

The Phenomenalization and Correction of Criminal Law Legislation: From the Perspective of the Amendment XI

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In the period of social transformation, legislators hope to enhance the social control of criminal law by meeting the public's safety expectations and preventing social risks, it makes legislators pay too much attention to the social hot spot's phenomenon, and leads to the phenomenalization of criminal law legislation; the Amendment XI of the Criminal Law of the People's Republic of China also has obvious phenomenalization legislative characteristics. Because social hot spots phenomenon is closely related to social public opinion and affected by the irrational factors in social public opinion, the phenomenalization of criminal law legislation often implicitly leads to many hazards, such as violation of the principle of modesty in criminal law, excessive protection of abstract legal interests, lack of systematic consideration, and so on, which makes criminal law legislation lack of rationality, foresight, and scientific characteristics. In view of the phenomenal trend of China's current criminal law legislation, the authors can correct it by changing the concept of governance to correct the omnipotent view of criminal law, improving legislative technology to ensure scientific legislation, and paying attention to criminal judicial interpretation to flexibly deal with social risks.

Keywords: the Amendment XI of the Criminal Law of the People's Republic of China, phenomenalization of criminal law legislation, principle of modesty in criminal law, systematization of criminal law

Legal Issues of Question

Under the background of network era, the high-speed development of all kinds of information and communication technology has greatly improved the speed of information dissemination and expanded the scope of information dissemination. People are accustomed to obtaining all kinds of instant messages through the Internet platform and software, which makes some news events cause widespread social concern and discussion in a short time and become hot social events. There is no lack of social hot events that trigger the rationality of the relevant laws and regulations, and the formation of public opinion prompted the legislator had to actively respond to social hot events as one of the important tasks of the revision of laws and regulations (Chen & Ou, 2021). China's legislation has thus entered the fire-fighting legislation period, and these social hotspots of public opinion have become the trigger for the legislative work (Chen, 2012). Criminal law as the most deterrent means

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of social governance, according to the social hotspot events reflected in the specific social phenomena of the old provisions of the targeted adjustment to respond to public opinion, naturally becomes an important work, with phenomenal legislation features of the criminal law provisions; criminal law provisions with the characteristics of phenomenal legislation have thus emerged; and criminal law legislation tends to be phenomenalized (Chen, 2020). It is undeniable that as China enters a period of social transformation and faces more security risks, amending the criminal law to actively respond to public opinion in response to hot social phenomena that are of widespread public concern will, on the one hand, help satisfy the public's concerns based on social security and their own security. There is an eager expectation that the criminal law can provide positive protection, thereby effectively improving the public's sense of security and enhancing public confidence in the criminal law to ensure social stability. On the other hand, it is conducive to the legislator to find out the deficiencies of the criminal law through the hot phenomenon in the society, and then improve the provisions of the criminal law with the changes of the times in order to better regulate the disorderly behavior of the society, to protect the rights and interests of the public, and to effectively safeguard the authority of the criminal law (Wang, 2016).

However, for the fundamental purpose of meeting public security expectations and preventing social risks so as to enhance the control of criminal law over social order, legislators are inevitably affected by social opinions directly related to the hot social phenomena when they customize the criminal law provisions for the hot social phenomena (Shao, 2016). The irrational qualities of social public opinion, such as emotional, temporary, inflammable, and one-sided, are in natural conflict with the rational qualities of criminal law legislation, such as modesty, stability, logic, and systematicity (Shover & Hochstetler, 2006), and the criminal law legislation under its influence is very likely to fall into emotional legislation due to the lack of rational consideration (Liu, 2016), symbolic legislation (Wei, 2018), responsive legislation of the misunderstanding (Liu & You, 2020), so that it lacks rationality, forward-looking, and scientific. For example, a number of similar cases, such as the "rich man's car crashes into someone while driving in Hangzhou City in 2009" case, triggered the legislator's heightened attention to the phenomenon of dangerous driving, such as drunk driving and racing, which prompted the Amendment VIII of the Criminal Law of the People's Republic of China to create the crime of dangerous driving. The Amendment VIII of the Criminal Law of the People's Republic of China completely broke the divide between illegal and criminal. The original criminal sanctions and intervention, which were originally last resort and used as a final sanction force, were diverted into the general field of public security penalties and used regularly, destroying the inherent dual system of legislation (Yu, 2011). This is a violation of the basic principle of modesty of criminal law legislation. For another example, various cybercrime cases have triggered legislators to pay great attention to the phenomenon of networkization of traditional crimes, and in order to safeguard cybersecurity and control social risks, the Amendment IX of the Criminal Law of the People's Republic of China has created four new cybercrime-related crimes, and they are the crime of illegal use of information network, the crime of refusing to perform information network security management obligations, the crime of assisting information network criminal activities, and the crime of fabricating and deliberately spreading false information. The boundary of punishability of the criminal law itself has been further shifted forward, and the punishment mechanism of the free criminal law that presupposes the result or the actual harm as well as the causal connection between the behavior and the result has been further shifted to a higher level. The causal linkage between act and result is no longer important in the face of the risk of effectively defending social security, and the protection of

