

NATURE OF NEW POWER OF SUPERVISION AND JUDICIAL SUPERVISION

Abstract. *The article provides an overview of the reform of the surveillance system in the People's Republic of China. The establishment of the supervisory commission is conducive to the integration and optimization of anticorruption forces and building up a centralized, unified, authoritative and efficient supervision system. However, the anti-corruption mechanism has also moved towards centralized from decentralized, and the mixture of powers with different natures has increased risks and uncertainties in the process of supervision. On the one hand, the balance of legal powers among state organs is touched; on the other hand, it is not conducive to the protection of rights of the investigated.*

Keywords: *supervision, judicial supervision, reform, legal nature, the oversight commission, People's Republic of China.*



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I. Introduction

The reform of supervisory system is the important practice of national management system and modern management ability in China whose related reforms need to be attached great importance to understand and explore as major events in the policy composition, fundamentality, longevity, intention or national significance and individual value. According to the principle of 'Theory of Importance'¹, for the nation and its people, the more important an event is, the more necessary it is in deeply thinking and reasoning. In early November 2016, the *On Carrying out Pilot Program for National Supervision System Reform in Beijing, Shanxi and Zhejiang Provinces* (hereinafter referred to as the program) issued by the General Office of the CPC, deployed setting up supervisory commissions at all levels in these cities and provinces. In the way of prior to carry and try to explore the experience of supervisory system reform, it is required to establish a national anti-corruption institute under the unified leadership of the CPC, integrate anti-corruption resources, expand and rich supervisory scope and means, achieve universal coverage of public powers exercised by public officers, and establish a centralized and unified, authoritative and efficient supervisory system that means public officials dare not, cannot and do not want to be corrupt. The program points out that the provincial (municipal) supervisory committee elected by the provincial (municipal) People's Congress and Commission for Discipline Inspection and Supervisory Commission in the Party should cooperate with each other, to establish a coordination mechanism between supervisory commissions and judicial authority, and strengthen supervision and restriction on supervisory commissions.

In December 2016, the National People's Congress passed the *On Carrying out Decision of Pilot Programme for National Supervision System Reform in Beijing, Shanxi*

¹ MAURER, GENERAL INTRODUCTION TO ADMINISTRATIVE LAW, at 110 (Gao Jiawei trans., Law Press, 2000).

and Zhejiang Provinces (hereinafter referred to as the decision), the decision elaborates that plan, such as in terms of integration of anti-corruption resources, the decision makes it clear that supervisory commission will integrate the function of regional governments' monitoring departments (bureaus), the prevention of corruption bureau and procuratorate in pilot areas in investigation of corruption and bribery, dereliction of duty and prevention of crime by taking advantage of duty; in terms of expansion and enriching supervisory control scope and means, the decision supervisory commissions in pilot areas have the power to supervise all regional public officials in the exercise of duty in supervision according to laws, fulfilling their duties of supervision, investigation and disposal, supervise situations in access right impartially, clean governance and observe moral principles, investigate the illegal and criminal behavior of suspected corruption and bribery, abusing authority, dereliction of duty, power rent-seeking, transfer of benefits, favoritism and a waste of national resources, and make disposal decisions; on suspicion of duty crime, transferring to the procuratorial organs and prosecuting in accordance with the law.

In order to fulfill the above duties and powers, supervisory commissions may take measures such as talking, questioning, inquiring, freezing, retrieval, sealing up, seizure, seizing, searching, inspection, appraisal and retention. In terms of the establishment of institutions, the decision defines the way in which supervisory commissions and their members in the pilot areas are elected or appointed, and stresses that supervisory commissions are responsible to the People's Congress at the corresponding level and its Standing Committee and the supervisory commissions at the upper stage, and accept their supervisions. At the end of October 2017, the Office of the CPC Central Committee printed and issued the *On Promoting Pilot Program of National Supervision System Reform* across the country, on the basis of the pilot reform experience summed up from three provinces and cities, deployed across the country and deepened the reform of the national supervisory system of exploration practice to realize the complete coverage of all public officers in the exercise of public power supervision. In November 2017, the *Supervision Law of the Peoples Republic of China (Draft)* was promulgated and submitted for public opinions, and the *Supervision Law of the Peoples Republic of China* (hereinafter referred to as the Supervision Law) was finally adopted on March 20, 2018. The reform of the national supervisory system is a major political reform that bears on the overall situation and is the top-level design of the supervisory system. Such a major political reform is bound to affect the wholeness and exert a profound impact on the existing political system and powers operation mechanism.²

II. Origin of Reform of National Supervision System

China has presented diversified supervisory mechanisms for a long time, including the supervision by the People's Congress and its Standing Committee, democratic supervision by the CPPCC, discipline supervision by the Party, administrative supervision, court supervision, audit supervision, social supervision and supervision by

² Qin Qianhong, *Dilemma, Reform and Way Out: From 'Troika' to National Supervision: Constitutional Reflections on China's Supervision System*, 1 *China Law Review* 182 (2017).

