

**The Prevention and Control of Economic Crime in China:
A Critical Analysis of the Law and its Administration**

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Declaration

I hereby declare that this thesis represents my own work. Where information has been used they have been duly acknowledged.

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Abstract

Economic crime and corruption has been an issue throughout Chinese history. While there may be scope for discussion as to the significance of public confidence in the integrity of a government, in practical terms the government of China has had to focus attention on maintaining confidence in its integrity as an issue for stability. Since the establishment of the Chinese Communist Party (CCP) and its assumption of power and in particular after the ‘Opening’ of the Chinese economy, abusive conduct on the part of those in positions of privilege, primarily in governmental organisations, has arguably reached an unprecedented level. In turn, this is impeding development as far as it undermines public confidence, accelerates jealousy and forges an even wider gap between rich and poor, thereby threatening the stability and security of civil societies. More importantly, these abuses undermine the reputation of the CCP and the government. China naturally consider this as of key significance in attracting foreign investment and assuming its leading role in the world economy.

While there have been many attempts to curb economic crime, the traditional capabilities of the law and particularly the criminal justice system have in general terms been found to be inadequate. This thesis examines the existing law relating to fraud and corruption, as a mechanism for reducing the incidence and impact of such abuses and offers appropriate recommendations for rendering it more efficient and efficacious. The author discusses the legal history of economic crime control, followed by the various initiatives that have been undertaken at different levels of government to curb economic crime and corruption since the foundation of the People’s Republic of China. This thesis also assesses the existing legal and institutional regime for the protection of victims of economic crime. China’s stand against corruption is then placed in the context of various international initiatives, in particular those involving the United Nations.

The primary objective of this thesis is to assess the law and its administration in China in the fight against economic crime and corruption and to facilitate a better understanding and control of the issues relating to the prevention of this phenomenon, in the promotion of China's economic and political stability.

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Table of Contents

Abstract	3
Acknowledgement	5
Table of Contents	7
Abbreviations	12
Introduction	15
Chapter 1: A Criminological Discussion and Analysis of Economic Crime, with Particular Reference to Corruption	21
The immoral phenomenon	22
The definition of economic crime.....	24
Economically motivated crime	30
A criminological analysis.....	37
Economic and social implications of economic crime	46
The situation in China.....	52
The distinction between facilitative and non-facilitative crime.....	54
Conclusion	57
Chapter 2: A Historical Review of the Control of Corruption on Economic Crime in China	59
Corruption control in ancient China	60
Chinese Slavery Societies (2070-476 B.C.).....	60
Chinese Feudal Society (221 B.C.-1911 A.D.).....	63
Primary methods used.....	68
The provisions before 1949	70
After the modern foundation of the People’s Republic of China.....	74
Three and Five Anti’s Campaign	75
The period of disruption	79
New laws and new approaches	80

Prosecution system	82
Central commission for discipline and inspection	83
Conclusion	83
Chapter 3: Economic Crime and Corruption in the Context of the Opening of China	85
Introduction – the opening of the Chinese economy	85
The relevance of crimes in terms of stability	88
Establishing the rule of law – the background	90
Worsening economic crime	99
How do they define economic crime?	103
Two-tiered price system	104
Guanxi in the reform context	107
The other side of the power decentralisation	113
Cases arising with the economic reform	118
Crime prevention	124
The enactment of Criminal Law and Criminal Procedure Law	124
The issue of corruption	126
Cleaning up corporations	131
Judicial and supervisory system	136
Conclusion	137
Chapter 4: Fraud in China: in a Comparative Context	140
Introduction	140
The nature and characteristics of fraud	141
The definition of fraud in criminal law	141
Definition of fraud in contract law	143
Definition of fraud in both criminal and civil law in China	146
Fraud in the civil law	149
Fraud in the law of tort	149
Misrepresentation – inducing a contract	152

Chinese civil law.....	155
Damages.....	159
Breach of fiduciary duties.....	161
Fraud in the criminal law	163
Dishonesty and fraudulent intention	163
Fraud by false representation (section 2).....	165
Fraud by failing to disclose information (section 3).....	166
Fraud by abuse of position (section 4).....	167
Criminal fraud in China	168
Why is it so difficult to deal with fraud?	171
Complexity.....	171
Document.....	172
Secret profit.....	172
Standard of proof	173
Conclusion	174
Chapter 5: Protecting the Victims of Economic Crime in China	176
The Criminal Justice system in China – a brief historical review	176
Before the foundation of the People’s Republic of China	176
During and post 1949.....	178
Disciplinary and legal institutions on combating economic crime.....	181
Commission for Disciplinary Inspection under the CCP.....	181
Corruption.....	184
The issue of independence.....	185
Shuanggui	186
The People’s Procuratorate	188
Cases concerning corruption and bribery	190
The internal relationship	193
Ministry of Supervision	195
National Bureau of Corruption Prevention.....	196

Ministry of Public Security	197
The financial regulators	198
Improving the Law	202
Basic laws	202
Some other major laws	204
Punishment.....	206
Taking the Profit out of Crime	208
Introduction.....	208
In the context of China.....	211
Related international conventions.....	213
The future.....	215
Chapter 6: The Enforcement of Economic Crime in China with particular reference to International Co-operation	217
Introduction.....	217
The enforcement issues.....	218
The law and its administration.....	218
Crimes of the powerful	220
Elite and collective criminals.....	221
International initiatives	225
The development – A periodical review	229
In the 1970s.....	229
In the 1980s.....	233
In the 1990s.....	236
1) UN	236
2) OECD	240
3) Transparency International	243
4) Council of Europe.....	244
5) World Bank.....	246

6) The Asian Development Bank	247
The New Millennium	248
1) International level conferences (ongoing)	248
The International Anti-Corruption Conference	248
The Asian Development Bank (ADB) and OECD Regional Anti-Corruption Conference for Asia and the Pacific	250
Conferences under the UN Convention against Corruption	252
2) Adoption of the United Nations Convention against Corruption ...	253
What has China done?	256
Fox Hunt Operation	257
Skynet Operation	258
Achievement – an ongoing process	258
Chapter 7: Conclusions and Recommendations for Improved Control and Prevention of Economic Crime in China	261
The legislative work	263
Empowering the citizen	266
The legal authority	268
Education – unhealthy tendency	271
International perspective	273
List of Statutes and Statutory Instruments	277
Bibliography	289

Abbreviations

ACBB	Anti-Corruption and Bribery Bureau
ACU	Anti-Corruption Unit
ADB	Asian Development Bank
AML	Anti-Money Laundering
APEC	Asia-Pacific Economic Cooperation
BOC	Bank of China
CBRC	China Banking Regulatory Commission
CCDI	Central Commission for Discipline Inspection
CCP	Chinese Communist Party
CDI	Commission for Discipline Inspection
CIRC	China Insurance Regulatory Commission
CMC	Central Military Commission
COE	Council of Europe
CPI	Corruption Perception Index
CPPCC	Chinese People's Political Consultative Conference
CSRC	China Securities Regulatory Commission
CTF	Counter Terrorist Financing
CTR	Currency Transaction Reporting
DOJ	Department of Justice
ECCP	European Committee on Crime Problems
ECIB	Economic Crime Investigation Bureau
EU	European Union
FACT	Federation Against Copyright Theft
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FCA	Financial Conduct Authority

FIU	Financial Intelligent Unit
FSA	Financial Services Authority
GRECO	Group of States Against Corruption
HK	Hong Kong
HSBC	Hong Kong and Shang Hai Banking Corporation
IAACA	International Association of Anti-Corruption Authorities
IACC	International Anti-Corruption Conference
IAP	International Association of Prosecutors
ICAC	Independent Commission Against Corruption
ICC	International Chamber of Commerce
IMF	International Monetary Fund
INTERPOL	International Criminal Police Organisation
KMT	Kuo Min Tang
MLAT	Mutual Legal Assistance Treaty
MOF	Ministry of Finance
MOJ	Ministry of Justice
MOS	Ministry of Supervision
MOU	Memorandum of Understanding
MPS	Ministry of Public Security
NAC	National Advisory Commission
NAO	National Audit Office
NBCP	National Bureau of Corruption Prevention
NFA	National Fraud Authority
NGO	Non-Governmental Organisation
NPC	National People's Congress
OAI	Office of Anti-corruption and Integrity
OECD	Organisation for Economic Co-operation and Development
PBOC	People's Bank of China
PLA	People's Liberation Army

PRC	People's Republic of China
SFO	Serious Fraud Office
SHSE	Shanghai Stock Exchange
SOCA	Serious Organised Crime Agency
SOE	State Owned Enterprise
SOE	State Owned Enterprise
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate
SZSE	Shenzhen Stock Exchange
TI	Transparency International
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
US	United States
UWO	Unexplained Wealth Order
WTO	World Trade Organisation

Introduction

Over the last thirty years, it has become increasingly clear economic crime is, and remains, a major concern for governments throughout the world. This concern has concentrated on differing issues, since the effect of economic crime varies in different contexts. Nevertheless, it is widely recognised that the prevalence of crime that is economically motivated in many countries is a substantial threat to the development of their economies and stability.¹ Indeed, economic crime, in particular fraud and corruption, poses a considerable risk to the public sector with potential damage extending beyond financial losses. This, unfortunately, is precisely what modern day China is facing.

China is emerging as the most dynamic economy in the world and is widely perceived to be the dominant economy within the next decade. Even though China has attracted enormous business and investment since its economic reform – a sound and trustworthy legal system in line with international standards – it remains, in many aspects, underdeveloped. As the world's largest emerging market, the lack of a consistent legal regime curbing dishonest practice, creates problems. It undermines China's economic growth, discourages foreign investment, and disrupts the effective distribution of economic resources. Socially, when paying bribes becomes the tradition, there will be unfair and unequal competition, citizens lose trust and faith, and it will accelerate jealousy and forge an even wider gap between rich and poor, thereby threatening the stability and security of civil societies. Most importantly, this undermines the institutions and values of democracy, ethical values and justice – jeopardising the rule of law. Even more serious is the fact that it brings substantial damage to the Chinese government and the ruling party, the Chinese Communist Party (CCP). As former

¹ Barry Rider, Haiting Yan and Lihong Xing (2010), *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, p. 1.

president Hu Jintao warned, the party's survival and popular support depends upon the integrity of party officials, and the acts of corruption and related crimes by party members will cause public distrust and is doing great damage to the reputation of the CCP.²

The CCP recognises that corruption has undermined the credibility of its own objectives ever since its foundation. It has launched innumerable initiatives against corruption and various associated forms of economic abuse and devoted considerable resources to the problem. However, there is still a widespread perception, at all levels of Chinese society, that corruption is rampant.³

Corruption has existed in Chinese history for thousands of years. It cannot be considered as an isolated phenomenon, but should be placed within a broader political, social and cultural context. Corruption is not purely a problem of administrative or political ethics but also a reflection of political development and changes in regime, and for this reason, the issue should be studied in the widest possible context. This thesis, however, does not seek to address the phenomenon across such a broad spectrum. It is intended to examine the legal history of the control of economic crime, in particular corruption, and to focus specifically on the numerous initiatives – both nationally and internationally – that have been undertaken since the founding of the People's Republic of China. It must be noted that analysis of many of these initiatives involves more political aspects than legal concepts, given the nature of the political environment in reference to various periods of China's history. My primary concern in this thesis, nevertheless, is to review the legal measures and actions that have been undertaken against fraud and public sector corruption, with a view to determine how it can be

² BBC News (2012), 'China's Hu Jintao in corruption warning at leadership summit', *BBC News*, 08.11.2012, available at: <http://www.bbc.co.uk/news/world-asia-china-20233101>.

³ Barry Rider (2013), 'When Chinese whispers become shouts', Editorial, *Journal of Financial Crime*, Vol. 20, Iss. 2.

monitored and controlled. The discussion also extends to an international perspective and analyses of the various international measures that have been taken. China has assumed its full role among the nations in this context and has, and will continue, to have a significant impact in the development of international mechanisms to combat corruption.

The issue of economic crime is dynamic, and it becomes more so, and more complicated, when examined in the context of China's economic reform. It is true that the 'opening' of the economy has broadly facilitated China's economic development, however, it has also provided unscrupulous individuals with greater opportunities to exploit the state. Furthermore, corrupt officials become more expert in moving their ill-gotten gains beyond the reach of the domestic courts and hiding their bribes and misappropriations in overseas bank accounts. Unfortunately, Chinese law enforcement has not kept pace with money laundering control and the globalisation of business with relative freedom of capital movement.

China is a socialist country with a long history of bureaucratic culture, and the structure of its political, governmental and judicial systems are complex and inter-related. Therefore, this thesis addresses various initiatives, not only undertaken by the government, but also the CCP and legal authorities. It should also be noted that China is geographically enormous, hence orders issued from the central government, through its hierarchical distribution – provincial, city and town levels of government, may not be fully implemented throughout.

The carefully crafted legislation may not be China's true concern in today's world; rather it is its administration and enforcement practices that exacerbated the problem. This work draws on a degree of experience from the UK, and to a lesser extent, that of the US and Hong Kong, with its unique depth and breadth of review, to provide an in-depth examination of China's legal and institutional development in the fight against

economic crime.

In the first chapter, a criminological analysis of economic crime is provided. It begins with various definitions of economic crime, where corruption has been given particular attention, as it has become the most prominent issue within Chinese society in recent years. It then relates to China's current war against corruption in discussing the economic and social implication of economic crime and corruption. More theories relating to the definition is worth exploring, but this thesis focuses rather more on the practical world and aims to present a forward-looking discussion of strategies that might be best advocated to address the prevention and control of economic crime.

In the second chapter, a historical review of the legal control of economic crime on corruption in China is presented, following the strict timeline from the ancient period of Chinese slavery societies (2070 B.C.) to the late 1970s before China launched its profound economic reform. While there have been discussions of specific codes and measures, this material has not been assimilated in detail. If time and resources permitted, it would be interesting to devote more attention to this. However, this thesis looks forward, as does China, not back. A brief historical review provides a base and a context, particularly given the historical perspective in Chinese culture.

The third chapter provides an examination of the condition of economic crime and corruption in the context of the 'opening' of China. Economic crime grew sporadically during this period, as the country and the government placed their utmost attention on implementing economic reform and crafting economic policy. Loopholes within the system and the law are observed and specific cases are analysed. Also, a few short-lived anti-corruption campaigns were initiated by the party due to the rigorous voices raised from the public. It is candid in its comments and evaluation since it is important that mistakes made in the past do not occur again in the future.

The fourth chapter focuses specifically on the core and protein concept of economic crime – fraud. It focuses on the definition and characteristics of fraud and selects the UK as an exemplar, with this being the origin of the common law system. This chapter makes a comparative analysis on the legal regime against fraud in the UK and China. There is much that can be learned from the fertile UK experience, but the fundamental difference between these two legal systems is that common and civil law systems create both theoretical and practical difficulties. However, sensible recommendations were made in the legal and practical senses, in terms of establishing an improved anti-fraud regime in China.

In the fifth chapter the evolvement of not only China’s criminal justice system, but also its laws and institutions in protecting the victims of economic crime, is explored. There must be limits to such a discussion and it has not been possible to examine all areas of the law and practice in depth. In particular, it has not been practical to examine developments in reforming the general corporate, company and commercial laws. As in China, given the unique structure of its political system, corruption related crimes are associated with party members and public officials. Accordingly, the cooperative work between the party built-in supervisory organ and judicial departments will be of key significance in the fight against corruption. Indeed, our society and economy moves dynamically, perhaps more than our institutions of government!

The sixth chapter studies in detail the various international initiatives that have been undertaken in the fight against economic crime and corruption. It also relates to China’s very recent steps on the international stage in hunting out corrupt officials who have fled overseas with their laundered proceeds. China has been active in the international arena and is ready to be one of the leading countries in the worldwide fight against corruption.

Finally, in the seventh chapter, the future path in the fight against economic crime is

discussed. There are no clear set answers to the problems that have been raised. However, the determination of the top leadership in China is clearly apparent in the efforts they have made in recent years. China learns from its past and it will now learn from the experience of other countries.

History has taught China the consequence of unbridled greed – an old Chinese maxim states: “while the waters can bear a boat, they can also sink it.”

Chapter 1: A Criminological Discussion and Analysis of Economic Crime, with Particular Reference to Corruption

In the past, the commission of crime was circumscribed by the distance over which people might travel on foot or by horse, the ports to which they might sail by ship and the borders they had to pass. The rapid development of sophisticated means of communication has brought about positive effects of integrating markets and the concept of the ‘borderless world’. However, such advancement has also offered no barriers to those who would deem to exploit our financial institutions, destroy the economic stability of our commercial system or corrupt our public officers. With the benefit of globalisation, economic crime is of rising world-wide concern, particularly after the 2007 global financial crisis.

Economic crime has become the crime of choice;¹ – it is a crime with low risk and high return, and generally, access to a computer and a telephone are sufficient tools with which to perpetrate massive frauds. A recent survey carried out by PwC (one of the Big Four² accounting firms) on global economic crime 2016³ has concluded that “more than one in three organisations are being impacted upon by economic crime; economic crime such as fraud, IP infringement, corruption, cybercrime, or accounting fraud continues to be a major concern for organisations of all sizes, across all regions and in virtually every sector”. The survey also indicates that asset misappropriation is the most commonly reported example of economic crime, at a rate of 64%, with cybercrime taking second place at 32% and crimes of bribery and corruption ranking third, at 24%.⁴

¹ See Rosalind Wright (2007), ‘Developing effective tools to manage the risk of damage caused by economically motivated crime fraud’, *Journal of Financial Crime*, Vol. 14, Iss. 1, pp. 17-27.

² The “Big Four” are the four largest international professional services networks, offering audit, assurance, tax, consulting, advisory, actuarial, corporate finance, and legal services. They are Deloitte, PwC, Ernst & Young and KPMG.

³ PwC: Global Economic Crime Survey 2016, accessed at: <http://www.pwc.com/gx/en/economic-crime-survey/>

⁴ Ibid.

This study will present a forward-looking discussion of optimum strategies that may be advocated to address the prevention and control of economic crime. Rather than reviewing and analysing the huge variety of published literature and discussion on the criminological analysis of economic crime, the author aims to emphasise the practical issues, particularly those concerns that require action and re-action to protect our society and economy.

The immoral phenomenon

In the present day, the corrosive effect of various economic crimes has been witnessed and recognised worldwide. With corruption as an example, the United Nations Convention Against Corruption (UNCAC), the first globally binding international anti-corruption instrument,⁵ clearly stated on the first page of its provision that corruption “undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish. Corruption also hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a Key element in economic underperformance and a major obstacle to poverty alleviation and development.”⁶ We have witnessed over the years that there have been innumerable regulations and laws passed specifically to tackle corruption, nevertheless corruption continues to be a rampant force, particularly in developing countries. Accordingly, this chapter discusses the benefit of comparative experiences, allowing for a more practical context, by limiting analysis of the relevant laws and regulations.

Although economic crime has been a phenomenon of commercial life in the past, it has

⁵ UNCAC, United Nations Office on Drugs and Crime, available at <http://www.unodc.org/unodc/en/corruption/index.html>

⁶ UNCAC, *Forward*, by Secretary-General Kofi A. Annan, 2004, New York, United Nations.

become a growth industry in the latter half of the 20th century, being a relatively new threat to emerging countries.⁷ Until the early 1990s, very few individuals in the evolving world were aware of the term ‘money laundering’, let alone understand how it works and the harmful consequences it brings. This is the case in China, where two major Chinese stock exchanges were established in the early 1990s, yet only recently has the public recognised crimes of insider dealing and other ‘white collar’ economic crimes.

In the heart of developed western countries, many scholars believe free-market capitalist economies present a fundamental paradox.⁸ It is identified by the need to provide maximum commercial freedom for the market to enable entrepreneurial business to flourish. While, at the same time, it is one of the biggest ironies of western capitalism that in uncountable cases, the most attractive, innovative and entrepreneurial financial schemes are all too often the brainchild of the white-collar criminal. For those countries whose free-market economies are still evolving, it becomes extremely difficult to strike the balance between the imposition of a strong bureaucratic regulation, which would certainly inhibit new commercial development, and deliberately refraining from the introduction of any prudent Act of Law, thus allowing criminals to infiltrate the emerging markets, offering tempting short-term profits, but with long-term subversive effects. As Professor Barry Rider stipulated: “the present devastation of the social, political and economic fabric of the developing world through, among other things, the phenomenon of international economic crime is hardly perceived, let alone acknowledged. There is compelling evidence that some national economies ... are coming under such an attack from organised crime groups and those engaged in

⁷ See more at George Gilligan (2015), ‘Financial Crime: A Historical Perspective’, in *Research Handbook on International Financial Crime*, edited by Barry Rider, Cheltenham: Edward Elgar Publishing Ltd, pp. 32-34.

⁸ See Rowan Bosworth-Davies and Graham Saltmarsh (1995), ‘Definition and Classification of Economic Crime’, in *The Regulation and Prevention of Economic Crime Internationally*, edited by Jonathan Reuvid, Kogan Page Ltd, pp. 3-5.

economic crime that their political institutions have been significantly weakened and corrupted”.⁹

The definition of economic crime

The man on the Clapham omnibus so to speak, might well characterise conduct as unfair and even describe it as fraud.¹⁰ However, by virtue of its complexity, and given the fact that varying global contexts means a variation of circumstances, a clear-cut definition of economic crime remains problematic. As argued by Professor Al-Sarraj, it is difficult to have a single comprehensive legal definition of economic and financial crime for the whole world, as criminal policy, especially in differing economic contexts, varies from one country to another.¹¹ Indeed, in the practical world it may be questioned whether devoting a substantive amount of time and energy to analysing relevant and related literature on the definition of economic crime serves any meaningful purpose. The author instead, shall enter into a brief discussion of its general definition and more importantly, a summary generated from relevant and practical national and international organisations, as this has had more impact on the ground and especially in China.

Black’s Law Dictionary defines the term economic crime as “a nonphysical crime committed to obtain a financial gain or a professional advantage”. It categorises such crime into two types: the first is often called white-collar crime, consisting of crimes committed by businessmen as an adjunct to their regular business activities, for example, embezzlement and tax evasion. The second type of economic crime is the provision of illegal goods and services or the provision of goods and services in an illegal manner,

⁹ Barry A. K. Rider (1986), ‘Combating International Commercial Crime – A Commonwealth Perspective’, 4th International Symposium on Economic Crime, Jesus College, Cambridge.

¹⁰ The phrase was first put to legal use by Sir Richard Henn Collins MR in the case *McQuire v. Western Morning News* [1903] 2 K.B. 100.

¹¹ Abboud Al-Sarraj (2005), ‘Concept of Economic Crime as Perceived Across the World – Typology, New Trends and Countermeasures’, Presentation Papers of Panels 1 and 3, *Measures to Combat Economic Crime including Money-laundering*, 11th United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, 18-25 April 2005.

where the provision requires coordinated economic activity, similar to that of normal business, but all engaged are involved in crime.¹²

In England and Wales, financial crime includes “any offence involving fraud or dishonesty; misconduct in, or misuse of information relating to, a financial market; or handling the proceeds of crime.”¹³ The Financial Conduct Authority provides a more concrete definition, by stating it is “any offence involving money laundering, fraud or dishonesty, or market abuse.”¹⁴ The Federal Bureau of Investigation in the United States of America, however, gives a much wider definition, providing that such crimes include the criminal activities of fraudulent corporate, securities and commodities, mortgage, healthcare, financial institutions, insurance, mass marketing and money laundering.¹⁵ The United Nations Office on Drugs and Crime (UNODC) and the International Monetary Fund (IMF) both go further by stating economic and financial crime can refer to “any non-violent crime that generally results in a financial loss”.¹⁶ This, as a result, can include fraud, tax evasion and money laundering, but essentially encapsulates all crimes that cause a financial loss. The UNODC also emphasised the difficulty in its definition, stating “the category of ‘economic crime’ is hard to define and its exact conceptualisation remains a challenge. The task has been further complicated by rapid advances in technology, which provide new opportunities for such crimes”.¹⁷

¹² Black’s Law Dictionary (2009), 9th edition, Bryan A. Garner, editor in chief, Thomson Reuters, p. 427.

¹³ Financial Services Act 2012, Section 1H (3).

¹⁴ Financial Conduct Authority, previously known as Financial Services Authority, ‘Fighting Financial Crime’, accessed at <http://www.fca.org.uk/about/what/protecting/financial-crime>

¹⁵ The Federal Bureau of Investigation, ‘Financial Crime Report to the Public’, accessed at <http://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011>

¹⁶ International Monetary Fund (2001), *Financial System Abuse, Financial Crime and Money Laundering – Background Paper*, IMF: Washington, DC, 12.02.2001, p. 3; United Nations Office on Drugs and Crime, ‘Economic and Financial Crimes: Challenges to Sustainable Development’, 11th United Nations Congress on Crime Prevention and Criminal Justice, 18-25 April 2005, Bangkok, Thailand.

¹⁷ UNODC (2005), *Ibid*, p. 1.

Economic and financial crime has also been referred to as ‘white collar crime’ – a term first penned by Professor Edwin Sutherland, and defined by him as “a crime committed by a person of respectability and high social status in the course of his occupation”.¹⁸ White collar crime has since become synonymous with the full range of frauds committed by business and government professionals.¹⁹ Despite his seminal status, Sutherland’s definition has been subject to a great deal of debate. For example, Bookman argued that Sutherland’s definition was too narrow²⁰ and Podgor went as far as to say: “throughout the last 100 years no one could ever figure it (white collar crime) out”.²¹

Definitions of financial crime have, of course, also been attempted by other academics. For instance, Dr Gottschalk states that it is “a crime against property, involving the unlawful conversion of property belonging to another to one’s own personal use and benefit”, emphasising that it is often “profit driven ... to gain access to and control over property that belonged to someone else.”²² Spencer Pickett and Jennifer Pickett define financial crime as “the use of deception for illegal gain, normally involving a breach of trust, and some concealment of the true nature of the activities.”²³ This can include fraud, insider trading, embezzlements, tax evasion, paying or receiving kickbacks, cyber-attack and money laundering.

¹⁸ Edwin H. Sutherland (1949), *White Collar Crime*, New York: Holt, Rinehart & Winston, p. 9. For a more detailed commentary on the definitions of white collar crime see Sally S. Simpson (2013), ‘White collar crime: a review of recent developments and promising directions for future research’, *Annual Review of Sociology*, 39, pp. 309-331, at pp. 310-313.

¹⁹ Federal Bureau of Investigation, ‘White Collar Crime’, available at: http://www.fbi.gov/about-us/investigate/white_collar/whitecollarcrime

²⁰ Zachary Bookman (2007), ‘Convergences and omissions in reporting corporate and white collar crime’, *DePaul Business and Commercial Law Journal*, Vol. 6, Iss. 3, pp. 347-392, at p. 355

²¹ Ellen S. Podgor (2008), ‘White collar crime: a letter from the future’, *Ohio State Journal of Criminal Law*, Vol. 5, No. 1, pp. 247-255, at p. 247.

²² Peter Gottschalk (2010), ‘Categories of Financial Crime’, *Journal of Financial Crime*, Vol. 17, Iss. 4, pp. 441-458.

²³ K. H. Spencer Pickett and Jennifer M. Pickett (2002), *Financial Crime Investigation and Control*, New York: Wiley; see also more discussions at Peter Gottschalk (2010), *Ibid*.

In China, the terminology of ‘economic crime’ (*jingji fazui*) appeared in print by the Standing Committee in its official document ‘Decision on the Severe Punishment of Serious Economic Criminals’, at the 5th National People’s Congress in 1982, as “smuggling, illicit currency exchange, seeking exorbitant profits, stealing public property, speculation and profiteering, stealing and selling valuable cultural relics, and demanding or receiving bribes”.²⁴ Further, in 1985, the Supreme People’s Court and the Supreme People’s Procuratorate defined the core component of economic crime – corruption (*tanwuzui*) – as “activities by state personnel who use positions to acquire public property by misappropriation, embezzlement, theft, fraud or other illegal methods”,²⁵ and the regulations relating to economic crime and corruption are mainly embodied in the Criminal Code of the People’s Republic of China.

Over the years of legal development, economic crime as a legal term, has not yet received a universal definition in China.²⁶ There are scholars who maintain upholding the definition of economic crime should be considered within the scope of economics, which, in short, covers all crimes that were carried out in an economic context. This could include acts against regulations of industry and commerce, business, agriculture, finance, tax, custom... and also theft, misappropriation, swindling, looting, illegal possession of public and private property and all others which have disrupted economic activities and resulted in serious losses (collectively or personally).²⁷ Other scholars have argued the definition should be more focused on the behaviour of the offender.

²⁴ ‘Guanyu Yancheng Yanzhong Pohuai Jingji de Zuifan de Jueding’ (Decisions on the Severe Punishment of Serious Economic Criminals), 22nd Plenary Session of the 5th National People’s Congress, 8 March 1982.

²⁵ ‘Zuigao Renmin Fayuan dui Ruogan Wenti de Jieda’ (Answers to Several Questions by the Supreme People’s Court), 1985.

²⁶ See Baibi Liu and Yongsheng Liu (1988), *Jingji Xingfa Xue (Economic Crime in the Criminal Law)*, Beijing: Qunzhong Publisher, pp. 55-58; and Baogui Xie and Qiong Zhang (1987), *Jingji Fazui de Dingzui yu Liangxing (Conviction and Punishment of Economic Crime)*, Beijing: Law Press, p. 18

²⁷ This theory mainly follows the way the term ‘economic crime’ was introduced in the ‘Decisions on the Severe Punishment of Serious Economic Criminals’ in 1982, can be found at Editorial Board (1983), *Jingji Fazui Wenti Jianghua (Dialogue Concerning Economic Crime)*, Beijing: Xinhua Press, pp. 1-2; and Hanming Xu, Jie Guo and Furong Yang (1996), *Jingji Fazui Xinlun (New Theory on Economic Crime)*, Beijing: China Procuratorate Press, p. 1.

The definition refers to the acts, for the purpose of obtaining illegal benefits that abused legitimate methods of economic transaction, which directly or indirectly violated relevant economic regulations and disrupted the socialist economic order.²⁸ This is an ongoing debate among academics while many others have realised that it is the implication of economic crime that is more important, and we have to deal with it in different contexts under which the crime has occurred.

In 1973, the issue of economic crime gave rise to serious discussions among European member states²⁹ and the Council of Europe. Their concern as to the problems of economic crime resulted in the undertaking of a detailed study into this matter. Having analysed the discussion of ‘the criminological aspects of economic crime’³⁰, the work on ‘Contribution of Criminal Law to the Protection of the Environment’³¹, and the work programme for 1977-1978 of the European Committee on Crime Problems (ECCP)³², the Council of Europe promulgated the ‘Recommendation of the Committee of Ministers to Member States on Economic Crime’³³. The recommendation provided a comprehensive list of economic offences from cartel to stock exchange and bank

²⁸ Jixian Xia (1987), ‘Xi shangpin jingji tizhixia de jingji fazui’ (Analysing economic crime within the economic system), *Law Science*, 1987, No. 2; and Zhenpan Zhang (1989), *Jingji Fanzui yu Duice (Economic Crime and its Countermeasure)*, Beijing: China University of Political Science and Law Press, p. 1; and Xiaobing Gong (1991), ‘Jingji fazui gainian xintan’ (Exploring the definition of economic crime), *China Legal Science*, 1991, No. 2, pp. 97-102.

²⁹ The matter of economic crime was discussed at the 8th Conference of European Ministers of Justice, Stockholm 1973.

³⁰ The 12th Conference of Directors of Criminological Research Institutes, held in Strasbourg in 1976, reports submitted by MM. Tiedemann, Kellens, Leigh and Cosson.

³¹ See *Report of the European Committee on Crime Problems on Economic Crime (prepared by the Select Committee on economic crime)*. A Select Committee of the European Committee on Crime Problems on the Contribution of Criminal Law to the Protection of the Environment concluded its work in 1977 by drawing up a report and a draft resolution which was subsequently adopted by the Committee of Ministers (Resolution (77) 28). The Select Committee’s work was very much concerned with the question of economy.

³² The question of economic crime was included in the ECCP’s work programme. The Steering Committee set up a Select Committee under the chairmanship of Mr P. H. Bolle (Switzerland) to study the matter. The Select Committee, with representatives from the Federal Republic of Germany, Italy, Iceland, Liechtenstein, Luxembourg, Portugal, Spain, Sweden, Switzerland and the United Kingdom and two consultants began work in 1977. UNSDRI and Interpol are represented by observers.

³³ Adopted by the Committee of Ministers on 25 June 1981 at the 335th meeting of the Ministers’ Deputies.

offences, considering that economic crime: “causes loss to a large number of people (partners, shareholders, employees, competitors, customers, creditors), to the community as a whole and even to the state, which has to bear a heavy financial burden or suffers a considerable loss of revenue; harms the national and/or international economy; causes a certain loss of confidence in the economic system itself.”³⁴ It was mainly due to the considerable growth of economic activity in the Council of Europe that member states have started to be aware of such wrongdoing.

In terms of the nature of economic crime, it is proposed that economic crime can be divided into two essentially different, but highly related kinds of conduct.³⁵ Firstly, there are those activities that dishonestly and unfairly ensure profits fall into the hands of, or under the control of, those who engage in the conduct in question. For example, the exploitation of inside information or the acquisition of another person’s property by deceit with the intention of securing material benefit. A common example among these activities may be a person, in possession of inside information, deciding to sell his shares before the market price plunges, thereby avoiding a loss. In short, this type of conduct guarantees direct material benefit for that person or another affiliated body. Secondly, there are also crimes that do not directly involve the unfair taking of a benefit, but which are concerned with protecting the benefit that has already been obtained or facilitated. A good example is the attempt to protect the proceeds of a crime beyond the reach of the law, through money laundering. Therefore, we can see that in general terms economic crime involves conducts with an acquisitive character and those of a facilitative nature. However, all tend to be motivated directly or indirectly by greed.³⁶

³⁴ See recommendation No. R (81) 12.

³⁵ Barry Rider, Haiting Yan and Lihong Xing (2010) *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, p. 3.

³⁶ Greed was found to be one example of the pleasure component of the rational choice model, in Santon Wheeler (1992), ‘The problem of white collar crime motivation’, in *White Collar Crime Reconsidered*, edited by K. Schlegel and D. Weisburd, Boston: Northeastern University Press, p. 112.

The concept of financial crime let alone economic crime is far too broad and given the constraints of time and space this thesis will only focus on certain specific, albeit connected types of economic crime relevant to present day China.

Economically motivated crime

Although it would be trite to state that economic crime is all about economics and the misuse of economic agents, obviously there is some truth in it.³⁷ The objective of almost all economically related crimes is to acquire and retain material benefit, as we have noted earlier, either by making an illicit profit or avoiding a loss improperly that would otherwise have occurred. While the scope and substance of economic crime may vary depending upon the sophistication of the environment and legal systems within which it occurs, an eternal feature is motivation.³⁸

We can generally claim that the choice of an economic agent to invest his resources in illegal activities, thus becoming criminal, will depend largely on two specific conditions, given the possible returns: the probability of being incriminated and the punishment he will suffer if found guilty.³⁹ Criminals will weigh the possibility of gaining rewards against the possibility of incurring punishment. The pattern of individual choice will of course vary, as the rewards and punishments accompanying the alternatives vary. As Lemert noted: “costs are important variables in analysis because changes in the costs of means can modify the order of choices, even though the ‘ideal’ order of the individual

³⁷ See generally Gianluca Fiorentini and Sam Peltzman (eds.) (1995), *The Economics of Organised Crime*, Cambridge: Cambridge University Press.

³⁸ See Richard A. Cloward and L. E. Ohlin (1960), *Delinquency and Opportunity*, Chapter 4: Goals, norms and anomie, New York: The Free Press; and Diane Vaughan (1982), ‘Toward understanding unlawful organizational behaviour’, *Michigan Law Review*, Vol. 80, pp. 1377-1402; and in the case of China’s transitional period, it is argued by Liu that economic motivation is a primary source of increased economically motivated crime, in Jianhong Liu (2004), ‘Social transition and crime in China: an economic motivation thesis’, *Australian & New Zealand Journal of Criminology*, Vol. 37, pp. 122-138.

³⁹ E. M. Lemert (1964), ‘Social Structure, Social Control and Deviation’, in *Anomie and Deviant Behaviour: A Discussion and Critique*, edited by Marshal Barron Clinard, New York: The Free Press, pp. 62-71; and Arthur L. Stinchcombe (1975), ‘Merton’s Theory of Social Structure’, in *The Idea of Social Structure*, edited by Lewis A. Coser, Routledge, p. 17.

remains constant”⁴⁰ An analysis of the choices of organised crime undoubtedly follows the same approach.⁴¹

History records the quest for money has been associated with avarice and thirst for power. Hernando Cortez, the conquistador who destroyed the Aztec empire, expressed his political adventurism by stating that “we Spaniards suffer from an affliction of the soul which can only be cured by gold.”⁴² Over the years of economic, political and social developments, such a motivation in the vast majority of cases remain unchanged. Although many criminologists may have hesitated to concern themselves greatly with motivations, it is not because they did not exist or were hidden from our eyes, but because their attention was focused more intently upon the actual crime and its associated punishment than the criminals themselves.⁴³

Opportunities presented in a given society to commit crime vary often depending upon the criminal’s social status⁴⁴ and, of course, not all individuals will recognise, let alone act on, the opportunities they encounter.⁴⁵ This raises the issue as to what motivates certain people to seize criminal opportunities while others would dare not think of so doing. A former insider trader, Dennis Levin, characterised his seizing of opportunities thus: “something deep inside me forced me to try to catch up to the pack of wheeler-dealers who always raced in front of me... It was only in time that I came to view myself as an insider trading junkie. I was addicted to the excitement, the sense of

⁴⁰ Ibid, Lemert (1964), p. 63.

⁴¹ Donato Masciandaro, Elod Takats, and Brigitte Unger (2007), *Black Finance*, Edward Elgar Publishing Ltd, p. 5.

⁴² Leften Stavros Stavrianos (1981), *Global rift: The Third World comes of age*, New York: William Marrow, p. 53.

⁴³ See David Abrahamsen (1946), ‘Motivation of crime’, *Boston University Law Review*, 26, pp. 91-118.

⁴⁴ Nicole Leeper Piquero and Alex Piquero (2001), ‘Characteristics and Sources of White-Collar Crime’, in *Crimes of Privilege: Reading in White-Collar Crime*, edited by Neal Shover and John Paul Wright, New York: Oxford University Press, pp. 329-330.

⁴⁵ See Sally S. Simpson (1986), ‘The decomposition of antitrust: testing a multi-level, longitudinal model of profit-squeeze’, *American Sociological Review*, Vol. 51, No. 6, pp. 859-875; and Marshall B. Clinard and Peter C. Yeager (1980), *Corporate Crime*, New York: The Free Press.

victory.”⁴⁶ A similar adrenaline rush was enjoyed by Michael Milken and those who worked with him.⁴⁷ The pursuit of fun and excitement swept Levin into insider trading and Milken into junk bond trading, which is akin to the excitement described by offenders of various criminal domains.⁴⁸

Having said this, the vast majority of criminal activity that could be described as economic crime today is motivated by the desire to acquire or protect financial wealth. That is to say, those who engage in economic crime desire more than the allocation of markets and in most cases their greed becomes infectious.⁴⁹ This is all the more true when the criminal activity, such as an enterprise, inevitably demands capital to operate, with which to facilitate its ambitions. Therefore money, or rather wealth, in its dispensable nature, is not only the goal of criminal enterprises but also the lifeblood of the enterprise.⁵⁰

Of course, it is not only in typical economic crimes that the motivation is financial advancement. Most corporate crimes are profit driven, and those who engage in trafficking activity, whether drugs, arms, people or cultural heritage, do so with the objective of economic benefit.⁵¹ As a result, until the profits of crime are taken away from criminals, we have little chance of effectively disrupting abusive conduct that

⁴⁶ Dennis Levine (1991), *Inside Out: An Insider's Account of Wall Street*, New York: Putnam, p. 390.

⁴⁷ Dan G. Stone (1990), *April Fools: An Insiders' Account of the Rise and Fall of Drexel Burnham*, New York: Donald Fine Company, p. 45.

⁴⁸ See for example, Jack Katz (1988), *Seductions of Crime: Moral and Sensual Attractions in Doing Evil*, New York: Basic Books; Irving Piliavin, Rosemary Gartner, Craig Thornton and Ross L. Matsueta (1986), 'Crime, deterrence, and rational choice', *American Sociological Review*, Vol. 51, No. 1, pp. 101-119.

⁴⁹ See Petter Gottschalk and Robert Smith (2011), 'Criminal entrepreneurship, white-collar criminality, and neutralization theory', *Journal of Enterprising Communities: People and Places in the Global Economy*, Vol. 5, Iss. 4, pp. 300-308.

⁵⁰ Barry A. K. Rider (2004), 'Law: the war on terror and crime and the offshore centres: the 'new' perspective?' edited by Donato Masciandaro, *Global Financial Crime: Terrorism, Money Laundering and Offshore Centres*, Ashgate Publishing Limited, p. 62.

⁵¹ See generally Gary Slapper and Steve Tombs (1999), *Corporate Crime*, Harlow: Longman.

produces great wealth or allows power to be acquired through its profits.⁵² In terms of motivation, the drug lord is essentially no different from those corporate fraudsters or insider dealers, and in order to discourage such misconducts, identification of the motivation is of key importance.

The element of motivation in crime has now been broadly emphasised in many jurisdictions. A very good example is the UK Fraud Act 2006, where new fraud offences involve a discernible shift from the previous focus on the crime of ‘deception’ – requiring not only that the prosecution prove that the defendant behaved dishonestly and with intent to gain or cause loss, but also that there were economic interests imperilled by their conduct. Now the focus is towards criminalising conduct which imperils economic interests, with greater emphasis on the *mens rea* of the defendant rather than on any actual harm caused.⁵³ The offence is committed if it is carried out dishonestly, with fraudulent intention.⁵⁴ As a result, in the context of modern fraud, it is the state of mind (*mens rea*) that is the determinant factor in liability.

The objective of the Fraud Act 2006 is arguably to widen the law of fraud so as to make it easier for the prosecution of fraudsters and to render the law clearer in its application. As Judge Alan Wilkie QC, then Law Commissioner of England and Wales, said in July 2002 when the Law Commission report was published: “our aim, by these technical changes to the law, is to make the law of fraud clearer and simpler... (and) as a result all concerned whether jurors, police, victims, defendants or lawyers, will be better placed to understand who has committed a crime and who has not.”⁵⁵ The aim is also to improve justice and in particular to reduce the amount of time and money wasted in

⁵² See David Chave (2017), ‘Proceeds of crime training: bringing it up to date’, *Journal of Financial Crime*, Vol. 24, Iss. 3, pp. 437-448.

⁵³ David Ormerod (2011), *Smith and Hogan’s Criminal Law*, 13th Edition, Oxford University Press, pp. 871-872.

⁵⁴ *Ibid*, pp. 875-876.

⁵⁵ Law Commission, *Fraud*, Law Com No 276, 2002, available at: http://www.lawcom.gov.uk/app/uploads/2015/03/lc276_Fraud.pdf.

handling the current ‘complexity and vagueness of the law’.⁵⁶ In so far as the new Fraud Act bases liability significantly on the concept of ‘dishonesty’, it remains to be seen whether there is any greater certainty.

Focusing on the acquisitive nature of many crimes – counteracting criminals through their assets is widely underlined by countries throughout the world. The establishment and development of financial intelligence has made a positive contribution to the fight against serious crime, both in the financial world and the more conventional areas of organised crime.⁵⁷ The use of such strategies is increasingly apparent in the fight against corruption and in particular in the provisions of the United Nations Convention Against Corruption (UNCAC) 2003, which is promulgated solely for preventing corruption and economic crime at both domestic and international levels. China in particular, has put itself forward in signing an alliance with the UNCAC.

As discussed above, economic motivation of criminals indicates that one of the optimum strategies in combating profitable crime is to render it relatively unprofitable. The deterrence model of criminal behaviour assumes people engage in specific modes of behaviour, only after careful and rational consideration of the costs (or risks) and the benefits (or rewards) of particular courses of action.⁵⁸ In this context emphasis is on risk of exposure rather than actual costs in money. For instance, when a legal writ requires the reporting and recording of all financial transactions over a certain amount, such as under the Currency Transaction Reporting (CTR) regulations, it will impose additional risks and costs for those transferring ‘black money’.⁵⁹ Thus, engaging in

⁵⁶ News from the Law Commission 30 July 2002, available at: <http://www.lawcom.gov.uk/docs/lc276sum.pdf>.

⁵⁷ See J. F. Thony (1996), ‘Processing financial information in money laundering matters: the financial intelligence units’, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 4, pp. 257-282; and Milind Sathye and Chris Patel (2007), ‘Developing financial intelligence: an assessment of the FIUs in Australia and India’, *Journal of Money Laundering Control*, Vol. 10, Iss. 4, pp. 391-405.

⁵⁸ See John E. Conklin (1981), *Criminology*, New York: Macmillan Publishing Co., Inc. and London: Collier Macmillan Publishers, p. 392.

⁵⁹ David Chaikin (2009), ‘How effective are suspicious transaction reporting system?’, *Journal of Money*

‘smurfing’ and relying on structured transactions just below the reporting threshold, will necessitate the involvement of additional contacts and perhaps the creation of numerous accounts. This represents a direct cost and effectively increases the risk of the launderer being exposed. The primary objective of many disrupting strategies operated either by law enforcement or security agencies, is to render involvement financially unattractive in that particular jurisdiction. However, this would not inhibit displacing serious criminal practices to other locations – perhaps to areas where it is more problematic to monitor activities.⁶⁰

When we focus on the financial aspects of crime and attempting – through a variety of deterrents, to render crime comparatively unprofitable, it is often argued that society often loses awareness of the seriousness of criminal activity that gives rise to illicit wealth.⁶¹ Therefore, in countries where law enforcement focuses excessively on asset interdiction and removal operations in fighting criminal enterprises, the process becomes simply one of taxation or licensing.⁶² In practice, obviously, the criminals would not terminate their wrongdoings until they must pay a significant additional cost, which cannot easily be passed onto the consumer. Governments have increasingly attempted to facilitate the strike on economic criminal assets, due to the practical

Laundering Control, Vol. 12, Iss. 3, pp. 238-253; and Barry Rider (2013), ‘Intelligent investigations: the use and misuse of intelligence – a personal perspective’, *Journal of Financial Crime*, Vol. 20 Iss. 3, pp. 293-311.

⁶⁰ See for example, reported by Nick Mathiason (2010), ‘Dubai’s dark side targeted by international finance police’, 24.01.2010, *The Guardian*, available at: <https://www.theguardian.com/business/2010/jan/24/dubai-crime-money-laundering-terrorism>; and also a speech given by the head of the National Crime Agency UK, Mr. Keith Bristow, reported by Kunal Dutta (2015), ‘London: a global heaven for criminal financial activity’, *Channel4*, at: <https://www.channel4.com/news/london-tax-haven-financial-crime-terrorism>.

⁶¹ See for example, HM Government (2013), *Serious and Organised Crime Strategy*, indicated raising a awareness of the reality and consequence of serious and organised crime is of key importance as a preventive measure, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf.

⁶² See Barry Rider (2009), ‘Old Weapons for New Battles – the Role of Stewardship in the Development of Common Law in its Fight Against Corruption and Self-dealing’, Centre of Anti-Corruption Studies, ICAC, Hong Kong; and also Barry Rider, Haiting Yan and Lihong Xing (2010) *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, p. 34

difficulties faced by law enforcement in many countries, by scaling down the standards of proof and promoting civil and administrative legal procedures.⁶³ New laws have also placed an increasing burden on private sectors to report suspicious activity to support law enforcement. The UK parliament has made meaningful advancements to the Bribery Act 2010, where they included a new offence for corporates as: “failure of a commercial organisation to prevent bribery”.⁶⁴ The Bribery Act also provides a statutory defence if the organisation can prove that it had put in place adequate procedures to prevent persons associated with it from engaging in bribery.⁶⁵ To a significant extent, these new laws have shifted risks and responsibilities to those who conduct themselves in the ordinary course of their business.

There are also offences which may be described as ‘financially motivated’ where the motivation is not purely enrichment. Illegal fundraising for subversive and terrorist organisations has been of increasing concern in countries throughout the world, following the attacks in New York on September 11, 2001.⁶⁶ Since then, with strong support from many countries – the US in particular, governments have initiated the ‘Financial War on Terror’, and various laws and regulations have been developed to criminalise the financial activities of organised crime, drug, human and arms trafficking and smuggling.⁶⁷ It is worth noting that although the activities of terrorist organisations

⁶³ See for example Abraham S. Goldstein (1992), ‘White-collar crime and civil sanctions’, *Yale Law Journal*, Vol. 101, pp. 1895-1900; and Barry A. K. Rider (1995), ‘Civilising the law – the use of civil and administrative proceedings to enforce financial services law’, *Journal of Financial Crime*, Vol. 3, Iss. 1, pp. 11-33.

⁶⁴ The UK Bribery Act 2010, Section 7.

⁶⁵ *Ibid*, Section 7.

⁶⁶ See Nicholas Ryder (2011), *Financial Crime in the 21st Century: Law and Policy*, Chapter 3: Terrorist Financing, p. 51, Cheltenham: Edward Elgar Publishing Ltd; Barry A. K. Rider (2004), ‘The War on Terror and Crime and the Offshore Centres: The ‘New’ Perspective?’ in *Global Financial Crime: Terrorism, Money Laundering and Offshore Centres*, edited by Donato Masciandaro, London and New York: Routledge; and Jayesh D’Souza (2012), *Terrorist Financing, Money Laundering, and Tax Evasion: Examining the Performance of Financial Intelligence Units*, Boca Raton: CRC Press.

⁶⁷ See Barry A. K. Rider, (2003) ‘Financial regulation and supervision after 11th September 2001’, *Journal of Financial Crime*, Vol. 10 Iss. 4, pp. 336-369; Patrick Hardouin (2009), ‘Banks governance and public-private partnership in preventing and confronting organized crime, corruption and terrorist financing’, *Journal of Financial Crime*, Vol. 16, Iss. 3, pp. 199-209.

are regarded as organised crime, their motivation is not purely the acquisition of profit. In many countries and international organisations, the laws and regulations that have been developed, particularly to deal with profit motivated crime, have also been adopted to address the issue of terrorist financing.⁶⁸ For example, the anti-money laundering international body the Financial Action Task Force (FATF) has been extended to combat terrorist finance, and this has been prominently witnessed by the issuance of the FATF's nine special recommendations on terrorist financing, in addition to the existing 40 recommendations on money laundering.⁶⁹

A criminological analysis

The rapid growth of transactions and diversification of economic activities have elevated economic crime to a global concern.⁷⁰ The transnational nature of economic crime hampers detection and thus hinders investigation and prosecution.⁷¹ A collapse of one financial institution can soon spread to the rest of the world and may consequently contribute to a global crisis. The Financial Crisis Inquiry Commission concluded among other causations, the global financial crisis of 2007 was mainly caused by “widespread failures in financial regulation and supervision”.⁷² As the then UK Solicitor General Oliver Heald noted in his opening speech of the *31st Cambridge International Symposium on Economic Crime*: “since the global financial crisis began

⁶⁸ Keven D. Davis (2003), ‘Legislating against the financing of terrorism: pitfalls and prospects’, *Journal of Financial Crime*, Vol. 10, Iss. 3, pp. 269-274; and Ilias Bantekas (2003), ‘The international law of terrorist financing’, *American Journal of International Law*, Vol. 97, Iss. 2, pp. 315-333.

⁶⁹ Financial Action Task Force on Money Laundering and Terrorism Financing, <http://www.fatf-gafi.org>; the United Nations and European Union have also responded promptly by implementing rules and regulations at tackling terrorist financing, see an example of UN Security Council Resolution 1373.

⁷⁰ See Hans Sjogren and Goran Skogh (2004), *New Perspectives on Economic Crime*, Chapter 1, Cheltenham and Northampton: Edward Elgar, pp. 1-2.

⁷¹ See generally Margaret E. Beare (ed), *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption*, 2003, Toronto: University of Toronto Press; and Navin Beekarry (2013), *Combating Money Laundering and Terrorism Finance: Past and Current Challenges*, Cheltenham: Edward Elgar Publishing Ltd.

⁷² Financial Crisis Inquiry Commission (2011), ‘The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States’, 25.01.2011, Washington, D.C. Government Printing Office.

in late 2007 it seems that financial institutions, markets and businesses have endured years of perpetual crisis. Rarely has a week passed without the emergence of some new allegation of financial misfeasance, fraud or corruption.”⁷³ Ryder has examined this in further detail, stating that white collar crime is considered a key variable that contributed to the 2007 financial crisis.⁷⁴ There have been an increasing number of commentators that have concluded that white collar crime either triggered the global financial crisis⁷⁵ or was one of the significant contributory factors⁷⁶.

In the mid twentieth century, criminal statistics collated in the US indicated unequivocally that crime, as popularly conceived and officially reported, had a high incidence among the ‘lower classes’ and a low incidence among the ‘upper classes’, based on criminals handled by the police, the criminal and juvenile courts and the prisons.⁷⁷ As a result, a general theory has been forwarded that since a higher percentage of crime is concentrated around lower class individuals, it is mainly caused by poverty or by personal and social characteristics believed to be associated statistically with poverty, such as feeble-mindedness, psychopathic deviations, slum neighbourhoods and ‘deteriorated’ families.⁷⁸ However, Sunderland overturned this

⁷³ See Oliver Heald QC MP (2013), ‘Fighting economic crime in the modern world’, 2 September 2013, 31st Cambridge International Symposium on Economic Crime, Jesus College, Cambridge.

⁷⁴ Nicholas Ryder (2014), *The Financial Crisis and White Collar Crime: The Perfect Storm?* Cheltenham and Northampton: Edward Elgar Publishing Ltd, p. 44.

⁷⁵ See Wim Huisman (2012), ‘White-collar crime and the economic crisis’, *Criminology in Europe*, Vol. 11, Iss. 3, p. 8.

⁷⁶ See Nationwide White Collar Crime Centre (2011), *National public survey on white collar crime*, p. 20.

⁷⁷ Michael L. Seigel (2011), *White Collar Crime: Law, Procedure, Theory, and Practice*, New York: Wolters Kluwer Law & Business, at p. 9, a speech delivered by Edwin H. Sutherland in 1939; this was based on a series of enduring empirical inquiries conducted by sociologists at the University of Chicago in the 1920s and 1930s, who emphasised the link between social disorganisation and poverty in areas within a city and high rates of criminal behaviour, see for example, Frederic Thrasher (1927), *The Gang*, Chicago: University of Chicago Press, and Clifford R. Shaw (1929), *Delinquency Areas*, Chicago: University of Chicago Press.

⁷⁸ This theory has a continuing effect in American criminology after Sutherland’s debate, see for example, Albert J. Reiss and Michael Tonry (eds.) (1986), *Communities and Crime*, Chicago: University of Chicago Press; and also, Victor E. Flango and Edgar L. Sherbenou (1976), ‘Poverty, urbanization and crime’, *Criminology*, pp. 331-346; Rony Rodas (2016), *Poverty and Crime*, Rontechmedia.

theory by stating that conventional explanations are invalid, principally because they are derived from biased samples that have not included vast areas of criminal behaviour of persons not from the lower classes, and he further pointed out one of these neglected areas was the criminal behaviour of business and professional men.⁷⁹

Professor Sutherland stated in his inspirational paper that “the present-day white-collar criminals, who are more suave and deceptive than the ‘robber barons’, are represented ... by many other merchant princes and captains of finance and industry, and by a host of lesser followers. Their criminality has been demonstrated again and again in the investigations of land offices, railways, insurance, munitions, banking, public utilities, stock exchanges, the oil industry, real estate, reorganization committees, receiver-ships, bankruptcies, and politics”.⁸⁰ Indeed, modern criminological efforts to enquire into and define economic offences are stem from the work of Sunderland, an American sociologist, who invented the term ‘white collar crime’, describing a crime committed by a person of respectability and high social status in the course of his occupation.⁸¹

It is true that certain types of criminal activities are much more likely to be perpetrated by persons working in an office rather than in a manual environment. Blue-collar workers might engage in stealing stock and equipment, but it may be the clerks who engage in fraud. Fraud, generally defined as use of deception to secure unfair or unlawful gain, is the core component of many white collar crimes. Others include abuse of organisational position or public office. When judges demand secret profit in return for favourable bail decisions, they commit white collar crime; when employers knowingly or negligently subject their workers to an unsafe work environment, they

⁷⁹ Edwin H. Sutherland (1940), ‘White-Collar Criminality’, *American Sociological Review*, Vol. 5, No. 1, pp. 1-12, at p. 2.

⁸⁰ *Ibid.*

⁸¹ See Edwin H. Sutherland (1949), *White Collar Crime*, New York: Holt, Rinehart & Winston, p. 9.

commit white collar crime too.⁸² It is evident that human beings, when motivated by greed, will take advantage of whatever opportunities exist in their immediate environment.⁸³

Before we examine the ‘white collar’ criminals, it is useful to refer to the categorisation of certain crimes as ‘white collar’. Sutherland’s definition and the debate surrounding it led to much conceptual and linguistic confusion. As Nelken stated, “if Sutherland merited a Nobel prize, as Mannheim thought, for pioneering this field of study, he certainly did not deserve it for the clarity or serviceableness of his definition”.⁸⁴ The key words of his definition including ‘crime’, committed by ‘persons of respectability and high social status’, ‘in the course of’ an ‘occupation’ all lead to issues in determining which activities should be included.

Professor Sutherland sought to distinguish crimes associated with respectable or legitimate occupations from those ordinary crimes such as murder or rape of high status individuals, and from the crimes of those whose occupation under organised or professional criminal groups could generally be described as ‘criminal’. This poses the immediate problem as to the definitions of ‘high social status’ and ‘respectability’.⁸⁵ Even though white collar crimes are often associated with senior managers and executives, the term white collar is designed to describe all non-manual workers, and any specific form of crime associated with occupations is likely to include a wide range of employment levels. Customers can be defrauded by junior or senior sales persons,

⁸² See Michael L. Benson, Tamara D. Madensen and John E. Eck (2009), ‘White-collar crime from an opportunity perspective’, in *The Criminology of White-Collar Crime*, edited by Sally S. Simpson and David Weisburd, New York: Springer.

⁸³ See for example John Braithwaite (1992), ‘Poverty, power, and white collar crime: Sutherland and the paradoxes of criminological theory’, in *White-Collar Crime Reconsidered*, edited by Kip Schlegel and David Weisburd, Northeastern University Press.

⁸⁴ David Nelken (2012), ‘White collar and corporate crime’, in *The Oxford Handbook of Criminology*, 5th edition, edited by Mike Maguire, Rod Morgan and Robert Reiner, Oxford: Oxford University Press, p. 628.

⁸⁵ See Hazel Croall (2001), *Understanding White Collar Crime*, Buckingham: Open University Press, pp. 6-8.

and corporate executives, secretaries or porters can sell inside information.⁸⁶ As a result, Shapiro argued the definition of white collar crime should be based on an abuse of occupational trust because people can lie, cheat or commit sins of omission up and down the occupational hierarchy, irrespective of status.⁸⁷ Croall also stated although Sutherland's focus is mainly on major corporations, small businesses can also be responsible for similar offences; consumers can be 'ripped off' by local corner shops, market stalls or large manufactures, and environmental pollution or safety issues in the workplace can be linked with 'cowboy' operators or large multinational conglomerates.⁸⁸ Even though the debate on the definition of white collar crime has not yet concluded, as most examples of economic crime necessitate a relative degree of planning and access, and may only be committed by persons with access to systems for recording and transmitting money, many commentators and authors who utilise this terminology include economic crime within the class of 'white collar' crime.⁸⁹

As we have seen, from the perspective of those responsible for preventing and controlling crime, it might be worth placing more emphasis upon the economic aspect of these offences, and, on the economic motivation of the offender. Sutherland in his seminal work, explored this area of activity, and acknowledged that in the case of 'white collar crime' the main determinant of whether a given individual, provided with the opportunity to engage in a crime, is predominantly his perception of the costs and benefits involved.⁹⁰ It is whether the risks of exposure, detection, apprehension and

⁸⁶ See Michael Levi (1987), *The Regulation of Fraud: White Collar Crime and the Criminal Process*, London: Tavistock.

⁸⁷ Susan P. Shapiro (1990), 'Collaring the crime, not the criminal: reconsidering the concept of white-collar crime', *American Sociological Review*, 55, pp. 346-365.

⁸⁸ See Hazel Croal (1992), *White Collar Crime*, Buckingham: Open University Press.

⁸⁹ See generally David O. Friedrichs (2009), *Trusted Criminals: White Collar Crime in Contemporary Society*, 4th edition, Wadsworth Publishing; Karen Harrison and Nicholas Ryder (2017), *The Law Relating to Financial Crime in the United Kingdom*, 2nd edition, London and New York: Routledge, p. 2; and William Tupman (2015), 'The Characteristics of Economic Crime and Criminals', in *Research Handbook on International Financial Crime*, edited by Barry Rider, Cheltenham: Edward Elgar Publishing Ltd, p. 4.

⁹⁰ Edwin H. Sutherland (1983), *White Collar Crime*, New Haven: Yale University press; see also at Barry Rider (2009), 'Cost effectiveness – a two edged sword!', Editorial, *Journal of Money Laundering Control*,

punishment outweigh the benefits they would reasonably expect to receive as fruits of the crime.⁹¹ When viewed through the crime-as-choice theory, crime unambiguously is a purposeful and calculated action.⁹²

Rational choice theory is of key importance, because it not only explains the variation in crime, but also justifies a changed emphasis in crime control practice.⁹³ Much of what we have previously discussed i.e. the motivation of crime, comes from the rational choice perspective. Risks, or the costs of crime, generally include formal sanctions – probability of detection and severity of punishment, informal sanctions – loss of reputation for both the individual and the company and self-respect, and the cost of executing the crime – including time, energy and know-how. Benefits, among other things, include increased income, higher status within the organisation, the thrill of engaging in the act, obtaining market shares, and reducing organisational expenses.⁹⁴ It needs to be born in mind that opportunity is an important factor in the rational choice model, as it varies by type of corporation and position of employment within the given corporation.⁹⁵

It was argued, however, that since the root causes, identified in some theories of crime, are perhaps beyond the reach of ameliorative action taken by the state, a more

Vol. 12 Iss. 4.

⁹¹ See Raymond Paternoster and Sally Simpson (1996), 'Sanction threats and appeals to morality: testing a rational choice model of corporate crime', *Law and Society Review*, Vol. 30, pp. 549-583.

⁹² Sanford H. Kadish (1977), 'The use of criminal sanctions in the enforcement of economic regulations', in *White-Collar Crime*, edited by G. Geis and R. F. Meier, New York: The Free Press, p. 16.

⁹³ See Raymond Paternoster and Sally Simpson (1993), 'A Rational Choice Theory of Corporate Crime', in *Routine Activities and Rational Choice: Advances in Criminological Theory*, Vol. 5, edited by Ronald V. Clarke and Marcus Felson, New Brunswick: Transaction Publishers, pp. 40-42; and Derek B. Cornish and Ronald V. Clarke (eds.), *The Reasoning Criminal: Rational Choice Perspectives on Offending*, 2014, New Brunswick: Transaction Publishers.

⁹⁴ See more discussions at David Weisburd and Elin Waring (2001), *White-Collar Crime and Criminal Careers*, Chapter 3: crimes of crisis and opportunities, New York: Cambridge University Press.

