

外国刑事诉讼

制度

[中加合作项目] — 检察官培训教学资料
Sino-Canadian cooperation Project
Training Materials for Prosecutors

探微

Essentials of Foreign
Criminal
Procedure

©江礼华 (中国) 杨诚 (加拿大) / 主编
Editors in-Chief
Jiang Li Hua (China) Vincent Cheng Yang (Canada)

法律出版社
Law Press · China

外国刑事诉讼

制度

〔中加合作项目〕—检察官培训教学资料
Sino-Canadian cooperation Project
Training Materials for Prosecutors

探微

**Essentials of Foreign
Criminal
Procedure**

◎江礼华（中国） 杨诚（加拿大）/主编
Editors in-Chief
Jiang Li Hua (China) Vincent Cheng Yang (Canada)

法律出版社
Law Press · China



图书在版编目(CIP)数据

外国刑事诉讼制度探微/江礼华,(加拿大)杨诚主编. - 北京:法律出版社,2000. 11

中加合作项目——检察官培训教学资料

ISBN 7-5036-3232-1

I. 外… II. ①江… ②杨… III. 刑事诉讼-研究-世界
IV. D915.3

中国版本图书馆 CIP 数据核字(2000)第 71557 号

出版·发行/法律出版社

经销/新华书店

责任印制/李跃

责任校对/杜进

印刷/北京四季青印刷厂

开本/850×1168 毫米 1/32

印张/13.25

字数/326 千

版本/2000 年 12 月第 1 版

2000 年 12 月第 1 次印刷

社址/北京市海淀区西三环北路甲 105 号科原大厦 A 座 4 层(100037)

网址/www.lawpresschina.com

电子信箱/pholaw@public.bta.net.cn

电话/88414899 88414900(发行部) 88414121(总编室)

88414933 88414934(读者服务部)

出版声明/版权所有,侵权必究。

书号:ISBN 7-5036-3232-1/D·2951

定价:23.00 元

(如有缺页或倒装,本社负责退换)

前 言

刑事诉讼制度,不仅事关打击犯罪、惩罚罪犯的力度和司法公正问题,同时也关系到犯罪嫌疑人的权利及其保护,故各国均将其作为一项重要制度加以规定,并不断予以完善。当今世界,由于各国具体国情不同,法律文化传统不一样,各国的刑事诉讼制度亦不尽相同。但随着国与国之间交流往来日益频繁,法律作为一种文化正在相互渗透和融合。尤其是在改革、完善我国司法制度的今天,如何立足我国国情,吸取、借鉴外国的长处和经验,已成为众多有识之士的共识。有鉴于此,我们翻译、出版了《外国刑事诉讼制度探微》一书,展示了近年来一些国家的学者在探讨刑事诉讼制度改革上的种种见解和观点。从这些论著中,我们可以看出这些国家刑事诉讼制度发展及改革的趋势。“他山之石”可为鉴,诚望本书能对国内外从事刑事诉讼制度研究与实践工作的同行有所裨益。

本书是加拿大驻中国大使馆与中国国家检察官学院的合作项目,由国家检察官学院具体组织翻译、编辑。将此书付印出版印制,我要特别感谢加拿大驻中国大使馆中国项目官员朱丽娅女士的关心和帮助。此外,加拿大学者杨诚博士为本书提供了全部翻译稿原文并对译稿进行了审校;法律出版社对本书的出版也给予了大力的支持,从而保障了本书的顺利出版。在此,一并表示感谢。

国家检察官学院副院长

法学教授 江礼华

2000年7月于北京

Preface

The system of criminal defence not only has a bearing on the effect of striking and punishing crime and the problem of Judicial Justice, but also connects with rights of criminal suspects and its protection. It has been regulated as an important system and continuously been perfected in all the countries. Nowadays, due to the different national conditions and different cultural traditions, the systems of criminal defence are different in all the countries too, the laws are infiltrating into each other and mixing together just like cultures. It has become a common sense how to absorb and learn from the strong points and experiences of foreign countries on the base of our national condition in today's reform and perfection of China's legal system. In view of this, we translated, edited and published *Essentials of Foreign Criminal Procedure* in order to introduce the recent research situations about the American system of criminal defence. From the essays in this book, we can see the segments of the system of criminal defence and the developing situation of the research on it in all the countries. There are other "hills" whose "stones" are good for a mirror. We sincerely hope this book would be of great benefit to those who are engaged in the research on the system of criminal defence of China or other countries.

