

The Draft Amendment (XI) to the Criminal Law of P.R.C: A Critical Perspective

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Abstract

The *Draft Amendment (XI) to the Criminal Law* published by the *NPC Standing Committee* on 28 June 2020 for public comments and advices, while positively responding to public concerns, shows major deficiencies worthy of being reconsidered from perspectives of criminal law being the last resort, scientific evaluation and the problem-oriented principle proclaimed in its explanatory documents. For example, the Draft may not resolve certain problems it emphasizes such as the use of bogus medicine as it is unable to eliminate their deep social and economic causes. Meanwhile, some articles may lead to long criticized phenomenon such as symbolic or political legislation because criminalization is neither feasible nor targeting the real actor, as can be easily seen from provisions prohibiting eating terrestrial wild animal and punishing construction in national nature reserves. Furthermore, relative conducts are already punishable according to extant criminal legislation and thus to criminalize them again is unnecessary and even make application of criminal law more complicated. The aggravated circumstances added by article 24 of the draft amendment are suitable examples, because they have been punishable by article 114 and 115 of the Criminal Law ever since 1997. Therefore, this article suggests that legislators carefully balance strengthening public administration and protection for legal interests, think over the necessity and feasibility of disputed provisions in the Draft, modify descriptions of certain crimes to cover more specific conducts and coordinate existing and newly added articles before adopting the draft amendment.

Key Words: Draft Amendment XI; Criminal Law; Last Resort; Equal Protection

The *Standing Committee of Thirteenth National People's Congress* (hereinafter, NPC Standing Committee) published and started collecting public comments and advices on the *Draft Amendment (XI) to the Criminal Law of P.R.C* (hereinafter, the Draft) on 28 June 2020.* The Draft deserves high comments in terms of its stance of positively and timely responding to public concerns, such as revising the definition of the crime of impairing infectious disease prevention and treatment referring to the successful experience of fighting COVID-19, creating a new crime of corporate espionage to protect business secrets and outlawing violence-related debt-collecting activities. Meanwhile, considerably major disputes have been aroused regarding its value choice, modification approaches and

descriptions of certain newly added crimes (Hu, 2020). This article will first give an overview of the Draft, then summarize its problems and analyze their main causes from a critical perspective, and finally bring forward suggestions for legislators' reference.

1. Overview of the Draft

According to *Explanatory Notes of Draft Amendment (XI) to the Criminal Law of P.R.C* (hereinafter, the Notes) published together with the Draft, articles of the Draft had been designed and selected following four principles.⁽¹⁾ Firstly, to resolutely implement decisions of the *Communist Party of China Central Committee* and turn its policies into legal systems, safeguard fruits of the reform and opening-up policy,

* It must be noted that NPC Standing committee published the revised Draft Amendment (XI) to the Criminal Law of P.R.C (hereinafter, the revised Draft) on 14 October 2020. The revised Draft adds several changes, for example, it suggests punishing teenagers between 12 and 14 for extremely serious crimes such as murder and increasing the age of consent from 14 to 16 in such special cases as a teacher having sex with his students and creates several new crimes such as obtaining qualification for higher education or employment by stealing others' identity. The NPC Standing Committee then adopted the revised draft on 26 December 2020. Analyses below show that these changes make comments and suggestions in this article more convincing, instead of invalidating them.

facilitate construction of a safe China and make better use of criminal law's function of normative guidance and protection for economic development. Secondly, to adopt to citizens' new requirements for a better life by increasing protection for their life, property and safety, especially workplace safety, drug and food safety and guarantee for public health. Thirdly, to further implementation of the criminal policy of combining severity with leniency by keeping tough on crimes that seriously endanger social safety and creating leniency space for those that cause lesser harm or with light circumstances to satisfy requirements of modernizing governance system and capacity of the State and to prevent intensifying contradictions and avoid unnecessary use of criminal punishment by resolving them through administrative, civil and economic means instead of criminal one. Fourthly, to timely modify criminal law to respond to and resolve prominent problems and ensure modifications pertinent, feasible and effective and thereby guarantee the authority and efficient enforcement of criminal law. Correspondingly, the Draft adds 10 new articles and revises 20 existing ones, focusing on six areas below.

In the beginning, the Draft increases deterrence and punishment for crimes relating to public and workplace safety by, for example, making the conduct of throwing objects from high buildings a crime punishable by criminal detention in article 1, penalizing the conduct of using violence against bus drivers in article 2 and enhancing punishment for the crime of causing major industrial accidents and lowering conviction threshold in article 3.

