公诉裁量权研究

石晓波◎著

GONGSU CAILIANGQUAN YANJIU

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内容提要

本书以刑事公诉案件为视角，采用历史与逻辑相一致的研究方法、比较的方法和系统论的方法，对作为国家权力之一的公诉裁量权进行了全面的分析和探究。

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摘　要

刑事案件公诉裁量权是指检察官依据法律的授权，根据本人对案件情况的认识和理解，进行权衡和裁量，从而最终作出决定是否进行起诉的权力。公诉裁量权作为刑事诉讼运行机制中的关键性枢纽，与惩罚犯罪、保障人权以及预防犯罪密切相关，具有非常重要的意义，它同刑事诉讼目的论、价值论同样也有着极为重要的联系。现代刑事诉讼制度的重要特征之一，就是检察官在公诉活动中拥有一定程度的自由裁量权，随着刑事诉讼制度的不断发展与社会形势的不断变化，从总体上看各国赋予检察官的公诉裁量权有逐渐扩大的趋势。与国外相比较，我国法律赋予检察官的公诉裁量权是比较有限的，适用的案件范围极为狭窄，在制约机制的设置方面也不够科学，无法实现刑事诉讼对公正和效率的价值要求。因此，对我国检察官的公诉裁量权进行扩张并加以合理规制应是必然的走向。澄清理论认识中的种种误区，构建科学合理的公诉裁量权制度已成为我们迫切需要研究的重大课题。本书在立足于我国立法规定和司法实践的基础之上，通过对国外的先进经验和成果加以借鉴，对我国公诉裁量权制度进行理性的分析，提出了完善我国公诉裁量权的理论见解与制度构想。

本书共由八章组成。

第一章对公诉裁量权进行了概述。本章首先对自由裁量权的概念进行分析，在法学理论和司法实践中，自由裁量权作为一个运用十分广泛的概念，简要介绍了自由裁量权的发展脉络，并厘清了公诉裁量权的概念；对于公诉裁量权的特征主要从法定性、灵活性、独立性和效益性等几个方面进行展开。对于与公诉裁量权相关概念的区别主要分析了其与公诉裁量以及检察裁量的区别，并在此基础上对公诉裁量权的法理基础进行论证，主

要从起诉便宜主义理论、诉讼效率理论及诉讼合目的性理论三个方面加以论证。在本章的最后，明确了公诉裁量权在行使过程中需遵循的四个原则：保持客观公正原则、维护公共利益原则、体现刑事政策原则和一般预防与特殊预防并重原则。

第二章对公诉裁量权的模式进行了细致的考察。由于受法律传统和价值观念等因素的影响，在大陆法系国家，一般以公诉法定模式为主，公诉便宜模式为例外；而在英美法系国家，则一般以公诉便宜模式为原则，公诉法定模式为例外。然而，近些年来，无论在大陆法系国家还是英美法系国家，公诉法定模式和公诉便宜模式更多体现的是一种相互融合的趋势，体现在各个国家的具体制度当中。本章分别从公诉法定模式和公诉便宜模式的内涵、制度环境、典型立法例及模式所存在的利弊进行详细论述，在典型的立法例中，分别选出了美国与德国作为代表性的国家对公诉法定模式与公诉便宜模式进行了分析。随后在第三节中对两种公诉裁量权模式的融合趋势进行研究，在对两种公诉裁量权模式的融合趋势制度体现进行分析的基础之上，对模式的融合进行了多个角度的评价。最后则对公诉裁量权的发展趋势进行了详细论述。并得出了两大法系国家的检察官公诉裁量权在内容和行使模式上越来越朝着趋同的方向发展的结论。

