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GENERAL ASPECTS OF THE CHINESE CRIMINAL CODE AND CODE OF CRIMINAL PROCEDURE

By Zhu Qiwu

The People's Republic of China was founded through the great success of the Chinese revolution. After the founding of the Republic, according to the needs of the society, the government established the Regulations for Punishment of Counterrevolutionaries, Regulations for Punishment of Crimes against State Currency and other statutes concerning criminal matters. A criminal code was also drafted, but owing to political developments, especially the interference and sabotage of Lin Biao and the "Gang of Four," it was never promulgated. Since the downfall of Lin Biao and the "Gang of Four", people have earnestly called for the development of socialist democracy and the improvement of the socialist legal system. Hence, on July 1, 1979, the Fifth National People's Congress formally adopted a Criminal Code, which consists of 192 Articles, and a Code of Criminal Procedure, which consists of 164 Articles. The laws became effective on January 1, 1980. An outline of the general principles and basic rules of Chinese Criminal Law and Criminal Procedure follows.

I. THE CHINESE CRIMINAL LAW

A. Guidelines

Criminal law is a fundamental law of the state. China is a socialist state based on the dictatorship of people's democracy, and the guiding ideology of Chinese criminal law is Marxist-Leninist-Maoist thought. In addition, Chinese criminal law incorporates the concrete practice of socialist revolution and socialist development in China. It finds expression in such tenets as: law is a manifestation of class will; law serves socialism; law is an instrument of the dictatorship of the proletariat; law is practiced democratically within the ranks of the people but law exercises dictatorial power over the reactionary classes; the law adheres to strict procedures based on investigations so that certain and accurate blows are dealt to counterrevolutionaries; the law protects

people and punishes crimes; and the law reflects the policy of linking punishment with leniency.

Chinese criminal law is formulated on the basis of the Constitution of the People's Republic of China, which is conceived as the organic law of the state. The Constitution lays down the fundamental principles of the Chinese state, which include: dictatorship of the proletariat, socialist economic development, socialist ownership by the whole Chinese people who act as the leading force of the national economy, and the inviolability of socialist public property. Also, criminal law is intended to maintain social order so that development of the national economy may proceed at high speed in a carefully planned fashion. Finally, criminal law strives to ensure the people's right to participate in the management of state affairs and to safeguard the fundamental rights and liberties of citizens.

B. Fundamental Principles and Rules

There are a number of fundamental principles and rules in Chinese criminal law concerning its application, the elements of a crime, the scope of criminal liability, and punishment, which need explanation.

(1) China asserts its sovereign authority to apply its criminal law expansively within the international community. The Chinese Criminal Code promulgated in 1979 applies to all Chinese citizens and aliens within the territory of China, including its land, territorial waters and air, and even Chinese ships and planes. It does not apply to persons enjoying diplomatic immunities. In addition, any part of an act or effect of an act that occurs within Chinese territory is considered sufficient to render the actor liable under Chinese law. Also, Chinese citizens abroad, including Chinese diplomatic personnel, who commit crimes are liable under the Criminal Code. Finally, and of much significance, any foreigner who commits an offense against China or against a Chinese citizen outside the country is liable under the Criminal Code if the minimum penalty provided is not less than three years imprisonment.

(2) The elements of a crime are defined in accordance with the principle of the unity of subjective and objective conditions. A crime, whether committed intentionally or unintentionally, is made up of three parts: the state of mind to commit the crime, or the subjective idea; the result of the act which endangers society, or the objective consequence; and a causal link between the subjective idea and the objective consequence. The unity of subjective and objective conditions is the overriding principle that defines the crime and determines criminal liability. According to

this principle, if there is no consistency between the subjective and objective conditions, the crime cannot be established. In the case of an intentional crime, when consistency between subjective and objective conditions is established, the offence is punishable. An unintentional offence is punishable only when the law so prescribes. An action which objectively results in harm due to irresistible or unforeseeable factors rather than due to one's intention or negligence is not deemed a crime. Finally, mental patients and offenders below the age of sixteen years are generally not held accountable by the Code for the harm that they have caused.

