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2005

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Citation for published version (APA):

Sapio, F. (2005). *Implementing Anticorruption in the PRC: Patterns of Selectivity*. (Working papers in contemporary Asian studies; No. 10). Centre for East and South-East Asian Studies, Lund University. <http://www.ace.lu.se/publications/workingpapers/Sapio.pdf>

Total number of authors:

1

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Implementing Anticorruption in the PRC

Patterns of Selectivity

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Working Paper No 10

2005

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This working paper is published by the Centre for East and South-East Asian Studies, Lund University. The views expressed herein, however, are those of the author, and do not represent any official view of the Centre or its staff.

ISSN: 1652-4128

ISBN: 91-975093-9-6

Layout: Petra Francke, Lund University Information Office

Printed in Sweden by Lund University, Media-Tryck, 2005

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Abstract

In this essay¹ I address what is maybe the most pressing problem regarding anticorruption in the PRC: why in spite of the party-state's repeated efforts anticorruption is enforced in a selective way? Selective enforcement of anticorruption laws has, so far, been the object of just a few scholarly enquiries².

My contention is that unless the concept of anticorruption campaign is discarded in favour of that of anticorruption policy, our reasoning in trying to address this question will remain somewhat circular. While on its surface anticorruption still makes extensive recourse to a rhetoric resembling that of mass movements (*qunzhong yundong*), such similarities are less important than they seem to be. They obscure the existence of a three pronged policy where preventive measures exist alongside repressive and propagandistic ones. While the format employed by the latter might be reminiscent of "campaigns", ideas about law and legality eventually came to play a dominant role in anticorruption. Anticorruption organs' institutional features, seen from the perspective of studies of implementation networks, are not necessarily a reason for anticorruption efforts to be ill-fated. Neither is the content of anticorruption rules and regulations at the central level, according to studies of central-local relations in China. Therefore, using the conceptual framework first devised by Jan Michiel Otto³, I will reframe the problem of anticorruption as an issue in the broader context of law implementation. I will try to detect and describe the main forms of phenomena of selective implementation and explore their causes.

¹ This study is a revised version of a paper entitled "Anticorruption law: why is it selective?" presented at the public lecture series "Focus Asia", Centre for East and South-East Asia Studies, Lund University, November 25 – 26, 2004. It was made possible thanks to a post-doctoral fellowship at the Centre for East and South-East Asia Studies, Lund University, which endowed me with the time and resources needed to further develop and refine my ideas. All of the sources this study is based on were freely accessible in public libraries and bookstores. Thanks to Professor Cheng Wenhao and to an official that I will leave anonymous for sharing some of their insights on corruption during conversation we had in October 2004 in Beijing. I also received valuable inputs from discussions with Oscar Almen, Marrias Burell, Maria Edin, Jonas Grimheden, Hakån Hyden, Johan Lagerkvist and Marina Svensson during a seminar on law implementation held in Uppsala. None of these people have read the final draft of this paper, so I am the only one responsible for any mistakes. Last but not least, I have to thank Professor Roger Greatrex for helping me polish this paper, and Dr. Sandro Sapio for patiently listening to my rants.

² Yan Sun, *Corruption and Market in Contemporary China*. Ithaca: Cornell University Press, 2004, particularly pp. 184 – 189, Young Nam Cho, "Implementation of Anticorruption Policies in Reform-era China: The Case of the 1993 – 1997 'Anticorruption Struggle'", *Issues & Studies*, vol. 37, n. 1, 2001, pp. 49 – 72. Melanie Manion, *Corruption by Design. Building Clean Government in Mainland China and Hong Kong*. Cambridge: Harvard University Press, 2004, chapter four and "Issues in Corruption Control in Post-Mao China", in *Issues & Studies*, n. 9, 1998, pp. 1 – 21.

³ Jianfu Chen, Yuwen Li and Jan Michiel Otto (eds.), *Implementation of Law in the People's Republic of China*, The Hague: Kluwer Law International, 2002, pp. 24 – 25. See also Chen Jianfu, "Implementation of Law as a Politico-Legal Battle", *China Perspectives*, n. 43, September/October 2002, pp. 26 – 39.

Three patterns of selective implementation are already discernible. First, punishment of most crimes takes place inside the disciplinary system by means of “organizational measures” (*zuzhi cuoshi*), means themselves different from either disciplinary or criminal sanctions (*chufen*). Second, laws proscribing graft (*tanwu*) and passive bribery (*shouhui*) are more likely to be implemented than laws punishing other crimes of corruption, as active bribery (*xinghui*), misappropriation of public funds (*nuoyong gongkuan*), possession of property in excess of legitimate income (*yu’e caichan lai yuan buming*), dividing state assets (*sifen guoyou zichan*), fines and confiscated goods (*sifen famo caiwu*). Third, courts are sentencing offenders in ways which are often inconsistent with the graduation mechanism of the criminal law.

The most immediate causes of this phenomenon, I argue, lie in the will to protect local economic interests, and in the broad and unchecked regulatory powers enjoyed by anticorruption organs at the local level. They allow for eschewing implementation of anticorruption laws enacted by the centre, and for continuing illegal practices which are seen as promoting short term local economic interests. Such an exploration provides a sketch of the broad picture of both “mis-implementation” and its underlying causes, and has to be understood as a preliminary study, which limitations can be overcome by an analysis focused on the provincial level⁴.

⁴ My current project on anticorruption in Beijing Municipality is aimed at gaining such an insight.

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1. Short-lived campaigns versus institutionalization

Literature on corruption in China shows the persistent tendency to conceptualize anticorruption policy as enforced using campaigns¹ or in a “campaign-style” way². Paroxysmal investigations meant to last for several years, vocal calls for the reporting of corrupt officials, their cyclic apprehension and punishment are of course some of the means by which anticorruption is carried out. Similarities between the unfolding of campaigns (*yundong*), and the stepping up of the political – legal system’s activity, establishment of anticorruption hotlines and prosecution of “tigers” (*laohu*) with its corollary of well rehearsed degradation ceremonies are just superficial. As a form of “organized mobilization of collective action”³, anticorruption campaigns were characterized by self-denunciations, denunciations and the accompanying bursts of institutional hyperactivity, which in turn shared three main features.

As events, campaigns were carried out intermittently and on an *ad hoc* basis. Their stages developed in a short time sequence and were aimed at fulfilling one or a few core tasks (*zhongxin renwu*). Last, campaign activities relied on weak legal foundations, and were carried out by cadres possessing no legal training⁴.

The anticorruption *strategy*, which reached its most clear-cut formulation in 1993⁵ consists instead of a far more complex set of measures marking a clear departure from the past style of enforcement. The old practice of finding temporary remedies to corruption was replaced by more far-sighted views already in 1982, when regime efforts in this respect were projected on the long term:

¹ Melanie Manion, *cit.* Julia Kwong, *The Political Economy of Corruption in China*. M. E. Sharpe: 1997. Lo Tit Wing, *Corruption and Politics in Hong Kong and China*. Buckingham, Philadelphia: Open University Press, 1993. Lü Xiaobo, *Cadres and Corruption – the Organizational Involvement of the Chinese Communist Party*. Stanford: Stanford University Press, 2000. Zhao Yuezhi, *Media, Market and Democracy in China. Between the Party Line and the Bottom Line*. Chicago: University of Illinois Press, 1998, pp. 72 – 93. Young Nam Cho, *cit.*

² Andrew Wedeman, “Anticorruption Campaigns and the Intensification of Corruption in China”, *Journal of Contemporary China*, vol. 14, n. 42, February 2005, pp. 93 – 116, p. 96.

³ Charles P. Cell, *Revolution at Work: Mobilization Campaigns in China*. New York: Academic Press, 1977, p. 7.

⁴ For instance during the five antis campaign corruption cases were examined and judged by the Committees for Increasing Production and Promoting Austerity, although the basic framework of the people’s courts already existed. “Guanyu Wufan Yundongzhong Chengli Renmin Fatingde Guiding”, (Provisions on establishing People’s Tribunals in the course of the five antis campaign) 21 March 1952, Zhonggong Zhongyang Wenxian Yanjiushi, *Jianguo Yilai Zhongyao Wenxian Xuanbian, disance*, (A Selection of important documents issued since the foundation of the PRC) Beijing: Zhongyang Wenxian Chubanshe, 1992, pp. 125 - 127.

⁵ Young Nam Cho, *cit.*

“Although we have said that *we will not launch a movement* against economic crime, we must make it clear that this is going to be a *constant and protracted* struggle. In my opinion, it will last at least until the day the four modernizations are achieved.”⁶

Since then anticorruption has seen a constant pattern of enforcement substituting the ad hoc one⁷. Anticorruption drives took place for at least 18 of the 20 years from 1980 to 2000, and beyond. Of course this intensification underwent some peaks, as underscored by Melanie Manion⁸, but the “campaigns” temporal sequence of the whole suggests that regime efforts, albeit the unavoidable recourse to the political rhetoric mentioning “anticorruption struggle”(s) (*fanfubai douzheng*), were actually routinized.⁹

The second point of departure from the past is that what was once a sheer repressive strategy embodied by the “denunciation – mobilization – mass trial” tactic was shifted to a new, holistic approach which began being implemented in selected areas in 1988 already¹⁰. Known in Chinese as “education, system building and supervision” (*jiaoyu, zhidu, jiandu*)¹¹, the new look of anticorruption in the nineties does not entail a crescendo of different stages culminating in the mass trial. Rather, it sees the parallel and simultaneous implementation of three different kinds of measures throughout

⁶ Deng Xiaoping *Wenxuan Di'er Juan*, Beijing: Renmin Chubanshe, 1994, p. 403. Translation in *Selected Works of Deng Xiaoping, Volume II*, <http://english.people.com.cn/dengxp/contents2.html>. Last accessed 31 January 2005. Italics mine.

⁷ To be precise, most of the literature has identified the following campaigns: 1982 campaign against economic crime, 1983 – 1986 rectification campaign, 1988 – 1992 anticorruption campaign, 1993 – 1997 anticorruption struggle. This was followed by yearly re-launches which culminated in the unveiling of the Yuanhua scandal in 2000, the case of Ma Xiangdong and Mu Suixin in 2001, and very recently the scandal involving Wang Daosheng, former secretary general of Hunan Provincial Government who accepted bribes totaling four millions yuan.

⁸ *Cit.*

⁹ Young Nam Cho, *cit.*, and Yang Dali, “Anticorruption and public management in China”, Paper presented at the Conference entitled “Modern State Structures in the Chinese World”, Asian Research Center, London School of Economics, London, UK, 10 – 12 May 2002.

¹⁰ This new tactic was first devised in Shenzhen. There are weak signs that Shenzhen could be considered a pioneering implementer of anticorruption policies. For instance, the reporting system later extended to the national level was first devised by the Shenzhen leadership in March 1988. *Zhongguo Jiancha Nianjian Bianjibu, Zhongguo Jiancha Nianjian 1989*, (China Procuratorial Yearbook) Beijing: Zhongguo Jiancha Nianjian Chubanshe, 1991, p. 1.

¹¹ This new approach was finalized by a circular issued by the CC of the CCP on 3 January 2005: “Zhonggong Zhongyang guanyu yinfa ‘Jianli jianquan jiaoyu, zhidu, jiandu bingchongde chengzhi he yufang fubai tixi shishi gangyao’ de tongzhi” (Central Committee of the Chinese Communist Party Circular on enacting the Program about the completion of a repressive and preventive anticorruption system based on education, system building and supervision), *Xinhuanet* (New China Net), 17 January 2005, http://news.xinhuanet.com/zhengfu/2005-01/17/content_2469429.htm. Last accessed on 20 January 2005. Interestingly, the expression “anticorruption struggle” (*fanfubai douzheng*) has been replaced in this document by the words “anticorruption work” (*fanfubai gongzuo*), although “struggle” (*douzheng*) is still used when talking about the repressive component of the anticorruption strategy.

the party-state institutional apparatus. Educational, preventive and repressive measures share the ideal aim of reducing corruption to an acceptable level.

The jiaoyu/education element fulfils prominently propagandistic and symbolic functions. Here, we can find measures ranging from the democratic life meetings (*minzhu shenghuo hui*) to the circulation of fictionalized accounts of cadre investigation, be they works written under the party-state's sponsorship¹² or semi-official novels¹³ and fact recording literature (*jishi wenxue*)¹⁴ sold under the table. Besides novels and anonymous short stories, internet websites¹⁵ and other media, a central role of this element is played by the staging of trials.

Preventive measures/*zhidu* represent the most innovative and thorough component of anticorruption. Existence of incomplete regulatory system resulting in a structure of opportunities that offered innumerable chances of wheeling and dealing¹⁶ has been targeted by measures such as the introduction of the single treasury accounting system, public bidding on procurement and construction project, the rotation of civil servants, their auditing at the time of retirement¹⁷, the beefing up of Commissions for Discipline Inspection (*jilü jiancha weiyuanhui*, CDI) powers¹⁸. The aim of sanctioning acts "which deviate from the normal duties of a public role because of private-regarding pecuniary or status gains"¹⁹, today sees preventive

¹² Hai Feng and Yan Xiao, *Gaoji jianchaguan Fang Gong ban'an jishi*. (*Record of the Investigations of High Prosecutor Fan Gong*) Beijing: Zuoqia Chubanshe, 2002.

¹³ Fang Wen, Tiannu. (*The Wrath of God*) Hohot: Yuanfang Chubanshe, 1996. Yang Su, *Shengwei dayuan*. (*The Provincial Party Committee Compound*) Beijing: Dazhong Wenyi Chubanshe, 2002. Their "prohibited" nature can make these works even more enticing, so that both their authors and readers unwittingly contribute to the construction and diffusion of a broader and more variegated propagandistic image. These novels, although sometimes enriched by details overlooked by the official media cannot be said to contain attempts at tarnishing the image of the party. Quite the contrary, they indirectly contribute to its representation as an organization capable of contrasting corruption in its ranks.

¹⁴ Xian Qi, *Zhongguo Fanfu*. (*Anticorruption in China*) Chengdu: Sichuan Renmin Chubanshe, 1998.

¹⁵ *Zhongguo Minjian Fanfubai Lianmeng (China Anticorruption Alliance)*
<http://www.cnfantan.com/Index.asp> *Fanfubai Wangshao (The Virtual Whistleblower)*
www.fanfubai.com

¹⁶ Discussed in detail by Yan Sun, cit.

¹⁷ For a more complete outline of these measures see particularly Yang Dali, supra, and He Zengke, *Fanfu xinlu, zhuangxingqi zhongguo fubai wenti yanjiu*. (*The New Road to Anticorruption: A Research on Corruption in the Transition Period*) Beijing: Zhongguo Bianyi Chubanshe, 2002.

¹⁸ Chang I-Huai, "An Analysis of the CCP's Role in Mainland China's State Supervisory Systems", *Issues & Studies*, n.1, 1998, pp. 38 – 78.

¹⁹ "Corruption is behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates the rules against the exercise of certain types of private-regarding influence. This includes such behavior as bribery (use of a reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding uses)" Joseph S. Nye "Corruption and Political Development: A Cost-Benefit Analysis", in *American Political Science Review*, vol. LXI, 2, 1967, p. 419.

and educational measure existing side by side with repressive ones. These might be the less interesting in terms of developments undergone, but the worthiest looking at.

The last difference between old campaigns and present day enforcement is the latter's improved legal foundation, and the involvement of legally trained, albeit not always professional, personnel. Since the eighties, besides re-founding the judicial apparatus on the ashes of the institutions shattered during the Cultural Revolution, the party-state has enacted a full panoply of anticorruption laws, rules and regulations. While before these had been drafted in vague and general terms²⁰, their content has become increasingly complex.

