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RESEARCH ARTICLE

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On the relationship of legal supervision and prosecution, defense, adjudication

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Abstract The purpose to set up public prosecution power is to restrict the investigation and judicial power. Public prosecution power is an organic combination of prosecution and trial supervision. The procurator's supervision in the court does not infringe on the defendants' procedural right. The procuratorial organ' s supervision on the matters of the court at the same level is only a power to start the correction procedure, however, the substantive power to make the final decision of whether to admit the mistake and how to make remedies belongs to the court. Therefore, the public prosecution's status is much higher than that of the defense and the interferences with independent judicial power of courts by legal supervision do not exist in China.

Keywords legal supervision, public prosecution, relationship between prosecution and defense, relationship between prosecution and adjudication

摘要 设置公诉权的目的主要是对侦查权、审判权进行制约，公诉权的追诉功能与审判监督功能既不对立也不可分割。审判程序中的法律监督并未限制被告人行使诉讼权利，检察机关对审判活动的监督只是同级机关之间的程序性监督纠错权，是否确认错误及如何纠错的实体性决定权仍在法院。因此，中国并不存在“控方的诉讼地位远远高于辩方”和“在法院之上设立一个超越审判权的监督机关”的问题。

关键词 法律监督，公诉，控辩关系，控审关系

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According to the provision of China's constitution and law, procuratorate is the state's organ for legal supervision, which not only represent the state in prosecuting crimes, but also implement legal supervision on judicial matters such as investigation, trial and enforcement. Some scholar has written an article to challenge this: "Procuratorates assume the function of prosecution, but at the same time they supervise the trial matters of the courts in the name of state organs for legal supervision. It is as if a player is at the same time an umpire. It indeed does not make too much sense, and it does not conform to the principle stipulated in Article 12 of the *Criminal Procedure Law* that the power of conviction should be exercised by the courts." (Cui, 2007) The authors think that the holder of this viewpoint obviously does not conduct in-depth research on the historical origins between the power of public prosecution and the power of legal supervision and the relationship between the form and the essence. In particular he does not have the positive analysis of the relationship between legal supervision and prosecution, defense and adjudication in China's criminal litigation. Instead, he makes the assumption simply based on the concepts and takes the above-mentioned conclusion for granted. We will debate with the holder of this viewpoint from three aspects.

1 The relationship between legal supervision and public prosecution power

Public prosecution power refers to the power of procuratorate that represent the country to initiate a prosecution and request the court to try the case so as to realize the state's power in criminal penalties. Legal supervision power means the power of procuratorate to supervise the enforcement of law within the legitimate scope and according to the procedure based on the authorization of state power. Literally legal supervision is a relatively extensive concept and can include supervision on the constitution and all the laws. Nonetheless, in the stipulations of China's constitution and law, the concept of legal supervision is only applied in the functional definition of procuratorate. Therefore as a special legal terminology, legal supervision should be interpreted as a supervision function of specific content that China's procuratorate owns according to law. In western countries where "the separation of three powers" is adopted, neither public prosecution power nor legal supervision power has independent constitutional status. In the executive power system public prosecution power is stipulated as a concrete capacity of judicial nature, and legal supervision is not set up as a special state power. However, similar to what is granted to procuratorate in China, in fact, procuratorate in many countries also have legal supervision power to varying extent, which is not clearly defined as legal

supervision though. Then, does the fact that procuratorate in China exercise both public prosecution power and legal supervision power lead to role conflicts? We are of the opinion that there are no conflicts between public prosecution power and legal supervision power, both of which are integrated and inseparable. The main reasons thereof are as follows:

1.1 The purpose of setting up public prosecution power is to constrain the investigation and judicial power

Compared with judicial power and investigation power, public prosecution power came into being quite late. It engendered with the social transformation and the development of judicial system. In slavery system, the pattern of penalty for crimes was that it leaves to the victims' discretion. With the evolution of crimes and the needs for the state to maintain the order of rule, in the medieval Europe pattern of the prosecution for crimes was changed to be inquisitional proceedings in the continental countries and litigation with the grand jury in England. With the mode of inquisitional proceedings, the judge had unlimited power of investigation, prosecution, adjudication and enforcement, and the defendant was only the accused who had no due litigation status and rights. This mode could easily cause abuse of power and unjust, false or wrong cases. Later, with the progress of society and the intensification of democratic awareness, the idea of power separation received more and more attention, and people started to explore the reform of litigation system, the most critical one of which was the separation of public prosecution power and judicial power. Reflected in the organization structure, this separation has given rise to the creation of an office that represents the state in prosecuting crimes, i.e. the procurator. "The purpose for the creation of the procurator is, on one hand, to eliminate the inquisitional system in which the judge is responsible for investigation and to restrict the judge's power; and on the other hand, to prevent a legal state from becoming a police state and to control the matters of the police. In other words, the procurator plays a role of double control on the state power, protecting the defendant from the arbitrariness of both the judge and the police." (Lin, 1999) It can be seen that the purpose of setting up the procuratorial system is to protect the objectiveness and the correctness of judicature by the mutual supervision and check between the procurator and the judge through the mode of separation of litigation powers. Meanwhile, it is also intended for a fair and objective office that has gone through strict legal training and under legal restriction to control the legitimacy of police matters so as to shake off the nightmare of a police state. (Sun, 2004) Therefore, it should be said that calling for judicial fairness and justice has brought about the prosecution system and procuratorate and at the same time the supervision and restriction system of procuratorate over investigation power and

judicial power. Just as what French scholar Portalis said, procuratorate is "a fortress to prevent occasional factors and unfairness in adjudication, and to prevent violence and abuse of power." (Supreme Procuratorate, 1980)

