

中国 检察权论略

检察权是国家权力的重要组成部分，加强检察理论研究是发展中国特色社会主义检察制度的必然要求，是积极应对当前检察制度和检察理论所面临的各种挑战的必然选择。

王俊 曾哲/著

中国检察出版社

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图书在版编目 (CIP) 数据

中国检察权论略/王俊, 曾哲著. —北京: 中国检察出版社, 2012. 12

ISBN 978 - 7 - 5102 - 0743 - 3

I. ①中… II. ①王…②曾… III ①检察机关 - 权力 - 研究 - 中国 IV. ①D926. 3

中国版本图书馆 CIP 数据核字 (2012) 第 247656 号

中国检察权论略

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出版发行: 中国检察出版社

社 址: 北京市石景山区鲁谷东街 5 号 (100040)

网 址: 中国检察出版社 ([www. zgjccbs. com](http://www.zgjccbs.com))

电 话: (010)68658769(编辑) 68650015(发行) 68636518(门市)

经 销: 新华书店

印 刷: 三河市西华印务有限公司

开 本: A5

印 张: 9.75 印张

字 数: 249 千字

版 次: 2012 年 12 月第一版 2012 年 12 月第一次印刷

书 号: ISBN 978 - 7 - 5102 - 0743 - 3

定 价: 30.00 元

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出版说明

当代中国的检察制度几经波折，目前已形成了中国特色社会主义法律体系框架下的具有中国特色的社会主义检察制度。历史证明，中国的检察制度，是和我国的政治命运、经济发展、文化传承、法治建设等方面同呼吸、共命运，紧密联系、无法分割的。政治开明、法治健全，检察制度和检察权的运行就顺畅健康。反之，则像 20 世纪 50 年代初甚至“文革”的 10 年浩劫中那样，产生休克甚至被彻底取消，人民的人身权利、财产权利、民主权利遭受极大的摧残破坏。

应该说，现今中国的检察权，是在一个较为健康的法治国家环境中较为正常的状态下运行，在服务我国经济社会科学发展的过程中，实现了检察机关自身的科学发展。近年来，检察机关狠抓业务建设和队伍建设，特别是 2012 年《刑事诉讼法》修改完善、中央司法改革要求充分发挥检察机关法律监督职能的新形势下，“执法规范化、队伍专业化、管理科学化和保障现代化”的水平不断提高，服务大局、保障中心工作的作用不断强化，检察事业正处于一个最佳的发展时期。

本书稿初成于 2010 年下半年，是和同在武汉大学攻读宪法学博士的同门师兄们一起切磋研究的结果。虽有个别内容可能落伍于当下新《刑事诉讼法》即将实施语境，但考虑作为一段时期学习思考的见证及同门师兄弟切磋交流的成果，仍决定付梓出版，以供交流之用。其中的一些观点、内容、论证及引注，如有不当之处，

敬请谅解！

成书期间，得到了南京工业大学汪自成教授的指点建议，出版过程中中国检察出版社苏晓红女士给与了大力帮助，一并表示由衷的感谢！

作者识于金陵下关

2012 年 11 月

内容提要

要研究中国的检察权，首先必须弄清楚检察权的性质和国家检察机关的基本职能。国家检察权在本质上主要表现为国家公诉权，以公诉权为基本内容的检察权在本质属性上和终极意义上应属于行政权。国家检察机关在刑事诉讼中的各项权力都是具体的诉讼程序权力，与所谓的法律监督机关、法律监督权在理论应然上并不存在内在的必然的关联性，但在实然的运行上，按照当下检察机关就是国家唯一的公诉机关实然状貌或者思路去探求司法改革的路径，或可建立理性而科学的以公诉权和法律监督权为双核的主导权力职能体系，同时兼及和主导审判前程序的公正和相关侦查权程序与实体的正当性，在对检察权的实然考量中，探求更为科学、更为中道、更为合于理性的法治智慧。对国家检察权的属性进行定位是因为我国检察权的国家权力配置有其特殊性，它既承担着题材繁多的法律监督职责，又担纲着对职务领域里的犯罪侦查，还要代表国家公意出庭支持公诉，行使公诉权，同时具有剥夺国家公民的人身自由权等方面的司法审查权。这种权力载体的高度集中已经大大超越了西方国家司法的三权分立体系，彰显了实然上的中国检察权“复合型”权力的宪法地位。

本书在吸收前人成果的基础上进一步论证检察制度与检察权的合理性、必然性与动态发展性。特别是基于检察监督权的实现，在人民代表大会制度的权力授予与权力制约条件下，检察机关不能简单地视为政府的行政机关，行使的是某种特别独立的权力，更不能

