

## ABHANDLUNGEN / ARTICLES

## On Development of Criminal Law in the People's Republic of China

By *Shizhou Wang*, Beijing\***I. Introduction**

Even in the modern legal system, criminal law is still occupying the indispensable position, if we do not say that it is the most important position. In China, this is particularly true. With social and economic development, civil law and other laws have gained much more significance in legal life.<sup>1</sup> However, criminal law has still provided legal protection of the highest standard for society. The role of criminal law has never been ignored. Criminal law shall be cautiously stipulated and implemented, due to its natures in depriving people's property, freedom and even life. The principles of modesty (Subsidiarität) and last method (ultima ratio-) shall be seriously observed. How to correctly use criminal protection is an eternal topic not only for criminal law science but also for the legal science at large.

If we make a brief review of legal history, people shall agree with the reality of expansion of criminal law.<sup>2</sup> On one hand, criminal law provides legal protection for more and more areas in order to meet the social demands. It no longer limits itself in the traditional legal interests (Rechtsgüter) of life, body and property. Rather, the forefield (Vorfeld) of criminal law protection has been expanded to trust, credit, information, environment, as

\* *Shizhou Wang*, Professor of Law & LL.D. Supervisor in Law School at Peking University, Alexander von Humboldt Research Award (2009), K C Wong's Research Fellow (2004), Alexander von Humboldt Research Fellow (1994-1996), LL.M. at UC Berkeley (1988) & Peking University (1985), LL.B. at Peking University (1982). E-mail: szwang@pku.edu.cn or wanginfreiburg@yahoo.com.cn. The article is based on the "Herbert-Krüger-Gedächtnis-Vorlesung" held by the author on the annual meeting of the "Arbeitskreis für Überseeische Verfassungsvergleichung" in Regensburg/Germany, July 02.- 04. 2010.

<sup>1</sup> According to China's Efforts and Achievements in Promoting the Rule of Law, the White Paper published by the Information Office of the State Council of the People's Republic of China on February 28, 2008, there were 229 laws promulgated by the National People's Congress and its Standing Committee by then, of which, 32 were civil and business law, 54 were economic law, 79 were administrative law, and criminal law had only 1.

<sup>2</sup> In China, for example, Emperor Bang Liu of Han Dynasty (in about 207 BC) made his first agreement with the people by only three provisions: any one who kills shall be executed and any one who injures or steals shall be exiated. However, the famous Tang Code promulgated by Emperor Shimin Li of Tang Dynasty (in about 637 AC) has reached 12 Titles with 30 Volumes and 502 articles already. See: The Compilatory Group for History of Chinese Legal History in the Editorial Division of Legal Textbook, Chinese Legal History, Press of the Masses, 1982, pp. 129, 205.

well as to attempt and preparation. On the other hand, the minimum criminal punishment stipulated in a criminal provision keeps lowering down while the areas under the protection of criminal law are moved further into the forefield. This is a world-wide tendency for criminal law development. China is also going in this direction. However, it is a serious question for Chinese academia of criminal law to consider how to avoid a misuse of criminal law and how to keep the protection of criminal law conforming to the requirements of rule of law.

In this paper, I would like to illustrate the main achievements of Chinese criminal law and explain the main problems in the development of Chinese criminal law. I would like also very much to welcome any comments and critiques upon the solutions I suggested to the direction of further development of Chinese criminal law.

## 1. Historical Overview

Current Chinese Criminal Law (hereafter the CCC) was promulgated in 1997. It is a revision of the Chinese Criminal Law of 1979 (hereafter the CCC 1979).<sup>3</sup> In structure and theoretical basis, both of the codes share many similarities. However, the difference between each code rests not only on the degree of delicacy and comprehensiveness but also on its basic attitude towards the spirits of rule of law, if we can observe them with a viewpoint of historical development. There are some characteristics worthy to mention on the CCC 1979.