Furthermore, ideas about corruption and anticorruption gradually came to be voiced using the vocabulary of law and legality. The instrumentality implied by the rule by law approach and its difference from the Rule of Law ideal²¹ must not blind us to the simple fact that arbitrary executions, kangaroo courts and mass trials²² as integral component of a campaign strategy, have been substituted by a fully institutionalized legal apparatus.

2. Anticorruption and ideas about law

Observations that corruption in China has increased and intensified²³, evolved to the point of showing similarities with "organized crime, broadly defined"²⁴

²⁰ Ambiguity and vagueness of the wording of Chinese laws, giving rise to conflicting interpretations, has been highlighted by Chen Jianfu, *Chinese Law: towards an Understanding of Chinese Law, its Nature and Development*. The Hague: Kluwer Law International, 1999, p. 106, and can itself be considered one of the reasons for poor implementation.

²¹ For an analysis of the applicability of Western, liberal democratic paradigm of the Rule of Law to China, see Randall Peerenboom, *China's Long March Towards the Rule of Law*, Cambridge: Cambridge University Press, 2002.

²² Mass trials are of course still employed during strike hard (*yanda*) campaigns. Their disappearance from anticorruption, which now employs different degrading ceremonies is another signal of the shift from campaign to policy. On strike hard campaigns in the eighties see Harold M. Tanner, *Strike Hard! Anti-Crime Campaigns and Chinese Criminal Justice, 1979 – 1985*. Ithaca: Cornell University Press, 1999, Murray Scot Tanner, "State Coercition and the Balance of Awe: the 1983 – 1986 "Stern Blows" Anti-Crime Campaign", *The China Journal*, n. 44, July 2000, pp. 93 - 125. For subsequent campaigns see Susan Trevaske, "Courts on the Campaign Path in China: Criminal Court Work in the "Yanda 2001" Anti-Crime Campaign", *Asian Survey*, vol. 42, n. 5, October 2002, pp. 673 – 693.

²³ Andrew Wedeman, *cit.* and "The Intensification of Corruption in China", *China Quarterly*, vol. 180, December 2004, pp. 895 – 921.

²⁴ Shawn Shieh, "The Rise of Collective Corruption in China: the Xiamen smuggling case", *Journal of Contemporary China*, vol. 14, n. 42, February 2005, pp. 67 – 91. Quotation on page 70. As far as similarities mentioned by Shawn Shieh are concerned, I raised the a very similar point in my "Untold tales of corruption control: the Chen Xitong saga and its shadows" (L'altra faccia della lotta alla corruzione: luci ed ombre del caso Chen Xitong), *Paper presented at AISC IX Conference "China and the Other"*, Capri, 14 – 16 October 2003. On collective corruption, see Gong Ting, "Dangerous

when framed in the concept of “campaign” can therefore only result in the blame for poor enforcement being laid upon the campaign-style implementation. Existence of an enforcement problem partially rooted in institutional factors has been acknowledged²⁵, but such over-reliance on a concept belied by developments dating back to slightly more than a decade ago has shifted the focus away from this problem’s legalistic stem, to its more colorful branches. Law plays a central role in anticorruption both at the symbolic and implementation level. Televised trials of high ranking officials, diffusion of pictures showing them tried, surrounded by judicial police besides their dubious deterrent function serve a purpose not dissimilar by that of mass trials marking the most important phases of “strike-hard” (*yanda*) campaigns. They are part of a wider discourse on representations of crime and state power²⁶. The prosecution of high ranking officials, by portraying the party’s power of life and death as something which can never be escaped serve the symbolic purpose of reassuring both the party and the population at large about the CCP capacity to protect itself from the moral blows corruption strikes to its prestige. At the same time, its most important feature is the fact that it is conveyed through the channel of a professional criminal justice apparatus. Differently from Cultural Revolution images of cadres bent in the airplane position or otherwise struggled by the masses, and representations of criminals caught during *yanda* campaigns, the rotten element who needs to be expelled by the body of the party is allowed to keep his dignity. His head is never bowed down²⁷, handcuffs are almost nowhere to be seen in his pictures, nor is he shantily dressed. Clad in a western-style suit and showing good physical conditions he is portrayed as signing the expulsion decision in a dignified manner, thereby showing compliance with the party law (*dangfa*), and later facing the state law (*guofa*) too, but with his head raised. He is standing beside a plate reading “defendant” (*beigaoren*). Such a simple word highlights the concept that the very law he is now standing in front of was put into place to protect him from any abuse or arbitrary exercise of the state power, and at the same time to enable the judicial panel to mete out his

collusion: corruption as a collective venture in contemporary China”, *Communist and Post-Communist Studies*, n. 35, 2002, pp. 85 – 103.

Melanie Manion, *cit.*

²⁶ These observation are strongly inspired by the work of Susan Tresvaskes, “Public sentencing rallies in China: The symbolizing of punishment and justice in a socialist state”, *Crime, Law and Social Change*, n. 39, 2003, pp. 359 - 382.

²⁷ One of the few exceptions is a picture of former Jiangxi Province deputy governor Hu Changqing which I have found on the BBC website http://news.bbc.co.uk/olmedia/665000/images/_669917_hu300.jpg Last accessed on 31 January 2005.

punishment in a fair way, thus protecting the interests of the party-state and the people. The actual workings of anticorruption organs and their effectiveness might of course not match these idealized images of justice. Anyway it is notable that it has been by relying on law that the various reform measures aimed at preventing corruption have been put in place. The years from 1949 to the promulgation of the 1980 Criminal Law just saw the enactment of one major piece of law, the 1952 Regulations of the People's Republic of China on the Suppression of Corruption and Bribery²⁸. The anticorruption legal framework enacted from 1980 onwards is instead constituted by more than 400 laws and regulations²⁹. Every single aspect of both the private and public lives of party cadres is now regulated by a legal maze of legal norms, administrative and disciplinary regulations. Coupled to the Criminal Law and its judicial interpretations, they have populated what once used to be a barren land. Differently from other analytical concepts and categories, corruption manifests anyway a dynamism resembling that of a living organism. While in the past the new forms taken by this crime might have been light-years ahead of an ossified law content, today the existing legal framework makes possible to sanction corruption's most creative, weird or unusual manifestations. Given such developments in the end the main condition for anticorruption to be successful is that these regulations be enforced. Be it in China or elsewhere, existence of a legislative framework and ideas about the Rule of Law have no real significance if they are confined to the ivory tower of law books and academic circles. They ought to reach a wider social realm. They should be put into practice in ways which testify to the citizens the undertaking of concrete anticorruption efforts, going well beyond the propaganda of high profile cases. In such an ideal scenario anticorruption would achieve what Jan Michiel Otto refers to as Real Legal Certainty³⁰. In other words, anticorruption legislation would be implemented in a fair, regular and predictable way. Anticorruption organs would apply both procedural, disciplinary and criminal laws in a way consistent with their rationale and wording, without ignoring them, alter or circumvent their

²⁸ Apart from norms enacted before 1949, very short and poorly drafted regulations were issued sporadically during the late fifties and in the sixties. This text is the most important, known and quoted piece of pre-reform anticorruption legislation. For an English translation see Albert P. Blaustein, *Fundamental Legal Documents of Communist China*. South Hackensack, New Jersey: Fred B. Rothman & Co. 1962.

²⁹ Chen Wenhao of the Anticorruption Research Center of Qinghua University, personal communication. I myself have gone through about 250 of them.

³⁰ Jianfu Chen, Yuwen Li and Jan Michiel Otto (eds.), *supra*, pp. 24 – 25. See also Chen Jianfu, "Implementation of Law as a Politico-Legal Battle", *China Perspectives*, n. 43, September/October 2002, pp. 26 – 39.

content. Disciplinary organs would expel and transfer to the judicial system all acts constituting a crime. Judicial organs would on their hand enforce the criminal law impartially, without bending to influence, either external or internal to the organization, or to material inducements. Unless anticorruption laws are enforced according to the real purpose enshrined in them, things might not be very much different from a scenario where, as it used to be in the Maoist past there was no law to rely on. Behind each official who can roam around free after having lined his pockets with millions of yuan in public funds stands an instance of non-enforcement. This phenomenon is still aiding the consolidation of corruption rings that the party will expose in the future adopting the same format and rhetoric. Unless we shift our focus on implementation of law, talking about corruption and anticorruption will make little sense. This is even more the case since scholarly enquiry has recently addressed³¹ this issue, recognizing that corruption is at the root of implementation problems spread across different institutional clusters and areas of legislation. So far analyses have centred on civil and economic law, while research on implementation of criminal law, not to speak of anticorruption law, has lagged behind³² given the difficulties associated with this task³³. The objection that anticorruption is implemented selectively because law enforcement agencies are themselves corrupt is backed by some evidences³⁴. Such a claim is anyway rather conventional and should stimulate efforts towards deeper analyses of implementation of anticorruption law, instead of constituting an easy shortcut to avoid the topic. A shift of the focus to implementation of law by allowing to exclude a priori the most critical variable resulting in the ongoing spread of corruption, might be of help in assessing the relative weight of other forces posing obstacles to an impartial

³¹ Jianfu Chen, Yuwen Li and Jan Michiel Otto, *supra*. Problems of implementation have been touched upon, amongst others, by Stanley B. Lubman, *Bird in a Cage, legal reform in China after Mao*. Stanford: Stanford University Press, 1999 and Pitman B. Potter, *The Chinese Legal System, Globalization and Local Legal Culture*, London: Routledge, 2001, David Kelly, "China: Major Ideological Trends of 1995", in Joseph Y. S. Cheng (ed.), *China in the Post-Deng Era*, Hong Kong: The Chinese University Press, 1998, pp. 54 – 79.

³² Hu Yunteng, "Application of the Death Penalty in Chinese Judicial Practice", in Jianfu Chen, Yuwen Li and Jan Michiel Otto (eds.), *cit*.

³³ One of the difficulties to conduct such a study is the time and the effort needed to get hold of statistical data about corruption at the provincial level. When found, data are more often than not incomplete, in that are released for just a limited period of time, and non standardized. The only two notable exceptions in this sense are constituted by Beijing Municipality and Hebei Province. Data for corruption in Beijing and in Hebei province are easily available on local statistical yearbooks (*tongji nianjian*), whereas data for referring to other provinces must be distilled from work reports of local procuratorates and courts, local yearbooks (*nianjian*) and local gazetteers (*difangzhi*).

³⁴ See for instance Ma Liangde, "Tanwufan dang fantanwujuzhangde guai yu buguai" (A corrupt official chairs the procuratorate anticorruption office: strangeness and normality), *Renmin Jiancha* (People's Procuratorate), n. 7, 1997, p. 54.

law enforcement³⁵. When talking about law and anticorruption, the problem becomes anyway much more complicated than it is in other legislative areas.

According to the Dengist tenet whereby “Just as the country must have laws, the Party must have rules and regulations”³⁶ party officials guilty of corruption find themselves at the intersection of two bodies of legislation: party disciplinary norms, and the state law. The most notorious and less studied track of this system consists of a framework of disciplinary and procedural regulations internal to the party, which in spite of having no place in the formal hierarchy of sources of law³⁷ operate in parallel to the criminal code. This “dual track” system of criminal justice is reflected in the existence of the twin institutional apparatuses of disciplinary and judicial organs. Anticorruption legislation, anyway, is not implemented just by CDIs³⁸, people’s procuratorates (*renmin jianchayuan*) and courts (*renmin fayuan*), although they are responsible for carrying out the main stages of its enforcement.

CDIs detect, investigate and sanction³⁹ both party members crimes and other kind of “deviant” behaviour⁴⁰. The only sanction that can put an end to a party member’s political life is expulsion from the party (*kaichu dangji*). Until this stage, party cadres, although they are formally⁴¹ under the jurisdiction of state anticorruption organs, find themselves shielded by what is

³⁵ The claim that one of the main sources of implementation problems in this area is to be found in factionalism although possesses some validity does not touch the above argument.

³⁶ Deng Xiaoping, “Jiefang sixiang, shishi qiushi, tuanjie yizhi xian qiankan” (Emancipating the mind, seeking truth from facts, unite and look forward), 13 December 1978, in *Deng Xiaoping Wenxuan, di'er juan*, (Selected works of Deng Xiaoping, Volume Two) Beijing: Renmin Chubanshe, 1994, p. 147.

³⁷ Which, in hierarchical order include: the Constitution, laws enacted by the NPC, administrative rules and regulations issued by the State Council, regulations and administrative rules issued by local people’s congresses and governments, judicial interpretations.

³⁸ For a very early overview on discipline inspection commissions see Graham Young, “Control and Style: Discipline Inspection Commissions since the 11th Congress”, *The China Quarterly*, no. 97, march 1984, pp. 24 – 52. A most recent account is that of Chang I-Huai, *cit*.

³⁹ By means of five sanctions ranging from a warning (*jinggao*) to expulsion from the party (*kaichu dangji*). Other disciplinary sanctions are serious warning (*yanzhong jinggao*), demotion from duty (*chezhi*) and expulsion from the party with a two year probation period (*liudang chakan*). A very similar set of sanctions is employed to punish violations of administrative discipline, that is, violations of disciplinary norms – and crimes – committed by state officials. Apart from the well known overlap between the party and the state apparatus, since 1993 this distinction has no more reasons to be, as in that year commissions for discipline inspections incorporated the personnel previously employed by administrative supervision organs (*xingzheng jiancha jiguan*). On this last point see Jean-Pierre Cabestan, *Le Système Politique de la Chine Populaire*. Paris: Presses Universitaires de France, 1994.

⁴⁰ As for example gambling, indulging in extramarital affairs, and the wide category of extravagant behavior.

⁴¹ As stated by article 33 of the Constitution “All persons holding the nationality of the People’s Republic of China are citizens of the People’s Republic of China. All citizens of the People’s Republic of China are equal before the law. Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law”. Constitution of the People’s Republic of China, *The China Daily*, http://www.chinadaily.com.cn/english/doc/2004-03/01/content_310678.htm. Last accessed on 14 October 2004.

generally conceived of as a safe nest ensuring their exemption from criminal punishment. It is only after expulsion that state organs enter the stage. While preliminary investigation on official crime and institution of prosecution are the two main tasks performed by the procuratorate⁴², officials are tried by criminal sections of the people's courts.

3. Anticorruption organs and their networked setting

In reality, things do not look so linear. Anticorruption agencies are comprised also of state organs, such as the offices for stopping professional unhealthy tendencies (*jiuzheng hangye buzheng zhifeng bangongshi*) and audit offices (*shenjishu*) instituted in the State Council and in governments at the local level. Besides, a marginal role is played also by people's congresses and the political-consultative conferences⁴³. These organs do not constitute a centralized apparatus, neither do the laws they are supposed to apply clearly fall in a single legislative area. Power of implementing anticorruption laws is disjointed and dispersed⁴⁴ horizontally between at least five organs, if we just consider the central layer of the party-state apparatus. If we go beyond this level, we will find a plethora of agencies scattered throughout the party-state organs having to keep horizontal as well as vertical linkages with their counterparts. As a single organ can hardly possess the information, expertise or resources needed to deal with stages of implementation ranging from investigations to prosecution to trial, implementation of anticorruption law obviously crosses the boundaries of multiple agencies. As a task, it requires that institutional efforts be coordinated in discovering official crimes and channelling at least a part of them towards the criminal justice system. In spite of their separate existence, in fact disciplinary and administrative regulations all explicitly rely on the standard for prosecution set by the Criminal Law. The statement that a violator of party discipline who also infringes upon the Criminal Code must be punished according to the Code dispositions is to be found even in the most obscure disciplinary regulation. In any discourse on

⁴² Amongst others. Procuratorates have, besides, jurisdiction over a total of 53 crimes, listed by "Zuigao Renmin Jianchayuan guanyu renmin jianchayuan zhijie shouli anjian zhencha anjian fanweide guiding" (Supreme People's Procuratorate Provisions regarding the jurisdiction of people's procuratorates), 11 May 1998, *Falü Fagui Sifa Jieshi Shiyong Shouce, Xingshi Susong*. (A handbook of laws, regulations and judicial interpretations on Criminal Procedure Law) Beijing: Zhongguo Falü Chubanshe, 2001, pp. 124 – 127,

⁴³ Who periodically can take such initiatives as sending their delegates on inspection tours, besides – in the case of people's congresses, approving expulsion decisions.

