刑事诉讼二审程序研究

胡献旁◎著

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内容提要

本书阐述了二审程序的概念和意义，对英美法系与大陆法系进行了比较研究，对刑事二审的法院审理方式、上诉不加刑和发回重审制度、刑事二审中人民检察院及二审中的律师辩护方面进行了研究，并对其中的问题提出了改革意见，有一定学术价值和实际意义。

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序

刑事司法审级程序是国家权力制衡与救济规律作用于刑事司法活动的体现。首先,国家权力的有效制衡路径之一是逐级的分权和制约。这一理念体现在司法权领域,则是级别式司法机关的设置,使国家的司法权由上下级司法机关分级行使,形成审级监督的格局。其次,有权利必须有救济,否则权利就得不到保障。当事人在司法中非常重要的权利救济手段就是上诉程序,即对不服的判决提出上诉要求上一级法院予以改判。还须强调指出,司法追求的价值目标首先是公正,它是司法的灵魂和生命线。但是案件是复杂的,法官的办案能力是有限的,因此,需要设置审级程序以使终审判决最大限度地实现对案件的公正处理。

当代西方国家大多在诉讼中实行三审终审制,但是其第三审程序实行法律审,只解决适用法律错误的问题。我国基于本国国情,在诉讼中实行二审终审制。在刑事诉讼中对死刑案件则增加死刑复核程序以便更有力地保障慎杀方针的贯彻。可见我国的刑事二审程序在诉讼程序中占有相当重要的地位。

我国刑事第二审程序为1979年制定的《刑事诉讼法典》所确立,后经两次刑事诉讼法修改,特别是2012年的修改而有较大完善。但是不论从立法层面抑或实施层面仍存在一定问题,有待法学界去关注,去思考,去研究如何进一步改革完善。

胡献旁博士的这本专著《刑事诉讼二审程序研究》是在其博士后出站报告的基础上修改、充实而成。他2009年进入中国政法大学博士后流动站攻读刑事诉讼法学,期间被委派到山西省人民检察院挂职,挂职结束后就到中国管理科学研究院法学研究所工作,并担任兼职律师。所以,本专著既是他本人从事检察、律师经历的工作感悟,也是其对刑事诉讼二审程序的理论研究成果,特别是专著对新旧刑事诉讼法二审程序的相关内容做了对比分析,肯定了新

刑事诉讼法的进步性，对其不足又提出了改革意见，有一定学术价值和实际意义。

胡献旁博士为人真诚，尊敬师长，善待朋友。我们师生情谊甚为笃厚，他的著作即将面世，无论从学术成就还是师生情谊来说，我都乐于为之作序，以示祝贺和支持之意。

是为序。

陈光中

于甲午年四月

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内容提要

二审程序是刑事诉讼制度的重要组成部分，担负着维护当事人的合法权益，保证司法裁判的正确性和统一法律适用等多方面的功能，因此在整个刑事司法制度中具有十分重要的地位。本文运用比较分析和实证分析的方法，研究探讨了刑事上诉制度的基本原理，在比较分析两大法系主要国家与地区刑事上诉制度的共同特征及其存在差异的基础上，阐释论证了我国刑事二审程序的基本原则、审理方式、发回重审制度以及人民检察院和辩护律师在二审程序中的功能与地位等。全文由七章构成。

第一章是绪论部分，即刑事二审程序的原理部分，对刑事上诉制度的价值、功能和上诉权的属性与保障进行了系统探讨；阐明了刑事上诉审程序在给予当事人救济和保证法制统一实施等方面所发挥的作用；梳理刑事诉讼二审程序的发展历程。

