

On the Specialization of Criminal Procedure of Duty Crime in China

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Abstract

The unique content of the criminal procedure of duty crimes in China is constituted by the personal coercive measures, the use of audio and video recordings, the lawyer's defense, the internal supervision and the legal supervision of the procuratorial organ in investigating duty crimes, as well as the procuratorial organ's discretion of public prosecution, trial by default, which distinguishes from that of ordinary crimes. There are many disputes about the specialization of procedure of duty crimes in China, such as the imbalance of rights protection and power restriction, the limitation of public prosecution discretion and the constraints on international criminal justice cooperation. However, its contribution to China's anti-corruption should not be underestimated, and its experience in strengthening the centralized and unified exercise of anti-corruption power, reducing the procedural confrontation of the suspects and expanding criminal judicial cooperation deserves attention.

Keywords: criminal procedure of duty crime; specialization; disputes and contributions

I. Context

Since 2012, China has comprehensively strengthened the strength and scope of fighting against corruption and achieved good results. In order to establish a long-term anti-corruption mechanism, China has deepened and solidified the practical experience of anti-corruption, and gradually formed a relatively complete anti-corruption system. Among them, the criminal procedure of punishing duty crimes is gradually distinguished from that of ordinary crimes, forming a special situation of criminal procedure of duty crimes with Chinese characteristics.¹

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¹ In China, supervisory organs and procuratorial organs are responsible for the investigation of duty crimes. According to the Criminal Procedure law and the Supervision Law, the procuratorate is responsible for the 14 crimes of false imprisonment, extortion of a confession by torture, and illegal search or any other crimes that infringes upon a citizen's rights or damages the fair administration of justice by taking advantage of his or her functions. And the other duty crimes are investigated by

As a contracting state to the United Nations Convention against Corruption, China has actively formulated various anti-corruption policies and measures. Strengthening the norms of criminal procedures is an important aspect, which is also a manifestation of China's active commitment to the Convention and being a responsible country. However, in recent years, China's criminal procedure norms have also been questioned: whether the special provisions on duty crime can play their due role? Whether it is in line with the basic requirements of power restriction and right protection? How much room for improvement is there for specialization of criminal procedure of duty crime in China? How much can it be used for reference to other countries in the world? With the continuous development of China, these problems are not only of positive significance to China, but also the spillover effect to all countries in the world that should not be ignored.

II. The manifestation of the specialization of criminal procedure of duty crime in China

Duty crime has particularity. Duty crime has great social impact because the subject of it is mainly the staff of state organs, and the object is mainly the integrity of state organs. In China, the fight against corruption in punishing duty crimes is considered to be a major political issue related to the life and death of the ruling party and the state. Therefore, we must firmly fight against corruption and promote the construction of the system of punishing and preventing corruption,² which is manifested by the specialization of criminal procedure of duty crimes.

According to the provisions of the Criminal Procedure Law of China, the basic structure of the criminal procedure mainly includes the investigation procedure, the examination and prosecution procedure and the trial procedure. However, according to the Supervision Law enacted in 2018, most of the duty crimes originally investigated by the procuratorial organ are transferred to the supervisory organ for investigation, and the Criminal Procedure Law is not applicable. Considering the integrity of criminal procedure, we hereby include the investigation procedure of this part of crimes into the scope of criminal procedure investigation, so as to fully reflect the differences between the procedure of duty crimes and ordinary crimes.

(1) Investigation procedure of duty crime

According to the provisions of the Supervision Law, there are great differences in the investigation procedure between duty crimes and common crimes, which are mainly manifested in the following aspects:

supervisory organs. The criminal procedure of the duty crimes investigated by procuratorial organs is different from that of the ordinary crimes, but the difference between them is small and the scope of the duty crimes involved is also narrow. Considering the reasons above, this article mainly discusses the difference of criminal procedure between duty crimes investigated by supervisory organs and ordinary crimes and the influence of criminal procedure of duty crimes investigated by supervisory organs.

² Zeng Wei, Shu Jie, Xi Jinping's, *Speech on Anti-corruption: Zero Tolerance for Corruption*. Available: <http://politics.people.com.cn/n/2014/0730/c1001-25372496.html> accessed on Oct.6, 2019.

1. Personal coercive measures

Based on Doctrine of the Presumption of Innocence, the personal freedom of the suspect should be guaranteed except that he or she interferes with the investigation of the crime. Personal coercive measures in the investigation of ordinary crimes include compelling the appearance, bail, residential surveillance, detention and arrest. The arrest shall be approved by the procuratorial organ, and other enforcement measures can be decided by the investigation organ itself. Considering the complex nature of the criminal case, the period of custody during criminal investigation after a criminal suspect is arrested cannot exceed two months in general; with the approval of Procuratorate at a higher level, the arrest can be extended three times,³ with a time limit of seven months. Because the arrest is a deprivation of the personal freedom of the criminal suspect for a long time, it can only be taken when other measures still cannot prevent the personal danger of the criminal suspect.

In contrast, in the duty crimes investigated by the supervisory organ, there is only one kind of personal coercive measure, which is, directly depriving the investigated person of personal freedom. The detention shall be decided by the leaders of the supervisory organ collectively. Generally, the time is not more than 3 months, but it can be extended once, and the time is also not more than 3 months. Detention is taken when the supervisory organ has some facts and evidence of illicit or criminal acts, but there are still important issues to be further investigated.

2. Audio and video recording

In the stage of investigation of crime, it is necessary to restrict the rights of citizens directly by the state organs; considering that confidentiality is in need in this stage, the supervision through the whole process by recording and videoing has become an important measure in modern society, which has been widely applied.

In China, it is not necessary to record or video the interrogation of the suspect in the ordinary criminal investigation, while it is necessary for the interrogation of the suspect in the case that may be sentenced to life imprisonment, death penalty or other major criminal cases. These recordings are generally transferred with the case for the examination of the procuratorial organ, the judicial organ and the defender.

In the investigation of duty crimes by supervisory organs, investigators are required to record and video the whole process of interrogation, search, sequestration, seizure and other important evidence collection work, and keep them for future reference. However, supervisory organs often refuse or limit the lawyer, the prosecutors and the judges to consult the audio and video recording, because there are many contents such as violations of discipline and law, even crimes in it which are not permitted to consult according to the law.

