

In the Battle against COVID-19: Reaction of Chinese Criminal law and Way Forward

Fan Xueke

Post-doc fellow, University of Macau, Faculty of Law
<https://orcid.org/0000-0002-4748-1193>

Li Zhe

Associate Professor, University of Macau, Faculty of Law
<https://orcid.org/0000-0002-4636-5932>

SUMMARY

I. Introduction

II. Criminal Law Applicable to the Outbreak of COVID-19 and Issues Unsolved, and Problems Caused by Law

III. The Evolution of the Response of Criminal Law in the Process of COVID-19 Control

IV. The Prospect of the Improvement of the Response of Criminal Law in the Future

Bibliography

I. Introduction

The COVID-19 Pandemic is the most serious health emergency that Chinese government has faced since its foundation in 1949. However, with the development of the Chinese legislation and legal system, as well as the experience in combating SARS in 2003, the battle against COVID-19 led by the Chinese government has had great success as evidenced by its economy increase, peaceful societal order and low infection rate. As in the criminal area, Chinese Criminal Law has shown some grey areas at the very beginning of the COVID-19 pandemic, but such loopholes were fixed quite quickly. On February 6, 2020, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice jointly issued the Opinions on Punishing the Illegal and Criminal Activities of Obstructing the Prevention and Control of COVID-19 Epidemic by Law (hereinafter referred to as "the Opinions"). The judicial bodies have issued their judicial interpretations in a timely manner, which, to some extent, plays an important role in compensating for the deficiencies in the legislation. After that, both the Supreme People's Court and the Supreme People's Procuratorate issued typical cases as guidelines for the application of the law. In order to meet the needs of punishing crimes in the epidemic prevention and control, the legislature has revised the relevant provisions of the criminal law in the form of amendments. On March 1, 2021, the Amendment (XI) to the Criminal Law of the People's Republic of China (hereinafter referred to as "the Amendment") came into effect. Therefore, the criminal laws and regulations for epidemic prevention and control have been greatly improved. However, in view of the characteristics of the spread of infectious diseases, by considering the applicability of relevant accusations and referring to the relevant overseas criminal legislation, there is still room for further improvement of criminal law on the prevention and control of infectious diseases in China.

In this paper, Section II analyses the application of criminal law and problems in the early stage of epidemic prevention and control. At that time, the public security organizations filed investigations for the crime of endangering public security by dangerous means in most cases. However, such acts may also apply to the crime of obstructing the prevention and treatment of infectious diseases. This section analyses the theoretical and practical disputes in the application of criminal law. Section III analyses the evolution and progress of criminal law based on the problems discussed in Section II, especially the necessity and progressiveness of judicial interpretation and criminal law amendments. Section IV explores possible improvements of criminal law to deal with similar issues in the future. This section proposes that the crime of spreading severe (or serious) infectious diseases should be established in the criminal law, and the elements

of the crime of obstructing the prevention and treatment of infectious diseases should be further clarified.

II. Criminal Law Applicable to the Outbreak of COVID-19, and Issues Unsolved, and Problems Caused by Law

In early January 2020, COVID-19 began to spread in Wuhan. The National Health Commission of China issued an announcement on the 20th day of that month to classify COVID-19 as the Class B infectious disease specified in the People's Republic of China Law on the Prevention and Control of Infectious Diseases, and adopted the prevention and control measures for Class A infectious diseases, and also included COVID-19 in the scope of management of quarantifiable diseases stipulated in the Frontier Health and Quarantine Law of the People's Republic of China. The authorities officially confirmed the human-to-human spread of COVID-19.¹ Wuhan entered a citywide lockdown on the 23rd day of that month.² At that time, the public was in a panic. The governments all over China immediately took prevention and control measures such as isolation and quarantine. The whole society was mobilized to actively take prevention and control measures to block the spread of the virus. At the same time, some illegal and criminal acts undermining the order of prevention and control occurred frequently, including the following: those that had escaped from Wuhan and other key epidemic areas in violation of the prevention and control regulations, concealed their true whereabouts, accessed public transport and public places, and even participated in large-scale group activities, which caused some residents to become infected or be at risk of becoming infected, and also led to the quarantine of many innocent persons. Some common crimes related to epidemic prevention took place as well, such as crime of disrupting public service by violently resisting the implementation of epidemic prevention measures, and crimes of fraud related to medical masks and medical equipment. This paper only studies the response of criminal law to the crimes related to the spread of the COVID-19 virus.

In more than ten days after the lockdown of Wuhan, the media reported that the public security entities were investigating more than 20 cases of spreading

1 The National Health Commission of the People's Republic of China, 2020. Announcement No.1 of 2020 of the National Health Commission of the People's Republic of China (2020 Jan. 20)

2 On January 23, 2020, the Wuhan Headquarters for Prevention and Control of COVID-19 issued its first notice, which announced that from 10:00 on January 23, 2020, the city's local bus, subway, ferry, and long-distance passenger transports would be closed, residents in Wuhan were suggested not to leave the city if there was no reason, all flights and trains scheduled to depart from Wuhan would also be temporarily cancelled. The time of reopening would be announced in further notice.

the virus, and most of them constituted the crime of endangering public security by dangerous means.³ There was a rapid growth trend for such cases, arousing a great part of the whole society's attention.

Articles 114 and 115 of Chinese Criminal Law provide for the crime of endangering public security by dangerous means, and the judicial interpretations related to the provisions of the Criminal Law are based on the Interpretation on Several Issues concerning the Specific Application of Laws in Handling Criminal Cases Impairing the Prevention and Control of Emergent Infectious Disease Epidemics and Other Disasters, jointly issued by the Supreme People's Court and the Supreme People's Procuratorate during the SARS prevention and control in 2003 (hereinafter "Interpretation of the Two Supremes"). Since the "Interpretation of the Two Supremes" is more detailed based on Criminal Law, and enjoys the same authoritative effect as law, it is widely used in judicial practice.

The "Interpretation of the Two Supremes" defines the characterization of two behaviours. First, those who intentionally spread pathogens of sudden infectious diseases and endanger public security shall be convicted and punished on a charge of endangering public security by dangerous means. Second, those who refuse to accept quarantine, compulsory isolation or treatment due to sudden infectious diseases or suspected sudden infectious diseases, negligently causing the spread of infectious diseases and seriously endangering public security shall be convicted and punished on a charge of negligently endangering public security by dangerous means.

There are several characteristics common to those who are accused of endangering public security by dangerous means by public security agencies in the early stage of epidemic. First, they come from Wuhan and other key epidemic areas, and a small number of them have symptoms such as fever and cough. Second, they violate the requirements of report, home isolation and other measures, participate in multiple activities, and even access public transport or public places. Third, many people are infected or isolated thereby. Fourth, most of the actors are not identified as confirmed or suspected cases when they violate the prevention and control measures. Fifth, the actors have been diagnosed with COVID-19 when they are condemned. Most public security agencies investigate the cases on a charge of endangering public security by dangerous means, and take criminal coercive measures against the actors.⁴

3 Chinanews, 2020, *More Than 20 People in China Have Been Investigated for Intentionally Concealing Their Diseases and Infecting Other People with COVID-19*, in <https://www.chinanews.com/gn/2020/02-07/9082866.shtml> (accessed on 06.05.2021)

4 The Supreme People's Court, 2021, *The third sets of 8-model-case on Punishing Criminal and Illegal Activities that Hinder the Prevention and Control of Novel Coronavirus Pneumonia*, in <https://www.china-court.org/article/detail/2020/04/id/4954377.shtml> (accessed on 06.05.2021)

The case of Mr. Gou announced by Qinghai police is one of the examples. Mr. Gou, 44 years old, from Hanshuigou Village, Lijiashan Town, Huangzhong County, had lived in Wuhan for a long time and engaged in catering service. After returning to Xining on January 17, 2020, his symptoms of cough, fever and fatigue appeared that night. From January 17 to January 26, he went out to visit relatives in his village and Xining city and dined with them. On January 30, he was diagnosed as a confirmed case after review by the Provincial Centre for Disease Prevention and Control. It was investigated and verified that Mr. Gou refused to register with the community (village) and take the initiative to stay at home as required by Xining COVID-19 Epidemic Prevention and Control Work Headquarters within a period of time after he returned to Xining. He deliberately concealed his real whereabouts and activities, fabricated the false information concerning the date of his returning to Xining, deliberately concealed his symptoms such as fever and cough, deceived investigators, and proactively made close contact with surrounding people on many occasions. Mr. Gou also deliberately concealed the fact that his son returned to Xining from Wuhan with him. His son also went out for many times and kept close contact with others. His son was also diagnosed as a confirmed case of COVID-19. Mr. Gou was investigated by the public security agency on suspicion of endangering public security by dangerous means.⁵ This is a representative case. The actor came from a key epidemic area, but failed to take measures of prevention and control as required, and went to various places. In reality, the actor had been infected with the virus, which caused the spread of the epidemic.

