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Preface

The criminal procedure is process that criminal actions go on. Chief parties during the actions include judicial organs handling cases, suspects who may be investigated for criminal responsibility, defendants, and other litigation participants. In the process of investigating criminal responsibility of criminal suspects and defendants by the police and judicial organs, they exercise the state power, while suspects and defendants exercise personal rights. The police and judicial organs must exercise power to investigate criminal responsibility of criminal suspect and defendant in accordance with the legal procedure, meanwhile suspects, defendants, and their entrusted defenders must exercise their litigation rights in the light of procedure to safeguard their lawful rights and interests. Here, the power and rights are intertwined and even conflicting, which demonstrates obvious features of the criminal procedure, and it also symbolizes the civilization of the criminal procedure of a country. Therefore, when studying the criminal procedure we must begin with the prospective of powers and functions, paying attention to power and rights. In the research of law, powers and functions are mostly studied in the branch of jurisprudence and civil and commercial law, but rarely in the criminal procedure law. It is because of this consideration, the author has been thinking about whether the power of public security and judicial organs can be combined with the individual rights of citizens, that is to say, to study the powers and functions of criminal procedure, which constitutes the original intention of writing this book. At present, there is no unified expression about how to understand the powers and functions of criminal procedure. Some people regard the powers and functions as right and obligation itself, and some people regard it as the subordinate concept of right and obligation, which is embodied in the right of jurisdiction, prosecution, investigation, defense, etc. In this book, the author claims that powers and functions actually refer to power and right.

This book, firstly, explores the powers and functions in theory and analyzes the concept, features, and fundamental principles of it and the relationship between powers and functions, and then explores the right of jurisdiction from the perspective of jurisdiction of the court. As the judicial organ, the court exercises the power of jurisdiction. Combined with the ongoing judicial reform, this book explores how the people's court further improve its ideas and guide the realization of its power with a new idea in the process of exercising its jurisdiction. Main changes include: from

one-sided crackdown on crime in the past to equal emphasis on both crackdown on crime and protection of human rights, from over emphasis on substantive justice to equal emphasis on both substantive and procedural justice, from overemphasizing the proof of verbal evidence to emphasizing the proof of physical evidence. The court also emphasizes the balance between justice and efficiency. How to exercise judicial power impartially and independently according to law has been a focus and sensitive topic in the academic circle of law for many years. This book comprehensively combs the external environmental factors that affect the judicial organs to exercise their functions and powers independently in accordance with law, responses to the relationship between independent handling of cases by judicial organs in accordance with the law and social and political effects, and puts forward that the main consideration should be the legal effect, and over emphasis on social and political effects often leads to the neglect of legal effects. Combined with the reform of judicial responsibility system, the independent exercise of judicial power after the reform is explored. The author also pays special attention to the issue of how the judicial organ can exercise the judicial power fairly without external intervention and the internal approval and supervision of presidents and heads of the court after delegating authorities to judges themselves. This is a worrying issue, which is likely to become a major hidden danger of judicial injustice in China in the future. At the beginning of the reform of judicial responsibility system, the consequences will be unimaginable if we don't have a clear understanding of this issue and take precautions. At present, it is urgent to discuss how to strengthen the all-round supervision of the jurisdiction. In this regard, the author puts forward some improving plans, for example, specialized inspection, regular selective examination, expert review, judicial precedent giving, accountability for misjudged cases, etc. Meanwhile, it is also an important part to strengthen the supervision of the president of court under new situation. In the discussion of judicial jurisdiction, the author also talks about the judicial review mechanism. This is an integral part and the due meaning of judicial power, and also the common characteristics of judicial power in the world. In China, the authority of judicial review doesn't belong to the court; the relevant powers and functions, such as the jurisdiction of arrest inspection, are entrusted to the procuratorial organ. On the premise of generally recognizing the judicial nature of the procuratorial organ, we cannot but say that this is an alternative judicial review. The problem is that, as far as the procuratorial organ concerned, its position of accusant in criminal proceedings conflicts with its neutral role in judicial review. How to ensure the legitimacy and fairness of the judicial review has become a question. For this reason, the book makes an analysis from the following four aspects: the essential characteristics of litigation form require judicial control over pretrial procedure; the nature of judicial power is the theoretical foundation of the natural rationality of judicial review mechanism; the establishment of modern constitutional state is the political foundation of judicial review mechanism; and the construction of modern criminal procedure is the system guarantee for the judicial review mechanism.

Procuratorial power marks the most complex and characteristic feature of the power of criminal procedure in China. Since the restoration and reconstruction of China's procuratorial system in the 1970s, disputes about procuratorial power have

never stopped. For a long time, there has been a lot of controversy about the nature of procuratorial power in the academic circles. This book summarizes and analyzes four academic viewpoints: the theory of administrative power, the theory of judicial power, the theory of administrative and judicial power, and the theory of legal supervision power. The author believes that the research level of the concepts of procuratorial power and supervisory power is vague, which makes the academic circle fall into a long-term dispute on the nature of procuratorial power. To clarify the theoretical disputes of "procuratorial power," we must use the semantic analysis method to find out the semantic differences of the same words, concepts, and propositions, and make the differences of the actual ideological content expressed by the same words as small as possible, and confirm what questions to answer, not whether this question really exists. Some disputes are sure to be avoided or clarified and settled. The author deconstructs the procuratorial power in China from the perspective of procuratorial function, and distinguishes the functions and powers owned by procuratorial organs, that is, the connotation of procuratorial power, and then the author draws a conclusion that the concept of procuratorial power is different in broad and narrow sense: in a broad sense, the concept of procuratorial power refers to the general term of the litigation authority and power of litigation supervision granted by law to procuratorial organs, which is mainly applicable to the macro-level of the judicial system in China, and in a narrow sense, the concept of procuratorial power refers to the general term of the litigation authority granted by law to procuratorial organs, which is mainly applicable to the level of litigation structure. The nature of procuratorial power in narrow sense is administrative power in the litigation structure of our country, which can also be confirmed in the procuratorial practice of western countries, especially the common law system. However, if we discuss the nature of procuratorial power in a broad sense, and consider the litigation authority, litigation supervision power, and judicial relief power of procuratorial organs (prosecutors) as a whole, the nature of procuratorial power in a broad sense may be different. This is because, by examining the concept of procuratorial power, we can know that procuratorial power is the general term of various functions and powers entrusted to procuratorial organs by law. We can get two inspirations from it: first, the procuratorial power is the general term of the powers entrusted to the procuratorial organ. The nature of the procuratorial power is determined by the nature of the power content. As the content of the power changes, the nature of the procuratorial power may also change. Secondly, it is "law" that endows procuratorial organs with functions and powers. Here, "law" should refer to the practice method. Therefore, the functions and powers entrusted to procuratorial organs (prosecutors) by laws of different countries or regions are different, and the nature of procuratorial power is also different. It can be seen that the issue of the nature of procuratorial power is not only a theoretical (ought to be) issue, but also a practical (being) issue; in the world, it is not only a common issue, but also a personality issue.

