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The Criminal Law of the People's Republic of China (1997): Real Change or Rhetoric?

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THE CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1997): REAL CHANGE OR RHETORIC?

Ian Dobinson[†]

Abstract: The 1997 Criminal Law supposedly heralds the beginning of a new era in Chinese jurisprudence and criminal justice. There are doubts, however, over the degree to which the revisions are substantial or symbolic. On the one hand, it can be argued that by making the criminal justice system more rational and predictable, China is moving much closer to the "rule of law" as that term is understood in the West. On the other, it can be argued that the changes are mainly illusory and that, underneath the veneer of rhetoric, China's criminal justice system remains a crude and arbitrary tool of state control over enemies both real and imagined. This Article considers the competing viewpoints and argues that the latter comes closer to the truth. Of course, even a shift in rhetoric can have important consequences and the author acknowledges that the true import of the 1997 Criminal Law will only be known with the passage of time.

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I. INTRODUCTION

On October 1, 1997, a dramatically revised version of the Criminal Law (“CL”)¹ took effect in the People’s Republic of China (“China” or “PRC”). The new law marked a significant departure from the previous version of the Criminal Law enacted in 1979, enumerating 250 criminal offenses not included in the 1979 version. In addition, the 1997 CL reclassified “counterrevolution offenses” as “offenses endangering national security,” abolished the analogy provisions in the 1979 CL, and gave explicit recognition to the principles of legality and equality:

Even though it took thirty years for the PRC to promulgate its first criminal code and then another seventeen years to revise it, the 1997 *Criminal Code* is relatively complete, uniform and reasonable. This criminal code should not only improve the Chinese criminal justice system, but also help China bring the country under [the] Rule of Law.²

Lin and Keith are somewhat more cautious about the long-term effects of the changes, but they are still quite positive about the reforms. In commenting on the 1997 CL, they note that “the current trend is remarkable in its reiterated support for the rational importance of predictability and the

¹ See LEGISLATIVE AFFAIRS COMM’N OF THE STANDING COMM. OF THE NAT’L PEOPLE’S CONGRESS OF THE PEOPLE’S REPUBLIC OF CHINA, THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA (1987) [hereinafter LAWS OF THE PRC]. All Laws, Decisions and Supplementary Provisions cited in this article since 1979 are taken from the relevant volumes of THE LAWS OF THE PRC. The first volume included laws enacted from 1979-1982. For all subsequent footnotes relating to Chinese law, consult the relevant volume of this collection by date of adoption.

² WEI LUO, THE 1997 CRIMINAL CODE OF THE PEOPLE’S REPUBLIC OF CHINA 21 (1998).

procedural protection of non-state interests through the adaptation to principles such as equality before the law, 'no crime, without law' and 'no punishment without crime.'³

The "current trend" that Lin and Keith refer to includes the 1996 Criminal Procedure Law ("CPL"), but it could also be said to include the Administrative Penalty Law (1996), the Judges Law (1995), the Procurators Law (1995) and the Police Law (1995).⁴ The 1996 CPL, for example, significantly amended the 1979 CPL and introduced a number of pre-trial provisions for the protection of those being investigated for crimes as well as for those subsequently charged with such crimes. This includes restrictions on pre-trial detention and the right to legal representation. It is also suggested, although somewhat debatable,⁵ that the 1996 CPL⁶ establishes the presumption of innocence as a principle in Chinese legal theory. In commenting on this, Chen cites a Chinese scholar who states, "'A just law does not guarantee the justice of law.' The adoption of many of the western practices, e.g., the presumption of innocence, etc., requires the change of approach and thinking of judicial personnel."⁷

For many in China, however, the reforms since 1995 demonstrate significant progress towards the adoption of a rule of law,⁸ if not proof that it has already been put in place. This view was further entrenched when, in his report to the Party on September 12, 1997, Jiang Zemin put forward in his now quite famous policy formulation on "running the country according to the law and establishing a socialist rule of law country."⁹ Jiang later expanded on this formulation by stating:

To safeguard the dignity of the Constitution and other laws, we must see to it that all people are equal before the law and no individual or organisations shall have the privilege to overstep it. All government organs must perform their official duties according to the law and guarantee the citizens' rights in real

³ Lin Zhiqiu & Ronald Keith, *The Changing Substantive Principles of Chinese Criminal Law*, 13 CHINA INFO 76, 78-79 (1998).

⁴ See relevant volumes of LAWS OF THE PRC, *supra* note 1.

⁵ JONATHAN HECHT, LAWYERS COMMITTEE FOR HUMAN RIGHTS, OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW (1996).

⁶ Article 12 of the 1996 CPL states: "No person shall be found guilty without being judged as such by a People's Court according to law." See LAWS OF THE PRC, *supra* note 1.

⁷ Jianfu Chen, *A Moderate Step in the Right Direction—The Revision of the Criminal Procedure Law in the PRC*, 3 J. CHINESE & COMP. L. 1, 157 (1997).

⁸ Li Buyun, *Ideal and Reality of the Rule of Law in China*, 3 J. CHINESE & COMP. L. 1, 40-59 (1997).

⁹ Lin & Keith, *supra* note 3, at 84.

earnest by instituting a system of responsibility for law enforcement and a system of assessment and examination.¹⁰

Jiang's policy formulation was observed¹¹ to have elevated the rule of law to a new level of Party policy, possibly equal to the policy on the creation of a socialist market economy. It was also seen to have ended the debate on the merits of rule *by* law as opposed to the rule *of* law. In March 1999, Jiang's policy formulation was included in the amendment to Article 5 of the Constitution.

A contrary view, however, is that the principle changes in both the 1996 CPL and 1997 CL are merely part of Chinese rhetoric on legal reform, and that what is occurring is not a real change in course, but a more subtle variant of the continuation of state instrumentalism. The crackdown on the Falun Gong may support such a view. Some Chinese academics outside of China have also been critical of the 1997 CL. Chen,¹² for example, sees the superficial change from counterrevolutionary offenses to crimes endangering national security, the maintenance of the artificial distinction between administrative sanctions and crimes, and the continued use of the death penalty as major disappointments. The fact that the 1997 CL made no changes to the number of offenses, carrying the death penalty, as well as the continued reliance on severe punishment, may also demonstrate continuity in approach rather than any real change. Lin and Keith, for example, note: "In view of the significant and positive changes elsewhere in the 1997 CL, the increased stipulation of severe punishment in the 1997 CL for the explicit purpose of social control by the state is a paradox."¹³

The objective of this Article is to assess whether changes introduced by the 1997 CL are merely symbolic rather than substantial. Such an assessment requires a detailed review of criminal law in China since the People's Republic was established. The Article therefore begins by tracing the history of Chinese criminal law from 1949 to 1997 in Part II. Part III discusses the 1997 reforms in some detail, outlining the major changes in the law compared to the provisions of the 1979 CL. Part IV examines changes to the criminal law since 1997 and the application of the 1997 CL against members of the Falun Gong religious movement. An important aspect of

¹⁰ *Id.*

¹¹ Jiang Zemin, *Hold High the Great Banner of Deng Xiaoping Theory*, 41 BEIJING REV. 10, 24 (Oct. 6-12, 1997).

¹² JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT (1999).

¹³ Lin & Keith, *supra* note 3, at 98.

Chinese criminal law is the dichotomy drawn between crime and administrative penalties, which is discussed in Part V. Finally, Part VI concludes that while there has been major change in the criminal law, there has been little change in fundamental principles that form the basis for the interpretation and application of the criminal law in China.

II. HISTORICAL OVERVIEW

Although Chinese legal history is quite ancient, Chinese historians argue that the Chinese legal system as it currently exists has little connection to the past. This conforms with the Marxist/Leninist approach to Chinese history by PRC historians of dividing the history of China prior to the twentieth century into three periods: primitive society (before the twenty-first century B.C.); slave society (between twenty-first century and 476 B.C.); and feudal society (between 475 B.C. and A.D. 1840).¹⁴ The period from 1840 to 1949 appears to be classified in a variety of ways, including not only capitalist or bourgeois, but also semi-feudal and colonial.

A. *Chinese Criminal Law 1949-1976*

The period from 1949 to 1976 is viewed by some as having only limited relevance to the current legal system. "The present legal system is, however, mainly a product of legal efforts in the 1980s and '90s. Thus the pre-1949 experience of communist justice is more relevant in explaining the lawlessness in the first thirty years of the PRC than the present legal developments."¹⁵

The first step undertaken by the new PRC government in 1949 was the abolition of the laws and legal system of the Nationalist (Kuomintang) Government. Consequently, during the years, 1949 to 1953, China proceeded without the benefit of a codified legal system. The interim legal regime was based on "the policies of the Communist Party and various fundamental principles, laws, decrees resolutions issued by the People's Government and the People's Liberation Army."¹⁶ In practice, this meant that the law conformed to the decrees of Mao Zedong.

¹⁴ ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 7 (2d ed. 1999).

¹⁵ J. CHEN, *supra* note 12, at 31.

¹⁶ See A. CHEN, *supra* note 14, at 24 (Item 5 of the Instructions on the Abolition of the Collection of the Six Laws of the Kuomintang, Feb. 1949).

The years 1949 to 1976, however, were not devoid of legislation, and a number of draft criminal codes (as well as other laws) were prepared. In 1951, for example, the Regulations for the Punishment of Counterrevolutionaries were promulgated.¹⁷ Of the provisions, two stand out. Article 16 contained the principle of crime by analogy, while Article 18 made the Regulations retroactive, thus reaching acts committed prior to 1949.¹⁸ This was consistent with the view that the law was principally to be used as a weapon against the enemies of the state.¹⁹

The criminal law of this era was used as an instrument of suppression in order to control the masses and reinforce the Communist regime. The Party sought initially to ensure that all sources of political opposition were crushed:

Indeed, it was emphasised by some CPC [Communist Party of China] leaders that law was "an extension of military force," being subordinate to politics and that judicial tasks were equivalent to those of the army and the police. It was also emphasised that during the transitional period (from New Democracy to Socialism) . . . it was impossible to make such fundamental laws as a civil code and a criminal code.²⁰

Following this period of consolidation, work on drafting a new criminal code began in 1954, with the introduction of the First Five-Year Plan.²¹ At this time, the Chinese leaders decided to adopt a legal system based on the Soviet model.²² To that end, many Soviet laws and legal texts were translated into Chinese.²³ Additionally, academic exchanges between China and the U.S.S.R. thrived as China both invited Soviet scholars to teach and sent its own students to study the Soviet system firsthand.²⁴ The Soviet influence was pronounced in the initial drafts of the CL and CPL.²⁵

¹⁷ For a detailed discussion of the period from 1949 to 1965, see LENG SHAO-CHUAN, *JUSTICE IN COMMUNIST CHINA: A SURVEY OF THE JUDICIAL SYSTEM OF THE CHINESE PEOPLE'S REPUBLIC* (1967).

¹⁸ *Id.*

¹⁹ A. CHEN, *supra* note 14, at 25.

²⁰ J. CHEN, *supra* note 12, at 37.

²¹ Chin Kim notes, however, that work had begun earlier in 1950 with the publication of the "Draft of the General Outline of the Criminal Law" and the "Draft of the Leading Principles of the Criminal Law." See CHIN KIM, *THE CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA 1* (1982).

²² A. CHEN, *supra* note 14, at 26.

²³ J. CHEN, *supra* note 12, at 38.

²⁴ *Id.*

²⁵ *Id.*

During the years 1956 to 1957 an important treatise on the principles of Chinese criminal law and procedure was published. The *Lectures*, or *Chung-hua jen-min kung-ho-kuo hsing-fa tsung-tse chiang-I*, constituted the principal Chinese Communist treatise on criminal law and procedure available in the non-Communist world.²⁶

Regarding the definition of crime, the authors of the *Lectures* stated: “[W]e may describe the concept of crime in the criminal law of our country as follows: *all acts which endanger the people’s democratic system of our country, undermine the social order, or are socially dangerous and, according to law, should be subject to criminal punishment are crimes.*”²⁷

The *Lectures* provide important insight into the early ideology of the criminal law. As far as the causes of crime are concerned, a quite traditional Marxist explanation was adopted. Capitalism was viewed as one of the major causes of crime.²⁸ The extent to which China suffered from high rates of crime was initially understood in such an ideological framework with the emphasis on crimes of counterrevolution and the categorization of criminals as enemies of the state. This was again reflected in the *Lectures*:

The criminal law of our country mainly attacks counter-revolutionary criminals and criminals who murder, commit arson, steal, swindle, rape, and commit other crimes that seriously undermine social order and socialist construction. We must make it clear that the sharp point of our criminal law is mainly directed at the enemies of socialism.²⁹

Work on a criminal code, as well as other major initiatives, was suspended during the anti-rightist campaign of 1957 and the “Great Leap Forward” of 1958.³⁰ During the next two years, the Soviet system came under increasing criticism. This was largely due to the increasing tension between Mao and the Soviet Union, whose policies, after the death of Stalin, Mao saw as revisionist.

In 1962, however, there appeared to be some relaxation of political control in order to facilitate economic recovery following the famines from 1959 to 1961. The “Great Leap Forward” had failed and the Party

²⁶ J. A. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA 1949-1963: AN INTRODUCTION* 58 (1968).

²⁷ *Id.* at 328.

²⁸ *Id.*

²⁹ *Id.* at 79.

³⁰ J. CHEN, *supra* note 12, at 39.

recognized the need for economic reform based on law and social order.³¹ Work on a criminal code was resumed and, in 1963, the thirty-third draft CL was completed. It was never implemented, being first interrupted between 1963 and 1965 by the so-called “Four Clean-Ups Movement,”³² and then, in 1966, by one of the darkest periods of modern Chinese history, the Cultural Revolution. This effectively saw the collapse of the PRC legal system and the rejection of formalized legal codes. Judges, procurators, and lawyers were persecuted and many were arrested and imprisoned. All law schools were closed. Anarchy was praised and the Soviet legal system was attacked. This period of legal chaos, although largely over by 1970, did not really end until the death of Mao and the arrest of the “Gang of Four” in 1976. Thereafter began a period of reform, which saw the re-establishment and expansion of the system that existed during the 1950s.

B. *Chinese Criminal Law 1976-1996*

1. *The End of the Cultural Revolution and the Rise of Deng Xiaoping*

The death of Mao in 1976 marked the end of the Cultural Revolution and saw the rise of Deng Xiaoping to the position of Chairman. Two major policies formed the basis of this period: legalization and the “Four Modernisations.” The Four Modernizations called for modernization of industry, agriculture, science and technology, and national defense. The establishment of a stable, codified legal system was seen as critical to achieving these goals. This need for a new regime and policy direction was initially embodied in the 1978 Constitution.³³ At the same time, calls were being made for the codification of laws. Foster notes: “This new call for codification was to be taken up again in October 1978 with the republication of Dong Biwu’s 1957 codification speech and accompanying explanatory note.”³⁴

This led to a reconsideration of the draft codes that were already in existence, including the thirty-third (1963) draft of the Criminal Law. On November 29, 1978, the Standing Committee adopted a resolution declaring that many pieces of legislation enacted in the 1950s and 1960s were to remain in effect unless they were inconsistent with the new Constitution or

³¹ *Id.*

³² *Id.* at 40.

³³ See *id.* at 40-43 for a more detailed discussion.

³⁴ F. H. Foster, *Codification in China*, 30 AM. J. COMP. L. 399 (1982).

had been replaced by more recent laws.³⁵ On July 1, 1979, the Second Session of the Fifth National People's Congress ("NPC") passed the Criminal Law. At the same time, the NPC also promulgated the Criminal Procedure Law, the Organic Law of the People's Courts, and the Organic Law of the People's Procuratorate.