The theory of separation and balance of powers proposed by Locke and Montesquieu in the 18th century is generally accepted by the western bourgeois and has become a universally applicable standard for constitutional governments. As an extension of the theory of power separation in litigation, the separation of prosecution and adjudication has made important contribution to the development of criminal litigation system: On the one hand it avoided role conflicts of the power exerciser, removing the structural obstacle for adjudication neutrality and providing the basic guarantee for equality of the prosecution and the defense; On the other hand, it has established the checked and balanced relationship between prosecution power and judicial power. The participation of the procurator in the criminal litigation has an important restriction function on preventing the abuse of power and inaction by the judges. (Li, 2006) Through developing what is useful and discarding what is not from the theory of the separation and balance of powers, Marx "threw away the political principle the bourgeois thinkers believe in devoutly—the 'dirty bath water' of 'the separation of three powers', but retained 'the baby' extremely carefully—the check and balance" (Zeng, 1991), and created the proletarian theory of state and law. Afterwards, based on the inheritance of the tradition and the development of Marxist theory of state and law, Lenin further created the theory of legal supervision of the proletarian state power and clearly defined the legal supervision status and the function of procuratorate. As the theory of legal supervision and the socialist political system are essentially coherent in nature, many socialist countries including China have granted the function of legal supervision to procuratorate according to Lenin's idea. Even many modern western countries have gradually realized the legal supervision function of procuratorate and have continuously strengthened their supervision function. The UK's parliament adopted the Prosecution of Offences Act in 1985, which reinforces the investigation and supervision function of procuratorate; France stipulated that the Supreme Procurator's main duty is to "supervise the state's overall law enforcement matters", which of course included the supervision on the court's adjudication. Germany recognized that procurators should "act as state public prosecutors in the court trial stage, and at the same time oversee whether the trial procedure is legal", therefore "procurators are both the public prosecutors and the legal supervisors in court". (Song, 2003)

It can be seen that the purpose of separating public prosecution power from judicial power to create the procuratorial system is mainly to form effective restriction on judicial power and police power while prosecuting crimes, to prevent the abuse of power by judges and the police so as to fully protect human

rights. And restriction on power is the same with legal supervision in nature. Therefore it can be said that from its date of birth, public prosecution power and the procuratorial system is naturally related to restriction on power and legal supervision, and legal supervision is not an extra function that is affixed to public prosecution power at a later date.

1.2 All the categories of public prosecution power have the nature of legal supervision

According to the legal stipulations of China, public prosecution power includes five categories of power, namely the power of prosecution, the power to decide whether to prosecute or not, the power to support public prosecution, the power to change public prosecution and the power to plead for an objection to the court's decisions. All those functions have the supervision functions in varying degrees in guaranteeing the uniform and correct enforcement of the law.

Firstly, the power of prosecution embodies legal supervision over the investigation matters of the public security bodies. In examining the prosecution, procuratorate must examine whether the behavior of the crime suspect constitutes a crime, whether there is illegal evidence collection by investigators, and whether the case complies with the legal prosecution conditions. This kind of examination is a restriction and supervising process for the procedural legitimacy and the substantive compliance with legal conditions of the investigation matters of the public security bodies, hence it reflects the character of legal supervision.

Secondly, the power to decide whether to prosecute or not—the exercise of which is based on the investigation of the prosecution, which is a conclusion drawn legally after examining and supervising investigation matters. For those that satisfy the legal prosecution conditions, prosecution will be initiated and the defendant will be submitted to the court for trial. For those that do not satisfy the legal prosecution conditions, no prosecution will be initiated and the litigation will be ended. The former is a positive supervision conclusion made by procuratorate with respect to the investigation matters, and the latter is a negative supervision conclusion, both of which reflect legal supervision over investigation matters. Meanwhile, the decision to prosecute plays a role of initiating the process and limiting the scope for the court's trial. The court can only try the defendant and the crime that the procuratorate have decided to prosecute, and the decision of non-prosecution will prevent the trial from being activated. All these reflect the restriction on the court's judicial power.