At the time, the application of the crime of endangering public security by dangerous means was in line with the public expectations, because the public generally did not know enough about COVID-19, and only knew that the spread was fast, the disease was urgent and the death rate was high. The society was in high panic and generally hated the virus disseminators. As stipulated by Criminal Law, the legal penalty for the crime of endangering public security by dangerous means is severe: those who do not cause serious consequences shall be sentenced to fixed-term imprisonment of no less than three years but no more than ten years; those who cause serious consequences shall be sentenced to fixed-term imprisonment of no less than ten years, life imprisonment or the death penalty. Therefore, at the beginning of the outbreak of the epidemic, the application of such crime could act as a deterrent and exemplary effect.⁶ From the

5 Qinghainews, 2020, *A Confirmed Case Surnamed Gou Was Investigated by Local Police in the City of Xinning, Qinhai Province*, in <http://www.qhnews.com/newscenter/system/2020/02/02/013068989.shtml> (accessed on 01.05.2021)

6 Liu Zhiwei, 2020, "The Criminal Law Should Take its Responsibility in Prevention and Control of Coronavirus Pandemic", *Procuratorial Daily*, 2020 Feb 14, no. 003.

perspective of criminal legislation, while Criminal Law does not specifically establish an independent charge for the transmission of serious infectious diseases, and this transmission seriously endangers the lives and health of an unspecific majority of people, the application of the accusation of endangering public security by other means, which is preceded by criminal acts such as arson, explosion, breaching dikes, and throwing dangerous substances as stipulated by Articles 114 and 115 of the Criminal Law, has become the best solution in this case.

In fact, the provisions of Article 330 of the Criminal Law can also apply, which are about the crime of obstructing the prevention and treatment of infectious diseases in violation of relevant regulations. The Article stipulates that “Whoever, in violation of the provisions of the Law on the Prevention and Control of Infectious Diseases, causes the spread or a danger of the spread of a Class A infectious disease shall be sentenced to fixed-term imprisonment of no more than three years of criminal detention; if the consequences are especially serious, he shall be sentenced to fixed-term imprisonment of no less than three years but no more than seven years.” Though this provision is applicable to Class A infectious diseases, and COVID-19 is a Class B infectious disease, yet the National Health Commission announced on January 20, 2020 that the prevention and control measures against Class A infectious diseases should be taken for COVID-19,⁷ and the provisions of the Supreme People’s Procuratorate and the Ministry of Public Security issued in 2008 on the prosecution standards for criminal cases under the jurisdiction of public security agencies also included the infectious diseases managed under Class A into the scope of accountability for crimes of obstructing the prevention and treatment of infectious diseases. This Article stipulates that any violation of the provisions of the Law on the Prevention and Control of Infectious Diseases, causing the spread of a Class A infectious disease or managed under Class A, or a grave danger of the spread, shall be filed for prosecution. At the same time, it stipulates that “Class A infectious diseases” refer to plague and cholera; and “infectious diseases managed under Class A” refer to infectious atypical pneumonia in Class B infectious diseases, pulmonary anthrax in anthrax, highly pathogenic human infections avian influenza, and other Class B infectious diseases to be managed under Class A, and infectious diseases with unknown causes, which need to be reported by the health administration department under the State Council as necessary to the State Council for approval and promulgation.⁸ Thus, there is a basis for applying the provisions of

7 The National Health Commission of the People’s Republic of China, 2020, Announcement No.1 of 2020 of the National Health Commission of the People’s Republic of China (2020 Jan. 20)

8 Supreme People’s Procuratorate and the Ministry of Public Security, 2008, Provisions (I) of the Supreme People’s Procuratorate and the Ministry of Public Security on the Standards for Filing Criminal Cases under the Jurisdiction of the Public Security Agencies for Investigation and Prosecution (2008 June 25th)

Article 330 of the Criminal Law to the conviction and sentencing for violations of the COVID-19 prevention and control measures. Nonetheless, it is noticeable that the 2008 Standards were promulgated by the Supreme People's Procuratorate and the Ministry of Public Security. The 2008 Standards shall only impact the process of prosecution rather than the process of trial. Some scholars believe that the 2008 Standards are vague compared with the judicial interpretation in 2020. All above mentioned offences can be categorized under Article 330, although they may at the same time trigger Article 114 or 115. This creates an overlap between these provisions.⁹

Why did the public security agencies rarely apply the crime of obstructing the prevention and treatment of infectious diseases in the early stage after the outbreak of COVID-19? From the perspective of crime constitution theory, both the crime of obstructing the prevention and treatment of infectious diseases and the crime of endangering public security by dangerous means can objectively cause the spread of serious infectious diseases or danger of the spread thereof, but there are two main differences between them. First, the former crime is a negligent crime (discussed later), and the latter crime is an intentional one; second, the main behaviour characteristic of the former crime is objectively violating the epidemic prevention and control measures, which does not necessarily occur in public places; while the main behaviour characteristic of the latter crime is endangering public security, that is, endangering the life, health or property security of an unspecific majority of people, which mostly occurs in public places. Due to the extremely severe situation in the early stage of the epidemic, in which the virus was spreading rapidly, and the actors carrying viruses repeatedly went to public places, threatening public security, the latter crime appears to be more in line with the requirements of the crime composition, and the statutory penalty for the latter crime is obviously more serious than that of the former crime. The application of severe punishment for crimes of spreading the virus to stop the spread of COVID-19 is in line with the public wishes. At that time, it was necessary to emphasize the legal consequences of criminal acts in the form of typical cases and meanwhile publicize them in the media.¹⁰

However, the application of the crime of endangering public security by dangerous means has some problems in theory and practice, and has also been questioned. The main problems are as follows: First, the subjective fault in the constitution of crime is concerned. The subjective fault form of this crime is intentional crime (the crime of negligence is the crime of endangering public

9 Yirong Sun, 2020, "From SARS to COVID-19: Balance of China's Criminal Law System", *Tsinghua China Law Review*, vol. 12, no. 2, pp. 399-411.

10 Li Hong, 2020, "The Criminal Law is Duty Bound to Take on Responsibility in Fighting COVID-19", *People's Court Daily*, 2020 Feb 07, no. 002.

security by negligent and dangerous means). In practice, most of the actors have not been confirmed with COVID-19, and they themselves do not know the actual situation, so that it is not advisable to determine that they have the intention to spread the virus. Second, the objective behaviour characteristics are not completely consistent. The behaviour of the actor entering the public place is not exactly the same as the behaviour of arson, explosion and breaching dikes as stipulated in the same provisions of the Criminal Law. Third, the application of Criminal Law should reflect the unity of its social protection and human rights protection, and the constitutive elements of the corresponding crime should not be interpreted freely. In particular, it should not be assumed that the subjective malice of the actor is deep based on the negative social impact and serious harmful consequences, and then be applied more serious charges.¹¹ Fourth, it is unreasonable to mostly apply the miscellaneous provisions such as “other dangerous means”, which goes possibly against the principle of a legally prescribed punishment for a specified crime.¹² As some scholars have argued that “the functional characteristics of the crime of endangering public security by dangerous means have become more obvious, as it plays a role of filling the loopholes of the Criminal Law to a certain extent, so as to facilitate the improvement of legislation. Because of this, the tension between the crime of endangering public security by dangerous means and the principle of a legally prescribed punishment for a specified crime has become increasingly prominent. While satisfying the normative basis for severe penalties for actions that have serious consequences but are not expressly stipulated in the law, the credibility of the principle of a legally prescribed punishment for a specified crime is greatly reduced”.¹³ In view of this, in the subsequent prevention and control, the judicial and legislative bodies of China have supplemented and improved the Criminal Law. In fact, the Criminal Laws of various countries are facing major challenges in response to the COVID-19 epidemic. Canadian scholar Terry Skolnik believes that in response to the COVID-19 pandemic, the governments around the world are implementing extreme physical distance measures with a wide range of impacts, and the courts are increasingly facing some problems and significantly changing the criminal justice system to cope with related issues. COVID-19 is affecting three main areas

11 Chen Wei, Wang Guoping, 2021, “The Comprehensive Identification of Applying and Punishing the Crime of Obstructing the Prevention and Control of Infectious Diseases”, *Procuratorial Daily*, 2021 Apr 21, no. 003.

12 Liu Xianquan & Huang Nan, 2020, “On the Nature of Refusing to Implement Epidemic Prevention Measures in Criminal Law”, *Research on Rule of Law*, vol. 02, pp. 3-10.

