检察权论

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序

我国以“议行合一”的全国人民代表大会为最高权力机关，行使决策权和立法权；以“一府两院”分别行使行政权、检察权和司法权，共同构成国家的基本权力主体。对于政府的行政权和法院的司法权，无论是在理论上还是在实务上都有较为明确的界定，但对于检察机关的检察权属于什么性质却含糊不清，认识不一。具有代表性的观点有两种：一种认为，检察机关是宪法规定的法律监督机关，因此检察权就是法律监督权；另一种认为，检察权包含法律监督权与公诉权，而公诉权具有司法权的性质，且是检察权的主要体现，因此检察权应基本定性为司法权。后一种认识也是将检察机关定为司法机关、将检察官定为司法官的主要理由。

本书的作者洪浩同志在分析、研究国内外检察制度的基础上，提出了自己的独到见解，认为各国的检察机关在执行检察权时均具有行政权与准司法权的双重性质，使检察权表现为一种典型的“司法行政权”；许多国家为了保证检察官行使权力的独立性，通常给予其准司法官的地位，使之带有司法色彩，但其本质仍是行政权。作者的这些见解，对于我国检察机关的改革与职权的重构，具有重要的参考价值。

从我国现实情况看，我国宪法虽然规定检察机关是国家的法律监督机关，但我国检察机关并不具有监督宪法和法律实施的实际功能。我国刑事诉讼法规定，检察机关对于刑事诉讼实行法律监督，其中对法院的“审判监督”，显然有悖于公诉权是一种司

法请求权的基本立场，因此，将我国检察机关定位为法律监督机关实为不妥，应予重新考虑。在我看来，只宜定位为公诉机关。所谓检察权，就是公诉权，也不应再作延伸解释。公诉权的本质是对犯罪的追诉权，它以追究被告人刑事责任、遏制犯罪、恢复被破坏了的法律秩序为使命。但公诉权是一种司法请求权，它本身不具有终结性即最终判定性和处罚性，而仅是为国家实现刑罚权准备条件，它所包含的实体性要求，只有通过法院的刑事审判才能最终实现。由于公诉权的实体意义是对犯罪进行追诉，因此，负责行使公诉权的检察机关，就必然拥有对一切刑事案件的侦查权。至于侦查权的具体行使，可由法律将特定范围的案件划归检察院专属侦查，从而使检察机关能够有力地控制某些突出的或危害严重的犯罪；检察机关可以依法授权司法警察机关负责一般刑事案件的侦查，并把司法警察的侦查活动置于检察官的领导和指挥之下。我想，我的这些意见与本书作者关于我国检察机关的职权重构的见解是相通的。

总之，作者这部力作不仅对检察权进行了系统的研究，且对我国检察制度的改革提出了新的思路，它的理论意义和现实意义是显而易见的。本书的出版也是值得高兴的一件事！

张耕村

2001 年 6 月 8 日

中文提要

中国共产党第十五次全国代表大会公报指出：依法治国是我国治国的基本方略。以此为标志，表明中国正在朝着一个成熟的法治时代迈进，同时也预示着又一个法制理论的春天到来。

依法治国需要从法治的角度正确认识国家权力结构形式，因为它是依法治国的主体与基础，同时必须正确把握法律制度的本质与内容，因为它是国家权力实现的方式与保障，而正确的法制理论则是依法治国的前提和先导。

检察权是我国“议行合一”的人民代表大会制度中的基本权力形式之一。它与国家最高决策权（立法权）、政府行政权、法院司法权、军事权等共同组成了国家的基本权力结构形式。

新中国建立五十多年来，由于对检察制度存在着许多不正确的认识与理解，导致检察权的实践遭受了重大挫折：检察制度曾一度被否认，检察队伍被解散，检察机构被撤销。1979 年，随着党的十一届三中全会的召开，检察机关得以重建，检察制度得以恢复，检察机关作为国家法律监督机关的法律地位得到了“1982 年宪法”的确认。而同时在相关的法律规定中，取消了“1954 年宪法”中曾确认的检察权制度的一般法律监督权及民事、行政诉讼权的内容，仅保留了以公诉权为核心的刑事司法监督权方面的内容。这种法律制度形式与内容上的脱节，理论与实践中的矛盾掣肘了我国检察权制度的实现。而其根源则在于我们对检察权的本质、内容认识的不足，检察权制度在理论准备上的不足。

