REFORMANCE AND IMPROVEMENT
OF CHINESE CRIMINAL SUMMARY PROCEDURE

我国刑事简易程序的改革与完善

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艾静，女，1981年生，河北唐山人。先后在中国政法大学获得法学学士、法学硕士（诉讼法学专业）和法学博士（诉讼法学专业）学位。曾在北京市海淀区人民法院工作六年，现就职于北京市中银律师事务所。主要研究领域为刑事诉讼法学，曾多次参与省部级、市区级重点课题研究并获奖，出版专著一部，参编著作二部，在《诉讼法研究》、《国家检察官学院学报》、《中国司法》、《证据科学》、《人民法院报》等刊物上发表论文及评论等十余篇，其中部分被《人大复印资料》、《中国法学创新网》转载。

序

樊崇义*

看到《我国刑事简易程序的改革与完善》一书付梓出版，我深感欣慰！刑事简易程序是刑事诉讼中的一个重大课题，无论是理论基础还是司法运行都具有重要的研究价值。在艾静同学进行博士学位论文选题之际，正值我国《刑事诉讼法》第二次修改启动之时，而简易程序的完善必然是此次修法的重点之一。艾静同学当时正在北京市海淀区人民法院从事刑事审判工作，有着丰富的司法实践经验和第一手宝贵的实证资料，在与其的交流中，我也发现她对于刑事简易程序问题有着自己敏锐的思考和独到的见解。因此，作为她的导师，我建议她以刑事简易程序为题完成博士论文，希望她能够在刑事诉讼法修改的背景下，对这一问题进行一次全面系统的研究和整理，对如何进一步完善我国刑事简易程序做出理论贡献。

研究和适用刑事简易程序意义重大。人类社会的司法，历经了压制型司法——权利型司法——回应型司法的转型，在当今社会步入回应型司法之时，辩诉交易程序、刑事简易程序、被告人认罪程序、刑事和解、调解程序等已全球风靡。我国刑事司法的改革也正沿着这一发展规律向前行进。1996年《刑事诉讼法》把简易程序适用范围规定为“对依法可能判处三年以下有期徒刑、拘役、管制、单处罚金的公诉案件，事实清楚、证据充分，人民检察院建议或者同意适用简易程序的；告诉才处理的案

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件;被害人起诉的有证据证明的轻微刑事案件。”而2012年《刑事诉讼法》修改大大扩大了简易程序的适用范围,扩大到基层人民法院管辖的可能判处无期徒刑(不含)以下的刑事案件,符合“案件事实清楚、证据充分;被告人承认自己所犯罪行,对指控的犯罪事实没有异议;被告人对适用简易程序没有异议的”条件要求的均可适用简易程序。这一变化,清楚地告诉我们,对正义与效率这两大程序价值目标进行适当的协调势在必行。鉴于此种价值与社会经济发展的需求恰相契合,因此刑事简易程序在世界上许多国家的刑事司法中都得到了广泛和深入的应用,形成了丰富的立法经验和科学的理论体系。

但在我国,由于现代意义上的刑事司法起步较晚,真正建立刑事简易程序也只是在1996年第一次修改《刑事诉讼法》之时,因此我们的刑事简易程序无论是立法还是司法运行层面都存在不少问题。作者正是抓住了这样一个契机,首先从刑事简易程序的基本范畴、基本类型和理论基础入手,对刑事简易程序的概念、类型、价值等基础性问题展开扎实的研究,提出“简易程序的层次性”、“简易程序的和谐价值”等创新观点,接下来又对我国近、当代有关刑事简易程序立法做出了开创性的梳理研究,后重点对我国1996年《刑事诉讼法》确立的简易程序以及2012年再次修改后的简易程序进行了立法与司法双重评析,结合《刑法修正案(八)》、《人民法院量刑指导意见(试行)》等有关规定,在充分肯定简易程序改革的基础上,指出仍存在一些问题有待完善。通过理性反思,作者提出了构建我国轻刑快审程序(书面审)、轻罪简易程序、重罪简易程序的体系化构想,从完善理念、科学标准入手进行了具体的程序设计,并对有关证据标准特殊性等问题进行了探讨,观点具有创新性和务实性。

有关刑事简易程序的论著并不鲜见。但是从作者的博士学位论文修改而成的此书,理论基础深厚、资料丰富翔实、观点鲜明且具有创新性,加之作者长期从事审判一线工作,因此本书又具有难得的务实特点。然而对于刑事简易程序问题的研究和探讨仍有许多空间,如今作者已步入律师职业领域,作为她的导师,我衷心希望她能够再接再厉,站在新的视角去发现并研究刑事司法中的更多问题,为国家法治建设做出自己的贡献!