Prior to the effective date of the 1979 CL, a widespread media campaign was launched to educate the people about the content and importance of the new CL.³⁶ As part of this campaign the Central People's Broadcasting Station presented a series of lectures.³⁷ In the first lecture the ideological foundation of the CL was made clear: "China's Criminal Law is the embodiment of the will of the proletariat and the broad masses of people. It is a sharp weapon with which to attack the enemy, punish criminals and protect the people. It is an important tool for realising the dictatorship of the proletariat."³⁸ Article 28 of the Constitution also stated: "The state maintains public order and suppresses treasonable and other counter-revolutionary activities; it penalises criminal activities that endanger public security and disrupt the socialist economy as well as other criminal activities; and it punishes and reforms criminals."³⁹

This underlying legal function appeared in other legislation. Article 3 of the Organic Law of the People's Courts entrusted the courts, when trying criminal cases, with safeguarding the system of the dictatorship of the proletariat and maintaining the socialist legal system and public order.⁴⁰ In addition the courts were obliged to "ensure the smooth progress of the socialist revolution and socialist construction in the country."⁴¹ Similarly, Article 4 of the Organic Law of the People's Procuratorates, provided for the prosecution of offenses "so as to safeguard the unification of the country, the system of proletariat dictatorship and the socialist legal system . . . and to ensure the smooth progress of socialist modernization."⁴²

³⁵ Tao-Tai Hsia & W. I. Zeldon, *Recent Legal Developments in the People's Republic of China*, 28 HARV. INT'L L.J. 2, 259 (1987).

³⁶ See generally *Lectures on the Criminal Law*, translated in CHINESE L. & GOV'T, Summer 1980 [hereinafter *Lectures on the Criminal Law*].

³⁷ *Id.*

³⁸ *Id.* at 6.

³⁹ LAWS OF THE PRC, *supra* note 1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

2. *The 1979 Criminal Law*⁴³

The 1979 CL adopted a structure similar to criminal codes elsewhere.⁴⁴ It consisted of 192 articles divided into two parts: Part I, which expressed general principles of crime and punishment; and Part II, which defined specific offenses. Because the 1979 CL was substantially based on the 1963 draft code, many of its provisions were in accordance with the 1926 and 1960 Soviet Criminal Codes.⁴⁵

The political nature of the CL was clearly represented in its objectives. Article 1 stated that the guiding ideology of the CL was "Marxism-Leninism-Mao Zedong Thought." The policy was to combine punishment with leniency "in light of the actual circumstances and concrete experiences of the people of all China's nationalities in carrying out the people's democratic, led by the proletariat and based on the worker-peasant alliance, that is, the dictatorship of the proletariat, and in conducting the socialist revolution and socialist construction."

Another important provision in the 1979 CL was Article 79. This article contained analogy provisions whereby crimes that were not expressly defined in the CL "may be determined and punished according to whichever article . . . that covers the most closely analogous crime." Judgments applying this provision had to be approved by the Supreme Court. The adoption of Article 79 was said to give flexibility to the CL even though the legislation was supposed to be quite comprehensive.⁴⁶ It soon became evident, however, that many of the provisions were vague and ambiguous. This led to an ongoing process of supplementation in the form of Standing Committee Decisions and Supplementary Provisions as well as Supreme Court interpretations. As early as 1981, for example, the Standing Committee passed its Decision Regarding the Handling of Criminals Undergoing Reform Through Labor and Persons Undergoing Rehabilitation Through Labor Who Escape and Commit New Crimes.⁴⁷

⁴³ *Id.*

⁴⁴ See, e.g., the Codes of the then USSR, Japan and Germany.

⁴⁵ H.J. BERMAN et al., *A Comparison of the Chinese and Soviet Codes of Criminal Law and Procedure*, 73 J. CRIM. L. & CRIMINOLOGY 1, 238-58 (1982). The 1979 CL contained crimes of counterrevolution even though the Soviets had abolished such offenses in favor of crimes against state security in 1958.

⁴⁶ J. CHEN, *supra* note 12, at 172.

⁴⁷ LAWS OF THE PRC, *supra* note 1.

3. *The Trial of the Gang of Four*⁴⁸

In November and December of 1980, Mao's widow and other top Government and Party officials went on trial for alleged crimes committed during the Cultural Revolution. The charges against the accused included various counterrevolutionary offenses under Chapter I of the 1979 CL. The Gang of Four was blamed for virtually all of the destruction caused by the Cultural Revolution. This included the cessation of the drafting of a criminal code in 1963. The Radio Lectures in 1980 made the following comment:

Then, however, because of a change in the situation, plus the influence of a wave of legal nihilism, and especially because of the disruption and destruction wrought by Lin Biao and the "Gang of Four," the work of formulating China's Criminal Law was once again put on the shelf.⁴⁹

It was further reported that it was only after "smashing the Gang of Four" that work could be resumed on drafting a CL as well as other important legislation.⁵⁰ The trial of the Gang of Four in 1980 was a very important event for the Chinese government. Apart from allowing them to place the blame for the Cultural Revolution on certain individuals, it allowed the Chinese to demonstrate that the lawlessness of the Cultural Revolution was over and that a period of law and order based on specific legislation was now beginning. It also provided an opportunity to showcase the new CL and CPL. The Chinese government did not see anything wrong in the retroactive use of the 1979 CL. In response to considerable criticism from Western observers,⁵¹ the Chinese sought to justify such retroactivity on the grounds that it was an exercise of the "principle of leniency," whereby a person can be tried by a new law if the punishment stipulated by the previous law was more severe than that in the new law. International precedent was cited, but what was not explained was what the previous law was and, therefore, what crimes had been committed. It also appeared from comments made prior to the trial that the defendants were already seen as guilty and the only

⁴⁸ There were in fact ten defendants.

⁴⁹ *Lectures on the Criminal Law*, *supra* note 36, at 9.

⁵⁰ *Id.*

⁵¹ See, e.g., Timothy A. Gellatt, *The People's Republic of China and the Presumption of Innocence*, 73 J. CRIM. L. & CRIMINOLOGY, 1, 259-316 (1982).

consideration was the extent of their punishment.⁵² The procedure adopted at the trial appeared to demonstrate a clear rejection of the presumption of innocence. In commenting on this, Wang Hanbin, then Vice Chairman and Secretary General of the Commission of Legislative Affairs, stated:

Different countries have different legal systems. . . . When instituting law, we must refer to and absorb that part of laws of other countries which is useful to us and absorb a good part of our own law from the past. However, in judicial work, such as the present trial, . . . we can only act in accordance with the law currently in effect in our country.⁵³

Chinese criminal procedure, it was said, “does not presume anything—it ‘seeks truth from facts.’”⁵⁴

The trial, however, was mainly an exercise for the benefit of the general population. It allowed the Chinese to demonstrate, at least in principle, that nobody was above the law. In commenting on the trial, Foster notes:

Its primary purpose was educational. Through extensive media coverage, the trial gave the masses a concrete demonstration of the new Chinese socialist legal system in practice and its applicability to even the highest officials. . . . The trial had as its related secondary goal the focusing of worldwide attention on China’s legalisation drive.⁵⁵

4. *The Anti-Crime Campaigns*

The appearance of a stable legal system was seen as a priority in order to attract foreign investment, but there was also a need to ensure stability within the community itself. This led to two approaches. The first was a crackdown on dissent. Rights, such as freedom of speech, which had been guaranteed by the 1978 Constitution, were significantly restricted by the changes introduced as part of the 1982 Constitution.⁵⁶ Article 90 of the

⁵² *Id.*

⁵³ Foster, *supra* note 34, at 407 n.75.

⁵⁴ Gellatt, *supra* note 51, at 261.

⁵⁵ Foster, *supra* note 34, at 407-08.

⁵⁶ Article 51 of the 1982 Constitution states that persons exercising their rights “may not infringe upon the interests of the state, of society or of the collective.” See LAWS OF THE PRC, *supra* note 1.

1979 CL also declared that a crime of counterrevolution was any act "with the aim of overthrowing the political power of the dictatorship of the proletariat and the socialist system and endangers the People's Republic of China." All anti-Party views were severely dealt with and extensive use was made of "re-education through labor."

The second approach was to streamline the criminal legal system. China's crime rate was also high and the new legal system was incapable of reducing it.⁵⁷ From the middle of 1981, new Standing Committee Decisions were introduced to streamline the system, the effect being, in most cases, to simply bypass a number of the provisions of the CPL. The earliest of these Decisions were the Decision Regarding the Handling of Criminals Undergoing Reform Through Labor and Persons Undergoing Rehabilitation Through Labor Who Escape or Commit New Crimes in 1981 and the Decision Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy in 1982.⁵⁸ The effect of both was to significantly increase the penalties for escapees, recidivists, and those who committed offenses under thirteen articles of the CL.⁵⁹ Such offenses included speculation, drug trafficking and corruption. These Decisions made the death penalty available for such offenses. In 1981, the Standing Committee also passed the Decision Regarding Approval of Cases Involving the Death Penalty, which allowed Higher People's Courts to order the death penalty without the need for approval by the Supreme Court.⁶⁰ In 1983, the government turned its attention to the serious problem of violent crime by passing the Decision Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security.⁶¹ Linked to this was the Decision Regarding the Procedure for Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Public Security, which allowed the courts and procuratorates to circumvent the requirements of the 1979 CPL.

These Decisions began the process of supplementation that was to continue for the next fourteen years and which included nineteen further Decisions and Supplementary Provisions. These Decisions also increased the maximum penalty for many offenses to the death penalty. The maximum penalty for regular smuggling under Article 118 of the 1979 CL, for example, was increased from ten years imprisonment to death.

⁵⁷ Donald C. Clarke, Note, *Concepts Of Law In The Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890, 1896 (1985).

⁵⁸ LAWS OF THE PRC, *supra* note 1.

⁵⁹ For a list of these Articles, see the Appendix to the 1982 Decision.

⁶⁰ LAWS OF THE PRC, *supra* note 1.

⁶¹ *Id.*

The 1982 and 1983 Decisions were heavily criticized in and outside China because they breached the principle of non-retroactivity. Article 9 of the 1979 CL stated that the CL was to enter into force on January 1, 1980. Acts committed after 1949, but before January 1, 1980, which were not criminal at the time, could not be prosecuted, whereas the lesser punishment was to apply to acts that were criminal both before and after January 1, 1980.⁶² If the 1979 CL did not make such an act a crime, then the CL would also apply.⁶³ The vagueness of the law before 1980 made it quite easy to conclude that criminal acts committed before this date were covered by the 1979 CL. The trial of the Gang of Four is ample evidence of this. The increases in penalty and the 1982 and 1983 Decisions, however, not only breached the principle of non-retroactivity, but also the principle that the law to be applied should be that which imposes the lesser penalty. Section 4(2) of the 1982 Decision was specifically retroactive:

In cases of crimes committed before the date of implementation of this Decision, if an offender voluntarily surrenders before May 1, 1982 or, if having already been arrested, he truthfully confesses all his crimes . . . and in addition brings truthful accusations with respect to the crimes of other criminals, he shall be dealt with in accordance with the relevant provisions of the law before the implementation of this Decision. In cases where the offender, before May 1, 1982, continues to conceal the crimes he has committed, . . . he shall be taken as continuing to commit crimes and shall be dealt with in accordance with this Decision.

The 1983 Decision, subsequent Decisions, and Supplementary Decisions were not explicitly retroactive, but in practice the approach was the same. In fact, Standing Committee Decisions such as that in 1983 could be viewed as even harsher than the 1982 Decision as they did not contain the provisions relating to voluntary surrender, and therefore, the option for an offender to take advantage of the lesser penalty before the enactment of the Decision.

While there are no official figures available, it is believed that tens of thousands were executed as part of this anti-crime campaign. In conjunction with these crackdowns, the Government launched major media campaigns,

⁶² See 1979 CL, art. 9, LAWS OF THE PRC, *supra* note 1.

⁶³ *Id.*

which often carried reports of arrests and executions.⁶⁴ Other newspaper articles talked more about the need for the masses to join the fight against the enemies of the state.⁶⁵

Various anti-crime campaigns continued after 1983 and appear to follow a pattern of first a Standing Committee Decision then the crackdown. In 1991, for example, as part of a crackdown on prostitution and trafficking in women and children, the Standing Committee passed the Decision on the Strict Prohibition of Prostitution and Whoring, and the Decision Regarding the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women or Children.⁶⁶ In fact, the Standing Committee enacted twenty-two Decisions and Supplementary Provisions during the period from 1981 to 1996.⁶⁷ All twenty-two laws have been incorporated in the provisions of the 1997 CL.⁶⁸

5. *Decisions and Supplementary Provisions 1988-1995*

From 1988 to 1995, nineteen Standing Committee Decisions and Supplementary Provisions were passed. The legality of all of them has been challenged. Zhao and He, for example, argued that all Standing Committee laws directly contradicted the rule against retroactivity in the 1979 CL.⁶⁹ All nineteen Standing Committee Decisions and Supplementary Provisions may also be unconstitutional. Article 67(3) of the Constitution empowers the Standing Committee to partially supplement and amend laws when the NPC is not in session provided that the basic principles of these laws are not contravened. Article 5 of the Constitution also states that “[n]o laws or administrative or local rules and regulations may contravene the Constitution.” There are no examples of any laws being invalidated by reason of such a contravention of either the principles embodied in the 1979 CL or the Constitution itself.⁷⁰ Even though the questionable legality of the Decisions was recognized at the time, Party policy, based on the need to fight crime, outweighed the need to conform to law and legal principles. In commenting on this, Chen notes:

⁶⁴ Clarke, *supra* note 57, at 1897.

⁶⁵ *Id.* On August 27, 1983, for example, the *Sichuan Daily* carried an article entitled “Strike Resolute Blows at and Thoroughly Exterminate an Evil.”

⁶⁶ LAWS OF THE PRC, *supra* note 1.

⁶⁷ *Id.*

⁶⁸ See 1997 CL, apps. I, II, LAWS OF THE PRC, *supra* note 1.

⁶⁹ Lin & Keith, *supra* note 3, at 93.

⁷⁰ See 1979 CL, arts. 62(11), 67(7)(8), 89(13), LAWS OF THE PRC, *supra* note 1. In fact, it is arguable that all Decisions and Supplementary Provisions since the promulgation of the 1997 CL are similarly unconstitutional.

[T]he principle of the supremacy of state law as against the edicts, policy documents and exhortations of the CPC and the orders, directions and instructions of senior officials has not yet been firmly established in constitutional theory, and, to the extent that the principles of socialist legality have indeed been officially affirmed verbally, they have not been fully observed in practice. The effect of these factors has been to blur the distinction between law and policy, and to stimulate students of the Chinese legal system to reflect upon their assumptions or definitions as to the nature of law.⁷¹

Nevertheless, all the Decisions and Supplementary Provisions relevant to the 1979 CL were very likely unconstitutional. The Supplementary Provisions Concerning the Punishment of the Crimes of Smuggling, and the Supplementary Provisions Concerning the Punishment of the Crimes of Embezzlement and Bribery, both passed in 1988, supplemented not only the CL, but also the 1982 Decision. Other Decisions and Supplementary Provisions made no attempt at amendment or supplementation of the CL and simply created new offenses. One of the last Standing Committee laws, the Decision Concerning Punishment of Crimes Against the Company Law (1995) is just one example of this process.

The piecemeal approach to the law of the 1980s and 1990s, however, was inevitable. In commenting on this in 1978, Deng Xiaoping stated:

There is a lot of legislative work to do, and we do not have enough trained people. Therefore, legal provisions will inevitably be rough to start with, then gradually improved upon. . . . In short, it is better to have some laws than none, and better to have them sooner than later.⁷²

The reforms in the 1996 CPL and 1997 CL may have remedied such defects and, as Wei Lou puts it, resulted in law that is "relatively complete, uniform and reasonable,"⁷³ but the process of supplementation has

⁷¹ A. CHEN, *supra* note 14, at 77.

