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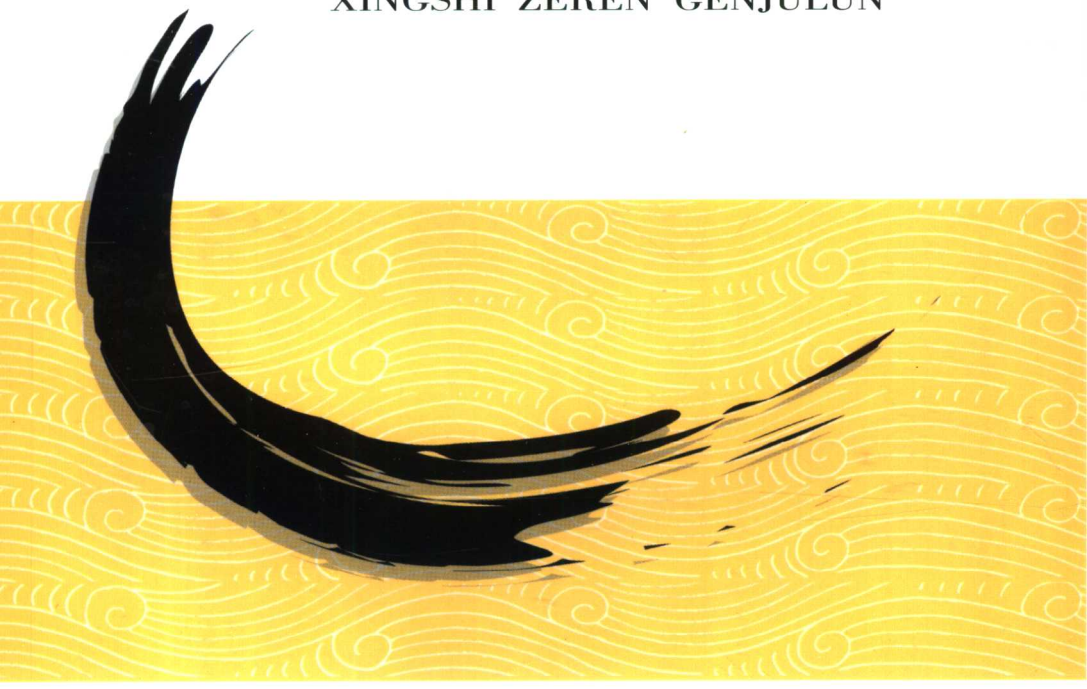
刑事责任根据论

XINGSHI ZEREN GENJULUN



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摘　要

刑事责任问题是刑法理论中的一个十分重要的问题，刑事责任作为犯罪行为的法律后果，它是与犯罪、刑罚和刑法相伴而生的。从一定的意义上讲，刑事立法、司法以及刑法理论中的诸多问题都是围绕刑事责任而展开的，整个刑法体系以刑事责任立论，以是否存在刑事责任及其大小，以为什么要追究刑事责任以及如何追究刑事责任为主题推动整个刑法有机体的运动、变化和发展，最后以刑事责任的实现为终结，它是主宰整个刑法体系的中轴。刑事责任既是联系犯罪与刑罚的纽带，也具有自身具体、独立的存在价值。它是凝结在各种犯罪之中的一种无差别的质的规定性。我国刑法分则规定了四百多个罪名，每一个犯罪的具体构成是不相同的，然而不同的犯罪之所以能够进行比较，判处一定的刑罚，究其原因主要是因为不同的犯罪中都包含着共同的价值因素——刑事责任。由于人们对于刑事责任的认识、研究与刑事责任在刑法中的应有地位是不相称的，与刑法理论中的其它问题相比，对刑

事责任的研究明显带有滞后性、不成熟性等特点，这种现象的产生，究其实质包括二个方面的原因：一方面是人们对刑事责任的研究没有引起足够的重视；另一方面是刑事责任在刑法体系中的应有地位没有得到确立。至于刑事责任理论中最重要也是最基本的问题——刑事责任根据问题更是无从谈起，因此研究刑事责任及其根据具有重要的意义。