3. Counsel for the defense

In the face of serious state accusations, complex legal issues and the limited knowledge, retaining a lawyer as a defender is an important guarantee of the suspect's rights, which has been expanded from trial stage to criminal investigation stage in China's criminal procedure. According to the Criminal Procedure Law, from the day when the suspect in a common criminal case is first interrogated or taken coercive measures by the investigation organ, he or she has the right to entrust a lawyer as a

³ See Articles 156-159 of Criminal Procedure Law.

defender, who can provide legal assistance, file petitions and accusations on behalf of him or her, apply for changing the coercive measures, learn the charges against a criminal suspect and relevant case information from the criminal investigation authority, and offer opinions.

In the process of investigating the duty crime by the supervisory organ, the investigated person can't hire a lawyer because it is not considered as a procedure of the proceedings, let alone defending with the help of a lawyer.

4. Internal supervision

For the investigation subject of ordinary crime, whether it is the public security organ, the state security organ or other investigating subjects, the relationship between the superior and the subordinate is the hierarchy of leadership, which makes it a common phenomenon for the superior supervising the subordinate in case investigation. However, the investigation organs at all levels still have considerable independence. The investigation organs alone can decide whether to take any coercive measures and investigation means other than arrest without the approval of the superior investigation organ. Only when reconsideration is applied as a way of providing remedies for some cases such as a guarantee or his or her legal representative is not satisfied with the decision of confiscating the deposit and the fine, or some special coercive measures such as residential surveillance of designated residence are taken, will the investigation be intervened by the superior investigation organ.

The relationship between the superior and the subordinate of supervisory organs is also a hierarchy of leadership. However, considering the status of the subject of duty crime and the possible political influence made by the investigation, the supervision of the higher supervisory organ over the lower level is stricter, which restricts the independence of the lower supervisory organ. As for the adoption of detention, the district supervisory organs below the municipal level shall report to the supervisory organs at the higher level for approval, and the provincial supervisory organs shall report to the state supervisory committee for filing. As for cases that the suspects under investigation confess and take punishment voluntarily, or the disclosure of the facts related to the duty crimes is verified, or the important clues provided are helpful for the investigation of other cases, proposals for lenient punishment can be made with the approval of the supervisory organ at the higher level when the case is transferred to the people's Procuratorate for examination and prosecution.

5. Legal supervision of procuratorial organs

In China, the procuratorate is the state legal supervision organ, which is clearly stipulated in the Constitution and the Criminal Procedure Law.⁴ Based on the system of people's congresses, the state establishes special legal supervision organs to supervise the implementation and compliance of laws such as whether administrative organs, judicial organs and military organs faithfully perform the functions and powers given by the Constitution and laws, and whether they act within the scope of the Constitution and laws, so as to ensure the uniform implementation of laws.⁵

⁴ See Article 134 of Constitution and Article 8 of Criminal Procedure Law.

⁵ Liu Songshan, Xu Anbiao, *General Interpretation of Constitution of the People's Republic of China*, Available: <http://www.npc.gov.cn/npc/c13475/201004/a8955b0985204d749ff02f05827e5f47.shtml>, accessed on Oct. 5, 2019.

In common criminal cases, the procuratorial organ can supervise the investigation activities of the investigation organ, including whether the case should be filed, whether the adoption of coercive measures is legal, whether the investigation activities are legal etc. Therefore, the law grants the procuratorial organ the power to intervene in the investigation activities in advance, and to provide remedy on the complaints or accusations of the litigants, defenders, litigation representatives and interested parties.

The Constitution and the Supervision Law also clearly stipulate that the supervision organ and the procuratorial organ should cooperate with each other and restrict each other in handling duty crime cases.⁶ With the investigation power's transition from the procuratorial organ, the supervisory organ has certain particularity.⁷ As a state organ with the separation of power under the system of people's congresses, the relevant power the supervisory organ exercises is still authorized and regulated by the law, and should be supervised by the procuratorial organ, which is the same in specific cases. According to the current laws and regulations, the procuratorial organ has no right to supervise the investigation of duty crime yet.

(II) Examination and prosecution procedure

The common function of procuratorial organs in various countries is to be responsible for the public prosecution of criminal cases. China also clearly stipulates that only procuratorial organs can initiate public prosecution. Under this common premise, there are some differences between the examination and prosecution of duty crimes and ordinary crimes in China.

1. Discretion of public prosecution and its remedy

As for the cases transferred for examination and prosecution, the Chinese procuratorial organs usually conduct examination by means of reading records, interrogating suspects, listening to the opinions of defenders or lawyers on duty, victims and their litigation representatives, so as to find out whether the facts and the crime are clear, whether the evidence is accurate and sufficient, whether the nature and accusation of the crime are correct, whether there are omissions of crime and other persons who should be prosecuted for criminal responsibility; whether they are those who should not be investigated for criminal responsibility; whether there are subsidiary civil action and whether the investigation activities are legal or not etc.

Although the examination content of all criminal cases is the same, the procedure of decision-making and the way of remedy are different. For ordinary criminal cases, if it is believed that the facts of the crime have been ascertained, the evidence is accurate and sufficient, and criminal responsibility should be investigated according to the law, the procuratorial organ shall make a decision on prosecution. If a suspect is believed to have no criminal facts or to have any of the circumstances stipulated in Article 16 of the Criminal Procedure Law,⁸ the procuratorial organ shall make a decision not to

⁶ See Article 127 of Constitution and Article 4 of Supervision Law.

⁷ Yan Ming, *The Supervisory Committee is a Political Organ*. China Discipline Inspection and Supervision Daily, March 8, 2018.

⁸ Article 16 of Criminal Procedure Law: Under any of the following circumstances, a person shall not be subject to criminal liability, and if any criminal procedure has been initiated against such a person, the case shall be dismissed, a non-prosecution decision shall be made, the trial shall be

prosecute. Deeming the decision erroneous, the investigation organ shall generally seek remedy from the procuratorial organ which made the original decision (request for reconsideration). If the opinion is not accepted, it may also apply to the procuratorial organ at the next higher level for review.

Different from what has been discussed, if a case investigated by a supervisory organ is in conformity with the situation of non-prosecution, the decision of non-prosecution can be only made after the approval of the procuratorial organ of a higher level and the request of the supervisory organ for reconsideration is only applied to the procuratorial organ of a higher level.