⁷² J. CHEN, *supra* note 12, at 43.

⁷³ LUO, *supra* note 2, at 21.

continued.⁷⁴ The Supreme Court, however, has at least addressed the principle of non-retroactivity. Article 12 states that if an act committed before the "entry into force" of the 1997 CL "was not deemed a crime under the laws in force at the time, then those laws shall apply. . . . However, if this Law does not deem it a crime or imposes a lighter punishment, this Law shall apply." According to the Supreme Court, this should be interpreted so as to reflect "the principle, adopted by most countries in the world, of applying the criminal law in effect at the time of the act but giving the lesser punishment prescribed by the new law when it is put into effect."⁷⁵

III. THE REFORM OF THE CRIMINAL LAW AND THE 1997 CRIMINAL LAW

A. *Structural Considerations*

The process of reforming the 1979 CL began in 1982 with the setting up of a review committee by the Standing Committee. In 1983, the redrafting process came under the auspices of the Legislative Affairs Commission of the NPC and by 1988 three drafts had been tabled and discussed. The implementation of the rule of law and the movement from a planned to a market economy were seen as the two driving forces behind the reform process.⁷⁶

In 1988, the Standing Committee drew up preliminary guidelines for the drafting of a revised CL. The events of 1989, however, were seen as not conducive to the proper consideration of such major change,⁷⁷ and further Decisions and Supplementary Provisions were passed.⁷⁸ This is particularly significant in light of the fact that the 1988 revisions included the abolition of the crimes of counterrevolution and their replacement by crimes against national security. The trials of the activists in 1990 to 1991 gave China an opportunity to again⁷⁹ demonstrate and legitimise its criminal justice system

⁷⁴ See, e.g., Standing Committee Decision on Penalizing Crimes of Foreign Exchange Defrauding, Evasion and Illegal Transaction (Dec. 29, 1998), and the Standing Committee Amendments to the CL (Dec. 26, 1999), LAWS OF THE PRC, *supra* note 1.

⁷⁵ Zhang Jun, *On Interpreting the New Criminal Law*, 4 CHINA LAW 66, 67 (1997).

⁷⁶ Chen Xingliang, Major Changes in the Chinese Criminal, (May 8, 1997) (paper presented at the School of Law, City University of Hong Kong). Professor Chen was a member of the drafting team for the 1997 CL.

⁷⁷ Wang Hanbin, Explanations on the Draft Revision of the Criminal Law of the PRC (Mar. 6, 1997) (speech delivered to the NPC).

⁷⁸ Supplementary Provisions Regarding Punishing Crimes of Counterfeiting Registered Trademarks (1993) and Decision on Punishment of Crimes Disrupting Financial Order (1995). See LAWS OF THE PRC, *supra* note 1.

⁷⁹ The other opportunity occurred in 1981 with the trial of the "Gang of Four." Like that trial, the trials of the pro-democracy activists that followed Tiananmen were seen as "show trials." For an analysis

to the outside world, but these trials might have been very different had a revised CL already been in place. By relying on the provisions of the 1979 CL, the government was also able to emphasize the principle of combining punishment with leniency. Consequently, the vast majority of students who took part in the anti-government movement were distinguished from the ringleaders based on Mao's theory of "antagonistic and non-antagonistic contradictions." Antagonistic contradictions focused on those who were class enemies and emphasized the severe punishment of those who sought to overthrow the state. The ringleaders had accordingly committed acts which were antagonistic contradictions and the retention and application of counterrevolutionary offenses was, therefore, essential for the purposes of prosecuting such offenders. Those who had been "misled and manipulated" were guilty of non-antagonistic contradictions and therefore could be offered leniency in the form of administrative sanctions.

Two laws and one Decision passed by the Standing Committee after Tiananmen are of interest in considering the policy of this time.⁸⁰ The first was the Law on Assemblies, Processions and Demonstrations, 1989.⁸¹ Chapter II of this Law set out the provisions for obtaining permission for holding assemblies, processions or demonstrations. In Chapter IV, Legal Responsibility, Article 29(3) states that the holding of an assembly, procession or demonstration where there has been no application, permission has not been granted, or the gathering is conducted contrary to the specifications of the permission and public order is seriously undermined, then those directly responsible for the assembly, procession or demonstration shall be liable under Article 158 of the 1979 CL. The maximum penalty under Article 158⁸² was five years imprisonment. In commenting on this, Findlay and Chiu state: "Through an analysis of recent public order legislation in the PRC it is possible to recognise the reliance on legality as a legitimator for a battery of social control mechanisms, more than to simply indict the law itself as a means of repression."⁸³ According to Findlay and Chiu, such laws reflect an approach to legality based very much on policies of state instrumentalism.

of this issue soon after Tiananmen, see M. Findlay, *Show Trials in China: After Tiananmen Square*, 16 J.L. SOC'Y 3, 352-59 (1989).

⁸⁰ It is not suggested that these laws were enacted solely because of Tiananmen, but that the events leading up to June 4, 1989, and the aftermath would have obviously affected policy at the time and, therefore, the usefulness of such legislation.

⁸¹ LAWS OF THE PRC, *supra* note 1.

⁸² 1979 CL, art. 158, LAWS OF THE PRC, *supra* note 1.

⁸³ M. Findlay & T. Chiu Chor-Wing, *Constitutional Rights and the Constraint of Populist Dissent: Recent Resort to Legalism in China*, 19 INT'L J. SOCIOLOGY L. 67, 80 (1991).

The second enactment was the Law on the National Flag.⁸⁴ Article 1 of this Law stated: "This Law is enacted in accordance with the Constitution with a view to defending the dignity of the National Flag, enhancing citizens' consciousness of the State and promoting the spirit of patriotism." Article 19 also provided for an administrative penalty of fifteen days' detention for anyone who desecrated the National Flag. On the same day, however, the Standing Committee issued its Decision Regarding the Punishment of the Crimes of Desecrating the National Flag and the National Emblem of the PRC.⁸⁵ This Decision made it a crime punishable up to a maximum of three years imprisonment for anyone who publicly and wilfully burnt, mutilated, scrawled on, defiled or trampled on the National Flag or Emblem.

The reform process was put back on track in 1993, and in March 1994, the Legislative Affairs Commission tabled the Collection of Articles in the Specific Provisions of the Criminal Law. At the same time, several scholars, including some from Renmin University,⁸⁶ were asked to draft the General Provisions. In commenting on the reform process, two members of the drafting committee stated: "The guiding principle for the reform has been clear: a new criminal law should serve economic restructuring rather than politics; and it should be democratic, scientific and consistent with international standards."⁸⁷

The driving forces behind the reform process were the implementation of the rule of law and the development of Deng's "socialist market economy." These two factors, however, were inexorably linked and this was clearly demonstrated in 1997 by the policy statements that "the market economy is a rule of law economy" and "govern[s] the country according to law and mak[es] it a socialist country ruled by law."⁸⁸

In 1996, a new draft code of the criminal law was before the NPC. After considerable debate and some amendment, the revised CL was finally enacted on March 14, 1997. Although there had been considerable input from Chinese legal scholars since 1989, the drafters of the 1997 CL decided to follow the 1988 guidelines:

⁸⁴ Law of the Peoples Republic of China on the National Flag (1990), LAWS OF THE PRC, *supra* note 1.

⁸⁵ The Decision of the Standing Committee of the National People's Congress Regarding the Punishment of Crimes of Desecrating the National Flag and the National Emblem of the People's Republic of China (1990), LAWS OF THE PRC, *supra* note 1.

⁸⁶ This group of scholars included Zhao Bingzhi, Bao Suixian, and He Xingwang.

⁸⁷ Zhao Bingzhi & Bao Suixian, *The Present and Future of Criminal Law Reform in China*, 1 J. CHINESE COMP. L. 1, 133 (1995).

⁸⁸ Lin & Keith, *supra* note 3, at 23-24.

First, the revision was to incorporate various Decisions and Supplementary Provisions issued by the NPC's Standing Committee since 1979. Second, the revision was to ensure continuity and stability of the Law; thus provisions without "major" problems would not be revised. Thirdly, general and vague provisions were to be elaborated and clarified. In short, the revision was to rationalise, systematise, clarify and elaborate the 1979 Law.⁸⁹

Since 1997, the process of revision has continued as the Standing Committee has passed new laws and the CL has been amended.⁹⁰ In addition, many of the offense provisions in the 1997 CL have been subject to judicial clarification.

B. The 1997 Amendments to the Criminal Law

1. The Three Guiding Principles of Reform

The 1997 revision of the CL is said to be based on three principles: unity, continuity, and clarity.⁹¹

a. Unity

As stated, the Standing Committee enacted twenty-two separate criminal laws from 1979 to 1997.⁹² Nearly 220 offenses were also created as part of civil laws that contained criminal provisions.⁹³ This created a total of approximately 300 offenses. In addition, 100 completely new offenses were added by the 1997 CL. There are a number of important aspects to the amendment process. The most significant is the process of supplementation that was deemed necessary to fill in the gaps of the 1979 CL and also to provide for the criminalization of new offenses. Reviewing some of these

⁸⁹ J. CHEN, *supra* note 12, at 170-71.

⁹⁰ The Standing Committee passed the Decision on Penalizing Crimes of Foreign Exchange Defrauding, Evasion and Illegal Transaction on Dec. 29, 1998; passed an amendment to the CL for offenses relating to securities and futures on Dec. 26, 1999; and issued the Decision Regarding Outlawing Cult Organizations and Punishing Cult Activities on Oct. 30, 1999.

⁹¹ Chen Xingliang, Major Changes in the Chinese Criminal (1997) (unpublished paper presented at the School of Law, City University of Hong Kong).

⁹² Listed in the 1997 CL, LAWS OF THE PRC, *supra* note 1.

⁹³ See, e.g., Company Law of the People's Republic of China (1993), LAWS OF THE PRC, *supra* note 1.

supplementary laws will assist in an analysis of this process of supplementation.

Some Standing Committee Decisions provided certain detail that was missing from the 1979 CL. The Decision on the Prohibition Against Narcotic Drugs (1990), for example, set out the various minimum quantities of opium and heroin, and the different sentence ranges to be imposed. Under Article 2, a person who smuggles, transports, or manufactures opium of not less than 1000 grams or heroin of not less than 50 grams is subject to a minimum of fifteen years imprisonment with a maximum of life imprisonment or death. An offender involved in amounts of between 200 to 1000 grams of opium and 10 to 50 grams of heroin is subject to a fixed term of seven years imprisonment. There are numerous other detailed provisions which expand upon the elements of various drug offenses and the punishments to be imposed.

Other Standing Committee Decisions enacted new offenses. Two examples of this were the Decision on Punishing Crimes Violating Company Law (1995), and the Decision on Punishing Crimes of Issuing, Making and Illegally Selling Fake Invoices of Value-added Tax (1995). The creation of these new offenses reflected the enormous changes in the Chinese economy and the major increase in crime that accompanied it.⁹⁴

These Decisions and Supplementary Provisions have now been incorporated within the 1997 CL. Appendix I of the CL specifies all legislation which has been invalidated by virtue of its incorporation in the 1997 CL and includes, for example, the Decision on Punishing Crimes Violating Company Law. Appendix II contains a list of legislation that remains in force but only insofar as it relates to the administrative provisions of those laws. Examples of this are the other two laws mentioned above: the Decision on the Prohibition Against Narcotic Drugs (1990) and the Decision on Punishing Crimes of Issuing, Making and Illegally Selling Fake Invoices of Value-added Tax (1995).

Of special interest are the Decision Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy (1982), and the Decision Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security (1983). Both were introduced as part of the "Anti-Crime Campaign" in 1983 and increased the number of offenses for which the death penalty could be applied. These increased penalties have been incorporated in the 1997 CL for those offenses which are the same or

⁹⁴ Susan Finder & Fu Hualing, *Tightening Up Chinese Courts' "Bags"—The Amended PRC Criminal Law*, 11 CHINA L. & PRACTICE 35, 37 (1997).

similar⁹⁵ to those in the 1979 CL. The 1997 CL has, therefore, not changed the number of offenses carrying the death penalty.

Notwithstanding the significant increase in the number of offense provisions in the 1997 CL, it appears that this process of supplementation is continuing. On December 29, 1998, the Standing Committee passed the Decision on Penalizing Crimes of Foreign Exchange Defrauding, Evasion and Illegal Transaction.⁹⁶ At the end of October 1999, however, the Standing Committee received proposals recommending that amending the CL was "more convenient for day-to-day implementation."⁹⁷ These suggestions were accepted on December 26, 1999, and it was reported⁹⁸ that the Standing Committee had passed an amendment to the CL for offenses relating to securities and futures:

According to the amendment, anyone who obtains inside information about securities or futures dealings is prohibited to leak the information or engage in related deals before it is officially published. Those who violate the law face imprisonment up to ten years and a fine of two to five times the illegal income thus gained.⁹⁹

b. *Continuity*

In accordance with the Standing Committee's 1988 guidelines, only those provisions of the 1979 CL which had major problems were to be revised.¹⁰⁰ Continuity, in this regard, was applicable to the twenty-two Standing Committee Decisions and Supplementary Provisions. This principle also related to the numerous Interpretations that were issued by the Supreme Court and the Supreme Procuratorate. In *A Guide to the Application of the New Criminal Law and Related Judicial Interpretations—1997*, the Supreme Court Research Office identifies those pre-1997 Interpretations which are relevant to the articles of the 1997 CL.¹⁰¹

⁹⁵ See 1997 CL, arts. 125, 151, LAWS OF THE PRC, *supra* note 1.

⁹⁶ It is of interest to note that on January 13, 1999, the State Council passed what appear to be parallel administrative regulations (Regulations on Punishing Violations of Monetary Law) becoming effective on March 1, 1999.

⁹⁷ *Law Making Set to be Streamlined*, CHINA DAILY, Oct. 26, 1999, at 2.

⁹⁸ *Annual NPC Session Passes Laws, Closes*, CHINA DAILY, Dec. 27, 1999, at 1.

⁹⁹ *Id.*

¹⁰⁰ J. CHEN, *supra* note 12, at 170.

¹⁰¹ SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, *A GUIDE TO THE APPLICATION OF THE NEW CRIMINAL LAW AND RELATED JUDICIAL INTERPRETATIONS* (1997).

An example of this is Article 17, which refers to the ages of criminal responsibility. Generally, the age of criminal responsibility is sixteen, but a person between the ages of fourteen and sixteen will be liable for crimes of intentional killing, intentional injury causing serious harm or death, rape, robbery, drug trafficking, arson, causing explosions, and poisoning. Among others, this incorporates the Supreme Court's Interpretation Regarding Laws Applicable to the Handling of Criminal Offenses Committed by Minors dated February 2, 1995.¹⁰² Some Interpretations have been incorporated into the wording of the articles, while others remain relevant for the purposes of interpretation.

c. Clarity

The third guiding principle for the revision process was clarity. The 1979 CL contained a number of vague, general provisions. Wei Luo suggests: "When the 1979 CL was formulated, the Chinese criminal legislative philosophy was 'General is more appropriate than specific.' Therefore, many provisions that related to specific offenses were very general and ambiguous in the old criminal code."¹⁰³

The drafters of the 1979 CL viewed such generality of terminology as appropriate to the constantly changing circumstances on the mainland. This provided justification for the inclusion of the analogy provisions in Article 79. The 1979 CL also contained three offenses—speculation, hooliganism and dereliction of duty,¹⁰⁴ which were subject to very broad interpretation. These were known in China as the "three bags" or "pocket" offenses. In commenting on speculation under Article 118 of the 1979 CL, Finder and Hualing observed: "It is a 'bag' which has been as big as the courts want it to be. It includes false advertising, publishing pornographic materials, trading in endangered species, manipulating prices, violating State monopolies and ticket scalping."¹⁰⁵

The 1997 CL abolished this single offense and created multiple individual offenses to cover all such activities. The details of this approach are discussed below in Part III.B.3, Amendments to the Criminal Law—Specific Provisions.

