梁玉霞·著

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Legitimacy of the Form of Criminal Action

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梁玉霞，女，1961年4月出生，湖北省老河口市人，民盟盟员，法学教授，法学博士，硕士研究生导师。1983年毕业于西南政法学院法律系，获法学学士学位，毕业后分配到中南政法学院任教。1991年被聘为讲师，1994年破格晋升为副教授，1997年破格晋升为教授。同年在职获得诉讼法学硕士学位，被聘为诉讼法学硕士生导师。1998年被确定为湖北省跨世纪学科带头人。1999年考入西南政法大学攻读诉讼法学博士学位。2001年调入广东省人民检察院，兼任广州大学法学院教授。

研究方向为刑事诉讼法、司法制度和军事法。独撰、合著、主编、参编书籍十余种，在《中国法学》、《中外法学》、《法律科学》、《法商研究》、《现代法学》、《中国刑事法杂志》及其他刊物与文集中发表论文40余篇。

内容提要

以主体——目的——行为的对应性为切入点的刑事诉讼方式正当性研究，在根本上涉及到国家刑事司法的宏观构架及诉讼目的的确定，这正如航行者对指南针的依赖。司法公正，作为人类永恒的诉讼价值追求，内含了一个审判中心主义的程序构造和中庸化的诉讼目的。从刑事诉讼方式运作模式的发展变化基本上可以看出刑事司法特定的规律性，并能对当代刑事诉讼的正当性给予基本的肯定。控、辩、审三方的存在、分离和主体性矛盾运动是诉讼的天然基础，人权的介入仅仅是一个时代开明的标记。当今两大法系刑事诉讼程序所呈现的共性和明显的差异，恰恰揭示了正当性与多样性或地方性的共生关系，这应当为包括我国在内的各国司法改革所明鉴。

在司法公正的旗帜下聚集着利益不同甚至根本对立的控辩审三方。抛开各方的实体利益追求不谈，控辩审三方在诉讼上的目的也各有不同——我们必须将实体目的和程序目的区别开，就如同我们将刑法和刑事诉讼法作区分一样，否则我们永远都摆脱不了理论和思维的混乱。公正地消解冲突的诉讼目的，不仅设定了审判者必须中立的诉讼立场，而且也限定了审判者基本的行为方式和活动特点。控辩双方的诉讼目的倾向于对立：控方追求诉讼主张的成立，辩方则意图使其不成立。双方的实体欲求则潜存于诉讼主张或意见之中，能否实现及实现的程度取决于诉讼目的能否实现及实现的程度。目的理论，不仅对于一审而且对于其他审判程序也都具有普适性意义。

实现诉讼目的的基本方式，在法院是听证和认证，在控辩双方是控诉和抗辩。法院过多地进行调查取证活动显然与其诉讼角色是不符的。由于控诉所具有的攻击性特点和举证责任的存在，侦查权成为控方必不可少的力量支撑，这也是建立诉侦督导关系的根据所在。但是任何时候，控诉强制都是非正当的，强制侦查必须受制于法院的司法监控。单从体制上讲，游离于司法之外的行政侦查的结果是不具有诉讼效用的。当侦查不受审判权监控并且侦查所获可以直接用作审判证据时，审判公正、司法独立和被告人的抗辩权就都遭到了根本的破坏。西方两大法系不同模式的审判中心主义设计给我们提供了重要的启示。除此之外，控方还不得将自己凌驾于法官之上。在辩护方，抗辩权的性质和特点决定了辩护行为只能是护卫性的而不能是攻击性的，因而如英美那样过多的辩护权配置对控方是不公正的，结果只会导致对犯罪一定程度的放纵。

明确诉讼主体的身份是把握其诉讼方式正当与否的重要前提。传统上，诉讼程序对案件实体内容的依附导致在一审后各种救济审程序中出现诉讼主体角色的混乱或缺位，如本是诉讼被告的却坐到了法官的位置上，由此演绎出救济审程序整体上的混乱。理顺该程序是实现刑事诉讼方式正当性的当然之举。

