A Comparative Study of the Legal Evolution and Cognate Offenses of “Picking Quarrels and Provoking Trouble”

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Abstract: In recent years, the discussion on “picking quarrels and provoking trouble” has become increasingly close in Chinese society and attracted the attention of legal scholars as well as deputies to the National People's Congress (NPC). Indeed, since 1997, when this offense was first criminalized in mainland China, it has been regulated and refined by the Amendment (VIII) to the Criminal Law of the People's Republic of China and also by several related judicial interpretations. However, its regulation is still ambiguous and open-ended, with its boundaries easily blurring with other crimes and leading the academia and social communities to believe that it has evolved into a new "pocket crime", frequently employed by a judiciary that lacks oversight, suppresses dissent and restricts freedom of expression. Therefore, it is crucial to study, from both legal and historical perspectives, analogous social control laws existing in mainland China across different periods and legal frameworks in order to reveal their social impact and pave the way for the establishment of the rule of law. In this direction, this paper adopts an empirical and comparative approach to the analysis of the legal evolution of “picking quarrels and provoking trouble”, starting from its legislative origins and background, while, on the other hand, focusing on the most controversial issues concerning this crime and the discussion on its survival or abolition.

Keywords: Legal History; Comparative Law; Public Order Offenses; Chinese Law; Socialist Legal System.

1. *Introduction*

The legal control of public order and morality is not unique to the modern socialist legal system but it has been a significant instrument for the enforcement of moral norms throughout Chinese history. Accordingly, this paper explores the various offenses against public and social order in the history of the Chinese legal framework and their chronological evolution, mainly focusing on the crime of "Doing What Ought Not to Be Done".

2. *The History of Social Management Laws: the Feudalist-Imperialist Period and the Genesis of the Concept*

The offense known as "Doing What Ought Not to Be Done (不应得为)" has existed in different periods of time, although it has also been referred to as "不应为" (bù yìng wéi) and "不当得为" (bù dāng dé wéi), in a form that slightly changes the order of the words but keeps the meaning untouched. In any case, if literally translated and understood as "不应,不当", the expression means "should not" or "improper", while "为" refers to a thing or an action[1].

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In the General Code of the Tang Dynasty (A.D. 618-907) where the crime was first prescribed, its legal interpretation is as follows: "It is a situation that is not in the law or command but is not morally justified"[2]. Moreover, in the Ming Dynasty (1368-1644), the Code of Ming's judicial interpretation explained that "What is not ethical and clean is what should not be done, and if you do it, it is a crime"[3].

In the mainstream view of scholars of Chinese legal history, instead, the idea that doing something improper should be punished comes from the Book of Documents, specifically recorded in the version that Dazhuan quoted in volume 648 of the Taiping Yulan[4], an encyclopedic book of the Song dynasty. It quotes the contents of a law dating back to the Zhou dynasty, which is generally regarded to be more than a thousand years old: "those who do things that should not be done, are not moral, and who recite inauspicious words should be punished with the penalty of ink on face"[5]. Additionally, in the subsequent Han dynasty the following cases and reflections are recorded one after another in the historical "Book of Han", finished in 111 C.E.

Immoral people like robbers and murderers are the cause

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[1] In particular, in this offense, "为" refers to something that violates Confucian ideology and morality.

[2] Tang Code, vol. 27, at 450.

[3] Code of Ming, vol. 26, at 48.

[4] See Hu Meng et al., vol. 648, *Taiping Yulan,* at 983, 1st ed.

[5] See Shude Cheng, *Legal examination of the nine dynasties,* at 105, China Book Council, 1978. It is necessary to outline that this may not be an accurate historical source for the period and that it may have been a later source or the result of an error. However, the canonical texts that once recorded the above passage were lost due to war and political reasons.

> of the people's suffering. They should not be allowed to be redeemed by money to offset their crimes; hiding and conniving at criminals should be crimes that are not in accordance with the law, and there are those who believe that such provisions should be dispensed with if the punishment is too severe, but if it is decreed today that such crimes can be redeemed by money, and such facilities are provided to the offenders, how should they be taught to behave in a disorderly manner?[6]
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> The Lamented King of Changyi had ten singers and dancers headed by Zhang Xiu, they were not his concubines nor did they bear him children, as ordinary citizens nor were they officials to whom they belonged, they should have gone home after the death of the Lamented King, Taifu Bao took the liberty of keeping them in the name of the Lamented King, which is something that should not be done[7].
>
> A man named Tian Yannian submitted a petition saying "Merchants hoard ritual objects for use in tombs and sell them for exorbitant profits when people are in dire need, this is not what merchants should do as courtiers and request the prefect to confiscate these items[8].