Firstly, it began to end the practice of the so-called revolutionary criminal law in China. The most distinct nature of the revolutionary criminal law is its ignorance to the principle of legality. After the People's Republic was founded in 1949, criminal law in China was mainly composed of three parts. The first part was individual regulations such as those concerning the crimes of counter-revolution and corruption, which were enacted in the beginning of 1950s. The second part was the policy of the ruling party of Chinese Communist Party (hereafter the CCP) and the governmental regulations. The third part was the 22<sup>nd</sup> draft of the Chinese criminal code.<sup>4</sup> The legislation of the Chinese criminal code actually began in as early as 1952. In 1957, the National People's Congress (hereafter the NPC) distributed the 22<sup>nd</sup> draft to law faculties, governmental organs, people's courts and procuratorates, in order to collect suggestion, comments and criticism for a final bill. However, the process of this legislation was interrupted by the so-called anti-rightists movement and other political unrests until the late of 1970s. But the 22<sup>nd</sup> draft of the criminal code had been used as the guidance in legal practice since then. The promulgation of the CCC 1979 means an ending of this situation.

<sup>3</sup> For the English texts of the Chinese laws mentioned in this paper, please see <http://www.lawinfochina.com/>.

<sup>4</sup> The text of this 22<sup>nd</sup> draft can be found in Mingxuan Gao & Bingzhi Zhao (Ed.), *General Collection of the Documents and Materials of the Criminal Legislation in the new People's Republic of China*, Press of China People's Public Security University, 1998, pp. 252-281.

Secondly, it was an important step in building up a state of rule of law. The most painful lesson China got from the so-called Cultural Revolution was that a state without law would eventually fall into terrible chaos. The death of the President of the People's Republic, Mr. Liu Shaoqi, and the exile of the General Secretary of the CCP, Mr. Deng Xiaoping, was good examples. After China survived from the disorder of the Cultural Revolution, it became the common understanding in the Chinese leadership to promulgate laws and to build up a state of rule of law. In the CCC 1979, the most notorious acts rampant during the Cultural Revolution were provided as a crime, such as the so-called "beating, smashing and looting", which means to assemble a crowd and to cause a person's injury, disability or death or the public or private property destroyed or taken away. It was proved that the CCC 1979 became one of the key footstones for the Chinese legal system to move towards rule of law.

Thirdly, it was the summary of the experience of the Planned Economy. Before 1979, the term of "market" was negatively deemed as a bourgeois or petty bourgeois one. The practice of the Planned Economy had ever been guaranteed by the Constitution until 1993. Under the model of the Planned Economy, the State needs to build up a huge administrative system to guarantee the implementation of the state's plan. This administrative system could suppress the occurrence of crime and petty illegalities. However, the effectiveness of the Planned Economy was at the expenses of economic development and the individual's initiatives. In the CCC 1979, for example, the crime of the so-called "speculation" in Articles 117 and 118 prohibited, with the maximum punishment of death penalty, trading without authorization between two places far away from each other.

Almost at the same time when the CCC 1979 was promulgated, great changes took place in China, too. With open and reform policy, economic model and social life changed significantly. The old system was being reformed, however, the new system was still being constructed. As the first criminal code with limited experiences from the Cultural Revolution and the Planned Economy, the CCC 1979 found itself difficult in dealing with social problems. But the newly established legal system need stability and could not start all over again immediately. A new type of criminal legislation was adopted: individual supplementary decision. From 1979 to 1997, there were 23 supplementary decisions adopted.<sup>5</sup> These 23 supplementary decisions revised the CCC 1979 significantly, some of which were necessary and correct but some were problematic. The notable revision could be obviously seen in the Specific Part. The total number of the provisions in the Specific Part was greatly increased. A large amount of new crimes was added into the Specific Part, most of which were economic or business related crimes, such as financial fraud, crimes by violating corporation law, taxation violation (including the crime against the special invoices for

5 There was another decision on exercising criminal jurisdiction over the crimes prescribed in the international treaties where the People's Republic of China is a party or has acceded, which was promulgated by the Standing Committee of the National People's Congress on June 23, 1987. If this Decision was calculated, the number of the Supplementary Decisions shall be 24.

