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**CHINA LAW UPDATE**  
**FROM SARS TO COVID-19:**  
**BALANCE OF CHINA'S CRIMINAL LAW SYSTEM**

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## FROM SARS TO COVID-19: BALANCE OF CHINA'S CRIMINAL LAW SYSTEM

Sun Yirong

### I. INTRODUCTION

Criminal law is one of the quick-responding regimes to the COVID-19 episode in China. On February 6, 2020, the Supreme People's Court and the Supreme People's Procuratorate issued joint judicial interpretation — the 2020 Opinions on Punishing Criminal and Illegal Activities that Hinder the Prevention and Control of Novel Coronavirus Pneumonia (hereafter “the 2020 Opinions”).<sup>1</sup> Following the 2020 Opinions, several batches of typical cases were issued by the Supreme People's Court for further guidance.<sup>2</sup>

This Note focuses on the update of two Crimes in the 2020 Opinions that directly relate to the spread and control of coronavirus. The first one is the crime of endangering public security by dangerous means, regulated in Article 114 and 115 of the Criminal Law.<sup>3</sup> The second one is the crime of impairing the prevention and treatment of infectious diseases, regulated in Article 330 of the Criminal Law.<sup>4</sup> The relationship between the two Crimes has developed greatly from SARS to COVID-19.

In this Note, Section II briefly introduces the criminal law system in China. Section III considers how the 2020 Opinions improve the balance of

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<sup>2</sup> Zuigao Renmin Fayuan Fabu Diyipi Shige Yifa Chengchu Fanghai Yiqing Fangkong Fanzui Dianxing Anli (最高人民法院发布第一批10个依法惩处妨害疫情防控犯罪典型案例) [The First Batch of Ten Typical Cases on Punishing Criminal and Illegal Activities that Hinder the Epidemic Prevention and Control Issued by the Supreme People's Court] (promulgated by Sup. People's Ct, Mar. 10, 2020, effective Mar. 10, 2020) (Chinalawinfo); Zuigao Renmin Fayuan Fabu Dierpi Bage Yifa Chengchu Fanghai Yiqing Fangkong Fanzui Dianxing Anli (最高人民法院发布第二批8个依法惩处妨害疫情防控犯罪典型案例) [The Second Batch of Eight Typical Cases on Punishing Criminal and Illegal Activities that Hinder the Epidemic Prevention and Control Issued by the Supreme People's Court] (promulgated by Sup. People's Ct., Apr. 2, 2020, effective Apr. 2, 2020) (Chinalawinfo); Zuigao Renmin Fayuan Fabu Disanpi Bage Yifa Chengchu Fanghai Yiqing Fangkong Fanzui Dianxing Anli (最高人民法院发布第三批8个依法惩处妨害疫情防控犯罪典型案例) [The Third Batch of Eight Typical Cases on Punishing Criminal and Illegal Activities that Hinder the Epidemic Prevention and Control Issued by the Supreme People's Court] (promulgated by Sup. People's Ct., Apr. 15, 2020, effective Apr. 15, 2020) (Chinalawinfo).

<sup>3</sup> Xing Fa (刑法) [Criminal Law] (promulgated by Nat'l People's Cong., Nov. 4, 2017, effective Nov. 4, 2017) art. 114, 115 (Chinalawinfo).

<sup>4</sup> *Id.*, art. 330.

conviction between the two Crimes. Section IV further discusses the possible increasing impact of local governments' regulatory power in the COVID-19 episode on the criminal law system.

## II. BRIEF INTRODUCTION TO CHINA'S CRIMINAL LAW SYSTEM

The sources of criminal law in China are composed of the code of Criminal Law and judicial interpretations promulgated by the Supreme People's Court or the Supreme People's Procuratorate. Unlike common law jurisdictions, judges in China are modestly restrained to develop criminal law. To a certain extent, judicial interpretations play a similar role as common law to help judges in practice.<sup>5</sup>

There are two types of judicial interpretations, *de jure* and *de facto*. *De jure* judicial interpretations are binding, while *de facto* judicial interpretations are highly persuasive. In practice, the slight difference between binding and highly persuasive is less significant. Judges barely rule against both types of judicial interpretation.