The three abovementioned passages, written in different sections of the Book, record the same concept, namely the principle of refraining from improper or inappropriate actions. However, the cases at that time did not show a systematized measure of punishment and treatment, suggesting that the consequences were not as clearly defined as the ones outlined in the Han dynasty's Law (Code)[9]. It is more likely that this was due to the Confucian doctrine, which was established as the political guiding principle of the Han dynasty: it may have been quoted as case law or integrated into the

[6] Ban Gu; Ban Zhao, vol. 78, *Book of Han dynasty: Xiao Wangzhi*.
[7] Ban Gu; Ban Zhao, vol. 63, *Book of Han dynasty: Tahe five sons of Emperor Wu*.
[8] Ban Gu; Ban Zhao, vol. 90, *Book of Han dynasty: Cruel officials.*
[9] See Tang Code (cited in note 2).

Confucian classical Book of Documents[10].

2.1.*"Doing What Ought Not to Be Done" Legislation in the Tang Dynasty - Maturity*

The crime of "Doing What Ought Not to Be Done" was first formally included in the Miscellaneous Laws of the Tang Dynasty as a provision in the Law. The article states as follows:

> There are numerous things that should not be done and for those who do them, forty strokes with a small bamboo stick (if the crime is not included in the law but is considered something that should not be done); those with serious circumstances, eighty strokes with a large bamboo board.
>
> Judicial interpretation: the number of minor offenses is so great that the law cannot provide for them all, so they are interpreted by analogy with other similar laws. If the offense cannot be found in any similar provision in the law at all, the penalty will have to be imposed by the use of the word "Doing What Ought Not to Be Done", and discretion will be exercised[11].

From the above articles and judicial interpretations it could be understood that in the Tang law, in order to apply the offense of "Doing What Ought Not to Be Done" to punish a certain act, the following points had to be satisfied: 1) the case must involve a minor offense; 2) there is no provision in the relevant legal documents for such an act to be punishable, so that a conviction cannot be made on

[10] The Book of Documents is a compilation of records of conversations between kings and courtiers from ancient China. In collating the laws of the Zhou dynasty, it cites the section on punishment from the Rites of Zhou - criminal law part, a historical book describing the politics of the Zhou dynasty.

[11] Tang Code (cited in note 2).

the basis of the offense in the law; 3) no similar provision can be found in the relevant legal documents, so that a judgment of conviction cannot be made on the basis of the relevant offense in the analogous statute; 4) there is also no provision in the relevant documents relating to such an act, but the act does violate an ethical obligation or the basic order of life.

In the extant historical materials, there are two case documents on the article of the Tang law on "Doing What Ought Not to Be Done". The first one is the case of Yang Si, the director of Shanglin Garden, who committed the crime of expressing his opinion when "he should not have done so" from Longjin *fengsui* jurisprudence.

> Yang Si, who was in charge of the Shanglin garden, asked for permission to build a new palace in the garden for the monarch's recreation…The jurisprudence held that the current garden architecture was frugal but not unsuitable, that there was no need to start work on a new palace, that Yang Si was a flatterer, and that his proposal would tarnish the image of the monarch since the faint-hearted rulers of history, only knew how to spend resources on self-indulgence. He asked for advice on matters that he should not have asked for advice on, just like doing what the law says should not be done. He should have been demoted as a warning to the Chaotang (the place where the officials meet, here refers to all officials)[12].

This is a very typical case of what should not be done. Yang Si, as the official in charge, did not have the right to directly order the construction of the palace, but only to ask for instructions on whether it should be done. His action was not a crime under the law, but it was considered to be an act that would have tarnished the perfect image of the monarch. The king was the subject of a petition and he

[12] Zhang Zhuo, vol. 2, *Long Jin feng shui jurisprudence: Director of the garden related second case.*

should have considered the consequences of the action. Therefore, in this case it is possible to understand that he was punished merely because of moral considerations.

The other example is the case of Guo Wei's wanton flogging of a soldier. From a legal interpretation of the Tang Code:

> Guo Wei, as an officer in the garrison, had behaved in a loose manner and whipped the soldiers, which was a very bad incident in terms of reason, and should be severely punished. However, as the law does not provide for officer discipline and assault on a soldier, the sentence was imposed using the crime of Doing What Ought Not to Be Done. The sentence should have been heavier, but as he had confessed his guilt, he was given a lighter sentence of 40 strokes with a small bamboo stick[13].

From the above two cases, it is inevitable to see that the norm of "Doing What Ought Not to Be Done" was already mature in the Tang Dynasty, while strictly limiting its field of application and achieving a relatively good balance. It is also clear from Guo Wei's case that the change in attitude towards sentencing at trial was already extremely similar to the modern view of leniency in law.

