# 危害社会行为的制裁体系研究

谢川豫 著

XIE CHUAN YU

On the Sanction System of Offense

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# 序　言

长期以来，从事公法领域研究的学者都注意到这样一种现象：在很多西方国家，大到杀人越货、贪污贿赂等严重违法行为，小到偷窃面包、交通违章等轻微违法行为，都被视为广义上的“犯罪”行为。尽管这些违法行为存在诸如“重罪”、“轻罪”或者“违警罪”的区分，但它们都是被作为“犯罪”行为来进行处罚，也都被纳入司法裁判程序之中。而在中国，法律对于这些危害社会行为，则按照危害社会的严重程度，同时确立了三大公共制裁体系：一是由行政机关主导的行政处罚体系；二是由公安机关实际控制的劳动教养体系；三是由司法机关主导的刑事处罚体系。这三大制裁体系既有各自独立的实体构成规范，也存在各自不同的程序体系。为什么中西法律制度会存在如此明显的差异呢？对于这一问题，大多数法学研究者都感到十分疑惑，却很少对这一问题进行过学术层面的思考。

谢川豫教授新近完成的学术专著《危害社会行为的制裁体系研究》，就以“危害社会行为的制

裁体系”为线索，全面研究了治安处罚、劳动教养和刑事处罚三个领域的法律问题。综观全文，该书打破了公法领域“各自为战”的学术壁垒，将刑法学、行政法学、诉讼法学等学科的研究予以整合，甚至从宪法学的角度重新审视危害社会行为的制裁体系的法律控制问题。该书不仅仅属于治安行政法学领域的研究成果，而且对于刑法学、刑事诉讼法学、宪法学的研究都具有一定的启发作用。表面看来，该书研究了多个处于多个法学部门边缘地带的问题，且具有明显的交叉性和宏观性，但实际上，该项研究却触及各相关学科的前沿问题，甚至对很多传统命题提出了质疑和挑战。例如，该书分析了我国危害社会行为三元制裁结构存在的深层原因，系统揭示了我国刑法中“定量因素”和“情节因素”对定罪概念的影响，讨论了定罪所带来的前科、政审等社会政治后果对刑事制裁体系的影响。又如，该书站在三元制裁结构的视角重新观察治安行政处罚制度和劳动教养制度，解释了这两大领域的法治化水平对“罪刑法定”和“无罪推定”原则的消极影响。再如，该书颇有见地地指出，刑事法学界仅仅关注对定罪的实体控制和程序控制是远远不够的，还必须树立起“大公法学”的理念，将整个公共制裁体系的法治化纳入研究的视野，而只有在所有危害社会行为的制裁体系走向了法治化，中国公法领域的法治化水平也才能真正得到整体的提升。

谢川豫教授的这部著作不仅研究了行政法学、刑法学、诉讼法学、警察法学等多个学科的交叉问题，弥补了法学界长期以来将治安处罚与刑事处罚隔离研究的缺憾，而且寻找到了“无罪推定”、“罪刑法定”等法治原则在我国难以贯彻落实的制度根源，在深入剖析我国现行劳动教养对象及其程序的基础上，发现了一些支撑劳动教养制度存在的制度空间，并提出了通过消灭劳动教养的制度空间来促使这一制度最终走向消亡的路径。不仅如此，该书对我国危害社会行为制裁体系的变革提出了一些系统性的理论思路，特别是从实体构成、处罚设置、程

序规则等角度，提出了重构危害社会行为制裁体系的设想。这不仅对我国刑法、诉讼法理论研究具有参考价值，而且为我国警察权配置和司法制度改革提供了翔实的理论论证。

本书作者曾先后在中国人民公安大学和首都经济贸易大学接受法学本科和硕士研究生教育，2004 年起在北京大学法学院进行了为期四年半的专业学习，并于 2009 年获得法学博士学位。在北大求学期间，她博览群书，求知若渴，阅读了大量文献，听取了大量相关课程，撰写了多篇分量很重的论文。她参加了我组织的多个研究项目和学术会议，既从事了一些学术组织工作，又承担了其中的研究工作。她具有较高的学术眼光，通过阅读和听课发现了不少学术前沿问题，并将其中的问题作为自己的研究课题。这部著作是在她的博士论文基础上进一步深化完成的。她在长期学术积累的前提下，呕心沥血，经过无数次修改和完善，最终写成了一部重要的学术著作专著。

作为中国人民公安大学治安系的一名年轻教师，谢川豫教授主要从事警察强制权、治安管理的理论与实践以及治安与刑事执法交叉问题的研究。迄今为止，她已经出版学术专著两部，发表论文 40 余篇，主持国家社会科学基金项目一项，主持部级科研项目两项。她曾获得过“中国人民公安大学课堂教学比赛一等奖”，参编的教材和专著还获得国家级、部级奖项多次。她治学严谨，热爱教学工作，课堂教学效果较好。可以说，在治安学研究领域，谢川豫教授既是一名后起之秀，又是具有较大影响力的青年学者。

作为谢川豫教授的博士生导师，我为她在教学和科研领域取得的成就感到欣慰和自豪，也衷心期待她在以后的学术生涯中，继续保持学术的敏锐和勤奋，争取做最前沿的研究课题，取得最具有创造力的学术成果。

陈瑞华

2012 年 10 月 30 日于北京大学

# Abstract

Offenses are actions that endanger the society and the public order. By the extent of the social harm of a behavior, Chinese law divides offenses into the following two forms: crime and violation against public order control, each of which is regulated by criminal legislation and public security administrative regulation. The sanction system of offenses in China is not only different from the civil law countries, but also the common law countries. The illegal elements of offenses are constituted by administrative offences and criminal offenses; the elements of sanction methods are constituted by administrative penalty, reeducation through labor and criminal penalty; the elements of the sanction procedures are constituted by administrative decision procedure and judicial decision procedure. The sub-elements of the three does not correspond to each other, either symmetrical, which form the "Combination Construction" known as the author refers.

