

A Study of the Korean Criminal Hesitation System in the Perspective of Comparative Law

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Abstract. Early intervention of criminal law in social governance has become an irreversible trend in China, which plays a significant role in preventing and controlling social risks, but the serious collateral consequences of penalties also lead to many new social contradictions. Korea's criminal hesitation system pays attention to the ethics of rules and regulations and has a strong color of subjectivism, which can better achieve the double effect of crime prevention and human rights protection. Our country should learn from the advantages of Korea, introduce the system of criminal deferral in due course, and expand the scope of application of the criminal deferral system in order to dissolve the contradictions caused by the consequences of the penalty. At the same time, it should also adhere to the concept of "criminal integration" and promote the systematic process of misdemeanor management in China.

1. Presentation of the problem

In recent years, the positive criminal law view was introduced into our country, emphasizing that the criminal law should be more actively involved in social problems, in order to realize the preventive function of the criminal law to intervene in advance and effectively prevent and control risks ^[1]. For example, the development of the financial market itself has a tendency to profit, involved in the crowd, the social public of financial investment is not prudent will lead to the unreasonable flow of capital or even touch the crime of illegal fund-raising, coupled with the popularization and application of the Internet, artificial intelligence technology, the number of victims of financial crimes and the amount of money involved in parallel and rapid growth, which is a huge impact on the formation of the security and stability of the community ^[2]. For this reason, the Amendment (XI) to the Criminal Law raises the statutory maximum penalty for the crime of illegally absorbing public deposits from ten years' imprisonment to fifteen years' imprisonment. In addition to this, the Criminal Law Amendment (XI) also added 18 new offenses, expanded the scope of criminal punishment, and at the same time lowered the age of criminal responsibility. We must admit that the position of adhering to the positive view of criminal law in the context of risk society has a very positive effect on the prevention and control of social risks, strengthening the governance of crimes against public legal interests and the protection of social order ^[3]. However, we also need to pay attention to is that in our country, the severity of criminal punishment is not only reflected in the penalty structure of mainly free punishment, but also lies in the seriousness of the consequences attached to the

punishment, the stigma of criminals may be accompanied by a lifelong. For example, although the penalty for the crime of dangerous driving is not heavy, once the penalty is imposed, the offender will almost be put on a "blacklist", as stipulated in article 39 of our Labour Law, which provides that if a worker is held criminally liable according to the law, the employer may terminate the employment contract. Not only that, but the family of the offender will also be implicated by the criminal penalty. The Dongguan Municipal Compulsory Education Program for Children of New Guans under the Integration System stipulates that "100 points will be deducted if the child has received a criminal punishment in the past five years". This means that children of criminals will be seriously affected when enrolling in compulsory education. Some scholars have carried out statistics and found that the provisions on the collateral consequences of penalties stipulated in various types of normative documents in China have risen from 643 to 880 during the period from 2014 to 2018^[4]. The Prison Administration of Sichuan Province has conducted a study on the recidivism of ex-prisoners, and conducted questionnaire statistics on 5505 recidivist offenders in 10 prisons around Chengdu, and the results showed that the recidivism rate of ex-prisoners in Sichuan was 69.38%. Among them, 32.41% reoffend because of "difficult to be accepted by neighbors". 84.9% reoffend because of "difficult to be accepted by neighbors". And 84.9% of the re-offenders "did not pay social insurance". Some insured criminals, due to serving their sentences, have had their social insurance, medical insurance, and occupational and practice licenses interrupted, making re-employment difficult; 34.33% of them were "discriminated against when looking for a job" after their return to the country,

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and most businesses require a clean criminal record or a letter of no criminal record.^[5] This kind of discrimination is not only a problem, but also a problem for criminals who have been convicted of a crime. The result of this kind of restriction is not conducive to the effective rehabilitation of offenders, not to mention the better reintegration into the society.^[6]

