

Empirical research on protection of the rights of criminal defendants in trial by case

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Abstract: The protection of the rights of criminal defendants in trial by case is insufficient in the current standard level in China, the theoretical basic research is weak, and the judicial practice lacks care for the interests of defendants. Based on the empirical research method, this paper focuses on three aspects: the improper restriction of the right to charge, the deprivation of the right to defense, and the absence of the right to relief, and proposes the legal construction path of perfecting the evidence rules of criminal division trial, the protection of the right to defense when the interests are opposite, and the juridical force of criminal division trial judgment, so as to realize the care of the rights of criminal defendants.

The academic community has long focused on the institutional issues of separate trial, but lacks attention to the protection of the rights of defendants in separate trial. From the existing research results, it can be clearly abstracted that there are two important paths for scholars to study the system of divisional trial in recent years: firstly, placing divisional trial in the perspective of comparative law to explore legislative improvement and construction issues. Among them, most scholars' research advocates to absorb the construction of the "power led" criminal division system from abroad by reasonably transplanting and borrowing foreign laws, in order to improve the prominent issues such as insufficient protection of the rights of the defendant in China's "power led" criminal division model, with the intention of caring for the interests of the defendant. The second is to place divisional trials in typical cases in China's practice, including juvenile delinquency.[1]Discuss specific applications in areas such as joint crime and organized crime. Among them, there is a lack of systematic research on the protection of the rights of criminal defendants in separate trials. The research on this issue is mostly scattered in the study of the divisional trial system, and the key research rights can be specifically summarized into three rights: the first is the defendant's right to pledge. The right to pledge is a fundamental right in criminal litigation, but China currently does not have a complete right to pledge at both the normative and judicial levels. Second, the defendant's right to defense. The protection of the defendant's right to defense in the divisional trial procedure mainly refers to the right to effective defense when the interests of the co-defendants are contrary. Third, the defendant's right to relief. The right of the criminal defendant mainly refers to the right to participate in and relief from the division of cases decided by the defendant, and the defendant shall have the right to appeal against the decision of the court after the judgment is made.

The article intends to investigate from the normative level, clarify the status quo of the norms for the protection of the rights of criminal defendants in the trial of criminal cases in China, and analyze the urgent need to improve the relevant provisions themselves. Taking this as a starting point, the author adopts the research method of empirical analysis to pay attention to the judicial status quo of the protection of the rights of the defendant in the form of division of cases. Combining with the normative research and rationally absorbing judicial experience, we hope to further refine and improve the rights of criminal defendants in the trial of separate cases within the framework of current legal norms.

1. Rights of criminal defendants in separate trials

1.1 Normative analysis of the rights of criminal defendants in separate trials

From the normative level, the legislative purpose of the current division trial system in China is to pursue the quality and efficiency of the trial, which belongs to the authority led mode. The protection system of the defendant's rights is mainly based on Article 220 of the Interpretation of the Criminal Procedure Law, which stipulates that "the exercise of litigation rights such as the right of cross-examination of the parties shall not be affected", and Article 269 of the Interpretation of the Criminal Procedure Law is a further supplementary guarantee for the normal exercise of the right of pledge. At present, the protection of the rights of criminal defendants in the trial of separate cases in China has only made general provisions on the issue of pledge at the legislative level. From the normative level, "trial by division" has not been clearly defined at the legislative level in China, and more often appears in the principled norms as a mode of handling criminal proceedings. The normative level of the division of cases in China is based on the 2021 Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China (hereinafter referred to as the Interpretation of the Criminal Procedure Law) as a general principle, and the remaining provisions are scattered in the normative documents dealing with specific cases. The procedure of division of cases was first found in 1984 in China in the Answers to Several Issues Concerning the Specific Application of Law in the Handling of Group Crime Cases, but the specific norms for the division of cases in criminal cases have not been clearly defined in the Criminal Procedure Law of China. Subsequently, the provisions on the division of cases have successively appeared in the Notice of the Supreme People's Court on Printing and Distributing the Opinions on Further Strengthening the Work of Juvenile Courts in 2010, the Summary of the Symposium on the Trial of Criminal Cases of Gangland Organizations by Some Courts throughout the Country in 2015, and the Notice of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice on Issuing the Guiding Opinions on Several Issues Concerning the Handling of Criminal Cases of Gangland Forces in 2018 Opinions of the Supreme People's Court on Strengthening the Trial of Minors in the New Era in 2020. The Interpretation of the Criminal Procedure Law stipulates for the first time the rules for the people's courts to handle cases of public prosecution separately (together). Although the content of this clause is slightly simple, it is a relatively feasible norm for the trial of separate cases rarely seen in effective laws and regulations. However, as the provisions only make principled provisions on the division of criminal cases, they are still insufficient to face the increasingly complex trial of criminal cases in China's judicial practice from the perspective of specific application. The Opinions of the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security on Several Issues Concerning the Application of Criminal Procedure in Handling Information Network Crime Cases (hereinafter referred to as the Opinions of 2022) in 2022 refer to "separate trial" again in the special issues of handling information network crime cases, but the Opinions only reiterate the simple rules that public procuratorates and law organs can adopt when