Besides, China has established a guiding case system in 2010. The Supreme People's Court and the Supreme People's Procuratorate are responsible for selecting and issuing representative cases as guiding cases. These guiding cases are not sources of law but also provide guidance and reference for judges.<sup>6</sup>

This Note mainly analyzes the 2020 Opinions and three batches of typical cases following it. The 2020 Opinions are a *de facto* judicial interpretation,<sup>7</sup> issued by the institutions that are authorized to interpret the Criminal Law.<sup>8</sup> In its preamble, the 2020 Opinions require the courts' earnest

<sup>5</sup> Lifa Fa (立法法) [Legislation Law] (promulgated by the Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015) art. 104 (Chinalawinfo).

<sup>6</sup> Liu Zheng (刘峰), *Zhidaoxing Anli de Shiyong Xiaoli* (指导性案例的适用效力) [*The Legal Status of the Guiding Cases*] RENMIN FAYUAN BAO (人民法院报) [CHINA COURT], July 19, 2017, <https://www.china-court.org/article/detail/2017/07/id/2928013.shtml> (last visited May 25, 2020).

<sup>7</sup> Zuigao Renmin Jiancha Yuan Sifa Jieshi Gongzuo de Guiding (最高人民法院司法解释工作规定) [Provisions of the Supreme People's Procuratorate on the Judicial Interpretation Work] (promulgated by Sup. People's Procuratorate, May 13, 2019, effective May 13, 2019) art. 6 (Chinalawinfo); Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding (最高人民法院关于司法解释工作的规定) [Provisions of the Supreme People's Court on the Judicial Interpretation Work] (promulgated by Sup. People's Ct., Mar. 9, 2007, effective Mar. 9, 2007) art. 6 (Chinalawinfo).

<sup>8</sup> Fayuan Zuzhi Fa (法院组织法) [Organic Law of the People's Courts] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Jan. 1, 2019) art. 18 (Chinalawinfo); Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falü Jieshi Gongzuo de Jueyi (全国人民代表大会常务委员会关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People's Cong. Providing an Improved Interpretation of the Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 1981, effective June 10, 1981) para. 2 (Chinalawinfo).

implementation.<sup>9</sup> Three batches of typical cases following the 2020 Opinions are guiding cases that provide further guidance and reference.

### III. POLICY TRANSFER FROM SARS TO COVID-19

#### A. *Begining: The 2003 Interpretation*

The punishment for the transmission of infectious diseases like SARS and COVID-19 has experienced a change of policy from 2003 to 2020. In fact, it is a common issue whether governments should consider criminal law to prevent the transmission of infectious diseases. Many nations' governments have criminalized such offences especially in the area of HIV/AIDS.<sup>10</sup> The policy behind criminalizing and encouraging personal responsibility may be in the hope that individuals will modify their behavior in order to avoid criminal penalties.<sup>11</sup> There may also be a belief that those who fail to protect others from the risk of transmission of infectious diseases, deserve punishment.<sup>12</sup>

In 2003, SARS called for rapid systemic response to protect public health. Probably for the same reason mentioned above, the policy-makers in China wanted to criminalize the violation of public health regulations which resulted in the transmission of SARS and risking public health. Yet, in the Criminal Law, such behavior was not punished as a crime because SARS did not belong to Class A infectious diseases, *i.e.*, plague or cholera.<sup>13</sup>

Therefore, a new judicial interpretation was required. At that time, the policy-makers had mainly two choices. The first was to broaden the crime of impairing the prevention and treatment of infectious diseases under Article 330, but this approach was risky. Because the chapeau of Article 330 expressly regulated that this Article was only applicable to the Class A diseases, while SARS was Class B.<sup>14</sup>

<sup>9</sup> Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Gong'anbu Sifabu Yinfa Guanyu Yifa Chengzhi Fanghai Xinxing Guanzhuang Bingdu Ganran Feiyan Yiqing Fangkong Weifa Fanzui de Yijian de Tongzhi (最高人民法院、最高人民检察院、公安部、司法部印发《关于依法惩治妨害新型冠状病毒感染肺炎疫情防控违法犯罪的意见》的通知) [Notice by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice of Issuing the 2020 Opinions on Punishing Criminal and Illegal Activities that Hinder the Prevention and Control of Novel Coronavirus Pneumonia] (promulgated by Sup. People's Ct., Sup. People's Procuratorate, the Ministry of Pub. Sec., and the Ministry of Just., Feb. 6, 2020, effective Feb. 6, 2020) preamble (Chinalawinfo).

