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Criminal Procedure Series

Comparative Study on the System of Expert Evidence

专家证据制度比较研究

本书系统、透彻地阐述和评析了英美法系国家专家证据制度的产生、演变及内容，对专家证据制度涉及的理论和实践问题进行了深入的研究，从新的视角考察了我国的司法鉴定制度，提出了一系列完善我国司法鉴定制度的立法建议。

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中文摘要

人类社会跨进20世纪以来，科学技术突飞猛进，司法证明方式也随之从人证时代步入物证时代。物证在司法证明活动中的作用日益显著，科学技术对证据法的影响也越来越大。在科技发达的国度，科学证据已成为现代诉讼证明活动中的主角，各个领域的专家们不时走进法庭扮演证人角色，就案件中遇到的疑难问题和专门性问题，向法庭提供科学的、有说服力的“答案”，专家证人也成为当事人赢得诉讼不可或缺的重要帮手。在英美法系国家，专家证据制度已经成为理论界和实务界共同研究的重点问题之一，如对专家证人的资格、作用、专家报告的撰写以及可采性规则等问题都有了比较深入的研究。

当前，我国正处在司法制度改革的重要阶段，对刑事诉讼法和民事诉讼法中的证据制度和证据规则的完善无疑将是改革的重点和热点问题，同时对在运行中存在种种弊端的司法鉴定制度的改革，也势在必行。近几年来，我国虽有不少学者著书立说，为解决这些弊端和问题献计献策，但诸多方案见仁见智，迄今为止，尚未有人提出一套得到人们普遍认可的改革方案。其中相当部分原因在于，近代以来，我国的司法鉴定制度基本沿袭大陆法系的传统，学者们在构建制度时往往会自觉或者不自觉地参考借鉴大陆法系国家的鉴定制度，而对英美法系国家的专家证据制度研究较少，或者只是宏观地介绍英美国家的某些做法。因此，为探寻我国司法鉴定制度改革的新出路，就有必要全面、深入地探讨英美法系国家的专家证据制度，对专家证据制度的历史沿革、理论基础以及在实践中的运作情况进行全方位的研究。

在此基础上，结合我国的具体国情，或许可以为当前的司法鉴定制度改革确立一个基本的改革思路，找到一个切实可行的改革方案。

本书主要采用判例分析的方法和比较的方法。在英美法系国家，判例是其法律的主要渊源。英美法系国家的专家证据制度是通过几百年来一个个判例的积累得以发展和完善的。通过对典型判例的分析，可以全面了解和把握该制度的变迁及专家证据可采性规则的产生、演变及内容。另外，本书的比较分析主要从两个层面展开：一是英美法系内部的比较。尽管从总体上看，英美法系国家的专家证人制度大同小异，但由于受各国的政治经济制度、民族心理特征及历史文化传统等不同因素的影响，英、美、澳三国的专家证据制度在具体规定上还是存在不少差别的，尤其表现在专家证据可采性规则的规定上。二是在两大法系之间的比较，即将英美法系国家的专家证据制度与大陆法系国家的鉴定制度，以及我国的司法鉴定制度，有针对性地进行比较和细致地分析，从中发现两大法系在专家证据制度上存在的共同点及在改革中的共同价值取向，以及我国司法鉴定制度目前存在的关键问题，从而开阔我国司法鉴定制度改革的思路。

本书共分六章。第一章是专家证据制度概述，主要探讨专家证据制度的概念、历史沿革、理论基础及重要性和发展前景等。在英美法系国家，专家证人是指凭借自己的知识、技能、经验、训练或教育，在科学、技术或其他专业知识方面能帮助事实裁判者理解证据或确定争议事实的人。专家证据制度是人类社会发展、社会分工细化和专业化程度不断提高的产物，也是人类认识能力存在局限性和司法证明活动中多种价值选择的结果。在专家证据制度的一系列组成要素中，专家证据的可采性规则是其核心问题，它在实现案件的公正审判中起着举足轻重的作用。从司法实践来看，英美法系国家的专家证据制度在应用上具有灵活性、广泛性和实用性的特点。

