

中外刑事公诉

〔中加合作项目〕

Sino-Canadian cooperation Project

制度

**Chinese and Foreign
Systems of Criminal Public
Prosecution**

◎杨诚 单民/主编

Chief Editor Vincent Cheng Yang Shan Min

法律出版社

Law Press · China

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本书是“中加刑事司法合作项目”的
成果之一，旨在介绍和比较中加两国
刑事公诉制度的异同，以供两国司法
人员参考。

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序 言

无论把法律看作是一种地方性知识,还是一种普适性知识,在法治现代化过程中都必然要涉及对世界先进法律文化成果的吸收与借鉴。我国已经确立了依法治国、建设社会主义法治国家的治国方略,中国共产党第十五次全国代表大会提出要“推进司法改革,从制度上保证司法机关依法独立公正地行使审判权和检察权”。实现依法治国,推进司法改革,就要不断完善我国的司法制度。一方面,我们要立足于我国实际,总结我国司法制度建设方面的成功经验,另一方面,也要了解其他国家和地区的司法制度,特别是法治发达国家在长期的历史发展过程中已经形成的一整套适合自己需要的法律制度和司法体制。外国的法律制度和司法制度虽然有适应其自身需要的特点,但作为人类共同法律文化成果的一部分,其中也包含着法治建设的某些规律性,这些规律性的东西是可以为我国所借鉴的。基于此,国家检察官学院与加拿大刑法改革与刑事政策国际中心在1998年合作立项,开展中外公诉制度的研究,本书即是这一课题的研究成果。

公诉制度是国家追诉犯罪的一种法律制度,它是人类诉讼走向文明的标志。公诉制度和检察制度是密不可分的。随着国家诉讼制度上控诉和审判职能的分离,一方面国家需要加强对犯罪的追诉,另一方面追诉犯罪的任务又不能让审判机关来承担,这样就需要建立一种新型的专门代表国家追诉犯罪的机构,检察机关由

此而生,检察制度也由此而建立起来。现在不同法系国家的公诉职能都是由检察机关或检察官承担。由于法律渊源、立法理论、法律文化以及国情的差异,各国公诉制度各有特色。由于时间和精力所限,不可能对世界上所有国家的公诉制度一一研究,因此,中加双方选择当今世界主要法系的几个代表性国家的公诉制度作为研究对象,如大陆法系的法国、德国、日本,英美法系的美国 and 加拿大,以及俄罗斯和中国。

在对不同国家公诉制度的研究中,本书首先客观地介绍了这些国家公诉制度的形成、演变及特征、公诉权的范围、公诉权的行使及制约制度等。对于各国中具有特色的公诉制度给予了更多的笔墨予以介绍,如法国的两级预审制度,日本的起诉犹豫制度,美国的辩诉交易制度。通过介绍能使我们深入了解这些制度在其本国存在的环境、功能及运作中所暴露的弊端,以便于我们在司法制度改革中不至于盲目地照搬。应当看到,一些制度和作法包括具体程序在他国看似很完美,但在中国,因缺乏其他制度和法治文化的支撑,却难以生存或有效地运作。在客观介绍的基础上,对这些国家的起诉模式、公诉权的范围、公诉的审查制度等作了比较研究,揭示了公诉制度发展中的一些共性或规律性。这些对我国司法制度改革都会有所裨益。

最后感谢加拿大国际发展署对此项目的资助,感谢加拿大刑法改革与刑事政策国际中心杨诚博士对国家检察官学院多年来的关心和支持。

孙 谦

2000年6月

于北京西山八大处

前 言

由中国国家检察官学院和加拿大刑法改革与刑事政策国际中心合作开展的中外公诉制度比较研究项目,经过双方共同努力,终于以双方合作编写的《中外刑事公诉制度》一书的出版而告完成。我谨代表国际中心向承担这一项目主要研究工作的中方专家们致以热烈的祝贺。

中华民族有八千年灿烂辉煌的文明史,更具有虚心好学的传统美德,加拿大是一个爱好和平、崇尚法治基础之上的民主和自由的国家,检察领域中的合作交流是近年开辟的中加两国间的一个崭新的合作领域。在这一方面,国家检察官学院和国际中心五年来作出了重要的贡献。

1995年春,我和国际中心主任、加拿大司法部助理副部长丹尼尔·浦瑞方廷御用律师及国际中心凯西·布莱格博士访问国家检察官学院,并且与雷铎院长等学院领导就开展中加检察领域合作交流达成初步共识。1996年春,受我中心邀请,中国最高人民检察院派出由雷铎院长和最高人民检察院官员组成的中国高级检察官代表团访问加拿大,首次对加拿大检察制度和公诉部门进行了实地考察。同年8月,应我中心邀请,最高人民检察院派出由最高人民检察院官员和学院江礼华副院长等教授组成的第二次中国高级检察官代表团访问加拿大,在国际刑法改革协会年会上结识了一批加拿大和西方各国的高级检察官和司法部门高层官员。随

