A STUDY ON CHINA'S SYSTEM OF
INVESTIGATION SUPERVISION

中国侦查监督制度研究

巩富文/著

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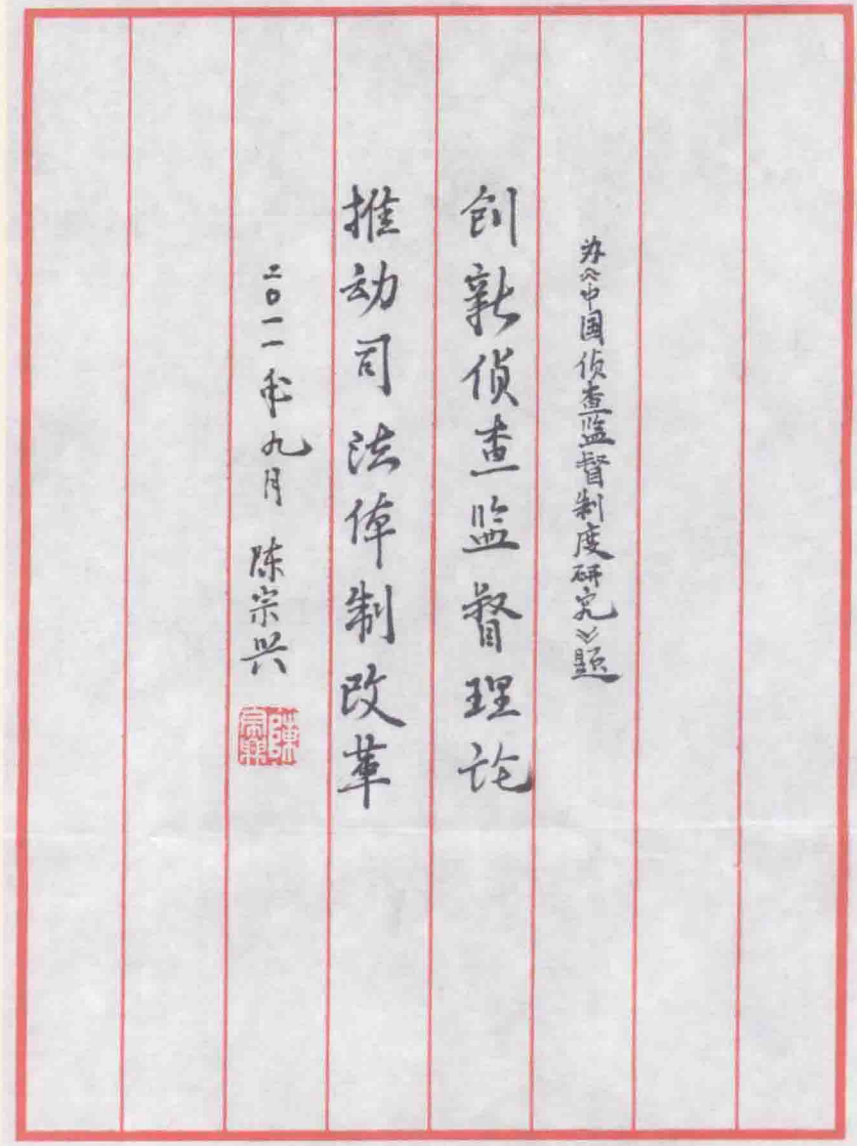
主持和承担国家社会科学基金项目、最高人民检察院检察理论研究重点课题、最高人民检察院检察应用研究重点课题、联合国开发计划署与监察部合作项目、教育部“十五”哲学社会科学研究重大课题攻关项目、陕西省哲学社会科学研究“十五”规划项目、中国法学会“深入研究党的十八届四中全会精神”重点专项课题等国家级和省部级研究课题80余项。著有《中国侦查监督制度研究》、《中国古代法官责任制度研究》两部个人专著，主编、合著《有序民主论——当代反腐建廉新战略构想》、《陕甘宁边区的人民检察制度》等20余部学术著作。在《人民日报》、《光明日报》、《中国法学》、《人民检察》等百余种报刊发表论文300余篇。荣获“第三届全国统战部门优秀文章奖”、“农工党中央优秀调研报告”、“全国第五届中青年诉讼法学优秀科研成果专著二等奖”、“全国检察基础理论研究优秀成果三等奖”、“陕西省第五次哲学社会科学优秀成果三等奖”等50余项省部级以上优秀成果奖。2003年被中组部遴选为第一批“西部之光”访问学者。2006年被中国法学会确定为第五届“全国十大杰出青年法学家”候选人。2013年被最高人民检察院授予“全国检察业务专家”称号。

