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The Protection of the Defendant's Rights in Criminal Trial by Default — From the Perspective of Due Process

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Abstract
Due to the change of the traditional procedural structure of the complete three parties of prosecution, defense and trial, criminal trial in absentia may result in the neglect of the rights protection measures due to the absence of the defendant in trial, and thus further impacts several principles and norms under the due process. Based on the criminal procedure system and even the reform of the entire judicial system, the discussion on the criminal trial in absentia should not be confined to the basic frame of normal bench trial paradigm by due process, the possible adverse consequences should not be taken as the inevitable argument for criticizing the system, but rather a rational and neutral position, return to the original point of the system, seek the basic principles involved in the criminal trial in absentia, and respond to many doubts that the absent defendant's rights are bound to fall, and thinking dialectically on this basis, from the two dimensions of system function, value presetting and perfection of existing specifications, deduces and sums up the internal logic of this system in its normative construction, system operation and internal and external harmony, focusing on strengthening the rights protection of the defendant at the times.
Keywords: Trial in Absentia; Legitimacy; Rights Protection; Procedural Relief.

Introduction

In October 2018, the Standing Committee of the National People's Congress adopted *the Decision on Amending the Criminal Procedure Law of the People's Republic of China*, adding a chapter on Criminal trial in Absentia to the fifth special procedure, which once again triggered a heated discussion in the academic circle on this procedure. This revision of the law and the debate in the academic circle are more focused on rights protection of absent defendants in this procedure. As an exception to the bench trial procedure, trial in absentia restricts or deprives the defendants of some litigation rights, it may violate the basic principles of criminal procedure, and even be questioned for judicial impartiality with due process as its essence, even in extraterritorial countries and regions ruled by law, which apply prudently, clarify its limited scope of application, and construct and improve procedure protection and necessary relief mechanisms.

In the field of sociology, the justification of a certain procedure or system can usually be demonstrated from two dimensions. First, by considering the purpose of the program or system, through the subjective evaluation of society and the demonstration of the path to realize the purpose of the system, we can prove its purposefulness and demonstrate the justification of its existence; Second, through the analysis of the rationality of the procedure or system itself, through the demonstration of the influence and requirements of social objective needs on the establishment of the system, and then prove the legitimacy of the system, so as to achieve the proof of its legitimacy[1]. In response to many doubts and disputes about the establishment of criminal trial in absentia, the author believes that, as a litigation system dating back to ancient Rome at the earliest, the reasonableness of the Chinese-style criminal trial in absentia can also be based on the above-mentioned evidence path, focusing on the following two dimensions: (a) the functional presupposition and value target of the procedure; (b) how to maximize the protection of the rights of absent defendants under the standards of fair trial and due process of law.

The doubt of trial in absentia system from the perspective of due process

Due process of law is also called due process of law. According to ***Black's Law Dictionary***, the so-called due process of law refers to a series of rules that protect everyone involved in criminal activities, including criminal suspects and defendants' right to life, right to liberty, right to property, right to privacy and other legitimate rights from illegal interference in order to ensure the fairness of judicial activities. It requires that the state departments exercising criminal judicial power should strictly follow the procedures prescribed by law when restricting or depriving the rights of individuals, and the procedures themselves must be just and reasonable[2]. "Due process of law has long been part of our constitution lexicon,

[1] ZHANG Jieyu, "*Research on the Rights of the Defendant in Criminal Procedure by Default in China*," Proceedings of the 2018 Annual Conference of the Chinese Society of Criminal Procedure Law, p. 367.
[2] Bryan A. Garner, Black's Law Dictionary (9th ed.), West Publishing Co, 2009, p. 575.

and there are few more important phrases[3]." The idea of observing "due process of law" and some factors it contains have a long history in western countries, With the gradual integration of common-law process and the conception of natural rights, due process of law has changed from the initial simple procedural connotation to substantive connotation, which has both procedural and substantive contents and has been adopted by *the United Nations Criminal Justice Rule*. What due process of law seeks to guard against is all threats to power, whether legislative power, executive power or judicial power. Due process of law is never a pure technical and formal rule, but a complete set of systematic engineering to realize the rights protection constructed with the concept of procedural justice. Specific to the trial procedure of criminal proceedings, what due process of law needs to maintain is the minimum guarantee of criminal defendants, including 11 rights, such as presumption of innocence, prohibition of self-incrimination, and autrefois, among which the core is the defendant's right to attend court for trial.

From the analysis of the origin of the system of the defendant attending court for trial, the reason why it is established in the modern criminal procedure is the rapid development of the human right of "litigation participation"[4]. With the establishment of the defendant's litigation subject status, the defendant is no longer regarded as the object of prosecution, but enjoys a series of litigation rights and actively participates in litigation. The litigation procedure must ensure that he can participate in litigation activities substantially, that is, to ensure that "before making a judgment concerning them, the court listens to his opinions and they have the right to speak[5]." As the most direct way for criminal defendants to participate in criminal trials, defendants can fully express their opinions to the court by attending the court, and confront witnesses directly and face to face, thus affecting the inner conviction and adjudication by factual adjudicators. At the same time, with the development of modern penalty theory, especially the rise of educational penalty theory, the focus of penalty has changed from traditional attention to "behavior" to "actor", and the individualized judgment of actor has become an important basis for penalty. In line with this, the criminal defendant's attendance at the court for trial has become a prerequisite for criminal trial. "The trial judge should not only observe the witness, but also observe the defendant personally in order to gain a real understanding of his personality. Therefore, in principle, if the defendant does not appear in court, the trial procedure shall not be conducted[6]." In this sense, the defendant's " the right of being at trail " is not only the basic requirement of due process of law, but also another guarantee of fair trial, which shows the basic procedural jurisprudence of respecting the subject status of the accused, and is rooted in the basic consideration of the state to prevent the wrong determination of judgment facts. Article 14, paragraph 3, of the *International Covenant on Civil and Political Rights* also sets "attendance of the accused in court for trial" as the minimum guarantee enjoyed by criminal defendants, and defines it as an integral part of due process of law.

