On the Defects and Perfection of the Criminal Protest System in China

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Abstract. This paper is written for the reflection based on the current situation of the criminal protest, aimed to improve China’s criminal protest system. Therefore, it put forward the question there are serious standard fuzzy and administrative color in the criminal protest system. These measures, introduced quantitative analysis increase the right of compulsory protest of victim, enhance the independence of the judiciary and others, should be proved in the standard of protest to solve the existing problems in the criminal protest through the ways of value analysis and logical analysis, aimed to realize the function of criminal protest, to carry out the trial supervision work, to solve the existing difficulties in the judicial work.

Introduction

The third Plenary Session of the 18th CPC Central Committee through the decision of the CPC Central Committee on deepening the overall reforms on several major issues, has clear and specific requirements of deepening the reform of judicial system, adheres to the trial of the center of judicial reform, and provides a new opportunity to promote the work of protest. However, the criminal protest functions of procuratorial organizations failed to get the corresponding development in contract with the work of protest. The defects of the criminal protest system has not been taken seriously and made up which makes the protest system has become the weakest link in our country’s legal supervision work. In the current judicial practice, because there are many defects that need legislation to regulate in the internal protest system, so that the protest system cannot run smoothly, cannot get a good play.

The Summary of Criminal Protest System

The Meaning and Classification of Criminal Protest

According to the Criminal Procedure Law, protest refers that when the people’s Procuratorate judgment think there are mistakes made by in the judgement and adjudication of the people’s court, the people’s Procuratorate judgment can submit a lawsuit again to the people's court in accordance with the law. In China, protest is a legal supervision power granted by the people’s Procuratorate judgment on behalf of the state.

On the way of the criminal protest, it can be divided into two categories, one kind is protested according to the procedure of trial supervision, which is usually called “trial supervision and resistance”; the other is protested according to the procedure of second trial, which is usually called “the second instance procedure”.

When the people’s Procuratorate judgment at the same level considers that the first instance criminal judgment or ruling of the people’s court at the same level is indeed wrong, the protest, submitted by the people’s court at the upper level within the period of the court protest, shall be called “the second instance procedure”. The specific procedures in the law of criminal procedure of our country is the Procuratorate submitted the protest to the people’s court at a higher level, the people’s Procuratorate judgment also should put forward a copy of the written protest to the
People’s Procuratorate judgment at a higher level should carefully check the reason and basis of protest. If the People’s Procuratorate judgment think the protest with wrong, it can directly withdraw the protest of next level the people’s court at the same level of the People’s Procuratorate, and notify the situation of withdrawing the protest to the people’s Procuratorate judgment at the next level.

“Trial supervision and resistance” refers the Supreme People’s Procuratorate has the legally effective judgment and order to the people’s courts at all levels; the higher People’s Procuratorate has the legally effective judgment and order to the next people’s courts. If there has found some contain errors, the People’s Procuratorate can lodge a protest according to the procedure for trial supervision. This kind of protest is not limited by time. For the cases protested by the people’s Procuratorate, the people’s court that accepts the protest should form a new collegiate panel to hear the case again.

It should be clear that the protest in the second procedure is initiated by the criminal referee who has no legal effect. But the protest in the procedure of trial supervision is initiated by the criminal referee who has already taken legal effect.

**The Purpose of Criminal Protest**

It is undoubtedly that the purpose of the protest should be divided into a lot of segments. Either for correcting the error or for protecting the rights of victims, its major purpose is the pursuit of justice. The procuratorate judgment accepted criminal protests in order to handle every case according to the law and justice, so as to safeguard the legitimate interests of the public, make the interests of social public not to be violated and effectively solve the existing social contradictions, so as to let the public see the justice behind every case. Its core value is to seek the concepts of suit with substantive truth and justice, and the implementation of legal supervision. Therefore, the procedure of protest itself must have certain impartiality.

**The Analysis on the Defects of Criminal Protest System in China**

**The Vague Standard of Criminal Protest**

In the code of criminal procedure, the standard of criminal protest is “there is a certain mistake”. There is only this single provision, no clear provision about “what is wrong”, and the boundary and nature of itself. However, in the practice of the agenda, the mistakes made by the judiciary cannot be single, and even the nature of the existence with complex and mixed. There may be procedural errors, or there may be substantial errors; there may be factual errors or legal errors; there may be major errors or technical errors. Although the procuratorate made some detailed provisions in the criminal protest standard (such as the Supreme People’s Procuratorate issued on the opinions of strengthening and implementing criminal protest work, and so on). In general, it is still comparative principle, but not has strong maneuverability. If there is big or small mistakes in the lawsuit, it all may become the grounds of protest considered it in our real life.