13 Chen Xingliang, 2013, “Legal Dogmatic Analysis on All-inclusive Crime: Endangering Public Security with Dangerous Means”, *Political Science and Law*, vol. 03, pp. 2-13.

of Criminal Law: scope, bail and sentencing of some criminal offences.¹⁴ Some countries have made changes to existing criminal laws. For example, Ukraine passed the Law No. 530-IX on March 17, 2020 to amend the relevant provisions of the Criminal Law and the Law on Administrative Crimes of Ukraine, and amend the provisions on crimes that violate quarantine and isolation measures and relevant penalties.¹⁵ Another example is that Russia passed Federal Law No. 99-FZ on April 1, 2020 to amend the Law of the Russian Federation on Administrative Crimes, stipulating the responsibility to be taken if violating the provisions on ensuring population health and epidemic welfare in case of emergency or in case of threat of the spread of dangerous diseases or restrictive measures (quarantine), as well as the responsibility if failing to comply with the requirements of the federal health and epidemic supervision agency in implementing health and epidemic measures within the specified time. The provisions of Article 6.3 in the Law of the Russian Federation on Administrative Crimes have been amended accordingly, and the relevant crimes and penalties have been amended.¹⁶

III. The Evolution of the Response of Criminal Law in the Process of COVID-19 Control

In the process of COVID-19 control, the existing problems have been timely addressed by means of judicial interpretations and criminal legislation in mainland China, and the response of Criminal Law has made progress throughout its evolution, which is mainly divided into two stages:

The first stage is the period from the issuance of the Judicial Interpretation of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice to the promulgation of the Amendment (XI) to the Criminal Law. On February 6, 2020, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice jointly issued the Opinions. Since then, there has been a marked change in the crimes applicable to the acts with the aforesaid characteristics, and the crime of obstructing the prevention and treatment of infectious diseases basically applies to the cases announced by the procuratorial body. In the Opinions, it is required to punish severely, according to law, the criminal activities of

14 Skolnik, T., 2020, "Criminal law during (and after) COVID-19. Manitoba Law Journal", vol. 43, no. 4, pp. 145-180.

15 Starodubov, S., Vladyshevska, V. & Pyzhova, M., 2020, "Liability for violation of quarantine: Novelty of administrative and criminal legislation." *Ius Humani, Revista de Derecho*, vol. 9, no. 2, pp. 137-158.

16 Savostin A., Admiralova I. & Kashkina Ye., 2020, "Administrative and Legal Consequences of the Spread of Coronavirus COVID-19: The Russian and Foreign Aspects", *Proceedings of the Research Technologies of Pandemic Coronavirus Impact (RTCOV 2020)*, pp. 312-315.

resisting epidemic prevention and treatment measures, and it is provided that the acts of the crimes of endangering public security by dangerous means, to which Articles 114 and 115 of the Criminal Law apply, are divided into two types: Firstly, the actor intentionally spreads the COVID-19 pathogens and endangers public security; secondly, the actor conforms to any of the following two elements: 1) He is a confirmed COVID-19 patient or COVID-19 pathogen carrier, and refuses to receive treatment in isolation or breaks away from isolation without authorization before the expiration of the isolation period, and enters a public place or a public transport vehicle; 2) he is a suspected COVID-19 patient, and refuses to receive treatment in isolation or breaks away from isolation without authorization before the expiration of the isolation period, and enters a public place or a public transport vehicle, and thus causes the spread of COVID-19.¹⁷ Compared with the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate, the Opinions have three distinctive features: Firstly, the Opinions clarify that the behavioural subject of the crimes of endangering public security by dangerous means is limited to the confirmed COVID-19 patients or COVID-19 pathogen carriers, or the suspected COVID-19 patients;¹⁸ secondly, the criminal acts, in addition to direct spreading, also include the refusal of prevention and treatment measures and the entry into a public transport vehicle or a public place; thirdly, it is provided that, in addition to the enumerated subjects and behaviours, if other persons refuse to execute the prevention and control measures proposed by the health and anti-epidemic agencies according to the Law on the Prevention and Control of Infectious Diseases, and thus cause the spread or a grave danger of the spread of COVID-19, they shall be convicted of the crime of obstructing the prevention and treatment of infectious diseases and punished according to Article 330 of the Criminal Law. The Opinions clarify that the act punishable as the crime of endangering public security by dangerous means is an intentional crime, effectively precluding the application of the negligent crime of endangering public security by dangerous means.¹⁹ The first act is an explicitly stated intentional criminal act, while the second act is not explicitly stated as an intentional crime, but the stipulated characteristics of the act indicate that it is an

17 The Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice, 2020, Opinions on Punishing Criminal and Illegal Activities that Hinder the Prevention and Control of Novel Coronavirus Pneumonia (2020 Feb. 06)

18 Chinanews, 2020, *The Supreme People's Court and The Supreme People's Procuratorate Clarify the Applicable Scope of the Crime of Endangering Public Security for the Activities that Hinder the Prevention and Control of COVID-19*, in <http://www.chinanews.com/gn/2020/02-29/9108812.shtml> (accessed on 01.05.2021)

19 The Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice, 2020, Opinions on Punishing Criminal and Illegal Activities that Hinder the Prevention and Control of Novel Coronavirus Pneumonia (2020 Feb. 06)

intentional crime. The behaviour of a confirmed COVID-19 patient who violates the prevention and control measures by entering a public place or a public transport vehicle is sufficient to show that he is subjectively intentional and directly intentional. The reason is that, given the fact that the harmful characteristics of the virus have been widely publicized throughout society, the confirmed patient enters a public place knowing that he was infected with the virus and there is inevitably a danger of spreading it. His behaviour constitutes a crime only if there is a risk of endangering the life, health and property rights of an unspecific majority of people, and is a potential damage offense, and heavier punishment shall be imposed on him if serious consequences have been caused; a suspected COVID-19 patient who spreads the virus to others may also be regarded as committing the crime of endangering public security by dangerous means, and his behavioural expression is the same as that of a confirmed patient, but the differences are as follows: A suspected patient is generally indirectly intentional, and enters a public place knowing that he was probably infected with the virus and it is very likely to transmit it to others, but he adopts a laissez-faire attitude; thus, his behaviour actually causes the spread of COVID-19. According to the provisions of the Health Department, a suspected patient has the characteristics such as having been to the infected area, having direct contact with the patient, and having fever. The criteria for identifying a suspected patient may change slightly from time to time. The Health Department is responsible for determining these characteristics and deciding the prevention and control measures.²⁰ A suspected patient may have the manifestations of being infected with the virus. The probability that a suspected patient is diagnosed as a confirmed patient is very high, but he remains a “suspected” patient before the confirmed diagnosis, and the possibility that he enters a public place and spreads the virus is very high.

The Opinions clarify the criteria for identifying of subject and behaviour of the crimes of endangering public security by dangerous means. The objects of the criminal prosecution procedures previously initiated with this crime are basically the undiagnosed or those not identified as suspected patients, and such objects fall into the category of “other persons” according to the Opinions, and only the crime of obstructing the prevention and treatment of infectious diseases can be applied to hold them accountable. Therefore, after the issuance of the Opinions, many of the acts that were originally filed as the crime of endangering public security by dangerous means will change their nature in criminal proceedings and be convicted of the crime of obstructing the prevention and treatment of

20 National Health Commission & State Administration of Traditional Chinese Medicine, 2020, Diagnosis and Treatment Protocol for Novel Coronavirus Pneumonia (2020, March 3)

infectious diseases.

As mentioned above, in the case of Mr. Gou in Qinghai province, the people's court of Huangzhong county, Qinghai province, ascertained that the residents of his village and some outsiders, a total of more than 900 people, were isolated and three of his relatives were diagnosed with COVID-19 due to his behaviour. Through the hearing, the court found that Gou, the defendant, knew that he was obliged to truthfully report his travel or residence history in Wuhan but deliberately concealed it, refused to execute the isolation and other prevention and control measures, and thus caused a grave danger of COVID-19 spread after the National Health Commission had announced Class A disease prevention and control measures against COVID-19; in this case, his behaviour constitutes the crime of obstructing the prevention and treatment of infectious disease, and he should be punished according to law. Considering that Gou truthfully confessed the facts of his crime, he was sentenced to one-year imprisonment for the crime of obstructing the prevention and treatment of infectious disease on March 17, 2020.²¹

The Opinions have significantly narrowed the application scope of the crimes of endangering public security by dangerous means. In reality, all walks of life have been mobilized in face of the outbreak of the epidemic, and the prevention and control measures are so strict that it is generally difficult for confirmed patients or suspected patients to circumvent the isolation measures and act without authorization, and their entries into public places or public transport vehicles are rare. In a typical case disclosed by the media, Ms. Li, 39 years old, a native of Jingha town, Jinghong city, Yunnan province, returned to Jinghong from Wuhan on January 15, 2020 with dry cough and general weakness, and was treated at the township hospital with a temperature of 38.5°. Subsequently, Li was sent to Jinghong city, and the health and anti-epidemic agency of Jinghong treated Li in isolation. Li refused to accept the management and treatment of the hospital, and attacked the medical staff by tearing their protective masks. At 7:33 p.m. on January 22, she escaped from the infectious diseases hospital, and then came into close contact with a number of her relatives for a long time. At 9:50 on that night, the police and the medical staff found her, and she was sent back to the hospital at 11:50 that night, and a number of people who had been in contact with her were sent to the infectious diseases hospital for observation. The public security agencies holds that Li committed the crime of endangering public security by dangerous means, and filed a case for investigation. In this case, Li was sent by the anti-epidemic agency for treatment and isolation as a suspected patient, but she refused to execute the prevention and control measures, escaped

21 The Supreme People's Court, 2021, The third sets of 8-model-case on Punishing Criminal and Illegal Activities that Hinder the Prevention and Control of Novel Coronavirus Pneumonia.

from the ward, entered public places, and got in contact with many people; there was a danger of spreading COVID-19 to an unspecific majority of people, and Li's subjective intention of endangering public security was obvious, so the application of the crime of endangering public security by dangerous means to pursue her responsibility was appropriate.²²

The Opinions incorporate "other" acts of obstructing prevention and control measures during the COVID-19 control into the applicable objects of the crime of obstructing the prevention and treatment of infectious diseases as specified in Article 330 of the Criminal Law,²³ having actually expanded the scope of application of the crime. Such amendment is a further recognition of Article 49 on the prosecution standards for criminal cases issued in 2008, is very reasonable, and is an objective and realistic requirement. The actor has undermined the order of prevention and control of a Class A infectious disease, and COVID-19, which is a Class B infectious disease controlled according to Class A prevention and control measures, has quick spreading speed and severe pathogenic hazard. The Opinions are developed on the basis of the lessons learned from the SARS period in 2003 when there was a lack of basis for the application of the crime of obstructing the prevention and treatment of infectious diseases regarding the acts of obstructing the SARS control measures.