第二章运用比较研究的方法，以刑事司法改革的最新成果和发展趋势为主线，考察两大法系具有代表性的国家和我国台湾地区刑事上诉制度的主要内容和改革变化，在此基础上总结了两大法系在刑事上诉制度方面的共同特征、差异及其成因。英国和美国作为英美法系的代表，在法律渊源上具有同源关系，但是英国刑事上诉的途径和程序都较为复杂，其中上诉许可制是英国区别于其他国家第二审程序的主要特点，也是英国控制上诉量的有效措施之一。美国刑事上诉审结构是一种法律审的事后审形态，其第二审程序属于当事人的权利性上诉，而第三审则属于限制性上诉，上诉到最高法院的案件通过上诉许可制受到严格的控制。

法国和德国同属大陆法系的代表，法国刑事上诉制度区分为普通上诉程序和非常上诉程序，重罪案件实行一审终审制，最高法院通常也不被看作审级法院。近年来法国在人权保障观念和《欧洲人权公约》的影响下，加大了刑事

司法改革的力度，并于新千年的法律改革中设立了重罪上诉制度，但是与其他国家相比，重罪上诉制度具有法式独特的风格，它采取轮转上诉形式，由最高法院指定另一重罪法院并采取陪审团制，对重罪案件重新进行审判。德国实行三审终审与两审终审相结合的多元审级制度，上告程序是针对地方法院判决适用的复审型的事实审程序；上诉程序是针对州法院以上的判决所适用的事后审型的法律审程序；抗告程序则是针对法院和法官作出的各种裁定与决定等所适用的程序性救济的专门程序。

第三章阐述了刑事二审程序的四个原则。保障上诉权对于维护上诉人的合法权益，加强上级人民法院对下级人民法院的指导和监督，以及人民检察院对人民法院的监督，以保障法律的正确实施，具有十分重要的意义。所以，这是所有二审法院进行第二审审理时都必须坚定不移贯彻执行的一项诉讼原则。

刑事第二审程序中的全面审查原则，是基于有法必依、违法必究的社会主义法制原则，和“以事实为根据、以法律为准绳”的刑事诉讼法基本原则而制定的。全面审查原则为第二审程序诉讼任务的完成和诉讼职能的实现，从审理原则和审理方式上提供了法律保障。全面审查原则决定了第二审法院的审理内容和审理范围，从而成为约束第二审法院诉讼活动的行为准则。同时，全面审查原则也是我国刑事第二审程序有别于其他国家第二审程序的显著标志。

刑事诉讼中的上诉不加刑原则，是资产阶级革命时期确立的一项司法民主原则和制度，现为世界大多数国家的刑事诉讼法所认可。它是从所谓“禁止利益变更原则”中引申出来的，随着刑事诉讼法制的演变和发展逐渐完善，并在世界范围内得到广泛的接受和采用，被称为保障被告人上诉权的基石。这对保障被告人的合法权益，体现诉讼民主和现代司法文明都起到积极作用。上诉不加刑原则，是刑事二审程序的特有原则，有利于保障被上诉人的上诉权，保障上诉制度的贯彻执行。此外，本章还对新《刑事诉讼法》关于上诉不加刑的规定做了评析。

疑罪从无原则，是指在不能证明被告人有罪又不能证明被告人无罪的情况下，应当宣告被告人无罪。为体现疑罪从无原则的精神，我国原《刑事诉讼法》明确规定了证据不足不起诉和一审阶段的证据不足、指控的犯罪不能成立的无

罪判决。但是第二审程序中却没有这种无罪判决形式。笔者认为，疑罪从无原则作为刑事诉讼的基本原则应当贯彻于刑事诉讼全过程，不仅侦查阶段、审查起诉阶段和第一审程序应当坚持疑罪从无原则，而且在第二审程序、死刑复核程序和审判监督程序中更应恪守该原则。