⁴⁴ Kenneth G. Lieberthal and Michel Oksenberg, *Policy Making in China: Leaders, Structures, Processes*. Princeton: Princeton University Press, 1988.

implementation, the Criminal Code should be therefore taken as a benchmark. The most important prerequisite for filing a case to the procuratorate seems to be the amount of sums involved in the crime. The rule that disciplinary violations involving sums above 5.000 yuan⁴⁵ must be transferred to the judicial system is clearly stated in party norms⁴⁶.

Table 1 – Anticorruption laws, punishments for crimes of corruption and their ideal implementation path⁴⁷

Party Disciplinary System	0 – 5.000 yuan	Disciplinary apparatus
		Warning
		Serious warning
		Demotion from duty
		Expulsion with a two year probation period (Sanctions of administrative discipline)
	Over 5.000 yuan	Expulsion from the party transfer to the judicial system
Judicial System	0 – 5.000 yuan	Criminal justice system
		Detention
		Two years imprisonment

⁴⁵ This limit was set in the mid to late nineties. Before, violations of discipline involving more than 2.000 yuan were to be punished according to the criminal law. See “Zhonggong Zhongyang Jilü Jiancha Weiyuanhui guanyu gongchan dangyuan zai jingji fanmiande weifa weiji chufende ruogan guiding (*shixing*)”, (Chinese Communist Party Central Commission for Discipline Inspection Provisions on the punishment of violations of law and discipline committed by party members in the economic field) 1 July 1990, Zhongyang Jiwei Jijian Jiancha Yanjiusuo (ed.), *Zhongguo Gongchandang fanfu chanliang wenxian xuanbian* (A Selection of CCP Documents on anticorruption and promotion of a clean government), Beijing: Zhongyang Wenxian Chubanshe, 2002, pp. 264 – 276.

⁴⁶ The 5.000 yuan limit is set by a reply known as “Zhonggong zhongyang jilü jiancha weiyuanhui guanyu dui fanyou tanwu, huilu cuowu dangji chufende shu’e jixiang wentide qingshide dafu” (Chinese Communist Party Central Commission for Discipline Inspection instructive reply on monetary limits to consider in the punishment of those responsible of mistakes of graft and bribery), in *Dangzheng ganbu dangnei jiandu he jilü chufen guiding*, (Regulations on Supervising and Punishing Party-state Cadres) Beijing: Zhongguo Fazhi Chubanshe, 2004, pp. 222. On the other hand, close coordination with the criminal law is maintained through a regulation issued by the Supreme People’s Procuratorate: “Zuigao Renmin Jianchayuan guanyu renmin jianchayuan zhijie shouli li’an zhencha anjian li’an biaozhunde guiding (*shixing*)” (Supreme People’s Procuratorate Provisions on monetary limits for opening cases falling under the people’s procuratorates jurisdiction) Zuigao Renmin Jianchayuan Yanjiushi, *Zuixin xingshi falü ji sifa jieshi shouce*, (A Handbook of New Criminal Laws and Judicial Interpretations) Beijing: Falü Chubanshe, 2000, pp. 278 – 302) stating the same limit for certain crimes, and article 383, par. 4 of the 1997 Criminal Law. The latter sets the same limit of 5.000 for criminal prosecution, although leaving some leeway for disciplinary punishment.

⁴⁷ *Supra*, Charles D. Pagle, *Chinalaw Web - PRC Criminal Law* (last modified April 7, 1998) <http://www.qis.net/chinalaw/prclaw60.htm>

(Disciplinary sanctions)	
5.000 – 50.000 yuan	1 – 7 years imprisonment (7 – 10 in serious circumstances)
50.000 – 100.000 yuan	More than 5 years imprisonment (life imprisonment in serious circumstances)
Over 100.000 yuan	More than 10 years imprisonment Life imprisonment Death penalty

The process of law implementation therefore can be better conceived of as carried out by a network⁴⁸. That is, anticorruption laws are implemented by a “pattern of two or more units in which not all major components are encompassed within a single hierarchical array”⁴⁹. According to Laurence O’Toole “networked arrays” can include not only links between agencies of the same governments, but also connections between agencies of governments at different levels, and linkages between these and non governmental actors. So, notwithstanding the fact that the features traditionally associated with networks, namely the bigger role played by horizontal and informal relations versus hierarchical ones are lacking here, this conceptualization of anticorruption organs is still possible in light of changes undergone by the concept of networks⁵⁰. This is even more the case since non-governmental actors, such as the media and the population at large do to play a role, albeit a very small one, in bringing cases of corruption to the attention of the authorities. There are certain evidences that citizens’ reports make up a sizable

⁴⁸ Dereck W. Brinkeroff, “Coordination Issues in Policy Implementation Networks: An illustration from Madagascar’s Environment Action Plan”, *World Development*, Vol. 24, No. 9, 1996, pp. 1497 – 1510.

⁴⁹ Laurence J. O’Toole Jr., “Treating Networks Seriously: Practical and research-based agendas in public administration”, *Public Administration Review*, Vol. 57, n.1, January – February 1997, pp. 45 – 52, quoted in Laurence J. O’Toole Jr. and Kenneth J. Meier, “Public Management in Intergovernmental Networks: Matching Structural Networks and Managerial Networking”, *Journal of Public Administration Research and Theory*, Vol. 14, n. 4, 2004, pp. 469 – 494, quotation of page 470.

⁵⁰ Jörg Raab and H. Brinton Milward, “Dark Networks as Problems”, *Journal of Public Administration Research and Theory*, Vol. 13, n. 4, 2003, pp. 413 – 439.

percentage of cases uncovered at the local level⁵¹. Furthermore, the party-state's apparatus is strongly indebted to the institutional design of what had once been a revolutionary organization structured according to a network format. Some of its features are still visible in the retention of the Leninist principle of democratic centralism. Actually, a derivation of this principle took into account the main problem hampering the smooth functioning of implementation networks: poor interagency coordination. Anticorruption organs, as a cluster of the wider political-legal system, are supposed to operate according to the principles of "separate responsibility, mutual coordination, reciprocal delimitation of power" (*fengong fuze, huxiang peihe, huxiang zhiyue*). This means that while each agency is individually accountable for the stage of implementation it is responsible for, nevertheless anticorruption organs must enhance their coordination by means of sharing information and expertise, for instance taking part to meetings, forming joint groups (*liancha ban'an zu*) to investigate a particular kind of crimes⁵² etc. This reflects one of the two solutions to the problem of coordination of multiple agencies proposed by the literature on policy implementation networks that is, striking a balance between "letting individual actors operate independently, and *limiting their independence with supervision and control mechanisms, and resource interdependencies*"⁵³. The other solution, resource interdependency, descends from the fact that courts, procuratorates, audit organs and offices for the suppression of unhealthy tendencies all share resources coming from the coffers of the same level people's government. Indirectly, that is also the source of funding of CDIs instituted in single state organs. So, even though anticorruption organs in China are not *nominally* independent from the political will of the CCP, their institutional design in principle should have avoided the occurrence of implementation problems. *In fact* it already complies with prescriptions about how to boost the performance of implementation networks.

⁵¹ See for instance procuratorate work reports published in the Beijing yearbooks *Beijingshi Difangzhi Bianji Weiyuanhui, Beijing Nianjian*, (Beijing Yearbook) (various issues) Beijing: Beijing Nianjian Chubanshe, (various years).

⁵² Mainly the "bottom-up interactive pattern" and the organized smuggling rings conceptualized by Yan Sun, *cit.*, pp. 126 – 140.

⁵³ Brinkerhoff, *cit.*, p. 1498. Italics mine.

4. Norm evolution

Such institutional arrangements, in the presence of a poorly articulated legal framework, are anyway not enough to prevent the occurrence of implementation problems. Implementation of anticorruption law, accordingly started showing the first difficulties already in the early eighties. To a significant extent, these could be attributed to deficiencies in norm content. An egregious example is given by the entry into force of the 1980 Criminal Code⁵⁴. The code listed just three poorly defined crimes of corruption: graft (*tanwu*, art. 155)⁵⁵, temporary misappropriation of public funds, (*nuoyong gongkuan*, art. 126)⁵⁶, and bribery (art. 185)⁵⁷. Graft, for instance, was defined as the act of “taking advantage of one’s office to engage in corruption”⁵⁸. As the Code lacked specifications of both of the penalties for crimes of corruption and of standards for graduating sanctions according to their seriousness, implementers had no concrete guidelines on how to mete out different sanctions for crimes of varying seriousness. Such flaws were less the result of an intentional and conscious effort on the part of the party state to create a zone of near absolute discretionality than an outcome of the lack of legal expertise. In fact, it wasn’t long before implementers applied the minimalistic wording of the law in ways that were not always consistent with the centre’s intention. Around 1983 CDIs at the local levels, started transferring to procuratorates a number of people the CCDI judged to be excessive. They were soon reined in by an order to revert this practice to a much milder approach, which had to see the number of party members sanctioned by disciplinary measures exceed the number of those to be

⁵⁴ *The Criminal Law and the Criminal Procedure Law of The People’s Republic of China*. Beijing: Foreign Language Press, 1984.

⁵⁵ “State personnel who take advantage of their office to engage in corruption involving articles of public property are to be sentenced to not more than five years of fixed-term imprisonment of criminal detention; if the amount involved is huge and the circumstances are serious, the sentence is to be not less than five years of fixed-term imprisonment; if the circumstances are especially serious, the sentence is to be life imprisonment or death. A person who commits the crime in the preceding paragraph is to be sentenced in addition to confiscation of property or ordered to make restitution or pay compensation. Personnel entrusted by state organs, enterprises, institutions or people’s organizations to engage in public service who commit the crime in the first paragraph are to be punished in accordance with the stipulations of the two preceding paragraphs” *The Criminal Law and the Criminal Procedure Law of The People’s Republic of China*. Beijing: Foreign Language Press, 1984, pp. 53 - 54.

⁵⁶ *The Criminal Law and the Criminal Procedure Law of The People’s Republic of China*. Beijing: Foreign Language Press, 1984, pp. 45 – 46.

⁵⁷ Bribery was in turn distinguished in active bribery (*xinghui*), passive bribery (*shouhui*), intermediation to bribery (*jieshao huilu*), and extortion (*suohui*). *The Criminal Law and the Criminal Procedure Law of The People’s Republic of China*. Beijing: Foreign Language Press, 1984, pp. 62.

⁵⁸ *Supra*.

criminally prosecuted, with the exception of a few tens of corruption cases to be publicized on a nationwide scale⁵⁹.

Of course enactment of this circular alone could not fill the room for discretion generated by the vague wording of the Criminal Code. In the following months CDIs, procuratorates and courts started introducing a maze of different criteria to implement both systems of laws. At this point, not just one, but three central organs, the CCP Central Committee Secretariat (*Zhonggong zhongyang shujichu*), the CCDI and the Central Political Legal Commission (*Zhongyang zhengfa weiyuanhui*) were spurred to intervene by doing all they could: make law content more specific. This choice resulted in the promulgation of three internal circulation (*neibu*) norms. For the first time, the so-called two “supplementary regulations”⁶⁰ together with an “opinion” (*yijian*)⁶¹ gave the judicial organs a set of quite stringent criteria for prosecuting and trying corruption cases. According to the new norms corruption crimes were to be punished by the death penalty only if they involved sums exceeding 100.000 yuan, or were committed in particularly serious circumstances. These norms were to be “used internally, and not to be quoted in public legal documents, where it is allowed to quote the state laws, but not (these) opinion(s)”⁶². Together with another piece of legislation presented in the 1982 National Conference on Political-Legal Work (*Quanguo Zhengfa Gongzuo Huiyi*)⁶³, and with a “Reply (for trial implementation)” jointly issued by the Supreme People’s Court and the Supreme People’s Procuratorate⁶⁴ the standards they introduced have been in

⁵⁹ “Zhongyang Jilü Jiancha Weiyuahui guanyu gongchan dangyuan zai jingji lingyuzhong weifa fanzuide dangji chulide tongzhi”, (Central Commission for Discipline Inspection circular on party disciplinary remedies to violations of law and crimes committed by CCP members in the field of economy) 10 March 1983, in Zhong Shuqin (ed.), *Xin Zhongguo fantanwu huilu lilun yu shijian*, (Theory and practice of anticorruption in new China) Beijing: Zhongguo Jiancha Chubanshe, 1995, pp. 441 – 443.

⁶⁰ “Zhonggong Zhongyang Bangongting zhuangfa Quanguo Renda Changweihui Fazhi Weiyuanhui jiguan dangzu guanyu chengzhi tanwu, huiluzui he chengzhi zousizui liangge buchong guidingde tongzhi” (Chinese Communist Party General Office circular on transmitting Two supplementary regulations on the punishment of crimes of graft, bribery and smuggling enacted by the National People’s Congress Commission for Legislative Affairs party group), Zhou Shuqing (ed.), *cit.*, p. 444.

⁶¹ “Zhongyang Jilü Jiancha Weiyuahui, Zhongyang Zhengfa Weiyuanhui yinfa “guanyu yancheng yanzhong jingji fanzuide yijian” de tongzhi”, (Central Commission for Discipline Inspection, Central Political-Legal Commission circular on transmitting the ‘Opinion on the severe punishment of economic crimes’) 20 December 1983, Zhou Shuqing (ed.), *cit.*, pp. 444 – 445.

⁶² *Supra* p. 444.

⁶³ Zhang Shengrong, Zhang Xiangjun, Xu Daomin, *Tanwu huiluzui*, (The crimes of graft and bribery) Beijing: Zhongguo Renmin Gong’an Daxue Chubanshe, 1999, p. 254.

⁶⁴ “Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan guanyu dangqian banli jingji fanzui anjianzhong juti yingyong falü ruogan wentide dafu (shixing)” (Supreme People’s Court and Supreme People’s Procuratorate experimental reply on the concrete laws to apply in the handling of cases of economic crimes) can be found in the March 1985 issue of *Zhonghua Renmin Gongheguo Zuigao*

place until today. The importance of the two subsequent revisions of anticorruption law, in 1988 and 1997, is thus greatly diminished. Norms usually quoted⁶⁵ as representing an innovation in anticorruption policy content and more in general in criminal law, the 1988 Supplementary Regulations on Suppression of Corruption and Bribery, were nothing new, albeit their wording was somewhat more accurate than the drafting of internal circulation norms. The real standard for punishment of corruption crimes differed from those stipulated by state norms, being instead very similar to the content of Chapter Eight of the Criminal Law as revised in 1997.

