

Study on the Application of the Trial in Absentia System for Corruption Offences

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Abstract: Combating corruption crimes is a systematic effort to build China's system for punishing and preventing corruption. In order to respond positively to the call for anti-corruption, the criminal law academia has also launched discussions and debates on the issue of corruption crimes, especially in the context of economic globalization, the means of corruption is more secretive, the amount of corruption is more huge, and the impact on the interests of the country and the people is more far-reaching, more and more corruption offenders begin to take advantage of the loopholes that have been formed temporarily in the international arena to evade the penalties of the Chinese law, in order to better implement the basic principle of self-responsible criminal law. In order to better implement the basic principle of criminal law, how to better pursue the criminal responsibility of fugitive corruption offenders has become the focus of research by many experts and scholars in recent years.

Keywords: Corruption Crime; Trial in Absentia; Criminal Procedure Law.

1. Introduction

Since the 18th National Congress of the Communist Party of China, China's anti-corruption work has achieved comprehensive and groundbreaking achievements. Anti-corruption and promoting integrity, as an extremely important task of our party, are developing in a positive direction with the improvement of the country's governance of corruption issues. As pointed out in the report of the 19th National Congress of the Communist Party of China, "Only with the tenacity and perseverance of anti-corruption Always on the Road, deepening the treatment of both the symptoms and root causes, and ensuring the integrity of cadres, the government, and the political clarity, can we jump out of the historical cycle rate and ensure the long-term stability of the party and the country." First, adhere to the anti-corruption free zone, comprehensive coverage, zero tolerance, unswervingly fight against corruption, "fight tigers", "shoot flies", "hunt foxes", and the goal of not daring corruption has initially been achieved, the cage that cannot corrupt is getting stronger and stronger, and the dam that does not want to corrupt is being built. The overwhelming trend of anti-corruption struggle has been formed and consolidated.

In order to actively respond to the call for anti-corruption, the criminal law community has also launched discussions and debates on the issue of corruption crimes. Especially in the context of economic globalization, the means of corruption crimes are more covert, the amount of corruption is greater, and the impact on the interests of the country and the people is more profound. More and more corrupt criminals are beginning to use the temporary loopholes formed internationally to evade punishment under Chinese law, in order to better implement the basic principle of self-responsibility in criminal law, how to better hold fugitive corrupt criminals criminally responsible has become a focus of research by many experts and scholars in recent years. The author searched CNKI with the keywords "Trial in absentia" and "corruption", and screened more than 40 eligible documents. By analyzing whether the relevant scholars should apply the Trial in absentia system to corruption crimes before and after the addition of the "Trial in absentia system"

in the Criminal Procedure Law of 2018, what are the advantages of applying the Trial in absentia system to corruption crimes The application of the Trial in absentia system in corruption crimes is studied in terms of what problems exist, and the application of the Trial in absentia system in corruption crimes is generally sorted out and recognized.

2. The Concept of Trial in Absentia and its Application in China

Although the scholars of the trial in absentia system of different expressions, but the identification of this system basically reached a consensus, that is, in the court on the day of hearing, the prosecution and defense litigation subject one party did not appear in court and not for the statement, debate, the court according to the statement of the party to the court, the debate on the case of the trial and verdict of the litigation system. Criminal trial in absentia system is derived from the civil trial in absentia system. As early as the ancient Roman period, the civil trial in absentia system had already taken initial shape. As a result of the modern separation of powers and the rise of the new school of natural law, people are paying more and more attention to the protection of their own personal rights, and have begun to realize that appearing in court is no longer an obligation of the parties concerned, but has become a kind of right to dispose of litigation. In practice, absenteeism does not only occur in civil cases, but also in criminal cases where the prosecution and the defense do not appear in court. Therefore, in order to ensure the realization of the state's right to punishment, to avoid the occurrence of criminal cases because the defendant does not appear in the case and cannot be sentenced, the criminal procedure law of many countries have made provisions for the trial in absentia.