Thirdly, the power to support public prosecution is the power that reflects most fully the litigation function of procuratorate, and at the same time has supervision and restriction function on the court's judicial power. Procurators' objective and fair prosecution, disclosure and proof of crimes before the court reflect the

supervision on violation of the criminal law by citizens and organizations. Among these, to support the prosecution of government employees who commit crime by taking advantage of duty also reflect the supervision over the illegal exercise of public power by government employees. In the court, procurators should also play a role in supervising the trial to make sure it is conducted legally and to safeguard the legitimate rights of the litigation participants. For any illegal behavior that occurs in the court matters, they should report to the chief procurator in a timely manner after the trial, and procuratorate shall put forward rectification opinions to the courts. All these reflect the nature of legal supervision.

Fourthly, the power to change prosecution means procuratorate have the right to legally change the content of public prosecution when the situation changes after procuratorate decide to prosecute, including adding or reducing defendants, changing accusation or withdrawing the prosecution. The courts should conduct or end the trial according to the changed prosecution content, which also reflects restriction on the court's judicial power.

Fifthly, the power to plead for an objection to the court's decisions means if procuratorate regard the decision of the first trial by the court as really wrong, they have the right to put forward objection to the high court; If the Supreme Procuratorate or high procuratorate regards the effective decision or decision by the district court as really wrong, it has the right to protest to the court of the same level so to initiate a second trial or trial supervision procedure and to rectify the wrong decision through the trial supervision of the courts. Obviously, the right to protest the court's decisions reflects the nature and role of procuratorate's supervision on whether the court's trial matters are legal and on ensuring the uniform and correct implementation of state law.

It can be seen that the five categories of public prosecution power reflect the nature of legal supervision to varying extents, from different aspects and in different ways, which determines that public prosecution power of procuratorate has the nature of legal supervision. In other words, the process in which procuratorate exercise public prosecution power is the process in which they execute the role of legal supervision.

1.3 The exercise of public prosecution power by foreign procuratorate also has the nature and function of legal supervision.

Socialist countries generally regard the role and function of procuratorate as legal supervision, and this viewpoint was already explicitly expressed as early as before the October Revolution in the Soviet Union by Mullayev, Russian jurist and judicial expert during Czarist Times. As such theory of procuratorial nature of legal supervision is not a peculiar invention of socialism. (Zhang, 2002) The exercise of public prosecution power by procuratorate shows that it reflects the

nature and function of legal supervision in varying degrees. This is natural in the countries implementing socialism like Mongolia, Vietnam and North Korea, whose law stipulates that procuratorate are organs of legal supervision and have the right to monitor the trial matters of the courts and the legitimacy of their judgments and decisions. Countries implementing continental law system grant procuratorate command, control and leadership power over police investigation matters, with the supervision and restriction over investigation matters included. Most countries grant procuratorate the right to appeal against the court's judgments and decisions or the power to plead for an objection to the court's decisions, reflecting the supervision over the legality of the court's trial. For instance, Germany's procuratorate are regarded as the organs to judge whether the law is correctly executed and thus can appeal against both "guilty" and "not guilty" judgments. (Weigend, 2004) Procurators in France and Japan can appeal not only against judgments that have not taken legal effect, but can also appeal against the court's verdicts that have already taken effect or have extraordinary appeal, and the reasons for appeal are not limited. (Zhu, 2007) Portuguese procuratorate have the power to supervise the work of the judicial officials, maintain the independence of the courts within their own authority, and monitor that the judicial function is implemented according to the constitution and law, and can appeal to the constitutional court. The *Russian Federal Procuratorial Organization Law* stipulates that procurators have the right to participate in any phase of the court's trial, the power to request the cancellation of verdict or plead for an objection to the court's decision for any illegal or groundless verdict, the power to investigate any case materials or various kinds of complete files for any judgments or decisions that have already taken effect, the right to protest the court's decisions or report to the chief procurator. The execution of death sentences by the court, which is protested by the general procurator or deputy general procurator, should be suspended. (Bian, 2006) The *Russian Criminal Procedure Code* also explicitly stipulates that procuratorate have the right to put forward opinions regarding issues arising from the court trials, supervise the legality of the enforcement of criminal judgments, and protest criminal verdicts and decisions made by any court in Russia. Moreover, the intensity and the measures of litigation supervision far exceed that of China. (Russian Criminal Procedure Code, 1999)[1] The countries implementing Anglo-American

[1] In addition, some scholars think that the system of China's procuratorate exercising legal supervision power as judicial organs is a copy from the Soviet Union and affirm that "this type of judicial system only exists in China at present, whose source country has already changed their course". This is not true. In 1993 the *Russian Federal Constitution* continues to confirm the consolidated and uniform supervision mechanism of procuratorate, and includes procuratorial power as the constituent part of judicial powers in Chapter 7, which is called judicial powers.

law system such as Canada and New Zealand also allow procurators to appeal against "not guilty" judgments for legal reasons and procurators in the US can appeal against certain decisions. (Gu, 2003) It can be seen that for procuratorate to supervise and restrict the court's trial matters and adjudication is not a special case in China but of international universality. The reason why procuratorate in the western countries are not specifically defined as legal supervision organs is related to their political system of "separation of three powers" under which legal supervision power does not have independent constitutional status, and procuratorate are affiliates of administrative organs. However, that is not to say that public prosecution power exercised by these countries' procuratorate does not have the nature and function of legal supervision.