public opinion. As a special legal supervision organ, the people's procuratorate has also played an important role. Although there are different types of supervisory mechanisms with diverse functions, they are scattered in different departments and mainly focus on internal supervision, which greatly reduces the performance of supervision functions. Meanwhile, there are problems such as unclear boundaries of supervision functions, blind areas for supervision and difficulty in forming joint forces. Specifically, the target of administrative supervision contain state administrative organs, their public officials and other personnel appointed by administrative organs, but it fails to cover the legislative organs, judicial organs and so on. There are blanks and blind areas in supervision. On the other hand, China's political power structure is relatively special, since 1954, a dual power structure in fact is formed, the ruling party in state political life enjoys absolute authority, national political power presents the characteristics of highly concentration and unification, which compels all social changes to rely on a bottom-up movement, without the support of leaders in high position and supervision organs with insufficient authority causing malfunction. Therefore, whether a supervisory organ can achieve effective restriction and supervision depends on its power. To strengthen the supervision function, the supervision power must be strengthened first. For example, the administrative supervision is the government's internal supervision, which means that administrative supervision departments should not only accept the guidance of a government at the same level, but also be responsible for the government at the same level, as well as the cadre and personnel, property funds controlled by the government at the same level. Restricted by this leadership system, it is difficult to make a difference, so that solving supervision problems often needs the support of all levels of Party committees and governments at higher levels. In addition, supervision measures and the regulations on supervision procedures are not perfect. The law on administrative supervision gives insufficient coercive force to administrative supervision organs in inspection and suggestions, resulting in the lack of deterrent power of the supervision system. However, the provisions of the supervision measures make the supervision departments unable to effectively conduct investigation and evidence collection, making it difficult for the related requirements of the *Administrative Supervision Law* to be implemented, due to unscientific and unreasonable administrative supervision procedures, single channels for handling complaints and closed supervision results.

In terms of discipline supervision in the CPC, the discipline inspection department, as the Party's institution, has the stronger support and organizational guarantee of the central government, and is also very convenient in mobilizing other government forces.³ Compared with administrative supervision departments and procuratorial organs, it has an obvious advantage of status. In the establishment of the authority, the discipline inspection department can investigate problems of discipline violation and illegal problems, exercise the powers of investigation and have the corresponding powers of punishment, and will not be restricted by the criminal procedure. But there are many problems behind effective anti-corruption. Firstly, like administrative supervision, discipline inspection departments are under the leadership of Party committees at the same level. The asymmetrical power relations have restricted the powers of supervi-

³ Zhang Jianwei, *A New Supervisory System in the Field of Due Process of Law*, 2 *Global Law Review* 62 (2017).



sion. Therefore, longitudinal supervision has to be implemented in the way of vertical management, which cannot be divorced from a set pattern under the traditional centralization of powers. Secondly, the Party discipline measures used in the supervision process are based on Party regulations rather than laws, so it is impossible to prove its legality, and even some discipline inspection measures are lack of the strict norms of substantive and procedural laws. Due to the complexity of anti-corruption work, the object of application of subjecting someone to questioning at an appointed time and place is easy to break through the boundaries and cause exceeding powers. Additionally, the time limit for restricting personal freedoms is often uncertain and prone to situations of excessive or timeless, which is tantamount to detention or disguised detention. Elicit confession and forced confession mess will also trigger the event of human rights and accountability risk. These problems not only inevitably harm the powers of the investigators, but also cause the legitimacy crisis to the overstepping of the national judicial powers.⁴ At the same time, the anti-corruption experience gained by discipline inspection organs also needs to be confirmed in the form of legislation.

As for the integration of supervision resources, although disciplinary inspection and supervision organs have overlaps with procuratorial organs in terms of anti-corruption powers, they are different in their status, roles, functions, division of labor and scope of authority, as well as the basis for the investigation and handling of cases, so that they also have differences in ideas, investigation and handling mechanisms and procedural requirements. For example, the procuratorial organs in the name of assisting or cooperating with Discipline Inspection Commission on the case make investigations, which conflict with the principle and requirements of the *Criminal Procedure Law*. The case basis of discipline inspection authority is the *Regulations on Case Investigation or Discipline Inspection Organ of the Communist Party of China* and the *Administrative Supervision Law* whose requirement is different from that of the *Criminal Procedure Law* in the specifications of collecting evidence and procedures. It needs to make sure by law if discipline inspection organs conform to the provisions of transferring the criminal evidence subject and the collection of evidence materials can be converted into criminal procedure evidence. Criminal case filing supervision is an important criminal supervision function given to procuratorial organs by the *Criminal Procedure Law*. In 2010, the *On the Provisions of Related Problems of the Criminal Prosecution Supervision (Trial Implementation)* put the situation of filing case that public security organs should not file case into the category of the procuratorial organs supervision. For discipline inspection and supervision departments over the case, whether the prosecutor's office must be filed and prosecuted. To sum up, the necessity of the national supervision system reform lies in: firstly, integrating and optimizing existing anti-corruption resources and establishing a centralized, unified, authoritative and efficient supervision system. Secondly, China's anti-corruption strategy has always been subject to the model of campaign-style enforcement, and corruption control is essentially political rather than combating corruption according to established rules.⁵ If the supervision

⁴ Wang Jingui, 'Shuanggui' and 'Surrender': Research on Constitutionality, 8 Law Science 62 (2005).

⁵ MELANIE MANION, CORRUPTION AND CORRUPTION CONTROL: MORE OF THE SAME IN 1996, at 46 (Chinese University of Hong Kong Press, 1997).

does not follow the law, it cannot guarantee the anti-corruption work of sustainability, fairness, predictability and authority, and the establishment of the national supervisory commission is just the promotion of anti-corruption legalization.