At present, the country's judicial reform is advancing rapidly, especially reform concerning the judicial system is deepening. Recently, the CPC Central Committee issued a document to promote reform of the national supervision system, which was first piloted in Beijing, Shanxi, and Zhejiang Provinces, and was fully launched

nationwide in 2018. After the state supervision organs exercise the power of filing and inquiring corruption cases, the procuratorial power faces new major issues. The author insists that after the reform of the supervision system, the procuratorial power has not changed substantially, because its powers of arrest, prosecution, supervision, and even investigation remained the same as before. What has changed is the scope of investigated cases. Therefore, we should take the reform as the background, probe into the development and change of procuratorial power, strengthen the ability of response, and build and fulfill the procuratorial power. Although the reform of the state supervision system and the judicial reform have brought great impact and influence to the procuratorial organ, from the perspective of the Constitution and the criminal procedure law, the position and attribute of the procuratorial organ as the legal supervision organ have not changed. Therefore, stripping away the investigation power of the duty crime will not reduce the position of the procuratorial organ in the national legal system. However, once the power of legal supervision is excluded, the procuratorial organ can only become the prosecutor who undertakes the function of prosecution on behalf of the state. Therefore, under the current situation, the procuratorial organ should firmly grasp the power of legal supervision, strengthen and improve the work of legal supervision. In this regard, the author has the following suggestions.

Firstly, the scope of supervision. The traditional supervision mainly focuses on the field of litigation, but with the advancement of the rule by law, especially the decision made at the Fourth Plenary Session of the 18th CPC Central Committee, the scope of procuratorial supervision is expanded, which makes the supervision of procuratorial organs expand from litigation supervision to non-litigation supervision. The decision clearly states that the procuratorial organ shall urge the administrative organ to correct any act of illegal exercise of its power or failure to exercise its power in the course of performing its duties, which enables the procuratorial organ to obtain a more clear basis for the supervision of administrative power. Some people interpret this kind of supervision as top-down supervision, which will enhance the legal status and authority of the procuratorial organ, even higher than the administrative organ in a sense. Therefore, the connotation of the legal supervision of the procuratorial organ will be further enriched. At present, the legal supervision of the procuratorial organ is still concentrated in the field of judicial power. For the supervision of administrative power, the relevant laws and regulations and reform practice are obviously insufficient. The procuratorial organ not only faces the situation of power being stripped, but also has no firm grasp of the new power entrusted. Therefore, while discussing this issue, the procuratorial organ should come up with a reform plan at an appropriate time, and the Supreme People's Procuratorate should report it to the National People's Congress for approval and then carry out a pilot project. Whether the scope of procuratorial supervision can cover the National Supervisory Committee has attracted the attention of relevant parties. At present, there is no such provision in the draft of the Supervision Law. The draft of the Supervision Law stipulates that the supervision committees will be supervised by itself, society, and party, while there is no specialized legal supervision. However, there is always a connection and restriction relationship between the procuratorial and supervision organs, which

needs our careful study. In addition, the procuratorial organ broadens the scope of its supervision to the civil, administrative, and public interest cases. The author believes that at present, the number of administrative litigation cases has increased, but the corresponding administrative litigation supervision of the procuratorial organ has not been effectively followed up. The same is true to public interest litigation. The procuratorial organ should attach importance to public interest litigation and then it can be reflected that the procuratorial organ represents interest of the state. On the contrary, the author is not very in favor of the supervision of civil litigation, because this is the intervention of public rights in private rights. He always believes that there is a problem for the plaintiff or the defendant "fights against" the defendant or the plaintiff with the help of public rights. The supervision of procuratorial organs should focus on administrative litigation and public interest litigation. Of course, the supervision of civil cases of procuratorial organs is also regulated by the civil procedure law.

Secondly, the ways and means of supervision. In the past, the legal supervision has not formed the organization and procedure of handling cases, and the way of legal supervision has certain arbitrariness and irregularity. At a meeting on the promotion of procuratorial reform held in Chongqing, the author once mentioned the problem of the reform of supervision mode, which is mainly the problem of laws supervising case-handling organization. Legal supervision is not an individual act. Procuratorial supervision is implemented by the procuratorate as a whole. The decision made cannot be completed by an independent prosecutor, but by the procuratorate. At the same time, we should use investigation thinking to deal with supervision cases, to regard supervised matters as cases, to deal with legal supervision with case-handling thinking, to set up special organizations, to build special supervision procedures, and to investigate and verify the details of supervision clues.

