

On the Improvement of the Investigation Procedure of the Duty Crime from the Perspective of the Reform of the Supervision System

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Abstract

The establishment of the supervisory committee has brought some new changes. it absorbed the anti-corruption and anti malfeasance crimes of the procuratorate into it, breaking the situation of the Procuratorate's self investigation and private prosecution of the duty crimes in the past. It has changed the situation of "horizontal separation and vertical integration", which plays an important role in the construction of anti-corruption legal system and is an important progress in the construction of anti-corruption legal system. "Investigation" is not mentioned in the full text of the supervision law, but the duties performed by the investigators of the supervision commission are the same as those of investigation, so it is necessary to introduce the right of lawyer's assistance. At the same time, we should establish a professional team of supplementary investigation, which is mainly composed of Procuratorate's own investigation, and establish the two-step strategy of supplementary investigation after the examination of qualification elements and substance elements, so as to connect the evidence obtained in the investigation of duty crimes. In this way, the procedural rights of the investigated can be guaranteed without affecting the handling of the case, which is also conducive to the handling of the case.

Keywords

Duty crime; supplementary investigation; investigation power; evidence.

1. Introduction

On March 20, 2018, the supervision law of the people's Republic of China (hereinafter referred to as the "supervision law") came into being in the expectation of all. The establishment of "supervision law" changed the structure of one government and two courts, and replaced by one government, one committee and two courts. Its establishment stems from the grim situation of domestic corruption. It is the crystallization of the wisdom of the Party Central Committee. It represents the systematic upgrading and uncompromising compromise of the Central Committee's struggle against corruption. It is also the latest theoretical achievement of Xi Jinping's socialist ideology with Chinese characteristics in the new era. It embodies the basic strategy of the Communist Party of China, as the world's largest party, to implement the rule of law. [1] Under the background of the reform of the national supervision system, the investigation departments of anti-corruption and anti malfeasance originally affiliated to the procuratorate will be transferred to the supervision committee as a whole, and the investigation of duty crimes will be conducted by the supervision committee in accordance with the provisions of the supervision law, breaking the integrated pattern of investigation and prosecution of the procuratorial organs in China since the reform and opening-up 40 years ago, and changing the previous procuratorial organs for duty crimes The mode of "being an athlete" and "acting as a referee" in the investigation. Since then, anti-corruption and anti profane has

become the past. The goal of the reform of the supervision system is to better crack down on job-related crimes, with the intention of establishing a more comprehensive supervision system, including all public officials who exercise public power. This is of far-reaching significance to the legal construction of national anti-corruption and the development of anti-corruption work led by the party. The economic foundation determines the superstructure, and the superstructure also reacts on the economic foundation. Just like the relationship between theory and practice, theory comes from practice, but it also plays an important role in practice. The promulgation of the supervision law marks the establishment of the superstructure. How does it work on specific physical cases? How does the exercise procedure, operation rules and restriction rules of the investigation power of the Supervision Committee for duty crimes connect with our criminal procedure law? Does the investigation power belong to the investigation power? Why is it not allowed to entrust lawyers in the investigation stage? The supplementary investigation should be based on self investigation Or return to investigation, which has become the focus of many scholars. In this paper, the author focuses on the four aspects of the nature of the investigation power of the duty crime, whether the supplementary investigation of the procuratorate can be realized, whether the lawyer's right to help should be obtained, and how the evidence obtained in the investigation of the duty crime can effectively link up with the criminal procedure law, so as to put forward some views on the investigation process of the duty crime of the supervision committee.

2. Positioning of Investigation Power of Duty Crime

Article 12 of the criminal procedure law stipulates that "no one shall be found guilty without the judgment of the people's court according to law." This is the embodiment of the principle of presumption of innocence in China. To determine a person's guilt, it must be tried by a people's court. It is true that the reform of the supervision system makes the supervision committee have a lot of authority in the investigation of duty crimes, but it still has no right to directly decide the conviction and sentencing, the public prosecution is still in the charge of the procuratorate, and the judicial power also belongs to the court. The supervisory committee only has the right to investigate duty crimes. So the question is, what kind of right is the investigation right of the commission? Is it the power of investigation? Subject to the criminal procedure law? The second paragraph of Article 11 of the supervision law stipulates that "an investigation shall be carried out into such crimes as corruption and bribery, abuse of power, dereliction of duty, power rent-seeking, interest transmission, malpractice for personal gain and waste of state property." The word "investigation" is used here, and the word "investigation" does not appear in the full text of the supervision law. This means that the "supervision law" only gives the supervision committee the right to investigate duty crimes, so what is the relationship between the right to investigate and the right to investigate here? Some scholars think that the investigation power of duty crime is different from the criminal investigation power. The supervision law is applicable to the investigation of cases by the supervision committee, and the criminal procedure law is applicable to the cases transferred to the procuratorial organ for examination and prosecution. This theory of "negation of investigation power" [2] means that the investigation of duty crimes by the supervision committee can completely break the restrictions of the criminal procedure law, and when there is a conflict between the supervision law and the criminal procedure law, there is no doubt that only the relevant provisions of the supervision law are abided by. This is contrary to the original intention of the criminal procedure law. There are obviously contradictions. The author thinks that whether the investigation power belongs to the investigation power should be discussed by classification. The author believes that the legal nature of the right of investigation depends on the nature of the case. First, why does the supervision law use the word investigation instead of investigation?

