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刑罚差异性研究

王恩海 著

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《华东政法大学刑法学博士文库》
总　序

在现代社会，刑法在人类社会生活、国家生活中依然演绎着举足轻重的角色，彰显出其无尽的魅力。刑法学作为一种文化的凝结，激发着一代代的学人为之皓首穷经，兀兀穷年，刑法学的发展正是这样薪火相传，生生不息。在这样的传承过程中，《华东政法大学刑法学博士文库》（以下简称《文库》）就像涓涓细流或一缕烛光，以学者或学子们自身的沉思和耕耘为刑法学的研究和刑事法治的发展注入自己的精神，闪烁出自己的智慧。继承前人之心智和毅力，“安知不如微虫之为珊瑚与蠃蛤之积为巨石也”（章太炎语）。

华东政法大学刑法学科是上海市教委重点学科，早在1981年就获批设立刑法学硕士点，现已设立刑法学博士点和博士后流动站，刑法学课程被评为上海市精品课程和华东政法大学精品课程，曾得到联合国教科文组织和世界银行的重点资助，现在又成立了华东政法大学刑法学研究中心，为研究刑法学的学人提供了坚实的平台和良好的氛围。《文库》就是中心推出的系列著作中的一部分。作为博士们思想和智慧的结晶，作为他们宣传和弘扬刑法文化的窗口，《文库》中的著作包含着华政刑法专业博士生们的追求、志向和期望，维系着他们对法治前景的憧憬。

古人曾经指出：理论和学术的追求在于“究天人之际，通古今之变，成一家之言”（司马迁语）。著书立说，匡济天下，一直是中国文人的最高追求，这一根脉至今仍然浸润在当代学人的精神深处。在我看来，作为刑法文化的研究者，“弘扬、建构、批判”是基本的要求也是终极目标，也是《文库》追求的基本价值取向。

所谓“弘扬”，首先是指弘扬祖国优秀的刑法文化传统，发掘中国刑法文化中优秀历史遗产，汲取世界各民族一切合理的、现代的刑法知识成果，促进刑法的发展，促进法治的完善，促进社会的进步。无论是从文化发展的历史过程分析，还是从当代文化的构成体系分析，刑法文化都是人类生活不可或缺的选

择方式，刑法的发展更是直接和明显揭示了人类价值与信仰的一种追求，刑法文化从一定意义上说是一个民族、国家和地区在一定的历史时期适应环境并取得成功的一种记录。圣人贤良无非是人类文化与智慧的代言人，正是他们在对困境的思考中，产生出了精湛的思想，创造了不朽的著作，形成和丰富了文化的宝库。刑法文化既有多样性的要求，又有一些共同的价值取向，这些都需要学者们去传递和弘扬。

所谓“建构”，实际上就是与时俱进。从一定意义上说，刑法是稳定的但又是滞后的，刑法文化需要弘扬但更需要改造，尤其是处于社会转型时期的中国，社会生活日新月异，法治的许多领域都在改弦更张，在旧有体制逐步解体过程中，新的体制尚未确立的边际，建构成为一项重要的使命，这是社会的迫切要求，也是理论研究者的历史责任。就刑法而言，存在着大量的如哈特所说的“空缺结构”，需要我们去应对，去补缺，建构较为完备的刑法学理论，建立科学的刑法学体系，以制度的建构促进观念的更新成为刑法学理论的重要使命。

具体而言，这种建构包括博士们对于自身学术理论的建构，对于刑法制度的设计，也包括对于作为他们研究和学业成果的《文库》本身的建构。荀子在《劝学篇》中说道：“不积跬步，无以至千里；不积小流，无以成江海。骐骥一跃，不能十步；驽马十驾，功在不舍。”我坚信，在他们继往开来的努力中，一定会在我国刑法学术体系的建构中确立自己的位置和人生轨迹。

