989: 1,084-5.

The exclusion of PSOs has major impact on crime rates for assaults and thefts, but no impact on murder. For example, Table 6.4 shows that the numbers of PSO assaults (beating & injury) could be many times the size of criminal assaults (injuries).

Table 6.4 Criminal and Public Security Offences in 1986 and 1988

<table>
<thead>
<tr>
<th></th>
<th>1986</th>
<th>1988</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PSO Crime</td>
<td>PSO Crime</td>
</tr>
<tr>
<td>Murder</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Assault</td>
<td>268,306</td>
<td>326,552</td>
</tr>
<tr>
<td>Robbery and snatching*</td>
<td>4,628</td>
<td>6,101</td>
</tr>
<tr>
<td>Rape</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Theft</td>
<td>368,468</td>
<td>438,433</td>
</tr>
<tr>
<td>Fraud</td>
<td>21,616</td>
<td>30,133</td>
</tr>
<tr>
<td>Counterfeiting</td>
<td>9,699</td>
<td>16,120</td>
</tr>
<tr>
<td>Total</td>
<td>1,115,858</td>
<td>1,410,044</td>
</tr>
</tbody>
</table>

* In this row, the crime figures are robberies only, whereas the PSO figures are snatching, including snatching by a group of people using relatively moderate force. It is still an issue in Chinese law what kind of group snatching should be defined as robbery. However, in the English edition of China Law Yearbook of 1987 (p.604), the PSO snatching and group snatching are misleadingly translated as "robbery" and "robbery by rioting."

Sources: China Law Yearbook(s), 1987: 604, 1989: 1,084-5, with alterations in translation.

In international comparison, differences in the legal definitions of theft and assault have great impacts on the rates and volumes of crimes. Table 6.5 shows that, except in South Korea, thefts alone accounted for 46.6 percent in the reported total of crimes in Canada, 61.4 in France, 64.5 in West Germany, 77.2 in Japan, 83.6 in the PRC, and 94.3 percent in the United States. The Chinese proportion of theft is one of the highest and the closest to the American.
Table 6.5 Proportions of Selected Types of Crimes in All Police-Recorded Crimes, 1980

<table>
<thead>
<tr>
<th>Offence</th>
<th>Murder</th>
<th>Rape</th>
<th>Serious assault</th>
<th>Theft (all kinds of theft)</th>
<th>Robbery and violent theft</th>
<th>Fraud</th>
</tr>
</thead>
<tbody>
<tr>
<td>China(1981)</td>
<td>1.1</td>
<td>3.5</td>
<td>2.4</td>
<td>83.6</td>
<td>2.5</td>
<td>2.1</td>
</tr>
<tr>
<td>Taiwan</td>
<td>2.7</td>
<td>1.0</td>
<td>6.9</td>
<td>50.9</td>
<td>23.6</td>
<td>2.7</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>0.1</td>
<td>0.1</td>
<td>7.8</td>
<td>63.1</td>
<td>15.8</td>
<td>2.9</td>
</tr>
<tr>
<td>Singapore</td>
<td>0.3</td>
<td>0.3</td>
<td>1.2</td>
<td>64.3</td>
<td>5.0</td>
<td>5.9</td>
</tr>
<tr>
<td>Japan</td>
<td>0.1</td>
<td>0.2</td>
<td>1.7</td>
<td>77.2</td>
<td>0.1</td>
<td>5.3</td>
</tr>
<tr>
<td>S. Korea</td>
<td>0.1</td>
<td>0.5</td>
<td>18.4</td>
<td>14.7</td>
<td>0.4</td>
<td>10.0</td>
</tr>
<tr>
<td>Indonesia</td>
<td>0.6</td>
<td>0.8</td>
<td>5.8</td>
<td>42.1</td>
<td>4.3</td>
<td>4.9</td>
</tr>
<tr>
<td>Canada</td>
<td>0.05</td>
<td>0.1</td>
<td>1.3</td>
<td>46.6</td>
<td>0.9</td>
<td>3.9</td>
</tr>
<tr>
<td>Germany</td>
<td>0.1</td>
<td>0.2</td>
<td>1.7</td>
<td>64.5</td>
<td>0.6</td>
<td>7.5</td>
</tr>
<tr>
<td>France</td>
<td>0.1</td>
<td>0.1</td>
<td>1.3</td>
<td>61.4</td>
<td>1.3</td>
<td>20.0</td>
</tr>
<tr>
<td>US</td>
<td>0.2</td>
<td>0.7</td>
<td>4.9</td>
<td>94.3</td>
<td>4.1</td>
<td></td>
</tr>
</tbody>
</table>


Apparently, the rates of total crimes in the West could be sufficiently lowered if we exclude, from the crime data, all the thefts each involving a value equal to 30 or 50 percent of the average annual expenditure of an individual in the society. As in China, the average expenditure of each individual resident in 1990 was 714 yuan (Information Office of the State Council, 1991:2). The Chinese crime rates are lowered since a theft involving a property value under 200 - or 400 yuan in economically developed areas (that is, 28% to 56% of the average expenditure), are defined as a PSO.\(^{395}\)

\(^{395}\) However, to initiate a criminal investigation, the police do not have to convince themselves that the value of the stolen property is 200 yuans or more. It has never been clarified in official Chinese data whether the police recorded criminal thefts are produced strictly following the rules set by the SPP.
According to data provided by the Ministry of Public Security (MPS), like its criminal counterpart, the total of PSOs increased during the period from 1986 to 1989 when the crackdowns on crimes and PSOs were going on. As Table 6 shows, both the total and almost all the major types of PSOs rapidly increased during 1986-1989, including thefts, assaults, frauds, snatching and group snatching, gambling, disrupting public order and disrupting public affairs. The absolute volume of PSO theft cases and the absolute volume of all PSOs increased 26.4 and 31.0 percent during 1988-1989 respectively, whereas the increases during 1987-1988 were only 17.8 and 26.4 percent. Massive increases also occurred in offences such as counterfeiting, gun and knife control violations. The only major type of PSOs which remained stable was hooliganism.

**Table 6.6 Recorded PSOs**

<table>
<thead>
<tr>
<th></th>
<th>1986</th>
<th>1988</th>
<th>1989</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault</td>
<td>268,306</td>
<td>326,552</td>
<td>386,149</td>
</tr>
<tr>
<td>Theft</td>
<td>360,708</td>
<td>424,899</td>
<td>512,091</td>
</tr>
<tr>
<td>Fraud</td>
<td>21,616</td>
<td>30,133</td>
<td>41,809</td>
</tr>
<tr>
<td>Snatching</td>
<td>7,760</td>
<td>13,534</td>
<td>17,683</td>
</tr>
<tr>
<td>Group snatching</td>
<td>4,628</td>
<td>6,101</td>
<td>6,640</td>
</tr>
<tr>
<td>Property destruction</td>
<td>14,882</td>
<td>21,312</td>
<td>27,909</td>
</tr>
<tr>
<td>Disrupting public order</td>
<td>68,533</td>
<td>75,200</td>
<td>99,565</td>
</tr>
<tr>
<td>Hooliganism</td>
<td>72,099</td>
<td>63,104</td>
<td>71,802</td>
</tr>
<tr>
<td>Gambling</td>
<td>141,148</td>
<td>218,094</td>
<td>316,747</td>
</tr>
<tr>
<td>Superstition</td>
<td>4,519</td>
<td>3,456</td>
<td>6,915</td>
</tr>
<tr>
<td>Disrupting public affairs</td>
<td>14,318</td>
<td>22,710</td>
<td>30,099</td>
</tr>
<tr>
<td>Dangerous substance control violation</td>
<td>8,101</td>
<td>10,231</td>
<td>13,902</td>
</tr>
<tr>
<td>Residence registration violation</td>
<td>15,976</td>
<td>23,680</td>
<td>45,874</td>
</tr>
<tr>
<td>Counterfeiting ID or securities</td>
<td>9,699</td>
<td>16,120</td>
<td>19,101</td>
</tr>
<tr>
<td>Gun and knife control violation</td>
<td>2,863</td>
<td>9,831</td>
<td>17,566</td>
</tr>
<tr>
<td>Disrupting public security</td>
<td>11,099</td>
<td>12,378</td>
<td>14,031</td>
</tr>
<tr>
<td>Others</td>
<td>89,603</td>
<td>132,709</td>
<td>219,742</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,115,858</strong></td>
<td><strong>1,410,044</strong></td>
<td><strong>1,847,625</strong></td>
</tr>
</tbody>
</table>

In Table 6.6, theft accounts for the largest proportion in the total of all the PSOs, that is followed by the number of PSO assaults and PSO gambling. Altogether, thefts, assaults and gambling account for about 66-69 percent in all the PSOs in 1986-1989. This apparently is significant in terms of international data comparison.

6.3.3 The Penalized Population

Table 6.7 covers official data on persons penalized for PSOs by the police in 1986 and 1989.\(^{396}\)

### Table 6.7 Persons penalized for public security offences, 1986 and 1989

<table>
<thead>
<tr>
<th>Offence</th>
<th>1986</th>
<th>1988</th>
<th>1989</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beating &amp; injuring</td>
<td>374,315</td>
<td>438,041</td>
<td>483,227</td>
</tr>
<tr>
<td>Theft</td>
<td>351,361</td>
<td>480,400</td>
<td>584,618</td>
</tr>
<tr>
<td>Fraud</td>
<td>23,524</td>
<td>39,814</td>
<td>57,480</td>
</tr>
<tr>
<td>Snatching</td>
<td>10,537</td>
<td>20,506</td>
<td>25,554</td>
</tr>
<tr>
<td>Group snatching</td>
<td>14,420</td>
<td>27,118</td>
<td>26,092</td>
</tr>
<tr>
<td>Property destruction</td>
<td>19,784</td>
<td>29,521</td>
<td>36,850</td>
</tr>
<tr>
<td>Gambling</td>
<td>473,505</td>
<td>805,516</td>
<td>1,083,852</td>
</tr>
<tr>
<td>Superstition</td>
<td>5,871</td>
<td>4,386</td>
<td>9,247</td>
</tr>
<tr>
<td>Disrupting public affairs</td>
<td>19,519</td>
<td>33,327</td>
<td>41,850</td>
</tr>
<tr>
<td>Disrupting public order</td>
<td>105,911</td>
<td>120,971</td>
<td>146,964</td>
</tr>
<tr>
<td>Hooliganism</td>
<td>92,177</td>
<td>87,779</td>
<td>101,237</td>
</tr>
<tr>
<td>Dangerous substance control violation</td>
<td>11,531</td>
<td>14,552</td>
<td>18,201</td>
</tr>
<tr>
<td>Residence registration violation</td>
<td>34,310</td>
<td>46,662</td>
<td>84,215</td>
</tr>
<tr>
<td>Counterfeiting ID or securities</td>
<td>9,921</td>
<td>17,357</td>
<td>20,448</td>
</tr>
<tr>
<td>Gun and knife control violation</td>
<td>3,529</td>
<td>12,357</td>
<td>19,745</td>
</tr>
<tr>
<td>Disrupting public security</td>
<td>14,439</td>
<td>16,473</td>
<td>17,876</td>
</tr>
<tr>
<td>Others</td>
<td>125,948</td>
<td>200,032</td>
<td>332,265</td>
</tr>
<tr>
<td>Total</td>
<td>1,690,602</td>
<td>2,394,812</td>
<td>3,089,721</td>
</tr>
</tbody>
</table>


\(^{396}\) Published MPS data do not classify the penalized PSO population according to the various types of administrative sanctions. Rather, they only provide information on the ratios of persons penalized for different PSOs.
In Table 6.8, it is found that, in 1986, 1988 and 1989, the penalized totals for PSOs (1,690,602; 2,394,812; 3,089,721) were between 3.75 to 4.67 times the size as the arrested totals of criminal suspects (355,603; 422,108; 579,992). Also, when compared with sentencing data, the penalized totals for PSOs in 1988 and 1989 were at least 6.5 times the size of the sentenced criminal populations in 1988 and 1989.

Table 6.8 Persons Arrested and Punished for Criminal Offences and PSOs

<table>
<thead>
<tr>
<th>No. of persons</th>
<th>1986</th>
<th>1988</th>
<th>1989</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrested for crime</td>
<td>355,603</td>
<td>422,108</td>
<td>579,992</td>
</tr>
<tr>
<td>Sentenced for crime</td>
<td>n/a</td>
<td>361,426</td>
<td>475,041</td>
</tr>
<tr>
<td>Penalized for PSOs</td>
<td>1,690,602</td>
<td>2,394,812</td>
<td>3,089,721</td>
</tr>
</tbody>
</table>


It is worth noting that there are far more people punished for PSO thefts and assaults than their criminal counterparts. In 1986, although the size of all recorded PSO theft cases (360,708) was smaller than that of criminal theft (425,845), the number of the thieves penalized by public security punishment (351,361) was about 60 percent bigger than the total of the people arrested for criminal theft and other property crimes (217,692). In the same year, persons penalized for "beating and injuring" were at least four times more than those arrested for various "crimes against citizens personal and democratic rights," including criminal injury as well as homicide, rape, illegal detention and search, and so forth. Table 6.9 confirms this finding.
Table 6.9 Persons Penalized for Criminal and Public Security Offences

<table>
<thead>
<tr>
<th>Crime or PSO</th>
<th>1986</th>
<th>1988</th>
<th>1989</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Persons arrested for criminal offences</td>
<td>Persons penalized for PSOs</td>
<td>Persons arrested for criminal offences</td>
</tr>
<tr>
<td>Against the person</td>
<td>7,965</td>
<td>374,315</td>
<td>7,933</td>
</tr>
<tr>
<td>Against property</td>
<td>217,692</td>
<td>419,626</td>
<td>279,719</td>
</tr>
<tr>
<td>Against public order</td>
<td>34,353</td>
<td>770,713</td>
<td>35,107</td>
</tr>
</tbody>
</table>


However, punishments imposed on China's two types of penalized populations (i.e., offenders of crimes and PSOs) are different. Criminals are usually sentenced to imprisonment, whereas PSO offenders are mostly punished by warning and fines.

6.3.4 More Thoughts about the Data

Three kinds of ordinary "public security punishments" are provided for in the RSAP: (1) warning by the police; (2) fine ranging from 1 yuan to 5,000 yuan; and (3) administrative detention between one and fifteen days. However, the police can also send a PSO offender to labour re-education for a prostitution-related offence, gambling, or an offence of producing, trafficking or distribution of pornographic materials. In relation to the use of labour re-education, the RSAP is in fact not the main body of law.

397 Article 6. Here, the word "ordinary" is used to set aside labour re-education that will be discussed later in this Chapter.

398 Articles 30 and 32.
In 1982, with the approval of the State Council, the Ministry of Public Security issued the *Provisional Regulations of Labour Re-education* (PRLR), which provide that the term of labour re-education is from one to three years. 399 If the inmate seriously violates regulations when serving the term, there can be a one-year extension. 400 The same document also provides six categories of persons for the use of labour re-education:

1. "counter-revolutionaries and anti-socialist elements whose criminal activities are minor and do not warrant criminal punishment";
2. members of criminal gangs who do not warrant criminal punishment;
3. those who repeatedly engage in "criminal or illegal" activities of hooliganism, prostitution, theft, fraud, etc., but do not warrant criminal punishment;
4. those who engage in group fights or other activities against social order;
5. those who refuse to work, violate work regulations, and constantly disturb public order; and
6. those who instigate the other to commit crime or illegal activities, but do not warrant criminal punishment. 401

So under the PRLR, labour re-education could be imposed on a vast variety of non-criminal offenders, including those who have committed PSO theft, hooliganism, assault, and so forth. Further, the PRLR has in fact created a number of non-criminal and non-PSO but quasi-criminal administrative offences, including non-criminal "counter-revolution" and "anti-socialist" behaviours. These offences are simply not defined.

---

399 Article 13 of the PRLR.

400 Article 58 of the PRLR.

401 Article 10 of the PRLR.
In European countries, misdemeanours and police violations are normally dealt with in courts. In some countries, there are "police courts" handling police violations, but the sentencing power of these courts is minimum. For example, in Belgium, a "délits" is tried in an ordinary criminal court, and a "contravention" is handled by a "Tribunal de police" (police court). The police court, however, can only impose a sentence of imprisonment not exceeding seven days and/or a fine of BF25 (Sheridan and Cameron, 1992: Belgium-27). Generally, in western countries, punishment applicable to misdemeanours and petty misdemeanours are short term imprisonment under 1 year and, in most cases, pecuniary sanctions such as fine. Even under the laws of the former Soviet Union, according to Berg (1985:35), the maximum administrative punishment was only 15 days. A fundamental problem with the Chinese RSAP and PRLR is that they give the police the power to sentence the administrative offenders to long-term imprisonment without a trial or the involvement of defence lawyers.

Table 6.10 demonstrates some rarely published Ministry of Justice (MOJ) data on China's two kinds of populations in prisons. The term "labour reform institutions" refers to prisons for sentenced criminals, whereas "labour re-education institutions" are for the so-called "non-criminal" offenders. Both types of institutions are in fact prisons.

---

402 It seems a similar system of Tribunal de police also operates in France. This kind of court can sentence the accused person to a maximum sentence of imprisonment of no more than two months and/or a fine not exceeding 10,000 francs. See Sheridan and Cameron, 1992, at p. France-29.

403 According to Berg, the USSR issued an edict in 1978, restricting the use of administrative detention to "exceptional cases" for a maximum of 15 days. Mostly, the sanction for administrative infraction is a fine. See Berg, 1985, at p.35-45.
Table 6.10 Persons in Chinese Correctional Institutions

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Labour Reform prison</td>
<td>674</td>
<td>1,052,743</td>
<td>671</td>
<td>1,123,973</td>
</tr>
<tr>
<td>Labour re-education prison</td>
<td>224</td>
<td>152,939</td>
<td>232</td>
<td>165,071</td>
</tr>
<tr>
<td>Total</td>
<td>898</td>
<td>1,205,682</td>
<td>903</td>
<td>1,289,044</td>
</tr>
</tbody>
</table>


The use of labour re-education against the “non-criminal” offenders is in the jurisdiction of Labour Re-Education Committees. These kinds of tribunal are primarily police-dominated and administrative, requiring no involvement of the legal profession.\(^{404}\) Obviously, by western standards, labour re-education would be considered a long term imprisonment. The Chinese police have far more power than their western counterparts. This, once again, might be another indication of the influence of Vyshinsky’s “socialist legality.”

This kind of system is incompatible with the principles of the rule of law and human rights. Moreover, it is also problematic in formal logic. Under the 1979 Criminal Law, the maximum time limit for "criminal detention" as a kind of criminal punishment is six months. Under the PRLR, the term of "labour re-education" is, however, from one to four years. If a non-criminal offence (i.e., a PSO or whatever) is "less harmful" or "less serious" than its criminal counterpart, why does the non-criminal offender deserve a longer

\(^{404}\) The Chinese judiciary sometimes also give guidelines for the use of labour re-education. See e.g., Article 5(2) of Supreme People's Court and Supreme People's Procuratorate, 1984, *Answers to Questions Regarding the Specific Application of Law in Handling Theft Cases*. In Ren et al. (Eds.), 1991, at p.759.
term of incarceration? For instance, under the Criminal Law, the punishment for a criminal offence of gambling is imprisonment not exceeding three years, or criminal detention not exceeding six months, or non-custodial "surveillance." Under the RSAP, however, the maximum "non-criminal" punishment for gambling is "labour re-education." Further, the system may generate problems in the police recording of criminal incidents. If the police can severely punish an offender by themselves, why should they bother to go through the formal legal procedure?

It is worth noting that, according to the RSAP and the Law on Administrative Litigation of the PRC (1990), the person convicted of a PSO might appeal his/her case to a higher police authority, if s/he disagrees with the conviction or the sanction; and then to a court, if he chooses to challenge a decision made by this higher police authority. For this part of the system to fully operate in practice, we should at least have lawyers involved in the first stage of the administrative process.

Table 6.10 also demonstrates that non-criminal inmates only account for about 13 percent of China's total inmate population, again indicating that most public security offenders are not sent to labour camps. However, there are apparently other methods to keep public security offenders in some kinds of custody, that are even less formal than labour re-education. For instance, there is a system of so-called "compulsory employment" to keep both criminal and non-criminal inmates in the camps after they have served their

405 Article 168.

406 Article 39.

407 In practice, the accused is certainly not encouraged to require a court hearing, if he wants to show a "good attitude."
sentence, although official data on the application of this system are not available.\footnote{408} An inmate who does not behave properly during the period of labour reform could be employed compulsorily by the camp for an unfixed time after he accomplished his time of sentence. This employee is not allowed to go outside of the camp like a free man, but get some kind of wage for his work (Shao Mingzhen, 1987: 246-249).

Further, there is a system of "shelter and inspection" to imprison the non-criminals, though the size is not published officially. Again, this system operates under the jurisdiction of the police. The detention centres of "shelter and inspection" are established for the investigation of those who do not give their true identities and are suspected of having roamed around committing crime or PSOs. "Shelter and inspection" is a measure of temporary detention with a time limit of three to four months in police practice.\footnote{409}

With all the systems that are based on the divisions between what is criminal and what is non-criminal, the implementation of the principle of legality is indeed a difficult endeavour.

\footnote{408} See Article 65 of PRLR. \footnote{409} See Article 2 of the Notice regarding the Unification of Forced Labour and Shelter and Inspection in Labour Re-Education, issued by the State Council in 1980.
Conclusion

Under the present system, the division of criminal and non-criminal offences is vague in law and threatening to the rule of law and human rights. To deal with this problem, it is proposed that the Chinese legislature should perform its function of legislative interpretation, that a Western-type *Statutory Interpretation Act* should be enacted, and judicial interpretation should be based on well-founded standards.

With respect to the division of crimes and quasi-criminal offences, it may be proposed that many of the PSOs, such as theft and assault, should be criminalized and unified under the Criminal Law, so that conviction and sentencing process can be handled by the legal profession. The power of the police should be limited in accordance with the principle of legality. In particular, labour re-education should be abolished, administrative incarceration should not exceed fifteen days, the corresponding changes should be introduced to both the *RSAP* and the *PRLR*.

China's extremely low crime rates could be misleading in the development of criminal justice policies. These low rates may be an achievement of China's social control systems. Somehow, they may also be a fiction owing to the dark figures in data collection, and the legal division between the criminal and non-criminal offences.
Chapter VII
The Insanity Defence and Specification of Law

7.1 Insanity: Negation of the Mental Element of Crime

7.1.1 Why Discuss

From a legal point of view, as discussed in the Chapter V, crime is defined as a unity of the constituent elements. Given the insanity defence may negative the required mental state of crime, any ambiguity with respect to this defence also amounts to vagueness in the definitions of crime and therefore infringes upon the principle of legality.

For various reasons, different jurisdictions treat the insanity defence differently. For example, Verdun-Jones (1991: 265) has noticed that "the defence is virtually dead" in England and Wales, but "still a viable issue in Canada." In recent years, he (1994:175) indicates, both the Canadian Criminal Code and the case law have experienced some "surprisingly profound changes" with respect to the insanity or the NCRMD (not criminally responsible on account of mental disorder) defence, primarily due to a number of "Charter" challenges.\(^{410}\) Apparently, in the English-speaking world, the producer of a vast number of academic publications on this subject is the United States, where insanity is one of the most frequently discussed criminal law subjects (Gardner & Anderson, 1992:104). In the People's Republic of China, however, the insanity defence has never become a major issue in the past five decades. Except in standard textbooks of criminal law (Gao and Zhao, 1993; He Bingshong et al., 1993; Zhao and Wu, 1993; Wang Zuofu,

\(^{410}\) The term "Charter" refers to the Canadian Charter of Rights and Freedoms (1982).
1987), the insanity defence is largely ignored in academic publications. Subsequently, there are some important issues to be addressed for the next phase of the Chinese law reform.

The lack of Chinese legal study in this field is obvious. In a 1986 collection of criminal law literature (Gao Mingxuan, 1986), the authors offered a list of 51 major subjects in academic debates during 1949-85. The insanity defence is not on the list. The book also presents a 200-page long list of journal articles published throughout the country during the same period, demonstrating that, prior to the 1980s, nothing impressive was published on the issue of insanity defence, whereas relevant articles published after 1980 were basically descriptive.

In 1989, a collection of LL.M theses was published in China (Zhao Bingzhi et al. 1989). The book summarises all the LL.M theses defended during 1981-88 by criminal law students throughout the country, including nearly 200 theses on various subjects, but none of them touched on the issue of the insanity defence.

Also, in recent years, insanity has never become a major issue in an annual conference of the China Criminal Law Research Society. During the past fifteen years, there were only a few short Chinese law journal articles that are relevant to the subject (Ma Zhiyuan, 1987; Li Meiyi, 1988; Zhao Bingzhi, 1989a; Zhao Junting, 1989; Yuan An, 1990; Liu Baiju, 1990).

Similarly, it is noted by Pearson (1992:409) that:

\[411\] E.g., Yang Duenxian et al.(Eds.), 1989; Yang Duenxian et al. (Eds.), 1990; Yang Duenxian et al. (Eds.), 1991; Yang and Zhao (Eds.), 1992; Yang and Chao (Eds.), 1993; Su and Shan (Eds.), 1994.
Little is available in English that examines the way that China has viewed the legal status of those regarded as mentally ill, or how such people are dealt with when they transgress.

After being in China for several months, Pearson (1992:409-423), a professor in Hong Kong, published an article, which appears to be an impressive foreign publication regarding the current Chinese system in this area.

In this chapter, I focus on the insanity defence in China, looking at its origins in the Chinese history, its similarities and differences as compared with its counterparts in other major legal systems, vagueness in the operation of the Chinese system, and its reform in the future.

7.1.2 Insanity as a Defence in Ancient Chinese Laws

Insanity as a defence in Chinese law traces its historical roots back to thousands of years ago. In her article (1992:409), Pearson noticed that, according to a Chinese author, "the first mention of psychosis" as an issue in Chinese law was made at least two thousand years ago, when a minister of justice, Han Feizi (280-233 B.C.), wrote: "psychotics cannot escape from punishment according to the law." Looking at Chinese legal history, however, one can easily find that insanity was defined as a defence during the Western Chou Dynasty (11th century - 770 B.C.).

According to Chan Shuen Wu Ji, the learned legislative commentator of the Tang Code in the Tang dynasty (A.D. 619-906), mental disorder, including retardation, was recognized as one of the three principal rules of exemption and mitigation of punishment in the Rites of Chou (Chou-li), a code of the Western Chou Dynasty. Chan wrote:
In the *Rites of Chou*, there are three rules on amnesty: the first is called the infant and weak; the second is called the aged and senile; and the third is called *cuin-yu*. At present, those aged ten and under are considered to be infant and weak, those eighty years of age or more are considered to be aged and senile, and those who are incapacitated are considered the same as those who are *cuin-yu*.

The term "amnesty" (*she*) here virtually equals to "defence," although at the time the law had no distinction between "not guilty" and "guilty but not punishable." *Cuin-yu* in the *Rites of Chou* is translated by Johnson as "feeblemindedness."\(^{412}\) but the term in Chinese authority is clearly interpreted as "born insane or mentally disordered" (Zhen Xuan, cited in Tairo, 1985: 95). Apparently, the ancient law-makers were simply using the term *cuin-yu* to cover serious feeblemindedness and mental illness, and the term "mental illness," as in modern Chinese, includes natural imbecility.

