



The Criminal Trial System—Fair Criminal Procedures Research and Practice

刑事审判制度研究

——公正刑事程序学术与实践研讨文集

易延友 主 编



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Preface I

Edward D. Ohlbaum⁽¹⁾

This collection is the culmination of a collaborative project involving professors and practitioners from the People's Republic and the United States who are committed to the rule of law. Specifically, Temple Law School professors joined with Dean Chen Qibin and Professor Cai Rangta of Qinghai Minorities (Minzu) University to offer a criminal trial workshop in Xining, China. We were delighted to include the Qinghai Judicial Training College and the State Administration of Foreign Expert Affairs as co-sponsors. We hope this unprecedented gathering in Western China will be but the first conversation in an ongoing dialogue that will reinforce our joint commitment to the rule of law.

The workshop familiarized those reforming the Chinese Criminal Procedure Law with the U.S. criminal justice model through participatory trial simulations that illustrated the importance of procedural due process in an adversarial justice system.

The curriculum was developed and presented by a talented teaching team that included the following: Current Dean of Temple Law School JoAnne Epps,

[1] Professor of Temple Law School.

a former state and federal prosecutor whose teaching interests focus on criminal procedure and evidence; U.S. Magistrate Judge L. Felipe Restrepo of the Eastern District of Pennsylvania, who is also an experienced trial attorney and adjunct professor of trial advocacy at Temple; Caroline G. Cinquanto, a former federal and state public defender and current adjunct professor of trial advocacy at Temple; and myself, a former state public defender who directs Temple's trial advocacy program and whose teaching focuses on evidence and advocacy.

Tsinghua University Law School Professor Yi Yanyou, Temple SJD graduate and Zhejiang University Law Professor Lan Rongjie, as well as Temple SJD student and Beijing prosecutor You Xiaoqin also helped put the event together and served as lecturers and demonstrators.

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This three-day workshop included six innovative and integrated sessions (one presented each morning, and a second in the afternoons). The six sessions were:

- The Criminal Jury Trial
 - A demonstration of a criminal jury trial in the United States, with analysis and critique
- Comparing the Inquisitorial andthe Adversarial Models of Fact-finding
 - How Best to Search for Truth
 - The Benefits and Constraints of Adversarial Justice
- Investigating the Case and Charging the Defendant
 - Exchanging Files - The American Discovery Process
 - Identification Issues and Reforms; The Cross-Examination of an

Identification Witness

- Confessions
 - Voluntary vs. Involuntary Confessions
 - Police Deception and the Confessions of the Innocent
- The Effective Assistance of Effective Lawyers: How lawyers can make a difference in the courtroom from trial through sentencing?
 - Open Forum and Future Planning
 - Where are we now?
 - Where do we go from here?

Each session included performances and demonstrations of American trial techniques with a brief presentation on substantive or procedural U.S. law, a roundtable allowing the participants to interact with the presenters, and a question and answer period. The demonstrations included mock trials and cross-examinations of witnesses. The roundtables involved the U.S. faculty's explanations of procedure and strategy. The question and answer component allowed the participants to ask questions about both theory and practice, and compare the U.S. model to China's. The U.S. faculty conducted the demonstrations and moderated the roundtable presentations while Tsinghua professor Yi Yanyou led the question and answer portions.

Highlights of the program were the spirited and stimulating discussions where participants challenged the speakers and each other, both during and after each session. In particular, the final roundtable, led by Professor Lan Rongjie, explored the value and feasibility of instituting "practical" reforms and required the participants to take positions on a variety of suggested reforms and defend

their choices in front of the group. This challenge left us all excited to continue our collaboration. If a conference's mettle is to be measured by the active engagement of its participants, then the Xining workshop was an unqualified success. I was honored to have co-directed a program that stimulated such critical thought and introduced practitioners in Western China to new approaches in criminal investigation and adversarial due process. I sincerely hope our dialogue has only just begun!

I hope you will enjoy reading this book. We certainly enjoyed writing it. On behalf of our team, I welcome your comments, insights, and questions.

Acknowledgments

The Fair Criminal Trial Workshop and the production of this book would not have been possible without the cooperation and generous support of Qinghai Minorities (Minzu) University, under the leadership of Dean Chen Qibin and Professor Cai Rangta, as well as Temple University Beasley School of Law under the leadership of Dean JoAnne A. Epps. Dean Yang Li of the Qinghai Judicial College and Lei Fengyun of the State Administration of Foreign Expert Affairs also provided invaluable assistance.

Professor Yi Yanyou of Tsinghua University Law School assisted us in chairing the roundtable and provided great counsel, support, and advice. Professor Mo Zhang, Director of Temple's Rule of Law Program in China, and John Smagula, Director of Asian Programs at Temple Law, provided support and coordination. In addition to the wonderful faculty mentioned above, Assistant Dean Louis Thompson contributed to the success of the program in many ways.