Then, it tries to take steps to ensure food and drug safety by, for example, increasing punishments for a state functionary with drug safety supervision and management functions abusing his powers or neglects his duties from seven to ten years imprisonment and lowering conviction threshold from causing a major consequence to given acts such as being reluctant to deal with identified drug and food violations timely and failing to find major food and drug risks in corresponding administration region in article 28.

Furthermore, it tries to extend the punishment scope of financial crimes by, for example, imposing liability on actual controllers and controlling share-

holders who conceal material facts or fabricate major fraudulent contents in share-soliciting prospectuses, share-subscription applications and bond solicitation in article 8 and article 9, toughening the penalties for the crime of illegally taking in deposits from the public in article 12, and outlawing violence-related debt-collecting activities by making it a crime punishable by imprisonment as high as three years in article 20.

Fourthly, aiming to achieve equal protection for private and public property, it increases maximum terms of imprisonment for the crime of taking bribes and appropriating funds by a non-state functionary respectively from 15 years to life imprisonment in article 18 and from seven to 15 years imprisonment in article 19, heightens conviction threshold of the crime of obtaining by fraudulent means any loan, acceptance of any instrument, letter of credit, letter of guarantee, etc. from a financial institution by providing a precondition to bringing a criminal charge in article 11, causing major loss to the financial institution and adds a new crime of corporate espionage to protect corporate property rights and better business environment in article 15.

Fifthly, it makes it a crime to illegally implant gene-edited or cloned embryos into human bodies or animals punishable by a maximum imprisonment of seven years to safeguard biosecurity in article 23 and revises the description of the crime of impairing infectious disease prevention and treatment referring to the experience of China fighting COVID-19 to strengthen protection for public health through criminal law in article 21.

Finally, it modifies relative articles or adds new ones responding to changes in other laws or highly criticized social problems. For example, it creates a new crime of insulting and defaming heroes and martyrs in article 17 to dovetail the *Law on the Protection of Heroes and Martyrs* that entered force as of 1 May 2018 and penalizes conducts of cultivating lands and constructing buildings in any national nature reserves in article 27 to strengthen protection for natural resources and environment.

2. Major Deficiencies in the Draft

The Draft immediately attracted academic and public

(1) NPC Standing Committee. the Draft Amendment (XI) to the Criminal Law of P.R.C and its Explanatory Notes. Online. EB/OL. Available HTTP <https://www.sohu.com/a/405768236_744299> (Last Retrieved 26 September 2020).

attention. It undoubtedly deserves positive comments in many ways. For example, it timely incorporates experience of effective preventing infection of COVID-19 into criminal Law and strengthens protection for private property. However, major deficiencies still can be seen, although some of which have been repeated time and again in past decades. This part summarizes the deficiencies from following critical perspectives.

2.1 Corporate Criminal Liability

It is well known that China didn't accept the concept of corporate criminal liability until late 1980s, when most criminal law experts were still opposed to the concept due to the deeply rooted belief of criminal liability being based on moralism and individualism (Zhou 2014: 68). Although the *Criminal Law of People's Republic of China* (the Criminal Law) provides corporations to be an actor alongside natural persons, it hasn't answered fundamental questions such as what crimes a corporation can commit and how to decide the quality and quantity of liability when a corporation commits a crime. Consequently, the Criminal Law has been extending the scope of corporate criminal liability in an article-by-article style, in other words, if there isn't such an explicit expression as if a corporation commits the crime stipulated in the first paragraph, a corporation cannot be punished for the crime in the article. Such a style has caused many problems and disputes, one of which is that it offers a legal circumvention for corporations to escape punishment or use scapegoat to reduce its crime cost in practice. Therefore, if a newly added crime isn't provided to be a corporate one while it has been proven there can barely be prevention effect without punishing related organizations, the authority of criminal law will surely be undermined, and this is right the case of article 27 of the Draft.

The article is inserted after article 345 of the Criminal Law as article 345(1), providing that it is a crime to carry out cultivation or development activities or construct buildings in any national nature reserve in violation of natural reserve administration laws and regulations if a serious consequence is

caused or there exists other flagrant circumstances. Because article 346 of the Criminal Law restricting punishment within corporations that commit the crimes stipulated in Article 338 to 345 isn't modified at the same time, the crime to be added in article 345(1) cannot be applied to a corporation.