Modern criminal procedure operates on the axis of the three functions of prosecution, defense and trial. In a sense, the whole criminal procedure is the process of the interaction and realization of these three functions. In the process of criminal trial, in order to maintain the mechanism of distinguishing litigation functions, it is necessary to maintain the litigation structure of prosecution, defense and trial, that is, to maintain the relative balance between the prosecution and defense functions, to achieve the equal confrontation between the two sides, and the judge is in the middle of it. In this sense, the criminal trial in absentia has changed the traditional structure of prosecution, defense and trial, which may result in the omission of rights protection measures due to the defendant's absence in the trial, thus affecting the relevant principles and norms of criminal procedure. For example, due to the absence of the defendant, the defender may not be able to obtain sufficient basis for defense and it is difficult to conduct effective defense, which ultimately leads to the erosion of the principle of the defendant's right to defense. For another example, the trial procedure in absentia will also affect the defendant and his defense's right to challenge, impact the court hearing procedure and process aimed at realizing the goal of truth finding, and deviate from the presence requirement under the principle of direct and verbal trial. In this sense, the trial procedure in absentia has already constituted an invisible "derogation" of the criminal defendant's right to appear in court, and constituted a real impact on the traditional "bench trial" and the fair trial right enjoyed by the accused. Because of this, the system of criminal trial in absentia is regarded by some scholars as a litigation system with "natural defects"[7].

However, in the author's opinion, the discussion of the criminal trial in absentia system should not be confined to the basic frame of due process versus normal bench trial paradigm, and should not take the possible adverse consequences as the inevitable argument of the system criticism. In the study and adjudication of this system, the analysis and adjudication of this issue should be placed under the era pattern of the criminal procedure system and even the reform of the whole judicial system from a more rational and neutral standpoint, so as to return to the origin of the problem, seek the basic principles involved in this system, respond to many questions about the inevitable omission of the rights of absent defendants, and think dialectically on this basis. The internal logic of the construction and operation of the system in the context of The Times is deduced from the two dimensions of the system function and value presupposition and the perfection of the existing norms.

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3 John V. Orth, *Due Process of Law: A Brief History,* Lawrence, Kansas: University Press of Kansas, 2003, p. 9.
4 DENG Siqing, "*Study on Criminal Default Trial System*," Chinese Journal of Law, no. 3 (2007): 97.
5 Michael D.·Bayles, *The Principle of Law — A Normative Analysis*, Encyclopedia of China Publishing House, 1996, p. 35.
6 WAN Yi, "*On the Trial by Default System in Criminal Procedure*," Contemporary Law Review, no. 1 (2004): 41.
7 WANG Minyuan, "*On the Criminal Trial in Absentia*," Law Science Magazine, no. 8 (2018): 43.

The justification theory of the criminal trial in absentia system in a multi-dimensional dimension

a) the value conflict under the criminal trial in absentia system

The construction and improvement of modern criminal procedure system is concerned with a multi-dimensional goal and value system with multiple levels. Not only do there exist multiple differences between values, but even the same value has multiple levels under different conditions. The legislative establishment of criminal trial in absentia is not only the embodiment of the deep development of criminal procedure system, but also the concrete representation of the recognition and practice of this multi-dimensional value system[8]. In the concrete construction of criminal procedure system, "if one of the values is fully realized, it is inevitable to sacrifice or deny other values to a certain extent[9]. "The construction and improvement of criminal procedure system itself is the trade-off of multiple values, and the establishment of trial in absentia system is also a rational choice after this multi-dimensional value balance, so it is coverd by the concepts of "value conflict" and "rational choice".

Based on the original meaning of due process of law, criminal trial should be conducted on the premise that the defendant attend the court trial, but not in his absence. However, there is often one kind or another inequality between the ideal state of being and the actual state of being. In the practice of criminal justice, criminal defendants may not appear in court for trial for various reasons, either actively or passively, or at the beginning or in the middle of the process. Under such circumstances, the court is faced with a dilemma: if the trial is stopped to maximize the protection of the defendant's right to participate in the procedure and ensure the realization of procedural justice, the litigation period will be prolonged to a certain extent, the litigation cost will be increased, and the litigation efficiency will be low; if the trial is conducted in the absence of the defendant, although it can give full play to the deterrent function of penalty, save litigation resources and improve litigation efficiency, that is, Beccaria said that "the more timely the penalty is, the more prominent and lasting the connection between crime and penalty will be in people's minds", it detracts from the procedural justice required by due process. In this sense, the most prominent conflict of values facing the legislative establishment of criminal trial in absentia system is the balance between justice and efficiency.

From the perspective of historical development, it is precisely because of the contradictions and conflicts between trial in absentia and certain principles under due process, especially the value orientation of judicial impartiality, that in the early to mid-20th century, when the pursuit of judicial impartiality was the only value goal, the criminal legislation of various countries almost always held a negative attitude towards trial in absentia. In case the defendant evaded trial, the practice of suspending the lawsuit and waiting for the defendant to attend the court trial before trial is generally adopted. However, in the middle-to-late 20th century, with the increase of criminal offenses, the efficiency of litigation has been paid more and more attention. In order to ensure the timely realization of the state power of punishment and avoid the situation that the criminal defendant can't be judged because he doesn't appear in court, more and more countries have established the trial in absentia system in their criminal procedure law, which is a necessary supplement to the bench trial under normal conditions[10]. As the value goal and system evaluation standard pursued by criminal trial and even the whole criminal procedure, the concept of litigation efficiency has emerged with the continuous penetration of economics into legal disciplines since Adam Smith, especially the application of legal economic analysis methods. With the continuous promotion of law and economics, the concept of litigation efficiency has been paid more and more attention by c the study of criminal theory and the norms of criminal legislation.

