On the Operation Mechanism of Investigation Power in Modern China

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Abstract: The Beiyang Government basically followed the investigation mode and the operation mechanism of the late Qing Dynasty, and formed the investigation mode with the characteristics of the continental law system. During the period of National Government in Nanjing, on the one hand, it followed the pattern and the operation mechanism of investigation power of the late Qing Dynasty and the Beiyang Government; on the other hand, it also learned from the European and American experience, and constantly promoted the learning, transplanting and localization of the western investigation mode, and finally formed the "authority principle" investigation mode of the continental law system in the form of law.

1. Introduction

The traditional Chinese investigation mode evolved step by step. In 1840, Western powers opened the door to China; the capitalist politics, ideology and culture formed a strong impact, which disintegrated the old order of the traditional Chinese society. At the beginning of the 20th century, "in order to prevent western colonialists from trampling on China's judicial sovereignty, to abolish the consular jurisdiction as soon as possible became the driving force for the late Qing Dynasty to formulate new laws and reform the judicial system." [1] Learning from the experience of western countries, the Qing government began to reform the law system, including reforming the police system, promoting the modernization of the police administration, and progresses in the investigation mode. In the *Criminal Procedure Law of Qing Dynasty* promulgated by the Qing government in 1903 and *Trial Regulations of Judicial Departments at All Levels* in 1907, the investigation procedure, the investigation subject, the investigation authority and the investigation behavior were clearly defined, which broke the traditional "inquisitive" litigation structure controlled by judges, and formed the litigation structure participated by the three parties of prosecution, defense and trial in the preliminary trial stage. The constitution requires that investigators must obtain the ticket issued by the judicial department before the arrest, so that the judicial officer can review the compulsory investigation behavior. This mode can check and balance the investigation power with the judicial power, and clarify the investigation authority and the investigation command power. The investigation powers of prosecutors and judicial police were divided. The prosecutor had the legal investigation power; the judicial police were responsible for most of the criminal cases. The prosecutor had the right to command judicial police to carry out the investigation.

At the end of 1921, the Beiyang Government issued *Criminal Procedure Regulations*, which were promulgated and implemented in the next year. On the basis of separating the investigation and the preliminary trial, the regulation further improved the procedure of investigation and was "the first criminal procedure law with the nature of code issued by the central government in Chinese history". First of all, the regulation replaced the "investigation punishment" in the original law with investigation, and clearly stipulated the investigation process in the first hearing of public prosecution procedure. The awareness of investigation was improved. Secondly, it further refined the procedural rules of "investigation", including the jurisdiction of prosecutors, "the integration of prosecution and police", and the rights of criminal suspects. It clearly defined that judges should not intervene in the investigation led by prosecutors, thus ensuring the efficiency of investigation procedures.

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2. Abolishing of the Preliminary Trial System

At the end of Qing Dynasty and the beginning of the Republic of China, the jurisdiction of the preliminary trial changed from the judicial organ to the procuratorial organ, and then to the judicial organ. Generally speaking, the preliminary trial was exercised by the judicial organ. The *Criminal Procedure Law* promulgated by the Nanjing National Government in 1928 canceled the preliminary trial procedure. In *Draft of the Criminal Procedure Law* of the late Qing Dynasty, the preliminary trial procedure was explained as follows. "Investigation and preliminary trial are both procedures preparing for prosecution. In order to decide whether to initiate a public prosecution, we should collect necessary information. According to Article 274, in principle, compulsory punishment is not allowed in search to protect the rights of subjects. In the preliminary trial, compulsory punishment is allowed to exercise public power. In other words, investigation is preliminary trial without compulsory punishment; preliminary trial is investigation with compulsory punishment." [2] It can be seen that the nature of the preliminary trial, namely the procedure for preparing to prosecute, is roughly the same as that of the investigation procedure. The difference between them is that in principle, the investigation procedure cannot use compulsory methods, while the preliminary trial procedure can use all compulsory methods permitted by the law. It is not difficult to see that the preliminary trial system was set up in the late Qing Dynasty and exercised by judicial organs, with the intention to check and balance the investigation power through the judicial power.

In 1906, the Qing government promulgated *Law on the Compilation of Trials of the Supreme Court*, which stipulated in Article 21 that "for major criminal cases, the supreme court may try them in secret." Article 25 stipulated that, "the president of supreme court orders the judge to take charge of the preliminary trial of cases within the jurisdiction of the court. For convenience, he can also ask the lower court and bureau officials to participate in the trial." In 1908, the Qing government promulgated *Trial Regulations of Judicial Departments at All Levels* after being examined and discussed by the constitutional government compilation and investigation office. The system was put into trial use in Beijing, Fengtian and Tianjin government of Zhili Province. It can be said that the preliminary trial procedure of criminal procedure was implemented in the late Qing Dynasty. Judging from the preliminary trial system established at that time, the preliminary trial was presided over and controlled by the judge. Meanwhile, it was conducted in a secret way; no one else was allowed to attend. The defender was not allowed to intervene at all. The prosecutor only had very limited rights to initiate and participate in the preliminary trial procedure.