The 2018 Criminal Procedure Law is a partial, limited, and contingent amendment, starting with the Criminal Procedure Law of the People's Republic of China (Draft Amendment), which was first examined at the second meeting of the Standing Committee of the 13th National People's Congress (NPC) on April 26, 2018, second examined at the fifth meeting of the Standing Committee of the 13th NPC on

August 29, 2018, and sixth examined at the sixth meeting of the Standing Committee of the 13th NPC on October 23, 2018, respectively. During the third trial, a total of twenty-six decisions were made to amend eighteen articles of the 2012 Criminal Procedure Law, and the new Criminal Procedure Law added a chapter to Part V of the 2012 Criminal Procedure Law on the basis of the special procedures as Chapter III, the system of trials in absentia.³ The new Criminal Procedure Law also amended the Criminal Procedure Law by adding a new chapter to Part V, Special Procedures, of the Criminal Procedure Law. Prior to this revision of the Criminal Procedure Law, a criminal trial in absentia system existed, but it had a limited scope of application, mainly for defendants suffering from serious illnesses who were unable to appear in court, and for defendants who died but should have been acquitted, and did not cover corruption offences. Before the newly amended Criminal Procedure Law included corruption offences and other corruption and bribery offences in the criminal trial in absentia system, there were widespread calls in the domestic academic community for the application of the criminal trial in absentia to corruption offences. The 2012 amendment to the Criminal Law Procedure Law, which established the 'confiscation procedure for the proceeds of violations', has already preliminarily embodied the main spirit of the trial in absentia system. Some scholars believe that although the law was amended in 2012, the establishment of the 'proceeds of violation confiscation procedure' has initially embodied the main spirit of the trial in absentia system. Some scholars believe that, although the laws and regulations at that time did not provide for a criminal trial in absentia system, the application of the trial in absentia system for corruption offences has the feasibility and necessity in cases such as interruption and suspension of the trial due to the flight of the perpetrators of corruption and dereliction of duty outside the country." In addition, prior to the implementation of the newly revised Criminal Procedure Law, some scholars believed that, in order to apply the needs of the current situation, "the trial in absentia system may be applied to corruption offences as well as to other criminal offences where the procedures are lawful. The criminal trial in absentia system should not be applied only to serious corruption offences."

The introduction of the trial in absentia system was in large part influenced by the relevant provisions of the United Nations Convention against Corruption (hereinafter referred to as "the Convention"), which, in article 57, stipulates that "when a requested State Party has effected the confiscation of assets transferred to that State Party, it shall, on the basis of a judgement in force in the requesting State Party, return the confiscated property to the requesting State Party". " However, at that time, the criminal procedure in China did not provide for a system of trial in absentia, so when a criminal suspect fled abroad, a criminal trial could not be conducted and an effective judgment could not be rendered. As a result, the Convention would not be used to recover assets that had fled the country. Therefore, through the establishment of the trial in absentia system, the results of corruption crime cases are presented in the form of a verdict through a special procedure, which creates favorable conditions for completing the recovery of corruption assets with the help of the Convention.

3. Advantages of the Trial in Absentia System

Article 291 of the Criminal Procedure Law provides that:

"In cases of corruption and bribery offences, as well as cases of serious crimes against State security and terrorist activities that require a timely trial and have been approved by the Supreme People's Procuratorate, where the suspects and defendants are outside the country, where the supervisory organs and public security organs have referred the case for prosecution, and the people's procuratorate is of the opinion that the facts of the crime have been investigated, that the evidence is solid and sufficient, and that criminal responsibility should be pursued in accordance with the law, it may bring a public prosecution in the people's court. If, after examination by the people's court, the indictment contains clear facts of the crime and meets the conditions for the application of the trial in absentia procedure, it shall decide to hold a trial." The legislative norms governing the scope of application of the trial in absentia system can be clearly seen in the formulation of the law. Due to the development and progress of science and technology and the economy in China, the technical means of corruption and bribery crimes have become more secretive, the amount of corruption and bribery by the perpetrators has increased, and the losses caused to the interests of the State and the people have become more and more serious; in order to effectively control this tense situation and to recover the losses of the State to the greatest extent possible, the Criminal Procedure Law reduces the corresponding limitations in the constraints on in absentia trial of corruption and bribery crimes, i.e., after the In cases of corruption and bribery offenses referred for prosecution by the supervisory or public security authorities, if the court finds that the facts alleged in the indictment of the procuratorate are clear and meet the conditions for trial in absentia, it shall hold a trial. The establishment of this system signifies that the judicial authorities may, subject to the fulfillment of certain conditions, impose penalties, pursue criminal liability, and confiscate property involved in the illegal proceeds, in accordance with the law, in the case of a defendant who has absconded abroad in connection with a corruption or bribery offense. There is a special need to set up an exclusive in absentia trial system for cases such as corruption offences, which has an urgent role and far-reaching impact on increasing the intensity of anti-corruption efforts to track down fugitives and recover stolen goods, and on improving the means of anti-corruption and fugitive-tracking efforts to track down fugitives and recover stolen goods.