所谓“批判”，既是一种方法论也是一种思考的结果。建构与批判实际上是一个事物的两个方面。对于刑法学的研究同样既是一个建构的过程又是一个批判的过程。新的理论的建构、理论的完善必然包含着对于旧的理论、理论缺陷的否定或修补，否定或修补就是一个批判的过程。而立足于批判基础上的刑法理论必将促使人们去建构和完善刑法的理论和思想。当然，由于方法论的不同，建构与批判具体表现在行为的方式和思路上也会具有较大区别。据此我们也会发现在《文库》的一些著作中，有些著作更倾向于建构某些理论，有些著作则更为突出对于现实的批判，为人们提供思考的方法和路径。批判的方法张扬了理论和学术的独立性，体现了学术的本质冲动，体现了学术存在的内在必要性，为打破知识视野的局限性提供了批判的武器，当然在现实性较为直接的刑法学领域，有时又显得束手无策。但无论怎样，质疑和批判绝非仅仅是一种情绪化的产物，而都应该建立在广博而全面的知识积累基础上，都应该建立在冷静地理性论证的

前提下。

“文章千古事，得失寸心知。”本《文库》所追求的“弘扬、建构、批判”宗旨只是一种外在形式表达，从实质上说，博士应该有博学之才，应该是有识之士。他们可能青灯素面，他们也可能守土一方，但是作为“士”，诚意、正心、修身、齐家、治国、平天下的观念应该是不变的信条，著书立说应该是一件庄重而严肃的事情，应该是战胜自我，洁净心灵，悟透人生的过程。伟大的时代召唤着与其相适应的理论成果和人格性情，我衷心希望更多的博士们经过自身矢志不渝的追求，走在时代的前列，成为社会发展的动力源。

刘宪权*

2005年10月1日

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* 荷兰艾柔莫斯大学法学博士，现任华东政法大学法律学院院长、教授、博士生导师、刑法学研究中心主任，兼任中国法学会刑法学研究会副会长。

序

王恩海博士的毕业论文《刑罚差异性研究》即将由上海人民出版社出版，作者请我为该书作序。作为他的博士生导师，曾经指导了这篇论文的写作，通过这种方式向读者简要介绍本书的基本内容，是一个恰当的形式。

虽然我国刑法确定了罪刑均衡原则，理论界和实务界对其基本内容也并无多大异议，但在司法实践中同罪不同罚、显失公平的案件时有发生，并引起社会各界的广泛讨论。如何正确认识这一问题有赖于对罪刑均衡原则的正确认识和理解。本书即以此作为切入点展开探讨。

作者在考察司法实践中的常见问题后提出了刑罚差异性这一概念。认为刑罚差异性包括三个层次，这一独特视角使我们得以动态考察罪刑均衡原则。在揭示已然之罪、未然之罪和报应之刑、特殊预防之刑的基础上，作者结合具体案例明确了“均衡”的含义。同时，作者深入考察了刑罚差异的原因并给出了解决途径。

理论与实践相结合是本书的最大特点。很明显，本书的选题即是从实践中的常见问题出发，试图揭开刑罚差异存在的原因并予以限制，以达到最大限度的公平。同时，作者以介绍历史上的不同公平观为起点，逐层分析了刑罚差异存在的原因并予以解释。可以说，本书较好地贯彻了“从实践中发现问题，从理论层面出发解决问题”的研究思路。在作者提出的解决思路中，最值得关注的是作者提出了一套量刑方法，它主要包括如何确定量刑基准以及处理量刑情节冲突和竞合的规则，这些都体现了刑法理论与司法实务紧密结合的特点。

立法和司法相结合是本书的另一大特点。本书以司法实务问题为出发点，转而探讨立法得失，并为立法完善提供了建议。如果结合本书的主题看，这些无疑体现了作者深厚的人文关怀精神。由此也可以看出，一个公平的判决不仅需要良好的法律，更需要有深刻领会法律精神的司法者，这在现阶段发生的许霆案中得到了深刻的体现。