The *Rites of Chou* also defined mistakes of law, inadvertent negligence and "forgetfulness," which, as opposites to criminal intent, were circumstances for mitigated punishment.\(^{413}\) The underlying ideas of this law later were recognized as parts of the Confucianist tradition of law which took a subjective approach towards criminal responsibility, advocating notions such as guilty mind and moral responsibility.\(^{414}\) In contrast to the ancient "Legalist School," Confucianism requires that laws and penal policies should primarily target behaviour which demonstrates a guilty mind rather than the actual harm caused by the accused person's conduct. Therefore, the mentally

\(^{412}\) See *The Tang Code*, translated by Johnson. 1979, at pp.171-172.

\(^{413}\) For discussion, see Tairo, 1985, pp. 94-99.

\(^{414}\) *Ibid*, at pp.92-94.
disordered, including the severely retarded, who obviously had little rationality, were considered as not punishable.

The law which most systematically demonstrated the Confucianist tradition in ancient China was the *Tang Code*. The *Tang Code*, generally recognized as the most influential piece of legislation in Chinese legal history before 1910, contains 502 articles, including 57 articles on general principles. Following the three rules of the *Rites of Chou*, the term "disabled" was introduced to include both the seriously physically disabled and *cuin-yu* (mentally disabled or severely retarded) persons, and again without a clear division between insanity and feeblemindedness. Article 30 of the *Code* stipulated that the mental disordered, like those who were under or above a certain age, were only criminally responsible for some serious crimes they had committed. The article reads:

Article 30 Those Who Are Aged, Juvenile, or Disabled

30.1a - All cases of those who are seventy years of age or over, or fifteen years of age or less, or disabled, who commit a crime punished by life exile or less, allow redemption by payment of copper.

30.2a - Where those who are eighty years of age or more, or ten years of age or less, or disabled, commit rebellion or sedition, or kill people, if the death penalty is required, they may send up a petition.

30.2b - Those who rob or wound people are still allowed redemption by payment of copper.

30.2c - Other crimes are not punishable.\(^\text{415}\)

This article indicates that the *Tang Code* not only inherited the principles in *The Rites of Chou*, but also specified the rules for applying these principles. First, the *T'ang Code* provided that mentally disordered people were only criminally responsible for the

\(^{415}\) The article cited here is translated by Johnson. See Johnson, 1979, at p.31.
offences of treason, murder, robbery, and intentional bodily injury. According to a legislative commentary to the article by Chan Shuen Wu Ji, all other harmful acts committed by a mentally disordered should not be prosecuted.\textsuperscript{416} Secondly, it was stipulated that, in most cases, a mentally disordered person taking criminal responsibility should be allowed to replace imprisonment by monetary payment. Thirdly, if a mentally disordered person committed a offence for which a death penalty was mandatory, he should be allowed to make a petition to the emperor and the execution could not be carried out until the emperor issued a decision.

Also, the \textit{Tang Code} applied the principle of Article 30 to those who had committed offences before becoming aged or disabled. Article 31 reads:

All cases in which an offense has been committed before a person is aged or disabled, yet the person is aged or disabled at the time that the crime is discovered, are sentenced according to the article on age and disability.

If within the term of years of penal servitude, a person becomes aged or disabled, such cases are also treated as in this article.

The corresponding legislative commentary states that if an offense is committed when a person is not disabled, and the crime is discovered after the person has become so, or, if a person was not disabled at the time of being sent into a jail, but becomes so during the term of imprisonment, "the case should follow the law on allowing redemption by payment of copper which has been explained above."\textsuperscript{417}

\textsuperscript{416} \textit{Ibid}, at p.175.

\textsuperscript{417} \textit{Ibid}, at pp.176-178.
No one has found a provision which stipulates a test of insanity defence in the *Rites of Chou*, the *Tang Code*, or in other ancient Chinese codes. However, the provisions cited here clearly treat the insane and feebleminded people like those who are too young or too old to understand the nature of their behaviour. The *Tang Code* provisions somehow share something in common with the "wild beast" test in old English common law. In *State v. Jones* of 1871, a 1723 English case *Arnold* was cited by Justice Ladd as an example of the "wild beast" test. In *Arnold*, Justice Tracey refers to a situation where "a man must be totally deprived of his understanding and memory, so as not to know that he is doing, no more than an infant, a brute, or a wild beast." So the "wild beast" test was in fact a layman's test, assuming that the insane, the infant and the beast share a similar total disability to understand and to reason. Still, the *Tang Code* is perhaps more liberal than the old English law in the sense that it treats insanity on the same basis as the mental ability of children under the ages of 15 and 10 rather than an infant or a wild beast.

Apparently, neither the *Rites of Chou* nor the *Tang Code* provides today's scholars anything to distinguish the so-called "medically insane" and "legally insane." This might help to explain, though partially, why the present Chinese system tends to empower the medical profession to decide the issue of insanity in criminal law.

### 7.1.3 The Dual-Incapacity Tests of Legal Insanity

In the 1935 *Criminal Law* of the Republic of China, which is still effective in Taiwan province, the insanity defence is stated virtually without a specific test, leaving the matter to the court. Article 19 of the *Law* reads:

---


419 Articles 30.1a, 30.2a and e.
Anyone who acts with *xingshen sangshi* is not punishable.

Anyone who acts with *jingshen haoruo* is subject to reduced punishment.

The vagueness in the statute is reduced by judicial interpretation. In 1937, the Chinese Supreme Court (cited in Kuo, 1983:461) defined the terms "*sin-shen sang-shih*" (*xingshen sangshi*) and "*chin-shen hao-jo*" (*jingshen haoruo*) as:

If, at the time of committing the crime, the person has lost his abilities of self-consciousness, comprehension, judgement and voluntary intention, such a state is defined as *sin-shen sang-shih*. If these abilities have not been fully lost, but are substantially decreased, such a state is then defined as *chi-shen hao-jo*.\(^{420}\)

Apparently, this definition has a focus on cognition. The present Japanese *Penal Code* (enacted in 1907), which was the model for the 1935 Chinese *Criminal Law*, has a similar wording.\(^{421}\)

The 1979 *Criminal Law of the PRC* takes a different approach to define the insanity defence. Paragraph one of Article 15 reads:

A mentally ill person who causes harmful results when in a situation of being unable to understand or control his actions is not to bear criminal responsibility. However, his family members or guardians should be instructed to keep close watch over him and arrange his medical treatment.

---

\(^{420}\) Under the official rules of *pingying* in the PRC, *sin-shen sang-shih* should be *xingshen sangshi*, and *chin-shen hao-jo* should be *jingshen haoruo*.

\(^{421}\) Article 39.
Apparently, this dual-incapacity test has two arms: first, the person is incapable of understanding his harmful act because he/she is suffering from a mental illness at the time when he commits the act; or, secondly, for the same reason, he/she is incapable of controlling the act even if he/she is able to understand it. The meaning of being "mentally ill" is determined by relevant psychiatric criteria, whereas the term "incapable" is, in criminal law theories, legal rather than medical.

In some Chinese publications, the phrase "incapable of understanding the act" is interpreted as incapacity to know the physical nature of an act, often demonstrated as a delusion about the target and the "surrounding environment." In other publications, the term is defined as incapacity to distinguish right from wrong, i.e., to understand the "socially harmful nature" of the act and its possible "harmful consequences" (Sun and Zhou, 1984:113; Wang Zuofu, 1987:99). At present, no judicial interpretation is available on this issue.

Aside from incapacity to understand, incapacity to exercise self-control due to mental illness is also recognized as insanity. Under certain circumstances, some authors argue, it is possible that a person understands his harmful behaviour but, due to his mental illness, he is still "incapable of controlling" it. Nonetheless, they wrote, the insanity defence is not open to psychopaths or those suffering from personality disorders, because, "in general," these people are still considered of being able to understand and control their

---

422 See Zhao Bingzhi, "The Subject of Crime," in Gao and Zhao (Eds.), 1993, pp.141-165, at pp.155-158; Zhao Bingzhi, "The Subject of Crime," in Zhao and Wu (Eds.), 1993, pp.88-114, at pp.104-108.

423 Also see ibid.

424 See Wang Zuofu, 1987, at p.99; also see ibid.
acts (Wang, 1987:99). It is worth noting that this too has not become an official position of the courts.

The two-arm dual-incapacity test in Chinese law is indeed different from the English M'Naghten Rules, which, as Verdun-Jones (1989:189-190) puts it, "focus almost exclusively on cognitive factors (namely, the accused person's reasoning abilities) to the apparent exclusion of emotional and volitional factors." Also, the Chinese test is distinctive from the modified insanity test under section 16 of Canada's Criminal Code. Nonetheless, the academic interpretation of Chinese scholars trying to keep psychopaths away from raising the insanity defence shows a rationale similar to that in Canadian case law. In Cooper v. The Queen and Kjeldsen v. The Queen, the Canadian Supreme Court ruled that psychopathic disorder of personality can constitute a "disease of the mind" under section 16(2) of the Canadian Criminal Code. However, a person suffering from this kind of disease will not be successful in raising an insanity defence under section 16 of the Canadian Criminal Code, because his disease does not make him "incapable of appreciating the nature and quality" of his act and of knowing that it was wrong.

In common law countries, the test that looks most similar to the Chinese dual-incapacity test is the American Law Institute (ALI) test as set out in section 4.01 of the 1962 Model Penal Code. This test includes both cognitive and volitional elements:

Section 4.01. Mental Disease or Defect Excluding Responsibility.

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity

---


426 §16(1).
either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Soon after its publication, Judge Kaufman, appraised the ALI test in his judgement in United States v. Freeman as being "the soundest yet formulated" test "free of many of the defects" which accompany previous common law rules and "couched in sufficiently precise terms to provide the jury with a workable standards." 427

A similar test is found in the 1974 bill to revise the Japanese Penal Code, which reads:

A person is not subject to punishment if he, at the time he committed the act, was, by reason of mental deficiency, incapable of appreciating the right-and-wrong of his act or acting in accordance with this appreciation. 428

However, unlike this proposed Japanese test, the Chinese test is different from the ALI test in at least two aspects: First, the Chinese test, like the M'Naghten Rules, defines the cognitive element as the incapacity to understand the conduct (or the nature and quality of the conduct), whereas the ALI test, as Hans and Slater (1985: 111) noticed, does not explicitly contain such a provision but rather "focuses more specially on understanding the wrongfulness of one's acts." Secondly, the Chinese test does not use the phrase "substantial capacity." This phrase modifies the previous requirement of "total incapacity" so as to make the insanity defence open to more people. Nonetheless, it might


428 § 16 (1).
generate vagueness since the upper and bottom lines of what is "substantial" cannot be easily specified.

It is worth noting that, well before the ALI, the dual-incapacity test had been adopted in many European countries. Since the Chinese law in general belongs to the civil law family, this legislation, in comparison with laws in common law countries, is more influential in relation to the Chinese law. For instance, the Italian Penal Code provides:

Anyone who, at the time he committed the act, was, by reason of infirmity, in such state of mind as to preclude capacity to understand and to will shall not be responsible.\(^{429}\)

Similarly, the old 1933 German Penal Code provides that:

There is no criminal act where the actor, because of ... a pathological disturbance of mental functioning or a mental debility, at the time of the act, is incapable of appreciating that the act is prohibited or of acting pursuant to such appreciation.\(^{430}\)

The 1975 German Penal Code (as amended to 1976), in §20, has confirmed the dual-incapacity test but changed the criterion of "incapable of appreciating that the act is prohibited" to "incapable of appreciating the wrongfulness of the act." An almost identical test is adopted in the Swiss Federal Penal Code (as Amended to 1971).\(^{431}\) Therefore, we might claim that the dual-incapacity test is not exclusively "American."

\(^{429}\) § 88 (total mental deficiency) of the 1930 Italian Penal Code.

\(^{430}\) §51 (1).

\(^{431}\) §10.
Also, at the time when China's *Criminal Law* was drafted, the Soviet criminal law was the most influential foreign legislation to the Chinese law makers. Article 11 ("Nonimputability") of the 1960 *Penal Code* of the RSFSR provides:

A person shall not be subject to criminal responsibility who at the time of committing a socially dangerous act is in a state of nonimputability, that is, cannot realize the significance of his actions or control them because of a chronic mental illness, temporary mental derangement, mental deficiency, or other condition of illness.

Also, a person shall not be subject to punishment who commits a crime while in a state of imputability but before the rendering of judgement by the court contracts a mental illness which deprives him of the possibility of realizing the significance of his actions or of controlling them.

Before the collapse of communism in East Europe, the entire region used to follow the Russian model of criminal law. A dual-incapacity test almost identical to the Soviet's was also found in the penal codes of many former socialist countries. As for China, the current criminal code was actually drafted in the early 1960s, when the PRC and USSR were still allies.

7.1.4 *Irresistible Impulse or Volitional Prong*

With the dual-incapacity test, a fundamental problem is that the law makes the insanity defence beneficial to someone who clearly knows the wrongfulness of his act but, due to his mental illness, cannot stop himself from doing it. Unlike in the West, the dual-incapacity test of insanity has never been critically evaluated in Chinese court cases and

---


273
legal literature. Therefore, a review of the relevant Western studies might help to rethink some of the key issues of this test.

In Anglo-American legal literature, the volitional element is described as an "irresistible impulse" or "volitional prong." In England and Wales, it is recognized as a partial defence in murder cases (i.e., to reduce murder to manslaughter if the existence of an abnormal mental disease is successfully proved), largely due to the lack of sentencing discretion for murder under the *Homicide Act* 1957 (Dix, 1985). Canada has never adopted the English approach, even if such an impulse is clearly generated from a psychotic process (Verdun-Jones, 1989:204-206). On the contrary, in the United States, irresistible impulse is recognized as the second branch of the 1962 ALI insanity test and, according to Gardner and Anderson (1992:109), this position was adopted by about half the states.

There might be different reasons for the various jurisdictions to adopt a dual-incapacity test of legal insanity. However, the debates around the volitional issue in the United States are indeed insightful to all of us. As Ogloff (1991:509) reported, from the acquittal of John Hinckley in 1981 to the year of 1991, "at least 17 states and the federal government revised their insanity defence statutes"; many abolished the ALI-type test and removed the volition element. But, what was the reason that the volitional prong became an element of the ALI test in the first place? Why did so many jurisdictions suddenly make a change to their law?

The U.S. apparently has a long history of recognising volition as an element of insanity. In *United States v. Jenkins*, it was noted by the court that, in American case law,
a test of volitional capacity had been suggested in addition to the cognitive one in as early as 1897.  

The underlying rationale of adopting an irresistible impulse test was discussed by Judge Bazelon in the 1954 case of Durham v. United States, which advocated the "Durham Rule" of insanity defence. At the time, the M'Naghten right-wrong test was constantly challenged by critics from both the psychiatric and legal professions. In 1838, Judge Bazelon noted, a founder of the American Psychiatric Association, Isaac Ray, called the test a "fallacious" test of criminal responsibility. In 1928, Justice Cardozo told the New York Academy of Medicine that the right-wrong test had "little relation to the truths of mental life." In the 1950s, the test was denounced by the Royal Commission on Capital Punishment and the Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry as "based on an entirely obsolete and misleading conception of the mature of insanity" because reason could be "only one element," but "not the sole determinant" of conduct. The problem with the right-wrong test, Bazelon said, is "its misleading emphasis on the cognitive." Therefore, the irresistible impulse test was adopted as part of the efforts to correct this mistake.

Since the acquittal of Hinckley, however, the volitional prong of the ALI test has been criticised by both what Brooks (1985) called "mens rea reformers" and "ALI-modifiers" in the United States. Changes to the ALI-type test in law have been supported by the U.S. government, the public, the professionals and the academics. As Brooks puts it, the mens rea reformers, "led by the American Medical Association and by the Reagan

433 See United States v. Jenkins (1968) 393 F.2d 930, Seventh Cir. The 1897 case cited in Jenkins is Davis v. United States (1897) 165 U.S. 373.

administration," suggested the ALI-type insanity defence should be abolished and replaced by a mens rea test, which is "quite similar to the McNaughten test." He said:

The mens rea test would result in the acquittal of a mentally ill defendant only in those cases where the defendant at the time of his offense was so seriously mentally ill that he did not have the requisite intent or state of mind required to commit an illegal act.

On the other hand, the "ALI-modifiers" argue that the insanity defence is "morally necessary" but "sensible reforms" need to be introduced to the ALI test (Morse, 1985). One of the reforms is to remove the volitional element out of the test, since no one, even the experts, honestly knows how to accurately assess the real self-control capacity of the accused when he committed the offence (Morse, 1985:142-143).

Chinese lawyers tend not to identify the volitional element of insanity as "irresistible impulse." The term, as Judge Bazelon noticed in Durham, could misleadingly imply that mental disease "produce(s) only sudden, momentary or spontaneous inclinations to commit unlawful acts." The Chinese silence on the issue of irresistible impulse might be considered as an attempt to avoid such kind of inadequacy. Nonetheless, a fundamental problem raised in the U.S. remains unsolved in China: Do the Chinese have the techniques to determine whether the accused was incapable to control his conduct when he committed the offence?

Indeed, under the present Chinese system, this is basically an academic concern. In practice, the Chinese justice system, due to the vagueness in law with respect to the operation of the Forensic Psychiatry Assessment Committees (FPACs), is able to convict and punish any socially dangerous individuals if it is required on grounds of public
policies. The fact that psychopathy and personality disorder are excluded from legal insanity demonstrates an intention to punish and control these people.

7.1.5 \textit{The Cognitive Element of Legal Insanity}

Definitions of the cognitive element of insanity are often debatable. Following the post-Hinckley debates, as Mackay (1988:93-94) noticed, some of the states in the United States introduced new laws to change the ALI cognitive test by requiring the accused to prove "that he was incapable of knowing or understanding the nature and quality of his act and of distinguishing right from wrong at the time of the offence."\textsuperscript{435}

As noted previously, the Chinese term of "incapable to understand his conduct" has been theoretically interpreted as incapacity to understand the nature or wrongfulness of the harmful act. This is roughly similar to the Canadian interpretation of section 16(2) of the Canadian \textit{Criminal Code} in \textit{Abbey}.\textsuperscript{436} However, under the Chinese system of FPAC, the burden of proof in relation to the insanity defence is almost meaningless. No matter who raises the defence, the issue will be referred to and decided by a FPAC. The Chinese defendant, therefore, is simply not required to prove his insanity.

In the U.S. and Canada, the meaning of "wrong" has been an important issue in defining insanity. In \textit{State v. Jones}, Judge Kaufman recalled the 1912 case of \textit{Bellingham}, in which Chief Justice Sir James Mansfield, in Kaufman's words, made a change to "the whole scope and meaning of the rule" by instructing the jury that "it must be proved beyond all doubt that, at the time he committed the atrocious act, he did not consider that

\textsuperscript{435} e.g., s.25(b) of the \textit{California Penal Code}, as cited in Mackay, 1988, at p.94.

murder was a crime against the laws of God and nature." The wording here seems to indicate a departure from the test of "legally wrong" to that of "morally wrong." In R. v. Schwartz, the Supreme Court of Canada defined the term "wrong" in section 16 of the Canadian Criminal Code as legally wrong. In the 1990 case of R. v. Chaulk, the same court expanded the definition of "wrong" to include "morally wrong" and therefore made the insanity defence open to more people.

In the current Chinese context, however, such a change is unlikely to generate any significant changes in practice. Unlike in the West, a religious delusion that somehow morally justifies an unlawful act can hardly become an issue in China. In Chaulk, the accused were found suffering from a paranoid psychosis which made them believe that they were above the ordinary Canadian law. The Supreme Court held that what was "morally wrong" should not be judged by the personal standards of the accused, but by the ordinary moral standards of reasonable members of the society. Nonetheless, the reasoning seems to indicate that the Canadian Supreme Court recognizes the existence of a legitimate religious moral code which might be in conflict with the law of the state. This is not a position of the Chinese law. In Chinese jurisprudence, all criminal behaviours that are legally wrong are considered morally wrong as well. The underlying political assumption is: a socialist society shall maintain a unified moral code which excludes any independent moral standard emerging from any religion. In other words, a religious

---


delusion that generates a harmful act in conflict with the state law cannot be recognized as morally justifiable in a Chinese court.

Nonetheless, the world is changing. The number of Chinese joining various religious groups has been skyrocketing since the mid 1980s (The People's Republic of China Year Book 1988/89:533-534). From a long term point of view, this development may influence the rigid position of China's law towards the relation between what is illegal and what is immoral.

Differences in the legal tests of insanity do not necessarily lead to significant differences in the law in the real world. For example, findings regarding the practical impacts of the legal change from the M'Naghten to the ALI test in the United States are conflicting. Some studies claim an increase in the insanity acquittal rate, others find no major increase at all. In one study, Ogloff (1991) found that jurors simply do not pay much attention to the instructions of the judge about the legal test. In making the verdict, jurors tend to focus on the expert psychiatric testimony, the defendant's intent to harm and his background, but not the legal test of insanity defence. It is also found that jurors often use their own definitions to determine the legal issue of insanity, whereas different social groups have various "lay definitions" (Hans & Slater, 1985). In sum, Ogloff (1991:526) wrote that:

For whatever reason, the particular insanity defense standards employed do not seem to strongly influence a juror's decision making. Thus, any differences that exist between the ALI and McNaughten standard may be practically meaningless.

\footnote{See Ogloff, 1991, at p.511.}
7.1.6 The Scope of Applying the Insanity Defence

Pearson (1992:411) has noticed that China applies the insanity defence to "a variety of offences rather than just to murder." However, she has also found that material concerning the kinds of crimes committed by the probably insane is "scarce and incomplete" (1992:413). Nonetheless, according to at least one Chinese study, the issue of insanity has been raised in cases ranging from rape to "murder, assault, theft, fraud, arson, framing others, antisocial and antipolitical speeches and deeds" (Zhang in Pearson, 1992:413). The study was based on a sample of 210 cases of psychiatric appraisals. The Chinese researcher, Zhang, also finds that the frequency of raising the insanity defence varies in different historical periods. For example, he found, approximately half the persons who were sent to psychiatric hospitals for appraisals in 1977 were charged with "antipolitical actions." In 1987, this figure dropped to 6.7%.

Making the insanity defence open to a wide range of offences is also witnessed in another Chinese society, Taiwan, where the culture and legal system share many similarities with the mainland's. Kuo (1983:457-471) conducted a study of 77 criminal cases, each resulted in a forensic psychiatric examination of the defendant's mental capacity. Among the 77 accused, 23 (29.87%) were charged with homicide, 5 (6.49%) with causing bodily harm, 20 (25.97%) with theft, 9 (11.69%) with "crimes against morals," 7 (9.09%) with offences against public safety, 6 (7.80%) with forceful taking, 2 (2.60%) with destruction of property, and 1 (1.30%) with fraud, bad cheques and "suspicion of an offence" each (1983:461-462). As a result, 25 out of the 77 were acquitted (total acquittals), 23 were convicted but subject to mitigation or commutation (diminished responsibility), 12 were convicted and sentenced, and 17 remained "undecided
or unknown" at the time of the study. Among the decided 60 cases, the rate of "consistency" between psychiatric assessment and court decision is 70%.

The wide range of application in both the Chinese societies demonstrates a long-term influence of Confucianism and a confidence that insanity acquittees can be kept under control. This confidence is probably determined by the family-oriented social structure and the informal social control networks in Chinese societies.

7.2 Psychiatric Experts in Criminal Proceedings

7.2.1 The FPAC under the 1989 Act

Overall, vagueness is not a major problem with the Chinese dual-incapacity test per se, but with the process of applying the test. Indeed, the present Chinese system of conducting and using forensic psychiatric assessment is founded on some vague and problematic rules.

In Canada and in "about half the states" in the U.S. (Homant and Kennedy, 1986), the presumption of sanity is a principle in law.\textsuperscript{442} This is not clearly laid down in Chinese law. Also, there is no Chinese law that establishes the burden of proof when insanity is raised as an issue in criminal proceedings. The Chinese rule seems to be: no matter which party takes the burden, this party needs psychiatric evidence to prove insanity.

\textsuperscript{442} For the Canadian rules, see s.16 (2) and (3) of the Canadian \textit{Criminal Code}, and \textit{Chaulk v. The Queen}, (1990), 62 C.C.C. (3d) 193.
In the 1980s, some provisional regulations were formulated in China, trying to establish some rules concerning psychiatric experts and evidence (Pearson, 1992:411-413). However, these were unpublished "internal" regulations circulated within the criminal justice system, not necessarily available to defence attorneys. Only on a few occasions, were such regulations used by attorneys for defence purposes (Zhu & Yang, 1989). Also, the regulations were only persuasive rather than legally binding on the courts. Before 1989, there was virtually no specific law regulating psychiatric experts in assessing the capacity of an accused.

The first law on forensic psychiatric assessments in the PRC is the 1989 Provisional Regulations of Forensic Psychiatry Assessments, jointly promulgated by China's Supreme Court, Supreme Procuratorate, Ministry of Public Security, Ministry of Justice and Ministry of Health. This document has replaced the previous local regulations.

The 1989 Regulations aim at building up a unified system of forensic psychiatric assessments. According to the Regulations, special psychiatric assessment committees are established at provincial and city levels. These "Psychiatric Judicial Assessment Committees" (PJAC) are far more powerful than the individual expert witnesses in common law countries. Their missions are to appoint assessors, organise them into working groups, assign and supervise psychiatric appraisal projects, deal with appeals of the assessed individuals, and issue appraisal reports that are considered as "scientific evidence" in criminal or civil proceedings.443

443 Articles 2, 3, 8 and 18.
Members of each PJAC must include psychiatric experts and representatives from the court, the procuratorate, the police, and justice administrations. The psychiatrists work as assessors on behalf of a PJAC. They assess the individual and draw a conclusion, but do not issue the final assessment report. When the conclusion is approved by the committee, it becomes a report of the committee and is adduced as evidence.

The 1989 Regulations empower a PJAC to "queding" (determine), in its assessment report, any of the following issues regarding the ability of an assessed criminal suspect or an inmate:

First, whether he/she has a mental disease; if yes, the category of the mental disease, its impacts on his/her mental state and the criminal conduct at the time of committing the offence; and whether the person is capable to take criminal responsibility;

Second, his/her mental state during the proceedings and fitness to stand trial; or

Third, if the person is serving a sentence, his/her mental state during the time of serving the sentence and what kind of legal measure is recommended.

Apprently, each set here includes both the issues of facts and the issues of law. For instance, the PJAC is empowered to tell the court its conclusive opinions regarding matters that are purely issues of law, such as whether the accused is capable of accepting criminal responsibility, i.e., whether the court should admit his insanity defence.

---

444 Article 4.
445 Article 15.
446 Article 9.
In general, Chinese scholars agree that psychiatric assessment reports are not legally binding on the courts (Wang Zuofu, 1987:99-100), and the law has remained silent on this issue. Also, as Pearson (1992:412) cited, a 1987 Chinese study indicates a 10 percent chance of the reports being rejected by the courts. Technically, the 1989 act does not attempt to alter the nature of psychiatric assessment reports. But in essence, given the power and the structure of PJACs, their appraisal reports are no longer ordinary medical evidence, but decisions made by some kind of tribunal. The involvement of judicial representatives in the PJACs implies that a PJAC psychiatric appraisal report is virtually automatically accepted as evidence once it is sent to the court. Also, this structure indicates that the legal opinions of a PJAC report are at least powerful recommendations to the court. In general, it is unlikely for an ordinary trial judge of a county court to ignore these powerful conclusive opinions from such a provincial level committee.

