A comparative study of the legal evolution and cognate offences of picking quarrels and provoking trouble

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Abstract

In recent years, the discussion of picking quarrels and provoking trouble has become increasingly close in Chinese society and has attracted the attention of legal scholars and deputies to the National People's Congress (NPC). Since 1997, when picking quarrels and provoking trouble were criminalised in mainland China, they have been regulated and improved by the Amendment (VIII) to the Criminal Law of the People's Republic of China and related judicial interpretations. However, the criminal law of picking quarrels and provoking trouble is still ambiguous and open-ended, easily blurring the boundaries with other crimes, which has led to concerns in the academic and social communities that it has become a new "pocket crime". Therefore, it is important to study, from a legal history perspective, other social control laws that are cognate with the current picking quarrels and provoking trouble in mainland China at different periods and legal systems. It is important to reveal their legal evolution, social impact and the path of rule of law construction.

This paper adopts an empirical and comparative approach to analyse the legal evolution of picking quarrels and provoking trouble, starting from its legislative origins and background. At the same time, it focuses on the most controversial issue of picking quarrels and provoking trouble - its survival or abolition - and analyses it.

Keywords: legal history, comparative law, picking quarrels and provoking trouble, Chinese law, socialist law

*I Sorting out the history of social management laws*

The legal control of public order and morality is not unique to the modern socialist legal system, but has long been an important tool in the implementation of moral norms in Chinese history. In the following, the author will sort out the crimes of social order in the history of the legal system, mainly the crime of "Doing What Ought Not to Be Done", in the order of historical development.

*1. The feudalist-imperialist period - the beginning of the concept*

Doing What Ought Not to Be Done (不应得为) was also known as "不应为" and "不当得为" in different periods of time, literally translated and understood, "不应, 不当" means should not or improper, while "为" refers to a thing or an act.

In the General Code of the Tang Dynasty where the crime was first prescribed, legal interpretation of this crime as follows: "It is a situation that is not in the law or command, but is not morally justified.” **[[1]](#footnote-1)** In the Ming Dynasty, Code of Ming judicial interpretation explains it as, “What is not ethical and clean is what should not be done, and if you do it, it is a crime. “ **[[2]](#footnote-2)**

In the mainstream view of scholars of Chinese legal history, this idea that doing something improper should be punished comes from the Book of Documents, specifically recorded in the version of the Book of Documents · Dazhuan quoted in volume 648 of the Taiping Yulan, an encyclopaedic book of the Song Dynasty.

"Those who do things that should not be done, are not moral, and who recite inauspicious words should be punished with the penalty of ink on face." **[[3]](#footnote-3)** The Book of Documents is a compilation of records of conversations between kings and courtiers from ancient China. In collating the laws of the Zhou dynasty it cites the section on punishment from the Rites of Zhou - criminal law part, a historical book describing the politics of the Zhou dynasty. Perhaps this is not an accurate historical source for the period, and it is possible that it may have been a later source or an error. Both the Rites of the Zhou and the Book of Documents were briefly lost in the Qin dynasty, after the Zhou dynasty, for war and political reasons. But in the Han dynasty, which immediately followed, the following cases and reflections are recorded one after another in the historical book” Book of Han “.

"Immoral people like robbers and murderers are the cause of the people's suffering. They should not be allowed to be redeemed by money to offset their crimes; hiding and conniving at criminals should be crimes that are not in accordance with the law, and there are those who believe that such provisions should be dispensed with if the punishment is too severe, but if it is decreed today that such crimes can be redeemed by money, and such facilities are provided to the offenders, how should they be taught to behave in a disorderly manner?" **[[4]](#footnote-4)**

"The Lamented King of Changyi had ten singers and dancers headed by Zhang Xiu, they were not his concubines nor did they bear him children, as ordinary citizens nor were they officials to whom they belonged, they should have gone home after the death of the Lamented King, Taifu Bao took the liberty of keeping them in the name of the Lamented King, which is something that should not be done" **[[5]](#footnote-5)**