第三章是对公诉裁量权的制度样态进行介绍。检察官公诉裁量权的内涵相当丰富，权限范围也相当广泛，既包括在审前阶段裁量决定是否提起公诉以及如何提起公诉的裁量权，也包括在审判阶段变更起诉的决定权等。虽然各国由于历史文化传统以及政治、法律制度等方面存在差异，检察官享有的自由裁量权的权限范围并不完全一致，但是在非刑罚化的世界发展趋势之下，面对犯罪数量猛增和司法资源有限性之间的矛盾，各国普遍采取加强检察官公诉裁量权，特别是加强检察官在审前程序中过滤和分流案件的做法，使得各国检察官自由裁量权在权限内容上也越来越趋向一致。本章根据诉讼阶段的不同分别从审前程序阶段和审判程序阶段对公诉裁量权的制度样态加以分类。在审前程序阶段的公诉裁量权中，制度样态主要体现为不起诉裁量权、选择起诉权、辩诉交易权和豁免权等，而在审判程序阶段的公诉裁量权中，制度样态则主要体现在公诉变更权、公诉撤回权

和公诉追加权等。在对制度样态进行介绍时注重对其历史渊源的介绍和其发展趋势的分析。

第四章是公诉裁量权的制约因素。在法律适用领域，纯粹的裁量自由是没有的。起诉裁量权都是弱式的相对的自由裁量权，检察官行使公诉裁量权除了受到证明标准和公共利益标准等显性标准的规范和制约之外，还受到诸如检察体制、诉讼构造以及公共政策等潜在因素的影响，而后者对公诉裁量权的影响可能还要更大一些。公诉裁量权的制约与控制是各个国家在构建公诉裁量权制度时所必须面对的一个难题。本章将能够对公诉裁量权产生制约作用的因素分为三类，分别为检察体制、诉讼结构和公共政策。

第五章是关于公诉裁量权控权模式的研究。现代刑事公诉制度在扬弃起诉法定主义的不合理因素的同时赋予公诉机关灵活的公诉裁量权。但是公诉裁量的灵活性也伴随着两大致命缺陷：一是公诉机关可能会因此而滥用公诉裁量权。容易因人为的问题，导致权力滥用，对于被害人及社会之一般利益将有损害。二是司法威信丧失。若无法确保起诉之公平性，将使一般人对于刑事司法威信丧失信心。所以，公诉裁量权也可能与平等保护的价值相对立，因此它是一把双刃剑。为保障公诉裁量权的正确行使，必须采取适当的方法加以控制。本章首先对控权的必要性进行了分析，并对公诉裁量权滥用的表现形式以及控制的一般原则进行了叙述。第二节和第三节分别介绍了控权的两种模式，一个是程序制约模式，另一个是体制制约模式。前者具体包括建立公诉指南，严格程序条件，缩小裁量范围和增加审批环节。后者则包括设置检察委员会，设置检察选民，确立不起诉听证制度以及确立司法审查机制。

第六章是我国公诉裁量权的制度描述与模式定位。我国关于公诉裁量权的制度主要体现在刑事诉讼立法之中，《刑事诉讼法》中有关检察机关提起公诉和不提起公诉的裁量权程序规定为我国检察机关公诉裁量权的建立提供了基本的框架。本章首先从历史的角度追溯了我国刑事诉讼立法上对公诉裁量权的制度沿革，并介绍了 1979 年和 1996 年《刑事诉讼法》中对公诉裁量权的规定。其次则论述了我国刑事诉讼中公诉裁量权的制度样态

和实践样态，制度样态主要包括变更公诉权、追加公诉权、撤回公诉权和酌定不公诉权，实践样态则包括暂缓公诉制度、量刑建议制度以及刑事和解制度。最后对我国公诉裁量权模式的定位从制度到实践层面都进行了研究。

