REASONS FOR THE PREVENTIVE SHIFT OF CHINESE CRIMINAL LAW

USING THE EIGHTH AMENDMENT AS A CASE STUDY

by

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Abstract

This dissertation concerns reasons for the preventive shift in Chinese criminal law; that is, the social, legal, and political rationales of the shift. It is inspired by the eighth amendment of Chinese criminal law in 2011 which amended several penalties related to road, drug, and environmental safety. The eighth amendment stemmed from a series of nationally-known incidents that triggered widespread public dissatisfaction with the rules and functions of the Chinese criminal justice system. This dissatisfaction would eventually result in a crisis of the government and the legal system. Based on John Kingdon’s theory of the multiple streams (“problems, policies and politics”), this dissertation seeks to explain the origins of the legislative process and its outcomes by examining the role of public opinion, policy experts, and political actors in the making of Chinese criminal law. It also uses practices of the UK and the US as references. The dissertation claims that in authoritarian China, the prominence of risk control through criminal justice methods is a state response to uncertainties generated through reforms under the Chinese Communist Party’s leadership. This shift is the result of Chinese criminal law making, driven by the policy of pursuing public security. Under the influence of such policy, the legislation not only acts quickly in response to public emotion, but also to the social control demands of the police. It also gains more support through the responsive and inclusive process of legislation, even though most of the time it remains a consultation with the elites in the framework set by the CCP. In China, the current legislation of criminal law enhances the CCP’s legitimacy. However, compared with the West, how to restrain the expansion of criminal law is a more critical issue for consideration for the authoritarian state like China.
Preface

This dissertation is original, unpublished, independent work of the author, Ying Ji.
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<th>Acronym</th>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>US</td>
<td>United States</td>
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<tr>
<td>USA</td>
<td>United States of America</td>
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<tr>
<td>CCP</td>
<td>Chinese Communist Party</td>
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<tr>
<td>PRC</td>
<td>People's Republic of China</td>
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<tr>
<td>MSA</td>
<td>Multiple Streams Approach</td>
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<tr>
<td>NPC</td>
<td>National People’s Congress</td>
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<tr>
<td>LAC</td>
<td>Legislative Affairs Committee</td>
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<tr>
<td>NGO</td>
<td>Non-government Organization</td>
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<tr>
<td>ASBO</td>
<td>Anti-Social Behavior Orders</td>
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<tr>
<td>ACEF</td>
<td>All-China Environment Federation</td>
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<tr>
<td>CNKI</td>
<td>China National Knowledge Infrastructure</td>
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<td>CNNIC</td>
<td>Chinese Internet Network Information Center</td>
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<td>CPPCC</td>
<td>People's Political Consultative Conference</td>
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For me, studying abroad without my family around was tough, and it has turned out to be an even bigger challenge for them. I could not love them more.
Dedication

This work is dedicated to people who would like to smile, listen and help.
Chapter 1: Introduction

This dissertation is about reasons for the preventive shift in Chinese criminal law; that is, the social, legal, and political rationales of the shift. It is inspired in part by the eighth amendment to Chinese criminal law in 2011 which amended several penalties related to road, drug and environmental safety. The eighth amendment stemmed from a series of nationally-known incidents that triggered widespread public dissatisfaction with the rules and functions of the Chinese criminal justice system. This dissatisfaction would eventually result in a crisis of the government and the legal system. Based on Kingdon’s theory of the multiple streams—“problems, policies and politics”, this dissertation seeks to explain the origins of the legislative process and its outcomes by examining the role of public opinion, policy experts, and political actors in the making of Chinese criminal law. It argues that in authoritarian China, the prominence of risk control through criminal justice methods is a state response to uncertainties generated through reforms under the CCP’s leadership. Shaped by the policy of pursuing public security, the legislation is not only responsive to public emotions, but also to the demand of social control of the police. The current criminal law making enhances the CCP’s legitimacy, through being more responsive, inclusive and punitive.

1.1 The Chinese Landscape

Amendments to Chinese criminal law, as the most visible sign of change in the institutional arrangement of criminal policies and sanctions in China, provides a sound case study of Chinese criminal justice. According to officials, the newest amendment in 2011 was driven by multiple pursuits, such as adhering to the policy of combining justice with mercy, solving problems of...
public livelihoods, and following international rules. But a core characteristic of the amendment is that it expands the boundary of criminal law by not only increasing the penalties of several existing offences, but also by criminalizing a number of minor offences. For instance, a prominent characteristic of this newest amendment is that it comprises several minor offences justified by the requirement of crime prevention, particularly the rationale of risk control, symbolizing the further growth of preventive justice in the field of criminal justice in China.

The amendment also provides additional reasons for expanding state power in the name of public security governance.

In this amendment, three changes constitute the present development of preventive justice in the criminal law, in which the role of “result” in actus reus becomes less important. Most of the changes are focused on fields related to public well being, such as road and drug safety, and environmental protection. The first and foremost change is the new “crime of endangerment”; endangerment offenses criminalize the creation of unacceptable “risks”. This “risk-liability” (in contrast to harm-liability) includes offenses of explicit endangerment, such as impaired driving in Article 133(2): "A person who races with other automobiles when driving on the road or

2 Minor offences justified by the requirement of crime prevention consist of offences of impaired driving, manufacturing and selling fake medications (without any actual harm), and environmental pollution (without any actual harm). The Chinese criminal justice system does not distinguish minor and serious offences. Nor does it have the distinction of summary and indictable offences. “Minor offences” here refer to offences that are not commonly believed as fatal for receiving harsh penalties in the Chinese criminal law.
commits drunk-driving shall be sentenced to criminal detention and be concurrently given a fine, provided that the circumstances are grave."  

Second, in the case of the crime of manufacturing or selling fake medications, the new amendment presumes the risk of the behaviour itself, so committing the offence simply requires identifying behaviours rather than further evaluation of the seriousness (real harm) of the actions.  

Third is the amendment to the crime of discharging, dumping or disposing of radioactive waste, waste containing pathogens of infectious diseases, or toxic substances. Committing serious environmental incidents was a compulsory element for this offence before, but in the new amendment simply seriously polluting the environment is enough to receive the same sentences. That is, whether it has generated a serious incident or not is unimportant. With the components of crime offences having been changed, “result-crimes” in criminal law are replaced by crimes manifested in a “behavioural” mode (as “conduct crimes”).

The above changes share a few common features. First, the focus on the punishment of harms is replaced by risk prevention. The justification for criminal sanctions or increased criminal sentences is preventive, aiming to reduce the risks of such behaviour. This differs from the traditional emphasis on punishing based on the harm already caused. Second, the role of the “result” is reduced when defining offences. With the increased number of “conduct crimes”, an offence simply requires the existence of criminal conduct instead of a substantial result. In this way, both the paradigm of criminal intent and acts are clearly different. Such as the crime of

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6 *Criminal Law*, RS 2011, c3, s141.

7 *Criminal Law*, RS 2011, c6, s338.
endangerment, reckless crime without harm is criminalized. 8 Third, given that inchoate crimes, preparatory crimes, crimes of membership and crimes of possession are all acts falling short of causing actual harm, preventive offences are not new in Chinese criminal law. However, distinct from the other preventive designs, the new changes all focus on risks directed at the general public’s security. 9 In the Chinese context, such security involves road safety, drug safety, and environmental safety, areas that are closely related to the public well being (min sheng). As a matter of fact, besides criminal law, this pursuit of public security can also be identified in Chinese criminal procedure law and administrative law. For instance, the newest amendment to the 2012 Criminal Procedure Law introduced several procedural restrictions on crime suspects who endanger national security, public security, or engage in terrorist activity. 10 The 2005 Amendment to the Public Security Administration Punishments Law also added a variety of administrative punishments against behaviour that threatens social order and public security. 11 Thus, in Chinese criminal law, the new preventive amendments manifest the regulatory uses of Chinese criminal law that will give rise to the idea of prevention being the primary justification in the near future. It is possible that more changes will take place to “shift the orientation of crime control away from traditional, reactive strategies towards more prospective and preventive

9 The Chinese character of “safety” and “security” is the same (an quan). In China the distinction between safety and security is blurred.
10 Criminal Procedure Law, RS 2012, c7, s83; Criminal Procedure Law, RS 2012, c9, s148; Articles 83 and 148 of the new amendment stipulate that in cases concerning national security or terrorist activities, the police may not notify the family of the arrested person about the reason for the arrest and the place of custody if the notification may hinder the investigation process. In cases regarding crimes that violate national security, terrorist activities, organized crime, drug crime, or any other crime that seriously endangers society, the police may take technical investigation measures approval.
11 For instance, the new Law of the PRC on the Public Security Administration increased number of violations of public security from 2 to 10. Public Security Administration Punishments Law, c3.
measures designed to maximize security.”\textsuperscript{12} The offense of risk creation in particular, which diverges from the other two in its explicit seeking to control “risk”, has the potential to bring about theoretical and practical changes in the penal field; for instance, new definitions of the fault element in liability, new criteria for criminal behaviour without traditional “harm”, and the relationship between the seriousness of the criminal offense and the proportionality of the punishment.

Focusing on these transformations, this dissertation seeks to analyze the reasons behind this preventive criminalization in the field of Chinese criminal justice. The dissertation concentrates on explaining how risk, as a legal form of knowledge, has emerged in Chinese criminal law. How can such changes be explained in terms of transformations taking place within the state and social structure? By examining the social, legal and political rationales of the eighth amendment to Chinese criminal law, this dissertation will shed light on key characteristics of the Chinese criminal justice system, as well as the landscape of contemporary society.

At the same time, the dissertation also uses Western experiences as references. Western criminological scholarship from the UK and the US sheds light on similar changes in the context of Western criminal justice. Since the 1990s, some Western societies such as the UK and the US have been going through a preventive rise. A number of Western criminological literature claims that crime prevention has become “increasingly prominent over the past twenty years”,\textsuperscript{13} and

“central to the government’s law and order policy.” 14 For instance, in the UK, Anti-Social Behavior Orders (ASBOs), control orders, and serious crime prevention orders generate a variety of academic discussions about the new shift in criminal justice. Besides Britain, “parallels can be drawn with developments elsewhere, not least the introduction of Control Orders (modeled closely on the British example) in Australia and the deployment of civil containment against sexual offenders in the US.” 15 In the US, the preventive shift is shown not only through anti-terrorism laws, but also through civil orders against sexual offenders and violent offenders. 16 Western research provides background information on the criminal justice system in a general sense. A variety of comparative studies of criminal justice have been taken between the US and the UK. 17 Rarely has the comparison be carried out between that of the West and China. Instead, China is commonly studied as an authoritarian country, whose political structure and social landscape are distinct from liberal democratic countries. 18 Thus examining the Chinese criminal justice with a globalized view, using practices of the West as evidences, is a new attempt.

18 In criminal justice and criminological studies, literature on the comparisons between China and the West is really limited. One exception is Jerome Bourgon, “Chinese Executions: Visualising Their Differences with European Supplies” (2003) 2 (1) European Journal of East Asian Studies 153-184.
“Interpreting what others are actually trying to do is essential even if -- or especially if -- the social actors we are studying do not have, nor could have, all the answers to our -- or even to their -- problems.” On the one hand, comparative studies between the Chinese and Western criminal justice shed light on the characteristics of the Chinese law making and practices. On the other hand, a Chinese case study not only tests to what extent Western theorization could explain the experiences of other districts, but also complicates the global understanding of crime prevention and risk control due to its special social context consisting of the current complex development status, the authoritarian regime, the large population, and other factors that are specific to developing countries or to China.

Therefore, the overall question this dissertation will explore is: What are the rationales behind this preventive shift in Chinese criminal law? Focusing on how law and institutions have developed in China, the dissertation will investigate the impact of multiple factors on criminal law in an attempt to understand the fundamental problems in Chinese society and potential future transformations. The other two sub-questions that the dissertation will examine and contextualize the Chinese transformations in the global environment, since the preventive shift is not limited to China. What are the particular state and social structures that make Chinese law making distinct from that of other countries? What are the similarities in legislation between China and the West, such as the UK and the US, even accounting for their social and political differences?

Last but not the least, the orthodoxy of crime prevention is best examined with a reference to non-political sensitive cases in China. In practice, the preventive shifts in Chinese criminal law developed simultaneously with preventive techniques of political risk. Chinese preventive restraints are also strict on those posing political risks to the regime of the party-state. To secure its authority, the party-state never stops intense censorship and suppression. “…A grand theory of law in a book seldom explains the behavior of law on the streets of China”.\(^{20}\) It is known that preventive techniques for political aims are widely used in Chinese social governance, even though it is sensitive to publicly address some of the issues on the mainland. Crime is used as an excuse to enact legitimate interventions that have other motivations. For instance, to maintain “harmonious” social order, the rights to free association are remarkably restricted to avoid potential mass incidents. The Ministry of State Security and Public Security monitors public activities and speeches that may “endanger the state security” or “pick quarrels and provoke trouble”. Any expression or activity the Ministry of State Security considers to be risky to the governance of the Communist Party will be censored, let alone actual preparatory acts. It is difficult to assess whether such prisoners have actually incited the crime of subversion of state power (the definition of which is broad), leaving much room for state discretion. Furthermore, people who have been consistently petitioning have been secretly detained by both central and local authorities for the so-called stable social order to prevent them from appealing.\(^{21}\) Police patrols and surveillance are also increased in large cities to deter misbehaviour, crimes, petitions,


and those who are ostensibly against the government. The total number of political prisoners significantly increased from 2004 to 2014.\textsuperscript{22} Such methods to prevent political risk (unrest) rather than punish existing harms are seriously criticized by the liberals for its disregard of procedural justice, distortion of legal norms, and infringement on human rights.\textsuperscript{23} They are no less burdensome than punitive sanctions, and they truly sidestep legitimate procedures with low or even no standard of proof of risk or harm. Though this dissertation will not address these sensitive issues in authoritarian China, it is important to keep in mind that there are far more underground illegal realities, both within and beyond criminal procedure.

Based on elaborations of current Chinese legal transformations, the next section will address existing literature on this topic, including those from China and other countries such as the US, the UK and Australia. The literature review intends to provide an analysis of the literature of the preventive shift of criminal justice both in China and the West over the past 10 years. Reviews of the Chinese literature summarize current Eastern scholarships of the preventive shift of the Chinese criminal law. It not only exists as the theoretical foundation of the dissertation -- concepts and theoretical frameworks that have been used to examine the preventive shift of the law, but also uncovers the gap in existing literature that the dissertation will address through critical analysis. By contrast, reviews of the Western scholarships, through examining “fundamental structural and cultural conditions that provide the broader context for policy

\textsuperscript{22} Congressional-Executive Commission on China, “List of Political Prisoners, Detained or Imprisoned as of October 2014”, Political Prisoner Database.

formulation in the Western context, helps to find out the socio-legal methodology that can be used to fill up the gap of Chinese legal studies.

1.2 Literature Review

The recent growth in the preventive shift for criminal law has been a cause of controversy among Chinese scholars. The discussion is intertwined with debates about the role of criminal law in the risk society from 2007 until present. Since 2007, criminal law scholars in China tried to use the risk society theory to interpret the social background of the preventive shift of criminal law, suggesting that criminal law was going through fundamental structural transformations. Not only do these scholars employ the risk society to theorize Chinese reforms, but also the reforms of Western countries like Germany and Japan. However, after many debates, opponents started to refute the relationship between the risk society theory and the Chinese social landscape by claiming that the risk society theory is unable to interpret the Chinese social environment. Such debate has continued until now. The following section will document this history, identify the concerns of Chinese scholars, examine the theories they use, and assess the strength as well as weakness of their arguments.

1.2.1 Chinese Scholarship

In China, preventive criminal policy is not adopted from Western counterparts; rather, it is the introduction of the Western risk society theory that augmented Chinese scholars’ interests in the

relationship between risk control and criminal law. According to the China Knowledge Resource Integrated Database,\footnote{The database, China National Knowledge Infrastructure (CNKI), is the most commonly used academic database in China. Developed by Tsinghua Tongfang Knowledge Network Technology Company, it is the most comprehensive gateway of knowledge of China, and the largest source of China-based information resources in the world. “About CNKI”, online: \url{http://eng.scholar.cnki.net/about/intro.aspx#dian_two}.} from 2007 to present there have been more than two hundred articles about the efforts of criminal law to control risk, as well as the threats of such efforts to civil liberties. Related articles from top law journals number more than thirty;\footnote{The list of 21 top journals is as follows: Chinese Social Science Research Evaluation Centre, “2012-2013 CSSCI Legal Journals”\footnote{Dongyan Lao, “Public Policy and Criminal Law in a Risk Society” (2007) 3 Social Sciences in China 126.}, online: \url{Lawinnovation<http://lawinnovation.com/html/xjdt/6153.shtml>}.} most of them are based on doctrinal analysis rather than empirical study.

Dongyan Lao from Tsinghua University raised this topic first in her famous article “Public Policy and Criminal Law in the Risk Society” in Social Sciences in China.\footnote{Dongyan Lao, “Public Policy and Criminal Law in a Risk Society” (2007) 3 Social Sciences in China 126.} The article initiated the debate about the new role of criminal law in the risk society. Drawing from Bernard Harcourt’s article “The Collapse of the Harm Principle”, Lao suggests that in China criminal law turns into a proactive tool of the government whose function has now been completely changed to risk management. That criminal law is increasingly subordinate to public policy pursuits has brought about eight significant transformations to coercive social control techniques, known as expanding the definition of “criminal action”, adopting criminal law to censure risky behaviours, diversifying ways of taking criminal responsibility, and broadening the criteria of establishing legal causation. As a conclusion, Lao insists that while it is normal to make legal innovations, one should not break the basic principles of criminal justice. Otherwise, any change cannot be
After her article appeared, several papers were published in Chinese journals that examined the current and potential changes of the criminal justice system. In a short time, studies of the so-called “criminal law and risk control” (fengxian xingfa) dominated the academy of Chinese criminal law, covering several topics such as endangerment crimes, negligent crimes, and crimes against public security. It seemed this new theory had obtained a number of followers with significant academic enthusiasm. However, at the same time, most researchers tended to accept the coming of the risk society as a reality without considering deeper conceptualizations of basic terms such as “risk”, “risk control” and “risk society”. Although it was insightful of them to be cautious of the dangers of preventive transformations of criminal law, they failed to identify whether the target they criticized was correct or not.

Discussions reached a peak in 2011 when a few noted scholars -- including Xingliang Chen, Yanhong Liu and Hongjie Tian -- published their articles together in Studies of Law and Business. These scholars are mostly skeptical of the legality of preventive methods in the criminal justice system, especially of risk control. Xingliang Chen claims that there is tension between maintaining social order and protecting individual liberty. Managing risk is not an

excuse for expanding the boundaries of criminal law.\textsuperscript{32} Yanhong Liu emphasizes that the “risk-oriented” reforms ought to be under strict scrutiny, since they may infringe on the foundation of criminal law. Hongjie Tian asserts that community correction and victim–offender reconciliation are better strategies than simply increasing criminal penalties. In addition, it is more appropriate to resort to civil and administrative law to deal with the increasing social risks.\textsuperscript{33} In summation, it is clear that Chinese scholars share some basic views about the relationship between risk control and criminal justice. They all recognize that Chinese criminal law is undergoing certain transformations; they harbour concerns about the dangers of preventive justice in corrupting state power, and they believe it imperative to use criminal penalties cautiously while simultaneously searching for alternative ways of crime prevention. Their focus mainly lies on a normative analysis of the proactive function of criminal law and its challenges with the criminal law principles and human liberty\textsuperscript{34}. “This extension of criminal liability through pre-emptive laws raises serious questions about the elasticity of the boundaries of the criminal justice system, and whether so stretching the boundaries of the criminal law is desirable or indeed possible without fundamentally corroding the criminal justice system.”\textsuperscript{35}

In 2012, the eighth amendment to Chinese criminal law gave rise to more scholarly papers in the following year that used the amendments as evidence of preventive reform. Among the fifty

\begin{itemize}
\item \textsuperscript{32} Xingliang Chen, “Criminal Law in the Risk Society and Risk of Criminal Law” (2011) 4 Studies in Law and Business 11.
\item \textsuperscript{33} Hongjie Tian, “Position of Criminal Law in the Risk Society” (2011) 4 Studies in Law and Business 20.
\item \textsuperscript{35} Tamara Tulich, “A View inside the Preventive State: Reflections on a Decade of Anti-terror Law” (2012) 21 (2) Griffith LR 235.
\end{itemize}
papers\textsuperscript{36} that directly or indirectly addressed such issues, one that was particularly noteworthy was “Critical Review of the Risk Criminal Law Theory”, published in the \textit{Criminal Law Review}.\textsuperscript{37} Compared to the others, it conducted a deeper analysis of the theory of risk society, claiming that the current theory understood the risk society incorrectly. Criminal law itself was unable to deal with the globalized risks generated by the advent of the risk society. The limits of criminal law and its post hoc logic make it hard to handle the insecurity created by nuclear explosions, genetic engineering, environmental deterioration, economic crisis and terrorism.\textsuperscript{38} This criticism demonstrated that Chinese scholars had started to question the appropriateness of using the risk society theory as the framework for examining reforms of contemporary criminal law.

Later in 2014, Dongyan Lao and Xingliang Chen separately wrote two more articles as follow-ups of their previous ones from 2011. Although holding opposite opinions, they both explored the relationship between risk society theory and changes to criminal law. In Lao’s article “Risk Society and Changing Criminal Law Theory”, she argues that the link between risk society theory and criminal law reform is the security (or safety) concern, which has enhanced the proactive role of criminal law to control the risks based on increasing public demands.\textsuperscript{39} She

\textsuperscript{36} This number was collected from China National Knowledge Infrastructure (CNKI. In China, CNKI is one “key project of national informatization construction, which is dedicated to the mass digitalization of China knowledge resources, as well as creating the platform for global dissemination and value-added services.


highlights “security” and “prevention” as the new key words of the ongoing discussion.

Conversely, Chen’s article “Critical Doctrinal Analysis of Risk Criminal Law Theory” is an overall rejection of the relationship between the risk society theory and reforms in Chinese criminal law. He insists that the risks that criminal law intends to manage are not those described in the risk society theory. A detailed examination of the background and logic of negligent crimes, endangerment crimes, and crimes of omission is required. Chen also claims that rather than changes that are enhanced by the risk society, amendments of the Chinese criminal law are signs of the re-arrangement of judicial and administrative (policing) powers in China, since more and more behaviour regulations are now subject to legal procedures rather than police discretion. Therefore, debates suggest that the key issue demanding further study lies in identifying the changes to Chinese criminal law and their driving forces.

The above studies are undoubtedly informative. Generally speaking, the theory of risk society can be applied to the Chinese social landscape in certain respects. On one hand, Beck uses “world risk society” to refer to the politics of risk management among the other countries. With globalization, China -- which will inevitably face insecurity -- is part of the world risk society. On the other hand, China, as a country with a mix of pre-modern, modern and late modern identities, manifests certain features of late modernity demonstrated by the risk society theory.

However, although many Chinese researchers agree that risk control is a “new” shift in criminal justice, current research lacks a perspective on how China varies from the other countries, even in their framework of the risk society. The key question of locating the Chinese landscape within international developments of crime control is not answered. For instance, scholars have not considered issues such as the following: Is the rise of preventive justice a Chinese phenomenon or a worldwide trend? How does the Chinese practice exemplify and modify the general proactive shift? How will comparative studies with Western development of crime control highlight factors in Chinese rule of law? More insight will be achieved if Western theories and practices are introduced into the Chinese research. Thus examining discourses of the risk society theory is a good place to start, but there remains far more to be done.

Second, as it has been noted, compared to the large amount of normative analysis seeking to restrict the use of preventive methods, little attention has been paid to the fundamental question about the way in which preventive justice came about and how well it fits into Chinese society. How can such changes be explained in terms of transformations taking place within the state structure? This is a common problem for Chinese criminal justice research, which focuses on doctrinal analysis and pure legal reasoning without considering the social and political context of legal change. Such research limits the analysis to changes of statutes, rather than broader social

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44 Most of them remain descriptive analysis of the theory and normative analysis of the preventive shift.
45 There are several reasons for the problem: first, difficulties of accessing into firsthand data make it difficult to take empirical researches in China. Second, the Chinese legal researches follow tradition of the civil law system, which focus on more legal reasoning, compared with those of the common law
reforms, how governmental activities and the effects of such unfold, or how we think and act, individually and collectively with government. Even though scholars have insisted over the years that equal attention should be paid to the social origins and impact of criminal law, little progress has been made in this area. Introducing the risk society theory has been a fine start, but existing concerns are limited to the theory itself. It will be interesting if we are able to move concerns from the risk society theory into concerns of risk and crime prevention in the Chinese context. “Punishment is a social institution, which can be understood only within the social context, which gives it its practical meaning and determines its social effects.” In China, studies linking legal reforms with social environment remain limited. Articles that specifically examine characteristics of the society usually fail to document changes to criminal law, while those that study legal changes commonly lack specific analysis of the Chinese social context. Compared to a large variety of Western literature on socio-legal or sociological studies of criminal law, Chinese research has considerable gaps. How did the participants act during the proceedings of the legislation? This can be a starting point of the dissertation.

46 See Huaizhi Chu, Outline of Criminal Sciences Integration (Beijing: Peking University Press, 2007).
Therefore, this dissertation aims to examine these neglected problems in order to obtain an in-depth understanding of Chinese criminal justice. It considers whether risk-oriented crime prevention emerges in China’s criminal justice system and, if so, what are the underlying social and political structures that make the changes unique from the other countries. Through examining activities of the participants, reasons for the preventive shift of the law are discovered. Gaps will be filled by socio-legal studies and foreign literature on current penal research.

1.2.2 Western Scholarship

Lucia Zedner and Andrew Ashworth are the two most influential scholars in the UK working on coercive preventive justice. Since the 2000s, and particularly in the last five years, they have examined the undercriminalization effect of preventive orders like the ASBOs, the impact of The Terrorism Act, the implication of actuarial techniques, and the boundaries of punishment, among others. They first identify the characteristics of preventive justice methods in the following three ways: a large part of their rationale is punitive; they aim to prevent the occurrence of harm or the risk of harm; and they are backed with the threat of coercive sanction (sanction of breach). Similar to their Eastern counterparts, the two scholars emphasize that

prevention makes good sense, but it is often carried out using regulatory strategies and authoritarian impulses. It is also questionable whether these penalties are proportionate to breach alone. Accordingly, it is essential to hold coercive methods under rigorous principled restraint and appropriate procedural protection so that criminal justice will be capable of maintaining its legitimacy without depriving human liberty.54


European Community” by Elizabeth Fisher56. The scholars have different analytical focuses within the framework of preventive state, including preparatory laws mainly facilitated by the fight against terrorism, laws of forecasting harm among potential offenders, risky prisoners and mental illness patients, as well as actuarial techniques of prediction in sentencing and policing. First, scholars interpret the concept of prevention in either a broad or narrow sense, as a general shift or a specific model, with political or managerial significance. For instance, Ian Hacking traces the history of the probabilistic revolution in The Taming of Chance, and demonstrates how the laws of probability displaced in significant part the laws of necessity by the early twentieth century. Bernard Harcourt points out that “the concept of the actuarial connects with several strands of modern penalty -- the emphasis on classification, risk assessment, preventative crime-control, and criminal profiling”.57 Feeley and Simon argue that “a new penology is emerging that shifts away from a concern with punishing individuals to managing aggregates of dangerous groups”, characterized as an “actuarial language of probabilistic calculations and statistical distributions applied to populations”.58 Second, their concerns about the legality of the new strategies to be justified through legal principles are basically the same claims as those of the Chinese researchers. For example, in “The Preventive State, Terrorists and Sexual Predators”, Janus claims that the sexual predator laws provide a model for undercutting these constitutional protections for liberty. In “A Jurisprudence of Dangerousness”, Slobogin describes a jurisprudence of dangerousness by developing the psychological and prediction criteria to govern

the state's implementation of its police power. 59 “The paradigm of the criminal law and the criminal trial is being eroded by the state as it pursues other agendas such as greater regulation, an emphasis on prevention, and an authoritarianism linked closely with penal populism and the demand for public protection.” 60 Such literature “raise[s] basic questions about the right to punish, the limits on state power, the responsibility and dignity of the offender, the nature of criminality, the depiction of human nature.” 61

Besides the normative analysis discussed above, there is other work from scholars such as David Garland, Jonathan Simon and Pat O’ Malley that contextualizes the reforms in broader social environments. Though compared with literature mentioned above, they are not particularly focused on crime prevention and risk control, the theories they raise -- such as the risk society theory, the late modern society theory, and the governance theory -- help us understand the reasons for and impact of the changes. 62 Such reasons consist of social unrest, the influence of social policies, public consciousness of risk and crime, and shifts in the sphere of criminal justice. Conceptualizing the risk discourse is a primary focus of Western scholarship. “This seems a rather massive and long-term process, when many criminologists are more concerned to

62 In the book Governing Through Crime, Jonathan Simon argues that crime has become central to the exercise of authority in America. It is a central theme through which all other problems are interpreted, framed and addressed. This “bold” theory is criticized for its exaggeration of the social reality at some points, but he successfully points out the punitive change the US has been experiencing since the 1970s, which not only creates the fear of crime but also intensifies social isolation. See Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Climate of Fear (New York: Oxford University Press, 2007).
consider and deal with specific changes in crime control associated with risk frameworks.”

Risk, as a very abstract concept, “is capable of multiple and very divergent realizations in institutional or governmental forms”. It is difficult to define risk since “there are numerous definitions that depend on the situational context, field of application and adopted perspective”.

The way to view risk is shaped by social transformations and public policy alterations. For instance, researchers holding the “cultural perspective” argue that risk is socially constructed and that all knowledge about risk is dependent on belief systems and moral positions. Risk is used to “reproduce and maintain concepts of selfhood and group membership”. While sociologists adopting the ”risk society” perspective are predominantly interested in the macro-social processes they consider characteristic of late modern societies and their relation to concepts of risk. Risk is a late modernist vision of the world’s chaos and conflicts. By contrast, “governmentality” scholars identify risk as a moral concept used to discipline future actions through rationalization and calculation. Individuals who are self-regulating moral agents take on the responsibility of self-protection from the government. Shifts in the meaning of risk or in risk itself reflect a change from welfare---social politics toward a neo-liberal political rationality, and

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from a collective treatment of social problems to a prudential model of partnerships between the state and individuals.69

The above theories employ different angles to analyze risk and risk control techniques. Looking at the ways in which the concept of risk operates in Western societies invites us to examine a China-based understanding of risk control methods. Western scholarship has remarkable value for Chinese criminal law research for the following reasons. Besides doctrinal analysis of the preventive shift that is a common focus of both Western and Eastern scholars, first, the socio-legal method of Western studies inspires a similar study of China-based legal transitions. Conceptualizing crime prevention cannot be separate from their broad social, political and intellectual contexts. In Western scholarship, crime prevention is used to exemplify radical changes in the configuration of both public and private governance in late modern society under the influence of neoliberal or other policies. This literature exists as an example of the Chinese case study on the transformations taking place within the state and social structure. Such an understanding will shed light on how the Chinese view not only themselves, but also the state, the society and the globalized world. It will also illuminate the public’s rising risk awareness, the governance of the ruling party, and China’s authoritarian regime in an era of deepening reforms and exposure.

69 For Keynesian welfarism, risk is regarded as a problem, as a product of pathology or incompleteness. Social engineering can and should be directed to correct these problems and eliminate the risks they generate. Pat O’Malley, “Risk and Responsibility”, in Andrew Barry et al, Foucault and Political Reason: Liberalism, Neo-Liberalism, and Rationalities of Government (Chicago: University Of Chicago Press, 1996) 203. Most risks are regarded as pathologies, and scientifically guided government should eventually eliminate them or neutralize their effects.
Second, contextualizing the Chinese preventive shift will enrich these arguments concerning crime prevention on an international level that are currently based largely on trends in Western countries. On the one hand, existing research suggests that both China and the West show some similar moves in criminal justice, such as the criminalization of minor behaviour and the role of public opinion in policy making, all of which may provide some understanding of crime prevention and of social situations given the worldwide focus on security governance. On the other hand, Western knowledge can also “help us rethink our approaches to the possible sources of punitiveness and leniency rather than only reinforce what we already think and value.”

In China, the expansion of crime includes several changes justified by the crime prevention requirement—particularly the rationale of risk control—symbolizing further growth of proactive techniques in the field of criminal justice in contemporary China, and additional reasons for expanding state power in the name of public security governance.

The party-state, which either hesitates or refuses to admit the state’s capacity limits in crime control, strives to show the public that it is both willing and capable to sustain a safe environment in the transformative era. Effective security control manifests the superiority of China’s political system under the leadership of the party. Besides the social environment in which punishments are embedded in, “A fuller understanding of penal-policy changes also requires a more detailed understanding of the purposive actions of key agents within the policy process, and the constraints and

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70 David Nelken, “Comparative Criminal Justice, Beyond Ethnocentrism and Relativism” (2009) 6 (4) European Journal of Criminology 299. David also argues that, “When it comes to the evaluation of criminal justice practices, whether actors think they are being tolerant or punitive is not the end of the matter. It can make sense in some contexts to describe people as tolerant even if they do not intend to be (and vice versa).” David Nelken, “Comparative Criminal Justice, Beyond Ethnocentrism and Relativism” (2009) 6 (4) European Journal of Criminology 308.

opportunities provided by the political systems within which they operate.”  

Through examining the social, legal and political rationales of the preventive shift of Chinese criminal law, the dissertation will highlight the participants’ beliefs and practices regarding the law, which helps to understand the politics, the dynamics and the future of the Chinese rule of law.

1.3 Methodology

Methodology describes how sources are chosen, what criteria are used for making assessments, and what concepts are used to organize a project.  

A research design is a blueprint dealing with at least four problems: what questions to study, what data are relevant, what data to collect, and how to analyze the results.  

In contrast to domestic research that focuses on normative analysis of the threats of preventive justice to civil liberties, this research will use the case study as the main research method. Many well-known case study researchers such as Robert E. Stake, Helen Simons, and Robert K. Yin have written about case study research and suggested techniques for organizing and conducting the research successfully.  

According to Yin, “the case study is not either a data collection tactic or merely a design feature along but a comprehensive research strategy.”  

It is “an empirical inquiry about a contemporary phenomenon (e.g., a “case”), set within its real-world context especially when the boundaries between phenomenon and context are not clearly evident.”  

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outcomes. Bogdan and Biklen identify case study as “a detailed examination of one setting, or a single subject, a single repository of documents, or one particular event.” Bruce L. Berg and Howard Lune define it as “a method involving systematically gathering enough information about a particular person, social setting, even, or group to permit the research to effectively understand how the subject operates or functions.” In general, these definitions suggest that case study is a qualitative social research method that describes, explains or explores the cases (as an individual, community, event, or social phenomenon). It develops narratives of single or multiple cases through data-gathering techniques to examine human behaviors and their settings.

In this dissertation, the case study is explanatory and traces the social, legal and political rationales for the preventive shift of Chinese criminal law. The dissertation chooses the case study as the main research method for the following reasons. First, “this qualitative case study is an approach to research that facilitates exploration of a phenomenon within its context using a variety of data sources.” This dissertation can be carried out through case studies, with the intention of locating them within both the Chinese and the global contexts. Besides, case studies consist of a detailed contextual analysis of a “limited” number of events or conditions and their relationships. As to the number of cases, the three revisions of criminal law (drunk driving, }

manufacturing and selling fake medications, and environmental pollution) provide sound cases with a “limited number” for a multiple-case study.

Second, mostly importantly, according to Yin, the case study is the preferred strategy when “how” or “why” questions are being posed, when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context.81 This dissertation, focusing on the rationales for the preventive shift in Chinese criminal law, explores the question of why the shift is emerging in the criminal justice system. Because the eighth amendment to Chinese criminal law was passed four years ago in 2011, the time passed makes it difficult to become involved in the discussion or to reassess the public’s opinion, scholars’ suggestions, or demands of the officials through interviews or surveys. Using case studies this dissertation will be able to carry out an analysis of these past events, which have an ongoing impact on current society.

The key question for this dissertation is what are the reasons behind this preventive criminalization in the field of Chinese criminal law. “The case is a unit, entity, or phenomenon with defined boundaries that the research can demarcate or fence in.” The dissertation is a multiple-case study. The three cases this dissertation intends to explore from the eighth amendment to Chinese criminal law are revisions to the drunk driving offence, the manufacturing and selling fake medications, and environmental protection. The eighth amendment reflects several trends in criminal law, and these three cases are the most explicit

examples of proactive development. Each case aims to examine a complementary facet of the major research question.

Furthermore, “Case study research is not limited to a single source of data.” A key strength of the case study method involves using multiple sources and techniques in the data gathering process. There are six common sources of evidence used for case studies: direct observations, interviews, archival records, documents, participant-observation, and physical artifacts. This dissertation aims to use a combination of sources, relying on both Eastern and Western experiences to gain a clearer picture of the shift in Chinese criminal law. It will focus on the attitudes and practices of different actors toward preventive techniques by analyzing criminal law amendments, amendment drafts, official reports of the law making body, legislative procedures, Supreme Court reports, the Supreme Procuratorate and the Ministry of Public Security, online comments, blogs and academic scholarship. Case studies rely on multiple sources of evidence including documentation, archived records, interviews and observations. The difficulty of conducting interviews in the Chinese social context stems from the challenges of gaining full access to the information within Chinese government ministries and legislative bodies. The real decision-making dynamic is commonly blocked from those who are kept outside of the process, especially at the final stage of the process. “Most important, processes that tend to play vital roles in shaping legal rules in China -- informal exchanges of views, behind-the-scenes lobbying,

83 “The Case Study as a Research Method: Uses and Users of Information -- LIS 391D.1 -- Spring 1997”, online: The University of Texas at Austin School of Information <https://www.ischool.utexas.edu/~ssoy/usesusers/l391d1b.htm>
and indirect exertion of influences by senior officials, to name a few--have seldom been put on the record." Without firsthand information, this dissertation will collect documentation from the three cases as far as is possible. It also draws on firsthand experience, knowledge and observations obtained in my own daily life, as supplemental information. Resorting to the personal experience of the researcher is common in social researches. “This (drawing on his or her own experience) can be necessary in areas from which we have no research findings, or the findings are too general for use in the specific instance.” The limits of lacking primary sources also manifest the Chinese characteristics of decision-making, which calls for a higher level of transparency to the public.

