Wrongs and Rights

A Human Rights Analysis of China's Revised Criminal Law

Lawyers Committee for Human Rights
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Since 1978 the Lawyers Committee for Human Rights has worked to promote international human rights and refugee law and legal procedures in the United States and abroad. The Chair of the Lawyers Committee is Norman Dorsen; Michael H. Posner is its Executive Director. Stefanie Grant is Director of Program and Policy. George Black is Research and Editorial Director. Jonathan Hecht is senior legal consultant to the Committee’s China Program.

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"The deepening of the reform of the economic structure and the cross-century development of the socialist modernization drive require that, under the precondition of adhering to the Four Cardinal Principles, we should continue to press ahead with the reform of the political structure, further extend the scope of socialist democracy and improve the socialist legal system, governing the country according to law and making it a socialist country ruled by law."

—excerpt from President Jiang Zemin's Report at the 15th National Congress of the Communist Party of China
September 12, 1997

The cover of this report incorporates the characters of the Chinese phrase yifa zhiguo: governing the country according to law.
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INTRODUCTION AND ACKNOWLEDGEMENTS

The serious and widespread nature of human rights violations in the People's Republic of China is a matter of profound international concern and intense debate. Open political dissent is ruthlessly suppressed. Freedom of expression and freedom of conscience are sharply curtailed. Basic rights of association for labor unions and other independent groups are not respected. The criminal justice system continues to be plagued by torture, arbitrary detention, and denials of due process. These violations and others have been extensively documented by international human rights organizations such as Amnesty International, Human Rights Watch, and Human Rights in China, as well as by intergovernmental bodies and national governments.

Despite the intensity of the international focus on China and the repeated stigmatization of the Chinese government for its conduct, progress toward improvement has proved painfully slow. The Lawyers Committee for Human Rights believes that a lasting solution to these deeply entrenched problems lies in comprehensive reform of those Chinese laws and practices that encourage the persistence of serious violations. This in turn will require the increased involvement of Chinese lawyers, legal academics, and rights advocates in efforts to enforce these new laws. We believe that new opportunities now exist to make headway in this direction.

In recent years, the Chinese government, driven by a desire to modernize its institutions and become fully integrated into the world economy, has embarked on a path of reform that is altering Chinese society and the laws that govern it. Two consequences of this process—in large part unintended by the Chinese government—give particular grounds for cautious optimism. One is the growth and professionalization of a legal community within China that is increasingly cognizant of international norms; these individuals, some of them operating at the margins of official tolerance, represent a distinct prospect of reform from within. The other is the penetration of the law into more and more of the daily transactions of Chinese life, which has begun—slowly, to be sure—to instill the sense that rights can be defined, codified, and made real through the legal process.

Wrongs and Rights is an analysis of the overhaul of China's substantive Criminal Law, which went into effect on October 1, 1997. The changes that have been enacted, while quite extensive, should not be viewed as an effort to liberalize, much less to advance human rights.
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Instead, the watchwords of the Criminal Law reform are modernization, rationalization, and professionalization. These all speak to the desire of the present Chinese leadership to ground its legitimacy in the law, as previous generations of leaders sought legitimacy from their revolutionary credentials, their military authority, or their technocratic skills. The pursuit of this goal means that, in sharp contrast to the past, the law must appear as neutral and non-ideological as possible.

Since embarking on its policy of "reform and opening" under Deng Xiaoping in the late 1970s, the Chinese government has placed consistently strong emphasis on the need to develop the country's legal system. This strategy has always been driven by a strong element of realpolitik. At the outset, Chinese leaders were principally motivated by a desire to attract foreign investment and avoid a repetition of the chaos of the Cultural Revolution. By the mid to late 1980s, they were stressing a broader role for law in guiding the actions of economic entities and state regulators in a market-oriented economy. As China was drawn more deeply into a web of international trade and diplomatic relationships, deficiencies in the legal system undermined China's ability to deal effectively with its foreign partners, while international criticism of China's human rights practices also often threatened adverse economic consequences. Today, President Jiang Zemin has elevated the concept of "governing the country according to law" (yifa zhiguo) to the level of one of the Communist Party's guiding principles.

While human rights have never been an explicit goal of this agenda of modernization, rationalization, and professionalization, they have become an increasingly visible part of the fallout. As the Chinese legal system has taken on vastly expanded functions in regulating economic and social affairs, it has become the principal means of defining rights and establishing procedures and institutions for their vindication. While in many respects Chinese law falls well short of international human rights standards, it is also the medium, both intellectually and institutionally, through which the Chinese engage in debate and experimentation about human rights and the closely related issues of predictability, transparency, and accountability of state action. The domestic audience for these debates has expanded dramatically with the growth of the legal profession, which has swelled from just a few thousand lawyers in 1979 to more than 100,000 today.

The increasingly explicit human rights dimensions of Chinese law are reflected not only in academic writings but also in a range of
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legislation adopted since the late 1980s. The 1989 Administrative Litigation Law created the first procedural basis for seeking judicial review of the acts of state agencies and officials. This was followed in 1994 by a statute governing compensation for damages resulting from illegal state actions and in 1996 by the Administrative Penalties Law, which seeks to strengthen procedural safeguards for persons subject to non-criminal, administrative sanctions. Over the course of the 1990s, China also adopted a series of new laws on the rights of traditionally disadvantaged groups such as women, children, and the disabled. The most significant recent development was the 1996 revision of the Criminal Procedure Law, which introduced reforms in a number of problematic areas such as pre-trial detention, the right to counsel, prosecutorial determination of guilt, and the conduct of the trial process.

How, then, are these trends manifested in the 1997 revisions to the Criminal Law? The overarching logic of the new Law is to rationalize and to modernize, to reduce the exercise of discretionary power, to depoliticize the law, and to keep pace with the momentous changes that have taken place in Chinese society since the adoption of the 1979 Law. The ideological trappings of the old Law are all but gone. Preambular language about the primacy of Marxism-Leninism-Mao Zedong Thought and the dictatorship of the proletariat has given way to invocation of the Constitution. The revised Law brings together criminal provisions that were previously scattered in a variety of statutes. Many new offenses are added, while old ones are more sharply defined. Penalties are revised to be consistent with the crime. This is a document that is designed less to be wielded against ideological adversaries than to be applied in a consistent and rational manner by people with specialized legal skills.

But from the point of view of movement toward international human rights standards, the revisions to the Criminal Law add little. What progress there is, when taken in conjunction with the 1996 reforms to the Criminal Procedure Law, is largely at a procedural rather than substantive level. The overt influence of international norms is less marked in the case of the Criminal Law. When revisions to the Criminal Procedure Law were under discussion, proponents of reform drew explicitly on international human rights law to bolster their arguments for strengthening the rights of criminal defendants. Similar arguments appear to have prevailed mainly in the Criminal Law's abolition of the former Law's provisions on analogy, which had made it possible for someone to be punished for an act that was not prohibited
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by any statute. The elimination of analogy does constitute a significant substantive advance.

The aspect of the revisions that has received the greatest attention internationally—the relabeling of "crimes of counterrevolution" as "crimes endangering state security"—provides no encouragement at all from a human rights perspective. On its face, this change is part of a general trend to depoliticize the law. Yet the revisions' effect—and their evident intention—is actually to increase the state's ability to criminalize internationally recognized rights of free expression and association by adding to the already lengthy list of punishable offenses. An equally serious failure of the revisions is that they did nothing whatsoever to rationalize, let alone liberalize, the operation of penal institutions such as re-education through labor (RETL) that continue to exist outside the statutory framework of the Criminal Law.

From a human rights point of view, the main significance of the reforms to the Criminal Law and the Criminal Procedure Law lies less in what they have accomplished so far than in to what they may lead. In addition to enhancing rationality and accountability in the administration of justice, the reforms have laid the intellectual and institutional foundation for further progress. One consequence of the reform process, partly unintended, has been to strengthen—even in some cases to create—a range of social actors with a strong interest in bringing Chinese law and practice more closely into line with international standards. This is becoming a significant domestic constituency. In addition to the legal scholars and practitioners who are actively engaged in designing and implementing the reforms, it comprises many judges, lawyers, and others who know from firsthand experience that the present legal system does not work and is not fair.

At present only a small minority of this constituency is overtly using the vocabulary of human rights. But their numbers are likely to increase, and their voices will grow more influential, as China's web of international relationships and treaty obligations expands. For a variety of strategic and pragmatic reasons, China has now voluntarily embraced many of the major international human rights instruments. These include the Convention Against Torture, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child. Most significantly, China has now signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International
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Covenant on Civil and Political Rights (ICCPR)—although it remains to be seen how soon it will ratify these key treaties and how extensive its reservations will be.

If China is to build lasting structural guarantees for the protection of human rights, the impetus must come from within; neither the pace of this process nor the manner in which it will be accomplished can be dictated by outsiders. At the present juncture in the legal reform process, the key question is how much political space will exist for those inside the country who favor moving China closer to international human rights standards. Those outside China, we believe, can help to expand that space and strengthen the hand of reformers.

There is considerable evidence to suggest that strong, consistent external pressure can be internalized into the Chinese political process. Such pressure will be effective to the degree that it is directed at systemic problems, couched in terms of international standards, and designed to expand awareness and knowledge of those standards among Chinese audiences. This was most strikingly illustrated in the 1996 revision of the Criminal Procedure Law, when foreign critiques played a positive role in shaping several of the more progressive revisions, including the elimination of some forms of arbitrary detention and the expansion of the role of defense counsel.

If outsiders are to be effective, they must first have a clear and accurate picture of the reform process that is now unfolding within China. This means understanding not only the extent of human rights violations but also the systemic legal problems that allow them to occur. The key here is detailed, reliable information and analysis about important developments in Chinese law that remain little known internationally, especially in those areas where officially sanctioned change has—intentionally or otherwise—forced questions of rights closer to the surface. Such information broadens and deepens the critique of China's human rights record. At the same time, it creates the base of knowledge on which to build programs of concrete support for people and institutions within China who are working to promote greater compliance with international standards.

Since 1993, the Lawyers Committee has sought to create this base of knowledge through a series of reports analyzing key legal developments in China from the perspective of international human rights law. The first of these reports, Criminal Justice with Chinese Characteristics, reviewed China's criminal procedure and substantive criminal laws, as well as provisions for administrative sanctions by the
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public security authorities. Our 1996 report, Opening to Reform? An
Analysis of China’s Revised Criminal Procedure Law, showed how the
protection of human rights had become for the first time a legitimate
objective in the reform of the criminal justice system. Lawyers in China:
Obstacles to Independence and the Defense of Rights (1998), examined
China’s fast growing legal profession and its potential to act as a
catalyst in bringing China into compliance with international
standards.

Wrongs and Rights presents an analysis of the 1997 revisions to
China’s Criminal Law, with an emphasis on their significance for the
protection of human rights. Chapter II sets forth necessary
background information, including an account of regulations other
than the Criminal Law under which punitive sanctions may be
imposed, and in light of which revisions to the Criminal Law itself
must be assessed. Chapter II also gives some historical background on
penal sanctions in general and on the Criminal Law in particular,
including the 1979 Criminal Law.

Chapter III of this report reviews the factors that contributed
to the revisions contained in the 1997 Law. It briefly describes the
drafting process and examines the major considerations—economic,
political, legal, and international—that motivated the revisions.
Chapter IV analyzes in some detail the content of the revisions
themselves. It identifies four main themes: a desire to rationalize an
inconsistent and arbitrary criminal justice system; to curb the
discretionary power of government officials; to eliminate political and
ideological language and concepts; and to keep pace with the seismic
changes in Chinese society since 1979. The chapter then examines
each of the principal specific revisions, including: the elimination of
analogy; the redesignation of “crimes of counterrevolution” as “crimes
endangering state security”; punishment (including the death penalty);
and the removal or redefinition of former catch-all categories of crime
such as “hooliganism” and “speculation.” Chapter V presents a
summary and conclusion, as well as a number of recommendations for
further reforms and constructive action by those outside China.

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I. THE NEW CRIMINAL LAW

On March 14, 1997, the Fifth Session of the Eighth National People's Congress of the People's Republic of China approved a major overhaul of China's Criminal Law. The revised Criminal Law went into effect on October 1, 1997, replacing the previous Criminal Law in effect since January 1, 1980. The revised Criminal Law, some 15 years in the making, effects major changes in China's criminal law. Most noticeable of these changes is the sheer length of the new Criminal Law: 452 articles compared with 192 articles in the old Criminal Law. With this length has come both wider coverage and greater specificity in the definition of crimes. In general, the revisions show a desire to rationalize and unify existing criminal law, to depoliticize the penal system, and to provide greater predictability and less discretion for officials. The latter goal stems primarily from the state's desire to exercise greater control over its officers, but human rights concerns also appear to have been present.

From a human rights perspective, the primary significance of the revisions lies not in what they offer now but in where they may lead. It would be incorrect to characterize the revisions as "liberalizing"; they were more accurately about rationalizing and professionalizing. Nevertheless, they represent a move toward a legal system that is structurally more hospitable to the assertion of individual rights against the state, even if in substance such rights still receive little protection.

The reforms to the Criminal Law represent a modest step toward conformity with international human rights standards, as expressed in particular in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Specifically, the Criminal Law is now in conformity with the principle of *nullum crimen sine lege* (no crime without law making it

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2See infra notes 73-75 and accompanying text.

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so) expressed in Article 11 of the UDHR and Article 15 of the ICCPR. However, the reforms do not represent any step toward further protection of the substantive human rights, such as freedom of speech and freedom of association, protected by international standards.

Whatever the reforms wrought in the Criminal Law, however, it is important to recognize that criminal law in China extends beyond the Criminal Law. The reforms to the Criminal Law did nothing to rationalize, let alone liberalize, the operation of other penal institutions such as re-education through labor (RETL), a punishment that may be imposed on the basis of extremely vague statutory language and with no real procedural protections. The substantive provisions of RETL remain so vague that they may fairly be said to be in violation of the principle of *nullum crimen sine lege*. In addition, the reforms did little to bring greater openness and transparency to the operation of the Chinese legal system. Information regarding arrests and sentences, for example, is still considered a state secret; the unauthorized release (or even possession) of this information is criminally punishable.
II. BACKGROUND OF CRIMINAL LAW IN CHINA

A. Scope of "criminal law" and punitive sanctions in China

China's Criminal Law must be understood within the context of the penal system of which it is a part. Not all punishable behavior is labeled "criminal" and punished under the Criminal Law. In assessing reforms to the Criminal Law, it is crucial to bear in mind that an act not punishable under the Criminal Law may well be punishable under a regulation labeled "administrative," and for this reason the scope of administrative regulations that resemble criminal statutes is discussed in some detail below.

Chinese legal theory defines punishments under the Criminal Law and the Criminal Procedure Law as "legal" punishments, while punishments under other regulations are known as "administrative" punishments. The distinction between "law" and "administration" has historical roots. Law was considered a weapon to be used against enemies of the state in order to resolve what Mao Zedong called "antagonistic contradictions": conflicts that could be resolved only through victory for one party and defeat for the other, not through compromise. "Administration" and administrative sanctions were a benign way of resolving "non-antagonistic contradictions": conflicts among "the people" that could be resolved through compromise and an appeal to a fundamental harmony of interests.

The primary significance of the distinction between administrative and criminal punishments today is both procedural and substantive. Procedurally, the imposition of administrative punishments is governed not by the Criminal Procedure Law, but instead by whatever procedures are set forth in the specific regulation providing for punishment and, more generally, the recently promulgated Administrative Punishments Law (APL). Substantively,

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Administrative regulations tend to punish offenses defined differently from those in the Criminal Law, and while the maximum punishments are not negligible—they can include imprisonment for up to four years with minimum procedural protections—they do not extend to the most severe sanctions available under the Criminal Law.

1. "Legal" sanctions

The chief source of "legal" sanctions has, since 1979, been the Criminal Law, supplemented by other legislative enactments of the National People's Congress or its Standing Committee. In some cases, such enactments will prohibit a certain act, and then state (somewhat tautologically) that in cases where the commission of the act constitutes a crime, criminal liability shall attach pursuant to the Criminal Law. In other cases, enactments have specifically amended the Criminal Law and the Criminal Procedure Law.6

2. "Administrative" and disciplinary sanctions

Of at least equal importance to the sanctions of the Criminal Law in the lives of ordinary citizens is a range of sanctions available under "administrative" regulations.7 Chief among these is the Security Administration Punishment Regulations (SAPR),8 a set of rules providing for "administrative punishments" originally issued in 1957 and revised and updated in 1986 and again in 1994.