¹⁰² For another example, see the Supreme Procuratorate Reply Regarding Whether a Person Between the Age of Fourteen and Sixteen Should Be Criminally Liable for Destroying Means of Transportation, Traffic Facilities, Electricity and Gas Facilities and Inflammable and Explosive Facilities (Apr. 8, 1995).

¹⁰³ LUO, *supra* note 2, at 11.

¹⁰⁴ 1979 CL, arts. 117-19, 160, and ch. 8, LAWS OF THE PRC, *supra* note 1.

¹⁰⁵ Finder & Fu, *supra* note 94, at 37.

2. *Amendments to the Criminal Law—General Provisions*

Apart from the massive increase in the number of offense provisions, the most important changes in the 1997 CL concern the general principles of criminal liability. The amendments are considered under four headings: (a) depoliticization, (b) Article 3 and *nullem crimen sine lege*, (c) “equality before the law,” and (d) Article 5 and “punishment must fit the crime.”

a. *Depoliticization*

One of the most significant changes in the 1997 CL is the abolition of the crimes of counterrevolution and their replacement by crimes endangering national security. This, however, is just one aspect of the depoliticization of the CL. Both Articles 1 and 2 of the 1997 CL have been amended so as to remove certain political terms that appeared in the 1979 CL. In Article 1, the references to Marxism-Leninism-Mao Zedong Thought, and the people’s democratic dictatorship led by the proletariat and based on the worker-peasant alliance, have been removed. Article 1 now states that the purpose of the 1997 CL is to punish crimes and protect people according to the Constitution, “in light of the concrete experiences and actual circumstances in China’s fight against crime.” In Article 2, it is no longer an aim of the CL to “fight against all counterrevolutionary . . . acts in order to defend the system of the dictatorship of the proletariat.” These changes have also been reflected in amendments to the Constitution.

The language of Articles 1 and 2 of the 1979 CL reflected Mao’s class theory of criminal law and the dictatorship of the proletariat. The criminal law served as the primary tool for this dictatorship “in accordance with the policy of combining punishment with leniency.” This was further expanded through Mao’s theory of antagonistic and non-antagonistic contradictions, whereby those who were guilty of antagonistic contradictions, such as counterrevolution and crimes of serious violence, were class enemies and should be punished very severely. Non-antagonistic contradictions were defined as conflicts between citizens that did not threaten the dictatorship and the socialist revolution. The harm caused could, therefore, be construed as less serious or minor, and offenders punished accordingly. As a result, a crime such as intentional killing (Article 132) was punishable by a relatively light sentence of between three and ten years imprisonment instead of life imprisonment or death. The distinction between antagonistic and non-antagonistic contradictions was also applied to pleading. Those who pleaded

not guilty were accordingly antagonistic. Counterrevolution reflected the classic example of an antagonistic contradiction and the label of class enemy.

With regard to the abolition of the offenses of “counterrevolution,” it was the use of this term in the 1979 CL that distinguished the Chinese criminal law from other socialist criminal codes. Since 1979, these offenses were also a major source of concern for many both in and outside China. For those outside China, they represented the basis for much of China’s abuse of human rights, particularly when combined with reform and re-education through labor sanctions. Within China, those involved in reforming the criminal law also sought the abolition of these offenses due to their incompatibility with China’s economic development and open-door policy.¹⁰⁶ Almost from the date of promulgation of the 1979 CL, proposals were put forward for the abolition of this term. While China has tended to show considerable resistance to Western criticism, calls from within China to abolish this term were based on its incompatibility with internationally acceptable principles. Proposals for the abolition of the term date back to 1983 and the drafts of the CL tabled in 1988 had removed such offenses, replacing them with “crimes endangering national security.” However, the events in 1989 put on hold the introduction of these changes. In light of the events in 1989 and China’s reaction to them, abolishing crimes of counterrevolution was seen as contrary to the maintenance of political and social stability. In the words of Wang Hanbin in 1997, it was inappropriate to introduce such changes at such a time.¹⁰⁷ According to Hanbin, however, the change was appropriate in 1997, in line with the development of China’s politics, economics, and social circumstances. In March 1999, the term “counterrevolutionary activities” was also removed from Article 28 of the Constitution and replaced by “crimes endangering national security.”¹⁰⁸

The primary justification for the amendment was that the term “counterrevolution” was political. Zhao and Bao saw the crimes of counterrevolution as political crimes and, as such, they were contrary to international standards. They argued that the retention of such offenses caused problems for the extradition of criminals to China because countries would not do so where the offense is counterrevolution. They further noted that such crimes were inconsistent with the “one country two systems” principle as it would be impossible to reconcile activities that were lawful in

¹⁰⁶ Lin & Keith, *supra* note 3, at 93-96.

¹⁰⁷ Hanbin, *supra* note 77.

¹⁰⁸ *Six Amendments to the Chinese Constitution*, PEOPLE’S DAILY ONLINE, (Mar. 17, 1999), at http://english.peopledaily.com.cn/1999/enc_990317001002_TopNews.htm.

Hong Kong and Macau, but which might be considered counterrevolutionary under the 1979 CL.¹⁰⁹

The actual changes, however, are superficial. Many of the crimes of counterrevolution have simply been reclassified as crimes endangering national security.¹¹⁰ Article 103, for example, makes it an offense to “organize, plot, or act to split the country or undermine national unification,” while Article 105 makes it an offense to “organize plot or act to subvert the political power of the State or overthrow the socialist system.” A new offense, Article 106, has been added that also makes it a crime to collude with a foreign institution, organization, or individual to commit crimes under Articles 103 and 105. In his address to the NPC in March 1997, Hanbin stated that the purpose of this article was to deal with individuals who colluded with foreign elements for the purposes of “westernizing” or “de-organizing” the socialist system.¹¹¹ The danger of westernization, he said, is an important State security concern for China. In fact, the involvement of foreign elements is recognized as an aggravating factor in a number of offenses.¹¹² With regard to political dissent in China, there obviously exists significant scope for prosecution. Successful prosecution could even be easier under the new provisions. The requirement of counterrevolutionary purpose has simply been replaced by endangerment of national security, and this term can be interpreted very broadly.

b. Article 3 and “nulle crimen sine lege”

As part of the rhetoric and promotion of the 1997 CL, Article 3 and the abolition of the analogy provisions in Article 79 of the 1979 CL are said to incorporate the principles of *nulle crimen sine lege* (“no crime without law”) and *nulla poena sine lege* (“no punishment without law”).¹¹³ Article 3 states that only acts which are clearly defined as crimes by the law shall carry criminal liability. This is in contrast to Article 79 of the 1979 CL, which allowed the prosecution of behavior that was not specifically defined as an offense in the CL, to be prosecuted under “whichever article of the Specific Provisions of this Law that covers the most closely analogous

¹⁰⁹ Zhao & Bao, *supra* note 87.

¹¹⁰ In fact, except for some minor changes, virtually all the previous offenses under the heading Counterrevolutionary Crimes have been retained as Crimes of Endangering National Security. An important exception is Article 98 of the 1979 CL, which made it an offense to organize or lead a counterrevolutionary group. See LAWS OF THE PRC, *supra* note 1.

¹¹¹ Hanbin, *supra* note 77.

¹¹² See 1997 CL, art. 107, LAWS OF THE PRC, *supra* note 1.

¹¹³ LUO, *supra* note 2, at 34.

crime.” At the time, such provisions were viewed as necessary due to the somewhat general approach taken in drafting of the 1979 CL. In 1982, Chin Kim noted that the principle of *nullem crimen sine lege* was not strictly implemented in the 1979 CL.¹¹⁴ At the time of the deliberations on the 1979 CL, support existed for a total adoption of this principle, but this was opposed on the basis of the need to be flexible in light of China’s fast-changing economic and social conditions. Such policy correlated with the need to ensure political and social control. With regard to the interpretation of counterrevolution, for example, the meaning of this term could differ depending on the political circumstances of the time. The compromise reached was the adoption of Article 79 with the requirement that the Supreme Court approve the use of this article. It was this very arbitrary nature of the 1979 CL—especially where it concerned counterrevolutionary crimes—that resulted in the most criticism from the West.

Limited use,¹¹⁵ however, was made of these provisions with most cases involving crimes of disruption of marriage and the family.¹¹⁶ Even though it was not often used, many Chinese scholars saw Article 79 as clearly contrary to the new spirit of law reform and the development of a rule of law. Hungdah Chiu, for example, “pointed out that the use of analogy in Article 79 of the 1979 CL undermined the basic spirit of the rule of law and subsequently conflicted with the 1982 state constitution’s commitment to the rule of law.”¹¹⁷

The inclusion of Article 3 and the rejection of analogy through the dropping of Article 79 appear, at least, to enshrine *nullem crimen sine lege* and *nulla poena sine lege*. The greatly expanded provisions on economic crime, as well as many other crimes, were also contrary to the principle of crime by analogy. What was required was not flexibility and generality, but certainty and predictability. The problem of allowing the prosecution of crime by analogy was also compounded by the existence of unqualified legal personnel.¹¹⁸ As a result, it was necessary to move towards even greater legalism. For those involved in drafting the 1997 CL, it was important to separate law from state policy. Flexibility and analogy supported a legal system based on a policy of rule *by* law, which reflected the existence of the law within the workings of the State and accordingly the Party policy of the

¹¹⁴ KIM, *supra* note 21, at 13-14.

¹¹⁵ Between 1980 and 1989, only sixty cases were submitted to the Supreme Court for approval.

Bingzhi & Suixian, *supra* note 87.

¹¹⁶ See *Chen Caigen v. Chen Caisheng*, 1 China L. Rep. 500 (1991).

¹¹⁷ Lin & Keith, *supra* note 3, at 87-88.

¹¹⁸ Bingzhi & Suixian, *supra* note 87.

time. This was contrary to a rule *of* law, which emphasized the supremacy of law and that everyone, including the Party and the State, was required to obey the law.¹¹⁹

The debate concerning rule *by* law versus rule *of* law, which started in the 1980s, reached its peak in the run up to the enactment of the 1996 CPL, the 1997 CL, and the CPC Congress in September 1997.¹²⁰ At the end of 1995 and the beginning of 1996, a series of lectures on the legal system was presented to the Central Committee of the Party.¹²¹ In his lecture in February 1996, Wang Jianfu set out three points for the adoption of the rule of law in China. These were the supremacy of law, constitutional validity, and equality.¹²² Jiang Zemin formally endorsed these points in his address to the Party in September 1997 with his pronouncement of “running the country according to law and establishing a socialist rule of law country.”¹²³ In terms of theoretical discourse, the adoption of the rule of law has accordingly been elevated to the same level as the development of a socialist market economy.¹²⁴ This status was confirmed in the Amendments to the Constitution of March 1999. These included the addition of Deng Xiaoping Theory to that of Marxism-Leninism-Mao Zedong Thought and the addition of a new sentence in Article 5. This new sentence states, “The People’s Republic of China practices ruling the country by law and constructs a socialist rule of law country.”

As noted earlier, Lin and Keith see the 1997 CL and the 1996 CPL as part of “an existing trend in the rationalization of legal development.”¹²⁵ It is probably still too early to draw any practical conclusions about the correctness of this observation, but the recent crackdown on the Falun Gong creates many doubts about the extent of any real change. The adoption of *nullem crimen sine lege* and *nulla poena sine lege* must also be assessed in light of the crime and administrative penalty law division. The arbitrary and artificial distinction between these divisions based on individual liability and punishment contradicts these two principles. This is particularly true when it is noted that, under the Security Administration Punishment Regulations (“SAPR”)¹²⁶ of 1986,¹²⁷ detention in custody for a period of up to four years

¹¹⁹ *Id.*

¹²⁰ Lin & Keith, *supra* note 3, at 83.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 84.

¹²⁵ *Id.* at 85.

¹²⁶ These regulations are also entitled Regulations of the PRC on Administrative Penalties for Public Security.

¹²⁷ The SAPR was amended in 1994.

is not deemed to be a criminal penalty. The maintenance of the crime/non-crime dichotomy has also led to the retention of the use of re-education through labor, and while this was discussed by the Criminal Law Drafting Committee in 1996, no change was made.¹²⁸

c. "Equality before the law"

Although this principle is contained in Article 33 of the Constitution and in Article 4 of the 1979 CPL, it did not appear in the 1979 CL; therefore, its inclusion in Article 4 of the 1997 CL is somewhat belated. As Chen notes, the class nature of the 1979 CL emphasized the need to distinguish between those who were class enemies, such as counterrevolutionaries, and those who committed less serious offenses.¹²⁹ Equality was contrary to such an approach. Article 4, however, is a clear statement of the principle that no one is above the law. This accords with Jiang's policy statements in 1997: "To safeguard the dignity of the Constitution and other laws, we must see to it that all people are equal before the law and no individuals or organizations shall have the privilege to overstep it."¹³⁰

Since passing the 1997 CL, China has, on a number of occasions, attempted to demonstrate its commitment to this principle through the prosecution of government and party officials. On March 8, 2000, for example, the former deputy governor of Jiangxi Province was executed for a series of bribery offenses committed between 1995 and 1999. He was the highest ranking Party official to date to receive the death penalty. In commenting on his execution, the *People's Daily* stated that "in socialist China, there is no special citizen in the eyes of the law," and further noted that "the severe punishment of Hu Changqing . . . serves as a caution to the Party's leading members, a warning to those who have still failed to correct their wrongdoing."¹³¹

Like *nullem crimen sine lege* and *nulla poena sine lege* though, the principle of equality is questionable in light of the distinction between crime and non-crime. Even within the 1997 CL, there appears to be inequality. Corne points out that although Article 383 states that officials charged with corruption and embezzlement where the amount is between 5000 and 10,000

¹²⁸ J. CHEN, *supra* note 12, at 192-93.

¹²⁹ *Id.* at 174-75 (again reflecting the distinction between two types of contradiction: those between the enemies of the state and those among the people).

¹³⁰ Jiang Zemin, *supra* note 11, at 24.

¹³¹ *Execution Means CPC Is Serious*, CHINA DAILY, Mar. 10, 2000.

RMB (\$600 and \$1200 U.S.)¹³² may receive a lesser punishment—or even no punishment—where they return the money: “No such option is given to those that engage in ‘blue-collar crimes such as fraud or robbery. The *Criminal Law* thus in effect favours ‘white collar’ over ‘blue-collar crime.’”¹³³

There is also considerable scope for discretion, and therefore inequality, in the CL when considering the distinction between the seriousness of the circumstances. The 1997 CL and judicial interpretations have provided penalty structures for many offenses, but for other crimes the distinction between serious and less serious circumstances is extremely vague. Under Article 111, for example, anyone who steals, obtains or provides state secrets to foreign organizations or persons shall be sentenced to imprisonment for a term of between five and ten years. Yet, “[i]f the circumstances are especially serious,” the term will be between ten years and life; and “[i]f the circumstances are relatively minor,” the sentence can be for a term of no more than five years, criminal detention, public surveillance or deprivation of political rights. Equality must also be considered in light of Article 37, which states that if the circumstances of a crime are minor, then an offender may be exempt from punishment, although he may still face an administrative sanction. These provisions were contained in the 1979 CL, and it is at least arguable that they continue to reflect a class distinction in the CL.¹³⁴

d. Article 5 and “punishment must fit the crime”

Article 5, another new provision, appears to incorporate the principle of “just desserts.” In conjunction with Article 3, it is also seen to incorporate the principle of *nulla poena sine lege* (“no punishment without law”). Wei Lou views this as a positive change, noting: “This principle is conducive to avoiding inappropriate penalties, using different criteria, which result in imposing light punishment for serious crimes or severe punishment for minor crimes.”¹³⁵

This claim is seriously flawed in light of the crime/non-crime dichotomy. The decision to prosecute someone for stealing under the CL or

¹³² All currency conversions are approximate, based on the November 2, 2001 conversion rate of 1 RMB = 0.12077 U.S. CNNmoney, *Currency Converter Results* (Nov. 2, 2001), at <http://qs.money.cnn.com/tq/curconv/>.

