

The Roles of Local Rules of Criminal Procedure in the Process of Rule by Law in China

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Abstract

Although China has a unitary tradition, there exist a large number of local rules in criminal procedure. Based on more than one thousands of copies of local rules of criminal procedure and relevant investigations, the article analysis the important functions of local rules of criminal procedure in the process of rule of law in China. In order to refine laws and regulations and guide pilot reforms, judicial offices draw up local rules of criminal procedure. These local rules also build mechanisms of coordinations between judicial offices and judicial internal offices and government departments, and local rules regulate the administration of justice system of judicial personals and business. In the aspect of protection of rights, local rules of criminal in China succeed in strengthen the rights of defendant and counsel and victim and prisoners. In addition, some controversies against local rules of criminal procedure in China are discussed. Finally, the article offer some suggestions to improve the justify of local rules in criminal procedure in China, such as admitting the power of local judicial offices to make rules and standardizing the procedure of formulating rules, and it's necessary to set a bottom line and effective relieving courses.

Key words: Local rules of criminal procedure in China; Rule by law; Function

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INTRODUCTION

Local rules of criminal procedure in China refer to the rules related to criminal procedure which is laid down by local judicial offices in Chinese mainland. Although China has a unitary tradition, there exist a large number of local rules in criminal procedure. The author collected more than one thousands of copies of local rules of criminal procedure in three years. In January in 2012 the Supreme People's Court and the Supreme People's Procuratorate sent a notice which prohibited local courts and procuratorates to lay down rules of criminal procedure. But two years on, the notice isn't been carried out, and many judicial offices in various regions continued to formulate local rules to implement the new criminal procedure law which come into force in 2012 in China.

Why there are so many local rules of criminal procedure in China? Probing the causes help to break the unified illusions on the system of the rule of law which are hold by people and promote a new route of rule by law from lower to upper.

What's the function of local rules of criminal procedure in China? What's the controversy against local rules of criminal procedure in China? Based on these two questions, the following article is divided into two corresponding parts.

1. THE FUNCTIONS OF LOCAL RULES OF CRIMINAL PROCEDURE IN CHINA

In the process of rule of law in China, the local rules of criminal procedure play an important role which cannot be replaced in five aspects as below.

1.1 Refining Laws and Regulations

On the whole, Chinese law aren't detailed and meticulous. Because there are many detailed problems which couldn't be regulated comprehensively by one time of legislation during the primary stage of socialism,

so Chinese legislations always adopt the principle of from-coarse-to-fine. It's less than forty years since China adopted the policy of the reform and opening up policy, therefore Chinese mainland is inexperienced in the construction of legal system. Deng Xiaoping once stressed the point that China should step up the pace of legislation, and he said that people should not wait for complete sets of fine laws because of better than nothing. The total articles of criminal procedure law in China are less than three hundreds, which is much less than in other developed countries.

Local judicial offices who formulate local rules refine criminal procedure law from all aspects. For example, in 2008, Guangdong Higher People's Court laid down Guidance on Commutation and Remand for New Trial of Criminal Cases, which clearly defined the situations of insufficient evidence and erroneous application of the law. Moreover, the Guidance clearly articulated the situations in which judicial personnel violate the procedure and cause unfair trial. Shanxi Higher People's Court laid down Norms on the Relations between Judge and Party and Counsel, which refined relevant regulations in the law of judge. The Chongqing People's Congress laid down Methods on Implementation the Law of State Compensation, which further clarify the provisions on the procedure for compensation.

Because the national legislations always are coarse, so it is necessary for some institutions to issue regulations to fill the loopholes, such as the Central Commission of Politics and Law, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice. Due to various reasons these regulations are also coarse, so local judicial offices need to regulate local rules for further refinements.

For example, in 2007 the public prosecution office of the Supreme People's Procuratorate issued Guidance on Withdrawal of Prosecution. Soon afterwards Chongqing City People's Procuratorate drafted Regulations on Withdrawal of Prosecution, which further refine the Guidance. In 2009 the Supreme People's Court issued Guidance on Sentence Procedure. By the end of 2010 all provinces and municipalities and autonomous regions in Chinese mainland drafted the detailed rules for the implementation of the sentencing guidance.

1.2 Building Mechanisms of Coordination

In order to promote the work of justice it is necessary for judicial offices to communicate and cooperate. It is difficult for one judicial office to perform the job independently during the primary stage of socialism. So local judicial offices frequently lay down local rules to stipulate the mechanism of coordination. This type of local rules mainly includes three types as below.

The first type is local rules on coordination between judicial offices. For instance, Chongqing People's Procuratorate and Chongqing Public Security Bureau laid

down Regulations on the Intervention in the Investigation Ahead of Time of the Procuratorial Organization in 2007, and Beijing Higher People's Court and Beijing People's Procuratorate laid down Regulations on Mechanism of Coordination in 2010.

The second type is local rules on coordination between judicial internal offices. For example, at the beginning of 2012 Shanghai Country People's Procuratorate enacted Working System on Prosecution Guiding Investigation, which detail the duty and the procedure and the resolutions to disputation.

