

THE POSITION AND ROLE OF CHINESE PROCURATORIAL ORGANS IN CRIMINAL JUSTICE

*Guan Fujin**

I. PEOPLE'S PROCURATORATES ARE STATE ORGANS FOR LEGAL SUPERVISION AND EXERCISE PROCURATORIAL POWER INDEPENDENTLY

Article 129 of the Constitution of the People's Republic of China and Article 1 of the Organic Law of the People's Procuratorates of the People's Republic of China stipulate that "the people's procuratorates of the People's Republic of China are state organs for legal supervision." According to the law, the state makes it clear that people's procuratorates are state organs for legal supervision and exercise the right of legal supervision on behalf of the state. This is the legal position of the Chinese procuratorial organs.

The Chinese procuratorial organs shall exercise procuratorial power independently and shall not be subject to interference. Procuratorial organs perform their functions and powers independently according to the law. This is the most important principle for legal supervision defined by the Constitution of the People's Republic of China. Article 131 of the Constitution of the People's Republic of China clearly stipulates that "people's procuratorates shall, in accordance with the law, exercise procuratorial power independently and are not subject to interference by administrative organs, public organizations or individuals." The Criminal Procedure Law and the Organic

Law of the People's Procuratorates of the People's Republic of China also have the same provisions. We can understand this principle in four aspects. First, procuratorial power is a state power exclusively exercised by procuratorial organs, and no administrative organs, public organizations and individuals have the right to exercise it. This is the requirement set by the particularity and seriousness of procuratorial power. Neither organs, public organizations and individuals which are not state organs nor state organs which are not procuratorial organs have the right to exercise procuratorial power. Second, when procuratorial organs exercise procuratorial power, they only obey the Constitution and state laws and are not subject to interference by administrative organs, public organizations and individuals. In practical procuratorial work, procuratorial organs shall not be subject to interference by other administrative organs' administrative orders which affect the exercise of procuratorial power and by other public organizations and some individuals with special privileges. This is the key to ensuring the fair and effective exercise of procuratorial power. Third, procuratorial organs must exercise procuratorial power according to their legal functions, powers and methods and cannot abuse it. The criminal, civil and administrative procedure laws and a series of internal regulations on procuratorial work formulated by the Supreme People's Procuratorate contain concrete provisions on the procuratorial functions and powers of procuratorial organs and the procedures and methods for exercising legal

* Deputy Director of Department, General Bureau of Anti-Corruption and Bribery, Supreme People's Procuratorate, China.

supervision. Violating these regulations and abusing procuratorial power will impair the socialist legal system, and legal responsibility will be investigated and affixed. Fourth, procuratorial organs exercise procuratorial power independently. This means that people's procuratorates at all levels exercise procuratorial power independently. This does not mean that chief procurators or other public procurators personally exercise procuratorial power independently. This shows that democratic centralism is applied in exercising legal supervision. This also ensures the correct exercise of procuratorial power and avoids the personal abuse of procuratorial power.

II. INVESTIGATING CRIMINAL CASES PERPETRATED BY TAKING ADVANTAGE OF THE OFFICE IS AN IMPORTANT DUTY OF PROCURATORIAL ORGANS

The filing of criminal cases of corruption and bribery perpetrated by taking advantage of an office for purposes of investigation and prosecution is a part of all the rights enjoyed by the Chinese procuratorial organs. Article 18 of the Criminal Procedure Law of the People's Republic of China, currently in effect, stipulates that "with regard to the crime of corruption and bribery, the crime of dereliction of duty committed by state personnel, the crime of illegal detention, extorting a confession by torture, retaliation and framing and illegal search to infringe on citizens' right of the person committed by state personnel who take advantage of their functions and powers and the crime of infringement on citizens' democratic rights, people's procuratorates shall file such criminal cases for investigation."

