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Research on the Standards for Reviewing the Necessity of Detention

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Abstract: *Both China's Criminal Procedure Law and the Provisions of the People's Procuratorates on Criminal Procedure explicitly stipulate the review of the necessity of detention, and the Procuratorial Work Development Plan for the 14th Five-Year Plan Period (2021) reaffirms the significance of the post-arrest detention review system. From the perspective of detention data, this system has reduced China's detention rate to a certain extent, yet the rate remains relatively high. As a system balancing public interests and individual rights, the various problems emerging in practice indicate that there is room for optimization in China's efforts to review the necessity of detention. To implement the concept of "less arrest and cautious detention" and effectively lower the detention rate, it is essential to re-examine the inherent meaning of "necessity of detention." In the practice of reviewing the necessity of detention, the ambiguity of review standards also restricts its in-depth development. Therefore, we should start from existing problems and put forward corresponding suggestions for establishing a more comprehensive review standard, aiming to activate the system's vitality and ensure the stable and effective implementation of the "less arrest and cautious detention" policy.*

Keywords: *Less Arrest and Cautious Detention; Arrest; Necessity of Detention; Social Danger; Review Standards*

1. Introduction

In April 2021, "adhering to the criminal justice policy of less arrest, cautious prosecution, and cautious detention, and promoting the application of non-detention compulsory measures in accordance with the law" was included in the work priorities of the Central Commission for Comprehensive Law-Based Governance in 2021 as a major reform initiative. This signifies that criminal justice reform has begun to address long-standing unresolved issues in the pre-trial procedure, such as high arrest high detention rates, and prolonged detention beyond statutory limits, with the goal of transforming the traditional case-handling model of "arrest upon establishment of a crime" and "detention until the conclusion of proceedings." This paper sorts out the standards for reviewing the necessity of post-arrest detention and analyzes existing problems, which helps clarify that detention review, as an independent link in criminal proceedings, must be emphasized. It is by no means acceptable to conduct only formal reviews while neglecting substantive reviews. The aim is to reverse the current situation of a relatively high detention rate in China and protect the human rights of detained persons.

2. Current Situation of Detention Work in China

2.1 Excessively High Pre-Prosecution Detention Rate

First, the pre-prosecution detention rate is excessively high. According to official data over the since the amendment of the Criminal Procedure Law in 2012, China's detention rate has shown an downward trend, but the average detention rate has reached 52.9%, which remains relatively high.

2.2 Unduly Long Pretrial Detention Period

Second, the pretrial detention period is unduly long. On one hand, China's laws stipulate a long detention period, but compulsory measures are rarely modified through reviewing the necessity of detention. Consequently, in judicial practice, it is common to see prolonged pretrial detention, or even phenomenon of "detention until the end of proceedings." Some scholars used big data to analyze 3.03 million judgment documents and found that since 2012, the duration of pretrial detention has not

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decreased but increased: the average detention time was 151.94 days in 2013, rose to 159.25 days in 2016, and then dropped to 154.67 days in the following year, with the average exceeding 5 months[1]. Moreover, this data only covers cases where judgments have taken effect and excludes other instances of prolonged detention beyond statutory limits. On the other hand, the phenomenon of prolonged detention beyond statutory limits still persists. After 2012, the number of people in such prolonged detention gradually decreased, showing an overall positive trend, but the problem of "new prolonged detentions emerging after previous ones are cleared" has occurred repeatedly. For example, in 2013, it was discovered that over 4,000 people had been detained for more than three years without their cases being concluded. Later, with the leadership of the central government and the cooperation of various agencies, these cases were not fully cleared until October 2016. However, the same problem reoccurred in 2019: procuratorial organs launched another campaign to clear cases of prolonged detention without verdicts, finding 367 people who had been detained for more than five years without their cases being concluded. A case-by-case investigation was conducted on these cases, resulting in the conclusion of 189 cases, while the correction status of the remaining 178 people remains unknown.