2. Duration of the stage of examination and prosecution

Litigation time reflects the efficiency of state organs in carrying out relevant activities, which also has an impact on the litigation rights of suspects. Too long a duration will lead to the delay of litigation, making the status of suspects uncertain for a long time, or even leaving personal freedom or property restrictions in a unfair state. Too short one may affect state organs' investigation of the fact, and it may also affect the defense right of the accused. Therefore, fair and reasonable limitation of litigation time is also the necessary content of the protection of rights of the suspects.

The duration of the examination and prosecution stage generally includes the time limit for examination and prosecution and other periods that are not included in the time limit, such as the identification period of mental illness etc. The procuratorial organ shall generally make a decision within one month on the transfer of ordinary criminal cases for examination, and may extend 15 days for major and complex cases. When a suspect confesses and takes punishment voluntarily, a decision shall be made within 10 days in the case where the quick judging procedure is applied, and if the possible sentence is more than one year, the duration may be extended to 15 days. In the case of duty crime, if the supervisory organ has taken detention when it is transferred for prosecution, the law allows the procuratorial organ to take an additional 10 days to decide what kind of coercive measures to take, including arrest, bail or residential surveillance; in special circumstances, the duration can be extended for one to four days, which is not included in the time limit for the review of prosecutions. The follow-up review time is consistent with that of ordinary crimes.

(III) Special procedure

There is no difference between duty crimes and ordinary crimes for the trial procedure. Even in the special procedure of trial, the procedure of confiscation of illegal gains and the procedure of trial by default are not just for duty crimes. According to the provisions of the Criminal Procedure Law, the trial procedure by default is applicable to the criminal cases of corruption and bribery, as well as the criminal cases seriously affecting the state security and terrorist activities that need to

terminated, or the person shall be acquitted: (1) the circumstances of the alleged conduct are obviously minor, causing no serious harm, and the alleged conduct is therefore not deemed a crime; (2) the time limitation for criminal prosecution has expired; (3) exemption of criminal punishment has been granted in a special amnesty decree; (4) the alleged crime is handled only upon a complaint in accordance with the Criminal Law, but there is no such a complaint or the complaint has been withdrawn; (5) the criminal suspect or defendant dies; or (6) the person is otherwise exempted by law from criminal liability.

be tried in a timely manner and approved by the Supreme People's Procuratorate. The procedure of confiscating illegal gains is applicable to major criminal cases such as corruption, bribery and terrorist activity.⁹

However, the main purpose of the original legislation was to fight against corruption, both the procedure of confiscating illegal gains and the procedure of the trial by default.¹⁰ The newly added trial procedure by default in 2018 is the latest manifestation of the specialization of the relevant criminal procedures under the trend of severely cracking down on duty crimes. Compared with other applicable ordinary cases, the trial procedure by default does not need strict approval procedure for corruption and bribery cases, which reflects the uniqueness and flexibility of its application. According to the relevant provisions of the law, China's procedure of trial by default can not only make a ruling on the criminal responsibility of the defendant, but also deal with illegal gains and other property involved in the case. Compared with the general trial procedure, some special requirements of the trial procedure by default include: the people's court shall serve the summons and the copy of the indictment of the People's Procuratorate on the defendant through the way of judicial assistance provided by the relevant international treaties or diplomatic channels, or other ways permitted by the law of the place where the defendant is located; when the defendant and his close relatives have not entrusted a defender, the court shall notify the legal aid agency to assign a lawyer to defend the case; the defendant and his close relatives have the right of appeal; if the defendant voluntarily surrenders to court or is arrested, the ongoing trial procedure shall be resumed; if a criminal objects to the rulings during the time after it comes into force and before it is delivered for execution, the court shall try the case again.

III. Disputes caused by special procedures of duty crimes in China

From 2012 to now, the criminal procedure of duty crimes in China has gradually developed from the special procedure of confiscation of illegal gains to the specialization of the whole procedure, and has formed a relatively independent feature different from the ordinary criminal procedure. China has not been applying special criminal procedure to duty crimes for a long time, and there are still some uncertainties in the relevant theoretical research and practice. The different treatment of suspects and defendants between in the duty crime and in the common crime has also aroused great controversies.

I. The imbalance between right protection and power restriction in the investigation of duty crime

The core of the whole criminal procedure is nothing more than the negotiation of state power and individual rights. Due to certain evidence proving that the investigated person is suspected of committing a crime, his rights need to be subject to the state's

⁹ See Articles 291-298 of Criminal Procedure Law.

¹⁰ Huang Taiyun, *Interpretation of the Revision of Criminal Procedure Law*, 8 People's Procuratorate (2012); Shen Chunyao, *Notes on Criminal Procedure Law of People's Republic of China (Revised Draft)*, Available: <http://www.npc.gov.cn/npc/c12435/201810/6cda6a2ab98a41268452a87a89e0a0c6.shtml>, accessed on Oct.6, 2019

restrictions according to the law. However, based on the Doctrine of the Presumption of Innocence, the rights of the investigated should be protected accordingly. A reasonable balance between the rights of the investigated and the power of the supervisory organ should be carefully maintained during the whole investigation procedure, that is, the limitation of the rights of the investigated is necessary, which has the least impact on the suspect, and is balanced with the benefits of the investigation.¹¹

It can be seen from the main differences of the five aspects in the investigation procedures of duty crimes that, as a whole system, the supervisory organ has a larger power in the investigation of duty crimes, but it is relatively closed and is not affected by the outside world. Whether from the basic status of state legal supervision organ, or the relations of coordination and check between the procuratorial organ and the supervision organ in handling specific duty crime, the procuratorial organ should be able to actively intervene in the investigation procedure of the supervision organ before the examination and prosecution, but it cannot be the fact. The procuratorial organ has no supervisory power over the detention taken by the supervisory organ even if its time of deprivation of personal freedom is longer than that of arrest, and even the subsequent procedure following the investigation should be limited to different extent. For example, the audio and video recording cannot be directly obtained and made public. At the same time, the independence of each level is relatively low within the supervision organ, and either the adoption of detention- one of the main personal coercive measures, or the suggestion of lenient punishment in the transfer of the investigated case to the procuratorial organ for examination and prosecution needs the consent of the higher level in different degrees.

