黑龙江大学法学文丛

刑事自由裁量权导论

An Introduction of Right of Discretion in Criminal Cases

董玉庭 董进宁 著

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摘　要

现代社会的最重要特征之一就是法治化，法治这个概念在现代社会中具有无与伦比的褒义特征。但是法律的适用不能脱离人的因素而独立存在，当人的因素掺杂到法律适用过程时，自由裁量权问题几乎是必然存在的。自由裁量权是20世纪60年代后流行起来的法律用语，它与法治这样的根本问题有着密切的关系，它在司法实践中不是个别的现象，而是一种普遍的存在。现代法治社会因为存在自由裁量权，使得法律适用变得更加复杂。刑事自由裁量权是自由裁量权问题在刑事法领域的体现，刑罚权力的发动事关当事人的生杀予夺，所以刑事自由裁量权是刑法适用过程中极为重要的理论课题。怎样认识刑事自由裁量权，如何评价刑事自由裁量权的价值，法官如何获得并行使刑事自

由裁量权等诸多问题摆在我们面前。文章从以下六个方面对这些问题进行了全方位的探讨。

第一部分主要介绍了刑事自由裁量权的概念、特征及主体。刑事自由裁量权是指在刑法适用过程中，涉及刑法适用的官方人员在所适用的刑法规则内容允许的范围内，有权在可以采取的多种行为中作出选择。刑事自由裁量权具有双重性，使用恰当可以造福于民，使用不当可以有害于民。其双重性的根源在于刑事自由裁量权具有绝对性和相对性的双重品格。刑事自由裁量权的绝对性是指在可裁量的范围内，刑事裁量者的裁量行为是任意的，不受限制。刑事自由裁量权的相对性是指此种权力仅仅是一种弱式自由裁量权而非强式自由裁量权。所谓弱式是指裁量行为必须在一定范围内活动，必须运用刑法给予的标准。刑事自由裁量权最主要的主体是刑事法官。

第二部分主要对刑事自由裁量权进行了实证考察。无论在东方或是西方，在成文法出现之前的社会发展阶段，都实行过无限制的自由裁量主义。司法上的无限自由裁量，对于被裁量的对象是极不安全的，成文法出现之后，至少在形式上对无限自由裁量权进行了限制。19 世纪随着罗马法的复兴，欧洲基本上处于严格规则主义时代。严格规则主义是指在司法过程中严格排除法官任何自由裁量因素的立法模式。严格规则对无限自由裁量的否定当然具有进步意义，但严格规则的法治模式无法摆脱短命的命运，因为立法者的立法活动不可能穷尽一切。在法律活动中把人的因素给予过高或过低的估计都是不可取的，绝对自由裁量使人们失去安全，而绝对严格规则又使法律陷入僵化而不能满足社会生活的实际需要，严格规则与自由裁量的有机结合就是历史的必然。从世界范围看，几乎所有的现代法治国

家都普遍采用严格规则与自由裁量权相结合的法律运行模式。

第三部分主要探讨成文法局限与刑事自由裁量权的价值。应该讲,正是成文法存在着固有局限,才为法官刑事自由裁量权的存在提供了实质根据。首先讨论了通过语言制定成文法典会产生局限性的五个深层原因。然后着重讨论了成文法的局限。通过分析,本书认为成文法主要存在四个局限:(1)不合目的性;(2)不周延性;(3)模糊性;(4)滞后性。法律在满足稳定性、安全性、公平、正义、效率、周延完备、明确性、灵活性及适应性等诸多价值需求时存在着内在矛盾与张力。由此我们得出结论,光靠成文法典,是无法满足众多相互矛盾的价值需求的。因此必须在刑事司法中引入人的因素,赋予法官刑事自由裁量权。通过分析本书认为刑事自由裁量权有如下价值:(1)是实现刑法个别正义的手段;(2)可以克服刑事法典的不周延性,填补法律的漏洞;(3)能够克服刑事法典的滞后性;(4)可以消除法规范之间的矛盾,澄清歧义,使刑法更好地在现实生活中发挥作用。