Value-added Tax), but also other crimes such as aircraft hijacking, copyright and trademark violations. Some of existing crimes were revised by enhancing severe degree of punishment, unfortunately, even to death penalty. The examples of these types of crime were crimes of seriously endangering public security, smuggling, and corruption (embezzlement and bribery). Revisions in the General Part were also significant. However, some of the revisions were necessary and appreciated while some were problematic, too. The most important revisions were followings: *As to the jurisdiction*, universal principle was added to the crimes which China should undertake its obligation of jurisdiction according to the international treaties. Retroactivity was even possible for economic crimes in some cases when the accused failed to surrender himself in a required period of time.<sup>6</sup> *As to the criminal subject*, unit crime (corporate crime) was now introduced into the criminal law. *As to the criminal punishment*, aggravating punishment was possible for the cases in which a convicted criminal escaped from the custody and attacked the witness or victim or the person who reported his criminal activity. The regulations for the application of monetary punishment like fine became much more complicated. Revisions on the rules for joint crime and probation were also made.

Since some of the principles in the General Part of the CCC 1979 were revised or supplemented, the problems in these newly promulgated decisions could not be ignored, because they were inappropriate and conflicted with other provision. Particularly, the problem of too many provisions with death penalty has been under sharp critique. However, it is fair to say that these newly promulgated decisions provided an urgent protection of criminal law for the Chinese society and supported the proceedings of the reform undertaken in China. In order to resolve problems in the criminal law, a reform was advocated even in the end of 1980s. Theoretical circle began their works even earlier. The legislative revision began in the middle of 1990s and was accomplished with the CCC 1997. The CCC 1997 has great significance in the development of Chinese criminal law. *Firstly*, the principle of legality was statutorily established finally. Art 3 of the CCC 1997 stipulated that any act deemed by explicit stipulations of law as a crime is to be convicted and given punishment by law and any act that no explicit stipulations of law deems a crime is not to be convicted or given punishment. The provision of analogy in the CCC 1979 was deleted. The promulgation of the principle of legality indicated that the Chinese process of rule of law was irreversible. *Secondly*, the whole Chinese criminal law was completely integrated. Previously, there had been more than 130 provisions in the Chinese economic law, civil law or administrative law, which stipulated that any violation thereof might undertake criminal liability “in comparison with” or “in accordance with” the relevant stipulations of

<sup>6</sup> For example, Art. 2 of the Decision Regarding the Severe Punishment of Criminals Who Seriously Sabotage the Economy in 1982 stipulates: if the offender voluntarily surrenders before May 1, 1982 or if he truthfully confesses all his crimes and brings truthful accusations with respect to the facts of crimes of other criminals before May 1, 1982., he shall be dealt with in accordance with the provisions of the old law. If the offender refuses to surrender voluntarily, he shall be taken as continuing to commit crimes and shall be dealt with in accordance with this Decision.

the criminal law.<sup>7</sup> All of them were completely integrated into this Criminal Code after careful consideration. Even the military crimes were included into this Code. Substantively, all of the criminal provisions were systematically arranged into one consecutive body.<sup>8</sup> Supplementary decision is still possible. According to the Chinese Legislature Law of 2000, however, any supplement shall not conflict against the principles of the Code itself any more. *Thirdly*, the definitions of crimes were much better specified. Some of them were revised, e.g., the so-called crime of counter-revolution was revised as the crime of endangering national security (Art. 102 - 113). Some were refined, e.g., the crime of dereliction of duty was increased from 7 articles in the CCC 1979 (Art. 185 ff) to 22 in 1997 (Art. 397 ff) plus many relative ones in other chapters. Some of the articles were abolished. For example, the crime of speculation was originally for violation of the laws and regulations on the control of monetary affairs, foreign exchange, gold and silver, or on the administration of industrial and commercial affairs. Now, it was replaced by the crime of manufacturing and selling counterfeit goods (Ch. 3) and the crime of disrupting market order (Ch. 6) in the new law. The crime of hooligan, which was used to be a catch-all provision for engaging in affrays with an assembled crowd, creating disturbances, humiliating women in public place, was criticized as unclear and too broad. In the CCC of 1997, it was broken as the crime of affrays with an assembled crowd (Art. 292), the crime of disturbances (Art. 293) and others. *Fourthly*, there were plenty of new crimes added into the new laws. The increasing numbers in economic crime and in crime against social administration were so many that this Criminal Code had to adopt a new legislative skill, i.e., to create sections under Chapter III Crimes of Undermining the Order of Socialist Market Economy and Chapter VI Crimes of Disrupting the Order of Social Administration. Of these revisions, the most important crimes newly added are the crime of underground society (Art. 294), the terrorist crime (Art. 120 ff), the crime of inciting national enmity or discrimination (Art. 249), money laundering (Art. 191), computer crimes (Art. 285 ff), security fraud (Art. 180 ff), crime against land resource (Art. 228), the crimes against business secrets (Art. 219), the crimes of unlawfully depriving personal freedom in order to get payment of a debt (Art. 238) or to compel people to work (Art. 244), the crime against witness (Art. 307), the crimes against environment and resources (Art. 338 ff), the crimes against the national defence (Art. 368) and more.