The legislative effort should absolutely be highly agreed, because the destruction of natural environment, including national nature reserve, has become a prominent political and public concern in recent decades. For example, it was reported that Shanxi province demolished more than 1185 villas in Qinling National Nature Reserve after the highest decision makers issued nine orders (Li 2019) and established a special Circuit Court to protect ecological environment in the area (Liu 2019). However, it is usually powerful corporations with strong backgrounds that can commit prohibited activities mentioned above. Therefore, article 27 of the Draft might fall into an awkward situation if enacted without any changes and may become a lawful backdoor for real perpetrators to go unpunished with lager amount of economic profit and thereby makes the purpose it desires impossible.

2.2 Equal Protection for Private and Public Property

To realize the purpose of achieving equal protection between public and private property stated in the Notes, the Draft increases the maximum prison sentence of taking bribes by a non-state functionary in article 163 of the Criminal Law from 15 years to life imprisonment, demonstrating legislature's emphasis on protection for private property rights. This effort should of course be applauded and is a meaningful step to safeguard citizens' solemn constitution rights.⁽²⁾ Regretfully, the Draft doesn't completely resolve the long-lasting problem of unequal protection between public and private organizations in the Criminal Law.

It is commonly recognized that the identity of public servant is the only difference of such crimes in the Criminal Law as taking bribes by a non-state functionary in article 163 and taking bribes by a state-functionary in article 385, taking over an organization's property in article 271 and 'graft' in article 382, and

(2) The Constitution of People's Republic of China declares that individual economy is a complement to the socialist public economy and state protects the lawful rights and interests of the non-public sectors of the economy, including individual and private sectors of the economy in article 11.

misappropriation of an organization's fund in article 272 and 'misappropriation of public fund' in article 384 of the Criminal Law (e.g. Wang 2020; Zhou 2014: 108). Therefore, it might be more rational and economic to put such crimes in the same section or chapter and provide the identity of public servant to be an aggravating circumstance than the legislators' choice in the Draft if harmfulness of a conduct is considered the standard of criminalization. Meanwhile, all mitigating circumstances specially designed for state or non-state personnel can accordingly be mutually applied.⁽³⁾

2.3 Legal Interests of Newly Added Crimes

The fact that the primary aim of criminal law is to protect legal interests, one of the four constitutive elements of a crime in traditional criminal law theory in China, implies that it is crucial to properly position a crime in the Criminal Law. It not only declares the reason that the crime is punished but also decides who can initiate a criminal proceeding. For example, the crime of maltreating in article 260 of the Criminal Law stipulated in Chapter IV of Special Part of the Criminal Law, Crimes of Infringing Upon the Rights of the Person and the Democratic Rights of Citizens, won't be investigated without a victim's accusation because the perpetrator and the victim are family and health right, the legal interest the crime is intended to protect, is of a private one. If it was provided in Chapter VI, Crimes Disordering Public Administration, investigation authority can in principle interfere whether there is a victim's accusation or not.

Article 17 of the Draft adds an article after article 246 as article 246(1), making it a crime to insult or slander heroes or martyrs and thereby damage public interests. The crime should be considered one of infringing on citizens' rights of the person as it is pro-

vided in the Chapter IV of Special Part of the Criminal Law. However, is this really a wise choice? The answer may be negative for two reasons. One is that relative laws protecting the fame of heroes and martyrs only allows public prosecution to charge given conducts that damage public interest, and the crime to be added is an indictable one. Such a choice implies that the crime is mainly intended to protect social or administration order instead of individual rights. Otherwise, legislature would have taken the same stance as the one in article 246 of the Criminal Law,⁽⁴⁾ leaving the right to sue with the victim in principle. The other is that heroes and martyrs the Draft intends to protect include those that have passed away, while rights of the person belong to persons who are still alive in principle. For those historical heroes without descendants, public authority can only interfere in the name of protecting public admiration order. Briefly, it would be more proper to provide the crime in Chapter VI of the Special Part of the Criminal Law.⁽⁵⁾

2.4 Coordination Among and Inside Articles

Articles to be added should be coordinative with extant laws and other articles in the Criminal Law to avoid contradictions and thereby ensure appropriate application. Judged from this perspective, the Draft has still considerable space for improvements. For instance, article 22 and article 23 of the Draft make 'violation of relative state regulations' a precondition to punish, without identifying which ones. What is more, there aren't state regulations on human genetic editing or human genetic resources now. Therefore, that the Draft criminalizes conducts in the articles may have broken the principle of criminal law being the last resort, which will be further discussed later.

