

The feasibility of criminal law retroactivity of Chinese convicted criminals

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Abstract: China's traditional criminal law theory holds that there is no retroactivity of convicted criminals, but with the increase of criminal legislation and the changes of the times, there has been an unfair phenomenon of 'different punishments for the same crime', which is bound to conflict with the principle of constitutional equality, and is not conducive to the implementation of the principle of legality and the protection of human rights. Therefore, a special relief system can be established to make convicted criminals have retroactivity, so as to seek a balance between maintaining the stability of judgments, legal dignity and safeguarding legal fairness and justice.

1. Introduction

The principle of "old and less severe" is applied to the retroactivity of convicted persons in China, but article 12, paragraph 2, of the Criminal Law stipulates that: "Judgements in force prior to the implementation of this Law, which have been handed down in accordance with the laws of the time, shall continue to be valid." This principle therefore does not apply to convicted persons. Convicted offenders herein include both those still serving their sentences and those who have completed their sentences but have previous convictions. With the development of the times and the continuous adjustment of China's criminal legislation, the phenomenon of "same crime and different punishment" has appeared. However, the view that the *res judicata* of the convicted offender is greater than the retroactivity is deeply rooted in the hearts of the people, so it is not conducive to the protection of human rights and the implementation of the rule of law. By consulting the data, it is found that the convicted criminals in Russia, France and Macao also have retroactivity. Therefore, inspired by this, this paper will focus on the feasibility of the criminal law retroactivity of the convicted criminals in China, in order to solve the problem of fairness, so as to protect human rights, maintain the fairness and justice of the law and promote the progress of the rule of law in China.

2. The adverse effects of non-retroactivity of convicted offenders

2.1. Theoretical interpretation

There are three views on the retroactivity of convicted offenders in academic circles. The first is

the positive view, that is, the res judicata of convicted offenders is greater than the retroactivity, which is adopted by our country. The second is the negative view, that is, the res judicata of convicted offenders is less than the retroactivity, and the convicted offenders have the retroactivity at this time. The third is the eclectic view, that is, if the revised new law considers that the previous conviction is not guilty at this time, it can be traced back. If only weakening the penalty, that is, only reducing the penalty, it cannot be traced back. For the eclectic view, the scope of its application is too narrow to truly effectively protect human rights and safeguard the fairness and justice of the law.

2.2. "Different punishment for the same crime " unfair phenomenon

With the development of society and the progress of the times, some crimes that do not conform to the status quo will be modified or deleted, but this will lead to an injustice, that is, some crimes that have been convicted and sentenced before the revision of the law will be reduced or even no longer constitute a crime after the revision of the law, ' It is obviously unfair that a person is still being punished for the act and bearing legal consequences when anyone else can commit an act without punishment. '[1] This is extremely unfair to the criminals before the amendment of the law, and the same behavior of the two criminals has brought different results. For example, the crime of hooliganism in the 79 Criminal Law has a penalty as high as death penalty, while the crime of picking quarrels and provoking troubles in the 97 Criminal Law as an alternative to the crime of hooliganism has a maximum sentence of no more than 10 years.

2.3. The purpose of crime prevention cannot be achieved

The main purpose of punishment is to prevent offenders from committing crimes again, and the phenomenon of "different punishments for the same crime" will make this goal impossible to achieve. The convicted criminal who has been abolished but is still serving his sentence is no longer a crime according to the new law, and even if the convicted criminal commits the same act again, there is no possibility of recidivism. Therefore, there is no need for special prevention and no need for further punishment.[2] Secondly, for the criminals, they have implemented the same behavior and have similar criminal circumstances, but they bear different penalties because of the amendment of the criminal law. It is inevitable that the criminals before the amendment of the law are dissatisfied or even resentful, which is easy to retaliate against the society and the country. At this time, it is not only impossible to achieve the purpose of preventing crime by penalty, but also will have a negative impact.