⁹⁵ Nicole Leeper Piquero and Alex Piquero (2001), 'Characteristics and Sources of White-Collar Crime', in *Crimes of Privilege: Reading in White-Collar Crime*, edited by Neal Shover and John Paul Wright, New York: Oxford University Press, p. 331.

appropriate focus is on policies and practices intended simply to increase the risks of choosing crime.⁹⁶ As we have already acknowledged, compared to street crimes, which are typically committed by confronting victims or entering their homes or businesses, white collar or economic crime occurs in a much more complex and sophisticated environment and is normally committed by using guile, deceit, or misrepresentation to exploit illicit advantage with the appearance of a routine legitimate transaction.⁹⁷ All this complicates the analysis in controlling and criminalising such misconduct.

This is not to say that all white collar crimes are morally neutral. However, it does suggest that if not everyone, most members of society have a price.⁹⁸ Although the above analysis has been challenged, it generally explains the incidence of certain crimes and in particular, many economic crimes. For example, when we say ‘they have a price’, they would be prepared to engage in illegal activities for a price which may range from a few hundred dollars to millions. It has always been of some surprise when public officials and particularly enforcement officials are willing to be exploited for a price.⁹⁹ As previously analysed in cases of corruption, the amount of the bribe is not commensurate with the benefit received by the briber, and the balance is not weighed only by the prospect of additional economic gain – it may also include favours or perks placed in the balance. The decision of each individual is influenced by many factors, but not least, moral and ethical stance, self-esteem and vulnerability.¹⁰⁰ In accord with

⁹⁶ James Q Wilson (1975), *Thinking about Crime*, New York: Basic Books; see also Neal Shover and Andy Hochstetler (2006), *Choosing White-Collar Crime*, Cambridge University Press, p. 1.

⁹⁷ See for example, Linda Ganzini, Bentson McFarland and Joseph Bloom (1990), ‘Victims of fraud: comparing victims of white collar and violent crime’, *Bulletin of the American Academy of Psychiatry and law*, Vol. 18, pp. 55-63.

⁹⁸ See Barry A.K. Rider (1999), ‘The Price of Probity’, *Journal of Financial Crime*, Vol. 7, Iss. 2, pp. 105-119; see also Barry A.K. Rider, Haiting Yan and Lihong Xing (2010) *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, p. 46.

⁹⁹ See Susan Rose-Ackerman (1975), ‘The economics of corruption’, *Journal of Public Economics*, Vol. 4, Iss. 2, pp. 187-203; and James William Coleman (1987), ‘Competition and motivation to white-collar crime’, *American Journal of Sociology*, Vol. 93, Iss. 2, pp. 406-439.

¹⁰⁰ See more at Anne Jenkins and John Braithwaite (1993), ‘Profits, pressure and corporate law breaking’, *Crime, Law and Social Change*, Vol. 20, pp. 221-232.

this view of white collar crime, it is worth emphasising that individuals are all potential ‘white collar’ criminals, and it is simply a matter of opportunity and the balance of risk to reward.

The moral issues in determining at what point the balance tips in favour of crime are of key significance not least to control and prevention. While most people would not anticipate murder, rape or other serious crimes of violence, would the same moral rules apply in the case of taking advantage of unpublished price sensitive information.¹⁰¹ The Federation Against Copyright Theft has directly addressed this issue by stating that purchasing a counterfeit video or downloading music or a film without authority, is just as much theft as stealing someone’s car or handbag.¹⁰² One of the toughest hurdles facing those who are concerned with controlling white collar crime is persuading the police and judiciary, let alone the public, that there are serious issues at stake.¹⁰³

Regarding certain technical and regulatory crimes, it is not always easy to find a moral content. Indeed, in a civilised society where democracy and the rule of law are cherished, there should be a clear moral obligation to obey the law no matter whether there is moral content or not.¹⁰⁴ However, in reality, the majority obey laws without a clear moral content, simply because they have no compelling reason to disobey them and may fear punishment.¹⁰⁵ Moreover, many of those technical and regulatory laws only apply to persons in a specific environment, trading platforms or professions; this is particularly so in cases of economic crime. Consequently, observance can be

¹⁰¹ See more discussions at Alan Strudler and Eric W. Orts (1999), ‘Moral principles in the law of insider trading’, *Texas Law Review*, Vol. 78, No. 2, pp. 375-387.

¹⁰² See more at its homepage: <http://www.fact-uk.org.uk>

¹⁰³ See for example, Herbert Edelhertz (1970), *The Nature, Impact, and Prosecution of White-Collar Crime*, National Institute of Law Enforcement and Criminal Justice; and Barry Rider, Haiting Yan and Lihong Xing (2010) *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, p. 46.

¹⁰⁴ See generally Joseph Raz (2009), *The Authority of Law: Essays on Law and Morality*, Chapter IV: Moral attitudes to the law, Oxford: Oxford University Press.

¹⁰⁵ Ibid.

reinforced by a set of inter-related rules and procedures, which make non-compliance, at best, inconvenient.¹⁰⁶ Many such rules give certain individuals privilege at management level, so that they would rather follow the rules in their own self-interest. Everything could change when a substantial and disproportionate benefit or profit arises, and the balance could inevitably be broken.

It is important to remember when dealing with economic and financial crime, that many of the rules and procedures will not necessarily be within the scope of criminal law. In particular in jurisdictions with a civilian tradition, where laws and their procedures are more organised and often confined within codes, problems inevitably occur. To amend this, it is necessary to promote the diversity of rules to ensure integrity within the financial and business world. While common law systems are not immune from such difficulties, the approach of the legal system and the courts seem to be rather more pragmatic. This is a factor that requires consideration in the context of parallel proceedings.¹⁰⁷ It is desirable to note that in developing an effective system to discourage and prevent economic crime, all the weapons of the legal system, including the civil law and compliance procedure, are of key importance.¹⁰⁸ In the business world, an individual working in a bank or other financial institution, is more likely to be influenced and controlled by the in-house compliance system and the terms of their contract of employment, instead of the provisions of the criminal law.¹⁰⁹ In today's

¹⁰⁶ See Chizu Nakajima (1995), 'The limits of prohibition: a cloud over compliance', *Journal of Financial Crime*, Vol. 3, Iss. 1, pp. 93-96; and Valpy FitzGerald (2004), 'Global financial information, compliance incentives and terrorist funding', *European Journal of Political Economy*, Vol. 20, Iss. 2, pp. 387-401.

¹⁰⁷ See discussions at Katalin Ligeti and Vanessa Franssen (2017), 'Current challenges in economic and financial criminal law in Europe and the US', in *Challenges in the Field of Economic and Financial Crime in Europe and the US*, edited by Katalin Ligeti and Vanessa Franssen, Oxford: Hart Publishing, pp. 10-15.

¹⁰⁸ See more discussions at Barry A. K. Rider (1999), 'The Limits of the Law: An Analysis of the Interrelationship of the Criminal and Civil Law in the Control of Money Laundering', *Journal of Money Laundering Control*, Vol. 2 Iss. 3, pp. 209-224; and also Barry A. K. Rider (1995), 'Civilising the Law – The Use of Civil and Administrative Proceedings to Enforce Financial Services Law', *Journal of Financial Crime*, Vol. 3 Iss. 1, pp. 11-33.

¹⁰⁹ See Peter N. Grabosky (1995), 'Using non-governmental resources to foster regulatory compliance',

world, the majority of relevant criminological analysis tends to be confined to violations of the criminal law, neglecting the rather more important non-criminal controls. It is perhaps partly for this reason that criminological discussion has tended not to concern itself with the prevention and control of economic crime.

Economic and social implications of economic crime

Even though economic crime is often deemed to be victimless, this is in fact far from true.¹¹⁰ In actuality, it is often the case that a great deal of economic and white collar crime goes unreported due to the fact that many of its victims are unaware they have been victimised.¹¹¹ Differing from robbery, burglary, and other street crimes, acts of white collar crime do not commonly stand out in victims' experiences – they often have the image of routine legitimate transactions. As noted, economic crime and white collar crime lead to an astronomical toll in deaths, physical health, emotional suffering, and fiscal costs, one that beyond any losses caused by street crime.¹¹² However, this assertion has not been seriously challenged, given the difficulty in determining those costs with any precision or confidence. Furthermore, the victim of economic crime, in general circumstances, may not be a specific individual but one of many. For example, the collapse of America's once renowned enterprise, Enron Corporation, in November 2001: the crime committed had huge implications; its stockholders and the relevant industrial area were deeply affected, and nearly 20,000 Enron employees lost or suffered severe reductions in their retirement funds.¹¹³ Indeed, this has been further

Governance, Vol. 8, Iss. 4, pp. 527-550; and Melvin A. Eisenberg (1997), 'The board of directors and international control', *Cardozo Law Review*, Vol. 19, pp. 237-264.

¹¹⁰ See for example Elizabeth Moore and Michael Mills (1990), 'The neglected victims and unexamined costs of white-collar crime', *Crime and Delinquency*, Vol. 36, No. 3, pp. 408-418; and Richard Pratt (2005), 'Economic crime – the financial system as a victim', *Journal of Financial Crime*, Vol. 12, Iss. 1, pp. 66-68.

¹¹¹ See Michael Levi (1994), 'White-collar crime victimization', in *White-Collar Crime Reconsidered*, edited by David Weisburd and Kip Schlegel, Northeastern University Press.

¹¹² Neal Shover and John Paul Wright (eds.) (2001), *Crime of Privilege: Reading in White-Collar Crime*, Chapter 2: Victims and costs, Oxford and New York: Oxford University Press, pp. 49-51.

¹¹³ See Joseph A. Petrick and Robert F. Scherer (2003), 'The Enron scandal and the neglect of management integrity capacity', *American Journal of Business*, Vol. 18, Iss. 1, pp. 37-50.

explained by the FATF: “Criminal proceeds have the power to corrupt and ultimately destabilise communities or [even] whole national economies”.¹¹⁴

Based on the inter-relationship of actors and institutions within the economy and from one economy to another, financial risk can have grave and relayed effects. Various investigations into the causes of the tsunami of United States financial markets in the 1920s, contributing greatly to the Great Depression, discovered many cases of financial fraud, insider dealing and market manipulation.¹¹⁵ As in the collapse of the financial markets in the 1990s in South East Asia and the Far East, such misconduct significantly contributed to the vulnerability of institutions and investors.¹¹⁶ The collapse of the Indian financial market in the late 1980s was another case of massive speculation and manipulation. The prevalence of unregulated and illegal practices in the financial markets undoubtedly contribute to their potential instability and leads to economic and social damage within the society.

Despite the enormous efforts made by such agencies as the UN, the FATF and nation states, it is still impossible to accurately quantify the extent of economic crime. It is partly because there are too many methodological difficulties when dealing with statistics of this type,¹¹⁷ but it is also due to the fact that almost all of the criminal behaviour is clandestine and thus undiscovered and unreported.¹¹⁸ However, analysis of the official documentation offers an intriguing insight into the estimated level of various types of economic crime. For instance, the FATF, quoting the IMF, indicated that between 2 and 5 per cent of the world’s gross domestic product (GDP) is associated

¹¹⁴ Financial Action Task Force (2004), *Report on Money Laundering and Terrorist Financing Typologies 2003-2004*.

¹¹⁵ See generally Ben S. Bernanke (2000), *Essays on the Great Depression*, Princeton: Princeton University Press.

¹¹⁶ See Giancarlo Corsetti, Paolo Pesenti and Nouriel Roubini (1999), ‘What caused the Asian currency and financial crisis?’, *Japan and the World Economy*, Vol. 11, Iss. 3, pp. 305-373.

¹¹⁷ Nicholas Ryder (2011), *Financial Crime in the 21st Century*, Cheltenham: Edward Elgar, p. 4.

¹¹⁸ See Karen Harrison and Nicholas Ryder (2017), *The Law Relating to Financial Crime in the United Kingdom*, 2nd Edition, London and New York: Routledge, pp. 3-4.

with money laundering, ranging from between \$590bn and \$1.5tn.¹¹⁹ According to the Treasury Department, the estimated amount of money laundered in the US is \$600bn per year.¹²⁰

The National Fraud Authority in the UK estimated that for the period of 2011/2012, the cost of fraud to the UK's economy was in the region of £73 billion; this can be broken down into losses of £20.3 billion from the public sector (primarily through tax, benefits and tax credits and government frauds), £45.5 billion from the private sector (including financial services, professional services, construction and engineering, natural resources, retail, wholesale and distribution and manufacturing), £1.1 billion from the non-profit sector and £6.1 billion from UK individuals (mass marketing, rental and online tickets).¹²¹ HM Treasury reports "organised crime generates over £20bn of social and economic harm in the UK each year".¹²² In 2004, the Home Office declared that organised crime "reaches into every community, ruining lives, driving other crime and instilling fear".¹²³ The FATF states "UK law enforcement estimates the economic and social costs of serious organised crime, including the costs of combating it, are upwards of £20bn a year. It is estimated that the total quantified organised crime market in the UK is worth about £1.5bn per year as follows: drugs (50%); excise fraud (25%); fraud (12%); counterfeiting (7%); organised immigration crime (6%)." ¹²⁴

One other cost that of increasing importance is the investment financial institutions

¹¹⁹ Financial Action Task Force, "Money laundering FAQ", available at: <http://www.fatf-gafi.org/pages/faq/moneylaundering/>

¹²⁰ Paul Waller and Katrin Roth von Szepesbela (2004), 'Silence is golden – or is it? FINTRAC and the suspicious transaction reporting requirements for lawyers', *Asper Review of International Business and Trade Law*, 4, pp. 85-130, at p. 86.

¹²¹ National Fraud Authority (2012), *Annual Fraud Indicator*, p. 3.

¹²² HM Treasury (2007), *The financial challenge to crime and terrorism*, London, p. 6.

¹²³ Home Office (2004), *One Step Ahead – A 21st Century Strategy to Defeat Organised Crime*, London, p. 1.

¹²⁴ Financial Action Task Force (2007), *Summary of third mutual evaluation report: anti-money laundering and combating the financing of terrorism – United Kingdom of Great Britain and Northern Ireland*, Paris, pp. 1-2.

have placed in their compliance and regulatory office. In 2014, research carried out by the Forum of Private Business estimated total UK business compliance costs of more than £19.2 billion – a 4% increase on the 2013 figure.¹²⁵ Taking one example, the London-based HSBC holdings disclosed in 2014 that it has set aside more than \$1.6 billion to cover legal and compliance costs in connection with several on-going regulatory investigations and improvements to its compliance operations. Furthermore, the HSBC Group Chief Executive Officer, Stuart Gulliver, added that nearly one in 10 of the bank’s 257,900 employees – or 24,800 employees – were working for risk and compliance teams. With the increase in the headcount in compliance space over the last two years, he stated, “we are not through the regulatory change agenda quite yet.”¹²⁶ HSBC is not the only bank increasing its expenses and staff on compliance offices¹²⁷ and following the financial crisis, and the inevitable cost, this expansion will continue to rise in the foreseeable future. This nonetheless increases the expenditure of financial institutions and certainly needs to be considered when assessing the economic implications of economic crime.

Further costs associated with elements of economic crime include the damage caused by financial abuse of poor regulatory frameworks, which undermines confidence in a country’s financial system and may subsequently result in financial crisis. Such losses relating to the total costs of the crises are impossible to quantify. There are also similar difficulties in attempting to estimate the effects of tax evasion, harmful tax competition and corruption.¹²⁸ Economic crime clearly has a heavy negative and costly influence on

¹²⁵ HSBC (2014), Business hot news, “Small firms’ compliance costs continue to rise”, available at: <https://www.knowledge.hsbc.co.uk/business-news/article/small-firms-compliance-costs-continue-to-rise>.

¹²⁶ Jaelyn Jaeger (2014), “HSBC Legal, Compliance Costs Surpass \$1.6 Billion”, November 4, 2014, *Compliance Week*, available at: <http://www.complianceweek.com/blogs/the-filing-cabinet/hsbc-legal-compliance-costs-surpass-16-billion#.VPR6xUJj7dk>

¹²⁷ See also Jaelyn Jaeger (2013) “JPMorgan to Spend \$4 Billion on Compliance and Risk Efforts”, September 13, 2013, *Compliance Week*, at <http://www.complianceweek.com/blogs/boards-governance/jpmorgan-to-spend-4-billion-on-compliance-and-risk-efforts#.VPSa6UJj7dm>

¹²⁸ International Monetary Fund (12 February 2001), *Financial System Abuse, Financial Crime and Money Laundering – Background Paper*, p. 11.

the economies of countries world-wide.

In recent years, terrorism has become a further area that has brought significant attention to both national and international organisations. The effect of terrorist attacks is hugely disruptive, for example the terrorist attacks in London; the disruption to the transport system caused by the bomb attacks of 7 and 21 July 2005 alone is estimated to have cost the nation in excess of £3bn.¹²⁹ Similarly, the Bishopsgate bomb in London in 1993 caused damage to property totalling over £1bn.¹³⁰

To a narrower degree, the impact of economic crime can also be seen on an individual level, although the losses may be minimal compared to the public and private sectors. For example, this may include a reduced flow of wealth between generations in families, subsequently resulting in a loss of tax revenue for the government through inheritance tax. Indeed, Deem insists that victims of economic crime can suffer as much as those who have been victims of violent crimes.¹³¹ Spalld emphasised that outrage, anger, fear, stress, anxiety and depression were experienced by victims of the Maxwell pension fraud and many victims of this fraud thought that their husbands' death had been caused, if not accelerated, as a result of these events.¹³²

The US National Advisory Commission on Civil Disorders stated in 1968 that the quality of life in a community rests on a sense of personal security that is more influenced by crime than by anything else.¹³³ Crime has a greater impact on society

¹²⁹ Gary Scanlan (2006), "The enterprise of crime and terror – the implication for good business", *Journal of Financial Crime*, Vol. 13 Iss. 2 pp. 164 - 176.

¹³⁰ HM Treasury (2002), *Combatting the financing of terrorism*, London, p. 11.

¹³¹ See Debble L. Deem (2000), "Notes from the Field: Observations in Working with the Forgotten Victims of Personal Financial Crimes", *Journal of Elder Abuse & Neglect*, Vol. 12, Iss. 2, pp. 33-48.

¹³² See Basia Spalek (1999), "Exploring the Impact of Financial Crime: A Study Considering the Effects of the Maxwell Scandal Upon the Maxwell Pensioners", *International Review of Victimology*, 6, pp. 210-220.

¹³³ US National Advisory Commission on Civil Disorders (1968), *Report of the National Advisory Commission on Civil Disorders*. New York: Bantam Books, 1968, p. 266.

than can simply be estimated. In particular, crimes such as white collar crime, involves major social costs in addition to the exorbitant financial losses to the public. The US President's Commission on Law Enforcement and the Administration of Justice stated in 1967 that white collar crimes are "the most threatening of all – not just because they are so expensive, but because of their corrosive effect on the moral standards by which American business is conducted."¹³⁴

When considering the economic aspects of economic crime, the influence and conduct of the crime may have a far greater impact than the actual monetary value of the property in question. This is particularly so in the case of corruption and bribery. For example, when a bribe is paid by a businessman to accomplish a certain objective, neither the briber nor the recipient may feel that he has suffered a loss. However, society certainly suffers from such transactions. One observer has thus assessed the costs of bribes: "if a buyer for an automobile manufacture takes a \$25,000 bribe from a supplier of shock absorbers in connection with a \$1 million contract, what is the true social and economic cost? It is not the \$25,000. It is not the difference between the contract price and what someone else would have charged. The true loss might be measured in these ways, of course, or by a qualitative evaluation of the shock absorbers supplied, but the major loss might well be the erosion of the integrity of the buying operation itself which could contribute to further losses in other transactions".¹³⁵

In a western capitalist economic system that relies on public investment, even though a common reaction by businessmen to revelations of white collar crime is defensiveness rather than condemnatory, the structure of the economy is seriously weakened by white collar crime.¹³⁶ However, focussing on the issue of corruption on the other side of the

¹³⁴ The President's Commission on Law Enforcement and Administration of Justice (1967), *The Challenge of Crime in a Free Society*, Washington, D.C., U.S. Government Printing Office, p. 5.

¹³⁵ Herbert Edelhertz (1970), *The Nature, Impact and Prosecution of White-Collar Crime*, Washington, D.C. U.S. Government Printing Office, 1970, pp. 8-9.

¹³⁶ John E. Conklin (1981), *Criminology*, New York: Macmillan Publishing Co., Inc. and London: Collier

globe, China – a communist country with the fastest growing economy in the world, this would certainly make the situation much more complicated and even threatening.

The situation in China

China, the most dynamic economy in the world, and widely predicted to be the dominant economy within the next ten years, has attracted enormous business and investment from many nations. However, as the world's largest emerging market, the lack of a consistent legal regime to sufficiently deal with economic crime undermines China's economic growth, discourages foreign investment and disrupts the effective distribution of economic resources. Also, in a society where paying bribes is embedded in its tradition, there is no equality of competition and ultimately no trust among citizens, and most importantly, it undermines the institutions and values of democracy, ethical values and justice – jeopardizing sustainable development and the rule of law.¹³⁷ Moreover, corruption brings about substantial damage to the Chinese government and the ruling party, the Chinese Communist Party (CCP). Former president Hu Jintao has warned on numerous occasions¹³⁸ that the party's survival and popular support depends upon the integrity of party officials, and the acts of corruption and other related crimes by party members would cause public distrust and is causing great damage and disrepute to the reputation of the CCP.

The current President Xi Jinping has taken a fast and robust action, and initiated a campaign to fight corruption immediately after he took over as the party leader in 2012. This campaign has prompted many high-profile cases, involving Zhou Yongkang (once headed party's Central Commission for Discipline Inspection and China's Ministry of Public Security), Bo Xilai (former Communist Party Chief in Chongqing and a member

Macmillan Publishers, pp. 59-60

¹³⁷ *United Nations Convention against Corruption*, Preamble, United Nations Office on Drugs and Crime, United Nations, 2004, p. 5.

¹³⁸ These include his speech at 18th Communist Party Congress (2012), 90th anniversary of the founding of the Communist Party Congress (2011).

of CCP Central Politburo), and Xu Caihou (former Vice-Chairman of the Central Military Commission and top-ranking General of the People's Liberation Army). Indeed, President Xi has left society, as well as the rest of the world, with a strong signal and in no doubt, as to how serious the new leadership considers the situation.

We need to bear in mind that corruption and economic crime exist in virtually every country in the world, and the question the government and the enforcement agencies are facing, is perhaps not the elimination, but rather the extent to which the social society and the people within that society can tolerate it. Along with this robust anti-corruption movement led by President Xi, there have been many commentators, businessmen and perhaps some politicians complaining that this reaction has gone too far – from the top to the bottom of the political hierarchy inside China, no one really knows who is going to be accused next. Foreign companies undoubtedly become hesitant to invest in China since they have no interest in getting involved in any allegations regarding corruption offences, such as the British multinational healthcare company GlaxoSmithKline being fined \$490m (£297m) for 'massive and systemic bribery'.¹³⁹

When we consider the economic implications of corruption, we need to differentiate between the short and long-term effects. Historical literature suggests that corruption may promote economic growth in the short-term as it relaxes inefficient and rigid regulations imposed by the government,¹⁴⁰ and bribes in a bidding process can promote efficiency since most established firms are often those who can afford the highest bribe.¹⁴¹ On the other hand, corruption has a negative effect on the economy's long-

¹³⁹ BBC (2014), "GlaxoSmithKline fined \$490m by China for bribery", *BBC News*, 19.09.2014, available at: <http://www.bbc.co.uk/news/business-29274822>.

¹⁴⁰ See Nathaniel H. Leff (1964), 'Economic development through bureaucratic corruption', *American Behavioural Scientist*, Vol. 8, Iss. 2, pp. 8-14; see also Samuel P. Huntington (1968), *Political Order in Changing Societies*, New Haven, Connecticut: Yale University Press.

¹⁴¹ See Da-Hsiang Donald Lien (1987), 'A note on competitive briber games', *Economics Letters*, Vol. 22, Iss. 4, pp. 337-341; see also Paul J. Beck and Michael W. Maher (1986), 'A comparison of bribery

term growth rate.¹⁴² Likewise, recently in China, Nobel Laureate in Economics, Michael Spence, is publicly against those who believe China's war on corruption has gone too far, stating "I do not think one should assume this is a failure at all but rather a very important first step and my expectation is it will lead to pretty decent healthy structure change and healthy growth prospects in China".¹⁴³

Finally, we also need to consider that the vast figures involved in financial statements, as we have discussed previously, may only be the tip of the iceberg. With such far-ranging impacts, it is vital that the national government has effective regulatory systems and legislation in place, which can efficiently prevent and reduce the commission of such activities.

The distinction between facilitative and non-facilitative crime

As discussed, regarding the nature of criminal behaviour, there is a distinction between criminal activity which is designed to make a direct profit and criminal activity that facilitates the process or safeguards illegal wealth. Structuring and running money laundering operations is deemed as an essential procedure in providing criminals with protection of their illegal gains. Criminals would not get caught by simply carrying out money transferring activities; they would not even commence laundering money until they have secretly received or been promised illegal proceeds. Accordingly, as the FATF emphasised, money laundering is the facilitative process by which criminals disguise the original source and control of the proceeds of criminal activity, by making such proceeds appear to have derived from a legitimate source.¹⁴⁴

and bidding in thin markets', *Economics Letters*, Vol. 22, Iss. 1, pp. 1-5.

¹⁴² See Francis T. Lui (1996), 'Three aspects of corruption', *Contemporary Economic Policy*, Vol. 14, Iss. 2, pp. 26-29.

¹⁴³ 'Anti-corruption crucial for China's long-term growth: Nobel laureate', *Xinhua News*, 09.10.2014, available at: http://news.xinhuanet.com/english/china/2014-10/09/c_133702322.htm

¹⁴⁴ 'What is Money Laundering', Financial Action Task Force, available at: <http://www.fatf-gafi.org/pages/faq/moneylaundering/>

It is interesting to consider the distinction between the crime of money laundering and other crimes. We understand that most crimes eventually have a clear effect such as a dead body (murder), missing property (theft) or a counterfeit product, whilst money laundering, which has a facilitative nature, may have no trace or impact. In addition, most crimes have a clear victim whereas in the case of money laundering it is unclear who the specific victim is, other than in a broad sense, the public, financial institutions and a country's economy.¹⁴⁵

In considering the extent to which criminals engage in money laundering to avoid the confiscation of the proceeds of their criminal conduct by the authorities, it is vital to consider that the more criminals consider their assets are at risk, the more likely they will justify the costs and risks of laundering.¹⁴⁶ This is perhaps one of the reasons why London became so significant in laundering operations, due to its sophisticated intelligence unit.¹⁴⁷ China's recent Anti-Money Laundering Law¹⁴⁸ promulgated in 2007, has placed particular emphasis on Chinese financial institutions to record and report suspicious transactions. In recent years, several notable cases reporting multinational financial institutions being fined for failure to maintain an effective money-laundering programme were commended for their efforts by several governments. For example, in December 2012, HSBC paid a record \$1.9 billion fine for laundering hundreds of millions of dollars for drug traffickers, terrorists and sanctioned governments such as Iran;¹⁴⁹

¹⁴⁵ See generally Dennis Cox (2014), *Handbook of Anti-Money Laundering*, Chichester: John Wiley.

¹⁴⁶ See Hans Geiger and Oliver Wuensch (2007), 'The fight against money laundering: an economic analysis of a cost-benefit paradoxon', *Journal of Money Laundering Control*, Vol. 10, Iss. 1, pp. 91-105.

¹⁴⁷ See Jack A. Blum, Michael Levi, Thomas Naylor and Phil Williams (1999), 'Financial havens, banking secrecy and money laundering', *Criminal Justice Matters*, Vol. 36, Iss. 1, pp. 22-23.

¹⁴⁸ The Anti-Money Laundering Law of the People's Republic of China, adopted at the 24th meeting of the Standing Committee of the Tenth National People's Congress on October 31, 2006, became effective on January 1, 2007.

¹⁴⁹ By Jessica Silver-Greenberg, 'HSBC to Pay Record Fine to Settle Money-Laundering Charges', *New York Times*, 2:17 pm 11 December 2012, available at: <http://dealbook.nytimes.com/2012/12/11/hsbc-to-pay-record-fine-to-settle-money-laundering-charges/>

Today, in the context of developing jurisdictions, it should be considered that the laundering process itself is essentially an uneconomic and wasteful process, and therefore it is vital to consider adopting and implementing crime control strategies; the practical profits and the costs of addressing the problem merely facilitate economic crimes.

The crime of corruption is also known to be, by nature, facilitative in its various forms. Indeed, in society, criminals do not bribe or wrongfully enrich others as a means to an end. Those who try to corrupt others, whether by bribery or blackmail, do so with the intent of gaining an advantage that has significant economic benefits. To make the act of corruption meaningful, generally, the financial significance of such misconduct will vastly exceed the financial benefit to the recipient of the bribe. Indeed, the amount of the bribe will often be wholly disproportionate to the benefit acquired by the briber. The conduct of corruption however, is to facilitate other crimes, as it inflicts massive damage to the country and most importantly, it undermines the integrity and the credibility of its own society.¹⁵⁰ This is the reason why President Xi Jinping embarked upon a serious campaign in fighting corruption as soon as he took over as the party chief. He stressed, “We must have the resolution to fight every corrupt phenomenon, punish every corrupt official and constantly eradicate the soil which breeds corruption, so as to earn people’s trust with actual results”.¹⁵¹

In comparison, in the economic world, one of the best examples of non-facilitative crimes is perhaps the conduct of those who purposefully take advantage of privileged information in their own field within the economic market, also known as insider dealing. The classic case that is often cited of abuse of inside information is where a

¹⁵⁰ See generally Rose-Ackerman Susan (2016), *Corruption and Government: Causes, Consequences, and Reform*, 2nd Edition, New York: Cambridge University Press; see also Barry Rider (ed), *Corruption – The Enemy Within*, 1997, The Hague and London: Kluwer Law International.

¹⁵¹ ‘Xi Jinping vows unswerving fight against corruption’, 22.01.2013, *Xinhua News*, available at: http://news.xinhuanet.com/english/china/2013-01/22/c_132119843.htm

director of a company learns, in a private board meeting, that his company's profit forecasts are about to be revised to a significant extent and then trades in the stock market based on this information, before it is made publicly available. In such circumstances, the director has clearly and purposefully taken advantage of his position and the information that came to him due to his seat on the board. Most jurisdictions have, in recent years, enacted legislation particularly to deal with the issue of directors and officers within companies. Insider dealing is not only confined to those holding office in a company; many regulatory systems impose prohibitions on anyone who acquires such information, with knowledge that it comes from a privileged source.¹⁵² However, despite the legal measures that have been enacted, there is still considerable scepticism as to whether it provides sufficient protection to investors and the markets.

Overall, it is deemed that facilitative economic crimes do not refer to crimes such as insider dealing, with an acquisitive intent of acquiring direct benefits, but are more often to be seen as important or even requisite components in constituting the whole process of crime. This however introduces even more complexities to both the international community and domestic enforcement agencies, in respect of the extent to which society should consider addressing and punishing merely facilitative economic crimes.

Conclusion

In this chapter we have attempted to emphasise the threat that economically motivated crime presents to the stability of China. In so far as economic misconduct directly interferes with the proper operation of markets, especially those in which confidence is an important factor, with the opening of the Chinese economy both the CCP and the government have had to be mindful of the risks. Indeed, given essentially the elitism of the Chinese political system the possibility that society – perhaps influenced by criticism from outside China, will brand the leadership as corrupt or engaged in

¹⁵² See Barry Rider, Kern Alexander, Stuart Bazley and Jeffrey Bryant (2016), *Market Abuse and Insider Dealing*, 3rd Edition, Heywards Heath: Bloomsbury Professional, p. 1.

economic abuse the dangers in terms of political and social stability are all the more serious.

While underlining these vitally important issues for China and for that matter all states, especially those with developing economies, we attempt to provide some degree of specificity to our discussion and analysis of the law. We refer to the academic discussion that has taken place in and around defining economic crime and financial crime. We make the point, however, that little stands by precise definitions and tend to place more emphasis on the work of Professor Sutherland. His analysis as to the characteristic motivation of crime presents a useful tool to those seeking to discourage economically motivated misconduct, whether this be at the level of law or compliance. Consequently we do not attempt a thorough literature review of the definition of economically motivated misconduct, but rather focus on those issues of particular relevance to China.

Chapter 2: A Historical Review of the Control of Corruption on Economic Crime in China

Professor Barry Rider once said: “attitudes to corruption in China are about as mixed as a good chop suey!”¹ China becomes the focus of this study not because it is particularly prone to corruption. Corruption exists in all societies, whether it is socialist or capitalist, developed or underdeveloped. However, China is unique in its means of understanding, identifying and combating corruption, given that China is a socialist country with a long history of bureaucratic culture.² The Chinese Communist Party (CCP) has placed many constraints on bureaucracy since its foundation due to the party’s egalitarian ideal among its society. Having said this, the party continues to rely heavily on the bureaucracy to manage the centrally planned and hierarchically ordered economy. Consequently, administrative power and its associated privileges essentially turned the bureaucracy into a powerful social class.³

Many of the oldest and draconian laws against corruption can be found in China in various forms, and over the long and rich tapestry of Chinese cultural development there have been instances where harsh and sometimes effective actions have been taken against individuals and even the system. However, throughout history, those measures failed more often than succeeded in those fights, and no dynasty has ever escaped the cycle of rise and fall that was linked to the phenomenon of corruption.⁴ An ancient

¹ Barry A. K. Rider (2013), ‘When Chinese Whispers become Shouts!’, *Journal of Financial Crime*, Editorial, Vol.20, Iss. 2.

² See Ting Gong (1994), *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes*, Westport: Praeger Publishers, p. 15.

³ Ibid; see also Jiangnan Zhu (2017), ‘Corruption networks in China: An Institutional Analysis’, in *Routledge Handbook of Corruption in Asia*, edited by Ting Gong and Ian Scott, London and New York: Routledge, pp. 27-32.

⁴ Feng Ye (2002), ‘The Chinese Procuratorates and the Anti-Corruption Campaigns in the People’s Republic of China’, in *Implementation of Law in the People’s Republic of China*, edited by Jianfu Chen, Yuwen Li and Jan Michiel Otto, The Hague: Kluwer Law International, p. 114.

Chinese idiom ‘*yi shi wei jian*’⁵ describes that we should always take history as a mirror. Indeed, China has a very long history of fighting corruption and it is significant to consider the past before we move on to discuss various initiatives against economic crime that are being taken in modern China, given the political, social and culture issues that this topic raises. Within this chapter, the author proposes to examine the legal history of corruption control in China, from its ancient times up until 1978 – the year China launched its ‘open-door’ policy.

Corruption control in ancient China

Chinese Slavery Societies (2070-476 B.C.)

A famous economist once stated: “the entire Chinese history was a history of embezzlement”⁶. Despite an exaggeration of the facts, it does suggest that corruption has been a serious issue throughout China’s history. Indeed, the history of China’s legal system is long standing and well established, and the content of its legislative culture is fertile and colourful. Anti-corruption laws formed an important part of the ancient Chinese legal system, and the systematisation, legalisation and institutionalisation of the punishment of corruption-related crimes appeared as early as in the slavery era.⁷ During the slavery societies of Xia, Shang and Zhou Dynasties, there were already written records of laws and regulations to punish officials committing offences of bribery and corruption.⁸ Over 2000 years ago, during the Yao Shun Yu period, when the judiciary enacted rules for the emperor, there were provisions to punish corrupt officials, given the label ‘Ink Penalty’⁹, meaning if the official was found guilty of corruption,

⁵ ‘以史为鉴’ in Chinese.

⁶ Yanan Wang (1987), *Zhongguo Guanliao Zhengzhi Yanjiu (A Study of Chinese Bureaucratic Politics)*, Beijing: Chinese Social Sciences Press, p. 117.

⁷ Liming Xu (1995), ‘Zhongguo Gudai Fantan Fangtan de Zuofa’ (Practice in fighting corruption in ancient China), *CassJournal of Political Science*, 1995, No. 1, pp. 18-25; see also Barry Rider, Haiting Yan and Lihong Xing (2010) *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, p. 182.

⁸ According to the record of ‘Zuo-Zhuan Zhao-Gong 14 Nian’ (Classical Annals of Lu, Zuozhuan 14 Years of Zhao Duke).

⁹ ‘Mo Xing’ or 墨刑 in Chinese.

the punishment was to ‘tattoo his or her face’. This is the earliest record of legal content regarding corruption in Chinese history, and this was subsequently inherited by China’s first dynasty, the Xia Dynasty¹⁰.

The Book of Documents of the Xia Dynasty¹¹ provides that anti-corruption regulations were part of the fundamental laws made by then Minister for Law, Gao Tao. At that time, there were three types of crimes that could result in the death sentence: ink (*Supra*), theft and murder. When the next dynasty, Shang, was founded in 1600 B.C., having observed the fall of its previous dynasty, Xia, Shang soon formulated provisions of anti-corruption as a means to warn its officers. The ‘Officer’s code’¹² was promulgated and specifically provided three bad tendencies and ten crimes; among these three tendencies, one was greed for money and goods.¹³ It further stated that once an official violated any of these provisions, he and his entire family shall be sentenced to death, and if it was committed by the emperor, his kingdom shall be replaced.¹⁴

Corruption in the Shang Dynasty was regarded as a serious crime that concerned the survival of the nation. In the Western Zhou period (1046-771 B.C.), legal rules were set in place, and anti-corruption regulations were more unequivocal than in the past. Lu Code was forwarded at that time and is regarded as the earliest legal rule in relation to the fight against judicial corruption in Chinese history.¹⁵ In 927 B.C., Mr. Lu, appointed by the emperor Zhou Mu Wang as the Minister of Justice of Western Zhou, was assigned to reform the legal system and supplement the criminal legal rules and draft the code –

¹⁰ Xia Dynasty or 夏朝 (2070 B.C. – 1600 B.C.) is the first dynasty in China to be described in ancient historical chronicles such as *Bamboo Annals*, *Classic of History* and *Records of the Grand Historian*.

¹¹ ‘Xia-Shu’ or 《夏书》 in Chinese.

¹² ‘Guan Xing’ or 《官刑》 in Chinese, general regulations for public officials.

¹³ Meiqing Xue (1996), ‘Zhongguo Gudai Chengtan Falu de Shijian jiqi Zhaoshi’ (Implementation of Laws for Punishing Corruption in Ancient China and its Enlightenment), *Jurist Review*, 1996, No. 4, pp. 33-40.

¹⁴ ‘Book of Documents of Yi Code’ (‘Shangshu Yixun’ or 《尚书·伊训》 in Chinese).

¹⁵ ‘Criminal Punishments of the Marques Lu’ (‘Lu Xing’ or 《吕刑》 in Chinese), it is the earliest extant criminal law literature and contains rules related to corruption and bribery.

the Lu Code. The code provided that if judicial officials were found guilty of corruption, they would receive punishments as harsh as those criminals and the prerogative of mercy should not be taken into consideration.¹⁶ Another development in the Western Zhou Dynasty was the establishment of special state organs to combat corruption, although the legal system at that time was not generally regarded as perfect nor advanced. There were two state organs relating to the prohibition of corruption, namely ‘*Sikou*’ (司寇) which was known as the Ministry of Justice at that time. The officers within were ‘*Sishi*’ (司士); the other organ being the Finance and Accounting Department, which supervised the finance and expenditure of all the state departments as well as all levels of local government.¹⁷

Instruments curbing corruption were further evolved through the Spring and Autumn period (771-476 B.C.) and the Warring States period (475-221 B.C.). Li Kui (李悝 455-395 B.C.), who was then Prime Minister of the Wei State in the period of the Warring States, compiled the ‘Classic Law of Li Kui’¹⁸ – the first complete written law in Chinese history which contained the earliest legal articles regarding the punishment of corruption-related crimes. One of its primary six sections was ‘Law of Miscellaneous Provisions’¹⁹, containing crimes of stealing of official seals, obstruction of state affairs and corruption. One article among the selection was entitled ‘Prohibition of Gold’²⁰; this was to prevent officials from taking bribes. The article also stated that if the prime minister took a bribe, his subordinates shall also be punished, and the sentence to them could be as harsh as the death penalty; other officials could also be sentenced to death if the amount of bribes they received reached a certain level.²¹

¹⁶ ‘Book of Documents of Lu Code’ (‘*ShangshuLuxing*’ or 《尚书·吕刑》 in Chinese).

¹⁷ Xiaoguang Xu and Baojun Lu (1998), ‘Zhongguo Gudai Fanfu Chengtan Falu Zhidu Sshuyao’ (Summary of the Legal System on Combating Corruption and Bribery in Ancient China), *Modern Law Science*, 1998, No.4, pp. 115-120.

¹⁸ Also known as the ‘*Cannon of laws*’, ‘*Fa Jing*’ or 《法经》 in Chinese.

¹⁹ ‘*Za Lu*’ or 《杂律》 in Chinese.

²⁰ ‘*Jin Jin*’ or 禁金 in Chinese.

²¹ ‘*Jin Jin*’, ‘*Za Lu*’ in ‘*Fa Jing*’.

Chinese Feudal Society (221 B.C.-1911 A.D.)

China has had a long lasting feudal society which lasted for more than 2000 years. In order to maintain the rulers' interests and ensure the safety of the state, emperors from different dynasties enacted various anti-corruption laws and used substantive measures to penalise corrupt officials. In the Qin Dynasty (221-260 B.C.), the first imperial dynasty and the start of the long feudal period in Chinese history, the founding Emperor Qin Shi Huang (260-211 B.C.) set up an autocratic centralised feudal rule and unified all the laws and regulations which were previously used by other states through the Warring States period. He also enacted extreme laws and regulations on combating crimes including corruption.²² For example, the Qin code provided that anybody who stole leaves from other mulberry trees worth less than one qian²³ would be sentenced to 30-days compulsory labour service, and if five people or more engaged in the same theft, they would lose their left legs as a punishment. Emperor Qin Shi Huang also attached great importance on exposing corrupt officials. In the 'Questions and Answers to Law'²⁴ of the 'Rules of Qin'²⁵, corruption was regarded as theft, and was punished based on the provisions of theft. According to the rule, officials who misappropriated public funds and who borrowed money from local governments without advance approval would be deemed guilty of theft, and would be punished as thieves. Both giving and receiving bribes was prohibited, and anyone who gave, accepted or helped someone to keep the bribes would be punished severely. Peculation was also strictly prohibited, where the Qin Emperor enacted the 'Rules of Efficiency'²⁶, in which ombudsmen in the capital were sent to supervise local officials on a regular basis. The

²² Meiqing Xue (1996), 'Zhongguo Gudai Chengtan Falu de Shijian jiqi Zhaoshi' (Implementation of Laws for Punishing Corruption in Ancient China and its Enlightenment), *Jurist Review*, 1996, No. 4, pp. 33-40.

²³ Qian is an old currency denomination used in China and East Asia; one qian equals to 10 candareens and is 1/10 of a tael.

²⁴ 'Falu Wenda' or 《法律问答》 in Chinese.

²⁵ 'Qin Lu' or 《秦律》 in Chinese.

²⁶ 'Xiao Lu' or 《效率》 in Chinese.

Emperor of Qin also placed great emphasis on the promotion and demotion of public officials to ensure integrity. To do this, he promulgated special laws such as the ‘Administrative Law on Supervision’, ‘Rules on Appointment of Officials’ and ‘Rules on Removal of Officials’.²⁷

In the Han Dynasty (206 B.C. – 220 A.D.), laws for regulating corrupt practices appeared to be scattered within a variety of historical books. For example, the Western Han Emperor Yuan (r. 49-33 B.C.) adopted a regulation that anybody sentenced for corruption was banned from a future official post; the Eastern Han Emperor Zhi (r. 145-146 A.D.) ordered that descendants of corrupt officials should never be recommended to take any official posts.²⁸ In the Western Han Dynasty (206 B.C. – 8 A.D.), there was an independent special official supervision law, which formed the basis for dealing with officials involved in corruption, and the law prescribed that corruption included two categories – theft and bribery. Theft meant taking advantage of an official position to embezzle state assets, and bribery meant officials accepting bribes from their subordinates or ordinary people. The first official decree against corruption in Chinese history is the ‘Anti-Corruption Decree’²⁹ of the Han Dynasty, which was co-drafted by the then Prime Minister and Chief Justice, in accordance with the order from the Emperor Jing, Liu Qi (刘启), in 156 B.C. It stated that officials would be dismissed if they accepted food or other benefits in their administrative district; officials would be dismissed or lose their rank of nobility if they accepted bribes or bought cheap and sold dear in their administrative district. Under further consideration, Emperor Jing amended those articles: if officials paid for the food they had accepted in their administrative district they would be free from criminal penalty; if any official accepted property, except food, or bought cheap and sold dear, he would be treated as a thief and the

²⁷ See further details at Chunyu Wang (2000), *Zhongguo Fantan Shi (Chinese Anti-Corruption History)*, Chengdu: Sichuan People’s Publishing House, pp. 83-85.

²⁸ Hanping Qiu (1988), ‘Houhan Xingfa Zhi’ (The Criminal Annals in Later Han Dynasty) in *Lidai Xingfa Zhi (The Criminal Annals in Chinese Dynasty)*, Beijing: Qunzhong Publishing House.

²⁹ ‘*Fan Shouhui Ling*’ or 《反受贿令》 in Chinese.

property should be confiscated. For those who had a title of nobility, they would be deprived of that title, those who had an official post would be dismissed, and those who had neither a nobility title nor official post would be heavily fined. Those who helped capture or report the corrupt officials would be awarded according to the bribe the official received.³⁰

In the following period of the Wei-Jin and Southern and Northern Dynasty (220-589 A.D.), corruption and bribery among officials became even more serious. For example, the ‘Wei Code’³¹ was compiled in 229 A.D. with 18 chapters wherein two of them were particularly concerned with corruption. One chapter entitled ‘Soliciting Bribes’³² provided details of the offence of corruption and its penalty; the other chapter ‘Punishing Corruption’³³ provided details of punishments of corrupt officials and confiscations of their ill-gotten gains. In 267 A.D. Sima Zhao promulgated the ‘Jin Code’³⁴ which was regarded as a systematic criminal code containing 620 articles among 20 chapters. Sections of ‘Soliciting Bribes’ and ‘Rules on Impeachment’³⁵ were inherited, and the ‘Rules of Officials’ was raised within a special chapter – ‘Rules on Officials Violating the Law’³⁶ – wherein corruption crimes were standardized. Since then, a chapter concerning anti-corruption had been reserved in the penal codes of the later dynasties. When Emperor Wen founded the Sui Dynasty (581-618 A.D.) and re-unified China in 589 A.D., he promulgated a new piece of legislation, the ‘Kai Huang Code’³⁷, which was inherited from the Wei-Jin and Southern and Northern period. What is interesting was that the code provided different degrees of punishments for officials and civilians, and officials could have some privileges when receiving punishments,

³⁰ The Biography of Emperor Jing, *Han Shu (Book of Han)*.

³¹ ‘Wei Lu’ or 《魏律》 in Chinese; it also refers to “New Code” (“Xin Lu” or 《新律》 in Chinese).

³² ‘Qing Qiu’ or 《请贼》.

³³ ‘Chang Zang’ or 《偿脏》.

³⁴ ‘Jin Lu’ or 《晋律》.

³⁵ ‘Gao-He Lu’ or 《告劾律》.

³⁶ ‘Wei-Zhi Lu’ or 《违制律》.

³⁷ ‘Kai Huang Lu’ or 《开皇律》.

which was not the case in previous dynasties. For example, for officials of 7th rank or above who committed corruption crimes, one level of punishment could be lessened, and officials of 9th rank or above committing corruption could use copper coins or their official post to offset their punishments.³⁸

In addition, Emperor Yang of the Sui Dynasty, put forward a systematic bureaucrat-selection system labelled the ‘Imperial Examination System’, which had been popularly acquired throughout ancient dynasties since this period. Under such a system, State officials were recruited through a series of examinations that mainly consisted of Confucian classics in their orthodox interpretations. It was believed that using examinations to recruit officials would curb the privileged and allow for the rise of talented people. This was a landmark revolution in valuing and selecting public officials.³⁹

In the Tang, Song, Yuan, Ming and Qing dynasties, which are known as the last five continuous and prosperous unified feudal societies, laws for punishing corruption were accurate and precise. In the Tang Dynasty (618-907 A.D.), the Tang Code (*Tang Lu*) classified economic crime into six categories: ‘six bribery crimes’⁴⁰ namely accepting bribes and breaking the law; accepting bribes without breaking the law; accepting goods and money from subordinates and ordinary people; robbery; theft and illegal possession. Among these six types, four were closely related to corruption. All six were highly adopted by subsequent feudal dynasties, such as the ‘Penal Code of Song Dynasty’⁴¹, which was largely inherited from the ‘six bribery crimes’ from the Tang Code in terms of regulating corrupt officials.

³⁸ ‘*Kai Huang Code*’ (‘*Kai Huang Lu*’).

³⁹ More details can be found at Victor Xiong (2006), *Emperor Yang of the Sui Dynasty: His Life, Times, and Legacy*, New York: State University of New York Press.

⁴⁰ ‘*Liu Zang*’ or ‘六脏’-- 受财枉法, 受财不枉法, 受所监临财物, 强盗, 盗窃, 坐赃 in Chinese.

⁴¹ ‘*Song Xing*’ or ‘《宋刑》’.

In the Yuan Dynasty (1271-1368 A.D.), there appeared a piece of legislation relating to corruption entitled the ‘General Act of Yuan’⁴², separate from crimes of robbery and theft and not included in the old six crimes. Severe punishment was included in the section ‘Ordinance for Positions and Responsibilities’ of ‘General Act of Yuan’, in which it stated an official in charge of a warehouse, who stole money and grain worth less than one guan (a string of 1000 holed copper coins), would be flogged with 57 strikes, and for more than 300 guans would be hanged.⁴³ Of course the extent of punishment was further increased depending upon the amount of goods stolen.⁴⁴

In the Ming (1368-1644 A.D.) and Qing (1636-1912 A.D.) dynasties, since corruption again became rampant, the penalties for criminals were much stricter and more severe. For instance, officials who broke the law and took a bribe of 80 strings of copper coins would be hanged, and when the regulators of the customs and laws committed the offence of corruption, they would be punished three degrees heavier. The articles in this regard were provided in two codes during these two dynasties, the ‘Code of Great Ming Empire’⁴⁵ and the ‘Code of Great Qing Empire’⁴⁶, in which not only ‘Ordinance for Positions and Responsibilities’⁴⁷ was included in these two codes, but also ‘Ordinance for Officials Accepting Bribery’⁴⁸ was firstly introduced into both codes. Indeed, during these two last dynasties in Chinese history, the legal system was more systematic, and the laws in regulating corruption and bribery were improved and enriched dynasty after dynasty. In the last feudal society Qing Dynasty, the ‘Code of Great Qing Empire’ has been recognized as the collection of all the laws and regulations of its kind in ancient China.⁴⁹

⁴² ‘*Da Yuan Tong Zhi*’ or 《大元通制》.

⁴³ According to the ‘Ordinance for Positions and Responsibilities’ of ‘General Act of Yuan’.

⁴⁴ Ibid.

⁴⁵ ‘*Da Ming Lu*’ or 《大明律》.

⁴⁶ ‘*Da Qing Lu*’ or 《大清律例》.

⁴⁷ ‘*Zhi Zhi Pian*’ or 《职制篇》.

⁴⁸ ‘*Shou Zang Pian*’ or 《受脏篇》.

⁴⁹ Ling Yang (2001), ‘*Zhongguo Lidai Sutan Falu Chuyi* (The Attempting Discussion of Anti-Corruption

Primary methods used

It is worth noting that in a similar vein to many other countries that are currently confronting the serious issue of corruption, in ancient China, bureaucrats did not just passively wait for gifts and bribes to come; they were sometimes actively engaged in extortion. For example, as recorded in the *Veritable Records of the Qing Emperors (1796-1911)*⁵⁰, extortion of public funds was the most frequent form of corruption during that period.⁵¹ In the Ming and Qing dynasties, the local officials were underpaid, so in some ways they had to create additional income; their official salary was entirely for their own use, but they also needed to finance office expenses, pay their assistants, offer lavish treatment to higher ranking officials and pay them a ‘regular fee’.⁵² In the Southern Song period (1127-1279), a *Chengxiang* (an official equivalent to a prime minister) could publicly request money or gifts from his subordinates who wanted to make petitions, and if no gift was attached, petitions would not be processed.⁵³

Another common illegal act frequently mentioned was misappropriating public funds – the state imposed heavy taxes and goods levies on the public, and officials then took advantage of tax collection for personal gains. Today, this is better regulated and monitored, while in the past, this double-edged exploitation spiraled the general public into dire poverty and allowed government officials to accumulate massive fortunes. For example, He Shen, a senior official in charge of the Boards of Revenue and the Civil

Laws in Ancient China’, *Journal of Southwest University of Political Science and Law*, Vol. 3, No. 2, pp. 90-94.

⁵⁰ Daqing Huangdi Shilu (2247 volumes), recorded significant events throughout Qing Dynasty, including all the cases of punishment of official offences.

⁵¹ Chong-chor Lau and Rance P. L. Lee (1981), ‘Bureaucratic Corruption and Political Instability in Nineteenth Century China’, in *Corruption and Its Control in Hong Kong*, edited by Rance P. L. Lee, Hong Kong: The Chinese University Press.

⁵² Shawn Ni and Pham Hoang Van (2006), ‘High Corruption Income in Ming and Qing China’, *Journal of Development Economics*, Vol. 81, pp. 316-336.

⁵³ Reizhong Liu and Chende Wang (1988), ‘Reasons of Growth of Economic Role of Local Governments at Present: An Analysis’ (in Chinese). *Zhongguo Fazhan yu Gaige (Development and Reform in China)*, vol.1, pp. 42-48.

Office in the Qian Long period (1736-1795) in the Qing Dynasty, plundered state properties for twenty-five years. His confiscated fortune was estimated at 223 million taels, an amount five times more than the total state revenues of that year.⁵⁴

In China, losing power meant losing everything you ever had, therefore a common reaction among officials was to try to create as much fortune as possible while they were in power.⁵⁵ In terms of the history of Chinese bureaucracy, as a common observation provided by Samuel Huntington, in a society where opportunities for the accumulation of wealth through the private sector are limited by traditional norms, politics could easily become a path to wealth.⁵⁶ Power was even more important than wealth in imperial China. The Chinese phrases ‘*sheng guan fa cai*’⁵⁷ (get promoted and then become rich) and ‘*zheng guan duo li*’⁵⁸ (scrambling power and then acquiring benefits) reflected the close relationship between power and fortune in Chinese history.

Generally, in ancient China, numerous anti-corruption regulations and activities were designed as a soft weapon to ensure the stability of the states and to protect their fundamental interests, wherein the state consisted of royal families and various levels of bureaucrats and, consequently, corruption could in no way be eliminated as long as the basic contradiction existed between the ‘exploiting class’ and ‘the exploited class’. This contradiction has repeated itself ever since the foundation of the feudal society, and again, the state organs and all the institutions were primarily created to maintain the effectiveness of the ‘exploiting system’. Furthermore, the autocratic monarchy system in imperial China gave emperors ultimate power; they had complete privilege

⁵⁴Xingxi Zhang (1996), *Tanwu Zhiwang– He Shen (The King of Corruption– He Shen)*, Beijing: China Social Science Press, p. 3.

⁵⁵ Ting Gong (1994), *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes*, Westport: Praeger Publishers, p. 38.

⁵⁶ Samuel P. Huntington (1968), *Political Order in Changing Societies*, New Haven, Conn.: Yale University Press, p. 66.

⁵⁷ 升官发财 in Chinese.

⁵⁸ 争官夺利 in Chinese.

to be exempted from trials and regulations. The ancient empires were far from ‘being ruled by law’, and the law was designed only to supervise the state’s bureaucrats and ordinary people. Accordingly, the legislation would inevitably be misused and abused by the dictator or his trusted high-profile officials. Nonetheless, laws for punishing corrupt activities in ancient China had undergone substantive development, and in the Ming and Qing dynasties the basic features of the crime of corruption were formally formulated and the punishment of such crime was highly emphasised.

The provisions before 1949

Corruption in its various forms flourished in traditional China to such an extent that it repeatedly triggered rebellions. For example, the Taiping Rebellion (1850-1864) denounced the rules of the Qing Dynasty as favouring corrupt officials and allowing them to exploit the public.⁵⁹ The most famous rebellion in Chinese modern history is the 1911 *Xinhai* Revolution, which successfully overthrew the last imperial dynasty, Qing, and with the aim of modernisation, established the Republic of China. Nevertheless, this has not put an end to corruption – China’s bureaucratic corruption continued to flourish throughout the following periods of the Republic (1911-1916), Warlord (1916-1927), and Nationalist (1927-1949).⁶⁰

However, the crime of corruption has also been given particular emphasis and various initiatives against corruption were constantly being raised by temporary leaders. Mr. Sun Yatsen, who established the temporary government of the Republic of China, experienced anti-corruption measures from western developed countries and integrated them into the Temporary Constitutional Law. He also set up the first special anti-corruption agency within the temporary government. This said, during that unstable

⁵⁹ See generally Deman Shao (1983), *The History of Chinese Modern Political Thoughts*, Beijing: Law Publishing House.

⁶⁰ Ting Gong (1994), *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes*, Praeger Publishers, pp. 41-46.

period, due to the turmoil between warlords and the CCP and Kuo Min Tang (KMT), the special agency lacked grounds to enforce any laws. The first special anti-corruption decree in the history of China, named the Decree of Anti-Corruption, was issued by the KMT government on May 17, 1932. It provided that the Supreme Court and High Court should establish a unique tribunal to trial cases of corruption, and the chairman of every court should be the presiding judge of its associated unique tribunal. If the crime was severe enough the defendant could be sentenced to life imprisonment or the death penalty.⁶¹

The first piece of official anti-corruption law that actually referred specifically to ‘corruption’ was the Provisional Rules of Anti-Corruption, promulgated by the KMT government in 1938. It contained 11 rules and stated clearly that any military officer or public official who committed corruption during wartime, should be tried at a military tribunal; it also provided ten different crimes of corruption and their relative punishments. It was further amended and renamed by the KMT as the Rules of Anti-Corruption which came into force on June 30, 1943.⁶²

At that time in the late 1920s and early 1930s, KMT’s rival party, CCP, having observed encumbered situations with corruption among the KMT government, decided to seize the chance to project a popular image of themselves. One such example was the Campaign against Embezzlement and Waste in the *suqu* (Soviet areas). The Central Worker-Peasant Democratic Government targeted its campaign at waste, negligence, bureaucratism and embezzlement amid cadres, after the official newspaper *Hongse Zhongguo* (Red China) reported that waste had become a common problem at all levels of government.⁶³ A small southern county of Jiangxi province exposed over twenty

⁶¹ The Collection of Codes of the Republic of China, 1040.

⁶² The Collection of Codes of the Republic of China, Beijing University Press, 1995.

⁶³ Zhaokang Huang (2008), ‘Lun Zhonggong Lishishang de Fanfubai Douzheng’ (A historical view on Chinese Communist Party’s Anti-Corruption Efforts), *Dangshi Tiandi (The History of Chinese Communist Party)*, 2008 No.12, pp. 43-50. See also Ting Gong (1994), *The Politics of Corruption in*

cases of embezzlement in less than one year, which involved the county's Party Secretary, Chief Executive, Military Officer, Minister of Treasury and other high-level officials.⁶⁴

In reaction, the CCP central committee launched a movement to check this 'unhealthy phenomena'. The Worker-Peasant Inspection Committee oversaw the movement and issued a series of orders in terms of the scope, targets, and reform methods. It also established a special governmental unit to accept and analyse complaints against corrupt cadres and government agencies. In various governmental departments, several cadres were sentenced to death while others were imprisoned. Also, for the first time, the CCP established auditing agencies at all levels of government.

The first anti-corruption decree of the Communist Party was Mandate No. 26 – the Mandate of Anti-Corruption and Anti-Waste, promulgated by the Central Executive Committee of the Soviet Republic of China in December 15, 1933.⁶⁵ The decree provided that anyone who embezzled more than 500 RMB should be sentenced to death; anyone who misappropriated public money for personal interest should be treated as a criminal. There were also many other provisions, both regional and central, following a similar path. These included: the Provisional Rules of Anti-Corruption of the Shandong Province (December 3, 1940), the Provisional Rules against Embezzlement of Public Grains (August 1, 1943), the Provisional Rules of Anti-Corruption of Northwest of Shanxi Province (September, 1941), the Provisional Measures of Anti-Corruption of the Jin Ji Lu Yu Regions (February 11, 1942), the Supplemental Rules of Anti-Corruption of Jin Cha Ji Region (October 15, 1942), the Provisional Measures of Anti-Corruption of Bohai Sea Region (July, 1943), the Provisional Rules of Anti-

Contemporary China: An Analysis of Policy Outcomes, Westport: Praeger Publishers, pp. 42-43.

⁶⁴ Ibid.

⁶⁵ The Collection of Legal Instruments of the Revolutionary Bases, Beijing: Publishing House of Social Science of China, 1995.

Corruption of Northeast Liberated Area (May 6, 1947) and the Rules of Honouring Economy and Anti-Corruption of Northern Jiangsu Area (September 1, 1949).⁶⁶

The first official regulatory document concerning the crime of ‘bribery’ was the Rules of Officials Committing Corruption, promulgated by the government of the Northern Warlords (Bei-Yang Government) on March 29, 1921. This provided that any official soliciting or accepting bribes in exchange for any favours, within or beyond his responsibility, shall be convicted of the crime of receiving a bribe, and anyone who gives bribes or unlawful benefits to public officials in exchange for any favours shall be convicted of the crime of bribery.⁶⁷

It is stipulated that during the Chinese Civil War, the propensity for grievous corruption alienated the KMT government from its citizens; meanwhile the communists emerged from the countryside and obtained material support from tens of millions of peasants.⁶⁸ Scholars have argued, “if anything, the republican period was more misery and lawless than before”.⁶⁹ The KMT even extorted small businesses for nominal ‘donations’ and confiscated them when they refused. Moreover, the criminals divided up the profits from the sale of drugs and from the ‘registration fees’ paid by regular addicts through the government’s Opium Suppression Bureau.⁷⁰ In regional areas, local KMT officials were tyrants in tax collection and service demanding. It is therefore not surprising that corruption was one of the most important causes of the KMT’s defeat by the Communist People’s Liberation Army. Though initially, the Nationalist Army was better equipped and had superior numbers, the rampant corruption damaged its popularity, limited its support base, and assisted the CCP in their propaganda war.

⁶⁶ Ibid.

⁶⁷ The Collection of the Laws of Bei Yang Government, Publishing House of Social Science of China, 1998.

⁶⁸ Ting Gong (1994), *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes*, Praeger Publishers, p. 42.

⁶⁹ Immanuel C.Y. Hse (1975), *The Rise of Modern China*, New York: Oxford University Press, p. 588.

⁷⁰ Jonathan Spence (1990), *The Search for Modern China*, New York: W. W. Norton & Company, p. 362.

After the modern foundation of the People's Republic of China

The Communist Party eventually survived the Civil War and subsequently founded the People's Republic of China (PRC) on 1st October 1949. Having observed and learnt from previous experiences, the leading committee of the ruling party, the CCP, again attached great importance to legislation in fighting economic crime. Since then, several movements against economic crime were initiated and various regulations and laws were promulgated.