Given the monopolized status of the PJACs, once an appraisal report is issued by a PJAC, it is difficult to overrule it. Interestingly, the 1989 act has provided one, and perhaps the only one, remedy to a possibly mistaken report. According to article 6 of the act, if a court doubts the correctness of a PJAC report, it may ask a PJAC in another province to perform a new assessment. However, since the PJACs are supposed to have a similar structure, this in fact means nothing but to find another group of psychiatrists to determine the case.
7.2.2 *The Durham Rule Revisited*

The term of "mentally ill" in the Chinese insanity test is not clearly defined in criminal law textbooks, although some writers suggest that the term includes schizophrenia, affective disorder, organic brain syndrome, paranoid state, and natural imbecility (Wang Zuofu, 1987:99-101; Gao and Zhao, 1993:156-157), with schizophrenia as the major mental illness for insanity defence in practice (Pearson, 1991:413). Unlike in the West,447 no detailed discussion about the clinical characteristics or symptoms of mental illness is published for lawyers in China. In practice, the psychiatric profession has the exclusive jurisdiction to define what is a mental illness. In a situation involving sleepwalking or a "psychological blow," the criteria to distinguish an "internal" factor and an "external" factor could vary case by case. As it is found in common law countries, there is always an incredible discretionary power to define what counts as a disease of the mind in legal practice.448

The 1989 Chinese act not only lets the psychiatrists define what counts as a "mental illness," but also empowers them to determine, or at least participate in determining, through the PJAC system, the legal issue of criminal responsibility. But is this too much power? We might get some insights from relevant debates back to the years when the "New Hampshire Rule" and the "Durham Rule" were formulated in the United States.


In 1871, the "New Hampshire Rule" was formulated by Justice Ladd on behalf of the Supreme Court of New Hampshire in the case of State v. Jones. The rule was called the "product of mental disease," i.e., a successful insanity defence only requires the defence to prove that the act is caused by a mental disease. This later became the "Durham Rule," adopted by the U.S. Court of Appeals for the District of Columbia in the case of Durham v. United States in 1954. Durham was introduced as a "broader test" to replace the M'Naghten "right-wrong test" which, though supplemented by the irresistible impulse test, was considered as "inadequate" for an insanity defence. In words, Durham looks similar to the "New Hampshire" test, holding that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." In essence, as Justice Bazelon put it on December 13, 1967, this "product" test was an attempt to clarify the relationship between the triers of the facts and the psychiatric experts:

Under M'Naghten, ... the use of the term "disease of the mind" was significant since it firmly established the relevance of medical testimony. The jury now had a broader role - to evaluate medical testimony in light of the right-wrong criterion. Soon, however, doctors began to complain that the right-wrong test permitted too narrow an inquiry into the accused's mental condition, that it precluded doctors from presenting important medical data. In Durham v. United States ... we intended to widen the range of expert testimony in order to enable the jury "to consider all information advanced by relevant scientific disciplines."

---


450 Durham v. United States (1954), 94 U.S. App. D.C. 288, 214 F.2d 862. In legal theory, this is an distinctive precedent. Its practical impact was however temporary and limited in history.

The "product" test was not accepted by other jurisdictions and was soon abolished in the same District. In *Blocker v. United States*, Judge Burger challenged the test for giving psychiatric expert witnesses too much power in determining the legal issue of insanity defence.452 "Product" in *Durham*, he said, is "a spurious term," "neither wholly medical nor wholly legal but partaking of both." The terms "disease" and "defect," he said, are not judicially defined and could "mean in any given case whatever the expert witnesses say they mean." Interestingly, he notices, a unified definition of "mental disease" never exists. Even psychiatrists themselves doubt whether there exists such a definable term. For instance, Judge Burger noted that, in 1958, a winner of the Issac Ray Award of the American Psychiatric Association had written that:

I will say there is neither such a thing as 'insanity' nor such a thing as 'mental disease'... since the mental illness is not actually something limited to a place called the 'mind', but rather it is a changed interrelationship of the individual with his fellow creatures.

This situation, Judge Burger pointed out, had made the *Durham* test unworkable in practice. Indeed, his following comments are still insightful for our answer to the question raised previously regarding the power of psychiatrists:

This is not to suggest we cannot rely on so uncertain an 'infant science' as psychiatry but rather to suggest that no rule of law can possibly be sound or workable which is dependent upon the terms of another discipline whose members are in profound disagreement about what those terms mean. How can lay jurors possibly understand and apply terms whose meaning is unclear to acknowledged experts? ...(For the sake of "rule of law") I emphasize that this court, not the psychiatrist, made the rule.

7.2.3 Restraints on Psychiatric Experts

A long-existing problem in applying the notion of "court-made-rule" and "expert-made-evidence" in a case of insanity defence is the following: unless the judge and the jury themselves have had a training in psychiatry, there is always a knowledge gap between these people and the experts. Freckelton (1986:166) has indicated that:

The danger inherent in this trend is that jurors in the criminal contest ... will be placed in a situation where they have to make deliberations and come to decisions on the basis of evidence that they do not fully comprehend.

This knowledge gap also makes it difficult for the court and the parties to uncover misleading statements in psychiatric expert testimony. Empirical studies frequently question the real ability of psychiatrists to provide objective testimony in the courtroom, indicating that the roles of psychiatric experts should be limited and the court should not blindly rely on psychiatric testimony in determining factual issues, let alone readily following the expert opinions in handling the legal issues.

The making of a psychiatric assessment is a human process. As Webster and others (Webster et al., 1982) have concluded, there are various political, legal, intra-and inter personal, and medical variables contributing to this process, such as policy, class, culture, legislative clarity, judicial in-put, psychiatrist’s adherence to medical standards, personal bias, the diagnostic system, and so on. Homant and Kennedy (1986) indicate that the personal training, experiences, and beliefs of psychiatrists have important impacts on their attitudes toward the insanity defense. In a 1984 survey, Homant and others found that: within the profession, psychiatrists found to be favourable towards the insanity defence were those who had been involved in actual insanity defense cases and those who were
older in age; on the contrary, the ones found more likely to be opponents of the defence were psychiatrists who took conservative or radical ideological positions on criminal justice issues about "whether individuals themselves or society as a whole is primarily responsible for criminal deviance" (Homant and Kennedy, 1986:67-69). More interestingly, Rogers and Mitchell (1991:156-158) hold that, as indicated in a survey, the majority of Canadian forensic psychiatrists are misinformed regarding the standards of NCRMD under the Canadian law when they testify as experts in courts.

No such empirical studies have been launched in China to examine the credibility of the psychiatrists working under the PJACs. Nonetheless, there is no evidence showing that, in comparison with their Western counterparts, Chinese psychiatrists are bias-free, technically more eligible, and therefore need less control from outside of their profession.

Critical studies in the common law countries have led to calls for more restraints on the roles of expert witnesses. Some have suggested that psychiatric experts should be excluded absolutely from the determination of responsibility and that their role should be confined to the sentencing/treatment process (cited in Freckelton, 1986). Others take a more moderate approach. In a statement of 1983, the American Psychiatric Association Insanity Defense Work Group proposed a recommendation to limit psychiatric testimony to the defendant's mental state and motivation rather than sanity or insanity. Following this approach, Homant and Kennedy (1986) state that:

We hypothesize that what is most helpful to a jury in making its decision about a defendant's legal responsibility is not the experts' bottom line opinions on sanity or insanity, but their (sometimes competing, sometimes complementary) explanations about the defendant's motivation. Based on this assumption, we feel that a reasonable conclusion to be reached from our data is that experts' testimony should be limited to their opinions about the defendant's mental or motivational state (at the time before and during the offense). We believe that this would help make it clear to the jury that it
is their role to conclude whether that mental state was extreme enough to warrant exculpation.

The 1989 law in China, which allows, or actually requires, psychiatrists to make conclusive opinions about whether the defendant is criminally responsible, has weakened both the external and the internal controls upon them. Since the defence attorney is clearly excluded from the FPACs, the psychiatrists may virtually have the report admitted by the court without having to worry about the awkwardness of being cross-examined by the defence attorney. This is indeed a new threat to the defendant. Also, the 1989 law has no clear provision for any internal checks-and-balances mechanism between the various PJAC members. What the regulations have stipulated are: first, only psychiatric and forensic experts are qualified to be the assessors; secondly, the assessors' conclusion will become the report of the PJAC unless their conclusion is challenged by other members of the PJAC; thirdly, the PJAC members who are not assessors do not directly participate in the process of assessment, although they may question the assessors if they have a doubt about the assessment.\(^453\)

To prevent possible injustice caused by abusive or incompetent psychiatric assessors, the 1989 law needs to include more procedural safeguards and a change to its Article 9. The PJAC and its psychiatric experts should not be asked to express a conclusive opinion about the legal issue of criminal responsibility in an assessment report.

### 7.2.4 Psychiatrists as Court Called Experts

The power of the court to call its own witnesses is a highly controversial issue in common law countries. A court-called expert, in Freckelton's words (1986:179), is "a

\(^{453}\) Articles 13 and 15.
dangerous animal" especially in Australia, where judges have "numerous" powers to call such witnesses. In England, Freckelton noticed, trial judges could call their own witnesses without the consent of the prosecution or the defence only before the jury has retired and the close of the defence case. In an Australian case R. v. Damic, Chief Justice Street (cited in Freckelton, 1986:172) concludes that this kind of "English restraint" is not applicable in Australia.

In China, rules essentially similar to the English restraints apply. A trial includes five phases:

1. the opening of the court;
2. the investigation and examination of the case in the court;
3. the debate between the prosecutor and the defence;
4. the closing speech of the defence;
5. the recess, discussion and announcement of the judgement of the court which, at a county level, usually includes one judge and two "people's assessors."454

Witnesses who are called to the courtroom, whether or not by the court, can only give testimony and be examined in the second phase.

However, a more fundamental problem exists in the Chinese system. In R. v. Damic, Chief Justice Street (cited in Freckelton, 1986:172) at least clearly indicated that "both parties should be afforded the unrestricted right of cross-examination" of the judge-called witnesses. Chinese law is vague at this point. In fact, under the present law, the defence does not have this right, because the court can decide whether its experts have to appear in the courtroom or simply give their testimony in a written report. Chinese law

does not share the English rule that a witness has to be cross-examined by both parties in trial before the testimony can be admitted. In the landmark case of *Duyong v. Sheng Yafu & Mu Chunlin*, the defence informed the court that key expert evidence was made in a way which had already been considered improper by the forensic psychiatry profession. However, the defence was not given an opportunity to cross-examine the PJAC psychiatric assessors whose report later became the basis of the judgment. As Lo (1995:207) indicates, this unprecedented case was the first ever criminal lawsuit against journalists in China. It sparked nationwide debate in the legal profession, mostly critical to the judgment.\(^\text{455}\)

To a defence attorney, lack of opportunities to question a court-called expert witness is only one side of the problem. The other side is even worse: there is simply no legally ensured direct access to a PJAC or a psychiatric assessor, if the purpose is to get a psychiatric appraisal as evidence. According to the 1989 regulations, a "forensic psychiatry assessment" can only be made by an officially organised PJAC.\(^\text{456}\) Therefore, a psychiatrist is not allowed to perform an assessment for the defence, unless he is appointed

\(^{455}\) The conviction was appealed to the Shanghai Intermediate People’s Court in 1987, and the appeal was turned down by the Court. The two defence counsels, Zhu Huarong and Yang Cheng published an article to challenge the decision of the Intermediate Court immediately after its judgement in August 1988. The criticism won a strong support from a large number of Chinese law professors and practitioners. Numerous articles and commentaries were published in the journal, *Democracy and Law*, during late 1988 to early 1989. The case was brought to the Shanghai High People’s Court in 1988, but the High Court once again turned down the appeal. In the meantime, the Intermediate Court released a lengthy report in the *SPC Gazette* to defend its judgement. As Liu Nanping (1989:307-312) indicates, the SPC however remained silent in relation to this report. The defence counsels, Zhu and Yang, then published another article in 1989, which challenged the Court report in a paragraph by paragraph fashion. This was also rare in Chinese legal history. For the Court report, see *SPC Gazette*, 1988, No.2, at 42. For opinions challenging the report, see Zhu and Yang, 1988, and 1989.

\(^{456}\) Article 3.
as an assessor by an PJAC and has the instruction from the PJAC to do so. In addition, the 1989 Regulations provide that only an "institution of justice" (shifa jiguán) can, by issuing a "letter of appraisal referral," entrust a PJAC to organise an appraisal.\footnote{Articles 2 and 17.} Without such a referral, no PJAC should perform an appraisal. In Chinese practice, an "institution of justice" refers to a police bureau, a procuratorate, a court, or a prison. Law firms, whether state-run or privately-owned, are excluded.

Obviously, under these regulations, the defence attorney cannot directly request an PJAC to make a forensic psychiatric assessment. Nor could he or she call an independent psychiatrist in court to give expert testimony regarding the mental state of his/her client. To obtain such psychiatric evidence, the attorney can only ask the court for an approval. There are, however, no clear rules specifying the conditions of an approval or rejection. If such an approval is granted, the court will request an PJAC to perform an appraisal for the court, rather than directly for the defence. Otherwise, the defence can only rely on other types of evidence to support an insanity defence. In this respect, again, there is a lack of rules on issues such as “how much weight a previous medical record has in trial.”

After all, the court is not obliged to accept a request of the defence to ask an FPAC for an assessment. What should the defence do in order to support his/her request? Under what circumstances should the court approve such a request? What can the defence do when their request is rejected by the court? Is there a procedure to appeal against such a court rejection? None of these questions has a clear answer in Chinese law. In practice, a court can simply ignore such a request by giving no answer to it (Zhu and Yang, 1988 and 1989). In essence, for the defence, obtaining court approval has become a prerequisite to raising the insanity defence successfully. Such a prerequisite is indeed in conflict with basic
principles of the Western adversarial system, and also incompatible with the general rules of criminal procedure and evidence in China. The 1979 Law of Criminal Procedure includes no such procedural requirements blocking the defence from obtaining any kind of expert evidence.458

Nonetheless, the Chinese system might have one "merit" in comparison with its Western counterparts. In England, Australia and the United States, the jurors often have to confront great difficulties when "a battery of experts" is called by both the prosecution and the defence (Freckelton, 1986). Such situations are rare in China and can only happen when the court acts in favour of the defence and at least two FPACs are involved.

7.3 Controlling the Mentally Ill: What to Import?

7.3.1 The Chinese Disposition of Insanity Acquittees

Unlike the former USSR, China does not have a record of treating political dissidents as mental patients. Under the present Chinese law, a successful insanity defence leads to a complete acquittal. Article 15 of the 1979 Criminal Law only provides one type of disposition, requiring the family members or the guardian of the acquittee to "keep close watch over him and arrange his medical treatment." Under this article, the family or guardian are obliged to send the acquittee to a mental hospital, if such a facility is available in the local area. In practice, insanity acquittals are out of the jurisdiction of the criminal correctional system and those affected are usually committed to mental hospitals with the help of their families. Upon request, the police and a relevant "work unit" (e.g., the factory

458 Articles 88-90.
where the accused is hired) might help the family to send the acquittee to a hospital, if he or she is still considered insane.

Apparently, the rationale underlying this informal control approach includes at least two considerations. First, the mentally ill are not punishable because of their inability to understand their acts and to understand the educational meaning of criminal punishment (Wang Zuofu, 1987:99). Therefore, they are out of the criminal justice system. Secondly, the acquittees could be dangerous to the society, and the best preventive approach is to empower their families to keep them under control. If the family does not meet its responsibility to keep an acquittee under control and the acquittee commits a dangerous act, the relevant family member shall take criminal or civil responsibility for this act.

However, during the past fourteen years of economic reform in China, the family-oriented social control network has been considerably weakened. Consequently, in the near future, China might have to introduce a formal system as an alternative to the present informal system to control insanity acquittees. To prepare for this change, the Chinese legislature should enact some specific guidelines in the criminal law. In this respect, many lessons could be learned from the systems of incarceration in other countries and their changing patterns in these years.

7.3.2 Security Measures in European and Soviet Laws

Custodial measures formally imposed on insanity acquittees by the court are defined as "security measures" in some European countries. The nature of such preventive measures is clearly different from both criminal punishment and medical treatment. In theory, punishment is based on past harm, whereas treatment is provided for illness. The security measures, however, are designed for preventive purposes and are applied mainly
to those who are considered as dangerous to the society, although its application also requires the existence of a harmful act.

A basic form of security measure for insanity acquittees is indefinite and compulsory hospitalization. The Italian Penal Code provides that, once found "socially dangerous," an insanity acquittee "shall always be ordered committed to an asylum." The Code does not provide caps for the maximum terms of commitment. On the contrary, minimum periods are provided as: (1) in general, two years, "except in a case involving a misdemeanor or crime of negligence or other crime for which the law prescribes a pecuniary punishment or imprisonment for a maximum term of not more than two years"; (2) ten years, if the penalty for the act committed is life imprisonment; and (3) five years if the minimum penalty is ten years.

In the German Penal Code, it is provided that a court shall order that an insanity acquittee be committed to a mental hospital or a community correctional facility if such a person is found dangerous to the public. This measure, unlike other types of custodial security measures, does not have caps to specify its maximum terms.

Security measures are also provided in the law of the former Soviet Union. The 1960 Penal Code of the RSFSR has a chapter (Chapter Six of the General Provisions) providing "compulsory measures of a medical character" to deal with mentally ill persons who have committed "socially dangerous acts." The law provides that a court may order

---

459 Article 222 of the 1930 Italian Penal Code.

460 §§63, and 65(3), 1975 German Penal Code.

461 §§64, 65 (1)(2), 66, 67d.
the commitment of an insanity acquittee to a general or special psychiatric hospital.\textsuperscript{462} An insanity acquittee "in need of hospitalization and compulsory treatment" may be committed into a general psychiatric hospital. If he or she is found to be a "special danger" to the society, he or she should be committed into a special psychiatric hospital and be kept in conditions of strict surveillance so as to prevent him or her from committing a new "socially dangerous act."\textsuperscript{463} The law also empowers the court to order a type of compulsory treatment which fits the mental illness of a committed person and the nature of his "socially dangerous act."\textsuperscript{464} Essentially similar provisions are also found in the laws of some formerly Soviet allies like Romanian Socialist Republic and Mongolian People's Republic.\textsuperscript{465} Like the German Code, none of these socialist penal codes prescribes a cap for the commitment. Recent years have witnessed some changes in this area in Russia for the purpose of "promoting patients' rights" (Smit, 1992).

Indeed, the Chinese way of dealing with insanity acquittees looks relatively liberal compared with these European and soviet systems. Technically, although the Chinese law requires the family to arrange medical treatment for the acquittee, this treatment does not have to be a compulsory hospitalization. Nonetheless, as in Japan, this kind of informal system in China may have its own problems. Family members can be abusive and may tend to keep the acquittee in a mental hospital indefinitely. As some Chinese scholars (in Kuo, 1983:469) noted, "in Chinese society the stigma carried by a mental patient is greater than that carried by a criminal." At present, neither civil commitment nor voluntary

\textsuperscript{462} §58.

\textsuperscript{463} §59.

\textsuperscript{464} §60.

\textsuperscript{465} See §§112-114 of the \textit{Penal Code of the Romanian Socialist Republic}, and §43 of the \textit{Penal Code of the Mongolian People's Republic}.

297
commitment is conducted according to any legally defined specific procedural rules in China. Technically, since the period of commitment is not clearly provided in law, an insanity acquittee, now labelled as a "patient," could be hospitalized indefinitely. However, in recent years, there has been some discussion about issues such as how to protect "the rights of psychiatric patients."^466

7.3.3 Indefinite Incarceration in Common Law Countries

In common law countries, indefinite incarceration was widely used as a disposition of the mentally ill. In the United States, as Morse (1982:69-70) recalled, this was the situation until the change of law during the mid-1960s to the mid-1970s, started with the promulgation of California’s Lanterman-Petris-Short Act and the 1972 Wisconsin federal district court decision in Lessard v. Schmidt. In England and Wales, prior to the introduction of the 1983 Mental Health Act, "the consequence of an insanity acquittal was indefinite detention 'at Her Majesty's Pleasure', without any access to independent review" (Verdun-Jones, 1989a:21).

In Canada, according to a study (Harris et al, 1991:228) of 518 subjects processed during 1975-85, insanity acquittees were found detained for a longer period (i.e., approximately 60 months in average for each) than their convicted counterparts (i.e., about 50 months each). Before 1992, Canada used to put insanity acquittees in automatic and indefinite custody.467 This system serves as an example of the so called "preventive

^466 For discussion, see Shah, 1991.

branch of the criminal law power" in controlling the mental ill. In fact, this type of disposition is purely designed for societal interests and clearly incompatible with the presumably individualist-oriented value system in the Western world.

The system of indefinite incarceration was finally changed in 1991 and 1992, due to the Supreme Court of Canada's decision in Regina v. Swain and the corresponding legislative changes. In Swain, the accused was charged with assault and aggravated assault. In law, the maximum punishments for the offences were 5 and 14 years respectively. The Crown raised the insanity defence over the objection by the defence, making it possible to keep the accused in indefinite incarceration "until the Lieutenant-Governor's pleasure was known." In its decision, the Supreme Court of Canada announced that the automatic and indefinite detention required under section 614(2) of the Criminal Code violated sections 7 and 9 of the Charter and could not be justified by section 1 of the Charter. As a result, the Court proclaimed a six month transitional period and required the legislature to change the law within this period.

The legislative amendments became effective in 1992. As Verdun-Jones (1991a) reported, the new legislation empowers the court to make a decision, or a Review Board where the court does not, to choose a proper disposition of an NCRMD acquittee, which has to meet the principles of both protecting the public and selecting a disposition that is "the least onerous and least restrictive to the accused." Such a disposition could be an absolute acquittal, a conditional acquittal, or custody in a hospital of up to 90 days. The

---

468 See opinions of the Supreme Court of Canada, in Regina v. Swain, 63 C.C.C. (3d) 481.

469 §§266 & 268, Canadian Criminal Code.

470 §672.54, Canadian Criminal Code.
new law also provides a procedure to appeal such a decision.\textsuperscript{472} In addition, a capping system is proposed to limit the period during which an acquittee (of one of the "designated offences" on the list section 672.64 (2)) may be detained. The caps are divided into three levels, following a principle that the detention under a mental disorder verdict should not exceed the maximum sentence which could be imposed upon conviction.\textsuperscript{473} This capping system, however, is not in force yet.

For the Chinese, at least three points could be learned from this recent Canadian history. First, while notions like \textit{mens rea}, "ability," "responsibility" and just deserts constitute the bases of the defence of NCRMD or insanity, they have little to do with the disposition of insanity acquittees. Secondly, disposition of insanity acquittees often reflects two conflicting value systems, i.e., the protection of individual freedom and the protection of the societal interests. Thirdly, even in a democratic society like Canada, it is still possible that the system tends to sacrifice individual interests for the alleged purpose of protecting societal interests. Therefore, if China is to introduce a system to formally keep insanity acquittees in incarceration, a whole set of human rights safeguards has to be included.

\textbf{7.3.4 The GBMI & Diminished Responsibility}

Beside the Canadian reform as set out above, reforms are also going on in the United States, though probably in diverse directions.

\textsuperscript{471} §§672.54, 672.55(2), and 672.47 (1), Canadian \textit{Criminal Code}.

\textsuperscript{472} §672.72, Canadian \textit{Criminal Code}.

\textsuperscript{473} §672.64 (3), Canadian \textit{Criminal Code}. 

300
On the one hand, according a report by Appelbaum (1993), laws in Louisiana and a few other states allow indefinite incarceration of insanity acquittees "until they can prove that release would not endanger other people, regardless of whether he or she remains mentally ill.” This, however, has been declared as against the principle of due process and the right to equal protection and therefore as unconstitutional by the U.S. Supreme Court in the case of Foucha v. Louisiana.474

On the other hand, as Mackay (1988:89) noticed, while three states have abolished the insanity defence and taken a "mens rea approach" in law, intending to restrict the acquittal of mentally ill defendants to those who were so seriously ill that they did not have the requisite intent or state of mind required to commit an illegal act, twelve states have enacted provisions providing for an alternative verdict of "guilty but mentally ill" (GBMI) so that, in most instances, the court can simply convict a mentally ill defendant and sentence him in the same way as an ordinary person would be if convicted for this offence. Although this new approach probably meets the need of public policy, it is apparently in conflict with the traditional legal philosophies. The new disposition, however, is better than an indefinite incarceration.

The debate over "diminished responsibility" in the United States also reflects diverse ideas. The arguments for this doctrine, as Dix (1985:251) noted, is that mental "impairments that affect culpability vary in degree" and that "the criminal law provide a mechanism for giving effect to impairments that reduce but do not eliminate culpability.” In sum, diminished responsibility might supplement the insanity defense and avoid the awkward choice of "all-or-nothing" (i.e., full criminal liability or complete acquittal). However, as in England and Wales, where the doctrine operates to reduce murder to

manslaughter, the application of this doctrine in U.S. state laws is basically to mitigate the punishment for capital offences. According to Dix (1985:252), in some jurisdictions where impairments of volition or cognition constitute a basis for the insanity defence, defects of either sort can serve "as mitigating considerations in capital sentencing." Also, interestingly enough, a similar rule is found in some jurisdictions where the insanity defence rests purely upon the M'Naghten Rules: while only cognitive incapacity constitutes the basis for the insanity defence, impairments of volition lead to mitigation in capital sentencing.

Although the GBMI defence has not elicited any response from the Chinese legal profession, the doctrine of diminished responsibility is already, well before any legislatorial amendments, recognized in China's forensic psychiatric theories and sentencing practice (Wang, 1987:102). As Pearson (1992) noticed, special hospitals have been established by the police in several metropolitan areas to commit those who are considered to be only partially responsible to their offences. Unlike the U.S., China seems to apply the doctrine of diminished responsibility on a much broader basis. This, again, indicates the strong influence of the continental legal family. Diminished responsibility is found as a general principle in the penal codes of nations like Italy, Japan, and Germany, applicable to various offences.475

7.3.5 The Issue of Prosecutor-Raised Insanity Defence

Indeed, a defence originally designed for the benefits of accused persons sometimes could be used against their rights and liberties. Unlike other defences in

criminal law, the insanity defence is often a two-edged sword. Raising an insanity defence might result in an acquittal, freeing the accused from a criminal punishment. Simultaneously, however, it stigmatizes the acquitted and places them under a certain type of "measure," which often turns out to be an indefinite custody or indefinite hospitalization.

In North America, a hotly debated issue is whether the prosecutor can raise insanity defence over the objection of the defence and thus in essence determine the fate of the accused. To this author's knowledge, the issue has never been discussed in any Chinese law journal articles.

Under the current Chinese system, the Chinese prosecutors probably have greater freedom to raise the issue of insanity than do their North American counterparts. The fate of an alleged mentally ill person is not at all controlled by him or his defence, but largely by the prosecutor with the help of the PJAC. According to the 1989 Regulations, psychiatric appraisals can be conducted during pre-trial investigation, whenever a "mental illness" of an accused or sentenced individual becomes an issue. As a unique feature of the current Chinese system, the law does not allow the accused to establish any contact with a defence lawyer during the period of pre-trial detention until the trial court has made a decision to try the case. For this reason, the accused and the sentenced are put in an extremely weak position facing the prosecutor and the PJAC experts.

476 Article 7.

477 See the Law of Criminal Procedure of the PRC 1979. For discussion of this problem, see Yang, 1988, at pp.202-203.
The 1991 Canadian case of *R. v. Swain* might provide some important insights to Chinese law reformers. In that case, the Supreme Court of Canada ruled that the old common law rule allowing the Crown to raise the insanity defence over the objection of the accused violates sections 7, 9 and 15 of the *Canadian Charter of Rights* and cannot be saved under section1 of the *Charter*. The court held it infringes upon the right of the accused to control his own defence and is inconsistent with the principles of fundamental justice. These principles, the court said, contemplate an accusatorial and adversarial system of criminal justice founded on respect for the autonomy and dignity of human beings. The Supreme Court, therefore, introduced a new rule to replace the old one. The new rule allows the Crown to raise the issue of insanity independently but only in two circumstances: (a) after the trier of fact concluded that the accused was otherwise guilty of the offence charged, or (b) during the trial when the accused person's own defence had somehow, in the view of the trial judge, put his mental capacity for criminal intent in issue.

