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RESEARCH ARTICLE

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Seeing the improvement of the criminal trial structure from China's criminal courtroom arrangements (tribunal design)

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Abstract The setting of criminal court has become an important representation of the criminal trial structure due to its visual and vivid reflection of the legal position and relations among the three parties of litigation, i.e. the prosecuting party, the advocating party and the judge. As a result of the influence of ancient "inquest" centered trial mode, lack of the defendant's right to silence and incomplete revolution of the criminal trial mode, the existing criminal court setting features an umbrella shaped structure. To reform the criminal trial structure in China, we should eliminate the air of "inquest" from the existing court interrogation mode, strengthen the hearing of evidence and set up a equiangular triangle shaped trial structure of neutral trial, equality between the prosecuting and advocating parties and litigant oriented.

Keywords criminal court, court setting, criminal trial, trial structure

The structure of criminal procedure generally refers to the legal status and mutual relation of prosecution, defense, and judges in criminal procedure, which are affected by its value and decided by the goals of criminal litigation. It is the reflection of a state's democratic political system, legal culture and tradition, and litigation value in judicial operation, and the foundation stone for concrete institutions, procedures, and measures. Trial is the most complete litigation period concerning the litigation shape of the "tri-party structure". Therefore, the trial structure is also the most centralized embodiment of criminal litigation structure. To build scientific and reasonable structure of trial is of great importance to the trial mode of criminal litigation and even the reform of the criminal justice system. The design of criminal tribunal objectively and vividly demonstrates the legal status and

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mutual relationship of the prosecution, the defense and the judges in criminal trials, and therefore, becomes an important token of the structure of criminal trial.

Currently, though quite in-depth research on trial structure has been conducted, few associate tribunal design with trial structure, and probe into the building and improvement of China's trial structure from the reflection function of tribunal design on trial structure. Therefore, the authors, starting from the existing criminal tribunal design, try to accurately and vividly draft the unique mode of China's criminal trial structure reflected thereof, and analyze the shaping reasons of the unique mode and the drawbacks resulting from it in judicial practice. Reforming and perfecting suggestions will be advanced with respect to rebuilding the "isosceles triangle structure" of China's criminal trial.

1 China's criminal tribunal design and the criminal trial structure reflected thereof

China's criminal tribunal design and its characteristics

Nowadays, the criminal tribunal designs in other countries can be categorized into three types: (1) adversarial criminal tribunal design adopted by the traditional common law system, with the characteristics of equally armed and equally adversarial prosecution and defense, and passive and neutral judges (Illustrated in Fig. 1); (2) the criminal tribunal designs of ex officio doctrine adopted by the traditional civil law system with the following characteristics: ex officio doctrine is employed in trial, and judges possess leading position, but not passive referee. Prosecutors represent state to do public prosecution but not an ordinary party and prosecution and defense do not have equal position. (Illustrated in Fig. 2 and Fig. 3); (3) the criminal tribunal design of North European countries where concepts of modern human rights originated is similar to family tribunal in form, and juvenile court being in the mode of "round table trial". The characteristics of the trials are obvious litigation democracy and human rights protection, and more humane care. (Illustrated in Fig. 4).[1]

Pursuant to relevant provisions of criminal procedure law and judicial interpretations, China's criminal tribunal design is illustrated in Fig. 5.

In 1996, the criminal procedure law was revised, victims were moved up from ordinary litigation participants to the parties to actions and had the right to authorize agents to attend trial to perform their duties together with prosecuting organs. This led to the changes in the balance of prosecution and defense. The tribunal design is illustrated below in Fig. 6.

As illustrated in Fig. 5 and Fig. 6, the Judge's seat in China's tribunal design is in the middle of the platform. In accordance with the criminal procedure law, at-trial, judges are in charge of hosting the trial and can actively ask questions to the accused, witnesses, and experts, hear the opinions raised by public prosecutors, parties, defense attorneys, or litigation agents with respect to the evidence presented to the court, and investigate and verify the evidence.

[1] The above Figures are all drafted pursuant to the field review in relevant countries by the authors.

Public prosecution seat is in the lower left position of the judge's seat. Pursuant to the criminal procedure law, in public prosecution cases, prosecuting organs shall send prosecutors to court to support public prosecution, to read the bill of prosecution in accordance with law, to charge defendants of criminal offenses, to question defendants, to ask questions to relevant witnesses, experts, and present relevant documentary evidence and physical evidence during the period of court investigation, to exercise prosecuting function such as declaring the opinions of public prosecution, and presenting arguments against defense attorneys' in the period of court argument. At the same time, as a supervision organ, the prosecuting organ conducts supervision over trials under Article 169 of the criminal procedure law.

The seats for victims and their agents are abreast to the seats for public prosecutors. During a trial, a victim enjoys all the rights that a litigation party possesses. He/She makes statements about the facts concerning the crimes charged in the bill of prosecution. A victim and his/her agent, with the permit of the chief judge, can ask questions to the defendant(s), witness(es), or expert(s), put forward his/her opinions about the evidence presented to court, and participate in court argument.

The seat for defense attorney is in the lower and right position to the Judge's seat, and opposite to that of the public prosecutor's and the victim's. During a trial, a defense attorney, with the permission of the chief judge, has the right to ask questions to the defendant(s), witness(es), and expert(s). The defense attorney also has the right to present relevant evidence to the court, to apply for noticing new witness(es) to court, to bring new evidence, to apply for reappraisal and resurvey, to make defense opinions, and to make arguments against public prosecutor(s), victim(s), and the agent(s) thereof.

The seat for the defendant is opposite to that of the Judge. Under the criminal procedure law, during a trial, a defendant has the right to make a statement about the crime charged in the bill of prosecution. The defendant shall accept questioning by judge(s), public prosecutor (s), victim(s), and the agents thereof, and even defense attorney(s). The defendant has the right to participate in court argument and pronounce a final statement.