2.3 Problems in the Case Structure of Detention

Finally, there are problems in the case structure of detention. Relevant data shows that from 2012 to 2020, the number of people sentenced to light crimes, acquitted, or exempted from criminal punishment by courts accounted for approximately 80% of those subject to effective judgments; the number of people sentenced to fixed-term imprisonment of less than three years or exempted from criminal punishment accounted for about 40% of those subject to effective judgments. This indicates that among effective judgments, light crimes (punishable by fixed-term imprisonment of less than three years) constitute the majority, and a large proportion are even minor offenses. The social danger of the prosecuted persons is relatively low, and there is basically no need to adopt detention measures. However, China's relatively high pretrial detention rate stands in sharp contrast to this. In February 2021, Miao Shengming, Director of the First Procuratorate of the Supreme People's Procuratorate, mentioned two sets of data in an exclusive interview with a reporter from Procuratorate Daily: "Currently, in China's criminal proceedings, the approval rate for arrest applications is nearly 80%, the number of pretrial detainees exceeds 60%, and the proportion of light crime cases is high". This shows that although the pre-prosecution detention rate has improved year by year, it still fails to align with the actual trend of lighter sentencing.

3. Problems in China's Detention Work in Judicial Practice

3.1 Long-Term Reliance on Substantive Review and Poor Review Effectiveness

Detention, as a compulsory measure to ensure the smooth progress of criminal proceedings, occurs before the entry into force of an effective judgment. Therefore, the review of the necessity of detention should take procedural matters as its core content—such as whether there is social danger or litigation risk after the termination of detention. However, in judicial practice, China's system for reviewing the necessity of detention has long focused on substantive indicators such as "danger of the crime"[2], leading to an imbalance between substantive and procedural reviews. The "danger of the crime" mainly evaluates the "case itself," referring to the severity of social danger that is self-evident based on preliminarily proven criminal facts (e.g., the phrasing "may be sentenced to fixed-term imprisonment of less than three years"). The long-term reliance on substantive review, with a focus on substantive issues such as the circumstances, acts, and nature of the crime, has gradually turned the review of the necessity of detention into a "preliminary trial" before the formal court trial. The root cause lies in the significant discrepancy in the difficulty of proof between substantive and procedural indicators. To prove the "danger of the crime," the key is to demonstrate the applicability of punishment: a relatively accurate conclusion can be drawn by aligning the suspected criminal facts with the provisions of the Criminal Law. In contrast, proving "personal danger" and "litigation controllability" is more akin to "predictive proof"[3], which requires comprehensive consideration of multiple factors such as the remorse attitude, subjective malice, and health status of the defendant or criminal suspect. This kind of proof is more difficult and the conclusion is more uncertain.

3.2 Difficulty in Determining "Social Danger" in the Review of the Necessity of Detention

In China's legislation on pretrial detention, "social danger" remains undefined, and legal provisions

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often use terms with strong subjective connotations such as “may” and “attempt,” lacking specific quantitative standards. This makes it difficult for relevant personnel to accurately assess “social danger” due to a lack of clear understanding when handling cases. Furthermore, due to the excessive ambiguity of legal provisions and the absence of a unified standard for judging social danger, procurators have considerable room for subjective judgment during arrest and detention. It is common to hold the rigid perception that “once a criminal suspect’s act constitutes a crime, he or she poses social danger.” “In the view of procuratorial organs, as long as there is evidence proving that someone has committed a crime, that person is deemed to pose social danger”[4]. The problem is that the outcomes of this procedure are often assumed to be valid: “a proper procedure will inevitably produce a correct result, or as long as the procedure is proper, the result can be ignored”. We must remain highly vigilant against such consequences.

In addition, statistical data shows that criminal records, compensation to victims, and obtaining victims’ forgiveness have become key factors in determining the existence of social danger in judicial practice[5]. Criminal records reflect the personal danger of defendants or criminal suspects to a certain extent, but they should be used cautiously. Arrests based on the possibility of recidivism are essentially “preventive detention.” Although such detention is widely stipulated in the legislation of other countries and regions, there have always been significant disputes over its legitimacy[6]. For instance, Professor Lin Yuxiong argues that if the basis for assuming a defendant’s higher risk of reoffending in the future is their past criminal record, this violates the principle of presumption of innocence.However, in China’s legislation and practice, the role of criminal records in reviewing social danger has been continuously strengthened, gradually becoming a key focus of review. Moreover, “extralegal factors” are often incorporated into the standards for judging social danger. For example, the status of “non-local residents” has practically become an important factor in determining social danger[7].