For the above problems, a considerable number of scholars have called for the activation of China's crime system, as a response to the growth of the criminal population. However, unfortunately, the current criminal path in China is characterized by the mismatch between the causes of crime stipulated in the substantive law and the ways of crime stipulated in the procedural law, the insufficient typology of the causes of crime stipulated in the substantive law, and the single way of crime stipulated in the procedural law, etc.^[7], which results in the failure of China's criminal system to achieve the desired effect. In addition to the establishment of Korean criminal law, such as deferred prosecution, the elimination of previous convictions and other traditional ways to get out of the crime, but also around the penal system itself to build a more complete criminal hesitation system, compared with China's criminal hesitation system, which is more flexible penal power to eliminate the consequences of the crime attached to it. The use of penal power can not be absolute rigidity, but should abide by the human nature of criminal law and moderate tolerance^[8]. In this regard, we need to examine, compare and learn from the Korean criminal hesitation system, and try to improve our criminal hesitation system on the basis of respecting the basic conditions of our country as a new path to eliminate the social contradictions brought about by the concept of positive criminal law.

2. Examination of the Korean Criminal Hesitation System

According to the current Korean Penal Code, the Korean criminal hesitation system consists of four parts, namely, the criminal law suspension system, the sentence suspension system, the felony parole system, and the sentence reduction system.

2.1 Suspension of sentence

Suspension of sentence means that in cases where the defendant is sentenced to less than one year of imprisonment or a term of imprisonment, suspension of qualification[®] or a fine, the sentence may be suspended if there are mitigating circumstances and the defendant has shown significant repentance in applying the sentencing circumstances of Article 51 of the Korean Penal Code. There are three conditions for the application of the system of suspension of sentence: first, the defendant has committed a crime and has been sentenced to a lesser sentence of imprisonment, disqualification or fine, i.e., the defendant has been sentenced to less than one year of imprisonment, disqualification, or a fine. Second, according to Article 51 to consider the offender's age, character, intelligence and environment; relationship with

the victim; the motive, means and results of the crime and post-crime circumstances, the defendant has extenuating circumstances^[9] and will be repentant performance is significant. Thirdly, the prohibitive condition is that the defendant does not have a prior criminal conviction in which he or she has been sentenced to suspension of qualification or a heavier penalty. It is worth mentioning that according to Article 59, paragraph 2 of the Korean Penal Code, even in the case of multiple offenses, all or part of the sentence can be suspended.

This suspension of sentence is also not an absolute effect. Article 60 of the Korean Penal Code stipulates that a stay of sentence is effective for two years, and a person is deemed to have been exempted from prosecution after two years have elapsed since the date of the stay of sentence. Of course, if, during the period of suspension, the person whose sentence has been suspended is sentenced to another judgment that imposes a sentence of disqualification or more, or if it is found that he or she has a prior criminal record that imposes a sentence of disqualification or more, the sentence that has been suspended shall be pronounced. A suspended sentence may be pronounced on a person who has been placed under protection observation pursuant to Article 59-2 of the Korean Penal Code if the person violates the matters to be observed during the period of protection observation and the degree of violation is serious.

2.2 Suspension of Execution of Sentence

Suspension of execution of a sentence means that the execution of a sentence of imprisonment for a term of less than 3 years, a term of imprisonment, or a fine of less than 5 million yen[®] may be suspended for a period of 1 year to less than 5 years if there are extenuating circumstances in consideration of the offender's age, conduct, intelligence, and environment, relationship with the victim, the motivation, means, and results of the crime, and the circumstances of the crime as stated in Article 51 of this Law.

