



行政检察监督研究： 从历史变迁到制度架构

傅国云 / 著

Prosecutorial Supervision on Administrative Activities:
The history and the legal framework



法律出版社
LAW PRESS • CHINA

行政检察监督研究： 从历史变迁到制度架构

傅国云 / 著

Prosecutorial Supervision on Administrative Activities:
The history and the legal framework



法律出版社
LAW PRESS · CHINA

图书在版编目(CIP)数据

行政检察监督研究:从历史变迁到制度架构 / 傅国云著. —北京:法律出版社, 2014. 3
ISBN 978 - 7 - 5118 - 5976 - 1

I. ①行… II. ①傅… III. ①司法监督—研究—中国
IV. ①D926.34

中国版本图书馆 CIP 数据核字(2014)第 016619 号

行政检察监督研究:从历史
变迁到制度架构

傅国云 著

责任编辑 郑 导
装帧设计 汪奇峰

© 法律出版社·中国

开本 720 毫米×960 毫米 1/16

版本 2014 年 5 月第 1 版

出版 法律出版社

总发行 中国法律图书有限公司

印刷 三河市兴达印务有限公司

印张 19.5 字数 296 千

印次 2014 年 5 月第 1 次印刷

编辑统筹 独立项目策划部

经销 新华书店

责任印制 张建伟

法律出版社/北京市丰台区莲花池西里 7 号(100073)

电子邮件/info@lawpress.com.cn

网址/www.lawpress.com.cn

销售热线/010-63939792/9779

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里 7 号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782

重庆公司/023-65382816/2908

北京分公司/010-62534456

西安分公司/029-85388843

上海公司/021-62071010/1636

深圳公司/0755-83072995

书号:ISBN 978 - 7 - 5118 - 5976 - 1

定价:48.00 元

(如有缺页或倒装,中国法律图书有限公司负责退换)



序

周佑勇*

法治乃现代文明国家之基本共识,而法治行政则是法治国家之关键。正所谓“无法律即无行政”。基于行政权具有扩张性、侵犯性的一面,行政乱作为、行政不作为等权力违法滥用现象层出不穷,往往伤及民众切身利益,引发官民对立,长此以往必将危及国之根本。如何加强对行政权的法律控制,使其在法治规则框架内运行,是政治学的一大课题,更是行政法学研究的首要任务。应当说,法学界对如何加强行政权的法律控制有了大量的研究。但是,选择从检察监督这一视角来研究行政权的法律控制,是一个较为新颖的视角,而相关研究为数不多。令人欣喜的是,傅国云博士在其博士论文基础上即将出版《行政检察监督研究》一书。据了解,本书是目前我国法学界关于行政权的检察监督这一主题研究的唯一专著,无疑具有极大的开创性意义。我作为他曾在武汉大学法学院攻读博士生时的指导教师,亦欣然为之推荐。

我国行政法理论源于大陆法系,而我国检察制度则源于前苏联模式,两者看起来风马牛不相及。从制度上讲,无论是英美法系还是大陆法系,检察机关主要是作为公诉机关而存在,而我国目前的人民检察院组织法也没有直接明文规定对于行政权的检察监督。在此种情形下,从“行政检察监督”这一设想的提出到其制度的具体构建,在理论阐述和制度建构上无疑都是一个很大的创新与挑战,其难度可想而知。傅国云博士长期在浙江省检察系统工作,对民事行政检察工作有着丰富的实务经验,了解行政执

* 周佑勇:东南大学法学院院长、教授,国务院享受政府特殊津贴专家,第六届“全国十大杰出青年法学家”。

法的现状与问题,熟悉检察监督的规律,同时一直保持着理论研究的热情与习惯,属于学者型的检察官。正是因为傅国云博士兼具经验与理论这样双重的知识结构,使得他能够较好地把握行政检察监督这一既有理论深度又有现实性的课题。傅国云以其深厚的法学理论功底、扎实的检察实务经验、开阔的学术视野以及巧妙而严谨的构思,运用历史分析、比较分析、实证分析等方法,较好地完成了这一课题的研究。