In contrast, the suspects under investigation are entitled less rights. In the fourth chapter (supervision authority) and the fifth chapter (supervision procedure) of the Supervision Law, which involve the investigation, almost all the subjects of the articles are supervisory organs or investigators, and there is no explicit empowerment of the investigated suspects. The suspect of the ordinary crime in investigation procedure is not only entitled to the key lawyer's defense and the mandatory defense under special circumstances, but also the right to sue, to apply for changing the coercive measures, to refuse to answer the questions irrelevant to the case, to apply for supplementary verification or re-verification etc., while the suspect investigated by the supervisory organ is not entitled to these rights.

Indeed, considering the particularity and serious influence of the duty crime, it is necessary to impose special restrictions on the suspects of the duty crime, so as to prevent them from using the public power and other forces to interfere in the handling of cases. Therefore, through the overall strength of the supervisory organ, the possible interference from the outside world, including the influence on the procedure after investigation, can be eliminated. At the same time, through the supervision between the superior and subordinate supervisory organs, orderly operation of investigation of supervision can be formed. However, this kind of guarantee and balance, mainly based on the authority of the supervisory organ itself, which is more similar to a moral regulation rather than a reasonable legal compulsory arrangement, is likely to be

¹¹ Hao Yinzong, Xi Zuoli, *The Principle of Proportionality from the Perspective of Constitutionalism*, 6 Studies in Law and Business (2004).

distorted by the personal power of the subject, because it starts from the assumption of the introspective subject to shape the subject, and ensures the appropriateness of the legal application through the sage (supervisory organ).¹² Under the tradition of bureaucratic system in China, the overall will of the supervisory organ under Responsibility System of the Leading Cadre will still be vulnerable to the interference of individual leaders to a large extent, which will also be sheltered by the will of the organization. Therefore, it is very difficult to place the order of power operation under the supervision of the same body, leaving the protection of the rights of suspects in an insecure position. In the period when the procuratorial organ led the investigation of duty crime, its approval of arrest in duty crime was raised to a higher level, and at the same time, it actively strengthened the supervision from the outside of the legal system – implementing the People's Supervisor System, which embodies the procuratorial organ's full recognition of the necessity and consciousness of external supervision.¹³ As the main compulsory power of national supervisory organ, how can the exercise of investigation power be trusted not to be abused and exclude the timely supervision of other state organs in specific cases?

Even if the supervisory organ without the supervision of other state organs can realize the protection of the rights of the investigated suspect, but it may not conform to the status of the investigated person. First of all, from the perspective of the subjectivity of human beings, the suspect of duty crime should be the subject of investigation procedure of the Supervision Law. No matter who, whether at any time, should not regard themselves and others only as tools, but should always regard themselves as the purpose.¹⁴ Man should be not only the aim, but also the tool and means. In the investigation procedure of duty crime, the investigated person is the object of the investigation procedure, and has the obligation to cooperate. At the same time, the respondent should not be completely passive, and an intersubjective relationship should be established between investigators and the investigated. The concept of Scientific Development once proposed by the Communist Party of China is to emphasize "people-oriented", and the core of concept is the confirmation and respect of human subjectivity. At present, the Supervision Law should not only be regarded as a law for punishing the criminal of duty crime, but also reflect and respect the subject status of the criminal.

Secondly, from the perspective of legal provisions, the subject of duty crime should also be the subject of rights. Compared with the clear procedural subject status of suspects in common crime and various procedural rights in criminal proceedings, the respondents in the investigation procedure of the Supervision Law have no clear subject status, so it is impossible to talk about their rights. The Supervision Law is mainly aimed at "strengthening the supervision of all public officials exercising public power" while there are no provisions such as "punishing the criminals, protecting the people" and "respecting and guaranteeing human rights", which is stipulated clearly in

¹² Chen Haifeng, *Study on the Improvement of the Legitimacy of Criminal Review and Prosecution Process*, Law Press (2014) 130.

¹³ See *Provisions of the Supreme People's Procuratorate on the Implementation of the System of people's supervisors and Administrative Measures for the Selection and Appointment of People's Supervisors*.

¹⁴ Immanuel Kant, *The Groundwork of the Metaphysics of Morals*, China Renmin University Press (2013), 86.

the Criminal Procedure Law. However, to “maintain the dignity of the Constitution and laws” and to “guarantee the parties’ lawful rights and interests” are expressly provided by the Supervision Law. In the process of investigation, it also imposes specific obligations on the supervisory organ to protect the civil rights, such as keeping the secrets of the investigated obtained in the investigation; terminating timely the seizure, impoundment or freezing measure of property and documents unrelated to the case, and returning it; collecting the evidence as to whether the person under investigation has committed any violation or crime, and, if any, the seriousness of circumstances; prohibition of collecting the evidence by threat, enticement, fraud, or any other illegal means, and of insult to, abuse, ill-treatment, physical punishment or physical punishment in any disguised form of the person under investigation and the person involved in the case; guaranteeing the food, drink, rest and security of the detained person, and providing medical services etc.

More importantly, as the subordinate law of the Constitution, the Supervision Law must also implement the provisions of “respecting and guaranteeing human rights” and the protection of the basic rights of citizens stipulated in the Constitution.

Thirdly, compared with the suspects of ordinary crimes, the rights of the investigated of duty crime should be guaranteed. The subject of duty crime is the staff of the state organs who may intervene in the investigation of duty crime. However, once left in a closed space because of detention, he or she is only the investigated who is not familiar with the law, and is in need of the legal help. The lawyer’s meeting and defense may bring restrictions to the investigation of the supervisory organ, but the restriction of power itself is an integral part of the national political framework. The fear that supervisory organs can’t afford to intervene should be alleviated by strengthening its independence and fight against illegal interference than to restrict the reasonable and necessary procedural rights of the investigated.

Finally, from the trend of human rights protection, more attention should be paid to the rights of the investigated in duty crimes. The provisions of human rights protection stipulated in China’s Constitution is respect for the trend of human rights protection in the world and basis of its realization in China. Confirmed by the Criminal Procedure Law in the investigation of duty crimes led by the procuratorial organ in the past, they should be practiced by Supervision Law in today’s more developed and progressive China.

(II) The limitation of the procuratorial organ’s discretion in public prosecution

The discretion of public prosecution refers to the application of the procuratorial power by the public prosecution organ to decide whether to prosecute or not after examining the cases transferred by the investigation organ. According to the provisions of the Constitution, the Criminal Procedure Law and the Supervision Law, the procuratorial organ exercises its powers independently without interference of administrative organs, social organizations or individuals. At the same time, procuratorial organs, investigation organs, supervision organs and judicial organs shall coordinate and check each other in the process of handling specific cases, which is carried out in accordance with law on the basis of their respective performance of duties.