In 1921, the Beiyang government promulgated the *Criminal Procedure Regulations*, which made more detailed legal provisions on the preliminary trial procedure. In the preliminary trial stage, the preliminary trial judge and the trial judge should be set up separately to prevent preconception. After the prosecutor completes the investigation, for suspects identified, the prosecutor applies for a preliminary hearing to the court with jurisdiction. The judge does not initiate the pretrial procedure voluntarily. The suspect can hire defenders; the "interrogation of defendants should be carried out with the presence of the defender." [3]A judge may still investigate a crime on his own and prosecute and try it. At that time, many scholars opposed and criticized the preliminary trial system. "The preliminary trial prosecutor often believes in the investigation of the prosecutor when handling the preliminary trial, and so does the preliminary trial judge who handles the preliminary trial. Therefore, the preliminary trial system is practically useless." In addition, some scholars have summed up three disadvantages of the preliminary trial system. First, the preliminary trial prolongs the process of judgment and may lead to blackmail. Second, "people are unwilling to testify in court since it takes time and may occupy their working hours." Third, "the preliminary trial can cause disputes easily. The crafty ones can skillfully evade punishment while honest people may become suspects". In addition, when the facts and applicable legal provisions determined by the preliminary trial judgment are different from the opinions of the prosecutor, "the prosecutor may not sue on this basis, which is against the spirit of impeachment."

In 1928, the National Government in Nanjing promulgated the *Criminal Procedure Law of the Republic of China*, which combined investigation and preliminary trial. The drafters thought that,

“the preliminary trial system should be abolished, and the provisions in favor of the defendant in the preliminary trial should be clearly set in the investigation procedure, so as to facilitate the litigation. The preliminary trial procedure could be regarded as the extension of the investigation procedure. There is no need for such a procedure to be resumed.” It can be seen that scholars at that time had different understandings on the nature of the preliminary trial, and regarded it as a part of the investigation procedure. At the same time, it stipulated that the prosecutor monopolized the whole pre litigation investigation procedure, and clearly stipulated the non-public investigation. It excluded the judge from the investigation stage, placing the investigation procedure under the prosecutor's control completely. The prosecutor's investigation power was expanded again, and all kinds of compulsory investigation measures could be used independently in the investigation process. The procuratorial organ decided the compulsory investigation behavior independently; the process did not need to go through judicial review. Although this practice was conducive to the efficiency of the investigation procedure, the judicial power could not balance the investigation power. The preliminary trial in investigation was carried out in a completely closed state. The prosecutor could decide to detain the accused and directly control the defendant. Due to the imperfection of the lawyer system, it was difficult for suspects to be voluntary in their confessions. Investigators could even take means such as coercion, inducement and even torture to obtain the guilty confession of suspects. It can be said that the Nanjing Government was aware of the drawbacks of separating investigation and preliminary trial, but it abolished the preliminary trial system and did not set a supporting new method of investigation supervision. To a certain extent, it caused the extrajudicial rampage of investigation power during the period of Nanjing National Government.

3. The Prosecutor Leads the Investigation

First, in terms of the initiation of investigation, the *Criminal Procedure Law of the Republic of China* stipulates that “if a prosecutor knows that there is a criminal suspect because of telling, reporting, surrendering or other circumstances, he shall investigate the criminal and evidence.” [4] Among them, the meaning of telling, informing and surrendering is roughly the same as that of today, while the law does not specify the meaning of “other circumstances”. Qin Xia, then president of the Supreme Court of the Nanjing National Government and President of the Criminal Court, explained this in his *Interpretation of the Criminal Procedure Law*, “the so-called ‘other circumstances’ in this article include records in the newspapers, street talks and so on.” It can be concluded that no matter what source of information is, and regardless of its authenticity and reliability, as long as it was suspected of a crime, prosecutors could carry out investigation activities. In 1931, the Judicial Organ of the Nanjing National Government issued an Interpretation Order No. 467, reiterating that, “if the prosecutor knows that there is a criminal suspect, no matter what occupation the suspect is, he or she should be subject to investigation and punishment.” In other words, when the prosecutor has the reason to believe that the other party is suspected of committing a crime, the investigation should be carried out even if the suspect is an administrative civil servant. On the one hand, the extreme expansion of the prosecutor's investigation power was to cope with the bad social security environment and frequent criminal activities; on the other hand, it also caused the infringement of civil rights such as civil freedom and privacy, which in practice was more alienated as a tool for Nanjing National Government to suppress dissidents and democratic activities. It was not until the amendment to the *Criminal Procedure Law* promulgated in 1945 that a provision was added: “in investigation, the defendant shall not be summoned for interrogation unless it is necessary.” Thus, the conditions of summoning were restricted and the abuse of investigation power by prosecutors was prevented to a certain extent.