Article 24 of the Draft would be another suitable instance. Article 114⁽⁶⁾ and article 115⁽⁷⁾ of the Crimi-

(3) For example, paragraph 3 of article 383 of the Criminal Law provides that whoever commits a crime as mentioned in paragraph 1, and before a public prosecution is filed, truthfully confesses his or her crime, shows sincere repentance and actively returns the illegally obtained money to avoid or reduce the occurrence of losses, if there is any circumstance as set forth in item (1), may be given a lighter or mitigated penalty or be exempt from penalty; or if there is any circumstance as set forth in item (2) or (3), may be given a lighter penalty. But non-state personnel cannot benefit from this mitigating provision.

(4) The article makes it a crime to openly insult others use force or other methods or those fabricating stories to slander others, if the case is serious, are to be sentenced to three years or fewer in prison, put under criminal detention or surveillance, or deprived of their political rights. But, those who committed the crime are to be investigated only if they are sued, with the exception of cases that seriously undermine social order or the state's interests.

(5) It should be noted that the revised Draft accepted this proposal and has moved this article to Chapter VI of Special Part of the Criminal Law as article 299(1).

nal Law has penalized the conducts of spreading pathogen of infectious diseases, poisonous and radioactive substances. Article 24 of the Draft criminalizes the conduct of discharging and dumping waste containing pathogens of any infectious disease again, and increases maximum prison term from seven to 15 years in following cases: ① emitting, discharging or disposing of pathogen of infectious diseases, poisonous and radioactive substances into any drinking water sources or core area of any nature reserves and thereby causing especially serious consequence, ② emitting, discharging or disposing of pathogen of infectious diseases, poisonous and radioactive substances into major rivers, lakes or waters designated by the state and thereby causing especially serious consequence, ③ causing basic farmland of large amount to lose fundamental functions or permanent destruction and ④ causing serious injuries or death. Because there exist no such legislative restrictions as ‘in violation of relative state provisions’ in article 115 of the Criminal Law, it can completely cover the newly added three aggravating cases mentioned above. The fact that the maximum punishment in article 115 of the Criminal Law is the death penalty while that in article 24 of the Draft is 15 years imprisonment makes it hard to understand how the amendment can strengthen protection for natural resources and public health (Wang 2020).

2.5 Description of Certain Crimes

Descriptions of certain crimes should be carefully reconsidered to exactly draw a line between criminal punishment and other legal sanctions. For example, article 4 of the Draft adds an article after article 134 of the Criminal Law, providing that anyone who carries out any of following conducts in violation of the provisions concerning the safety management in production or operations and thus creates a realistic risk of serious casualty or any other serious consequences shall be sentenced to less than one year imprisonment, criminal detention or public surveillance: ① turning

off or damaging CCTV, alarm devices, protective or rescue equipment, or altering or concealing related datum, information. ② refusing to follow orders to stop manufacturing, producing or constructing or using given equipment, facilities or places or to take rectification measures issued by legal authorities according to assessment on potential accident peril. ③ engaging in highly risky production or operations such as mining, metal smelting, construction and producing, storing or transporting dangerous substances without obtaining approval or permission in relation to safe production issues and the circumstances are serious. Then, what is the relation between ‘realistic risk of serious casualty or any other serious consequences’ and ‘serious circumstances’ in the third case? Why there isn’t such a limitation in the first and the second case, while conducts in three cases are of the same nature? If the article is intended to punish conducts it lists, it would be wise to delete the restriction of the circumstances being serious.⁽⁸⁾

2.6 the Principle of Last Resort

Judged from the principle of criminal law being the last resort, more than one article of the Draft should be reconsidered. For example, article 1 of the Draft inserts two paragraphs into article 141 of the Criminal Law, respectively providing ‘anyone who throw objects from high buildings and thus endangers public safety shall be sentenced to criminal detention or public surveillance, and fine independently or concurrently’, and ‘those who committed the crime in above paragraph and thereby caused casualty or other serious consequence, if breached other articles, shall be punished according to the one carrying a heavier penalty’.⁽⁹⁾ The phenomena of throwing objects from high buildings and its harmfulness attracted intensive public and even political attention in recent years. However, is it dangerous enough to be criminalized? the answer might be negative.