handling criminal cases for specific types of cases. Although the Interpretation of the Criminal Procedure Law of 2021 proposes that the exercise of litigation rights such as the defendant's right to evidence shall not be affected, the basis for the application of rights protection is extremely ambiguous. With regard to the defendant's right of pledge, Article 220 of the Interpretation of the Criminal Procedure Law specifically stipulates that the division of cases "shall not affect the exercise of the parties' right of cross-examination and other litigation rights." Based on this right, Article 269 of the Interpretation of the Criminal Procedure Law stipulates that when the court deems it necessary, the object of summons for confrontation is not limited to the co-defendant, but also includes the accomplice in the division of cases.

To sort out the norms of the current division trial system in China, it can be seen that the system is a normative system established to meet the practical needs of various special cases, with the Interpretation of the Criminal Procedure Law as the general norm and the other relevant normative documents as supplements. The system is based on Article 220 of the Interpretation of the Criminal Procedure Law. According to the first paragraph of Article 220 of the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China in 2021, the division of cases shall be "in the opinion of the people's court after examination". It can be seen that the division of cases is a criminal trial procedure mainly led by the court, and its application stage should be mainly the trial stage. From the perspective of the applicable stage, there is time overlap between the division of cases and the division of cases, and the division of cases involves a wider range of time stages. From the perspective of the applicable object, there are views on the applicable object of the division trial that it is only for the "person" in the case being tried separately. There are also views that the facts of the case themselves can also be divided. However, the academic community has some disputes over this view. When the court hears different litigation objects with different litigation object systems, it may choose to hear separately or jointly. If it is actually the same litigation object, it shall be tried together. According to the principle of oneness of criminal objects, when the relevant facts of a case are different objects, the division of cases can still be applied. It can be seen that the applicable objects of the division trial include both the "person" in the case and the facts of the case itself. From the perspective of the nature of the applicable cases, the trial of separate cases can be handled in the same way as that of separate cases. According to the provisions of the first paragraph of Article 220 of the Interpretation of the Criminal Procedure Law, the nature of the applicable cases can also be regarded as complex cases of joint crime or related crime involving a large number of persons.

Generally speaking, the legislative purpose of the current division trial system in China is to pursue the quality and efficiency of the trial, which belongs to the authority oriented mode. The protection system of the defendant's rights is mainly based on Article 220 of the Interpretation of the Criminal Procedure Law, which stipulates that "the exercise of litigation rights such as the right of cross-examination of the parties shall not be affected", and Article 269 of the Interpretation of the Criminal Procedure Law is a further supplementary guarantee for the normal exercise of the right of pledge.

1.2 Litigation rights of criminal defendants in case Division

For a long time, academic circles have focused on the system of divisional trial, but lack of attention to the protection of the defendant's rights in divisional trial. There are two important ways for scholars to study the divisional trial system: one is to put the divisional trial in the perspective of comparative law to explore the legislative construction. By drawing lessons from foreign laws, it advocates to absorb the extraterritorial "rights oriented" case division system structure, so as to improve the prominent problems of inadequate protection of the defendant's rights in China's

"authority oriented" criminal case division mode, with the intention of taking care of the interests of the defendant. The second is to place the divisional trial in the typical field of cases in China's practice, including juvenile delinquency. The specific application of joint crime and organized crime is discussed. Among them, the issue of the protection of the rights of the criminal defendants in the divisional trial is mostly scattered in various research results, and the rights worthy of attention can be specifically summarized as three rights: first, the defendant's right to pledge. China's current normative level and judicial level do not have a complete right to pledge. The second is the defendant's right to defense, which means giving the co defendants the right to defend effectively when their interests are opposite. The third is the defendant's right to relief, which refers to the defendant's right to participate in the trial decision, the right to relief and the right to appeal.

