

# The Right to Dissent in Trial in Absentia Procedures within the Realm of Chinese Criminal Legal Proceedings

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**Abstract:** During the 2018 revision of the *Criminal Procedure Law*, China introduced the trial in absentia procedure into its criminal justice system. Concurrently, the concept of the “right to dissent”, outlined in Article 295 of the revised *Criminal Procedure Law*, was enshrined. This right stands as a pivotal component of defendants’ recourse within Chinese criminal trial in absentia scenarios, serving as an indispensable safeguard for defendants’ litigation rights. However, the current legal stipulations concerning the right to dissent are notably concise. The exercise of this right by defendants neither necessitates justification nor is bound by a definitive timeframe. This deviation not only contravenes the legislative ethos underpinning the establishment of the right to dissent, but also poses impediments to the preservation of judicial stability. Consequently, a recalibration of the underlying rationale is imperative, entailing a systematic analysis of extant issues and predicaments to formulate proposals for enhancing the system further. Such endeavors aim to facilitate the continuous amelioration and judicious application of this aspect of the legal framework.

**Keywords:** Procedure; Criminal Proceedings; Trial in Absentia; Right to Dissent

## 1. The Establishment of the Right to Dissent in Trial in Absentia Procedures within the Realm of Chinese Criminal Legal Proceedings

### 1.1 Background of Establishing the Right to Dissent in Trial in Absentia Procedures within the Realm of Chinese Criminal Legal Proceedings

The statement of “Wherever criminals flee, they must be apprehended and brought to

justice” manifests the ambition to eradicate evil and enforce a policy of “zero tolerance” towards corruption. This ensures the timely and effective prosecution of individuals who have escaped abroad due to corruption or judicial misconduct, thereby upholding social justice. Hence, by implementing trial in absentia procedures, issuing adverse evaluations of corrupt officials who have absconded abroad and refused to return to their homeland can bolster societal acceptance of punitive measures, expedite decisive actions against crime, mitigate losses to national interests, and serve to educate, deter, and dissuade those harboring criminal intentions, preventing them from flouting the law.<sup>[1]</sup>

### 1.2 Implications of the Right to Dissent in Trial in Absentia Procedures within the Realm of Chinese Criminal Legal Proceedings

According to Article 295 of the *Criminal Procedure Law of the People’s Republic of China*, the right to dissent refers to the right to raise objections to a judgment or ruling after it has taken legal effect in a trial in absentia, before the enforcement of the penalty, thereby granting the People’s Court the authority to conduct a retrial of the case. A defendant has the right to raise objections to rulings rendered in absentia. This is unquestionably essential, as expressing objection is an inherent aspect of the defendant’s right to defense.<sup>[2]</sup> Consequently, the right to object represents a novel form of relief for parties in the criminal proceedings of China, significantly safeguarding the litigation rights and interests of the parties involved. The right to object exhibits the following characteristics:

(1) The right to dissent is specifically conferred upon defendants in absentia trial proceedings, particularly in cases involving serious threats to national security and terrorist offenses where the suspect has fled overseas and is being tried in absentia. This right serves

as a legal safeguard ensuring the full protection of the defense rights of specific defendants within the context of absentia trials.

(2) The right to dissent is directed towards judgments and rulings that have already acquired legal force in absentia proceedings. If a defendant is apprehended by the public security authorities prior to the enforcement of an absentia judgment or ruling or voluntarily appears in court, the People's Court is mandated to conduct a retrial in such cases. Subsequently, should the defendant appear after the judgment or ruling has become effective, they retain the freedom to exercise their right to dissent. Upon the defendant raising dissents, the People's Court is obligated to initiate a fresh review of the case.

(3) Prior to the execution of the penalty, defendants retain the entitlement to exercise their right to dissent following the legal effectuation of a judgment or ruling, notwithstanding the absence of explicit legislative directives in Chinese law regarding the temporal boundaries of this exercise. In practical application, the timeframe within which this right may be invoked is subject to potential extension or curtailment.

### **1.3 Jurisprudential Analysis on the Establishment of the Right of Dissent in Trial in Absentia Procedures within the Realm of Chinese Criminal Legal Proceedings**

In the context of the legal system in China, the establishment of the right to dissent in trial in absentia procedures within the realm of Chinese criminal legal proceedings necessitates a dual-sided legal analysis.

