



CHANGES AND EFFECTS to the 8th Amendment to the Criminal Law

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This practice note, prepared by the legal staff at International Bridges to Justice, describes new laws and changes to existing laws enacted through the 8th Amendment, creates some practice points for defense counsel, and applies the new amendments to hypothetical situations to assist the practitioner.

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OVERVIEW OF CRIMINAL LAW INCLUDED IN THE 8TH AMENDMENT effective May 1, 2011:

1. Reduction in the number of crimes from 68 to 55 that are eligible for the death penalty
2. Introduction of exclusion of death penalty at 75 years of age (unless the accused caused the death of another person by extremely cruel means), and availability of mitigated punishment (**Art. 17A, Art. 49¶2 CL**)
3. Allowing mitigation of punishment for defendants who did not initially voluntarily surrender but who later confess truthfully, especially if serious harm is thereby prevented (**Art. 67 ¶ 3 CL**)
4. Elimination of a public record of conviction, with penalty of less than five years, for youth who commit a crime when under the age of 18 (**Art.100 CL**)
5. Amendments to criminal punishment, including provision for *community correction and prohibitions regarding engaging in certain activities, going to places or contacting people*, parole regulations, an increase of minimum sentence requirements, and regulations affecting recidivists (**Art. 38 ¶2, ¶3 CL**)
6. Clarification of crimes and gradation of criminal offenses
7. Added Crimes.
 - a. Drunk driving (**Art. 133A CL**)
 - b. Bribery of foreign official or international public organizations (**Art. 164 ¶.2 CL**)
 - c. Falsely writing out invoices (**Art. 205A CL**)
 - d. Holding forged invoices (**Art. 210A CL**)
 - e. Organizing the trading in human organs (**Art. 234A CL**)
 - f. Assistance in forcing others to do labor (**Art. 244¶.2 CL**)
 - g. Malicious arrears of wages (**Art. 276A CL**)
 - h. Food safety dereliction of duty (**Art. 408A CL**)

DESCRIPTION OF CHANGES

1. Elimination of the death penalty for 13 offenses:

- smuggling of artifacts; smuggling of precious metals ; smuggling of rare animals or rare animal products ; crime of smuggling ordinary cargos and articles, providing armed escort for smuggling ; (**Art. 151, Art. 153 ¶1, Art. 157 CL**)
- notes fraud; financial instrument fraud; credit fraud; falsely writing out value added tax invoices or any other invoices for obtaining fraudulent tax refunds; forging VAT invoices or selling fake VAT invoices (**Art. 194, Art. 195, Art. 205, Art. 206 CL**)
- excavating and robbing sites of ancient culture or ancient tombs; crime of excavating ancient human fossils or ancient vertebrate fossils (**Art. 328, Art. 328 ¶.2 CL**)
- crime of teaching another person how to commit a crime (**Art. 295 CL**).
- theft (**Art. 264 CL**)

Practice Points for Defense Counsel:

- The elimination of the death penalty for the above listed crimes reflects the reality of the judgments for these crimes. The changes remove the penalty of death for those crimes for which death has not been given, or upheld, in recent years. Defense lawyers should be aware of existing trends in sentencing judgments. For example, while the death penalty remains a possible punishment for serious infliction of injury (**Art. 234 CL**) it is not often requested unless the injury is inflicted by especially cruel means and the degree of resulting disability to the victim is especially extreme, and more likely, only if death is caused.

Hypothetical scenario:

Scenario: Your client has been charged with robbery (**Art.263 CL**). He stole a purse from a woman on the street. As he ran away the woman saw that he had a gun in his pocket.

Question: Is the client guilty of robbery under **Art.263 ¶7 CL** (“robbing with a gun”) and subject to the imposition of death, or is he guilty of **Art.264CL** (theft with a lethal weapon), and not subject to the imposition of death.

Remedies: **Art.26 CL** Burglary, or stealing by pickpockets with a lethal weapon is now defined as theft. The death penalty has been eliminated for the crime of theft. The client is guilty of the crime of stealing with a lethal weapon but not of robbery since the gun was not used to bring about the theft. He is not subject to the death penalty.

2. Punishment limitations for persons 75 years or older

Persons 75 years or older are not subject to the death penalty and are eligible for mitigated punishment. (**Art. 17A, Art. 49¶ 2, Art. 72 CL**)

Practice Points for defense counsel

- Remember to verify the age of any defendant who is senior.
- **Attention:** a lighter punishment **may** be given for an intentional crime but **shall** be given for a negligent one.
- **Attention:** the senior over 75 can be subjected to the death penalty only on condition that the crime is **especially cruel**.
- Obtaining probation for a defendant who is 75 years of age (probation at this age is mandatory if the conditions in the article are met) (**Art. 72 CL**)
- **Defense counsel should prepare materials that address :**
 - 1) how the defendant’s family will monitor and take care of him/her;
 - 2) the health condition of the defendant;
 - 3) showing why there will be little or no adverse impact on the community if probation is granted

Hypothetical Scenarios:

Scenario 1: Your client has been charged with intentional murder. At the time of commission of the offense your client was 74 years old, but turned 75 while in detention.