本书通过考察我国古代监察制度以及西方近代以来的监督制度,拓展我们对于行政权监督的认识视野,分析检察监督与它们的联系与区别;同时,通过宪法与法理层面阐述我国行政检察监督的理论基础。基于前两者,结合我国检察制度现行框架与检察实务,建构了行政检察监督的原则和基本框架。到此为止,算是完成了本书主题的“上篇章”。本书的“下篇章”则围绕所设想的行政检察监督基本框架,进行逐项制度深入阐述,包括行政执法行为检察监督、行政公诉、民事督促起诉、行政抗诉以及监督行政抽象命令的抗告程序。著作立论清晰、逻辑严谨、观点明确,论证上理论与实践相结合,结构上统分结合、前后呼应,宛然一体。

本书很多观点具有首创性,尤其是系统阐述了行政检察监督的基本原则和基本框架,提出了行政检察监督的四种模式:诉讼监督模式、督促模式、纠正模式和监督抗告模式。四种模式的提出在目前法学界尚属首次,既是对民事行政检察实务的理论提炼,也是对检察机关法律监督之基本定位的具体贯彻,符合检察制度的逻辑,同时具有高度概括的理论范畴特性,对于我们深入研究行政法乃至检察制度都具有积极的理论启示意义。同时,本书所阐述的民事督促起诉制度和监督行政抽象命令的抗告制度,在传统的行政法学、诉讼法学乃至宪法学领域都是未曾见过的,完全是创新性的本土理论命题,深深根植于本土法治实践,对于传统法学研究者而言是一次富有意义的视野拓展,值得学界同仁仔细品读。

当然,作为行政检察监督的初次专题研究,本书内容也难免存在这样或那样的不足。例如,行政检察监督与行政监察的界分没有予以明确阐述;行政检察监督是以四种模式为本,还是以五种具体制度(行政执法行

为检察监督、行政公诉、民事督促起诉、行政抗诉、监督行政抽象命令的抗告程序)为本,未有相关论述。这些显然都还有进一步研究的空间。当然,瑕不掩瑜,总体上本书是一部具有理论开创性的优秀著作。作为导师,能够看到本书出版,欣喜由衷。希望本书的出版是学界关于行政检察监督研究的一个良好开端,也希望傅国云博士能够持之以恒,以更丰富的实务经验与更敏锐的理论智识,不断深化该领域的研究,为完善中国特色检察制度和法治政府建设贡献自己的力量。

是为序。

2013年12月31日于南京

内容提要

我国法学界和实务界对如何完善检察权对行政权的监督提出了一些建议和设想,但在检察权对行政权监督的定位上还存在模糊认识,以至于影响检察监督模式、范围的合理界定,要么失之过宽,落入不具有可行性的—般监督窠臼;要么失之过窄,将检察权监督行政权仅限于对行政管理中职务犯罪领域的监督,这显然不利于强化法律监督,制约日益扩张的行政权。

目前,随着我国刑事诉讼法、民事诉讼法的修改,我国刑事、民事检察制度逐步完善,但行政检察制度仍然很不健全,除了《中华人民共和国人民警察法》(1995年)、《中华人民共和国治安管理处罚法》(2005年),以及废止的国务院《劳动教养的补充规定》(1979年)、《劳动教养试行办法》(1982年)、《劳动教养条例》(1995年)对行政检察监督作原则性规定,其他法律有关行政检察的规定基本处于空白。然而行政检察制度构建应当成为完善中国特色检察制度的重中之重。实践中,检察权监督行政权的手段、方法不多,措施也不够有力,对于行政人员滥用职权、玩忽职守,只有触犯刑律,检察机关才予以介入,即按照刑事诉讼法规定追究有关行政人员的刑事责任,而对行政管理中的滥用职权、不作为违法等导致国家利益、公共利益严重损害的,只要尚未构成刑事指控条件的,通常不予直接监督,最多将发现的这类违法线索移交有关部门处理,对与此相关的国资流失及损害公共利益的问题往往不太关注,即便向有关部门发出检察建议,也缺乏跟踪监督,一般也难以收到实际效果。尤其是对行政监管权、行政抽象命令的检察监督的研究基本上处于空白状态。因此,有必要从我国实际出发,按照检察权属性、定位,科学地界定现行检察权对行政权的监督模式、具体范围,合理设计监督程序。