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6In 1983, for example, as part of a campaign against crime, the Standing Committee of the National People's Congress approved two "decisions" extending the application of the death penalty to numerous offenses and reducing the time for appeal in such cases to three days. See Donald C. Clarke, "Concepts of Law in the Chinese Anti-Crime Campaign," 98 Harvard Law Review (1985), at 1897.


While not labeled "criminal" in China, the SAPR are an important item of criminal legislation. Their reach is extremely broad, and unlike the Criminal Law, they are administered by the police, not the courts. The difference between SAPR punishments and those imposed under the Criminal Law is that the former are considered "merely" administrative punishments. From the defendant's point of view, the difference is that maximum sentences under the SAPR are much lighter than those under the Criminal Law.

In general, the determination of a violation and its punishment is made by the public security bureau at the city or county level and the defendant may appeal to the public security organ at the next highest level. The post-1986 version of the SAPR provides for an additional appeal out of the public security bureaucracy to a people's court. This is an extremely significant reform in its implications, although its practical effect will be limited so long as courts and public security organs are simply two arms of the same "political-legal" apparatus.

Re-education Through Labor

Between the SAPR and the Criminal Law stands the institution of re-education through labor (laodong jiaoyang) (RETL). RETL should not be confused with reform through labor (laodong gaizao), a punishment generally accompanying a sentence of penal servitude under the Criminal Law and governed by separate regulations. A 1985 article provides a standard explanation of the purpose behind RETL:

If we look at the phenomena of infringement of law (weifa) and crime (fanzui), we find that in every country there exists a group of people who have not broken major laws, but whose actions fall somewhere between crime and error, people who threaten public security and whom it is difficult for the courts to deal with. In

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9 The relative importance of the SAPR is indicated by official statistics: the public security organs imposed sanctions under the SAPR in more than three million cases in 1996, compared with only 617,000 first-instance court judgments in criminal cases. Zhongguo falü nianjian 1997 [China Law Yearbook 1997], China Law Yearbook Editorial Dept., ed. (China Law Yearbook Publishing House, Beijing 1997) [hereinafter China Law Yearbook 1997], at 1055, 1061.

10 The SAPR provide for three punishments: a warning, a fine of up to 200 yuan for most offenses, and detention for up to 15 days.
its handling of those who infringe the law or commit crimes, China has established a category at a level between the punishment of security administration offenses and criminal sentencing by the courts, namely, re-education through labor.\textsuperscript{11}

Like the SAPR, the regulations on RETL depend crucially upon the distinction between minor lawbreaking and gross violations that rise to the level of crime.

RETL first received a quasi-statutory basis in 1957 in the form of a State Council "decision" (jüeding) approved by the Standing Committee of the National People's Congress,\textsuperscript{12} and its continuing viability was confirmed in 1979.\textsuperscript{13} For most of the 1980s and early 1990s, it appears to have been governed, if at all, by the Trial Procedures on Re-education Through Labor, a Ministry of Public Security document of uncertain legal status issued in 1982 and made public only in 1989.\textsuperscript{14} These regulations have been supplemented, although apparently not replaced, by the 1992 Detailed Rules on the Implementation of Law in the Administration of Re-education Through Labor.\textsuperscript{15}

Whatever its documentary basis, which is in any case largely unknown to both ordinary citizens and legal specialists, RETL remains, among China's penal institutions, uniquely prone to arbitrary application and abuse and affects a great many people. Even the most basic statistics, however, such as the number of detainees, are not

\textsuperscript{11}Dang Guoqing, "Qiantan laodong jiaoyang xuexiao" [A Brief Discussion of Labor Re-education Schools], Zhongguo fazhi bao, April 29, 1985, at 3.

\textsuperscript{12}Decision of the State Council on the Question of Re-education Through Labor, adopted August 3, 1957, in Zhonghua renmin gongheguo falü quanshu [Compendium of the Laws of the People's Republic of China] (Jilin People's Press, Changchun: 1989) [hereinafter Compendium], at 1572. This and several other regulations relating to administrative detention are collected and translated in Epstein, supra note 7.

\textsuperscript{13}Supplementary Rules of the State Council on Re-education Through Labor, issued October 29, 1979, in Compendium, supra note 12, at 1574.

\textsuperscript{14}Trial Procedures on Re-education Through Labor, issued January 21, 1982, in Compendium, supra note 12, at 1583.

\textsuperscript{15}Detailed Rules on Implementing the Law in the Administration of Re-education Through Labor, issued by the Ministry of Justice on August 10, 1992, in 26 Guowuyuan gongbao (1992), at 1055.
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published in the usual places such as the annual Law Yearbook of China (Zhongguo fālǜ nianjian), and must be gleaned from occasional official comments reported in the press. The official China Daily recently reported that a total of 3 million persons had been subject to RETL since its inception. As of September 1997, 230,000 persons were officially reported to be detained in 280 re-education through labor camps, compared with 150,000 in 1993.16

Persons can spend up to four years at a stretch in RETL, a sentence much longer than the maximum 15 days under the SAPR and harsher than certain criminal punishments such as control (guanzhi) (three months to two years), criminal detention (juyi) (maximum of six months), and even fixed-term imprisonment (youqi tuxing) (minimum of six months). Indeed, a sentence to RETL can result in internal exile for life: under a number of circumstances, including simply having one's sentence extended for a year as a result of an offence committed while in custody, the authorities can cancel a prisoner's urban registration and require him to stay at the labor camp as a "free laborer" under conditions very similar to those of prisoners.17 Yet its rules defining substantive offenses are very loose—it can be imposed, for example, on "counterrevolutionary elements and anti-Party, anti-socialist elements whose crimes are minor" and "those who are employed but for a long period of time refuse to labor, stir up trouble unreasonably, disrupt the lives of those around them, and do not respond to admonition"—and its application is subject to almost no oversight or review prior to imposition.18 The simple and moralistic


17 See Trial Procedures on Re-education Through Labor, supra note 14, art. 65.

18 Following imposition of a sentence under RETL, the subject of the sentence may bring an action under the Administrative Litigation Law seeking to overturn it. This has been formally possible since 1991. See Opinion of the Supreme People's Court on Several Questions Concerning the Implementation
language of the RETL regulations, a remnant of an earlier day in Chinese legal drafting, offers a striking contrast with that of the SAPR, which uses more than 10 times the number of characters to set forth its offenses, although they merit substantially lesser terms of confinement.

While the 1997 Criminal Law has largely jettisoned the vague pejoratives found in the 1979 Criminal Law in favor of more objective and precise language, there remains in existence a legal basis for imposing up to four years’ imprisonment, as well as internal exile for life, for the offense of “stirring up trouble unreasonably.” RETL has regularly proved its usefulness against political dissidents and remains available to the authorities today.

Custody and Investigation

Custody and investigation (shourong shencha)\textsuperscript{19} (CI) is essentially a catch-all rubric under which persons may be detained by the police for virtually any reason where no law or administrative regulation provides proper grounds. Although CI was officially abolished in 1996, it is discussed here because it is too early to be certain that CI and all similar measures are gone for good. Any discussion of CI based on published sources must, however, necessarily be sketchy due to the high degree of secrecy—even higher than that accompanying RETL—with which the Chinese government surrounds it. For example, a 1988 Ministry of Public Security document on the subject begins by reiterating the instructions of a document issued the previous year: “[W]hen informing the media about the fight against

\textsuperscript{19}Shourong shencha is usually translated as “shelter and investigation.” Although shourong, perhaps most precisely translated as “to take in,” can mean to shelter, in this context it means to take into custody, and the benevolent connotations of “shelter” are absent.
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criminal elements, public security organs shall not provide information about custody and investigation and shall ensure that the media concerned do not publicize any news about shelter and investigation." The document goes on to say that even when it is necessary to report to the public that a suspect has been placed under custody and investigation, "the words 'custody and investigation' should be avoided. Instead, it can be put vaguely that public security organs 'are in the process of investigating the case." 20

CI was based upon the idea that suspicious persons need to be detained while police investigate the crimes that they have committed or might commit. It was not to be used on persons whose identities were known and who were unlikely to leave the local area. In practice, CI blurred the line between investigation and punishment, and was described as a method of "simultaneously educating the criminal, making him perform labor, and investigating him." 21

CI was administered entirely at the discretion of public security organs with no external supervision. Not surprisingly, the potential for abuse was great. Although the rules that govern CI appeared to allow a maximum of three months' detention, in practice these limits were often grossly exceeded. It seems clear from Chinese sources that public security organs frequently expanded the scope of CI, taking in persons

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20Reply to the "Request for Instructions on the Question of Publicizing Custody and Investigation," issued by the Ministry of Public Security on October 14, 1988, in Zhonghua renmin gongheguo falü guifanxing jieshi jicheng [Collected Normative Interpretations of the Laws of the People's Republic of China] (Jilin People's Press, Changchun: 1990), at 1424, translated in Epstein, supra note 7, at 41-42. Indeed, the very volume in which this regulation appears is not intended for public circulation. Because of this secrecy, the author has been unable to find statistics showing the extent to which CI has been used nationally in recent years. Chinese sources from the mid-1990s, however, indicate that 80-90% of persons formally arrested since the promulgation of the first Criminal Procedure Law were first subjected to CI. See Lawyers Committee for Human Rights, Opening to Reform? An Analysis of China's Revised Criminal Procedure Law (New York: 1996) [hereinafter Opening to Reform], at 22. Given that the great majority of those formally arrested would eventually have been punished under the Criminal Law, and that there were probably a substantial number of CI detainees who were never formally arrested or subjected to punishment under the Criminal Law, it follows that most likely the number of people detained under CI exceeds the number punished under the Criminal Law.

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whose identities were known and who were from the local area, in addition to those who had merely violated administrative or civil laws. Moreover, in some areas the procuratorate as well, without any legal basis, adopted the practice of detaining persons for investigation.

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In 1980, the State Council issued a Notice providing that custody and investigation and re-education through labor should be "unified" under the single rubric of re-education through labor. The 1980 Notice did not quite abolish CI, however, because it continued to allow detention for essentially the same reasons that had traditionally justified CI. In practice, the Notice had no effect. CI continued in much the same form as before the 1980 Notice, not only in substance but also in name.

In 1996, the abolition of CI was again announced with the promulgation of the amended Criminal Procedure Law. It is too soon, however, to predict that China's public security organs will readily give up their power to detain suspects for virtually any act deemed to warrant detention. It is frequently reported, for example, that persons believed likely to cause trouble are rounded up before sensitive occasions and released afterward. Since such persons are typically questioned about the activities of themselves and others but not charged with criminal or even administrative offenses—the main

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22This fact is attested to not only by numerous reports in the Chinese press, but also by a Ministry of Public Security regulation that admits as much: Notice on Further Controlling the Use of the Method of Custody and Investigation, issued June 11, 1991, in Zui'an suicheng shouce [Handbook on the Prosecution of Criminal Cases] (China Procuratorate Press, Beijing: 1992), at 260-62.

23The procuratorate is a body that is structurally parallel to the courts and is responsible for the investigation of certain crimes, the prosecution of virtually all crimes, and general supervision of the lawfulness of the actions of government organs. It is not in practice as powerful as this description of its formal functions might suggest.

24See, e.g., Notice on Further Controlling the Use of the Method of Custody and Investigation, supra note 22.

25See generally Opening to Reform, supra note 20, at 21-26; Donald C. Clarke, "One Step Back Permits Two Steps Forward," China Rights Forum (Fall 1996), at 8-11. Since CI had never been authorized by the Criminal Procedure Law, the revisions to that law could not explicitly abolish it. Nevertheless, contemporary official commentary made the intent to abolish clear.
Background of Criminal Law in China

purpose being simply to get them off the street—it appears that CI continues to exist in substance if not in form.

Finally, mention should be made of Custody and Education (shourong jiaoyu) (CE), a form of administrative detention that can be imposed by the police on prostitutes and their customers in certain circumstances. While narrow in focus, CE is potentially severe in its impact, as detention from six months to two years may be imposed. Unlike Custody and Investigation, CE does in fact appear to have been appropriately authorized by the National People's Congress Standing Committee, and the governing legislation provides for an appeal to courts under the Administrative Litigation Law. While the Lawyers Committee has no evidence suggesting CE has been abused, so little is known about this institution that a reliable assessment cannot be made.26

Other Administrative and Disciplinary Sanctions

In addition to the legal and administrative sanctions described above, there also exists a mechanism for punishing the violation of state norms through the workplace. Employees who violate family planning policies, for example, can suffer pay cuts. These sanctions were most effective, however, when economic reforms in China were still not far advanced and virtually all urban residents were tied to a state-owned enterprise or government work unit that controlled significant benefits. As economic reform has brought about a progressive decline in the importance of the workplace as a locus of

social control, the importance of these relatively informal sanctions has declined as well and can be expected to continue to do so.

B. History of criminal law

1. Punitive sanctions in general

One of the first acts of the Chinese Communist Party upon achieving power in 1949 was the abolition of the entire legal apparatus of the Republic of China under the Nationalist Party. For the subsequent 30 years, China had no statute, or indeed any normative document, systematically setting forth the principles and standards governing the imposition of punishment by the state upon individuals. Nor was there any clear standard for distinguishing between offenses properly viewed as manifesting antagonistic contradictions and those that merely manifested non-antagonistic contradictions. To be sure, there were a few statutes defining criminal conduct and prescribing punishment. One of the first laws to be enacted by the PRC government after assuming power was the Regulations of the People's Republic of China on the Punishment of Counterrevolution, passed in 1951. The Marriage Law, passed in 1950, also provided (albeit vaguely in each case) for the definition and punishment of certain offenses. A range of “administrative” offenses were defined and made punishable under the Security Administration Punishment Regulations, passed in 1957. Regulations on Re-education Through Labor, passed in the same year, made punishable such offenses as “stirring up trouble unreasonably.” In the absence of express statutory prohibitions, however, criminal conduct could be defined by “relevant resolutions, decisions, orders, instructions and policies of the Party and the government...” There were simply no consistent standards defining what body, using what procedure, had the authority to lay

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27The document formally providing for such abolition is the Common Program of the Chinese People's Political Consultative Conference—in many respects the first constitution of the People's Republic of China, although it is not formally labeled as such—adopted September 29, 1949.

Background of Criminal Law in China

down rules governing who should and should not be imprisoned or otherwise punished by the state. 29

Customary notions of right and wrong were also substitutes for codified definitions. Prior to the 1979 Criminal Law, there was no published legislation outlawing common crimes such as murder, rape and robbery, yet such acts were regularly defined and punished as crimes by the authorities.

2. Criminal Law

1979 Criminal Law

The long absence of any comprehensive statute on criminal law was the result not of inattention but of a series of political interruptions. 30 Upon the founding of the People's Republic, a Legal System Commission (fazhi weiyuanhui) under the People's Government (renmin zhengfu) began drafting a statute. In 1954, the work was taken up by the Legislative Bills Commission (fa'an weiyuanhui) (LBC) of the Standing Committee of the First National People's Congress (NPC), China's highest legislative body. In June 1957, near the height of the liberalizing "hundred flowers" movement, 31 the LBC presented the twenty-second draft of the Criminal Law to the Fourth Session of the First NPC Standing Committee for discussion. The "Anti-Rightist" Movement 32 immediately followed, however, putting an end to discussions of inadequacies in the existing system and proposals for

29 Insofar as official legal theory is concerned, this is no longer the case today. See infra note 43 and accompanying text.

30 This section draws largely on Cheng Linjie & Ma Yongmei, "Xiuding xing fa de taiqian muhou" [On the Stage and Behind the Scenes in the Revisions to the Criminal Law], 6 Renmin gongan (1997), at 6.

31 The Hundred Flowers Movement was a Party-sponsored initiative to permit greater intellectual and artistic freedom. It was introduced first into the arts in the spring of 1956 under the slogan, "Let a hundred flowers bloom, let the hundred schools of thought contend." In early 1957, with Mao's encouragement, the campaign was extended to intellectual expression, and by the spring of 1957, the movement had mounted to the point of vehement criticism of the Party in general and the excesses of its officials in particular.

