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THE CRIMINAL LAW OF COMMUNIST CHINA

Lung-sheng Tao†

The author elucidates the principles of the criminal law of China, as established and applied by the Chinese Communists. Special attention is given to the use of criminal punishment as a weapon of the "class struggle," to the rejection by the Chinese Communists of the Western "principle of Legality," and to the Chinese concepts of causation, harm, and mens rea, which, the author explains, differ markedly from the corresponding Western concepts. The author concludes that, as used by the Chinese Communists, criminal law is largely a political weapon.

Recent writings on the criminal law of Communist China reveal a tendency to view the development of that law in terms of the Soviet experience shortly after the 1917 Revolution.¹ It should not be assumed, however, that Communist China's penal law simply follows that of Soviet Russia.² As a result of the tendency to equate the Chinese experience with the Soviet, there has been no thorough study of the principles, doctrines and rules of the substantive criminal law of Communist China.³ The purpose of this article is to make a beginning in this direction by elucidating the principles of the Chinese criminal law.⁴

I

CRIMINAL PUNISHMENT

Punishment in Communist China is "a coercive means applied by the people's court to protect the interests of the state and people,"⁵ and is a

† LL.B. 1963, Taiwan University; LL.M. 1966, Indiana University. The author is gratefully indebted to Professor Jerome Hall for his invaluable criticism and suggestions on this article. The author also wishes to acknowledge his indebtedness to Professors W. J. Wagner and Alfred R. Lindesmith of Indiana University for their valuable criticism of the manuscript.

¹ See, e.g., Lin, "Communist China's Emerging Fundamentals of Criminal Law," 13 Am. J. Comp. L. 80 (1964); Buxbaum, "Horizontal and Vertical Influence Upon the Substantive Criminal Law in China: Some Preliminary Observations," 10 Osteuropa-Recht 31 (1964). But see Chiu, "Communist China's Attitude Toward International Law," 60 Am. J. Int'l Law 245 (1966). Chiu's excellent article is a pioneer in the field.

² "The Chinese Communists evidently have not themselves chartered a clear and definitive course for their legal development," Lee, "Chinese Communist Law: Its Background and Development," 60 Mich. L. Rev. 439, 447 (1962). The applicability of the Soviet model of law has been denounced by Chinese since 1957. See Cohen, "The Criminal Process in the People's Republic of China: An Introduction," 79 Harv. L. Rev. 469, 483-84 (1966).

³ The writer shall refrain from predicting the future development of law in Communist China, and from making evaluations unless the established facts justify his doing so. For the study of legal institutions and other problems, see Buxbaum, "Preliminary Trends in the Development of the Legal Institutions of Communist China and the Nature of the Criminal Law," 11 Int'l & Comp. L.Q. 1 (1962).

⁴ "We do not understand a body of law or its resemblance to branches of other systems until we have pushed inquiry to the point of discovering their common underlying principles." Hall, Comparative Law and Social Theory 65 (1963).

⁵ Chung-hua Jen-min Kung-ho-kuo Hsing-fa Tsung-tse Chiang-i (Lectures on the General Principles of Criminal Law in the People's Republic of China) 147 (1957) [hereinafter cited as Lectures], translated in Joint Publications Research Service No. 13331, U.S. Gov't. Publications No. 10317 (1962). The original Chinese textbook was published by the Legal Press

form of "class struggle." It is a "sharp weapon" used by the state organs "to eliminate the enemies and the antagonistic elements."⁶ However, the relationship between punishment and harm in Communist law is ambiguous. Throughout the discussion of the problem of punishment, it seems that the rational relationship between the two principles escaped the attention of Chinese Communists.⁷ The view that punishment is to be inflicted in proportion to the gravity of the harm has often been disregarded. This implies that the idea that the severity of punishment should be related to the harmfulness of the offense has been discarded, and that the ethical significance in harm and punishment has been ignored by the Communists.⁸ For example, in a factory where production was high, work efficiently managed, and the accident rate low, a worker, who negligently violated a regulation and thereby caused an accident fatal to another worker, was convicted in a mass trial presided over by a people's judge and was given a suspended sentence of two years.⁹ In another factory where production was unsatisfactory and the rate of accidents high, a defendant who committed the same type of crime was held to be a counter-revolutionary element and was punished with life imprisonment.¹⁰ The harms involved were almost the same, and the mental states were no more than mere negligence. What made the punishments different was presumably not the gravity of the harms committed. Nor was the nature of the act expressed by the *mens rea* of one defendant more serious or dangerous than that of the other.¹¹ This unequal punishment for equal offenses is understandable as a reflection of a policy which applies a severe and deterrent punishment in a factory with a poor production and accident record "to suppress the bad elements and to deter the potential criminals in that area."¹²

(Fa-lu Ch'u-pan-she), Peking, in September 1957. It has been used as a textbook in the Peking law school.

⁶ For the Soviet criticism of the persistent use of the law as a measure of suppression in China, see Hazard, "Unity and Diversity in Socialist Law," 30 Law & Contemp. Prob. 270, 285 (1965).

⁷ It might be argued that the Chinese have not paid attention to any "relation" between harm and punishment. But the relation emphasized here is a "rational" one. It may be said that the traditional sphere of responsibility and blame, the moral connotations of punishment, escaped their attention. Instead, "the degree of punishment can be determined to some extent by one's social [economic] classification." Buxbaum, *supra* note 1, at 34.

⁸ "... [S]anctions are intelligible only when they are related to the prior harms" Hall, "Legal Sanctions," 6 Natural L.F. 119, 120 (1961).

⁹ Hsing Tung Tse. No. 819 (1953). (Decision Character "Tung" No. 819 of the Criminal Branch of the Antung Higher Court). There has been no official publication of court decisions in China. The few cases used in this paper were collected through various sources from Hong Kong, Taipei and Tokyo. Acknowledgments are due Mr. Chen Hsien-Yu, editor of the Hong Kong Times and Mr. Y. L. Sung, a lawyer in Tokyo, who collected a few unpublished decisions from the refugees from mainland China. As long as stare decisis is non-existent in Communist China, court decisions can only be viewed as representing the Chinese attitude toward the law, but not the rules of law established by judicial precedents.

¹⁰ Hsing Tung Tse. No. 1207 (1953).

¹¹ Cf. Lectures 150.

¹² This slogan is frequently found in the official reports in China. Cf. Lo Jui-ching, Report

The explicitly declared objectives of punishment in the criminal law of Communist China are (1) suppression and deterrence, (2) education, and (3) reformation.¹³ Deterrence as an objective of the criminal sanction has been emphasized by the Communists. "The application of punishment by the people's court . . . serve[s] a warning to all the unstable elements in society,"¹⁴ and "to deny the role of our punishment in deterring the enemies is unrealistic and therefore erroneous."¹⁵ In the suppression of counter-revolutionaries since 1951, deterrence has been espoused as the salient and most powerful aspect of criminal punishment. Public execution of various punishments, *e.g.*, reprimand, public humiliation, and the death penalty, was widely used by the people's tribunals (Jen-min Fa-tin) in mass trials.¹⁶ Suppression is directed to "the class enemies of socialism," while education and reformation are used in coping with the so-called "contradictions among the people."¹⁷

Reprimand, often called "criticism-education" (P'i-ping Chiao-yü) by the people's courts, and sometimes "admonition," "reproof" or "an order to apologize,"¹⁸ is one of the punishments frequently imposed on criminals, particularly those who commit petty offenses and are found guilty in "mass trials."¹⁹ Although its function is alleged to be educative, it is actually a kind of public humiliation. The convicted person is usually ordered by the court or tribunal to post a public notice expressing his apology and repentance for his offense, to have his face slapped by the victim on the spot, or to parade along the streets with a sign on his back describing his evil behavior (You-cheh-shieh-chung).²⁰ Perhaps it is more noteworthy that in some cases the criminals are ordered by the court to pay monetary compensation to the victims.²¹ However, it is by no means clear whom the offender is supposed to compensate in cases where the crime is not one against person or property, as for example in

to the Third Session of the First National People's Congress, Jen Min Jih Pao [hereinafter cited as *People's Daily*], June 24, 1956. Cf. Fan, "A Preliminary Study on the Problems of Negligence and Accidents in Factories and Mines," *Cheng Fa Yen Chiu* [hereinafter cited as *Studies on Political Science and Law*] 7 (No. 5, 1955).

¹³ See Lectures 148-51.

¹⁴ *Id.* at 150.

¹⁵ *Ibid.*

¹⁶ This is traceable to the early period of the Communist regime. "Sanctions of varying degrees of severity were applied: fines, public humiliation, death . . ." McAleavy, "The People's Courts in Communist China," 11 *Am. J. Comp. L.* 52 (1962).

¹⁷ The "educational function" of the courts is one of the features of the pre-1949 experience which have been noticeably developed down to the present day." *Id.* at 55. The Chinese Communists "have never had illusions that they could dispense with criminal sanctions." Cohen, *supra* note 2, at 471.

¹⁸ Lectures 162.

¹⁹ *Ibid.*; see Thompson, "The People's Tribunals: The Antithesis of Justice," 40 *A.B.A.J.* 289 (1954).