During the period of the Communist Party establishing the basis of anti-corruption laws between 1949 and 1951, the government set up a series of governmental institutions with anti-corruption functions and activities. In creating a solid legal foundation to monitor anti-corruption campaigns, article 18 of the 'Common Programme of the Chinese People's Political Consultative Conference (CPPCC)', the provisional constitution in 1949, stated "all government institutions of the PRC should practice a revolutionary working style, and this should be uncorrupted, simple and in the service of the people; corruption should be severely punished, waste should be prohibited, and previous bureaucratic working style detached from the people should be opposed."⁷¹ This article became the basis for formulating anti-corruption regulation and policy in the early days of the PRC, and has been further incorporated in later constitutions.

To implement those anti-corruption obligations, the CCP set up a special governmental organisation, the Commission for Discipline Inspection, solely for investigating and penalising Communist Party members who violated party discipline. The government also established a supervisory committee, which was designed for supervising the activities of government institutions and civil servants to ensure honest behaviour; and it had the authority to rectify improper activities and punish those who breached their

⁷¹ Guoqing Liang and Feng Ye (1994), *Zhongwai fan Fubai Shiyong Quanshu (Complete Book on Chinese and Comparative Anti-Corruption Work)*, Beijing: Xinhua Press, p. 713.

duties. The People's Procuratorate was also established at that time, responsible for investigating and prosecuting those who were alleged to have enacted corrupt activities.⁷² These institutions were functional institutions for combating corruption after the foundation of the PRC.

Those initial measures were mainly educational and party disciplinary punishments. For example, in 1950, 1760 people in 27 departments within the Central Government were punished by party discipline in the Party Rectification Campaign.⁷³ Legal measures were also utilised. The incomplete statistics collected by the Supreme People's Procuratorate from Sichuan, Jiangxi, Xinjiang, Tianjin, Shenyang, Wuhan and thirteen other provinces and municipalities, illustrated that from July 1950 to June 1951, approximately 6,000 corruption cases were prosecuted by the people's procuratorates, involving some RMB (old) 300 billion (about RMB 30 million) of state assets.

Three and Five Anti's Campaign

The CCP believed that a capable and reliable state apparatus on the one hand, and the obedience and cooperative private enterprises on the other, were the two prerequisites for a successful socialist transformation.⁷⁴ As a result, in order to eliminate the growing concern of corruption which had been hindering New China's economic development, only two years after the CCP took power, between 1951 and 1952, China initiated its first large-scale anti-corruption campaign in PRC history – the Three and Five Anti's Campaign. Due to the exposure of serious corruption, on December 1, 1951, the CCP issued the Resolution on Better Staff and Simpler Administration, Production Increase and Austerity, and initiated the campaign firstly with anti-corruption, anti-waste, and anti-bureaucratism among government officials. The main target, according to Teng

⁷² Xueqin Li (1999), *Xinzhongguo Fanfubai Dashi Jiyao (Summary of Major Anti-Corruption Events since the Foundation of People's Republic of China)*, Tianjin: Nankai University Press, p. 2.

⁷³ Xinmin Tian (1997), *On Anti-Corruption*, Chengdu: Sichuan Education Press, p. 352.

⁷⁴ *Nanfang Ribao (Southern Daily)*, January 1, 1952, Guangzhou.

Daiyuan, then Minister for Railways, included “all actions in which public funds, property or materials are retained by individuals for private reasons, as well as the usurpation of power to steal, extort, and take bribes.”⁷⁵

The campaign soon turned its focus to those private enterprises through the Five-Anti’s movement against bribery, tax evasion, theft of state assets, cheating in labour and materials, and stealing national economic intelligence. Chairman Mao made it very clear that combating corruption, waste and bureaucratism should be viewed as important as suppressing counter-revolutionary movements, and they should encourage people to fight those misconducts thereby establishing a strong public voice – only this could threaten corrupt officials and eventually eliminate corruption.⁷⁶ According to some statistics, about 80% of cases were reported by ordinary people.⁷⁷

As summarised by Ting Gong, this campaign could be divided into four stages – mobilisation (December 1-31, 1951), confession and accusation (January 1-25, 1952), expansion (January 26-March 1952), and disposition (April-June 1952).⁷⁸ It is worth mentioning that the procedure of various Chinese campaigns ever since then follows this four-step routine. In the first stage, mobilization, the party and other leading government organs such as the CPPCC and the State Council issued a series of directives to encourage the public to take part in the campaign. Followed by several editorials published by *The People’s Daily*, people were then asked to gather together to study Chairman Mao’s works and documents, while cadres criticised waste, bureaucratism, and rightist tendencies.

⁷⁵ *Renmin Ribao (People’s Daily)*, December 21, 1951, Beijing.

⁷⁶ ‘Mao Zedong guanyu fandui zichanjieji fushi de shifen wendian’ (Mao Zedong’s ten messages concerning anti-bourgeoisie), in *Wenxian yu Yanjiu (Literature and Research)*, 1986 compiled edition.

⁷⁷ Meiling Zhang (1996), ‘Dang de lishishang fanfubai douzheng de jingyan jiaoxun’ (A historical review of anti-corruption experiences of Chinese Communist Party), *Shandong Social Science*, Vol. 56, No.4, pp. 74-77.

⁷⁸ Ting Gong (1994), *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes*, Westport: Praeger Publishers, pp. 67-71.

As the campaign entered its second phase, confession and accusation, the party urged all its members who had engaged in corrupt activities to confess. At the same time, the party encouraged the general public to expose and denounce cadres who were involved in corruption, waste, and bureaucratism. The party made it very clear that people could expose individuals publicly or privately, orally or in writing, and anonymously or with their names, and the party guaranteed they would be protected against retaliation in any event. According to statistics, during the first month in Beijing, 556 people from 24 different administrative units, and 250 from the army's logistic units, confessed their crime of corruption; additionally, 823 people from 18 administrative units, and 566 from military units informed against others and exposed a total of 359 cases.⁷⁹

With the campaign continuing, more cases were explored. It entered its third phase, 'expansion', which further increased the party's concern. On January 26, 1952, Liu Ren, the chairman of the Economy Inspection Committee of Beijing Municipality, claimed that 80 percent of the discovered corrupt related behaviour had connections with private industrialists: among them were agents of the bourgeois class or of bourgeoisie origin.⁸⁰ Thus, unsurprisingly, the campaign soon investigated private enterprises and business circles. On January 26, 1952, the party released the Directive on Launching a Large-Scale, Resolute, and Thorough 'Five Anti' Struggle in Urban Areas. It requested all cities should begin the battle against the 'Five Evils' in the first ten days of February.⁸¹ The campaign was immediately intensified and numerous 'working teams' or 'tiger-hunting teams'⁸² emerged, composed of workers and mass activists from ordinary members of staff. These teams soon investigated private entrepreneurs. The

⁷⁹ Huning Wang (1990), *Fanfubai, Zhongguo de Shiyao (Anti-corruption, China's Experiment)*, Haikou: Sanhuan Publisher, p. 34.

⁸⁰ *Xuexi (Study)*, February 10, 1952, Beijing, p. 16.

⁸¹ Zedong Mao (1977), *Selected Works*, Beijing: Foreign Language Press, Volume 5, p. 66.

⁸² During Three and Five Anti's Campaign, the term 'tiger' was used to refer to those private businessmen who 'ate' (stole) public property.

investigative results of nine major cities involved 450,000 private enterprises, with 340,000 (76 percent) engaged in corruption.⁸³

The final phase commenced in mid-March 1952, when the party published a series of documents relating to how to handle the exposed cases, including Provisions on Handling Corruption and Waste and Overcoming Bureaucratic Mistakes (March 8, 1952), Provisions on the Establishment of the People's Courts in the Three Anti's Campaign (March 8, 1952), Provisions on Recovering Stolen Money and Properties (March 8, 1952) and the Act of Corruption Punishment of the People's Republic of China (April 21, 1952). The Beijing People's Government also issued the Criteria and Measures of Classifying Private Entrepreneurs and Merchants. These documents provided general principles and detailed guidelines in terms of dealing with corruption. For example, penalties for the crime of corruption were divided into several categories, depending on the amount of money: 1) under 100 yuan: no penalty; 2) 100-1,000 yuan: disciplinary sanction;⁸⁴ 3) 1,000-5,000 yuan: 1-5 years imprisonment; 4) 5,000-10,000 yuan: 5-10 years imprisonment; 5) more than 10,000 yuan: from 10 years imprisonment, up to the death penalty.

During this Three and Five Anti's campaign, some 1,226,984 corrupt party and government members, including many high-ranking party officials, were penalised. Among them, over 100,000 people had embezzled over 10 million Yuan, and the total amount embezzled reached over 600 billion yuan.⁸⁵ The corruption case of Liu Qingshan and Zhang Zishan during the campaign was billed as the 'first serious

⁸³ Yuping Ma and Yuchang Huang (1989), *Zhongguo: Zuotian he Jintian (China: Yesterday and Today)*, Beijing: The Liberation Army's Publisher, p. 739.

⁸⁴ Disciplinary sanction included six categories: warning, recording demerit, demoting position, dismissing from post, and discharging from job.

⁸⁵ Yifan Li (1993), *We Can Jump Over this Periodic Law – Mao Zedong's View on Clean and Honest Government*, Beijing: China Politics and Law University Press, p. 99; Changshui Cai (2000), *Manual on Self-discipline and Honesty Education to Party and Government Leading Cadres*, Beijing: China Yanshi Press, p. 1768; Jiliang Yang (1997), *On Anti-Corruption*, Beijing: China Social Science Press, p. 87.

criminal case of New China'⁸⁶. Liu, the party secretary of Tianjin Municipality, and Zhang, the administrative chief, were executed for misappropriation of huge sums of state funds.⁸⁷

Toward the end of the campaign, on June 13, 1952, the State Council of the CCP issued a Directive to Conclude the Five-Anti's Campaign. The directive interpreted some policy issues in disposing of cases while declaring that the campaign had reached its concluding stage. In the following months, more emphasis was placed on the establishment of new and efficient work systems. The Three and Five Anti's Campaign as a mass campaign concluded in June 1952.

The period of disruption

From 1957 to 1976, various issues meant anti-corruption movements in China were seriously disrupted. During this period, while such campaigns achieved some successes in the Socialist Education Movement between 1963-1966 (a nationwide movement to 'clean' matters up in the fields of politics, economics, organization and ideology, also known as the 'four-cleanups' movement), the 'Anti-Rightists' movement and the 'Cultural Revolution' seriously damaged the substantive anti-corruption efforts. Institutional developments stagnated, and governmental agencies specifically dealing with corruption were dissolved. Nevertheless, despite continual political movements, anti-corruption directives regularly appeared on the government agenda, even during the Cultural Revolution. For example, the CCP issued the Instructions against Corruption, Theft, Speculation and Profiteering, and the Notice against Waste.⁸⁸ Many crimes of corruption and theft, speculation and profiteering throughout those political

⁸⁶ Bing Lu, Yuxin Shi, and Yongzhao Wu (1990), *Zhongguo Fanfubai Diyi Daan (The First Serious Case of Corruption in the New China)*, Beijing: China Law Press.

⁸⁷ According to the 'News of the Communist Party of China, Corruption Case of Liu Qingshan and Zhang Zishan', Liu Qingshan embezzled 184 million yuan (old currency) and Zhang Zishan embezzled 194 million yuan (old currency). Exchange rate: 10,000 old Chinese yuan equals to 1 new Chinese yuan.

⁸⁸ Gailong Liao (2000), *Zhonghua Renmin Gongheguo Biannianshi (Chronicle of the People's Republic of China)*, Zhengzhou: Henan People's Press, p. 365.

movements were exposed and penalised. The spread of corruption and bribery was controlled but only to a certain degree.

New laws and new approaches

Generally, in the first thirty years of the PRC history, corruption persisted and serious cases manifested. The CCP accepted that fighting corruption would require a long-term strategy rather than short periodic movements. Having experienced the stagnation period of China's reform and development, the period between 1977 and 1981 was a time when anti-corruption measures resumed. Following the 'Cultural Revolution' from August 1977 to December 1978, the Third Plenary Session of the Eleventh National Congress of the CCP convened, where the CCP central committee decided on 'striking hard' against economic crimes and once again directed the nation's attention towards anti-corruption.

Various directives and regulations that were designed to control economic crime, in particular, corruption, were promulgated throughout the unstable period of the PRC's first thirty years. On 21 April 1952, under the provision of severely punishing corruption in the Common Programme of the Chinese People's Political Conclusive Conference, which was the provisional constitution law of the PRC, the government promulgated 'Rules on Punishing Corruption of the People's Republic of China'. This rule was developed based on the legislation discussed in this chapter, before in the Democratic Revolution Period, and was the basic rule in punishing corrupt officials before the enactment of China's first Criminal Law. On 1 July 1979, the National People's Congress (NPC), the superior legislature within China, officially formulated the Criminal Law of the People's Republic of China⁸⁹, which clearly defined the crime of corruption and bribery. According to article 155 and 185, "any state functionary who

⁸⁹ Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No.5 of the Chairman of the Standing Committee of the National People's Congress on 6 July 1979, and effective as of 1 January 1980.

takes advantage of his office to embezzle public property shall be sentenced to fixed-term imprisonment of not more than 5 years or criminal detention; if the amount embezzled is huge and the circumstances are grave, he shall be sentenced to fixed-term imprisonment of not less than five years; if the circumstances are especially grave, he shall be sentenced to life imprisonment or death. For the crime mentioned above, the offender shall be sentenced concurrently to confiscation of property or ordered to make restitution or compensation payments. If any person entrusted by state organs, enterprises, institutions or people's organizations to perform public duties commits the crime mentioned in the first part of this article, he shall be punished in accordance with the provisions of the two preceding parts",⁹⁰ "any state functionary who takes advantage of his office to accept bribes shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention. The illicit funds or properties he received as bribes shall be confiscated, and public funds or properties shall be recovered. Whoever commits the crime mentioned in the preceding part and causes great damage to the state or its citizens shall be sentenced to fixed-term imprisonment of not less than five years. Whoever offers or introduces a bribe to a state functionary shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention".⁹¹

In 1979, the NPC also formulated 'the Ordinance on Arrest and Detention', 'the Criminal Procedural Law' and 'the Law on the Organisation of People's Prosecution Services', which provide the standard procedure for the Prosecution Service to investigate and prosecute crimes of corruption and bribery.⁹² Furthermore, article 13 of 'the Criminal Procedure Law' robustly reflected the special attention that had been given by the legislature to the limits of jurisdiction in filing and investigating such cases of corruption and bribery. It stipulated that "cases involving crimes of corruption,

⁹⁰ Article 155 of the Criminal Law of the People's Republic of China, 1979.

⁹¹ Article 185 of the Criminal Law of the People's Republic of China, 1979.

⁹² *Compilation of Selected Laws of the People's Republic of China*, Volume 2, Changchun: Jilin People's Press, 1984, at p. 52, p. 91 and p. 133.

violation of the citizens democratic rights and dereliction of duty (including bribery), as well as other cases which the people's procuratorates consider necessary to handle directly themselves, shall be placed on file by the people's procuratorates, and the people's procuratorates have the right to decide whether to initiate a public prosecution."⁹³

Prosecution system

The restoration of the Prosecution system began on March 5, 1978. The 'Constitution of the People's Republic of China' 1978 version was adopted at the First Meeting of the Fifth National People's Congress. The People's Prosecution Service was restored according to the Constitution, and the People's Prosecution Service again began to shoulder the responsibilities to investigate and prosecute corruption and bribery cases.

In the following year after the Criminal Law and Criminal Procedure Law was promulgated, the Prosecution Service in total investigated and prosecuted over 4,000 cases of economic crimes, 43 percent of which were corruption cases, with 89 cases involving over one million Chinese yuan.⁹⁴ In 1981, the prosecution service again directly investigated and prosecuted over 31,000 cases of economic crimes.⁹⁵ It can be seen that the number of cases of economic crimes being prosecuted by People's Procuratorates rose sharply in the following two years after the corresponding legislation and institutions were established and they had increasingly effective control of such crimes related to corruption.

⁹³ Article 13 of the Criminal Procedure Law of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No.6 of the Chairman of the Standing Committee of the National People's Congress on July 7, 1979 and effective as of January 1, 1980.

⁹⁴ Huoqing Huang (1980), Working Reports of Supreme People's Procuratorate, September 2, 1980.

⁹⁵ Ibid, December 7, 1981.

Central commission for discipline and inspection

The Central Commission for Discipline Inspection (CCDI), which was dismissed during the Cultural Revolution, was restored at the Third Plenary Session of the Eleventh Central Committee in December 1978, under the leadership of Deng Xiaoping.⁹⁶ The CCDI is regarded as the highest internal institution of the CCP, tasked with enforcing internal rules and regulations and combating corruption and malfeasance within the party. Interestingly, as the clear majority of government officials at all levels were also Communist Party members, as a result the commission is the dominant anti-corruption body in China. The first plenary meeting of the commission was held in January 1979, in which it endorsed its mission, functions and powers and adopted its organizational framework. Since then, a series of directives against various malpractices, irregularities, and corruption were issued by the CCDI on behalf of the party; many directives have also been issued directly by the Central Committee of the Party.⁹⁷

Conclusion

In the years following, the CCP attempted to bring order out of chaos and change the focus of the future from class struggle to economic construction.⁹⁸ The party and the government did not fully understand the nature of corruption in China so they failed to adopt effective measures to control it; they believed that it was merely an unhealthy tendency and naively thought it could be rooted out once directives and summons were implemented. The *People's Daily* issued an editorial entitled 'Come out Boldly and Strike Firmly – Unhealthy Tendencies in Economic Arena!' in 1981.⁹⁹ The editorial

⁹⁶ *Compilation of Selected Important Documents since the Third Plenary Session of the National Congress of the Party*, Beijing: The People's Press, 1982, p. 2.

⁹⁷ Shiyong Li (1987), *The Current System of Procuratorates in China*, Beijing: the Chinese Social Science Press, p. 184.

⁹⁸ Namely negating the "Great Cultural Revolution", clarifying confusion of the Great Cultural Revolution, rehabilitating unjust, false and erroneous cases occurred in the various political movements since the Cultural Revolution and the founding of the PRC, bringing back the healthy and normal order.

⁹⁹ *People's Daily*, Editorial, 18 September 1981.

stated, “The main problem of eliminating unhealthy tendencies now is not that of lack of clarity between right and wrong, or is that of issuing directives and summons. It is whether the leaders are bold enough to strike out at those tendencies, and to self-criticise. It is a spiritual problem.”

It is said that corruption in contemporary China is often seen as a function of changing political economy, in particular, the transition from state socialism to a market economy.¹⁰⁰ In 1978, Deng Xiaoping enacted economic reform and the ‘open door policy’, which, on one hand stimulated China’s economic growth and created massive business activities, while on the other, economic reform had also involuntarily contributed a great deal of opportunities for public officials to seek private gain by abusing their position. The centrally planned economic system allowed public officials to procure illicit gains from selling goods and materials from state-owned enterprises to the market, due to the price margin. Therefore, in the next chapter, the author will examine the extent of economic crimes that occurred in the context of the opening of China’s economy, and provide a detailed analysis of both new opportunities and challenges that the country and the party were facing.

¹⁰⁰ Xiaobo Lu (2000), *Cadres and Corruption: The Organizational Involvement of the Chinese Communist Party*, Stanford: Stanford University Press, p. 190.

Chapter 3: Economic Crime and Corruption in the Context of the Opening of China

Introduction – the opening of the Chinese economy

China's closed mind in the past excluded the nation from involvement in international comprehension and solution-seeking forums regarding economic crime. It is fair to say that in modern Chinese history one of the most significant landmarks was the 1978 Chinese economic reform. This is widely seen as a turning point following the 10-year dark period of China's Culture Revolution. The Chinese economic reform¹ commenced in 1978 and in general terms refers to the programme of economic reform by reformists within the ruling party, the Chinese Communist Party (CCP) led by Deng Xiaoping, named 'Socialism with Chinese characteristics' in the People's Republic of China (PRC).

During the ten-year Cultural Revolution between 1966 and 1976, the PRC's domestic production had become seriously dislocated. Chronic disproportions had appeared in various sectors of the economy, notably among agricultural, light and heavy industry. The economic organisations and institutions had proved to be a barrier to both human initiatives and material growth.² Consequently, the CCP and the government authorities determined to push forward domestic production with the aim of fundamentally increasing people's standard of living.³

Having assessed the successes and failures in the past, economists and reformists

¹ 改革开放 in Chinese, literally means Reform & Opening up.

² Zhuoyuan Zhang (1982), 'Introduction: China's Economy After the "Cultural Revolution"', in *China's Economic Reform*, edited by Lin Wei & Arnold Chao, Philadelphia: University of Pennsylvania Press, p. 1; see also Dwight H. Perkins, 'Reforming China's economic system', *Journal of Economic Literature*, Vol. 26, No. 2, pp. 601-645.

³ See more at Joseph C. H. Chai (1996), 'Consumption and living standards in China', in *The Chinese Economy under Deng Xiaoping*, edited by Robert F. Ash and Y. Y. Kueh, Oxford: Clarendon Press, pp. 247-276.

forwarded various ideas to change the pattern of China's economy and reshape its economic setup.⁴ The general proposal was approved at the Third Plenary Session of the Eleventh Central Committee of the CCP in December 1978, followed by the announcement of a policy of readjustment, reform, consolidation, and improvement. In a brief explanation, readjustment is remedying the disproportions among different sectors of the economy, principally among agriculture, light industry and heavy industry, as well as between the allocations of funds for production, construction and those for people's use.⁵ Reform is transforming the economic system, or management system, both nationally and within every enterprise, particularly those in a state of confusion. Improvement is defined as the achievement of a higher level of production, technology, and managerial skills.⁶

The issue that the western press regarded as one of the most significant elements of economic reform, was that China after so many years finally decided to open its door to foreign investments.⁷ Market principle, introduced by the economic reform, was carried out in two stages. As well as opening its business to other countries, in the first stage of the reform between the late 1970s and the early 1980s, agriculture was decollectivized and entrepreneurs were permitted to run their own business, even though at that time, the majority of industry remained state-owned.⁸ In the second stage

⁴ See Alfred K. Ho (2004), *China's Reform and Reformers*, Westport: Praeger Publishers, pp. 81-114.

⁵ See Gary H. Jefferson (1995), 'Reforming China's industrial sector: Mapping the transition', in *Productivity, Efficiency and Reform in China's Economy*, edited by Kai-yuen Tsui, Tie-tung Hsueh and Thomas G. Rawski, Hong Kong: The Chinese University of Hong Kong, pp. 1-18.

⁶ Discussed at 3rd session of the 11th Central Committee of the Chinese Communist Party, 18-22 December 1978; see also a general overview of the reform at Raphael Shen (2000), *China's Economic Reform: An Experiment in Pragmatic Socialism*, Chapter 3: Reform: Macro-overview, Westport: Praeger Publishers, pp. 39-54.

⁷ See generally Peter Nolan (2004), *Transforming China: Globalization, Transition and Development*, London: Wimbledon Publishing Company; and Nicholas R. Lardy (1992), *Foreign Trade and Economic Reform in China: 1978-1990*, Cambridge: Cambridge University Press.

⁸ See Shulian Zhou (1982), 'The market mechanism in a planned economy', and Yulin Zhang (1982), 'Readjustment and reform in agriculture', both in *China's Economic Reform*, edited by Lin Wei and Arnold Chao, Philadelphia: University of Pennsylvania Press, pp. 103-114 and 123-146; and Xiang Wu (1994), 'Why did China's reforms start in the countryside?', *China's Human Resources Development*, 1994, No. 1, included in Christopher Howe, Y. Y. Kueh and Robert Ash (2003), *China's Economic Reform:*

between the late 1980s and 1990s, the main features involved the privatisation and contracting-out of most state-owned enterprises, lifting price controls, and the promotion of policies and regulations, though state control in major sectors such as banking and petroleum remained.⁹ This was the beginning of a remarkable growth of the private sector in China; the figures illustrated that the private industry had contributed as much as 70 percent of China's gross domestic product by 2005.¹⁰ As Golley and Song stated, the results were outstanding: "within just three decades, China has succeeded in transforming itself from a centrally planned closed economy into one of the world's most dynamic and globally integrated market economies. The dynamics unleashed by Deng Xiaoping's reforms, open-door policies and institutional changes have unleashed enormous entrepreneurial energy and propelled continuous capital accumulation, productivity gains and trade and income growth on a scale the world has never seen before. During this period, China's total gross domestic product, industrial output, foreign trade and, importantly, its per capita income increased respectively by factors of 16, 27, 124 and 12. As a result, the incidence and severity of poverty has declined dramatically in China".¹¹

The last few decades have seen a great deal of in-depth studies on China's economic development. However, while the world is recognising and marvelling at China's

A Study with Documents, London and New York: RoutledgeCurzon, pp. 232-240.

⁹ See Susan Young (1995), *Private Business and Economic Reform in China*, Chapter 2: Reviving private industry and commerce, New York: M. E. Sharpe, pp. 13-24; see also Alvin Rabushka (1987), *The New China: Comparative Economic Development in Mainland China, Taiwan, and Hong Kong*, Chapter 4: China goes to market, San Francisco: Westview Press, pp. 71-94; and Yongzheng Yang (2004), 'SOE reform and private sector development in China', in *China's Third Economic Transformation: The Rise of the Private Economy*, edited by Ross Garnaut and Ligang Song, London and New York: RoutledgeCurzon, pp. 72-88.

¹⁰ Peter Engardio (2005), 'China is a Private-Sector Economy', 21 August 2005, *Bloomberg Businessweek*. see more at Xiaowen Tian (2004), 'Privatisation and economic performance in China', in *China's Third Economic Transformation: The Rise of the Private Economy*, edited by Ross Garnaut and Ligang Song, London and New York: RoutledgeCurzon, pp. 60-61.

¹¹ Jane Golley and Ligang Song (2010), 'Chinese economic reform and development: achievements, emerging challenges and unfinished tasks', in Ross Garnaut, Jane Golley and Ligang Song (eds), *China: The Next Twenty Years of Reform and Development*, Canberra: ANU E Press, at p. 1.

economic accomplishments since the economic reform, few, if any, works have examined its drawbacks. For example, the opening-up of the economy has provided unscrupulous individuals with greater opportunities to exploit the state, by moving their ill-gotten gains beyond the reach of the domestic courts or hiding their ‘dirty’ money in foreign bank accounts. It is the case that China’s criminal justice system has not kept pace with economic crime control. China only had its first comprehensive Criminal Code in 1979, when its economy was still centrally planned. It is still the case that through the transition to a market-orientated economy, local officials abusively misuse their power, taking enormous advantage of the two-tiered price system through speculation and racketeering. All these issues listed above will be discussed in detail within this chapter.

The rest of the world may be amazed with what China has achieved so far. This chapter however, is not going to praise its economic results, nor reflect on how successful China’s economic development is, but will provide the reader with a detailed description and analysis of the overall problems this reform has brought and how the ruling party and government authorities have handled them, together with some outstanding issues.

The relevance of crimes in terms of stability

Before the ‘opening-up’ of the Chinese economy, the PRC was a socialist country under the tight political control of the CCP. The primary means of production were owned by the state or collective. Under this centrally planned economy, the government designated the qualities and quantities of production, designing production processes and controlling distribution lines.¹² However, this centrally controlled system has been

¹² For a detailed discussion on China’s centrally planned system before the reform, see Christin P. W. Wong, Christopher Heady, and Wing T. Woo (1995), *Fiscal Management and Economic Reform in the People’s Republic of China*, London: Oxford University Press; Michel Oksenberg and James Tong (1991), ‘The evolution of central-provincial fiscal relations in China, 1971-1984: The formal system’, *China Quarterly*, Vol. 125, pp. 1-32.

largely transformed since the economic reform, with new systemic features emerging. During the transition period to the market-oriented economy, central administrative control began to weaken as the CCP began to relinquish part of its control to local government.¹³ The subsequent increase in local autonomy on the other hand, created opportunities for personal and institutional corruption. In addition, the party in the 1980s adopted a two-tiered price system in which identical goods were offered for sale at different prices and were available at two distinct distribution outlets: the government institutions and the market. This created its own range of economic crimes committed by insiders of the party such as speculation and arbitrage. Furthermore, regional imbalances and urban-rural wealth disparity became fundamental problems that came with the reform. Indeed, economic expansion came at a cost to social cohesion, as China had to confront problems of crime and corruption.¹⁴

As a result, the reform in many ways stimulated an emergence of economic crime within society. Of course, the Chinese government did not leave these deleterious roots to grow. It enacted its first ever Criminal Law¹⁵ and Criminal Procedure Law¹⁶ since the founding of the PRC. Much emphasis had been given to economic crimes as they were mentioned among four out of a total of eight chapters of the Criminal Code, respectively: Chapter Three: Crimes of Undermining the Socialist Economic Order (e.g. speculation, smuggling, counterfeiting and tax evasion); Chapter Five: Crimes of Property (e.g. embezzlement and extortion); Chapter Six: Crimes of Obstructing the

¹³ Muqiao Xue (1981), *China's Socialist Economy*, 1st Edition, Beijing: Foreign Languages Press, pp. 203-233 (discussion on the Maoist system of economic management).

¹⁴ Roderic Broadhurst, John Bacon-Shone, Brigitte Bouhours and Thierry Bouhours (2011), *Business and the Risk of Crime in China*, Canberra: Australian National University E Press, pp. 6-8; see also Julia Kwong (1997), *The Political Economy of Corruption in China*, Armonk, New York: M.E. Sharpe, Inc, pp. 29-32.

¹⁵ Criminal Law of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No.5 of the Chairman of the Standing Committee of the National People's Congress on July 6, 1979, and effective as of January 1, 1980.

¹⁶ Criminal Procedure Law of the People's Republic of China, adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No.6 of the Chairman of the Standing Committee of the National People's Congress on July 6, 1979, and effective as of January 1, 1980.

Administration of Public Order (e.g. forging, altering, stealing or destroying official documents, certificates or seals of state, enterprises, institutions, or people's organisations), and Chapter Eight: Crimes of Dereliction of Duty (e.g. state functionaries making it illegal to accept or offer bribes, and neglect official duties).

Establishing the rule of law – the background

Even though there were areas of society with improved conditions, the occurrence of massive inequality did little to legitimise the party's founding ideals, as they faced increasing social unrest.¹⁷ Growing inequality, the near and final collapse of the Soviet Union and other communist states, and the pressure for political reform in China (e.g. 4th June 1989 Tiananmen Square movement) urged vital regulatory and legal transformations to the political and policing arms of the country.

The Chinese government and its public security organs have acknowledged the influence of rapid economic development on the emergence of illegal opportunities for economic crime. The Research Unit Number Five of the Ministry of Public Security of the PRC published an influential report entitled 'The Basic Character of Crime in Contemporary China' in 1989. This confidential report acknowledged that crime originated from social contradictions, which had been deepened by the commodity economy and the transition to a new system, which had conflicts and loopholes in social administration.¹⁸ It also pointed out the changes in the criminals' demography, particularly the rising number of perpetrators from the unemployed and the emergence of gangs. The deficient legal response and the inability to control and defend against crime was also recognised. The report states: "In recent years, there has been vigorous development of the socialist commodity economy. The commodity economy is a

¹⁷ *People's Daily* Online n.d., cited by Roderic Broadhurst, John Bacon-Shone, Brigitte Bouhours and Thierry Bouhours (2011), *Business and the Risk of Crime in China*, Canberra: Australian National University E Press, at p. 6.

¹⁸ Michael Dutton (1997), 'The basic character of crime in contemporary China', *China Quarterly*, No. 149, pp. 160-177.

powerful lever for improving social development, but it is also a major inducement to crime. With the development of a commodity economy, money has functioned as a ‘battering ram’, knocking down traditional values and concepts. Accordingly, there have been great changes in people’s ideology. The historical tradition of looking down on trade has disappeared. In its place has emerged a new craze for trade and running business, and what most people now want is simply to make money. At the same time, there has been one wave after another of consumerism that has engulfed the country. The huge gap between the high consumption lust and existing buying power of the people has resulted in a serious contradiction emerging. Stimulated by the above factors, some people who cannot fulfil their personal desires for material enjoyment through proper and legal means have taken the other route – namely, getting money through criminal activity.”¹⁹

The circumstance demonstrated in the above quote reflects Robert Merton’s ‘innovation’ adaptation phenomenon, in reference to his ‘strain theory’²⁰. It suggests that in the context of rapid economic and social changes in Chinese society, functionalist theories of crime to adapt to strain enhanced by institutional anomie are pertinent.²¹ Institutional and regulatory weakness arises together with institutional anomie when the rules are not clear, for example, in a transitional economy or a colonial order of dubious legitimacy. Under those situations, a permissive environment for crime emerges, deteriorated by the insufficient capabilities of anti-crime authorities and other forces of law and order.

¹⁹ Ministry of Public Security Research Unit Number Five, cited in Michael Dutton (1997), ‘The basic character of crime in contemporary China’, *China Quarterly*, No. 149, p. 165.

²⁰ Robert King Merton’s Strain Theory explains in a society strain occurs when people faced with a gap between their goals (usually finances/money related) and their current status. They have five ways to adapt: Conformity; Innovation; Ritualism; Retreatism; and Rebellion. See more details at Robert K. Merton (1932), ‘Social structure and anomie’, *American Sociological Review*, 3(5), pp. 672-682.

²¹ Jon G. Bernburg (2002), ‘Anomie, social anger and crime: a theoretical examination of institutional anomie theory’, *British Journal of Criminology*, 42(4), 729-742; see also Steven Messner and Richard Rosenfeld (2009), ‘Institutional theory: a macro-sociological explanation of crime’, in Marvin D. Krohn, Alan J. Lizotte and Gina O. Hall (eds), *Handbook of Sociology and Social Research*, New York: Springer Publisher, pp. 209-224

In various political regimes throughout contemporary history, it has not been uncommon for top politicians and policymakers to claim that certain forms of justice should be side-lined in favour of fast economic development. Law and justice were sometimes portrayed as being a costly irrelevance to economic development. This view, for example, was prevalent in the former Prime Minister of Singapore, Lee Kuan Yew's discourse and often reflected his political decisions, where for example, basic human rights were normally sacrificed in favour of rapid economic growth.²² Relevantly, the point that some forms of social justice, those implied in generous redistribution policies and a large welfare state, is undermining economic development. It is often assumed that distributive justice will result from prioritising economic development, a rationale that underlines the assumptions on the 'trickle down' effect of economic growth.²³

On the other hand, with the rise of New Institutional Economics in the 1980s, a consensus seems to have emerged among many economists and development experts regarding the undeniable importance of institutions in facilitating long-term socio-economic growth of low-income countries.²⁴ With this institutionalism resurgence, increasing emphasis has been on examining the role that legal and judicial institutions could possibly play in order to promote material improvements in the quality of people's lives. A well-articulated summary of the economic benefits that could be extracted from an efficient and accessible judicial system was provided in a report produced by the United Nations Commission on Legal Empowerment, launched in 2005: "Four billion people around the world are robbed of the chance to better their lives and climb out of poverty because they are excluded from the rule of law... it is

²² See for example discussions at Amartya Sen (1999), *Development as Freedom*, Oxford: Oxford University Press, pp. 231-233; and Fareed Zakaria and Lee Kuan Yew (1994), 'Culture is destiny: a conversation with Lee Kuan Yew', *Foreign Affairs*, Vol. 73, No. 2, pp. 109-126.

²³ Ibid; and also see generally Frances Stewart (1985), *Basic Needs in Developing Countries*, Baltimore, Maryland: Johns Hopkins University Press.

²⁴ See more at Douglass C. North (1990), *Institutions, Institutional Change and Economic Performance*, Cambridge: Cambridge University Press, at p. 8 and pp. 112-113.

not the absence of assets or lack of work that holds them back, but the fact that the assets and work are insecure, unprotected, and far less productive than they might be”.²⁵

Examined in context, it is clear that far from being a costly irrelevance, the notion of justice is integral to a country’s sustainable development.²⁶ Furthermore, the importance of establishing the rule of law was also noted by Member States in the ‘Declaration of the High-level Meeting on the Rule of Law’ hosted by the United Nations (UN), that “the rule of law and development are strongly interrelated and mutually reinforcing, and the advancement of the rule of law at national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realisation of all human rights and fundamental freedoms, including the right to development, all of which in turn, reinforce the rule of law”.²⁷ At national level, the UN further pointed out that the rule of law is essential to create an environment for providing sustainable livelihoods and eradicating poverty. The rule of law fosters development through strengthening the voices of individuals and communities, by “providing access to justice, ensuring due process and establishing remedies for the violation of rights”. Legal empowerment goes far beyond the provision of remedies and encourages improved economic opportunities.²⁸

Christine Lagarde, managing director of the International Monetary Fund (IMF), publicly stated that the underground economy is estimated at 30-40 percent of GDP in developing countries, and around 15 percent in advanced economies such as the US. She called upon people to consider the lost productive potential in an economy where

²⁵ United Nations Commission on Legal Empowerment of the Poor (2008), ‘Making the Law Work for Everyone’, pp. 1-2.

²⁶ See more at J.B. Ruhl (1999), ‘The co-evolution of sustainable development and environmental justice: cooperation, then competition, then conflict’, *Duke Environmental Law and Policy*, 9.

²⁷ United Nations and the Rule of Law: towards a just, secure and peaceful world, governed by the rule of law. Available at: <https://www.un.org/ruleoflaw/rule-of-law-and-development/>.

²⁸ Ibid.

almost half of the activities are unreported and nearly half the population is beyond the reach of public services.²⁹ The IMF has emphasised the importance of strong legal and institutional framework for sustainable economic growth. This is also recognised by political scientists and economists, and above all by history – countries that have developed strong legal and institutional frameworks have improved performance in terms of sustained growth and human development.³⁰ By the same token, the World Bank research department has concluded that the power of legal and judicial reform can spur economic development, which is strongly affected by the quality of institutions – including the quality of a nation’s legal institution.³¹

In the United Kingdom, former Prime Minister David Cameron has on various occasions demonstrated the significance of upholding the rule of law. He wrote at the 799th anniversary of the Magna Carta that “we should be proud of what Britain has done to defend freedom and develop these institutions – Parliamentary democracy, a free press, the rule of law – that are so essential for people all over the world”.³² In a recent landmark international anti-corruption summit hosted in London in May 2016, he took a robust stand against corruption and described it as eroding “public trust in government, undermines the rule of law, and may give rise to political and economic grievances that may, in conjunction with other factors, fuel violent extremism”.³³ David Cameron,

²⁹ Christine Lagarde (2013), ‘Strong laws and institutions for a strong global economy’, *Washington Foreign Law Society*, June 4, 2013, available at: <https://www.imf.org/external/np/speeches/2013/060413b.htm>.

³⁰ IMF *working paper* ‘What role do legal institutions play in development’, by Keven Davis and Michael J. Trebilcock, October 20, 1999. See also Daron Acemoglu and James A. Robinson (2013), *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, Profile Books.

³¹ Rule of Law and Development, ‘Economic development and the quality of institutions’, the World Bank, available at: http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20934363~menuPK:1989584~pagePK:148956~piPK:216618~theSitePK:1974062,00.html#rule_of_law.

³² David Cameron (2014), ‘British values: article by David Cameron’, Prime Minister’s Office, published on 15 June 2014, available at: <https://www.gov.uk/government/news/british-values-article-by-david-cameron>.

³³ Anti-Corruption Summit London 2016 – Communique, as agreed by the participating countries and, where appropriate, international organisations, published on 12 May 2016.

along with participating countries, issued the ‘Global Declaration Against Corruption’ on the same day and announced that legislation would soon be introduced to expose the beneficial ownership of UK companies.³⁴ Under the new government, Prime Minister Theresa May is likely to go even further as she has made it a priority to trace those who undermine our society by fraud, tax evasion and corruption.³⁵

The rule of law, as its name suggests, refers to a system in which it is the law, and not some other body, that ultimately rules. As Thomas Paine stated, when the rule of law is present, it is the law that is King.³⁶ It is also often presented as being the opposite of ‘rule by law’, the idea that the government is above the law while, under such a concept, the government is subservient to it. Aristotle espoused similar ideas in ancient studies, disavowing personal rule and claiming, ‘rightly constituted laws should be the final sovereign’³⁷. This point of view was certainly not limited to the Greeks and parallels can be found in a variety of ancient societies including China, which will be discussed in the following paragraph. However, the concept came to greater importance in western legal thought when it emerged as a response to the once dominant principle of ‘divine rule of Kings’ in the sixteenth century. It was in fact during this period that the term itself was coined. Thomas Paine further illustrated that the rule of law was an important and foundational concept during the time of American independence and

³⁴ see G20 High Level Principles on Beneficial Ownership Transparency, 16 November 2014; and UK Implementation of G20 High Level Principles on Beneficial Ownership Transparency; see also Barry Rider (2015), ‘Rumblings in the corporate jungle’, *The Company Lawyer*, Vol. 36, Iss. 2, pp. 33-34; and Barry Rider (2013), ‘Exposing the modesty of companies!’ *The Company Lawyer*, Vol. 34, Iss. 9, pp. 263-264.

³⁵ Note in particular Criminal Finance Act 2017 has been enacted in April 2017. The UK Government has since 2016 instituted a public register of beneficial ownership and in collaboration with UK Overseas Territories and Crown Dependencies has established a network of agreements which require effective disclosure and recoding of beneficial ownership of companies. In Europe the ‘systematic exchange’ of beneficial ownership established by the UK, Germany, France, Italy and Spain has now extended to over 50 jurisdictions and covers trusts and other entities as well as companies.

³⁶ See Thomas Paine (1776), *Common Sense*, Salt Lake City: Infomotions Inc Press.

³⁷ See discussions at Antonin Scalia (1989), ‘The rule of law as a law of rules’, *The University of Chicago Law Review*, Vol. 56, No. 4, pp. 1175-1188 at p. 1176; Fred D. Miller (1997), *Nature, Justice, and Rights in Aristotle’s Politics*, Oxford: Oxford University Press; and Brian Z. Tamanaha (2001), *A General Jurisprudence of Law and Society*, Oxford: Oxford University Press, pp. 11-16.

played a vital role in shaping the new country's political system, which was among the first to contain three of the institutions now considered crucial for the existence of the rule of law: a written constitution, separation of powers, and judicial review.³⁸

With the pace of reform and opening-up policy since the end of the 1970s in China, *fazhi*, a translation of the western term 'the rule of law' has increasingly gained popularity among the Chinese, from intellectuals to common people.³⁹ The concepts of *fazhi* (the rule of law) and its opposite, *renzhi* (the rule of man) are concepts readily established in China. Similar to the western world, history records that similar views led to heated debate among early philosophers in China, between Confucians and the Legalists.⁴⁰ The first debate was possibly provoked in 536 B.C. by an order of Zi Chan, a representative of Chinese Legalists and the Prime Minister of state of Zheng, to have the written criminal law of the state inscribed on a bronze vessel put on public display. It was understood by his colleagues as a gesture to illustrate the permanence of the law and to ensure the people that the law would only be applied according to its letter, free of government intervention.⁴¹ Following this thought, the Legalists subsequently suggested that in governing, leaders should not rely on their intellect but on laws, just as craftsmen relied on tools, such as the compass and the square. The leader should not make arbitrary decisions but instead let the law 'rule'.⁴²

³⁸ Jethro Lieberman (2005), *A Practical Companion to the Constitution*, California: University of California Press, p. 436; and Brian Z. Tamanaha (2005), *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press.

³⁹ Albert HY Chen (2004), *An Introduction to the Legal System of the People's Republic of China*, Third Edition, Chatswood: LexisNexis Butterworths, pp. 22-38.

⁴⁰ See Jacques deLisle (2000), 'China's approach to international law: a historical perspective', *American Society of International Law*, Vol. 94, pp. 267-275; Herrlee Glessner Greel (1970), *Origins of Statecraft in China*, Chicago: University of Chicago Press; see also Yongping Liu (1998), *Origins of Chinese Law: Penal and Administrative Law in its Early Development*, Oxford: Oxford University Press.

⁴¹ Jack L. Dull (2000), 'The deep roots of resistance to law codes and lawyers in China', in *The Limits of the Rule of Law in China*, edited by Karen G. Turner, James V. Feinerman and R. Kent Guy, Seattle: University of Washington Press, pp. 327-328.

⁴² See Derk Bodde and Clarence Morris (1967), *Law in Imperial China*, Massachusetts: Harvard University Press, pp. 23-29.

Similar ideas were brought up in a speech given by Deng Xiaoping in 1978, following the success of Deng Xiaoping and his colleagues in consolidating their authority at the third plenary session of the Eleventh Central Committee. Deng stated: “in order to safeguard people’s democracy the legal system must be strengthened. Democracy needs to be institutionalised and legalised so that such a system and such laws would not change merely because of a change of leadership or a change in the leaders’ views and attention. The present problem is that the laws are incomplete; many laws have not yet been enacted. Leaders’ words are often taken as ‘law’, and if one disagrees with the leaders’ words, it is called ‘unlawful’. And if the leaders change their words, the ‘law’ changes accordingly.”⁴³ Earlier in the same year, a new constitution was enacted at the first session of the Fifth National People’s Congress, and both Hua Guofeng, CCP Chairman and State Council Premier and Ye Jianying, Chairman of the Standing Committee of the National People’s Congress, emphasised the need to strengthen the socialist legal system.⁴⁴ Indeed, after a ten-year lawless period of cultural revolution, no one was more demanding than China’s own citizens for a more stable legal environment; and of course, the reformist leadership had also realised that the country could not lure investments from abroad without creating a predictable legal framework to safeguard trade.

Consequently, many formal laws and regulations were promulgated.⁴⁵ China, in line with other developing countries, believed that creating an institutional environment is conducive to economic growth.⁴⁶ However, they might just perceive law as a significant

⁴³ Xiaoping Deng (1983), *Deng Xiaoping Wenxuan 1975-1982 (Collected works of Deng Xiaoping)*, Beijing: People’s Press, pp. 136-137.

⁴⁴ Collection of Documents of the First Session of the Fifth National People’s Congress of the People’s Republic of China (1978), Beijing: People’s Press, pp. 55, 122, 132-133.

⁴⁵ See a general overview at Keyuan Zou (1999), ‘Towards the rule of law: an overview of China’s legal reform’, in *China: Two Decades of Reform and Change*, edited by Guangwu Wang and John Wong, Singapore: Singapore University Press, pp. 41-66.

⁴⁶ James V. Feinerman (2000), ‘The rule of law imposed from outside: China’s foreign-oriented legal regime since 1978’, in *The Limits of the Rule of Law in China*, edited by Karen G. Turner, James V. Feinerman and R. Kent Guy, Seattle: University of Washington Press, p. 306. See also James Gwartney, Richard Stroup, Russell Sobel and David Macpherson (2009), *Economics: Private and Public*, 12th

ingredient within this environment, as exemplified by the widespread effort to make and modify laws to accommodate and encourage desired changes in Chinese economy. Indeed, there were concerns arising, such as lawmakers embracing laws that were hugely imported from the west. Feinerman argued that it is critical for China to ‘dig below the surface’ in assessing legal and economic development. He indicated the veneer of legalisation created since the late 1970s in China, created a legal ‘Potemkin village’, and over-reliance on promulgating formal law may have both diverted attention from necessary economic changes as well as creating misimpressions about the rapidity and extent of economic and legal change that has actually occurred.⁴⁷ It is also the case that legalisation has only focused on issues of particular concern to the state and the party, while the foundational areas of law, vital to the legal development, were often neglected. For example, a Sino-Foreign Joint Venture Law was enacted in July 1979, before the more basic laws dealing with matters such as contract, status of legal persons and taxation.

The efficiency of the rule of law has also been questioned by China’s own scholars. For example, a speech given by a distinguished Peking University law professor, He Weifang at his alma mater, Southwest University of Political Science and Law, where He mentioned that doubts and distrust about the Constitutional provision ‘all power in the People’s Republic of China belongs to the people’ rose among the students after their teacher made such highly supportive statements on the newly enacted Constitution. Professor He believed that the teacher also sensed this distrust from his students but he had no choice and dared not tell the students that the democracy is hypocritical. He further mentioned, during this ideologically fervent period, that everything they were taught about the Constitution was completely politicised and full of falsehoods. Every

edition, Mason: South-Western College Publisher, pp. 330-344.

⁴⁷ James V. Feinerman (2000), ‘The rule of law imposed from outside: China’s foreign-oriented legal regime since 1978’, in *The Limits of the Rule of Law in China*, edited by Karen G. Turner, James V. Feinerman and R. Kent Guy, Seattle: University of Washington Press, pp. 304-324.

time they returned from class, constitutional law lecturers would speak to themselves with a sign: “Gosh, I again pulled the wool over the eyes of my students.”⁴⁸

The rule of law in China has always been a hotly contested topic. Though China’s leadership has not been slow in moving its first step towards legalisation, there is still great room for improvement. This chapter however, is not one on evaluating the progress China has made or is continuing to make on establishing its rule of law. This section intends to give readers some general background information on China’s initial efforts on establishing a legal framework. The following sections will examine specifically how the Chinese authorities confronted and dealt with economic crimes that coincided with economic reform.

Worsening economic crime

Economic crime grew dramatically in China by the 1980s, and such issues had been emphasised and discussed publicly through top party officials at various national meetings – many expressed the importance of curbing economic crimes, which they believed was absolutely vital to the party’s survival and the country’s future. Li Xiannian, Vice Chairman of CCP Central Committee, called worsening economic crimes a crucial issue for the future of the CCP and its regime, at a Spring Festival meeting on January 24, 1982. He promised to firmly handle economic and other offences, starting with making serious investigation and disposition of cases involving senior cadres. “Serious cases with sufficient evidence must be strictly and expeditiously handled by law; such offences will be vigorously dealt with and no area will be left untouched”, Li stressed.⁴⁹ His statement is no doubt an explicit illustration of the explosion of economic crime at that time, which Li firmly indicated, was becoming a threat to the existence of the party and its regime.

⁴⁸ Weifang He (2012), *In the Name of Justice: Striving for the Rule of Law in China*, Washington D.C.: Brookings Institution Press, pp. 67-68.

⁴⁹ *People’s Daily*, full text of Li Xiannian’s speech, January 25, 1982, p. 1.

Detailed information disclosed by Chi Zhanyuan, Deputy Procurator of the Supreme People's Procuratorate at the All Nation Procurators' Conference, on October 18, 1981, illustrated that economic inspection organs had been set up since 1980 under the people's procuratorates at various levels, given the responsibility to handle economic crimes. Within a year, ending in October 1981, these organs had already handled over 20,000 cases.⁵⁰ Of these 20,000 cases, Chi Zhanyuan pointed out, corruption made up 43%, illegal tree cutting 35%, and the remaining 22% was shared by negligence, malfeasance, bribery, tax evasion, falsification and imitation of trade marks. Chi disclosed that between the period of January and June 1981, people's procuratorates, working in conjunction with taxation departments, successfully prosecuted cases of tax evasion amounting to 720 million Chinese yuan.⁵¹

Furthermore, on December 7, 1981, Huang Huoqing, Chief Procurator of the Supreme People's Procuratorate, at the 4th session of the 5th National People's Congress, presented a report concerning economic crime in China and measures taken to deal with it. He said: "the resolution of the 3rd session of the 5th NPC has called for efforts to strengthen justice in economic areas, and to carry out this resolution; the people's procuratorates at all levels have stepped forward. They, in a serious manner, disposed of a mob of criminals for abuse of power and graft, theft and bribery that caused heavy losses to the state and collective property, and other cases involving disruption of national economy and negligence leading to injuries, deaths and illegal deforestation."⁵² Huang further added that in the period between January and September 1981, more than

⁵⁰ *Wen Hui News*, October 19, 1982, p. 3. See more at Richard Levy (1995), 'Corruption, Economic Crime and Social Transformation since the Reforms: The Debate in China', *The Australian Journal of Chinese Affairs*, No. 33, pp. 1-25; see also Andrew Wedeman (2012), *Double Paradox: Rapid Growth and Rising Corruption in China*, Ithaca: Cornell University Press, pp. 1-3.

⁵¹ *Ibid.*

⁵² Report by Huoqing Huang (1981), 'Summary of the 5th National People's Congress and the 4th session of Political Consultative Conference', Taipei: Mainland Operations Board, Central Committee, December 1981, pp. 105-121.

31,000 cases of economic crime were investigated.⁵³

These cases would not be dealt sufficiently and efficiently without the cooperation of the people's courts. Jiang Hua, President of the Supreme People's Court, had also issued a report in this regard at the NPC meeting on December 7, 1981. "For over a year now, all levels of people's courts have firmly carried out the resolution of the 3rd session of the 5th NPC on strengthening economic justice by setting up special organs to investigate and initiate the trials of economic abuse. At this point the Supreme People's Court, local high courts, and 293 intermediate courts have all established economic trial courts, with a total cadre number of over 1,900, in accordance with the organic law of the people's court". Jiang further revealed that over the past year more than 14,700 cases of economic abuse, most of which involving disputes and criminal offences, had been presented to the people's courts.⁵⁴

Through the above figures presented by Chi Zhanyuan, Huang Guoqing and Jiang Hua, it is not difficult to testify the increasingly widespread incidence of economic crimes in China after the economic reform. It soon promoted the General Secretary of the CCP Hu Yaobang, to warn, at the 12th Party's Congress, that "serious economic criminal activities are undermining construction projects, destroying the peace of society, badly influencing moral standards, eroding people's mentality and life, and endangering the edifice of socialism like termites."⁵⁵

To control this, the party and the government periodically initiated major anti-crime and anti-corruption campaigns throughout the first decade after the economic reform.⁵⁶

⁵³ Ibid, p. 108, see more discussions at Cynthia B. Schultz (1989), 'Economic Crimes in the People's Republic of China: A Swinging Door Policy', *American University International Law Review*, 5 (1), pp. 161-206.

⁵⁴ Report by Hua Jiang (1981), Ibid, pp. 98-104.

⁵⁵ Yaobang Hu (1982), 'Open up a new horizon for socialist modernised constructions', 1 September 1982, at the 12th Party Congress, *Wen Hui News*, 8 September 1982.

⁵⁶ See for example, 1982 Campaign against economic crime in China, discussions at Keith Forster (1985),

These campaigns imposed significant pressure on the criminal justice system reform which had been essentially non-existent since the Cultural Revolution.⁵⁷ Of course, the rapid increase in foreign investment, together with domestic market changes such as collective ownership and the beginning of private enterprises, have been another important impetus in China's anti-crime campaigns and justice system reform.⁵⁸

The ruling party recognised that economic crimes were their major concern in maintaining stability of society. This is particularly the case with China in running a single party system. Rampant economic crime would undermine China's economic growth, disrupt the effective distribution of economic resources and discourage foreign investment; but more importantly, it would jeopardise the reputation of the ruling party CCP and subsequently have a disproportionate impact on the trust and confidence of its people. As Professor Barry Rider witnessed, in socialist economies, where the state is a major or perhaps the sole player, economic abuse was, and to some degree still is, viewed as treason; more criminals were executed in the USSR during the last twenty years for 'economic crime' than any other form of crime.⁵⁹ Indeed, we remember the shocking news that the Chinese government sentenced corrupt officials Liu Qingshan and Zhang Zishan to the death penalty in the early 1950s during the three and five anti's movement. Even today, the new leadership of China governed by President Xi Jinping, called upon a war on economic crime and corruption as soon as he took over as the party leader at the end of 2012. He stated in his first public speech that corruption and bribery is the first and foremost problem that the party must address!⁶⁰

'The 1982 campaign against economic crime in China', *The Australian Journal of Chinese Affairs*, No. 14 (July 1985), pp. 1-19.

⁵⁷ See details at Zhen Peng (1979), 'Explanation on Seven Laws', *Beijing Review*, July 13, 1979, p. 8.

⁵⁸ Qiyin Weng (1985), 'Lun daji yanzhong jingji fanzui yu gaige kaifang de guanxi' (A discussion on the connection between cracking down economic crime and economic reform), *Hebei Law Science*, 1985, No. 1, pp. 3-9.

⁵⁹ Barry Rider, Haiting Yan and Lihong Xing (2010) *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, p. 125.

⁶⁰ English version of the full text of President Xi Jinping's speech is available at: <http://www.bbc.co.uk/news/world-asia-china-20338586>, the speech was given on 15 November 2012.

How do they define economic crime?

The CCP define economic crimes as “activities carried out by various illegal means making use of loopholes in socialist production, distribution and circulation, in order to badly disrupt socialist public ownership, embezzle large amounts of money, exploit the broad masses, in particular working class people, and imperil socialist constructions”.⁶¹

It also included other illegal conducts such as smuggling and selling smuggled goods, illicit currency exchange, seeking exorbitant profit, speculation and racketeering, stealing of state and collective properties, stealing and selling valuable relics, and demanding or receiving bribes.⁶²

For speculation and racketeering, unlike other terms such as ‘stealing’ or ‘smuggling’ which are reasonably understandable, the party felt it was necessary to offer specific explanations by dividing these activities of speculation and racketeering into, in total, ten categories.⁶³ It contains common and generic offences including engagement in illegal operations of industry, commerce, transportation and construction and in running underground factories, stores, transport teams, and contractors; illegal sales of state supplies for profiteering or acting as a middleman to receive kickbacks. This was one of the most prevalent wrong doings at that time, and will be focused on as an example for discussion in the following section. It also specifies activities that harm the grand market, such as manipulating the market or hoarding and illegally increasing commodity prices to falter the market. Finally, it provides details of offences of making and presenting counterfeit goods, illegally selling invoices or contracts, engaging in fraudulent transaction within enterprises, and illicit dealing in imported products,

⁶¹ National People’s Congress on Punishing Serious Criminals, 8 March 1982, in *Xinbian Qiye Falu*, p. 155; see also a more detailed discussion on the definitions at Richard Levy (1995), ‘Corruption, Economic Crime and Social Transformation since the Reforms: The Debate in China’, *The Australian Journal of Chinese Affairs*, No. 33, pp. 1-25.

⁶² Ibid. See also Xiaoli Chen (2008), ‘Lun jingji fazui de gainian’ (Exploring the definition of economic crime), *Legal Science and Society*, 2008, No. 21, pp. 107-108.

⁶³ *Social Science Monthly*, May 1982.

jewellery, foreign currency, cultural relics and drugs.

Other than these listed activities of speculation and racketeering, there is a further problem of ‘second hand retailers’, meaning those who instead of selling their own manufactured products, buy in commodities and make profit on the resale. It was made clear that bodies who operated in contravention to state policies, engaging in activities of speculation and racketeering, price hiking and disrupting market order, were not permitted.⁶⁴ As a simple example, some speculators may go to the production area to buy goods earmarked for planned purchase by the state, thereby hindering efforts of state purchase; while others would buy up essential commodities from state-owned stores or collective retail shops for the purpose of reselling them at a higher price to make an inordinate profit from the general public. The CCP emphasised that such activities must be resolutely banned, and in cases of serious violations, economic or criminal penalties will be imposed.⁶⁵ Without a consistent and efficacious monitoring system, all regulations would be made in vain. We should not really have expected too much during this start-up period – but this was nonetheless the case in China during its first ten years after ‘opening up’.

Two-tiered price system

As noted, the CCP had taken a series of initiatives during the transition from its stagnant centrally planned economic system to a market orientation, whereas it has never determined to completely eradicate the state planning system and reduce its reliance on bureaucracy.⁶⁶ This accordingly created the so called dual track phenomenon. For example, in the same workshop, doing exactly the same work, there were two types of

⁶⁴ Xuebing Zhang (2011), ‘The rise and fall of the ‘crime of illegal speculation and profiteering’ in contemporary Chinese history: a view from the development of China’s economic system’, *Journal of Chinese Communist Party History Studies*, 2011, No. 5, pp. 37-48.

⁶⁵ *Renmin Ribao (People’s Daily)*, February 8, 1982, p. 4.

⁶⁶ See James T. Myers (1989), ‘China: Modernisation and Unhealthy Tendencies’, *Comparative Politics*, Vol. 21 No. 2, pp. 193-213.

workers. One held the job for life under the state job assignment scheme, while the other was a contract worker, working temporarily for a certain amount of time and on different pay and benefit schemes. Also, in the same steel factory, the same products were offered at two prices – the state purchasing price and the market price. The market price could be twice as high.⁶⁷

This two-tier price system (also labelled the dual track price system) was adopted in China between the period 1984 to 1992. Indeed, this system created more opportunities for Chinese people and furthered the modernisation of the economy. However, the same goods were offered for sale under different prices and availability conditions based on two distinct distribution mechanisms: the government organisations and the market. Very few could deny that this unequal system was a source of massive distortions.⁶⁸

During this period, a huge number of administrative corporations emerged to promote business and the term ‘official speculation’ was developed to describe the practices of buying and reselling, conducted by cadres working in these corporations. Official speculation became one of the most noticeable forms of economic crime due to this two-tiered price system.⁶⁹ In theory, state-set price, floating price and the market price were restricted within their respective scopes: state-set price for the materials or products designed for mandatory planning; floating prices for those under guidance planning and market prices for the materials and products for the market. As Ting Gong observed, this arrangement stimulated the economy, between 1984 and 1987, for

⁶⁷ See for example at Jisheng Yang (1988), ‘Shuanggui xianxiang (The dual-track phenomenon)’, *Liao Wang Weekly*, 1988, no. 37, at pp. 10-12. In 1987 for a ton of thread-rolled steel was around 700 yuan, while out of planned price was 1,400 yuan. Of the 43.85 million tons of steel produced that year, 22.8 million tons, accounting for 52 percent, were distributed at the state-fixed price; the prices of the rest 48 percent were decided by the market.

⁶⁸ See generally Shengming Yang and Jun Li (1993), *Jiage Shuangguizhi de Lishi Mingyun (The History of Two-Tiered Price System)*, Beijing: China Social Science Press.

⁶⁹ See Jinglian Wu and Renwei Zhao (1987), ‘The dual pricing system in China’s industry’, *Journal of Comparative Economics*, Vol. 11, Iss. 3, pp. 309-318; and Fan Gang (1994), ‘Incremental changes and dual-track transition: understanding the case of China’, *Economic Policy*, Vol. 9, No. 19, pp. 99-122, at pp. 108-111.

instance, China's steel plants in total raised 12.4 billion yuan in funds for reinvestment, by selling extra-quota products at higher prices.⁷⁰

On the other hand, this also benefited those in public positions who acted as middlemen in market exchanges. These cadres connected suppliers and private consumers and drew high profits for themselves. Since state-owned corporations were usually run and administered by government officials, they were able to obtain the desired products at state-set (cheaper) prices, and resell them to local or private companies at market (much higher) prices. Normally such a transaction brought these corporations or individual cadres astonishing profits. For example, as the *People's Daily* reported, a manager working for a trading centre in Xuzhou city made a 14,000 yuan profit by reselling 18,000 tons of state-priced coal to local enterprises.⁷¹ The Qingdao Wholesale Hardware Corporation made a total of more than 1.35 million yuan profit through buying and reselling some 23 million tons of state-planned products such as wire rods, round steel, and rolled plate.⁷²

This brought up another issue associated with official speculation. This speculation involved a series of transactions – not just one, and there were consequently more than one profiteer. Certainly, this complicated the situation as every transaction inflated the product price, and eventually the whole process could lead to an abnormally high price for the material. For example, a steel factory in Nanjing city bought thousands of tons of steel plate through its 'back door' connections at a cheaper price (normally this means they had connections with government officials and could buy materials at cheaper state-set prices) and then resold them to 31 small factories for a profit of 1.35 million yuan. By the same token, these small factories duplicated the process and again

⁷⁰ Ting Gong (1994), *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes*, Westport: Praeger Publishers, pp. 131-132.

⁷¹ 14 May 1989, *Renmin Ribao* (*People's Daily*).