III. Establishment of Supervisory institution and Nature of Supervisory Power

A. Establishment of Supervisory Institution

In December 2016, the *Regulations of Communist Party of China on Intra-party Supervision* adopted at the Sixth Plenary Session of the 18th Central Committee of CPC clearly stated that Party committees at all levels should support and guarantee the supervision of state organs and public officers by the people's congresses, governments, supervisory organs, judicial organs and other organs at the same level in accordance with the law. For the first time, the supervisory organs will be juxtaposed with the National People's Congress, the government and the judicial organs, which indicates that the reform direction of supervisory commission is to be juxtaposed with the government and the judicial organs under the first-level people's congress, forming the power structure of one government, one commission and two houses. The plan and decision lasted the thought of setting institution and cooperation with the Central Commission for Discipline Inspection (CCDI) in 1993, 'co-location with the discipline inspection commission and supervision commission', 'being total responsible for Party committee, fulfilling the two duties of disciplinary inspection and supervision' and 'carrying out a set of institutions, two names of institution'.⁶ This kind of relationship is similar to the relationship between the Party's central military commission and the national central military commission, both of them fully integrated. Although the supervision commissions and discipline inspection commissions are offices of cooperation, after the transformation of traditional disciplinary inspection and supervisory system to the modern state supervisory system, on the premise of the unified leadership of the Party, it should insist on the principle of focusing on national supervisory commission in business. In this sense, the duty where the discipline inspection commission was previously out of reach or could not be implemented after the joint office, can now be implemented in accordance with the law in the name of state organs through the supervisory commissions, which not only expanded supervisory coverage, but also provided a legal basis for the supervisory commission's cases, ensuring that the legitimacy of implementing the inner-party supervision measures by the Discipline Inspection Commission.⁷ The co-working system expresses that dialectical relation on both sides between inner-party supervision and national supervision not only improves the Party's self-supervision, but strengthens the supervision over the state apparatus. The

⁶ In November 2016, the General Office of the CPC issued the On Carrying out Pilot Program for National Supervision System Reform in Beijing, Shanxi and Zhejiang Provinces. In December 2016, the National Peoples Congress passed the On Carrying out Decision of Pilot Programme for National Supervision System Reform in Beijing, Shanxi and Zhejiang Provinces.

⁷ Ma Huaide, Important Significance and Main Task of National Supervision System Reform, 6 Journal of National Administration Institute 18 (2016).



Party Secretary of the discipline inspection commission as the national supervisory committee, is beneficial to dispel resistance in the supervisory work, implement the Party's the will of anti-corruption in the supervision. The National Supervisory Commission belongs to specialized state organs under the direct leadership of the Party's disciplinary inspection department, which is not the same mode with political-legal organs under the leadership of the Party's political-legal committee that does not directly deal with the case, only responsible for major policy formulation, urged to correct mistakes and organize coordination work, and the specific cases have been dealt with by public security, judicial organs and administrative organs according to their respective functions and scope of jurisdiction. In contrast, the Party's discipline inspection organs will deal with cases directly.

The newly established supervisory commissions integrate the anti-corruption powers of discipline inspection commissions, supervision commissions and procuratorial organs. The anti-corruption system has moved towards centralization from decentralization. At the same time, the supervisory commissions have been granted the powers of talking, questioning, inquiring, freezing, retrieval, sealing up, seizure, seizing, searching, inspection, appraisal and retention and other measures and so on, which will have a direct impact on the personal and property rights of the investigated. Generally speaking, the status of a state organ higher than the procuratorate is normal, but the status higher than the court is more complicated. Because once the political status of state organs mastering criminal investigation powers is higher than that of judicial organs, which causes malpractices of investigation powers out of the track of litigation and out of judicial control, and the basic rights of the investigated personnel will often be in danger.⁸ From the experience of Singapore and other places, their special anti-corruption agency has not been endowed with such strong power. In other countries and regions, crime investigation either is mainly conducted by the police agency or directly by the procuratorial organ. Neither the police agency nor the procuratorial organ does have such strong power. Therefore, the supervisory organs combined Party power and State power, and integrated administrative power and judicial power in the state power, which is incompatible with the organizational system of modern countries. In Singapore and other places, the establishment of a dedicated anti-corruption institution is often measured by the necessary powers needed to carry out anti-corruption work independently, rather than by all the powers needed to effectively advance anti-corruption.⁹ If a supervisory organ has much power, or the organizational system is too unitary, there will be risks and uncertainties in the process of exercising authority.

B. Nature of Supervisory Power

According to a report by Xinhua news agency on November 5, 2017 about the pilot reform of the national supervisory system, the article clearly pointed out that the supervisory commission is an anti-corruption agency in essence, and cooperates with the discipline inspection commissions, exercising the power of supervision on behalf of Party and State, and is a political organ, neither an administrative organ nor a judi-

⁸ Tong Zhiwei, How to Strengthen Supervisory Control of Supervisory Commission, 1 Law Review 2 (2017).

⁹ TIAN HENZHU, COMPARATIVE STUDY OF ASIAN ANTI-CORRUPTION LEGAL MECHANISM, AT 96 (Chinese People's Public Security University Press, 2009).

cial organ. From the plan and the practice of pilot provinces and cities, the supervisory commission in the integration of the administrative supervision departments, bureau of corruption prevention and procuratorate to investigate and punish corruption and bribery, prevention of duty crime and other related functions, has become an integrated and comprehensive collection of Party discipline supervision, administrative supervision and legal supervision organs. Different from Party organs, administrative organs and judicial organs, their functions and powers are comprehensive and mixed. In accordance with the provisions of article 15 of the Supervision Law, supervisory organs exercise the power of supervision over all public officials exercising public power in their areas according to the administrative authority. Article 12 of the Supervision Law stipulates that the duties of the supervisory organs are supervision, investigation and disposal, which is supervising the performance of public officials in accordance with the law, impartiality, integrity and ethical conduct; investigate and make decisions on official violations and crimes such as corruption and bribery, abuse of power, dereliction of duty, power rent-seeking, interest transmission, favoritism and fraud, and waste of state assets; and transfer suspected official crimes to the procuratorial organs for prosecution in accordance with the law. These three successive powers in time and space remove obstacles for handling cases, but what is constructed is a closed power ring. If the investigation of the case cannot enter the judicial process, the restriction cannot be formed among procuratorial organs, and other external supervision mechanisms are more difficult to get involved.