(3) Only the perpetrator of a crime is punishable. No person may be punished merely for being related to or for associating with the defendant. Family, relatives, friends or neighbors cannot be implicated because of the prosecution of the defendant. This rule is an important advance over the recent past when the defendant's relatives were punishable for the crimes of the defendant. While crime is resolutely dealt with severely, the state has adopted a policy of supporting the defendant's family members and friends during the prosecution. Concerning joint criminal liability, the Criminal Code states that, "A joint offence refers to one committed intentionally by two or more persons,"¹ again making clear the point that only the criminal actor is punishable. Assessment of criminal penalties also reflects the rule that liability is limited to the offender. The Code states, "Confiscation of property includes part or all the personal property of an offender, . . . the property belonging to the dependents of the offender or that to which they are entitled shall not be confiscated."²

(4) Chinese criminal law adheres to the principle that punishment should be suited to the crime. The Criminal Code states that "Punishment for the offender should be determined by the facts, nature and circumstances of the offence and the degree of harm to society. Sentence will be based on the provisions of the criminal law."³ In addition, a criminal penalty shall be imposed within the limits set by law. After conviction, the punishment is assessed primarily on the basis of the degree of harm caused to society. A felony, of course, is sentenced severely, while a misdemeanor is sentenced lightly. Concerning joint offenders, the principal offender is punished more severely than the accessory. Finally, a repeat offender is more heavily punished than a first offender.

1. This and subsequent quotations from Chinese laws have been translated by Professor Zhu. An English translation of the Chinese Criminal Code by Jerome Alan Cohen, Timothy Gelatt and Florence Li may be found at 73 *J. CRIMINOLOGY & CRIM. L.* 138 (1982).

2. *Id.* art. 55.

3. *Id.* art. 57.

(5) The Criminal Code also upholds the principle that punishment should be combined with education so as to remold the character of criminals into new people. Eradication of crime and rehabilitation of criminals are complementary components of the building of socialism. The Chinese Criminal Code implements the principle of reforming the criminal. At present, the death penalty cannot be abolished; it is, however, imposed only for the most heinous offences, and is employed as infrequently as possible. When an offender is given the death penalty, if immediate execution is not mandatory, a two year reprieve may be given simultaneously with the death verdict. In this instance, reform through labor will be carried out to see if the offender shows evidence of repentance. Typically, death penalties are reviewed and approved by the Supreme People's Court. Also, fixed-term imprisonment is preferred to life imprisonment, so that reform through labor may be employed. Reform through labor is the preferred method of rehabilitation for those who are sentenced to detention or surveillance. Finally, the commutation of sentences and parole are used to encourage rehabilitation.

C. Types of Punishment

Punishment is a compulsory measure intended to deprive the criminal of certain rights. Its chief purposes are to smash all criminal acts and maintain the socialist order. In determining punishment, the people's court is required to consider only the facts of the particular case and to adhere to the law as the yardstick of punishment.

Punishments are divided into several main and supplementary categories. The main legal sanctions which may be imposed on the criminal are: (1) surveillance, (2) detention, (3) fixed-term imprisonment, (4) life imprisonment, and (5) death penalty. Supplementary punishments are legal sanctions which may be imposed on criminals in addition to main punishment. They are: (1) fines, (2) deprivation of political rights, and (3) confiscation of property. In some cases, supplementary punishment only may be imposed. In addition, deportation may be applied as an exclusive or supplementary penalty to a foreigner who has committed an offence.

Deprivation of political rights includes the following: (1) loss of the right to vote and stand for election; (2) loss of freedom of speech, freedom of correspondence, freedom of assembly, and freedom of association; (3) loss of the right to hold a position in a state organ; and (4) loss of the right to hold an executive position in any commercial enterprise unit or people's organization.

D. Main Tasks of Chinese Criminal Law

The main tasks of Chinese criminal law have changed with the political and economic development of the Chinese state. At the present time, class relations in China have undergone many advances: turbulent class struggle has passed, the exploitative classes have nearly been extinguished, the targets of the revolution are closer, the influence of the counterrevolutionaries has been undermined, and the scope of people's democracy has been enlarged. The emphasis of work in the whole nation has therefore shifted to economic modernization. For the purpose of achieving economic development, a stable and consolidated social order is needed. Therefore, the main task of Chinese criminal law is to maintain public order and order in production, work, teaching, scientific research and in the lives of the people, and to insure the smooth progress of the socialist revolution and construction. The cardinal principle and spirit of Chinese criminal law, in addition to combating crimes of counterrevolutionaries and other criminal offenders, is consolidation of the dictatorship of the proletariat, the realization of socialist economic development, and the bringing to fruition of the role of the superstructure so as to serve the economic basis.

The Chinese Criminal Code specifies several main types of crimes. The main task of the law will be discussed in light of these specific types of crimes.

