

中澳刑事诉讼制度 和实务比较研究

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前 言

在澳大利亚澳中文化教育交流中心的帮助下,上海市人民检察院于2001年、2002年两次组织高级检察官赴澳大利亚进行考察培训,重点了解澳大利亚的刑事司法制度和实务。通过专家授课,与澳大利亚同行的座谈交流,旁听法院开庭,到司法机关、政府部门、社会机构的实地参观考察等一系列活动,对澳大利亚的社会、政治、经济、文化、历史等情况,特别是对澳大利亚的刑事诉讼制度和实务有了比较深入的了解。

由于历史的原因,澳大利亚司法制度最早继受于英国,按照英国的模式移植而来。但澳大利亚的司法制度并没有一成不变,而是伴随着社会的不断发展,“在继受中发展,在移植中再造”,形成了适应澳大利亚国情需要,具有澳大利亚特点的司法制度。

《中澳刑事诉讼制度和实务比较研究》是上海高级检察官两次赴澳考察培训的一个成果。促使写作本书的直接动因有两个:一是在国内预培训期间,我们发现国内在对澳大利亚的情况介绍和研究中,涉及澳大利亚司法制度的介绍和专题研究甚少;而在比较法研究领域,对英美法系的比较研究也主要集中在英国、美国和加拿大等国的司法制度,对澳大利亚司法制度的比较研究同样很少,对澳大利亚刑事诉讼制度和实务的比较研究则更为少见。二是我们在考察培训中,澳大利亚司法制度“在继受中发展,在移植中再造”的理念和实现这一理念的过程,给我们留下了深刻的印象。而

这种理念及其实现的过程对我国正在进行的司法改革具有很好的启发和借鉴作用。有鉴于此,我们决定对中澳两国刑事诉讼制度和实务进行比较研究。本书就是研究的成果。

《中澳刑事诉讼制度和实务比较研究》在体例上采用专题研究的形式,共分12章。第一、二章主要介绍澳大利亚的法律制度和司法体制;第三章至第十二章,就刑事诉讼中的强制措施、证据制度、起诉制度、不起诉制度、审判程序、出庭公诉模式、辩护制度、刑罚执行、被害人诉讼地位和未成年人刑事司法进行专题分析、比较。中澳两国社会制度不同,历史、文化传统迥异,刑事诉讼制度和实务方面存在较大的差异。但作为不同国家的司法诉讼制度,并无绝对的先进与落后之分。只要该国的司法诉讼制度对其社会进步和生产力发展具有促进作用,为本国人民所认可,即是好制度,而形式、过程并无一定之规。即使司法诉讼制度或实务中有相同的规定或做法,也并不表明具有同样的司法理念,更何况还有程度上的差异。所以,在比较研究中,我们更多的是作客观的比较和研究。

本书写作的素材主要来自于在澳大利亚考察培训期间收集的资料、交流了解的情况和实际感受,以及回国后在网上与考察培训期间相识的澳大利亚专家、同行继续交流得到的信息,此外参考了国内的一些相关著作和文章,在此一并表示感谢。

本书由上海市人民检察院副检察长郑鲁宁、上海市人民检察院政治部副主任刘晓明统筹,各章撰写人如下:

前 言

郑鲁宁

第一章、第二章

吴毓韬

第三章	陈卫国
第四章	刘华丽 李 文
第五章、第六章	宫 鸣 李素清
第七章、第八章	周永年
第九章	王林镐 何方荣
第十章	谭宝亮 徐荣根
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2001 年访澳日记	叶 青
2002 年访澳日记	周生福
后 记	刘晓明
统稿和定稿	郑鲁宁

希望本书有助于增进对澳大利亚刑事诉讼制度和实务的了解,更期望有更多的人来研究澳大利亚的司法制度和实务,并通过比较研究为我国的司法改革和实践提供有益的启示。

郑鲁宁

2005 年 2 月于上海市建国西路 648 号

Preface

Thanks to the assistance of Australia – China Culture & Education Exchange Center, Shanghai Prosecution Service sent two groups of Senior Prosecutors to Australia in 2001 and 2002 respectively for the studying of the criminal justice system and its practice in Australia. From a series of activities, including lectures given by legal experts, discussion sessions with Australian prosecutors, auditing in trials, visiting judicial bodies, government departments and other institutions, we have gained some knowledge of the society, politics, economy, culture and history of Australia, especially some better understanding of the criminal justice system and its practice in Australia.

Due to historical circumstances, the judicial system in Australia was at beginning inherited and transplanted from the model of the United Kingdom. However, it has been changing all the time with the evolution of the society. A judicial system with Australian characteristics, adapted to the circumstances of Australia, has taken its shape, which may be characterized as '*Evolution from Inheritance; Reconstruction through Naturalization*'.

Comparative Study on Criminal justice systems and Practices between China and Australia is the fruit of our visits to Australia. There are several causes that prompt the writing of this book: firstly, during the pre – training course we found that, in China, there are very few books on introduction and researches on Australia and its criminal justice system and practice; secondly, in

the field of the study on comparative law, especially in comparative research on Anglo – American law system, most attention has been paid to the judicial system of the United Kingdom, the United States and Canada but less on that of Australia; thirdly, during our visits to Australia, we were very impressed by the idea of ‘ *Evolution from Inheritance; Reconstruction through Naturalization* ’ in the judicial system of Australia and the process of carrying out the idea into execution. Such idea and the process of carrying out the idea into execution is good example to be used for reference in the on – going judicial reform in our country. In view of the above, we decided to conduct comparative study on criminal justice systems and practices between Australia and China. This book is the result of our efforts.

