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张智辉 杨 诚／主编

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中 文 序 言

现代检察制度，是以公诉制度的确立为前提，以检察官的设立为标志，以维护国家法律统一实施为宗旨的一种法律制度。检察制度的基本特征是通过检察官的职能活动，追诉实施犯罪行为的人，维护国家法律的统一实施。因此，伴随着法治现代化的进程，检察官在依法治国中的地位和作用越来越重要。能否充分发挥检察官的作用，直接关系到一个国家法律实施的状况和法治现代化的进程。

一

由于世界历史发展的不平衡性和多样性，各国的检察制度走过了不尽相同的历程，并表现出各具特色的样态。1166 年，英国国王亨利二世设立了专司向法院控告重大刑事案件、起公诉人作用的 12 名陪审员组成陪审团，规定凡属重大刑事案件，都由当地 12 名陪审员向法院提出控告。但涉及王室利益的案件仍由国王律师提起诉讼。从公元 13 世纪开始，英王开始派律师代替他起诉。1461 年，国王律师更名为总检察长，同时设置“国王的辩护人”。1515 年，国王的辩护人更名为副总检察长，担任对破坏王室利益案件的侦查、起诉和听审。英国总检察长的设立标志着英国检察制度的建立，但总检察长和副总检察长的职责只是处理涉及王室利益的案件。1827 年增设了追究侵犯王室利益以外案件的检察官。随着英国势力的扩张，以英国为范本的检察制度也在美国、加拿大、澳大利亚、印度等英联邦国家和一些美洲

国家中建立起来，形成以英美为代表的英美法系的检察制度。

法国从13世纪起，将封建领主的司法权置于王室法院的管辖之下，对教会法院和城市法院的审判权也作了一定的限制，把以当事人自诉为主的弹劾主义诉讼方式改变为国家主动追究的纠问式诉讼。与此相对应，将原先仅代表国王私人处理与诸侯发生的涉及财政、税务和领土方面纠纷的“国王的律师和代理人”改为检察官。检察官作为国家的专职官员逐渐具有了以国家公诉人的身份听取私人告密，进行侦查，提起公诉，在法庭上支持控诉，以及抗议法庭判决并代表国王监督地方行政当局等职能，逐渐形成现代意义上的检察制度。1808年，《法国刑事诉讼法典》全面规定了检察官在刑事诉讼中的地位和职权，使之以法律的形式得以巩固。法国的检察制度随着法国大革命的影响而广泛传播，影响了世界许多国家。欧洲大陆的比利时、德国、意大利和亚洲的日本等国以及法国在拉丁美洲和非洲的殖民地国家也纷纷以法国为范本建立自己的检察制度，从而形成了以法国为代表的大陆法系的检察制度。

与资本主义国家的检察制度相对应，随着20世纪社会主义制度的建立和发展，以前苏联为代表的社会主义国家的检察制度也应运而生。十月革命胜利后，列宁给俄共中央政治局写了题为《论双重领导和法制》的著名的长信，阐述了成立检察机关并在检察机关实行单一垂直领导体制的必要性。1933年6月；成立了新的、独立的苏联检察院，取代了原来的最高法院检察署。1936年7月，各加盟共和国检察院从各自的共和国司法体系中分离出来，直属苏联总检察长。1936年12月，苏联通过了宪法，进一步明确规定了检察机关在国家体制中的地位、作用、职权和组织原则等，逐渐形成了高度垂直统一的社会主义检察制度。二次世界大战以后成立的社会主义国家，仿照前苏联的模式并结合本国的实际建立的检察制度，与前苏联的检察制度具有许

多相同之处，从而形成社会主义法系的检察制度。

英美法系、大陆法系和社会主义法系的检察制度，虽然具有各自不同的特色，但是作为检察制度，在其最基本的方面，是相同的。无论哪个法系、哪个国家的检察制度，都是以检察权与审判权相分离为前提、以公诉活动为主要形式、以维护国家法律的统一实施为宗旨的，并且这种检察权都是作为国家权力的重要组成部分由专门主体来行使的，而这种主体被认为是法治国家不可或缺的组成部分。因此，不同法系、不同国家的检察制度，虽然带有不同历史传统和不同文化背景的烙印，但是基本职能的共性特征，使它们之间具有很高的可比性。