As the two major value goals pursued by criminal proceedings, justice and efficiency have different connotations and extensions, so they inevitably have conflicts. When the two value goals of justice and efficiency conflict, we need to make a balance and choice. Admittedly, as the primary value goal pursued by criminal proceedings, justice should always be the first, because "every wrong judgment will lead to inefficient use of litigation resources[11]." However, this does not mean that the efficiency of litigation should not or cannot be maximized on the basis of guaranteeing the minimum judicial impartiality.

b) The justification of criminal trial by default system

As Radbruch said: "If the law is regarded as a form of social life, then the procedural law as a 'formal law' is the form of this form. Like the top of the mast, it will make a strong swing to the slightest movement of the hull[12]. "The criminal system of trial in absentia is a new system created by the "law of form". The design of its content, the construction of its system and the logical framework of its provisions directly reflect the value orientation and practical response of legislators. In my opinion, the standardized, detailed, sound and effective criminal trial in absentia system not only has realistic rationality, but also has the justification of original significance, which shows the convergence trend of modern criminal procedure.

First, based on the justification of the defendant's rights. The so-called right, that is, the sum of powers enjoyed by the right subject within the legal scope to satisfy its specific interests, is concentrated in the freedom of the right subject to choose a certain behavior or not to act according to his or her own will. Right means that in a specific relationship, the law recognizes

8 HU Zhifeng, *"Study on Standard of Proof in Criminal Trial by Default,"* Journal of National Prosecutors College, no. 3 (2018): 116.
9 XU Guodong, Interpretation of Basic Principles of Civil Law, China University of Political Science and Law Press, 1992, p. 333.
10 DENG Siqing, "*Study on Criminal Default Trial System,*" Chinese Journal of Law, no. 3 (2007): 93.
11 Michael D.·Bayles, *The Principle of Law — A Normative Analysis,* Encyclopedia of China Publishing House, 1996, p. 24.
12 Gustav Radbruch, *Introduction to Law,* Commercial Press, 2013, p. 170.

that the choice of the subject of right is superior to the choice or will of the subject of obligation. Any decision made by the subject of the right within the scope of such freedom shall be regarded as the exercise of the right. As far as the essence of rights is concerned, waiver of rights itself is also a specific way of exercising rights, which is the token of the litigation status of the subject of rights[13]. The "Opinions" issued by the United Nations Human Rights Committee in "hearing" the relevant "cases" clearly stated that: "After the defendant has been given all necessary notices, including informing the time and place of the trial, and being required to attend the court trial, but the defendant himself decides not to attend the trial, the criminal trial in absentia does not violate the provisions of Article 14, paragraph 3 (d), of *the International Covenant on Civil and Political Rights* on the right to attend the court trial[14]." In other words, the right of being at trail, like other rights, can be disposed of or even waived. The defendant has the right to decide the fate of litigation and bear the corresponding legal consequences according to his free will and within the scope permitted by law based on his status as the subject of procedure in criminal proceedings, which should be respected by the court[15]. In my opinion, respecting the defendant's status as the subject of litigation itself includes respecting the free choice made based on his own judgment under the right of his subject. When the defendant gives up the right of being at trail, the trial in absentia is not only the compliance of his will to exercise his rights, but also the confirmation of his status as the subject of litigation.

Moreover, although the defendant's participation in trial activities in court is an effective means for him to defend himself, question, explain and argue, and protect his legitimate rights and interests, as Professor Deng Siqing said, "In some cases, there will be some unfavorable factors in the defendant's participation in criminal trials, which are not conducive to the protection of his rights. On the one hand, the defendant's attendance in court will show his "possible" disgraceful side in front of the public and bring psychological pressure; on the other hand, in cases where the defendant is not in custody, blindly requiring the defendant to attend the court will add an extra time and cost burden to him[16]."

Second, in response to the needs of judicial practice, ensure the justification of the realization of state power. Article 181 of *the Interpretation of the Supreme People's Court on the Application Criminal Procedure Law of the People's Republic of China* (hereinafter referred to as the *"Supreme People's Court Interpretation"*) stipulates: "If the people's court finds that the defendant is not in the case after reviewing the case of public prosecution, it shall return it to the people's procuratorate." According to this article, whether the defendant is in the case or not is a core content of pre-trial public prosecution review, and criminal trials can only be conducted in the case of the defendant, and the trial procedures in China's criminal proceedings have been solidified into a single bench trial model[17].

However, in complex criminal trials, there will inevitably be multiple situations such as the defendant's inability to be present or refusal to be present, and if the defendant's presence is blindly regarded as an element of the criminal trial on the grounds of rights protection, not only will the criminal procedure itself be in an unfinished form, making the dispute status of the case unable to be solved, but also making it difficult to play the function of settling disputes that litigation should have. The jurist Michael D. Bayles once said, "The intrinsic purpose of legal procedure is to find out the truth and settle disputes. If the purpose of the court is not to do so, but only to show solidarity with one of the parties, then the procedure becomes unnecessary at all[18]. "In criminal trials, dispute settlement is embodied in properly handling social conflicts in the form of specific criminal cases, that is, through inquiry in a court and debate in court, on the basis of finding out the facts of the case, we can determine the existence and size of the state power of punishment in specific criminal cases, and then restore those social relations damaged by criminal acts, while maintaining law and order, and protecting the legitimate rights and interests of citizens[19]. "The purpose of the court hearing is not simply to protect the rights and interests of the defendant, but to settle disputes arising from criminal cases by correctly applying the law[20]." The legitimacy of the procedure not only requires that the procedure can play its due role in promoting justice, but also requires that the construction of the procedure can meet the practical requirements of settling social disputes. In other words, in a sense, whether the criminal defendant attends the court hearing has no substantial impact on the existence of the dispute resolution, and in the absence of the defendant, the determination of the crime, the disposal of the assets involved in the case, and civil compensation still need to be resolved through trial[21].

As Professor Liang Yuxia said: "Any behavior of defendants in resisting prosecution or evading trial cannot prevent the normal progress of criminal proceedings, the law will not stop taking effect because of someone's violation, and the

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13 XIAO Peiquan, "*The Application of the System of Criminal Trial in Absentia under the Value Balance Theory,*" Law Science Magazine, no. 8 (2018): 52.

14 ZHANG Yi, "*On the Convention against Transnational Organized Crime and the Convention against Corruption and the Reform of China's Criminal Procedure System*," in CHEN Guangzhong's *The Latest Development of Foreign Criminal Procedure Legislation in the 21st Century*, China University of Political Science and Law Press, 2004, p. 77.

15 CHEN Weidong & HU Zhifang, "*On Consideration of Right of Disposing by Criminal Litigant*," Political Science and Law, no. 4 (2004): 122.