什么是检察权？检察权的本质是什么？它应该包含哪些法律内容？我国法学界众说纷纭、莫衷一是。其中传统的、具有代表性的观点认为："由于我国宪法规定检察机关是国家的法律监督机关，那么检察权就是法律监督权。"① 很显然，这种观点只给了我们一个字面上的解释。

本书中归纳了我国法学界及外国部分学者对检察权的概念、内容的一般理论；从检察制度的产生、发展的过程及其政治、经济背景中，揭示了检察权的本质、内容和特点；进而对当今具有代表性的检察权制度进行了比较，尤其是对列宁创造与指导实践的检察长监督理论进行了分析，得出了检察权的本质是刑事公诉权、刑事侦查权以及检察官以公益代表人名义实现的有关民事、行政诉讼方面的权力等，而法律监督权不过是检察机关（官）依法律规定"兼担"的另一种法律权力。同时，笔者以此为基础揭示了检察权与法律监督权之间的辩证关系；对我国现行的检察权制度进行了分析，指出了我国现行权力结构中检察官（机关）不能执行法律监督权的理由；提出了在坚持我国"议行合一"政权结构模式下，结合检察权的本质、内容、特征及我国现行政治、经济改革形势，对我国检察权制度进行重塑的构想，并指出，检察权制度的嬗变必将对我国现行刑事、民事、行政诉讼结构产生影响。

本书包括前言、正文（八章）、余论，共十个部分。

前言：简单介绍了检察权制度的研究在我国的实用价值与理论意义，目前国内外有关检察权制度研究的现状及最新理论成果；阐述了本书的切入点和研究方法。

第一章：全面介绍了检察权的概念、内容及在我国研究检察权制度的一般意义。揭示了检察权与公诉权、侦查权的本质与内容的关系，以及检察权与法律监督权之间的法律关系，同时对我

① 王洪俊著：《检察学》，重庆大学出版社 1990 年版，第 16 页。

国现行检察权的一般内容进行了分析，并指出，在目前国家进行政治体制改革、经济体制改革和建设法治国家的目的要求下，必须正确把握检察权的本质、内容；正确理解检察权与政府的行政执行权、法院司法权之间的辩证关系，只有如此，方能推进国家法制化建设，推进国家政治体制改革的顺利进行。

第二章：论述了检察权制度的产生。介绍了法国、英国等西方国家检察权制度产生的背景及发展过程，同时比较了检察权制度与古代中国御史制度之间的区别，评析了中国御史制度消亡与西方检察权制度随着资产阶级宪政制度更新发展的原因。

第三章：对当代具有代表性的检察权制度进行比较研究。在当代具有代表性的检察权制度中，首推法国、美国、日本、前苏联。法、日、美作为资本主义国家的检察权制度具有一定的代表性，以刑事公诉、民事公益作为其制度共同性的一方面，均存在着各自的特色。其典型性在于它们分属于不同的诉讼模式：法国的诉讼职权主义模式、美国的诉讼当事人主义模式、日本的诉讼混合主义模式。在本章中，笔者对日本检察权制度重点予以介绍，指出日本检察权制度的本质是行政权，但由于强调检察官在司法中的独立性以及检察权与司法权在诉讼中的紧密关系，故尔承认检察权具有司法属性。日本检察权制度中对检察权的本质与属性的确认，为研究检察权“游离”于行政权与司法权之间的状态的原因提供了一个较合适的切入点。由于前苏联检察长监督制度从本质上讲属于法律监督权的一部分，笔者将它视为检察权本质上的异化。笔者肯定了日本检察权制度中的相关规定与特色对重新构架我国检察权制度的借鉴意义。

第四章：检察权的本质。从检察权的产生、历史发展，以及世界上大部分国家现行的有关检察权制度的法律规定、内容及法制实践来看，检察权的本质就是刑事公诉权以及有关检察机关（官）作为公益代表人在民事诉讼、行政诉讼中的权力内容。