Thirdly, enrich the means of supervision. The procuratorial organs may learn from the supervision means of the supervisory committee, such as appointment, interrogation, inquiry, etc., which are not used but should be used in legal supervision. For many years, we haven't studied deeply and thoroughly the process of regarding legal supervision as cases, the programming and standardization of legal supervision. It is necessary to establish a proper separation mechanism between the litigation function and supervision function of the procuratorial organs. The author does approve the practice of Hubei Province. Why should litigation and supervision function be separated? Many of the litigation functions demonstrate the judicial attribute, and the way of handling cases is different, while the supervisory function embodies a very strong administrative attribute. The two functions cannot be performed by one investigator, because he or she only pays attention to litigation but ignores supervision, that is to say, they mainly handle cases, rather than supervising. If separated, some specialize in handling cases, while others actively engage in supervising.

Fourthly, strengthen the effectiveness of supervision. How can legal supervision be effective? In the past, legal supervision, whether it is procuratorial advice, notice of correction of violations, or other aspects of supervision, was ignored by the people under supervision, and there is no way for the procurators. The author believes that solutions should be found. During the study of the Criminal Procedure Law, the author

was inspired by the Article 263, which says: If the People's Procuratorate considers that the ruling of the People's Court on commutation or parole is improper, it shall, within 20 days after receiving the copy of the ruling, make a written correction to the People's Court. The People's Court shall, within one month after receiving the correction opinions, reconstitute a collegial panel for trial and make a final ruling. This is the latest form of supervision by the People's Procuratorate, which was added in 2012. This form is that after the procuratorate put forward supervision opinions, the supervised organs must have a special procedure to start the review of supervision opinions, unlike the previous supervision of the public security organs. In the next step, we should actively discuss with the public security organs and detention houses how to start the review procedure after supervision, which is an innovation and the necessary way for supervision. The legal consequences of further implementation of the supervision opinions should also be studied, and we are supposed to ensure the implementation of the supervision decisions made on illegal acts, and make our supervision exert substantial binding force. Once the illegal act is found and the correction opinions are put forward, the investigation and other organs as the supervised object and their relevant personnel shall response and correct, otherwise there will be corresponding adverse consequences or responsibilities, which may include: (1) for those who refuse to implement the supervision suggestions, the procuratorial organ may recommend the public security or the supervisory organ to investigate the responsibilities of the relevant personnel, and if the circumstances are minor, they shall be corrected within a time limit or given administrative sanctions, while if the circumstances are serious, they shall be dealt with as a criminal case and suggest that they be investigated for criminal responsibility. (2) Take the implementation of illegal supervision as an important reference for the quality of handling cases and the standardized assessment of law enforcement of the public security police, only in this way can the violators be urged to earnestly implement the supervision opinions or decisions. (3) When it is related to whether the case can be developed smoothly or not, the procuratorial organ may suggest the relevant organs to replace the investigators. In order to make the supervision more effective, we should try to avoid oral supervision but use written form, leaving evidence in the whole process, by which the supervision has binding force.

Fifthly, problems of the internal organs of the procuratorial organs. The central government attaches great importance to the establishment of institutions, because the establishment of institutions is closely related to the performance of the responsibilities of procuratorial organs. The author thinks, at present, that the scheme of institutional reform of Shanghai can be copied and popularized. According to the Supreme People's Procuratorate, there should be no more than 18 internal organs in provincial procuratorates. There are 17 internal organs in the Higher People's Procuratorate of Shanghai, which are divided into four parts: the first part is the judicial department, including the following: (1) The First Department of Criminal Prosecution (the Department of Arrest Inspection) sets up a number of prosecutor's offices for arrest inspection, which are responsible for inspecting the handling and guidance of arrest cases. (2) The Second Department of Criminal Prosecution (the first Department of Public Prosecution) establishes several offices for public prosecutor,

and is responsible for handling and guiding public prosecution cases such as ordinary criminal cases and death penalty cases. (3) The third Department of Criminal Prosecution (the Second Department of Public Prosecution), with several public prosecutor offices, is responsible for the handling and guidance of public prosecution in special criminal cases such as duty crime, financial crime, and intellectual property. (4) The Fourth Department of Criminal Prosecution (the Supervision Department of Criminal Execution). (5) The Criminal Procedure Supervision Department shall establish several procurator offices to be responsible for the supervision of the establishment of cases, the connection of two levels of court, the supervision of the public security police station, the protest cases in the procedure for supervision upon adjudication, the investigation and verification of the major clues of the case supervision, the supervision tracking, the centralized management of the supervision documents, etc. (6) The Civil Procuratorial Department shall establish a number of procurator offices to be responsible for the supervision of civil proceedings. (7) The Administrative Procuratorial Department shall establish several procurator offices to be responsible for the supervision of administrative litigation, the supervision of administrative illegal acts and administrative compulsory measures, and the handling and guidance of administrative public interest litigation. (8) The Procuratorial Department for Juvenile Cases establishes several procurator offices to handle and guide juvenile cases. (9) The Department of Prosecution for Complaints (the Procuratorial Service Center) shall set up a number of procurator offices to perform the functions of the original Department of Prosecution and Appealing, and the Department of Litigation Supervision shall be responsible for the protested cases in the procedure for supervision upon adjudication. The second part is the Comprehensive Business Department, including the following: (1) the Business Management Department shall establish a number of procurator offices to perform the duties of the original Case Management Office. (2) The Research Office, without a change of its function, may set up the Secretary Office of the procuratorial committee to be responsible for the operation of it. The third part is the Procuratorial Auxiliary Department, including: (1) the Information Technology Department; (2) Judicial Procuratorial team. The fourth part is the Judicial Administration Department, including (1) the Political Department, (2) the Supervision office, and (3) the Security Department of Procuratorial Affairs. The author believes that these departments are well set up, but at the same time, revision suggestions are also put forward. Firstly, the departments can't be named as the First, Second, and Third Department, but named according to its function to help people have a clear acknowledgement of it. Secondly, the division of the complex supervision should be integrated. Supervision of criminal execution and supervision of criminal proceedings can be unified into supervision of criminal proceedings. Thirdly, the Civil Procuratorial Department and the Administrative Procuratorial Department should be changed into the Civil Procuratorial Supervision Department and the Administrative Procuratorial Supervision Department. This kind of setting separates the power of arrest and public prosecution, litigation and supervision, which accords with the author's idea. Shanghai emphasizes that the main purpose of setting up this department is to transfer the main body for handling cases from the named prosecutor to the prosecutor office. The internal organization is also

