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比较与借鉴

从各国经验看中国刑事诉讼法改革路径

——比较刑事诉讼国际研讨会论文集

中国政法大学出版社

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Viewing the Reform of China's Criminal Procedure Law from the Perspective of Other Countries' Experiences

—— *Collection of Articles Presented at the International Symposium on Comparative Criminal Procedure*

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主编的导读与说明

中国政法大学刑事法律研究中心、中国社会科学院法学研究所和美国纽约大学于2006年6月23~25日在北京召开了比较刑事诉讼国际研讨会，本次研讨会是2005年春天在美国纽约召开的比较刑事诉讼国际研讨会的继续。来自美国、俄罗斯、韩国以及中国台湾、香港、澳门和大陆的70余位学者、专家出席了本次会议。本次研讨会以中国刑事诉讼法的再修改为主轴，与会专家分八个专题从比较的角度进行了专题发言和自由讨论。中国学者从中国目前亟须改革的制度层面出发，对一些重要问题进行了研讨，海外学者则结合本国本地区或者其他国家和地区的改革经验，对中国刑事诉讼将来的改革及其可能产生的后果做了谨慎而富有建设性的建议。有关本次会议的详细情况，参见会议综述。

在与会者发言与评论之外，中外学者也踊跃提交了多篇论文。陈光中教授领导的刑事诉讼法修改小组向大会提交了刑事诉讼法再修改的专家建议稿，并做了详细的说明。国外专家应会议的邀请就专门的问题也准备了文章，同时，为了充分了解近年来发生在欧洲大陆、亚洲国家和地区的方兴未艾的刑事诉讼改革情况，我们还特别选择了综述文章，以介绍和分析近年来这些国家和地区的改革趋势。专家们对中国刑事诉讼法的再修改见仁见智，需要讨论的问题也很多，限于篇幅，本论文集侧重介绍了欧陆、前苏东国家以及韩国和中国台湾地区最新的刑事诉讼程序的变迁，并集中讨论了传统上受到忽略的几个重要问题，例如无罪推定原则的具体定义以及对刑事诉讼的实质影响；侦查手段特别是监听手段使用的正当性和合法性；证据法和证明过程以及一事不再理等重要原则。以下是对这些论文编列的简单介绍：

首先，陈光中教授详细地介绍了他所领导的专家小组在最近几年深入细致的调查研究基础上形成的刑事诉讼法再修改建议稿。该文重点说明了专家意见稿的中心修改思想以及建议修改的具体内容，联系各国经验和国际刑事司法标准，对修改的建议做了论证。可以预见，该修改意见将对未来的刑事诉讼法修改产生较大

的影响。

其次,本论文集本着"他山之石可以攻玉"的精神,对近年来世界各国刑事诉讼法修改的浪潮进行了讨论和评析。美国圣路易斯大学法学院的塞门教授基于他多年对欧洲大陆,特别是前苏联东欧国家刑事诉讼法的精深研究,专门为本论文集撰写了欧洲刑事诉讼法改革的趋势,并提供了其个人对中国正在进行的改革的一些具体建议。为了说明大陆法系国家最近修改刑事诉讼法的艰难历程,我们选择了恩尼欧·阿莫戴奥教授介绍意大利最新改革的文章。该文系统地介绍了意大利近20年的刑事诉讼模式改革,并分析了其中的经验和教训,对中国即将进行的改革大有裨益。台湾大学王兆鹏教授则综合介绍了台湾地区"刑事诉讼法"的发展与变迁,对台湾地区"刑事诉讼法"的发展路径给予了详细周全的分析和说明,强调违"宪"审查在"刑事诉讼法"改革中的关键作用以及相关制度性的演变,对台湾地区从职权主义诉讼模式向当事人主义模式转变的各种相关制度做了较为深入的剖析。韩国著名法学家、现任联合国刑事法院法官宋相现教授则侧重介绍了2005年韩国修改刑事诉讼法的提案(尚在议会审查),指出韩国刑事诉讼法的改革重点包括:从过去变相的书面事实审理转变成将以庭审言词为中心的发现事实程序。其他改革包括加强对被告人的保护、强化司法对审前强制措施的审查、削弱检察官不起诉权等方面。尤为重要的是,韩国还对法院审判组织做了转折性的改革——逐步引入陪审团制度。为了进一步帮助读者了解韩国刑事诉讼制度的改革路径,编者还翻译了韩国国立首尔大学法学院曲楚教授的文章,介绍了韩国刑事诉讼制度近20年发展的历史及其政治背景。最后,我们还翻译了韩国总统司法改革委员会有关司法改革的决议,为宋相现教授和曲楚教授的论述做了脚注。