第五章：法律监督权制度的形成与检察权制度的异化。从检

察权的刑事公诉权的本质入手，分析了检察权与法律监督权之间的区别与联系。同时以前苏联检察长监督的法律理论与法制实践为参照系，指出检察长（机关）对法律监督权的执行并不是检察权的本质要求，而是国家权力机关赋予国家检察机关（官）的法律职责。因而，从本质上讲，认为检察权就是法律监督权是对检察权制度的片面认识。因为检察机关（官）对检察权、法律监督权的同时执行，那不过是两种权力形式上的并存而已。本章分析了法律监督、法律监督权的概念、内容及法律监督权的产生、本质以及法律监督权的基本模式（结构形式）与实现方式。同时，为了认同检察权、法律监督权在我国现行权力结构中的地位，笔者认为检察权作为一种国家权力的二级形式与行政权、司法权并立存在，是介入行政权、司法权中的重要制衡手段，仍有存在的必要；而法律监督权则属于我国更高的一种权力形式，应由检察机关、行政机关、司法机关的上位领导机关——全国人民代表大会及其常务委员会去行使。

第六章：我国检察权在国家权力体系中职能的重构。本章以检察权的法律本质、属性、内容及特点为基础，以其他国家的检察权制度为参照系，以我国现行检察权制度的实践为背景，结合我国目前政治、经济体制改革的现状，在坚持我国“议行合一”的全国人民代表大会领导下的“一府两院”结构条件下，提出了重构我国检察权的领导体制与内部职能关系的设想及理论依据。

第七章：检察权实现的基础与法律保障。以重构的检察权制度为依据，继续论证了以公诉权为核心内容的检察权制度实现的基础与法律保障形式。指出检察权实现的主体是其中的关键，因为主体的能动作用是实现一切法律制度的先导，国家、检察机关、检察官从不同切入点来看均应是检察权实现的主体。同时，主体在检察权实现中遵循什么组织原则及活动原则，是主体活动的准则，并且一定的方式也构成了检察权实现的法律途径。同时，对检察权的行使主体——检察官，也必须确定相应的身份保

障并制定相关的制约制度，一定的物质基础对顺利实现检察权制度来说也是必不可少的。

第八章：检察权制度的嬗变对我国诉讼结构的影响。检察权制度的法律本质内容的确定将成为区别法律监督权制度与检察权制度的基础；而检察权以公诉权为核心内容，不仅肯定了我国检察机关（官）在现行刑事诉讼结构中的地位，同时也将对检察机关（官）在刑事诉讼结构中的权力运用产生明朗化影响，还对我国现行民事、行政诉讼结构中检察机关（官）的参与产生质的影响。

在本章中，笔者首先肯定了我国的刑事诉讼与民事诉讼结构模式的改革尝试，因为这种改革符合国际上要求的公正与效率原则，更进一步顺应了职权主义模式与当事人主义模式互相渗透与融合的发展潮流。但是由于现行的模式是在检察监督制度下运作的，必然带有前苏联检察长监督制度僵硬的烙印。因此，当揭示出检察权制度的公诉权本质以后，检察权与法律监督权的分离成为必然。检察机关作为纯粹的公益代表人介入行政权与司法权之中，不仅会对政府与法院起到平衡与制约作用，还将从根本上对刑事诉讼结构、民事诉讼结构、行政诉讼结构产生影响。正因为如此，对于检察权制度的研究无疑将对国家的法制建设起推动作用。

余论：笔者对检察权制度研究的法制意义进行了概括性的总结，将法治的目标与法制的理论研究结合起来，以期对法治的实践产生积极影响。

An Introduction on Procuratorial Power

The Chinese Communist Party pointed out in the Report of the 15th representing conference: Ruling Nation by Law is a basic method of our nation. A sound legal system is having been formed ever since then, which signifies coming of spring of legal theory.

Ruling Nation by Law, we must bear in mind a proper idea of the form of national power structure, for it is the subject and basis of Ruling Nation by Law. And also we must bear in mind the correct essence and contents, for it is the means and guarantee of exercising national power. And a proper legal theory is a guide of Ruling Nation by Law.

The Procuratorial Power is one of the basic power forms in the People's Congress system which combines legislative power with executive power. It constitutes the structure forms of the national basic power together with the supreme decision making power [legislative power], the Procuratorial Power, the executive power of government and the judicial power from court of law.