As to the research strategy, this dissertation applies Kingdon’s Multiple Streams Approach (MSA) of agenda making of the US as the theoretical framework for analyzing the Chinese process of law making. Kingdon’s multiple streams approach is an adaptation of the “Garbage Can Model”. It contrasts with “comprehensively rational” policymaking in which -- in this order -- policymakers identify problems (or their aims), bureaucracies perform a comprehensive

86 “They (practitioners) may draw on experience gained from practice or from their life in general...the experienced practitioner is liable, therefore, to draw upon those three areas--formal knowledge, specifically social research, practice experience, and life experience--to provide them with guidance in relation to any particular practice issue or problem.” Michael Sheppard, Appraising and Using Social Research in the Human Services: An Introduction for Social Work and Health Professionals (London: Jessica Kingsley Publishers, 2004) 28. However at the same time, the researcher has to try to be objective, and manage to collect as much information as possible to support the arguments.
analysis to produce various solutions (or ways to meet those aims), and policymakers select the best solution. According to Kingdon, “both ambiguity and time constraints render rational problem-solving models highly unconvincing.” In his book *Agenda Making, Alternatives and Public Policies*, Kingdon identifies three streams that lead to final policy outcomes: “problem, policy and political streams”. The three streams develop separately from each other with their own logic, but at some critical moments (when policy windows open), they are joined together, and this is where agendas are successfully set. Thus “collective choice is not merely the derivative of individual efforts aggregated in some fashion but rather the combined result of structural forces and cognitive and affective processes that are highly context dependent.”

Though Kingdon’s model is based on interviews of the health and transportation reforms in the US, it has been applied to a wide variety of policy areas, ranging from energy policy, environmental policy, climate policy, forestry policy, educational policy, privatization.
policy,\textsuperscript{98} gender policy\textsuperscript{99} and constitutional policy to foreign policy,\textsuperscript{100} to name just a few.\textsuperscript{101} His model has also been subject to modifications by other researchers in the other social environments, such as the parliamentary systems.\textsuperscript{102} However, as it is claimed, “MSA is rarely applied to policy making in developing and transition countries.”\textsuperscript{103} The dissertation is a refinement of the MSA model in the Chinese context. It is an adaption of the model to the authoritarian societies. The three stream conceptualization clearly categories and summarizes the factors that contributed to the Chinese criminal law revisions. It also matches with the social, legal and political rationales of Chinese criminal law that this dissertation examines. In China, at times, rather than “comprehensive rationality”, “policymaker aims and policy problems are ambiguous, and bureaucrats struggle to research issues and produce viable solutions quickly.”\textsuperscript{104} “Individuals sometimes behave rationally, but the process of making systemic decision often does not exhibit rational properties.”\textsuperscript{105} The Chinese legislation is not a fully rational process. But at the same time, since Kingdon’s model is based on interviews of the liberal democratic countries, there are several aspects that make Chinese law making distinct from the framework

\textsuperscript{98} Nikolaos Zahariadis, “Selling British Rail: An Idea Whose Time has Come?” (1996) 29 (4) Comparative Political Studies 400-422.
\textsuperscript{104} Paul Cairney, “Policy Concepts in 1000 Words: Multiple Streams Analysis”, online: Paul Cairney: Politics & Public Policies <https://paulcairney.wordpress.com/2013/10/31/policy-concepts-in-1000-words-multiple-streams-analysis/>.
that Kingdon proposes. For instance, in the one-party state like China, under the governance of the CCP, the policy and the political stream overlap. On the one hand, those who raise proposals in the policy stream are commonly experts, technicians, and scholars working in government ministries. Their activities are inevitably influenced by political interests. On the other hand, in the political stream a number of experts are also the ones who carry out these proposal debates. Therefore, the dissertation is both an application and modification of MSA. Chapter 3 of the dissertation will specifically explore the reasons (strengths and limits) for adopting this framework on China-related issues. How the peculiarities of agenda making are related to the requirement and logic of risk management sheds light on not only the Chinese characteristics, but also on the differences between China and the US on issues of agenda making.

Lastly, throughout this dissertation, Western theories and practices since the late 1990s will be used as supporting evidence to highlight the characteristics of their Chinese counterparts. This dissertation views the development of the Chinese criminal justice system within the global context and situates the progress of laws and legal institutions in this historical and social context. Compared to other countries, more attention will be on the practices of the UK and the US, since these two countries are the key focus of Western criminological studies, offering rich data and theories about the political, social and cultural reasons for the changes in Western criminal justice. Statistics originate not only from reports and publications on official websites from the West (such as the Home Office of the UK, the FBI and the US Justice Department), but also from Western academic research, including literature on the rise of preventive justice in the UK and the US, the punitive turn in Western criminal justice after the 1970s, the coming of late-modern society, and the impact of neoliberal politics on the penal realm. For instance,
preventive justice in the UK has also generated hot academic debate. The research on the justifications for preventive justice in the UK starting from 2011 at the University of Oxford sets a great example for my study on Chinese pre-emptive methods. Though most Western undertakings are quite distinct from the Chinese experience, there are similarities between China and the West, such as the criminalization of minor behaviour, preventive techniques in policing, and the role of public opinion in policy making, all of which show hints of similar beliefs on crime prevention and social situations given the worldwide focus on security governance. Theorizing risk in the Western context through a socio-legal perspective also inspires similar criminological research on the Chinese experience. It fills the gap in current studies which focus solely on the philosophical foundation of criminal law while ignoring what crime control rhetoric actually is.

1.4 Dissertation Structure

This dissertation comprises eight chapters. Drawing on Western theories that are applicable to China, it examines both the macro and micro aspects of the process of law and policymaking, and about the major forces that have driven this shift. Based on three case studies of the eighth amendment to Chinese criminal law, it explores rationales of the preventive shift of the Chinese criminal law through analyzing the problem, policy and political streams of the law making processes. It claims that the shift is the result of Chinese criminal law making, driven by the policy of seeking public security. Under the influence of such policy, the legislation not only acts quickly in response to public emotions, and also to the social control demand of the police. It also gains more support through the “inclusive” legislative process including representatives of Lianghui (“two meetings”: the National People's Congress and Chinese People's Political
Consultative Conferences), government ministries, academics, lawyers, and non-government organizations (NGOs). The legislation of criminal law enhances the legitimacy of the CCP.

After the introduction section, the second chapter examines the recent legislative changes to Chinese criminal law to identify what has emerged. It also lays the foundation for the entire dissertation. Based on case studies of the changes in criminal penalties for food, drug and environmental safety and their implications to the Chinese criminal justice system as signs of the pro-active reforms, it analyzes how risk discourse diverges and overlaps with the routine moral regulations of responsibility allocation. The hypothesis of this chapter is that current legislation shows evidence of preventive developments for the pursuit of public security. Accordingly, it first explains the reasons why choosing the three as case studies, through conceptualizing “prevention” in Eastern and Western context. Then it examines the changes in the eighth amendment to investigate if these changes are distinct from the other provisions of the amendment, and the effects they will likely have on Chinese criminal law, state power and civil liberty. Provisions of all eight amendments will be summarized to identify whether these changes illustrate a clear trend toward crime prevention, as well as the general public’s pursuit of security governance. The third section examines in details about the limits of using risk society theory as the analytical framework of the preventive shift. The gap calls for a new socio-legal study of the shaping power between the state and the public in the legislative system of China.

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106 In this section, corresponding reforms in other fields enhance the validity of proposed changes in criminal justice. Legal changes to criminal procedural law and administrative law are also addressed as supporting evidence to examine the extent to which they indicate the growing emphasis on public security.
After that, “to understand how law matters in China, we have to unpack society and discover how different political, cultural, economic and personal experiences shape attitudes toward the law and lead to different forms of legal and political action.” In the third chapter, the dissertation starts to examine the history of amending Chinese criminal law. It then explores the reasons for applying the Multiple Streams Approach (MSA) of John Kingdon about US policy making to analyze the social, legal and political rationales for the preventive shift in Chinese criminal law. The chapter claims that Kingdon’s MSA helps to classify the roles of the public, of proposal makers, and of political actors in the eighth amendment. The theory is also subject to revisions in the Chinese context.

In the fourth chapter, in order to assess the social justifications for legislative change, the dissertation examines the “problem stream” of amending Chinese criminal law, emphasizing the demands of social forces in the “focusing events”. In MSA, the problem stream includes multiple conditions that policy makers have to deal with. Policy makers discover the problematic conditions through indicators, focusing events and feedback. In the problem stream, focusing events are like road accidents, terrorist actions, or social crisis. In the Chinese focusing events, the public’s rising sense of security runs parallel to growing anxiety of social risk, which poses challenges to the governance of the CCP by eroding the “trust” between the state and society. The social forces manifest as an increase in media-stimulated public involvement under state

censorship prior to the legislation. The inclusion of public opinion converges with “penal populism” documented in Western scholarship.

The fifth chapter will explore the “policy stream” in amending Chinese criminal law, including activities of government specialists, think tanks, lawyers, NGOs, representatives in the national congress, and scholars. It is not guaranteed that intense public demand will bring about policy reforms. In China, there have been many issues about which the public have been concerned that still go unsolved. In MSA, the policy stream is a selection process. Whether the ideas will be selected or not depends on their value acceptability, technical feasibility, or resource adequacy. In China, becoming law requires the coexistence of several factors. First, the wide participation of proposal making is mainly triggered by political and social pressures from the “focusing events”. Second, the proposal makers aim to consolidate or enhance individual power, which directly leads to changes in criminal law. The inclusiveness of current law making also contribute to increased changes of the law. Third, even though the specialists have addressed almost all of the legal concerns of such revisions, there remain several issues requiring further consideration so that the boundary of criminal law can be properly maintained.

The sixth chapter examines the “political stream” of amending Chinese criminal law by analyzing the status, attitudes and activities of the institutions. The law cannot be passed without approval of the CCP and negotiations among the departments. In MSA, the political stream is

“composed of such factors as swings of national mood, election results, changes of administration, changes of ideological or partisan distributions in Congress, and interest group pressure campaigns.”

In the Chinese context, responses from various participants, including the CCP, the National People’s Congress (NPC), the Supreme People’s Court, the People’s Procuratorate, the Ministry of Public Security and the media, are covered in this section. First of all, law is a mechanism by which political power is exercised and protected. Criminal law exists as an essential tool of the CCP to regain public trust and maintain social stability, especially with the rise in the sense of insecurity. On the one hand, the making of criminal law takes place within the framework set by the CCP. Criminal law reforms reflect the CCP’s governing characteristics by determining on a macro perspective which risks should be reduced and which ignored, deciding what constitutes unacceptable levels of risk, evaluating who should bear risk plus who risk should protect, and what are acceptable ways of reducing risk. On the other hand, “observations illustrate that party leadership over law making is far less centralized and unified than has often been supposed.” 

CCP’s leadership on specific legislation has actually become more ambiguous. The retreat is a reactive adaptation of the social environment. It is a balance between “governing at a distance” and “governing with no distance”. Second, within the institutional framework set by the CCP, the legislation is a co-operative model among the agencies, which has shown a certain degree of power struggle with limited data of internal conflicts. Besides, bureaucratic reports and claims shape the law to the greatest extent through

the inter-agency review process, with advice from think tanks/scholars taking an assistive role through expert argumentation meetings.

Based on the three streams examined in the previous chapters, the seventh chapter makes a comparison of the role of the state between the West and China. It continues with the exploration of the role of the CCP in criminal law making. The chapter suggests that even though it looks like the CCP has retreated from the legislative process, it actually strengthen its power through the whole project of legislation. In criminal justice, the interactions between the individuals and the state in China are distinct from that of the west. In China, crime prevention, with the trend towards enhanced risk control, is a product of the collective “it works” beliefs on the fights with crimes, rather than the pessimism towards the government ability of crime fighting in the West. To examine the orthodoxy of crime prevention with this paradigm shed lights on the Chinese characteristics, which other theories like the risk society theory is unable to accomplish.

Then the concluding chapter analyzes the “policy window” of amending criminal law, and concludes that the present Chinese criminal legislation has been more responsive and inclusive than ever before. “An open policy window is an opportunity for advocates to push their pet solutions or to push attention to their special problems.”\textsuperscript{112} Policy window opens at the time when the three streams are joined. In China, the dynamic between public support and political approval largely affects how and when the policy window will be opened. Criminal law making enhances the trust between the government and the public through a top-down approach in both

procedural and substantial aspects. As it has been shown, law making procedures win mass support with responsive and participatory institutional arrangements; substantial changes to criminal law strengthen the government’s legitimacy by being harsh on crimes. However, this trust can be harmful for criminal law itself. It is hoped that the party-state will give equal consideration to restraining criminal law. Besides, viewing public emotions rationally should run in parallel with widening real participation during the stages of negotiations. This all depends a lot on the power structure of the Chinese society. Otherwise, given that authoritarianism is more likely to lead to the expansion of the penal system, Chinese society will slide into a thoroughly surveillance society, which will eventually be detrimental to the pursuit of liberty and democracy.
Chapter 2: Recent Reforms in Chinese Criminal Law and Their Implications

Based on the eighth amendment to Chinese criminal law, Chapter 2 of this dissertation will document reforms to the statutes of the law in order to lay the foundation for the dissertation as a whole. Through a comparison between the Chinese and Western preventive models of the criminal justice system, the first section examines the reasons the dissertation uses the three legislative changes as case studies. Then the second section analyzes these three changes in detail by highlighting their characteristics as preventive shifts. The third section argues that solely relying on the risk society theory as the analytical framework for the preventive shift of Chinese criminal law is not enough. This dissertation aims to fill the resulting gap.

2.1 Conceptualization of “Crime Prevention”

2.1.1 Crime Prevention in the Chinese Context

In China, the concept of “prevention” can be analyzed with diverse analytical frameworks, relying on what it refers to in each circumstance: first, prevention has a similar utilitarian function as “deterrence”\(^{113}\): aiming to prevent offenders or potential offenders from committing crimes in the future. Crime prevention justifies the expansion of the whole Chinese criminal

\(^{113}\) As to the justifications of penal punishments, there are hybrid principles for the existence and distribution of criminal sanctions, including different models of combining retribution, deterrence, rehabilitation, incapacitation, prevention and restorative justice. Researchers Ludwig Andreas Feuerbach, M.E. Mayer, H.L.A Hart, Herbert L. Packer, Ernest van den Haag, Andrew von Hirsch, and Paul Robinson have independently constructed theories about the dynamic of these combined purposes functioning within one criminal justice system. They advocate a hybrid system to balance the “just desserts” concerns and utilitarian purposes, though they each adopt a different approach to distribute sentencing. “Code drafters are choosing to further different purposes in different contexts.” See Stephen Shute & A. P. Simester, Criminal Law Theory: Doctrines of the General Part (Oxford: Oxford University Press, 2002) 83.
justice system. Since the 2000s, there has not only been continuous criminalization of new behaviour in the law, but also increased policing input in crime prevention and security governance (such as the relentless war against deviance and crime), as well as widespread use of surveillance technology all over the country.114

As rationales for criminal penalties and in parallel with retribution, deterrence and rehabilitation, “prevention” refers to the exertion of criminal penalties without actual harm being committed, such as inchoate crimes, which include attempt, conspiracy and incitement. In Western scholarship, Andrew Ashworth and Lucia Zedner identify seven preventive offences in which prevention is the primary rationale for the criminalization, including inchoate crimes, preparatory or pre-inchoate offences, crimes of membership, and crimes of endangerment.115 At present in China, inchoate crimes are routinely criminalized. Articles 22 to 24 and 25-29 of the criminal law (as general rules applied to all offences) have detailed provisions of inchoate crimes of attempt, conspiracy, and solicitation.116 The most prominent proactive change of the increase of “preparatory or pre-inchoate offences”, which just has started, is in recent Chinese anti-terrorism laws. War, in the sense it has been used in phrases like “war on crime” and “war on terror”, is a maker that a transformation of the means and rationalities by which elites justify and set the desired dimensions of their own governance.117 In September 2014, the Chinese Supreme People’s Court, Supreme People’s Procuratorate, and the Ministry of Public Security enacted

116 Criminal Law, RS 2011, c2, s 22-24, s25-29.
“Decisions on Legal Application of Cases of Violent Terrorism and Religious Extremism”, restipulating a variety of preparatory offences of terrorist acts and secessionist activities. The anti-terrorism decision, which has the same effect as the law, is an ad hoc extension based on preventive rationale. Besides, the ninth amendment to Chinese criminal law, which will take effect in November of 2015, has a variety of new provisions of terrorism offences.\(^{118}\)

Besides existing as a justification for substantial criminal law, “prevention” can also serve as a rationale of criminal procedure, which implies intense policing and broader surveillance management. The Ministry of Public Security, the Ministry of State Security, and private security forces keep strict surveillance of the society both openly and secretly. In the amended Criminal Procedure Law in 2011, although much progress has been made to restrain police authority, police power keeps extending its surveillance and investigation of serious crimes such as terrorism, crimes against state security, and crimes endangering social order, the definitions of which remain quite blurred.\(^{119}\) On terrorist crimes and certain offences against public or state security, the amendments of criminal procedure law also developed special restrictive provisions, criticized by lawyers and foreign commentators as “secret detention”.\(^{120}\) The expansion is also

\(^{118}\) “The Ninth Amendment to Chinese Criminal Law”, online: NPC<http://www.npc.gov.cn/englishnpc/news/Events/2015-08/31/content_1945691.htm>. The NPC adopted the newest amendment on 29 August 2015. The new law added in many stipulations against terrorism. For instance, those who promote terrorism and extremism by producing and distributing related materials will receive the same punishments with the terrorists.


shown in the penal system, where the number of prisoners incarcerated and that of convicted offenders are on the rise every year.\textsuperscript{121} Besides those under administrative detention, until 2010 segregated people in China exceeded 2.3 million, almost the same number as that of the US.\textsuperscript{122}

But changes to Chinese criminal law are not simply limited to those discussed above. There are three techniques in the eighth amendment to Chinese criminal law to make criminalization even more preventive on crimes of drunk driving, manufacturing and selling fake medications, and environmental pollution. The three change categories are signs of the law’s preventive move in the Chinese punitive criminal justice system. “Prevention” refers to the techniques justified by controlling conduct risk for the prevention of future harm, rather than punishing existing harm. The shifting focus from harmful results to risky behaviour are signals that criminal law itself is moving even further from the emphasis on harmful wrongdoing. Compared to the concept of “just desserts”, the law is increasingly moralized through the need for risk control.

Therefore, on one hand, in the Chinese context, fighting serious crimes (a long-lasting focus of Chinese criminal justice) is a factor that keeps promoting changes to the legal system. On the other hand, there are new minor offences that violate public well-being, like driving infractions, fake medications, and environmental pollution. These social problems that emerge in modernization have been attracting attention and debate. In contrast to the anti-terrorism law that

exists in many places of the world as a preventive trend of criminal law, the proactive techniques of Chinese law reflect the Chinese legislative pattern and social conditions.

Indeed, over the past ten years, a number of countries such as the US, the UK and Australia have also witnessed a preventive turn in criminal justice.\textsuperscript{123} Though Western penal practices have divergences among them, they nonetheless share an overall developing trend.\textsuperscript{124} Treating the West as a whole,\textsuperscript{125} the next part of this section will analyze the distinctions between the Chinese and the Western models, with the aim of shedding light on the Chinese characteristics of the preventive shift.

### 2.1.2 Crime Prevention in the Western Context

In the West, the concept of crime prevention is not clear. Under the umbrella of “crime prevention” there is a set of theories and practices ranging from criminal law statute transformations and new policing approaches, to the emergence of atypical penalties such as

\textsuperscript{124} In Western scholarship, “that contemporary penal policy and practice is complex and capricious is generally agreed. Whether the transformations it appears to be undergoing can be explained by reference to a larger master pattern is more controversial. And which particular master pattern this might be is more controversial still.” Lucia Zedner, “Dangers of Dystopias in Penal Theory” (2002) 22 Oxford J Legal Stud 341-366.
\textsuperscript{125} The dissertation treats the west as a whole for the convenience of research, but at the same time, it also recognizes the differences among these countries. In the dissertation, the West consists of Anglo-American countries, the UK and Western Europe, excluding Continental Europe. While studies have shown similarities and transplantations of criminal polices between the US and the UK, or the UK between the Commonwealth, the policy distinctions between the US and continental European are evident. Some researchers even use “American Exceptionalism” to refer to the apparent differences between American and continental European in their approaches to justice generally. See James Q. Whitman, \textit{Harsh Justice: Criminal Punishment and the Widening Divide Between American and Europe} (New York: Oxford University Press, 2005) 41-68; Carol S. Steiker, “Capital Punishment and American Exceptionalism” (2002) 81 Or L Rev 97-130; Matthew B. Kugler et al, “Differences in Punitiveness Across Three Cultures: A Test of American Exceptionalism in Justice Attitudes” (2013) 103 (4) J Crim L & Criminology 1071-1114.
preventive orders and civil commitments. “Crime prevention” can be conceptualized in at least two dimensions. Used in a utilitarian perspective, “all correctional ideologies can be legitimized by the rhetoric of prevention”\(^{126}\), and constitute key parts of the expansion of the state apparatus. The rise in crime prevention refers to the expansion of the coercive state through the criminal justice and policing systems, which also comprise approaches of situational crime control, multi-agency cooperation, and community participation programs. While in a narrower perspective than that of “preventive justice” or “actuarial justice”, preventive methods tend to govern the future through criminalizing “risk”, rather than imposing punishment on existing harmful wrongdoing, which implies the use of restrictive methods on risky behaviour based on recidivism, mental illness, or summary offences. Preventive methods themselves are also subject to various interpretations. They are not limited to terrorist offences, encompassing a broad range of social policies and regulatory endeavours, such as the proliferation of preventive offences like inchoate crimes, civil preventive orders, the courts’ preventive role, preventive detention of dangerousness, and preventive counter-terrorism laws.\(^{127}\)

These dimensions of the prevention concept overlap on some occasions; they are essentially “in stark contrast to the traditional retrospective orientation of the criminal justice system”\(^{128}\) but, at times, will be discussed separately by researchers who each have a distinctive focus. For instance, in the US, changes to criminal justice focus mostly on criminal conduct associated with terrorism and violent crimes. First, the Model Penal Code penalizes a person who "…recklessly


\(^{128}\) Tamara Tulich, “A View Inside the Preventive State: Reflections on a Decade of Anti-terror Law” (2012) 21 (2) Griffith LR 2.
engages in conduct which places or may place another person in danger of death or serious bodily injury."\textsuperscript{129} Because reckless endangerment under this provision could be based on any act or failure to act that creates the requisite danger, these statutes are routinely upheld by the courts against challenges of ambiguity.\textsuperscript{130} Second, since 2000, anti-terrorism laws have tremendously extended state power. The USA Patriot Act of 2001 as well as its Extension Act of 2011 gave the FBI much more discretion in terms of search and surveillance, even without a court order.\textsuperscript{131} The provisions have generated a great deal of controversy about the Act’s constitutionality since it may abuse the privacy of not only the suspects but also of innocent people.\textsuperscript{132} Third, in the US there is civil detention of sexual crime offenders as well as prolonged detention/continued supervision of criminals with risky personalities. For instance, the Supreme Court in Kansas v. Hendricks (1997) and Kansas v. Crane (2002) upheld sexually violent predator statutes that provided for the post-imprisonment civil commitment of sex offenders who have a "mental abnormality" (but not a major mental disorder such as schizophrenia) which results in their becoming "likely to engage in repeat acts of sexual violence."\textsuperscript{133} Fourth, the US has also enacted preventive orders to restrict gang-related activity, particularly violent crimes and drug trafficking. A case in point is that in 2011, the city of Chicago revised the Chicago Municipal Code 8-4-015 (1992) to make anti-loitering laws constitutional.\textsuperscript{134}

In the UK, besides concerns over public security, the state aims to crack down more on minor crimes and anti-social behaviour. The preventive shift is most evidently shown in a series of preventive orders, including anti-social behaviour orders, control orders (which have been repealed), sexual offence prevention orders, and serious crime prevention orders, which were enacted to control minor behaviour for the prevention of more serious crimes such as terrorist acts and sex crimes. Out of the restraints of criminal procedure law, these civil orders allow the government to “avoid the rigorous procedural protections of the criminal law and perhaps eventually replace criminal justice altogether”.\(^{135}\) The pre-trial detention and investigative stops by police often -- or always -- depend upon dangerousness assessments as well.\(^{136}\) There are also cases of expansion of inchoate and anticipatory offenses, as well as preventive detention of mentally disordered persons, all of which constitute so-called “preventive justice”, manifesting how the state governs and the nature of criminal justice in the United Kingdom.\(^{137}\)

UK and US practices have had enormous influence on other Western countries.\(^{138}\) In more and more countries all over the world, the prediction of dangerousness and the attempt to preempt future harm through deterrence, rehabilitation and incapacitation are becoming well-established

\(^{135}\) Christopher Slobogin, “A Jurisprudence of Dangerousness” (2003) 98 (1) Sw UL Rev 6. The UK as a united nation has distinct systems of law: English Law (England and Wales), Northern Ireland Law, and Scots Law. In specific, England and Wales ASBOs have mostly been via the Anti-social Behaviour Act of 2003, in Northern Ireland through an Order in Council and in Scotland with the Antisocial and Sexual Behaviour etc. (Scotland) Act of 2004. In practice, the growth in the use of ASBOs in England and Wales has been more rapid, and stands well above the rate (relative to household population) in Scotland.


pillars of punishment. A great variety of crimes are based on the prediction of harm, even without the proof of any harm. For instance, Australia has witnessed the pervasion of the term “prevention” in its anti-terror policy as it introduced control orders into its legal system. Other commonwealth countries also added new penalties against crimes of solicitation and crimes of conspiracy. In civil law countries like Germany, the legal system not only attached increased importance to environmental interests, but also added new offences of crimes with danger, weapon possession, as well as inchoate and conspiracy actions of terrorism crimes.

Western experience shows that the fight against terrorism is one of the main driving forces of the preventive shift in its criminal justice system. But in addition to anti-terrorism laws, each country also has its own feature. For instance, the US demonstrates the most intense control of terrorist behaviour, while the UK focuses more on minor offences. In China, expansion of crime prevention can be addressed in a variety of dimensions. Similar to that of the West is the expansion of the overall system and the increase in preparatory offences on terrorist offences. Differences lie in the control of political risk and criminal law amendments as indications of the proactive trend of punitive law on crimes against public well-being. For instance, the three

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140 An anti-terrorism control order is a civil order that imposes obligations, prohibitions and restrictions on an individual, such as reporting to police and abiding by a curfew. A control order is issued by a court where the court is satisfied, on the balance of probabilities, that making the order “would substantially assist in preventing a terrorist act” or the person provided or received training from a listed terrorist organization.
legislative changes to criminal penalties on minor misbehaviour in the eighth amendment to Chinese criminal law, having been officially written in criminal law, represent the largest number of such proactive legislative changes. Even though the anti-terrorism law is a main source of preventive action in China, it has not been specifically stipulated in criminal law until the ninth amendment to Chinese criminal law, which will take effect in the coming month. Compared to others such as anti-terrorism laws, which are mostly decided on by the deciding bodies themselves, these changes illustrate more of the interplay between the public and the state, the law and the policy. Accordingly, this dissertation will use these three changes as case studies, with the other reforms as supporting evidence. Preventive techniques can be understood in the context of a broader transformation of governance and society. “Crime is not only about the imposition of actual criminal sanctions but is also descriptive of situations in which crime provides the metaphors and narratives in which efforts to govern are cast.”144 It is “a mechanism for viewing the institutions, practices and personnel of government”.145

2.2 Three Case Studies: Based on 2011 Eighth Amendment to Criminal Law

In China, enacting the Criminal Law Amendment Act as the major method of revising criminal law146 was designed to meet the needs of a rapidly developing society while maintaining the stability and predictability of the law. It is also one of the signs of progress in China’s criminal justice system. After the 1997 Criminal Law replaced the 1979 Criminal Law, the Chinese state

made eight amendments up until 2011. In 2011, the eighth amendment, which was acknowledged as the most important amendment by a number of commentators, came into force with fifty provisions that changed the penalties for a variety of crimes that endanger public security, economic order, and property rights.\textsuperscript{147} It is difficult to use one term to categorize the changes since the changes reflect multiple pursuits. The abolishment of thirteen capital punishments (the first time in Chinese history) was recognized as showing respect for liberal values.\textsuperscript{148} New community correction practices have also been introduced to address minor crimes or offenders ascribed with less responsibility, such as juveniles. Compared to former amendments, these changes reflect the progress in Chinese law for more lenient and diversified penalties.\textsuperscript{149} While at the same time, the boundary of criminal law has been continuously expanded to criminalize new conduct, especially those closely associated with public well-being (the livelihood of the people).\textsuperscript{150} Penalties for violent crimes, such as terrorist attacks, gang crimes, crimes against state security, and their associated minor offences, have been increasing over time. In criminalization, three changes manifest a preventive trend of crime control. This section will identify these changes and examine their similarities.

\textsuperscript{147} Criminal Law, RS 2011.
\textsuperscript{149} Kechang Ma, “Position of Criminal Policy of Combining Justice with Mercy” (2007) 4 \textit{China Legal Science}.
2.2.1 Three Offences in Chinese Criminal Law

2.2.1.1 Crime of Drunk Driving

The first of the changes establishes impaired driving as a crime. Impaired driving is an offence in many countries like the US, the UK and Canada.\(^{151}\) In China, drunk driving or speeding without causing an accident was punished with administrative penalties.\(^{152}\) However, with the newest amendment to criminal law in 2011 it became a criminal offence against public security. Making the shift from an administrative offence to a criminal offence is a crucial transformation in China’s legal system. Only offences that seriously violate the public interest are “crimes”. The imposition of public censure as well as the deprivation of liberty by criminal law is much more intense than the other punishments. Furthermore, due to the Chinese drinking culture, drunk driving, which was assumed to be a minor problem, is commonly regarded as a non-criminal offence in the public mind.\(^{153}\) The Chinese people are apt to worry about the expansion of state power if such endangerment behaviour continues to be criminalized in the future.

In the jurisprudence of criminal law, drunk driving is preventive for several reasons. First, drunk driving is an endangerment crime that criminalizes the creation of unacceptable risk of harm.\(^{154}\)

“The driving is not itself harmful, and need not be directed toward increasing the risk of injury to

\(^{151}\) Zhiqiong Yang, “Drunk Driving in the US” (2011) 2 Law Science Magazine 35-44.
\(^{152}\) In China, administrative penalties are usually issued by the police or the other departments from the government. They do not involve with court decisions, and are commonly believed to be less harsh than criminal penalties. Typically, administrative penalties include but are not limited to fines, revocation of licenses, and detention of less than 15 days. To change from administrative penalty to criminal penalty is an increase of the seriousness of penalties in China.
others; it is criminalized primarily because it does increase that risk.”

The primary purpose of establishing this as a crime is to prevent road accidents (the potential result of drunk driving), however there is yet no established harm result for the crime itself. Though “modern criminal law is characterized by ‘bringing forward of criminal law in the sphere of endangerment’,” it is new in Chinese criminal law. Second, this kind of “negligence/recklessness + risk” combination, which is distinct from the “negligence/recklessness + harm” model, applies more restrictions on the freedom of ordinary people. An offender is found guilty as a person with common consciousness who, even though without intent, leaves others at excess risk in road safety. The risks have become so grave that criminal law can no longer tolerate them. Third, without “harm” as the defining rule, assessing risk must rely more on actuarial techniques. For instance, according to the Law on Road Traffic Safety, alcohol content in the blood at the time of driving that is 20-80mg/100ml is “driving after drinking”, while that exceeding 80mg/100ml is “drunk driving”.

The judges also have to consider other circumstances such as the time and the place where the offences were committed to assess whether the conduct posed risk to the public. Based on Article 13 of Chinese criminal law, “an act that is clearly of minor importance and little harm shall not be considered a crime”; if it is impossible for the conduct to generate any injury or property loss, then it is not a crime.

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157 The Road Traffic Safety Law, RS 2011, c9, s91.

158 Criminal Law, RS 2011, c2, s13.
Before the enactment of the new amendment, it was the Road Traffic Safety Law of the People's Republic of China and other associated regulations that penalized drunk driving without causing road accidents. Article 88 of the law establishes several administrative penalties such as warnings, fines, suspending or withholding the driver’s license, or taking into custody. Regulation on the implementation of the law specifies the details of carrying out the penalties. However, since 2003, officials report that cases of drunk driving and speeding have separately exceeded 19 and 1 million per year nation-wide, and the public’s awareness is growing. Since 2009, with the rising number of drunk driving infractions and a series of notable cases that produced fatal accidents, some local courts sentenced the offenders with “crimes against public security through other dangerous means”, since under such circumstances they could be charged with detentions of more than ten years rather than less than seven years. At the same time, both internet comments and journal papers began to argue that existing administrative penalties for the offences were not compatible with the risks they actually generated, and required harsher punishments to prevent potential injuries. Under these circumstances, in order to prevent drunk driving more effectively under the newest amendment in 2011 (and besides the existing “traffic offence causing bodily harm or property damage”) a second provision was added to

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159 The Road Traffic Safety Law, RS 2011, c7, s88.  
161 Liangyuan Mo, “Use of Law in Hot Discussed Cases: Based on 7 Cases of Drunk Driving” (2012) 8 Legal Science Monthly 133-134.  
162 Guangquan Zhou, “Necessity of Creating the Offence of Impaired Driving in Our Criminal Law” Social Sciences in China, 2009-08-18, A7. Zhou claims that penalties of drunk driving are too lenient in China. Creating this new offence in criminal law will not only decrease such offences, but also clarify the distinction between traffic crimes and intentional crimes against public security. In this respect, the Japanese experience serves as a good example for Chinese legislation; Ling Jia & Qimei Bi, “On Criminalizing Drunk Driving” (2010) 09 Law Science Magazine 86-89. Jia and Bi insist that criminalizing drunk driving is the trend in criminal law all over the world. It meets the public’s demands in China as well.
Article 133 as an offence of “dangerous driving”,\(^{163}\) that is, "A person who chases with other automobiles when driving on the road or commits drunk-driving shall be sentenced to criminal detention from one to six months and be concurrently given a fine, provided that the circumstances are grave."\(^{164}\) The crime of drunk driving fills the gap in the former system that maintained the harm result as one requirement of committing a crime. With the newly established crime of drunk driving, current traffic offences consist of the offence of drunk driving, traffic offences causing inquiry or property damage, and using drunk driving conduct as the means to endanger public security. In this way, Chinese criminal law regulates road safety more efficiently by criminalizing drunk driving, both with and without road accidents, and with intention, negligence, or recklessness.\(^{165}\)

It may be suggested that drunk driving criminalization is a common practice all over the world. For instance, Canadian driving offences include Drive Disqualified, Dangerous Driving (no injury), Dangerous Driving (injury occurs), Driving or Care or Control while Impaired or Over 80 mgs, Impaired Driving Causing Bodily Harm, and Impaired Driving Causing Death.\(^{166}\) In the

\(^{163}\) *Criminal Law*, RS 2011, c2, s133 (2).
\(^{165}\) Under this circumstance, the boundaries of these three crimes are as follows: the crime of drunk driving is negligently or recklessly creating risks that are serious enough to generate road accidents; drunk driving that leads to real road accidents by negligence or recklessness is a traffic offence causing injury or property damage; using the conduct of drunk driving as a means to endanger the general public is an intentional crime against public security through other dangerous means. The Law on Road Traffic Safety was also revised in 2011 to serve as a supplement of criminal law by raising the administrative punishments of drunk driving and driving after drinking. The new amendment to this law adds revoking the driver’s license as well as depriving the driver of the eligibility to regain it in five years as associated punishments. As such, the overall penalties for drunk driving are both harsher and more complete.
\(^{166}\) “Criminal Offence Penalty Chart”, online: Defencelaw <https://www.defencelaw.com/penalty-driving.html>.
UK, the Highway Code sets penalties for a variety of offences, such as causing death by dangerous driving, dangerous driving, careless and inconsiderate driving, driving while disqualified, speeding, and traffic light offences.\textsuperscript{167} Other countries or districts, including Japan, Germany, Korea, Finland and Hong Kong, also have corresponding penalties for drunk driving.\textsuperscript{168} While it may be true that drunk driving is common, being common practice cannot be an argument for the crime of drunk driving not being preventive in the Chinese context. The concern lies in the shift from resulting in an administrative penalty to a criminal penalty in China, rather than having the penalty or not. In addition, as the first endangerment crime in criminal law, it is a sign that creating risk without a purpose (which is distinct from traditional models focusing on either guilty intention or harm) can be criminalized as well.

\subsection*{2.2.1.2 Crime of Manufacturing and Selling Fake Medications}

Another example of this shift in criminal law is found in the changes concerning manufacturing and selling fake medications. Before the eighth amendment, Article 141 of the criminal law stipulated that “Manufacturing or selling fake medications, which is serious enough to endanger public health, shall be sentenced to imprisonment of less than 3 years or criminal detention, and be given a fine with 50\% to twice amount of gross sales concurrently or un-concurrently…”\textsuperscript{169} This offence was one of the “crimes with risks”\textsuperscript{170}. The \textit{mens rea} of manufacturing and selling fake medications was intention, but for the endangerment of public health it was

\begin{itemize}
\item \textsuperscript{167} \textit{The Highway Code}, RS 2015.
\item \textsuperscript{168} Bingzhi Zhao & Bin Yuan, “Discussion on Main Issues of Drunk Driving” (2011) 3 Crim L Rev 163-165.
\item \textsuperscript{169} \textit{Criminal Law}, RS 2011, c3, s141.
\end{itemize}
negligence/recklessness. Controversy ignited over the meaning of “serious enough to endanger public security”. It used to be debated that whether simply manufacturing or selling fake medications without generating income constituted an offence. It was also uncertain whether manufacturing or selling fake medications but without producing bodily harm constitutes committing this crime.\textsuperscript{171} In 2009, the Supreme Court and the Supreme People's Procuratorate made a judicial interpretation using five examples of “seriousness” for local courts to follow.

