

学校编码：10384

分类号_____密级_____

学号：12920071150344

UDC _____

廈門大學

碩 士 學 位 論 文

缓起诉的法理分析及制度建构

The Legal Analysis and System Construction of
Deferred Prosecution

闫冰

指导教师姓名：张泽涛教授

专业名称：诉讼法学

论文提交日期：2010年4月

论文答辩时间：2010年 月

学位授予日期：2010年 月

答辩委员会主席：_____

评 阅 人：_____

2010 年 月

厦门大学学位论文原创性声明

本人呈交的学位论文是本人在导师指导下，独立完成的研究成果。本人在论文写作中参考其他个人或集体已经发表的研究成果，均在文中以适当方式明确标明，并符合法律规范和《厦门大学研究生学术活动规范（试行）》。

另外，该学位论文为()课题(组)的研究成果，获得()课题(组)经费或实验室的资助，在()实验室完成。(请在以上括号内填写课题或课题组负责人或实验室名称，未有此项声明内容的，可以不作特别声明。)

声明人(签名):

年 月 日

厦门大学学位论文著作权使用声明

本人同意厦门大学根据《中华人民共和国学位条例暂行实施办法》等规定保留和使用此学位论文，并向主管部门或其指定机构送交学位论文（包括纸质版和电子版），允许学位论文进入厦门大学图书馆及其数据库被查阅、借阅。本人同意厦门大学将学位论文加入全国博士、硕士学位论文共建单位数据库进行检索，将学位论文的标题和摘要汇编出版，采用影印、缩印或者其它方式合理复制学位论文。

本学位论文属于：

1. 经厦门大学保密委员会审查核定的保密学位论文，
于 年 月 日解密，解密后适用上述授权。

2. 不保密，适用上述授权。

（请在以上相应括号内打“√”或填上相应内容。保密学位论文应是已经厦门大学保密委员会审定过的学位论文，未经厦门大学保密委员会审定的学位论文均为公开学位论文。此声明栏不填写的，默认为公开学位论文，均适用上述授权。）

声明人（签名）：

年 月 日

厦门大学博硕士学位论文摘要库

内容摘要

近年来，随着国际司法实践经验的交流以及修复性司法、和谐社会等观念的提出，缓起诉制度逐渐成为我国刑事诉讼法学研究的热点之一。我国是否有必要借鉴缓起诉制度以及如何构建具体规范的缓起诉制度等一系列问题，虽然目前我国学界已有所探讨，但很少有系统的研究，许多问题上并没有形成统一的认识，特别是其理论基础方面还有待进一步的论证。而对于这些问题的追问与思索，不仅具有一定的理论价值，还具有重大的现实意义。

本文试图对这一制度加以全面论述，从缓起诉制度本身的立法理念和法理基础分析，借鉴各国法律运作情况，提出缓起诉制度在中国的立法构想，以期对我国未来的缓起诉制度设计作一探讨。本文拟分为以下五部分。

第一部分，缓起诉制度概述。笔者将从缓起诉的概念、特征、性质等几个方面对缓起诉的内涵作一剖析；并通过对缓起诉制度与起诉、不起诉、缓刑以及辩诉交易辨析来对缓起诉的外延作一界定。

第二部分，缓起诉的法理分析。本部分对缓起诉制度的理论基础进行概括和梳理，从正反两方面分析缓起诉的价值。具体而言，本文将从刑事政策上的考量、修复性司法之实践、诉讼经济三个方面，系统论述缓起诉的理论基础；缓起诉实质上扩大了检察官的自由裁量权，其运作在带来正价值的同时，也会产生检察官不当裁量、破坏平等原则、侦查程序长期化等一系列负价值，在此基础上，概括出检察官裁量缓起诉应遵循的原则。

第三部分，详细介绍日本的“起诉犹豫”制度、德国的“附条件不起诉”制度、美国的“缓起诉交付保护管束”制度以及我国台湾地区“缓起诉”制度的发展脉络、特色，通过对大陆法系和英美法系的几个有代表性国家和地区的制度介绍，勾勒出一个缓起诉的宏观框架。

第四部分，结合我国国情，对缓起诉在我国移植的可行性和必要性作一分析。针对我国起诉裁量的现实运作状况，主张采取局部调整、整体扩张的改革思路，即扩大酌定不起诉的适用范围，将一些事实上已经出现于

我国司法实践中的起诉裁量权制度法定化，增设缓起诉制度。

第五部分，构建我国缓起诉制度的初步设想。本文结合我国实际，从缓起诉适用范围、综合考量因素、考验期间、附随义务、效力，制约与救济几方面初步谈了一下构建缓起诉制度的设想，分析了缓起诉在运作中可能遭遇的难题，并有针对性的提出自己的建议，希望缓起诉制度能够在被法律确认后发挥更好的效果。

关键词： 缓起诉；刑事政策；修复性司法；诉讼经济；制度建构

厦门大学博硕士论文摘要库

Abstract

With the development of the international judicial practice and rising of the notion of restorative justice and harmonious society, the problem of deferred prosecution has gradually becomes a hot-issue of the criminal procedural circle. Whether the system should be established in China and how to build concrete specification of deferred prosecution and other issues, Although scholars have explored in it, few systematic studies on many issues and there is no unified understanding of many questions. In particular, its theoretical foundations to be further argument, are of great significance not only to the law theory but also to the judicial practice.