第四部分主要探讨了法官刑事自由裁量权的根据及表现。理性主义与经验主义的结合是严格规则与自由裁量权相互结合的哲学基础。在人的理性范围内,用严格规则实现对世界的控制,在人类理性没有办法事先预测的领域或者说立法者的能力范围之外,只能由司法官员根据实际碰到的具体案件自由裁量。我国的刑事法律是在马克思主义辩证唯物主义和历史唯物主义指导下制定的。刑事古典学派主张严格规则主义,反对刑事自由裁量,刑事实证学派主张认可甚至扩大法官的刑事自由裁量权,刑事古典学派的精神理念与刑事实证学派的精神理念的结合是刑事司法实践中严格规则与刑事自由裁量权结合的法学理论基础。法官获得刑事自由裁量权的制度依据是刑法典的授

权。我国刑法典采取了两种立法技术授权法官自由裁量，其中包括明显性授权条款和隐含式授权条款，法官审理刑事案件主要包括两个阶段即定罪和量刑，法官不仅在量刑时享有自由裁量权，而且在定罪上也有不容忽视的自由裁量权存在。

第五部分主要探讨了刑事自由裁量权与刑法基本原则的关系。罪刑法定原则得以确立在某种意义上就是让立法权限制司法权。绝对罪刑法定发展到相对罪刑法定，标志人类对刑法现象认识的深化，使刑法基本原则更具现实意义。如果我们把罪刑法定原则理解为一种相对意义的罪刑法定，那么其与刑事自由裁量权不但不矛盾，而且刑事自由裁量权还是相对罪刑法定原则的逻辑结论。刑法必须以严格规则为主要立法形式，而刑事自由裁量权仅为补充，如果立法技术对于某一事物完全可以通过严格规则进行规范，那么对此事物规范中的任何自由裁量权都是多余的。在坚持适用刑法面前人人平等原则的同时，必须清醒地认识到自由裁量权的存在，所以适用刑法人人平等，实际上是包括了自由裁量因素在内的相对意义上的人人平等。罪责刑相适应的原则与传统罪刑相适应的最大区别就是它既注意刑罚与犯罪行为的社会危害性相适应，同时也注意刑罚与犯罪人的人身危险性相适应，因此罪责刑相适应原则在本质上呼唤法官的刑事自由裁量权。

第六部分主要讨论了刑事自由裁量权的负面效应及其克服。在充分肯定刑事自由裁量权价值的同时，同样应该认识到刑事自由裁量权是利弊并存的一把双刃剑。刑事自由裁量权的适用暗藏一个危机，也就是这种权力存在很大被滥用的危险，它可能被法官以合乎需要为借口，无法司法，任意裁量，损害刑法法治的统一。刑事自由裁量权的负效应一方面表现为刑事自由

裁量权容易造成司法随意性，另一方面容易造成司法腐败。刑事自由裁量权所造成的司法随意性既包括法官恶意行使刑事自由裁量权导致的司法随意性，同时也包括法官因个体差异而导致的司法随意性。在合法性掩饰下的刑事自由裁量权很有可能成为权钱交易、权色交易、权情交易的腐败温床。克服刑事自由裁量权的种种负面效应是一个系统工程，不但要用刑事司法解释严格限制法官的自由裁量权，同时建议最高司法机关应汇编典型刑事判例供各级法官参考。克服刑事自由裁量权负效应的最重要措施是真正提高法官的素质。

Abstract

As a concept, legal ruling has acquired an unmatched commendatory sense in modern society, where legalization has turned out to count for much. However, law cannot be applied independent of man. As a matter of fact, the question of discretion arises once a factor like man is involved in the application of law. As atechnical term popular with people as early as 1960's, discretion has been closely related to legal ruling, considered to be not an individual phenomenon, but a universal existence of judicial practice. It is the existence of discretion that causes the application of law to be more complex. Criminal discretion is what discretion assumes in criminal law. It is one of the most important theoretical issues yet to be solved in

the application of criminal law, because the exercise of penal power is always a matter of life and death to the party concerned. The present dissertation is intended to treat of criminal discretion, trying to answer the questions of how to understand criminal discretion, how to evaluate its importance, and how a judge acquires and exercises criminal discretion, etc.