With the CCC 1997, we can say that China has successfully built up a framework of a modern criminal justice system in the field of substantive criminal law. It is modern

<sup>7</sup> See Mr. Hanbin Wang, Vice-President of the Standing Committee of the National People's Congress, Illumination on the Criminal Code of the People's Republic of China (Bill of Revision) in the Fifth Session of the Eighth National People's Congress on March 6, 1997, in *The Gazette of the Standing Committee of the National People's Congress*, No. 2, 1997, pp. 219, 220.

<sup>8</sup> The 23 Supplementary Decision were also integrated into the Code, part of which was totally integrated and no longer applicable (as listed in Appendix I of the Code), others were integrated with the part of criminal liability and no the part of administrative punishment (as listed in Appendix II of the Code).

because it recognizes the principle of legality. It is still a framework because there are still many details to be filled in.

## 2. New Developments

After the CCC 1997, the development of the Chinese criminal law went into a new stage. The CCC 1997 really remains stable. Since then, there was only one decision supplemented to it. That was the Decision on Suppression of Fraudulently Purchasing, Evading and Illegally Trafficking Foreign Exchange promulgated in 1998. After this decision, the Chinese legislature abandoned this type of legislative skill and adopted amendments and legislative explanations as its main methods to keep the Code up to date. The adoption of new legislative methods shows the sincere efforts of the Standing Committee of the National People's Congress, who holds the constitutional privilege to amend and explain the Constitution and laws, to follow the requirements of rule of law. With the social and economic development in China, criminal law needs developing, too. Besides that decision, there were 7 amendments and 9 legislative explanations made to the CCC 1997 by April of 2010. A brief introduction to these supplements can be summarized as followings:

As to the Decision on Suppression of Fraudulently Purchasing, Evading and Illegally Trafficking Foreign Exchange, the purpose was to improve the protection of foreign exchanges in China. If we can still remember the Asian financial storm in the end of 1990s, this Decision will be highly appreciated. The key point of this Decision was to create a new type of crime, i.e., fraudulently purchasing foreign exchange. In addition, the prohibition for the state-owned company was expanded to all kinds of company and institute to deposit foreign exchange abroad without authorization or to illegally transfer foreign exchange abroad. The managements related to foreign exchange such as Customs and foreign exchange administration were also under the cover of criminal law now. The First Amendment to the CCC was promulgated in 1999 with the purpose to strengthen the protection of the order of market economy. New criminalization was made to protect document of account such as financial invoices, books and reports, etc.. The bankruptcy of the state-owned company was under supervision of criminal law now. Punishments for illegally establishing banks, stock or futures exchanges, insurances, and other financial institutes, as well as the inside trading, were increased. Protection of stock and futures exchanges from rigging price or false information was strengthened by detailed definition and severer punishments. Almost at the same time, the *first legislative explanation* was issued in 2000, clarifying the meaning of "the other persons who perform public service according to law" as a state functionary in Art 93 of the CCL 1997. Accordingly, the personnel working in the rural grassroots organization, such as the member of a village's committee, should be regarded as state functionaries when they assisted the governments to do the administrative management, such as to relieve the victim from a disaster, to deal with emergency, or to collect taxes, and so on. *The Second Amendment* was promulgated in August of 2001 with the purpose to strengthen the protection of cultivated land and woodland. Accordingly, the