**Lack of Protest against the Improper Discretion**

Franz·Newman, the American jurist, once said, “if a place’s discretion is not limited, there is no rule of law in that place”. In the process of exercising discretion, the legal system of our country has not been perfect, often leads to a series of problems. For example, how to prevent the improper exercise of discretion? How to correct the improper exercise of discretion? The “improper exercise of discretion” is actually one of the “mistakes” mentioned. Because of its special features, so we can discuss it separately in the text. Today, the judge’s discretion has been expanded, and the protection has been strengthened. But in some places, the judges’ legal literacy is low and the procedure is imperfect, which makes the original “appropriate” discretion be improperly exercised. As a case of the sentencing range is imprisonment for three to seven years, it is more appropriate to sentence to seven years, but the judge sentenced to three years. The prosecution has found the “mistakes” in the cases of this kind of improper exercise, but in the actual judicial operation, the people’s court are
not recognized that, and the standard is difficult to grasp in the correct sentencing range of light. Therefore, the prosecution of such cases in protesting is relatively small.

So in the process of trial unfair cases will be gradually reduced. However, the discretionary power will still be abused, because of the inherent defects of human nature, and the incomplete system. In order to prevent the abuse of discretionary power, in addition to constantly improve the quality of judges, we must strengthen the supervision and restriction mechanism of the law. Among them, the protest is a good constraint mechanism. In the laws and regulations, it should be expressly provided for abuse of discretion judgment to lodge a protest. In civil procedure, criminal proceedings and administrative proceedings, the law should strengthen the strength of judicial supervision procedure in protest, and expand the scope of supervision, in order to make the procuratorial organs more seriously to perform their related duties.

The Incomplete Regulation of Protest Right

First of all, we should recognize who is the main body of the protest. Originally, the right of protest should belong to the lower people’s Procuratorate. But according to the actual situation, the lower level people’s Procuratorate only has the right to initiate the protest procedure, the Supreme People’s Procuratorate and the people’s Procuratorate at the higher level have the real protest right to exercise. Because the pro-curatorial organ implements the mechanism of protest integration, or the system of reporting before the protest, whether the protest is not made by the lower people’s procuratorate or not, the superior people’s Procuratorate has great influence on whether to protest. This makes the “protest power” which belongs to the lower people’s Procuratorate become a mere formality, finally turns into “the right of protest proposal”. It has a great uncertainty whether the “protest right” of the lower people’s procuratorate can be thoroughly implemented.

Secondly, the reporting system of the exercise of the right to the people’s court at a higher level has seriously hindered the using of protest right. According to the provisions of the relevant documents and spirit, when the important cases are ready to protest, the people’s court should report with the superior Institute of public prosecution department before finally decided to protest, and the superior institute shall put forward specific opinions and suggestions. This provision aims to establish a system of criminal protest system and mechanism. But in fact, it has become a prior procedure of protest. Because the case is mainly composed by the lower people’s procuratorate to review, so it is natural the lower people’s procuratorate has a more profound understanding than the supreme people’s Procuratorate in the general case. In the case of the reporting process, the superior procuratorate listen the report of subordinate procuratorate, access to information and analysis the case at the same time. There is a one-sided greatly because the process is relatively one-sided. Therefore, it is too hasty and casual to give the right to the people’s Procuratorate at higher level to make a final decision whether to protest or not.

Finally, the lower procuratorate lacks the right of relief and protest. Every time the lower procuratorate protest should be carefully discussed and have a strict examination, then make a protest of the judgment. But there are no clear regulations why the superior procuratorate withdraw the decision. According to the current law, the decision of lower procuratorate protest cannot win the support of superior Institute. And there is the only “notice” unilateral behavior after the protest was vetoed by the superior Institute, and there is not the right to support the lower procuratorate to reconsider from the legal level.

Negative Effect of Administrative Trial Mechanism on Protest Results

We all know that the process of judicial is about the independence of judicial, which requests judicial cases are independently handled by judiciary. Between the upper and lower people’s court should not interfere with each other, other state organs should not to intervene. However, the whole procedure of judicial operation cannot be completely independent because of the interaction of traditional custom and judicial system. The judicial system often received pressure from various aspects in the process of trial, and this caused a great threat to the independence and neutrality of the trial of the case. So there is a very strong administrative factor in the trial of cases in our country.
The strong administrative guidance relationship and administrative color greatly weaken the function of the procuratorial organ’s protest.

**Suggestions on Criminal Protest System in China**

**Establish the Compulsory Protest Right for the Victim in the Second Instance Procedure**

In 2012, the criminal procedure law was further amended, which affirmed the status enjoyed by all kinds of subjects, and also constructed a variety of ways to protect the rights. However, in the actual prosecution process, the status of the victim is still in a little awkward. The victim is the party namely, but essentially only has “public power” under the protection of the status of witnesses. The victim is not endowed with the right of protest.