1.4 The crime prosecution function and the adjudication supervision function of public prosecution power are two aspects of one thing, which are neither contradictory nor separable

We believe that public prosecution power is just a way to realize legal supervision power, which is an inherent nature of public prosecution power but not another function that is parallel with public prosecution power, both are integrated and have a symbiotic relationship. Procurators initiate public prosecution, appear in the court to prosecute and prove crimes, and protest decisions and decisions that are really wrong according to law, which conducts procedural restriction and supervision over judicial power in exercising public prosecution power with the purpose of ensuring that the court trials are in a fair and objective manner by law to protect citizens' legitimate rights from being impinged by abuse of judicial power. Putting forward rectification opinions to the court on illegal behavior in the court trials is another kind of non-litigation legal supervision by procuratorate to maintain the fairness in judicial matters through requesting the court to rectify illegal exercise of judicial power by the judges. This kind of non-litigation supervision is sometimes corresponding to and connected with litigation such as protest against the court's decisions, and procuratorate can at the same time protest against the court's decisions for the reason that the trial matters are illegal. When procuratorate places the case on file for investigation and prosecution on judges suspected of committing crimes by taking advantage of their duty, it is legal supervision over judges in prosecuting crimes, and this kind of prosecution will give rise to subsequent litigation type of supervision like initiating public prosecution, instituting the case before the court and protesting the court's decisions. Thus, it can be seen that public prosecution and legal supervision of procuratorate are inseparable. Legal supervision needs to be realized in public prosecution matters, while public prosecution is the form and carrier of legal supervision. The legal supervision determines the nature for

public prosecution power, and public prosecution power provides legal supervision a platform where it can be realized, both of which are two aspects of one case. The viewpoint holding that public prosecution power should be separated from legal supervision power, and that procuratorate only exercise public prosecution power but not legal supervision power does not realize the dialectical relations between the form and the content, the semblance and the essence of public prosecution power and legal supervision power, hence it is not adequate or feasible in reality.

2 The relationship between legal supervision and prosecution and defense

Some scholars think that in China the procuratorate are too powerful. In the litigation legal relationship among the prosecution, the defense and the adjudication, not only the prosecution's litigation status is higher than that of the defense, but the procuratorial power is stronger than the judicial power". (Cui, 2000) Some other scholars believe that with procuratorate having both legal supervision function and public prosecution function, "it definitely will lead to serious imbalance between the powers of the prosecution and the defense, making the principle of equality between the prosecution and the defense only an empty shell, and there will be no protection at all for the constitutional rights of the defendant." (Hao, 2006) We disagree with this.

As an important principle of the rule of law in modern criminal litigation, the equality of the prosecution and the defense mean to "maintain an equal adversary pattern in form" between the prosecution and the defense in criminal trials. (Song, 2003) That means the defendant and his defender have the equivalent litigation status and the equal defense right with the prosecution in the court, and both parties have the same opportunity to state opinions and appeals, and present evidence, conduct cross-examination and debate in an equal manner. The judge should make a fair and impartial decision, thus forming an "equilateral triangular" litigation structure among the prosecution, the defense and the adjudication. Nonetheless, the equality between the prosecution and the defense is not absolute equality, but is equality in a specific context, that is, equality in the adversary litigation. The basic characteristics of adversary litigation is that the prosecution and the defense have equal status in the court and equivalent adversary approach and opportunity, which does not mean that complete equal status, power and rights between the prosecution and the defense in any stage of the criminal litigation. In the investigation procedure before the trial and the enforcement procedure after the court trial there does not exist equality between the prosecution and the defense. The difference in the litigation role and task

determines that the prosecution and the defense should have the power or rights that suit their litigation roles and satisfy their litigation task requirements. (Zhang, 2006)