<sup>10</sup> GLOB. COMM'N ON HIV AND THE LAW, HIV AND THE LAW: RISKS, RIGHTS & HEALTH, <https://hivlawcommission.org/report/> (last visited May 15, 2020).

<sup>11</sup> World Health Org. [WHO], *Advancing the Right to Health: The Vital Role of Law* (2016), <https://www.who.int/gender-equity-rights/knowledge/advancing-the-right-to-health/en/>.

<sup>12</sup> *Id.*

<sup>13</sup> Xingfa (刑法) [Criminal Law] (promulgated by Nat'l People's Cong., Nov. 4, 2017, effective Nov. 4, 2017) art. 330 (Chinalawinfo).

<sup>14</sup> Weisheng Bu Fuze Ren Xishuo Weihe Jiang Feidian Guiru Yilei Fading Chuanran Bing (卫生部负责人细说为何将非典归入乙类法定传染病) [*The Person in Charge of the Ministry of Health Explains in*

The second choice was to include such offence under the crime of endangering public security by dangerous means under Article 114 and 115. This approach seems much safer textually, since the Criminal Law offers no clear definition to the term “by dangerous means” and in practice, this crime is often regarded as a “pocket crime” to cover various offences that might not reach the threshold of other crimes in the same chapter.<sup>15</sup>

Finally, the policy-makers chose the second approach. Article 1 of the Judicial Interpretation No. 8 [2003] (hereafter “the 2003 Interpretation”)<sup>16</sup> introduces the offence of violating prevention and control measures of infectious diseases into the crime of endangering public security by dangerous means under Article 114 and 115.

Consequently, the 2003 Interpretation makes the penalty for non-Class A disease heavier than Class A diseases, because the crime of endangering public security is considered as a felony in China. The basic penalty for the crime of this crime is above 3 years’ imprisonment, while the basic penalty for the crime of impairing the prevention and treatment of infectious diseases is below 3 years.<sup>17</sup> Thus, some scholars criticize that the 2003 Interpretation violates the fundamental principle of legality in the criminal law.<sup>18</sup>

#### B. Transition: The 2008 Standards

In 2008, the Supreme People’s Procuratorate decided to lower the threshold of the crime of impairing the prevention and treatment of infectious diseases under Article 330. In the 2008 Standards for Filing Criminal Cases (hereafter “the 2008 Standards”), Article 49 interprets the chapeau of Article 330 in the Criminal Law quite boldly. It suggests that Class A diseases include both Class A diseases and any infectious diseases managed as a Class

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*Detail Why SARS is Classified as a Class B Infectious Disease*] JILINSHENG YUFANG YIXUEHUI XUESHU NIANHUI LUNWEN JI (吉林省预防医学会学术年会论文集) [COLLECTED THESES OF THE ANNUAL ACADEMIC MEETING OF JILIN PREVENTIVE MEDICINE ASSOCIATION] (2004).

<sup>15</sup> Lao Dongyan (劳东燕), *Yi Weixian Fangfa Weihai Gonggong Anquan Zui de Jieshi Xue Yanjiu* (以危险方法危害公共安全罪的解释学研究) [*The Interpretation of the Crime of Endangering Public Security by Dangerous Means*] ZHENGZHI YU FALÜ (政治与法律) [POLITICAL SCIENCE AND LAW] 3 (2013).

<sup>16</sup> Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Banli Fanghai Yufang Kongzhi Tufa Chuanranbing Yiqing Deng Zaihai de Xingshi Anjian Juti Yingyong Falü Ruogan Wenti de Jieshi (最高人民法院、最高人民检察院关于办理妨害预防、控制突发传染病疫情等灾害的刑事案件具体应用法律若干问题的解释) [Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues concerning the Specific Application of Law in the Handling of Criminal Cases of Obstructing the Prevention or Control of Unexpected Epidemics of Infectious Diseases and Other Disasters] (promulgated by the Sup. People’s Ct. and Sup. People’s Proc. May. 14, 2003, effective May. 15, 2003) art. 1 (Chinalawinfo).

