

Reflection and Reconstruction: On the Legal Supervision Mechanism of Substantive Trial of Commutation and Parole Cases

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Abstract

The “trinity” linear trial mode of commutation and parole is faced with structural dilemma. The legal supervision of the procuratorial organ in the execution procedure is formalized, and the procuratorial role is marginalized. The proposal of substantive trial of commutation and parole cases puts forward new requirements for procuratorial functions. As the basic path of the “third instance” reform of “examination and approval”, “examination” and “trial”, it is necessary to switch from the “trinity” linear trial mode to the “quasi confrontation mode”. Correcting the cognitive deviation of the legal supervision responsibility of the procuratorial organ in the past, building a procuratorial authority system led by public prosecution, strengthening the public prosecution function of the procuratorial organ, realizing the transformation of “court trial” legitimacy supervision to “pre-trial + court trial” legitimacy supervision in the whole process, and standardizing the objection processing mechanism will help to effectively promote the substantive trial.

Keywords

Commutation and Parole, Substantive Trial, Legal Supervision, Procuratorial Power

1. Introduction

At present, the disposal of commutation and parole cases in our country is dominated by the power of execution, the legal supervision of the procuratorial organs is marginalized, and the court trial is in vain, so the court trial mode needs to be reformed urgently. In December 2021, Supreme People’s Court, Supreme People’s Procuratorate, Public Security, Ministry of Justice jointly issued

the Opinions on Strengthening the Substantive Trial of Commutation and Parole Cases, which aims to ensure the transparency of the trial procedure and fairness of the results in a substantive way, and regulate prison corruption. However, the Opinions did not clearly define the meaning of “substantive trial”, nor did it specify the specific responsibilities of the procuratorial organ to send personnel to court. What is the difference between the procuratorial organ’s sending personnel to court and the past? How should they perform their duties to meet the requirements of substantive trial? The blank of these issues will inevitably lead to the difficulty of effective operation of substantive trial, and more likely lead to the failure of the reform intention of the Opinions. This article will sort out the requirements for substantive trial from the Opinions, clarify its basic connotation, and examine the situation of “procuratorial power” in the court trial of commutation and parole cases, aim to reasonably construct the substantive trial mode of judgment, so as to remodeling a more standardized, self consistent and fair procedure for executing changes in sentencing.

2. The Nature Definition, Basic Mode and “Structural” Predicament of Commutation and Parole in China

The basic function of the commutation and parole system in China is to urge criminals to plead guilty and face the law, actively reform and reduce crimes for them to maintain the stability of social order after their return to society. However, different definitions of the nature of commutation and parole will lead to different execution modes, which will directly determine the exertion of its functions. To effectively implement the substantive trial of commutation and parole cases, we need to accurately define its nature, sort out its current mode and problems, and explore a more scientific and standardized trial mode for the realization of its basic functional value.

2.1. Definition of the Nature of Commutation and Parole in China

When talking about the commutation and parole system in China and discussing the substantive trial, the first thing is to give a scientific explanation of its nature. Although the academic circle has discussed this, there are great differences, mainly reflected in the dispute on the definition of its administrative power attribute and judicial power attribute.

2.2. The Theory Dispute between Administrative Power and Judicial Power

At present, the definition of the nature of the criminal law enforcement system mainly includes four views: the theory of administrative power, the theory of judicial power, the theory of synthesis and the theory of dual attributes. According to the theory of administrative power, commutation and parole belong to administrative power. “Execution is a judicial administrative activity, and the power of execution belongs to administrative power rather than judicial power,

which is the fundamental difference between execution and conviction and sentencing trial” (Chen, 2003: p. 254). The criminal jurisdiction is the power enjoyed by the judicial organ to convict and sentence the defendant. The two are different in nature, content and operation mode. The jurisdiction and the execution power belong to different criminal powers. The jurisdiction does not necessarily include the right to commutation and parole, and the right to commutation and parole is not a natural appendage of the jurisdiction (Liu, 2005: p. 20). The other three views do not deny the judicial power attribute of commutation and parole.

At present, commutation and parole in our country need to be judged by the court according to the application of the prison. The prison only has the right to initiate the procedure, but not the right to decide the outcome. This legislative style reflects its judicial power attribute, and is also the theoretical source of strengthening its substantive trial. “In principle, the power of execution belongs to the administrative power. However, commutation and parole involve the change of the term of sentence determined by the original effective criminal judgment, which should be regarded as the continuation of criminal litigation activities in the stage of penalty execution, which is essentially a judicial activity” (Xiong, 2021: p. 2). In a word, the power of execution has the dual attributes of administrative power and judicial power, in which commutation and parole belong to judicial power rather than administrative power.

Debate between Right Theory and Reward Theory

Whether commutation and parole are the rights of criminals can be divided into affirmative and negative theories. Affirmative theory is a theory of rights, which holds that commutation and parole are the rights enjoyed by criminals based on good performance. They have the right to claim commutation and parole based on good reform performance, and have full litigation rights to remedy the unfairness they encounter. The negation theory is actually a reward theory, which believes that commutation and parole are a kind of “favor” given by the state to criminals based on their good performance. In essence, it is a concession to obtain freedom ahead of time for criminals to reform well, and it is an authorized act rather than a power stripping struggle (See Sun, 2011: p. 18). Whether the right is granted or not is in the state. Criminals have no right to claim commutation or parole, nor have the right to object to the outcome. However, in practice, it is the qualified criminals who apply to the prison first, which is actually a right rather than a duty of the criminals. This “non right” view deviates from the basic legal principle of the unity of rights and obligations, and also goes against practice. Substantive trial requires the court to scrupulously abide by its neutrality and passivity, and both the prosecution and the defense should provide evidence to cross examine and debate on the issue. However, if the criminal is not a right advocate and cannot form an antagonistic relationship with the procuratorial organ, it is difficult to call it a substantive trial. As the undertaker of commutation and parole results, criminals should enjoy more full rights in substantive trials,

rather than passive recipients.