The new (eighth) amendment avoids the above controversy by eliminating the condition “serious enough to endanger public security”, and changing the offence to “whoever manufactures or sells fake medications shall be sentenced to imprisonment of less than 3 years, or criminal detention, and be concurrently given a fine…” This is a shift from the offence of concrete endangerment (which presupposes the causation of danger or harm) to abstract endangerment (which presupposes that the conduct at least typically causes danger)\textsuperscript{172}. Since the amendment presumes the risk of the behaviour itself, judges no longer have to evaluate the seriousness of the risks like they did before. Rather, the act becomes one of the offences that are charged through behaviour identification without risk assessment, which makes it easier for criminal trials.\textsuperscript{173} At the same time, by removing the condition (serious enough to endanger public security) that was used to restrain the scope of this offence, the boundary of criminal law is accordingly expanded to behaviour producing minor risks. The significance of the changes lies on the shift from “crime

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\textsuperscript{171} Xihui Li & Wenhui Dong, “Research on the Revisions of Crime of Environmental Pollution” (2011) 9 Law Science Magazine 8-11.
\end{flushright}
with risks” into preventive crimes such as “crimes of possession”; it is not compulsory to identify precise wrongful harm or risk in the offense.\textsuperscript{174}

\subsection*{2.2.1.3 Crime of Environmental Pollution}

The third case in the new amendment is the crime of discharging, dumping or disposing of radioactive waste, waste containing pathogens of infectious diseases, or toxic substances. Before the eighth amendment, Article 338 of Chinese criminal law was “whoever, in violation of the regulations of the state, discharges, dumps or treats radioactive waste, waste containing pathogens of infectious diseases, toxic substances or other hazardous waste on the land or in the water bodies or the atmosphere, thus causing a major environmental pollution accident which leads to the serious consequences of heavy losses of public or private property or human casualties, shall be sentenced to fixed-term imprisonment of no more than three years, and be concurrently or separately fined. If the result is extremely serious, he/she shall be sentenced to fixed-term imprisonment of three to seven years and be concurrently fined.”\textsuperscript{175} The mens rea of this offence is intentionally violating the state regulation by discharging, dumping or treating dangerous waste, however it was uncertain whether the mental state involved in causing an accident was by negligence or recklessness.\textsuperscript{176} Many scholars claimed that it was an offence of

\footnotesize{\textsuperscript{174}Forthcoming judicial interpretations may clarify that minor violations will not be criminalized, but a change in the law itself is an official declaration prohibiting any such behaviour.}\textsuperscript{175}\textit{Criminal Law}, RS 2011, c6, s338.\textsuperscript{176}Zegang Jin & Yi Yan, “Why Identical Cases Have Different Verdicts: Reflections on the Water Pollution case of Yancheng and the Chemical Major Pollution Case of Yixin in Corporation” (2011) 2 Journal of Shanghai Jiaotong University 31-32.
negligence; otherwise, causing environmental accidents on purpose was an offence against public security.\textsuperscript{177}

The eighth amendment to Chinese criminal law made essential changes to this environmental crime by eliminating the “result” of “a major environmental pollution accident”, the key component of the offense, and replacing it with “seriously polluting the environment”. It is preventive since the focus on risk has started to replace results of harm. The name of the offence was changed accordingly from “crime causing major environmental accident” into “crime of environmental pollution”. Eliminating the “results” of serious environmental accidents mean that lawmakers believe it is too late to take action once an accident happens. Criminalizing behaviour causing minor harm or risk will prevent more accidents from happening. However, it is not an overall transformation from result-oriented to behaviour-oriented, since according to judicial interpretation this offence is a balance of harmful results with risky behaviour. In 2003, the Supreme People’s Court and Procuratorate jointly issued a judicial interpretation with precise criteria for convictions and sentences to make the amendment more enforceable, of which fourteen rules were developed based on the concept of “seriously polluting the environment”.\textsuperscript{178}

In the fourteen rules, less than one half focus on dumping waste of more than three tones, or discharging waste to Grade 1 areas of water supply or natural reserves. The rest (more than one half) are characterized as bodily injury or property loss. However, compared to the old statute,\textsuperscript{177, 178}

\textsuperscript{177} However, in these fourteen rules of the explanation, besides clarifying the place, times, and types of waste that may pollute the environment, the court still uses certain minor results as defining criteria of “seriously polluting the environment”. Thus, in general, this is a behaviour-oriented arrangement, but the “harm” result still plays some part in defining crimes.

the number of behaviours that do not cause harm have still increased as the sole elements of committing the crime. This shift from the post hoc responses “harm done” perspective, to a more proactive focus on “harm prevention” expands the boundary of criminal law even further.

2.2.2 Similarities among the Changes

The three cases above share at least four common features. First of all, the element of “harm” has become increasingly less important. With the rising number of crimes with risk, criminal law intervenes proactively to control behaviour before harm is done. The role of “harm” as a core justification of criminal penalties is collapsing. For example, in offences of drunk driving, manufacturing or selling fake medication, and discharging, dumping or disposing of waste, it is now unnecessary for the offender to cause criminal results (that is, traffic, drug, or environmental accidents). Behaviour constituting the offence exists as the primary justification of criminal penalty. By penalizing risk to prevent potential harm, such offences diverge from the traditional paradigm of “harm plus culpability”. It may also be argued that such conduct causes “social harm” by damaging social order or hurting public feelings of security, but in this case, an over-extension of the concept of “harm” may violate legal certainty through its ambiguity and thus infringe upon the fundamental spirit of criminal law.

Second, the scope of legally protected interests is expanding. Legally protected interests are mainly materialized benefits including the physical integrity of the body and the value of

179 The amendment also replaces the concept of “hazardous waste” with “harmful substances”.
property. However, at present “these interests are becoming ‘magic words’ whose conceptions are more and more blurred”,\textsuperscript{181} including conceptions that are commonly claimed by the officials as objectives of their policies, such as security of the society, peace of the community, or even the well-being of future generations without concrete victims or losses.\textsuperscript{182} On the one hand, the general words are subject to wide interpretation. Some of them are even subjective “feelings”, violations of which ought not to be criminalized. On the other hand, compared to other crimes, the distance between protected interests and the offences are much further apart, and the “cause result” relationships are more indirect. In the case of drunk driving, fake medications, and dumping waste, Chinese criminal law has started to punish behaviour that remains far from real and concrete harm.

Third, criminal behaviour turns into the main focus for these criminal penalties. By criminalizing “risk” rather than “harm”, criminal behaviour replaces criminal results as the criterion for substantial crime. Not only has the number of conduct crimes increased in Chinese criminal law, but in existing conduct crimes some requirements have shifted from risk assessment to behaviour identification, making it easier for prosecutors to charge offenders. The boundary of criminal law is accordingly expanded by penalizing the rising number of behaviours that are with or without minor “harm” results. In this aspect, it is justified for the Supreme People’s Court and the Procuratorate to work out judicial interpretations of the law on ambiguous concepts, such as the criteria of the amendments, to assess how much risk criminal behaviour exposes.

\textsuperscript{181} Zhiming Gao, History of the Concepts of Legally Protected Interests: Based on German Theories, (Master thesis, Taiwan National University Law Faculty 2001) [unpublished].
\textsuperscript{182} David Nelken, “Comparative Criminal Justice, Beyond Ethnocentricism and Relativism” 6 (4) European Journal of Criminology 307.
Fourth, the *mens rea* of these offences with respect to causing risk are either recklessness or negligence. It involves the pursuit of a course of action while consciously disregarding the fact that the action gives rise to a substantial and unjustifiable risk, or failing to exercise the care that a common prudent person should exercise in like circumstances. In Chinese criminal law, there is no concept of recklessness. In the US, the Model Penal Code sets five different modes of culpability: negligently, recklessly, knowingly, purposely, and strict liability. “Recklessly” is a level of *mens rea* that is similar to oblique intention and negligence with overconfidence in the Chinese legal system. Different from direct intention, both recklessness and negligence require some degree of objective testing to establish the minimum requirements of foresight. The greater the risks that exist, or the more they can mature into a foreseen injury, the greater the degree of blameworthiness, and subsequently, the greater the sentence rendered. In this way, although recklessness and negligence do not amount to strict liability, they reclaim the individual’s responsibility of protecting the general public.

Such a shift raises concerns about the challenges posed by “prevention” to the dominance of “just desserts” as the central rationale in penal theory. Adhering to just desserts is a basic principle of the Chinese criminal law. Article 5 of Chinese Criminal Law stipulates that, “The degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender.” “Whereas uncertainty once spoke of incalculability, of an unknown future impossible therefore to control or of a lack evidence sufficient for prosecution for criminal offences, it has now become a developed set of discourses and
techniques through which state action is both warranted and required.”\textsuperscript{183} Preventive measures not only penalize risks, but also censor risk creators with a negligent or reckless mindset. The utilitarian characteristic is much more explicit, particularly when it is employed for the pursuit of public security. Considering that “just desserts” remains a central justification of criminal law in China, the risks that criminal law prevents must be grave enough. “Unless the individual engages in conduct that causes legally-defined harm or that is otherwise obviously risky, the government should not be permitted to intervene preventively.”\textsuperscript{184} The further the system travels from the paradigm of the “harm plus culpability” model of criminal offences, the stronger the justifications should be for invoking criminal law with its censures and punishments.\textsuperscript{185} This is the legitimate line beyond which preventive methods cannot step.

### 2.2.3 Weak Constraints of the Law

In practice it is difficult to impose normative restraints on the expansive criminal law. The foremost issue is whether the offences are defined in broader terms that criminalize a wide range of activities remote from actual harm and “stretching their predictive capacity beyond safe reliance.”\textsuperscript{186} While it is quite proper for criminal law to punish risky behaviour, there should be a boundary within which the restriction is both justified and effective. To be justified commonly

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means that the restriction adheres to the fundamental principles of criminal law. In order to be proportionate to the seriousness of the wrong involved, and as the last resort when civil, administrative and other regulatory measures have failed, “the more remote an offense becomes from the actual infliction of harm, the higher the degree of fault necessary to justify criminalization”. To be effective means it is capable of meeting the demands of the retributive and deterrent effects it seeks, which is the common primary reason for criminalization. Working well in doctrinal analysis, both of these two criteria are complex when tested in actual practice. On the one hand, ambiguous principles coupled with the prevention function are open to the interpretations of legislators and judges in deciding how significant the risk of serious harm is, whether other means will be ineffective, and which kind of sanctions are appropriate. On the other hand, it is difficult to assess the long-term effects of criminal sanctions. Most of the public believes in the positive correlation between an increase of criminal penalties and their deterrent effects. In legislation concerning crimes against public safety (or security), support for efficient prevention measures will prohibit an accurate calculation and rational response to unknowable and incalculable risks.

It is also difficult to conceptualize “security”. Conflict between the pursuit of public security and human rights is the deciding factor for the rationales of preventive methods. The number of revisions on crimes endangering economic order was the greatest in Chinese criminal law

187 Criminal Law, RS 2011, c1, s 3-5. Article 3-5 of Chinese Criminal Law outlines the principles of Chinese criminal law. Article 3 stipulates, “For acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law; otherwise, they shall not be convicted or punished.” Article 4 writes as, “The law shall be equally applied to anyone who commits a crime. No one shall have the privilege of transcending the law.” Article 5 is, “The degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender.”

amendments from 1999 to 2011. This reflects the development of Chinese crime rates, where crimes compromising economic order contribute most to their growth, while rates of traditional crimes as homicide, injury and rape have not changed substantially in the past twenty years. However, criminal law has always been associated with the pursuit of security. Besides adding new offences, the law continues to increase the harshness of criminal penalties on traditional serious crimes. There are wars to ensure road, food and drug security every year. In the Chinese context, “feelings of insecurity may encapsulate a much larger set of concerns, coalescing perhaps around security of the environment, of health, employment, and the economy.” Personal safety concerns make the public much more sensitive to road accidents, food and drug scandals exposed by the media, and the expanding internet. This sensitivity may eventually have an impact on laws and state policies. However, the rising focus on security does not parallel a clear understanding of the concept. The concept of “security” is subject to expansive interpretation and application. The concept’s boundaries become even broader when “safety” and “security” refer to the same Chinese character. Furthermore, “the effect of applying the label security is to foreclose debate, to legitimize emergency powers and thus to depoliticize questions of social and political power”. Thus it is commonly insisted that “security” should be used very cautiously and with solid evidence. It ought to be balanced against liberty, freedom and justice to have its proper place. Meanwhile, in countries such as the United States, Canada, Germany, and South Africa, those safeguards have the status of constitutional guarantees. In other countries, such as the United Kingdom and several other European jurisdictions, the rights

189 This conclusion is drawn based on the calculations of all the amendments to Chinese criminal law from 1999 to 2011.
are reinforced by protection from the European Convention on Human Rights (ECHR). In China, such restraints remain weak.

In all, highlighting key words such as “risk”, “conduct”, and “recklessness/negligence”, these changes are signs that Chinese criminal law has become increasingly preventive, characterized as a special proactive technique of criminal law for intense regulation of misbehaviour for the better pursuit of public safety. Compared to criminal behaviour resulting in harm, such risky behaviour is of minor seriousness to society. Compared to behaviour with the intention of harm, a reckless or negligent mindset is less condemned as well. In Chinese criminal law, inchoate crimes and weapon possession punish behaviours that simply cause risks. The above changes in the amendment are recent preventive shifts of the statues. But in China preventive techniques are never limited to those in the law. As it has been claimed, there are other initiatives in criminal procedures and policing that can be characterized as preventive methods. In the West, crime prevention is intertwined with risk discourse and is not only based on the degree to which the methods reflect the pursuit of risk control, but also on how risk discourse in the changed social environment shapes the pattern of crime prevention. In China, current changes are subject to the legislation politic among different participants with distinctive risk awareness, and this sheds light on society’s power relationships in the long journey of socialist modernization.

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2.3 Analytical Framework of Risk Society and Its Limitations

As it has been addressed, Chinese scholars who recognized the preventive shift in Chinese criminal law interpreted the legislative changes through the risk society theory (mainly Ulrich Beck’s theory) almost seven years ago. Until now the whole debate is still carried out within this framework. The debate is mainly about whether it is appropriate to apply this theory in the Chinese context, whether Chinese criminal law is transforming into a “risk-oriented” tool, and how to cope with associated challenges of the basic principles of criminal law and human rights protection. The eighth amendment is also assessed using this approach.

In this discussion, Chinese researchers introduce the risk society theory as a theoretical framework to analyze the proactive shift, with the eighth amendment as one of the main evidences of their arguments. Not only do they employ it to theorize the Chinese reforms, but also those of Western countries like Germany and Japan. Supporters such as Dongyan Lao claim that it is the coming of the risk society -- characterized as a rising number of road accidents, drug accidents, environmental accidents, violent crimes and acts of terrorism -- that enhances the role of risk control in criminal law. The link between the risk society and changes to criminal law is “security”; although in the Chinese context, the link may be referred to as either “safety” or

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195 These Chinese scholars include Dongyan Lao, Xingliang Chen, Hong Li, Yong Xia, Yanhong Liu, Lianwei Nan and so on.
“security”.\textsuperscript{198} It seems that growing demands of security due to rising risk awareness that the risk society theory advocates has successfully interpreted current Chinese society. This has made the theory increasingly popular not only in the field of criminal justice but also in research of other legal fields.\textsuperscript{199} Opponents like Xingliang Chen insist that it is essential to draw the distinction between the “risks” in the risk society theory and “risks” that criminal law has to cope with. Whether these two concepts are identical or not reflects on the rationale of the changes. In two of his articles, Chen also suggests that the shift should be viewed as the progress of the rule of law in China.\textsuperscript{200} According to him, with criminal penalties taking the place of administrative ones, administrative power will consistently be restrained.

As the debate goes on, the understanding of basic concepts keeps being developed. Current debate focuses on whether China is a risk society, and whether criminal law can control the “risks” described in this theory.\textsuperscript{201} Discourses set by the risk society theory emphasize individuals’ reflexivization on risk (an enhanced level of risk awareness) and world-historic pessimism of scientific expertise. “The risk society is fraught with new risks and hazards that we

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\textsuperscript{201} There are controversies about the accurate meaning of “risks”. Some insist that the risks are post-modern risks of disasters like nuclear explosions, or genetic disorders that criminal law is unable to manage. Some claim that the risks are exactly everyday risks that criminal law should be conscious of and cope with.
\end{flushleft}
ourselves have manufactured.” Failure to manage these hazards that scientific development creates generates an endemic sense of insecurity all over the world. Facilitated by the anxieties about everyday risks and uncertainty, “welfare sanctions and penal modernism, aimed at reforming and reintegrating offenders” were replaced with mass incapacitation and exclusion in the name of risk reduction. However, what the Chinese scholars understand of the risk society theory is far from enough, since confined to the risk society theory, they ignore the discourse of “risk” in other Western literature. The risk society theory is simply one way to view the discourse of risk. Some Western researchers also raise criticisms that the risk society theory is too “speculative, making broad and loose speculations about structural and organizational processes, without grounding these specifically enough in the actual processes and experiences of institutional and everyday life.” Understanding of penal transforms calls for a detailed study of actions of the participants and scope of the institutional environment in which they are involved. In addition to risk society theory, scholars from the US, the UK and Australia analyze the shift in a variety of different analytic frameworks such as the neoliberalism theory and the late modernity theory. For instance, “it is widely accepted that the rise of crime prevention is linked with a convergence of social forces associated with the ‘risk society' and the ascendancy

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of neo-liberal governance from the 1970s forward.” 206 In the neo-liberal framework, the emergence of neo-liberal politics in the 1970s in the US and the UK “seeks to make the techniques and mentalities of the business sector -- both risk-taking and risk management -- into the guiding rules for the public sector.” 207 Based on this, the field of crime control witnessed not only the normalization of crimes as everyday risks, but also “the emergence of an individually focused framework of governing risk -- a new prudentialism”, 208 which fostered community-based crime prevention, or situational crime prevention that reflected the vision of neo-liberal politics. Besides the two theories, “an increasing number of social theorists have taken up the challenge of relating developments in crime prevention and risk management to the large-scale, historical shifts highlighted in this grand theorizing on late modernity.” 209 Late modernity theory characterizes the era “with uncertainty and ambivalence related to constant change and flux, cultural fragmentation and the breakdown of norms and traditions.” 210 The shift away from modernity gives rise to a growing fear of risk. Preventive methods are state responses to the late modern social transitions to fight crimes, secure public support, and maintain security.

The above theories have distinct interpretations of the rise of crime prevention and risk control in Western countries. However, they overlap on several aspects, even supporting each other on

sketches of major social reforms in late-modern Western society since the 1970s. In general, they argue that major changes in the governance of crime have shifted the orientation of crime control away from traditional, reactive strategies towards more prospective and preventive measures designed to maximize security. The current era is a break from the past modernity and welfare state, in which risk anxiety shapes collective and individual behaviour. Furthermore, the theories go on to examine the shifts of governance, trends in the contemporary era, and unpacking new modes of government intervention and public involvement. “As a cutting edge of a much broader contemporary social transformation in which risk was displacing other forms of governance,” crime prevention is taken to exemplify radical changes in the configurations of both public and private governance in late modern society under the influence of neoliberal or other policies. The theories all address the state’s capacity to control in the era of transition when there is a crisis of public trust due to rising crime rates. This is the reason why crime prevention has generated so much concern among scholars.

These Western theories inspire a similar study to contextualize risk operation in China. Criminal behaviour cannot be understood apart from the cultural context in which it occurs. The concept of prevention changes based on how it is interpreted in practice. “Without clarification of the specific meanings of the terms in the context in which they are used, the discourse has little

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211 The formation of social work was shown to take place in a complex system that includes: a social dimension, that of risk society; a political dimension, that of advanced neoliberalism; and a cultural dimension, that of reflexive or late modernity.

explanatory or analytical power, and hampers discussion of broader legal implications.”

Considering that “law making is the result of the work of a multitude of institutions and actors, ranging from the national legislature to the local level, and from professional law-drafters to the general public,” this dissertation seeks to contextualize the changes in Chinese criminal law through a study of the shaping power between the state and the public in the legislation. Compared to the era before the 1980s when poverty was a main social issue, the current Chinese state is suffering from multiple side effects of extensive economic growth and social unrest. The coexistence of rapid economic ascendance, far-reaching open-up policy, and slow political reform brought about many challenges and much imbalance. The Chinese state has been increasingly resorting to criminal law as a risk control method on various social aspects to regain public trust. Criminal law becomes a sound justification for the Chinese party-state to manage these political, economic, social and cultural uncertainties. Thus, this dissertation not only re-conceptualizes “crime prevention” and “risk”, but also highlights the broader transformation of governance and society. Methods in different countries originate from distinctive social backgrounds and political regimes with different aims and effects. The models are “relied on by legislators, sentencing-guideline drafters, and judges in the formulation, interpretation and application of the rules and doctrines of criminal law and the determination of sentencing guidelines and individual sentences”.

Is it possible to fully recognize the current Chinese style

of criminal law making? It is a complex picture that is still being formed and constantly changing.

In all, this chapter argues that the concept of prevention can be analyzed in different dimensions. This shift is manifested in broad changes throughout the criminal justice system of China. The dissertation will especially focus on the three preventive techniques of the eighth amendment to Chinese criminal law, since it illustrates more of the interplay between the state and the citizens in China. It suggests that the amendment has shown a preventive shift towards risk control, but the current risk society theory used by Chinese scholars fail to capture the whole picture of the transform. Accordingly, the next chapter will start to take a case study of the three changes by exploring the history of law making, and introduce in the Multiple Streams Approach as a new analytical approach of the transforms.
Chapter 3: The History of Lawmaking and Reasons for Applying the Multiple Streams Approach

The second chapter of the dissertation has examined the recent preventive shift of the Chinese criminal law. In the third chapter, the first section will document the history of making the eighth amendment to Chinese criminal law through three case studies. Examining the legislative history is like “processing tracing”, a method used to search for causal inference through the “unfolding of events or situations over time”\(^{216}\). “Process tracing, to reiterate, is an analytic tool for drawing descriptive and causal inferences from diagnostic pieces of evidence -- often understood as part of a temporal sequence of events or phenomena.”\(^{217}\) A central concern (of process tracing) is with the sequences and mechanisms in the unfolding of hypothesized causal processes.\(^{218}\) In order to examine the rationale for the preventive shift of the law, this dissertation will identify the causal relationship between the reasons and the shift using evidence, while the sequences and mechanisms can only be identified through legislation history. During the process of law making, the crime of drunk driving (with the contested nature of drunk driving overall) gave rise to diversified attitudes among departments, officials and the public. The other two cases, which are less radical, were selected for complementary purposes. After that, the second section of this chapter examines the approach of applying John Kingdon’s MSA to Chinese legislation. This section argues that the “problem, policy and political streams” theory Kingdon proposes can be


used as the theoretical framework for analyzing the current process of criminal law making in China.

3.1 Legislative Initiative, Bill Passing and Final Amendments

This section will examine the drafting process of the three amendments of Chinese criminal law to identify the legislation’s stages and participants. In China, lawmaking is now a far more important part of the policy-making process, is far more conflictual and is fought out among a far greater array of institutions and arenas than ever before. By providing background information for the "multi-stage and multi-arena" process, this section lays the foundation for the rest of the dissertation.

3.1.1 Amendment on the Crime of Drunk Driving

Before the enactment making drunk driving a crime there was a series of nationally known cases in 2008 to 2009. When the media exposed the series of drunk driving with bodily harm cases it quickly drew the public’s attention, producing mixed feelings of anxiety, pity and anger. Some of the news was first broadcasted by traditional media, including newspapers and TV, while some was disclosed by the Netizens in blogs or forums. The internet discourses were, in turn, documented in newspapers, magazines and journals. For instance, China Daily, Guangming Daily, Xinhua Daily, and CCP newspapers also followed the developments of the cases and

expressions of public attitude from the internet. News on traditional media and the internet quickly gave rise to hot topics throughout the country. Residing in a country with a long patriarchal history, citizens tended to blame the government for neglect of duty, such as lenient penalties or failure of policing. The criticisms undoubtedly put pressure on the CCP’s governance.

The first direct effect of establishing traffic violations was the launch of a national war against drunk driving by both the Ministry of Public Security and local police starting in August 2009. “The Chinese police departments have been very busy waging specific campaigns targeted against special crimes that are prominent, almost one campaign after another.” In a short period with huge police input, cases of drunk driving declined significantly in a variety of provinces and districts. In August 2009, the Standing Committee of the National People's Congress (NPC), China's top legislature, added amending criminal law to the 2010 legislation plan just a few days after amending it in February 2009. It was claimed that making drunk driving a crime was a key focus of this amendment, which had not only gained support from the people’s representatives, but also from the party’s senior leaders and the government. The Road Traffic Safety Law and Regulations on Road Traffic Safety Violations on Penalties Points were

also revised to match the increased penalties after the criminal law amendment. The government also upgraded the enforcements in 2013, specifying details on the definition of drunk driving and related administrative penalties in a new regulation against behaviours violating road traffic safety.  

With the growing amount of personal automobile ownership, departments in both the central and local police have had to fight drunk driving behaviour, particularly since 2007. However, “conditions must deteriorate to crisis proportions before the subject achieves enough visibility to become an active agenda item.” Although indicators from government agency monitors had already shown there was a problem, it was not until August 2009 that the series of well-publicized cases took place and the war began. Before that, public reports from the Ministry of Public Security rarely took drunk driving as an issue requiring special resolution. Data from before 2007 on such offences were limited, while since then there have been monthly and yearly

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226 The new 2013 regulation introduces a number of harsher administrative penalties against drunk driving offences, like revocation of driving licenses, fines and detentions. For instance, for those who drive after drinking alcohol or driving while intoxicated, causing a major accident, besides criminal offenses, the driver will lose the driving license for the rest of the life. These administrative penalties are used as supplements of increased criminal penalties.

227 This can be shown from news reports of road safety from the websites of the Ministry of Public Security before 2007, though data before 2007 was really limited. Researchers have argued that the Ministry of Public Security underestimated the seriousness fatalities caused by drunk driving in late 2000s. See Zhaoxin Wang et al, “The Underestimated Drink Driving Situation and the Effects of Zero Tolerance Laws in China” (2015) 16 (5) Traffic Injury Prevention 431. Some researchers also point out the lack of thorough and reliable data of drunk driving as a common problem for low- and middle-income countries, including China, Colombia, Mexico, Nigeria, Russia and Vietnam. See Kathryn Stewart, David Silcock & Fred Wegman, “Reducing Drink Driving in Low-and Middle-income Countries: Challenges and Opportunities” (2012) 13 (2) Traffic Injury Prevention 93-95.


229 The fatal cases mainly include cases of Weiming Sun in 2008, Bin Hu in 2008, and Mingbao Zhang in 2009, which all caused huge bodily injuries and property damage. Details of the cases will be discussed in the next chapter.
statistics on drunk driving accessible both nationally and provincially. For instance, in 2009 the number of drunk driving increased by 22%, and in 2010 it decreased by 22.3%. The rise in 2009 was mainly due to an increase in police investigations, while the decline the following year resulted from the temporary deterring effects of the war on drunk driving. The cases reinforced the pre-existing perception of the seriousness of the problem. By disclosing and following the cases, more and more national attention was called to drunk driving until officials deemed it to be a widespread condition that needed special attention.

3.1.2 Amendment on the Crime of Manufacturing and Selling Fake Medications

Fake medications are not a new problem and have been haunting Chinese society for decades. Since 2000, there have been cases of manufacturing and selling fake medications every year, but national attention was only raised after fatal cases in 2006. Evidence suggests that a complete and transparent information system on fake drugs has emerged in China in response to these crises. “At the national level, Ministry of Health, State Administration of Traditional Chinese Medicine, and State Food and Drug Administration issued many policies on strengthening drug

231 Official recognitions of the need of addressing the problem of drunk driving include bills of criminalization of drunk driving in “Lianghui” in 2010, and report from then Minister of the Ministry of Public Security, Jianzhu Meng, to the standing committee of the NPC to strengthen the management of road safety in 2010.
232 Among the fatal cases of counterfeit medications in China in 2006, the scandal of Qiqihar No 2 Pharmaceutical Company, which led to the deaths of thirteen lives, was the most noted one. The other cases include but are not limited to fake Clindamycin Phosphate Glucose Injection (Xinfu Clindamycin) from Huayuan Co., Ltd. in Anhui province, fake Viagra in Zhejiang province and so on.
safety management in pharmacy,“ with the aim of promoting drug safety. Although data available to the public mostly consists of scattered statistics from departments in different provinces and time phases (which makes it difficult to assess the seriousness of the problem), the China Food and Drug Administration Bureau website has statistics on manufacturing and selling fake medications in China from 2008 onward. Police data remains limited. The table below shows that the number of cases has developed at a slow pace with minor ups and downs until 2011 when it witnessed a sudden rise (See Table 3.1).

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases tackled</th>
<th>Business Suspension for rectification</th>
<th>License Revocation</th>
<th>Sent to the Police</th>
<th>Sentenced with Criminal Sanctions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>326</td>
<td>547</td>
<td>212</td>
<td>223</td>
<td>92</td>
</tr>
<tr>
<td>2009</td>
<td>273</td>
<td>445</td>
<td>73</td>
<td>259</td>
<td>88</td>
</tr>
<tr>
<td>2010</td>
<td>285</td>
<td>703</td>
<td>112</td>
<td>262</td>
<td>49</td>
</tr>
<tr>
<td>2011</td>
<td>441</td>
<td>1015</td>
<td>126</td>
<td>763</td>
<td>173</td>
</tr>
<tr>
<td>2012</td>
<td>833</td>
<td>1274</td>
<td>236</td>
<td>2160</td>
<td>425</td>
</tr>
</tbody>
</table>

Table 3.1 Number of Nation-wide Cases Tackled by the Food and Drug Administration Bureau from 2008-2012

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235 Data from Table 3.1 is collected from statistic reports of China Food and Drug Administration from 2008-2012, online: China Food and Drug Administration <http://www.sfda.gov.cn/WS01/CL0010/>.
In May to July 2009, six departments and bureaus, including the Ministry of Health, the Ministry of Public Security, the Ministry of Industry and Information Technology, the Food and Drug Administration Bureau, the Industry and Commerce Administration Bureau, and the Traditional Chinese Medicine Administration Bureau, passed the Agenda on Drug Safety Management Program, from which began a planned timeframe of two years of intense control of national drug safety. In 2010, these six agencies started comprehensive work on drug safety, which is part of the reason the offences in Table 4 increased significantly in 2011. From 2011 to 2012, the Ministry of Public Security and the Food and Drug Administration Bureau cooperated to fight the manufacturing and selling of fake medications, giving rise to even higher commissions in 2012. In 2013, the Ministry of Public Security continued the war. At present, the state is considering setting up a bureau specifically for the investigation of both food and drug safety, with the aim of winning the war.

Meanwhile, in 2009 the Supreme Court and the Supreme People’s Procuratorate enacted the Interpretations on Issues Concerning the Application of Law in the Trial of Criminal Cases of Production and Sale of Medicine. In 2010, the Good Manufacture Practice of Drugs was revised. In 2011, the Measures for Supervision and Administration of Drug Safety were

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239 Interpretations on Issues Concerning the Application of Law in the Trial of Criminal Cases of Production and Sale of Medicine, 2013, s1-12.
240 Good Manufacture Practice of Drugs, RS 2010.
made. In addition, the eighth amendment to the criminal law, which was revised in 2010, was put into effect in 2011. It was uncertain to what degree these initiatives were triggered by the fatal cases, but the campaign-like activities were clearly influenced by such. “Problems are brought to the attention of people in and around government by systematic indicators, by focusing events like crises and disasters, or by feedback from the operation of current programs.” National incidents such as fake drug scandals, by generating national awareness of the problem, lead to emerging consensus and agreement on solutions or proposals. The number of cases disclosed is also influenced by the resources that the state devotes to the problem. The more attention that is put into investigations, the more the problem will be discovered. Police officials have argued that they had not expected there to be so many problems in this area after the war started.

3.1.3 Amendment on the Crime of Environmental Pollution

Since 2000, cases of serious water polluting have been striking different Chinese provinces almost every year. “Despite China’s comprehensive system of environmental laws and standards, poor water quality is widespread.” Until now, the “violation of environmental law remains a pervasive problem and law enforcement, while improving, is still weak”. It is argued that, “Difficulties with environmental enforcement in China point to fundamental systemic problems

relating to inappropriate institutional arrangements, inadequate resourcing, and unclear legislative drafting.”246 In China, “Of all the classes of environmental accidents, water pollution accidents are the most frequent, and they have become more frequent between 1997 and 2003.”247 Most cases involve chemical companies that discard pollutants into the rivers, either damaging drinking water for days, or causing property and bodily harm to nearby residents. In 2007, the Law on the Prevention and Control of Water Pollution changed more than eighty of its previous provisions through the new amendment, increasing administrative penalties for both offenders and regulatory agencies.248 However, national attention increased mainly after the pollution of Lake Tai in 2007 and the polluting of drinking water in Yancheng City in 2009 for their negative impact on thousands of households.249 The public also expressed doubts about the effects of existing administrative and criminal penalties, some of which even led to protests.250

After the crisis, in 2010 the Legislative Affairs Committee (LAC) proposed to the Standing Committee of the National People's Congress to expand the boundary of criminal law for tougher treatment concerning violations of environmental protection. The proposal turned into part of the eighth amendment to Chinese criminal law in 2011. To match with the new amendment, in 2013 the Supreme Court and Supreme People’s Procuratorate worked out an “Explanation of the

Application of Law on Criminal Cases of Environment Pollution”. Considering a bill usually takes years to draft, this explanation was impressive for its speed and detailed specifications. According to one official who participated in this legislation, this was primarily due to demands from the CCP and the state council: “…this top-down approach shows that the high rankings are really concerned about the well being of the people”. Furthermore, in 2013 the Ministry of Environmental Protection and the Ministry of Public Security announced an official agreement to enhance cooperation toward environmental protection, for which seven mechanisms were designed to fight against criminal behaviour. The 12th Five-Year Plan, and its subordinated plan, the “General planning for the development of Environmental Protection Legislation and Environmental Economic Policies”, not only sets impressive sustainability targets for water pollution management, but also lists key fields to improve environmental legal systems and the eco-compensation mechanisms. Therefore, a war is now being waged in China in the field of environmental protection.

3.2 Applying John Kingdon’s Theory into the Chinese Context

This dissertation will identify the social, legal and political rationales of the preventive shift of Chinese criminal law by examining the legislative model from which it has generated. Rationales for the shift are embodied in the procedures of criminal law making. On one hand, law making

itself as an organized national activity is an essential part of the rule of law, shedding light on a large portion of the features of Chinese society. Ever since the 1978 Third Plenum of the Eleventh Chinese Communist Party (CCP) Central Committee called for more rapid development of a “socialist democracy” and rule by law, law making has become an increasingly large, important and contentious part of policy making.\textsuperscript{255} This dissertation considers legislation as an approach to explore the beliefs of the Chinese public and its elites with regard to criminal law and crimes. On the other hand, it is impossible for one dissertation to cover all the aspects of criminal justice, considering there have been diverse national and local practices before and after the promulgation of criminal law. Thus, this dissertation does not examine the final stage: the implementation of criminal law. Rather, it takes legislation as a springboard for future research.

Although Chinese Legislation Law has stipulated the rule of law making in China, there remains a lack of study on the actual participants and processes of it. It is argued that “the result of this fundamental lack of understanding about how policy is made, for whom, by whom and the constraints that policy makers and policy doers operate under, led otherwise perfectly able students to make unfounded criticisms of current arrangements and put forward unachievable utopian suggestions for policy advances.”\textsuperscript{256} Among the limited literature concerning Chinese legislation, it is suggested that the Chinese legislative model follows the approach of “setting an agenda, interdepartmental assessment, approval by senior politicians, parliamentary procedure


and implementation.”²⁵⁷ It is also claimed that “each law moves through approximately five different stages: agenda-setting; inter-agency review; top leadership approval; NPC debate and passage; and the explication, implementation or adjudication of the law as policy.”²⁵⁸ However, these models commonly fail to examine the activities of external participants like the public, the media, and scholars, which have been newcomers to Chinese decision making. “Efforts to explain such rapid changes within an organizational politics paradigm often seem to require the analyst to invoke actors, events and situations which actually fall well outside the core elements of the organizational paradigm.”²⁵⁹ Shaoguang Wang’s 2013 book *The Chinese Model of Consensus Decision Making: A Case Study of Healthcare Reform* is an effort to incorporate such external participants. Based on empirical research on how the new Chinese healthcare policy is formed, it argues that rather than being decided upon by one leader or a group of entrepreneurs, the policies are debated by government officials, think tanks, interest groups and the public. Not only has the government intentionally eliminated the barriers to participate in the decision making, but the proceedings have also been reformed to be more democratic, with multiple rounds of reviews and negotiations. This book, as up-to-date research of the Chinese model of agenda making, provides data to prove that the process and the people involved are indeed different from ten years ago. However, considering that some of the arguments in the book are exaggerated, their credibility is downgraded to some extent.²⁶⁰

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²⁶⁰ For instance, it lacks solid evidences to prove that public opinions are truly valued and reflected in the final result of policy-making. See Mingyu Yang, “Surpassed Fragmented Authoritarianism? Reviews of
In contrast, the “garbage can model” is another theory frequently mentioned by scholars in the last twenty years. In the book *The Politics of Lawmaking in Post-Mao China*, Tanner summarizes existing models of Chinese law making with the following: the command model, the leadership struggle model, and the organizational or bureaucratic politics model.  

He applies the garbage can model to the politics of Chinese legislation. Zhenglai Deng, a well-known scholar, has also indicated his support for this pattern of policy making in China. Authors of the garbage can model suggest three or four more or less independent streams: problems, potential solutions, and opportunities for choice. “Problems are worked upon in the context of some choice, but choices are made only when the shifting combinations of problems, solutions and decision makers happen to make action possible.”

Kingdon’s MSA is a revision of the garbage can model as well. In the book *Agenda, Alternatives and Public Policies*, Kingdon examines the reasons why some subjects rise and others fall as governmental agendas (see Figure 3.1). The “agenda” is conceived to be “the list of subjects or problems to which governmental officials, and people outside of government closely associated with those officials, pay some

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262 See Murray Scot Tanner, “How a Bill Becomes a Law in China: Stages and Processes in Lawmaking” (1995) 141 The China Quarterly 39-64. Specifically, these are independent streams of policy problems, proposed solutions (such as proposed legislation), political balances of power or "moods", and opportunities or vehicles for making decisions. Also see Michael Cohen, James G. March & Johan P. Olsen, "A Garbage Can Model of Organizational Choice" (1972) 17 Administrative Science Quarterly 1-26.


Based on interviews with people close to decision making in health and transportation, Kingdon identifies three process streams: problems, policies, and politics. In brief, he claims that the “problem stream” refers to problems pressing in on the system (such as the focusing events), indicating the prominence of certain social problems. The “policy stream” refers to a gradual accumulation of knowledge and perspective among specialists in a given policy area. It focuses on the generation of policy proposals by researchers, career bureaucrats, and consultants, among others. The “political stream” consists of events, such as swings in national mood, public opinion, election results, administration changes and congress turnover that may set the agenda. According to Kingdon, the three streams are largely independent of one another, but at some critical junctures when a policy window is open, the three streams are joined into a single package through which the final policy changes are made. The most interesting part of this model is how the streams are coupled together. Why are specific problems addressed at specific moments? Is there a deciding factor that leads to the outcome?