本论文分为七章。

第一章刑事诉讼方式及其正当性注解。本文所说的刑事诉讼方式是指侦查、检察、审判机关和诉讼当事人基于各自的诉讼欲求而在刑事诉讼中所采取的或者应当采取的不同的诉讼立场、原则、行为倾向、活动方法等综合而成的行为定势，或称行为模式。对刑事诉讼方式的研究首先迎合了司法仪式性或称格式化的需要，就其实质来讲可以为刑事诉讼的各利益主体提供基本的诉讼行为模式标准。刑事诉讼法学也会因刑事诉讼方式范畴的补充而趋向完善。正当性有制度正当性和程序正当性之分。刑事诉讼

方式正当的一般标准为：主体性、合目的性、无妨害性、秩序性、实效性。西方两大法系求同存异的发展提示我们，刑事诉讼方式的正当性和多样性是彼此兼容的。

第二章刑事诉讼方式正当的逻辑起点。将刑事诉讼方式放置于一个正确的坐标系上才能准确衡量其正当与否。司法首先必须公正，公正是司法的生命之所在。公正的司法内含了这样一个程序构架：冲突双方即诉讼中的控诉方与辩护方位于两边，法官则居中裁判，不偏不倚。该原理对整个刑事诉讼程序的扩展就是审判中心主义。另一方面，刑事诉讼的目的在于消解国家与个人或个别利益集团之间的冲突，而非打击犯罪或保护人权。控辩审三方进行诉讼的目的各不相同。对此给予充分的认识与尊重，才能体现设置刑事诉讼的初衷。这是我们确定正当的刑事诉讼方式的两个出发点。

第三章刑事诉讼方式运作模式的变异与回归。早期的刑事诉讼类似于当今的民事侵权诉讼。审判以消解冲突为目的，法官中立，原被告双方地位平等，谁主张谁举证，表现出最初的自然与和谐，故称为自然平衡式诉讼。封建国家权力的介入，打破了这种平衡，控辩审三方的诉讼格局变成为两方对峙的行政格局。资产阶级革命后，刑事诉讼在更高层次上恢复了三方的权能平衡。历史发展的轨迹恰恰证明了控辩审职能分离、法官中立、当事人平等方为诉讼的本真，诉讼的目的只在于解决纷争。刑事诉讼的历史演变，根本上缘起于控辩对抗的矛盾运动以及国家对诉讼风险防范的不同手段。

第四章实现裁判公正的审判方式。审判者肩负着控辩双方的期望，连结着审判的过程和结果。公正的审判需要审判者保持行为的评判性、亲历性、超脱性、权威性和必然性，并以听证、认证为其基本的行为方式。听证、认证的内容决不仅仅是事实证据，听证、认证的方法也需要慎重对待。我国刑事审判方式在基

本实现由调查型向听证型转变之后，公正审判面临的最大障碍，一是突袭裁判；二是救济审诉讼主体的错位所导致的角色、行为与目的的不对应。必须对之予以克服。

第五章裁判真实主义与侦查方式。司法裁判必须以能够查明的纠纷事实为客观依据，但是侦查与审判的不同方式使得侦审分离成为必然。另一方面，正因为有这种不同和分离，审判权对侦查权自然产生一种异己的排斥。英美法系和大陆法系国家分别用侦审监控和侦审附属的办法实现二者间的协调和侦查效力的承认和传递。中国的刑事侦查无论从体制还是从程序上看，都游离于司法之外，最没有理由获得司法的认同却偏偏效力最强。因此，改善我国的侦查方式并以此理顺侦审关系，是实现司法公正的重要保障。

第六章控诉方式的正当性。控诉方在审判程序内只能是当事人，不得凌驾于法官之上，没理由对被指控人直接实施强制。为支持指控理当享有侦查权。在侦诉分工的情形下，确保检察机关的侦查督导是极为重要的。无论自诉还是公诉，都有需要注意克服的局限性。起诉时大陆法系和英美法系并存的诉状主义和卷宗主义各有其合理性，关键是如何在制度上予以完善。起诉必须明确诉讼主张和理由，并在庭审中予以充分的阐述，这是指控成败的关键。

第七章刑事被告人抗辩权及其实施方式。刑事被告人有实体性被告人和程序性被告人之分。在平衡式诉讼中，被告人的主体资格是当然的，其主体性靠其享有的自然权利和诉讼权利来形成。抗辩权是一种防御性权利，具有被动性，其行使具有消极和积极两种形式，包括沉默权在内的消极抗辩权是最低限度的抗辩权。抗辩重在“破”，故无需过多的积极手段和措施。从各国实体性被告人抗辩权的行使看，我国存在的主要缺陷是实体性被告人消极抗辩权缺乏、积极抗辩权受限。