特别是20世纪80年代以来，各大法系主要国家的检察制度连续进行了一些改革，出现了相互借鉴、融合的趋势。在这种国际背景下，对不同法系、不同国家的检察制度中最核心的内容进行比较研究，借鉴各国检察制度中的优化设计和检察实践中的成功经验，丰富和完善本国的检察制度，指导本国的检察实践，无疑是当代检察制度发展的重要方面。

二

检察官是检察制度中最为重要的因素。无论采取怎样的制度设计，检察权最终总是由检察官来行使的，检察权的运用在现代法治国家的重要性最终是通过检察官的职能活动实现的。检察官能否严格公正地依法办事，能否忠实高效地履行职责，不仅直接关系到法治精神在公众心目中的认同程度，而且直接决定着检察权功能的有效发挥和运用检察权目的的实现。因此，能否建立一支业务精通、品质优良的检察官队伍，必然决定着检察制度的历史命运。

检察官是检察制度中最为活跃的因素，因而也是推动检察制度发展的有生力量。检察权是一种实践性很强的权力，而检察权

适用的对象具有多样性和多变性。在运用检察权处理具体案件的过程中，为了把法律规定的一般原则适用于具体的案件，检察官必须具有观察的敏锐性、思维的灵活性和行动的主动性。检察官通过自己的职能活动，不仅能够深刻地感受到制度设计的优劣，及时发现检察实践中存在的问题，反映检察制度发展的内在要求，而且能够不断调整自己的思想观念和工作方法，适应社会发展和犯罪活动的变化，提出推动检察制度改革和发展的方案。可以说，检察官是推动检察改革的生力军。

因此，无论是检察制度的运作，还是检察制度的改革，都应当把检察官作为重点。通过具体的制度设计，保障检察官依法独立高效地行使检察权，充分发挥检察官的职能作用；通过健全的制度管理，规范检察官的执法活动，保证检察官公正廉洁地行使检察权。研究检察制度，同样离不开对检察官作用的认识和对检察官发挥作用的条件的研究。基于这种认识，我们选择了“检察官作用准则”作为研究的主题。企盼通过本课题的研究，学习借鉴他国发挥检察官作用的经验，推动我国检察官作用的发挥和检察官行为的规范化管理。

三

检察官在检察制度运作和发展中的重要性，以及检察官行使检察权在依法治国中的重要性，是如何有效地发挥检察官作用的问题，成为国际社会普遍关注的对象。1990 年 9 月 7 日，第八届联合国预防犯罪和罪犯待遇大会就审议通过了《关于检察官作用的准则》，并经联合国大会决议批准，该准则成为世界各国发挥检察官作用的共同的行动指南。

《关于检察官作用的准则》主要从两个方面提出了发挥检察官作用的行为准则：

一是从保障机制上提出了保障检察官发挥作用的行为准则。

这主要是针对国家提出的。按照该准则的规定，国家应当：(1)确定检察官的任职资格和甄选检察官的标准，防止检察官任用中的偏见和歧视，并通过适当的教育和培训提高检察官的职业道德、法治意识和保护人权的观念；(2)保障检察官作为司法工作者的地位和执法条件，包括履行检察职责时的人身安全保护、服务条件保障和职业保障等；(3)保障检察官作为公民所享有的基本权利；(4)保证针对检察官的纪律处分具有正当程序的保障。

二是从行为机制上提出了保证检察官发挥作用的行为准则。这主要是针对检察官提出的。按照该准则的规定，检察官在履行其职能活动中应当：(1)根据法律和法律授权积极发挥职能作用；(2)公平地依法行事，尊重和保护人的尊严，维护人权，特别是犯罪嫌疑人和被害人的诉讼权利，确保法定诉讼程序和刑事司法系统职能的顺利运行；(3)不偏不倚地履行其职能，避免任何形式的歧视；(4)保证公共利益，适当考虑犯罪嫌疑人和被害人的立场；(5)保守职业秘密；(6)维护法治权威，注意对公务人员所犯罪行特别是对贪污腐化、滥用权力、严重侵犯人权和国际法公认的其他罪行的起诉和调查，拒绝使用通过非法手段获得的证据，尤其是对通过拷打、或者残酷的非人道的、或有辱人格的待遇或处罚、或以其他违反人权办法取得的证据，检察官不仅应当拒绝使用，而且应当采取一切必要的步骤确保将使用此类手段的责任者绳之以法；(7)在充分尊重犯罪嫌疑人和被害人人权的基础上适当考虑免予起诉、有条件或无条件地中止诉讼程序，或使某些刑事案件从正规的司法系统转由其他办法处理，特别是对少年，应尽量考虑非起诉的处理办法。