第二章主要讨论专家证人的资格、选任、审查以及权利、义务和过错责任问题。在英美法系国家，法律并没有明文规定专家证人应具备的具体条件，从理论上说，任何人只要具有特殊的专业知识、技能或经验，能为事实裁判者解决案件中有争议的专业问题提供帮助，都有可能成为法庭上的专家

证人。在法庭上,一个人是否真正具备专家证人的资格,在双方律师进行主询问和交叉询问以后,最终由法官自由裁量决定。法官在判断一个人是否有资格担任专家证人时,看重的是专家判断解决现实问题的能力,而不是纸面上的证书、文凭与头衔等。在英美法系国家,专家证人所享有的权利和承担的义务与普通证人基本相同,但因专家证人以其具有的特殊知识和能力作证,故在法庭上享有发表专家意见或观点的特权,其发表的意见不会受到意见证据规则的排除。英美法系国家的证人在传统上享有作证的豁免权,也就是说,证人在法庭上作证时不会因其所说的话而受到任何追诉,即使其作证时带有某种恶意甚至是诽谤。这一原则也适用于专家证人,其目的是为了确保专家证人在法庭上能够畅所欲言,且不会因疏忽行为作出不真实陈述而受到追诉。但在整个社会对各行各业的执业者都加大责任的大背景下,专家证人如果故意作伪证,在理论上也有可能会受到刑事法律的制裁,但由于证明专家证人犯伪证罪要达到排除合理怀疑的证明标准极其困难,在司法实践中指控成功的可能性不大。事实上,无论是民事诉讼还是刑事诉讼,不管是专家证人还是普通证人,在法庭上提供证据时都享有民事责任的豁免权,该豁免权还延伸到专家为庭审作准备撰写专家报告阶段。

第三章重点探讨了在专家证据制度中占核心地位的专家证据可采性规则问题。刑事证据可采性规则是英美法系国家证据法中的核心问题,它在阻挡不可靠的证据进入诉讼程序、实现程序公正、实体公正和有效地保护被告人的权利等方面都起着举足轻重的作用。本章详细、全面而深入地阐述和评析了英、美、澳三国的专家证据可采性规则,如有用性规则、专业技术领域规则、普通知识规则、终局性问题规则等,并对美国近一百年来有关科学证据的可采性标准的演变作了详细的阐述,如 Frye“普通接受”检验标准、Daubert 规则、702 规则以及自由裁量权滥用标准等。从普通专家证据的采纳标准来看,英国的法官在采纳专家证据时具有两大明显特点:一是不确定性,尽管“有用性”规则被人们公认为是采纳专家证据的指导性原则,但这一规则仍带有很大的不确定性,且颇具争议,因而在刑事案件的审判中,导致了在决定采纳或排除专家证言时也带有一定的不可预测性和不一致性;二

是自由性，尤其表现在采纳科学领域的新形式证据上。在澳大利亚，像新南威尔士州，专家证据的可采性问题已成为该司法区全面法典化的一部分，而其他州，尽管普通法仍占优势地位，但澳大利亚高等法院已对那些基本规则做了详细的阐述以便为庭审法官如何采纳专家证据提供更加具体的指导。在此基础上，本章进一步分析了英、美、澳三国在专家证据可采性规则方面的异同点及其多方面的原因。

第四章主要采用判例分析方法，着重探讨了特殊专家证据——DNA 证据的相关问题，如 DNA 证据产生的背景、特征、价值、应用及可采性问题等。最近几十年来，随着 DNA 检测技术的飞速发展，通过检测犯罪分子在作案现场留下的种种痕迹或污点中的 DNA，就可以锁定犯罪嫌疑人，DNA 证据所具有的这一独特优势使其在刑事诉讼中的运用越来越普遍，发挥的作用也越来越大，有时甚至对案件事实的认定起着一锤定音的作用。因此，控辩双方不管在预审听证会上，还是在庭审中都会对 DNA 证据进行激烈的争论，竭尽全力以降低对方 DNA 证据的可信度和证明力。尽管 DNA 证据是以客观的科学结论为依据，具有准确率高、稳定性强等特点，在刑事侦查程序中引进 DNA 技术可以极大地提高犯罪的破案率、减少刑事案件错判的发生，但 DNA 证据也具有局限性，对 DNA 的检测、分析和鉴别需依赖尖端的科学设备及工作人员的专业知识，同时还应遵循科学、合法的程序进行提取和检测，如果 DNA 检材被污染或适用的程序不科学，其检测结果也会发生人为的错误。因此，法庭在决定是否采纳 DNA 证据时，应详细考察 DNA 证据的真实性和准确性，而且还要考虑其有助性和相关性。案件中的 DNA 证据只有同时满足有助性、可靠性和相关性这三个条件后，才具有可采性而成为认定案件事实的依据。