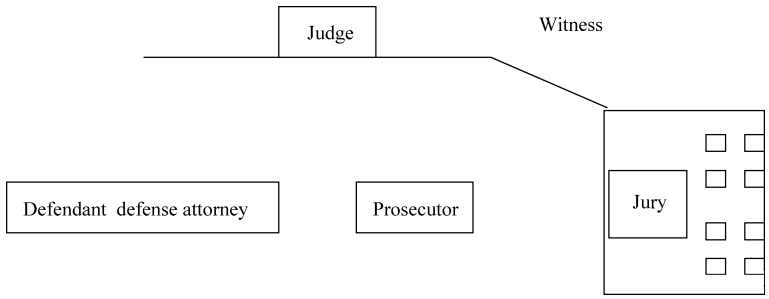

Fig. 1 Design of American criminal jury tribunal

The comparison about the foreign and domestic tribunal designs shows that China's criminal tribunal is different from that of the adversarial common law

system, and that of the civil law system with the characteristics of ex efficio doctrine. There is a great gap between the humanism tribunal design in China and that in North European countries. So China's tribunal design is a unique trial mode with the following characteristics:

(1) A judge is not a passive and a neutral listener. He is not only the "host" of the trial, but also the "fact finder" of substantive trueness in the case. He possesses powerful and nearly unlimited power to make the court investigation, and, in a sense, still undertakes the whole thing, such as providing evidence, especially asking questions to witnesses on behalf of prosecution and defense.[2] At the same time, the "power of investigation out of court" vested in people's court by Article 158 of the criminal procedure law is not controlled by both prosecution and defense, and the evidence obtained through the investigation out of court can be used as the basis for deciding cases without the confrontation of prosecution and defense. This makes people's court continue to be the "fact finder" in the case, but not the neutral referee. The trials are full of strong sense of ex officio doctrine.

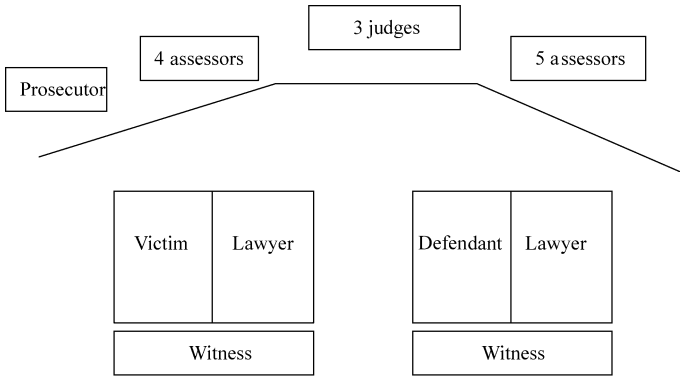

Fig. 2 French felony tribunal

(2) The prosecuting organ, during a trial, is both the public prosecuting organ representing the state to investigate criminal offenses and the supervision organ to supervise the trial in accordance with law. Therefore, the prosecuting organ is not a litigation party that has equal position with the defense in a trial, whereas it has a special litigation position in which it investigates criminal offenses as a state special organ, together with the court, and supervises the trial.

[2] See Long Zhongzhi, *Study on the System of Criminal Trial*, China University of Political Science and Law (2001), p 99

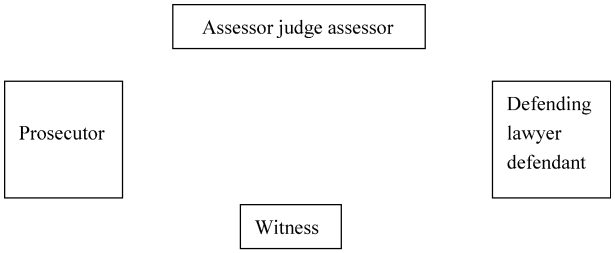

Fig. 3 German criminal division of district court

(3) A victim takes part in trial as a party to an action, and cooperates with the public security organ, making supplements, as constitutes dualized subjects of prosecution, resulting in further imbalance of prosecution and defense.
(4) The seat for the defender and that for the defendant are separated. Defender, as the defender of the legal rights of the defendant, cannot communicate and negotiate with the defendant at trial, but can only, with the permission of the chief judge, ask questions to the defendant. This makes the defender to be transformed from being a "legal remedy provider" to a "participant of trial questioning".
(5) The defendant does not enjoy the right to remain silent and must respond to the questioning conducted by judges, public prosecutors, victims and their agents, and the defender(s). He becomes an "object of questioning". The defendant himself is in a position opposite to the judges, cannot communicate with his defender and get guidance and consultation from his defender, and even does not know how to respond to the questions raised by the defender. He is actually isolated and lowered to the rank of a litigation object.

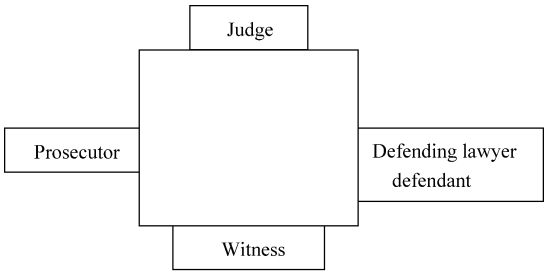

Fig. 4 Finnish criminal division of district court

Therefore, the structure of China's criminal trial is not the "triangle" in a supposed way, nor a "reversed triangle"[3] put forward by some scholars. Actually, it is a kind of umbrella-like geometrical figure that is composed of judges, public prosecutors (including victims and their agents), and defender(s), while the

[3] See Pei Cangling, On Criminal Procedure Structure, published in *Procedural Law Treatises* Vol. 2, Law (1998), p99.

defendant him/herself is at the end of the umbrella handle. The particular trial structure inherits ancient China's custom of "three departments hearing cases together", and "inquiring cases in court", in which defendants are obviously the object of the trial. This also brightly depicts the cooperative relationship between judges and prosecutors, and the embarrassing situation of defender(s) at trial. A net composed of prosecution, defense and judges makes the defendant a "target for public criticism" in it or something being covered by an umbrella. Such kind of trial is still a "questioning" or "inquisition" in essence, but not others.