ABSTRACT

By taking into consideration the corresponding relations between subject, goal and behavior, studies of the legitimacy of form of criminal action in essence concern the macro framework of national criminal justice and the setting of the goal of action, just like what a compass is to a traveler. As the perpetual human target for actionable value, judicial justice consists of a procedural structure characterized by centralism judgment and neutral purpose of action. From the development of the operating patterns of form of criminal action, the specific regularity of criminal justice may be found, and the legitimacy of contemporary criminal action may be ascertained. The existence, separation and subjective contradictory movement of accuser, defendant, and adjudication organization constitute the natural basis of an action, and the intervention of human rights is just the mark of civilization. The similarities and evident differences of the criminal procedures of the present two genealogies of law precisely speak for the mutually dependent relations between legitimacy and variety or locality, which should be considered in judicial reforms of all countries, including China.

Judicial justice involves three parties: the accuser, the defendant, and the adjudication organization, who seek quite different even basically antagonistic benefits. Laying aside their pursuit of substantive benefits, the purposes of action of the three parties are various, and hence the entity and procedural purpose should be differentiated in the way criminal

law and criminal procedure law are distinguished, otherwise we can never push our foot out of the confusion of theories and thinking. The purpose of action to meditate conflicts impartially determines not only the stand of action that the adjudicator must remain neutral but also the adjudicator's basic behavioral patterns and features. The purposes of action of the accuser and the defendant tend to be antagonistic: the former seeks for the establishment of the claim, while the latter intends to deny it. Their substantive pursuits are included in the claims or opinions, and whether and how much they can be realized depends on whether and to what degree the purposes of action can be realized. The theory of purpose is of applicable importance to the first instance and other trials as well.

The basic methods to realize purpose of action include hearing and certification on the part of the court, accusation and defense on the part of the accuser and the defendant. Too much investigation and evidence-taking by the court is not in conformity with its role in the action. On account of the aggressive character of accusation and the burden of producing evidence, the right of investigation constitutes an indispensable right of the accuser, which also accounts for the integration of police and procuratorial department. However, compulsory accusation is legitimate on no occasion, and compulsory investigation must be put under the control of judicial supervision by the court. As far as the system is concerned, any result of administrative investigation unauthorized by a judicial organization is of no actionable effect. When investigation is not monitored with adjudicative power, the findings in such an investigation may be directly used as adjudicatory evidence, adjudicatory justice, judicial independence, and the defendant's right of defense will be entirely undermined. The schemes based on centralism judgment with different patterns in the two western genealogies of law provide us with

significant instructions. In addition, the accuser is not supposed to place himself above the judge, while the defendant's defense must be defensive rather than offensive in accordance with the nature of the right of defense; therefore, it is unfair to the accuser to entitle excessive right of defense as it is in Britain and America, which will surely give free rein to crimes to a certain degree.

To make clear the identification of the subject of an action is a vital premise to tell whether the form of action is legitimate or not. In tradition, the dependence of contentious procedure on the substantive content of a case used to lead to the confusion or vacancy of the subject of action in various remedial adjudicatory procedures after the first instance. For example, those who should be the accused in the action take the position of the judge, and thus confusion occurs in remedial adjudicatory procedure. Evidently it is necessary to rationalize the procedure so as to realize legitimacy of the form of criminal action.

The paper may be divided into seven chapters.

Chapter 1 relates the form of criminal action and the interpretation of its legitimacy. The form of criminal action stated in this thesis refers to a behavioral set or pattern composed of various stands of action, principles, behavioral tendency, and forms of activities adopted or supposed to be adopted by the investigative, prosecutorial, and adjudicatory organizations, and the contesting parties out of their respective purposes of action in the criminal action. Studies of the form of criminal action firstly satisfy the need of judicial solemnization or formalization, and in essence may provide basic standards of the models of acts of procedure for various subjects with different benefits in a criminal action. Moreover, science of criminal procedure law will tend to be ameliorated with the addition of the scope of form of criminal action. Legitimacy may be divided into two

categories: institutional legitimacy and procedural legitimacy. The general criteria of legitimacy of the form of criminal action consist of subjectiveness, purposefulness, unharmfulness, orderliness, and effectiveness. The tendency of seeking common ground while reserving differences in the western two genealogies of law reminds us that legitimacy and variety of the form of criminal action are mutually compatible.