<sup>17</sup> Xingfa (刑法) [Criminal Law] (promulgated by Nat’l People’s Cong., Nov. 4, 2017, effective Nov. 4, 2017) art. 114, 115, 330 (Chinalawinfo).

<sup>18</sup> Fengjun (冯军), *Yi Zuiming Shiyong Jingzhunhua Cujin Sheyi Fanzui Zhili* (以罪名适用精准化促进涉疫犯罪治理) [*Accurate Application of Crimes to Promote the Governance of Epidemic-related Crimes*], JIANCHA RIBAO (检察日报) [PROCURATORIAL DAILY], Mar. 8, 2020, at 003.

A one.<sup>19</sup> The 2008 Standards are legally binding judicial interpretation, which has significant influence on the judicial system.

Nonetheless, it is noticeable that the 2008 Standards were promulgated by the Supreme People's Procuratorate and the Ministry of Public Security. According to the Legislation Law and related provisions, the 2008 Standards shall only impact the process of prosecution rather than the process of trial,<sup>20</sup> which leaves room for judges to stick to the 2003 old approach, namely the textual interpretation of Article 330, rather than to adopt the bald interpretation brought by the 2008 Standards.

### C. Transfer: The 2020 Opinions

The 2020 Opinions are the first to deal with the relationship between two approaches, *i.e.*, Article 114 and 115 approach taken by the 2003 Interpretation and Article 330 approach taken by the 2008 Standards. To better illustrate the change, the following part will first introduce how several offences are categorized under the 2020 Opinions and then compare with the categorization under the 2003 Interpretation and the 2008 Standards.

The importance of categorization is that different provisions stipulate different criminal sanctions. In the whole dialogue, four provisions are mentioned, Article 114, 115(1), 115(2) and 330. Article 115(1)'s sanction is the heaviest — above ten years' imprisonment. Article 330's is the lightest — below three years' imprisonment.

To briefly introduce the four provisions, first, Article 114 stipulates the crime of endangering public security whose *actus reus* requires concrete risk of public security. Second, Article 115 stipulates almost the same offence as Article 114, but its *actus reus* requires actual damage. The difference between Article 115(1) and 115(2) is the *mens rea*. Among the four provisions, only Article 115(2)'s *mens rea* is negligence, and the rest require intention. Third, Article 330 stipulates the crime of impairing the prevention and treatment of infectious diseases.

<sup>19</sup> Zuigao Renmin Jianchayuan Gong'anbu Guanyu Yinfa Zuigao Renmin Jianchayuan Gong'an Bu Guanyu Gong'an Jiguan Guanxia de Xingshi Anjian Lian Zhuisu Biaozhun de Guiding Yi de Tongzhi (最高人民法院、公安部关于印发《最高人民法院、公安部关于公安机关管辖的刑事案件立案追诉标准的规定（一）》的通知) [Notice of the Supreme People's Procuratorate and the Ministry of Public Security on Issuing the 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 Organs For Investigation and Prosecution] (promulgated by Sup. People's Proc. and the Ministry of Pub. Sec., June 25, 2008, effective June 25, 2008) art. 49 (Chinalawinfo).

<sup>20</sup> Lifa Fa (立法法) [Legislation Law] (promulgated by the Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015) art. 104 (Chinalawinfo); Zuigao Renmin Jianchayuan Sifa Jieshi Gongzuo Guiding (最高人民法院司法解释工作规定) [Provisions of the Supreme People's Procuratorate on the Judicial Interpretation Work] (promulgated by Sup. People's Proc., May 13, 2019, effective May 13, 2019) art. 6 (Chinalawinfo).

In the 2020 Opinions, if the offence of refusing isolation treatment results in actual damage, the patient will be punished under Article 115(1). If the same offence results in concrete risk rather than actual damage, judges need to further consider whether the patient has been confirmed. If the offender is a confirmed patient, he/she will be punished under Article 114. Otherwise, the offender will be punished under Article 330. Besides isolation treatment, if a patient violates other regulatory measures and causes damage or risk, they will be punished under Article 330.