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Kingdon’s book *Agenda, Alternatives and Public Policies* was first published in 1984, but the theory still has explanatory power for contemporary policy making not only in the US but also in other Western countries. The second edition of the book came out in 2010 with new case studies from the 1980s and 1990s and argues that the concepts still work well in those empirical studies, even beyond areas of health and transportation reform. In the last decades, MSA has still been used by Western researchers to analyze changes to criminal policy in the US, the UK and
Europe, such as in gun control, counter-terrorism, and other punitive strategies.\textsuperscript{267} Even the number of papers systematically applying the MSA is remarkable. Jones in a recent meta-review, found no less than 311 English-language peer-reviewed journal articles applying the MSA since the year 2000.\textsuperscript{268} Furthermore, this theory has been subject to broad application, discussion and modification. According to Kingdon, the theory itself is not all-inclusive; rather, it is open to revisions in different contexts. Even in some circumstances in the US, rather than the three streams merging with each other, some focusing events can become so dramatic that they directly lead to the final results. For instance, the 9/11 terrorist attacks turned into the “policy window” for a number of preventive offences and policing strategies.

Legislative initiative can be one option in a set of agendas. In this respect, Kingdon’s MSA model of policy making provides a sound framework for analyzing the Chinese model of criminal law. MSA “explains how policies are made by government under conditions of ambiguity”.\textsuperscript{269} It argues that policy makers are commonly under time constraints, so rather than a linear decision-making process – identifying problems, formulating solutions and making a choice, the whole process is complex and chaotic. The theory points out some basic nature of policymaking, though it originally focuses on the participants and processes of US policy formation. In China, on one hand, power has been decentralized in the past twenty years during the legislative process. On the other hand, due to the rise of public opinion, the press, and policy

\textsuperscript{267} See Johan Eriksson & Erik Noreen, Setting the Agenda of Threats: An Explanatory Model (Dept. of Peace and Conflict Research, Uppsala University Dept.); Karen Callaghan & Frauke Schnell, Framing American Politics (University of Pittsburgh Press, 2005).


think tanks, proposals are less tied to government ministries. With the increase of multiple factors in the policy making process, such as the media, the public, and scholars, the system is filled with uncertain and irrationality. Therefore, this dissertation uses MSA as a primary framework for Chinese law making. Tremendous bureaucratic development remains responsible for law making, but the bureaucratic politics is unable to fully document the current Chinese legislation. At the same time, the model will also be revised on several aspects to fit with Chinese criminal justice. For instance, in the first dimension, the Chinese participants include the CCP, government bureaucracy, the media, scholars/think tanks, and the public. How they act and relate to each other in China are different from what Kingdon presents in the multiple streams model about the president, congress, and interests groups of the US. In the second dimension, the distinction between policy and political stream is not very clear in the Chinese context. The proposals that have more social influence are made by those within state institutions, or at least those in close relationship to the institutions. Policy drafts, presentations, and acceptance can never be set apart from political considerations and bureaucratic competition. This adaption not only develops MSA but also sheds light on the Chinese characteristics of policy making.

Specifically, the pattern of making the above three revisions to Chinese criminal law converges with this “problem + policies + politics” model of agenda making in a number of ways. An examination of the three streams, public demands, professional opinions and political willingness will be addressed in the framework. In the problem stream, the focusing event reveals the development of public demands, which serves as a major trigger factor for criminal law expansion. Security concerns are the main booster for legal activation. Criminology scholars have mentioned the distinction between what is truly threatening and what is perceived to be
threatening. Among the dangers that have been detected by the public, those that successfully turn into focusing events require the coexistence of multiple factors to maintain continuous national attention. In the policy stream, institutions’ proposals solve technical issues, including legal rationales of the change and the utilitarian use of criminal law by examining criminal law principles and compatibility of criminal penalties with the others, such as administrative ones. Events are institutionalized through professionals both inside and outside the bureaucratic paradigm, which “means that further ‘securitization’ is facilitated as events and new problems can then be interpreted within the framework of established threat images”. Furthermore, in the political stream, bureaucratic cooperation, bargaining, and political support finally make the change possible. “It is impossible for a threat image to gain salience if it is has not been given some sort of form for decision-makers.” The problem and political stream matter most to the agenda’s chances of changing criminal law, with visible participants such as the public, the CCP, and the NPC. However, the policy stream remains important as a bridge between the other two streams, based on the efforts of policy entrepreneurs. The growing awareness of problems, the rise of adequate policies, and political acceptance all contribute to the final Chinese legislation. However, one challenge of this dissertation is the difficulty of examining the policy stream without directly gaining access to the policy community, which is comprised of government staff, NPC representatives, People's Political Consultative Conference members, think tanks and scholars. Lacking primary sources is a common problem for researches on Chinese issues. Under

271 See Johan Eriksson & Erik Noreen, Setting the Agenda of Threats: An Explanatory Model (Dept. of Peace and Conflict Research, Uppsala University Dept., 2002).
this circumstance, the dissertation has to rely on second-hand information such as news broadcasts, journal papers or public speeches related to revisions of the law. Though mixed methods approach helps us to triangulate measurement strategies, when it is hard to obtain first-hand data, research focuses will lie more on the validity and reliability of the data, techniques of understanding existing data, and ways of drawing the conclusion. The dissertation will use news broadcasts and journal papers from China and abroad as references. Besides second-hand data, it also relies on personal observation and experience of the researcher as evidences. Compared with the other data, personal views only serve a supplementary role in this research.

All in all, the rest of this dissertation will use John Kingdon’s MSA as the theoretical framework to interpret Chinese legislation. As a preliminary sketch, the process of problem recognition, generation of policy proposals, and political evaluations will be analyzed successively. First, problem recognition and definition affect outcomes significantly. Focusing events, including drunk driving, deadly fake medications and water pollution in Yancheng and Wuxi City, captured the attention of personnel in and around government. These actors indicated to officials that the crises had become so pressing that rapid settlements were required, otherwise the trust between the government and the public would deteriorate. Second, “policy entrepreneurs invest considerable resources bringing their conception of problems to officials’ attention, and trying to convince them to see problems their way.”273 The specialists make proposals to revise both administrative and criminal laws. Representatives from “Lianghui”, staff from the State Council including the Ministry of Public Security, the Ministry of Health and the Ministry of

Environmental Protection, as well as lawyers and NGOs kept claiming that current penalties were too lenient, making it difficult for the law to function. Their proposals provided solutions to emergent social problems. Third, in the political stream, criminal law making re-establishes the public’s trust of the CCP. “Events within government itself like administrative change bring with them marked changes in policy agendas.”274 The long-lasting politic of the CCP to maintain its governing capability and legitimacy by stressing on people’s livelihoods stands as the political environment for amendments to criminal law. In the past five years, solving people’s livelihood issues has been a top priority for the central government. Road and drug safety, together with environmental safety, constitute part of the “Chinese dream”, a slogan promoted by General Secretary Xi Jinping in 2013. The party’s central decision making actors (the Politburo, the Secretariat, etc.), and other factors including jurisdiction competition and inter-agency consensus building, also operate as impetuses (or at least not as constraining factors) of the legislation. Finally, “the probability of an item rising on a decision agenda is dramatically increased if all three elements -- problem, proposal and political receptivity -- are coupled in a single package.”275 When the opportunity to amend criminal law emerged in 2009, changes took place accordingly.

Based on MSA, the next chapter of the dissertation will examine the problem stream for Chinese criminal law making. Through analyzing the focusing events of drunk driving, manufacturing

and selling fake medications, and environmental pollution, the chapter aims to discover the social justification of the preventive shift of Chinese criminal law.
Chapter 4: Problem Stream for Chinese Criminal Law Making

This chapter will examine the “problem stream” that has driven the amendments to the criminal law with the aim of examining the role the public plays in generating the “problem”. Criminal law is the most public face of the state security function. While it is often argued that both Chinese bureaucratic administration and law making lack public participation, criminal law legislation seems to be different, especially when it has a direct impact on the safety of the greater population. On one hand, it is common to develop criminal law making in response to intense public emotions and criticisms -- feelings of insecurity, anger toward offenders, and sympathy for victims. On the other hand, the use of criminal law usually shape public’s assessment of the state’s security capabilities, which is a key focus of governance. Thus, compared to other laws, criminal law stands as a case study of the interplay between a state trying to maintain its legitimacy and a public increasingly seeking to voice its demands.

The first section of this chapter examines the focusing events, which pose challenges for the public trust toward the government. The second section argues that in the focusing events, collective forces from emotional, negative online voices empower the public who have been unable to express themselves properly. The internet, which provides the platform for information transmission and open discussion, shapes the development of such events. Then the third section analyzes survey results concerning public emotions as a comparison to online discourse. Surveys show that in China the fear of crime is low, but anxiety concerning risk has seen a significant increase. Anxiety partly explains the overwhelmingly negative online expression.
In this chapter, drunk driving is selected as a representative case due to its huge national influence, and the other two cases, which involve fewer conflicts, are used as the supplements. Evidence is collected from documentation and archival records. Documentation includes news broadcasts, journal articles, and cyber blogs. Archival records are composed of charts, survey data and so on. It is noted that most documentation and records are produced for a specific purpose and a specific audience, so the contents of such evidences have to interpreted with enough caution. Thus this chapter relies on both official announcements and cyber discourses, survey data from both Chinese and foreign organizations as evidences to enhance their validity and reliability.

4.1 Studies of Nationally-known Cases as Focusing Events

“Problems are often not self-evident by the indicators. They need a little push to get the attention of people in and around government. That push is sometimes provided by a focusing event like a crisis or disaster that comes along to call attention to the problem, a powerful symbol that catches on, or the personal experience of a policy maker.” The same happens in China. In concrete terms, governments constantly face a stream of problems, some of which are viewed as especially urgent or ripe for solution at any given time, some of which go largely unnoticed for long periods. “It is a process of problem recognition that serves as an impetus.” This section examines high profile cases as focusing events prior to the drafting of the amendments.

4.1.1 Three Case Studies

That drunk driving and speeding gained national online attention in 2008 and 2009 is deemed by a number of people as the main reason for the eighth amendment to criminal law. Serious traffic accidents have been the media’s focus in the past ten years, but none have generated so much interest as a series of such accidents in 2008 and 2009. In December 2008, Weiming Sun killed four people and wounded one by crashing into four cars while driving drunk. In June 2009, Mingbao Zhang killed five people and injured four while driving drunk. Newspapers unavoidably set the stories together for more attention. Bloody crime scene photos and stories of grieving relatives rapidly grasped national attention, giving rise to overwhelming expressions of sympathy and anger on the internet.\(^\text{280}\) In May 2008, Bin Hu killed a young man while speeding with other cars. The accident enraged the public since the victim was said to be a decent, diligent man with a bright future, while the offender was a spoiled youth from a rich family who did not appear to feel any guilt about his offence. That the police first claimed his driving speed was 70 miles per hour, which was far below his actual speed, also intensified suspicions of a possible trade-off between the offender’s wealthy family and the police.\(^\text{281}\) “Populist responses to crime are strongest and would seem most likely to influence policy when they are focused on a common enemy, a group of criminals who seem utterly different from the rest of the population, and a common enemy whose activities only add to the pervading sense of anxiety and tension

\(^{280}\) “Drunk Diver: Killing 9 in the Downtown of Nanjing”, online: Sohu <http://news.sohu.com/s2009/nanjingerash/>. This Chinese website covers the whole process of the accident, including words, photos and videos of the victims, the final judgment, and legal explanations.
characteristic of everyday life.”

In the process, the internet and traditional media have shaped discourses of each other in following the developments of these cases. Online discussions are more emotional, critical and pessimistic, while traditional media like newspapers and TVs are balanced with detailed storylines, officials’ opinions, and public claims.

The cases of Mingbao Zhang and Bin Hu were voted in the top ten influential cyber incidents in 2008. With wide discussions online, the cases challenge the authority’s management skills; not only is there anger toward the offenders, but the public keeps expressing demands for stricter governance of traffic offences, as well as voicing their suspicion of the injustice that the police and the judiciary may generate. “An idea has a history. When one starts to race the history of a proposal or concern back through time, there is no logical place to stop the process.” Even though the cases are never a perfect illustration of the divide between a good and a deteriorating traffic situation, they emerge as crises of policing and social governance through pressures from society.

A similar situation arises in cases of fake medications. Since 2006, counterfeit medications have been a nightmare for China. Serious cases happened every month of every year in China before 2006, but it was still not a pressing “problem” that required timely response. The reasons why it changed into an urgent problem were: (1) consistent media exposure of similar fatal cases, particularly on the internet; (2) victim deaths; (3) growing public panic of unseen threats; and (4)

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loss of confidence in local governments. All of these reasons transformed the problem of fake medications into a national crisis. For instance, in 2006, the fake medicine scandal of Qiqihar No 2 Pharmaceutical Company in Heilongjiang province killed thirteen patients. This scandal lasted for two years until the offenders were sentenced to life in prison in 2008.\textsuperscript{285} After that, in the 2010 Shanxi vaccine scandal, a reporter for the \textit{China Economic Times} disclosed that improperly stored vaccines administered by the Shanxi Provincial Center for Disease Control and Prevention had killed four children and injured more than seventy others between 2006 and 2008.\textsuperscript{286} As the news quickly spread on the internet and other media, the panicked public not only called for a fast response from the government about the truths behind vaccines, but also refused to take any vaccine provided by the government. This deep suspicion and fear can also be easily found in the Chinese opinion of food safety, instigated by the 2008 milk powder scandal.\textsuperscript{287} Slow action from the Shanxi provincial government and a refusal to admit a problem with the investigation left the government heavily criticized by the public. The deaths by fake medications, particularly from government-owned enterprises, challenged the governing capacity of the party-state.

\begin{flushright}
\textsuperscript{286} Keqin Wang, “Shanxi Vaccine Scandal”, \textit{China Economic Times} (17 March 2010).  \\
\textsuperscript{287} The 2008 Chinese milk scandal was a food safety incident in China, involving milk and infant formula, and other food materials and components, adulterated with melamine. The scandal broke on July 16, 2008 after sixteen infants in Gansu province, who had been fed milk powder produced by Shijiazhuang-based Sanlu Group, were diagnosed with kidney stones. A number of criminal prosecutions occurred, with two people being executed, another given a suspended death penalty, three others receiving life imprisonment, two receiving 15-year jail terms, and seven local government officials, as well as the Director of the Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) being fired or forced to resign. 
\end{flushright}
Environmental cases such as water pollution have also become increasingly serious since the 2000s. The 2007 Report of Cyber Opinions in China claimed that environmental protection was becoming an essential public concern.\textsuperscript{288} In the 2008 report, it was suggested that environmental problems were one of the top social problems as well.\textsuperscript{289} In 2007, the bloom of cyanobacteria in Lake Taihu that contaminated the drinking water of Wuxi City, and the 2009 water pollution in Yancheng City by carbolic acid emitted by a local factory which affected the daily lives of millions of people, were only two in a series of water pollution cases in the Jiangsu, Shandong and Fujian provinces from 2009 to 2011. Netizens who first discovered the news posted it on local forums and personal micro-blogs, complaining about the lack of timely information on water pollution.\textsuperscript{290} Public anxiety quickly expanded to other provinces in China. Local governments swiftly dispatched emergency response and inspection teams to restore clean water to the cities. But even after restoring normal water supply, complaints and worries continued. “Crises, disasters, and focusing events reinforce some preexisting perception of a problem, focus attention on a problem that was already in the back of people’s minds.”\textsuperscript{291} It has not only been the affected citizens, but also others who learn about stories through the media, who have increasingly stressed the urgent need for environmental protection. Through these cases, the public have also begun to recognize the price of extensive economic development. As surveys indicate, though satisfied with rising living standards, citizens are becoming more and more

anxious about environmental, medication, food, and traffic safety in China, most of which they believe is the result of government incompetence.\textsuperscript{292}

4.1.2 The Public, the Media and the Government

The above problems become the so-called “focusing events” for Chinese criminal law making.\textsuperscript{293} The dynamic looks different from what it used to be in the 1990s or before. First, the problems are prominent daily issues for Chinese citizens. Kingdon suggests that compared to health issues, traffic problems (including car accidents and airplane crashes) generate more public attention, pushing the issue of traffic regulation onto the agenda.\textsuperscript{294} Traffic, medication and environmental problems, which are a part of everyday public experience and perception, are easier to detect, especially when they challenge the governance capacity. Central and local governments must therefore react quickly to avoid social unrest. These new challenges also show that China, which is still in the process of modernization, differs from late modern Western societies where environmental, food, or drug security issues have ceased to be top social concerns.\textsuperscript{295}

Second, the public views the government’s neglect of duty as a main reason for the above social problems. Trust in the government is consistently being challenged. It has become a


\textsuperscript{293} “Focusing events” is a conception used by Kingdon in his book Agendas, Alternatives, and Public Policies to refer to crises or known cases in the problem stream. It plays an important part in agenda making, and it may individually lead to the final policy outcome.


\textsuperscript{295} Modernity has been a period characterized by capitalist industrialization and imperialism, urbanization, secularization and constitutional government and welfare state. Gordon Hughes, Understanding Crime Prevention (Berkshire: Open University Press, 1998) 3-7.
characteristic of Chinese society to blame local or central governments for creating injustices, lacking modern management skills, or being irresponsible to public demands. They “…make that translation by evaluating conditions in the light of their values, by comparisons between people or between the US and other countries, and by classifying conditions into one category or another.”

Although only a fraction of those who care about the issues write about it online, being brave and having the consciousness to complain have already been improvements of the traditionally obedient Chinese. The tendency to blame the government is partly because of the patriarchal tradition in Chinese society. With the fear of social instabilities, the government has manipulated too many social fields, making it seem as though the government is responsible for all the problems. At the same time, the criticisms are also intensified when a large number of people start to view themselves as rights holders rather than subordinates of the government. Shifts in the roles and relationships between the government and the citizens empower the citizens to fight for their rights.

Third, one key reason for the rising attention toward problems is the media’s function of sharing news and molding public opinion. It is through the internet and traditional media that information is exposed and discussed. Some news is first posted by netizens themselves; some is forwarded for more awareness. “People discuss and debate about these issues in online bulletin boards and online communities, thus taking the issues beyond the officially guided coverage of

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the mainstream mass media.” In several cases, broadcasting news through micro-blogs and forums demonstrates remarkable values since local governments are forced to respond quickly to satisfy not only the interested parties, but also bystanders. Whatever online or offline methods the government adopts, the goal is to minimize the effect of such social unrest, which could damage their reputations and careers within hours. Conflicts are rapidly mitigated rather than being continuously ignored.

Chinese society is extremely diverse with multiple participants and dynamics, and can never be fully described through a single aspect. It is a “field” in the theory of Pierre Bourdieu, in which people on the inside relate and struggle with each other through complex social relations, developing the “habitus” as a subjective structure for their actions and thoughts (see Figure 4.1). Both in the physical and virtual field, the party-state that remains authoritative faces new challenges from the bottom, both about its legitimacy and its ability to govern. The media operates between government censorship and market drivers, but rather than a watchdog, it also strives for profit and independence. When public thoughts and activities are clearly influenced by the media and the restrictions imposed by the government, citizens develop their own judgments and consciousness with the growing access to information. This necessarily impacts others with less media and internet access, shaping the entire Chinese society. The public, the media and the government obtain the habitus for their own interests. If the participants can successfully arouse general attention, if the media deems something newsworthy and, most importantly, if the story

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is not a sensitive issue that will seriously undermine the government’s legitimacy, the problem is more likely to be settled within the bureaucratic system or enter into the stream of legislation. Missing one single factor, for instance, government approval/support, public initiation, or consistent follow-up from the media, may lead to a lack of government engagement. Whether public opinion is uninformed or not, or whether it boosts nationalism or populism or not, will not change this dynamic.

Netizens\textsuperscript{299} who are concerned about such issues express themselves online by commenting, forwarding, and supporting (liking) the news. Their collective use of the internet initiates the so-called “focusing events”. Considering the role of the media, and especially of the internet, in

\begin{figure}[h]
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\includegraphics[width=\textwidth]{figure41.png}
\caption{Interplay between the Government, the Public, and the Media in China}
\end{figure}

\textsuperscript{299} “Netizens” (wangmin), or cybercitizens, refer to the citizens who are involved in the cyber space in general. The 35th Statistical Report on Internet Development in China shows that differences in the access to the internet between eastern developed provinces and western undeveloped provinces are slowly decreasing. Until December 2014, rural citizens account for 27.5% of entire population of the netizens. Sex ratio is 56.4:43.6 (males to females). Majority of netizens are aged from 10-39 (78.1%). “The 35th Statistical Report on Internet Development in China”, online: CNNIC < http://www.cnnic.net.cn/hlwfsyj/hlwzbg/hlwjbg/201502/P02015020354852631921.pdf>.
contributing to the focusing events, the next section will analyze netizens’ opinions about these cases.

4.2 Opinions of Netizens on Focusing Events and Chinese Criminal Law

4.2.1 Rapid Growth of the Chinese Internet: Social Landscape

The public needs to find ways to access information and voice their demands. The internet is a new method for them to not only obtain the latest news, but also to communicate with the government and others in a much more efficient way. In China, according to the laws and policies,\textsuperscript{300} there are multiple ways for the public to express their opinions, including through representatives of the National People’s Congress or People's Political Consultative Conference, local party organizations, the petitioning system, public hearings, and surveys. But these traditional approaches usually fail to provide space for enough “authentic” public voices. It is also difficult to determine the extent to which statistics are shaped by political considerations. Newspaper articles and TV programs are commonly filled with government guidelines or intellectual arguments, rather than those from the masses. The limited venues conflict with the soaring demands for expression and communication in the Chinese modernization process where “citizens intend to participate more and more in political, economic and social affairs for their rights and interests”\textsuperscript{301}. Lacking enough independence and power, the National People’s Congress remains far from the Western understanding of parliament. Furthermore, the petitioning system is continuously being criticized for its ineffectiveness, abuse, and illegal

\textsuperscript{300}In China, the laws include Constitutional Law, The Legislation Law, Administrative Procedure Law, Regulations on Letters and Visits and so on.

\textsuperscript{301}John Pratt, Penal Populism (New York: Routledge, 2007) 11.
imprisonment of petitioners.  

Non-government organizations also grow slowly due to the strict environment, with registration conditions, fund raising, and their own problems. Public surveys organized by the government, research institutes, and business corporations, which are much more numerous than before, are good ways to trace public opinion. But compared to the internet, surveys are still less responsive and convenient. New media outlets allow the voice of the general public a much more direct airing. Cyber discourse is a crucial source of viewing the emotions and attitudes of the masses.

According to the 33rd report of the Chinese Internet Network Information Center (CNNIC), at the end of December 2013 China had 618 million internet users, a 9.5 percent increase over the year before, and a penetration rate of 45.8%. According to the 35th report, until December 2014, the total number of netizens reached 649 million, with a penetration rate of 47.9%. Number of netizens from the rural areas has also rise to 178 million. Besides, 43.8% of Chinese netizens would like to comment on the internet; 53.1% of them believe they use the internet a lot. Two surveys from the Social Development Research Institute of the Chinese Academy of Social Sciences, as well as Sohu.com, and incorporated with the Horizontal Research Consultancy Group, show that around 60-80% of netizens agree that the internet makes it easier to learn about politics, criticize government work, and voice their thoughts (see Table 4.1).

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Furthermore, for both the young and old, and mainly for those aged 18-45, the internet is the key means of communication with the government. Blogs, micro-blogs and online forums are the first choice for voicing complaints, compared to traditional means of making phone calls, writing, or going directly to the agencies (see Figure 4.2). Cyber opinions are generated and broadcasted every day in China through BBS, blogs, Wikipedia, chat rooms and emails. Those willing to meet in virtual arenas and daring enough to air their discontent with social and political problems are definitely on the increase.307 There is also evidence that internet venues have influenced the verdicts of judges, party officials and the overall news agenda.308

<table>
<thead>
<tr>
<th>The internet as a channel of public opinion collection</th>
<th>Netizens who extremely agree or agree</th>
<th>Non-netizens who extremely agree or agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>More chances to express</td>
<td>71.8%</td>
<td>61.9%</td>
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<tr>
<td>More chances to criticize government work</td>
<td>60.8%</td>
<td>61.5%</td>
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<tr>
<td>More chances to learn about politics</td>
<td>79.2%</td>
<td>77.4%</td>
</tr>
<tr>
<td>For government officials to gain public opinions</td>
<td>72.3%</td>
<td>73.3%</td>
</tr>
</tbody>
</table>

Table 4.1 Netizens’ Opinions on the Impact of the Chinese Internet

Therefore, although cyber opinions are not fully representative of the views of the general public, the internet remains a low-cost way to assess public attitudes, especially those contrary views or findings that the authorities commonly dislike.

4.2.2 Netizen Opinions on Focusing Events

The internet is commonly filled with negative opinions. In Tianya Club, one of the most popular online forums in China, news related to drunk driving can get millions of hits and thousands of comments. With the exception of feedback with ambiguous meaning, a majority of replies are short and full of resentment toward offenders and the government. They often argue for

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retributive “eye for an eye” justice as well as tough treatment. The supposed lenient criminal penalties have always been a focus of cyber critics. For instance, in Tianya club, on cases of Mingbao Zhang, Weiming Sun, and Qiming Li, there were three posts addressing them separately. They each had around 1000 replies. The case of Mingbao Zhang, which killed 5, injuring 4, gained the most number of replies with furiousness. Even replies showing a little sympathy toward the offender are overwhelmingly berated. Among relies of the other two cases, around 25% argue that the offender should be sentenced with death penalty. Around 23% are skeptical of justice since it looks to them that compensation to the victims’ family could reduce sentences. Around 28% are focused on other legal problems, such as judicial discretion, gaps of the legal system, and so on.\textsuperscript{310} Compared to posts on drunk driving and speeding, posts addressing fake medications and environmental protection focus much more on poor governance. Comments on other websites such as www.163.com and www.weibo.com are similar. There are also numerous concerns about social disorder after news of serious offences. This may support the argument that cyber sentiment is sometimes emotional,\textsuperscript{311} but a high number of comments represent the actual beliefs of a large portion of the public about the society’s political, economic and social aspects -- beliefs filled with dissatisfaction. Without the internet, such voices would not be reflected. It also appears as though most known cyber cases are created by the collective strength of such “nonsense” arguments. Public opinion, even a simple emotional release, must be aired and respected, considering the right to free speech has already been limited under cyber


censorship. That said, “Growing media diversification and consumption clearly increased public confidence in media and nurtured citizen-initiated political participation, pro-Western feelings, a sense of political efficacy and civic values.” The internet empowers the public; broad sections of the public that have regularly demanded the right to be involved in matters of governance are no longer satisfied with this (decision making) being decided on their behalf behind the scenes. When the society starts to/dares to re-consider the legality, legitimacy and ability of state governance, the party-state will pay more attention to public demands.

Online discourse of criminal justice in China converges with the “penal populism” of the West. For instance, “most people have a strong intuition that deterrence works.” The retributive and deterrent demands of the public on criminal law are not unique to Chinese society. The public in Western countries, including the US and UK, also expect strong punitive measures and criticize lenient sentences. This idea that “desperate diseases must have desperate remedies” is almost a human instinct. “It is usually the rights of the public at large to safety and security, and the withdrawal of rights from those very groups (immigrants, asylum seekers, criminals, prisoners) on whose behalf other social movements are campaigning for.”

Besides, the media “have the effect of shaping, solidifying and directing public sentiment and

313 John Pratt, *Penal Populism* (New York: Routledge, 2007) 40. Even elderly or people who live in rural areas that merely use the internet in everyday life will resort to it for help in serious disputes, especially those concerning misbehaviour of government agencies and civil servants like the police, the courts, and urban management officers.
The media are prone to focus more extensively on stories of violent crimes and series of crimes, which make crime seem all too prominent and close to each individual (no matter how removed). Furthermore, both in the East and West, in criminal justice the politics appear more in tune with the ideas and expectations of the public. The internet not only provides a platform for individual expression and open communication, but also creates a new type of social participation in which everyone can be the news receiver and broadcaster, with wider freedoms than ever before. Both the public and the authorities agree (officially, at least) that the public can and should have a strong influence on penal affairs, so punishment should be turned into a public spectacle rather than take the form of a bureaucratic accomplishment hidden from public view. One aspect in which the Chinese scenario is distinctive from that of the West is public suspicion of judicial injustice. In the West, “the desire for longer, more punitive prison sentences was inextricably linked to the desire to curtail the power and authority of those members of the establishment who seemed to want to defend the criminal rather than protect innocent victims.” In China, by contrast, the desire for stronger punishments is based on the desire to prohibit those in power from exercising judicial inequality, which they believe will only segregate the powerless. Defending an advantaged criminal is what the Chinese largely believe happens in reality. Therefore, most Chinese still tolerate vulnerable criminals in some specific cases. The relatively open cyber arena gives rise to an explosion of emotions and demands. “Since political reform started in the late 1970s, openness has

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simultaneously brought a market economy, liberalism, and democratic ideas." China is still in the process of establishing the institutions that define modernity, such as a market economy, professionalized bureaucracy, and autonomous legal and political systems, so that late modern crises of the West are less prominent in China. The lack of independent victims’ rights and citizen-based lobby groups forces individuals to directly face the government. What they mostly criticize is the unfairness in both the judiciary and the administration that favour the powerful and the rich.

It is interesting that cyber pessimism is slightly different from the results of public surveys. Limited survey results on attitudes toward the eighth amendment to Chinese criminal law converge with online discourses, while surveys on the public’s sense of security shows a different picture. The last section of this chapter aims to explore surveys disseminated by the government, private companies, and foreign research groups as comparisons of negative online discourses.

4.3 Public Sense of Security in the Surveys

Surveys related with public sense of security are taken by national bureaus, national research centers, government-owned magazines, civil organizations, and market research companies in China. There are really limited surveys on nation-wide topics carried out by individual

321 Yin Lu, “Reporting public opinion polls in China” (Paper delivered at the 65th Annual Conference of World Association of Public Opinion Research of Hong Kong, 15 June 2012)[unpublished].
researchers. To increase the reliability of the information, the section also relies on survey data from a foreign project, Pew Global Attitudes Project, as a comparison of the Chinese data.

4.3.1 Public Sense of Security: Based on Survey Results

There have been a few surveys about public opinion specifically on the eighth amendment to Chinese criminal law. In 2009, the Horizon Research Consultancy Group conducted a survey on drunk driving. 73.7% of respondents believed drunk driving was very dangerous; more than half claimed that the penalties for driving after drinking were too lenient; more than 30% suggested that stricter enforcement and harsher penalties would help improve the situation.\(^{323}\) However, surveys on fake medications and environmental protection are more scattered. The Canton Public Opinion Research Center, an independent civil organization, has been conducting surveys since 2011 all over China. After 2003, attitudes toward environmental protection within Guangdong province moved up and down, but in general people have recognized the pollution problem as becoming increasingly serious and damaging to their health. More than 80% of residents agreed that lack of regulation is the main reason for the deteriorating environment.\(^{324}\) In online surveys on medicine safety and environmental pollution, negative opinions appear much more often than those on other topics. Increasing penalties is usually considered to be the most desirable solution.


However, surveys on the public’s sense of security since 2000 tell a different story. For instance, statistics from the National Bureau of Statistics since 2001 suggest that although there was a minor decline in the number of people who believed the overall society was “quite safe” or “safe”, that number has grown from 37.1% to 63.6% since 2005. If there were the option of choosing “basically safe”, 90% of respondents would have chosen it. After 2008, the China Statistical Information and Consultancy Service Center replaced the National Bureau to administer the surveys, and the public’s feelings of security in each province were above 95%.325 Scholars like Yijun Pi from the China University of Political Science and Law raised doubts about the authenticity of the data,326 but his doubts remained personal suspicion lacking academic counter-evidence. There were still no independent academic surveys on the public sense of security until now.

Survey results conflict with the rising crime rate in China. Rapid social development has been accompanied by rising crime rates that are unprecedented in Chinese history.327 Crime rates in the 2000s were much higher overall than those before the 1970s, despite the ups and downs from 1950 to 2005.328 According to the National Bureau of Statistics of the People’s Republic of

328 The crime rate’s ups and downs during the three strike-hard periods show that it is less than likely that the campaigns managed to reduce crime. Even official crime statistics quickly resumed their rapid upward
China (see Figure 4.3), from 2003 to 2012 the number of criminal cases filed by the police nationwide rose from 4,393,893 to 6,551,440. Cases of minor offences grew from 7,197,200 to 13,889,400.\textsuperscript{329} While crime rates increase, the public’s sense of security actually drops.

![Figure 4.3 Number of Police-filed Cases from 1950 to 2005 per 100 Thousand Population](image)

Considering “Chinese public opinion via sample survey has come under increasing scrutiny, in a growing number of mass-based studies”,\textsuperscript{330} there are other resources to help confirm the credibility of official data. The Horizon Research Consultancy Group, one of the top market research companies in China, has also conducted surveys on changes in the public’s sense of trend almost immediately after the campaign ended. The anti-crime campaigns have also been notable for their brutal methods and their frequent use of the death penalty.

\textsuperscript{329} The statistics are available online: National Bureau of Statistics of China <http://data.stats.gov.cn>.


security. According to its statistics from 2002 to 2007, the surveyed population who felt safe was 64% to 74% (see Figure 4.4).

Note: 1. Blue line: Sense of Security of Urban Residents; Pink line: Sense of Security of Rural Residents; Red line: Chinese Residents in Total
2. 5.00 refers to the highest satisfaction of public security; 1.00 refers to the lowest.

Figure 4.4 Comparison of Sense of Security between Chinese Urban and Rural Residences from 2002 to 2007

(Report from the Horizon Research Consultancy Group)

This result is supported by another survey taken by the journal Insight China (moderately prosperous society) from 2005 to 2013, which confirms the official survey results of the China Statistical Information and Consultancy Service Center. But Insight China is a semi-

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331 Horizon Research (for market research) was founded in 1992. Over the past 20 years, it has developed into a new knowledge-intensive services corporation excelling in research, consulting and empirical management. In was ranked the top civil think tank by the “Report of Chinese Think Tanks” in 2013.
monthly magazine that is affiliated to *Qiushi*, the party-run magazine in Beijing; even though it claims to voice public opinion, discussing affairs regarding Chinese politics and social culture, its data is inevitably influenced by political considerations. It is believed that “Information supplied by the Chinese government deserves careful reading, with attention to its possible incompleteness, omission, distortion, misrepresentation and bias.” Public sense of security is a crucial factor to show the party’s governing capacity.333 “The state in China has sought to maintain its own legitimacy and authority by using poll reports in the news media to justify its performance and thus to influence Chinese people’s fundamental political attitudes.”334 The following table also shows that the above surveys may be more or less shaped by the preferences of Chinese officials in China (see Table 4.2).

334 Yin Lu, “Reporting public opinion polls in China” (Paper delivered at the 65th Annual Conference of World Association of Public Opinion Research of Hong Kong, 15 June 2012)[unpublished].
In contrast to domestic surveys, overseas ones may test the survey results mentioned above. The Pew Global Attitudes Project conducts research around the world on a broad array of subjects ranging from people’s assessments of their own lives, to the current state of the world and important issues of the day. Several surveys have been conducted on the views and concerns of the Chinese population. Although the research design, sample size, and representativeness of each survey are different, the Pew Global Attitudes project was sponsored by an overseas organization and may help verify some official data on China. A 2007 report entitled “A Rising

Tide Lifts Mood in the Developing World” found that the Chinese people are much more satisfied with national conditions than they were in 2002 (83% now vs. 48% then). The Chinese also give near universal support to the national government; fully 89% say the national government has a very good or somewhat good influence on the way things are going in the country. The 2008 report on China notes that the citizens who were polled rated many aspects of their own lives favourably. “Concern about crime is down considerably, however, from 2002, when 89% said it was a big problem and 40% rated it very big. About six-in-ten Chinese think crime is a big problem in the country and 17% rate it a very big problem.”336 These findings are more or less consistent with Chinese domestic survey results.

Therefore, it may be superficial to argue that the data is solely the result of government manipulation. The results seem to be opposed to the abundant pessimism on the internet. The following part of this section will explore the reasons why the public who were surveyed have been generally satisfied with their safety in the past ten to fifteen years.

4.3.2 Reasons for Public Satisfaction and Divergence with Internet Sentiment

Chinese policing strategies, such as consistent wars against crimes and misbehaviours, are effective in reducing the public’s fear of crime. They may prohibit a decline in the sense of security despite the crime rate growth. Comprehensive management of public security -- “strike hard” campaigns against violent crimes -- has meant increased police patrols and the number of

private security guards, as well as mass surveillance systems.\textsuperscript{337} These measures have raised public confidence in personal safety, at least with regard to serious crimes. Since the 1990s, national comprehensive management of public security has aimed to control and prevent crime through the cooperation of multiple agencies and the public.\textsuperscript{338} The Ministry of Public Security launches campaigns against serious crime every year; in May 2013, the state also held several conferences to continue these campaigns for the maintenance of public security.\textsuperscript{339} Public fear is significantly decreased by such police endeavours. Surveillance technology and private security that is accessible to ordinary people also help decrease their fear of crime. For example, since 2014, with a number of terrorist offences on the mainland and random killings of the innocent,\textsuperscript{340} the people’s fear of crime started to grow, but after increased police patrols and media broadcasting of wars against serious crimes, public confidence was consistently reinforced, and the fear has faded.

In addition, as Pew reports show, rapid economic growth and growing social prosperity create much support for the government. Such support influences judgments on other aspects of governmental administration. In China, most Chinese (especially the elderly who have

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{338} The Chinese Ministry of Public Security has launched the project of establishing a safe China for a long time. “Establishment of a Safe China”, online: Ministry of Public Security <http://www.mps.gov.cn/n16/n983040/n3695342/>.
\item \textsuperscript{339} “Conference Promoting the Establishment of a Safe China”, online: People <http://legal.people.com.cn/GB/43027/364596/>. Jinping Xi (Current President of China) held the conference to promote the continuing establishment of a safer China in Jiangsu province in 2013.
\item \textsuperscript{340} Terrorist actions are like the 2014 Kunming attack, and a series of violent riots within Xinjiang Uyghur Autonomous Region in China.
\end{itemize}
\end{footnotesize}
experienced past wars), have a deep-rooted fear of lawlessness and chaos (luan).\textsuperscript{341} There is strong support for a government that maintains law and order and forcefully metes out severe punishment to those who break the law.\textsuperscript{342} With such firm popular sentiment, harsh punishment proves to the public that the government is “doing something” about the negative consequences of economic reforms.\textsuperscript{343} In three surveys conducted by the National Bureau of Statistics from 2005 to 2006, respondents in favour of such campaigns rose from 42.5% to 58.1%.\textsuperscript{344} A punitive sanctioning system and the popularity of harsh anti-crime campaigns have also helped the regime gain support in an insecure environment of transition. In another survey conducted by the Horizon Research Consultancy Group on the living quality of Chinese residents in 2007, around 72.8% of respondents agreed that the government would make progress on the war against crime and misbehaviour.\textsuperscript{345} Such data suggests that the public is basically confident about the government’s role in crime fighting, which helps maintain some form of good reputation for the government.