第七章是我国公诉裁量权的制度反思。从长期以来的司法实践看，我国现行的公诉权制约机制仍存在诸多问题。在这其中，既有立法漏洞方面的原因，也有具体的制度设计及程序保障方面的因素。本章从三个方面展开论述，一是公诉裁量体制制约的缺陷，主要包括："公诉转自诉"对公诉裁量权的影响，不起诉听证制度的效果，司法审查机制的缺失，主诉检察官制度对公诉裁量权的影响以及复议复核制度的缺陷；二是公诉裁量权的制度缺陷，包括公诉裁量权适用对象、时间、范围、决定的效力以及制度种类等方面存在的不足；三是公诉裁量程序制约的缺陷，主要包括：类罪统一公诉指南的阙如，公诉裁量审批程序的缺陷以及公诉裁量基准的模糊。

第八章是我国公诉裁量权的制度重构。我国已经面临并将面临更为严重的司法资源有限性和案件压力过重之间的冲突，因此，必须从总体上扩张检察机关的公诉裁量权。针对我国司法实践公诉裁量权的运作状况，笔者主张局部调整、整体扩张的改革思路。本章共分为四节。第一节对检察体制中需完善的方面进行了探讨，包括检察院领导体制的转变、检察权的重新配置以及检察官角色的调整。第二节则在第一节的基础上提出了完善我国现行公诉裁量权制度的设想，具体包括扩大公诉裁量的适用范围；废除公诉裁量权的实体效力；补充公诉裁量权的适用对象；增设公诉裁量权的制度种类。第三节则论述了公诉裁量程序制约的完善，具体包括建立统一公诉指南；确立类罪统一公诉政策；科学设置内部审批程序。最后分析了公诉裁量体制制约的完善，主要从五个方面进行了分析，包括增设强制公诉制度；完善检委会制约机制；重构不起诉听证制度；确立不起诉裁量的可诉性以及完善主诉检察官制度。

关键词：公诉裁量权；公诉便宜模式；控权模式；制度样态；制度重构

Abstract

Prosecutorial discretion of criminal cases is authorized by law, according to prosecutors' understanding of the circumstances of the case and understanding the balance and discretion, and ultimately make the decision whether prosecutor the criminals or not. In the modern country of rule of law, Prosecutorial discretion is the key point to run the criminal procedural mechanism in the criminal case process, it is related to punishment of crime, the purpose of protection of human rights and criminal penalties for crime prevention purposes, has very important role. The prosecutorial discretion, with the purpose of criminal proceedings on the value of important links. Activities of the Prosecutor in the indictment have certain amount of discretion is an important modern features of criminal procedure system, and, with the social situation changes and the development of litigation, national prosecutor's discretion has gradually expanded. Compared with foreign countries, the prosecutorial discretion in our country is very limited, the applicable scope of the case is still very narrow, restrictive mechanism is not scientific, it is difficult to adapt to the efficiency of criminal proceedings and the requirements of justice. Therefore, the expansion of the Prosecutorial discretion and reasonable restriction are unavoidable. Theoretical understanding to clarify the misunderstanding, build a scientific and rational system of public prosecutorial discretion has become an urgent need to study and solve a major issue. Based on the provisions of this legislation and judicial practice, learn from advanced foreign experience and results, through the discretion of the prosecutor's indictment rational analysis, the development and improvement of Public Prosecutorial

discretion of Prosecutors and the system concept of theoretical insights.

This paper is composed of the eight chapters.

The first chapter provides an overview of Prosecutorial discretion. In legal theory and judicial practice, the use of discretion as a very broad conceptThis chapter begins with the concept of discretion analysis, outlined the development context of discretion, and clarifying the concept of prosecution, characteristics and differences with other related concepts, and on this basis, the legal discretion of the prosecution demonstration basis, mainly from the theory of Prosecution, litigation and litigation Purpose efficiency theory to be demonstrated in three aspects. At the end of this chapter, the indictment clearly in the exercise of discretion to be followed during the four principles: to maintain an objective and fair principle and safeguard the public interest principle, embodied the principles of criminal policy, and both the general principles of prevention and special prevention.