This book is a cooperative programme of the Canadian Embassy in P. R. China and the National Prosecutor's College of China. It is translated and edited by the National Prosecutor's College of China. On the occasion of its being published, I would like to extend a special thanks to Ms. Julia Bentley, the Chinese programme official of the Canadian Embassy in P. R. China for her concerns and help. Besides, Dr. Vincent Yang, who is a Canadian scholar, has provided the original essays for translating and has read and corrected its proofs. The Law Press has given her great support to the publication of the book. so that it can be published successfully. Thank you, each and every one.

Professor Jiang lihua

The vice president of the National Prosecutor's College

June, 2000, Beijing

序 言

由加拿大国际发展署经加拿大驻华大使馆资助、中国国家检察官学院组织翻译的《外国刑事诉讼制度探微》一书，终于出版发行了。我愿借此机会向承担这一项目主要任务的各位中方译者和专家们致以热烈的祝贺。

这本论文集的翻译、汇编和出版，是国家检察官学院与加拿大大使馆经我安排和设计在1998年末签署协议确定的合作教学科研项目。当时，全国司法系统正在努力贯彻修订后的《中华人民共和国民事诉讼法》，积极探索诉讼制度的改革，引进抗辩式（时称“辩论式”）的诉讼概念，以进一步体现和保障诉讼制度的公正、公开和公平原则，努力建设与“社会主义市场经济”相适应的、符合“社会主义法治国家”方略要求的诉讼制度。根据修订后的《中华人民共和国民事诉讼法》，中国法学界和包括检察部门在内的司法界一致认为应当改变过去那种由法官包办代替、庭审走过场、诉权与审判权混淆不分的旧的诉讼方式，纠正审者不判、判者不审、联合办案、黑箱操作等等陈规陋习，实行以诉讼参加人为主体的，由控方负举证责任，通过双方言词对抗和“当庭陈诉”、“当庭举证”、“当庭辩论”，做到“当庭裁判。”这一改革要求发展和改进检察官教育培训事业，在检察官培训中加强对外国抗辩式诉讼制度和经验的研究与学习，以革新诉讼观念，并且提高检察官的业务素质和抗辩能力。但是，当时中国国内能够见到的有关西方国家抗辩式诉讼

制度和公诉实际操作经验的研究资料不多,译成中文出版的这类检察官教学培训资料更是十分缺乏。所以,亟需有针对性地组织选择一批外文资料。国家检察官学院的这一项目就是根据检察官教育培训和公诉理论比较研究的这一迫切实际需要提出并实施的。

1998年末,我应国家检察官学院和加拿大大使馆的要求,作为加方主编,为本项目挑选了十多篇英文资料,由学院决定采用并组织院内教师和院外译者负责翻译,然后经多次共同校对修改汇编成书,作为学院检察官培训教学资料正式出版,并且供各省检察官培训机构在教学和科研中使用。这本书收入的论文,大部分由加拿大和美国的学者和教授撰写,核心是英美法系抗辩式诉讼中检察官应当遵循的法律原则和操作规范。本书中方主编江礼华教授依照各篇论文所讨论的主要内容,将它们作了精心分类,列了六个专题,依次为:

第一,国外刑事诉讼规则发展趋势。这部分的论文比较全面地探讨了目前国际社会公认的刑事诉讼基本规则,西方发达国家刑事程序共有的法治原则或正当程序原则,这些原则的哲学和政治基础及其它们在法律和实践中的运用,以及国际规则与西方规则的相互关系。这些论文有助于从宏观上思考刑事诉讼改革的国际动向和趋势。

第二,刑事诉讼中庭审前的程序与规则。这部分的论文系统介绍了有关庭审前讯问的法律,检察官和预审法官和警察在这一诉讼阶段的关系及对警察的制约,检察官审查决定起诉的标准、依据和酌量权,起诉的程序和规则,起诉文书的内容和作用,等等。这些论文有助于了解加拿大和美国等国家检察官在庭审前阶段的职权和工作,及其所遵循的法律原则和操作规范。

第三,刑事诉讼中庭审的程序与规则。这部分的论文重点讨论了公诉方向辩护方的证据开示、辩护权、在合理时间内受到审判

的权利、控方自由裁量权以及辩诉交易等问题。在加拿大等国家,这些都是法学界和司法界长期关注的热点问题,在立法和司法实践中有重大现实意义。西方关于这些问题的讨论,对于正在推进诉讼制度和司法制度改革的中国,也具有重要的实际借鉴价值。

第四,辩诉交易制度。这部分的论文对美国盛行的辩诉交易制度作了正反两方面的讨论,其中不乏尖锐的批评。由此可见,英美法系的抗辩式诉讼制度也有许多问题有待进一步反思,有的长期存在的弊端需要重视。诉讼制度的改革是包括美国在内的世界各国所共同面临的课题。