a problem which is needed to be concentrated with the guidance of simplification, delayering, and scientification, adjusting measures according to different conditions, while avoiding imitating other levels of procuratorates or other procuratorates of the same level blindly. Internal organizations should be set flexibly according to the size of the procuratorate and the amount of cases. The above suggestions are directed against the procuratorates of provincial level, as for those of prefecture and county levels, for example, with a size of 50 officers or 30 officers, and principles are given by the central authorities but details are left to be researched.

In addition, the power of investigation of China is too much incomparable in the world. On the one hand, the criminal investigation in our country is not divided into compulsory or arbitrary. The public security organs have all rights to investigate compulsorily, with no room for negotiation. On the other hand, the investigation of our country is decided by the public security organs themselves who carry out the power of investigation. Most of the compulsory measures and compulsory investigation measures are decided by themselves, without an international judicial review system. There was a popular joke: "you must go to China to be a police man." Laws, including the People's Police Law of the People's Republic of China and the Criminal Procedure Law, empower police with huge and unrestricted power, and it mainly comes from our country's high attention to social security and social stability, and the strong control over society. In addition, this is also due to our overemphasis on fighting and punishing crime over the years, while neglecting to protect rights of the accused. However, we must face up to the fact that since the amendment of the Criminal Procedure Law in 1996, the legislators of the state have begun to restrict and regulate the investigation power continuously, especially the amendment of the criminal procedure law in 2012 has made strict restrictions on the application objects, conditions, and procedures of the compulsory measures. Time, place, audio, and video recording of the interrogation shall not force anyone to prove his guilt, the illegal evidence shall be excluded, and the complaint handling mechanism of illegal investigation behavior, all of them highlight the regulation of investigation power. This book pays special attention to the relationship between investigation and protection of human rights. Based on the basic characteristics of the restriction of investigation on human rights, and based on the norms and consensus of international conventions on investigation activities, it explores how to maximize the effective regulation of investigation rights in the Chinese context, which can be summarized in three aspects: First, strengthen the restriction, that is, according to the principle of mutual restriction, given by the law, of the police, the procuratorate, and the court, correct the past practice of only focusing on cooperation while ignoring restriction, exerting the check and balance function of procuratorate and court to investigation. Second, give full play to the special legal supervision function of the procuratorial organ in the investigation. We should not only supervise whether the investigation activities are legal, but also emphasize the supervision of the legitimate rights infringement of the criminal suspect. Third, advocate establishment of judicial control over investigation and judicial review mechanism. In China, scholars have different opinions on whether to establish judicial review system. On the one hand, we do not regard court as the center or core in litigation, but rather as a body

of sharing division of responsibility and cooperating with public security organs and procuratorial organs. On the other hand, our system design determines to take procuratorate as legal supervision organs to exercise power of judicial review. In the context of comprehensively promoting the rule of law, the judicial reform puts forward the reform of the litigation system centered on trial. Therefore, it is necessary to emphasize the decisive role of court in the whole litigation process, rethink the judicial review mechanism, and explore the construction path of the system.

Different from the public power of police, procuratorate, and court, there is another form of power in criminal procedure, that is, the litigation rights of criminal suspects, defendants, and their defense lawyers. Objectively speaking, the public power of China's judicial organs has never been lacking, even very strong, while the rights of criminal suspects, defendants, and their defense lawyers are relatively weak, even vulnerable. With the continuous improvement of the criminal procedure law in recent years, especially the continuous legal reform, the protection of citizens' human rights has been greatly improved and enhanced. The protection of human rights of citizens has been improved to a great extent and it is not substantially different from international standards only in terms of system provisions, but the gap is still large in terms of judicial practice. In this book, the author evades the rights of criminal suspects and defendants, and studies the defense rights of lawyers, not because that the rights of the former are unimportant; on the contrary, these are the top priority of rights protection. It is because that the structure of this book is to analyze the forms of power and function of each participant in the process of pursuing criminal responsibility of criminal suspects and defendants. Over the years, the protection of rights of defense lawyers has been mainly focused on the so-called "three difficulties" of meeting with the suspects and defendants, reading files, and collecting evidence. After the amendment of the Criminal Procedure Law in 2012, these problems have been significantly improved, but still remain prominent. At the same time, new "three difficulties" of questioning, cross examination, and illegal evidence exclusion appear. This book has carried on omni-directional research to these new and old problems, paying attention to details and countermeasures, and it is more thorough compared with the previous discussion.

At present, in the process of in-depth implementation of the reform of criminal procedure centered on trial and the pilot program of the leniency system of confession and punishment, the importance of defense lawyers has become increasingly prominent. The Supreme People's Court and the Ministry of Justice recently put forward the implementation opinion of full coverage of criminal defense. This book does not discuss the legal aid of the duty counsels, involved in the reform, because of length and time limitation. It should be continuously researched and answers should be provided as for the question of what is the relationship between the legal aid lawyer and the duty lawyer and what is the litigation status, the litigation rights, and obligations of the duty lawyer.

The last chapter of this book studies rights of other subjects in criminal proceedings, including appraisers, witnesses, victims, and stakeholders in the special procedure of confiscation of illegal gains. The fair handling of cases is closely related to active and effective participation of the participants mentioned above. Previous

studies have paid more or less attention to their obligation to testify or the litigation duty they should perform, intentionally or unintentionally ignoring their litigation rights, such as unilaterally emphasizing the fair appraisal and the obligation to appear in court of the appraisers, but lack of effective research on protecting necessary rights to ensure performance of their duties. This book puts forward relevant suggestions to protect rights from the perspective of laying particular emphasis on right protecting, with a purpose to draw attention to this issue, on one hand, and put forward suggestions for peer discussion, on the other.