Reasons for forming the "umbrella-like structure"

(1) The influence of ancient China's trial mode focused on "inquisition". In ancient China's litigation system, there was no division between criminal function and executive function, no division between criminal law and civil law, no division between prosecution and judge, and inquisitorial mode was being used instead of

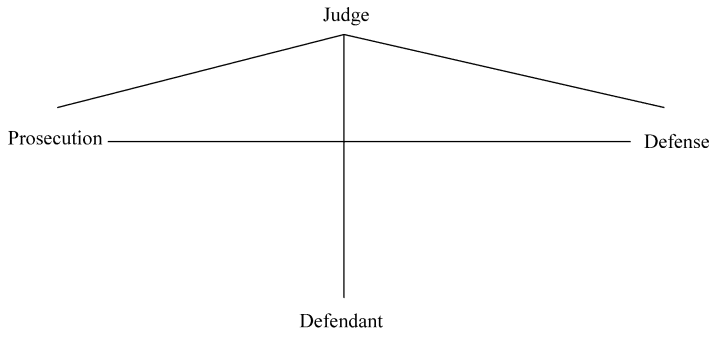

Fig. 5 China's tribunal design

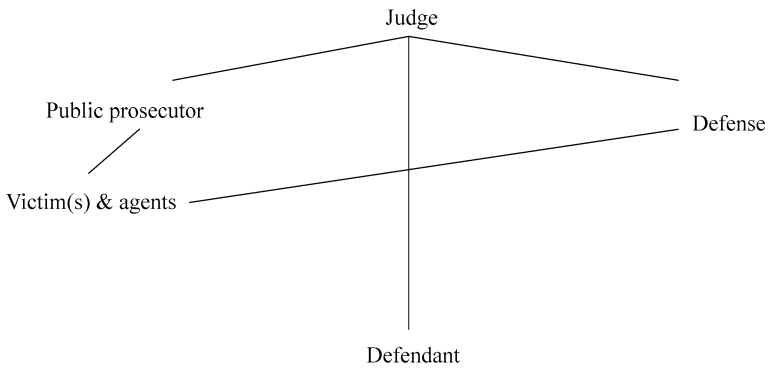

Fig. 6 Current tribunal design pursuant to the revised criminal procedure law

the adversary mode. The executive officials enjoy the judicial functions and

powers of investigation, prosecution, judgment, and even execution. Trial is not to make a judgment on the disputes between the parties, but it bears a strong color of "inquisition" in the form of inquiring cases in court. Such kind of trial is actually a contest between the judges who possess the executive power and the power of punishment on behalf of government and the defendants, and is a crackdown conducted by the feudal arbitrary regime on those whose acts are against the ruling order. In Tang Dynasty, the organization structure of a trial composed of three departments hearing cases such as the prison, the criminal department, and pickets is the centralized demonstration of feudal arbitrariness in criminal trial. The defendant in the inquisitorial trial is completely in the position of the object of proceedings. The criminal code of past dynasties all take "inquisition" as the basic form of trial, and regard the defendants' confession as the essential source of the facts of cases, and therefore, inquisition by torture has become a common practice, and confession is the basis of conviction.[4] Such type of trial mode inquisitorial proceedings cored with "inquisition" has existed in China for thousands of years, together with feudal arbitrary ruling, which has inveterately affected the shaping of the criminal trial structure in modern China. At present, the aim of the criminal trial is still to find substantive trueness, but not to settle disputes, which surely makes the courts and prosecution who are in charge of investigating the truth of cases being opposed to defendants, and makes the principle of "cooperation but not checks and balances" become the essential principle of building and structuring the subject position of courts and prosecution and the mutual relation thereof. Although the defendant is the subject in name and enjoys the right to plea, the function of defense has been seriously restricted at trial, and the defendant still has to be inquired, being the object of inquisition in fact. The tradition of ancient inquisitorial proceedings led to the fact that China's criminal trial still bears the strong color of "inquisition", and has not really stepped on the route of modern democratic trial, that is, "hearing" and therefore, the particular "umbrella-like" structure has formed.

(2) The right to remain silent has not been vested in defendants at trial. The right to remain silent is derived from the principle of being against self-incrimination, a litigation privilege of the accused. The aim and function of the privilege is to prevent law enforcement officers from forcing confession through torture or other illegal methods and to ensure that the confession be made at the free will of the defendant. Moreover, the right to remain silent releases the defendant from the obligation of making confession, makes them get rid of the disadvantageous position of "targets of inquisition" or "litigation objects", and makes it possible that they become the litigation subjects who can actively exercise their defense functions, which is helpful for realizing the equal adversary between prosecution and defense. In the period of pre-trial and trial, the accused enjoys the right to remain silent. The right to remain silent at trial is the basis of the triangle trial structure in which prosecution and defense are equal, and judges are neutral. Therefore, both the common law system and the civil law system give defendants the right to remain silent at trials and generally not allow judges or

[4] See Chen Guangzhong, *Judicial System of Ancient China*, Qunzhong Chubanshe(1984), p126.

jury draw inference unfavorable for defendants on the basis of defendants' remaining silent. However, defendants in China do not have the right to remain silent during the proceedings of pre-trial and that of trial. On the contrary, it is prescribed that during the pre-trial, criminal suspects have the obligation of making honest confession, and during the trial there is a special procedure for public prosecutors, victims, judges, and even defenders to question defendants, and defendants' confession will be used as an important source of evidence. The shortcoming of legislation on the criminal trial with respect to the right to remain silent makes defendants still in the position of a litigation object, being the "target of questioning", unable to be in the adversary position against prosecution, and hard to become the litigation subjects who can actively exercise their defense function. Defendants are excluded and isolated, being at the end of the umbrella handle of the "umbrella-like structure", and become the "target of public criticism".

(3) Incomplete reformation of criminal trial mode. With the development of the construction of democracy and rule of law, and the international trend of the criminal procedure system, China's criminal procedure law was revised in 1996. In the reform of trial mode, the democracy of criminal trial and participation of parties have been improved, which makes China's criminal trial structure a great progress to the ideal triangle structure. However, because the reform of criminal procedure involves many complicated factors such as state judicial system, litigation concepts, and legal traditions, the reform has suffered a lot of frustration and cannot realize its expected aims. For instance, eliminating pre-trial review and transferring case files enable the separation of prosecution function and inquisition function, but retaining the practice of transferring the "copy and photo of the main evidence", and there is no explicit definition of the scope. Relatively weakening the absolute leading power of judges at trial, but retaining their leading position in substantive investigation and independent power of doing out-court investigation. Making the prosecution and the defense adversarial directly, but not giving the defendant the right to remain silent and not making adjustment about the criminal tribunal design, which means the defendant cannot stay together with their defenders and therefore, cannot make timely communication and consultation with their defender(s) to get legal assistance from them in the whole process of trial. The incompleteness of the reform does not make China's criminal trial structure jump out of the hedge of "unification of judicature", being in an abnormal and anomalous formation—"umbrella-like structure".

