

Development of criminal law in China since the introduction to the reform and opening-up policy – continued

by Ye Feng

Part One of this article appeared in Issue 19 (July). Here Dr Feng concludes his analysis of the changes brought about in the criminal law system in China under the new 1997 Penal Code.

ENFORCING RULE OF LAW IN CRIMINAL CASES

Since 1979 China has embarked on building a modernised socialist legal system. It is the basic strategy of modern China to govern by the rule of law and to build the country into a state operating under the socialist rule of law. As far as criminal law legislation is concerned, implementing the rule-of-law principle and reinforcing the security functions of the criminal law are of vital importance. A closer examination shows that implementation and reinforcement are mainly manifested in the following aspects.

Three basic principles

The code has clear stipulations concerning the three basic principles in criminal law, namely:

- the crime and punishment to be decided by law ;
- equality before the criminal law; and
- compatibility between crime and punishment.

It has abolished the inference system under the 1979 Penal Code, which was essentially exclusive of the principle of crime and punishment being decided by law. For various reasons there were no written regulations on the basic principles of criminal law, which had, to some degree, adversely affected China's criminal law legislation and the quality of its administration of justice in criminal cases. On the general initiative of the theoreticians and practitioners in criminal law, in the latest penal code revision, the highest legislative body attached great importance to the addition of basic criminal law principles and widely solicited opinions in this connection. The process started from first setting out the principle of statutory decision on criminal punishment to eventually adding the principle of all being equal before the criminal law. It also included compatibility between criminal responsibility and punishment. The process demonstrated the status and role displayed by the basic principles of criminal law in the current process of penal code revision:

'For acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law; otherwise, they shall not be convicted or punished.'(art. 3)

'The law shall be equally applied to anyone who commits a crime. None shall have the privilege of transcending the law.'(art. 4)

'The degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender.'(art. 5)

The legislation of the three foregoing basic principles became a milestone marking the progress in the science of criminal law in China. The stipulations in art. 3 and 4 on the principles of all being equal before the criminal law and of compatibility between

criminal responsibility and punishment, together with the principle of statutory decision on criminal punishment stipulated in the Code, also signify the full implementation of the basic guidelines in the modern rule by law. The former principle is intended to combat privileges and seek equality in law application, conviction and sentencing, while the latter is intended to achieve fairness and individuality of criminal punishments.

Greater leniency for juvenile offenders

In dealing with juvenile offenders, China has always maintained a policy of education and correction, with punishment only as the supplementary means. Based on this policy, the 1979 Penal Code set out two important and especially lenient principles for the punishment of juvenile offenders; first, the principle of light or reduced punishment for those offenders who have reached age 14 but not yet 18; secondly, the principle of no death sentence applicable to any offenders who have not reached age 18 when committing the crime. While fully retaining the first principle mentioned above, the New Penal Code, in the spirit of humanity in criminal law and proceeding from the concept of preserving human rights in criminal law, has made major revisions in the second principle of no death sentence applicable to juvenile offenders.

The 1979 Penal Code principle of no death sentence applicable to juvenile offenders was contained in art. 44, but while according to one paragraph of that article no death sentence should be meted out to those who have not reached age 18 when committing the crime, the next paragraph of the same article stipulated:

'... in [the] case of extremely serious crimes, those who have reached age 16, but not yet 18, may be given a death sentence with two years' reprieve.'

These two paragraphs of the same article contradict each other. According to the latter, death sentences may still be applied to juvenile criminals who have not reached age 18, because a death sentence with two years' reprieve is not a penalty that is independent of the death sentence. The New Penal Code has deleted the 1979 Penal Code stipulation on the applicability of the death sentence to young offenders who have reached age 16 but not 18. Accordingly, no death sentence whatsoever, including death sentence with reprieve, will be applicable to any juvenile who has not reached age 18 when committing a crime. The legislative choice in the New Penal Code has not only further restricted and reduced the application of death sentences in general in legislation, but has also facilitated the comprehensive and correct implementation of the policy to treat juvenile offenders with leniency and rationality – a choice of highly positive significance.

Greater protection for right to self-defence

Proper self-defence is an important right for citizens and plays an important role in punishing and preventing criminal offences. For this purpose, all countries without exception have

paid attention to the criminal legislation of proper self-defence. While having made clear stipulations on proper self-defence, the 1979 Code was defective in that they were too general to be operable in the administration of justice.