32 The Anti-Rightist Movement was the Communist Party's response to the unexpected scale of criticism directed against the Party during the Hundred Flowers Movement. Those who had criticized the Party were attacked as "rightists," purged from their positions, and in some cases imprisoned.
reform and removing from positions of influence many of the legal experts involved in the codification project.

By 1962, codification efforts had revived to the point where a thirty-third draft was completed, but this draft too ultimately fell victim to the political storms of the 1960s. The advent of the Cultural Revolution in 1966 dealt a severe blow to the entire idea of legality along the lines contemplated by the codifiers.

After the ascension of Deng Xiaoping, following the death of Mao Zedong and the purge of his followers, the codification project was soon revived. In July 1979, the Legal System Commission of the Standing Committee of the Fifth NPC revised the thirty-third draft of the Criminal Law, already 15 years old, and presented it to the Second Session of the Fifth NPC for approval. The revised draft was approved and went into effect on January 1, 1980.

**Summary of Provisions**

To understand the changes brought about by the 1997 revisions to the Criminal Law, it is important to comprehend the system first put in place by the 1979 Criminal Law, which is in many respects still in effect.

The 1979 Criminal Law was in its basic form a Western-style penal code on the German model, and was divided into two sections: the General Part (zongze), providing the basic principles underlying the application of the Criminal Law, and the Special Part (fenze), listing specific crimes.

**The General Part**

The General Part defined general notions of crime, making social danger a key element. It discussed criminal responsibility, distinguishing between intentional and negligent acts and providing for diminished responsibility in various circumstances, e.g., where the offender was young or mentally ill. There were also rules on sentencing and parole and a statute of limitations.

Permissible punishments were listed and defined in Chapter Three of the General Part. Control (guanzhi) lasted from three months to two years. The convict continued to work and receive wages at his or her place of employment and had to report regularly to the local police. Criminal detention (juyi) entailed confinement in a local detention house for 15 days\(^3\) to six months. Detention for fewer than

\(^3\)This was increased to one month in Article 42 of the 1997 Criminal Law.
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15 days was considered an "administrative punishment," provided for under a different statute, the Security Administration Punishment Regulations. Penal servitude (youqi tuxing) meant confinement for a period of six months to 15 years (20 years in the case of multiple crimes) or for life. The offender would generally be sent to "reform through labor": hard labor in a prison camp.34 Finally, the death penalty (sixing) could be imposed either for immediate execution (subject to appeal and review) or with a two-year suspension if immediate execution was not deemed "essential."35 If the convict was observed to have demonstrated sufficient repentance and reform during the period of suspension, the sentence could be commuted to penal servitude for life or for a period of 15 to 20 years.

The statute also provided for the supplementary punishments (which, despite their name, could be imposed by themselves) of fines (fajin), confiscation (moshou caichan) of the convict's property, and deprivation of political rights (boduo zhengzhi quanli) for a period after release from prison.36

The 1979 Criminal Law did not so much define which acts are punishable as prescribe what the sanctions should be when relatively severe punishments were deemed—pursuant to some other standard—to be in order. As in the pre-Law era, the crime was defined by reference to political exigencies or generally accepted standards of morality. This would pose a dilemma in a legal and political system governed by the principle that the state must, as far as possible, be neutral between competing moral systems and that the embodiment of particular moral standards in law—for example, the prohibition of gambling—must be in accordance with specific defined procedures. This principle does not, however, govern the legal and political system of China. Consequently, the 1979 Criminal Law and subsequent


35 While no further definitions of "essential" have been published, presumably the central government issued non-public instructions from time to time for the guidance of courts and prosecutors.

36 According to Article 54 of the 1979 Criminal Law, deprivation of political rights means deprivation of (i) the right to elect and the right to be elected; (ii) the right to freedom of speech, of the press, of association, of procession, and of demonstration; (iii) the right to hold a position in state organs; and (iv) the right to hold a leading position in a state-owned company, enterprise, or institution or people's organization.
legislation interpreting or modifying it contained many instances of moralistic language not readily susceptible to interpretation by professional legal specialists, such as "stirring up trouble" (xunxin zishi), "hooligan activities" (liumang huodong), "odious circumstances" (elie qingjie), "speculation" (touji daoba), and "the people's indignation is very great" (minfen jida). Nor was there any accepted procedure, such as the use of precedent, interpretation by appellate courts, or consignment of the issue to a jury, for giving to these terms any meaning other than what the relevant government official on the spot chose to give them.

When the elastic language of the Criminal Law was still insufficient to cover an act deemed worthy of punishment, the Law itself provided another solution: the use of analogy (leitui). Under Article 79, a "crime" not defined in the Law (or elsewhere) could, with the approval of the Supreme People's Court, be punished according to the most nearly applicable article. This shows that if rules defining crime are "law," then the very notion of "crime" under the 1979 Criminal Law was not a "legal" concept: the determination of whether a particular act constituted a crime was something that had to take place outside of the Law. Thus, while the Law indicated what punishment to apply when such-and-such a crime was committed, it was often unhelpful in determining whether a crime had been committed.37 In this respect, the 1979 Criminal Law resembles the rules for punishment of Imperial China, which stipulated any number of punishable acts in great detail, but also contained provisions allowing for analogy and punishing "doing what ought not to be done."

The Special Part

The Special Part listed various crimes and their punishments. Pride of place went to counterrevolutionary crimes (fangemingzui), which were defined as "[a]ll acts endangering the People's Republic of China committed with the goal of overthrowing the political power of the dictatorship of the proletariat and the socialist system" (Article 90). Despite their textual prominence, however, government statistics show that crimes explicitly labeled counterrevolutionary were insignificant in number—a mere 0.28% of all criminal cases decided by courts from

37See, e.g., 1979 Criminal Law, supra note 1, art. 139, para. 1, which punishes but does not define rape. Paragraph 2, by contrast, does define one act that will constitute rape: having sexual relations with a girl under 14.
Background of Criminal Law in China

1983 to the end of 1987, 38 and 0.036% in 1996 alone. 39 Indeed, counterrevolution appears to have been the one major crime whose incidence decreased in the 1980s and 1990s. 40 The statistics can be misleading, however, since government persecution of perceived political opponents was not limited to charges of counterrevolution. 41

The other chapters in the Special Part cover crimes of endangering public security, undermining the socialist economic order, infringement of personal and democratic rights, property violation, disruption of the order of social administration, disruption of marriage and the family, and dereliction of duty and corruption.

Summary

The Special Part was a relatively skimpy 103 articles. The Criminal Law of the Republic of China 42 used in Taiwan, by contrast, contains 258 articles in its Special Part. One reason for the relative simplicity of the 1979 Criminal Law is that the vague or non-existent definitions of certain catch-all categories such as speculation and hooliganism, as well as the provision on analogy, offered an escape hatch in case of imperfect or careless drafting. Another reason is that the 1979 Criminal Law was expected to be, and in fact was, supplemented by numerous other pieces of special legislation either specifically criminalizing a certain act or prohibiting an act and providing vaguely that “where it constitutes a crime, criminal responsibility shall be affixed,” without providing any guidance as to the circumstances under which the performance of a prohibited act would constitute a crime.

Finally, it must be remembered that the 1979 Criminal Law was as much a political text as a legal one. The government’s political

39China Law Yearbook 1997, supra note 9, at 1055.
40In many cases, it is likely that what are in fact political offenses are prosecuted under other rubrics in order to conceal their political nature. On the other hand, some crimes such as leading a jail break are considered counterrevolutionary even though an outside observer might not discern a political motive on the part of the offenders.
41For further discussion of the crime of counterrevolution, see infra note 109 and accompanying text.
42As amended, November 26, 1997.
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aim at the time was to establish that the mode of governance had changed from the days of Mao and the Gang of Four. State action was now to be justified less by direct ideological inspiration than by "law."

As a result, the drafters of the 1979 Criminal Law were concerned simply with providing a statutory basis for state action, not with worries about due process. Moreover, the 1979 Criminal Law was designed to be used by judicial and public security cadres with a low educational level.

Although it may not have been clear at the time, a major contribution of the 1979 Criminal Law was to lay the groundwork for the idea, increasingly accepted in China, that punishment—in particular, the deprivation of personal liberty—may be imposed only when authorized by the decisions of specific bodies acting pursuant to specific procedures. By virtue of its aspiration to completeness—an aspiration aided, to be sure, by vagueness and the use of analogy—the 1979 Criminal Law by implication excluded other less formal sources of penal norms. Consequently, the Party no longer purports to have the authority to define and punish criminal conduct on its own, and the potential for criticism of police actions as unlawful now exists in a way it did not in an earlier era.

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43 The continuation of this trend is clear in the 1997 Criminal Law. Although government action was to be grounded in the 1979 Criminal Law, the Law itself proclaimed its ideological inspiration. The 1997 Criminal Law, by contrast, claims grounding only in the constitution. See infra note 54 and accompanying text.
III. BACKGROUND OF THE 1997 CRIMINAL LAW

A. The revision process

As early as 1981, the Standing Committee of the NPC had begun revising the Criminal Law and the Criminal Procedure Law through a series of Decisions (juding), and by the time the 1997 Criminal Law was approved, the Standing Committee had issued more than 20 documents revising or supplementing the 1979 Criminal Law.44 While the initial decision to begin a systematic revision of the 1979 Criminal Law was apparently made in the early 1980s, it was only in 1988 that revision was officially put on the legislative agenda of the Standing Committee of the Seventh NPC and a first draft of the revised Criminal Law was created.45

In May 1989, the Legal Commission (falu weiyuanhui) of the NPC and the Legislative Affairs Commission (fazhi gongzuoweyuanhui) of the NPC Standing Committee, the body in overall charge of the revision project, had several meetings on revisions.46 As in the 1950s and 1960s, however, law reform once again fell victim to political storms as the crackdown in the wake of the June 4th massacre put a temporary end to discussions of reforming criminal law.47

Reform of the Criminal Law returned to the political agenda in 1991, when the Legislative Affairs Commission drafted a Decision revising the crime of counterrevolution and circulated it for comments to the Central Political-Legal Commission, the Communist Party body in charge of legal policy, as well as the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, and certain specialists. The revisions were to be submitted to the Fourth Session of the Seventh NPC in March 1991. Various delays held up the submission, however, and once again

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45See Cheng & Ma, supra note 30, at 6; Wang Hanbin, supra note 44, at 219.

46See Cheng & Ma, supra note 30, at 7.

47Chinese commentators refer to these events obliquely as "changes in the domestic and international situation." See, e.g., Li Wenyan, "W oguo xingfa xiugai zhong ruogan zhuyao wenti zongshu" [An Account of Several Important Issues in the Revision of China's Criminal Law], 2 Gongan daxue xuebao (1997), at 15.
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political factors intervened: the breakup of the Soviet Union and the
downfall of the Eastern European communist parties put any revisions
to the crime of counterrevolution on hold indefinitely.48

In 1993, revision of the Criminal Law was once again put on
the legislative agenda of the Eighth NPC,49 and passage of the revised
Criminal Procedure Law in March 1996 led to a renewed effort to
finish revisions to the Criminal Law. A draft of 384 articles was
presented to the 23rd Session of the Standing Committee of the NPC
in December 1996, following which a revised draft was circulated
widely to government departments and legal institutes across the
country. Intensive meetings appear to have been held throughout
January 1997, involving representatives from relevant ministries, the
State Council, Party bodies, NPC commissions, and the Central
Military Commission.

In early March 1997, a draft was brought before the Fifth
Session of the Eighth NPC, and after further revisions, adopted on
March 14. Although the draft adopted by the NPC was substantially
similar to the one initially brought before it, there were some changes
showing that the NPC is no longer simply the rubber stamp it has long
been considered. The Ministry of Public Security, for example, favored
a provision contained in the March 6 draft originally presented to the
NPC providing that the use of weapons by police in the lawful
execution of their duties would constitute legitimate self-defense in all
cases. This provision was the cause of such controversy—apparently
more than 3000 deputies to the NPC objected to it—that it was even
reported in the China Daily, an official English-language newspaper.50
Over the objections of Tian Qiyu, a member of the Presidium and a
vice minister of public security, the presidium of the NPC removed the
offending provision from the draft that was ultimately approved.51

48See Cheng & Ma, supra note 30, at 7.
49I.d., at 7; Li Wenyuan, supra note 47, at 15.
50See "China Congress Disagrees on Criminal Law Prior to Passage," Deutsche
Presse-Agentur, March 14, 1997.
51See Cheng & Ma, supra note 30, at 8.
Background to the 1997 Criminal Law

B. Reasons for revisions

The Criminal Law was revised for several reasons. Foreign criticism of China's human rights practices seems to have had some effect, despite the assertions of the Chinese government to the contrary.\textsuperscript{52} In part, the drafters may have believed that certain cosmetic or even substantive changes were necessary in order to avoid foreign policy setbacks; in part, foreign criticism may have dovetailed with the complaints of domestic critics, who could use foreign policy concerns to advance their own agenda. Yet the main place to look for the sources of pressures to revise the Criminal Law, however, is still within the borders of China, and in particular in the impact of the post-Mao reforms inaugurated by Deng Xiaoping, the current results of which were scarcely imaginable at the time the 1979 Criminal Law was adopted.

1. Economic

The seismic changes in China's economy meant that many of the criminal categories in the 1979 Criminal Law had become obsolete or unworkable. For example, speculation and profiteering in the 1979 Criminal Law had never been defined. To a judge or public security official steeped in the traditional ideology of Chinese communism, they might amount to nothing more than buying low and selling high. But buying low and selling high is an integral part of trading in a market economy, and therefore could not be left on the books as a crime. The resale of planned supply coupons was also prohibited under the 1979 Criminal Law. While this could have been left on the books, it was hardly necessary: with the effective disappearance of the system under which such coupons were issued, it is virtually impossible to commit this crime.

At the same time that economic reform made certain categories obsolete, it created opportunities for new activities that the authorities wished to prohibit.\textsuperscript{53} Securities crimes, for example, could not have been committed in 1979, when no Chinese enterprises issued securities. Nor were computer crimes an issue at the time in China or, indeed, anywhere in the world. The new opportunities for both 

\textsuperscript{52}See generally Andrew Nathan, "China: Getting Human Rights Right," The Washington Quarterly (Spring 1997), at 133.

\textsuperscript{53}Wang Hanbin, supra note 44, at 219.
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legitimate and illegitimate wealth created the need, through a provision on money laundering, to prohibit the conversion of the latter into the former. Finally, the establishment of a value-added tax created the opportunity for vast amounts of money to be gained through fraudulent documentation. As a result of these changes in society, some of the most extensive revisions to the 1979 Criminal Law appear in the chapter formerly entitled "Crimes of Destruction of the Socialist Economic Order"—a title now tellingly revised to include the word "Market" after the word "Socialist."

Economic reform also brought about changes in Chinese civil society that may have contributed to pressures to reform the Criminal Law. First, the move toward production and allocation through the market instead of through bureaucratic directives meant that citizens became progressively less dependent on state institutions and their work unit and hence less amenable to traditional methods of social control. As a result, the Criminal Law had to play a larger role and its inadequacies became clearer. At the same time, economic reform brought increased contact with foreign countries. Thus, today's Chinese citizens, both in and out of the elite, are vastly more knowledgeable about foreign countries and practices than in 1979, and may have been less inclined to be satisfied with the 1979 Criminal Law. Moreover, the increased contact with foreign countries has meant that foreign views of China are of increased importance. Thus, to the extent that foreign criticism of China's human rights practices threatened China's economic intercourse with foreign nations, the government was under more pressure to respond than a Chinese government in an earlier era would have been.

2. Political

Political reforms in the post-Mao era, while not as striking as economic reforms, have nevertheless been significant. One of the most striking political reforms has been the effective abandonment by the Party of attempts to justify its rule in terms of openly political ideology and historical inevitability. Instead, the Party has attempted to appeal to the ideal of the rule of law. The search for legitimacy grounded in law has meant that the law must appear to be as neutral and non-ideological as possible. The opening two articles of the 1979 Criminal Law, which grounded the Law in Marxism-Leninism-Mao Zedong Thought and repeatedly invoked the dictatorship of the proletariat, socialist revolution, and the masses, had become an anachronism and
Background to the 1997 Criminal Law

an embarrassment. The 1997 Criminal Law, by contrast, is grounded in the constitution—certainly a political document, but unlike Mao Zedong Thought or "the masses," something with specialized legal content as well in which legal professionals can claim expertise.