3.3 Lack of Neutrality and Independence of the Review Subject

According to current regulations, the review of the necessity of post-arrest detention is the responsibility of people’s procuratorates; the power to review the necessity of post-arrest detention during the pre-trial investigation stage and the pre-trial examination and prosecution stage is both assigned to the “department responsible for arrest and prosecution.” Although the criminal execution procuratorate handles matters without interest involvement, does not directly participate in investigation, preliminary hearing, or trial, and serves as a protector of human rights and a supervisor in detention facilities, it can review various factors related to criminal suspects from a more objective perspective to determine whether detention should continue[8]. While this system appears sound, careful examination reveals flaws: the subject responsible for reviewing the necessity of detention lacks independence and neutrality.

The reasons are as follows: First, the review of the necessity of arrest and the review of the necessity of post-arrest detention are two independent yet interrelated procedures, each performing distinct functions at different stages of criminal proceedings. Assigning these two distinct review powers to the same subject clearly violates the recusal principles in the Criminal Procedure Law and undermines the independence and neutrality of the review process. After making an arrest decision earlier, the same review subject tends to hold preconceived notions during the subsequent review of detention necessity—such as the fixed mindset that “since arrest was approved, detention should continue”—and overlooks evidence favorable to the criminal suspect that emerges during the interval between the two stages. Second, the pre-trial arrest review procedure aims to determine whether arrest (a compulsory criminal measure) is necessary before trial, and it is of an “authoritative nature.” In contrast, the pre-trial review of post-arrest detention necessity focuses on whether changes in case facts or circumstances (as criminal proceedings progress) affect the necessity of continuing detention, and it is more of a “dynamic supervisory nature.” However, allowing the same procurator who decided on pre-trial arrest to conduct a second review on the continuation of post-arrest detention “is equivalent to allowing someone to supervise themselves, which is unreasonable and unfair. It is analogous to a person acting as both an athlete and a referee in a competition—this fails to meet society’s requirement for the referee’s impartiality”[9].

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4. Measures to Improve the Standards for Reviewing the Necessity of Detention

4.1 Clarify the Indicators for Reviewing the Necessity of Detention

"Abduction is reasoning to the best explanation"[10]. To explore the original intention behind the establishment of the detention review system, the best approach is to examine the reasons for its creation. Concept, object, carrier, and rule are the four essential elements of any system, and legal systems are no exception. Therefore, it is necessary to clarify the weight of various indicators in the review system through standardized means.

Detention, as a tool to ensure the smooth progress of proceedings, should not be misinterpreted as "pre-punishment." The indicator system for reviewing the necessity of detention is complex; in terms of content alone, it includes three indicators: "danger of the crime," "personal danger," and "litigation risk." Among these: "Danger of the crime" is an evaluation of criminal facts, referring to the degree of danger posed by the criminal act. Its judgment generally relies on initially confirmed case evidence to prove whether the crime circumstances are serious (e.g., "the possible penalty to be imposed" and "the role in a joint crime" can all serve as indicators for judging social danger); "Personal danger" is an assessment of the criminal suspect's risk level. This type of danger has little connection with the criminal act, crime constitution, or penalty content. Instead, from the perspective of Lombroso's criminology, it focuses more on the "potential harm" of the criminal suspect or defendant[11], which includes groups such as "pregnant or breastfeeding women," "minors," "the elderly," and "first-time offenders"; "Litigation risk" refers to adverse impacts that may hinder the smooth progress of criminal proceedings if the criminal suspect is released from detention or has their compulsory measures modified—such as fleeing, concealing evidence, or colluding with witnesses. In the system for reviewing the necessity of detention, different indicators should have different weights based on their importance and the difficulty of judgment; they cannot be treated equally. Considering the principle of presumption of innocence, the "danger of the crime" has the highest uncertainty among the three indicators during the pre-trial stage. Furthermore, since the procuratorial organ is responsible for reviewing the "danger of the crime," there is a potential conflict between supervisory power and judicial power. Therefore, although the "danger of the crime" is an indispensable indicator in the review process, it should not be excessively elevated to become the core indicator.