²⁰ See Lectures 162-63; Ta Kung Pao [hereinafter cited as *Ta-kung Daily*], March 17, 1952; Cohen, *supra* note 2, at 497-98.

²¹ See Lectures 162.

the offense of spreading reactionary words.²² Equally significant is the fact that punishment by reprimand is applied by the people's courts to non-criminals as well as to criminals, and in civil disputes as well as in criminal cases.²³ Nor do the people's courts or tribunals follow definite rules of procedure in these cases.²⁴

Surveillance is "a punishment whereby the punished is subject to labor reform under the control of state organs and under mass supervision."²⁵ Earlier, when the Chinese Communists first assumed control of mainland China, surveillance was applied to those counter-revolutionaries whose harmful conduct was relatively insignificant,²⁶ and, perhaps because the prison institutions were overcrowded due to the large-scale suppression of counter-revolutionaries soon after the *Sanfan* and *Wufan* movements in 1951-52, the Communists issued the Provisional Surveillance Act to deal with minor counter-revolutionaries by way of "labor re-education without confinement."²⁷ Later, surveillance was also applied by the courts to "those offenders who are dangerous to social order," such as thieves, crooks, gamblers and racketeers.²⁸ It may be noted that no statutes proscribing these acts have as yet been enacted. As shall be discussed later, this raises problems concerning the principle of legality. In certain regions, *e.g.*, Chinghai and Sikang, where there is an insufficient number of the people's courts, the authority for surveillance shifts to the executive or Party organs. Most of the cases involving the surveillance of counter-revolutionaries are directly determined and enforced by public security bureaus.²⁹ The purpose in putting petty offenders under "mass surveillance," "mass control," or "surveillance in villages" is allegedly so that offenders can "transform themselves into new persons."³⁰ Although since 1956 the power to put under surveillance has been concentrated in the people's courts under an order issued by the National People's Congress, public security members still have influence in these

²² Cf. Statute on Punishment for Counter-Revolutionary Activity art. 10 [hereinafter cited as Counter-Revolutionary Act]. An English translation of existing statutes can be found in Blaustein, *Fundamental Legal Documents of Communist China* (1962).

²³ See Lectures 162-63.

²⁴ See Criminal Court Procedure in Chinese People's Republic, translated in Joint Publications Research Service No. 4595 (1961); Buxbaum, *supra* note 3, at 23.

²⁵ Lectures 163.

²⁶ See Shih Liang, former Minister of Justice, Report to the First Session of the National People's Congress, *Wen Hui Pao* [hereinafter cited as *Wen-huei Daily*], Sept. 27, 1954.

²⁷ Temporary Regulations for the Surveillance of Counter-Revolutionary Elements (1952) [hereinafter cited as Provisional Surveillance Act]. *Sanfan* and *Wufan*, also known as the "Three-Anti" and "Five-Anti" movements, were purge campaigns in 1951-52 and 1955.

²⁸ See Shih Liang, *supra* note 26.

²⁹ It seems that the statement that "In general, courts were reopened very quickly after 'liberation,'" McAleavy, *supra* note 16, at 56, could not be applied to these border regions. See Lectures 163. Article 10 of the Provisional Surveillance Act specifically provides that "Everyone has the right to check on persons placed under surveillance . . ."

³⁰ Lectures 164. See Provisional Surveillance Act art. 2.

cases. For instance, while the maximum term of surveillance is officially three years, it may be extended beyond that at the discretion of the bureau of public security or the "mass" represented by local Party members.³¹

In sum, in Communist China the class enemies have been denied the equal protection of law. Criminal sanctions are employed for the deterrence and suppression of these "reactionary elements," while, in contrast, measures of persuasion, criticism and so on are used for rehabilitation of the "people" prior to the imposition of severe punishment (if they fail to express repentance).³² Public execution of the death penalty and of various minor punishments is widely used to achieve these objectives.³³ Under such circumstances, it is evident that difficulties are raised with respect to the principle of legality.

II

LEGALITY

The principle of legality is understood to mean that crimes should be narrowly and precisely defined, that definite penalties should be prescribed, that retroactive criminal statutes are forbidden, and that criminal statutes should be strictly construed. The central purpose of the principle is to definitely limit the power of the State. This implies the absolute supremacy or predominance of law as opposed to the arbitrary use of power and prerogative, or even of wide discretionary authority on the part of the government. Thus "the essence of this principle of legality is limitation on penalization by the State's officials, effected by the prescription and application of specific rules."³⁴ The significance of this principle finds expression in four ways. *First*, it influences legislators by requiring that penal statutes be enacted in narrow and clearly defined terms and that punishments be definitely prescribed.³⁵ *Second*, the principle provides canons of statutory interpretation, e.g., that ambiguous statutory provisions be strictly interpreted in favor of the accused, and in the United States, that vague provisions be declared void

³¹ Provisional Surveillance Act art. 6. For the influence of the police and security agencies in criminal cases, see Cohen, *supra* note 2, at 522.

³² See Lin, *supra* note 1, at 90. For the differentiation between "people" and "enemy" under the "Democratic Dictatorship," see Clubb, *Twentieth Century China*, ch. 9 (1964). Cf. Mao Tse-tung, *On People's Democratic Dictatorship* (reprint, 1949).

³³ "[A]lthough death sentences had nominally to be approved by County authorities, in fact they were as a rule executed on the spot." McAleavy, *supra* note 16, at 58.

³⁴ Hall, *General Principles of Criminal Law* 28 (2d ed. 1960).

³⁵ "*Nullum crimen* is an injunction to the legislature not to draw its statutes in such broad general terms that almost anybody can be brought within them at the whim of the prosecuting authority and the judge." Williams, *Criminal Law—The General Part* 437 (1953).

and unconstitutional.³⁶ *Third*, the rule of law requires equality before the law in the sense of uniformity regardless of personal status or characteristics. This, however, does not exclude rational differentiation in terms of individualization, mitigation and aggravation of peno-correctional treatment. *Fourth*, implicit in the principle of legality is the independence of the judiciary.³⁷

Most of these aspects of the principle of legality seem to have been rejected by the Chinese Communists. The independence of the judiciary is said to be "employed by the capitalist class as a reactionary instrument for class struggle, and for enforcing class politics."³⁸ This reflects the Marxist theory that the capitalist State is essentially an instrument used by the ruling class to suppress the masses and, consequently, that the judiciary cannot possibly be independent of the executive representing the ruling class.³⁹ Thus, it is said in Communist China that the purpose of the courts is to serve the people in their proletarian dictatorship and to facilitate socialist transition by punishing antagonistic elements and criminals. As a corollary of this policy, the presumption of the innocence of the accused is viewed as a "bourgeois rule" and has been repudiated by the Communists.⁴⁰

It follows that the view that the government and its officials are as much bound to observe the law as the people seems to be a source of wonder to Communist jurists. The government is the instrument of the people. How, then, can the public interest require protection from the government? Law is thus the servant, not the master, of the Communist Party.⁴¹ It is as much the function of the executive as it is of the judiciary to express the will of the State and the people. The distinctions between formal legislation, court decisions, and Party policy are hazy. Moreover, the concepts of guilt and innocence have given way to the alleged needs of the "Party line" and its view of social defense.⁴²

In Chinese Communist criminal legislation the definition of specific crimes is either very broad and imprecise or is not made at all. The

³⁶ See *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). See also Williams, *supra* note 35, at 437.

³⁷ Phillips, *The Principles of English Law and the Constitution* 63 (1939).

³⁸ Ch'i, "The Capitalist Idea of Judicial Independence Must Be Thoroughly Repudiated," *Studies on Political Science and Law* 52 (No. 2, 1960); see Wu Te-feng's words quoted in 8 *Bulletin of the Int'l Comm'n of Jurists* 7 (1958).

³⁹ "The Chinese Communists regard criminal law as an instrument of the dominant class, used to protect its class interests and political hegemony," Buxbaum, *supra* note 1, at 32.

⁴⁰ See Wu, "Censure the Bourgeois Rule of Presumption of Innocence," *Studies on Political Science and Law* 37 (No. 2, 1958); Cohen, *supra* note 2, at 484-85.

⁴¹ For the relation between law and state, see Kuo-chia ho Fa de Li-lun Chiang-i (Lectures on the Theory of Law and the State) (the Legal Press, Peking 1957); Cohen, *supra* note 2, at 482, 485; 8 *Bulletin of the Int'l Comm'n of Jurists* 8.

⁴² Buxbaum, *supra* note 3, at 23; Cohen, *supra* note 2, at 482.

consequent uncertainty is increased by the fact that all the laws, statutes, and judicial decisions of the Nationalist regime have been abrogated.⁴³ This situation indeed clouds the concept of crime and relevant penal theory. In the penal statutes enacted in China "common crimes," crimes not categorized as political offenses, can hardly be found.⁴⁴ Actually, the Chinese Communists still recognize the ordinary major crimes as punishable by the courts, but criminal homicide, robbery, and rape, for example, are acts which the State does not have to proscribe by penal statutes, "because the seriousness of these acts is obvious,"⁴⁵ and the people are presumed to have a sense of guilt with respect to them. This, of course, still leaves undetermined the problem of fixing punishment. On the other hand, if an act done in the course of the commission of a crime is regarded as "endangering the socialist order of the people's democracy," it is usually merged in a higher or greater offense punishable under the Counter-Revolutionary Act. It is on this theoretical basis that no penal statute enacted by the Chinese Communists has specifically dealt with the general crimes.