16 DENG Siqing, "*Study on Criminal Default Trial System*," Chinese Journal of Law, no. (2007): 97.

17 CHEN Weidong, "*On Criminal Default Trial system with Chinese Characteristics,*" Criminal Science, no. 3 (2018): 22.

18 Michael D.·Bayles, *The Principle of Law — A Normative Analysis,* Encyclopedia of China Publishing House, 1996, p. 37.

19 LONG Zongzhi, *Research on Criminal Court Trial System,* China University of Political Science and Law Press, 2001, p. 22.

20 CHEN Weidong, "*On Criminal Default Trial system with Chinese Characteristics,*" Criminal Science, no. 3 (2018): 21.

21 YANG Ming & WANG Zheng, "*On Criminal Trial by Default,*" Criminal Science, no. 1 (2003): 73.

authority and coercion of criminal proceedings are more clearly reflected due to the conduct of criminal trials in absentia[22]." In the absence of the defendant, the people's court does not have the only option of ruling on the suspension of litigation. To ensure the smooth progress of criminal proceedings, prevent criminal defendants from taking absence as a means to delay litigation, timely compensation and relief for the material losses of victims, to give full play to the function of settling disputes in trial, criminal legislation should be based on the positive function of trial by trials in absentia and the practical needs of ensuring the realization of state power in response to judicial practice, allowing the judicial application of this procedure under specific circumstances, and highlighting the restrictive content under the essence of the right of being at trail. Article 29, paragraph 2, of the *Universal Declaration of Human Rights* clearly stipulates: "Everyone shall, in the exercise of his rights and freedoms, be subject to such restrictions as may be determined by law for the sole purpose of ensuring due recognition and respect for the rights and freedoms of others and meeting the legitimate needs of morality, public order and general welfare in a democratic society[23]." Criminal trial in absentia system belongs to such a typical necessary restriction on the exercise of rights based on value judgment.

Thirdly, the justification theory of integrating the existing "absence" norms and delineating the category of absence norms in the form of system. Some norms under *the Criminal Procedure Law of 2012* have typical "absence" characteristics. Although the legislation does not adopt the expression of "criminal trial in absentia", it conforms to the system characteristics of criminal trial in absentia and belongs to the existing "absence" norm. Among them, the most typical one is Article 194 of *the Criminal Procedure Law of 2012*, which stipulates the court trial order.

Article 194 of *the Criminal Procedure Law of 2012* stipulates: "During the court trial, if the participant to a proceeding or audience violates the court order, the chief judge shall warn to stop it. Those who do not listen to the stop can be forcibly taken out of the court..." The "participant to a proceeding" here include the parties including the defendant. According to this article, if the defendant seriously violates the court order, he may lose the right of being at trail. Although the Criminal Procedure Law does not clarify how to carry out the proceedings after the defendant is taken away from the court, it can be seen from the legislative intent of this norm that the legislative purpose of this provision is to prevent the defendant from disrupting the litigation order and hindering the normal conduct of the court hearing. If the defendant is taken away from the court and the lawsuit is ruling the suspension of litigation, it will objectively satisfy the subjective intention of the defendant to commit obstruction. Therefore, after the defendant is taken away from the court, it is advisable to continue the trial, and this continued trial belongs to the trial conducted in the absence of the defendant, which belongs to the typical existing "absence" norm[24]. In this sense, the legislative establishment of criminal trial in absentia system is helpful to integrate the existing "absence" norms to a certain extent, standardize the actual criminal trial in absentia behavior in practice, delimit the category of absence norms in the form of system, and bring the scattered "absence" norms and practices into the framework of the system.

In addition, the establishment of criminal trial in absentia can also play a coordinated pattern with the confiscation of illegal proceeds procedure in China's criminal proceedings. Under the current legal framework, the two procedures have their own advantages, one for "things" and the other for "people", and jointly safeguard the systematicness of criminal proceedings.

Improving Approach Focusing on Strengthening the Protection of the Rights of Defendants in Absentia

Trial in absentia is by no means a system of proceedings designed to derogate from the rights of the accused. The waiver and necessary limitations of the defendant's right to be tried in court do not mean that such proceedings may justly derogate from the bottom line required by the right to due process of law. From the perspective of legislative orientation, the criminal trial in absentia is stipulated in the special procedure, which is an exception to the bench trial procedure. According to the principle of the relationship between the general and the exception, when there is no special provision for the trial in absentia, the general provisions of the bench trial should be followed. All kinds of bottom-line rights protection under due process aimed at achieving a fair trial should not and cannot be infringed or derogated from under the pretext of waiver or limitation of rights.

Despite multiple differences in litigation values and legal cultural traditions[25], there are differences in the specific construction of the criminal trial in absentia between the Common Law system and Civil law system, they generally strengthen the other rights of the absent defendant enjoyed based on the status of the subject of litigation except the right to appear in

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[22] LIANG Yuxia, "*On the Rationality of Criminal Trial by Default and Its Reference,*" in Chen Guangzhong's *Theory and Practice of Procedural Law (2005).* China Founder Press, 2005, p. 679.

[23] ZHANG Jixi, "*On the Scope of Application of Criminal Trial by Default — From the Perspective of Comparative Law,*" Criminal Science, no. 5 (2007): 76.

[24] WANG Yichao, "*The Scope of Application of Criminal Trial by Default--From the Perspective of Functional Analysis,*" Proceedings of the 2017 Annual Conference of the Chinese Society of Criminal Procedure Law, p. 342.

