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THE CHINESE MODEL AND MECHANISM CONSTRUCTION OF EXCULPATION IN CORPORATE COMPLIANCE

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ABSTRACT

Corporate compliance is an important institutional innovation to promote the implementation of policies optimising the business environment, and to shift China's criminal justice from remedial to preventive, from confrontational to cooperative, and from harsh to modest. However, at present, there are still problems with China's compliance decriminalisation mechanism, such as incentive mechanisms and corporate governance, and weak prevention of decriminalisation risks. In the future, in terms of the type of decriminalisation, the integrated model of procedural and substantial decriminalisation can be explored, In terms of the stage of decriminalisation, the whole chain of compliance and decriminalisation mechanism at the stages of investigation, prosecution and trial should be constructed, In terms of the decriminalisation system, a diversified system of substitute punishment and systematic compliance incentives can be established, so that a paradigm of "liability-incentive governance" can be formed, In terms of the guarantee of decriminalisation, a risk identification-response mechanism should be implemented with criminal risk as the centre to safeguard the equality, voluntariness, effectiveness and constraint of compliance decriminalisation. Therefore, the formation of an integrated, comprehensive, systematic and standardised Chinese compliance decriminalisation path can be promoted.

KEYWORDS: corporate compliance, non-bearing criminal responsibility, the Chinese model

INTRODUCTION

The research is funded by The Teaching and Research Section of the Introduction to Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era in the 2023 School-level "Quality Project" of Guangdong Polytechnic College (2023年广东理工学院质量工程项目“习近平新时代中国特色社会主义思想概论教研室”KCJYS202303) and The 14th Five-Year Plan Project for Philosophy and Social Sciences of Zhaoqing City (肇庆市哲学社会科学“十四五”规划项目“关于企业合规不起诉基础理论及其适用问题研究——以肇庆市企业为例”24GJ-190).

Based on the reflection on the current mechanism of acquittal in accordance with the law in China, it is advisable for China to establish an integrated acquittal mechanism combining procedures and entities in the future and strengthen the prevention of acquittal risks. In terms of the acquittal stage, an acquittal mechanism covering the whole chain of investigation, prosecution and trial should be established; in terms of the acquittal system, an integrated promotion model of “responsibility – incentive-governance” should be explored, so as to promote the formation of an integrated, whole-process, systematic and standardized path of acquittal for corporate compliance with Chinese characteristics.

I. Integrated Acquittal: From “Determining Crimes Based on Penalties” to “Acquittal for Compliance”

Different from penalties and disciplinary measures, acquittal for compliance is a positive incentive for enterprises. Its operating mechanism is that the state uses both external supervision and the incentive of acquittal to prompt enterprises to prevent, detect or stop crimes, thus forming a pattern of joint crime governance by the state and enterprises. From the perspective of governance, this mechanism has changed the traditional one-way state intervention in crimes and formed a new cooperative judicial model, which can become the third path for crime governance besides penalties and disciplinary measures.

1.1 Procedural Aspects of Acquittal for Compliance

Compliance cases may involve the following types of non-prosecution: (1) Absolute non-prosecution. If an enterprise’s circumstances are obviously minor and cause little harm due to compliance, and it is not considered a crime or there are other circumstances where criminal liability does not need to be pursued, it should not be prosecuted in accordance with the law (Li 2021). (2) Relative non-prosecution. If an enterprise has pre-compliance or post-compliance and, according to the provisions of the Criminal Law, does not need to be sentenced to penalties or can be exempted from penalties, relative non-prosecution can be made. (3) Special non-prosecution. If the person in charge of an enterprise voluntarily and truthfully confesses the facts of the unit's crime, has significant meritorious service, or the case involves significant national interests, special non-prosecution can be made upon the approval of the Supreme People’s Procuratorate. The application scope of the above three types of non-prosecution models is limited. In comparison, conditional non-prosecution for compliance or the establishment of a special non-prosecution procedure for compliance is more feasible.