Here, we are facing two sets of problems. The first one regards the internal circulation (*neibu*) nature of much of the disciplinary legislation, a feature that has been slowly disappearing, since now regulations can even be found on websites of local level CDIs⁶⁶. The second one concerns the features of the Criminal Code itself. Its well known vagueness gave rise to the phenomenon of rule-binding discretion⁶⁷. In other words, although anticorruption organs could rely on the Criminal Code to implement their tasks, the Code could not provide them but with broad guidelines. This characteristic resulted in agencies introducing their own rules while carrying out their tasks. The most likely outcome of this kinds of discretion, is that it can lead to “informal practice to lead to formal”⁶⁸ laws. Such a process was reflected first in the central party-state catching up with the praxes followed by anticorruption organs. Years later these norms would have been enriched and redrafted before receiving the final stamp of approval by the NPC.

In the meantime the party, while showing a lack of dynamism of the front of the state law, had been exceptionally active on its disciplinary front. Revision of the Criminal Law began between the late eighties and the early nineties. It was precisely at this time that party norms witnessed a stunning development in their content. The concrete chance for this was given by

Renmin Fayuan Gongbao 1985 – 2000. (Gazette of the People’s Republic of China Supreme Court) Beijing: Zuigao Renmin Fayuan Chubanshe, 2001. (Cd Rom)

⁶⁵ Gao Mingxuan, Delmas-Marty Mireille, *Criminalité économique et atteintes à la dignité de la personne. Vers des principes directeurs internationaux de droit pénal*. 5 voll. (Economic Crime and Infringement Upon the Rights of the Person. Towards Principles of International Criminal Law) Paris, Éditions de la Maison des Sciences de l’Homme, 1995. Liu Shenrong, Zhang Xiangjun, Xu Daomin, *cit.* talk about these documents on pp. 4-5

⁶⁶ See for instance the website of Ningbo Jiangdong District’s Commission for Discipline Inspection *Zhonggong Ningboshi Jiangdongqu Jiwei, Ningboshi Jiangdongqu Jianwei*, <http://www.dflz.gov.cn/djw/index.html>. A slightly richer site where provincial regulations can be found is *Shandongsheng Wuxianzhen Dangfeng Jianshewang*, (Shandong Province Wuxian Township Party Construction and Clean Government Website) maintained by Wuxian Township’s Commission for Discipline Inspection <http://wxxjwjw.nease.net/tltg/tltgyz.htm>.

⁶⁷ Leanne Weber, “Down that Wrong Road: Discretion in Decisions to Detail Asylum Seekers Arriving at UK Ports”, *The Harvard Journal*, vol. 42, n. 3, 2003, pp.248 – 262, pp. 251 – 252.

⁶⁸ Leanne Weber, *supra*, p. 253

developments occurred in the anticorruption strategy. Back then, three priorities were set for party and state organs to achieve. Besides the usual investigation, punishment and propaganda of crimes committed by a few leading cadres, and the suppression of the so-called unhealthy tendencies (*buzhengzhi feng*), cadres above the county level had to carry out “anticorruption self-restraint”⁶⁹ (*liangjie zilü*), that is, voluntarily confess their acts of corruption and put an end to them in exchange for lenient punishment. It was the spread of this latter target⁷⁰ that put in motion a trend towards a considerable and extremely detailed regulatory activity that continues until today. The variety and content of disciplinary regulations is impossible to describe. The most important of these norms, such as the 2003 Chinese Communist Party Regulations on Disciplinary Sanctions⁷¹ (*Zhongguo gongchandang jilü chufen tiaoli*) and others have put in place what can be considered a parallel criminal *cum* procedural code regulating every single aspect of party members’ lives, and specifying the procedure for all the stages of disciplinary investigation in every minute detail. Whereas in the eighties and before this regulatory system contained broad guidelines concerning the kind of perks party members were entitled to⁷², and generic prohibitions of indulging in acts such as wining and dining at the expense of the public⁷³, occupying excess housing space⁷⁴ etc. now party members rights and duties have come to constitute an extremely complex and articulated pseudo-legal maze, closely coordinated with the Criminal Law. Apart from replicating the usual prohibition of employing public power for private aims contained in the criminal code, disciplinary norms proscribe each and every manifestation that this act can possibly take. They range from the usual prohibitions of running

⁶⁹ I borrow this expression from Young Nam Cho, *cit.*

⁷⁰ Which before the merger had been carried out by administrative supervision organs (*xingzheng jiancha jiguan*), too. See Zhonghua Renmin Gongheguo Jianchabu (ed), *Zhongguo Jiancha Nianjian, 1987 – 1991*. (China Yearbook on Administrative Supervision) Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1993, pp. 353 and following.

⁷¹ *Zhongguo gongchandang jilü chufen tiaoli*, (Chinese Communist Party Regulations on Disciplinary Sanctions) Beijing: Zhongguo Fazhi Chubanshe, 2004. Issued on 31 December 2003.

⁷² “Zhonggong Zhongyang, Guowuyuan guanyu gaoji ganbu shenhua daiyude ruogan guiding”, (Chinese Communist Party Central Committee, State Council provisions regarding the supply system for high ranking cadres) Zhongyang Jilü Jiancha Weiyuanhui Yanjiusuo (ed), *cit.* pp. 105 – 111.

⁷³ “Zhonggong Zhongyang Jilü Jiancha Weiyuanhui guanyu chongshen yanjing jiedai gongzuozhong bu zhengshi fengde tongzhi”, (Chinese Communist Party Central Commission for Discipline Inspection circular on reiterating the prohibition to engage in deviant tendencies in the course of reception work) *supra*, pp. 185 – 186.

⁷⁴ “Zhonggong Zhongyang Jilü Jiancha Weiyuanhui guanyu bixu jianjue zhizheng dangyuan, ganbu zai zhufang fenfang zhongde waifeng zhi quanguo dangzheng jiguan, qiye shiye danwei geji lingdao ganbude gongkaixinde guiding”, (Chinese Communist Party Central Commission for Discipline Inspection provisions on resolving stopping deviant tendencies in housing assegnation and ordering an increase in the transparency of leading cadres of party-state organs and professional units at all levels) *supra*, pp. 174 – 178.

private enterprises, accepting gifts in kind or in cash, and invitations to banquets and to every kind of recreational activity which might compromise the cadre impartial fulfilment of his duties towards the state⁷⁵, to the more awkward proscriptions of mounting smoked or mirror glasses to one's private residence windows⁷⁶, or of installing a stereo in one's lawfully owned car⁷⁷. In short, content of the regulatory system in place since the nineties is detailed to the point of leaving absolutely no room for CDIs to manipulate it by means of self interested interpretations.

A characteristic of the trial of corruption cases is the existence of conflicting interpretations of the wording of the criminal code given by both member of the judicial panel or by members of the judicial committee⁷⁸. The usual dynamic sees two or more of the judges or of the official sitting in the judicial committees arguing over the tip of a needle on the exact meaning of words such as "public interest", "private gain", which continue to at the centre of debates held by Chinese scholars of criminal law⁷⁹. When all the activities which pursuing realizes the fulfilling of private interest at the expense of the public are clearly specified, such arguing becomes impossible. This is perfectly consistent with the theorizing of Young Nam Cho⁸⁰ and Jae Ho Chung⁸¹. Since laws are the primary tool in implementing anticorruption policy, a change in their characteristics should have eliminated all the room for discretion that implementers could enjoy. In short, anticorruption laws are encompassing, in that they are directed to all party and state unit. Second,

⁷⁵ "Zhongguo Gongchangdang dangyuan lingdao ganbu liangjie congzheng ruogan zhunce (shixing)" (Chinese Communist Party experimental principles on the professional cleanliness of leading cadres), 28 March 1997, *supra*, pp. 420.

⁷⁶ Zhonggong Zhongyang Jiwei Bangongting guanyu henzhua zhizheng cheyi langfei baxian guidingde luoji tuijin lingdao ganbu liangjie zilü gongzuode tongzhi, (Chinese Communist Party Central Commission for Discipline Inspection General Office circular on stopping extravagance and waste, implementing and promoting the work of cleanliness and self restraint among leading cadres) 9 March 1998.

⁷⁷ Zhonggong Zhongyang, Guowuyuan guanyu dangzheng jiguan qiche peihe biantong guanlide guiding, (Chinese Communist Party Central Committee, State Council provisions about the management and the supply of cars to party and state organs) 5 September 1994.

⁷⁸ See for instance Wang X passive bribery case, where the judicial committee was divided over the notion of "public good". Zuigao Renmin Jianchayuan Falü Zhengce Yanjiushi, *Dianxing yinan anli pingxi*, (An Analysis of Typical and Dubious Cases) 1999, n. 1. Beijing: Zhongguo Jiancha Chubanshe, 1999, pp. 72 – 3

⁷⁹ Such debates fill the page of Chinese scholarly journals of law and criminal law. One such example is Wang Qiuling, "Lun zhiwu fanzui xingshi lifade quexian yu wanshan", (Remedies to flaws in the legislation on crimes of public officials) *Dangdai Faxue* (Contemporary Studies in Law), n. 11, 2001, pp. 73 – 75.

⁸⁰ Cho Nam Young, *cit.*

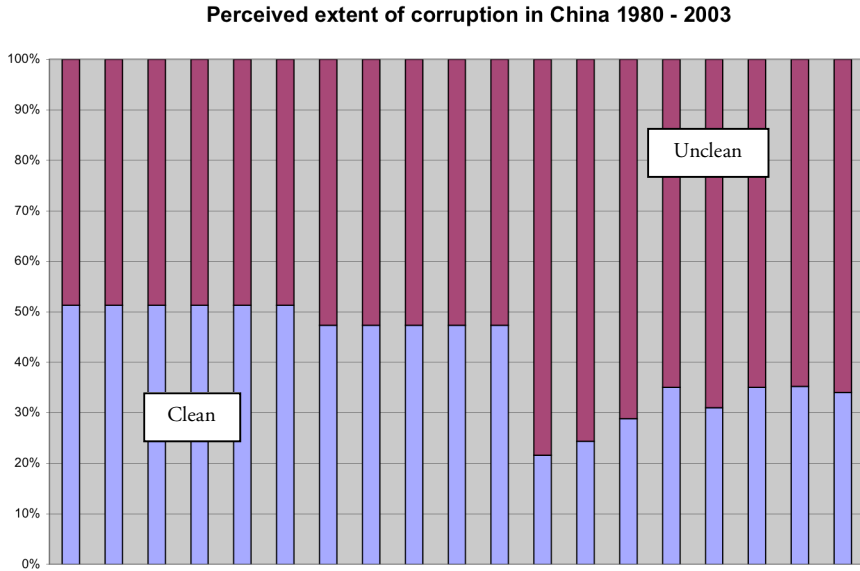
⁸¹ Jae Ho Chung, "Studies of Central-Provincial Relations in the People's Republic of China: A Mid Term Appraisal", *The China Quarterly*, n. 141, 1995, pp. 486 – 508. *Central Control and Local Discretion in China. Leadership and Implementation During Post-Mao Decollectivization*, New York: Oxford university Press, 2000. Shaun Gerard Breslin, *China in the 1980s, Centre-Province Relations in a Reforming Socialist State*, Londong: Macmillian, 1996, especially Chapter 2.

they do not entail the transfer of resources from local to central level actors, but rather, a more rational distribution of resources within the implementing network. Last, the degree to which this rationalization of resource distribution conflicts with the existing interests is uncertain, but anyway anticorruption regulations do not mark any radical departure from local units' situation during a given period of time. Since content of their main prohibitions has become more detailed, they have changed over the time. Anyway, their prohibitions have been directed at roughly the same kind of behaviours.

5. Organizational measures versus disciplinary sanctions

Anticorruption agencies are backed by a very detailed norm content, and intertwined in a network which institutional features show more than just strong resemblances to solutions devised to overcome implementation problems taking place elsewhere. At least in theory, nothing in the legal tools they have been endowed with, or in their institutional design suggests that their work should not be effective. A picture at the macro level, notwithstanding its limitations, shows that these factors were ineffective in restraining anticorruption agencies' power. In the absence of any reliable index for measuring corruption, quantifying selectivity in anticorruption is not an easy task. The ideal comparison between the number of officials guilty of this crime and those who were prosecuted remains in all cases wishful thinking. A rough translation of the Transparency International CPI into figures shows anyway the *perceived* number of corrupt officials to be much higher than the number of clean party members.

Graph 1⁸²



Since the CPI has two main shortcomings, sources of this perception are debatable⁸³. First, the so called dynamism of the index results from a duplication in the survey sources used to measure the perception of corruption for the years 2000 – 2004. In other words, perceptions for 2001 were used to constitute the index not only for 2001, but for 2002 and 2003 as well. While it is true that there might have been changes in how corruption was perceived, use of a quantitative indicator can in this case result in duplications and overlaps

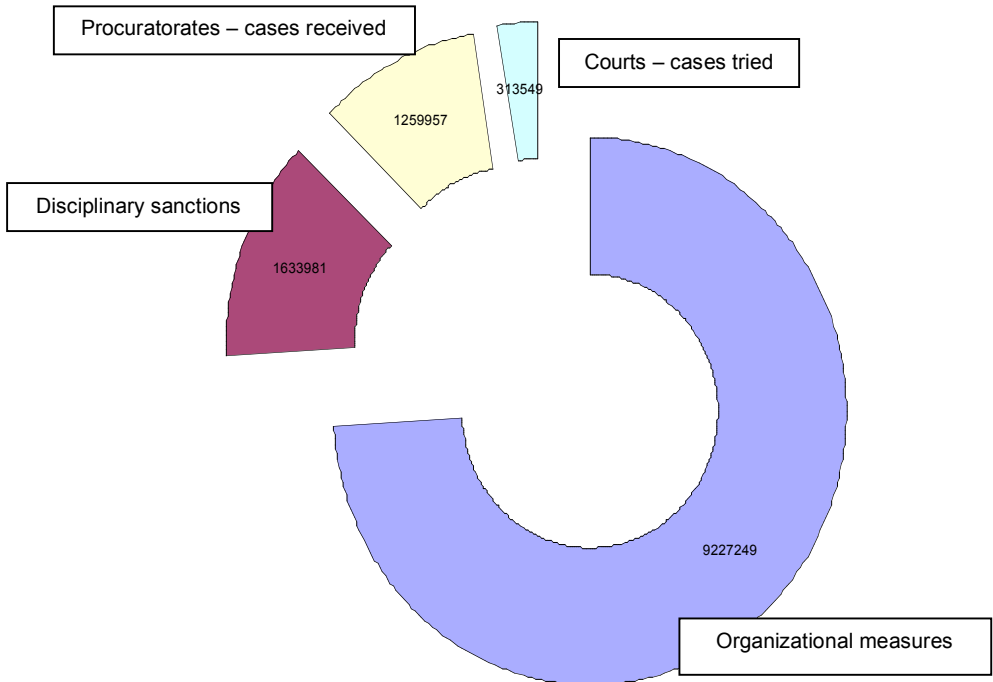
⁸² Sources: www.transparency.org, Wang Gungwu and Zheng Yongnian. *Damage Control. The Chinese Communist Party in the Jiang Zemin Era*. Singapore: Eastern University Press, p. 192. "Zhonggong dangyuan zongshu yida 6541 wanming, zhan quanguo renkou 5.2%", (Number of CCP members reaches 65.410.000, 5.2% of the Chinese population) *Zhongxinshe* (China News Agency), 3.6.2001, <http://www.chinanews.com.cn/2001-06-03/26/95590.html>. Last accessed on 28.1.2005. "Zhonggong dangyuan zongshu yida 6694 wan qunian fazhan dangyuan 209 wan ming" (Number of CCP members reaches 66.940.000, with new members amounting to 2.090.000), *Zhongxinshe*, (China News Agency) 1.07.2003, <http://www.chinanews.com.cn/n/2003-07-01/26/319411.html> Last accessed on 28.1.2005. "Quanguo gongyou zhongguo gongchandang dangyuan 6800 duo wan ming" (Number of CCP members surpasses 68.000.000), *Xinhuashe* (New China Agency), 30.6.2004, http://china.dayoo.com/gb/content/2004-06/30/content_1610662.htm Last accessed on 28.1.2005. The Corruption Perception Index was not available for the years 1986, 1987, 1993, 1994. Therefore, the graph does not include data for these years.

