

On the Nature of Community Correction

—Comments on Article 1 of the Community Correction Law

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Abstract

The nature of community correction has been controversial in Chinese academic circles, but a series of official legal documents have always made it clear that community correction is the execution of punishment. Based on the research of normative analysis and comparative analysis, the author believes that China's probation belongs to the execution of punishment, so it is not correct to change the nature of community correction to "criminal execution" on the basis that the probation does not belong to criminal punishment in the Community Correction Law. This modification reflects the incorrect and incomplete understanding of the criminal law, and avoids the punitive nature of community correction, and It is not in line with the practice of developed countries as well. Furthermore, It is against the original intention and mission of introducing community correction in China. Therefore, legislation should restore the nature of penalty execution of community correction.

Keywords

Rehabilitation, Probation, Penalty Execution, Temper Justice with Mercy

1. Introduction

The community correction started from the socialized execution thought of the modern school at the end of the 19th century, which is one of the utilitarian purposes of penalty execution—"returning to the original"—product; it reflected the mitigation and socialization of penalty execution. At present, it has become the dominant execution mode in western countries.

For China, community correction is a criminal justice system transplanted from the western world. Since the pilot work of community correction was carried out in Beijing and other six provinces and cities in 2003, it has entered the formal legislative stage after expanding the pilot, comprehensive trial and com-

prehensive promotion. In the past 20 years, China has issued a number of legal documents on community correction, and it has been written in the amendment viii to the criminal law of the People's Republic of China passed on February 25, 2011, but the legal provisions on community correction are too simple to regulate the practice of community correction in China, so there has been a strong call for the introduction of community correction law.

The Ministry of Justice submitted the community correction law of the People's Republic of China (Draft) to the Standing Committee of the National People's Congress in 2015, but the draft was not adopted after the first deliberation. On October 31, 2019, the Ministry of Justice submitted to the Standing Committee of the National People's Congress the community correction law of the People's Republic of China (Draft for second deliberation), which changed the expression of the nature of community correction that has been used for more than ten years to "The correct execution of criminal judgments, rulings and decisions on temporary execution outside prison". In the report on the amendment of the community correction law (Draft) of the People's Republic of China on October 15, 2019, the Constitution and Law Amendment Committee explained the reasons for the amendment: "some representatives, local authorities, departments, colleges and universities and the public have put forward that the correct expression of punishment in the draft is not accurate, because there are four objects of community correction in which probation is the main applicable object"; according to regulations of the criminal law, probation is a conditional non execution penalty; it means the original penalty will not be executed after the test period expires. "Therefore, it is suggested to adopt the above opinions and modify correct execution of penalty" into "correct execution of criminal judgment, ruling and temporary execution outside prison". On December 28, 2019, the Community Correction Law passed and still maintained the expression of the second deliberation draft, which the author quite disagrees with. For this reason, the following will first explore the nature of probation.

2. Whether Probation Belongs to Penalty Execution

2.1. The Concept and Purpose of Penalty

Lu Xing in Shang Shu records that the punishment is lighter than the world. But it's not the same, the ruler should take light or heavy punishment to maintain social stability according to the situation of social security at that time; Historical Records: the book of empress LV says: Punishment is rarely used and there are few offenders. Biography of Wei Chuo in the old Tangshu records: those who are good at doing goods should be rewarded by the Marquis; those who are evil should be punished by the punishment. From the records of punishment in ancient Chinese legal books, punishment refers to corporal punishment and death penalty, while fine refers to atonement with money. Cesare Beccaria believes that punishment "is a kind of power that is easy to feel". The so-called "easy to feel" of Beccaria means that the power of punishment should "directly touch the