我国检察权属于程序性的公权力,不像行政权那样可以配置资源,在法律授权范围内创设公民权利义务;也不像审判权那样能裁断当事人权利

义务,在诉讼程序中处于主导地位,并且享有终局处分权。按照权力区分原理,应该强化这部分权力,增加其对行政权监督的刚性与效应,以有效制约行政权,防止和减少行政权的滥用。笔者立足本土法制文化,批判地继承传统监察制度中监督权的独立性、垂直性、强制性,丰富我国检察监督的内涵,保障检察监督应有的权威和作用;借鉴古代御史制度中的都御史与监察御史上下级之间权力相互独立、相互牵制的体制,建立一套科学的内部制约机制,以解决对监督者的监督问题。同时,在比较研究的基础上,结合中国实际,借鉴域外监督制度及我国传统法制文化的有益经验,为检察权对行政权的监督提供坚实的理论支持。在我国现行法律框架下,反思和重构行政检察监督的模式,界定监督的合理范围,设定科学的运作程序,使检察权对行政权的监督保持其必要性、有限性、谦抑性。总之,本书立足我国的宪法定位和本土文化,批判地吸收传统法律文化中的精髓,借鉴西方民主、权力制约理论的合理内核,根据经济转型、社会变迁、司法改革的情势,寻求符合我国实际的行政检察监督的基本理论及制度架构。

本书共分十章内容:

第一章,分析我国古代御史制度的变迁,借鉴传统监察权的合理内核。透过古代监察制度产生、发展到解体的整个演变过程,探寻我国古代监察权的权源、性质、地位和作用,以及监察权内部的分权制约等。运用历史分析方法,辩证地看待传统监察制度中对行政权监督的价值。笔者认为,传统中国监察权是皇权的延伸,它必须无条件地为皇帝及以皇帝为代表的官僚集团服务;同时,中国古代监察机构自成体系,实行垂直统辖,行政长官不得染指监察官的选任,保证监察官有效行使职权。其中,监察权的独立性、垂直性、权威性值得我们借鉴。该章研究我国传统监察制度的转型,揭示我国古代监督性质的监察权与近代司法行政性质的检察权的根本差异,为中国行政检察监督制度的构建提供合理的借鉴。

第二章,比较中国传统监察制度与西方近代以来的监督制度的差异,吸收人类监督制度的文明成果。通过比较法的方法对我国传统监察权与西方民主宪政下的监督权作比较,揭示出传统监察权系皇权对包括行政权在内的其他国家权力的集权性监督,与西方近代以来的君权有限、分权制衡下的监督权有着根本的区别。有着悠久自然法传统的西方国家监督权

系隶属于国会立法权之下的权力,更多地体现为立法权对行政权的制衡,是权力分立之下的制衡。这与我国传统监察权对其他权力,特别是对行政权居高临下的监督有质的不同。不管是英美行政性的检察权,还是欧陆司法性的检察权,尽管对其他权力有一定的监督作用,但主要体现的是制约,即弱监督、强制约。西方国家自近代以来也认识到三权分立的不足及监督权独立的重要性,纷纷仿效瑞典的议会监察专员制度,加强对行政权的监督,从而保障国家监督权的专门性、独立性,这已经成为一个趋势。