2.2. *Ming/Qing Doing What Ought Not to Be Done - Development*

The Ming and Qing laws actually inherited the "Doing What Ought Not to Be Done" law from the Tang Dynasty, and there were almost no fundamental differences and changes in the sentencing and provisions. Indeed, the "Doing What Ought Not to Be Done" law in the Code of Ming stipulates the following: "Anyone who does

[13] See Junwen Liu, vol. 2, *Legal interpretation of the Tang Code*, at 311, China Book Council, 1996.

something that should not be done, small bamboo board beaten forty times, not in other legal provisions, the circumstances are serious, with a large bamboo board beaten eighty times"[14].

In the law of the Qing Code, which includes miscellaneous crimes, the "Doing What Ought Not to Be Done" provisions are as follows: "anyone who does something that should not be done will be beaten with forty strokes of the small bamboo board, and eighty strokes of the large bamboo board for serious cases. If the law does not specify, according to the seriousness of the crime case sentencing"[15].

Due to the expansion of the Qing Dynasty, a multifaceted empire, including Mongolia, was established where the frontier areas were once again united with the mainland under a single country[16]. With a large number of Chinese immigrants, the original traditional legislation and customary law used to regulate the Mongolian local summary of the Mongolian Law; its development of the Frontier Management Sector Regulations were no longer effective to regulate the social transformation resulting from these contradictions and conflicts. For this reason, at that time, the "Doing What Ought Not to Be Done" clause in the Qing law was used extensively. This was perhaps the first time in Chinese history that the law was widely used to address and regulate social issues. A clear example of this new trend may be observed in the gambling case of Ordos's Badari in 1735, the first year of the Qianlong era. This is the confession of Samubalasi:

> "I am a subordinate of Alabtanzo Niru, and my sister Nomimusu is the wife of Ordos's Badari. In the third month of the thirteenth year of the Yongzheng's reign, because the order that different Jasagh people are not allow mixed together, Badali let my sister Nomimusu stay at my home, and he returned to the

[14] Code of Ming, (cited in note 3) at 11.

[15] Qing Code, Criminal Laws, *Miscellaneous Crimes.*

[16] See Johanna Waley-Cohen, *The New Qing History*, at 193-206, Radical History Review, Issue 88, 2004.

> hometown, wanting to bring the carriage and animals, then taking his wife with him. In the first month of this year, Badari again said that he did not find the carriage and animals, came to my house on foot and stayed there for a while. It's true that he lives in my house, but I have no idea where he gambles."

The case ruled that: "Samubalasi knew that for the sake of not allowing him to let other Jasagh people stay, repeatedly ordered to prohibit, and against the ban to stay Ordos's Badari, is a fault." Therefore, Samubalasi was flogged 40 lashes according to the law of Doing What Ought Not to Be Done[17].

It has to be noted that the background of this case was the intention to rule and divide the Mongolian land, with a strong demarcation of the pastoral boundaries of each ministry and a division of the population, which was strictly prohibited from communicating with each other. Such conditions extended to the Mongolian tribes, such as those in the South, North, and West of the territory, which were to remain isolated from one another. Furthermore, the people from the frontier were not allowed to leave the country. At the same time, the prohibition stipulated that "when a People from the frontier left the country, he should present himself at the banner's Administrative divisions of Mongolia office. In case of non-compliance, the negligent banner-keeper, deputy banner-keeper, seneschal, jawans, and chiefs would be punished together"[18].

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[17] See Wanjun Zhang, vol. 36, *"The incompatibility of different genera": the application of the law of "not to be" in the mixed areas of Mongol and Han in the Qing Dynasty*, at 82, Yinshan Journal, 2023.

[18] Frontier Management Sector Regulations, vol. 34, *Border protection: oversight of Mongols outbound* available at https://upload.wikimedia.org/wikipedia/commons/3/35/SSID-13367353_%E6%AC%BD%E5%AE%9A%E7%90%86%E8%97%A9%E9%83%A8%E5%89%87%E4%BE%8B_%E7%AC%AC13%E5%86%8A.pdf (last visited May 2, 2024).

In the aforementioned case, the defendant Samubarasi did not participate in gambling and did not violate the prohibition of crossing the border. However, by hosting people from another Jasagh without authorization, he actually contributed to the crime of crossing the border while also violating the new ban on intermarriage. Therefore, since there was no specific standard for the punishment, he was punished with the law of "Doing What Ought Not to Be Done".

3. *"Nullum Crimen Sine Lege" of the Western Legal Tradition*

In the Nineteenth century, all Asian countries were in the stage of awakening by Western civilization's business or war machine. In contrast to the Qing Dynasty, the Japanese government abolished the *Shogunate*, re-establishing the rule of the Emperor, and began the so-called Meiji Restoration, a process of major social change which promoted a comprehensive study of Western institutions and technology. Japan, as a member of the old Chinese legal system, was also influenced by the Tang Dynasty's concept of "Doing What Ought Not to Be Done", and Japanese law featured a similar clause with the exact same name[19]. This article first appeared in the Yanglao Code in 757 A.D.