本书以刑罚差异性为起点，对刑罚论中的一些重要问题，如刑罚目的、量刑情节等问题展开了思考，并得出了自己的结论。其中有些结论可能并不一定能为所有人赞同，但其论证过程值得关注。同时，作者将刑罚论中的传统问题巧妙地契合在主题中，显示了作者较为深厚的理论功底。

应该看到，犯罪论和刑罚论是刑法学不可或缺的两大组成部分，但我国长期存在重视前者忽视后者的做法，本书即是对我国刑罚论的进一步深入探讨。我认为，本书对刑罚论研究的贡献最大的内容在于，作者以动态的视角考察罪刑均衡原则，突破了以往对罪刑均衡的静态理解，同时以此为依据考察司法实践中的具体案件，为其提供理论解释并探讨其中的利弊得失，以追求最大限度的公平。

当然，限于种种因素，本书存在一定不足。如在确定量刑基准时，仅仅有逻辑推演，而无实证调查。在某些论断上还存在论述不深，论证不足等问题。特别是在论述刑罚目的时，将理论界的通说双层预防说修正为报应和特殊预防，并以报应为主，观点虽然新颖，但论证过于简单。另外，某些结论与司法实践中的常见做法并不吻合，如主张减轻处罚存在"格"，这些似乎仍有待进一步考证。

青年教师王恩海是我指导的第三届博士生，他自刑法学硕士毕业后即留校在法律学院任教，后考取了我的博士生。在长期的交流中，我深深地体会到他对知识的渴望和积极探索的精神。现在他专职从事教学研究工作，我希望他能在以后的刑法理论研究中有更大的收获。

是为序。

刘宪权

内容摘要

公平、正义和平等始终是人类追求的目标，作为法律的保障法，刑法确立的罪刑均衡原则是实现这一目标的重要途径。但在司法实践中，经常出现同罪异罚的现象，导致了社会公众对判决的困惑。笔者认为，主要原因在于刑罚本身具有差异性。本书即是对这一问题的初步探讨。

第一章讨论了刑罚差异性的概念、特征和渊源，并将其与司法实践中的常见概念予以比较。认为刑罚差异性包括纵向差异和横向差异，前者表现为法定刑与公平观之间、宣告刑与刑罚基准点之间、执行刑与宣告刑之间的差异。后者表现为在不同时间、不同地域，甚至同一地域的不同法官对相类似案件甚至同一案件可能会判处不同的刑罚，它是刑罚差异性的外在表现形式。刑罚差异性是从动态罪刑关系的角度考察刑罚后得出的结论，具有客观性，其前提条件是罪名认定正确。在介绍了哲学中两种主要公平观的基础上，分不同历史阶段介绍了刑罚的公平观，认为公平观的不确定性是刑罚差异性存在的客观根据和理论渊源。通过比较论述了刑罚差异性与量刑平衡、量刑失衡、量刑畸轻畸重的关系，认为限制刑罚差异是保证量刑平衡的前提条件，量刑平衡是研究刑罚差异性的目的。刑罚差异性与量刑失衡、畸轻畸重的关系犹如物理学中误差与错误的关系，误差（刑罚差异性）是不可避免的，如果超过一定限度，就变成错误（量刑失衡、量刑畸轻畸重）了。最后简要讨论了研究刑罚差异性的意义。

第二章讨论了刑罚差异性与罪刑均衡原则的关系。从罪刑均衡原则与刑罚个别化关系的角度论述了罪刑均衡原则的含义，认为罪刑均衡原则要求刑罚的轻重必须与犯罪对社会造成的危害和行为人的人身危险性相适应，它体现了报应和功利的要求。认为罪刑均衡原则有人权保障和彰显正义的功能，是在立法和司法过程中必须坚持的原则。在确认刑罚目的是报应和特殊预防的基础上，以已然之罪和报应之刑、未然之罪和特殊预防之刑为标准，结合具体案例，探讨了实现罪刑均衡应当注意的问题，认为均衡并不是如数学公式般的均衡，这是不可能实现，也是没有必要实现的。均衡是比较后的结论，这种比较包括已然之罪与未然之罪的比较；报应之刑与特殊预防之刑的比较；不同法官对同一案件宣告判决的比较；不同法院对同一案件宣告判决的比较；不同时期对同一案件宣告判

