

The Thoughts on Certain Issues Referring the Construction of Procedural Diversion Mechanism in China

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Abstract: The establishment of complete diversion mechanism in criminal procedure is recognized as a consensus of judicial reform; and the construction of complete diversion mechanism can not only be limited to the improvement and upgrade of criminal procedure law, but also should be carried out by integrated planning and system reform in the long run . On the one hand, from the perspective of judicial procedure, we should actively absorb the experience of the fast-track sentencing pilots, construct hierarchical and clear procedure, and lay a solid foundation of procedural law for the diversion. On the other hand, from the substantive law, we should clarify the connotation and extension of relevant concepts and provide a solid institutional support for procedural diversion. Finally, the active participation of the social subject can properly cope with the cases after the procedural diversion, which is more conducive to repairing the social relations damaged by crimes.

Keywords: Procedural diversion, complexity-based diversion, community correction

1. INTRODUCTION

With the 4th plenary session of 18th CPC Central Committee issued the Decision of the CPC Central Committee on Several Major Issues Concerning the Overall Advancement of the Rule of Law (hereinafter referred to as the Decision), the improvement of Chinese criminal procedure and the strengthening of the foundation referring judicial guarantee of human rights are the beginning of a new round of judicial reform. "Let our people feel fairness and justice in each judicial case." is one of the important weighing basis of the actual effect of this round of judicial reform. Apart from focusing on solving high-profile cases that give rise to general concerns, what really make our people feel the actual effect of judicial reform is to carry out the judicial reform centering on the common criminal cases closely related to the people; thereby the effectiveness of judicial reform can be deeply rooted in public.

From the angle of the citizens, the justice and handling of high-profile cases embody the social justice and credibility, which can promote the citizen's confidence and expectation to the judicature. Also, the cases which are closely related to public can more directly affect the

citizen's cognition and judgment to the judicature, which is the foundation of the stable operation of the national judicial power. In recent years, in addition to further strengthening and perfecting the reform of the "trial-centric doctrine" of the traditional criminal justice procedure, the importance of the diversion system of criminal procedure has been paid more and more attention in the proper handling of minor and ordinary criminal cases, thus perfecting criminal procedural diversion mechanism has become an unavoidable subject to be confronted and solved in future judicial reform.

2. THE THOUGHT OF CONSTRUCTING PROCEDURAL DIVERSION MECHANISM

To construct procedural diversion mechanism, the first thing needs to be made clear is the type and actuality of procedural diversion, so as to obtain an overall grasp of the framework of diversion mechanism. One of the primary connotations of procedural diversion is the rational diversion within the criminal procedure, for which the first thing to be done is complexity-based diversion. Through the change of the Criminal law Amendment, we can find that the criminal substantive law is developing in the direction of increasing charges and lowering the standard of incrimination. And correspondingly, it will bring the further increase of the number of criminal cases, which will undoubtedly aggravate the contradiction between overwhelming cases and insufficient personnel. Therefore, the starting point of the fast-track sentencing pilots in China is how to digest a large number of simple and minor criminal cases. The prosecuted party can be granted with lenient treatment of the judicial organs through appropriate confession or accept of punishment, which is considered as the law of judicial democracy and judicial civilization. The policy basis of "Leniency to those who confess, severity to those who resist" has been long existing in China. But only when this lenient treatment-comes-with-confession is specifically institutionalized and standardized, can defendants be motivated to confess. Judging from the development direction of criminal procedure in our country, it is moving toward the classification development of "fast-track sentencing procedure—summary procedure—ordinary procedure", and the establishment of lawsuit procedure with such a pluralistic pattern needs reasonable diversion according to the cases' needs. In China, summary procedure was introduced in Criminal Procedure Law in 1996, but summary procedure is often limited to the trial stage; and either summary procedure or ordinary procedure falls into the situation of "summary procedure is not necessarily simple, while the complex one may not be cumbersome". Therefore, a large number of studies have led to a convergent conclusion, that is, strengthen evidence legislation, improve the principle of directness and verbalism, and so forth, but the deep guidance behind these studies is that China's criminal procedure spends excessive energy for fact-finding of the cases. From the unjust of the past years, fact-finding issues are usually the source, while the controversy and social impact in term of the applicable law are relatively limited (e.g. the case of Ting Xu). So how to understand the "complexity" in the so-called complexity-based diversion is also a key