The book is composed of six chapters.

Chapter One attempts to deal with criminal discretion, its subject and characteristics. By definition, criminal discretion means that as far as the application of criminal law is concerned, the officials pertinent to it have the right to make choice of the one they prefer from among quite a few criminal rules available. Discretion has duality, which means that it should be used properly, otherwise, it can do harm to the people. The duality of discretion stems from dual characteristics of discretion: its absoluteness means that discretion is random and unlimited within the scope of discretion, while its relativity refers to the fact that discretion must be conducted within a certain scope according to the relevant rules of criminal law.

Chapter Two is supposed to make an empirical study of criminal discretion. It is argued that unlimited discretionalism had been existent both in the East and in the West before the appearance of written laws, pointing out that unlimited discretion in judicial practice is unfair to the party to a certain extent. But, after written laws came into being, effort has been made to restrict unlimited discretion at least in form. Along with the rebirth of Roman Law in the nineteenth century, Europe came into the era of absolute rule-orientation, which

requires judges not to use discretion in judicial practice. Undeniably, negating unlimited discretion with strict rule-orientation means much. But, considering that lawmakers cannot make all the needed rules, absolute rule-orientation is destined to disappear. In legal activities, it is not reasonable to overestimate or underestimate man's factors. Absolute discretion makes people unsafe, while absolute rule-orientation causes law to be inflexible. In view of this, the union of rule-orientation with discretion is a historical necessity. Studies indicate that a model of absolute rule-orientation united with discretion has been adopted in almost all the modern countries characterized by legal ruling.

Chapter Three tries to discuss the limitation of written laws and the value of criminal discretion. In fact, it is the limitation of written laws that motivates the existence of criminal discretion. Thus, this part attempts to cope with the five causes of the limitation of written laws coded in words. It is suggested that written laws are limited in the following four aspects: (a) inconsistence with their aims; (b) indistributionality; (c) vagueness and (d) stagnancy, concluding that dependence on written laws alone cannot satisfy the demands of a multitude of contradictory values. It therefore follows that effort should be made to take man's factors into account in criminal judicature so that judges can be well equiped with criminal discretion, which is argued to have the following values: (a) instrumental for realizing individual justice with criminal law; (b) overcoming the indistributionality of criminal codes so as to make up for the demerits of law; (c) overcoming the stagnancy of

criminal codes and (d) removing the contradictions between rules so as to exercise criminal law to the full in reality.

Chapter Four touches on the basis and expression of judges' criminal discretion. The union of rationalism with empiricism is the foundation of the union of absolute rule-orientation with discretion. Absolute rules work to bring the world under control only when man's rationality is available. Discretion starts to operate where man's rationality cannot anticipate in advance. The criminal law of China has been made under the guidance of Marxist dialectic materialism and historical materialism. The Classical Criminal School support absolute rules while objecting to criminal discretion. On the contrary, the Positive Criminal School acquiesce in judges' criminal discretion, even enlarges it sometimes. It is suggested that the union of the ideas between the former and the latter is the jurisprudent basis of the union between absolute rules and discretion in criminal judicature. The foundation for judges to obtain criminal discretion is nothing but the rights accorded by criminal codes. The criminal codes of China take two forms of discretion on the part of judges: explicitly accorded right and implicitly accorded right. Judge, when they tackle criminal cases, usually go through two phases: defining crime and measuring penalty. Judges can exercise discretion in these two phases.

Chapter Five is concerned with the relationships between criminal discretion and criminal principles. The adoption of "the principle of defining crime and measuring penalty based on law" means that the right of law making works to restrict judicial right. Development from absolute to relative persistence in the principle

indicates that man has achieved a deep understanding of criminal law, which enables the basic criminal principles to be more realistic. To take the principle to be a relative one, we can see that such a principle is not contradictory to criminal discretion, but rather, it is the logic inference of the relative understanding of the principle. It is argued that criminal law should take absolute rules as its lawmaking model, with discretion to be an effective supplement. It deserves mentioning that the equality of people in front of criminal law is not absolute equality, but one in a relative sense, because discretion has been existent according to criminal law. It is suggested that one of the major differences between the principle of correspondence between crime, responsibility and penalty and the principle of correspondence between crime and penalty is that the former takes into consideration the correspondence between penalty and the harms of the crime in society, and the correspondence between penalty and the insecurity of the criminal. Just because of this, the principle of correspondence between crime, responsibility and penalty required judges to enjoy criminal discretion.

