



京师刑事法学博士文库（6）

刑事上诉制度的功能与构造

Function and Structure of the Criminal Appeal System

王超著



中国人民公安大学出版社

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京师刑事法学博士文库 序 言

经过精心筹划,“京师刑事法学博士文库”在北京师范大学这所拥有百年历史的著名高等学府面世。该文库在今日之北师大创办,可谓生逢其时,躬逢其势,恰逢其地。

所谓生逢其时,乃指文库诞生于中国刑事法学理论研究进入精耕细作阶段。这是一个需要并且能够产生精深的刑事法学理论专著的时代,文库的内容恰好迎合了这种时代的需要。

所谓躬逢其势,乃指文库诞生之时,恰逢中国法律改革和法治现代化运动如火如荼地展开,方兴未艾,文库有幸见证并参与到这一国家与民族法治振兴的大业之中。

所谓恰逢其地,乃指北京师范大学为文库的茁壮成长提供了良好的环境和肥沃的土壤。众所周知,北京师范大学是我国极少数目前即拥有百余年历史的著名高校之一。她发端于1902年的京师大学堂师范馆。经过百余年的历史积淀,她不仅有着深厚的文化底蕴与优良的人文环境,而且在诸多人文社会学科领域达到了国内或者世界一流的水平,培养了大批国家栋梁之材。长期办学实践形成的厚重稳健的办学风格和“学为人师、行为世范”的办学理念,为法学这一逻辑严谨、内容深邃、价值超凡的社会科学在北师大的发展提供了得天独厚的条件。古人云:“源不深而望流之远,根不固而求木之长,德不厚而思国之安”,犹如“伐根以求木茂,塞源而欲流长”。没有深厚的人文底蕴与长期的学术积淀作为基础,要想在法学领域有所建树,即便费尽一时之心力,亦难免流于肤浅,不成大器。在北师大创办刑事法学博士文

库，自始避免了先天不足。

毋庸讳言，与众多成熟并稳步前进的学科相比较，北京师范大学的法学学科还是非常年轻的学科。由于种种原因，不管是学术人才的培养和引进，还是学术理论的创新和发展，法学学科都要比其他社会学科逊色。这不仅使得京师法学在 20 世纪 90 年代错失发展的良机，而且与北京师范大学闻名遐迩的国内与国际地位极不相称。令人欣慰的是，这种情况自 2005 年有了重大改观。在北京师范大学校领导的大力支持下，以著名中年法学家赵秉志教授为院长的北京师范大学刑事法律科学研究院于 2005 年 8 月 18 日在北京隆重成立，成为中国国内刑事法学领域中首家且目前唯一的、专门从事刑事法学研究与人才培养的独立性、综合性学术研究机构。2006 年 4 月 26 日，在北京师范大学法律系的基础上，北京师范大学又正式成立了法学院。两院相继成立并得以迅速和良性的发展，标志着北京师范大学法学学科全面繁荣的新时代的到来。“人事有代谢，往来成古今。江山留胜迹，我辈复登临。”随着法学科学建设在北师大的全面展开，我们完全有信心经过若干年的努力，让北师大学术研究跻身于中国乃至世界法学强者之林。

“桃李不言，下自成蹊”。北京师范大学以其深厚的学术底蕴与宽松、自由的教育环境，吸引着国内外的青年学人慕名而来，追求精神的提升与文化的发展。“千里之行，始于足下”，任何宏大的事业都必须从一点一滴做起。北京师范大学刑事法律科学研究院深知，“百年之计，莫如树人”，十分重视刑事法学学科的人才建设，在建院不长的时间里，不仅引进了多位学术功底深厚、科研能力突出、在国内外有一定学术影响的中青年法学学者，而且招聘了一批毕业于国内外著名法学院、综合素质优秀、学术功底扎实的青年才俊。为了培育新人，使其在学术上不断推陈出新，北京师范大学刑事法律科学研究院凭借学校坚实宽广的学术综合实力与浓郁深厚的人文氛围，决定建立“京师刑事法学博士文库”，支持年轻的法学博士和博士后将其博士学位论文、博士后出站报告以学术专著的形式

形式付梓出版，以此作为促进京师刑事法学发展的重大举措之一。由北京师范大学刑事法律科学研究院的资深学者组成的编委会负责“京师刑事法学博士文库”的运作。

“京师刑事法学博士文库”主要面向北京师范大学刑事法律科学研究院所培养的法学博士、博士后以及引进的具有法学博士学位的教学科研人员。鉴于目前刑事法律科学研究院已经初步形成学历层次高、年龄结构年轻化、专业知识结构合理、团结和谐、奋发向上的学术研究梯队，本文库将同时兼顾实体法学与程序法学，以多学科、多维度的精神兼容并蓄，以开放的态度欢迎跨学科方面的研究成果，使其具有视野宽广、包容性强的时代特征。简言之，“京师刑事法学博士文库”将以质取文，唯质取材，但凡有所创新、质量上乘的著作，均可入选。

