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Original Article

Recent Anti-corruption Legal Reforms in China

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Abstract: Combating corruption crimes has long become a primary mission for the Chinese government since the late 1990s. Considerable progress has been made in this area over the past decade since President Xi's administration launched a new round of anti-corruption campaigns. This paper overviews three major anti-corruption legal reforms in China: the enactment of the National Supervision Law in 2018, the establishment of a special proceeding of confiscation of illegal gains in the 2012 Criminal Procedure Law (CPL) amendment, and the introduction of "trial in absentia" in the 2018 CPL amendment, as well as the ongoing pilot reforms on corporate compliance non-prosecution. The National Supervision Law proves to be a great leap for the anti-corruption enterprise in China, for it integrates the powers and resources to make anti-corruption more efficient and effective. The two special proceedings aimed at combating corruption crimes with a tough stance, but the effect remains to be seen due to the insufficient implementations. The ongoing non-prosecution pilot reforms might be a more effective way of ensuring corporate compliance and minimalizing the harms of corporate crimes to society.

Keywords: Anti-corruption, supervision law, special proceedings, corporate compliance, non-prosecution.

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Corruption is one of the thorny issues in any modern society, especially in China. Corrupt behavior, including corruption crimes, has become increasingly serious in China over the past three decades with the rapid economic growth and social transition. The new leadership of the Communist Party of China (CPC) led by President Xi Jinping has robustly initiated an anti-corruption campaign as soon as he took over as the party chief at the end of 2012. Several legal reforms aiming at fighting harder against corruption crimes attracted attention from home and abroad. These reforms include the enactment of the National Supervision Law in 2018, the establishment of a special proceeding of confiscation of illegal gains in the 2012 Criminal Procedure Law (CPL) amendment, and the introduction of "trial in absentia" in the 2018 CPL amendment. The National Supervision Law created a new organization, the Supervisory Commission, as the exclusive investigating agency for all corruptive behaviors including both duty-related violations and duty-related crimes (mainly corruption crimes), ending the complicated situation in which corruption crimes were investigated by different organizations. Another undergoing reform is the corporate compliance non-prosecution. Crimes committed by units or organizations (Unit crimes) are different from those committed by individuals. China used to adopt a dual punishment approach upon unit crimes, which means imposing punishments on individual offenders, usually the directly responsible persons, and the involved enterprises separately. However, the traditional sanction against enterprises tends to cause secondary harm to society. For example, when a corporate is broken, thousands of innocent people will be unemployed, and the local economy will be affected. Therefore, non-prosecution is regarded as a more effective way of ensuring corporate compliance as well as minimalizing the harm mentioned above. This paper tries to overview the anti-corruption mechanisms that the Chinese government has created or improved over the past decade and provide a whole picture of China's anti-corruption law.

1. Creation of Supervisory Commission: Refiguration of Anti-corruption Powers in Criminal Cases of China

Before the 2018 Constitutional Amendment established the Supervisory Commission, a new organization to investigate all corrupted behaviors, the anti-corruption power in China was shared by at least three agencies. Commission for Discipline Inspection (CDI) of the Chinese Communist Party (CCP) oversaw investigating corruption cases involving CCP members; the Ministry (or Bureau at the local level) of Supervision was responsible for investigating corruption behaviors committed by non-CCP member officials [1]. Once the facts were clear, the cases would be referred to the people's procuratorates for formal investigation and indictment in accordance with the Criminal Procedure Law. That said, the investigation power in corruption cases used to belong to three agencies: CDIs and Bureaus of Supervision as preliminary investigation agencies, and the people's procuratorates as formal investigation agencies. This model was referred to as a "dual-track model" or "three carriages (troika)" [2]. Besides the discipline commissions and the procuratorates, the police departments at all levels were also in charge of the investigation of corruption crimes committed by non-state workers, or commercial bribery in private sectors. No wonder some scholars used the vivid metaphor of "controlling the waters with many dragons" to describe the decentralized power model in the previous anti-corruption system [3].