senses, and often be reflected in the mind to compete with the strong desire that against the general interests”. Because “any eloquence, any sermon, any less remarkable truth, is not enough to restrain the desire induced by living material stimulation for a long time” (Cesare, 2014a). The American scholar Ellen Hochstedler Steury and Nancy Frank thinks that to be declared as a criminal is a sign of identity loss, humiliation is a demeaning social reputation attached to the defendant in criminal proceedings. “The real difference between criminal law and civil law is the degree of which those who violate the law are condemned” (Ellen & Nancy, 2002a). Punishment has a series of definite purposes. By imposing some sanctions on criminals, whether described as punishment or disposal, their utilitarian purpose is to reduce crime. The utilitarian justification of punishment includes deterrence, incapacity and restitution. If punishment is not very painful compared with the joy brought to criminals by criminal acts, even rapid and definite punishment cannot deter crimes; the two non utilitarian purposes of punishment are retribution and restitution. Retribution aims to restore the balance destroyed by criminal acts. When a criminal commits a crime, he should be punished because he owes a debt to the member of the society who abides by the law (Ellen & Nancy, 2002b). The purpose of punishment is not to destroy and torment a perceiver, nor to eliminate the crimes that have been committed. It is only to prevent criminals from invading citizens again, and to persuade others not to repeat the same mistakes (Cesare, 2014b). From the above discussion, it can be seen that the punishment at all times and in all countries is essentially to create pain and misfortune for criminals for which is the punishment deserved by criminals.

2.2. The Origin and Development of Probation

The socialized execution thought of modern school, which began in the late 19th century, is the product of one of the utilitarian purposes of penalty execution—“rehabilitation”. Rehabilitation is based on the assumption that people’s behavior can be shaped or changed. It refers to the transformation of criminals into social members who contribute and abide by the law by striking the personal factors that cause criminal behavior (Ellen & Nancy, 2002c). Probation, the beginning of the community correction, is just the judicial practice of the rehabilitation.

The word probation in English originated from the Latin word probation, which evolved from the practice of judicial reprieve. Probation is one of the earliest penal systems and one of the most typical types of community correction (Wu, 2011a). From the history of community correction, its practice originated from the protection observation or probation in the United States, which can be proved by the well-known “father of probation, John Augustus”. However, according to Professor Wu Zongxian, the earliest sprout of probation may have come into being in England, and it may be *solve the problem of too severe punishment at that time*¹. In fact, no matter the practice of probation first came in-

¹For the development history of probation in the UK, see Wu Zongxian’s Comparative Study on Community Correction (I), China University of political science and Law Press, 2011 Edition, pp. 143-147.

to being in whatever country, their purpose is the same, that is, to avoid the severe and malpractice of imprisonment, and to supervise and protect criminals in the community, so as to facilitate the return of criminals to society.

From the number of criminals handled by probation, probation is undoubtedly the most important form of community correction in some developed countries. In 2017, the number of defendants in the criminal cases of Chinese courts was 1,270,141, of which 347,989 were granted probation², the proportion of probation was 27.40%; in 2017, 510,000 new community inmates were accepted in China, the proportion of probationers was about 68%³. Obviously, probationers are also the main application objects of community correction in China.

2.3. China's Probation Belongs to the Execution of Penalty

The third chapter of the criminal law—"punishment" stipulates five main punishments and four additional punishments, the five main punishments are respectively: control, criminal detention, fixed-term imprisonment, life imprisonment and death penalty. "Probation" provisions in the fourth chapter of the criminal code "specific application of punishment", it is applicable to criminals who are sentenced to criminal detention or fixed-term imprisonment of not more than three years, and meet the following conditions at the same time: the circumstances of the crime are relatively light, there is repentance, there is no danger of further crime, and the declaration of probation has no significant impact on the community they live in.

Exploring the conditions for probation, we can find that "there are penitence manifestations, no danger of further crimes, and no significant impact on the community where they live" stipulated in article 72 of the criminal law are all conditions set for not imprisoning criminals. Comparing control with probation, control is applicable to criminals with minor crimes and low personal risk, so they don't need to be imprisoned. Probation is applicable to a minor criminal who should have been imprisoned but could not be imprisoned temporarily. It is a flexible implementation of criminal detention and fixed-term imprisonment so as to reduce imprisonment, to implement the criminal policy of severity with leniency, and to benefit criminals returning to the society.