In comparison, the 2003 Interpretation makes no distinction between the measure of isolation treatment and other regulatory measures. Therefore, intentionally refusing any measure and resulting in actual damage is punished under Article 115(1), while the same offence with negligence is punished under Article 115(2). Besides, the 2003 Interpretation makes no distinction between confirmed and suspected patients.

Therefore, most offences punished under Article 330 in the 2020 Opinions are punished under Article 114 or 115 in the 2003 Interpretation, resulting in much heavier criminal sanction.

Comparatively, the 2008 Standards are vague. All abovementioned offences can be categorized under Article 330, while it may at the same time trigger Article 114 or 115. This creates overlap between these provisions. Since the breakout of infectious diseases is rare, the issue of overlap is rarely discussed.

After the issuance of the 2020 Opinions, the Supreme People's Court and the Supreme People's Procuratorate clarified that the overlap between Article 330 and Article 115(2) is the overlap of articles of law. In other words, when they are triggered concurrently, Article 330 shall prevail.<sup>21</sup> Therefore, Article 115(2) is completely excluded from application in the case of infectious diseases regulation.

Conclusively, the 2020 Opinions has lessened the penalty of the infectious diseases related crimes by introducing two elements into the categorization — the element of confirmed or suspected and the element of isolation treatment.

#### *D. Jurisprudence Following the 2020 Opinions*

The 2020 Opinions significantly narrowed down the scope of the crime of endangering public security by dangerous means in infectious diseases related crimes, which respond to the scholars' eager appeal.<sup>22</sup> Meanwhile, the

<sup>21</sup> Wangxin (王新), *Quanjufiao Fanghai Chuanranbing Fangzhi Zui Zhangxian Xingshi Sifa Linian Jinbu* (全聚焦妨害传染病防治罪 彰显刑事司法理念进步) [*Focus on the Crime of Impairing the Prevention and Treatment of Infectious Diseases and Highlight the Progress of Criminal Justice*], RENMIN FAYUAN BAO (人民法院报) [CHINA COURT], Apr. 18, 2020, at 002.

<sup>22</sup> Zhang Mingkai (张明楷), *Lun Yi Weixian Fangfa Weihai Gonggong Anquan Zui Kuoda Shiyong de Chengyin Yu Xianzhi Shiyong de Guize* (论以危险方法危害公共安全罪——扩大适用的成因与限制适用的规则) [*The Analysis of the Crime of Endangering Public Security by Dangerous Means — Causes of*

Supreme People's Procuratorate also calls for restrictive application at the prosecution stage.<sup>23</sup> The jurisprudence following the 2020 Opinions further confirmed such improvement.

Up to now, the Supreme People's Court has published three batches of typical cases regarding the 2020 Opinions, in all, 28 cases.<sup>24</sup> Among them nine cases are offences under Article 330. None of the typical cases are offences under Article 114 or 115. The detailed analysis on the nine cases is in the following table.

TABLE 1. TYPICAL CASES IN THE THREE BATCHES<sup>25</sup>

<b>Batch 1 Case 1</b>	<b>Actus reus:</b> 1) conceal the recent Hubei Province travel history; 2) refuse to cooperate with medical treatment as a suspected patient; 3) 37 people under quarantine; <b>Mens rea:</b> intentional; <b>Sanction:</b> 10-month imprisonment.
<b>Batch 3 Case 1</b>	<b>Actus reus:</b> 1) conceal the recent outbound travel history; 2) enter into public places, take public transportation and go to work when having typical symptoms of COVID-19; 3) 43 people under quarantine; 4) shutdown of his working place for a week; <b>Mens rea:</b> intentional; <b>Sanction:</b> 18-month imprisonment.
<b>Batch 3 Case 2</b>	<b>Actus reus:</b> 1) conceal the recent Wuhan City living history; 2) violate the local government's regulation of self-quarantine; 3) 28 people under quarantine; <b>Mens rea:</b> intentional; <b>Sanction:</b> 8-month imprisonment.
<b>Batch 3 Case 3</b>	<b>Actus reus:</b> 1) conceal the recent Wuhan travel history; 2) violate the local government's regulation of self-quarantine and the ban of catering business operation; 3) 173 people under quarantine; <b>Mens rea:</b> intentional; <b>Sanction:</b> 10-month imprisonment.
<b>Batch 3</b>	<b>Actus reus:</b> 1) conceal the recent Wuhan travel history; 2) conceal the relevant travel information as a confirmed patient; 3) 900 people under