看成是立法机关或者是审判机关，检察机关根本不具备立法功能和审判职能，它是特立独行且具有存在价值的法律监督机关。其制度设计的目标，旨在卫护国家法律的统一实施，防止行政权、审判权的误用和滥用。再则，在行使国家公权的过程中，通过检察权的“缓冲”可以使得行政权、审判权以及公安部门的侦查权在程序上有一个制衡的地带和不可克减的机制安排。通过对我国宪政构架中检察权配置或权力重置的分析，提出进一步完善检察权配置。实然的中国检察权法律规范上的空间不是太小而是过大。虽然在某种虚拟的层面，来自各种权力和权利的量子对检察权的行使试图碰撞或对抗，但远远还不足以挤压国家检察权正常行使的空间，即使翻越法律许可的边界扩张到私权的田野，中国的百姓也只能是“望权兴叹”。在国家公权行使的高速路上，救济往往要比肇事滞后得多，晚来得多。检察权之法律监督权还远不能撑起行政权与审判权这两把“太阳伞”。因此，必须科学认知检察权，审视检察权，对新时期检察权的权威性进行大胆重构，为全社会公平正义搭建起一道最后的防线，对国民基本权利建树起一道较为牢固的保障屏障。

正确认识世界各国检察制度与检察权发展过程中的各自必然性及强求世界各国不同宪政体制下检察权属性的认定同一的不科学性，进而论证我国检察权的现实合理性。中国检察权现实的合理性与普适性，主要表现在宏观和微观两个方面，宏观上基于国家检察权的来源和职能的正当与正义性，而微观上则值得着重阐释其权能的实质正义性。一是职务犯罪侦查权。职务义务上对法律的不忠诚，导致国家公职人员在履行法定职务义务过程中实施滥用以及误用国家权力的行为，直接危害了一个国家正常的管理秩序，因此对其监督并施以法律惩戒是法律监督的内在要求。二是侦查监督权。侦查监督是指人民检察院依法对侦查机关的刑事侦查活动及程序是否合法进行的监督。在宪法的层面，有权行使侦查权的是公安机关和国家安全机关，当然检察院也有自侦权（在经济犯罪和职务犯

罪法域)。公安机关和国家安全机关从权力谱系上讲应该属于行政权，但从侦查行为和行使权力属性上说则是司法权，因此，不论是行政权还是司法权，侦查活动的合法性当然地要接受检察机关的法律监督。三是批准逮捕权。批准逮捕是指人民检察院对于公安机关、国家安全机关提请批准逮捕犯罪嫌疑人的请求进行审查，决定是否逮捕的活动。它是刑事强制措施中最严厉的一种，涉及公民的人身自由权限制问题，因此对逮捕的使用进行必要监督的正当性是毋庸置疑的。四是公诉权。公诉是指享有公诉权的主体为了维护公共利益，代表国家对认为犯有罪行，应当追究刑事责任的人向法院提起公诉，请求人民法院依法判定有罪并对其判处刑罚的活动。公诉权配置于检察机关是世界上民主法治国家的通例，从公诉角度进行法律监督，其合理性是非常明了的。还有与基本人权密切关联的羁押监督权、行政处罚监督权、审判监督权与刑罚监督权等。

Study Chinese procuratorial

Abstract: China's procuratorial power to study, first of all to be clear about the nature of prosecutorial power and the state of the basic functions of the prosecution. National prosecutorial power in nature for the state indictment, mainly the right to indictment for the basic content of the right of the prosecutorial power in nature and the ultimate significance of attributes should belong to the executive power. State prosecutors in criminal proceedings to the powers of the proceedings are specific powers, and the so - called legal supervision organs, the right of legal supervision ought to be in theory there is no inherent relevance of the inevitable, but it ran in the operation of, in accordance with the present prosecution is the only national real likelihood of public prosecution status and outlook or to explore the idea of the path of judicial reform, or to establish a rational and scientifically the right to indictment and the legal supervisory authority for the dual - core functions of the dominant power system, At the same time, and leading and pre - trial procedures and the fairness of the investigation and related entities the right to process and legitimacy is contingent on the prosecutorial power considerations, and explore more scientific, more middle, more in line of the rule of law in a rational wisdom. Procuratorial attributes of national identity because of prosecutorial power of the state power in China is equipped with its uniqueness, it bears a multiplicity of legal subjects oversight respon-

sibilities, but also take on the duties of the field of criminal investigation, public will have to appear in court on behalf of the state support indictment, the exercise of the right to indictment and at the same time have the personal freedom of citizens deprived of their right to respect the right of judicial review. This high concentration of power vector has already far exceeded the Western countries the judicial separation of powers system, and demonstrate the real likelihood of China's procuratorial "compound" of the constitutional position of power.