As important as the change in political ideology has been the change in the nature of the personnel manning the institutions involved in drafting and implementing the Criminal Law. The demographic characteristics of this group have changed radically since the 1979 Criminal Law was drafted. At that time, law departments in institutions of higher education had barely reopened after having been closed since the onset of the Cultural Revolution in the mid-1960s. Those with legal training from before that time who had survived the Cultural Revolution were only beginning to return to positions of influence in the legal arena. In short, with the exception of some aged professors brought out of retirement or the political wilderness, China had virtually no persons with specialized legal training. Finally, the key political posts were held by aged cadres on the basis of revolutionary credentials such as service in the Long March, not education or technical competence.

The recovery of legal education in China began quickly, however, and by the end of 1997 China had more than 110,000 lawyers, compared with only 50,000 five years earlier, and their quality was improving with their numbers. On the political side, the retirement age of ministers, provincial Party secretaries, and governors was set in 1982 at 65, and that of their deputies at 60. In addition, Party and government positions may now be held for a maximum of

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54 The corresponding articles of the 1997 Criminal Law, by contrast, mention the people's democratic dictatorship, socialist construction, and the masses only once each, and Marxism, Leninism, Mao Zedong Thought, and revolution not at all. The Law is instead grounded solely in the constitution.


56 See "Law Reforms Aid Human Rights Protection, Ministry Official Says," Xinhua News Agency, February 27, 1998. This source claims over 170,000 lawyers as of the end of 1997, but that figure is inconsistent with most other estimates putting the number at something over 100,000. An official source, for example, gives a figure of 100,148 persons with lawyer qualifications as of the end of 1996. China Law Yearbook 1997, supra note 9, at 1074.

two terms. The results of this personnel reform have been striking: “Almost instantly, it transformed a ruling elite dominated by poorly educated, aging revolutionaries into one composed mostly of middle-aged technocrats.” In the 15 years since 1982, for example, the proportion of college-educated members of the Communist Party’s Central Committee has risen from 55 percent to 92 percent.

The change in the backgrounds of the political elite, and the greatly increased supply of the legally educated, has meant that there is both an increased understanding of, and desire to fix, the inadequacies of the 1979 Criminal Law and an increased technical ability to do so.

A further element of political reforms has been the increased role for the National People’s Congress. While Party control over the selection of delegates as well as the agenda makes comparisons to a Western parliament inappropriate, the NPC has in recent years nevertheless moved beyond its traditional role as rubber stamp for Party policies. The greater prominence of the NPC, the official legislative body responsible for the Criminal Law, has meant decreasing legitimacy for the traditional method of filling gaps in the formal law—Party policy statements and interpretive documents issued by agencies such as the Supreme People’s Court. Thus, revision became more pressing as a response to inadequacies as traditional solutions lost legitimacy.

3. Legal

In addition to the indirect pressures for revision brought about by changes in the economic and political realm, changes in the legal realm itself made revision more pressing. As the volume and sophistication of China’s legislation increased, particularly in the field of economic organization and regulation but also in the field of criminal law itself, the 1979 Criminal Law became more and more anachronistic in both tone and substance. In 1986, the SAPR were substantially revised and rationalized, and provisions for analogy removed. In 1996, the Criminal Procedure Law was substantially revised, and the Law on Administrative Punishments—a kind of procedural law for administrative sanctions—was promulgated for the

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58Minxin Pei, "Is China Democratizing?,” Foreign Affairs (Jan./Feb. 1998), at 68, 71.
59I.d.
60See supra note 27 and accompanying text.
Background to the 1997 Criminal Law

first time. The abolition of the long-criticized institution of custody and investigation was announced. Given all these measures in every other field of penal regulations, 61 reform of the Criminal Law could hardly be put off any longer.

4. Foreign relations

A significant element of the post-Mao reform program was China's increased participation in the international system. China became party to a host of treaties and multilateral conventions in the 1980s and 1990s. In doing so, China assumed certain obligations under international law, and to the extent those obligations implicated its domestic legal system, they made that legal system the legitimate object of foreign concern.

As a member of the United Nations, China is bound by the Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948. 62 China has signed, but not ratified, both of the two main conventions of international human rights law, the International Covenant on Economic, Social and Cultural Rights 63 and the International Covenant on Civil and Political Rights. 64 It has acceded to nine other United Nations human rights conventions, including the Convention against Torture, and to several minor International Labour Organisation (ILO) conventions, although it has not ratified the major ILO conventions relating to freedom of

61 The institution of Re-education Through Labor remains in place as a striking exception to this reforming trend. See infra notes 166-168 and accompanying text.

62 See UDHR, supra note 3.

63 International Covenant on Economic, Social and Cultural Rights, UN General Assembly resolution 2200A (XXI), December 19, 1966. The covenant was signed by China's ambassador to the United Nations on October 27, 1997, but the government made it clear that it would not be implemented until ratified by the NPC through specific legislation. See "China Will Only Implement UN Covenant After Ratification," Agence France-Presse, October 28, 1997.

64 See ICCPR, supra note 3. The covenant was signed by China's ambassador to the United Nations on October 5, 1998. It has not yet been ratified by the NPC.
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association, the right to organize and collective bargaining.\textsuperscript{65} International human rights standards were clearly influential in the revision of the Criminal Procedure Law; it is also likely that they were used in support of arguments to abolish certain features of the 1979 Criminal Law such as analogy.

China's integration into the international system also led to a desire by the authorities to harmonize the categories of China's criminal law with those used internationally for pragmatic as well as political reasons. This desire appears to have been the chief force behind the transformation of counterrevolutionary crimes into crimes of endangering state security. Whatever liberal legal academics may have wished, authoritative Chinese commentary on the change almost always stresses that the change was not intended to be substantive, but was instead intended among other things to make extradition of suspects easier by making the crime appear non-political.\textsuperscript{66}


\textsuperscript{66}See infra notes 109-124.
IV. ANALYSIS OF REVISIONS

A. Main themes

The revisions to the Criminal Law are characterized by four main themes: rationalization, reduction in discretionary power, depoliticization, and response to changing circumstances.

1. Rationalization

A major purpose of the revisions was to unify in a single document criminal provisions previously scattered in several others. By some counts, more than 130 other pieces of legislation provided for criminal punishment by reference or by analogy to Criminal Law provisions by the time of revision. At the level of substance, the rationalization impulse is reflected in the stated desire to make the penalties more consistent with the severity of the crime. A surprising number of commentators highlighted as a major theme of revision the declaration in Article 5 that the punishment should match the crime. It is difficult to imagine a substantial body of influential opinion opposed to matching the punishment with the crime; the explanation for the prominence given this theme is presumably that lawmakers were no longer satisfied with the particular way the matching had been done almost two decades earlier at the time the 1979 Criminal Law was promulgated.

The rationalization impulse is also reflected in the Criminal Law's procedures for making the application of discretionary measures more consistent. For example, the procedures for parole, reduction of sentence, and the imposition of sentence below the legally prescribed minimum have all been tightened. The conditions that must be met have been defined more precisely, and decision-making power has been taken away from the basic-level people's court and lodged either in an intermediate-level or higher-level people's court or in the Supreme People's Court. All of these changes reflect a dissatisfaction with the

67 See Wang Hanbin, supra note 44, at 220.
68 See Li Wenyan, supra note 47, at 15; Xiong Xuanguo, "Xing fa xiuding yu sifa shiyong" [The Revision of the Criminal Law and its Application in Judicial Proceedings], 5 Falü shiyong (1997), at 5.
69 See, e.g., Li Wenyan, supra note 47, at 16.
70 See infra notes 139-141 and accompanying text.
existing system as arbitrary and prone to corruption because the standards were vague and their implementation was local. Yet the drafters recognized that the written law simply could not account for all possibilities. The compromise was to preserve the possibility for leniency in light of unforeseen circumstances, but to attempt to unify its application through a single body. In light of the poor facilities for communication of court decisions, local courts, with the best will in the world, could not be expected to develop a kind of common law for the application of the provisions on leniency. Only a single court, or at most a very limited body of courts, could be expected to do so. The cost of such a procedure, of course, is either an increased workload for the Supreme People's Court or, if it cannot shoulder such a workload, a decrease in opportunities for the exercise of discretionary leniency.

2. Greater predictability, less discretion

Closely related to the theme of rationalization is the apparent attempt in the revisions to the Criminal Law to provide greater predictability and less discretion in the application of the law. The reasons behind this are twofold. First, less discretion for officials administering the law means greater power for those who write the law. The 1979 Criminal Law was characterized by a concern on the part of the drafters that they might have missed something, and so police, prosecutors, and courts were given a great deal of leeway in deciding how to apply its provisions. The drafters of the 1997 Criminal Law had more experience and self-confidence, as well as less confidence in the willingness and ability of local officials to apply the law correctly and impartially.

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71 See Wang Hanbin, supra note 44, at 222; Wang Xudong, "Xin 'xing fa' dui sifa xingzheng gongzuo de biance" [The New Criminal Law's Spur to Judicial Administration], 6 Dangdai sifa (1997), at 10.

72 See infra notes 139-141 and accompanying text.

73 See Wang Hanbin, supra note 44, at 220.

74 See, e.g., id. (explaining the presence in the 1979 Criminal Law of the provision on analogy by reference to a concern that the Special Part in its brevity might have omitted crimes); Zhang Jun, "Xiuding xing fa de kuanglia shexiang ying you gongshi" [There Should Be Agreement over the Conceptual Framework for Revision of the Criminal Law], 12 Renmin sifa (1996), at 4 (noting that revisions to the catch-all crimes were feasible only after gaining...
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Second, some commentators explicitly made the point that excessive discretion could lead to arbitrary acts by government officials inimical to the rights of citizens. If, as some argued, it was as important for the Criminal Law to protect the rights of citizens as to protect society from crime, then officials could not simply be given carte blanche to punish. The 1979 Criminal Law was explicitly criticized on the grounds that it was excessively concerned with protecting society and had therefore neglected protection of the rights of citizens. The use of both analogy and catch-all categories such as speculation and hooliganism was criticized as giving excessive power to officials.75

3. Depoliticization

Depoliticization has been accomplished less through any change of substance than through the elimination of certain political vocabulary. Consider, for example, the striking difference in guiding philosophy expressed in the first two articles of the 1979 and the 1997 Criminal Laws. Article 1 of the 1979 Criminal Law is laden with the vocabulary of politics:

The Criminal Law of the People's Republic of China, which takes Marxism-Leninism-Mao Zedong Thought as its guide and the Constitution as its basis, is formulated in accordance with the policy of combining punishment with leniency and in light of actual circumstances and the concrete experience of all of our country's ethnic groups in carrying out the people's democratic dictatorship led by the proletariat and based on the worker-peasant alliance, that is, the dictatorship of the proletariat, and in conducting socialist revolution and socialist construction.

Compare this with Article 1 of the 1997 Criminal Law:

experience, and that the 1979 Criminal Law had been correct in defining them broadly).

75See, e.g., the comments of Professor Chen Xiangliang of People's University in "Xing fa xiugai zongheng tan" [A General Discussion of the Revision of the Criminal Law], 12 Renmin sifa (1996) [hereinafter A General Discussion], at 5.
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This law is formulated, in accordance with the Constitution and in light of our country's concrete experience and actual circumstances in the struggle against crime, in order to punish crime and protect the people.

Taken together, the first two articles of the 1997 Criminal Law mention the dictatorship of the proletariat, socialist construction, and the masses only once each (as opposed to three times, twice, and twice, respectively, in the 1979 Criminal Law), and Marxism, Leninism, Mao Zedong Thought, the worker-peasant alliance, and socialist revolution not at all. The Law is instead grounded solely in the constitution.

The most prominent example of depoliticization is the transformation of crimes of counterrevolution—a political concept—into crimes of endangering state security. This aspect of the revisions is discussed in more detail below.

It would be a mistake to make too much of a mere change of language in a document emanating from a legal culture in which the government is not meaningfully restrained by the precise verbal formulations of statutory law. Nevertheless, the reduction of specifically political language and its replacement by terms more familiar to legal professionals does suggest an increased role for such professionals in the interpretation of the law. If political terms such as counterrevolution or "the anger of the masses" have legal significance, then those with authority and expertise in politics—Party officials—will have a say in legal interpretation, whether or not they have legal training and experience. Compared with the 1979 Criminal Law, control over the meaning of the 1997 Criminal Law is more firmly lodged in the hands of specialized legal personnel such as judges, procurators, police,76 lawyers, and law professors.

4. Response to changing circumstances

Many of the revisions to the Criminal Law reflect nothing more than a desire to catch up with the massive changes that have taken place in Chinese society since the adoption of the 1979 Criminal Law. The great expansion in the number of economic crimes has been.

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76 The police are an integral part of the "political-legal" system in China and are closely connected to courts and prosecutors in a way they may not be in other countries.

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noted already. In addition, the 1997 Criminal Law specifically punishes a number of crimes against the person that have been on the rise in the 1980s and 1990s, in particular the kidnapping for sale of women and children and the taking of debt hostages. Although the 1979 Criminal Law curiously did not directly prohibit kidnapping for ransom, it did prohibit kidnapping for sale, and made unlawful detention punishable by up to three years' imprisonment. The 1997 Criminal Law contains a new provision punishing kidnapping for ransom by up to life imprisonment. The taking of debt hostages, however, is not considered a type of kidnapping for ransom. Instead, it is assimilated into unlawful detention and punished by no more than three years' imprisonment. Similarly, the abduction of women and children for sale is not dealt with as an ordinary kidnapping, but is instead treated as a separate offense and, barring aggravating circumstances, punished by up to 10 years' imprisonment.77

Both of these crimes present human rights challenges in that they are initially perpetrated by individuals, not by government. It is government, on the other hand, that is responsible for the official response, and in both cases the official response is not an unambiguous condemnation.

The kidnapping and sale of women and children is essentially a form of slavery which could not exist without the cooperation of government officials in the community—typically a rural village—into which the victims are sold. All too often rescue efforts are stymied by the obstruction of local officials sympathetic to the local party. In their view, he is being asked to give up something for which he paid good money.78

The same ambivalent attitude also exists with respect to the kidnapping of debt hostages. The special feature of this kind of kidnapping is that the kidnapper cannot conceal his identity. It is an essential part of the success of the scheme—the recovery of the debt—that the relatives or work unit of the victim know who needs to be paid and why. Thus, newspapers report cases where the victim was held for months while local authorities attempted to solve the problem. In

77One of the aggravating circumstances justifying imposition of a sentence of up to life imprisonment is the use of force, threats or drugs in the abduction; barring the use of these methods, it is hard to see how a genuine abduction could be carried out in the first place.

78See e.g., “Yige bei guaimai guniang de kongsu” [The Accusation of a Girl Who Was Kidnapped and Sold], Fazhi ribao, October 28, 1989, at 3.
such cases, it is clear that the local authorities did not regard the
matter as a crime of ordinary kidnapping, but saw it as understandable,
if not entirely justified. The 1997 Criminal Law continues to reflect
this view and treats kidnapping for the purpose of obtaining a sum of
money claimed as a debt as less blameworthy than kidnapping for the
purpose of obtaining a sum of money not so claimed.

The 1997 Criminal Law contains several new provisions aimed
at strengthening the power of institutions of the legal system, in
particular the courts. The prohibition on incitement to resist the
implementation of state laws and decrees has been moved out of the
chapter on counterrevolutionary crimes in the 1979 Criminal Law,
which required the troublesome proof of counterrevolutionary motive,
and into the chapter on crimes of disrupting the order of social
administration. No counterrevolutionary intent need be proved here,
although the maximum sentence is lower. More importantly, an entire
new section on disrupting the administration of law has been added.
This section contains provisions punishing the giving of false
testimony, the destruction or fabrication of evidence, attacks on courts
or judicial personnel, disposal of property that has been sealed or
frozen by court order, and refusal to implement court judgments.

The last provision is particularly important in the Chinese
judicial system. Under Article 157 of the 1979 Criminal Law, it was
never clear whether the simple refusal to obey a court order,
unaccompanied by threats or violence, was punishable as a crime.
Article 313 of the 1997 Criminal Law drops the requirement of threats
or violence, but makes refusal to obey a crime only in the case of
unspecified "serious circumstances."