Though China has not completely implemented adversary litigation, specific analysis of the rights and obligations of the prosecution and the defense in the trial procedure defined in the Criminal Litigation Law indicates that the litigation status of the two parties are more or less equivalent. This kind of equivalence or equality is mainly shown in the following aspects: Firstly, the right of both parties to present evidence and to conduct cross-examination and debate is equal. The public prosecutor can read the indictment, interrogate the accused, question the witnesses, present physical exhibits, documentary evidence and appraisal statement, issue indictment or suggest supplementary investigation. The defendant and his defender can also conduct defense or express defense opinions, question the witnesses, the victims and the appraiser, present exhibits, documentary evidence and appraisal statement to prove that the defendant is "not guilty" or has minor offense, apply for new witnesses to appear in the court and to have new exhibits, and both parties can debate with respect to the opinions expressed by the other party. Secondly, if the public prosecutor finds any illegal fact in the trial matters out of his legal supervision function, he should report to the chief procurator after the court is adjourned, and put forward rectification opinions to the court in the name of the procuratorate. For the purpose of protecting his own legitimate rights the defendant can apply for withdrawal regarding the court staff and has the right to put forward opinions concerning behavior that impinges on his legitimate right in the trial matters, who can also use the serious breach of litigation procedure in the court's trial matters as a reason for appeal. The defender has the obligation to protect the defendant's legal rights, including protesting behavior that violates litigation procedure and impinge on the defendant's legal rights in the court trials. Thirdly after the court makes the judgment of the first trial, the interested parties can appeal and the procuratorate can protest, and the time limit of appeal and protest has the same effect with the initiation of the second trial procedure. Fourthly in the course of the court trial, both parties have the obligation to obey the instruction and follow the decision of the chief justice and to comply with the rules of the court trial. With regards to the final judgment and decision made by the court, though the prosecution and the defense can both continue to protest and appeal against them, before the court changes the sentence according to law, both parties have the obligation to carry out the effective judgment and decision. It can be seen that in China's criminal trial procedure, the litigation status, the rights and the obligations of the prosecution and the defense are more or less equivalent, and procuratorate are not privileged because they are the legal supervision organs. Moreover, in the case of private prosecution, the plaintiff is also entitled to the

above-mentioned power that procuratorate have.

What needs to be pointed out is that although there are many similarities in the power and obligations in criminal trials between China's procuratorate and litigation parties, as a state's legal body, the procuratorial organ is after all not a litigation party and has differences with litigation parties, which are mainly reflected as follows:

2.1 The starting point and legal requirements of the exercise of the rights by the prosecution and the defense are different

As the legal supervision organ, China's procuratorate must comply with the principle of subjectivity, fairness, rule of law and human rights protection when exercising public prosecution power, who not only assume the responsibility of prosecuting crimes according to law, but also take the responsibilities of maintaining the uniform and correct application of law and protect citizens from unfair treatment. Therefore, in the pre-trial litigation procedure, procuratorate not only have the obligation to investigate and collect facts and evidence to prove that the crime suspect and the defendant are guilty and the offense is serious, but also have the obligation to investigate and collect facts and evidence to prove that the crime suspect and the defendant are not guilty and the offense is less serious, who not only protect the litigation right of the victim, but also protect the litigation right of the crime suspect. During the trial, while revealing and proving the crime, they have the responsibility to present evidence that is favorable to the defendant and to point out the case that enables the defendant to receive lenient punishment or mitigated punishment by law or by discretion, who also have the responsibility to put forward rectification opinions to the court regarding illegal behavior to protect the defendant's legal rights, and to exercise the right of protest in the cases where innocent people are judged as guilty or minor offense is judged as serious crime.[2] The procuratorate's executing responsibilities does not represent any litigation parties or safeguard its own interests, but represents state law, which is determined by its function and nature as a legal supervision organ. The procurator is not, and should not be a prosecution maniac who

[2] According to the provisions of the *Quality Standard for Handling Prosecution Cases by the Procuratorate* (Trial), for illegal behavior that impinges on the legal rights of the crime suspect and the defendant in the investigation and trial matters, if the procuratorial organ does not execute its legal supervision responsibility according to the law by putting forward rectification opinions, or does not exclude evidence that is obtained illegally, the case handling will be considered of low quality. According to the *Several Opinions of the Supreme Procuratorate on Criminal Protest Work*, if innocent people are judged as guilty and minor offense is judged as serious crime and if the punishment is obviously inappropriate, protest and support of protest should be initiated.

one-sidedly pursues cracking criminals. Instead, he should be a objective and fair guardian that follows the law. (Lin, 1999) Undoubtedly no litigants have this kind of objective obligation and professionalism.

In view of the circumstances of foreign countries, some countries implementing litigant proceedings like the US have the criminal litigation concept of strong confrontation between the litigants so as to clarify fact and truth. Under the circumstance the procurator is considered a litigant in the litigation. Accordingly anything that can not be done by the defendant also can not be done by the procurator, moreover, the procurator can not use state power to interrogate the defendant; On the other hand, the procurator has almost unlimited prosecution discretion and is not controlled or supervised by external parties. The procurator often ignores the restriction of law in the court, use his own way and conducts illegitimate behavior, and even forges or alters evidence with the only purpose of winning the case. For this reason, the one who abuses prosecution discretion is nobody else but the procurator. (Huang, 1986) This is inevitable for the procurator as a litigant. In the countries implementing the continental law system, the procurator is not considered as a litigant, who is required to collect and judge evidence in a objective and fair way from the perspective of judicature. For instance, Germany's criminal litigation stipulates that the procurator has the obligation to investigate evidence to support both cases of "guilty" and "not guilty". At the end of the trial, if the procurator thinks the evidence is not sufficient to make the conviction, he can request the court to declare the defendant not guilty. If the procurator believes the conviction is not fair, or the punishment is too harsh, he has the right to appeal for the defendant's interests. (Weigend, 2004) The reason for this stipulation is that the procuratorial organ assumes the responsibility of law's guardian. China has many things that are the same or similar in terms of litigation tradition and structure with the continental law system. If we ignore this, and just imitate the litigation system of the Anglo-American law system and make the procurator a litigant, we can not expect the procurator to be objective and fair from a legal perspective, which is even more unfavorable to the protection of the defendant's legitimate rights and interests.