Question 1: If found guilty, is your client eligible for the death penalty?

Remedies: No. **Art. 49 CL** has been modified so that defendants excluded from the death penalty include those who at the time of the commission of the crime had not yet attained the age of 75, so long as they have reached the age by the trial stage. It is important to note that this provision does not exclude ALL defendants 75 years or older, since it gives judges the discretion to assign the death penalty in cases of especial cruelty.

Scenario 2: Your client who is 75 years old has been charged with intentionally causing serious bodily injury.

Question 2: Is he eligible for *mitigated* punishment under the new rules?

Remedies: Maybe. **Art. 17 ¶2 of the amended CL** states that where the crime is intentional, the defendant who is 75 years or older *may* be eligible for mitigated punishment. This may indicate that the existence of grave/cruel circumstances in the way the crime was committed may result in the imposition of the harsher penalty, notwithstanding the age of the defendant. This interpretation is consistent with the amendment discussed above to **Art. 49 CL** which, although generally exempting senior citizens from the imposition of the death penalty, nevertheless leaves judges with the discretion to depart from the principle where especially cruel circumstances are present.

Scenario 3: Your client who is 75 years old has been charged with negligently causing serious bodily injury.

Question 3: Is he eligible for mitigated punishment under the new rules?

Remedies: Yes.

Scenario 4: Your client who is 75 years old has been convicted of an offense with a fixed-term imprisonment of 3 years or less.

Question 4: Is he eligible for suspended sentence?

Remedies: Yes. Senior citizens aged 75 years and above are eligible for suspended sentence under modifications to **Art. 72 CL** provided they meet the stipulated criteria.

Scenario 5: Your client is 68 years of age and has been convicted of inflicting intentional injury (**Art. 234 CL**) causing severe injury.

Question: Is he eligible for mitigation of punishment?

Remedies: No. The 8th Amendment specifically addresses clients 75 years of age. However, there may be other criteria for mitigation.

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3. Allowing mitigation of punishment for defendants who did not initially voluntarily surrender but who later confess truthfully, especially if serious harm is thereby prevented (**Art. 67 ¶ 3 CL**)

The addition of new **¶ 3 to Art. 67 CL** provides the opportunity for mitigation of sentence even though a defendant did not initially voluntarily surrender.

Practice Points for Defense Counsel:

- Whenever a defendant accepts guilt, mitigation of punishment should be argued.

Hypothetical Scenario:

Scenario: Your client was detained by the police for the commission of the crime of robbery of private property under **Art.263 CL**. After your investigation and preparation with the client, you and he have decided that the best course for him is to confess to his guilt and tell the police about plans of others he knows to commit a robbery of apartment residences in a nearby neighborhood.

Question: Is your client eligible for mitigation of sentence?

Remedies: Yes. Under **Art.67 new ¶ 3 CL**, he is eligible.

4. Juveniles: Introduces an exception to reporting criminal records, directs that a sentence of probation be given under certain circumstances, and declares that the conviction is not a criminal record for purposes of recidivism.
- Introduces an exception to reporting criminal records when offense committed as a juvenile and the sentence was a term of imprisonment of not more than five years(**Art. 100 CL**)
 - In the above circumstance a juvenile conviction need not be disclosed when joining the army or getting a job.
 - The conviction cannot be counted toward recidivism (**Art. 65 ¶ 1CL**)
 - If the sentence is a fixed term of imprisonment of not more than three years, and the case fits the four conditions laid out in **Art.72 CL**, a juvenile **shall** be given probation. Probation **shall** be given to juveniles in this circumstance if the juvenile is repentant, unlikely to repeat his offense, and his release will not adversely impact the community.

Practice Points for Defense Counsel:

- Defense counsel should prepare materials to show that the juvenile has a positive attitude toward rejoining the community and that members of his community support his return.

5. Expansion of Possible Conditions Placed on Sentences of Public Surveillance:

The sentence of public surveillance has been changed under the amended law. In addition to the supervisory scheme detailed in **Art. 39 CL**, the court may also order community correction and orders restraining defendants from meeting certain people, entering certain places, and/or engaging in certain activities.

