

# CHINA'S MAJOR REFORM IN CRIMINAL LAW

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On March 14, 1997, the Fifth Session of the Eighth National People's Congress approved the Reform Bill on Criminal Law, which will produce significant changes to criminal law in China. China's existing criminal law statute was formulated in 1979 shortly after the Cultural Revolution. It was one of the first of seven groups of laws formulated. Triggered by the lessons learned from the Cultural Revolution, this series of statutory drafting reflected the importance China attributed to the rule of law at that time. A country with a history of a weak legal system, China had little experience in dealing with legal theories. Therefore, the resulting statute focused largely on principles and was comprised of definitions that were unduly formalistic as well as containing many loopholes. In 1982, the Standing Committee of the National People's Congress began its research on the reform of criminal law, which continued for fifteen years. During this period, the National People's Congress adopted 22 ordinances and decisions that amended or supplemented the criminal statute. In addition, it adopted 130 articles regarding criminal liabilities in context of civil, economic, and administrative law. The Reform Bill on Criminal Law was formulated out of the accumulated experiences from the enactment of criminal laws over the past 17 years, the research conducted on criminal laws of various foreign countries, and the studies made on modern criminal legislation and developmental trends.

The Reform Bill on Criminal Law is a significant one. Under the bill, the existing criminal statute will be expanded from 192 articles to 449 articles; all criminal ordinances and decisions will be assimilated to produce a unified criminal code. The reform encompasses the following areas.

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## 1. Clarifications of Three Fundamental Principles of Criminal Law

First, the reformed criminal code defines the legal elements of each criminal offense and abandons the principle of application by analogy. Article 79 of the existing criminal statute provides that, if a defendant's act is not explicitly proscribed by statute, the defendant can be convicted and sentenced based on the most analogous provision, as long as permission from the People's Supreme Court is obtained. Article 3 of the new criminal code provides that "if a defendant's act is proscribed by law explicitly, the defendant should be sentenced according to the provisions; if a defendant's act is not proscribed by law explicitly, the defendant should not be convicted or sentenced."

Second, the reformed criminal code follows the principle of equality before the law. Article 4 of the new criminal code states that "the applicable law for every defendant of the same offense should be identical; no person has the privilege of surpassing the law."

Third, the reformed criminal code clearly defines the principle of proportionate sanction. Article 5 of the new criminal code provides that "the applicable sanctions should be proportional to the crime committed by and the criminal responsibilities of the defendant."

These new provisions represent large improvements in Chinese criminal law.

## 2. Abolishment of Counter-Revolutionary Crimes

Most offenses characterized in the counter-revolutionary chapter are redefined as offenses of endangering national security. Other articles are redefined as offenses endangering public safety or offenses interfering with the administration of public order. The new code increases the sanctions for offenses endangering national security when the act involves conspiracy with "foreign organizations, associations, and individuals." Most changes concerning counter-revolutionary crimes, however, are linguistic; few substantive changes have been made. For example, Article 102 of the existing criminal statute defines the offense of counter-revolutionary propaganda as "the use of counter-revolutionary slogans, leaflets, or other methods that provoke overthrowing the 'classless totalitarian government and socialist system.'" This offense is converted to that of solicitations to overthrow the government, an offense consisting of "the use of slander, libel, or other methods to provoke the overthrow of the government and destruction of the socialist system"; the offense of

counter-revolutionary propaganda is thus discarded. The change reflects the end of the revolutionary period in which legal concepts focused mainly on struggles between the social classes.

### 3. Clarifications of the Two "Pocket Offenses" in the Existing Criminal Statute.

"Pocket Offenses" proscribe conduct that endangers society. Their definitions focus on theoretical principles; thus, making identification of an offense as ambiguous as locating an item in a big pocket. There are two "pocket offenses." The first involves taking chances in a planned economy in an abusive manner. The offense punishes conduct that violates the administrative rules governing financial, currency exchange, monetary, and commercial areas. The boundaries of the offense are blurry, and the conduct proscribed is potentially very broad. Prosecutors thus have broad discretion in enforcing the statute. In the past, many were convicted of the offense because of improper conduct in the business areas of sales, trading, and agency. The offense has been abolished pursuant to the needs of a socialist market economy. Conduct previously proscribed is now analyzed and redrawn into narrower categories, such as the offense of manufacture and sale of fake commercial products, the offense of disrupting discipline in financial management, the offense of contractual fraud, the offense of dealing in licensed or patented products, and the offense of trading import and export permits.

The second "pocket offense" arises from the creation of public nuisance. Article 160 of the existing criminal statute defines the offense as any conduct that disrupts public order in a serious manner such as group fights, provoking trouble, and harassing females. In practice, judges have broad discretion in drawing the line of the offense and much improper conduct can potentially fall under the offense of creating public nuisance. The reformed criminal code divides the offense into four separate offenses: harassment and molestation of females, organized sexual activities, group fights, and provocation of trouble.