According to the provisions of the Constitution of the People's Republic of China and the Organic Law of the People's

Procuratorates of the People's Republic of China, statically the legal supervision exercised by procuratorial organs is a system under which people's procuratorates exercise procuratorial supervision over the implementation and observance of state laws, and dynamically it is an activity in which people's procuratorates exercise procuratorial supervision with a view to ensuring the correct implementation and strict observance of state laws. The scope of legal supervision are as follows:

- (1) Procuratorial organs exercise supervision to determine whether state organs and their personnel correctly apply and enforce the laws; and
- (2) Procuratorial organs exercise supervision to determine whether ordinary citizens abide by state laws.

The first is the major task of legal supervision exercised by procuratorial organs. Of course, procuratorial organs exercise supervision over the crime committed by taking advantage of the office. Such supervision is an important component of legal supervision. There are three reasons for this. First, when state organs apply and enforce the laws, in fact state personnel do this. In other words, all activities to apply and enforce the laws cannot be conducted without the personnel in state organs.

Second, procuratorial organs exercise supervision over the application and enforcement of the laws by state organs and their personnel with a view to discovering, investigating and dealing with violations of state laws in the process of applying and enforcing the laws. The activities to apply and enforce the laws will be conducted through the acts of state personnel. Therefore, in investigating and dealing with violations of the laws in the process of applying and enforcing the laws, we focus on violations of state laws perpetrated by

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state personnel in the process of applying and enforcing the laws. Some of the violations of the laws perpetrated by state personnel are ordinary acts in violation of the law, and some seriously impair the interests of the state, the collective and the citizens and constitute crime, that is, the crime committed by taking advantage of the office. Therefore, when procuratorial organs exercise supervision over the application and enforcement of the laws by state organs and their personnel, of course this supervision includes supervision over the crime committed by taking advantage of the office.

Third, state personnel administer the state and society on behalf of the masses and should exercise management in strict accordance with the law. However, some state personnel do not strictly abide by and carry out the Constitution and the laws in the process of performing their official duties, but wilfully violate the Constitution and the laws. People's procuratorates exercise legal supervision to ensure the correct implementation of state laws. Therefore, people's procuratorates must control the crime committed by taking advantage of the office, which is seriously divorced from the legal system and rectify violations of the law. Such crime causes more serious harm to the correct application and enforcement of state laws than ordinary illegal acts perpetrated by taking advantage of the office. Therefore, supervision over the crime committed by taking advantage of the office is more important than supervision over ordinary illegal acts occurring in the application and enforcement of laws.

Supervision over the crime committed by taking advantage of the office is designed to determine whether or not such crime occurs, give proper punishment for it, prevent and reduce it, and ensure the correct application and enforcement of state laws. People's procuratorates exercise supervision over such crime which

has occurred, which is a kind of subsequent supervision. This feature of supervision over the crime committed by taking advantage of the office determines that conducting investigation is the necessary means to supervise it.

First, we can discover the crime committed by taking advantage of the office only through investigation. Clues to the criminal cases perpetrated by taking advantage of the office come from various channels. However, clues only show that the criminal cases committed by taking advantage of the office may have occurred, but do not mean that they have occurred and that the offenders and the circumstances of such crimes are known to the public. Only by investigation can people's procuratorates finally determine whether or not such crimes have occurred, who the offenders are and what the circumstances of crimes are. In this way, such crimes can be exposed promptly and can be placed under the supervision of procuratorial organs.

Second, only by investigation can people's procuratorates discover and determine the crimes committed by taking advantage of the office and transfer the criminal cases perpetrated by taking advantage of the office to the adjudicatory organs for trial, so that offenders will be given due punishment. People's procuratorates cannot clarify the facts of the crime committed by taking advantage of the office without investigation and consequently cannot transfer the cases to the courts for trial. Prosecution of the crime committed by taking advantage of the office will become empty talk.