内容提要

近年来，刑事简易程序已在世界刑事司法范围内得到广泛适用，其多元化的发展趋势已经彰显。刑事简易程序，是刑事诉讼理论研究的重要部分，也是刑事司法运行的重要制度之一，它通过对审判程序的一些环节、步骤加以不同程度的简化，从而使刑事案件得到快速处理。从理论上讲，设立简易程序的主要目的在于对正义与效率这两大程序价值目标进行适当的协调，[①]实现二者间的相对平衡，故而这一程序既肩负着实现案件的繁简分流、提高诉讼效率、节约司法资源、促进诉讼经济的重要任务，又承担着实现诉讼正义、保障个人权益的重要使命。

本书的主要内容由七章组成。

第一章为刑事简易程序的基本范畴研究，主要从刑事简易程序的概念、价值评析和基本特征三大方面展开论述。首先，通过现代意义上简易程序的最早出现及其发展轨迹，笔者回应了一些学者提出的“简易程序低级形态”、“初级形态”之说，揭示出简易程序乃诉讼程序发展到高级阶段、精细化之后的产物。据考，最早的关于刑事简易程序的法律记载，一是英国的《1879 年犯罪起诉法》，二是同样于 1879 年生效的德国《刑事诉讼法典》。在此基础上，应当认识到刑事简易程序这一概念的“层次性”，即以普通程序的层次性为基础，简易程序概念也存在不同的

① 陈瑞华：《刑事审判原理论》，北京大学出版社 1997 年版，第 378 页。

层次，普通程序的完善形态和普通程序的一般形态，分别对应不同层次的简易程序，即“相对于普通程序完善形态的简易程序”和“相对于普通程序一般形态的简易程序”。“层次性”概念理论是要解决一个问题，即在刑事简易程序中，不以独任制或者合议制来区分该审判程序是否属于简易程序，而意味着简易程序中既可包括独任制的审理方式，也可包括合议制的审判组织形式，因此，“层次性理论”可以说是合议制简易程序的理论基础。刑事简易程序的价值评析部分，笔者则从公正价值、效率价值、实用价值和和谐价值四个方面进行了分析，特别是“和谐价值”的提出作为理论创新点，是在我国特定的社会环境下对刑事简易程序价值的全新解读。刑事司法运作过程所展现的刑事法律关系间的人性化和宽容性，正是刑事法治的和谐精神之所在。① 刑事简易程序的运用蕴涵着和谐精神的基本思想，它的制度设计与和谐的理念高度契合，能够协调平衡国家权力与个人权利之间的关系，缓和化解被告人与被害人之间的矛盾冲突。在刑事简易程序的基本特征部分，各种简易程序在程序特征上具有一定的共性，比如审理方式简化、诉讼主体简化、适用范围受限、结果轻缓、救济受限、多以被告人认罪为前提、程序类型多元化等特征。程序的“简化”是简易程序的核心特征。

第二章是对刑事简易程序的基本类型研究。从世界范围来看，许多国家和地区的刑事简易程序都不约而同地呈现出多元化的表现形式，均设立了不同种类的简易程序以适应刑事司法实践的需求。本书按照不同的程序特征对域外刑事简易程序进行了分类和整理，以期从宏观和微观两种视角呈现出世界各国刑事简易程序的现状。本书依据的类型化整理的标准有两个：一是是否完全省略了庭审程序，或者说有无保留一般意义上的庭审程序；二是简化处理是否以控辩协商内容为前提。之所以采取这两种标准，主要是考虑了两大法系不同的诉讼传统以及简易程序的现实表现情况，同时也借鉴了其他学者的研究成果。故依据上述标准，可将域外现行简易程序分为四大类——处罚令程序、快速审理程序、