An important practical problem posed by the sheer number of
new offenses is whether there is sufficient manpower to detect and
investigate them, let alone prosecute them. Chinese commentators
point regularly to the deficiencies in existing police work.80 There are
currently about 100,000 investigative personnel nationwide in police

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79 In one case, the local village committee and unspecified "judicial authorities"
spent five months attempting to convince the holder of a debt hostage to
return the hostage (a baby) before finally deciding simply to arrest him. See
"Ci an gai ding he zui?" [What Crime Should This Case Be Classified As?], 1
Zhengfa luncong (1992), at 17.

80 See, e.g., Bao Suixian, "Xin xing fa de shishi dui gongan jiguan tichu de tiaozhan he
yaoqiu" [Challenges to and Demands Made on Public Security Organs by the
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departments, or about one investigator for more than 10,000 persons. In the past, they covered between 30 and 40 percent of criminal cases, while the local police station (paichusuo) covered the rest. At present, the tasks of the local police station are being revised to focus more on day-to-day administration and crime prevention and less on investigative work. Thus, there is more work for investigators at the same time that the number of crimes has been drastically increased and the definitions elaborated. The substitution of a well defined offense for a poorly defined one generally means more work for police and prosecutors, because there are more elements to prove.81

B. Specific revisions

1. Elimination of analogy

The most significant change in terms of principle in the 1997 Criminal Law is the abolition of the 1979 Criminal Law's provision on analogy. This brings the formal criminal law much closer to the international norm expressed in Article 11 of the Universal Declaration of Human Rights, which states that "no one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed."82 It is also perhaps the foremost symbol of the themes of rationalization and reduction of scope for arbitrary discretion embodied in the reforms.

Article 79 of the 1979 Criminal Law provided that a "crime" not defined as such in the Criminal Law (nor, presumably, in any other legislation) could be punished according to the most nearly analogous provision of the Law upon approval by the Supreme People's Court. This provision, which recalls similar provisions in the law of the Qing dynasty, was a clear repudiation of the principle of nullum crimen sine lege. It was possible to be punished for an act that was not prohibited by any statute at the time it was committed (and might even remain statutorily unprohibited at the time it is punished). The provision on analogy implied necessarily that "crime" was something defined outside of the Criminal Law, and left that definition essentially in the hands of prosecutors, subject to review by the Supreme People's Court.

81Id., at 23.
82Article 15 of the ICCPR, which China has signed but not ratified, uses almost identical language.
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In the 1997 Criminal Law, the provision on analogy was removed and replaced by Article 3, which states:
Where an act is expressly stipulated in law to be a crime, the crime shall be determined and punished according to law. Where an act is not expressly stipulated in law to be a crime, it may not be determined to be a crime and punished.

This provision was hailed by Chinese commentators as the application in China of the principle of nullum crimen sine lege. As the following discussion will show, while this is accurate in a formal sense, several substitutes for analogy remain available that implicate the same human rights concerns implicated by analogy: specifically, lack of fair notice to the accused and the potential for arbitrary application.

The provision on analogy, long criticized by academic commentators in China, has its origins not only in Chinese legal

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84Professor Chen Xingliang of People's University, for example, criticizes the institution of analogy as ill-suited to the protection of rights and states that the 1979 Criminal Law went too far in the direction of protecting society at the expense of individuals. Professor Chen also criticizes the catch-all crimes of speculation, hooliganism, and official malfeasance on the same grounds: that their vague definitions make them too amenable to arbitrary application. See A General Discussion, supra note 75, at 5. Another commentator concludes a long critique of analogy by stating:

The system of analogy runs counter to the value orientation of China's criminal law, which is to protect the interests of the people and to determine guilt and measure punishment in accordance with the elements of the crime stipulated in the Special Part of the Criminal Law.

Hu Yunteng, supra note 83, at 69.
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history, but also in the inexperience and caution of the drafters of the 1979 Criminal Law. Acutely conscious of the possibility of their overlooking socially undesirable acts that ought to be criminalized, and not part of a tradition concerned with concepts of due process such as fair notice, they saw analogy as a convenient way to ensure that no loopholes remained in the law. Approval by the Supreme People's Court was the method chosen to avoid excessive and arbitrary application.

In practice, it turns out that analogy was rarely used, at least in a formal way, in the almost two decades that the 1979 Criminal Law was in force. According to Chinese commentators, as of June 1996, only 72 cases of analogy had been approved by the Supreme People's Court and only 92 submitted. These cases apparently were largely related to minor crimes relating to interference with marriage—probably criminalizing adultery in some circumstances—and property cases.

Commentators adduced a number of reasons for the abolition of analogy. First, they pointed out that the infrequency of its use indicated that its benefits were marginal even under the old Law, to say nothing of the revised, greatly expanded Law. Then they noted the costs—for example, burdening the Supreme People's Court with the need to deal with cases that were typically of minor importance.

The main arguments against analogy, however, were twofold. First, it was argued that as a matter of China's constitutional order, the

85The argument for retaining analogy on the grounds of inexperience was still being raised by supporters as late as 1995. See Hou Guoyun, "Shichang jingji xia zuixing fading yu letui de jiazhi quxiang" [The Value Trend of Analogy and Nullum Crimen Sine Lege Under the Market Economy], 3 Faxue (1995), at 64.
86See Xiong Xuanguo, supra note 68, at 3. Criminal law professor Gao Mingxuan puts the number at 73. See Wang Songmiao, "Wei shi we yan: zhuanti xishuo xingfadian" [Pragmatic and Exacting: Specialists Discuss the Criminal Law], 4 Renmin jiancha (1997), at 12.
87See Guo Guanghua, "Xing fa de zhongda xiuai" [Major Revisions in the Criminal Law], 7 Renmin gongan (1997), at 11.
88See Wang Songmiao, supra note 86, at 12; Xiong Xuanguo, supra note 68, at 3.
89See Wang Hanbin, supra note 44, at 221; Xiong Xuanguo, supra note 68, at 3.
90It seems unlikely that the abolition of analogy went unchallenged or that there were no misgivings, but such views do not find expression in the state-controlled media.
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use of analogy by courts infringed on the legislative competence of the NPC. Thus, the abolition of analogy can be seen as an assertion of political power on the part of the NPC, because it takes away from prosecuting organs and the Supreme People's Court the right to define new crimes.

Second, it was argued explicitly that the use of analogy was inimical to the protection of human rights. Not only was this, as a political matter, "disadvantageous to [China] in the struggle over the international human rights issue," but it was also undesirable because human rights were worth protecting for their own sake. The following commentary is worth quoting at length because it presents arguments rarely heard in China:

Practice proves that the disadvantages of the system of analogy outweigh the advantages. The disadvantages are as follows. First, the system of analogy puts the functions of the criminal law in the wrong order. The two main functions of the criminal law are the protection of society and the guarantee of human rights, and the criminal law should give them equal priority in order to achieve the optimum balancing of interests. The value orientation of the system of analogy is the excessive strengthening of the function of protecting society through the expansion of the methods of punishment, while to a certain degree eroding the function of guaranteeing human rights. The system of the market economy requires a looser, freer social environment. The manifestation of this in the ideology of the criminal law is a requirement that the criminal law tilt away from its function of protecting society and toward its function of guaranteeing human rights, that it strengthen its nourishment of human rights. But analogy does precisely the opposite.

Second, the system of analogy is inimical to the imposition of limits on the arbitrary exercise of penal power. Even though the application of analogy is

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subject to strict procedural constraints, because the substantive rules lack any clear and concrete legal standard, the essential character of analogy—it is unwritten law and allows for the extra-legal definition of crimes—results in an intrusion by judicial power into the realm of legislative power in violation of the requirement that each be separate and a constraint on the other. It is therefore impossible to ensure that penal power is not arbitrarily exercised.

Third, the system of analogy is inimical to the full exercise of citizens' rights. Every citizen has the right to do that which is not prohibited by law, and should have the right to know which acts are lawful and which acts are unlawful so that he can determine his will on the basis of this knowledge. Under the system of analogy, however, the citizen's realm of legal freedom is vague and the legal consequences of his acts are unpredictable. The system of analogy, because it expands the scope of punishments in an unstable way, establishes for all citizens—not only criminals—an invisible and unfathomable "forbidden zone" where they face the threat that because of a moment's carelessness they may find themselves accused of a crime that was never set forth in the law.92

Even a high official of the Ministry of Public Security weighed in with a similar argument:

"The establishment of this principle [of nullum crimen sine lege] is more helpful to the realization of the criminal law's dual function of protecting society and protecting human rights, and is of great significance to further protecting the lawful rights and interests of citizens and guaranteeing the strict implementation of the law by judicial organs.93"
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To at least some participants in the controversy, an important issue was not the merits per se of establishing the principle in China, but the secondary issue of whether the principle of nullum crimen sine lege actually existed in the West or was merely "a trick to fool people" with no substance. According to one commentator, Western countries long ago abandoned any real commitment to the principle and adopted, in various guises, institutions similar to analogy. He concluded that China should not attempt to reach a standard that Western countries had found unattainable and maintained only in name, and that China should not concern itself with the carping of others in constructing its system of criminal law "with Chinese characteristics." This view, however, was forcefully challenged in a later issue of the same journal in which it first appeared. The author of the second article asserted that the principle of nullum crimen sine lege was indeed alive and well in the West, and was worthy of emulation. While the Chinese should not pay excessive attention to foreign criticism in building their system of criminal law, the author agreed, they should carefully examine the "Chinese characteristics" it possessed and reject those that were backward.

One reason analogy was used so infrequently is that there were many serviceable substitutes for it. To the extent those substitutes still exist, the concerns raised by the institution of analogy do not disappear with its prohibition.

One substitute recognized by Chinese commentators is simply the very loose (and sometimes non-existent) definitions of other criminal categories in the 1979 Criminal Law. Speculation, hooliganism, and malfeasance were widely used catch-all categories in the 1979 Criminal Law; had they not been available, the use of

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7. Luo is the secretary of the Ministry of Public Security's internal discipline inspection body.

94 Hou Guoyun, supra note 85, at 65.

95 Id. Hou was identified in his article as an assistant professor at the Chinese University of Politics and Law, an institution under the Ministry of Justice. As he did not offer any examples of criminal convictions obtained through the use of the institutions alleged to be similar, the argument did not move much beyond repeated assertions of the point.

96 See Hu Yunteng, supra note 83, at 69. Hu was identified as an assistant researcher (equivalent in rank to assistant professor) at the Institute of Law of the Chinese Academy of Social Sciences.
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analogy would have been much greater.97 Similarly, other crimes such as rape were never defined: Article 139 of the 1979 Criminal Law simply prohibited "rape" (qiangjian) accomplished by violence, coercion, or "other means." This left open the possibility that the crime punishable as rape could be an act accomplished other than by violence or coercion, but since rape is not defined, it is impossible to ascertain what the "other means" might be.98 As a result, socially offensive sexual activities such as seduction could be punished as rape even if not specifically outlawed. While rape has remained undefined in the 1997 Criminal Law and hence open to expansive interpretation, the three catch-all categories described above have all been broken down into more precisely defined offenses and thus are no longer available as easy substitutes for analogy.

Another substitute for analogy is the issuance of what is effectively legislation in the form of interpretations by the Supreme People's Court and other bodies. Article 185 of the 1979 Criminal Law imposes liability on "state personnel who take advantage of their office to accept bribes[.]" In a joint notice "interpreting" this article, the Supreme People's Court and the Supreme People's Procuratorate stated that where former or retired state personnel in effect used connections developed while they were working and through the actions of state personnel still working procured benefits on behalf of someone, any property given to them by the beneficiary would be deemed a bribe for the receipt of which they would be liable under Article 185.99 As at least one Chinese commentator noted, this interpretation goes well

97See the remarks of Zhang Jun, deputy chief of the Research Department of the Supreme People's Court, in A General Discussion, supra note 75, at 4.

98By the same token, the failure to define rape—a failure that persists in the 1997 Criminal Law—means that the possibility of spousal rape remains an open question in China incapable of solution except by legislative fiat. See, e.g., Lao Shan, "Qiangxing yu qizi fasheng xing xingwei you zui ma?" [Is it a Crime to Have Forcible Sexual Relations with One's Wife?], Fazhi ribao, July 22, 1993, at 3. The author notes that the law is unclear, canvasses various views, and concludes that a husband cannot be guilty of rape.

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beyond the scope of the text both with respect to the subject of the crime—who can commit it—as well as with respect to the means by which it is committed—by taking advantage of one's office. Thus, it is a kind of analogy under another name, with the difference that it is sanctioned by the Supreme People's Court beforehand instead of after the fact. While this kind of application of analogy satisfies the concerns about fair notice, it does not satisfy the concern about legislative competence that also motivated the critics of analogy.

Still another practical substitute for analogy is the still-widespread use made by the 1997 Criminal Law of vague, undefined or residual catch-all formulations such as "or by other means" (qita fangfa) and "other especially serious circumstances" (qita yanzhong qingjie), as well as the whole concept of "circumstances" (qingjie), which (along with "harm" (weihai) or "consequences" (houguo)) can be "relatively minor" (jiao qing), "serious" (yanzhong), "especially serious" (tebie yanzhong), "odious" (elie), or "especially odious" (tebie elie). In addition, some crimes are punishable according to the amount of money involved, but the amount may be defined only in terms of "relatively large" (jiao da), "huge" (juda), or even "especially huge" (tebie juda).

Although setting these formulations forth in the statute technically satisfies the criterion of defining the crime in law, their vagueness and openness to arbitrary application implicates the same concerns raised by the system of analogy. The 1997 Criminal Law accepts the notion that crime must be defined in law, but not that it must be defined precisely. In practice, the confusion created by such vague phrases is usually resolved by specific rules promulgated by the Supreme People's Court or some other authoritative body specifying just how much money, for example, constitutes a "relatively large"
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amount for the purposes of a particular provision in the Criminal Law. While such rules may address the concern over arbitrary application by local officials, they may not be public, and if so, are not likely to be widely known.

One Chinese commentator defended the use of such vague formulations as necessary and appropriate to China's national circumstances, but added that writing such formulations into law and using them was quite a different matter from the principle of nullum crimen sine lege as it is understood internationally.

In summary, the abolition of analogy and the enshrinement in the Law itself of the principle that crimes must be defined in the law are significant steps forward in terms of principle and are to be welcomed. It is particularly encouraging to see these steps openly justified in terms of their positive impact on the rights of Chinese citizens, and not simply on the grounds that they will help the state exercise better control over its officials or defend itself better in international disputes over human rights. Nevertheless, the 1997 Criminal Law still contains several features, in particular the common use of vague formulations such as "by other means" or "serious circumstances," that raise the same due process concerns—lack of fair notice and the potential for arbitrary application—found in the system of analogy.

2. Transformation of crimes of counterrevolution into crimes of endangering state security

The single revision in the 1997 Criminal Law that has drawn the most attention internationally is the replacement of counterrevolutionary crimes with crimes of endangering state security. This aspect of the revisions was also the subject of the

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107 See, e.g., infra note 174.
108 See Zeng Qingmin, "Guanyu xin xing fa de jiben yuanze" [On the Basic Principles of the New Criminal Law], 3 Gongan yanjiu (1997), at 18. The author was identified as a researcher at the Institute of Law at the Chinese Academy of Social Sciences.
This class of crimes, regardless of the label, has long been troublesome from an international human rights perspective because it makes punishable the non-violent exercise of certain fundamental rights. Article 19 of the Universal Declaration of Human Rights (UDHR), for example, provides:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20 of the UDHR further provides in part:

Everyone has the right to freedom of peaceful assembly and association.

Freedom to form and join trade unions is protected by Article 8 of the International Covenant on Economic, Social and Cultural Rights, which China has signed but not ratified, and rights of free expression, peaceful assembly, and association are protected by Articles 19, 21, and 22 of the International Covenant on Civil and Political Rights, which the Chinese government also recently signed but has not ratified.

The Chinese government has frequently dealt with the peaceful exercise of such rights by punishing the actor under the law on counterrevolutionary crimes. Cases of counterrevolutionary propaganda and incitement—speech crimes par excellence—appear to have constituted a large number of the total of counterrevolutionary cases immediately prior to revision. As discussed below, the relabeling of such crimes is not without significance, but the government's power—and intention—to punish the peaceful exercise of

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110 See Wang Hanbin, supra note 44.