The third type is local rules on coordination between judicial offices and party and government departments. Because Chinese local judicial offices are constrained by local governments in finance and personnel, it is crucial for local judicial offices to get support of local party committee and government departments. For example, in 2004 Department of Justice of Jiangsu Province united Jiangsu People's Procuratorate and Jiangsu Public Security Bureau and Jiangsu Civil Bureau and Jiangsu Labor Support Office to jointly lay down Regulations on Administration of Correction.

1.3 Guidance on Pilot and Reform

It is an important route for China to advance the judicial reforms by local innovation in advance under the circumstances that it is premature to carry out national innovation. Local innovation in advance could gather experience and create other conditions which are necessary for the central legislation. It is obvious that the local reforms are adept to solve realistic problems at lower cost. On the base of long-term test, some effective reforms could be enhanced to widespread norms.

In recent years local judicial offices have laid down some rules to guide related reforms such as criminal reconciliation and differed prosecution and summary trial. Some reforms and rules generated powerful demonstration effects across the country and were absorbed in subsequent criminal procedure law, such as the criminal record elimination system of minor offender which was initiated in the local rule made by judicial offices in Wengan County in Guizhou Province in the year of 2009.

In order to avoid the risk of execution an new and immature system across wide areas, Chinese always launch a pilot project within certain areas. In August in 2008 the Supreme People's Court issued the Notice to Carry Out the Pilot of Sentencing Standardization and chose eight gross-courts as pilot units including Shenzhen Intermediate People's Court. In November in 2009 Guangdong Higher People's Court and Guangdong People's Procuratorate issued Guidance on Sentencing Procedure.

In order to solve some outstanding problems emerging from practice, some local judicial offices issued local rules. For instance, Basing on deeply probe, in March in 2010 Honghe Autonomous Prefecture Intermediate People's Court issued Opinions on Investigation and Control of

Defendant's Property in The Process of Trial and required gross-courts to choose some cases to make experiments.

1.4 Strengthening the Protection of Human Rights

One of the main aims of criminal procedure is to protect the human rights, in this respect Chinese local rules also play an important role.

Some local rules of criminal procedure stress on protection of defendant's legitimate rights and interests. For instance, in 2000 shanghai higher people's court and shanghai justice bureau laid down Interim Measures on Legal Aid. In 2002 jiangsu higher people's court and jiangsu provincial people's procuratorate and jingsu public security bureau jointly laid down Regulations on Drug Cases, which expressly forbid to verdict cases relying on confession. In 2005, sichuan higher people's court and sichuan provincial people's sichuan procuratorate and sichuan public security bureau jointly laid down Opinions on Regulating Criminal Evidence, which articulated that judge could presume in favor of defendant under the condition that police or prosecutor refuse to investigate clear clues in favor of defendant.

Some local rules of criminal procedure stress on guaranteeing the rights of counsel. For instance, in 2003 sichuan people's procuratorate and sichuan public security bureau and sichuan justice bureau jointly layed down Regulations on Lawyer's Meeting Criminal Suspect in Custody. In 2008 nanjing city people's procuratorate issued Trail Measures on Layer Present during Interrogation in the Stage of Examination and Prosecution. In 2013 ningbo people's procuratorate and ningbo justice bureau jointly layed down Interim Regulations on criminal lawyer's practice.

Some local rules of criminal procedure stress on judicial reparation for criminal victim. For instance, in 2007 sichuan provincial political and legal committee and sichuan financial department jointly issued Administrative Measures on Sichuan Judicial Relief Special Fund. In 2009 department of justice of guizhou united guizhou people's procuratorate and guizhou public security bureau and guizhou civil bureau and and guizhou financial deparment and guizhou labor support office to jointly layed down Regulations on Judicial Reparation for Criminal Victim.

Other local rules of criminal procedure stress on protection the rights of prisoner. For instance, in recent years jiangsu administrative department of prison has made regulations on prisoner's rights of communication and interview and rights to complain and charge and expose. Hainan prison administration has made regulations on prisoner's rights to visit family and cohabit with spouse. Sichuan higher people's court has ever made some regulations on prisoner's commutation and parole.

1.5 Standardizing the Judicial Administrative System

In recent years China has attached great importance to promote the standardization of judicial management from top to bottom. The Supreme People's Court and the Supreme People's Procuratorate and the Ministry of Public Security issue regulations on performance evaluation, after that local judicial offices laid down corresponding detailed rules for the implementation of performance evaluation, which would be carried out in daily administration. Different from the western developed countries, there is still large room for law enforcement standardization in China, so it is efficient to raise the level of law enforcement by performance evaluation.

In 2001 the Ministry of Public Security issued Regulations on Public Security Administration's Enforcement Quality Evaluation, soon afterwards chongqing public security bureau made corresponding detailed rules for the implementation. In 2009 the Supreme People's Procuratorate issued Assessment Methods on Standardization Construction of Grass-root Procuratorate, and tianjin people's procuratorate made the detailed schemes on examination. In 2010 the Supreme People's Court issued Six Rules on Judicial Publicity, and in 2011 beijing higher people's court laid down Opinions on Further Advance Judicial Publicity, which refined the rules of the Supreme People's Court.