*Expanding Application and Rules of Restrictive Application*], 20 GUOJIA JIANCHAGUAN XUEYUAN XUEBAO (国家检察官学院学报) [JOURNAL OF NATIONAL PROSECUTORS COLLEGE] 43 (2012); Lao, *supra* note 15.

<sup>23</sup> Chen Jinghui (陈敬慧), *Rending Sheyi Weihai Gonggong Anquan Fanzui Youying Zhuzhong Yindao Quzheng* (认定“涉疫”危害公共安全犯罪尤应注重引导取证) [*Special Attention Should be Paid to Guiding Evidence Collection when Identifying 'Epidemic-Related' Crimes that Endanger Public Safety*], JIANCHA RIBAO (检察日报) [PROCURATORIAL DAILY], Mar. 31, 2020, at 003.

<sup>24</sup> See *supra* note 2.

<sup>25</sup> *Id.*



<b>Case 4</b>	quarantine; <b>Mens rea:</b> intentional; <b>Sanction:</b> 12-month imprisonment.
<b>Batch 3 Case 5</b>	<b>Actus reus:</b> 1) conceal the recent Wuhan travel history; 2) 1 person and 8 medical personal infected; <b>Mens rea:</b> intentional; <b>Sanction:</b> 8-month imprisonment.
<b>Batch 3 Case 6</b>	<b>Actus reus:</b> 1) offender 1 — conceal the close contact with 32 people in a recent party; 2) offender 2 — conceal the close contact with offender 1 & conceal the above party information as a confirmed patient; 3) 21 people under quarantine; 4) 113 people without timely quarantine; <b>Mens rea:</b> intentional; <b>Sanction:</b> 1) offender 1 — 8-month imprisonment; 2) offender 2 — 9-month imprisonment.
<b>Batch 3 Case 7</b>	<b>Actus reus:</b> 1) conceal the recent trace information as a confirmed patient; 2) 38 people without timely quarantine; <b>Mens rea:</b> intentional; <b>Sanction:</b> 6-month imprisonment and probationary sentence for 1 year.
<b>Batch 3 Case 8</b>	<b>Actus reus:</b> 1) secretly accept and treat two patients who were later confirmed infection with COVID-19 in his private clinic, with no proper isolation measures; 2) 457 people under quarantine; <b>Mens rea:</b> intentional; <b>Sanction:</b> 12-month imprisonment.

Conclusively, the 2020 Opinions result in the cautionary application of Article 114 and 115 and activation of the application of Article 330.<sup>26</sup> Yet, it is noteworthy that most of the regulations violated by the offenders in the typical cases are related to the disclosure of private information, which triggers the tension between privacy and infectious diseases control.

This is a quite big issue and this Note has no intention to discuss the legality and proportionality of such administrative regulation. Nonetheless, this Note will try to discuss the solution to eliminate the possible illegal regulations' impact on the criminal law. Such impact is well displayed by the crime of impairing the prevention and treatment of infectious diseases under Article 330 and therefore, the following Section will try to find out the proper scope of the Crime under Article 330.

<sup>26</sup> Zhiyin She "Yi" Anjian Zuiming Shiyong Zhutui Luoshi Guojia Zhili Nengli Xiandaihua (指引涉“疫”案件罪名适用 助推落实国家治理能力现代化) [Guide the Application of Convictions Regarding “Epidemic” and Help Implement the Modernization of National Governance Capabilities], JIANCHA RIBAO (检察日报) [PROCURATORIAL DAILY], Mar. 12, 2020.

