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黄　文，男，1966年9月生，四川资阳人。1983年至1987年就读于四川大学历史系，获历史学学士学位；1989年至1992年就读于西南政法大学诉讼法专业，获法学硕士学位。现为重庆工商大学法学院副院长、副教授，重庆红岩律师事务所兼职律师。在《当代法学》、《法学杂志》、《理论与改革》等刊物上发表学术论文30余篇。参编了《21世纪中国刑事程序改革研究》、《刑事诉讼法学》、《档案法理论与实务》、《合同法理论与实务》、《实用经济法》等专著或教材9部。

内容提要

随着政治生活民主化以及社会事务处理科学化进程的发展，司法改革的呼声日益高涨，对诉审关系的研究已成为刑事司法改革的一项重要课题。从某种意义上说，一个国家刑事诉审关系的状况如何，是衡量这个国家民主和法治发展程度的一个重要标志。多年以来，刑诉法理论界对诉审关系问题一直缺乏系统深入的研究，致使我国司法实践中诉审关系紊乱、控审职能混淆的现象日益突出。因此，对刑事诉审关系问题进行全面探讨既具有的理论价值，又具有极强的现实意义。

本书共分四个部分，即起诉权与审判权概述；刑事诉讼模式与刑事诉审关系；刑事诉审关系的基本原则；我国刑事诉审关系及其重构。

一、起诉权与审判权的概述。控诉与审判，同辩护一道构成了刑事诉讼的三大基本职能，诉审之间存在着相互独立又相互依存的关系；起诉是审判的先导，起诉的范围决定了审判的范围；而审判的运作决定着起诉的目的能否得以实现，随着审判程序的启动，起诉的质量逐步得到检验，只有事实清楚、证据确实充分、罪名认定准确的刑事起诉，才能得到审判的认可。起诉权就其特征来讲具有主动性（由国家机关或被害人个人主动发动）、请求性（是一种司法请求权，它所包含的实体性要求只有通过审判才能最终实现）、追诉性（以追究被告人刑事责任、恢复被破坏了的法律秩序为使命）。而审判权则具有独立性（实质独立、身份独立、集体独立、内部独立）、中立性（与审判自

身有关的人不应该是法官，结果中不应含纠纷解决者个人利益，纠纷解决者不应有支持或反对某一方的偏见[①]）、被动性（启动程序和审理过程均具有被动性）、多方参与性（由法官与控辩双方共同参与）。

二、刑事诉讼模式与刑事诉审关系。这主要是从纵向和横向的角度来研究诉审关系，刑事诉讼程序和制度既有阶级性，又有技术性。就技术性而言，它反映了人类社会在维持正常秩序，调整社会越轨方面的一般性努力。因此，外国的、历史上的诉审制度和实践，对我们可能具有借鉴和参考的作用。即使是不成功的实践，也可以提醒我们不走或少走他人已走过的弯路。有些社会的制度文明程度较高，其诉审关系的设置也比较科学、合理，更值得我们认真研究，对其中一些内容，可结合我国的实际情况予以借鉴。这对于完善我国诉审关系的理论和实践都具有十分重要的意义。

三、刑事诉审关系的基本原则。现代刑事诉讼理论和立法中所揭示的刑事诉审关系的诸项原则，是人类在经过了长期的刑事诉讼实践的基础上形成的，它体现一定的价值观念，反映了诉审关系的一般规律，反映了人类制度文明在刑事诉审方面的基本要求，因此具有"公理"的意义。尽管在不同的国家，因历史传统和现实情况的不同，其各自的刑事诉审关系的基本原则存在某些差异，但由于刑事诉讼内在规律的作用，使得各国刑事诉审关系的基本原则，更多地呈现出共同性和一致性。这些蕴含于刑事诉审关系之中的基本原则，构成了整个刑事诉审关系的理论基础。它既是立法者设计刑事诉审关系的基本依据，同时也是评判司法实践中刑事诉审活动正当性的标准，只有切实掌握了刑事诉审关系的基本原则，才能在具体问题的分析中有深刻明晰的眼光和高屋建瓴的气魄，因此对诉审关系基本原则的研究，具有十分重要的意义。笔者认为，诉审关系的基本原则主要有：控审分离原则、不