"A man named Tian Yannian submitted a petition saying, "Merchants hoard ritual objects for use in tombs and sell them for exorbitant profits when people are in dire need, this is not what merchants should do as courtiers and request the prefect to confiscate these items." **[[6]](#footnote-6)**

The above three passages, recorded in different sections of the Book of Han, all record the same concept at the same time, namely that one should not do what one should not do. But the cases at this time do not show us a systematized measure of punishment and treatment, which suggests that the punishment still did not produce further clarity as the punishment in the Han dynasty's Law (Code) did. It is more likely that this was because the Confucian doctrine was established as the political guiding principle of the Han dynasty, and that it was quoted as a case law or as part of the Confucian classic Book of Documents.

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

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

"The numerous things that should not be done are those who do them, forty strokes with a small bamboo stick (if the crime is not included in the law, but is considered something that should not be done); those with serious circumstances, eighty strokes with a large bamboo board. Judicial interpretation: the number of minor offences is so great that the law cannot provide for them all, so they are interpreted by analogy with other similar laws. If the offence cannot be found in any similar provision in the law at all, the penalty will have to be imposed by the use of the word ". Doing What Ought Not to Be Done", and discretion will be exercised," **[[7]](#footnote-7)**

From the above articles and judicial interpretations, we can understand that in the Tang law, in order to apply the offence of ". Doing What Ought Not to Be Done" to punish a certain act, the following points had to be reached:

1.First point is that the case must be one involving a minor offence;

2.Second point is that there is no provision in the relevant legal documents for such an act to be punishable, so that a conviction cannot be made on the basis of the offence in the law;

3.Third point is that no similar provision can be found in the relevant legal documents, so that a judgment of conviction cannot be made on the basis of the relevant offence in the analogous statute.

4.Fourth point is that there is also no provision in the relevant documents relating to such an act, but the act does violate an ethical obligation or the basic order of life.

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

“Yang Si, who was in charge of the Shanglin garden, asked for permission to build a new palace in the garden for the monarch's recreation.”

“The jurisprudence held that the current garden architecture was frugal but not unsuitable, that there was no need to start work on a new palace, that Yang Si was a flatterer, and that his proposal would tarnish the image of the monarch, like the faint-hearted rulers of history, only knew how to spend resources on self-indulgence. He asked for advice on matters that he should not have asked for advice on, just like doing what the law says should not be done. He should have been demoted as a warning to the Chaotang (The place where the officials meet, here refers to all officials). “**[[8]](#footnote-8)**

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

One is the case of Guo Wei's wanton flogging of a soldier. from legal interpretation of the Tang code. “Guo Wei, as an officer in the garrison, had behaved in a loose manner and whipped the soldiers, which was a very bad incident in terms of reason and should be severely punished. However, as the law does not provide for officer discipline and assault on a soldier, the sentence was imposed used the crime of Doing What Ought Not to Be Done. The sentence should have been heavier, but as he had confessed his guilt, he was given a lighter sentence of 40 strokes with a small bamboo stick. " **[[9]](#footnote-9)**

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

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

The Ming and Qing laws actually inherited the "Doing What Ought Not to Be Done" law from the Tang Dynasty, and there were almost no fundamental differences and changes in the sentencing and provisions.

The "Doing What Ought Not to Be Done" law in the Code of Ming stipulates the following: “Anyone who does something that should not be done, small bamboo board beaten forty times, not in other legal provisions, the circumstances are serious, with a large bamboo board beaten eighty times" **[[10]](#footnote-10)**

The law of the Qing Code- miscellaneous crimes -Doing What Ought Not to Be Done provisions are as follows: “Anyone who does something that should not be done will be beaten with forty strokes of the small bamboo board, and eighty strokes of the large bamboo board for serious cases. If the law does not specify, according to the seriousness of the crime case sentencing.” **[[11]](#footnote-11)**

However, due to the expansion of the Qing Dynasty, a multifaceted empire. Mongolia, the frontier areas were once again united with the mainland under one country. With a large number of Chinese immigrants, the original traditional legislation and customary law used to regulate the Mongolian local summary of the Mongolian Law, and its development of the Frontier Management Sector Regulations, is no longer good enough to regulate the social transformation and immigration brought about by the contradictions and conflicts. At this time, the "Doing What Ought Not to Be Done" clause in the Qing law was used extensively. This was perhaps the first time in Chinese history that the law was widely used to regulate social problems.