A number of major crimes against property have been consolidated under the heading "corruption," and are proscribed by the Anti-Corruption Act of 1952.⁴⁶ They are, however, not clearly enough defined to enable one to know precisely what acts are punishable under the law. More remarkable are the facts that courts seldom rely specifically on criminal statutes in rendering their decisions, and that the people's procurators do not specify in their indictments the essential elements of the crimes charged.⁴⁷ This situation was described by a commentator as the "elasticity of the law" of Communist China.⁴⁸

⁴³ "All laws, decrees and judicial systems of the Kuomintang reactionary government which oppress the people shall be abolished." Common Program of the Chinese People's Political Consultative Conference art. 17 (1949); see Blaustein, *Fundamental Legal Documents of Communist China* x (1962). After the abolition of the codes, Communist lawyers were required to go through a special course of legal training before they were assigned to different posts in the courts and other legal institutions. The 1952 reform of the legal profession was considered a great success for having "purged the old concepts," despite the "violent attack of rightists."

⁴⁴ "[T]here are no statutes proscribing murder, rape, robbery and other crimes of similar nature." Buxbaum, *supra* note 1, at 41.

⁴⁵ Lectures 46.

⁴⁶ Statute on Penalties for Corruption in the Chinese People's Republic (1952).

⁴⁷ Yu Chung-lo, the Advisor of the Supreme Court, complained that in passing sentences, "the judges simply write out the autobiography and confessions of the defendants with a final verdict of guilty of what is described as 'great and evil crime.'" 8 *Bulletin of Int'l Comm'n of Jurists* 12 (1958).

For the importance of one's past record and background, see text accompanying notes 101-02 *infra*. Confession is one of the most important elements to be considered by the courts. Refusal to confess may be deemed as antagonistic to the people, and usually incurs heavy punishment. See Ch'en & Ch'ang, "Some Understanding About the Guiding Principles of Evidence in Criminal Trials in China," *Studies on Political Science and Law* 22 (No. 1, 1963.)

⁴⁸ See Lévy, "L'Elasticité de la Loi en Chine Populaire," 60 *L'Afrique et l'Asie* 25 (1962). See also Hazard, "The Soviet Legal Pattern Spreads Abroad," 1964 *U. Ill. L.F.* 277, 294.

The concept of crime has nevertheless been the subject of theoretical discussion by Communist jurists. Generally speaking, all acts which endanger the people's democracy, destroy its social order, or are dangerous to the society and deserve criminal punishment are offenses.⁴⁹ Since building a socialist society is said to be the common desire of the vast majority of the country led by the Party, an act endangering the people's democracy and social order must be regarded as an act dangerous to the society. The "danger" of an act is considered by the Communists as the most essential element of an offense. Whether or not an act is socially dangerous is determined by the will of the people led by the working-class,⁵⁰ and the will of people is expressed by the courts under the supervision of the government and the Party.⁵¹

During the "Hundred Flowers" movement in 1957, some Communist theoreticians ventured the view that an act can become a crime only when its social danger has been recognized by the court in accordance with the law.⁵² Thus it was asserted, theoretically at least, that the social danger of an act and its illegality should to some extent be unitary. An offense, it was held, is an act which is socially dangerous on the one hand and is a violation of the law on the other. However, in the "rectification" movement of the same year this view was condemned by the Party as a "rightist" or "deviationist" view, and has been repudiated.⁵³ As a result, it has been established that the term "violation of the criminal law" has a much wider connotation than its usual meaning.⁵⁴ "It cannot be understood merely as violation of criminal legislation,"⁵⁵ and where the law is admittedly incomplete, as it is in China, the relevant resolutions, decisions, orders, instructions, and policies of the Party and the State have been declared to be the basis of determining criminal offenses.

⁴⁹ See Lectures 48.

⁵⁰ See Ho & Wu, "How to Distinguish Two Types of Contradictions in the Judicial Practice," *Studies on Political Science and Law* (No. 2, 1963). Lin Fzu-chi'ang, a Chinese lawyer, was quoted as saying: "according to the wishes of the Party and the people . . . State and society today are led by the working class and its vanguard — the Communist Party." 8 *Bulletin of the Int'l Comm'n of Jurists* 9 (1958).

⁵¹ "Generally, in all 'major cases,' approval [of draft judgment] of the district Party secretary is also necessary." Cohen *supra* note 2, at 513. Cf. Wang, "Several Problems Concerning the Proceeding of Trial Supervision," *Studies on Political Science and Law* 71 (No. 2, 1958).

⁵² The "Hundred Flowers" movement was a short-lived movement, in 1957, for the freedom of speech and judicial independence. It was soon suppressed. See, generally, MacFarquhar, *The Hundred Flowers* (1960).

⁵³ For the "counter-criticism" of this view and others, see Liu Wen-huei's and Shih Liang's reports to the National People's Congress, *People's Daily*, July 6 and July 13, 1957, respectively. Almost the entire 1958 edition of *Studies on Political Science and Law* was devoted to criticism of these "rightists." See also Hazard, "Unity and Diversity in Socialist Law," 30 *Law & Contemp. Prob.* 270, 285-86 (1965).

⁵⁴ Wei & Eo, "The Absurdities of the Capitalist Principle of Legality," *Studies on Political Science and Law* 28 (No. 1, 1962).

⁵⁵ *Id.* at 29.

The danger of an act is proportionate to its seriousness. If the nature of a person's act is serious, the degree of its social danger is also great. What kind of act is a serious one is generally judged on the basis of the people's "social practice." For example, if the seriousness of an act, such as criminal homicide, is obvious, it is to be punished by the court even though no statute prohibits it. But in peripheral cases where the seriousness is not substantial or distinctive, the certainty of the law can hardly be attained by the above criterion. Illustrations can be found in the textbook for the judicial cadres in China. The defendant's past record and the extent of the damage caused by his act must be taken into consideration before a verdict is rendered. If a worker who does not have a bad record steals one *yuan* (dollar), he is not likely to be criminally punished.

Some people hold that since stealing is an act prohibited by the law, any stealing should be regarded as an offense, in spite of the amount of property involved. Such an understanding is wrong. It ignores the requirement that an offense cannot be determined on the basis of the *form* of an act alone. The substantial damage of the act to society and its degree of seriousness should be taken into account.⁵⁶

Communist criminal statutes that "prescribe" punishment may be divided into three types. A relatively small number of them provide a flat sentence as punishment. More of them merely declare that the violation of the law "shall be punished" without any further specifications.⁵⁷ A majority of the criminal statutes prescribe minimum sentences without specifying a maximum.

The punishments usually set forth in the Counter-Revolutionary Act are the death penalty and life or long-term imprisonment. Article 3 of the act is typical of the first group mentioned above: "Persons maintaining a link with the imperialists and betraying their motherland shall be punished by death or life imprisonment."⁵⁸

The second type is set forth largely in the orders, decrees and resolutions promulgated by the government or the Party in order to carry out special programs under socialist policy. This may be seen, for example, in a 1953 statute: "Those speculative elements who violate this order and those state workers who violate the law shall be severely punished."⁵⁹

The third group of statutes generally provide a minimum sentence

⁵⁶ Lectures 48.

⁵⁷ Where no maximum or minimum penalty is provided by statute, the judge usually knows, on the basis of experience and unpublished regulations, the penalty ordinarily imposed. See Cohen, "The Criminal Process in the People's Republic of China: An Introduction," 79 Harv. L. Rev. 469, 512 (1966).

⁵⁸ Counter-Revolutionary Act art. 3.

⁵⁹ Order issued in October 1953; see note 57 *supra*.

without setting a maximum, so that a defendant could legally be sentenced to as long a term as the court deems proper. Many of the provisions in the Counter-Revolutionary Act are of this nature. Article 5 of the act, for instance, after providing that "persons instigating the masses to armed insurrection . . . shall be punished by death," states: "Active accomplices in these crimes will be punished by prison terms of 5 years or more."⁶⁰

It is apparent that the latter two types of penal statutes, which constitute a major portion of the existing criminal legislation in Communist China, contradict the principle of legality and allow the courts great discretionary power in fixing punishment.⁶¹

Surveillance, as stated above, is utilized for the counter-revolutionary elements who have not shown repentance for their past crimes.⁶² This kind of legislation gives the bureau of public security the right to enforce surveillance of individuals, by way of checking, reporting, and criticizing the individual's daily behavior, and constitutes a special type of punishment.⁶³ Labor and ideological re-education of criminals is administered in corrective labor camps. Labor re-education also takes place during preliminary detention of the accused. Long months of detention before trial are often devoted in part to such re-education, and the length of the period of surveillance or labor re-education is left to the discretion of the people's courts and the people's procurators.⁶⁴

The principle of legality requires the court to take certain attitudes in interpreting penal statutes, and enjoins the judge to "remain anchored to the authoritatively established and the ordinary meaning of the words and to resolve his doubts in favor of the accused."⁶⁵ In Communist China, since a person can be convicted of a crime which is not covered by any statute, the question of strict or literal interpretation is seldom raised. Furthermore, the canons of statutory interpretation observed by democratic countries are criticized by the Chinese Communist jurists as absurd, on the grounds that "the capitalist class has the power to make arbitrary interpretations of statutes to oppress the toiling

⁶⁰ Counter-Revolutionary Act art. 5. [Emphasis added.] Cf. articles 6-13 of the act.

