



面向 21 世纪 课 程 教 材
Textbook Series for 21st Century

全国高等学校法学专业核心课程教材

刑事诉讼法

Criminal Procedural Law

主编 陈光中

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前 言

在诸多法律中,刑事诉讼法是历史悠久的重要部门法之一。在历史上,当程序法与实体法分离时,独立的诉讼法就随之产生了。追溯这一历史,我们不难发现,远至上古时期人们确立的某些刑事诉讼原则、规则至今仍然在刑事诉讼中保持着生命力。以刑事诉讼法为研究对象的刑事诉讼法学,同样是一门古老的法学学科,一代又一代学者将自己的智慧倾注于它,使这门学科跻身于科学的行列。如今,纵观世界各国刑事诉讼法学的研究现状,可以看到,无论在深度上还是在广度上,刑事诉讼法学都得到了不断开拓和挖掘。

在我国清朝末年,作为欧风东渐的成果之一,政府开始仿效西方国家制定了独立于实体法之外的诉讼法典。到了国民党统治时期,制定和实施了体系较为完备、内容较为详实的刑事诉讼法典。伴随这一过程,刑事诉讼法学作为一门独立学科也正式发展起来,各个大学纷纷设置了这一课程。

新中国成立以来,经过了长时期的曲折历程,我国不但有了一部刑事诉讼法典,而且刑事诉讼法学也已成为一门比较成熟和发达的学科。这一学科的发展,为进一步完善刑事诉讼立法和指导刑事司法实践活动打下了基础。

刑事诉讼法是一部程序法。在现代社会,人们逐渐认识到完善的程序对于实现法治和保障民主所具有的重要性,有的论者甚至将程序视为法治与恣意的人治相区别的关键所在。现代法治的基本特征,是国家权力受法律的约束,这种约束使之不至对公民个人自由造成威胁和损害。人民可以运用完善的程序实现对国家权力的控制,从而为这一权力的正当运作提供切实有力的保障。当法治、民主的观念深入人心的时候,程序的观念也必然深入人心,像刑事诉讼法这样的程序法在国家法律体系中的重要性也必然得以凸显出来。

刑事诉讼是行使国家刑罚权的活动,其目的之一,在于通过发现和证实犯罪、惩罚犯罪人来维护公共秩序、保障公民个人的安全使之不受犯罪行为的侵害。侦查权、检察权和审判权是刑事诉讼中的主要国家权力,这些权力行使得当,有利于顺利完成刑事诉讼法的上述目的;但如果行使不当,往往损害公民的各项自由、权利,甚至造成大量冤假错案。为防止国家权力被滥用,刑事诉讼法对国家权力的运作施加了种种程序限制,如对立案、采取逮捕等强制措施、起诉和判决有罪等条件加以明确规定,对搜查、扣押等规定了严格的程序要求,这些规定对于保障公民基本人权发挥着十分重要的作用。国际社会重视刑事诉讼法这一作用,为了促进世界各国强化对刑事司法活动中的人权保障,联合国通过《公民权

利和政治权利国际公约》等一系列国际规范性文件,发布了在刑事司法中的人权保障的基本准则,其中含有大量有关刑事诉讼程序的内容。由此可见,刑事诉讼法是一部与人权保障密切相关的法律。

20世纪中期,世界上许多国家从民主、法治的废墟上重建了对自由、民主、人权和法治的信心,并强化了对于这些价值和制度的尊崇和加以捍卫的决心。继此强劲的发展趋势,21世纪将是进一步加强人权、民主、法治的世纪。在这新的世纪里,经济全球化已经呈现在人们面前,法律方面的进一步协调,也成为发展的趋势。在刑事诉讼法领域,国际社会为世界各国确立的刑事司法准则为各个法系、各个国家缩小彼此间的差距,建立起彼此均衡、协调的刑事诉讼法律制度创造了条件。

在我国,刑事诉讼法律制度发展至今,立法方面处在进一步完善的过程中,司法方面也处在不断进行改革尝试的过程中,其改革、完善的方向,是在保障维护公共秩序基本功能得以发挥的同时,加强对刑事诉讼中人权的保障,并注意提高诉讼效率。在这个过程中,将我国刑事诉讼与国际司法准则相比较,找出差距,通过完善我国的法律制度和司法环境,与国际司法准则接轨,显然是我国刑事诉讼法律制度发展的重要内容。