1.2 Substantive Aspects of Acquittal for Compliance

Effective pre-event compliance means that an enterprise has formulated a compliance plan and taken measures such as compliance risk assessment and compliance due diligence, which can, to some extent, prove that the enterprise does not have the subjective intention of hoping for or allowing the occurrence of harmful consequences. Similarly, the establishment of an effective pre-event compliance system is also an important factor in blocking the occurrence of negligent crimes committed by units. Because based on the principle of trust and the theory of expectability in criminal dogmatics, what society expects is whether an enterprise has taken actions in line with norms. If an enterprise and

relevant managers have already taken compliance measures, but employees still commit crimes, then from the perspectives of norm justification, the possibility of unjust blame, and public interest, sanctions on the enterprise can be waived. Since pre-event compliance can effectively reduce the risk of crime, is it necessary to make compliance a criminal obligation and add the crime of corporate management negligence?

Regarding this, there is significant controversy in the theoretical circle. The author believes that adding management obligations is indeed an effective measure to promote corporate compliance. However, in order to prevent the excessive intervention risk of the criminal law, whether to add and what kind of management negligence crimes to add should adhere to the principle of proportionality. Moreover, the premise for analyzing the impact of compliance on corporate criminal liability from the perspective of intention or negligence is to establish the “theory of the independence of the will of the unit” (Chen 2023:49). This theory contains two implications: (1) The unit has an independent “will”. This will can be embodied through specific or abstract behaviors such as risk assessment, due diligence, employee training, and the formulation of norms. (2) The independence of the unit’s will. After its establishment, an enterprise should have an independent will that transcends its founders, managers, and internal members. At present, Chinese enterprises generally have problems such as a low level of organization and concentrated power in the shareholders’ meeting, which are important reasons for the difficulty in distinguishing between the will of the enterprise and that of individuals and are also institutional factors affecting the operation of compliance. It can be seen that the key to establishing the “theory of the independence of the will of the unit” (Shi 2023: 62) is to improve the corporate governance structure and enhance the level of enterprise organization.

2. Full-Process Compliance: Establishing an Acquittal Mechanism Covering the Whole Chain of Investigation, Prosecution and Trial

2.1 Creating Opinions on Non-Prosecution for Compliance in the Investigation Stage

Some scholars have put forward that there are two paths for acquittal in the investigation stage through conditional criminal filing and conditional criminal case withdrawal. Conditional criminal filing and general conditional case withdrawal can both be decided by the public security organs, and the external supervision is weak. In order to prevent improper acquittal, the scope of application should be strictly limited. Special conditional criminal case withdrawal must be approved by the Supreme People’s Procuratorate and meet conditions such as voluntarily and truthfully confessing the suspected criminal facts, having significant meritorious service, or the case involving significant national interests, and the applicable objects are also relatively limited. In comparison, when the conditions for non-prosecution are met in the investigation stage, it is feasible for the public security organs to transfer the opinions on non-prosecution to the procuratorial organs for review and decision. Although this procedure is not exactly “acquittal”, compared with the situation where the procuratorial organs decide not to prosecute during the transfer for review and prosecution, the transfer of opinions on non-prosecution can better motivate enterprises to take the initiative to comply and cooperate with the investigation in the investigation stage. Moreover, the opinions on non-prosecution can be extended to

all enterprises that meet the conditions for non-prosecution, and the applicable objects are more extensive. In addition, this kind of procedure has a litigation structure involving the investigation organs, the defense and the procuratorial organs, which can reduce the risk of illegal acquittal. To avoid the abuse of the right to propose non-prosecution for compliance in the investigation stage, the following points should be achieved: (1) Adhere to the statutory proof standard. Clear criminal facts and sufficient and reliable evidence are the prerequisites for initiating compliance and proposing non-prosecution in the investigation stage. The public security organs shall not lower the evidence requirements and proof standards due to compliance. (2) Strengthen lawyer defense and legal assistance. Ensure that enterprises can obtain effective legal assistance and make sure that they understand the nature of compliance and its legal consequences and are willing to comply voluntarily. (3) Strengthen rights relief. Protect the right to object of victims, shareholders, creditors and other subjects. Meanwhile, the procuratorial organs should also strengthen the supervision of compliance and the review of opinions on non-prosecution for compliance in the investigation stage. In practice, there are three modes for the procuratorial organs to intervene in supervision, namely, applying for review, consulting for intervention and taking the initiative to intervene, and each has its own advantages and disadvantages. We can adopt a comprehensive mode. If the public security organs think that compliance inspection can be carried out, they can consult the procuratorial organs to intervene in advance, and the procuratorial organs will guide the compliance investigation. The public security organs will continue the investigation according to the guidance. If they think that the inspection conditions are met, they can draw lessons from the procedure of transferring for review of arrest and apply to the procuratorial organs for compliance review. If the procuratorial organs find that the inspection conditions are met during the process of clearing up “pending cases”, they can take the initiative to intervene and strengthen the guidance. No matter which mode is adopted, the procuratorial organs should clarify their guiding and supervising functions, grasp the limit of intervention, and strengthen the review of the voluntariness, authenticity and legality of compliance.