The advantages of establishing an in-absentia trial system in criminal proceedings have also been recognized by relevant scholars and are mainly manifested in the following points:

3.1. Broadening the Intensity and Modalities of the Fight Against Corruption

The system of trials in absentia inevitably deprives the accused of the right to participate in the proceedings. If trials in absentia were to be applied in criminal proceedings, many of the rights of the accused, which are recognized as essential requirements of due process, would not be exercised. However, there is also a risk that serious corruption offenders will not be effectively punished if such a system is not established. On the one hand, the establishment of a system of trials in absentia for corruption offences will bring deterrence to potential offenders and enhance the public's confidence in the fight against corruption offences. On the other hand, due to the absence of effective legal instruments of adjudication, for some criminals absconding abroad or transferring their property abroad, some countries may use

this as a reason to refuse to cooperate in recovering the assets of corruption and bribery criminals abroad, thus creating obstacles to the work of pursuing fugitives and recovering stolen goods abroad. There is a need for our country to establish an in-absentia trial system for corruption offences in a timely manner, which is necessary for the active recovery of corruption assets, the improvement of litigation efficiency and the saving of litigation costs in corruption cases, as well as for the severe punishment of corruption offences and the maintenance of judicial authority.

3.2. The Need for Synergies with Criminal Confiscation Procedures

The Criminal Procedure Law, as amended in 2012, added the special procedure of confiscation of proceeds of crime in cases where the suspect or defendant has fled or died, providing a direct legal basis for the confiscation of proceeds of crime and other property involved in a case where the suspect or defendant has fled or died. However, in the process of application, this procedure also faces problems such as too narrow a scope of application, more restrictive conditions, and objections as to whether it is essentially a criminal procedure or a civil procedure. The essence of the confiscation procedure of illegal proceeds in cases of the flight and death of criminal suspects and defendants is criminal confiscation without conviction, not a conviction and sentencing activity in the strict sense. The "trial in absentia system" added to the Criminal Procedure Law amended in 2018 refers to the special trial activities conducted by the court with the participation of the prosecution and the defendant's defense when the defendant is not present in the courtroom. In contrast, trial in absentia is the criminal trial activity that really needs to solve the problem of conviction and sentencing, and it is the litigation activity for the absence of "people". Based on the nature and content of the criminal trial in absentia system, should be appropriate to separate the treatment of things and people, not only to establish criminal confiscation procedures, but also to build a true sense of the criminal trial in absentia system. As a matter of fact, the legislative task of the former has been completed, while that of the latter remains to be realized.

3.3. Safeguarding the Smooth Running of Extradition Requests

In addition to this, the establishment of a system of trials in absentia can also be better harmonized with the provisions of the domestic laws of extraterritorial countries, in order to guarantee the smooth conduct of international extradition applications or negotiations. For example, in countries where the authority of the court is high, the degree of recognition of the judgment is higher than that of the procuratorate and the public security system, and the establishment of the system of trial in absentia gives the judge the right to make a judgment in the case where the defendant is not able to appear in the case, and provides more convenient conditions for the recognition and execution of the judgment in foreign countries, as well as the possibility of recognition and execution; for example, the laws of the vast majority of countries in the world do not have the death penalty for economic crimes, because in accordance with the market economy related to the "death penalty", there is no death penalty for economic crimes. For example, the laws of the vast majority of countries in the world generally do not impose the death penalty for economic crimes, because, in

accordance with the principle of "equivalent exchange" in the market economy, the money and property that have been embezzled and bribed cannot be compensated for with a life. Therefore, according to international practice, death penalty offenders are not extradited, and China added the life imprisonment system for corruption and bribery in 2016, unless the amount of the crime is particularly large, the circumstances are particularly serious, and it has caused particularly significant losses to the interests of the state and the people, and the death penalty is rarely imposed on the defendant of corruption and acceptance of bribes, which finds a feasible space for the extradition of corruption and acceptance of bribe offenders to return to their home countries, or to conduct in absentia trials if they cannot be extradited back to their home countries. This is a feasible space for the extradition or in absentia trial of corrupt and bribe-taking offenders.