The Code of Shiritsu Kouryou states that: "Anyone who does something that is not in accordance with the law shall be beaten thirty times with a small bamboo board and seventy times with a large bamboo board if the circumstances are serious"[20]**.** Moreover, the Code of Kaiteiritsurei refers to the "Doing What Ought Not to Be Done"

[19] See National Diet Library, *Chronology of Japanese History from the End of the Shogunate to the Meiji Period,* available at: https://www.kodomo.go.jp/yareki/chronology/index.html (last visited May 2, 2024). *Also,* Song Chengyou, *A New History of Modern Japan*, at. 74-124, Peking University Press, 2006.

[20] Prepared by Cabinet Records Administration (1980). *Also see* H. Shobo, vol. 54, *The Complete Classification of Laws and Regulations*, at 111, Criminal Law Division, 2008.

rule in the following manner:

> 289. Whenever two or more people break a law that should not be broken, the leader shall be sentenced to thirty days of forced labor and the accomplice to twenty days; if the leader is sentenced to seventy days of forced labor and the accomplice to sixty days. If there is a difference in the severity of the offense, the penalty is determined by the severity of the offense, not by whether the offender is a leader or an accessory.
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> 290 Anyone who destroys a statue of Buddha and commits that offense should not be treated with severity.
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> 291 Anyone who commits the crime of obstructing the whole because of his words shall not be dealt with severely[21].

In Japan's early reforms, compared with the completely classical version, the Code of Shinritsukouryou's "Doing What Ought Not to Be Done" "distinguishes criminals from masters and subordinates, and emphasizes multiple "situations that should not be taken seriously", further weakening the offense. In 1882, the Penal Code was promulgated in the fifteenth year of the Meiji Restoration and the principle of *nullum crimen sine lege* was established in Japanese law. At that point, the "Doing What Ought Not to Be Done" rule had completely disappeared[22].

At the same time, the Qing Dynasty had lost many wars, especially after the defeat of the Sino-Japanese War of 1894. The Westernization Group who "learned from the foreigners in order to gain command of them" failed by learning Western technology. The reformists who believed that the government needed comprehensive

[21] See *Ibid.*

[22] See Xinyu Chen, *Inheritance and Change -Centering on the Changes of "No Justification" and "Should Not Be" under the Japanese Transitional Penal Law*, at 116, Tsinghua Law, 2008.

reforms gradually began to emerge and led the Hundred Days Reform[23]. Although it was repressed by the government, due to the social environment and natural disasters, its supporters were still permitted to participate in governmental reforms, despite facing successive setbacks such as the coup d'état, the Boxer Rebellion and the Eight-Power Allied Forces. It was during this period that the new criminal law of Qing emerged, influenced by Japanese criminal law and legal thinking and did not continue the structure of the traditional "Qing Law". "Doing What Ought Not to Be Done" was completely abandoned in this Code because of the introduction of "statutory crime and punishment", a Western concept absorbed by Japanese law, despite it not being officially applied until the collapse of the Qing Dynasty consequent to a wave of revolutions. The Republic of China, which inherited the name of China's ruling power in the ensuing chaos, did not go to the trouble of revising the law, but chose to essentially inherit it: the main body of the Daqing Criminal Law and the concept of Nullum crimen sine lege[24].

4. *The Socialist Period*

It is convenient to start this section with a quote from Professor Haruo Nishihara: "I am not bothered by the fact that socialist criminal jurisprudence unexpectedly determines the scope of crime 'from above', even though socialism was originally supposed to be based on 'the people'"[25].

[23] The "Hundred Days's Reform" was a 103-day failed national, cultural and political reform movement that occurred during the late Qing Dynasty.

[24] See Guofu Zhang, *On the Revision of the Provisional New Criminal Law*, at 123, Journal of Peking University, Philosophy and Social Science Edition, 1985.

[25] See Xinglinag Chen, Haruo Nishihara, *New Developments in Chinese Criminal Law*. Preface. SEIBUNDO Publishing, 2020. Professor Haruo Nishihara, a leading figure in Japanese and Asian criminal law, has maintained academic exchanges with China. In his opinion, this sentence perfectly synthetizes the unique feature of socialist

4.1. *The Early Years of the Founding of the State: Social Order Offenses Based on Counter-Revolution*