[25] Generally speaking, the Common Law regard attending the court as the right of the defendant, and their system norms more reflect the tendency of strengthening the protection of the rights of the defendant in absentia; the Civil Law based on the real exploration of entities, emphasize more on the nature of the obligation to appear before the court, reflecting an obvious tendency of state power.

court for trial, which provides minimum guarantees including 11 rights such as the presumption of innocence, the prohibition of self-incrimination and autrefois convict.[26] Based on the existing norms of the current criminal trial in absentia system in China, starting from the approach of strengthening the protection of the rights of the absent defendant, the author believes that the Chinese-style criminal trial in absentia should be responded and improved in the following three aspects at least, so as to maximize the rationality of its normative construction under the premise of maintaining the legitimacy of the system, and further create the possibility of expanding the application of the Chinese-style criminal trial in absentia.

a) Adjusting the logical order of normative provisions and clarifying the central position of rights protection from the technical level

In order to clarify the central position of rights protection at the legislative technical level, criminal legislation should adjust the logical order of the provisions in the short term, and place the right protection mechanism under the procedure after the trial in absentia of" defendants in a serious illness" and "defendants in deceased", that is, the "type" situation of the trial in absentia is stipulated firstly, and then stipulate various rights protection mechanisms under the procedure. Such as the right to know, the right to counsel, the right to appeal, the right to procedural objections, etc., in order to play the "ought to be" and "to be" role of the right protection mechanism.

Of course, this kind of legislative technical adjustment is only a short-term fine-tuning on the premise that the criminal procedure law has just been amended. In fact, as Professor Wan Yi said, "Among the three types of trial in absentia under the current criminal legislation, only the former, that is, the first type of trial in absentia can be called the real trial in absentia. The latter two types of trials in absentia are actually a way to eliminate trial obstacles, that is, the ordinary judgment proceeding encounters objective obstacles in operation (such as the defendant suffers from serious illness, cannot appear in court or the defendant dies), and loss the trial elements, which leads to the failure of the trial to proceed normally. In order to eliminate such trial obstacles, we can only choose to continue the trial in the absence of the defendant. Therefore, its nature belongs to a part of the ordinary procedure, which is a litigation measure when the ordinary procedure deals with the trial obstacles[27]." Therefore, in the long run, Criminal legislation should start with system theory, while bringing the second kind of "defendants in a serious illness" trial in absentia into Article 206 of the current *Criminal Procedure Law* on the suspension of the first instance procedure, the third kind of "defendants in deceased" trial in absentia is incorporated into the principle of "criminal responsibility shall not be investigated under statutory circumstances" in Article 16 of the current *Criminal Procedure Law* and the trial supervision procedures, so as to avoid the conflict of norms and mechanisms between systems and procedures, and to realize the harmony and self-consistency of the internal norms of the Criminal Procedure Law.

b) Strengthening procedural guarantee and optimizing the procedural norms of trial in absentia

The procedural guarantee under the system of trial in absentia belongs to a pluralistic and open mechanism category, and countries are not exactly the same in the normative setting of this guarantee mechanism. In my opinion, the procedural guarantee mechanism under the Chinese-style criminal trial in absentia should be optimized mainly around the following two aspects.

First, it is served in a way that can guarantee the actual knowledge of the absent defendant, so as to realize the objective proof of the voluntariness and knowledge of the defendant's right to appear in court. In my opinion, the rationality of the trial in absentia and the procedural guarantee under the trial in absentia should first guarantee the defendant's right to information. The defendant has the right to appear in court, and the basis for the trial in absentia to be carried out should be that the defendant voluntarily gives up his right to appear in court, and the defendant can dispose of his right to appear in court on the premise of knowing. The service of litigation documents is the premise to ensure that the parties know, and it is one of the necessary conditions and basic guarantees for the trial in absentia of criminal suspects and defendants. By examining the legislative norms of the way of service about the trial in absentia in foreign countries and regions, it can be found that the service in this procedure mainly includes the service through criminal judicial assistance, the service through diplomatic or consular agencies, the service to counsels, the announcement service and other methods accepted by the addressee.

From the perspective of the ways of service in absentia allowed by the criminal legislation of various countries, in addition to announcement service and "other methods accepted by the addressee", the service methods under the system of trial in absentia generally emphasize the actual knowledge of the absent defendant, and the performance of the notification obligation should be based on the actual knowledge of the absent defendant, avoiding the "deemed knowledge" method represented by announcement service. Taking actual knowledge as a notification benchmark is not only the basic requirement of *International Human Rights Conventions*, but also a common practice of regional judicial assistance. When informing the relevant procedures for the accused, only legal and proper efforts are not enough to provide legitimacy for the trial in absentia. The prosecution must prove the defendant's actual knowledge of the procedure. If it fails to prove, it will constitute an infringement of the defendant's right to appear in court.

General Comment No. 32 of the United Nations indicates that only in cases where the defendant has been fully informed of the relevant procedures in advance, but he or she still refuses to exercise the right to appear in court for trial, it can be

[26] ZHANG Jianwei, "*Focus on Trial: Deep and Vertical Interpretation of Rights and Benefits Protection on Trial,*" Journal of CUPL, no. 5 (2016): 120.

[27] WAN Yi, "*Three Topics on Legislative Technique of Criminal Default Trial System: Focus on the Criminal Procedure Law of People's Republic of China (Amendment Draft)*," Criminal Science, no. 3 (2018): 29.

allowed to bring a lawsuit without the defendant based on considerations such as judicial interests. In other words, a trial in absentia meets the requirements of article 14, paragraph 3 (d), of the *International Covenant on Civil and Political Rights* only if the State takes the necessary steps to summon the defendant in a timely manner and notifies him of the date and place of the trial and requires him to appear in advance[28]. Referring to the relevant norms of the criminal trial in absentia in EU countries, this system is admissible, and the premise of due process is to ensure the right to know of the accused before the trial in absentia, that is, ensuring that the accused "knows" the trial date and the legal consequences of not appearing in court, which implies the objective requirements for the service mode of this procedure[29]. The Council of the European Union also pointed out: "For a trial in which the person concerned did not appear in person, the recognition and enforcement of the decision shall not be refused in the following cases: if he or she is personally summoned and thus be informed of the scheduled date and place of the trial, or if he or she actually receives official information on the scheduled date and place of the trial in other ways, it can be clearly determined that he or she knows the scheduled trial. In such cases, the person should also receive the information 'in a timely manner', which means that this time is sufficient for him or her to participate in the trial and effectively exercise his or her right to defence[30]. "It not only clarifies the due degree of actual knowledge, but also shows the basic position of EU countries that the actual knowledge of the defendant in absentia is the premise of the application of the trial in absentia.