提交的“全面推进依法治国”、“制定《法律监督法》”、“修改《人民检察院组织法》”、“提高司法公信力”、“完善环境公益诉讼制度”、“加强反腐败立法”、

作者简介

“高举司法反腐利剑，彻底解决‘不敢腐’问题”、“制定《违法行为教育矫治法》”、“制定《生态文明建设法》”、“加速推进丝绸之路经济带建设”、“加快推进医疗体制改革”等80多个提案，分别被全国人大、全国政协采纳。其中，“加快制定《旅游法》”、“修改《立法法》”、“修改《预算法》”、“修改《行政诉讼法》”、“修改《环境保护法》”等25个提案，被全国人大吸纳为法律；“尽快防治大气污染”提案，被2013年国务院《大气污染防治行动计划》采纳；“构建和谐医患关系”提案，被2014年国务院《政府工作报告》吸收；“加快西部地区自然资源开发立法”提案，被全国政协评为“优秀提案”；“制定《法律援助法》”提案，入选《把握人民的意愿——全国政协十二届委员会提案及办理复文选（2014年卷）》一书；“全面推进依法治国”提案，入选最高人民检察院政治部编印的《依法治国与检察工作》一书；“制定《西部地区开发法》”等提案，被农工党“十三大”、“十四大”报告列为“重大提案”；“尽快改革我国私家车安全检验制度”提案，推动公安部、国家质检总局联合发布了《关于加强和改进机动车检验工作的意见》。2001年、2008年两次被农工党中央评为“全国参政议政工作先进个人”。2006年获农工党中央颁发的“全国社会服务工作突出贡献奖”。

2013年6月14日，参加全国政协“公正司法”专题座谈会，并作了“确保公正司法亟需解决四个问题”的发言。2014年5月6日，2015年5月12日，先后两次参加中共中央政治局常委、全国政协主席俞正声主持的全国政协“确保依法独立公正行使审判权、检察权”双周协商座谈会、“推进人民法院司法体制改革”专题协商会，并分别作了“推动省以下地方检察院人事统一管理应注意三个问题”、“严格入额标准，确保法官队伍精英化”的发言。2015年3月11日，在全国政协十二届三次会议上作了“抓好‘关键少数’，推动法治进程”的大会发言。中央电视台《新闻联播》、《朝闻天下》、《新闻直播间》等节目多次报道了巩富文的参政议政成果。



陈宗兴：
十一届全国政协副主席，教授，博士生导师。

序

陈光中*

欣闻富文教授撰写的又一部个人学术专著《中国侦查监督制度研究》即将由法律出版社出版，这是一件令人欣喜的事情。

侦查权作为现代司法权的重要组成部分，与保障其实施的侦查活动能否依法进行，往往直接关系着惩罚犯罪与保障人权两大刑事诉讼目的实现与否。因此，各国都在寻求各种途径加强对侦查活动的控制与监督，并依据其政治、经济、文化及社会形态的差异，形成了各自不同的监督理念，陆续颁布了适合本国特点的法律。反观我国的侦查监督制度，无论是在立法层面，还是在实践环节，抑或在相关理论研究上，都还显得比较薄弱，亟须大胆探索、创新和改革。近年来，中央着力推进的司法体制改革、2013 年实施的我国新《刑事诉讼法》和党的十八届三中、四中全会先后通过的《中共中央关于全面深化改革若干重大问题的决定》、《中共中央关于全面推进依法治国若干重大问题的决定》在这方面均进行了不同程度的改革完善。富文教授撰写出版其学术专著《中国侦查监督制度研究》，真可谓适逢其时、再予推力，无疑具有较大的时代价值和实践意义。

这部专著是富文在其博士学位论文基础上精心修改而成的。

五年前，在他的博士学位论文答辩会上，该博士学位论文就以“选题有眼力、内容有创新、论述有功力”而博得了七位答辩专家的一致赞誉，并将其评定为优秀博士学位论文。作者大量搜集掌握了我国侦查监督制度的有关立法和司法实践材料以及理论成果，广泛参考借鉴了联合国有关法律文件和法国、德国、英国、美国、意大利、荷兰、俄罗斯、日本、韩国、越南、新加坡等