2.2 Different effect of the objection to the effective judgment and decision

According to the provision of the criminal procedure law, the court' judgment and decision that have taken effect and are found wrong by the Supreme Procuratorate or the high procuratorate should be protested. If the litigants are not convinced by the judgment and decision they can also appeal to the high court. However, the legal effect of the protest and appeal is different. For a protesting case, the court shall hold a second trial according to the trial

supervision procedure, as for an appealing case of a litigant, the court will review and decide whether to have a second trial. So far as this is concerned, the rights of the procuratorate and the defendant are indeed not equivalent. Nonetheless, this kind of inequality, firstly, is because that the trial supervision procedure is not the third trial procedure but a special remedy procedure for ensuring the correct enforcement of the law, which already reflects the characteristics and value orientation of supervision, hence it can only be activated by the president of the court, the high court or legal supervision organ in high rank, while the procuratorial organ, the litigants and the judge of the first trial do not have the right to activate the procedure; The second reason for such inequality is the supervision responsibility assumed by the procuratorial organ to maintain the uniform and correct enforcement of the law.

If the procurator finds an effective decision is really wrong through professional investigation, he does not have the right to sit back and do nothing. Instead, he has the responsibility and obligation to activate the trial supervision of the high court through protesting the decision so that the high court can correct the mistakes of the low court through re-trial to safeguard the legitimate rights of the state, the litigants and the defendant. Therefore, in this kind of protest, the function of complaining is not critical, and supervision is the basic characteristic. Just for this, on one hand, the protest in the trial supervision procedure can not be lodged by the procuratorate which was the prosecution in the first trial, who should be lodged by the Supreme Procuratorate or high procuratorate to reflect the legal supervision by the higher legal supervision organ over the lower trial organ; On the other hand, within the procuratorial organ, the department that exercises the protest activation power in the high procuratorate is not the public prosecution department but the criminal appeal department.[3] This not only fully reflects the legal supervision nature of the protest in the trial supervision procedure as a special remedy and correction means, but also can prevent the activation of protest at will from the mechanism. In addition, according to the stipulations of the Criminal Litigation Law, the court tries the case according to the trial supervision procedure, if the effective decision is made in the first trial, the trial should be conducted according to the first trial procedure. If the effective decision is made in the second trial, the trial should be conducted according to the second trial procedure. During the trial, the prosecution and the defense can

[3] Article 407 of the *Criminal Procedural Rules of the Procuratorate* stipulates: "For any protest that needs to be lodged against the court's judgment and decision that are in legal effect, the appealing department shall report to the chief justice then submit to the procuratorial committee for discussion and decision. After the procuratorate decides to lodge protest, the investigation and prosecution department will appear in the court to support the public prosecution."

still present evidence and conduct cross-examination and debate in an equal manner, and the court will make the judgment at last. As a result, when exercising the protesting power in the trial supervision procedure, the procuratorial organ has not broken the "equilateral triangular" litigation structure of "equality between prosecution and defense".

3 The relationship between legal supervision and defense and adjudication

Some scholars think that as the legal supervision organ, the procuratorial organ not only acts as the plaintiff in the litigation but also has to supervise the judge's trial, just like an athlete also acts as an umpire at the same time, making the court's judgment and decision lose the meaning of "final trial". (Cui, 1999) We are of the opinion that the procuratorial organ's supervision on whether the court's trial matters are legal is necessary to effectively restrict the judicial power and ensure the judicial fairness under China's system of people's congress. However, this kind of supervision is a procedural supervision within the bodies of the same level, thus the procurator can not be both an "athlete" and an "umpire" at the same time. This has been fully proved by the relationship between the prosecution and the adjudication in practice.

3.1 The procuratorial organ's supervision over the court's trial matters reflects the requirements of supervision and restriction of the system of the people's congress over state power

China implements the system of the people's congress, and the state power is unified. In order to ensure the efficiency of exercising the state power, except for directly exercising important powers like the legislative power, the appointment and dismissal power of officials in important positions and the power to supervise the execution of the constitution and the work of governmental organs, the state power organ sets up under it administrative organs, adjudication organs and procuratorate, and grants the latter relevant powers. But this grant of power is relative, and the above-mentioned organs must be responsible to the people's congress and are supervised by the people's congress. Limited by its way of working, the supervision of the people's congress over adjudication organs can only be macro supervision, which can not directly supervise over any specific case of the court. Therefore it is necessary to set up a dedicated legal supervision organ, which conducts daily and individual legal supervision over the exercise of power by adjudication organs within legal authorization scope and in accord with the legal procedure. At the same time, this supervision organ should be

responsible for the people's congress and be supervised by the people's congress. As the prosecution function of the procuratorial organ has the above-mentioned natural relationship with legal supervision, and the procuratorial power is only a power to activate legal procedure while it can not make a final or substantive decision like conviction or punishment, using this kind of procedural power to supervise the substantive power of the judicial power can not only forms the effective mutual restriction between the procuratorial power and the judicial power, but can also prevent the procuratorial power from getting too strong and causing the misallocation of state power. For this reason China's constitution and law define the procuratorial organ as the state's legal supervision organ and grant it the supervision power over the legality of the court's trial matters so as to ensure the fair exercise of the judicial power and safeguard social fairness and justice.