这些行为准则，既是对世界各国检察实践中带有共同性的经验的高度概括性总结，是检察官发挥作用的最基本的保障，是不同社会制度国家之间达成的基本共识，同时也是国际社会对检察官履行职责的最低要求，是不同制度的国家、不同检察制度下的

检察官必须共同遵守的基本准则，因而也是我们对检察官作用准则进行比较研究的准绳。

我们要按照联合国《检察官作用准则》的要求和中国的实际情况，在丰富和发展有中国特色的社会主义检察制度的过程中，不断加强检察官队伍的建设，学习借鉴世界各国的先进经验，优化检察官管理机制，规范检察官履行职责的行为，保障检察权行使的正确性，使检察官在推进依法治国、建设社会主义法治国家的进程中更充分地发挥其应有的职能作用。

本课题研究得到了加拿大国际发展署和刑法改革与刑事政策国际中心中国项目提供的慷慨资助。该中心还特意邀请我赴加学习，对本课题的研究起到了有力的促进作用。值本书出版之际，谨向加拿大国际发展署和刑法改革与刑事政策国际中心表示衷心的感谢！

需要说明的是，本书第一、十、十一章由邓思清撰写；第二、三、四、七章由吴孟栓撰写；第五章由邓思清、缪树权撰写；第六章吴孟栓、缪树权撰写；第八章由何慧新撰写；第九章由王景琦撰写。本人虽然提出了本书的编写大纲和撰写要求，并对全书进行了统稿，但主要是一些技术性的处理。本书反映的主要观点，都是作者自己的研究成果。在此，我也向参加本书撰写的各位作者表示诚挚的谢意！同时也向为本书的出版付出了很大心血、提出许多宝贵而具体的修改意见的李忠诚博士表示衷心的感谢！

张智辉

2001 年 9 月

English Preface
The Chinese Procurators – A Comparative Perspective

Vincent Cheng Yang (*Canada*)

The publication of this book, entitled The Roles and Standards of Procurators – A Comparative Study, is a result of cooperation between the Research Institute of Procuratorial Theories of China (the "Institute") in Beijing and the International Centre for Criminal Law Reform and Criminal Justice Policy (the "Centre") in Vancouver, Canada. This is the first major Chinese publication to systematically introduce the roles and standards of Chinese procurators to international readers. It is also the first major Chinese publication for Chinese readers to systematically compare the roles and standards of the Chinese procurators with those in the relevant international instruments and in some foreign jurisdictions. The People's Procuratorates and their procurators play important roles in the historical transition of the nation to the rule of the law. Given the powerful status of the procuratorates in China, the book will have some far-reaching impact on the promotion of the rule of the law and legal professionalism in the People's Republic. As the Canadian Co-Editor to assist in this research project, I congratulate my counterpart

Professor Zhang Zhihui, a leading scholar known for his work in the field of criminal law, and his colleagues in China for making this joint effort a visible success. In the meantime, the Canadian International Development Agency (CIDA) is acknowledged for providing financial support for the sharing of the cost in this project.

The current Chinese system of jian－cha ji－guan and jian－cha－guan, usually translated as the "procuratorate" or the "procuracy" and the "procurators" respectively, was re－established in the late 1970s and earlier 1980s.① In 1978, the National People's Congress (NPC), by adopting the 1978 Constitution of the People's Republic of China, declared its decision to re－establish the abolished system of procuratorates.② One year later, in a legislative package of seven major laws, the NPC passed the Organic Law of the People's Procuratorate to define the organizational structure of the procuratorates, their roles and mandate, their powers, as well as

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① Because of the difficulties in language, some English writers would translate jian－cha ji－guan as "the prosecutorial agencies" (or "procuratorial agencies" or "prosecution service"), and use the English word "prosecutor" as an equivalent to jian－cha－guan. This however could be misleading, given that "jian－cha" in Chinese refers to a much broader range of functions and powers than "prosecution" in English.