The second chapter concerns the logical origin of legitimacy of the form of criminal action. Only by putting the form of criminal action on a proper coordinate system can the legitimacy be precisely assessed. Justice must primarily be impartial, and the power of the former rests upon the latter. Impartial justice involves such a procedural framework: the conflicting parties, namely the accuser and the defendant, are located on either side, while the judge remains neutral and never shows favor to any side. The expansion of such a principle to the whole criminal procedure means centralism judgment. On the other hand, the purpose of criminal action lies in eliminating the conflicts between the state and an individual or between individual groups with different benefits rather that cracking down on crimes or preserving human rights. The purposes of action are nonetheless different for the three parties, and only with enough concern and respect for that point can the original intention to establish criminal action be reflected. Those are the two principal considerations when working out legitimate form of criminal action.

Chapter 3 expounds the variation and recurrence of the operating patterns of form of criminal action. Criminal action in its early stage was similar to today's civil action: the trial was aimed at eliminating conflicts, while the judge managed to be neutral, the accuser and the accused enjoyed equal treatment, and those who claimed produced evidence,

which appeared originally natural and harmonious and thus called action of natural equity. However, intervention of the power of feudal states broke the balance, and the contentious structure of three parties, namely, the accuser, the accused, and the adjudicatory organization, was transformed into an administrative structure with two conflicting parties. After the bourgeois revolution, the balance of power and function was restored to a higher level in criminal action. Traces of historical development offer full proof that the nature of action lies in the separation of the functions of accusing, defending and adjudicating, neutrality of the judge, and equality among the litigants, and that the sole purpose of action is to settle disputes. Historical evolution of criminal action originates from the contradictory movement of the confrontation between the accuser and the accused and various defensive means against litigious risk taken by the state as well.

Chapter 4 discusses ways of trial for the purpose of realizing fair judgment. The adjudicator shoulders the exception of the accuser and the defendant and connects the process and result of the trial. Fair judgment involves the adjudicator's adjudicativeness, personal experience, detachedness, authoritativeness, inevitability in behaviors, which are based on hearing and certification. The content of hearing and certification by no means covers the mere factual evidence, and the methods of haring and certification must be handled with care. After accomplishing the conversion of the type of hearing from the type of investigation in China's criminal adjudicatory form, fair judgment is confronted with the biggest barriers: one is sudden attack on the adjudicator, the other being the nonconforming state of the role, behavior, and purpose as a result of the dislocation of the contentious subject in remedial trial, which should be removed.

The fifth chapter is about judgment realism and ways of investigation. Judicial adjudication must take ascertainable disputes and facts as objective bases, but different ways in investigation and adjudication make the separation inevitable. On the other hand, on the very account of the difference and Separation, the right of trial naturally excludes that of investigation. Supervision over investigation and adjudication and mutual dependence between investigation and adjudication are respectively adopted in states with Anglo-American law system and in those with continental law system so as to realize harmony between the two rights, and recognition and transmission of the effects of investigation. Viewed from system or procedure, Chinese criminal investigation severs its connection with justice and is accordingly most unable to obtain identification from justice, whereas it turns to be most influential. Therefore, it is keenly necessary to perfect the Chinese investigating methods and thus rationalize the system of investigation and adjudication so as to guarantee the realization of impartial justice.

Chapter 6 concerns legitimacy of the forms of accusation. The accusing party serves only as the litigant in the procedure of trial, and is never supposed to be superior to the judge and entitled to exercise enforcement on the accused. On the other hand, the right of investigation should be granted to the accuser in order to support accusation. Under the circumstance of separation of investigation and prosecution, it is of ultimate importance to ensure the power of command over investigation of the prosecutor, namely, integration and investigation and prosecution. In private prosecution or in public prosecution, there exist disadvantages worth mentioning. Exclusiveness of the bill of prosecution and socialism coexisting in the continental law system and Anglo-American law system are both reasonable in certain sense, and the key lies in haw to improve

them in system. In prosecution, prosecuting viewpoints and reasons should be sought out and fully presented in court, which ultimately determines the result of the accusation.