At present, what we find in *Swain* are not necessarily easily applicable in the Chinese context. China does not have an accusatorial and adversarial system like that in Canada. Nonetheless, fundamental justice and fairness are universally recognized principles. If insanity is still a defence, it should be under the control of the defendant.

**Conclusion**

It is unfortunate that in China, with its thousands of years history of civilization, there is still a lack of explicit legal standards and academic researches with respect to the insanity defence. In general, the present legal test of dual-incapacity as provided in the

---

1979 Criminal Law shares many similarities with its foreign counterparts around the world, not just the criteria, but also the problems. Given these similarities, there comes a need to re-evaluate the system with Western experiences.

For legality and the promotion of human rights, there should be a number of changes to the Chinese system. They are:

First, to reduce vagueness and prevent abuse, the medical criteria of "mental illness" for legal insanity must be specifically articulated and formally promulgated, with the consent of the legal profession.

Second, to reduce the inconsistency between the law and practice with respect to the volitional test, the present dual-incapacity test in Article 15 of the 1979 Criminal Law should be carefully re-evaluated through empirical studies.

Third, for legality and fairness, the monopoly of the FPACs has to be abolished. The FPACs should not be empowered to decide the legal issue of criminal responsibility. Nor should they have the exclusive power to produce psychiatric expert evidence. Specific rules should be introduced in the Chinese law to allow the use of competing psychiatric experts for the competing parties in criminal proceedings. The FPAC should change its nature, from a tribunal to a professional association which enacts ethical codes and applies them to the experts.

Fourth, specific rules must be introduced to ensure that psychiatric experts are directly accessible to all the parties in criminal proceedings, particularly the defence attorney. Before a fundamental change is made to the FPAC system, the defence attorney should have direct access to the FPAC, without an approval from the court. If this cannot
be achieved, the law should at least specify the standards for the issuance of an approval by the court.

Lastly, dispositions of insanity acquittees should apply the principles of effectiveness, due process and the least restrictive alternative. Along with the ongoing economic and social reforms in China, the present family-controlled hospitalization system needs some alternatives. Specifically, one of the alternatives might be the Western-style preventive incarceration/hospitalization, so long as it is imposed through a due process and supplemented with clear legal limitations, periodic reviews, procedural safeguards and reasonable treatment. In addition, as already noticed in China (Shah, 1991), the entire psychiatric hospital system should be subject to clear legal regulations and apply the principles of fundamental human rights.
Chapter VIII
Corporate Crime: Key Issues of Conception

8.1 The State and Its "Units"

8.1.1 A New Issue

Corporate crime is a relatively new realm in China's criminal law. As Alberto Cadoppi (1994) and J. F. Nijboer (1994) indicate, corporate crime as a legal concept is primarily developed in common law, rather than traditionally European, jurisdictions, although some European countries (e.g., the Netherlands) have recognized this concept. In addition to the European tradition, the Marxist ideology was another major barrier to the reception of this concept in the Chinese law. Following the traditional European-Soviet model, the 1979 Chinese Criminal Law only recognizes individual liability in its definitions of criminal offences.

In 1982, Zhu Huarong (1982), an eminent criminal law professor in Shanghai, wrote an article suggesting that legal persons' criminal liability was an interesting topic for discussion, although the concept appeared to be incompatible with the mainstream Chinese theory regarding the elements of crime. From 1982 to 1988, Chinese legal scholars spent six years to debate issues such as whether or not a "socialist enterprise," i.e., state-owned or publicly-owned enterprises, can commit crime (Xu Jian, 1982; Guo Feng, 1982; Chao

479 See e.g., Qiao Keyu, 1991. In this essay, Qiao argues that "corporate crime" is a problematic concept for Chinese law, because Marx and Engels never talked about such a concept. To "both the Teachers," Qiao said, crime could only be committed by individuals.
This debate reached its climax in 1987, when *China Jurisprudence (Zhongguo Faxue)*, an influential Chinese law journal, published five debating articles in Issue 6 (Gao and Jian, 1986; Cui Nangshan, 1986; Chen Guangjun, 1986; Lu Yide, 1986; Fu Zhaolong, 1986). In fact, corporate crime has been running rampant throughout China since the early 1980s. Many Chinese socialist organizations, similar to their western capitalist counterparts, have been committing criminal offences, such as commercial fraud, corruption, smuggling, pollution, tax evasion, and unfair competition (Chen Yen, 1990; He Bingshong et al., 1991).

In 1988, China started to employ the concept of corporate crime in its criminal law. The borrowing of this western concept is one of the most important developments in the reform of criminal law in China. At the time, the change of law had immediate impacts on the balance of the debating jurists. Since then, with a few exceptions, most Chinese scholars and practitioners have never challenged the concept of corporate crime (Zhu and Lin, 1988; Guo Yongje, 1988; Deng Xuhui, 1988; Zhao and Li, 1989; Zhu and Zhang, 1990; Hao Xuokai, 1990; Cui Qingshen, 1990; Zhang Chun, 1990). By and large, however, the concept is still in law books, but rarely operates in practice.

---


481 A small number of scholars still question the concept of corporate crime. See e.g., Zhao Bingzhi, 1989b; Luo Meifeng et al., 1990; Jie Sushen, 1990). To these scholars, as Jie Sushen puts it, the concept of corporate crime is incompatible with the system of socialism.
The actual operation of the law on corporate crime is determined by the socioeconomic context. Over the past fifteen years, China has been transforming a planned economy to a market economy, but most state-owned enterprises are still state-owned, their CEOs state appointed, and their management state supervised. In this context, corporate crime is indeed a premature concept in the criminal law. With the introduction of corporate crime in law, the Chinese law reformers must clarify the borderline between corporate liability and state immunity. Yet, under the present system of state ownership, this line is always vague, since the enterprise or organization is a "unit" of the state rather than an independent entity.

Since 1988, very few organizations have actually been convicted, or even prosecuted, for corporate crime. In some cases, when the circumstances are serious, officials of the corporation are prosecuted as individual offenders for the crime committed by the organization. In this respect, there are no published official statistics, but reports of individual cases are available. For example, He and others (He et al., 1991:415) noted that thirty-two cases of crimes by legal persons were "handled" by courts in Beijing in 1989. The authors however did not indicate how many of them were actually prosecuted and convicted.

It is difficult to draw a clear line between the state and the offending corporation. The difficulty is primarily rooted in the system of state ownership. According to Yuan Baohua (1988:2), in the late 1980s, there were "more than 90,000 all-people-owned (i.e., state-owned) industrial enterprises in China. The majority of Chinese medium and large size enterprises are state-owned.\textsuperscript{482} During the past decade, state-owned and other

---

\textsuperscript{482} Official Chinese statistics indicate that in the early 1990s there were "more than 10,000 state-owned large-and-medium-size industrial enterprises" in China. They account for
publicly-owned corporations have committed almost all the major corporate criminal cases that have been reported by the Chinese official media, such as the *Jinjian Simulated Medicine Case* (1986), the *Hainan Motor Vehicle Case* (1985), the *China Electronic Technology Import and Export Corp. Shenzhen Branch Smuggling Case* (1984), and the *Shanghai Hualian Trading Center Illegal Profiteering Case* (1986). Punishing the offending state-owned corporations clearly affects state interests.

Moreover, numerous non-business organizations are directly involved in illegal business activities. Apart from commercial organizations, a large number of non-business organizations are trying to "get rich quickly" by directly or indirectly (i.e., through their business subsidiaries) engaging in business activities. Like the enterprises, these organizations sometimes seek illegal profits and violate the law. Such organizations include government and Party agencies, military units, public schools, presumably non-profit institutions. Also, there is a vast number of official and semi-official organizations. For example, in 1992, there were a total of 154,502 lawfully registered "societies" (*shehui tuanti*) in China (*China Law Yearbook 1993*:958, Table 2). Convicting such an organization, and a government agency in particular, may undermine the dignity of the government, affect adversely the public service, and cause long-term damage to state interests.

Furthermore, in a state-owned corporation or non-business organization, the decision-making power is exercised by the executives who usually work with a Party committee, under the supervision of a controlling government department (*zhuguan bumen*), have an approval from this department, or even make a decision based on an

2.5% of the total number of industrial enterprises, but generate almost 50% of the national industrial output in terms of monetary value. See Li Peng, 1992, at p.67.

483 For a brief review of some of the cases, see He Bingshong et al., 1991, pp. 405-408.
instruction or order from such a department. Therefore, the state is not only over the corporation, but also inside it. The "brain" of the corporation includes a state component. For instance, in the *Jinjian Simulated Medicine Case* (1986) and the *Hainan Motor Vehicle Case* (1985), the decisions to produce and sell fake medicine and to smuggle cars were made by the relevant local governments and Party committees (He Bingshong et al., 1991:405-408).

So a "publicly-owned" (i.e., state-owned or collectively owned) enterprise in China is different from a "public company" in a western jurisdiction. If convicting a "public company" would affect the "innocent masses" in a Western society, punishing a publicly-owned corporation in China is effectively to punish the state itself.

8.1.2 Vagueness in "Danwei (Unit) Crime"

*Danwei* is a most frequently used term referring to Chinese organizations. A *danwei* could be a corporation or an unincorporated association, a business organization or a non-business institution, a government agency or a public school, a court or a police department. Under the present Chinese law, *corporate crime* is by and large included in the concept of *danwei crime*, whereas *danwei* is often translated as "working unit(s)" in English.

For decades, China was managed like a huge army. Under a semi-military system, every individual had a *danwei*, each *danwei* was established by and took command from a higher *danwei*, and the highest *danwei* (i.e., the central government and the Party's Central Committee) oversaw the entire army. *Danwei* is a vague concept in law: it refers to an association or organization without any specifics about its legal nature, qualifications, structure, assets, ownership or formation process. Primarily, *danwei* is virtually a term
that refers to an administrative unit rather than a commercial association; it may or may not have a distinct legal personality or own property, let alone the capacity to assume legal liability independently. Therefore, it is inherently vague to use danwei as a working concept to define the criminal liability of different kinds of business and non-business organizations.

Nevertheless, the term is used in Chinese law to define the criminal liability of legally established organizations. In this respect, there has been a three-phase development in recent years. Legislation enacted during 1988-1990 used the term danwei in its broadest sense, not differentiating amongst enterprises, non-business institutions, government agencies, and societies. Under these statutes, any unit is criminally liable for committing a criminal offence. Subsequently, in three criminal statutes of 1992-93, the term is used more narrowly to signify enterprises and non-business danwei, which may exclude government agencies. The promulgation of the 1993 Company Law is possibly a beginning of a third phase, in which the law clearly states that a gongsi (company) shall be liable for committing criminal offences. However, it is worth noting that several items of later legislation once again employed the term danwei to impose punishment on offending organizations in general.

484 For a list of unit offences defined in law prior to 1992, see ibid, pp. 389-403.


486 See Chapter 10, the Company Law.

487 E.g., Resolution of the Standing Committee of the NPC on Punishing Crimes of Breaching the Company Law, 1995. For the text, see People's Daily, 1 March 1995, at p.4.
The term danwei crime is employed in statutes that are important supplements to the 1979 Criminal Law. In 1988, the Standing Committee of the NPC adopted two supplementary statutes, which for the first time in history introduced the concept of danwei crime into the criminal law of the PRC. Considering the massive involvement of various danwei in smuggling activities, the Supplementary Provisions on Punishing Crimes of Smuggling provide that danwei could be punished for smuggling,\textsuperscript{488} violation of foreign currency control regulations,\textsuperscript{489} and illegal profiteering in selling or purchasing foreign currencies.\textsuperscript{490} The statute provides a two-tier penalty model, imposing criminal sanctions on both the offending danwei (fine) and its "directly responsible officials" (imprisonment and other types of penalties).\textsuperscript{491} The same model of penalty is prescribed in the Supplementary Provisions on Punishing Crimes of Embezzlement and Bribery, which state that any danwei is criminally liable for demanding, taking or offering bribes.\textsuperscript{492}

In 1990, the Standing Committee adopted two more resolutions, both imposing penalties on any type of offending danwei. The Resolution on Prohibition of Narcotic Drugs holds both the individual and the danwei criminally liable for smuggling, illegally producing, transporting, or supplying narcotics.\textsuperscript{493} The Resolution on Punishing Criminals for Smuggling, Manufacturing, Selling, and Distributing Pornographic Materials criminalizes activities by danwei in trafficking, producing, publishing, selling,

\textsuperscript{488} Article 5.
\textsuperscript{489} Article 9, para.1.
\textsuperscript{490} Article 9, para.2.
\textsuperscript{491} Articles 5 and 9.
\textsuperscript{492} Articles 6 and 9.
\textsuperscript{493} Articles 5 and 10.
distributing, or exhibiting pornographic materials and once again employs the two-tier penalty model.494

More recently, in 1994 and 1995, the Standing Committee enacted at least four statutes, that prescribe the criminal liability of danwei. Under the 1994 Supplementary Provisions on Severely Punishing Crimes of Organizing and Transporting People Illegally Crossing the Border, a danwei is criminally liable for obtaining a passport or visa by fraudulent means in order to smuggle anyone abroad.495 Similarly, the 1994 Resolution on Punishing Crimes Against Author's Rights holds danwei criminally liable for copyright infringement.496 The 1995 Resolution on Punishing Crimes of Breaching the Company Law imposes sanctions on danwei that violate the 1993 Company Law by fraudulent means.497 The 1995 Law on the Administration of Taxation targets any danwei for obtaining export tax refunds by fraudulent means.498

Notwithstanding the growth of criminal law, some danwei are inherently resistant to prosecution or conviction as criminals. For instance, it has been seven years since the Supplementary Provisions on Punishing Crimes of Smuggling became effective, but few government agencies have been convicted and sentenced for smuggling. In the Rushang July 19th Smuggling Case (1993), the Rushang City Police Bureau in Shandong Province, along with its border division, participated in an armed operation with the City's Bureau of Commerce to smuggle a total of 9,000 cases of cigarettes, but no charges were laid

494 Article 5.
495 Article 2.
496 Article 3.
497 Articles 1-3, 6, and 7.
498 Article 44.
against the Police Bureau or the division under the *Supplementary Provisions*, although several senior police officials were convicted, executed or sentenced to long-term imprisonment.\(^{499}\)

The stigma of a criminal conviction on a police department can virtually paralyze law enforcement in the region. Similarly, it is unrealistic to expect a court to continue its official function while it is being prosecuted or after it has been convicted. Also, it is highly unlikely that a Chinese court will convict an agency of the Party if its functions are indispensable and a conviction would undermine them. For example, it is hardly feasible to prosecute and convict a regional committee of the Party for committing a criminal offence, even if it actually organized the criminal operation. In the *Hainan Motor Vehicle Case* (1985), it was found that the Hainan Regional Committee of the CCP had organized the smuggling of some 10,000 vehicles and tens of millions of US dollars. The events occurred before the promulgation of the 1988 *Supplementary Provisions on Punishing Crimes of Smuggling*. Had it happened now, one might still have difficulties to imagine the prosecution of the provincial committee of the Party.

Thus, a key issue in drafting criminal legislation in China is to determine what kind of *danwei* can realistically be prosecuted without causing too much damage to the public interests or to the infrastructure, rather than whether a *danwei* is capable of committing crime. When creating a *danwei crime*, the legislature has to carefully consider the possible

\(^{499}\) See the report, "The sea is a witness, and the law has no mercy - Rushang July 19th Smuggling Case," *People's Daily* (overseas edition), 30 May 1994, p.3. In the judgement, the Weihai City Intermediate People's Court sentenced the Political Commissar of the Division, Fan Zhanwu, and other two senior officials to death. The Deputy Commissioner of the Bureau, Sun Xiping, was sentenced to life imprisonment.
benefits and damages regarding each type of public entity that might be devoured by the criminal process.

A similar concern arises with regard to defining appropriate sanctions against danwei. Imposing a stiff monetary penalty on, let alone winding up, a state-owned entity amounts to punishing the state itself unless the entity has its own property, separate from public funds, to pay the fine. In the Rushang Smuggling Case, the court imposed a fine of 100,000 yuans on the Bureau of Commerce. Apparently, such a sentence could be meaningless if the agency solely operates on public funding and has nothing of its own to pay the fine. Under this circumstance, prosecuting the agency is only a symbolic action. It is pointless to impose a fine on a public entity, knowing such an entity has no asset of its own and can only pay the fine by government funding. This kind of law can only cause confusion, since the entity is spending state funding to pay the fine on the one hand and receiving funding from the state on the other hand for the continuation of its functions.

In light of these concerns, individual rather than corporate liability seems to be the principle that might cause less vagueness and awkwardness in cases where the offender is a government agency (the legislature, the judiciary and the executive), the Party, or an unincorporated public association (e.g., a public school or a trade union) that is registered as an entity for public good and relies predominantly on governmental funding.
8.2 Separation of State and Enterprise

8.2.1 Problems with Faren (Legal Person) Liability

In three criminal statutes enacted in 1992 and 1993 by the Standing Committee of the NPC, danwei (in general) is replaced by "enterprise (qiye) and non-business (shiye) danwei." While this usage seems to exclude government agencies, shiye danwei is not a precisely defined concept and might include government agencies if construed in a broad sense. Under the Resolution on Punishing Crimes of Tax Evasion and Refusal to Pay Tax, 1992, an enterprise or non-business institution is criminally liable for committing an offence of tax evasion and tax fraud.500 Such qiye and shiye danwei are also criminally liable for committing trademark violation pursuant to the Resolution on Punishing Crimes of Using Fake Trademark, 1993,501 and for producing or selling imitation and low-quality commodities, pursuant to the Resolution on Punishing Crimes of Manufacturing and Selling Imitation and Low-Quality Merchandise, 1993.502

Tax evasion by danwei is mostly committed by faren, i.e., legal persons, who have the liability to pay income tax. Interestingly, although danwei is a term employed in almost all the relevant criminal statutes, most Chinese scholastic publications choose to use the term faren crime (e.g., Zhu Huarong, 1982; He Bingshong et al, 1991; Chao Shenlong, 1985a and 1985b; Chen Yen, 1990). In Chinese law, faren, as an opposite to a natural person, at least has a legally defined definition. Accordingly, the term has a clearer

500 Articles 3 and 5.
501 Article 3.
502 Article 9.
meaning than danwei. The *General Principles of Civil Law* (1986)\(^{503}\) define *faren* as "an association that possesses capacity to acquire civil rights and competence to perform civil acts, and that, according to the law, may independently assume civil rights and bear civil liability."\(^{504}\) To acquire the status of a legal person, a *danwei* must "possess the necessary property" and can "assume civil liability independently."\(^{505}\) Accordingly, under the Chinese civil law, only *faren*, rather than all the *danwei*, can independently incur legal liability. At this point, the provisions of *danwei* liability in the Chinese criminal law are obviously incompatible with the civil law concept of *faren*.

Under the *General Principles*, legal persons fall into one of two categories: *qiye*, or enterprise, legal persons;\(^{506}\) and a general category that includes non-business institutions (*shiye danwei*), societies (*shehui tuanti*), and government agencies (*jiguan*) with "independent funds."\(^{507}\) Aside from the requirements prescribed in the *General Principles*, the 1988 *Registration Regulations of Enterprise Legal Persons* provide that an enterprise legal person shall have registered capital, business license and articles of association. This statute further classifies enterprise legal persons into several categories, mainly:

1. state-owned enterprises;
2. collectively-owned enterprises;
3. integrated enterprises;
4. foreign-funded enterprises in China; and

---

\(^{503}\) This statute, often referred to as China's "*Civil Code,*" includes 156 articles.

\(^{504}\) Article 36.

\(^{505}\) Article 37.

\(^{506}\) Article 41.

\(^{507}\) Article 50. In the statute, this is the only article on these non-enterprise legal persons. The provision is very brief and flexible.
5. private enterprises.\textsuperscript{508}

This classification of qiye legal persons appears to be based on different forms of ownership. This raises the question of what property rights an enterprise may be said to have under state ownership and to what extent a publicly owned enterprise can operate as an independent legal person distinct from the state.

For many years, "separation of the asset ownership and management rights" has been a theme in the reform of state-owned enterprises (Zhao Zhiyang, 1987).\textsuperscript{509} The goal is to transform the previous "state-run" enterprises into "state-owned" but self-managed enterprises, i.e., to ensure the freedom of the enterprises to "independently manage" the state property without changing the state ownership (Qi, 1988). This is specified in two landmark statutes: the \textit{All-People-Owned Industrial Enterprise Law} 1988 and the \textit{Regulations on Changing the Management System in All-People-Owned Industrial Enterprises} 1992.

According to some scholars, through this transformation, state ownership of enterprise assets is "primarily demonstrated" as the rights of the government to issue mandatory plans to the enterprise, appoint the general manager, and determine whether to close down or merge the enterprise, and so forth. Under these conditions, the enterprise

\textsuperscript{508} Article 2.

\textsuperscript{509} In 1987, Zhao Zhiyang (1987), then the General Secretary of the CCP, delivered the \textit{Working Report to the 13th CCP National Congress}. In this landmark document, Article 1 of Chapter 4, the CCP Central Committee proposed the "principle of separating the ownership right and the management right." The same document also prescribes that property right of small-size state-owned enterprises "may" be sold to collective or private enterprises. Accordingly, it is recognized in Chinese law that the state-owned enterprises "have independently disposable property," i.e., the "management right" of the state-owned enterprises to their state-owned assets.
can "exercise its state-granted management rights," including: the rights to possess, use and legally dispose of the state-owned assets; and the ability to incur civil liability within the limits of its state-owned assets (Xu et al., 1992; Yuan et al., 1988).\footnote{Under the 1988 \textit{Enterprise Law}, a state-owned enterprise has presumably as many as fourteen types of "management rights." These include the right to decide what to produce and what to sell and buy without violating a state plan, the right to invest, to merge and to cooperate, the right to keep part of the profits, the right to hire and to dismiss, and the right to change organizational structure, etc. The enterprise' capacity to assume limited liability in civil law is however provided in Article 48 of the \textit{General Principles of Civil Law}.}

The transformation has increased the freedom of business operation, but has not changed the nature of the state-owned enterprises. In essence, they are still \textit{danwei} of the state. The state owns all the assets and the enterprise \textit{per se}; has authority to appoint the director of the unit while allowing this person to make certain decisions; and remains the power to replace the director or disband the unit by means of an administrative order.

This situation raises several fundamental problems. First, the enterprise can send its legal representative to physically appear in a court trial, but has no separate assets of its own. If it is ordered to pay a criminal fine, is the state effectively liable for the offence committed by the enterprise? Second, the \textit{General Principles of Civil Law} only permit such an enterprise to incur civil liability within the limits of the state-owned assets. Is there a parallel authorization in the Chinese law allowing the enterprise to incur criminal liability by using state assets? Third, in this situation, to what extent is the state liable to a criminal offence committed by the enterprise? The present Chinese criminal law is silent to these critical issues. Hence, "\textit{faren} crime" is still a vague concept.
With the introduction of a market-oriented economic system, a publicly-owned enterprise is more likely to pursue profits by illegal means than it was before. Moreover, with greater freedom of management, the enterprise is more capable of committing crimes, but it still has to use state assets to pay the penalty. While the enterprise may become a farén, it remains unclear whether its legal personality is separated from the state. Consequently, punishing the enterprise may eventually transfer the liability to the state. Even worse, while loosening its control, the state probably is exposing itself to virtually unlimited liability for a vast number of state-owned enterprises that are not registered as limited companies. In light of these concerns, the law on crimes by state-owned legal persons can be enforced only rarely, serving mainly as a symbolic statement in extraordinary cases.

There are Chinese publications discussing the various difficulties of dealing with farén crime, but most of them focus on factors such as corruption, vagueness of economic policies, lack of training of the judiciary, underestimation of the harm, and so forth (He Bingshong et al., 1991:405-415). In fact, it is the very nature of state-owned qiye farén that determines the limits of the criminal law in this area. Without a comprehensive change to the enterprise system, continuous expansion of the criminal law through the creation of more farén crime and strict enforcement could place the state in a highly vulnerable position.

Therefore, in relation to offences involving state-owned legal persons, farén liability should only be an exception to the general principle of individual liability. Any substantive expansion of the criminal law in this field would require China's economic reform to reach a stage where business corporations are clearly separated from the state. Without such a change, the legal definitions of corporate crimes will remain vague, creating more confusion in practice.
8.2.2 Gongsi (Company) As an Independent Offender

The 1993 Company Law is a most important legislative development in China's enterprise reform in the post-Mao era. This law became effective on 1 July 1994. So it is probably too early to assess its full impact in practice. Nonetheless, this landmark piece of legislation was enacted as a legal blueprint to transform ordinary Chinese business organizations, and state-owned enterprises in particular, into 'independent modern enterprises'. It might bring about fundamental changes to the legal framework of business organizations in China and turn corporate liability into a working concept in criminal law.

The Company Law introduces the concept of gongsi (company) into the Chinese law, which in essence encompasses all the essential elements of its western counterpart, "limited liability company." According to official Chinese publications, the legislative goal of this enactment is to introduce the limited liability company as a standard form of enterprise, including the state-owned ones (Modern Enterprise System Research Team, 1993; Chen and Jiang, 1994:5-9).

511 For the full text, see People's Daily (Overseas Edition), 31 Dec. 1993, at pp.2-5. This is the first formally promulgated national-level company law in China. Prior to this legislation, the State Council had introduced a number of administrative regulations for "experimental" purpose, including the Experimental Methods of Share Enterprise (1992), the Regulatory Opinions of Share Limited Company (1992), and the Regulatory Opinions of Limited Liability Company (1992), and so forth. At the local level, important previous enactment's include the Shanghai Provisional Regulations on Share Limited Company 1992 and the Shenzhen Provisional Regulations on Share Limited Company (1991).

Under this new law, a company is an enterprise legal person (*qiye faren*) that has its own assets, which it uses to assume limited liability; the state becomes an investor in, or shareholder of, the company, with its liability limited to its investment or shares.\(^{513}\)

The *Law* sets out three forms of companies, i.e., limited liability companies, share limited companies, and solely state-owned companies. As in Western law, the limited liability company is prescribed as the basic form of all companies, and the share limited company is a more complicated form of corporation subject to additional requirements. As to the requirements of formation, the major differences between a limited liability company and a share-limited company are:

1. A limited liability company requires two to fifty shareholders, whereas a share-limited company needs at least five founders and, with government approval, can have an unlimited number of shareholders.\(^{514}\)

2. A share-limited company requires a minimum share capital of 10 million yuans, whereas a limited liability company only needs a minimum registered capital of 500,000 yuan.\(^{515}\) However, a share-limited company is not necessarily larger than a limited liability company. In particular, a significant number of state-owned large enterprises

\(^{513}\) Article 3.

\(^{514}\) There are exceptions to these requirements if the company is a solely state-owned one or is transformed from a state-owned enterprise. See Articles 20, 21 and 75 of the *Company Law*.

\(^{515}\) *Ibid.*, Articles 78 and 23. Under Article 23, a production-oriented company or a whole-sale trading company needs a minimum capital of 500,000, a retail company needs 300,000 yuan, and a technology-development, consulting or service company only requires 100,000 yuan.
will be transformed into wholly state-owned limited liability companies instead of share-limited companies.