2.2 Promote Conditional Non-Prosecution for Compliance or Add a Special Non-Prosecution Procedure for Compliance in the Stage of Reviewing and Prosecuting

The applicable objects of conditional non-prosecution are minors. At present, although it is difficult to apply it to corporate crime cases in terms of regulations, if the scope of application is expanded in the future, it can become the main mode of non-prosecution for compliance. In fact, before the amendment of the Criminal Procedure Law in 2012, some scholars had proposed that conditional non-prosecution should not be limited to minor crime cases where the possible sentence is less than one year of fixed-term imprisonment. However, due to the legislative thinking of being active, prudent and proceeding step by step at that time, it was still strictly restricted. In the future, with the maturity of the conditional non-prosecution system and the promotion of the compliance system, it is possible to consider expanding the scope of application to achieve an effective connection between corporate compliance and non-prosecution. In view of the value and particularity of acquittal through the compliance procedure, the Criminal Procedure Law can also be amended to establish a special non-prosecution procedure for compliance. Meanwhile, in order to maintain the unity of the legal application of non-

prosecution for compliance and other types of non-prosecution, it is advisable to adhere to the prosecutor's discretionary model. The reasonable core of the judicial review models of countries such as the UK and Canada can be absorbed to strengthen the review of non-prosecution agreements and the supervision of the performance of agreements, and disclose the corresponding contents to ensure the procedural legitimacy of non-prosecution for compliance.

2.3 Implement the Withdrawal of Prosecution for Compliance in the Trial Stage

If an enterprise has not complied in the investigation and review and prosecution stages, it can apply to the People's Court for a compliance inspection in the trial stage. Drawing lessons from the bankruptcy reorganization procedure, if the People's Court believes that the inspection conditions are met, it can rule to initiate the compliance inspection and make an announcement. From the time when the inspection is ruled to be initiated until the termination of the inspection procedure, it is the compliance inspection period. During this period, the compliance procedure shall be applied with reference to that in the review and prosecution stage. After the inspection is completed, the third-party organization should conduct a comprehensive assessment of the compliance situation of the enterprise involved in the case and prepare an inspection report, which shall be submitted to the third-party mechanism management committee, the People's Procuratorate handling the case and the People's Court. If the procuratorial organ believes that the conditions for non-prosecution are met, it can apply to the People's Court to withdraw the prosecution. From the perspective of power attributes, the right to withdraw the prosecution is an extension of the discretionary power of public prosecution in the trial stage, and its essence still belongs to the right of request. In order to prevent the procuratorial organ from causing undue interference to the judicial power when exercising this right of request, when the procuratorial organ decides to withdraw the prosecution in the trial stage, it should submit a decision letter on the withdrawal of the prosecution to the People's Court and explain the reasons. The People's Court should conduct a substantive review of the voluntariness, authenticity, and legality of compliance and whether the compliance plan has been effectively implemented. To prevent the abuse of the right to withdraw the prosecution and affect the stability of the procedure, the procuratorial organ should also strengthen the reasoning and internal supervision of the compliance cases where it intends to withdraw the prosecution, and promptly report the prosecution opinions, the decision letters on the withdrawal of the prosecution and the compliance inspection materials to the superior procuratorial organ for the record. Of course, the procuratorial organ and the judicial organ should also safeguard the right to defense of the enterprise and the right to object and the right to relief of victims and other subjects. In order to reduce the impact on production and operation and enhance the motivation for compliance, the trial stage should also be cautious in freezing the property of the enterprise such as funds, bonds and stocks.