① 马丁·P·戈尔丁.法律哲学.北京：三联书店，1987.240

告不理原则、法官中立原则、诉审同一原则。

1. 控审分离原则。控审分离是现代刑事诉讼制度中的一项重要原则，它要求控诉职能和审判职能分别由两个不同的国家机关行使，不能集中在同一机构或个人手中。裁判者应尽力避免实施任何带有追诉性质和后果的诉讼行为，以保持基本的中立地位；控诉方也不能越权实施带有裁判性质的诉讼行为，从而维护其追诉的效力和责任。控审分离对于人类诉讼发展史具有积极而深远的影响，可以说："司法独立是诉讼史上的第一次重要分工，控诉与审判的分离则标志了诉讼史上的第二次重要分工。"① 控审分离原则的理论基础有：分权制衡理论、诉讼公正理论、程序主体性理论、认知心理学理论、诉讼经济理论。

2. 不告不理原则。如果说控审分离原则主要强调的是审检机构的分立和建立完备成熟的公诉制度，那么不告不理原则则是明确了检察机关与审判机关在追究犯罪上具体的职能分工，明确了起诉和审判程序的交替、衔接与过渡。不告不理原则，要求刑事案件必须有公诉人或自诉人起诉，法院才能受案并进行审判。法院在审理中受起诉人提出的诉讼请求范围的限制，不得审理诉讼请求范围以外的问题。法院主动追究被告人的刑事责任、自诉自审或者不诉而审，都是与不告不理原则相背离的。不告不理原则最早出现在奴隶制初期控告式诉讼中，随着社会的发展，弹劾式诉讼逐渐被纠问式诉讼所取代，不告不理原则也就失去了存在的依据，法官开始依职权主动追究犯罪。资产阶级在反对封建专制诉讼的过程中，继承了古代弹劾式诉讼的不告不理原则并加以发展，重新实行控诉职能与审判职能的分离，建立专门的起诉机关代表国家追诉犯罪。不告不理原则从产生到沉寂，再到复兴，体现了诉讼史上对犯罪的控诉权由分到合、由合到分的演变过程，反映了控诉权与审判权的分离是诉讼制度发展的必然要求。

3. 法官中立原则。法官必须是公正无偏的(impartial)，他不

① 陈光中. 外国刑事程序比较研究. 北京：法律出版社，1988. 58

能允许自己的偏见遮蔽了对案件事实的明察，否则法官不是一个公正判断事实的、具有科学精神的、可以信赖的人[①]。在三方组合的诉讼结构中，在发生争端的各方参与者之间，法官必须保持一种超然的、无偏袒的态度和地位，不得对任何一方存有偏见和歧视。法官的中立地位源于这样一个事实：他与审判结局没有任何利害关系，他没有自己独立的诉讼请求，也无需对诉讼的结局承担任何直接的后果。无论是古罗马时期对自然正义的基本要求，还是当代法治国家中的正当程序，亦或是联合国有关法律文件，都是将法官中立作为实现司法公正的基本前提或要求。从诉审关系的角度来看，影响法官中立的原因在于控审不分和控审混同。控审不分是指法官同时行使控诉与审判两种诉讼职能，也就是说法官既是案件的追诉者，又是案件的裁判者，这当然使其无从在控辩双方之间保持中立。控审不分主要存在于封建制纠问式诉讼模式下，到了现代几乎没有国家还在实行控审不分的诉讼制度。而控审混同是指法官虽然不同时享有控诉职能和审判职能，但在审判活动中却不自觉地实施了带有追诉色彩的行为。控审混同一般具有以下几种表现方式：法官在庭审前与控方单方面接触；法官的调查活动具有追诉色彩；由审查公诉的法官主持审判。这三种控审不分的情况都将严重影响法官的中立地位。

4. 诉审同一原则。这是当今世界各国在刑事诉讼中所普遍遵守的原则。它实际上是不告不理原则在审判中的具体体现。不告不理原则强调在程序的启动上无控诉即无审判，法院不能自诉自审或不告而审，而诉审同一原则强调的是在程序的运作中，法院的审判对象和范围必须与起诉指控的对象和范围保持同一，对于检察院未指控的被告人及其罪行，法院无权进行审理和判决，即使法院在审判过程中发现检察院起诉指控的对象有错漏，也不能脱离检察院起诉指控的被告人或其罪行而另行审理和判决。诉审同一原则是实现控审分离原则的必然要求，有利于保障

