

Diversion Mechanism of the Criminal Produces in China

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Abstract

The establishment and development of the diversion mechanism of criminal procedure has become a global trend due to its significant value in improving judicial efficiency and promoting justice. The diversion of criminal produces embodies both depenalization and individualization of punishment. China has already applied such diversion mechanism in prosecution, trial, criminal reconciliation, and juvenile cases; however, there are still limitations and the mechanisms can be further improved.

Key words: Diversion; Diversion based on complexity; Depenalization

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1. MEANING OF DIVERSION

The majority of researchers consider the meanings of diversion in criminal procedures both in the broad and narrow sense. In the narrow sense, diversion is also known as “non-criminalization procedure”; for a specific conviction, trials are dropped during the investigation or prosecution, ends up with depenalization, and will no longer be trialed in the future. In such system, the case is terminated without a trial or even prosecution or arrest. There are few legislative steps and the procedure is relatively simple. At the same time, it does not involve the determination of the crime of the defendant, nor does it impose penalties. It reflects the idea of depenalization in the criminal procedures.

The “diversion” in a broad sense includes not only the above-mentioned diversion in the narrow sense, but also the application of a simpler procedure instead of the ordinary procedure at the trial stage. The latter is generally applied to cases of misconducts or cases in which the defendant pleads guilty. In practice, reduced accusations or penalties are often used in exchange for the defendant’s procedural rights. They exist mainly in the following forms: plea bargaining, simplified procedures, and simplified ordinary procedures, and so on.

2. SIGNIFICANCE OF DIVERSION

From the global perspective of development of criminal procedures, the establishment and development of the diversion mechanism has become a worldwide trend (Zhang, 2003). The diversion of procedures has emerged in the context of increasing crime rates and criminal cases and is of great significance to the daily operation of the justice system.

2.1 Diversion Helps Improve the Efficiency of the Justice System

The diversion of procedures eliminates the processing and execution steps and saves the judicial “cost”. Through the diversion of procedures, a large number of criminal cases are dealt within the pre-trial stage. Some cases are terminated without even prosecution or arrest, reducing the legislative steps and saving judicial resources such as human resources, money, and materials. In addition, in the cases handled using diversion, instant, flexible non-penalized measures are usually used to educate and reform the respondent, thus avoiding consumption of judicial resources imposed by the execution of the penalty.

2.2 Diversion Helps Promote Legislative Justice

First of all, diversion can guarantee the timely closure of the case. There is a British idiom: “Justice delayed is justice denied”. Through the simplification and diversion mechanism, the parties involved can get out of the situation

in time, reduce the pre-trial detention time, which is also conducive for the maintenance of peace in law.

Secondly, the application of diversion on the criminal procedures in some cases can save the judicial resources and help the government to be more impartial in the process of investigating other crimes. The establishment of the diversion mechanism follows the principle of optimal allocation of judicial costs. That is, according to the nature of the crime and the complexity of the procedures, etc., judicial resources invested in different cases are varied (Wen and Wang, 2007) to ensure that the total cost of the judicial resources remain unchanged while meeting the people's needs and achieving justice. Accordingly, for some cases that do not need or should not apply the complete, complex criminal procedures, the application of diversion does not only improve the judicial efficiency, but also promote the rational flow of judicial resources so that the government can investigate more manpower, materials and money in more serious, complex crimes and can be relatively strict and impartial during the procedures.

Some scholars have pointed out that there is also the so-called "Pareto Principle" in economics, especially in the field of jurisdiction. The application of such principle in the field of law can be summarized as the principle of "more simple cases and less complex ones" (Li, 2013). The key is the uniform of efficiency and fairness by simplifying the simple cases and optimizing the complex ones. The so-called "simple cases" refer to cases where the results are deterministic and easy to judge; "complex ones" refer to cases where the results are not deterministic and are hard to judge. The main goal of the Pareto Principle in law is to decide the procedures for the simple cases and the complex ones to optimize the allocation of judicial resources.

2.3 The Diversion Mechanism Is Conducive to the Implementation of the Corresponding Legislations

2.3.1 Depenalization

Historically, the concept of punishment has undergone a transition from retributivism to purposivism. Different from the retributivism that "retribution is everything", the purposivism points out that the purpose of setting penalties is to prevent crime. "The severity of the sentence should not only consider the severity of criminal behavior, but also the need of crime prevention." (Liu, 2011) Based on this, the punishment can be eliminated when the penalty is not suitable and other non-penalized methods can achieve the purpose of preventing and controlling crime. The penalty is replaced with non-penalized measures, and this is called depenalization.