#### IV. PROPER SCOPE OF THE CRIME OF IMPAIRING THE PREVENTION AND TREATMENT OF INFECTIOUS DISEASES

##### A. *Blanket Criminal Law*

Blanket Criminal Law is a legislative technique adopted by the crime of impairing the prevention and treatment of infectious diseases. This term describes national criminal legislation of which the field of criminal behavior is determined by a reference to a non-criminal law regulation.<sup>27</sup> Under Article 330 of the Criminal Law, the act of violating the Law on Prevention and Treatment of Contagious Diseases becomes an integral part of the *actus reus* of the crime of impairing the prevention and treatment of infectious diseases.

Such criminal legislative technique promotes the flexibility of the Criminal Law, but also bears the risk of lowering the criminal threshold improperly. It is a two-step lowering process. Firstly, the criminal threshold of Article 330 depends on the Law on Prevention and Cure of Contagious Diseases, because the *actus reus* of Article 330 is to violate the measures set by the sanitation and epidemic control organs in accordance with the Law on Prevention and Cure of Contagious Diseases.<sup>28</sup> Secondly, the Law on Prevention and Cure of Contagious Diseases stipulates that the local people's governments at or above the county level are authorized to carry out such measures when any infectious disease breaks out and prevails.<sup>29</sup> Therefore, the criminal threshold of Article 330 ultimately depends on the local governments' regulation.

Although there are other elements in the *actus reus*, like risk or damage, that can be used to keep the threshold proper, the element of act still largely depends on local governments' regulation. In fact, to better control the pandemic, local governments may overuse regulatory measures.

Conclusively, the criminal threshold of Article 330 is at the risk of being lowered improperly and this calls for proper restriction on the local governments' regulatory power.

##### B. *Available Restrictions on Regulatory Power*

Since Article 330 itself contains no restriction in this aspect, the restriction may be found outside the criminal law system, for example, the Law on Prevention and Cure of Contagious Diseases. However, the only restriction in it to the local government's regulatory power is its next higher-level government, who has the authority to approve the measures. Moreover, in its

<sup>27</sup> This technique also exists in other jurisdictions. See MERITA KETTUNEN, LEGITIMIZING EUROPEAN CRIMINAL LAW: JURISDICTION AND RESTRICTIONS 231–32 (2020).

<sup>28</sup> Chuanran Bing Fangzhi Fa (传染病防治法) [Law on Prevention and Treatment of Infectious Diseases] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2013, effective June 29, 2013) (Chinalawinfo).

<sup>29</sup> *Id.*, art.41, 42.

legal responsibility chapter, none of the articles mention the situation when the local governments overuse their regulatory power. Instead, it punishes the local governments' inaction, which may worsen the misuse of regulatory power.<sup>30</sup>

Therefore, other legal regimes shall be introduced. The Administrative Reconsideration Law may be the major instrument within the administrative system.<sup>31</sup> Administrative reconsideration can revoke both the specific administrative act and its legal basis.<sup>32</sup> The reviewing organ is the next higher level government.<sup>33</sup>

Other than the review within the administrative system, one can also file an administrative litigation against the local governments, while the scope of administrative litigation only covers the specific administrative acts but not its legal basis.<sup>34</sup> Meanwhile, one can receive compensation in accordance with the relevant provisions of the State Compensation Law in both administrative reconsideration and litigation.<sup>35</sup>

However, after a thorough analysis on the possible restriction and remedy, this Note finds that once the emergency measure is approved by the next-higher level government, the revocation or invalidation of the measure is possible only after it has been applied to specific person, *i.e.*, become specific. In other words, the abstract provision itself is not enough to file a review.

In comparison, the United States' judicial review system accepts complaints against abstract emergency measures. In the COVID-19 situation, the judicial review system towards the states' emergency measures is activated. The Fifth Circuit upheld Texas's application of a coronavirus emergency order. The trial court in New Hampshire upheld the group gathering ban.<sup>36</sup> Both of them take the approach of the Supreme Court's 1905 ruling in *Jacobson v. Massachusetts*, which reads the judicial authority imposed "the controlling standards, established by the Supreme Court over a century ago, for adjudging the validity of emergency measures."<sup>37</sup>

<sup>30</sup> *Id.*, chapter VIII.

<sup>31</sup> Xingzheng Fuyi Fa (行政复议法) [Administrative Reconsideration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 1, 2017, effective Jan. 1, 2018) (Chinalawinfo).

<sup>32</sup> *Id.*, art.7.