在长期的封建社会中司法权和行政权的交错、公诉权和审判权的合一,使得以公诉权为核心的西方检察权在中国的移植缺乏本土资源,但却形成了以弹劾查处官吏和监督制约审判为主要内容的、部分职能与检察权重合的御史制度。清末以后,引进了西方的审、检分离,进行诉讼民主化改革,在中国逐步建立起以公诉权为内容的检察制度。严格地说,中国古代并没有检察制度。孙中山先生在借鉴西方三权分立和我国古代御史制度的基础上提出了“五权分立”,为独立的国家监督权构建奠定了坚实的基础。新中国检察制度是在废除国民党“六法全书”的基础上建立的,它以列宁法律监督理论为基础,结合我国的国情建构专门法律监督制度。其中带有高度中央集权和大一统的计划经济的印记,如一般监督即如此。这与当代中国构建公民社会,崇尚契约自由的精神相比,显得日益滞后。笔者认为,检察机关专门法律监督权作为一种独立的公共权力,应当坚持有限监督的原则,超然于各种利益纷争,尽力做到客观公正,监督权的运作始终围绕公共权力这个轴心,以权力制衡为目标,特别是确保行政权力在法治的轨道上运行。在现实中要避免监督权力过度扩张,以致陷入“大监督”的泥潭,造成对其他国家权力的不当干预,浪费有限的监督资源,违背设立专门国家监督权的初衷。

第三章,透析我国检察权对行政权监督的法律与宪法基础,揭示行政权力检察监督的现实必要性。通过对我国法律制度的分析,笔者指出,我国人民代表大会拥有完整的国家权力,实行一元多立的权力构架,即一元权力——人民代表大会下,分出立法权、行政权、审判权、检察权、军事权,其中立法权由人民代表大会自己保留,而将行政权、审判权、检察权、军事权分别授予行政机关、审判机关、检察机关、军事机关行使,这些机构都由人民代表大会产生,对人民代表大会负责。在这种权力构架下,人民代表

大会及其常务委员会固然有权对由其产生及下辖的诸权能实施监督,但是,这种监督只能是宏观的监督和对国家、社会重大事项的监督,而不可能是经常性、专门性的具体的监督。故须在人民代表大会下设立专门的法律监督权,使得国家权力机关的宏观监督具体化。从而有必要将专门法律监督权赋予检察机关行使,包括对行政权的专门法律监督。因为审判权对行政权的制约体现为通过行政诉讼进行司法审查,撤销或变更违法的具体行政行为,控制行政权的滥用。但由于审判权是一种消极、被动的权力,遵循的是“不告不理”的诉讼原则,因而其对行政权的制约只是在相对狭小的范围内进行。检察权具有对其他并行的公共权力的“纠举”、“弹劾”性质,有利于弥补法院司法审查之不足。

第四章,通过对行政检察监督的实证分析,提出行政检察监督的原则和基本框架。笔者对近几年来理论界有关行政检察监督的主要观点进行辩证分析,结合多年来的检察监督的创新实践,探索符合中国实际的检察监督模式,并提出了有限监督、事后监督、合乎比例、行政处理先行、超然性原则。特别是比例原则对于科学合理界定行政检察监督的范围和方式具有积极意义,即行政检察监督在监督手段上,如果有多种监督方式可以行使的话,则应选择有利于发挥行政管理能动性的监督方式;程序上,只有在无法通过行政救济(包括行政复议、行政诉讼及行政体制内部监督)途径解决,而且涉及国家利益、公共利益,行政检察监督才予以介入;实体上,涉及私法领域,检察机关应当尊重当事人意思自治、契约自由的原则,尽可能地减少公权力对市场的干预,以确保交易秩序的稳定。如在行政诉讼中,对被告行政机关与原告行政相对人之间达成的和解,只要不损害国家利益、公共利益的,检察机关应当予以尊重。从而使检察权真正做到有所为,有所不为,着力制行政权之“恶”,扬行政权之“善”,在我国现行法律制度下,构建检察权对行政权监督的基本框架。

第五章,行政执法行为检察监督是指检察机关针对涉及国家利益、公共利益的行政违法行为的法律监督,即检察机关发现行政机关或法律法规授权组织违法行使权力、滥用职权、不作为违法等损害国家利益、公共利益,向有关行政机关或法律法规授权组织发出检察建议、纠正意见,督促其在合理期限内履行法定职权,并将处理结果书面答复检察机关。同时,针对存在行政管理漏洞,提出综合治理意见和建议,促使行政机关、法律法规