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十几个国家以及我国香港、澳门、台湾地区有关侦查监督的立法、理论与经验，十分熟练地采用了比较研究、历史研究、实证研究、规范分析、统计分析和案例分析等多种研究方法，重点对我国侦查监督制度的含义、特点、原则、发展历程、设计依据、存在问题、改善思路、模式选择、体系构建等问题首次进行了深入系统的研究和客观全面的阐述。其中既有宏观的扫描与俯瞰，又有微观的精心构造与雕琢，既有深层次的理论分析，又有丰富的实践经验，建立了比较系统科学的侦查监督理论体系。尤其是作者发挥在检察机关担任领导的优势，认真做调查研究，有数据，有案例，有图表。更值得肯定的是该专著针对当前侦查监督立法、司法工作中存在的缺陷和问题，提出了许多创新性建议，对进一步改革和完善我国侦查监督制度具有十分重要的参考价值和借鉴作用。因此，这是一部很有分量的学术专著。该专著的选题、取材、体例编排、研究方法乃至分析阐释显示出作者具有较强的学术洞察力、资料驾驭能力和脚踏实地的务实精神以及开拓创新的勇气。本书体系完整，逻辑严谨，材料翔实，脉络清晰，行文流畅，读来令人感到兴味甚浓。

二十八年前，富文开始在我的指导下就读刑事诉讼法学硕士研究生，毕业后分配到西北大学，从事刑事诉讼法学教学和科研工作。36 岁，成为该校最年轻的教授。39 岁，担任了法学院院长、知识产权学院院长。41 岁，调任陕西省人民检察院副检察长。其间，曾两次返回母校继续跟随我学习：一次是 2003 年 12 月，他被中组部遴选为第一批“西部之光”访问学者来校研修刑事诉讼法学，我又一次做了他的指导老师。另一次是 2007 年 9 月，他去省检察院任职还不到半年时间，再次返回母校，在我的指导下就读诉讼法学博士研究生，并于 2010 年 5 月顺利通过了博士学位论文答辩。在我的众多弟子中有他这种经历的，确实还不多见。富文担任省检察院副检察长期间主管全省侦查监督工作，这为他积累大量实践素材提供了机会，为该专著的撰写创造了良好的条件，也最终成就了这部专著。作为他的博士生导师，我深为他的研究成果和进步感到由衷的欣慰，更愿他在今后的检察工作和科学研究中锲而不舍，更上一层楼！现在，专著出版，相信能得到法学界和实务部门的广泛关注与欢迎。

是为序。

2015 年 3 月 1 日

中文摘要

本专著除引言和结论外，分上、下两篇，共八章内容。

上篇总论，包括第一章至第四章内容，主要是侦查监督制度的基本理论研究，重点探讨了我国侦查监督制度的含义、特点、原则、发展历程、设计依据、存在问题、改善思路、模式选择、体系构建等问题。该篇对于分论篇中各项具体制度具有重要指导作用。

下篇分论，包括第五章至第八章内容，主要是对侦查监督制度的专题研究，重点对我国侦查监督制度的四大组成部分，即刑事立案监督制度、侦查行为监督制度、强制措施监督制度和职务犯罪侦查监督制度进行了分析论证。其中，第五、六、七章构成该制度的主干，第八章则是其特殊性问题。

现简要说明如下：

第一章　侦查监督的概念和原则　该章首先分析了侦查监督的概念，认为我国的侦查监督是指检察机关为规范侦查权的行使和控制侦查权的滥用，在刑事诉讼过程中对侦查机关为指控犯罪而进行的立案、证据调查和采取强制措施以及有关侦查行为依照法定的权限和方式进行的一种监察和督促活动。该监督具有司法性、专门性、权力制约性、程序性、救济性五个特点。其次，阐释了依法监督、客观公正、全面监督、适时监督、注重实效五项侦查监督原则的含义、要求和具体体现。

第二章　中国侦查监督制度的发展历程　该章认为，六十余年来我国的侦查监督制度经历了新中国成立初期和改革开放以来两个不同发展时期。前一时期可以划分为探索、确立、波折、中断四个阶段，其教训多于经验。后一时期可划分为重建、改革、发展、创新四个阶段，其经验多于教训。我国侦查监督制度的发展呈现出了从粗疏到精细并逐步完善，内容从模糊到清晰，方法从单一到多样化，对象逐渐延伸至检察机关自侦部门，并实现了同步监督的鲜明的时代特点。其发展历程对我们的启迪意义是：必须毫不动摇地坚持和发展中国特色社会主义检察制度；必须与时俱进地健全和