Seeing from the prosecution procedures of duty crimes investigated by the supervisory organs, the contents and methods of case review in the same procuratorial organ may be the same, but there may be differences in the restrictions

on making non prosecution decisions for cases of different natures. Compared with ordinary crimes, the requirements for decision of non-prosecution and its relief in duty crime cases are higher, that is, the procuratorial organ that accepts a case has no right to decide the case, and the supervisory organ seeks relief directly from a higher level about their disagreement on the decision of non-prosecution. Although, the final decision of prosecuting or not and the relief are still reserved by the procuratorial organs, which is consistent with legal principles of the mutual coordination and check between the procuratorial organs and the supervisory organs, showing the legitimacy and rationality, the kind of application of strict approval procedure and improvement of relief level may erode the discretion of procuratorial organ to a certain extent.

First of all, the strict procedure restriction, which is appropriate for the investigation led by procuratorial organs, is not necessary now. During the investigation of duty crimes by the procuratorial organ, the raising of the decision-making power of non-prosecution to a higher level is mainly to deal with the weak supervision among the internal departments of the procuratorial organ, so as to restrict the discretionary power of public prosecution organ by strengthening the supervision of the upper and lower levels, which is the measure for the procuratorial organ to strengthen self-supervision. However, the current cases are investigated by the supervisory organ, which is not comparable with the previous background.

Secondly, prosecutors are reluctant to make decisions of non-prosecution because of the strict procedures. China's procuratorial organs have a slight power over discretion in public prosecution, which is mainly for minor crimes,¹⁵ and the conditional non-prosecution can be applied to juveniles only. Moreover, the decision of non-prosecution needs to be made by the Prosecutor General or the procuratorial committee, and the undertaking prosecutor has no right to make it. Currently, at the background of strong administrative characteristic in China's procuratorial organs, the non-prosecution of a case must be reported to the Prosecutor General or the procuratorial committee for approval, which means that the prosecutor, who has different opinions from the dean of his department, must adhere to his own opinions, prepare additional reporting materials, wait for the approval from the Prosecutor General or the procuratorial committee etc., i.e. it is a risk because the prosecutor's ability of case-handling is directly examined by the leaders. Different from this, the prosecutor insists on prosecution while the case is minor. On the one hand, there is no problem with the decision because it is within the scope of the prosecutor's discretion. On the other hand, even if there is a certain risk of convicting and sentencing, it is obviously easier to communicate with the judges at the same level with whom the prosecutors have a long-term business relationship than the leaders of the court, and it is also possible to have a certain degree of tacit agreement between the prosecutors and the judges who are familiar with each other.¹⁶ There are many reasons for the low rate of acquittal in China among which the cooperation of police, procuratorial organs and courts is also a possible factor.¹⁷

¹⁵ See article 177 paragraph 2 of Criminal Procedure Law: Where the circumstances of a crime are minor and no criminal punishment is necessary or the criminal suspect is exempted from criminal punishment in accordance with the Criminal Law, a people's procuratorate may decide not to initiate a public prosecution.

¹⁶ Hu Yunteng, *On the People's Court's Difficulty in Acquitting*, People's Court Daily, June 4, 2014.

¹⁷ Li Yang, *On the Key Factors Affecting China's Acquittal: An Empirical Analysis of 100 Cases of Acquittal*, 4 Tribune of Political Science and Law (2013).

Finally, this strict procedure reduces the legitimacy and efficiency of the review procedure, which may not be in line with the trend of judicial reform. China is carrying out the reform of the power list system of procurators, which insists that procuratorial organs exercise procuratorial power independently according to law, and the emphasis is also on the necessity for procurators to enjoy their power at the meantime, thus decentralizing the power of the Prosecutor General. Some of the judicial powers are entrusted to the procurators, and the relevant decisions are made by the procurators independently according to law.¹⁸ The examination and prosecution of a case is a power of adjudicative nature. The process of exercising this power should be judicialized appropriately, and the long-standing “three-level examination and approval system” should be changed, which means that the procurators who undertake specific cases should directly exercise this power and make relevant decisions.¹⁹ The non-prosecution of duty crime cases is decided by the higher level procuratorial organ. Adding more restrictions on the current “three-level examination and approval system” for non-prosecution strengthens the existing chronic problems of judicial administration, which does not accord with the law of power exercise. Not only that, this exercise means that, besides the “three-level examination and approval system”, the non-prosecution still needs to wait for the approval from the procuratorate of a higher level. Although the time for the review is not extended by the law, it obviously leads to the extension of the time for the review decision, and the 10-15 review period required in the case of confession and punishment may be broken. Even if it does not break the time limit stipulated by the existing law, this kind of approval procedure makes the process of decision-making longer than that should be, which results in legitimacy of the procedure being questioned.

(III) Constraints of international criminal judicial cooperation on the application of trial by default

The authority of law comes from its enforcement. As an important procedure of tackling corruption, trial by default should be implemented, and its ruling should be implemented to the greatest extent. Otherwise, it will not only be unable to deal with corruption cases under specific circumstances, but also have a negative impact on the implementation of the whole criminal procedure, and even the determination of anti-corruption in China.

Trial procedure by default in China is a special trial procedure when the defendant escapes to other countries. To some extent, the application of the procedure and the enforcement of relevant rulings depend on international cooperation. However, it is mainly applied in anti-corruption cases with the suspects of corruption and bribery fleeing abroad as the main objects in China, which may be hindered by the difficulties in international criminal justice cooperation.

Firstly, it is very difficult to verify the accurate address of the defendant, which may lead to the difficulty of promoting trial procedure by default. The escape of the defendants of corruption and bribery is to avoid criminal prosecution. It is very

¹⁸ Li Tianhao, Xu Henan, *On the Three-dimensional Connotation of the Power List of Prosecutors*, 7 People's Procuratorate (2018).