授权组织建立完善有关制度、机制,以促进依法行政和创新社会管理。

第六章,探索行政公诉制度,加强对行政管理权的直接监督。笔者从我国宪法与检察权的定位入手,从比较法的视角分析我国行政公诉不同于西方国家行政公诉的特点,认为我国行政公诉既是一种公力救济,又具有典型的监督属性。它始终以公权力监督为主线,体现了对行政权的直接监督、有限监督。据此,从公共利益优先权和公力救济有限性的角度,提出了行政公诉的范围界定,将督促行政主体履行职责作为提起行政公诉的前置程序,以节省诉讼成本,提高监督效率。基于检察机关拥有特别的公权力,检察监督具有明显的司法性、专门性、专业性,以及为了防止行政公诉的恣意,诉讼中应当以检察机关负举证责任为原则,行政机关仅对其控制的行政信息情报、规范性文件以及公害案件涉及的高度专业性、技术性问题负责举证。

第七章,从检察权对行政权法律监督与检察权对国家利益、公共利益救济的统一性出发,建立对行政监管权法律监督的新机制——民事督促起诉。民事督促起诉是指针对正在流失或即将流失的国有资产,监管部门不行使或懈怠于行使自己的监管职责,检察机关以监督者的身份,督促有关监管部门履行自己的职责,依法提起民事诉讼,保护国家利益和社会公共利益。这是近年来民事行政检察实践中正在探索的一种新的监督方式,理论上的研究尚属罕见。据此,从国家利益、公共利益优先权和公力救济有限性的角度,对民事督促起诉的范围、条件程序等问题作初步探讨。

第八章,完善行政抗诉监督制度,加强对具体行政行为的检察监督。通过阐述行政抗诉对审判权的直接监督与对行政权间接监督的双重性,以及行政抗诉对监督制衡行政权的现实意义,分析目前行政诉讼中的突出问题,提出了有助于克服部门保护、地方保护的强化行政抗诉监督的设想。

第九章,研究行政抽象命令的属性及现实弊端,构建行政抽象命令检察监督的程序。从严格意义上说,行政抽象命令(主要指行政机关对外发布的规章以外的规范性文件)不属于法律的渊源,但对行政管理、行政复议以及行政审判的意义不容忽视,大量的经济社会事务管理活动是依靠行政抽象命令来实施的,其存在具有坚实的法理基础。然而随着市场经济的发展和政府公共服务的加强,行政权也会呈现出扩张的态势,行政抽象命

令不可避免地渗透到社会的各个领域,包括其对公民、法人及其他组织正当权益的侵夺,以及损害社会主义法制的统一,导致公权力的失控和滥用,从而加强对行政抽象命令的外部监督就成为一个现实的议题。基于我国权力机关对行政抽象命令监督的非专门性和非职业性,法院对行政抽象命令的司法审查作用又十分有限,因此,检察机关作为专门法律监督机关根据宪法、法律的定位,应当履行对行政抽象命令的法律监督职责,以克服行政体系内部监督的局限性,实现对行政权力的制衡。同时,对行政抽象命令的检察监督程序提出了初步的构想。

第十章,由于检察环节的行政申诉案件往往经过一审、二审甚至再审,当事人历经漫长的诉讼之旅,此类案件的社会敏感性、关联性、对抗性增强,潜在的社会风险增大,稍有不慎,极易引发新的矛盾和冲突。为顺应多元化的利益诉求,检察机关必须采取多元化的纠纷解决方法,延伸诉讼监督职能,着力化解行政争议,从而行政检察调解就成为十分重要的替代性纠纷解决方法。笔者通过行政检察调解的现实价值、正当性分析论证,提出行政检察调解的原则、范围和效力,使此项纠纷解决方式能切实地平衡协调各种利益,克服和弥补行政审判制度的不足,实现法律的秩序价值和“接近正义”。

Abstract

Scholars from academic and professional backgrounds have made some recommendations on how to improve the effect of using procuratorial power to supervise administrative power. However, the ambiguity in terms of conceptualizing this supervision affects the definition of the paradigm and the scope of administrative procuratorial supervision, either too broad as general procuratorial supervision to operate in practice or too narrow as limited to duty-related crimes to be effective in restricting the administrative power in expansion.