Depenalization is one of the important contents of contemporary criminal law reform, and it also affects the criminal legislation. The implementation of procedural diversion in criminal proceedings is an important manifestation of the idea of depenalization.

In the procedural diversion mechanism, the criminals of misconduct or other crimes will not be convicted and sentenced by the court; instead, they are subject to non-penalty measures by other agencies for disciplinary and education, such as admonition, participation in treatment programs, participation in job training, apologize to the victims and compensate for the loss, or provide certain public services, and so on. Through the application of these non-penalized measures, these people have avoided the label of the "criminals" and the shame so that they can be return to the society better based on both the subjective will and from the objective environment. In addition, "due to the independent or assisting application of non-penalized measures, the drawbacks of traditional penalties, especially the short-term deprivation of freedom, have been largely avoided, thus effectively controlling the situation of recidivism rate for a period of time. Overall, the relative stability of the crime situation has been maintained." (Liang, 2000)

2.3.2 Individualization of Penalty

Closely related to the purpose of purposivism is the individualization of penalty. Because the degree, the nature, and the process of the crimes are all different for each case, the need for each criminal to correct his/her behaviors should also vary. Therefore, measures to improve their behaviors must be based on the principle of individualization. The individualization of the penalty not only applies to the court's conviction and sentence, but also applies to the pre-trial stage when the police and the prosecutor needs to determine whether it is necessary to arrest or proceed the prosecution. Judging from the legislation and practice of the major countries under the two major legal systems, for minors, the elderly, occasional lost, negligent, overdefended, etc., because of their less subjective malignancy and less social harm, there is no need to apply penalties and it can generally be handled by diversion, thus reflecting the principle of individualization.

3. THE DIVERSION MECHANISM IN CHINA'S CRIMINAL PROCEDURE LAW

3.1 Diversion Based on Complexity at the Trial Stage

The diversion based on complexity at the trial stage is a problem that has received much attention in China for a long time. In 1996, the Criminal Procedure Law was amended to create a simplification procedure. The procedure is applicable to public prosecution cases where the facts are clear and the evidence is sufficient. The defendant may be sentenced to three years or less of imprisonment, criminal detention, control or single fine. They need to be minor criminal cases where the victim provides enough evidence and the cases are to be processed. The establishment of the simplified procedure has helped reduce the pressure on the judicial

organizations to a certain extent and has significance for the improvement of the efficiency of the system. However, from the practical implementation, the application of simplified procedures is limited.

Therefore, in March 2003, the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Justice jointly issued *Opinions (Trial) on the Application of Ordinary Procedures for Trials where "the Defendant Pleaded Guilty"*. According to the "Opinions", in the case where the defendant pleads guilty but simplified procedure is not applicable, the ordinary procedure is applied for trial. However, since the defendant pleads guilty, some procedures and actions can be simplified in the trial process, it is also called "ordinary procedures to simplify the trial." Judging from the specific provisions of this opinion, the simplification of the trial procedure for ordinary procedures is very efficient.

The idea of simplifying the trial of ordinary procedures was largely confirmed in the process of the revision of the Criminal Procedure Law in 2012. According to the new Criminal Procedure Law, if the facts are clear and the evidence is sufficient, the defendant admits that he committed the crime and there is no objection to the alleged criminal facts nor to the application of the simplified procedure, the simplified procedure may be applied. This provision has led to a significant increase of application of simplified procedures compared to 1996.

After the proposal of the trial-centered judicial system reform during the Fourth Plenary Session of the 18th CPC Central Committee, the simplification and diversion of the trial procedure gained more attention. The mainstream opinion in the theoretical and practical aspects believed that the process of simplifying the trial procedure should be further promoted. The reason is that the trial-centered court requires the court to fully investigate the evidence at the trial stage, which requires much more judicial resources comparing with the current trial procedure. It is impossible to do all the cases with limited judicial resources. For many cases that are minor, simple, and where the defendant pleads guilty, a simplified or simple trial should be adopted. Under the guidance of this idea, the judicial organizations at various levels have begun to explore different programs for simplifying trial procedures, such as "quick procedural procedures" and "convictions for confession and punishment".