In accordance with the 2018 Constitutional Amendment and the 2018 National Supervision Law (the Supervision Law), the CCDI (Central Commission for Discipline Inspection) was merged with the Ministry of Supervision and became a new independent organization called the National Supervision Commission (NSC), which has the same administrative ranking as

the Supreme People's Court and the Supreme People's Procuratorate. Accordingly, CDIs were merged with the Bureaus of Supervision and become Supervisory Commissions at the local level. The people's procuratorates stopped exercising the investigation power over corruption cases, and all the power of investigating corruption cases is now in the hands of Supervisory Commissions. The Commission exercises supervisory powers over all public employees, including government officials, state-owned enterprises, other government-managed institutions, and public schools and universities, and investigates any "illegal or criminal conduct abusing public office" (duty-related violations and duty-related crimes) [4]. As a new anti-corruption agency, the Supervisory Commission is directly enshrined in the constitution as a peer institution to the Judiciary and Procuracy and is governed by formal procedural rules concerning investigation, detention, and eventual prosecution, clearly it can "consolidate anti-corruption forces, reduce overlapping investigations and resolve the conflicts that stemmed from the previous system" [2].

2. Anti-corruption Special Proceedings: Pursuing the Criminal and Civil Liability of Corrupted Officials

China's anti-corruption law used to focus on recipients of bribes, and it is still the principal task to make the corrupted government officials take criminal responsibility and civil liability. The Chinese Criminal Procedure Law enhanced its capacity of combating corruption crimes by adopting two special proceedings: Confiscation Proceeding and the Trial in Absentia, to take a tougher stance against corruption crimes and bring offenders to justice.

In the 2012 CPL Amendment, a special proceeding has been adopted to confiscate the illegal assets owned by corrupt criminals. This special proceeding is called "Procedures for Confiscating Illegal Gains in Cases Where the Criminal Suspect or Defendant Has Absconded or Died" (hereinafter "the Confiscation Procedure"). According to Article 280 of 2012 CPL.

A people's procuratorate may apply with a people's court for confiscation of illegal gains in a case of grave crimes such as corruption, bribery, or terrorist activities where the criminal suspects or defendants have absconded and have not been found one year after the public arrest warrants were issued, or where the criminal suspects or defendants have died, and the illegal gains and other property involved in the case shall be confiscated pursuant to the Criminal Law.

The special proceeding on confiscation of illegal gains was established to recover the state assets illegally obtained by corrupt officials. Before the confiscation procedure was adopted, illegal gains in corruption crimes can only be recovered until the corrupt officials were caught and brought to justice. However, quite a few corrupt officials absconded across borders and hid in foreign countries when their corruption were found. Due to the complexity and difficulty of mutual assistance among international criminal justice systems, it usually takes a lot of energy to have the run-away corrupt officials extradited to China. Both Chinese academic and legal professionals saw eye to eye that illegal gains can be dealt with in a separate proceeding without the necessity of criminalizing the corrupted officials first. The confiscation procedure was an effective way of recovering the economic loss caused by corruption crimes.

In the 2018 CPL Amendment, another special proceeding, "Trial in Absentia", was adopted to punish corruption crime offenders even if they have fled overseas. According to Article 291 of 2018 CPL.

In a case of corruption, bribery, seriously endangering public security (with approval of

the Supreme People's Procuratorate), and terrorist activities, if the suspect or defendant is abroad, the supervision committee or public security organs can refer the case to the prosecutor for review. When the prosecutor holds that the criminal fact is clear, the evidence is true and sufficient, and the accused is criminally responsible, he/she may decide to file a charge with the court. The judges may try the case in open court without the presence of the defendant.