3. Systematic Governance: Promoting the Integration of “Responsibility - Incentive - Governance”

The governance of enterprises after acquittal is a complex systematic project, which requires strengthening top-level design and overall planning. The integrated promotion of “responsibility -

incentive- governance” is an effective measure. Among them, the assumption of responsibilities after acquittal is the foundation, compliance incentives are the means, and enterprise governance is the purpose.

3.1 Explore a Diversified System of Alternative Punishments after Acquittal

This system includes compound liability assumption methods such as administrative penalties, administrative sanctions, and civil liabilities. Among them, administrative penalties are the most common disciplinary measures after acquittal for compliance and are also the focus of the connection between criminal and administrative aspects. Regarding the aforementioned issues concerning the connection between acquittal and administrative penalties, the improvement paths include: (1) Strengthen the two-way connection between acquittal and administrative penalties. Improve the mutual recognition mechanism for similar penalty results. If administrative penalties are still required after acquittal, the illegal gains already confiscated and the taxes already paid during the compliance process can be offset against the corresponding administrative penalties, and the execution does not have to be stopped, but they should be considered as factors in determining the criminal liability of the enterprise. If no administrative penalties have been imposed, in principle, a decision on whether to impose administrative penalties should be made after the public security organs, procuratorial organs, and judicial organs have made their decisions. (2) Construct a full-process connection mechanism. If the compliance reform is extended to the investigation and trial stages, reference can be made to the connection regulations between non-prosecution for compliance and administrative penalties to clarify the criminal-administrative connection procedures after acquittal for compliance by the public security organs and judicial organs. (3) Strengthen the integrated connection between procedures and entities. In terms of procedural connection, it should be clarified that the materials such as compliance plans and compliance inspection reports transferred by the public security organs, procuratorial organs, and judicial organs, which meet the requirements of authenticity, legitimacy, and relevance upon review, can be used as evidence for administrative penalties, thereby strengthening the connection of criminal-administrative evidence. In terms of substantive connection, clarify the offset mechanism between acquittal for compliance in the investigation and review and prosecution stages and administrative penalties to reduce the burden on enterprises. After acquittal for compliance, relevant personnel of the enterprise may also be involved in administrative sanctions. For example, when a unit commits an environmental violation, in addition to punishing the unit and the directly responsible personnel in accordance with the law, personnel appointed by state organs should also be transferred to the appointment and removal organs or supervision organs for sanctions in accordance with the law. In addition, illegal enterprises sometimes also need to bear civil liabilities. When the victim files a lawsuit with the People's Court, the enterprise should still bear civil compensation and other responsibilities after acquittal for compliance.

3.2 Construct a Systematic Compliance Incentive Mechanism

Besides acquittal for compliance and the application of lenient criminal compulsory measures, leniency in sentencing is also an important mechanism to incentivize corporate compliance (Ye 2014).