legal interests is thus increasingly early and front-loaded (Liu, 2017). The criminal law academic circles have long paid attention to the problem that China's criminal law legislation pays too much attention to hot social phenomena. Through theoretical criticism of the lack of rational considerations in relevant legislative adjustments, scholars have profoundly revealed the potential harm of the phenomenon-oriented trend of criminal law legislation. However, according to the authors' compilation and rough statistics, in the Amendment XI of the Criminal Law of the People's Republic of China promulgated on December 26, 2020, more than 40% of criminal law provisions are based on responding to the hot phenomena in the society, and the trend of phenomenalization of criminal law legislation has not been alleviated. Mainly based on news reports, legislative background explanatory documents, and other information, it is believed that there are 19 articles in the Amendment XI of the Criminal Law of the People's Republic of China that mainly make legislative adjustments for social hot phenomena, respectively Article 2, Article 5, Article 6, Article 7, Article 12, Article 16, Article 26, Article 27, Article 28, Article 31, Article 30, Article 34, Article 35, Article 37, Article 39, Article 41, Article 43, Article 44, and Article 45. In this regard, the authors intend to take the Amendment XI of the Criminal Law of the People's Republic of China as a perspective, through revealing the theoretical defects of some of its phenomenalized legislative provisions, to reiterate the potential harms of phenomenalization of criminal law legislation, and accordingly to propose specific corrective measures for discussion.

Revealing the Potential Harm of the Phenomenon of Criminal Law Legislation

The promulgation of the Amendment XI of the Criminal Law of the People's Republic of China went through three deliberations, and the draft formed during the process triggered in-depth discussions in the academic community. After fully listening to and absorbing opinions from all walks of life, the final version of the Amendment XI of the Criminal Law of the People's Republic of China contains a total of 48 articles. Among them, except for the last provision on the effective date, one article is an amendment to the content of the general provisions of the Criminal Law, and the remaining 46 articles are aimed at the content of the specific provisions of the Criminal Law. In terms of specific content, the 47 articles mainly address issues such as juvenile delinquency, drug management, financial market control, public security, protection of corporate rights and interests, and protection of minors' sexual rights and interests that are widely concerned by the society. By adding new crimes and modifying the composition, requirements, adjustments to statutory penalties, and other means respond. As mentioned above, more than 40% of the provisions are based on responding to current social hot topics.

In response to various hot social phenomena and the public opinions caused by them, the Amendment XI of the Criminal Law of the People's Republic of China has actively responded with legislation, or modified the elements of crime, or increased the statutory penalty, or added new crimes, and the amendments generally have the characteristics of expanding the criminal circle of criminal law, preempting criminal law regulations, and aggravating criminal penalties (Liu, 2021). As mentioned above, due to the irrational characteristics of social public opinion itself, which is directly related to hot social phenomena, such as emotionality, temporary nature, easily incited, and one-sidedness, and the modesty, stability, and logic that criminal law legislation should have, there is a natural conflict between rational characteristics such as sexual and systematic nature, and the criminal law legislation influenced by it can easily lack rationality, forward-lookingness, and scientificity due to the lack

of rational considerations. The Amendment XI of the Criminal Law of the People's Republic of China, which pays too much attention to hot social phenomena, naturally cannot escape the negative influence of public opinion, causing it to have the following legislative flaws in the following three aspects.