However, the expansion of the scope of application of Article 330 of the Criminal Law in the form of judicial interpretation such as the Opinions and the prosecution standards for criminal cases has eased the requirements of judicial practice, but theoretical problems are obvious, which are mainly manifested in two aspects: 1) There is a problem with logic. The national health administration department may, according to its powers, decide to take prevention and control measures against a Class A infectious disease for a Class B infectious disease, but the nature of such Class B infectious disease remains unchanged and it is not a Class A infectious disease as expressly provided for in the Criminal Law. The harmful consequences caused by the spreading of the actor still fall into the category of spread or danger of spread of a Class B infectious disease, and do not fully comply with the conditions of a Class A infectious disease as expressly provided for in Article 330 of the Criminal Law. Some scholars believe that the 2008 Criteria for Filing Cases "interpret the cause of spread or a grave danger of

22 Sohu, 2020, *Xishuangbanna's First Confirmed Patient Who Left the Hospital Without Discharge was Charged Guilty and Detained*, in https://www.sohu.com/a/372374687_115092 (accessed on 01.05.2021)

23 Opinions on Punishing Criminal and Illegal Activities that Hinder the Prevention and Control of Novel Coronavirus Pneumonia, the Supreme People's Court (2020): "Others who refuse to implement the prevention and control measures proposed by the health and epidemic prevention agencies in accordance with the Law on the Prevention and Treatment of Infectious Diseases, thus resulting in transmission of novel coronavirus or serious danger of transmission, shall be convicted of and punished for the crime of impairing the prevention and treatment of infectious diseases in accordance with Article 330 of the Criminal Law."

spread of a Class A infectious disease as the cause of spread or a grave danger of spread of a Class A infectious disease or an infectious disease controlled according to Class A prevention and control measures; such interpretation has the suspicion of analogous application of the Criminal Law, and is not in line with the principle of a legally prescribed punishment for a specified crime. Article 330, Paragraph 3 of the Criminal Law only provides that the scope of a Class A infectious disease can be determined by the relevant provisions of the State Council, but does not provide that an infectious disease for which the State Council decides to take Class A prevention and control measures is a Class A infectious disease".²⁴ Of course, it is not inappropriate for the health administration department to take Class A prevention and control measures and pay close attention to the Class B infectious disease considering that its spreading mode, speed, intensity and degree of harm are similar to those of a Class A infectious disease, but the nature of the Class B infectious disease will not change. 2) There is a problem with the authority of interpretation. The relevant law enforcement authorities expanded the scope of application of Article 330 of the Criminal Law in the form of judicial interpretations during the epidemic control period, which is an expedient way to punish the crime of obstructing the prevention and treatment of infectious diseases. After all, the explicitly stated provisions of the Criminal Law can only be amended by the legislature in accordance with the law, and other agencies should not expand its definite scope or change its clear meanings at will. Judicial interpretations should be controlled within the legal authority of interpretation of the subject.²⁵ Similarly, it is also not advisable to fill legal loopholes through guiding cases and dogmatics of law. The dogmatics of Criminal Law should be based on legal provisions.²⁶ The principle of a legally prescribed punishment for a specified crime is a basic principle of the Criminal Law that should be observed.²⁷

The second stage is the period from the promulgation of the Amendment

24 Feng Jun, 2021, "Crime Prevention and Control of the Conduct Concerning Endangering the Public Security", *Law Science*, vol. 02, pp. 19-29.

25 Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law (June 10, 1981): "The National People's Congress invests Supreme People's Court and Supreme People's Procuratorate with power of law interpretation, and the questions involving the specific application of laws and decrees in court trials and in the procuratorial work shall be interpreted by Supreme People's Court and Supreme People's Procuratorate respectively."

26 Chen Wei, 2020, "The Expanded Interpretation of the Crime of Obstructing Prevention and Control of Infectious Diseases in the Context of the COVID-19 Epidemic and Its Regression", *Political Science and Law*, vol. 05, pp. 15-29.

27 Article 3, Criminal Law of the People's Republic of China: "Any act deemed by explicit stipulations of law as a crime is to be convicted and given punishment by law and any act that no explicit stipulations of law deems a crime is not to be convicted or given punishment."

(XI) to the Criminal Law to the present. Based on extensive consultation and in-depth discussion, the Standing Committee of the National People's Congress voted on December 26, 2020 to adopt the Amendment (XI), which is effective from March 1, 2021. Article 37 of the Amendment is itself an amendment to Article 330 of the Criminal Law, and the legislature believes that this amendment is intended to strengthen the protection of the lives and property of the people, especially public health and especially public health and security of people's livelihood; it is a timely adjustment to the Criminal Law in response to the prominent problems reflected in practice, the adjustment is reasonable, practical and effective; it has avoided deviating from the practice orientation, and is conducive to maintaining the authority of the law and effective implementation. Based on China's national conditions and social governance practices, this amendment summarizes the experience and needs of COVID-19 control, and synergizes with the amendments and formulation of the Law on the Prevention and Control of Infectious Diseases and other laws. It not only meets the objective requirement of punishing the criminal acts of obstructing the epidemic prevention and control in practice, but also is a legislative measure to implement the principle of a legally prescribed punishment for a specified crime.²⁸

Article 37 of the Amendment amends Article 330 of the Criminal Law mainly in the expansion of the scope of application of the crime of obstructing the prevention and treatment of infectious diseases, by amending the original provision of "a Class A infectious disease" to "a Class A infectious disease and an infectious disease for which the execution of prevention and control measures for a Class A infectious disease is decided according to law" (hereinafter referred to as "severe infectious disease"). It means that: 1) An infectious disease controlled according to the prevention and control measures for a Class A infectious disease is added besides the Class A infectious disease originally specified in Article 330 of the Criminal Law. The scope of application of this provision is expanded in the form of legislation by incorporating the reasonable content of the previous relevant judicial interpretations. That is, the amended Article 330 of the Criminal Law can be directly applicable from then on without the need to refer to the relevant judicial interpretations only if the actor performs an act of obstructing the prevention and control of infectious diseases and the national health administration department decides in accordance with the law to take prevention and control measures of a Class A infectious disease for such infectious disease; 2) The infectious diseases under Class A prevention and control

28 Li Ning, deputy director of the National People's Congress Standing Committee's Legislative Affairs Commission. The speech on the Draft of the Amendment (XI) to the Criminal Law of the People's Republic of China, delivered at the 20th Session of the Standing Committee of the Thirteenth National People's Congress of the People's Republic of China on June 28, 2020.

are not limited to Class B infectious diseases. This expression is consistent with the provisions of the Law on the Prevention and Control of Infectious Diseases.²⁹ Some scholars hold that the crime specified in Article 330 of the Criminal Law should be expressed as “violating the provisions of the Law on the Prevention and Control of Infectious Diseases by causing the spread or grave danger of the spread of a Class A infectious disease or a Class B infectious disease for which the prevention and control measures of a Class A infectious disease should be taken”.³⁰ This opinion is inappropriate because Article 4 of the current Law on the Prevention and Control of Infectious Diseases provides that: “If other Class B infectious diseases and unexpected infectious diseases of unknown origin require the implementation of the prevention and control measures for Class A infectious diseases referred to in this Law, the health administration department of the State Council shall promptly report to the State Council for approval to be announced and implemented”. It can be seen that the objects of the prevention and control measures of a Class A infectious disease are not limited to Class B infectious diseases, and the implementation of the prevention and control measures of a Class A infectious disease may be decided according to law for other “unexpected infectious diseases of unknown origin”. The Law on the Prevention and Control of Infectious Diseases has undergone two major amendments in 2004 and 2013, with great changes in its legal provisions. However, the objective elements of the crime of obstructing the prevention and treatment of infectious diseases have not been changed. In the case of the major revision of administrative law, the constitutive elements of administrative crime must keep pace with the times.³¹ Article 37 of the Amendment expands the scope of application of Article 330 of the original Criminal Law, and conforms to the purpose of the Criminal Law to maintain the order of prevention and control of infectious diseases, curb the spread of infectious diseases and protect public life and health; meanwhile, it synergizes with other laws and regulations to meet the actual needs, and summarizes the experience in the application of the relevant judicial interpretations.