第四章论述了二审的审理方式。开庭审理是法院审判活动的基本方式，具有公开性、直接性和规范性，最能体现审判的公正和权威。对二审案件实行一律开庭审理，当然是解决问题的一种最理想办法。但是，目前我国经济社会发展很不平衡，城乡差别、地区差别扩大的趋势尚未根本扭转。一方面，在发达地区如一些沿海地区和城市，经济发展较快，交通便利，已经基本具备二审全面开庭审理的客观条件；另一方面，在欠发达地区如一些西部边远地区和农村山区，经济相对落后、交通十分不便，尚不具备二审全面开庭审理的条件，且在短期内无法实现根本改善。由于目前面临着刑事案件总量上升而司法资源有限的形势，如果在全国范围内不分地域地对二审案件一律实行“开庭审”这种“一刀切”做法，既不符合我国国情，也难以统一执行。

笔者认为，要切实解决二审开庭率偏低的突出问题以及强化检察机关对二审审判监督的作用，必须从立法与司法两个层面上进行系统性改革。立法上应当坚持“以开庭审理为原则，以不开庭审理为例外”的审判原则，全面修改现行“调查讯问审理”方式；司法上应建立相关配套措施，积极推行二审案件全面开庭审理的改革实践，为今后全面实行一律开庭审理积累立法经验。本章对新《刑事诉讼法》关于二审审理方式的规定做了评析。

第五章论述了二审发回重审制度，分析了当前我国在发回重审方面存在的问题，并提出了改革意见。一是废除基于事实不清或证据不足的发回重审制度。二是在取消基于事实不清、证据不足的发回重审时，还应增加规定两种应当发回重审的理由：一方面，在上诉、抗诉中提出新证据并可能影响原判判决的，第二审人民法院应当撤销原判，发回原审人民法院重审；另一方面，二审法院发现原审遗漏了罪行或者共同犯罪人，应当裁定撤销原判，发回重审。三是对于程序违法的发回重审制度，在理由上增加规定：依照法律规定应当出庭作证的证人、鉴定人未出庭。四是明确规定发回重审既可以发回原审人民法院重审，也可以指定其他同级人民法院重新审判。本章对新《刑事诉讼法》关于发回重审的规定做了评析。

第六章根据刑事二审程序的制度特征，包括其审理对象、程序规范等，阐述二审出庭的检察人员诉讼活动在任务和程序方面有别于一审公诉人的特点。然后具体说明在刑事二审出庭实务中，检察人员应如何针对二审特点，在庭前准备、法庭调查、法庭辩论等各个环节有效开展工作，正确履行监督职能。最后部分对新《刑事诉讼法》关于人民检察院查阅案卷的规定做了评析。

第七章简单介绍了律师在刑事二审程序中的作用，以及在审判前、中、后的工作。重点介绍了新《刑事诉讼法》对法律援助制度的规定及其进步。从刑事诉讼法实施的角度看，有的规定仍然不够具体明确。其中，最突出的问题就是法定法律援助的适用阶段是否包括第二审程序。笔者认为法律援助不仅仅适用于一审程序，也适用于二审程序。第一，就未成年人案件而言，由于不适用死刑，法定法律援助适用的审判阶段包括二审程序；对于犯罪嫌疑人、被告人是盲、聋、哑人或者尚未完全丧失辨认或者控制自己行为能力的精神病人的案件，其适用的审判阶段包括二审程序。第二，对于可能判处无期徒刑、死刑的案件，法定法律援助应该适用二审程序。对可能判处无期徒刑的案件，一审程序毫无疑问应当适用，而且二审也应适用，因为二审的裁判结果既可能改判，但也可能维持无期徒刑的判决。如果在二审程序里，被告人没有委托律师，且不提供法律援助，这使被告人缺少了必要的法律援助，更违反了控辩平等对抗的诉讼构造和理念。二审诉讼的科学程序要求控诉与辩护双方在形式上应保持平等对抗的格局，这是保证诉讼客观、公正的前提。因此，对于可能判处无期徒刑、死刑的案件，法定法律援助应该适用二审程序。

Abstract

The second procedure is the important component of the criminal proceedings system. It is undertaken to safeguard the party's legitimate rights and interests, to guarantee the exactness of the judicial judgment, to unify the law application and functions in many aspects , so it plays a very important role in the whole judicial system. The author applies the methodology of comparative analysis and positive analysis and research on the basic principle of the criminal proceedings system. On the basis of the general characteristics and differences of regional criminal proceedings system between the main common law countries and main civil law countries, the article points out the basic principle, ways of hearing, retrial system and the function and status in the second procedure for the People's Procuratorate and the defense attorney. The article is formed by seven chapters.