Firstly, it is violating the principle of modesty in criminal law legislation. The modesty of criminal law legislation, also commonly referred to as the economy or frugality of criminal law, means that legislators should use less punishment or use other punishment alternatives to effectively combat and prevent crime, so as to minimize crimes as much as possible. The social governance costs should be spent to obtain the greatest possible social governance benefits. The principle of complementarity of criminal law and the principle of modesty of criminal law are basically the same in connotation. According to the principle of complementarity of criminal law, if administrative measures against a certain illegal behavior are sufficient to protect legal interests, such behavior should not be treated as a crime. The principle of modesty and complementarity of criminal law obviously requires legislators to bring relevant behaviors into the scope of criminal law through legislation only when other regulatory means cannot effectively punish them. Since punishment is more punitive and deterrent than other punishment measures, the public's sense of security comes more from the legislative adjustments made by the criminal law to hot social phenomena, which makes legislators often regard punishment as the main method when dealing with hot social phenomena. It is even the only means of social control, which inevitably leads to legislators who respond to public opinion in a timely manner to ensure social stability and easily ignore the restrictions of the modesty principle of criminal law on criminal law legislation. As a result, the criminal circle continues to expand, and the penalties continue to increase. Therefore, the phenomenon of criminal law legislation contains the potential harm of causing some criminal law provisions to break through the limitations of the modesty principle of criminal law legislation (Zhang, 2017).

Secondly, it is the overprotection of abstract legal interests. The arrival of the risk society during the period of social transformation is the background of the era when criminal law legislation pays too much attention to hot social phenomena and becomes a phenomenon in Chinese Mainland. Along with the omnipresence of risks, people have a sense of powerlessness to control many events that affect their life experiences. The spread of risk awareness has intensified the public's anxiety and insecurity. Due to the vagueness and abstractness of social risks and insecurity themselves, and compared with individual legal interests, it has a greater impact on collective legal interests such as public safety and economic order. Harmful behaviors that transcend personal legal interests are more likely to cause a surge in public insecurity because they affect a wider range and affect a large number of people (Guo, 2018). Criminal law legislation with the main purpose of enhancing social control and ensuring social stability will inevitably be more inclined to strengthen the control of criminal law. The protection of abstract legal interests such as collective legal interests and economic order legal interests may expand the criminal circle of abstract legal interests, preempt criminal law regulations, or increase the penalties (Keefe & Ogul, 1985). As far as the phenomenal legislative provisions in the Amendment XI of the Criminal Law of the People's Republic of China are concerned, except for the protection of legal interests in the crime of rape, the crime of sexual assault by persons with care duties, and the crime of child molestation, the protection of legal interests in the crimes involved in the other provisions are all for abstract legal interests such as collective legal interests and trans-individual legal interests. For example, the newly added crimes of impeding safe driving and dangerous operations are protected by public safety legal interests; the revised crime of producing, selling, and

providing counterfeit drugs is related to the crime of producing, selling, and providing inferior drugs, and the newly added crime of obstructing drugs. Management crimes are all based on the legal interests of drug management order; the revised financial crime-related crimes are basically based on the legal interests of financial management order; the newly added crimes of throwing objects from high altitude and the crime of collecting illegal debts are all based on social management order. Moreover, the protection of the above-mentioned abstract legal interests in the Amendment XI of the Criminal Law of the People's Republic of China is generally strict and severe. Affected by the irrational factors of public opinion, criminal law legislation that pays more attention to the protection of abstract legal interests can easily fall into the misunderstanding of over-protection of abstract legal interests and lacks rationality. The phenomenon of criminal legislation obviously also contains the potential harm of over-protecting abstract legal interests in criminal law legislation.