紧接着,专家们就无罪推定问题做了讨论。无罪推定原则曾经是中国刑事诉讼研究的禁区,20世纪80年代以后,经过长期学术辩论和理念更新,学界和实务界对该原则基本持接受态度。然而理论上的接受并不意味着问题的解决,事实上,学术和实务界对什么是无罪推定原则以及该原则如何表述并没有一致的意见。1996年修改的刑事诉讼法第12条对无罪推定原则所作的含混的规定就是明证之一。中国政法大学卞建林教授的文章综合论述了无罪推定原则在西方的发展,对该原则的定义、内容,以及功用进行了详细的分析,并坦率指出现行刑事诉讼法有关无罪推定原则规定的种种缺陷。美国纽约州布朗士区最高法院法官马可斯着重阐述了美国法律中有关无罪推定原则的具体含义及其内容,通过判例解说了该原则实施的种种后果。香港中文大学麦高伟、蔡迪云教授的文章则从对抗制入手解释无罪推定在传统的英美法中的发展及其含义,并对证据制度、证明标准等相关问题做

了详尽的分析。麦文解释了与无罪推定原则有关的种种制度设计，旨在说明该原则的实现有赖于相关配套制度的落实。文章同时也比较了中国大陆刑事诉讼法在这些方面与其他国家的不同之处，提出了一些发人深思的问题。

如果说无罪推定原则一直以来是个热门的话题，那么对侦查特殊手段，特别是监听制度的讨论则显得比较冷僻。北京师范大学的宋英辉教授、郑好先生对中国现行法律有关规定作了比较全面的论述，指出中国监听法制目前几乎处于空白的尴尬现实，从世界各国的经验和中国实际情况出发，对刑事诉讼有关规则的修改提出了系统的建议。来自美国的马可斯法官则详细介绍了美国监听法制的历史发展及现状，并对监听涉及的控制犯罪和个人基本隐私权价值观的冲突做了分析，对我们发现两种价值观的平衡点提供了宝贵的参考意见。中国台湾地区的资深法律专家和高级警官邱念兴先生全面论述了台湾地区的监听制度，对监听的审批程序、内容以及违反法律的责任做了周详的评述。澳门特别行政区司法警察局的黄少泽局长根据其多年的丰富经验，对澳门的监听制度的理论和实践做了深入地阐述，并对现行制度的历史渊源、具体程序及基本原则进行了分析，对中国的未来监听法制的建立提出了殷切的希望。同样来自澳门的邱庭彪先生则从比较的角度出发对监听制度的内容及发展做了详尽的论述。来自台湾地区的资深检察官林邦梁先生对台湾地区刑事诉讼程序中的强制措施做了系统的论述。他结合司法实践说明了台湾地区强制处分权（包括拘提、搜索以及监听等措施）的审批使用程序及其原则，对最近司法介入强制处分权以来的变化做了评述，对目前正在进行的改革提供了很好的借鉴。

中国刑事诉讼法对证据运用规则的规定十分简略，建全证据制度一直为理论界所重点关注。可以说，没有证据规则的刑事诉讼程序是一个缺乏公信力的程序。为此，我们专门编入多篇有关证据问题的论文，围绕着证人出庭作证、非法证据排除规则、直接言词规则、证明标准等重大问题进行讨论。四川大学左卫民、马静华教授为我们展示了司法实践中证人出庭的现状，对证人出庭的法律规定以及证人不出庭对刑事审判的实质性影响做了详细地分析。为我们分析现状、改革证据制度提供了宝贵的实证材料。中国政法大学的刘玫教授则从现行有关证据的规则出发，结合司法实践对将来证据法的修改提出了有价值的建议。香港资深司法官员及大律师江乐士先生对传闻证据问题从英国法律传统入手作了系统的介绍，并比较各国的现行规定，提出对排除传闻证据的古老规则作适当的修正，令人耳目一新。韩国法官吴奇斗先生从韩国现行法律出发，对传闻证据规则的发展进行了颇为细致的分析，并对传闻证据排除规则的例外情形作了一一列举，具有很大的参考

价值。同样来自韩国的资深检察官李兴洛先生对非法证据排除规则在韩国的运用作了较为详细的介绍,并对其他国家非法证据排除规则的规定进行了评论,对即将通过的韩国新一轮刑事诉讼改革中的非法证据规则作了论述。