illegal land development should be strictly prohibited. Meanwhile, the second legislative explanation was issued in 2001 to unifying the meaning of “land” in the criminal law with the law of land administration, the forest law, the grassland law and other administrative regulations. *The Third Amendment* was promulgated in December of 2001 in order to strengthen the struggle against terrorist activities. Punishments for organizing, leading and participating in a terror group were significantly enhanced. Financing terrorist activities was incriminalized. The suppression to terror-related crimes such as explosion, poisoning and arson, money laundering or spreading false terrorist information were improved. The crime of poisoning was expanded to producing or trading any kinds of substances of poisonous, radioactive and pathogen of infectious diseases. Somewhat related, the third legislative explanation of April of 2002 clarified the meaning of “the organization in the nature of criminal syndicate” in Art. 294. To be a criminal organization, accordingly, it should be relatively stabilized in organization, rather strong in economic capacity, several times in committing crime and illegal activities, and strongly influential by connivance or shield of a state functionary.

In 2002, there were two other legislative explanations. The one in April of 2002 provided the meaning of “for his own use” for the crime of misappropriation in Art 384, which was referred to a State personnel who takes advantage of his office and misappropriates public funds for his own use. Accordingly, any circumstances shall be included, as long as it was the perpetrator who made the decision to provide the public funds for a private use or it was he who attempted to gain personal benefits. The one in August of 2002 provided the meaning of “disobeying judgment or order made by a people’s court with capacity” for the crime of refusing to obey the decision of a court in Art 313. Accordingly, any acts of hiding, transferring, intentionally damaging the property or selling the property in an obviously low price should be covered in the meaning.

On December 28 of 2002, the *Fourth Amendment* was promulgated. The purpose of this Amendment was to strengthen the protection of the order of medical administration and Customs as well as natural resource and labor conditions. Punishments were enhanced in order to protect medical apparatus and instruments, medical hygiene materials. Illegally importing waste materials was now completely prohibited, not matter they were in forms of gas, liquid or solid. Employing people under 16 years old to do hard or dangerous work was incriminalized. Illegally lumbering was under heavier punishment than before. Judicial officials were facing more severe punishment for the misconduct in bending the law for selfish ends or twisting the law for a favour. On the same day, the sixth legislative explanation clarified that the crimes of dereliction of duty in Chapter 9 of the CCC 1997 should apply to any person who exercised the authority on behalf of the state, no matter he did so was according to law or upon the trust of a governmental office or because he was performing a public service in a governmental office without formally listed as a state functionary. *The Fifth Amendment* was promulgated in 2005 to improve the protection on credit card management and the crime of sabotaging military weapon, equipments, facilities and communication. Accordingly, knowingly possessing or transporting large amount of coun-