Furthermore, rapid urbanization and growing social inequality have led to soaring crimes against

\textsuperscript{342} Borge Bakken, “China, a Punitive Society?” (2011) 6 Asian Criminology 44.  
\textsuperscript{343} Borge Bakken, “China, a Punitive Society?” (2011) 6 Asian Criminology 42.  
\textsuperscript{344} “Reports on the Public’s Sense of Security Nationwide”, online: National Bureau of Statistics of the People’s Republic of China  
\texttt{<http://www.stats.gov.cn/was5/web/search?channelid=288041&andsen=群众安全感调查公报>.} The national surveys used one person above age 16 from 104107 (Year 2005), 102448 (Year 2008), 101029 (Year 2007) families all over the country as surveyees through questionnaires.  
\textsuperscript{345} “General Level of Satisfaction of Life: Growth in Rural Residents vs Decline in Urban Residents”, online: HorizonKey  
\texttt{<http://www.horizonkey.com/c/cn/news/2008-03/04/news_708.html>.} The 2007 Life Quality Report by Horizon Research Consultancy Group chose 3,355 respondents from seven cities, including Beijing, Shanghai, Wuhan, Guangzhou, Chengdu, Shenyang and Xi’an. Rural residents numbered 1,560, small town residents numbered 924, and rural residents numbered 871. Face-to-face surveys were conducted.
people and property rights. The rise in the crime rates from 1995 to 2010 suggests that the number of crimes against property has been far more prevalent than those against people (see Figure 4.5).

![Figure 4.5 Categories of Police-filed Cases from 1995 to 2010 per 100 Thousand](image)

On one hand, most people have become used to the threat of minor offences like theft and fraud, assuming them to be common risks of everyday life. Though they are wary of such crime, most people do not believe it is a big issue. On the other hand, serious life threats still seem a bit removed from the lives of regular people. Data from the Chinese Yearbook from 1987 to 2010 indicate that crimes such as larceny, fraud, and smuggling have grown the most, while crimes such as murder, rape, and injury have developed relatively slowly. Statistics from the National Bureau of Statistics and bluebooks of Chinese society (Society of China, Analysis and Forecast) suggest that from 2003 to 2012, the number of cases of murder, rape, and robbery has actually
declined, with larceny, fraud and smuggling rising rapidly.346

Overall, it is difficult to determine whether and to what degree the statistics and media broadcasts concerning crime rates are misleading, so it remains uncertain exactly how much the government has manipulated public opinion. However, based on existing findings, it can be assumed that in the past ten years, the general public has been basically satisfied with the safety of their living environment. The state’s tough measures on crime play a crucial role in this respect. In the West, penal populism consists of a set of penal policies aimed at winning votes rather than reducing crime or promoting justice. Penal populism does not exist in the one-party China; what is taking place also has a strong resonance “between governments and various extra establishment individuals, groups and organizations which claim to speak on behalf of ‘the people’ in relation to the general development of penal policy”. 347 The Communist Party always argues for adherence to the rule of “mass line” to serve the people’s interests, and wars against crime are good opportunities for them to enhance governing legitimacy by strengthening the party–people relationship.348 If the statistics are correct, the Chinese landscape varies from what penal populism describes about the state’s declining authority and its representatives in the West. Statistics suggest that the Chinese still hold positive views of the government’s ability to fight crime, even though they have serious doubts about the state’s other abilities. The “responsibilization” strategy, as well as multi-agency partnership with the West, is also nothing

348 “Mass line was the operational creed of the CCP governmental rationality. It was through the various practices that grew out of the mass line that CCP policy was able to connect with the mass and mobilize them in large numbers to participate in military, economic and social programs.” David Bray, Social Space and Governance in Urban China: The Danwei System from Origins to Reform (Stanford, Stanford University Press, 2005) 58.
new in China. Under the CCP’s monitoring, even the courts assume security governance duties similar to the police. All stand as an intact bureaucratic group in the face of the common enemy of crimes, not only through the coordination of state agencies, but also with local communities through the mobilization techniques inherited from the “mass line”.

However, survey results also show that the public is struggling with the side consequences of economic growth, which has been damaging the trust the state has established through intense policing techniques. For example, the surveys the National Bureau of Statistics carried out from 2002 to 2007 asked respondents to identify what they believed most affected their sense of security (see Figure 4.6). Criminal offences used to be the top concern, but traffic offences gradually grew to be the most serious. With regard to which type of social problem respondents cared about most, data from the journal Insights China indicate that from 2009 to 2013 public security concerns declined, with food security identified as the top social problem, followed by medical safety, road safety and environmental safety. In addition, according to online surveys taken every year before “Lianghui” (two meetings), though the ranking of concerns shifts every year, since 2002 safety has never been the public’s top concern. What the general public is mostly worried about is corruption, social inequality, environmental protection, among others. The 2012 Pew report “Growing Concerns in China about Inequality, Corruption” presents similar findings that the Chinese “are grappling with the concerns of a modern, increasingly wealthy society”. Concern about the safety of medicine has more than tripled from 9% in 2008 to

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28% in 2012. The public also expresses concerns about the environment: a third or more rate air pollution (36%) and water pollution (33%) as very big problems.350

Therefore, survey results do not contradict the pessimism on the internet. The fairly high sense of security coexists with anxiety about new social risks. “Common people have become the victims of such social phenomena, as environmental pollution, traffic accidents, and the production of hazardous products.”351 Cyber opinions are reflections of such anxieties. What the public fears are the emerging risks endangering daily life, such as food, medicine, traffic and environmental accidents and possible intrusion of state power into basic human rights, all of which create support for criminal legislation. With the increase of such new risks, the public’s sense of

Figure 4.6 Public Concerns about Safety from 2001 to 2007

Therefore, survey results do not contradict the pessimism on the internet. The fairly high sense of security coexists with anxiety about new social risks. “Common people have become the victims of such social phenomena, as environmental pollution, traffic accidents, and the production of hazardous products.”351 Cyber opinions are reflections of such anxieties. What the public fears are the emerging risks endangering daily life, such as food, medicine, traffic and environmental accidents and possible intrusion of state power into basic human rights, all of which create support for criminal legislation. With the increase of such new risks, the public’s sense of

security drops, which damages the trust in the government, even though traditional crimes are harshly punished. Existing satisfaction with the living environment also promotes public demand for more safety goods based on beliefs on public policing. In addition, the demographic structure of those who frequently use the internet and those who take surveys is also distinct from each other. Surveys are excellent for manifesting the preferences of the masses through their relatively accurate research methods, while direct expression on the internet clarifies public preferences and demands, especially in specific cases. It is also claimed that internet-active citizens are younger, wealthier, better educated, and more likely to live in urban areas, and such people tend to be more apt to express opinions on the anonymous internet. Therefore, at present, a widespread rise in the number of critical citizens can still be expected, even though the rapid rate of economic development has produced high levels of satisfaction among the materialist public.

Finally, it should be noted that both surveys and internet opinions are not fixed. Inconsistencies in public opinion regarding criminal justice issues have been well documented all over the world.\textsuperscript{352} They are subject to shifts in education, government propaganda, media reports, interactions with local officials, daily experience, and so on. Survey design techniques and the sheer amount of information posted on the internet influence public perception. Sense of security is not always associated with changes in the crime rate. The public feel safer with more police presence, even when crimes increase. They will also become anxious for a short period after media coverage of serious crimes, even as the crime rate drops. News of traffic, food, drug and environmental accidents reduces their sense of security. For the public and the state, harsher

criminal law is a win–win situation.

4.4 Conclusion

This chapter has argued that the development of the internet and increased public participation has led to the focusing events. First of all, in parallel with the “unprecedented economy growth and significant rise in the standard of living”,\textsuperscript{353} the Chinese public has started to recognize that the society is much less secure than the era before economic reforms. But state strategies on crime fighting have succeeded in maintaining the sense of security at a relatively high level. Democracies do not appear to have an advantage in perceptions of public security. The current worries of the Chinese masses lie primarily in traffic offences, drug safety scandals, and environmental accidents, which continue to add to feelings of vulnerability. News of accidents such as airplane crashes and train derailments also increase perceptions of the world’s instability and vulnerability.

These anxieties are reflected on the widespread use of internet, and they are also consistent with survey results. The active Chinese public promote the development of focusing events through the internet, demanding timely responses from decision makers. The social landscape, and the relationship between the public and the party-state are significantly different from what they were in the past. There are six models of agenda building in the Chinese social context, addressing variations in not only the origin of issues inside and outside government, but also the

degree and direction of efforts to expand issues beyond the initiating groups\textsuperscript{354} (see Table 4.3). Currently, ordinary people want to be involved in opinion-forming themselves, rather than allowing elites to do it for them.\textsuperscript{355} What is emerging is the fourth, fifth, and sixth models with increased public participation. The next initiative will be fostering an informed, rational public deliberation in such a relatively open arena.

<table>
<thead>
<tr>
<th>People who Propose Agendas</th>
<th>Decision Maker</th>
<th>Brain Trust</th>
<th>The Public</th>
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<tbody>
<tr>
<td>Low</td>
<td>I Inside Model</td>
<td>III Inside Initiative Model</td>
<td>V Outside Initiative Model</td>
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<tr>
<td>High</td>
<td>II Mobilization Model</td>
<td>IV Inside Model with Expansion</td>
<td>VI Outside Initiative Model with Pressure</td>
</tr>
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Table 4.3 Six Models of Agenda Building

Seen from another angle, the new picture also sheds light on changes of governance. While keeping tight control of the internet over political issues, the party-state tolerates some social pluralism on non-political problems, as long as it maintains ultimate control over agendas and outcomes and “reflect[s] its problem-focused, issue and domain segmented nature.”\textsuperscript{356} Encouraging debate and discussion on specific topics while allowing a certain degree of critique


\textsuperscript{355} John Pratt, \textit{Penal Populism} (New York: Routledge, 2007) 82.

will not only test new policy ideas, but also signify the development of a more open, participatory and accountable governance model in China. This model is also consistent with the “mass line” principle adopted in both law making and implementation after the founding of the PRC.  

However, the picture of the future is becoming gloomier. Although Weifang He, a noted Chinese scholar, claims that “the Chinese have relied on the Internet so much that no western Internets have showed such magnificent power for the freedom of express”, according to the CNNIC’s 33rd report in 2014, the enthusiasm in using social network services is fading, especially for those with high educational background. 20% of netizens are not as active on social networks as before; users of micro-blogs have declined by 9% and the number of netizens who have and participate in blogs is also declining. Thus, the long-term effect of the internet remains uncertain when people find it less and less appealing. If, in the long run, netizens find their participation fails to gain satisfying results, their devotion to the virtual world will decrease.

However, not all the focusing events contribute to the revisions of Chinese criminal law. Are the focusing events really facilitating legislative changes? How will we know that the state is taking these views into account? Whether the focusing events are able to catch the attention of lawmakers also depend on the policy stream, in which policy entrepreneurs actively bridge the

358 Weifang He, “The Chinese Reliance of the Websites”, online: <http://past.nbweekly.com/Print/Article/1884_0.shtml>.
proposals to the field of legislation, and the political stream, in which government agencies manage to reach agreements approved by the CCP. Hence the next chapter will examine the dynamic of the policy stream of criminal law making in China.
Chapter 5: Policy Stream for Chinese Criminal Law Making

Chapter 4 sketched out the “problem stream” of Chinese criminal law making. It argued that willingness of expression on the internet and anxiety over social safety create demands for rapid responses from the governor. On the one hand, large portions of the Chinese population are satisfied with policing under CCP governance; fear of crime decreased as a result of the war against crime. Sense of security is also enhanced by China’s significant economic growth in the past thirty years, which has provided the Chinese with far more material goods, security and openness than before. On the other hand, challenges to the new socialist model, including political instability, corruption, the income gap, environmental deterioration, and the transition from a centrally-planned to a market-oriented economy, exaggerate social instability though the party-state’s propaganda and suggest that the society is moving in a better economic, social and political direction. Uncertainty, dissatisfaction with government, a surging sense of individual rights, and widespread internet use create demands to amend Chinese criminal law.

However, it is not guaranteed that intense public demand will bring about policy reforms. In China, there have been many issues about which the public have been concerned that still go unsolved. Becoming law requires the coexistence of several factors, of which appropriate policy proposals is one that cannot be ignored. In the “policy stream” of Kingdon’s MSA, many ideas are possible in principle and specialists try them out in a variety of ways -- bill introductions,
speeches, testimonies, papers and conversation. Therefore, this chapter will examine the policy stream of Chinese criminal law making. It argues that inclusiveness of the policy community provides opportunities for both the dominant and marginalized institutions to enhance their power. The engagements promote revisions of the Chinese criminal law. However, without political competition like the West, the policy stream acts more like a response to the problem stream. On the one hand, it shows that public opinions in the focusing events do influence the making of proposals. On the other hand, it manifests that in China policy changes are punctuated. There also lacks institutional restraints on criminal law expansion.

Accordingly, through investigating the key participants of policy making, known as the “policy entrepreneur”\(^ {361}\), the first section suggests that, shaped by the current Chinese political mechanism, the policy stream modifies Kingdon’s model in the Chinese context. First of all, the specialists commonly act until serious problems emerge; the proposals usually will not stay for long. However, this also illustrates that the focusing events, and public emotions are really having influences on Chinese proposal making. Otherwise, some entrepreneurs will not even know about the problem. Second, the inclusiveness of the policy community promotes the amendment to Chinese criminal law. “Inclusiveness” means that the community has incorporated more marginalized groups in the decision making process, like the lawyers and NGOs into policy-making procedures. After that, besides the participants, to become successful agendas also require the technical feasibility of agendas. Accordingly, the second section analyzes the legal


rationales these proposals dealt with. The “policy entrepreneurs” who are able to present proposals directly to the NPC and its standing committee assess the effect of changes to criminal law. The section claims that even though the policy entrepreneurs have addressed most of the theoretical issues, several concerns still require reconsideration. This chapter takes drafting of the three amendments of Chinese criminal law as case studies. Data comes from newspapers, government reports, journal articles and so on.

5.1 Roles of the Specialists in the Policy Stream

The policy stream in Kingdon’s model -- as the process of specialists making and presenting policy proposals -- has a clear boundary with the problem and political streams. The policy stream is simply involved with proposals. Concerns about national mood, bureaucratic bargaining (jurisdiction competition), and administrative changes all develop in the political stream. However, in China, setting the policy stream separate from the influence of public opinion and political turnover, has both limits and strengths. The operation of the policy stream in the one-party Chinese environment lacks a clear boundary with the political stream. All the laws in China are policy-driven.362 As a policy instrument, law in china is constantly subject to interpretation and intervention by central and local level officials of the Party/State.363 The CCP’s power penetrates the whole society, imbuing the two streams of “problem” and “policy” with the politic. Considering that the ministries are also involved in the making of agendas and

alternatives, it is justified to address their activities and implications in the policy stream as well. But to examine the policy stream alone also has its own advantages. Those who raise proposals are different from those who review and debate them. Classification of participants and proceedings make the process clearer. In addition, distinguishing the policy stream from the political stream could saddle proposal makers with technical issues. Specific legal problems related to criminal law making can also be addressed in the stream. Therefore, this chapter still aims to follow Kingdon’s model by analyzing specialists’ roles, including government staff or think tanks, representatives of the National People’s Congress and legal scholars, keeping in mind that the policy stream is not an entirely independent process. In contrast, bureaucratic and political manipulations will be discussed in the next chapter.

5.1.1 Proposal Drafting Specialists: the Policy Entrepreneurs

A variety of people were involved with making proposals of revisions to criminal law, including cyber activists, government staff, NPC representatives, members of the People's Political Consultative Conference, NGOs and legal scholars. The Ministry of Public Security, the China People's Political Consultative Conference (CPPCC) and the All-China Environment Federation (ACEF) are the three main institutions making proposals to amend Chinese criminal law with respect to drunk driving, fake medications and environmental pollution. The Ministry of Public Security is a government organ supervised by the State Council. The People's Political Consultative Conference is a political advisory body, established by the state with the intention of becoming more representative with the consultation with a broader range of people in government affairs. The All-China Environment Federation is a self-proclaimed non-profit national organization for environmental protection and sustainable development. It is an
environmental NGO with deep government ties. These three agencies have specialists in various policy areas such as criminal justice, health, economy, culture, resources, and environmental protection. The specialists are composed of government staff, consultants, lawyers, and researchers, among others.

In China, since drunk driving has become a prominent social problem, a number of people and organizations online and offline have made proposals to criminalize it. Two that eventually submitted the proposal to the NPC during the Chinese “Lianghui” in 2010 were the Ministry of Public Security and a delegate of the Political Consultative Conference, Shi Jie, who was a criminal defense lawyer. In April 2010, a representative from the Ministry of Public Security made a report to the NPC standing committee during the Chinese “Lianghui”, arguing a revision of criminal law on impaired driving to maintain road safety. At the same time, a delegate from the Political Consultative Conference who was also the defending lawyer on the nationally-known drunk driving case involving Sun Weiming, drafted a proposal to create the new offence of impaired driving. Noting that the war on drunk driving was far from enough to deter such crime, both reports suggested replacing existing administrative or regulatory offences with criminal penalties. However, being a criminal defense lawyer provided Shi Jie a slightly different viewpoint from those of government agencies. His proposal originated from his opinions of the case he defended, in which the offender (Sun) was charged with the crime of endangering public


365 In the dissertation, “specialists” refer to those who are directly involved in the process of raising and negotiating bills, rather than a layperson. Specialists include but are not limited to legal scholars.

security. The lawyer claimed that the judgment was inappropriate, considering that the court intended to use harsher penalties on the offender. He insisted that there was a gap in criminal law between traffic crimes that are caused by accident, and crimes against public security, which are felonies and intentional. Inspired by this, he proposed amending criminal law after his further research and interviews with government officials.

It was the Political Consultative Conference that made proposals to the NPC to revise criminal law in 2010 with respect to the crime of fake medications (NO. 000027 of the Third Session of 11th National Committee of CPPCC). The proposal was drafted by the Jiusan Society, one of the eight legally recognized political parties in China, together with the China Food and Drug Administration and the Beijing Food and Drug Administration. Based on national research from May to October 2009, these institutions argued that fake drugs had caused significant social harm to Chinese society, but that existing criminal law failed to deter such offences, making it difficult to protect citizens against such risks. The proposal, which the NPC finally accepted, became part of the new criminal code in 2011.

The All-China Environment Federation submitted a proposal to the NPC through one of its representatives with regard to the crime of environmental pollution.\textsuperscript{371} The federation drafted three proposals altogether, later summarized as one single proposal, to the second conference of the eleventh NPC National Committee in 2009. The proposals were the collective advice of the participants in a national forum of “Criminal Law and Environmental Protection” organized by the federation.\textsuperscript{372} The forum brought together government officials, lawyers and researchers, a majority of whom supported adopting severe penalties for environmental offences.

Overall, proposal makers are active in Chinese criminal law making. The preventive shift of criminal law is the result of the collective effect of specialists, even if they don’t have the specific intention of making criminal law more preventive per se. The establishment of consultative democracy, the willingness to be involved in public affairs, and most importantly, the institutions’ desire to enhance power, all contribute to wide participation. Although three changes cannot fully represent reforms of the eighth amendment to criminal law, this characteristic has been evident in Chinese law making. Each proposal has evolved from the efforts of multiple actors, including government agencies, lawyers, political parties, NGOs and scholars. In general, the policy entrepreneurs themselves have to gain resources to have impact on the agenda making: e.g. expertise, such as technical and legal skills from officials, lawyers and researchers, and having a name or title that is recognized by legislation law, such as

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representatives of the People’s Congress and the People’s Consultative Conference.\textsuperscript{373} It is evident that the lawyers, NGOs and the Political Consultative Conference, which were marginalized in public policy making, are slowly starting to shape public affairs.\textsuperscript{374} The Political Consultative Conference, which is commonly ignored as a ceremonial and non-functional government body, has been consistently making proposals to the NPC to formalize its power, covering almost all areas of social life. The lawyer community has also become active the last number of years, not only in suing cases, but also in becoming policy entrepreneurs in public affairs.\textsuperscript{375} Criminal law, criminal procedure law and environmental protection law are their main focus.\textsuperscript{376}

The inclusion of policy entrepreneurs in proposal drafting has a significant impact on the revisions to Chinese criminal law. The most explicit outcome is that the number of provisions in the amendment has greatly increased. The increase in provisions started from the sixth amendment to criminal law in 2006, and the eighth amendment is the most numbered revision in Chinese criminal law history. Rather than covering a few areas of the law like before, current

\textsuperscript{373} The identities are backed up by people who hold power, or have connections with power.


revisions reach a number of areas of the law, including those regarding cybercrime, terrorism, and corruption.\textsuperscript{377} Although wider participation from the legal community is not the only reason for the increase, proposal drafting and consultation with experts make for the incorporation of more opinions into the official policy making process. This inclusiveness can be beneficial to Chinese criminal law making: not only is broader participation a good sign of the establishment of democracy, but it also promotes the contribution of more discussion topics to improve criminal law. But in practice, in common, that the proposals are made in cooperation with government officials or raise similar issues as officials will increase the chances of being accepted by the NPC. In contrast to the proposals that are based simply on a sense of natural justice, agendas are more valued by the NPC and its standing committee due to the influential. The decentralization of power within the system, with the central party’s gradual loosening of decision making control over law making, has been coupled with tremendous bureaucratic development by the State Council and NPC staff offices.\textsuperscript{378} For instance, on proposals regarding the crime of fake medications, the Jiusan Society worked with the other two bureaucracies to obtain the data. On crimes of environmental pollution, the All-China Environment Federation held conferences inviting government staff, scholars and lawyers.

In China, the policy stream operates more as a response to the problem stream. It modifies MSA on this key aspect. The next section will address this characteristic of the Chinese policy stream. Though it manifests the limits of our political system, it also shows that public opinions do

\textsuperscript{377} Criminal Law, as amended by RS 2011.
influence the proposals and possibly the final revisions, through the policy stream of criminal law making.

5.1.2 Policy Stream: As a Response to Public Opinions in China

Different from what Kingdon has proposed about the consistent advocacy of proposals policy in the West, “One would observe in authoritarian regimes a highly punctuated policy process in which the policy making is too insulated to react until the built-up pressures can no longer be resisted.”379 In the West, “Active and persistent policy advocacy and interest representation keep even the more idiosyncratic and marginal issues on the policy agenda, which has the effect of diversifying the contents of the agenda and the overall scope of issues being considered by the government.”380 MSA proposed by Kingdon is based on such institutional design. In China, without such a mechanism of policy competition, it is hard for one proposal to stay too long in the “pool” of proposals. Absence of political competition leaves the policy agenda unchanged until serious problems take place, when the government has no choice but to respond. Otherwise, without sustained support, ideas will be removed from agenda making. Even though inclusiveness of the policy community has diversified topics of the proposals, persistent debates of one topic, especially before crisis happen, are really rare. For instance, specialists’ preferences in choosing topics have a direct impact on the contents of criminal law, while these proposals have been heavily influenced by serious incidents of road, food, drug and environmental safety.

The chosen topics reflect the specialists’ criterion of choosing the right (most urgent) problem and drafting solutions that are most likely to be accepted by the legislator. One such example is that the Chinese government faces growing pressure from civil society as NGOs, internet activism, and protests compel the government to proactively address environmental issues.\textsuperscript{381} Among a number of issues requiring state action, only those that are able to attract national attention receive rapid treatment. It shows that the specialists lack regular observation of social affairs; or, even though some issues require treatment, they are largely ignored until a serious incident takes place. Although criminal law is not the only law on which policy entrepreneurs concentrate, among the large number of laws that are made and revised every year, it is one that is closest to the public’s perception of natural justice. Hence, compared to other laws, criminal law proposals are good opportunities to enhance existing power, or to transform the power structure’s poor public image as long as they appear to meet public needs.

However, from another aspect, to respond to the public emotions in the policy stream also manifests that public opinions in the focusing events have really influenced the criminal law making. They motivate the policy entrepreneurs to make proposals. The proposals will be a reflection of public involvements to some degree. Considering it is the proposals that will eventually become the law, the policy stream acts as a channel between public opinions and revisions of Chinese criminal law.

In all, hot topics (especially those related to public security) and strong support (particularly from bureaucrats) contribute to quick changes in the laws. The desire to maintain or expand power in policy making, the belief in criminal law’s utilitarian effect, the unshakable desire for security, and the lack of persistent debates of policies until serious incidents occur, make the current criminal law making in China a bold project. Considering the ministries and even the courts (at times) have advocated being harsher on misbehaviour to regain public order and safety, focusing events offer sound opportunities for such growth. Besides the officials, certain groups such as non-communist parties, lawyers and NGOs, with the desire of enhancing power, have also increased the number of law making proposals in their respective fields. Criminal law is not the only part, but definitely an essential part, of their focus.

One direct result of resorting to criminal penalty as a tool of social management with such frequency is the expansion of criminal law. The heated participation reveals the majority’s reliance on criminal law as the most effective tool of social control. During discussions the deterring effect of criminal law is consistently stressed. Not only does the idea of deterrence prompt the revision of criminal law, but it also eliminates further discussions about the law’s legitimacy. As one researcher has noted with regard to environmental protection, arguing with those in favor of criminalization in the conferences appears “weird, hostile, and inappropriate”. He even hesitated to ask such people to re-consider the proposals. Especially when the issue is justified by the goal of security or public safety, it is difficult to raise opposing ideas. In China, to resort to criminal law has always been an agenda to those who make

proposals. In this regard, it fits into Kingdon’s model arguing that policy stream develops independently of the other two streams in agenda making. For example, it is evident that the representatives consistently refer to “criminalization” as the solution for a certain social problem. The advocates criticize that there are gaps in the current criminal law, so it is necessary to improve the law for better social governance. In that case, no matter justified or not, revising criminal law, either by expanding the boundary, or increasing the penalties, exists as an idea routinely floating around in Kingdon’s policy primeval soup. It is continually brought out when serious problems come about. To make matters worse, most often, scholars’ theoretical arguments (which mostly serve as references) are rarely able to restrain the demands of ministry officials. Although it is suggested that, in general, “state elites and experts can control policy formation, downplaying or ignoring the public’s emotional attachments and irrational impulses, leading to more rational, technical responses,” 383 such ability really depends on different circumstances, under the suppression of state power. In addition, these justifications all share the element of uncertainty identified in the concept of prevention. It is “law and order ideology” -- most often associated with an emphasis, not on just desserts, but on deterrence and incapacitation -- which gives rise to the harshest results. 384 Limits (negative effects) of these rationales for criminalization will be documented in the next section.

Accordingly, the next section will examine the legal implications of the proposals. In Kingdon’s model, besides efforts of policy entrepreneurs, criteria of being selected also include assessment

of agendas, such as technical feasibility, congruence with the values of community members, and the anticipation of future constrains, and politician’s receptivity.\textsuperscript{385} Though specialists have solved most of these technical issues connected to amending criminal law, there remain several legal problems that need to be considered.

5.2 Legal Concerns of the Proposals

As bureaucracies, the Ministry of Public Security, the Ministry of Environmental Protection, and the Ministry of Food and Drug Administration generate monthly and yearly data, reports, and plans. For the Political Consultative Conference and the NGO, such data present numerous proposals for policy and law making. There have also been many other proposals from specialists in other areas of law serving to either draft a new law or revise an existing one. The agendas, having been debated by specialists from multiple fields, have a greater chance of being accepted and confirmed as law for their technical feasibility. To revise criminal law, the specialists solve legal problems to make proposals acceptable in the light of criminal law values and the proper role of the state. The war on crime launched by the Ministry of Public Security’s changes to administrative law, regulations made before revisions, and existing scholarship on related misbehaviour are all resources that policy entrepreneurs rely on in making proposals.

The first issue that needs to be addressed is whether there exists a legal problem. Is there really a legal gap in the system, or does a given issue simply require strict enforcement? In China, weak management techniques and practices in the administrative systems are one major reason for the

development of new offences and changes to traditional offences. As a developing country undergoing modernization, its institutional arrangements often lag behind the rapidly growing economy. Most problems result from a lack of efficient, practical implementation rather than from a lack of rules.\textsuperscript{386} For example, as to drunk driving, the study carried out by a research group headed by Zhaoxin Wang, showed that a large decrease occurred for traffic fatalities caused by drink driving in 2012 to 2013 and might indicate that the effects of the latter (zero tolerance) policy were greater than the “Criminal Law Amendment”.\textsuperscript{387} As to manufacturing fake drugs and environmental pollution, one of the most crucial reasons for the weak control of them is local protectionism, which values greater local GDP development rather than justice and environmental protection.\textsuperscript{388} In addition, Beijing’s decentralized authoritarianism lacks the political processes and incentives needed to implement meaningful national reform and to encourage local governments and polluting factories to adhere to laws and regulations.\textsuperscript{389} “The PRC has promulgated an increasingly comprehensive array of laws intended to speak to environmental concerns, but those laws suffer from the doctrinal infirmities and difficulties of enforcement that characterize contemporary Chinese law more generally.”\textsuperscript{390} “The government is aware of enforcement problems. An annual report to the National People’s Congress in October noted that ‘incompetent supervision by local governments’ was partly to blame for rising

\begin{itemize}
  \item \textsuperscript{388} Xiaoping Qian, “Western Experience on Environmental Protection Legislation” (2014) 3 Political Science and Law 137.
  \item \textsuperscript{389} Elizabeth Economy, “Environmental Governance in China: State Control to Crisis Management” (2014) 143 (2) Daedalus 184.
  \item \textsuperscript{390} William P. Alford & Yuanyuan Shen, “Limits of the Law in Addressing China’s Environmental Dilemma” (1997) 16 Stan Evntl LJ 127.
\end{itemize}
pollution. Enterprises that concealed or falsely monitored data were also a major factor.\textsuperscript{391} Court data suggest that the number of environmental cases is very low.\textsuperscript{392} “Policy works better than law. What is more efficient is the CCP’s five-year plan that creates guidelines for economic growth, economic structure, resources, environment, and public services. Officials who fail to reach the goals must take responsibility for such failure.

After that, the justifications for criminalization are considered, particularly about “just desserts” and the deterring (general prevention) effects of criminal law. Total elimination of harm is not possible. The seriousness of a criminal act is the focus for deciding whether to criminalize or not. “There should be, in principle, an initial decision about whether the conduct constitutes a serious wrong that merits criminalization, with public censure and sentencing to follow, or whether the conduct is a minor wrong that can properly be dealt with in this non-stigmatic way by a financial penalty.”\textsuperscript{393} Two conflicting forces of criminalization are the utilitarian effect of criminal law, which advocates criminalization by the state, and the principles of criminal law that act as a constraint of massive criminalization. “The use of state coercion stands as contrary to any basic respect for an individual’s autonomy.”\textsuperscript{394} The state’s power of punishment ought to be squared with the duty of providing a criminal justice system that respects individuals’ autonomy as a responsible moral agent. To justify criminal penalties there are also another three minor technical issues that need to be dealt with: the rationale of using criminal penalties to replace

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\item \textsuperscript{392} Chunxiang Yuan, “Analysis of Cases of Environmental Pollution from 2002-2011: Based on Data from Courts Nationwide” (2012) 12 Legal Information 19-23.
\item \textsuperscript{393} Andrew Ashworth & Lucia Zedner, Preventive Justice (Oxford: Oxford University Press, 2014) 117.
\item \textsuperscript{394} Andrew Ashworth & Lucia Zedner, Preventive Justice (Oxford: Oxford University Press, 2014) 6.
\end{itemize}
administrative penalties (that is, the necessity of using criminal law to solve problems),
coherence of the criminal law system itself with regard to the proper balance of various
sentences, and the international trend of developing criminal law. Considering that the
abolishment of the death penalty and less criminalization is the current world trend,
criminalization in China requires justification.

During the legislation process of Chinese criminal law, specialists have presented answers for
almost all the legal concerns above. However, has misbehaviour caused enough harm that it
ought to be considered a crime? Drunk driving, manufacturing fake medications, and
environmental pollution that have not resulted in injury, death or property loss have not
generated social harm. They are criminalized based on the risk of harm. Justified through severe
harm, insecurity, and public anger, the definition of risk and the criterion for evaluating such risk
are quite objective. Even though the data suggest that with the increasing ownership of
automobiles drunk driving has become much more prevalent than before, there remains a lack of
evidence pointing to any increase in the manufacturing of fake medications or polluting the
environment. The caseloads mostly depend on the willingness of local government and police
efforts to crack down on related wrongdoings. It is also difficult to assess the effects of the law
since the current “success” (decline in crime rate) after the promulgation of the law mainly
results from intense police wars, which are far from normal, everyday practices. In history, the
deterring effect of criminal law has raised numerous doubts. It remains unconvincing to justify
criminal penalties with it. Therefore, rather than expanding the boundary of criminal law by
arguing that administrative penalties are not effective, it makes more sense to strictly enforce
existing criminal and administrative law. Instead of frequently making or changing the law, it is worth considering other strategies, such as community prevention, and situational crime control.

Furthermore, after the promulgation of the eighth amendment to Chinese criminal law, data suggest that a variety of minor cases, which were formerly simply considered misbehaviours, have been charged as well, including drunk driving and manufacturing fake medications. Some researchers argue that this model, which mixes criminal penalties and administrative penalties, is learned from the West. Some minor offenders are probated or released on parole, without increasing the burden on the judicial system. The model maintains public respect of the law, since offenders who commit even minor offences receive criminal penalties instead of simple administrative sanctions. Some also claim that it is better to treat the offences within the criminal justice system rather than leaving them to the discretion of the police so as to not circumvent the application of procedural safeguards in the criminal justice system. Criminal procedure law will provide better protection for suspects’ and offenders’ rights. However, even in the West, there is support for a more extensive regulatory field and less extensive criminal law. For instance, in its 2010 Consultation Paper, the English Law Commission proposed that the use of criminal law to reinforce regulatory systems in England and Wales should be reviewed.

Regulatory offences are generally denoted as ”simple offences”. Section 21(1)(c) of the Penal

Code defines a simple offence as an offence “punishable with imprisonment for up to ten days or with fine of up to twenty-five thousand francs.” However, this is not always so because a person convicted of an offence under section R. 370(7)-(10) is liable for more severe penalties. Thus, what is the line between offences that merit criminalization and other minor infractions “that can properly be dealt with in this non-stigmatic ways”? “Harm done or risked should be regarded as serious enough to warrant criminalization.” The distinction between administrative and criminal penalties still needs to be maintained, since “whereas the criminal law is a censuring institution, regulation has a less morally condemnatory tone.” Not only the degree of punishment, but also the use of judiciary resources are different as well.

Indeed, some Western researchers have already recognized that “it seems that both the harm principle and the culpability principle require external supplements if they are to avoid collapsing into illiberal results.” They argue that the liberal criminal law theory lacks enough restraint on the criteria defining right and wrong. Instead, political theory may provide a more secure contemporary foundation for the objectivist limit. For instance, in “Overcriminalization” Von Hirsch suggests applying principles of political obligation, within the

399 Part four of the Penal Code lists many simple offences. The provisions under this part are designated as “section R...” The “R” stands for “regulation”. The offences grouped under part four invite a number of preliminary observations. Furthermore, all simple offences are sub-categorized into what the Code calls “classes”. There are altogether four classes of simple offences, namely, simple offences of the first, second, third and fourth class. Carlson Anyangwe, Criminal Law in Cameroon: Specific Offences (CMR: Langaa RPCIG, 2011).
appropriate scope of an individual citizen’s duties to the state, to the limits of the criminalization problem. In “The Problem of Mistaken Self-Defense: Citizenship, Chiasmus, and Legal Form” Alan Norrie also insists that “what determines the matter in individual cases is a political understanding of the nature of citizenship in modern society.” Therefore, political consideration of the citizen–state relationship offers external criteria for dealing with theoretical legal problems. On one hand, when Chinese scholars apply Western liberal criminal law theory to Chinese practice they face similar difficulties in carrying out deep legal analysis without political philosophy theories; on the other hand, it is difficult to resist the expansion of criminal law using legal principles, if the state really intends to do so. An interdisciplinary study with a political perspective may solve this problem, and that is the reason why socio-legal and sociological studies of criminal law are needed in Chinese research.

By reviewing the legal problems, this section has investigated concerns about changes to criminal law. The community of specialists has made proposals with legal reasoning, but the proposals stand more as a means for them to gain power and public support. Whether criminalization is effective or not lacks cautious examination.

All in all, this chapter examines the policy stream of the preventive shift of Chinese criminal law. It argues that in China, at times the policy stream acts as a response to the problem stream.