3. A share-limited company must follow the more complicated rules regarding the issuance of shares. With an approval from the State Council, a share limited company can be listed at a stock exchange, provided that the company has a capital of 50 million yuans or more.516

The number of companies is increasing, although only a small percentage of the companies are listed on the Shanghai and Shenzhen Stock Exchanges. In early 1994, according to Wu Jiajue (1994), a scholar in China, there were 4,000 share-limited companies. In September 1994, however, the People's Daily reported a total of 15,000 share-limited companies. In February 1995, according to another report on the People's Daily, there were a total of 15,100 share-limited companies and 10,700 limited liability companies. Nearly half of these companies, that is, 12,800 out of the total of 25,800, were established in 1994.518

The wholly state-owned company is a special kind of limited liability company. Such a company is established by administrative order. Its organizational structure and business activities are subject to direct control of the government.519 Under the Company Law, this type of organization is required for companies in the defence industry and certain

516 Chapter 4 of the Company Law prescribes fairly detailed rules in this respect.


519 Articles 65-71.
high-tech industries.\textsuperscript{520} Apparently, the legislative purpose is to maintain a state monopoly over industries that are crucial to national security. Most presently state-owned enterprises will be transformed into limited liability companies to attract investment from non-government sources (Modern Enterprise System Research Team, 1993).

By introducing the concept of limited liability company, \textit{Company Law} is bringing about changes to the legal framework of corporate criminal liability in China. Chapter 10 ("Legal Liability") of the law provides for both corporate and individual liability. Articles 206 and 211 stipulate that a company shall be "prosecuted" for false pretence in registration and false financial statement,\textsuperscript{521} whereas Articles 218 and 219 provide individual offences. This Chapter also provides for the punishment of governmental officials who are "directly liable" for the offence. Although there is no provision for prosecuting government agencies, this is arguably possible under provisions relating to the criminal liability of founders and shareholders where a government agency acts in these roles.\textsuperscript{522}

Unlike \textit{danwei} and \textit{faren crime}, "\textit{gongsi} crime" could become a workable concept in China’s criminal law. Under the \textit{Company Law}, a limited liability company appears to have a separate legal personality from its shareholders, which may or may not be the state. The company has its own assets and "company property rights."\textsuperscript{523} When a state-owned

\textsuperscript{520} Article 64.

\textsuperscript{521} In the Chapter, these are the only two articles which clearly provide indictment of the company itself rather than prosecution of its officials.

\textsuperscript{522} Articles 220-223. Articles 208 and 209 provide for the criminal liability of founders and shareholders for committing false investment and unauthorized withdrawal of investment, and thus imply the possibility of prosecuting a government agency who acts as a founder or shareholder of the company.
enterprise is transformed into an ordinary limited liability company, the state might become one of the shareholders,\textsuperscript{524} provided the company attracted investment from other sources.\textsuperscript{525} A company uses all its assets to incur liability, whereas the state, like other shareholders, is only liable for obligations within the limit of its shares.\textsuperscript{526} This can make prosecution and conviction more feasible, although wholly state-owned companies are still difficult to prosecute as under the old danwei system.

In theory, the recognition of the company's own property could be significant. It might allow the company to incur civil and criminal liability within the limits of this property. Yet, there is still something vague in the Company Law: what exactly is the relationship between “company property right” and state ownership? Some years ago, there were scholars advocating a recognition of enterprise-ownership of the state-owned assets. The proposal was condemned as an attempt to set back the socialist system and for its obvious inconsistency with the traditional exclusiveness of ownership (Pei, 1988). The usage of a new term “company property right” in the Company Law appears to be a compromise, trying to avoid the issue of company ownership. Owing to this vagueness, some Chinese scholars contend that the new term only refers to "the right of an independent legal person to dispose of the state-owned property" (Kong, 1994). We might, however, question the validity of this interpretation, given that the “right to dispose of the state-owned property” was defined as one of the “management rights” well before the enactment of the Company Law. The new term should be construed in a way that could demonstrate a new “change.”

\textsuperscript{523} Article 4.

\textsuperscript{524} Article 21. The State Council will make detailed regulations regarding the transformation of state-owned enterprises to limited liability companies.

\textsuperscript{525} Article 12.

\textsuperscript{526} Articles 2, 3, and 5.
It is worth noting that there are numerous "companies" operating in China, but many are simply the old-fashion state units registered under the name of "companies." Punishing these "administrative companies" (xinzheng gongsi) is no less difficult than punishing other state units. In 1993, for example, the Guangxi Provincial Government discovered a major cross-border car smuggling case. The four state-owned administrative companies are the Qingzhou City Material Corp., a corporation of the People's Bank of China Qingzhou Branch, the Beihai City Industrial Supply Corp., and the Chemical Industry Branch of Liuzhou City Foreign Trade Corporation. A total of 798 cars were smuggled into the region. According to an official report, charges were laid against company officials but not the companies, although the offence was clearly committed by the corporations.527

8.3 The Corporate Mind and the State

8.3.1 The Corporate Fault

To make company crime a workable concept, the law must separate the corporations from the state not only in terms of property rights but also in terms of organization.

The complete rejection of principles such as strict liability, absolute liability, and vicarious liability is an important distinction of Chinese criminal law. Automatic liability is

considered an injustice, and a particular state of mind is always a prerequisite to guilt (Gao and Zhao, 1993; He Bingshong, 1993; Zhao and Wu, 1993; Ma Kechang et al., 1993). However, the Chinese law has never specified whether the same state of mind is required of corporate entities as of individuals. Since the 1979 Criminal Law sets forth intent or negligence as a substantive element of every crime, the courts will have to treat corporations like individuals unless the legislature changes the law.

Considering the absence of absolute and vicarious liability, what constitutes the guilty mind of a corporation is obviously a key issue in defining corporate crime. There are substantial discussions amongst Chinese scholars about why a socialist corporation can become the subject of crime, but the discussion with respect to the constituent elements of corporate crime is virtually a repetition of the same ideas about individual crime (e.g., Zhu Hurong, 1982; Zhu and Lin, 1987; Zhu Huarong et al., 1988; Zhu and Zhang, 1990; He Bingshong et al., 1991; Chao Shenlong, 1985a and b; Lin Wenxian, 1987; Sun Shen, 1987; Gu Xiaorong et al., 1988; Zhen Yong, 1989). There is clearly a lack of discussion about issues such as what fault means in a case of corporate crime, whether a conviction requires a proof of corporate intent or corporate negligence, and whose decisions constitute corporate fault.

After all, what constitutes a corporate offence? Under some statutes, a corporate crime is mainly a crime where the corporation receives the illegal gains of the crime. For instance, the Supplementary Provisions on Punishing Crimes of Smuggling 1988 provides that in a case where a danwei participated in an offence, the offence is committed by the danwei only if the illegal gains obtained in the crime go to the danwei and not to the individuals.528 However, what if the offence is not profit-oriented?529 What if some

528 Article 5.
employees commit the crime by themselves and then transfer the gains to the company? Furthermore, should the law intervene in a case of negligent crime by a corporation?

At least, given the fact that intent is prescribed as the state of mind for most corporate offences under the Chinese criminal law, the legislature must specifically define the corporate fault by carefully examining the planning and decision-making process in the particular corporate structure. The illegal gain after the fact is only one factor.

To specify the concept of corporate crime (*faren* crime or *gongsi* crime), the Chinese legislature may consider the Western models. Recently, James Gobert (1994) contends that in Western law there are four models of corporate fault:

1. vicarious liability, which holds the company automatically liable for the crimes of its employees within the course of business;
2. the ‘identification’ model, which makes the company accountable only for the crimes of certain corporate officers who are identified as the company’s mind;
3. the ‘aggregation’ model, which defines corporate crime as a multi-phase operation involving the acts and minds of more than one individual; and
4. what he called the ‘corporate fault’ model, which prescribes direct rather than derivative corporate liability.

The Chinese law has provided no specific model of corporate liability, but there has been some scholastic discussion advocating the idea of direct liability. For example, borrowing a Japanese version of direct liability, He Bingshong (1991:485-486) contends that a corporation is “a personalized entity of social system.” This “system,” he claims, has its collective mind and action, its own criminal capacity and culpability, that should not be

---

529 e.g., in a case of pollution where no one obtains anything.
mixed with the mind and actions of the individuals. So corporate crime in his words is "one crime (i.e., a crime of the entire legal person) of two subjects (the legal person and the individuals who are elements of the legal person)."

This approach justifies the existing two-tier system of penalty in Chinese law and allows the prosecution to directly charge the company without even proving the fault of any particular individual. Nonetheless, it does not define what exactly constitutes or proves the "collective mind and acts" under a law of direct liability.

I would suggest that the Chinese law makers carefully study a number of the organizational models of corporate fault, given the lack of Chinese discussion on this subject. "Direct liability" is appealing to many Western scholars, but only a few countries have successfully embodied it in legislation. In this respect, a most impressive legislative initiative has been proposed in the Australian Criminal Code Bill 1994.\(^{530}\) Under the title "Corporate Criminal Responsibility," the Bill proposes that the general principles of liability apply to companies in the same way as they apply to individuals, without restricting corporate liability to offences punishable by a fine.\(^{531}\) Section 12.3 of the Bill provides the fault elements of corporate crime other than negligence. Significantly, subsection 12.3(2) specifies the means by which an authorisation or permission of the body corporate for the commission of the crime may be established, including:

(a) proving that the board of directors authorised or permitted the commission of the offence;

(b) proving that a high managerial agent authorised or permitted the commission of the offence;

\(^{530}\) See Part 2.5 of the Bill.

\(^{531}\) §12.1.
(c) proving that a corporate culture directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

The provision of "corporate culture" in paragraphs (c) and (d) is distinctive. Under this provision, as the *Explanatory Memorandum of the Bill* (1994:43-44) indicates, the prosecution would no longer have to prove the conduct of very senior officers in a case of corporate crime. Rather, the fault element might be established if there is evidence showing that the company's culture tolerates non-compliance or the company failed to create a culture of compliance. This, according to the *Memorandum*, extends the *Tesco* rule which requires evidence of conduct of senior company officers.\(^{532}\)

However, "corporate culture" appears to be a vague concept. Under subsection 12.3(2), corporate culture does not have to be "express," it could be "tacit" or "implied." Moreover, under subsection 12.3(3) of the *Bill*, due diligence is a defence available to the company only in a case of 12.3(2)(b), but not in a case of "corporate culture." It is debatable whether or not this model of corporate liability is compatible with the notion of fairness, especially in a case where the penalty could be imprisonment.

For a healthy growth of the new market economy, it is undesirable to import the stiff Australian model into the Chinese law. Instead, the relatively old *Tesco* rule is probably a better route to achieve justice. The law should require the prosecution to prove the fault of certain senior officers who are in a commanding status in the company to establish a corporate fault, or to prove the "corporate culture" and then to establish a corporate fault, or the general managerial responsibilities and policy of the corporation.

Don Stuart (1994) holds that although "corporate culture" is an innovative concept, the model of corporate liability should be less of a departure from the traditional "general rules." These rules, he contends, include that the State should not punish without proof both of conduct and fault and that the State should prove the act and fault beyond a reasonable doubt. Accordingly, automatic liability should be abolished. Under these principles, "corporate culture" might be a less vague concept.

So the law must define corporate fault by looking at the "brain" of corporation, i.e., the organizational structure of the corporation where the individual directors or officers or the collective of these individuals make decisions or fails to make proper decisions. In this respect, a major distinction of a Chinese state-owned enterprise is the existence of "state components" in the "brain," i.e., the Party committee and government-appointed officers.

8.3.2 The PC vs. the GM

The power of the Party Committee (PC), as against that of the General Manager (GM), has been a key issue in China's reform. Prior to 1984, the Party Secretary was the chief executive officer of a state-owned enterprise, whereas the General Manager was only his managerial officer. Under a 1982 statute, the PC was the "Center of leadership" of the enterprise, making decisions on all "important matters." In 1984, this system of "GM-in-charge under PC's leadership" was formally replaced by a system of "GM-in-charge"

533 See Provisional Regulations on the Organizational Work of CCP Basic Units in Industrial Enterprises (1982).
(with an absence of "PC's leadership"). In 1988, the GM became the only \textit{furen} representative of the enterprise and is "in full charge" of management.

The rules are vague and contradictory. In 1984, the Party called upon PCs throughout the nation to support the "GM-in-charge" reform. Two years later, however, the \textit{Regulations on GMs' Work} were promulgated, requiring the GMs to accept "supervision" of the PCs. In 1988, the \textit{All-People-Owned Industrial Enterprise Law} prescribed the full decision-making power of the GM without specifying any power of the PC. Significantly, the GM alone can make an "important" decision when he cannot concur with the PC. The GM can appoint all controlling officers of the enterprise.

However, no one has formally declared an abolition of the Party's leadership in a state-owned enterprise (Pei, 1988). Indeed, soon after the June 4th Events in 1989, the

\begin{itemize}
\item[534] See Resolution of the CCP Central Committee on the Reform of Economic Systems, Chapter 7, \textit{People's Daily} (overseas edition), 21 October 1984, p.1. As stated in the document, this reform is to achieve the goal of "establishing a unified, stronger, and highly efficient system of production and business management."
\item[535] See \textit{All-People-Owned Industrial Enterprise Law} 1988, Articles 7 and 45.
\item[536] See \textit{supra} note 501.
\item[537] See \textit{Regulations on General Managers' Work in All-People-Owned Industrial Enterprises} 1986, Article 6.
\item[538] See \textit{supra} note 502, Article 8.
\item[539] See \textit{supra} note 504, Article 26.
\item[540] See \textit{Provisional Regulations of Contract Management and Responsibility System in All-People-Owned Industrial Enterprises} 1988. Article 31 states: "The GM may hire a number of people to form the leading group of the enterprise."
\item[541] The author, Pai, holds that the 1982 \textit{Provisional Regulations on the Organizational Work of CCP Basic Units in Industrial Enterprises} is "extremely important in the implementation of the All-People-Owned Enterprise Law," because the leadership of the
\end{itemize}
Party decided that "implementation of GM-in-charge system should not make the function of grassroots PCs dim and the Party's leadership weak." Accordingly, the PC is once again the "political Center" of the enterprise, empowered to "assign" and "supervise" a GM's work. Interestingly, the All-People-Owned Industrial Enterprise Law 1988 is not abolished either. This law stipulates: "The GM is the Center and is in full charge in an enterprise." In the early 1990s, a three-tier guideline was issued to contain both the ideas. "To give further play of the political Center function of the Party's organization, to insist and improve the GM-in-charge system, and to fully rely on the working class."

So to some extent the PCs still are still in charge. Given the power of the Party is the power of the State, a powerful PC in an enterprise per se is a significant state element within the corporation, let alone the fact that both the PC Secretary and the GM could be appointed by the state. In this context, does the enterprise have an independent "brain" to make decisions? If the "brain" is mainly a state element (i.e., the PC), should the Party in the enterprise is an "ultimate guarantee to ensure that the enterprise will proceed forward along the socialist road."


543 Article 44. This provision virtually deprives the PC's commanding power in the "political and ideological work" and allows the GM to give orders to the PC. The same "GM Center" principle was reiterated by the CCP Central Committee in 1988, see Notice to Implement the All-People-Owned Industrial Enterprise Law (28 April, 1988), in Policy and Law Branch of the State Commission of Economic Reform, 1992,, pp. 42-45. Furthermore, the Notice indicates that in general the GMs should be openly selected by public bidding rather than appointed by the government or the Party.

544 The same policies were also reiterated in 1991 and 1992. See Li Peng. 1992, at p. 72.

545 See Article 44 of the 1988 Industrial Enterprises Law. Under this article, a GM can either be appointed or elected. The traditional way, however, is by government appointment.
enterprise be punished by the state for a crime initiated by a decision of this element? Why should the corporation be held liable for an offence ordered by someone who was appointed by the state rather than by the enterprise? Or, should the state be accountable for appointing a “wrong” PC Secretary to such a powerful position in the enterprise? No matter who is held responsible, the Party and the government are often involved in the pre-trial process of corporate criminal cases. The legal proceedings sometimes cannot start without the relevant Party and government departments showing their consent.\footnote{In practice, investigation of corporate wrongdoing is usually initiated by a Party disciplinary committee (\textit{jilu jiangcha weiyuanhui}) or a government Administrative Inspection (\textit{xingzhen jiancha}). The case will be referred to the procuratorate if these departments consider it is serious.}

The use of the criminal law against offending corporations requires an independent corporate organizational structure. In this respect, the \textit{Company Law} serves as a blueprint for change. This law provides a western-style structure, which includes a board of directors, a general manager, a supervisory board, the general meetings, but no PC, indicating a significant departure from the traditional structure of Chinese enterprises.\footnote{In the \textit{Company Law}, there is only one brief statement which requires organizations of the Party must act according to the Party's \textit{Constitution}. See Article 17. Nonetheless, laws such as the \textit{Provisional Regulations on the Organizational Work of CCP Basic Units in Industrial Enterprises} (1982) are still effective. It is difficult to predict whether the government intends to change such kinds of regulations.} Instead of reiterating the PC's leadership, the new law provides that the general meeting of shareholders is the highest decision-making authority of a company.\footnote{\textit{Ibid.}, Articles 37, 38, 102 and 103.} Further, the law requires that the directors of the board be elected by a general meeting for a limited
In a share limited company, at least half of the directors must concur in acts done on the company's behalf.\textsuperscript{550}

Significantly, the \textit{Company Law} defines the GM as the chief executive officer appointed by the board of directors, not by an external power. His function is to implement decisions of the board in the daily management of the company.\textsuperscript{551} The supervisory function of the PC is given to a supervisory board, whose function is to supervise both the board of directors and the GM and, in particular, to prevent any activities that are illegal or breach the rights of shareholders.\textsuperscript{552} Obviously, if the PC continues to exist under this structure, the Secretary might become the chair of this committee. We would have to wait and see what roles the PC plays under the new system, since there is no published empirical study on this subject.

\textbf{Conclusion}

A decade ago, the Chinese leadership frankly acknowledged that the entire classical model of planned economy, including its state-owned-and-state-run enterprise system, had been what Lenin called "a bureaucratic dream."\textsuperscript{553} Now, after all these years, state-owned enterprises are enjoying far more freedom to operate, and the state is trying

\textsuperscript{549} \textit{Ibid.}, Articles 38, 45, 47, 102, 112, 115.

\textsuperscript{550} \textit{Ibid.}, Article 117. An untouched issue in this statute however is the rights and liabilities of the minority directors.

\textsuperscript{551} \textit{Ibid.}, Articles 50 and 119.

\textsuperscript{552} \textit{Ibid.}, Articles 54 and 126.

\textsuperscript{553} See \textit{supra}, note 501, Chapter 4. The citation of Lenin reads: "To us, a complete, inclusive, and true plan equals a 'bureaucratic dream'".
to control them with more law and less plans. The use of criminal law against corporate crime is part of the efforts to import "advanced management methods" from the West. Nonetheless, in a context of state ownership and PC's leadership, the applicability of this controlling method is always questionable.

The present law on corporate crime is vague in three aspects:

(1) What kind of “danwei” could be held criminally responsible?
(2) Where to draw the line between corporate liability and state liability?
(3) What is the mental element test in a case of corporate crime?

Specification of the definition of corporate criminal liability is a sophisticated subject matter in China’s law reform. The Company Law is bringing about fundamental changes to the system of business organization. These changes will determine the scope and limits of the criminal law in the next decade. The law should replace the vague concept of danwei crime with corporate crime or company crime, distinguish those faren who can independently assume criminal liability and those who cannot, and clearly define the essential elements of corporate offences. Corporate criminal liability is a concept applicable when the corporation not only commits the crime but also has the capacity to take the liability independently. Individual liability is still the only principle applicable to a government agency, even if the crime is collectively committed.

Given the historic context of China's reform, criminal law reformers can only advance gradually. The reception of Western concepts shall fit the Chinese context. In particular, the law makers should make sure that every new criminal law statute is enforceable in the existing context where the state and the enterprises are still closely interconnected and the decision makers in publicly-owned enterprises are mainly appointees of the state.
Chapter IX

Environmental Crime: Issues of Criminalization

9.1 A Realm for Westernization

9.1.1 The Theoretical Issues

The legal definition of environmental crime is a relatively new subject to law reformers around the world. It is also an interesting subject for this dissertation, since it involves the various key issues that have been addressed in the previous Chapters.

In the post-Mao development of Chinese law, westernization appears to be a straightforward process in the realm of environmental law, which includes its criminal law aspects. This is indeed part of the "borrowing" process, that has been discussed as a common route of legal development in Chapter I of the dissertation. More significantly, it also clearly demonstrates the idea that, as discussed in Chapters III and IV, a legal system in a civilized society is not built for the repression of "class enemies," and the primary function of the criminal law is to protect the rights, interests, happiness and well-being of the members of the society.

Although some scholars still insist on the so-called "class nature" of environmental law (Zhang Shenming et al., 1993:524-525), the old slogans are obviously absurd in theory and meaningless in practice. It is worth noting that the slogans might obstruct the ongoing exchange of ideas in the international community. If all laws are "an expression of the will of the ruling class" (Zhang Shenming et al., 1993:524-525), should we suspect that the Western regimes and jurists, by talking about environmental protection, are trying
to sabotage socialism? If anything which "serves the long-term interest of the ruling class" (Zhang Shenming et al., 1993:525) qualifies as "an expression of the will of the ruling class," would mathematics, botany, zoology, and so forth, also become such an "expression?"

Moreover, what has been discussed in Chapters V, VI and VIII are essential to the definition of environmental crime. In this realm, a key issue is where to draw the line between criminal law and administrative law, given the fact that environmental law is primarily administrative law. Corporate liability is another key issue heatedly debated by legal scholars during various international meetings of environmental criminal law. For example, during the 1992 International Seminar on Criminal Law and the Environment held by HEUNI (Albrecht and Leppa, 1992), the criminal-administrative law relation and corporate criminal responsibility attracted a lot of debates. Similarly, the same issues were raised and debated during the 1994 Portland International Meeting of Experts on the Use of Criminal Sanctions in the Protection of the Environment (International Centre for Criminal Law Reform and Criminal Justice Policy, 1994). The impacts of these Western-led developments should be carefully assessed in the Chinese context.

9.1.2 From Abolition to Importation

As Chapter III of the dissertation recalls, the abolition of the Kuomintang legal system in 1949 was total and indiscriminate. Like all the other laws, the "old" laws for natural resources protection were also abolished. In Chapter III, it was indicated that the criminal law components of the Kuomintang system could have been abolished on the

554 In this respect, the former Republic of China (ROC) enacted a Fishing Law of the ROC (1929), a River Law (1930), a Forest Law (1932), a Hunting Law (1932), and so forth. There was, however, a lack of laws for pollution control.
ground of legality and human rights protection. The abolition of the environmental protection components, however, appears to be an absurd application of the theories of “class struggle.”

Between 1949 and 1976, China did not have a legal system to protect its natural resources and the environment, given the abolition of the “old” laws and the preference to “the rule of men.” This was destructive to China’s national interests. From the beginning of the 1958 Great March Forward to the 1976 ending of the Cultural Revolution, the country experienced nearly two decades of massive ecological destruction. According to published Chinese data, for example, there were four "high tides of destroying" grasslands for farming, reclaiming about 6.7 million hectares and killing 50 percent of the nation's natural grass production capacity; more than 7,320,000 hectares of forests disappeared, and nearly 1.3 million hectares of lakes were converted into farmlands; and ruthless logging destroyed one third of the forests in Sichuan (Qu Geping, 1987:47; Han et al., 1991:8). In 1963, facing the disastrous consequences of the Great March Forward, the government quietly adopted a few laws such as the Regulations on Forest Protection. Yet, there was no reversal of the destruction, given the overall situation of lawlessness in the country.

There is a lack of Chinese data on the state of pollution during 1949-1979, but the deterioration of air and water was evident in urban areas such as Shanghai. Factories built during this period continued to pollute after the Cultural Revolution. In 1981, the entire country discharged a total of 42 million tons of hazardous substances into the air, generated 30.3 billion tons of wastewater, and emitted some 430 million tons of industrial slag (Qu Geping, 1987:49). Many of the disasters were indeed state-planned to achieve an economic miracle, so no one was held responsible under the regulations.
In 1972, however, there was an interesting event. In the year, China sent a delegation to the United Nations Conference on Man and the Environment in Stockholm. Although the mission was to introduce some ten Chinese "cardinal principles" to the Conference, the delegation also brought back the concept of "environmental protection." Later, the government adopted a set of pollution control regulations and established a Leading Group on Environmental Protection to supervise the implementation of the new rules (Ma and Chai, 1990:44).

Yet, like other laws made during Mao's era, the language of the new regulations is extremely vague. For example, the Provisional Discharge Standards of Industrial "Three Wastes" (GBJ4-73) (1973) asks "all industrial and mining enterprises" to control the discharge of "three wastes" (polluted air, waste water and solid materials) and meet the standards "within three to five years, or a little bit longer time." It then goes on to require the environmental agencies to "assist" the enterprises to carry out the inspection on the three forms of wastes. In a case of violation, the law says, the environmental agency should "demand" the polluting danwei to take a proper "action." If the demand is


557 E.g., Provisional Discharge Standards of Industrial "Three Wastes" (GBJ4-73) (1973), and Water Quality Standards of Industrial Waste Water Discharged in City Drainage System (1994). For the full texts, see Zhou Qihua et al., (Eds.), 1994, Encyclopaedia of Environmental Protection Law, approved by the Law Committee of the NPC Standing Committee, pp.674-677.

558 Articles 2-4.

559 Article 6.
ignored, the agency should report to the government department that is in charge of the 
danwei. When pollution has caused a “harmful accident,” someone (not identified in the 
Regulations) “shall handle it seriously.”560 Apparently, this kind of regulation is at most 
designed for compliance, not for enforcement. Such regulations are standards “for 
references,” rather than laws. After all, the standards were never properly followed in 
practice during the Cultural Revolution.

The legal system of environmental protection in the PRC is clearly a post-Mao 
achievement. It is in opposition to, rather than a continuation of, the practice in Mao’s era. 
With respect to environmental protection, real changes only started after the Third Plenum 
in the late 1970s. Since then, China has entrenched the principle of environmental 
protection into the Constitution,561 and implemented this principle in some six hundred 
national and provincial statutes and regulations.562 As demonstrated in the 1994 
Encyclopaedia of Environmental Protection Law (Zhou Qihua et al., 1994), which ranks 
as the most exhaustive single collection of Chinese environmental law, only four out of the 
hundreds of statutes and regulations were made during 1949-1976.

The growth of law is amazing in this realm. The law reformers in China have 
made invaluable contributions to this new system, but the rapid growth would be 
impossible without successful imports from overseas. China’s Director of State 
Environmental Protection Commission, Qu Geping, has frankly acknowledged that:

Environmental protection is a relatively new development in this country. 
Starting from the very beginning, we have been learning foreign

560 Ibid.

561 See Articles 9, 10, and 26.
experience, because there was a lack of [Chinese] knowledge and experience. This has assisted environmental protection in our country. I myself began to study China's environmental problems by learning from foreign experience. I understand that lots of my colleagues in the profession of environmental protection also went through this learning process.563

The term “foreign experience” primarily refers to the relevant Western systems and practice. Under the title of “Foreign Environmental Protection Law,” the Encyclopaedia of Environmental Protection Law (Law Committee of the NPC Standing Committee, 1994) contains laws in ten jurisdictions, including the United States, Britain, Germany, Japan, Poland, Romania, and the Soviet Union. However, the Soviet laws hardly have any positive influence on the present Chinese environmental law. In a Chinese textbook, the authors (Zhang Shenming et al., 1993) note that Western countries have achieved major progress in environmental protection since the 1972 Stockholm conference. This, they (1993:526-527) contend, is largely owing to the establishment of a powerful legal system for environmental protection. The book introduces the laws in Japan, the United States and Britain, and concludes that, although the laws are capitalist in their nature, there are still a great deal of ideas that could be “very beneficial” to the Chinese system.