Problems originated from the "umbrella-like structure"

(1) Confusion of prosecuting function and inquisition function and judge's neutrality being unrealized. First, under China's laws, the relationship between police, prosecution, and courts is defined as "work division, mutual cooperation, and mutual checks", which fully demonstrates that the litigation concept of "unification of judicature" goes against the basic principle of separation of

litigation functions, twists the structure of "isosceles triangle" of criminal trial, and ruins the neutral position of a judge, making him transform from a neutral and passive referee to an active "inquisitor" who tends to punish someone for his crime. Second, the pre-trial transferred "copy and photos of main evidence" by prosecuting organizations is likely to make judges have pre-judgment about the case, which may be unfavorable for defendants. Thus, the improper relationship between prosecution and court has not been completely broken and it is possible for judges to make prior judgment that the "defendant is guilty". Third, the reform of transferring case files that is aimed to realize the neutral judgment and exclude pre-trial fore-judgment virtually restricts the lawyers to read files, which is bad to the prosecution and the defense being equally armed and defendants' right to be defended being fully exercised, and therefore, the effect of defense has been negatively influenced. Finally, in the legislation, the power of out-court investigation enjoyed by courts is retained. Since there are no explicit provisions about out-court investigation concerning the aim, scope, effect, and participation of both parties, the power is easily abused, which may make judicature organization a prosecuting organization, being seriously against the neutral principle of trial and impairing justice.

(2) Prosecuting organization having two tasks goes against the character of its being a litigation party and impairs the authority of justice. Prosecuting organizations are not only the "public prosecuting organ" but also the "supervision organ". Such special position results in the conflicts of their litigation roles. On the one hand, it falls away from the litigation character and orientation of prosecuting organ as a party. As a result, the trial that should be composed of three parties such as prosecution, defense, and judges is made up of prosecuting organ and judicial organ on the one side and the defendant on the other side, and the weight of the prosecution and that of the defense is unbalanced. Therefore, the defendant in the disadvantageous position cannot have his rights and interests protected through the litigation mechanism demanded by procedural justice, and is bound to end up as the "litigation object". The formation of the isosceles triangle structure of criminal structure with equal adversary between the prosecution and the defense, and the neutral judge has been negatively affected. On the other hand, the supervision power of the prosecuting organ conflicts with the leading power of trial enjoyed by courts, which hinders the full play of the power and functions possessed by courts, impairs the authority and finality of adjudgment, and wavers the leading and commanding status of judges who are detached from the prosecution and the defense and at the top of the triangle of the trial structure.

(3) The right of defense being restricted, its hard to form the equal adversary between the prosecution and the defense. In the existing "umbrella-like structure", China's criminal trial, first, because the defendants do not have the right to remain silent, they have to respond to the questions asked by judges, prosecutors, victims, litigation agents, and even their defenders. So it is hard for them to be released from the position of "litigation object" as "questioning targets". They cannot actively and effectively exercise their defense function and become the equal adversary of the prosecution, and are always in the "disadvantageous position" of being beaten. Second, defenders and defendants

cannot stay close enough, which damages the integrity of the defense and limits and even deprived the defendants of their legal rights to get timely and full legal assistance at trial. Defenders have been transformed from "legal remedy providers" or "maintainers of defendants' legal rights" to "participants of questioning". Defendants' litigation status and functions have been confused. Defendants are always in the disadvantageous position of being "the target of public criticism". Third, in the pre-trial procedure, many rights of defending attorneys have been frustrated and limited such as the right to intervene, the right to meet defendants, the right of communication, the right to be present, the right to read files, and the right to make investigation and to collect evidence, and so on. The unequally armed prosecution and defense result in the defendants' defending rights being seriously frustrated and therefore, the equal adversary between the prosecution and the defense is hard to be realized.

(4) The binary prosecuting subjects goes against the prosecution mechanism and leads to a further imbalance between the prosecution and the defense. In accordance with the principle of criminal prosecution mechanism, the prosecuting power should be executed completely by the state-prosecuting organ in the cases of public prosecution. Victims should not enjoy the right. While China's criminal procedure law was being revised, a victim in cases of public prosecution is given the right to have the status of a litigation party, and his/her attorney is allowed to attend trial at his/her authority to perform the function of prosecution together with public organizations through mutual supplement and cooperation. As a result, the binary prosecuting subjects came into being. This is not only against the basic requirements of public prosecution but also ruins the "triangle structure" of criminal trial structure, resulting in the weak defense to be impaired and further imbalance between the prosecution and the defense.

2 The ideal supposed structure of criminal trial and the mechanism thereof

There are three modes of modern criminal trial structure: one is the adversarial trial structure of the common law system; the other is the civil law system with the characteristics of ex efficio doctrine; yet another is the trial structure with the characteristics of adversarial being prior to ex efficio doctrine or the mixture of both adversarial and ex efficio doctrine, being represented by Japan and Italy. Although to build a trial structure is the result of the value and interests balancing of a certain country in a certain period of time, the common law of trials and the inherent essence of litigation must be followed.

The ideal supposed structure of criminal trial The authors agree that the ideal supposed structure of criminal trial should be a triangle structure, and an isosceles triangle. The reasons are as follows:

(1) The triangle structure is decided by the value of the criminal procedure. In the values of criminal procedure, the independent value and effect of procedural justice more conform to the special character of litigation. First, litigation is the highest form of settlement of disputes. Through due legal procedure, procedural justice makes the defendants change from questioning targets to litigation

subjects, realizes the equal adversary between the prosecution and the defense, and defendants' human rights are protected to the largest degree while crimes are investigated; therefore, this is helpful to settle disputes. Second, if criminal substantive law is an authoritative law, the criminal procedure law is more like a power-limiting norm. The procedural justice just fully realizes the power-limiting function of the criminal procedure law and the procedural obstacles have been made to limit the power of executing punishment and the reach of substantive goal. Therefore, the dissimilation of state powers in the criminal proceedings can be prevented effectively, and defendants' legal rights and interests will be protected. In accordance with the concrete standard of procedural justice, criminal trial structure should be structured as follows: the prosecution and the defense are the two litigation subjects with equal litigation status; equal rights and obligations, being at the two ends of the bottom line of the triangle respectively, forming equal adversary. Judges should be in the position above the two parties and keep the same distance from them, being neutral and forming the ideal isosceles triangle structure.