<sup>33</sup> *Id.*, art.13.

<sup>34</sup> Xingzheng Susong Fa (行政诉讼法) [Administrative Litigation Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective July 1, 2017) (Chinalawinfo).

<sup>35</sup> Xingzheng Fuyi Fa (行政复议法) [Administrative Reconsideration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 1, 2017, effective Jan. 1, 2018) art. 28, 29 (Chinalawinfo); Guojia Peichang Fa (国家赔偿法) [State Compensation law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 26, 2012, effective Jan. 1, 2013) (Chinalawinfo).

<sup>36</sup> Lindsay F. Wiley & Steve Vladeck, *COVID-19 Reinforces the Argument for 'Regular' Judicial Review — Not Suspension of Civil Liberties — In Times of Crisis*, HARVARD L. REV. BLOG (Apr. 9, 2020), <https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/> (last visited May 15, 2020).

<sup>37</sup> *Jacobson v. Mass.*, 197 U.S. 11 (1905).

On May 13, 2020, the Supreme Court of Wisconsin ruled in *Wisconsin Legislature v. Andrea Palm* on whether the Department of Health Services violated Wis. Stat. § 227.24 by issuing Emergency Order No. 28 without complying with § 227.24's procedures.<sup>38</sup> In a 4-3 decision, the Supreme Court overturned the extension of Gov. Tony Evers' Safer at Home order. The dissenting judge Rebecca Dallet comments the ruling as blatant judicial activism.<sup>39</sup>

The United Kingdom's emergency measure system is quite different, but also puts stronger restrictions on the local governments' regulatory power. According to the Coronavirus Act, the power to make regulations and the power to order health measures belong to different organs. The power to enact regulations belongs to department of health. The power to order emergency health measures in relation to persons, things and premises belongs to the magistrates' court.<sup>40</sup>

Therefore, compared to the typical common law jurisdiction, the restriction is comparatively weak in China and the role of judicial system is not that active. The revocation before concrete damage may be impossible. Therefore, Article 330 may be misused to punish those who violate an illegitimate regulatory measure.

To avoid such misuse, scholars suggest that if local governments' emergency measures are obviously illegitimate, the offender's violation of such measures shall not be guilty. This approach calls for the courts' proper interpretation of the Criminal Law and judicial activism to a certain extent. Without the balance in the structure of the system, the goal of balancing may be hard to achieve.

## V. CONCLUSION

From SARS to COVID-19, the policymakers have made great progress in balancing the aim and the means of punishing the offence in the criminal law system. The 2020 Opinions transfer the approach from expanding a felony, *i.e.*, the crime of endangering public security by dangerous means to a minor offence, *i.e.*, the crime of impairing the prevention and treatment of infectious diseases.

However, there are still several issues that remain to be settled. First of all, the possible misuse of the crime of impairing the prevention and treatment of

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<sup>38</sup> *Wisconsin Supreme Court Oral Argument: Wisconsin Legislature v. Andrea Palm*, WISCONSINEYE, <https://wiseye.org/2020/05/05/wisconsin-supreme-court-oral-argument-wisconsin-legislature-v-andrea-palm/> (last visited May 15, 2020).

<sup>39</sup> Ruth Conniff, "Blatant Judicial Activism" as Wisconsin Supreme Court Overturns Safer at Home, WIS. EXAMINER (May 14, 2020), <https://wisconsinexaminer.com/2020/05/14/blatant-judicial-activism-as-wisconsin-supreme-court-overturns-safer-at-home/> (last visited May 23, 2020).

<sup>40</sup> Coronavirus Act 2020, c. 7.

infectious diseases may occur, due to lack of active judicial review system to limit the administrative power.

Secondly, the 2020 Opinions are only applicable in COVID-19 related cases, which creates a weird situation that the COVID-19 related crimes are actually lessened than other infectious disease-related crimes since the 2003 Interpretation is still effective and shall apply to them.<sup>41</sup> Besides, the 2020 Opinions have escaped from a thorough internal review of legitimacy before issuance, because it is not a formal judicial interpretation.

In conclusion, the 2020 Opinions are progressive, while more issues still call for policy-makers' attention.

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<sup>41</sup> *Supra* note 26.