From the very beginning of the post-Mao era, there have been various Chinese publications presenting such an idealistic vision of the Western law that, aside from its “capitalist nature,” the system is portrayed as being free of any problems. Some years ago, a Chinese professor of environmental law (Ma, X., 1987:64) wrote:

All countries with developed industry and a sound legal system have rather perfect environmental protection laws. In addition to the institution of many specialised laws and decrees on environmental protection ... quite a

few countries have enacted comprehensive environmental protection laws to make all-around adjustment of environmental protection activities.

 Nonetheless, for the next phase of legislative development, and particularly with respect to the use of criminal law for environmental protection, it would be desirable to take a more critical approach to the various Western legal concepts and carefully evaluate their applicability in the Chinese context.

9.2 Environmental Crime under Present Law

9.2.1 The Borderline Issue

From a legal perspective, one might find that the borderline between administrative environmental law and criminal law is a difficult issue in any jurisdiction.

The specification of the borderline has been a tedious process in Chinese law. In 1979, the NPC promulgated China's first comprehensive environmental enactment, entitled Law on Environmental Protection (Provisional). This law provides a one-article principle of liability, declaring that polluters shall receive administrative, economic or criminal sanctions.\textsuperscript{564} It requires the establishment of environmental protection agencies (EPAs) at four administrative levels (i.e., national, provincial, county and township) and environmental offices within various Ministries, Bureaux, large enterprises and institutions.\textsuperscript{565} Nonetheless, this law provides nothing to clarify the borderline issue.

\textsuperscript{564} Article 32.

\textsuperscript{565} Articles 6-7.
The 1979 enactment was replaced in 1989 by the present *Law on Environmental Protection*. The new law has a Chapter V, which divides legal liability into three categories: administrative, civil, and criminal. Unlike its 1979 predecessor, the *Law* at least presents some general ideas about the borderline. Chapter V states that, in a case of violation, the environmental protection agency "may" impose an administrative sanction, such as warning and/or fine. It also demands that, when "the circumstances of the case are serious," the polluting *danwei* or the government department in charge of the *danwei* shall impose an administrative sanction on the "directly responsible" individual of the *danwei*. Moreover, under this *Law*, an EPA can require a polluting *danwei* to meet the standard of waste emission within a certain time limit. If the *danwei* fails to do so within the limit, the EPA "may" impose another fine, but a decision to suspend the business operation or to close down the factory has to be made by the "government," rather than the EPA, which is an agency of the government. The *Law* also stipulates that a polluter could be sued by the victim for civil damages. Further, Article 43 of the *Law* allows criminal prosecution under two conditions: first, only against the individual offender; second, only against the individual who is "directly responsible" for a major incident of environmental pollution that has caused a "serious consequence of heavy loss of public or private property or death and injury." However, this article avoids using the words "shall" or "may" to specify whether the prosecution is discretionary.

The vagueness indicates the reluctance to prosecute. This is often demonstrated in enforcement. Under a criterion set by the State Environmental Protection Bureau, a

---

566 Chapter Five, Articles 35-45.

567 Article 38.

568 Article 39.

569 Articles 41-42.
pollution qualifies as "a major incident" as provided for under Article 43, if it has caused a
direct property loss worth more than 50,000 yuans, or it has poisoned a group of
people.\textsuperscript{570} This criterion has only been used for criminal prosecution in rare occasions.
For example, on 18 October 1990, the \textit{China Environment Daily} reported a case in Nanle
County of Henan Province, where a farm chemical factory emitted a large amount of
hazardous substance into a river, causing a direct loss of more than 500,000 yuans to the
local fishing industry. The EPA investigated the case and held the factory responsible. No
sanction was used, let alone criminal prosecution. In this case, a media exposure of the
incident seems to have been far more powerful than the EPA intervention. Two months
after the newspaper publication, the factory agreed to pay the fishermen a damage of
73,000 yuans, which, rather ironically, is worth only one-seventh of the actual loss.\textsuperscript{571}

Apart from the 1989 Law, which is a cornerstone enactment, China has enacted
some more specialised laws for environmental protection. These laws roughly fall into
two large categories: those designed to control pollution and those enacted to protect
natural resources. In the first category, the important enactments are the \textit{Marine
Environment Protection Law} (1982), \textit{Law on Prevention and Control of Water Pollution}
(1984), \textit{Law on Prevention and Control of Air Pollution} (1987), \textit{Regulations on
Prevention and Control of Noise Pollution} (1989), \textit{Provisional Regulations on
Environmental Controls in Economic Open Areas} (1986), \textit{Regulations on Construction
Environmental Protection} (1986), \textit{Provisional Regulations on Waste Discharge Fees}
(1982), \textit{the Urban Noise Standards} (1982), and so forth. In the second category, the

\begin{itemize}
\item \textsuperscript{570} Article 5(3), \textit{Provisional Methods of Reporting Environmental Pollution and Sabotage
Incidents}, issued by the State Bureau of Environmental Protection in 1987.
\item \textsuperscript{571} See the \textit{Case of Zhongyuan Farm Chemical Factory Polluting A River} (1990), in
Zhang Shenming et al, 1993, pp. 292-293.
\end{itemize}
basic ones are the *Forest Law* (1984), the *Prairie Law* (1985), the *Land Law* (1986), the *Fishing Law* (1986), the *Water Law* (1988), the *Law on Wildlife Protection* (1989), and a number of others.\(^5\) However, the same borderline problem arises in virtually every enactment listed here.

In 1994, the Chinese government announced that at least fourteen new statutes for environmental protection would be enacted in four years.\(^6\) Apparently, there is a pressing need to specify the borderline in this phase of development.

### 9.2.2 Relevant Criminal Offences

Ten years ago, the Law Reform Commission of Canada (1985:49) indicated in its Working Paper, *Crimes against the Environment*, that crimes against the environment could be penalized under some sections of the Canadian *Criminal Code*, such as the provisions on criminal negligence (section 202), common nuisance (section 176), mischief (section 387), causing disturbance (section 171), offensive volatile substance (section 174), explosive substance (sections 77 and 78), and offences against animals (sections 400 to 403). Interestingly, the Commission applied a number of criteria to justify its conclusion (1985:49-50). On the list, the first criterion is "whether the wording, focus and scope of the present Code offence under consideration clearly and directly enough prohibits and sanctions crimes against the environment." This is also a question for the reform of China’s criminal law.

---

\(^5\) For a detailed list of laws, see Zhou Qihua et al. (Eds.), 1994. For a list in English, see Zou and Zhang, 1993, at p.279, Figure 1.

There are roughly three categories of provisions in the Chinese Criminal Law that, in conjunction with the administrative rules and statutory interpretation, might be, but not necessarily are, usable for the prosecution of individual offenders of environmental crime. The corresponding criminal offences are also divided into three categories, and the penalties are stiff.

The first category may be considered as crimes against the protection of natural resources. They include:

1. Stealing or illegal logging of forest trees. Under the Criminal Law, the Forest Law, and the Detailed Regulations on Implementation of the Forest Law, the maximum sentence could be three years' imprisonment for illegal felling, five years' imprisonment for common theft of trees, and life imprisonment for habitual or aggravated theft.574 Furthermore, under the Resolution of the Standing Committee of the NPC on Severely Punishing Offenders of Crimes Seriously Endangering the Economy (1982), a person convicted of theft of “very serious circumstances” could be sentenced to death.575


575 Article 1 of the Resolution. In judicial interpretation, the phrase, theft of “very serious circumstances,” refers to theft which involves: (1) a “particularly large amount” of property worth 30,000 yuan or more; or (2) a “particularly large amount” of property worth 10,000 yuan or more and some additional “particularly serious circumstances” such as stealing “badly needed” materials causing serious consequences to production, and so on. See Article 6, Supreme People's Court and Supreme People's Procuratorate, 1984, Answers to Questions Regarding the Specific Application of Law in Handling Theft Cases. The text is in Ren et al., 1991, at pp.756-761.
2. Robbery of forest trees. Under the Criminal Law, the maximum penalty is also death.\textsuperscript{576} 

3. Speculation of a large amount of stolen forest trees for illegal profiteering. Again, the maximum sentence is death under Article 1 of the Resolution of the Standing Committee of the NPC on Severely Punishing Serious Economic Crimes (1982).

4. Illegal fishing. Under the Criminal Law and the Fishing Law (1986), the court can impose up to two years' imprisonment.\textsuperscript{577}

5. Illegal hunting. Under the Criminal Law and the Wildlife Protection Law, the maximum punishment is also two years' imprisonment.\textsuperscript{578} Furthermore, under the Resolution of the Standing Committee of the NPC on Crimes of Catching and Killing Wild Rare and Endangered Animals Specially Protected by the State (1988), illegal hunting of rare species leads to a maximum of seven years' imprisonment. The same Resolution also defines illegal trafficking of rare species as the offence of illegal speculation and speculation;\textsuperscript{579} that is, a capital offence if the circumstances are "very

\textsuperscript{576} Article 150.

\textsuperscript{577} Article 129 of the Criminal Law, and Articles 28 and 19 of the Fishing Law.

\textsuperscript{578} Article 130 of the Criminal Law, and Articles 31, 32, 35 through 38 of the Wildlife Protection Law.

Further, both the Resolution and Resolution of the Standing Committee of the NPC on Punishing Crimes of Smuggling prescribe that smuggling of rare species constitutes the offence of smuggling rather than illegal hunting. This type of smuggling could also be a capital offence.581

The second category is crimes against public safety. This, through interpretation, might somehow include pollution cases:

1. Intentionally using dangerous means to endanger public safety. This offence is defined under the Criminal Law, as well as the Water Law (1988), and the court may impose up to ten years' imprisonment.582

2. Intentionally using dangerous means against public safety causing loss of life, serious bodily injury, or major loss of property. Under the Criminal Law, the maximum punishment for this offence is death.583

3. Causing a major disastrous incident due to a negligent violation of statutory regulations. The offender can be sentenced to maximum seven years' imprisonment.584

580 See Article 1 of the Resolution of the Standing Committee of the NPC on Severely Punishing Offenders of Crimes Seriously Endangering the Economy (1982).

581 Article 2, Resolution of the Standing Committee of the NPC on Punishing Crimes of Smuggling (1988). For example, smuggling of a panda fur is a capital offence.

582 Article 105 of the Criminal Law, and Article 46 of the Water Law.

583 Article 106 of Criminal Law.

584 Articles 114-115 of the Criminal Law; Article 43 of the Law on Prevention and Control of Water Pollution (1984); Article 38 of the Law on Prevention and Control of Air Pollution (1987); Article 41 of the Regulations on Prevention and Control of Noise Pollution (1989).
The last category is crime against public duty, that, through interpretation, could include breach of duty by a state functionary in pollution control causing major loss of public property. Under the Criminal Law, the maximum penalty is five years' imprisonment.\textsuperscript{585}

Yet, these prohibitions are vague in wording, insufficient in scope, and do not have a clearly defined focus on safe environment. Most of the criminal law provisions in relation to the first and third categories, as well as item 3 of category two, involve a "circumstantial element," which, as discussed in Chapter VI of the dissertation, is subject to judicial or administrative interpretation. For example, according to a judicial document, to lay a criminal charge of illegal logging under Article 128 of the Criminal Law, the prosecutor needs to prove that the accused person felled a minimum of 10m\textsuperscript{3} of wood or 500 "young trees," if the offence occurred in a forest area; to charge someone with stealing trees under this Article, the required minimum amount of stolen property is 2m\textsuperscript{3} of wood or 100 "young trees."\textsuperscript{586} Furthermore, the provisions regarding intentional offences in category two have never been used in any environmental cases. Articles on crimes of negligence in category two and crimes against public duty in category three are occasionally used for environmental protection, if there is a "serious consequence" or "major loss" of property or life.\textsuperscript{587}

\textsuperscript{585} See Article 187 of the Criminal Law; Article 39 of the Law on Prevention and Control of Air Pollution; Article 50 of the Water Law; and Article 38 of the Wildlife Protection Law; Article 44 of the Regulations on Prevention and Control of Noise Pollution (1989).

\textsuperscript{586} See Article 2, Interpretations of the Supreme People's Court and the Supreme People's Procuratorate Regarding Some Legal Issues in Cases of Stealing and Illegal Logging of Forest Trees (5 September 1987).

\textsuperscript{587} Articles 114, 115, and 187 of the Criminal Law.
Moreover, these existing prohibitions were designed to protect the property and life of the public, rather than their environmental right. In practice, the Chinese enforcement of the environmental-related criminal law prohibitions focuses on protection of natural resource, which, in tradition, is considered as part of the public property. Starting from 1982, the criminal law has been used quite frequently in illegal logging cases. Between October 1982 and July 1983, for example, a total of 5,011 illegal logging cases were formally investigated by the criminal justice system.

On the contrary, the law has rarely been used to crack down on polluting activities. Pollution costs the nation nearly ten billion yuan a year, but the polluters are rarely prosecuted and leniently sentenced. For example, in a collection of 88 environmental law cases (Zhao Yongkang, 1989), there are only four criminal convictions of polluters. The individuals were convicted separately in four provinces, and only one of them was sentenced to jail. In 1979, Zhang Changling, a worker, was sentenced to jail by a Suzhou court for negligently discharging 28 tons of cyanide material into a river. This became the first criminal case in the history of the People's Republic where a polluter was prosecuted and convicted. The same case is also recorded by two Chinese researchers in a 1993 UNICRI publication as one of five "typical cases of criminal sanctions" (Zou and Zhang, 1993:308). The sentences in other recorded criminal pollution cases appear to be

---


589 See "Qu Geping et al. Answer Questions Regarding Environmental Protection," *People's Daily (Overseas Edition)*, 16 March 1994, p.3. This report claims: "China loses nearly ten billion yuan a year because of pollution." It does not, however, provide detailed data about the loss.

590 See the *Case of Zhang Changling Water Pollution*, in Zhao Yongkang, 1989, pp.1-3.
strikingly similar: mostly probation. The courts did not even impose a fine on the convicted individual offenders. In one case, a sailor, Ne Yukai, was convicted under s. 114 of the Criminal Law for negligently discharging 3,420 tons of gasoline into the Yangtze River. Ne was convicted because "the masses strongly demanded severe punishment," but he walked out of the court with a sentence of two years' probation. In another case, a man received a two years' probation for negligently discharging 530 tons of gasoline and polluting 3.5 hectares of land.

The overall Chinese sentencing pattern indicates that a heavy penalty has only been imposed in recent years and only when the emission of pollutants directly caused death. In 1991, two employees of a farm chemical factory were convicted under Article 115 of the Criminal Law for negligently releasing hazardous substance in a town, which poisoned a total of 667 residents, caused 37 deaths and property loss of 2,600,000 yuans. They were sentenced to seven and six years' imprisonment respectively.

---

591 In law, the Chinese term is "imprisonment with suspension" or "suspended punishment."

592 See the Case of Ne Yukai Zhao Polluting the Yangtze River, in Zhao Yongkang, 1989, p.162.

593 Ibid, at pp.6-8.

9.3 How to Specify

9.3.1 Crime against the Environment

Much could be learned through the international exchange of ideas for the specification of Chinese law, since many countries are considering the reform of the criminal law for environmental protection. For instance, in its Working Paper on environmental crime, the Law Reform Commission of Canada (1985:65) held that, primarily given that the existing Criminal Code prohibitions could not “directly and explicitly prohibit seriously harming or endangering the natural environment,” the legislature should create a new category of offence (i.e., “offences against the environment”), rather than revise the existing sections.

Similarly, it would be desirable that the new Chinese Criminal Law include a new chapter of “environmental crime” to cover, in an explicit and direct way, the various crimes against the environment, including pollution. The lack of such definitions in the present Criminal Law has increased the difficulties of enforcement. For example, Articles 105 and 106 of the Criminal Law might be applicable to cases of intentionally caused pollution. Yet, the penalties in these Articles were designed to suppress “real crimes” such as arson, rather than a “regulatory crime” like pollution. Therefore, it appears that proportionality might become an issue if a polluter is sentenced to death under Article 106. If the crime, as defined under these Articles, was in fact committed for the purpose of massive killing or massive destruction, pollution might only be a side-effect. Hence, it is awkward to use these Articles against the polluters.
To define a crime of pollution, the concept of "harm" (to the environment) should go beyond the actual and concrete consequence. Under Articles 114 (crime of causing major accident) and 115 (crime of causing major accident in handling hazardous materials) of the 1979 Criminal Law, the prosecution would have to establish an actual and serious consequence for a conviction. This kind of requirement hardly fits a case of pollution wherein the hazards to public health are long-term and difficult to measure. In addition, in cases of negligently caused pollution, the polluters are only occasionally prosecuted when the circumstances are extremely "serious," or the incident has caused death or a social unrest in the area. Interestingly, even the Environmental Protection Bureau of the Chinese central government has listed "social unrest" as one of the "serious circumstances" in a pollution case.595 The use of these standards has made the definitions of offences even more vague.

Some of the Western concepts might be enlightening to Chinese law reformers. The concept of treating the environment as a unity (Westerlund, 1992; Nilsson, 1992; Giampietro, 1992) is important to the articulation of the definitions of pollution crimes. Applying this concept, the law should no longer require a harm that has already occurred for conviction, even if the offence is committed by negligence. Instead, endangerment of the environment should be sufficient.596 Taking this approach, the Criminal Law should redefine negligence.597 This would be also a challenge to the theoretical proposition

595 Articles 5(2), (3), and (4) of Provisional Methods of Reporting Environmental Pollution and Sabotage Incidents, issued by the State Bureau of Environmental Protection in 1987.

596 This concept of "harm" is also recognised in the 1994 Portland model. See International Centre for Criminal Law Reform and Criminal Justice Policy, 1994, p.18.

597 Article 12 of the Criminal Law states: "A negligent crime occurs when one should foresee that his act may cause a socially harmful consequence but fails to do so because of
which holds that a "harmful consequence" in a negligent offence must be an "already occurred" harm rather than an endangerment (He Bingshong et al., 1993:148-149). Nevertheless, to insist on the rule of law, the law should specify the concept of endangerment or the level of endangerment for the definition of environmental crime, although this would be something difficult in legal techniques.

A more difficult issue is how to draw a clearer borderline between administrative and criminal laws with respect to environmental cases. A classification of three models has been proposed by a German scholar, G. Heine. Albrecht (1992:197-198) summarises the three models as ways to design the "three distinct types" of environmental criminal offences. The first model (absolute dependency) is "absolutely dependent" on administrative law. By creating criminal offences, the objective of criminal law is to suppress the contempt of administrative law or administrative orders. The second model (relative dependency) "directly" incriminates behaviours endangering or harming the resources. The criminal law is "formally independent" from the administrative law, but in fact still "relatively dependent" on the "administrative concerns." The third model (absolute independency) is completely independent from the administrative law, given it incriminates behaviours that create serious threats to human life or health.

This classification might be a way to determine what definitions of specific environmental offences should include the violation of administrative environmental law as

carelessness or, having foreseen the consequence, readily assumes he can prevent it, with the result that this consequence occurs."

598 According to Albrecht, this idea was proposed by Heine in his article "Environmental Protection and Criminal Law," in O. Lomas (Ed.), Frontiers of Environmental Law. Warwick, 1991. pp. 75-101. See Albrecht, 1992; Frate and Norberry, 1992:24, note 44. The proposition appears to be influential in the German legal circle. Also M. Mohrenschlager, 1992.
an essential element. However, in a jurisdiction with a sound administrative environmental legal system, it is questionable whether there would be a definition of environmental crime which has a truly "absolute independency." Even if the criminal law section does not prescribe the violation of an administrative regulation as a precondition of prosecution, one should always be able to find such a violation in the case. Therefore, the issue still arises as: "Where to draw the borderline between a criminal offence and an administrative offence?"

There is no universally agreed upon solution to this kind of question. Nonetheless, there are a number of classical propositions that might be commonly acceptable, such as ultima ratio and effectiveness.

9.3.2 The Legislative Models

Given the heavy Western influence on the Chinese environmental law, the extension of the Chinese criminal law for environmental protection should also take into account the relevant legislative models that have been developed in the international community. In particular, the models should be carefully studied for the creation of crimes of pollution in the Chinese law, since this is the realm where we see a great deal of controversies.

Penal laws in some Western jurisdictions have embodied the concept of environmental crime. For instance, under the title of "criminal acts against the environment," Chapter XXVIII of the German Penal Code provides a variety of crimes of pollution, including water pollution, air pollution and noise, illegal disposal of 

599 §324.
hazardous waste, unauthorized operation of plants, unauthorized use of nuclear fuel, and so forth. In 1993, two Chinese researchers (Chu and Zhou, 1993) proposed the creation of a new chapter in the Special Part of the Criminal Law to cover twelve definitions of crimes against the environment. Apart from crimes against natural resources, the list includes five types of pollution: air pollution, water pollution, ocean pollution, noise pollution, and land pollution. Yet, the authors appear to be ignorant of the recent international development in this realm and present no critical review of the relevant Western-oriented legislative models. Indeed, before one makes a decision to import, one should analyse the models, be aware of the relevant controversies, and explore the problems, even if a particular model has won strong support in the Western world.

It is very encouraging that, in recent years, there have been increasing regional and international efforts to work out legislative models for the use of criminal law to protect the environment. For instance, at the regional level, the Council of Europe has been drafting a Convention for the Protection of the Environment through Criminal Law. The draft convention covers a list of criminal offences, applies the concept of endangerment offences which requires no actual damage, defines the relationship between criminal law and administrative law in the environmental sphere, and provides both individual and corporate criminal liability. The draft also covers keys issues such as the

600 §325.
601 §326.
602 §327.
603 §328.
604 Resolution No. 1, the 17th Conference of European Ministers of Justice, Istanbul, 1990. The draft of this European convention has not yet been published.
preparation of common guidelines for investigation, prosecution, public participation in proceedings, jurisdiction and judicial assistance.

At the international level, an influential model is presented in the Report of the 1994 Portland International Meeting of Experts on the Use of Criminal Sanctions in the Protection of the Environment, which provides stiff rules for the definition of environmental crimes (International Centre for Criminal Law Reform and Criminal Justice Policy, 1994). During the meeting, experts from 27 countries, including China, recommended an extension of the scope of criminal law for environmental protection. To assist the governments achieve the corresponding improvement in their laws and international co-operation, they drafted a three-tier package: a draft convention on transnational offences, a model domestic criminal statute, and a structure of regional enforcement.605

The Report suggests that “hard core offences” should be defined as international crimes and included in a Code of Crimes against the Peace and Security of Mankind. Specifically, it identifies four categories of “hard core” international environmental crimes:

1. the intentional causation of widespread, long term or severe pollution;
2. the intentional unauthorised discharge of hazardous substances which is likely to severely pollute the environment;
3. the intentional and illegal disposal, export or import of hazardous waste;
4. the intentional and illegal operation of a hazardous installation, and the intentional and illegal handling of specified radioactive, hazardous chemical or biological materials.

605 The participants are mostly experts rather than government representatives. Therefore, the Report is recommended to the various governments for reference.
Given the various limitations on the effective use of criminal sanctions at the international level, the Report recommends that intergovernmental bodies should be established to ensure the application of the international instruments, that the proposed international convention should also provide for extradition and mutual assistance, recognise the principle of aut dedere aut judicare, as well as the concept of universal jurisdiction in respect to the prosecution of trans-boundary offences. However, this draft may have go through a long-term process of tedious international debates and negotiation.

Priority consideration should be given to the second part of the Portland package, i.e., the Domestic Law of Crimes Against the Environment. The Domestic Law is the first model law of this nature in history and has some distinctive ideas, but the applicability of these ideas must take into account the Chinese context.

The Domestic Law proposes a division between “generic crimes” and “specific crimes” (International Centre for Criminal Law Reform and Criminal Justice Policy, 1994:18-24). The basic formal distinction lies in the fact that a violation of regulation is required for conviction of a specific crime, but not for a generic crime. In Haine’s classification, a generic offence would be “absolutely independent” from administrative law, whereas a specific crime would be “absolutely dependent” on administrative law.

The definition of generic environmental crime is summarised as: anyone commits a crime against the environment who knowingly, recklessly, or through negligence, whether or not in violation of a statutory or regulatory duty, causes or contributes to serious damage, or a substantial risk of serious damage, to the environment, whether local or regional, or releases a pollutant and thereby causes death, serious illness, or severe personal injury to a human being (International Central for Criminal Law Reform and
Criminal Justice Policy, 1994:18). The definition of specific crime is even more inclusive, virtually covering any first time offender who knowingly, recklessly, or negligently, and in violation of a environmental administrative regulation, releases a pollutant into the environment, operates a hazardous installation, handles hazardous material, and so forth.

This model, once transplanted into a domestic law, would be an extremely powerful tool for the suppression of pollution. However, there are a number of issues open for debate. First, under the proposed definition of “specific crimes,” would the criminal law still be the last resort for the control of pollution? In the Chinese context, an application of this model might be a “great leap forward” from under-criminalization to over-criminalization. This kind of change is unrealistic. Secondly, it appears that the division of generic and specific crimes in the Portland model law is primarily determined by the different levels of seriousness (International Centre for Criminal Law Reform and Criminal Justice Policy, 1994:22). Curiously, however, the proposed structure of a “specific crime” also includes, rather inconsistently, a “serious injury or damage to the environment,” although it is not necessarily an essential element of all the specific crimes (International Centre for Criminal Law Reform and Criminal Justice Policy, 1994:19). If a specific crime is presumably “less serious” than a generic crime and therefore requires a violation of a regulatory duty, why should the law list “serious damage” as one of its constituent elements? For the next phase of criminal law reform in China, the new Criminal Law should only criminalize the most serious behaviours that may be equivalent to the listed “generic crimes” in the Portland model law, but save the clause, “in violation of statutory or regulatory duty,” for the definitions of these crimes, and leave the less serious “specific” ones to the hands of the EPAs.

606 See (b) Specific Crimes, section 2(iv).
9.3.3 Corporate Liability for Pollution

Let us come back to the issue of corporate liability. In addition to the provision of individual liability, the Portland model law recommends a principle of legal entity liability, which rejects the identification theory and embodies the concepts of both "faulty risk management" and absolute liability (International Centre for Criminal Law Reform and Criminal Justice Policy, 1994:19). Accordingly, a legal entity is criminally responsible for an offence on the ground of faulty risk management or violation of a regulatory provision. This concept was brought up during a variety of international conferences, including the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (United Nations, 1995a). A background paper distributed at the Conference indicates: “The international trend encourages the liability of enterprises, especially in cases involving large-scale enterprises and faulty risk management over time” (United Nations, 1995a:17).

Further, the Portland model proposes that the liability of the legal entity is direct, independent from that of any individual agent of the corporation. Moreover, taking into account the massive state-ordered environmental destruction during the 1991 Gulf War, experts to the Portland meeting unanimously agreed not to recognise government immunity in the model law.

As discussed in Chapter VIII of the dissertation, the present Chinese law on corporate crime is relatively vague, mostly articulated in the old language of state-planned economy. It is difficult to enforce the law particularly in cases involving state-owned danwei. The same problem arises in environmental cases. No Chinese state-owned company has been prosecuted for creating pollution, no matter how grave the hazards are. Even the use of administrative sanctions is extremely lenient. For example, in 1982, the
Jianjiang Pesticide Factory in Guizhou Province dumped a large amount of nitrogenous water into a river, killing more than 330,000 tons of fish and poisoning the only source of drinking water in three neighbouring counties. An administrative fine of only 100,000 yuan (the equivalent of about US$12,000) was imposed on the factory, and the party secretary who ordered the dump received nothing but an administrative warning.607

As reviewed in Chapter VIII, the concept of legal entity liability has been introduced in a number of Chinese criminal law enactments. These enactments deal with a variety of offences, such as smuggling, accepting bribes, violation of foreign currency regulations, drug trafficking, drug production, production of pornographic materials, tax evasion, breaching copyright, and so forth. Unlike many of the offences, grave environmental damages are mostly committed by publicly owned corporations. Hence, the introduction of corporate liability in this realm, especially a rigid concept as proposed in the Portland model, is particularly difficult.