1.2.1 Improper restriction of pledge rights

In the practice of divisional trial in China, the cases involving a wide range of joint crimes and related crimes are divided into several cases according to their functions and powers, but the guarantee standard for the defendant's right to testify is relatively low in each case. It is mainly reflected in two specific aspects: first, the limitation of the system of leniency in guilty plea and punishment on the pledge right of the defendant in the divisional trial. When some defendants have opposite interests in some key facts and guilty plea attitudes, the litigants of all parties in the case have greater disputes. The defendants who have pleaded guilty and admitted punishment will have a certain preconceived impact on the judge's testimony process, which is not conducive to some defendants who do not plead guilty and admit punishment. The second is the improper restriction of the defendant's hostage right in the process of identifying the accomplice's statement. In the empirical study, it is not limited to drug-related crimes. In other types of crimes, the defendant's confession and the defendant's confession after the division of the case are mutually confirmed, which is also regarded as the basis for determining the defendant's guilt. The confession of the other case handler played a greater role. Although the statement of the co defendant has high evidential value, it also has a higher risk of falsity.

1.2.2 Deprivation of the right to defense

When the criminal defense lawyers handle the case division, the prosecution usually does not transfer all the evidence materials in strict accordance with the principle of "full case and full volume transfer", resulting in the limitation of the evidence materials obtained by the defenders. If the defendants in the same case are absent during the trial, it is difficult for the defendants and their defenders to effectively prove all kinds of evidence. However, after the divisional trial, the defendant in the same case did not appear in court, and the defender could not question him or give him the relevant details of the appropriate case in court.

1.2.3 Absence of relief right

The first is the improper influence of the expansion of res judicata. Article 401 of the rules of criminal procedure of the people's Procuratorate of China confirms that the public prosecution organ does not have to provide evidence to prove the facts confirmed by the effective judgment of the people's court and that it has not been re tried in accordance with the trial supervision procedure. This provision provides specific operating rules for judicial practice and recognizes the binding force of the judgment in the previous case on the fact finding in the subsequent case. This "expansion of res judicata" in the previous case reduces the burden of proof of the procuratorial organ. Even in some organized crimes where the "offensive and defensive alliance" is difficult to disintegrate, for the key criminal facts not recognized by the principal, the case handling organ will

participate in the trial of the defendant in the corresponding criminal activities, so that the principal can be directly identified in the subsequent case. [2]At this time, the burden of proof of the defendant is increased. It is difficult to provide clear evidence to the contrary, which violates the basic requirements of the principle of presumption of innocence.

Second, it violates the principle that the second instance is final. The investigating authorities will handle joint crimes separately from the perspective of strategy and case pressure. The sentencing circumstances of some of the accomplices did not meet the jurisdictional standards of the intermediate people's court. So these defendants are also being tried by the grassroots people's courts. But this approach seriously violates the provisions of Article 15 of the Interpretation of the Criminal Procedure Law. This is equivalent to depriving these defendants of their right to appeal to the intermediate people's court.

2. Analysis of the current situation of the operation of the divisional trial mechanism

According to the empirical analysis data of the author, the number of cases involving the use of case division procedure in criminal justice judgment has reached 5472 in 2022. It accounts for 4.72% of the total number of judicial documents in the same period.

2.1 Empirical analysis of criminal case division mode

2.1.1 Empirical analysis of case types in case division mode

The author will retrieve the cases involving the division of cases, and establish a visual mathematical model of the main data obtained according to the system of the criminal law of China. In China's judicial practice, in the sample of this time period in 2022, the crime of disrupting social management order is the most common type of case in the trial process, accounting for 77.8% of all cases, followed by the relatively more types of cases involving the crime of corruption and bribery and the crime of undermining the order of the socialist market economy. The author further summarizes the divisional trial of the types of crimes against the management of social order. Among them, the crime of helping information network criminal activities accounts for the largest proportion of the type of cases. The number of judicial documents involving the crime of helping information network criminal activities alone reached 1403, accounting for 31.57% of the total sample; Among the crimes of disrupting social management order, other relatively large crimes include the crime of opening a casino, the crime of gambling, the crime of opening a casino and other crimes. In general, the above crimes, which account for a relatively large proportion, involve cyber crimes committed using telecommunication networks. Cyber crimes are highly interactive, involve a wide range of people, are highly hidden, and are difficult to detect. They often involve more joint crimes and related crimes. In such types of cases with a large number of people and complex cases, there is a reasonable space for divisional trial to play its value. According to the work report of the Supreme People's court, China has "concluded 92000 criminal cases such as online pyramid selling, online gambling, and illegal use of information networks" in 2021. This has increased by 178.79% year-on-year compared with 33000 cases of such crimes in 2020. With the emphasis on network security and the strengthening of the fight against network crimes in recent years, the proportion of network crimes in judicial practice will be further increased from the perspective of trend, which means that there will be a corresponding growth trend in the judicial cases handled through the case division mode.