Prior to the establishment of New China by the Communist Party, a comprehensive study of Soviet criminal law began during Soviet China, leading to a legal transplantation**.** In 1934, the Central Revolutionary Bases implemented the Regulations of the Chinese Soviet Republic on the Punishment of Counter-Revolution. This law was supposed to be a parody of Article 58 contained in the Soviet Union's 1926 Criminal Code, which defined the crime of counter-revolution as "all those who seek to overthrow or destroy the Soviet government and the rights gained by the democratic revolution of the workers and peasants, and who intend to maintain or restore the rule of the gentry and landed bourgeoisie, by whatever means, are regarded as counter-revolutionary acts and shall be severely punished"[26]**.** This intention was incredibly vague and entirely based on subjective assessments. Furthermore, during the Soviet purges, according to information verified by the State Security Committee on 13 March 1990, 3.7 million people were sentenced by judicial and non-judicial authorities for this provision from the 1930s to 1953, many of whom (around 790,000) were shot[27]**.**

The creation of such a vague provision was closely linked to the state of criminal law practice in the Soviet Union at the time. The 1924 Basic Principles of Soviet Criminal Law provided in its Section 3 that

jurisprudence.

[26] Central Executive Committee, *Regulations of the Chinese Soviet Republic on Punishing Counter-Revolution*, order no. 6 of the Central Committee, 1934.

[27] See Letter from the USSR Prosecutor General R.A. Rudenko, USSR Ministry of Internal Affairs S.N. Kruglov and USSR Ministry of Justice K.P. Gorshenin to the 1st Secretary of the CPSU Central Committee N.S. Khrushchev on the revision of cases against those convicted of counter-revolutionary crimes, document no. 44, 1954.

> In the case of socially dangerous acts not directly provided for by criminal law, the basis and scope of liability and the methods of social defense shall be determined by the courts in accordance with the criminal code and in accordance with the minor nature of the crime. The court shall decide on the basis and scope of liability and the methods of social defense in the case of a socially dangerous act which is not directly provided for by criminal law[28].

The 1926 Soviet Criminal Code, along with the subsequent Criminal Codes of the Soviet Union's constituent republics enacted two years later, established the principle of analogy based on this provision[29]. As an imitation, the Regulations of the Chinese Soviet Republic on the Punishment of Counter-Revolution also established this system, as did the mainstream thinking at the time: any counter-revolutionary crime not covered by these regulations could be punished in accordance with the similar provisions of these regulations (Article 38)[30]. The reason for the creation of such analogy was to allow for greater flexibility in the early years of socialism in order to accommodate the different types of crimes that occurred in society, as demonstrated by the case of the application of "shall not be" in the Mongolian frontier regions mentioned above. The People's Republic of China faced the same problems at the time of its birth, since the law was incomplete, leading to a chaotic social order exacerbated by the ongoing civil war. Thus, in early legislation, the new Chinese criminal lawyers generally favored the continuation of

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[28] Limin Wang, *Chinese Law and Society: An examination of the transplantation of the Soviet model in new China's criminal legislation*, *Peking University Press,* at 445, 2006. Professor Haruo Nishihara, a leading figure in Japanese and Asian criminal law, has maintained academic exchanges with China. In his opinion, this sentence perfectly synthetizes the unique feature of socialist jurisprudence.

[29] See Xiuqing Li, *Examination of the transplantation of the Soviet model of criminal legislation in New China,* at 124-25, 2002.

[30] See Limin Wang (cited in note 25).

the analogical system and the formal rejection of statutory criminalism[31].

Similarly, the Regulations of the People's Republic of China on the Punishment of Counter-Revolution, issued in 1951 after the founding of the state, also contained a continuation of the akin system found in the counter-revolutionary regulations of the old Soviet Republic. Article 16[32] provided that other criminals with counter-revolutionary aims, not covered by these regulations, may be punished in an equivalent manner to similar crimes within the regulations themselves[33].

By the 1960s, the socialist transformation of the "private ownership of the means of production" had largely been completed and Communist China had consolidated power. However, the chaos brought about by the Cultural Revolution disrupted normal economic life and the legal order while the Red Guards' supreme instructions were "Chairman Mao's quotations" rather than the state law. After the break from the revolutionary tide, the crime of counter-revolution faded into the crime of subversion of State power, and the crime of hooliganism, created by the Soviet law, became the new main law of social order in order to reorganize the broken public order.

All of the above-mentioned historical events led in 1979 to China finally enacting its first Criminal Law. Regarding social stability offenses, article 160 defines the crime of hooliganism as a series of bad acts that disrupt public order, including gathering a

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[31] See Jin Biao, *Intermediate People's Court of Wuxi City, Jiangsu Province, Re-thinking the Analogical Reasoning System of China's Criminal Law*, at 22, Law Application, Issue no. 2, 1996.

[32] GuangDong Government, available at https://www.gd.gov.cn/zwgk/gongbao/1951/2/content/post_3352420.html (last visited May 2, 2024).