Last but not least dwells on the side effects of criminal discretion as well as the measures taken to over them. It is contended that to affirm and emphasize the value of criminal discretion is meaningful, but we should also know that criminal discretion has defects of its own, too. That is to say, a crisis of random abuse lurks in criminal discretion, which might be taken as pretext for personal gains. Criminal discretion has two side effects: it is likely to give rise to judicial randomness on the one hand and to result in judicial

corruption on the other. Judicial randomness refers either to the randomness judges cause when they purposely intend to exercise criminal discretion, or to the randomness which comes into being as a result of the individual differences between judges. To worsen the matter, under the legal cloak, criminal discretion is most likely to turn into hotbeds for trade between power and money, women and feelings. It is worthwhile to point out that overcoming all the side effects of criminal discretion is a systematic project: we should try to restrict judges' discretion by virtue of judicial interpretation and make proposal to the top judicial departments so that they can compile materials of typical criminal cases for judges at various levels. Of all these, the most important is to improve the quality of judges, because only when they are well improved with respect to discretion, can they set about using it to apply law.

前　言

对于正在步入现代化国家行列的中国来说，1997 年新刑法实行了罪刑法定原则，是划时代的进步，具有里程碑式的意义。它标志着中国法治现代化的真正开端，这一点已经取得广泛的社会共识。不论是法学界还是法律界，都认为罪刑法定原则来之不易，目前应该大加宣传，以使法治精神深入刑法领域。客观地说，罪刑法定原则目前还没有在全国各级法院特别是基层法院得到很好的贯彻落实。在此背景下，谈“自由裁量权”的问题，表面上看有点不合时宜。一提到“刑事自由裁量权”，人们自然就联想到“罪刑擅断”，想到无法司法，随意出入人罪的惨痛历史。正是这一原因，使我国目前对自由裁量权特别是刑事自由裁量权的研究还不够深入。

引发我们对刑事自由裁量权问题深入思

考的起因是法律实践所遇到的问题。在教学科研工作之余，我们兼职做司法实践业务。在办案的实践中，我们深有感触的是，虽然我国沿袭的是大陆法系成文法传统，没有明确使用“自由裁量”的法律术语，但由于成文法固有的局限及我国特有的立法技术的粗陋，使得我国法官在事实上拥有巨大的自由裁量权。从证据采信、事实认定、法律逻辑推理、法条选择及法律后果选择等很多都任凭法官自主决定。而又由于我国法院在判决书中，法官不陈述其之所以如此判决的法理根据，只用一句“本院认为……”就下结论。这使得我国法院的一些判决，表面上严格按法律判案，实际上在某些情况下有些法官主观武断地随意定案。这种以严格依法办案之名，行自由裁量之实的司法现状，为司法腐败提供了客观基础。

我们认为解决这一问题根本渠道之一是深入研究法官自由裁量权的问题，使自由裁量权问题显现化，明晰化，从而把法官对案件的裁量问题变成在阳光下操作。通过研究厘清法官在哪些问题上有权进行自由裁量，而在哪些事项上绝对应按法律规则办事。由此使法治真正得以实现。

刑事自由裁量权在刑事司法中是客观存在的。成文法固有的局限使得绝对严格规则主义无法真正实现。因此研究刑事自由裁量权的目的主要有二：(1)防止刑事自由裁量权被滥用，更好地贯彻罪刑法定原则；(2)克服成文法局限，使刑法更好地为社会生活服务。

基于以上考虑，我们把刑事自由裁量权导论作为课题进行研究，希望能够通过对刑事自由裁量权问题的系统研究，对我国刑事司法的改革与完善提供一点有益有参考，为法治现代化尽一点绵薄之力。

目录