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Deliberation on adjusting Chinese criminal law structure

Abstract There are two problems with regard to the structure of Chinese criminal law. Firstly, the crimes that are defined in the Chinese criminal code are approximately equal to the felonies that are defined in the western criminal codes, while re-education through labor and penalty for administration of public security similar to the misdemeanors and violations in western countries respectively are not included in the Chinese criminal code, and meanwhile the security measures have not been systematized. Secondly, crimes and penalties, except in criminal law, can not be prescribed in administrative laws and economic laws, and such single track system of conviction and sentencing fails to satisfy the current social situation in which the number of mala prohibia has increased so much. The way to reform Chinese criminal law structure: firstly, it is to establish a double track system, where mala prohibia should be prescribed in the related administrative laws or economic laws; secondly, a comprehensive criminal code should be reformulated in which felonies, misdemeanors, violations and security measures are all included.

Keywords criminal law structure, uniform criminal code, single track system, double track system

摘 要 中国现行刑法结构存在两方面的问题：一是刑法典中规定的犯罪大约相当于西方国家刑法典中规定的重罪，而没有将劳动教养、治安处罚这两种类似于西方国家的轻罪、违警罪纳入其中，同时保安处分措施也没有系统化；二是刑事法律之外的其他行政或经济法律不能直接确立罪名和刑罚，这种定罪量刑单轨制模式无法适应当今法定犯大增的社会形势的需要。调整中国刑法结构的路径是：一是确立双轨制的立法模式，将大量的法定犯规定在与之形同皮毛关系的行政或经济法律里；二是重新制定一部包含有重罪、轻罪、违警罪及保安处分措施的综合刑法典。
1. Definition of criminal law structure and angle of view

Recently, general criminal jurisprudence textbooks and treatises have defined criminal law as the legal norms for prescribing the crimes and penalties, and after pointing out its components, discussed it by classifying it into such two parts as crime and penalty without referring the relationship of the two. In the opinion of Professor Chu Huaizhi, “its components are not equal to its structure”, and he acutely pointed out that with the same components, if the proportion (structure) of components was different, the nature of which would be different. For instance, with the same methods for criminal penalties (components) such as death penalty, imprisonment and fines, if their percentages are different, a severe penalty structure or a light penalty structure will be formed. (Chu, 2004)

Then, what is the criminal law structure? Professor Chu defined it as “the combination of the facets of crime and the quantity of penalty”. (Chu, 1994) Later, he pointed out that the criminal law structure was actually the combination of different elements in the criminal law system, i.e. the combination of crime and penalty in different quantities. The quantity of crime shows the scope of crime while that of penalty means the degree of penalty. The size of the crime scope means the density of the net of criminal law, while the degree of penalty means the degree of the severity of statutory penalty. (Chu, 2004)

According to the severity of penalty upon establishment of crimes, Professor Chu divided the combination of the crimes and penalty into four types: (1) Neither strict nor severe; (2) Strict and severe; (3) Strict but not severe; (4) Severe but not strict. In his view, neither the “strict and severe” criminal law structure nor the typical “neither strict nor severe” criminal law structure exists, and in most countries which have developed and with higher level of rule of law, the criminal law structures is of the type “strict but not severe”, while the current Chinese criminal law structure is of the “severe but not strict” type. The “strict but not severe” type of criminal law structure is the type with “less severe penalty” with “strict net of law”, while the “severe but not strict” type of criminal law structure is with “severe penalty” but “with less strict net of law”, the later of which is the intrinsic reason for the non-smooth criminal law mechanism. The direction of Chinese criminal law reform should be from the “severe but not strict” type to the “strict but not severe” type. (Chu, 2004)

Professor Chu’s definition and classification of criminal law structure are enlightening, but the author is of the opinion that it is still necessary to discuss his definition and classification. Firstly, he seems to simplify the components of criminal law system into such two components as crime and penalty. But in fact,