This article attempts to be a comprehensive discussion of this system, analyze the legal basis of the legislative concepts, draw national legal operation of the deferred prosecution in the Legislation of China, hoping to reduce our country's future prosecution system design for a Discussion. The main body can be divided into five chapters.

Chapter one, The outline of deferred prosecution. The Author will define the notion, characteristic and the aspects of the nature of deferred prosecution, and at the same time tells the difference between some correlative notions.

Chapter two, The Legal Analysis of deferred prosecution. This paper will systematically discussed the theoretical basis of deferred prosecution from the three aspects of considering the criminal policy, restorative justice into practice, litigation economy, analyze the pros and cons of the value of deferred prosecution. And then summarized the principles of prosecutor discretion deferred prosecution to be followed.

Chapter three, details the abroad origins of deferred prosecution, analyzes the development, characteristic of deferred prosecutions in Japan, Germany, U.S.A and Taiwan, with the purpose of learning some experiences of designing

reasonable regulations and outlining a broad framework for deferred prosecution.

Chapter four, The author develops his idea by analyzing the necessity and feasibility of the system of deferred prosecution, based on the national conditions. In view of the practical operation of the state prosecution discretion, the author advocated partial adjustment, the overall expansion of the reform ideas, expanding the scope of discretion, institutionalizing some in fact will be seen in our judicial practice in the legal system of prosecution discretion, and establish the deferred prosecution.

Chapter five, the author suggests building deferred prosecution from aspects such as: targets objects, comprehensive consideration of factors, collateral obligation, effects and monitoring mechanism, in our country. On the basis of analysis of the deferred prosecution of the operational problems that may be encountered, the author also raises his own advices, hoping the deferred prosecution can be confirmed to play better results.

Key Words: Deferred Prosecution; Criminal Policy; Restorative Justice; Litigation economy; System Construction

目 录	
引 言	1
第一章 缓起诉制度概述	2
第一节 缓起诉制度的概念	2
第二节 缓起诉的定性	3
一、 起诉裁量制度与缓起诉	3
二、 起诉裁量的形态	6
第三节 缓起诉及其相关概念辨析	7
一、 缓起诉与起诉	8
二、 缓起诉与不起诉	8
三、 缓起诉与缓刑	10
四、 缓起诉与辩诉交易	11
第二章 缓起诉制度的价值及隐忧	13
第一节 缓起诉制度的价值	13
一、 刑事政策上的考量	13
二、 修复性司法之实践	20
三、 诉讼经济	22
第二节 缓起诉制度之隐忧	23
一、 检察官扩权与不当裁量	24
二、 破坏平等原则	24
三、 不利于维护司法权威	25
四、 侦查程序的纠问化、长期化	26
五、 悖离审判中心主义	26
第三节 检察官裁量缓起诉的原则	27
一、 法治原则	27
二、 比例原则	28

三、正当程序原则	29
四、平等原则	30
第三章 相关国家和地区缓起诉的立法概况及评述	31
第一节 日本的起诉犹豫制度	31
一、起诉犹豫制度的发展沿革	31
二、日本起诉犹豫现行法特色	33
三、日本起诉犹豫制度评析	33
第二节 德国的附条件不起诉制度	34
一、附条件不起诉制度的发展沿革	34
二、德国附条件不起诉制度的特色	36
三、德国附条件不起诉制度评析	37
第三节 美国的缓起诉交付保护管束制度	38
一、概述	38
二、美国缓起诉制度的特色	38
三、美国缓起诉制度评析	40
第四节 台湾地区的缓起诉	41
一、概述	41
二、台湾地区缓起诉制度的特色	42
三、台湾地区缓起诉制度评析	43
第五节 小结	44
第四章 我国建立缓起诉制度的必要性与可行性分析	46
第一节 我国起诉裁量权的现状与问题	46
第二节 引进缓起诉制度的必要性分析	49
一、现行不起诉制度之缺陷需要缓起诉制度作为必要补充。	50
二、日益严峻的犯罪形势与诉讼效率低下的现实需求	50
第三节 建立缓起诉制度的可行性分析	51
一、刑事司法理念的更新为建立缓起诉制度奠定了思想基础	51
二、我国现行刑事诉讼法规定为缓起诉立法留有制度空间	51
三、国内外缓起诉的成功范例为设置我国的缓起诉制度提供了实践依据	

.....	52
第五章 我国建构缓起诉制度的基本构想.....	53
第一节 制度设想.....	53
一、缓起诉制度的要件.....	53
二、缓起诉处分的内容.....	55
三、被告同意之程序要件.....	57
四、缓起诉处分的效力.....	58
五、缓起诉处分的撤销.....	59
六、缓起诉的救济监督机制.....	60
第二节 运作中可能遭遇的难题与建议.....	62
一、可能成为检察官案件脱手的捷径.....	62
二、裁量基准不确定.....	62
三、缓起诉与其他制度重叠.....	63
四、建议.....	64
结 论.....	68
参考文献.....	69