Although the words "suspend" are used in both the provisional pronouncement of a sentence and the suspension of the execution of a sentence, they are fundamentally different. First of all, the two can not be applied at the same time. Suspension of the sentence is not yet pronounced on the defendant, the defendant does not know the criminal behavior of the penalty, while the defendant is suspended execution is to be pronounced on the sentence, the penalty they face belongs to the state of knowledge. Second, the two apply different levels of penalties. A suspended declaration of sentence is used only for imprisonment of less than one year, a term of imprisonment, suspension of eligibility, and a fine, whereas a suspended execution of sentence limits the applicable degree of penalty to imprisonment of less than five years, a term of imprisonment, and a fine of less than five million yuan. Finally, the conditions for expiration differ between the two. As mentioned earlier, the suspended sentence shall be pronounced if the person whose sentence has been suspended has been sentenced to another judgment that imposes a penalty above the

disqualification level or if the person is found to have a prior conviction for a crime that imposes a penalty above the disqualification level. A suspended sentence may be pronounced if a person who has been placed under protective observation pursuant to Article 59-2 of the Korean Penal Code violates the matters to be observed during the period of protective observation and the degree of the violation is serious; and if a person who has been placed under suspension of sentence has been sentenced to imprisonment for a term of more than a year for committing an intentional crime during the period of suspension, and the sentence is finalized, the suspension of the sentence becomes effective.

In addition to this, the system of suspension of sentence has additional elements of revocation. This is mainly reflected in Korea's new law No. 5057 of December 29, 1995, which stipulates that the suspension shall be revoked if the sentence to which it applies was imposed on a defendant who committed a crime within three years after the execution of the final sentence of imprisonment for a term of imprisonment or a heavier sentence was completed or waived; or if the defendant violated an order to observe, engage in community service, participate in lectures, etc., that he/she was ordered to perform during the period of suspension of the sentence. The suspension may be revoked if the violation is serious.

2.3 Parole for felonies

Articles 72-76 of the Korean Penal Code provide for parole for felonies. The elements include: 1. the offender has been sentenced to a term of imprisonment or a term of confinement and the sentence is to be carried out; 2. the offender is of good behavior and has shown significant remorse; 3. the offender has served 20 years of a life sentence or more than one-third of a term of imprisonment; and 4. the offender has paid the full amount of the fine or the amount of the punishment⁴.

Parole also has a protection period. According to the current Korean Penal Code, the period of protection for a suspended sentence is 1 year, the period of protection for a suspended sentence is the period of suspension or the judge's discretion during the period of suspension, and the period of protection for parole is set at 10 years; however, the setting of protection observation is not absolute, and it can be dispensed with if the administrative agency that granted the parole deems that it is not necessary. The time limit of the protection period is the same as that of the parole period. If the offender is sentenced to imprisonment or more during the parole period and the sentence is determined, the parole lapses; if the driven person violates the provisions of the parole supervision or the matters to be observed under the protection observation, and if the degree of violation is serious, the parole may be revoked. It should be noted that the Korean Penal Code provides a negative element for the lapse of parole, i.e., if the offender is sentenced for a crime of negligence during the parole period, the parole is still valid. The revocation of parole, however, is not specified in terms of the consequences arising from an intentional

or negligent crime. However, according to the method of interpretation of citing the weight to make clear the light, the statute of a certain matter will be pushed and other similar matters for interpretation and application ^[10], it should also be considered that the intentional crime will lead to the revocation of parole, because of the negligent crime, the negligent violation of the provisions of the supervision of parole or negligent violation of the protection of the observation of observance of the matters to be complied with, the parole shall not be revoked.

2.4 Reduction of sentence

Korea's sentence commutation system is stipulated in the Korean Pardon Act, a separate criminal law, and together with pardons and reinstatement of rights, it constitutes Korea's criminal pardon system. Korea's sentence reduction system is divided into general and special reduction, with general reduction meaning that the sentence is changed if there is no special provision, and special reduction meaning that the sentence is reduced, while the sentence can be changed if there are mitigating circumstances for the offender.

The application of mitigation is harsher than suspension of sentence, suspension of execution or parole for felonies. The main manifestations are:

In terms of the initiation of sentence reduction procedures, there are two types of applications for sentence reduction and recommendations for sentence reduction. The former requires the Prosecutor General, on his or her own initiative or on the basis of a report from a prosecutor of the Prosecutor's Office supervising the execution of a sentence or a report from the head of the correctional institution in which the offender is detained, to request the Minister of Justice to reduce the sentence of a specific person; the latter requires a prosecutor of the Prosecutor's Office supervising the execution of a sentence or the head of the correctional institution in which the offender is detained who intends to reduce the sentence of a specific person to submit a report with a specific explanation of the reasons for the recommendation to the Prosecutor General. A report specifying the reasons for the recommendation shall be submitted to the Prosecutor General, accompanied by the relevant statutory instruments.