¹³³ Peter Corne, *Legal System Reforms Promise Substantive—But Limited—Improvement*, CHINA L. & PRACTICE 29, 31 (June 1997).

¹³⁴ 1979 CL, art. 32, LAWS OF THE PRC, *supra* note 1.

¹³⁵ LUO, *supra* note 2, at 9.

to assess an administrative penalty, for example, is simply determined by the value of the property stolen. When considering the distinction between crime and administrative penalties in cases of public order, the scope for discretion is considerable. The principle must also be considered with regard to the continued reliance on severe punishment and the use of the death penalty. The 1997 CL incorporated many of the Decisions and Supplementary Provisions passed by the Standing Committee between 1980 and 1997.¹³⁶ In doing so it adopted all the increased penalty provisions; in particular, those contained in the Decision Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security (1982), and the Decision Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security (1983). The inclusion of these penalty provisions in the 1997 CL appears to be an attempt to legitimize these retroactive laws and their class aspect. Commenting on this and the replacement of counterrevolutionary offenses by crimes endangering national security, Chen notes: "Essentially, however, the revision is a matter of renaming, restructuring and supplementing; the majority of the previous provisions on 'counterrevolutionary crimes' have been retained."¹³⁷

While the phrase "combining punishment with leniency" has been removed from Article 1 of the CL, there appears to be a continuation of policy rather than any real change. This conclusion is supported by the approach to confessions whereby those who confess can be punished more leniently, even to the extent of exemption under Article 37, while those who plead not guilty receive harsher punishment. The distinction in degrees of seriousness supports this view. A factor in the assessment of the seriousness of the circumstances is, accordingly, whether or not the accused confesses. This issue should be considered in light of Article 63, which restates Article 59 of the 1979 CL. Under Article 63, an offender can receive a mitigated penalty below the minimum and, even where mitigation is not warranted, may still be given a punishment below the minimum "in light of the special circumstances of the case." Keith cites a number of examples of the use of Article 59 in the trials, in 1990 to 1991, of the pro-democracy movement leaders.¹³⁸ Wang Dan, for example, was convicted under Article 98 of the 1979 CL, but received a sentence of only four years instead of the five-year

¹³⁶ It did not incorporate all the provisions; as noted in Appendix II of the 1997 CL, it adopted the provisions of those laws listed with the exception of the provisions relating to administrative sanctions. 1997 CL, app. II, LAWS OF THE PRC, *supra* note 1.

¹³⁷ J. CHEN, *supra* note 12, at 186.

¹³⁸ RONALD KEITH, CHINA'S STRUGGLE FOR THE RULE OF LAW 170-71 (1994).

minimum. This, according to the authorities, was because Wang had assisted the State by pointing out other offenders.¹³⁹

In commenting on Tiananmen, Cohen noted that the period immediately following demonstrated an attempt by China to "contain the fallout from their actions by preserving the role of law in promoting economic growth, international business co-operation and social stability."¹⁴⁰ According to Lin and Keith, this has subsequently resulted in a convergence of economic reform and criminal law reform.¹⁴¹ The other aspect of this convergence, however, is the meshing of economic reform with strict social control based on severe punishment. This can be seen when considering the priority given to reform in the areas of economic crime and corruption, along with the stipulation of severe penalties including death, for such offenses. In fact, it should be noted that the promulgation of the 1997 CL coincided with what could be called a renewed anti-crime campaign of striking hard at those who committed serious crimes. In his speech to the NPC in March 1997, Wang Hanbin stated that it was still a time of public disorder and that many serious economic crimes were being committed. A reduction in the number of death sentences was, therefore, unwarranted.¹⁴² In March 1998, Ren Jianxin, President of the Supreme Court, pledged to "pummel gang crime and corruption which have increasingly unsettled society in the past five years."¹⁴³

3. *Amendments to the Criminal Law—Specific Provisions*

Part 2 of the 1997 CL sets out the specific offense provisions. The consolidation process increased the number of articles from 102 in the 1979 CL to 349 in the 1997 CL. With the exception of the abolished counterrevolutionary crimes, all previous offense articles have been retained, subject to expansion and amendment, and approximately 200 new articles added. As with the 1979 CL, articles in the 1997 CL often include several offenses and, accordingly, there are many more than 349 offenses. The main changes can be summarized as follows:

¹³⁹ For a detailed discussion of this and the legal impact of the Tiananmen Square incident, see J.A. Cohen, *Tiananmen and the Rule of Law*, in *THE BROKEN MIRROR: CHINA AFTER TIANANMEN* 323 (G. Hicks ed., 1990).

¹⁴⁰ *Id.*

¹⁴¹ Lin & Keith, *supra* note 3, at 78.

¹⁴² LUO, *supra* note 2, at 12-13.

¹⁴³ *China Courts To Clamp Down on Crime*, CHINA DAILY, Mar. 11, 1998.

Table: Summary of Amendments to Part 2—Specific Provisions

1979 CL	1997 CL
Chapter I. Crimes of Counterrevolution	Chapter I. Crimes Endangering National Security—Title changed but provisions mostly retained
Chapter II. Crimes Endangering Public Security	Chapter. II Crimes Endangering Public Security—Title retained but number of articles increased from 11 to 26
Chapter III. Crimes of Undermining the Socialist Economic Order	Chapter III. Crimes of Undermining the Socialist Market Economic Order—Title changed and number of articles increased from 15 to 91
Chapter IV. Crimes of Infringing Upon the Rights of the Person and the Democratic Rights of Citizens	Chapter IV. Crimes of Infringing Upon the Rights of the Person and the Democratic Rights of Citizens—Title retained but number of articles increased from 19 to 31
Chapter V. Crimes of Property Violation	Chapter V. Crimes of Property Violation—Title retained but number of articles increased from 7 to 14
Chapter VI. Crimes of Obstructing the Administration of Public Order	Chapter VI Crimes of Disrupting the Order of Social Administration—Title changed and number of articles increased from 22 to 90

Chapter VII. Crimes of Disrupting Marriage and the Family	Provisions incorporated in Chapter IV Crimes of Infringing Upon the Rights of the Person and the Democratic Rights of Citizens Chapter VII. Crimes of Endangering the Interests of National Defense— This is a new chapter comprising 14 articles
Chapter VIII. Crimes of Dereliction of Duty	This has been divided into Chapters VIII and IX, and the number of articles significantly increased Chapter VII. Crimes of Embezzlement and Bribery comprises 15 articles Chapter IX. Crimes of Dereliction of Duty comprises 23 articles Chapter X. Crimes of Violating Duties by Military Servicemen—This is a new chapter and comprises 32 articles

a. *Chapter II: Crimes endangering public security*¹⁴⁴

This chapter can be divided into five offense groups. The first group includes crimes of sabotage against the public infrastructure and commercial property such as factories and mines, public property such as rivers and forests, and transportation facilities.¹⁴⁵ The second group includes offenses relating to terrorism and hijacking.¹⁴⁶ The third group of offenses are

¹⁴⁴ This discussion begins with Chapter II as the offenses in Chapter I, Crimes Endangering National Security, have already been discussed *supra* Part III.B.2.a.

¹⁴⁵ See 1997 CL, arts. 114-19, LAWS OF THE PRC, *supra* note 1.

¹⁴⁶ *Id.* arts. 120-23.

specific to the sabotage of broadcasting and telecommunication facilities.¹⁴⁷ Next are firearm and gun control offenses.¹⁴⁸ Finally, serious breaches of health and safety regulations are grouped together.¹⁴⁹

b. Chapter III: Crimes of undermining the socialist market economic order

The inclusion of the term “market” is the first significant change here, and this reflects Deng’s policy of the need for China to move from a planned to a market economy. The significant changes to China’s economic structure and corresponding crime have resulted in this chapter being the longest in the 1997 CL. It has been noted, “The length of this Part reflects the enormous economic and political changes in China that have resulted in an increase (and increase in variety) of business-crime and the corresponding concern of the political leadership with such activity.”¹⁵⁰

Chapter III is divided into eight sections comprising ninety-one articles. It also subsumes the 1995 Decision of the Standing Committee on Penalties for Crimes Violating Company Law and includes offenses of fraud on shareholders¹⁵¹ and false reporting of registered capital.¹⁵² Other offenses relate to the financial market, such as insider dealing¹⁵³ and market manipulation.¹⁵⁴ Apart from these offenses, there are provisions for producing and selling counterfeit goods (Section 1), smuggling (Section 2), counterfeiting currency (Section 4), financial fraud (Section 5), tax offenses (Section 6), and intellectual property offenses (Section 7).

The amendments in 1997 also sought to abolish or amend the so-called “three bag offenses.” The first of these was Chapter III, Article 118 of the 1979 CL. This article made it an offense to smuggle or speculate as a regular business. While smuggling can be understood as being criminal,¹⁵⁵ speculation was an extremely vague and general term. The matter became even more serious when, in 1982, the offense became punishable by death in cases of especially huge profits. Such offenses are now mainly covered in

¹⁴⁷ *Id.* art. 124.

¹⁴⁸ *Id.* arts. 125-30.

¹⁴⁹ *Id.* arts. 131-39.

¹⁵⁰ Finder & Fu, *supra* note 94, at 36-37.

¹⁵¹ See 1997 CL, art. 161, LAWS OF THE PRC, *supra* note 1.

¹⁵² *Id.* art. 158.

¹⁵³ *Id.* art. 180.

¹⁵⁴ *Id.* art. 182.

¹⁵⁵ It is important to note, however, that smuggling could also be very broadly applied as the Article made no reference to what was smuggled.

Section 8, Crimes of Disrupting Market Order, which contains ten articles.¹⁵⁶ This does not mean that there are no longer any offenses which are capable of being given extremely broad interpretations. Article 225(3), for example, states, extremely broadly, that it is an offense for anyone to seriously disturb market order.

The provisions on smuggling have also been expanded, the relevant crimes being contained in Section 2, Articles 151 through 157, and incorporate the Standing Committee's Supplementary Provisions Concerning the Punishment of the Crimes of Smuggling (1988).

c. Chapter IV: Crimes of infringing upon the rights of the person and the democratic rights of citizens

The 1997 amendments made only one significant change to this part of the CL, moving offenses relating to marriage and family to this chapter. Apart from this and some new offenses, this chapter continues to set out the law relevant to offenses against the person, such as homicide, assault, rape, sexual molestation, kidnapping, and abduction. The last of this group of offenses, abduction, reflects a particular social problem in China that has resulted in the trafficking in women and children for a variety of purposes, including child labor and prostitution.¹⁵⁷ The chapter, however, still contains the offense of public insult and defamation.¹⁵⁸ Three important new offenses are Article 249, inciting racial hatred; Article 250, the publication of racially discriminatory or humiliating material; and Article 251, the unlawful deprivation of religious freedom.

d. Chapter V: Crimes of property violation

This chapter sets out the provisions for the main property offenses such as theft, burglary, robbery, fraud, extortion, and blackmail. A number of new offenses have been added. Article 265, for example, criminalizes the counterfeiting of another's telecommunication codes. Articles 271 and 272 deal with corruption in the private sector, while Article 273 covers the misappropriation of funds or materials for disaster relief.

¹⁵⁶ These Articles incorporate the Standing Committee Decision on the Punishment of Crimes of Disrupting Financial Order (1995). See LAWS OF THE PRC, *supra* note 1.

¹⁵⁷ See 1997 CL, arts. 240-41, LAWS OF THE PRC, *supra* note 1.

¹⁵⁸ *Id.* art. 246

e. Chapter VI: Crimes of disrupting the order of social administration

This chapter has been significantly enlarged. It continues to cover offenses relating to public order, obstruction of justice, border control, cultural and historical relics, dangerous drugs, and prostitution, but has considerably expanded the offense provisions in each category. This again reflects the Government's concern over the increase in such crimes in China, in particular drug trafficking and prostitution. The other significant change is the inclusion of offenses relating to public health (Section 5), and offenses involving environmental pollution (Section 6).

The 1979 version of this chapter also contained the second of the "bag" offenses. This was the offense of hooliganism under Article 160. This article stated that it was an offense "[w]here an assembled crowd engages in affrays, creates disturbances, humiliates women or engages in other hooligan activities that undermine public order." Each person so involved faced a maximum penalty of seven years imprisonment. The amended provisions have abolished this article and the term "hooligan." Acts of hooliganism are now specifically covered in Article 237 (indecent assault), Article 292 (unlawful assembly for fighting), and Article 293 (incitement to fight).

f. Chapter VII: Crimes of endangering the interests of national defense

The title of this section is misleading and could be confused with Chapter I, Crimes Endangering National Security. The chapter contains a number of specific offenses that relate to damaging China's military services. This could occur by means such as obstruction (Article 368), sabotage (Article 369), demonstrating in a restricted military zone (Article 371), or supplying substandard or defective weapons or installations (Article 370). Other offenses include the impersonation of a military serviceman, counterfeiting military documents, and unlawfully making uniforms.¹⁵⁹ There are also a number of offenses relating to desertion or refusal to obey the draft.¹⁶⁰ Finally, there are offenses relating to the provision of false information, the damaging of troop morale, and the failure to provide supplies and requisitions in times of war.¹⁶¹

¹⁵⁹ *Id.* arts. 372, 375.

¹⁶⁰ *Id.* arts. 373, 376, 379.

¹⁶¹ *Id.* arts. 377, 378, 380, 381.

g. *Chapter VIII: Crimes of embezzlement and bribery*

Chapter VIII of the 1979 CL has been divided into two chapters and the number of articles has been increased from eight to thirty-eight. The new Chapter VIII is also a clear reflection of the Government's concern for the seriousness and frequency of the crimes of embezzlement, bribery, and corruption committed by State personnel that have plagued the PRC for many years. From a practical perspective, Chapter VIII subsumes two earlier laws, the Standing Committee Decision Regarding the Severe Punishment of Criminals Who Seriously Undermine the Economy (1982) and the Standing Committee Supplementary Rules on the Severe Punishment of Corruption and Bribery Offenses (1988). The effect of this has been to retain the death penalty as a sentencing option in the most serious of cases. Article 383 sets a scale of penalty according to the monetary amount of the bribe. This includes: (1) ten years to life if the amount exceeds 100,000 RMB (\$12,000 U.S.), or death if the circumstances are very serious; (2) five to ten years for amounts between 50,000 and 100,000 RMB (\$6000 and 12,000 U.S.), but may be life if the circumstances are serious; (3) one to seven years for amounts between 5000 and 50,000 RMB (\$600 and 6000 U.S.), but seven to ten years if the circumstances are serious, but if the amount is between 5000 and 10,000 RMB (\$600 and 1200 U.S.), the money is returned, and the offender shows true repentance, then he may be given a mitigated punishment or even exempted from criminal punishment and subject only to an administrative penalty; (4) up to two years if the amount is less than 5000 RMB (\$600 U.S.) and the circumstances are relatively serious, but only an administrative sanction if the circumstances are minor.

The chapter also includes a variety of provisions relating to corruption by State personnel, while Articles 390, 391, 392, and 393 create offenses relating to those who bribe State personnel.

h. *Chapter IX: Crimes of dereliction of duty*

This chapter consists of twenty-three articles and has considerably expanded the offence provisions in the 1979 CL. The previous Chapter VIII set out five general offenses relevant to violations by "state functionaries"¹⁶² and "judicial functionaries."¹⁶³ These offenses, expanded in the 1997 CL,

¹⁶² *Id.* arts. 186, 187.