¹⁹ Chen Haifeng, *Grading and Classification in the Formulation of the List of Prosecutors' Powers*, 5 Journal of National Prosecutors College (2018).

common to hide their tracks in other countries by ways like using pseudonym, getting across the border, and running away from countries to countries. It is not easy to find out the tracks of these defendants, which may lead to the failure of delivering service and the promoting of the case.²⁰

Secondly, even if the address of the defendant is found out, the service to the defendant is rejected by many countries. For example, in the case of a country where Chinese defendants of duty crimes often flee.²¹ According to Article 8 of the Agreement between the Government of the People's Republic of China and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, "the requested party shall not have the obligation to effect service of a document which requires a person to appear in court as the defendant". There are similar provisions in treaty between China and Australia.²²

Thirdly, since China takes defendants of "corruption and bribery crime" as the main objects of trial by default, the service may be rejected by other countries for reasons that the suspects are possible "political prisoners" or "persecuted people", or reasons in other forms of refusing judicial cooperation. The United Nations Convention against Corruption states clearly that "the crimes established in the Convention shall not be regarded as political prisoners", based on the premise of "the permission of domestic laws of the contracting states". From the perspective of the judicial cooperation practice abroad in China, the defendants of corruption and bribery are mainly government officials at all levels or state-owned enterprise managers appointed by the government, which have certain political attributes. There are many phenomena that they falsely claim to be persecuted or politically attacked, which leads to more difficulties in cooperation or rejection of their requests.²³

Fourthly, criminal judicial cooperation is also restricted by the current status of the criminal judicial assistance treaties signed by China. By the beginning of 2019, only 77 countries have signed the treaties on bilateral judicial assistance with China, and not all of them have come into force,²⁴ which mean that many countries have not cooperated with China, and the relevant judicial cooperation will be carried out on a case by case basis, thus increase the difficulty of cooperation. Among the countries favored by corrupt officials, many countries have no assistance treaty with China, such as the Netherlands.

²⁰ See Articles 4 and 21 of *International Criminal Judicial Assistance Law of the people's Republic of China*.

²¹ Research in China shows that the United States, Canada, Australia and the Netherlands are the main places where corrupt officials with high value and high status flee. See Lu Yao, Wang Min. *The Destination of Fleeing Officials: High-ranking Officials often in Europe and the United States and Low-ranking Officials in Neighboring Countries*. Outlook Oriental Weekly, August 19, 2013.

²² See Article 9(1) of *International Criminal Judicial Assistance Law of the people's Republic of China*.

²³ The latest example is Sweden's refusal to extradite Qiao Jianjun to China on the grounds of "possible persecution". Early typical cases such as Lai Changxing, Yang Xiuzhu and others extradition. See Mo Ran. *Sweden Refuses to Extradite No.3 Fugitive Suspects on Red Notice, China hope Sweden not to be a Paradise for a Criminal*, Global Times, July 10, 2019; *Lai Changxing is Repatriated*, Ningbo Evening News, July 24, 2011; Tian Yi, Tang Changwei. *Dutch Trial Years of Yang Xiuzhu, a Corrupt Female Official*, 13 Law and Life (2015).

²⁴ Wang Qian, *China's Ratification of the Treaty between the People's Republic of China and Barbados on Criminal Judicial Assistance*. Available: http://www.xinhuanet.com/politics/2019-04/23/c_1124406789.htm accessed on Oct. 27, 2019.

Fifthly, the cases applicable to trial by default in China include serious penalties, which may not be understood by foreign countries. According to the provisions of the Criminal Law of China, the most serious crime related to corruption and bribery can be sentenced to death, while the ruling at this time is made without the participation of the defendant and only the participation of the defender, which is not in line with the minimum criminal guarantees of “the accused has the appropriate time and convenience to prepare the defense, contact with the lawyer, attend the court and defend himself” stipulated in the International Covenant on Civil and Political Rights. In countries where corrupt officials often flee, trials by default are strictly restricted. For example, the trial by default procedure in the United States is mainly applicable to the situation that there is no need to appear in court and the court refuses to continue to appear in court for various reasons; the trial by default in Canada is also mainly aimed at the summary offenses (the maximum penalty is \$2000 or six months’ imprisonment), and the defendant is required to appear in court for all the actionable offenses; the default judgment in New Zealand is mainly aimed at the situation that there is no imprisonment, and a serious crime requires at least the presence of the defendant.

Finally, it is still difficult to promote the international cooperation in recognition and enforcement of criminal rulings. Although China’s International Criminal Judicial Assistance Law clearly defines the content of “transferring the sentenced person”, it mainly regulates the procedure of transferring the sentenced person from China to foreign countries or from foreign countries to China. Since it is only a domestic procedure, some specific transfer issues still need to be negotiated between countries. In the treaties of criminal judicial assistance signed between China and the United States, Canada, New Zealand and Australia, which are the main countries favored by defendants, there are no provisions about the implementation of conviction and sentencing decisions, such as transfer of custody,²⁵ which means that the conviction and sentencing of duty crime defendants may be difficult to be implemented, and the relevant criminal decisions are more symbolic and deterrent. As for the lack of legitimacy of the domestic criminal justice process or being questioned by foreign countries, it is also common for relevant decisions to be refused to assist in the execution,²⁶ and the execution of the decisions under the trial by default will be more difficult.

IV. The influence and value of duty crime special procedure in China

There are some disputes about the duty crime special procedure in China, which is the firm measure taken for internal complicated corruption crimes situation. And now good effect has been achieved. We should pay more attention to the experience of fighting against corruption crimes, which may also be a reasonable reference for some countries.

²⁵ The conventions on criminal judicial assistance signed between China and these countries are related to the handling of the property involved in the case to some degree, which is very helpful for the application of procedures for the escape and concealment of criminal suspects and defendants and the confiscation of illegal income in death cases.

²⁶ Zhang Xiaohai, *Discussion on the Problems of Criminal Trial by Default in China*, 3 Journal of Beijing Vocational College of Political Science and Law (2019).

(I) The effectiveness of anti-corruption under the specialization of criminal procedures for duty crimes in China²⁷

The specialization of criminal procedures for duty crimes in China began with confiscation procedure of illegal income in the Criminal Procedure Law of 2012. Since then the discipline inspection and administrative supervision organs strengthen the cooperation with the procuratorial organs in anti-corruption.²⁸ In December 2016, The reform of National Supervision System in Beijing, Shanxi province and Zhejiang province is authorized to carry out by Standing Committee of the National People's Congress. The original administrative supervisory organ and the branches for investigating duty crimes in procuratorial organs are integrated to form local supervision organizations which worked with the Discipline Supervision Committee to exercise the power of supervision, investigation and disposal of duty crimes. These experiences and measures in anti-corruption were confirmed in Supervision Law enacted in March 2018, and improved in the revision of the Criminal Procedure Law in October 2018. Generally speaking, though the criminal procedure for duty crimes has not been enforced for a long time, the relevant measures and mechanisms have been applied to handle cases for years.