In this sanction system, the dual distinguish between violation against public order and criminal offense is not only the base of the whole system, but also the basic reason for the small criminal circle and the careless legislation of criminal law in China; reeducation through labor is the core element of the combination construction model. However, the "quasi-crime" which deserves reeducation through labor is not a new type of offense. In fact, its natures are no more than three situations: violation against public order, crime, and the action which violates the criminal law but is identified as non-guilty. The procedure of reeducation through labor is not an independent procedure, either, which depends on the procedure of public order administrative procedure or the criminal procedure.

The current sanction system of offenses has the defects of ambiguous interpretation or contradictory in theory, or is contrary to some principles of jurisprudence or legal principles, which bring some negative impacts to the whole legal system, and is the basic reason of many difficulties and obstacles in the law enforcement and judicial in reality of our country. For example, non theoretical basis can be found to explain the classification of dividing offenses into violation against public order and crime; there lies legitimacy crisis in reeducation through labor system from its nature, its objects of application , its procedure, and its impact on the structure of sanctions system; there are many theoretical flaws and conflicts while using administrative procedure to sentence public order administrative penalty and reeducation through labor, which also impact the law enforcement work; the level of human rights protection in the procedure of public order administrative penalty and in the procedure of reeducation through labor are both much lower than that in criminal procedure; in the

sanction system of offenses, the police power shows a strong position and even goes beyond the judicial power and legislative power ; the structure of the whole sanction system seems to be irrational, too.

In China, the legal system is getting constant perfected, the rule of law is getting continuous development. However, China' s existing sanction system of offenses is disconnected with the overall direction of social development. At the same time, the constant renewal of jurisprudence theories and the ideas of ruling-of-law also promote the reform of the sanction system of offenses, and guide the overall direction of the reform. Many aspects of the development of legal system show the reform contents as follows: The quantitative criteria of the crime concept should be abolished; the dual distinguishable situation of crime and violation should be broken; the concept of offense and crime should be united; the punishment on personal freedom should be judged and sentenced by the judicial adjudication, but not decided by the administrative organ by taking an administrative examination and approval way; the relationship between public security organs, the People' s Procuratorates and the courts, which is called "separation of functions, coordination and mutual check" should be changed into a triangle structure, in which the judicial power is the core and in the middle of the structure, balanced by prosecution and defense; the police power should be re-arranged in the social transition period, and should be supervised and reviewed by the judicial power; Reeducation through labor system must be abolished to avoid from being continually used by the international human rights movement as the target to attack our country.

To implement the series of reforms mentioned above, China' s sanction system of offenses must be reconstructed. First of all, the

quantitative factors of the concept of crime should be abolished—the crime should be classified as felony, misdemeanor and police offense. Moreover, the violation against public order regulated by the Law of Public Order Administrative Penalty should be brought into the criminal law system, and regulated as misdemeanor or police offense. After the reconstruction of the crime concept, the obscure zone between violation against public order and crime no longer exists, and the subject of reeducation through labor no longer exists, which creates conditions to abolish the reeducation through labor system completely.

Secondly, the type of criminal penalty should be increased so as to make it diversified, the mitigative punishment should be created in order to meet the needs of suiting punishment to crime; penalty on the personal freedom should be reconstructed so that punishment against freedom besides capital punishment should be reunified as imprisonment.

Finally, the criminal procedure must be divided into the complicated procedure and the simple one in accordance with a certain standard in order to create a new police-prosecuting procedure with the character of "government sues citizen". Police offense, misdemeanor and felony cases may correspond to the police-prosecuting procedure, summary procedure and general procedure. Both the police-prosecuting procedure and the summary procedure are quick-approval procedures. All the devising of confrontational procedures should be reflected in the general procedure.

After the principal part of the sanction system of offense reconstructed, some related legal system should be reformed as follows: We should set up the judicial de-crime system. To avoid all crime from entering the judicial process, we should set up the de-crime procedures in investigation, prosecution and trial stages. China' s criminal record

system should be reformed. The legislator should define the criminal concept clearly in the criminal law; at the same time add the abolition rules of criminal record. Meanwhile, the reform of the criminal record system is bound to bring the reform of files management and political examination system.

When the freedom-related punishments are all sentenced by the court, the freedom-related coercive measures should also be reformed. The criminal diversion measures should be introduced into criminal law. Some enforceable police' s coercive measures should be modified for security measures, which should be sentenced by the court; the other instantaneous police' s coercive measures and criminal coercive measures should reform together, and China' s criminal coercive measures should be reformed as well.

After the reconstruction of the sanction system of offenses, there will be a great number of police offense cases and judicial reviews to be dealt with by the court and the judges, while the current arrangement of courts and the number of judges can not meet the requirements, therefore, restructuring of judicial organs must be in hand.

Keywords: offense, sanction, crime, violation against public order, reeducation through labor

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# 第一篇
# 制裁体系的宏观分析