It is obvious to all that the structure of power and function of China's criminal procedure is undergoing profound changes. Public right and private right are becoming more and more balanced and reasonable, with public right constantly shrinking, and private right expanding. However, where the final boundary still remains to be an unanswerable problem. At the beginning of this century, when the author was talking about this topic with an American professor during a visit to the United States, the author was deeply impressed by his answer, which said that public power and private rights are just like two people walking. The front one walks back and the one walking behind rush forward. The place they meet may be the boundary we want to reach. This humorous and wise metaphor expresses that the reasonable boundary between public power and private right is the result of resonance, debugging, and running-in of the two, which needs time and practice to be explored. In fact, the continuous revision of the Criminal Procedure Law and the promotion of judicial reform are just such a process of exploration.

Thanks to China Renmin University for publishing this book. And thanks to my students who have also provided a lot of materials, and some chapters are results of their joint research.

Beijing, China Weidong Chen
January 2018

Contents

Chapter 1
Basic Theory of the Powers and Functions of Criminal Procedure

Since human society abandoned blood feud and relief by private force, and entered the era of national criminal procedure, the continuous differentiation of powers and expansion of rights in the realm of criminal procedure has become the main thread of the evolution of the procedural regime.

"Criminal suspects and defendants no longer play the role of procedural object, but become procedural subject that actively participates in and influences the judicial proceedings. With intensified right guarantee and continuously expanding scope of each right, the role of defendants as litigation subject has been consolidated".[1] The public power of the state in criminal procedure also undergoes an evolutionary process from inexplicit division of powers to separated investigation, prosecution and trial, presenting itself as "a self-contradictory process with constant expansion and constant decomposition".[2] In this process, the relationship between rights and powers ("an interactive relationship between individual procedural participants and national criminal justice authorities) is specifically manifested as the wane-and-wax relationship between the powers of state organs and the rights of procedural participants".[3]

The game between increasingly differentiated rights and powers shows the development vein of the criminal procedural legislation, and it will be an internal driving force for the development and progress of criminal procedure in the future. But the previous studies on the right-power relationship in criminal procedure focus on the confrontation between rights and powers, especially between the power of accusation and the right to defense.

Undeniably, in the realm of modern criminal procedure, the relationship between the power of accusation and the right to defense is a key indicator to define the procedural model, but according to the American scholar J. Griffiths, no matter it is the "crime control model" or the "due process model", the essence of which is to

[1] Chen [1].
[2] Li [2].
[3] Liu [3].

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take the "battle" between the the power of accusation and the right to defense as the main content of the process, which is known as the "battle model".[4]

However, when we distract our obsessive attention from the confrontation between accusation and defense, we can find that the entire criminal procedure is essentially a "field" where different rights and powers work together; the power of accusation and the right to defense are natural protagonists, but other important rights (powers) such as the power to trial, the right of victims and other procedural participants may not be ignored. Therefore, we shall broaden our horizon when studying the rights (powers) in criminal procedure, analyze the types of rights (powers) involved in the judicial proceedings and their relationships from a more macroscopic and comprehensive perspective. Only in this way can we, while realizing specific rights (powers), avoid the imbalance and disorder of the overall procedural structure because of "seeing trees but not forests".

When we lift the veil that covers the confrontation between the power of accusation and the right to defense in the realm of criminal procedure, what emerges before us is a legal relationship framework for criminal procedure that is formed during the interaction (i.e., confrontation, cooperation, check and balance) of all rights and powers. What constitute this relationship are the procedural acts of all procedural participants, while the procedural acts are based on the specific powers and functions of criminal procedure of the acting subjects. The perspective of powers and functions helps to eliminate the prejudice and discrimination arising from different subjects of rights and powers, so as to optimize and improve the operation mechanism of rights and powers in the realm of criminal procedure by following the law of procedural operation.

1.1 Overview of the Powers and Functions of Criminal Procedure

1.1.1 Connotation

As a new concept, the powers and functions of criminal procedure are not explored in depth in previous studies. To avoid the subsequent discussions from the embarrassment of self-talk due to different understandings of this concept, we shall first interpret the connotation of the powers and functions of criminal procedure, so that the relevant studies will be based on a common object.

[4] Griffiths [4].

1.1.1.1 Concept of the Powers and Functions of Criminal Procedure

"We think, talk and discuss through concepts. Some arguments without firstly clarifying the concepts are actually meaningless, since the arguers may have different understandings of the same concepts; they are not arguing at the same level and have not formed a real confrontation. Such argument cannot add the value of knowledge, but tend to devalue it".[5]

After the concept of the powers and functions of criminal procedure came out, the first challenge in front of us is to define this concept. In the realm of criminal procedure, powers and functions are a new concept, but in the realms of jurisprudence and civil law, the research and application of this concept have yielded some results. Given this, before defining the concept of the powers and functions of criminal procedure, we shall examine the concept of powers and functions at the first place.

(1) Concept carding

The basic meaning of "powers and functions" refers to the functions that are legally prescribed or vested. Semantically, this concept is interpreted in three ways as follows: (i) authority, might; (ii) powers, functions; (iii) the elements of rights which are the specific content of rights, the role of rights or the ways to achieve them, the means that the right holder employs according to law to achieve the purposes and interests embodied in his rights, and the ways that manifest the will power of the right holder. In the past this concept did not receive much attention in the realm of criminal procedure law, but mainly examined in the realms of jurisprudence and science of civil law. The jurisprudential circle, which studies the basic theories and concepts of legal science, finds it is hard to define the concept of powers and functions, because it is unquestionably pervasive in our daily life. However, when people start to analyze this concept, everything seems so suspicious, it is mainly because this concept is intrinsically linked to other basic legal concepts such as norms, effects, obligations, subjective rights, authority and autonomy. As such, an analysis of this concept is in fact an analysis of the entire conceptual network; moreover, since all of these concepts are the basic legal concepts, a theory of powers and functions also covers the essential elements of a theory of legal nature.[6] In this sense, powers and functions could be equated to rights, and there is no significant essential difference between them.