① 杨芳：“论社会主义和谐社会的和谐观”，载《西北民族大学学报》2007年第6期。

认罪处刑程序和辩诉交易程序。其中“处罚令程序”是简易程序中最为简易的一种,其完全省略了一般意义上的开庭程序,法官根据书面证据和被告人的有罪供述直接作出处刑命令;“辩诉交易程序”是具备了以控辩协商为前提这一鲜明特征的案件审理程序,其大大提高诉讼效率的特质也使得世界上越来越多的国家不断吸收和引进。至于“快速审理程序”和“认罪处刑程序”,实际上不能将其完全区别开来:二者在一定程度上是有所交叉的,“快速审理程序”更多侧重于大陆法系被告人作出有罪答辩或者不予答辩而直接申请适用的、简单的、快速的处理案件的程序;“认罪处刑程序”则更多侧重于英美法系中被告人作出有罪答辩但是并未达成辩诉交易或者不符合辩诉交易范围的案件的处理程序。在这一部分的最后,笔者还对域外刑事简易程序的发展趋势进行了总结,指出刑事简易程序的适用范围从有限性向扩大化转变、适用标准从单一性向综合性转变、程序类型从单一模式向多元模式转变、程序性质从权力式向权利式转变等特点,是当今世界范围内简易程序的发展趋势。

第三章是刑事简易程序的理论基础研究。正义性首先是评价一项法律程序的首要标准,程序正义性的独立价值不但无法忽略,而且作用重大,程序正义性理论是指引刑事诉讼程序不断发展的核动力。其次,在刑事诉讼中,我们会考虑自身的经济实力能否有效地维持刑事诉讼体系的运转、有限的资源能否在惩罚犯罪与保障人权当中寻求到合理的平衡。这就意味着,在“经济理性”的影响下,尊重了“程序经济性”的程序才能成为有价值、有效率的纠纷解决方式。再次,随着人们对犯罪现象认识的不断深入,刑事实体法出现了谦抑化的趋势,即越来越和缓、人道、宽容。从刑事一体化的角度讲,如果刑事诉讼的过程不谦抑,也不可能真正实现结果上的谦抑。因此,在刑法谦抑已成大势所趋的背景下,亟须“程序谦抑性”理论作为刑事简易程序的理论基础。最后,刑事案件本身的类型化、主体需求的多样化是简易程序建立的重要条件。现实中,每一个案件的繁简、轻重、缓急都存在客观差异,对不同的案件理应设置与其重要性、复杂程度相适应的程序,故此“程序多元性”理论也必不可少地成为简易程序的理论基础之一。

本书从第四章开始涉及我国刑事简易程序的内容。这一章主要是对我国刑事简易程序的立法沿革及发展做了一个系统的梳理。从目前文献资料来看，国内学者对清末民初以来的刑事诉讼立法史的系统研究非常薄弱，对刑事简易程序的早期立法及沿革几乎没有深入全面的研究，以至于绝大多数研究刑事简易程序的文献中根本未提及过我国刑事简易程序的源起。① 多数研究成果肇始于20世纪80年代的“严打”。实际上，在民国初期的中国就有了正式的简易程序。如早在1920年北洋政府时期就有了正式的处罚令程序，在民国政府时期还曾经写入当时的刑事诉讼法典。所以，笔者将我国刑事简易程序的发展沿革放在对我国刑事简易程序研究的开端，从清末变法、《违警律》的制定和颁布标志着近代中国刑事简易程序立法的萌芽、北洋政府时期的刑事简易程序立法、《地方厅刑事简易庭暂行规则》第10条和《审检厅处理简易案件暂行细则》第9条正式建立中国近代意义上的刑事简易程序、《处刑命令暂行条例》的颁布，到国民政府时期《刑事诉讼法》正式确立简易程序、抗战时期人民政权下的刑事简易程序以及20世纪80年代的“严打”程序、1996年《刑事诉讼法》修改正式确立刑事简易程序和司法解释中的“普通程序简化审”，以及2012年再次修改《刑事诉讼法》被大大扩容的刑事简易程序等，做了一个系统、明确、清晰的梳理。