序一

爱德华·奥尔本^[1]

本论文集是一个中美两国合作项目的成果，参加者是致力于法治的教授和法律从业者们。需要特别介绍的是，基于美国天普大学的教授们和青海民族大学法学院的陈其斌院长、才让塔教授合作，才能在西宁召开刑事审判研讨会。我们很感谢青海法官学院和国家外国专家局共同赞助了此次研讨会。我们希望，这次在中国西部召开的前所未有的会议研讨，只是中美之间合作致力于法治进步的长期对话的开始。

这次研讨会通过互动参与式的模拟审判，展示了正当程序在对抗制司法系统中的重要性，向中国刑事诉讼法的改革者们介绍了美国的刑事公正模型。

研讨会的课程是由一个才华横溢的教学团队所设计并执行的，他们包括：天普大学法学院院长JoAnne Epps，她曾经担任过州的检察官和联邦检察官，她的教学兴趣主要集中在刑事诉讼法和证据法方面；美国东宾夕法尼亚联邦治安法官L. Felipe Restrepo，他是一位经验丰富的庭审律师，也是天普大学庭审技巧兼职教授；Caroline G. Cinquanto，她曾经担任联邦公共辩护律师和州的公共辩护律师，现在是天普大学庭审技巧兼职教授；还有我本人，曾经担任过州的公共辩护律师，现任天普大学庭审技巧项目主任，主要教学兴趣在于证据法和庭审技巧。清华大学法学院易延友副教授

[1] 天普大学法学院教授。

授，天普大学法律毕业生、浙江大学教师兰荣杰，天普大学法律博士在读学生暨北京的检察官游小琴，也加入了这次研讨会的教员队伍，担任了讲座演示员。

这次三天的研讨会包括了六个富有创新性而又浑然一体的课程（每天上、下午各一个）：

- 刑事陪审团审判
 - 一个美国刑事陪审团审判演示，之后进行了分析和评论
- 审问制审判和对抗制审判模型在事实发现方面的比较
 - 什么是发现真相的最好方式
 - 对抗制司法的好处和局限
- 调查案件——起诉被告人
 - 交换卷宗——美国的证据开示程序
 - 辩认程序的问题和改革，对辨认人的交叉询问
- 有罪供述
 - 自愿与非自愿的有罪供述
 - 警察欺骗和无辜者的有罪供述
- 有能力律师的有效帮助：从审判到量刑，律师是如何在法庭中有所作为的
- 开放讨论和谋划未来
 - 我们现在的位置
 - 我们要从这里去哪儿

每个课程都从一个美国庭审技巧的表演和展示开示，继之以一个对美国实体法或程序法的简要演讲介绍，然后是参与者与主持者的互动式圆桌讨论，最后是提问和回答阶段。演示包括模拟审判和对证人的交叉询问，

圆桌讨论包括美国教员对程序和策略的解释，提问和回答部分则允许参与者就理论和实践两方面提出问题，并比较美国和中国的模型。美国教员负责演示和主持圆桌讨论，清华大学的易延友副教授负责引导提问和回答部分。

研讨会最精彩的部分是充满灵感和启迪的讨论——参与者挑战发言人以及二者之间相互的挑战——在课堂上和课堂下。特别是最后由兰荣杰主持的圆桌讨论，要求参加者在多个建议方案里作出选择，并在众人面前论证自己的理由，由此来探索一些“实用”改革方案的价值和可行性。这一挑战让我们都更加急切地希望继续我们的合作。如果一个会议的特质要以参加者的主动参与程度来衡量的话，西宁研讨会无疑是成功的。这个项目启发了批判性的思考，向中国西部的法律从业者们介绍了刑事调查和对抗制审判的新途径。作为项目的领导者之一，我为此感到非常荣幸！我们之间的对话应当继续！

我希望您能够喜爱阅读本书。我们很享受写作这本书。我代表我们团队，欢迎您作出评论，表达您的真知灼见并提出问题。

致 谢

得益于陈其斌院长和才让塔教授所在的青海民族大学法学院和JoAnne A. Epps院长领导下的天普大学法学院的合作和慷慨支持，让举办公正的刑事审判研讨会和出版本书成为可能。青海法官学院的杨力院长和国家外国专家局的雷风云副司长也提供了宝贵的帮助。

清华大学易延友副教授帮助我们主持了圆桌讨论，为我们提供了大量的咨询、帮助和建议。除了前面提到的杰出的教师队伍，天普大学法学院院长助理路檀森先生、亚洲项目主任桑国亚先生和中国法律项目主任张默教授，为此项目的成功提供了帮助并进行了协调，从多方面作出了贡献。在此一并表示感谢。