In this paper, the results of absorption of the previous system and the prosecution further argued the reasonableness of prosecutorial power, the inevitability and dynamic development. Special is based on the realization of the right to supervise the prosecution in the People's Congress system and the authority to impose restrictions on the powers granted, the prosecution can not simply be regarded as the executive branch of government to exercise the powers of a particular independent, nor can we as a legislature or judicial, the prosecution does not have legislative functions and trial functions, it is an independent special line and the value of the legal supervision organs. The design of the system aims to defend the unity of the implementation of national laws to prevent the executive power, jurisdiction, duties obligations on the misuse of power and abuse. Furthermore, in the exercise of the national process of public power, through the prosecutorial power of the "buffer" to allow the executive power, judicial power, including the right of the public security authorities in the investigation procedures of checks and balances, there is a non - derogable Strip and institutional arrangements. Through the framework of our constitutional powers of prosecutorial power configuration or reset the analysis to further improve the allocation of prosecutorial power. Is the Chinese laws and regulations procuratorial space is not

too small but too large. While some virtual level, the exercise of prosecutorial power will suffer from a variety of powers and the rights of the quantum collision or confrontation, but not enough to squeeze the country far from the normal exercise of prosecutorial power of the space is permitted by the law of the border over the expansion of the private fields, the Chinese people can only be “the right to be disappointed look.” The exercise of public power in the national high-speed roads, relief is often much more than those lagging behind, to much later. The right of legal supervision of prosecutorial power is far from the executive power and judicial power up to two “umbrella”. Sometimes the power of the Party Commission for Discipline Inspection has also obscured or even override the other hand, the national procuratorial power on, making the true sense of the prosecutorial power to exercise even more embarrassing. Therefore, cognitive science and prosecutorial power, look at the prosecutorial power of the authority of the new era boldly procuratorial reconstruction, social fairness and justice for the whole effect together with the erection of the last line of defense, the fundamental rights of citizens to defend the achievements together with a more solid from the protection of barriers.

A correct understanding of the prosecution system in the world with the inevitability of the development of different procuratorial aids in different countries around the world under the constitutional system that the same attributes procuratorial power is unscientific, and further argues that the reality of China's procuratorial reasonable. Chinese procuratorial life of rationality and universality, the main table, see the two aspects of macro and micro, the macro level, based on national sources of prosecutorial power and functions are legitimate and that justice is done, is worth focusing on the micro level to explain the essence of its authority

justice: First, the investigation of job - related crimes on the right. Duties of the legal obligations of infidelity, resulting in the national public officers in performing its statutory duty obligations during the implementation of the use of abuse and misuse of state power directly against the management of a nation's normal order and therefore the implementation of its monitoring and disciplinary law is the inherent requirement of legal supervision. The second is to supervise the investigation. Investigation and Supervision means the People's Procuratorate in accordance with the law on the criminal investigation authorities to detect the activities of criminal cases and procedures for the supervision of the legality of conduct. The level of the Constitution, is entitled to exercise the right to public security organs in the investigation and national security agencies, of course, there's the right (in job - related crimes, economic crimes and jurisdiction) . Public security and national security organs of these two terms from the power spectrum should belong to the executive power, but the investigation and the exercise of power is the attribute that the judicial power, therefore, can not be the executive power or judicial power, of course, the legitimacy of the investigation activities and to to accept the prosecution of legal supervision. Third, the approval of a power of arrest. Approved the arrest means the People's Procuratorate for public security organs, state security organs approved the arrest of criminal suspects to draw people to review the request and decide whether to arrest activities. It is a criminal coercive measures in the most severe one, involving the right to restrict personal freedom of citizens, so the use of arrest to carry out the necessary oversight is no doubt the legitimacy of. Fourth, the right to indictment. Indictment refers to the main body of the right to enjoy the indictment in order to protect the public interest, on behalf of the state of that offense for a person should be held

criminally responsible, prosecuted to the court to request the people's court in accordance with the law and found guilty sentence activities. The right to configure the indictment the prosecution in the countries of the world's democratic countries of the General Orders, the rule of law, from the perspective of public prosecution and supervision of legal supervision is a very rational and clear. Also closely associated with basic human rights of custody supervision, the right to an administrative penalty, the trial supervision, such as supervision and penalties.

The full text is divided into six chapters, followed by the introduction and afterword.

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导 言

一、问题意识

众所周知，检察权是国家权力的重要组成部分，加强检察理论研究是发展中国特色社会主义检察制度的必然要求，是“强化法律监督，维护公平正义”这一工作主题的重要基础，也是积极应对当前检察制度和检察理论所面临的各种挑战的必然选择。但是，在不同的国家或地区，其检察权的性质和内容及其权力配置都有着重大差异。之所以如此，既有各国宪政实践方面的考虑，更有各国法律文化传统方面的原因。也就是说，由于各国政治、文化、历史、法律制度发展的不同，各国的检察制度设计与检察权运行当然也会存在诸多差异。比如，中国检察权既不同于西方国家的检察权，又与其效仿的前苏联的检察权有所差异，具有较强的独特性；与此相适应，中国的检察权配置也有很多特立独行的地方。这一特色与中国独具的社会主义宪政有关，又与中国悠久历史文化中的监察制度传承密不可分；因此，我们必须客观地厘清中国检察权产生的历史背景和源流，才能科学地揭示中国检察权从应然到实然存在的合理性根据^①。但是，在我国反腐倡廉任务日益艰巨的背景下，有一些学者转而考虑将英美法系国家的检察制度当做世界上所有检

^① 参见徐荣生：《中国检察权及其权力配置》，载《国家检察官学院学报》2006年第1期。