One on hand, criminal liability cannot be imposed

(6) The article provides that whoever commits arson, breaches dikes, causes explosions, spreads pathogen of infectious diseases, poisonous or radioactive substances or other substances, or uses other dangerous means to endanger public security, but causes no serious consequences, shall be sentenced to fixed-term imprisonment of no less than three years but no more than ten years.

(7) According to the article, whoever commits arson, breaches dikes, causes explosions, spreads pathogens of infectious diseases, poisonous or radioactive substances or other substances, or uses other dangerous means to have inflicted any serious injury or death on people or caused heavy losses of public or private property, shall be sentenced to fixed-term imprisonment of no less than ten years, life imprisonment or death.

(8) It should be noted that the revised Draft has deleted this restriction.

until a specific suspect is identified, and practice shows that civil liability is the resolution in most cases. On the other hand, when the person who threw an object was found, whether criminal liability can be imposed should be decided according to such elements as what the object is, when it was thrown and whether it was targeted at anyone or anything. If it was a heavy object such as an ax, a cook knife or a laptop, the person in question can be charged with the crime of endangering the society through dangerous means provided in article 114 and article 115 of the Criminal Law. If it was targeted at a specific person, the conduct is punishable according to murder in article 232 of the Criminal Law. If it was targeted a specific property such as a car, the crime of criminal damage in article 275 of the Criminal Law can be used. Judicial authorities have been dealing with such cases depending on articles mentioned above for a long time, as shown in the following part (Xia, 2020; Xu, 2020). Consequently, the new crime to be added may be applicable only to throwing light objects such as toilet garbage and a piece of paper from high buildings. However, to what degree can these objects endanger public society, and isn't it enough to deal with the problem using civil or administrative sanction? The answers should be yes.

For another example, article 7 of the Draft adds an article as article 142(1) of the Criminal Law, providing that whoever commits any of the following acts in violation of drug administration acts and dangerous enough to harm the people's health shall be sentenced to less than three year imprisonment or criminal detention, and criminal fine concurrently, or if any human death is caused or there is any other especially serious circumstance, shall be sentenced to imprisonment of more than three years and less than seven years in the case: ② importing medicines without obtaining an permission certificate or knowingly selling such medicines. Following paragraph in the article provides that whoever commits the crime in above paragraph and breaks article 141 or article 142 of the Criminal Law shall be punished according the one with heavier penalty. Meanwhile, article 5 of the

Draft modifies article 141 of the article as follows: Whoever produces or sells bogus drugs shall be sentenced to imprisonment of not more than three years or criminal detention and a fine; if any serious damage is caused to the people's health or there is any other serious circumstance, shall be sentenced to imprisonment of not less than three years but not more than ten years and a fine; or if any human death is caused or there is any other especially serious circumstance, shall be sentenced to imprisonment of not less than ten years, life imprisonment or death penalty and a fine or forfeiture of property. Any units knowingly offer bogus drugs to others shall be punished according above paragraph. In other words, in such a case as where a patient buys cancer drugs that are produced in India and has not been allowed to import and asks a doctor to inject the drugs, the doctor may be criminally charged. However, such a criminalization choice may be not be accepted by the public because that it is a common sense that the protection for life is much more important than maintaining order.

Finally, article 25 of the Draft adds a paragraph into article 341 of the Criminal Law providing that whoever illegally hunts, kills, transports or sells terrestrial wild animal other than rare and endangered wild ones with the purpose of eating in violation of wild life protection and administration laws shall be punished. Judged from extant practice of convicting according to the number of hunted animals, it might punishable to hunt 100 sparrows with the purpose of eating. But this is apparently against common sense. In the special background of fighting the Covid-19, it is understandable for the Draft to add such a paragraph. However, to include all terrestrial wild animal without any exceptions is questionable not only from the perspective of last resort but also from that of feasibility. Briefly, such a choice deviates from the general principle of 'maintaining the authority and ensuring strict and effective enforcement of law' proclaimed in the Notes.

3. Main Causes of the Deficiencies

Then, what led to the deficiencies? Briefly, the main

(9) It should be noted that the revised Draft now provides the proposed article in Chapter IV of the Criminal Law as article 291(1) and adds a second paragraph providing where the conduct provided in the previous paragraph breaks two or more articles in the Criminal Law, it should be punished according to the one carrying heavier punishment. This change implies that the proposed crime isn't considered a crime of endangering public security but one of disturbing public administration and partly accepts the suggestions in this article.

causes may be summarized as follows.

