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# Problems and Solutions of the Criminal Compulsory Treatment Procedure in China

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**Abstract:** The criminal compulsory treatment procedure of China has been in operation for nearly three years, part of the barrier in operation has been highlighted, such as the chaos in the forensic psychiatric expertise, the subject who need to bear the cost is not clear, termination of the procedure is full of difficulties, and the supervision ability of prosecution authority is not equal to its ambition, and so on. All the problems have actually hindered the operation of the procedure, and they are urgent to be solved. There are also some problems, such as whether to expand the scope of applicable object of the procedure, how does the criminal compulsory treatment procedure connect and interact with the general procedure, what is the standard of proof of the procedure, whether to expand the scope start subject of the expertise of forensic psychiatry, whether the victims are entitled to the request of subsidiary civil action, which are the stumbling block in the future operation of the procedure and need to save against a rainy day as soon as possible. Otherwise, the procedure will go astray under pressure.

**Key words:** compulsory treatment; expertise of forensic psychiatry; standard of proof; prosecutorial supervision on compulsory treatment procedure

Since the criminal compulsory treatment procedure in China go into service, the road of its operation is not smoothly. Although the scholars and the people in practice have reached consensus on some issues, such as the applicable conditions of criminal compulsory treatment procedure including behavior fact condition, responsibility ability condition, social risk condition; the ways to start the criminal treatment procedure including started by the application of prosecution authorities, started initiatively by the court, and the public security authorities don't have the power to start the procedure; the victims and their legal representatives and near relatives shall participate in the trial. However, there are still some problems, whether in theory or in practice, that are more important than the problems that have been reached consensus need to be solved.

## 1. Perspective of current outstanding issues

### 1.1 the chaos in the forensic psychiatric expertise

The forensic psychiatric expertise in the compulsory treatment procedure plays an important and even decisive role. Different with the American psychiatry report, forensic psychiatric expertise in China not only solve whether citizens suffering from mental illness, but also make an evaluation about the ability of criminal responsibility. It has the functions of both medical diagnosis and legal evaluation and is the core evidence material of the compulsory treatment procedure. In essence, the judicial process is to confirm the normative of the identification. Forensic psychiatric expertise itself has some defects, such as a lack of objectivity, easy to produce different appraisal opinions, and due to the nature of the forensic psychiatric expertise itself, the improved space is also limited. We should pay more attention to the procedural problems of this kind of expertise, mainly manifested in the following two points:

First of all, the forensic psychiatric expertise is lack of a unified standard. Judicial expertise system in China don't form a uniform and definite understanding on the forensic psychiatric expertise, and there is no a uniform expertise standard, and this lead to a result that different expertise organs may produce different expertise opinions, which have damaged the authority of judicial expertise.

Secondly, the levels of expertise organs are not clear, and the problem of which one to choose has

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not yet been resolved when there are more than one opinions that are inconsistent. There are four kinds of expertise organs in China which belong to different systems and authorities, and there is no a unified standard on management and evaluation, and the level of effectiveness of expertise opinions made by different expertise organs are not clear. Even if the respondent or his legal representative apply for re-expertise, there may also be the problem that the judges don't know which expertise opinion to choose when the re-expertise opinion is inconsistent with the previous one.

### **1.2 Bearing of the cost in compulsory treatment has become a chronic illness**

The cost of the criminal compulsory treatment procedure mainly includes the expenses during the period of compulsory treatment, and the follow-up expenses of the people who have been discharged from the compulsory treatment. Most scholars believe that the bearing of the cost should be divided into two parts: one part undertook by financial allocation of the state, which should be included in the fiscal budget; the other part of the treatment expenses could be included in the social medical insurance, and part of the cost should be undertaken by the people who received the compulsory treatment and their families. The majority of the current practice is that the public security organs pay the cost of compulsory treatment from the office expenses in advance and apply the government or relative departments at the same level for allocating special funds, and part of the cost are undertaken or payed in advance by the family of the people who received the compulsory treatment, or undertaken by the working unit of the people who received the compulsory treatment. Part of the respondents can apply for reimbursement of the cost according to the new rural cooperative policy. Because of the shortage of funds for the public security organs, many people who meet the conditions of compulsory treatment can't accept the compulsory treatment, which limits the application of the new procedure.