京师刑事法学博士文库编委会将主动联系新加盟的北京师范大学刑事法律科学研究院的法学博士和研究院毕业的博士生，了解其博士学位论文的选题、内容及结构等，以宁缺毋滥、铸造精品的原则及严谨、踏实、创新的学术态度从中谨慎选择优秀之作，并认真审读，提供切实的修改补充建议，供作者修正参考，并负责联系出版，虚心接受国内外刑事法学同行和社会读者的批评指正。我们希望“京师刑事法学博士文库”的作品虽属阳春白雪之作，却能洞明世事，传递俗理；虽属曲高之作，却不至于合者甚寡。同时特别申明：文库的范围不仅限于博士学位论文，只要是加盟刑事法律科学研究院的法学博士同仁创作出的学术精品，均可列入此文库见诸世间。愿同仁闻弦歌而知雅意，愿我等奏流水而遇知音。

“泰山不拒细壤，故能成其高；江海不择细流，故能就其深”。学术事业的发展与壮大依赖于理论的点滴积累。“京师刑事法学博士文库”在目前也许只是我国刑事法学学术事业中刚刚吐青的新芽，但是我们相信，它会在京师刑事法学博士文库编委会、加盟刑事法律科学研究院的诸位博士以及国内外方家学者和同行的精心培

育之下，逐步成长为国内外瞩目的参天大树，从而为繁荣、深化我国刑事法学学术研究，推动国内外刑事法学思想交流与学术合作，促进社会主义法治建设，作出有益的贡献。

北京师范大学刑事法律科学研究院
京师刑事法学博士文库编委会
二零零七年三月三日

Doctorial Series of books of Metropolitan Criminal Law Science

Preface

After carefully planned and prepared, "Doctorial Series of books of Metropolitan Criminal Law Science" has been established in this distinguished University with over a century history. We can well say that the establishment of "the Series" is on a proper occasion, in a proper situation and at a proper place.

Being on a proper occasion means "the Series" was established in the exquisite stage of China's criminal law scientific theory. This is a stage which needs and may produce profound masterpieces of criminal law scientific theory. The content of "the Series" is just right catering for the requirements of this era.

Being in a proper situation means while "the Series" being established, China's law reform and modernization are experiencing her development in the ascendant, just like a raging fire. "The Series" is lucky to witness and participate in the development of this great cause.

Being at a proper place means Beijing Normal University has facilitated "the Series" with healthy environment and fertile soil. It's well known, Beijing Normal University is one of the few distinguished Universities with over one century's history. She grew out of the Faculty of Education of Metropolitan University founded in 1902. After a century of development, through a century of accumulation, she not only holds deep-seated cultural foundation and good environment of the humanities, but also her disciplines of the humanities and social science have reached to the world standard or at the level of First Class in China. She has culti-

vated large numbers of National Talents. Firm and steady style and the conception of “studying to teach and acting to example” of running a school has provided the unique condition for the development of law science which requires rigorous logic, deep content and high value. Our ancestors said: “Fountainhead being not deep enough but hoping the water can flow farther, the root being not solid but hoping the trees can grow big, morality being not high but thinking about the safe of our State” is just as “cutting the wood in order for the exuberant trees, blocking up the fountainhead in order for the water flowing far”. Without deep-seated cultural foundation and long term academic accumulation as its base, it seems a bit superficial and ne’er-do-well to get major attainments in the field of law science, even though momentary mental and physical efforts have been used. The establishment of “Doctorial Series of books of Metropolitan Criminal Law Science” avoided the congenital deficiency from the very beginning.

No need for reticence, compared with the many ripe and steadily developed disciplines, the Law Science for Beijing Normal University is still very young. For the varieties of reasons, discipline of law science seems inferior to other social sciences, either in the cultivation and introduction of talents or in the innovation and development of academic theories. It not only made the Law Science of Beijing Normal University lost the chance of development in 1990s, but it is not matching with her famous international and national status as well. To be relieved, things have changed dramatically since 2005. With the support of the leaders of Beijing Normal University, College for Criminal Law Science of Beijing Normal University was solemnly founded in Beijing on August 18, with the noted jurist Professor Zhao bingzhi as the Dean. She has become the only independent and comprehensive academic unit in the criminal law scientific field specializing in taking on the criminal research and the talents

cultivation. Based on the Faculty of Beijing Normal University, Law School of Beijing Normal University was formally founded on July 26, 2006. Successive founding and rapidly well developing of these two schools signifies the prosperous new era is coming. "Human and nature have their own metabolization, old events have passed by. The world left wonders and interests, our generations step up". With the construction of Law Science of Beijing Normal University opening comprehensively, we believe absolutely we can enable Law Science of Beijing Normal University to rank among the world's most advanced influential universities nationally or even globally.