① 张建伟. 刑事司法体制原理. 北京：中国人民公安大学出版社，2003. 263

被告人辩护权的充分行使，制约裁判权的盲目扩张，防止法官的突袭裁判。

四、我国刑事诉审关系及其重构。1996 年修订后的刑事诉讼法虽吸取了许多当事人主义诉讼模式的成功经验，并对控、辩、审三大职能进行了重新定位，但仍保留了职权主义诉讼模式的整体特征，无论在立法上还是在司法实践中，刑事诉审关系都存在着重大缺陷，因此应予重新设计和完善。

检察机关对刑事审判的法律监督问题。根据我国宪法和刑事诉讼法的规定，人民检察院是国家的法律监督机关，审判监督是其法律监督职责的内容之一。对于检察机关如何行使审判监督权、能否对法院的审判活动进行监督、能否将公诉权与审判监督权合一等问题，在诉讼法学界争议颇大。文章认为，检察权在本质上应该是控诉权而非法律监督权，而控诉权在本质上又是一种裁判请求权，是一种程序性权利，它只具有请求性，并不能作出实体性决定，检察院对法院的判决认为确有错误的，也只能通过行使抗诉权向法院表示不服，检察院本身不能直接对案件作出改判，也不能指令法院改判，在检、法之间的互动制约关系中，法院处于上位，检察院处于下位，因此检察院不可能监督法院。如果检察院能以法律监督者的身份对法庭的审判活动进行监督，必然会使法官的中立形象受到很大的冲击，因为考虑到监督与被监督的关系，法官在感情上更多地存在维护控方主张和观点的可能，因此对检察机关的刑事审判监督权应予彻底废除。

法官的庭外调查权问题。在法庭审理过程中，合议庭对证据有疑问时，能否在休庭后对证据进行调查核实，这是一个十分重要的理论与实践问题，它涉及法官的地位、职权，涉及诉审关系的定位，涉及法官中立原则、控审分离原则能否真正实现。文章认为，法官行使庭外调查权，超越了审判权限，干预了公安、检察机关的侦查权，妨碍了诉讼机制的正常运转，混淆了侦查与审判的职能，违背了控审分离原则，而且破坏了法官的中立形象，有使法官蜕变为"第二公诉人"的倾向，因此应予取消。

刑事审判对象问题。审判对象问题反映了国家权力的分配形态，涉及控、辩审三方的权利义务关系，但在我国的刑事诉讼法中却无片言只语的规定，仅在最高人民法院的司法解释中有所提及，而根据司法解释的规定，法院的审判对象仅限于检察院起诉指控的犯罪事实，而不包括检察院对事实的评价。至于法院如何变更检察院对事实的法律评价，在变更前后如何保障被告人辩护权的有效行使，司法解释均无明确规定。从司法实践来看，法院在改变事实的法律评价时，往往是在不告知公诉机关、不通知辩护方的情况下，以单方面、秘密、主动的方式进行的。这导致了审判的范围过宽，不利于被告人开展有针对性的防御准备，有碍其辩护权的行使。因此，应根据诉审同一的原则，借鉴各国的立法与司法实践，建立合理的公诉变更和罪名变更机制。

诉审双方的审前联系问题。在我国，诉审双方在审前存在着广泛而密切的联系，审判中心主义无论在理论上还是实务上都没有得到完全确立。首先，法官“提前介入”的现象仍然大量存在，尤其在一些重大、疑难、影响面广的案件中，“提前介入”几乎已成为法院办案的一个通例。加上我国司法实务中有各级政法委员会对公、检、法“三机关”的活动进行协调的做法，这种“提前介入”还会演变成公、检、法三家的“联合办案”或“联合办公”，从而导致“三道工序”合而为一，控审职能的分离名存实亡。其次，修改后的刑事诉讼法虽然废除了全案移送起诉制度，但并未采纳“起诉状一本主义”，而是采用了一种“复印件移送主义”，要求检察院起诉时除起诉书外还应移送主要证据的复印件和证据目录，而主要证据的范围，法律并未作出明确规定。第三，由于没有明确规定审查法官的回避制度，审查法官仍然可能成为本案的主审法官。可见，控审双方的审前联系依旧存在，仍然可能会产生预断，影响法庭审判的质量。因此，我国应借鉴起诉状一本主义，明确禁止法官“提前介入”到侦查、公诉程序之中，使其不得与追诉方进行任何形式的单方面交流意见、了解案情、熟悉证据等活动，否则该法官即可因妨碍公正审判而被列入申请回避之列。同时，我国还