111 For several recent and typical examples, see China, Whose Security?, supra note 109, at 40-49.

112 Id., at 33 (reporting a Chinese estimate that such cases accounted for 80% of all counterrevolutionary cases by 1990).
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internationally protected rights remains undiminished. In some ways it has even been enhanced.

The elimination of the category of counterrevolution is part of the general trend of reducing or eliminating political concepts from criminal law. As noted above, the opening articles of the 1997 Criminal Law no longer make any mention of Marxism-Leninism or socialist revolution. The political character of the definition of counterrevolution also led to complaints. Since what was considered counterrevolutionary would change according to political and economic developments, such a moving target was unsuitable for use in legislation.\(^{113}\)

The history of efforts to revise the provisions of the criminal law on counterrevolution predates by many years the adoption of the 1997 Criminal Law. Arguments were heard from the very beginning of the post-Mao era that, as a criminal category, “counterrevolution” had been used abusively more than correctly, and that a more objective and non-political standard of endangerment of state security should replace it. Indeed, a draft of the revised Criminal Law circulated in 1988 already incorporated this view.

Although the political crackdown in 1989 put a temporary halt to reform efforts,\(^{114}\) by 1991 commentators were once again publishing articles promoting the change from counterrevolution to endangerment of state security. It is important to note, however, that the justifications offered do not reflect any kind of liberalizing impulse. Indeed, commentators stressed that the change of name was not intended to imply any change of substance,\(^{115}\) and the official report on the revisions to the National People’s Congress stressed that convictions and sentences for counterrevolutionary offenses under the


\(^{114}\)Counterrevolutionary offenses figured prominently in the charges brought against defendants involved in the protests of the spring of 1989.

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1979 Criminal Law remained valid and would not be changed.\textsuperscript{116} Thus, unlike the abolition of analogy or the 1996 reforms to the Criminal Procedure Law, in which international human rights standards appear to have played at least a subsidiary role, the reforms to the chapter on counterrevolutionary crimes bear no trace of the influence of such standards.

If no change of substance was intended, what was the point? The post-1989 commentary consistently invoked several themes.\textsuperscript{117} First, the obviously political nature of the concept of counterrevolutionary crimes made it difficult for China to maintain in international fora that its jails held no political prisoners, only common criminals. Second, the existence of counterrevolutionary crimes in the Criminal Law hindered the growth of China's judicial cooperation with foreign countries, particular in the area of extradition, since political crimes are generally not extraditable offenses.\textsuperscript{118} Third, the requirement of counterrevolutionary motive under the 1979 Criminal Law had proved difficult to work with in practice and created an unnecessary procedural obstacle for the courts.\textsuperscript{119} Fourth, the reversion of Hong Kong to the jurisdiction of the PRC created difficulties, since a necessary consequence of the "one country, two systems" policy was that the PRC government itself had, in effect, to oppose the implementation of socialism and the dictatorship of the proletariat in Hong Kong for at least 50 years.\textsuperscript{120}

The new provisions on endangering state security are fraught with problems from a human rights perspective. First, as noted, there is no longer any requirement of subjective purpose. This expands the reach of the law considerably, as it was intended to.


\textsuperscript{117}See generally China, Whose Security?, supra note 109.

\textsuperscript{118}See, e.g., Song Qingde, supra note 113, at 10.

\textsuperscript{119}See, e.g., Wang Hanbin, supra note 44, at 223. The elimination of the requirement of counterrevolutionary intent makes it easier, not more difficult, to prosecute.

\textsuperscript{120}See Song Qingde, supra note 113, at 10.
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Second, and more important, there is no meaningful definition of what might constitute an act endangering state security. For example, Article 102 of the 1997 Criminal Law provides simply:

Linking up with foreign countries and thereby endangering the sovereignty, territorial integrity and security of the People's Republic of China, shall be punishable by life imprisonment or fixed-term imprisonment of at least ten years.

Linking up with institutions, organizations and individuals beyond the border to commit the crime in the above paragraph shall be punishable in accordance with the provisions of the above paragraph.

Nor, apparently, is it necessary that any harm actually result from the acts leading to criminal prosecution, or indeed that any concrete acts actually have been performed. In short, the statute allows the prosecution of a person who has not yet committed an act that might not, if committed, have brought about an undefined result—and all without any requirement of showing subjective intent.

Third, the 1997 Criminal Law retains crimes involving the nonviolent exercise of internationally recognized rights of free expression and association. Article 19 of the Universal Declaration of Human Rights declares:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Yet Article 103 of the 1997 Criminal Law, for example, would criminalize the advocacy even of the continued peaceful status quo between Taiwan and the PRC, while peaceful attempts to reform the domestic political system or public criticism of the government could run afoul of Article 105's prohibition of activities aimed at "subverting state political power and overthrowing the socialist system[.]" A document published by the Supreme People's Procuratorate in 1981

122 See cases cited in China, Whose Security?, supra note 109, at 18, n. 43.
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makes it clear that "viciously attacking or slandering central leading comrades" can constitute a crime, and that it is a grave error to suppose that speech is beyond the reach of the Criminal Law. The continued validity of this document, and the thinking behind it, seems clear from the fact that the 1997 Criminal Law actually adds a provision, not present in the 1979 Criminal Law, specifically prohibiting attempts to subvert state power and overthrow socialism by means of rumor-mongering and slander.

2. Punishment

Death penalty

Chinese sources, even official ones, do not present a consistent view on the issue of whether the revisions to the Criminal Law were intended to reduce the use of the death penalty. Undoubtedly, there was significant support among academics and deputies to the NPC for doing so, in particular with respect to economic and property crimes. According to the most authoritative commentary, that presented to the NPC deputies by the vice chairman of the NPC Standing Committee, the conditions for reducing use of the death penalty were not ripe and it had been decided in principle neither to increase nor to reduce its use in the Criminal Law. Other commentators with official standing, however, have claimed that the

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124 1997 Criminal Law, supra note 1, art. 105.

125 Not only the existence, but also the value of these views were acknowledged in the report on the draft revisions presented to the NPC on March 6, 1997 by Wang Hanbin, the Vice Chairman of the Standing Committee of the NPC. See Wang Hanbin, supra note 44, at 226.

126 See Li Wenyuan, supra note 47, at 1.

127 See Wang Hanbin, supra note 44, at 226. This point is echoed in Xing fa de xiugai yu shiyong [The Revision and Application of the Criminal Law], Zhou Daoluan, Shan Changzong & Zhang Sihan, eds. (Beijing: 1997), at 18.
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revisions were intended to reduce, and had in fact reduced, the incidence of death sentences and executions.128

While the Chinese government has always asserted that the use of the death penalty in China is strictly limited to the most heinous crimes,129 so far this has not been the case by any reasonable standard. Official Chinese media have reported cases of death sentences imposed and carried out under the 1979 Criminal Law for crimes such as the theft of 14 cows. That sentence was carried out in 1996. In that year, Amnesty International counted 6,100 death sentences and 4,367 confirmed executions—a figure undoubtedly less than the actual number.130 According to Amnesty, on the basis of conservative estimates, "more people were executed or sentenced to death in China during the 1990s than in the rest of the world put together."131

In general, the 1997 Criminal Law does appear to impose more limits on the use of the death penalty than the 1979 Criminal Law. For example, Article 44 of the 1979 Criminal Law provided that while 16- and 17-year-olds could not be executed, they could be sentenced to death subject to a two-year reprieve. If the sentence were not commuted at the end of the period of reprieve, they would be executed. Article 49 of the 1997 Criminal Law provides simply that those who are under 18 at the time the crime is committed shall not be sentenced to death. This brings the criminal law into line with Article 6 of the ICCPR.

Theft is now punishable by death in fewer circumstances than before. Under the 1979 Criminal Law and a 1982 Decision of the


131See Death Penalty in China, supra note 130.
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NPC Standing Committee,\textsuperscript{132} theft of a "huge" (juda) amount was punishable by death. Pure theft unaccompanied by violence is punishable by death under the 1997 Criminal Law only where the amount is "especially huge" (tābìe juda) and has been stolen from a financial institution, or where the theft is of precious relics and the circumstances are serious.\textsuperscript{133}

A major advance is the elimination of the death penalty for the ill-defined crime of "hooliganism" (liumang zui). Under a 1983 Decision of the NPC Standing Committee enacted as part of an anti-crime campaign, the penalty imposed by Article 160 of the 1979 Criminal Law for such activities as "stirring up trouble" and "other hooligan activities" was extended from a maximum of seven years' imprisonment to death, in cases where the harm caused was "especially serious" (tābìe yanzhong).\textsuperscript{134} The 1997 Criminal Law eliminates "hooliganism" as a category\textsuperscript{135} and replaces it by several individual articles, each addressing a more specifically defined undesirable behavior. "Stirring up trouble," for example, is now further defined as one of four more specific acts,\textsuperscript{136} and "other hooligan activities" has disappeared entirely. None of the acts formerly classified as crimes of hooliganism is punishable by death under the 1997 Criminal Law.

The revised Criminal Law also closes a conceptual gap that existed in the 1979 Criminal Law in the provisions on commutation of suspended death sentences. Under the 1979 Criminal Law, if an offender "truly repents" (huigai) during the period of suspension, the sentence is to be commuted to life. If the offender "resists reform in an odious manner" (kangju gaizao qingjie elie) then the death sentence is to be carried out. What about the offender who neither truly repents nor


\textsuperscript{133}See 1997 Criminal Law, supra note 1, art. 264.


\textsuperscript{135}See infra note 152 and accompanying text.

\textsuperscript{136}See 1997 Criminal Law, supra note 1, art. 293. One of the four specific acts is defined loosely as "creating a disturbance in a public place," but similar definitions are common in many jurisdictions. The real issue is less the text of the statute than the procedures for resolving ambiguity in that text.
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resists reform in an odious manner? In the only well-known case where the authorities have made public the reason for commutation of a death sentence, it was stated that Mao's widow, Jiang Qing, and her fellow Gang of Four member Zhang Chunqiao would not be executed because they had not resisted reform "in any flagrant way." The government did not claim that she had truly repented. The commutation of Jiang Qing's sentence therefore suggests that the proper standard to apply under the 1979 Criminal Law was whether the offender had resisted reform in an odious manner, although there is no evidence suggesting that this standard was actually applied in practice.

Article 50 of the 1997 Criminal Law clarifies the criteria, providing that a suspended death sentence is to be commuted to life imprisonment if the offender commits no intentional crimes during the period of suspension. On its face, this objective standard seems preferable to the looser and more subjective "truly reform" or "resist reform in an odious manner." Given the realities of prison life, however, it is probable that if prison authorities wished to ensure that the sentence were carried out, it would not be difficult to implicate the offender in at least one crime.

It is still too soon to judge whether the revisions to the Criminal Law will mean reduced death sentences. Among other things, the key factor influencing the rate of death sentences is not the text of the Criminal Law, but government policy. The record so far, to the extent it can be known, does not suggest that it is being imposed only on the "most heinous" (zuida eji) crimes, although details are sketchy.

Mitigation of punishments

As part of the aim of rationalizing the law and reducing opportunities for the exercise of discretion, the drafters of the revisions tightened considerably the provisions on imposition of sentences below

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137 Jiang Hua, Work Report of the Supreme People's Court (delivered to the First Session of Sixth National People's Congress on June 7, 1983), translated in Summary of World Broadcasts, supra note 5, June 29, 1983, at FE/7372/C/1.

138 Press sources have recently carried reports of death sentences imposed on a Beijing woman for organizing a prostitution ring and on a minor municipal official in Tianjin for spending 537,000 yuan (approximately US$65,000) over 14 months on lavish official entertainment. See "Harsh Penalty for Pimp," China Daily, November 18, 1998; "Chinese Official Given Death Sentence for Excessive Wining and Dining," Agence France-Presse, November 16, 1998.
Both the 1979 Criminal Law and the 1997 Criminal Law contain provisions stating that in certain circumstances, the offender may be sentenced to a lesser punishment (congqing chufa) or a mitigated punishment (jianqing chufa). A lesser punishment is a punishment at the lower end of the legally prescribed range; a mitigated punishment is a punishment below the legally prescribed minimum. Article 59 of the 1979 Criminal Law provided that where the legally stipulated conditions justifying a mitigated punishment were not present, a mitigated punishment could still be imposed upon the decision of the adjudication committee of the court.\(^{139}\) if, according to the “specific circumstances” (juti qingkuang) of the case, the legal minimum would still be too high.

According to the official commentary, Article 59 was unsatisfactory because its lack of standards opened the door to arbitrary application and corruption.\(^{140}\) Article 63 of the 1997 Criminal Law changes this by providing, first, that the justification must be found in “special circumstances” (teshu qingkuang)\(^{141}\) and second, that the decision to impose a subminimum sentence must be approved by the Supreme People’s Court.

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\(^{139}\) Each court in the PRC has an adjudication committee (shenpan weiyuanhui) chaired by the president of the court and staffed by senior judges. The adjudication committee is the highest decision-making body in the court, and can direct the judge or panel actually hearing the case to enter a particular judgment or sentence.

\(^{140}\) See Wang Hanbin, supra note 44, at 222.

\(^{141}\) “Special circumstances” is clearly intended to be more restrictive than “specific circumstances,” since all cases have specific circumstances, but there is as yet no publicly available interpretation specifying its meaning in further detail. The Supreme People’s Court has, however, defined the identical term more specifically in the context of Article 81 of the 1997 Criminal Law (discussed below): it is to mean special needs of the state in politics, national defense, diplomacy and other matters. See Rules on Several Issues in the Concrete Application of Law in Handling Cases Involving Reduction of Sentence or Parole, promulgated by the Supreme People’s Court on October 29, 1997, effective November 8, 1997 [hereinafter Rules on Parole], art. 11. This gives the state discretion, for example, to grant early parole to a political offender where doing so would ease international human rights pressure on China. It is reasonable to suppose that a similar definition would be applicable to “special circumstances” in the context of the original imposition of sentence.
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Essentially the same problem was diagnosed, and the same remedy prescribed, in the rules regarding granting of parole and reduction of sentence.142 Under the 1979 Criminal Law, a prisoner's sentence could be reduced, or parole granted, if among other things the prisoner demonstrated that he had "truly repented" or "established merit" (ligong biaoxian).143 The 1979 Criminal Law did not specify which body had authority to decide on sentence reductions and parole, but in 1980 the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Justice, and the Ministry of Public Security resolved the issue among themselves.144 In general, the recommendation for sentence reduction or parole had first to come from the prison or labor camp authorities and then to be approved by the local intermediate-level or higher-level court, depending on the circumstances. These jurisdictional rules were confirmed and restated in their essentials in 1989.145

The 1997 Criminal Law attempts to specify in greater detail what will constitute grounds for sentence reduction or parole. Article 78 states that where a prisoner demonstrates "true repentance" or "establishes merit" his sentence "may" be reduced. It goes on, however, to state that in a number of specifically defined instances of "establishing merit," the prisoner's sentence "should" be reduced. In all

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142See Wang Hanbin, supra note 44, at 221. According to one commentator, a problem with the system under the 1979 Criminal Law was that it was not public. As a result, "some people" had the "misimpression" that reductions in sentences could be bought. See Wang Xudong, supra note 71, at 10. One may reasonably surmise that this is the commentator's way of making an oblique criticism.

143See 1979 Criminal Law, supra note 1, arts. 71, 73.


cases, the reduction in sentence must be approved by a people's court at the intermediate level or higher.\textsuperscript{146}

Although the concepts of true repentance and establishing merit, for the purposes of the first part of Article 78, remain undefined in the 1997 Criminal Law, this lacuna was filled by a document promulgated in late 1997 by the Supreme People's Court.\textsuperscript{147} In this document, the Supreme People's Court provided that "true repentance" could be demonstrated by the fulfilling the following four conditions: acknowledging one's crime and submitting to the law; following prison rules and accepting reform; actively engaging in studying politics, culture and technical subjects; and actively engaging in labor and fulfilling production tasks. It cautioned further that the filing of petitions\textsuperscript{148} by prisoners should not in all cases be viewed as a failure to acknowledge one's crime and submit to the law.