Accordingly, the author advocates that the Chinese-style criminal trial in absentia should try its best to make the criminal suspects and the defendants receive it in person in the setting of the service mode of summons, copies of indictment and judgments, so as to protect their right to personally perceive the proceedings and increase their opportunities to participate in the trial. In the author's view, although the strict requirement of personal service will inevitably reduce the possibility of the application of this procedure to a certain extent, however, from the perspective of the protection of judicial human rights and the proper meaning of legal due process, the notification obligation of the trial in absentia should be regarded as a strict interpretation, and the right to know of the absent defendant should not be derogated by means of the announcement and the transfer simply because of the difficulty of extraterritorial personal service. Article 232, paragraph 2, of the German *Code of Criminal Procedure* clearly stipulates: "If only summoned by public announcement, the defendant shall not be tried in absentia. "Article 83, paragraph 3, of the German Law on *International Judicial Assistance in Criminal Cases* stipulates: "Extradition shall not be granted if the request is based on a judgment in absentia against the person sought and the person sought is tried in absentia because he has not been summoned in person or otherwise informed of the date of the hearing..." A trial in absentia conducted without the actual knowledge (personal service) of the absent defendant is excluded from the circumstances in which extradition is possible.

The application of direct service and the exclusion of announcement service to the defendant in absentia is not only the legal premise of the operation of this system, but also the most critical difference between the criminal trial in absentia and the property confiscation procedure without judgment. The difference between the two types of procedures is the guarantee of the accused's right to know in the trial in absentia, that is, whether the accused has known"knowledge of the date of the trial and the consequences of failure to appear "before the court trial and waived his right to appear in court in an express or implied way. Therefore, due to the legislative considerations of the minimum procedural justice and the protection of the accused's right to know, the trial in absentia should be carried out by direct service, which denies the legality of announcement service in this procedure, which is the basis of the legality of the default judgment, and it is also a necessary condition for the subsequent return of the property involved and the extradition of the defendant based on the default judgment.[31] Of course, in view of the objective existence of direct service difficulties, I agree with Professor Huang Feng's view that "the legal difficulties of serving a notice of summons to criminal suspects or defendants abroad through criminal judicial assistance should be fully estimated, and we may consider serving more neutral notification documents to the above-mentioned persons firstly; appropriately move forward the process of assigning counsel to the accused in absentia, so as to try to complete the litigation notice required by the trial in absentia through lawyers[32]." This needs the support of legislative norms of the legal aid system.

Second, provide substantive and effective lawyer help for the absent defendant, and make up for the absence of the trial structure caused by the absence of the defendant. As a special type of trial procedure, the requirement of the verbal trial determines that trial in absentia should still maintain the procedural structure of the three parties of prosecution, defense, and trial. Due to the absence of the defendant in this procedure, the participation and effective help of the counsels have become another key mechanism for the operation of the trial in absentia, which constitutes another measure to protect the rights and interests of the defendant under the trial in absentia, that is, "quasi-bench trial" as some scholars say. In order

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[28] UNCHR, General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (23 August 2007), para. 36. quoted in ZHAO Changcheng, "*Chinese-model Trial in Absentia from the Perspective of international Human Rights,*" Western Law Review, no. 1 (2019): 79.

[29] CHEN Weidong, "*Several Issues pn the Application of Criminal Trial by People's Procuratorate,*" Journal of National Prosecutors College, no. 1 (2019): 42.

[30] Council Framework Decision 2009/299/JHA of 26 February 2009, OJ L 81, 27. 3. 2009. P. 25. quoted in ZHAO Changcheng, "*Chinese-model Trial in Absentia from the Perspective of international Human Rights,*" Western Law Review, no. 1 (2019): 79.

[31] CHEH Weidong, "*On Criminal Default Trial system with Chinese Characteristics,*" Criminal Science, no. 3 (2018): 42.

[32] HUANG Feng, "*Legal Issues to be Paid Attention to in Absentia Trial of Fugitive Persons,*" Research on Rule of Law, no. 4 (2018): 63.

to ensure that the counsel's opinions can still effectively participate in the formation of the referee in the trial under the circumstance of the absence of the defendant, some countries explicitly require that defense lawyers must participate in the trial in absentia[33].

As one of the basic elements of due process and fair trial of law, ensuring that criminal defendants can obtain the help of lawyers is not only an essential part of human rights protection in *international human rights law*, but also a basic requirement of the *United Nations Criminal Justice Rule*. After the two World Wars, people became more aware of the importance of human rights protection, and the words of respecting and protecting human rights frequently appeared in important international conventions. The most representative are undoubtedly *UN Charter*, *the Universal Declaration of Human Rights*, *the International Covenant on Civil and Political Rights* and some Conventions of International Organizations in some regions, such as *European Convention on Human Rights*、*The American Convention on Human Rights and so on*. *The UN Charter* "reaffirms basic human rights, the dignity and worth of the human person"; *The International Covenant on Civil and Political Rights* "considers that recognition of the inherent dignity of all members of the human family and their equal and inalienable rights, in accordance with the principles proclaimed in the UN Charter, is the foundation of freedom, justice and peace in the world..." Just under such background that national legislation in many countries has strengthened the protection of human rights.[34] When it comes to the area of criminal proceedings, a symbolic embodiment is to improve and develop the right to defense, especially the right of access to a lawyer. Article 93 of *the Standard Minimum Rules for the Treatment of Prisoners* requires that: "Prisoners without trial, who have a social obligation to legal assistance in order to prepare their defence, shall be granted access to such assistance and to a lawyer." *The International Covenant on Civil and Political Rights* recognizes the defendant's right to criminal legal aid as one of the minimum requirements for fairness in criminal trials[35].