完善我国侦查监督制度。

第三章　中国侦查监督制度的宏观审视　该章首先论证了中国侦查监督制度设计的依据。认为侦查权的特殊性决定了对其进行监督的必要性，检察机关掌控侦查监督权的体制完全符合我国宪政体制要求，其因利益中立和宪法定位独特而具有中立性。其次，分析了我国侦查监督制度在内容与范围、手段与措施两个方面存在的主要问题，如立案监督缺乏法律责任保证，撤案、不当羁押、消极侦查以及多数强制措施和侦查行为尚未纳入监督范围，法律评价权监督不够周延，建议权的程序和效力明显不足，知情权和调查权严重缺位等。最后，论证了如何建立科学的侦查监督体系问题。认为它应当包括检察机关侦查监督权体系和侦查权社会控制体系两个方面。前者由法律评价权和建议权所构成；后者则包括人大监督、组织监督、检察监督以及权利性监督和其他社会监督。

第四章　当代域外侦查监督模式的比较与借鉴　该章认为，当代域外侦查监督模式主要有四种类型：一是检察主导型侦查监督模式，以法、德和我国台湾、澳门地区为代表；二是司法审查型侦查监督模式，以英、美和我国香港地区为代表；三是融合型侦查监督模式，以日本为代表；四是后强职权型侦查监督模式，以俄罗斯为代表。它们之间既有相同或相似之处，也因其政治、经济、文化及社会形态的差异而呈现出明显的不同。我国则应当坚持以检察机关监督为主的侦查监督模式。该侦查监督模式无论是在监督主体和权力来源上，还是在监督的范围和方式上，均区别于上述四种当代域外侦查监督模式。

第五章　刑事立案监督制度研究　该章首先开宗明义地指出，我国的侦查监督活动应当始于刑事立案监督。接着阐述了刑事立案监督的概念、特点及其理论和法律依据，考察、比较了西方两大法系刑事立案监督的立法与实践，探讨了刑事立案监督的基本内容，认为它应当包括对“应当立案而不立案”的监督、对“不应当立案而立案”的监督以及对“立案后作治安处罚案件”的监督三个方面，讨论了刑事立案监督应遵循的受理、审查、调查、处理和救济等程序，在考察分析我国刑事立案监督制度现状的基础上，从刑事立案制度运行环境、刑事立案监督标准、刑事立案调查权制度、刑事立案救济措施四个方面论证了进一步改革和完善的问题。

第六章　侦查行为监督制度研究　该章辨析了侦查行为与侦查活动、

侦查策略、侦查措施、侦查手段、侦查技术以及侦查方法诸概念的异同，阐述了侦查行为监督的概念与构成要素；反思了我国传统的侦查行为监督理念，提出了应确立正当程序与犯罪控制相结合、权力制约权力与权利制约权力相结合、强制侦查行为监督与任意侦查行为监督相结合的新监督理念；比较了英、美、法、德等国的侦查行为监督制度；重点研究了我国传唤监督、搜查监督、扣押监督、侦查讯问监督、询问监督、特殊侦查措施监督、诱惑侦查监督、强制采样监督、辨认监督、侦查实验监督十种侦查行为监督制度，并从明确侦查行为可诉性、实行司法令状制度、完善我国非法证据排除规则三个方面论证了改革与完善的初步设想。

第七章　强制措施监督制度研究　该章首先阐述了强制措施监督的含义与构成要素，分析了影响其完善的制约因素；接着考察了西方两大法系的强制措施监督制度，指出其以司法令状确立司法权对强制措施的监督、强化对羁押的司法审查、注重对强制措施的司法救济等成功经验对完善我国强制措施监督制度具有重要参考作用和借鉴价值；分专节具体分析了我国强制措施监督制度主要存在拘传监督的法制化不足、监督效能有限、缺乏权利救济机制，公安机关内部对拘留的监督有限、而检察机关则缺乏对它的实质性监督，检察机关未能全面实施对逮捕的监督，取保候审决定机关的自由裁量仍难制约，监视居住监督中尚未真正建立司法审查机制等问题；提出并论证了应当完善我国强制到案措施体系，建立对适用强制措施的司法审查机制，切实加强对滥用拘留权的监督，完善审前羁押期限延长审查制度，确立违法羁押程序性制裁机制，完善取保候审决定程序并使其司法化，建立对被追诉人的权利救济机制等改革设想。