### **1.3 Termination of the procedure is full of difficulties**

For the relief of the compulsory treatment, Chinese "Criminal Procedure Law" only provides that "the compulsory treatment institutions should carry out diagnostic assessment regularly for the people who received the compulsory treatment. For the people who are danger no longer and need not to continue the compulsory treatment, the compulsory treatment institutions should be promptly put forward the opinion of terminating the procedure to the court which decided the application of the compulsory treatment for approval. The people who received the compulsory treatment and their close relatives have the right to apply for the relief of compulsory treatment." At present, the relief of compulsory treatment is still facing the dual problems of legislation and judicial practice.

### **1.4 The supervision ability of prosecution authority is not equal to its ambition**

Chinese "Criminal Procedure Law" clearly stipulates that the prosecution authority is in charge of the supervision of the decision and execution of compulsory treatment. "Criminal Procedure Rules for the People's Prosecution (Pilot)" also stipulates supervision of the enforcement of criminal compulsory treatment specifically as a separate section in content of the fourteenth chapter "law supervision of criminal procedure". However, the compulsory treatment procedure is still a new thing, so the legal supervision ability of the prosecution authority is not equal to its ambition when facing to the procedure as the ability is always not so strong, and mainly manifested in the following points:

First of all, the lack of professional knowledge restricts the development of prosecutorial supervision. The compulsory treatment procedure is closely related with medical and mental health program, forensic psychiatric expertise in the procedure plays an important and even decisive role. Due to the lack of professional knowledge, the supervision of prosecution authority on the forensic psychiatric expertise can only stay on the form level, and can't carry out effective supervision on the question whether the results of the expertise go against with the professional knowledge of expertise.

Secondly, the works of different departments have overlaps, and the communications are not smooth, these factors restrict the function of supervision. The works in the compulsory treatment procedure related to the prosecution authority are in charged by different departments of the prosecution authority, and the

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“Criminal Procedure Rules for the People's Prosecution (Pilot)” stipulates more details further. The public prosecution department of the prosecution authority is mainly responsible for the three items: supervision on the compulsory treatment opinion submitted by the public security organ, submitting the application of compulsory treatment to the court, and the supervision of the compulsory treatment decision. The supervision department of the prosecution authority is mainly responsible for the supervision of temporary protective restraint measures, supervision of the implementation of compulsory treatment, as well as the handling of the complaint against the compulsory treatment. The works of the two departments have overlaps, if the communications and information exchanges between the two departments are not well, it will affect the supervision function of the prosecution authority.

Finally, the prosecution authority doesn't have the right to protest, which greatly restricts the function of supervision on compulsory treatment decisions. The compulsory treatment procedure is different with the criminal ordinary procedure, when the prosecution authority thinks that the compulsory treatment decisions are not appropriate, it can only submit a paper comments to the court to ask for correction within twenty days after the receipt of the copy of the decision. Paper comments asking for correction are generally the measures took by the prosecution authority when it found that the court and the public security organ have behaviors that violate the statutory procedures, and the public security organ and the court should correct their illegal behaviors after receiving the paper comments asking for correction. The compulsory treatment decisions are the court's decisions on the substantive issues, so the prosecution authority ask the court to correct the compulsory treatment decisions in the way of paper comments is not so appropriate.

## **2. Solutions of the outstanding problems**

### **2.1 Establish the level system of the expertise institutions and the program to handling with objections**

Forensic psychiatry expertise and even the whole industry of judicial expertise are facing the dilemma that expertise institutions belong to different management system, and there are no standards to define the effectiveness hierarchy of expertise opinions between the various management systems and different judicial expertise institutions, so that when the different expertise opinions are not consistent with each other, no authoritative expertise organizations can make a "arbitration". Although there is such a phenomenon in the judicial expertise industry - not the expertise opinion of bigger expertise institution must be more authoritative than the opinions made by the smaller institutions. However, it still necessary to establish the level system of the expertise institutions and the program to handling with objections in accordance with the categories and majors of expertise.

