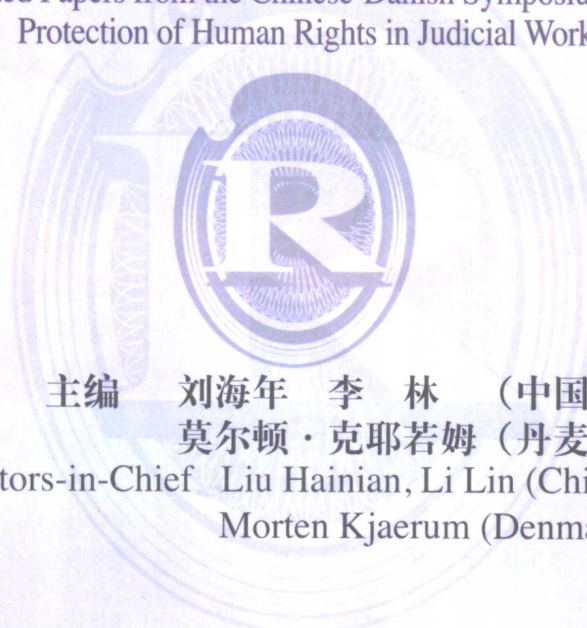


人权与司法

Human Rights and Administration of Justice

中国-丹麦司法中的人权保障学术研讨会文集

Collected Papers from the Chinese-Danish Symposium on the
Protection of Human Rights in Judicial Work



主编 刘海年 李 林 (中国)

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前 言 （一）

尊重和保障人权是世人普遍关注的事业。为了更好地相互借鉴和交流在人权保障方面的经验,应丹麦人权研究中心主任莫尔顿先生的邀请,我们于1998年10月下旬和11月上旬对丹麦王国进行了学术考察和访问,并于考察结束后,在哥本哈根举行了中丹两国司法人权保障学术研讨会。感谢莫尔顿主任、泰丽女士和丹麦人权中心的其他朋友,在他们的热情接待和周到安排下,我们的考察和双方共同举行的学术研讨会均达到了预期目的。

丹麦位于欧洲北部,南与德国接壤,北与瑞典、挪威隔海相望,西临北海,面积4.3万平方英里,人口520多万,居民主要是丹麦人、爱斯基摩人。丹麦为民主立宪政体,立法权由国王和议会共同行使,议会由普选产生。内阁由议会多数党单独或几个党派联合组成,总理由国王任命。除本土外,丹麦还管辖两个岛屿,即波罗群岛和格陵兰岛。从1979年起,格陵兰岛享受自治。美丽的自然条件,悠久的历史文化,安宁富足的生活,都使这个国家在世界上享有超越其土地面积和人口数量的声誉。

我们到达哥本哈根后,先后会见了丹麦外交和发展部部长、议会监察员、议会司法委员会主席、司法部警察局局长,访问了丹麦最高法院,参观了国家博物馆、监狱。与地区警察局局长和地区检察长举行了座谈,并拜访了一个颇为温馨的家庭。“百闻不如一见”。通过访问,使我们对丹麦的历史文化、政治法律制度和人权保障有了进一步了解,使我们对少年时代曾向往过的美丽的童话王国、美人鱼的故乡增加了实感。

丹麦是古朴而又美丽的。令人惊异的是,这种古朴美丽与现代化建设做到了较为完美的结合。丹麦的人权保障制度较为完备,宪法和法律对基本人权有明确规定;国际人权两公约早已获得批准;欧洲人权公约可以在司法中直接适用;上述法律和公约在实践中基本上得到了实施。据丹麦朋友介绍,丹麦的社会稳定;社会权利有可靠保障;与其他国家相比,警察在社会各种职业中威望列居榜首;已经废除死刑,对犯罪量刑较轻;监狱的条件也比较好。丹麦人权制度建设的实例表明,稳定与发展是人权保障的基础条件。不过从人口比例看,占丹麦犯罪数量大部分的交通肇事和毒品犯罪的犯罪率仍然较高,且从监狱释放后重新犯罪的比例也较大。此外,对外国移民限制比较严格,外国人只有具备丹麦法律规定的条件后方能获准在该国居住和工作,而其他北欧国家和欧共同体成员国的国民有优先权;外国人在丹麦购买房产受严格限制。这些做法被认为是对其他国家移民和外国人的潜在歧视。