Some people argue that powers and functions refer to the ability, which is legally justified, to create legal norms (or legal effects) through and based on the declaration of relevant effects.[7] The definition of the concept of powers and functions involves the three aspects of being possible, normative and dispositive; it is a concept closely related to rights. The jurisprudential circle usually takes powers and functions as a subordinate concept of rights; for example, a scholar even proposed the concept of "powers and functions of rights", stating that rights have three basic powers and

[5] He [5].

[6] Alexy and Wei [6].

[7] Ross [7] quoted in Alexy and Wei [6].

functions in defense, benefit and relief. "The powers and functions of rights are a unified summary of the basic interests and functions of rights, which convey the basic content and force of rights in a better way. The concept of powers and functions shall be used to express the requirements, obligations and abilities covered by rights".[8]

In the realm of civil law, the research on powers and functions focuses on the ownership and its particular relationships with powers and functions. "There are two different views on the relationships between the ownership and the powers and functions of ownership: one is the theory of collection of rights, and the other is the theory of role of rights. The powers and functions of ownership denote the rights that are held by the owner and constitute the content of the ownership; they are not independent rights in themselves, but the possibilities to realize the rights of the owner. The content of ownership refers to the powers and functions of ownership, including positive and negative powers and functions. Positive powers and functions are the content of ownership, while the negative ones indicate the claims of real rights after the ownership is infringed, and the rights of the owner to protect his ownership if it is damaged".[9]

Through interpretation of the concept of powers and functions in the realms of jurisprudence and civil law, we can find that due to the different relationships between powers and functions and rights (powers), powers and functions are sometimes the subordinate concept of rights (powers), specifically referring to the particular types of rights (powers). In some cases, powers and functions are a synonym with rights (powers), and a synthesis that uniformly denotes rights (powers). Therefore, the concept of powers and functions shall be defined as the specific qualifications and capabilities contained in rights (powers) that can produce legal effects. To be more specific, powers and functions are essentially the particular forms and methods by which rights (powers) play their role, and they are also the transitional elements that convert rights (powers) into a subjective behavior.

(2) Definition of the powers and functions of criminal procedure

In the realm of criminal procedure, the concept of powers and functions has been widely used,[10] but the in-depth studies on the concrete meanings of powers and functions remain in absence, only the term of this concept is contained. After sorting out the relevant research results, we have found that Chinese scholars on criminal procedure law generally hold two different views on the use of this term: one takes powers and functions as a subordinate concept of rights (powers) to denote the specific rights (powers) to prosecution, defense and trial; the other takes powers and functions as a synonym for rights (powers) and a neutral concept that transcends rights (powers). The first viewpoint more accords with the perception of powers and functions in the realm of civil law; if the connotative rights (powers) to investigation,

[8] Jian [8].

[9] Wang [9].

[10] Xu [10]; 11. Zhang and Liu [11]; Lv and Chen [12]; Chen [13]; Chen [14]; Wang [15]; Gu [16]; Li [17]; Xiao [18]; Gou [19]; Wang and Zhu, [20]; Gong [21]; Sheng [22]; Gong and Zheng [23]; Sun [24]; Le and Gou [25]; Zhang and Zhang [26]; Wu [27].

prosecution, defense and trial could be broken down and refined, they would be more aligned with the operational model of rights (powers) in practice.

There are special reasons for the second viewpoint to come into being. In the realm of criminal procedure, rights and powers are strictly split according to the identity of subjects: the rights (especially the procedural right) are held by the procedural participants beyond the state organs; while the powers refer in particular to the powers of investigation, prosecution, trial and enforcement enjoyed by the state organs. Moreover, in the realm of criminal procedure, there is a huge gap between rights and powers: the basic value tendency of rights is protection and manifestation, while the basic value tendency of powers is restriction and balance. Therefore, in order to eliminate the tension and conflicts caused by the innate confrontation between rights and powers during the research, we shall use the concept of powers and functions—which spans the gap between the concepts of rights and powers—to ensure the neutrality and compatibility of research.

Although the above two uses of powers and functions have reasonable grounds, if the concept of powers and functions of criminal procedure is not defined uniformly and normatively, there will be confusions and misunderstandings during the research. Based on the general meaning of powers and functions and the special institutional context of criminal procedure, the author holds that the powers and functions of criminal procedure should be defined as the concept that claims compatibility between rights and powers, and denotes all the rights and powers of criminal procedural subjects.

The above explanation is made for the following reasons: (i) The typical criminal procedural rights (powers) of investigation, prosecution, defense and trial are in essence a community constituted by a series of rights and powers. On the same occasion, the concepts of rights (powers) and powers and functions are expressed separately for fear of causing any semantic confusion. For example, the power of public prosecution, which is a core power as the power of trial in the procedural structure, is subordinate to the procuratorial power under the Chinese procedural power system. If it is taken as the powers and functions of public prosecution, the powers of the same rank will be distinguished in "superiority or inferiority", which is no good for accurately expressing the relationship between procedural rights and procedural powers. (ii) Based on the different subjects of rights (powers), the procedural subjects are divided into the subject of powers and the subject of rights for separate research. Although it helps to reflect the procedural ideas of restricting powers and protecting rights, this man-made hostile division is adverse to studying the commonalities between procedural rights and procedural powers. While coexisting in the realm of criminal procedure, procedural rights and procedural powers do have certain commonalities, such as the right (power) to appear in court – it is a power of the procuratorial organ, and a right of the defendant. The concept of powers and functions avoids being confined by the division between rights and powers, so it will not hamper the holistic research on the right of defendant and the power of prosecutor to appear in court. (iii) By analyzing the use of the term "powers and functions" in criminal procedure, we have found that this term is associated with procuratorial