此外,中国政法大学的顾永忠教授作为"刑事诉讼法专家意见稿"的参与者,对刑事诉讼法中如何完善刑事辩护提出了系统的建议。清华大学的张建伟教授则从冤案产生及其预防的角度,对"一事不再理原则"的重要性作了富有激情的论述,提出中国刑事诉讼法应当顺应潮流纳入该原则。最后,我们将这次国际研讨会的会议综述作为附录,以供读者参考。

如读者所见,与其他文集不同的是:本论文集没有面面俱到地讨论到刑事诉讼的各个方面,而仅仅选择了几个重要的、曾经被忽略或者尚未厘清的问题做了深入细致的研讨,并侧重其他国家最新的经验和教训,以期收到事半功倍的效果。我们之所以这样做的另外一个原因是:历史的经验反复告诉我们,任何一次法律改革都不可能是包罗万象、一蹴而就的。我们希望学术界和实务界能够携手从上述根本性的问题着手,结合中国政治法律制度的现实,在力所能及的范围内,达致可持续的制度性改革。如果本论文集以及中国政法大学、中国社会科学院法学所、纽约大学联合召开的两次国际学术研讨会对上述目标有所贡献,我们就倍感欣慰。

最后要说明的是,本次研讨会的成功召开与论文集的顺利出版得益于福特基金会自始至终的大力支持,以及实务部门和学术界专家的热情参与。中国政法大学博士生葛琳、对外经济贸易大学陈学权博士、中国社会科学院法学研究所李西霞女士等为会议作了大量的工作。本论文集的出版还得到了中国政法大学出版社的大力支持。对以上个人和单位,我们表示衷心的感谢。

Editor's Introduction

On June 23rd to 25th, 2006, more than 70 scholars and experts participated in the International Symposium on Comparative Criminal Procedure in Beijing which was jointly held by the Criminal Law Research Center of China University of Political Science and Law, the Legal Research Center of the Chinese Academy of Social Sciences, and New York University School of Law. These Scholars and experts came from the United States, Russia, South Korea, Taiwan, Hong Kong, Macao, and Mainland China to discuss the amendment of the People's Republic of China (PRC) Criminal Procedure Law. The symposium was divided into eight sub-sections which fostered free and constructive discussions. Chinese scholars began by introducing several rules that required urgent reform. Overseas scholars, based on experiences with reforms in their own countries/regions or other countries/regions, made cautious and constructive recommendations for the upcoming reform of the Criminal Procedure Law in China, as well as discussed possible consequences of these reforms. For details, please refer to the following summary of the seminar. This symposium was a follow-up of the 2005 International Comparative Criminal Procedure Conference held in New York.

The Project Team on the Re-amendment of the Criminal Procedure Law, led by Professor Chen Guangzhong, submitted their draft of the Experts' Recommendations for the Amendment of the Criminal Procedure Law and gave a detailed explanation of the draft. Foreign experts accordingly prepared papers on the same topic. In addition to participants' speeches and comments, both Chinese and overseas scholars also submitted their working papers. Participating scholars expressed various opinions concerning many topics that needed to be addressed, however, for some other reasons, this collection of essays only focuses on some of the most recent changes in Continental Europe, counties that were formerly part of the Soviet Union, South Korea and Taiwan. In order to acquire a better understanding of recent criminal procedural reforms in Europe and in other Asian countries and regions, we selected several comprehensive essays that provide excellent insight to analyzing

trends in reforms in these countries and regions. Moreover, the collection emphasizes some important but traditionally issues that usually are ignored. For instance, the collection addresses the specific definition of the presumption of innocence and its substantial influence on criminal litigation; the legitimacy and legality of investigation methods, in particular communication surveillance; the rules of evidence and the process of proving a case; and the principle of double jeopardy, among others. Below are brief summaries of these essays.

First, Professor Chen Guangzhong presented draft recommendations for amending the Criminal Procedural Law, which is based upon comprehensive research conducted by a team of experts that he has led over the past few years. The essay illustrates the main points in the experts' recommendations and addressed specific areas that are recommended for amendment. The recommendations are supported by drawing upon different countries' experiences and international standards of criminal justice. We predict that this draft will have a strong influence on amending the Criminal Procedural Law in the near future.

Second, there is a Chinese saying that "stones from other mountains can help to polish jade." With the spirit of this saying in mind, this collection contains many essays that discuss the wave of criminal procedure reforms in other countries in recent years. Professor Stephen C. Thaman from St. Louis University in the Unites States prepared an essay examining trends in criminal procedural reforms in Europe, which he based on his many years of research in this field, particularly in the area of criminal procedure in countries that were formerly part of the Soviet Union. In the essay, he provides personal thought on current reforms in China.