Chapter one is introduction part, which is the principle part of criminal instance in the second procedure. Discuss systematically on the value, the function and the properties; Clarify the role of criminal proceedings given the party relief and ensured the uniform implementation; Streamline the development history of criminal proceedings in the Second Instance.

Chapter two , it uses the methodology of comparison and research, investigating the main contents and reform changes of criminal proceedings system in the typical countries towards two fundamental law systems and regions of Taiwan province of China, which is with the main line of latest achievement and development trend towards the criminal judicial reform, based on that, the article has summarized the common characteristics, differences and causes of two fundamental law systems to-

wards the criminal proceedings system. In the western various countries, the criminal judicial reform has been attracting people's attention since the 1990s, and its key pursuit is the balance of the plural values, which is undoubtedly has rich referential meanings to perfect the system of criminal judicial reform and the criminal appealing system in our country. As the representatives of the Anglo – Americana law system, the United Kingdom and U. S. A. have a close relation at legal origins and traditions but the way and procedure of the criminal appealing system in United Kingdom are more complicated. The appeal system is the main characteristics different from those of the other counties in the second instance and also the effective measures to control the quantity of appealing cases in United Kingdom. Traditionally, United Kingdom follows the rule of forbid – double – danger and strictly limit the appeal right of prosecutors however, through continuously judicial reform in the last few years, the United Kingdom makes efforts to realize the balance of procedure justice and efficiency, crime controlling and value objective of human rights, so it is gradually expanded for protest party in appeal rights which is showing a trend to move closer to the appeals system in civil law countries. The criminal appealing trial structure in U. S. A. is a kind of law trial of an afterwards trial, and the second instance procedure depends on the party's choice, while the third instance is a kind of restricted appealing, and the quantity of cases appealing to the Supreme Judicial Court is under control through the permission of appealing system, so as to ensure the court of last instance achieve the function on unifying the application and explanation of law through the way of "full mat try". In the part of the American criminal appealing system, it exploits some relevant measures taken in U. S. A. and some reform activities aiming to lightening the work of the appellate court.

France and Germany both represent the Civil Law, France's criminal appealing system is divided into the ordinary proceedings and extraordinary proceedings. The felonious eases implement last instance system of the first instance, and usually the Supreme Judicial Court is not regarded as one grade of courts either. In recent years, under the guidance of human rights safeguards and the "European human

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rights convention". France has strengthened the criminal judicial reform, and it has set up felony appeal system in its legal reform in the new century. Compared with other countries, felony appeal system has its unique style in France, By adopting cyclical appeal form, the Supreme Judicial Court nominate another felony court and this court will adopt the jury to go on a trial. This article also explains the nature of the Supreme Judicial Court in France, and put up with the assumption that theappeal for the interests of party should be the third proceedings in its procedural system, and what mentioned above doesnt have substantive difference with the legal trial of the Supreme Judicial Court in other countries. Germany has adopted the plural system combining last instance for the third instance with last instance for the second instance. The complaining procedure aims at the factual procedure which is applicable to the ad judgment of the local courts; The appeal procedure is an examination afterwards aiming at the appeals on the case judgments made by the state court and above; Resisting and informing procedure is pure procedural remedy to exam the various kinds of adjudication and special verdict made by courts and judges.

The third part of article points out the four principles in third instance of the criminal procedure. The principle of protection on appeal right makes a very important significance to the maintenance of the legitimate rights and interests of the appellant; to strengthen the guidance and supervision of the higher people's court to the lower courts; to the supervision of the People's Procuratorate to the People's Court and to safeguard the correct implementation of the law. Therefore, this principle is a unswervingly implementation principle of a proceeding for all the second – instance court of second instance trial.