As mentioned earlier, the functions and powers of the supervisory organs can be divided into two categories. One is to supervise the performance of public officials in accordance with the law, impartiality, integrity and ethics, and to investigate and make decisions on the illegal acts of corruption and bribery, abuse of power, dereliction of duty, power rent-seeking, benefit transmission, favoritism and fraud, and waste of state funds. The other is to investigate such official crimes as corruption and bribery, abuse of power, dereliction of duty, power rent-seeking, benefit transmission, favoritism and fraud, and waste of state funds, and to refer those suspected of official crimes to the procuratorial organs for prosecution according to law. The former supervises the violation of discipline and illegal behaviour of public officials, which belongs to administrative power in nature. The latter is similar to the power of criminal investigation of public security organs and procuratorial organs in investigating and transferring crimes committed by public officials. According to relevant contents of the supervision law, the means of investigation mainly include talking, questioning, inquiring, freezing, retrieval, sealing up, seizure, seizing, searching, inspection, appraisal, retention and technical investigation measures. If the investigation activities of a supervisory organ involve the collection of evidence of an official crime, it falls under the category of criminal investigation power. However, the *Criminal Procedure Law of China* establishes the exclusive principle of investigation power, procuratorial power and judicial power. Exclusive power means that the investigation power, procuratorial power and judicial power are exclusively exercised by public security organs, procuratorates and courts, while other organs, groups and individuals have no right to exercise these powers. Supervisory organs are not prohibited from being authorized to exercise the power of investigation, but they should abide by the *Criminal Procedure Law* and other relevant regulations of law when exercised. Administrative power is different from investigation



power, they have large differences in launch conditions, strength and so on. From the overall view, a compound of two powers exists in the same institution, which is a mutual alternative or compounded. Compared with the single exercise of one power, the combination or alternation of exercising two powers is easier to make adverse impacts on using national public power in regulation and legal order.

IV. Supervision of Supervisory Committee and Judicial Supervision

When delegating the corresponding functions and powers to supervisory organs, Chapter 7 of the Supervision Law provides detailed supervision methods for supervisory organs and supervisory personnel, including internal supervision, supervising supervisory personnels' performance of duties and compliance with laws by supervisory organs; Supervision of the People's Congress, the supervisory organs shall accept the supervision of the people's congresses and their standing committees at the corresponding levels. The standing committees of the people's congresses at various levels shall listen to and consider the special work reports of the supervisory organs at the corresponding levels and organize law enforcement inspections. The supervisory of the power organs may establish complaint committees of the relevant supervisory committees to receive complaints of supervisory organs and supervisory personnel. For example, the complaints committee of the Hong Kong Independent Commission against Corruption (ICAC) supervises and reviews all non-criminal complaints involving the ICAC and officers of ICAC. Members of the committee are appointed by the chief executive and include members of the legislative council and public personages. Any citizens who are dissatisfied with the conduct or working practices and procedures of officers of the ICAC may lodge a complaint.¹⁰ And the supervision of the Party committee, the supervision commission and the Party's discipline inspection commission work together under the leadership of the Party commission at the same level, which contains supervision. Judicial supervision of the supervisory commission is realized in the division of powers, checks, balances and restraints; it also requires supervisory organs to disclose information about supervisory work in accordance with the law and accept democratic supervision, social supervision and supervision by public opinion.

A. Necessity of Judicial Supervision

Firstly, the concentration of supervisory powers is not conducive to the protection of the rights of the investigated. It is true that the combination of powers will create a strong anti-corruption campaign. However, the investigation of duty crimes is quite different from the discipline inspection of Party and administrative supervision in terms of procedure requirements and intensity of power limitation. These powers mixed in together, will increase the risk of power abuse. It is possible that Party discipline inspection, illegal supervision and duty crime investigation can be selectively applied, if it could be applied to the cases of Party discipline inspection or administrative illegal supervision, it would choose the duty crime investigation which belongs to the field of criminal procedure with greater application intensity to limit or deprive citizens' person-

¹⁰ Chen Yongge, On Characteristics of Hong Kong's ICAC System and Its Revelation to Law. 2 Tsinghua Law Review 182 (2003).

al freedoms, which is very adverse to protect the rights of the investigated. Secondly, the intensity of the supervisory organs' investigation measures needs to be restricted. For example, in exercising the power of investigation, the supervisory organ allows the detention of not more than three months. The degree of detainment on restriction to personal freedoms of citizens exceeds that of criminal summon by force and custody, which is equivalent to an arrest, the most severe in the coercive measures of criminal procedure. According to the provisions of the *Constitution* and *Criminal Procedure Law*, the arrest of a criminal suspect or defendant must be approved by the people's procuratorate or people's court. The Supervision Law rules that measures of detention by supervisory organs should be approved or filed by supervisory organs at a higher level, which is incongruent with the constitutional requirement in which the three organs of public security, procuratorial and court restrict and supervise with each other to ensure the legality of the investigation. Thirdly, the remedies for the rights of the investigated are limited. Articles 38 and 40 of the *Administrative Supervision Law* stipulate that if the investigated refuses to accept a decision made by supervisory organs, he or she shall only have two chances to apply for internal review of the decision, which shall be the final decision. Such an internal review should be of limited remedy to the parties concerned and cannot effectively correct erroneous decisions.