The infectious diseases specified in the amended Article 330 of the Criminal Law are undoubtedly severe infectious diseases, instead of all infectious diseases. Except for Class A infectious diseases in the definite scope, the infectious diseases under Class A prevention and control shall be identified by the

29 Chen Wei & Wang Guoping, 2021, “The Comprehensive Identification of Applying and Punishing the Crime of Obstructing the Prevention and Control of Infectious Diseases”, *Procuratorial Daily*, 2021 Apr 21, no. 003.

30 Liu Zhiwei, 2020, “Suggestions on Improving Legislation of the Crime of Obstructing the Prevention and Control of Infectious Diseases”, *Democracy & Legal System*, vol. 09, pp. 28-30.

31 Ouyang Benqi, 2020, “Dogmatic Analysis on the Objective Elements of the Crime of Obstructing the Prevention and Treatment of Infectious Diseases”, *Oriental Law*, vol. 03, pp. 4-13.

national health administration department because it is highly professional and technical to decide on the classes of prevention and control. Such identification is a precondition for the judicial bodies to apply Article 330 of the Criminal Law. Such a provision of the Criminal Law is determined by the degree of social harm and characteristics of the crime. In comparison, it is different from the scope of infectious diseases involved in other similar crimes under the Criminal Law. For example, the crime of obstructing frontier health and quarantine specified in Article 332 of the Criminal Law is also a crime of impairing public health. It involves the violation of the provisions on frontier health and quarantine, and the causing of the spread or a grave danger of the spread of a quarantinable infectious disease. The scope of quarantinable infectious disease is wide. According to the relevant provisions, its scope includes Class A infectious diseases, and aids, yellow fever, smallpox, etc., which reflects stricter control of China over frontier health and quarantine. Another example is the crime of dereliction of duty in the prevention and treatment of infectious diseases under Article 409 of the Criminal Law, which is a consequential offense. The consequence of the crime is to cause the spread or epidemic of an infectious disease, the subject of the crime is the functionary of an administrative department for public health who is engaged in prevention and treatment of infectious diseases, the behavioural expression of the crime is gross neglect of duty, and the circumstances are serious. The infectious diseases referred to in the crime include Classes A, B and C, the classification of which is adaptable to the characteristics of special subject of the crime, negligent offense and consequential offense. The crime of obstructing the prevention and treatment of infectious diseases specified in Article 330 of the Criminal Law is both a consequential offense and a potential damage offense. A person who causes a grave danger of the spread of an infectious disease can also incur a crime, and the perpetrators are mostly general subjects who violate the prevention and control measures of infectious diseases, so the scope of infectious diseases provided for in the crime is narrower than the crimes provided for in Articles 332 and 409 of the Criminal Law. Except for the clear and specific scope of Class A infectious diseases, the infectious diseases under Class A prevention and control measures shall be decided by the national health administration department in accordance with the actual circumstances. In general, the reason for taking prevention and control measures for Class A infectious diseases is that the infectivity and spreading speed of the emerging infectious disease can be compared to those of a Class A infectious disease in terms of human harm. Such a provision not only reflects the preciseness of the Criminal Law and coordinates with other provisions of the Criminal Law, but also allows for unforeseen circumstances, which is conducive to ensuring the relative stability of the criminal legislation.

The significant legislative progress of the Amendment is manifested in the amendment to the scope of application of the crime of obstructing the prevention and treatment of infectious diseases, and in the amendment to the behaviour types of the crime as well. The four behaviour types constituting the crime of obstructing the prevention and control of infectious diseases listed in Article 330 of the original Criminal Law have obviously lagged behind. Such four types are specified in Article 35 of the Law on the Prevention and Control of Infectious Diseases promulgated by the State in 1989, but the State authorities amended such law in 2004 and 2013 to substantially change the behaviour types specified in the original Article 35, formulate the acts of obstructing the prevention and treatment of infectious diseases systematically and comprehensively, and markedly expand the scope. It can be seen that the added behaviour types are not included in Article 330 of the original Criminal Law.³²

The four types of acts listed in Article 330, Paragraph 1 of the Criminal Law, before the amendment are as follows: “(1) failure on the part of a water supply unit to supply drinking water in conformity with the hygienic standards set by the State; (2) refusal to give disinfection treatment, according to the sanitary requirements raised by the health and anti-epidemic agencies, to sewage, wastes or faeces contaminated with the pathogen of infectious diseases; (3) approving or conniving with the employment of patients with infectious diseases, pathogen carriers or suspected patients of infectious diseases at jobs which they are prohibited from taking by the health administration department under the State Council because of the likelihood of causing the spread of infectious diseases; or (4) refusal to execute the prevention and control measures proposed by the health and anti-epidemic agencies according to the Law on the Prevention and Control of Infectious Diseases.” In the amended Article 330 of the Criminal Law, sub-paragraphs (1) and (3) are retained, sub-paragraphs (2) and (4) are amended, and sub-paragraph (5) is added. A total of five types of acts are provided for after the amendment. In the amendment to sub-paragraph (2), “faeces”, which is one of the objects of sub-paragraph (2), is included in according to the relevant requirements, is included in “wastes”, and “places and articles” are added to emphasize the anti-epidemic requirements for disinfection of places and articles; in addition, “the health and anti-epidemic agencies” are amended to “the disease prevention and control institutions”, which meets the requirement of changes in the institutional setup of the health administration department. “The health and anti-epidemic agencies” in the original sub-paragraph (4) are amended to “the people’s government at or above the county level and the disease prevention and control institutions”. After the amendment, the original sub-paragraph (4)

32 Liu Zhiwei, 2020, “Suggestions on Improving Legislation of the Crime of Obstructing the Prevention and Control of Infectious Diseases”, *Democracy & Legal System*, vol. 09, pp. 28-30.

turn into sub-paragraph (5). The reason for the amendment is that many important measures are taken by the people's government at or above the county level in the prevention and control of severe infectious diseases. Especially in COVID-19 control, it is a fact that the subject proposing the prevention and control measures is beyond the scope of the disease prevention and control institutions, and the people's government at various levels takes the leading role in executing the prevention and control measures based on the local epidemic situation, all of which is in conformity with the provisions of the Law on the Prevention and Control of Infectious Diseases.³³ A new type of act is added in sub-paragraph (4), i.e. "the sale or transport of articles contaminated or possibly contaminated with the pathogen of infectious diseases in the infected areas, without disinfection treatment", which is sourced from the fourth type of act specified in Article 73 of the Law on the Prevention and Control of Infectious Diseases.

It should be acknowledged that the amendment made by Article 37 of the Amendment to Article 330 of the original Criminal Law has adapted to the changes in the situation of prevention and control of infectious diseases is consistent with the relevant provisions of the current Law on the Prevention and Control of Infectious Diseases, and has covered the scarcity of the original provisions. The first four of the specified five types of acts are multiple acts, and the fifth is actually a general provision, including all violations of the prevention and control measures proposed by the people's government at or above the county level and the disease prevention and control institutions. Here we should pay attention to two aspects: Firstly, just violating the prevention and control regulations of the government at the village, township, village committee, or at any relevant unit level cannot be deemed a condition to establish the crimes specified in Article 330 of the Criminal Law; secondly, not all violations of the Law on the Prevention and Control of Infectious Diseases constitute the crimes of obstructing the prevention and treatment of infectious diseases under Article 330 of the Criminal Law, and only violations of the Law on the Prevention and Control of Infectious Diseases in one of the five circumstances listed can establish the crimes because Article 330 of the Criminal Law only selectively provides for five types of acts, and a considerable number of types of acts is not included. For example, three of the circumstances specified in Article 73 of the Law on the Prevention and Control of Infectious Diseases are not included: "(2) the products involving the health and safety of drinking water do not meet the

33 Article 5, Law of the People's Republic of China on Prevention and Treatment of Infectious Diseases: "People's governments at various levels shall direct the work of preventing and treating infectious diseases. People's governments at or above the county level shall draw up programmes for prevention and treatment of infectious diseases and arrange for their implementation, and establish a sound system for prevention and control of diseases, medical treatment and supervision and control for prevention and treatment of infectious diseases."

national hygienic standards and hygiene practice; (3) the disinfection products used for the prevention and treatment of infectious diseases do not meet the national hygienic standards and hygiene practice; and (5) the blood products produced by biological product manufacturers do not meet the national quality standards". The five types of acts specified in Article 330 of the Criminal Law are the most common and typical circumstances that cause the spread or a danger of the spread of infectious diseases. If other unlawful acts as set forth in the Law on the Prevention and Control of Infectious Diseases involve other crimes, other provisions of the Criminal Law shall apply.

The actor's violations of the prevention and control measures implemented by the people's government at or above the county level and the disease prevention and control institutions are in fact violations of the Law on the Prevention and Control of Infectious Diseases because such measures are proposed and implemented by statutory authorities in accordance with the law.³⁴ During the period of COVID-19 control, the behavioural subjects of the crimes of obstructing the prevention and treatment of infectious diseases were mostly undiagnosed virus carriers or potential carriers, who came from key infected areas or had direct contact or even had obvious symptoms, did not take isolation measures as required, and infected more than one person or cause more than one person to be infected or more than one person to be taken isolation measures. Such behaviour falls into the category of the fifth circumstance under Article 330 of the Criminal Law.