Thirdly, it is lack of systematic legislative considerations. The systematization of criminal law legislation requires that "in the process of revising the criminal law, legislators should not just start with the provisions themselves, but should fully consider the relationship between provisions and place a single provision in the criminal code as a whole for consideration" (Zhang, 2020, pp. 3-16). Correspondingly to evaluate whether criminal law legislation is systematic, it can judge whether there is duplication between the legislative provisions and the regulatory scope of the original criminal law provisions (necessity inspection), and whether the description of the essential characteristics of the regulated behavior in the legislative provisions is highly general to ensure the effectiveness of the legislation. Stability (typology inspection) and whether there is a conflict between the legislative provisions and the original criminal law provisions (coordination inspection) will be investigated. Whether the motivation for legislation comes from changes in the background of the times, from rational suggestions from the criminal law academic community, or from the need to respond to hot social phenomena, scientific legislation requires that the amendment, deletion, and addition of criminal law provisions should be rational, sufficient, and comprehensive scientific demonstration and evaluation to ensure the scientific nature of the criminal law provisions themselves. Affected by social public opinion, criminal law legislation that responds to hot social phenomena in a timely and effective manner is often passive, hasty, and result-oriented, resulting in popular orientation—social promotion—academic justification—law (policy) formulation. Deviations may occur in all aspects of the legislative process, and the scientific nature of the criminal law provisions itself is naturally difficult to guarantee (Li, 2016).

Circumventing the Phenomenalization of Criminal Law Legislation

The aggravation of security risks during the period of social transition has made it the primary task of criminal law legislation to adjust the criminal law in response to social hotspot phenomena in order to respond to social public opinion, thereby enhancing the social control power of the criminal law itself in order to satisfy the needs of the public for a sense of security and to safeguard social stability. The legislation model of "uncovering individual cases—boosting public opinion—reflecting on the phenomenon—amending the legislation" has gradually become the main legislative model of criminal law legislation in Chinese Mainland. The trend of phenomenalization of criminal law legislation has thus been formed. However, the phenomenalization of criminal law legislation itself contains many hazards that make criminal law legislation violate the principle of modesty of criminal legislation, over-protect abstract legal interests, and lack of systematic consideration, which leads to

the lack of reasonableness, foresight, and scientificity of criminal law legislation in Chinese Mainland. Therefore, it is necessary to take reasonable measures to avoid the current trend of phenomenalization of criminal law legislation in Chinese Mainland, in order to protect the healthy development of criminal law. Specifically, the phenomenalization tendency of criminal law legislation in Chinese Mainland can be corrected from the three levels of governance concept, legislative technology, and judicial interpretation.

Firstly, it is time to change the concept of “omnipotence of criminal law”. When in the front of some kind of bad phenomenon, Chinese people often hope the criminal law to adjust or increase the penalty to solve. Especially in the current era of risk society, the concept of “omnipotence of criminal law” has become an important part of the collective consciousness of the public, jurists, legislators, politicians, and other social subjects; makes the adjustment of the criminal law legislation become the main or even the only means of social governance to respond to public opinion and deal with the hot spots in society. The prevalence of the “omnipotent view of criminal law” is obviously an important reason for the phenomenalization of the development trend of criminal law legislation in Chinese Mainland, and the correction of the concept of “omnipotence of criminal law” by the public and legislators is especially necessary for the correction of the phenomenalization of the trend of criminal law legislation (Sun, 2015).

The authors provide three methods. One method is that the public will be guided to establish a sense of respect for the criminal law. It is undeniable that, as the most severe means of punishment, criminal punishment is more punitive and deterrent than other means of social governance and can minimize the occurrence of social disorder. However, precisely because it is the most severe, the negative impact caused by unreasonable criminal punishment is also the most serious. Excessive respect for and reliance on penalties, although a timely solution to many current social problems, but also may bring irreparable long-term damage to the stable development of society and the rights and interests of the public themselves, making the purpose of the legislation and the social effect far from, or even counterproductive. The application of penalties should be based on the premise that the behavior has serious social harm, while not all social disorder behind the social hotspot phenomenon needs to be regulated by the criminal law. Relevant departments can use education and guidance to help the public not only advocate punishment, but also have a deep understanding of the side effects of punishment itself, so as to more comprehensively understand the severity of punishment, thereby changing the original misconceptions and establishing the correct concept of “respect in criminal law”.