According to a series of international instruments adopted and confirmed by the United Nations, the purpose of providing legal aid in the field of criminal justice is to protect the legitimate rights and interests of criminal suspects and defendants in criminal proceedings and ensure the fair handling of criminal cases. The law not only grants the defendant the right to defense, in addition, full-time legal personnel are allowed to defend and provide legal help for defendants, so that some of the defendant cannot get effective help from lawyers just because of economic poverty and other reasons, thus damaging their litigious rights and the interests of the entity. *The United Nations Guidelines on Criminal Legal Assistance* require States to "ensure equal and equitable treatment of all persons in the process of criminal justice". From the perspective of the relevant legal instruments of the *United Nations Criminal Legal Assistance*, the objects applicable to legal aid in the process of criminal justice can be divided into general objects and special objects. Among them, the general object is the ordinary defendants. Article 14, paragraph 3 (d), of the *International Covenant on Civil and Political Rights* states that "if he does not have access to legal aid, he shall be notified of that right; in cases where the interests of justice so require, legal aid shall be assigned to him, and in cases where he is not sufficiently able to pay for it, he shall not be required to pay for it himself." Special objects are mainly prisoner under sentence of death and juvenile delinquent.In order to enhance the special protection of persons who may be sentenced to death, *Safeguards on the Protection of the Rights of Persons Facing the Death Penalty* specify that "any person suspected of or accused of committing a crime punishable by death" shall, without exception, receive legal aid. In view of the differences between juveniles and adults in psychological and physical aspects, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* provides special protection for juveniles involved in criminal defense. It not only provides comprehensive provisions on the rights of juveniles involved in criminal proceedings, but also emphasizes that "juveniles should have the right to be represented by a legal counsel throughout the proceedings, or he could apply for such legal assistance in the country where it is compulsory", thus realizing the all-round stage of legal aid.

In the author's opinion, the particularity of the meaning of "absence" in the trial in absentia determines that the defendant in absentia should be included in the object of special legal aid like the prisoner under sentence of death and juvenile delinquent[36]. At the same time, in order to protect the rights and interests of the defendant in absentia in time, give full play to the due role of criminal defense, and realize the basic essentials of the litigation notice required by the lawyer in absentia trial, in trial in absentia, the author believes that the procedure for assigning counsel to defendant in absentia should be appropriately advanced. That is to say, Article 293 of the current *Criminal Procedure Law* on legal aid defense should be applied to all procedures, including filing, investigation, prosecution, first instance, second instance, retrial and the system of retrial after the presence in court of defendant in absentia, to ensure that the attorney can provide full and comprehensive assistance and avoid the legal aid defense becoming a mere formality.

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33 如俄罗斯《刑事诉讼法典》规定"因身处境外或逃避出庭而缺席审判的，必须有辩护人参与"。For example, *The Criminal Procedure Code* of Russian stipulates that "if a trial is held in absentia because of being abroad or evading appearance in court, the defender must participate". Italy also explicitly requires that such trials in absentia be "represented by the defender". The jurisprudence of the European Court of Human Rights also clearly stated that "if the court is required to conduct a trial by default, it shall bear the responsibility to prove that the defendant evaded the trial, and the defense lawyer shall appear in court to defend."

34 CHEN Guangzhong & Wang Haiyan, "*A Study on Lawyer's Defense in the Investigating Stage,*" China Legal Science, no. 1 (2010):124.

35 BIAN Jianlin & YANG Yuguan, *Summary of the United Nations Criminal Justice Standards,* Journal of CUPL, 2003, p.105.

36 This view has been confirmed by the current *Criminal Procedure Law*. The current Article 294 of *the Criminal Procedure Law* : "When people's court tries a case by default, the defendant has the right to entrust a defender, and the immediate family of the defendant may entrust a defender on his behalf. If no defender is entrusted, the people's court shall notify legal aid to appoint a lawyer to provide defence."

c) Refine the relief standard, clarify the respective application conditions of the relief methods and their internal logical relations

The provisions of different countries are slightly different on what remedies can be adopted for cases of trial in absentia. The essence of what kind of review remedy should be established depends on how lawmakers view the effect of trial in absentia in the legislative orientation, that is, whether it is regarded as bench trial. If so, the judgment made in trial in absentia is as effective as an ordinary procedure; If not, provision may be made for the defendant in absentia to be retried after his presence in court or retried on dissent. The factors influencing its legislative considerations include the type of trial in absentia，the institutional arrangements to ensure the effect of bench trial to-be, etc.[37] The trial in absentia is held under the condition that the defendant does not appear in court. After the defendant arrives in court, there may be not only changes in the selection of procedure application, but also a new judgment can be even made by starting the procedure for supervision upon adjudication, which gives rise to some uncertainty in the adjudication of this procedure. Therefore, from a worldwide perspective, the criminal trial in absentia in countries and regions under the rule of law generally endows the defendant with the right to procedural relief.

First, the right of procedural dissent enjoyed by the defendant in absentia. As an important phase of the mechanism of rights protection in the trial in absentia, the procedural dissent right of the criminal defendant is not only an important way for the protection of the litigation right of the defendant in absentia, which helps to alleviate the value conflict between justice and efficiency, and ensure the maximum balance between ***procedural justice and substantive justice***, but also a necessary prerequisite for the smooth realization of the extradition request. Article 8 of the ***Extradition Law of the People's Republic of China***, adopted in 2000, also stipulates that one of the circumstances under which China refuses a foreign extradition request is "the requesting State makes an extradition request based on a trial in absentia", except that "the Requesting State undertakes to give the person sought the opportunity of retrial in his presence after extradition". For some countries that do not recognize the trial in absentia or provides for extradition not to be based on a trial in absentia, the retrial clause was specially stipulated when the system was constructed to ensure that the defendant will have the opportunity to retry the case after his arrival in court, so as to smooth the progress of extradition[38].

In addition, in extraterritorial countries and regions where defendant in absentia are endowed with the right of procedural dissent, their criminal legislation generally attaches necessary restrictions to the exercise of such right of dissent, and the court exercises the discretion according to law. As a special procedure, the trial in absentia is special only in the particularity of the application object and the program construction, rather than the particularity of the legal effect of the judgment. Since the trial in absentia is one of the procedures of legal proceedings, then the trial in absentia made by the people's courts in accordance with this procedure is the legal judgment of first instance. In litigation jurisprudence, after the legal appeal weeks, the certainty of Res judicata is generated. The stipulation that the people's court should retry once the defendant in absentia voice a dissent is equivalent to directly negating the Res judicata of the trial in absentia, impinges the stability and authority of the legally effective judgment or order made in this procedure, and violates the principle of litigation jurisprudence and procedural rule of law.