[33] See Xiuqing Li (cited in note 26).

crowd to fight, provoking trouble, insulting women and other similar activities. Under this article, particular actions are punishable by a term of imprisonment of up to seven years, detention or control, while for the leading members of a hooligan group, the penalty can be up to a term of imprisonment of more than seven years, although the Standing Committee of the Chinese People's Congress has also formulated judicial interpretations that raise the penalty for hooliganism to the death penalty[34]**.** In particular, the application of this crime reached a peak in the last century during the severe crackdown on serious criminal activities, when some purely moral and ethical issues were elevated to legal issues and sentenced as hooligans.

In 1996, for example, a man named Khogjild was taking a break at the factory he worked at when he heard a woman's cry for help coming from nearby. He and his co-worker, Yan Feng, went to check and found a woman who has been raped and killed in a nearby women's toilet. The two then went to a nearby police booth to report the incident. However, because of his reporting behavior and minority status, Khogjild was quickly identified by the police as the murderer. After a first instance trial at the Hohhot Intermediate Court, Khogjild was found guilty of intentional homicide and hooliganism, sentenced to death and deprived of his political rights for life. On 5 June, the Inner Mongolia High Court rejected Khogjild's appeal and upheld the original sentence. In the end, Khogjild was executed on 10 June, despite a serious lack of evidence[35]**.**

In addition, in a Xi'an case that occurred in 1983, Ma Yanqin was a 42-year-old retired and divorced woman with two daughters.

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[34] Supreme People's Court (SPC) / Supreme People's Procuratorate *Answers of the Supreme People's Court/Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Law in the Current Handling of Hooliganism Cases*, 1984.

[35] See *State compensation of more than 2.05 million yuan in the "Huge case", including 1 million yuan for moral damages Pengpai,* December 21, 2020, available at https://m.thepaper.cn/kuaibao_detail.jsp?contid=1290304&from=kuaibao (last visited May 2, 2024).

Ma Yanqin was fond of social events and often held private dances at her home. However, the police arrested her in September 1983 and charged her with a criminal gang of hundreds of hooligans involved in a house party at her home. The court ruled that she had organised numerous hooligan dances, lured young men and women into hooliganism, engaged in illicit sexual relations with dozens of people and allegedly threatened and lured her own two daughters for the hooligans to play with, among other charges. Ma Yanqin was sentenced to death after an unsuccessful request of appeal. In 1985 she was escorted to the Xi'an City Stadium for a public trial meeting and was then taken to the northern suburbs penal colony where she was executed by firing squad[36].

In accordance with the scope of this research, the above two cases show that the crime of hooliganism was used for extremely abusive and pervasive purposes, which led to many tragic and wrongful cases. At the same time, we can still see shades of the "Doing What Ought Not to Be Done" in the crimes of counter-revolution and hooliganism, even though the moral standards have changed, with the new socialist order and morality partially replacing the old Confucian-dominated moral code.

5. *Post-Reform Challenges and Opening Up: a Closer Look*

On 14 March 1997, when the National People's Congress amended the Criminal Law of the People's Republic of China, the offense of hooliganism was abolished and some of its specifications were separated and considered independently as "forcible indecent assault and insult on women", "indecent assault on children" and

[36] See Chinanews, *Details of the rule of law /why the crime of hooliganism is eliminated but not dead*, August 21, 2018, available at https://www.thepaper.cn/newsDetail_forward_2366861 (last visited May 2, 2024).

"public disorder". Finally, the crime of picking quarrels and provoking trouble was established in Article 293 of the Criminal Law in the Provisions of the Supreme People's Court on the Implementation of the Criminal Law of the People's Republic of China for the Determination of Crimes, adopted by the Trial Committee of the Supreme People's Court on December 9, 1997[37]. Nevertheless, the crime is equally vague, compared to other ones diverging from the crime of hooliganism. Thus, such a constatation leads to its recognition as a continuation of the social control crime of hooliganism.

5.1. *"Nullum Crimen Sine Lege"*

The offense of "picking quarrels and provoking trouble" differs from the historical "Doing What Ought Not to Be Done" in the way that it only regulates offenses and moral issues that are not provided by the law. However, in contrast to other offenses in the Criminal Code, which includes four different aspects of criminal behavior, the terminology is obscure and difficult to interpret and there is no standard measure of the seriousness of the circumstances. It goes without saying that the lack of clearly defined criteria makes the application of such measures controversial. Moreover, divergences between jurisdictions in the interpretation of "picking quarrels and provoking trouble" have led to inconsistent judicial decisions and weakened legal certainty and predictability, since citizens should be able to first understand its meaning in order to prevent themselves from breaking the law. Moreover, the current judicial interpretation places:

[37] Procuratorate Daily, *The decomposition of "pocket crimes" reflects three major legislative advances*, September 9, 2008, available at https://web.archive.org/web/20080513212217/http://news.xinhuanet.com/legal/2008-05/09/content_8136391.ht (last visited May 2, 2024).