Firstly, we should unify the criteria for forensic psychiatry expertise, including the content of the expertise, standards of identifying a people as a mental patient, etc., for the situation that is not suitable to give a certain opinion, we can identify the possibility level of the people to suffer from mental illness. Secondly, on this basis, take the expertise conditions, personnel equipment, scientific research capacity and other factors into concern to determine the authority of the expertise of professional institutions, as the organ of handling with the forensic psychiatry expertise objections. But to other institutions, we will just give assessment on whether they have the professional qualification, and no longer to divide them to different levels, in order to avoid the both parties doubting the authority of the forensic psychiatry expertise opinions just according to the low level of the expertise institutions. Finally, we can deal with the expertise opinion objections in this way: for expert opinion objections, the parties can apply another expertise institution for re-expertise, if the re-expertise opinion is consistent with the previous one and accepted by the applicant, it can be decided by the court about whether to accept or not; if the re-expertise opinion is not consistent with the previous one, the parties and the investigation organ and the prosecution authority can apply the organ of handling with the objections for judgement.

### **2.2 establish the compulsory treatment cost-sharing mode of proportion sharing**

The funding of compulsory treatment procedure is an important factor that affects the application of

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compulsory treatment procedure. If all of the funding were burdened by the financial of the state, it would lead to a consequence that mental patient's family pulling all the responsibility to the country and even abetting the mental patients to crime in order to reach the goal of "taking over" by the state, which is not very appropriate. Therefore, the author suggests that the state and the individual sharing the compulsory treatment cost by the proportion of 4:1 (refer to the proportion of NCMS reimbursement) ways, in which, the state is responsible for most of the cost, while the mental patients' family is responsible for a small fraction of the cost and the cost should be incorporated into the social medical insurance. This plan will not impose a large financial burden to the people who received the compulsory treatment, and will not result to their families disgusting with the compulsory treatment procedure and pulling all the responsibility to the country.

### **2.3 The court is responsibility to relief of the enforcement of compulsory treatment**

Chinese criminal procedure law stipulates that for the people who meet the conditions of relieving the compulsory treatment procedure, should be proposed an opinion by the compulsory treatment organ, and approved by the court, but the law doesn't stipulate the detail procedure and forms of the approval. It is a common phenomenon in the judicial practice that the compulsory treatment institutions can't be contact with the family of the people who received the compulsory treatment, or because these institutions can't get respond from the patients' families on the question whether they accept the patients' return or not, and result that the patients have to continue the compulsory treatment. This is equivalent to impose the burden of the relief of the compulsory treatment procedure to the compulsory treatment institutions, which is the key reason for the difficulties of the relief of the procedure. The author believes that responsibility of the relief of compulsory treatment should be undertook clearly by the court, for the situation of meeting the conditions of reliving the compulsory treatment, the court should make a decision to relieve the treatment, and should ask the patients' families to take good care of the patients in the content of the decision, and served the decision to the close relatives of the people who received the compulsory treatment.

### **2.4 Enhance the supervision of the prosecution authority**

Due to the professionalism of forensic psychiatry expertise's diagnosis and judgment, the prosecution authority should focus on the formality examination of whether the compulsory treatment institution have assessed the patients regularly, and supervise mainly on whether the assessments are on time and the quality, whether the compulsory treatment institutions have put forward the relief requests in time, and for the results of the assessment with doubt, the prosecution authority can require for re-assessment. At the same time, on the basis of the combination of prison supervision and circuit supervision, the prosecution authority should supervise whether the compulsory treatment institutions have treated the patients regularly, and whether there are improper behaviors, such as, maltreatment and insult during the compulsory treatment.

### **3. Conclusion**

Criminal compulsory treatment procedure is a new procedure, and relates to the knowledge of mental health, due to the lack of the professional knowledge, the exploration of the scholars on the theory of the procedure is also affected by the limitation of major, and many problems are still not being discussed deeply. At the same time, provisions of Chinese law and judicial interpretation for the procedure are very rough, resulting in many problems of the procedure in both legislation and judicial practice. Because of this, we should pay more attention to the procedure, and promote the perfection of the procedure as soon as possible, so that the vulnerable groups like mental patients can obtain the equal protection of human rights, which is the embodiment of a country height of the rule of law.