Hypothetical Scenarios:

Scenario: Your client was convicted of theft by pick pocketing of a large number of wallets while in an internet café. He was sentenced to public surveillance for 6 months.

Question 1: Under the new rules can your client be restricted from entering certain places or areas?

Remedies: Yes. The applicability of the new restrictions is subject to the circumstances of the crime. In this instance, the crime was carried out in the Internet cafe, and it could be possible for a court to consider it necessary to include in the sentence, a restriction to enter Internet cafes.

Question 2: Is the imposition of the new restrictions mandatory under the amended law?

Remedies: As indicated by the word *may*, the imposition of these measures are up to the discretion of the court on consideration of the circumstances of the case. Therefore defense lawyers should identify and mitigate the circumstances that would trigger the court to impose these additional measures. For example, a defender might respond to a request for a broad order restricting his client from going to a geographical area where a crime occurred by obtaining documents demonstrating that the defendant's presence in the area is needed for him to perform valuable work.

Question 3: Under the new rules is the PSB solely responsible for executing the sentence?

Remedies: No. **Art. 38 ¶2 CL** has been modified so that community correction *shall apply* where a defendant is sentenced to public surveillance; former **Art. 38 ¶2 CL** stated that a public security organ should execute the surveillance, but this has been deleted. What this may mean in practice is that clients with suspended sentences will now have to report to community centers and obtain compulsory corrective education, as opposed to report to the PSB on a regular basis. The role of the PSB is changed. Only if the orders of the court are disobeyed will public security punishment be employed according to **Art. 38¶4 CL**.

6. Amendment to Criminal Punishments

Terms of Imprisonment – Combined Crimes

Maximum term of imprisonment for combined punishment may not exceed 25 years if total of combined punishments is 35 years or more, and it may not exceed 20 years if total of combined punishments is less than 35 years (**Art. 69 CL**).

Terms of Imprisonment – Commuted Sentence

Death penalty commutation for major meritorious service increased to 25 years from 15-20 years. (**Art. 50 CL**)

Pattern of Revision Under the Eight Amendment:

The increase of maximum sentences in both of the instances set forth above is consistent with the 8th Amendment's over-all scheme: to increase punishment for serious crimes that endanger the public safety, while fostering leniency for minor crimes.

Practice Point for Defense Counsel:

- Defense counsel should be aware of **Art. 12 CL** which sets out the “rule of lenity” for crimes committed under laws that have been superseded by laws that create harsher punishments.

Hypothetical Scenarios:

Scenario: Your client is charged with shielding drug smugglers (**Art. 349 CL**), conspiring to cultivate marijuana and opium. (**Art. 351 CL**) and drug trafficking (**Art. 347 CL**). The combined punishment for his crimes is more than 35 years. His crimes are charged to have occurred in December, 2010 but he is arrested and brought to trial on June 11, 2011.

Question: Is this client's maximum sentence 25 years or *does it remain 20 years?*

Remedies: According to **Art. 12 CL**, in this situation the lighter punishment must apply.

7. Clarification and Gradation of Criminal Offenses

The amendments in these articles reflect rising concerns regarding production and sale of consumption goods, in particular, foodstuffs and drugs. On plain reading they appear to be aimed at lowering the threshold to absorb more instances of criminal behavior into the definition of the offense. This is done through eliminating ambiguities in the formulation of crime, and simultaneously, through creating a gradation of the offences to include aggravating circumstances that would merit heavier punishment. Legislators have also tightened the punishment of these offenses by removing the discretion to impose a fine, making it instead a compulsory punishment at each grade of the offense.

Pattern of Revision Under the Eight Amendment:

- The 8th Amendment has changed the “elements” of crimes regarding the production and sale of consumption goods, particularly food and drugs.

Art. 141(1) CL: removes the need to prove **the harmful risk posed by the drugs**. The amendment appears to introduce strict liability for engaging in production and/or sale of fake drugs, regardless of the potentially noxious effect on consumers. The prosecution does not need to prove the harmful effect of the drugs to obtain a conviction, but rather the focus of the court would be on the **fake** quality of the drugs (that they were produced without a license, for example), and where it concerns sale, likely on the mental state of the person charged with the offense (their knowledge). There are three levels of offense:

1. Manufactures or sells
2. Manufactures or sells where serious harm to human health is caused or there are other grave circumstances

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3. Manufactures or sells where death is caused to another person or there are other especially serious consequences

Art. 143 CL: replaced hygiene standards for *safety standards* and *added a condition of sufficiency to cause serious food poisoning or disease*, that must be satisfied in order to prove the crime. It is unclear whether the condition attaches to the food product or to the means, methods and conditions of production/sale of the product. If the former, the prosecution would need to show that production/sale conditions are below required safety standards **and** that the food product is sufficiently compromised so as to cause severe food poisoning or illness if consumed. Under the latter approach, proof of non-compliance with safety standards would be sufficient proof of guilt, the actual potential risk - or lack thereof - posed by the food being irrelevant to a determination of guilt or innocence.