2.3. The Basic Model and Characteristics of the Commutation and Parole System in China

The judicial power attribute of commutation and parole and the procuratorial organ's supervision responsibility in the execution procedure have formed a unique Chinese model, the "trinity" linear model, which is proposed by the prison department, submitted to the people's court for decision, and supervised by the people's procuratorate. The whole court trial is a streamline without the opposition between the criminals and procuratorate, with distinctive Chinese characteristics.

2.3.1. Dualization of Trial Mode and Trial Path

In order to eliminate the drawbacks of written trial, the Supreme Law promulgated the "Several Opinions on the Implementation of the Criminal Policy of Tempering Justice with Mercy" in 2010, which proposed that the cases of commutation and parole should be heard in court in combination with written trial, and for official crimes and major violent crimes, they should be heard in court. However, restricted by many factors, it is difficult to hear in court, the number of court cases is small, the court trial is a mere formality, and most cases are still heard in writing. In view of this, the Supreme Law issued the Provisions on the Trial Procedure of Commutation and Parole Cases in 2014, which specifies the trial procedure, including all links before, during and after the trial, and clarifies the basic requirements of relevant participants in the trial. It provides guidance for the trial of commutation and parole cases, and also lays the necessary system and practical foundation for the promotion of this substantive trial.

With the rapid development of Internet+5G technology, online trial modes such as Internet Court, Smart Court and Cloud Court emerge as the times require. According to Article 8 of the Provisions of the Supreme People's Court on the Trial Procedure of Commutation and Parole Cases, the hearing shall be conducted in the place where the punishment is executed or the place determined by the people's court, and the people's court may conduct the hearing by video if conditions permit. At present, online trial becomes more convenient and fast. Offline court trials need to consume more resources and increase the workload, especially under the constraints of the current normalized epidemic prevention and control policy, court trials face many obstacles, and offline court sessions are difficult. Online court trials have become a priority, for example, Shenzhen Intermediate People's Court recently "sounded the first hammer of substantive trial of commutation and parole cases", that is, 8 cases of commutation and 2 cases of parole were heard online according to the requirements of the Opinions.

2.3.2. Batch Trial of Cases and Mechanization of Trial Mode

At present, the cases of commutation and parole are reported regularly in batches and tried intensively. After a prisoner submits an application, the prison

shall make a public announcement according to the principle of “one assessment, three trials and one publicity”. The procedure shall be handled first. The reported cases usually meet the conditions, have strong guidance for the court trial, and the court trial results can be predicted. The prison departments transferred the cases in batches and the people’s courts tried them in batches. Because the undertakers were tired of coping with the cases, the trials were reduced to the administrative approval of “full receipt according to documents”.

Through the trial which was requested by Shenzhou Prison of Hebei Province. It shows that the current court trial investigation mode is mechanical and formal, and the interrogation of criminals is not targeted. The presiding judge only formally asked the criminal to make a brief statement about his original crime and his reform after serving his sentence. The court lacked in-depth investigation on the source of materials, scoring assessment and other specific facts; The role of witnesses in the court investigation is limited. Whether they are police officers or prisoners in prison, they all cooperate with the court to complete the investigation by reading the relevant content prepared in advance. The opinions of the procurators in court on the corresponding evidence materials are highly attached with little objection. The materials submitted by the prison department, in addition to the scoring assessment materials for prisoners’ reform, also have specific time for requesting commutation of sentence, which is highly oriented to the trial. In the case of batch trial, it is difficult for the court to have time and energy to investigate one by one, and it is also difficult for the court to make a decision that is inconsistent with the time when the prison requests commutation. The court trial is only the assembly line work that must be completed according to the law.

2.4. The “Structural” Predicament Faced by Commutation and Parole in China

The “trinity” linear model has both advantages and disadvantages. On the one hand, it will help to hear all kinds of submitted cases efficiently and quickly, save judicial resources and reduce the burden of handling cases. On the other hand, the power of execution dominates the judicial power, leading to the status of the court trial being null and void. The court trial has lost its proper function of truth checking to prevent false scoring and assessment, and lacks the power to regulate prison corruption. The handling of commutation and parole cases is faced with a “structural” dilemma. The so-called “structural dilemma” refers to that although the handling of commutation and parole cases has the form of court trial, it is difficult to form the tripartite structure of prosecution, defense and trial that should be possessed by the court trial due to the particularity of the status of litigation participants, and the lack of confrontation leads to the nullification of the court trial. The function of the court trial is not played well, the protection of the rights of criminals is insufficient, and the corruption behind the prevention and regulation of commutation and parole cases is weak.

2.4.1. Inconsistent Effect of Prison Reform

The purpose of commutation and parole is to educate and correct criminals, promote them to repent and change their ways, which is related to legal and social effects. The phenomenon of some commutation and parole personnel committing crimes after being released from prison is obvious. The preferential treatment given to criminals by commutation and parole was once called the evil act of “letting the tiger go home”. Although the reasons for recidivism are complex, it should not be entirely attributed to the failure of prison reform. However, it is difficult to verify the repentance of criminals and the score assessment results. The phenomenon of “false repentance” is frequent, and the phenomenon of “only giving points” to obtain commutation or parole is serious. The identification standard for the reform of criminals really needs to be improved. The purpose of prison’s reform of prisoners is to make them confess their sins and return to society as soon as possible. However, the solidified reform mode in the prison promotes the prisoners to get used to and rely on the life of the prison. This institutionalized living state directly impairs their ability to return and adapt to society. Therefore, “after a prisoner has served his sentence in prison, he should not return to society without being monitored and tested. It is careless and cruel to make him suddenly turn from a state of bondage under supervision and imprisonment to an unlimited state of freedom and fall into an isolated state of personal desire and demand” (Bentham, 2004: pp. 204-205).