Article 49 of the Supervision Law provides that if the investigated refuses to accept a decision made by supervisory organs, he or she may apply to the supervisory organs at the next higher level for check in accordance with the law. Article 61 also stipulates that if the case is found to be based on insufficient or false evidence after investigation, there is a major fault found in the handling of the case, and the supervisory personnel seriously violate the law, the direct responsibility must be investigated, and the relevant leading personnel must be held responsible. Article 65 provides the form in which supervisory organs and their staff exercise their power illegally, but does not clearly indicate the way in which the relevant personnel will be held liable for violation of the law. Initially, article 4 of the Supervision Law stressed that supervisory organs should cooperate and restrict each other with judicial organs, procuratorial organs and law enforcement departments in handling cases of official violation and official crime, what is expressed is the rule of law principle that there must be relief if there is right. In the previous handling case process, the discipline inspection authorities implemented the intraparty disciplinary procedure of requiring a member who is being investigated to cooperate with questioning at a set time and place and the supervision departments implemented the intraparty disciplinary procedure of ordering a personnel suspected of violating administrative discipline to explain the issues involved in the investigation at the designated time and place, which were most criticized for the conflict with the rule of law principles. In summary, the significance of judicial supervision lies in avoiding the alienation of supervisory authority as repressive and imperious force, avoiding the variation of supervisory mechanism as an administrative crime activity, and finally overcoming the adverse impact of political opportunism.

B. Feasibility of Judicial Supervision

1. *Judicial Supervision on Illegal and Criminal Behavior of Supervisor* Article 65 of the Supervision Law provides that departments or persons under supervision violate the provisions of the Supervision Law by committing any of the following acts, who impose sanctions in accordance with law, and if constituted crime, it shall be respon-



sible for crime in accordance with the law. First, without authorization, authorizing the disposal of clues, major findings of the case to withhold, or privately retained, the processing of the material involved; second, interfering in the investigation through taking advantage of duty or influence of duty to seeking personal gain; third, illegally stealing or revealing the information of the investigation, or revealing the information about the reported matters, acceptance conditions about reported and the information of the whistleblower; fourth, by forced confessions, confession by inducement, or insulting, abuse, maltreatment, corporal punishment or disguised corporal punishment to treat the persons under investigation; fifth, disposing of sealed up, detained or frozen property in violation of provisions; sixth, the occurrence of a security accident in handling a case in violation of the provisions, or concealing, inaccurate reporting and improper disposal after the occurrence of a security accident; seventh, taking detention measures in violation of regulations; eighth, restricting the exit of others in violation of the regulations, or failing to lift the exit restrictions in violation of the regulations; ninth, other acts about the abuse of power, malpractice for selfish ends, neglecting duties or divulging secrets.

Article 66 of the Supervision Law provides that in violation of the provisions of this law, constituting a crime shall be investigated for criminal responsibility according to the law. According to the provisions of the decision and the Supervision Law, the investigation of corruption and bribery, dereliction of duty and the prevention of duty crime and other functions have been transferred to the supervisory organs. The scope of the investigation by the supervisory organs includes suspected corruption and bribery, abusing authority, dereliction of duty, power rent-seeking, transfer of benefits, favoritism and a waste of national resources and other official violations and crimes. If it involves the crime of the supervisory organ and its staff, by supervisory organs to investigate their duties violations is unsuitable, especially for the duty crime, and it should submit the criminal cases of the supervisory organ to the procuratorial organ for filing and investigation. In addition, the crime belonging to national officer infringing citizen's personal rights and democratic rights, namely the national officer abuse their authorities by implementation of illegal detention, illegal searching, extort a confession by torture, resorting to violence, abuse of detainees, retaliation and frame-ups and disrupt the elections still remain the scope of the jurisdiction of the procuratorial organ functions. Supervisory organs and their staff within the scope of this crime, the jurisdiction of the procuratorial organs have the power of investigation.

Therefore, there is a practical need of judicial practice to retain the investigative power of procuratorial organs. It not only accords with the orientation of the supervisory organ as the anti-corruption working organization, but also forms the mutual restriction of supervisory power and procuratorial power. In the institutional design of the ICAC in Hong Kong, non-criminal complaints involving disciplinary acts and corruption charges by ICAC personnel are investigated by the Investigation and Monitoring Team (Group L) within the ICAC, and which are monitored and reviewed by the Independent Complaints Committee of the ICAC. However, all criminal complaints should be notified to the Secretary for Justice, who decides whether they should be investigated by the ICAC or other law enforcement agencies, and ultimately handled by the Department of Justice in collaboration with the Advisory Committee on the Review of Corruption Reporting. Therefore, the peoples procuratorates shall file cases

and investigate the criminal cases of malfeasance and infringement during the investigation of the supervisory personnel to establish public trust to investigate this type cases. From the perspective of power attribute, the supervisory commission enjoys the power of investigation, which is different from the power of investigation enjoyed by the procuratorate and cannot completely replace the power of investigation of the procuratorate. In the transfer of institutions, some procuratorial technical departments and information departments should be retained in procuratorial organs to ensure the smooth implementation of the right of self-investigation. At the same time, the procuratorate, as a legal supervision organ stipulated in the *Constitution*, has the right to exercise legal supervision over decisions made or measures taken by supervisory organs, which is also a way of judicial supervision.