Third, supervision over the crime committed by taking advantage of the office is different from legal supervision over other ordinary crimes. Legal supervision over other ordinary crimes can be exercised by means of arrest and prosecution, and special investigative organs (public security organs) which conduct

investigation. However, public security organs cannot first investigate the crime committed by state personnel by taking advantage of the office and then transferring the criminal cases to procuratorial organs for handling. This is determined by the following features of the crime committed by taking advantage of the office:

- (1) The subject of the crime committed by taking advantage of the office is state personnel. Most of the personnel have some administrative powers, and some are senior officials. They have close social relations in administrative organs, and they are protected by other officials. The organs for investigating their crimes can only be special organs which are not administrative organs. It would be futile for public security organs, which are administrative organs, to investigate the crime committed by state personnel who have administrative powers and take advantage of their office.
- (2) Offenders have a high educational level and professional knowledge, make use of intelligence in criminal activities and often take advantage of their legal capacities. These criminal cases are more covert and cunning than other criminal cases.
- (3) Unlike homicide, theft and other ordinary criminal cases, it is hard to differentiate between guilt and innocence concerning the crime committed by taking advantage of the office. Therefore, this sets high demands on the knowledge about law which the personnel for handling cases must master. In our country procuratorial organs, administrative organs and adjudicatory organs are equally important. Procuratorial organs exercise procuratorial power independently. According to the provisions of the Public Procurator Law, public procurators must be

university graduates. Therefore, the power to investigate the crime of embezzlement and bribery committed by taking advantage of the office can only be exercised by procuratorial organs. Investigation of the criminal cases perpetrated by taking advantage of the office is the necessary means for procuratorial organs to exercise supervision over the such crime.

III. PROCURATORIAL ORGANS EXERCISE SUPERVISION OVER CRIMINAL PROCEEDINGS ACCORDING TO THE LAW

In criminal proceedings, people's procuratorates are special organs for legal supervision which perform the functions and powers of legal supervision.

Exercising legal supervision to determine whether litigation proceeds impartially according to the law is the special function and power entrusted to procuratorial organs by the law. According to the law, people's procuratorates exercise legal supervision over criminal proceedings in such concrete ways as reviewing a case to make a decision to approve arrest, examining prosecution, and appearing in court for public prosecution. In other words, people's procuratorates successfully exercise legal supervision by handling cases. Handling cases is the most effective means for procuratorial organs to exercise legal supervision. Procuratorial organs' functions and powers in litigation come from legal supervision, and legal supervision is successfully exercised in litigation.

A. Supervision over Filing Cases

The Criminal Procedure Law of the People's Republic of China stipulates that people's procuratorates exercise supervision over filing cases mainly in the following two aspects:

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1. Article 87 of the Criminal Procedure Law stipulates that “if a people’s procuratorate thinks that a public security organ does not file a case for investigation which should be filed for investigation or if a victim thinks that a public security organ does not file a case for investigation which should be filed for investigation and presents the case to the people’s procuratorate, the people’s procuratorate should require that the public security organ explain the reasons for not filing the case. If the people’s procuratorate thinks that the reasons for not filing the case given by the public security organ are untenable, the former should send a notice of filing the case to the latter. After the public security organ receives the notice, it should file the case.”

From this regulation, we can know the following things:

- (1) In exercising supervision over filing cases, people’s procuratorates should focus on the cases which public security organs should file for investigation, but do not file.
- (2) A people’s procuratorate has the right to require that a public security organ explain the reasons for not filing a case.
- (3) If the public security organ’s reasons for not filing the case are untenable, the people’s procuratorate should send a notice of filing the case to the public security organ. The notice is mandatory, so the public security organ must carry it out.
- (4) After the public security organ receives the notice, it must file the case which should be filed. This shows that procuratorial organs perform the function of prosecuting crimes on behalf of the state. This is also a necessary reflection of procuratorial organs’ rights of supervision and public prosecution. In applying this regulation, people’s procuratorates should focus on the

cases which public security organs do not file for investigating and affixing legal responsibility for crimes. Such cases mainly come from those cases which are discovered by people’s procuratorates in the process of reviewing cases to make decisions to approve arrest and prosecution, which are presented to people’s procuratorates by victims and which are entrusted or transferred by the relevant departments under special circumstances.

2. Article 18 of the Criminal Procedure Law stipulates that “when people’s procuratorates need to directly handle other major criminal cases perpetrated by the personnel in state organs who take advantage of their functions and powers, with the decision of people’s procuratorates at and above the provincial level, people’s procuratorates can file them for investigation and prosecution.”