We can see from some relevant data below that remarkable achievements have been made in anti-corruption in China since 2012. According to the working report of the Supreme People's Procuratorate,²⁹ procuratorial organs investigated 254419 suspects involved into duty crimes with the cooperation of Discipline Inspection and Supervision organs in the past five years (2013-2017). The number of suspects increased 16.4% compared with the previous five years. Among the national staff involved into duty crimes above, there are 15234 in the position of county level, 2405 in the department and bureau level and 122 in the position of provincial and ministerial level. China has taken special actions to fight against duty crimes and strengthened judicial cooperation with relevant countries and regions since October 2014. 222 fugitive suspects were persuaded to return, repatriated and extradited from 42 countries and regions, of which 35 suspects belong to one hundred fugitive suspects on Red Notice. The process of confiscating illegal income in time has been started in 45 duty crime cases which the suspects escaped or died.³⁰ Criminal

²⁷ China's systematic criminal procedures for duty crimes were formed after the enactment of Supervision Law and the amendment of Criminal Procedure Law in 2018. However the discipline inspection and supervision organs have been strengthening cooperation with the procuratorial organs in anti-corruption since 2012, and most of their experiences and practices were adopted in the supervision system reform in 2016 and Supervision Law and Criminal Procedure Law later on. Considering the comparison with the earlier anti-corruption effect, the anti-corruption effect here includes the effect since 2012 and after 2018.

²⁸ Before the enactment of Supervision Law and the amendment of Criminal Procedure Law in 2018, China's discipline inspection and supervision organs were responsible for corruption cases generally such as violations of laws and disciplines, and the procuratorial organs were responsible for the handling of corruption crimes; if the former find criminal clues in the process of reviewing cases, they will transfer them to the procuratorial organs for investigation. They have a good cooperation in the fight against corruption crimes.

²⁹ Cao Jianming, *Work Report of the Supreme People's Procuratorate*, Available: https://www.spp.gov.cn/spp/gzbg/201803/t20180325_shtml, accessed on October 30, 2019.

³⁰ There are some statistics on corruption cases investigated and dealt with by the discipline inspection organs and administrative supervision organs, which shows that from 2012 to January 2017, 240 cadres appointed by the central government of China have been put on file for review, the number of which is 10 times that of 1978 to 2012. Corruption cases investigated and dealt with in

procedure on duty crimes is officially enforced in China in 2018, when procuratorial organs at all levels accepted 16092 people suspected of duty crimes transferred by supervisory organs, of which 9802 people were prosecuted and 250 people were not prosecuted. The rate of non-prosecution decreased by 9.5 percent year on year.³¹

The achievements above have greatly boosted Chinese people's confidence in anti-corruption. The relevant survey shows that about 90% of the surveyed public is very cognizant of the determination of the state to punish corruption and 60.5% of the leading cadres, 54.6% of the ordinary cadres, 35.6% of the professionals and 37.2% of the enterprise managers believe corruption has been effectively curbed in general.³² More than 5000 national staff involved into corruption across the country turned themselves in from October 2017 to the beginning of 2019 because of feeling a strong deterrent.³³

Currently the corruption situation has been alleviated from the definition of it by the Communist Party of China. For example, it is pointed out that the phenomenon of corruption takes on a prone situation and the fight against corruption is still grim and complicated in the 2013-2017 Work Plan for Establishing and Improving the System of Punishing and Preventing Corruption issued by the Central Committee of the Communist Party of China in December 2013. In June and October 2014, Comrade Xi Jinping, general secretary of the Communist Party of China, points out that the spread of corruption has not yet been effectively curbed and a high pressure situation must be maintained to resolutely curb it.³⁴ However Comrade Xi Jinping mentioned it in his speech in December 2018 that the fight against corruption has achieved an overwhelming victory.³⁵ Obviously, the Communist Party of China has changed its understanding of the current situation of corruption.

(II) Experience in the construction of criminal procedures in response to duty crimes in China

The success of anti-corruption has not only been recognized at home, but also gained international reputation,³⁶ which obviously is not brought by the controversies

China in 2014 were twice of that in 2009, which increased significantly in 2015 and 2016. See Guo Yong, *On the situation of Corruption after the Eighteenth National Congress of the CPC*, 3 Cass Journal of Political Science (2017).

³¹ Zhang Jun, *Work Report of the Supreme People's Procuratorate*, Available: https://www.spp.gov.cn/spp/gzbg/201903/t20190319_412293.shtml, accessed on Oct.30, 2019.

Compared with the situation of the previous five years, the number of duty crimes transferred in 2018 has declined significantly, which reflects the effect of anti-corruption. But the supervision authorities still accepted 3.44 million reports, in which 638000 cases were filed for review, and 621000 people were punished for administrative sanctions. See Circular on the supervision, inspection and investigation of national discipline inspection and supervision authorities in 2018 by Central Commission for Discipline Inspection and State Supervision Commission, Available: http://www.ccdi.gov.cn/toutiao/201901/t20190108_186570.html, accessed on Nov. 1, 2019.

³² Liu Shaohua, *Overwhelming Situation on Anti-corruption has Formed in Three Years after the 18th National Congress of the Communist Party of China*, People's Daily Overseas Edition, January. 15, 2016

³³ Sun Ying, *Report card of the State Supervision Commission*, Beijing Evening News, March 24, 2019.

³⁴ See Xi, *Jinping's Excerpt on the Construction of a Clean and Honest Administration and Anti-corruption Struggle*, Available: <http://www.sdjj.gov.cn/channels/ch01179/>, accessed on Nov. 1, 2019.

³⁵ Wang Jun, *Xi Jinping's speech on the Central Party's Major Judgment on the Current Situation of Anti-corruption*, Available: https://www.thepaper.cn/newsDetail_forward_2749646, accessed on Nov. 1, 2019.

³⁶ Yan Yu, *China's Anti-corruption Achievements Amaze the World*, People's Daily Overseas Edition, June 12, 2017.

of criminal procedure of duty crimes, but by the positive factors, especially the positive role it has played in the severe situation of corruption in China.