କେବୁ ଦୁଃଖାଶ୍ରମକେନ ପ୍ରତିକାଳ ରେଣୁ ଶର୍ଵାଶ୍ରମକେନ ଶର୍ଵାପଦ୍ମନାଭ ଗର୍ଭିନୀ ପାରୁଷ୍ୟମୁଦ୍ରାବିନି ସିର୍ବଲାଙ୍ଘନାଶ କେବୁ କେବେ ପ୍ରତିକାଳ ହୃଦୟ ପରମାପା ଦରଶକରୁ ଯେ
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ଯେବୁ ପରି

ବେଳା ଦିନେ ତୈର ଯାଏଇ କିମ୍ବା କିମ୍ବା କିମ୍ବା କିମ୍ବା କିମ୍ବା କିମ୍ବା କିମ୍ବା

ଶ୍ରୀ ଦେବ ପାତ୍ର କେତ୍ତ ସମ୍ବନ୍ଧ ଗଣ୍ଡ

अर्द्धेत्रिवेषां दृक् रूपं विद्यते विषयाया विश्वासा विद्युत् गुणं विद्युत् गुणं देवता द्वेषाणुं देवद्वये विषयाद्वयं द्वयं विद्यते

ନ୍ରୀ-ଗର୍ଭ-ତୁମ୍ଭୀ-ପିତାଶ-ଗର୍ଭ-ଦି-ଏବ-କୁଳ-ଦଶଶ-କୁଳ-ତୁମ୍ଭୀ-ପିତାଶ-ଗର୍ଭ-ଦି-ଦର୍ଶନ-ଦଶଶ-କୁଳ-ଏ-ଦର୍ଶନ-ଦଶଶ-କୁଳ-ତୁମ୍ଭୀ-ଶୁଣ-ଏବେ-ପଞ୍ଚ-ଶୁଣ-

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ଦ୍ୱାରା ଦୁଃଖ କେତେ ଧରି ଛେଷ ପରିବର୍ତ୍ତନ ଧରି ସମ୍ବନ୍ଧ ପରିବର୍ତ୍ତନ କରି ଛିଲେ ଯିବା

କୃପାଦିତାମୁଦ୍ରିତା ଶ୍ରୀଦ୍ଵାରା ଅର୍ଥକାନ୍ତରେ କାହାରେ

ଶୁଦ୍ଧିକାରୀଙ୍କ ପ୍ରକାଶକ ପରିଷଦ୍ ଏବଂ ଶୁଦ୍ଧିକାରୀଙ୍କ ପରିଷଦ୍ ଏବଂ

དྲବ୍ୟ ༜ୀବ ພଦେଶ୍ୱର ତୁମ୍ଭ ଧରିବେ ପଦେଶ ଦ୍ୱାରା କଷେତ୍ର ଜୀବ ରେଖା

ଶ୍ରୀମଦ୍ଭଗବତପ୍ରକାଶନ ପ୍ରକାଶନ କେନ୍ଦ୍ର ଅଧିକାରୀ ଶ୍ରୀ ପଟ୍ଟନାୟକ ହିନ୍ଦୁ ପଟ୍ଟନାୟକ ହିନ୍ଦୁ

ਲੇਖਾ·ਦਾ·ਸ਼ਕਾ·ਘੇਟ·ਘਰੀ·ਕਿਸ·ਵਾਡੀ

ସନ୍ଦର୍ଭାବିତ ପରିମାଣରେ କାହାରେ ଯାଏଇଲୁ କାହାରେ ଯାଏଇଲୁ

ଲେଖା ହେତୁ ପରମାଣୁ ଯନ୍ତ୍ରା ଯନ୍ତ୍ରା ଲେଖା କେନ୍ଦ୍ର ଅଧିକ ଶ୍ରୀ ଲେଖା ପାତେ ଯନ୍ତ୍ରା କେନ୍ଦ୍ର।

କୁଣ୍ଡଳ ପିଲାଙ୍କୁ ଝର୍ନା ଦେଖିବା ପରିମାଣ କରିବା ପରିମାଣ କରିବା ପରିମାଣ କରିବା ପରିମାଣ କରିବା

ੴ ਕਾਰਿਂਦ ਪ੍ਰਾਪਿ ਅਤਨ ਧਰੀ

८. क्षेत्री वस्तु विद्या विद्या विद्या

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‘শৈন্ম’ শব্দের পূর্বে ‘দণ্ডনির্দলী’ এবং ‘শব্দ’ শব্দের পুর্বে ‘পুরুষান্তর’ এবং ‘শব্দ’ শব্দের পুর্বে ‘ক্ষমতা’ এবং ‘শব্দ’ শব্দের পুর্বে ‘ক্ষমতা’ এবং ‘শব্দ’ শব্দের পুর্বে ‘ক্ষমতা’