可考虑借鉴法国的预审程序或德国的中间程序，在法院内部设立专门的审查起诉部门，将审查起诉法官与庭审法官实行彻底分离。唯有如此，才能杜绝庭审法官对案件产生预断。

再审程序的启动主体问题。根据我国现行刑事诉讼法的规定，法院对确有错误的生效裁判有权启动再审程序，这一规定有违诉审关系的原理，从控审分离原则和不告不理原则的角度来说，不论是由作出判决、裁定的原审法院院长和审判委员会决定再审，还是由最高人民法院以及上级人民法院提起的再审，实际上都是法院自身在启动再审程序，这与审判权的被动性特征明显不符，而且法院再审的前提是"发现生效裁判确有错误"，试问，如果不审理、不接触案件实体内容，何以得知"确有错误"？很明显，法官在提起再审前已经形成预断，这必然直接影响到其后庭审功能的发挥与审判公正的实现，因此应取消法院启动再审程序的主体资格。

Content Abstract

Because the political life is becoming more democratic and the way to deal with the social affairs is becoming more scientific today, acclaim for judicial reform is also arising higher and higher. The research on the relationship between prosecution and trial has become one important issue in the process of criminal judicial reform. In a sense, the situation about this relationship between prosecution and trial in one country has become one important element to evaluate the developing degree of one country's democracy and legislation. For many years, still nobody has made a systematic and thoroughful study on this relationship in Chinese academic circles. Now in our judicial practice the relationship between these two is confused and the prosecution-trial function is also mixed. In view of this condition, it is of theoretical significance and current value to probe into this area.

This paper may be divided into four parts:

1. Brief introduction about prosecution right and trial right.

2. Criminal procedure mode and the relationship between the criminal prosecution and trial.

3. The theory and principles about the prosecution-trial relationship.

4. The condition and reconstruction of

Chinese prosecution-trial relationship.

The problem about the relationship between prosecution right and the trial right. Prosecution, trial and defense are the three basic functions in the criminal procedure. Prosecution and trial separate from each other and also rely on each other. Prosecution is the guide of trial. The scope of prosecution decides the scope of trial. However, the operation of trial decides that of the goal if prosecution can be achieved. With the statement of the trial procedure, the quality of prosecution will be checked on continuously. Only the criminal indictments that have clear facts, stuffiest evidence and correct accusation (charges) can be accepted by the court. The prosecution right has characteristics as follows:

1. Initiative (be started actively by the government organ or the individual victim)

2. It is one of requests (that is one of the judicial claims, the substantive claims involved can be achieved finally only by the way of trial)

3. It is one of responsibilities (the aim of prosecution is to affix the defendant's criminal responsibility in order to recover the legal order that has be destroyed).

On the other hand, the trial right has the characteristics as follows:

1. Independence (substantive independence, identity independence, collective independence, internal independence)

2. Neutrality (the person that has interest with this trial can not be the judge; the result of the case can not include the individual interest of the dispute settlers; the dispute settlers should not stick to or object to one party's prejudice)

3. Be passive (starting process and trial process are both

passive)

4. Multilateral-participation (judges, prosecutor and defense are all involved)

Problems on prosecution-trial relationship in various lawsuit procedure mode. We research on this problem mainly from the vertical and transverse aspects. Criminal procedure system has class stand and technical feature, it shows the ordinary effort of human beings in the process of maintaining the normal order, dealing with the social offenses. So we should take the foreign, historical relevant system and practice as our reference. Even the unsuccessful practice can warn us to avoid making mistakes. In some countries, the system civilization has developed to a higher degree, the arrangement about the prosecution-trial relationship is also more reasonable and scientific, so it is more valuable for us to research. For some parts of the content, we can use for reference according to the reality in China now. By this way it is important for us to develop the theory and practice concerning with the prosecution-trial relationship.