"If we are strict with ourselves, others will surely respect us". With deep-seated cultural foundation and free educational environment, Beijing Normal University has attracted young learners out of admiration home and abroad to pursue for spiritual promotion and cultural development. "A thousand-li journey is started by taking the first step". Any great cause should be done bit by bit. College for Criminal Law Science of Beijing Normal University knows deeply "as to a project of vital and lasting importance, human should be cultivated first". So she strongly emphasizes the construction of talents. Not long before the establishment of the college, she not only has absorbed many middle and young law experts who hold deep-seated academic foundation, good scientific research ability and academic influence home and abroad, but also has engaged a number of young talents who graduated from the famous universities home and abroad and hold good comprehensive qualities and solid academic foundations. In order to cultivate new talents and gradually make them weed through the old to bring forth the new and depend on her solid and wide comprehensive academic ability and strong and deep environment of the humanities, College for Criminal Law Science of Beijing Normal University decides to establish "Doctorial Series of books of Metropolitan

Criminal Law Science” to support young law doctors and postal doctors to put their fruits to be published in the form of academic books, as one of the great measures of promoting law science of College for Criminal Law Science of Beijing Normal University. Noted Editorial board organized by College for Criminal Law Science of Beijing Normal University is responsible for the management of “Doctorial Series of books of Metropolitan Criminal Law Science”.

“Doctorial Series of books of Metropolitan Criminal Law Science” is designed to face the young law doctors and postal doctors cultivated by College for Criminal Law Science of Beijing Normal University and the teaching and researching staff who have doctor degrees in law introduced by the College. Because College for Criminal Law Science of Beijing Normal University has preliminarily formed her united and harmonious academic research group with high record of formal schooling and reasonable specialized knowledge of structure, “the Series” will give considerations to both substantial and procedural law science and welcome multiple disciplines’ academic fruits with her open minded attitude and her spirit of multiple disciplines and sides. Thus she will hold her strongly magnanimous character of era with her wide vision. In brief, “Doctorial Series of books of Metropolitan Criminal Law Science” will choose the fruits merely according to its high quality. If the works are creative and is of high quality, it can be chosen. “Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science” will positively contact the new doctors graduated from College for Criminal Law Science of Beijing Normal University, getting to know the topic, content and structure of their essays. We will abide by the principle of putting quality before quantity and producing fine works and strict and steady and innovative academic attitude, choose the excellent works from them and carefully read and check, provide practical supplementary suggestions of amendments for the

authors to amend as a reference. We will be responsible for contacting publishing house, listen to criticisms with an open mind from our fellow scholars and social readers. We hope the works of Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science can find and know affairs of human lives, communicate common saying, even though they belong to the spring snow works; They are welcomed by many, even though they belong to the elegant works. Meantime we declare particularly the scope of "the Series" is not restricted in the field of doctoral degree essays, all the fine works or articles from the fellow law doctors in law are welcome. These articles and works can be listed in "the Series" and can be published throughout the world. May our fellow researchers know the real meaning while listening to the music; May we can meet our bosom friends while playing the flowing water.

"Mountain Taishan accepts small soils, so it can become high; Rivers and seas accept small streams, so they can become large". The development and expanding of academic causes depends on theoretical accumulation bit by bit. "Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science" may be the heading sprouts in the process of academic causes of our State's Criminal Law Science. But we believe that she can gradually become towering tree, attracting the attention home and abroad. It can make beneficial contributions for making our state's academic research of Criminal Law Science, promoting exchange and cooperation of Criminal Law Scientific thinking home and abroad, and accelerating rule of law's construction of our Socialism.