第五,刑事诉讼参与人的权利。这部分的论文介绍了抗辩式诉讼制度下被告人的宪法权利,并且对米兰达规则和反对自证其罪的特权作了批判性的分析。这部分的讨论,有助于从宪法的高度来看待诉讼权利,即从民主国家立国的基本法律依据上探讨如何切实保障诉讼权利的问题。此外,有关米兰达规则和反对自证其罪的特权的讨论,有助于客观地全面地分析英美法系的抗辩式诉讼制度一些规则所存在的缺憾,思考在实践中运用这些规则可能遇到的问题。

第六,刑事诉讼中警察的权力。这部分的论文描述了刑事诉讼中警察拥有的权力,警察权力的行使与控制,以及有关证据排除的规则。警察权力的控制是刑事诉讼制度的重要内容,而非法的、不合理的证据的排除是这种制约的有效诉讼机制之一。在这一方面,加拿大等国长期以来行之有效的经验很值得借鉴。

上述论文,经各位译者一年多时间的努力译成中文,终于成书。由于部分译者还缺乏法律翻译经验,各篇译文中缺憾之处在所难免,还望读者谅解。

我愿借此机会再次向中国国家检察官学院各位朋友表示崇高的敬意,向积极支持中加法律合作项目的加拿大驻华大使馆的各位朋友致以良好的问候,并且向多年以来为中加在检察领域开展

建设性友好交流以及本书的出版提供慷慨资助的加拿大国际发展署表示衷心的感谢。

祝愿中加法学界和司法界同行的合作在今后的岁月中进一步发展,并且结出更加丰硕的友谊之果。

加方主编 杨诚博士

2000年7月于加拿大温哥华

An In – Depth Discussion On the Western Adversarial System and Its Trend of Change ——Preface and Introduction

The publication of this book, entitled “Essentials of Foreign Criminal Procedure,” is a result of a translation project organized by the National Prosecutors College. I warmly congratulate the Chinese translators and experts, who have accomplished most of the project work, for the successful completion of this project. The Canadian International Development Agency, through the Canadian Embassy in China, is acknowledged for providing financial support to the project.

The translation, compiling and publication of this collection of essays is a joint educational research project, which was launched according to an agreement signed by the National Prosecutors College and the Canadian Embassy in late 1998. I was pleased in designing the project and assisting in the formation of the agreement.

At the time, those who were with the various departments of the Chinese justice system were making serious effort to implement the amended Law of Criminal Procedure of the People’s Republic of

China. They were actively addressing issues in procedural reforms and trying to introduce and absorb new concepts of the adversarial system. The objective was to make the procedure in China more compatible with the needs of a “socialist market economy” and a “socialist rule – of – law country.”

Based on the amended Law of Criminal Procedure, Chinese legal scholars and practitioners in various justice institutions, including those with the procuratorates, reached their consensus in pushing ahead for important changes. They agreed that judges should not take on what ought to be done by others in the trial, that a trial in court should no longer be a show only, and that judges and litigants should have different powers and responsibilities. They held that judges conducting the trials should be the ones making their own judgement. They argued that it was unfair to make a judgement outside of the courtroom where the case was tried. They argued against the old way of practice whereby the judge, the prosecutor and the police would work in the same “team” when handling the cases. They asked for more transparency in the criminal process. They suggested that the parties should be the litigants and that the prosecutor should carry the burden of proof. They proposed that the parties should face each other and debate in court, all the testimonies should be made in court, all the evidence should be examined in court, all the debates should be presented in court, and the judgement should be delivered in an open court.

These reforms requested improved education and training for the prosecutors. With enhanced research and teaching capacities, the introduction of foreign adversarial systems and relevant experience to the Chinese prosecutors would assist in reshaping the legal

concepts and strengthening professionalism and adversarial skills among the Chinese prosecutors. However, in China, very few research materials were available with detailed information on the Western adversarial systems and the relevant experience of public prosecution, let alone translated materials tailored for the training of prosecutors. Therefore, the project undertaken by the National Prosecutors College was proposed and implemented to meet the pressing demand of developing a training program for the prosecutors and strengthening research on comparative prosecution.

In late 1998, I was designated as the Canadian editor in chief for the book. At the request of the College and the Canadian Embassy, I was pleased in selecting and recommending some fifteen English essays. The College accepted my recommendations. Faculty members and translators were organized by the College in this project. The translated texts were revised and edited many times before they were compiled into this book. The College has decided to use the book as a formally published training material. It will also distribute the book to provincial prosecutor training centres for educational and research purposes.