### 4. Strengthening of Prosecution for Breach of Official Duties.

The existing criminal statute contains a chapter on breach of official duties, which address specific offenses committed by state officials, such as corruption and bribery and negligence of official duties. Recently, the number of cases involving corruption in public office has increased. A

significant minority of state officials are corrupt, abusive, and gravely irresponsible, thus endangering the welfare of the state and the public. Some law enforcement officials, prosecutorial officials in particular, are biased in their implementation of the law, and they seriously tarnish the image of the legal system. The reformed criminal code contains additional, more concrete, and more stringent provisions targeted toward state officers. It contains one full chapter on bribery and corruption and expands the chapter on breach of official duties from 7 to 23 articles, thus greatly enhancing the sanctions imposed on state officers who breach their official duties. Breach of official duties includes abuse of power in approving the illegal formation and registration of corporations, the illegal issuance of equities and bonds, negligent execution of fraudulent contractual provisions causing heavy losses to the state, failure to collect tax revenues in full or in part, fraud or bias in the management of stock issuance, withholding of taxes, and administration of export refunds, illegal issuance of permits for timber harvesting, irresponsibilities that result in heavy environmental pollution, illegal issuance of permits for land use and permits for land possession, sale of land use rights of state property at a low price, trafficking, and falsification of inspection reports.

##### 5. More Stringent Provisions on Sentence Reduction and Probation

The existing criminal statute provides that sentence reduction and probation can be granted to criminals who have truly repented. The definition of "truly repented," is however blurry in practice. Consequently, a large degree of discretion is reserved for enforcement officials. Because there has been a serious corruption problem among enforcement officials in recent years, some criminals who have been sentenced heavily or sentenced to life without parole are imprisoned only for a short time in practice; by bribing enforcement officers, these criminals are either granted a reduction in their sentence or released on probation. The reformed criminal code sets forth the limits and conditions under which a reduction in sentence or probation can be granted. For example, violent sex offenders are not entitled to any reduction in sentence or probation at all. Under the new criminal code, an enforcement unit no longer has the power to decide whether a criminal is entitled to sentence reduction or probation. The unit must now submit a recommendation to an intermediary court or a court at a higher level. Consideration is then made by the judicial commission of the court.

## 6. New Offenses that Meet the Needs of Societal Development and Market Economy

The main offenses created include participating in triad activities, terrorism, inciting racial hatred and disrupting racial harmony, money squandering, fraud in stock-related activities, destroying environmental sources, infringing trade secrets, tarnishing construction quality, kidnapping and detaining ransoms for debt collection, limiting individual freedom for labor work, attacking witnesses for revenge and endangering national security interests.

The reformed criminal code also contains articles governing breach of official duties by military personnel.

The reform bill is a big step in China's construction of a legal system. It unifies and outlines criminal law in China. By changing the existing scattered and chaotic criminal law statutes, ordinances, and rules, the reformed code facilitates the enforcement of criminal law. The new criminal code provides for principles of substantive due process, equality before the law, and proportionate sanctions. It increases the rights enjoyed by the public and criminal defendants. In addition, this reform raises the standard of criminal law. Criminal enforcement is facilitated as some provisions have been made more elaborate and concrete, hence greatly limiting the discretionary power of judges and reducing the chances of corruption.

Nevertheless, some legal scholars are not completely satisfied with the reform because little progress has been made in reducing the scope of capital punishment. Heavy criminal sanctions have been favored throughout Chinese history. In 1979, when the existing criminal statute was formulated, there were 28 capital offenses. Since 1982, there has been an increasingly strong societal sentiment against this broad classification. Supplemental ordinances of the criminal statute have greatly expanded the scope of capital punishment, increasing the number of capital offenses to 66. During the reform process, some legal scholars advocated reducing the scope of capital punishment, referring to the trends of criminal laws in other countries and the features of a modern legal system. Public safety, however, is highly emphasized in Chinese society today. At present, the country is focusing heavily on efforts directed against criminal activities. Under this climate, the police and the prosecutorial office believe that the death penalty should be used more frequently. The public also supports heavy punishment of criminals. Accordingly, this is not the best time to advocate a reduction in the scope of capital punishment. In view of the

different opinions given by lawyers, police, and prosecutorial officers, the scope of capital punishment has neither been increased nor decreased. For criminals below the age of 18, however, the most severe punishment has been changed from the death penalty to life without parole.

Furthermore, one important reform was not instituted due to strong opposition from representatives of the People's National Congress. Recently, crimes involving heavy firearms have dramatically increased. To protect the safety of on-duty police officers, the police department proposed an amendment to the self-defense provision of the existing criminal statute. Under the proposal, the scope of self-defense by the police would have been overly broad: "if a police officer is forcefully attacked or is fearful of his or her personal safety during any legal interrogation, detainment, arrest, pursuit of fleeing suspects, and coup against illegal activities, the officer will be not criminally liable for the injuries or death of anyone because of the use of excessive force in self-defense, as long as the officer uses the weapon or firearm in a legally appropriate manner." When the bill was revised in the National People's Congress, many representatives believed that the provision would confer excessive power on the police as the degree of "forceful attacks" might vary. They argued that the lack of a strict limitation on the use of weapons would likely result in their excessive use by certain police officers, considering that the excessive use of firearms and weapons often occurred in practice. In view of these representatives' opinions, this provision in the original bill was deleted. The reformed criminal code retains the self-defense provision of the existing criminal statute. Self-defense must be reasonable in scope; the actor will be criminally liable otherwise.