The theory and principle about the "prosecution-trial relationship". The modern criminal procedure theory and the prosecution-trial relationship principles appeared on the basis of long criminal lawsuit practice. These theory and principles show the value concept, regular pattern of prosecution-trial relationship and the essential requirement in the developing history of human being's regulation civilization, so we can say that they have become the generally acknowledged truth. Because different countries have different history tradition and different reality, their basic principle about the prosecution-trial relationship is somewhat different. However, because of the internal regularity, the basic principles about prosecution-trial relationship in vari-

ous countries are somewhat identical. These principles about the prosecution-trial relationship are theoretical foundation. These principles have become the basic basis for the legislators to design the relationship between prosecution and trial, at the same time they have become the standard to justify if the judicial practice is lawful. Only after the people have understood these principles well, we can analyze the specific problems with a keen eyesight and high boldness of vision. In view of this situation, it is very important for us to research the basic principles about the prosecution-trial relationship. In this paper , the author lists the basic principles about the prosecution-trial relationship as follows: prosecution-trial right separation principle; "no claim no trial" principle; judge neutral principle; prosecution-trial identical principle.

Prosecution-trial separation is one of the important principles in modern criminal procedure law. This separation requires that the prosecution right and trial right should be carried out by two different government organ, and can not be gathered on one same organ or one same person. The judges should try their best to avoid carrying out the prosecution right and bringing about the consequences with the prosecution feature so as to keep the basic neutral status. On the other hand, the prosecutors also can not carry out the trial right beyond the prosecution scope so as to preserve the effect and responsibility of prosecution. Prosecution-trial separation has an active and deep influence on the development of human being's procedure law. To some extent, we can say: "judicial independence is the first division in the procedure law history, however, prosecution-trial separation is the second important division in human being procedure law history." The theoretical foundation of prosecution-trial

separation may he described as follows:

1. Power separation and balance theory.
2. Fair suit theory.
3. Procedure subject theory.
4. Understanding psychology theory.
5. Economical suit theory.

If we say that prosecution-trial separation mainly emphasizes on the separation between prosecution organ and trial organ and establishment of certain mature, complete prosecution system, then, we can say that the principle of "no claim no trial" specifies the function division between the prosecution organ and the trial organ, and also stipulates the exchanging, linking point between the prosecution procedure and the trial procedure. The principle about "no claim no trial" requires that a criminal case should be prosecuted by a certain prosecutor or charged by a certain victim (complainant). The court can not trial the issue beyond the scope the suit claims. The condition as follows all breaks the principle of "no claim no trial". For instances, the judges investigate and affix the dependant's criminal responsibility initiatively, the judges prosecute and trial at the same time or the judges trial one case without prosecution. The principle of "no claim no trial" first appeared in the early stage in ancient slave society time. With the development of society, the impeaching procedure system was replaced by the inquisitorial procedure system gradually. Thus, "no claim no trial" principle also loses the existing foundation and the judges began to investigate and affix the offenders's responsibility initiatively. In the period that the capitalists struggled with the feudal autocracy, the capitalists success to "no claim no trial" principle in the ancient impeaching procedure system and devel-

oped it. And again they separated the prosecution function from the trial function, and establish a special prosecuting organ representing the government to prosecute the offender. The developing history of "no claim no trial" principle shows the developing history of prosecution trial right, that is, from separation to combination and then from combination to separation in procedure law history. This developing history also indicates that it is the necessary tendency and requirement to make the prosecution right separate from the trial right in the process of procedure law developing history..

Judge neutral principle. Judges should be impartial, and they are not allowed to cover the truth of facts with their prejudice, otherwise, they will be regarded as a unfair, unreliable and unscientific person. In the lawsuit structure of the three parties' combination (that refers to the prosecutor, judges, and defenses combination), judges should hold impartial attitude and position to the respective party involved, furthermore, they can not have prejudice against any party. The neutral position of the judge derived from the fact that judges have no interests with the case. The judges have no independent request connecting with the case and also they never take any responsibilities for the consequences of judgment. Neutral principle is the basic premise for achieving the fair justice, according to the request of natural justice in ancient Roman, the due process of modern nations and the legal documents of UN. In the point of the relationship between prosecution and trial, the judge's neutral status is greatly influenced by the prosecution-trial confusion and prosecution-trial mixture. Inseparability of prosecution and trial is refers to judges have prosecution and trial function at same time. Fox example, they are prosecutors and judges at the same