These cases mainly have the following three characteristics:

- (1) The subject of crime is personnel in state organs.
- (2) These cases must be major cases perpetrated by state personnel who take advantage of their functions and powers.
- (3) The filing of these cases must be specially examined and approved, that is, with the decision of people’s procuratorates at and above the provincial level. This regulation gives people’s procuratorates the right to supervise cases in the process of filing and conducting investigation, with a view to giving full play to people’s procuratorates’ functions of legal supervision, solving the problems of not filing cases even if there are cases, not investigating and affixing legal responsibility for crimes and replacing penalty with fines in criminal judicial practice and

ensuring that the criminal responsibility of all criminals is investigated and affixed. By doing so, people's procuratorates exercise the right of prosecution for some cases. This does not mean that people's procuratorates exclusively exercise the right of investigation enjoyed by other organs. People's procuratorates exercise supervision with a view to tightening supervision over law enforcement, promoting strict law enforcement and ensuring the unified and correct implementation of state laws.

In light of judicial practice, such cases mainly include the following:

- (1) Cases perpetrated by the personnel in state organs which the relevant organs do not file to investigate and affix legal responsibility and which the relevant organs still do not affix even if people's procuratorates send notices of filing cases for investigation;
- (2) Cases in which fines replace penalty, which are handled too leniently and in which the relevant organs still do not rectify illegalities even if people's procuratorates urge the relevant organs to rectify them;
- (3) Cases in which people do not reach a consensus on whether these cases constitute crimes and people's procuratorates think it necessary to investigate and affix legal responsibility according to the law;
- (4) Cases involving several crimes, of which some crimes fall under the jurisdiction of people's procuratorates, and others fall under the jurisdiction of public security organs or other departments, over which people's procuratorates have proper jurisdiction or which the latter persist in not handling;
- (5) Cases in which there are disputes over jurisdiction, or in which the organs with the right of jurisdiction refuse to investigate or do not file for investigation for a long time; and
- (6) Cases in which specific organizations entrust the people's procuratorates directly to file for investigation and prosecution.

This last regulation is a flexible regulation on people's procuratorates' direct filing of cases for investigation and prosecution. People's procuratorates should strictly carry out this regulation and cannot arbitrarily increase cases directly handled by them. With regard to the ordinary cases in which public security organs should file for investigation, but do not file, people's procuratorates should require that public security organs explain the reasons for not filing them. If people's procuratorates think that the reasons for not filing cases given by public security organs are untenable, the former should notify the latter of filing cases and the latter should do so. In principle, public security organs should file such cases for investigation. If public security organs give up filed cases which indeed have great impact, cause serious consequences and conform to this regulation, people's procuratorates can file them for investigation and prosecution according to this regulation.

B. Supervision over Carrying out Arrest Decisions

Article 68 of the Criminal Procedure Law of the People's Republic of China stipulates that "after conducting a review of a case that a public security organ has submitted for approval of arrest, a people's procuratorate, according to the differing circumstances, shall make a decision to approve arrest or not to approve arrest. The public security organ should immediately carry out the decision to

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approve arrest and should promptly notify the people's procuratorate to explain the reasons for not approving arrest. If there is a need to conduct supplementary investigation, the people's procuratorate should notify the public security organ for doing so." Article 69 stipulates that "in cases where the people's procuratorate does not approve the arrest, the public security organ shall, immediately after receiving the notice, release the detained person and should promptly notify the people's procuratorate of the circumstances of the release." Article 73 stipulates that "if a people's court, a people's procuratorate and a public security organ discover that improper coercive measures are taken to deal with a suspect or a defendant, they should promptly abandon or change them. If a public security organ releases the arrestee or changes the arrest measures, it should notify the people's procuratorate which originally approved the arrest."