In fact, investigation includes more kinds of behaviors, among which investigation is one of them. The purpose of the supervision law is to crack down on various kinds of corruption, such as duty crimes, etc. there are many kinds of corruption in real life, as well as different violations of laws and disciplines. In some cases, it can only be regarded as a violation of discipline and law, but not a criminal offence. Therefore, legislators can use the term "investigation" to include all kinds of behaviors, which is also the wisdom of upper level design. Take the crime of corruption as an example, only a large amount can constitute a crime, and a small amount only constitutes a violation of law and discipline. Second, if the investigation right of duty crime does not belong to the investigation right, it means that the whole process of the investigation of duty crime is not regulated and adjusted by the criminal procedure law. Naturally, for the investigated, there is no procedural right given to the criminal suspect and the defendant by the Criminal Procedure Law. Therefore, the supervisory organ can not enjoy the investigation authority given by the criminal procedure law. This is obviously contrary to the original intention of legislation. Therefore, the theory of "investigation negation" put forward by some scholars will not be broken. So to sum up the two points, the author thinks that the investigation power of duty crime of the supervision committee is aimed at the criminal crime, and there is no doubt that the investigation power of duty crime is the investigation power.

3. Can We Introduce the Right of Lawyer's Help

The development history of criminal procedure law is equal to the history of human rights protection. Since the reform and opening up 40 years ago, the construction of rule of law in China has made great achievements. The first thing is that the protection of human rights has been paid attention to. The criminal procedure law of 1996 stipulates that the criminal suspect can hire a lawyer to provide legal assistance in the investigation stage. The revised criminal procedure law of 2012 gives the criminal suspect greater rights and the lawyer defender status in the investigation stage. In a short period of 16 years, from the legal help of lawyers to lawyers and defenders, this is a great progress of the rule of law in China, and also a concrete embodiment of the protection of human rights in China. However, in the supervision law, there is no mention of "lawyer's defense" and there is no provision for lawyer's help. During the investigation of the supervisors, the lawyer is not allowed to intervene to understand the case. The author thinks that such provisions deviate from the legal concept of human rights protection, but because of the particularity of duty crime, the author can also understand some intentions of legislators. But the author thinks that no matter how special the case is, when the investigated person is detained by the supervision committee, his heart is already flustered and his head is blank. In the face of the possible punishment, anyone's instinct is like this, and he thinks how to avoid it. In this case of brain fever, on the contrary, it is not conducive to obtain effective evidence. On the contrary, we should introduce lawyers to help the respondents understand the harm of their actions and think calmly. Make the right choice.

(1) The difference between "the right to defense" and "the right to legal aid"

Before discussing whether the right of lawyer's assistance should be introduced, the author needs to clarify that there is no difference between the content of "right to defense" and "right to legal assistance". It is only the diversity of cases investigated by the supervisory committee that does not necessarily lead to criminal proceedings. "Defense" refers to the defense activities that the criminal suspect, the defendant and their defenders refute the prosecution's accusations in the criminal proceedings, put forward the favorable reasons for the criminal suspect and the defendant, and safeguard the legitimate rights and interests of the criminal suspect and the defendant. The term "defense" has a special attribute in law, which belongs to litigation and belongs to a kind of action in litigation. However, the investigation of the

supervisory committee does not have the nature of criminal proceedings [3]. Therefore, it is better to use "the right to legal aid" here. But it's essentially the same.

(2) Time for obtaining the right of legal aid

Article 33 of the criminal procedure law of China stipulates that a criminal suspect has the right to entrust a defender from the date of the first interrogation or compulsory measures taken by the investigating organ; " Here it is clear that the time when the investigation organ handles the entrusted defense of the criminal suspect, then how to determine the time when the investigated person gets the right of legal help in the investigation process of the supervision committee. The cases handled by supervisory organs are different from those handled by ordinary investigative organs, and the cases of duty crimes handled by supervisory organs are more special. Ordinary investigative organs, such as public security organs, often directly control the suspects and defendants, or summon or arrest. So the supervisory organs often follow the lead and find out a series of people and things. For example, through the investigation of a minor violation of the law, we found that B embezzled 50 million yuan. It was originally an investigation into minor violations, but the result was a criminal fact. This kind of investigation makes the boundary between "illegal" and "criminal" vague, so that we don't know when to start the criminal investigation with the nature of criminal procedure in a specific case. It can be seen from Article 43 of the supervision law that Lien belongs to criminal investigation with criminal procedural nature. Therefore, the author thinks that since the time of being detained by the supervision organ, the investigated person has the right to obtain legal help.