It is played a positive role on protect the defendant's legitimate interests, embodies litigation democracy and modern judicial civilization. "Appeal not Infliction" principle is a unique principles I the Criminal Procedure of Second Instance, which may help protect the defendant's right of appeal; to ensure the implementation of the appeal system. Meanwhile it makes the comments to new "Code of criminal procedure".

Principles of comprehensive review in criminal procedure of second instance is formulated based on the principle of the socialist legal system of must follow the law, violators are prosecuted, the fact basement and the law as the criterion in code of criminal procedure. Principles of Comprehensive review provides a legal guarantee for the realization of the second instance proceedings for the completion of the task and litigation functions, from the view of principles and ways of hearing. It also determines the content and range of hearing in the court of second instance, so that it becomes the behavior principle to constrain the activities for the court of second instance. Meanwhile, this principle is a significant signs in China different from those of other countries in criminal procedure of second instance.

"Appeal not Infliction" principle in criminal procedure is a judicial democratic principles and institutions established in Bourgeois revolution which is now recognized by the Code of Criminal Procedure of most countries in the world. It is an extension of the principle of so – called "prohibited interests were deduced" With the gradual improvement and development of the Law of Criminal Procedure it is widely accepted and used in the world and is called the cornerstone to protect the defendant on appeal right.

The principle of Suspected as innocent refers to the defendant can not be proved the guilty and at the same time can not be proved not guilty, in this situation the defendant should be declared to be not guilty. To reflect spirit of the suspected as innocent. Our original "Code of Criminal Procedure" clearly defined not to prosecute once insufficient evidence and Not – guilty verdict of disestablished to the accused crime once the lack of evidence in the first instance. But there is no such Not – guilty verdict from in the second instance . The author comments that the Suspected as innocent principle should be taken as the basic principle of the criminal proceedings and be implemented in the whole process of criminal proceedings. Not only in the investigation stage, the prosecution phase, and the first instance should adhere to the suspected as innocent, the same in the second instance, the death penalty review procedures and trial supervision procedures.

The fourth part discusses the way of hearing in second instance. The hearing is the basic way of court trial activities with the openness, directness and normative which could best embodies the fairness and authority of the trial. Of course, is an optimal way to solve the problem if all cases of second instance to implement trial. However, there in an unbalance the development between urban and rural areas in China and expansion of regional differences has not been reversed till now. The one hand, some in developed regions such as coastal areas and cities where the economic develop rapidly and transport conveniently, which have basic objective conditions for the hearing in the second instance. On the other hand, some in the less developed regions, such as the remote western and rural mountain area where the economy is relatively backward and the traffic is not convenient as developed area which have not basic conditions for the hearing in the second instance with the consideration of it's fundamental improvement can not be achieved in the short term. Consideration on the increased of criminal cases and limited judicial resources. If regardless of geography in the country and make the approach of "One size fits all", implementation "hearing" in the second instance, which is not only inconsistent with China's national conditions, but also difficult to uniform.

The author thinks to effectively solve the outstanding problems of the low rate of hearing in the second instance and to strengthen the role of supervision to second instance trial for Public Prosecutor's Office, it must be carried out systemic reform from two levels of legislative and judicial. Legislation should adhere to the trial principles "hearing orientation and no hearing as the exception";To set up related supporting measures on judicial; To actively promote the comprehensive reform and practice on hearing in second instance.

Part fifth, it discusses remand system in the second instance. In this part, it analysis the existing problems while give the suggestions on reform. First, To abolition the old remand system followed the rule of unclear facts or insufficient evidence. Second, besides, to identify two provisions for remand. On the one hand, to present new evidence in the appeal or protest which may affect the original verdict

judgment. The Second instance of the people's court shall revoke the verdict and remand the case to the People's Court for retrial. On the other hand, the second instance court found that the trial omissions offense or co - perpetrator which should be rescind the original judgment and remand for retrial. Third, for the remand system in violation of procedure, the following modifications should be made: Increase provisions on the grounds: the witnesses and the appraiser did not appear in court in accordance with the law. Fourth, define that remand either could be sent back to the trial People's court and can also nominate a same level court to retrial. The last part of this chapter gives the comments on the remand provisions in new "Code of Criminal Procedure".