To illustrate the difficulties experienced when amending criminal procedure laws in continental law countries, we selected an essay by Professor Ennio Amodio that addressed the most recent reforms in Italy. This essay systematically introduces criminal procedure reforms in Italy during the past twenty years and analyzes Italy's experiences and lessons learned which will provide much insight for China's reforms in the near future.

Professor Wang Jaw-Perng from Taiwan University thoroughly presents the development and variations in Taiwan's Criminal Procedure Law. He also provides detailed illustrations of the law's development and emphasizes the key role of judicial review in moving the reforms forwards, as well as in facilitating the evolution of relevant rules. Professor

Wang presents an in-depth analysis of the various rules generated by Taiwan's transformation from the inquisitorial system to the adversarial system.

Professor Sang-Hyun Song, a famous Korean jurist and current judge on the International Criminal Court introduces the proposed amendments to the 2005 Korean Criminal Procedure Law, which is still under review by the legislature. He notes that a key point in the law's reform centers on the shift of the fact finding process from a review of written materials to a court hearing with oral debate. Other reforms include strengthening the protection of defendants' rights, strengthening judicial review of pre-trial forcible measure, and reducing the prosecutors' right to waive prosecution. More importantly, South Korea has substantially reformed the court adjudication system by gradually importing the jury system. In order to help our readers better understand the path of reform that Korea's criminal justice system has undergone, we also translated a paper by Professor Kuk Cho from Korean National University of Seoul that provides a general introduction to the historical and political background of the Korean Criminal Procedural Law over the past twenty years. In addition, we translated the resolutions on judicial reform that were issued by the Presidential Committee on Judicial Reform. This essay serves as a discussion reference to Professor Sang-Hyun Song and Professor Kuk Cho.

The symposium fostered expert discussion on the principle of the presumption of innocence. It was once a forbidden topic in PRC Criminal Procedural Law research field. It was not until the 1980s——after lengthy academic debates and the renewal of people's ideas——that both academics and practitioners began to accept this principle. Nevertheless, acceptance at the theoretical level does not mean that the problem was solved. In fact, people with competing views have never reached a consensus on what the presumption of innocence is and how it should be defined. For example, this issue is seen in the ambiguous wording of Article 12 in the amended 1996 Criminal Procedural Law. In his article, Professor Bian Jianlin from China University of Political Science and Law discusses the development of this principle in western countries and analyzes the definition, content, and functions of this principle in detail. He also frankly points out the limitations of the presumption of innocence in the current Criminal Procedural Law.

In addition to Professor Bian Jianlin's article several additional authors also contribute to this discussion. Judge Martin Marcus, from the Bronx Supreme Court in New York, examines and explains the specific definitions and components to the presumption of inno-

cence in American law. Furthermore, Judge Marcus provides examples to illustrate the consequences of applying this principle in practice. Professor Mike McConville and Choy Dick Wan Pinky at the Chinese University of Hong Kong explore the development and meaning of the presumption of innocence under traditional common law. Their essay also provides a detailed analysis of related issues, such as the rules of evidence and the standard of proof. In addition, their essay touches upon other rules that are related to the presumption of innocence which is aimed at drawing people's attention to the fact that the implementation of relevant rules is crucial for the realization of this principle. Their essay also serves as a comparative study. They also examine differences between the PRC Criminal Procedural Law and the laws of other countries highlighting many valuable topics for future discussion.

Compared to the presumption of innocence, a hotly debated topic, discussions regarding special investigation methods such as communication surveillance often falls under the radar. Professor Song Yinghui and Mr. Zheng Hao from Beijing Normal University thoroughly examine the relevant regulations in the current Chinese legal system. They point out the awkward fact that, nowadays, the law of communication surveillance is still basically blank in China. Based on the experiences of other countries and the current reality in China, they offer recommendations for amending relevant regulations.

Judge Marcus maps out the historical developments of communication surveillance regulations and discusses its current status in the Unites States. In addition, he addresses the conflict between crime control/prevention and protecting basic personal privacy providing valuable insight in understanding how best to balance these two different values.

Senior police officer and experienced law expert Mr. Gui Nian-xing from Taiwan discusses in detail the rules of communication surveillance in Taiwan, including the approval process for surveillance requests, the rules' content, and the legal liability if and when rules are violated.