The other method is to ensure that legislators adhere to the modest view of criminal law. Out of realistic considerations of regulatory costs and benefits and the need to effectively protect citizens’ rights and interests, the modesty of criminal law requires that criminal law be regarded as the last line of defense to safeguard social order. Behaviors that are adequately regulated by other laws and regulations should not be included in the scope of regulation. Only those serious illegal acts where civil sanctions and administrative sanctions are ineffective require criminal law intervention. Therefore, the criminal law legislation in the face of public opinion should first examine the laws and regulations other than the criminal law on the social disorder of the effect of the regulation of the behavior; if other laws and regulations can effectively deal with the relevant social hotspot phenomenon, there is no need to make targeted legislative amendments to ensure the stability of the criminal law itself and the reasonableness of the law. Secondly, if other laws and regulations are unable to effectively regulate this type of social disordered behavior, it is necessary to further examine its own social harm and punishability, and only

behavior that is both socially harmful and punishable needs to be evaluated by the criminal law. In addition, criminal law legislation needs to make a rational assessment of the consequences that may result from penalizing such socially disordered behaviors; if the harm to social development and the protection of the rights and interests of citizens is greater than the benefits to be gained from penalizing such behaviors, they should be penalized with caution (Li, 2022).

Another method is that the non-criminal legal system should be improved and conceptual corrections should be promoted. Under the legal system of “heavy punishment but light on the people” in ancient China, the construction and improvement of the non-criminal legal system was not paid attention to, making it unable to effectively regulate relevant social disordered behaviors due to its limited social governance capabilities. The criminal law, which has greater social governance capabilities, naturally has become the “first choice” of the public and legislators. Therefore, continuous improvement of the non-criminal legal system and “increasing the governance functions of all non-criminal legal systems can reduce the reliance on criminal law in the process of national governance”, help the public and legislators in the concept of “omnipotence of criminal law” correction. On the one hand, the enhancement of the governance capacity of the non-criminal law system can make the public realize the effectiveness and reasonableness of non-criminal punishment measures, that is, imposing non-criminal punishments on some social disordered behaviors can not only effectively safeguard the social order, but also have fewer side-effects compared with the implementation of criminal penalties, thus correcting the concept of “omnipotence of criminal law” of the public. On the other hand, the improvement of the non-criminal law system can make the legislator in choosing to apply what kind of punishment measures to deal with social disorder behavior, can be more comprehensive, scientific assessment and investigation, so as to get rid of the legislator’s reliance on the criminal punishment, and help the legislator in the criminal law of the principle of modesty and suppression of the law to adhere to. Therefore, through the continuous improvement of the non-criminal law system, it should enhance the comprehensive social governance capacity of Chinese legal system, reduce the dependence on criminal law for social governance, so as to promote the public and legislators from the concept of “omnipotence of criminal law” to the concept of “criminal law reverence” and the concept of “modesty in criminal law” (Li & Li, 2020).

Secondly, it is time to improvement of legislative techniques and guarantee the scientific nature of legislation. Adjusting criminal law provisions on the basis of topical social phenomena does not, in itself, necessarily lead to a lack of science in criminal law legislation. However, unlike the general process of scientific legislation, under the influence of public opinion, legislators are often more passive and hastier in setting up phenomenal legislative provisions and are mainly oriented towards the effects of social governance, resulting in a lack of concern for the scientific nature of the provisions themselves, which has led to the systematic inadequacies of many of the phenomenal provisions of the legislation. In this regard, the scientific nature of criminal law legislation should be safeguarded in the following two ways (Li, 2016).

On one way, building a rational system to scientifically assimilate public opinion: Social public opinion related to specific social hotspot phenomena is an important factor affecting criminal law legislation, which refers to the views or opinions with a common tendency expressed publicly by most members of the society on social hotspot events, phenomena, or problems closely related to their work and life, and is a centralized embodiment of public opinion. Reasonable absorption of public opinion in the legislative process is not only an inherent

requirement of democratic legislation, but also a proper connotation of scientific legislation; however, it is certainly very important for criminal legislation to expand its public opinion, strengthen the adhesion between the law and the people, and increase the public's acceptance of the criminal law, so as to cultivate the legitimacy foundation of the criminal law, but it can never substitute for the legal legitimacy created by a more legitimate and democratic legislative process. But it can never replace the legal legitimacy created by a more legitimate and democratic legislative process. That is to say, the absorption of public opinion in criminal law legislation should not be arbitrary, and its rationality and legitimacy should be built on the basis of strictly following the scientific legislative procedure and legislative system. As for the current phenomenal trend of criminal law legislation on the adoption of public opinion in Chinese Mainland, it is often more emotional than rational, more arbitrary than procedural. Therefore, in the period of social transformation, the construction of a more reasonable and scientific legislative procedure and system of "public opinion acceptance" is of vital importance to guarantee the scientific nature of China's criminal law legislation. The construction of this system can, on the one hand, help the legislator effectively eliminate part of the irrational social opinions, and incorporate part of the rational public opinions into the scope of legislative consideration, so as to increase the rationality of the legislation itself; on the other hand, it can also help the legislator ensure the legitimacy of the legislation itself through the procedural acceptance of this part of the public opinions.