406 However, the modification does not mean that the Chinese law making cannot fit to MSA. For instance, in MSA, Kingdon argues that the policy stream develops independently of the other two streams in agenda making. In China, to resort to criminal law has always been an agenda to those who make
The wide participation of proposal making is mainly triggered by political and social pressures from the “focusing events”. In this way, corresponding proposals in the policy stream are reflections of public emotions to some degree. The aims of proposal makers to consolidate or enhance individual power also lead to changes in criminal law. However, even though it looks that the specialists have addressed almost all of the legal problems of the revisions, there remain several issues requiring further consideration so that the boundary of criminal law can be properly maintained. The next chapter will examine the political steam of Chinese criminal law making, which include the shaping power of the CCP and negotiations among government agencies.

proposals. On this respect, it matches with Kingdon’s model. One case in point is that the representatives consistently refer to “criminalization” as the solution for a certain social problem. They criticize that there are gaps in the current criminal law, so it is necessary to improve the law for better social governance. No matter justified or not, revising criminal law, either by expanding the boundary, or increasing the penalties, exists as an idea routinely floating around in Kingdon’s policy primeval soup. Criminalization is continually brought out when serious problems come about.
Chapter 6: Political Stream for Chinese Criminal Law Making: Role of the CCP and the Bureaucracy

“Law making constitutes one of the fundamental functions of any society and touches up such important issues such as the trias politica and the relationship between politics and law as well as between policy and law.” 407 In Kingdon’s model of policy making, compared to the concept of “political” in political science research, the political stream is a narrow concept that includes electoral, partisan, or pressure group factors. 408 The political stream is imposed of diversified variables as swings of national mood, organized interests, election repercussions, changes of administration, and the orientations of elected officials. 409 “Although Kingdon’s original application referred only to agenda setting in a single national setting, the scope of the framework is clearly broader than that.” 410 For instance, it is claimed that, “…the most important variable in the political stream in parliamentary systems is party politics and (where they occur) coalitions. 411 In the Chinese context, the Chinese political stream consists of CCP influence and bureaucratic negotiations on existing legal proposals. Accordingly, the first section will examine the impact of the CCP on Chinese criminal law making. In China, on one hand, although the

public, the media and the specialists have played a crucial role in bringing about drafts of
criminal law, the proceedings are nonetheless operated within the party-state framework. Both
generations of the national incidences and proposal bundles are essentially permitted by the
party-state; otherwise, the state will intervene when needed. On the other hand, “typical analyses
of Chinese law making still tend to portray a top-down law making process, highly centralized
and integrated”, 412 “but observations illustrate that party leadership over law making is far less
centralized and unified than has often been supposed.” 413

The second section examines other key influential institutions of the legislation, including the
National People’s Congress (NPC), the administration, the media, and scholars. That criminal
law making is used frequently to solve social crises manifests an active and responsive
legislation. It is these institutions that are eventually evolved in the process. The dynamic of law
making sheds light on how key institutions in China are engaged in the fundamental questions of
social governance and their existence within an evolving system414. Police involvement plays an
essential role in the proceedings, and the court has started to be more lenient, not only in the
legislation but also in everyday trails.

The third section then summarizes the chapter with the hierarchy of Chinese law making and the
law’s instrumental use imbued in the legislative process. It identifies which element plays an

412 Murray Scot Tanner, “Organizations and Politics in China’s Post-Mao Law-Making System”, in
413 Murray Scot Tanner, “Organizations and Politics in China’s Post-Mao Law-Making System”, in
414 See Laura Paler, “China’s Legislation Law and the Making of a More Orderly and Representative
Legislative System” (2005) 182 The China Quarterly 301-318.
essential role within legislative practices. In brief, it argues that bureaucratic reports and claims shape the law to the greatest extent through the inter-agency review process, with advice from think tanks/scholars taking an assistive role through expert argumentation meetings.

In general, this chapter is based on a mix of data including official documents, cyber discourses, foreign surveys, foreign literature, and my own observations. In contrast to most Western reports on China that focus on political suppression, this section suggests both positive and negative changes are taking place in Chinese rule of law. However, I am well aware of the limitations of the lack of data on the legislative process, and the risk of over-relying on open documents that are usually not privy to behind-the-scene activities. It looks that the CCP has retreated from the actual legislative process, leaving it to the negotiations of the bureaucracy. The chapter is a speculation on the picture of the Chinese landscape with an all-sided view of the most amount of information that the dissertation could obtain.

6.1 The Role of the CCP in Chinese Criminal Law Making

The CCP’s influence on Chinese society remains immense. Through both formal and informal mechanisms, it maintains “Foucault's panopticon” in the midst of the rapidly transforming society. Drawing on Western experience, since 1978 China has established an almost entirely new legal system from nothing. This system plays an enormous role in regulating social activities. The party-state claims that, as any civilized society, China respects the rule of law,

415 In Discipline and Punish, Michel Foucault elaborates upon the function of disciplinary mechanisms and illustrates the function of discipline as an apparatus of power. This panoptic design can be used for any "population" that needs to be kept under observation or control, such as prisoners, school children, medical patients, or workers. See Michel Foucault, Discipline and Punishment (New York: Vintage Books, 1995).
honouring equality and freedom. However, this is only true in mostly non-sensitive or non-political cases. Sometimes, “the grand theory of law in a book seldom, if ever, explains the behavior of law on the streets of China.”\textsuperscript{416} Although not announced, the law is inevitably influenced or, more precisely, directed by the party:\textsuperscript{417} “in principle there should be no law that could be in conflict with the Party’s interest and/or inconsistent with the Party’s policy.”\textsuperscript{418} As an important decision maker in its own right, the party has immunized itself from legal challenges to its decisions.\textsuperscript{419} “If somebody uses law to threaten the party’s ruling status, the party may not tolerate it.”\textsuperscript{420} The CCP, which stays above the law itself, is not ready for a genuine rule of law. Of late in particular, to call the current system “a legal system with the characteristics of a communist China” justifies a departure from the modern or Westernized understanding of legal rules. The party’s supervision of the legislation can be reflected in the aspects described below. Rather than “an actor in the affairs of the state”, it is “an organization integrated within the state apparatus”.\textsuperscript{421} At present, the basic structure remains unchanged. The “Decision” of the 4\textsuperscript{th} Plenum of the 18\textsuperscript{th} Central Committee in October 2014\textsuperscript{422} emphasized that the socialist legal system  

\textsuperscript{416} Kam C. Wong, \textit{Chinese Policing: History and Reform} (New York: Peter Lang, 2009) 3.  
\textsuperscript{421} Susan Trevaskes, “Political Ideology, the Party, and Politicking: Justice System Reform in China” (2011) 37 Modern China 333.  
\textsuperscript{422} \textit{Communique of the 4th Plenary Session of the 18th Central Committee of CCP}, 2014. For instance, it was stressed at the session that the Party's leadership is the most essential feature of socialism with Chinese characteristics and the most fundamental guarantee for socialist rule of law in China.
would remain bound by the Constitution and the principle of Party leadership. The priority of party leadership remains.

First, control is realized through organizational penetration of the NPC’s leadership and control over key NPC appointments through the NPC Party Group. The ruling CCP maintains effective control over the composition of people's congresses at various levels through this system.\footnote{Jianmin Zhao & Rongwei Lai, “Principle of the CCP’s Leadership in NPC” (2000) 2 Mainland China Studies 3-10.} Since legislation is the most important function of the NPC, the law, either made or revised, reflects the will of the party. However, according to the Constitution, the NPC, which is voted by the people, is the supreme power entity on Mainland China, representing the will of the Chinese public. In China, “rather than solely relying on what is written on the norms, examining the role of the congress has to analyze its true condition in the political life.”\footnote{Jianmin Zhao & Rongwei Lai, “Principle of the CCP’s Leadership in NPC” (2000) 2 Mainland China Studies 2.} In both official documents and news reports, the party’s name is commonly put before the People’s Congress. The number of party members account for more than 60% of the NPC’s representatives.\footnote{Jianmin Zhao & Rongwei Lai, “Principle of the CCP’s Leadership in NPC” (2000) 2 Mainland China Studies 11.} They are required to participate in CCP activities before the legislation to become familiar with the CCP’s principles and guidelines. The NPC’s central and provincial groups, whose presidents are mostly CCP leaders, are always subject to the supervision of the CCP’s leading group in the process of legislation as well.
Second, the CCP’s influence on the NPC is also maintained through the initiation, approval, and oversight of meeting agendas. Legislative reports commonly cite CCP demands as the most crucial drivers of legislation in China. For instance, in the *Explanations of the Draft of the Eighth Amendment to Criminal Law*, the NPC Commission of Legislative Affairs noted that the CCP’s suggestion of deepening judicial reform required changes to criminal law.\(^{426}\) It is also compulsory for the laws of great economic, administrative and political importance to be reviewed by the CCP before NPC meetings so that the CCP’s central committee can approve the legislative thoughts and principles beforehand. Furthermore, presidents of central and provincial NPC groups monitor the law making process, making it relatively harder for other representatives to voice objections. Therefore, even though the NPC’s autonomy has increased over the years, the CCP still dominates the NPC in multiple aspects. It remains the CCP that monitors and legitimates the institutional arrangements in China. The NPC and other public mechanisms still lack the ability to restrain the power of the CCP.

However, in concrete law making processes, the CCP’s role is much more blurred. Although revisions of criminal law are taken within the framework of CCP dominance (which is the same as in the making of other laws), the law is not intended for political suppression. The process is carried out in a manner less concerned with “revolutionary fervor”, and more on addressing urgent problems (driven by social crises), applying international rules (to reduce death penalties), increasing rationality (to improve the integrity of the legal system), and becoming more accountable to public demands (growing safety anxieties). Whether the laws eventually reach

such goals is another issue. The CCP centre only monitors the process on a macro level of policy guidance, leaving the career bureaucrats and scholars to take the technical legislative jobs. Party discipline in concrete law making is weak: “Power resources within the system are fragmented among the various leaders and bureaucracies involved in the law making”\textsuperscript{427}. The CCP’s decentralization of power is consistent with Tanner’s findings in his book \textit{The Politics of Law Making in Post-Mao China}, where he contends that “centralized top-level Communist Party control over lawmaking has eroded greatly since 1978, and seems very unlikely to be significantly recentralized in the foreseeable future”\textsuperscript{428}. Even though the book was published more than 20 years ago, the phenomenon has not changed. There has been a high degree of continuity in many areas.\textsuperscript{429} The actual retreat of the CCP from law making may be due to a lack of training and interest in the details of the draft bill among party officials. It makes no difference if the current model is labeled “rule of law” or “rule by law”, and as long as it keeps monitoring legislative structure and proceedings, the authoritarian regime can pursue an advanced legal system without facing challenges to its leadership.

The benefits of the law that the CCP experiences are not limited to the economic needs of the market economy. It is also a requirement of the state to ensure certainty and predictability in governance, something that is not unique to China. Criminal law is a sound tool to enhance the country’s leadership through increased mass support. The CCP understands that risks of both

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“instability” and “insecurity” from internal and external pressures keep challenging its legitimacy, especially when the economy slows down and the side effects of the fast growing economy are increasingly serious. These side effects include corruption, social inequality, environmental deterioration, as well as problems of lack of management in food and medication production. During the Hu–Wen era, the slogan emphasized maintaining social stability and constructing a “harmonious society.” At present, the new slogan of establishing the “Chinese dream” also puts stability and security as the basis of the party-state policy. Pursuing stability relies on support from the people. Thus, appeals to populism often mix with party efforts to assert oversight over the society. In particular, when fear of crime is triggered by moral panic, resorting to criminal law by creating new legal rules and institutions satisfies the demands of the punitive Chinese public. Given that environmental protection and food and medication manufacturing are problems requiring systematic treatment, it is much easier to simply increase criminal penalties to show to the public that the responses have been made. Furthermore, through the congress, the CCP’s principles and policies are stressed again in law making. The policies shape not only policing but also the harshness of criminal sentences to a great extent. “Policies are now to be translated into laws in accordance with proper procedures for law-making.”

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431 “Populism” in the Chinese legal system refers to a range of forms of public expression, from public opinion created by the state-run media, to opinions in internet forums, to collective action and individual protests by persons seeking redress of grievances. Populism also refers to efforts by legal institutions to seek public support by aligning outcomes with perceived dominant social norms or conceptions of popular morality, or by making legal institutions more accessible. See Benjamin L. Liebman, “A Return to Populist Legality? Historical Legacies and Legal Reform”, in Elizabeth Perry & Sebastian Heilmann, eds, Mao’s Invisible Hand (Cambridge: Harvard University Asia Center Press, 2011) 166.
432 Borge Bakken, “China, a Punitive Society?” (2011) 6 Asian Criminology 42.
instance, in July 1983, the CCP’s central committee initiated the “strike hard” policy. Then, in September, the NPC standing committee followed up with a “Decision on punishing criminal offenders of serious crimes” and a “Decision on speeding up the trial of criminal offenders of serious crimes”. The current criminal policy of “combining leniency with severity” was also first written in by the CCP, and legalized by the Supreme Procuratorate the following year in judicial announcements. This balance reflects the policy of establishing a harmonious society. It is a positive change, since introducing the concept of leniency into criminal justice can not only reduce international criticism (e.g. minimizing the number of death penalties), but also save judicial resources, while being harsh on serious crimes is effective in maintaining social order. Compared to the most scolded policy of “strike hard”, “combining leniency with severity” is problem-driven, and less politically inspired. First adopted in 2005 and implemented in 2007, it has already impacted both criminal law making and adjudications.

Overall, the CCP’s guidance in Chinese law making is a mix of intense political suppression, formal composition control, and loose practical restraints. It shows much flexibility in certain

434 The strike hard or campaign-style policing generally involved a sudden increase of police law enforcement over a short period of time that targeted particular types of crime.
435 The “balancing leniency and strictness” policy encourages procurators and courts to treat serious crimes harshly, but also encourages them to be lenient toward minor crimes, in particular those not reflecting malice or posing significant risk of harm to society. In the courts, the emphasis on leniency is primarily manifest in reduced sentences for those who confess and on the use of suspended sentences in minor criminal cases for those who agree to pay restitution or compensation to their victims. See Benjamin L. Liebman, “Leniency in Chinese Criminal Law? Everyday Justice in Henan” (2015) 33 (1) Berkeley J Int’l L 153-222.
436 Susan Trevaskes, “Political Ideology, the Party, and Politicking: Justice System Reform in China” (2011) 37 Modern China 320.
437 See Susan Trevaskes, Policing Serious Crime in China: From 'Strike hard' to 'Kill fewer' (Oxon: Routledge, 2010).
non-sensitive areas, even in the field of criminal law making. As a matter of survival instinct, the CCP understands that “it is imperative to improve the governing capacity of the party in the increasingly affluent yet divided Chinese society.” With the decline of the Confucius and Marxist-Leninist ideology, the law is a governance tool for the CCP that has transformed it from a revolutionary party to a ruling party. “If China is to cope with the many problems that are by-products of economic reform, including a decline in social order, spreading corruption and a general crisis of values, it will need strong legal institutions and a legal culture that promotes the rule of law.” The CCP relies on the law to advance its leadership, and to boost economic and social reforms without damaging its authority. Criminalizing certain crimes most concerning to an anxious public is a reflection of such politics.

6.2 The Role of Other Participants in the Legislative Process

This section will analyze the players in the process of legislation. It identifies the importance of each participant that has separate power and interests, as well as the way each is important in law making. The participants include the NPC (National People’s Congress), the judiciary, the administration, and the media, among others. In reality, most people have mixed identities. For instance, the “public” is a general term that can comprise all the participants. A great number of government officials in China are CCP members. Some legal scholars not only serve in

government positions, but also act as consultants in legal affairs. The categories are a rough way to organize the discussion.

6.2.1 The NPC

The NPC is the highest-ranking organ in the Chinese state system. Outside of plenary meetings, the NPC functions through its committees. The most important of these is its standing committee, which consists of some 150 members and meets every two months. However, as it has been claimed, though the congress is the supreme power entity in China, in reality it lacks enough authority. The NPC can neither decide on its own organization, nor independently determine state affairs. With gloomy prospects for political reform into a pluralistic liberal system in the near future, the NPC will continue to be under the party’s censorship.

At the same time, both the NPC and the CCP have to adapt to the increasingly open society. Without challenges to its leadership, the CCP allows the NPC a certain autonomy. At present there are two phenomena evident in the legislation which manifest in “a high degree of experimentalism with consultation, deliberation, and limited forms of democracy”. The first phenomenon consists of more effort from the Legislative Affairs Commission to incorporate popular views into legislative drafting. Before the final draft of the eighth amendment to Chinese criminal law, the commission posted drafts on the website for public review; before the

442 The institutional capacity of the people’s congresses has been enhanced steadily through a variety of measures, including rapid expansion of personnel, the development of subcommittees responsible for specific technical tasks, and efforts to raise delegates’ educational level.
443 The Legislative Affairs Commission is the legislative body of the Standing Committee of the NPC. The main responsibility of the commission is making drafts and revising drafts of the law.
“Lianghui” (two meetings), the CCP’s official website (www.people.com.cn) conducted online surveys to gauge public concerns. Cyber consultation has become routine in law making in China. There have also been more press broadcasts of the proposals that are closely related to public livelihood from both NPC and the People's Political Consultative Conference representatives, such as drunk driving and food scandals. “NPC deputies primarily influence policy through the introduction of opinions and motions.” An explanation of the eighth amendment’s draft made by the legislative office also cited these proposals as crucial reasons for making the amendments. If the proposals are followed by focusing events and match proposals from government agencies, they will have a better chance of being seriously considered. Otherwise, the proposals will fade away with an uncertain future. Whether public opinion counts depends on the magnitude of national attention, consistency with bureaucratic needs, and the preferences of CCP leaders, among others. The above activities can be reactions to former criticisms of the NPC’s useless representation and the lack of public expression in the democratic dictatorship regime. Communique of the 4th Plenary Session of the 18th Central Committee of CPC in 2014, which focuses on “comprehensively advancing the rule of law” in China, also writes, “We must stick scrupulously to the idea of putting the people first in legislation and making legislation for them, put into effect the core socialist values, and make sure every piece of legislation is in keeping with the spirit of the Constitution, reflects the will of the people, and is supported by them.” Some foreign observers identify the expanding public participation in legislation as “deliberative authoritarian”, “consultative authoritarian”, or “a combination of

446 Communique of the 4th Plenary Session of the 18th Central Committee of CCP, 2014.
command and consultative authoritarianism”. Though the press, such as Southern Weekly, has suggested that though the media show that the representatives are much more active in presenting proposals, few proposals result in actual drafts of law. Scholars also point out that the ultimate result is still controlled by the party. The final enacted amendments of criminal law do have shown a trend of being more responsive to public demand in selected cases (such as drunk driving).

Besides efforts to gain more justification from the bottom-up approach, the NPC’s second explicit change is to raise the level of legislative expertise by combining information from, among others, bureaucratic considerations and academic concerns. The amendment drafting process inspired heated arguments from influential institutional actors like the Supreme Court, the Supreme Procuratorate, the Ministry of Public Security and the Ministry of State Security. While some committee staff were legal researchers themselves, they consistently held meetings with other legal scholars for professional advice. Both news reports and official documents show that by negotiating different viewpoints, arranging for consultations, and briefing materials, staff of the Commission of Legislative Affairs “borrowed ideas from such sources as academic studies, executive branch reports and proposals, interest group materials, and members’

447 See Baogang He & Mark E. Warren, “Authoritarian Deliberation: The Deliberate Turn in Chinese Political Development” (2011) 9 (02) Perspectives on Politics 269-289. Indeed, they are sometimes justified as an alternative to “Western” adversarial, multiparty democracy. In democracies, decisions are typically the consequence of voting or vote-based authorization of representatives, not deliberation. Even in cases of consensus, voting still stands as an implicit part of the process—the moment in which the work of deliberation is transformed, unanimously, into a collectively binding decision.

448 Zhongzhou He, “Why Bills to the NPC have decreased?”, online: Southern Weekly <http://www.infzm.com/content/42431>. According to this news, there are also a number of representatives who have no proposals at all. Meaningful representation can and does arise in an authoritarian setting. It arises not from electoral accountability, but from top-down accountability to a regime with informational needs.
opinions”. Now, quite routinely, when such laws come before the NPC or its standing committee, even though they already bear the endorsement ’in principle’ of the highest Party offices, they are subjected to extended, repeated subcommittee review and serious floor debate.” The draft was “a blend of the substantive and the political, the academic and the pressure group information, the bureaucracy and the constituency.” However, at the same time, though the NPC is exposed to “an impressive variety of information -- studies, administration arguments, leaks, interest group pressures, complaints from the districts, concerns of constituents, experiences of Western countries and international rules”, what needs to be better understood is that fighting risk through criminalization is a primary claim of the representatives. Most members of the NPC and its standing committee still deliberate draft bills through a control perspective for more effective social management than the “rule of law” which restricts state power. It seems that NPC members have a lack of restraining power against the rhetoric of problem solving and the desire to create new offences.

In all, without the party’s leadership, one cannot correctly understand the NPC’s role in China. Due to the CCP’s overwhelming number of seats in the NPC, the NPC still lacks authority, even though non-Communist Party members have been on the rise. At the same time, there has been an incrementally more transparent and participatory legislative process (involving advice from

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academics and other experts), discretionary use of public hearings, less formal public workshops, and the publishing of draft laws and administrative rules and regulations for input from the general public.\(^{453}\) On one hand, “China’s legislatures are more important than they were thirty years ago, reflecting both the increased complexity of law and the increased professionalism and legal knowledge within people’s congresses.” On the other hand, to balance populism and professionalism in the making of the law, “The NPC has begun to exercise something more than a rubber stamp function though it is still a weak legislator.”\(^{454}\) One of the reforms the CCP is undertaking in order to change its authoritarian image is to open up drafts to public consultation, rather than actually seeking democracy in the Western sense. Though public demand is consistently criticized as populist, media-driven, and with a “supposed three-minute attention span”, it cannot be excluded from policy and law making.\(^{455}\) Different from adjudication that pursues independence and fairness, legislation on a democratic foundation should seek as much public opinion as possible. A promising option is to guide and encourage informed and reasoned public debates for high-quality participation.

### 6.2.2 The Judicial System

The supremacy of the Party was expressed through the continued role of Party committees across the judicial system and in particular the role of Party secretaries in chairing the Adjudication Committees in the People’s Courts that review and approve judicial appointments and decisions.


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As it is with the other institutions, the party monitors both the Supreme People’s Court and the Supreme People’s Procuratorate. In their annual reports to the NPC, “correct guidance of the CCP” is routinely placed before “effective supervision of the NPC; policies and duties that are defined by the CCP are on top of maintaining justice and equality; “to keep state security and social stability” has always been the goal in deciding criminal cases.\textsuperscript{456} Reports from the Supreme Procuratorate are closely attached to CCP policy.\textsuperscript{457} The same is the case with Supreme Court reports (“to adhere to the leadership of the CCP”), except that the contents reflect the characteristics and duties of the courts. For instance, in the beginning of the 2009 “Report on the Work of the Supreme People’s Court”, the goal was highlighted “to implement the spirit of the Seventeenth Meeting of the CCP (the Party) and the first meeting of the eleventh NPC (the People’s Congress)”, “to prioritize the interest of the Party, the interest of the People, the Constitution and the law”. In 2010, the report started with “to work for the CCP’s strategy of ensuring economic growth, people’s livelihood and social stability”. In 2011 and 2012, it stressed “the establishment of the socialist legal system”, as well as the policy of “resolving social conflicts, innovating on social management skills, and maintaining equality and integrity”.\textsuperscript{458}

It is usually believed that the Chinese court could not maintain independence in authoritarian China. Compared to those in democratic countries, “they (the judges) are responsible for

\textsuperscript{456} This conclusion is drawn from summaries of the Work Reports of the Supreme People’s Court to the NPC from 2008-2014.
\textsuperscript{457} This conclusion is drawn from summaries of the Work Reports of the Supreme People’s Procuratorate to the NPC from 2008-2014.
\textsuperscript{458} This conclusion is drawn from summaries of the Reports of the Supreme People’s Court to the NPC from 2008-2014.
ensuring that national goals, including the preservation of social stability, are met.” 459 In addition, “evaluations of judges in many Chinese courts include evaluation of the social effect of their work, not just whether decisions are legally correct”. 460 The judiciary’s relationship with Party and government agencies in China continued to be organized in such a way as to maximize the successful outcomes of state objectives and to accommodate the smooth implementation of Party policy. 461 It is difficult for the courts to maintain independence at all times, especially before the interests of powerful parties. This applies to not only criminal cases, but also civil and administrative cases. However, most of the cases the courts deal with are not politically sensitive. Courts have been making reforms such as “improving education and training of judges, raising qualifications of new judges, fighting corruption, and taking modest steps to reduce the political emphasis in court work”. 462 Signs of change have also taken place in their 2013 reports where the policy of the party was replaced by “[keeping] social justice, respect and protecting human rights”. The policy even emphasized the balance of “fighting crime and guaranteeing human rights” in the first section, which had never happened before in the annual reports.

Under party leadership, the Supreme People’s Court and the Supreme People’s Procuratorate, as the supreme judicial bodies in China, take part in the making of criminal law, enact judicial interpretations of the law, and manage nationwide trials and prosecutions. Indeed, they are main participants in the making of criminal law. Even though the two are not legislative bodies, during

462 Benjamin L. Liebman, “China’s Courts: Restrained Reforms” (2007) 21 Colum J Asian Law 86. Most participants in the debate readily admit that there is no judicial independence in China, but they argue that gradual improvements are taking place.
legislation the NPC’s Commission of Legislative Affairs (the entity that drafts the law) frequently consults with them for legal advice. Due to limited information, it is difficult for outsiders to become privy to their arguments and debates with the other institutions on the agenda. However, one week after the enactment of the eighth amendment, the vice president of the Supreme People’s Court suggested that the courts ought to be cautious with the crime of drunk driving. In contrast to the assertions of the Ministry of Public Security and the Supreme Procuratorate, the argument that “not all offences of drunk driving are crimes” raised controversy of too much leniency and possible unfairness in enforcement. Though the argument was not a direct response to the other two bodies, it manifested the court’s attempts of expanding its autonomy and authority. This was an effort to maintain the Supreme People’s Court’s jurisdiction in competition with administrative agencies and congressional committees. Remaining “at the same level as other bureaucratic hierarchies of the state and lack[ing] authority over them”, the court has been acting differently from its weak standing in the metaphor of the public security bureau cooking, the procuratorate serving, and the court eating. In cases of criminal law making, court pursuits of leniency are difficult given the predominant police system and populist demands. However, in actual practice, studies suggest that both supreme and local courts have been exercising leniency in criminal cases through suspended sentences, mediations, or reduced penalties. Thus, a complex relationship is developing between the court and the other entities where they are both allies and at odds, depending on the nature of the cases.

The Supreme People’s Court and the Supreme People’s Procuratorate making official interpretations and commentaries of law has become common practice in China, something that has been consistently opposed by legal researchers.\(^{465}\) “The Supreme People’s Court is engaged in a creative law-making process, despite Constitutional prohibitions against it, by issuing interpretations of national legislation that are binding on the lower courts and circulating judicial decisions chosen to provide ‘guidance’ to the courts.”\(^{466}\) Caught in the dilemma of the NPC’s heavy law making workload and limited time at its conferences, the Supreme Court is the most valued alternative institution to make such interpretations. The interpretations are sometimes more valued by local judges in the adjudications due to their preciseness, practical use, and guidance of the upper courts on the lower courts. For instance, on the crime of drunk driving, since the eighth amendment there have been requests for judicial interpretation since similar criminals have received sentences that were largely different in local courts, which challenges the equality of criminal law. For the crime of environmental pollution, after the eighth amendment the Supreme People’s Court and the Supreme People’s Procuratorate also passed the “Interpretations on criminal cases of environmental pollution” to match with changes to criminal law. Furthermore, the Supreme People’s Court publishes certain cases as “precedents” from local courts. China does not have case law tradition, but those “guiding cases” function like precedents


to maintain similar and predictable outcomes in trials. The crimes of drunk driving and environmental pollution both have guiding cases.

In all, within the current framework of the party-state, the judicial bodies still maintain a cooperative relationship with other agencies. Under the current circumstance, “Judicial reform now seems to be inching forward, but meaningful progress remains a distant goal.” What can be expected is a growth of independence, influenced by how the CCP defines the role of the judicial system, how the courts and procuratorate themselves resist internal and external pressures, and how litigants as well as lawyers perform in lawsuits. With the exception of trials, the court currently impacts law making through inter-agency reviews and the drafting of judicial interpretations, without oversight powers over other entities. Its legitimacy is still rooted in meeting popular demand, protecting public interests, and maintaining social stability. The future role of the court depends on which model, “rule of law” or “rule by law”, is applied in China. Western researchers debate about whether current changes in the Chinese legal system are signs of “rule of law” or “rule by law”. The answer largely relies on how to define the two concepts. As long as the CCP remains the ruling party without election, China will not become a “rule of

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468 The Chinese criminal process continues to reflect overt links between law and policy. To say that the courts, at best, only coordinate with other bureaucracies is simply another way of expressing how far away China is from establishing a notion of the supremacy of law, at least as that concept is conceived in the West. In various ways, then, the articles echo the familiar idea that law is still frequently conceived as William Alford has observed elsewhere: as a tool of state administration, and always within close reach of the CCP.
law” regime like in Western democratic countries.\textsuperscript{469} China lies in the middle between typical models of the instrumental use of the law, and valuing the law as an all-binding rule of society. The efforts of the court itself to expand power do indeed matter, but considering “the imperative of maintaining political supremacy for the party-state remains a salient feature in this process”,\textsuperscript{470} the ultimate determinant lies in the role of the Socialist Party in the running of the legal system. Rome was not built in a day: “Whether state leaders will allow law to become sufficiently powerful to impose significant restraints on state power, and whether the CCP will ever allow legal and political reforms to threaten its own privileged position, remains to be seen”.\textsuperscript{471}

6.2.3 The Administration

According to Weber, in a modern state the ruler is necessarily and unavoidably the bureaucracy, since power is exercised neither through parliamentary speeches nor monarchial enunciations, but through the routines of administration.\textsuperscript{472} Kingdon refers to the administration as group pressure: “Bureaucratic agencies and congressional committees battle for their share of the policy turf, affecting agendas in the process.”\textsuperscript{473} In this dissertation, “The administration” refers to the Chinese State Council comprised of the Ministry of Public Security (the police), the Ministry of Food and Drug Administration, and the Ministry of Environmental Protection,

\textsuperscript{469} To be sure, single party socialism is not compatible with a Liberal Democratic rule of law or even Communitarian rule of law, as both advocate genuine democracy defined by multiparty elections at all levels of government.
among others. This section will mainly document the role of the police since suggestions from the police have more impact on legislation than others. Other government departments led simultaneously by the party, including the Ministry of Public Security, the Ministry of Food and Drug Administration, and the Ministry of Environmental Protection, will not be emphasized as the same as the police.

“Police is a centrally organized, bureaucratically administered, functionally specialized, professionally trained agency in China.”

It has been one of China’s major forces in the fight on crime and the maintenance of the CCP regime. “… the Chinese political system places a special reliance on them: they often become an important force in the maintenance of the CCP’s monopoly on state power and in the suppression of any resistance to this system.”

“Over the past two decades, the Chinese domestic security apparatus has expanded dramatically. “Stability maintenance” operations have become a priority for local Chinese authorities.”

Chinese police involvement is focused on campaign-like actions against law violations and police reports remain the major initiators for amendments to criminal law. In China, Western policing -- under the guise of bureaucratic, scientific, technocratic and legalistic policing -- began to take root and spread after 1979.

Based on demands from both central and provincial bureaus for fast, mobile and effective policing, the Ministry of Public Security and provincial public security departments launched wars against certain misbehaviour every year since then. Besides serious crimes that police target all the time, it has become routine for the ministry to lead the crack-down on crime

477 Kam C. Wong, Chinese Policing: History and Reform (New York: Peter Lang, 2009) 32.
by investing huge amounts into the police force before big events. For instance, from 2009 to 2013 (except the year 2012), the number of special actions and strikes against crime from the central government went from four to six.478 "Special struggles" have almost become a constant state of affairs in China.479 Though high-ranking police officials have recognized the limits of campaigns, they prefer the short-term effects of deterring crimes to decrease the pressure on them.

More resources will generate more problems that need to be addressed, all of which lead to proposals to amend criminal law and criminal procedure law. Evidenced by the power gained from the fight against crime, the police indeed have a say in China’s law making. Suggestions from police to expand criminal law and restrict procedural protection of suspects account for a large number of proposals. For instance, proposals on the above three discussed proposals were more or less impacted by police suggestions. Even though faced with resistance from some scholars and other institutions, they still have more influence on final legislative outcomes than others. When it comes to policy and law making, bureaucratic considerations take precedence. In the West, the police have considerable power and exercise great influence on decisions regarding what types of conduct are to be subjected to the criminal process.480 The current Chinese institutional structure, in which legislators and courts are incrementally gaining power, still

478 The bureaucratic system sets impersonalized goals and standards, with a system of inspections and of incentives to control and motivate local officials.
479 On environmental issues, China also relies on large-scale campaigns to meet targets. “The leadership uses mass campaigns to tackle macro-level environmental threats, including land degradation, water pollution, and water scarcity.” Elizabeth Economy, “Environmental Governance in China: State Control to Crisis Management” (2014) 143 (2) Daedalus 184.
favours the police. The police remains a department of huge power, and not just in law making and enforcement.

According to the legislation law, the Ministry of Public Security itself (the police) is also entitled to make regulations. In 2009, the ministry drafted a regulation to amend laws on drunk driving, which generated controversy over punishing even passengers riding with drunk drivers.481 In 2013, the ministry also worked with the Supreme People’s Court and the Supreme People’s Procuratorate to publish the “Regulation on legal issues of criminal cases of drunk driving” which aimed to severely punish offences of drunk driving.482 In addition, from 2009 to 2010, the Ministry of Public Security was frequently invited to participate in the making of the eighth amendment to criminal law. Therefore, the police, empowered by Chinese law with a wide range of functions and discretion that their Western counterparts do not enjoy, have great power within the current institutional framework. The police definitely influence the making and enforcement of laws in China.

In addition, the Chinese police also shape law making based on their close connections to everyday life by undertaking both judicial and administrative work. A comprehensive cooperative system with multiple government agencies for potential crises exists in the Chinese context. Traditionally “the police mode of operation calls for following the mass line and for taking part in a comprehensive approach -- an approach that calls for the police to work closely

with government, factories, enterprises, schools, neighborhoods, and other institutions in order to maintain public order and prevent, reduce and forestall crime through ideological, political, economic, educational administrative and legal work”. Public security work is also guided by the general policy of “comprehensive management of social order,” which encourages mobilizing all possible forces from the party, military, and public to maintain social order. The Ministry of Public Security develops partnerships with other state departments in fields that are not directly within the police scope -- which is similar to the multi-agency partnerships in Western policing strategies -- with varied power at different stages or arenas involving partnerships against crime. Due to the nature of the cases, the degree of police participation varies. For instance, drunk driving is solely managed by the police, fake medications are apprehended mainly by the Ministry of Health and the police, while environmental protection is overseen by both the Ministry of Environmental protection and the police. Cooperating with both of the other agencies is a common policing approach. Such centrally-driven multi-agency crime prevention projects further empower the police, both in administration and in the creating of norms. With the exception of revising criminal law, the institutions work out “interpretations, decisions or notice” collectively. They even have more impact on society than abstract laws. In 2009, the Ministry of Public Security cooperated with the Ministry of Public Health in creating the Agenda to Maintain Drug Safety. In 2013, the ministry issued “Opinions on strengthening the work of environmental protection through coordination with the public security departments” jointly with the Ministry of Environmental Protection.

Besides the police, other government agencies also provide professional advice to law drafters as policy entrepreneurs. Though it is insisted that changes to the eighth amendment were made out of the will of the CCP and the public, when it comes to issues of technique it remains expert suggestions that count the most. The draft bill presented to the NPC’s standing committee has represented a primary consensus among the agencies. Deliberation among delegates and consultations with the public only take place within the framework of such agreements. “This happened because new economic forces presented bureaucrats with increasingly complex problems that could not be resolved by traditional methods relying on consensus, compromise and the internalization of disputes. The rationalization of work styles also occurred because of the bureaucracies’ specialization and professionalization and their adoption of Western methods.”

However, practices of these state institutions reflect more of a practical requirement of control than a pursuit of rule of law. In China, both cases of fake medication and environmental pollution have illustrated the inefficiencies of joint strategies and the coordinated approach. The rise of fake drugs and environmental pollution also partly results from deficits in local enforcement -- the police and municipal or provincial bureaus. Failed multi-agency cooperation calls for revisions to criminal law to enhance public security and social stability. These claims also gain more public support, since in China the old but resurging approach of

punitive retribution continues to be a central basis of law and order politics. There is still a clear preference for strong punishments for crime.486

6.2.4 The Media

After the economic reform, media on the mainland (subject to the limits of party oversight and primarily by party-state actors)487 ride a balance between the CCP’s censorship, grass-roots demands, and their own interests. As media commercialization and increased editorial discretion have combined with growing attention to social and legal problems, the media have gained incentives to expand their traditional mouthpiece roles in new directions.488

The media also have a crucial effect on the agenda of law making. First, the media (including newspapers, TV and the internet) create “focusing events” as long as “the media remain within certain boundaries and do not directly challenge fundamental norms”.489 “The mere fear of crime may be perceived as a greater threat to quality of life than actual criminal incidents”.490 Like in the West, criminal stories from the media commonly focus more on the crudeness of the suspects and the harm suffered by the victims. By listing similar events together (e.g. drunk driving, fake medications, environmental protection), media coverage of criminal cases and public

perspectives has raised national awareness of certain problems in a relatively short time period. In China, “the redlines that journalists cannot cross still exist, but changes are taking place.”  

The media, especially the internet, encourages political activism rather than political alienation by generating virtual “interest groups”. These groups have started to “challenge traditional media” by both reflecting and creating public opinion beyond “direct” party control. The wide scope of public discussion leads officials to intervene in cases, facilitating changes either in future law making or enforcement.

The media also act as channels for lawmakers to gauge public attitude in the process of law making. In the legislation of the eighth amendment, both official and commercial websites employed online surveys to assess popular preference. Through this new strategy, websites controlled by the authority (such as www.people.com.cn and www.npc.gov.cn) seek to promote the legitimacy of the CCP and the government. This strategy is consistent with the change of “respecting public opinion”, which is mentioned more and more in official reports. The effects of official surveys are improving; whereas before, the Legislative Affairs Commission only showed the amount of feedback, it has started to categorize and post the replies for the public’s further reference. Commercial websites such as www.sohu.com enjoy more autonomy in survey

design and outcomes. Based on the intended audience, most such surveys only focus on controversial issues, like punishing drunk driving with criminal penalties. The surveys are also inclined to raise easy and casual moral questions, such as: Have you recognized the legal changes? Will you support them or not? What efforts should we make to prohibit such behaviour?\(^{496}\)

At the same time, the media, which is the main facilitator of state propaganda, maintains the image of the CCP and the government in their rule of law. Besides personal experience, what the public view as an authority is shaped by information provided by the media and, as such, the media structure the public’s understanding of their environment to a large degree. Serving both as the mouthpiece and as the "eyes and ears" of the party,\(^{497}\) the media follow legislative proceedings that have an emphasis on breakthroughs in Chinese law. As directed by the CCP, most of what is covered is about improvements and praise, rather than criticisms or worries. It is risky for the media to set its own agenda. For instance, the Southern Metropolis Daily’s report on the Sun Zhigang case in Guangzhou city promoted reforms of Chinese administrative law. However, at the same time, repealing the “custody and repatriation” regulation failed to win support from local residents since they prefer a sense of security rather than rights for the homeless, and the public assumes that public security is challenged because of media reports.\(^{498}\)

\(^{496}\) One example is like: “What is Your Opinion on Drunk Driving?”, online: CNWest <http://news.cnwest.com/content/2011-05/13/content_4581039.htm>


Compared to traditional media, the internet is a much more open arena. However, intense internet censorship at the hands of the Chinese government significantly reduces the internet’s effectiveness in the pursuit of democracy. It is suggested that the government acts as external pressure to either end or interrupt this pursuit by blocking related news coverage and online discussion, particularly in the reporting of foreign affairs and domestic dissent. In addition, fear of punishment from the government also leads to retreat in the Chinese online community and, as such, China remains an authoritative regime with the coexistence of technological censorship and media control. While it is evident that there is a tight, strict and centralized internet control system (through the hierarchical Communist Party, an extensive police system, and a highly penetrating local organizational network based on community policing), as it has been argued, this dissertation still holds a positive view of the internet’s role in China. Nonetheless, “It is more likely that a spirit of citizenship and the will to mobilize, were it to appear, are more important than the censoring technology itself.”