The second chapter is about the mode of prosecutorial discretion. Due to legal traditions and values and other factors, in civil law countries, generally the main prosecution of statutory model, cheaper models as the exception indictment; in common law countries, are generally less expensive model for the principle of public prosecution, the prosecution of statutory mode is an exception. However, in recent years, both in civil law countries or the Anglo-American countries, the legal mode of indictment and prosecution more expensive model is reflected in the trend of mutual integration, reflecting the specific systems in each country were. This chapter separately from the indictment and prosecution of statutory model meaning cheaper models, system environment, a typical example and model legislation pros and cons of the existence of a detailed discussion of the legislation in a typical case, the United States and Germany were selected as representative of the State Prosecution cheaper models with the indictable statutory model were analyzed. Then in the third quarter on two prosecutorial discretion in the mode of convergence study, in the two prosecutorial discretion to integrated analysis of

trends in system reflects the basis of the integration of the model for the evaluation of a number of angles, Finally, prosecutorial discretion of the development trend in detail. And state prosecutors obtained two legal prosecution and the exercise of discretion in the content model more and more toward the direction of convergence of the conclusions.

The third chapter is a kind of public prosecution system of discretion states were introduced. Prosecution Prosecutor Discretion meaning very rich, very wide terms of reference, both in pre-trial stage in the prosecution discretion to decide whether and how the discretion of the prosecution, including prosecution at the trial stage changes such as the right decision. While countries due to historical and cultural traditions and political and legal system and so there are differences, prosecutors have discretion in the terms of reference are not identical, but in the non-punishment of the world development trend, the face of crime soared and the number of limited judicial resources and the contradiction between the universal indictment prosecutors discretion to take to strengthen, in particular, to strengthen the prosecutor in the filter and pre-trial diversion program, the practice of cases, making the country the discretion of the Prosecutor is also increasingly in the content rights more consistency. And, respectively, according to the different stage of the proceedings from the stage of pre-trial procedures and trial stages of prosecutorial discretion to classify a system like state. Stages of pre - trial proceedings in the prosecutorial discretion, the system mainly for the kind of state discretion not to prosecute, choose the right to sue, plea bargaining and other rights and immunities, and stages of the proceedings in the discretion of public prosecution, the system kind of state is mainly the right to change embodied in the indictment, indictment and prosecution the right to withdraw additional rights. Like state in the system are described by focusing on the introduction of its history and its development trend analysis.

The fourth chapter is about prosecutorial discretion' s constraint mechanism. Law applicable in the field of pure freedom is not discretionary. Prosecution

discretion is a relatively weak form of discretion, the prosecutor in addition to the exercise of discretion by the prosecution and the public interest standard of proof standards, norms and constraints of dominant standards, but also by the system, such as prosecution, litigation and public policy structures and other potential factors, which affect the discretion of the prosecution may be even larger. Prosecutorial discretion and constraints are built in various countries in the discretionary power system when the prosecution must face a difficult problem. This chapter will be able to produce constraints on the role of public prosecutorial discretion the factors into three categories, namely, the prosecution system, complaints are, including the rule of law, principles and procedures involved in the principle of moderation. Then a controller of Public Prosecutorial discretion model is divided into two categories: procedural constraints and institutional constraints model mode, respectively, the program model and institutional constraints restricting the procedure model to study the operation and systems building, and focus on analysis and evaluation of the two models their respective strengths and weaknesses.

The fifth chapter is about the prosecutial discretion of the controlling mode. Abandon the criminal prosecution system in the modern legal doctrine of unreasonable prosecution of factors while giving flexibility to the prosecution prosecutor discretion. However, the flexibility of discretionary prosecution is also accompanied by two fatal flaws: First, public prosecution and may result in abuse of discretion indictment. Vulnerable to man-made problems, leading to the abuse of power, for the general interests of the victims and the community will be compromised. Second, the loss of judicial authority. If you can not ensure the fairness of the prosecution, would make most people lose confidence in the criminal justice authority. Therefore, the prosecution discretion may also be opposed to the value of equal protection, so it is a double-edged sword. To protect the public prosecution the right to exercise discretion to take appropriate approaches to control. This chapter begins with the necessity of controlling the

analysis, and the indictment form of abuse of discretion and control of the general principles of the narrative. II and III controllers were introduced two models, one is constrained model program, and the other is the system constraint model. The former specific guidelines including the establishment of public prosecution, strict procedural requirements, narrowing the scope and increase the discretionary approval procedures. The latter includes the provision of Attorney Committee, set the Attorney voters, not to prosecute the establishment of judicial review hearing system and the establishment of mechanisms.