power in most cases, which is directly due to China's vague positioning of procuratorial power.[11] By using the concept of powers and functions, it is possible to avoid the theoretical disagreements arising from the relationship between legal supervision power (contained in procuratorial power) and other state powers such as judicial power and investigatory power. (vi) The purpose of using the concept of powers and functions is to bridge the conceptual gap caused by the mechanical distinction between procedural rights and procedural powers. If powers and functions are simply positioned as particular rights (powers), it will be unlikely to fulfill such purpose. Powers and functions shall be taken as a synthesis of rights and powers to be their neutral representation, which is premise for a value-free research on the relationship between rights and powers of different subjects in the process of criminal procedure.

1.1.1.2 Classification of the Powers and Functions of Criminal Procedure

The criminal procedural system is formed on basis of different procedural rights and powers, and the legal relationship of procedure is constituted by the procedural actions of different subjects of rights and powers. In China, the core rights (powers) in the realm of criminal procedure include the rights (powers) of investigation, prosecution, defense, trial, procedural participation and enforcement. Based on the different identities of procedural subjects, their qualifications or freedom in criminal procedure are divided into rights and powers. Such mechanical division is simple, explicit and able to show the urgency of protecting different procedural subjects, but it may lead to rigidity and lack of integrity. Thus, the concept of powers and functions of criminal procedure is introduced to change this situation. Under this concept system, the powers and functions of criminal procedure are divided into different structural systems of powers and functions based on different classification criteria.

(1) The powers and functions of prosecutor, defendant, trial and assistance

With different content, the powers and functions of criminal procedure are divided into the powers and functions of prosecution, defense, trial and assistance. Such division is made for different powers and functions to play separate roles in criminal procedure. Specifically, the powers and functions of prosecution includes the power of investigation and the power of public prosecution; the powers and functions of defense mainly refers to the right to defense; the powers and functions of trial denote the power of trial; the powers and functions of assistance include the powers of inspection and supervision, enforcement, and procedural participation of other procedural subjects. This classification breaks the distinction between rights and powers. Based on the classic structure of criminal procedure, this classification highlights the fundamental status of the powers of prosecution and trial, and the right

[11] In China there are multiple viewpoints on the attributes of procuratorial power, such as the theory of judicial power, the theory of administrative power, the theory of duality of judicial administration, and the theory of legal supervision. Chen [28].

to defense in the structural systems of powers and functions of criminal procedure, straightens up the relationship between the power of procedural supervision and the power of prosecution, splits and deconstructs the procuratorial power.

With the continuous improvement of criminal procedure, the types of powers and functions of criminal procedure have kept enriching. For example, as a result of the development of the movement of protecting the rights of victims, their right to participate in procedure has become one of the powers and functions of criminal procedure; in the amendment to China's *Criminal Procedure Law* in 2012 there is a new type of powers and functions, i.e., someone with expertise is entitled to participate in procedure. But all of this is not enough to shake the fundamental status of the powers of prosecution and trial and the right to defense in the structural systems of criminal procedural rights (powers), implying that the three parties (prosecutor, defendant and judge) still play a leading role in criminal procedure. Placing the powers and functions of prosecution, defense and trial at the same rank will help to reinforce their importance in the system of powers and functions of criminal procedure, and realize the equal adversary between prosecutor and defendant substantially.

In addition, we should note that auxiliary powers and functions, which have achieved the most fruitful results, are the focal point for developing the powers and functions of criminal procedure. For example, regarding the amendment of the criminal procedure law, an important part to be revised and refined is the protection of witnesses' right to procedural participation. Although the subject structure of prosecutors, defendants and judges, which features a three-party game, still exists in criminal procedure, we should pay enough attention to the exercise of auxiliary powers and functions of the subjects in the procedural process, and provide them with more protection.

(2) Right-based and power-base powers and functions

With different subjects and different attributes, the powers and functions of criminal procedure are divided into right-based and power-based powers and functions. This division seems to be no different from the traditional classification of rights and powers, but the introduction of social power will greatly alter the traditional relationship between criminal procedural rights and powers. To be specific, right-based powers and functions mainly refer to the procedural powers and functions of individual procedural subjects, while power-based powers and functions are either based on public power or social power. Among the three types of powers and functions, right-based and public power-based ones, as focus of the criminal procedure law study, will be free from a detailed account herein. In contrast, the newly-born social power-based powers and functions represent the development of social powers in the realm of criminal procedure, which is proved by the major breakthrough in enabling citizens to access to justice.[12] With the deepening of reform and opening-up, China's civil society has become more developed, and citizens have become active participants in criminal procedure. In addition to traditional jury system, new ways of participation such as public opinion supervision and media supervision have

[12]Cheng [29].

increased opportunities for citizens to participate in proceedings. Therefore, being taken as a component of the powers and functions of criminal procedure, the importance of social power-based powers and functions is highlighted; it will benefit their continuous development and progress.

1.1.1.3 Characteristics of the Powers and Functions of Criminal Procedure

The purpose of introducing the concept of powers and functions into the realm of criminal procedure is primarily for reversing the starting point of the adversarial research on the opposition between traditional rights and powers, which determines that the powers and functions of criminal procedure are different from the traditional criminal procedural rights and powers, but they are essentially characterized as a complex of criminal procedural rights and powers.