⁸³ For sources of historical data see: http://www.icgg.org/corruption.cpi_olderindices_hist_sources.html. Survey sources for just some years can be found on www.transparency.org

Second, respondents to some of the survey employed to elaborate the index have sometimes been selected inaccurately. One of the sources used to construct the ranking of China in 2003 was a survey carried out by Information International. Respondents were Lebanese, Saudi Arabian and Bahrainese businessmen. They were asked how common bribery was in their business contacts with friends and relatives in neighboring countries. By definition, countries confining with Lebanon, Bahrein and Saudi Arabia **are not** China. Results were anyway used to measure the perception of corruption in China. TI survey sources were, unfortunately, not available for all the years. Besides, estimates for the years 1980 – 1994 were the result of just 2 surveys carried out in 1980, 1982, 1984 and 1985. Two surveys carried out in 1988 were used to measure perceptions from 1998 to 1992. Most surveys were made among journalist and western expats, business executives and academics. Although they have a first hand knowledge of China, some of them might not have gained their perception from direct experience of bribery, but rather from rumours or hearsay. Reliability of these perception is hence highly questionable. In the absence of fully reliable data, I suggest that employing Chinese statistical sources could give a more accurate picture. PRC statistics on crime are notoriously incomplete and dubious. Furthermore they do not reflect the real extent of corruption. Rather, they provide the public with a *representation* of anticorruption organs' activity and of its results. Nevertheless, they are produced by institutions which are dealing with real cases of corruption on a permanent basis. Although they might be manipulating data about their activity, members of CDIs and prosecutors are not “perceiving” corruption in subjective ways, biased by their cultural, educational and ideological background. They are the ones who have a direct experience of acts occurring in shapes and to extents which might be unfamiliar to expats. While foreign businessman might be accustomed to much simpler, one-to-one crimes, dealing with networks of corruption and smuggling is not one of their activities.

An observation of the variations undergone by cases during their transit from one part to another of the implementation network will allow us to pinpoint the institutional locus where the strongest obstacles to implementation lay.

Graph 2 - Cases sanctioned by CDIs versus cases dealt with by judicial organs 1990 – 2003⁸⁴



If anticorruption laws were put into practice consistently with their content, slices of the “doughnut” above should have been more or less of the same size. The flow of cases would have moved from one network node to the next one regularly and steadily. Small variations in this process would have been normal, and accounted for deficiencies in interagency coordination, errors, etc. The “perfect” implementation process after all just exists in a scholarly

⁸⁴ Zhongguo Falü Nianjian Bianjibu (ed.), *Zhongguo Falü Nianjian (1990 - 2003)* (China Law Yearbook), Beijing: Zhongguo Falü Nianjian Chubanshe, (1991 - 2003). Wu Guanzheng, “Wu Guanzheng tongzhi zai zhongjiwei disanci quanti huiyishangde gongzuo baogao”, (Comrade Wu Guanzheng’s work report to the Third Plenary Session of the CDI) 22.02.2004, *Renmin Ribao* (People’s Daily) <http://www.people.com.cn/GB/shizheng/1024/2352546.html>; Xiao Yang, “Zuigao Renmin Fayuan gongzuo baogao, 2004 nian 3 yue 10 ri zai dishijie quanguo renmin daibiao dahui dierci huiyi shang” (Supreme People’s Court work report to the Second Session of the Tenth NPC, 10 March 2004), *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan* (People’s Republic of China Supreme People’s Court) <http://www.court.gov.cn/work/200403220012.htm>. Jia Chunwang, “Zuigao Renmin Jianchayuan gongzuo baogao 2004 nian 3 yue 10 ri zai dishijie quanguo renmin daibiao dahui dierci huiyi shang”, (Supreme People’s Procuratorate Work Report to the Second Session of the Tenth NPC, 10 March 2004) *Zhonghua Renmin Gongheguo Zuigao Renmin Jianchayuan* (People’s Republic of China Supreme People’s Procuratorate) <http://www.spp.gov.cn/baogao/> All websites were last accessed on 14 November 2004.

world, not in the empirical realms employed to test or build theories. What we see here are instead two anomalies. As known, most cases are dealt with within the party. From 1990 to 2003 the party sanctioned 1.633.981 crimes. Consistently with the scholars' gloomiest predictions, an astonishing 9.227.249 acts were anyway not punished. They were dealt with by means of "organizational measures" (*zuzhi cuoshi*). Organizational measures are used to remedy to acts of "petty" corruption. They differ from both party/administrative and criminal sanctions, and are therefore also known as "non-disciplinary measures" (*fei jilü chufen chuli fangshi*). Organizational measures can consist of "criticism and education" (*piping jiaoyu*), a verbal criticism (*koutong piping*), the order to return sums illegally acquired, to apologize to the unit etc.⁸⁵ Other measures are the holding of "democratic life meetings" (*minzhu shenghuohui*) during which officials come clean about the sources and the size of their wealth, "self inspection and self stopping" (*zicha zijiu*). Already practiced in the late eighties by supervision organs⁸⁶, this measure was stepped up from 1993, when their merger with CDIs occurred. Under *zicha zijiu* officials are supposed to put an end to their acts of corruption spontaneously. Having apologized, repented and returned their booty, they can thus avoid being either sanctioned or prosecuted, provided their acts are of minor importance and involve sums well below 5.000 yuan.

Now, it is rather striking that out of the enormous figure of 12.063.440⁸⁷ millions alleged crimes reported by citizens, more than nine million cases were dealt with by means of organizational measures⁸⁸. The number of official who experienced these measures in some years surpassed one⁸⁹, two⁹⁰ or even three million people⁹¹. Given the increase in sums involved in corruption crimes it would not be surprising if authorities concentrated on prosecuting major crimes, and showed leniency towards officials guilty of accepting gifts worthy

⁸⁵ See *Zhongguo Jiancha*, 1 July 1997, p. 39.

⁸⁶ Zhonghua Renmin Gongheguo Jianchabu (ed.), *cit.* This measure is referred to a few times on pp. 353 – 364.

⁸⁷ Zhonghua Renmin Gongheguo Jianchabu (ed.), *cit.* *Zhongguo Falü Nianjian Bianjibu* (ed.), *cit.* Unfortunately at the time of revising this working paper I could find data on citizens' reports just for the following years: 1990, 1991, 1992, 1994, 1995, 1996, 1997, 1998.

⁸⁸ It should not be assumed anyway that a direct relation there exists between citizens' report and these measures. Although letters and visits are an important aid leading to the exposure of corruption, disciplinary organs can be tipped also by work units or other anticorruption organs.

⁸⁹ 1.207.126 such cases were dealt with in 1997. Data were assembled using the sections on disciplinary supervision published in the 1998 issues of the China Law Yearbook. *Zhongguo Falü Nianjian Bianjibu*, *Zhongguo Falü Nianjian 1998*, (China Law Yearbook, 1998) Beijing: Zhongguo Falü Nianjian Chubanshe, 1998, pp. 111 and following, 1025.

⁹⁰ 2.289.000 cases as of 1998. *Zhongguo Falü Nianjian Bianjibu*, *Zhongguo Falü Nianjian 1999*, (China Law yearbook, 1999) Beijing: Zhongguo Falü Nianjian Chubanshe, 1999.

⁹¹ 3.416.000 cases. *Zhongguo Falü Nianjian Bianjibu*, *Zhongguo Falü Nianjian 1994*, (China Law Yearbook, 1994) Beijing: Zhongguo Falü Nianjian Chubanshe, 1994.

a few hundreds yuan. Available evidence seems to indicate that acts “voluntarily stopped” by party members are not just petty corruption. Ideally, there might be a *very slight* chance that gifts such as *cash, credit cards or shares* accepted by an official could amount to less than 5.000 yuan⁹². Other acts, such as diverting public funds to buy laptops, luxury cars, videocameras, open bank accounts, start businesses and gamble must definitely involve sums so high as to fall well beyond the 5.000 yuan limit. Implementation of party regulations saw anyway these acts falling under the scope of “self inspection and self stopping”, until this practice slowly became a routine measure. Officials could divert or accept as much money as needed to build a house, buy a Volvo car, travel to Guangdong on a holiday disguised as a meeting⁹³, and in the worst case get away with as little as a statement of repentance and restitution of the goods or the money illegally obtained, or a circular of criticism (*tongbao piping*).

A better understanding of the kind of acts which are being dealt with by means of organizational measures or disciplinary sanction, is given by the cases of Henan Province Madian county Office of Land Administration, and of the anonymous party secretary of an hospital in Shijiazhuang. The leadership of the Office of Land Administration in Madian county in 1999 collectively diverted 5.600.000 yuan, which could not be recovered. Later, just the office director was expelled from the party with a two year reprieve and transferred to a different post by Henan province CDI⁹⁴. Differently, the party secretary of the hospital in Shijiazhuang, who embezzled 1.250.000 yuan, was deemed responsible of an “ordinary problem” (*yibanxingde wenti*) and just received a serious warning⁹⁵. Given that these acts were not considered serious enough to be transferred to the criminal system, the chances that behaviours falling under the scope of organizational measure involve sums and consequences which would fully justify criminal prosecution are very high.

This outcome can of course be attributed to the existence of what Melanie Manion refers to as a dual standard of criminal justice. This body of

⁹² ...or that, while accepting much bigger “donations” the official would actually turn to the party just a small fraction of his bribes.

⁹³ This instance was recounted to me by a person who had joined one such trips as a guest. Nothing afterwards happened to people who had used public funds to travel on that leisure trip. I have changed the name of the province.

⁹⁴ Zhongyang Jiwei Bangongting (ed.), *Jianding xingxi, jiada lidu, shenru tuijin dangfeng lianzheng jianshe he fanfubai douzheng, zhongyang jiwei disici quanhui zhuangji*. (Further Carry on the Construction of a Clean Government and the Anticorruption Struggle with Increased Strength and Unshakeable Trust. Special Report on the Central Commission for Discipline Inspection Fourth Plenary Session) Beijing: Zhongguo Fangzheng Chubanshe, 2000, pp. 70 – 75.

⁹⁵ Zhongyang Jiwei Bangongting (ed.), *cit.*, pp. 91 – 95.

regulations is not implemented in a policy vacuum, but in a broader sociopolitical environment⁹⁶, criss-crossed by a set of different policies and priorities, that could conflict with requests posed by anticorruption law. Therefore although data at the macro level provide just a sketchy picture of what is going on, it is interesting seeing the degree to which, over the time, localities choose to employ organizational measures and why.

CDIs seem to have been successful in recurring to organizational measures, under the guise of implementing the centre's directives, particularly in 1993, 1997 and 1998. In these years 3.416.000, 1.207.000 and 2.289.000 party members respectively benefited from the party's leniency⁹⁷. So although in the nineties CDIs all over the country dealt with at least 10.861.230 cases, 9.227.249 of them were labeled "minor" and just 1.633.981 (15.04%) could be sanctioned. This anomaly can be explained by the nature of the crimes that were made to fall under the scope of "self inspection and self stopping". Technically speaking, purchase of cars, cameras, cellular phones, businesses, houses etc. constitute a violation of both party norms and the Criminal Code. Anyway, they stopped being represented as corruption, and became instead "mistakes" (*cuowu*) between the eighties and the nineties, when more virulent crimes surfaced. Since then, the chance to find courts prosecuting officials who stole 100.000 yuan to buy a Chrysler is exceptionally slim. The only case that I could find was that of He Shiping⁹⁸, manager of Beijing Village and Township Telecommunication Development Corporation (*Beijingshi cunzheng tongxin kaifa gongsi*). He was tried in 1996 on charges of passive bribery and graft. Amongst other, he used public funds to buy a car, at the same time taking the chance to skim off 20.000 yuan. It is worth noting here that He was anyway convicted on more complex charges. Had he just stolen 20.000 yuan in public funds, I doubt his unit would have reported him. In the absence of more serious acts, office and government buildings, phones, expensive foreign cars, although obtained with means that are clearly proscribed by the law, are essential elements of the representation of local party committees and their connections as successful, affluent and efficient. They testify their commitment to the speeding up economic growth, and the building up of an affluent society. Party officials cruising about in their Range

⁹⁶ Merilee Grindle, *Politics and Policy Implementation in the Third World*, Princeton: Princeton University Press, 1980.

⁹⁷ Zhongguo Falü Nianjian Bianjibu (ed.), *Zhongguo Falü Nianjian* (1990 - 2003) (China Law Yearbook), Beijing: Zhongguo Falü Nianjian Chubanshe, (1991 - 2003). Zhonghua Renmin Gongheguo Jianchabu (ed.), *cit.*

⁹⁸ Beijingshi Difangzhi Bianji Weiyuanhui (ed.), *Beijing Nianjian*, 1997 (Beijing Yearbook, 1997) Beijing: Beijing Nianjian Chubanshe, 1997, p. 153.

Rovers are in other words those who got rich first. Having get rid of their Sun Yat Sen jackets and red star caps their revolutionary fervor came to be embodied in being the mobile phone sporting vanguard of the soon to come masses of the well-off. As shallow as this representation might be, it is nevertheless taken more than seriously by the higher echelons of the Communist Party and, I argue, by foreign observers and investors as well. A case in point is the story of Yu Zuomin recounted by Bruce Gilley⁹⁹.

The party secretary of Daqiu village, Yu Zuomin had been praised for years as an ingenious and resourceful administrator, capable of transforming Daqiu from the poorest to one of the richest villages in China. The source of the village wealth, which Yu enjoyed and used as part of his personal wealth, had been the creation of a complex of enterprises. Local enterprises were first set up “borrowing” state funds, and later their property rights were gradually transferred to members of Yu’s family. In the meantime, each of them grew accustomed to skimming off a sizeable part of the public monies under their administration to build fabulous residences, buy cars, or just donate cash to fellow village leaders. Although most enterprises operated at a loss, such showing off exerted a positive impression towards inspection teams sent from Beijing, who started praising Yu Zuomin’s skills until Daqiu village was singled out as a model in economic reform. In the meantime, as Gilley observed, the two expensive foreign cars parked outside Yu’s residence reassured everybody about the continuity and irreversibility of Yu’s support to economic development. Had Yu behaved in a way consistent with the extremely conservative anticorruption rhetoric urging officials to despise comforts associated with “capitalist corrupt ideology” conclusions drawn by the center about his skills as a leader would have been maybe different. After all, who looks more resourceful as a manager, both to western and Chinese eyes: a modestly dressed official who rides a rusty bicycle and lives in a 60 square meters apartment, or one clad in Armani suits who owns a Ferrari and lives in a villa?

There were some conditions and some policies under which implementation of anticorruption law, even when it was quite favorable to the self interest of corrupt officials, could be overlooked, as it was perceived to clash with the need to sustain a high rate of economic growth. After all, is no secret that anticorruption should serve economic development. Therefore, the hierarchy

⁹⁹ Bruce Gilley, *Model Rebels, the Rise and Fall of China’s Richest Village*. Berkeley: University of California Press, 2001.

of priority implicitly set by the party looked as having been welcomed by localities, at least at a first and rather shallow level.