2. CONTROVERSY AGAINST LOCAL RULES OF CRIMINAL PROCEDURE IN CHINA

Although the local rules of criminal procedure play an important role in the process of rule by law in China, they face controversies all the time. To sum up the main criticisms are the following three aspects.

First, local rules don't accord with the principle of procedure under law. On the doctrine of procedure under law the criminal procedure only made by legislature, so judicial offices have no right to lay down rules of criminal procedure.

Secondly, Chinese local judicial offices have no power to enact rules of criminal procedure. Article eight of legislation law in China articulate that coercive measures and litigation system belong to specific matters of the legislative power of the state, so local judicial offices below provincial level must not enact local rules on criminal procedure. Resolution on Enhancing The Legal Interpretation Work of The Standing Committee of The National People's Congress also articulate that special law application should be interpreted by the Supreme People's Court and the Supreme People's Procuratorate, so local judicial offices have not the power to interpret criminal procedure law.

Thirdly, some local rules destroy the unity of legal system. For example, some local judicial offices have carried out the innovation of deferred prosecution in past, but there was no deferred prosecution in criminal procedure law in 1997 in China. In addition, practices on deferred prosecution are different between each judicial office.

The author of the thesis deems that the above viewpoint should be analyzed concretely.

First of all, the principle of procedure under law is not absolute. Besides legislature, judiciary also take an coequal role on protection of rights, by the means of interpretation of law and creation of legal precedent.

Secondly, it is too simplistic to say that Chinese local judicial offices have no right to lay down local rules of criminal procedure. Although in theory the legislative power of The National People's Congress prior to the power of interpretation of the Supreme People's Court and the Supreme People's Procuratorate, Chinese legislature unable to exercise the legislative duties in time because of lack of capacity of legislation or lack of enough resource to promote the implementation of legislation in the national scope. On the other hand, if the aim of monopoly on power of interpretation is to make local judicial offices mechanical performer of law and interpretation to the greatest extent, it is an utterly violation of reality, that interpretation is an activity closely relating with the process of legal practice of judicial organs. From the view of actual demand, any judicial institutions have responsibility to interpret the laws, even the basic level judge. On the whole, the subject of interpretation of law is more than even mainly not highest judicial organs.

Thirdly, variations between regions in China exist inevitably in the process of legal application. Although law is unified, judicial personnel are localized, and there are different between local rules in some ways. So we shouldn't rigidly demand completely unified legal system, and we should allow local judicial offices to lay down flexible rules. More importantly, China is now in a period of law reform. The existing legal system is the base of reform. So illegal reform would be allowed in some degrees both the aspects of entity and procedure. Law should keep pace with times.

Finally, the Central acquiesces in the draft of local rules of criminal procedure, because some local rules are more in line with the need of practice than central legislations. If local judicial offices are not allowed to amend central legislation to solve the problems, at the same time central judicial organs could not amend it in time, how to establish the authoritative position of central legislation? Especially China is now in a transition period of development of criminal law, and central legislation need endless complement and perfect. It's a lot of steps. In China important reforms are always begin from

grassroots. After summing up experience some local rules become law. This is also the successful experience of Chinese legal development.

CONCLUSION

The rationality of Chinese local rules of criminal procedure should be confirmed. In the background of the relationships between the Central and the local and between legislative and judicial departments, Chinese local rules in criminal procedure have important functions such as refining laws and regulations, building mechanisms of coordination between judicial offices and accumulation of reformatory experience. As a kind of local knowledge, local rules compose the dynamic rule by law with central law. Therefore, Chinese local rules of criminal procedure are reasonable exist in a longer period of time, and this is also in line with the development orbit that criminal procedure gradually standard in practice.

But at the same time, people must attach importance to improve the justification of Chinese local rules in criminal procedure. In particular, we should start with the following aspects.

First, the power for local judicial organs to lay down documents of interpretation must be admitted. We should realize the inherent limitation of national laws and the relative lack of the ability of the Supreme People's Court and the Supreme People's Procuratorate to enact interpretation. We should give full play to the role of local judicial organs in the construction of the legal system in China. In order to cope with changing society we should promote continuous self-improvement of our legal system. Under the hierarchy management mode, only after local judicial organs having laid down corresponding guidelines, the judicial documents of the Supreme People's Court and the Supreme People's Procuratorate can be really implemented at the grassroots. Therefore, we should distinguish different levels of interpretation and give local judicial organs restricted power to interpret laws.

Secondly, the procedure of enactment of local rules of criminal procedure must be standard. The public should have rights to advise local judicial organs to enact related rules. In the process of enactment of local rules lawyer and scholar should be invited to join. The local rules which come into force must be overt.

Finally, it's necessary to set a bottom line and effective relieving courses. The bottom of local rules of criminal procedure is the spirit of restriction of powers and protection of rights. As long as local rules are benefit for restriction of powers and protection of rights, they should be permitted to try in a certain range, even though they break through the existing law in part. Meanwhile examination and relieving courses are essential and local rules which seriously violate human rights and influence judicial justice must be declared invalid.

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