(3) ways of obtaining legal aid

The duty crime has its unique characteristics, but also has its unique way of handling. Duty crime is different from ordinary criminal crime. The subjects of ordinary criminal crime are various, covering all kinds of people and occupations. But duty crime has its own characteristics. The main body of duty crime is the person who performs the public duty according to law. Then the public official is generally an intellectual who is in the leading position and has certain knowledge and ability. Therefore, this kind of crime belongs to the crime of high intelligence. If the country wants to fight against this kind of crime, it must consume huge human and material resources. In the face of such a nature of crime, in order to prevent collusion, avoiding investigation must not allow criminal suspects to hire lawyers at will. The purpose of introducing lawyer's help is to make the investigated object better understand the situation, truthfully explain and strive for leniency, so that he can get procedural help. But it must be combined with the current situation of anti-corruption in China. There are two ways to get lawyer's help, one is to entrust lawyer by oneself, the other is to assign lawyer by legal aid organization [4]. The author thinks that the latter should be adopted in the case of duty crime. The supervisory committee should set up a legal advisory group, and the lawyers of the legal advisory group should provide legal assistance for the investigated, which can not only meet the procedural rights of the investigated, but also be conducive to the investigation of the case.

4. Supplementary Investigation By Duty Crime Procuratorate

Article 47 of the supervision law stipulates that "if the people's Procuratorate believes that supplementary verification is necessary after examination, it shall return it to the supervisory organ for supplementary investigation, and it can supplement investigation by itself if necessary", which is basically consistent with the supplementary investigation provisions of article 171 of the criminal procedure law [5]. But the author thinks that such a regulation is too broad, which gives too much imagination space in practice. In practice, there must be one party to mainly undertake the task of supplementary investigation. In this way, the stipulation of "model Ling and dual feasibility" may cause unnecessary litigation burden in the process of practice, resulting in the waste of judicial resources. It may be that the two organs compete for

supplement, or the two organs may shirk the buck from each other. Therefore, it is necessary to define a "main force". The author thinks that the words in the supervision law are vague. In the process of practice, if there is insufficient evidence to supplement such an act, should the procuratorate supplement the investigation or return it to the Supervision Committee for supplementary investigation? If we say that the Procuratorate's self supplement is the main one, it is obviously a lack of substantive conditions. The anti-corruption and anti malfeasance crimes that originally belonged to the Procuratorate are now transferred to the supervisory committee. It is obvious that the procuratorate does not have the hardware foundation to continue to fight against the crimes of corruption and malfeasance. If the supplementary investigation of duty crime cases is mainly to return to the supervisory organ for supplementary investigation, then there are many problems. Before the public prosecution of the mobile prosecutor's office in the case of duty crime, the supervisory organ should investigate the case. No matter in terms of human and material resources, the supervisory organ is superior to the procuratorate. Through the provisions of Article 43 of the supervision law on the retention time of the investigated, it can be seen that the investigation of duty crimes generally takes a long time, because it takes time for the investigators of the supervision organ to fight with the investigated for wisdom and courage. So the question comes. First, the supervisory organ has not collected clear evidence after such a long time of investigation. Can we collect clear evidence after returning it to the supervisory organ? The answer is clearly questionable. Secondly, the supervisory organs must have used all kinds of forces to investigate the cases of duty crimes. Returning to the supervisory organ for supplementary investigation also means that they should admit their own shortcomings and continue to investigate new evidence. It's a little similar to the investigation and prosecution integration of the former procuratorates. This is obviously questionable.