3.1 Excessive Dependence on Deterrence of Criminal Punishment

Criminal punishment is traditionally considered the most powerful tool to deal with the most dangerous thing or person in China. Therefore, the ‘problem-oriented’ principle proclaimed by the Notes is understandable. However, history has made it clear that criminal law isn’t a suitable solution to some problems. We need to analyze causes of a problem, evaluate overall effect of criminalization and decide whether it is more appropriate to deal with it through civil or administrative means with a scientific attitude using scientific measures before appealing to the weapon of criminal punishment. Criminal law can interfere if it could effectively deal with a given phenomenon, although unable to eliminate its causes. For example, criminal law cannot eradicate ideological causes of terrorism, but it does have deterrence on specific conducts such as possessing or transmitting terrorist materials and assisting terrorist activities. Therefore, criminalization of such conducts is both acceptable and feasible. On the contrary, it has been proven that the criminalization of evading payment labor remunerations by the Eighth Amendment to the Criminal Law enacted in 2011⁽¹⁰⁾ is unsuccessful, because few corporations were prosecuted even in the following year, and the phenomena became even more serious than before (Liu, 2013). Just as once commented, compared to the total number of 218,000 complaints involving refusal to pay labour remuneration handled by labour security supervision authorities in 2012, the number of 152 criminal cases filed at the people’s court with only 134 closed in May 2011 to December 2012 is obviously ‘disproportionate’ (Shu, 2013: 58). In other words, administrative approach may be more effective than criminal law.

Similarly, the Draft is intended to protect private property by providing heavier punishments in cases of corruption and bribery in private organizations than before. However, it is commonly accepted that the deterrence of criminal punishment depends not only

on its severity, but also on its certainty and timeliness (e.g. Beccaria, 1996: 56, 59). Corporate crime and bribery crime have been especially stressed in recent decades, and offering bribe committed by corporations is now considered one of focuses of law enforcement due to its characters such as large value of bribes, long duration of bribery act and difficulties in disclosing (Liang, 2013) and accounts for a big part of all kinds of cases of offering bribe (Yin and Cao, 2014). However, analysis of 827 corporate bribery cases closed in 2008 to December 2016 shows that more than 76 percent of convicted natural persons are granted a probation, 12.6 percent of convicted legal persons aren’t even ordered to pay any fine and the average amount of paid fine is much lower than that of bribe value. Meanwhile, the analysis finds that more than 36 percent of bribery conducts lasts longer than two years, and 17 percent longer than five years (Zhou, 2020). It may be inferred from these facts that at least the requirements of severity and timeliness aren’t met in the case of corporate bribery. Then, how can we expect the law to function effectively as a deterrent? Therefore, to strengthen law enforcement, better business environment and create a compliance culture in commercial organizations are much more urgent than to heighten punishment.

3.2 Influence of Public Opinion

Public opinion can influence political decisions in almost all countries that adopts an election system, and China is no exception. Law as a tool of social control must respond to social requirements to function as expected. In the meantime, legislators must remain sober, serious and objective and not unduly be influenced by social sentiment to adhere to fundamental values of law. Regretfully, advancements in information technology is making it increasingly easy for media to enlarge and exaggerate a trivial matter to a public or even political incident, which in turn is very likely to exert major influence on criminal legislation. Article 1 of the Draft criminalizing the conduct of throwing an object from a high building and article 25 prohibiting eating terrestrial wild animal are solid

(10) According to the Amendment, whoever evades by transferring property or escaping and hiding or refuses to pay a relatively large amount of labor remunerations though capable, and still refuses to pay even after being ordered by the relevant government department to pay, shall be sentenced to imprisonment of not more than 3 years or criminal detention and/or a fine; and if there are serious consequences, shall be sentenced to imprisonment of not less than 3 years but not more than 7 years and a fine.

examples of the influence of public opinion on legislative decision. The former is a consequence of a serial of heavily reported cases (Xu 2020) and the latter is obviously a reflection of a suspected source of COVID-19 virus.

It is a common knowledge that to prohibit eating all terrestrial wild animals doesn't help to prevent the infection of new coronavirus, and it can be easily seen from the empirical analysis of 24 the cases between 2016 to the publication date of the Draft that existing criminal legislation is sufficient and serious enough to deal with throwing objects from high buildings: ten defendants were convicted of endangering public safety by risky means, two of criminal damage, three of negligently causing serious injury, seven of negligently causing death, one of criminal nuisance and one of causing major industrial incident. Majority of defendants were sentenced to imprisonments ranging from six months to 15 years (Xu 2020). Then, what is the meaning of criminalizing such conducts again?