With regard to the substantive discretion of commutation of sentence, it is necessary for the Minister of Justice to request the President on the received request for application for commutation of sentence or recommendation for commutation of sentence, and the commutation of sentence for a specific person shall be made by the President in the form of a presidential decree. In addition to the request to the President, the Minister of Justice is also required to request a review by the Pardon Board at the same time.

3. The Korean criminal hesitation system evaluation

The emergence and development of Korean law, had a long time by the influence of foreign law ^[11], in particular,

a long time by the influence of Chinese Confucianism, emphasizing the moral basis of criminal law, to the modern era, in the continental law thought, especially the dominance of German thought in the case of Confucianism ethical morality has been denied, but the current Korean criminal law still retains the traditional rule of law thought and the color of the ethics of the rules and regulations. For example, in Article 250 of the Korean Penal Code, there are two paragraphs for the crime of homicide, the first of which reads, "Anyone who kills a person shall be punished by death, life imprisonment, or imprisonment for a term of more than five years", and the second of which reads, "Anyone who kills his or her own or his or her spouse's immediate family member shall be punished by death, life imprisonment, or imprisonment for a term of more than seven years". " As can be seen, the pursuit of the current Korean criminal law to play the role of the last barrier in maintaining social order and family order is obvious and sincere. The same is true for the criminal hesitation system. For example, Korea's current criminal law in the sentence suspension system, is considered to be "typical of the subjectivist criminal law thought as the theoretical basis" [12], subjectivism to the subjective danger of the perpetrator as the standard of conviction and punishment, externalized into the perpetrator repeatedly commit criminal acts of the danger of the performance of illegal acts [13]. Sentence suspended declaration system will be the offender's age, conduct, intelligence and environment; relationship with the victim; the motive, means and results of the crime, as well as the circumstances of the crime as the content of the investigation to determine the objective danger of the offender, the offender no longer pronounce a sentence for eligible offenders, to achieve the essence of the "elimination of the previous conviction", to a certain extent, can dissolve the penalty attached to the sentence. To a certain extent, this can eliminate the collateral consequences of punishment and play a special preventive role in criminal law. For example, in order to reduce the recidivism rate of juvenile delinquents and to help them spontaneously recognize their mistakes and return to society as soon as possible, the Korean Criminal Law introduced the protection observation system. According to the Korean Protection Observation Act, protection observation is a form of punishment in which the juvenile is not detained and is allowed to live normally in his/her community, but at the same time, he/she is subject to the relevant regulations and supervision by a protection observation officer. Protection observation is educational and restorative, and also has a mild punitive component, such as making up for the juvenile's misdeeds through a certain form of labor payment. [14]

However, the criminal hesitation system in the current Korean criminal law also has certain drawbacks. First, in terms of the procedural setting of the criminal hesitation system in Korea, Article 335 of the Korean Criminal Procedure Act stipulates that the suspension of punishment needs to be requested by the prosecutor to the court that has jurisdiction over the defendant's place of residence or last place of abode, and that the court needs to decide on it after asking the defendant or his or her