6. An “exploded network” and the regulatory power of its nodes

The conflict between policy objectives perceived as incompatible is just one of the forces contributing to distortion of law implementation. It takes the shape of a clumsy inter-agency coordination.

As is well known, a quick glance at the four stages that corruption cases have to undergo before they can reach the courts shows that the whole process stops at two junctures. After the uneasy transition from organizational measure to disciplinary sanction, a second stage in the prosecution process is the filing of case to procuratorates, which seems to be relatively easy. 1.259.957 (77.10%) of the 1.633.981 cases sanctioned by CDIs, were successfully transferred to procuratorates. Having exited the disciplinary organs, these cases showed all the elements that would have made prosecution possible, at least on technical grounds. Instead, they engulfed procuratorial organs: just 313.549 (24.85%) of them were transferred to the courts and tried. The remaining 75.12% were either dropped or exempted from criminal prosecution (*mianyu qisu*).

It is thus as if each node in the network shows the tendency to sever the links to the other nodes, in order to operate in a state of partial autonomy. Existence of this problem has long been recognized by the party¹⁰⁰. Each organ tends to reduce communication with other agencies to a minimum. Whenever it is found out that a case should be handed over to a different agency, the tendency is to deal with it internally¹⁰¹. Implementing agencies

¹⁰⁰ See for instance “Zhonggong Zhongjiang Jiwei, Zhongyang Zuzhibu, Jianchabu, Renshibu guanyu jiaqiang gongzuo lianxie tongzhi”, (Chinese Communist Party Central Commission for Discipline Inspection, Central Organization Department, Ministry of Supervision, Ministry of Personnel circular on strengthening work relationships) 8 April 1999, *Jijian Jiancha Ban’an Chengxu Guiding Bianxiezu, Jijian Jiancha Ban’an Chengxu Guiding*, (Provisions on the Investigative Procedure of Disciplinary Cases) Beijing: Zhongguo Fangzhen Chubanshe, 1999, pp. 125 – 126, and “Jiancha Jiguan zai diaocha chuli zhengji anjianzhong huxiang xiezuo peihede guiding”, (Provision on strengthening the coordination between administrative supervision organs in the course of investigations on cases of administrative discipline) 11 November 1992, in *ibid.*, pp. 170 -171.

¹⁰¹ *Zhonggong Zhongyang Jilü Jiancha Weiyuanhui, Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gong’anbu guanyu jilü jiancha anjian guochengzhong huxiang tigong youguan anjian cailiaode tongzhi*, (Chinese Communist Party Central Commission for Discipline Inspection, Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security circular on mutually providing documentation regarding cases in the course of disciplinary investigations) Shi Qingben (ed.), *Zhonghua Renmin Gongheguo gong’an falü fagui guizhang shiyi daquan*, (A Compendium of

seem to be part of an “exploded network” which nodes continuously encroach upon each other’s jurisdictions. Procuratorates, unmindful of their power of arrest approval and of their task of keeping close coordination with public security organs, often subject corruption suspects to administrative detention measures targeted at vagrants and roving criminals, such as sheltering and examination (*shourong shencha*). CDIs, in spite of their leniency, both alleged and actual, fearful that he might flee abroad¹⁰² even detained a suspect who during the period of his detention was elected as a delegate to Canton people congress!¹⁰³ This dynamic is the main factor beyond this feature of selective implementation of anticorruption law: cases which should be prosecuted, as they fall under the scope of criminal law are dropped. This result is achieved, I believe, thanks to an important feature shared by anticorruption organs at each level: the possession of regulatory power. Local regulations shared with both disciplinary and criminal law the feature of graduating sanctions according to the amount of sums involved in the crimes. It was precisely this feature that allowed for non implementation of central norms.

China is a country displaying an impressive array of law making authorities, and a host of conflicting regulations¹⁰⁴. As far as anticorruption law is concerned, this picture is complicated by the status of norms issued by party organs. If the state law sometimes needs still to be clarified and interpreted by the supreme judicial organs, this problem does not touch disciplinary legislation. Its extreme detailedness in principle not only should leave no room for discretion, furthermore, it excludes the enactment of local regulations. Local committees show little understanding of norms they are supposed to implement, and therefore keep flooding the Central Disciplinary Inspection Commission with awkward requests for instructions (*qingshi*) on how to apply disciplinary norms to concrete cases.

Cadres who sit in commissions for discipline inspection are requested to implement a body of legislation far more detailed than the criminal law and

laws, regulations and administrative rules of public security organs of the People’s Republic of China) Beijing, Zhongguo Renmin Gong’an Daxue Chubanshe, 1997, pp. 2115 – 6.

¹⁰² Just in 2004, Hebei Province and Beijing Municipality saw respectively more than 190 and 120 corrupt officials fleeing abroad. “China hunts corrupt officials who abscond overseas”, *People’s Daily*, 24 march 2004, http://english.people.com.cn/200403/24/eng20040324_138361.shtml. Last accessed on 12 November 2004.

¹⁰³ Such was the case of the general manager of a state company who during its period of “disciplinary” detention under a rather obscure measure known as the “two designateds” (*shuanggui*) was nevertheless elected to the Canton people’s congress “Hai zai shuanggui qijian, heyi dangxuan renda daibiao?” (Still detained under the dual regulation, how can he be elected to the people’s congress?), *Renmin Ribao* (People’s Daily), 29 May 2003 <http://past.people.com.cn/GB/guandian/30/20030519/995381.html>. Last accessed on 12 September 2004.

¹⁰⁴ Chen Jianfu, *supra*.

the set of judicial interpretations complementing its content. As poor as a procurator or a judge's training might be, those former servicemen had nevertheless the opportunity to gather at least some superficial legal knowledge in the course of night or part time classes. In spite of this, there are certain notorious instances of ignorance of the law they are supposed to apply. Until 1988 prosecutors in Fujian thought that the crime of temporary misappropriation of public funds, itself introduced in the Criminal Law in 1980 and besides, a well known legacy of traditional Chinese law, did not exist at all. Admittedly, this is why just two cases of temporary misappropriation of public funds were filed in the whole province from 1980 to 1988¹⁰⁵.

The situation might be even more difficult to master for cadres employed in CDIs, who might concurrently hold other positions. Furthermore, as an official¹⁰⁶ admitted, the number and variety of disciplinary norms is so big, and norms are being enacted at such a fast rhythm that keeping pace with them is difficult. Members of CDIs cannot remember their content exactly. They ignore a large majority of the legislation, and know and apply just those few pieces of laws that closely correspond to the actual situation and needs of their work unit. So, cadres of a unit in the health system¹⁰⁷ might know and apply mainly the norms dealing with bribery associated with the approval for the sale of fake or substandard medicines, while not dealing with other forms of corruption. Still, implementation of norms is perceived as a difficult task by some officials, since their detaildness, according to them, makes their implementation harder.

Requests for instructions (*qingshi*) such as the one sent to the CDIC by Beijing Municipality Tongzhou District can be therefore taken almost at face value. The district officials asked the CCDI if they could expel cadres who had obtained bribes in excess of 5.000 yuan. Although such question had not reason to be asked it was replied that "Sums involved in the crime are just a part of the social damage caused by corruption. In implementing these regulations disciplinary committees must take into account other circumstances"¹⁰⁸. The reply fixed at 5.000 yuan the limits for prosecution of

¹⁰⁵ Fujiansheng Difangzhi Bianji Weiyuanhui (ed.). *Fujiansheng Zhi, Jianchazhi*, (Fujian Gazetteer, Procuratorial Gazetteer) Beijing: Fangzhi Chubanshe, 1997, pp. 24 - 28.

¹⁰⁶ Notes taken during conversations with an anonymous official.

¹⁰⁷ To protect the identity of the official who disclosed this information to me during an informal meeting in Beijing, October 2004, I have changed the sector.

¹⁰⁸ *Beijingshi Tongzhouqu Danshiquzhi Bangongshi, Zhongguo Gongchandang Beijing Tongzhouqu Lishi Dashiji, 1923 - 2000*. (Chronicles of the History of the Communist Party in Beijing Municipality Tongzhou District) Beijing: Beijing Chubanshe, 2001, pp. 1022 - 1023.

a case. Such statement gave CDIs the possibility to expel officials who for instance, although had accepted bribes for 4.999 yuan for closing an eye on substandard construction work, were responsible for a building's collapse and the subsequent death of tens of people¹⁰⁹.

As soon as such documents were spread within the party, they combined in vicious ways with the regulatory power enjoyed by local party committees. These started employing the "legal weapon", to manipulate a norm content so complex and detailed that in principle should have left no room for manipulation. Each organ, backed by the claims that central norms were too many, started relying on departmental and local regulations conflicting both with party regulations, NPC laws and State Council regulations to implement an anticorruption legislation with local characteristics.

Local norms¹¹⁰ vary in scope, wording, detailedness and content, but their most prominent point is that they set a limit for expulsion from the party higher than that stipulated by central norms. For instance, in Fujian province party and state cadres guilty of accepting bribes worth more than 10.000 yuan are punished with an expulsion with a two year probation period¹¹¹. This basically means allowing the official to stay in the party, and to continue carry out its former tasks. Similar norms are implemented in Haishu District in Ningbo, where official are allowed to receive more than 10.000 yuan in bribes and get away with and expulsion with a two year probation¹¹².

Apart from norms targeted at state-party officials in general, there are signs of the existence of a growing body of norms issued by single institutions, and targeting very specific violations of discipline or crimes. According to the repeated calls for reducing corrupt phenomena in the health sector, which themselves can cause incommensurable damage to public health, localities have begun implementing norms that, while on the surface can be read as a sign of compliance, in reality them to fully bypass central level legislation. In Guangdong province cadres employed in the health system are just fined twice

¹⁰⁹ Sadly, this dynamic seems to be quite common in the construction sector. This example is entirely hypothetical. For a description of corruption phenomena plaguing the construction sector, see Ding Xueliang, "The quasi-criminalization of a business sector in China, deconstructing the construction-sector syndrome", in *Crime, Law and Social Change*, n. 35, 2001, pp. 177 – 201.

¹¹⁰ Amazingly, beyond the more conventional sources, a 'new' source where lots of rather obscure laws and regulations can be found are websites of local governments, government organs, and CDIs

¹¹¹ Fujiansheng, "Guanyu zhizheng dang he guojia jiguan gongzuo ren yuan zengsong he jieshou hongbaode zanxing guiding", (Temporary provisions on party and state organs personnel putting an end to the giving and receiving of 'red envelopes') in *Kejiazhi guang* website (The Home of the Hakka), <http://www.hakkazg.com/z> Last accessed 22 November 2004.

¹¹² "Lingdao ganbu lianjie zilü neirong wenda" (What does cleanliness and self-restraint of leading cadres mean?), in *Zhongguo Ningboshi Haishuqu Jilü Jiancha Weiyuanhui* (Disciplinary Commission of Ningbo Haishu District), <http://www.hsjw.gov.cn> Last accessed 22 November 2004.

the amount of the bribes they get if their act of corruption is discovered. Prosecution is of course almost never mentioned¹¹³. Other units, such as the Jilin Provincial Health Office, have vested themselves the authority of determining if an act of passive bribery constituted a crime or just a “mistake”¹¹⁴. Thus, even though an official could be expelled by the party, contrary to central disciplinary norms, he can be prosecuted only if his acts is deemed to constitute a crime, no matter the wording of the criminal code, disciplinary legislation and procuratorial interpretations as flawed and vague as they might be, say something widely different. Similar norms have been issued by, amongst others, the Xiamen Tax Office¹¹⁵. Differently, other provinces, such as Jiangxi, instead of altering the amount of sums above which prosecution becomes compulsory, have devised a whole different range of “organizational measures” whereby party cadres are allowed to quietly resign from their position in a state organ¹¹⁶, while keeping their position in the party!

7. Imbalances in the kind of crimes prosecuted

Side by side with the phenomenon of wild law-making, which allows for the shielding of corrupt officials, we find another form of selectivity. Cases not only are punished less and less as they get nearer to the state nodes of the anticorruption network. Those which are prosecuted show a significant imbalance in the acts punished. Crimes of graft and passive bribery (*shoubui*) are prosecuted with a higher frequency, compared to crimes of misappropriation and active bribery (*xinghui*).

¹¹³ “Guangdong chutai guiding yisheng shou hongbao yiwuan yuan yishang kaichu”, (New provisions in Guangdong Province: medical doctors who receive ‘red envelopes’ worth more than 10.000 yuan should be expelled) in *Dalian Tianzhengwang*, <http://www.runsky.com/homepage/dl/re/userobject1ai430649.html> 17.4.2004. Last accessed 22 November 2004.

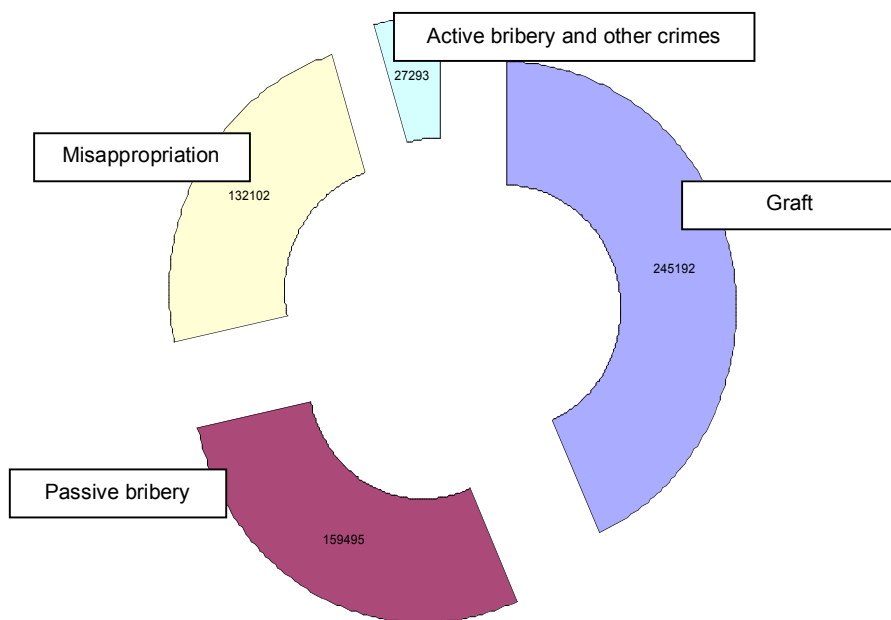
¹¹⁴ “Jilin Weishengting guiding yisheng shou hongbao leiji 5.000 yuan kaichu gongzhi”, (Jilin Province Health Office to expel medical doctors who receive ‘red envelopes’ totaling 5.000 yuan) *Yiyao zaixian* (Medicine Online) http://www.cnm21.com/xinwen2/040429_013.htm. Last accessed 22 November 2004.

¹¹⁵ Fujiansheng Xiamenshi difang shuiwuju guanyu zhizheng dang he guojia gongzuo renyuan zengsong he jieshou hongbaode zanxing guiding, (Fujian Province Xiamen city tax office temporary provisions on on party and state organs personnel putting an end to the giving and receiving of ‘red envelopes’) 2 December 1999, in *Xiamen Dianzi Difang Shuiwuju*, (Xiamen online tax office) <http://www.xm-l-tax.gov.cn/xmds/spsx/lz4.htm> Last accessed 22 November 2004.