⁷² 28 October 1988, *Foreign Broadcasting Information Service*, daily report, p. 49.

sold the plate to others instead of using it for production. Such a process continued until after 129 transactions, with a final price raised from 1,750 to 4,600 yuan per ton.⁷³ The question is, who were the winners and who were the losers? It was the ordinary people who, at the end, bought those inflated products and the profits received by those involved in these 129 transactions were actually from the broad masses!⁷⁴ This certainly could not be tolerated in a nation with an aim of enhancing a socialist economy and in particular with a slogan of ‘*renren pingdeng*’ (everyone is equal).

In light of the above examples, emerges the phrase ‘back door’. It exposed another corrosive problem in transitional China – *guanxi*, which was often described by western countries as ‘connection’ or ‘relationship’ between persons and can sometimes be used as a way to achieve desired services or benefits. Although it is not the case that this is unique to China, the author believes that such an activity has become far too rampant. .

Guanxi in the reform context

In recent years, the Chinese word ‘*guanxi*’ has become increasingly popular and well acknowledged among western countries – a word originated from China, often with negative connotations referring to corrupt practices in Chinese society.⁷⁵ *Guanxi* generally describes the basic dynamic in personal relations of influence and the relationships individuals cultivate with others. In the past, ‘connections’ or ‘relationships’ was perhaps the most widely used English word to translate ‘*guanxi*’. However, as Gold, Guthrie and Wank observed, the pinyin romanisation of this Chinese word is becoming more widely accepted in western media, simply because neither of

⁷³ 21 July 1989, *Renmin Ribao* (*People's Daily*).

⁷⁴ See discussions at Lawrence J. Lau, Yingyi Qian and Gerard Roland (2000), ‘Reform without losers: an interpretation of China’s dual-track approach to transition’, *Journal of Political Economy*, Vol. 108, No. 1, pp. 120-143.

⁷⁵ See generally Y. H. Wong and Thomas K. Leung (2001), *Guanxi: Relationship Marketing in a Chinese Context*, New York: International Business Press; and Mayfair Mei-hui Yang (2002), ‘The resilience of *guanxi* and its new deployments: a critique of some new *guanxi* scholarship’, *The China Quarterly*, Vol. 170, pp. 459-476.

those two English terms can sufficiently reflect the wide cultural implications that *guanxi* indicates.⁷⁶

Guanxi primarily originates from the Chinese philosophy of Confucianism, which emphasises the significance of associating oneself with others in a hierarchical manner, to maintain economic and social order. It has placed emphasis on implicit mutual obligations, reciprocity, and trust, which are the foundations of *guanxi* and its networks.⁷⁷

Analysing the theoretical context of *guanxi* in order to gain a better understanding of the Chinese term, however, is not recommended by the present author, since *guanxi* is a practical term, which exists in differing societies, functions under various circumstances and always has different effects and consequences. Indeed, in China, situations where the ability to achieve personal benefits for one's family members or supporters is seen largely as confirmation of status and power, which itself is commended or at least condoned by members of that society or group. For example, a survey conducted in China⁷⁸ among business executives revealed that they mostly retained what they considered to be traditional Confucian values. As a result, in the conduct of their business, advancement of personal and family interests came first. In fact, there was little knowledge of the fiduciary obligations on directors and officers imposed by China's Company Law and a few respondents went as far as saying that if these obstructed the advancement of family interests, the law needed to be

⁷⁶ See Thomas Gold, Douglas Guthrie, and David Wank (2002), *Social Connections in China: Institutions, Culture and the Changing Nature of Guanxi*, Cambridge: Cambridge University Press.

⁷⁷ Yadong Luo, Ying Huang, and Stephanie Lu Wang (2011), 'Guanxi and organisational performance: a meta-analysis', *Management and Organisation Review*, Vol. 8, No. 1, pp. 139-172; see also a historical development of *guanxi* at Mayfair Mei-hui Yang (2002), 'The resilience of *guanxi* and its new deployments: a critique of some new *guanxi* scholarship', *The China Quarterly*, Vol. 170, pp. 459-476.

⁷⁸ Raymond Chan, Daniel Ho, Alex Lau and Angus Young (2013), 'Chinese traditional values matter in regulating China's company directors: findings from an empirical research', *The Company Lawyer*, Vol. 34, Iss. 5, pp. 146-147.

reconsidered.⁷⁹ It is also the case that there are still many societies where giving gifts is considered respectful and is not necessarily given in the expectation of a particular benefit.⁸⁰ In such cases, failure to understand the expectation might contribute to a justification for criticism. It is true that the understanding of the cultural elements within a specific society is vital when scholars research to clarify one phenomenon occurring in that given society. In this context, *guanxi* occurs in various circumstances such as a personal, business, and government context,⁸¹ and it is vital to consider different examples.

Following the explanation of ‘back door’ previously in this chapter – ‘*zouhoumen*’ in Chinese – it is regarded as a common phenomenon throughout Chinese modern history.⁸² *Zouhoumen* entailed personal connections that facilitated access to the right person who could carry out desired actions, normally through unofficial or illegal channels.⁸³ It can be seen from this example that people making profits by buying products at state-set prices and selling them at market prices, in order to proceed, *guanxi* and *zouhoumen* played a vital role. Profiteers needed firstly to have *guanxi* with state officials, so they needed to invest in cultivating and maintaining, and then they would have the chance to purchase those products through *zouhoumen*. The practice of *zouhoumen* originated in China as early as the 1960s when the disaster of the Great Leap Forward left its imprints on people’s daily lives.⁸⁴ Unbalanced industrial

⁷⁹ Further reading regarding the role of *guanxi* in the business context: Seung Ho Park and Yadong Luo (2001), ‘*Guanxi* and organisational dynamics: organisational networking in Chinese firms’, *Journal of Strategic Management*, Vol. 22, Iss. 5, pp. 455-477; and Y. H. Wong (1998), ‘The dynamics of *guanxi* in China’, *Singapore Management Review*, Vol. 20, Iss. 2, pp. 25-42.

⁸⁰ P. Steidlmeier (1999), ‘Gift giving, bribery and corruption: ethical management of business relationships in China’, *Journal of Business Ethics*, Vol. 20, No. 2, pp. 121-132.

⁸¹ See Hilton Root (1996), section ‘Relationship-Based Trade – *Guanxi*’ in ‘Corruption in China: Has it become Systemic?’ *Asian Survey*, Vol. 36, No. 8, pp. 741-757.

⁸² See discussion about *guanxi* and *zouhoumen* at Lowell Dittmer and Xiaobo Lu (1996), ‘Personal politics in the Chinese danwei under reform’, *Asian Survey*, Vol. 36, No. 3, pp. 246-267.

⁸³ Tulips Yiwen Wang and Alan B. I. Bernardo (2017), ‘Through the back door: personality factors predict acceptance of illegal *zou hou men* among Chinese people’, *Personality and Individual Differences*, Vol. 119, pp. 194-197.

⁸⁴ See generally David Bachman (1991), *Bureaucracy, Economy, and Leadership in China: The*

developments and agricultural failures resulted in a lack of basic necessities and consumer products in retail stores. Most of the consumer and food items were either supplied on ration or reserved in controlled access.

Consequently, residents had to try other means to obtain these elusive items. These means included purchasing from acquaintances or relatives working in the commercial sector, through the ‘back door’, and this is the beginning of *zouhoumen*. The earliest evidence of *zouhoumen* is recorded in an internal directive from the Ministry of Commercial and Financial Work of the CCP Central Committee in June 1959.⁸⁵ Since then, *zouhoumen* became an informal and alternative response by both individuals and institutions to economic problems caused by the failure of the economic system.

However, *zouhoumen* was also in many ways used by the privileged group of high-ranking officials who enjoyed ‘special supplies’ (*tegong*) during those difficult times. High-ranking officials had been provided with special supplies of goods that were usually in short supply. To acquire more of these goods, some local governments tried to include as many officials as they could on the special supply lists, which eventually gave the government officials enormous opportunities to make profits by selling them at very high prices to the people.⁸⁶ As the vice premier in charge of finance and commerce under the State Council Li Xiannian pointed out: “*Zouhoumen* is caused by the shortage of commercial goods. There are different manifestations of *zouhoumen*: some are for personal need, some for eating and taking more than one’s own share, and the most serious ones are speculation, profiteering, and corruption.”⁸⁷ The party soon

Institutional Origins of the Great Leap Forward, Chapter 5: the panning and heavy industry coalition, Cambridge: Cambridge University Press.

⁸⁵ Dangdai Zhongguo Shangye Bianjibu (Editorial board of Modern Chinese Commerce) (1990), *Zhonghua Renmin Gongheguo Shangye Dashiji, 1958-1978 (A Chronology of Major Events in the Commercial Sector of the PRC, 1958-1978)*, Beijing: China Commercial Publishing House.

⁸⁶ Haizhong Zhang (1992), *Xingshi Fanzui Anli Congshu – Touji Daoba Zui (Collection of Criminal Cases – Crime of Official Speculation)*, Beijing: China Procuratorate Press.

⁸⁷ Xiannian Li (1992), *Li Xiannian Lun Caizheng Jinrong Maoyi, 1950-1991 (Selection of Li Xiannian’s work on Finance and Trade)*, Vol. 1. Beijing: China Financial & Economic Publishing House, p. 488.

realised the severe effects of *zouhoumen* and subsequently issued a series of directives to curb such practice.⁸⁸ It certainly was not hard to see, though occurring in different periods of China, that the substance of various economic abuses is essentially the same with official speculation at the two-tiered price system.

These activities could not have been carried out without the crucial element of *guanxi*. If one did not have *guanxi* with the officials, he could not exploit either ‘special supplied’ items or ‘state-set’ priced items, much less make profits from them. In the sense of market reform, the phenomenon of high-ranking officials’ special treatments and official privileges had gradually diminished along with the increasing availability of daily consumer goods. However, *guanxi* had not only survived the market change, but became more sophisticated, complex and commonly used than ever before. As Zhang mentioned in her article, a senior CCP official once contended in the mid-1980s that bureaucratism, usurpation of office for private gains, *guanxi*, and money fetishism were the four major ‘epidemics’ torturing the party – they were ‘the main features among all the unhealthy tendencies that many other deviances derived from’.⁸⁹ In many ways, the prevalent practice of cultivating and exercising *guanxi* and the thriving *guanxi* networks were a continuation and refinement of the earlier *zouhoumen* practice. Lu observed, compared with *zouhoumen*, this occurred as a response to consumer product shortages which needed *guanxi*.⁹⁰ The practice of *guanxi* in the 1980s was more proactive, open, and widely exercised. In the early 1980s, *guanxi* progressed to the point that it could not only be used by individuals, but also by units.⁹¹ He further conducted an interview

⁸⁸ See for example, ‘Reforming the system of special supplies for high-ranking officials and prohibiting backdoor dealing’ was issued in October 1960 by Central Committee, see more at Xiurong Huang and Songbin Liu (1997), *Zhongguo Gongchandang Lianzheng Fanfu Shiji (A History of Anti-Corruption in the CCP)*, Beijing: China Fangzheng Press.

⁸⁹ Yun Zhang (1986), ‘Quanmian tigao dangyuan suzhi shi dangfeng ganben haozhan de jianshi jichu’ (Improving the quality of party members is the foundation for improvement of the party’s orientation), Official CCP Central Committee journal: *Hongqi (Red flag)*, No.10.

⁹⁰ See Xiaobo Lu (2000), *Cadres and Corruption: The Organisational Involution of the Chinese Communist Party*, Stanford: Stanford University Press, pp. 175-179.

⁹¹ *Ibid.*

with a factory manager in a rural township, who indicated: “factories of our size and type often have to reserve a fair amount of money each year to spend on maintaining and developing connections. Without good *guanxi*, you will not have the chance to get too far. Sometimes we need materials that are hard to obtain, and sometimes we need to be shielded from inspections and fines for not meeting minimum standards. These all require some work in cultivating good *guanxi* with different parties”.⁹²

We can see that *Guanxi* was beneficial in securing state-owned bank loans and government construction contracts, as well as avoiding quality inspections and fines. A county party department divided *guanxi* relationships into four categories: 1) links of kinship; 2) links with classmates, comrade-in-arms, ex-colleagues, old friends, or acquaintances; 3) factional ties left over from the Cultural Revolution; 4) links involving exchange of money or materials. On the other hand, these relationships often intertwined and knitted into a web which involved large numbers of people, who could subsequently share useful information and mutual benefits within the group.⁹³ The significance of *guanxi* can even be seen in publicised employment advertisements. A company in Zhengzhou, advertising to employ 200 public relations and sales persons, made it completely open that they prefer the children or relatives of high-ranking public officials, high-level managers, and officials serving on boards of directors of state firms.⁹⁴ Of course, *guanxi* could also be found in foreign joint ventures, where the *guanxi* network could help managers to circumvent bureaucratic control.⁹⁵ In the legal sector, *guanxi*, for a long time, was seen as a useful tool to help people escape attention when he or she faced criminal or disciplinary investigations.⁹⁶ The web of *guanxi* not

⁹² An interview conducted by Xiaobo Lu, cited in his book, *Ibid*.

⁹³ *Zugong Tongxuan (Bulletin of organisational work)*, no. 384, 1985.

⁹⁴ *Gongren Ribao (Worker's Daily)*, Beijing, 10 December 1997.

⁹⁵ See Margaret Person (1991), *Joint Venture in the People's Republic of China*, Princeton: Princeton University Press; see also Steven Dickinson (2008), ‘Avoiding mistakes in Chinese joint ventures’, *China Brief*, April 2008, pp. 20-21.

⁹⁶ See for example, *guanxi* kingdom built by millionaire Changxing Lai, who was eventually found guilty of smuggling, bribery and corruption, at Shawn Shieh (2005), ‘The rise of collective corruption in China: the Xiamen smuggling case’, *Journal of Contemporary China*, Vo. 14, Iss. 42, pp. 67-91.

only provided meaningful ways for officials to achieve their financial or political goals, but also became their protector. Based on the information provided by employees of party and state control agencies, in almost every case that was investigated or prosecuted, people tried to intercede for those under investigation or after they were disciplined.⁹⁷

The transitional process of economic reform has inevitably been distorted by the widespread practice of *guanxi*. Some Chinese scholars have characterised China's economy as one of "thirty percent power, thirty percent *guanxi*, and forty percent market".⁹⁸ Some extreme commentators even called China a '*guanxi* economy'⁹⁹ or a '*renqing* economy'¹⁰⁰. It is fair to say that not all *guanxi* or informal connections are illicit. However, informal connections did, in many ways, create grounds for irregularities. In the period of market reform, informal relationships have gained almost as much influence as formal ones, which is an area that the party needs to seriously consider, since it is a threat to the formal organisational ties that the party have always intended to maintain.

The other side of the power decentralisation

It has already been noted that one of those key elements of the reform was the decentralisation of centrally controlled systems; local governments were granted more power in their autonomous administrations than in previous years. The decentralisation movement first became apparent when Deng Xiaoping attained power in 1978. The

⁹⁷ See Longze Jin (1988), 'Xinshiqi dangyuan weiji fanfa de tedian, yuanyin ji fangfan cuoshi' (Characteristics, causes and preventive measures of illegal conducts in the new era), *Tianchi Xuekan (Journal of Tianchi)*, March 1988, pp. 30-35; see also, Jiangnan Zhu (2008), 'Why are offices for sale in China? A case study of the office-selling chain in Heilongjian province', *Asian Survey*, Vol. 48, No. 4, pp. 558-579.

⁹⁸ *Liaowang (Outlook)*, No. 3, 1988; also at Xueguang Zhou, Qiang Li, Wei Zhao and He Cai (2003), 'Embeddedness and contractual relationships in China's transitional economy', *American Sociological Review*, Vol. 68, No. 1, pp. 75-102.

⁹⁹ *Gongren Ribao (Worker's Daily)*, Beijing, 10 December 1997.

¹⁰⁰ *Liaowang (Outlook)*, No. 3, 1988; see also Tong Chee Kiong and Yong Pit Kee (1998), 'Guanxi bases, xinyong, and Chinese business networks', *The British Journal of Sociology*, Vol. 49, No. 1, pp. 75-96.

trend then gained momentum when he embarked on his famous southern trip of China in 1992, during which he administered decentralisation and temporary economic disparities.¹⁰¹ One of the key reforms within this period included an amendment to the Constitution that allowed the nation's economic power to be distributed among the provinces, which has subsequently become the driving force behind this transition. As planned, priority was given to the coastal provinces with the establishment of Special Economic Zones, serving as 'laboratories', where reform was first carried out.¹⁰²

The extension of decentralised control during the reform period was in many ways beneficial for China's development. It allowed for flexibility and local initiatives in implementing new economic and governmental strategies.¹⁰³ According to various empirical findings presented by scholars in economics, decentralisation of fiscal control made a significant contribution to China's economic growth since the mid-1980s. The conclusion was reached that fiscal decentralisation could increase economic efficiency and consequently economic growth, mainly by improving the efficiency of resource allocation.¹⁰⁴ The centre also decentralised investment power in order to make local authorities more responsible for productive projects. Prior to 1984, investment projects of over 10 million yuan were subject to central approval, whereas after 1988, the State Planning Commission only reviewed over 50 million yuan projects.¹⁰⁵ The rest was left

¹⁰¹ Suisheng Zhao (1993), 'Deng Xiaoping's southern tour: elite politics in post-Tiananmen China', *Asian Survey*, Vol. 33, No. 8, pp. 739-756.

¹⁰² See more details at Pierre F. Landry (2008), *Decentralized Authoritarianism in China: The Communist Party's Control of Local Elites in the Post-Mao Era*, Cambridge: Cambridge University Press.

¹⁰³ See Shaun Breslin (2000), Decentralisation, globalisation and China's partial re-engagement with the Global Economy, *New Political Economy*, Vol. 5, No. 2, pp. 205-226.

¹⁰⁴ Justin Yifu Lin and Zhiqiang Liu (2000), Fiscal decentralisation and economic growth in China, *Economic Development and Cultural Change*, Vol. 49, No. 1, pp. 1-21; see also Tao Zhang and Heng-fu Zou (1998), Fiscal decentralisation, public spending, and economic growth in China, *Journal of Public Economics*, Vol. 67, No. 2, pp. 221-240; Christine P. W. Wong (1991), Central-Local relations in an era of fiscal decline: The paradox of fiscal decentralisation in post-Mao China, *China Quarterly*, Vol. 128, pp. 691-715; and Canfei He (2006), 'Regional decentralisation and location of foreign direct investment', *Journal of Post-Communist Economies*, Vol. 18, Iss. 1.

¹⁰⁵ Franklin Allen, Jun Qian, Chenying Zhang, and Mengxin Zhao (2012), *China's Financial System: Opportunities and Challenges*, NBER Working Paper 17828.

entirely in the hands of provincial departments. Additionally, the local government's control over banks and taxes also allowed them to intervene with investment activities.

This change, however, has provided local officials with many more opportunities for abuse at subsystem levels.¹⁰⁶ The centre became more dependent upon local cadres to implement its routine control; the local cadres were exercising much more influence and sometimes even monopolised power on local resource allocation and economic and business activity control – they became increasingly free from intervention.¹⁰⁷ On many occasions, policy interpretation and enforcement fell completely into the hands of individual cadres.

The proliferation of governmental agencies was probably the most obvious at local levels, even though the state government made substantive efforts to streamline organisations. The 'organisational simplification' commonly had a lesser impact at local levels than that at the centre, simply because the local government were reluctant to cut their administrative budgets.¹⁰⁸ Along with institutional proliferation, the number of personnel increased dramatically. Figures show that between 1978 and 1990, the total number of party and government officials¹⁰⁹ climbed by 90.7 percent from 1.8 million to 3.3 million.¹¹⁰ Administrative expenditures in line soared, where the budget for administrative management increased by 474 percent from 6.7 billion RMB to 31.7 billion during the decade of 1980-1990.¹¹¹

¹⁰⁶ See for example, Yongshun Cai (2008), 'Power structure and regime resilience: contentious politics in China', *British Journal of Political Science*, Vol. 38, Iss. 3, pp. 411-432, p. 416

¹⁰⁷ See Kevin O'Brien and Lianjiang Li (1999), 'Selective policy implementation in rural China', *Comparative Politics*, Vol. 31, 167-186.

¹⁰⁸ See detailed discussion at Ting Gong (1994), *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes*, Westport: Praeger Publishers, pp. 121-123.

¹⁰⁹ Including those working in party and government departments, in public institutions (*shiye danwei*) – education, science and technology, and public health sectors, and in state enterprises.

¹¹⁰ Xinhua News Agency, November 18, 1987, in *Foreign Broadcasting Information Service*, pp. 17-18; and *Renmin Ribao (People's Daily)*, September 16, 1989 and June 7, 1991.

¹¹¹ May 30, 1991, *Renmin Ribao (People's Daily)*.

With the subsystem autonomy granted, the regional power and government budget have subsequently increased, hence the chances of various organisational and territorial players to seek private gain increased. Misappropriation of public funds was one of the most frequent areas. Even though the central government made numerous requests to save money, energy, and other production materials, local governments continued to carelessly spend regardless. Often, government cadres spent public funds in tourism under the label of governmental inspection. For example, as reported at that time, a group of six officials went to six work units to evaluate product quality. Their one-month stay cost these government units 55,400 yuan, and one-fifth of the money was spent on banquets. Also, each person in the group received presents worth 1,100 yuan.¹¹² It became very common that officials held banquets with public expenditure, as was reported in 1988, 60-70 percent of the incomes of the large and medium sized restaurants throughout China came from feasts at the public expense.¹¹³ Su and Jia forward further statistics: over about 50 days in early 1987 (around the New Year and Chinese Spring Festival), 400 work units held banquets with public funds at a total cost of approximately 410,000 yuan at nine first-class restaurants in Shanghai.¹¹⁴

In addition, the central government was especially upset about the ‘small treasuries’ (*xiaojinku*), referring to public funds that were deposited by local units without the authorisation of their superior governmental institutions.¹¹⁵ Based on official views, these ‘small treasuries’ were sources of corruption where funds could be either obtained illegally or spent improperly.¹¹⁶ Also, these ‘small treasuries’ caused a drain on state revenues and led to the expansion of consumption expenditure. For example, as

¹¹² April 20, 1989, *Jiefang Ribao* (*Liberation Daily*).

¹¹³ March 22, 1990, *Foreign Broadcasting Information Service*, daily report, pp. 24-25.

¹¹⁴ Ya Su and Lusheng Jia (1990), *Sheilai Chengbao: Zhongguo Jingji Xianzhuang Toushi* (*Who Contracting: The Perspective of the Current Economic Situation in China*), Guangdong: Huacheng Press, p. 110.

¹¹⁵ See Hongbing Xu (1992), ‘Danwei sishe xiaojinku xingwei dingxing chutan’, (A preliminary study of illicit danwei small treasures), *Politics and Law*, 1992, No.1, pp. 32-33.

¹¹⁶ Xiaobo Lu (2000), ‘Booty socialism, bureau-preneurs, and the state in transition: organizational corruption in China’, *Comparative Politics*, Vol. 32, No. 3, pp. 273-294, at p. 279.

reported by *Xinhua News*, the state-owned Kaili Typing and Printing House in Shanghai cheated the state out of more than 32,000 yuan by falsely reporting their staff and worker numbers. The money in ‘small treasure’ they created was spent on drinking and dining.¹¹⁷ There was only 7,196 yuan left when it was discovered. The Petroleum and Natural Gas Corporation of China discovered in October 1989 that the ‘small treasuries’ run by its subordinate units, had taken in total 7,196 million yuan in deposits.¹¹⁸

Local cadres also used public welfare funds to build private houses. It was reported since 1986, 90 percent of the cities throughout the country disclosed cases of this nature, involving 20,100 cadres. Some cadres took possession of public production bases to build houses for themselves or their families; some took advantage of their power to obtain labour and materials without compensation; and some directly used public or collective funds to buy private houses. Examples given include Wang Qinghai, deputy chief of Shenyang Municipal Farm Machinery and Automobile Industrial Bureau, who spent 56,000 yuan of public funds refurbishing his private house.¹¹⁹ A vice chairman of Guangdong People’s Congress Standing Committee built a house with twelve rooms and four living rooms for his family of four, in total 424 square metres.¹²⁰

The practice of misappropriation of public funds has always been an on-going issue in China. The anger against such misconduct has grown dramatically in recent years, perhaps due to jealousy and conflicts raised over the years between government officials and the general public. Nonetheless, the news has spread that due to a current intensive anti-graft campaign initiated by President Xi Jinping, hundreds of up-market restaurants were closing down. Restaurant owners hopelessly told journalists that they had lost many customers from the public sector.¹²¹ It has to be born in mind that this

¹¹⁷ 29 November 1989, *Foreign Broadcasting Information Service*, daily report, p. 30.

¹¹⁸ *Ibid.*

¹¹⁹ 13 June 1989, *Renmin Ribao (People’s Daily)*.

¹²⁰ 8 August 1989, *Foreign Broadcasting Information Service*, daily report, p. 22.

¹²¹ “Sida Hangye bei Fanfuquan Jizhong” (Four industries were punched by anti-corruption trend),

was just one of the common methods that local officials used to misuse public funds distributed from their central organ. There were plenty of other ways, as long as officials were able to provide their government units with ‘proper’ invoices – it did not really matter from where they obtained the invoice. Indeed, to deal with such an issue, a competent, independent, and trustworthy national auditing team must be a prerequisite.

Cases arising with the economic reform

It is vital to consider typical selected cases that are tied to previous discussions concerning economic reform.

(1) Case of Wang Weiqing, Director of Guangdong Telecommunication Bureau¹²²

Wang Weiqing, director of Guangdong Telecommunication Bureau and secretary of the party committee, had abused his position by engaging his wife in smuggling and fraudulent foreign exchange remittance, speculation and racketeering. Since 1978, the launch of ‘opening up’, Wang Weiqing and his wife Wang Min used various means to acquire foreign remittance of more than HK\$ 8,000 from Hong Kong businessmen and through their relatives living in Hong Kong and Macao. Wang abused his position to stealthily and illegally exchange local currency to foreign exchange notes worth up to US\$ 4,000. He also bought colour and black and white TV’s, radio-tape recorders, electronic calculators and wrist watches through various channels in Hong Kong, Macao and Guangdong, and shipped them to Yantai and Wendeng in Shandong province for sale with a lucrative profit.

In April 1979, through blackmail and extortion, Wang Weiqing bought in a number of colour TV sets at low cost and resold them at a much higher price. Thereafter, Wang Min made a personal appearance and illegally purchased a batch of imported television

02.12.2013, *People’s daily*, available at: <http://finance.people.com.cn/n/2013/1202/c1004-23709209.html>.

¹²² Reported at *Renmin Ribao (People’s Daily)*, 5 February 1982, p. 1.

sets from smugglers in Shantou city. In January 1980, Wang Weiqing, Wang Min, their son and daughter in law went to Wendeng, Shandong, hometown of Wang Min, and sold a large number of TV sets, recorders, and wrist watches. They made a huge profit. In April 1980, Wang Min instructed foreign affair personnel to secretly trade for foreign exchange notes. Under the guise of collecting electric circuit rentals from foreign businessmen's houses, these contacts gained US\$ 4,000. They then went to the Foreign Trade Centre and bought a large quantity of electronic calculators and top of the range furniture.

In May 1980, as a member of the Guangdong telecommunications delegation, Wang Weiqing went to Hong Kong for a visit. He advised the Hong Kong businessmen that he was in partnership with Guangdong Telecommunication Bureau to buy colour TV sets in Hong Kong prior to the trip. He then brought these TV sets back for sale without paying any taxes. He also accepted radio cassette recorders from foreign businessmen in Hong Kong as 'gifts'. In July the same year, Wang Min travelled to Shandong province again and made a huge profit on selling these smuggled goods in her hometown.

In early 1981, the couple were exposed by the staff in Guangdong Telecommunications Bureau and local inhabitants with numerous letters written to the CCP discipline inspection commission, judicial organs as well as newspapers. They were subsequently arrested. It was not hard to see that Wang Weiqing, the head of Guangdong Telecommunication Bureau, was indeed excessively powerful and benefited from the governmental position he held. He and his family had undergone many illegal activities during his tenure and it was not until 1981 that they were eventually exposed. The lack of an independent supervision system, both at provincial and departmental level, resulted in this phenomenon. It was worth noting that Wang held not only the position of the director of the bureau, but simultaneously, the general secretary of the party committee within the bureau. He was the superior of the party discipline inspection in

the bureau. It would be nonsense that inspectors asked for permission to initiate an investigation into their own boss! In China today, there is still obscurity as to the clear boundary between a director and party secretary of a state-owned enterprise; sometimes these two posts were even occupied by one person.

(2) Case of Zhong Jialun and Ren Qingsheng, fraud by offspring of high-ranking public officials¹²³

Zhong Jialun was originally a worker at the capital construction office, administrative bureau of the Ministry of Communications and the son of Zhong Fuxiang, former minister of the Ministry of Posts and Telecommunications. Ren Qingsheng was originally a clerk at the Beijing Electronic Education Video Centre and the son of Ren Zhuangsheng, former minister of the Ministry of Commerce. They both left their public posts and unlawfully founded Bei Huan Enterprise Service Company through their personal connection (*guanxi*) with the deputy chief of Production Service Association, Chaoyang district, Beijing, who allowed them to borrow the seal and the bank account of Zuo Jia Zhuang Community Association. The company had not been issued a business licence by the industrial and commercial state department, nor had it owned any initial capital or assets. This was a completely fraudulent and speculative setup.

After Bei Hua was established, Zhong Jialun made himself the manager and Ren Qingsheng the deputy manager. In less than a year, they had sealed over 30 contracts and agreements on the supply of goods to state organisations, military forces and local enterprises. Through these deals they gained up to 2,950,000 yuan for the goods they were supposed to supply. They only provided their clients with a limited amount of goods – worth around one tenth of the payment they received in advance. Most of the contracts they did not deliver, while they used clients' funds to engage in massive speculation and fraud.

¹²³ Reported at *Renmin Ribao (People's Daily)*, 17 April 1982.

With the huge amount of funds acquired by dishonest means, Zhong Jialun and Ren Qingsheng illegally bought in state-controlled supplies through their fathers' background and connections, and resold them at a premium. The CCP disclosed that for example, they made over 72,700 yuan from the resale of seven automobiles alone. Some cars were resold at more than twice their purchasing value. To secure various merchandise in short supply, they openly offered bribes. The amount of cash and gifts they spent on bribes was valued up to 13,000 yuan. In a year and half since the establishment of their company, they squandered more than 210,000 yuan.

When China gradually opened its market to the public, the phenomenon of power-for-trade accelerated. Being children of powerful high-ranking officials in many ways gave them many more opportunities than other people, as it seemed they were born to be 'resourceful', in particular *guanxi*, the informal and generally much more 'efficient' way of transactions that was prevalent. Rumours had spread that the case also involved others, whose fathers were even more influential, and it was due to this that no investigations were pursued. The popularity of children of top political leaders in China is nothing new; even today they publicly become hot targets of well-established and famous multinational financial institutions, who wish to open doors and secure deals in the world's fastest growing economy.¹²⁴ This reflects how deep the bureaucratic root still is inside the country.

(3) Case of corruption by smuggling suppression personnel¹²⁵

Ever since China opened its door to the rest of the world, inward and outward foreign

¹²⁴ See for example, David Barboza (2013), 'Many Wall St. Banks Woo Children of Chinese Leaders', *The New York Times*, August 20, 2013, available at: http://dealbook.nytimes.com/2013/08/20/many-wall-st-banks-woo-children-of-chinese-leaders/?_r=0; and Neil Irwin (2013), 'Did JPMorgan Commit Bribery by Hiring the Kids of Chinese Politicians?', *The Washington Post*, August 19, 2013, available at: <https://www.washingtonpost.com/news/wonk/wp/2013/08/19/did-jpmorgan-commit-bribery-by-hiring-the-kids-of-chinese-politicians/>.

¹²⁵ Reported at *Renmin Ribao (People's Daily)*, 20 February 1982.

investment started to flourish. However, there had also been an increasing number of smuggling activities in the coastal area along with economic developments. The *People's Daily* referred to a commentator's statement on this phenomenon, stating: "serious smuggling activities in the fast developing economic area are eroding the reputation of the party cadres, poisoning social morality, undermining economic constructions and destabilising the society."¹²⁶ The CCP, to deal with such a rising activity, set up extensive smuggling suppression units in the coastal regions with particular emphasis on 'the importance of establishing a smuggling suppression force'. Yet, these measures failed in limiting such activities; on the contrary, the suppression personnel had begun to collude with the smugglers. The party itself had admitted the corrosive problem, and stated: "the people working in the smuggling suppression force in many places are seriously impure. Some have been hit by sugar-coated bullets and collaborated with the smugglers. Others have been mentally unstable and neglected their duty. Even some have gone so far as to actually engage in smuggling activities in the name of suppression."¹²⁷

The CCP had limited the case of collective corruption with four smuggling suppression boats in the Haifeng, Guangdong province. The four boats were numbered 05, 07, 08 and 09, designed to serve the Maritime Smuggling Suppression Command of Haifeng, Guangdong. Since 1980, Zheng Xingu, second-in-command of Boat 07; Liu Yao, captain of Boat 05; Liu Guihuan, captain of Boat 08; and Liang Zheng, captain of Boat 09, had on numerous occasions set smuggled vessels and crew free after being caught, and the personnel in those boats kept the smuggled goods to themselves and sold them for substantial profits. It was reported that the four boats collectively stole smuggled goods worth 670,000 yuan. The goods sold by the crew of Boat 07 alone were valued at 260,000 yuan.

¹²⁶ 'Building a smuggling suppression force', *Renmin Ribao (People's Daily)*, 13 July 1982, p. 4.

¹²⁷ Ibid.

The report provided us with one detailed example of the criminal activity of Boat 07. On December 21, 1980, Boat 07 interceded with a smuggled ship on the high seas. Having removed most of the cargo from the ship, 07's chief engineer Yu Chen persuaded the second-in-command Zheng Xingu and staff member Lin Qinrun, to release the smugglers and their vessel, and they divided the seized cargo among themselves. By May 1981, they had made nine more catches of vessels laden with smuggled goods. The total goods were: 6,646 wrist watches, 70 cassette recorders, 678 cassette recording tapes, 262 antelope horns, 1,079 silver coins, 1.5 catty silver bullion, 962 metres of nylon fabric, 294 pieces of clothing, 12 silk-cotton quilts, 169 metres of plastic floor mats and other miscellaneous products. They sold the goods on the market and made a profit of 163,666 yuan.

These corrosive practices had also infiltrated into the local public security bureau wherein the director and deputy director had also been offered smuggled goods that the smuggling suppression team unlawfully acquired, as an exchange for providing a 'protective umbrella'. The public were shocked by the case, in a small coastal city appertaining to so many public officials and various government institutions. The number of cases involving conspiracy of local officials involved in underground business began to rise due to the 'benefit' brought up by the 'opening up' policy.¹²⁸ This had also given an ironic warning to the authorities on how these rural and remote cities actually followed the rules and laws promoted by the central government. By only blaming the personnel working at the smuggling suppression force was certainly not enough!

¹²⁸ See another famous smuggling case in Xiamen city in 1990s, at Ping He (2010), 'A typological study on money laundering', *Journal of Money Laundering Control*, Vol. 13 Iss. 1, pp. 15-32, and Shawn Shieh (2005), 'The rise of collective corruption in China: the Xiamen smuggling case', *Journal of Contemporary China*, Vo. 14, Iss. 42, pp. 67-91.

Crime prevention

The party and the government did not just passively observe the increasing number of economic crimes, both in quantity and quality. Various initiatives had been taken against economic crimes and corruption, albeit seemingly not as efficient as people anticipated. The party leaders on various occasions, emphasised such pressing issues, and promulgated numerous state laws and disciplinary regulations. Many newly established government institutions were also specifically established to deal with economic crimes and corruption.

The enactment of Criminal Law and Criminal Procedure Law

China had realised that law and regulation could be a powerful policing mechanism when a country implements free market measures of economic reform. It was not until 1979, however, thirty years after the foundation of People's Republic of China, that a comprehensive criminal code was promulgated. This was partly due to the previous leader, Mao Zedong's distrust of bureaucratisation and his preference for the 'mass line',¹²⁹ and was also due to the party's long emphasis on the societal, rather than the judicial and the model of law.¹³⁰ Consequently, this societal approach left the Chinese people neither understanding nor experiencing the strength of the legal system.

When Deng Xiaoping took over as the party leader, he proposed various plans to spur economic growth, known as the open-door policy, discussed previously. The party also attempted to promote and integrate the rule of law into society to regulate the newly proposed free market. The open-door policy had a positive effect on international trade and investment, however, as we have observed in previous sections, it also resulted in a surge of economic crime.

¹²⁹ See Shao-Chuan Leng and Hungdah Chiu (1985), *Criminal Justice in Post-Mao China: Analysis and Documents*, Albany: State University of New York Press, pp. 24-26, discussed the theory behind the mass line.

¹³⁰ Shao-Chuan Leng (1982), 'Criminal justice in Post-Mao China: some preliminary observations', *The Journal of Criminal Law and Criminology*, Vol. 73, Iss. 1, pp. 204-237, at p. 205.

The CCP enacted the first Criminal Code and Criminal Procedure Code in 1979, as two solutions to promote foreign trade and to prevent domestic criminal activity. Crimes were drawn up into eight categories: (1) counter-revolutionary activities, (2) public security, (3) socialist economic order, (4) personal and democratic rights, (5) property, (6) social order, (7) marriage and family and (8) dereliction of duties. Among these chapters, chapter three, five, six and eight, four out of total eight chapters, include articles relating to economic crimes.

Soon afterwards the Supreme People's Court and Supreme People's Procuratorate jointly issued a document defining acts and elements necessary to constitute an economic crime,¹³¹ to prevent further ambiguities of the definition of crimes of embezzlement, speculation, and bribery provided in the Criminal Code. Moreover, an amendment entitled 'Decision on the Question of Approval of the Death Sentence'¹³² imposed harsher sentences including the death penalty on criminal activity, in response to the prevalent economically motivated criminal activity in the early 1980s.

By the same token, to curb the increase in corruption related activity, the National People's Congress (NPC) amended the Criminal Law by adopting two resolutions in 1982, namely the 'Resolution for Severely Punishing Offenders Making Great Damage to the Economy'¹³³ and the 'Resolution on Severely Punishing Criminals Seriously Endangering Public Security'¹³⁴. It is worth noting that one important aspect of these resolutions was to increase criminal penalties for economic crime. For instance,

¹³¹ See 3 August 1985, *China Daily*, 'Document clarifies bribery law', p. 4.

¹³² See 'Decision on the Question of Approval of the Death Sentence', adopted on June 10, 1981, reprinted in *Renmin Ribao (People's Daily)*, June 11, 1981, p. 1.

¹³³ 'Resolution for Severely Punishing Offenders Making Great Damage to the Economy', adopted on March 8, 1982, effective on April 1, 1982, 22nd session, 5th NPC, reprinted in *Xinhua News*, March 9, 1982.

¹³⁴ 'Resolution on Severely Punishing Criminals Seriously Endangering Public Security', adopted on September 2, 1983, at 2nd session, 6th NPC, reprinted in *Xinhua News*, September 2, 1983.

compared with previously when the maximum penalty for criminals committing economic crimes was ten years imprisonment, the new resolution set a minimum penalty of ten years and a maximum of life imprisonment or even the death penalty for serious crimes of corruption.¹³⁵ However, the NPC proposed an amnesty programme which granted lighter sentences to criminals who voluntarily surrendered themselves to the police prior to the promulgation of the new regulations on May 1, 1982.¹³⁶

The various laws and statutory documents, to some extent, formulated the foundation for the increased control of economic crime. Having said this, a societal transformation from anti-crime campaign-based policing to the rule of law, required time. Undeniably, it was the policies of these political campaigns that determined the extent of the severity and the degree of punishment. As Schultz observed, due to the absence of a competent legal system, inherent conflicts between the Criminal Code and the anti-corruption campaigns emerged in the areas of implementation and enforcement.¹³⁷

The issue of corruption

The crime of corruption had been given particular emphasis in the 1979 Criminal Code. According to article 155 and 185 of the Criminal Law, “any state functionary who takes advantage of his office to embezzle public property shall be sentenced to fixed-term imprisonment of not more than 5 years or criminal detention; if the amount embezzled is huge and the circumstances are grave, he shall be sentenced to fixed-term imprisonment of not less than five years; if the circumstances are especially grave, he shall be sentenced to life imprisonment or death. For the crime mentioned above, the offender shall be sentenced concurrently to confiscation of property or ordered to make restitution or compensation. If any person entrusted by state organs, enterprises,

¹³⁵ See ‘Decision on the Question of Approval of the Death Sentence’.

¹³⁶ See ‘Resolution for Severely Punishing Offenders Making Great Damage to the Economy’.

¹³⁷ Cynthia B. Schultz (1989), ‘Economic crimes in the People’s Republic of China: a swinging door policy’, *American University International Law Review*, Vol. 5, No. 1, pp. 161-206, at p. 180.

institutions or people's organisations to perform public duties commits the crime mentioned in the first part of this article, he shall be punished in accordance with the provisions of the two preceding parts",¹³⁸ "any state functionary who takes advantage of his office to accept bribes shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention. The illicit funds or properties he received as bribes shall be confiscated, and public funds or properties shall be recovered. Whoever commits the crime mentioned in the preceding part and causes great damage to the state or its citizens shall be sentenced to fixed-term imprisonment of not less than five years. Whoever offers or introduces a bribe to a state functionary shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention".¹³⁹ Moreover, other supplementary regulations concerning corruption were published in the 1980s, such as 'Several Answers to the Application of Law Relating to Economic Crime' (1985) and 'Supplementary Regulations Relating to Corruption and Bribery' (1988).

Despite all efforts the ruling party made, it is notwithstanding a widely held view that corruption had accelerated since the advent of reform.¹⁴⁰ Wedeman from his own findings argued that in the early stage of the reform, corruption was characterised by a qualitative increase, while the later reform period witnessed an 'intensification' of corruption.¹⁴¹ Corruption intensified in the sense that high-level corruption increased more rapidly than any other forms of official malfeasance.¹⁴²

Eventually, public anger against corruption once again reached a new level in the late

¹³⁸ Article 155 of the Criminal Law of the People's Republic of China, 1979.

¹³⁹ Article 185 of the Criminal Law of the People's Republic of China, 1979.

¹⁴⁰ See for example, Michael Johnston and Yufan Yao (1993), 'China's surge of corruption', *Journal of Democracy*, Vol. 6, No. 4, pp. 80-94; and Hilton Root (1996), 'Corruption in China: has it become systemic?' *Asian Survey*, Vol. 36, No. 8, pp. 741-757; see also Alan P. L. Liu (1983), 'The politics of corruption in the People's Republic of China', *The American Political Science Review*, Vol. 77, No. 3, pp. 602-623.

¹⁴¹ Andrew Wedeman (2004), 'The intensification of corruption in China', *The China Quarterly*, No. 180 (Dec 2004), pp. 895-921.

¹⁴² See Yong Guo (2008), 'Corruption in transitional China: an empirical analysis', *The China Quarterly*, No. 194, pp. 349-364.

1980s. As reflected in a survey conducted by the Sociology Institute of the Chinese Academy of Social Science in 1987, 83.7 percent of a total of 2,348 respondents from 30 cities described corruption as the problem which concerned them most.¹⁴³ By the same token, another survey conducted the following year showed that among 12,000 people from 16 cities, “embezzlement and bribery” was considered the most prevailing social crime; in terms of the party’s so called working style, only 22 percent of the respondents described it as ‘improved’, 50.4 percent thought it had “not improved”, and 24.4 percent thought it was ‘even worse’.¹⁴⁴ Furthermore, before the student movement in 1989, a nationwide survey by an authoritative magazine *Ban Yue Tan*, reported people’s resentment against corruption: corruption and

Responding to this issue, the CCP politburo set up a meeting in early June 1988, where the leadership reached a conclusion that a new anti-corruption movement was necessary and it was “concerned with the party and state’s prestige and image among people, with the smooth implementation of party paths and policies, with the establishment of a clean and efficient government, and with the progress of economic reform.”¹⁴⁵ Further, the party announced the ‘Notice on Keeping Party and Government Apparatus Honest and Clean’, calling on all state organisations to put anti-corruption at a high priority. At the Third Plenum of the Thirteenth Party Congress convened later in the same year, the party General Secretary, Zhao Ziyang, stated: “keeping the party and state apparatus clean is of extreme importance in the current stage of party construction... Today, embezzlement, bribery, extortion, speculation, extravagance, and waste that occurred among party cadres are what people hate the most... and harm the image of the party and the ruling government. If this problem continues, we shall finally lose the support

¹⁴³ *Liao Wang (Outlook Weekly)*, May 23, 1988, p. 27, Beijing: Xinhua News Agency.

¹⁴⁴ Qinfang Zhu (1989), ‘The State of Mind of Urban Workers’, *Liao Wang (Outlook Weekly)*, 1989, pp. 8-10.

¹⁴⁵ See Mr Li Peng’s speech at the Party’s Working Conference of the Central Government Organs, March 18, 1988, in *Zhongguo Zhengfa Daxue (China University of Political Science and Law), Selected Readings on Government Integrity*, 1989, p. 21.

of the people.”¹⁴⁶ Zhao Ziyang further stated that he believed corruption was an inevitable by-product of great economic and social development during this modernisation period. With the reform continuing, particularly with a further reduction of the state’s central manipulation, people could expect a breakdown of trade between official power and wealth. Soon afterwards, at the party’s annual summer retreat at Beidaihe in September 1988, the Party Central Committee adopted a retrenchment plan with anti-corruption as one of its core components, including postponing price reform, reducing capital construction, strengthening ideological rectification, and recentralising administration.¹⁴⁷

However, it was not until the famous 1989 student demonstration that the anti-corruption movement was officially initiated, where the demonstrations released the prevalent hatred against government corruption.¹⁴⁸ During the demonstrations, the most popular slogans were ‘Down with Venal Officials’, ‘Opposing Official Speculation’, and ‘Opposing Privileges’. Based on the western newspaper, the *Boston Globe*, one worker from Beijing told the media that the students had given the public the courage to raise their voice.¹⁴⁹ Comments in the *Worker’s Daily* also reflected the public mood: “the people who should have got rich have not, but those who should not have, lined their pockets.”¹⁵⁰ It was reported that the party General Secretary Zhao Ziyang had presented a four-point proposal to the party’s central committee in early May 1989, which included anti-corruption measures such as elimination of special privileges (*tegong*) for senior party members and investigation into high-level cadres and their relatives, aiming to avoid further escalation of the student-government conflict. Yet, the proposal failed to progress since other leaders considered this student movement as

¹⁴⁶ *Fazhi Ribao (Legal Daily)*, December 12, 1988, Beijing.

¹⁴⁷ See Ting Gong (1994), *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes*, Westport: Praeger Publishers, pp. 136-137.

¹⁴⁸ See Yan Sun (1991), ‘The Chinese protests of 1989: the issue of corruption’, *Asian Survey*, Vol. 31, No. 8, pp. 762-782.

¹⁴⁹ *Boston Globe*, May 24, 1989.

¹⁵⁰ *Worker’s Daily*, May 5, 1989.

‘counterrevolutionary insurrection’ instead of an anti-corruption oriented protest.¹⁵¹ While, after the Tiananmen incident, even Deng Xiaoping himself had to admit the stimulating impact of corruption along with this incident, as he told other senior party members that “the development from the student demonstrations to turmoil, and then to a counterrevolutionary rebellion, has a vital reason; that is, rampant corruption has made many people lose their faith in the ruling party and the government, and they actually believe that we are protecting corruption.”¹⁵² Thus, it was not surprising that Chinese mass media increased the exposure of corruption cases soon after the student demonstrations.

Meanwhile, China’s procuratorial departments increased the number of corruption cases that they investigated and prosecuted. For example, in 1989, China’s procuratorial organs dealt with a total of 116,763 cases of embezzlement and bribery; of which 58,926 were placed on file for investigation and prosecution. The cases accepted increased by 1.6 and the number of cases for investigation and prosecution increased by 1.8 compared with cases in 1988.¹⁵³

Furthermore, in contrast to previous anti-corruption campaigns, in the context of economic and social reform, the party, for the first time, applied rational and legal methods. Having observed the problems associated with the legitimacy based on traditional claims, the ruling party, the CCP, realised the necessity to rely on legal means to control corruption and consequently the party’s popular image could be restored on a new and rational basis. From January 1988 to March 1989, the party and the government issued approximately thirty documents connected with anti-corruption rules. As summarised by Ting Gong, these rules and regulations were classified into

¹⁵¹ *Ming Bao*, June 1, 1989, p. 1, Hong Kong.

¹⁵² Haimin Wu (1990), *The Republic Gave an Ultimatum: How 50,000 Corrupt Officials Turned Themselves in*, Beijing: Xueyang Publisher, p. 5.

¹⁵³ Figures for 1988: number of cases accepted 45,700; number of cases prosecuted 21,045. Figures were based on *Renmin Ribao (People’s Daily)*, December 29, 1988; March 4, 29, 30, 1989; April 10, 1990.

three major categories¹⁵⁴:

- 1) Strengthening centralised control on certain commodities and production materials. For instance, it required any government units to report its purchase of important commodities to its superior; the number of categories of the commodities subject to pre-purchase approval increased from 19 to 29, which included automobiles, sofas, carpets, office furniture, blankets, washing machines, refrigerators, TV sets, vacuums, clocks worth over 50 yuan, lamps worth over 100 yuan, and imported liquor and cigarettes.
- 2) Forbidding certain ‘unhealthy tendencies’¹⁵⁵, for example, gift giving in public affairs, wasting public funds, cadres’ engagement in trading, excessive consumption of liquors and cigarettes at receptions.
- 3) Establishing rules and regulations to punish wrongdoers. For example, the Interim Provisions Governing Disciplinary Sanctions Against Corrupt Functionaries of State and Administrative Organs stipulated the following disciplinary penalties for embezzlement: anyone who embezzled more than 5,000 yuan should be expelled from office and the money being embezzled should be repaid in full plus interest; anyone who embezzled 3,000 – 5,000 yuan or who embezzled money in order to make a profit, should receive a disciplinary warning and a penalty up to removal from office, with the money being repaid; anyone who embezzled less than 3,000 yuan should receive a disciplinary warning or a demotion penalty.¹⁵⁶

Cleaning up corporations

Due to the blurred connection raised by the public between the problem of official speculation and the proliferation of state-owned corporations, the party and the State Council between 1988 and 1989 issued several important documents. One such

¹⁵⁴ Ting Gong (1994), *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes*, Westport: Praeger Publishers, pp. 139-140.

¹⁵⁵ More detailed discussions on ‘unhealthy tendencies’ can be found at James T. Myers (1989), ‘China: Modernisation and Unhealthy Tendencies’, *Comparative Politics*, Vol. 21 No. 2, pp. 193-213

¹⁵⁶ *Renmin Ribao (People’s Daily)*, September 22, 1989.

document was the ‘Resolution to Clean up Corporations’, aimed at corporations run by government agencies. It specified that according to the central authority, these corporations should not engage in profit making and required all government agencies to separate themselves from business corporations and emphasised that no government agencies could take money out of their administrative budget or other government grants to invest in business.¹⁵⁷

The party leaders not only viewed the damage caused by their profiteering activities to the centre’s control over means of production, but also realised that they jeopardised the fairness of free competition in the market, as they had a monopoly over important materials and products; their buying-selling-reselling activities led to dramatic price changes; and most importantly, they affected social morality and the reputation of the party and the government.¹⁵⁸ As a consequence of this intensified clean-up, according to the report, by the end of April 1990, 88.8 percent of some 13,390 companies run by party or government agencies were abolished, and the rest were transferred to economic sectors.¹⁵⁹

In addition to limiting illegal or ill-managed corporations, the party also banned its officials from holding concurrent positions in corporations. On February 5, 1989, the Party Central Committee and the State Council circulated a notice requiring all the cadres who concurrently held positions in government sectors and business corporations to quit their positions in business. According to official statistics, one year after this notice was made, 96.4 percent of these cadres pulled themselves out of business.¹⁶⁰ The party further publicised four major cases involving cadres acting as

¹⁵⁷ See Golden White (1996), ‘Corruption and the transition from socialism in China’, *Journal of Law and Society*, Vol. 23, pp. 149-172.

¹⁵⁸ Ting Gong (1994), *The Politics of Corruption in Contemporary China: An Analysis of Policy Outcomes*, Westport: Praeger Publishers, pp. 140-142.

¹⁵⁹ *Renmin Ribao (People’s Daily)*, July 7, 1990.

¹⁶⁰ *Renmin Ribao (People’s Daily)*, July 7, 1990.

middlemen who took advantage of their concurrent positions both in government and corporation to make profit. Ge Datong of the Economic Daily, Chen Kaizhi of the North China Industrial Corporation, Zhang Shuchun of the Yanshan Chemical Corporation, and Xiang Yan of the Jiangshu Zhenhua Chemical Industrial Corporation, were party officials working for newly established government corporations. They took advantage of their privileged positions which gave them free access to important products and materials, and then made fortunes. They were eventually severely punished.¹⁶¹

It is worth noting that business operating within the military, which received limited attention from academic scholars, contributed significantly to the crime of corruption that emerged with the reform. Mulvenon presented his work over a decade ago stating that military corruption in China was primarily facilitated by two factors: (1) the People's Liberation Army (PLA)'s legal but limited participation in the Chinese economy, and (2) a series of structural factors, for example, the PLA's privileged access to infrastructure, transportation, natural resources, and borders as well as its immunity from civilian monitoring and prosecution.¹⁶²

In the spring of 1985, the mighty Chinese army rolled into battle – a battle without blood, gunpowder and smoke, but with a mission to storm the commanding heights of the country's booming economy and claim a stake in its prosperity. Instead of charging forward with missiles and tanks, officers and soldiers were armed with business plans and tax breaks. Enormous efforts and resources were invested to build a vast but loosely connected commercial empire extending into almost every corner of the economy.¹⁶³

¹⁶¹ *Guangming Ribao (Guangming Daily)*, March 12, 1990.

¹⁶² James Mulvenon (2001), *Soldiers of Fortune: The Rise and Fall of the Chinese Military-Business Complex*, New York: M.E. Sharp, pp. 138-139. To be noted, these factors are a necessary but not sufficient cause of corruption in the PLA, but they are the key permissive factor allowing military corruption to survive and proliferate.

¹⁶³ See Ellis Joffe (1996), 'The PLA and the economy: the effects of involvement', in *Chinese Economic Reform: The Impact on Security*, edited by Gerald Segal and Richard H. Yang, London and New York: Routledge, pp. 12-22.

Thousands of enterprises were established which earned hundreds of millions of dollars annually. They carved out lucrative niches in China's fastest growing industries such as telecommunications, tourism and real estate. They became magnets for the children of senior cadres, and the immense interests to whom their business gave rise had corrosive effects on the officers.¹⁶⁴ The top political authority has increasingly extended its powerful voice from the political and national security into the economic realm – this is particularly apparent in industries in which the PLA had direct interests.

Within a few months of the approval being given for the PLA's legitimate engagement in business, an appraisal of army backed trading companies had to be conducted in order to control rampant economic abuses. Since then, the military organisations and authorities commenced a series of actions to limit the spread of malpractices and economic crimes by military units and their business partners. Despite regular crackdowns, corruption, smuggling, and other abuses became an increasing occurrence and huge sums of undeclared benefits and misappropriated assets were illegally extorted by individuals and institutional units. Furthermore, the PLA's troops and defence resources were regularly diverted from military moneymaking duties, which inevitably impacted on troop's training and combat readiness.¹⁶⁵ Their involvement in business also contributed to the outflow of talented and well qualified military personnel into higher paid jobs. According to a study conducted in 1993 on military salary structures, commercial pilots earned between RMB 2,600 to 7100 monthly compared to RMB 500 for pilots working in the air force.¹⁶⁶

However, above all, as Cheung summarised, the drawbacks of military commercialism

¹⁶⁴ Tai Ming Cheung (2001), *China's Entrepreneurial Army*, Oxford: Oxford University Press, pp. 1-2.

¹⁶⁵ Ibid, pp. 173-174;

¹⁶⁶ Fulin Chao and Changshui Hu (1993), 'Yetan Jundui Ganbu Gongzi Zhidu de Gaige' (Discussions on the reform of the Army cadres' salary structure), *Junshi Jingji Yanjiu (Military Economic Research)*, July 1993, pp. 51-52.

were numerous, complex and deep-rooted; the most serious sins that were of particular attention to the authorities were malpractice and economic crimes, such as corruption, smuggling, profiteering, misuse of public funds and evasion of tax.¹⁶⁷ Indeed, lax supervision and the extra-legal status of military units and their immunity from civilian law enforcement authority in many ways encouraged these crimes to emerge.¹⁶⁸ Statistics in the civilian sector suggest that economic malpractice in the armed forces spread rapidly from the mid-1980s and economic crime grew sharply at the end of this decade and into the beginning of the 1990s. Case numbers brought before military courts were 102 in 1989, 341 in 1990, 234 in 1991 and 450 in 1992, which illustrates a steady increase of economic crimes between 1989 and 1992.¹⁶⁹ Economic violations accelerated in the following years, those uncovered by military auditors in the mid-1990s expanded at record rates which may have been comparable to an annual increase of 30 to 40 percent that were registered in the civilian judicial system.¹⁷⁰ Of course these numbers only represent a tiny fraction of total economic abuses that took place within the PLA, given that military units were reluctant to report cases to their higher level authorities and consequently these abuses were either covered up or dealt with administratively by local party committees or discipline inspection offices.¹⁷¹

Serious abuses became so wide-spread that the political reliability of the PLA and the health of China's economic environment was undermined. This exasperated President Jiang Zemin, who in July 1998 eventually ordered all army-backed companies to cease their commercial activities. After nearly two decades of profitable but chaotic involvement in business activities, military chiefs had admitted that the disadvantages

¹⁶⁷ Tai Ming Cheung (2001), *China's Entrepreneurial Army*, Oxford: Oxford University Press, pp. 174-175.

¹⁶⁸ See David S. G. Goodman (1996), 'Corruption in the PLA', in Gerald Segal and Richard H. Yang, *Chinese Economic Reform: The Impact on Security*, Oxon: Routledge, pp. 35-52.

¹⁶⁹ Zhongguo Falu Nianjian Bianjiwei (China Law Yearbook Editorial Board), *Zhongguo Falu Nianjian (China Law Yearbook)*, Beijing: China Law Yearbook Publishing House, annual editions, 1988-1993.

¹⁷⁰ Guanglin Liu (1996), 'Enforcement of financial regulations and discipline', *Junshi Jingji Yanjiu (Military Economic Research)*, June 1996, p. 71.

¹⁷¹ Ibid.

of moneymaking had finally outweighed its financial rewards.¹⁷² Divested of these commercial profits, the PLA claims to have finally returned to its pre-1985 days of engaging in limited side-line agricultural and industrial activities.

Judicial and supervisory system

Various institutions had either been set up or resumed through the first decade of the economic reform by the CCP, with the aim of more efficiently and effectively regulating the market. In the beginning of the reform, the procuratorate system resumed functioning in 1978, and the internal party disciplinary body Central Committee for Discipline Inspection (CCDI) was re-established in 1979. In 1987, the supervisory agency, the Ministry of Supervision, was reinstated. These three systems were initially created to have their own regulatory and investigative functions: the party discipline commission dealt with cases of violating organisational disciplinary rules involving party members, the supervisory agency dealt with cases of violating administrative regulations involving administrative staff of public units, and finally the people's procuratorates dealt with cases involving anyone, either party members or public workers, who violates the law. In 1993, the Ministry of Supervision was merged with the CCDI and they began to conduct joint investigations.¹⁷³

The CCDI, from its establishment, was solely designed to strengthen its supervision over party members. The Committee for Discipline Inspections were established from the provincial to county level, forming a network throughout the country. Even in modern China today, the CCDI is a powerful weapon within the Communist Party and exclusively deals with party cadres who are under corruption and malfeasance charges. The party disciplines and rules appear to have a more deterrent influence on party

¹⁷² See more at James Mulvenon (2001), *Soldiers of Fortune: The Rise and Fall of the Chinese Military-Business Complex*, New York: M.E. Sharp, pp. 138-152.

¹⁷³ Official website of Ministry of Supervision of the People's Republic of China, access at: http://english.gov.cn/state_council/2014/09/09/content_281474986284141.htm

officials, given the secret internal disciplinary conduct of *Shuanggui* – at an appointed time and place to confess their violation of party discipline, beyond the normal legal process. Officials subject to *shuanggui* are not permitted to have legal counsel and contact with family members for a prolonged period. This gives party discipline power over public laws in arresting, detaining and investigating party members.¹⁷⁴

In addition to combating corruption, the Supreme People's Procuratorates set up a special bureau, Anti-Corruption and Bribery Bureau, within the procuratorates, and it oversaw investigating and prosecuting corruption and bribery at various levels. In 1989, the first bureau was established in the Guangdong Province. Then in November 1995, under the auspice of the Supreme People's Procuratorates, the central bureau was established. By 1996, there were over 1,500 such agencies operating in 26 provinces of China.¹⁷⁵

Conclusion

The tremendous economic reform China has undergone has been witnessed globally. What the country and the CCP have achieved certainly is worthy of praise. In the first ten years since 1978, the country and the CCP have been through a new series of crimes never encountered before, and in response, they promulgated the first ever issues of Criminal Law and Criminal Procedure Law in the PRC's history; they publicised innumerable customised regulations and rules in order to curb every type of fast growing economic crime they have confronted and initiated several anti-crime movements. Of course, China's enormous efforts have been recognised. Nevertheless there still were a certain number of issues waiting to be addressed.

¹⁷⁴ See Lihong Xing, Xuebin Li and Enze Liu (2015), 'Corruption in China', in *Research Handbook on International Financial Crime*, edited by Barry Rider, Cheltenham: Edward Elgar Publishing Ltd, pp. 419-434.

¹⁷⁵ *China Daily*, August 13, 1996.

Establishing the rule of law is something China has long emphasised, and it is becoming more and more important when China stepped upon the world stage. As the discussion presented above illustrates, short-lived anti-crime campaigns would not sufficiently solve the problem. Where the degree of severity of the crimes and level of punishment used to be determined by the policies of the political campaign, it should, in the context of market reform, be determined by the law. The status and significance of the law should be further emphasised, given that people in the country would not want to accept the fact that the anti-corruption campaign gradually became a tool for political struggles against rivals.

Corruption is not a pure economic problem. It is a political matter concerning public image and political legitimacy of the leading institution. It is particularly the case that, for a party such as the CCP who defeated rivals through its reputation for moral rectitude and its military power, it would not tolerate being tarred with the same corrupt image as that of KMT in the period before 1949. Amassing a clean and trustworthy government requires not only the rule of law, but also an independent monitoring system. The cases discussed illustrate how corrosive it was within culprit state departments, and regulatory and judicial bodies in a small coastal city where smuggling activities were prevalent. This is of course partly due to the single party system and the absolute domination of the party and its members, which leads to a further issue – lack of judicial independency.

Efforts have been made by the government to balance the power between the party and the judiciary. The revised 1982 Constitution provides for independent judicial power.¹⁷⁶ Yet the judicial branch exercised very little independence as it is obliged to follow the party's directives, and the presidents and judges in regional courts are in fact subordinates of the party regional secretary. As a result, the provision granting

¹⁷⁶ Constitution of the People's Republic of China (1982), article 126.

independent judicial power remains a form with little substance. Indeed, China needs not only bold plans for economic reform toward a market economy, but also meaningful political reforms to bring in effective control over power holders.