This mechanism is stipulated in the laws of countries such as the United States, Austria, and the United Kingdom. In China, although many scholars also support leniency in sentencing for compliance, compliance has not yet become a legal reason for leniency in sentencing. From the perspective of criminal law theory, the basis of punishment includes the liability punishment based on the demand for retribution and the preventive punishment based on social needs. Compliance means that the preventive punishment for enterprises is reduced, and leniency in sentencing is justified. As for the relationship between leniency in sentencing for compliance and leniency in sentencing for pleading guilty and accepting punishment, there are currently two views, namely the "integration theory" and the "separation theory". The author believes that at the present stage, a "dual" mechanism for leniency in sentencing for natural persons who plead guilty and accept punishment and leniency in sentencing for corporate compliance can be established, and in the long run, an independent compliance sentencing incentive system should be established. To incentivize the enthusiasm of enterprises for compliance, administrative organs and judicial organs should also use measures such as seizure, impoundment, and freezing with caution. If it is really necessary to seize, impound, or freeze, necessary working capital should be reserved to reduce the impact on production and operation. In addition, regarding how to connect with the administrative incentive mechanism after acquittal for compliance, Article 12 of the "Several Provisions on the Third-Party Supervision and Evaluation of the Compliance of Enterprises Involved in Cases in Pudong New Area" stipulates that "the implementation of the compliance rectification of enterprises involved in cases can be provided to relevant competent departments as a reference for whether to be lenient in administrative penalties". Article 18 of the "Opinions on Establishing the Working Mechanism of the Third-Party Supervision and Evaluation of the Compliance of Enterprises Involved in Cases (Trial)" in Zhejiang Province also stipulates that after the criminal procedure for enterprises involved in cases is completed and administrative penalties need to be imposed, the People's Procuratorate shall transfer a copy of the compliance inspection report to the corresponding administrative organ and, depending on the circumstances, suggest in the form of procuratorial suggestions or other appropriate ways that the administrative organ reduce or exempt the punishment for the enterprises involved in cases. The above experiences can be considered for promotion. Since the rules formulated by various regions are still rather principle-based, it is advisable to refine the list of administrative incentives and clarify the types and ranges of leniency. To ensure that administrative organs exercise their discretionary power of punishment in accordance with the law, the basic principles and discretionary benchmarks that should be followed in administrative penalties can also be clarified. After acquittal for compliance, in order to maintain the reputation of enterprises and reduce the impact on production and operation, the exceptional circumstances under which administrative organs can be exempted from notifying other units, not revoking the honorary titles of illegal enterprises and responsible persons, and allowing not to publicize the information of administrative penalties can also be clarified. Enterprises that are acquitted and exempted from administrative penalties should be given incentives such as no restrictions on loans, no suspension of loans, and no restrictions on being approved for listing and refinancing.

3.3 Grant Acquittal with an Inspection Period to Achieve Long-Term Governance of Enterprises

To strengthen the governance of enterprises after acquittal, the suggestions put forward by the procuratorial organs should focus on improving the internal governance and risk prevention and control of enterprises, and acquittal can be granted with an inspection period attached. During the inspection period, the enterprises involved in crimes can be supervised by the administrative competent authorities. The supervision contents include the implementation of procuratorial suggestions and compliance plans, etc. The supervision methods include regular written reports, sampling inspections, and penetrating inspections. If an enterprise refuses to implement or fails to implement the compliance plan without justifiable reasons during the inspection period, the supervisory authority can notify the administrative organs, the management committee of the supervision and evaluation mechanism, and the procuratorial organs (Li 2020). The administrative organs can take it as a factor to consider when determining the administrative liability of the enterprise. The management committee of the supervision and evaluation mechanism can prepare a compliance report during the inspection period based on the materials transferred by the administrative organs and submit it to the procuratorial organ handling the case. The procuratorial organ will determine whether to revoke the acquittal decision in combination with this inspection report. After the inspection period ends, the procuratorial organ can make a definite acquittal decision. After acquittal, if the enterprise involved in the crime commits a crime again, it should be punished more severely, and the compliance incentives will no longer be applicable. It should be said that strengthening the supervision of enterprise governance after acquittal puts forward higher requirements for information communication and work coordination among different subjects. Administrative organs and judicial organs should strengthen cooperation and improve the multi-directional connection mechanism. If the acquittal mechanism for compliance is extended to the whole process of investigation and trial, these stages can also refer to the application in the stage of reviewing and prosecuting.

4. Strengthen the Construction of the Mechanism for Preventing the Risks of Acquittal

To prevent formalistic compliance, a risk “identification -response” (Sun 2022:85-86) mechanism can be constructed with criminal risks as the center: (1) Risk identification. Effective risk identification should focus on risk points and follow the principle of individualization to form a personalized risk prevention checklist. (2) Risk response. Countermeasures should be taken in response to risks. For example, for compliance-related crimes, enterprises should cultivate a compliance culture to make compliance a habit and internal awareness of employees. (3) Risk-based responsibility tracing. To prevent the management from shifting responsibilities under the guise of compliance, the obligation of risk prevention can be used as the basis for accountability. Regarding the risks that may exist in the acquittal through the compliance procedure, such as selective application, power imbalance, speculative compliance, and technical supervision, we can follow the “four criteria”.