¹¹⁶ “Zhonggong Jiangxisheng Jiwei, Jiangxisheng Jianchating guanyu zhili dangzheng lingdao ganbu weifan guiding jieshou he zengsong xianjin, youjia zhengquan, zhifu pinzheng jiancheng ‘hongbao’ wentide tongzhi”, (Jiangxi Province Party Committee, Supervision Office circular regarding the problem of leading cadres giving and receiving cash, stocks, ‘trial goods’ and ‘red envelopes’) 21 June 2004, in *Jiangxi Lianzhengwang* (Jiangxi Clean Government Net), <http://www.jxlz.com.cn/content.php?id.=100000576> Last accessed 22 November 2004.

Of the more than 9.000 cases of bribery filed by procuratorates in 2000, just 1.367 were cases of active bribery. In the same year, courts tried just 77 cases of such crimes¹¹⁷. This has been a constant trend, the party unsuccessfully tried to revert in 2000, when it promulgated a circular reminding both CDIs and judicial organs that, whenever a case of passive bribery came to their attention, bribe givers were to be prosecuted along with the bribe takers¹¹⁸. In spite of the fact that, for each bribe taker, there must be at least one or more bribe giver prosecution of active bribery continued to account for an estimated 12% of all cases of bribery which were prosecuted a year after the circular was issued.

Graph 3 – Kind of crimes tried by courts, 1990 - 2001¹¹⁹



¹¹⁷ Zhongguo Falü Nianjian Bianjibu, *Zhongguo Falü Nianjian 2000*. (China Law Yearbook 2000) Beijing: Falü Nianjian Chubanshe, 2001, pp. 157, 175.

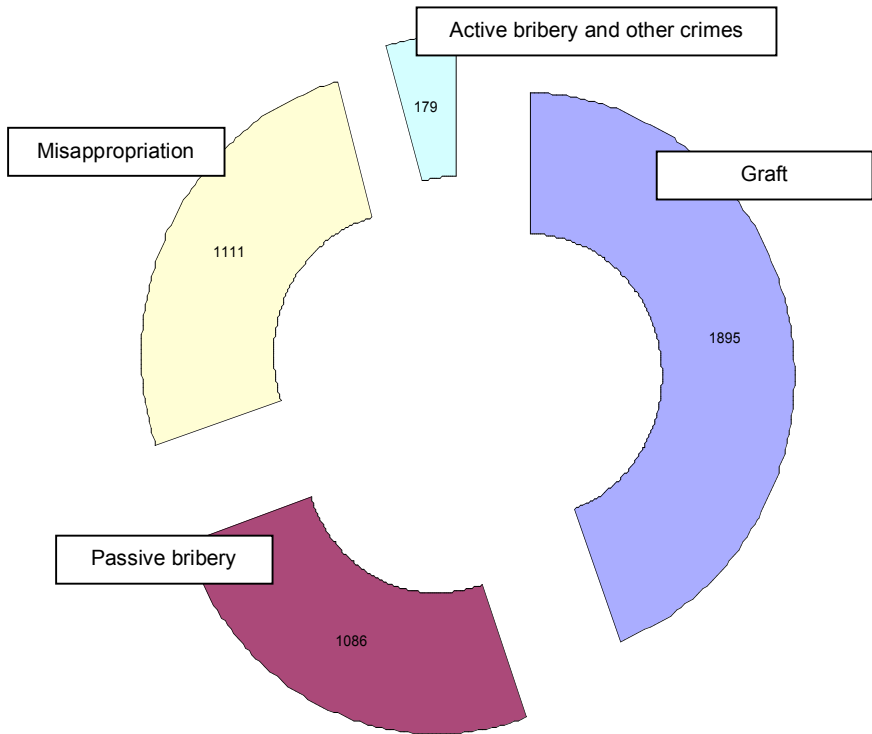
¹¹⁸ *Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan guanyu zai banli shouhui fanzui da'an yao'ande tongshi yao yansu chachu yanzhong xinghui fanzui fenzide tongzhi*, (Supreme People's Court, Supreme People's Procuratorate circular on severely punishing criminals responsible of active corruption at the same time of prosecuting big and important cases of passive corruption) 4 March 1999.

¹¹⁹ Zhongguo Falü Nianjian Bianjibu (ed.), *Zhongguo Falü Nianjian (1990 - 2003)*, (China Law Yearbook) Beijing: Zhongguo Falü Nianjian Chubanshe, (1991 - 2003).

If a certain degree of confusion between the crimes of embezzlement and temporary misappropriation of public funds can indeed be possible for a prosecutor or judge not too versed in the subtleties of legal jargon, the difference between *accepting* and *giving* a bribe is unmistakable! As simple and linear as this logic might be, such a phenomenon seems to have spread at least in two different areas of China.

As showed in graph 6, it has been active in one of the most tightly controlled areas of China, Beijing Municipality, where crimes of active bribery and misappropriation accounted for respectively for 4.19% and 26% of all crimes prosecuted, with graft being the lion’s share (44.36%), followed by passive bribery (25.42%)

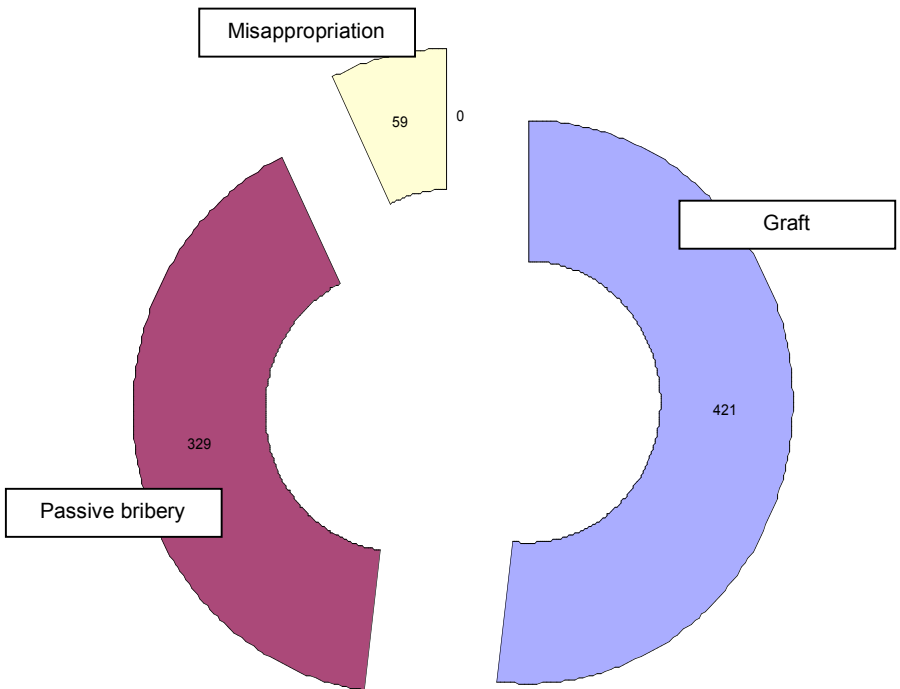
Graph 4 - Corruption crimes received by courts in Beijing Municipality 1990 – 2000¹²⁰



¹²⁰ Beijingshi Tongjiju, *Beijing Tongji Nianjian* (1993 - 2001) (Beijing Statistical Yearbook), Beijing: Zhongguo Tongji Chubanshe, various years, pp. 384, 500, 529, 501, 530, 434, 505, 515, 424. It should be noted that these data **do not yet** include figures for the years 1990 – 1991, as data on prosecution on single crimes were not available in some issues.

If we go lower to the district level, observing data, albeit limited to 1993, for Xicheng District, we will find, again, the same phenomenon: 52.03% of cases prosecuted involved graft, 40.66% were cases of bribery, and misappropriation accounted for just 7.29% of the 809 cases tried in 1993.

Graph 5 - Corruption crimes received by courts in Xicheng District, Beijing Municipality 1993¹²¹.



Misappropriation of public funds is on the whole, a crime less prosecuted than crimes of both active and passive bribery, while legislation pertaining to other offences is almost unimplemented. The 1988 Supplementary Regulations on Suppression of Corruption and Bribery created the crimes of

¹²¹ Beijingshi Xichengquzhi Bianji Weiyuanhui, *Beijingshi Xichengquzhi*, (Beijing City Xicheng District Gazette) Beijing: Beijing Chubanshe, 1999, p. 294.

possession of property in excess of legitimate income¹²², and of privately distributing state assets, fines¹²³ and confiscated goods¹²⁴. Creation of such offences had aroused the sharp critiques of many legal scholars¹²⁵, who pointed out how they overlapped with the crime of graft. In their opinion, there was no need to punish the act of appropriating and dividing fines or state assets, since they acts had already been proscribed by legislation on graft. This overlap is not anyway perceived to be the reason why part of the Criminal Code is not implemented: legal scholars themselves recognize this as a matter of fact, but give no explanation as to how and why both party and state anticorruption organs each year sanction just a small number of such crimes.

Part of this explanation lies in the limits set for prosecutions of these latter offences. Cases of possession of property in excess of legitimate amount can be filed by procuratorates only if the property suspected of having been acquired illegally surpassed the amount of 300.000 yuan¹²⁶. Similarly, crimes of privately distributing state assets, fines or confiscated goods can be prosecuted just if the amount they involved exceeds 100.000 yuan¹²⁷. A first reason why this part of legislation is seldom implemented, then, lies in existence of norms who have set such limits. Although their content contravenes the Criminal Code, in that crimes committed for sums above 100.000 yuan can be punished with penalties ranging from life imprisonment to the death penalty, nevertheless this is a typical case of a provision (*guiding*), issued moreover on an experimental basis by the Supreme People's Procuratorate prevailing on a law (*falü*) issued by the NPC. More interestingly, the few cases that have been published show that majority of these crimes are likely to be committed either by high ranking officials, often with the aim of fleeing abroad, of by cadres employed in the public security system. Whereas officials ranking at the

¹²² Art. 395, 1997 Criminal Law.

¹²³ Art. 396, 1997 Criminal Law.

¹²⁴ Both offences are a result of the transmigration of foreign norms in the Chinese criminal system. The crime of possession of property in excess of legitimate amount was in fact first proscribed by the Napoleonic Code, and then by anticorruption law of Hong Kong, India and Pakistan, whereas the offence of hiding of bank accounts existed in Singapore, South Korea, Malaysia and Egypt criminal law. Cai Xingjiao, *Caichan tanhui fanzuide yinan he bianzheng*, (Solutions to Doubts about Corruption and Crimes against Property) Beijing: Zhongguo Renmin Gong'an Chubanshe, 1999, pp. 460 – 464, 489.

¹²⁵ Wu Minglei, "Ju'e caichan laiyuan bumingzui fadixingde wanshan" (Improving Penalties for the Crime of Possession of Property in Excess of Legitimate Income), *Renmin Jiancha*, (People's Procuratorate) n. 8, 1996, pp. 11-12. Zhao Jifu, "Xi jiti sifen guoyou zichanzui", (The Crime of Privately Distributing State Assets) *Renmin Jiancha*, (People's Procuratorate) n. 8, 1997, pp. 36 – 37.

¹²⁶ *Zuigao Renmin Jianchayuan guanyu renmin Jianchayuan...*, in *Zuigao Renmin Jianchayuan Yanjiushi*, (ed.) cit. pp. 278 - 302.

¹²⁷ *Ibid.*

ministerial or at the vice ministerial level are prosecuted less frequently than lower ranking cadres, due also to the lower number of high ranking officials compared to lower level ranking cadres one feature of the public security system is that anticorruption is, contrarily to other state and party organs, implemented internally.

A conventional explanation for this pattern of selectivity would mention the interference of party committees and political legal commissions. Adjudication by the political legal committee secretary (*shuji bian*) and trial before adjudication (*xian ban hou shen*) were in the past the main tools used to shield officials from prosecution. Young Nam Cho anyway mentions¹²⁸ that interference of such bodies is now restricted just to the more sensitive cases. Furthermore, as showed by the discussion on the exercise of regulatory power, party intervention in implementation has changed from direct to indirect. Party leaders do not need to scold overzealous political-legal cadres or directly interfere in the workings of the political-legal system anymore, since they can enact norms that can allow to bypass law content at the central level. Apart from this, another quite traditional mean much used to safeguard local economic interest is devising ambiguous policy lines.

For instance, in the nineties Fujian province implemented anticorruption law according to the line (*fangzheng*) of “combining resoluteness with caution”. Translated into ordinary language, this meant that the higher people’s procuratorate devised an approach to implementation of anticorruption law that was quite different from the line endorsed by the centre. First, prosecutors in Fujian had long cherished the notion that “graft can be prosecuted, bribery cannot”, and that was better to “wait” and “let the suspect go”¹²⁹ whenever there was the chance that prosecution of a given case might result in an interference with the policy of reform and opening up. Second, sub-provincial procuratorates were instructed to drop the case whenever the suspect manifested repentance and, most important, returned the sums he obtained. This measure thus resulted in an unprecedented laxness in law enforcement. In a province notorious for having given birth to the Yuanhua smuggling scandal¹³⁰, procuratorates at all levels dealt with just a mere 219 cases of smuggling in 1992! The need to protect factory directors, managers and technical personnel also resulted in leniency towards crimes

¹²⁸ Young Nam Cho, “Symbiotic Neighbour or Extra-Court Judge? The Supervision over Courts by Chinese Local People’s Congresses” *The China Quarterly*, Vol. 176, 2003, pp. 1068 – 1083.

¹²⁹ Fujiansheng Difangzhi Bianji Weiyuanhui (ed.), *cit.*, pp. 24 - 28.

¹³⁰ For a case study of the smuggling network headed by private entrepreneur Lai Changxing, and involving hundreds of officials both in Xiamen and in Fujian, see Shawn Shieh, *cit.*

committed by those who had better and deeper access to opportunities for corruption. A third and final point in the provincial policy was the need to carefully consider, while deciding if cases had to be filed or could be dropped, whether prosecution of the case would exert a negative influence on the overall environment in “open zones”, particularly when foreign interests were involved. Therefore, acts of bribery committed by foreign business people could be prosecuted only if the bribe taker admitting that he was corrupted by the foreigners, would agree to testify against himself.

A similar approach was devised in Beijing Municipality. Whereas the two areas differ, in that while the overall policy line for Fujian province stresses the need to maintain a high rate economic growth and to enjoy a steady flow of FDI, development plans for the capital stressed first and foremost the need to keep social stability, and to fully develop the potential of Beijing as China’s window to the world¹³¹. Nevertheless, considerations of local protectionism were central in inducing procuratorates to drop cases. Beijing top prosecutor He Fangbo, remarked that cases took an excessively long time to be investigated and dealt with. This was not surprising, since procuratorates in Beijing had to fulfil the task of “preventing ultraleftism”. Preventing ultraleftism was shorthand for letting procuratorial cadres understand that they should carefully consider the current economic policies while implementing the Criminal Code. Therefore, the relationship between the Code and the broader policy line of fostering economic development was to be treated cautiously. Cases were to be transferred to the courts only when law content was coherent with the need for local economic development. Whenever the need for local economic development conflicted with anticorruption law, or contradictions or unclear points were to be found in the one or the other, acts of corruption were not to be prosecuted too lightly. Such cases were to be dealt with slowly, delayed, postponed and eventually dropped. Dubious cases had to be dealt with in the same way. Such cases were furthermore to be published in collection of cases such as the *cankao anli*¹³²,

¹³¹ Beijingshi Renmin Zhengfu yingfa Chen Xitong shizhang zai shi jiu jie renda sici huiyishang zuode “Guanyu Beijingshi guomin jingji he shehui fazhan shinian guihua he dibage wu nian jihua gangyaode baogao” deng wenjian de tongzhi, (Beijing Municipality People’s Government Circular about releasing Mayor Chen Xitong report delivered to the Fourth Session of the Ninth Municipal People Congress entitled “Outline of the then year development plan for economic growth and social development and of the eight five-year plan” and other documents) *jingzheng fa* (1991) 32 hao, *Beijing Chuang* (Beijing Window) www.bjgov.cn. Last accessed on 15 September 2004.