3.4. Demonstrating a Responsible Attitude of a Major Country in Actively Complying with the Convention

Article 35 of the United Nations Convention against Corruption provides that each State party shall adopt such measures as may be necessary, in accordance with the principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to institute legal proceedings against those responsible for causing the damage in order to obtain compensation. At the same time, article 54, paragraph 1 (c), of the United Nations Convention against Corruption provides for "consideration of measures necessary to enable confiscation of such property without a criminal conviction in cases where the offender cannot be prosecuted because of his or her death, absconding or absence, or in other relevant cases". The 1996 Criminal Procedure Law realizes claims for damages through civil litigation incidental to criminal proceedings, but the results are often unsatisfactory and have become a major obstacle in practice to the pursuit of fugitives and the recovery of stolen goods abroad. In fact, in the context of China's signing of the United Nations Convention against Corruption, the construction of a criminal trial in absentia system is an indisputable necessity, only that it should be based on China's national conditions to realize scientific legislation.

4. Disadvantages of Trials in Absentia

As the legal proverb says, "Justice should not only be done, but should be done in a way that is visible to the people." The new system of trial in absentia has set out in detail the conditions for its implementation, the protection of the rights and interests of the defendant and relief, which ensures the possibility of actual operation in judicial practice. However, the trial in absentia system in the process of operation there are still some need to repair and make a reasonable explanation of the problem. In earlier times, some scholars did not agree that the problem of capital flight could be solved by adding a trial in absentia system to criminal proceedings. On the contrary, they believed that the situation could be resolved entirely through the existing civil procedure of trial in absentia. They summarized the problem as consisting of the following points:

4.1. Inability to Reconcile the System of Trials in Absentia with the Right of the Accused to be Present at the Trial

This is the first concern in adding the system of trials in absentia to criminal proceedings. The democratization of justice begins with guaranteeing the right to participation of the parties, "people have at least a reasonable expectation that they will be heard by the court before a judgment is passed that concerns them, i.e., that they have a right to be heard", which is regarded as the bottom-line requirement of judicial democracy. Article 230 (1) of the German Code of Criminal Procedure provides that "no trial shall be held for an accused who has not appeared in court." In the more serious procedure of criminal procedure, where the fundamental rights of the accused must be protected, the trial in absentia of a defendant who has absconded from the country for embezzlement and bribery becomes a corruption of the defendant's fundamental rights.

4.2. Criminal Trials in Absentia in Western Countries Governed by the Rule of Law are Not based on the Recovery of Assets That Have Fled the Country.

Scholars holding this view believe that scholars advocating the establishment of a criminal trial in absentia system have not taken into account the background of the establishment of the trial in absentia system in Western countries governed by the rule of law. However, the author did not make a rational argument as to why the background of the Western rule of law countries led to the inability of China to add the trial in absentia system to the criminal procedure, so the persuasive power is not strong.

4.3. Criminal Trial in Absentia Systems Do Not Necessarily Improve the Return of Assets

Scholars holding this view believe that, because of the differences in attitudes towards criminal trials in absentia in various countries of the world, the United Kingdom, for example, does not recognize trials in absentia in criminal proceedings, and the United Kingdom Extradition Act provides that extradition shall be refused to fugitives from justice who have been sentenced in absentia. Article 3 of the United Nations Model Treaty on Extradition, "Mandatory Grounds for Refusal of Extradition", paragraph 7: "Where the judgment of the requesting State is in absentia, the convicted person has not been given adequate notice of the trial, has not had an opportunity to arrange for a defence, and has not had or will not have an opportunity to obtain a retrial of the case in his own presence. retrial in his own presence." Moreover, there is not necessarily a causal relationship between the extradition of a criminal defendant and the return of assets. It is not uncommon for a criminal defendant to be extradited to his or her home country without the return of the assets involved in the case.

After the promulgation of the new Criminal Procedure Law in 2018, in the face of the stereotyped provisions and regulations, the relevant scholars have also put forward their own points of view and suggestions based on the experience of the previous literature as well as the relevant judicial practice experience, which are mainly manifested in the following points:

(a) How to deal with the issue of domestic standards and

international rules remains an important factor in criminal trial in absentia procedures in practice. As far as trials in absentia are concerned, this procedure has its own special background and purpose, and it is necessary to harmonize the relationship between the functional positioning and procedural design of China's criminal trial in absentia system and the norms and rules generally accepted by the international community; only in this way can we facilitate this system to truly play its functional role in practice.