In general, the above crimes, which account for a relatively large proportion, involve cyber crimes committed using telecommunication networks. Cyber crimes are highly interactive, involve a wide range of people, are highly hidden, and are difficult to detect. They often involve more joint

crimes and related crimes. In such types of cases with a large number of people and complex cases, there is a reasonable space for divisional trial to play its value. With the emphasis on network security and the strengthening of the fight against network crime in China in recent years, the proportion of network crimes in judicial practice will be further increased, and the judicial cases handled through the case division mode will also have a corresponding growth trend. It is forward-looking to deal with the specific problems of judicial practice in the future to reasonably construct China's case division legal system and enhance the standardization of practical operation. In addition, as two relatively large types of crime, stakeholder economic crimes and corruption and bribery crimes, which involve gang crimes, many joint suspects, some accomplices and the handling organ itself to improve the efficiency of handling cases, are also usually tried separately.

2.1.2 Empirical analysis on the application of trial procedure in the case division mode

The author gets the visual data model by classifying the judgment documents in the sample according to the standard of trial procedure. This phenomenon is closely related to the application of the leniency system of guilty plea and punishment in the case division mode. 4047 cases, accounting for 91.40% of the total sample, adopted the leniency system of guilty plea and punishment under the case division mode. The types of crimes that the divisional trial faces are mainly joint crimes and associated crimes. The complexity of such crimes is often higher than that of other separate crimes. In particular, the so-called "offensive and defensive alliance" between accomplices is inevitable in joint crimes. Failure to break up the "offensive and defensive alliance" between these accomplices will pose a challenge to the trial of cases. In addition, some local prosecutors in China have achieved remarkable results in disintegrating the alliance between the organization personnel of the underworld nature by boldly applying the leniency system of guilty plea and punishment in underworld related cases. The leniency system of guilty plea and punishment has become an effective and habitual strategy for judicial organs to deal with difficult and complex joint crimes. The leniency system of guilty plea and punishment is applicable under the divisional trial mode. Due to the high correlation between the previous and subsequent cases, the pre judgment effect of the previous case on the subsequent case makes the trial process a mere formality, the space for the defendant to exercise the right of cross examination is limited, and the case evidence is too fragmented with the divisional trial, which will have an adverse impact on the defendant's litigation rights.

3. Implementation of the protection of the defendant's rights in the trial of three cases

3.1 Improvement of evidence rules in criminal case Division

Mainly from the identification of the statement of the accomplice in our country and the guarantee of the pledge right, this paper puts forward some suggestions on the improvement of the evidence rules. In the common law system, if the co defendants give up the right to silence and make statements in court, they are in the status of general witnesses, need to sign and accept cross examination, and bear the risk of perjury. In the civil law system, neither the defendant nor the co defendant is qualified as a witness. Taking German law as an example, the co defendants are not allowed to testify as witnesses about other co defendants' involvement in the case.

On the one hand, as far as the statement of the accomplice is concerned, the problem that the confessions of the offenders cannot be mutually reinforced should be clarified at the legislative level, so as to avoid the consequences of violating the rights of the defendant caused by the improper identification in judicial practice. On the other hand, the defendant's right to pledge should be regarded as an inviolable right in the divisional trial mode. Correspondingly, as long as the

defendant's request for pledge is within the reasonable investigation scope of the case, the court should meet the defendant's requirements, allow the defendant to confront other defendants face-to-face, and clearly inform the relevant defendants of the adverse procedural consequences of not appearing in court for cross examination.

