

### 刑法视野下的犯罪集团研究

On Criminal Groups in the Context of Penal Law

王俊平 著

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## 京师刑事法学博士文库 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世界或者国内一流水平,培养了大批国家栋梁之才。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瑕迹的国际与国内地位极不相称。今 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干 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目目前唯一的。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 成立法学院。两院相继成立并得以迅速良性发展。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, 让北师大法学跻身于 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。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,却不至于和者甚寡。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;江海不拒细流,故能成其大"。 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 二二零零七年三月三日

上的学术研究梯队、本文库格同时兼顾架体法学与程序法学、以多

充成果,使其具有视野意广、包奉社通的时代特征。简言之,"京

"刑事法律援王文革"得以质取文、唯质取材、但凡有所创新、

质量上乘的著作,故可人选

上学位论文的选题。 内容及生物等。以守块身溢、铸造精品的原则

及严谨、婚实、创新的学术态度从中证值选择优秀之作、并认真写

, 提供切案的修设补充建议, 供作者修正要者, 并负责服务出

(, 超少数美国网外州事及平周打和社会联系统治师,我们都

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华研究院传法单博士同仁创作出的学术精品、均可引入此文库见诸

世间。應同仁開放裝而知建度、應我等為流水而通知者。

"泰山不拒細擾。故能忠禁高。江海不並细流,故能成果太"。

学术事业的发展与壮大依赖于理论的点面积累。"京师刑事法学博

華 伯惠 我们相信 中全本直顺州草法学博士文库编卷会、加盟

## Doctorial Series of books of Metropolitan Criminal Law Science

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After carefully planed 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 tal-

ents cultivation. Based on the Faculty of Beijing Normal University, Law School of Beijing Normal University was formally founded on July26, 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 doctorial 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

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《刑法视野下的犯罪集团研究》系王俊平同志在其博士论文《犯罪集团研究》的基础上修改而成的,本书作为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"的著作之一,即将由中国人民公安大学出版社出版。作为作者的导师,我感到十分欣慰。他邀我为之作序,我欣然应允。

集团犯罪是备受世界各国和各地区的政治决策者和立法者关注的重点犯罪现象之一。从立法规制模式上看,有不少国家和地区都制定有专门的反集团犯罪法。例如,美国、日本、加拿大、南非和我国的香港特别行政区、澳门特别行政区以及我国的台湾地区;一些国家和地区虽然没有针对集团犯罪的专门立法,但在其刑法典中也都设有专门的条款,以防控集团犯罪现象的蔓延。特别是,在当今全球化的背景下,集团犯罪现象的意延。特别是,在当今全球化的背景下,集团犯罪也受到了一些以联合国为代表的国际组织的密切关注,并专门出台《联合国打击跨国

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有组织犯罪公约》及附加议定书等国际性法律文件,以遏制日益肆虐猖獗、危害极其严重、影响日趋广泛的跨国有组织犯罪。

对犯罪集团问题的研究。既可以立足于惩治和防范的 需要。围绕集团犯罪的成因和对策进行,也可以出于定罪 与量刑的需要, 围绕集团犯罪的认定和处罚进行。从我国 目前的研究现状看, 学界主要基于犯罪学的视角, 对黑社 会性质组织犯罪、恐怖犯罪等有组织犯罪产生的原因及其 防控做了大量的研究,发表了许多论文,出版了一些著 作。但从刑法的角度,对集团犯罪定罪与量刑的研究较为 薄弱, 有分量的论文和著作较少。就这一问题的刑法视角 的研究而言。我国1997年刑法通过之前。学者们主要关 注的是一些具体类型的犯罪集团的认定以及犯罪集团与犯 罪团伙的关系等问题: 1997 年刑法通过之后。随着我国 "打黑除恶"专项斗争的启动和逐步深入。刑法学界的研 究重心开始转向黑社会性质组织犯罪的认定及处罚方面。 一时间,发表和出版的论文和著作不计其数。这种研究状 况其实也凸现了我国目前如下的研究特点:集团犯罪的犯 罪学研究较为深入。而刑法视角的研究较为薄弱:对黑社 会性质犯罪以及恐怖组织犯罪的研究较为深入, 但将犯罪 集团作为一个整体来研究的成果则较少。在这种情况下, 王俊平同志立足于刑法定罪量刑的需要。以犯罪集团为题 撰写博士论文、既展现了作者理论密切联系实践的研究风 格,同时也具有填补国内空白的意义。相信本书的出版会 有力地促进法学界对此问题的关注,并有助于推动对这一 问题研究的深入。

统观全书, 我认为, 作者主要在以下方面取得了一定 的创新,通过对世界上主要国家以及我国有关反集团犯罪 立法的比较研究。认为。世界各国的立法对犯罪集团界定 的多样性,不仅由一国集团犯罪的发展状况及其态势所决 定。而且也与该国的立法者对集团犯罪的认识和在某一历 史时期所实际采取的刑事政策立场息息相关: 基于我国刑 法对犯罪集团的界定,在分析我国学者主张的基础上,研 究并归纳出犯罪集团成立的条件, 运用组织学的原理, 剖 析其组织性和固定性的特征: 主张在适用有关黑社会性质 组织的立法解释和司法解释时,不应根据从旧兼从轻原则 选择适用:对犯罪集团中"其他主犯"的范围主张区分不 同情形加以考察: 在对德日有关学说进行研究的基础上, 指出在我国刑法理论话语系统下对犯罪集团首要分子的归 责亦应坚持责任主义原则; 明确提出实行犯的实行过限在 刑法理论体系上属于共犯的错误问题,就首要分子而言, 实行犯是否属于实行过限,应当采取"未预见说",只要 实行犯实施的犯罪行为属于犯罪集团事先拟定的犯罪计划 的一部分,或者实行犯实施的其他犯罪行为系集团犯罪之 完成所必需。或者实行犯以犯罪集团的名义或集团成员的 身份并为集团的利益而实施犯罪,均应负刑事责任;主张 犯罪的实行着手具有法律和实质两个方面的特征、犯罪集 团首要分子的实行着手应以实行犯是否着手实行为准: 共 同实行犯的既遂与未遂形态并存说不仅理论根据不足, 而 且也会为刑法理论制造混乱和难题,应予否定:起次要作 用的从犯不能等同于次要的实行犯。其范围应区分不同情 况加以确定、等等。透过这些具体观点的论证、我们不难