2. *Judicial Supervision on Investigation of Official Crimes of Supervisory Organs.* —

The Supervision Law provides 13 kinds of supervision measures. If the current *Criminal Procedure Law* and administrative laws and regulations are used as the reference, the conversation should be a disciplinary investigation measure. Inquiry, requisition, inspection, appraisal, sealing, seizure, searching, freezing, detention, etc., are the measures that can be set up and implemented by administrative supervision and criminal investigation. Inquiry, search and technical investigation belong to criminal investigation measure. Involved these measures in the criminal investigation, the Supervision Law should make the strict and detailed rules in terms of the inspection conditions, the applicable scope, applicable period, implementing subject, the specific procedures, remove conditions, relief ways and enforcement power of supervisory organs should follow the *Criminal Procedure Law* and other relevant laws and regulations. Other countries have also established a procedural judgment system for the judicial control of compulsory investigation.¹¹ This procedural judgment mechanism mainly includes the following three indispensable links: firstly, the prior judicial authorization; secondly, formal procedural hearing; third, judicial relief after the event. Pre-trial investigations also rely on the track of procedure. In Britain, the police must generally apply to the magistrate in advance for any compulsory act of arrest, search or seizure of any citizen, and explain the justification for the arrest and search. During the investigation, suspects in custody have the right to release on bail directly from the police. If denied, he or she can apply to the magistrate's court. The magistrates' court will hold the hearing about whether it can be released on bail. The police and the suspect and their lawyers will present their opinions and debate. The judge will decide in accordance with their argument and the suspect can also appeal to the high court in terms with the procedural issues. In addition, the throne chambers of the high court through the application will hold court proceedings and make decisions on the legality and justice of detention of suspects who are improperly or illegally detained during the investigation stage¹².

In the field of criminal procedure, procuratorial organs have the right to exercise legal supervision over the litigation activities of public security organs, courts and penalty enforcement organs, which is manifested in the supervision of the public security

¹¹ SUN CHANGYONG, INVESTIGATION PROCEDURE AND HUMAN RIGHTS, at 26 (China Founder Press, 2000).

¹² Chen Ruihua, Nature of Judicial Power: An Analysis Based on Criminal Justice, 5 Law Research 55 (2000).



organs in filing cases, the approval of arrest, the extension of detention decision, the right to protest against the court and so on. The procuratorates as specialized supervision organs of law whose attributes are not changed with the reform of the supervision system. The relationship between supervisory organs and procuratorial organs in the investigation of duty-related crimes can be referred to the relationship between public security organs and procuratorial organs in criminal proceedings. That is, the procuratorial organs exercise supervision over the initiation of investigative powers of supervisory organs, the process of exercising investigative powers and whether the cases transferred by the supervisory organs to prosecute meet the conditions for prosecution. Therefore, according to the provisions of article 47 of the Supervision Law, procuratorial organs have the right to review and prosecute cases transferred by supervisory organs, which is similar to the provisions of article 167 of the *Criminal Procedure Law*. Detention measures by supervisory organs in accordance with article 43 of the Supervision Law shall be decided by the collective research of supervisory organ leading personnel, which is unreasonable. Detention measures taken by the supervisory organ shall be approved by the people's procuratorate is legal. At the same time, it should also in the instance of overdue detention set a corresponding relief system, in order to protect the rights of the detained personnel. Supervisory organs in accordance with the law exercise the power of collecting identification evidence, which should follow the requirement of the relevant *Criminal Procedure Law* and make it clear to collect the regulation evidence and identify procedures, and investigate and verify the evidence of people's procuratorate. If there is any behaviour to collect evidence by threat, enticement, deceit or other illegal means, or insult, abuse, torture, corporal punishment and disguised corporal punishment of respondent, it should be ruled out. Technical investigation measures of the *Criminal Procedure Law* must pass strict approval procedures, and can be applicable after meeting the condition of filing cases, felony cases and necessity. Article 28 of the Supervision Law stipulates that when investigating suspected major official crimes such as corruption, bribery, dereliction of duty and so on, the supervisory organs may take technical investigative measures according to their needs, but what approval procedures should be followed and who should approve them have not been explained. Usually, technical investigation measures in other countries generally by the prosecutor or the judge approved the legitimacy review. Therefore, the supervisory organs to take technical investigation measures can be passed on to the people's procuratorate of investigation supervision departments at the next higher level in strict accordance with the law in examination and approval, and strict supervising survey plan, subjects, matters and the scope of the investigation. It can increase the right of reconsideration of the duty crime investigation department of the supervisory organ correspondingly so as to realize the justice of its approval procedure in the judicial system and environment of China.

Among them, in view of the possible illegal or criminal acts in the investigation of duty-related crimes, the Supreme People's Procuratorate's Office of Investigation and Supervision formulated the *Opinions on Investigation and Verification of Illegal Acts by Investigation and Supervision Departments* on December 27, 2013, which can be used as a reference by supervisory organs, the procuratorates, as the investigative and supervisory department, investigate the illegal situation of the investigative department (supervisory organs) of duty-related crimes. After the investigation is completed,

according to the facts and evidence of the investigation, the procuratorates shall make the following treatments according to the law. in the situation that there is no illegal behaviour, it should show it to the investigation department timely. If an investigator involved in the investigation has been questioned, he or she shall also be informed of the situation. If adverse effects are caused, appropriate ways shall be taken to clarify them in a certain range. At the same time, the results of the investigation timely reply to the complaint, appeal, and whistleblower. If it is determined that an illegal act exists and no crime has been constituted, it shall put forward a correction opinion to the investigation department. If the circumstances are relatively minor, the procurators shall give an oral correction opinion after obtaining the consent of the head of the department. If the circumstances are serious, it shall report to the deputy chief procurator or the chief procurator for approval and issue a notice of correction to the investigating department. If the investigation department violates the law seriously, report the decision to the inspector general. If continuing to undertake the case will seriously affect the impartial proceeding of the litigation according to the law, the investigation departments concerned may put forward a proposal to replace the person handling the case to the investigation department concerned. Investigators who need to be responsible for suspected crimes during the investigation shall be transferred to the competent investigation organs for handling according to the law.¹³