第五章是对1996年《刑事诉讼法》确立的刑事简易程序的规范与实证分析。1996年《刑事诉讼法》设立了简易程序，后又出台了“普通程序简化审”等相关司法解释，在规范分析的基础上，笔者对司法实践亦进行

① 对我国刑事简易程序的历史沿革进行了梳理的，为数不多，有左卫民等的《简易刑事程序研究》（法律出版社2005年版），对刑事简易程序的历史沿革进行了专章研究；马贵翔的《刑事简易程序概念的展开》（中国检察出版社2006年版），对刑事简易程序的历史沿革进行了非常简单的整理。而其他有关“刑事简易程序”的专著中，如高一飞的《刑事简易程序研究》（中国方正出版社2002年版，第54页）则认为“在1979年刑事诉讼法颁布以前，我国没有刑事诉讼法，在刑事司法过程中也没有完整的刑事诉讼程序，因而也就谈不上普通程序与简易程序之分”。故其认为，1983年9月2日通过的《关于迅速审判严重危害社会治安的犯罪分子的决定》——实践中又被称为严打程序，可以把它看作我国当代刑事简易程序的最初形态。

了实证分析，简易程序对于提高诉讼效率、节约司法资源确实具有积极效果，但同时也存在类型单一、公诉人不出庭、被告人程序主体地位和辩护权难以保障等问题。笔者还以北京市海淀区法院对简易程序的探索和创新为蓝本进行了评析。

第六章是对2012年《刑事诉讼法》修改后刑事简易程序的规范与实证分析。2012年《刑事诉讼法》对刑事简易程序作出了重大修改。结合司法解释、《刑法修正案（八）》、《人民法院量刑指导意见》等的有关规定，笔者指出，修正案中刑事简易程序的适用条件更加科学、适用范围进一步扩大、审判组织形式有所增加、诉讼结构有所完善、程序种类有所增加，但是仍然存在一些不足之处，比如未能充分体现被告人的程序选择权、对简易程序适用后从轻处罚的确定性及力度不够、程序简化的内容实际并无突破、类型仍显不够完备、未对未成年人刑事案件作出特别规定等。基于法律规定的问题和司法实践的需要，北京地区法院系统的“轻刑快审”改革试点出现，其理念和试验的方式、效果均为我们简易程序进一步改革提供了宝贵的实践样本。

第七章是对我国刑事简易程序的完善建议。此部分也是本书的亮点和核心。完善我国的简易程序，首先，应从完善基本理念做起：坚持以中国特色社会主义法治理念为基础，坚持公平正义的基本价值取向，坚持尊重和保障人权的基本原则，针对司法改革坚持开放的眼光、包容的姿态。其次，要完善刑事简易程序的体系化标准：案件标准、主体标准。之后，笔者提出了改革与完善刑事简易程序的具体构想，设立了“轻刑快审程序”、“一般简易程序”和“重罪简易程序”这样一种层次分明、多元化的简易程序体系，其中“轻刑快审程序”的性质为书面审理程序；并分别从各类简易程序的适用条件、适用的案件范围、启动方式、审理方式、简化内容等方面进行了具体的设计，对未成年人犯罪案件适用简易程序的特殊性也作出了分析。为了确保刑事简易程序的真正顺利运行，笔者还提出应当特别规定刑事简易程序的证据规则，把握好刑事简易程序与刑事和解的衔接等问题。

ABSTRACT

In recent years, criminal summary procedure has been widely applied in criminal justice worldwide, manifesting a diversified tendency. Criminal summary procedure is an important part of the theoretical study of criminal procedure and one of the substantial mechanisms of criminal justice operation. It expedites the processing of criminal cases through different degrees of simplification of some segments and steps in the judicial procedure. Theoretically speaking, the main purpose of establishing summary procedure is to properly coordinate between the two procedural value goals, justice and efficiency,① achieving a relative balance between the two. Therefore, this procedure shoulders both the significant task of realizing the separation between complicated cases and simple cases, improving the litigation efficiency, saving judicial resources and promoting litigation economy, and the remarkable mission to realize litigation justice and to safeguard individual rights and interests.