On the other way, focusing on the relationship between the old provisions and the new provisions in order to safeguard the systemic nature of the legislation: The lack of a systematic approach to criminal law legislation inevitably leads to overlapping or conflicting relationships between legal provisions, which, while undermining the scientific nature of the legislation, also leads to a significant increase in the difficulty of judicial application. Therefore, if legislators really need to adjust the criminal law provisions for some hot social phenomena, they should still pay attention to the systematic nature of the criminal law legislation, and should not neglect the scientific nature of the legislative technology itself for the sake of responding to the public opinion in a hurry, so that the criminal law legislation, which is based on the reasonable absorption of the public opinion as the starting point, but due to the lack of legislative technology to obtain the negative effect of the legislation, leads to a mismatch between the legislative purpose and the effect of the legislation. The legislative purpose is inconsistent with the legislative effect. Specifically, the legislator in the legislative amendment, first of all, should be a comprehensive examination of the existing relevant criminal law provisions of the regulatory scope and penalties; if the existing criminal law provisions are sufficient to regulate the relevant social disorder behavior, there is no need to make targeted adjustments; secondly, if targeted adjustments are needed, legislators should pay attention to the typology of the description of the construction elements in the provisions, "by summarizing, modeling and pictorially constructing similar behaviors, extracting parts with legal significance as constituent elements", in order to adapt to the diversity of crime forms in the context of social transformation, and thereby ensure the stability of the legislative provisions themselves; in addition, it is still necessary to consider whether the adjustments of the original provisions will lead to contradictions and conflicts between the provisions and the rest of the Criminal Law of the People's Republic of China, and then comprehensively consider how to make further adjustments and refinements. Lastly, the specific legislative amendments and their justifications should be presented in a document of clarification, which should be made public and the opinions of all sectors of society should be widely heard before further optimization and improvement is made.

Thirdly, it focuses on criminal justice interpretation and flexible responses to social risks. In a period of social transformation facing more social risks, how to ensure the stability of the criminal law itself on the basis of more effective control of social risks is the main problem faced by the current legislators. Excessive pursuit of flexibility will inevitably lead to an impact on the stability of the criminal law itself, while over-emphasizing stability will lead to further loss of control of social risks. That Legislators failed to balance the relationship between the two is to lead to that the current Chinese criminal law legislation presents an important reason for the trend of imagination. As an important bridge connecting criminal law legislation and judicial practice, criminal judicial interpretation can not only ensure the stability of the criminal law provisions themselves, but also appropriately increase their flexibility to effectively respond to the development and changes of the social situation (Zhao, 2014). Therefore, during the period of social transformation, more attention should be paid to the adjustment and improvement of criminal judicial interpretation to cope with the increasing social risks, and the criminal judicial interpretation should be used as a buffer belt between the criminal law legislation and the society, and a flexible link between the stability of the criminal law and the flexibility of the criminal law. The judicial interpretation of criminal law is used as a buffer between criminal law legislation and society, and as a debugger between the stability and flexibility of criminal law, so as to reduce the frequent amendment of criminal law provisions in order to rectify the trend of phenomenalization of criminal law legislation. Among them, the purpose of criminal law interpretation because of its own characteristics can be preventive policy factors into the interpretation of norms, in the impact of norms interpretation at the same time has an important significance to the judicial practice, and compared with other methods of interpretation is more in line with the current social transition period to control the reality of various types of social risk needs. Therefore, special attention should be paid to the reasonable application of the purposive interpretation method in criminal judicial interpretation, so as to truly realize the authoritativeness of criminal law rules (i.e., the completeness quality of criminal law) and the responsiveness of criminal law to social reality (i.e., the openness quality of criminal law) (Liang & Zhang, 2021).

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