3. *Judicial Supervision on Duty Infringement of Supervisor.* — Administrative litigation is a kind of *ex post facto* legal supervision system for administrative acts. This mechanism of restricting and supervising administrative power by judicial power aims to guarantee administrative management by administrative organs according to the law through the final judicial decision, and realize the principle of having rights and having remedies. The supervisory organs infringe the rights of supervised personnel because of their illegal duties. Whether the victim can bring administrative proceedings depends on two factors: First, whether or not the relationship between the supervisory organ and the supervised personnel belongs to the relationship between the administrative subject and the relative administrative person as regulated by the *Administrative Procedure Law*. Second, whether or not the supervisory power belongs to the power of administrative. As for the first question, the *Chinese Administrative Law* has developed the theory of internal administrative behaviour, which was once a standard of special power relationship,¹⁴ according to the view of special power relation point that the relationship between the Party organizations and Party members is different from the relationship between administrative authority and administrative personnel and the general relationship between state organs and citizens, which is based on the internal relations, different from the relationship between the state and citizens. Countries to interfere in the freedom of citizens and property need to follow in the form of the law, but there are not legal provisions in terms of the internal relationship of the

¹³ Yuan Ming, Zhang Qingbin & Zhu Rongli, Understanding and Application of Comments on Investigation and Supervision Department to Investigate and Verify Illegal Acts (for Trial Implementation), 4 People of the Public Prosecutor's Office 40 (2014).

¹⁴ Hu Jianmiao, The Theory of 'Special Power Relations' and China's Administrative Legislation: Taking 'Administrative Procedure Law 'Civil Servant Act' as an Example, 5 Chinese Jurisprudence 65 (2005).



state. Therefore, the significance of the special power is to provide an authorization basis for limiting the basic rights of the special status subjects.¹⁵

As a result of this theory, the relief right of the supervised personnel is very limited. The special power limits the relief of the rights of the monitored persons, but such limitation itself also has to be restricted, for example: the first is appropriateness, that is, the limitation of basic rights should achieve the purpose of special order, otherwise, it constitutes the infringement of the rights of the special status subject. The second is necessity, that is, whether there are more modest means to maintain special power relations. The third is equilibrium and excessive prohibition. To balance the relations of special power needs the basic rights of special status subjects. Thus, special power relations cannot be used as a reason to exclude judicial remedies if the rights of the investigated are restricted to the proportion of loss of balance.

As for the second question, according to article 2 of the *Administrative Procedure Law*, administrative acts also include acts of organizations authorized by laws, regulations and rules. Thus, organizations other than administrative organs can also make administrative acts. Therefore, even if not as administrative organs, the supervisory organs also do not interfere with the exercise of executive power and become the administrative lawsuit defendant. However, what the supervisory organs enjoy is a kind of compound power. On the one hand, they exercise the investigation on the violation of official duties, including Party discipline supervision and administrative supervision, which is the executive power in the broad sense. On the other hand, the exercise of the investigation of official crime is similar to the investigation power. On the latter, based on the *Interpretation of the Supreme People's Court on Several Issues concerning the Implementation of the Administrative Procedure Law of the Peoples Republic of China of 1999*, paragraph 2 of article 1 of the regulations, for the criminal justice act cannot bring administrative prosecution to it, can only rely on the *Constitution* and the *Criminal Procedure Law* by the judicial authority responsible for the division of labour, mutual restriction between both of them to supervise. If the personal right and property right of the persons concerned are infringed due to a criminal investigation or illegal procedure, they should be settled through judicial compensation instead of administrative litigation according to the relevant provisions of the state compensation law. According to this interpretation, if the investigation of duty crime of a supervisory organ belongs to the category of criminal jurisdiction, then compulsory measures such as interrogation, inquiry, freezing, transfer, sealing, seizure, search, inspection, appraisal, detention, technical investigation, etc. do not have the justiciability of administrative proceedings. If this is the case, the supervisory organ may evade judicial review by selectively applying the duty crime investigation power, and the administrative supervision originally imposed on the investigated may be transferred to the duty crime investigation. The *Criminal Law* and the *Decision on the Administration of Judicial Appraisal* both confirm the judicial activities are the litigations and the investigation is a part of judicial activities.¹⁶ The key of the question is whether the supervisory organs

¹⁵ Li Hongbo, Towards Supervisory Commission: Power to Oversee Transformation of Law in China, 3 Law Review 153 (2017).

¹⁶ Chen Guangzhong & Cui Jie, The Chinese Interpretation of Judicature and Judicial Organs, 2 China Law 277 (2008).

have the power to investigate the behaviour of duty crime. Furthermore, is it a criminal jurisdiction? The investigation of duty crimes by supervisory organs is not fundamentally different from other administrative behaviours except that it is related to criminal proceedings. Different from the legal supervision function of procuratorial organs, the duty of supervisory organs is to fight against corruption. It is not the litigation, but the preparation before litigation. Not all power involving in criminal matters is judicial power. Only the final jurisdiction over criminal cases belongs to the category of judicial power. The function of criminal investigation power of supervisory organs is the same as that of other executive powers, which is to carry out, that is, to deliver all criminals to trial as much as possible by gathering solid and sufficient evidence, so as to achieve the functional goal of maintaining social peace and order by the *Constitution* and law. The task of the judiciary is to determine the rights and wrongs through its judgment, which is recognition and does not permit the intervention of commands on the truth and falsehood.¹⁷ The characteristics of *ex post* relief, openness, passivity, neutrality, independence and finality contained in judicial power are obviously different from the characteristics of formation, initiative, public welfare, restraint, purpose, concreteness and hierarchy of supervisory power. In essence, the investigation of duty crimes by supervisory organs is an act related to justice, not the criminal justice act itself.