在开展对刑事责任的根据这一基本问题的研究之前，有必要对刑事责任本身这一基础性问题进行研究，得出关于刑事责任的概念、特征等方面较为科学、合理的观点。由于我国刑法理论对于刑事责任这一基础理论问题的研究相对过缓，重视程度不够，研究的方法、角度又各不相同，因此，对刑事责任的概念、特征等这一开展刑事责任根据研究的前提条件，我国刑法理论都没有进行较好的研究，这种状况制约了包括刑事责任的根据在内的刑事责任理论的发展。要正确地界定刑事责任的概念，首先应从刑事责任自身的属性出发对刑事责任进行正确的认识，在此基础上，有必要对国内外关于刑事责任的概念的不同观点进行分类比较，分析差异产生的原因，并借鉴其中的合理成份，进一步结合我国的刑法理论与实践，得出一个较能体现中国刑法理论实际的刑事责任的概念。在德日等大陆法系国家，刑法理论与实务中一般都很少使用“刑事责任”这一术语，即使有提及的时候，也是“有责性”的代名词，即将刑事责任作为继构成要件该当性、违法性之后的犯罪成立的又一要件，“刑事责任”与“有责性”二者基本上是在同一意义上使用的。由于我国与前苏联及俄罗斯犯罪论体系的相似性，我国关于刑事责任概念及刑事责任其他理论的不同观点，都能在前苏联关于刑事责任的理论中找到雏形。如前苏联及俄罗斯关于刑事责任概念的一些学说：法律关系说、法律责任说、法律义

务说、否定评价说。由于受普通法传统的影响，英美国家的刑法学者们很少讨论刑事责任的概念，很少给刑事责任下定义，而是着眼于构成刑事责任的各个要素。这种处理，似乎刑事责任的概念尽在不言之中。在英美刑法学中，刑事责任一般理论没有受到应有的重视和展开，但是由于他们对刑事责任作了广义的理解，所以有关犯罪成立涉及的各种要素，都在“刑事责任”或“刑事责任的基本原则”的标题下展开论述。我国现行刑法对刑事责任的概念没有作规定，如前所述，我国早期的刑法学对刑事责任的研究甚少，刑事责任在很大程度上都被认为是刑罚的同义语。我国刑法学界对刑事责任展开研究始于20世纪80年代左右，以后关于刑事责任的研究都是直接受到前苏联及俄罗斯关于刑事责任研究的影响，相关的研究成果都是沿袭前苏联的研究成果，我国刑法理论中关于刑事责任的研究成果都可以从前苏联的研究成果中找到雏形。纵观我国刑法理论中关于刑事责任的不同观点，我们发现，均从不同的角度论证了刑事责任的一些属性，但对于刑事责任的概念的把握还有所欠缺，不够全面。笔者认为，要对刑事责任的概念有一个较为准确的把握，首先必须弄清这些不同的观点之间的差异产生的原因，在此基础上结合我国的刑法理论与实践，对刑事责任的概念作一个较为科学的界定。刑事责任是指基于行为人（包括自然人和单位）因其所实施的严重危害社会的犯罪行为所引起的，由代表国家的司法机关根据刑事法律的规定对其所追究一种法律责任，其实现的方式包括刑罚处罚和非刑罚处罚。这一概念，能从较多的具体方面准确界定刑事责任，涵盖了刑事责任的基本属性。结合我国刑法理论的自身特点及我国现行的刑事立法的实践，刑事责任具有如下特征：1. 刑事责任是联系犯罪与刑罚的价值因素；2. 刑事责任是最为严厉的、具有补充性质的法