However, online public discourse is also open to criticism on the basis that it is subject to irrational, emotional and intolerant mass politics known as “cyber populism”. For example, in one study of cyber discourse, “expressions of negative sentiments were more common than

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expressions of positive sentiments. In fact, not a single comment was coded as expressing even a
moderately positive attitude toward the current health system.”504 It is even contended that
“many messages on BBS sites in China are the online equivalent of the big character posters of
the Cultural Revolution”.505 “The style of comments in web blogs ranges from emotional
outburst to cynical rebuke to enthusiastic support to rational discussion”.506 Researchers argue
that there are three elements of informed public opinion: information, deliberation and
responsibility taking.507 Giving an opinion varies from taking responsibility for official action
that affects people’s lives when participants must weigh competing goals, sensitivities and
constraints to have a rational debate. The former provides a suitable platform for expressive
opinion, and the latter for sober judgment.508 Most of the time, the anonymous internet is the
former and facilitates a populist regime of collective irresponsibility. Particularly when it is
related to criminal justice where the public knows little about the actual structure of the
sentencing process or sentencing trends,509 the populist debate on crime and punishment revolves
more around emotion than on rational judgment.510 There are also underground, hired people
who make comments for profit by pretending to be commoners (known as “Wumao Dang” and
earn around ten cents for posting one comment).

504 Steven J. Balla, “Health System Reform and Political Participation on the Chinese Internet” (2014) 7
China Information 219.
505 Yongming Zhou, Historicizing Online Politics: Telegraphy, the Internet, and Political Participation in
Attitudes to Punishment” (2012) 14 Punishment & Society 149.
Attitudes to Punishment” (2012) 14 Punishment & Society 150.
509 Roberts J V, “New Media Influences on Public View of Sentencing” (1990) 14 Law and Human
Behavior 453.
The dissertation argues that despite the populist emotion-oriented characteristic of cyber opinions, the positive effects of the internet on facilitating public expression cannot be overlooked. First, offline comments can have similar characteristics of cyber voices. Especially when faced with crime, the public attempts to protect the well-being and security of law-abiding “ordinary people” by punishing those whose crimes jeopardize them. This is the same for both online and offline expression. Second, being populist partly results from a lack of legitimate procedures of voting and decision making. In the Chinese context, the internet’s growth as a new arena for public involvement, the rise in the public’s consciousness of rights, and the increasing gap of social inequality, together boost the desire for mass expression. When opinions explode in the cyber world, what is needed is to channel opinions by establishing responsive mechanisms, rather than dismissing them as purely populist like some scholars do. Besides, it is unfair to claim that all comments are irrational, since there are many arguments that are reasonable and inspiring, such as those of opinion leaders. Micro-blogs and blogs remain influential. The public, most of whom have a common sense of right and wrong, will gradually develop the consciousness that full information should be gathered before making sober judgments. Third, there is still a benefit for the public to highlight problems before making possible improvements, such as in focusing events. The internet works as a pioneer to discover issues demanding to be addressed by the bureaucracy. Most of the public are not experts on specific fields (e.g. law making), so it is much more efficient to leave technical problems to the experts. Perhaps one of the most meaningful aspects of the rise of cyber arenas and discourse in China is to know, to observe, and to voice.
Overall, the party-state still exercises extensive control over the media through government outlet ownership and censorship. It is able to intervene in media coverage at any time. In Chinese law making, the media act positively for the authority by highlighting their goal of valuing public attitudes, evaluating popular preferences, and enhancing the government’s good image. For the public, the media serve as a restrained forum of communication. Even though the internet may contribute to the increase of populism, it stands as one of the most essential channels of public sentiment in China. The internet in China is a domain to express, as well as to censor.

6.2.5 The Legal Experts

Drafts of policy proposals constitute a portion of bureaucratic activities, but they come without open information on those who originally proposed or drafted them. Compared to those within the government, legal experts are part of a more open and flexible community that is able to accommodate different opinions. Legal scholars are also playing an important part in contemporary Chinese rule of law. This section will examine the role of legal experts in Chinese criminal law making.

As mentioned, legal scholars have been very active in the legislation of criminal law. Acting as rule makers themselves, some scholars/intellectuals are directly involved in the agenda forming and reviewing process. A number of legal researchers serve in multiple positions in the NPC, judicial institutions, government agencies, and business organizations at different levels. For instance, in the Legislative Affairs Commission and the NPC’s law committee, there are members who have pursued academic careers before or simultaneously with their work in the NPC, such as Xianming Xu, Chunying Xin and Guangquan Zhou. Zhou is a well-known
professor of criminal law at Tsinghua University. He was also appointed deputy attorney general in Beijing’s procuratorate and acts as a law firm consultant in addition to his various academic activities. The influence of legal doctrine obtained in university early in life on their legislative and administrative work is mostly distinct from those of officials who apply degrees afterward simply for job promotion. However, since there is no empirical research on the dynamic and influence of the shifting identities of scholars, it remains difficult to assess how their attitudes are shaped by their diverse roles in making and reviewing proposals.

Besides being directly involved as lawmakers themselves, scholars and think tanks are frequently invited to participate in making agendas at both local and central levels. On revising the crime of environmental pollution, legal researchers were invited to the conference held by the All-China Environment Federation to debate and draft proposals. The legislative affairs committee also sought guidance from legal researchers for opinions of the first draft of the amendment. The legislative reports of the eighth amendment mentioned expert suggestions as references. In other laws, such as contract law and property law, the committee even granted scholars the opportunity to draft the laws. The final enacted laws were basically the same as the primary drafts. In 2014, the “Decision on Major Issues Concerning Comprehensively Deepening Reforms of the CCP” finally institutionalized legal consultancy of governmental affairs introducing researchers and lawyers as government consultants. In addition, not only in criminal justice but also in other areas of law, another common practice among scholars is to assist in the design of the legal system based on existing claims from bureaus, ministries, departments and commissions; for

example, to provide documents of Western practices on similar problems. It remains difficult for the scholars to turn down a proposal of criminalization that has already become a consensus among bureaucracies.

Furthermore, scholars hold conferences and seminars, and publish papers before and after legislation to point out problems, examine details, and propose improvements. There is much scholarship on the three amendments of drunk driving, fake medications and environmental pollution. “By reaffirming her links with the civil law tradition, China is rejoining a great community of legal thought which unites half the world and which owes its chief debt, as has been pointed out already, to the Romans rather than to Marx.”\(^{512}\) “… That education is beginning to show the influence of intellectual forces other than the dogma of the Communist Party, suggesting the possibility of the gradual development of legal science as an autonomous branch of reasoning about government and society.”\(^{513}\) Dicks made these statements 15 years ago, but they remain unchanged at present. Though most of these academic activities serve more as internal discussions within the legal community rather than affecting legislation, they do help specialists form their perceptions of the law and its enforcement through focused research and debate.

Increasing legislative professionalism is a requirement of modern society. With rapid social development, law making activities “have become so specialized and sophisticated that common


people without special training can only deliver amateur opinions’. ⁵¹⁴ Both Eastern and Western practices reveal that “…politicians turn to that [researcher-analyst] community for proposals that would be relevant to their concerns and that might constitute solutions to their problems. ⁵¹⁵ If it is lay citizen discussions on the internet that contribute to focusing events, it is elite debates that determine the proper solution to a crisis. Academic proposals directly related to problems will be given more attention. However, “intellectuals remain critical of their government.” ⁵¹⁶ In China, “they (scholars) also have more contact with the West and thus more understanding of the basic elements of a democratic system, such as free elections and checks and balances.” ⁵¹⁷ A number of them embrace the dream “to modernize and civilize China’s legal system, which has lagged behind the rising standards of legality, rationality and humanism that have been achieved in the West since the advent of modernity”. ⁵¹⁸ It is obvious that in both drafting and reviewing revisions of criminal law, scholars (especially criminal law scholars who are more conscious of principles of equality and human rights) mostly demonstrate an adherence to the Western model of rule of law in their speeches and publications. For instance, for the crimes of drunk driving and environmental pollution, several researchers indicate their opposition as a reflection of their concerns regarding the over-expansion of criminal law. Thus, there remains tension between crime control agendas of state development and legitimacy agendas upon which modern

institutions are based. This tension could be beneficial since it exerts pressure on the government to improve.

Contrary to their close relationship with the government, criminal law scholars keep a certain distance from the public. They rarely take the lead in focusing events. Except for a few that appear on traditional media or post on the internet, most criminal law scholars focus on research within the academy and interactions with courts and agencies. Apart from explanations concerning technique, it is difficult to witness any communication between criminal law specialists and the public. The conflict between popular demands for public security and academic claims against extending criminal law are intensifying. That “expert rationality and public preferences often fail to coincide” 519 is one reason for the tension. Requirements protecting criminal rights are consistently attacked by the populist masses. Most importantly, in China today, this tension between professionalism and populism is also a result of the lack of trust between the public and scholars. Scholars are assumed to be part of a group whose interests lie with the advantaged rather than the masses. The belief in selective law enforcement compromises the professionalism of legal experts, while the scholars who hold themselves as elite criticize public demands as populist, disorganized and irrational. Working with the party elite is probably the most practical way of not only promoting reform but also of getting funding for their projects. Thus, society has witnessed both suspicion of legal expertise and the academy’s spontaneous removal from the public. This does not mean that scholars ignore social

affairs; scholars who view rule of law both as their career and their collective pursuit commonly come up with proposals after issues rise to popular attention.

Overall, scholars have positive long-term effects on law making, especially when their role is supported by the “Decision of the CCP concerning Some Major Questions in Comprehensively Moving ‘Governing the Country According to the law’”, which promotes maintaining scientific and democratic legislation. However, even though the intellectual issues they face are more or less the same as their counterparts in Japan, Germany and even common-law countries, the influence of Chinese scholars on the rule of law remains within non-political terrain. Party officials control and approve agenda topics, consultant procedures, and the extent to which elite and public opinion will be “taken into account” in the final result. A great many scholars have shown collective retreat from sensitive political issues in an effort to protect themselves. Since the 1990s, they view themselves more as professional or academic elites than as voices of the public conscience. Instead of criticizing the CCP through socio-legal studies, criminal justice scholars (criminal law, criminal procedural law etc.) are more interested in solving technical issues within the legal system. The methodology of doctrinal analysis is not only a civil law system tradition inherited from Continental Europe (like Germany), but also a shelter against political risk, since there is a dilemma of maintaining academic integrity without highlighting the exact role of the CCP in China. Scholars also receive funding from the government as a primary

way of earning a living, making it impossible for them to challenge the dominance of the party-state. Therefore, scholar involvement enhances the rule of law in China by providing professional legal advice. Their input is a positive change, even when they are unable to bring about direct political reform. “More consultations with elite groups, and increased possibilities for ordinary people to influence decision making at the lowest local level” could contribute to a more deliberate and consultative democracy in the long run.

6.3 Conclusion

This chapter analyzes the participants of Chinese criminal law making, including the CCP, the NPC, the judiciary system, the administrative agencies, the media and scholars. It is an examination of the law–politics nexus with regard to the crime control model upon which the system is based. All of the participants are directly involved in the creation, review and revision of draft bills, with varied influence on the proceedings and final results.

First, while it is commonly assumed that in authoritarian China it is the CCP that has dominated the law and decides the function and content of the rules, this dissertation finds that the CCP’s leadership on specific legislation has actually become more ambiguous, mostly exercised through personnel selection, thought work, policy development, and agenda/outcome review. In non-political affairs such as social governance, although Chinese political reforms are often seen in the West as lagging behind the country’s sweeping economic changes, the CCP has actually


shown a remarkable degree of political flexibility and adaptability over the last three decades. Although there remains a lack of autonomous citizen organizations since the party fears potential political risks resulting from collaboration of the citizens, the CCP allows space for such organizations, think tanks and the public to propose agendas under its supervision. This increased power allotted to such entities is more a result of practical daily needs than of any upright intentions of the party. Given that contemporary China is a more modern, diverse and conflicted country, the CCP has become unable to manage all the aspects of running the huge state machine. Indeed, “most of the concrete reform initiatives arise from below in response to the practical concerns of those on the front lines.” Bureaucratic interests and public demand has prompted the party to be more inclusive, open and transparent. Therefore, the CCP’s retreat is a reactive adaptation of the social environment. It is a balance between “governing at a distance” and “governing with no distance”. That is, broad discretion in social regulation with strict censorship on political issues; incremental (or slow) steps for problem solving with rapid treatment of high-profile cases, and growing consultative participation with ultimate control over laws and policies. Western researchers have focused on the wide-ranging control mechanisms for what are considered highly sensitive social and political issues, arguing that the CCP is the major impediment to the realization of rule of law and political reform in China. Fewer are concerned with regular domestic issues that constitute the routines of everyday life for the Chinese. A smaller role of the party could raise the hope of reform.

Second, in revisions to Chinese criminal law, the hierarchy of impact on law making is shown in the following illustration: Instead of a tightly hierarchical, unitary, top-down law making process, the Chinese system should be seen as a “multi-actor” process with numerous conferences, consultations and workshops among the state organs. Bureaucratic reports and claims shape the law to the greatest extent through the inter-agency review process, with advice from think tanks/scholars taking an assistive role through expert argumentation meetings (see Figure 6.1). “Advocacy is largely contained in a system of elite co-optation, and the exclusiveness of political leadership preserves the integrity of control at the top of the hierarchy.”

Online consultation is frequently used to gain feedback on draft bills, which can “promote the notions that government can be responsive to public needs and that citizens can voice their views in a context of equality and mutual respect”. However, “Because comments submitted during the consultation period were not made public unless the person or organization making the submission published it elsewhere, it is impossible to do a thorough analysis of the questions collected by the NPC or to assess how those comments might have been taken into consideration in the legislative drafting process.” That opinions of draft bills are mostly sent in an anonymous fashion raises the difficulty of assessing state responsiveness to such comments. It is also unlikely that one comment can generate significant change.

529 Online consultation is “a process through which government officials provide citizens with opportunities to offer feedback on draft laws and regulations.” Steven J. Balla, “Health System Reform and Political Participation on the Chinese Internet” (2014) 7 China Information 227.
This pyramid is similar to the model of decision making in modern countries which balances bureaucratic practical needs, academic expertise, and popular support. The ideal structure would be one in which the participants are not only governed by the rule of law, but also one where they see the rule of law as the ultimate goal. However, in reality, and apart from varied understanding of justice and law, the pursuit of self-interest raises the importance of power restraint. In the West, interest seeking is subject to legal and electoral constraints. The Chinese problem lies in the party’s superior role, the imbalance in the separation of power (the weak court), and the lack of the public’s restrictive power to the superstructure, leaving little space for
external legal and legitimacy review. The CCP’s loose control in select social areas gives rise to an expanding bureaucracy. While most of the attention in existing literature is on the CCP as a main impediment to the rule of law project, the power of the ministries in both law making and administration requires special caution as well. “What China now clearly needs are meaningful mechanisms for checks and balances.”^532^ The key here consists not in ideological/theoretical choices, but rather in the grasp of operative realities and how they might be changed,^533^ particularly in criminal justice where the Ministry of Public Security and State Security have been gaining power in dealing with affairs related to public security.

Furthermore, the current legislative framework also manifests in an instrumental use of rule of law rather than considering it a primary aim. A noted scholar in China used to call it the “functionalization of law”, or as a constant search for practical solutions by resorting to law.\(^534^\) Other Chinese specialists call it “laws for emergencies”, “legal pragmatism”, or the “piecemeal approach” which keeps challenging the stability of the legal system.\(^535^\) In criminal law revisions, the participants are more focused on its problem solving function than on fighting abuses of power from the ruling state. It looks as though people prefer to surrender their rights when faced

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with risks to their security, as shown not only in serious crimes like terrorist acts, but also food, drug and environmental offences. Drafting laws sometimes takes years, but making these amendments in China happened quickly. For social problems in China, such as the three rural issues (migrant workers, compulsory education, and social security), it usually takes three to five years for proposals to turn into government policy. However, it has taken a minimum of two years to make amendments to criminal law, from drafting the legislative plan to the promulgation of the revisions. As previously stated, it was not until 2008 to 2009 that drunk driving, manufacturing and selling fake medications, and environmental pollution commanded special attention from state agencies. Meanwhile, in December 2009, the standing committee of the National People’s Congress wrote amending criminal law onto the legislative plan for 2010, even though the seventh amendment had just been passed in February 2009. The authoritarian state structure authorizes the government to act quickly. Despite the fact that the real effects of the legislation are yet to be determined, they save the government from crises (focusing events), showing the public that efforts have been made to solve the problems. With a large variety of other concerns like corruption and income distribution taking turns in the media spotlight, current criticisms of lenient penalties gradually fade out of sight. As a matter of fact, criminal law and other areas of law have also been under frequent revision since 2000. In the modernization process, the Chinese state is not only faced with new challenges, but also suffers from side effects of former reforms, including a weak legal system, a deteriorating environment, slow political reform, and an unjust social structure, all of which are difficult to change. The party-state, which “wades across the stream by feeling the way”, has to cope with emergencies every day. It seems that the state, which lacks a clear and coherent legislative plan, still relies on
a cooperative responsive approach to evidentiary social issues. Otherwise, without the collective support of the participants, amendments of criminal law would not be without controversy.

Indeed, the practical vision of criminal law is not unique in China. The punitive turn of Western criminal justice over the last decade partly results from public demands to regain “law and order” at the tipping point of transitioning into a late-modern society. Increased concerns about risk cannot be separated from the neoliberal policy of the Reagan government in the US and the Thatcher government in the UK to boost the market economy. However, in Western democratic countries, such policies and laws are subject to judicial review by the courts. The court’s supreme power, a most crucial sign of law, maintains the legality of laws. Hence, even though the laws are made to meet functional needs, the court is still able to rely on a basic structure that works against bad laws. For instance, in the UK, a number of preventive laws -- including the stop-and-search powers under section 44 of the Terrorism Act of 2000, and the Anti-terrorism, Crime and Security Act of 2001 -- were either ruled as illegal, or repealed. Meanwhile, in China both the NPC and the courts lack such power. Even though it is suggested that “Increasingly, delegates [of the NPC] are willing to vote against or abstain on draft laws, decrees and even high level personnel appointments which Party and state bodies submit to the NPC for approval”,536 such cases are rare. “The instrumentalist approach to law continues to dominate,”537 but “Law


has gained more importance than it has ever possessed in Chinese history.” 538 Hopefully, in the long run, legal reforms will impose more and more limits on the power of the party-state.

The next chapter of the dissertation continues with the exploration of the role of the CCP in criminal law making through a comparison of the role of the state between the West and China. The chapter suggests that even though it looks the CCP has retreated from the legislative process, it actually strengthen its power through the whole project of legislation. Chinese Criminal law enhances legitimacy of the CCP.

Chapter 7: The Role of the State in the Criminal Justice System: Through a Comparative Perspective

The three streams discussed in previous chapters reflect role of the state in the system of crime control. This chapter aims to take a comparison between that of the West and China. By locating the Chinese experience within the world context, it suggests that the social environments and the interactions between the individuals and the state are distinct from each other between the West and China. To examine the orthodoxy of crime prevention with this paradigm shed lights on the Chinese characteristics, which other theories like the risk society theory is unable to accomplish.

In the first section, it argues that in a number of western countries, risk management, as a governing technique of the state, manifests a distributive network of security governance as well as solidified state power in certain areas. It is a transform of power relationships in response to the pessimism about declining social order. After that, the second section focuses on the politics of the Chinese dynamic of crime prevention. In China, crime prevention, with the trend towards enhanced risk control, is a product of the collective “it works” beliefs on the fights with crimes. It is one approach within the Chinese mixed problem-solving approaches of security governance. With the massive support of the punitive law, the CCP also strengthen its power, and the authoritarian system continues to demonstrate its resilience.
7.1 Risk Control in the Western Criminal Justice System

7.1.1 Conceptualizing Risk in the Western Criminal Justice System

The paradigm of risk in the preventive shift of Western criminal justice can be analyzed from multiple angles. Risk is an approach through which more and more objects, technique, and logic are viewed and managed. The way that risk discourses shape the penal field originates from reforms in society and public policies. First, risk, as an object, needs to be identified and controlled through actuarial methods. It exists more as logic rather than a practice, shaped by the circumstance in which it is set. In criminal law, that crimes are considered everyday risks rather than personal illnesses introduces a systematic perspective of classification and surveillance mechanisms. Accidents, danger to public security generated by inchoate crimes of violent offences, and risky personalities of recidivist sexual offenders have been challenging human societies for centuries. The offenders have not changed; the significance lies in the way in which they are viewed and treated. Different from the moral agent that should be blamed for his/her own evils and the sick who need to be corrected through clinical techniques, offenders are now considered normal risks that should be managed. Accordingly, duty of the state is partly shifted to information monitoring and exchange on a macro level.

Second, risk is a technology of the government. It is more about the statistical prediction of the sanction of free will through actuarial reasoning. With the use of probabilistic techniques, in criminal law making the boundary of public interest that criminal law protects is expanding.

case in point is in anti-terrorism laws of the US, the UK and Australia where the supposed preparatory acts of terrorism, which are far away from actual harm, are increasingly criminalized. Fault is replaced with the prediction of dangerousness and requirement of social management, rationalized by utilitarian purposes. In practice, “a particular manifestation of this is the spread of actuarialism (the mathematical calculation of levels of risk) and a consequent focus upon aggregate risk groups rather than individuals.” Considering that the pursuit of security is a never-ending project, it invites worry that without concrete harm, aggregate risk prediction may give rise to power abuse and exclusion of disadvantaged groups. For example, the ascendance of preventive justice in the UK -- characterized as coercive methods dealing with risk before harm has been done and preparatory offences of serious crimes raise concerns due to the ambiguity of the criteria of criminalization, which cause concerns over the overexpansion of the boundary of criminal law. The state’s use of penalties and out-of-court penalties, which bypass the normal procedures of criminal law, have been consistently problematized and criticized. Thus, risk, as a technology of the state, ought to be under the restriction of legal principles against state power.

Third, growing concerns of risk in the West reflect changes in the Western social context and governance dynamic. As Pat O’ Malley insists, there is a shift from the pessimist (“nothing

\[542\] Nicola S. Gray, Judith M. Laing & Lesley Noaks, *Criminal Justice, Mental Health and the Politics of Risk* (London: Cavendish, 2001) 177. The state also guides citizens to employ preventive technologies for their personal security.
works”) to the optimist (“what works”) stances favouring evidence-led intervention.\textsuperscript{544} Since the 1970s when it was widely believed that penal modernism was failing to deliver its promises of rehabilitation and social inclusion, the state has adopted the acting-out strategy (such as Megan’s Law and “three strikes”) mainly for incapacitation. At the same time, it also attempts to seek “what works” by establishing a collective crime prevention system; for example, fostering the preventive capacity of individuals and communities, developing situational crime control methods, and enacting proactive sanctions. The citizens are both active agents of their own security and coerced objects of state penal power. Compared to the era before, it is a re-arrangement of the power structure in which the state is shifting to fields that it is more capable to deal with. However, this does not mean that state power is declining. Instead, its power is increasing in certain areas such as fighting serious crime with harsher penalties or preventive techniques, monitoring private security, identifying and classifying risk, and social discipline on a macro level. The risk-based preventive shift in criminal penalties, ancillary orders and policing reflects the new logic of crime prevention based on the conservative role of the state. It sheds light on not only “how authorities come to understand and manage their relations to the problematized field, and the forms of power, knowledge and technology necessary to their activities”,\textsuperscript{545} but also how the governing practices of authorities shape and are shaped simultaneously by the power of the autonomous subjects’ engagements.

7.1.2 State’s Role of Risk Control in the Western Social Context

The current Western criminal justice system is a myriad of actions that are both inclusive and exclusive, private and public, neoliberal and conservative. A most prevalent feature lies on the chain of coordinated actions of crime control between individuals and communities, like the “responsibilization strategy” with the government governing at a distance. This shift is mainly facilitated by the transformation from welfarist to neo-liberal politics lead by politicians and their followers such as Thatcher in the UK and Reagan in the US, seeking market-driven individualized responsibility for the management of uncertainty. “The status and economic well-being of citizens tend to be much more heavily dependent on the market in this type of society.”\textsuperscript{546} The USA is the archetypal example of a neo-liberal society. The other historically Anglo-American nations (the UK, Australia and New Zealand) also feature in this group.\textsuperscript{547}

Under the influences of the neoliberal theory and policy, in Western criminal justice there coexists a contract-out pattern of policing and an emphasis of the self-governing capacity of individuals and communities for their own risk management. This partnership, which reduces the state’s accountability for security provision, fosters a mechanism of mixed governance between public and private spheres. The Foucauldian governmentality theory addresses organized practices, including rationalities and technologies, through which the society is rendered governable by its government. The “government” that Foucault and his followers use is not confined to the traditional sovereign government; rather, it is about the range of actors including state agencies, families, schools, churches, and individuals. “What is to be governed is itself self


\textsuperscript{547} Michael Cavadino & James Dignan, \textit{Penal Systems: A Comparative Approach} (London: Sage Publications, 2006) 17. It is argued that with the introduction of the free-market economic policies, the countries have witnessed growing inequality in material distribution.
governing, and thus any act of governance must take account of the self-regulating order of things."\textsuperscript{548} The self-governance capacity of individuals is stressed by the risk society theory as well, though its analytical framework is quite distinct from the others with regard to the focus, hypothesis, analytical approach, and conclusions. Risk society theory is mainly based on the reflexive thinking of the side effects of modernity that have emerged since the last decade of the past century. Beck argues that, “science and technology are now being challenged at the grassroots level by a politics born out of the recognition of modernist experts’ inability to govern the monsters they created.”\textsuperscript{549} In the risk society, every individual has to be reflexive of his/her own actions. Therefore risk control is privatized, dispersed and segmented for “responsibilized” autonomy.

However, though the impact that diffused power has on political programs and individual subjectivities is examined by a number of analytical frameworks, it does not suggest that the state has completely retreated or the social is “dead”. In parallel with the collaboration for crime prevention among individuals, communities and state authorities, when the state rolls backward it has actively increased the use of proactive techniques and longer detentions, manifesting in an intensified concern for security and surveillance at the macro level. A free economy requires a strong state. After 9/11, such is increasingly justified for the prevention of terrorist acts, which has transmitted from political issues in international relations to the deterrence of national deviances. Besides the enhanced “technologies of the self through which individuals work on

themselves to shape their own subjectivity”, the state still takes a strong position as a sovereign authority to facilitate market competition, safeguard rule of law, intervene when conflicts arise, and exclude offenders who fail to be rehabilitated. The state still serves as the main provider of basic public security and guide of the private security market, characterized by the prevention of serious crime, increased use of surveillance technology, civil detention of persons with mental illness, and the introduction of preventive orders on risky offenders. The sovereign command remains one key tactic from multiple centres of self-government and government. For instance, Foucault argues that “the rise and continuation of discipline relied on the continuation of sovereign power, and that both sovereignty and discipline (rather than disappearing) are essential to the complex form of government that has emerged more recently”. Thus the government should govern to an appropriate degree without disrupting the self-governing capability of those it governs.

The combination of private self-governance and public surveillance is consistent with the arguments of Garland and Rose on the two extremes (or two poles) of governance due to the allied relationship; between neoliberalism and conservatism. The combination also resonates with the claims of a great many researchers that the penal system in the West is “a mixed and

contradictory picture that there is no abrupt change, that the shift to a postmodern penalty system may be evolutionary rather than radical in nature, and that its exact contours are still somewhat vague and ill defined. Preventive methods are typical examples of this “state-based” approach of viewing the current role of authorities in crime control and security governance. They exist as a balance between the conservative and neoliberal ideology of criminal justice. In the UK, the US, and some Commonwealth countries like Australia, a large number of preparatory crimes and preventive detention are used for the deterrence of serious offences and their associated crimes or misbehaviours, reflecting the old penology of being harsher on crime. Other changes in the same period such as “rising levels of punishment, the apparent decline of human rights discourse in the penal realm and the resurgence of interest in ‘pre-modern’ modes of punishment”, or the neo-feudalization of punishment which involves new forms of humiliation and degradation as well as public displays of remorse, also reflect the conservative ideology of the state’s role and criminal justice. Preventive law making and postmodern penology both show that there are certain responsibilities monopolized by state authorities such as law making, law enforcement, and policing, even though both social forces and economic elements have been gradually introduced into the programs. The power, which is dispersed in pluralist social institutions, is eventually centralized in the state, which stays as a

key nodal point of governance with the other actors. However, distinctive from Keynesian welfare modernism, in the post-social politic, “the language of probability and risk increasingly replaces earlier discourses of clinical diagnosis and retributive judgment.” The preventive shift is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness, rather than individualized correction and rehabilitation based on moral concerns, illustrating this systematic transformation to an aggregate classification system for purposes of surveillance, confinement, and control. This shift is driven by a mix of factors, comprised of the collapse of penal welfarism, the war against terrorism, the development of statistical technology, among others.

In all, Western liberal societies have witnessed a shift from penal welfarism to restructured criminal justice that relies on cost control, risk management and public surveillance, with a favourtism for governmentality technology that may reduce uncertainty, foster self-regulation, and prevent loss. “Risk thinking has become central to the management of exclusion in post-welfare strategies of control.” At the same time, it should be noted that it is a picture that is still forming, without a clear-cut boundary from the past. There is certainly solid empirical evidence to support that post-modern changes are taking place. For instance, research suggests that in the control of sexual and violent offenders, new forms of partnership and accountability dispersal

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have been driven by the logic of risk. However, the picture is much less clear on some other points. The transition itself is not an overall and sudden change. Neither is risk thinking completely novel, nor rehabilitation entirely declined. “There are numerous aspects of culture and practice which reflect the continuing strength of the modernist project, for example, interest in the individual case, and the use of professional judgment to overrule actuarial assessments.” Both law making and enforcement are hybrids of new and traditional methods with diverse pursuits like retribution, deterrence, rehabilitation and risk control. American penal sanctioning itself is fragmented, multidimensional, and often contradictory among different states. In addition, the transition does not apply to all Western countries, like Canada and Japan, which have shown a certain resistance to the punitive transition due to their political and cultural arrangements.

7.2 Risk Control in the Chinese Criminal Justice System

7.2.1 The “It works” Belief on Criminal Justice in China

The development of Western criminal justice inspires an examination of Chinese practices based on a state-centred approach. The comparison will especially highlight the role of the CCP in the Chinese society. Different from the mechanisms of the US and the UK which are shaped by neoliberal policy, the Chinese field of crime control is primarily monopolized by the coercive power of the central and local governments. Governance theory can only explain part of the

picture on mass line policy, private security, and other policing practices. In general, since the 1980s, the Chinese criminal justice system has been a model of “it works”, searching for “what works better”, rather than “nothing works”. In the UK, the public expressed pessimism about the crime rate in the 2000 British Crime Survey, which suggested that two-thirds of the respondents believed that crime at the national level had increased over the previous two years, even though that is contrary to the actual rates.\(^ {564} \) Meanwhile, Chinese legislation and policing have made progress with the help of public support. China is shifting to be more in line with the Western pattern of rule of law with a top-down approach, providing the overall social background for legal analysis. However, this shift is based on the law’s utilitarian value to solve problems and earn public support, rather than the intention of upholding legal principles. The shift will consolidate state power with a more stable society.

Resorting to the law, as Western democracies do, is a necessity for the survival of China and the CCP. After the launch of economic reforms and the opening-up policy in the late 1970s, the Chinese state has started to use the law as a key tool of social governance. The significance of the law for China is rising, primarily to meet the needs of economic development, as well as for more efficient social control. Max Weber argues that governments can derive their authority from three sources: tradition, the qualities and charisma of a given leader, and constitutional and legal norms.\(^ {565} \) In China, after Mao and Deng, neither tradition nor a leader’s fine qualities can sustain a stable governance over the increasingly pluralist and open society. Accordingly, “the


\(^ {565} \) David M. Lampton, “How China is Ruled: Why it is Getting Harder for Beijing to Govern”, in Gideon Rose, ed, Tiananmen and After (Foreign Affairs, 2014) 119.
reliance on the ideology of mass line and class struggle was toned down, and the importance of the rule of law was repeatedly emphasized.

There has been an unprecedented increase in state-initiated laws across almost all fields. The first Chinese criminal law came out in 1979. Then, in 1997 the second criminal law replaced the first one with many more advances. Not only did it abandon the revolutionary tone of the former law, but it was also drafted using the latest models from Germany and Japan. The three principles of criminal law were also introduced for the first time. After that, the state made eight amendments to criminal law. Revising the law with amendments was also learned from the West (e.g. the US). Compared to before, the laws are more complete and professionally created. Law enforcement has improved as well. The “strike hard” policy has been criticized for its violation of human rights since the 1980s. After the early 2000s, it was replaced by the new criminal policy of “balancing leniency with severity”. Similar to other laws and policies, the decision makers wrote it with reference to Western policies that demonstrated two extremes in the criminal justice field, that of being harsh on serious crimes and being lenient on minor deviances. This new criminal policy is both more compatible with the trend of international development of criminal law, and with Chinese crime rates during that time (which have been rising at a slower pace than in the 1980s). The leniency policy also goes deeper; Research shows that its local implementation has significantly reduced the crudeness of Chinese criminal law in daily adjudications.

In Chinese criminal procedure law, incremental progress has also been made to restrict police power, though it remains difficult to change the imbalance of power. Therefore, the history of criminal law making progress, enforcement and

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policing do show development toward a Chinese model of rule of law. The process is basically monitored by the state, though it may be not what the top authorities originally expect or intend.

Such progress runs parallel to the support of Chinese citizens who still hold high expectations of the government’s capacity to fight crime, underlined with the impression of “it works”. As Chapter 4 noted, with strict policing Chinese citizens are more or less satisfied with the Chinese government’s security function. They tend to believe that although the future is uncertain, progress will be made step by step. However, the Chinese population favors stability and fears political disorder. Most of those who have been through the mess and trauma of either the Sino-Japanese wars, internal wars, or the cultural revolutions, are relatively tolerant of the CCP, which has not only brought China out of such wars, but also brought in remarkable material advancements in the several decades.\footnote{568} The CCP’s media censorship also helps to maintain the image of the party-state by blocking unwanted information and showing the negative aspects of other countries. Therefore, different from Western crime governance, the Chinese scenario is more “it works” than “nothing works”. Interactions between the public and the state continue to boost increased law making and stricter surveillance with solid public support. One case in point is the expansion of criminal law which has received little public resistance. A secure social environment enhances the legitimacy of the authoritarian regime, and a centralized, strong government proves to be effective in crime fighting. The authoritarian structure sustains national unity through power and authority. Western democratic countries do not have obvious advantages in security provision over China.

\footnote{568} Coercive repression - in 1989 and after - may itself have generated legitimacy by persuading the public that the regime’s grip on power is unshakeable.
Overall, criminal law expands hand in hand with the overwhelming belief of “it works” with regard to the Chinese criminal justice system. With public demand (as shown in focusing events) and bureaucratic considerations, each of these various organizations now has its own unique package of power resources that allows it to influence law making at different stages of the process. As it has been documented, first, the legislative body is amenable to social and political impact of focusing events. “Populist pressure has become a key characteristic of the legal system over the past decade.” External pressures from the public serve as the main booster of criminal law making in China. The reason that driving accidents, fake drug scandals and environmental pollution become prominent issues lies more on their national awareness than their seriousness. Authorities failed to react earlier due to lack of awareness, or due to the problems’ complexities requiring systematic solutions, until emergencies arise and they have to act quickly. Even though drunk driving is supposed to be less harmful than fake drugs and environmental pollution, it receives equal or even more attention from both the public and legislators than the other two. Whether the problems -- which actually have existed for a long time -- could enter the legislative stream largely depends on how much attention they garner nationwide. The scope over which the issues are able to raise attention relies on the magnitude of the problems themselves, the discretion of the media, the open spaces allowed by local or central governments, the results of the power struggle among the participants, and the extent of public activism. “Impact of populist

views of law is particularly strong in China.”

It is officially claimed that responsiveness in law making manifests in that the state “serves the people” or tends to meet public demand, through which the CCP’s legitimacy is justified. However, from another angle, the government’s rapid response to crises is also a result of intense fear of potential social instability and bankrupt public confidence. In almost all cases, compared to municipal and provincial governments, the central government succeeded in maintaining its reputation by urging quick feedback from locals, holding lower-level authorities accountable, or enacting new laws to fill gaps in the legal system. “China’s rulers now try to resolve, rather than crush, conflicts among competing interests, suppressing such conflicts only when they perceive them to be especially big threats.”

Thus, even though evidence from both quantitative and qualitative studies have suggested widespread expression of dissatisfaction among locals, the Chinese regime as a whole continues to enjoy a relatively high level of acceptance from the public.

Second, if external public pressures are the triggers of criminal legislation, results of criminal law making are mainly decided through bureaucratic negotiations of social control. Bureaucratic concerns and relationships between these agencies go hand in hand with the CCP’s decentralization of power. As it has been argued, the CCP’s actual power has been dispersing into departmental bureaucracies, levels of government, and judicial bodies: “Government ministries, have enormous influence over the detailed content of legislation and its

571 David M. Lampton, “How China is Ruled: Why it is Getting Harder for Beijing to Govern”, in Gideon Rose, ed, Tiananmen and After (Foreign Affairs, 2014) 122.
implementation”, where the police (the Ministry of Public Security) maintains supreme power over the other agencies. Most of the bargaining process is hidden from public view, with limited information available to the public. There has also been little study on domestic policy issues where actors within the government take different positions. However, separation of responsibilities and spheres of authority -- which Max Weber saw as definitive characteristics of the modern state -- have gradually increased. “The professionalization of legal actors and institutions is perhaps the single most significant accomplishment of China’s legal reforms.”