For example, in the gambling case of Ordos‘s Badari in 1735, the first year of the Qianlong era, according to the confession of Samu Balasi, "I am a subordinate of Alabtanzo, Ordos’s Badari married my sister Nomimusu as his wife. Yongzheng thirteen years in March, not let other Jasagh people mixed, Badali had my sister Nomi Musu stay in my home, return to the hometown, want to bring the carriage and animals, and take his wife with him. In the first month of this year, Badali again said that he did not find the carriage and animals, came on foot, living in my home is true. I don't know how he gambled in the place". The case ruled that: "Samu Balasi knew that for the sake of not allowing him to let other Jasagh people stay, repeatedly ordered to prohibit, and against the ban to stay Ordos’s Badari, is a fault. Therefore, Samubarasi was flogged 40 lashes according to the law of Doing What Ought Not to Be Done. **[[12]](#footnote-12)**

The background of this case is to adopt the division and rule of the Mongolian land, strict demarcation of the pastoral boundaries of each ministry, the division of the population, strictly forbidden to communicate with each other, as far as the tribes, so that the three major Mongolian Sourth, North, West do not belong to each other, do not communicate with each other; as far as the personnel, strictly forbidden to cross the border to The ban also stipulated that "the people from the frontier were not allowed to leave the country. At the same time, the prohibition stipulated that "when a People from the frontier left the country, he should present himself at the banner's （Administrative divisions of Mongolia）office. In case of non-compliance, the negligent banner-keeper, deputy banner-keeper, seneschal, jawans, and chiefs would be punished together. **[[13]](#footnote-13)**

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

*II Nullum crimen sine lege of the western wind*

In the nineteenth century, all Asian countries were in the stage of being awakened by Western civilization. In contrast to the Qing Dynasty, the Japanese government abolished the Shogunate, re-established the rule of the Emperor and began the Meiji Restoration, a comprehensive study of Western institutions and technology. Japan, as a member of the old Chinese legal system, was also influenced by the Tang Dynasty's Article of "Doing What Ought Not to Be Done", and also had a similar clause, which has exact same name. in Japanese law. This article was started in Yanglao Code at 757 A.D. The sentence and main content of this article are highly consistent with the "Doing What Ought Not to Be Done" of Chinese law.

<Code of Shinritsukouryou>, “Anyone who does something that is not in accordance with the law shall be beaten thirty times with a small bamboo board and seventy times with a large bamboo board if the circumstances are serious.” **[[14]](#footnote-14)**

<Code of Kaiteiritsurei> · Miscellaneous crimes · Doing What Ought Not to Be Done: 298. Whenever two or more people break a law that should not be broken, the leader shall be sentenced to thirty days of forced labor and the accomplice to twenty days; if the leader is sentenced to seventy days of forced labor and the accomplice to sixty days. If there is a difference in the severity of the offense, the penalty is determined by the severity of the offense, not by whether the offender is a leader or an accessory.290 Anyone who destroys a statue of Buddha and commits that offense should not be treated with severity. 291 Anyone who commits the crime of obstructing the whole because of his words shall not be dealt with severely. **[[15]](#footnote-15)**

In Japan's early reforms, compared with the completely classical <Code of Shinritsukouryou>, the <Code of Shinritsukouryou> “Doing What Ought Not to Be Done “distinguishes criminals from masters and subordinates, and emphasizes multiple "situations that should not be taken seriously”, further weakening the offense. In 1882, the Penal Code was promulgated in the fifteenth year of Meiji. The principle of Nullum crime sine lege has been established in Japanese law, and the “Doing What Ought Not to Be Done “has completely disappeared. **[[16]](#footnote-16)**