"Trial in Absentia" procedure was established to pursue the criminal responsibility of corrupt officials who have absconded to foreign countries. This special proceeding makes an exception to the principle that defendants should be present at trial in criminal cases. Because criminal trials produce outcomes involving the guilty verdict and sentencing decision that have significant impacts on the accused's rights and interests, it used to be a strict requirement that the defendant must attend the main hearing. Corrupt officials took advantage of this trial principle and tried to escape criminal punishment by fleeing overseas. To better combat corruption crimes, the Chinese legislature decided to bring in "trial in absentia" to pursue the criminal responsibility for corrupt officials. Corruption crime defendants can be found guilty and imposed criminal punishment even if they do not show up before the court. This newly built special proceeding took a harsher stance against and strengthened the capacity of fighting against corruption crimes.

Both the Confiscation Proceeding and the Trial in Absentia aim at striking hard against corruption crimes and bringing offenders to justice. These procedural reforms not only make the anti-corruption movements more effective but also convey an explicit message to the criminals that China is taking a strong stance against corruption crimes. Despite all the abovementioned benefits, the effect of these special proceedings remains to be seen because these proceedings were rarely implemented in practice so far.

3. Corporate Compliance Non-prosecution Reforms: A Developing Anti-corruption Mechanism

Commercial bribes account for a high percentage of corruption behaviors in China. The consequences of corporate corruption are much more serious than that of corruption crimes committed by individual offenders because lots of innocent employees will be affected if the involved corporate is prosecuted, punished, or even broken. As aforementioned, the cost of imposing traditional criminal punishment upon corrupt corporations seems too high for society to bear. Therefore, many jurisdictions tried to find alternative ways to combat and prevent corruption crimes committed by corporations or their leaders. Non-prosecution is one of the widely used mechanisms for corporate corruption cases.

China launched a pilot project on corporate compliance non-prosecution reform in six basic-level procuratorates in 2020. In implementing the pilot projects, the local people's procuratorates have formed some creative practices with Chinese characteristics within the current legal framework of criminal procedure law, such as pushing the concerned corporations to improve their corporate compliance programs by means of non-prosecution and prosecutorial suggestions, making a non-prosecution decision after a prosecutorial hearing, or organizing the third-party management committee in collaboration with administrative organs to supervise over the concerned enterprises' rectification for corporate compliance. The Supreme People's Procuratorate (SPP) has expanded the scope of pilot projects reform to 165 basic-level procuratorates in ten provinces in 2021 based on summarizing experience of the past year and has issued the guiding opinions on establishing a third-party

supervision and evaluation mechanism for the compliance of enterprises involved in criminal cases (for trial implementation) (hereinafter as "the guiding opinions") and pushed this pilot project reform to a new level.

During the implementation of the pilot projects on corporate compliance non-prosecution, the basic-level procuratorates have experimented with two institutional modes: the prosecutorial suggestion mode and the conditional non-prosecution mode [5]. Under the prosecutorial suggestion mode, when the enterprises involved in crimes satisfy the criteria for a conditional non-prosecution (also called deferred prosecution in other jurisdictions) and plead guilty to the charged crimes and accept corresponding punishments, the procuratorates shall make a non-prosecution decision, then give prosecutorial suggestions on corporate compliance to the concerned enterprises; the latter must complete the rectification and reform within the required time limit upon receiving the prosecutorial suggestions. Under the conditional non-prosecution mode, the procuratorates defer prosecution for the enterprises involving crimes and set up a parole period, and determine to file or drop a charge depending on whether the enterprises in question have completed the rectification and reforms on corporate compliance.

Under these two modes, the procuratorates at various pilot sites share some similar practices. For example, prior to initiating the non-prosecution procedure for enterprises involving corporate compliance, the procuratorates usually conduct certain inspections. Some procuratorates entrust a group of experts to conduct the evaluation from perspectives of economic security and the order of the market, while other procuratorates conduct the inspections from the perspectives of professional status, scientific research capacity, taxation contribution, social responsibility of the enterprises [6]. Although the details may be different, they all take public interest into account; in terms of application objects, these two modes apply both to the enterprises and to the entrepreneurs, but the conditions for non-prosecution must be met, namely, the cases must involve minor offenses which constitute a crime but can be exempt from criminal punishments [7]. Procuratorates at various pilot sites usually made non-prosecution decisions by means of prosecutorial hearing, inviting the investigation organs, involved corporations, suspects and defenders, the people's supervisors, and professional experts to participate in the hearing, and making a final decision after listening to the opinions of various parties [8].