There has always been a controversy about whether the probation is a penalty or a method of penalty execution in the legal academy. From the point of view of the provisions of the criminal code, probation obviously does not belong to the narrow sense of "penalty" (that is, only limited to five kinds of main punishment and four kinds of additional punishment); in Article 76 of the criminal law "when the probation period of probation expires, the original penalty will no longer be executed", the "penalty" here refers to is also the "penalty" in the narrow sense of the criminal code. The main reason why probation is not the execution of punishment in academic circles is the relative lack of punitive provisions

²The data are from page 1185 of 2018 China Law Yearbook.

³The data are from page 213 of 2018 China Law Yearbook.

on non imprisonment in China's criminal law, especially reflected in the four obligations of Article 75 of China's criminal law on probation personnel: 1) abide by laws and administrative regulations, obey supervision; 2) report their own activities in accordance with the regulations of the inspection authorities; 3) abide by the regulations of the inspection authorities on receiving visitors; 4) report to the inspection authorities for approval before leaving the city or county where they live or moving. These obligations do not involve punitive and compensatory content, so criminals are not actually subject to any substantive sanctions. But probation is undoubtedly the specific application and execution of penalty—criminal detention and fixed-term imprisonment, which has a natural connection with the narrow sense of “penalty”. It should be regarded as an extended penalty method and measure, belongs to the scope of non imprisonment, certainly belongs to the execution of penalty and has the nature of punishment (Liu, 2007).

Secondly, those who violate the provisions of supervision and investigation during the probation period still face the possibility of being put into prison for execution. Therefore, it is not allowed to deny the nature of the execution of the probation on the ground that some of the suspended criminals will not be put into prison for execution after the expiration of the probation period.

In the United States, “death penalty, imprisonment and community-based sanctions are the three main types of punishment (Ellen & Nancy, 2002d)”, Their “community-based sanctions”, in which probation and parole play an important role, refer to the community correction in China. From the name of this kind of penalty in the United States, the punitive nature of community-based sanctions is self-evident. The theory of restitution in penalty is the theoretical foundation of community correction, but the 1970s was a period when the theory of restitution was neglected in USA. The United States, which has a high proportion of probation application, realized the inability of traditional probation in accepting its promise of restitution, some critics even suggested that correction managers abandon the purpose of restitution and turn their focus to the more effective purpose: punishment (Ellen & Nancy, 2002e) finally, the United States has developed some more punitive community non custodial penalties, such as separate penalties (sometimes referred to as deterrent probation or deterrent imprisonment), strict supervision of probation (ISP), family imprisonment and so on. This is due to the defect of probation, that is, the punishment of criminals is so light that people think that probation is out of the rigor of punishment. The purpose of probation is to avoid the severe punishment, but the probation, which can not reflect the severity of punishment, undoubtedly goes to another extreme for which completely deviates from the punitive nature of punishment.

In fact, the reason why community correction is introduced in China is that there are the same problems in the execution of non custodial sentence with probation as the main body in the United States and other countries. On the surface, it seems that the original executive organ, the public security organ, is

unable to supervise, but the underlying reason is that the lack of supervision and investigation of the suspended offender greatly reduces or even disappeared to some extent the “sensitivity” of the punishment, which makes it difficult to produce the necessary psychological pressure and behavior constraints on criminals, and makes the penalty lose its proper function. The experience of foreign developed countries can be used as the lesson in the design of law in China. Therefore, now the community correction should not only reflect the change of the subject of executing penalty, first of all, we should make clear the nature of execution of penalty, such as probation and parole. When we carry out community correction for criminals, we should enhance the sensitivity of execution of penalty, not only make criminals feel the pain of punishment, but also make people see the condemnation and misfortune brought by penalty, no matter in prison or in the community, so as to realize the deterrence and retribution function of penalty, and then achieve the ultimate goal of crime prevention.

3. The Nature of Community Correction Should Be the Execution of Punishment

The main reason why the community correction of our country can't be legislated is that the community correction in foreign countries represented by Britain, America and Japan is not unified. Because of the complicated and diverse influence of foreign legislation and different domestic theories, some basic theoretical problems of community correction have not been basically agreed, and the legislative foundation is not solid.