(b) The law does not give defendants and defenders the right to object to the initiation of trial in absentia proceedings. Scholars holding this view believe that, in the newly amended Criminal Procedure Law, after the judicial authorities believe that corruption offenders absconding abroad have met the legal requirements, they will apply the trial in absentia procedure based on the judgment of public power, which means that the defendant cannot decide or influence the initiation of the procedure by filing an objection, etc., and, in addition to the lack of clarity in the relevant pretrial public notice and service procedure that may occur, this mode of relief that focuses on safeguarding the defendant's post-trial rights may lead to arbitrariness in the initiation of the trial procedure in practice. This mode of relief, which focuses on safeguarding the defendant's post-trial rights, may lead to arbitrariness in the initiation of in absentia proceedings in practice, and may easily become a judicial pitfall leading to unfairness in the case.

5. Author's Views

After the above analysis and the study of the new Criminal Procedure Law, without denying the advantages of the trial in absentia system, but also puts forward the author of the "trial in absentia system" in the judicial practice of the following questions:

First, according to article 292 of the Criminal Procedure Law, only when the people's court serves a summons and a copy of the indictment of the people's procuratorate on the defendant with the permission stipulated in the relevant international treaty or obtains mutual legal assistance through diplomatic channels or with the permission of the law of the defendant's place of residence, shall the court have the authority to hold a trial in the absence of the criminal, to pass a sentence in accordance with the law and to make disposition of the illegal The proceeds and other property involved in the case to be dealt with. In judicial practice, because China has not signed relevant international treaties with many countries (especially the United States, Canada, Australia, New Zealand, etc.), with the growing awareness of national sovereignty, coupled with the increasingly fierce economic competition between countries, as long as the absconding country's permission is not obtained, even if the court makes a judgment, it will be unable to get timely implementation and lose its deterrent effect, which inhibits the absconding trend and does not achieve the desired results. This kind of curb on absconding does not achieve the desired effect. Therefore, the key lies in the question of how to establish corresponding international treaties with countries to which more corrupt persons abscond. If the establishment of a system of trials in absentia provides a means of pursuing the criminal responsibility of corruption offenders, then effective mutual assistance treaties between international organizations will provide a guarantee for the smooth implementation of the former.

Secondly, according to article 293 of the Criminal

Procedure Law, "In cases where the people's court adjudicates a case in absentia, the defendant shall have the right to appoint a defender, and the defendant's close relatives may appoint a defender on his or her behalf. If the defendant and his close relatives fail to appoint a defender, the people's court shall notify the legal aid institution to assign a lawyer to provide a defense for him." The provisions of this article do enable the defendant who wants to defend his rights and interests to exercise his right to defense, but the problem is that when neither the defendant nor the defendant's close relatives appoint a defender and the court provides legal aid for his defense, the question arises as to on what basis the defender will defend the defendant. In the defendant and his close relatives are recused from the right to defense, defense lawyers cannot collect more evidence in favor of the defendant, and the only defense lawyers can understand the progress of the case is the only material collected by the judicial organs of the relevant evidence, and this evidence because of the collection of the subject of the specificity of the evidence of the nature of the bias, the defense lawyer because of the inability to understand the facts of the case, which will inevitably lead to the loss of the case. In the court may appear such a scene: cannot get the defense material legal aid lawyers against the judiciary, which cannot be like the "criminal procedure law" to establish this system when the original intention to protect the rights of the accused. However, there are scholars who object that "the law does not protect those who sleep on their rights", but in such a situation, if the defendant is in a disadvantageous position because of the defendant's failure to actively exercise the right to argue by not appointing or contacting a defender, what is the difference between that and not giving the defendant the right to defend himself from the outset, which puts him in a disadvantageous position? What is the difference? Although the former emphasizes that the right to a defence is given but not exercised, and the latter emphasizes that the right to a defence is not given at all, the accused still does not enjoy the right to a defence in terms of its outcome.

On the whole, the trial in absentia procedure established in the newly amended Criminal Procedure Law not only links up with the Convention's offshore asset recovery system for

cases of corruption offences, reflecting the legislator's determination in combating crimes of officialdom, but also solves the problem of minimizing the adverse consequences of delays in proceedings in the event that the defendant is unable to be present due to objective reasons. Although there are still some details that need to be perfected in the application of the system of trial in absentia in dealing with corruption offences, it is believed that better solutions will be found in the subsequent practical exploration, which will be more in line with the requirements of modernization and the rule of law.

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