② See Article 43, The Constitution of the PRC of 1978. The system of procuracy was abolished under the Constitution of 1974 as a result of the launch of the Cultural Revolution. In 1976, after the arrest of the "Gang of Four", which included the widow of Chairman Mao and three other senior officials of the Party, the Chinese Government declared the ending of the Cultural Revolution.

the principles and procedures for the use of their powers. ① The system started to function in the 1980s, when only a small percentage of the procurators had been legally trained, mostly in poorly designed programs during the 1950s and the early 1960s. The vast majority of the procurators were receiving some short – term legal training while doing their work. I recall that during the three years of 1982 – 1984, when Prof. Zhang and I were among the first group of LL. M students in China, there was no substantive research publication on the system of the procuratorates. However, we were encouraged to witness the emergence of professionalism in the Chinese procuratorial service in those years. It was their strong commitment to the transition to the rule of the law that was directing that generation of Chinese procurators to overcome the tremendous difficulties in their work. To understand the new laws, they tried to catch up by studying the science of law on the weekends and in the evenings. An extremely friendly tie was developed between the handful of academics and the new practitioners for the sharing of knowledge and information. Those were the good old years of facing the great challenges in building a system of justice on the ruins of the Cultural Revolution (1966 – 1976).

It has been a great transition of two decades. Significant

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① See the Organic Law of the People's Procuratorates of the PRC, 1979. In the meantime, the Congress passed China's first Law of Criminal Procedure, which defined the roles of the procuratorates relating to criminal prosecution, investigation and the powers of "supervision" in the criminal process. The other five laws adopted in the same legislative package included China's first Criminal Law, its first Law on Sino – Foreign Joint Ventures, and the Organic Law of the People's Court.

progress has been made in nearly every aspect of the Chinese society, including the system of law and justice. The procuratorial system has also progressed, not only in its size, but also in its quality. In 1995, after many years of debate, the Law of Procurators was promulgated. This Law demonstrated an effort to raise the professional standards of all Chinese procurators. ① The Law also introduced a classification of professional ranks and mechanisms for the promotion and discipline of the Chinese procurators. ②

In 1997, the amended Law of Criminal Procedure of China entered into force, bringing about comprehensive changes to the practice of the procurators. ③ Some of the changes have had significant impact on the roles and powers of the procurators. Under the new Law, their work in criminal litigation now shares more similarities with those of their western counterparts. The new Law, for example, provides that no one shall be considered guilty unless he is convicted so by a court according to the law. Thus, the Law abolished power of the procuratorate to convict an accused person by "exempt-

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① Under Article 10 (6) of the Law, it would be ideal if new procurators are mostly graduates from law schools. The Article however failed to make this a mandatory qualification.

② Chapter 7 of the Law has introduced a classification of twelve ranks. It however failed to specify the professional qualifications of these ranks.

③ The Amendments to the Law of Criminal Procedure were adopted in 1996. For a discussion of these Amendments, see Chen Guangzhong and Yan Duan (Eds.), (1996), Annotations and Application of The Criminal Procedure Law of the People's Republic of China. Jilin: Jilin People's Press.

ing" him from prosecution. ① The Law introduced some new procedural safeguards for the protection of the rights of the accused person. The accused person is now allowed to contact his lawyer during the almost entire pre－trial investigative process, rather than only seven days prior to the opening of the trial. ② The Law changed the trial process, borrowing some ideas from the adversarial system. This includes improved rules of open trial, a moderated role for the judge in questioning the accused person and examining the witness, a more clearly defined burden of proof on the prosecutor, and new rules allowing serious cross－examination of the accused person and the witness by both parties. ③

Changes in the law have created new pressure on the Chinese procurators to improve their professional skills and enhance their working standards. Many in the legal circles expressed serious con-

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① See Article 12 of the Law of 1996. Under the old Law of Criminal Procedure (1979), if the procuratorate believes that the accused person has committed a minor crime, it can exempt him from prosecution. The exemption, however, is kept as a criminal record, and the accused person, who is convicted by the procuratorate, has little legal means to appeal the conviction or seek remedies because the case is not decided by a court.

② Article 96 of the Law of 1996 permits a suspect to contact and hire the lawyer after the first interview by the investigative agency or start from the day when a compulsory measure, such as arrest or detention, is applied to him. Article 33 of the Law stipulates that the suspect can hire a defense lawyer or defender, starting from the day of the transfer of his case from the investigative agency to the prosecution agency.