我们与丹麦朋友举行学术研讨会的议题是司法中的人权保障。司法可分为民事、刑事和行政。笼统地说,它涉及个人、社会与国家。具体地说,它除涉及当事人(自然人和法人),还涉及法官、检察官、警察和律师,等等。司法面对的不仅是人和事,而且通过具体的人和事面对各种复杂的社会关系。粗略地划分,在现代国家,司法被认为是解决经济、政治、社会和文化领域纠纷的最后手段,也是人权保障最后的救济方法,其地位非常重要。莫尔顿主任希望以研讨会有限的时间重点讨论刑事司法方面的问题,我们欣然同意了。他还提出希望利用一段时间谈谈有关酷刑问题,我们也同意了。其实酷刑问题,今年10月19至20日在北京举行的“中国——欧盟第二次司法学术研讨会”上,已经进行了讨论,并在许多方面与欧盟国家的学者取得了共识。但鉴于酷刑在当今世界上不少国家明里或暗里不同程度普遍存在;酷刑为所有善良、有正义感的人所憎恶;鉴于酷刑的消除对于提高人类文明程度和国际

人权保障的重要性,我们认为进一步讨论并通过讨论加深认识是有益的。

中国和丹麦都是联合国《禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约》的参加国。两国学者都在为本国和世界上一切地方酷刑的最终废止而努力工作。我们认为,对于酷刑和所有司法中人权问题的研讨,无论是学者、人权活动家和政府官员,都应该怀着一种正义感、怀着一种建设人类文明的责任感,将之看做是共同的事业,进行平等交流和合作;而不应该“五十步笑百步”或“百步笑五十步”,相互指责和讥讽。如此,才能使研讨获得预期的效果。

本书是中国和丹麦两国学者提交中丹司法中的人权保障学术研讨会的论文或依据在会议上的发言整理出的论文,其观点不可能不受作者生活国度的文化传统和发展状况制约。但我自信,它的出版对于沟通中丹两国在司法人权保障方面的情况,增进两国人权理论界的相互了解,扩大两国学者进一步交流,都是一个贡献。

刘海年

1998年12月于北京

Preface I

Respect and protection of human rights is a cause that has aroused great interest among the people all over the world. Between late October and early November of 1998, we visited Denmark at the invitation of Mr. Morten Kjaerum, Director of the Danish Centre for Human Rights, to exchange experiences in the field of human rights protection. During our stay in Denmark, we carried out study visits and participated in a seminar on the protection of human rights in judicial work. Thanks to the careful arrangement by Director Morten Kjaerum, Professor Hatla Thelle and other friends from the Danish Centre for Human Rights, the study visits and the seminar has been very successful.

Denmark is situated in Northern Europe, to the north of Germany, to the south of Sweden and Norway, and to the east of North Sea. It has a territory of 43,000 square kilometers and a population of 5.2 million. Its inhabitants are mainly Danes and Eskimos. The political system in Denmark is that of constitutional monarchy. The legislative power is jointly exercised by the King and the Parliament. The members of the Parliament are decided in the general election. The cabinet is formed by the majority party or by a coalition of several parties. The Prime Minister is appointed by the King. Apart from the metropolitan territory, the Kingdom of Denmark also consist the Fareo Islands and Greenland. Greenland has enjoyed autonomy since 1979. Despite its small territory and popula-

tion, Denmark has achieved world-wide fame for its beautiful natural environment, its long history, its social stability and prosperity.

During our stay in Copenhagen, we met with the Minister of Development, the Parliamentary Ombudsman, the Chairman of the Parliamentary Legal Committee, and the National Commissioner of Police; We visited the Supreme Court, the National Museum and a prison; we held informal discussions with the chief constable and the chief prosecutor of a police district, and we also visited two lovely Danish homes. Just as the Chinese saying goes, it's better to see once for yourself than to hear a hundred times from others. These visits have greatly increased our knowledge about the history, the culture, the political system, the legal system, as well as the human rights protection system in Denmark. They had given us a sense of reality about this beautiful land of fairy tales, which had fired our imagination in our childhood as the "hometown of the Little Mermaid".

Denmark is a country with an age-old culture. To our amazement, this age-old culture is perfectly adapted to the process of modernization. Denmark has a well-developed human rights protection system: the basic human rights are provided for by the Constitution and the laws; the two International Human Rights Covenants have long been ratified by Denmark; the European Convention of Human Rights is directly applied by the judiciary; and the above-mentioned laws and treaties are generally complied with in practice. According to our Danish friends, Denmark enjoys high degree of social stability: a very good social security system has been established; Compared with similar countries, the Danish police enjoy the highest degree of trust with the population; the death penalty has been abolished and the punishment for various crimes are lenient; and the

conditions in prisons are very good. The Danish experience has proved that stability and development are the basic conditions for the safeguarding of human rights. However, statistics indicate that the rates of traffic violations and drug related crimes are very high, as is the rate of recidivism among the released prisoners. Besides, Denmark has imposed very strict restrictions on immigrants. Foreigners can obtain permissions to live and work in Denmark only if they meet the conditions prescribed by the Danish laws. The citizens of other Nordic countries and other members of the European Union enjoy certain privileges. Strict restrictions have also been imposed on the purchase of real estate property by foreign nationals. These practices are considered by some people as potentially discriminatory towards the immigrants and citizens from other countries.