Indeed, as some Chinese scholars have noted, a number of Western countries have introduced corporate liability in their environmental criminal law.608 In China, however, there is a different situation. The big polluters are state-owned enterprises, built twenty years ago, managed by government-appointed cadres, and mostly do not have sufficient resources to control pollution. For example, according to a 1988 EPA national study, 80 percent of the waste water in China is discharged by 3,000 large size state-owned


No one can afford to convict these enterprises. Indeed, the state probably does not have the right justification for a conviction. The factories were designed, founded, and directly operated by the state according to state plans twenty years ago, when environmental protection was not a concern at all in state planning. If pollution is an inherited problem left by history, who should be held liable? Therefore, in practice, Chinese law enforcement agencies are required to take "historic factors" into consideration. Furthermore, even if the pollution has nothing to do with state planning and is solely a fault of the enterprise, the EPA or the court still has to proceed with great caution in enforcement. The large corporations are responsible to their own "departments in charge" at ministerial or provincial level. In general, the EPA is not a powerful agency in the government hierarchy. A local EPA is relatively less powerful than most industrial and business bureaux of the same government. For example, Zhang and other scholars (Zhang Shenming et al., 1993:440-441) have noted that because of the relatively low status in the power hierarchy, the EPAs sometimes "do not dare to enforce the law" if another government department intervenes. To impose a sanction, be it administrative or criminal, the EPA or the court often has to contact the relevant departments.  

Apart from the state-owned danwei, the fast growing village and township industry is posing new threats to the environment. This kind of enterprise is profit-oriented,  

---

609 See Han et al., 1991, at p.82.

610 For example, in its Resolution on Environmental Protection Work (1984), the State Council requires that, in strengthening the pollution control in "old enterprises," the EPAs should "jointly make decisions with the Economic Administrative Departments." See Article 5 of the Resolution.

611 In the preface of the Provisions of Environmental Regulation for Village, Township and Street Enterprises (1984), for example, the State Council indicates that these enterprises are causing "serious pollution and damage to the urban and rural environment." Also see Qu Geping, 1987, at p.45.
mostly small-sized, poorly equipped, often ignorant to the ordinary regulations, but enjoys strong support from the community. These enterprises employ tens of millions of surplus labourers, make life less intolerable in the countryside, produce thirty-six percent of China's NDP and seventy-one percent of the nation's rural NDP.\textsuperscript{612} In this context, it is particularly difficult to incriminate the local heroes. Recently, a background paper for the Ninth UN Congress (United Nations, 1995a:19-20) contended that the big corporations and small enterprises respond differently to administrative sanctions, but both fear criminal sanctions. Although it is difficult to determine how much the Chinese enterprises fear criminal sanctions, the following statement (United Nations, 1995a:20) certainly makes sense:

\begin{quote}
[P]articularly regarding the actions of small polluters, application of a criminal sanction requires far stronger cultural and social support than the mere enforcement of an administrative measure (for example, a fine) or a civil sanction (an order to remedy the damage).
\end{quote}

So, instead of punishing the \textit{danwei}, the EPAs have been providing advice to them, trying to teach them the value of environmental protection, and suggesting a "reasonable" time limit for them to stop polluting the area and clean up the mess. The EPAs are required to take a selective approach and only target the most serious offenders. According a 1988 official report, amongst all the industrial enterprises operating in China, 54 percent breach the legal standards of waste water discharge (cited in Han et al., 1991:84-85). Can the state enforce the principle of corporate criminal liability, let alone a direct and absolute one?

\begin{flushright}
\end{flushright}
Therefore, the definition of environmental crime in Chinese law should be based on the traditional principle of individual liability. If the Chinese legislature introduces corporate liability in the definition of environmental crime, the law should or, more accurately, has to, recognize state immunity and extend this immunity to the publicly-owned danwei. To ensure enforcement, the definitions must include specifically described essential elements, especially with respect to the seriousness of the "harm," so that a criminal offence would not be processed only as an administrative violation.

A new concern in China's environmental protection is the relocation of environmentally hazardous industries from the overseas into the mainland. "Foreign and overseas capitalists are trying to transplant high hazardous industries into this country," two Chinese lawyers wrote (Ma and Chai, 1990:400). Yet, in this kind of case, there appears to be no compelling need to penalize the companies, given the fact that administrative sanctions have not been exhausted. Indeed, there has not been a case wherein a foreign or overseas Chinese individual is prosecuted for causing pollution in China. In 1984, a Hong Kong owned factory was finally fined HK$20,000 (an equivalent of some US$3,500) after constantly causing serious air and noise pollution in the city of Shenzhen for a period of two and a half years (Cheng Ren, 1988:62-64). This was the first environmental case involving a "foreign element" in the PRC, and the sanction was really a joke. For the next phase of law reform, the EPAs need to impose heavier administrative sanctions on the polluting companies, and let the procuratorate deal with the individual officials who are responsible to the action of their companies.

Looking at the broader picture, there are various factors inhibiting the incrimination of polluters. Incriminating the publicly-owned polluters could be in conflict with the system of public ownership. If the state-owned enterprises continue to be the biggest polluters, the state will be punishing itself by incriminating them. In addition, there
might be conflicting interests between the central and the local governments. According to recent official Chinese reports, environmental protection laws made by the central government are often ignored in local areas. In general, the difficulties may be reduced when China establishes a modernised legal framework of business organisation as designed in the 1993 Company Law and the central government improves its control upon the various regions.

Nonetheless, some level of pollution is often a reasonable and inevitable cost of economic growth in a developing country. In China, economic growth is the first priority, although it is said that the country should not repeat the process of "polluting it first, clearing it up later" characteristic of earlier Western industrialisation. In Chinese criminal law theory, "social harm" is the ultimate justification for the use of criminal sanction (Gao and Zhao, 1993; He Bingshong et al., 1993). In a case of pollution, however, there is often a mixture of social benefits and harm. A factory may contribute a lot to the society in a short term while causing long-term damages. A fundamental issue is: in a case when the "right of development" conflicts with the "environmental right," which one prevails? It would be ideal to achieve a balance between the two, but what if the industry cannot afford it? Since the World Commission on Environment and Development proposed the concept of sustainable development, the basic factors which inhibit an effective enforcement of environmental law have not been changed. These factors, as a background paper for the Ninth UN Congress (United Nations, 1995a:9) puts it, are "lack of priority accorded to environmental issues, lack of resources, and, especially in developing countries, the desire to enhance industrial growth."

---

Therefore, as the author proposed earlier in this Chapter, it would be desirable to keep the clause of “in violation of statutory or regulatory duty” in the Chinese definitions of environmental crimes. In Shanghai, for instance, there are tens of thousands of constructions simultaneously going on day and night throughout the city. They generate constant and loud noise and a large amount of dust, making life almost intolerable in many areas. An introduction of the Portland model into the Chinese law would require the prosecution of this type of “offences.” This would be obviously unrealistic.

9.3.4 From Ultima Ratio to Self-Defence

The definitions of crimes must be articulated in light of the concept of ultima ratio. The "regulatory model" for environmental protection, which underlies the use of criminal law in this particular realm, has been debated among Western scholars. In the Chinese context, the reform of the criminal law for environmental protection should not ignore the use and improvement of other alternatives.

In particular, the EPAs should be empowered to mobilise fully and independently the various administrative sanctions that are provided for under the Environmental Protection Law and other environmental enactments, such as fines, temporary discontinuance of production, suspension of business, annulment of business licenses, relocation or closure of the company, removal from managerial positions, and party disciplinary sanctions. To impose these sanctions, the EPA should not need a consent from the “economic administrative department” or “department in charge” of the offending danwei. Also, the Chinese civil courts should fully open the door to

---

614 See Richardson et al., 1982, Policing Pollution: A Study of Regulation and Enforcement.
environmental law suits. They should actively impose civil sanctions, such as discontinuance of offending activity, removal of hazards, compensatory and punitive remedies.

In addition, there should be a continuous development of the various systems of prevention, mediation, and education for the protection of the environment. China has more than ten million mediators, but only about 55,000 lawyers and 150,000 judges (China Law Yearbook 1992, p.859; China Law Yearbook 1993, p.955-6). About 75.4 percent of the "environmental disputes" are settled by mediators (Zou and Zhang, 1993:298). This approach, nevertheless, has its problems, which include the lack of clearly defined rules and authorities. Consequently, the process to achieve a non-legal settlement could drag on for a while, and, instead of asking for compensation, the victim sometimes has to pay the offender for a speedy ending of the dispute.615

It appears that every controlling mechanism has certain limits: prevention requires money and technology; the EPAs might be too weak to quickly terminate the pollution; the criminal law has problems to penalise corporate offenders; the outcome of mediation could be unfair to the victim; and education may take too long for a change. Therefore, it may be a good idea to recognise the right of self-defence in a case of pollution (Yang Cheng, 1994, 1995). Specifically, individual citizens should have the right to use force against the polluters in a case where an ongoing pollution is causing damages or has become an imminent threat to life or health. It appears to be desirable that the Special Part of the new Criminal Law includes such a special remedy with the provisions of

615 e.g., in the Case of Chongqing X Instruments Factory v. Y Brick Field (1983), the victim (the factory) paid the polluter (the brick field) 10,000 yuans to help its relocation. In Cheng, R., 1988, pp.91-93.
environmental crimes. It is worth noting that it is inappropriate to consider this remedy a "self-help,"616 since the general principle of self-defence is defined under Article 17 of the Criminal Law. Under this article, an individual can take an action of self-defence even if public remedy is available. In a case of pollution, the individuals should be allowed to exercise this right where a public remedy is available but has not functioned efficiently within a reasonable time.

For example, in the Chinese context, the law may have to clarify the issue of whether or not the victims have the right to use force against a polluting factory in their neighbourhood when there is no public remedy available within a reasonable time limit. In 1984, Chen Zhenkan (1984) raised this issue in his discussion of the 1982 Case of Wuhan Port Bureau No. 41 Dock Environmental Dispute. In the first six months of the year, numerous complaints were individually and collectively filed by 20,000 residents against the state-owned coal dock company in Wuhan for constantly generating serious air pollution. The city's EPA twice contacted the company, strongly demanding a settlement, but the polluting company simply ignored the request. Subsequently, a group of local residents forced their way into the dock and smashed the power-supply facilities to stop the pollution. Three citizens were arrested under the charge "crime of destroying public property," but the police released them after receiving an order from a Vice Premier of the central government. In two weeks' time, the company installed a pollution control system that solved the problem. In his article, Chen argued that the use of force in this particular case was for self defence. Two years later, this proposition was challenged on the ground that it could encourage "extremist activities" (Deng Jianxu, 1986). In a more recent publication, this case is recorded as an example of "successful intervention" of the central

government to settle a case of "environmental dispute" (Zhang Shenming et al., 1993:278-281). However, from a legal point of view, it would be ideal to settle the dispute by legal means without depending upon a decision of the Central Government. Further, as this author (Yang Cheng, 1994, 1995) has indicated, the use of force in this particular case was apparently the only effective way to stop pollution. After all, the right of self-defence, subject to clearly defined criteria in law, should be part of the "citizens' environmental right."

**Conclusion**

"Environmental crime" is a new area in Chinese criminal law. The law is vague primarily in two aspects:

1. The borderline between administrative environmental law and criminal law is vague.
2. Although the criminal law is useful for the protection of natural resources, there is a lack of clearly-defined provisions for the crackdown on pollution.

Since the early 1980s, there have been some Chinese publications discussing the concepts of "environmental crime" (Zhou Qingping, 1986; Ma Xiangcong et al., 1986; Chen Zhenkan, 1987; Yi Xianlian, 1989; Qing Feng, 1989; Huang Taiyuen, 1989; Zhou Guoqing, 1990; Chu and Zhou, 1993; Ma Xiangcong, 1993). Many of the authors proposed that the Chinese criminal law, like some of its Western counterparts, should create this type of offence. However, as a recent Chinese publication (Fu and Chu, 1994) indicates, there is a lack of discussion with respect to the legislative models and the
underlining theories. To date, some of the important development in the international community, such as the Portland model, have not been mentioned in Chinese law publications. There has been no critical review regarding the applicability of any particular Western model in the Chinese context. After all, even in the West, few publications have challenged the Portland model law. Hence, the discussion in this Chapter might be helpful for legislative and theoretical development.

The specification of the law must take a realistic approach. The use of criminal law for the protection of the environment is an important and controversial subject for discussion, involving a variety of complicated issues that do not arise in traditional criminal law. The Chinese government has now realised that with all the achievements in establishing a legal system for environmental protection, the laws are not really complied with, the enforcement is obviously weak, and the polluters are rarely prosecuted.617

Indeed, the situation has become so frustrating that Shong Jian, Member of China's State Council and Director of the State Environmental Protection Commission, once demanded that the justice system "severely punish" major polluters in the same way as it deals with drug dealers. "Arrest those who should be arrested and sentence those who should be sentenced," he said.618 To facilitate the cracking down on pollution, it is very likely that China's new Criminal Law will include at least one definition of the crime of pollution (Gao, X., 1989). Nevertheless, it is essential that law reform in this direction


should be based on sound theoretical analyses of the legislative models and the particular Chinese social context.

As the Ninth UN Congress background paper (United Nations, 1995a:21-22) has indicated, the role of criminal law in environmental protection is "indispensable," but this law "must be viewed as only one of a number of means of achieving environmental goals." To play an active role in this realm, the criminal law must be reformed for the control of hard core crimes. The definitions of environmental crimes should be articulated according to the principles of legality and ultima ratio. Moreover, to enhance effectiveness, there should be corresponding changes in the types of penalties and the procedure in addition to the creation of new offences in the criminal law.
Chapter X
Reform of Criminal Law and United Nations Policies

10.1. International Rules and Domestic Law

10.1.1 A Broader Picture

In Chapters I to IX, we have addressed, in a manageable way, a series of key issues with respect to the specification of the legal definitions of crimes in Chinese law. The emphasis of discussion is on the reduction of vagueness by properly and cautiously borrowing, adapting, and applying those western concepts that in one way or another could serve the needs of the ongoing Chinese reform. Along with the discussion, there have some practically-oriented proposals for the next phase of China’s reform of the criminal law, given that the purposes of this dissertation are not only to explain, but also to bring about changes to the real world. In this respect, this author has always been a believer of what he saw many years ago on Karl Marx’ tombstone in London, England, that the true mission of philosophy is not to explain the world, but to change it.

In order to change the real world, it is important to recognize that the specification of legal definitions is only part of a much broader picture of reform in China: that is, the reform of the entire criminal justice system, if not the reform of the entire society. Moreover, China’s reform is part of the global process of changing the world; that is, from a legal perspective, to improve the various systems under the internationally recognised principles of the rule of law, the protection of human rights, the prevention of crime, and the promotion of good governance. In other words, the specified definitions in law should
not only have explicit wording, but also explicitly recognize and protect these fundamental values.

During all these years of international research, among the others, what has been fascinating to me is the development and the reception of "international standards" of criminal justice in the various parts of the world. Indeed, the proposed changes in this dissertation are designed in light of both the Chinese situation and the relevant international standards. Here, by "international standards" is primarily meant the basic principles, notions, policies and norms that are embodied in the relevant criminal justice instruments of the United Nations. Looking at the broader picture, this last chapter of the dissertation is devoted to the implementation of these standards in the Chinese reform, which includes, but goes well beyond, the specification of legal definitions. Due to limited space, however, this concluding chapter can only address some of the key points in this broader picture.

For many decades, the United Nations has launched various programs to establish a "new international-national criminal justice order" (Lopez-Rey, 1985). In this respect, the participation of the PRC is a relatively recent development. During 1949-1978, China only ratified a few international conventions regarding war crimes and racial discrimination. From 1978 onward, owing to the post-Mao open-door policy, the People's Republic has become increasingly active in contributing to, and participating in, United Nations criminal justice programs.

---

As always, the United Nations criminal justice programs and instruments are presumably designed on what Bassiouni (Bassiouni, 1986a:6) called "a vision of world order which sought to transcend political and ideological barriers." In this sense, the standards that are proposed or prescribed in many of the programs and instruments are considered "international," if not "universal." In other words, these standards are designed to be acceptable and applicable to the vast majority of UN Member States. Many of the standards are based on principles and concepts that are originally Western in the sense that, in legal history, they were first entrenched in Western laws, or first conceptualised and articulated by Western jurists in modern terminology, although some of the ideas might also be found in ancient non-western writings. To list a few of the "originally-Western" concepts, one might mention the rule of law, human rights, due process, judicial independence, the right to have a defence counsel, exclusion of evidence, presumption of innocence, separation of powers, victims' rights, corporate crime, white-collar crime, computer crime, strict liability, treatment of offenders, and so forth. Once the "originally-Western" concepts are properly embodied in UN instruments, they become "international." It is also worth noting that non-western countries are playing increasingly important roles in the various UN criminal justice programs. For example, China apparently made important contributions to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Moreover, at the time when this dissertation is being finalised, Beijing has just hosted the Fourth UN World Women's Conference (September 1995), a historic event for the promotion of women's rights.

Being "international," the UN instruments are unique sources of standards, norms, principles, or at least policy-making references, for the reform of criminal law in various

---

620 Resolution 1386 (XIV), Annex.
jurisdictions. The ending of the Cold War has created a better atmosphere for international collaboration in implementing these instruments for the goals of legality, equality, humanism, cost-effective crime control, and good governance. In the long term, harmonization appears to be evident in the global trend of reforming the criminal laws. As Bonell (1990:865) has pointed out:

Our times are characterized by a multiplicity of initiatives directed towards the unification or at least the harmonization of national laws.

10.1.2 The Principle of State Sovereignty

In the process of harmonization, the international standards are not imposed upon the various countries. Rather, they are recognised, imported, borrowed, adapted, and implemented by the sovereign states.

Unlike its predecessor, the current UN Commission of Crime Prevention and Criminal Justice intends to shift the focus of its work from the promulgation of standards to their implementation (Clark, 1992). R. S. Clark has observed that, in the language of the United Nations, implementation primarily consists of two elements: encouraging the sovereign Member States to apply international standards in domestic laws, and monitoring, supervising or assisting in the changes. In the second aspect, the United Nations heavily relies on the voluntary self-reporting, request and collaboration by the states. Hence, the implementation of UN standards depends on the domestic laws and systems.

On most occasions, even if the standards are entrenched in conventions, the enforcement of the conventions still primarily relies on domestic law and system. In this respect, Bassiouni (1986b:25) contends that:
Two methods have been used in enforcement: a "direct enforcement scheme" and an "indirect enforcement scheme." The direct enforcement scheme contemplates the creation of an international criminal court and international machinery for the execution of an extra-national system of justice. The indirect enforcement scheme obligates states to prosecute or extradite violators of international normative proscriptions in accordance with national laws.

Apparently, the direct scheme has only been used in several historic cases. So Bassiouni (1986b:3) admits:

It must be observed that because there have been few efforts to create a direct enforcement system, all international criminal law conventions rely on the indirect system.

Domestic law reform is most important to the implementation of both UN policies and international criminal law. The creation of an international criminal court or any UN commission could only play a limited role in facilitating implementation. The International Court of Justice, even with an extended jurisdiction upon criminal matters, still has to exercise its power on the ground of the consent of the relevant states. International justice is usually optional.621

Most UN instruments, as Joutsen (1992) puts it, clearly demonstrate values of "due respect for human rights, the promotion of the highest standards of fairness, humanity, justice and professional conduct." Nonetheless, their effective implementation still relies on the needs and support of the states. According to paragraphs 15 and 16 of General Assembly Resolution 46/152 (18 December 1991), current UN criminal justice programmes are primarily designed to strengthen international cooperation and to improve the quality of criminal justice.

621 For a brief discussion of this point, see Osmanczyk, 1991, pp.447-448.
To any government, the ratification and rejection of UN criminal justice instruments are both determined in light of national interests that are often assessed on a utilitarian basis. Ratification of a UN instrument might bring a state some important benefits, such as international collaboration against transnational crimes, technical assistance for policing, and international recognition of certain achievement. On the contrary, a regime is unlikely to trade in its governing power in exchange for international assistance. It is understandable that a state might refuse to accept an international instrument on the ground of state sovereignty.

Therefore, a realistic and effective approach of implementing UN criminal justice policies requires the active participation and support of the relevant states. To achieve a success of implementing UN standards in China's reform, it is essential to develop a West-and-East and North-and-South working partnership, give sufficient consideration to the Chinese situation, and proceed for long-term common goals and interests.

10.2 The Balancing of Goals

10.2.1 The Challenge and the Controversy

As this dissertation has demonstrated, the specification of legal definitions is more than an application of legal techniques. Rather, it must achieve certain goals. R. S. Clark (1992) has divided the various UN instruments into two categories: some are designed for law-and-order, others are made for the protection of human rights. In other words, some of them focus on crime control or containment; others have an emphasis on the protection
of human rights, due process, or, in Canadian terminology, "fundamental justice." The two goals often overlap in a UN document, but balancing them is always a challenge to law reformers.

In some cases, efficiency in crime control conflicts with the promotion of human rights, and vice versa. For example, during the late 1950s to the mid-1960s, China had few laws and not many street or economic crime; but during the past sixteen years, both laws and crimes have been growing. A possible correlation is: when the law becomes more specific, it somehow ties the hands of the state in its endeavour to wipe out the criminals. There is hardly a final solution in any country as to the issue of how to balance these goals.

Some of the law-and-order instruments of the United Nations are conventions against international crimes. Through ratification, these conventions become sources of domestic criminal law. To date, the Chinese government has ratified, with or without reservation, a variety of conventions to crack down on roughly four categories of crimes (United Nations, 1995, China Law Yearbook, 1987:371-389; 1989:653; 1990:661-662; 1993:694): war crimes and international weapon crimes; crimes of apartheid and

---

622 The term “fundamental justice” is used in the 1982 Canadian Charter as roughly an equivalent to the American term “due process.” For a most updated discussion regarding the specific meaning of “fundamental justice” in Canadian criminal proceedings, see Brockman and Rose, 1996.

623 The relevant conventions ratified by China include the Geneva Convention Relative to the Treatment of Prisoners of War (1949); Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972); and Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (1980); etc.
discrimination, including international trafficking in women or other human beings;\textsuperscript{624} crimes against air and sea safety, including hijacking;\textsuperscript{625} and crimes against other social order and individual interests, such as international trafficking in narcotic drugs.\textsuperscript{626} Accordingly, some recent Chinese publications propose that the new \textit{Criminal Law} should include specific provisions on the jurisdiction of international crimes, extradition, and so forth.\textsuperscript{627} The inclusion of definitions of international crimes would also be a desirable change to Chapter One in the Special Part of the present \textit{Criminal Law}; if the title of the Chapter is changed from “counter-revolutionary crimes” to “crimes against national security.” The drafting of the specific definitions should take into consideration the relevant UN law-and-order instruments and the legislative models. The discussion in Chapter IX of the dissertation serves as an example in this regard.

\textsuperscript{624} The relevant conventions ratified by China include the \textit{International Convention on the Suppression and Punishment of the Crime of Apartheid} (1973); \textit{International Convention on the Elimination of All Forms of Racial Discrimination} (1965); and \textit{Convention on the Elimination of All Forms of Discrimination against Women} (1979), etc.


\textsuperscript{627} See Zhang Zhihui, 1993, \textit{General Introduction to International Criminal Law}. 
The UN human rights instruments, although ideologically and culturally controversial on many aspects, also deserve proper consideration in the next phase of China's criminal law reform. Theoretically, from a broader perspective, "human rights" is a term covering both "individual rights" and "collective rights." Given the different references, we have seen a great deal of controversy between the Western version of human rights that focuses on the former and its counterpart in non-western countries that emphasises the latter. Furthermore, the same kind of division exists in the arguments regarding the various types of individual rights: the Western view of political freedom versus the non-western preference for economic rights. On numerous international occasions, we have seen accusations between the different regimes, which in Chinese official texts, are sometimes considered as international struggles.\(^{628}\)

Like many other developing countries, China is particularly concerned with the potential danger of Western interference with its internal human rights affairs. In this context, the notion of "universal human rights" is unacceptable. "Despite its international aspect," the Chinese government contends, "the issue of human rights falls by and large within the sovereignty of each country" (Information Office of the State Council, 1991:9). Accordingly, questions concerning the treatment of prisoners, crimes with political motives, pre-trial detention and capital punishment are regarded as domestic rather than international in nature.\(^{629}\)

---


The present Chinese stance against "universal human rights" and "Western human rights standards" is understandable, given China's history of "dismemberment, oppression and humiliation at the hands of alien powers for well over a century" (Information Office of the State Council, 1991:11). It is worth noting that, before 1949, foreign powers had abused China for more than a hundred years. Therefore, state sovereignty is the highest principle of China in dealing with international relations.

Another underlining factor of this controversy, however, is that the country is still carrying the heavy burden that is left by its two thousand years of feudalist totalitarian history and the repressive political campaigns during the 1950s-1970s. The post-Mao government simply needs more time to resolve the problems and establish a system of democracy and the rule of law. Moreover, there are financial and human resource restraints in a developing country like China. For instance, it is impossible for Chinese prisons to ensure the same living standards as those in Canada. Similarly, the lack of training of police officers owing to the lack of funding and facilities may contribute to the abuse of police power in practice. Further, the lack of Chinese empirical studies on the effectiveness of the death penalty is one of the factors generating the high rate of execution. All these problems inhibit the application of certain standards in China.

10.2.2 From Confrontation to Collaboration

From a legal perspective, therefore, we should handle the controversies in a constructive and professional way. Instead of accusing each other of human rights abuses, the states should face their own needs and situation, while collaborating in the endeavours of implementing the appropriately chosen UN human rights policies for the

---

630 E.g., see United States Department of State, 1990.
benefits of their own citizens. The "collective rights" and "individual rights," or "political rights" and "economic rights," are not necessarily conflicting concepts. Rather, it would be desirable to embrace all these rights in law reform and practice.

In the Chinese context, there is a great potential to implement UN policies for the protection of individuals' legal rights in the criminal process. Given the unfortunate history of lawlessness prior to the late 1970s, the recognition of these rights is only a post-Mao development in the PRC. As recalled in Chapter III of the dissertation, during the Cultural Revolution, the so-called "proletarian dictatorship" was a "rule of man," and the criminal process was primarily a political repression of "class enemies." The words of the Great Leader effectively became the highest norms of law. The independence of the judiciary, presumption of innocence, and legality were labeled as "bourgeois" and "anti-Party fallacies" (Feng Ruoquan, 1958; Li Muan, 1958; Wu Yushen, 1958; Xu Zhiyi, et al., 1958). The legal profession virtually vanished. The use of torture was routine and open in investigation and detention. In this context, could there be any kind of "individual legal rights" in the Chinese criminal process?

Since the late 1970s, as reviewed in Chapter IV of the dissertation, the progress has been significant, but more has to be accomplished in the future. China has recognised some important UN instruments concerning the protection of individual legal rights, including the signing of the Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment. However, given the historical burden, the People's Republic has remained among the few nations that have not ratified the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (United Nations, 1995b). Nor has China ratified

531 Some of the conventions are indeed crime prevention and human rights instruments.
the two optional protocols, i.e., the Optional Protocol to the International covenant on Civil and Political Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights.