Chapter 4: Fraud in China: in a Comparative Context

Introduction

Economic crime, corruption and fraud are not isolated problems within any nation state. In today's society, it is widely believed that the prevalence of economically motivated crime is a substantial threat to the development of economies and financial/social stability.¹ These crimes are deemed to undermine the country's economic growth, disrupt financial order and destroy investors' confidence. This is particularly so with fraud, which has widely been viewed as a key concept of economic crime.² Literature suggests, fraud has been described in many ways as 'white collar crime'³, 'financial crime', 'economic crime'⁴, 'deceit'⁵, 'forgery'⁶, and 'dishonesty'⁷. The present author, seeks in this chapter to present the control of fraud in a comprehensive manner and to give emphasis has adopted a comparative analysis with English law.

According to a report published by the UK National Fraud Authority in 2012, fraud costs the UK £73 billion a year. Correspondingly, each UK adult over the age of 16 is £1441 worse off per annum due to fraud.⁸ A new report published recently in 2016 indicates that the cost of fraud on the UK economy has soared to £193 billion a year –

¹ Barry Rider, Haiting Yan, and Lihong Xing (2010), *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, p. 1.

² See Gilbert Crentsil (2015), 'The concept of fraud: a comparative analysis', in *Research Handbook on International Financial Crime*, edited by Barry Rider, Cheltenham: Edward Elgar Publishing Limited, pp. 15-31.

³ Edwin H. Sutherland (1968), 'White-Collar Criminality', *White-Collar Criminals: The Offender in Business and the Professions*, 1st edition, Atherton Press, p. 40.

⁴ This term has been widely used by Professor Barry Rider and other scholars at *The Cambridge International Symposium on Economic Crime* which takes place annually at Jesus College, University of Cambridge.

⁵ See Sir James Fitzjames Stephen (1883), *A History of the Criminal Law of England*, Vol. II, MacMillan and Co, pp. 121-122.

⁶ See Michael Gale, Sarah Gale and Gary Scanlan (1999), *Fraud and the Plc*, LexisNexis UK, p. 2.

⁷ *R v Ghosh* [1982] QB 1053; see also Gale, Gale and Scanlan Ibid, pp. 1-5.

⁸ BBC News (2012), 'Fraud costing the UK £73bn a year', 29 March 2012, available at: <http://www.bbc.co.uk/news/uk-17548260>

equating to more than £6,000 lost per second per day.⁹ The consequences of fraud are obvious and the urgency of efficacious action to tackle such misconduct has been recognised by countries worldwide. This chapter will focus particularly on the legal regimes of China, and to a lesser degree on the UK – as an exemplar and the origin of the Common Law system, based on a comparative analysis regarding the law relating to fraud. To provide readers with a clear content of comparison, the author will initially evaluate English legal textbooks in relation to Chinese codified statutes.

Fraud is a broad concept that is embodied in both civil and criminal law.¹⁰ This chapter, will firstly provide a brief introduction to the definition of fraud in the UK and China under both strands of law. This will be followed by a detailed discussion of fraud within civil law under both legal systems; more specifically, it will focus on the law of tort and contract. Subsequently, a comprehensive analysis will be presented assessing and comparing criminal fraud in the UK and China, through evaluation of the UK Fraud Act 2006 and equivalent provisions in the Chinese criminal code. Furthermore, a discussion as to the reason why fraud is difficult to monitor will be presented, in particular, its complexity, the evidence required and the high level of proof.

The nature and characteristics of fraud

The definition of fraud in criminal law

In many legal systems, it seems rather difficult to determine exactly what constitutes fraud, although we may naturally recognise fraudulent acts. A general definition, defined by the International Monetary Fund, states that fraud is a deception, deliberately

⁹ *Annual Fraud Indicator 2016*, produced by Experian, PKF Littlejohn and the Centre for Counter Fraud Studies, University of Portsmouth, May 2016. Cited in Jane Croft (2016), 'Fraud costs the UK up to £193bn per year, reports say', *Financial Times*, May 25, 2016, available at: <http://www.ft.com/cms/s/0/fbb5c2e8-21ad-11e6-9d4d-c11776a5124d.html#axzz4DIBuR7s6>.

¹⁰ See Jonathan Fisher (2016), 'Fraud in civil and criminal law', in *Research Handbook on International Financial Crime*, edited by Barry Rider, Cheltenham: Edward Elgar Publishing Limited, pp. 315-327; see also Barry Rider, Kern Alexander, Stuart Bazley and Jeffrey Bryant (2016), Chapter 6: Fraud and financial crime, in *Market Abuse and Insider Dealing*, 3rd edition, Heywards Heath: Bloomsbury Professional, pp. 123-178.

practiced, in order to secure unfair or unlawful gain.¹¹ However, the act of fraud is developing and changing constantly. One leading law book in common law states “it is not easy to give a definition of what constitutes fraud in the extensive signification in which the term is understood by the Civil Courts of Justice. The Courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety. The fertility of man’s invention in devising new schemes or fraud is so great, that the courts have always declined to define it ...reserving to themselves the liberty to deal with it under whatever form it may present itself. Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered fraud. Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to.”¹²

In the context of criminal law, there have always been concerns as to the fairness of such vagueness in definition and attempts have been made in many countries to present what passes as a universal definition. However, in reality, most judicial bodies do little more than recite the manner in which courts have identified a crime as fraudulent.¹³ In modern English criminal law, accepted deception offences, under the Theft Act 1968 and 1978, have been abolished and replaced by the newly enacted Fraud Act 2006, enacted on 15 January 2007. The new law, in many respects, broadens the crime of fraud, and its objective is, as Judge Alan Wilkie QC stated, to make the law of fraud

¹¹ International Monetary Fund website: <http://www.imf.org/external/np/leg/amlcft/eng/>

¹² Denis Lane McDonnell, and John George Monroee (1952), *Kerr on the Law of Fraud and Mistake*, 7th Edition, Sweet & Maxwell, page 1.

¹³ See Melville M. Bigelow (1887), ‘Definition of fraud’, *Law Quarterly Review*, Vol. 3 No. 4, pp. 419-428

clearer and simpler, and more readily understandable for all jurors, police, victims, defendants and lawyers.¹⁴

The new fraud offence, to be discussed in detail within this chapter, involves a discernable shift from the previous focus on the term of ‘deception’ – requiring not only that the prosecution prove that the defendant behaved dishonestly and with intent to gain or cause loss, but also that there were economic interests imperilled by their conduct. Recently, the new focus is towards criminalising conduct which imperils economic interests, with greater emphasis on the *mens rea* of the defendant rather than on any actual harm caused.¹⁵ The new Fraud Act bases liability on the concept of dishonesty as perceived; whether this provides any greater certainty remains to be seen.

The Fraud Act 2006 creates only one offence of fraud which can be committed in three broad ways. Firstly, by a false representation,¹⁶ secondly, by failing to disclose information regarding whether there is a legal duty to disclose¹⁷ and thirdly, by abuse of a position in which one is expected to safeguard or refrain from acting against the financial interests of another person.¹⁸ The offence is committed if the action taken is dishonest and with fraudulent intention.¹⁹ It is a matter of the state of mind that has become the determinant factor in liability.

Definition of fraud in contract law

Although English law does not provide a general duty to disclose information during

¹⁴ News from the Law Commission 30 July 2002, report available at: http://lawcommission.justice.gov.uk/docs/lc276_Fraud.pdf

¹⁵ David Ormerod (2011), *Smith and Hogan's Criminal Law*, 13th Edition, Oxford University Press, pp. 871-872.

¹⁶ The Fraud Act 2006, Section 2.

¹⁷ *Ibid*, Section 3.

¹⁸ *Ibid*, Section 4.

¹⁹ David Ormerod (2011), *Smith and Hogan's Criminal Law*, 13th Edition, Oxford University Press, pp. 875-876; see also Andrew Phang (1992), ‘Positivism in the English law of contract’, *The Modern Law Review*, Vol. 55, No. 1, pp. 102-111.

the process of contractual negotiation, the process is not left entirely unregulated. A duty is imposed to avoid making false statements of fact to the contracting party and thereby inducing them to enter into a contract.²⁰ Given the importance of contract law in all business and trade relations, it is fundamental to briefly examine the law of misrepresentation, which plays a crucial role in curbing fraud throughout contractual negotiations.

According to English law, a misrepresentation is an untrue statement of fact made by one party within a contract with the other party, which induced the second party to enter into a contract.²¹ A misrepresentation renders a contract voidable and it may also lead to a right to damages, depending on the type of misrepresentation that has occurred.²² For a misrepresentation to be actionable, it has to meet three requirements: it must be a statement of fact; the statement must be untrue or misleading and it must have induced the other party to enter into the contract.

To constitute a misrepresentation, the statement must be an existing fact, rather than an opinion, sales talk or a statement of intention. In *Bisset v Wilkinson*²³, Bisset was selling land in New Zealand to Wilkinson, who wanted to utilise it for sheep farming. The land had not been used as a sheep farm before, but Bisset expressed, during the negotiation, that the land could carry 2,000 sheep if adequately prepared. The judgment held that both parties were aware that the land had never been used as a sheep farm, and therefore neither could expect the other to know how many sheep it could carry. So a farmer's description of the quality of his land was no more than a matter of opinion instead of an existing fact, and thereby could not amount to a misrepresentation.²⁴

²⁰ Ewan Mckendrick (2011), *Contract Law*, 9th Edition, Plagrove Macmillan, p. 225.

²¹ *Ibid* p. 226.

²² *Ibid*

²³ [1927] AC 177

²⁴ *Ibid*, pp. 183-184.

Mere ‘sales talk’ between customer and seller is not considered to be a statement of fact. In *Dimmock v Hallett*²⁵, the land for sale was described as ‘fertile and improvable’. This was held to be simply sales talk and the court considered that this statement had insufficient substance to be classed as misrepresentation.

Finally, a statement of intention is not a statement of fact. However, if the statement of future intention falsely represents the actual intention, i.e. it is a wilful lie, then it may be treated as a misrepresentation. In *Edgington v Fitzmaurice*²⁶, directors of a company invited the public to subscribe debentures on the basis that money raised was for expanding the business. But, in fact, the real purpose of raising the money was to pay off company debts. It was held that the directors were guilty of misrepresentation because they had disguised their actual intention.²⁷

It is important to note that an untrue statement can be made by conduct rather than being written or spoken. A contracting party does not have to open his mouth to make a false statement. In *Walters v Morgan*²⁸, Lord Campbell stated that, while simple reticence does not amount to a legal fraud, in the case of a contract sale, whether of goods or land, “a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold” would be sufficient ground for refusing to enforce a contract.²⁹ Conduct can be as misleading as words; however, difficulties arise in identifying the meaning to be attributed to the conduct and in ascertaining the situations in which the defendant is under an obligation to redress the meaning expressed by his conduct.

²⁵ (1866) 2 Ch App 21.

²⁶ [1885] 29 Ch D 459.

²⁷ *Ibid*, at 481.

²⁸ (1861) 3 D. F. & J. 718.

²⁹ *Ibid* at 724, Lord Campbell.

Generally, mere silence cannot amount to a misrepresentation. In the case of *Keates v Cadogan*³⁰, a landlord who was letting his house did not tell the tenant that it was in a ruinous condition. The judgment said this failure to disclose material information was held not to be a misrepresentation. In other words, there is no duty for a party who is going to enter into a contract to disclose material facts known to that party while not known to the other. However, the courts may decide in certain circumstances³¹, that there is a positive duty of disclosure, for example, where there is a contract of utmost good faith. Firstly, these exceptional circumstances typically arise where one party is in a strong position to know the truth and the other is in a weak position (e.g. contracts of insurance), thus the law imposes an obligation to affirmatively disclose all material facts relating to the contract. Secondly, where there has been a change due to later events or in some cases a change of intention, this would normally require correction. Thirdly, where there is a half-truth. If only a half-truth is told, and the result is misleading, then the law may impose on the person responsible for the half-truth a duty to correct the false impression given. Lastly, where there is a fiduciary relationship. A fiduciary relationship, for example, between agent and principal, solicitor and client, or doctor and patient, imposes a duty of full disclosure.

The misrepresentation will only be actionable if the statement results in an inducement to the other party to finally enter into the contract. The claimant must have known of the existence of the statement; and the statement must have affected the claimant's judgment so that they were induced by it or relied upon it.³²

Definition of fraud in both criminal and civil law in China

Compared with English law, Chinese law has been a complex mix of ancient, traditional

³⁰ (1851) 10 CB 591.

³¹ The four points stated below are from the same source at Stefan Fafinski and Emily Finch (2010), *Contract Law*, 2nd Edition, Harlow: Pearson Education Limited, page 116-117

³² *Ibid* Page 119.

and western influences, and is based upon civil law legal tradition, where its core principles are codified into the Chinese system that serves as the primary source of law.³³

Fraud in Chinese law is defined under Article 68 of the ‘Opinions of the Supreme People’s Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law’ as “where a party purposely conveys any false information to the other party, or purposely conceals any fact so as to induce the other party into making any false declaration of will, such an act shall be determined as a fraudulent act.”³⁴ *Prima facie*, fraud appears to have very much the same definition as in English contract law.

The legal term of ‘fraud’ has many different components and characteristics under Chinese criminal and civil law. It is worth noting that the English translation of the concept of fraud in Chinese criminal and civil laws interchangeably use the words ‘fraudulent’, ‘defrauding’ or ‘fraud’. However, these words cannot always fully express or define what this really means in Chinese. Civil law uses ‘*qi zha*’ to describe fraud, while criminal law uses ‘*zha pian*’. In Chinese, ‘*qi zha*’ means to defraud people in sly ways while ‘*zha pian*’ expresses deception and swindle.³⁵ In other words, ‘*zha pian*’ is a much more severe act than ‘*qi zha*’ as to the degree of harm caused to others’ interests. This perception is consistent with the distinction between a less serious civil fraud and

³³ See more at Chippings Lang (1989), ‘Explicating law: a comparative perspective of Chinese and Western legal culture’, *Journal of Chinese Law*, Vol. 3, No.1, pp. 55-92; and Derk Bodde and Clarence Morris (1973), *Law in China: Exemplified by 190 Ching Dynasty Cases with Historical, Social, and Judicial Commentaries*, Philadelphia: University of Pennsylvania Press.

³⁴ Opinions of the Supreme People’s Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People’s Republic of China (Trial Implementation), Promulgated 26.1.1988, Article 68.

³⁵ Henry (Litong) Chen, and Carlo Carani (2010), ‘Civil Fraud v. Criminal Fraud: Criminal Proceedings Not a Silver Bullet to Resolve Business Disputes in China’, *Bloomberg Law Reports*, MWE China Law Offices, available at: <http://www.mwe.com/info/pubs/Civil%20Fraud%20v.%20Criminal%20Fraud%20-%20Criminal%20Proceedings%20Not%20a%20Silver%20Bullet%20to%20Resolve%20Business%20Disputes%20in%20China.pdf>

a more serious criminal fraud.

Returning to the definition of fraud under civil law, Chinese contract law stipulates “a contract shall be null and void if a contract is concluded through the use of fraud or coercion by one party to damage the interests of the State.”³⁶, and “if a contract is concluded by one party against the other party’s true intention through the use of fraud, coercion, or exploitation of the other party’s unfavourable position, the injured party has the right to request the people’s court or an arbitration institution to modify or rescind the contract.”³⁷

In comparison, China’s 1997 criminal law provision states that “those defrauding relatively large amounts of public or private money and property are to be sentenced to three years or fewer in prison or put under criminal detention or surveillance, in addition to the imposition of a fine.”³⁸ and “whoever, for the purpose of illegal possession, uses one of the following means during signing or executing a contract to obtain property and goods from the opposite party by fraud, and when the amount of money is relatively large, is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention and may in addition or exclusively be fined...”³⁹

The subtle difference in Chinese terms defining fraud indicates a distinction between civil and criminal fraud. Having looked through relevant articles present in both criminal and civil law in China, it is evident that the key difference between them is in the *intent* of the fraudster.⁴⁰ Civil fraud only requires the wrongdoer to have an intention

³⁶ Contract law of the People’s Republic of China, Promulgated by 9th NPC and effective on 1.10.1999, Article 52.

³⁷ Ibid, Article 54.

³⁸ Criminal Law of the People’s Republic of China (1997), Revised at 8th NPC and effective on 1.10.1997, Article 266.

³⁹ Ibid, Article 224.

⁴⁰ Haibo Zhu (2010), ‘Minshi hetong qizha yu hetong zhapian zui’ (Civil fraud and criminal fraud), *China Law Information*, available at: http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=53875

of general fraudulence, while criminal fraud requires a much more severe intent of illegal possession. Certainly, there are related minor elements that differ from civil and criminal fraud. For example, a monetary threshold must be reached in order to file a criminal fraud case with the police, where the value of money or property illegally possessed must reach at least 5,000 RMB for individuals and at least 50,000 RMB for companies.⁴¹ This monetary limit does not exist in civil fraud. Briefly, a civil fraud may not be serious enough to constitute a criminal fraud, whereas a criminal fraud case simultaneously gives rise to a civil fraud offence.

Fraud in the civil law

Fraud in the law of tort

As we have seen previously, fraud is a broad concept that can give rise to liability in both criminal and civil law. Yet, the dividing line between them, with regards to fraudulent activities, has never been clear in English law. Indeed, one of the earliest causes of action for deceit involved considerations of an almost penal nature.⁴² In substance the tort of deceit has much in common with the traditional crime of fraud.

At the end of the eighteenth century, *Pasley v Freeman*⁴³ established the rule that if a person knowingly or recklessly (not caring whether it is true or false), makes a statement to another with the intention that it shall be relied upon by that person, who does rely on it and therefore suffers harm, then an action of deceit will be deemed. In the modern law of fraud in the UK, actual reliance and loss are not necessarily required. What is important is the state of mind of the defendant. However, in the civil law of tort, unless there has been causative loss, there will be no cause of action as there is

⁴¹ Provisions of Supreme People's Prosecuting Institute and Ministry of Public Security Bureau on the Standard of Prosecuting an Economic Crime, Effective on 05.07.2010, Article 69.

⁴² Barry Rider, Kern Alexander, Stuart Bazley and Jeffrey Bryant (2016), *Market Abuse and Insider Dealing*, 3rd Edition, Haywards Heath: Bloomsbury Professional, p. 169.

⁴³ (1789) 3 TR 51.

nothing to compensate.⁴⁴

It is the need for the claimant to establish that the defendant must either have known that the statement was false or must have been reckless as to its truth or falsity.⁴⁵ If the defendant carelessly, but honestly, makes a false statement, he will not be liable for deceit. These legal arguments were presented in the leading case of *Derry v Peek*⁴⁶, where a tramway company provided that it could operate steam-driven carriages with the consent of the Board of Trade. The directors issued a prospectus declaring that they had the right to use steam, on the faith of which the claimant bought shares in the company. The Board of Trade subsequently refused the necessary permission. The House of Lords held that there was no action in deceit since the defendants had honestly believed that permission was a formality; they had merely been careless.⁴⁷ In *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*⁴⁸, the House of Lords stated that carelessness might, in certain circumstances, give rise to liability for breach of a duty of care in negligence.⁴⁹ Generally, the main difference between suing in deceit and in negligence is the remoteness of damages. In deceit, the defendant is liable for all losses following on directly from the tort, whether foreseeable or not.⁵⁰

History illustrates that English law has developed various mechanisms for rendering a fraudster liable in the law of tort. In comparison, the Chinese statutory law of tort is relatively new. In China, the first comprehensive law of tort⁵¹ was adopted in 2010, and

⁴⁴ Barry Rider, Haiting Yan, and Lihong Xing (2010), *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, p. 434.

⁴⁵ Simon Deakin, Angus Johnston, and Basil Markesinis (2013), *Markesinis and Deakin's Tort Law*, 7th Edition, Oxford University Press, p. 468.

⁴⁶ (1889) 14 App Cas 337.

⁴⁷ *Ibid*, at 376.

⁴⁸ [1964] AC 465.

⁴⁹ *Ibid*, page 502.

⁵⁰ *Smith New Court Securities Ltd v Scrimgeour Vickers Ltd* [1997] AC 254.

⁵¹ Tort Law of the People's Republic of China, adopted at 11th NPC on 26 December 2009 and came into force on 1 July 2010.

covered a broad range of activities including medical malpractice, personal injury and liability for environmental damage.⁵² However, the new tort law does not include business-related torts such as interference with contracts or business relationships, unfair competition or fraud and misrepresentation. Accordingly, it is widely believed that Chinese tort law lacks definition of key terms used or alluded to throughout western tort law such as negligence, gross negligence, reasonable care, trespass to land and in particular, fraud and misrepresentation.⁵³ Only in Article 2 of Chinese tort law, does it stipulate: “those who infringe upon civil rights and interests shall be subject to tort liability according to this law.” It then lists a range of ‘civil rights and interests’ and further uses “... and other personal and property rights and interests”.⁵⁴ Generally, this might be the only indication for those who have been defrauded by others to seek compensation from the action of deceit in tort liability, though no such relevant cases have yet been reported.

In comparing fraud in English and Chinese tort law, it can be summarised that there are clearly major differences. Firstly, Chinese civil code defines and regulates fraud based only on general principles of civil and contract law, while fraud is governed by both contract and tort law in England. Secondly, although in theory, scholars recognise tort liability, Chinese civil codes do not clearly define tort liability of fraud. Yet, fraud (action of deceit) is categorised as a recognised independent tort in English law. Thirdly, English law has already established mature and detailed principles regarding the tortious liability of fraud, but China has yet to follow this example. Fourthly, in many cases, English fraud leads to the concurrence of contract liability and tort liability, whereas China is facing the problem of how to coordinate the effect caused by fraud on both contract liability (claim for unjust enrichment) and tort liability (claim for

⁵² See more at Laura Ascher (2013), ‘Punitive damage under the new Chinese tort liability law’, *China-EU Law Journal*, Vol.2, No.3, pp. 185-200; also Liming Wang (2008), ‘On the construction of China’s tort liability legal system’, *China Legal Science*, 4: 003.

⁵³ See Xiang Li and Jigang Jin (2014), *Concise Chinese Tort Laws*, Heidelberg: Springer, pp. 35-42.

⁵⁴ *Ibid* Article 2.

compensation for damages), and this may result in ambiguities in relevant cases.

The present author believes that China should acknowledge tort liability of fraud, and the injured party should have the right to claim for compensation for damages. Notwithstanding this, the current law provides the right for the injured party to rescind the contract and obtain certain remedies; the acknowledgement of the right for the injured party to claim for tort liability does have theoretical and practical significance in China.⁵⁵ It is perhaps, due to the majority of fraud cases in China in the economic sphere, that contract law has been the most commonly if not solely used mechanism for victims to seek compensation. However, when dealing with fraudulent activity existing without a contractual obligation, such as an individual deceived by an untrue story that a relative had died and subsequently suffered mental damage, in these circumstances, the claimant cannot seek a remedy in accordance with contract law, so seeking justice through tortious liability becomes of great significance.

Misrepresentation – inducing a contract

As discussed previously, an actionable misrepresentation refers to a statement of fact stated prior to the contract by one party to the contract to the other, which is false or misleading and which induced the other party to enter into the contract.⁵⁶ The remedy provided for those who have suffered as a consequence of relying on a misrepresentation varies, depending upon the essence of the misrepresentation, whether the misrepresentation was made fraudulently, negligently or innocently, or whether it has resulted in a mistake or been incorporated as a term of the contract. In contrast, Chinese law relating to misrepresentation is deemed as relatively simple.

⁵⁵ See Wei Yang, (2010), ‘Luelun qizha de qinquan zeren – yi hetongfa, qinquanfa dui qizha de butong guizhi wei jiaodu’ (Tort liability of fraud – in a view of different regulations from Contract Law and Tort Law), *Journal of Jinan University (Philosophy and Social Sciences)*, No.3 2010, pp. 200-206.

⁵⁶ See above section: the nature of fraud in contract law.

It has been seen in the law of tort that fraudulent misrepresentation has much the same meaning as it does in the action of deceit in the UK. However, in terms of remedies in the context of contract law, the misrepresentation must induce an eventual contract.⁵⁷ Fraudulent misrepresentation is regarded as the most serious misrepresentation, but the types of conduct that give rise to an action of deceit have been narrowed down to rigid limits. In the case of *Derry v Peek*⁵⁸, the House of Lords established that an absence of honest belief is essential to constitute fraud (as mentioned in the tort of deceit). Lord Herschell, further delivered a more elaborate definition of fraud, saying that it means a false statement made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.⁵⁹ Motive is irrelevant in an action of deceit. Once it has been proved that the claimant has acted upon a false representation, liability ensues, although the defendant did not believe the representation to be true or may not have been actuated by any bad motive.⁶⁰ The representor is not liable, until the representee has acted on the representation and thereby suffered loss.⁶¹

The second type of misrepresentation is negligent misrepresentation. Historically, all misrepresentations which were not fraudulent were considered innocent, thereby giving rise to no cause of action or remedy in common law.⁶² However, there are now actions available for certain non-fraudulent misrepresentations under both common and statute law. Negligent misrepresentation at common law was first established by the House of Lords in *Hedley Byrne & Co. Ltd v Heller & Partners Ltd*⁶³, in which it held that in some circumstances, an action would lie in tort for negligent misstatement. In this case the claimant had entered into advertising contracts on behalf of another company,

⁵⁷ See Peter Cane and Joanne Conaghan (2008), 'Fraud and misrepresentation' in *The New Oxford Companion to Law*, edited by Peter Cane and Joanne Conaghan, Oxford: Oxford University Press.

⁵⁸ (1889) 13 App Cas 337.

⁵⁹ *Ibid*, at 374.

⁶⁰ See *Foster v Charles* (1830) 7 Bing 105.

⁶¹ See *Briess v Woolley* [1954] AC 333.

⁶² Ewan Mckendrick (2011), *Contract Law*, 9th Edition, Plagrove Macmillan, p. 231.

⁶³ [1964] AC 465.

Easipower. Under the agreement, the claimants were liable if Easipower failed to pay, so the claimant clarified Easipower's creditworthiness, by contacting its bankers. Subsequently, the bank provided a reference supporting the financial soundness of Easipower. Unfortunately, Easipower defaulted on their payment, so the claimant sued the bankers. The claimant lost, since the reference was provided with a disclaimer that it was 'without responsibility'⁶⁴. However, the House of Lords stated that there could be liability for negligent misrepresentation on the normal principles of tort, where there was a 'special relationship' between the parties.⁶⁵ It is still not completely clear what a 'special relationship' is, but broadly speaking, it appears that such a relationship will only arise where the maker of a false statement has some knowledge or skill relevant to the subject matter of the contract, and can reasonably foresee that the other party will rely on the statement.⁶⁶

Further, under English statute, the Misrepresentation Act 1967, section 2(1) provides that where one party enters into a contract as a result of a misrepresentation by the other, no matter whether fraudulent or not, the innocent party can claim damages, unless the other party can prove that at the time the contract was made, they believed the statement to be true, and had reasonable grounds for that belief.⁶⁷ This effectively creates a negligent misrepresentation, but with the burden of proof reversed, so that the person making the statement has to prove they were not negligent.

Finally, innocent misrepresentation refers to a misrepresentation that is neither fraudulent, nor negligent. Following the development in *Hedley Byrne* and the Misrepresentation Act 1967, it states that innocent representation applies to misrepresentations that are made entirely without fault or false intent – in the belief that

⁶⁴ Ibid, page 504.

⁶⁵ Ibid, page 502.

⁶⁶ Catherine Elliott, and Frances Quinn (2011), *Contract Law*, 8th Edition, Harlow: Pearson Education Limited, p. 194.

⁶⁷ See Misrepresentation Act 1967, Section 2(1).

it is true and there are reasonable grounds for that belief.⁶⁸

One area that English law considers outside the ordinary law of misrepresentation is mistake as to identity. In the case of *Cundy v Lindsay*⁶⁹, the claimants (Lindsay) received an order by post of a large number of handkerchiefs from a Mr. Blenkarn of 37 Wood Street, Cheapside. Mr. Blenkarn rented a room at that address, and further down the road at number 123, were the offices of a highly respectable firm, Blenkiron & Co. On the order for handkerchiefs, Blenkarn signed his name so that it looked like Blenkiron. The claimants sent off the goods to Blenkiron & Co; Mr. Blenkarn purposely accepted them and by the time the fraud was discovered, he had sold the goods to the defendant, Cundy, who bought them in good faith. The House of Lords held that the claimant had meant to deal only with Blenkiron & Co; there could therefore have been no agreement or contract between them and Mr. Blenkarn.⁷⁰ Accordingly, title did not pass to Mr. Blenkarn and could not subsequently have been passed on to Cundy and they were enforced to therefore return the goods.⁷¹ In a typical situation of this kind of unilateral mistake, the contract will either be void for mistake, or voidable for fraud. Such a distinction depends on the manner in which the contract was made.⁷²

Chinese civil law

Looking purely at the legal provisions of Chinese law, neither the civil code nor contract law contains a single definition of such a legal term of misrepresentation, nor defines the various interpretations. In China's Securities Law, it prohibits any party in the securities market (e.g. stock exchange, securities companies, securities trading service institutions, and practitioners) from making any misrepresentations or presenting

⁶⁸ Catherine Elliott, and Frances Quinn (2011), *Contract Law*, 8th Edition, Harlow: Pearson Education Limited, pp. 195-196.

⁶⁹ (1878) 3 App Cas 459.

⁷⁰ Ibid, p. 465.

⁷¹ Ibid.

⁷² Catherine Elliott, and Frances Quinn (2011), *Contract Law*, 8th Edition, Harlow: Pearson Education Limited, p. 225.

misleading information in the activities of securities issuance and trading.⁷³ This is perhaps the unique reflection of the term ‘misrepresentation’ in various Chinese laws. However, this does not mean Chinese law has no concern about such misconduct. China has its own preferred texts to describe such actions. For example, as the author has mentioned in the first section, misrepresentation in Chinese contract law directly refers to the definition of fraud and fraudulent activities.

Reviewing the Chinese anti-fraud regime regarding contracts, regulations are governed not only in general principles, but also in special laws⁷⁴. Firstly, Article 58 (3) of the General Principle of the Civil Law of the People’s Republic of China (PRC) stipulates civil acts shall be null and void where “they are performed by a person against his true intentions as a result of cheating, coercion or exploitation of his unfavourable position by the other party”, and further provides “civil acts that are null and void shall not be legally binding from the very beginning”.⁷⁵

Contract Law of the PRC is the primary source of legislation in regulating contractual fraud, where Article 52 states “a contract shall be null and void if a contract is concluded through the use of fraud or coercion by one party to damage the interests of the State”. Article 54 states “if a contract is concluded by one party against the other party’s true intention through the use of fraud, coercion, or exploitation of the other party’s unfavourable position, the injured party has the right to request the people’s court or an arbitration institution to modify or rescind the contract”. Article 56 states “a contract that is null and void or revoked shall not be legally binding from the very beginning”, and finally Article 113 (2) provides “where a merchant engages in any fraudulent activity while supplying goods or services to consumers, it is liable for damages in

⁷³ Securities Law of the People’s Republic of China, Article 78

⁷⁴ Such as contract law, Consumer Protection Law, Securities Law and Insurance Law.

⁷⁵ General Principles of the Civil Law of the People’s Republic of China, adopted at 6th National People’s Congress, effective on 1.1.1987, Article 58.

accordance with the Law of the People's Republic of China on Protection of Consumer Rights".⁷⁶

Furthermore, the Law of the PRC on Protection of Consumer Rights stipulates "business operators engaged in fraudulent activities in supplying goods or services shall, on the demand of the consumers, increase the compensation for the victims' losses; the increased amount of the compensation shall be two times the costs that the consumers paid for the goods purchased or services received".⁷⁷

Chinese fraud law is primarily inherited from German and French civil laws;⁷⁸ beyond that, it has also made some changes in order to maintain China's traditions. For instance, Article 52 of the contract law clearly states the contract is null and void when it damages the state's interests, to emphasise that national interests are the highest priority, while the lack of uniform constitutive requirements results in theoretical inadequacy. For example, the China Central Television (CCTV) 12 legal channel once reported a case⁷⁹, where Mr. Li legally sold a house to Miss Hu, but some time after the transaction, Miss Hu heard from others that this house was a 'xiong zhai' (haunted house)⁸⁰. Hu sued Li for concealing this and cheating during the negotiation, but Li argued that the contract was made in good faith; Hu had obtained a surveyor's report, that convincing procedures had been strictly adhered to and Li had not lied presenting the key facts. The court held, the fact that Li did not disclose this information did in fact affect Hu's decision on the purchase, which should be considered as fraud, and thereby the contract

⁷⁶ Contract law of the PRC, Article 52, 54, 56, 113.

⁷⁷ Law of the People's Republic of China on Protection of Consumer Rights and Interests, Promulgated by 8th NPC and effective on 1.1.1994, Article 49.

⁷⁸ See Mingyi Ye (2012), 'She hetong zhapian de minfa guizhi' (Civil laws on regulating contract fraud), *China Legal Science*, 2012, No.1; and Xiaodong Wang and Bo Huang (2010), 'Zhongying hetong qizha wenti bijiao yanjiu' (Research on Chinese and English Contractual Fraud), *Market Modernization*, June 2010, total No. 613.

⁷⁹ CCTV 12 Legal Channel, 'Falu Jiangtang' (legal lecture), 10.2.2010.

⁸⁰ In Chinese feudal ideology, 'xiong zhai' is generally believed to be a sign of unluckiness which may bring misfortune to the host.

was null and void. Many argued against the judgment, stating ‘*xiong zhai*’ is a feudal superstition and is clearly not included in the concept of general law, and consequently the courts should not support those elements that do not have legal force. Moreover, today, many people make a healthy profit on buying and selling ‘*xiong zhai*’, and whether the house is ‘*xiong zhai*’ should not affect the validity of the contract. However, people who support the judgment hold that whatever factors influence a person’s decision to enter into a contract should be given weight when considering liability for fraud.

From the above case, we can appreciate the difficulties in identifying and remedying fraud cases. The law in China does not provide a uniform and integral principle of what constitutes fraud, and lacks proper guidance in terms of factors to be considered within the scope of related activity. The law in China does not contain a unified definition of objective and subjective criterion in respect of defining fraud. Hence there are difficulties in identifying and regulating fraudulent activities, and may therefore produce varying results of judgments made in different courts, even though the trial cases may be similar. Yet when we consider misrepresentation in English law, based upon the benefit of case law, it is well established in all aspects of contractual fraud in view of historical precedents.

Moreover, it is widely considered that it is a great handicap that contract law in China does not contain the concepts of negligent and innocent misrepresentations.⁸¹ Adapted from civil law legal tradition, Chinese anti-fraud regimes strictly require a defendant’s fraudulent intent and do not recognise negligent and innocent fraud, which thereby has led to a unique and single type of fraud. In today’s society, an increasing number of cases concerning contract fraud have been reported, and in some cases a negligent misrepresentation can cause financial loss as much as a fraudulent misrepresentation.

⁸¹ Xiaodong Wang and Bo Huang (2010), ‘Zhongying hetong qizha wenti bijiao yanjiu’ (Research on Chinese and English Contractual Fraud), *Market Modernization*, June 2010, Total No. 613.

Therefore, it is acknowledged that the single recognised definition of fraud in China causes problems with respect to a defendant's liability and the course for remedies. The author believes recognising and defining negligent and innocent fraud under Chinese contract law, could contribute significantly to ensuring fairness and equality in business contracts.

Damages

In English common law, a contractual claim for damages does not lie in misrepresentation, unless it has been subsequently incorporated into the contract as a term, in which case, damages can be claimed for breach of contract.⁸² But damages may be recoverable in tort where the misrepresentation was made fraudulently or negligently. In the case of fraudulent misrepresentation, the aim is to restore the claimant to the position they would have been in if the misrepresentation had not been made.⁸³ The claimant can recover damages for all direct loss flowing from the fraudulent inducement, regardless of foreseeability.⁸⁴ In addition, punitive damages can potentially be recovered for fraudulent misrepresentation.⁸⁵

For negligent misrepresentation, a claim can be made under the principles from *Hedley Byrne v Heller*, as discussed previously, that liability in tort can be established for negligent misrepresentation. Unlike deceit in tort, only reasonably foreseeable losses may be recovered. Alternatively, under section 2(1) of the Misrepresentation Act 1967, damages are assessed on the same basis as fraudulent misrepresentation.⁸⁶

Regarding innocent misrepresentation, at common law, as for all forms of

⁸² Ewan Mckendrick (2011), *Contract Law*, 9th Edition, Plagrove Macmillan, p. 238.

⁸³ Simon Deakin, Angus Johnston, and Basil Markesinis (2013), *Markesnis and Deakin's Tort Law*, 7th Edition, Oxford University Press, p. 469.

⁸⁴ See *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158.

⁸⁵ See *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122.

⁸⁶ See *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297.

misrepresentation, innocent misrepresentation only gives rise to the right to rescind a contract. However, when the Misrepresentation Act 1967 was passed, section 2(2) gave the court discretion as to whether it will allow the rescission of a contract, or substitute an award of damages in lieu.⁸⁷ For this reason, the power to award damages is discretionary.

In China, as to the single form of fraud, both general civil principles and contract law provide provisions regarding contractual damages. Standing as a basic principle, the general civil code states “after a civil act has been determined to be null and void or has been rescinded, the party who acquired property as a result of the act, shall return it to the party who suffered the loss. The erring party shall compensate the other party for the losses it suffered because of the act”⁸⁸. Further, contract law provides “after a contract has been determined to be null and void or has been rescinded, the property acquired as a result of the contract shall be returned; where the property cannot be returned or the return is unnecessary, allowance shall be made in money based on the value of the property. The party at fault shall compensate the other party for losses incurred as a result there from”.⁸⁹ The rule of punitive damages in China was first introduced by the law of consumer protection, stipulating that business operators, engaged in fraudulent activities in supplying goods and services, must pay compensation of twice the amount the consumer paid for the items.⁹⁰

Compared with the English law regarding damages, it is clear that the single category of fraud has limited the remedies. In English law, the decision to award punitive damages, reasonable damages, or the right to rescind the contract, is dependent upon the types of misrepresentations being committed. Fraudulent behaviour takes on many

⁸⁷ See Misrepresentation Act 1967, section 2(2).

⁸⁸ General Principles of the Civil Law of the PRC, Article 61.

⁸⁹ Contract Law of the PRC, Article 58.

⁹⁰ Law of the PRC on Protection of Consumer Rights and Interests, Article 49.

variables, and this single remedy in Chinese law cannot generally satisfy every circumstance in which fraud occurs. As a result, it seems necessary to import the legal concepts of English misrepresentation into the Chinese legal framework.

Finally, having discussed the matter of unilateral mistake, English common law and equity does not take the simple line of ruling that a contract is void merely because one of the parties would not have made it, had the true facts been realised.⁹¹ Therefore, remedies are not generally available on the grounds of mere unilateral mistakes. However, a contract can be voidable from a mistake in Chinese law, if (1) the contract was concluded due to a ‘material’ mistake; and (2) the mistake shows that not only was the statement false, but also it caused ‘great losses’.⁹² However, the concept of ‘material mistake’ and the consequence of ‘great losses’ have limited the scope of voidable contracts, and this in many ways, creates obstacles against the interests of an injured party.

Breach of fiduciary duties

Previous reference has been made to the matter of fiduciary duty in this chapter. In English common law, a person who stands in a fiduciary relationship may be obliged to carry out a number of duties to his principal. The concept of fiduciary obligation was authoritatively set out by Lord Millett in *Bristol and West Building Society v Mothew*⁹³ that “a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary”⁹⁴. Accordingly, the

⁹¹ Michael P. Furmston (2012), *Cheshire, Fifoot and Furmston’s Law of Contract*, 16th Edition, Oxford University Press, p. 292.

⁹² See Article 54 of the Contract Law and Article 71 of Opinions of the Supreme People’s Court on Several Issues concerning the Implementation of the General Principles of Civil Law.

⁹³ [1998] Ch 1.

⁹⁴ *Ibid* at 118.

main types of relationship accepted by the courts in imposing such a fiduciary duty are those for example, between parent and child, solicitor and client, trustee and beneficiary, and principal and agent. While the list is not exhaustive, it is always open to a party to show that the relationship between them and the other contracting party is such, that one party places trust in the other, and that the other therefore has influence over them.⁹⁵ However, the courts do not always find such a relationship satisfactory in establishing a fiduciary relationship.

Where there is a breach of fiduciary duty in fraud cases, the obligations are strict and remedies generally do not depend upon the state of mind of the fiduciary.⁹⁶ If a fiduciary enters into a conflict of interest or takes a secret profit, he will be liable, irrespective of whether he was dishonest or not. His breach of stewardship is sufficient harm and justification for remedy. As such, his principal will be able to recover either equitable compensation or restitution from his fiduciary.⁹⁷

In civil legal tradition, China has thus far not incorporated the complete legal doctrine of fiduciary responsibility. However, such western transplanted legal terms have gained increasing popularity in China, in particular in the relationship between directors and companies. Fiduciary duty in the context of Chinese society is seen as an inherent institution that has a disciplining role; it is also regarded as a general rule of conduct among the society members.⁹⁸ Such content has been added in the revised 2005 Corporate Law of the PRC, which stipulates “the directors, supervisors and senior executives of a company shall comply with the laws, administrative regulations and the

⁹⁵ Catherine Elliott, and Frances Quinn (2011), *Contract Law*, 8th Edition, Harlow: Pearson Education Limited, p. 189.

⁹⁶ Barry Rider, Haiting Yan, and Lihong Xing (2010), *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, p. 437.

⁹⁷ Robert Pearce, John Stevens, and Warren Barr (2010), *The Law of Trusts and Equitable Obligations*, 5th Edition, Oxford University Press, p. 915.

⁹⁸ See Nanyi Zhang (2008), ‘Jianquan fazhi xia de xintuo zeren’ (Fiduciary duty under a sound legal system), *Finance Review*, 2008, No. 9.

articles of association of the company and bear the duties of loyalty and due diligence towards the company”.⁹⁹ It also describes directors’ activities, such as the acceptance of bribes, misappropriation of company funds and exploitation of company business opportunities.¹⁰⁰ It is widely acknowledged that the introduction of directors’ fiduciary duties in China’s Company Law is a significant achievement. However, insufficient regulation regarding such matters have been publicly criticised by academics,¹⁰¹ and the vagueness and lack of workability of the provisions on the duties of directors, especially the duty of diligence, is considered to be another negative issue.¹⁰² Bearing in mind the duty between director and company reflects only one fraction of broad fiduciary relationship, it remains a concern in all relevant legal provisions in China. Indeed, the need for the establishment of a legal concept of fiduciary duty has become more apparent in recent times, following the vigorous legal development of China.

Fraud in the criminal law

Dishonesty and fraudulent intention

As mentioned at the beginning of this chapter, the Fraud Act 2006, represents the most radical change in the law of criminal fraud in the UK since 1968. It abolishes deception offences in the Theft Acts 1968 and 1978, and creates a general offence of criminal fraud.¹⁰³ The new fraud law is wide in scope, as emphasised. Dishonesty is the first element that must be established, which is regarded as a core protean concept in fraud. Dishonesty is a question of fact, not law, so it is the responsibility of those who decide

⁹⁹ Article 148, Company Law of the People’s Republic of China, 2004.

¹⁰⁰ Article 148, 149, Company Law of the PRC.

¹⁰¹ For example, in Guangdong Xu, Tianshu Zhou, Bin Zeng and Jin Shi (2013), ‘Directors’ duties in China’, *European Business Organization Law Review*, Vol. 14, Iss. 1, pp. 57-95, it is argued that the revised Company Law states during his employment with the company, a director shall not be self-employed or work for other companies that operate in a similar field. Whereas the law does not explicitly address proscribed activities after the director’s resignation.

¹⁰² See Peixin Luo, Jian Li, Yingjie Zhao (2010), ‘Woguo gongsi gaoguan qinmian yiwu zhi cailiang de shizheng fenxi’ (An empirical analysis of judicial discretion on duty of diligence of senior managers in China), *Zhengquan Fayuan (Securities Law Review)*, 2010, No.3, p. 372.

¹⁰³ The Fraud Act 2006, Section 1(1).

the facts – the jury. Therefore, according to *R v Ghosh*¹⁰⁴, the proper instruction is where the prosecution has proven that what the defendant did was dishonest by the ordinary standards of reasonable and honest people, and the defendant is held to be dishonest only if he realises he is acting contrary to those standards. It is important to remember that it is for the jury to decide what the standards of honesty are and they must consider the defendant’s own state of mind at that time.

The concept of honesty and dishonesty appear in China’s written laws, although it is generally regarded as a basic moral principle inherited from ancient Confucianism. For instance, Article 4 of the General Principle of the Civil Law states: “in civil activities, the principles of voluntariness, fairness, making compensation for equal value, honesty and credibility shall be observed”;¹⁰⁵ Contract law also stipulates that “the parties shall observe the principle of honesty and good faith in exercising their rights and performing their duties”.¹⁰⁶ Dishonesty in China is more concerned with civil wrongs and compared with Common Law tradition, due to a lack of the system of jury, it is completely dependent upon the judges’ discretions.¹⁰⁷

The second element that must be established is fraudulent intention. For example, a false representation offence can be committed without the proof of the defendant actually placing any economic interests at risk or even causing a victim to believe the representation.¹⁰⁸ In fact, for each limb of the fraud offence, it must be proven that the defendant intended to make gains for themselves, or for another, or to cause loss to another, or expose another to a risk of loss.¹⁰⁹ It is to be noted that, in contrast to the old

¹⁰⁴ (1982) 75 Cr App 154.

¹⁰⁵ General Principles of the Civil Law of the People’s Republic of China, Article 4.

¹⁰⁶ Contract Law of the People’s Republic of China, Article 6, see more articles regarding ‘honesty’ at article 42, 43, 60 and 92.

¹⁰⁷ See more details at Hong Chen (1997), ‘Chengxin yuanze yu ziyou cailiangquan’ (The principle of honesty and the discretionary power), *Faxue Luntan (Legal Forum)*, 1997, No.2, p. 15.

¹⁰⁸ Simon Farrell, Nicholas Yeo, and Guy Ladenburg (2007), *Blackstone’s Guide to the Fraud Act 2006*, Oxford University Press, p. 7.

¹⁰⁹ See the Fraud Act 2006: section 2(1), section 3(b) and section 4(c).

deception offences, the focus of the fraud offence is upon the acts and state of mind of the offender, the fact that a gain or loss occurred is irrelevant. It is the defendant's intention that is the determinant. In the context of Chinese criminal law, the fraudulent intent is an essential component, but not the determinant factor in processing a criminal trial. More detailed discussions will be given in the following section of criminal fraud in China.

Fraud by false representation (section 2)

The offence of fraud is committed in English law if the defendant, with the requisite intention, makes a false representation. The representation may be by word or conduct, expressed or implied as to fact or law, including the state of mind of the person making the representation or another person.¹¹⁰ It will be a false representation if it is untrue or misleading and the person making it knows this.¹¹¹ The Fraud Act also provides that a representation may be regarded as made, if it, or anything implying it, is submitted in any form to any system or device designed to receive, convey or respond to communications, with or without human intervention.¹¹² As we have already noted, under the new English law, the focus is shifted to the making of the representation by the offender, rather than the effect it has on the victim.

In the majority of cases these changes make no practical difference. However, there are three significant areas to consider: 1) the use of payment cards; 2) representations made to a machine; and 3) representations made where the victim has been pre-warned of the fraud.¹¹³ For unauthorised use of a credit card, the merchant who takes the card does not rely in any way on the implied representation of the person presenting the card for payment that he has the authority to use it, as the merchant will generally be paid either

¹¹⁰ Ibid, section 2(3) and section 2(4).

¹¹¹ Ibid, section 2(2).

¹¹² Ibid, section 2(5).

¹¹³ Simon Farrell, Nicholas Yeo, and Guy Ladenburg (2007), *Blackstone's Guide to the Fraud Act 2006*, Oxford: Oxford University Press, p. 22.

way. Under the new Act, it is not necessary for the prosecution to prove that the merchant was misled. It is adequate that the defendant falsely represented he had the authority. Secondly, in the past, a deception offence was committed, for example, where cigarettes were bought with fake coins from a person, but it was not a deception offence when they were bought from a vending machine. Today, such issue becomes significant with the increasing use of the Internet as a marketplace, but the new fraud offence covers this. At the time of entering card details into the website, the individual is making a representation that they have authority to use the card, so the offence is clearly committed. Thirdly, and by the same token, a merchant participating in a sting operation, having been warned by the police, does not need to be deceived. It is enough that the defendant makes the false representation.

Fraud by failing to disclose information (section 3)

A person commits fraud if he dishonestly fails to disclose to another person information which he is under a legal duty to disclose, intending thereby to make a gain for himself or another, or to cause loss to another or to expose a risk of loss.¹¹⁴ Generally we have seen that the law does not place an obligation on an individual, even during the negotiation of a contract, to disclose information that he thinks would be influential to the other party's decision.¹¹⁵ The core element of this section is the concept of 'legal duty', but unfortunately, this critical concept is not defined in the Act, nor in the Home Office Explanatory Notes. It is therefore necessary to turn to the Law Commission's Report which states that information should be disclosed if there is a legal duty to do so, and such a duty may derive from statute, from the fact that the transaction in question is one of the utmost good faith, from the terms of a contract, from the custom of a particular trade or market, or from a fiduciary relationship between the parties.¹¹⁶ Again

¹¹⁴ The Fraud Act 2006, section 3(1) and section 3(2).

¹¹⁵ See Barry Rider, Kern Alexander, Stuart Bazley and Jeffrey Bryant (2016), *Market Abuse and Insider Dealing*, 3rd Edition, Haywards Heath: Bloomsbury Professional, p. 139.

¹¹⁶ The Law Commission, *fraud* (Law Com No 276, 2002), at 7.28, available at http://lawcommission.justice.gov.uk/docs/lc276_Fraud.pdf

under the Act, for liability, it is not necessary for the prosecution to establish that the defendant is aware that he is under a legal duty to disclose the information in question. Of course, if he did not, he may well be regarded as dishonest.

Fraud by abuse of position (section 4)

The third example of the general fraud offence is perhaps the most controversial one, where a person is guilty of fraud if he occupies a position in which he is expected to safeguard, or at least not act against, the financial interests of another person and he dishonestly abuses that position, intending thereby to make a gain for himself or another, or to cause loss to another, or to expose another to a risk of loss.¹¹⁷ It is further provided that a person may be regarded as having abused his position, even though his conduct is an omission rather than an affirmative act.¹¹⁸

The critical issue in this section is the concept of ‘position’, namely, what constitutes ‘position’, and who can properly be said to occupy such a position? Clearly, those in a fiduciary relationship, are intended to be included in this definition.¹¹⁹ However, it is unclear as to whether it is the victim’s subjective view or a wider, more objective perspective that should determine if this relationship exists, and whether the expectation is reasonable or not. It appears that it is the government who anticipates it being a question of fact for the jury to determine, similar to dishonesty.¹²⁰

It is worth noting that many public officials are able to safeguard or ignore the financial interests of another person (i.e. against the public or the state). So fraud may be proven by local or central government officials.¹²¹ The abuse of public office is of particular

¹¹⁷ The Fraud Act, section 4(1).

¹¹⁸ Ibid, section 4(2).

¹¹⁹ Simon Farrell, Nicholas Yeo, and Guy Ladenburg (2007), *Blackstone’s Guide to the Fraud Act 2006*, Oxford: Oxford University Press, p. 32.

¹²⁰ Barry Rider, Kern Alexander, Stuart Bazley and Jeffrey Bryant (2016), *Market Abuse and Insider Dealing*, 3rd Edition, Haywards Heath: Bloomsbury Professional, p. 140.

¹²¹ See Simon Farrell, Nicholas Yeo, and Guy Ladenburg (2007), *Blackstone’s Guide to the Fraud Act*

and increasing concern in China today, along with its evolving market spreading all over the world. Such issues will be further discussed in the following section.

Criminal fraud in China

The distinction between civil and criminal fraud in China has been discussed, both of which are very similar in the English translation of the legislation, but with different contents and characteristics. The major difference lies in the intention of the fraudster as well as the consequence of the amount of money or property that is defrauded – where criminal fraud strictly requires the intent of illegal possession and the actual effect of a relatively large amount of monetary threshold being lost. Compared with the UK Fraud Act, where the intent of the offender is sufficient to commit a fraud offence, Chinese law still requires both the intention and the consequence.

In the criminal code, fraud is described as “someone, for the purpose of illegal possession, in a way of making up the fact or concealing the truth, defrauded relatively large amounts of public or private money and property”.¹²² It does not provide any further guidance as to the constitutive requirements in committing a criminal fraud. Basically, with respect to the comparison, making a false representation, to some extent, has the same meaning as making up a fact and concealing the truth means failing to disclose information. As a result, we can find this brief definition covers the offence of both section 2 and section 3 in the Fraud Act 2006; however, many scholars have argued that the lack of a further detailed explanation makes the law ambiguous, in particular with similar offences such as theft, robbery and the crime of forcible seizure.¹²³

The Article further states the criminal punishment for fraudsters is a maximum of life

2006, Oxford: Oxford University Press, p. 35.

¹²² Criminal Law of the PRC (1997), Article 266.

¹²³ See Yong Dai and Lili Wu (2009), ‘Sifa shijian zhong zhapianzui de lijie yu rending’ (Understanding and determination of criminal fraud in judicial practice), *Journal of Anhui Vocational College of Police Officers*, No.19, Vol. 4, 33-36.

imprisonment, as well as a fine imposed for those defrauding extraordinarily large amounts of public or private money and property.¹²⁴ The law subdivides the degree of money being defrauded as ‘relatively large’, ‘large’ and ‘extraordinarily large’¹²⁵, upon which the sentence depends.

In addition, the criminal code provides a single section specifically in the area of financial fraud in its 1997 version, including illegal fund raising, bank loan fraud, financial bills fraud, letters of credit fraud, credit card fraud, and insurance fraud.¹²⁶ Credit card fraud can be used as an example to compare and contrast the difference with English law. The law in China states that whoever uses a forged, voided credit card belonging to a third person, or takes out a loan with evil intention, resulting in large amounts of money being defrauded, shall commit a fraud.¹²⁷ In other words, credit card fraud will only be committed if the offender (1) used one of the above means to carry out fraudulent activities, which in fact (2) led to the consequence of money being stolen. Whereas, under the UK Fraud Act, as we have discussed, it is enough for the prosecution when a person falsely presents the unauthorized credit card to a merchant. It can be seen that the offence is result-based in China while it is conduct-based in the UK.

In rare cases, offenders can be subject to the death penalty if they have caused extraordinarily heavy financial or other losses to the interests of the state and the people.¹²⁸ In the famous case of Wu Ying¹²⁹, the defendant was an entrepreneur from Dongyang city in Zhejiang Province, and formerly the sixth-richest woman in China.

¹²⁴ Criminal Law of the PRC.

¹²⁵ See details in the Explanation of the Supreme People’s Court and Supreme People’s Procuratorate on Several Issues Concerning the Laws with Criminal Fraud, effective on 08.04.2011.

¹²⁶ Criminal Law of the PRC (1997), Article 192-198.

¹²⁷ Ibid, Article 196.

¹²⁸ Ibid, Article 199.

¹²⁹ Martin Yip (2012), ‘Death for fraud: China debates Wu Ying’s sentence’, *BBC News*, 24.02.2012, available at <http://www.bbc.co.uk/news/world-asia-china-17071311>.

She was convicted of financial fraud (illegal fund raising) and sentenced to the death penalty by the Zhejiang Province High Court. However, on 21 May 2012, following heated debates among the people and the press, the sentence was overturned by the Supreme People's Court and was reduced to death with a two-year reprieve.¹³⁰ China is tending to be more lenient with economic criminals, and in effect, the majority of economic offences, which used to be eligible, have now been banned from the death penalty,¹³¹ while in the UK, the death penalty was abolished permanently for almost all cases in 1969.¹³²

In regard to the offence of abuse of position in China, this has closer links with civil law, such as company law, contract law and securities law. The absence of the concept of fiduciary duty makes the offence much more ambiguous. In the criminal code, one single article provides clearly that “any state personnel who abuses his position or neglects his duties and as a result, causes heavy losses to public property, state interests, or the people, shall be committing the offence of abuse of position”.¹³³ Other articles relating to such misconduct state: “state-owned enterprise staff who engage in abuse of position (for the benefit of his friends) or due to gross negligence of his duty, causing bankruptcy or serious losses to the state-owned enterprise, or causing heavy losses to the state interest, shall be liable.”¹³⁴ We can see, those articles are clearly made to regulate civil servants, and there must be a causal link between the conduct of abuse and the consequence of losses. The discussion of the issue of abuse of position has been heatedly debated recently, and it is regarded as a particularly important component in

¹³⁰ Xuequan Mu (2012), ‘Death-sentenced businesswoman receives lighter penalty following heated debates’, *Xinhua News*, 21.05.2012, available at: http://news.xinhuanet.com/english/china/2012-05/21/c_131601890.htm.

¹³¹ Chris Hogg (2011), ‘China ends death penalty for 13 economic crimes’, *BBC News*, 25 February 2011, available at <http://www.bbc.co.uk/news/world-asia-pacific-12580504>; Ting Yan (2014), ‘China mulls scrapping death penalty for 9 crimes’, *Xinhua News*, 27.10.2014, available at: http://news.xinhuanet.com/english/china/2014-10/27/c_133746032.htm.

¹³² Murder (Abolition of the Death Penalty) HC Deb 15 December 1969, Vol 193, cc 1148-297.

¹³³ Criminal Law of the PRC (1997), Article 397.

¹³⁴ *Ibid* Article 166-168.

terms of power-for-money trade and corruption.¹³⁵

If we compare this to English law, section 4 of the Fraud Act does not narrow the scope to public civil servants only, but refers to anybody that may have a particular relationship with another, whereas China, based on its socialist system, only includes personnel to whom such criminal offences may apply. Another point that is worthy of noting is that we can find many words such as ‘state’, ‘state-owned enterprise’, ‘state interests’ and ‘public property’ in Chinese laws, but we can barely find any such phrases in English law. This perhaps is quite an obvious distinction between a socialist country and a capitalist country.

Why is it so difficult to deal with fraud?

Complexity

As early as the 1980s, the Roskill Committee pointed out “the public no longer believes that the system... is capable of bringing the perpetrators of serious fraud expeditiously and effectively to book. The overwhelming weight of evidence laid before us suggests that the public is right.”¹³⁶ Many years later, the issue seems to remain, although innumerable initiatives have been launched against such misconduct by both UK and Chinese governments, and for that matter, the international community. The rapid development in business globalisation and new technology has brought many positive effects of integrating markets, but it has also made crime global. Funds can be transferred between banks in various countries immediately and stock shares can be traded globally within seconds. All this has made the nature of fraud much more complex.

In terms of the challenges faced by investigators, taking an example of corruption

¹³⁵ Shaomu Tan (2006), ‘Lanyong Zhiquan zhi Fali Tantaoy’ (Exploring the Legal Theory of the Abuse of Position), *Lan Zhou Xue Kan (Journal of Lanzhou Education)*, 2006, No.4, pp. 186-189.

¹³⁶ The Roskill Committee, on Fraud Trials, para 1 (1986) HMSO.

within the police, who may abuse their position destroying evidence in order to protect high profile individuals; in particular, this may include the destruction of documentary and computer records. Further challenges become increasingly apparent with the ever-evolving sophisticated methods of transferring money, whether in a physical form or through tokens.¹³⁷ In practice, a fraudster or money launderer is far more likely to obscure their transactions by layering or adopting a multiplicity of identities, and hide their ill-gotten gains in foreign bank accounts.

Document

Most so-called ‘white collar’ crimes involve the manipulation or misuse of documents and records. This is particularly the case in respect of fraud and financial crime. The relevant documents, for example, a forged cashier’s check, will often be used to facilitate and substantiate the crime. Consequently, such documents represent highly important material evidence. While documentary evidence may exist longer than many other forms of evidence and be capable of being preserved, it must be remembered that a document will need to be ‘proven’.¹³⁸ Evidence will need to be produced establishing the document’s relevance to the crime; that the defendant was responsible for the document; the circumstance of its existence and retention and that it has not been interfered with from where it was seized. This, in itself, is a challenge for many authorities investigating a fraud.

Secret profit

A complex fraud case often involves secret profit, and this often causes considerable difficulty for investigators. For example, cases involving company directors, who have abused their position and secretly transferred large amounts of money into personal

¹³⁷ Barry Rider, Haiting Yan, and Lihong Xing (2010), *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, pp. 52-53.

¹³⁸ *Ibid*, p. 52.

accounts; this could be offshore, or another corporate entity. This money may be used to fund a lifestyle of luxury cars, houses, antiques, paintings, or five-star hotels. Secret profits may also involve the transfer of funds from investors' accounts to the perpetrator of the fraud. Often the money chain is difficult to trace, it could move around the world into a number of Swiss bank accounts and in and out of tax havens. In a recent Chinese high-profile case, Zhang Shuguang¹³⁹, director of the transportation bureau and deputy chief engineer at the Ministry of Railways, was accused of fraud, abuse of position and corruption. He owned three luxury mansions in the US and had bank account savings worth as much as \$2.8 billion in the US and Switzerland.

Standard of proof

The tremendous importance of the standard of proof arises from the fact that fraud, by its very nature, is something that the perpetrator wishes to conceal.¹⁴⁰ Thus, a high standard of proof can be another discouraging factor in prosecuting fraudsters. It is the case that English courts demand a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case.¹⁴¹ It has been emphasised that the more serious the allegation the stronger, in terms of reliability and persuasive effect, the evidence must be.¹⁴² For a criminal prosecution and administrative proceedings involving the imposition of essentially criminal penalties, the standard of proof is 'beyond all reasonable doubt'. If there is more than a remote possibility of the defendant's innocence, he should be acquitted. This again, brings substantial barriers to the prosecution of serious fraud cases.

The new UK fraud law disregards technicalities, but has been criticized for creating

¹³⁹ Malcolm Moore (2011), Chinese rail crash scandal: 'official steals \$2.8 billion', *The Telegraph*, Shanghai, 12:15pm 01 Aug 2011, available at: <http://www.telegraph.co.uk/news/worldnews/asia/china/8674824/Chinese-rail-crash-scandal-official-steals-2.8-billion.html>

¹⁴⁰ Johanna Hjalmarsson (2013), 'The standard of proof in civil cases: an insurance fraud perspective', *International Journal of Evidence & Proof*, 2013, Vol. 17, Iss. 1, pp. 47-73.

¹⁴¹ Ibid.

¹⁴² Ibid.

offences which rely too much on dishonesty and the danger is that one jury might find conduct dishonest whilst another does not, due to those complex issues.¹⁴³ It is believed that establishing dishonesty to the satisfaction of the traditional criminal process is one of the main stumbling blocks in securing increased convictions. The UK government intended to bring forward a stand-alone bill to permit non-jury trials in a limited range of serious and complex fraud cases in November 2006, however, it cannot be brought into force without the resolution of both Houses of Parliament.¹⁴⁴ In similar circumstances, the proof of intent of illegal possession is also regarded as a main barrier to secure criminal fraud convictions in China's criminal justice system. The defendants often state that they have a wish to return the defrauded property. Indeed, the issue of what illegal possession exactly means, and how long the illegally possessed property was held, without consent from the claimant, could lead to such intent, remains a moot point. Moreover, highly specialised judges are required, particularly in China, as, unlike common law tradition, Chinese courts do not have a binding principle and the judgment is made based on each individual case. Thus, this may potentially bring difficulties and uncertainties that similar fraud cases may result in inconsistent sentences in different courts.