terfeited credit card or illegally possessing large amount of other's credit card would be a crime. Before and around that time, the criminal legislative explanations of 2004 explained the meaning of credit card and included all types of cards issued by a bank or financial institute with the function of paying, transferring, depositing or withdrawing. The explanation of 2005 explained the meaning of the invoices to refund the tax for exports or to offset tax money. Another explanation of 2005 stipulated that the provision on protecting cultural relics should apply to the protection on fossils of paleoanthropoids or paleovertebrates of scientific value. *The Sixth Amendment* was promulgated in 2006. Although this Amendment emphasized the protection of financial administrative order and interests of listed company and investor, it provided also several new provisions for social and economic safety. Punishments for violation of safety regulations concerning production, operation, installing safety facility and organizing event of large mass of people were clearly enhanced. Failure to report accident should undertake criminal liability for those who had a duty to do so. The definition of crime for failure to provide report of financial account in an exchange-listed company was improved. False bankruptcy, commercial bribery and breaching faithful duty by senior official of a listed company were newly incriminated. Fraudulently obtaining the guaranty from a bank or a financial institute was added into the category of financial fraud. Provision on rigging price of stock and future exchanges was improved. Breaching trust duty and misappropriating client's fund in stock and futures market as well as bank and financial institute were incriminated. Crime of money laundering was revised to cover all types of predicate offences. Organizing disable persons or those under 14 years old with means of violence or coercion was incriminalized. The punishment for running a gambling house was significantly increased. Criminal liability of intentionally bending or twisting the law was expanded to arbitrator. *The Seventh Amendment* was promulgated in 2009 in order to strengthen the struggle against corruption and economic crimes and improve the protection of citizen's rights. Goods and articles prohibited by the state for ex- and importation were all under the protection of anti-smuggling provision. Insider trading was also extended to all undisclosed information obtained by taking the advantage of position. Multi-level marketing and the any commercial activities without authority in banking, futures, insurance and financial settlements were completely incriminalized. Selling or illegally giving out the personal data received in the process of performance or service should undertake criminal liability now. The prohibition of invasion into a computer system was no longer limited to the fields of State affairs, national defense construction or sophisticated science and technology, however, the criminal liability need the purpose such as obtaining the data or controlling the system. Organizing minor people to commit administrative violation such as petty stealing, fraud or seizing and so on was incriminalized. The crime of harboring plunder was extended to a unit (legal person), so a unit could commit such a crime now. The criminal liability for the crime of violating the law on the entry and exit of animal and plant quarantine was no longer limited to the fact that actual result of a serious animal or plant epidemic, a danger of such epidemic should be enough. The special symbols of the armed forces such as the number plates of vehicles

were better protected with heavier punishment. The people who were not a state functionary could become the subject of bribery now, if they accepted bribe by using the advantage of that state functionary. This is required by trading in influence in the UN Convention against Corruption. Punishment was increased from 5 to 10 years imprisonment if a state functionary whose property or expenditure obviously enormously exceeded his lawful income failed to explain the sources of his property were legitimate. Very significantly, the crime of taxation would receive a lighter punishment, if the perpetrator had paid the due tax and overdue fine and got an administrative sanction, and the crime of kidnapping would also receive a lighter punishment, if the circumstance was not serious. Generally speaking, the new development of Chinese criminal law after the CCC 1997 can be divided into two stages by 2005, mainly taking the Constitutional Amendment of 2004 on “respect and ensure of human right” as an indicator.

The development of Chinese criminal law before 2005 mainly showed the expansion of the definition of the existing crime. The expansion could be seen by terms of conduct. For example, the crime of causing bankruptcy of the state-owned company in Art 168 was no longer only through the practice of favoritism but by now also by abusing power or neglecting duties. It could also be seen by subject. For example, the crime against liquidation in Art 162 was expanded from the natural person to legal person. It could still be seen in criminal target. For example, the crime of insider trading in Art 180 was available not only to stock exchange but also to the futures exchange. These expansions provided a better protection of criminal law horizontally, which was necessary for a new country with rapid development of economy. These expansions also refined definitions of crimes in the criminal law, which were also necessary to fulfill the requirement of rule of law.

The development of Chinese criminal law after 2005 might be more significant. The topics of each amendment were not as centralized as they were before. However, the protection provided by criminal law got more deeply involved in daily social and economic activities. Very compellingly, many of these requirements of protection of criminal law were raised by people’s representatives of the National People’s Congress. The Seventh Amendment was even published before adoption in order to collect comments, suggestions and critiques from the public. From credit card fraud, military facilities protection, labor safety, safety of financial report and due diligences of senior officials in listed company, safety of banks and financial institutes as well as stock and futures exchanges, to money laundering, gambling house, royalty of arbitrator, computer crime, personal data safety, minor people’s protection, people can be convinced that criminal law in China begins to play its role in an even broader area.