In the spirit of proper self-defence as a right, and based on the desire to encourage and support citizens in actively combating all sorts of offences and crimes and helping to defend citizens in the exercise of their legal rights and performance of their duties, the New Penal Code has made even clearer and more detailed stipulations in art. 20 (concerning, for instance, the scope of protection for proper self-defence, the target conditions and the essential elements for excessive self-defence). Furthermore, the third paragraph of that article stipulates:

'If a person acts in defence against an ongoing assault, murder, robbery, rape, kidnapping or other crime of violence that seriously endangers his personal safety, thus causing injuries or death to the perpetrator of the unlawful act, it is not undue defence, and he shall not bear criminal responsibility.'

These two stipulations have conspicuously strengthened protection of the right to proper self-defence in the face of serious and violent crimes, and are conducive to encouraging the taking of bold action against serious violence.

INTERNATIONALISATION OF CHINA'S CRIMINAL LAW

Criminal law reform is an organic component of cultural evolution. The mutual penetration and common advancement of criminal law theory and legislation in all countries of the modern world has become an irreversible trend. It is an important principle, to be strictly observed, that China's criminal legislation should be geared to the practical situation and needs in China, but also actively and rationally absorb and draw on useful legislative experience from abroad, paying great attention to the internationalisation of its own criminal law to keep abreast of the progressive trend of the contemporary world's criminal law towards democracy; humanism, opening up and scientific development will be of special importance to China, which is just starting on its way towards a market economy. The New Penal Code of 1997 was a gratifying step towards the internationalisation of China's criminal law, as manifested in the following.

Non-territorial crimes

The new Code extends the jurisdiction of China's criminal law beyond its borders and adds universal jurisdictional principles. While the 1979 Penal Code adopted the restricted person principle in relation to the jurisdiction of Chinese citizens committing crimes beyond its boundary, i.e. only when a Chinese citizen who had committed crimes outside Chinese territory qualified for extradition could the Chinese criminal law be applied, art. 7 of the New Penal Code stipulates:

'This Law shall be applicable to any citizen of the People's Republic of China who commits a crime prescribed in this Law outside the territory and territorial waters and space of the PRC; however, if the maximum punishment to be imposed is fixed-term imprisonment of not more than three years as stipulated in this Law, he may be exempted from investigation for his criminal responsibility. This Law shall be applicable to any state functionary or serviceman who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China.'

Under this provision, the law applies in principle when a Chinese citizen commits a crime beyond the Chinese borders, no matter whether it is regarded as a crime or not in the country where it is committed, or whether the offence is serious or not, which category it belongs to, still less against the interests of what country or of what citizen of what country the offence or crime is committed; only when the case deserves a penalty of no more than three years' sentence in accordance with this law may it be exempted from investigation.

The power of universal jurisdiction refers to a jurisdiction system under which all crimes endangering the common interests of the international community as prescribed in international pacts shall be punished by the states concerned in their exercise of criminal jurisdiction, no matter where the crime is committed, or whatever the citizenship of the perpetrator or the victim thereof. No stipulations were made in the 1979 Penal Code in this connection. As a result of its reforms and opening-up policy, China is occupying an ever more important place and playing an increasingly important role in international affairs, and has acceded to a number of international agreements which call for the punishment of such crimes as aircraft hijacking, hostage taking and drug selling, and under which every signatory is obliged to take the necessary measures to exercise criminal jurisdiction over these international crimes, no matter whether the criminal is a citizen of that country or not, or whether the crime is committed within the borders of that country or not. To link this international duty with domestic laws, the Standing Committee of the Sixth NPC made a decision on 23 June 1987 to the effect that the People's Republic of China shall exercise its criminal jurisdiction over the crimes prescribed in international pacts which the PRC has signed or acceded to and within the scope of the obligations undertaken therein, thus establishing the principle of universal jurisdiction in China's criminal law. Article 9 of China's New Penal Code has completely absorbed the foregoing stipulation concerning universal jurisdiction.

The revision of criminal jurisdiction in China's New Penal Code, in step with the new situation of modernisation and opening up to the outside world, is conducive to China playing a greater role in international affairs.

Replacement of 'counter-revolutionary' category

In pursuance of opening up to the outside world, the need to promote China's peaceful reunification, and to make the accusation charges in criminal law more scientific and the administration of justice more operable, the New Penal Code of China in 1997 changed 'counter-revolutionary crimes', as prescribed in the first chapter of the 1979 Penal Code, into 'crimes, endangering state security', deleting the definition of 'subjective counter-revolutionary aims' in this category of crimes, making revisions and readjustments relating to the characteristics of state security endangerment, and transferring into other chapters crimes which actually belonged to the ordinary criminal category. Such revisions were an important step towards promoting a scientific approach and adapting to conventional practice in modern criminal law.