(2) The triangle structure should be decided by the aim of criminal procedure. The direct aim of criminal procedure is to settle disputes that should be settled in the aspect of facts and psychology as well. Therefore, while establishing the concrete aim of criminal procedure, state must, to the largest extent, pay attention to the litigation needs of both parties, and punishment and guarantee should be both taken into consideration. The aim of considering both punishment and guarantee decides that during criminal trial, the subject of prosecution and the subject of defense should enjoy equal status in the proceedings through procedure design. The subject of adjudgment cannot be the "accessory" of the prosecution, and the "complicity" of the defense, but must be independent and detached from the two opposing parties, and to the largest extent, considerate and balance between punishing criminal offenses and guaranteeing human rights, making the disputing parties observe the procedure and have the experience of justice. Therefore, the isosceles triangle structure of trial structure must be established.

(3) Triangle structure conforms to the character of procedure (referring to trial). The so-called procedure is actually the "combination of tri-parties". Trapero, a jurist, believes that the concept of the "combination of tri-parties" can be taken as the starting point of understanding the task of litigation. In the "combination of tri-parties", plaintiff and defendant are adversarial, while the judge is a referee, and therefore, an isosceles triangle structure is formed. The triangle structure originated from the "combination of tri-parties" and is the essential character that distinguishes the litigation structure from the administration structure made up of "order-obedience".

(4) The triangle structure is helpful to judging and determining the disputed facts. The procedural character of triangle structure is to emphasize the parties in criminal trial being adversarial. That the parties are being adversarial is regarded as the best way to find the truth of cases. Adopting the adversarial trial system makes the cases pending between the opposing opinions of both parties, so there is enough time to probe into all the characters and the subtle differences in the

case. This helps the judges to hear all the different opinions, be omniscient, and make a clear distinction between right and wrong.

The inherent mechanism of triangle structure of criminal trial

(1) Trial being supreme

The supremacy of trial originated from the finality of settling disputes. The finality of trial decides that the judge, in the aspect of procedure, is not only the director and organizer of a trial to guarantee it to go smoothly without being interrupted, but also the person who pronounces the final judgment on the dispute of both parties to decide the fate of the parties with respect to substance. At the same time, the supremacy of trial requires the exercising powers of judges to be authoritative in form and conclusively decisive in substance.

(2) Separation of the function of prosecution and that of the judge

The principle of separating the function of prosecution and that of the judge requires that the power of prosecution should be separated from the power of the judge, and that the prosecuting organs should be independent of adjudgment organs (审判机关). Prosecution is the premises of a trial that is only with valid prosecution courts can make decision about cases. Trial is confined to the scope of the prosecution and the effect of the prosecution can only involve the people and matters alleged in the bill of prosecution. This generates two principles: one is no prosecution, and no lawsuit and the other is the identity of prosecution and trial target.

(3) Neutrality of judges

Judges being neutral is the basic guarantee of fair trial, which includes three requirements: first, interests withdrawal; second, separation of roles including separation of the function of prosecution and that of the judge and the adversary between prosecution and defense; third, equal distance, which means on the one hand, judges are not allowed to have any special relation with prosecution or defense.[5] On the other hand, judges should give equal opportunity to both prosecution and defense to participate in the trial and pay equal attention to the claims, opinions, and evidence provided by all the parties.

(4) Equal adversary between prosecution and defense

This principle requires that first, the defendant's status of subject in criminal proceedings should be established. Second, the defender's active function should be recognized at trial and even in the whole process of proceedings, and full participation of the defender and the defending function thereof should be guaranteed. Finally, it should be guaranteed that both prosecution and defense be equally armed and adversarial.

[5] See Zuo Weimin, *Value and Structure—Dual Analysis of Criminal Procedure*, Sichuan University Press(1994), p187.

3 To reform and improve China's criminal trial structure with triangle structure as the goal

It is demonstrated from the above analysis of the drawbacks in the existing criminal trial structure of China and the exploration of the structure that criminal trial should have that China's criminal trial structure should be reformed. The goal of the reform is to completely eliminate the negative effect of China's feudal trial mode cored with "inquisition" on the existing criminal trial structure, to guarantee the defendant to transform from a "questioning target" to a litigation subject who can fully participate in the trial and, to a certain degree, self-determine and control the development of a trial, and have an active and an effective influence on the court decision, thus, making the criminal trial step on the route of "hearing" that demonstrates modern judicial civilization and democratic character from the old fashioned "inquisition" of criminal trial, to establish the modern trial structure with an "isosceles triangle structure" by starting from the essence of litigation of "Tri-party combination". Therefore, the following reform and improvement should be done to the China's existing criminal trial structure.

To realize the separation of the function of prosecution and that of the judges and to ensure that judges are neutral

(1) To reform the principle of "work division, mutual cooperation, and mutual checks" to harmonious relations between investigation organs, prosecuting organs, and courts. The principle of "work division, mutual cooperation, and mutual checks" established by the criminal procedure law shows that in China, the criminal procedure has long been regarded as a contest between state special organs and criminals, and therefore there is the idea that as state special organs, though the public security organs, people's procuratorates, and people's courts have different functions, and they have common litigation tasks, that is, to investigate the criminal responsibilities of defendants. So at trial, prosecuting organs and courts both possess leading positions and view trial as the further continuance of investigating crimes by state special organs, as a confirm and maintenance of investigation conclusion and prosecuting claims. Their cooperation abandons the principle of separating the function of the prosecution and that of the judges, and results in trial structure being a procedure of "inquisition and questioning" conducted by judges and prosecutors together instead of the procedure of prosecution and defense being adversarial, producing evidence and performing examination, and judges being neutral. As "something" in the "judicial assembly line" composed of the three organs such as public security organs, procuratorates, and courts, defendants are still the questioning targets and litigation objects. It is clear that the "judicial unification" emphasized by the principle of "work division, mutual cooperation, and mutual checks" is against the basic concept of procedural justice and the doctrine of distinguishing litigation functions, does not conform with the litigation character of "tri-party combination", and twists the supposed criminal trial structure, and therefore makes China's criminal trial full of the color of

punishing somebody for his crime. Thus, reform is necessary, and the useful should be developed and the useless should be discarded.