Art. 144 CL: no amendments other than replacing “such foods” with “food mixed with toxic or harmful non-food materials.”

Gradation of Crimes: A common element of all provisions of the CL is the gradation of offenses consisting generally of three grades of criminal behavior, the term of imprisonment being determined by the gravity of the crime. The new amendments follow this pattern.

Practice points for Defense Counsel:

- The issue for defense lawyers is to identify, and to the extent possible, separate these categories. For example,

Serious harm to human health or other grave circumstances

This is the second seriousness level of the **Art. 141(1) CL**, where ascertainable harm to human health has been caused. What will be considered serious harm to human health?

Death is caused to another or there are other especially serious circumstances

This is the third seriousness level of the crime.

Hypothetical Scenarios:

Scenario: Your client produced fake medicine and sold it to a couple of pharmacies. There is no evidence that anyone bought or consumed the medicine.

Question: Can your client be found guilty, even if there is no evidence that the fake medicine was consumed by anyone?

Remedies: Your client is strictly liable for producing fake medicine, and may be convicted to a fixed term of imprisonment of maximum 3 years, in addition to a fine.

There is no proof that anyone ever bought or consumed the fake medicine, and therefore no evidence of harm to human health arising out of the crime.

However, under the terms of “other grave circumstances” your client may still receive a harsher sentence of between 3-10 years.

There is no indication of what may fall under “other grave circumstances,” but presumably it could be related to the toxicity levels in the fake medicine. If there is no evidence to support that the fake medicine was dangerous, you should argue that there is no evidence of grave circumstances.

Practice Points for Defense Council:

- The defense should argue that *clear proof* of a likelihood of actual harm must be *identified* for the court *by the prosecution*, in order for the court to find “other grave circumstances” in the case.

Art. 81 CL –Conditions for Obtaining Parole

Main Changes:

- Increased the minimum term before parole eligibility to 13 years for those convicted to life imprisonment;
- Eliminated parole for recidivists;
- Added arson and organized violent crime to the list of offenses for which there is no parole eligibility;
- Specified that those convicted of intentional homicide may not be paroled, thereby allowing parole for those convicted of negligent homicide;
- Allows the court to consider impact of inmate’s release upon the community where he/she will live.

Hypothetical Scenario:

Scenario: Your client was convicted of negligent homicide in 2007 and was sentenced to seven years in prison under **Art. 233 CL**. In prison he has shown good behavior and taken advantage of all educational programs that were available. He wants to apply for parole to return home.

Question 1: Is he eligible for parole?

Remedies: Yes, under the **CL** as now amended. He has served more than half of his sentence and this crime is now an eligible crime for parole.

Question 2: Will the court consider the impact of your client’s release upon the community where he will live?

Remedies: Yes.

Practice Points for Defense Counsel:

- Defense counsel should prepare materials that show how the defendant’s family will monitor him; why he is now prepared to accept parole supervision, and why he will be successful. The materials should clearly address why there will be little

or no adverse impact on the community if parole is granted.

8. Selected Examples of New Crimes:

Art. 109 CL – Abandonment of Official Duties by State Officials and Absconding

- The elements of the crime have been clarified. Proof that the act endangered state security is removed.

Art. 133(a) CL – Drunk Driving and Car Racing

- Two new offenses are established
- No strict liability: prosecution must prove the existence of grave circumstances to obtain conviction.

Hypothetical Scenario:

Scenario: Your client drank baijiu at a karaoke club over several hours. He then left in his car. Police observed him get in his car and pulled him over. Breath testing revealed that he had a blood alcohol level of 70mg. per 100ml. of blood.

Question: Is the client guilty of the new crime of drunk driving?

Remedy: No, while “drunk” is not defined in the new law, it is defined in National Standard GB 19522 (2004), Vehicle Driver: Blood/Breath Alcohol Test. To be considered drunk the test must show an alcohol level 80mg. per 100 ml. of blood. This client, while subject to administrative punishment, is not guilty of the new crime of “drunk driving”.

Practice Points for Defense Council:

- Since drunk driving is now criminalized, it is important to understand how breath and blood testing are done and what kinds of errors may occur.
- The definition of “drunk” should be strictly adhered to in the evidence.

We hope this practice note helps you understand and apply the 8th Amendment to the Criminal Law of the PRC. If you have questions or comments, please contact us at (jmandel@ibj.org).