At the same time, the Qing Dynasty lost many wars, especially after the defeat of the Sino-Japanese War of 1894. The Westernization Group who "learned from the foreigners in order to gain command of them" failed by learning Western technology. The reformists who believed that the government needed comprehensive reforms gradually began to emerge and led the Hundred Days Reform. Although it was repressed by the government, due to the 1900 Incident and natural disasters, the government still allowed the reformers to participate in government reform after being hit one after another.” New crime law of Qing “was born during this period, which was influenced by a lot of Japanese criminal law and legal thinking, and did not continue the structure of the traditional "Qing Law". "Doing What Ought Not to Be Done" is completely abandoned in this code because of the statutory crime and punishment. The government of the Republic of China then chose to inherit the main body of the Daqing Criminal Law and continued the concept of Nullum crime sine lege. **[[17]](#footnote-17)**

*III The Socialist Period*

I would like to begin here with a quote from Professor Haruo Nishihara: “I am not bothered by the fact that socialist criminal jurisprudence unexpectedly determines the scope of crime ‘from above’, even though socialism was originally supposed to be based on "the people". **[[18]](#footnote-18)**

*1. The early years of the founding of the state: social order offences based on counter-revolution*

Prior to the establishment of New China by the Communist Party, a comprehensive study (legal transplantation) of Soviet criminal law began during Soviet China**.** In 1934, the Central Revolutionary Bases implemented the Regulations of the Chinese Soviet Republic on the Punishment of Counter-Revolution. This law is supposed to be a parody of Article 58 of the Soviet Union's 1926 Criminal Code. It defined the crime of counter-revolution as "all those who seek to overthrow or destroy the Soviet government and the rights gained by the democratic revolution of the workers and peasants, and who intend to maintain or restore the rule of the gentry and landed bourgeoisie, by whatever means, are regarded as counter-revolutionary acts and shall be severely punished". **[[19]](#footnote-19)** This intention was incredibly vague and based entirely on subjective assessments, and in the Soviet purges, according to information verified by the State Security Committee on 13 March 1990, 3.7 million people were sentenced by judicial and non-judicial authorities for this provision from the 1930s to 1953, of whom 790,000 were shot. **[[20]](#footnote-20)**

The creation of such a vague provision was closely linked to the state of criminal law practice in the Soviet Union at the time. The 1924 Basic Principles of Soviet Criminal Law provided in its section 3 that: "In the case of socially dangerous acts not directly provided for by criminal law, the basis and scope of liability and the methods of social defence shall be determined by the courts in accordance with the criminal code and in accordance with the minor nature of the crime. The court shall decide on the basis and scope of liability and the methods of social defence in the case of a socially dangerous act which is not directly provided for by criminal law. **[[21]](#footnote-21)** The 1926 Soviet Criminal Code and the subsequent criminal codes of the Soviet Union's constituent republics, enacted two years later, established the rule of analogy based on this provision. **[[22]](#footnote-22)** And the Regulations of the Chinese Soviet Republic on the Punishment of Counter-Revolution, which served as an imitator, also established this system, as did the mainstream thinking at the time: any counter-revolutionary crime not covered by these regulations may be punished in accordance with the similar provisions of these regulations (Article 38). **[[23]](#footnote-23)**

The reason for the creation of analogism was to allow for greater flexibility in the early years of socialism to accommodate the different types of crimes that occurred in society, as was the case with the application of "shall not be" in the Mongolian frontier regions mentioned above. The People's Republic of China faced the same problems at the time of its birth. The law was incomplete, social order was chaotic and it was still in a state of civil war.

Thus, in early legislation, the new Chinese criminal lawyers generally favoured the continuation of the analogical system and the formal rejection of statutory criminalism.