College for Criminal Law Science of Beijing Normal University
Editorial board of Doctorial Series of books of
Metropolitan Criminal Law Science
March 3rd, 2007

序 言

半个多世纪以来，我国之所以在刑事诉讼中一直实行两审终审制，而没有像世界许多发达国家那样实行三审终审制，可能与我国主流观点过于迷信刑事第二审程序具有强大的纠错功能密切相关。在主流观点看来，我国刑事第二审程序实行全面审查原则，第二审法院不仅审查事实认定有无错误、适用法律是否准确、诉讼程序是否违法，而且第二审程序原则上应当开庭审理，因此，刑事第二审程序足以纠正刑事第一审裁判可能出现的错误，而没有必要增加更多的审级。而且，从我国刑事审判制度的整体来看，也没有必要增加更多的审级。因为，一方面，我国刑事诉讼法对死刑案件单独规定了一整套严格的死刑复核程序，能够有效地防止错杀，保证死刑案件获得正确的处理。另一方面，即使少数已经发生法律效力刑事裁判出现错误，还可以通过再审程序予以补救。然而，从近年来的司法实践来看，不仅刑事第二审程序没有充分地发挥其纠错功能，而且死刑复核程序和再审程序也没有像人们所期望的那样起到弥补两审终审制的局限性的作用。例如，在第二审法院普遍采用书面的审理方式或者上下级法院之间的关系出现行政化的情况下，第二审程序很难实现法律赋予它的纠错或者救济功能。再如，在绝大多数死刑案件的第二审法院通常就是负责死刑复核的法院的情况下，第

二审程序和死刑复核程序往往合二为一，从而导致死刑复核程序名存实亡，人们试图通过死刑复核程序来检验、审核第二审程序的纠错功能或者救济功能，进而提高死刑案件的审判质量的愿望很难得到实现。

有鉴于此，审级制度或者上诉制度问题越来越成为理论界研究的热门话题。其中，最引人注目的莫过于理论界在反思两审终审制的基础上，普遍主张我国应当借鉴国外先进经验，实行有条件的三审终审制，赋予上诉法院以法律解释或者统一法律适用的功能，尤其是赋予最高人民法院制作判例或者制定公共政策的功能。客观地说，目前理论界对于两审终审制或者第二审程序的批评还是具有一定根据的。然而，就刑事上诉制度而言，尽管许多学者发现了症状，但不一定开对了药方。例如，许多学者针对第二审法院实行全面审查原则所带来的诸多弊端，主张我国应当取消全面审查原则，在划分事实问题和法律问题的基础上，明确将上诉程序定位为法律审理，尤其是未来的第三审程序应当实行法律审理，而不再实行事实审理。但是，在现行第一审、第二审程序往往流于形式从而无法彻底解决事实审理的情况下，我们很难指望第三审法院仅仅审理法律问题，而不再过问事实问题。再如，在法院内部或者上下级法院之间的行政化关系得不到彻底改观的情况下，通过增加审级的办法，并不能保证案件的审判质量。由此看来，对于我国刑事上诉制度的研究，要想取得一定的突破，不仅不能停留在就事论事的层面，而且不能动辄将国外所谓的先进经验作为解决我国问题的应然方案。但是，长期以来，正是由于不少学者过于依赖对策法学或移植法

学的研究方法，因此，目前关于刑事上诉制度的研究成果往往沦为一种书斋成果，不仅难以在理论上取得重大突破，而且无法真正地为立法与司法提供富有建设性的参考意见。

幸运的是，王超博士所著的《刑事上诉制度的功能与构造》并没有陷入对策法学和移植法学的泥沼。与传统的博士学位论文不同，《刑事上诉制度的功能与构造》采取了一种只发现问题、分析问题而不解决问题的研究思路，这反映出了作者比较强的创新意识与勇气。毕竟，按照通常的研究思路，在发现问题和分析问题之后，解决问题不仅是顺理成章的事情，而且是学术论文不可缺少的一个重要组成部分。在结构安排上，作者抛弃了教科书体例，始终从我国现实存在的问题出发，提炼出基本的命题，然后就这些命题进行充分论证。作者不仅以独特的视角，对我国刑事上诉制度在司法实践中存在的问题与缺陷进行了全面的解释与分析，对学术界关于我国刑事上诉制度改革的主流观点进行了全面评析和反思，论证了我国刑事上诉制度改革的困境问题，而且在此基础上，作者对刑事上诉制度与司法权之间的关系问题进行了周密论证，认为刑事上诉制度是由司法权决定的，中西方司法权之间的差异决定了西方国家刑事上诉制度与我国司法权不具备兼容性，我国不太可能按照西方模式对我国的刑事上诉制度予以重构。尽管本书没有对我国如何修改和完善刑事上诉制度问题提供具体的解决方案或者立法建议，但作者在灵活运用比较分析、实证分析、逻辑分析等多种研究方法的基础上，找到了我国刑事上诉制度存在的问题和缺陷。相对于