issue; and the reason that our criminal lawsuit is somehow acting as an investigation center is that even at the trial stage, the focus is still on fact-finding. While the truth is that truth finding is the core function of investigation phase, that is to say, even at the trial stage, often the legal judgment of criminal cases still depends on the fact discovery, which is one of the important problems facing our country in terms of the establishment of trial-centered lawsuit system. Therefore, the complexity-based diversion is the primary problem and foundation of mechanism of litigation diversion; complexity-based diversion on the one hand is established on the basis of the special organs' grasp concerning the nature and difficulty of the case. On the other hand, complexity-based diversion can also be established relying on the consultation between specialized agencies and criminal suspects, so the standard of "diversion" must be based on pluralism and refinement within the procedure, giving special organs and parties more spaces for choices and consultation.

The first step in the construction of procedural diversion mechanism is to have a well-developed internal diversion mechanism, that is, the critical consisting part with the aforesaid "common procedure—summary procedure—fast-track sentencing procedure" as foundation. On the other hand, the diversion should not only rely on traditional authoritative judicature, but the idea of cooperative judicature should also be introduced. The state should downplay the role of "policy executor" in the course of criminal prosecution, but focus more on resolving the dispute [1]. In addition to resolving disputes through traditional criminal procedure, the dispute settlement should rely more on the function and exploration of informal procedure and the non-judicial organ. In the case of minor criminal cases, procedural diversion mechanism, in addition to being able to meet the classification of the traditional procedures, shall go all out to expand the non-judicial way of resolving disputes for some types of cases which can be resolved by non-judicial means. It is a favorable idea to give the accused broader choices. On the one hand, expanding the way of non-judicial procedure can promote the initiative of the accused to plead guilty, which is advantageous to the efficient resolution of the case; for the national specialized agencies, it is also an opportunity and an attempt to give full play to the enthusiasm of the social subject and to encourage the society to participate in Judicature. From another view, it is easier for the victim's view to be fully expressed through non-judicial procedure, which is beneficial to repair the relation between the victim and the society. Compared to the five major stages in traditional criminal justice procedure, which include filing, investigation, prosecution, trial and enforcement, if the judiciary focuses on the fact-finding and dispute resolution these two major issues, regardless of which procedure is applied, even when it come to the so-called "double simplified" fast-track sentencing procedure, it is inevitable to appear the phenomenon of the "repeated labor" of the three organs. Because from the investigation stage of the case, the fact-finding has been solved already, the accused also agree with the charge and punishment, and the fast-track sentencing procedure is merely compressing the burden of the traditional judicial procedure, but it does not liberate it from the judicial procedure. Whereas, the starting point of informal procedure is to reduce pretrial detention and to change the penalty execution in a retribution manner, and to play the

role of social organization in helping the perpetrators of criminal acts to return to the society. The criminal procedural diversion mechanism of our country cannot be separated from the dispute settlement function of the informal procedure, but in the way of enforcing the informal procedure, we should follow a gradual process. The criminal procedure of our country still has a strong tradition of authority doctrine, therefore, the emergence and development of informal procedures cannot be separated from the support of formal procedures. China's criminal procedure stipulates the legal proceedings of the reconciliation between the litigants in the chapter of special procedures, while reconciliation is carried out as a special procedure, the "particularity" of which is still questionable. Furthermore, the process of reconciliation in our country continues to focus on the dominance of specialized agencies, and after special procedures, such as conciliation procedures, the way in which criminal cases are resolved relies more on administration of justice of informal approach. In addition, the community correction system in China also has a larger space of "informal" transformation. The current community correction is still positioned as an alternative measure of penalty, and must be implemented in the enforcement phase. This system has a great improvement potential, that is, through the prosecution's fact-finding in pretrial procedure and the consultation and communication with the criminal suspects, carry out an informal dispute resolution where the suspects can apologize and compensate the victims by performing specific community service as well as fulfilling corresponding obligation. Through the provisions of the procedure Law of our country to the reconciliation and community correction, it can be seen that informal judicial process needs to rely on formal judicial procedures, which is the first step towards the solution of the informal judicial process in China. From the perspective of the future trend of the informal process, under the guidance of formal procedures, it can eventually evolve into an independent informal procedure. At the same time, necessary legal provisions should also be established between formal judicial and informal procedures, thus guaranteeing a flexible transformation between the two, thereby encouraging the accused to plead guilty and accept punishment, while ensuring the effectiveness of the enforcement of the informal judicial procedure.