One of the five types of acts under Article 330 of the amended Criminal Law constitutes the crime of obstructing the prevention and treatment of infectious diseases, and an act conforming to two or more than two circumstances specified therein can establish such crime undoubtedly, with the critical element that the act objectively causes "the spread or a grave danger of the spread" of severe infectious diseases mentioned therein. Article 330 of the amended Criminal Law retains other important contents of the original provision: 1) Both a unit and a natural person can be the subject of the crime; if a unit commits the crime, it shall be fined, and the criminal responsibility of the persons who are directly in charge and the other persons who are directly responsible for the offence shall be investigated; 2) An act of causing a grave danger of the spread of severe infectious diseases also constitutes the crime.

34 *Ibid.*

IV. The Prospect of the Improvement of the Response of Criminal Law in the Future

It has been proved that Criminal Law has played an important role in the effective prevention and control of COVID-19. At the same time, the prevention and control of the pandemic have also promoted the revision and improvement of the Criminal Law in the response, and significant progress has been made. In view of the current situation, the prevention and control of COVID-19 have become normalized,³⁵ and the response of Criminal Law will also be regularized. Therefore, the issues related to the response of Criminal Law shall be studied with a long-term thinking of the rule of law. This paper holds that there are two aspects to improve the criminal law as follows:

1. Establishing the crime of spreading severe (or serious) infectious diseases in the Criminal Law

First of all, the spread of severe infectious diseases is a serious crime, which will be concentrated in a specific period of time. The application of the miscellaneous provisions of Article 114 and Article 115 of the Criminal Law,³⁶ i.e. "endangering public security by other dangerous means", can achieve the punishment effect to a certain extent, but it is appropriate to classify such behaviour as a named crime, in order to implement the principle of a legally prescribed punishment for a specified crime. In the system of crimes involving infectious diseases in the current Criminal Law, there are many crimes of special subjects, crimes of special occupations and violations of administrative laws and regulations that will cause the spread of infectious diseases. For example, the crime of causing the spread of the bacterial strains and virus strains of infectious diseases, the crime of impairing the frontier health and quarantine, the crime of dereliction of duty in the prevention and control of infectious diseases, specified in Article 331, Article 332 and Article 409 respectively. And there is also a special provision for the crime of spreading sexually transmitted diseases (Article 360). It is clearly

35 The Standing Committee of the CPC Central Committee Political Bureau held a meeting on April 29, 2020 to study, deploy and improve measures for regular epidemic prevention and control. General Secretary Xi Jinping stressed that, all localities should implement and improve measures for regular epidemic prevention and control, and continue the necessary control of personnel and measures of health monitoring.

36 Article 114, Criminal Law of the People's Republic of China: "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."

incongruous and unreasonable that there are only named crimes applicable to special behaviours but no clear provision for the general crimes of spreading severe infectious diseases. This paper holds that the best solution to this problem is to establish the crime of spreading severe infectious diseases in the Criminal Law, so as to realize the interconnection with other crimes and enhance the strictness of the crime system involving the prevention and control of infectious diseases. One of the characteristics of the criminal legislation of some foreign countries and regions on the crime of spreading infectious diseases is the establishment of independent charges. For example, Article 231 of the Swiss Criminal Code stipulates that: penalties of different levels shall be imposed to “the behaviour of deliberately spreading dangerous and contagious human diseases”; Article 270 of the Penal Code of the Macau Special Administrative Region stipulates that persons who spread infectious diseases, thereby causing danger to the lives of other, and causing serious danger to the integrity of other, shall be punished; Article 438 of the Italian Criminal Law stipulates that “who causes an epidemic by spreading germs shall be sentenced to life imprisonment”. This kind of legislation is worth learning from.

Secondly, the behaviour of spreading a severe infectious disease is not fully “equivalent” to the behaviours stipulated in Articles 114 and 115 of the Criminal Law. To punish the intentional spread of severe infectious diseases according to the current Criminal Law and judicial interpretations, the crime of endangering public security by dangerous means shall apply, but there is still inappropriateness in the application of this crime. The crime of endangering public security by dangerous means is a specific crime under the amended Criminal Law of China of 1997 in the special chapter of crimes against public security. According to the common thinking in China’s criminal theory scope, such crime refers to the behaviours that endanger public security by setting fires, breaching dikes, causing explosions, throwing dangerous substances and other dangerous means of similar risk.³⁷ The object of application should not only have the characteristics of the crimes of endangering public security as specified in such chapter, but also have the characteristics of the crimes under Articles 114 and 115 of the Criminal Law, and should be “equivalent” to the listed setting fires, causing explosions and other behaviours. There are two main aspects of this kind of equivalence: one is the equivalence of the harmfulness and danger of the result, and the other is the equivalence of the characteristics and danger of the behaviour. The former equivalence shall be the basis and can be compared only when it is available, and

37 Gao Mingxuan & Ma Kechang, 2017, *Criminal Law*, 8th Edition, Peking University Press, Beijing, p. 338.

the latter equivalence shall be the necessary condition.³⁸ Otherwise, the same clause cannot be applied and the behaviour must be stipulated in the provisions of another crime. The behaviour of deliberately spreading COVID-19 infringes on many aspects of legal interests, among which the main legal interest is public security. This kind of behaviour directly endangers the lives and health of an un-specific majority of people and consumes a large amount of social wealth. There is no dispute that this criminal behaviour should be a crime of the same nature as the crimes of endangering public security as specified in the aforesaid chapter. However, there are some differences in the characteristics and dangerousness between such behaviour and the criminal behaviours listed in Articles 114 and 115 of the Criminal Law: First, the degree of relation between the behaviour and its harmful consequence is different. The harmful consequence arising from the criminal behaviours of setting fires, causing explosions, breaching dikes, and throwing dangerous substances listed in the two articles is urgent and immediate. Once the acts are carried out, the consequences will occur simultaneously or immediately. Even in the crimes of throwing anthrax, cyanide, Tetramine and other dangerous substances, which are similar to the spread of infectious diseases, the victims of dangerous substances will quickly suffer from them because those are highly toxic substances. As we all know, the COVID-19 virus usually has a certain latent period, ranging from a few days to more than ten days; therefore, infection is not an immediate consequence. Second, the objective expression of the criminal behaviour is different. The criminal behaviours listed in the two articles are direct, and their expressions and consequences are directly observable. Setting fire, causing explosions and breaching dikes are most likely to be directly perceived by people, and even the objective behaviours of throwing dangerous substances and the substances themselves can be observed. But the virus cannot be directly perceived, and there is no obvious difference between the spreading behaviours and people's normal activities. Third, the consequences of the crimes listed in the two articles are directly caused by criminal behaviours, which will generally not further cause more serious consequences, but the act of spreading infectious diseases will make the victims continue to spread infectious diseases unconsciously and cause more serious consequences. In addition to the above-mentioned differences in behaviour characteristics, the motives of intentional crimes are also different. In the intentional crimes listed in the two articles, the actor is generally motivated by revenge, hatred and other motives, while the motive for spreading infectious diseases is generally to avoid being discriminated and resentment against the prevention and control measures, etc.

38 Zhang Mingkai, 2012, "The Causes of Expanding Application of the Crime of Endangering the Public Security by Using Dangerous Methods and the Rules of Limiting its Application", *Journal of National Prosecutors College*, vol. 04, pp. 43-55.

In the theory of Criminal Law, it is generally believed that the miscellaneous provisions of “other acts” shall be strictly controlled to avoid the formation of “pocket crimes”. In the case of so many differences, the behaviour of spreading infectious diseases should not be regarded as “other dangerous means” specified in the two articles, but rather specifically defined as an independent crime.³⁹ “Other dangerous means” stipulated in Articles 114 and 115 of the Criminal Law are only the miscellaneous provisions of such two articles, rather than the miscellaneous provisions of Chapter II of the specific provisions of the Criminal Law. Therefore, if a certain behaviour conforms to the constitutive requirements of similar crimes of endangering public security in Chapter II of the specific provisions of the Criminal Law but does not meet any of the provisions of the articles, a new crime should be added.

Third, the application of crimes in the current criminal law imposes too narrow limits on the environment scope of the objective behaviour. The criminal behaviour of endangering public security by dangerous means is committed against an unspecific majority of people, generally occurring in public places; otherwise, it cannot infringe on the lives and property security of an unspecific majority of people, which is also determined by the nature of the behaviours stipulated in Articles 114 and 115 of the Criminal Law. The Opinions stipulate that confirmed and suspected COVID-19 patients who refuse or break away from isolation treatment to enter public places and endanger public security shall be punished for the crime of endangering public security by dangerous means. There is no obvious impropriety, but it is unreasonable to limit the environment scope of behaviour to “public transport vehicle” and “public place”. The behaviour of spreading infectious diseases endangers public security in its own ways. The main and direct way to spread the virus is by the actor entering a public place, but it’s not the only way. In particular, COVID-19, which spreads mainly through droplets and has high transmission rate and quick speed, can be transmitted through various behavioural means, such as continuous spread to unspecified objects in relatives, friends, colleagues, customers and others in non-public places. It also produces harmful effects on the public. Once virus carriers get together with ten people or have meals with ten people separately they will also endanger public security. And the limitation on public places only focuses on the transmission mode characterized by human-to-human transmission, but does not take into account the material-to-human transmission. If virus carriers spit on the masks for epidemic prevention that are being distributed, it is an extreme behaviour that spreads virus and endangers public security. The

39 *Ibid.*

Opinions focus on punishing the serious transmission behaviours that occurred in public places during the COVID-19 epidemic, and highlight the features of Articles 114 and 115 of the Criminal Law, which are clear in its definition but do not cover all the transmission behaviours that should have been punished.