The topic under discussion in this seminar was the protection of human rights in judicial work. Judicial work includes administration of civil justice, criminal justice and administrative justice. Generally speaking, it involves relationship between the individual, the society and the state. Specifically speaking, it involves the parties (natural persons and legal persons), judges, prosecutors, police, lawyers, etc. It deals not only with specific persons and acts, but also with complicated social relations. Judicial work plays a very important role in modern societies. It is considered not only as the last means for resolving economic, political, social and cultural disputes, but also as the last remedy in the protection of human rights. Director Kjaerum suggested that we devote our limited time to the discussion of the problems in the administration of criminal justice. We agreed. He also suggested that we spend sometime to discuss the problem of torture. Again we agreed with him. As a matter of fact, the prob-

lem of torture had already been discussed in the Second China-EU Seminar on Judicial Work, which was held between 19-20 of October 1998, and consensus on many issues in this area had already been reached between the Chinese scholars and scholars from EU countries. However, in view of the facts that torture is still widely practiced in many countries of the world, either openly or secretly, that torture is abhorred by all the good and honest people in the world, that the elimination of torture is of vital important to the advancement of the civilization and to the international protection of human rights, we believe that it was necessary to deepen our understanding on this issue through further discussion.

Both China and Denmark are state parties to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The scholars of both countries are devoted to the elimination of torture, not only in their own countries, but also in other parts of the world. We believed that, in the discussion of torture and other issues in the judicial work, all of us, whether scholars, human rights activists, or government officials, should refrain from attacking and ridiculing each other. Rather, we should carry out exchange and cooperation on the basis of equality and with a view to promoting justice and civilization. Only in this way can we achieve the expected goals of the seminar.

This book is a collection of papers submitted to the Chinese-Danish Seminar on the Protection of Human Rights in Judicial Work or papers prepared on the basis of the speeches given at the seminar. The opinions expressed in these papers inevitably reflect the cultural backgrounds and the levels of development of the different countries in which the different authors live. But I believe that the publication

of this book will contribute to the promotion of mutual understanding and of the academic exchanges in the field of judicial work between the human rights scholars in the two countries.

Liu Hainian

December 1998 in Beijing

前 言 （二）

中国社会科学院法学研究所和丹麦人权中心之间的良好合作是从 1998 年 2 月和 10 月在北京召开的两次“中国——欧盟人权和司法工作研讨会”上开始的。在这两次富有成就的研讨会上，中国和欧洲学者在一起交换了意见、观点和看法。

在刘海年教授的领导下，这两个机构之间达成了一个合作研究项目。该项目的目的是进一步探讨在这两次专家会议已经讨论过的一些疑难问题。很显然，这两次会议不可能对其议程上的所有问题进行深入探讨。尽管如此，我们还是达成了一个共识，那就是在有关领域进一步合作是非常有益的。在这一基础之上，我们决定集中讨论有关刑事司法，尤其是对酷刑和残忍、不人道和有辱人格的待遇的预防方面的问题。这些问题在中国——欧盟研讨会上已讨论过了。

人权的普遍性是我们在这两个研讨会上以及在中国社会科学院法学研究所和丹麦人权中心之间的合作过程中所达成的共识。但是在探讨人权问题的过程中，各位专家也意识到了中国和欧洲之间不同的文化和历史背景。因此，他们之间的讨论是本着 1993 年维也纳联合国世界人权大会的精神进行的。这一大会深入地探讨了人权普遍性和地方传统之间的平衡关系。这一微妙的平衡关系在维也纳会议之后不同地区、不同文化和不同宗教之间的许多具体合作中得到了进一步发展。通过这些合作，人权的内容日益丰富并且在人民的现实生活中的根基也越来越牢固。