First, the Code combats counterrevolutionary crimes and serious criminal offences. Chinese criminal law states that counterrevolutionary activity and serious criminal offences resulting in grave consequences to society are bitterly hated by the Chinese people and should be punished mercilessly. Of these two types of crimes, the counterrevolutionary offence is the most serious crime in nature and the most harmful to society. In order to avoid the abuse of prosecution, the Criminal Code defines counterrevolutionary offences as "those acts performed for the purpose of overthrowing the political power of the dictatorship of the proletariat and the socialist system and jeopardizing the People's Republic of China."⁴ The intent to overthrow the political power of the dictatorship of the proletariat and the socialist system is the subjective idea; the jeopardizing of the People's Republic of China is the objective consequence. Only these two factors, joined together, constitute the counterrevolutionary offence. It should be noted that all serious criminal offences are strictly defined by statute, and hence, the role of analogy is narrowly limited.

Second, the Criminal Code bans encroachment on socialist pub-

4. *Id.* art. 90.

lic property as well as the legitimate private property of an individual. Socialist public property is sacred and inviolable because the socialist economy is based on socialist public ownership. Any appropriation or damage of state or collective property by any organization or individual by whatever means is punished.

While the socialist part of the economy constitutes the major component of economic production, the individual economy based on the legitimate property rights of the individual serves as a necessary complement at the present stage of economic development. Therefore, the state also protects legitimate property rights of the individual. These include the right of citizens to possess lawfully-earned cash, savings, and houses as well as individual land plots for private use. Even the right to inherit private property is upheld. Thus, the law brings into play the initiative and enthusiasm of the masses to help in the development of the socialist economy.

Third, the personal rights of the Chinese people are to be protected. China is a socialist state under the dictatorship of the people's democracy. People are the basis of power in the country, and have broad democratic rights. But during the period of the Great Cultural Revolution, Lin Biao and the "Gang of Four" instituted ultra-left policies that stirred-up mass hysteria and caused crowds to smash and loot. In addition, persons were unlawfully arrested and detained, and confessions were often compelled as well as false accusations lodged. These ultra-left policies undermined the democratic system, and resulted in the jailing of large numbers of innocent people. After overthrowing the rule of Lin Biao and the "Gang of Four," the people of the whole nation earnestly called for the restoration of the rule of law. It became clear that only when adequate socialist legality existed could there be socialist democracy. The Chinese Criminal Code reflects this concern and states, "The law protects personal and democratic rights and other rights of citizens against unlawful infringement by any person or organization. Those who are directly responsible for serious cases of unlawful infringement should be subject to criminal sanction."⁵

Crowds are strictly prohibited under the Code from gathering for the purpose of beating, smashing or looting. Also, unlawful arrest and detention, extortion of confessions by torture, and bringing of false charges against cadres and other persons are strictly prohibited. These laws are resolutely intended to bring order out of chaos, strengthen the struggle against infringement of citizens' personal rights, and maintain peace and solidarity so that socialist economic construction can advance.

Fourth, acts violative of public order are forbidden. Public or-

5. *Id.* art. 131.

der, the prerequisite for work and production, must be maintained so that work, production, business, teaching and scientific research may move forward. The whole Chinese nation is now concentrating its efforts on socialist modernization with one heart and one mind. All state organs, all enterprises, and all individuals are working hard to build up socialism. Any act that disturbs social order and undermines public security harms the realization of socialist modernization. The Code, therefore, states explicitly that, "No person is permitted to disrupt public order by any means whatsoever. If public order is seriously disrupted so that work, production, business, teaching, or research may not be carried out and the state and society sustain losses, the major culprit is to be punished severely."⁶ Also, "anyone who by means of force or threat obstructs a state functionary in the performance of his duties under the law is also to be punished severely."⁷ Thus, a balance is struck between the exercise of democratic rights and the need to maintain public order.

Fifth, acts contrary to the socialist economic order are forbidden. In order to ensure that the socialist economic construction continues smoothly, any disturbance of the orderly functioning of the economy or disruption of the state economic plan by any organization or individual is prohibited. The emphasis of the work of the whole nation has shifted to socialist construction in a systematic and planned way. Since primary importance is placed upon socialist development, every possible means to complete the main task is employed. Not only is general social order upheld, but also the principles of socialism are maintained.