3.2 Establishment and Expansion of the Procuratorate's Prosecutorial Discretion

Another important practice in criminal proceedings in China is to achieve the purpose of diversion of procedures through the execution of procuratorate's prosecutorial discretion. In 1996, the Criminal Procedure Law amended the abolition of exemption from prosecution and replaced it with non-prosecution. The provision on discretionary non-prosecution was the embodiment of the procuratorate's prosecutorial discretion in the legislation.

According to the provision, the procuratorate organization may make a discretionary decision not to prosecute a case when the crimes committed are minor and the penalty is not required to be imposed or the penalty may be waived in accordance with the provisions of the Criminal Law. Compared with the abolition of the exemption from prosecution, the person is legally innocent after the non-prosecution decision is made. The scope of application of non-prosecution is relatively limited, which reflects the recognition of the procuratorate's prosecutorial discretionary power to a certain extent. Therefore, in theory, the principle of criminal prosecution in our country is summarized as "Doctrine of commencement of action by law is the main component and doctrine of prosecuting discretion is the supplement".

In 2012, while the revision of the Criminal Procedure Law retained the discretionary non-prosecution system, it further explored various new forms of procuratorate's prosecutorial discretionary powers. One is that in the case of juvenile, if the statutory conditions are met, the decision to make a conditional non-prosecution can be achieved; the other one is that in the public prosecution case of the settlement of the parties, if the statutory conditions are met, the procuratorate can make a decision not to prosecute.

3.3 Criminal Reconciliation

In 2012, the Criminal Procedure Law amended the procedures for the public prosecution of the parties to settle the case. The legislative intent of the procedure is to highlight the value concept of restorative justice. For some minor criminal cases, after the defendant's repentance, apology, compensation, etc., and the victim's forgiveness is obtained in the criminal proceedings, the government will no longer pursue the criminal liability of the perpetrators or deal with them leniently. The purpose is to resolve conflicts to the maximum extent and to repair the social relations destroyed by crimes. It can be said that the establishment of such special procedures is mainly based on criminal policy considerations. At the same time, criminal reconciliation also has the value of saving judicial resources. Some investigations have shown that the case of criminal reconciliation has reached the "four no's", that is, no criminal suspects have re-offended after returning to the society; no criminal suspects have again entangled with the victim because of dissatisfaction with criminal reconciliation; no victim has filed a private prosecution because of the lack of protection of rights and interests; no party has appealed or petitioned for dissatisfaction with criminal reconciliation. (Wu, Zhang, & Shi, 2013)

3.4 Special Procedures for Juvenile

In 2012, the Criminal Procedure Law was amended to add a criminal procedure for juvenile criminal cases. The purpose of its legislation is to enhance the professional

characteristics of juvenile cases. In the case of juvenile crimes, the principle of “education, probation, and salvation” is fully implemented, and the principle of “education-based, punishment-assisted” is fully implemented, as well. In fact, before the introduction of the new Criminal Procedure Law, people’s courts at various levels have already implemented special procedures for juvenile in the organization, but still rely mainly on the provisions of ordinary criminal procedures. The purpose of the law is to provide special procedural rules for the handling of juvenile criminal cases, and further promote the diversion of juvenile criminal proceedings and criminal proceedings in ordinary cases.

4. THE DEFICIENCIES OF CHINA’S CRIMINAL PROCEDURE DIVERSION MECHANISM AND THE DIRECTION OF REFORM

Because diversion is still a relatively new concept in China, its specific application in legislation and judicial practice also has a series of problems that need to be further improved.

4.1 Insufficient Understanding of the Function of the Diversion Mechanism Leads to Bias in the Design of the System

As mentioned earlier, the function of diversion is embodied in three aspects: efficiency, fairness, and implementation of criminal policy. However, at present, domestic theory and practice pay too much attention to the function of the mechanism in improving judicial efficiency, regards program diversion as a way to alleviate the pressure of the judicial organizations to handle cases, and neglects the other two aspects, especially the functions of criminal policy. For example, the most important theoretical basis for the criminal reconciliation and juvenile proceedings established by the new Criminal Procedure Law is to implement the corresponding criminal policy, not to improve the judicial efficiency. In fact, in many cases, these two procedures may not reduce the judicial costs compared to ordinary programs; instead, they will increase judicial costs. However, a careful analysis reveals that the two special procedures established by the current law are not strictly independent procedures, but merely a summary of a series of specific provisions that are still based on procedures such as arrests, non-prosecution, trial, and sentencing in existing criminal proceedings. Therefore, how to fully exploit the potential of the diversion mechanism in implementing criminal policy should become a major issue in the process of future institutional reform.