Since July 2003 to the Ministry of justice submitted the Community Correction Law of the People's Republic of China (Draft for review) to the State Council in February 2013, a series of legal documents issued to adjust community correction have made it clear that “community correction is an important system to improve the execution of punishment, promote the modernization of national governance system and governance capacity”. Whether the definition or the “purpose basis of the first article in the legislation”, the nature of community correction is expressed as the “correct execution of penalty”. Obviously, although there are different views in academic circles, the officials have always believed that the nature of community correction is the “penalty execution”.

3.1. Main Views on the Nature of Community Correction in Chinese Academic Circles

In fact, the second review of the draft of community correction law and the revision of community correction law reflect the disputes about the nature of community correction in domestic academic circles. Some people hold the view that the nature of community correction is not the execution of punishment, but the control and protection or observation and protection of criminals, which has the nature of security measures restricting personal freedom (Cheng, 2006); some hold the view that community correction not only has the nature of punishment

execution, but also should have the nature of social welfare (Shi, 2009), and some hold the view that: to build the policy objectives of community correction, first of all, it is in the economic society Under the condition of development and weakening of grass-roots management ability, it is necessary to correct the problems that are difficult to implement in supervision and investigation of control, probation and parole, so as to improve the penalty structure and enhance the effect of penalty execution. Therefore, the nature of penalty execution is still the basic orientation of community correction (Xu, 2012). As for the nature of community correction, there are education theory, correction theory, treatment theory, redemption theory, execution theory and so on in the legal circle (Conference Affairs Group, 2014). At present, the commonly accepted view is execution theory and mixed theory (Lian, 2016).

The change in the second review draft and in the Community Correction Law actually reflects the domestic academic disputes about the nature of community correction. The nature of community correction in academia includes “criminal execution activity theory, non custodial execution method and treatment theory, execution, correction and welfare nature theory”, etc. The author thinks that although the community correction comes from abroad, we can’t be totally confined to the theory and system of its origin. In fact, even those countries with developed and perfect community correction system, such as the United States, Britain and Japan, are not exactly the same in terms of theoretical views, legislative achievements and system design, this is precisely because of the differences in economic and social development, legal system and traditional culture among countries.

3.2. Description of the Nature of Community Correction in Foreign Countries

According to Marliyn D. McShane and others, the term “community correction” refers to the punishment that provides alternative measures for criminals imprisoned in state prisons; the definition of community correction proposed by American correction Association in 1996 is “community correction is an integral part of the judicial system that promotes public safety and enables victims and defendants to be in the community through sanctions and services” Paul F. Cromwell and others believe, community correction is “a kind of penalty method that emphasizes the local institutions to integrate the criminals into the community”. Paul F. Cromwell believes that community correction is “a kind of non custodial sanction that the criminals carry out all or part of their sentences in the community (Wu, 2011b)”. From the definition of “community correction” by American scholars, there is no doubt that the nature of community correction is penalty execution.

In a matter of fact, what is the basic nature of community correction? Many countries in the world, like China, have different views, some of them think it is compulsory measures, some of them think it is measured to supervise the pris-

oners in the community. Some think it is the corrective measures for the prisoners, and others think it is the measures for the execution of punishment. With the rise of community punishment, the community correction develops rapidly either, the development of community correction has changed the traditional penalty execution system with imprisonment as the core, and formed a penalty execution mode with imprisonment execution and community execution as the main part. The controversial issues in the Western traditional academic circles, such as “whether probation is a penalty” and “whether protection observation is a penalty”, have been solved. The basic nature of community correction as an activity of executing penalty has now been determined (Zhai, 2013).

3.3. Community Correction is Penalty Execution in China

Although the Community Correction Law modifies the nature of community correction, the reason given by the Constitution and Law Amendment Committee is not convincing. As for whether the probation belongs to penalty, it has been stated before, and will not be repeated here. Through a careful study of the provisions of the Community Correction Law, we can find that control, parole and temporary execution outside prison are generally recognized as the nature of penalty execution but the so-called expression of penalty execution is the same as the execution of probation in the legal provisions, which is supervision and inspection, moreover, the current legislation does not distinguish between the contents, methods and procedures of the supervision and inspection of the four objects of community correction. However, it is obviously contradictory that control, parole and temporary execution outside prison belong to the execution of punishment, while probation does not.