First, equality. Adhere to the equality of rights, opportunities, and rules for all types of enterprises, and provide equal incentives for acquittal to enterprises involved in crimes. However, given the particularities of micro, small, and medium-sized enterprises, a “stepwise compliance standard” can

be adopted (Gustavo 2019: 63). Based on indicators such as the rectification effect and prevention ability, set compliance standards from level 1 to level 4, which are respectively matched with micro, small, medium-sized, and large enterprises. Second, voluntariness. It includes the voluntariness of waiver and the voluntariness of rectification. The voluntariness of waiver emphasizes safeguarding the basic rights of enterprises, such as the right to know, the right to choose procedures, and the right to change one's mind. Where the disclosure of illegal information may involve trade secrets or privacy, forced disclosure shall not be allowed. The voluntariness of rectification emphasizes that procuratorial organs should not use the threat of prosecution to coerce enterprises in order to promote compliance. During the rectification process, they should not overly interfere with the formulation and implementation of compliance plans and the internal structural reform of enterprises. Third, effectiveness. The compliance plan should follow the principle of individualization and be determined by comprehensively considering factors such as the scale of the enterprise, the nature of the industry, and the business layout. After the compliance plan is formulated, the senior and middle-level managers of the enterprise should make compliance commitments and effectively convey them. The person in charge of compliance should have appropriate powers and resources to promote the compliance project. In addition to analyzing the causes of crimes and conducting targeted repairs during the inspection stage, enterprises must also timely revise the compliance plan according to changes in the business environment, laws and regulations, and industry standards. Meanwhile, improve the effectiveness evaluation mechanism for compliance rectification, clarify that third-party regulatory agencies must follow the principle of systematic evaluation, and strengthen the inspection of the overall, systematic, and long-term nature of the rectification. In terms of the design of evaluation plans and indicators, vertically, it can be carried out around elements such as the compliance organization system, the institutional system, the operation system, and the guarantee system; horizontally, the effectiveness of compliance design, implementation, and effects can be mainly evaluated. In terms of evaluation methods, it is necessary to comprehensively use methods such as questionnaires, random inspections, and unannounced inspections, and, if necessary, supplemented by scientific and technological means for continuous monitoring. Fourth, restrictiveness. Clarify the factors, standards, and procedures for compliance evaluation, and strengthen the investigation and relief of illegal acquittal responsibilities. When the procuratorial organ decides on acquittal, in addition to safeguarding the rights of the public security organs to apply for reconsideration and review, the rights of victims and enterprises to appeal, etc., it must also clarify the limits of the exercise of power in combination with the characteristics of this type of non-prosecution. In terms of power supervision, a compliance hearing procedure should be established to strengthen the reasoning for non-prosecution for compliance and disclose the non-prosecution documents to accept the supervision of victims, interested parties, and the public.

CONCLUSION

Involved enterprise compliance reform is an institutional innovation that fully implements Xi Jinping Thought on the Rule of Law, strengthens litigation source governance, and better serves the high-quality development of the economy and society. Acquittal for compliance is an important means to

promote this system. It can not only incentivize enterprises involved in crimes to implement compliance plans, guide more enterprises to independently prevent crimes, and help implement the policy of optimizing the business environment, but also contribute to the transformation of criminal justice from a remedial type to a preventive type, from a deterrent type to an incentive type, from an adversarial type to a cooperative type, and from a harsh type to a restrained type. In the future, it is advisable to improve the integrated acquittal mechanism for compliance and explore the full-chain compliance acquittal model covering investigation, prosecution, and trial. Meanwhile, adhere to the integrated promotion of “responsibility - incentive – governance”, strengthen the prevention of acquittal risks, and thus construct an integrated, full-process, systematic, and standardized acquittal system for compliance.

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