> Those who use information networks to commit crimes of abusing or intimidating others in bad circumstances and disrupting social order, as well as those who fabricate false information, or spread it on information networks knowing that it is fabricated and false or organize or instruct people to spread it on information networks and cause serious disorder by raising a ruckus, are guilty of picking quarrels and provoking trouble shall be convicted and punished[38].

Judicial interpretations of the Supreme People's Court and guiding cases in recent years further broaden the scope of the offense of "picking quarrels and provoking trouble", departing from the principle of *nullum crimen sine lege*.

5.1.1. *The Equivalence of Crime and Punishment*

The basic penalty for the offense of "picking quarrels and provoking trouble" is imprisonment for a term not exceeding five years, detention or control, and in case of aggravating circumstances, imprisonment for a term which is not less than five years, but not exceeding ten years[39]. The upper limit of this penalty is extremely high and because of the difficulty of determining the aggravating circumstances, sometimes it leads to heavier sentences for minor

[38] See Supreme People's Court Supreme People's Procuratorate, *Interpretation on Several Issues Concerning the Application of Law to the Handling of Criminal Cases Involving the Use of Information Networks to Commit Defamation and Other Criminal Cases*, Legal Interpretation, no. 21, 2013.

[39] See Mingkai Zhang, *Judicial determination of the crime of provoking trouble*, People's Court Newspaper, June 23, 2022, available at https://www.chinacourt.org/article/detail/2022/06/id/6758111.shtml (last visited May 2, 2024).

offenses and lighter sentences for major ones. Unlike the historical Doing What Ought Not to Be Done, as stated earlier, it is unlikely that it will be used in other situations that already have specific legal provisions in place.

The case known as "Zhaoqing graffiti incident" is a typical instance in which a young man, Ding Man, was arrested for painting graffiti on the walls of a street building. Initially, the criteria for determining the offense of "intentional destruction of property stipulated that the economic loss needed to be either of RMB 5,000 or to be considered as a crime. In this case, the prosecutor's office found that Ding Man's graffiti had caused a total of RMB 5,638 in damage to property. However, the defense lawyer pointed out that the price determination issued by the procuratorial authorities was unreasonable, with several of the price determinations differing significantly from the actual loss. As a result, the lawyer suggested that the actual damage did not reach RMB 5,000 and, therefore, the charge of intentional destruction of property was not established. However, the prosecution quickly changed the charge and made it one of "picking quarrels and provoking trouble".

In comparison, the offense of intentional destruction of property is less serious than the one of "picking quarrels and provoking trouble". In fact, according to the criteria for conviction of provocation and nuisance, it is only necessary to cause damage of more than RMB 2,000 to be held criminally liable. On the other hand, Article 275 of the Criminal Law regarding the crime of intentional destruction of property links the imprisonment and its duration to the nature of the damage and eventually to other serious circumstances. Depending on that, the author could be sentenced to imprisonment for up to three years in case of a "large" damage and between three and seven years in case of a "huge" one. Undoubtedly, this legislative approach leads to a result that is often difficult to understand: acts that cause higher damage are considered misdemeanors while the ones that cause lower damage are considered felonies. This is a clear

violation of the principle of equivalence between crime and punishment[40].

"Doing What Ought Not to Be Done" derives from the basic Confucian idea of being careful with punishment. In the past, the basic punishment was a thin or thick bamboo strip. This idea should be reclaimed: for minor offenses, the emphasis should lean towards guidance and correction rather than applying the same punishment used to prosecute immoral, unreasonable and socially unjustifiable behavior.

5.1.2. *The Risk of Abuse*

On January 27, 2022, after learning online that a memorial service for compatriots who died in Xinjiang would be held that night at the Liangma River in Chaoyang District, Beijing, Li Yuanjing and some friends went together to the Liangma River Bridge to participate in the memorial service. However, two days later, they were taken away and summoned by police from the local police station, including more than a dozen young people. Surprisingly, they were released a day later without charge by the police as they had not committed any misconduct during the mourning event. On December 18, 2022, Li Yuanjing was again criminally detained by the Beijing Chaoyang District police on suspicion of "gathering a crowd to disturb the social order". On January 20, 2023, she was formally arrested by the Beijing Chaoyang District Procuratorate on suspicion of "picking quarrels and provoking trouble" and detained at the Chaoyang District Detention Centre in Beijing[41].

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[40] See Pengpai News, *A teenager in Zhaoqing, Guangdong is charged with provoking trouble over street graffiti, and his father runs to apologize and gets an understanding*, October 12, 2018, available at https://www.thepaper.cn/newsDetail_forward_2725056 (last visited May 2, 2024).

[41] See Iris Zhao, *University of New South Wales Chinese student Yuanjing Li arrested for*

Another interesting example, on December 28, 2020, is a case of conviction for speech that was heard in the Pudong New Area Court in Shanghai. It involved the defendant Zhang Zhan's "provocation" case. The court sentenced Zhang Zhan to four years in prison for "picking quarrels and provoking trouble" and her detention is set to last until May 14, 2024, despite insufficient evidence and insufficient presentation of materials[42].