3. THE INSTITUTIONAL BOTTLENECK AFFECTING THE CONSTRUCTION OF PROCEDURAL DIVERSION MECHANISM

One of the important goals of the construction of procedural diversion mechanism is to establish a scientific and pluralistic procedure application model according to the complexity and difficulty degree of cases. A clear division of the nature of cases by substantive law is the prerequisite of an application mode of reasonable procedure. The Division of substantive law can help the investigators to better grasp the nature of criminal cases, which is more conducive to the diversion of cases.

From the development direction of the criminal substantive law of our country, on the one hand, it reduces the threshold of the incrimination; on the other hand, light punishment is also

an obvious trend. So the demand for procedural diversion is more urgent. The State should guarantee its sufficient legality when using penalty of suffering by depriving specific rights and interests, so it is necessary to control the scope and severity of punishment while it is used to control society and protect interests, which is also in consistency with the basic spirit of restricting penalty in the concept of criminal law. In addition, the free guarantee function of criminal law cannot be neglected. With the promotion of penalty concept to criminal legislation, light punishment, depenalization, and decriminalization become a hot spot in the criminal substantive law of our country [2]. But light punishment firstly needs to re-interpret Chinese criminal substantive law's application. At present, Chinese criminal substantive law's light punishment is often accompanied by criminalization, that is, involve more behavior into the regulation category of criminal substantive law. Then, the application of light punishment indicates criminal expansion (for example, exam cheating is included in the criminal laws), while the ideal state of light punishment should be the reduction of the traditional means of punishment and the sentencing scope of it, such as reducing the application of death penalty and reducing the proportion of imprisonmen. In these respects, the criminal substantive law of our country also has a big transformation space. Decriminalization refers to that the act being recognized as a crime by criminal substantive law is no longer regarded as a crime and is not treated as a crime. At present, the reform and discussion of the criminal substantive law about light punishment and decriminalization have both directly affected the construction and influence of the criminal procedural diversion mechanism, and the reasonable diversion of the procedure often takes the seriousness of the case as the prerequisite. Presently, according to the spirit and requirement of judicial reform, the criminal procedure system of our country adopts the three-level structure of "ordinary procedure-summary procedure-fast-track sentencing procedure". And the reform of the lawsuit system centering on trial needs to enhance the reform of ordinary procedure, supplemented by the expanded application of summary procedure and fast-track sentencing procedure. At the moment, the substantive law in our country is not divided in details according to the spirit of lawsuit procedure, in another word, the unclearness of connotation and boundary of misdemeanor and felony, and the indistinct definition of minor crime. Moreover, the administrative Illegal act defined by the Law on Public Security Administration Punishments has not been covered by judicial process, which, to a great extent, influences the substantive law-based construction of procedural diversion mechanism. The limits of misdemeanors and felonies often generate the discussion about a 3-year sentence or a 5-year sentence, which is still on the theoretical level. Whether 3 years or 5 years, from the author's view, the principle of division of a misdemeanor and felony seems to have a certain degree of rigidity, because trial procedure is often required to determine whether the sentence of set term of imprisonment is applicable to the accused, while the type of applicable procedure to the case must be determined at the investigative stage. Therefore, the principle of division of a misdemeanor and felony shall be the combination of 5-year sentence and other out-case factors; the comprehensive judgment of such will be a rational choice respecting and guaranteeing human rights. Apart from that, the terms of "lenient treatment

comes with confession” that currently vigorously advocated by China has not been fully manifested in the substantive law. Its systematic degree is far from satisfying the construction of procedural diversion mechanism. If the terms of “lenient treatment comes with confession” are only embodied in corruption and bribery crime with intermediary amount, and leave out ordinary property crimes and economic crimes, the importance of this provision will be greatly reduced.