Firstly, concerning the initiation of trial in absentia proceedings, in practical operations, investigative authorities typically abstain from investigating cases where the criminal suspect fails to appear. Should a case be transferred to the prosecutorial authority, the likelihood of prosecution decreases, and the court refrains from initiating legal proceedings. However, in adherence to the principles of prosecution and statutory prosecution, regardless of the defendant's presence, the prosecutorial authority should file charges with the court following examination, and it is incumbent upon the court to handle the case, serving as a foundational prerequisite for the

commencement of trial in absentia.<sup>[3]</sup>

Secondly, the question of the reasonableness of trial in absentia must be addressed. The defendant's right to appear in criminal proceedings directly contradicts the system of trial in absentia, with the right of presence exercised by the defendant and the realization of the right to defense grounded in fundamental rights that ideally should remain unrestricted. However, in practice, the right of presence may be waived. In pursuit of a balance between values and interests, providing the defendant with the possibility to waive their right to appear within a specific timeframe is logically justifiable. Moreover, the concept of trial abstention based on the relinquishment of the right to appear also holds legal validity and has garnered reasonable legal interpretation.

## **2. The Justness Analysis of the Right to Dissent in Trial in Absentia Procedures within the Realm of Chinese Criminal Legal Proceedings**

### **2.1 Advantages of the Right to Dissent in Trial in Absentia Procedures within the Realm of Chinese Criminal Legal Proceedings**

For defendants in absentia proceedings, the right to dissent holds significant importance as it not only allows for a retrial and conviction after adversarial litigation but also provides avenues for relief, embodying various values of rationality.

(1) Upholding the principle of due legal process

A fair and legitimate judicial process serves as the "vehicle" for safeguarding criminal procedural rights, constituting a crucial and independent value. The principle of due legal process is not only the essence of upholding human rights but also a fundamental principle that must be followed in the pursuit of fair and just judicial rulings. Judicial decisions must adhere to the principles of justice, guided by legal rulings, and ultimately result in judgments that are accepted by society as just and equitable. Within the procedural framework, in addition to detailed provisions regarding the defendant's right to be informed, right to defense, and right to appeal, the right to dissent has been introduced into China's criminal proceedings, actively fulfilling the

duty of notification to ensure the exercise of the right to dissent.

#### (2) Facilitating practical work

Under various bilateral treaties signed between China and other countries, a default judgment serves as a reason for refusing extradition, while in the realm of international criminal judicial cooperation, it serves as a deterrent and a primary method for overseas pursuit. In cases where fugitive officials voluntarily return to face trial, they generally perceive a relatively lenient sentencing, leading to a strong desire to return to their homeland. However, once a fugitive official becomes aware of their trial in absentia, their willingness to return diminishes, making it increasingly challenging to persuade them to return. The establishment of the right to dissent in trial in absentia procedures provides defendants with a pathway for legal relief. When fugitive corrupt officials realize that their case can be retried and that they still have the opportunity to defend themselves, their willingness to return increases correspondingly. In the field of international judicial assistance, the right to dissent can also provide institutional assistance for extradition work, thereby enhancing the success rate of extradition efforts.

## 2.2 Shortcomings of the Right to Dissent in Trial in Absentia Procedures within the Realm of Chinese Criminal Legal Proceedings

Looking from an alternative perspective, the defendant's right to dissent may lead to the annulment of judgments in trial in absentia, undermining the effectiveness and stability of rulings and decisions in criminal litigation and impeding the rational allocation of judicial resources.

#### (1) Disadvantages to judicial stability

The enactment of the *Criminal Procedure Law* aims to ensure the correct application of criminal law, punish unlawful behavior, protect the public, safeguard national and societal security, and maintain public order. To enhance the protection of the defendant's rights in the context of trial in absentia procedures, the defendant is granted the right to dissent after the judgments and decisions rendered through the criminal trial in absentia procedure take effect. Should the initially absent defendant raise dissents, regardless of

the rationale, the trial will revert to its pre-absentee state. This inevitably provides certain parties with loopholes for abusing dissents and prolonging litigation<sup>[4]</sup>, leading to ongoing instability in judgments—counterproductive to social stability, judicial resource efficiency, impairing the decisiveness and authority of rulings, and hindering the achievement of the objectives of criminal procedural law formulation.

#### (2) Overly broad and unrestricted provisions of the right to dissent

The lack of clarity regarding the timeline for exercising the right to dissent, the authority of acceptance, and other provisions gives rise to numerous issues in judicial practice. Firstly, the ability to restart criminal trial procedures without any justifications or conditions places the judgments of the court in an extremely unstable position. This provision implies that court rulings can be overturned at any time without justifications or temporal constraints, damaging the credibility of the judiciary and the authority of the law. Secondly, unconditional restarts of trial procedures lead to the wastage of judicial resources. When the defendant challenges this decision, the court reopens the case. The procedures to be followed during the retrial are not clearly specified, and whether the facts and evidence established in trial in absentia proceedings can directly serve as the basis for normal trial proceedings remains ambiguously defined. Reinvestigating cases, gathering evidence, and freely restarting trial procedures all contribute to the misallocation of judicial resources, conflicting with the current scarcity of judicial resources in China.<sup>[5]</sup>