③ See Articles 11 and 152 (open trial), Articles in Part 3 (trial), and 162 (2) (acquittal on the ground of insufficient evidence).

cerns on the professional quality of the procurators. In 1997, when the Amendments to the Law of Criminal Procedure became effective, there were over 180, 000 officials employed in the procuratorates nationwide, but only 0. 4% had university degrees, and fewer with university law degrees. Furthermore, corruption and abuse of power have become new problems facing the procurators. In 1998, for example, some 1, 641 officials in the service of procuratorates in China received disciplinary or legal sanctions for corruption and other wrong doings. ①

A a new wave of reform has been launched to improve the system of the procuratorates and enhance the professional quality of the procurators. In 2000, the Supreme People's Procuratorate of China issued its blueprint for the launch of a comprehensive initiative. ② In this plan, entitled "Implementation Opinions Regarding the Reform of the Procuracy for Three Years," the Surpeme Procuratorate declares that the reform shall apply some general principles including, among others, the following that may be interesting to the international observers outside China:

(1) The reform shall make the system of the procuracy compatible with the progress in developing the socialist market economy and promoting the rule of the law in China;

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① Tan Shigui (ed.), (2002) Research on Justice Reform in China. Beijing: The Law Press. pp. 23 and 26.

② See Supreme People's Procuratorate of China, "Implementation Opinions Regarding the Reform of the Procuracy for Three Years," in Research Office, the Suprem People's Court of China (ed.), Outline of Five－Year Reform of the People's Court. Beijing: The People's Court Press. Annex. pp. 361－371.

(2) The reform shall help to ensure that the procuratorates will exercise their powers and fulfil their responsibilities lawfully and independently;

(3) The reform shall enhance the supervisory functions of the procuratorates to ensure fairness in the administration of justice and the protection of human rights;

(4) The reform shall benefit the development of a procuratorate system of Chinese characteristics as well as facilitate the borrowing of good foreign experience; and

(5) The reform shall support the effort of improving the professional quality of the procurators and the quality of their work in implementing the law.

As the Supreme Procuratorate rightfully indicated in its plan, international cooperation can provide useful assistance to this new endeavour. In the past six years, the International Centre in Vancouver, under the leadership of Professor Daniel Prefontaine and with the support of the Board of Directors, has engaged in a ground breaking program of cooperation with our working partners in China. During 1996 – 2001, my Canadian colleagues and I delivered many lectures and seminars to procurators in Beijing, Shanghai, Guangzhou, Wuhan, Chongqing and Hainan. The International Centre in Vancouver also hosted some eight delegations of procurators and other delegations of legal professionals from China. In these years, I alone had the pleasure of giving lectures and seminars to approximately 3, 000 Chinese colleagues and law students. In the meantime, many Canadians were able to learn the basics of the Chinese systems from the delegates. Also, through this Program and other initiatives supported by international donors, I have enjoyed

working with my colleagues in developing and conducting many research projects on the system of procuracy and other legal topics. In 2000 – 2001 alone, three books were published through cooperation with scholars at the National Prosecutors College of China. ① These books are now used as teaching tools in training programs for Chinese procurators.

Although mutual exchange and learning have increased significantly in this field, in many aspects, the roles and standards of the Chinese procurators are still very different from their common – law counterparts. For the readers of this book, I offer the following comments on some of the remaining differences and key issues for comparisons.

(1) The political nature and independence of the institution. A fundamental difference between the Chinese procuratorial system and its western counterparts is that the former is subject to the leadership of a political party, that is, the Chinese Communist Party. Under the current Chinese law, the procuratorates shall be free from intervention from any "administrative organs, social associations and individuals." ② This provision of indepdence does not apply to their relationship with the Party. Since the re – emergence of the procura-

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① See Vincent Cheng Yang and Shan Min (eds.), (2000), Chinese and Foreign Systems of Criminal Public Prosecution. Jiang Lihua and Vincent Cheng Yang (eds.), (2000), Essentials of Foreign Criminal Procedure. Jiang Lihua and Vincent Cheng Yang (eds.), (2001), Criminal Defense in American Criminal Proceedings. All three books were published by The Law Press in Beijing.

② Article 126 of the Constitution of the PRC. A similar provision is seen in Article 9 of the Organic Law of the People's Procuratorates of the PRC.