Thus the Regulations of the People's Republic of China on the Punishment of Counter-Revolution, issued in 1951 after the founding of the state, also contained a continuation of the analogous system found in the counter-revolutionary regulations of the old Soviet Republic, Article 16 of which provided that other criminals with counter-revolutionary aims not provided for in these regulations may be punished analogy with similar crimes under these regulations. **[[24]](#footnote-24)**

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

In 1979, China enacted its first Criminal Law. Article 160 of it defines the crime of hooliganism as a series of bad acts that disrupt public order, including gathering a crowd to fight, provoking trouble, insulting women and other similar hooligan activities. Under this article, particularly egregious acts are punishable by a term of imprisonment of up to seven years, detention or control. For the leading members of a hooligan group, the penalty can be up to a term of imprisonment of more than seven years. Since then, the Standing Committee of the Chinese People's Congress has also formulated judicial interpretations that raise the penalty for hooliganism to the death penalty. **[[25]](#footnote-25)** The application of the crime of hooliganism reached a peak in the last century during the "severe crackdown on serious criminal activities". Some seemingly purely moral and ethical issues were elevated to legal issues and sentenced as hooligans.

In 1996, Khogjild was taking a break at the factory when he heard a woman's cry for help coming from nearby. He and his worker, Yan Feng, went to check and found a woman raped and killed in a nearby women's toilet. The two then went to a nearby police booth to report the incident. However, because of his reporting behaviour and minority status, Khogjild was quickly identified by the police as the murderer. After a first instance trial at the Hohhot Intermediate Court, Khogjild was found guilty of intentional homicide and hooliganism and sentenced to death and deprived of his political rights for life. on 5 June, the Inner Mongolia High Court rejected Khogjild's appeal and upheld the original sentence. In the end, Khogjild was executed on 10 June, despite a serious lack of evidence. **[[26]](#footnote-26)**

In addition, in a Xi'an case that occurred in 1983, the subject, Ma Yanqin, was a 42-year-old retired divorced woman with two daughters. Ma Yanqin was fond of social events and often held private dances at her home. The police arrested Ma Yanqin in September and charged her with a criminal gang of hundreds of hooligans involved in a house party at her home. Ma's dance partner was also arrested. The court ruled that Ma had organised numerous hooligan dances, lured young men and women into hooliganism, engaged in illicit sexual relations with dozens of people, and allegedly threatened and lured her own two daughters for the hooligans to play with, among other charges. Ma Yanqin was sentenced to death,. Ma Yanqin appealed the sentence but did not obtain a valid result.1985 Ma Yanqin was escorted to the Xi'an City Stadium for a public trial meeting and was then taken to the northern suburbs penal colony where he was executed by firing squad. **[[27]](#footnote-27)**

The above two cases show that the crime of hooliganism was extremely abusive and pervasive, and that the maximum penalty for hooliganism was raised to the death penalty because of the "strict crackdown", which led to many tragic and wrongful cases. At the same time, we can still see shades of the "Doing What Ought Not to Be Done" in the crimes of counter-revolution and hooliganism, but the moral standards have changed, with the new socialist order and morality partially replacing the old Confucian-dominated moral code.

*2. Provocations after the reform and opening up*

On 14 March 1997, when the National People's Congress amended the Criminal Law of the People's Republic of China, it abolished the offence of hooliganism and divided some of its offences into the offences of "forcible indecent assault and insult on women", "indecent assault on children", "public disorder", and "public disorder". The amended Criminal Law came into effect on 1 October 1997. The crime of picking quarrels and provoking trouble was established in Article 293 of the Criminal Law in the Provisions of the Supreme People's Court on the Implementation of the Criminal Law of the People's Republic of China for the Determination of Crimes, adopted by the Trial Committee of the Supreme People's Court on December 9, 1997. **[[28]](#footnote-28)**

The crime of picking quarrels and provoking trouble is equally vague compared to other disintegrated crimes, which makes it recognized as a continuation of the social control crime of hooliganism, which remains to this day.

*Current problems with the offence of provocation and disorder*

*1. The problem of Nullum crimen sine lege*

The offence of picking quarrels and provoking trouble differs from the historical "Doing What Ought Not to Be Done" law in that it only regulates offences and moral issues that are not provided for by law. The offence of picking quarrels and provoking trouble is different from the historical "shall not" law, which regulated only offences and moral issues not provided for by law. In contrast to other offences in the Criminal Code, which include four different aspects of criminal behaviour, the terminology of the law is too vague and difficult to interpret, and there is no standard measure of the seriousness of the circumstances.