Conclusion

In comparing English and Chinese law, it is not difficult to view the distinction between these two legal traditions – in common law and civil law. In terms of fraud, English case law is in many respects superior to the Chinese approach: its long history of precedents, where senior judges in higher courts have been able to examine specific facts on individual cases, has provided a rich collection of case law that continues to assist judges in lower courts, hearing and analysing fraud cases. In China, however, judgments are given based on each individual case with reference only to codified

¹⁴³ Simon Farrell, Nicholas Yeo, and Guy Ladenburg (2007), *Blackstone's Guide to the Fraud Act 2006*, Oxford University Press, p. 2.

¹⁴⁴ *Ibid*, p. 3.

legislation. This often creates debates among the public when considerable variations in judgments of similar serious fraud cases are given by different judges. What is more, in China, the courts are geographically spread out, where district and lower courts may be in remote areas. Distant from the close supervision of central government, abuse of position by local officials is widespread, where power-for-money trade as well as corruption, is rife.

Having made a comparative analysis of the law relating to fraud in the UK and China, it appears that China has not yet fully realised the significance and urgency of regulating and controlling fraud. Firstly, China's comprehensive statutory tort law adopted recently, does not contain a single article that directly relates to misrepresentation or fraud. Secondly, in contract law, the lack of a uniform and integral principle of what constitutes civil fraud brings substantial difficulties in identifying, and regulating fraudulent activities. Further, a unique and single type of fraud, without recognition of negligent and innocent misrepresentations, is problematic with respect to a defendant's liability and the types of remedies available. Finally, for criminal fraud, compared to the comprehensive Fraud Act 2006 in the UK, Chinese criminal law is too broad, with excessive emphasis placed on financial fraud whereas other relevant areas are given limited attention.

In today's society, the sophisticated world of banking and financial sectors are often involved with fraudulent activities, with even more elaborate methods of carrying out such criminal activities constantly being developed. As a result, even the most sweeping laws are not always sufficient. Enhancing the investigating and prosecuting procedures becomes crucial and highly specialised and experienced police officers, judges and prosecutors will be the key in the next stage of controlling fraud.

Chapter 5: Protecting the Victims of Economic Crime in China

The Criminal Justice system in China – a brief historical review

Before the foundation of the People's Republic of China

To develop a deep understanding of contemporary Chinese law and the legal system, it is imperative to fully appreciate the social, cultural, political, and historical aspects of China's legal tradition. Contemporary social control in China is rooted in the Confucian period during the Imperial Era. The ideas originated from Confucius have had an enduring effect on people's daily lives, and provided the foundation for maintaining social order through much of China's history.¹ Confucians believed in the essential goodness of man and called for rule by moral persuasion in line with the traditional concept of *li*² - a set of socially accepted values or norms of behaviour. However, *li* was enforced by society rather than by courts, and education was considered the key ingredient for maintaining social order, whereas codes of laws (*fa*) were designed only to supplement it, not to replace it.³ Confucianism emphasised *li* represents positive methods for preventing crime, while *fa* serves as a measure of punishment that only encourages people to evade the law rather than to do what is essentially right.⁴

Moreover, Confucians believed that pure codified law was inadequate to provide meaningful guidance for the entire panorama of human activity, but they were not against using laws to control the most disorderly behaviour in society. The first recorded criminal code was promulgated sometime between 455 and 395 B.C. Civil statutes were

¹ See *Zhongguo Fazhi Jianshi (Brief History of Chinese Legal System)*, Faxue Jianming Jiaocai (Official material for legal studies), 1983, Shijiazhuang: China Law Press.

² ‘*理*’ in Chinese, meaning virtue or propriety.

³ See more at Yongping Liu (1998), *Origins of Chinese Law: Penal and Administrative Law in its Early Development*, Chapter 3: *Li*: Confucius and the theory of natural *li*, pp. 87-110, Oxford: Oxford University Press.

⁴ Albert HY Chen (2011), *An Introduction to the Legal System of the People's Republic of China*, Fourth Edition, LexisNexis, p. 38.

also promulgated although most were concerned with land transactions.⁵ It is interesting to note that under the ideals of Confucianism, taking civil action, for example, against your neighbour, is seen as a result of incapacity to negotiate.⁶

As has been discussed, legalism, a competing concept during the Warring States period (475-221 B.C.), upheld that man was by nature evil and had to be controlled by means of a strict, clear, and public legal code and uniform justice.⁷ One of the famous points that the Legalists argued is that a ruler could not govern effectively without a set of laws.⁸ Legalist philosophy had its greatest impact during the first Imperial dynasty, the Qin dynasty (221-207 B.C.). Following Qin, the Han dynasty (206 B.C. – 220 A.D.) retained the basic legal system established under Qin, but modified some aspects in accordance with the Confucian philosophy of social control, according to ethical and moral persuasion. The majority of legal professionals at that time were not lawyers but generalists trained in philosophy and literature.⁹ The classically trained Confucian gentry played a vital role as arbitrators and handled almost all local disputes. Overall, such basic legal philosophy remained in effect for the duration in Imperial China. Until the final years of the Qing dynasty (1644-1911), reformist in the government adopted certain aspects of the modernised Japanese legal system, which originated from Germanic judicial precedents.¹⁰

⁵ See more at Hugh T. Scogin (1994), 'Civil law in traditional China: history and theory' in *Civil Law in Qing and Republican China*, edited by Kathryn Bernhardt and Philip C. C. Huang, Stanford: Stanford University Press, pp. 13-41.

⁶ The concept of 'losing face' plays an important role in Chinese society, and is deeply rooted in Confucianism. The concept of face is akin to status, and people will go to great lengths to avoid 'losing face'. To be proven wrong or incompetent is a great humiliation. See more at generally Richard King and Sandra Schatzky (1991), *Coping with China*, Oxford: Blackwell Pub, pp. 112-113.

⁷ See Benjamin I. Schwartz (1985), *The World of Thought in Ancient China*, Harvard: Belknap Press, pp. 321-343.

⁸ As noted by Vitaly A. Rubin (1976), the law of the Legalist was "intended to serve the despot, not to limit him", in his book *Individual and State in Ancient China: Essays on Four Chinese Philosophers*, Columbia: Columbia University Press, p. 70.

⁹ See more at Karen Turner (1992), 'Rule of law ideals in early China', *Journal of Chinese Law*, Vol. 6, No. 1, pp. 1-3.

¹⁰ Ibid.

Although the dynasties were replaced by the Republic from 1912 to 1949 and thereafter by the Communist regime, the ethos of Confucius remains alive and in practice in Chinese society today. Even though government officials and party leaders have changed over time and some have attempted to abandon the effect of Confucius, the people, however, continue to revert to the conservative values of Confucianism's respect for authority, pursuit of privilege, and social harmony.¹¹

During and post 1949

In 1949 after the Chinese Communist Party (CCP) defeated the Kuo Ming Tang government, including its judicial organs and the entire body of laws, the CCP issued a Directive Regarding the 'Abolition of the Kuo Ming Tang's Entire Book of Six Codes'¹² and the 'Affirmation of the Legal Principles in the Liberated Areas'. In September 1949, the CCP directive was incorporated into the 'Common Programme of the Chinese People's Political Consultative Conference', which was regarded as the basic law of the PRC, temporarily until 1954. The Common Programme Article 17 clearly stipulates, "All laws, decrees, and judicial systems of the Kuo Ming Tang reactionary government, which oppress the people, shall be abolished; laws and decrees protecting the people shall be enacted and the people's judicial system shall be set up."¹³ Commentators have noted that the new Chinese government since then, has begun to experiment with the establishment of formal, Soviet style judicial organs, such as people's courts and people's procuratorates.¹⁴

¹¹ See Weng Li (1996), 'Philosophical influences on contemporary Chinese law', *Journal of Indiana International & Comparative Law Review*, Vol. 6, No. 2, pp. 321-335.

¹² This term is used to describe the whole body of laws established by Kuo Ming Tang, including Constitution, Commercial Law, Civil Code, Criminal Code, Civil Procedure Code, and Criminal Procedure Code, that are modelled on European legal codes.

¹³ The Common Programme of the Chinese People's Political Consultative Conference, adopted by the First Plenary Session of the Chinese People's Political Consultative Conference on 29th September 1949, in Beijing, Chapter 2, article 17.

¹⁴ Tao-tai Hsia and Wendy Il Zeldin (1987), 'Recent legal development in the People's Republic of China', *Harvard International Law Journal*, Vol. 28, No. 2, pp. 249 – 287.

From 1949 to 1953, 148 important laws and regulations were promulgated, most of which were in experimental or provisional form,¹⁵ the purpose being to strengthen the new order and restore economic and social stability in the country. However, the government noticed a new challenge – lack of experienced legal personnel. Since the PRC was founded, many judicial personnel, including judges, prosecutors, court clerks, and prison administrators, who had served under the Nationalists were initially allowed to continue to hold their offices.¹⁶ Yet, the nationwide legal reform campaign that was launched in 1952, resulted in the removal from office, or condemnation as counter-revolutionaries, of many of these legal personnel.¹⁷ In fact, while the government had made persistent efforts to promote the skills of judicial officials, in particular after China opened its door to the rest of the world, the problem of inadequate numbers of experienced judicial personnel remained.¹⁸

The period between 1954 and mid-1957, under the huge influence of legal concepts and models imported from the Soviet Union, was regarded as the ‘golden era’ of legal development since the foundation of the PRC, due to the considerable progress that had been made in creating a formal legal system within the country.¹⁹ The framework of the legal system was established along with the promulgation of the first PRC Constitution in the autumn of 1954.²⁰ The Constitution was soon supplemented by organic laws for the courts and the procuratorates, largely based upon Stalin’s 1936 Constitution in the

¹⁵ For a brief list of pre-1949 Communist laws, see Quanpu Lan (1980), *Sanshi Nianlai Woguo Fagui Yangde Gaikuang (Development of the laws and regulations in the last thirty years)*, Beijing: Qunzhong Publishing House; for a description of the important laws and regulations enacted by the Council of the Central Government, see Zhongyang Renmin Zhengfu Faling Huibian, 1949-1950 (Collection of laws and decrees of the Central People’s Government, 1949-1950), Beijing: People’s Publishing House, 1982.

¹⁶ See Jerome Alan Cohen (1966), ‘The criminal process in the People’s Republic of China: an introduction’, *Harvard Law Review*, Vol. 79, No. 3, pp. 469-533.

¹⁷ *Ibid.*

¹⁸ See for example, in January 1980, Deng Xiaoping said that China still needed at least one million trained judicial personnel. *Selected works of Deng Xiaoping* (1983).

¹⁹ See more at Weng Li (1996), ‘Philosophical influences on contemporary Chinese law’, *Journal of Indiana International & Comparative Law Review*, Vol. 6, No. 2, pp. 327-329.

²⁰ Constitution of the People’s Republic of China, Adopted on September 20, 1954, by the First National People’s Congress of the People’s Republic of China at its First Session.

Soviet Union.²¹ Substantive work on the drafting of an official criminal and civil code also commenced.

Until a dramatic political change led by Mao Zedong took place in 1957, which shattered the Soviet-Chinese alliance, China's top leaders were determined to abandon the Soviet legal mode. Between 1957 and 1965, a short period of political fallout, many liberal jurists, legal scholars and legal authorities demanded changes to the judicial system, including adherence to western legal concepts such as judicial independence, equal justice before the law, presumption of innocence and due process of the law.²² However, the reform movement came to a sudden halt when an Anti-Rightist movement was launched and, significantly, the liberal reformers were condemned as rightist with anti-socialist views attempting to use the law against the party and to negate the class nature of law.²³ Furthermore, in 1959, during the course of the Anti-Rightist campaign, the Ministry of Justice was disbanded, and a number of law schools were dissolved. Recommended attempts to draft civil and criminal codes in the early 1960s also failed.²⁴

The situation however, deteriorated during the years between 1966 and 1976 – the 'Cultural Revolution decade' – known as the dark age of legal development in the history of the PRC.²⁵ No laws were enacted and no legal books or journals were published; law schools and research institutions were shut down and law professors and

²¹ See more at Jizeng Fan (2014), 'Constitutional transplant in PRC: the communism Russian legacy and globalized era challenge', *Federalismi*, No. 20, 2014.

²² See more at Tao-tai Hsia (1967), *Guide to Selected Legal Sources of Mainland China: A listing of laws and regulations and periodical legal literature: with a brief survey of the administration of justice*, Michigan: University of Michigan library.

²³ For legal articles condemning the liberal jurists as rightists, see *ibid.* See also Wenqiu Mei (1957), 'The Reactionary Nature of Yang Zhaolong's Negation of the Class Nature of Law', *Faxue (Jurisprudence)*, No. 28, 1957; Zhaolong Yang, a Harvard-educated jurist, was among a number of prominent liberal jurists condemned as rightist.

²⁴ Dasheng Jiang (1980), 'The Disparagement of Liu Shaoqi's Brilliant Thought of Completing the Socialist Legal Shall not be Tolerated', *Faxue Zazhi (Law Journal)*, No. 1, July 1980, pp. 5-8.

²⁵ See more at Tao-tai Hsia and Wendy Il Zeldin (1987), 'Recent legal development in the People's Republic of China', *Harvard International Law Journal*, Volume 28, No. 2, pp. 249 – 287.

researchers were sent to the countryside for re-education.²⁶ During this period, lawlessness was openly accepted, and the ‘Gang of Four’²⁷ encouraged Red Guards to “smash the police organs, procuratorates, and courts.”²⁸ Revolutionary morality dominated political ideology, and the Party and the mass organisation of the people, ruled the country.

In 1976, with the death of Mao and the fall of the ‘Gang of Four’, a new China began to emerge, and the legal institutions that had constituted the judicial system from 1954 to 1957 were gradually restored and evolved under the new policy of ‘strengthening the legal system’ and ‘creating a legal system with Chinese characteristics’.²⁹ The resumption of legislative activity and the adoption of various legal codes, in particular the first Criminal Code and Criminal Procedure Code of the PRC in 1979, corrected a conspicuous gap in Communist Chinese legislation. What new changes had the leadership decided upon, and what exactly were ‘Chinese Characteristics’? The following section will explore this further.

Disciplinary and legal institutions on combating economic crime

Commission for Disciplinary Inspection under the CCP

China’s ruling party, the CCP, as in other Communist states, had its own disciplinary mechanism that was specifically designed to regulate its members.³⁰ Legal institutions, however, have traditionally been weak, inefficient, and marginal under China’s single-party system. Even though, since the late 1970s, China has carried out legal reform

²⁶ See more at Shouyi Chen (1984), ‘Thirty years of Chinese legal science’, in *Zhongguo Faxue Wenji Volume 1 (Collected essays on Chinese Legal Science)*, Beijing: China Law Press, pp. 16-17.

²⁷ Gang of Four was a political faction composed of four Chinese Communist Party officials who played prominent role during the Cultural Revolution and were later charged with a series of treasonous crimes. The gang’s members are Jiang Qing, Zhang Chunqiao, Yao Wenyuan and Wang Hongwen.

²⁸ ‘In Praise of Lawlessness’, *Renmin Ribao (People’s Daily)*, Jan. 31, 1967, p. 6.

²⁹ Deng Xiaoping (1983), *Selected Works of Deng Xiaoping*, p. 319.

³⁰ See more information on a historical review on China’s party disciplinary inspection at Ting Gong (2008), ‘The party discipline inspection in China: its evolving trajectory and embedded dilemmas’, *Crime, Law and Social Change*, Vol. 49, No. 2, pp. 139-152.

where a re-emerged legal system tended to function successfully in civil and criminal matters, the CCP was in complete control over matters concerning direct interests of the party, including corruption and malfeasance committed by its members.

Differing from many other jurisdictions in the rest of the world, as demonstrated above, the party disciplinary inspection played an important role in crime prevention, and was a key component within the structure of the CCP, which set up committees at each local level of government, named ‘Committee for Disciplinary Inspection (CDI)’, to be in charge of disciplinary matters against local members of the CCP.³¹ Its highest level, the Central Committee for Discipline Inspection (CCDI), established within the administration of the ruling party in Beijing, is seen as a unique weapon in fighting corruption.

The CCDI operated under the Central Committee, and the local CDIs operated under the dual leadership of the party committees at the corresponding levels, and the next higher commissions for discipline inspection. The objective of the CDIs, at all levels, was to improve the party’s general work and ensure that it was clean and honest.³² The CDIs were responsible for upholding the Constitution of the PRC and rules and regulations of the party, examining the implementation of the principles, policies and decisions and supporting the respective level of party committees in improving the party’s style of work, organising and coordinating work against misuse of public office. Moreover, the CDIs were empowered by the Constitution of the PRC, to provide education for party members in their duty to obey party discipline; to supervise party members holding leading positions in exercising their power; to examine and handle important cases of violation of the Constitution or other statutes and to initiate or rescind disciplinary measures against party members involved in such cases and handle

³¹ See Jean-Pierre Cabestan (1988), ‘Communist party discipline and the law in the People’s Republic of China’, No.21, *XXXth European Conference of Chinese Studies Proceedings*, pp. 29-37.

³² See more at its official website: <http://www.ccdi.gov.cn/>.

complaints and appeals forwarded by party members.³³

The party control system was initially inspired by Soviet institutions, most notably the Central Control Committee of the Communist Party of the Soviet Union.³⁴ Even though the Soviet Party Control Committee was founded to solve its Party's bureaucracy, it evolved into a political tool wielded by top politicians.³⁵ Nonetheless, the Chinese disciplinary system was not empowered to the same level as its Soviet counterpart, which was largely due to Chairman Mao favouring mass mobilisation and ideological campaigns over party disciplinary measures in order to prevent non-conformist actions. Liu Shaoqi and Dong Biwu, for example, who shared the Soviet fascination with organisational self-correction, did not share their obsession with 'scientific administration'.³⁶

The CCDI was re-established at the 3rd Plenary Session of the 11th Central Committee in December 1978 after the Cultural Revolution. The disciplinary system had existed previously under the name 'Central Control Commission' for a brief period in 1927 and again between 1955 and 1968, and also under its present name between 1949 and 1955. It was dismissed during the period of the Cultural Revolution.³⁷ Despite the fact that the commission was, in theory, independent of the Party's executive bodies such as Central Committee and its Politburo, historically, the function of the CCDI had been hugely influenced by China's top politicians. Yet, since the commencement of Mr. Hu Jintao's term as President and General Secretary of the CCP in 2002, and, following Xi Jinping's direction since his presidency in November 2012, the commission has

³³ Ibid.

³⁴ Larence R. Sullivan (1984), 'The role of the control organs in the Chinese Communist Party', 1977-83, *Asian Survey*, Vol. 24, No. 6, pp. 597-617, at p. 598.

³⁵ Ibid, at p. 599.

³⁶ Ibid, at p. 598.

³⁷ 'Zhongyang Jilu Jiancha Weiyuanhui Lishi Yang'e' (History of the Central Commission for Discipline Inspection), *People's Daily*, Central Committee of the CCP, accessed at: <http://cpc.people.com.cn/n/2013/0904/c75234-22804679.html>.

undergone significant reforms, leading to more independence from party movement below the Central Committee.³⁸

Corruption

Given the nature of China's socialist system, corruption is committed mainly by state functionaries, abusing their power for personal gain. In recent years, before the offence of corruption was extended to the private sector,³⁹ it had been limited to the public sector and was mostly carried out by members of the CCP. In the meantime, the CCP, as the constitutionally entrenched ruling party, monopolised state power and its members occupied almost all vital positions in state institutions. Therefore, corruption occurring under the CCP and the state largely overlap, and the party disciplinary commission is, in practice, the leading anti-corruption agency in China.

The CDIs also enjoyed the right of exercising disciplinary measures to any member of the party who violated party rules. According to the nature and the seriousness of the offender, the punishment varied from (1) warning; (2) serious warning; (3) removal from party posts; (4) probation within the party and (5) expulsion from the party. Those members who seriously violated the criminal law of the PRC would be expelled from the party directly.

In fact, within the country, an investigation of major corruption cases is now almost impossible without involvement of the CCDI, partially because of the engagement of high-ranking party officials over whom the CCDI has exclusive jurisdiction; it is also

³⁸ See more at Hualin Fu (2015), 'Wielding the sword: President Xi's new anti-corruption campaign', in *Greed, Corruption, and the Modern State: Essays in Political Economy*, edited by Susan Rose-Ackerman and Paul Lagunes, Gheltenham: Edward Elgar Publishing Limited, pp. 134-160.

³⁹ See for example, Joe Zhang (2014), 'Private-sector corruption with Chinese characteristics', August 12, 2014, *Financial Times*, accessed at: <https://www.ft.com/content/ec7d6c62-2147-11e4-a958-00144feabdc0>; and also Keira Lu Huang (2015), case studies of China's largest corporation like Dalian Wanda, Alibaba, Baidu etc., at 'China's private sector joins the nation's battle against corruption', 16 July, 2015, *South China Morning Post*, accessed at: <http://www.scmp.com/news/china/policies-politics/article/1840674/chinas-private-sector-joins-nations-battle-against>.

because of the weakening capacity of local and regional anti-corruption institutions in taking effective controls over the increasingly collective and syndicated nature of corruption.⁴⁰ Indeed, today a local corruption case is likely to involve higher level party officials (i.e. at central level). As some scholars observed, the corrupt network now stretches vertically to higher levels – just as organised crime offenders seek official protection, local officials seek protection from a higher level to the degree that local investigation cannot be effectively initiated and carried out by the CDIs.⁴¹ Fu further indicates that the most drastic change in China’s corruption in the past 30 years is that money can purchase power from very high levels; if the society and economic forces cannot influence decision-making processes through the voting system, they do so through bribes.⁴²

The issue of independence

The long-standing question concerning the independence of local CDIs can be seen as another factor for their underperformance. The political structure makes it clear that local CDIs, work under the leadership of the CCP committee at the same level, even though the CCP committee’s leadership over the CDI is shared with the CDI or the CCDI at its next-higher level. The party has made efforts, in recent years, to strengthen the leadership within the disciplinary inspection system, to ensure that the local CDIs have more independent power from the respective local CCP committees.⁴³ Nevertheless, all evidence shows that the control by the CCP at local level was superior to that from the higher-level CDI. The CCP even openly admits that, due to the CDI’s

⁴⁰ See more at Hualing Fu (2013), ‘The upward and downward spirals in China’s anti-corruption enforcement’, in *Comparative Perspectives on Criminal Justice in China*, edited by Mike McConville and Eva Pils, Cheltenham: Edward Elgar Publishing Limited, pp. 390-410.

⁴¹ Xiaogang Deng, Lening Zhang and Andrew Leverentz (2010), ‘Official corruption during China’s economic transition: historical patterns, characteristic, and government reactions’, *Journal of Contemporary Criminal Justice*, Vol. 26, No. 1, pp. 72-88, at p. 72.

⁴² Hualin Fu (2013), ‘The upward and downward spirals in China’s anti-corruption enforcement’, in *Comparative Perspectives on Criminal Justice in China*, edited by Mike McConville and Eva Pils, Cheltenham: Edward Elgar Publishing Limited, at p. 401.

⁴³ Ting Gong (2008), ‘The party discipline inspection in China: its evolving trajectory and embedded dilemmas’, *Crime, Law and Social Change*, Vol. 49, No. 2, pp. 139-152.

subordinate position within the political hierarchy, the CDI, is “dependent, lacks authority and cannot supervise the Party Committee to which the CDI is responsible. In many places, the CDI is almost a phantom organisation.”⁴⁴ Furthermore, Gong argued that, as subordinates in the CCP hierarchy and with their appointment, promotion, and personal welfare essentially governed by leading officials of local party committees, CDI members confronted enormous difficulties performing their independent supervisory duty.⁴⁵

Shuanggui

The secret internal disciplinary conduct of *shuanggui*, has become increasingly popular among western media in recent years, along with the new anti-corruption wave initiated by President Xi in late 2012. The Chinese term ‘*shuanggui*’ means ‘at an appointed time and place’, where ‘*shuang*’ means double and ‘*gui*’ means appointed or designated. The term is an abbreviation of codified disciplinary processes within the party, which stipulates that “a CCP member must be present at a designated time and a designated location,” – the ‘double designation’, “... to provide explanations on issues related to an ongoing case.”⁴⁶

Both the CCP discipline inspection organs regulation⁴⁷ and the Administrative Supervision Law of the PRC⁴⁸ provided that they (CDIs) “order state personnel under investigation for suspicion of violating administrative disciplines to make explanations of the matters under investigation at an appointed time and place.” They also provided a controversial point that “personnel under investigation shall not be detained in any

⁴⁴ Changfa Cui and Yongyuan Zhai (2010), *Fanfu Changlian Jianshe Xuexi Duben (Textbook on Anti-Corruption Framework)*, Beijing: State Institute of Administration, p. 102.

⁴⁵ Ting Gong (2008), ‘The party discipline inspection in China: its evolving trajectory and embedded dilemmas’, *Crime, Law and Social Change*, Vol. 49, No. 2, pp. 139-152.

⁴⁶ Zhongguo Gongchandang Jilu Jiancha Jiguan Anjian Jiancha Gongzuo Tiaoli (Regulations of Chinese Communist Party Disciplinary Inspection Organs), Promulgated by Central Committee for Discipline Inspection, on 25 March 1994, Article 28(3).

⁴⁷ Article 28 (3).

⁴⁸ Article 20 (3).

manner.”⁴⁹ The personnel in extreme cases, however, may still be detained or even hurt. A good example was on 9th April 2013, when the *China Daily* reported: “An official from a state-owned enterprise in Wenzhou, Zhejiang province, died accidentally while in the *shuanggui* process in the morning of April 9, 2013.”⁵⁰

Shuanggui reflects the most drastic power that the CCP has, unconstrained by law. Such extra-legal power allows the CCP to place its members in detention for interrogation. Under *shuanggui*, a party member can be detained indefinitely, without any contact from the outside world, and isolated from any form of legal counsel or even family visits. Therefore, as Xiang observed, appeal or review against any decision made by the CDIs is generally not available, even though there is a complicated interlocking approval procedure to ensure that a CDI’s decision is monitored by both the CCP committee at the same level and the CDI at the next higher level.⁵¹

The system of *shuanggui* has been widely regarded not only as an efficient way to root out corruption and malpractice within the party, but also as depriving its subjects of basic legal rights, even though there have been constant reports of *shuanggui* subjects being tortured to make forced confessions.⁵² There are also comments on the CCP managing corruption cases, according to its political expedience, where legal considerations are marginalised in the decision making process. Sapio argued that *shuanggui* is designed by the party to “avoid the shame that would be caused by a thorough investigation on corruption” to the CCP and to “channel the people’s feeling of distrust and betrayals on carefully handpicked officials”.⁵³ Indeed, limited statistics

⁴⁹ Ibid.

⁵⁰ ‘Wenzhou official dies after being disciplined,’ 09.04.2013, *China Daily*, accessed at: http://usa.china-daily.com.cn/china/2013-04/09/content_16387746.htm.

⁵¹ Xiang Xiang (2009), *Tansuo: Zhongguo Gongchandang Jilu Jiandu Lun (Exploring: Disciplinary Inspection in the Chinese Communist Party)*, Beijing: Central Party School Press.

⁵² See for example, Andrew Jacob (2012), ‘Accused Chinese party members face harsh discipline’, *The New York Times*, accessed at: http://www.nytimes.com/2012/06/15/world/asia/accused-chinese-party-members-face-harsh-discipline.html?pagewanted=all&_r=0

⁵³ Flora Sapio (2008), ‘*Shuanggui* and Extralegal Detention in China’, *China Information*, Vol. 22, Iss.

illustrate that most cases are internalised and end up with internal disciplinary action, where only 3 to 4 percent of the offenders were referred for criminal prosecution.⁵⁴

The People's Procuratorate

The people's procuratorates were established after the PRC was founded. The Organic Law of the Central People's Government of the PRC⁵⁵ stated that a Supreme Procuratorial Organ of the Central People's Government needed to be established, together with local people's procuratorial organs. The first Constitution of the PRC and the Organic Law of the People's Procuratorate⁵⁶ both provided for the establishment of a Supreme People's Procuratorate, local procuratorates and special procuratorates. Later, during the ten-year period of the 'cultural revolution' which began in the mid 1960s, procuratorial departments were dissolved. In March 1978, the First Session of the Fifth National People's Congress (NPC) re-established the people's procuratorates, and further in July 1979, the Second Session of the Fifth NPC revised the Organic Law of the People's Procuratorates. Since then, the people's procuratorates started its crucial role in maintaining the unity and dignity of the state legal system and ensuring the smooth progress of China's socialist modernisation.

As Articles 129-133 under the current Constitution of the People's Republic of China⁵⁷ indicate, the people's procuratorates are components of the Chinese judicial system, and they are state organs for legal supervision; they exercise statutory duties of (1)

1, p. 1; see also Flora Sapio (2010), *Sovereign Power and the Law in China*, Leiden, Boston: Brill.

⁵⁴ Hualin Fu (2013), 'The upward and downward spirals in China's anti-corruption enforcement', in *Comparative Perspectives on Criminal Justice in China*, edited by Mike McConville and Eva Pils, Cheltenham: Edward Elgar Publishing Limited, pp. 399-400.

⁵⁵ Adopted by the First Session of the Chinese Political Consultative Conference on September 27, 1949.

⁵⁶ Adopted by the First Session of the First National People's Congress in September 1954.

⁵⁷ Constitution of the People's Republic of China, adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on December 4, 1982. Amended in accordance with the Amendments to the Constitution of the People's Republic of China adopted respectively at the First Session of the Seventh National People's Congress on April 12, 1988, the First Session of the Eighth National People's Congress on March 29, 1993, the Second Session of the Ninth National People's Congress on March 15, 1999, and the Second Session of the Tenth National People's Congress on March 14, 2004.

approving the arrest of suspects by police forces; (2) prosecuting; (3) investigating criminal cases of corruption, bribery and malfeasance of functionaries of the state; and (4) supervising the investigation, judgment and execution of penalties. The Chief Procurator, who ranks at the same level of the Chief Justice, equal to vice premier, is elected by the NPC and is obliged to report to them.

According to its Organic Law⁵⁸, the people's procuratorates have the power to exercise procuratorial authority. They (1) deal with cases endangering state and public security, damaging economic order and infringing citizens' personal and democratic rights and other severe criminal cases; (2) examine cases arranged for investigation by the public security organs, and decide on whether a suspect should be arrested and whether a case shall be further pursued or exempted; (3) institute and assist public prosecution in criminal cases and (4) oversee the general activities of public security agencies, people's courts, prisons, houses of detention and reform-through-labour institutions. It is interesting to note that the functions of the procuratorates were initially to perform similar duties to a prosecutor in the United States, where it oversees investigations carried out by the public security organs. However, the 1983 amendment of the Organic Law of the People's Procuratorates extends its oversight beyond the investigation, to supervision of legal activities of the people's courts and similar legal institutions. As a result, the people's procuratorate and public security organ both execute judicial power, although their judicial functions are limited.⁵⁹

The people's procuratorates are divided into four levels, corresponding with the

⁵⁸ Organic Law of the People's Procuratorates of the People's Republic of China, adopted at the Second session of the Fifth National People's Congress on July 1, 1979, promulgated by Order No.4 of the Chairman of the Standing Committee of the National People's Congress on July 5, 1979 and effective as of January 1, 1980; amended according to the Decision on the Revision of the Organic Law of the People's Procuratorates of the People's Republic of China adopted at the Second Meeting of the Standing Committee of the Sixth National People's Congress on September 2, 1983.

⁵⁹ See more at William H. Byrnes and Robert J. Munro (2016), *Money Laundering, Asset Forfeiture and Recovery and Compliance – A Global Guide*, LexisNexis, Chapter on China.

people's courts, namely basic people's procuratorates (at town level), intermediate people's procuratorates (at city level), higher people's procuratorates (at provincial level) and supreme people's procuratorate (at national level). There are in total over 3700 prosecution services in the country with more than 280,000 state functionaries, of which approximately 140,000 are public prosecutors. The Supreme People's Procuratorate (SPP) is the highest procuratorial organ of the state and represents the state independently in implementing the right of prosecution. It is responsible for the Standing Committee of National People's Congress, and its primary tasks are to exercise leadership over local people's and special people's procuratorates⁶⁰ in implementing their supervision functions and ensure the unity and rightful implementation of state laws.⁶¹

Furthermore, although the practicality of the procuratorial independence remains arguable, the Constitution made it clear that "the people's procuratorates shall exercise their own authority in accordance with the law, independent of interference from any other administrative organ, civil organisation and individual".⁶² For cases of corruption and bribery, people's procuratorates have total control while public security only plays a limited assisting role.⁶³

Cases concerning corruption and bribery

As we have noted, the people's procuratorates have direct responsibility in investigating and prosecuting criminal cases of corruption and bribery perpetrated by official abuse,

⁶⁰ For example, Military Procuratorate, Railway Transportation Procuratorate and Maritime Procuratorate, China established special people's procuratorates at many other vital and technical departments.

⁶¹ See more about Supreme People's Procuratorate at its official website: <http://www.spp.gov.cn/>

⁶² Article 131 of the Constitution of the PRC; The Criminal Procedure Law and the Organic Law of the People's Procuratorates of the PRC also have the same provisions.

⁶³ Guanyu Shishi Xingshi Susongfa Ruogan Wenti de Guiding (Regulations on Several Issues Concerning the Implementation of the Criminal Procedure Law), promulgated by Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, Ministry of Justice, and the Legislative Affairs Commission of the Standing Committee of the National People's Congress, effective on 01.01.2013.

along with other duty-related crimes committed by Chinese officials.⁶⁴ The reasons for such cases being out of security organs' hands are, as the then deputy director of Anti-Corruption and Bribery Bureau Guan Fulin stated, firstly, the criminals committing corruption and bribery offences are state personnel, most of whom have a degree of administrative power and some are even senior officials. They may have close social relations in administrative organs and can be protected by other officials. The organs for investigating their crimes should only be special, not among the administrative organs. Secondly, offenders normally have a high level of educational and professional knowledge and often take advantage of their legal capacities. These cases are more covert and cunning than other criminal cases. Thirdly, due to the complexity of those cases, it sets high demands on personnel's knowledge concerning the law. The procurators in China are carefully selected, and based on the provisions of the Public Procurator Law, they must all at least be university graduates.⁶⁵ It should be noted that this speech was given in the late 1990s, when university graduates were far less common than they are today.

The current internal department within the people's procuratorates, namely the Anti-Corruption and Bribery Bureau (ACBB) is specifically set up to deal with cases of official corruption and bribery. Tracing back to the early 1980s, to fulfil the powers of investigating corruption cases, the SPP created a special department at all levels of the people's procuratorates around China, which was labelled the Economic Crimes Procuratorial Department.⁶⁶ However, due to the rampant incidences of corruption in the 1980s, and to support the needs of general anti-corruption programmes in the

⁶⁴ Article 18 of the Criminal Procedure Law of the PRC; see also at Yuzhong Dai (2000), 'China: Responsibilities of the Procuratorate and the Necessity for Cooperation in Combating Economic Crime', *Journal of Financial Crime*, Vol. 7, No. 4, pp. 348-350.

⁶⁵ Fulin Guan (1999), 'The Position and Role of Chinese Procuratorial Organs in Criminal Justice', *Resource Material Series No. 53*, UNAFEI, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders.

⁶⁶ Wei Xiao (2009), Fan tanwu huilu: Wei fanfu changlian zuochu jiji gongxian (Anti-corruption and bribery: Making contribution to a clean government), *Procuratorate Daily*, 11.09.2009, available at: http://newspaper.jcrb.com/html/2009-09/11/content_26307.htm.

country, the SPP reformed the Economic Crimes Procuratorial Department and established ACBBs at all levels of the people's procuratorates in China.⁶⁷ Ever since the establishment of the ACBB, the procuratorates have become the sole judicial organ that specialises in investigating and prosecuting corruption cases in China.

In accordance with the Criminal Procedure Law of the PRC, the ACBBs hold the power to (1) detain; (2) arrest; (3) exercise the necessary measures of issuing a warrant to compel an appearance order to the defendant, obtain a guarantor pending trial and subject the defendant to residential surveillance; (4) initiate a special investigation and (5) search and seize.⁶⁸

The ACBB holds very similar powers to the Serious Fraud Office (SFO) in the United Kingdom, a specialist prosecuting authority combating top level or complex fraud, bribery and corruption. The SFO views itself as unique as, in comparison with the ACBB, "they both investigate and prosecute their cases".⁶⁹ Yet, the scope of the cases that can potentially trigger both institutions are slightly different. The SFO's current director, Mr. David Green, has stated that under his leadership, the SFO will only focus on the most complex fraud and corruption cases, such as serious fraud which could undermine confidence in the City of London; serious fraud, bribery and corruption cases that involve a high actual or potential financial loss, significant actual or potential economic harm, or an important public interest element.⁷⁰ Contrastingly, under Chinese law, neither the director of the ACBB nor even the chief procurator of the SPP has such discretionary power. The ACBBs instituted at various levels of the people's procuratorates are responsible for every single case involving abuse of public office.

⁶⁷ Ibid.

⁶⁸ Article 162-166, Criminal Procedure Law of the PRC.

⁶⁹ Serious Fraud Office official website, available at: <https://www.sfo.gov.uk/about-us/>.

⁷⁰ Ibid, SFO official website; see more at OECD (2013), *Specialised Anti-Corruption Institutions: Review of Models*, Second Edition, OECD Publishing, pp. 133-138, available at: <http://dx.doi.org/10.1787/9789264187207-en>

The internal relationship

In the struggle against economic crime, namely corruption, the CDIs and the ACBBs have a common aim. However, the relationship between the party's disciplinary mechanism and the ACBB has not been clearly stipulated. The CDI investigates misconduct of CCP members and the ACBB is solely an institution in charge of investigating the crime of corruption. In the 1980s, both the CDI and the ACBB worked side by side, cooperating in matters regarding corruption and official misbehaviour.⁷¹ In 1992, the CCP at its 14th National Congress declared that the CDI should play a leadership role in coordinating anti-corruption work; the investigation of major corruption cases should directly be carried out by the CDI, with cooperation and support of the ACBB.⁷² For example, if an ACBB and a relevant CDI have simultaneously started an investigation, the ACBB is required to suspend its investigation, and under CCP internal rules, any investigation concerning certain ranks of CCP members must first be endorsed by the CCP Committee – a rule that suffocates any independent investigation of senior officials. Generally, the CCP's disciplinary system since the mid-1990s has authoritatively appropriated China's anti-corruption enforcement.⁷³

Even though it is clear that the CDI plays a primary role in the fight against corruption, in some major investigations, the ways in which they cooperate with the ACBB may vary. Under normal circumstances, ACBB is seconded to the CDI to assist with investigations together with the police and investigators from other relevant governmental departments. The CDI and the ACBB produce their respective reports where the CDI prepares evidence for disciplinary action and the ACBB pieces together

⁷¹ Melanie Manion (2004), *Corruption by Design: Building Clean Government in Mainland China and Hong Kong*, Cambridge: Harvard University Press, pp. 89-135.

⁷² Database of all previous Chinese Communist Party National Congress, Report of 14th National Congress, accessed online at: <http://www.generexpo.com/GB/64162/64168/64567/index.html>.

⁷³ Melanie Manion (2004), *Corruption by Design: Building Clean Government in Mainland China and Hong Kong*, Cambridge: Harvard University Press, p. 135.

evidence for a possible criminal prosecution; a criminal prosecution after the disciplinary action may follow. There are also cases where CDI send their investigators to the ACBB, to assist and support investigations initiated by the ACBB.⁷⁴

Although the political and legal institutions in fighting corruption have their respective functions, the CCP ‘interferes’ significantly with anti-corruption work whereas the law plays a relatively limited role. This is captured and commented on by former President of the Supreme People’s Court, Xiao Yang: “Some leading officials are so used to the Party Committee approval system (in anti-corruption investigation) ... They interfere with case filing, investigation and decision-making; they give instructions, set perimeters and demand procuratorial organs to handle cases according to their wishes. When the procuratorial organs handle cases based on law and deviate from political instructions, they could be reprimanded for ‘competing with the Party Committee’, ‘objecting to Party leadership’, or even asking questions as ridiculous as ‘who is more powerful, you the procuratorate or me the Party Secretary?’”⁷⁵

This is a well-accepted truth for all prosecutors. According to Song, it is suggested that more than 80 percent of corruption cases are initiated by the CDI before the procuratorate takes over; more specifically, for cases involving officials at *xian/chu* level (town level), more than 96 percent are first investigated by the CDI; and for cases involving officials at *sheng/bu* level (provincial/ministerial level), all cases are initiated by the CCDI.⁷⁶ It is clear that in cases relating to corruption, political power has, in many ways, gone far beyond the law.

⁷⁴ See Feng Ye (2007), *Combating Corruption: A Chinese Perspective*, PhD thesis, University of London.

⁷⁵ Yang Xiao (2008), *Fantan Baogao: Gongheguo Diyige Fantanwu Huilu Gongzuoju Dansheng de Qianqian Houhou (Anti-Corruption Report: The Birth of the First Anti-Corruption Administration in the Republic)*, Beijing: Law Press, p. 135.

⁷⁶ Tao Song (2007), ‘Fanfu zoujin zhongjiwei moshi’ (Anti-corruption is moving towards the CCDI model), *Dangzheng Luntan (Party/Government Forum)*, 2007, No.6, at p. 9.

Ministry of Supervision

The Ministry of Supervision was established after the founding of the PRC as the People's Supervisory Commission in October 1949. It took on its present name, the Ministry of Supervision (MOS) in September 1954. It was abolished in April 1959 and re-established in July 1978 at the 6th National People's Congress.⁷⁷ The supervisory organ at central government, under the State Council, is named the MOS; the corresponding organ at provincial level is named the Department of Supervision; and others at local level are called the Bureau of Supervision. All supervisory organs operate under the Administrative Supervision Law of the PRC⁷⁸.

As Article 18 of the Administrative Supervision Law stipulates, the statutory duties of government supervisory organs include (1) examining compliance and enforcement of laws, regulations, and decisions and orders of the government; (2) receiving reports of violations of administrative discipline by state administrative organs, civil servants, and other persons appointed by state administrative organs; (3) investigating and handling the violations of administrative discipline by state administrative organs, civil servants, and by other persons appointed by administrative organs; (4) handling complaints against decisions of administrative punishments imposed by administrative organs as well as other complaints as prescribed by the laws and administrative rules.

Even though, as acknowledged, the CDI are party internal organs who deal with disciplinary matters under the party rules and regulations, and the supervisory organs (i.e. MOS) are executive organs that handle administrative cases involving civil servants according to administrative laws, these two institutions are on many occasions, performing similar supervisory duties, in particular when dealing with cases of corruption. As a result, in 1993, the Central Committee of the CCP and the State Council

⁷⁷ See more at the State Council's official website: http://english.gov.cn/state_council/2014/09/09/content_281474986284141.htm.

⁷⁸ Adopted at the 25th Meeting of the Standing Committee of the 8th National People's Congress of the PRC on May 9, 1997, promulgated by President Jiang Zemin.

decided that the CDI and the supervisory organs under the MOS should combine into a single body to deal with official cases and fulfil their common supervisory functions.⁷⁹ Thus, the two institutions as well as their local branches at a corresponding level share one office with two names with overlapping staff and jurisdiction. They also share the same official website.⁸⁰

National Bureau of Corruption Prevention

The National Bureau of Corruption Prevention (NBCP) is a relatively new department that was established in 2007, in response to the United Nations Convention against Corruption, under the direct administration of the State Council, and with an objective of improving government transparency, developing and improving the mechanisms on corruption prevention and coordinating anti-corruption efforts.⁸¹ Though it does not have the power of investigating individual cases, it is specifically set up to take overall responsibility for the work of corruption prevention, and its major responsibilities include planning on organising and coordinating the national work of corruption prevention; formulating relevant policies; coordinating and directing the work of corruption prevention in enterprises, public institutions, social groups, intermediate agencies and other non-government organisations and taking charge of international cooperation and technical assistance in this regard.⁸²

The NBCP also set up an information centre for monitoring the flow of suspicious assets and suspicious corruption activities, as reported on its inauguration day, by establishing an information-sharing system among prosecuting organs, people's courts, police

⁷⁹ See more at Zengke He (2000), 'Corruption and anti-corruption in reform China', *Communist and Post-Communist Studies*, Vol. 33, Iss 2, pp. 243-270.

⁸⁰ See official website for both the Central Committee for Discipline Inspection and Ministry of Supervision at: <http://www.ccdi.gov.cn/>.

⁸¹ Xinhua News Agency (2007), 'Establishment of the National Corruption Prevention Bureau', 13 September 2007.

⁸² See more information at its official website: <http://www.nbcp.gov.cn/>, see also at International Association of Anti-Corruption Agencies website at: http://www.iaaca.org/AntiCorruptionAuthorities/ByCountriesandRegions/C/Chinajigou/201202/t20120209_801305.shtml.

authorities and banks.⁸³ What is more, upon its inauguration, the Bureau set up a website which not only publicises events and corruption-related news, but also provides citizens with a forum to directly submit complaints of corruption and opinions on the government's work. Interestingly, within hours of its launch, the site crashed due to the unexpected volume of complaints.⁸⁴ Nonetheless, the initiation of NBCP's online reporting system has clearly made far more significant impact than expected, particularly when we consider the proportion of corruption cases that were first discovered through online complaints.

Ministry of Public Security

Public security branches lead and direct the people's police. They are responsible for maintaining order and state security, as well as conducting investigations, arrest and preliminary hearings in criminal cases.⁸⁵ An established department under the Ministry of Public Security, namely the Economic Crime Investigation Bureau (ECIB), deals with economic crime such as money laundering, commercial corruption, insider dealing, securities fraud and market manipulation. Its primary responsibilities are to: (1) investigate, collect, research and analyse the data regarding the incidence of nationwide economic crime; (2) formulate policies, measures and plans in controlling nationwide economic crime; (3) draft regulations, administrative rules and enforce terms on combating economic crime; (4) examine, lead and supervise investigation of major economic crime cases and (5) organise cross-province extremely serious or major economic crime cases.⁸⁶ The ECIB also set up several sub-departments such as the money laundering crime investigation department and the financial crime investigation department.

⁸³ The State Council of the People's Republic of China (2007), 'China Establishes National Corruption Prevention Bureau', 13.09.2007, available at: http://www.gov.cn/english/2007-09/13/content_748148.htm.

⁸⁴ *Shanghai Daily* (2007), 'Anti-corruption Website Breakdown as Masses Log On', December 9, 2007.

⁸⁵ See more at Ministry of Public Security official website: <http://www.mps.gov.cn/>.

⁸⁶ See Economic Crime Investigation Bureau of the Ministry of Public Security at its official website: <http://www.mps.gov.cn/n2256207/n2256209/c4109244/content.html>.

Given the specialty of the Bureau, it has close internal ties with financial institutions in the economic sector in China. For example, the Bureau works closely with the central bank, the People's Bank of China, as well as other major commercial banks, in monitoring potential illegal transaction that relate to economic crime such as money laundering and bribery. As its then director Zheng Shaodong stated: "commercial corruption commonly occurred in the fields of construction, land acquisition, pharmaceutical sales, government procurement, resource development, securities and futures, bank loans, energy, commercial insurance, telecommunications and environmental protection. The police, in particular the ECIB, must intensify corruption investigations in these fields, to crack down on major commercial cases quickly and curb the high frequency of bribery."⁸⁷ He further emphasised that in the 21st century, police have recorded thousands of cases concerning bribery in the private sector.⁸⁸

The financial regulators

China's financial regulators have an overall responsibility to combat crime of money laundering. China enacted its Anti-Money Laundering (AML) Law⁸⁹ in 2006, in which Articles 3 and 4 provide the central bank, the People's Bank of China (PBOC), is the overarching organ that oversees the administration of the AML regime at national level. Under Article 4 of the Law of the People's Republic of China on the PBOC⁹⁰, the PBOC was delegated the responsibility of "directing and disposing of the AML work of the financial industry and being responsible for capital supervision and measurement over AML."

⁸⁷ Xinhua News Agency (2006), 'China orders police to step up probes into commercial corruption', *BBC Morning Asia Pacific*, 15 June 2006; see also Yanni Chen (1999), 'Centre set up to fight economic offences', *China Daily*, 30 January 1999.

⁸⁸ *Ibid.*

⁸⁹ Anti-Money Laundering Law of the People's Republic of China, adopted at the 24th Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on October 31, 2006, is promulgated by President Hu Jintao and take on effect on January 1, 2007.

⁹⁰ Adopted on March 18, 1995, at the Third Session of the Eighth National People's Congress of the People's Republic of China, issued by President Jiang Zemin.

Furthermore, in 2004, the PBOC established the Financial Intelligence Unit (FIU), which is composed of two departments: the Anti-Money Laundering Bureau – responsible for investigation, dissemination and policy oversight; and the China Anti-Money Laundering Monitoring and Analysis Centre, with functions of collecting, analysing and broadcasting suspicious currency transactions. This was widely seen as a significant accomplishment in developing the legal and regulatory framework for countering money laundering in the banking sector.⁹¹

The China Banking Regulatory Commission (CBRC) was established by the Chinese government in 2003, taking over the role previously performed by the PBOC and acting as the main regulator of the Chinese banking sector.⁹² The CBRC was authorised to supervise and regulate banks, asset management companies, trusts and investment companies, as well as other deposit-taking financial institutions.⁹³ The CBRC's objectives were maintaining market confidence in the Chinese banking system, promoting public awareness and reducing financial crime through prudential and effective supervision. To be more precise, setting rules and standards for banks to follow, ensuring accuracy of loan classification, adequacy of loss provisions, true and fair reporting of profits and loss and meeting capital adequacy requirements – to overall increase the accuracy and transparency of the Chinese banking system and protect customers from financial risk. This said, the primary authority in terms of enforcement of AML remains with the PBOC and the Ministry of Public Security.

⁹¹ See more at William H. Byrnes and Robert J. Munro (2016), *Money Laundering, Asset Forfeiture and Recovery and Compliance – A Global Guide*, LexisNexis, Chapter on China; see also at Wouter H. Muler, Christian H. Kalin and John G. Goldsworth (2007), *Anti-Money Laundering: International Law and Practice*, Chichester: John Wiley & Sons Ltd, pp. 707-708.

⁹² See more of the evolution of the CBRC at James R. Barth, Zhongfei Zhou, Douglas Arner, Berry F.C. Hsu and Wei Wang (eds), *Financial Restructuring and Reform in Post-WTO China*, 2007, Dordrecht: Kluwer Law International.

⁹³ See its official website: www.cbrc.gov.cn.

The China Securities Regulatory Commission (CSRC) was founded in October 1992, set up to jointly supervise and regulate the behaviour of securities and futures market with the State Council Securities Commission.⁹⁴ These two securities regulators were merged afterwards, and the surviving CSRC was vested with the exclusive authority to regulate the securities market in April 1998.⁹⁵ It is also responsible for disclosing and supervising information to the capital market, and exploring and punishing activities, such as insider trading, that violate security regulations.⁹⁶

The China Insurance Regulatory Commission (CIRC) was established in November 1998, with the aim of governing and regulating China's insurance market.⁹⁷ The CIRC also assists the PBOC in supervising the industry's compliance with AML regulations. In 2008, it set up an AML Department under its Enforcement Bureau to particularly deal with all related AML work.

Together with the PBOC as the central bank, these three highly specialised and mutually independent regulatory commissions make up China's financial regulatory framework, collectively referred to as *Yihang Sanhui* (One bank, Three commissions). Generally, China's institutional regulatory scheme is very specific and sectorial based, while the four bodies, the PBOC, CBRC, CSRC and CIRC are correlated and coordinated to create a stable and effective supervisory force. However, a long-standing problem of the lack of regulatory independence has again in many ways hindered the development of China's financial system. Even though the PBOC law seeks to preserve a certain degree of independence for the PBOC, it is essentially a ministry-ranking constituent department under the direct leadership of the State Council. Article 5 the PBOC law

⁹⁴ See more at its official website: www.csrc.gov.cn.

⁹⁵ Hui Huang (2006), *International Securities Market: Insider Trading Law in China*, London: Kluwer Law International, pp. 18-19.

⁹⁶ Further reading can be found at Hui Huang (2005), 'The regulation of insider trading in China: A critical review and proposals for reform', *Australian Journal of Corporate Law*, 2005, No. 17, pp. 1-42.

⁹⁷ See more at its official website: www.circ.gov.cn.

explicitly stipulates that “the PBOC must obtain the approval of the State Council before it is able to take actions on certain important matters such as the annual supply of currency, interest rates and foreign exchange rates”.⁹⁸

The CBRC, the CSRC and the CIRC, three specialist regulatory commissions, may have even less independence from the government. For example, the CBRC is formally an instrument of the central government and the relevant law has referred the CBRC as “the banking supervision institution of the State Council”.⁹⁹ Furthermore, all the chairpersons of the CBRC are appointed by the State Council and are accountable to the Premier.¹⁰⁰ This is also the case with the CSRC and CIRC.

The UK financial regulator – the Financial Conduct Authority (FCA) – is, however, an additional model worth considering. The FCA is a private company discharging a public function, operating independently of the UK government but accountable to the Treasury and Parliament, with the main objectives of protecting consumers and financial markets, and promoting competition.¹⁰¹ More interestingly, it is entirely financed by charging fees to the firms they regulate as opposed to the state budget. This relationship inevitably builds up a special sense of trust between the regulator and private firms, while China, who regards itself a socialist country, could find this rather difficult to implement.¹⁰²

⁹⁸ PBOC law of the PRC, Article 5

⁹⁹ Law of the PRC on Banking Regulation and Supervision, adopted at the 6th session of the Standing Committee of the 10th National People’s Congress of the PRC on 27 December 2003, amended on 31 October 2006, Article 2.

¹⁰⁰ See for example, Daqi Zhu (2007), *Jinrong Fa (Financial Law)*, Beijing: China Renmin University Press.

¹⁰¹ Financial Conduct Authority, available at: <https://www.fca.org.uk/about/the-fca>.

¹⁰² See more discussions at Hui Huang (2010), ‘Institutional structure of financial regulation in China: lessons from the global financial crisis’, *Journal of Corporate Law Studies*, Vol. 10, No. 1, pp. 219-254.

Improving the Law

Basic laws

As noted, the Criminal Law of the PRC was revised in 1997, almost twenty years after its first promulgation in 1979.¹⁰³ The provisions of the new Criminal Code on corruption and bribery were significantly amended, to meet the anti-corruption movement and the new policy. It also added many recent crimes such as financial fraud and economic crime, as has been examined in the previous chapter.¹⁰⁴ The new Criminal Law has separated the crimes of corruption and bribery and introduced a specific chapter: chapter eight – the crime of corruption and bribery, containing 15 articles. Article 382 to 396 define 12 charges and their punishments, including: the crime of corruption (Article 382); the crime of embezzling public funds (Article 384); the crime of state functionaries receiving bribes by taking advantage of their positions (Article 385); the crime of state organisations receiving bribes (Article 387); the crime of state functionaries receiving bribes by taking advantage of other state functionaries' positions (Article 388); the crime of offering bribes to state functionaries (Article 389); the crime of offering bribes to state organisations (Article 391); the crime of introducing bribes to state functionaries (Article 392); the crime of offering kickbacks or commission charges to state functionaries for the purpose of securing illegitimate benefits (Article 393); the crime of state functionaries accepting gifts which are worth relatively large amounts of money in the activities of domestic or international services (Article 394); the crime of state functionaries failing to explain the source of enormous wealth or failing to report their overseas savings (Article 395) and the crime of state organisations and judicial and administrative law enforcement organs misdealing with collective or state assets, or confiscated assets (Article 396).

Compared with the 1979 model, the new Criminal Law has expanded both the scope

¹⁰³ First adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, Revised at the Fifth Session of the Eighth National People's Congress on March 14, 1997.

¹⁰⁴ See Chapter 4 of the thesis on Fraud in China.

and the variety of the crime of corruption. While the old version was mainly provided to regulate and punish government party officials, the new code has extended this to state functionaries, which includes all persons connected to the state. Article 93 of the Criminal Law provides that “state functionaries as mentioned in the law, refers to persons who perform a public service in state organs; those who are employed by state-owned companies, enterprises, public institutions and collective organisations and those who are assigned by state organs, state-owned companies, enterprises, public institutions and collective organisations that are not owned by the state to perform public service but shall be regarded as state functionaries.”¹⁰⁵ This is indeed strengthened by adding individuals who manage state owned assets. The amendments can also be found in, for example, the threshold amount leading to a criminal punishment which has increased due to economic growth.

From 1993 to 1997, China’s prosecution service followed the slogan ‘to execute laws strictly and grasp cases firmly’, regarding the investigation and prosecution of cases concerning economic crime as a most important role in promoting economic reconstruction.¹⁰⁶ In this period, nearly 60,000 cases were successfully investigated and prosecuted by the prosecution services each year, of which 30,000 were defined as serious cases and 2,000 grave cases. In total between 1993 and 1997, 313,033 cases and 357,235 people were placed on file for investigation, and the prosecution services confiscated 22.92 billion Chinese yuan. The number of cases investigated doubled compared to the years between 1982 and 1987, and the number of serious cases increased five-fold, with the number of grave cases increasing by six.¹⁰⁷

¹⁰⁵ Article 93, Criminal Law of the PRC.

¹⁰⁶ Siqing Zhang (1994), Speech on the Meeting of Chief Procurators’ Work of China, December 22, 1994.

¹⁰⁷ According to the Working Reports of Supreme People’s Procuratorate in at the National People’s Congress given respectively by Yichen Yang, Fuzhi Liu and Siqing Zhang, the Chief Procurator, at the Fifth Meeting of the Eighth National People’s Congress.

Some other major laws

In 2006, the Chinese government adopted the AML Law¹⁰⁸, which is not only deemed to control the crime of money laundering, but also to address its predicate offences, including corruption.¹⁰⁹ The AML law allows China to enhance its internal control system and increase transparency of officials' accounts, to monitor suspicious financial transactions and identify anonymous or pseudonymous accounts and beneficiaries of these suspicious transactions. Chinese AML law and its international co-operation in terms of proceeds recovery intends to deter corrupt officials who purposely launder their 'dirty' money into legitimate money laundering activity, although the effectiveness of the AML law is questionable.

The Constitution offers protection to victims and whistle blowers. Article 41 provides: "citizens have the right to make to relevant state organs a complaint and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary... In case of complaints, charges or exposures made by citizens, the state organ concerned must deal with them in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures, or retaliate against the citizens making them. Citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to receive compensation in accordance with the law."¹¹⁰ Whistle blowers protection can also be found in the Criminal Law¹¹¹ and the Criminal Procedure Law¹¹².

In line with the Constitution and state laws, the local organisations and departments have also enacted and issued their own local and departmental regulations. The

¹⁰⁸ Anti-Money Laundering Law of the PRC, became effective on January 1, 2007.

¹⁰⁹ See Article 191 of the Criminal Law of PRC, and the Criminal Law Amendment XI, which added corruption and other financial crimes as predicate offence for money laundering.

¹¹⁰ Article 41 of the Constitution of the People's Republic of China.

¹¹¹ See Article 254, Criminal Law of the People's Republic of China.

¹¹² See Article 84, 85, Criminal Procedure Law of the People's Republic of China.

Administrative License Law regulates the establishment and implementation of administrative licenses, and guarantees and supervises the effective administration of administrative organs.¹¹³ The Law on Public Servants concerns the management of public servants and provides supervision over them.¹¹⁴ The Government Procurement Law, Anti-Monopoly Law and Bidding Law also supervise administrative discretion and the market's fundamental role in allocation of resources, in order to effectively prevent corruption related crime.¹¹⁵

The CCP itself has also enacted a series of intra-party rules and regulations. The 'Guidelines of the CCP for Party Member Leading Cadres to Perform Official Duties with Integrity' in 1997, revised in 2010, is the party's fundamental rule in regulating the behaviour of leading cadres. It prohibits leading cadres from engaging in profit-making activities and seeking illegitimate gains by taking advantage of their positions.¹¹⁶ In 2007, the CCDI issued the 'Regulation on Strict Prohibition of Seeking Illegitimate Gains by Misuse of Office', in order to curb rent-seeking practice.¹¹⁷ 'Regulation of the Executives of State-owned Enterprises for Performing Management Duties with Integrity', released in 2009, was forwarded to prohibit leading officials in state-owned enterprises from seeking illegal profit through misuse of office for either themselves or other related parties, which in turn undermines the interests of the

¹¹³ Administrative License Law of the People's Republic of China, adopted at the 4th Session of the Standing Committee of the Tenth National People's Congress on August 27, 2003, promulgated by President Hu Jintao.

¹¹⁴ Law of the People's Republic of China on Public Servants, adopted at the 15th Meeting of the Standing Committee of the Tenth National People's Congress on April 27, 2005, promulgated by President Hu Jintao.

¹¹⁵ The Government Procurement Law of the People's Republic of China, Adopted at the 28th Meeting of the Standing Committee of the Ninth National People's Congress on June 29, 2002; The Anti-Monopoly Law of the People's Republic of China, adopted at the 29th meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on August 30, 2007; The Bidding Law of the People's Republic of China, adopted by the Standing Committee of the Ninth National People's Congress at the 11th Session on August 30, 1999.

¹¹⁶ The Information Office of the State Council, China's cabinet, China's Efforts to Combat Corruption and Build a Clean Government, available at: http://www.gov.cn/english/official/2010-12/29/content_1775353.htm.

¹¹⁷ Ibid.

enterprises.¹¹⁸

The ‘Regulation on Implementing the System of Registration for Gifts Received in Domestic Social Activities by Functionaries of Party and State Organs’ prohibits state functionaries from accepting any gifts or grants that might influence their impartial performance of official duties¹¹⁹. The ‘Regulation on Leading Cadres’ Report of Relevant Personal Matters’ requires senior public officials to honestly report their incomes, housing and investment owned by themselves, their spouses and children living with them, and the employment status of their spouses and children. There is also an ‘Interim Regulation on Strengthening Management of State Functionaries whose Spouses and Children Have Emigrated Abroad’.¹²⁰ Even though the rules and regulations are clearly written on paper, the question remains in its efficiency. There have been provisions requiring officials to report their assets, but how many cadres have followed this ruling? The relatively recent investigation into ‘naked officials’¹²¹ brings hope to the people and this trend has spread from the southern provinces to Beijing, but the consequence and the extent to which the discipline authority is effective remains unknown.¹²²

Punishment

In terms of criminal punishment, China has enacted substantive criminal and administrative regulations to punish economic crime offenders. The Criminal Law

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ *Luoguan* in Chinese, describing Chinese bureaucrats whose family members have emigrated while they are still in public positions. The party has issued ‘The ordinance of the work of selecting and appointing cadres of the party and country’, which clearly stipulates ‘Naked officials’ will not be considered for promotion as they are high risks that their ability to escape overseas could make them more inclined to engage in corruption.

¹²² See ‘China investigation finds 1,000 ‘naked officials’ in Guangdong’, 07.06.2014, *BBC News*, available at: <http://www.bbc.co.uk/news/world-asia-china-27747097>, and Demetri Sevastopulo (08.06.2014), “China cracks down on ‘naked officials’”, *Financial Times*, available at: <http://www.ft.com/cms/s/0/9d1f3a88-ef01-11e3-acad-00144feabdc0.html#axzz37jmdiWKd>.

provides harsh punishment for corrupt officials, stipulating anyone who embezzles more than 100,000 Yuan (£11,900) will receive more than ten years imprisonment, a life sentence, or even the death penalty should the offence be deemed serious enough and the personal asset shall be confiscated.¹²³ Indeed, China's top politicians once urged that "when there is a choice to kill or not to kill, choose to kill," when they faced a surge of economic crimes at the beginning of the economic reform in the early 1980s. Former party leader, President Hu Jintao also stated that "any crime that the law regards as serious should certainly receive serious penalties, and any crime that is punishable by the death penalty according to the law, should certainly receive the death penalty."¹²⁴ During these periods, criminals who committed economic crime received no mercy in their sentencing.