(2) To completely reform the "doctrine of file referral", and adopt the "doctrine of sole bill of prosecution"[6] The function of "doctrine of sole bill of prosecution" are as follows: (1) To exclude the fore-judgment of crimes, to correct the determination prior to trial, emphasizing separation of prosecution and inquisition, and to prevent judges from being influenced by prosecution, and therefore having the first impression unfavorable for defendants to guarantee adjudgment to be neutral. (2) To guarantee the equal position and opportunities of prosecution and defense at trial, to prevent prosecutors from possessing advantageous position through transferring files and evidential materials to judges before trials and make them have opinions favorable for prosecution, which puts defendants in disadvantageous position at the beginning of the trial. (3) To ensure the trial-centered principle, the relations between investigation, prosecution, and adjudgment should be completely cut off and the trial should be completely devoted to the allegation raised by the bill of prosecution. The finding of all the disputed facts must be based on the evidence produced to courts or examined at trial to make the trial a substantial stage in the process of dealing with cases, but not simple a confirmation and maintenance of investigation conclusions and prosecution claims. It is obvious that the "doctrine of sole bill of prosecution" is of great function and significance to realize the separation of prosecution and adjudgment, and neutral adjudgment, and build a truly triangle structure criminal trial. After the criminal law was revised in 1996, the prosecution approach in China's criminal procedure was only referring "bill of prosecution, evidence contents, name list of witnesses, and the copy or photos of main evidence" instead of the traditional approach, that is, transferring all the files. However, there is still a great gap between the approach and the "doctrine of sole bill of prosecution" because the relation between prosecution and adjudgment has not been cut off completely and judges can still make fore-judgment unfavorable for defendants from the "copy of main evidence", and therefore lose neutral position at trial. So the linear structure of "doctrine of file referral" under the judicial unification should be completely reformed and the "doctrine of sole bill of prosecution" should be strictly adhered to. The litigation concept that prosecution should be devoted to the piece of "paper" needs to be established to guarantee the final establishment of triangle trial structure.

(3) To regulate and control the exertion of the power of out-court investigation. From long views, the courts' power of out-court investigation should be gradually called off. But at present, the court's' power of out-court investigation should be regulated and controlled. First, the aim of exercising "the power of out-court investigation" is only to review and verify the evidence produced by

[6] In the process of revising the criminal procedure law in 1996, people are familiar with a term coming from Japan, i.e. "exclusiveness of the bill of prosecution" that was used as a reference to reform China's traditional "doctrine of file referral". In fact, in Japan, "exclusiveness of the bill of prosecution "has another name, that is "doctrine of sole bill of prosecution" "exclusiveness of the bill of prosecution" is the form of the principle, while "doctrine of sole bill of prosecution" is the essence of the principle.

prosecution and defense, but not to uncover and prove crimes, so the investigation activities conducted by courts should not bear the color of the prosecuting trend. Second, to adhere to the principle of no prosecution, no lawsuit. The scope of the courts investigation must be confined to the evidence produced by prosecution and defense and there must be doubts about the evidence. Judges are not allowed to collect evidence for supplement due to insufficient evidence. Third, in the process of exercising "the power of out court investigation", courts should guarantee the full and equal participation of both prosecution and defense. Only after being examined by prosecution and defense, the evidence obtained throughout court investigation can be admitted as the basis for determining cases.

To make public prosecutors "a party to an action" at trial, and restore the prosecuting organs to the position of prosecution, China's prosecuting organs have two tasks at trial, being not only public prosecuting organs, but also the supervision organs. This leads to the conflicts between their litigation role and function, and their legal supervision function lacks neutrality and therefore is not just and detached. It is "internecine". It is proved in judicial practice that the "double status" of prosecuting organs hinders the establishment of "triangle structure" of criminal trial structure, and makes great negative effect on trial structure. So it is necessary to reform the "double status" of the prosecuting organ to release them from the dilemma of being an athlete and a referee at the same time

The aim of the reform is to actively make the public prosecutor "a party to an action" at a trial and strengthen his/her prosecuting function and burden of proof. Although in China the prosecuting organ is the special legal supervision organ, as the component part of state judicial organ, it is different from the power division of the two legal systems: the common law system and the civil law system. But the public prosecutor is still in the position opposite to defense at trial. First, in the public prosecution cases, public prosecutors represent state, an abstract subject, to initiate the prosecuting procedure, prosecuting the defendant in court and attending the court to support the public prosecution, acting as criminal plaintiff with the function of prosecution and exercising the power of applying for punishment. Second, the aim of public prosecutors attending court is to prove the prosecution advanced by themselves at the levels of facts and law through court investigation and court argument, to persuade the court to admit and confirm the evidence provided by them and the prosecution, and therefore make themselves the litigation subject who has the "litigation disputes", litigation interests, and litigation functions that are opposed to the defendants. In addition, the prosecuting function and the character of the power of public prosecuting organs decide that public prosecutors are bound to bear the strong color of "prosecuting tendency", and therefore, having the psychological basis and interests of motivation of "pursuing the judgment favorable for state".[7] Therefore, public prosecutors should be actively made "a party to an action". The litigation status of public prosecutors as a party of an action

[7] See Chen Ruihua, *On Principles of Criminal Trial*, Peking University Press(1997), p 238.

should be expressly defined. The strange phenomenon that prosecuting organs bearing the function of prosecution but do not admit it should be changed to bring the exertion of the power of public prosecution into the litigation track of "tri-party combination", and to strengthen prosecuting function of public prosecutors and burden of proof. This is the only route and the necessary premises for establishing triangle structure of criminal trial structure.

To make public prosecutors a party to an action needs to reform the existing mode of trial supervision and to release public prosecutors from the special status of being "trial supervises" and the dual responsibilities. The so-called supervision over trial activities conducted by prosecuting organs can only be conducted in the normal channel of litigation. If a judgment is thought to be improper, the only way to correct it is to make a petition through appeal, concerning fact identification, evidence collection, law application, conviction and sentencing or violation of statutory procedure. In fact, as state special law supervision organ, the prosecuting organ can only realize its supervision function over trial by exercising the right to appeal. To make the public prosecutor restore to the position of litigant does not make the prosecuting organ lose the power and function. If the prosecuting organ finds that the judge does not make judgment in accordance with law, the responsibility of the judge should be investigated, but this is not subject to the trial supervision in the general sense.