3.2 The procuratorial organ's legal supervision over the court's matters is only procedural supervision and correction of mistakes between the organs of the same level, and the substantive decision power concerning whether to admit the mistakes or how to correct the mistakes still belongs to the court

The procuratorial organ's legal supervision is not "the superior over the inferior" supervision, but the supervision and restriction between different functions of organs in the same level. In the modern Chinese language, *jian* (the first character of "supervision" in Chinese) means checking from aside, and *du* (the second character of "supervision" in Chinese) means urging, so *jian du* means "checking and urging" (Chinese Word Ocean, 1989), but it does not have the ancillary meaning of "superior over inferior" or "dominance and obedience". Therefore, in view of the meaning of words, there is no ground to draw the conclusion that legal supervision is the supervision by the superior over the inferior. In fact, the legal supervision power granted to the procuratorial organ by China's constitution and law over investigation and adjudication organs is just procedural supervision but not the top-down supervision with substantive effect like what the state organ has over administration, adjudication and procuratorate. This embodies an important idea of Lenin's legal supervision theory: "The duty of the chief justice is to make sure that any decision made by any local organ does not conflict with law, hence just in the viewpoint the chief justice has the obligation to raise objection to any decision that does not conform to the law, but the chief justice does not have the right to stop the execution of the decision." (Lenin, 1987) In accordance with the stipulations of China's criminal procedure law, the procuratorial organ's legal supervision over adjudication matters is mainly reflected in the following two aspects: Firstly, it is to put forward rectification opinions against any behavior that breaches the

litigation procedure in the court trial; Secondly, it is to protest against the court's wrong judgment and decision. Both supervision measures just provide legal remedy channels for the rights damaged by the judge's unlawful behavior or the wrong judgment, and only have the effect in activating the court's own rectification procedure such as law-breaking liability investigation and trial supervision, otherwise it does not have the substantive effect in directly penalizing the unlawful judge, declaring that the adjudication behavior invalid or changing the original judgment. As to whether the unlawful behavior pointed out by the procuratorial organ can be admitted and rectified by the court and whether the judgment and decision that have been protested can be changed eventually depend on the court's decision, and there is no such issue as the procuratorial organ replaces the court in exercising its power or forces the court to have trial according to the will of the former. Relevant data can illustrate this. According to the President of the Supreme Court, Xiao Yang's work report presented in the 10th session of the Fifth Conference of the National People's Congress in March 2007, in 2006 the courts of various levels received 10,918 cases of protests against the court's decisions by procuratorate according to the trial supervision procedure, tried 10,715 cases and changed only 2,798 cases, accounting only 26% of the trial cases. In addition, according to statistics, in 2006 the procuratorate put forward written rectification opinions to the court concerning violations in the criminal trial matters for 2,200 times, and the courts only rectified 1,581 cases or 71.9% of it. This is sufficient to prove that the court is impossible for it to "surrender" to the procuratorial organ for legal supervision and give up independent judgment and exercise of power.[4]

3.3 In the trial procedure the judges are always in the dominating position and the matters of the procurator are always controlled and restricted by the judges and there is no such circumstance that the procurator has stronger power and in higher status than the judge

The procuratorial organ's legal supervision over the court's adjudication matters is a power balance within the criminal litigation procedure, which is realized through specific litigation functions like initiating public prosecution, appearing in the court to support public prosecution and protesting the court's decisions. It

[4] The reasons for low sentence change rate of re-trials are various, such as the demurral quality by the procuratorate, the courts that have accepted the protest re-try most of the cases, the difficulty for the courts of the first trial to rectify problems by themselves, and the differences between the procuratorial organ and the court in law application. However, no matter for what reason, it shows that the court does not have to change the sentence because the procuratorial organ protests the decision.