决的比较；法定刑与公平观之间、宣告刑与基准点之间、执行刑与宣告刑之间的比较。最后，以立法阶段、司法阶段和理论研究为标准，讨论了刑罚差异性与罪刑均衡原则的关系。

第三章讨论了刑罚差异性存在的原因。认为其原因是多方面的，主要分析了三个方面的因素。第一节分析了人的因素。认为法官的具体情况，包括性别、年龄、籍贯、经济状况、个人习惯、成长环境、成见、性格等都会在很大程度上影响着案件的认定；诉讼参与人包括被告人、被害人、律师、证人、鉴定人、翻译人员、旁听人员的不同表现也会导致刑罚差异。第二节认为从重、从轻、减轻处罚的含义不明确，法定刑配置不当和量刑根据模糊是造成刑罚差异的立法原因。第三节认为对刑罚目的的不同认识、量刑方法不明确和法官自由裁量权过大是造成刑罚差异的司法原因。

第四章讨论了限制刑罚差异性的途径。在第三章的基础上，分析了如何通过立法途径、司法途径和程序途径限制刑罚差异。第一节分析了立法途径，主要包括明确从重、从轻、减轻处罚的含义，合理配置法定刑和明确量刑根据。认为，从重、从轻是相比较不存在从重处罚情节、从轻处罚情节的犯罪而言的，减轻处罚是在相应法定最低刑与其下一格之间的幅度内选择适当的刑罚，并认为对可以分割的刑罚种类，减轻处罚是指刑期的减轻，对不可以分割的，减轻处罚是指刑种的减轻。在分析法定刑攀比的基础上确定了配置法定刑的方法：首先，在类罪中确立某一犯罪的法定刑；其次，比较其他犯罪与该罪的轻重，确定其他犯罪的法定刑，同时，还需考虑其他类罪中相类似的犯罪，并以侵犯财产罪为例对此方法进行了分析。另外还认为，细化刑法分则、细化犯罪和优化法定刑也是合理配置法定刑的途径。在确定量刑原则的前提下，分析了我国刑法第61条的规定。着重分析了定罪情节和量刑情节，并探讨了禁止重复评价原则在量刑中的适用。认为，在量刑时，对定罪情节是否予以再次评价不能一概而论，应当具体情况具体分析，对可分的定罪情节，在量刑时有可能再次予以重新评价，但这种评价是在不同层次、不同意义上的评价，是必须的，不可避免的，它并不违背禁止重复评价原则。另外，民愤不应当成为量刑的考虑因素。第二节分析了司法途径，着重从完善量刑方法角度予以论述。将量刑分为四个步骤：(1)根据定罪情节确定具体的法定刑幅度；(2)在确定的法定刑幅度内确定量刑基准；(3)考察量刑情节，分析其对量刑基准的影响；(4)以量刑情节为根据修正量刑基准。并主要分析了后三个步骤。认为量刑基准是犯罪在常见形态下应当适用的刑罚，常见形态的确定标准是发案率最高的犯罪形态。本节结合我国法定刑的不同模式，以逻辑推理为方法，分析了以中线论为基础确定量刑基准的可行性。以法定情节和酌定情节为根据，提出了情节的量刑标准，并对同向量刑情节的竞合和逆

向量刑情节的冲突进行了分析，主张对前者采取相加原则，辅之以限制加重原则和吸收原则处理，对后者主要依据抵消法处理。本节确定的量刑方法可以表述为：以中线论为主要原则确定量刑基准；赋予法定量刑情节和常见的酌定量刑情节作用力；根据相加原则（吸收原则、限制加重原则）和抵消法，将量刑情节的作用力作用于量刑基准，最终确定宣告刑。第三节分析了程序途径。

结语是对本书的简要总结。认为刑罚差异性是客观存在的，它无法消除，只能采取各种途径予以限制。

ABSTRACT

Fairness, justice and equality have always been the goal of the human pursuit. As a law of legal protection, the principle of balance between crime and punishment established in criminal law is an important way to achieve this goal. But in the judicial practice, the phenomenon: different punishments to the same crime, has often led the public to judgment puzzles. In the author's view, the main reason lies in the inherent differences in penalties. This work is a preliminary study on the issue.