In addition, from the procedural law level, there are some problems and obstacles that need to be solved in creating a hierarchical procedural diversion mechanism. First of all, the existing procedural diversion mechanism is pretty much decentralized. According to the ideal diversion state, to create a program operation mode of clear hierarchy is a rational choice. However, there is still a fuzzy zone between the limits of general procedure and summary procedure in our country and the difference between summary procedure and fast-track sentencing procedure. The use rate and the application effect of the fast-track sentencing procedure appearing in the pilots are still to be studied and inspected, so the overall framework of procedural diversion mechanism needs to be further refined. Secondly, with the revision of the criminal law, the criminal circle is constantly expanded, which correspondingly significantly increases the burden of criminal justice, but the construction of the diversion mechanism in the current pre-trial procedures, especially in the filing and investigation phase, is still relatively weak, which is unable to assume the effective filtering and circulation functions, and thus cannot alleviate the contradiction between overwhelming cases and insufficient personnel. In addition, there are limited judicial auxiliary personnel in the court, and a large number of errands still need to be mainly carried out by the judge; also, in addition to trial business, the judge's pressure of performance assessment and of fulfilling the suit-withdraw persuasion greatly aggravate the burden of the judicial organ. Judging from the system itself, the principle of the comprehensive review of criminal procedure also means that a lot of energy is needed to verify the factual problems in the procedure of second trial and death penalty review, so simplifying the existing trial procedure cannot properly solve the contradiction between overwhelming cases and insufficient personnel. Insufficient classification of complexity degree of the cases remains in the present situation of procedural diversion, of which the most typical manifestation in the trial stage is "summary procedure is not necessarily simple, while the complex one may not be cumbersome". Taking the ordinary procedure as an example, the principle of direct speech has not been fully established, and the witness appearing in court is still pretty rare, so the defendant's right of confrontation still stays in a theory level, which cannot be effectively guaranteed. In addition, court procedure is still needed in fast-track sentencing procedure; the defendant also needs to be present at the court, which does not have obvious distinction compared with summary procedure. And summary procedure has a wider application scope, while the procedure design cannot satisfy cases' nature pluralism; therefore it also cannot differentiate different case types. In summary, the current procedural diversion mechanism is still relatively rough, which cannot play a proper role for the judicial personnel to conduct reasonable diversion. In the process of constructing procedural diversion mechanism,

the function of lawyers cannot be neglected, because procedural diversion can be promoted based on authority, and can also be carried out by consultation and consensus. The subject status of the parties in the process of procedural diversion is based on the necessary cognition of law and the existence of negotiable space. And the defense counsel can effectively play the role of lubricant in procedural diversion, which is conducive to advancing the diversion mechanism smoothly; the current duty lawyer system has not extended to the legal help of procedural level, so procedural diversion mechanism still remains in a state-led thinking, which imposes certain limitations for exerting its effectiveness in the long run.

4. EXTERNAL DOCKING OF PROCEDURAL DIVERSION MECHANISM

Although there are some legal bottlenecks in the construction process of procedural diversion mechanism in our country, our country already has the basic conditions to build a complete diversion mechanism, and how to make better use of social subjects to participate in the judicial process is a more critical problem. On the one hand, there is great potential for community correction system in our country; on the other hand, how to better use community correction system as a key connection point of procedural diversion mechanism is critical to bring the utility of current solution procedural diversion mechanism into play. Community correction is often applied to execution stage of penalty, of which the application objects are the perpetrators under enforced control, probation, parole, and other light punishments, but the simple function of community correction and the pluralistic requirement of community correction function have formed a certain conflict in our country. The current community correction in our country is simply limited to the execution stage of the penalty and cannot penetrate the trial and pretrial procedure, so it is easy to result in a one-sided understanding of the function of community correction, that is, to emphasize the special prevention function of the community correction excessively. It ignores the potential of community correction function in the process of conviction and sentencing. As a substitute for imprisonment, community correction takes more responsibility for the correctness and preventive of penalty. However, the current community correction cannot effectively guarantee and respect the participation and appeal of victims. A mature community correction cannot be separated from the gradually formation of formal correction effect, so as to return the society and build the compensation mechanisms for victims, that is, to balance community benefits and public effects, while providing psychological and material compensation to the victims. Directed repentance of victims and labor compensation shall be considered as an important corrective project. The diversion in the function of community correction in terms of the crime risk monitoring of perpetrators needs to face and to prevent the risk in a real sense, that is, carry out correct assessment in the process of community correction to the perpetrator, so as to take appropriate measures to deprive the offender of the ability of crime, thus guaranteeing the effect of the management and control in the whole process of rectification. This is the most priority function in community corrective risk control [3]. Therefore, the risk assessment of the