这种合作在 90 年代末得到发展并非偶然。自从 1993 年世界

人权大会之后,国际人权日程的焦点在很大程度上集中于人权标准的实施。政府、学者以及非政府组织等等都在探讨如何在其特定的社会中改善特定领域内的人权状况。任何社会在确定其自己的人权保护模式和策略的过程中都可以通过公开和坦率的对话从其他社会中得到某种启发。那种一些国家照搬另一些国家的司法制度、议会制度以及其他社会制度的时代已经过去了。每个社会都应以国际人权标准为框架并参照其他国家的经验建立一个符合其自身需要的人权保护体系。毫无疑问,通过这种方法建立起来的人权保护体制要比迄今为止在世界许多地区所建立起来的任何其他人权保护体制都更具有持久性。因此,在全球性对话中,人们越来越从实际的角度出发来探讨人权问题。

这本论文集是1998年10月在哥本哈根举行的“司法中的人权保障——有关被关押人的权利及保护的国内人权标准的国内实施问题”研讨会的产物。这一研讨会是我们两个机构之间正式合作的开端。

集中讨论有关刑事司法,尤其是有关防止酷刑方面的问题对于任何一个社会来说都是非常重要的。被关押人总是面临着被虐待的危险,因此如何预防针对这些人的暴力问题应该列入任何一个社会的日程。目前人们已在全球范围内达成了一个共识,那就是在任何一个国家中,酷刑和虐待都不仅会损害司法制度而且还会阻碍民主的发展。但是人们也认识到,仅仅采取批准联合国《禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约》这一措施还不足以预防酷刑和虐待的发生。正如本书中的几篇论文所揭示的,一个社会只有在具备了一定的条件之后才有可能消除这一特定的侵犯人权的现象。这些条件包括:明确的立法,严格的警察招募和教育制度,独立的申诉机制,能够对具体案件进行调查的、自由的新闻媒体和非政府组织,国际监督以及公众的人权意识。在一个具备了以上这些条件的社会中,酷刑和虐待就会成为非常

罕见的现象,甚至可以被完全消除。在由刘海年教授带领的中国代表团访问丹麦期间,中丹两国学者就以上这些条件交换了看法。陈云生教授和毕小青助理研究员在1998年9月至1999年4月访问丹麦期间对丹麦有关领域内的实践进行了研究,从而进一步发展了这方面的合作。

我们希望通过这本论文集以及将来其他一些书籍的出版,我们两个机构之间在这一领域内的合作能够给中国——欧盟人权对话带来新的思想和启发。另外,我们还希望这一出版物能够对司法行政以及预防酷刑和虐待等领域内的学者和实际工作者有所帮助。

莫尔顿·克耶若姆

1999年4月19日

Preface II

At the first and second China-EU seminar on human rights and judicial work which took place in Beijing in February and October 1998 Chinese and European scholars met and had a fruitful exchange of ideas, views and understandings. It was during these meetings that the good collaboration between the Chinese Academy of Social Sciences and the Danish Centre for Human Rights took its beginning.

Under the leadership of professor Liu Hainian a joint programme was established between the two institutions. The aim of the programme was to develop further some of the difficult issues which had been discussed during the expert meetings. It was obvious that these meetings could only scratch the surface of the topics identified on the agenda. Nevertheless, the meetings brought about a common understanding that closer collaboration could be useful. On that basis it was decided to focus on the administration of criminal justice and in particular on the prevention of torture and cruel, inhumane and degrading treatment. These issues had been dealt with at the China-EU seminars.

The universality of human rights has been the common understanding and recognition at the two seminars and also in the collaboration between the Chinese Academy of Social Sciences and the Danish Centre for Human Rights. However, in the deliberations, experts have been sensitive to the different cultural and historical back-

grounds in China and Europe. Consequently, the discussions have taken place in the spirit of the 1993 UN World Conference on Human Rights in Vienna, where the balance between universalism and local traditions were discussed at length. Since the meeting in Vienna this delicate balance has been explicated in many concrete cases of collaboration across continents, cultures and religions. In any such collaboration human rights are being enriched and anchored more deeply in the every day reality of people.

It is no coincidence that this kind of collaboration is developing in the second half of the 90s. Since the World Conference on Human Rights in 1993 the international human rights agenda has to a large extent focussed on the implementation of human rights. Governments, scholars, NGOs and others are looking for inspiration and ideas on how to improve specific human rights issues in their particular society. In an open and frank dialogue any society can be inspired by others to create their own specific models and strategies to protect human rights. The time when countries hardly without any adjustments copied entire structures such as the judiciary or parliamentary systems is over. Each society should develop its particular structures which meet its needs and concerns using the international human rights norms as the normative framework and other countries as inspiration. Undoubtedly, this approach will create more sustainable systems than what has been the case in many areas hitherto. Consequently, human rights are now developing from a very practical outset in a global dialogue.

The articles in this volume is the outcome of a symposium on "National Enforcement of International Human Rights Standards on the Rights and Protection of Detained Persons" held in Copenhagen,