The main content of this book is constituted by seven chapters.

Chapter One is the elementary category study of criminal summary procedure, mainly discussing three aspects: the concept deployment, the

① Chen Ruihua, Principles of Criminal Trial (Peking University Press, 1997), p. 378.

value analysis, and the basic features of criminal summary procedure. First, the author responses to some theories proposed by scholars such as "summary procedure as the low - level form" or "as the primary form" through the research of the initial appearance and afterwards development of the modern summary procedure, revealing that summary procedure is the outcome of judicial proceedings developing to an advanced and refined stage. According to the present study, the earliest legal records of criminal summary procedure are the *Prosecution of Offences Act* 1879 of England and the *Code of Criminal Procedure* (*Strafprozessordnung*) of Germany which came into force in 1879. In view of those, the "hierarchy" in the concept of criminal summary procedure should be recognized, which means there are various levels, based on the hierarchy of general procedure, in the concept of summary procedure. The complete form and general form of general procedure correspond respectively to the different levels of the summary procedure, i. e. "summary procedure relative to the complete form of general procedure" and "summary procedure relative to the general form of general procedure". The conceptual theory of "hierarchy" aims to settle that in criminal summary procedure, whether a trial proceeding belongs to summary procedure or not shall not be determined by which trial form, the sole - judge system or the collegial system, it takes, which means summary procedure contains both trial organization forms of the sole - judge system and the collegial system. Therefore, the "hierarchy theory" can be deemed as the theoretical basis for summary procedure of collegial system. With regard to the value analysis section of criminal summary procedure, the author analyzes from four aspects: the justice value, the efficiency value, the practical value and the harmonious value. In particular, the proposal of the "harmonious value", as the theoretical innovation point, is the brand - new interpretation of the value of criminal summary procedure in the specific Chinese social context. The humanity and tolerance within

the criminal legal relations manifested during the operation of criminal justice is exactly the harmonious spirit of the rule by criminal law. ① The application of criminal summary procedure implies the basic thought of harmonious spirit; and the institutional design of criminal summary procedure highly complies with the ideal of harmony, thus coordinating the relationship between state power and individual rights, as well as conciliating and resolving the contradiction between the defendant and the victim. As for the basic features, various summary procedures share certain procedural characteristics, such as the simplification of trial methods, the simplification of litigation subjects, the limitation on application scopes, the light and minimal nature of the outcome, the limitation on relief, the usual premise of the defendant's admission of guilt and the diversification of the types of procedures. The "simplification" of procedures is the core feature of summary procedure.

Chapter Two studies the basic types of criminal summary procedure. From a worldwide perspective, the criminal summary procedures in many states and districts all present diversified manifestations, setting various types of summary procedures to comply with the requirement of criminal judicial practice. This dissertation classifies and reorganizes the oversea criminal summary procedures according to their different procedural features so as to demonstrate the present condition of the criminal summary procedures worldwide from both the macro - perspective and micro - perspective. There are two standards of the categorized reorganization in this dissertation, one is whether the court hearing proceeding has been completely omitted, or rather, whether the court hearing proceeding in general sense has been maintained; and the other is whether the simplified

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① Yang Fang, *The Viewpoint of Harmony in the Harmonious Socialist Society*, Journal of Northwest University for Nationalities (Philosophy and Social Science), No. 6, 2007.

case process is on the premise of the prosecution and defense consultation. The adoption of these two standards is mainly for the consideration of the litigation traditions of the two legal systems and of the realistic performance of summary procedure, with reference to the research achievements of other scholars in the meantime. Therefore, according to the abovementioned standards, the current oversea summary procedures can be divided into four types: the procedure of penal order, the procedure of quick trial, the procedure of pleading guilty and sentencing, and the procedure of plea bargaining. The "procedure of penal order" is the most simplified type of summary procedures in which the hearing proceeding in general sense has been completely omitted and the judge sentences the penal order directly based on the written evidence and the defendant's confession of guilt. The "procedure of plea bargaining" is a trial procedure distinctly characterized by taking prosecution and defense consultation as the premise; and an increasing number of states are constantly absorbing and introducing this procedure on account of its great improvement of trial efficiency. As for the "procedure of quick trial" and the "procedure of pleading guilty and sentencing", these two procedures are in effect impossible to completely distinguish from each other as they are intersectional to some extent. The "procedure of quick trial" emphasizes more on the simple and quick case handling procedure, which is directly proposed to be applied as the defendant makes the plea of guilty or makes no plea in the continental law system; while the "procedure of pleading guilty and sentencing" emphasizes more on the case handling procedure where the defendant makes the plea of guilty but fails to reach the plea bargaining or the case does not fall into the scope of plea bargaining in the Anglo – American law system. In the end of this part, the author further summarizes the developing tendency of oversea criminal summary procedures, pointing out some features, such as the application scope transforming from limited to