The lack of clearly defined criteria makes its application controversial. Differences in what constitutes the offence of picking quarrels and provoking trouble between jurisdictions and judges have led to inconsistent judicial decisions and weakened legal certainty and predictability. Citizens should be able to understand its meaning and thus prevent breaking the law. The current judicial interpretation places: "Those who use information networks to commit crimes of abusing or intimidating others in bad circumstances and disrupting social order, as well as those who fabricate false information, or spread it on information networks knowing that it is fabricated and false, or organise or instruct people to spread it on information networks and cause serious disorder by raising a ruckus, are guilty of picking quarrels and provoking trouble shall be convicted and punished." **[[29]](#footnote-29)** further broadens the scope of the offence of picking quarrels and provoking trouble, departing from the principle of Nullum crimen sine lege.

*2. Equivalence of crime and punishment*

The basic penalty for the offence of picking quarrels and provoking trouble is imprisonment for a term not exceeding five years, detention or control, and in case of aggravating circumstances, imprisonment for a term not less than five years but not exceeding ten years. **[[30]](#footnote-30)** The upper limit of this penalty is extremely high and because of the difficulty of determining the aggravating circumstances sometimes leads to heavier sentences for minor offences and lighter sentences for major offences. Unlike the historical offence of Doing What Ought Not to Be Done, if this provision needed to be invoked in the Tang Dynasty, the requirements had to be met: the first was that there was no provision in the relevant legal documents for the punishment of such conduct, and therefore a judgment of conviction could not be made on the basis of the offence in the legal article; the second was that no similar provision could be found in the relevant legal documents, and therefore a judgment of conviction could not be made on the basis of the analogous to the relevant offence in the statute to make a judgment of conviction.

The Zhaoqing graffiti incident is a typical case in which a young man, Ding Man, was arrested for painting graffiti on the walls of a street building. Initially, because the criteria for determining the offence of intentional destruction of property stipulated that the economic loss needed to be RMB 5,000 or more to be considered a crime. The prosecutor's office found that Ding Man's graffiti had caused a total of 5,638 yuan in damage to property. However, the lawyer pointed out that the price determination issued by the procuratorial authorities was obviously unreasonable, with several of the price determinations differing significantly from the actual loss. As a result, the lawyer suggested that the actual damage did not reach RMB5,000 and therefore the charge of intentional destruction of property was not established. However, the prosecution quickly changed the charge and made it one of picking quarrels and provoking trouble. In contrast, according to the criteria for conviction for provocation and nuisance, it is only necessary to cause damage of more than RMB 2,000 to be held criminally liable. According to Article 275 of the Criminal Law, the crime of intentional destruction of property means that "a person who intentionally destroys public or private property for a large amount or under other serious circumstances shall be sentenced to fixed-term imprisonment of not more than three years, detention or a fine; if the amount is huge or under other particularly serious circumstances, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years". In comparison, the offence of intentional destruction of property is less serious than the offence of picking quarrels and provoking trouble. However, this leads to a result that is often difficult to understand: acts that cause higher damage are considered misdemeanours, while acts that cause lower damage are considered felonies. This contradicts the principle of equivalence of crime and punishment [[31]](#footnote-31)

Doing What Ought Not to Be Done has been the basic Confucian idea of being careful with punishment. The basic punishment was a thin, thick bamboo strip. The number of strokes was between 30-40 and 60-70 for the crime of "not being able to do". For offences that were not very serious, the emphasis should be more on guidance and correction than on punishment for immoral, unreasonable and socially unjustifiable behaviour.