3.2 Protection of defense right in case of opposite interests

The protection of the right of defense of the co defendants when their interests are opposite. When the joint trial of a joint crime causes difficulties or obstacles to the exercise of the defendant's right to defense, it shall be tried separately. For example, in the United Kingdom, when the judge finds that there is a risk of unfair trial in the joint trial, he can make an order of divisional trial according to the application of the prosecution and the defense or ex officio.[3]In the United States, there is a mutually exclusive relationship between the defense of CO defendants. It is unfair to conduct a joint trial of such mutually exclusive defenses, which needs to be tried separately.[4]In Japan, if there are conflicting interests between the co defendants, which may lead to adverse circumstances in defense, the court must try the case separately.[5]In Taiwan, according to article 287-1 of the "Criminal Procedure Law" in 2003, when the interests of the co defendants are opposite and it is necessary to protect the rights of the defendants, the court should conduct a case division trial.

Although the extraterritorial law has more experience of rights oriented system construction, the reference of the system should be based on the localization status quo, and cannot be blindly introduced or transplanted. Therefore, in order to improve the system of divisional trial mode in China, we should introduce the system construction tendency of the protection of the defendant's rights in a more moderate way on the existing basis, reasonably guide the specific divisional mode in judicial practice, and control the potential tension between system theory and judicial practice. In the current mode of divisional trial in China, the author believes that the standard of divisional trial mode should be improved from two aspects: first, provide the defendant with the way to participate in the decision-making process of divisional trial, and protect the defendant's right to participate; The second is to effectively regulate the abuse of power of the case handling organ, limit the power to a reasonable operating space, and improve the relief channels of the defendant. The choice of improvement mode should be combined with the current judicial situation in China, and on the basis of absorbing reasonable judicial experience, select the improvement mode that is relatively suitable for China's divisional trial mode, and gradually transfer the logical main line from "power" to "rights".

3.3 Regulation of res judicata in criminal case Division

The author believes that it is necessary to clearly deny the binding force of the previous criminal judgment on the subsequent criminal judgment, and limit this res judicata to a reasonable range. Even if the judgment of the previous case has taken effect, where the defendants in the previous and subsequent cases have objections, they should still identify the facts according to the complete investigation procedure and cross examination process, and the public prosecution organ should still bear the corresponding burden of proof for their claims. The people's court shall be given limited decision-making power in the case division trial under the condition of meeting the statutory requirements. From the perspective of regulating the abuse of power of case handling organs, first, it is clear that the final decision power of case division trial should be in the court. From the perspective of extraterritorial law, it is a common practice of national and regional legislation that the court has the final decision-making power. For example, the United Kingdom, France and Germany have given judges clear discretion in the division of cases within the scope of reasonable

power in legislation.

Second, while giving judges the space of discretion, legal conditions should also be added to decide or block the divisional trial. Lacking the restriction of the specific case division system, China's judicial practice has a large number of "should not be divided" and "should not be divided randomly". It is necessary to further explain the overall legal conditions of case division at the legislative level.

In the current situation of the application of the case division mode in China, in order to ensure the consistency of the judgment, after the former case has formed an effective judgment, the judge's judgment on the latter case will inevitably be bound by the former case judgment, so as to ensure the consistency. However, in terms of the protection of the defendant's rights, there are certain differences between the previous and subsequent cases in terms of litigation procedures, defense opinions, evidence investigation and determination process, and there are often conflicts between the defendant's interests.

Hastily expanding the influence scope of res judicata in the former case will easily evolve the court investigation of the latter case into a formal trial. As the author pointed out in the argument above, on the one hand, the improper expansion of res judicata will improperly reduce the responsibility of the case handling organ; On the other hand, it will increase the burden of proof of the defendant, which is difficult for the defendant to reverse the situation.[6]

In view of the particularity of the divisional trial, many factors will affect the trial results of the case, such as the different judgment ideas of the upper and lower courts on the case, the adjustment of the criminal procedure law policy, etc., the legislature should handle the divisional trial power of the criminal case more carefully, and must comply with the specific procedures, and need to clarify the specific procedures of the divisional trial, so as to correct the disorder that infringes the defendant's right of appeal in judicial practice. Therefore, the author believes that the first is to clearly deny the binding force of the previous criminal judgment on the subsequent criminal judgment at the legislative level, and limit this res judicata to a reasonable range. Even if the judgment of the previous case has taken effect, where the defendants in the previous and subsequent cases have objections, they should still identify the facts according to the complete investigation procedure and cross examination process, and the public prosecution organ should still bear the corresponding burden of proof for their claims. Second, we should specifically implement the procedural issues of divisional trial at the legislative level, and endow the people's court with limited decision-making power of divisional trial under the condition of meeting the statutory requirements.

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