representative for his or her opinion. In the current system of administration of justice in Korea, prosecutors have absolute superiority as both investigative and prosecutorial departments and can counter the decision of the court with their legal supervisory power. Suspension of sentence can only be initiated by the prosecutor's office, which means that even if the judge believes that the defendant has the conditions for suspension of sentence, he or she can only act as a "bystander" due to the lack of discretion, and whether or not the prosecutor applies the conditions for suspension of sentence when the defendant has the conditions for application depends entirely on discretion, and it is not a mandatory requirement, and the prosecutor has become "the judge behind the judge" in essence. In essence, the prosecutor has become the "judge behind the judge". The initiation of sentence reduction procedures is even more complex. In Korea, the procedure for commutation of criminal sentences is set out in the Korean Pardon Act, a separate criminal law, and is a form of pardon. In ancient times, pardons were used as a tool for emperors to maintain their rule, to show benevolence, and to win the hearts of the people, with a strong color of humanism. Nowadays, the pardon system has undergone a profound metamorphosis of the nature of jurisprudence, the maintenance of the overall interests of society and the realization of special preventive purposes as the fundamental follow. [15] Although the issuance of pardons by the head of state is one of the common practices in today's countries, it is clearly inappropriate for the president to issue orders for the commutation of criminal sentences in Korea, with the involvement of a number of state-level institutions in the foreground. There are three reasons for this: first, because the degree of clemency of commutation is lower than that of sentence suspension and sentence suspension, and the complexity of the procedure of the system with a lower degree of clemency than that of a higher degree of clemency is not conducive to the maintenance of the unity of the law and order; second, in the procedure of commutation of sentence, it is necessary to involve the Minister of Justice and the Prosecutor General, and ultimately the President to issue the Presidential Decree, but in fact, the top officials of the relevant national administration and the Head of State need to deal with a lot of affairs, and high-ranking officials are in charge of the President's decree. However, the fact that the top officials of the relevant administrative departments and the Head of State have to deal with a wide range of matters, the control of high-level officials over procedural decisions will inevitably lead to inefficiency. Third, Korea is a country with a separation of powers between the legislature, the judiciary and the executive, and although the Korean prosecutors undertake legal functions such as investigation and public prosecution, they are of the same nature as the Ministry of Justice and belong to the sequence of administrative organs as they are subordinate to the Ministry of Justice. The fact that the system of sentence reduction, which has judicial attributes, is entrusted to the executive branch gives rise to the suspicion of executive interference in the judiciary.

4.The significance of Korea's criminal hesitation system for our country

From the level of criminal substantive law, the criminal hesitation system in China includes probation, sentence reduction, parole, and pardon. Some scholars believe that, in the process of China's rule of law, especially in the context of the criminal policy of leniency and severity, the criminal hesitation system adhering to the concept of decriminalization, non-incarceration is undoubtedly the modern society of criminal reform a "good medicine."^[16] However, in recent years, China's criminal legislation has gradually introduced the positive criminal law concept, which makes the criminal legislation and criminal justice in the participation of social governance further ahead. Although through the establishment of misdemeanor, thus making the criminal law of the punishment range greatly expanded, the punishment boundary gradually front, so as to deal with the current increasing social risk does have a certain legitimacy and necessity. The emergence of a large number of misdemeanor criminal cases exacerbated the strain on judicial resources, the expansion of the criminal population also brings many factors of social instability^[17]. Therefore, it is necessary for us to further reflect on our criminal hesitation system.

4.1 Timely introduction of the criminal hesitation system

Combing through the existing criminal hesitation system in China's substantive law, whether it is the probation system or the sentence reduction system, or the parole or pardon system, we can't help but find that there exists a commonality, that is, it needs to be applied only after the defendant has been declared guilty. In practice, however, not all criminal cases, especially misdemeanor cases, all have to enter the criminal justice process and make a guilty verdict^[18]. Perhaps, in China's existing criminal prosecution system, let the criminal case into the criminal justice process is more conducive to the investigation of the facts of the case, but also more in line with the work of China's judicial organs, but whether it must be made a guilty verdict is the judiciary can be discretionary, even if a guilty verdict, if you can be suspended declaration of leniency, can be effective in mitigating the rise in the criminal population of this social problem.