To strengthen the function of defense, and guarantee the equal adversary between prosecution and defense

(1) To give the defendant the right to remain silent at trial. First, the right to remain silent is to guarantee the willingness and arbitrariness of the defendant's making confession, and exempt him/her from an obligation, the basic litigation right that he/she enjoys in the whole process of criminal proceedings. Especially, the right to remain silent can completely free the defendant from the obligation of responding to questioning, make the prosecution and the judge not relying on questioning the defendant to find the heart of the case, change the trial mode cored with "inquisition", and help the defendant move up from "questioning target", "or "litigation object" to the litigation subject, a party that can be equally adversarial to the prosecution and actively exercise the function of defense. Therefore, the defendant should be given the right to remain silent, especially, the right to remain silent at trial, making the defendant restore from the end of the umbrella, the target of public criticism, to the position that builds and supports the triangle structure of criminal trial structure, and making the "inquisition proceedings" with the "umbrella-like structure" to be reformed into the "hearing proceedings" with "triangle structure". Second, while giving the defendant the right to remain silent, the relevant mechanism that encourages the defendant to make a guilty plea should be established. After the court investigation, the guilty plea is really made by the defendant voluntarily, intellectually, and knowingly, and it is not only the evidential material that are effective to the identification of facts, but also the litigation subject's way of

operating the proceedings, and the option and disposal of his/her substantive rights. That the defendant makes guilty plea means that he/she voluntarily waives the procedural guarantee in adversary and the right to be released for being not guilty, makes it easier for the prosecution to investigate and prove criminal offenses, and lowers the cost of ending litigation through equal adversary. Therefore, litigation procedure should be simplified and the defendant will be punished leniently.

(2) To reform the position of the defendant's and defender's seat at trial to guarantee the full and effective play of the function of defense at trial. At present, in China, the defendant's seat and the defender's seat are separated, which intentionally breaks the integrity of the defense, limits and even deprives the defendant of the legal rights to get timely and full assistance from his/her attorney at trial, and therefore, makes the defendant become the "target of public criticism" at trial and makes the litigation subject that can exercise his/her function of defense become the litigation object being questioned by others without being assisted. Such type of tribunal design twists the "triangle structure" of criminal trial, and turns the modern trial, a hearing procedure composed of "provide evidence, examination, and determine evidence" into a questioning procedure involving "questioning confession, inquire-being inquired". Therefore, the criminal tribunal design must be readjusted and the defendant's seat must be abreast with the defender's seat and in the same horizontal row with the public prosecutor's seat, that is, both the prosecution and the defense locate respectively on either side of or below the bench. In this way, the defendant can get full assistance from his/her attorney at trial, and make timely communication and adjust defense strategy as the trial goes along, constituting the integrity of the defense and being equal to the prosecution and fully adversarial.[8]

(3) To perfect the lawyers' right in the pre-trial procedure to be fully ready for the trial.(a) To intervene into the proceedings. In accordance with the UN Standards and Norms in Criminal Justice and the common practice of many countries, the time for the lawyers in China to intervene into criminal proceedings should be changed and it should start from the date when the criminal suspect is "questioned for the first time or thrust upon compulsory measures", and it should be prescribed that the time for intervention cannot be late up to "48 h after the arrest or detention". (b) To be given the right to present during the questioning. It is prescribed that before the investigating organ starts to question the criminal suspect, it should inform the suspect of his/her right to the assistance from a lawyer. If the criminal suspect asks his/her lawyer to be present, then the questioning can only start after the lawyer arrives, unless he/she voluntarily, knowingly, and intellectually waive the right. (c) To perfect the right to meet and communicate with the suspect. The investigating organ

[8] At present, it is said in the *White Book of Judicial Policy* of Taiwan that in the criminal procedure, civil procedure and administrative procedure, judge's seat should be equal with the parties to show democracy and equality of litigation. Especially, the defense lawyer and the defendant should sit abreast together, but not one sit ahead of another. They should be guaranteed to do timely and full communication and consultation to guarantee the defendant's basic rights and interests. The details can be found on www.judicial.com.

should, in accordance with relevant judicial interpretation, arrange lawyers to meet the criminal suspect within 48 h in ordinary cases, or five days in complicated cases, and provide guarantee with respect to time and condition. As to the meeting, the investigating organ usually should not send officers there. If officers have to be sent there in special cases, the supervision should be in the "visible and inaudible" way, that is, the conversation should not be monitored. With respect to the "cases concerning state secrecy", it should be confined to the secrecy concerning details of cases or the nature of cases". Violation of the above provisions constitutes seriously illegal and void procedure. In addition, while lawyers are given the right to meet suspects, they are also given the right to communicate with suspects, which is understood in a broad way, including exchanging things and documents.[9] (d) To establish the institution of evidence discovery to ensure lawyers' right to be informed. Lawyers have two ways to be informed: one is the institution of lawyer's reading files in the civil law system, the other is institution of evidence discovery in the common law system. In view of the reform aim of China's way of criminal prosecution is to transform from the doctrine of file referral to the exclusiveness of the bill of prosecution, and the communication of evidence information between the prosecution and the defense being unilateral and exparte, the institution of evidence discovery should be established to guarantee the right of the defense to be informed of the cases and the evidence possessed by the prosecution. The evidence provided by the party that did not perform the obligation of discovering evidence should not be admitted as the basis of the findings of the case. (e) To give lawyers full right to do investigation and collect evidence, and to improve relevant set of measures. To improve the existing lawyers' right to self-collect evidence and the right to apply for collecting evidence, and to prescribe that lawyers have the right to collect relevant materials of the case from the concerned units or individuals. Lawyers have the right to make application to people's courts for collecting evidence, if the concerned units or individuals refuse to provide evidence. Lawyers have the right to apply for reconsideration, if the people's court refuses to grant lawyers' application to people's courts for collecting evidence and they should have due reason for the refusal. It can also prescribe that as to the application for investigation raised by lawyers, courts, with no due cause, does not take measures to protect evidence and causes the evidence to be destroyed, which can be used as the cause for making decisions favorable for the defendant or even repealing the case or acquit the defendant of a crime.

(4) To deprive the prosecuting organ of the right to suggest supplementary investigation at trial. In accordance with the principle of procedural justice and the basic requirements of fair trial, prosecution and defense should be equal in position and be adversarial at trial. In fact, it requires that the rights and obligations of the prosecution and the defense should be proportional with respect to their participation in trial activities and the influence on the course of the trial. However, Article 165 of the criminal procedure law of China prescribes that prosecution has the right to suggest supplementary investigation

[9] See Song Yinghui, Wu Hongyao, *Guarantee of Defending Lawyers' Rights in Pretrial Procedure*, published on www.procedurallaw.com.

at trial and the court may decide to suspend the trial according to the suggestion. This provision unilaterally vests in the prosecution the power to control the course of the trial and leads to the inequality between the prosecution and the defense with respect to their influence on the course of the trial and the resources allocation of both parties. The reverse in the procedure is against the objective law of the development of proceedings, and causes unnecessary delay of the proceedings and actually extends the term of the defendant's custody and invades the defendant's right to have a speedy trial. This may bring double disadvantages to the defendant and is inconsistent with the requirements of fair trial and judicial justice. As the result, suggestion is made to deprive the prosecuting organ of the right to suggest supplementary investigation at trial to guarantee the unilateral direction of the proceedings track and the defendant's right to have a speedy fair trial and to control the investigating power of prosecuting organ and make it to be exercised properly and effectively.