第五章主要运用比较的方法，将大陆法系国家的鉴定制度与英美法系国家的专家证据制度做了全面的比较和分析。大陆法系国家不论在鉴定人的资格、选任及审查方面，还是在鉴定人的权利、义务及责任的规定上，都具有自己的特色，尤其是在专家证据的最终表现形式——鉴定结论的可采性规定方面，更是表现出极大的差异。这种选择和制度设计上的重大差异，与

两大法系中各国的政治制度、文化传统及人们的信仰和思维习惯息息相关，具体到专家证据制度或鉴定制度上，与两大法系国家的诉讼理念、诉讼构造、价值取向、陪审制度模式以及司法证明模式倾向性等密不可分。在司法实践中，专家证据制度和鉴定制度都存在一些问题：在英美法系国家，专家证据制度出现了专家意见带有倾向性、专家证人被滥用以及诉讼的拖延和成本的提高等缺陷；在大陆法系国家，鉴定制度中存在着对鉴定结论缺乏审查和制约，使鉴定人常常从法官的助手摇身变成了法官的主人等弊端。两大证据制度各自存在着自身难以克服的弊端，但应注意到，两者之间又具有很大的互补性，在当前的司法改革中已经出现了互相借鉴和融合的趋势。

第六章主要探讨我国司法鉴定制度存在的问题及改革的基本思路。笔者从宏观上分析了目前我国司法鉴定制度存在的问题及产生的严重后果，认为要改革问题百出、混乱无序的司法鉴定制度，笔者提出了自己的观点：在借鉴国外运用采纳专家证据方面的成功经验时，须以重视本土资源和制度配套为前提，淡化专家证据模式的选择，吸收英美法系和大陆法系专家证据制度中适合我国国情的合理因素；在确定改革的基本思路时，要全盘考虑司法鉴定的程序制度、组织制度和证据制度，统筹兼顾，不可偏废；在设计鉴定主体时，可以构建鉴定人——专家顾问——专家证人三位一体的司法鉴定主体格局。

关键词：专家证人　可采性规则　比较　改革

Abstract

Since the beginning of 20th century, science and technology have been developing very fast. Consequently, the modes of judicial proof have changed into a time of physical evidence from a time of witnesses. Therefore, the physical evidence has played more and more significant role in the activities of judicial proof and science and technology have also brought more and more influence on the law of evidence. In those countries where science and technology are well developed, scientific evidence has exerted major role in the activities of proof in the modern procedure and experts of all kinds of fields to be witnesses in the courts. They proffer scientific and persuasive "answers" to the court in order to assist the trier of fact to understand evidence or to determine a fact in issue involving expertise knowledge. In the meantime, expert witness may serve to assist a party to establish their cases. In Common Law countries, the system of expert evidence has become an contentious issue both in theory and practice, such as the qualifications, role, report and the admissibility of expert evidence, etc. The expert primary responsibility is to assist the court to understand technical issues.

At present, China is undergoing the legal and judicial reform vigorously. When the legislative body amends the Criminal Procedure Law and the Civil Procedure Law, the system and rules of evidence will undoubtedly become the most important point of such amendment. It is of great necessity to amend the system of judicial authentication which has a variety of demerits and problems. In recent

year, a lot of scholars have made different proposals to solve those problems and drawbacks. However, no proposal has been widely accepted across this country. The reasons behind this are as follows: since modern times, our system of judicial authentication has copied the traditional system in Civil Law countries, so when scholars make proposals for it, they base their experiences on the system of authentication in Civil Law countries consciously or unconsciously. There are few scholars who have carried out systematic research into the system of expert evidence in the Common Law countries. Academics have written overview papers on elements of the system. Therefore, it is necessary to do comprehensive research in depth on the system of expert evidence in the Common Law countries with developed science and technology and judicial system. In order to understand these laws and evidence completely and systematically, the areas needing research are history, theoretical basis and the way to be implemented in practice. On the basis of such research and combining the special conditions and the reality of China, experiences may be drawn in order to find a practical and feasible scheme to reform the present system of judicial authentication in China.