(1) Pluralism of subjects

In the traditional division of criminal procedural rights and powers, subjects play a decisive role: powers are enjoyed by state organs, while rights are owned by natural persons and private legal persons, showing that they are entirely different. Such simple and clear division is helpful for restriction and supervision of public power and for balance and protection of rights, but it may impress people with the confrontation between public power and rights, which is bad for accurate positioning of the relationship among judicial power, investigatory power and procuratorial power, and also bad for maintaining the balance of power between prosecutors and defendants. As a complex of criminal procedural rights and powers, the powers and functions of criminal procedure do not require designated subjects. All the procedural subjects, as long as they have certain rights and powers in proceedings, can be taken as the subjects of the powers and functions of criminal procedure and also the subjects featuring pluralism.

To a certain extent, procedural rights and powers are the basis for subjects to participate in proceedings and perform procedural acts. Therefore, all procedural subjects enjoy corresponding procedural rights and powers in the realm of criminal procedure, which determines that all procedural subjects are the subjects of powers and functions under the system of powers and functions of criminal procedure. Such a plural scope of subjects makes the concept of powers and functions of criminal procedure widely representative, includes the intricate legal relationships in criminal procedure into a unified conceptual architecture for analysis, and avoids the opposition resulting from the classification of subjects of powers and rights.

(2) Complexity of content

In the realm of criminal procedure, the content of powers and functions (as aggregate of rights and powers) features complexity, meaning that the content includes not only the public power of state organs, but also the rights of procedural participants, and

the social power of citizens. There are so many doctrines about what are rights[13] and powers. For example, according to Max Weber, a German classical sociologist, power is an ability that controls the will of others despite of being opposed by them, i.e., in a social relationship, actors have opportunities to rule out resistance for carrying out their will, regardless of the basis of such opportunities.[14] Some other scholars take "power" as a force to constrain the will of others and restrain their freedom.[15] With regard to social power, it means that social subjects are able to influence and dominate the state and society with their social resources.[16] Social power has private and public attributes: from the perspective of external stipulation, particular social powers are private relative to organizations, groups, and even the state and the world at large; from the perspective of internal stipulation, social power is public relative to social members, and it is an organic collection of powers of social members.[17] The three different types of rights (powers) are incorporated into the category of the powers and functions of criminal procedure, thus making their content characterized by complexity, which require us to take a more holistic perspective when doing studies in this regard, instead of being bound by the traditional views on rights and powers.

(3) Openness of variety

In the realm of criminal procedure, with the increase in the number of participants in proceedings and the differentiation of the types of rights (powers), the system of particular powers and functions has kept expanding, and its content has been constantly enriched. The particular powers and functions of criminal procedure involve not only the traditional rights (powers) of investigation, prosecution, trial and defense, but also the emerging social power such as the increasingly important powers and functions of media and citizens in supervision of criminal procedure. Compared with the earlier integration of prosecution and trial, which features a structure of powers and functions monopolized by trial power in the case of objectification of trial objects, the current "tripod" of prosecution, defense and trial has greatly enriched the types of powers and functions of criminal procedure. Besides, since social power is becoming more and more important in the current rights (powers)-obligations structure, it is sure to occupy a vital position in the system of the powers and functions of criminal procedure. In addition, as a result of the rising "victims' rights movement",[18] the protection of victims' rights in criminal procedure has received greater

[13] Zhang Wenxian has systematically introduced the eight leading and most representative theories on the nature of rights: the Entitlement Theory, the Claiming Theory, the Liberty Theory, the Interest Theory, the Legal Capacity (or Power) Theory, the Possibility Theory, the Norm Theory, and the Choice Theory. These theories boast the most extensive impact. Zhang [30].

[14] Max and Gu [31].

[15] Okuda et al. [32].

[16] Guo [33].

[17] Wang [34].

[18] Liu and Liu [35].

attention, so the powers and functions of victims are also included into the category of the powers and functions of criminal procedure.

(4) Distinciton of efficacy

Owing to pluralism of subjects, complexity of content and openness of variety, the powers and functions of criminal procedure are sure to be diversified and complicated. To make it clear, regardless of the game of powers and functions, the criminal judicial verdict is based on the coercive trial power. Moreover, as provided by the criminal procedure law, different powers and functions are protected and valued to different degrees, in order to achieve a balance between punishment of crimes and protection of human rights. This determines that the powers and functions of criminal procedure have different efficacy in proceedings. The fundamental reason for differentiating the efficacy of the powers and functions of criminal procedure is to smooth the procedural operation, thereby realizing the basic values of justice and efficiency of criminal procedure. The *Criminal Procedure Law of China* is a law of authorization and a law of limitation of power, there are explicit divisions of the efficacy hierarchy of rights and powers. In the current era, human rights have become a major concern of most countries, but China has been concentrated on combating crimes and failing to pay enough attention to protection of human rights, so we need to increase the right consciousness of citizens, upgrade the efficacy hierarchy of defense right, and balance its relationship with the state power (especially prosecution power). Besides, for lack of judicial authority, China shall reiterate the dominant position and supreme authority of trial power in the system of powers and functions.

1.1.2 Subjects of the Powers and Functions of Criminal Procedure

According to the above analysis of the concept and characteristics of the powers and functions of criminal procedure, all participants in criminal procedure shall be regarded as subjects of powers and functions since they have certain criminal procedural rights and powers. In the traditional theories on criminal procedure, the criminal procedural subjects are divided into two categories: subjects of powers and subjects of rights.[19] This means that the subjects of the powers and functions of criminal procedure include both the subjects of powers (investigative organs, procuratorial offices, and courts), and the subjects of rights (criminal suspects, defendants and their close relatives, victims and their close relatives, agents of victims, parties of an incidental civil action and their agents, appraisers, deponents, and witnesses).

[19]The subjects of powers involve the "public security agencies, procuratorial offices, and judicial organs that are empowered by national laws to investigation, prosecution and trial in criminal procedure". The subjects of rights are the "persons who enjoy certain procedural rights and bear certain procedural obligations in criminal procedure other than the personnel of special state organs". Chen [36].