2.4.2. Repeated Judicial Corruption

In practice, some prison departments artificially manipulate the objects of commutation and parole in order to realize the proportion of commutation and parole. There is a widespread phenomenon in prisons that posts determine scores, which varies from post to post, so that even if criminals actively participate in the same time of labor, their scores may be different, and the technical content involved in labor and the criminals’ own labor capacity are different, so their scores may be different. Behind it is the artificial arbitrariness of post arrangement, which provides some special groups with power rent-seeking space. For example, the case of duty crimes committed by the Jiucheng Prison Administration Branch in Anhui Province in 2013. 11 prison policemen helped nearly 100 criminals by changed jobs, selected labor activists, commuted sentences and applied for parole, and illegally obtained personal interests from them. In addition, there are many prison corruption cases (Chen, 2007: p. 2). According to the annual work report of the SPC and SPP, the illegal and corrupt situation of commutation and parole cases has always existed.

2.4.3. Weakness Legal Supervision

Based on the need of power supervision and balance, our country has adopted the “basic working principle of division of labor and responsibility, mutual cooperation and mutual restriction” to restrict and balance the power of various functional departments. However, various implementation corruption problems

have not been effectively eradicated. The existence of various corruption problems is closely related to the ineffective supervision of prison law enforcement and the failure of power balance. The key link is that some supervisors use the right to bring commutation and parole to take bribes, bend the law, practice favoritism, and rely on prison to serve prison. The current supervision mechanism fails to prevent the exchange of human relations, the exchange of money and rights, the transfer of interests, and the phenomenon of profiteering at the expense of the public.

2.4.4. The Execution Procedure with the Pipa Half Hidden

Judicial openness and transparency is an important indicator to measure the fairness of judicial activities, so as to maintain the smooth operation of the judicial system and the fairness of the process and results of judicial activities. This is the source of people's sense of dependence on the national legal system and judicial credibility (Fan, 2003: p. 424). However, the execution procedure in China has been plagued by the lack of transparency of the procedure. Without openness, there is no justice. Darkness is the breeding ground for corruption and injustice, and sunshine is the best preservative (Berman, 1990: p. 48). To improve the transparency of case handling procedures, The Supreme Law has put forward the principle of "all five are open" for cases of commutation, parole and temporary execution outside prison. "To curb judicial arbitrariness and judicial corruption, enhance the acceptability of procedures and case handling results, and strengthen the authority of the system" (Chen, 2005: p. 194). At the same time, before the prison is submitted to the people's court for trial, it needs to be filtered through the procedure of "one evaluation, three trials and one publicity" to curb the cases of human corruption through the participation of different departments. The publicity effect of the trial procedure is based on the publicity of the information related to the pre-trial execution procedure. However, in view of the confidentiality of the relevant specific materials and the closeness of its internal management, the situation inside the high wall is unknown to the outside, and it is difficult to verify whether the relevant materials can truthfully prove the criminals' imprisonment and reform.

2.4.5. Severely Unbalanced Application Ratio of Commutation and Parole

The practice of commutation of sentence, supplemented by parole, makes the application rate of parole extremely low in practice. Taking the data from the judicial statistics bulletin of the national courts in 2016 as an example, cases of parole were accepted, accounting for only 3.5% of the cases of commutation. Some scholars call this phenomenon of serious imbalance between the ratio of commutation cases and parole cases as "the inverse ratio of gold medal to silver medal" in criminal rewards for criminals, that is, the inverse ratio of commutation (gold medal) to parole (silver medal) (Li & Liao, 2012: p. 13). This is closely related to the unscientific application conditions of commutation and parole in China's legislation.

3. “Substantive Trial” of Commutation and Parole Cases and Legal Supervision of Procuratorial Organs

The “trinity” linear model is faced with structural difficulties, which makes it impossible to play its due function and value, and substantive trial arises at the historic moment. “Substantive trial” is easily confused with “Substantiation of court trial”. The substantiation of court trial is intended to promote the court trial to play a decisive role in fact finding, evidence identification, litigation right protection and fair adjudication, so as to avoid the court trial being suspended by activities “before the court trial” and “outside the court trial”, resulting in the court trial becoming a mere formality (Chen et al., 2015: pp. 101-116). The essence of excluding out of court factors is not consistent with the provisions of the Opinions, and substantive trial is not synonymous with “Substantiation of court trial”.

3.1. Connotation of Substantive Trial of Commutation and Parole Cases

One of the differences between commutation and parole and the first and second trials is that it is not a trial of criminal responsibility and punishment for conviction and sentencing, and the court trial has its particularity. The basic principles involved in substantive trial do not include the separation of charges and trial and the equality of charges and defense, and the attention to factors inside and outside the court is also different from the Substantiation of court trial which exclusive the interference outside the court. Substantive trial is not a synonymous substitute for the substantiation of court trial, and their connotations are different.

3.1.1. Basic Principles of Substantive Trial

Principles are the guidance of action. The basic requirements stipulated in Part I of the Opinions are actually the basic principles that should be followed in court trials.

1) Comprehensive review principle

Whether a criminal meets the conditions for commutation and parole requires a comprehensive review of the nature of the crime and its specific circumstances, the extent of social harm, the original sentence and the performance of the property sentence in the effective judgment; It is necessary not only to review the written materials related to the assessment scoring, but also to review the basis of the relevant assessment, and to comprehensively identify its transformation through court investigation. “No fact can prove its authenticity by itself, and its authenticity and reliability can be verified only by comparing it with other relevant facts” (Chen, 2007: p. 34). For parole cases, it is also necessary to consider the factors that affect the recidivism, such as the offender’s physical condition, age, personality, economic source after parole, and regulatory conditions. If the review is not comprehensive, it will be difficult to effectively penetrate the paper materials to deeply touch the prisoners’ prison reform, and even

more difficult to identify the violations behind them. Through a comprehensive review, we will conduct an in-depth investigation into the substantive effect of the reform of criminals' serving sentences, and avoid the paper-based phenomenon of "only dividing the sentence into two parts".