4.2 The Simple Scheme of Diversion Fails to Meet The Needs of Judicial Practice

- On the issue of the simplification and diversion of trial procedures, the current law is only divided into two types:

ordinary procedures and simplified procedures. However, the scope of cases in which simplified procedures can be applied is wide (as long as it is a case heard by the local courts, those who meet the statutory conditions may apply the simplified procedure) makes the simplified procedure still relatively conservative in terms of simplicity, which leads to the problem of “simple procedure is not simple” in many cases. The direction of reform in the future should be based on the needs of different cases to explore a wider variety of simplified procedures. For example, in addition to ordinary procedures and simplified procedures, Germany has a simpler punishment procedure; the plea bargaining procedures applicable to more than 90% of criminal cases in the United States can be used as reasonable reference.

- Judging from the specific steps of the diversion mechanism, according to the current Criminal Procedure Law, diversion of procedures only comes in at the stage of review, prosecution and trial, and the statutory principle must be strictly applied in the case of filing and investigation. The same procedure and rules should apply to all cases. This makes the investigating agency likely to face more pressure than the prosecutorial and judicial branches. Due to the lack of criminal procedure diversion mechanism in our legislation, these increasing pressures on handling cases can only find breakthroughs in catharsis and transfer through invisible procedures. For example, some scholars have pointed out that the phenomenon of “not standing upright” that exists in a large number of cases is a de facto diversion mechanism in practice. Instead of letting the investigators arbitrarily do it, it is better to establish a corresponding diversion mechanism at the investigation stage in response to actual needs. If a scholar advocates the establishment of a “slight criminal punishment” method in the investigation stage, it is a very constructive idea. This view advocates that if investigators in the investigation process, through comprehensive consideration of the prosecution interests of minor criminal cases, believe that the criminal suspects are suitable for non-prosecution, then the investigators who investigate the case should first contact the suspect and the victim. After communication and with approval by the corresponding subject, the suspect will be given non-criminal punishments such as warnings, fines, damages, and community services.

5. SEVERAL ISSUES WITH THE APPLICATIONS OF DIVERSION MECHANISM

5.1 Should Not Violate the Basic Principle of the Rule of Law

The diversion of procedures does not mean that it can violate a series of fundamental principles and systems of

the modern rule of law. For example, the principle of a legally prescribed punishment for a crime, the principle of presumption of innocence, and the right to defend the accused are still fully respected, and diversion that fundamentally contradicts these basic principles should be denied. For example, the exemption system prescribed in the Criminal Procedure Law of 1979 can be regarded as an effective scheme for diversion of procedures, but the system allows prosecutorial organization to sentence guilty without a trial, and fundamentally contradicts the presumption of innocence. In principle, the system was abolished when the Criminal Procedure Law was amended in 1996.

5.2 The Procedural Choice of the Prosecuted Is Guaranteed

The diversion of procedures means that a considerable number of cases are no longer subject to the rigorous trials required by ordinary procedures, and that trials in the modern rule of law should be a basic right of the prosecuted. The diversion of procedures means that the accused waives the right. Only in the case where the defendant gives up voluntarily the program diversion is likely to be justified. Therefore, the most critical factor in the various program diversion schemes is to fully guarantee the procedural choice of the prosecuted.

5.3 Ensuring the Defendant's Right to Legal Assistance

Considering that the accused is usually not proficient in the law and has difficulty understanding the legal consequences of different procedural choices, lawyers are required to intervene to provide legal assistance. It can be said that the more complicated the diversion mechanism,

the greater the demand for lawyers. With the help of lawyers, the prosecuted person can objectively understand the impact of the choice of the program on his/her own interests so that the choices made are in line with his/her own interests and will and will regret afterward. As the degree of institutionalization of criminal procedures increases, the technicalization of program setting and the tendency of legal professionalism will become more and more obvious, and more experts with rich legal experience are required to participate or operate.

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