In order to prevent the abuse of the right of dissent, which aims to realize the rights protection and the right to relief, the author proposes to clarify the basic conditions for the defendant in absentia to voice a procedural dissent through judicial interpretation, that is, the defendant in absentia who voices the dissent is required to provide evidence to prove that his previous absentia has a valid reason, and the judgment of this kind of reason can be made according to the relevant provisions of the ***Civil Procedure Law***, such as natural disasters and other force majeure, reasons that can not be attributed to the objective, etc. Once the criminal defendant has knowingly and voluntarily waived his right to appear before a judge, he is not required to be offered a retrial. In other words, "if the defendant in absentia had prior knowledge of the scheduled trial and was defended by a lawyer at the trial, the legal effect of acknowledging and enforcing conviction in absentia shall not be denied, or the determined force cannot be optionally negated[39]." Only when a trial is held without ascertaining that the defendant in absentia has waived his right to attend the court and to defend himself, and deprive him of the right of dissent，which allows him to then apply for a new decision on the facts and law of the default judgment, can it constitutes a so-called miscarriage of justice and depart from the due process of law.

Second, the independent right of appeal enjoyed by immediate family. Different from the current Article 227 of the ***Criminal Procedure Law*** on the conditional right of appeal enjoyed by the immediate family of the criminal defendant[40], the immediate family of the defendant in absentia enjoy the independent right of appeal[41]. According to the current regulations, even if the defendant in absentia himself can correctly express his will and clearly express his intention not to appeal, his

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37 CHU Dianqing, "***Classification and System Structure of Criminal Trial by Default,***" People's Court Daily, Jan 24, 2019, at A6.

38 FAN Wen, "***The German System of Extradition: Principles, Structures and Changes,***" Global Law Review, no. 4 (2016): 135.

39 Council Framework Decision 2009/299/JHA of 26 February 2009, OJ L 81, 27. 3. 2009. P. 25. quoted in ZHAO Changcheng, "***Chinese-model Trial in Absentia from the Perspective of international Human Rights,***" Western Law Review, no. 1 (2019): 87.

40 the current Article 227 of ***the Criminal Procedure Law*** : " with the consent of the defendant, the defender and the immediate family of the defendant may file an appeal."

41 the current Article 294 of ***the Criminal Procedure Law*** : " The people's court shall serve the court verdict on the defendant and his relatives and defenders. If the defendant or his relatives refuse to accept the judgment, they shall have the right to appeal to the people's court at the next higher level. A defender may file an appeal with the consent of the defendant or his close relatives."

immediate family has the right to appeal according to their own will. The reason why the legislative issues operate like this is to protect the right of relief enjoyed by defendant in absentia to the maximum extent, avoid the right of appeal relief in name only due to multiple reasons such as the objective don't arrive before the court. However, when analyze by terms of properties, as a kind of trial procedure, the content of trial in absentia revolves around the resolution criminal responsibility for the defendant in absentia, namely conviction and sentencing, the defendant in absentia is the party of this procedure. In this sense, compared with the original right of appeal enjoyed by the defendant in absentia himself, the right of appeal enjoyed by his immediate family is a derived, subordinate and supplementary right of relief in nature. In the case that the defendant in absentia can correctly express his will and has clearly expressed his intention not to appeal, in criminal legislation and criminal justice, individual's cognitive judgment and inner will should be respected, and his immediate family should not be allowed to appeal. The right of appeal enjoyed by the immediate family of the defendant in absentia should be limited under the premise that "the defendant is unable to correctly express the intention of appeal or has not made a clear indication of whether to appeal or not", so as to avoid self-cognition in the name of protection of rights.

Third, clarify the internal logical relationship between different relief methods.The trial in absentia is a kind of procedure with high risk. Therefore, it is necessary to strictly set conditions, and strictly control the program startup, program operation and other links. In order to prevent erroneous judgement caused by absentia and dissolve many trial principles and trial systems under the due process of law, in the trial in absentia, once there is evidence that there may be erroneous judgement or breach of procedural law, the defendant in absentia or his immediate family and the advocate should be given the right of remedy by starting the relief procedure. However, the author believes that among the three relief modes of procedural dissent, appeal relief and retrial relief stipulated in the current *Criminal Procedure Law*, criminal legislation should clarify the internal logical relationship between different relief methods in the form of judicial interpretation on the basis of clarifying their respective applicable conditions, to form a relief mechanism with primary and secondary logic and smooth connection, which takes appeal relief and retrial relief as normal and retrial as exception, so as to avoid the procedure returning to zero caused by the retrial to the maximum extent on the basis of conforming to the essence of the judgement proceedings of trial in absentia.

In addition, the author believes that all stages of the criminal trial in absentia, from the first trial, the second trial to the retrial, should emphasize the significance of public disclosure, for example, we can invite non-specific members of the public to attend the trial and broadcast the trial live through network media, so as to strengthen the legitimacy, rationality and social acceptability of the procedure. One way to be considered is to clarify the participation of people's jurors in this procedure, break the public's subjective cognition of the judicial injustice of this procedure, deepen the public's recognition of this procedure through the participation of jurors. At the same time, we should strengthen the reasoning of the judgment by default, maximize the promotion of the defendant by default, his close relatives and the defender to stop litigation and serve the judgment, and give play to the positive function of the origin of criminal trial. At the same time, we should strengthen the reasoning of the judgment by default, maximize the promotion of the defendant by default, his close relatives and the defender to stop litigation and serve the judgment, and give play to the positive function of the origin of criminal trial.

Conclusion

As a new criminal procedure system, the legislative mode of criminal trial in absentia is obviously different from the leniency system of admitting guilt and accepting punishment and fast-track sentencing process. This system is guided by practical problems and is of great significance for solving practical problems and perfecting the criminal procedure system. In order to ensure the consistency between the noumenal norms of this system and between this system and other related litigation systems, the construction and perfection of Chinese-style criminal trial in absentia should not only be examined and reflected with local thinking, but also be detailed and standardized from macro and micro dimensions based on the smooth operation of international criminal justice standards and international judicial assistance mechanism and the bottom line requirements of due process of law.

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