后,由国际中心董事甘那先生安排及本人陪同,代表团又前往美国访问了美国联邦及地方司法和公诉机关。至此,检察官学院和国际中心实际建成了一座中加两国在检察领域开展交流的桥梁。

双方的关系在 1998 年由初步交流进入实质性合作阶段,签署了合作备忘录,并且确定以加强信息和专家交流、合作编写检察官培训教材为合作重点。1998 年,检察官学院夏振发书记率第三次代表团访问加拿大,并且根据对加拿大检察工作考察的结果,与我中心拟定了一份比较公诉课程研究教学大纲,制定了中外公诉制度一书详细计划,确认在出版后作为学院和省级检察官培训基地的教材。同年,我与加拿大发展署小组访问学院,再次确认上述计划及相应的项目经费安排。1999 年,检察官学院新任院长孙谦博士为加速完成项目采取有力措施,中方主编单民博士和各位作者对本书的内容又加以调整充实。同时,从 1995 年至 2000 年,应最高人民检察院、检察官学院以及数省检察院的邀请,国际中心也多次组织加拿大检察官和专家去中国访问交流,并且就刑事司法和检察实务为数百名检察官举办了多次各种专题讲座。今年 4 月,应我中心邀请,最高人民检察院派出由学院林有海书记率领的、由多位省级检察机关负责官员和学院教授等组成的第四次中国高级检察官代表团访问加拿大,与国际中心以及联邦和省的公诉部门和警务机关等单位开展专题研讨座谈。今年 6 月,最高人民检察院派出主要由地方检察长组成的第五次高级检察官代表团访问加拿大。此后,中加双方努力一举完成了本书的最后编辑工作。

本书的出版,是中加两国有史以来在检察领域开展法学研究与培训教材合作交流的第一项重要的具体成果。本书在中国具有很高的学术理论和独特的实际运用价值。书中所提供的信息与阐述的观点,有许多是在中国国内第一次发表的。本书对中国、加拿大、美国、法国、德国、日本和俄国的公诉制度的历史沿革和现状、公诉机关的设置和职责、公诉权的概念与行使、公诉的审查和批

准、上诉(抗诉)的提起、公诉机关与其他司法和执法机关以及辩护律师的关系、特殊案件的公诉或公诉工作的重点等一系列专题作了简明扼要的阐述,各位作者还对有关理论问题分别加以分析,发表了许多见解。这些信息和见解,在检察官培训中,不仅有助于学员在短期内有效地掌握上述各国公诉制度的基本概貌和基本要点,而且有利于他们从比较的角度、运用国外的信息来思考中国检察制度和刑事诉讼面临的挑战和正在进行的改革。我相信本书的出版发行,对中国检察官的培训工作、检察理论的探讨、检察改革的研究乃至中外在检察领域的进一步友好交流合作,必定会发挥积极的作用。

我愿借此机会再次向为这一项目的完成提供了大量宝贵研究资料的加拿大刑法改革与刑事政策国际中心艾琳·史格尼德女士、加拿大不列颠·哥伦比亚省总检察长部(律政厅)御用律师大卫·温可乐先生和加拿大不列颠·哥伦比亚省高等法院安·罗尔斯法官,向对本项目予以大力支持的国际中心主任丹尼尔·浦瑞方廷御用律师和其他加拿大朋友们,向多年以来为我中心与中国检察部门的交流以及本书的合作出版提供慷慨资助的加拿大国际发展署,表示感谢。

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

FORWARD

This book, entitled Chinese and Foreign Systems of Criminal Public Prosecution, is a result of cooperation between the national Prosecutors College of China and the International Centre for Criminal Law Reform and Criminal Justice Policy in Canada. The joint publication is a successful completion of a project that the two organizations have undertaken for the comparative studies of public prosecution. On behalf of the International Centre, I warmly congratulate the Chinese experts who have accomplished most of the work in producing and editing the chapters in this book.

The Chinese nation has over eight thousand years of history of civilization and enjoys a marvellous tradition of maintaining humble and learning hard from the others. Canada is a peace – loving country that promotes and cherishes democracy and freedoms under the rule of the law. The work on public prosecution is a pioneer area for cooperation between the two countries, which was not developed until recent years. In this field, the National Prosecutors College and the International Centre have made important contributions in the past five years.