近年来,我国刑事诉讼法学界的学术研究呈现繁荣局面,热点频出,争鸣热烈,从而推动人们对于一些理论问题和司法实务问题的认识不断深化,如对于司法公正、证据制度的研究;对于诉讼效率如何进一步提高,简易程序怎样落实等等。对于这些理论与实务问题的研究正在活跃地进行着。

本教材的编撰,是在教育部制定、颁布的法学14门主干课之一——刑事诉讼法学教学大纲的基础上完成的。本教材有如下特点:

其一,以1996年修订的《中华人民共和国刑事诉讼法》为依据,这部法律是在1979年刑事诉讼法的基础上修改并经第八届全国人民代表大会第四次会议审议通过的。这部法律对我国刑事诉讼程序作出了多项修改,吸收了我国刑事诉讼法学多年来的研究成果,解决了刑事诉讼活动中亟需解决的问题,适应了新形势下我国刑事司法的实际需要,体现了刑事诉讼观念的诸多变化。这部法律实施以来,对它的理解与运用都日臻成熟,为编写较为完善的教材提供了条件。

其二,理论与实际紧密结合,对有关法律原则、制度、规则、程序进行了言简意赅的叙述,从而既承担起作为大学法律本科教材的任务,又能够为司法实践活动提供参考。刑事诉讼法是用于规范刑事诉讼活动的法,讲求可操作性。同样,刑事诉讼法学是一门实践性很强的学科,要学好这门课,不但要掌握诉讼法学的基本理论,还应该将刑事诉讼法的基本理论与刑事诉讼实践紧密结合,学以致用,使刑事诉讼的基本理念、各项原则、制度和规则能够在刑事司法实践中得到落实,使我国的刑事司法取得进步。

其三,对于我国立法、司法和学术研究的动态和正在取得的成果,本教材也适当地加以反映。当然,作为教材,它毕竟不能将所有动态和成果尽情纳入,只能将其中比较成熟的吸收进来。

21世纪是我国“依法治国”方略全面贯彻实施的崭新世纪。在实现法治国家的进程中,法学教育肩负着传播法律知识、培养法律人才的重任使命。这套面向21世纪全国高等学校法学专业核心课程教材的出版,对于我国的法学教育将有所裨益,提供一定的助力。本教材的编撰者能够参与其中,感到十分欣慰。我们衷心希望这本教材能够发挥其一课之本的作用,并在促进我国的刑事诉讼法学教育的健康发展、学术繁荣和司法公正的实现方面发挥一定的作用。

陈光中

2001年10月于中国政法大学

Preface

Among various laws, the criminal procedure law is the one with a long history. With the separation between substantial law and procedural law, the procedure law had been established in the history. Recalling this, we may find that some principles of criminal justice recognized in ancient time still remain vital at present. The criminal procedure law research has a long history too. Scholars of generation after generation dedicated their wisdom to the criminal procedure law study and made it as one of the subjects of social science academy. To view the criminal procedural researches of various countries in the world, we may also find that the criminal procedure law research has been in continued development in terms of both depth and width.

In the late Qing Dynasty, as one of the influences from the Western countries, the Chinese government made the modern criminal procedural law independent from the substantial law by following the model of Western countries. In the period of the Nationalists ruled China, a criminal procedural code with an almost mature completed system and contents was made. With this development, criminal procedure law study as an independent academic branch was established and set as a lecture course in universities.

After the founding of the People's Republic of China, with a long time effort and difficult process, China has achieved not only in making a Criminal Procedure Law but also making the criminal procedure law study as a fair developed branch of social science. Its development, in turn, has set a good basis for improving criminal procedure legislation and enforcement.

Criminal procedure law is one the procedure laws. In modern society, people have realized the importance of procedure laws in protecting of the system of rule of law and democracy. Some people even have regarded procedure laws as the key point of telling the difference between the rule of law and arbitrary ruling. The basic nature of rule of law is that the law should restrict the state authority so that it should not impose unlawful interference with individuals' liberty. People may control state power via a due process. Therefore the execution of the state power correctly can be guaranteed. While

people accept the principles of rule of law and democracy, the necessity of procedure is accepted as well. The importance of procedure laws such as criminal procedure law among the state laws has been recognized.