2) Principle of unity of subjectivity and objectivity

The reform of prisoners in prison includes ideological reform and labor reform. The ideological reform is divided into pleading guilty and obeying the law, earnestly learning the law, obeying discipline, and actively participating in the "three lessons" study; in this way, criminals' sincere repentance will be assessed, and their reform through labor will be tested. Reform through labor includes actively participating in labor and striving to complete labor tasks, paying attention to labor quality, and abiding by labor discipline and prison rules. When reviewing the reform of criminals, the court trial should not only pay attention to their objective reform through labor, but also pay more attention to their subjective reform, and adhere to the principle of subjective and objective consistency.

3) Principle of legal certification standard

Substantive trial will promote the transformation of "submitted materials" into "evidence materials" and change the way of court review. The proposition of the legal standard of proof will pay more attention to the binding role of the rules of procedure and evidence. Only when the relevant evidence fully proves that the prisoners are actively reformed based on sincere repentance, they can be sentenced to commutation or parole. The standard of proof is closely related to the procedure of proof, and strict standard of proof often needs strict litigation procedure to guarantee (Xiong, 2019: p. 92). Therefore, the people's court should strictly follow and implement the norms of adducing and cross examining evidence. Only adhere to the legal standard of proof, attach importance to the comprehensiveness of the court investigation, and try to avoid the distortion of the court investigation caused by cognitive deviation, which leads to wrong judgment. This will also promote the prison to standardize the production, preservation and submission procedures of materials, strengthen the internal logic of the assessment materials, and reflect the preciseness of the evidence chain and the overall probative force.

4) Principle of differential treatment

Due to different prison inmates, there are differences in the nature of their crimes, the circumstances of specific cases, and individual circumstances. Therefore, when hearing the commutation or parole of relevant personnel, specific problems need to be analyzed. Such as negligent crimes and violent crimes, the principal of joint crimes and the accomplices and coerced accomplices of other joint crimes, although the sentences may be similar, there are differences in subjective malignancy. The application of commutation and parole should take this related factor into consideration. For example, the treatment of commutation or parole of juvenile offenders should be different based on the policy of "education, probation and rescue"; The treatment of the elderly, disabled, sick

and female prisoners needs to follow the same principle. The range, starting time and interval of commutation should be different according to the specific circumstances.

3.1.2. Handling Procedural Mechanism, Supervision and Guidance and Work Guarantee Requirements for Substantive Trial

From the point of view of Article 1 “Basic Requirements” of the Opinions, it is still impossible to distinguish the difference between substantive trial and Substantiation of court trial. However, the differences between the two can be further distinguished from the contents of Article 3 “handling procedure mechanism” and Article 4 “supervision, guidance and work guarantee” of the Opinions. From the perspective of the provisions of the Opinions on substantive trial procedure mechanism, it covers both internal and external factors. It not only emphasizes the effective operation of the court trial function in court, and require the presence of the procuratorate and the sound presence of witnesses in court as condition. It also emphasized the effective exercise of out of court investigation and verification power and the strengthening of the function of trial organization. The cases which are significant, difficult and complex need to be submitted to the judicial committee for discussion. Difficult issues concerning the application of law and other major policy issues need to be reported to the higher authorities in a timely manner. This concern for out of court factors is different from the required by the substantiation of court trial, that is, evidence adduction and cross examination in the court, case truth finding in the court, prosecution and defense opinions issued in the court, and judgment reasons formed in the court, so as to eliminate the influence of out of court cases and “ensure that the court trial plays a decisive role in ascertaining the facts, identifying evidence, protecting the right of action, and making fair judgments” (Zhang, 2015: p. 863).

3.2. Legal Supervision of Procuratorial Organ in Substantive Trial

The formalization of supervision and marginalization of the procuratorial role of the procuratorial organ in the execution procedure are closely related to the function orientation of the procuratorial organ in the execution procedure, and the misreading of its function directly limits the effective exercise of the procuratorial power.

3.2.1. The Connotation of Procuratorial Organ’s Legal Supervision Duty in Commutation and Parole

As a legal supervision organ, the procuratorial organ has a unified legal supervision responsibility and procuratorial power. The exercise of the specific powers and functions of the procuratorial power lies in the implementation of the legal supervision responsibility. Its legal supervision in the execution procedure should not be limited to litigation supervision. “In the criminal procedure, the procuratorial organ is both the subject of supervision and the public prosecutor, and it has a clear litigation status. The exercise of supervision power can rely on the status of the public prosecutor. However, the procuratorial organ is only a

supervision organ in the execution procedure, which leads to the exercise of supervision power into embarrassment” (Mao et al., 2017: p. 223). As the owner of the procuratorial power, the procuratorial authority includes the power of investigation, the power of case filing supervision, the power of decision and approval of arrest, the power of review and prosecution, the power of initiating public prosecution, the power of public prosecution in court, and the power of litigation supervision. The power of litigation supervision is only one of its powers. The procuratorial power and legal supervision in China are unified. Each power and function of the procuratorial power has the nature of legal supervision. The realization of the legal supervision function of the procuratorial organ needs to be realized through each specific procuratorial power. Legal supervision is the essence and purpose, and each specific procuratorial power is the form and body. Without specific procuratorial power, legal supervision will be in vain. (Zhu & Zhang, 2010: pp. 326-327). The procuratorial organ of our country sends its personnel to perform their duties in court, which is not simply the responsibility of litigation supervision, but the comprehensive exercise of procuratorial power.