In the spring of 1995, Mr. Daniel Prefontaine, Q. C. , Executive Director of the Centre and Assistant Deputy Minister of the Depart-

ment of Justice of Canada, Dr. Catherine Bragg and I visited the National Prosecutors College. We met with Mr. Lei Xian, President of the College and reached an initial consent for the launch of Sino-Canadian exchange activities in the area of prosecution. In spring 1996, at the invitation of the International Centre, the Supreme People's Procuratorate (SPP) of China sent the first Delegation of Senior Chinese Prosecutors to conduct a visit to Canada. The visit by the delegation, which consisted of Professor Lei and senior SPP officials, was the first Chinese study tour in the field in Canada to study the Canadian system and contact the departments of public prosecution. In August, invited by the International Centre, the SPP sent the second Delegation of Senior Chinese Prosecutors, which involved senior SPP prosecutors, Vice President Jiang Lihua and other professors from the College. In Canada, the delegation attended the Annual Conference of the International Society for the Reform of the Criminal Law and was introduced to many senior prosecutors and high-ranking officials of the justice departments of Canada and other western countries. After the event, with the assistance of Mr. Ronald Gainer, Board Member of the Centre, and myself, the Delegation visited the federal and local institutions of justice and prosecution in the United States. By that time, the College and the Centre had indeed built a bridge for the exchanges between China and Canada in the field of public prosecution.

The relationship between the two organizations entered from a phase of initial exchanges into one of substantial cooperation in 1998, with the signing of a Memorandum of Understanding for Cooperation, which aimed at promoting enhanced exchange of information and experts and identified the joint production of a textbook for

the training of prosecutors as the focus of work. In 1998, Mr. Xia Zhenfa, Secretary General of the College, led the third Chinese delegation to Canada. Based on their field study on the Canadian prosecution system, they worked with the Centre in completing the development of a curriculum for a training course On Comparative Public Prosecution. A decision was also made to jointly produce a book on comparative prosecution, which, after publication, would be used as a textbook at the College and provincial prosecutors training centres. In the same year, a team of officials from the Canadian International Development Agency (CIDA) and I paid a visit to the College. We confirmed the plan and made the corresponding financial arrangement with the College. In 1999, Dr. Sun Qian, the new President of the College, took the measures for the early completion of the Project. Dr. Shan Min, the Chinese Co-Editor-in-Chief, and the authors made some necessary adjustment to the chapters.

During 1995 – 2000, at the invitation of the SPP as well as the College and several provincial – level procuratorates, the International Centre organized many visits to China. Canadian prosecutors and experts participated in these visits and delivered many lectures and seminars to hundreds of Chinese prosecutors. The lectures and seminars covered a broad range of topics that are relevant to the administration of justice and the practical work of the prosecutors.

In April 2000, at the invitation of the Centre, the SPP sent the fourth Delegation of Senior Chinese Prosecutors to Canada. The delegation was led by Mr. Lin Youhai, Secretary General of the College and consisted of several top prosecutors of the provinces and faculty members. The delegates participated in the discussion of special topics at seminars and a conference that were attended by experts from

the International Centre, the Canadian federal and provincial prosecution services and the police departments. In June, the fifth Delegation of Senior Chinese Prosecutors visited Canada. After this visit, the final editing of the book on Chinese and Foreign Systems of Criminal Public Prosecution was completed through our joint effort.

The book is the first specific major achievement of Sino - Canadian collaboration in developing legal research and training textbooks for the prosecution services. It is the first publication of this nature in history. The book is an excellent academic research product. It is also a book of unique values in practice. Lots of the information and ideas offered in this book are for the first time published in China. The book provides a highlighted overview of each of the systems of public prosecution in China, Canada, the United States, France, Germany, Japan and Russia. It clearly describes the historical evolution and current status of these systems, the establishment and functions of public prosecution organs, the concept of the power of public prosecution and the exercise of this power, the examination and approval of prosecution, the initiation of public prosecution and appeals, the prosecution service's relations with the courts, the police and the defence bar, prosecution in special categories of cases, priorities of public prosecution and many other important topics. In addition, the authors have provided their views in the analysis of the relevant theoretical problems. When the book is used in the training of prosecutors, these information and ideas will help the trainees to quickly and effectively understand the basic features and aspects of the various systems. The book will also assist the trainees to develop and apply the method of comparative analysis in their discussion of the on - going reforms and challenges to the prosecution services and the crimi-

nal procedure in China. It is my belief that the publication of the book will play a positive role in the training of Chinese prosecutors, support the growth of prosecution theories, contribute to the reforms of the procuratorial system, and benefit China's cooperation with other countries in this field.

I would like to take this opportunity to express my sincerely gratitude to Ms. Elieen Skinnider of the International Centre, Mr. David Winkler, Q. C. , of the Ministry of Attorney General of the Province of British Columbia, and Justice M. Anne Rowles of the Court of Appeal of British Columbia, for providing me with a large number of precious research materials during the implementation of this project. I want to thank Mr. Daniel prefontaine, Q. C. , Executive Director of the International Centre, and my other canadian friends for their strong support to the project. And once again, I sincerely acknowledge the canadian international Development Agency for its generous financial support to our projects of cooperation with the Chinese procuratorates in all these years, including its funding support to the joint 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

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