At most times, the agencies cooperate with each other in both law making and enforcement. This collective national social control strategy is rooted in “reformulated mass-line ideology in response to the changing socioeconomic reality in the post-reform era”, where the courts may coordinate with other bureaucracies to maintain social order. However, it seems that the court has started to shift away from the police and prosecutors, who appear to act differently from those in the West and in authoritarian countries, in order to expand its own authority, defending legal principles from a professional perspective or addressing technical issues of sentencing that the other entities are not familiar with.

Regime theory holds that authoritarian systems are inherently fragile because of weak legitimacy, over-reliance on coercion, over-centralization of decision making, and the

predominance of personal power over institutional norms. Scholars have also debated whether totalitarian regimes can adapt to modernity. China offers a different model of authoritarianism with efficient provision of economic and public security. Through increased consultation, dispersed leadership and enhanced legitimacy generated by the collective efforts of the CCP, the bureaucrats and the citizens, the regime has actually reconsolidated itself. “Alternative political regimes may appear increasingly unlikely and unappealing.” The era of transformation requires a strong government to reduce public anxiety. The Chinese authoritarianism not only provides highly placed leaders with the power to launch reform, but also does well in selectively meeting public demand. For instance, faced with crises, the authoritarian party-state regime demonstrates advantages to mobilize required resources in a short time period, during which police from different levels are devoted to intense battles. This plays a crucial role in decreasing the public’s fear of crime. It is the reason China has been able to remain united despite dramatic upheaval, and it is why the party-state has been able to maintain its authority.

However, though the current framework is practical in deterring crime, as it has been suggested, the institutional arrangements lack restraining power on the use of criminal law. They focus more on the law’s utilitarian value rather than upholding its fundamental spirit of restricting state power. This is consistent with research that finds that “the emphasis that courts, procuratorate, and the police place on settling cases reflects trends in the Chinese legal system away from

formal adjudication in favor of mediated outcomes.” This is even referred to as “return to populist legality.” As to the elites, both the court and scholars are unable to defy the expansion of the law within the current state structure, given the coexistence of weak incentives of top-down political reforms, the absence of a constitutional spirit of limiting state power, court intentions to defend itself from criticism, the influence of traditional patriarchy, the rationale of improving the lagging legal system, and the pursuit of public security. Pursuit of public security is the crucial driving element among these factors, which unavoidably leads to concerns of law and order, as well as to a preventive shift in criminal law. As to the masses, the mix of populist punitiveness and the lack of respect for legal principles and procedures suggest that the establishment of legal culture will no doubt be a long process in China. “Legal discourses do not exist above society or simply to control citizens, but instead are embedded in how people interact as legal conventions or cultures.” Public insistences on the zero-tolerance approach are not unique to China. For instance, in the West, “although the new penology speaks the language of managerialism and systems theory, populist punitiveness remains rooted in normative judgments about aberrational evil.” One study of US sex offenders argues that the new sex offender laws must merge appeals of this populist response while enabling state bureaucracies themselves, ever

more technocratic in orientation, to actually implement the policies. But compared to the West, Chinese society is traditionally lack of the respects of laws. In China, laws were traditionally transplanted rather than growing automatically from the needs of society. As such, some of the principles, like everyone should be treated equal or that criminals ought to be protected from state power, diverge from traditional Chinese values. Popular demand for security promotes risk consciousness, while weak respect for the law fails to restrain popular preference toward adequately severe sanctions. In such a political and social environment, more and more laws will be generated within the legal system.

7.2.2 The Chinese Mixed Problem-solving Approach

In Western criminal justice, policy changes are primarily made based on the pessimistic belief that the formal penal modernism failed to reduce crime rates, which creates skepticism over the government’s ability to provide security. The state not only abandons some of its responsibilities to the citizens themselves, but also transforms criminal policy from individualized clinical rehabilitation to systematic risk prevention and control, with little moral sense. By contrast, in Chinese criminal law making, that criminal law is expanding in a preventive sense is highly influenced by the public’s anxiety about dangers (which has become a pervasive feature of contemporary life), as well as positive beliefs in the current criminal justice system, which remains rationalized through criminal law’s moralized retribution and deterring effect. “The law

in general broadens the legal foundation of surveillance practices.\textsuperscript{584} In China, anti-terrorism laws continue to create preparatory offences. However, the criminal law shift from “result-based” punishment to “behaviour-based” prevention blurs the boundary between criminal penalties and administrative penalties,\textsuperscript{585} which is highly probable of normalizing criminal offenders guided by the calculation of cost and pleasure rather than the evils to be excluded. The Chinese style of management through criminal law reveals a more practical value of problem solving, with the coexistence of theories and practices: self-generated or borrowed from abroad; pre-modern, modern or post-modern; retribution, deterrence, rehabilitation or risk management. During the transiting period, neither the Chinese people nor their leaders appear at ease with the current situation.\textsuperscript{586} China, as a developing country, offers the chance to experiment with the various models as long as the joint problem solving approach proves to be effective. The pursuit of utilitarian effects is the top concern. It used to be claimed that, “China’s legal reform experience is unique in its ability to mix foreign imports with Chinese tradition, and to recast many imported ideas to be in line with the ideological goals of the party.”\textsuperscript{587} The proactive expansion of criminal law goes hand in hand with concerns of risk in criminal trials and policing. Besides the legislation that has manifested a preventive shift, in adjudication, the judges carry out a risk assessment of the suspect’s personality and threats to society in sentencing.

\textsuperscript{585} This boundary was set to not only save judicial resources but also to restrain the over-extension of the scope of criminal law. To replace administrative penalties that are managed by the police with criminal penalties provides more procedure protections to the offenders, but the deprivation of general liberty requires much more concern.
assessment is mixed with moral components and policy concerns. One that most resembles Western penology is in policing, where the police monitors the society through statistic assessment and widely-used surveillance technology, judging and minimizing the risks that various situations and individuals pose. In general, crime is normalized as a by-product of modern societies and organized in terms of a risk profile. Tools such as target hardening, statistical profiling, opportunity minimization, and loss prevention that are prevalent in Western policing have also been gradually put in place in China.

In addition, the development of managerialism is also evident in Chinese criminal justice. In governance theory, the aim of government is shifted toward regarding the central issue as the optimal harnessing of these self-governing capacities -- the “conduct of conduct” in Foucault’s words. In Chinese criminal justice there have been practices resembling Western neoliberal practices, such as the growth of private security, the progress of community policing, contracting out of police services, and a series of money-based bonus systems. “The desire to replace the Maoist-induced collective dependence upon the state with a notion of rationally calculable individual obligation was central to Deng’s reform program.” The free market mechanism, the essential element of a capitalist economy, has been gradually introduced into spheres of Chinese public service. For instance, parts of security provision, once managed exclusively by the government, have been subject to privatization and market forces. This shift undoubtedly aims

to reduce the government’s spending and commitment of resources. However, different from the West, the legality of some such privatization remains uncertain since there have been no laws to approve it. A number of practices are therefore taken underground. Considering even private security companies are managed by the Chinese police, it is impossible for the Chinese government to contend the same as Western neoliberal countries that “the most effective protection would result where individuals partnered or cooperated with the state and police while acting on their own behalf.” The balance of market forces and authoritarian governance sheds light on the features of the current Chinese society.

7.3 Conclusion

This section documented differences and similarities of the development of Chinese criminal justice with those of Western neoliberal countries. Both China and the West are at political and economic crossroads, leading to different models of criminal justice. The Western model is shaped by the shift from welfare to neoliberal policies, reflecting an economic reconstruction of criminal justice, while the Chinese one is based on the transforming faces of the party-state’s authoritarian governance with the aim of resolving contentious social issues through mixed theories and approaches. In both China and the West, the central government remains strong in crime prevention, but the underlying rationales are quite distinct from each other, including an understanding of the role of authorities in relation to crime, the power structure, governing rationalities, and technologies. It appears as though that the Chinese government has successfully used the criminal justice system, including criminal law, to steer and guide. It is equally, or even

more, attentive to public requirements, since they are the criteria through which Chinese citizens evaluate the socialist democracy and government legitimacy. Bellin's findings suggest that China's experience may be typical of state-led late development, which breeds dependence on the state from capital and labour. This is the same with crime fighting, through which citizens become more reliant on the state. In this aspect, China stands in contrast with Western rulers in the early capitalist development when social, economic and legal advances empowered citizens to challenge the political system. The Chinese authoritarian regime is becoming more stable. The worry still lies on the establishment of the rule of law within this utilitarian framework. Hopefully in the future, the public, who may become more legal-conscious, will bring about true legal and political reform from the bottom-up approach. There is currently no such opportunity.

The next chapter is the concluding chapter of the dissertation. It examines the “policy window” of amending criminal law, and concludes that the present Chinese criminal legislation has been more responsive and inclusive than ever before. In China, the dynamic between public support and political approval largely affects how and when the policy window will be opened. Criminal law making enhances the trust between the government and the public through a top-down approach in both procedural and substantial aspects.

Chapter 8: Policy Window of the Chinese Criminal Law Making and the Conclusion

Previous chapters of the dissertation have examined the problem stream, policy stream and political stream in Chinese criminal law making. The interplay of public demands, legal culture, bureaucratic politics and political influences are evident in legislative activities, reflecting a controlled participation with selective use of consultation and jurisdiction competition. Kingdon’s MSA explains in detail what the “policy windows” are, why they open, and how the coupling of the streams takes place. The policy window is an opportunity for advocates of proposals to push their pet solutions, or to push attention to their special problems. It opens when the three streams are all available, through which government agendas turn into the final decisions. At this policy window, “a problem is recognized, a solution is developed and available in the policy community, a political change makes it the right time for policy change and potential constraints are not severe.”592

As to Chinese criminal law making, law reform is a routinized opportunity to change the law. The legislation was consistently up for renewal, and several factors come together at this given point just in time. It is a window that opens quite frequently and predictably. This chapter not only summarizes previous chapters through the factors contributing to the opening of the policy window, but also predicts future developments of the Chinese criminal justice system. The first section of this chapter examines law renewal as a window for revising criminal law. It argues

that compared with the policy stream, the problem and political stream have played most important parts in opening the policy window. It can be risky since the policy stream will fail to restrain the expansion of the law, as long as the political institutions tend to meet public demands with criminal law. Thus on one hand, if decision makers are able to view public mood in a rational way, that is, being responsive and keeping away from an instrumental use of the law, legality of the law will be better maintained. On the other hand, much still depends on the efforts of the government to introduce in more social forces against the dominant power in the legislative proceedings, though the unbalanced power structure will take a long time to change.

Then the second section goes further to analyze two concerns of the development of the Chinese criminal justice and Chinese society: will the authoritarian state structure lead only to harsh penalties, and is China an exclusive or inclusive society. It claims that the future is not pessimistic since the current institutional arrangements do not necessarily refer to an entirely disciplined society. However, at the same time it argues that the Chinese society should also be cautious of sliding into a thoroughly surveillance society, which will eventually be detrimental to the pursuit of liberty and democracy.

Finally the last section makes the conclusion of the whole dissertation and suggests that there are still spaces for future studies. It argues that a number of factors such as public opinions, academic suggestions, political concerns have played a part in the making of Chinese criminal law. They are all correlated with the preventive shift of the law for the control of social risk. Among all the factors, public opinions and political concerns are the two most important factors
leading to the shift. The legitimacy of the CCP is also enhanced through the responsive process of criminal law making and the policy of being harsh on crimes.

8.1 Legal Renewal: Easily Opened Windows for Law Reforms

8.1.1 Frequent Coupling of the Streams

In Kingdon’s model, “policy entrepreneurs” use national events and themes to push new ideas to the fore. In law making, the subjects rise and fall on the agenda according to the renewal cycle.593 “The renewal becomes a window giving policy entrepreneurs of various descriptions an opportunity to advance their ideas, raise their problems, and push their proposals. When the three streams are all available, they simply need to be ready when the time for renewal comes.”594 The Chinese criminal legal renewal takes the form of making amendments, rather than redrafting of all existing criminal statutes. This model, which is learned from the west,595 is the traditional method of revision in the criminal law.596 In China, revisions of the law, as the policy windows, open quite frequently. Since it is believed that “China’s growing legal system, is relied on both by the CCP for its governance and by Chinese citizens as a safeguard for their increasing individual rights”, in the last decade, “the legislative program is so extensive and ambitious that it probably knows no equal in the legal history of the world”597. For instance, criminal law has

596 Frank J. Remington, “Criminal Law Revision Codification vs. Piecemeal Amendment” (1953) 33 Neb L Rev 402. This approach will avoid over-disturbance to other criminal statutes.
been revised several times since 1997. Changes made by the eighth amendment to Chinese criminal law were also much more than the previous seven amendments. These easily opened windows encourage the specialists from the ministries, intellectual community, law firms, members of “Lianghui”, and NGOs to draft proposals of amending criminal law. Vice versa, increased proposals will lead to more chances of the opening of the “revision windows”. The forthcoming ninth amendment, which has just been passed in 2015, is a sound case to shed light on the rising number of revisions in a single amendment. Compared with former amendments that did piecemeal change to the criminal law, the eighth amendment has started to make broader changes, including the general section and the special section of the law. It increases and decreases the boundary of criminal law at the same time. The present-day “legalization” program echoes a long-standing tradition in late developers (Confucian and otherwise), which accorded the state a key, proactive role in political, economic, and social development. Wider consultation, which brings in combined factors such as public expressions, bureaucratic considerations, and intellectual arguments, prompts such changes. What is needed is the development of institutional methods, for broad discretion to be exercised in ways that are visible, subject to critical review and to methods of insuring that the discretion is not abused. Unfortunately in China there remain lack of restraining institutional arrangements and power on the expansion of criminal law.

As a matter of fact, not only in China, some other countries also amend criminal law at a fast speed. For instance, the Criminal Code of Germany has been under frequent revisions since 1969. In 1998, a new criminal code was passed because the old one has been amended for too many times. After 1998, the revision is still going on. It is common for criminal law to be revised to meet the needs of social development, to deal with emerging problems, and to match with shifts of dominant theories. The Chinese case is fused more with supervision of the Party, public support for the government, and enthusiasm of the establishment of rule of law. Same as the west, in China, criminal law, as an aspect of the institutional structure of the state, “much will still depend on the disposition of the decision making body, on evidence adduced on crucial issues of security”, and on the ways in which a state should deal with and related to its citizens. “Revision must be justified on the basis of real need, upon a determination that there is something basically wrong with present criminal statutes and that revision will result in significant improvement in administration.” What China lacks is a universal respect of principles of criminal law, and judicial review system that could ultimately sustain the legality of the law.

601 The criminal code of Canada has also been revised numerous times. Besides these general changes, law against terrorism emerges to be a focus of numerous countries all over the world. Anti-terrorism legislation is “preemptive” in that it seeks to punish or apply coercive sanctions on the basis of what it is anticipated might happen in the future. In Australia, since 2001 there have been more than 35 pieces of Federal anti-terrorism legislation passed. UK, US and Canada have also passed a series of anti-terrorism laws in the 2000s. See Jude McCulloch, “Contemporary Comments: Australia's Anti-Terrorism Legislation and the Jack Thomas Case” (2006) 18 Current Issues in Criminal Justice 358. The quantity and pace of legislative change in this area has reduced the opportunity for informed public debate. Andrew Ashworth & Lucia Zedner, “Counterterrorism Laws and Security Measures”, in Andrew Ashworth & Lucia Zedner, Preventive Justice (Oxford: Oxford University Press, 2014) 171-195.
8.1.2  Two Important Streams for Legal Renewals

The problem stream and the political stream are the two main streams that facilitate renewals of Chinese criminal law. According to Kingdon, the agenda, in a general sense, is affected more by the policy stream and political streams, and the alternatives are affected more by the policy stream. Three components that set governmental agendas are: problems, politics and visible participants like the president, members of Congress, the media and so on. The combined impact of the problem stream and the political stream applies to the Chinese political structure and social environment as well. The approval of policies, including proposals of the law, and other criminal policies, is based on the coexistence of public supports and political confirmation. Since there are a variety of social issues to be addressed, those with the most risks of generating social unrests will be prioritized. That is the reason why social protests will commonly get settled at an early stage, or being absorbed before hand, which inspires potential protesters to make efforts for boosting attention. Considering there have always been solutions to emerging social problems as long as they have gained enough attention of the Chinese authorities, when they fit with the guidelines or plans set by the CCP, the problem, policy and political stream will be grouped together, through which changes of the law come about.

8.1.2.1  Public Influences: Public Mood and Public Participation

Both the problem stream and the politic stream are shaped by public opinions in the process of law making. Public opinions do have influences on the procedures of the legislation and content

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of the law. In China, the problem stream consists of national incidents that reflect public mood, serving as external pressure for public administration. In the political stream, the CCP and bureaucracy claim to enhance public participation in the final decision-making. While both (public mood and public participation) are related to the public, the implication and influences of them are distinct from each other. Public mood affects the social affairs in an indirect and un-institutionalized way, while public participation, may directly determine the process how the proposals are negotiated and the result of such negotiations through legislative proceedings.

In criminal justice, penal populism discusses influences of public mood, and democratic involvement considers institutional designs of public participation in criminal and penal policymaking. Public mood and public participation sometimes are not distinguished from each other, but from a narrow perspective, public or national mood is a vague presence that the state notices; it is subject to manipulation from the government and the media. While public participation relate to the seats of the parliament, components of the party, and institutional arrangements of decision-making. As it has been noted, in the US and the UK, penal populism is one crucial reason for the increasingly punitive penal system. National mood has important policy consequences. “It has an impact on election results, on party fortunes, and on the receptivity of governmental decision makers to interest group lobbying.” To seek for votes, the political parties compete to be tough on crimes to meet with public demands of retribution and deterrence, rather than to enhance justice or reduce crime rates. Thus it looks that public false perception such as fears of crime, of strangers, of the young, is the origin of the problematic criminal justice system, which ought to keep certain distances away from criminal law. However, in the book *The Politics of Imprisonment*, Vanessa Barker suggests that the way Americans
engage in the democratic process significantly shapes the way they punish offenders. Barker compares the civic engagement in California, New York and Washington. She finds that the inclusive decision making in Washington facilitate social cohesion and trust, reducing state coercion against the disadvantaged group. On the contrary, in California, with few people participating in local affairs, officials tend to pursue a more retributive penal regime. Therefore she contends that:

High levels of civic engagement and social trust can constrain the intensity of penal sanctioning, enabling inclusionary but normalizing conditions of citizenship. Under-democratized polities with lower levels of social capital can amplify state coercion, creating restrictive and exclusionary conditions of citizenship, often in the name of public good.  

Compared with criminological scholars that solely examine the exemplary impacts of the punitive penal system of the US, this idea traces political reasons for the diversity of imprisonment among the US states. Citizenship has three elements--rights, responsibilities and a voice in the country’s and the local community’s decision-making processes. As Barker has suggested, wide participation in the votes, through facilitating social cohesion and trust, may lead to mild treatment of crimes or misbehaviors in Washington, but at the same time, the inclusion may also due to open discussions among people with different social status and backgrounds that contribute to more reasonable results. Rather than a certain group that dominates the process,

broader public participation enhances the legality and legitimacy of the law. It is also the symbol of contemporary democracy.

Distinction of public mood and public participation applies to the Chinese context as well. In brief, the problem stream mainly demonstrate public mood, and the political stream addresses the degree and impacts of public participation. Previous chapters examining public mood claim that the CCP pays great attention to the management of public mood to maintain social stability and enhance its own legitimacy. Overall, the public is generally satisfied with the security condition of the Chinese society due to intense policing from the state. This satisfaction is also mixed with media censorship that keep sending them messages of positive police work, and gratitude for the CCP’s leadership that has brought huge social and economic progress to China in the past 60 years. But at the same time, the citizens are anxious of a variety of risks that keep decreasing their sense of security. Although many of them have been developing the sense as rights-holders, their rights are focused on rights to safety, fairness and equality rather than rights against state power. Just as it is insisted, the Chinese conception of ‘rights’ distinctly privileges socioeconomic security and collective livelihood, in contrast to the Anglo-American tradition that emphasizes political liberty and individual freedom. Hence most people still prefer a retributive and deterrent criminal justice mechanism to maintain “law and order” in the era of transition. In western penal philosophy, it is commonly suggested that a reasoned and informed public debate is needed to combat penal populism (with the domination of the tabloid media and the contemporary citizen’s supposed three-minute attention span). “Public outrage with the criminal law, whether or not misguided, will eventually find its way to change.” While in China,
it also depends on the long-term legal education of the citizens and reduced control of the media that has already enjoyed much more freedom.

As to public participation, in the legislative proceedings, the CCP and NPC have absorbed diversified groups to make proposals and pass laws. Though the votes are still taken within the CCP’s authoritarian framework, on non-sensitive affairs the CCP’s supervision has more political rather than practical implications. The process is also similar to western democratic participation, which is a good sign for the development of a rational criminal justice system. What are problematic are the supreme power of the police and the collective misconceptions of the social control effects of criminal law. Wider participation will definitely have positive influences on the making of criminal law, such as rescue the declining moral cohesion, fight against monopoly of bureaucratic power, and restrict biased opinions, but since numerous representatives still favor the utilitarian belief of penal sanctions, there remains lack of efficient restraining agents and institutions against state power expansion.

In all, public mood and public participation reflect the role of the public in the Chinese criminal law making. Examination of public impacts on law making suggests that the Chinese legislation has become more and more inclusive. The public influences criminal legislation in a diversified way, depending on the ways that the opinions are formed, represented, and controlled. Impacts of the public on criminal law can be both positive and negative. On one hand, if decision makers are able to view public mood in a rational way, that is, being responsive and keeping away from an instrumental use of the law, legality of the law will be better maintained. On the other hand, much still depends on the efforts of the government to introduce in more social forces against the
dominant power in the legislative proceedings, though the current power structure remains hard to change.

8.1.2.2 Political Influences: Focusing on Social Stability and Public Security

As it has been claimed, in the Chinese party-state, both of the public and political streams demonstrate prevalent influences of the Party’s preference and supervision. It is the CCP that holds the deciding power of law making. In Kingdon’s model, the political stream consists of public mood, shift of administration and judiciary competition. According to him, in the US the mood-election combination plays the most important part in consensus building. In China, primary changes of administration of the CCP are the elections of the National congress of the CCP, which generate the new general secretary and central committee every 5 years, bringing in policy changes. From Jiang’s “Three Represents” theory⁶⁰⁷, to Hu’s “Harmonious Society”⁶⁰⁸, and subsequently to Xi’s “Chinese Dream”, the goals of the CCP have undergone transformations. The policies, with shifting focuses of the presidents, shaped the development of Chinese criminal law. Two policies during President Hu Jintao’s administrative period that had impacts on the eighth amendment to Chinese criminal law were “harmonious society” and “promotion of public security”. “Harmonious society”, as the key feature of President Hu

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⁶⁰⁷ “Three Represents” is a guiding socio-political theory credited to Jiang Zemin, which was ratified by the Communist Party of China at the Sixteenth Party Congress in 2002. Jiang Zemin first introduced his theory on February 25, 2000. The official statement of the ideology stipulates that the Communist Party of China should be representative to advanced social productive forces, advanced culture, and the interests of the overwhelming majority.

⁶⁰⁸ “Harmonious Society” is a key feature of Hu Jintao's signature ideology of the Scientific Development Concept developed in the mid-2000s, being re-introduced by the Hu–Wen Administration during the 2005 National People’s Congress. The philosophy is recognized as a response to the increasing social injustice and inequality emerging in the Chinese society as a result of unchecked economic growth, which has led to social conflict.
Jintao’s signature ideology of the “Scientific Development Concept” developed in the mid-2000s, was focused on the fights against social injustice and inequality. First raised in 2004, it was composed of a number of strategies to improve the livelihood of the public and enhance equality. Compared with former policies that were mainly targeted on economic progress, “harmonious society” shifted the attention to political, social and cultural growth to avoid social conflicts. However, it gradually developed into “stability at all costs”, which consistently justified surveillance and repression against the public. The concept of “promotion of public security” was originally noted in the 17th National Congress of the CCP in 2007. After that, “security provides a lens through which more and more problems are viewed, a hazardous phenomenon neatly captured by the tag securitization.” In contrast with the reports before, the 2007 report of the National Congress of the CCP especially elaborated techniques of “security protection” in the section of “enhancing social management and maintaining social stability” under the theme of “accelerating social development with the focus on improving people's livelihood”, rather than the traditional sections of “national defense” or “international relations”. The shift suggests that the CCP considers current public security as the main concern of the series of Chinese security problems. The 18th National Congress of the CCP continues to expand the conception of security to other non-traditional areas, which is quite similar to the extensions of western definitions of security in the late 20th century.

Accordingly, the eighth amendment to Chinese criminal law, with the largest number of changes, was promulgated with this background, emphasizing the pursuits of public security and social

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stability. Lucia Zedner describes security as “a slippery and contested term”. Actually both “stability” and “security” can mean different things under different circumstances. When the social problems are categorized as these “law and order” policy priorities, they will get more chance of being solved or repressed by the officials. Hence, why do agendas rise and become prominent in China? Demands from the bureaucrats matter; still, that the problems, which have been floating in the Chinese society are coupled with special policy focuses of the authorities also determines the speed at which they are able to be bring about legal changes. This is the underlying logic why the Chinese criminal law is expanding with a preventive tone. However, while recognizing the necessity and desirability of administrative discretion, how to channel and control such discretion to insure a proper degree of responsibility remains a tough issue. Who makes the final decision remains unknown. The current realities of the legislative process are such that efforts at legislative revision and recodification are likely to produce only changes of degree, and the necessity for the responsible exercise of discretion of the authorities will continue to be of vital importance.

Fortunately, although power relations take time to change, since 2008, the standing committee of the NPC has been trying to make legislative plans every year. The legislative plans are attempts to maintain the legality and legitimacy of the law. The plans, set by the Legislative Affairs Commission of the standing committee under the supervision of the CCP, outline the

\[\text{811} \] Xiaoyang Qiao, “To Enhance the Legislative Project” The People’s Congress of China (25 December 2014).

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workload of the standing committee in law making for the next year.\textsuperscript{612} Observations of existing plans in 2008, 2009, 2010, 2013 and 2014 are able to reflect some positive characteristics of the Chinese legislation. For instances, to enhance “democratic participation” and “professionalism legislation”, goals of current legislative plans, have gradually been institutionalized in practices.

On democratic participation, compared with before, Chinese law making have absorbed more opinions from the public and those marginalized groups. The process reflects characteristics of “consultative authoritarianism”: the CCP has displayed increased concerns for the feedbacks from the public and intellectuals on non-sensitive affairs to enhance its legitimacy. Since justice and equality are often regarded as being of more relevance to criminal procedure than to the substantive criminal law, criminal law legislation involve more and more participation with less political and bureaucratic restrains, which is quite similar to western democratic negotiations. On “professional legislation”, the legislation itself is an elite-led intra-bureaucratic debate. The criminal justice system is a creature of its professionals, and their satisfaction appears to be critical.\textsuperscript{613} The 2014 legislative plan also claims that decision makers ought to improve the quality of the proposals through assessing the necessity, conditions, timing, and effect of revising the law both before and after their promulgation. The standing committee of the NPC has not taken post-revision evaluations of the eighth amendment to Chinese criminal law since its enactment in 2011. A detailed regulation of the assessment needs to be worked out, including not only the deterrent effect of the revisions, but also the compatibility with the administrative penalty system, judicial costs, implementation status, trend of the international development of

\textsuperscript{612} Songshan Liu, “Reflections on the Chinese Legislative Plan” (2014) 12 Political Science and Law 86-96. The commission did not make the plans in 2011 and 2012, and the legality and necessity of making the plans are repeatedly criticized.

criminal law and so on. Besides, “it also seems reasonable to suggest the potential utility of
informing the public about some of the more important issues, their temporary resolution in law
change, and the resultant impact.”614

Overall, this section examines legal renew as a policy window for the changes of Chinese
criminal law. Public involvements and political guidelines play the most important parts in the
making of Chinese criminal law. With the pursuit of public security, public emotions and police
demands are the two main factors that lead to the shift. Under the current power structure, being
cautious of public moods should work in parallel with staying away from penal populism. It is
also essential to broaden the participation in the final stages of law making so that more debates,
especially opposing opinions can be introduced into the legislation.

8.2 Reflections of the Chinese Criminal Justice

8.2.1 Will Authoritarian Regime Necessarily Lead to Harsh Penalties?
Comparative study of criminal policies of the transitional states helps to gain more insights of the
Chinese criminal justice system. The current Chinese criminal justice regime somewhat
resembles that of Turkey, which is transforming into a democratic society with remaining
authoritarian impacts.615 Experiences of the two countries promote thinking of one essential
question: will authoritarian regimes inevitably result in harsh penalties? Or will democratic
process necessarily lead to lenient penalties? It is commonly believed that “democratization is

(4) Journal of Criminal Justice 404.
615 Penny Green, “Criminal Justice and Democratisations in Turkey: The Paradox of Transition”, in Penny
generally suggestive of more liberal, humane and consensual criminal justice practices, especially when contrasted with the arbitrary terror and human right abuses characteristic of authoritarian regimes.616 Research also shows that democratic institutions also matter to the penal practices of various states of the US, including California, Washington, and New York.617 But the answer is not that simple. First, democracy helps to enhance legitimacy but not the legality of the decision. For instance, in the US and UK, since the late 1970s, given the rise of neoliberalism and decline of the welfare state ideal, the criminal justice systems have witnessed a punitive turn, leaving criminological scholars quite pessimistic about the future. The US holds a higher crime rate than many other countries all over the world. In the UK, “the state (modern Britain), or rather the political administration of the day, becomes increasingly powerful, centralized and remote.”618 Research on Turkey’s experiences also suggests that “the imposition upon democratizing countries of Western models of criminal justice policy, without contextual appreciation, many have unforeseen repressive outcomes.619 It is the reactive rather than preventive criminal Turkish criminal justice itself that retains the humane results for the offenders. Thus democracy does not have a direct relationship with the gravities of criminal penalties. The policy transitions rely on the changes of social contexts and discretion of the decision makers at that specific time period. Democracy also does not guarantee lenient sanctions. The institutions have to be under constitutional check like the judicial review system

for legality. For authoritarian countries that would like to survive and transform in the contemporary era, to become democratic is important since it will not only fight against power abuse but also contribute to a more reasoned decision. But the pursuit of rule of law is equally essential to seek what is ethical, fair and just to its own country.

Second, it is hard to compare the harshness of criminal penalties considering the variations of the systems. Comparisons of the boundary of criminal law or gravity of criminal sanctions have to be limited to particular circumstances with fully consideration of social and cultural origins. For example, China does not have preventive orders. In addition, China, as a developing country, has broad spaces for new laws, making it hard to compare the progress of legalization between the east and the west. Even within the western countries themselves, except the main trend the crime control landscape also demonstrates mixed and contradictory pictures with differentiated responses to crime.

Third, under some circumstances the authoritarian regime does have a positive correlation with the expansion or harshness of criminal justice. The pragmatic state seeks to use criminal law as a policy response. In China, the statist orientation was apparent throughout the dynastic era and only intensified when the Leninist conception of a vanguard party was grafted onto an already authoritarian political tradition. The authoritarian regime itself lacks a systematic check and restrain of the dominant power. Under the governance of the CCP it is quite possibly that police force and criminal law will continue to be expanded, if not in laws but in practices. However at

the same time, it has to be noted that the relationship of China between democratic transition is more complicated, since the CCP currently is seeking a new authoritarian model distinct from the western liberal democratic countries, characterized as social and economic prosperity under the strict political control of the CCP. Though the government still maintains control over the scope and content of the discussion, as it has been illustrated, public participation has been boosted in Chinese policy and law making. Furthermore, the Standing Committee of the NPC consults with intellectuals and government officials in the legislative process. “Intellectuals deliberated both behind closed doors, by attending government sponsored meetings, and in the public sphere, at academic conferences or during debates organized by the media.”

They constitute as counter-forces against the authoritarian regime, though it is the CCP that ultimately determines when and how to intervene into the dynamic. Hence “the regime (Party-state) is strong, increasingly self-confident, and without organized opposition” in the foreseen future, but it is not too pessimistic. On the one hand, wide participation in actual policymaking will increase democratic elements to the authoritarian country. Compared with before when it is the CCP that holds monopolized power, the decision will possibly become more rational and humane. On the other hand, attention needs to be paid to other aspects as well, such as systematic protection of the citizens’ constitutional rights, respects of the principles of criminal law and so on.

8.2.2 Is China an Exclusive or Inclusive Society?

Combinations of the political manipulations and public involvement in the Chinese criminal justice inspire a follow-up question: with the impacts of current policing and sentencing practices, is the society exclusive or inclusive? In the US, a variety of researchers have insisted that the US is increasingly becoming an exclusive society due to the punitive turn of criminal justice. Some even contend that the US fight of crime through prisons and jails is a new Jim Crew, or a coercive reallocation of labor. Then how about China? Whether China is an exclusive or inclusive society depends on how to define “exclusive” and “inclusive”. An exclusive society is much concerned with personal protection and the assessment and avoidance of risk. It favors surveillance and imprisonment to facilitate public fear of punishments. On the contrary, the inclusive society emphasizes respect for human dignity, person identity, a sense of public duty and social responsibility. Instead of penalties and blame, it focuses on the obligations of the community to treat or support the underclass. Thus inclusive and exclusive distinct from each other on the approach the society treat the offenders, potential offenders, and the beliefs the citizens hold upon the society about disobedience.

In China, the expanding criminal law, growing police force and rising number of prisoners all suggest an exclusive society with increased repressive and segregation. Governance of the CCP

is the top reason for the police state, but it not the only reason for the exclusion. Rapid urbanization transforms China into a strangers’ society.\textsuperscript{625} The large territory, huge population, declining social trust and intense social polarization raise difficulties of social management. Hence authorities resort to coercion with less cost of time and efforts. This pragmatic solution is similar to the UK policing, which has gone through a managerialism turn in the past decades, based on macro concerns of the system’s effectiveness rather than the traditional moralized justice. The emergence of managerialism, deemed as the outcome of neoliberal policies in the west, also partly resulted from failures of rehabilitation. Rather than to trace the deep problems of individualized disordered behaviors, the state was inclined to pursue the operational efficiency of policing. It is problematic that concerns of social utility may override principles of responsibility.

Therefore either for the repression of the society, or real policing requirements for social order, China is an exclusive state. Given the “continuing commitment to the primacy of state power”\textsuperscript{626}, there are few chances of fundamental reorientation. In criminological literature, scholars who are concerned of western social exclusion tend to suggest resorting to community-based correction to reduce the segregation. What they expect is the shift from criminalization of social policy to the socialization of criminal justice and crime prevention policies. For instance, Gordon Hughes prefers an inclusive, civic, and safe cities model in contrast to the models of the fortress,

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\textsuperscript{625} Anxieties of risks, such as fear of minor crimes of theft, robbery, and fraud deteriorate social cohesion.

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privatized cities, and the hierarchical, paternalistic cities. While in China, though both the scope of degree of public participation has been intensified, Chinese society lacks spaces for the communities to self-censor. The CCP is unwilling to distribute power among the social groups. One obvious difference between the politicized Maoist period and the economically focused post-Mao leadership has been the current state’s reluctance to endorse, much less encourage, popular protests. Since it fears social protests, social empowerment remains slow. The state power remains strong and solid even it has introduced new “technologies of the self” with the “scientific social engineering and socialist planning” combined with neo-liberal strategies of “governing from a distance”, which are much more gentler.

Therefore, surveillance from the government, distrust between the public members, and over-reliance on criminal penalties to punish and deter, make the society even more exclusive. In the legislation, consultation may generate popular expectations for inclusion and responsiveness, but for the society as a whole, the change will take a long time. We really should reconsider what is a good society, and how it will be achieved.

8.3 Conclusion

In all, the dissertation aims to explore the social, legal and political rationales of the preventive shift of the Chinese criminal law. Based on John Kingdon’s theory of the multiple streams

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approach (“problems, policies and politics”), it seeks to explain the origins of the legislative process and the outcomes by examining the role of public opinion, policy experts, and political actors in the making of the eighth amendment to Chinese criminal law. The dissertation changes the following three aspects of MSA to adapt it to the Chinese case. First, the CCP shapes the development of all the three streams, even though its role is mainly discussed in the political stream. In the one party state, the CCP will intervene the focusing events as well as the decision-making process at any time when needed. Thus different from the model, in which the three streams operate independently of each other, the political stream in China has deciding impact on the other two streams. Second, lack of competing parties and interest representation in China usually leaves the policy agenda unchanged until serious problems take place, so how much attention the focusing events draw plays an essential role in agenda making. That’s also one of the reasons why the dissertation emphasizes on the rise of the internet for spreading the news in the problem stream. Third, due to the absence of political competition, it is rare to see consistent advocacy of proposals in the policy stream. Compared with the West, consensus building takes less time in China. Accordingly, the final result of agenda making requires extra check and review.

Based on the modified framework, the dissertation argues that in authoritarian China, the prominence of risk control through criminal justice methods is a state response to uncertainties generated through reforms under the Chinese Communist Party’s leadership. Under the influence of the policy of pursuing public security, the legislation not only acts quickly in response to public emotion, but also to the social control demands of the police. It also gains more support through the responsive and inclusive process of legislation, even though most of the time it
remains a consultation with the elites in the framework set by the CCP, including representatives of Lianghui (“two meetings”), government ministries, academics, lawyers, and others. The current legislation of criminal law enhances the CCP’s legitimacy. However, without the opposition party, the free media, and the system of separation of powers, preventive techniques pose more changes to the authoritarian state. How to restrain the expansion of criminal law remains a critical issue for consideration. It is not only a topic for legal scholars, but also for political scientists. Otherwise, criminal law making will turn into a too “bold” project in China.

The dissertation relates changes of Chinese criminal law to the social and political context of China. In contrast to previous studies that examine these two topics separately, the dissertation is the most updated research that combines them. It is not only a study of the law but also the current Chinese society. Besides, the dissertation also resorts to experiences of the western countries in the realm of criminal justice as references. The characteristics of the Chinese law making are not only examined through its own practices but also those of the other countries. In this way, the dissertation also makes contributions to international comparative studies of the law.

However, due to the topic and scope of the dissertation, the research has not answered a number of questions. The un-answered questions are left for future studies. For instance, the ninth amendment to Chinese criminal law has taken effect in November 2015. With a number of changes on terrorism offences, it manifests a continuous pursuit of public security. Future research will be able to examine whether there is a similar preventive shift, and how much the process of Chinese criminal law making shows an extent of continuity. Another possible research
project is that legislation is simply the first step of the research. Law in action differs from law on books. Future studies can add in more practices regarding the implementation of Chinese criminal law to gain a more complete picture of legal reform in China.
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