These cases reveal the abuse of the criminal offense of "picking quarrels and provoking trouble. The judiciary often uses it as a tool to suppress dissent and restrict freedom of expression by characterizing mourning events as nuisance acts, thereby unjustly punishing the participants. Such abuse not only infringes on the legitimate rights and interests of individuals but also undermines social justice. "Picking quarrels and provoking trouble", as a social order touting offense, should be used to combat disruptions of public order in common places and should not be abused as a tool to suppress citizens' legitimate actions and freedom of thought[43].

6. *Conclusion*

"Picking quarrels and provoking trouble" played a significant role in a particular historical period when the law was inadequate, as in the case of its historical predecessor Doing What Ought Not to Be Done, which was a crime in the Mongolian frontier regions of the Qing dynasty, used to address several crimes not regulated by clear

participating in anti-zeroing protests after returning to China, 7 February 2023, available at https://www.abc.net.au/chinese/2023-02-08/101936884 (last visited May 2, 2024).

[42] See Radio France Internationale, *State's fear comes from distrust of people, says Zhang Zhan in court,* 30 December 2020, available at 张展在法庭上说：国家的恐惧来自于对人民的不信任 (rfi.fr) (last visited May 2, 2024).

[43] See Zhao Hong, *Administrative Punishment for Provocative Behavior: How to Prevent the General Moralization of Law*, at 81-82, Society Ruled by Law, Issue no. 44, 2023.

laws and employed to maximize the punitive function of criminal law. In particular, it made up for the fact that less serious crimes of wounding and violence could not be punished by the crime of wounding. However, this is not a sufficient reason for the continued existence of such provisions, whose vagueness conflicts so much with the principle of statutory penalties that are inevitably abused in judicial practice. Thus, as legislation continues to deepen and as society progresses, laws that have lost their application to the environment and situation should be naturally eliminated. Different countries and different periods of Chinese history have in fact restricted and eliminated unclear social order provisions such as "picking quarrels and provoking trouble". As in the case of the Meiji Restoration and the revision of the law in late Qing Dynasty in Japan above, and in the later years of Soviet criminal law after the implementation of the 1936 Constitution, the emphasis on legal certainty led to the abolition of the analogy system in the draft of the criminal code and a shift to legalism that should explicitly provide for crimes and penalties. Even though China is currently constrained by its large population and the difficulty of social control, the scope of "picking quarrels and provoking troubles" should be gradually reduced, as in the case of hooliganism, while being divided into more specific offenses. For example, a separate offense of "atrocity" could be created for assault and chase. This would help to distinguish these crimes from other ones that may be less serious. Penalties proportional to the seriousness of the crime can be imposed more effectively, while offenses such as intentional destruction of property and gathering to disturb public order could be expanded[44]. Finally, changing social values and the technological revolution may lead to

[44] See Li Lizhong, *Violence should be treated as crime*, at 34-40, Journal of Political Science and Law, 2020. *Also,* Zheng Ze Shan, *Atrocity Crimes and Injury Crimes in Japanese and Korean Criminal Law*, at 73-75, Research on rule of law, Issue no. 3, 2016.

new forms of problems that were not previously foreseen. However, a targeted expansion of more similar or more targeted crimes could ensure that the law remains relevant and adequate to meet contemporary challenges. Alternatively, the offense could be strictly limited by drawing on the Tang Law of "Doing What Ought Not to Be Done" as a judgment that can only be activated if a conviction cannot be made on the basis of the offense in the statute book.

At the same time, historically, a large number of moral issues and minor crimes have been dealt with by local self-governing organizations such as the village elder, in keeping with the Confucian principle of no litigation[45]. Today, empowering local organizations, such as village committees, to deal with minor disputes and violations of the law may be a way to manage social control more effectively and reduce the burden on the judicial system to deal with minor cases[46]. However, there is also a need to set up sophisticated complaint and monitoring mechanisms to avoid corruption and miscarriage of justice. Additionally, implementing restorative justice for such minor offenses could serve as a solution to repair social relations and guide the offender's understanding, emphasize reconciliation and bring more meaningful solutions to victims, facilitate the reintegration of offenders into society, and reduce criminal discrimination, and the recidivism it causes, that, as above outlined, is still significantly diffused.

[45] See Feng Yujun, *The Formation and Comparison of Chinese and Western Legal Cultural Traditions*, at. 15-18, Journal of Political Science and Law, Issue no. 6, 2019.

[46] See John Braithwaite, *Encourage restorative justice,* at. 690, Criminology & Public Policy, vol. 6, Issue no. 4, 2007.