However, in recent years, China has started to adopt new punishing guidelines of 'justice tempered with mercy' and 'kill fewer, kill cautiously'.¹²⁵ More and more suspended death penalties have been applied, even though the value of the bribe is extremely large. For example, the former manager of the China National Petroleum Corporation Jiang Jiemin, took a bribe worth £20 million, but received the death penalty with a suspension for two years.¹²⁶ These convicted officials can escape execution by not committing any other crime in prison during this two-year period, where subsequently their sentences will be transferred to life imprisonment, or 25 years if 'meritorious service' is demonstrated.

For less serious offences, China provides intra organisational rules as well as party

¹²³ Article 383 of the Criminal Law of PRC.

¹²⁴ Amnesty International (1997), People's Republic of China – The Death Penalty in China: Breaking Records, Breaking Rules, Strike Hard – Yanda, available at: <http://www.refworld.org/pdfid/45b84b772.pdf>.

¹²⁵ Ibid.

¹²⁶ Benjamin Haas and Aibing Guo (2013), 'China Widens Anti-Graft Drive as Petrochina Ousts Managers', *Bloomberg Business*, available at: <http://www.bloomberg.com/news/2013-08-28/china-widens-anti-graft-drive-as-petrochina-ousts-managers-4-.html>.

disciplines on imposing penalties. For example, the ‘Regulation on the Punishment of Civil Servants in Administrative Organs’¹²⁷ specifies the principles, power limit, types of misconduct and the punishment standards, including explicit warning, recording of demerit, recording of major demerit, demotion, dismissal from post and discharge from office. The party’s own disciplinary rules also give five measures for enforcing party discipline, as explored, including explicit warning, stern warning, removal from post within the party, probation within the party, and expulsion from the party.¹²⁸

Taking the Profit out of Crime

Introduction

Confiscation in economic crime case is an indispensable tool to further ensure that criminals do not benefit from their illegal conduct. It could be a supplement to imprisonment and sometimes could be implemented in isolation. Indeed, the recovery and restitution of proceeds of corruption practices is made absolutely clear to be one of the principal objectives of the United Nations Convention Against Corruption.¹²⁹ However, the records in most countries in actual forfeiture or confiscation of proceeds of economic crime, is far from impressive. For example, in the UK, the amount of criminal property that has been confiscated is a tiny proportion of the expected whole.¹³⁰ Even in relatively clear-cut cases of drug related crimes, it is assumed that the UK confiscates less than 0.001 percent of the suspected wealth involved.¹³¹

¹²⁷ Adopted at the 173rd executive meeting of the State Council on April 4, 2007, promulgated by Premier Wen Jiabao.

¹²⁸ The Information Office of the State Council, China’s cabinet, China’s Efforts to Combat Corruption and Build a Clean Government, available at: http://www.gov.cn/english/official/2010-12/29/content_1775353.htm.

¹²⁹ Articles 1 and 51 of the UNCAC.

¹³⁰ The UK National Audit Office estimated in the UK confiscation of criminal assets was no more than 26 pence in every £ 100 of criminal property and that in only two per cent of cases is the full amount of the confiscation order actually collected, NAO *Confiscation Orders*, 17 December 2013. See also Report of the House of Commons Committee of Public Accounts, *Confiscation Orders*, 21 March 2014, SO.

¹³¹ See Barry Rider (1996), ‘Taking the Profit out of Crime’, in *Money Laundering Control*, edited by Barry Rider and Michael Ashe, Dublin: Sweet & Maxwell; and Barry Rider (2016), ‘Proceeds of crime – A bridge too far?’, Editorial, *Journal of Money Laundering Control*, Vol. 19 Iss 1.

As Professor Rider stated, the acquisition of and control over wealth is the motivation for most serious crimes that involve premeditation.¹³² This is particularly so when criminal activity operates as an enterprise requiring capital to fulfil its ambitions. Consequently, the money, or rather wealth, is not only the goal but it is the lifeblood of criminal enterprises. Therefore, until the profits of crime are eradicated from criminal behaviour, there is little chance of discouraging abusive and illegal conduct that produces great wealth.

It is obvious that by definition, public sector corruption is a crime that deals with the powerful and while individuals remain in positions of authority, it is extremely difficult for the ordinary legal system and its law enforcement agency to interfere, let alone prosecute. In the common law tradition and in the context of the obligation of fiduciaries to be accountable for the taking of 'secret profits', many precedented principles have been applied not only to those in private relationships but also those in positions of trust in government.¹³³ A number of common law jurisdictions have held that the imposition of a constructive trust shall apply where the money ends up. For example, a Singapore appeal court had invoked such a principle in regard to the proceeds of corruption that took place in Indonesia held in a Japanese bank in Singapore.¹³⁴

There are commonly two forms of profits of corruption existing in China, one is property profit and the other one is non-property profit, such as promotion. It is understandable in the case of property profits, as has been demonstrated by the PRC

¹³² Barry Rider (2007), 'Recovering the proceeds of corruption', *Journal of Money Laundering Control*, Vol. 10 Iss 1, pp. 5-32, at p. 9. See also Anthony Kennedy (2007), 'An evaluation of the recovery of criminal proceeds in the UK', *Journal of Money Laundering Control* Vol. 10 Iss 1, pp. 33-46.

¹³³ See generally Robert Pearce, John Stevens and Warren Barr (2010), *The Law of Trusts and Equitable Obligations*, 5th Edition, Oxford: Oxford University Press; and Andrew A. Burrows (2011), *The Law of Restitution*, 3rd Edition, Chapter 26, Oxford: Oxford University Press.

¹³⁴ *Sumitomo Bank Ltd v. Karitika Ratna Thahir* (1993) 1 SLR 735.

Criminal Law, the necessity of the confiscation of criminal assets.¹³⁵ It is indeed, a controversial topic in the common law world as to the ability of the law to trace the proceeds of corruption and fraud.¹³⁶ Nevertheless, English courts in common with many other common law countries, through the development of a series of cases involving corruption and breaches of fiduciary duty, have now been prepared to trace such property and impose a constructive trust upon the breach.¹³⁷

Such a situation, however, becomes much simpler and straightforward in the law of China. According to the law regarding property ownership, no matter how many times or into what forms the criminal property is transferred, ownership remains with the State as long as it lawfully originated from the state, given that the profits of corruption crime are appurtenance to the property, the ownership should not change.¹³⁸ As a result, taking away the proceeds of corruption is seen to be merely recovering original ownership of illegally obtained property.

The Criminal Law of the PRC provides two ways of seizing the profit of corruption crime; firstly, the property that has been misappropriated including the profits generated from it, shall be recoverable by its original department (i.e. state organs or public institutions); secondly, ill-gotten property resulting from embezzlement and bribery, including other properties, shall be confiscated by the Treasury.¹³⁹

Non-property profit corruption obviously renders the case more complicated. Based on

¹³⁵ Article 383 of the Criminal Law of the PRC.

¹³⁶ See Attorney General for Hong Kong v. Reid (1994) 1 All ER 1 *contra* Sinclair Investments (UK) Ltd v. Versailles Trade and Finance Ltd (2011) 3 WLR 1153.

¹³⁷ See a detailed analysis at Barry Rider (2014), 'A simple approach to justice', Editorial, *Journal of Financial Crime*, Vol. 21, Iss. 4; and in particular the recent case FHR European Ventures LLP v. Cedar Capital Partners (2014) UKSC 45.

¹³⁸ Property Law of the People's Republic of China, adopted at the 5th Session of the 10th National People's Congress of the PRC on March 16, 2007, promulgated by President Hu Jintao.

¹³⁹ Article 59 of the Criminal Law of the PRC.

the ‘Civil Servant Law’¹⁴⁰, ‘Supervision Law’¹⁴¹ and the ‘Work Regulations for the Promotion and Appointment of Leading and Party Government Cadres’, “any promotions of jobs or positions should be proceeded through a lawful procedure by lawful means, it is unfair if a promotion is received by violating the laws and rules; and to maintain a just, fair and open competition in society it is vital that the corrupt official be deprived of the benefit of this crime.” In China, non-property profit can be taken away through degrading the position to the original office, and disqualifying the civil servant. However, there are still debated views on certain types of non-property profit, for example, sexual bribery, where the profit of corruption is a sexual service.¹⁴² In practical terms, the law is uncertain; the criminals normally receive disciplinary punishment such as expulsion from the party or fines. Nevertheless, it is widely accepted that it is not in every case that the benefit of corruption can be appropriately removed – this is something that relevant law enforcement agencies are still working on at present.

In the context of China

Taking profit out of crime is nothing new in China, while in Chinese written laws, the confiscation of property is a rather more widely used term. The laws relating to the confiscation of criminal property can be found in criminal, administrative and even business law. In China, there are two means to undermine a criminal’s wealth; the first one is the discussed term of confiscation of property, which has been utilised in the past, both in ancient and modern China; the other is to impose fines or orders of financial contribution and retraction and even deprivation of an official post to discipline

¹⁴⁰ Civil Servant Law of the People's Republic of China, adopted at the 15th session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on April 27, 2005, came into effect on January 1, 2006.

¹⁴¹ Law of the People's Republic of China on Administrative Supervision, adopted at the 25th Meeting of the Standing Committee of the Eighth National People's Congress on May 9, 1997 and promulgated by Order No. 85 of the President of the People's Republic of China on May 9, 1997.

¹⁴² See more discussions at Supreme People's Procuratorate's Research Committee (2007), *Xinxing Shouhui Fanzui de Rending yu Chufa (Determination and Punishment of New Types of Bribery Crime)*, Beijing: Law Press.

criminals.

Throughout China's dynasties, emperors who took away a criminal's illegal possession in many dynasties in China, attached great importance to their economic base, as the nature of law at that time was to repress people, and the best way to repress people was to weaken their economic status.¹⁴³ The nature of law, subsequently, under the feudal society maintained autocratic governance. For serious criminals, taking away the proceeds of their crimes was a necessary method to diminish their potential threat to the stability of public order.¹⁴⁴

From the 1970s to the 1990s, China has enacted many provisions on taking the profit out of corruption crime, covering areas of criminal law, criminal procedure law, legal explanations, administrative law and business law, which indicated the government's determination in erasing corruption in all sectors in the country. The first Criminal Law promulgated in 1979 contained 23 articles in relation to confiscation, and it sanctioned confiscation for the crimes of smuggling, market manipulation, speculation, and counterfeit currency. Ever since then, the confiscation of property was formally established as a supplementary punishment in Criminal Law, and was widely used in property related crimes such as economic crime, drug trafficking and in particular corruption. The Standing Committee of the NPC on 8 March 1982 promulgated the 'Decision on Severely Punishing Crimes on Sabotaging the Economy' and on 21 January 1988, 'Supplementary Provision on Punishing Embezzlement and Bribery Crimes' was passed. These two documents, as previously discussed, were the two major documents in the 1980s concerning the punishment of corruption and bribery.

The Criminal Procedure Law of the PRC was revised in 1996, in which it provides

¹⁴³ See more detailed discussion at Feng Ye (2007), *Combating Corruption: A Chinese Perspective*, PhD thesis, University of London, pp. 137-142.

¹⁴⁴ Ibid.

detailed procedure in taking the profit out of crime, including corruption.¹⁴⁵ It empowers the people's courts and people's procuratorates to be leading institutions of enforcement.¹⁴⁶ In 1997, the NPC revised the 1979 version of Criminal Law, where a special chapter on Confiscation of Property was added, containing 59 articles.¹⁴⁷ Furthermore, in March 1999, the Supreme People's Court and Supreme People's Procuratorate issued associated regulations, providing that the courts and prosecution departments should give priority to grave cases of bribery and especially those involving large sums of money from bribes taken by party officials and judiciary members. China has indeed made tremendous efforts in implementing state laws and regulations in taking away the proceeds of crime. Nevertheless, as we can see in today's borderless world, corrupt officials become experts in moving their ill-gotten gains beyond the reach of domestic courts and hiding their bribes in foreign bank accounts. Indeed, the call for international cooperation is, and will continue to be, essential.

Related international conventions

The international community has also realised the danger of corruption and attached great importance in combating it, having witnessed its rapid development across the borders. Indeed, the subject of taking away the profit of corruption related crime is nothing new. It has in fact appeared in many international contentions tracing back to the 1990s. For example, in 1996, the Inter-American Convention against Corruption was promulgated, and its Article 15 stipulates "in accordance with their applicable domestic laws and relevant treaties or other agreements, that may be in force between or among them, the States Parties shall provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offences established in accordance with this Convention."¹⁴⁸ On January 27, 1999, the Criminal

¹⁴⁵ See Criminal Procedure Law of the PRC, Article 173, 280, 281.

¹⁴⁶ Article 262, Criminal Procedure Law of the PRC.

¹⁴⁷ See Section 8 Confiscation of Property, Chapter III Punishment, Criminal Law of the PRC.

¹⁴⁸ Article 15, Inter-American Convention against Corruption, adopted at the third plenary session, held

Law Convention on Corruption was adopted by the Council of Europe, of which Article 23 provides detailed measures to facilitate the gathering of evidence and the confiscation of proceeds.¹⁴⁹ In Africa, the African Union Convention on Prevention and Combating Corruption was passed in 1999, where Article 8 provides that state parties should adopt necessary measures to establish, under the law, an offence of illicit enrichment, and adopt necessary measures to take away the profit of corruption. In the United Nations, Article 13 of the United Nations Conventions against Transnational Organised Crime requires international cooperation for the purposes of confiscation, and Article 14 provides clauses regarding disposal of confiscated proceeds or property.¹⁵⁰ The final, but certainly not the least important policy, the United Nations Convention Against Corruption (UNCAC), has been acting as the most influential legal and international convention and it is the first global legally binding anti-corruption instrument.¹⁵¹ The convention was signed by 140 countries and entered into effect in 2005. It provides measures for direct civil recovery and mechanisms for recovery of proceeds through international cooperation. It is indeed a milestone for the international community in issues of tracing the proceeds of economic crime.¹⁵²

China has not been slow in realising this and entered and ratified the UNCAC at the earliest stage. It is true that taking away the profit of corruption crime is not only a requirement of domestic criminal law, but also a matter of international commitment. The Chinese government assigned the Supreme People's Procuratorate as the central authority that is responsible for dealing with requests regarding mutual legal assistance

on March 29, 1996.

¹⁴⁹ Criminal Law Convention on Corruption, Strasbourg 27.01.1999 – treaty open for signature by the member states and the non-member states which have participated in its elaboration and for accession by other non-member states and by the European Union, entry into force on 01.07.2002.

¹⁵⁰ United Nations Convention against Transnational Organised Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organised crime.

¹⁵¹ UNODC's Action against Corruption and Economic Crime, available at: <http://www.unodc.org/unodc/en/corruption/index.html>.

¹⁵² See Frank Vogl (2004), 'The UN Convention against Corruption: A Milestone on the Road to Curbing Global Bribery', *UN Chronicle*, September-November 2004.

including taking away, recovering and returning profit from transnational crime.¹⁵³

The future

Protection of the victim of economic crime has never been an easy task. The more diversified forms of bribe have increased in monetary value and has made investigation more challenging. Research and reports have also indicated the increasingly common phenomenon of group corruption, which is a corruption scandal involving many more officials and the corruption syndicate extends horizontally to different departments at the same level. This will be further examined in the next chapter. Indeed, this has in various ways made investigation and prosecution more difficult.

Lawyers, in many countries, certainly excluding China, are playing an important role in protecting victims of economic crime. However, the primary duty of lawyers in China is still a duty to the state. The ‘Provisional Regulations for lawyers of the People’s Republic of China’¹⁵⁴, which became effective on January 1, 1982, provided that lawyers were legal workers of the country, whose primary responsibility was to protect the correct implementation of state law; whereas the protection of the interests of individual clients was secondary. Over the years even though we have seen an evolution of Chinese lawyers in the areas of, for example, intellectual property and commercial disputes, the situation has not changed much in cases involving the party in power. Indeed, the status of lawyers should be further promoted and of course, the lawyers themselves should put themselves forward in ensuring involvement in major cases concerning the masses’ interests.

¹⁵³ See more at Nihal Sri Ameresekere (2011), *UN Convention against Corruption to Combat Fraud & Corruption: A Cancerous Menace with Mere Rhetoric Subverts UN Convention*, Milton Keynes: AuthorHouse, pp. 68-69; see also the then Chief Procurator Jia Chunwang’s speech at annual meeting of International Association of Anti-Corruption Authorities (IAACA) in 2007, available at: <http://www.spp.gov.cn/site2006/2007-11-22/0002116179.html>.

¹⁵⁴ Adopted by the 15th Session of the Standing Committee of the 5th National People’s Congress on August 26, 1980.

The internationalisation of wealth and the more sophisticated financial derivatives have also complicated the situation. However, China is not slow in realising that it cannot deal with all these issues in isolation. The country has in various situations expressed its willingness on international cooperation and put itself forward in signing up to the UNCAC. The former President, Hu Jintao, even gave his personal support to the establishment of the International Association of Anti-Corruption Agencies. In the next chapter, the author will attempt to provide a detailed examination and analysis specifically on international cooperation against transnational economic crime.

Chapter 6: The Enforcement of Economic Crime in China **with particular reference to International Co-operation**

Introduction

Despite differing cultural backgrounds and economic conditions, economic crime exists, to varying degrees and with diverse characteristics, in every country, whether developing or developed. Along with the dramatic development of the world economy and the increase in international communications, domestic economic crime has, and certainly will continue, to be transnational. Many criminals now flee abroad, and wrongdoers try every means possible to transfer and 'launder' their illicit gains outside their home country. Misappropriation of state property, a particularly common crime in China, with this international trend, has resulted in making China's enforcement body more vulnerable.¹

Given the principle of mutual respect for sovereignty, judicial jurisdiction and mutual non-interference in other countries' internal affairs, transnational economic crime can hardly be controlled effectively without judicial cooperation. A nation's law and judicial system can only be effective within its own territory. As a result, when a state encounters economic crime that is related to other countries, it can only guarantee effective punishment for internal economic crime with judicial assistance and mutual cooperation from other relevant nations. Essentially, it is necessary not only to maintain state sovereignty and judicial power, but also to cope with economic crime and keep channels open for international communication.²

¹ See Lei Chen (2012), *Fanfubai Guoji Hezuo Lilun yu Shiwu (Research on Theory and Practice of Anti-Corruption of International Cooperation)*, Beijing: China Procuratorate Press; see also Xiang Li (2011), *Fanfubai Guoji Xingshi Hezuo Jizhi Yanjiu (Research on Anti-Corruption Mechanisms of International Cooperation)*, Beijing: Beijing University Press; see also Wujun Liu (2005), 'Waitao tanguan yindu kunnan chongchong' (The difficulties in extraditing fled corrupt officials), *Zhongguo Guoqing Guoli (China National Conditions and Strength)*, published by National Bureau of Statistics, 2005, No. 9, pp. 60-61.

² See more at Harry Leroy Jones (1952), 'International judicial assistance: procedural chaos and a

The then executive director of the Anti-Corruption and Bribery Bureau of the Supreme People's Procuratorate once voiced that internal economic crime has always been commonplace in all countries; it prevents social stability and economic development and it impairs the normal operation of social and political systems and the implementation of the law. It is essential to strengthen international cooperation and mutual judicial assistance across the world in order to combat such crime.³ He further pointed out that great importance has been attached to international judicial cooperation by the Chinese government since the 1980s, and China has already and is willing to sign up to further treaties with nations across the globe.⁴ Nonetheless, despite encouraging mutual and international assistance on combating economic crime, the issues arising in enforcing the law and regulation can be more important, even within its domestic territory.

The enforcement issues

The law and its administration

Even though rules have a general influence in that they set out standards and define barriers between what is acceptable and what is not, in the real world, if they are not capable of enforcement, or in other words, not enforced, they will have far less impact. Their status and legality may be brought into question. Philosophers distinguish between different types and layers of rules and regulations, ranging from social customs to 'hard' law. Yet, not all these have determinant and predictable sanctions. The breach of customs may bring social criticism and disapproval, yet this often is undefined and unpredictable – at least in its consequences.

program for reform', *Yale Law Journal*, Vol. 62, No. 4, pp. 515-562; and also Jenny S. Martinez (2003), 'Towards an international judicial system', *Stanford Law Review*, Vol. 56, No. 2, pp. 429-529.

³ Yuzhong Dai (2000), 'China: responsibilities of the procuratorate and the necessity for cooperation in combating economic crime', *Journal of Financial Crime*, Vol. 7, Iss. 4, pp. 348-350.

⁴ *Ibid.*

It has been brought up by jurists that the test of a rule of law is whether there is an identified and predictable sanction upon the breach.⁵ In the context of economic and financial crime, such a problem should not be distinct, as almost all defined economic offences carry a specific penalty. Nonetheless, there has been a tendency to ‘decriminalise’ certain offences that are merely technical and mainly of regulatory concern. For example, the laws relating to the preparation and filing of financial statements have, in many jurisdictions, been rather emasculated.⁶

There are also many other factors subject to debate. For example, it has been argued that the approach of the previously named Financial Services Authority, today’s Financial Conduct Authority in the United Kingdom, to regulate through principles instead of carefully drafted rules, has made the boundaries ambiguous between what is, and what is not the law. This is exacerbated by the consequences of sanctions after the violation, including, in extreme cases, criminal penalties. Lawyers have argued that this is not in line with the rule of law and notions of natural justice, and conduct which may be sanctioned by the courts, with penalties and stigma, should be clearly articulated and defined – otherwise uncertainties can often lead to injustice.⁷

Indeed, in addition to these theoretical difficulties that contribute immense uncertainties into the regulatory system, the real and practical problems can be significant.

⁵ Henry Melvin Hart, Albert Martin Sacks, William N. Eskridge and Philip P. Frickey (1994), *The Legal Process: Basic Problems in the Marketing and Application of Law*, Westbury, New York: Foundation Press; see also Maimon Schwarzschild (2007), ‘Keeping it private’, *San Diego Law Review*, No. 44, P. 686.

⁶ See more discussions at Barry A. K. Rider, Haiting Yan and Lihong Xing (2010), *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, pp. 108-112; and also Rob McQueen (2001), ‘The corporate image – the regulation of annual reports in Australia’, *Macquarie Law Journal*, Vol. 1, No. 1, pp. 93-128.

⁷ Andromachi Georgosouli (2007), ‘The nature of the FSA policy of rule use: a critical overview’, *Legal Studies*, Vol. 28, No. 1, pp. 119-139.

Crimes of the powerful

In considering certain criminal activities and crimes committed by the ‘powerful’, it is important to recognise practical realities. As analysed previously, complex crime, such as economic crime, by its very nature, is often committed by persons who are in positions of influence and who may already have disproportionate authority due to their scant regard for the law and fair governance. Indeed, blue-collar workers may engage in burglary of stock and equipment, but it would be the clerks who would engage in fraud. It is true that complex and sophisticated criminal activities require safeguarding from those holding powerful positions – they will do whatever is necessary to protect their interests as well as their associates. This inevitably creates obstacles in successfully arresting and prosecuting them – much to the regret of the law.

Criminologists and legal commentators often described economic crime as ‘elite crime’.⁸ In the real world, to be able to perpetrate such offences it is necessary for the perpetrators to be in a position to dispose of assets, or at least have a certain degree of influence.⁹ For example, undeniably, there would be little point in bribing someone who did not have influence over the matter in which the briber hoped to secure some advantage or privilege. Taking the simplest example of police fraud in a domestic context, it can become quite complex where influential individuals within the state are involved who can protect themselves, perhaps by means of corruption. What follows are issues of securing evidence, particularly documentary and computer records, which is under the control of those criminals; this can be of great significance in rendering them within the realms of prosecution. Consequently, as we have seen, the majority of economic crimes are pertinent to those who are holding an influential position, whether

⁸ See more discussions at Lawrence M. Salinger (2004), *Encyclopedia of White-Collar & Corporate Crime*, Vol. 1, 1st Edition, SAGE Publishing; and also Barry A. K. Rider, Haiting Yan and Lihong Xing (2010), *Guoji Jinrong Fanzui Yufang yu Kongzhi (The Prevention and Control of International Financial Crime)*, Beijing: China Financial Publishing House, pp. 28-30.

⁹ See more at Leonid Fituni and Irina Abramova (2015), ‘Crimes of the powerful and legitimisation’, in *Research Handbook on International Financial Crime*, edited by Barry Rider, Cheltenham, UK and Northampton, USA: Edward Elgar Publishing Limited, pp. 51-53.

in the public or private sector.

Elite and collective criminals

It is clear that there are many global examples of elite prosecutorial and investigative agencies, established specifically to spear-head the fight against corruption and economic crime, themselves becoming tainted by the evils they are dealing with. We need only consider the famous scandal of the Commercial Crime Unit in Hong Kong and its corrupt director, Warwick Reid. As Lord Templeman, then a distinguished judge in the Privy Council noted: “bribery is an evil practice which threatens the foundations of any civilised society. Bribery of policemen and prosecutors brings the administration of justice into disrepute ... in this case the amount of harm caused to the administration of justice in Hong Kong ... cannot be quantified”.¹⁰ Sadly there are plenty more examples.

For China, it would be disastrous if judges and prosecutors colluded with leading officials in various governmental departments. Latterly, research and reports in China have shown a tendency towards collective corruption; scandals that involve a relatively large number of public officials holding positions in various disciplines.¹¹ As previously discussed, smuggling scandals in Xiamen city and Jiangmen city involved hundreds of middle-ranking and senior government officials¹² – corruption scandals in Shenyang city implicated almost the entire top echelon of the political and governmental departments.

China’s judicial department has been an arena that breeds corruption. Recently, a series of investigations of judicial corruption in Wuhan city, Hunan province and Guangdong

¹⁰ Attorney General for Hong Kong v. Reid [1994] 1 All ER 1.

¹¹ Ting Gong (2002), ‘Dangerous collusion: corruption as a collective venture in contemporary China’, *Communist and Pot-Communist Studies*, Vol. 35, No. 1, pp. 85-103.

¹² See more details at, for example, Shawn Shieh (2005), ‘The rise of collective corruption in China: the Xiamen smuggling case’, *Journal of Contemporary China*, Vol. 14, No. 42, p. 67.

province demonstrated that judicial corruption often involved dozens of judges in the same court.¹³ A more recent investigation in the city of Maoming in Guangdong province, led to the collapse of the city's party secretary, the Secretary of the Politics and Law Committee, involving two deputy mayors, and numerous officials in the city's political and legal establishment.¹⁴

As has been acknowledged, being a country that runs a single-party political system, the most radical change in the past decades in China is the appearance of 'money for power trade'.¹⁵ At the time when corruption became a collective force, there is a visible upward spiral illustrating that senior CCP officials became increasingly involved.¹⁶ In particular, in recent years, hundreds of senior officials at or above provincial and ministerial level, have been placed under investigation for abuse of their powers since 2013, after the newly elected President Xi Jinping initiated the anti-corruption campaign. This wave has implicated offenders at an unprecedented level. The former member of the top decision-making body, the Politburo Standing Committee – Zhou Yongkang, who once headed the party's Central Commission for Discipline Inspection and China's Ministry of Public Security, was found guilty of corruption and sentenced to life imprisonment.¹⁷ Zhou was the first Politburo Standing Committee member and the most senior-ranked official since the founding of the People's Republic of China, to

¹³ See more at: Ping Li (2000), 'Corruption in China's Courts', in *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, edited by Randall Peerenboom, New York: Cambridge University Press, pp. 196-220; also Ping Li (2011), 'The production' of corruption in China's courts – the politics of judicial decision-making and its consequences in a one-party state', *Journal of Law & Social Inquiry*, Vol. 37, No. 4, pp. 848-877.

¹⁴ See more at Zhong Wen (2011), "'Four Representatives" in Corruption in Maoming', *Hong Kong Economic Newspaper (Xin Bao)*, 5 March.

¹⁵ Hualing Fu (2013), The upward and downward spirals in China's anti-corruption enforcement, in *Comparative Perspectives on Criminal Justice in China*, edited by Mike McConville and Eva Pils, Cheltenham: Edward Elgar Publishing Limited, p. 401.

¹⁶ Ibid, pp. 400-404; see also Melanie Manion (2004), *Corruption by Design: Building Clean Government in Mainland China and Hong Kong*, Cambridge: Harvard University Press, p. 85.

¹⁷ Damien Grammaticus (2014), 'Zhou Yongkang: China investigates ex-security chief', *BBC News*, 29.07.2014, available at: <http://www.bbc.co.uk/news/world-asia-28544428>; and James T. Areddy (2015), China's former security chief sentenced to life in prison, *The Wall Street Journal*, available at: <https://www.wsj.com/articles/chinas-former-security-chief-zhou-yongkang-sentenced-to-life-in-prison-1434018450>.

be tried and convicted of corruption and its related crimes.¹⁸

Even though there have been constant corruption convictions concerning high-profile officials, compared to the size of the CCP members implicated, it is far from adequate. As noted, the unique political structure of the CCP allows the CDI a degree of independence since, as with the CCP Committee, its members are elected through Party Congress. Thus, it has a higher status than other working departments under the CCP. However, the CCP Constitution makes it clear that the CDI works under a duo leadership, the CCP Committee at the same level and the CDI at a superior level. In recent years, efforts have been made to strengthen the vertical leadership within the disciplinary inspection system, in order to ensure that local CDIs have a certain degree of independence from respective local CCP Committees.¹⁹ However, evidence shows that control by the CCP Committee at local level is far superior to that from their higher-level disciplinary departments.²⁰ In various ways, this introduces tremendous difficulties in the process of investigating and prosecuting criminals associated with the party committee, together with the influence of the high-ranking party officials at local committee on so-called independent but in reality, not so independent people's procuratorates and people's courts.

Under the direct leadership of the local party committee, the effectiveness of a local CDI depends largely upon the support of the local CCP chief. For example, if political power corrupts at the core, the CDI would be ineffective, and it could even degenerate into a corrupt institution that eventually supports the corrupt political authority. There are many examples where whistle blowers are themselves placed under *shuanggui* or

¹⁸ Cary Huang (2014), 'Xi Jinping boosts clout with Zhou Yongkang takedown, but what next?', *South China Morning Post*, July 29, 2014, available at: <http://www.scmp.com/news/china/article/1561990/xi-jinping-boosts-clout-zhou-yongkang-takedown-what-next>.

¹⁹ Ting Gong (2008), 'The party discipline inspection in China: its evolving trajectory and embedded dilemmas', *Crime Law and Social Change*, Vol. 49, No. 139, p. 145.

²⁰ See more at Changfa Cui and Yongyuan Zhai (2010), *Fanfu Changlian Jianshe Xuexi Duben (Textbook on the Fight against Corruption)*, Beijing: State Institute of Administration, pp. 102-103.

subjected to other types of punishment, where the CDI plays the role of conspirator.²¹

On the other hand, given the new tendency towards the syndicated nature of scandals, a detailed investigation into a high-profile case in China is costly and can only be possible if it is centrally coordinated. Statistics have shown that 49 investigators are required to investigate a ministerial level official and it may take more than 1,000 investigators in large-scale cases, for example, the smuggling cases in Zhanjiang and Xiamen.²² This is another factor that can potentially make the investigation and prosecution of such collective corruption cases more difficult.

The perpetration of such ‘elite criminals’ is particularly damaging to governments in terms of respect and confidence, which skews and therefore brings their suitability to remain in such influential positions into issue. The state that allowed such individuals to assume positions, which they now abuse for their own personal gain, appears, if not corrupt, to be at least unfair and inefficient. In societies where there is a clear line between people who have the authority, whether this is due to of class, ethnicity, tribal or family connections, the perception that those in a privileged position are unfairly benefiting from their positions, promotes even greater social and cultural pressures and unrest. Perhaps much more common in newer economies, where there has not been a long tradition or process for the determination of those who hold power in government and business, there is an inevitable tendency that those in power will employ their kin and close associates into positions of authority, the former thereby acting as their protective umbrella. This has widely seen as a human response to uncertainty, and such a phenomenon has unfortunately not been confined to the developing world, as has been seen in recent allegations of nepotism in the Blair Government (UK) and the Bush

²¹ Kean Wang (2004), My Opinion on “Where is the Committee of Disciplinary Inspection”, *People’s Daily*, 9 July.

²² Hualing Fu (2013), The upward and downward spirals in China’s anti-corruption enforcement, in *Comparative Perspectives on Criminal Justice in China*, edited by Mike McConville and Eva Pils, Cheltenham: Edward Elgar Publishing Limited, p. 404.

family (US).²³ Most importantly, however, when these issues were tainted and fuelled by allegations of self-dealing and corruption, it created wider political and social unrest. Many recent successful and failed revolutions and rebellions in developing and former Soviet dominated countries have been ‘justified’ by allegations of corruption and similar economic crimes.

The perceived level of such crime is of real interest to those who are concerned with the nation’s stability and security. Allegations of corrupt officials on the part of a country’s government may well justify domestic and international investigation, with the development of civil society and organisations such as the Transparency International and Amnesty International. Condemnation can be far more effective and internationally expressed. Moreover, inter-governmental organisations have also recognised the importance of upholding integrity. This chapter will examine the various initiatives of such bodies, such as the Organisation for Economic Co-operation and Development (OECD) and the World Bank and International Monetary Fund. It should also be noted that the United Nations Convention against Corruption places considerable emphasis on facilitating those who wish to combat corruption and economic crime. If those in positions of authority in other jurisdictions are under investigation, this support will enhance effective enforcement.²⁴

International initiatives

It has been emphasised in this study that in our modern inter-dependent world, effective and efficient international cooperation is paramount, not only in the sense of enforcing criminal law, but also in facilitating the role of regulatory agencies. Tremendous efforts

²³ See more at Richard Reeves (2003), ‘Nepotism: is it back?’, *New Statesman*, 29 September 2003, available at: <http://www.newstatesman.com/node/158389>.

²⁴ See more discussions at C. Fijnaut (2000), ‘Transnational crime and the role of the United Nations in its containment through international cooperation: a challenge for the 21st century’, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 8, Iss. 2, pp. 119-127; and Jean-Germain Gros (2003), ‘Trouble in paradise: crime and collapsed states in the age of globalization’, *The British Journal of Criminology*, Vol. 43, Iss. 1, pp. 63-80.

have been taken in recent years, across a broad range of issues, to promote international cooperation. States are traditionally determined to maintain their own sovereignty and thus protective of their territorial integrity. History, however, records many successful examples of independent state collaboration in fighting economic crime.²⁵

Obligations on countries to take affirmative action to provide legal assistance to another state are invariably pursuant to the agreement to do so, through a treaty or convention. It is always open to a state to offer unilateral assistance to another, in the exercise of its own sovereignty and within the scope of its laws, regardless of reciprocity. However, this is not always an efficient or predictable approach since, for example, the surrender of fugitives through rendition or extradition will be pursuant to bilateral rendition or extradition treaty.²⁶ By the same token, many other forms of mutual legal assistance such as search, freezing and seizure of evidence, the execution of requests and orders and the recognition of judgments will be based on the obligations imposed by an agreed treaty that has been duly implemented by domestic law.²⁷

In the past thirty years it has become policy for many countries to seek to engage in full mutual legal assistance treaties on a bilateral basis. Similar to cooperation between the commonwealth countries, there has been a long tradition of ‘schemes’ that have been agreed upon, by consensus, between commonwealth governments who attempt to provide various degrees of standardisation in terms of legal cooperation across a broad

²⁵ See for example, Sundaresh Menon and Teo Guan Siew (2012), ‘Key challenges in tackling economic and cyber crimes: creating a multilateral platform for international co-operation’, *Journal of Money Laundering Control*, Vol. 15 Iss. 3, pp. 243-256; see also at Mario Serio (1998), ‘Italy: economic crime and international cooperation’, *Journal of Financial Crime*, Vol. 6 Iss. 2, pp. 189-190.

²⁶ David A. Sadoff (2016), *Bring International Fugitives to Justice: Extradition and its Alternatives*, Cambridge: Cambridge University Press, pp. 42-43.

²⁷ See an example of UK law: United Kingdom – National Procedures for Mutual Legal Assistance on Laundering, Search, Seizure and Confiscation of Proceeds of Crime, ETS No. 141, updated 01.11.2016, available at: <https://rm.coe.int/16806b5f24>; see also Extradition Law of the People’s Republic of China, Order of the President of the People’s Republic of China No. 42, adopted at the 19th meeting of the Standing Committee of the Ninth National People’s Congress on December 28, 2000, by President Jiang Zemin.

range areas, from the exchange of information to the extradition of convicted criminals.²⁸ These Mutual Legal Assistance Treaties (MLATs) generally provide legal cooperation across a broad spectrum of issues. Although such instruments, once implemented into domestic law, play a vital role in fighting transnational crime and in particular, many aspects of economic crime, the resources required to negotiate, enforce and administer such complex and comprehensive arrangements are substantial. Even the US State and Justice Departments are strictly limited in the number of such treaties they can be involved in at any point in time.²⁹ Smaller and less well-resourced jurisdictions have more limitations.³⁰ The burden placed upon small states in developing a workable web of such treaties and then administering them, is considerable and in many circumstances seen to be impractical.

Moreover, apart from bilateral or multilateral treaties between sovereign states, there are also international instruments and agreements, which may or may not impose obligations recognised in international law. These agreements are often referred to as Memoranda of Understanding (MoU) and have become increasingly common in recent years.³¹ They are mainly concerned with the exchange of information and intelligence and intentions to provide optimum cooperation and assistance. It is not unusual to find in specific domestic laws, that certain acts and interventions are lawful if carried out

²⁸ See details at for example, Mutual Assistance in Criminal Matters within the Commonwealth (Enactment and Enforcement) Act, an Act to make legislative provision to give force of law to the scheme for Mutual Assistance in Criminal Matters within the Commonwealth, 1998 No. 13.

²⁹ See Alan Ellis and Robert L. Pisani (1985), 'The United States treaties on mutual assistance in criminal matters: a comparative analysis', *The International Lawyer*, Vol. 19, No. 1, pp. 189-223; see also Julian M. Joshua, Peter D. Camesasca and Youngjin Jung (2008), 'Extradition and mutual legal assistance treaties: cartel enforcement's global reach', *Antitrust Law Journal*, Vol. 75, No. 2, pp. 353-397.

³⁰ See for example Ethan A. Nadelmann (1985), 'Negotiations in criminal law assistance treaties', *The American Journal of Comparative Law*, Vol. 33, No. 3, pp. 467-504.

³¹ MoUs in international relations fall under the broad category of treaties and should be registered in the United Nations treaty collection, see United Nations Treaty Collection, at: <https://treaties.un.org/>. See also some insight into the determination of the legal status of a document provided by the International Court of Justice in the landmark case of *Qatar v. Bahrain*, 1 July 1994, see Maritime Delimitation and Territorial Questions between Qatar and Bahrain, International Court of Justice, at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&PHPSESSID=66a15edfa6bb89698b26627e76c1d56b&case=87&code=qb&p3=4/>.

according to such an agreement. Accordingly, many financial regulators have agreements with one another to foster cooperation in the handling of their own supervisory and regulatory obligations and under their own laws.³² It is also not unusual to find such agreements within jurisdictions between financial regulators and the police or the intelligence community.³³ Indeed, these provide a certain degree of consistency, continuity and regularity in providing assistance and exercising discretion in both domestic and international contexts. However, it is also important to note that such agreements can only amount to contracts that regulate the relationships of these two agencies – with the absence of special legal provisions in statute or other relevant laws, they cannot, as a matter of law, influence directly on the rights of the third party.³⁴

There are many advantages to the development of multilateral and bilateral agreements in promoting cooperation in legal and regulatory matters. However, there are also areas of concern. For example, the process of negotiation and implementation between countries can be time consuming and resource intensive.³⁵ Further, it may be difficult for a government to guarantee effective implementation, or find resources and expertise to adequately administer the provisions and respond to requests effectively.³⁶ It is also

³² See for example, Memorandum of Understanding Concerning Cooperation and the Exchange of Information in the Context of Supervising Covered Firms, between United States Commodity Futures Trading Commission and United Kingdom Financial Conduct Authority, October 6, 2016, available at: <https://www.fca.org.uk/publication/mou/fca-cftc-mou-covered-firms.pdf>; and many other international MoUs, see full list at: <http://www.bankofengland.co.uk/about/Pages/mous/default.aspx>.

³³ See for example, Memorandum of Understanding between the Financial Conduct Authority and the Prudential Regulation Authority, at: <http://www.bankofengland.co.uk/about/Documents/mous/prastatutory/moufcapra.pdf>; and MoU between National Audit Office and the Bank of England, at: <http://www.bankofengland.co.uk/about/Documents/mous/statutory/mouforboeandnao.pdf>; see full domestic MoU list at: <http://www.bankofengland.co.uk/about/Pages/mous/default.aspx>.

³⁴ See more discussions on International Monetary Fund Working Paper, Marco Arnone and George Iden (2003), *Primary Dealers in Government Securities: Policy Issues and Selected Countries' Experience*, Monetary and Exchange Affairs Department.

³⁵ See for example, 'Treaty Making Process', Australian Government Department of Foreign Affairs and Trade, available at: <http://dfat.gov.au/international-relations/treaties/treaty-making-process/pages/treaty-making-process.aspx>; and also 'Treaties', *Factsheet P14 Procedure Series*, revised August 2010, House of Commons Information Office, available at: <https://www.parliament.uk/documents/commons-information-office/p14.pdf>.

³⁶ See more discussions at *International Criminal Law*, Third Edition, Volume II: Multilateral and Bilateral Enforcement Mechanisms, edited by M. Cherif Bassiouni (2008), Leiden: Martinus Nijhoff

worth noting that international agreements have the effect of formalising cooperation, while future cooperation depends upon whether the relevant agencies are competent in securing cooperation and assistance within their own jurisdiction. This is far from the case in almost every country. As a result, MLATs and MoUs are indeed no panacea and must be placed carefully in context. As discussed, there are more dramatic and substantial measures being taken within the European Union, in the creation of a single criminal jurisdiction and the facilitation of cooperation on judicial and prosecutorial matters.

The development – A periodical review

As China has opened its economy and become more engaged with the global economy, the country and the government have been enforced to be more responsive to the concerns of the international community. The criticism that China is inundated with economic crime, corruption in particular, along with concerns about China's human rights issues, has spurred the ruling party and the government to take action and become a major player in the world stage in the fight against fraud and corruption. This is to be seen in the context of China's wish to be truly competent and competitive in world trade.

In the 1970s

Meaningful international initiatives against corruption can be traced back to the mid-1970s, where the United Nations (UN) became the first international organisation working on the development on such matters. The UN raised its concern about the problem of corruption as far back as 1975, when the matter was discussed at the quinquennial UN Congress on the 'Prevention of Crime and the Treatment of Offenders'.³⁷ The fifth congress, held in Geneva in 1975, focused specifically on the crimes of business, with particular attention on organised crime, white collar crime and

Publishers.

³⁷ Guido Bertucci (1998), International Conventions: Status Action Panel Presentation on the United Nations, 2nd April 1998.

corruption. Its working paper ‘The Changes in Forms and Dimensions of Criminality – Transnational and National’,³⁸ observed the increasing threat posed to countries by economic crime and corruption. The report also noted that, for most countries, the economic and social consequences of economic criminality are much greater than that of the traditional forms of crime, such as violence and crime against property.³⁹ In the congress, the UN provided another working paper ‘The Emerging Roles of the Police and Other Law Enforcement Agencies, with Special Reference to Changing Expectations and Minimum Standards of Performance’. This was in response to the huge problem of corruption occurring in high-level places, and when those who are expected to maintain social order are asked to maintain different standards by their superiors.⁴⁰ Moreover, the UN General Assembly, in Resolution 3453 at the 23rd plenary meeting on 9th December 1975, requested the committee on Crime Prevention and Control to formulate a draft code of conduct for law enforcement officials, which was subsequently submitted to the General Assembly.⁴¹

Following this, the UN General Assembly adopted Resolution 3514 on ‘Measures against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved’. The plenary meeting, held on 15 December 1975, condemned all corrupt practices including bribery, by transnational corporations, their intermediaries and other persons involved in violation of laws and regulations in host

³⁸ Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, ‘Changes in Form and Dimensions of Criminality – Transnational and National’, *Working Paper*, prepared by the Secretariat, A/CONF.56/3, available at: https://www.unodc.org/documents/congress/Previous_Congresses/5th_Congress_1975/013_ACONF.56.3_Changes_in_Forms_and_Dimensions_of_Criminality.pdf.

³⁹ *Ibid.*

⁴⁰ Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, ‘The Emerging Role of the Police and Other Law Enforcement Agencies, with Special Reference to Changing Expectations and Minimum Standards of Performance’, *Working Paper*, Prepared by the Secretariat, A/CONF.56/5, available at: https://www.unodc.org/documents/congress/Previous_Congresses/5th_Congress_1975/015_ACONF.56.5_The_Emerging_Roles_of_the_Police_and_Other_Law_Enforcement_Agencies.pdf.

⁴¹ United Nations (1975), *Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment in Relation to Detention and Imprisonment*, United Nations General Assembly, Resolution 3455 (XXX), NR000166, 1975; the draft code was to be based on the proposal presented to, and the conclusions reached by, the Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders.

countries.⁴² It further reaffirmed the right of any state to adopt legislation and to investigate and take appropriate legal action complying with its national laws and regulations in combating such corrupt practices, and called on all governments to cooperate with each other in the fight against corruption and bribery.⁴³

Between 21st June and 2nd July 1976 in New York, the fourth session of the Committee on Crime Prevention and Control of the Economic and Social Council produced, based on the proposals presented to and conclusions reached by the Fifth Congress, a draft code of conduct for submission to the UN General Assembly. In 1977, the General Assembly set up a working group of the Third Committee to reach a consensus. In finalising the code, great attention was given to the issues of police professionalism and accountability, referring to: “Corruption being intolerable in all phases of life, particularly in the public service agencies. Governments cannot expect to enforce the law among their citizens if they cannot, or will not, enforce the law against their own agents and agencies; it is incumbent upon law enforcement officials to rigorously oppose and pursue all acts of corruption coming to their attention”. Two years later, in 1979, the UN General Assembly adopted the Code of Conduct for Law Enforcement Officials at the 106th plenary meeting on 17 December, which was sent to governments with the recommendation that favourable consideration should be given to its use within the framework of national legislation or practice, as a body of principles for observance by law enforcement officials.⁴⁴

The fight against economic crime and corruption also attracted the attention of international non-governmental organisations. The first of this kind was the

⁴² United Nations (1975), Measures against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved, United Nations General Assembly, Resolution 3514 (XXX), NR000227, 1975.

⁴³ Ibid.

⁴⁴ Code of Conduct for Law Enforcement Officials, United Nations General Assembly, adopted by General Assembly resolution 34/169 of 17 December 1979.

International Chamber of Commerce (ICC). In 1975, the ICC set up a ‘blue-ribbon’ committee, chaired by Lord Shawcross, the former Attorney General of England and Wales. The committee issued a ground-breaking report two years later, calling for complimentary action against corruption by international organisations, national governments, and the business community. It also called for the UN to adopt a special convention in prohibiting extortion and bribery.⁴⁵ Further, it promulgated the revolutionary ICC Rules of Conduct on Extortion and Bribery in International Business Transactions. The rules specifically state “what companies must do to combat corruption” and have since then served as a model for numerous corporate compliance polices. The ICC rules also reflected the fundamental premise that “governments alone cannot overcome corruption: the business community must get its own house in order”.⁴⁶

Such efforts made by the ICC were particularly welcomed by the Commonwealth Secretariat, who soon launched its own initiative against economic crime in 1980 after a meeting of Law Ministers from over fifty-three commonwealth countries in Barbados.⁴⁷ This subsequently led to the establishment of the Commonwealth Commercial Crime Unit under Barry Rider. This was the first international agency responsible for not only providing assistance and promoting international cooperation, but also developing intelligence and conducting transnational investigations.

Nonetheless, the first independent country, as opposed to the international organisation, that initiated international cooperation and the fight against corruption at an

⁴⁵ ‘Business backs UN’s Anti-Corruption Day’, International Chamber of Commerce, online news on 09/12/2003, available at: <https://iccwbo.org/media-wall/news-speeches/business-backs-uns-anti-corruption-day/>.

⁴⁶ Fritz Heimann (2003), Vice Chair of the International Chamber of Commerce Commission on Fighting Corruption, Presented by the ICC at the High-Level Political Conference for the Signature of the United Nations Convention against Corruption, Merida, Mexico, 11 December 2003.

⁴⁷ See details at *1980 Meeting of Commonwealth Law Ministers*, Barbados, 28 April – 2 May 1980: Memoranda, Published by The Commonwealth Secretariat, London: Commonwealth Secretariat Publications.

international level was the United States.⁴⁸ After the Watergate Scandal⁴⁹, the US congress proposed a Bill in 1975, specifically to prohibit the corrupt use of mail and other instrumentalities of interstate commerce by US corporations, whether directly or indirectly, to offer bribes to foreign officials, foreign political parties or candidates from foreign political office.⁵⁰ The Bill was enacted two years later in 1977, and was named the Foreign Corrupt Practices Act. Even though it does not extend to areas relating to ‘grease’ or facilitating payments, it did signal that the United States was prepared to stand-alone and lead the world in making it a crime to bribe foreign officials in their own jurisdictions.⁵¹

In the 1980s

The fight against corruption continued in the 1980s. International activity was relatively slow and cooperation almost failed in recriminations between industrialised and developing countries, where they blamed each other for the spread of corruption and rejection to acknowledge a shared responsibility to combat the problem. Consequently, a mechanism of an international anti-corruption conference was forwarded in 1981, by the Inspector General of the District of Columbia, the Chief Investigator of the New York City Department of Investigation, the Executive Director of the Chicago Office of Municipal Investigation and the Commissioner and other officials of the Hong Kong Independent Commission Against Corruption (ICAC). Their goal was to liaise and facilitate the flow of information between agencies and others concerned with the prevention and investigation of corruption.⁵²

⁴⁸ See Jean-Francois Arvis and Ronald Berenbeim (2002), *Implementing Anti-Corruption Programs in the Private Sector, Lessons from East Asia*, Washington D.C.: World Bank.

⁴⁹ See the full story of Watergate Scandal at ‘Watergate: The Scandal that Brought Down Richard Nixon’, available at <http://watergate.info/>.

⁵⁰ See Legislation history of Foreign Corrupt Practices Act of 1977, 95th Congress, 1st session, Report No. 95-640, September 28, 1977.

⁵¹ See Houston Putnam Lowry and Peter W. Schroth (1999), Survey of 1998 Developments in International Law in Connecticut, 73 Connecticut Bar Journal 399 (1999).

⁵² Joyce Blalock (1981), International Anti-Corruption Conference: Present at the Beginning, included in *The Journal of Public Inquiry*, Fall/Winter 2001.

In total, four such conferences took place over the course of the 1980s. The first, entitled ‘International Conference on Corruption and Economic Crime against Government’, was held between 5th and 14th October 1983 in Washington DC., and was attended by delegates from 21 relevant agencies from across 13 countries.⁵³ Two years later, the second conference, with the same title from 7th to 11th October 1985 in New York, was attended by more than 200 delegates, involving 60 from 32 countries.⁵⁴ Following the success of the first two conferences and increasing awareness of the importance of mutual legal assistance against corruption, the title of the third conference was amended to the ‘International Anti-Corruption Conference’, and was hosted by the Hong Kong Government from 2nd to 6th November in 1987, where there were more than 250 delegates participating, of which 105 were from overseas representing 72 relevant agencies from 32 countries.⁵⁵ The fourth conference was hosted towards the end of the 1980s in November 1989 in Sydney by the Australian government.⁵⁶

At the same time, the United Nations, whilst assisting in the implementation of the previously mentioned ‘Code of Conduct for Law Enforcement Officials’, also devoted substantial time and effort to proposing practical steps so that states could devise and implement strategic plans and reforms. In December 1989, the UN Crime Prevention and Criminal Justice branch, in cooperation with the UN Department of Technical Cooperation for Development, organised an inter-regional seminar on corruption in The Hague, held by the Netherlands government.⁵⁷ The seminar was participated by high

⁵³ Preface, *The Third International Anti-Corruption Conference Report*, Printed by the Government Printer, Hong Kong, 1988, pp. 1-6.

⁵⁴ See Feng Ye (1996), *Anti-Corruption for Social Stability and Development: the Collected Works of the Seventh International Anti-Corruption Conference*, Beijing: Red Flag Publishing House, p. 1625.

⁵⁵ Preface, *The Third International Anti-Corruption Conference Report*, Printed by the Government Printer, Hong Kong, 1988, pp. 1-6.

⁵⁶ *The Fourth International Anti-Corruption Conference: Attorney General's Department*, by International Anti-Corruption Conference, Canberra: Australian Government Publication Service, 1990.

⁵⁷ Department of Technical Cooperation for Development and Centre for Social Development and Humanitarian Affairs, *Corruption in Government: Report of an Inter-Regional Seminar*, The Hague, Netherlands, 11-15 December 1989, New York, 1990, TCD/SEM.90/2-INT-89-R56.

level governmental officials from 18 developing countries from all regions of the world, as well as by observers from 8 developed countries, non-governmental organisations, academic institutions, independent anti-corruption bodies and Ombudsman's offices. The seminar held in-depth discussions on the forms of corruption, its causes, consequences, connections with organised crime, and also assessed existing measures in dealing with corruption, as well as appropriate actions to be taken at regional, national and international levels.⁵⁸ The role of international cooperation in the prevention, detection, investigation, prosecution and sanctioning of corrupt practices and enforcement in the public management system was highlighted, and the need for sustained information and expertise, in order to facilitate mutual assistance through technical cooperation in developing countries, was also underlined. The possibility of an international convention dealing particularly with transnational corruption and a code of ethics at an international level for public services was also proposed.⁵⁹

The 1980s witnessed the growth of a new emerging force in combating corruption: the Organisation for Economic Co-operation and Development (OECD). The OECD placed international cooperation to combat corruption on its agenda at a very early stage, in which it involved two basic objectives: fighting corruption in international business and helping to level the competitive playing field for companies.⁶⁰ In addition, the 'Guidelines for Multinational Enterprises' were published by the OECD in 1989, which called upon enterprises to refrain from bribing public officials over the course of operations. It states: "Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion".⁶¹ The Guidelines, since its first launch, have been amended and updated

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Bribery and Corruption, Topics, the OECD website: <http://www.oecd.org/corruption/>.

⁶¹ See VII. Combating Bribery, Bribe Solicitation and Extortion, *Guidelines for Multinational Enterprises*, the OECD, 2011 version, p. 47, available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

regularly with the latest version published in 2011. They are recommendations, addressed by governments, to multinational enterprises operating in or from adhering countries and they provide non-binding principles and standards for responsible business conduct in a variety of areas, involving employment and industrial relations, human rights, the environment, information disclosure, competition, taxation, and science and technology. The aim was to ensure that operations of these enterprises were in line with government policies, strengthening the basis of mutual confidence between enterprises and the societies in which they operate, improving foreign investment climate, and enhancing the contribution to sustainable development.⁶² The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.⁶³

In the 1990s

The 1990s witnessed a further development of international cooperation against corruption. In the early 1980s, corruption was a subject that governments invariably avoided in international disclosure and the word ‘corruption’ was rarely expressed in official circles. Corruption, at that time, was considered purely a domestic issue. It was from the 1990s, particularly after the end of the Cold War and the evolving economic, political and information globalisation, that the global community became increasingly concerned about the menacing consequences caused by corruption. Systematic efforts have been made by both domestic institutions and international organisations, initially at a technical level, followed by a political level, to place the fight against corruption on a global agenda.

1) UN

By the end of 1991, the UN General Assembly adopted a ‘Statement of Principles and

⁶² The OECD, *Guidelines for Multinational Enterprises*, 2011 version, Foreword, pp. 3-4, available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

⁶³ Ibid.

Programme of Action’, annexed to Resolution 46/152, at its 77th plenary meeting on the 18th December 1991.⁶⁴ During the meeting, the UN Crime Prevention and Criminal Justice Programme proposed to assist the international community in meeting the pressing needs in the field of crime prevention and to provide countries with timely and practical assistance in dealing with both national and international crime.

In the following year, a new functional inter-regional agency, the UN Commission on Crime Prevention and Criminal Justice, was formally established. Immediately following this, the Commission organised the ‘Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders’, held between 29th April and 8th May 1995 in Cairo, in which an anti-corruption strategy was one of the main topics under discussion. Under the Commission’s Guidance, the ‘International Code of Conduct for Public Officials’ was adopted by the UN General Assembly at its 82nd plenary meeting by its resolution 51/59 on the 12th December 1996, which was then recommended by the General Assembly to the member states as a tool to guide their efforts against corruption.⁶⁵ Subsequently, in its 51/191 resolution of the 16th December 1996, the General Assembly adopted the ‘UN Declaration against Corruption and Bribery in International Commercial Transactions’, urging member states to take concrete action to combat all forms of corruption, bribery and related illicit practice in international commercial transactions.⁶⁶

Moreover, Resolution 1997/25, the ‘International Cooperation against Corruption and Bribery in International Commercial Transactions’, was adopted by the UN Economic

⁶⁴ United Nations (1991), Creation of an Effective UN Crime Prevention and Criminal Justice Programme, General Assembly, Resolution 46/152, 1991, available at: <http://www.un.org/documents/ga/res/46/a46r152.htm>.

⁶⁵ United Nations (1996), Action against Corruption, Annex: International Code of Conduct for Public Officials, General Assembly Resolution 51/59, 1996, New York, available at: <http://www.un.org/documents/ga/res/51/a51r059.htm>.

⁶⁶ United Nations (1996), Declaration against Corruption and Bribery in International Commercial Transactions, General Assembly Resolution 51/191, 1996, New York, available at: <http://www.un.org/documents/ga/res/51/a51r191.htm>.

and Social Council at the sixth session, 28th April – 9th May 1997,⁶⁷ and then, by the General Assembly in Resolution 52/87, at its 70th Plenary meeting on 12th December 1997.⁶⁸ It contained 7 articles and specifically urges member states that have not yet done so, to implement relevant international declarations and to ratify, where appropriate, international instruments against corruption.

Resolution 53/176 on the ‘Action against Corruption and Bribery in International Commercial Transactions’ was adopted by the General Assembly at its 91st plenary meeting on the 15th December 1998. Consisting of 6 articles, it requested the UN Conference on Trade and Development and other competent bodies of the UN system, within their respective mandates and agreed work programmes, to assist member states. Upon request, they would implement national programmes to strengthen accountability and transparency and by implementing the relevant conventions, declarations and instruments, to combat corruption and bribery in international commercial transactions.⁶⁹

In 1999, the UN General Assembly adopted Resolution 54/128, ‘Action against Corruption’ at its 83rd plenary meeting on the 17th December. This resolution declared:

- the strengthening of national laws and regulations to criminalise corruption in all forms;
- the amendment of anti-money laundering provisions to ensure they cover bribes and the proceeds of corruption, and provisions concerning the prevention and detection of corruption and related money laundering offences;

⁶⁷ United Nations (1997), International Cooperation against Corruption and Bribery in International Commercial Transactions, UN Economic and Social Council, Resolution 1997/25, 1997, available at: <http://www.un.org/documents/ecosoc/res/1997/eres1997-25.htm>.

⁶⁸ United Nations (1997), International Cooperation against Corruption and Bribery in International Commercial Transactions, UN General Assembly, Resolution 52/87, 1997, available at: <http://www.un.org/ga/documents/gares52/res5287.htm>.

⁶⁹ United Nations (1998), Action against Corruption and Bribery in International Commercial Transactions, UN General Assembly, Resolution 53/176, 1998, available at: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010969.pdf>.

- the improvement of transparency, vigilance, and monitoring of financial transactions and the limitation of bank and professional secrecy in cases involving criminal investigation;
- the promotion of coordination between relevant agencies and international administrative and judicial cooperation in matters involving corruption;
- the enactment of legislation and establishment of programmes promoting the participation of civil society in efforts to fight corruption;
- the provision of extradition and mutual assistance in cases involving corruption and money laundering, in line with relevant international instruments and domestic legislations.⁷⁰

Resolution 54/205 on the ‘Prevention of Corrupt Practices and Illegal Transfer of Funds’ was also adopted in 1999, by the General Assembly at its 87th plenary meeting on the 22nd December. It called for further national and international strategies to deal with corrupt practices and bribery in international transactions, and devise ways and means for international cooperation to prevent and address illegal transfers, as well as repatriating illegally transacted funds to their countries of origin.⁷¹ Following the institutional reform within the UN, anti-corruption matters are now handled entirely by the United Nations Office on Drugs and Crime (UNODC).

The UN issued a series of resolutions throughout the 1990s to deal specifically with corruption and money laundering. However, how these resolutions were actually enforced by the member states is questionable, given the complicated national and international conditions at that time.⁷²

⁷⁰ United Nations (1999), Action against Corruption, UN General Assembly, 1999, available at: https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1990-1999/1999/General_Assembly/A-RES-54-128.pdf.

⁷¹ United Nations (1999), Prevention of Corrupt Practices and Illegal Transfer of Funds, UN General Assembly resolution 54/205, 1999.

⁷² See generally Phil Williams and Ernesto U. Savona (eds.), *The United Nations and Transnational Organized Crime*, 1996, Introduction, Oxon: Frank Cass & Co Ltd.

2) OECD

Over the course of the 1990s, the OECD introduced a series of recommendations and conventions to fight corruption and bribery. ‘Recommendation of the Council of the OECD on Bribery in International Business Transactions’ was adopted by the Council at its 829th session on the 27th May 1994, consisting of 9 articles. It presented general principles on handling bribery of foreign public officials; domestic action; international cooperation; relations with non-members and international organisations and follow-up procedures. This was the first milestone in the OECD’s effort to combat international bribery.⁷³

The provisions of the follow-up procedures of the Recommendation instructed the Committee on International Investment and Multinational Enterprises to set up a Working Group on Bribery in International Business Transactions, in order to monitor implementation and follow-up this Recommendation.⁷⁴ The duties of the Working Group were fivefold: (i) to carry out regular reviews of steps taken by member countries to implement this Recommendation and to make proposals, as appropriate, to assist member countries in their implementation; (ii) to examine specific issues relating to bribery in international business transactions; (iii) to provide a forum for consultation; (iv) to explore the possibility of associating non-members with this work; and (v) in close cooperation with the Committee on Fiscal Affairs, to examine the fiscal treatment of bribery, including the issue of tax deductibility of bribes.⁷⁵

Two years later, the Council of the OECD adopted the ‘Recommendation of the Council of the OECD on the Tax Deductibility of Bribes to Foreign Public Officials’ at its 873rd

⁷³ OECD (1994), Recommendation of the Council on Bribery in International Business Transactions, C (94)75/Final, 1994, available at: <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/1952622.pdf>.

⁷⁴ Ibid, Article VIII, Follow-up Procedures.