The methodology of this paper is mainly by case analysis and the comparative study since case law is a principal origin of laws in Common Law countries and most rules have been established by those key cases, this book analyses some key cases in detail which are closely related to the rules of admissibility of expert evidence so that people can understand those rules completely. In order to find the common factors and values chosen in the recent reforms in two legal systems, the author directly compares and analyzes not only the relative parts in those countries inside the Common Law Legal Family, but also the corresponding parts among the system of expert witness in Common Law countries and the system of authentication in Civil Law countries as well as the key problems existing in the system of judicial authentication in China. The advantages identified in these and other countries will help to consolidate and widen the reform of our

system of judicial authentication.

This book is divided into six chapters. Chapter One is an introduction to the system of expert witness, including the concept, history, theoretical basis, importance and perspective. In Common Law countries, expert witness is a person who has scientific, technical, or other special knowledge to assist the fact-finder to understand the evidence or to determine a fact in issue. The system of expert evidence is not only the product of the development of a social society, the division of labor and improvement of specialization, but also the result of limitation of human recognizing the world and the choice of multiple values in the activities of judicial proof. In a series of composing elements, the key point is the rules of admissibility of expert evidence, which plays a fundamental role in determining the judicial justice of cases. In practice, the system of expert evidence in Common Law countries has the characteristics of flexibility, universality and practicability in application.

Chapter Two deals with the qualifications, employment, review of qualifications, the rights and obligations as well as the civil and criminal liability of expert witnesses. In Common Law countries, the law doesn't stipulate the explicit definitions of expert witness. In theory, any person who has special knowledge, skill or training to furnish fact-finders to settle disputed questions of fact will be an expert witness in court. In court, whether a witness has qualifications of expert will be determined by the judges' discretion after the examination-in-chief and cross examinations by lawyers. When a judge decides who is an expert, he or she will pay more attention to the ability of the witness to solve a fact in issue, not the title, certificates and others. The rights and obligations of expert witnesses in court are just like those of the lay witnesses and both enjoy immunity from any form of civil action in respect of evidence given in either civil or criminal proceedings including the preparatory work for the trial. There is the potential for

the professional's reports to the courts or tribunals to attract liability, particularly if an expert witness deliberately misleads the court or perjury himself. What is agreed is that proof of the elements of such an offence would be exceptionally difficult. Therefore, for criminal liability, it may be possible in theory, but it is impossible in practice. In addition, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion, which won't be excluded by the rule of opinion generally.

Chapter Three is the most important in this book, which discusses the rules of admissibility for expert evidence, the central aspect of these rules being the law of evidence in the Common Law countries. The admissibility of expert evidence is the key point of the common law system, which plays a crucial role in setting the obstacles for those unreliable evidence to go into the procedure and realizing justice both in procedure and substance as well as protecting the rights of the defendant effectively. In this chapter, I analyze a number of cases judged during several hundreds of years in the common law in England, the United States and Australia. From these cases, a series of rules of admissibility for expert evidence have been developed. These include the helpfulness rule, the area of expertise rule, the common knowledge rule, the basis rule and the ultimate rule. The admissibility of scientific evidence particularly in the United States have been influenced by such cases as the Frye "general acceptance" test, the Daubert rule and the abuse of discretion standard, etc.

Generally speaking, as to the rules of admissibility for common expert evidence, there are two striking features of English law's current approach to the acceptance of expert evidence which stand out for further consideration. First, although probative "helpfulness" has been identified as the guiding principle of admissibility, it must be conceded that the common law rules applicable to expert evidence remain to a surprising extent uncertain and controversial, which in

turn generates unpredictability and inconsistency in judicial decisions to admit or exclude expert witness testimony at trial. The second feature of English law is its liberal approach to the reception of novel forms of scientific expertise. As to the rules of admissibility of scientific evidence, the United States has led the way. The most controversial doctrine developments in this field have undoubtedly occurred in the federal courts of the United States. In Australian courts of New South Wales, the admissibility of expert evidence is now governed by statute as part of the comprehensive codification of the law of evidence undertaken in that jurisdiction. For other Australian states, where the Common Law still prevails, the High Court of Australia has elaborated on the basic standard in an attempt to give more detailed guidance to trial judges on the admissibility of expert evidence. On the basis of these introductions and discussions, this chapter further compares and analyzes the similarities and differences among these three countries as well as some reasons for them.