Very significantly, people can also see in the Seventh Amendment in 2009 that the Chinese criminal law was for the first time not to enhance punishment, rather, to lower down the minimum punishment for a crime. For the crime of kidnapping in Art 239 and the crime of tax evasion, the amendment provided a lighter punishment for light circumstance. This is also an important indicator that the Chinese criminal law began to move to the forefield of its traditional protection area.

### 3. Deficit and Solution

Indeed, China has made great achievements in term of substantive criminal law on the way towards rule of law. However, there are still problems. According to my viewpoint, there are two most serious problems in Chinese criminal law. One is high guilty line and the other is too many death penalty.

Guilty line, or threshold of criminal liability, is stipulated in both CCC 1979, Art 10, and 1997, Art 13. It says:

All acts that endanger the sovereignty, territorial integrity, and security of the state; split the state; subvert the political power of the people's democratic dictatorship and overthrow the socialist system; undermine social and economic order; violate property owned by the state or property collectively owned by the labouring masses; violate citizens' privately owned property; infringe upon citizens' rights of the person, democratic rights and other rights; and other acts that endanger society, are crimes if according to law they should be criminally punished. However, if the circumstances are clearly minor and the harm is not great, they are not to be deemed crimes.

Because the stipulation in the last sentence of this provision, the Chinese enforcement authorities have to draw a line to separate the guilty and the innocent. Let's take the crime of theft for example. In the area of Beijing, this guilty line is 1,000¥ (about 100 €). Those who steal less than 1,000¥ shall not be deemed as a crime, rather, only an administrative violation. This structure in Chinese criminal law represents a remnant of the Planned Economy. During that time, it was clever to make use of the administrative machinery to deal with petty violations. The stigma brought by an administrative sanction was by no means less than a criminal sanction. This system worked well in the time of the Planned Economy.<sup>9</sup> However, it began to have problems, when China has moved forward.

First of all, the administrative sanction contains the punishment of depriving people of personal freedom. In the usual case, the administrative sanction might be 20 days detention as maximum. In the most serious cases, the administrative sanction can be education through labour for as long as 3 years with the possibility of one year's extension.

Secondly, the administrative sanction shall be decided by the public security organ above the county level or the committee headed by the public security organ.

Thirdly, there is no defense lawyer possible in the administrative proceedings. However, the people can raise an administrative lawsuit against the administrative decision they were inflicted, when they can be able to have a help from a lawyer.

This system of administrative sanction has been under sharp critiques from all sides for the natures against modern principles of human rights such as fair trial. The legal basis of this system is also very old. It can be traced back to as early as 1957. The works in drawing such guilty line just like building a China Wall within the justice system and they are never

<sup>9</sup> Cf. *Shizhou Wang*, On Present Situation and Problems of Protection of Right of Personality in the Chinese Criminal Code, in *Law Journal of He Bei* (He Bei Fa Xue), No. 11, 2006, pp. 24, 51.

completed. In those crimes and at those points where the guilty line are not clear, implementation will always have difficulty and problems. This statutory guilty line is also not good for a unified legal system. It not only weakens the efficient protection of criminal law but also restricts the authority of people's court!

As to death penalty, it is a big problem in the Chinese criminal law. The number of the provisions with death penalty was increased from 15 in the CCC 1979 to 44 in 1997. The most important critique upon the CCC 1997 has been too much death penalty. In judicial practice, the real execution has been limited only to the crimes of murder, seriously injury, kidnapping, robbery, and drug trafficking. Besides drug trafficking, the other crimes subjected themselves to death penalty normally need the result of losing a life. Drug trafficking as an exception to this "rule" is because of the historical lesson of Opium War in 1840, which got China into her darkest times for about one hundred years until 1949. The "death line" for drug trafficking is stipulated in Art 347 of the CCC 1997: opium of more than 1,000 grams, heroin or methyl aniline of more than 50 grams or other narcotics with a large quantify.