¹⁶³ *Id.* arts. 188-90.

apply not only to state functionaries and judicial officers, but also to police, tax officers, forestry officers, environmental protection officers, public health inspectors, customs officers, immigration officers, goods and produce inspectors and animal inspectors.¹⁶⁴ Specific government officers can therefore be charged under specific articles.¹⁶⁵

The revisions in this chapter have also abolished the third of the “bag” or “pocket” offenses. Article 187 of the 1979 CL stated that: “Any state functionary who, because of neglect of duty, causes public property or the interests of the state and the people to suffer heavy losses shall be sentenced to fixed term imprisonment of not more than five years.” Chapter IX now contains twenty-three articles that specify a variety of actions for which State functionaries and judicial officers can be prosecuted. In some cases the offense is quite specific. Article 400, for example, states that a judicial officer is guilty of an offense if he releases a prisoner without authorization. Similarly, Article 404 makes it an offense for a tax official to fail to collect or undercollect taxes for personal gain. Article 187 of the 1979 CL, however, is retained in an expanded form in Article 397 of the 1997 CL, which states that it is an offense for any functionary of a State organ to “abuse his power or neglect his duty, thus causing heavy losses to public money or property or the interests of the State and the people.”

i. Chapter X: Crimes of violating duties by military servicemen

This new chapter comprises thirty-two articles covering a variety of offenses relating to military service and wartime. According to Article 450, the chapter is applicable to “military officers, civilian staff, soldiers in active service and cadets in the People’s Liberation Army, police officers, civilian staff and soldiers in active service and cadets with military status of the Chinese People’s Armed Police and reservists and other persons performing military tasks.” Specific offenses include disobeying orders, leaving one’s post, espionage, defection, weapons offenses, unlawful release of a prisoner of war, and mistreatment of a prisoner of war.¹⁶⁶ This chapter is distinguished from Chapter VII, Crimes of Endangering the Interests of National Defense, by the fact that only those groups or individuals specifically identified in Article 450 may be prosecuted under Chapter X.

¹⁶⁴ *Id.* arts. 404-19.

¹⁶⁵ *Id.* art. 407 (relating to Forestry Department officers).

¹⁶⁶ *Id.* arts. 421-30.

4. *General Comments on the New Offense Provisions*

An overview of the new offense provisions emphasizes the priority given to economic crime and corruption. This is not surprising given that of the twenty-two Decisions and Supplementary Provisions passed by the Standing Committee before 1996, eleven were directly concerned with such crimes.¹⁶⁷

Such legislation was also prompted by the comprehensive developments in economic legislation and supplementary regulation and the conspicuous failure of the CL to keep pace with such reform.¹⁶⁸ Even with all the supplementary legislation, the law was still piecemeal and lacking in certainty. Legal protection was necessary for the newly emerging rights and interests of individual citizens as a result of the new socialist market economy. The need to stamp out endemic corruption was paramount. Economic development could only proceed if legal outcomes were predictable. The 1997 CL accordingly adopted a far more technical and comprehensive approach to the law compared to the vagueness and flexibility of not just the 1979 CL, but also much of the supplementary legislation that followed.

This trend has continued since the enactment of the 1997 CL with the 1998 Decision and 1999 Amendments also concentrating on economic crime.¹⁶⁹ Judicial interpretations have also focused on this aspect of the CL.

¹⁶⁷ These included the Supplementary Provision of the Standing Committee of the National People's Congress Concerning the Punishment of the Crimes of Smuggling (1988), the Supplementary Provisions of the Standing Committee of the National People's Congress Concerning the Punishment of the Crimes of Embezzlement and Bribery (1998), the Supplementary Provisions of the Standing Committee of the National People's Congress of the People's Republic of China Regarding the Imposition of Punishment in Respect of Offenses of Tax Evasion and Refusal to Pay Tax (1992), the Supplementary Provisions of the Standing Committee of the National People's Congress regarding Punishment of Crimes of Counterfeiting Registered Trademarks (1993), the Decision of the Standing Committee of the National People's Congress on Punishing Crimes of Falsely Making Out, Forging or Illegally Selling Special Invoices for Value-Added Tax (1995), the Decision of the Standing Committee of the National People's Congress on Punishment of Crimes of Production and Sale of Fake or Substandard Commodities (1993), the Decision on the Infringement of Copyright (1994), the Decision of the Standing Committee of the National People's Congress on Punishment of Crimes of Disrupting Financial Order (1995) and the Decision of Standing Committee of the National People's Congress of Falsely Making Out, Forging or Illegally Selling Special Invoices for Value-added Tax (1995). See LAWS OF THE PRC, *supra* note 1.

¹⁶⁸ It should also be pointed out that amendments to the Constitution in 1988 and 1993 emphasised the move to a market economy. In 1988, Article 11 of the Constitution was amended to include permission for the development of the private sector. In 1993, the wording of Article 15 was changed so as to read, "The state practices socialist market economy." See LAWS OF THE PRC, *supra* note 1.

¹⁶⁹ See Decision of Standing Committee of National People's Congress on Punishing Crimes of Fraudulently Purchasing, Evading and Illegally Trading in Foreign Exchange (adopted 6th Meeting of the Ninth National People's Congress, Dec. 29, 1998), and the Amendments on Offenses Relating to Securities and Futures (1999), LAWS OF THE PRC, *supra* note 1.

Two examples from 1999 include the Interpretation of Several Issues Concerning the Application of the Law in Handling Illegal Publication Cases, and the Interpretation on Questions Relating to the Trial of Cases Arising from the Resale of Train Tickets for a Profit. There were many interpretations that followed the CL soon after its promulgation, but at this stage it would appear that the CL is relatively comprehensive and stable. The amendment process, however, is still under the control of the Standing Committee, and as yet there has been no consideration of the legality of such amendments in relation to the provisions of the Constitution, particularly Article 67(3).

C. *The Role of the Supreme Court and Supreme Procuratorate*

Since 1979, the CL has been supplemented by numerous interpretations and directives issued by the Supreme Court and the Supreme Procuratorate, either separately or jointly.¹⁷⁰ The Standing Committee was empowered to directly interpret the CL¹⁷¹ but has not done so, confining itself to enacting Decisions and Supplementary Provisions in order to provide interpretations of the CL. The State Council was also empowered to interpret the many administrative laws that came within its area of control.

As stated, many of these interpretations have actually been included in the new provisions of the 1997 CL. In October 1999, however, draft legislation ("Legislative Law") was published which proposed significant changes to the interpretation of law in China. The draft proposed that only the Standing Committee and the Supreme Court be empowered to interpret the law. On March 15, 2000, the Ninth National People's Congress adopted the Legislation Law of the People's Republic of China. The power to interpret national law vests in the Standing Committee.¹⁷² Article 43 states that the Supreme Court, Supreme Procuratorate, State Council and other specified bodies may make requests for legislative interpretation to the Standing Committee.

This new law is very significant. In the past the Supreme Court issued interpretations on its own, but more often it did so jointly with the Supreme

¹⁷⁰ This was provided for under the four basic rules of the Resolution of the Standing Committee of National People's Congress Providing an Improved Interpretation of the Law (1981). See LAWS OF THE PRC, *supra* note 1, although this Resolution must now be read in light of the Legislation Law (2000), <http://www.isinolaw.com>.

¹⁷¹ See Resolution of the Standing Committee of National People's Congress Providing an Improved Interpretation of the Law, *supra* note 170, and the Constitution, art. 67, LAWS OF THE PRC, *supra* note 1. See also Legislation Law, sec. 4, *supra* note 170.

¹⁷² Legislation Law, art. 42, *supra* note 170.

People's Procuratorate. The Supreme Court, Supreme Procuratorate, Ministry of Justice, and the Ministry of Public Security also jointly issued many interpretations.¹⁷³ It is unclear, however, how the Standing Committee's Resolution on Providing an Improved Interpretation of the Law (1981) is to be interpreted in light of the Legislation Law. According to Article 2 of the Resolution, the Supreme Court shall provide interpretations of questions involving the specific application of laws and decrees in court trials. Similarly, the Supreme Procuratorate can interpret laws and decrees relating to procuratorial work. The interpretative powers of the Supreme Court and Supreme Procuratorate must also be considered in light of the Several Provisions on Judicial Interpretation (1997), and Judicial Interpretation Work Tentative Provisions (1996), respectively. Both Provisions confirmed the powers of the Supreme Court and Supreme Procuratorate as outlined in the 1981 Resolution, and that such interpretations are to have legal effect. The State Council's¹⁷⁴ power to interpret administrative rules and regulations also appears to be unchanged.

According to Article 43 of the Legislation Law, however, it now appears that where either the Supreme Court, Supreme Procuratorate, or State Council require interpretation of a national law for implementation of that law, then they should request such an interpretation from the Standing Committee. The Supreme Court and Supreme Procuratorate separately or jointly, or the State Council can accordingly issue interpretations which do not fall into such a category. Where there is conflict, for example, between the Supreme Court and Supreme Procuratorate, this would have to be resolved by the Standing Committee. It would also appear to be the case that an interpretation issued by the Standing Committee would have precedence over any conflicting interpretation issued by the Supreme Court, Supreme Procuratorate or State Council.

IV. INTERPRETATION OF THE CL SINCE 1997¹⁷⁵

A. *General Interpretations by the Supreme Court and Supreme Procuratorate*

Following the enactment of the 1997 CL, the Supreme Court and Supreme Procuratorate issued a number of interpretations. In fact, the need

¹⁷³ See, e.g., Circular on Some Questions in Handling Criminals Who Escape and Commit New Crimes (1989), LAWS OF THE PRC, *supra* note 1.

¹⁷⁴ This includes government departments.

¹⁷⁵ All Interpretations are published in the volumes of the *Gazette* of the Supreme People's Court.

to provide interpretations of the 1997 CL was recognized even before it came into effect on October 1, 1997. In September 1997, over 100 judges and jurists attended a national judicial conference in Beijing. Seven draft interpretations were discussed.¹⁷⁶ The one interpretation that emerged from the conference determined the manner in which Article 12, the non-retroactivity clause, would be enforced.¹⁷⁷

The interpretation, issued on September 27, 1997, stipulated that a criminal who commits another crime before September 30, 1997, and that crime occurs more than three years after his earlier crime(s), shall be dealt with in accordance with the provisions of the 1979 CL, and even if he were to be tried after October 1, 1997, he should not be classified as a recidivist.¹⁷⁸

Another interpretation considered the approach to be taken when offenses overlap. An example is the possible overlap between Article 140, selling fake goods and Article 214, selling goods with a counterfeit trademark. The first step in determining which offense applies is to consider any special provisions that are contained in the offense provisions. This may relate to specific subjects (for example, state personnel), specific physical locations (restricted military areas), specific time periods (wartime), or specific circumstances. Applying this to Articles 140 and 214, there are various ways to differentiate the two offenses. With regard to the accused, Article 140 specifies that the defendant must be a producer or distributor, whereas Article 214 refers to "anyone who sells." Article 140 further sets out specific details regarding the various punishments depending on the value of the sale of the goods. If, for example, the amount sold is between 50,000 and 200,000 RMB (\$6000 and 24,000 U.S.), then the punishment can be a maximum of two years imprisonment, criminal detention, and a fine of not less than fifty percent of the sale amount, but not more than two times the value. If, however, the sale amount exceeds 2,000,000 RMB (\$250,000 U.S.), then the maximum penalty is fifteen years imprisonment and a fine. Article 214 carries a maximum penalty, in the most serious of circumstances, of three to seven years imprisonment and a fine. This distinction between penalties is important because the interpretation

¹⁷⁶ After the conference one interpretation was published, while the other six were referred to the Adjudication Committee of the Supreme People's Court.

¹⁷⁷ For a detailed discussion of the conference, see Jun, *supra* note 75.

¹⁷⁸ Article 65 of the 1997 CL increased the period from three (1979 CL, art. 61) to five years. Offenders who are now convicted of a crime, punishable by a fixed term of imprisonment, within five years of an earlier conviction, receive a heavier punishment.

stipulates that, as a general guideline, the offense with the heavier penalty should be preferred.

After September 1997, further interpretations were issued. In April and May 1999 respectively, the Supreme Court issued the Interpretation of Relevant Questions Concerning the Concrete Application of the Law in Trying Organization Crime Cases and the Interpretation on Questions Relating to the Trial of Criminal Cases Arising from the Resale at a Profit of Train Tickets. On September 16, 1999, the Supreme Procuratorate also issued explanations on thirty-eight "clauses" of the CL regarding corruption, bribery, and dereliction of duty.¹⁷⁹

B. *The Crackdown on the Falun Gong*

The most controversial (from a Western perspective, that is) judicial interpretation was that issued on October 30, 1999. This interpretation, jointly issued by the Supreme Court and Supreme Procuratorate, sought to "explain" the law against "cult crime" under Article 300 of the 1997 CL. It is this interpretation, combined with Article 300, that has been used to prosecute members of Falun Gong. This interpretation is important from two perspectives. The first, which is the topic of this article, is that it provides an opportunity to evaluate the extent to which there has been real reform, and whether 1997 CL truly represents an adoption of the rule of law in China. The second perspective, which is not discussed here, is that it is a very recent example of the process of criminalization in China.

In April 1999, the Falun Gong held a large demonstration in Beijing to protest against unfair practices in various provinces which had discriminated against its members. The size of the demonstration shocked the authorities and their response was severe.

The Falun Gong has mainly been charged with violating Article 300 of the 1997 CL. This states:

Whoever forms or uses superstitious sects or secret societies or strange religious organisations or uses superstition to undermine the implementation of the laws and administrative rules and regulations of the State shall be sentenced to fixed-term imprisonment of not less than three years but no more than seven years; if the circumstances are especially serious, he shall

¹⁷⁹ CHINA DAILY, Sept. 17, 1999.

be sentenced to fixed term imprisonment of not less than seven years.

This is a vague offense, and in early October 1999 the Supreme Court and Supreme Procuratorate issued a lengthy and detailed interpretation. Subsequently, the Standing Committee Decision Regarding Outlawing Cult Organizations and Punishing Cult Activities was issued, with both the interpretation and Decision effective as of October 30, 1999.¹⁸⁰ The interpretation resembled an act of legislation, while the Decision, in contrast, more closely resembled a statement of policy. In order to fully understand the implications of the interpretation, it is set out in full below as it was reported in the *China Daily* on November 1, 1999.¹⁸¹

The judicial interpretation jointly issued by the two departments says that "cult groups" in Article 300 in the Criminal Law refers to those illegal groups that have been found using religion, qigong or other things as a camouflage, deifying their leading members, recruiting and controlling their members and deceiving people by moulding and spreading superstitious ideas, and endangering society.

Section 1 of Article 300 in the Criminal Law stipulates that those who organize superstitious sects and secret societies or use superstition to violate laws or administrative regulations are subject to three to seven years imprisonment, and those whose cases are extremely serious are subject to seven years imprisonment or more.

Under Section 2 and 3 of the article, those who set up or use superstitious sects and secret societies or superstition to deceive people and cause death of others are subject to the same penalties.

Under the two sections, those who organize and use superstitious sects, secret societies or superstitions to sexually exploit women or swindle money or property will be punished according to Criminal Law articles on rape and swindling.

¹⁸⁰ See LAWS OF THE PRC, *supra* note 1.

¹⁸¹ *Judicial Explanations on Crimes by Cults*, CHINA DAILY, Nov. 1, 1999, at 4.