Second, in investigation activities, the prosecutor's search and inspection power was also expanded. According to the *Criminal Procedure Law of the Republic of China* in 1928, the prosecutor or the judicial police performing the investigation function only had the right to check objects as well as the body of the defendant or the victim related to the case. For the third party except the defendant and the victim, the investigation organ did not have corresponding inspection right. However, the

Nanjing National Government extended the procurator's power of search and inspection by amending the law in 1935. Article 122 of the *Criminal Procedure Law of the Republic of China*, which was revised in 1935, stipulated that, “the body, residence or other places of the defendant can be searched if necessary. The objects, residence or other premises of a third party can also be searched if there are appropriate reasons.” [5] According to the law, the prosecutor or the judicial police who perform the investigation function had the right to search the body, residence or other places of the defendant as long as they thought it was necessary. At the same time, it should be realized that the “appropriate reason” stipulated in the law is not the subjective will of the prosecutor or the judicial police, but the objective facts. At the same time, Article 157 of this law stipulates that “if there are considerable reasons to believe that it is necessary to investigate the circumstances of the crime, the body of a person other than the defendant can be checked.” That is to say, when prosecutors or judicial police had sufficient reasons to think that it was necessary to investigate a case, they could check and search the body of the third person. The so-called third party “has a wide range, that is, people who have no knowledge of the defendant can also be the third party and be checked.” Therefore, it greatly expanded the scope of investigators' inspection in investigation activities. Moreover, the defendant defined in the *Criminal Procedure Law of the Republic of China* includes the suspect before the prosecution, as well as the defendant after the prosecution. The general public could be a criminal suspect in investigation activities. When there was no “appropriate reason” to believe that his residence or body contained the detained items, investigators were still allowed to intruded into their residences for inspection and search for their bodies. This is obviously a violation of citizens' rights of privacy and personality.

4. The Position of Defense Lawyer in Investigation

During the period of Beiyang government, the first special law of lawyers in Chinese history, the *Temporary Regulations of Lawyers*, was promulgated, and the lawyer system was formally established in China. In 1921, the *Criminal Procedure Law* issued by the Beiyang government stipulated that the lawyer defense system could be applied to the preliminary trial stage, but it was not implemented. Although the *Criminal Procedure Law* of Nanjing National Government did not completely prohibit lawyers from participating in the investigation procedure, the right of lawyers to participate in the investigation procedure was very limited. The *Criminal Procedure Law of the Republic of China* clearly stipulated that “the investigation shall not go public”.[6] The preliminary trial procedure was canceled; the investigation should be carried out in secret. The prosecutor could decide to take compulsory measures for investigation alone. There is not much space left for lawyers to intervene in investigation activities. In investigation, the lawyer's sense of presence is very low, and they could not provide legal help for the suspect in different aspects, which affected the protection of the rights of the suspect's lawyers. During the period of Nanjing National Government, the lawyer's negative litigation obligation was also stipulated. The lawyer should not practice with an active and positive attitude; even within the scope of duty permitted by law, they must perform their duties in a passive manner, otherwise they would be punished, which greatly limited the space for lawyers to actively fight for the rights of suspects. It also showed the injustice between the prosecution and the defense at that time; the investigation mode was in a single line.

The construction of the investigation procedure at the end of Qing Dynasty and the beginning of the Republic of China was not successful. Although it once established the procedure of trial under the jurisdiction of the magistrate, the system of preliminary trial was finally abolished by the Nanjing National Government,[7] and the investigation procedure was monopolized by prosecutors, forming an investigation procedure involving only the prosecution and the defense. The feature of “administrative punishment” is very obvious.

5. Summary

To sum up, in the late Qing Dynasty and the Republic of China, the government was constantly adjusting the structure of the procuratorial organization, and actively promoting the construction of the police organization. They made certain achievements in promoting the investigation mode. However, the specialized development of the investigation organization was still backward. First of all, the prosecutor's investigation power was expanded. During the period of Nanjing National Government, the cancellation of the preliminary trial procedure made the prosecutor monopolize the investigation procedure. The prosecutor could not only carry out arbitrary investigation, but also carry out compulsory behaviors such as investigation, search, interrogation and seizure. The power of investigation could not be effectively checked and balanced. Secondly, the rights of criminal suspects can not be effectively protected. The prosecutor can directly conduct mandatory acts of investigation, such as arrest, detention and search. The procedural rights of the suspect were in the weak position; the procedural rights could not be guaranteed. Finally, lawyers did not have the procedural right to participate in the investigation, and could not be involved in the investigation procedure. The defense rights of suspects could not be effectively protected.

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