⁶¹ "[I]f no law fixes an upper limit, there is no adequate protection for any convicted person against life imprisonment." Hall, *Studies in Jurisprudence and Criminal Theory* 273 (1958). But cf. *Frese v. State*, 23 Fla. 267, 2 So. 1 (1887), where a Florida statute, declaring that the punishment for selling liquor without a license shall be a "fine of not less than double the amount required for such license," was challenged on state constitutional grounds and held valid.

⁶² See Provisional Surveillance Act.

⁶³ See Buxbaum, "Preliminary Trends in the Development of the Legal Institutions of Communist China and the Nature of the Criminal Law," 11 *Int'l & Comp. L.Q.* 1, 16-18 (1962).

⁶⁴ *Ibid.*

⁶⁵ Hall, *supra* note 34, at 47.

people,"⁶⁶ and that extensive interpretation is used by the capitalist judges "as a guise of analogy to preserve the class interests."⁶⁷ It seems that Chinese Communists have wholly disregarded these canons. In any event, if the act charged involved a high degree of danger and caused or might have caused serious social harm, *e.g.*, preparation or an admission of criminal intent,⁶⁸ the actor is to be punished in accordance with the social danger and seriousness of his criminal intent or act regardless of the ambiguity or vagueness of the statutes involved.

The canons of statutory interpretation, accordingly, are regarded by the Communists as adherence to a "formal" definition of the offense which neglects the "substance" of the crime. Included in the "substance", according to the Communists, are elements of personality and background. One authority cites the example of two defendants, both workers, who conspired and attempted to steal some coal from a mine for home use. The first defendant, a forty year old worker, was considered a "corrupt and decadent racketeer," while the co-defendant, a sixteen year old worker who was "somewhat influenced by racketeers, [was] . . . not a bad element from the vast people's viewpoint."⁶⁹ The first defendant was to be condemned, while the young worker was not criminally liable, because his act was not an offense in substance. This kind of decision raises not only problems connected with the principle of legality, but also those with respect to the principle of harm.

The criminal law of Communist China is not limited to the statutes enacted by the legislature, but also includes, as has been stated, the resolutions and decrees promulgated by the government and the Party. The people's court is not authorized to set any rule of statutory construction because, being an instrument of the Party and the people, it is not entitled to restrict the meaning of a given statute.⁷⁰ Similarly, although "all the existing laws approved by the Chinese People's Political Consultation Conference on October 1, 1949 shall remain in force unless in conflict with the Constitution,"⁷¹ no case or other source can be found to support the notion that the people's court has authority to invalidate or nullify a penal statute on the ground that it is in conflict with the Constitution.

⁶⁶ Wei & Eo, *supra* note 54, at 31.

⁶⁷ *Ibid.*

⁶⁸ See text accompanying notes 150-52 *infra*.

⁶⁹ Lectures 48-49. See Li, "On Joint Offenders," *Fa Hsueh* (Science of Law) 26 (No. 3, 1956). The author analyzes the factors relevant in determining the guilt of joint offenders.

⁷⁰ Supervision by the Party is in effect complete control of judiciary by the executive. The court is in actual fact "assisted" by a Judgment Committee which, apart from reviewing important and difficult cases, is empowered to deal with any cases that, after pronouncement of verdicts, are found to have been wrongly adjudicated.

⁸ Bulletin of the Int'l Comm'n of Jurists 8 (1958).

⁷¹ Resolution, Sept. 26, 1954.

One of the perennial problems concerning the principle of legality in Western legal systems is that of analogy. In Communist China, analogy is defined as "the application of the most similar provisions in the existing criminal legislation to convict and punish those socially dangerous acts which are not directly proscribed by the criminal statutes as offenses."⁷² Thus, in cases where the doer's act is deemed socially dangerous in substance and deserves punishment, though not directly proscribed by any criminal statute, the Communist law permits the judge to apply the most similar provisions in the existing criminal legislation in order to convict.⁷³

The application of analogy in Communist Chinese criminal law is alleged to be closely related to the current political and economic situation. At present, the country is in a period of transition from "political consolidation and economic rehabilitation" through "socialism" toward complete "communism." Thus "everything is in a state of constant development and change, and the offenses committed by the enemy and other criminals are various in type."⁷⁴ The situation, accordingly, could not have been accurately estimated by the legislators when they enacted the criminal statutes.⁷⁵ Thus the existing statutes cannot possibly include all the types of criminal acts which "may appear or are appearing."⁷⁶ In order to insure the struggle against acts which are substantially dangerous to society but not directly forbidden by the criminal statutes, there is a need, it is declared, to let the people's courts perform their duty by analogy.⁷⁷ For that reason, the Counter-Revolutionary Act specifically provides for the use of analogy.⁷⁸

The principle of legality prohibits retroactivity of criminal law. But except in certain special cases, the criminal law of Communist China can be applied retroactively to any acts committed after the founding of the

⁷² Lectures 54.

⁷³ "[T]he deliberately vague wording . . . opens the door to all analogous reasoning. One is accused of 'sabotage,' 'feudalism,' 'reactionist tendencies,' 'anti-revolution' and there is hardly a single act which cannot be fitted into one or other of these flexible categories." Bonnichon, *Law in Communist China* 6-7 (1955).

⁷⁴ See Lectures 50-51.

⁷⁵ "[W]e are now in a period of transition from one kind of society to another, moving toward socialism. Law is the armor of the social system and it must change as the system changes . . ." Wu Teh-peng's words quoted in Greene, *Awakened China* 191 (1961).

⁷⁶ "[T]he degree of social danger is not unchangeable at all. It changes with the change of the State's political and economic situations as well as the development of mass awareness and social culture." Lectures 50.

⁷⁷ See Ts'ao, "The Question of Whether There Should or Should Not Be Reasoning by Analogy in Our Nation's Criminal Law," *Studies on Political Science and Law* 11 (No. 3, 1953).

⁷⁸ Counter-Revolutionary Act art. 16 provides: "Persons who have committed other crimes for counter-revolutionary purposes that are not specified in this Statute are subject to the punishment applicable to the crimes which most closely resemble those specified in this Statute."

regime which have not been tried or are not pending.⁷⁹ Serious "crimes" committed before the "liberation" are also punishable by the people's courts.⁸⁰ The individual criminal statutes promulgated after the liberation are "demonstration[s] of the country's struggle with crimes, and of the Party and State policies."⁸¹ In terms of their applicability to the entire nation, "this is only a beginning." Therefore, it seems beyond question that they should be applied retroactively to the "crimes" committed before the statutes came into force.

Some statutes, for example, Article 18 of the Counter-Revolutionary Act,⁸² have explicitly provided for retroactivity. Other statutes do not have similar provisions, but Communist jurists maintain that their retroactivity is indicated in the legislative reports. For example, the Anti-Corruption Act⁸³ does not expressly provide that it is retroactive. But the legislative report points out that the act can be applied retroactively to those who offended its provisions before it came into force. In corruption and theft cases, where the degree of the offense is serious or popular resentment is high, the time limits of prosecution may be pushed back to the time before the Communists assumed control of the Chinese mainland.⁸⁴

Some statutes do not expressly provide for retroactive application, nor do they have legislative reports covering the possibility. Although one such statute provides: "this statute is to come into force the day of its publication,"⁸⁵ it has been interpreted to be a retroactive statute against those offenses endangering national currency which were committed before its promulgation. The rationale is that "every citizen knows that forgery or alteration of national currency is illegal even before the promulgation of this Act."⁸⁶

It is manifest that it is not objectionable in Communist China for unequal sentences to be applied to like offenders in like circumstances, particularly when "personal situations" and the class status of the offenders play a decisive role in determining criminal liability.⁸⁷ Western revulsion against retroactivity of penal laws, and the attitude that it is

⁷⁹ See Cohen, *supra* note 57, at 483-84.

⁸⁰ E.g., Counter-Revolutionary Act art. 18 provides: "This Statute is also applicable to counter-revolutionary crimes committed before it came into effect."

⁸¹ Wei & Eo, *supra* note 54, at 32.

⁸² See note 80 *supra*.

⁸³ Statute on Penalties for Corruption in the Chinese People's Republic (1952).

⁸⁴ "In view of the nature of the communist regime, economic crimes are of great significance. Socialist property is considered the source of the country's wealth, and the foundation of the socialist regime." Buxbaum, "Horizontal and Vertical Influences Upon the Substantive Criminal Law in China: Some Preliminary Observations," 10 *Osteuropa-Recht* 31, 47 (1964).

⁸⁵ Provisional Statute on Penalties for Undermining the State Monetary System art. 11 (1951).

⁸⁶ Lectures 33.