offender and the adoption of the monitoring means should be carried out in the process of deciding the penalty given to the person who needs to be corrected, thus ensuring the development of the community correction. Secondly, community correction should pay attention to the risk control of the recurrence of the crime after the correction, that is, to ensure that the corrected offender no longer has the risk of harming the society. Compared with the diversion function of monitoring, the urgency of preventing the second-time crime is relatively weak, but the proper control the risk of crime also indicates the necessities of appropriate risk assessment and corrective measures. Finally, in addition to the diversion of monitoring functions and the prevention of the risk of crime, the restoration of social relations is positioned as the ultimate goal of community correction. In dealing the relationship of the triple goals of Community correction function, we should fully take into account the relationship of the community correction's function referring risk control. Apply its primary value target according to the dialectical relationship of the three functions, of which the importance of diversion function is most urgent, which should be taken as a focal point, while the risk of normative correction is secondary, and the function of social relation repair shall be considered at last.

Among them, the understanding of diversion monitoring function should be enlarged and interpreted. The current diversion monitoring is only the diversion and monitoring to the penalty and imprisonment, while compulsory measure application stage of punishment pre-trial procedure has not yet involved. Therefore, the diversion and monitoring function has not fully been exerted to its potential. From the perspectives of corrective prevention and risk assessment, the assessment cannot be solely on the basis of the application of the penalty and the possibility of avoidance of regulation, but the assessment basis shall be expended to the extent of the perspective of the entire proceedings, such as the victim's appeal, the repentance before the verdict and the possibility of evading the proceedings. At present, the community correction in our country is limited to the implementation within the community, which emphasizes the administrative nature of the diversion monitoring function, but the solution and the monitoring of the separation of supervision are insufficient, which leads to the failure of management in practice. What is more noteworthy is that the current community correction usually ignores victims' demands, while overly emphasizing on the single corrective function. Also, the results of community correction methods and risk assessment should be dynamic, and corresponding corrective schemes should be taken according to risk assessment. Therefore, the corrective solutions with flexibility that can meet multiplex value are more practical. Apart from that, full attention should be paid to the institutional potential of community correction, and its procedural diversion function shall be exerted rather than merely on the level of "penalty diversion". The foundation of diversion mechanism is based on the successful cooperation of community correction project; the judicial procedure with the national specialized organ as the subject and the non-judicial procedure with the community as the main participant should reach the system effect of mutual support. However, in the current pretrial procedure, the community correction mechanism is in absence, which to a large extent affects

the potential of pre-trial transfer system. One of the most cohesive potential is the bail pending trial with restricted liberty of moving and the follow-up treatment of the system of non-prosecution. In addition to being applicable to the convicted perpetrators, a mature community correction should also be extended to the suspects in pretrial procedure, which can both enhance the supervision of the pending detainees in pre-trial procedure and perfect the diversion system in Chin. Currently, it is only applicable to the perpetrators under control, probation, parole, and temporary execution of the sentence outside prison, which cannot cover every perpetrator who can meet the corrective conditions, but greatly restrict the extension of the corrective function. Judging from the supervision mechanism of pretrial procedure in our country, the biggest obstacle restricting the effectiveness of bail pending trial system is also the supervision pressure on the criminal suspects and the defendants who are on bail pending trial. Therefore, the pre-trial detention rate of our country is relatively high, while the supervision function and potential of community correction cannot cover the supervision of bail pending trial, so it is unable to answer the integration of judicial resources and the lawsuit pressure of the judicial organs, let go of the procedural complexity-based diversion. Judging from the current situation of the diversion line in prosecution stage, the relative non-prosecution decision is another potential function can be extended of the community correction, because the relative non-prosecution behavior has already constituted a crime, and it has certain personal danger. But imprisonment is prone to be labeled, which will increase the difficulty for the perpetrator to get back into the society. Therefore, community should act as a buffer zone for the relative non-prosecution to return to the society, whereby the connotation of community correction needs to be interpreted to certain extent. Downplay its "correction" function and strengthen its "helping" function, that is, as an important carrier of procedural diversion, the community's functions at different stages of the proceedings should be looked upon differently, of which the function of warning and help should be put into effect at pre-trial stage, and the corrective function should be carried out mainly after the enforcement of the penalty.

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