The author believes that in order to protect the rights of victims more comprehensively, we can explore to establish the compulsory protest system. First of all, “forced”, two words in Chinese, can be inferred that “compulsory protest” is a kind of “absolute” rights. As long as the victims have the corresponding qualifications and apply within the specified time, regardless of the reason for the application is to get people’s Procuratorate approval, it can be caused the protest and the situation “there is application, will have the protest”. Secondly, we advocate establishing the right of compulsory protest in the second instance procedure in order to safeguard the interests of the victims and to make the justice fairer. Because the trial supervision procedure is mainly aimed at the legally effective judgment, so we do not propose to introduce mandatory protest right in the procedure of judicial supervision. If at this time the victims are given the right of compulsory protest, it is likely to pose a threat to the stability and authority of the judiciary, and does not conform to our spirit of “instance system”.

With regard to the system of compulsory protest, the author makes the following assumptions. First of all, the victim should request an application with the form of written for the prosecutor, and indicate the specific claim and case in the written documents. The procuratorate should not refuse because of that reason does not fully apply, but should negotiate with it on the grounds of action of the victim to revise and improve the reason; or analysis the case, explain the reason to the victim, let the victim form a more fully understanding of the case so that he can abandon to use the “compulsory protest right”. Second, we must have a definition to limit the line of time for the use of “coercion”. When the victim gets the verdict, he must lodge a protest within the prescribed period. If beyond the prescribed time limit, the “mandatory right to protest” will not be able to exercise. In this way, the victim can be protected, and the defendant is far away from the danger of “tired litigation”. Third, we should increase the mission of the people’s court to inform the victims that they have the right of compulsory protest.

**Enhancing the Independence of Judicial Organs**

Whether the lack of the right to protest in the subordinate procuratorial organs or the effect of superior court to the lower court, it is the result of administrative too serious in the judicial system to some extent. In the judicial system, the administrative power of dominant or recessive will intervene or affect the judicial power. And when the procuratorate lodge a complaint, the result is triggered by this problem will directly influence the trial of the case. Thus strengthening the independence of the judiciary, removing the administration becomes the key to solve the problem. “Let those who hear the referee judge, the referee is responsible for judicial reform” is not only the goal of the judicial reform, but also the goal of removing the administration. However, the power does not constraint itself. So we must strengthen the supervision of administrative power in judicial institutions so that the power would not exceed the limit by using the external forces.

**Introducing Quantitative Factors into the Standard of Protest**

By introducing quantitative factors, it is not only beneficial to limit the abuse of discretion in the protest process, but also conducive to the extended perspective of protest. There are advantages and disadvantages to quantitative factors. Its positive effects are as follows, firstly, it conforms to the
internal constitution of the two level ruling system of China’s entire social governance security. Secondly, it can reduce the number of protest cases and reduce the rate of crime. Not only to help the establishment of a good nation shape, but also to help stabilize the order. Not only to make the appropriate part of the population free from bad names and affect their lives, but also to benefit to their future life. And also let the prosecution focus on handling major problems with serious harm cases to society. The quantitative factors also have its negative effects. First of all, it will result the confusion of studying the theory of the criminal law and the embarrassment of theoretical explanation in the process of protest by introducing a quantitative factors, and will make the components on the basis of theory of crime. So there are some unexplained contradictions. Secondly, the introduction of quantitative factors may cause some illegal persons to escape from the restriction of law.

First of all, it should be clear that as long as the traditional legal culture still exists in the public view, we should not easily give up quantitative factors. Second, the ability of human beings to understand the world is still extremely limited at this present stage. It is impossible for a crime in social risk to introduce quantification precision when the number of “elements” decision is not the only factor of social risk in most of the time even under the condition, and in the appropriate introduction of quantitative composition.

Therefore, we can introduce quantitative factors in the standard of protest, and also to limit it. This standard should be combined with the “wrong” standard, so that every protest made by the procuratorial organs is necessary.

Concision

As the study of eight miscarriages of justice in the United States Kolter, the author of this book said “if a legal system only allows people to discuss and praise its merits, and not let people find and put forward his shortcomings. If things go on like this, this system will gradually move toward collapse. We can adapt to the needs of the society and keep pace with the times only by constantly improving and innovating, the system can have vitality”. In the current Criminal Procedural Law, there are still many shortcomings and deficiencies, we need to seriously find these defects, and make up them by formulating laws. So we can make the legal supervision procedures to maintain a good momentum of development, the protest functions can be fully playing. Enhancing the supervision and restriction of the procuratorial organs can protect the victims and defendants’ rights better; safeguard the public interests of country and society. In this way, can we realize the progress of the rule of law, and realize the fairness and justice we are pursuing.

Reference