The author believes that the change of the nature of community correction in current legislation is not only the change of simple words, but also will bring serious consequences of weakening and avoiding the punitive nature of community correction. This idea has been repeatedly presented in the legislation and practice of community correction in China. For example, when the author investigated in the community, the staff of the judicial office admitted that they seldom publicized the community correction, because they were worried that through the publicity, the community residents will have psychological panic and question the execution system punishment in China when they know that there were so many criminals around them. Another example is the appellation of the community inmates. In the legal documents of the past ten years of community correction in China, there has been a change from “community inmates” to “community correctors” to “community correction objects”. This change reflects the intentional dilution of the criminal identity of the community inmates. The author does not agree with this, because of the change of the time and space of serving a sentence, the fact that he is a criminal cannot be artificially diluted. Whether he is serving a sentence in prison or in the community, the fact that he is declared guilty and sentenced to criminal punishment according to law is ho-

mogeneous. Community correction reflects only the socialization and reprieve of penalty execution, just like the penalty execution system mainly based on imprisonment instead of meat punishment and death penalty in the history, it only reflects the progress and civilization of society, but not the change of penalty execution nature.

Some scholars in our country object to the definition of community correction as penalty execution, which is not only because of the misunderstanding of the current criminal code, but also because of the fear that the socialized execution of community correction has turned the society into a prison, that is, the so-called “social prison”. This fear not only reflects the concern about the lack of light and slow execution of the community inmates, but also reflects the concern about the lack of light and slow execution of the community inmates. In fact, the public power of the state is too much and too heavy to be applied to the prisoners in the community, which violates the worry of socialization and mitigation of the execution of community correction, which is reflected in the distrust of the agents of public power. There is no doubt that these concerns are necessary. However, we can't avoid the medical treatment, because this kind of worry sets the nature of community correction regardless of national conditions. In fact, even in countries where social forces are widely involved in community correction, such as the United States, the description of the nature of community correction has never evaded the nature of penalty execution (as evidenced by many American scholars' description of the concept of community correction in the above), and even developed more punitive probation types and community penalties. In our country, it is the only way of community correction for quite a long period of time to take the government as the leading role and the participation of social forces as the auxiliary. This is determined by the political system, economic and social development of our country, and there is no doubt about it. As some scholars pointed out, “China's community correction system is not a real sense of community correction”, but a “government correction (Chen, Huang, & Chu, 2012)”, Compared with the developed civil society in the United States, Britain and so on, the color of the government-led community correction in China is very obvious, which cannot be changed in the foreseeable years. Under the government led system, the nature of the community correction must be the execution of punishment. We can't ignore the national conditions and negate or avoid the essence of the execution of punishment.

4. Epilogue

Community correction is an important system to promote the modernization of national governance system and governance ability. Since its birth, China's community correction has undertaken the mission of implementing the criminal policy of severity with leniency, reducing the cost of penalty execution, improving the efficiency of penalty execution, maximizing the harmonious factors and maintaining social stability. In fact, the implementation of community correc-

tion can reduce imprisonment by about 30%, reflect the criminal policy of severity with leniency, and reduce the recidivism (the recidivism rate of the community inmates during the correction period has been kept at a low level of about 0.2%⁴). Compared with the imprisonment, the implementation efficiency of the penalty is significantly improved and good legal effect is achieved; more importantly, the community correction greatly reduces the cost of penalty execution, improves the system of penalty execution with Chinese characteristics, and enables China to invest limited judicial resources in legal aid and other undertakings.

In China, the promulgation of the Community Correction Law is a great event in the history of the development of the rule of law, and it has improved the penalty system; from then on we will enter the stage of the parallel development of imprisonment and non imprisonment. However, in the Community Correction Law, the nature of it is changed to criminal execution on the ground that “Probation” does not belong to execution of punishment. It is not appropriate for the current law to replace execution of punishment with criminal execution that has been a consensus for a long time. The expression of criminal execution cannot clearly express the legal attribute of community correction, because it has weakened the punitive nature of four kinds of criminals, such as those who have been suspended, and avoids the characteristics of penalty execution that community correction should have; moreover, it is not conducive to the education and reform of criminals serving sentences in the community.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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⁴Data from 2018 China Law Yearbook page 213.

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