Extending the scope of 'control' and fines

Control is the lightest of all free penalties in China. It is a penalty of control and supervision exercised by the public

security organ. As the penalty does not involve the custody of the offender, it may avoid the 'cross-infection' resulting from imprisonment, and may help to encourage communities to join in the education and correctional reform of criminals; furthermore, as this modern penalty does not affect the criminals' work and family life, it follows the trends in criminal penalty development around the world. While there were only 23 crimes to which the control penalty was applicable under the 1979 Penal Code, the figure has been increased to 109 under the New Penal Code.

Fining is a frequently-used penalty in Western countries. Under China's 1979 Penal Code it was a supplementary penalty, mostly supplementary to penalties applicable to some profiteering crimes, while at the same time it was stipulated as independently applicable to some minor offences. However, taken as a whole, there were few crimes to which fining could be applied according to the 23 stipulations, of which only 14 were suitable for independent application. Under significant changes in the New Penal Code, although fining remains a supplementary penalty and is mainly applicable as a supplementary means, the number of applicable crime categories has increased to 180 – accounting for some 43.5% of the total, out of which 84 were suitable for independent

application (6 times the number prescribed in the 1979 Penal Code). This also corresponds with global trends.

CONCLUSION

In a modern society governed by rule of law, good laws are merely the basis and prerequisite for the rule of law, while sound and effective administration of justice is the key – and the hard nut to crack. Likewise, the development and improvement of China's New Penal Code has merely provided a legal basis for the development and improvement of its application of rule of law in criminal areas. The translation of legal norms stipulated in a document into a rule of law in actual practice still requires tremendous effort and dedication from all law departments, the whole of society and all the people who are determined to bring about the rule of law across the country. The reform of China's criminal law still has a long way to go and must continue to advance alongside the major social changes and developments currently taking place. 

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Book Review

Developments in European Company Law – Vol. 1

reviewed by Emilios Avgouleas

Edited by BAK Rider & M Andenas, Kluwer Law International (The Hague London, Boston) 1997, pp. xxvii + 238; ISBN: 90-411-0671-5.

This book was edited by two of the leading UK academics in the field of company and financial services law and carries the contributions of some leading experts in these areas. What is striking, however, is that the majority of the contributions refer in one way or another to fundamental issues of UK company and financial services law without alluding as extensively as the title suggests to relevant EC legislation. Nevertheless, this book contains some fine contributions. It starts with G Gilligan's study on the origins of self-regulation of the City of London. This, although it lacks the theoretical flair of comparable studies, still provides significant information about the origins and development of self-regulation in the City and how repeated attempts to impose statutory regulation were in one way or another frustrated. In this context, Gilligan draws useful conclusions about the influence of the City's financial community on lawmakers before the enactment of the *Financial Services Act 1986*.

Professor Rider's contribution, which touches on the disparity between what is perceived as conflict of interests in the UK and the rest of the EC member states, is interesting and informative. Rider's analysis of the English law on fiduciaries is, as are all Rider's writings on this topic, insightful and authoritative. The same observations apply to the contributions of Colin Bamford and Gerard McCormack. These authors, following the House of Lords decision in *Westdeutsche Landesbank*

Girozentrale v Islington LBC [1996] 2 WLR 802 and the Law Commission's 1995 paper 'Fiduciary Duties and Regulatory Rules' provide an interesting analysis of the possible ways in which the law on fiduciaries may intersect with the regulation of modern commercial and financial transactions, such as derivatives trading.

Finally, the book contains two contributions that seem very fitting with its theme. The first is by Mads Andenas and discusses the role of parallel proceedings in the disciplining of auditors together with relevant UK case law and EC legislation. Andenas raises some very timely and important points that should be given further consideration by UK lawmakers. The second contribution is by Professor Lomnicka, who analyses crudely the difficulties that home state control creates in the offer of cross-border investment services in the EU following the enactment of the Investment Services Directive ('ISD'). The author of this review feels obliged to agree with the majority of her observations as to the ambit of art. 11(2) of the ISD and the possibility of jurisdictional conflict that this creates.

This book contains contributions that will be found useful by the student of UK-EC company financial services law. Therefore it is hoped that the next volume, to be published later this year, will contain more contributions like the ones mentioned above with, however, more coverage of EC law. 

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