3. Decided criminals have the value of retroactivity

3.1. Justice value

The retroactivity of criminal law and the system of criminal res judicata are the products of the balance of interests. The purpose of the two is not only justice but also order and more emphasis on the latter.[3] However, the realization of the value of order should not be at the expense of the value of justice. Justice is the criterion of law, but also the soul and life of law. As the legal proverb says, ' When the reason for the existence of law ceases to exist, the law also ceases to exist. 'In addition to stability and predictability, the authority of law lies in justice.[4] Therefore, justice must not be ignored while maintaining order. Justice is the primary value of the social system. Some laws and institutions, no matter how efficient they are, must be reformed or abolished as long as they are unjust.[5]

3.2. Value of protecting human rights

Human rights are the most important and basic core of natural rights. Without human rights as the basis, there can be no freedom, equality, democracy, constitutionalism and fraternity. In today's era, with the rapid development of the globalization of human social civilization, human rights have become the primary consideration for every country and the whole international community to deal with political, economic, legal and other matters. [6] Human rights guarantees are emphasized in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and in 2004 our country incorporated "the State respects and guarantees human rights" into the Constitution. Criminal law has both punitive and safeguarding functions, but the safeguarding function is the most important, as it protects the public in order to safeguard human rights and thus punishes offenders. Lister's legal proverb "Criminal law is both the Magna Carta of the good citizen and the Magna Carta of the criminal" well illustrates this point. When the criminal law is amended and the principle of retroactivity cannot be applied to convicted criminals, they are subject to penalties that are not appropriate to their criminal behavior, and the phenomenon of "different penalties for the same crime" occurs, thus failing to protect their human rights. Contemporary criminal law should therefore endeavour to change the situation of sacrificing individual human rights in order to preserve social stability, pay attention to the protection of individual human rights, especially the protection of the human rights of the perpetrator, show its concern for human nature, and endeavour to harmonize the function of punishment with that of safeguard, so as to jointly push forward the comprehensive progress of contemporary criminal law and the full realization of its functions of punishment and safeguard. [7]

3.3. The need to maintain the principle of constitutional equality

Article 33, paragraph 2, of the Constitution of China clearly stipulates: "All citizens of the People's Republic of China are equal before the law." Criminal law, as its subordinate law, should naturally follow the principle of equality, which requires that criminal law be applied equally and that the same cases be handled in the same way. However, in the case of convicted prisoners without retroactive effect, the "different punishment for the same crime" resulting from the amendment of the Criminal Law to make the penalty lighter is obviously unequal to them, and the constitutional principle of equality cannot be implemented.

3.4. The need to implement the principle of suiting punishment to crime

The principle of suiting punishment to crime is that ' the severity of punishment should be compatible with the criminal responsibility of criminals. It is one of the three basic principles of criminal law, which is not only the restriction of penalty but also the maintenance of legal justice. If a criminal act is weakened or even no longer a crime with the amendment of the criminal law, it shows that the social harmfulness and personal danger of the act are weakened or even disappeared. For the convicted criminals who are accepting the penalty, their behavior is not adapted to the penalty, which is contrary to the principle of suiting punishment to crime.

3.5. The need to implement the principle of legality

The main purpose of the principle of legality is to limit punishment and protect human rights, while the retroactivity system is derived from the principle of legality, which aims to protect national freedom and predictability. The purpose of the establishment of the "old and light" principle in retroactivity is to prevent the change of law from adversely affecting the offender and to

protect his human rights. However, the "old and light" principle, which is originally designed to maximize the protection of human rights, is subject to legislative restrictions. It only allows the application of the situation where the criminal law norms are favorable to change before the judgment takes effect after the act, thus giving up the protection of the human rights of the convicted person whose judgment takes effect. The effect of human rights protection is greatly reduced, which not only violates the core purpose of the principle of legality, but also is far from the value of the establishment of the retroactivity system. [8] Therefore, the role of the retroactivity system cannot be effectively played, and the principle of legality cannot be effectively implemented.