The document further provided for a concrete definition of "establishing merit" such that a sentence "may" be reduced—essentially a restatement in watered-down language of the conditions under which the sentence "should" be reduced.\textsuperscript{149}

Essentially the same procedure applies to parole. Article 81 of the 1997 Criminal Law sets forth in moderately greater detail the kind of things that might be deemed "true repentance"—following prison rules and accepting education and reform—but true repentance remains an independent condition for parole. As with sentence reductions, parole must be approved by a people's court at the intermediate level or higher.

The requirement for approval by a people's court at the intermediate level or higher is clearly an attempt to impose some kind of control over the granting of sentence reductions and parole and to reduce the possibility of corruption. Yet important questions remain. First, the 1997 Criminal Law does not state which intermediate level court is to have jurisdiction. Presumably, it is either the court at the

\textsuperscript{146}China has four levels of courts: basic-level courts, intermediate-level courts, higher-level courts (at the administrative level of province), and the Supreme People's Court.

\textsuperscript{147}Rules on Parole, supra note 141.

\textsuperscript{148}A petition (shensu) is a kind of appeal made after a final judgment has become effective.

\textsuperscript{149}For example, the sentence "may" be reduced where the prisoner prevents "criminal activities" by others; the sentence "should" be reduced where the prisoner prevents "major criminal activities" by others.
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place of imprisonment or the court in the jurisdiction where the sentence was originally imposed; in the absence of any indication to the contrary, it is likely the court at the place of imprisonment, as stated in the 1980 Joint Notice.\textsuperscript{150} Second, adding parole and sentence reduction decisions to the workload of intermediate level courts means either that their main task—that of deciding cases—must suffer, or that they will be unable to do much more than rubber-stamp decisions brought to them, thus negating the purpose of review. Given that there are only about 380 intermediate level courts, each court will, on average, be responsible for deciding parole and sentence reduction issues for more than 3400 prisoners.\textsuperscript{151}

4. Breakdown of catch-all categories

As part of the drive to rationalize the Criminal Law and reduce opportunities for arbitrary application, the drafters broke down two categories of crimes that had been broad and undefined in the 1979 Criminal Law.

Hooliganism

Article 160 of the 1979 Criminal Law provided in part as follows:

Whoever assembles a crowd to have brawls, stirs up trouble, humiliates women, or engages in other hooligan activities, undermining public order, when the circumstances are odious, is to be sentenced to not more than seven years of fixed-term imprisonment, criminal detention, or control.

\textsuperscript{150}See 1980 Joint Notice, supra note 144.

\textsuperscript{151}In 1995, China's prisons held 1.3 million prisoners, in addition to more than 200,000 persons detained under RETL. See China Law Yearbook 1996, supra note 16, at 974. There is no reason to think that the number has gone down since then. In March 1997, Vice Minister of Justice Zhang Xiufu asserted that the 2026 persons serving sentences for crimes of counterrevolution constituted 0.46% of China's prison population. See Counterrevolutionary Crimes, supra note 116. This yields a total prison population of 440,000, a figure that is simply too low to be credible, given other official statistics.
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The broad reach of this provision—especially the term "other hooligan activities," which is no more precise in Chinese than it is in English—is readily apparent, and may explain why it was so rarely necessary to resort to analogy in order to punish undesirable activities not specifically covered by the 1979 Criminal Law. In addition to its use to punish those whose transgressions were unrelated to politics, hooliganism was a mainstay of the anti-dissident arsenal in the Soviet Union, and it has been used for similar purposes in China. Indeed, a charge of hooliganism may sometimes be preferred by the government, as it tends to conceal the political nature of the offense.

Despite its political utility, hooliganism was subject to essentially the same criticisms as analogy: it was too loose and provided too much scope for arbitrary discretion. As such, it came under the same rationalizing imperative. The provision was significantly revised in the 1997 Criminal Law by breaking it down into separate articles, defining at least one element more clearly, and eliminating entirely the category of "other hooligan activities." Article 292 of the 1997 Criminal Law continues to criminalize the undefined act of "assembling a crowd to have brawls" for those who are ringleaders or active participants. Article 253 criminalizes "stirring up trouble" (xunxin zishi), but only where it takes one of several defined forms. Finally, Article 237 criminalizes the forcible defiling (weixie) or humiliation of women by threats, violence, or other means.

The 1997 Criminal Law's revisions to the crime of hooliganism unquestionably represent a step in the right direction, even though troubling areas of vagueness remain. Perhaps the most important revision is not in the definition of the crime but in its punishment. The most by which any of the acts in Article 237 can be punished, even with aggravating circumstances, is 10 years' imprisonment (under Article 292). Under the 1979 Criminal Law, by contrast, much harsher punishment, including the death penalty, was available for any act local authorities chose to define as "other criminal hooligan activities"—and unlike the death penalty for counterrevolutionary offenses, which required Supreme People's Court approval, the death penalty for hooliganism needed approval only by the provincial-level court.

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Speculation

Article 118 of the 1979 Criminal Law criminalized making a regular occupation of smuggling or speculating, or smuggling or speculating in "huge" amounts. Speculation was never, however, defined in the statute, leaving it up to local and departmental interpretation. The category of speculation is particularly prone to arbitrary application in a socialist economy undergoing extensive reform. Under the pre-reform economy, with its extensive use of planned allocation and subsidized pricing, speculation might mean nothing more than unapproved resale at a profit—a definition that was intended to discourage private commerce, and in practice undoubtedly had that effect. As late as 1987, State Council regulations defined as speculation "purchase[ing] fraudulently from retail stores or other channels goods in short supply and resell[ing] them on the spot at higher prices" and "resell[ing] at a profit any economic contracts." At the same time, however, an important element of economic reform has been the dismantling of the structure of state control over substantial parts of the economy, including commerce. As a result, the boundary between permitted and forbidden economic activity has shifted constantly over time with central government policy, and can vary from place to place as well depending on local government policy.

The category of speculation has disappeared entirely from the 1997 Criminal Law, although a remnant category of "other unlawful business operations that seriously disrupt market order," punishable in "especially serious circumstances" by five to 15 years' imprisonment, remains in Article 225. Given that the previous maximum punishment for speculation had been death, this is a substantial step forward.

Although there was little official commentary on the reasons for the abolition of the crime of speculation (other than its membership in the group of "catch-all" criminal categories considered

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153 Provisional Regulations Governing Administrative Punishment for Speculation, art. 3, issued September 17, 1987; translated in Summary of World Broadcasts, supra note 5, October 1, 1987, at FE/8687/BII/1. The regulations do not define what constitutes a "fraudulent" purchase from a retail store—presumably it is a purchase not for one's own use. Despite the title of the regulations, their definition of speculation is intended to apply in the criminal context as well as the administrative context.

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per se in need of reform), it seems likely that it was a direct result of China's increasingly open economy. In the place of what was in effect a blanket prohibition on making money through trade, the drafters substituted a long list of specific economic crimes ranging from securities fraud to money laundering. In short, the abolition of speculation represents the official acceptance in the criminal law of economic reform.

5. Who is subject to the Criminal Law

The 1997 Criminal Law claims a greater scope of jurisdiction that its 1979 predecessor in two areas. First, it expands the reach of Chinese law over Chinese citizens abroad. Second, it provides that organizations may bear criminal liability in a greater variety of circumstances than before.

Jurisdiction over individuals

The 1979 Criminal Law provided that Chinese citizens were liable for acts committed outside of China in two circumstances: first, where the act constituted one of a specified list of crimes, including among others counterrevolution, counterfeiting, disclosing state secrets, and falsely posing as state personnel for fraudulent purposes; and second, where the act was a crime carrying a minimum sentence of at least three years' imprisonment under the Law and was punishable in the place where committed. The 1979 Criminal Law similarly applied to foreigners abroad who committed crimes against the PRC or its citizens, provided that the act was punishable under the Law by a minimum sentence of at least three years' imprisonment and was punishable in the place where committed.

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155 1997 Criminal Law, supra note 1, ch. 3: "Crimes of Sabotaging the Order of the Socialist Market Economy." This chapter is significantly larger than its counterpart in the 1979 Criminal Law.

156 1979 Criminal Law, supra note 1, art. 5. Needless to say, this formulation raises as many questions as it answers. How is the "crime" defined? Suppose a Chinese citizen living in the United States attempts to bring goods into the United States without paying the required customs duties, an offense under United States law. Chinese law prohibits smuggling, to be sure, but only where the smuggling is into China. It does not generally prohibit Chinese citizens from attempting to smuggle goods from country A into country B. Is the act punishable under the Law?

157 1979 Criminal Law, supra note 1, art. 6.
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The 1997 Criminal Law broadens its reach over Chinese citizens considerably. Article 7 provides that the Law applies generally to all acts committed by Chinese citizens abroad, whether or not punishable under the law of the country where committed. Where the maximum punishment under the Law is less than three years' imprisonment, however, prosecutorial organs have discretion not to prosecute.\(^{158}\) This assertion of universal jurisdiction over all Chinese citizens, wherever located, is highly significant. No longer does it matter that the act in question was perfectly legal in the jurisdiction where committed. That exception remains effective only for foreigners.

The expanded jurisdiction of the 1997 Criminal Law is probably a response to the activities of dissidents abroad. At the time the 1979 Criminal Law was drafted, the drafters appear to have foreseen a limited range of specific activities by Chinese nationals abroad that could threaten the state. It is unlikely that they foresaw the vast number of students who would go overseas in subsequent decades and the proliferation of independent organizations and communications among them. The expanded jurisdiction of the 1997 Criminal Law reduces the possibility that the government will be hamstrung in prosecuting undesirable activities that do not happen to fall convincingly into one of the categories of the 1979 Criminal Law's list. While few countries are likely to extradite Chinese nationals for clearly political offenses, a person once back in Chinese territory remains subject to prosecution.

Expanded jurisdiction needs in particular to be understood in connection with Article 107 of the 1997 Criminal Law, a new addition criminalizing the provision of financial and other assistance to persons or groups who commit any of the basic crimes of endangering state security (Articles 102 through 105). This provision appears aimed at overseas groups that have raised money to support political prisoners and their families or to support activism in China.\(^{159}\)

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\(^{158}\) Article 7 literally states that "it is permitted not to seek liability," but neither specifies in which body this discretion is lodged nor sets forth any standards for the exercise of this discretion. As a practical matter, given finite manpower and resources, prosecution for crimes in China, as in many other jurisdictions, is within the discretion of prosecutors.

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Organizations

The 1979 Criminal Law made no provision for the bearing of criminal liability by organizations. Subsequent legislation, beginning with the Customs Law in 1987 and followed by at least two dozen other legislative acts or decisions,160 did provide for liability by organizations in specific circumstances. The 1997 Criminal Law sets forth general rules, but still limits organizational liability to where it is specifically provided for by law.

While organizational responsibility is accepted in the criminal legislation of many jurisdictions, the 1997 Criminal Law is deficient in that it appears to consider self-evident that a given act may be attributed to an organization, and is concerned only with the question of whether the organization should be held criminally responsible for "its" act. In fact, only specific individuals can commit acts; organizations can act only through individuals. The question for the criminal law is whether, given the act committed by a particular individual, circumstances exist making it desirable to hold some larger group or organization liable, and if so, what sanctions should be imposed on that group or organization. Thus, Article 151 of the 1997 Criminal Law provides that if an organization commits the crime of smuggling, it shall be criminally liable. It does not, however, provide any guidance as to what kind of relationship between the organization and the person engaged in the smuggling will suffice to permit the conclusion that the act was committed by the organization as well as the individual. None of the academic commentary on this revision addresses this key point: that organizational responsibility is not a question of fact (is the organization responsible?) but one of policy (are the circumstances such that it makes sense to hold the organization responsible?).

For this reason, Chinese commentators have been engaged in a sterile debate over whether the organization to bear criminal liability should be a legal person (faren) or the more broadly defined "unit" (danwei).161 The majority opinion is in favor of legal person liability,

160See Gao & Qian, supra note 91, at 11; Xiong Xuanguo, "Xing fa zongze di xiugai yu wanshan" [The Revision and Further Perfection of the General Part of the Criminal Law], 5 Renmin sifa (1997), at 5.

161The defining characteristics of a unit are less legal than political and social. The unit is the body that issues employee or student identification certificates, holds personal dossiers on individuals within its jurisdiction, has a Party committee, and serves as the locus for distribution of certain benefits and the exercise of certain controls. Not all legal persons have employees—a holding
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on the grounds that the concept of unit, while well understood as a social or economic concept, is too loose for use as a legal concept. In response to those who argue that limiting organizational responsibility to legal persons will somehow let non-legal person organizations off the hook, the legal person school allows that a provision should be added stating that when organizations that are not legal persons commit crimes, they should be held liable as if they were legal persons. This concession, of course, vitiates the entire stated purpose for opposing unit liability in the first place.

The absence in the 1997 Criminal Law of any kind of theory justifying the attribution to an organization of the act of an individual means that prosecutorial authorities will inevitably have to apply whatever theory seems self-evident to them, and there is no reason to suppose that these theories will be consistent across space and time. Consequently, the provisions on organizational liability contain significant room for arbitrary and unpredictable application.

6. Nature of criminal responsibility

The 1997 Criminal Law revises the nature of criminal responsibility in two important ways. First, it contains new provisions on acts attributed to groups. Not only can organizations be liable for certain crimes, but the leaders of criminal groups are now liable for all crimes committed by the group. This liability is separate from, and presumably additional to, any liability the group leader might have under provisions regarding joint commission of crimes or instigation to commit crimes. As with crimes by units, the Law does not address the issue of how to determine when a crime committed by an individual is to be attributed to the group.

Second, the 1997 Criminal Law significantly expands the scope of permissible self-defense. Under the 1979 Criminal Law, self-defense was permitted provided it did not “exceed the bounds of what was necessary” (chaoguo biyao xiandu). According to official commentary, this standard was unsatisfactory because in practice, persons engaging in legitimate self-defense too often found themselves subject to criminal company, for example, might exist only on paper—and not all units have legal personality.


163 See 1997 Criminal Law, supra note 1, arts. 25-31.
prosecution after harm resulted to the aggressor. The vagueness of the standard opened the door to too much arbitrariness.

The solution provided by the 1997 Criminal Law, unfortunately, is simply to define away the problem: where there is a violent crime in progress that seriously threatens personal safety, any act of self-defense is deemed not to be excessive and is not subject to criminal liability. In other cases, self-defense is allowed unless it "clearly exceeds the bounds of what is necessary and results in serious injury." The addition of the word "clearly" is intended to give the benefit of any vagueness to the defender.

The revisions to the standard for permissible self-defense reflect the general trend of the revisions toward greater precision and less room for the exercise of discretion. But in some cases the quest for precision can be counter-productive, because the area in question simply may not admit more than a certain amount. In the case of self-defense, it is hard to see how one could achieve an acceptable standard more precise than "defend, but not excessively." In some legal systems, the vagueness of this standard achieves political legitimacy by means of a procedural device: it is implemented by a jury instead of by government officials. In China there is no alternative to implementation of legal standards by government officials, and so the only solution to vagueness seems to be to eliminate it. The 1997 Criminal Law eliminates the vagueness in the case of violent crimes, but at the cost of declaring that no self-defense will be considered excessive.

Given the stated justification for the revisions—that prosecutors and courts were imposing criminal liability for legitimate self-defense—it remains to be seen whether the revisions will in fact work any changes in practice. Where flexibility is eliminated in one area of the law, it is likely to reappear somewhere else. Thus, prosecutors anxious to prosecute who can no longer say that the act of self-defense in question was excessive will still be able to say that the

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\[164\] See Wang Hanbin, supra note 44, at 222; see also Li Wenyan, supra note 47, at 16. This assertion, if true, is extremely interesting. It was similarly asserted that the police needed extra leeway in their use of weapons because too often they were being subjected to criminal prosecution after harming criminal suspects in the legitimate exercise of their duties, although the latter assertion did not carry the day. It is astonishing to hear Chinese courts and prosecutors accused essentially of worrying more about the rights of criminals than the needs of law enforcement. Without details of specific cases, however, it is hard to know what to make of these claims or how to analyze them.
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crime defended against was not truly life-threatening or a danger to personal safety.