The sixth chapter is about the discretionary power of public prosecution system description and model positioning. Discretion on the indictment of the system is mainly reflected in the legislation of criminal proceedings, "Criminal Procedure" in relation to the prosecution to prosecute and not prosecute the discretion of the procedural requirements for the prosecution of discretion in the prosecution provided the basic framework established . This chapter first traces the historical perspective of criminal procedure legislation of discretion on the prosecution history of the institution, and introduced the Code of Criminal Procedure 1979 and 1996, in the discretion of the provisions of Public Prosecution. Secondly discusses the prosecution of criminal proceedings discretion of the State and Its Practice in the system state, system-like state includes the right to change the indictment, an additional right of public prosecution, the right to withdraw the indictment unfair and discretionary right to appeal, practical kind of state include the suspension of prosecution system of criminal sentencing system and the proposed settlement system. Finally, the prosecutorial discretion of the positioning mode to practice from the system level are studied.

The seventh chapter is about the system of prosecutorial discretion reflection. From the long judicial practice, the existing public right of control mechanism there are still many problems. In this one, both legislative loopholes reasons, there are specific system design and procedural safeguards aspects. This chapter discusses the three aspects, namely the defect prosecutorial discretion institutional

constraints, including: "Public Prosecution," the impact of discretion on the prosecution not to prosecute the effect of hearing system, the lack of judicial review mechanism, the system of the Chief Prosecutor Prosecutorial discretion and review the impact of the defect review system; Second, prosecutorial discretion deficiencies in the system, including the prosecutorial discretion for the object, time, scope, effectiveness and institutional types of decisions in areas such as the shortage; third indictment discretionary procedural constraints defects, including: class crimes lacking a unified guidelines for public prosecution, the crime class of the lack of a unified prosecution policy, the prosecutorial discretionary approval process defects and fuzzy basis prosecutorial discretion.

The eighth chapter is a system of prosecutorial discretion Reconstruction. China has faced and will face more serious cases of judicial resources are limited and the conflict between the pressure is too great, therefore, must be from the general expansion of prosecutorial discretion is the public prosecution authorities. Practice for the Prosecution of Judicial Discretion in working condition, the author advocates local adjustment, the overall expansion of the reform ideas. This chapter is divided into four sections. Section I of the prosecution system in the area to be improved were discussed, including changes in leadership structure Procuratorate, prosecutorial power to re-adjust the configuration and the Role of Prosecutors. Section II is presented in the first quarter on the basis of a sound discretion of the existing system of public prosecution the idea, including its discretion to expand the scope of prosecution; clear indictment discretion of the applicable conditions; prosecutorial discretion to extend the application of time; abolition of discretionary prosecution physical effect; additional indictment for discretionary object; additional types of public prosecution system of discretion. The third section discusses the constraints of the perfect indictment discretionary programs, specifically including the establishment of a unified prosecution guidelines; to establish a unified class of crimes prosecution policy; clear indictment discretionary basis for conditions and discretion; Science set the

internal approval process. Finally, institutional constraints of the prosecutorial discretion perfect, mainly from the five aspects of the analysis, including the addition of mandatory prosecution system; perfect control mechanism Review Committee; reconstruction of the hearing system not to prosecute; perfect Chief Prosecutor system.

Key words: Prosecutorial discretion; Doctrine of prosecuting discretion; The mode of restriction; The typical system; System reconstruction

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