In Chapter Four, case analysis is mainly used to discuss a special expert evidence fundamently, which is DNA profiling evidence, such as its backgrounds, characteristics, value, admissibility and application. In recent decades, with the fast development in DNA technology with the acceptance and use of PCR technology and multiplex systems which enables inspection of different STR loci by inspecting DNA extracting from various traces or stains such as any fibres, hair or blood which are left by criminals at the crime scene, the investigators can find out the suspect immediately and absolutely. In Criminal procedure, DNA evidence is being applied more and more universally and has also been playing more and more importance with its unique advantage. Sometimes, DNA evidence plays a crucial role in determining a particular case's facts. Due to the predominance of DNA evidence in criminal cases, both the prosecution and defence try the utmost to argue with DNA evidence exhaustively in order to degrade or weaken the liability and validity of the opposing party's DNA evidence or even try to

keep DNA out of the courtroom whereever it is the pre-trial hearing or the cross-examination during the trial.

Although the result of DNA profiling is on the basis of objective scientific conclusion, which has the features of high accuracy and stability, it will improve the rate of solving cimianl cases and reducing wrong ones by applying DNA techonogy in the criminal investigating procedure. However, it needs high advanced technology equipments and special knowledge of crime scene investigators and laboratory personnel, as well as following the scientific and legal laboratory procedure, otherwise, if the DNA samples are contaminated or laboratory procedures are not meticulously employed at every step, the result of DNA matching and statistical interpretation will be incorrect by human error. Therefore, when court decides whether DNA evidence is admissible or not in a particular case, it should cautiously review the reliability and correctness of DNA evidence as well as the helpness and relevance. DNA evidence will be admissed to determine a particular case's facts as the basis provided that it meets the requirements of helpness, reliability and relevance simultaneously.

In Chapter Five, comparative study is mainly used to analyze and compare the systems of expert evidence between the Common Law countries and Civil Law countries. Comparisons are made as to qualifications, selections, review, including rights, obligations and liabilities, especially the final form of expert evidence, the conclusions of authentication. Anyway, in close relation with the various differences in the political system, the traditional culture, the believes and the ways of thinking in these countries, each system has its own characteristics, so do the system of expert evidence and the system of authentication.

Due to the great dissimilarities in legal procedure and organizations, the choices of multiple values, the models of jury as well as the system of judicial proof, these dissimilarities have been existing from the establishment of each system. It was found that each system has its own demerits which can't be overcome

by itself. However, it can learn something from the other in order to solve those disadvantages, for example, the inclinations of expert opinion, the abuse of expert witness, the delay of action and the high cost of litigations in Common Law countries, and the lack of review and check for the conclusions of authentication which may lead to the assistant to become the owner of the judge so easily in Civil Law countries. Therefore, in recent decades, the two systems have been taking measures to reform their regulations by learning from each other. Moreover, some common trends and values are turning up in these two legal families.

The final Chapter deals with the reality of the system of judicial authentication in China, particularly the problems and the ways to reform. First, the author macroscopically analyzes major problems existing in the system and their serious consequences. Secondly, in order to reform the system of judicial authentication in China, it is necessary to address the problems, disadvantages and confusions mainly. The author puts forward her own proposals: when learning from successful experiences in admitting expert evidence in foreign countries, the prerequisite is that we have to respect the original resources and special conditions in China and should pay more attention to the necessary systems, then to adopt those elements which are beneficial to our system no matter where they are from, the system of expert evidence in Common Law countries or the system of authentication in Civil Law countries; when we choose the basic ways of reform, we should consider the procedural system, organizational system and evidential system totally and comprehensively in our system of judicial authentication. When we legislate the subjects of judicial authentication, we may use appraisers, referees and expert witnesses at the same time so as to meet the different requirements in the trial.