The meaning is mostly symbolic. Specifically, criminalization of such conducts that arouse public anxiety can show political resolution to handle the problem in question and console victims and their families, satisfying their revenge emotion and thereby prevent private revenge or radical acts. What is more, to strengthen criminal punishment for such conducts may placate public's resentment to culpable individuals and distract public attention from structural causes of a category of crime (Wang and Zhou, 2014). It is regretful to say that a considerable part of China's preventive efforts in recent decades can be labelled 'symbolic legislation' (Liu, 2018).

The crime of evading payment labor remunerations mentioned above is an instance. cybercrime legislation is another suitable one. The *Ninth Amendment to the Criminal Law of P.R.C* adopted in 2015 created four crimes to safeguard internet security. Then, how many criminal cases have been closed so far? Although zero is doubtful, it is true that no conviction report has been found in leading case databases. Meanwhile, five of ten specific cybercrimes stipulated in the year of 1997 haven't been used, and the other five have been used only in 240 cases in the 20 years of 1997 to 2017 (Liu, 2018). Such a low application rate cannot convey to citizens the message that all crimes will be punished and thereby strengthen their belief in law. Nor can it help in deterring poten-

tial offenders. Certain articles to be added by the Draft may face the same destiny.

3.3 Problematic Typification

What criminal law punishes is typed conduct. For example, murder covers all kinds of lethal conducts such as stabbing, poisoning, bombing and shooting. Therefore, a conduct that can be punished according to an extant criminal article, even if not a as an independent specific crime, shouldn't be penalized again unless to include it into the article goes against the principle of legality or its punishment is too light to produce any deterrence. As mentioned above, the four aggravated circumstances in the article 24 of the Draft can already be punished under the charge of spreading dangerous substances in article 114 and article 115 of the Criminal Law, and the punishment in the latter is much heavier than the former. Therefore, it would be unnecessary to reiterate them in article 338 of the Criminal Law again.

Similarly, when deciding on whether to criminalize a conduct, we need to carefully think it over whether the conduct is typed enough to cover all conducts we intend to punish too. Judged from this perspective, the crime of collecting unlawful debts using violent means in article 20 of the Draft needs to be reconsidered. According to the article, whoever commits any of the following acts of collecting unlawful debts and taking it as a profession shall be sentenced to less than three years imprisonment, criminal detention or surveillance, in addition to a fine, or be sentenced to a fine only: ① using violence or coercive means; ② restricting citizens' liberty or intruding into citizens' residences, and the circumstances are relatively light; ③ intimidating, stalking or harassing citizens and the circumstances are relatively serious. The following paragraph provides that whoever commits any other crime while committing a crime as mentioned in above paragraph shall be convicted and punished according to the provisions with heavier penalty.

Because a perpetrator who causes any injury to a victim can be charged with intentional assault stipulated in article 234 of the Criminal Law and second paragraph of the newly added article, it may be said that the draft aims to punish those trying to collect unlawful debts by threatening to use violence or causing nuisance and thereby imposing psychological

coercion on victims. However, a perpetrator can realize this purpose by much more means than the Draft lists, such as writing threatening letters, making threatening calls and showing terrifying pictures to victims' children. Briefly, current description of article 20 of the Draft shall be modified to cover all conducts potential to cause psychological coercion, such as the word of 'coercion' (Wei and Zhao, 2020).

4. Suggestions for Legislator's Reference

There is enough time for us to rethink and modify as the Draft is still at the stage of collecting public comments and advices, and the NPC Standing Committee will in principle reviews a bill three times before adopting it to be a law. Therefore, this article brings forward following suggestions for legislator's reference.

In the first place, abolishing the restrictive element of 'being considered a crime under the law' in article 30 of the Criminal Law.⁽¹¹⁾ On one hand, Chinese legislature adopted corporate criminal liability as a hasty response to social pressure resulted from illegality committed by commercial organizations such as smuggling and environmental pollution in the end of 1980s when the liability principle in the Criminal Law still stressed moral blameworthiness and individualism. Consequently, legislators took a compromising approach of punishing organizations while laying down a restrictive element (for a detailed history of corporate criminal liability, see Zhou, 2012: 22-28). However, it must be admitted that corporate criminal liability conflicts with tradition liability principle in nature and cannot be compromised because organizations aren't moral agents. Therefore, it is absolutely irrational to limit the scope of corporate criminal liability depending on tradition criminal law principles. Listing organizations as one of the actors in the Criminal Law implies that legislators have recognized the competence of a corporation to commit any crime in the law, except for those requiring special constitutive elements that a corporation can never satisfy. For example, a corporation cannot be charged with rape as a perpetrator even if the restrictive element were abolished because it has no pennies, although it may be

charged as an instigator or accessory.