expanded, the application standards from unitary to comprehensive, the procedure types from single mode to multiple mode, and the procedure nature from power - oriented to right - oriented, are the developing tendency of summary procedure in the present world.

Chapter Three is the elementary research of criminal summary procedure theories. First, justice is the primary standard for the evaluation of legal procedures. The independent value of procedural justice cannot be ignored, and is of great significance. The theory of procedural justice is the nuclear driving force to guide the continuous development of criminal procedure. Second, in criminal procedure, we will consider whether our economic power could effectively maintain the function of the criminal procedure system and whether the limited resources could seek a reasonable balance between the punishment of crimes and the guarantee of human rights, which means that under the influence of "economic rationality", only procedures that respect "the economy of procedure" can be the valuable and effective dispute settlement. Third, along with the public's increasingly deepened understanding of criminal phenomenon, criminal substantive law presents a tendency of modesty, becoming more and more mild, human and tolerant. From the perspective of criminal integration, the modesty of the outcome could not be actually realized if the process of criminal procedure is not modest. Therefore, in the context that the modesty of criminal law has become the general trend of development, the theory of "modesty of procedures" is in urgent need to be regarded as the theoretical foundation of criminal summary procedure. In the last place, the categorization of criminal cases and the diversification of subject demands are also vital prerequisites for the establishment of summary procedure. In reality, there are objective differences in the complexity, degree and urgency of each case, and different procedures should be established to correspond with the different importance and complexity of various cases.

Therefore, the theory of "diversity of procedures" is also one of the indispensable theoretical foundations of summary procedure.

This dissertation begins to discuss Chinese criminal summary procedure from Chapter Four. Chapter Four mainly combs systematically the legislative evolution and development of Chinese criminal summary procedure. Judging from the current available documentary materials, domestic scholars conducted a rather weak systematic research of the legislative history of criminal proceedings from the late Qing Dynasty and early Republic of China, and rarely made thorough and in - depth study of early legislation and evolvement of criminal summary procedure. Consequently, most documentary materials on criminal summary procedure fail to refer to the origin of Chinese criminal summary procedure. ① Most research achievements dated the origin back to the "Strict Strike of Crimes" in the 1980s. In fact, formal summary procedure has already come into being since early Republic of China. For example, in 1920, during the administration of Northern Warlords Government of China, there was formal procedure of penal order which was later stipulated in the *Criminal*

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① Research on the historic evolvement of Chinese criminal summary procedure is rare, for instance, in "On Simplified Criminal Procedure" by Zuo Weimin (et. al) (Law Press, 2005) there is a specific chapter studying the historic evolvement of criminal summary procedure; in "The Expandedness of the Concept of Criminal Summary Procedure" by Ma Guixiang (Procuratorial Press of China, 2006) gives a very simply order of the historic evolvement of criminal summary procedure. As for other works related to "criminal summary procedure", there is "Research on Criminal Summary Procedure" by Gao Yifei (China Fangzheng Press, 2002) who argues that "before the promulgation of Criminal Procedure Law of 1979, there was no criminal procedure law in China. Since there was no complete criminal procedures, there was no distinction between general procedure and summary procedure." Therefore, Gao believes that "The Decision of the Standing Committee of the National People's Congress Regarding the Procedure for Prompt Adjudication of Cases Involving Criminals Who Seriously Endanger Public Security" adopted on September 2, 1983, which in practice was known as the "Strict Strike Procedure", could be deemed as the initial form of the Chinese modern criminal summary procedure.