With the modification of China's Criminal Procedure Law and Civil Procedure Law, the procuratorial supervision systems have been gradually improved in both criminal and civil laws, with the exception in administrative law. Currently the administrative procuratorial supervision is only provided in principle in the Public Security Administration and Punishments Law promulgated by the Standing Committee of National People's Congress (the Standing Committee of NPC) in 2005, the State Council's Supplementary Decision on Reeducation Through Labor in 1979, the Trial Measures on Reeducation Through Labor in 1982, and the Rules on Reeducation Through Labor in 1995. The construction of administrative procuratorial supervision system should be one of the most important supervision systems with Chinese characteristics. Nevertheless, there is few pragmatic means available for procuratorial authority to supervise the use of administrative power. And the measures that can be taken for administrative procuratorial supervision are very weak. Even when abuse of administrative power or neglect of duty occurs, procuratorial authority cannot intervene unless such behavior violates criminal law as well. In that case, only criminal responsibilities will be pursued according to criminal procedures, leaving unsupervised those administrative

behaviors that cause severe damages to public interests and state interests because of abuse of power or omission of duty, but fail to constitute criminal offences. At best, those identified evidences of violation of law will be transferred to competent authorities for further investigation, although the resulting loss of state-owned assets and damages to public interests are usually ignored. But absent follow-up supervision, the efficacy of such investigation is often questionable. In particular, scholarship on administrative regulation and the procuratorial supervision on pure administrative order is almost non-existent. Therefore, it is necessary to set out from the reality in China and the conceptualization of procuratorial power, define the paradigm and the scope of procuratorial supervision on administrative power and design a set of proper procedures for such supervision.

Procuratorial power is a form of public rights in procedural law. It is different than administrative power that can allocate resources and create rights and obligations of citizens, and distinguished from judiciary power that can judge the rights and obligations of relevant parties, dominate in legal proceedings, and make the final decision. According to the principles of power separation, procuratorial power should be strengthened enough to effectively restrict the use of administrative power and prevent from abuses. To solve these problems, this book sets root in the Chinese legal culture, critically analyses the characteristics of traditional supervision systems, and studies the inter-restricting mechanism between independent, different levels of supervision authorities in ancient supervision systems, with a view to enrich the concept of procuratorial supervision in China, ensure the procuratorial supervision to be authoritative and functional, and build up a set of reasonable internal power-restricting mechanisms. In the meantime, this book provides a solid theoretical ground for procuratorial supervision on administrative power by examining the Chinese traditional legal culture and foreign procuratorial supervision systems from a comparative perspective, and combing with Chinese realities. Within the current Chinese legal framework, this book rethinks and reconstructs the paradigm of procuratorial supervision on administrative power, defines the

reasonable scope of such supervision, and designs appropriate procedures in a way that preserves the necessity, limitedness, and modesty of procuratorial supervision. In summary, while acknowledging the supreme status of Chinese Constitutional Law and taking into account the reality of economic and social transition and legal reform in China, this book attempts to construct the theoretical and institutional framework of administrative procuratorial supervision by critically assimilating the essence of traditional legal culture and drawing on the rationality of western democracy and power restriction.

This book is divided into ten chapters.