The policy China carries out for death penalty is to maintain but strictly restrict death penalty. However, too many death penalties will not only trigger the issues of human rights protection but also have negative influence upon the process of rule of law. There are too many lessons in the Chinese history that misusing death penalty led a dynasty to collapse so soon. And China would not be able to verify the International Covenant on Civil and Political Rights (ICCPR) which it signed in 1998, if the execution number is still very high. The efforts in restricting or abolishing death penalty shall be strengthened.<sup>10</sup>

Facing these two problems, I advocate that Chinese criminal law shall lower down the guilty line. By lowering down the guilty line, Chinese society could improve the level of social safety, which would provide a good condition for abolishing death penalty, at least a de facto one.<sup>11</sup>

My argument is actually following the general tendency of criminal law development in the world: to strengthen the social security by the protection of criminal law and to restrict death penalty to the strictest level, i.e., de facto abolition. I find out that the current Chinese situation on criminal law just has some significant difference with the common understanding of criminal law in the world. For example, what the international human rights treaties allow is still believed by the Chinese criminal law as not allowed (lower guilty

<sup>10</sup> Cf. *Shizhou Wang*, Rethinking of the Death Penalty System in China, in *Journal of Peking University (Bei Jing Da Xue Xue Bao)*, Edition of Philosophy and Social Science, Vol. 41, No. 3, 2004, pp. 89, 96.

<sup>11</sup> Cf. *Shizhou Wang*, On Present Situation and Problems of Protection of Right of Personality in the Chinese Criminal Code, in *Law Journal of He Bei (He Bei Fa Xue)*, No. 11, 2006, pp. 24, 30.

line), and what the Chinese criminal law allows is already provided by the international human rights treaties as not allowed (too many death penalty).<sup>12</sup>

Now, the new development of Chinese criminal law has showed a sign of good direction. From the criminal amendments and explanation, we can see that criminal liability covered more areas and got more involved in the daily economic and social life. From the judicial practice, we can see that the Supreme People's Court has strengthened the control on approving capital sentence and that the execution number keeps going down, although the total number is still a "state secret". More reforms have been also going on. A system of community correction has been introduced for those who were convicted of light crime. The administrative sanction of depriving person of freedom is considered to be reformed, part of which shall be shifted into criminal law and other will remain in the law without the nature of depriving personal freedom any more. However, there are still disputes within the Chinese law circle. Is this direction against the principles of modesty and last method (Subsidiaritätsprinzip und ultima ratio-Prinzip)? Does the Chinese criminal law expand itself too much? My answers to both questions are no! According to my research,<sup>13</sup> the principle of modesty is a legal principle without binding legal power in all jurisdictions, though it is universally observed by law circles. This principle stresses on a humanistic nature of self-responsibility: the assistance of a state can only be provided when and where an individual person is unable to protect himself in his own power. Accordingly, however, this principle is also a policy principle or a legislative principle. Obviously, the criminal law protection shall be provided according to the needs of the weakest in a society, although the strongest might think it unnecessary! For the question of too much expansion of criminal law, there are two sides to be considered. On one hand, China is a country going from a state without law towards a state rule of law. So, the problem for China is not yet the over-regulated but still the less-regulated. I believe, on the other hand, it shall be alright if criminal provisions are clearly stipulated and if the principle of proportionality is followed. If the Chinese criminal law keeps developing in this direction, the understanding of international human rights will play an important role. Without ending, the Chinese criminal law shall also pay more attention to its accurate stipulation of criminal law. In this direction, the German science of criminal law and other laws is the best resource for China to study. Chinese scholars shall learn more from Germany and Sino-German relations shall be further strengthened.

<sup>12</sup> See *Shizhou Wang*, On Allowability and Non-allowability in the International Human Rights Treaties to National Criminal Law, in: Bingzhi Zhao & Sheng Lang (Ed.), *A Harmonious Society and the Construction of the Chinese Modern Criminal Law – Festschrift for 10<sup>th</sup> Anniversary of the New Chinese Criminal Code*, Press of Peking University, 2007, pp. 389-393.

<sup>13</sup> See, *Shizhou Wang*, Concepts of Supplementary Principle and Modest Principle in Criminal Law, in *Law Journal of He Bei (He Bei Fa Xue)*, No. 10, 2008, pp. 6, 12.