3.2.2. Misread “Legal Supervision Responsibility” and Its Correction

At present, the legal supervision function of the procuratorial organ in the execution procedure is wrongly positioned, and its comprehensive legal supervision is simplified into a single litigation supervision. The procuratorial organ has formalized its legal supervision and marginalized its procuratorial role in the execution procedure. Substantive trial should give full play to the court trial function, and ensure the normal exertion of the rights and powers of the three parties involved in the prosecution, defense and trial. The full exertion of the procuratorial function is a necessary condition. It is necessary to adjust the past retroactive litigation supervision mode, and strengthen its public prosecution confrontation function in the court trial. The function of public prosecution is the natural orientation of the procuratorial organ, the basic function is public prosecution, and the procuratorial power is mainly manifested as the power of public prosecution in essence (Chen, 2002: p. 10). The presence of procuratorial organs in court is not only necessary for the performance of their supervisory duties, but also where the effective exercise of procuratorial power lies. Transforming the extensive procuratorial supervision into specific litigation functions, (Zeng, 2019: p. 152). Not only will it not detract from its legal supervision function, but also strengthen the power of the procuratorial organ in the execution stage.

3.2.3. The Adjustment of the Procuratorial Organ’s Legal Supervision Responsibility—Constructing the Procuratorial Power System Led by Public Prosecution

Building a procuratorial power system led by public prosecution and strengthening the public prosecution function of the procuratorial organ are the proper actions to implement substantive trials, and also an important guarantee to

achieve criminal purposes. The criminal procedure does not stop at the effective stage of the criminal judgment, and the execution of the criminal judgment is still a part of the criminal procedure (V. *Virginie Lecointe*, 2002: p. 13). The purpose of criminal activities is not a one shot decision after the sentence is passed, but the follow-up implementation needs to be investigated. It is the proper meaning of criminal procedure to combine the execution process of punishment, the reform of criminals and the prevention of social crimes, and thereby change the degree and types of punishment, so as to maximize the social benefits of punishment and reduce the cost of execution.

On the one hand, only by making the supervision function litigation functional can we follow the “general law of litigation, that is, the court trial has the basic structure of litigation. The accusers and defendants provide evidence, cross examine evidence, and express debate opinions around issues of contention, and the judges make decisions in the middle on the basis of finding out the facts of the case” (Xiong, 2021: p. 1). At present, there is no link of adducing evidence, cross examination and defense debate in the court trial. The prison will read out the commutation and parole proposal and explain the main reasons, the prosecutors will give their opinions, the people’s court will investigate the relevant facts and the criminal will make the final statement, which cannot meet the needs of substantive trial.

On the other hand, the litigation function of supervision responsibility will not lead to the limitation of the functions of relevant departments and affect their interests. Power is naturally expandable, and any measure against power restriction may face the risk of conflict. Commutation and parole is a concession to the procuratorial organ’s right to ask for punishment. The realization of the right to ask for punishment cannot be easily changed to maintain its basic position of the prosecution function. In a word, the supervision of the procuratorial organ in the process of execution is the continuation and maintenance of its prosecution function, and its public prosecution function should be returned to the trial of commutation and parole cases. “The actual role of the procuratorial organ in the trial of commutation and parole cases is similar to the trial procedure of the second instance cases. The court shall make a ruling after hearing the opinions of the prosecutor and the explanations of the parties” (Cherizov, 1955: pp. 556-557). The legal supervision responsibilities of the court and the court appearance of the second instance have not changed.

4. Reshaping the Power Structure of the Procuratorial Organ’s Legal Supervision in the Substantive Trial of Commutation and Parole Cases

Substantive trial of commutation and parole cases is intended to change “the judicial nature of commutation and parole work procedure alienation into a ‘execution centered’ work mode” (Research Group of Changzhou Municipal People’s Procuratorate of Jiangsu Province, 2019: p. 23). Establish judicial au-

thority, give play to the trial “targeting function”, and avoid the court being led by prison materials. In order to give full play to the function of court trial to verify the truth of a case, it is necessary not only to have a normal form of prosecution, defense and trial, but also to give full play to the due litigation power of all parties to the prosecution, defense and trial.

4.1. Review and Conception of Substantive Trial Mode

The effectiveness of the execution procedure of commutation and parole is related to the specific power structure, which can be divided into vertical power structure and horizontal power structure. Vertical structure refers to the distribution and separation of relevant powers in the whole litigation process; Horizontal structure refers to the division of functions of different departments in the execution procedure. Whether from the vertical structure or from the horizontal structure, the execution results affect the fulfillment of the procuratorial organ’s right to seek punishment, and it should have the responsibility of supervision and defense, but different modes of choice have different functions.

4.1.1. “Confirmatory Trial” and Commutation and Parole & “Adversarial Trial” and Commutation and Parole

Substantive trial is actually the full play of the court trial function. The “approval” and “confirmation” court trial results in the failure of the court trial function and loss of its due function. The Opinions emphasized the need to “give full play to the trial function”. The function of the trial is to “listen at the same time and be clear”. Once the voice of the trial participants is basically consistent, the trial will lose its due role in ascertaining the truth. Substantive trial should take the tripartite structure of prosecution, defense and trial as the formal element and be characterized by confrontation between prosecution and defense. However, from the perspective of the current court trial form, the starting of the trial procedure is based on the request of the prison, and its identity is similar to that of the plaintiff in civil proceedings. Although it does not deny the significance of commutation and parole for prisons, it is not the direct undertaker of the results of commutation and parole. In essence, the result of commutation and parole trial belongs to the criminal, and it belongs to the plaintiff in essence. This separation of form and substance makes the subject of procedural confrontation unclear. Some researchers think that the prisoners can be established as a third party to participate in the trial by referring to the third party system of civil litigation (Mao et al., 2017: pp. 228-230). Although it is not denied that the effective operation of criminal procedure does refer to the situation of civil procedure, after all, the operation mechanism of the two is different. At present, the proposal of the third party system has neither direct legal basis nor specific practical basis. In addition, if the procuratorial organ believes that commutation and parole are improper, it is necessary to put forward a written correction opinion within the statutory time limit, and the people’s court shall form a new collegial panel for trial after receiving the correction opinion, and make a ruling within one month.

There is no authorization of the procuratorial organ to protest the corresponding results, and pure antagonism is not the key to substantive trial.