⁸⁷ See Buxbaum, *supra* note 84, at 33-34.

unjust to convict a person for an act which was legal when it was done, have little place in Chinese Communist criminal law. The attribute of justice or the moral quality of criminal law raises no problem among Chinese Communists.⁸⁸

III

MENS REA

In Communist China certain kinds of acts are punishable only as counter-revolutionary, while others can either be punished by the people's courts as counter-revolutionary or be disposed of as ordinary crimes, *i.e.*, "contradictions among the people."⁸⁹ Conviction for counter-revolutionary crimes usually requires proof that the offender had "counter-revolutionary intent" (Fan-keh-m'in-ku-i), which implies that the *mentes rea*e in counter-revolutionary activities are different from those in the ordinary non-political crimes.⁹⁰ A counter-revolutionary intent is an intent, or purpose as the Communists call it, of "overthrowing the popular democratic government and undermining the people's democracy."⁹¹ However, in practice the meaning is broadened by the people's courts to include almost all crimes which are believed to endanger the "socialist order" of the country. Thus, a person who possesses or uses counterfeit money can be convicted either of the crime of counter-revolution or of undermining the national monetary system.⁹² It is, therefore, difficult to draw a clear and definite line between counter-revolutionary crimes and ordinary ones.⁹³ One of the factors considered by the people's courts is the "seriousness" of the offense. If it is found that the purpose of the defendant in committing the crime was to "overthrow the people's democratic government and to destroy the people's democratic enterprises,"⁹⁴ he is likely to be convicted of counter-revolutionary crime. The criteria for judging the seriousness of an offense are, however, left to the dis-

⁸⁸ "In view of the Party line and the mass interests represented by the Party policies . . . there can arise no question of justice in the law." Change, "A Critique of the Obsolete Conception of Law," Studies on Political Science and Law 53 (No. 4, 1958). "The Party is always right . . . what the Party considers to be right and just cannot be wrong or unjust." Tung Pi-wu, People's Daily, July 24, 1955.

⁸⁹ See Ho & Wu, "How to Distinguish Two Types of Contradictions in the Judicial Practice," Studies on Political Science and Law 28 (No. 2, 1963).

⁹⁰ See Li, "On What Basis Shall the Counter-Revolutionary Crime Be Established?" Studies on Political Science and Law 1 (No. 3, 1957). Cf. Buxbaum, *supra* note 84, at 45-46. Compare article 2 of the Counter-Revolutionary Act with article 12.

⁹¹ Counter-Revolutionary Act art. 2.

⁹² See Counter-Revolutionary Act art. 9(3); compare Provisional Statute on Penalties for Undermining the State Monetary System art. 4 (1951).

⁹³ "The counter-revolutionary crime is obviously a broad offence. It includes what may be loosely termed treason as well as other acts . . . which would ordinarily be lesser offences." Buxbaum, *supra* note 84, at 45. See Li, *supra* note 90.

⁹⁴ Lectures 106.

cretion and determination of the people's courts in accordance with the "personal situation" of the offender.⁹⁵

As can be seen from the Communist jurists' analysis of *mens rea*, a counter-revolutionary crime obviously has fewer "definitional requirements" (Kou-chen-yao-ch'ien) than do common crimes.⁹⁶ This is primarily because of the Chinese Communists' classification of crimes into "struggles against the enemy" and "contradictions among the people."⁹⁷ Counter-revolutionary activities belong to the former. Under the policy of "dealing severely with enemies and leniently with the people," it seems natural that it should be believed that counter-revolutionaries do not deserve "due process."⁹⁸ Thus it is not necessary to test the actual mental state of a counter-revolutionary; once the objective situation justifies a presumption of counter-revolutionary intent, no other elements or requirements are held essential, although the crime is much more seriously punished than are non-political crimes.⁹⁹

In determining the "nature" of a crime, including the *mens rea*, the class or group to which the defendant belongs must be taken into account by the people's courts. Class status usually affects the determination of an offender's mental state or the "subjective element," *i.e.*, the *mens rea*. If a defendant belongs to the bourgeoisie or middle class, he is more readily found to have counter-revolutionary intent than if he is a state worker.¹⁰⁰ For instance, the defendant Chao, a high school teacher who had been a landowner before his property was confiscated by the State, conspired with a factory worker to steal coal from the state factory of Hanyan, Hupeli. The people's court found that the worker was guilty of the crime of theft, while it convicted the teacher of counter-revolutionary crime in violation of the Anti-Corruption Act and sentenced him to twenty years of labor re-education (Lao-kai) in prison, the reason being, *inter*

⁹⁵ See, Lectures 187; Shih Liang, Report to the First National People's Congress, People's Daily, July 29, 1955. See also Mao Tse-tung, Analysis of the Class in Chinese Society 10 (1956 ed.).

⁹⁶ See Ku, Some Problems in Criminal Law, Hua Tung Cheng Fa Hsueh Pao (East China Political and Legal Bulletin) 83 (1955). The term in the Communists' discussion may have a similar meaning as what Professor Mueller has called "definitional requirement" ("Tatbestand"). Cf. Hall, Comparative Law and Social Theory 58 (1963): "every rule of law can be analyzed in terms of the elements comprising it, each of which is also a compound concept."

⁹⁷ See Ho & Wu, *supra* note 89. Cf. Mao Tse-tung, On the People's Democratic Dictatorship (1949).

⁹⁸ ". . . [W]hen a man is patently a class-enemy, no considerations of law or legal procedure may be permitted to obstruct the course of justice." McAleavy, "The People's Courts in Communist China," 11 Am. J. Comp. L. 52 (1962); See Chang Ting-cheing, the Chief People's Procurator, Report to the First National People's Congress, Kwang Ming Jih Pao (Kwang Ming Daily), June 24, 1956.

⁹⁹ "The Chinese People's Republic regards counter revolutionary activity as the highest crime." Buxbaum, *supra* note 84, at 45.

¹⁰⁰ "In determining guilt, use could be made of class status in both Soviet and Chinese Communist law in order to determine subjective factors, such as intent." *Id.* at 37.

alia, that the defendant's "previous records, background, ideological quality and class composition" enabled the court to presume that he had counter-revolutionary intent in committing the crime.¹⁰¹ In general, the "class enemy" who comes from a bourgeois family seems to have a harder time proving his innocence of counter-revolutionary intent than does the citizen of working class ancestry.¹⁰²

Equally noteworthy is the fact that despite the assertion by Communist jurists of the requirement of special *mentes reae* in counter-revolutionary crimes, evidence of counter-revolutionary intent is not always required. For instance, a defendant, discovered by the bureau of public security to be in communication with his relatives in Formosa, was convicted of the counter-revolutionary crime of "maintaining a link with the imperialists and betraying his motherland," even though nothing was found in the letters to indicate such an intention.¹⁰³ Even assuming that proof of *mens rea* is essential in conviction for all the counter-revolutionary crimes, and that the above were merely exceptions to the rule, it remains true that subjective guilt, the defendant's actual mental state, does not have to be proved under the prevalent objective method of determining *mens rea* in Communist China. It seems that by taking into account such factors as background and class composition, a person can be convicted of a crime involving counter-revolutionary intent regardless of his actual mental state.¹⁰⁴

According to the Communist jurists, crimes other than counter-revolutionary activities require both the objective and subjective "elements;"¹⁰⁵ in other words, *mens rea*, divided into direct intent, indirect intent, or negligence, is essential for most crimes.¹⁰⁶ The principal difference between direct and indirect intent is the difference in the mental attitude of the doer, and this, in turn, is dependent upon the degree of foreseeability.¹⁰⁷ If the actor *expected* the result of his act and foresaw it as inevitable, his intent was direct, but if he foresaw the result as only a *possible* consequence of his act, his intent was indirect.¹⁰⁸ As is the case in proving counter-revolutionary intent, foreseeability usually pertains to

¹⁰¹ Hsing Eh Tse. No. 281 (1953) (The Hupeh Higher People's Court).

¹⁰² For the different treatment of state workers and the other classes, see Tung Pi-wu, Report to the Fourth Session of the First National People's Congress, *People's Daily*, July 3, 1957.

¹⁰³ Hsing Min Tse. No. 175 (1952) (The Fukien People's Court).

¹⁰⁴ "Intent is . . . determined primarily on the basis of objective facts rather than upon the subjective attitude of the individual." Buxbaum, *supra* note 84, at 50.

¹⁰⁵ See Lectures 97.

¹⁰⁶ *Id.* at 97-110.

¹⁰⁷ *Id.* at 98-99.

¹⁰⁸ If the offender belonged to the working class, he might be dealt with more leniently than are counter-revolutionaries. See Shih Liang, Report to the First Session of the National People's Party Congress, *Wen Hui Daily*, Sept. 27, 1954.

objective situations or external surroundings concerning the crime at issue. Thus, if the factual situation of a case is regarded by the people's court as justifying a finding that any person in the same situation "should have or could have foreseen" the occurrence of the harm, the defendant is generally held to have foreseen such a consequence.¹⁰⁹ It may be concluded that the requirement of foreseeability in the determination of *mens rea* is hardly employed to denote the real state of mind of the defendant; rather, it suggests a sort of "strict liability."