Scholars and professors in Canada and the United States authored most of the essays in the book. The theme of the book is on legal principles and operational norms that prosecutors should follow under the Anglo - American adversarial system. The Chinese co - editor in chief, Professor Jiang Li Hua, has divided the essays into six categories according to their contents. They are:

First, trend in the development of criminal procedure overseas. The essays in this category provide a comprehensive review of the basic procedural principles that are recognized by the international

community, the principle of the rule of law or due process that is a common feature of the systems in Western developed countries, and the relationship between the international and the Western principles. The essays explore the philosophical and political origins of these principles and examine their implementation in practice. This can help the readers to rethink, in a broad context, the international trend of procedural reforms.

Second, pretrial procedure and norms in the criminal process. The essays included present a systematic introduction to the laws governing the pretrial inquiry, the relations among the prosecutor, the judge and the police, the control of police power in this phase of the process, the standards and discretionary power of the prosecutor in examining the cases and approving prosecution, the procedures and norms for the initiation of prosecution, the contents and roles of prosecution documents and so on. The essays can assist the readers in studying the roles and functions of prosecutors in Canada and the United States, as well as the legal principles and operational guidelines of their work.

Third, procedure and norms in criminal trial. The essays focus on a series of issues, including pretrial disclosure of evidence, the right to defence, the right to be tried in reasonable time, discretions by the public prosecutors and plea - bargaining. In Canada, these are much debated issues that have attracted the attention of legal scholars and practitioners for many years. The discussion has had significant impact on the law and legal practice. The ideas discussed in Western countries are valuable and can have practical significance in the promotion of procedural and judicial reforms in China.

Fourth, pleabargaining. The essays present the pros and cons

in the debate regarding the system of pleabargaining in the United States. Some serious criticisms are made here. The essays show that the Anglo – American adversarial system also has its problems and that some of the long – standing problems should be examined carefully. Procedural reform is a common subject for all the nations to study, including the United States.

Fifth, the rights of individuals in the criminal process. The essays give an introduction to the constitutional rights of the accused persons under an adversarial system and offer a critical analysis on the Miranda Rules and the privilege against self – incrimination. The discussion in this part of the book benefits the development of an understanding of the constitutional spirit of procedural rights; that is, the importance of ensuring actual protection of procedural rights in the light of the fundamental laws of a democratic country. In addition, the views on the Miranda Rules and the privilege against self – incrimination help the readers to analyze existing flaws in the adversarial system and assess the difficulties that one will face when the flaws become problems in legal practice.

Six, the power of the police in the criminal process. The essays in this part describe the power of the police, the exercise and control of police power, and the exclusion of evidence. The control of police power is a key aspect of the system of criminal procedure, and an effective controlling mechanism is to exclude the illegally and unreasonably obtained evidence. In this aspect, Canada and many other countries can offer some valuable experience in dealing with the problems effectively.

The translation of all these essays has taken over a year. Thanks to the work of the translators, the book is now published.

Readers are advised that there are errors in the translated texts, largely because some of the translators still need more experience in legal translation.

I would like to take this opportunity to extend high respects to all the friends at the National Prosecutors College of China. I also want to pay heartfelt tribute to the friends at the Canadian Embassy in China for their gracious support to legal exchange activities between the two countries. And once again, I sincerely thank the Canadian International Development Agency for its generous financial support to the friendly constructive cooperation between Canada and China in the field of prosecution, including its funding support to the publication of this book.

Best wishes to further development of cooperation between Chinese and Canadian jurists and legal practitioners in the years to come, and to the production of more fruitful results of our friendship in the future.

July, 2000 Co-Editor in Chief (Canada)
Vincent Cheng Yang, Ph.D.
Vancouver, Canada

目 录

前 言	(1)
序 言	杨 诚(1)
一、国外刑事诉讼规则发展趋势	
刑事诉讼规则国际共识前瞻	…… 克莱格·M·布兰德利(1)
西方民主社会中刑事诉讼的一个共同特征： “法治原则”或“程序公正”	…… 威尔弗莱德·勃特克(19)
二、刑事诉讼中庭审前的程序与规则	
关于庭审前讯问的法律	…… 美国司法部法律政策司(61)
检察官、预审法官及其对警察调查的控制	…… 斯迪沃特·菲尔德 皮特·艾尔瑞吉 尼克·金格(86)
起诉中的裁量权与责任	
——关于法庭外处理犯罪的比较研究	…… 克利斯杰·布莱兹 斯迪沃特·菲尔德(107)
起诉	…… 安德鲁·桑达斯 瑞恰德·扬(132)
告发书与起诉书,提审和答辩	…… 琼·布鲁克曼 V·戈登·罗斯(174)
三、刑事诉讼中庭审的程序与规则	
公诉方证据披露与初步听审	…… 琼·布鲁克曼 V·戈登·罗斯(187)