The layout of this book is in the form of special topics, altogether 12 chapters. Chapter 1 and 2 briefly introduce Australian Laws and its Judicial Systems. Chapter 3 to 12 give some analysis and Comparative research on criminal coercive measures, criminal evidence, criminal prosecutions, non – prosecutions, criminal trial procedures, public prosecution patterns, criminal defense, enforcement of penalties, victim’s position and rights in criminal procedure, Juvenile justice in the two countries. There are huge differences in social systems, historical and cultural traditions, criminal justice systems and practices between Australia and China. However, as for judicial system, there is no absolute standard in assessing how advanced or backward a system may be. So long as such judicial system can promote evolution of the society and increase productivity and be accepted by its citizens, it should be regarded as a good system.

There is no fixed pattern for the form and process of judicial system. Even though there are some similar legal provisions and practices in different countries, they do not represent that there are same legal ideas behind the provisions and practices, much more that there are differences in application. Therefore, we primarily conducted this comparative study in an objective manner without trying to make any judgment on how advanced or backward a system may be.

The reference materials for the writing mainly come from the materials collected during our visits, the information gathered in our exchanges, our impressions gained in Australia and other resources provided by Australian experts and prosecutors of whom we made acquaintances during the visits and via the internet after we came back to China. In addition, we also referred to some monographs and articles published in domestic periodicals. Therefore, it gives us great pleasure to acknowledge all the people concerned and express our deep gratitude.

The edition and publication of this book was organized by ZHENG Lu - ning, the Deputy Prosecutor - General of Shanghai Prosecution Service, and LIU Xiao - ming, the Deputy Director of Political Department of SPS. The names of contributors are as follows:

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ZHENG Luning

Chapter 1 & Chapter 2

WU Yutao

Chapter 3

CHEN Weiguo

Chapter 4

LIU Huali LI Wen

Chapter 5 & Chapter 6

GONG Ming LI Suqing

Chapter 7 & Chapter 8

ZHOU Yongnian

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Visiting – Australia Diary in 2001	YE Qing
Visiting – Australia Diary in 2002	ZHOU Shengfu
Chief Editor and Finalizer	ZHENG Luning

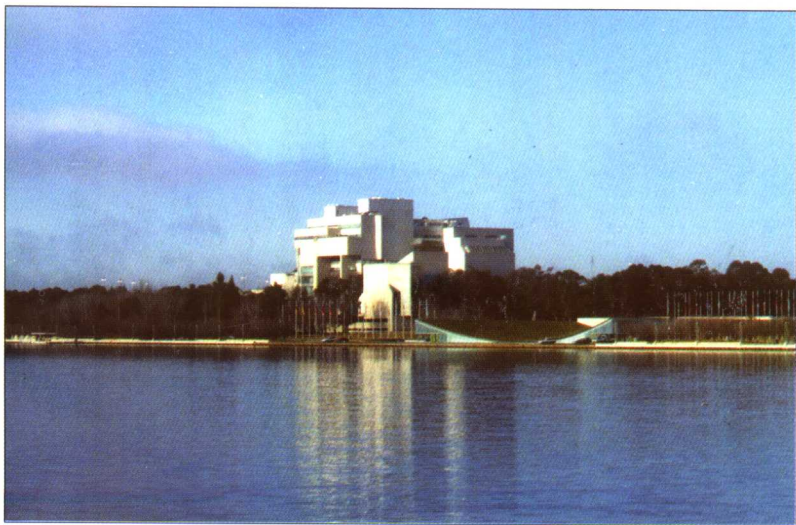
It is our hope that this book will make some contribution to the understanding of the criminal justice system and its practice in Australia. It is also our hope that more people will be interested in the study of Australian judicial system and its practice, which may inspire and provide reference to the judicial reform and practice of our country.

ZHENG LU NING

At 648, Jianguo Road (W.), Shanghai
February 2005



澳大利亚联邦国会大厦



澳大利亚联邦高等法院

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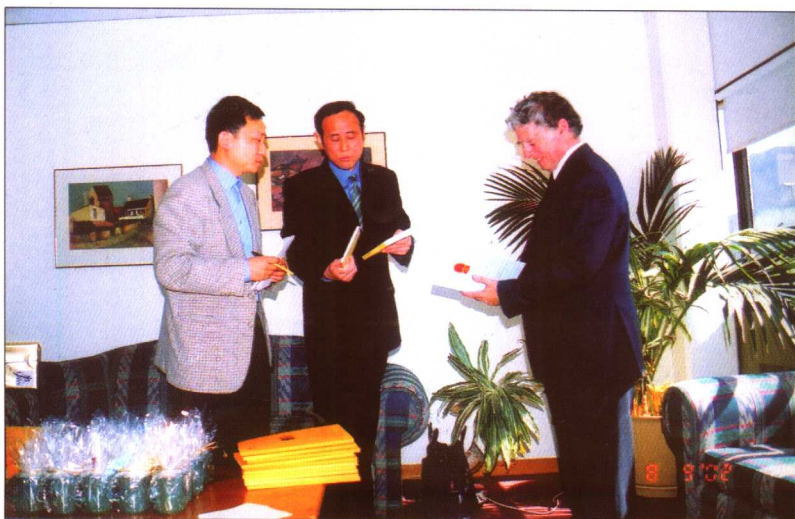
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团长郑鲁宁与新州监狱局副局长（右二）、长湾监狱长（左一）等合影



访问麦考里大学法学院与该院教授等合影



与麦考里大学法学院交换法律书籍