According to these regulations, the people's procuratorates exercise supervision over carrying out arrest decisions in the following aspects:

- (1) Public security organs must immediately carry out the decisions to approve the arrest made by people's procuratorates and should promptly notify people's procuratorates of the circumstances for carrying them out. The circumstances for carrying out these decisions include whether or not offenders have been seized and arrested, where they are detained, and the explanation of the reasons for failure to arrest offenders if they are not seized.
- (2) Public security organs must immediately release detained persons if procuratorial organs decide not to approve arrest and should promptly notify people's procuratorates of the circumstances of the release, such as whether or not

suspect is released and such coercive measures as allowing a suspect to obtain a guarantor and await trial out of custody and allowing him to live at home under surveillance should be taken.

- (3) If public security organs discover that improper coercive arrest measures have been taken to deal with suspects and abandon and change coercive arrest measures, they should notify the people's procuratorates which originally approved the arrest. If people's procuratorates hold different views, they can urge public security organs to rectify improper coercive measures.
 - (a) Reviewing cases and making decisions to approve arrest are the functions of procuratorial organs, and other organs cannot make such decisions arbitrarily;
 - (b) The organs for executing arrest must immediately carry out arrest decisions; and
 - (c) Efforts should be made to tighten supervision over carrying out arrest decisions. The circumstances for arrest, releasing detained persons and changing coercive measures should be reported to people's procuratorates promptly.

After people's procuratorates decide whether or not to approve an arrest, they should pay great attention to tightening supervision over the notices and activities concerning public security organs' carrying out arrest decisions, releasing arrested suspects or changing coercive measures. If people's procuratorates discover illegalities, they should request public security organs to rectify them. If public security organs improperly change arrest measures and release arrested suspects, or after people's procuratorates urge public security organs to rectify their mistakes

and public security organs do not do so, people's procuratorates should make arrest decisions and request public security organs to carry them out.

C. Supervision over Investigation

People's procuratorates exercise legal supervision according to the law to determine whether the criminal investigation conducted by public security organs is legal. They exercise supervision throughout the process of investigation conducted by public security organs, including collecting evidence and taking coercive measures to arrest criminal suspects. Such supervision seeks to identify mainly the following:

- (a) Extorting a confession from a suspect and inducement leading to confession;
- (b) Obtaining testimony and collecting evidence from victims and witnesses through such illegal means as physical punishment, threat and inducement;
- (c) Falsifying, concealing, destroying, changing and obliterating evidence;
- (d) Intentionally creating injustices;
- (e) Engaging in misconduct to seek selfish ends, conniving with and harbouring offenders;
- (f) Taking advantage of the office to seek illegal interests in the process of investigation and preliminary trial;
- (g) Embezzling, misappropriating and changing illegally acquired money and goods and interest;
- (h) Taking, carrying out, changing and invalidating measures and regulations in violation of the Criminal Procedure Law;
- (i) Violating the regulations on the time-limit for handling cases; and
- (j) Perpetrating other acts in violation of the relevant provisions of the Criminal Procedure Law.

People's procuratorates exercise supervision over investigation by reviewing cases to make decisions to approve arrest and examining prosecution. Meanwhile, in participating in the investigation conducted by public security organs, undertaking supplementary investigation of cases and handling offence-reporting and accusations, people's procuratorates can discover illegal acts perpetrated by public security organs in the process of investigation. People's procuratorates should conscientiously examine the applications for withdrawal of the responsible persons in public security organs and send personnel to participate in discussions of major cases held by public security organs, if necessary. If in reviewing cases people's procuratorates think it necessary to conduct reinspection and re-examination concerning the inspection and examination undertaken by public security organs, they can require that public security organs conduct reinspection and re-examination and can also send procuratorial staff to participate in reinspection and re-examination. With regard to the illegal acts which have been discovered, people's procuratorates can orally notify public security organs to rectifying them or send *the Notices of Rectifying Illegal Acts*. If the circumstances are serious and the cases constitute crimes, people's procuratorates should investigate and affix criminal responsibility according to the law.

D. Supervision over Adjudication

Article 169 of the Criminal Procedure Law stipulates that "if people's procuratorates discover that people's courts violate the litigation procedure prescribed by the law in trying cases, they have the right to notify people's courts of rectifying the wrong acts." We should understand this regulation in two aspects.