Criminal justice is the activities that a state imposes its punishment on criminals. Some of its purposes are to find out and to prove crime, to protect the public order and security of persons against crime. The powers of investigation, prosecution and adjudication are the state powers in criminal justice. Those powers, if used properly, can achieve aims of criminal justice as mentioned above; if abused, may violate individuals' freedom and rights, even cause a lot of wrong convictions. To prevent the state power being abused, the criminal procedure law provides various restrictions on filing case, arrest and other coercive measures, prosecution, conviction, inter alia, those very strict procedural requirements on search and seizure. These requirements have played a very important role in protecting citizens' fundamental rights. The international community has recognized fully the functions of criminal procedure law. To promote all states in the world enhancing human rights protection in criminal justice, the United Nations has made a number of documents, inter alia, the International Covenant on Civil and Political Rights; which provides the fundamental principles of human rights protection in criminal justice. Among those, a lot of contents concern criminal procedure. Therefore it may conclude that the criminal procedure law has very close connection to human rights protection.

The middle of the 20th century witnessed many countries re-established on the ruins of democracy and rule of law their confidence in liberty, democracy, human rights and rule of law, and strengthened their determination to respect and protect the related value and system. To continue this strong development trend, the 21st century will be the century with further intensified protection of human rights, democracy and the rule of law. In this new century the economic globalization has appeared, legal coordination has been further promoted and become a new trend. In the criminal justice field, the international community has created criminal justice standards, which provide opportunity for countries to reduce their differences and create a balanced coordinated criminal justice system among them.

To view the China's criminal justice system, we may see that the legislation concerning criminal procedure law is in the process of further

improvement, and judicial reformation is also under way. The aims of the reformation and improvement are to ensure basic functions of criminal justice, namely safeguarding the public orders while intensifying human rights protection in criminal justice and promoting judicial efficiency. It is no doubt that the main tasks in developing criminal procedure law will be to make a comparison between China's criminal procedure with that of international standards, to find out their differences, to make China's laws be compatible with the international standards by improving China's legal system and situation concerned.

In recently years, the academic research on criminal procedure law has been flourishing; controversial issue appeared one after another. Debate is strong on the theoretic and practical issues, such as judicial fairness, evidence system researches, promotion of judicial efficiency, adaptation of streamlined procedure, etc. The research on these theoretical and practical issues is being conducted very lively.

This textbook is compiled according to "the Criminal Justice Course Teaching Outline" set by the Education Ministry. The textbook has the following distinguishing features:

First, it was written in the context of the 1996 modified Criminal Procedure Law of the People's Republic of China. This law was made on the basis of the 1979 Criminal Procedure Law and adopted by the 4th Session of the 8th National People's Congress.

The law made various reformations on China's criminal procedure, incorporated the research results of many years, solved various problems in criminal proceedings, met the needs in criminal justice in the new situation, reflected various changes of criminal justice. Since the law being effective, the understanding and application of it have gradually developed towards maturity. All those factors provide basis for compiling this textbook.

Second, the textbook is a combination of theories and experiences of practice. It narrates the principles, systems, rules, and procedure of related laws. It may be used as a textbook of law schools and as a reference book for law enforcement. The criminal procedure law regulates the activities of criminal justice. Therefore, it should be practicable. Similarly, the criminal procedure law study, the academic course offered in law school should serve practice. To study this course well, students need not only learn the basic

theory of criminal procedure law, but also combine the basic theory with the questions aroused in criminal justice. The purpose of study is to use the knowledge, namely, to use the principles, doctrines, rules in practising law, to promoted the progress of China's criminal justice.

Third, the textbook reflects some the trend and achievements of China's legislature, as well as judicial and academic research. As a textbook, it can not take in all of them, but those trend and achievements with wide recognition.

The 21st century is the new century. It is the time for China to carry out the principle, i. e. "to rule the country with law." In the process of building the country with "rule of law", the law teaching departments should bear the tasks of disseminating law knowledge and training. This textbook is one of the series of textbooks produced as the 21st century key course of national universities. It should be conducive to China's law education. The authors are very pleased to be involved in this work. . We hope this book may play a role, as a basis of the course, in promoting China's criminal procedure teaching, encouraging academic research and judicial fairness.

Chen Guangzhong

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October, 2001

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