Meanwhile, there are disparities among the practices by procuratorates at various sites. For instance, in setting up a probation period for corporate compliance, some procuratorates set up a spectrum of one to six months, some procuratorates set up a range of six to twelve months [5], other procuratorates set up a period as long as from six months to two years. In terms of supervision and inspection, some sites chose the third party supervisor from law firms, some sites hold a pretty open attitude towards the sources of third party supervisors, and they may be selected either from social intermediary organizations such as law firms, accounting firms, certificated tax agencies, or randomly selected from a corporate compliance supervisor bank, which was formed by personnel of administrative agencies, according to their expertise where there is need for corporate compliance inspection [9]. Procuratorates at some pilot sites even have two hearings, one at the beginning and the other at the conclusion. The hearing held in the beginning is conducted by experts, providing advice and suggestions on the corporate compliance proposal, imposing another insurance upon the corporate compliance construction [10].

Based on the current situation of pilot reform on corporate compliance, "the prosecutorial suggestion mode" cannot have a substantial effect upon the structure of the corporation's external management due to the lack of binding force, therefore, it can merely play a weak role in encouraging enterprises to

construct effective compliance programs [11]. While "the conditional non-prosecution mode" is a powerful encouragement compared to "the prosecutorial suggestion mode" because it makes it a precondition for the corporations to complete an effective compliance rectification. In addition, at the moment, these two modes can merely apply to enterprises meeting the condition of non-prosecution, which makes the scope of their application highly restricted. In effect, the purpose of adopting the corporate compliance conditional non-prosecution is to decriminalize a corporate that has committed a crime and deserves criminal punishment. For this reason, adopting conditional non-prosecution to unit crimes in criminal proceedings has become the ultimate goal of this reform [8]. The prosecutorial suggestion mode should be retained as a supplementary institution because of its flexibility in timing and application objects [12].

The Supreme People's Procuratorate, based on the experiences of various pilot sites, jointly issued the Guiding Opinions on Establishing a Third-Party Supervision and Evaluation Mechanism for the Compliance of Enterprises Involved in Criminal Cases (for Trial Implementation) with other related authorities on June 3, 2021. The Guiding Opinions have left some space for further reform in addition to consolidating some experiences and good practices of the pilot project reforms on corporate compliance non-prosecution. For example, it makes the enterprises and entrepreneurs the object of third-party supervision mechanism; it endows the third party the authority to determine the parole period without an explicit provision on the time range; it holds an open attitude towards the selection of third-party personnel, not confining them to social intermediatory organizations such as administrative agencies, law firms or accounting firms.

The process of Chinese academic's research on corporate compliance non-prosecution is basically consistent with the evolvement of judicial practice, which has gone through three phases so far. The first phase is introducing theories and practices of foreign countries to China. Most Chinese scholars focus on the evolvement of deferred prosecution and its implementation in the U.S., the U.K., and France, analyzing similarities and disparities among institutions of different countries, and exploring controversial issues. For example, some scholars divide the Differed Prosecution Agreement into the prosecutorial discretion mode and judicial review mode according to the features of institutions in different countries [13]. Some scholars conducted a systematic analysis on the evolvement of normative texts on Deferred Prosecution Agreement, combining the overview of individual cases and statistics, analyzing the rationale and irrational factors of this institution, drawing a conclusion that the irrational factors of operating the institution include violation of constitutional rights, the poor quality of case handling due to absence of individual prosecutions, and arbitrariness of the content of the agreement, etc. The rational factors include the control over the prosecutorial power and the emphasis on judicial review [14]. Other scholars focus on controversies and challenges this institution confronts and solutions brought by foreign judiciaries [15].