Fourth, the establishment of the crime of spreading a severe infectious disease should be defined in two types, i.e. intentional crime and negligent crime, and should be stipulated in crimes of endangering public security in Chapter II of the Criminal Law. Regarding whether the negligent crime of endangering public security by dangerous means is applicable to the behaviour of spreading COVID-19, the Opinions have actually made negative provisions. The crime of endangering public security by dangerous means under Article 114 of the Criminal Law is an intentional crime juxtaposed with the crimes of setting fires, causing explosions, breaching dikes, and throwing dangerous substances, and the crime under Article 115, Paragraph 1, is a circumstance of aggravated punishment when the crimes under Article 114 cause serious consequences, and Article 115, Paragraph 2 provides for the corresponding negligent crime, i.e. the negligent circumstance of the intentional crime under Article 115, Paragraph 1, that is, there is the crime of endangering public security by dangerous means and the negligent crime of endangering public security by dangerous means. The Opinions stipulate that the type of behaviour to which the crime of endangering public security by dangerous means shall apply is obviously an intentional crime, and also stipulate that other acts shall be punished as the crime of obstructing the prevention and treatment of infectious diseases. Therefore, the negligent transmission of COVID-19 to endanger public security shall be convicted of the crime of obstructing the prevention and control of infectious diseases and punished accordingly, which has actually excluded the application of the negligent crime of endangering public security by dangerous means, and is not in line with the integrity of Article 115 of the Criminal Law. There are two forms of crime in the act of spreading severe infectious diseases, intentional crime and negligent crime, which should be confirmed in legislation. However, the intentional behaviour is very harmful and the actor's subjective malice is deep, so the intentional behaviour can be deemed as potential damage offense. The negligent behaviour can be deemed as consequential offense, and the actor shall bear criminal responsibility only when a certain harmful result occurs. Most of the criminal laws of overseas countries and regions that stipulate the crime of spreading infectious diseases distinguish between intentional crime and negligent crime. For example, Article 452 of the Italian Criminal Law stipulates that if a crime is committed due to negligence, it shall be sentenced to fixed-term imprisonment of no less than one year but no more than five years, and its charges in an indictment and its penalty are stipulated separately from those of intentional crime.

The behaviour of spreading severe infectious diseases should be classified as an independent crime against public security in Chapter II of the Criminal Law, because the main legal interests infringed by this behaviour are the life, health and property rights of an unspecific majority of people, that is, the public security. Although the legal interests infringed by such behaviour are usually multi-faceted, complex objects, the public security is the most important and on the first level in the logical structure of multiple legal interests. Foreign countries and regions basically classify the crime of spreading infectious diseases as a crime of endangering public security. For example, the crime of spreading infectious diseases is included in Chapter 9 “Crimes of Endangering Public Security and Social Order” of the Criminal Code of the Russian Federation; the crime of spreading infectious diseases is included in Chapter 3 “Crime of Impairing Public Security” of the Penal Code of the Macau Special Administrative Region; and the crime of maliciously transmitting genetic diseases is included under the “Crime of Impairing Public Security” in the Penal Code of Spain. The establishment of the crime of spreading severe infectious diseases in the Criminal Law is conducive not only to the accurate conviction and sentencing according to the subjective and objective characteristics of such criminal behaviour, but also to the effects of education and deterrence of the Criminal Law.

2. Further clarifying the connotation of the elements of the crime of obstructing the prevention and treatment of infectious diseases

In the Criminal Law response process of epidemic prevention and control, the crime of obstructing the prevention and treatment of infectious diseases as stipulated in Article 330 of the Criminal Law has been more applicable. Although the Amendment has made significant progress in the scope and type of behaviour of the crime, the specific connotation needs to be classified in order to accurately identify the crime.

First of all, the form of the crime should be clarified. It is generally believed that the crime of obstructing the prevention and treatment of infectious diseases is subjectively manifested as negligence, which is specifically manifested as the actor's negligent or overconfident attitude towards the spread of infectious diseases or danger of the spread, but the actor may have an intentional attitude towards his behaviour in violation of the Law on the Prevention and Control of Infectious Diseases.⁴⁰ Some scholars hold the view that the content of “intentional transmission” is not mentioned in the crime of obstructing the prevention and

40 Wang Zuofu, 2010, *Practical Studies on Specific Provisions of Criminal Law II*, 5th Edition, China Fangzheng Press, Beijing, p. 1343.

treatment of infectious diseases stipulated in Article 330 of the Criminal Law.⁴¹ This view is reasonable for the following reasons: First, the five behaviours listed in the revised Criminal Law are all violations of the Law on the Prevention and Control of Infectious Diseases by units or individuals in terms of epidemic prevention management or enforcement measures, and the spread of virus or the danger of spread is generally negligent, not intentional. Second, it is stipulated in Article 330 of the Criminal Law that the maximum sentence for this crime is fixed-term imprisonment of seven years, which is consistent with the maximum statutory sentence for most negligent crimes. Third, it is stipulated that a crime can be established only when it causes the spread of severe infectious diseases or danger of the spread, which is consistent with the criminal liability for the harm caused by the negligent crime in the Criminal Law.⁴² In terms of the content of criminal negligence, the crime also has an important feature, that is, the violation of the Law on the Prevention and Control of Infectious Diseases is taken as the prerequisite. Therefore, the subjective fault content of the crime includes the knowledge and volitional factors of the illegality of behaviours and the results produced. However, according to Article 12 of the Criminal Law, the actor's knowledge of the harmful results and volitional factors is decisive to the nature of the crime. In this crime, the actor's subjective attitude towards the violation of the laws and regulations on the prevention and control of infectious diseases may be intentional, but his subjective attitude towards the spread of infectious diseases or grave danger of the spread by their behaviours may be negligent, which can be negligence or fault of overconfidence.⁴³ This crime is not recognized if the actor has an intentional attitude towards the consequences of spread.

Secondly, the objective elements of the crime should be gradually clarified to specify the objective behaviour. Five behaviours listed in Article 330 of the revised Criminal Law are actually omissions that violate specific obligations. Five behaviours are included in the Law on the Prevention and Control of Infectious Diseases, and the implementation of one of them is actually illegal. The extent to which each behaviour constitutes a crime should be determined by the judge based on the actual situation. In the process of prevention and control, the judicial bodies can make specific or quantified judicial interpretations on the basis of summing up experience. Especially for the fifth behaviour, there is a generality for the behaviour of refusal to implement the prevention and control measures proposed by the people's government at or above the county level and the disease

41 Liu Xianquan, 2003, "Criminal Analysis on the Determination of the Nature of Criminal Activities relating to SARS", *Prosecutorial View*, vol. 12, pp. 48-49.

42 Cai Rong, 2021, "The Determination of the Crime Form of Obstructing the Prevention and Control of Infectious Diseases", *Contemporary Law Review*, vol. 03, pp. 78-88.

43 Ma Kechang, 2014, *Hundreds of Crime Theory*, Peking University Press, Beijing, pp. 1031-1033.

prevention and control institutions. In practice, the common and important prevention and control measures can be prescribed in the form of judicial interpretations, such as notification of whereabouts, isolation, prohibition of gatherings. The general provisions of Article 330 of the Criminal Law are comprehensive and flexible, but their arbitrariness should be controlled. In most of overseas criminal laws, the specific violations of prevention and control measures are convicted and sentenced in the form of individual epidemic prevention law. For example, the Law of the Macau Special Administrative Region on the Prevention and Control of Infectious Diseases stipulates the crimes and penalties for certain specific violations of prevention and control measures. The provisions of Article 30(1) of the Law stipulate that a person who refuses to provide a declaration or provides a false declaration can be punished by a maximum of six-month imprisonment, or a fine of up to 60 days. The Regulations of the Hong Kong Special Administrative Region on Prevention and Control of Diseases stipulate the crimes and penalties for specific behaviours in violation of prevention and control measures. On May 10, 2021, the Kowloon City Magistrates Court heard the case of SYED MOHAMED RIZVI, an Indian male defendant, and his girlfriend. The male defendant arrived in Hong Kong from Dubai on March 19, 2021 and was isolated until April 8. On April 16, he was confirmed to be infected with the mutant virus. When the staff of the Department of Health inquired about his whereabouts after his arrival in Hong Kong, he lied that he did not participate in any party, but went shopping in the Harbour City, Tsim Sha Tsui and visited Cheung Chau from April 10 to April 11. Subsequently, three cases of “unknown origin” Filipino domestic workers infected with the mutant virus associated with the male defendant occurred in Tung Chung, Hong Kong Island and other places. At that time, the male defendant admitted in another investigation that he had visited many places on Lantau Island, including Tong Fuk, Citygate Outlets, Novotel Citygate Hong Kong, and also attended the family party of the female defendant in Hing Wah 2 Estate, Chai Wan during that period. His girlfriend participated in the party together with the male defendant and also went to Tung Chung and other places, but she also concealed her whereabouts before. The police arrested the Indian man and his Filipino girlfriend on a charge of “providing false or misleading information” under Section 3(4) and “failing to comply with the requirement to provide the required information” under Section 3(2) of the Regulations on Prevention and Control of Diseases (Disclosure of Information).⁴⁴ The provisions of such criminal law are specific and easily operable. The Criminal Law of China’s mainland can take its

44 Chinanews, 2021, *Judges in Hong Kong Refused Bail of a Male Patient Who Infected with New COVID-19 Variant and Concealed Tracks*, in <http://www.chinanews.com/ga/2021/05-10/9474103.shtml> (accessed on 06.05.2021)

advantages to specify the objective behaviours in the form of judicial interpretation under the crime of obstructing the prevention and treatment of infectious diseases.