Chinese criminal law strictly prohibits smuggling, speculating, and profiteering. It is intended that state functionaries who take advantage of their position by engaging in such activity be severely punished. The Criminal Law also strictly prohibits counterfeiting of national currency or valuable securities and tax evasion. Chinese law also forbids the wrecking of machinery, the damaging of draught animals, the disruption of collective production, and the illegal cutting of timber. Finally, it is intended that any state functionary who exploits his office or takes a bribe will be severely punished.

II. CHINESE CRIMINAL PROCEDURE

The body of law constituting criminal procedure is intended to ensure accurate and prompt investigation of the facts of a criminal offence, correct enforcement of the law, punishment of criminals, and protection of innocent persons from criminal prose-

6. *Id.* art. 158.

7. *Id.* art. 157.

cution. While the Criminal Procedure Code has its own rules and regulations, it has guidelines and principles similar to those of the Criminal Code so that together they form a complete and coherent criminal legal system.

(1) *The Public Security Organ, the People's Procurate and the People's Court.* Three organs, the public security organ, the people's procurate and people's court, are involved in handling a criminal case. The public security organ is in charge of investigation and apprehension. The people's procurate approves of arrests and institutes prosecution. The people's court is responsible for trying cases. No other government organ, institution, organization, or person has the right to exercise these powers.

Concerning conflicts among these three organs, when the public security organ differs with the people's procurate, it may ask for reconsideration. If the people's procurate disagrees with the judgement of the people's court, it may appeal the decision. According to the prescription of law, these three organs perform separate functions, exercising countervailing pressures so as to restrict one another, while nonetheless working together with one another, in order to guarantee the enforcement of the law accurately and effectively. In dealing with cases, the three organs must rely on the masses, base their decisions on facts, and take the law as the yardstick. All citizens are equal before the law.

(B) *The Trial System.* Usually there are five stages in handling a criminal case: filing of a charge, investigation, arrest, prosecution, and trial. At the trial stage, the people's court, representing the state, makes the determination of guilt or innocence with the direct involvement of the public prosecutor, all persons concerned, the witnesses, and the advocates.

The Code of Criminal Procedure sets forth the following elements of the system of trial: (1) All cases are heard in public, except those specifically exempt. All activities of the trial, such as the investigation of the court, the defense, the final statement of the accused, the discussion and appraisal of the court, and the announcement of sentence are open to the public. The people thus supervise the court as well as receive education in the law. (2) The people's court is organized in a collegial system. Trials are conducted by a group of persons composed of judges and representatives of the people, called people's assessors. When opinions differ concerning the determinations of the people's court, a simple majority of the collegial court prevails. The opinions of the minority, however, are also included in the court records. (3) In trials, people's assessors take part in accordance with the law. people's assessors are chosen by the people to participate in trials. They have the same rights as judges to investigate the case, ask questions of the parties and witnesses of the case, and participate in the con-

duct of the trial. (4) The courts are organized in a hierarchical system, so that decisions of higher courts are binding on lower courts. If a party contests the judgement or order made by the court of the first instance, he may file an appeal to the court at the next higher level.

(C) *The System of Defense.* The accused's right to defense is an important aspect of the Chinese criminal law system. The Criminal Procedure Code clearly states that "the accused has the right to a defense and that the people's courts have the obligation of guaranteeing that the accused receives a defense."⁸ In addition to defending his case personally, the accused may ask the assistance of a lawyer, a near relative, a guardian, a citizen recommended by a people's organization or by the work unit to which the defendant belongs, or any citizen approved by the court. Where necessary, the people's court may also appoint counsel for the accused.

In putting forward his defense, the accused may state his opinion to the court, argue with the public prosecutor and the injured party, request permission of the court to examine evidence presented against him, and question opposing witnesses. The accused may also present his own evidence and witnesses to either exonerate himself or extenuate the circumstances of his crime. He may also offer his recommendation for mitigation or remission of punishment. The responsibility of an advocate is to safeguard the legitimate rights of the accused. The advocate may request to see materials pertaining to the case for study in order to acquaint himself with the case, and the advocate may meet and communicate with the accused when he is in custody.