Ever since New China was founded 50 years ago, plenty of wrong knowledge and mistakes to the procuratorial system had led serious frustration of the Procuratorial Power: procuratorial system had been denied, public procurators had been dismissed, procuratorial institutions had dissolved. In 1979, following the 3rd Plenary Session of the Chinese Communist Party's 11th Central Committee,

the procuratorial institutions were refounded and the procuratorial system was restored. The legal status of being national legal supervision institution was affirmed by the Constitution of 1982. Meanwhile, the legal supervision power on civil and administrative proceeding of procuratorial institution, which had been affirmed by the National constitution now was canceled. In the procuratorial system, only the public prosecution power in criminal proceedings was remained to it as its main contents. This practice, which the contents of legal system have divorced from its forms, have prohibit the exercising of the Procuratorial Power system in our country. It stemmed from the insufficiency of knowledge on the essence and contents of the Procuratorial Power, and insufficient knowledge of theory of the procuratorial power system.

What is the procuratorial power? What is the nature of Procuratorial Power? What shall it contain? The law area of our country disputes on it. Among them, the conventional and representative view is, "since the procuratorial institution is the national legal supervision organ according to the Constitution, the Procuratorial Power equals to legal supervision power." Obviously, the view only gives us an literal meaning of it.

The author sums up some general theories of domestic law area and foreign scholars on the concept and contents of Procuratorial Power. From the course of production and the development of procuratorial system, and its political and economical background, the author tries to reveal the nature, contents and characteristics of Procuratorial Power, makes comparison among some representative procuratorial power systems, and does some analysis on the chief prosecutor supervision theory which was created by Lenin and guides the practice, then the author concludes that the essence and con-

tents of Procuratorial Power is the criminal public prosecution power, criminal investigation power, and the powers that exercised by the public procurators for the benefit of public interests in civil and administrative proceedings, and the legal supervision power is the only part of the powers that exercised by procuratorial institution at the same time. On the basis of the conclusion above, the author further illustrates the dialectical relationship between the Procuratorial Power and the legal supervision power, makes analyzing on the procuratorial system in practice in our country, finds out the essence, contents and features of inability of executing of law by procuratorial institutions (public procurators) in the current power structures of our country, analyzes the current political and economical situation of our country, and gives his imagination of reconstruction of procuratorial system of our country. And the author points out at the same time that the evolution of procuratorial power system will lead to impact on criminal, civil and administrative proceedings in practice of our country.

This wook is divided into ten parts, including preface, main body, and conclusion.

Preface: A brief introduction on the practical value and the significance on the theory of researches of Procuratorial Power system in our country, the current situation of researches on procuratorial power system in our country and abroad, and the recent newest research result. Meanwhile the author explains the way that results this article and the methodology of this work.

The first part fully introduces the concept and contents of Procuratorial Power and general meaning of researches on procuratorial power system in our country, illustrates the relationship between the essence of the public Prosecution Power and the contents

of criminal investigation power, and the legal relationship between the Procuratorial Power and the legal supervision power, and analyzes the common contents of our procuratorial system in practice. The author points out, when our country is having been in the reform of politic system and economic system and at the beginning of ruling nation by law, we must master the essence and contents of Procuratorial Power properly, and have a proper understanding of dialectical relationship between the Procuratorial Power and the government executive and judicial power. Only in this way, could we implement the construction of national legal system, and push forward the national reform of political structure.

The second part discusses the production procuratorial power system, introduces the forming background and development of the western countries procuratorial power system. Meanwhile, it makes comparative study between the west procuratorial system and the ancient Chinese censor system, comments on the dying reason of Chinese ancient system surviving reason of western procuratorial system.

The third part makes a comparative study on some representative procuratorial systems in the world nowadays. Among these representative procuratorial systems, countries which bear distinguishing features are France, the United States, Japan, sharing the common features on criminal prosecution and civil public interest, which are regarded as the representatives in the capitalist countries, and distinguishing each other by their different proceeding models. In this part, the author introduces highly the procuratorial system of Japan, and points out that the essence of Japanese procuratorial power system is administrative power. But for its emphasizing on the independence of the public prosecutor in the administration of

justice and the close relation with judicial power, Japanese procuratorial system agrees to its judicial feature. The confirming of the essence and property of Japanese procuratorial power system offers a good beginning for researches on reason why Procuratorial Power "takes a balance" between the administrative power and judicial power. Since the chief procurator supervision system of former Soviet Union belonged to legal supervision power system in essence, the author regards the chief procurator supervision system as an unusual change of procuratorial power system. Meanwhile, the author affirms the active effect that the Japanese procuratorial power system will bring to the reconstruction of our national procuratorial power system.