The second phase is analyzing the justifications for corporate compliance non-prosecution and the necessity and feasibility of adopting this institution. Some scholars analyze from the angle of law and economics and think this institution can achieve the Pareto efficiency in acquiring justice and efficiency and encourage the enterprises to cooperate with the procuratorates and accomplish their respective goals [16]. Some scholars reason from the perspective of "transition of legal interest theory" and think that this institutional reform just reflected a legal interest transition from state orientation towards social orientation [17]. Other scholars based on empirical analysis and held that neither the current legislation on unit crimes nor the non-prosecution for corporate crimes have the effect of crime prevention, thus it may make

up for the defect to adopt the corporate compliance non-prosecution institution [18]. With regard to the feasibility of introducing this institution to China, most Chinese scholars agree that the current non-prosecution system and plea leniency system have laid a legal and practical foundation for the introduction of corporate compliance non-prosecution [19].

The third phase is studying the localization of related institutions. In designing the general framework of the institutions, Chinese scholars almost unanimously agree that conditional non-prosecution shall be established in unit crime cases as a procedural encouragement to implement a corporate compliance program [20]. At the micro level of the institutions, Chinese scholars focus on different aspects. For instance, some scholars thought that there are six important questions about corporate compliance non-prosecution, i.e., the procuratorates' authority to impose a fine, setting up a parole period for corporate compliance supervision, coordination between corporate compliance non-prosecution with the investigation procedure, coordination between corporate compliance non-prosecution with the administrative procedure, the effectiveness of the independent supervisor, and the object of corporate compliance [10]. Some scholars think that important issues include the nature of corporate compliance non-prosecution, the scope of its application and the criteria, the application of fines, the flexibility of so-called "conditions", and the room for the application of "negotiation for non-prosecution" [21]. Other scholars focus on constructing corporate compliance supervision [22], the basic standards for an effective corporate compliance program [23], and the proof of a corporate compliance program [24], etc. It is worth noting that most academic arguments on the construction of procedure are piecemeal and fractional, and meticulous and systematic analyses are rare.

Generally speaking, the studies on corporate compliance non-prosecution in China are burgeoning. As the reform came to enter the deep end, the current system has been insufficient to meet practical needs. Therefore, a set of brand-new systems on corporate compliance non-prosecution needs to be established in criminal proceedings to cater for the needs of judicial practice.

4. Conclusions

With anti-corruption being the priority of legislation and administration of justice, China has conducted a series of legal reforms over the past decade. These multi-level reforms include organizational reforms such as the creation of supervisory commissions, procedural reforms such as the introduction of two special proceedings aiming at combat corruption crimes, and institutional reforms such as the ongoing corporate compliance non-prosecution pilots. Anti-corruption reforms in China attempt to strengthen the capacity of fighting against corruption crimes on the one hand, and try to strike the balance between crime control and social governance on the other hand. To be specific, the creation of supervisory commissions ended the decentralized power of investigation, enabling the sole investigation agency to employ the power with uniformity and efficiency. The two newly established special proceedings aimed at solving the problems of evading punishment and losing national assets. All these reforms tried to fight harder against corruption crimes. However, when too harsh punishments lead to negative consequences, new institutions need to be adopted to balance between punishment and protection. Either non-prosecution or deferred prosecution (or conditional non-prosecution) tries to strike a balance between punishing the enterprises that have committed corrupted behaviors and protecting innocent employees and maintaining local economic growth. This means the anti-corruption reforms in China do not merely use "sticks", but also use "carrots". Crime control is not the only consideration for reformers. There are still many other factors needed to be taken into account. The corporate compliance non-prosecution reform suggests

that China's anti-corruption reforms have entered into a more mature era. There is reason to believe that more advanced reforms to fight against and even prevent corruption are on the way in the future.

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