The sixth part, according to the institutional characteristics of the Criminal Procedure of Second Instance including the trial objects, procedural norms etc.

Elaborate the different of prosecutor activities from the second instance court and the first instance in terms of tasks and procedures. Then specific the instructions in the second instance court practice that how inspectors could perform effectively and properly fulfill the supervisory functions in all aspects of pre - trial preparation, court investigation and court debate.

The last part is comments on the provisions of examination the case files from the People's Procuratorate in the new "Code of Criminal Procedure".

The seventh part of the report briefs the role of lawyers in the second procedure, and the trials including before, during and after. Focus on the provisions of legal aid system and its progress in new "Code of Criminal Procedure"; while proposal on the existing provisions of an important issue which is not yet clear, this is, the defendant in the death penalty cases of second instance and the death penalty review cases whether is the same situation with "the defendant may be sentenced to death". Of course, both cases should be classified as "the defendant may be sentenced to death" situation. If the defendant does not appoint a defender, the people's court shall specify the legal aid lawyer for the defendant. The section 240 in New "Code of Criminal Procedure" provides that the Supreme People's Court should in-

terrogate the defendant and should listen to the opinion of the defense lawyer once requested in the cases of death penalty reviewing" It is not clear on the definition of "Defense lawyer", which refers to a previous lawyer or newly assigned lawyer in the death penalty review procedures. Because the death penalty review is the final procedure in the death penalty cases, it should protect the defendant of the pleading from the lawyer. It is recommended that relevant departments should formulate relevant judicial interpretation to clarify this issue in the future that a legal aid lawyer should be assigned if the defendant does not have a lawyer.

本文法律文件全称简称对照表

序号	全　称	简　称
1	《中华人民共和国宪法》	《宪法》
2	《中华人民共和国刑事诉讼法》(1979 年)	1979 年《刑事诉讼法》
3	《中华人民共和国刑事诉讼法》(1996 年)	原《刑事诉讼法》
4	《中华人民共和国刑事诉讼法》(2012 年)	新《刑事诉讼法》
5	《中华人民共和国刑法》	《刑法》
6	《中华人民共和国律师法》	《律师法》
7	《中华人民共和国人民警察法》	《人民警察法》
8	《中华人民共和国国家安全法》	《国家安全法》
9	最高人民法院、最高人民检察院、公安部、国家安全部、司法部、全国人大常委会法制工作委员会《关于〈中华人民共和国刑事诉讼法〉实施中若干问题的规定》	六机关《刑诉法规定》
10	最高人民法院、最高人民检察院、公安部、国家安全部、司法部《关于办理死刑案件审查判断证据若干问题的规定》	两院三部《办理死刑案件证据规定》
11	最高人民法院、最高人民检察院、公安部、国家安全部、司法部《关于办理刑事案件排除非法证据若干问题的规定》	两院三部《非法证据排除规定》
12	最高人民法院、最高人民检察院、司法部《关于适用普通程序审理“被告人认罪案件”的若干意见(试行)》	三机关《适用普通程序审理“被告人认罪案件”》
13	全国人大常委会《关于司法鉴定管理问题的决定》	人大常委会《司法鉴定管理决定》
14	最高人民法院《关于执行〈中华人民共和国刑事诉讼法〉若干问题的解释》	最高人民法院《刑诉法解释》
15	最高人民检察院《人民检察院刑事诉讼规则》	最高人民检察院《刑事诉讼规则》
16	公安部《公安机关办理刑事案件程序规定》	公安部《办理刑事案件程序规定》
17	司法部《司法鉴定程序通则》	司法部《司法鉴定通则》

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