Thirdly, it is necessary to pay attention to the difference between this crime and the negligent crime of endangering public security by dangerous means.

Attention should be paid to the relationship between the crime of obstructing the prevention and treatment of infectious diseases and the negligent crime of endangering public security by dangerous means in the epidemic prevention and control. The two crimes have both similarities and differences, which should be regarded as partial legal concurrence. The similarities of the two crimes lie in two aspects. First, they are both subjectively negligent; second, the statutory punishments for the two crimes are exactly the same.⁴⁵ The differences between the two crimes are as follows: First, in terms of the impact of the result on the establishment of a crime, the former crime can be constituted when the behaviour causes the spread of infectious diseases or a grave danger of the spread, while the latter crime can only be constituted when the behaviour causes serious injury, death or severe damage of public and private properties; second, in terms of the scope of application, the former crime is applicable to the Class A infectious diseases or the infectious diseases that are prevented and controlled under Class A, while the latter crime is not imposed with such restrictions; third, in terms of behaviour types, the provisions of Article 330 of the Criminal Law stipulating the former crimes specify five types of behaviours, in which the first four are specific and clear, and only the fifth type is open to violations of prevention and control measures, while the provisions of Article 115 of the Criminal Law stipulating the latter crime have no restrictions on behaviour types; fourth, in terms of the infringement of legal interests, the legal interests of the two crimes are multi-faceted, but each has its own focus. The main legal interest of the former crime is the prevention and control order, while the main legal interest of the latter crime is public security. Therefore, some scholars hold the view that there is no legal concurrence between the two crimes in general, and such legal concurrence exists only in the case of causing death, serious injury or severe damage to public and private properties.⁴⁶ This view is tenable, yet incomprehensive. Only the conditions for the above two crimes with coincidence can be included in the scope of legal concurrence for the two crimes. These conditions are specified as follows: In the prevention and control of Class A infectious diseases or

45 Chen Zhengda, 2003, "Study on Criminal Law Application of Crimes About Hindering Abrupt Contagion Prevention and Control", *Modern Law Science*, vol. 04, pp. 123-127.

46 Cai Zhengtao, 2020, "The Application of Criminal Charges on Criminal Cases on Spreading Infectious Diseases in COVID-19 Pandemic", *Procuratorial Daily*, 2020 Feb 27, no. 003.

the infectious diseases that are prevented and controlled under Class A, the actor violates the prevention and control measures, causing the spread of infectious diseases, and also resulting in death, serious injury or severe damage to public and private properties. In the scope of legal concurrence, which crime is applicable? The author believes that it is more reasonable to choose main legal interest as the basis of the two crimes. When the behaviour of the actor causes multiple deaths, serious injuries or severe damage to public and private properties, the characteristics of endangering public security are prominent, and it is appropriate to apply the crime of endangering public security by negligent and dangerous means. If the Criminal Law adds the crime of negligently spreading severe infectious diseases, this crime can be applied. For the behaviours within the scope of the two crimes that are not coincident, the appropriate crimes are applied separately. The crime of obstructing the prevention and treatment of infectious diseases shall apply if there is no death, serious injury or severe damage of public or private property due to the behaviour of spread of infectious diseases or danger of the spread. If the behaviour of the actor is included in the first four types of behaviour specified in Article 330 of the Criminal Law, this is a special provision, and the crime of obstructing the prevention and treatment of infectious diseases should also be applied.

In summary, the Criminal Law of China's mainland has made unusual and significant progress in the process of COVID-19 prevention and control, and has also played an important role. In the future, there is still a large space for the development of Criminal Law in terms of punishing the crime of spreading severe infectious diseases and improving the elements of the crime of obstructing the prevention and treatment of infectious diseases.

Bibliography

Books

GAO MINGXUAN & MA KECHANG, 2017, *Criminal Law*, 8th Edition, Peking University Press, Beijing.

MA KECHANG, 2014, *Hundreds of Crime Theory*, Peking University Press, Beijing.

WANG ZUOFU, 2010, *Practical Studies on Specific Provisions of Criminal Law II*, 5th Edition, China Fangzheng Press, Beijing.

Journal articles

CAI RONG, 2021, "The Determination of the Crime Form of Obstructing the Prevention and Control of Infectious Diseases", *Contemporary Law Review*, vol. 03, pp. 78-88.

- CAI ZHENGTAO, 2020, "The Application of Criminal Charges on Criminal Cases on Spreading Infectious Diseases in COVID-19 Pandemic", *Procuratorial Daily*, 2020 Feb 27, no. 003.
- CHEN XINGLIANG, 2013, "Legal Dogmatic Analysis on All-inclusive Crime: Endangering Public Security with Dangerous Means", *Political Science and Law*, vol. 03, pp. 2-13.
- CHEN WEI, 2020, "The Expanded Interpretation of the Crime of Obstructing Prevention and Control of Infectious Diseases in the Context of the COVID-19 Epidemic and Its Regression", *Political Science and Law*, vol. 05, pp. 15-29.
- CHEN WEI & WANG GUOPING, 2021, "The Comprehensive Identification of Applying and Punishing the Crime of Obstructing the Prevention and Control of Infectious Diseases", *Procuratorial Daily*, 2021 Apr 21, no. 003.
- CHEN ZHENGDA, 2003, "Study on Criminal Law Application of Crimes About Hindering Abrupt Contagion Prevention and Control", *Modern Law Science*, vol. 04, pp. 123-127.
- FENG JUN, 2021, "Crime Prevention and Control of the Conduct Concerning Endangering the Public Security", *Law Science*, vol. 02, pp. 19-29.
- LI HONG, 2020, "The Criminal Law is Duty Bound to Take on Responsibility in Fighting COVID-19", *People's Court Daily*, 2020 Feb 07, no. 002.
- LIU XIANQUAN, 2003, "Criminal Analysis on the Determination of the Nature of Criminal Activities relating to SARS", *Prosecutorial View*, vol. 12, pp. 48-49.
- LIU XIANQUAN, Huang Nan, 2020, "On the Nature of Refusing to Implement Epidemic Prevention Measures in Criminal Law", *Research on Rule of Law*, vol. 02, pp. 3-10.
- LIU ZHIWEI, 2020, "The Criminal Law Should Take its Responsibility in Prevention and Control of Coronavirus Pandemic", *Procuratorial Daily*, 2020 Feb 14, no. 003.
- LIU ZHIWEI, 2020, "Suggestions on Improving Legislation of the Crime of Obstructing the Prevention and Control of Infectious Diseases", *Democracy & Legal System*, vol. 09, pp. 28-30.
- OUYANG BENQI, 2020, "Dogmatic Analysis on the Objective Elements of the Crime of Obstructing the Prevention and Treatment of Infectious Diseases", *Oriental Law*, vol. 03, pp. 4-13.
- SAVOSTIN A., ADMIRALOVA I. & KASHKINA Ye., 2020, "Administrative and Legal Consequences of the Spread of Coronavirus COVID-19: The Russian and Foreign Aspects", *Proceedings of the Research Technologies of Pandemic Coronavirus Impact (RTCOV 2020)*, pp. 312-315.
- SKOLNIK, T., 2020, "Criminal law during (and after) covid-19". *Manitoba Law Journal*, vol. 43, no. 4, pp. 145-180.

- STARODUBOV, S., VLADYSHEVSKA, V. & PYZHOVA, M., 2020, "Liability for violation of quarantine: Novelties of administrative and criminal legislation." *Ius Humani, Revista de Derecho*, vol. 9, no. 2, pp. 137-158.
- YIRONG SUN, 2020, "From SARS to COVID-19: Balance of China's Criminal Law System", *Tsinghua China Law Review*, vol. 12, no. 2, pp. 399-411.
- ZHANG MINGKAI, 2012, "The Causes of Expanding Application of the Crime of Endangering the Public Security by Using Dangerous Methods and the Rules of Limiting its Application", *Journal of National Prosecutors College*, vol. 04, pp. 43-55.