厦门大学博硕士学位论文摘要库

CONTENTS

Preface	1
Chapter 1 The Outline of Deferred Prosecution	2
Subchapter 1 The Concept of Deferred Prosecution.....	2
Subchapter 2 The Nature of Deferred Prosecution.....	3
Section 1 The System of the Prosecution Discretion and deferred prosecution.....	3
Section 2 The Pattern of the Prosecution Discretion.....	6
Subchapter 3 The Distinction Between Deferred Prosecution and the Related Concepts.....	7
Section 1 Deferred Prosecution and Prosecution	8
Section 2 Deferred Prosecution and Nonprosecution.....	8
Section 3 Deferred Prosecution and Probation	10
Section 4 Deferred Prosecution and Plea Bargain	11
Chapter 2 The Value and Hideen of Deferred Prosecution.....	13
Subchapter 1 The Value of Deferred Prisection.....	13
Section 1 The Consideration of Criminal Policy.....	13
Section 2 The Practice of Restorative Justice	20
Section 3 Litigation economy	22
Subchapter 2 The Hideen of Deferred Prosecution.....	23
Section 1 Expansion of prosecutor’s power and undue discretion	24
Section 2 Undermine the principle of equality	24
Section 3 Not conducive to maintaining judicial authority	25
Section 4 The inquisitorial and long-term of the Investigation Procedure	26
Section 5 The Departure from the Adjudication	26

Subchapter 3	The Principle of Discretionary to Deferred Prosecution ..	27
Section 1	The rule of law.....	27
Section 2	The principle of proportionality.....	28
Section 3	The principle of due process.....	29
Section 4	The principle of equality	30
Chapter 3	Legislative Overview and Comments of Relevant countries and regions' Deferred Prosecution.....	31
Subchapter 1	The Deferred Prosecution in Janpan	31
Section 1	The Company History of Deferred Prosecution in Japan	31
Section 2	The Characteristic of Current law of Deferred Prosecution ...	33
Section 3	The Commentes of Deferred Prosecution in Japan	33
Subchapter 2	The Deferred Prosecution in Germany	34
Section 1	The Company History of Deferred Prosecution in Germany... ..	34
Section 2	The Characteristic of Current law of Deferred Prosecution ...	36
Section 3	The Commentes of Deferred Prosecution in Germany.....	37
Subchapter 3	The Pre-trial Diversion in the U.S.A.....	38
Section 1	The Outline.....	38
Section 2	The Characteristic of Pre-trial Diversion in the U.S.A	38
Section 3	The Commentes of Pre-trial Diversion in the U.S.A.....	40
Subchapter 4	The Deferred Prosecution in Taiwan	41
Section 1	The Outline.....	41
Section 2	The Characteristic of Deferred Prosecution in Taiwan	42
Section 3	The Commentes of Deferred Prosecution in Taiwan.....	43
Subchapter 5	A Summary.....	44
Chapter 4	The Necessity and Feasibility Analysis on the Establishment of Deferred Prosecution in China	46
Subchapter 1	The Status and wanting of Prosecution discretion in China	46

Subchapter 2 The Necessity Analysis on the Establishment of Dederred Prosecution	49
Section 1 The defect of nonprosecution need to Deferred Prosecution as a necessary complement	50
Section 2 Increasingly serious crime situation and practical needs of inefficient litigation.....	47
Subchapter 3 The Feasibility Analysis on the Establishment of Dederred Prosecution	51
Section 1 Update of Criminal Justice System for the establishment of Deferred Prosecution laid the ideological foundation	51
Section 2 China's current Criminal Procedure Law provides for the Deferred Prosecution of the legislative system of space left	51
Section 3 Successful example of Oversea's Deferred Prosecution provides a practical basis for the establishment in China	52
Chapter 5 The Basic Concept of Deferred Prosecution of China's Construction	53
Subchapter 1 System Assumption	53
Section 1 System Requirements of Deferred Prosecution.....	53
Section 2 Content of Deferred Prosecution.....	55
Section 3 The defendant agreement	57
Section 4 Effect of Deferred Prosecution	58
Section 5 Revocation of Deferred Prosecution	59
Section 6 Monitoring mechanism of Deferred Prosecution	60
Subchapter 2 May apply to the problems encountered and recommendations.....	62
Section 1 May become a shortcut to the Prosecutor	62
Section 2 Uncertain Decision Standards.....	62
Section 3 Deferred Prosecution of overlap with other systems.....	63
Section 4 Recommendations	64

Conclusion	68
Bibliography	69

厦门大学博硕士论文摘要库

Degree papers are in the "[Xiamen University Electronic Theses and Dissertations Database](#)". Full texts are available in the following ways:

1. If your library is a CALIS member libraries, please log on <http://etd.calis.edu.cn/> and submit requests online, or consult the interlibrary loan department in your library.
2. For users of non-CALIS member libraries, please mail to etd@xmu.edu.cn for delivery details.

厦门大学博硕士论文摘要库