*3. The problem of abuse*

On 27 January 2022, after learning online that a memorial service for compatriots who died in Xinjiang would be held that night at the Liangma River in Chaoyang District, Beijing, Li Yuanjing and some friends went together to the Liangma River Bridge to participate in the memorial service. However, two days later, they were taken away and summoned by police from the local police station, including more than a dozen young people. Surprisingly, they were released a day later without charge by the police as they had not committed any misconduct during the mourning event. On 18 December 2022, Li Yuanjing was again criminally detained by the Beijing Chaoyang District police on suspicion of "gathering a crowd to disturb the social order". On 20 January 2023, she was formally arrested by the Beijing Chaoyang District Procuratorate on suspicion of "picking quarrels and provoking trouble" and detained at the Chaoyang District Detention Centre in Beijing. [[32]](#footnote-32)

On 28 December 2020, a case of conviction for speech was heard in the Pudong New Area Court in Shanghai, involving the defendant Zhang Zhan's "provocation" case. The court sentenced Zhang Zhan to four years in prison for picking quarrels and provoking trouble, which will last until 14 May 2024, despite insufficient evidence and insufficient presentation of materials. [[33]](#footnote-33)

This case reveals the abuse of picking quarrels and provoking trouble. The judiciary may use this offence as a tool to suppress dissent and restrict freedom of expression by characterising mourning events and expressions of opinion as nuisance acts, thereby unjustly punishing the participants. Such abuse not only infringes on the legitimate rights and interests of individuals, but also undermines social justice. picking quarrels and provoking trouble, as a social order touting offence, should be used to combat disruptions of social order and order in public places, and should not be abused as a tool to suppress citizens' legitimate actions and freedom of expression.

*Prospects for the development of the offence of picking quarrels and provoking trouble*

As a law regulating a social category, picking quarrels and provoking trouble had some significance in a particular historical period when the law was inadequate, as in the case of its historical predecessor "Doing What Ought Not to Be Done" above, which was a "crime in the In the Mongolian frontier regions of the Qing dynasty, the crime of provoking trouble was used to combat many crimes that had not been regulated by clear laws for some time, and to maximise the punitive function of criminal law. In particular, it made up for the fact that less serious crimes of wounding and violence could not be punished by the crime of wounding.

However, this is not a reason for the continued existence of such vague provisions, whose vagueness conflicts so much with the principle of statutory penalties that they are inevitably abused in judicial practice. Thus, as legislation continues to deepen, and as society progresses. Different countries and different periods of Chinese history have in fact restricted and eliminated vague social order provisions such as picking quarrels and provoking trouble. As in the case of the Meiji Restoration and the revision of the law in late Qing Dynasty in Japan above, and in the later years of Soviet criminal law after the implementation of the 1936 Constitution, the emphasis on legal certainty led to the abolition of the analogy system in the draft criminal code and a shift to the legalism that should explicitly provide for crimes and penalties.

Even though China is currently constrained by its large population and the difficulty of social control, the scope should be gradually reduced, as in the case of hooliganism, while being divided into more specific offences. For example, a separate offence of atrocity could be created for assault and chase, while offences such as intentional destruction of property and gathering to disturb public order could be expanded. Alternatively, the offence could be strictly limited by drawing on the Tang Law's "Doing What Ought Not to Be Done" as a judgement that can only be activated if a conviction cannot be made on the basis of the offence in the statute book.

At the same time, historically, a large number of moral issues and minor offences have been dealt with by local self-governing organisations such as the village elder, in keeping with the Confucian principle of no litigation, and restorative justice for such minor offences would be a solution to repair social relations and guide the offender's understanding to emphasise reconciliation and understanding.

1. Tang Code. Volume27. 450 [↑](#footnote-ref-1)
2. Code of Ming. Volume 26. 48 [↑](#footnote-ref-2)
3. Shude Cheng (1978). Legal examination of the nine dynasties. China Book Council. p105 [↑](#footnote-ref-3)
4. Book of Han dynasty. Volume 78 [↑](#footnote-ref-4)
5. Book of Han dynasty. Volume 63 [↑](#footnote-ref-5)
6. Book of Han dynasty. Volume 90 [↑](#footnote-ref-6)
7. Tang Code. Volume27. 450 [↑](#footnote-ref-7)
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