In the first chapter, I discussed the concept, characteristics and origins of discrepancy of criminal penalty, and compares it with the judicial practice in common concept. This chapter maintains that the discrepancy of criminal penalty could be divided into vertical discrepancy and horizontal discrepancy differences, the former is showed by the discrepancy between statutory sentence and the view of equity, declaration penalty and penalties benchmark, enforcement punishment and declaration penalty. The latter is manifested in that at different times and different regions, even in the same region, different judges possibly can condemn the different penalty to the similar case even identical case, which is the external manifestation of the discrepancy of criminal penalty. The discrepancy of criminal penalty is an objective conclusion based on the study on the penalty in the view of dynamic relationship between crime and punishment, the prerequisite is that the accusation is correct. This chapter begins with introducing two philosophical fair views, then it gives a presentation about fair view of penalty on different historical stages, and it holds that the uncertainty of fair view is the objective grounds and theoretical source of the discrepancy of criminal penalty. This chapter also, through the comparison, elaborates the relationship between the discrepancy of criminal penalty and the balance of sentencing, the unbalance of sentencing, the light sentencing and the heavy sentencing, believes that the limitation to the discrepancy of criminal penalty is the prerequisite to guarantee the balance of senten-

cing discretion which is the goal to make study on the discrepancy of criminal penalty. The relationship between the discrepancy of criminal penalty and the unbalance of sentencing, the light sentencing and the heavy sentencing, is just like the relationship between the error and the wrong in the physics, the error(the discrepancy of criminal penalty) are inevitable, if it surpasses the certain limit, if will turn to fault(discretion of punishment unbalanced, discretion of punishment lopsided). Finally, the article briefly discusses the significance to make research on the discrepancy of criminal penalty.

The Second chapter discusses the relationship between the discrepancy of criminal penalty and principle of balance between crime and punishment. This chapter elaborates the meaning of the principle of balance between crime and punishment in the view of relationship between the principle of balance between crime and punishment and the individualization of criminal penalty, holds that the principle of balance between crime and punishment demands a match between the degree of criminal penalty the jeopardize of the crime to society, it also manifests the requirement of retribution and utility. This chapter believes that the principle of balance between crime and punishment could function as protecting human rights and showing justice which is the principle needed to be insisted during the legislation and justice. This chapter then discuss the matters that should be noted in order to realize the balance between the crime and punishment, combined with specific cases, based the confirmation that the goal of the penalty is retribution and special prevention, taking criterion as ascertained offense and retribution penalty, unaccomplished crime and penalty for special prevention, holds that equilibrium is not like the one of mathematics formula which is not possible and not necessary to realize either. Equilibrium is the conclusion after comparison which includes the comparison between ascertained offense and unaccomplished crime, the comparison between retribution penalty and special prevention, the comparison of different judges toward the same case, the comparison of different courts to the same case, the comparison between statutory sentence and the fair view, declaration penalty and penalties benchmark, enforcement punishment and declaration penalty. Finally, this chapter discusses the relationship between the discrepancy of criminal penalty and balance between crime and punishment with the criterion of legislation, justice and theoretical study.