The last chapter refers to the accuser's right of defense in a criminal action and methods of exercising the right. The accused in a criminal action may be classified as substantive defendant and procedural defendant. In an action of equity, the capacity of the accused as a subject is by nature, and his subjectiveness is testified by the natural rights and right of action he owns. The right of defense is a defensive one and thus passive. The exercise of the right has two forms: passive and active, and the right of passive resistance, including the right to muteness, is one of the lowest degree. To defend means to disprove, and thus no excessive active means and measures are needed. Taking the exercise of the right of defense by substantive defendants in various countries, the major defects in China rest on the lack of the right of passive resistance for substantive defendants, and the restraint on the right of active defense.

导论：选择中的理性视域

我们似乎可以说，二十世纪60年代发生在美国的那场“正当程序革命”，在世界范围内点燃了跨世纪司法改革的燎原之火。在盖勒（Gala）诉普莱斯顿·布勒娜（Preston Brennan J）一案中，澳大利亚法官判决说：“法律原则在司法过程中加以发展的目的是使法律处于良好的状态以便法官能根据在现代社会中的对它的理解而将其作为解决纠纷的工具。在一个社会中，随着价值观念的变化，在法律的影响下，社会关系会变得越来越复杂。因而，法律的司法发展是法院的一种职责——尤其是在立法改革失去活力的时候。”① 当然，大幅度的司法改革都免不了立法的支持，并将必然涉及对刑事诉讼体制、原则、制度和程序规范的调整。进入90年代，这一运动发展到高峰，司法制度内在的矛盾以及人们对新世纪的美好企盼促使各国进行着积极的司法努力，英国、法国、德国、俄罗斯、日本等都在大规模地改革其司法制度。只是，各国司法制度原本的基点不同，故而改革的切入点、内容以及目的预期也各不相同。“人类社会由于其中的参量和变量太多，而且参与社会活动的人都有自己的主体意志，因而显示出极大的复杂性。”② 这种复杂性给各国法律、司法制度创造了差异，提供了选择的机缘，证明了并仍将证明着人类理性的力

① 刘立宪、谢鹏程主编：《海外司法改革的走向》，中国方正出版社2000年版，第121页。

② 刘长林：“从历史的‘惟一性’中走出来”，载《新华文摘》1999年第5期。

量。梁治平先生认为，历史是被人创造处理的，即是说，历史是在文化选择的基础上发展起来的。"[①] 当然，这里的"文化"不能作狭义的解释，在很大程度上，"文化"在此意指由政治、经济、法律、历史传统、科技教育等综合而成的立明现象。

世界司法改革的浪潮对中国产生了强烈的震动，引起了积极的回应。因为，中国在70年代末、80年代初恢复重建的法律、司法制度，带有浓重的旧时代的痕迹，与改革开放所产生的日新月异的社会变革的现实越来越不相适应，特别是市场经济体制的建立所牵引的社会政治、文化、价值观念、道德准则等的巨大变化，迫切要求法律、司法制度的深刻变革。继1990年行政诉讼法的实施、1991年民事诉讼法的正式颁行，国家于1996年对刑事诉讼法作了重大修改。与此同时，司法领域先后开展了民事审判方式、刑事庭审方式的改革，并由此引发了国人对司法制度的高度关注和进行全方位司法改革的强烈呼吁，因为对抗制审判方式由于缺乏同一司法体制内相应制度的支持而呈现孤掌难鸣之势。刑事司法面临的实际问题是，侦查方式、起诉方式是否也应当改革？如何改？辩护方式是否也该调整？这一切改革的导向是什么？有无标准？在向西方看齐的鼓噪声中，我们是否该冷静地思考和辨别：什么是西方刑事诉讼制度中的劲歌与哀怨？

这些问题构成本文研究的基本思路和重要内容，但笔者更为关注的却是刑事诉讼方式形成、变化的机理和运行逻辑。在面临政治、经济、文化、历史、地理、人口、风俗等等无数变量影响着的多种选择机缘时，寻求一种普适性、公理化的刑事诉讼发展规律和路向，无疑是必要的。这种努力有助于人们准确把握世界刑事诉讼的主流和基本走向，并以此为标准明辨各国刑事诉讼制

① 梁治平编：《法律的文化解释》，生活·读书·新知三联书店1994年版，第62页。