Nonetheless, it appears that the country is moving towards ratification. Prior to the late 1980s, “human right” was generally considered as a concept of “bourgeois law,” given the fact that it assumes natural, universal, and equal rights for all the individuals in a society. Therefore, UN human rights instruments were rarely mentioned by Chinese in non-diplomatic occasions. In 1989, there was an unprecedented gathering of a small number of legal scholars in Beijing to celebrate the anniversary of the Universal Declaration of Human Rights.632 It was the first event of this nature in PRC history. In the same year, only weeks prior to the “June 4th Tiananmen Incidents,” “human rights” became a subject in official and semi-official media discussion. In 1991, the Chinese government released its first “White Paper” on human rights, which officially recognised the Universal Declaration as “the basis for international human rights practice” (Information Office of the State Council, 1991).

Since 1991, there has been an increasing number of lengthy publications on this subject. Among them, the Encyclopaedia of World’s Human Rights Law (Dong and Liu, 1991) is most impressive. It covers a large number of international and regional human rights instruments, including the full texts of the International Bill of Human Rights and its two Protocols. In addition, this publication has opened the door to ordinary Chinese citizens to access the original, though translated, texts of human rights laws in leading Western countries, such as England, the United States, France, Germany, and so forth.633

632 This event is recorded in China Law Yearbook 1989, at p.998.

633 Unfortunately, this publication does not include any Canadian law.
More significantly, as it is demonstrated in recent Chinese scholastic initiatives, improving the protection of human rights appears to be an emphasis in reforming the criminal justice system.\(^{634}\)

It is worth noting that, given the diversity of social contexts, the discussion and implementation of international standards in the reform of national law has to take into account the particular political, economic, cultural and legal context in the particular country. There are different approaches and models for the various sovereign nations to achieve the same general goals of human rights protection. Given the diversity, there is clearly a need to promote the exchange of useful ideas and experience and develop collaborations among the various members of the international community.

10.2.3 Crime and Development

With respect to crime control, the UN instruments that deal with the issue of "crime and development" are most welcome to China, a country facing numerous problems in the ongoing historic transition. In this realm, the collaboration between China and the Western world is proceeding smoothly.

"Crime and development" has been a concern of UN criminal justice programs for decades. In 1971, when the PRC resumed its seat in the UN, the Fourth UN Congress on crime prevention called upon all governments to take effective steps to co-ordinate and intensify their crime preventive efforts within the context of the economic and social

\(^{634}\) See relevant Chinese publications regarding the reform of criminal law and criminal procedure. E.g., Su and Shan, 1994; Yang and Chao, 1993; Yang and Zhao, 1992; Yang Duenxian et al., 1991; Yang, Duenxian et al., 1990; Yang Duenxian et al., 1989.
development which each country envisages for itself. In 1980, when China started its open-door policy, the Sixth UN Congress affirmed that crime prevention and criminal justice should be considered in the context of economic development, political, social and cultural systems and social values and changes, as well as in the context of a new international economic order. This was reiterated by the Seventh UN Congress in the Milan Plan of Action and the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order.

International collaboration in criminal justice is based on mutual needs and common goals. Chapter IV of the dissertation has touched the issue that China's social control system is facing tremendous challenges during the process of industrialisation and modernisation. To crack down on the various waves of crimes, and trans-boundary crimes in particular, China apparently shares common needs and goals with the West. In this respect, the collaborative approach might lead to the implementation of UN policies. This is found in China's efforts to combat drug-related crimes.

Drug trade and abuses were once wiped out in China during the early 1950s, but reappeared in the late 1980s. This is clearly a side-effect of the open-door policy. According to official data, the reappearance of the drug trade started in China's southern border areas neighbouring the heroin-producing Golden Triangle area of Southeast

---


636 See s.3 of Report of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders; and s.2 of Caracas Declaration.

637 See s.4 of Milan Plan of Action and s.1 of Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order.
Asia. In 1991, among the 18,500 traffickers arrested, 829 were foreigners and almost all of them came across the borders from Burma, Laos and Vietnam. The outlets, however, are primarily found in Western countries. This pattern indicates the ongoing narcotic transhipments from the Golden Triangle through Chinese territory to the Western world. This has led to collaboration between the Chinese police and their Western counterparts. In addition to enacting the Resolution on Prohibition of Narcotic Drugs (1990), China has participated in joint operations with Western countries.

Although the Western governments are critical of the Chinese practice of handling "political dissidents," few of them have made much "noise" with respect to the execution of drug dealers. The number of executions in the Chinese anti-drug war has been astonishing. In 1991, when China's number of drug-related criminal cases jumped 120 percent as against 1990 to more than 8,000, the number of drug-related executions also soared to some 800. Interestingly, according to official media, mass sentencing rallies were held throughout China before and on 26 June 1992, the UN-sponsored International Day Against Drug Abuse and Illicit Trafficking. The frequent use of

---


540 An operation was launched in March 1988, when the Chinese police, through the Interpol and in collaboration with their U.S. and Hong Kong counterparts, arrested a ring of international drug traffickers. See China Law Yearbook, 1989, p.17.


execution against drug dealers appears to be part of the problem of over-execution in China. After all, there are no statistical studies indicating the effectiveness of using the death penalty in the war against drugs in China.

In its resolution, the Eighth UN Congress (United Nations, 1991:149) on crime prevention indicates that:

[T]he success of the international struggle against drugs involves a balanced and resolute policy aimed at reducing drug production, trafficking and demand, at promoting prevention, treatment and the social resettlement of drug addicts, and at combating the laundering of drug money.

It is worth noting that China's anti-drug policies have included these aspects. A large number of drug addicts are treated in special facilities,\(^6\) and the system of propaganda has been mobilised. The State Education Commission and the Ministry of Public Security have even issued China's "just say no" anti-drug handbook to middle school students in South China. To achieve a balance between crime control and human rights, these non-repressive measures are far more preferable than the death penalty.

10.3 Reform the System

10.3.1 From Crime Definition to System Reform

If the rule of law is the central theme in specifying the definitions of crime, this specification could only achieve its goals when corresponding changes are also

\(^6\) By mid-1992, the Chinese government had spent an equivalent to some US$ 100 million on drug eradication and rehabilitation of the addicts. See supra note 602.
accomplished to the relevant components of the entire criminal justice system. It appears that the ongoing Chinese law reform is taking this systematic approach. In law, the reform of the Criminal Law is proceeding hand in hand with the recodification of the Law of Criminal Procedure, the enactment of a Judges Law, a Prosecutors Law, a Prison Law, and so forth. Some of the UN instruments might assist the Chinese law reformers to raise the new laws and their implementation to well-founded international standards.

In late 1994, Daniel C. Préfontaine, Q.C. and Director of the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR, a UN affiliated institute in Canada), presented a paper at the 1994 Beijing International Conference on the Reform of Criminal Procedure. This paper, entitled The Reform of Criminal Procedure: From UN Policy to Canadian Law, addresses a number of key issues with respect to the implementation of UN instruments in domestic law reform, such as the independence of the judiciary, the role of defence counsel, and the exclusion of evidence (Prefontaine and Yang, 1994). In 1995, ICCLR launched a program of co-operation to provide assistance in China’s reform of the criminal law and criminal justice.

In March 1996, the Chinese legislature passed the Amendments to the Law of Criminal Procedure. Under these Amendments, the People’s Republic has for the first time recognised the presumption of innocence; abolished the system of “shelter and inspection”; and allowed the defendant to contact his/her counsel during the early phase

---


646 Under this system, the police can arrest a suspect and keep this person in detention for several month without obtaining a warrant or an approval from the judiciary or the procurary.
of investigation. These are important changes for the implementation of international standards in the criminal process.

10.3.2 The Chinese Judiciary

The applicability of UN standards in the Chinese reform of criminal justice system involves a variety of key aspects. One of them is to reform the status quo of the judiciary. It would be simplistic and naive to assume that by rewriting the laws alone we could establish the rule of law. Without a highly professionalized and independent judiciary, any specification proposed in this dissertation would not make much difference in the operation of the criminal law. The international standards of the judiciary are covered in the Basic Principles on the Independence of the Judiciary of the United Nations. The Basic Principles require that the independence of the judiciary shall be guaranteed by the state and entrenched in the national law; and the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law. The present Chinese law has already recognised this part of the principles.

There is a great potential to apply this UN instrument in China. For example, under the Basic Principles, the judiciary shall have jurisdiction over all issues of a judicial nature; everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures; and the court should be able to review pre-trial investigation and decide the lawfulness of arrest and detention made by the police. Accordingly, the present Chinese system of the PSOs, "labour-reeducation," and so forth, are indeed

See General Assembly resolution 40/146, 1985.

problematic, given they actually allow the police to share part of the judicial power and punish people without using the formal legal procedure. Moreover, under the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*,\(^{649}\) the exercise of police power to arrest a person, keep him under detention or investigate the case shall be subject to recourse to a judicial authority,\(^{650}\) and a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial authority.\(^{651}\) In this respect, we should see more specific changes in the Chinese system.

The impartiality of the court requires a clear division between the police/prosecution and the court in criminal proceedings. For this purpose, Chinese reformers have partially borrowed the concept of the adversarial system. Under the *Amendments to the Law of Criminal Procedure* 1996, the court will play a less active role in the investigation of the case. The enactment of the *Amendments* is an important legislative development to implement the 1948 *Universal Declaration of Human Rights* and the 1988 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.\(^ {652}\)

Moreover, the *Basic Principles on the Independence of the Judiciary* set forth that judges shall always conduct themselves in such a manner as to preserve the dignity of their office. Dignity is determined by a variety of factors, including the training and qualifications of the judges, as well as the decency of their service conditions and tenure.


\(^{651}\) *Ibid.*, Principle 11, s.1.

The relatively low qualifications of many Chinese judges, their lack of professional training, their low salaries, and even the military-style uniform, are all problematic for the independence of the judiciary. In particular, the lack of training might be a source of other problems: if being a judge does not require many years of professional training and legal working experience, the qualifications must be relatively low in comparison to his/her Western, and particular common law, counterparts; if the qualifications are low, a high salary would be unreasonable; and, adversely, if the salary is low, the qualifications are unlikely to be high, and so forth.

It will require far more years to raise the professional standards, and consequently the professional status, of the Chinese judiciary than does rewriting the law. In 1989, the UN Economic and Social Council adopted the Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, which invite the relevant UN research and training institutions as well as other concerned entities to assist governments that seek to improve their judicial systems. Upon proper arrangement, the Western legal profession can play important roles in China. For example, Chapter VI of the dissertation has proposed that the common law techniques of specifying the law through the judicial process would be most helpful to the Chinese judiciary.

The Canadian legal profession is in an excellent position to provide their Chinese counterparts the ideas and expertise regarding the independence of the judiciary. Canada does not have a history of being an imperialist power, but has a good system of maintaining judicial independence. In Canada, this principle is embodied in both the

---

653 See Economic and Social Council Resolution 1989/60.

654 The preamble to the Constitution Act, 1867, states that Canada shall have a constitution similar in principle to that of the United Kingdom.
Constitution Act of 1867 and the Charter of Rights and Freedoms. The Charter by implication in Section 7, and directly in Section 11 (d), provides for the independence of the judiciary in conjunction with the presumption of innocence. The Charter has also embodied the remedy of habeas corpus as a constitutional right in Section 10 (c). Furthermore, the Supreme Court of Canada has indicated that judicial independence applies to all types of judicial tribunals, including the court martial. Based on the notion of checks-and-balance, the Canadian judiciary is clearly separated from the police, the prosecution, and other governmental branches. In addition, Canada has also developed a good system to secure the dignity of judges (Prefontaine and Yang, 1994).

10.3.3 Reunification and Constitutional Reform

China's upcoming reunification with Hong Kong and Macao is a unique opportunity for a systematic reform. According to the relevant treaties and the Basic Laws, the current law in the colonies, including the common law, rules of equity, ordinances, subordinate legislation and customary law, will continue to operate for at least fifty years after 1997, save for any that contravene the basic Law and subject to any amendment by the future Special Administrative Region (SAR) legislatures.

655 See ss.91-101.

656 For more discussion of judicial independence in Canada, see Canadian Bar Association (1985), Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada.


The underlining Chinese policy to this arrangement is "one country with two systems," which promises the coexistence of a socialist system in the mainland and a capitalist system in the SAPs. Many in the colonies have doubts regarding this policy and the Basic Law of Hong Kong Special Administrative Region of the PRC, especially owing to tremendous negative impacts of the 1989 “June 4th Incident.” In particular, there is a concern about the possibilities of mainland intervention in Hong Kong. Under the Basic Law of Hong Kong, the Central Government can declare a state of emergency in Hong Kong when the situation in the SAR is "out of control," or crack down on sabotage activities which target the mainland.

However, from a legal perspective, the Basic Laws per se are major achievements of Chinese law reform. The Basic Law of Hong Kong SAR, like that for Macao, includes a bill of rights that is distinctive in the law of the PRC. Under the title of "Basic Rights and Duties of the Residents," Chapter Three of the Basic Laws entrenches some important rights and freedoms that are not explicitly provided for under the present Constitution of the PRC. One of the rights is the freedom of the press, which may conflict with the provision on “counter-revolutionary propaganda” in the 1979 Chinese Criminal Law. Similarly, the rights to organise trade unions and to strike may also be problematic in the mainland. Yet, the Basic Law has stipulated these legal rights that should also be applicable to mainland residents:

1. protection from vague and retroactive laws;

---


659 Article 102.

660 See Articles 98 and 158 of the Criminal Law. The right to strike does not exist under the Chinese Constitution and the Trade Union Law, given strike might cause social unrest.
2. protection from torture;
3. protection from arbitrary detention;
4. protection from illegal deprivation of life; and
5. the right to have confidential legal consultants, to choose an advocate in time and have legal aid.

The entrenchment of these rights in a PRC constitutional enactment is significant in terms of implementing the relevant international standards. It would be most desirable to see these principles being introduced into the Chinese Constitution in the next phase of reform. Under these principles, the retroactive or excessively vague laws shall be repealed; evidence collected by torture shall be made inadmissible in court; the various kinds of administrative and arbitrary detention shall be prohibited; the use of the death penalty shall be reduced; and a system of legal aid should be established.

More significantly, Chapter Three of the Basic Law of the Hong Kong ASR stipulates that the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) shall remain in force in Hong Kong. This is the first time that the PRC recognises these conventions, although their application is limited to the SAR. In the next phase of Chinese reform, it would be desirable for China to ratify them for application in the mainland.

In particular, the ratification of the ICCPR has a great impact on the criminal justice system. This convention entrenched a variety of rights, including a number of legal rights that are not explicitly and directly provided for under the present Chinese Constitution:
1. freedom from arbitrary deprivation of life;
2. freedom from forced or compulsory labour;
3. freedom from arbitrary arrest or detention;
4. the right, when under arrest, to trial within a reasonable time without delay;
5. the right to have compensation as victim of unlawful arrest or detention;
6. the right to a penitentiary system which respects human dignity and aims at reformation and social rehabilitation;
7. the right to protection against retroactive legislation;
8. the right to a fair trial by an independent and impartial tribunal;
9. the right to be presumed innocent;
10. the right to be informed promptly and in detail of the nature and cause of the charge against him;
11. the right to have adequate time and facilities for the preparation of his defence and to communicate with counsel;
12. the right against self-incrimination, and so forth.\textsuperscript{661}

China has achieved some progress in protection of some of these rights. Still, it would be desirable that China ratifies both the ICCPR and the ICESCR prior to 1997, when the Basic Laws become effective in the SARs. In this way, the UN conventions could provide roughly equal protection to all Chinese citizens, no matter whether they are SAR residents, mainland residents, or mainland residents in the SARs. Otherwise, there will be awkward disparities in terms of constitutional rights between different kinds of Chinese citizens.

\textsuperscript{661} Article 6-14 of the ICCPR.
One might argue that, under the Chinese SAR policy of Deng Xiaoping's "one country with two systems," it is quite logical to have these kinds of disparities between the mainland and the SARs. Yet, this is a gross misinterpretation of the policy. Here, the fundamental issue is not the coexistence of socialism and capitalism, but equality in constitutional rights. In his discussion of the "one country with two systems," Deng has indicated that the mainland and the SARs may have different economic systems, different political systems, and different life styles, but he never suggested that the residents in the mainland and in the SARs should have different legal rights under the constitutional law. After all, it is absurd to assume that residents in a previous colony should have privilege simply because the areas were once occupied by an imperialist power. In a unified nation, it would be very problematic to apply different standards of basic legal rights to different parts of the country. Such a differentiation is against the principle of equality in the Chinese Constitution. As this author wrote in May 1989 (Yang Cheng, 1989c:44-45):

The basic rights of citizens are the fundamental freedoms of all human beings, no matter which social class they belong to and what political belief they have. Therefore, it is groundless to argue that, due to the different social systems in the mainland and Hong Kong, residents in these two territories ought to have different basic rights.

For the next phase of China's law reform, we should emphasise the explicit entrenchment of the legal rights, rather than the political rights, if the "one country with

---

two systems” policy requires different political systems. A successful criminal law reform must touch the constitutional framework of the criminal justice system. It is worth noting that, even during the Cold War, both the ICCPR and the ICESCR were ratified by East European socialist countries, such as the German Democratic Republic, Poland, Rumania, Hungary, Bulgaria, Czechoslovakia, Yugoslavia and the USSR (United Nations Center for Human Rights, 1987:1-3, 25-27; United Nations, 1995b). In Asia, the Democratic People's Republic of Korea and Viet Nam have also ratified both the conventions (United Nations Center for Human Rights, 1987:2-3, 26-26; United Nations, 1995b). Ratification of these conventions certainly expresses a respect for the international standards, although it does not necessarily serve as an indication of better human rights situation. Nonetheless, the Chinese reform has created a good context not only for a ratification, but also for an actual implementation. One could be optimistic that the world will soon be witnessing a Chinese progress in this direction.

Conclusion

This dissertation started with a question, “How to Specify,” in Chapter I. In the subsequent Chapters, the author has applied an integrative methodology of comparative legal study to address the following main research findings and the corresponding proposals:

1. The post-Mao Chinese endeavour has achieved tremendous success in establishing the existing system of criminal law and justice. Still, law reformers have many problems to deal with, including the excessive vagueness in the legal definitions of crime.
2. There is a great deal of vagueness in the sources of criminal law, especially with respect to the policy-and-law relation and the law-making power of the judiciary. The sources should be streamlined in order to reduce vagueness in the definitions of crime.

3. There is a lack of tools in Chinese legal research. Importation of Western tools (e.g., citation systems, index, etc.) may help to clarify the legal definitions of crime.

4. From a philosophical and historical approach, one could trace the ideological roots of the vagueness problems to the old version Classical Marxism. The slogan-type provisions of Classical Marxist principles in the Chinese Criminal Law are vague and problematic. The post-Mao pragmatic version of Marxism and “proletarian dictatorship” is part of the Chinese reform, but the criminal law should be depoliticized.

5. The classical and neo-classical school is an opposite to the old version Classical Marxism. The humanistic spirit of the classical school and the neo-classical conceptual framework have been, and will continue to be, helpful to the promotion of legality.

6. For the next phase of law reform, China needs an integrated criminal law theory, that could assist the reformers to specify the law for the protection of human rights and effective crime control. Western criminological perspectives may help the growth of theory in China, but the perspectives per se have to be critically reviewed.

7. Brevity in the Special Part of the Chinese Criminal Law is another major indication of vagueness, especially with comparison with Western laws. Learning from overseas could assist the specification of the legal prohibitions in the Special Part.

8. For the promotion of the rule of law and human rights, the vaguely-defined borderline between criminal and non-criminal offences should be clarified through legislation and properly rendered statutory interpretation. Also, the power of Chinese police and police-recorded crime rates should be critically reviewed.
9. To reduce vagueness, the Chinese medical criteria of "mental illness" for legal insanity must be specifically articulated and formally promulgated. Also, the power of psychiatrists in criminal proceedings should be subject to specific rules in law.

10. Chinese law is vague in its existing provisions regarding corporate crime. The law should replace the vague concept of danwei crime with company crime, differentiate corporate liability and state liability, and explicitly define the mental element test.

11. Chinese law on "environmental crime" is vague with respect to the borderline between administrative and criminal laws. The law has no explicitly and directly defined provision on pollution. However, for effective enforcement, the importation of Western legislative models must cope with the Chinese situation.

12. Specification of the legal definitions of crimes is part of a broader picture of reforming the Chinese criminal justice system, and the entire reform should be carried out in light of UN instruments and taking into account the Chinese context.

Instead of taking a single-theory approach for discussion, this dissertation has employed a number of interrelated propositions, principles, notions, and concepts. The various theories are tools of academic discussion. Each one of them could help to explain a certain level or a particular aspect of the issue, but the subject we have addressed involves multi-level and multi-aspect issues. The system of the propositions, principles, notions, and concepts that has been employed here does not belong to one single theory. Rather, it might be regarded, as E. A. Fattah (1992) said in an excellent article on criminal law reform, a "paradigm.”

Given the restraints of time and resources, I have only covered a number of key issues in relation to the problem of vagueness in China's criminal law. In the future, more studies could be undertaken with respect to the relevant issues, such as: the division of power between the legislature and the judiciary in statutory interpretation, the integration
of a reformed Marxism with non-Marxist legal and criminological theories, the borderline between criminal and administrative offences, the introduction of corporate liability in criminal law, the formulation of explicit and direct definitions on environmental crime, and the balanced implementation of United Nations’ standards in China’s law reform and criminal justice.

None of these issues has an easy solution. Facing the real world, let all the law reformers in the East and the West pass over the man-made theoretical, disciplinary, and ideological boundaries, freely test and use the available tools, generously share our thoughts and experience, and continue our glorious endeavour for the rule of law, the protection of human rights, the effective prevention of crime, and the promotion of good governance.


Han, Zhongmuo. (1981). *Basic Theories of the Criminal Law*. Taiwan: Yuli Arts and Prints Ltd.


421


427


430


LIST OF STATUTES

I. Chinese Statutes

A. Laws of the People’s Republic of China (PRC)

Amendment to the Constitution of the PRC (1988).
Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (1989).
Birth Control Regulations of Gansu Province.
Birth Control Regulations of Hebei Province.
Birth Control Regulations of Helongjian Province.
Declaration of the 3rd Plenum of the 11th CCP Central Committee (22 December 1978).
Detailed Regulations of Control and Education in Prisons and Labour Reform Brigades (1982).

* Including cited legislation, regulations, resolutions, conventions, and United Nations instruments.
Election Law of the National People’s Congress and Local People’s Congresses of the PRC (1979).


Guidelines regarding the Interpretation (of Definitions) and Handling of Counter-revolutionaries and Other Bad Elements (1956).


Instructions of the Chinese Communist Party Central Committee to Abolish the Complete Six Laws of the Kuomintang and to Lay Down the Judicial Principles for the Liberated Areas (1949).


Law on Environmental Protection (Provisional) of the PRC (1979).

Law on Environmental Protection of the PRC (1989).


Notice of the CCP Central Committee on Strengthening Party’s Build-up (1989).

Notice to Implement the All-People-Owned Industrial Enterprise Law (1988).


Patent Law of the PRC. the NPC of the PRC.


Provisional Discharge Standards of Industrial "Three Wastes" (GBJ4-73) (1973).

Provisional Methods of Reporting Environmental Pollution and Sabotage Incidents (1987).


Provisional Regulations of Forensic Psychiatry Assessments (1989).

Provisional Regulations of Labour Re-education of the PRC (1982).

Provisional Regulations of Medical Treatment Accidents of Shanghai (1985).


Provisional Regulations on Crimes against State Currency (1951).

Provisional Regulations on Environmental Controls in Economic Open Areas of the PRC (1986).

Provisional Regulations on the Organizational Work of CCP Basic Units in Industrial Enterprises (1982).

Provisional Regulations on Waste Discharge Fees of the PRC (1982).


Registration Regulations of Enterprise Legal Persons (1988).


Regulations on Construction Environmental Protection of the PRC (1986).

Regulations on Forest Protection of the PRC (1963).

Regulations on General Managers' Work in All-People-Owned Industrial Enterprises 1986.

Regulations on Prevention and Control of Noise Pollution of the PRC (1989).

Regulations on Punishing Counter-revolutionaries of the PRC (1951).

Regulations on Punishing Embezzlement of the PRC (1952).

Regulations on Security Administration Punishment of the PRC (1986).


Resolution of the Council of Political Affairs on the Classification of Class Status in the Rural Areas (1950).


Resolution of the Standing Committee of the NPC on Prohibition of Narcotic Drugs (1990).


Resolution of the Standing Committee of the NPC on Punishing Crimes Against Author’s Rights (1994).


Resolution of the Standing Committee of the NPC on Severely Punishing Offenders of Crimes Seriously Endangering the Economy (1982).


Resolution of the Standing Committee of the NPC on Strengthening the Work of Legal Interpretation (1981).


Resolution of the Standing Committee of the NPC Regarding the Jurisdiction on Criminal Offences Provided in International Treaties Signed or Joined by the PRC (1987).


Road Traffic Regulations of the PRC (1987).


Supplementary Provisions of the Standing Committee of the NPC on Punishing Crimes of Catching and Killing Wild Rare and Endangered Animals Specially Protected by the State (1988).

B. Chinese Laws prior to 1949

Criminal Law of the ROC (1928).
Emergency Law on Punishing Crimes Endangering the Republic (1931).
Emergency Regulations on Punishing Crimes Endangering the Republic During the Period of Cracking Down on the Rebellion (1947).
Fishing Law of the ROC (1929).
Forest Law of the ROC (1932).
Hunting Law of the ROC (1932).
Law on Police Violations (1908), the Qing Dynasty.
Law on Police Violations (1915, amended in 1928 and 1943), the ROC.
New Qing Penal Code (1910), the Qing Dynasty.
Organic Law of the Government of the ROC.
Outline of Constitution (1908), the Qing Dynasty.
Outlines of Directed Government of the Central Committee of Kuomintang (1928).
Provisional Law on Punishing Counter-revolutionaries of the ROC (1928).
Provisional Law on the Trial by Jury in Counter-revolutionary Cases of the ROC (1929).
Provisional Regulations on Punishing Bandits (1927).
Rites of Chou (11th - 8th Centuries B.C.), the Western Chou Dynasty.
River Law of the ROC (1930).
The Qin Code (4th - 3rd Centuries B.C.), the Qin Dynasty.
The Tang Code (7th Century), the Tang Dynasty.

II. Non-Chinese Statutes

Criminal Code (Revised Statutes of Canada 1985).
Criminal Codes of the Russian Socialist Federated Soviet Republic (1922).
Criminal Codes of the Russian Socialist Federated Soviet Republic (1926).
Fundamental Principles of Criminal Legislation of the USSR and the Union Republics (1958).
Fundamental Principles of Criminal Legislation of the USSR and the Union Republics (1924).
German Penal Code (1871, amended to 28 June 1935).
Interpretation Act (Canada).
Italian Penal Code (1930).
Model Penal Code (1962). (Although this “Code” is not a law, it is a model for legislation in the United States.)
Penal Code of Thailand (1956).
Penal Code of the People’s Democratic Republic of Korea (1950).
Penal Code of the People’s Republic of Mongolia (1942).
Principles of Legislation on Administrative Violations of the USSR (1980).
Spanish Penal Code (1944, amended to 1971).
Swiss Federal Penal Code (as amended to 1971).
III. Conventions and United Nations Instruments

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988).
Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).
Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (1984).
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (1980)
Geneva Convention Relative to the Treatment of Prisoners of War (1949).


Universal Declaration of Human Rights (1949).