⁷⁵ Ibid.

session on 11th April 1996. Complementary to the 1994 Recommendation, the latter called upon those member countries who permitted bribes paid to foreign public officials to be treated as tax-deductible business expenses, to re-examine this treatment with the aim of abolishing it. It stated that bribes paid to foreign officials should be treated as illegal.⁷⁶

This was followed by the 1997 ‘Revised Recommendation of the Council of the OECD on Combating Bribery in International Business Transactions’, which was adopted on the 23rd May 1997. In addition to the 1994 version, the Revised Recommendation pulled together analytical work on anti-corruption measures and commitments undertaken over previous years in the fight against corruption and bribery in international business transactions, and invited member countries to take effective measures to deter, prevent and combat international bribery in a number of areas. The key provisions included the criminalization of bribing foreign public officials; the addressing of the tax deductibility of bribes paid and the needed improvement of transparency and efficiency within relevant agencies.⁷⁷

Also in 1997, one of the most important legal documents of the OECD, the OECD ‘Convention on Combating Bribery of Foreign Public Officials in International Business Transactions’,⁷⁸ was adopted by the Negotiating Conference of the OECD on the 21st November 1997. The Convention had, for the first time, established legally binding standards to criminalising bribery of foreign public officials and provided a host of related measures that made this effective. It is the first and only international

⁷⁶ OECD (1996), Recommendation of the Council of the OECD on the Tax Deductibility of Bribes to Foreign Public Officials, 1996, available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=c\(96\)27/final](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=c(96)27/final).

⁷⁷ OECD (1997), Revised Recommendation of the Council of the OECD on Combating Bribery in International Business Transactions, 1997, available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C\(97\)123/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C(97)123/FINAL&docLanguage=En).

⁷⁸ OECD (1999), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997, entered into force on 15 February 1999, 41 Signatories, full text available at: http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

anti-corruption instrument focused on the ‘supply side’ of bribery transaction.⁷⁹

Article 3 of the Convention dealt at length with the issues of sanctions, which required that the offence of bribery by a foreign public official be punished with “effective, proportionate and dissuasive” penalties. These penalties included imprisonment and were to be of a similar severity to those applicable to the bribery of officials in their own countries. In cases where a member country does not provide for criminal liability, lawyers should be subject to effective, proportionate and dissuasive civil or administrative penalties, including monetary penalties. The proceeds of the bribery of foreign public officials, or alternatively, a comparable amount of monetary value, were to be subject to seizure or confiscation.⁸⁰

The OECD, comprising developed nations with advanced economic systems and democratic institutions, provided a more realistic platform for effective implementation of moral principles with enforcement instruments for combating corruption. As of now, 41 countries have ratified and signed the OECD Anti-Bribery Convention.⁸¹ The OECD also monitors the progress of the signatories in legislating bribery as a criminal offence, and monitors the effectiveness and implementation of relevant laws in its member states.

Over the years the OECD Convention has proven to be surprisingly successful, primarily due to its rigorous peer review system. Under this system, members of the OECD Convention must, at regular times, submit to an extensive and invasive peer review and members cannot veto or prevent disclosure of the resulting reports. According to the latest report in 2014, 427 foreign bribery cases have been filed since

⁷⁹ OECD Official Website: OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, at: <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

⁸⁰ Article 3 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD.

⁸¹ 41 countries include all 35 OECD member states and 6 non-OECD countries: Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa, according to its official page: <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

the OECD Anti-Bribery Convention entered into force in 1999. The report also found that two thirds of the cases between February 1999 and June 2014 occurred in only four sectors: extractive (19%); construction (15%); transportation and storage (15%); and information and communication (10%).⁸² The OECD system also contributed to steady progress in strengthening enforcement, which has been tracked and illustrated in annual progress reports on the state of OECD enforcement, produced by Transparency International.

3) Transparency International

Transparency International (TI) was established in 1993, and is regarded as the first specialist international non-governmental organisation in combating corruption. Its mission was clearly stated as: “to stop corruption and promote transparency, accountability, and integrity at all levels and across all sectors of society. Our Core Values are transparency, accountability, integrity, solidarity, courage, justice, and democracy.”⁸³ TI attracted massive global attention through its Corruption Perception Index (CPI), a comprehensive survey and composite index on corruption, listing the scores (from 10 – extremely clean, to 0 – highly corrupt), and ranks most countries or regions worldwide in respect of the degree to which corruption is perceived among their public officials and politicians.

The CPI commenced in 1995 and was widely used and cited by economists, academics, business people, journalists, and politicians, both in research and public debate worldwide. Over the past 20 years, TI has published its CPI ranking of countries (176 countries in 2016) using an ‘expert’ approach – a combination of polls drawing on corruption related data collected by a variety of reputable institutions, to prevent the difficulty of measuring actual corruption and the expense of running broad national

⁸² See OECD (2014), *Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*, Paris: OECD Publishing.

⁸³ See Transparency International Official Website – Mission, Vision and Values, at: https://www.transparency.org/whoweare/organisation/mission_vision_and_values/.

surveys.⁸⁴

One of the greatest strengths of the CPI is that it brings the issues of corruption and its causes to the attention of the press and to investors, who see the ratings as a first indication of the level of corruption in a country. As Charles Garofalo et al. suggested, the self-sustaining nature of corruption requires a strong supervision from external sources such as CPI's rankings and subsequent world media exposure.⁸⁵ Indeed, as is generally understood, when top managers are part of a corrupt system, radical change requires the involvement of outsiders.

TI also set up the TI Quarterly Newsletter in 1995, Bribe Payers Index in 1999, and its official website in 7 languages, all of which have received broad global recognition. Moreover, TI has been playing an active role in the drafting of international legal instruments, and engaging in consultation, participation and organisation for international projects and conferences relating to corruption.⁸⁶

4) Council of Europe

The Council of Europe (CoE) also formally placed its stance against corruption on its agenda in 1994, and made the control and elimination of the issues of corruption one of its key priorities. Having upheld the fundamental values that the pre-eminent European institutions should not be destroyed, the CoE launched its initiative against corruption at the Malta Conference of the European Ministers of Justice, between 14th and 15th of June 1994.⁸⁷ The Multidisciplinary Group on Corruption within the CoE,

⁸⁴ Corruption Perceptions Index: In Detail, Transparency International, at: https://www.transparency.org/cpi2013/in_detail; see an example list of data sources that were used to construct the CPI 2013, at: http://www.transparency.org/files/content/pressrelease/2013_CPISourceDescription_EN.pdf.

⁸⁵ Charles Garofalo, Dean Genuras, Thomas D. Lynch and Cynthia E. Lynch (2001), 'Applying virtue ethics to the challenge of corruption', *The Innovation Journal: The Public-Sector Innovation Journal*, Vol. 6, No. 2, article 2.

⁸⁶ See a full coverage of TI's activities at its official page: Programmes, Projects, Activities, at: <https://www.transparency.org/whatwedo/projects/>.

⁸⁷ 19th Conference of European Ministers of Justice, Council of Europe, Valletta, Malta, 14-15 June 1994,

the first specialist agency in response to threats posed by corruption, was established in September 1994 under the resolution adopted by the Malta Conference.⁸⁸ Following its foundation, the Group started work under the supervision of the European Committee on Crime Problems and the European Committee on Legal Co-operation, with the task of preparing international programmes of action and examining the feasibility of drafting anti-corruption legal instruments, as well as elaborating a follow-up mechanism to implement action.⁸⁹

Results have been fruitful. Between 1994 and 2001, the Multidisciplinary Group on Corruption has (i) organised six European Conferences of Services Specialised in the Fight against Corruption; (ii) drafted several legal instruments, including, the ‘Programme of Action against Corruption’ (1996)⁹⁰, the ‘Twenty Guiding Principles for the Fight against Corruption’ (1997)⁹¹, the ‘CoE Criminal Law Convention on Corruption’ (1998)⁹², the ‘CoE Civil Law Convention on Corruption’ (1999)⁹³ and the ‘Recommendation on Codes of Conduct for Public Officials’ (2000)⁹⁴ and (iii) monitored the observance of the Twenty Guiding Principles for the Fight against Corruption and the implementation of the international legal instruments.⁹⁵ The Multidisciplinary Group on Corruption was replaced by the Group of States against

Report by the Secretary General of the Council of Europe, CM (94)117, available at: <https://rm.coe.int/16804ead6d>.

⁸⁸ Resolution No. 1 on civil, administrative and criminal law aspects of corruption, 19th Conference of European Ministers of Justice, available at: <http://www.coe.int/en/web/human-rights-rule-of-law/mju19-1994-valletta>.

⁸⁹ Group of States against Corruption, About GRECO, History, Council of Europe official website: <https://www.coe.int/en/web/greco/about-greco>.

⁹⁰ Programme of Action against Corruption, Corruption, Legal Co-operation, Legal Affairs, Council of Europe, 1996.

⁹¹ Twenty Guiding Principles for the Fight against Corruption, Committee of Ministers, Council of Europe, 1997.

⁹² Explanatory Report, Criminal Law Convention on Corruption, Council of Europe, 1998.

⁹³ Explanatory Report, Civil Law Convention on Corruption, Council of Europe, 1999.

⁹⁴ Recommendation No. R (2000) 10 of the Committee of Ministers to member states on Codes of Conducts for Public Officials, Committee of Ministers, Council Europe, 2000.

⁹⁵ Group of States against Corruption, About GRECO, History, Council of Europe official website: <https://www.coe.int/en/web/greco/about-greco>.

Corruption (GRECO), on 1st May 1999 by Resolution 99(5).⁹⁶

The GRECO, a specialist anti-corruption agency and a flexible and efficient follow up mechanism of the CoE, is set up to improve the capacity of its members in the fight against corruption by monitoring their compliance with CoE anti-corruption standards, through a dynamic process of mutual evaluation and peer pressure. It helps to identify shortages in national anti-corruption strategy, prompting the necessary legislative, institutional and practical reforms. In addition, GRECO provides a platform for countries to share their best practice in the prevention and detection of corruption.⁹⁷

5) World Bank

A speech at the World Bank in 1996 formally triggered its fight against public corruption, in which James D. Wolfensohn, then President of the World Bank, publicly committed the Bank to fighting corruption, the ‘cancer’ of developing countries, with measures ranging from public sector reform to debt cancellation, at the World Bank – IMF Annual Meeting on 1st October 1996.⁹⁸ During the meeting, a working group was set up under the Development Economics Vice Presidency of the World Bank to develop an integrated anti-corruption strategy. The final report, ‘Helping Countries Combat Corruption: The Role of the World Bank’, along with the guidelines of accompanying staff, was supported by the World Bank’s Board of Executive Directors on 2nd September 1997.⁹⁹

Furthermore, the World Bank institutions included a specialist team named the

⁹⁶ Ibid.

⁹⁷ Group of States against Corruption, About GRECO, what is GRECO? Council of Europe official website: <https://www.coe.int/en/web/greco/about-greco>.

⁹⁸ People and Development: Annual Meetings Address by James D. Wolfensohn, President, *Working Paper*, 01/10/1996, full text available at: <http://documents.worldbank.org/curated/en/135801467993234363/pdf/99712-WP-Box393210B-PUBLIC-1996-10-01-People-and-Development.pdf>.

⁹⁹ World Bank (1997), *Helping Countries Combat Corruption: The Role of the World Bank*, Report, full text available at: <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf>.

Governance and Anti-Corruption Team. It was made up of more than 20 experts and led by Daniel Kaufmann, who was regarded as a leading expert, researcher and advisor on governance and development, pioneering with his colleagues new empirical and survey methodologies.¹⁰⁰

6) The Asian Development Bank

The Asian Development Bank (ADB), similar to other international organisations, established its own Anti-Corruption Unit in 1998, under the direct leadership of the Office of the Auditor General, to deal with all matters related to allegations of fraud and corruption. Prior to its foundation, the Office of the Auditor General was designated as the initial point of contact for allegations of fraud and corruption among ADB's staff and projects. After the ADB's first special anti-corruption document, the Anti-Corruption Policy was approved in July 1998, and the Anti-Corruption Unit was established within the Office of the Auditor General.¹⁰¹

There has been constant evolution of the anti-corruption organisation within the ADB ever since its initial foundation in the 1990s. In December 2004, the Anti-Corruption Unit was upgraded to an Integrity Division with expanded power to deal with the growth in volume and complexity in investigations of fraud and corruption.¹⁰² On 1st October 2009, the newly established Office of Anti-corruption and Integrity (OAI) presided over all work related to fraud and corruption, which aligned with ADB's broader commitment to combat corruption and improve governance as a core strategic objective of ADB Strategy 2020, and the Paris Declaration on Aid Effectiveness of 2005.¹⁰³

¹⁰⁰ The World Bank Institution Governance and Anti-Corruption Team, World Bank, 2004.

¹⁰¹ Asian Development Bank Anti-Corruption Procedure, Asian Development Bank, 2003.

¹⁰² Office of Anti-Corruption and Integrity, Historical evolution of OAI, available at: <https://www.adb.org/site/integrity/overview>.

¹⁰³ Office of Anti-Corruption and Integrity, Overview, available at: <https://www.adb.org/site/integrity/overview>.

The New Millennium

As the world entered the 21st century, many governments began to accept the notion that fighting corruption in the global context was essential to their own interests. The rising economic giant in the Far East, the Country of China, following its successful entrance into the World Trade Organisation (WTO), had become an increasingly active member on the world stage in the fight against economic crime and corruption. The international community has eventually, achieved much after a long and slow struggle.

1) International level conferences (ongoing)

Having observed a series of specifically designed international units and organisations established throughout the 1990s, since the 21st century, global conferences and forums have become another important mechanism with regards to international cooperation in the fight against transnational criminal activities. These, as observed, are deemed essential to exchange information and experiences between the increasing number of relevant institutions involved.¹⁰⁴

The International Anti-Corruption Conference

A range of regional and international anti-corruption conferences, hosted by governments, international organisations and non-governmental organisations (NGOs) have taken place since 2000. Legal experts, scholars, officials and even heads of governments and international organisations have taken the opportunity offered at the plethora of specialist international anti-corruption forums, to exchange ideas and call for cooperation in fighting economic crime.

The International Anti-Corruption Conference (IACC) was convened in 1983, and takes

¹⁰⁴ See for example, General Letter produced by Professor Barry Rider, *The Cambridge International Symposium on Economic Crime*; see also Indira Carr (2007), 'Fighting corruption through regional and international conventions: a satisfactory solution?' *European Journal of Crime, Criminal law and Criminal Justice*, Vol. 15, Iss. 2, pp. 121-153.

place every two years in a different region of the world. The IACC aims at advancing the anti-corruption agenda by raising awareness and stimulating debate. In various ways it fosters networking, cross-fertilisation and the world-wide exchange of idea and experience. The conference also promotes international cooperation among government, civil society, the private sector, and citizens in providing the opportunity to face dialogue and direct liaison between agency representatives and participating organisations.¹⁰⁵

The IACC has successfully held 17 conferences, with current preparations for the 18th, which will be held in Copenhagen, Denmark, in October 2018. China, in the meantime, has also taken an active role in this, with Beijing, supported by the Supreme People's Procuratorate, organising the 7th IACC entitled 'Fighting Corruption for Social Stability and Development', between the 6th and 11th October 1995.¹⁰⁶ The then President, Jiang Zemin, was present at the opening ceremony, where he stated, with the opening of China's economy over a decade ago, to maintain a stable social order and to develop the economy, the struggle with corruption had to be tackled with firmness.¹⁰⁷ Further to this, Mr. Wang Hanbin, then Vice President of the Standing Committee of the National People's Congress, added, during the closing remarks, that China had invested great energy into strengthening its socialist democracy and legal system, and had undertaken serious measures to combat corruption, whilst developing its economy; China, in this matter, was willing to cooperate with any country and any region, in particular those advanced countries with extensive experience.¹⁰⁸

The influence of the IACC is unlimited, not only in its host country but also on the rest

¹⁰⁵ International Anti-Corruption Conference, About the IACC series, available at: <https://iaccseries.org/about/>.

¹⁰⁶ Feng Ye (1996), 'Anti-Corruption for Social Sociality and Development', in *the Collected Works of the International Anti-Corruption Conference*, Beijing: Red Flag Publishing House, p. 1625.

¹⁰⁷ Yong Zhang (1995), Seventh International Anti-Corruption Conference, *International Institute for Asian Studies*, available at: <http://iias.asia/iiasn/iiasn7/general/corrupt.html>.

¹⁰⁸ Ibid.

of the world. For example, China during the 7th IACC hosted in Beijing, passed the ‘Regulation on the Income Declaration by the Leading Cadres above the Provincial Level within the Party and the Government Institutions’, which is unique in regulating governmental officials’ income in China. The IACC has also issued a series of Declarations in the past, for example, the relatively recent ‘Putrajaya Declaration: Zero Tolerance for Impunity’, which hailed the world’s attention by stating “impunity feeds grand corruption, the abuse of high-level power that benefits the few at the expense of the many, causing serious and widespread harm to individuals and society”.¹⁰⁹ Indeed, the IACC has proven itself to be the premier global forum for communication and cross-fertilization that is indispensable to effective global and national advocacy and action.

The Asian Development Bank (ADB) and OECD Regional Anti-Corruption Conference for Asia and the Pacific

The ADB and the OECD have co-hosted eight regional anti-corruption conferences for Asia and the Pacific. The 1999 conference, the first in this series, was held in Manila, the Philippines, from 29th September – 1st October, entitled ‘Combating Corruption in Asia and Pacific Economies’¹¹⁰. The workshop was sponsored by the ADB and OECD, with an objective of raising awareness of the seriousness of the issue of corruption and to identify effective anti-corruption strategies. There were more than 200 participants from over 36 countries who shared their views and experiences throughout the event and assessed the effectiveness of translating international anti-corruption instruments and programmes into national policies. The conference provided assistance for anti-corruption initiatives at sub-regional, national, and international levels and identified workable future actions in both the public and private sector, including strategies to promote (i) stronger law enforcement; (ii) greater integrity and transparency in institutional government structures and (iii) the role of business ethics programmes and

¹⁰⁹ International Anti-Corruption Conference (2015), Putrajaya Declaration: Zero Tolerance for Impunity, 16th IACC, Malaysia, available at: <http://16iacc.org/blog/2015/09/04/putrajaya-declaration/>.

¹¹⁰ See more detail at OECD website, ADB/OECD Anti-Corruption Initiative for Asia-Pacific, available at: <https://www.oecd.org/site/adboecdanti-corruptioninitiative/>.

codes of conduct in the private sector.¹¹¹

The success of the 1st regional conference, or rather workshop, was soon to be followed by the 2nd regional conference held in Seoul, South Korea, the following year, during which the serial Regional Anti-Corruption Conference was formally established.¹¹² China, again, was present. With the assistance of the Chinese government, the 5th Regional Anti-Corruption Conference was hosted in Beijing, China, on the 28th – 30th September 2005. The conference brought together governments, international organisations, donor agencies, the NGOs, trade unions, the private sector and the media from the initial 25 members as well as ADB members and state parties of the OECD Anti-Bribery Convention. The event raised particular awareness of strengthening regional cooperation, fostering the exchange of knowledge and experience and building synergies and networks.¹¹³

To date, 31 countries and economies from Asia and the Pacific have endorsed the ADB/OECD anti-corruption plan and agreed on means to achieve its standards. The latest serial conference, held in Cambodia in 2014, shifted its focus to ‘restoring trust’ in government, the private sector and civil society by intensifying efforts to combat corruption and prevent illicit financial flows.¹¹⁴ This is in response to the doubts arisen among citizens about the control that governments have over events, and their role as competent stewards of the public interest, in light of the global economic crisis.

These series of conferences, held within a narrower and more specific but highly

¹¹¹ ADB/OECD Anti-Corruption Initiatives, 1st Regional Anti-Corruption Conference for Asia and the Pacific, Conference conclusions and recommendations, 1999.

¹¹² See details at ADB/OECD Anti-Corruption Initiatives, 2nd Regional Anti-Corruption Conference for Asia and the Pacific, Conference conclusions and recommendations, 2000.

¹¹³ ADB/OECD Anti-Corruption Initiatives, 5th Regional Anti-Corruption Conference for Asia and the Pacific, Conference Conclusions and Recommendations for Future Actions, 2005.

¹¹⁴ ADB-OECD Conference on fighting corruption and building trust in Asia and the Pacific, 8th Regional Anti-Corruption Conference for Asia and the Pacific, 3-4 September 2014.

correlated region, and with the most up to date issues debated, provide an excellent opportunity for in-depth exchange of experiences, regional cooperation and progress evaluation across all the relevant sectors in the fight against corruption. Correspondingly, there are many similar regional conferences that have taken place in other parts of the world.¹¹⁵

Conferences under the UN Convention against Corruption

In response to a request from the General Assembly, Resolution 55/61 on the 4th December 2000, concerning a legal instrument against corruption, the UN commenced work on a UN independent convention regarding fighting corruption, separate from the UN Convention against Transnational Organized Crime.¹¹⁶ The Meeting of the ‘Intergovernmental Open-ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of a Future Legal Instrument against Corruption’ was held in Vienna, between the 30th July and 3rd August 2001, with participation of representatives from 97 member states and UN organisations, institutes of the UN Crime Prevention and Criminal Justice Programme network, intergovernmental organisations and NGOs.¹¹⁷

This was followed by an ‘Informal Preparatory Meeting of the Ad Hoc Committee on the Negotiation of a Convention against Corruption’ in Buenos Aires between the 4th and 7th December 2001, which established the basis for the UN Convention against Corruption.¹¹⁸ The ad hoc committee held in total seven sessions, in which: the first two

¹¹⁵ For example, Anti-Corruption Network for Eastern Europe and Central Asia, OECD; OECD/African Development Bank Initiative (AfDB) to Support Business Integrity and Anti-Bribery Efforts in Africa, joint initiative by OECD and AfDB; European Conferences of Services Specialised in the Fight against Corruption, hosted by the Council of Europe; Southeast Europe Regional Programme on Strengthening the Capacity of Anti-Corruption Authorities and Civil Society to Combat Corruption and Contribute to the UNCAC Review Process, Regional Anti-Corruption Initiative, Funded by the Austrian Development Agency.

¹¹⁶ See United Nations (2000), General Assembly Resolution 55/61, 81st plenary meeting on 4 December 2000, available at: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010993.pdf>.

¹¹⁷ United Nations (2001), Report of the Meeting of the Intergovernmental Open-ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of a Future Legal Instrument against Corruption, UNODC, full details available at: https://www.unodc.org/pdf/crime/expertmtg_corruption/2E.pdf.

¹¹⁸ United Nations (2001), Informal Preparatory Meeting of the Ad Hoc Committee on the Negotiation

sessions concluded the first reading of the draft convention; the third and fourth sessions completed the second; the fifth session reached a preliminary agreement on a significant number of the provisions and the final two sessions finalised the convention.¹¹⁹ The Convention was finally signed by member states at the High-level Political Conference for the Purpose of Signing the United Nations Convention against Corruption, in Merida, Mexico, 2003.¹²⁰

2) Adoption of the United Nations Convention against Corruption

On the 31st October 2003, the first major international anti-corruption treaty of the new millennium, the United Nations Convention against Corruption (UNCAC), was adopted by the UN General Assembly in Resolution 58/4.¹²¹ It is a milestone for global efforts to fight corruption. The 9th December, marking the date of signature of the convention, is the annual UN International Anti-Corruption Day, and more importantly, on the same day, the UN provides a shared platform for signed countries to raise awareness and evaluate progress on the Convention and global efforts to combat corruption. During the High-level Political Conference, for the Purpose of Signing the UN Convention against Corruption in 2003, 95 nations signed, and, as of today, the number has risen to 140.¹²² Given the importance of the UNCAC, it is imperative to present an overview of this treaty, in which five fundamental areas have been covered in the convention, which in itself consists of eight chapters and 71 articles.

of a Convention against Corruption, UNODC, full details available at: <https://www.unodc.org/unodc/en/treaties/CAC/background/adhoc-preparatory.html>.

¹¹⁹ United Nations (2003), Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions, UNODC, available at: https://www.unodc.org/pdf/crime/convention_corruption/session_7/422e.pdf.

¹²⁰ United Nations (2003), High-level Political Conference for the Purpose of Signing the United Nations Convention against Corruption, UNODC, full details available at: <https://www.unodc.org/unodc/en/treaties/CAC/background/adhoc-committee-merida.html>.

¹²¹ United Nations (2003), UN General Assembly Resolution 58/4, United Nations Convention against Corruption, available at: <http://www.un-documents.net/a58r4.htm>.

¹²² According to United Nations Convention against Corruption Signature and Ratification Status as of 12 December 2016, full list available online at: <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

The first area is prevention. The importance of prevention in the fight against corruption is widely accepted, and past experience indicates that a comprehensive ‘three-pronged’ strategy (i.e. investigation, prevention and education) could contribute to a successful anti-corruption policy.¹²³ To improve the ability of states’ preventive measures, the UNCAC dedicates an entire chapter (Chapter II) to provide a comprehensive model for preventive policies in both the public and private sectors, such as the establishment of anti-corruption bodies, enhancing transparency in the financing of election campaigns and political parties, suggested preventive measures in the judiciary and in the public procurement as well as measures to prevent money laundering.¹²⁴

The second area is criminalisation. Tackling corruption as a crime is of great importance. In order to aid member states to establish criminal offences, Chapter III of the UNCAC defines a wide range of acts of corruption, such as bribery of national public officials, bribery of foreign public officials and officials of public international organisations; embezzlement, misappropriation or other diversion of property by a public official; illicit enrichment; laundering of the proceeds of crime; concealment and obstruction of justice.¹²⁵ This chapter continues with in depth considered preventive measures and procedures to deal with these actions.¹²⁶ It also addresses specialist authorities, suggestions for cooperation with law enforcement, cooperation between national authorities and the private sector.¹²⁷

Chapter IV focused on the third area, international cooperation, in which it emphasises

¹²³ See for example, experience from Hong Kong IACA, Tony Scott, Alastair Carstairs and Doug Roots (1988), ‘Corruption prevention: the Hong Kong approach’, *Asian Journal of Public Administration*, Vol. 10, Iss. 1, pp. 110-119; see also Sofie Arjon Schutte (2012), ‘Against the odds: anti-corruption reform in Indonesia’, *Public Administration and Development*, Vol. 32, Iss. 1, pp. 38-48; see also Nyaga Isaiah, K. Ng’etich, E. K. Bor and M. M. Theuri (2014), ‘Suggested modifications in the implementation of the three-pronged anti-corruption strategy in Nairobi county, Kenya’, *International Journal of Economics, Commerce and Management*, Vol. 2, Iss. 9, pp. 2-23.

¹²⁴ Chapter II, Article 5-14, UNCAC.

¹²⁵ Chapter III, Article 15-25, UNCAC.

¹²⁶ Chapter III, Article 25-35, UNCAC.

¹²⁷ Chapter III, Article 36-39, UNCAC.

the significance of enhanced procedures and broader mutual legal assistance, including extradition, transfer of sentenced persons, transfer of criminal proceedings, law enforcement cooperation, joint investigations and special investigative techniques.¹²⁸

Fourthly, asset recovery, the return of assets obtained through corruption, is recognised as a fundamental principle in this Convention. Chapter V affords the widest possible measures on cooperation and mutual legal assistance in returning state embezzled public funds and the proceeds of corruption. They include measures for the direct recovery of property; mechanisms for recovery of property through international cooperation; confiscation; international cooperation for the purposes of confiscation; special cooperation; return and disposal of assets; the creation of financial intelligence units and bilateral and multilateral agreements and arrangements.¹²⁹ This is regarded as a landmark achievement. The UNACA is the first global anti-corruption instrument that provides the recovery of funds transferred abroad by corrupt officials, it sends a strong and clear signal to corrupt parties that there will be no place to hide their illicit gains.¹³⁰

Finally, the fifth area UNACA is concerned with is the mechanisms for implementation. The adoption of the Convention is only a new beginning – it is its implementation that can provide vital momentum. It must be admitted that the mechanisms provided in UNACA cannot ensure its effective implementation – this is an inevitable consequence of the international negotiation process. However, it does set up a series of rigid implementation mechanisms in Chapter VIII, covering not only implementation and its entry into force, but also matters concerning the settlement of disputes.¹³¹

¹²⁸ Chapter IV, Article 43-50, UNCAC.

¹²⁹ Chapter V, Article 51-58, UNACA.

¹³⁰ United Nations Secretary-General (2003), Secretary-General's statement on the adoption by the General Assembly of the United Nations Convention against Corruption, 31 October 2003, available at: <http://static.un.org/sg/en/content/sg/statement/2003-10-31/secretary-generals-statement-adoption-general-assembly-united>.

¹³¹ Chapter VIII, Article 65-71, UNACA.

In general, with 71 articles, the UN Convention is a comprehensive treaty on corruption and has aided the creation of a common framework for promoting cooperation amongst all nations in fighting this malaise. It is an important step in achieving a universal agreement, despite the lack of an efficient and workable mechanism to promote compliance and monitor it.¹³²

What has China done?

President Xi Jinping, in his first public speech after taking over the presidency and the party chief in late 2012, robustly called upon the party to fight fraud and corruption. He stated, “inside the party, there are many problems that need to be addressed, especially the problems among party members and officials of corruption and taking bribes, being out of touch with the people, undue emphasis on formalities and bureaucracy and other issues.”¹³³ The campaign, since it started, has investigated a large number of high-profile corruption cases. General Xu Caihou, Vice-Chairman of the Central Military Commission and top-ranking General of the People’s Liberation Army, along with Zhou Yongkang, a former member of the Politburo Standing Committee, who once headed the party’s Central Commission for Discipline Inspection and China’s Ministry of Public Security, were both found guilty of corruption.¹³⁴ President Xi left no one in any doubt as to how serious the new leadership considered the situation. This campaign, compared to previous ones, has placed far more emphasis on international initiatives due to the accelerated pace of globalisation.

¹³² See discussions at Mel D. Powell (2017), ‘International Efforts to Combat Corruption’, *2017 Annual Conference American Society for Public Administration*, Atlanta, Georgia, March 17-21, 2017, at pp. 4-5; and Philippa Webb (2005), ‘The United Nation against corruption: global achievement or missed opportunity?’ *Journal of International Economic Law*, Vol. 8, Iss. 1, pp. 191-229.

¹³³ Jinping Xi (2012), English version of the full text of President Xi Jinping’s speech at his inauguration is available at: <http://www.bbc.co.uk/news/world-asia-china-20338586>, the speech was given on 15 November 2012.

¹³⁴ See Yamei Wang (30.06.2014), “Flash: Xu Caihou expelled from CCP for graft probe”, *Xinhua News*, available at: http://news.xinhuanet.com/english/china/2014-06/30/c_133449642.htm; and Damien Grammaticus (29.07.2014), “Zhou Yongkang: China investigates ex-security chief”, *BBC News*, available at: <http://www.bbc.co.uk/news/world-asia-28544428>.

Fox Hunt Operation

Following President Xi's anti-corruption drive, the international 'Fox Hunt Operation' was launched by the Ministry of Public Security (MPS) of the People's Republic of China in 2014, vowing to track down fugitives who had fled overseas and bring them to justice. As the state agency *Xinhua News* reported, Chinese officials have been 'lining their pockets' and 'skipping the country' since the 1980s, while the problem has now reached staggering proportions.¹³⁵ By the end of 2014, in a 5-month period of the operation, 680 suspects of economic crime from 69 different countries were returned to China, of which 280 related to cases involving over 10 million Chinese Yuan (£1.14 million) and 117 have been abroad for over 10 years.¹³⁶

The return of suspected criminals was mainly through extradition or repatriation, indicating that China has, during this operation, made remarkable inroads in international legal cooperation. This is particularly so with Southeast Asian countries, including Thailand, the Philippines, Malaysia, Vietnam, Laos, Burma and Indonesia, where 229 of the suspects, taking up 34 percent of the total number, were successfully arrested and deported.¹³⁷ Some other countries, such as the US, France and Australia, have also expressed their willingness to assist and support China's anti-corruption movement – if not through formal extradition treaties, to do so through informal mutually agreed measures.¹³⁸ Determination has already been made clear: "the

¹³⁵ Fei Chen and Mengda Wu (2014), 'Gonganbu Bushu 'Liehu 2014' Jibu Xingdong Jianzhi Zaitao Jingwai Jingji Fanzui Xianyiren' (Ministry of Public Security Initiating Foxhunt Operation Targeting Suspects of Economic Crime Who Have fled Abroad), in Chinese, *Xinhua News Agency*, 22.07.2014, available at: http://www.sc.xinhuanet.com/content/2014-07/22/c_1111747031.htm.

¹³⁶ Cheng Yang (2015), 'Ministry of Public Security: 'Fox Hunt Operation' Arrested 680 fled Suspects of Economic Crime', *People's Daily*, 01.01.2015, available at: <http://legal.people.com.cn/n/2015/0108/c42510-26348438.html>.

¹³⁷ Ibid.

¹³⁸ See for example, *China Daily* (2014), 'France to assist in hunt for corruption suspects', *China Daily*, 04.12.2014, available at: http://www.chinadaily.com.cn/cndy/2014-12/04/content_19021525.htm; Simon Denyer (2016), China's most-wanted corruption suspect repatriated from U.S. after 13 years on the run, *The Washington Post*, 17.11.2016, available at: https://www.washingtonpost.com/world/chinas-most-wanted-corruption-suspect-repatriated-from-us-after-13-years-on-the-run/2016/11/16/b0f58b0a-abfd-11e6-8410-7613f8c1dae8_story.html?utm_term=.f760280e6f0b; and also NetEase (2014), China and Australia making joint efforts on asset recovery, *NetEase*, 21.10.2014, available at:

economic fugitives seem like the crafty foxes who have fled overseas to avoid punishment, but we, the wise hunters, will nail them, no matter where they are, or who they are.” – stated Liu Dong, deputy director of the economic crime unit at the Ministry of Public Security.¹³⁹

Skynet Operation

In April 2015, following the success of the ‘Fox Hunt Operation’, the CCP announced the initiation of an upgraded multi-agency operation, ‘Skynet Operation’, with cooperation between the MPS, the Central Organisation Department, the Supreme People’s Procuratorate, and the People’s Bank of China. ‘Skynet Operation’ was set up not only to cover the sequential ‘Fox Hunt Operation 2015’ operated under the MPS, but enjoyed a much wider objective, that of “clearing up a batch of forged passports and personal documents; striking a batch of underground banks; recovering a batch of stolen assets; extraditing a batch of fled officials”.¹⁴⁰ The ‘Skynet Operation’ extended its target to both the fugitives and those who help them. As the old Chinese idiom says, ‘the sky may look thin and sparse, but it is vast and will not let you escape’.

Achievement – an ongoing process

Fruitful results have been observed, and the determination of the ruling party’s zero tolerance on corruption has been applauded by both China’s own citizens and the rest of the world. This is certainly an ongoing process. The Chinese government has published a list of 100 fugitives who are on Interpol’s red notice, and brought 27 of them to justice with the assistance of Interpol and relevant countries.¹⁴¹ Furthermore,

<http://news.163.com/14/1021/11/A930H7PR00014AED.html>.

¹³⁹ Tom Phillips (2014), ‘China launches global ‘fox hunt’ for corrupt officials’, *The Telegraph*, 25.07.2014, available at: <http://www.telegraph.co.uk/news/worldnews/asia/china/10991255/China-launches-global-fox-hunt-for-corrupt-officials.html>.

¹⁴⁰ Xiaobo Chen and Lie Fang (2015), 2015 nian zhongguo fanfu mizhi zhuitao ‘tianwang’ (2015 China’s anti-corruption campaign is weaving ‘Skynet’), *Xinhua News*, in Chinese, available at: http://news.xinhuanet.com/politics/2015-12/31/c_1117638373.htm.

¹⁴¹ Shuxian Huang (2016), Anti-Corruption Summit in London 2016, China Country Statement, presented by the Minister of Supervision of the PRC.

according to a recent meeting held by the MPS and the CCDI in March 2017, the ‘Skynet Operation 2016’ has returned a total of 1,032 fugitives and a sum of 2.4 billion Chinese Yuan (£272 million) to China.¹⁴² The meeting also deployed a detailed plan on ‘Skynet Operation 2017’, and made it crystal clear that “the anti-corruption work will never end, nor will work in capturing fugitives and recovering stolen assets”.¹⁴³

China is probably the most dynamic economy in today’s world. Since the opening of China’s economy, the system of government and its instructions, along with the party in power (CCP), has had to adapt, to address new risks and challenges. This is an ongoing process. Today, the Chinese economy has become far more diversified and international and together with political, social and economic changes, the situation is complex. It is promising that China understands that it cannot handle all these issues in isolation.

China has long been an active character within the international community in the fight against corruption. The country has put itself forward in signing up to the United Nations Convention Against Corruption (UNCAC) and has voluntarily initiated, participated and organised a series of international level conferences and served as the chair of anti-corruption working groups of APEC and the G20. The former President, Hu Jintao, even gave his personal support to the establishment, with China’s own money and personnel, of the International Association of Anti-Corruption Agencies, with the aim of promoting the effective implementation of UNCAC.¹⁴⁴

Remarkable success has been made by the Chinese government in establishing

¹⁴² Jie Meng (2017), China launches ‘Skynet 2017’ to hunt down corrupt suspects abroad, *Xinhua News*, available at: http://news.xinhuanet.com/english/2017-03/08/c_136113421.htm.

¹⁴³ Ibid.

¹⁴⁴ See Lihong Xing, Xuebin Li and Enze Liu (2015), ‘Corruption in China’, in *Research Handbook on International Financial Crime*, edited by Barry Rider, Cheltenham: Edward Elgar Publishing Limited, p. 432.

cooperative relationships with foreign countries. However, the lack of mutual extradition treaties and the difficulty in concluding one have been publicly observed. There are various reasons. The differences in the political system and the distrust of the Chinese legal system in ensuring justice are perhaps the prominent reasons. For example, the death penalty, which has been abolished in many countries, still exists in China, and this inevitably frustrates extraditing conditions of Chinese corrupt officials. Nonetheless, according to the *Global Times*, China has been working very closely with the US Department of Justice into seeking effective ways of ensuring asset recovery and implementing extradition treaties, discussing the possible conditions of a proceeds-sharing regime.¹⁴⁵ It is believed that China has provided a list of over 1,000 Chinese ‘wanted suspects’ that are currently living in the US.¹⁴⁶

It remains to be seen whether the complex apparatus of the state can address these issues with sufficient vigour and alacrity to retain public confidence. Indeed, reform is vital in certain areas of China’s legal system. In the next concluding chapter, possible solutions and recommendations will be explored in a bid to strengthen control and prevent economic crime in China.

¹⁴⁵ ‘Zhongfang yixiang Meifang Kaichu Chaoguo 1000 Waitao Tanguan Mingdan’ (China has provided the US with over 1000 fled corruptive officials’ name list), 12.5.2014, *Global Times*.

¹⁴⁶ The ‘most wanted’ people list is available at CCDI website at: http://www.ccdi.gov.cn/xwtt/201504/t20150422_55183.html.

Chapter 7: Conclusions and Recommendations for Improved Control and Prevention of Economic Crime in China

This thesis, following the key timeline of China's history, examines the issues of economic crime with particular reference to corruption throughout China's development as a global force. Focus on China is not due to the country being particularly prone to this malevolent phenomenon. Corruption exists in every society, and has been a stubborn by-product of economic development since ancient times. However, it is the case that China, a socialist country with a long history of bureaucratic control, is unique in its approach to understanding, identifying and preventing corruption. The Chinese Communist Party (CCP), the party in power, has placed many constraints on the bureaucracy, while, on the other hand, it continues to rely heavily on this system to manage the centrally planned and hierarchically ordered economy. Although determination to enact economic reform and opening its door to the world seems to be a solution, newer and even greater challenges arise in this unstable transitional period.

Corruption, in the sense of abuse of public office, has been a serious crime for thousands of years in China. Numerous methods have been employed by emperors in ancient China to counteract this problem and a series of anti-corruption campaigns, with different emphasis, objectives and results, have been observed in differing eras in China's modern history. Indeed, the CCP has recognised that corruption undermines the credibility of its own objectives ever since its foundation, and has launched innumerable initiatives against corruption and self-dealing and devoted considerable resources to the problem.¹ Much has been done, but much more needs to be done. The

¹ See Barry Rider (2013), 'When Chinese Whispers Become Shouts!' Editorial, *Journal of Financial Crime*, Vol. 20, Iss: 2.

government and the CCP understand that short-lived campaigns cannot fulfil their objective; a much stronger systematic anti-corruption regime must be implemented.

Economic crime is by no means a domestic issue in today's society. With the accelerated speed of globalisation, economic crime, money laundering and corruption have gone far beyond the control of the domestic justice system. This is more so in China than in any other country, the most expanding economy in the world, and is widely predicted to be the dominant economy in the next ten years. The country's reputation and moral standards will be of key importance if China desires to sustain its attraction to foreign investment, as well as assume its indispensable role on the world's stage. Indeed today, China's every move towards curbing economic crime will influence international business ethics and legal standards.

The issue of economic crime is a dynamic point of interest. Since the 'opening' of China's economy, the system of government and its delegation of power, together with the CCP, has addressed new risks and challenges – this is an ongoing process. China however, is not slow in realising that it cannot deal with all these issues in isolation. Corrupt officials have become far more intelligent and moved their ill-gotten gains beyond the reach of the domestic power and hidden their bribes and thefts in foreign bank accounts.

This study has illustrated how, historically, corruption varies between periods and societies. When seeking to devise an appropriate strategy for combating corruption in China, consideration must be given to its economic, legal, political and cultural contexts. An effective and efficient approach must be tailored to the unique environment in which corruption occurs. This chapter, based on the author's personal views, aims to provide general recommendations, several already explored throughout this thesis, for a tighter control of economic crime and corruption in China.

The legislative work

Ever since the economic reform in the late 1970s, China has enacted a large volume of legislation. In the realm of economic crime, more study and action needs to be completed, both theoretically and practically. The law relating to fraud (covered in Chapter 4), illustrates the lack of a uniform constitutive requirement in terms of the definition of fraud which can lead to theoretical inadequacy in related trial cases. The single recognised type of fraud, with the absence of the concepts of negligence and innocent misrepresentation in Civil Law, causes problems with respect to a defendant's liability. The remedies available, therefore, result in inequality and unfairness in business contracts. Furthermore, compared to English common law, the incorporation of legal doctrine of fiduciary duty has also become necessary.

There is much to learn from the UK's legal practice. It recently re-enacted the Criminal Finances Act 2017, providing greater powers for law enforcement agencies in tackling economic crime, including tax evasion, money laundering, corruption and terrorist financing. Its newly introduced regime of Unexplained Wealth Orders (UWO)² is of particular importance, where it requires an individual to demonstrate the nature and extent of interest in a property specified in an order and explain how the property was obtained. This is vital in cases where a person's income does not explain ownership of that property.

The High Court, under English law, is empowered to grant a UWO in terms of property (which has to be valued at more than £50,000) upon request by a number of agencies including the Serious Fraud Office and the Financial Conduct Authority. It further states that, in order for the application for UWO to be made legally, the court need to be satisfied that either there are reasonable grounds for suspecting that the respondent (or a person connected with the respondent) is, or has been, involved in serious crime, or

² Section 1, Criminal Finances Act 2017.

that the respondent is an overseas ‘politically exposed person’ (an individual who has been entrusted with prominent public functions by an international organisation or a State outside of the UK or the European Economic Area, or a close relative or associate of such a person). The UWO, as referred to by the executive director of Transparency International, Robert Barrington, can be used as a valuable tool “which will empower the UK law enforcement agencies to target corrupt money flowing into the UK and more easily return it to those from whom it has been stolen”.³

Section 10 of the Prevention of Bribery Ordinance in Hong Kong has also created a statutory presumption that any wealth over and above the lawful remuneration of a public official is the proceeds of corruption. Similar provisions can also be found in many other Commonwealth countries. Indeed, relevant laws and regulations, with respect to unexplained wealth, would be invaluable if they were incorporated into China’s legal framework in its current war against public corruption. In addition, further laws on preventive measures should be considered, especially on the allocation and operation of state powers and the regular examination of officials’ income; laws on the organisation and the powers of administrative, judicial, and in particular, military departments need to be further specified. Specific rules should be placed on the departments that have close ties with business-related operations such as licensing and procurements.

Much emphasis has been placed on the ‘demand’ side of corrupt practices in the context of China. Western experience has illustrated that by increasing the risk of being exposed on the ‘supply’ side of corruption, this can also be an effective preventative measure. The United States Foreign Corrupt Practice Act is a good example, where one of its primary objectives is to prevent US associated persons and companies from offering

³ Transparency International (2017), ‘Unexplained wealth orders as significant in fighting corruption as the Bribery Act’, 27.04.2017, *Transparency International*, available at: <http://www.transparency.org.uk/press-releases/unexplained-wealth-orders-as-significant-in-fighting-corruption-as-the-bribery-act/>.

bribes to foreign officials. Indeed, relevant laws and regulations should be imposed and more importantly, enforced in China on the company's compliance system; if they fail to file regular reports and meet the requirement, they will be punished, both in monetary terms and through damaged company reputation. There eventually will become a point at which the costs are just too great and are disproportionate to any assumed rewards.⁴

Further to this, the need to regulate newly developed facilitative mechanisms on economic crime have raised increasing public concern. For example, underground banking is an effective mechanism for corrupt officials to launder their illicit gains. China's newly initiated anti-corruption international operation 'Skynet Operation' has sought assistance from the central bank, the People's Bank of China, with a specifically assigned objective to strike underground banks. The current laws relating to the operation of underground banking in China are ambiguous. Generally, the operation lies under the crime of illegal business operations. However, one of the requirements in such a crime, is criminal intent to acquire illegal profits, however this may not be reflected in the transaction of 'black' money and exchange of foreign currencies operated by underground banks, which only amounts to illegal use of business license and is liable for less serious administrative redress. Furthermore, as underground banking services often involve money laundering activities, there are academics proposing to define underground banking as a money laundering offence.⁵ Yet in practice, to be qualified for a money laundering offence, proof is required that the money has derived from seven predicate offences, namely smuggling, drug trafficking, organised crime, terrorist activity, disrupting the financial order, financial fraud and corruption. Individuals may only use the underground service to obtain an investor visa

⁴ See more discussions at Barry Rider (2015), 'Strategic tools – for now and perhaps the future?' in *Research Handbook on International Financial Crime*, edited by Barry Rider, Cheltenham: Edward Elgar Publishing Limited, pp. 748-749.

⁵ See Lei Zhang (2017), 'Daji dixia qianzhuang jixu pojie falu shiyong nanti' (The urgency to break the bottleneck of application of the law relating to underground banks), *China News*, 10.03.2017, available at: http://news.china.com/news100/11038989/20170317/30336418_all.html.

and the money they earned can be completely legitimate. Indeed, the implementation of such laws in relevance to newly emerging economic crime is worthy of considerable attention.

Additional laws on the supervision of government officials should also be considered. Laws should include requests for officials to report their legal income and gifts accepted, anti-corruption authorities should have more power to examine officials and their families' bank accounts and personally or jointly owned properties in the context of unexplained wealth, when necessary. Moreover, laws relating to other sectors have the potential capacity to attract the media, 'whistle blowers' and bounty hunters need also to be considered.⁶ A 1.4 billion population can obviously have a huge impact on the prevention of public corruption.

Empowering the citizen

In western countries, there has long been a suggestion to empower their citizens, who have suffered loss as a consequence of public corruption, to raise claims. In most cases, their damage is a result of what the corruption has facilitated rather than the corrupt act itself. For example, those who lost relatives or sustained injury after a major road bridge collapse in China, due to the failure of inspectors to sufficiently monitor its construction. While in most cases, those who have been harmed will not, under domestic law, have a clear claim for compensation, this concentrates on claims for damage and loss that have resulted from the corrupt act, rather than restitution of illicit payments. The United Nations Convention Against Corruption places an obligation on states to facilitate such actions. However, without a litigation friendly environment, with the possibility of class actions and contingent attorney fees, it is difficult to see that this would be a meaningful and viable strategy in many countries. A positive move can be gleaned from the United

⁶ Further reading can be found at Richard Alexander (2005), 'The role of whistleblowers in the fight against economic crime', *Journal of Financial Crime*, Vol. 12, Iss. 2, pp. 131-138; and Caroline Bradley (2015), 'Rewards for whistleblowing', in *Research Handbook on International Financial Crime*, edited by Barry Rider, Cheltenham: Edward Elgar Publishing Limited.

States False Claims Act, in which it has enabled citizens to bring civil claims on behalf of the state, based on allegations of fraud and misconduct against the government, and the litigants and their lawyers, who are then, if successful, permitted to share in the recovery.

The Chinese government and its party disciplinary organ, the Committee for Disciplinary Inspection (CDI) have, in various situations, expressed their willingness to work with the public. Beijing, with the recent establishment of a whistle blower internet platform, under the official website of the Central Committee for Disciplinary Inspection (CCDI), appears to be taking a positive path in recruiting the general public and gaining their support and alliance. The collapse of the formal deputy head of the National Development and Reform Commission Liu Tienan emerged from an online report, written by a well-known journalist.⁷ More impressively, former Chongqing District Party Secretary Lei Zhengfu was sacked by the party only 63 hours after his indecent video was uploaded online, via the popular Chinese microblog Sina Weibo.⁸

The government, the supervisory authority, should continue to utilise newly developed information technology. Article 41 of the Constitution has granted citizens the right to criticise the work of the government and its officials, and the right to accuse or report misconduct. Recruiting the general public to assist in monitoring public officials is a welcome tendency, which can be a win-win strategy. To some extent, it tempers jealousy in society between the populace and the governing officials, as well as aiding the effectiveness of the party's built-in supervisory bodies. To this end, special guidelines on how to 'blow the whistle' should be made public and strongly emphasised. The protection of the whistle blower should also be strengthened in serious cases of corruption involving allegations against those still in office and law enforcement, and

⁷ BBC News (2013), 'China sacks top economic official Liu Tienan', *BBC news*, 9 August 2013, available at: <http://www.bbc.co.uk/news/world-asia-china-23628085>.

⁸ Yong Han (2013), 'Officials being convicted since the 18th CCP National Congress', *Sina News*, 12.11.2013, available at: http://news.sina.com.cn/c/sd/2013-11-12/110828687589_2.shtml.

strict regulations on openly dealing with public reports should be properly supervised. Moreover, compared with western countries, where the media is a major player in monitoring the integrity of government officials, China's media sector is still under state influence which mainly derives from the local governments, who are concerned about their 'face' (governmental image). Accordingly, it is necessary to publish laws and regulations to protect the independence of the media in its vital role as a public supervisor.

The legal authority

To remain firmly within the rule of law, the role of the prosecutorial department is vital, not only constitutionally in terms of due process, but also in achieving a fair and focused investigation tailored to the production of admissible evidence. Sadly, judicial independence and, prosecutorial independence, have long been a debatable topic in China. Lessons can be learnt from China's Special Administrative Regions, Hong Kong. The Independent Commission Against Corruption (ICAC), established in 1974, has been helping Hong Kong to transform from a city plagued with syndicate corruption to one now upheld among the cleanest in the world.⁹ The ICAC is directly accountable to the Governor, now the Chief Executive of Hong Kong. Its absolute independence from the government was one of its greatest strengths when it was founded, and this continues to give it credibility. Regarding business operations, this body has set clear divisions between the business and political worlds, and maintained a clear standard in the way entrepreneurs are able to relate to government officials without soliciting unfair benefits or aiding their personal interests.

Anti-corruption bodies in China refer to the Anti-Corruption and Bribery Bureau (ACBB) under the People's Procuratorate and the ruling party's built-in supervisory

⁹ Independent Commission Against Corruption official website, Message from the Commissioner, available at: <http://www.icac.org.hk/en/c/msg/index.html>; also more discussions can be found at Shaomin Li (2004), 'Can China learn from Hong Kong's experience in fighting corruption?', *Global Economic Review*, Vol. 33, No. 1, pp. 1-9.

organ, the Commission for Discipline Inspection (CDI). However, as examined in Chapter 5, the dividing line between these two bodies has been rather indistinct, even though they were established with a common aim. Based on previous experience, while the People's Procuratorates, provided by law, have direct responsibility in investigating and prosecuting criminal cases of corruption and bribery, CDIs are, in practice, playing a leadership role in the detention and investigation of corrupt officials.¹⁰ The law needs to be clearer in terms of their respective functions and cooperative work. In addition, procedures regarding CDI's operation, in particular its secret internal disciplinary conduct '*shuanggui*', should be reported and updated regularly with the public, as rumours and criticisms have intensified in recent years concerning the human rights issue within the organisation.

It is provided in the Constitution that the People's Procuratorate has exclusive jurisdiction on prosecution, including the jurisdiction to investigate corruption and independent interference from any other administrative organ, civil organisation and individual.¹¹ In the practical world, however, this is almost impossible, mainly due to its dependent status under the administration of the government. The leaders and prosecutors of the People's Procuratorates were chosen and appointed by respective local governments and their financial budgets were distributed by relevant finance departments under local government control. To gain an independent status, at the very least, they should have the power to make decisions on appointing leaders and approve the financial budgets – this could be under the discretion of the relevant higher-level People's Procuratorates. Indeed, this has also been the case with China's specialised financial regulators, namely the CBRC, the CSRC and the CIRC, as discussed in Chapter 5.

¹⁰ See more detailed discussion in Chapter 5, section 'The internal relationship'.

¹¹ See Article 131 of the Constitution of the PRC; The Criminal Procedure Law and the Organic Law of the People's Procuratorate also have similar provisions.

The cadre's promotion system in China, in the author's view, is also prone to cadre and department dependency and as a result, breeds corruption. China is apparently using a rank-based system rather than a sector-based system – which means if you have reached a certain level in your department, you will be a potential candidate to gain promotion to other departments if there are vacancies. For example, the current President of the Supreme People's Court (SPC) Zhou Qiang, who spent over a decade working in the Communist Youth League, then moved to Hunan Province and was promoted to minister level, serving as Hunan Provincial Secretary before assuming his current role as President of the SPC.¹² Similarly, the current General Secretary of the CCDI, Wang Qishan, who studied history at University and began his career as a historian researcher at the China Academy of Social Science, moved to the financial sector, the China Rural Development Trust Investment Corporation, Bank of China, and then became the Governor of one of China's largest state-owned commercial banks, the People's Construction Bank of China before his current post at the CCDI. Wang's experience derives from the Guangdong Province, Hainan Province and Beijing City.¹³ Of course, extensive experience may be regarded as a bonus in the role of the candidate, and can also reduce or even eliminate, if relevant, any long-standing corrosive tendencies within the department. However, relevant experience and a deep understanding of the role, especially the leadership role, is also important, particularly in the legal sector. This mixed level-based promotion system also encourages cadres to nurture social connections and cultivate relationships with the leadership of other departments and influential leaders within the government for the sake of their own careers. This has resulted in the independence of legal authority being much more vulnerable and such a promotion system remains unshakable in the present realms of leadership.

Fighting corruption is highly demanding; it requires not only a sound legal education

¹² Resume of the President of the Supreme People's Court, Zhou Qiang, National People's Congress, available at: http://www.npc.gov.cn/npc/dbdhhy/12_1/2013-03/15/content_1785440.htm.

¹³ Resume of the General Secretary of Central Committee for Disciplinary Inspection, Wang Qishan, available at CCDI website: http://www.ccdi.gov.cn/xxgk/ldjg/wqs/201307/t20130717_44942.html.

but also experience and ability in problem solving, which can only be gained through years of legal practice. The People's Procuratorates should have overall control of the recruitment and promotion of their prosecutors, as well as widen their sight to not only recruit college law students (currently the main method – through entry examination), but also experienced legal practitioners such as private lawyers and company accountants. The People's Procuratorates should also increase the salary for those working at ACBBs, to inspire and attract individuals, in particular with China's current war against corruption, and perhaps negotiate a proceeds-sharing scheme with the central government on the assets recovered from a successful prosecution of a corruption case. Also, the Procuratorial department should devote increased man-power to deal with public reports, under the current trend of 'working with the public', and respond quickly; the ICAC in Hong Kong integrated a '48-hour response to the reporter' into their policy.

Education – unhealthy tendency

Education can be as important as prosecution in the sense of preventing future criminal activities. Indeed, education is viewed as the final step of the ICAC's three-pronged strategy on combating corruption, combined with detection and prevention. ICAC offers Corporate Ethics Programmes in the business sector along with a series of tailor-made preventive education services to the public sector, non-governmental organisations, youth and schools.¹⁴ The CCP has also realised the significance of education and in particular, educating its own members. Only a month after President Xi's succession, on 4th December 2012, he presided over a meeting at the Political Bureau of the Central Committee of the CCP and issued an 'eight-point code', with the aim of reducing the 'unhealthy tendency' within the party. The code was issued in a rather educational directive, but with disciplinary actions, and pertains to curbing bureaucratic practices and eradicating pomp and ceremony, to limit sumptuary

¹⁴ See more detail at ICAC website: <http://www.icac.org.hk/en/cpd/index.html>.

behaviour among officials. Each level of the government units was required to host regular educational seminars to ensure their member officials fully understood the significance of the code. In this educational move, thousands of party members were punished due to the violation of the code. It is ironic that due to this newly issued principle negating the waste of public funds, certain industries in China struggled to survive. For example, the demand for expensive wines for high-end restaurants dropped dramatically, and several luxury restaurants closed. Business owners told journalists that they have lost so many customers from the public sector due to this move against the party's unhealthy tendency.¹⁵

In today's world, with advanced technology, the means of education can be manifold. The traditional methods, by publishing tedious articles and books, are seen to be inefficient and time consuming. Society, in particular the younger generation, are used to gaining news and knowledge through television and the internet. The party has followed this wave and attracted rave reviews worldwide after they produced the eight-episode TV programme '*Yongyuan zai lushang*', with its English translated name 'Never ending for anti-corruption struggle'. The programme, produced and filmed by the Propaganda Department of the CCDI and the China Central Television, generally describes China's endless efforts in combating corruption after the new leadership came to power at the 18th National People's Congress in 2012. Following face-to-face interviews with dozens of minister-level corrupt officials who had been prosecuted and sentenced, the educational significance it brings, not only to party members, but every individual in society, is huge. Facing the camera, the convicted officials tearfully expressed their regrets for betraying the country, the party and the people. They form their political careers as symbolic lessons and describe in-depth, the first bribe they accepted, the major cases they were involved in and how they struggled over the years

¹⁵ Xi Wang (2013), 'Sida Hangye bei Fanfuquan Jizhong' (Four industries were punched by anti-corruption trend), 02.12.2013, *People's daily*, available at: <http://finance.people.com.cn/n/2013/1202/c1004-23709209.html>.

and eventually placed themselves in such a vulnerable position (in prison). They finally called upon the people to believe in the country and the CCP and warned party members to never touch upon any interests that do not and will never purport to them, and to always put public interest first!

The recently produced and first ever Chinese TV drama series on the subject matter of politics and anti-corruption, ‘*Renmin de mingyi*’ (it may also be described as Chinese ‘House of Cards’), has broken the long-standing audience rating since it premiered in March 2017. The story focused on the political battle between a province’s entire top echelon and its People’s Procuratorate, in particular, the Anti-Corruption and Bribery Bureau, ending up with the corrosive circle, that has existed for so long, being destroyed. Indeed, China should continue with such pace and education as an important component in the prevention of economic crime. Further community events are also proposed and the public can even be invited to the policy making process – making them active participants. More public lectures should be encouraged by the party and the judicial department, taking place in public spaces and universities; this can be particularly important in the education of code of ethics before university graduates commence on their careers.

International perspective

With the rapid development of globalisation, information technology and transportation, economic crime and corruption is becoming more complex and transnational. China, as the largest emerging market, is concerned about its international reputation more than ever before. We can see from Chapter 6, that innumerable initiatives have been undertaken by the government in recent years. Also, a number of intra-party rules have been enacted by the CCP – many have shifted the focus to the preventive measures on a much wider international perspective, given the fact that many corrupt officials are transferring their assets and fleeing overseas. A good example is the party’s crackdown on ‘*luoguan*’ (‘naked officials’) – a word describing Chinese bureaucrats whose family

members have emigrated while they are still holding public positions. The CCP issued ‘the Ordinance of the Work of Selecting and Appointing Cadres of the Party and Country’, in which it clearly stipulates ‘naked officials’ will not be considered for promotion¹⁶, as they are seen to potentially have high risks and their ability to escape overseas could make them more inclined to engage in corrupt activities.¹⁷ Fang Xuan, as one of the first examples, has taken early retirement from his position of deputy chief of the Guangzhou city party committee.¹⁸

It can be of great significance, as the United Nations Convention Against Corruption provided, to establish a direct and close relationship between financial intelligence units and anti-corruption authorities in the war against economic crime and corruption, in particular, in the inquiry for information, obtaining evidence, confiscating illicit property and the extradition of suspects. China has, in recent years, made remarkable progress in promoting international cooperation. Up to February 2017, China has liaised with 70 countries, with a total of 135 agreements or treaties on mutual legal assistance, asset recovery, extradition and combating terrorism, of which 48 are mutually signed extradition treaties.¹⁹ However, there is still much work to be done. Parties that have signed extradition treaties with China are mainly developing countries, while with criminals’ favourite destinations, such as the United States, Australia and Canada, conclusions have yet to be reached. Main obstacles include the stance towards the death penalty, the protection of human rights in the procedure of investigation and of course, resources. However, the successful extradition of the principle criminal in

¹⁶ ‘The ordinance of the work of selecting and appointing cadres of the party and country’, Chapter 5, Article 24(4), Promulgated on 15.01.2014, by Central Committee of the CCP.

¹⁷ Paul Carsten (2014), ‘China corruption fight turns on ‘naked officials’ with family overseas’, *Reuters*, 22.05.2014, available at: <http://www.reuters.com/article/us-china-corruption-idUSBREA4L0HW20140522>.

¹⁸ Demetri Sevastopulo (2014), ‘China cracks down on ‘naked officials’’, *Financial Times*, 08.06.2014, available at: <http://www.ft.com/cms/s/0/9d1f3a88-ef01-11e3-acad-00144feabdc0.html#axzz37jmdiWKd>.

¹⁹ Ministry of Foreign Affairs, ‘Agreements and treaties on mutual legal assistance and extradition’, full list available at: http://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfzhzy_674917/t1215630.shtm.

the Yuanhua smuggling case, Lai Changxing, who fled to Canada for over 10 years, is regarded as an inspiring achievement. Undeniably, negotiations and agreements on a case by case basis can produce valuable results and should certainly be further encouraged.

In further promoting a cross-border law enforcement network to strengthen transnational anti-corruption in the region of the Asia-Pacific, China undertook an active role and issued the 'Beijing Declaration on Fighting Corruption' at the Asia-Pacific Economic Cooperation (APEC) Ministerial Meeting at the end of 2014 in Beijing. In 'Declaration', 21 APEC members pledge to eliminate corruption through extradition and judicial assistance and adapt more flexible measures to recover the proceeds of corruption within the law of APEC economies. It is true that the efforts of China's new leadership, both domestically and internationally, has brought raucous applause. China has expressed its willingness in various situations, as provided in Chapter 6, to open its channel in reaching further cooperative agreements on matters of economic crime.

Today, the continuous and never-ending struggle against corruption, has been described as another short-lived campaign by commentators. The anti-corruption warrior however, Wang Qishan, a member of CCP Political Bureau Standing Committee and the General Secretary of the CCDI, has emphasised that time limits are not inherent within the plan. The anti-corruption drive has to be internalised as part of the culture and moral code of officials across the country. Of course, it may take some time to restore public confidence, but this is certainly something worthy of the wait!

It has been seen that scholars have examined corruption in its various forms, in all regions of the world, and produced a voluminous body of work. Researchers are also continuing to debate the prominence of ethical behaviour, to create a professional public workforce, and consider whether the carefully crafted laws and regulations, as the

backbone of the compliance system, can effectively foresee deviant behaviour in a continuing circle of laws and regulations, in the search for a competent administrative state. Nevertheless, the ambition, in the author's view, may extend to the establishment of a system of ethical management which blends both reinforcement of integrity and ethical behaviour in governmental departments and compliance systems, that are responsible for maintaining the control of the pervasiveness of greed. Critical to such success, however, is leadership – not only the leadership of the People's Republic of China, but a universal recognition of the significance of moral values among leaders of the world.

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