1. Strengthening the centralization and unification exercise of anti-corruption power and reducing the constraints on the exercise of power

The particularity of duty crime determines that anti-corruption organs need to have greater power, confidentiality or non-publicity in the process of power exercise, and reduce the involvement of the outside world. There are two main ways in China:

On the one hand, a unified anti-corruption agency has been established. Before the enactment of the Supervision Law of March 2018, state organs with anti-corruption functions included procuratorial organs, administrative supervisory organs and corruption prevention departments. In addition, the Communist Party of China, as the ruling party, has a discipline supervision agency within the party, Commission for Inspecting Discipline, which works jointly with the administrative supervisory organization. The procuratorial organ is responsible for the investigation and prevention of duty crimes, the administrative supervisory organ is responsible for the investigation and punishment of illegal acts of governmental officials, and the corruption prevention department is mainly responsible for the prevention of corruption within the government. These organs or agencies share the responsibilities of anti-corruption, which results in the decentralization of power and the limit of cooperation. Theoretically, there is a close relationship among violation of discipline, violation of law and crime, but now the three state organs and one inner-party agency share the responsibilities respectively, resulting in the overlapping of functions and poor convergence. In response to these problems, the relevant functions and departments of the three state organs in China has been integrated, and a supervisory committee, as a special anti-corruption agency, has been set up, cooperating with the discipline supervision agency within the party. In this way, one organ can deal with three kinds of behaviors at the same time, avoiding the possible delay of procedure handover, reducing the duplication of work, and improving the efficiency of anti-corruption.

On the other hand, the power supervision is realized through the supervision between the upper and lower levels. As the sole organ responsible for the function of state supervision, the power of the supervisory organ may be abused, so the supervision of the supervisory power is also an essential part of the power structure. However, the supervision of the procuratorial organ may not be appropriate, because only the criminal behavior has been the object of the supervision of the procuratorial organ while it is the supervisory organ that is responsible for any illegal, disciplinary or criminal act. In the case that the supervisory organ does not distinguish three kinds of acts, the intervention of procuratorial organ in supervision goes beyond the provisions of the Constitution and the law, and may also cause the leakage of the illegal and disciplinary information provided by the investigated person, leaving unnecessary hidden troubles for the investigation of other illegal and disciplinary acts. The supervision between the upper and lower levels can not only prevent the investigated from interfering in the cases handling, but also the possible abusing power of the supervisory organ. For example, currently, the detention shall be decided by the leading group of the supervisory committee, submitted to the supervisory committee at a higher level for approval or filing; and the proposal of lenient punishment shall be approved by the supervisory organ at a higher level.

2. Weakening the procedural protection of the investigated and reducing the possible external restrictions on power exercise

The investigated of duty crime are not only the object of the crime, but also the subject of the procedure, whose corresponding rights should be protected. However, this may result in the restriction or even interference of rights to power. If there is no restriction on personal freedom, the investigated may destroy the evidence, run away etc.; the lawyer's intervention may instigate the investigated to refuse to answer any questions, or even collude in confession etc.

Measures to prevent violations and abuses of the rights of the investigated are taken in China. The first measure is to restrict personal freedom of the investigated, that is to say, as long as the investigation still needs to be continued when there is certain evidence to prove the fact of the crime, the investigated will be retained without external approval no matter whether there is any interference with the investigation. The second one is that lawyers are not allowed to defend, and the investigated is not given corresponding and equal rights against the above restrictions. In this way, the investigated, who have no procedural right to confront directly with the investigation organ, or get help from the outside world, will be in a relatively closed and isolated place, only having the basic rights stipulated by the substantial law (such as food, rest, safety, medical services). Thus, the supervisory organ has a large space to exercise its power under the premise of guaranteeing the basic rights of the investigated.

3. Expanding the cooperation of criminal justice to providing the help for anti-corruption

International criminal judicial assistance is an important part of China's anti-corruption, especially when the criminals of corruption and bribery flee to the countries and regions abroad. So far, there are only more than 70 countries that have signed criminal judicial assistance treaties with China, but China is still committed to expanding cooperation with countries and regions in anti-corruption through various ways.

In December 2018, after the establishment of the State Supervisory Committee of China, the Memorandum of Understanding between the National Supervisory Committee of the People's Republic of China and the Federal Police of Australia on Anti-Corruption Law Enforcement Cooperation was signed successfully with western countries for the first time, which reflects not only the recognition and respect of the Australian for the work of China's new anti-corruption institutions, but also the active cooperation between the supervisory organ of China with overseas countries. In October 2019, the State Supervisory Committee of China and the United Nations (UNODC) signed, for the first time, a document of the mechanism of anti-corruption, namely, the Memorandum of Understanding between the State Supervisory Committee of the People's Republic of China and the United Nations on Anti-Corruption Cooperation, starting the practical cooperation on preventing and punishing corruption, asset recovery, information sharing and exchanging, training and capacity building.

In the short term, it is still difficult for China to sign criminal judicial assistance treaties with more countries and regions, or expand judicial cooperation. However, in addition to the signing of criminal judicial assistance treaties, corruption crimes can be fought by means of diplomacy, persuasion or domestic procedure of the requested state. Even if the trial by default cannot be initiated or the criminal decisions cannot be implemented with the cooperation of foreign countries, such anti-corruption determination and efforts can, to a certain extent, deter criminals for corruption.

IV. Summary

The criminal procedure of duty crimes in China has formed an independent system, and has achieved good results in fighting against corruption. Of course, this does not mean that the current program does not have problems or need to be improved. The criminal procedure of duty crimes in China is an emergency measure taken under the severe situation of corruption in China, which has the characteristics of certain stage. It is based on the consideration of anti-corruption strategy, and is the realistic demand for China to achieve the two centenary goals. In the long run, when the situation of corruption in China has been alleviated to a large extent, the criminal procedure of duty crimes needs to be improved to a certain extent accordingly, such as allowing lawyers to intervene in the later stage of the investigation when the internal organs of the supervisory organ put crimes and violations of laws and disciplines on file for examination; providing relief after the event even if there is no prior approval when deprivation of personal freedom is of a long time. At present, the problems faced by the criminal procedure of duty crimes in China should not be ignored. More importantly, this kind of procedure should not be ignored for the healthy and orderly development of Chinese society and for the reference of other similar countries.

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