¹³² He Fangbo, “Beijingshi renmin jianchayuan gongzuo baogao” (Beijing Municipality People’s Procuratorate work report), in Beijingshi Difangzhi Bianji Weiyuanhui, *Beijing Nianjian*, 1993, (Beijing Yearbook, 1993) Beijing: Beijing Nianjian Chubanshe, pp. 32 – 35.

so as to instruct individual prosecutors on how to implement anticorruption law “the right way”.

8. Local economic interests

But why these line has targeted just the crimes of graft and passive bribery? There is a substantial difference between graft and misappropriation on one hand, and crimes of active and passive bribery on the other. The crime of graft consists in the act of “misappropriating, stealing, swindling or acquiring state property using other illegal means”¹³³ It involves a direct and often irreversible loss of local governments and units’ funds. Once an official has misappropriated funds, the organizational interests of his work units can suffer a very serious damage, particularly if funds stolen are employed for “unproductive” purposes, such as for shopping, traveling, gambling, womanizing, or – as it often happens simply hoarded. There is no chance that such acts might benefit the unit, neither at a symbolic nor at an actual level. The official’s work unit therefore finds itself deprived of the means with which it is supposed to implement other policies. Its overall performance is negatively affected. Furthermore, as successfulness of corruption control is one of the criteria used to evaluate officials performance, occurrence of this crimes might affect their chances of promotion. Therefore, localities have a real interest in prosecuting graft, since they receive nothing in return for letting the money flow out of their coffers.

Acts of misappropriation are aimed at different purposes. Notwithstanding the absolutely negative impact sorted by corruption on long term economic growth¹³⁴, misappropriation can often result in a boost of local growth, albeit one standing on shaky foundations. Most of the funds misappropriated are, as shown by various collection of cases, employed to set up new enterprises, loaned or otherwise invested. Furthermore, the funds are usually returned, even though after the statutory term of ninety days. Their diversion takes place with the approval of the unit leaders, following discussions between the unit or the local leadership. Diversion is then carried out by individual officials who assume full responsibility for their restitution. In exchange for taking this risk, they are allowed to skim off part of the funds, to get a share

¹³³ Art. 382, Criminal Law of the People’s Republic of China. Charles D. Paglee, *Chinalaw Web - PRC Criminal Law* (last modified April 7, 1998) <http://www.qis.net/chinalaw/prclaw60.htm>

¹³⁴ The literature on this topic is huge, a good example is anyway Mauro Paolo, “Corruption and Growth”, in *The Quarterly Journal of Economics*, no. 110, 1995, pp. 681 – 712.

in the enterprise thus set up, or to ask the counterpart for small bribes disguised as “commissions”, “reimbursements”, “management fees” and so on. Ultimately, even though they have to put up with a temporary lack of funds, and the risk that the official might flee with the money or not return them, local units can often receive some benefits from misappropriation. This especially if, as it often happens, funds are employed to set up “briefcase companies”, used to attract overseas investments and to set up joint ventures.

Active bribery can sort the same effect. Starting from the nineties bribery has been employed to get access to resources needed to fulfill the plans for local economic growth. Most cases of passive bribery that have been prosecuted show in fact that bribes were demanded to allow units or individuals to obtain use of land, bank loans, and generally speaking other resources indispensable to foster local economic development. Of course such acts, viewed from the point of view of the units who were deprived of their resources because one or two officials agreed to loan millions of yuan in exchange for a bribe are extremely virulent.

On the other hand, they are thought of as benefiting the unit of the bribe giver. Active bribery and misappropriation are – rather awkwardly – represented as acts that under these circumstances do not constitute crimes, as they are committed to obtain resources to which one is more or less legitimately entitled and which ultimately promote both the unit and local interests. Therefore, they are not always prosecuted, as procuratorates prefer devoting their attention to different kind of crimes, so as not to overburden themselves and strike at a number of crimes considered to be “excessive”¹³⁵

So, when it comes to deciding who to prosecute, cases transferred to the courts involve mainly passive bribery and graft. This will lead us in turn to the last point of discussion. Do courts implement anticorruption law uniformly? Do they sentence in more or less the same way similar crimes? Again, the answer is negative.

For instance Gu Chengbin, the general manager of a state company, was sentenced to just two years of fixed term detention for having bribed bank personnel with more than 2 millions yuan. His purpose was, of course, securing a loan for his company, which might otherwise have gone bankrupt or lost its competitive advantages *vis a vis* other companies. Seen from this perspective, Gu was better than somebody who, for instance, could have squandered the same amount of money gambling and womanizing in Macao. In fact, heavier sentences are likely to be meted out for such cases. Gu violated

¹³⁵ Cai Xingjiao, *cit*, p. 558.

the law, but did that with the intention of benefiting his company, not just himself. Another example is that of Shen Shulan. The wife of Nantong city vicemayor Fan Baocai, Shen accepted more than half a million yuan in bribes. In turn, she was sentenced to a mere five years fixed term imprisonment. In other cases¹³⁶, defendants are found to be innocent, in spite of the fact they misappropriated sums well above 200,000 yuan. It is important, I believe to take this line of reasoning seriously, instead of attributing it to obscure factional dynamics active at the local level, and not only because it is present all over commentaries to court cases. When viewed from an outside perspective it might sound artificial and it certainly does not fit the letter of the law, but it nevertheless reflects real dilemmas experienced by local units. Side by side with such cases, there are various instances of exceptional severity on the part of the courts.

It is interesting to notice that this phenomenon, already documented by publicly available sources, started being reported by the press just recently. Officially, courts complained that standards set by the Criminal Law were too vague. For instance crimes of graft and bribery could be punished with penalties ranging from ten years imprisonment to the death sentence¹³⁷. Judges remarked that while content of the Criminal Law was fixed and stable, crimes were evolving at such a fast pace that the law could not keep up with them anymore. Again, besides endless suspicions of corruption, we can find considerations about how not to damage economic interests of the local governments behind such exceptional leniency. Courts, following the path already broken by CDIs and procuratorates, have begun enacting their own regulations on how to “correctly” sanction acts committed for sums above 100,000 yuan. The first known instance of such legislation is a regulation promulgated on 5 September 2004 by Jiangsu Province Higher People’s Court¹³⁸. We can expect that the regulatory pattern already active in local party organs and procuratorates will soon spread to local courts, thereby increasing the number and variety of obstacles to impartial implementation of anticorruption law.

¹³⁶ For these and other cases, see *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao 1985 – 2000*. Beijing: Zuigao Renmin Fayuan Chubanshe, 2001. (Cd Rom).

¹³⁷ “Tan duoshao pan sixing yaoyou ge biao zhun” (A criterion needed to punish cases of corruption by the death penalty), *Renmin Ribao* (People’s Daily), 20 September 2004, <http://www.people.com.cn/GB/guandian/1036/2796504.html>. “Jiangsu gaofa chutai “guize” tongyi liangxing biao zhun yinfa zhengyi” (Debates caused by Jiangsu Higher Court’s rules on unifying the graduation of sentences), *Renmin Ribao*, (People’s Daily) 20 September 2004, <http://www.people.com.cn/GB/shehui/1060/2793371.html>. Both websites last accessed on 7 March 2005.

¹³⁸ “Jiangsusheng Gaoji Renmin Fayuan lianxing zhidao guize”, quoted in “Tan duoshao pan sixing yaoyou ge biao zhun”, *supra*.

9. Conclusions

In this paper I have pointed out the existence of three basic patterns of selectivity, which can be detected at the macro level, and are likely to be active also at the provincial level and below.

The first one has been already touched upon by the literature on corruption, and consists of letting party organs deal with most cases of corruption. A glimpse into the workings of CDIs shows that, while most cases are punished with just disciplinary sanctions, a fairly higher number of them cannot even reach this stage. Organizational measures, and other remedies which might vary from province to province and county to county, are employed to recover the sums illegally appropriated or otherwise obtained by the official, and to allow him stay inside of the party. Technically, most of the actions that are subject to organizational measures infringe the standards set by both disciplinary norms at the central level, and the Criminal Law. Anyway, wild regulation-making on the part of local CDIs and government organs allows to circumvent both sets of laws and regulations.

The second form of selective implementation shows that crimes affecting the organizational interests of local party and government organs *are* prosecuted. Crimes that, on the short term at least, result in an economic growth resting on unstable foundations are looked at from a different perspective. The fact that a steady flow of revenues, investments, rise of local economic growth, etc. are achieved with means which are tantamount to corruption does not seem to be considered a crime. If it is, acts violating both party regulations and the state law are the object of an exceptional leniency.

Last, courts are sentencing crimes in ways which are at odds with the content of the criminal law. They either hand in light sentences for crimes involving huge amounts of money, or sanction crimes committed for lesser sums with greater severity. Now, the usual claims that can be encountered whenever this topic is raised are two. First, it is widely believed that actual limits employed for both prosecuting cases and graduating sentences are much higher than those stated in the criminal law. Therefore this phenomenon should not be considered an anomaly. This claim might be true. The wildly changing estimates of monetary amounts set for prosecution mentioned in conversations with mainlanders are not an effective argument, anyway. Their claims that a death sentence is customarily handed for crimes involving sums above 200.000, 500.000, 1.000.000 or even 5.000.000 yuan are belied by data published in legal casebooks and the media and therefore unreliable unless they are supported by *accessible* documental evidence. The second most

common claim is that differences in prosecution are motivated by imbalances in economic development. If a 10,000 yuan bribe might be welcomed by a Qinghai official, the same amount of money would look like pocket money in the eyes of a Shanghai or Guangzhou official. Unwritten rules stating the acceptable amount of a bribe do exist, and change from province to province. As proved by disciplinary regulations quoted in the previous paragraphs, party norms have already taken this feature into account. Disciplinary regulations anyway contain explicit and direct references to the criminal law, which adopts a different kind of standards ignoring differences of local economic performance in the name of an ideal equality before the law.

The picture of selectivity in anticorruption sketched in this paper is of course not complete. While these three phenomena can be present at lower level of the political system, selective implementation could be discernible along different lines, such as sectors of the economic system, macro-regions, provinces, counties, institutions etc. These still to-be-found patterns of selectivity could in turn be directly or indirectly linked to the different patterns of corruption illustrated by Yan Sun¹³⁹, and therefore call for an analysis of corruption focused below the central level.

Some factors obstructing the transition from black letter law to law in practice have been identified by literature on law implementation. Local protectionism, corruption, the lack of judicial independence of legal organs, low educational level of law implementers, ambiguity and vagueness of norm content can be considered the main ones.

To a certain extent, such forces are active in the field of anticorruption too. Conceiving the anticorruption system as a bipartite disciplinary *cum* state apparatus or a “tangle”¹⁴⁰ of agencies could draw a smokescreen between us and variables other than anticorruption organs’ design. To transcend this dichotomy not only the obsolete notion of “campaign” needs to be abandoned: our conceptualization of anticorruption organs must be as close as possible to the reality of their setting, while maintaining an appropriate degree of abstraction. The concept of network makes possible to admit that some nodes are more important than others, while at the same time broadening our focus beyond just CDIs and party committees. Seen from this perspective, nodes of the anticorruption network span through different legislative areas and institutions. Therefore, they show a kaleidoscope of the special problems and issues which, although arising from various clusters of China’s legal

¹³⁹ Yan Sun, *cit.*, chapter 4.

¹⁴⁰ Melanie Manion, *cit.* p. 201.

system¹⁴¹ are related to the narrow task of punishing corrupt officials. These problems do not relate to just party disciplinary norms, but also invest the criminal law and the criminal procedure laws¹⁴². They do not only regard the party apparatus, but also the judicial system and besides, auditing organs, people's congresses, local branches of the executive, public security organs, the press, local enterprises, units and enterprises hosting CDIs. Each of these actors enjoys a share of an administrative, political or legislative power which has been feudalized¹⁴³ by the dismantling of the planning system and the introduction of a market economy. As far as anticorruption is concerned, their rule making powers share the feature of being too weak to directly affect the redistribution of wealth amongst the networks' nodes. Anyway, they are strong enough to allow violations of an ideally just redistribution process to be targeted and stopped. Furthermore the feature of resource interdependency allows these organs to share the benefits of an higher rate of local economic growth. In a context where the absolute primacy is given to economic growth, and anticorruption is considered a "weapon" to suppress acts hampering it, the premises for manipulating the dialectic between these two priorities have been set. And anticorruption organs have been given a substantial stake in doing so. Therefore a more detailed content of anticorruption instead of obliterating their discretion allowed local organs to turn the "weapon of law" against the centre. Poor legal training apart, a shrewd and instrumental aptness to wild rule making can be discerned.

Decentralization of regulatory power has also changed the nature of the party's interference in anticorruption from direct to indirect. While it is still true that a phone call from a person of prominence in the party hierarchy might significantly alter the outcome of a case, imagining that this is a routine occurrence would bring us back at least twenty years in the history of contemporary China. The need to intervene in judgments by holding political-legal committees meetings etc. while still present in the most sensitive cases, has been substantially reduced by a subtle pseudo-legalistic approach. Party organs nowadays just need to steer the activities of anticorruption organs by means of regulations which are not only more available than in the past, but ironically represented as complying with the centre's policy!

¹⁴¹ Randall Peerenboom, "Law Enforcement and the Legal Profession in China", Jan Michiel Otto, Chen Jianfu and Li Yuwen, *cit.* pp. 125 – 147.

¹⁴² I have not examined other legislative realms, such as legislation on enterprises, the banking system, administrative licensing, land use transfer, construction etc. which are related to anticorruption although they do not pertain to the criminal law.

¹⁴³ Pan Wei, "Toward a Consultative Rule of Law Regime in China", *Journal of Contemporary China*, vol. 34. n. 12, 2003, p. 3.

In such a scenario, trading money for power to avoid prosecution loses much of its utility. While it is true that party officials bribe law enforcers to escape prosecution, as I have shown above, those who play on the sides of both their private and their units' or local interest are relatively safer than those who don't. In the end, the will to protect a parcelled political power and economic growth seems to be a factor which can obstruct impartial law enforcement more than just the brusque exchanging of money.

A hierarchy between factors contributing to poor law implementation and a set of empirically tested causal relationships between them is still to be found. While the issue of law implementation is complex, I might formulate two propositions to test.

Enforcement in areas of the law and/or institutional clusters entailing processes which directly or indirectly involve creation, re-distribution or distribution of wealth amongst the nodes of one or more networks might be obstructed in the first place by "local protectionism".

Areas and/or clusters singled out for these processes to take place at an accelerated pace might change territorially or institutionally according to developmental/policy priorities set by the centre. If such priorities are accepted by a locality, the resulting pattern of law implementation would see enforcement efforts migrate from this area to a "peripheral" one.

At the individual level, corruption would act as a strong incentive to either deviate from the law, allow linkages between a network composed by government actors and parts of a "dark network"¹⁴⁴ (smuggling ring, the mafia etc.), foster relations between the network and outsiders. A positive testing of both propositions therefore would lead to the exclusion of corruption as an independent variable hampering implementation of laws in at least some legislative areas.

¹⁴⁴ Jörg Raab and H. Brinton Milward, *cit.*

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