Based on his many years of professional experience, Commissioner Wong Sio Chak from Macao Special Administrative Region Judicial Police Bureau describes the theory and practice of communication surveillance in Macao. He further analyzes the historical background, specific processes, and basic principles of the current system. Commissioner Wong also gives his best wishes for future establishment of rules governing communication surveillance in China. Mr. Qiu Teng Pio, who is also from Macao, discusses the content

and development of rules on communication surveillance from a comparative perspective.

Mr. Lin Ban-Liang, an experienced prosecutor from Taiwan, gives a very comprehensive introduction to coercive measures that are used in Taiwan's criminal procedure. Drawing on judicial practice, he describes the process for using coercive measures in Taiwan (including subpoenas, searches, communications surveillance, and other measures) and also addresses the principles behind the use of coercive measures. He ends his articles with comments on recent changes caused by judicial intervention in the use of coercive measures, which provides useful reference for China's ongoing reform process.

The PRC Criminal Procedural Law has only a very brief provision on the use of evidence. Therefore, improving the rules of evidence has been a hot topic in academia for a long time. It is safe to say that processing a criminal case without the use of the rules of evidence will be a process that will not be trusted by the general public. Bearing this in mind, we have presented several essays that focus on important issues regarding the use of evidence. The essays include topics such as the presence of a witness in the courtroom, the exclusionary rules, the rules of direct examination of a witness, and the standard of proof. Professor Zuo Weimin and Professor Ma Jinghua from Sichuan University give a very thorough analysis of the present situation with regard to witnesses appearing in court, the legal regulations governing this area, and the substantial impact that the absence of witnesses has on the adjudication of criminal cases. Their work provides valuable empirical research materials for our own analysis and for the reform of the current rules of evidence in China. Professor Liu Mei of the China University of Political Science and Law Provides a valuable recommendation on how to reform the laws of evidence from both the perspective of the existing rules and that of practice. Mr. Grenville Cross, barrister and senior Hong Kong judicial official, systematically introduces the British rules of evidence with respect to hearsay, compares them with other countries' systems, and proposes to revise the long-standing hearsay rule of the Common Law, Judge Gidu Oh from South Korea offers a detailed analysis of the hearsay rules in Korean Law and lists all of the circumstances regarding evidence exclusion based upon the hearsay rule. This is certainly of great value to China's ongoing reform on the evidence law. Mr Heung-Lak Lee, a senior prosecutor from South Korea, introduces the South Korean exclusionary rule and its practice. Furthermore, he compares exclusionary rules among different systems and discusses the pending legislative reform on the exclusionary rules in South Korea.

In addition, as a member of the team that drafted the expert opinions, Professor Gu Yongzhong from China University of Political Science and Law, raises suggestions regarding how to improve criminal defense work in China. Professor Zhang Jianwei from Tsinghua Law School addresses the causes and ways of preventing wrongly decided cases and, in particular, makes a passionate appeal for the importance of the principle of double jeopardy. He points out that China should follow the international trend and incorporate this principal into the Criminal Procedural Law. Finally, we have included the summary of the conference as an appendix for the reader's reference.

Unlike some other essay collections, ours does not attempt to address all of the various aspects of criminal litigation but rather selects only a few problems that are most important but have been habitually ignored. It provides an in-depth study of these problems. This collection also emphasizes the latest experiences and lessons from other countries, which hopefully will help China to yield twice the result with half the efforts. Another motivation for compiling this collection is that history has repeatedly told us that any legal reform is unlikely to address every topic and will not accomplish everything overnight. We hope our colleagues in academia and practice can work together on the fundamental problems addressed in this collection and combine theory with the current reality of China's political and legal systems. In this way, we can achieve a sustainable systematic reform within the ability of Chinese society. If this essay collection, along with the two international conferences jointly held by China University of Political Science and Law, the Legal Research Center of the Chinese Academy of Social Science and New York University, can contribute to the achievement of the above goal, we will be very pleased and grateful.

Last but not least, we would like to express our sincere gratitude to the Ford Foundation. Without her support, it would have been impossible to put together two successful conferences and the publication of this collection. Also, our thanks go out to the academics and practitioners whom enthusiastically participated and contributed to the success of this project. We like to acknowledge the enormous efforts made by Ms. Ge Lin, a Ph. D candidate of China University of Political Science and Law, Dr. Chen Xuequan of the University of Economy and International Trade, and Ms. Li Xixia of Chinese Academy of Social Science Law Institute. Moreover, we received indispensable support from the China University of Political Science and Law Press that made this publication possible.

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