As in other legal systems, negligence is punishable in the criminal law of Communist China: "If a person's negligent act results in a consequence seriously dangerous to society, he [is] . . . to be punished."¹¹⁰ Unlike most legal systems,¹¹¹ however, there has been no tendency in Communist China to restrict rigorously the punishment for such behavior. This may be inevitable where no defensible theory of criminal liability exists, and no effort has been made to draw a clear distinction between intention and negligence.¹¹² In any case, an act, whether committed voluntarily or negligently, is punishable if its social danger is recognized by the people's courts, even though it is not proscribed by any criminal statute.¹¹³ Chinese Communists hold that in most crimes, negligent behavior is as destructive and culpable as voluntary conduct.¹¹⁴ Moreover, throughout their discussion of *mens rea*, the mental state described as negligence, *i.e.*, inadvertence or unawareness, escaped the attention of the Communist jurists.¹¹⁵ Even with counter-revolutionary crimes, a distinction between intentional and negligent conduct is rarely drawn.¹¹⁶ The emphasis on the consequence of an act rather than on the "guilt" of the actor may be attributed to the policies in Communist China.¹¹⁷ The functions of the criminal law as an instrument of the Party are (1) to "eliminate" enemies and antagonistic elements, (2) to warn and deter potential criminals, and

¹⁰⁹ See Lectures 97.

¹¹⁰ *Id.* at 104.

¹¹¹ See Hall, "Negligent Behavior Should Be Excluded From Penal Liability," 63 Colum. L. Rev. 632, 634 (1963).

¹¹² See Binavince, "The Ethical Foundation of Criminal Liability," 33 Fordham L. Rev. 1, 21 (1964).

¹¹³ See notes 43-48 *supra* and accompanying text.

¹¹⁴ See Chang Ting-chiang, Report to the Third National People's Congress, People's Daily, Jan. 1, 1965.

¹¹⁵ It is agreed that negligent harm-doers are subject to punishment regardless of their state of mind. See Lectures 104-107; Ku, *supra* note 96, at 86-87. See also Li, *supra* note 90.

¹¹⁶ "The failure to distinguish clearly between intentional and negligent conduct in the counter-revolutionary law, however, permits an objective determination of the injury to the State, rather than the subjective guilt of the accused, to govern the sentence imposed." Buxbaum, "Preliminary Trends in the Development of the Legal Institutions of Communist China and the Nature of the Criminal Law," 11 Int'l & Comp. L.Q. 1, 21, (1962).

¹¹⁷ "Policy is the spirit of the law," said Wu Teh-teng quoted in Woodsworth, "The Legal System of the Republic of China," 4 Can. B.J. 299, 300 (1961).

(3) to educate the general public.¹¹⁸ As most of the statutes and regulations are said to have been based upon "wide solicitation of public opinion, mass propaganda and education,"¹¹⁹ there is no reason to exculpate those who inadvertently fail to conform to the law.¹²⁰

Negligence means that "a doer should have foreseen the socially dangerous consequence of his act," but failed to do so because (1) the actor was "careless of his duty," or (2) he believed that the dangerous consequence "could have been avoided."¹²¹ It might be said that an objective "should have" standard is established. The Communist jurists have repeatedly declared that "negligent harm-doers deserve punishment," and that their liability should be based "more upon the danger of the act than upon the *mens rea*."¹²²

Similarly, one who mistakenly but honestly believes that a harm could have been avoided is answerable for the harm done irrespective of the "reasonableness" of his belief.¹²³ This accords with the fact that accidents in state factories and mines may subject the persons involved to criminal liability.¹²⁴ By the same token, mistake of fact does not exculpate, however reasonable the mistake may be.¹²⁵ In "special cases" the public security bureau is ready to intervene. Thus a defendant, designated as a "landlord," misappropriated communal property which he believed to be his own. He was executed by the bureau before the people's court had a chance to hear the case.¹²⁶ It may be noted that during the period when the people's communes were being set up, landowners were deprived not only of their rights to land, but also to all other private property, including farming implements.¹²⁷ They were usually treated as "class enemies," and "landlords" who mistakenly took back confiscated property from the people's commune were to be severely punished for their action irrespective of *mens rea*.¹²⁸ As the cases were generally dealt with by the public security bureau, by the "mass organizations" in the communes, or in

¹¹⁸ See Ku, *supra* note 96, at 86.

¹¹⁹ Lectures 104.

¹²⁰ *Ibid.* Cf. Fan, "A Preliminary Study of the Problems of Negligence and Accidents in Factories and Mines," *Studies on Political Science and Law* 7 (No. 5, 1955); Buxbaum, *supra* note 116.

¹²¹ Lectures 100.

¹²² See Liu Wen-huei, Report to the Fourth Session of the First National People's Congress, *People's Daily*, July 6, 1957.

¹²³ See Lectures 101.

¹²⁴ See Fan, *supra* note 120, at 41.

¹²⁵ Cf. Buxbaum, *supra* note 116, at 19.

¹²⁶ See 19 Union Research Service 77-79 (1960).

¹²⁷ Cf. Johnson, "Building a Communist Nation in China," in Scalapino, *The Communist Revolution in Asia* (1965).

¹²⁸ See Chung-kuo Ch'ing-nien Pao (*China Youth News*), Feb. 25, 1960. It is evident that *animus furandi* in larceny is not required.

"mass trials,"¹²⁹ mistake of fact could not affect the determination of the offender's guilt. Thus, although the Chinese jurists may in theory accept the doctrine of *ignorantia facti excusat*,¹³⁰ it does not seem to be recognized in practice as part of the Chinese criminal law.

In addition, motive is viewed as an element of *mens rea*. "Motive affects the degree of social danger. If the motive is evil, it implies that the offender's subjective wickedness is serious."¹³¹ In distinguishing counter-revolutionary crimes from ordinary crimes, a confession by the defendant indicating his motive is always relevant.¹³² But while a person may be presumed to have counter-revolutionary intent by virtue of his revealed "evil motive," his laudable motive is irrelevant once the criminal intent is presumed to have existed.¹³³ In sum, if the behavior of the accused does not enable the court to reach an inference or presumption regarding his *mens rea*, guilty intent may nevertheless be inferred from his motive as disclosed in his confession before the court, or in most cases, before the people's procurators.¹³⁴ The Communist law in this regard is different from American law where *mens rea* and motivation are clearly distinguished.¹³⁵

The lack of adequate criminal legislation renders the principle of *mens rea* very vague. Since the Chinese Communists define the criminal law to include not only the statutes enacted by the People's National Congress, but also the decrees, orders, and policies of the Party, the distinctions among criminal law, civil law, and administrative regulations become ambiguous.¹³⁶ Since civil statutes and administrative regulations usually do not provide for the need to prove *mens rea*, violators of these laws may be subjected to punitive sanctions despite the lack of *mens rea*. Thus it is provided that a person who violates the Electoral Law shall be criminally liable and punished.¹³⁷ Similarly, the defendant whose act is an infraction of the Marriage Law is punishable as a criminal.¹³⁸ The orders of the Government Administrative Council concerning planned purchase

¹²⁹ For a discussion of the "mass organizations" see Clubb, *Twentieth Century China* 317-20 (1964).

¹³⁰ See Lectures 79.

¹³¹ Lectures 107.

¹³² Chu Kwang, Report to the Fourth Session of the First National People's Congress, *People's Daily*, July 23, 1957; see Counter-Revolutionary Act art. 14(1).

¹³³ See Ku, *supra* note 96, at 89.

¹³⁴ *Ibid.*

¹³⁵ See Hall, *General Principles of Criminal Law* 104 (2d ed. 1960).

¹³⁶ See Chen, "To Destroy the Old Legal System and To Liquidate The Capitalist Concepts of Law," *Studies on Political Science and Law* 15, 16 (No. 2, 1964).

¹³⁷ See Articles 62-64 of the Electoral Law of the People's Republic of China (1953).

¹³⁸ Article 26 of the Marriage Law of the People's Republic of China (1950) provides: "Persons violating this law shall be punished in accordance with the law. In cases where interference with the freedom of marriage has caused death or injury, the person guilty of such interference shall bear responsibility for the crime before the law."

and supply also have penal sanctions.¹³⁹ What merits special attention is that in these statutes and regulations the provisions in issue rarely specify the requirement of *mens rea*. Nor can such terms as "knowingly" (Min-ch'ih), "intentionally" (Ku-i) or "for . . . purposes,"¹⁴⁰ which refer to criminal intent, be found in the above laws.

IV

CRIMINAL CONDUCT AND CAUSATION

Chinese Communists use the term "act" (Hsin-wei) to designate human conduct that is relevant in the penal law. ". . . [T]he establishment of an offense must be based on a person's act."¹⁴¹ Unlike the Austinian view, however, the Chinese Communist view does not restrict the meaning of "act" to "voluntary act;"¹⁴² instead, negligent and inadvertent behavior is included. A criminal omission is "a negative act" by which the person "failed to do what the law requires him to do."¹⁴³ It is noteworthy, moreover, that the likelihood of punishing those undesirable acts which were committed by persons who have "special status" is very high.¹⁴⁴ Obviously, it would be difficult to convict persons who hold an "antagonistic status" if *mens rea* were required, since the law is so vaguely written and incomplete that these people usually do not know what inaction is punishable.¹⁴⁵ For example, persons who had been classified by the Party as "enemies of the people" or as "class enemies" during the *Sanfan* and *Wufan* movements, or as "rightists" during the "Hundred Flowers" movement,¹⁴⁶ were criminally punished by the courts or the people's tribunals,¹⁴⁷ even though they did not commit any statutorily defined crime.¹⁴⁸ So too, the people who committed counter-revolutionary or other "ma-

¹³⁹ See the order issued on April 20, 1953, item 9.