4.1.2. The Definition and Justification of the Subject of Prosecution and Defense

The above two trial modes cannot meet the requirements of substantive trial. And the exertion of the court trial function needs to take the operation of the accusation and defense trial mode as an important element to ensure the self consistency of the procedure. The definition of the subject of prosecution and defense is the first problem in the construction of the trial mode. The trial procedure is initiated at the request of the prison and involves the concession of the procuratorial organ's right to seek punishment. Should it become the defense and constitute the opposite relationship between the prosecution and the defense? As both prisons and procuratorates are national functional departments, and their functional differences are result division of power. Therefore, it is necessary for the prison to submit relevant evidence materials and implement the witness's presence in court, which is the basis for the normal performance of its duties. Therefore, the prison does not turn itself into a defendant and has no legitimate grounds to become a defendant.

The execution of commutation and parole is similar to the appeal filed by the defendant on the grounds of excessive sentencing after the First Instance Division, both of which aim to adjust the commutation period. The difference lies in the effectiveness of the judgment and the different appellation of identity. But in fact, it is the change of personal appellation in different litigation stage. Prisoners who are held accountable for their crimes can also obtain a concession of their terms of imprisonment due to good reform performance. Throughout the proceedings, they are always the specific subject that has influence on their own rights because of their behaviors. The issue to be dealt with in the trial is still to determine the subject's guilt, and the role of the defense remains unchanged. He has the right to defend his criminal responsibility, and also has the right to propose the idea of reducing his sentence based on his good performance. In short, because of the degradation of his life danger, the prisoner should have the right to defend himself and become the defender in the trial.

4.1.3. "Quasi Adversarial Trial"—Reconstruction of Substantial Trial Mode of Commutation and Parole

The key to substantive trial is to pierce the veil of paper assessment materials, clarify the source and basis of assessment materials, and review the authenticity of corresponding scoring and rewards. We will strengthen the supervision of the prison's right to execute sentences, and prevent false scoring and assessment due to violations of laws, regulations and even corruption, such as human relations. Through the intervention of procuratorial organs and people's courts in different links, progressive quality inspection can be achieved, and the role of procedural filtering can be fully played. At a time when China's criminal adjudication procedures have undergone structural changes and become diversified (Xiong &

Yu, 2022: p. 2). It is necessary to explore the trial mode that fits the substantive trial from the perspective of the self consistency of the trial procedure.

Neither the focus is on “confrontation” nor the form of “two parties” confrontation in court trial can be separated to ensure the self consistency of the trial procedure. At present, there are obstacles for prisoners to exercise the right to request and provide evidence, which makes it difficult to effectively implement. The quasi adversarial model may be more suitable for the requirements of substantive trial. The so-called “quasi confrontation mode” refers to the extension of the criminal’s application for commutation and parole to the right to apply to the people’s court for trial. The prison department, as the facilitator, submits relevant materials to the people’s court to complete the burden of proof. The people’s procuratorate, as the prosecutor, participates in the court trial and cross examines/adduces relevant evidence. The prosecution and the defense fully debate, and the people’s court makes a decision accordingly. In addition to the particularity of the applicants and their assistance requirements, “quasi confrontation” is also different from the supervision responsibilities of the procuratorial organs. It is not only responsible for supervising and correcting illegal acts, but also responsible for safeguarding the legitimate rights and interests of criminals.

On the one hand, the model is based on existing laws and has corresponding legal basis and practical basis. Since the trial procedure is initiated at the request of the prison, and the court trial also places it in the position of “plaintiff”, the prison is actually assisting the criminal to perform his duties. It will not be contradicted by the interests damaged due to the restriction of the authority of relevant departments. Although there is room for discretion in the exercise of the prison’s power of execution, it should also be regulated and supervised by the procuratorial power. This is also the basic legal basis for establishing the quasi confrontation model.

On the other hand, it can avoid the delay of court proceedings caused by excessive attention to confrontation and reduce the efficiency of litigation. In the absence of a safeguard mechanism the present, it can also avoid the embarrassment of insufficient protection of the rights of criminals caused by the failure of relevant departments to perform their duties, such as refusing to cooperate with the submission of materials and the implementation of investigations.

4.2. Adjustment and Reconstruction of Procuratorial Power under the “Quasi Confrontation” Model

The procurator’s appearance in court is the comprehensive exercise of his public prosecution function and litigation supervision function, and because the exercise of litigation supervision function is not characterized by the implementation in court, his appearance in court “is still a broad public prosecution function” (Long, 2022: p. 417).

4.2.1. The Concrete Function of the Procuratorial Organ in Court Trial

In order to change the previous formalized court trial of “only care the score and

use score discount punishment”, it is necessary to refine the litigation function of the procuratorial organ in the court trial. In the commutation and parole proceedings, sending personnel to the court should focus on “question” inquiry rather than approval, and on confrontation rather than agreement (Chen, 2021: p. 2). The procuratorial organ should actively participate in the trial and make good preparations before the trial, including reviewing, investigating and verifying relevant evidence materials, collecting information from all aspects extensively by listening to the opinions of relevant prisoners, victims and other different objects, and fully understanding the attitude of criminals to plead guilty and the situation of returning stolen goods and compensation, so as to avoid the court trial being limited to the examination materials submitted by the prison department and the unilateral testimony of witnesses.