4.2 The appropriate expansion of the scope of application of our criminal deferral system

Some scholars have found that China's 2003-2005 period of reduction of the application rate of 25%, the application rate of parole for about 1% to 3%, the difference between the two is nearly ten times more than the current situation of judicial practice rely on the reduction of the sentence^[19]. In the author's opinion, the reason for this, in addition to the technical limitations of the legal language, the judicial practice preference, there is another important reason is that the parole system applies the prohibitive conditions are too harsh. Article 81 of China's Criminal Code provides that recidivism and

criminals sentenced to more than ten years of imprisonment or life imprisonment for intentional homicide, rape, robbery, kidnapping, fire prevention, explosions, the release of hazardous substances, or organized violent crimes shall not be released on parole. And the sentence reduction system does not have this provision, means that for this part of the offender directly exclude the application of the parole system, only to apply the sentence reduction. It is worthwhile for us to think about is that, our country parole system applies the substantive criteria for "recognized to abide by the prison rules, accept the education and reform, really repentant performance, there is no danger of reoffending", although the recidivism and the implementation of violent crimes perpetrators of the physical danger in the implementation of their criminal behavior and even accept the trial compared to other criminals higher, but it does not mean that they will be punished during the period of accepting the sentence, but this does not mean that they will be punished during the period of accepting the sentence. It does not mean that their rehabilitation effect is not good during the period of receiving the sentence. It is not feasible to fully adopt the Korean parole model in our country at present, but we can try to make moderate adjustments to the prohibitive conditions, such as retaining the basis of the substantive conditions for the application of parole, and setting the requirement of a longer period of time to be served for recidivism and offenders sentenced to more than ten years' imprisonment for violent crimes than for ordinary offenders, in order to incentivize offenders to accept rehabilitation better.

5. Conclusion

Misdemeanor legislation in the context of the risk society has its rationality, but the serious consequences of penalty attachment lead to the deviation between the actual and the deserved of criminal governance, and we must reflect on our criminal hesitation system with objectivism as the standard. In terms of comparative law, Korea's criminal hesitation system, which is based on the standard of subjectivism, deserves to be recognized for its full respect for social ethics, but its complicated institutional procedures have also become an obstacle to its effectiveness. China has an incomparably deep legal culture, as early as the early Northern Song Dynasty, there is a more complete record of the idea of prudent punishment of the "persuasion of prudent punishment of the text" and "prudent punishment of the aphorism". To this day, fewer arrests, more cautious prosecution, and more cautious detention have been formalized as a criminal policy, and the policy of leniency and severity is also deeply practiced in the process of China's rule of law reform. In the face of the new situation of criminal governance in China, we should draw on the strengths of different countries to improve our criminal hesitation system. Finally, it should be noted that, in addition to the participation of substantive law in criminal governance, procedural law is also essential, criminal hesitation system needs to be criminal justice procedures on the ground. Entering the era of misdemeanor, it should be

based on the integration of criminal, rationalize the coordination and articulation between the criminal law and other criminal laws such as the criminal procedure law [20], and realize the systematic governance to cope with the dilemma of misdemeanor legislation.

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Appendix

(Note: ① Korea's local literature expressed "한국형사집행유예제도", directly translated as "Korea's criminal probation system". However, in order to avoid conflict of understanding with China's criminal probation system, taking into account the word practice in the academic community, so this paper is translated as "Korea's criminal hesitation system".

② According to Article 43 of the Korean Penal Code, the cessation of qualification sentence means: "A person who has been sentenced to death, life imprisonment or life imprisonment shall be deprived of the following qualifications: (1) the qualification to become a public servant; (2) the right to vote and the right to stand for election in public law; (3) the qualification to engage in the business of the public law which shall have the necessary conditions as prescribed by law; (4) the qualification to become the director of the juridical person, supervisor, general manager or inspector in relation to the affairs of the juridical person, (4) Qualification to be a director, supervisor, general manager, or inspector or property administrator of a juridical person in connection with the affairs of the juridical person."③The type of currency in this document refers to the basic unit of the Korean currency, the won, unless otherwise specified.④ Section material is a type of property penalty in the current Korean Penal Code. Article 47 of the Korean Penal Code stipulates that the amount of koji shall be from 2,000 won to 50,000 won or less.)

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