¹⁴⁰ See Article 11 of the Counter-Revolutionary Act: "Persons [who commit the following acts] . . . for counter-revolutionary purposes shall be punished . . ." One of the possible results is that these statutes, regulations, decrees, and orders open the door for strict liability. The people's judges, of course, have very wide discretionary power, and can avoid imposing such liability.

For problems regarding strict penal liability in the common-law systems, see Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55 (1933); Mueller, "Mens Rea and the Law Without It," 58 W. Va. L. Rev. 34 (1955); Hall, *supra* note 135, at 325-59. The trend, however, has been against strict liability. See, e.g., *Morissette v. United States*, 342 U.S. 246 (1952); *Lambert v. California*, 355 U.S. 225 (1957).

¹⁴¹ Lectures 69.

¹⁴² See Austin, *Lectures on Jurisprudence* 424 (1897 ed.).

¹⁴³ See Chuiien, "On Causation in Criminal Law," *Studies on Political Science and Law* 36 (No. 3, 1963).

¹⁴⁴ E.g., Landlords after the *Sanfan* and *Wufan* movements and rightists and revisionists after the *Hundred Flowers* movement.

¹⁴⁵ Cf. Article 4 of the Anti-Corruption Act.

¹⁴⁶ For the *Sanfan* and *Wufan* movements, see note 27 *supra*. For the "Hundred Flowers" movement, see note 52 *supra*.

¹⁴⁷ For the People's Tribunals, see McAleavy, *supra* note 98.

¹⁴⁸ See text accompanying notes 43-48, 52-55 *supra*.

licious and serious" crimes before the "liberation," but failed "to atone for their guilt" thereafter, are subject to the death penalty, or to imprisonment of from five years to life.¹⁴⁹

While both criminal attempt and preparation are punishable, the distinction between the two is not clearly drawn. The fact that merely preparing to commit a crime is punishable indicates a difference between Chinese law and that of most European countries and the United States.¹⁵⁰

It is perhaps more significant that a mere admission of criminal intent will usually incur criminal liability even though the intent has never been actualized in overt conduct. Often the admission of criminal intent is punishable as a criminal preparation or attempt.¹⁵¹ For example, when a defendant was charged with larceny, he confessed that he had actually intended to kill the victim after committing the larceny. The people's court convicted him of "an attempt to commit murder" in addition to larceny as charged.¹⁵²

The principle of concurrence requires the fusion of the defendant's *mens rea* and conduct.¹⁵³ Since the Chinese Communist criminal law does not seem to require overt conduct,¹⁵⁴ it is evident that there is little room for the principle of concurrence. Moreover, in negligent behavior there is no psychic connection between the defendant's mental state and his behavior; yet, as seen above, the Chinese law punishes negligent harm-doers without any restriction. In other situations, there has been punishment despite the lack of concurrence between the *mens rea* and conduct. For example, the plea of coercion by the defendant who killed a Chinese Communist Party member in Manchuria under the threat of Japanese soldiers did not constitute a defense.¹⁵⁵ However, in the textbook for the Chinese judicial cadres, attention has been directed to this problem. It is said that if "the doer commits his act when he is physically under the pressure of the external force," he is not to assume criminal responsibility.¹⁵⁶ In the hypothetical case used as an illustration, that B is pushed

¹⁴⁹ Counter-Revolutionary Act art. 7(3).

¹⁵⁰ See Jarnao, "Criminal Law," in *The French Penal Code* 22 (House of Representatives, Doc. 4, 1901). Cf. Art. 43 of the German Penal Code. See also Hall, *supra* note 135, at 576-79.

¹⁵¹ See Lectures 124.

¹⁵² See Hsing Yueh Tse. No. 253 (1955) (The Higher Court of Canton).

¹⁵³ "... (I)t has always been said that the intent . . . and the overt act . . . must both concur in point of time as well as in point of kind and intensity." Mueller, "The Public Law of Wrongs—Its Concepts in the World of Reality," 10 J. Pub. L. 203, 241-42 (1961); see Hall, *General Principles of Criminal Law* 185-86 (2d ed. 1960).

¹⁵⁴ The law "does not seem to require an overt manifestation of a definite nature (i.e., an overt act) in order to find an individual guilty of an offence." Buxbaum, *supra* note 116, at 19.

¹⁵⁵ See Chome, "In a Chinese Courtroom," 25 *New World Rev.* 27, 29-30 (1957).

¹⁵⁶ See Lectures 70. "The act which is not committed according to the doer's will is of two kinds: one is committed under the circumstances where the doer is physically forced

by A to collide with C who is standing on a riverside, causing C's drowning and death, it is asserted that B should not be responsible because his act is against his own will.¹⁵⁷ This would certainly bring the Chinese law closer to the requirement of concurrence between *mens rea* and conduct, although there are many subtle problems regarding the principle of concurrence awaiting further elaboration by the Communist jurists.

Causation in the criminal law of Communist China is an "objective relation" between an act and its effect.¹⁵⁸ "The study of causation in the criminal law contributes to, and provides an objective foundation for, the determination of a defendant's criminal liability."¹⁵⁹ However, the issue of legal causation is primarily relevant in cases of "contradictions among the people,"¹⁶⁰ in cases where "class enemies," "reactionaries," "rightists," or "the running dogs of the imperialists" are involved, the problem of causation is sometimes irrelevant.

Since causation is alleged to be "merely an objective aspect of a crime,"¹⁶¹ to assert that *mens rea* is essential for determination of causation in law is to be "guilty of the fallacy of spiritualism."¹⁶² "According to Marxist dialectical materialism, causation in law is indistinguishable from that in a physical or scientific sense."¹⁶³ This being so, "how, then, can one say that *mens rea* is essential for legal causation?"¹⁶⁴ In practice, the people's courts adhere to this view. The defendant who struck the victim who had heart disease was held liable for murder by "causing" the latter's death, despite the defendant's lack of knowledge of the possibility of death resulting from his slight blow.¹⁶⁵ It may also be recalled that *ignorantia facti* is not always a valid defense in China, and this provides an additional reason why the defendant could hardly escape criminal liability for murder.¹⁶⁶

to do so; and the other is committed under the influence of *force majeure*." Ibid. This is a narrow view of concurrence. The principle of concurrence covers other situations which are not noticed by the authors of the textbook. See e.g., *Jackson v. Commonwealth*, 100 Ky. 239, 38 S.W. 422 (1896); *Holbrook v. State*, 107 Ala. 154, 18 So. 109 (1895).

¹⁵⁷ Lectures 70-71.

¹⁵⁸ Id. at 75.

¹⁵⁹ See Chuién, *supra* note 143, at 36.

¹⁶⁰ Ibid.

¹⁶¹ See Lectures 75; Chuién, *supra* note 143, at 36.

¹⁶² Chuién, *supra* note 143, at 37-38.

¹⁶³ Id. at 37. "[C]ausation implies the inanimate, and inevitable relationship between two phenomena That which exists in temporal priority is 'cause,' and which follows is 'effect.'" Ibid.

¹⁶⁴ "This 'subjective rule' is reactionary." Ibid.

¹⁶⁵ The case is discussed with approval in Chuién, *id.* at 39. In *State v. Frazier*, 339 Mo. 966, 98 S.W.2d 707 (1936) the defendant punched a hemophiliac and caused his death. He was convicted of manslaughter. In *State v. Bell*, 38 Del. 328, 192 Atl. 553 (1937) the defendant and the deceased engaged in an ordinary fist fight in which the former caused the latter's death. He was also convicted of manslaughter. The convictions were based on the misdemeanor-manslaughter rule. These cases have been criticized. See Hall, *Studies in Jurisprudence and Criminal Theory* (1958).

¹⁶⁶ Although the rationale is unclear, the law in the United States is practically to the

It is sometimes asserted that in cases where the defendants are class enemies, proof of factual *sine qua non* ought to be required.¹⁶⁷ However, when, in the discretion of the people's procurator or the court, a class enemy's act showed great danger to the society, or his confession indicated an "evil motive or purpose," he is to be held guilty even though no harm was committed.¹⁶⁸ On the other hand, if a harm is brought about by a class enemy, or by a physical cause initiated or accelerated by his behavior, he is likely to be held criminally liable regardless of his *mens rea*.¹⁶⁹ Here, causation in criminal law is rationalized in terms of physical or scientific cause.¹⁷⁰

While it is true that criminal theories differ in their emphasis on the requirement of *mens rea* in legal causation,¹⁷¹ the existence of *sine qua non* is indispensable for the imputation of harm in modern legal systems. But in Communist China certain kinds of acts are punishable with no reference to the issue of harm,¹⁷² and, in like manner, criminal punishment can be imposed in some cases in which neither overt conduct nor harm is required to be proved.¹⁷³ The teleological perspective of human conduct is condemned by the Communists.¹⁷⁴ The view that the act and its effect compose the two polarities of causation in criminal law remains only a theoretical concern in China.