The third chapter discusses the reason behind the discrepancy of criminal

penalty. It mainly makes analysis on three factors of various reasons. First section has analyzed human's factor, the author thinks that judge's special details, including the sex, the age, the native place, the economical condition, individual custom, the growth environment, the prejudice, and the disposition and so on may have great influence to certain extent when deciding cases. The performance of litigant participants including the defendant, the victim, attorney, witness, the expert, interpreter, audits personnel can also cause the discrepancy of criminal penalty. The Second section consider that the legislative reason of the discrepancy of criminal penalty lies in both the ambiguous meaning of heavier punishment, light punishment and mitigation of punishment below the minimum statutory prescript, and improper statutory sentence allocation and the ambiguous sentencing discretion grounds. The third section holds that the judiciary reason of the discrepancy of criminal penalty lies in the different understanding to the goal of penalty, ambiguous sentencing method and oversized discretion of judges.

The fourth chapter discusses the methods to limit the discrepancy of criminal penalty. This part based on the third chapter, analysis the legislative and judiciary way to limit the discrepancy of criminal penalty. The first section analysis the legislative way, including clarifying the definition of the heavy punishment, light punishment, abating punishment, rational allocation of statutory punishment and indicating the grounds of sentencing discretion. This chapter holds that heavy punishment and light punishment are used when certain crimes doesn't fall into the circumstances of heavier punishment and light punishment, abating punishment means the mitigation of punishment below the minimum statutory prescript, and also believes that abating punishment means the mitigation of prison term to punishment which could be divided, abating of kind of punishment to punishment which couldn't be divided. This chapter defines the methods to allocate the statutory punishment based on the analysis on statutory punishment: first, to establishes the statutory punishment in the crimes of same kind; next, compares the weight of this crimes with others, to determine the statutory punishment of other crimes, at the same time the similar crimes of other crimes of the same kind is taken into consideration, and also carry on the analysis on this method with crimes against property as the example. This chapter also holds that making the specific provisions of criminal law more specific, making the crimes more specific and optimizing the statutory sentence are the methods to be taken to allocate the

statutory sentence reasonably. This chapter based on the principle of discretionary action of sentencing, carry analysis on the 61st stipulation of the Criminal Code of China. It analyzes emphatically the circumstances for adjudgment and sentence, and discusses the principle of prohibited repetition appraise used in the application of sentencing. It believes that at the time of sentencing, we may not take rigid attitude to whether to give a second appraise to the circumstances for adjudgment, but make specific analysis to specific circumstances, to circumstances of adjudgment which could be divided, it is possible to give another appraise which maybe not be in the same level and the significance may also be different, but this appraise is necessary and inevitable, not against the principle of prohibited repetition appraise. This chapter also believes that, the popular indignation shouldn't be taken into consideration when making sentence. The second section analyze the judicial way, elaborating emphatically from the angle how to perfect the sentencing method. This chapter divides the sentencing into our steps: (1) to determine concrete legal punishment scope according to circumstances for adjudgment; (2) to define sentence benchmark in the certain scope of statutory sentence; (3) to review the influence of circumstances for sentence to sentence benchmark; (4) to revises sentence benchmark in the light of circumstances for sentence. This chapter mainly carries on research on the last three steps. It holds that sentence benchmark should be the penalty needed to be applied in crimes of the normal configuration of which the fixing criterion is rate of exposed criminal cases. It combined the various model of statutory sentence of china, analysis the availability of confirming the sentence benchmark based on midline theory, take the logical reasoning as the method. Based on the legal circumstances and circumstances for discretion, it puts forward the criterion for sentencing, and carries on research with the concurrence of the sentencing discretion and the conflict of the reversion circumstances of sentencing discretion, maintain to take the doctrine of accumulation to the former, combined with principle of restrictive aggravation and absorption principle, and take the elimination methods to the later. The sentencing method confirmed in this chapter may be defined as follows: fix the sentencing benchmark in the light of principle of median line theory. Endow the function to legally-prescribed circumstances of sentencing and discretionary circumstances of sentencing; apply the function of sentencing circumstances to sentencing benchmark to fix the declaration penalty finally

according to the doctrine of accumulation (absorption principle and principle of restrictive aggravation) and the elimination methods.

Epilogue consists of brief summary to the work. It holds that the discrepancy of criminal penalty is objective and couldn't be removed, the only way is to take various measures to confine it.

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