On the other hand, although corporate criminal liability has been rapidly extended since the Criminal Law was modified in 1997, as can easily be seen in the increase of the number of corporate crimes from 146 in 1997 to 194 in 2018, the Legislature hasn't clarified the standard of differentiating corporate crime from non-corporate crime. What is more, the *Interpretation of the Standing Committee of the National People's Congress on Article 30 of the Criminal Law of the P.R.C* adopted on 24 April 2014 has actually extended corporate criminal liability to all crimes in the Criminal Law by providing that when an organization commits any conduct endangering society as prescribed in the Criminal Law, if the specific provisions of the Criminal Law and other laws fail to provide that the entity shall be subject to criminal liability, a person organizing, planning, or implementing such conduct shall be subject to criminal liability in accordance with the law. The wording of 'commits any conduct endangering society as prescribed in the Criminal Law' makes it very clear that an organization is competent to commit all crimes, and it is because of the restrictive element that justice authorities can punish only culpable individuals.

In a word, there have been sound reasons to abolish the restrictive element in article 30 of the Criminal Law, and thereby extend corporate criminal liability to all crimes the draft adds into the Criminal Law.

Secondly, reassessing the necessity of the newly added 10 articles and the possibility of effectively dealing with them using administrative or civil measures. Legislators should analyze not only causes of the problems the Draft intends to resolve and evaluate deterrence of criminalization but also the cost of law enforcement, to thoroughly implement the guidance principle of 'avoiding radicalization of internal conflicts and unnecessary expansion of criminal punishment by dealing them through administrative, civil or economic laws instead of criminal law' stated in the Explanation. For example, it might be a prudent choice to criminalize the conduct of illegally implanting gene-edited or cloned embryos into human bodies or animals after adoption of relative administrative laws.

(11) The article provides that 'a company, enterprise, institution, organization, or group which commits an act endangering society that is considered a crime under the law shall bear criminal responsibility'.

Thirdly, carefully thinking over the 30 articles of the draft, including their relationship with related articles in administrative, civil and economic laws, their inter-relationship, their positions in chapters of the Criminal Law, wording and expressions, etc. to avoid convergence and even conflicts among articles, enhance legislative effectiveness and ensure exact application.

Finally, modifying descriptions and conviction circumstances of certain crimes to avoid potential consequences that go against common sense and public expectation, especially in the time that judicial practice hasn't fully prepared to restrict the use of criminal punishment by substantial interpretation of the Criminal Law and take into consideration of necessity and rationality of punishment when convicting. This is also necessary to realizing constitutional promises to 'respect and safeguard human rights'⁽¹²⁾ and protect private and public property equally.⁽¹³⁾

5. Conclusions

Criminal law as a tool of social control must be reviewed and revised to adopt to changes in society timely. Therefore, it is fair to say that the guidance principles of the Notes and certain articles of the Draft deserve high comments. Meanwhile, criminal punishment is the severest sanction and must be used carefully and cautiously to avoid its negative impact and enable criminal law function properly as a deterrent, especially in such a country as China where stigma culture is still deeply rooted, and conviction may lead to a 'social death'. Moreover, Legislators must take into consideration the cost and feasibility of law enforcement and potential social impact when criminalizing a conduct. After all, the life of law rests with enforcement and public recognition to a high degree.

It is from the perspectives mentioned above that this article suggests Chinese legislature abolish the restrictive element in article 30 of the Criminal Law, reconsider articles punishing the conduct of hunting terrestrial wild animals with the purpose of eating, throwing objects from high buildings, using medicines with official production and sales certificate of a for-

eign country but without import permission of China, etc., and reassess potential impact of criminalization of certain conducts. To draw a conclusion, criminal law must respect fundamental principles such as criminal law being used as a last resort when adopting to requirements of administration and social governance.

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(12) Paragraph 3, article 33 of the Constitution provides the state respects and protects human rights.

(13) Article 11 of the Constitution provides that the individual economy of urban and rural working people, operating within the limits prescribed by law, is a complement to the socialist public economy.

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