1) Strengthening the function of cross examination of evidence materials in court trial

Only by strengthening the work of adducing evidence and cross examining evidence in court can we effectively meet the requirements of substantiation of court trial, and it is also an important measure to comprehensively and thoroughly implement the rules of evidence adjudication and deepen the reform of the prosecution system. In 2018, the Supreme People’s Procuratorate issued the Guidelines for Public Prosecutors to Provide Evidence and Cross examine Evidence in Court to strengthen the ability of public prosecutors to provide evidence and cross examine evidence. In the substantive trial of commutation and parole cases, it is equally important to strengthen the procuratorial organ’s function of cross examination in court. Article 2 of the Provisions of the Supreme People’s Court on the Trial Procedure of Commutation and Parole Cases stipulates the scope of materials that the people’s court should review when accepting commutation and parole cases. The cross examination of the court trial is conditional on the full preparation before the court, which requires the procuratorial organ to refine the examination of evidence types, evidence sources, evidence content, property punishment performance, dangerousness of the person, etc. before the court, clarify the reward and score related to the commutation range and parole, and fully express the corresponding cross examination opinions in the court trial. Due to the particularity of such cases, the verification of relevant materials needs to be supplemented by corresponding out of court investigation activities. The procuratorial organ can inquire and verify the relevant evidence to the enforcement organ and witnesses. For serious prisoners and major meritorious deeds and other complicated cases, they have the right to apply for witnesses and experts to appear in court to cooperate in the investigation. In particular, the current decision on the appearance of witnesses is not in the procuratorial organs, but in prisons. The practice of selecting witnesses by the prison can hardly avoid the fact that the prison chooses the witnesses based on its own interests and provides them with pre court guidance, which raises doubts about the authenticity of the witness’s testimony. Witnesses shall be determined by the procuratorial organ, and be notified by the court and assisted by the prison de-

partment to appear in court.

2) Pre trial examination and strengthening the function of out of court investigation

The procuratorial organ should not only strengthen its function of cross examination, but also conduct out of court investigation on relevant evidence and present the evidence obtained to strengthen the effect of cross examination. The effect of cross examination is closely related to the pre-trial examination of the procuratorial organ and the out of court investigation and verification. The current Criminal Procedure Law stipulates that the executing organ only needs to copy the copy of the execution proposal or opinion to the People's Procuratorate, and there is no requirement to transfer relevant evidence. Article 8 of the Opinions of the Political and Law Commission of the Central Committee of the Communist Party of China on Strictly Regulating Commutation, Parole and Temporary Implementation outside Prison to Prevent Judicial Corruption, although there are provisions on the procuratorial organs to access and copy case materials. However, from the perspective of its full text, it can not be understood as the provision of pre-trial transfer and protection of the examination of the procuratorial organ. It is a supplementary relief measure for different opinions that have not been adopted.

Criminals who apply for commutation or parole have the same motive as those who appeal for excessive sentencing - to change the term of sentence, which will affect the procuratorial organ's right to seek punishment. With the realization of the procuratorial organ's right to ask for punishment, the procuratorial organ should have the duty of defense. Although the commutation and parole cases do not involve the qualitative determination of crime and non crime and are different from the second instance, the concession of sentence will lead to the change of the right of the public prosecution organ to seek punishment against the criminal's original charges. Although the basis of the concession of the sentence is different from that of the second instance, its essence is the relief and adjustment of the original sentence, so as to adapt to the growth and decline of the criminal's personal danger. It is the result of homogeneity and heterogeneity caused by differences in institutional design. Therefore, after the people's court accepts the case, the relevant file materials should be transferred to the procuratorial organ for review and participation in the trial, so as to realize the synchronization of substantive review.

3) Strengthening the function of pretrial arraignment

The pretrial arraignment is an integral part of the procuratorial organ's right to investigate out of court. However, due to the different nature of other matters between the arraignment and the out of court investigation, it is necessary to discuss them separately. Whether it is the first and second trials or the trials of commutation and parole cases, they are all factual trials in essence. The basic connotation of the fact trial certainly includes the inquiry and understanding of the relevant parties. Therefore, the pre-trial arraignment plays an important role

in the procuratorial organ's mastering the facts of the case and determining the basis, strategies and approaches of legal supervision on this basis (Shi, 2006: p. 121). The Criminal Procedure Law has made it clear that the procuratorial organ shall present a case before the trial of the first and second instance. Although the Criminal Procedure Law does not stipulate that the procuratorial organ needs to summon prisoners in the process of handling cases of commutation and parole, under the new requirements of substantive trial, in order to ensure the effectiveness of continued trial, pre-trial summoning helps the procuratorial organ to comprehensively and deeply understand the situation of criminals' imprisonment and reform. This is also an important guarantee for the procuratorial organs to give full play to their legal supervision functions. The procuratorial organ can effectively regulate the illegal acts of the investigation organ in the litigation process and can urge the investigation organ to standardize the law enforcement, that is, it has a number of supervisory powers on the investigation behavior, such as case filing supervision, approval of arrest, etc. In commutation and parole cases, it is difficult to ensure the effective operation of substantive trial if only the procuratorial organ sends personnel to court to supervise. Safeguarding the procuratorial organ's function of summoning criminals so as to listen to the opinions of criminals and their inmates in the prison, can more comprehensively understand the reform of criminals in the prison, and avoid one-sided statements in court.

4) Strengthening the Right to Suggest the Choice of the Trial Mode

The procuratorial organ will make suggestions on the procedure applicable to the case during the trial procedure. However, there are no quick judgment procedure, summary procedure and ordinary procedure in the criminal sentencing trial procedure in commutation and parole cases. The difference between the trial methods lies in the written trial, the open court trial and the online and offline trial. Article 6 of the Provisions of the Supreme People's Court on the Trial Procedure of Commutation and Parole Cases stipulates five situations that should be heard in court. The regulation was issued in 2014, and there is no substantive hearing at this time. That is to say, the substantive trial should be embodied in the full implementation of the principle of direct speech, and the court session should be adopted as the regular practice. Opening a court session and ensuring that witnesses are present in court is the most basic requirement for the substantiation of a court trial, and is also the key to the court trial's function of ascertaining the truth. In other words, only by truly fulfilling the principle of direct speech can we call it substantive trial. However, hearing in court has the disadvantages of increasing litigation costs and reducing litigation efficiency, which may lead to the failure of the operation of the procedure due to deliberate circumvention. In view of the particularity of such cases and the convenience of online court hearing, in addition to the situations that should be heard in court as stipulated above, the selection of specific trial methods for other cases should also listen to the suggestions of the procuratorial organ, so as to facilitate the

smooth organization of the court hearing and avoid the blocking of court proceedings due to the inability of witnesses to appear in court and other reasons.