Chapter One analyses the Yushi supervision system in imperial China and extracts the merits of the traditional systems. It reviews the evolving process of the traditional supervision systems from the origin to the development to the demise, and investigates the source of power, the nature, the status, and the role of traditional supervision power as well as the separation and restriction mechanism within the supervision systems. Using historical research methods, this chapter dialectically examines the value of supervision on administrative power in traditional supervision systems, and argues that in imperial China, supervision power was the extension of royal authority, meaning that it served the interests of the King and the ruling bureaucracy. Meanwhile, the traditional supervision authority adopted an independent, vertical administration system, with the chief supervisor having no power to intervene in the appointment of individual supervisors, thus ensuring the supervision power to be effectively performed. The independence, vertical administration, and authoritativeness of the traditional supervision systems are merits that deserve the use for reference in our current system. This chapter also studies the transformation of traditional supervision systems, revealing the root difference between traditional supervision power as monitoring check and modern procuratorial power as judiciary check.

Chapter Two compares the Chinese traditional supervision systems with the power check system in modern West, with a view to draw on the successful experience in foreign countries. Based on the comparison, this chapter

discovers the difference between the two: tradition supervision power in imperial China as a form of royal authority is a collective supervision on all other state powers including administrative power, whereas the power check system embedded in western constitutional democracy rests on the limitation of royal power and the separation and restriction of various powers. Western countries have the natural law tradition since long, and the power check system as part of the Congress's legislative power, such as the Parliament Commissioner system, represents the restriction of legislative power on administrative power, because they are separated. This differs from the Chinese traditional supervision power that overlooks the use of administrative power. Either the procuratorial power in Britain and the US, or that in European continents, reflects the restriction of power, though with certain supervision effects, suggesting a pattern of weak supervision and strong restriction. Nevertheless, western countries had realized the shortcomings of power separation and the significance of the independence of supervision power. Consequently, they began simulating Swede in setting up Parliament Commissioner to strengthen the supervision on administrative power and thus ensure the specificity and independence of state supervision power, which has become a trend.

In imperial China, judiciary power and administrative power had been mixed together, and prosecution and trial mixed together, for such a long time that the implantation of western procuratorial system centered on prosecution failed in China. But there formed the Yushi supervision system, mainly comprised of systems concerning investigation and impeachment of officers and systems concerning supervision restricting trial, where the supervision power partly correlated with procuratorial power. After the demise of the Qing Dynasty, China introduced the system separating judiciary power from procuratorial power and started the democratization of litigation, thus gradually establishing the procuratorial system in China. Strictly speaking, there was no procuratorial system in imperial China. The procuratorial system in the new founded People's Republic of China, completely abolishing the National Party's

“Six Laws”, was established on the foundation of Leninist legal supervision theory in combination with the Chinese realities, and thus influenced by power centralism and planning economy. For that, general supervision in China is an example. This pattern seems more and more obsolete relative to the spirit of civil society and contract freedom in modern China. This chapter argues that the special legal supervision power of the procuratorial authority is an independent public right, independent of various interests, and should follow the principle of limited supervision to pursue justice. The operation of this procuratorial power should revolve around the axis of public right with the aim of restriction of power, and ensure the administrative power running in the legal orbit. In practice, it is important to prevent the over-expansion of the procuratorial power from inappropriately intervening in other state powers and leading to the waste of the scarce resources in supervision that contradicts the original purpose of setting up state supervision authority.

Chapter Three analyses the constitutional basis and the legal rules of using procuratorial power to supervise administrative power in China, suggesting the necessity of administrative procuratorial supervision. Through a doctrinal analysis of the Chinese laws, this chapter argues that the NPC enjoys the complete state power that is divided into legislative power, administrative power, judiciary power, procuratorial power, and military power. The NPC reserves the legislative power while conferring the other powers respectively to administrative authority, judiciary authority, procuratorial authority and military authority, which are assigned by the NPC and report to the NPC. Within this power framework, the NPC and its Standing Committee obviously can supervise all the other powers, but this supervision could only be macro and focus on matters with significant national and social influence, instead of regular and specific supervision. Hence, there is need to set up a special agency responsible for legal supervision, in order to specify the macro supervision of the NPC. That is the procuratorial authority, empowered to supervise the use of other state powers including administrative power. Judiciary power may also be a restriction on administrative power through