First, the legal supervision over the people's courts' trial of criminal cases and over court hearings exercised by people's procuratorates is the function and power of people's procuratorates, which function as state organs for legal supervision. People's procuratorates should perform this function and power, and public procurators cannot simply exercise this function and power personally. Therefore, people's procuratorates should exercise this supervision according to some prescribed procedures and request people's courts to rectify the wrong acts.

Second, in court hearings, people's procuratorates should supervise the people's courts' violation of the relevant procedures prescribed by the Criminal Procedure Law in trying cases. When public procurators discover that people's courts violate the litigation procedure prescribed by the law in court hearing, they should promptly report this to their procuratorates and request people's courts to rectify mistakes in the name of people's procuratorates. People's courts should accept the opinions of people's procuratorates, promptly rectify their mistakes, and notify the people's procuratorates of the circumstances of the rectification.

It should be pointed out that the provisions of the law do not require that people's procuratorates exercise supervision over court hearings in written form after the court adjourns. If a public procurator who appears in court discovers that the court hearing seriously violates the litigation procedure prescribed by the law, in the court he can put forward his opinions to the court. If the court does not accept his opinions and the violation of the litigation procedure prescribed by the law may affect the fair trial, the public procurator can request for the adjournment of the hearing. After he reports this to the chief procurator (except for the case in which the chief procurator appears in

court), he can request the court to rectify its mistakes in the name of the procuratorate. Supervision over court hearings is a component of the right of legal supervision, that is, procuratorial power. People's procuratorates should exercise this right, and individual public procurators should exercise legal supervision according to Article 6 of the Public Procurator Law. Public procurators perform their duties, thereby enabling people's procuratorates to perform their functions and powers of legal supervision. When public procurators appear in court, people's procuratorates entrust the task of supervision over court hearings to them. When public prosecutors appear in court, they can put forward their opinions about the violation of the procedure prescribed by the Criminal Procedure Law in the process of court hearing. If a collegiate bench is formed illegally or if a case which should not be tried in public is tried in public, the litigants have the right to apply for withdrawal and put forward their opinions about the relevant problems in the court trial. If public procurators discover that the procedures violate the provisions of the law in the court trial, they can put forward their opinions to the court. This is beneficial to rectifying mistakes promptly and ensuring a fair and legal court trial. This does not impair the dignity of the court.

E. Supervision over the Execution of Punishment

Article 215 of the Criminal Procedure Law stipulates that "the organ which approves temporary execution of a sentence outside prison should send a copy of the approved decision to a people's procuratorate. If the people's procuratorate thinks it improper to temporarily execute a sentence outside prison, it should give its written opinion to the organ which approves temporary execution of a sentence outside prison within one month from the

day it receives the notice. After the organ which approves temporary execution of a sentence outside prison receives the written opinion given by the people's procuratorate, it should immediately reexamine the decision."

Article 222 of the Criminal Procedure Law stipulates that "if a people's procuratorate thinks that a people's court improperly makes a decision on a reduction of sentence or parole, it should give its written opinion about rectifying mistakes to the people's court within 20 days after the former receives a copy of the decision. The people's court should form another collegiate bench to try the case within one month after it receives the written opinion about rectifying mistakes and gives final ruling."

Article 224 of the Criminal Procedure Law stipulates that "the people's procuratorate exercises supervision to determine whether or not the execution of punishment by the executing organ is legal. If the people's procuratorate discovers illegalities, it should notify the executing organ of rectifying them." According to the provisions of the law, the procuratorial organs supervise the execution of punishment by the executing organs, such as prisons and organs responsible for supervising and controlling offenders. The scope of supervision does not include the other activities of the organs responsible for supervision and controlling offenders, such as production and life. The procuratorial organs exercise procuratorial supervision over illegal acts which occur in execution of a sentence, control of the term of penalty, imprisonment management, change in the execution of a sentence, termination of the execution of a sentence and management of supervision and control of offenders exercised by the executing organs.