7. Failures to reform: the case of re-education through labor

Whatever can be said about the reforms in the 1997 Criminal Law, a crucial feature about the reform process is what it did not do: abolish or substantially reform the system of rehabilitation through labor (RETL) and other procedurally deficient grounds for detention. More than ever before, RETL stands out in marked contrast to the newly rationalized and professionalized criminal law. Reforms to the formal criminal law will be of little practical significance to the protection of human rights if the authorities remain able to punish under another rubric the exercise of those rights by imprisonment for up to four years followed by internal exile for life. Moreover, as noted earlier, the offenses that can result in a sentence under RETL are defined so loosely as to be almost designed for arbitrary application, and RETL provides no procedural protections such as the right to a defense or the right to appeal before imposition (although the sentence may be challenged after imposition under the Administrative Litigation Law). As one authoritative commentary on the 1997 Criminal Law noted dryly, "This is very far from what is required in a democratic, law-governed state" (minzhu fazhi guojia).  

165These grounds include forced hospitalization (qiangzhi yiliao), custody and re-education (shourong jiaoyang), and work-study education (gongdu jiaoyu). See generally Xingfa xue yuanli [Principles of Criminal Law], Vol. 3, Gao Mingxuan, ed. (People's University Press, Beijing: 1994), at 190-197 and Zhongguo xingfa yuanli (zonglun juan) [Principles of the Criminal Law of China (General Treatise volume)], Zhao Tingguang, ed. (Wuhan University Press, Wuhan: 1992), at 553-558.

166See supra note 17 and accompanying text.

167Zhou, Shan & Zhang, supra note 127, at 19. It is important to note that this view appeared not in an underground samizdat or overseas dissident publication, but in a book edited by senior figures in China's legal world—Zhou, for example, is a justice of the Supreme People's Court and former member of its adjudication committee—and inscribed with a congratulatory message by Ren Jianxin, who at the time of publication was at the apex of the hierarchy in China's "political-legal system" (zhengfa xitong) as the head of the Political-Legal Committee of the Communist Party's Central Committee and President of the Supreme People's Court.
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The contrast between the principles driving the reform of the Criminal Law—essentially, rationalization, professionalization, and the reduction of scope for arbitrariness—and the utter absence of those principles, or indeed any reform whatsoever, in the realm of RETL is striking. According to the commentary cited above, one influential school of thought favored providing for both criminal and RETL-type punishments in the Criminal Law, in order to change the current situation where the latter was determined largely by administrative regulations and Communist Party policy.168 Other scholars also advocated placing RETL within the Criminal Law and having the dangerousness of the act and the actor determined by a court in a special simplified proceeding.169 Both of these schools emphasized the need for procedural protections and appropriate oversight in order to protect the rights of citizens and to prevent abuse. Another school of thought, however, was strongly in favor of retaining RETL, and ironically (from a human rights standpoint) saw it as even more necessary following the abolition of custody and investigation in 1996. The result, according to the commentary, was that the drafters essentially dodged the issue as too complicated to be dealt with in the time available.170

This explanation may be correct, or it may be that the retention of RETL in fact represents an outright victory for its proponents. In either case, it is hard to see it as less than a signal failure on the part of reformers. Indeed, the failure to “resolve” the question of re-education through labor during the reform process is specifically listed as a “disappointment” (yihan) in another authoritative commentary on the 1997 Criminal Law published by the Supreme People’s Court.171

170 See Zhou, Shan & Zhang, supra note 127, at 19.
V. EVALUATION AND CONCLUSION

A. Overview

Taken as a whole, the revised 1997 Criminal Law represents an important advance over the 1979 Criminal Law. While the effort to tighten the drafting and reduce discretion can be attributed in some degree to the central government's desire to rein in local officials and to the desire of the NPC to assert its authority over criminal law more strongly, it is clear that another motivation, at least for some of those involved, was the desire to reduce official arbitrariness that infringed on citizens' rights.

The effort to reduce the scope of local discretion and arbitrariness was not entirely successful. As a general principle, no system of criminal law designed and operated by human beings can function without room for discretion and flexibility. If the formal system leaves no room for discretion, those within the system are bound to find some other way of providing for it.\textsuperscript{172} The challenge for the Chinese legal system, however, is to find a way of making the exercise of discretion transparent and legitimate. Because the operation of the legal system is still considered in many respects to be a state secret,\textsuperscript{173} and because few Chinese citizens believe that they have any say in how they are governed, the only available solution so far to the problems created by discretion has simply been to curtail it. Curtailing it too far, however, would result in an unworkable statute, because not everything can be foreseen. Thus, the 1997 Criminal Law remains troublingly vague in several places.

One way of dealing with the irreducible uncertainty of written law is to have in place a system for resolving vagueness and ambiguity in a manner that is as fair as possible and, at least from a procedural standpoint, predictable. While the 1997 Criminal Law did reduce vagueness, it did nothing—and as a substantive criminal law, could not be expected to do anything—to improve China's existing system for resolving statutory vagueness. That system depends on occasional

\textsuperscript{172}In the United States, for example, it is evident that prosecutorial and judicial discretion remains even in the "three-strikes" jurisdictions where voters have attempted to abolish it. See, e.g., Susan Freinkel, "Strike Zone," \textit{The American Lawyer} (July-August 1995), at 61.

\textsuperscript{173}See infra notes 177-179 and accompanying text.
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"opinions" from the Supreme People's Court—which are not decisions in specific cases, but are rather legislative documents containing lists of rules clarifying existing statutes—as well as "replies" to questions posed by lower courts that are circulated within the court system and other documents circulated within the procuratorial and police bureaucracies.¹⁷⁴ Such documents cannot fill all the gaps, however. The Chinese legal system still conspicuously lacks a reliable way for courts and litigants to discover, for example, what other courts have done in similar cases—this is in part due simply to technological limitations—and an accepted set of principles for reasoning from existing law to new applications. Thus, the remaining vagueness in the 1997 Criminal Law is just as susceptible to arbitrary abuse as the vagueness of the 1979 Criminal Law.

The substance of the revisions does not show any strong liberalizing impulse. While the use of the death penalty appears to have declined somewhat, the revisions for the most part simply add new crimes or define old ones more precisely. The substance of the 1997 Criminal Law is not more friendly to civil liberties than was the substance of the 1979 Criminal Law. Many actions that are clearly nothing more than expression are criminalized—for example, publishing material that insults ethnic minorities in China (Articles 249 and 250) and desecration of the flag or national emblem (Article 299). Article 300 prohibits "sabotaging the implementation of state laws and administrative regulations" through the use of "secret societies (huidaomen) and heretical sects (xiejiao zuzhi)." Because state law prohibits religious organizations other than those officially approved by the state, any religious activity not under the auspices of an

¹⁷⁴In April 1998, for example, the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security issued a joint notice interpreting the vague provisions of Article 264 of the 1997 Criminal Law on larceny. A "relatively large amount," the minimum required to constitute a crime (as opposed to an administrative offense) is declared to be 500 to 2,000 yuan; a "huge" amount, the theft of which carries a larger penalty, is set at 5,000 to 20,000 yuan, and an "especially huge" amount is set at 30,000 to 100,000 yuan. The notice also provided that provincial-level governments could set their own detailed standards within the ranges provided for. See "China Revises Amounts for Legal Determinations of Larceny," Xinhua News Agency, April 23, 1998; reprinted in Foreign Broadcast Information Service, Daily Report: China, April 25, 1998, FBIS-CHI-98-115.
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approved religious organization would ipso facto run afoul of this provision.

B. Evaluation under international human rights norms

The reforms to China's criminal law, in conjunction with previous reforms to its criminal procedure law,\textsuperscript{175} in some ways bring it more into line with what might be called international procedural standards governing the protection of human rights. The abolition of analogy brings the law, at least on a formal basis, into harmony with Article 11 of the UDHR and Article 15 of the ICCPR. The general tightening of definitions and the reduction in catch-all categories also contribute to the value underlying Article 11: the notion that it is unjust to punish a person for an act he or she could not reasonably have known was prohibited.

On the other hand, the system still falls short in another important procedural area: that of openness and transparency in the administration of the criminal law. Transparency is an important protection for human rights because authoritarian governments, while frequently claiming that the application of international human rights norms to their own acts represents the imposition of alien, Western values on their people, often implicitly acknowledge the authority of such norms by attempting to hide violations. Publicity is thus a powerful means of protecting human rights. Articles 10 and 11 of the UDHR recognize this by providing for the right to a public trial for those charged with crimes. Article 14 of the ICCPR provides the same right, and further provides that any judgment in a criminal case shall be made public except in certain cases involving children and marriage.

The Chinese state has (with some exceptions) traditionally been hostile or at best ambivalent about publicizing the operation of the legal system. The law has traditionally been viewed as a collection of rules and institutions for governing subjects, not a source of rights for citizens, and thus information is released only on a need-to-know basis.

This principle is manifested in a number of ways. Attendance at court proceedings, whether civil or criminal, is possible only with the permission of the court. Permission is by no means routine and needs

\textsuperscript{175}See generally Opening to Reform, supra note 20.
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It is unlawful to publish statutory collections without the permission of the government. The publication of transcripts of court proceedings is unlawful without the permission of the government.

Added to this historical tradition is the present government's apparent discomfort with its own violations of the standards described above. Thus, the government has perceived—by and large correctly—efforts to publicize the arrest or trial of dissidents as a political challenge and has punished the challengers with criminal and other sanctions. Political activist Liu Qing was sentenced to three years in prison in 1979 for having distributed a transcript of the trial of Wei Jingsheng. In 1987, a Taiwanese man was arrested and expelled from China for attempting to attend the trial, proclaimed "public" by the government, of a political defendant in Shanghai. In 1996, Li Hai was convicted of "prying into and collecting the following information about people sentenced for criminal activities during the June Fourth 1989 period: name, age, family situation, crime, length of sentence, location of imprisonment, treatment while imprisoned." The sentencing court labeled this information "high-level state secrets."

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176So strong, in fact, is the courts' instinct for secrecy that even a reporter for the official People's Daily was recently refused permission to view a trial in the Tianjin Intermediate-Level People's Court despite provisions mandating "public" trials in the Constitution (art. 125), the Organic Law of People's Courts (art. 7), the Criminal Procedure Law (art.11), the Courtroom Rules for People's Courts issued by the Supreme People's Court, and even the Tianjin court's own internal rules on trial administration, and in spite of the absence of any circumstances justifying exclusion. See Chen Jie, "Tianjin diyi zhongji renmin fayuan yi an gongkai shenli jujue jizhe pangting" [Tianjin First Intermediate-Level People's Court Publicly Adjudicates Case But Refuses to Allow Reporters in Audience], Renmin ribao, May 31, 1998, at 5.


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And it is reported that in April 1998, Wu Ruojie was sentenced to three years of re-education through labor for “divulging state secrets”; the fact that four poets had been arrested in Guizhou as they prepared to launch a literary review.180

In the realm of protection of substantive rights such as freedom of speech and freedom of association—particularly for workers desiring to form trade unions independent of the government-sponsored organizations claiming the name—the 1997 Criminal Law has little more to offer than the 1979 Criminal Law. In the years the 1979 Criminal Law was in effect, the government made frequent use of its provisions on counterrevolution, as well as other criminal categories and administrative punishments, to deal with persons who peacefully exercised rights protected under international human rights standards. With the exception of hooliganism, the most commonly used criminal and administrative categories remain available with little or no substantive changes. The removal of the concept of counterrevolution has not altered the punishment for acts that would formerly have been labeled counterrevolutionary.

C. Recommendations

While the revisions to the Criminal Law are driven by a desire to rationalize and modernize, and show very few overt signs of being influenced by international human rights norms, the fact remains that China continues to invest considerable time and energy in studying foreign legal systems and international standards. Despite rhetoric to the contrary, China is also acutely sensitive to criticism from the international community, and will go to considerable lengths to avoid censure. Well-informed critiques from outsiders therefore remain essential if China is to close the still enormous gap between its present criminal justice system and international human rights standards. A variety of foreign actors can bring pressure to bear on China in this way, including governments and international bodies, non-governmental organizations and human rights groups, and law schools, bar associations, and individual lawyers. Critiques by outsiders can also contribute to improving the status and skills of the Chinese legal services.

profession, so that it can discharge its growing responsibilities effectively.

Continued pressure on the shortcomings of China's penal law—whether it is labeled criminal or administrative—is particularly important in view of the Chinese government's recent decision to sign the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In considering its ratification of these two treaties, China will be obliged to review its domestic laws and identify areas in which these do not conform with the covenants. As this report demonstrates, there continue to be glaring discrepancies between the revised Criminal Law and related enactments and the rights set forth in the two covenants. In order to protect these rights fully, China needs to enact a broad range of further revisions to its Criminal Law, Criminal Procedure Law and other statutes. Specific areas in which further reform is needed include:

(i)  In the spirit of the abolition of analogy, the further reduction in the use of vague terms subject to arbitrary application, to ensure conformity with Article 15 of the ICCPR, which expresses the principle of nullum crimen sine lege. This will also require the establishment of a systematic and transparent process for preventing the arbitrary application of those vague terms that remain, including ex ante notice of the meaning of imprecise terms, through supplementary legislation and/or judicial interpretation, as well as the right to open trial before an impartial tribunal.

(ii) Revisions to the Organic Law on People's Courts and the Law on State Secrets, as well as to any other related regulations, to ensure that the operation of China's courts is fully public, subject only to the limited exceptions allowed by Article 14 of the ICCPR, as well as measures to ensure
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that courts conscientiously observe China's existing guarantees of public trials.181

(iii) The inclusion in the General Part of the Criminal Law of a specific provision stating that, notwithstanding any other provision of the Law, the peaceful exercise of the right of free expression, the right of free association, the right to religious belief and expression, and the right to form a trade union shall not be deemed crimes.

(iv) Revision of those provisions of the Criminal Law which continue to criminalize internationally protected rights, particularly of freedom of expression, freedom of association and freedom of thought, conscience and religion. Among the articles most in need of revision, Articles 102, 103 and 105 of the Criminal Law violate Articles 19 and 22 of the ICCPR, which guarantee the right to freedom of expression; Articles 249, 250 and 299

181Article 14 of the ICCPR states in part as follows: "The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children." While the constitution and other existing Chinese laws and regulations have for years mandated public trials in all but few types of cases (see supra note 176), court officials freely admit that courts have not implemented the relevant provisions. See, e.g., "Trials to Open to Public in Beijing," China Daily, November 20, 1998 ("Beijing will open trials in its courts at all levels to the public and media from this December 1, becoming the first region in China's mainland to do so."); "Courts Prepare for New Legal Practice," China Daily, November 20, 1998 ("Asked why Beijing was so late to fulfil the basic principle of the Chinese constitution of public trial, [the vice president of the Beijing Higher-Level People's Court Ji Kunmei] explained that the improvement of people's legal awareness and of judges' professional level took time.").
additionally violate Article 19 of the ICCPR; and Article 300, which singles out activities by "secret societies and heretical sects," violates Article 18 of the ICCPR, which provides for freedom of thought, conscience, and religion.

(v) Revision of Article 7 of the Criminal Law, which applies to all acts committed by Chinese citizens abroad—regardless of whether they constitute an offense in the country in which they are committed. This provision, aimed at the activities of dissidents outside China, should be of particular concern to governments contemplating mutual legal assistance agreements or treaties with China.

(vi) Further reductions in the use of the death penalty to bring the Criminal Law into conformity with Article 6(2) of the ICCPR, which provides that the death penalty, in countries where it has not yet been abolished, shall be applied "only for the most serious crimes."

(vii) The abolition of the institution of re-education through labor, in recognition of the fact that the Security Administration Punishment Regulations and the 1997 Criminal Law provide a full range of necessary punishments and degrees of formality.

(viii) The revision of the current practice of treating the operations of the criminal justice system as secret. This should be done by releasing accurate, current, and comprehensive information on detentions and sentences under all relevant criminal and administrative statutes, including re-education through labor, custody and investigation (or similar measures under another name), and custody and education. The Chinese government should make public:
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- The total number of detainees at any given time;
- The total number of persons sentenced each year;
- The average length of sentences;
- The specific provisions of the Criminal Law or other relevant law or regulation pursuant to which sentences were imposed, particularly in the case of re-education through labor;
- With respect to re-education through labor, the number of persons sentenced to an additional, fourth year of detention and the number "retained for employment" each year, and the current total number of persons at RETL centers under "retention for employment."
Wrongs and Rights
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