Those who organize and use sects and commit one of the following activities should be penalised according to Section 1, Article 300 of the Criminal Law:

- I. Gathering people together to besiege and charge government organisations, enterprises or institutions, and disrupt their work, production and teaching and research activities;
- II. Holding illegal assembly, demonstrations to incite or deceive, or organize their members or others to besiege, charge, seize, disrupt public places or places for religious activities, or disrupt social order;
- III. Resisting departments concerned with banning their groups, resuming the banned groups, establishing other sects, or continuing their activities;
- IV. Instigating, deceiving or organising their members or others to refuse fulfilling their legal obligations;
- V. Publishing, printing, duplicating or distributing publications spreading malicious fallacies, and printing symbols of their sects;
- VI. Other activities that violate the State law or administrative regulations.

According to the explanations, a case is regarded as serious if it involves any of the following while conducting the activities in the previous article:

- I. Setting up organizations or recruiting members across provinces, autonomous regions and municipalities that are under the direct administration of the central government;
- II. Collaborating with overseas groups, organisations and individuals for sect-related activities;

- III. Publishing, printing, duplicating and distributing, either in terms of volumes or sales values, a large amount of publications spreading fallacious ideas and printing symbols of sects;
- IV. Instigating, deceiving or organising their members or others to violate State laws, administrative regulations, and resulting in serious consequences.

Organizing or using superstitious sects, secret societies or superstition to deceive people which may lead to their death in Section 2 and 3 of Article 300, refers to the cases of establishing or using sects to mould, spread superstition or fallacies, deceiving their members or others to practice fast, inflict wounds upon themselves, or prevent patients from taking normal medical treatment and resulting in their illness or death.

According to the interpretation, doing these things will be considered a "serious offense" if the following occurs:

- I. Causing three deaths or more;
- II. Causing fewer than three deaths, but injuring many people;
- III. Those who have received criminal or administrative penalties for engaging in cult activities continue to establish or use sects to deceive people and result in deaths;
- IV. Causing other special serious consequences.

Under the explanations, those who establish or use sects to mold, spread superstition and fallacies, instigate and coerce their members or others to commit suicide or inflict wounds on themselves, should be punished according to laws on attempted murder or causing serious injuries.

Those who organize and use superstitious sects and sexually exploit women or young girls by seducing, coercing, deceiving or other ways should be punished according to clauses on rape, or offenses concerning raping underage girls, under the Criminal Law.

Those who swindle money or property by establishing or using sects or other means should be punished according to the Criminal Law articles on swindling offenses.

The offenses of establishing or using sects to organize, scheme, carry out and instigate activities of splitting China, endangering the reunification of China or subverting the country's socialist system should be handled according to relevant laws on endangering State security offenses, as stipulated in the Criminal Law.

All the money and property collected by sects or criminal offenders who use sects to violate laws, and tools and publicity materials used for criminal activities, should be confiscated.

Those who organize, plot or use sects for criminal activities and those participants who refuse to change their ways despite repeated admonition should be investigated and be given the related criminal offense, according to Criminal Law.

But those who surrender themselves to law enforcement departments, or who perform meritorious services, will be given a lenient penalty or may be exempt from penalty according to law.

Those who were deceived or coerced into sects and had already withdrawn from the sect will not be considered offenders.

The most important aspect of the interpretation is its specificity in targeting the practices of the Falun Gong. Section 1, for example, now prohibits any demonstrations or public gatherings and, accordingly, any reoccurrence of the April 1999 demonstration. The provisions can also be used to discourage any form of public assembly as the recent arrests of Falun Gong members in Tiananmen Square demonstrate. It is also a crime under

Article 300 for persons to set up such organisations across provinces and collaborate with overseas groups, and this clearly reflects Falun Gong's membership across the PRC and the existence of practicing groups in many other countries, including the United States, Canada, and Australia. In addition, the interpretation targets the Falun Gong practices of fasting, diet, and not taking drugs and medicines. It is estimated that this interpretation creates at least ten separate offenses under Article 300. If the provisions relating to "serious" and "very serious" circumstances are included, then this number would be even higher.

One view of this interpretation is that it creates new offenses. Its use against Falun Gong members based on activities that predate the interpretation is, therefore, contrary to the rule against retroactivity. The opposing view, and that which is held by the Chinese government, is that the interpretation does not create new offenses but merely supplements Article 300 by more clearly defining the types of behaviour that are covered by Article 300. The fact that the provisions of the interpretation are so specific in terms of Falun Gong practices and characteristics and that such an interpretation was not deemed necessary until after the Beijing demonstration, makes this argument rather unconvincing.

Of considerable interest are some of the commentaries on the crackdown that have appeared in the press. On November 8, 1999, for example, the *China Daily* carried the report of an interview with Guo Yang, Director of the Beijing Hualian Law Firm.¹⁸² He observed that the interpretation and Standing Committee Decision provided a legal basis for the campaign against cults.¹⁸³ He further noted that "there have been no such accurate laws directly dealing with crimes committed by cults before," and that "it is one of China's efforts to build a more mature legal system and develop towards a rule of law."¹⁸⁴

On December 26, 1999, the first major trial against four Falun Gong members was completed.¹⁸⁵ The charges included using a cult to obstruct justice, causing deaths in the process of organizing a cult and illegally obtaining State secrets.¹⁸⁶ All four defendants were convicted and sentenced to terms of eighteen, sixteen, twelve and seven years respectively.¹⁸⁷

¹⁸² *State Adamant in Elimination of Cults*, CHINA DAILY, Nov. 8, 1999, at 2.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Key Falun Gong Cult Members Sentenced*, CHINA DAILY, Dec. 27, 1999, at 1. The four defendants were Li Chang, Wang Zhiwen, Ji Liewu, and Yao Jie. *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

The media report of that trial contains a number of important statements on the operation of the criminal law, the punishment imposed, and the trial procedure. First, the report states that the court took a lenient approach to the first and fourth defendants.¹⁸⁸ The first defendant, who was sentenced to eighteen years, was given a mitigated penalty because he had confessed and exposed the criminal activities of the Falun Gong, including its founder Li Hongzhi.¹⁸⁹ The fourth defendant had also confessed and shown repentance and was accordingly sentenced to seven years.¹⁹⁰ With regard to procedure, the report noted that all defendants had been sent copies of the indictments and notified of their rights.¹⁹¹ Three defendants had hired lawyers and the court appointed a lawyer for the fourth defendant.¹⁹² Prior to the trial, the lawyers had met with their clients on several occasions and, at the trial, the lawyers challenged the accusations.¹⁹³ Finally, the report stated that relatives of the defendants, reporters from the media, and many other individuals were present at the trial.¹⁹⁴

On the same day, Wang Zuofu, Professor at the Institute of Jurisprudence of People's University, commented that the sentences were based on the facts, the relevant law, and had "sufficient legal backing."¹⁹⁵ He went on to say that the four had been responsible for the deaths of 1400 people across China by manipulating their deaths or self-inflicted injury. The Professor concluded, "[I]t is clear that the court handled the case strictly in line with the law."¹⁹⁶

The tenor of both reports is reminiscent of the rhetoric of the 1983 anti-crime campaign and the phrases of "arrested and charged according to law," "tried according to law," "convicted according to law," and "punished according to law."¹⁹⁷

The crackdown on the Falun Gong has continued unabated and appears to dominate the political agenda of the most senior government and party officials. In June 2001, the Supreme Court and Supreme Procuratorate issued another Interpretation that, in effect, created more offenses under the

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See Clarke, *supra* note 57, at 1900.

overall umbrella of Article 300.¹⁹⁸ Under Article 1(1) of the Interpretation, for example, it is an offense under Article 300 to “make or spread 300 pieces of heresy flyers, pictures, slogans or newspapers, more than 100 books, more than 100 compact discs, or more than 100 video or audio cassettes.”¹⁹⁹ Further offenses are also specified in relation to Articles 103 and 105 (Crimes Endangering National Security), and Articles 232 and 234 (Intentional Homicide and Intentional Infliction of Injury).²⁰⁰ With regard to Articles 232 and 234 of the CL, Article 9 of the Interpretation states that it will be an offense under the CL for a heresy organization to organize, promote, incite, instigate, or help members of the organization to commit suicide or acts of self-deformity.²⁰¹ In fact, these were the provisions applied in August 2001 to the conviction and sentencing of the alleged Falun Gong members who, the court held, had incited the self-immolations in Tiananmen Square.²⁰²

V. DISTINCTIONS BETWEEN CRIME AND NON-CRIME

Many of the reforms in the CL must be considered in light of the continued distinction between crimes enumerated in the Specific Provisions of the CL and “offenses” included under the numerous administrative penalty laws.²⁰³ The distinction between criminal and administrative offenses could be compared to the felony/misdemeanour or indictable/summary dichotomies in common law. This so-called crime/non-crime dichotomy has, in effect, created two separate systems of liability and punishment.

The foundation for the administrative penalty system is found in the provisions of the CL. According to Article 13 of the 1997 CL, an act will not be considered to be a crime “if the circumstances are obviously minor

¹⁹⁸ Interpretations of the Supreme People’s Court and the Supreme People’s Procuratorate on Some Issues Concerning the Specific Application of Laws When Handling Criminal Cases of Organizing and Exploiting Heresy Organizations (2001), <http://www.isinolaw.com>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *People Behind Tiananmen Square Suicide Sentenced*, CHINA DAILY, Aug. 18, 2001.

²⁰³ See 1997 CL, arts. 3-5, LAWS OF THE PRC, *supra* note 1.

and the harm done is not serious.²⁰⁴ An individual in such circumstances, however, may be subject to an administrative sanction.²⁰⁵

The most prominent of the administrative regulations is the Security Administration Punishment Regulations ("SAPR") (1986), but other legislation, such as the Law on Environmental Pollution by Solid Waste (1995), also includes administrative regulations.²⁰⁶ In addition, the State Council has enacted numerous rules and regulations that are applied administratively.²⁰⁷ In many cases, a decision as to whether an offense will be prosecuted as criminal or dealt with under the SAPR will be decided by the likely penalty or punishment to be imposed. Article 2 of the SAPR states:

Whoever disturbs social order, endangers public safety, infringes upon citizens' rights of the person or encroaches upon public or private property, if such an act constitutes a crime according to the Criminal Law of the People's Republic of China, shall be investigated for criminal responsibility; if such an act is not serious enough for criminal punishment but should be given administrative penalties for public security, penalties shall be given according to these regulations.²⁰⁸

The distinction between acts that are treated as crimes and those that trigger administrative sanctions, however, is arbitrary. For example, whether theft is charged as a crime or under the SAPR is simply determined by the amount of money involved. Other offenses include minor assaults, public order infringements, vandalism, traffic violations and failure to register residence.

²⁰⁴ This wording is very similar to that in Article 10 of the 1979 CL. See LAWS OF THE PRC, *supra* note 1.

²⁰⁵ Even where a person is criminally liable, they may be exempt from criminal punishment due to minor circumstances. Article 37 of the 1997 CL states that in such circumstances they could still be subject to an administrative sanction. See LAWS OF THE PRC, *supra* note 1.

²⁰⁶ See relevant volumes of the LAWS OF THE PRC, *supra* note 1. Article 59 of the Law on Environmental Pollution by Solid Waste (1995), for example, sets out a number of prohibited acts with regard to solid waste. *Id.* It further empowers the "competent department of environmental protection to order him to put it right within a specified period of time and impose a penalty on him." *Id.* Such provisions should also be read in conjunction with Articles 338-46 of the 1997 CL, which set out the "Crimes of Impairing the Protection of the Environment and Resources." Article 338, for example, carries a maximum penalty of seven years for someone who causes a major environmental pollution accident. See 1997 CL, LAWS OF THE PRC, *supra* note 1.

²⁰⁷ Government departments and agencies are also empowered to pass such regulations. An example of such an agency is the State Environmental Protection Administration (SEPA).

²⁰⁸ See LAWS OF THE PRC, *supra* note 1.

There are a number of controversial aspects of the SAPR. These include procedural deficiencies, including the lack of any real hearing or satisfactory process of review or appeal with regard to penalties, and the use of certain additional sanctions: "rehabilitation and re-education through labor" (*laodong jiaoyang*) and "sheltering for investigation" (*shourong shencha*).²⁰⁹ The use of these sanctions has been a major concern for western observers of the Chinese criminal justice system because they can be used to detain political dissidents. Sheltering for investigation was of particular concern, although this form of detention was abolished in 1996.²¹⁰ Re-education and rehabilitation through labor, though, continues to be used in a regime or structure of sanctions that appears to exist outside of both the administrative penalty and criminal law systems. This and other practices of the Public Security Bureau remain controversial both in and outside China.

The other concern with the operation of the system of administrative penalties was that responsibility for the investigation, determination, and punishment of these so-called minor offenses was under the authority of the Public Security Bureau. The SAPR contained few provisions in relation to any form of hearing or appeals process. In 1996, the law and system of administrative offenses underwent major reform with the enactment of the Administrative Penalty Law (APL).²¹¹ Article 1 states that the purpose of the law is to standardize "the creation and imposition of administrative penalties, ensuring and supervising the effective exercise of administration by administrative organs, safeguarding public interests and public order, and protecting the lawful rights and interests of citizens, legal persons and other organisations."

While the Public Security Bureau remains the central administrative organ, the APL has introduced a number of safeguards. In particular, Chapter V sets out numerous procedural requirements that must follow a decision to impose an administrative penalty. One important example is Article 32:

The parties shall have the right to state their cases and defend themselves. Administrative organs shall fully heed the opinions of the parties and shall examine the facts, grounds and evidence

²⁰⁹ *Id.* The sanctions proscribed in the SAPR are warnings, fines, and administrative detentions. *Id.* In addition, any property obtained as a result of the offense can be confiscated and, if relevant, victim compensation can also be ordered. *Id.*

²¹⁰ The abolition of this form of detention, however, does not appear in any formal decision by the NPC or Standing Committee. Its abolition followed from the enactment of the 1996 CPL.

²¹¹ LAWS OF THE PRC, *supra* note 1.

put forward by the parties; if the facts, grounds and evidence put forward by the parties are established, the administrative organs shall accept them. Administrative organs shall not impose heavier penalties on the parties just because the parties have tried to defend themselves.

As one observer noted:

Article 32 of the APL may be one of the most significant articles to be enacted by the NPC over the last several years. The introduction of the concept of natural justice to the extent expressed above is nothing less than revolutionary when seen against the backdrop of China's political and cultural history.²¹²

Having said this, however, the rights of the individual are still limited. Many of the rights and protections contained in the 1996 CPL are not available to someone who is subject to an administrative penalty.²¹³ Nor is there any mention, as in the CL, of the principles to be applied for a breach of an administrative regulation.²¹⁴ This is justified by the designation of such offenses as non-crime, and by the fact that the penalties are not punishments. However, the distinction between crime and breaches of administrative regulations is vague and, at the level of principle, perhaps unsustainable. Special note should be made here of Articles 4 and 5 of the APL. Article 4 provides: "Creation and imposition of administrative penalty shall be based on the facts and shall be in correspondence with the facts, nature and seriousness of the violations of law and damage done to society." Article 5 provides: "In imposing administrative penalty and setting to rights illegal acts, penalty shall be combined with education, so that citizens, legal persons and other organisations shall become aware of the importance of observing the law." These provisions contain terms that are descriptive of the criminal law. In addition, there appears to be considerable discretion and scope for abuse, especially regarding the initial decision whether to prosecute an individual under the CL or impose an administrative penalty. In commenting on this as part of his assessment of the 1997 CL, Chen notes, "The problem of the artificial distinction between administrative sanctions and criminal penalties is simply un-addressed."²¹⁵

²¹² Corne, *supra* note 133, at 31-32.

²¹³ Legal representation is an example.

²¹⁴ See, e.g., 1997 CL, arts. 3-5, LAWS OF THE PRC, *supra* note 1.

²¹⁵ J. CHEN, *supra* note 12, at 196.