第八章　职务犯罪侦查监督制度研究　该章首先指出职务犯罪侦查监督具有监督主体与监督对象的一致性、监督形式的内外结合性、监督方式的事后性与书面性、监督缺乏被追诉方有效参与四个特征。其正当性基础在于：保护被追诉人合法权利的需要，正当程序理念的体现，有效打击职务犯罪的要求，现阶段司法改革的必然。该章认为，我国职务犯罪侦查监督中存在外部监督薄弱、内部制约面临困境、监督方式多为事后监督、监督程序不完善等问题。当务之急是应尽快完善职务犯罪侦查监督方式，强化外部监督和内部制约机制；建立职务犯罪特殊侦查行为监督制度，实现特殊侦查措施的法制化，确立适用的比例原则、相关性原则与审批原则，确立对其进行

审查监督的程序和规则，赋予犯罪嫌疑人寻求救济的途径；完善职务犯罪侦查中的强制措施监督制度，重点解决好其执行主体与监督主体的同一性问题和职务犯罪案件审查决定逮捕权“上提一级”后出现的新问题。

英文摘要

A STUDY ON CHINA'S INVESTIGATION SUPERVISION SYSTEM

ABSTRACT

This monograph focuses on China's Investigation Supervision System. It comprises two sections-the general introduction and the specific review except for the introduction and the conclusion, containing eight chapters.

As the first section, the general introduction from Chapter One to Four is intended for an overview of the basic theory of China's Investigation Supervision System, especially it goes further into the concepts, characteristics and principles of investigation supervision; the development courses; design consideration; the existing problems with the system; refining ideas; mode selection; system construction . This part plays a major guiding significance for specific systems.

The remaining four chapters make up the second section , the specific review, which focuses on an analysis of particular aspects of China's Investigation Supervision System in greater detail, especially in relation to its four important components, such as the supervision system for placing criminal cases on file for investigation and prosecution, the supervision system for investigation activities, the supervision system for enforcement measures, and the supervision system for duty-crimes . Actually the parts of Chapter Five, Six and Seven are the critical components of the monograph, whereas Chapter Eight focuses on some exceptional cases in terms of China's Investigation Supervision.

Here are some brief descriptions about eight chapters.

In Chapter One, the monograph focuses on the concept of investigation supervision and reveals the basic meaning and characteristics of China's Investigation Supervision System. It defines the concept of investigation supervision as the activity of supervision and enforcement where the procuratorial organs regulate and limit the abuse of investigation power during the course of criminal prosecution: i. e. for the purposes of establishing the allegation against the accused, the initiation of the case, evidence collection, adopting injunctive measures, and providing that other investigation activities must be carried out in accordance with the powers and methods provided by the law. The supervision by China's procuratorial organs of the exercises of powers of investigation has attributes to justice, specialisation, empowerment, procedure and relief. Secondly, this monograph explains the principles and systems of supervision of investigations. Such principles refer to the basic principles of conduction that apply to the whole process of investigation supervision and that procuratorial organs are required strictly to observe when they are carrying out investigation supervision. There are essentially five principles of the supervision of investigations: supervision in accordance with laws, objectiveness and fairness, overall supervision, timely supervision, and focusing on effectiveness.

In Chapter Two, the monograph focuses on the development courses of China's Investigation Supervision System over the past six decades. In general, China's Investigation Supervision System has seen two different historical periods of development-the first three decades since the founding of new China, and the three decades since China's reform and opening-up. The first three decades of development of China's Investigation Supervision System can be further divided into four phases-exploration; establishment; twists and turns; and suspension. During this period the monograph presents many more lessons available than existing experience for the Investigation Supervision System. The later three decades of development of China's Investigation Supervision System can also be further divided into four phases-rebuilding; reform; development;

and renovation. During this period the monograph also presents many more existing experience than lessons available within the Investigation Supervision System. Over the past six decades, China has seen its investigation supervision system achievement, by gradual improvement, five distinguishable contemporary characteristics: moving from a rough to a detailed system; moving from blurred to clear contents; moving from a unitary to a manifold approach; expanding the investigation departments of prosecutorial organs; and realizing simultaneous supervision. The long journey of development has come to two major inspirations: the prosecutorial system with Chinese characteristics must be unswervingly adhered to and developed; the Chinese Investigation Supervision System must constantly be improved to keep pace with the times.