(1) establish a supplementary investigation mechanism based on the self investigation of the Procuratorate

The author thinks that we should establish a mechanism that the Procuratorates' self investigation is the main supervisory organ and the Procuratorates' self investigation is the auxiliary organ. The independent existence of supplementary investigation of procuratorial organ does not depend on the investigation right, but the right derived from the public prosecution right, which determines the independent attribute of supplementary investigation. Therefore, the procuratorial organ is in charge of the supplementary investigation of duty crime cases, which is more conducive to the supervision function of the procuratorate. This may not be persuasive. For example, when investigating the corruption and bribery cases of Party A, the supervisory organ uses a series of illegal means, such as extorting confessions by torture, obtaining evidence by violence, fatigue trial, etc. How can investigators obtain more evidence when the case is returned to the supervisory authority? Would you like to talk with the respondents? It is impractical, so the procuratorate can only investigate by itself. In this way, we can avoid a series of problems arising from the supplementary investigation returned to the supervisory organ. But the anti-corruption and anti desecration that originally belonged to the procuratorate have been removed. How can the procuratorate have the ability to carry out supplementary investigation on duty crime cases. At the same time, we should also pay attention to the auxiliary function of the supervisory organ. The investigation organ of the supervisory organ, the main case facts and evidence materials are only understood by the original investigators. Therefore, the introduction of the assistance of the supervisory organ in the process of supplementary investigation by the inspection organ is more conducive to the discovery of new facts and evidence.

(2) establishment of personnel allocation matching with cases of supervisory organs

The author thinks that the procuratorate should form a special team to connect with the cases of the supervisory organ. This team should carry out the special training of anti-corruption and

anti profane investigation, which can be guided by the former anti-corruption and anti profane personnel of the procuratorate. Moreover, the recruitment of the personnel of the procuratorate should not be limited to the relevant laws, but should be expanded to the relevant aspects of investigation, so as to expand the Procuratorate's Business skills. The competent power of the procuratorate can be divided into two groups, which are respectively responsible for the examination of the evidence form of the transferred case, the examination of the substance and the special supplementary investigation. Through the examination of formal elements, it can be decided to arrest the suspects. Through the examination of substantive elements, we can find out the problems in the investigation process of the supervisory committee, and carry out supplementary investigation. For example, whether the evidence is obtained by torture, violence and other means, and whether the necessary rest, diet and so on are guaranteed. In order to ensure the procedural rights of the investigated and the authenticity of the entity. For the supplementary investigators, they should be particularly careful in the process of practice. The investigators will not admit that they have adopted illegal methods such as extorting confessions by torture, obtaining evidence by violence, and fatigue interrogation to obtain evidence, which needs to be judged by the subjective experience of the investigators, so they have higher requirements for practical experience.

(3) return to the custody status of the criminal suspect for supplementary investigation

The supervision law is applicable to the investigation of cases by the supervisory organ and the criminal procedure law is applicable to the handling of cases by the procuratorial organ? The author thinks that we should not change the custody status of the investigated persons. Because the arrest of the procuratorate is more severe than the detention of the supervision organ, if the detention status is returned, the detention place needs to be changed, which repeatedly causes the waste of judicial resources. At the same time, under the control of the procuratorate, the duty criminal suspect is more conducive to the supplementary investigation of the procuratorate, and the possible illegal acts such as torture and violence by investigators are eliminated. At the same time, it is more conducive for duty criminal suspects to truthfully state their criminal acts.

5. Connection of Evidence Obtained in the Investigation of Duty Crimes

Whether the evidence obtained by the supervisory organ in the process of investigating the case can be directly transformed into the supervisory law in the process of criminal proceedings has made provisions. It also provides for the exclusion of illegal evidence. That is to say, the fixed evidence obtained in the process of investigation by the supervisory organ is an important basis for the procuratorate to initiate public prosecution and the court to make a judgment in the subsequent criminal procedure stage. The supervision law rather than the criminal procedure law is applicable to the investigation of cases by the supervision organ. Although the supervision law stipulates the applicable rules of evidence and the exclusion of illegal evidence, the evidence must be reviewed by the procuratorate for legality [6], and the supervision organ cannot be both an athlete and a referee. In the type of evidence, we should pay special attention to physical evidence. At the same time, combined with the characteristics of job-related crimes, job-related crimes mostly involve power money transactions, which inevitably involves a lot of money, such as cash, gold, bank cards, stock funds, etc. These are the important material evidence to prove the case. We must establish and improve the transfer mechanism of material evidence with the case. For the physical evidence, the original must be moved, and it is not allowed to submit the evidence by taking photos, copying, etc. if the physical evidence is really difficult to transfer, inconvenient to move, etc., the photos or copies can be submitted, but it must be explained in writing. Original documents shall be submitted for documentary evidence, witness testimony, confession and defense of the investigated, audio-

visual materials, electronic data and other evidence materials. If the original is lost, legal copies or copies may be submitted. When the evidence obtained in the investigation is transferred to the procuratorial organ, the attribute of the evidence should be taken into account, for example, the biological sample will change with the change of time, space and temperature. Therefore, the procuratorate should do a good job in the connection mechanism of evidence acceptance. The "special team" that has been put forward in the above-mentioned supplementary investigation is the best mode of connection. The specialized personnel are divided into two groups, one is responsible for the examination of qualification elements, the other is responsible for the examination of substantive elements and supplementary investigation. This is the way to connect.

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