4.2 Establish a Quantitative Evaluation Mechanism for Social Danger

In the evaluation of social danger, logical reasoning and empirical assumptions are equally important and must be combined. China's current laws and regulations only list several typical scenarios of social danger, which cannot cover all possible situations. Moreover, factors such as reoffending and obstruction of proceedings (which affect social danger) have not yet occurred and are difficult to predict. Procuratorial organs must extract information related to social danger based on known case facts, existing evidence, and case-handling experience to ultimately determine the suspect's danger level. However, since logic and experience are unique to each individual and cannot form a unified thinking model, different case handlers often have different understandings of the same case. Without a unified quantitative standard, relying solely on the discretion of procuratorial organs may lead to the consequence of "different judgments for similar cases."

The core condition for arrest is whether the criminal suspect poses social danger that cannot be prevented by non-detention compulsory measures. The failure to properly grasp this condition has led to a high arrest rate. Therefore, in the reform of China's arrest system, it is particularly important to continuously advance and construct an independent evaluation procedure centered on social danger. Regarding the classification of social danger levels, we must first clarify that different factors have different degrees of importance in the evaluation process and thus account for different proportions. Corresponding values should be assigned based on the weight of each factor; the total score (obtained by summing the values of factors present in a case) determines whether the suspect's social danger is "high-risk," "medium-risk," or "low-risk." For high-risk suspects, a decision of "arrest is necessary" is recommended; for medium-risk suspects, discretionary handling should be made based on the scores of different factors; for low-risk suspects, a decision of "arrest is unnecessary" is recommended[12]. This quantitative method for evaluating social danger can also be referenced in the review of the necessity of detention. It should be noted that the role of criminal records in detention decisions must be refined and restricted—even if a defendant has a criminal record, their social danger can vary significantly depending on factors such as the severity of the previous crime and their attitude of remorse after the current offense[13].

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4.3 Change the Review Subject and Improve the Review Initiation Mechanism

Judicial review of compulsory investigations (including pretrial detention) by an independent and neutral judicial body is a core value of the civilization and rule of law in criminal procedure[14]. Some scholars have pointed out that "establishing a judicial review system for compulsory investigations in China is undoubtedly necessary. This consideration is based on existing problems in China's investigation practice, helping to better coordinate the relationship between investigative power and judicial power, and more importantly, it safeguards the Constitution"[15]. It can thus be seen that changing the review subject—transferring the power to review the necessity of detention from procuratorial organs to people's courts (transforming supervisory power into judicial power)—is the optimal solution to address existing problems.

Reform is not vague and abstract; it must be based on current judicial conditions. Given the current state of China's criminal procedure, the power to decide on detention reviews should remain with procuratorial organs, but additional provisions can be added: if a criminal suspect disagrees with the detention decision made by a procuratorate, they may apply to a people's court for a re-review. When conditions are mature, the people's court can assume full responsibility for deciding on detention and be accountable for the review results. This phased and orderly approach to reform will enhance the rational acceptability of the reform, ensuring that pretrial detention truly serves as a safeguard for human rights rather than a tool dependent on investigative measures[16].

5. Conclusion

This paper conducts an in-depth analysis of the standards for reviewing the necessity of detention precisely because there are problems and shortcomings in China's work in this area. Issues such as long-term reliance on substantive review, difficulty in determining "social danger" in detention review, and lack of neutrality and independence of the review subject all hinder the reduction of the pre-trial detention rate. Whether these problems can be effectively resolved not only affects the procuratorial organs' pursuit of lowering the detention rate but also determines whether the reform goal of "less arrest and cautious detention" can be achieved. Therefore, after analyzing relevant concepts and sorting out existing problems, this paper puts forward suggestions for improving China's standards for reviewing the necessity of detention. It is hoped that these suggestions will contribute to alleviating the problem of excessively high pretrial detention rates in China and encourage more scientific methods and prudent attitudes in the practical review of the necessity of detention.

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