In Chapter Three, the monograph focuses on a microspical review over China's system of investigation supervision. The necessity of imposing supervision over the investigation is determined by the particular nature of the power of investigation. It is in accordance with China's constitutional system for procuratorial organs to exercise the power of investigation because of its neutrality in constitutional position and interests. Then, the main problems existing in China's current system of investigation supervision are discussed, which includes the lacking of legal responsibility in supervision, the exemption of supervision on withdrawing a case, improper custody imprisonment, negative investigation supervision, usages of compulsory measures, and deficient regulation on legal evaluation, legal suggestions, and right to know. Last, the potential routes for further reform to perfect China's Investigation Supervision System are discussed. It suggests that a scientific Investigation Supervision System should cover two aspects of contents: the improvement of the supervisory powers of the procuratorial organs, and the improvement of the system of social control over investigative powers. The powers within the Investigation Supervision System include the power of legal review and the power of suggestion.

In Chapter Four, the monograph focuses on a comparison of, and lessons learned from, current Investigation Supervision Systems outside Mainland

China. This part describes the view that Investigation Supervision Systems could be divided into four models in general: Prosecution-led supervision model, represented by France, Germany, Taiwan and Macao; Judicial review supervision model, represented by United Kingdom, United States and Hong Kong; Integration supervision model, represented by Japan; and Post Strong-Authority supervision model, represented by Russia. Though with different appearances and varied extents, these models have surprising resemblances to each other.

The Investigation Supervision System in China should develop its current supervision model of taking the prosecutorial organs as its leading force in investigation supervision, which is obviously distinguished from the other four current foreign models in terms of the subject, sources of authority, and the ranges and measures of supervision.

In Chapter Five, the monograph focuses on a discussion of the initiation of the case supervision system. First of all, it is pointed out that the investigation activities begin with the supervision over filing a case. Then it elaborates on the concept, characteristics, rationale and legal basis of the supervision of criminal case filing. It then discusses the legislation and practices of various modern countries on the supervision of criminal case initiation and draws comparisons with the legislation and practices in China. It also discusses some basic contents such as how the following situations may be supervised: where a criminal case that should have been initiated for investigation was not initiated; where a criminal case that should not have been initiated was initiated erroneously; and where after initiation, a case receives a sentence of public security punishment. This part reviews the supervisory procedures as to criminal case initiation, such as the acceptance, review, investigation or handling of a case, and remedial actions, etc. Finally, it analyses the status quo of China's system of supervision of criminal case initiation and discusses how to further reform and improve the system in terms of the operating environment, the standards of supervision, the system of investigation power, and remedial measures.

In Chapter Six, the monograph focuses on the study of the Investigation

Supervision System. This part begins with a definition of the acts of investigation, and then compares the acts of investigation activities, investigation tactics, investigation measures, investigation means, investigation technology, and investigation methods. This part also sets out the concept and composition of supervision over the acts of investigations, reflects on China's traditional concept of supervision over acts of investigation based on control of crime, and proposes the timely establishment of a new concept of supervision over acts of investigation which combines proper procedures with crime control, power restrained by power with power restrained by rights, and compulsory supervision over acts of investigations combined with discretionary supervision over acts of investigations. It compares the systems of supervision of acts of investigation in the UK, the USA, France, Germany and other countries, comments on the operation of China's ten types of supervision over acts of investigation (including supervision over summons; supervision over searches; supervision over detention; supervision over investigation and interrogation; supervision over enquiries; supervision over special investigation measures; supervision over inductive investigation; supervision over compulsory sampling; supervision over identification; and supervision over investigation experiments), and demonstrates the preliminary concept of reforming and perfecting the system of supervision of acts of investigation in China from three perspectives: clarifying the possibility of being sued due to any acts of investigation, implementing the system of judicial writs, and perfecting the rules of eliminating illegal evidence.

In Chapter Seven, the monograph focuses on the study of the enforcement supervision system. This part sets out the definition and the composition of the supervision of enforcement measures. It analyses the factors restricting the perfection of China's system of the supervision of enforcement measures, while it also reviews the systems of supervision of enforcement measures in the two major Western legal systems. This part identifies the practices, the successful experience and the reference value in these systems, such as using judicial writs to establish the system of the jurisdiction's supervision over enforcement