does not affect the basic structure of criminal litigation, neither does it change the due litigation status of the procurator, hence it is impossible for it to encroach on the legal status of the judicial power at the apex of the equilateral triangle. From the stipulations of China's criminal litigation law and the practice of adjudication, the judge is always in the dominating position: (1) It is the judge who decides on the course and direction of the trial, and the procurator and litigation parties must comply with the court's rules and follow the instruction of the chief justice. (2) For the procurator's request and suggestion of delayed trial or supplementary investigation, the judge has the decision right. If the judge does not agree to the delayed trial and supplementary investigation, the procurator must continue to complete the task of appearing in court to support public prosecution and must not leave the court without approval. (3) After the trial, if the court thinks that the facts are not clear, the evidence is insufficient or the case does not constitute a crime for what the procuratorial organ charges, it has the right to declare that the defendant is not guilty without having to obtain approval from the procuratorial organ. (4) For the decisions protested by the procuratorate (incl. the Supreme Procuratorate), it is totally at the court's discretion as to whether to send the cases back to the court of the first trial for re-trial or to retry the cases directly, whether to have the trial before the court or in writing, and whether to change the sentence or how to change the sentence after the trial. Unless there is violation of legal stipulations, the procuratorial organ does not have the right to interfere. (5) With respect to the procuratorial organ's rectification opinions, it is also at the court's discretion as to whether to adopt and how to make rectification. The procuratorial organ can not exceed its function and directly make the rectification, or order the court to implement the supervision opinions of the procuratorial organ. (6) If the procuratorial organ suspects the judge for committing crime by taking advantage of duty and places the case on file for investigation and prosecution, whether the judge will be convicted eventually is still up to the court's trial and decision according to law, and the procuratorial organ also does not have the power to interfere. If the judge is found not guilty in the end, the procuratorial organ will have to assume state indemnity responsibility according to law, and will investigate the procurator who handles the case unlawfully for the fault liability. (7) If through the trial the court finds that the procuratorial organ handles the case unlawfully, it has the power to put forward rectification opinions to the procuratorial organ and exclude evidence that has been obtained illegally. Thus it can be seen that in the trial proceeding the court is always the leader of the litigation matters and has necessary effective restriction mechanism for the procuratorate. The legal supervision by the procuratorate over trial matters is a necessary constraining mechanism over the trial power during normal litigation procedures. Therefore, that in China the procuratorial organ is higher in the rank than the court, and the prosecution power is stronger than the

judicial power is not in accordance with China's legal provisions and actual situation. (Cui, 2000)

3.4 The procuratorial organ's legal supervision does not affect the authority of the court

The authority of the court and the res judicata of the final trial must be safeguarded, otherwise the real authority of the rule of law can not be established. However, both authority and res judicata are not absolute, and what is critical is whether the judicial process and result are fair. Just as what the judge said: "Res judicata needs to be respected, but how can we respect unfair res judicata?" (Wang, 2004) Fairness is the essential requirement for judicature, and judicature is the final defense of fairness, but unfair judicature loses the meaning of judicature. Only when the judgment really reflects fairness, can the authority of the court and the adjudication be established. Here we need to distinguish two concepts: court's authority and law's authority. Although the purpose of establishing the court's authority is to realize the law's authority, in some cases the two authorities are not equivalent. The law's authority is the source of the court's authority, and the court's authority can only be established through safeguarding the law's authority. Like the court's authority, legal supervision is intended to realize the law's authority, as the law's authority is the ultimate goal. Consequently, the court's authority can not be used to repel the law's authority in any circumstances. Only after the judicial fairness is realized can the law's authority be realized and the court's authority be established. The adjudication that violates judicial fairness and the law's authority not only have no authority but also needs to be rectified. For unlawful trial and unfair judgment, the procuratorial organ will urge the court to make rectification according to law by putting forward rectification opinion or protest. This is not only helpful to safeguarding judicial fairness and the law's authority, but also conducive to safeguarding the court's authority.

In summary, legal supervision is an inherent nature of the procuratorial organ. Of public prosecutor's prosecution function and supervision function, the prosecution is the means and the supervision is the end. (Zhu, 2007) Both of the two functions enable the procuratorial organ to form two kinds of close legal relationships with the defense and the court: One is a litigation relationship of "equilateral triangle" among the prosecution, the defense and the court based on the procuratorial organ's allegation; The other is a legal supervision relationship between the procuratorate and the court based on the procuratorial organ's trial supervision. The object of the procuratorial organ's trial supervision is the court but not the defendant and his defender. The supervision measures target the court's unlawful behavior or wrong judgment, and the role and effect of the

supervision is to start the court's own rectification mechanism and supervision procedure but not to replace the court to directly make rectification or change the court's sentence. As the legal supervision of the trial procedure does not limit the defendant's exercise of litigation rights, and in fact the defense is equally entitled to the supervision power over case trials as the procuratorial organ, the problem that "the prosecution's status is much higher than that of the defense" and "the legal supervision power of the prosecution interferes with the independence of judicial power" does not exist in China. (Cui, 2000) Instead, the relationship of the prosecution, the defense and the adjudication is balanced according to the criminal litigation rule, and the powers of the procuratorial organ and the court is allocated based on the constitutional principle of separation of functions, coordination and mutual checkup of judicial organs. The viewpoint that the exercise of prosecution power and the assumption of legal supervision responsibility by the procuratorial organ causes the dislocation of litigation role is neither in accordance with the dialectical relations between the form and the content of public prosecution and legal supervision, nor in accordance with the provisions of the Criminal Procedure Law of China.

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