(5) To eliminate the duality of prosecuting subjects and redefine the victim's status in proceedings. In the existing criminal trial structure, the duality of prosecuting subjects and the status of the litigant enjoyed by the victim does not conform with the prosecuting mechanism of public prosecution, break up the litigation structure of the adversary between the prosecution and the defense, and twist the "isosceles triangle structure" of criminal trial structure. The victim's attendance at the court as a part of the prosecution may lead to conflicts with the claims of public prosecutors because of their different prosecution interests[10], and may influence the objectivity and independence of the independent evidence, that is, the victim's statement. Many drawbacks arise from it in judicial practice. Therefore, the litigation status of the victim should be redefined and the victim, being the litigation party, should be adjusted to being the ordinary participant[11] to restore the original unification of prosecuting subject, to change the seriously unbalanced structure of prosecution and defense, and to make condition for establishing "triangle structure" of criminal trial. At the same time, in order to consider the protection of the victim's and the defendant's rights and interests, the victim can be given a special treatment that is different from that of ordinary witnesses, including prosecuting organs should fully listen to the victim's opinions at the period of review and prosecution and before the trial, informing the victim of the litigation course in a timely manner, the victim having the right to authorize agents to participate in relevant litigation activities, and retaining the victim's right to ask the prosecuting organ to appeal for the unsatisfactory trial

[10] It is reported that in a criminal case concerning injury, public prosecutor and the agent of the victim had some disputes about how to determine the nature of the defendant's act. The prosecuting organ prosecuted the defendant for unjustifiable self-defense, while the agents of the two victims believed that the defendant's act constituted the intentional injury that caused death. At trial, there are strong conflicts between the public prosecutor and the agents, and the public prosecutor, in the very unfavorable situation, asked the chief judge to stop the agents from stating their conflicting opinions about the nature of the defendant's act but was refused, so the public prosecutor retired from the trial without the permission of the chief judge, which make the court in a uproar, and the trial has to be suspended. See China's Lawyer, 2003/12.

[11] See Long Zongzhi, *Study on Criminal Trial System*, China University of Political Science and Law (2001), p 221.

decision, and so on.

To strengthen the system of providing evidence, and examination in court, and the adversary of court investigation

(1) To enforce the Grundsatz der Unmittelbarkeit. The principle of direct testimony is established on the basis of western countries abandoning the indirect trial and written trial feudal inquisitorial litigation. The civil law countries make the Grundsatz der Unmittelbarkeit the important principle for fair trial, while the common law countries make the Grundsatz der Unmittelbarkeit to be fully or even strictly demonstrated at trial through the principle of prohibiting hearsay evidence.[12] The value of the Grundsatz der Unmittelbarkeit is that: (a) The trial judge participates in trial from start to finish. And it is beneficial to find substantive truth through the testimony of witnesses and experts at trial, and the confrontation of the prosecution and the defense. (b) To guarantee the realization of procedural justice. The Grundsatz der Unmittelbarkeit is favorable for making trial the substantial period of settling disputes, for judges being neutral and equal adversary between the prosecution and the defense, and for guaranteeing the defendant's right of cross-examination.[13] (c) The Grundsatz der Unmittelbarkeit requires that the trial should be conducted continuously, being favorable for increasing the efficiency and lessening the phenomenon of extended custody of the defendant.

When the criminal procedure law of China was revised in 1996, the reform was taken on the way to transfer files, and the mode of trial in order to prevent the connection of the investigation and inquisition, avoiding making judgment before trial, and reinforcing the court adversary. However, because of the incomplete reform on the way of transferring files, the inexplicit definition of "main evidence", no detailed provisions about the witness' attending court to make testimony with respect to obligation, procedure, legal guarantee, and economic compensation, in the current criminal trial, judges can still unilaterally get the materials of the prosecution, the rate of the witness attending court is low, and the trial focuses on reviewing the documentary evidence provided by the prosecution (including the witness's written testimony). Therefore, it is necessary to define the Grundsatz der Unmittelkeit, to establish the exclusionary rule of hearsay evidence, to perfect the system of the witness attending court, and to guarantee the defendant's right of cross-examination. Through pre-trial discovery, the prosecution and the defense provide the evidence and the name list of the witnesses that will be used at trial and submit the name list of witnesses to the court that will inform the witnesses of attending court. Measures should be taken to punish those witnesses who refuse to attend court, thereby creating testimony. State compulsive should be used to make them perform their obligation of making testimony. The protection and compensation to witnesses

[12] See Fan Chongyi, *Study on Implementing Issues of Criminal Procedure Law and Countermeasures*, China People's University of Public Security (2001), p 429.

[13] *UN Covenants on Civil Right and Political Rights* makes "examining the witness of the opposite party and inquiring the witness favorable for the defendant under the same condition" an important right for the defendant to be fairly tried.

should be improved.

In addition, to establish the system of cross-examination, strengthening the adversary of court investigation. Cross-examination, the basic way to investigate verbal evidence at the trial of the common law system, is the main feature of adversarial trial. It is viewed as the "key legal device for finding the trueness of cases" by the jurist in common law countries. At the same time, it is also the important procedural mechanism that makes litigation show the character of adversary. The object of cross-examination is the witness in common law system, including ordinary witness, victim, the defendant who waives his right to remain silent to testify before court, and experts, and so on. After the revision of the criminal law of China, quite a large reform was done on the mode of trial. In the court investigation, judge's right to investigate evidence is relatively weakened, and the activities of providing evidence and cross-examination are reinforced. The general direction of the reform is to realize the transformation from the inquisitorial trial mode to the trial mode of adversary. Therefore, in order to really strengthen the adversary of court investigation and realize the aim of transforming trial mode, it is necessary to take the experience of common law system as reference, and establish the cross-examination system conforming with the practice in China including the procedure of examination, cross-examination, reexamination, re-cross-examination, the rule of educing the testimony of one's own side, the rule of cross-examination the testimony of the opposite party, the exclusionary rule of hearsay evidence and opinion evidence, the rule of challenging leading questions, and the rule of impeaching evidence capability.