The fourth part discusses the essence of Procuratorial Power. By analyzing the production and historic development of Procuratorial Power, and from the view of legal provisions, contents and legal practice of current procuratorial power systems in the world, the Procuratorial Power is (or includes) the criminal public prosecution power, and other powers executed by procuratorial institution in civil and administrative proceedings for public interest's.

The fifth part discusses the forming of legal supervision power system deriving from unusual changes of Procuratorial Power. It begins from the essence of the criminal public prosecution power of Procuratorial Power, points out that the legal supervision power exercised by chief Procurator or procuratorial institution in the procuratorial system is not an essential requirement of Procuratorial Power, it is just a duty imposed by national power on procuratorial institutions. In essence, regarding the Procuratorial Power as legal supervision power is an alienized view towards procuratorial power system, as the Procuratorial Power and legal supervision power are

only two powers coexist formatically. The author makes analyzing on the concepts, contents of legal supervision and legal supervision power, the forming and essence of both of them, the basic models of legal supervision power and the means of exercising it. Trying to reveal the status of Procuratorial Power and legal supervision power in the current power structure, the author considers the Procuratorial Power as a subordinated power to national power coexisting with executive power and judicial power, which is an important means of balancing executive power and judicial power, it is worthy of continuing to have it in practice. And legal supervision power ranks higher in the power structure of our country, it shall be exercised by the superior of procuratorial institution, executive power institution and judicial institution — the National People's Congress or its permanent committee.

The sixth part discusses the reforming of Procuratorial Power in the national power structure. On the basis of legal essence, property, content, distinguishing features of the procuratorial power, having referred to the procuratorial power systems of other countries, setting according to the current practice of our country, combining with the current political and economic situation of our country, sticking to the power form of "one government institution together with two institutions" which is led under the National People's Congress in which legislative combines with executive, backgrounded by the current practice of procuratorial power system of our country, the author forms his imagination and presents his theoretical basis of reconstructing the hierarchy and relation of internal function of Procuratorial Power of our country.

The seventh part discusses the basis of exerci-sing Procuratorial Power and its legal guarantee. Basing on procuratorial power system

reconstructed, the author continues to explain the basis of exercising of Procuratorial Power which takes public prosecution power as its main content, and the legal guarantee forms. The author points out that the subject of Procuratorial Power exercising is the key element, as the active functioning of the subject is the prerequisite of perfecting all legal system, the nation, procuratorial institution and procurator shall be regarded as the subjects of Procuratorial Power exercising from different point of view. The forming principles and working principles by which abided by the subjects in exercising Procuratorial Power constitute the legal means of exercising Procuratorial Power to some extent. Also some status protection for the immediate subject of Procuratorial Power — procurator — shall be provided, and relevant restricting rules shall be made, some materials is also the necessity of making a Procuratorial Power system.

The eighth part discusses the influence to our criminal procedure structure brought by unusual change of the essence of procuratorial power system. The establishing of legal essence and the contents of procuratorial power system is the basis of procuratorial power system, also makes the difference from legal supervision system. The main contents' change of the public prosecution power in the procuratorial power system will definitely not only influence the power forms of procuratorial institutions (the public procurator) in the current criminal proceeding of our country, but also bring material impact on the civil and administrative proceedings in our country.

In this part, the author first gives his positive view on the experimental reforms of National Authoritism in criminal proceeding and Clientism of civil proceeding, as it accords with the principle of fair and efficient in the world, also it meets with the development of

mixing and combining of National Authoritism with Clientism. As the current model functions under the influence of legal supervision power, it will bear the rigid feature brought by Chief Procurator Supervision of the former Soviet Union. So after we have mastered the essence and content of public prosecution in procuratorial power system, it's necessary that the Procuratorial Power take a divorce from supervision power. Acting for the public interest by procuratorial institution between executive power and judicial power will not only balance between government and judiciary, but also bring fundamental influences to the criminal proceeding structure, the civil proceeding structure and the administrative proceeding structure. Only until then, could the impetus on the legal system construction brought by the researches on procuratorial power system be shown.

The conclusion, in which the author sums up the significance of study on procuratorial power system from the point of Ruling Nation by Law, combines the ideal of Ruling by Law with the theory of Ruling by Law, in an effort to brings some influence to the legal practice, hoping an era of Ruling by Law society will soon come!