As a result, the investigation of the supervisory organs on duty crime is closer to the broad category of executive power, which is expressed by a concept of social control. Considering studies on the development of criminal proceedings in other countries, the police and prosecutors as criminal prosecutor tend to become the defendant, which take coercive measures such as involved restrictions and denial of individual's fundamental rights or the legitimacy of investigation has become the object of procedural justice. Therefore, the supervisory organs cannot keep out of the way. In view of supervisors' duty tort, it can be allowed to use the *Administrative Procedure Law*, which shall be accepted by the administrative court of the people's court. In terms of legal technology, it is necessary to make special provisions in the Supervision Law, which will then be accommodated by paragraph 2 of article 12 in the *Administrative Procedure Law*, which states that the people's court accepts other cases that can be brought in accordance with the provisions of laws and regulations. On these grounds, the Supervision Law can increase the requirement of administrative litigation against the commission's illegal exercise of supervisory power and the disclosure of supervisory information, thus allowing the commission to accept more effective litigation and supervision.¹⁸

V. Conclusion

The article provides an overview of the reform of the surveillance system in the People's Republic of China. The establishment of the supervisory commission is conducive to the integration and optimization of anti-corruption forces and building up a central-

¹⁷ RADBRUCH, INTRODUCTION TO LAW, AT 101 (Mi Jian trans, China Encyclopedia Publishing House, 2003).

¹⁸ Wang Kai & Wang Xinyang, How to Supervise the Supervisors: Discussion about Litigation Supervision of the Supervisory Commission, 8 Zhejiang Social Science 20 (2017).



ized, unified, authoritative and efficient supervision system. However, the anti-corruption mechanism has also moved towards centralized from decentralized, and the mixture of powers with different natures has increased risks and uncertainties in the process of supervision. On the one hand, the balance of legal powers among state organs is touched; on the other hand, it is not conducive to the protection of rights of the investigated.

В статье дается обзор реформы системы надзора в Китайской Народной Республике. По итогам проведенного исследования автор приходит к выводу, что создание наблюдательной комиссии способствует интеграции и оптимизации антикоррупционных сил и созданию централизованной, единой, авторитетной и эффективной системы надзора. В то же время антикоррупционный механизм перешел от децентрализованной к централизованной форме, а сочетание полномочий различной правовой природы привело к усилению рисков и неопределенности в процессе осуществления надзора. С одной стороны, это нарушает баланс полномочий государственных органов, а с другой не способствует защите прав поднадзорных лиц.

REFERENCES

1. Chen Guangzhong & Cui Jie, The Chinese Interpretation of Judicature and Judicial Organs, 2 China Law 277 (2008).
2. Chen Ruihua, Nature of Judicial Power: An Analysis Based on Criminal Justice, 5 Law Research 55 (2000).
3. Chen Yongge, On Characteristics of Hong Kong's ICAC System and Its Revelation to Law. 2 Tsinghua Law Review 182 (2003).
4. Hu Jianmiao, The Theory of 'Special Power Relations ' and China's Administrative Legislation: Taking 'Administrative Procedure Law 'Civil Servant Act ' as an Example, 5 Chinese Jurisprudence 65 (2005).
5. Li Hongbo, Towards Supervisory Commission: Power to Oversee Transformation of Law in China, 3 Law Review 153 (2017).
6. Ma Huaide, Important Significance and Main Task of National Supervision System Reform, 6 Journal of National Administration Institute 18 (2016).
7. MAURER, GENERAL INTRODUCTION TO ADMINISTRATIVE LAW, at 110 (Gao Jiawei trans., Law Press, 2000).
8. MELANIE MANION, CORRUPTION AND CORRUPTION CONTROL: MORE OF THE SAME IN 1996, at 46 (Chinese University of Hong Kong Press, 1997).
9. Qin Qianhong, Dilemma, Reform and Way Out: From 'Troika' to National Supervision: Constitutional Reflections on China's Supervision System, 1 China Law Review 182 (2017).
10. RADBRUCH, INTRODUCTION TO LAW, AT 101 (Mi Jian trans, China Encyclopedia Publishing House, 2003).
11. SUN CHANGYONG, INVESTIGATION PROCEDURE AND HUMAN RIGHTS, at 26 (China Founder Press, 2000).
12. TIAN HENZHU, COMPARATIVE STUDY OF ASIAN ANTI-CORRUPTION LEGAL MECHANISM , AT 96 (Chinese People's Public Security University Press, 2009).

13. Tong Zhiwei, How to Strengthen Supervisory Control of Supervisory Commission, 1 Law Review 2 (2017).
14. Wang Jingui, 'Shuanggui' and 'Surrender': Research on Constitutionality, 8 Law Science 62 (2005).
15. Yuan Ming, Zhang Qingbin & Zhu Rongli, Understanding and Application of Comments on Investigation and Supervision Department to Investigate and Verify Illegal Acts (for Trial Implementation), 4 People of the Public Prosecutor's Office 40 (2014).
16. Zhang Jianwei, A New Supervisory System in the Field of Due Process of Law, 2 Global Law Review 62 (2017).
17. Wang Kai & Wang Xinyang, How to Supervise the Supervisors: Discussion about Litigation Supervision of the Supervisory Commission, 8 Zhejiang Social Science 20 (2017).