4. A feasible method for convicted criminals to have retroactivity

4.1. Feasible method

In order to maintain the stability of the judgment and the dignity of the law, the criminal law adopts the principle of non-retroactivity of convicted criminals. Therefore, the solution cannot violate this purpose. It should be based on the premise of maintaining the effectiveness of the original criminal judgment, and then establish a special relief system for convicted criminals, that is, recognizing the retroactivity of convicted criminals in disguised form, and adopting the principle of "from the old and from the light" is also adopted for other convicted prisoners other than those who have completed the execution of the death penalty. For convicted criminals who have completed the death penalty, this system is meaningless. For those who have completed the execution of the penalty and released, their criminal record can be exempted. However, this system should not support appeal retrial and compensation, that is, to recognize the validity of the original criminal judgment, because the original judgment was based on the legal and effective law at that time, and conforms to the criminal procedure. After that, although the law was changed, it was not possible to look at the problems at that time from the current perspective. Secondly, the initiation of the system should be based on the active application of the convicted offender, but retain the right of the judicial organ to start, so as to take into account the legal efficiency. In this way, a balance point is sought between maintaining the stability of the judgment, the dignity of the law and the maintenance of legal fairness and justice.

4.2. Proof of rationality

First of all, the criminal law stipulates that the main purpose of the non-retroactivity of convicted offenders is to maintain the stability of the judgment and the dignity of the law, and the relief system is based on the premise of maintaining the legality and effectiveness of the original criminal judgment, preventing the abuse of the right to appeal and the right to appeal. Therefore, the stability of the judgment and the dignity of the law are maintained. The second is to worry about the waste of judicial resources and the low efficiency of the law. The initiation of the system requires the convicted to apply for compensation and retrial, which effectively solves the problem of waste of judicial resources and low legal efficiency. Furthermore, if the penalty is reduced or disappeared after the amendment of the criminal law, that is, the social harmfulness and personal danger of the act are reduced or eliminated, the basis of punishment disappears, and the penalty should be reduced. The relief system can fully play its role, maximize the protection of human rights and safeguard the fairness and justice of the law.

4.3. The ' special ' of the special relief system'

This relief system is special in that it neither directly modifies the provisions of the criminal law on the retroactivity of convicted offenders, but also guarantees the human rights of convicted offenders to the greatest extent, and solves the problem of injustice of ' different punishments for the same crime '. Because it is not in the form of direct amendment of the law but in the form of establishing a special system, it will not directly conflict with the existing legal provisions and theories of the retroactivity of criminal law. It can still play a transitional role before the revision of the provisions of the criminal law on the retroactivity of convicted offenders. Today, even if the provisions of the criminal law on the retroactivity of convicted offenders are not amended, the relief system can effectively play its role. It seeks a balance between maintaining the stability of the judgment, the dignity of the law and the maintenance of legal fairness and justice.

4.4. The Role of the Special Relief System

The development of the times and the maintenance of the dignity of the law are inevitable, but the convicted criminals should not be the victims of the development process. The law is born because of the maintenance of fairness and justice. If it violates fairness and justice, the law will exist in name only and its dignity will be damaged. Perhaps the lack of retroactivity of convicted criminals is a legislative defect that cannot be modified, but this legislative legacy, which is difficult to avoid and inevitably violates human rights, can be compensated or softened by providing compensation or softeners for those who have been unfairly treated due to legal changes.[9] This relief system can effectively protect human rights on the basis of maintaining the stability of judgments and the dignity of the law, reduce the occurrence of the phenomenon of " different punishments for the same crime, " implement the basic principles of criminal law and the spirit of the rule of law, play the role of penalty reform, and maintain the fairness and justice of the law to the greatest extent.

5. Conclusions

With the rapid development of China's society, the law has been amended frequently, resulting in the unfair phenomenon of " same crime and different punishment, " which is not conducive to the protection of human rights and the implementation of the rule of law. This special relief system can effectively alleviate this problem and seek a balance between maintaining the stability of judgment, the dignity of law and the fairness and justice of law. In order to effectively protect human rights, maintain the fairness and justice of the law, and promote the construction of the rule of law in China, this special relief system can also exist for a long time. However, if we want to completely solve the problem, we should also rely on the revision of the relevant provisions of the retroactivity of the criminal law.

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