(D) *The System of Proof and the Collection of Evidence.* Evidence is defined as anything that proves the truth of the facts of the case. The Code of Criminal Procedure states that "All facts that prove the true circumstances of the case are evidence."⁹ When handing down judgments, consideration is to be given to the weight of evidence acquired by investigation and study. However, no weight shall be given to statements made by the accused under illegal examination. The extraction of confessions by torture, or while the accused is under duress, is strictly forbidden, as is the collection of evidence by threat, enticement, deceit or other illegal means. Also, judges, procurators, and investigators shall, in accordance with the legal process, collect evidence to furnish proof of guilt and of the gravity of the offense. Judicial personnel

8. A translation of the Code of Criminal Procedure by Jerome Alan Cohen, Timothy Gelatt and Florence Li may be found at 73 J. CRIMINOLOGY & CRIM. L. 171 (1982).

9. *Id.* art. 31.

are required to strive for a complete picture of the problem, and must consider any evidence that might exonerate the accused. The Code provides that "Conditions shall be guaranteed for citizens who are involved in a case or who have knowledge of the case to fully furnish objective evidence."¹⁰

The accused also has "the right to request the court to call new witnesses and order the production of new exhibits, and to apply for re-identification or re-examination of the evidence."¹¹ In addition, evidence can be used as the basis for a ruling only when it is verified through investigation. With regard to testimony, the law is very strict: "The testimony by a witness can be used as evidence in a case only when the witness is questioned in court by the public prosecutor as well as by the advocates of both the victim and the accused."¹² Also, "Any testimony must be substantiated by other witnesses."¹³ The people's court must arrive at a verdict, and determine punishment, if any, only on the basis of established facts and evidence, and on the basis of relevant provisions of the Criminal Code.

(E) *The Ban on False Charge and Evidence.* At all stages of judicial proceedings, judicial personnel are required to justify their actions on the basis of a showing of the facts and are subject to limitations imposed by law. The public security organ's request for an arrest warrant, the indictment by the people's procurate and the verdict of the people's court must be based on facts. Those who willfully withhold the truth are investigated and held responsible. Therefore, the person who receives a charge or report of a crime clearly explains to the person making the report the legal accountability for a false charge. When judicial personnel examine a witness, the witness is notified that he must produce evidence and give testimony strictly according to the truth of the facts and that he is legally responsible if he commits perjury or withholds evidence. Also, anyone who forges, withholds or destroys evidence is responsible before the law.

Specifically, the criminal law defines the crimes of false charge, false evidence, and slander. False charges against a cadre or any other person are strictly prohibited. Whoever brings false charges against another person is punished according to the nature and seriousness of his act. A state functionary who is guilty of bringing a false charge is seriously punished. Any witness, appraiser, recorder, or interpreter who intentionally falsifies evi-

10. *Id.* art. 32.

11. *Id.* art. 117.

12. *Id.* art. 36.

13. *Id.* art. 31.

dence in the course of an investigation or of a trial so as to conceal facts or to implicate another person is severely punished.

III. CONCLUSION

The Chinese Criminal Code and Code of Criminal Procedure are the fundamental laws which maintain social order and ensure economic construction. They are vital to the socialist state so that, thirty years after the founding of the People's Republic of China, their promulgation is of prime importance in the development of Chinese legal history. We may draw some generalizations about these laws.

First, the Chinese criminal law has a clear class character. The Chinese Criminal Code and Code of Criminal Procedure are based on socialist legal principles. The primary source is Marxist-Leninist-Maoist thought which has been fused with the experience of the socialist revolution and its later development in China. These laws embody the will of the proletariat and the masses who are struggling against counterrevolutionaries and other criminal offenders in order to achieve the goals of maintaining social order, consolidating the dictatorship of the people's democracy, and ensuring socialist modernization.

Second, the Chinese Criminal Code and Code of Criminal Procedure have an affinity to the Chinese people. China is a state of the people's democratic dictatorship. These laws reflect the will and interests of the people, safeguarding their personal and democratic rights. All citizens of the People's Republic of China are equal before the law. No organization or individual may enjoy any special privilege. In the administration of justice, judicial organs protect the rights and legitimate interests of every citizen, regardless of nationality, sex, vocation or class origin. Criminal responsibility is fixed on the basis of guilt only. In handling cases, judicial organs rely on the participation of the people. Since criminal offenses jeopardize the state, the Chinese people owe a duty to help in the elimination of crime.

Third, the Chinese Criminal Code and Code of Criminal Procedure have great practical significance. They have been integrated with actual conditions so as to ensure the realization of socialist modernization as soon as possible. China is in a stage of historical transition, and class relations have made great strides forward. As a tool of the dictatorship of the proletariat, these laws play an active role in advancing socialist development by supporting the conditions necessary for growth of the economic foundation, in addition to maintaining political solidarity and social order.