Key words: Expert Witness; Admissibility's Rules; Comparisons; Reforms

序　言

我第一次见到季美君，是在最高人民检察院主办的一次国际研讨会上。我听别人叫她“美军”，颇感诧异，不知她为何得了这样一个“雅号”。后来我才知道，她的名字叫“季美君”，是大会的英语翻译。我当时的印象是，她的外语很不错。后来可能又在一些研讨会上见到过她，但是我对她这个人的印象都不如对她的名字的印象深刻。

2004 年初，我在博士研究生的报考名单中看到了“季美君”三个字，当时并没有特别留意。但是考试成绩出来之后，她的成绩名列前茅。于是，我向最高人民检察院的一位熟人询问了她的专业研究能力等情况，得到的回答是“还可以”。后来，她就成为了我的博士研究生。而且因为考试成绩排在第一位的学生最终为工作而放弃了“读博”的机会，她便幸运地得到了“公费”的名额。同时，她还获得了去澳大利亚进修学习的机会。因此在旁人眼中，她的运气确实不错。

入学之后不久，美君就去了澳大利亚，带着博士生研修的任务。在那一年的时间里，她时时通过电子邮件的方式向我汇报学习的情况。虽然她有外语的优势，虽然她有过出国的经历，但是一个人生活在异国他乡，困难是可想而知的。我曾经在美国留学，对于国外生活中的种种艰难深有体会。我发现，虽然美君是个江南女子，貌似柔弱，但是她的内心其实很坚强，很有面对困难的勇气和毅力。回国之后，她一边工作一边完成积压的学业。按照学校的有关规定，像她这样在外一年的博士生，可以延迟答辩。然而，她克服重重困难，按时完成各项学习任务，并且写出了一篇相当不错的博士学

位论文，顺利地通过了答辩。她的论文题目就是“专家证据制度比较研究”。

近年来，司法鉴定制度的改革和完善一次又一次地成为我国公众关注的焦点和专家学者争论的话题，而且这些关注和争论往往是与具体案件相关联的，邱兴华杀人案就是一个很好的例证。2006 年 7 月 14 日，陕西省汉阴县的平梁镇发生一起特大杀人案，10 人死亡。7 月 31 日，湖北省随州市又发生一起抢劫杀人案，结果是一人死亡两人重伤，抢走现金 1300 多元。公安机关通过侦查，锁定犯罪嫌疑人邱兴华，并于 8 月 19 日将其抓获。2006 年 10 月，一审法院以故意杀人罪和抢劫罪数罪并罚，判处邱兴华死刑。在这起案件的审判过程中，由于有精神病专家认为邱兴华可能有精神病，而且有法学专家公开呼吁法院对邱兴华进行精神病鉴定，所以，应否对邱兴华进行精神病鉴定就成为新闻媒体关注的“热点问题”。12 月 28 日，陕西省高级人民法院决定不给邱兴华做精神病鉴定，维持原判，并立即对邱兴华执行了死刑。对于这个决定，社会公众议论纷纷，专家学者也是众说纷纭。很多批评都直接指向了中国的司法鉴定制度。

中国现行的司法鉴定制度是在 20 世纪 50 年代开始形成，在 70 年代末确立的。随着近 20 年中国社会的发展和诉讼制度的变化，现行的司法鉴定制度逐渐暴露出许多缺陷。这些缺陷不仅导致了司法鉴定的混乱，影响了鉴定结论的科学性，而且在一定程度上影响了司法裁判的公正性。新世纪伊始，在社会民众的要求下，在人大代表的呼吁下，全国人大法工委和内司委相继开始研究相关法律的制定与完善问题，努力把司法鉴定活动纳入规范化、法制化的轨道。2005 年 2 月 28 日，全国人大常委会通过了《关于司法鉴定管理问题的决定》。这项旨在“积极推进司法鉴定的规范化、法制化”的决定于 2005 年 10 月 1 日起生效。然而，这个《决定》的实施并没能全面解决司法鉴定中存在的问题，混乱的状况依然存在，并且给人留下“头痛医头脚疼医脚”和“治标不治本”的印象。

进行司法鉴定制度改革，首先要明确改革的基本思路和推进改革的路径，而这都必须建立在对司法鉴定制度的科学认识的基础之上。有人以为，只要重新划分或界定司法鉴定权力，把鉴定机构从公、检、法机关中分离出