4.2.2. Transformation from “Court Trial” Legality Supervision to “Pre-Trial + Court Trial” Legality Supervision in the Whole Process

The whole process of legal supervision of procuratorial organs fully reflects the nature of their legal supervision. The whole process of supervision is not only to supervise and correct illegal acts in execution, but also to safeguard the legitimate rights and interests of criminals according to law. For example, the guiding case issued by the Supreme People’s Procuratorate, the case of Wang’s commutation supervision (JJ No. 133). During the probation period, Wang carried out fire relief for the liquefied gas tank on the hot melt scribing engineering vehicle under construction. Later, due to news reports, the procuratorial organ attached importance to the case, and supervised the public security organ to review Wang’s behavior, which was determined to be a courageous act of righteousness. Because it was in line with important meritorious service, Wang received a six-month commutation of his sentence. Without the intervention of the procuratorial organ, it is difficult to promote Wang to obtain the result of commutation.

In the past judicial practice, the procuratorial organ was mainly limited to supervising the legality of the court trial process, and the supervision before the court was weak. This function was not comprehensive and lacked rigidity. The exercise of public power must be backed by coercive force (Bodenheimer, 2017: p. 378, 379). At present, China has not established the means to guarantee the power of legal supervision of procuratorial organs, leaving a power vacuum. To give full play to the leading role of procuratorial organs in legal supervision, we need to strengthen the power attribute of legal supervision and expand the scope of legal supervision (Zhang, 2019: p. 36). Although the prison has the responsibility to inform the procuratorial organ of the criminal assessment system and its work, it can also invite the People’s Procuratorate to send its staff to participate in the scoring and assessment of criminals working meeting and listen to the opinions and suggestions. However, the process is mainly participated in by the procurators stationed in the prison and led by the prison, and the procuratorial organ does not have the right to speak about the handling results. The formulation and implementation of the prison management system do not have the power of review and lack of process supervision. It is difficult to find the problems behind the law enforcement only by reviewing the written materials submitted later. It is also possible to ignore the identification of the facts conducive to the reform of criminals. The process supervision should start from the source of the executive organ management, including the filing and review of the management system, the inspection and inspection of the system implementation, the reporting and supervision of the transformation of prisoners, and the handling of the prisoners’ objections to the transformation. Among them, a standardized and scientific management system is the basis and has a guiding role in

prison management. Without a scientific and standardized management system, it is difficult to ensure the scientificity of prisoners' imprisonment and reform; the standardization of system implementation is the key, and it will be a dead letter if the scientific and standardized system cannot be effectively implemented; Reporting and objection handling are important indicators to test the implementation of the system. The process supervision of the scoring assessment is the key to ensure the fairness of the results.

4.2.3. Standardization of the Handling Procedure of Commutation and Parole Objection

The occurrence of a court hearing is that there is a dispute and the court needs to distinguish between right and wrong to determine the merits, and there is no need for a court hearing if there is no dispute objection. Paying attention to and properly handling the objections of relevant personnel will help ensure the fairness of the results. The commutation of sentence is defined as an absolute state power. Prisoners belong to the beneficiaries of favors, and there is no right to raise objections. It is not only easy to lead to the abuse of state power, but also easy for criminals to suffer from unequal treatment (Zeng, 2019: p. 153). The dissent of criminals includes the dissent that they failed to apply for commutation and parole. In particular, the difference in scoring assessment between long offenders and short offenders is different due to the difference in cycle and period, which affects their fair opportunity to apply for trial; It also includes, for example, the objection to the job arrangement and the violation and corruption behind the job arrangement. A prisoner who raises an objection shall not be regarded as not actively accepting reform and shall not be adversely treated.

Although the prison also has provisions on the handling of prisoners' objections, the handling of objections is only reviewed by the prison unilaterally. The objector does not participate and if not satisfied with the results of objection handling, and there is no remedy. The actual right of objection is nullified. The procuratorial organ shall intervene and guarantee the feedback of the objection. When the procuratorial organ believes that the reason for the objection is valid, it can be incorporated into the procuratorial opinion. If the objection is not valid, prisoner shall also be informed of the reason. Give prisoners and other groups the right to object to the irregular behavior of supervision, and establish and ensure the smooth way to exercise the right to object. Restricting power by rights makes the state power be restricted by the legal objection right of prisoners, so as to reduce the corruption phenomenon of rule of man in the process of execution.

5. Conclusion

Substantive trial is the concrete embodiment of the modernization of national governance in the modernization of criminal justice governance. It is intended to transform the previous "formal judicial power" into "substantive judicial power" to reduce the drawbacks of the execution procedure. It covers the ele-

ments of different subjects at different levels, such as system concept, function allocation and operation mode. It also requires profound institutional reform in terms of the allocation and adjustment of powers and responsibilities of relevant departments. This paper reviews the characteristics of the current system and its existing problems, clarifies its basic connotation by sorting out the basic requirements for substantive trial, thus proposing the “quasi confrontation model”, and demonstrates the reconstruction of the procuratorial authority with the main line of “public prosecution of the legal supervision function”. As a systematic project, the substantive trial of commutation and parole cases cannot be separated from the attention to the other two important participants (prisons and criminals) and the corresponding system response. The scientific power structure can be promoted from the emphasis on power elements to the emphasis on right elements, so as to better realize the checks and balances of power and the protection of rights. There is no ready Chinese experience to follow, nor can it be achieved simply by refining relevant procedural rules and relevant technologies. It is necessary to deepen the research from the theoretical level, summarize and sort out the existing experience, and innovate the case handling mode. Only then may realize the reform intention of substantive trial of commutation and parole cases.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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