VI. CONCLUSION

In analyzing the 1997 CL, it is apparent that there has been considerable change and reform. In order to fully understand the new law, it is also important to consider the development of criminal law in the PRC from its inception. This includes the period leading up to the 1979 CL, the Decisions and Supplementary Provisions passed by the Standing Committee from 1979 to 1996 (and since 1997), the interpretations issued by the Supreme Court and Supreme Procuratorate, cases, and, finally, the 1997 CL itself. There is no denying that there has been significant change in the law. This is reflected not just in the offense provisions, but also in the general principles. Chinese rhetoric concerning such reforms has led to the claim that there has been an adoption of the rule of law in China. These changes and the rhetoric are extremely important, but it is the conclusion of this Article that while the law has changed, the underlying principles and policies on which Chinese criminal law is based have not. On the contrary, it is possible to conclude that policy, in particular, has shown a remarkable continuity and resistance to change.

In assessing this, it is important to place the development of criminal law in the PRC in a historical context. In doing so, one encounters a major misconception. This is that many, both within and outside of China, opine that modern legal reform in the PRC did not start until 1979 with the enactment of laws including the 1979 CL, the 1979 CPL, the Organic Law of the People's Courts and the Organic Law of the People's Procuratorates.²¹⁶ In addition, the period from 1949 to 1979 is seen as having little relevance to the post-1979 period. This is misleading. From a practical perspective, it must be remembered that the 1979 CL was largely based on the thirty-third draft of the CL, completed in 1963. As many of the provisions of 1979 CL are contained in the 1997 CL, in either identical or revised form, it is arguable that the principles and policies espoused in this earlier period continue to affect the determination of criminal liability in China today. As noted earlier, the 1956 to 1957 *Lectures on Chung-hua jen-min kung-ho-kuo hsing-fa tsung chiang-I*, described the purposes of the criminal law as follows:

²¹⁶ This highlights those laws relevant to the creation of a new criminal justice system. It should also be noted that a new Constitution was enacted in 1978, although this was amended in 1982. Other important laws passed in 1979 included the Organic Law of the Local People's Congresses and Local People's Government and the Electoral Law.

The criminal law of our country mainly attacks counterrevolutionary criminals and criminals who murder, commit arson, steal, swindle, rape, and commit other crimes that seriously undermine social order and socialist construction. We must make it clear that the sharp point of our criminal law is mainly directed at the enemies of socialism.²¹⁷

Such purposes were clearly evident in Article 2 of the 1979 CL, which stated that the tasks of the CL included the fight against counterrevolutionary and other criminal acts "in order to defend the system of the dictatorship of the proletariat" and "to safeguard the smooth progress of the socialist revolution and socialist construction." One of the objectives of the 1997 revisions was the depoliticization of the CL, through the removal of such terms as "dictatorship of the proletariat" and "socialist revolution," but do they reflect any real change? Finder and Fu, for example, state, "These changes are more symbolic than substantial and have little practical impact on the operation of the criminal law."²¹⁸

This contrasts with the views of Lin and Keith who observe that "the revision also reflects changes in the prioritization of class struggle, state interests and social control as the Criminal Law's substantive purposes are now more closely aligned with the policy purposes of economic reform."²¹⁹

While economic reform and Deng's open-door policy were the driving forces behind the enactment of the 1997 CL, the revisions do not appear to reflect any real change and the criminal law remains the principal instrument of state policy and strict social control. A comprehensive analysis of the changes introduced in 1997 suggests that they are just a subtle variation of the same policies that formed the basis of the 1979 CL. There is considerable support for such a conclusion.

This can be initially demonstrated through an analysis of the numerous Standing Committee Decisions and Supplementary Provisions from 1979 to 1996. The purpose of these Decisions and Provisions was twofold. First, they provided detail missing from the 1979 CL, relating to provisions concerning both liability and punishment. Second, some of the Decisions were part of anti-crime campaigns and crackdowns, which took place during this period. All the criminal law provisions of these Decisions and Supplementary Provisions have been incorporated in the 1997 CL under the three guiding principles for the 1997 revisions: continuity, unity, and

²¹⁷ COHEN, *supra* note 26, at 79.

²¹⁸ Finder & Fu, *supra* note 94, at 35.

²¹⁹ Lin & Keith, *supra* note 3, at 76.

clarity. Under the headings of continuity and unity, the 1979 CL was largely retained along with the Decisions and Supplementary Provisions. Under the heading of clarity, vague provisions were elaborated and clarified.

Regarding the Decisions forming the basis of the anti-crime campaigns, two stand out. These are the Decision Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy (1982), and the Decision Regarding the Severe Punishment of Criminals Who Seriously Endanger Public Security (1983). The effect of both Decisions was to increase the maximum penalty for many offenses. Zhao Bingzhi and He Xingwang argue that these Decisions, as well as all other Standing Committee laws which supplemented the 1979 CL, were unlawful.²²⁰ This is because they contradicted the rule against retroactivity and the principle of *nullem crimen sine lege*. All such laws were therefore contrary to Article 67(3) of the Constitution. The incorporation of these Standing Committee Laws in the provisions of the 1997 CL appears to be an attempt to legitimise the contested Decisions. Even so, the process of supplementation and amendment is continuing. On December 29, 1998, the Standing Committee passed the Decision on Penalizing Crimes of Foreign Exchange Defrauding, Evasion and Illegal Transaction. This was followed, on October 30, 1999, by the Standing Committee Decision Regarding Outlawing Cult Organizations and Punishing Cult Activities. In what is seen as a significant change in approach, the Standing Committee, on December 26, 1999, passed amendments to the CL for offenses relating to securities and futures.

The Supreme Court and Supreme Procuratorate have provided much of the detail of how the CL is to be defined, interpreted and applied.²²¹ A very controversial example of this was the Interpretation Explaining Crimes by Cults under Article 300 of the CL, issued jointly by the Supreme Court and Supreme Procuratorate on October 30, 1999, and effective the same day. Apart from the legislative nature of the enforcement provision, an analysis of the Interpretation reveals that it has created at least ten new offenses within Article 300.

Ashworth states:

The main determinants of criminalization continue to be political opportunism and power, both linked to the prevailing

²²⁰ *Id.* at 93.

²²¹ The power of the Supreme Court and Supreme Procuratorate to interpret legislation must now be read in light of both the Standing Committee's Resolution on Providing an Improved Interpretation of the Law (1981), LAWS OF THE PRC, *supra* note 1, and the Legislation Law (2000), *supra* note 170.

culture of the country. The contours of criminal law are not given but politically contingent. Seemingly objective criteria such as harm and offense tend to melt into the political ideologies of the time.²²²

Between 1949 and 1979, Communist Party policy dominated the legal system, often in the form of decrees by Mao Zedong. In many ways, these decrees and Party policy were the law and, as such, had a profound effect on the laws that were passed in 1979 and thereafter. This is clearly reflected in the Preamble to the Constitution, which states that China and all its nationalities are under the leadership of the Communist Party and the guidance of Mao Zedong Thought. Article 1 of the 1979 CL also stated that the Criminal Law took as its guide Marxism-Leninism-Mao Zedong Thought. It is noted that this phrase has been removed from Article 1 of the 1997 CL, but it is arguable that aspects of Mao Zedong Thought continue to affect Chinese criminal law.

One of Mao's most important policy statements on criminal law made a distinction between antagonistic and non-antagonistic contradictions. Those who were guilty of antagonistic contradictions such as counterrevolution or other serious crimes involving violence or large amounts of money were considered enemies of the state. Conflicts between citizens, which did not threaten the socialist system, were defined as non-antagonistic contradictions. In line with the policy of "combining punishment with leniency," non-antagonistic contradictions could be punished less severely than antagonistic contradictions, even to the extent of being exempt from punishment and subject only to an administrative sanction. Antagonistic contradictions were to be punished severely and in many cases this meant the death penalty. Even here, however, leniency could be applied where the accused confessed and showed true repentance. In the case of the death penalty, this could lead to a two-year suspension and eventual commutation. The wording of the CL may have changed in 1997 but the current approach to liability and punishment continues to reflect such policy.

Perhaps the most symbolic amendment in 1997 was the abolition of counterrevolutionary crimes and their replacement by crimes endangering national security. In reality, this is nothing more than a change in name. Most of the crimes of counterrevolution are simply retained as crimes against national security. For example, Article 102 of the 1997 CL, which

²²² A. ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 56 (3d ed. 1999).

makes it an offense to collude with a foreign state to endanger the sovereignty, territorial integrity and security of the PRC, is virtually identical to Article 91 of the 1979 CL. In fact, the 1997 CL has expanded the range of offenses. As Chen notes:

The revised law also adds a provision to make it a crime for state personnel to desert their position and escape to foreign countries to engage in activities endangering state security.²²³ Apparently, this provision is aimed at those who were sent to work or study abroad and then decided to stay by, for example, applying for refugee status in a foreign country.²²⁴

It is also important to note again that proposals to drop the use of the term “counterrevolutionary” were first made soon after the enactment of the 1979 CL. In fact, such changes had been incorporated in the 1988 draft CL. The circumstances of Tiananmen Square in 1989, however, were seen as an inappropriate time to enact a revised CL, particularly as counterrevolutionary offenses provided a useful tool against the pro-democracy movement.

China continues to charge political dissidents and those involved in the pro-democracy movement with crimes against national security. For example, in December 1998, Xu Wenli and Wang Youcai were sentenced to thirteen and eleven years imprisonment, respectively, for their roles in planning and founding the China Democratic Party.²²⁵

Nevertheless, many in China see the 1997 CL as a continuation, if not a culmination, of a law reform process leading to the adoption of the rule of law in China. For example, Lin and Keith see the principles expressed in Articles 3, 4, and 5 of the CL, and the major expansion of the specific offense provisions as the continuation of a trend, which is “remarkable in its reiterated support for the rational importance of predictability and the procedural protection of non-state interests.”²²⁶ In 1997, Jiang Zemin made his now famous pronouncement of “running the country according to law and establishing a socialist rule of law country.” In March 1999, these words were enshrined in the Constitution by adding them to Article 5.

There is no denying that these changes are significant, but the extent to which China has adopted, or is in the process of adopting, the rule of law

²²³ See 1997 CL, art. 109, LAWS OF THE PRC, *supra* note 1.

²²⁴ J. CHEN, *supra* note 12, at 186-87.

²²⁵ *Two Sentenced for Subverting State*, CHINA DAILY, Dec. 22, 1998.

²²⁶ Lin & Keith, *supra* note 3, at 78-79.

remains controversial. The sentence added to Article 5 of the Constitution, for example, states, "The People's Republic of China practices ruling the country by law and constructs a socialist rule of law country."²²⁷ This appears to suggest a coexistence of rule *by* law and rule *of* law. In a lecture to the Party in 1996, Wang Jianfu stated that the rule of law in China was to be based on three points.²²⁸ The first point was supremacy of the law, which required everyone and every organization to obey the law. Second, power must be based on and exercised within the Constitution and the laws. Third, everyone must be equal before the law, regardless of status, and no one was to be above or outside the law. He concluded by noting that an application of these principles would "counter past resort to [leaders] replacing law with one's words and 'placing power above law.'"²²⁹

There are many aspects of the 1997 CL, the 1996 CPL and the new laws on judges, procurators, police, lawyers, and administrative penalties that reflect the adoption of these three points. The prosecution and execution of high-ranking Party officials for corruption is practical proof that everyone is equal before the law. On the other hand, certain aspects of the CL and events since 1997 demonstrate a continuation of state instrumentalism. Much of the reform in the CL is a direct consequence of the need to protect the developing socialist market economy, but maintenance of the new economy is also intrinsically linked to Party policy on strict social control. This is clearly reflected by the continued use of severe punishment, including the death penalty, and while this may appear anomalous to Lin and Keith,²³⁰ it was to be expected.

If there was an expectation within China that the 1997 CL would "transcend unpredictable political purposes,"²³¹ then the crackdown on the Falun Gong stands in stark contrast to such expectations. The Supreme Court and Supreme Procuratorate interpretations on cult offenses criminalize, in very precise terms, the practices of the Falun Gong. The Chinese position is that they are merely applying Article 300, and thus, that the prosecution of Falun Gong members is according to the law, but this is reminiscent of much of the rhetoric used in the anti-crime campaigns. As such, it reflects Findlay and Chiu's observations concerning the 1989 Law

²²⁷ See LAWS OF THE PRC, *supra* note 1.

²²⁸ Lin & Keith, *supra* note 3, at 83.

²²⁹ *Id.*

²³⁰ *Id.* at 85.

²³¹ *Id.* at 82.

on Assemblies, Processions, and Demonstrations, whereby legality is seen “as a legitimator for a battery of social control mechanisms.”²³²

The interpretation is also evidence of the continued influence that the Communist Party has over the judiciary. While Article 126 of the Constitution states that the people’s courts “are not subject to interference by any administrative organ, public organisation or individual,” this does not include the Party. In this regard, Liu has documented very clearly how the Party has used the Supreme Court as a channel through which Party policy is transmitted to lower courts.²³³

Lin and Keith observe, somewhat conditionally, that the criminal law “might still be understood as a legitimate instrument of state policy, if not as a tool of state instrumentalism.”²³⁴ On the contrary, and despite the changes in the 1997 CL, the continuity of policy towards social control leads to the inevitable conclusion that the CL remains very much an instrument of state policy and a tool of state instrumentalism. As Gellat has pointed out:

An overarching concern is of course the subservience of the legal system to the arbitrary dictates of the Communist Party, a problem that cannot by any means be resolved solely by reforms within the legal system. Without fundamental political changes there can be no independent judiciary or an autonomous bar—key elements of the rule of law.²³⁵

Gellat drew this conclusion in 1993, two years before the beginning of the reform process in 1995.²³⁶ These reforms are significant as they affect China’s criminal justice system. They do not, however, represent the adoption of the rule of law. If they represent progression towards the adoption of the rule of law in China, which is at least debatable, the crackdown on the Falun Gong enabled by the Supreme Court interpretation of October 30, 1999, represents a significant backward step in such progress.

Lubman is also pessimistic about claims concerning the rule of law and concludes that fundamental changes are required in China before any

²³² Findlay & Chor-Wing, *supra* note 83, at 80.

²³³ NANPING LIU, JUDICIAL INTERPRETATION IN CHINA (1997).

²³⁴ Lin & Keith, *supra* note 3, at 78.

²³⁵ TIMOTHY A. GELLATT, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS: CHINA’S CRIMINAL PROCESS AND VIOLATIONS OF HUMAN RIGHTS 85 (1993).

²³⁶ As noted at the beginning of this article, the major criminal justice reforms since 1995 include the Police Law (1995), the Judges Law (1995), the Procurators Law (1995), 1996 Criminal Procedure Law (CPL), the Administrative Penalty Law (1996), and the Criminal Law (1997). See LAWS OF THE PRC, *supra* note 1.

real notion of a rule of law could be said to exist.²³⁷ In this regard, he goes as far as to suggest that without such fundamental changes there can be said to be no 'legal system' in China.²³⁸ This is not to say, however, that the reforms introduced to date are not significant. There has been significant change, but as Lubman observes, this may have resulted in "the economic bird escaping its cage," but "the legal bird" remaining firmly locked in its.²³⁹ The cage, in this regard, is the existence of the Party/State and the continued policy of strict social control. In fact, the liberation of the "economic bird," and China's resultant prosperity and economic development, appears to be seen by those in power as dependent upon a continuity of the policy of strict social control. The crackdown on the Falun Gong is again symptomatic of this perception and policy.

²³⁷ STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 298-309 (1999).

²³⁸ See Ian Dobinson, *Stanley B. Lubman's Bird in a Cage: Legal Reform in China After Mao*, 46 *CHINA J.* 168-69 (2001) (book review).

²³⁹ *Id.*