## 3. Recommendations for Enhancing the Right to Dissent in Trial in Absentia Procedures in Chinese Criminal Legal Proceedings

To prevent the wastage of judicial resources and the potential abuse of the right to dissent by defendants, China should introduce limitations on the exercise of the right to dissent in criminal litigation. The following recommendations outline three key aspects for consideration:

### 3.1 Restriction on the Timeline for Exercising the Right to Dissent in Trial in Absentia Procedures

China can adopt a two-year limit akin to the right to apply for retrial.<sup>[6]</sup> After the effective date of a judgment or decision in trial in absentia proceedings, the defendant is granted a two-year period to raise dissents. Within this timeframe, if the defendant appears, they can exercise the right to dissent; if the defendant remains absent, their right to dissent extinguishes. Only by initiating an appeal through legal channels to commence a retrial process can relief be sought. Alternatively, if the defendant enters legal proceedings post the judgment's effectiveness and fails to exercise the right to dissent within six months after the court informs them of this right, it should be deemed as a waiver, precluding future dissents. This approach ensures that defendants have adequate recourse while not adversely affecting the stability of trial in absentia proceedings, and may exert psychological pressure on corrupt individuals evading justice to surrender themselves promptly.

### **3.2 Limitation on the Justifications for Exercising the Right to Dissent in Trial in Absentia Procedures**

To prevent the misuse of the right to dissent, defendants should be required to submit written justifications when raising dissents. The courts should establish a review mechanism to scrutinize the reasons for the defendant's dissent.<sup>[7]</sup> In order to avoid excessive constraints on defendants' remedies, the reassessment should focus on the validity of their stated reasons. The reviewing body for dissents should be the court handling the trial in absentia case. During the second hearing, the judgment or ruling naturally carries legal weight. In the dissent review process, the presiding judge, if finding valid grounds, should revoke the original verdict or ruling for reassessment. If the judge deems the dissents untenable, the response should be context-dependent. Correctable issues should be clarified by the judge, demanding the defendant to rectify dissents within a specified timeframe; irreparable dissents should lead to a ruling rejecting the dissent request. The court should promptly communicate the outcomes of the case processing to relevant parties. When a court-confirmed dissent is upheld, a retrial should be conducted; if dissents are dismissed after review, defendants can apply for retrial citing existing errors. This approach not only

prevents judicial resource waste and alleviates the burden on judges but also ensures unimpeded avenues for defendants seeking redress.<sup>[8]</sup>

### **3.3 Limitation on the Scope of Cases where the Right to Dissent in Trial in Absentia Procedures Applies**

Restricting the scope of cases where dissents can be raised aims to achieve optimal application. With the exclusion of minor offenses, judgments in trial in absentia should apply solely to grievous crimes, granting absent individuals the right to dissent. This approach emphasizes combating corrupt practices that severely harm the state and society, aligning with legislative goals.<sup>[9]</sup> In practice, courts exhibit restraint in conducting trial in absentia for minor offenses. China mandates cautious handling of trial in absentia cases, promptly reporting the first such case within its jurisdiction. For minor offenses, the prosecutorial authorities may submit the trial in absentia procedure to the Supreme People's Court, often resulting in a non-activation scenario. This explains why, over a span of more than two years, trial in absentia procedures have yet to yield an effective absentee judgment. Consequently, for minor offenses, trial in absentia should not be employed, and the right to dissent should not be granted<sup>[10]</sup>. Cases where the right to dissent in trial in absentia is permissible could mirror the Criminal Procedure Law's provisions regarding significant official misconduct cases, defining them as "corruption and bribery crimes of considerable influence within a province, autonomous region, municipality directly under the Central Government, or nationwide". Further clarity on the jurisdictional scope could be outlined in accordance with judicial interpretations.<sup>[11]</sup>

### **4. Conclusion**

In comparison to other forms of redress, the right to dissent stands out for its unique role in protecting the rights of absent trial participants. However, since the introduction of trial in absentia through the amendment of the *Criminal Procedure Law*, the provisions have been somewhat vague. In practical terms, there may be instances where defendants' rights are not adequately safeguarded, hindering the realization of the benefits of streamlining

criminal proceedings. Enhancing and refining the right to dissent within trial in absentia procedures, and standardizing its application, can not only protect the legitimate rights of all parties involved but also prevent the wastage of judicial resources, ultimately achieving a harmonious blend of fairness and efficiency.

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