V

HARM¹⁷⁵

Under the prevailing theory of criminal law in Communist China, harm has been defined as the consequence or effect of a socially dangerous

contrary. *Mens rea*, necessary and effective conditions, and *sine qua non* are requisites for legal causation. See Hall, *id.* at 167-69, 185-87.

¹⁶⁷ See Chuién, *supra* note 143, at 37. The author designates this condition as an "inevitable relationship."

¹⁶⁸ See text accompanying notes 100-02 *supra*.

¹⁶⁹ See Fan, *supra* note 120.

¹⁷⁰ See Chuién, *supra* note 143, at 37.

¹⁷¹ For a discussion of the theories on causation, see Ryu, "Causation in Criminal Law," 106 U. Pa. L. Rev. 773 (1958); Mueller, "Causing Criminal Harm," in *Essays in Criminal Science* 169-214 (Mueller ed. 1961). Professor Homig represents those who emphasize an "objective theory," e.g., causation means "the objective suitability of the conduct to produce the harm in issue . . ." Homig, "Criminal Law Systematized," 54 J. Crim. L., C. & P.S. 273, 280 (1963). However, this by no means implies that the Communist "Marxist objective theory" of causation accords with the above objective theory.

¹⁷² See Yang, *Some Understanding on Harmful Consequences in Crime*, Studies on Political Science and Law 46 (No. 1, 1964).

¹⁷³ See Buxbaum, "Preliminary Trends in the Development of the Legal Institutions of Communist China and the Nature of the Criminal Law," 11 Int'l & Comp. L.Q. 1, 19 (1962).

¹⁷⁴ See Chang, "A Critique of the Obsolete Conception of Law," Studies on Political Science and Law 53 (No. 4, 1958). Contra: "All human conduct is end-seeking and goal-directed." Mueller, *supra* note 153, at 231-32.

¹⁷⁵ The term "harm" as used in this section means an actual disvalue, and it includes more than physical damage and personal injury. See Hall, *supra* note 153, at 217; "From

act.¹⁷⁶ Harmful conduct is to be punished because it damages the social relationships protected by the criminal law.¹⁷⁷ These social relationships are "the people's democracy, the public order, public property, the rights and lawful interests of citizens, and the socialist construction and socialist transformation in the country."¹⁷⁸ This implies that harm is not restricted to tangible or corporeal injuries. For instance, a person who engages in "counter-revolutionary agitation, fabricating and spreading false rumors," is likely to be convicted by the people's court although no actual activities against the government have been organized.¹⁷⁹ So, too, preparation is punishable in Communist China despite the fact that no tangible harm was caused. In this regard, the theory that harm is not restricted to tangible injuries resembles the law in most modern legal systems.¹⁸⁰

Often in counter-revolutionary crimes proof of harm is not necessary. What is essential is the nature of the perpetrator's act. An act that shows serious risk of harm to the society and the people is to be punished "although there is no harmful consequence."¹⁸¹ This idea is also applied to crimes other than counter-revolutionary crimes. Intentional harm-doers are to be punished by the people's courts because such offenders represent a serious threat and great hostility to the society, not on the ground that harm was intentionally brought about by the actor.¹⁸² This leads to the assertions that "intentional acts are punishable by the law although no harmful consequence was produced," and that "intentionality includes harm; thus there is no intentional act which has no harmful consequence."¹⁸³

A person who is found guilty of criminal attempt or preparation may be subjected to criminal liability for the ultimate crime. The defendant who had prepared to blow up an important bridge across the Yangtse River was convicted of the crime of counter-revolution, destroying the property of the State—*i.e.*, the intended or ultimate crime.¹⁸⁴ In like

Legal Theory to Integrative Jurisprudence," 33 U. Cinc. L. Rev. 153, 159 (1964). In the Communists' discussion of this problem, it will be noted that the term "harmful consequence" (Wei-hei-cheh-kuo) refers to intangible harms, although it by no means has ethical significance.

¹⁷⁶ See Yang, *supra* note 172.

¹⁷⁷ See Lectures 65.

¹⁷⁸ Yang, *supra* note 172, at 47. Cf. Organic Law of the People's Courts art. 3.

¹⁷⁹ A case cited in Chui, *supra* note 143.

¹⁸⁰ See Hall, *supra* note 153, at 217. See also German Penal Code art. 43.

¹⁸¹ See Yang, *supra* note 172, at 47.

¹⁸² See Lo Jui-ching, Chief of the Public Security Bureau, Report to the First National People's Congress, June 24, 1956. It must be noted that "harm" or "harmful consequence" in the Communists' discussion designates more than corporal injuries. See note 175 *supra*.

¹⁸³ See Yang, *supra* note 172, at 48. In early law, "the judges were even inclined to be absurd, and they usually went far in considering the 'intent' for the deed. They punished 'intent' though the act was uncompleted." But "this principle was limited . . . to treason; in all other cases, a completed conduct was required." Binavince, "The Ethical Foundation of Criminal Liability," 33 Fordham L. Rev. 1, 19 (1964).

¹⁸⁴ A case cited in Chui, *supra* note 143.

manner, one who attempted to kill an official of the local Chinese Communist Party was convicted of criminal homicide, although the crime was not consummated.¹⁸⁵ Moreover, in punishing the crime of "theft," particularly during the movement of constructing the "people's communes," Chinese Communists maintained that the harm brought about by stealing commune property was "more than a sheer violation of law,"¹⁸⁶ since it produced "suspicion and distrust" among the people and thus "injured the work in the communes."¹⁸⁷

CONCLUSION

Chinese Communists have been criticized by the Russians for their failure to promulgate codes, and for their divergence from socialist legal theory.¹⁸⁸ However, codification of criminal law could hardly be a solution to the problems raised in China, because law is subordinate to Party policies. It is necessary, in the opinion of the Communist leaders, that the certainty and regularity of the law yield to the need for elasticity and flexibility.¹⁸⁹

The principle of legality has been condemned as one of the most obsolete "capitalist" legal conceptions. In like manner, the common notions of criminal law, for example, *mens rea*, harm, conduct, and concurrence (fusion) are viewed skeptically. In the light of the philosophy of dialectical materialism, the postulate that human conduct is end-seeking has little part in Chinese Communist criminal law. Since the premise of voluntary harm-doing is invalid, and all human conduct is viewed as determined, the principle of causation becomes vague, and the meaning and interrelationships of all the basic concepts are disproved.¹⁹⁰ In addition to the facts concerning the act in a criminal case, the defendant's class status, personal history, record, and individual background become essential factors to be considered.¹⁹¹ Consequently, *mens rea* gives way to "counter-

¹⁸⁵ Hsing Yueh Tse, No. 236 (1955) (The Higher Court of Canton).

¹⁸⁶ See Liu Wen-huei, Report to the Fourth Session of the First National People's Congress, People's Daily, July 6, 1957.

¹⁸⁷ Ibid. See also, 19 Union Research Service 77-79 (1960) which reports two cases of "sabotage" which took place in the Chuchia People's Commune in Hoch-uan hsien, and in the Ch'ienkuang District of Hoch'uan.

¹⁸⁸ See Hazard, "Unity and Diversity in Socialist Law," 30 Law & Contemp. Prob. 270, 285-86 (1965).

¹⁸⁹ "A time of rapid social change is not the time to codify laws . . . Law is the armor of the social system and it must change as the system changes." Wu Teh-peng's words quoted in Greene, Awakened China 191 (1961). See also, Dai, "Government and Law in Communist China," 41 Current History 164 (1961).

¹⁹⁰ For the meaning of the principles and their interrelationships in a penal theory, see Hall, "The Scientific and Humane Study of Criminal Law," 42 B.U.L. Rev. 267 (1962).

¹⁹¹ See Woodsworth, "The Legal System of the Republic of China," 4 Can. B.J. 299, 309 (1961).

revolutionary intent," which can often be easily presumed from knowledge of the defendant's background. A sort of "strict liability" is imposed on persons whose behavior is considered "antagonistic" or "reactionary." Also, in certain cases a manifested effort is not necessary, and concurrence of *mens rea* and conduct is not always required. Punishment aims at the "suppression" of class enemies, deterrence of the potential criminals, and the education of the "people."¹⁹² Accordingly, it is impossible to elucidate the basic concepts in the criminal law of Communist China in terms of a realistic penal theory based on the postulate of the "free-will" of human beings.¹⁹³ One can hardly avoid the conclusion that the Chinese Communist legal system, under the influence of Marxist-Maoist ideology, is one in which order is superior to justice, and the law, particularly the criminal law, is largely a political weapon used by the Chinese Communist Party.¹⁹⁴

¹⁹² "We are Marxist-Leninists, we do not believe a *class* can ever be reformed; but we think *individuals* can be . . ." Wu's words quoted in Greene, *supra* note 189, at 195.

¹⁹³ "Thus, each crime is (1) legally proscribed (2) human conduct (3) causative (4) of a given harm (5) which conduct coincides (6) with a blameworthy frame of mind (7) and which is subject to punishment." Hall & Mueller, *Criminal Law and Procedure*, v (2d ed. 1965).

¹⁹⁴ Professor Lon L. Fuller would conclude that, judging on the basis of the eight directions set forth by him, this legal system not only is a bad system, but can not properly be called a legal system at all. See Fuller, *The Morality of Law* 39 (1964).