律责任；3. 刑事责任的实现具有及时性；4. 刑事责任是一种主客观相统一的法律责任；5. 刑事责任是一种个人责任；6. 刑事责任具有报应性与预防性；7. 刑事责任是刑法实践的起点和归宿。根据不同的标准，刑事责任可以大致分为如下类别：1. 个人刑事责任与单位刑事责任；2. 立法上的刑事责任与司法上的刑事责任；3. 或然刑事责任与确定刑事责任；4. 单个刑事责任与多个刑事责任；5. 故意刑事责任与过失刑事责任；6. 作为刑事责任与不作为刑事责任；7. 单个人刑事责任与共同刑事责任。

刑事责任的根据是刑事责任理论中最重要的问题之一，它涉及整个刑事责任理论和刑法体系的构建，它既是刑事责任理论体系的根基，也是整个刑法体系这座大厦坚强的基石，它既说明了刑事责任的合理性，又论证了整个刑法体系的必要性，没有刑事责任根据的存在，整个刑事责任及其刑法体系便成了无源之水，无本之木。因此，刑事责任的根据是我们认识、研究刑事责任及其整个刑法体系的基础和逻辑起点，可以说几乎整个刑法体系的一切问题都与刑事责任及其根据有关。要对刑事责任的根据展开正确的研究，必须明确“刑事责任的根据”这一术语的含义，笔者认为，从关于“根据”一词的词义出发，刑事责任的根据即刑事责任的来源，实际上就是指如何认定刑事责任的决定力的问题，也即究竟是什么决定刑事责任是否存在及存在的大小。从犯罪人方面而言，刑事责任的根据说明的是犯罪人基于何种原因承担刑事责任及承担刑事责任大小的原因；从国家方面而言，它回答的是国家追究行为人刑事责任的原由，这说明刑事责任的根据即是国家追究行为人的刑事责任和行为人承担刑事责任的正当性事由，这种正当性事由包括合理性与合法性。合理性也叫合乎道德性，这就是我们通常所讲的追究刑事责任的伦理道德根据（哲学根据），合法性就

是我们通常讲的追究刑事责任的法律根据。但刑事责任的根据可以从多方位、多角度论证，除上述哲学根据和法律根据外，行为事实和人身危险性也可以成为刑事责任的根据，并且各种根据的地位是不平等的，哲学根据是解决刑事责任根据的“定向”问题，法律根据是解决刑事责任根据的“定性”问题，事实根据解决的是刑事责任根据的“定量”问题，“定性”问题是相对于“定向”问题而言的，“定性”问题与“定量”问题相比较，法律根据又变成了形式根据，事实根据又变成了实质根据。所以，刑事责任的根据是哲学根据和法律根据的统一，又是形式根据和实质根据的统一。刑事责任的根据说明了刑事责任据以产生的来源，刑事责任的根据与刑事责任理论的其他问题有密切关系，刑事责任的根据贯穿于刑事立法、刑事司法，刑事责任的根据是质与量的统一，这是我们认识刑事责任的根据必须把握的。刑事责任是一个法律范畴，同时也是一个历史的范畴，它是建立在一定的社会基础之上的，不同时期、不同社会基础的刑事责任的内容、涵义都不相同，同样，刑事责任的根据也就不相同，要对刑事责任的根据有一个正确的、全面的认识，有必要对刑事责任的根据进行历史的考察。对于不同的历史时期、不同的社会制度下刑事责任的根据的考察，有助于我们进一步从根源上探究刑事责任，从而使我们对刑事责任的研究能够较好地立足于对社会制度、经济基础的研究，使其建立在较为科学的根基之上。关于刑事责任的根据的学说，大陆法系刑法理论主要有道义责任论与社会责任论、人格责任论与性格责任论、规范责任论与心理责任论等几种不同的学说。

纵观我国及前苏联、俄罗斯刑法关于刑事责任的根据的学说，主要有如下一些学说：犯罪构成根据说、犯罪行为说、事实总和根据说、罪过说、行为符合构成要件说、社会危害性说。

要对刑事责任的根据进行正确的认识，有必要对这些差异产生的原因进行分析，进而对刑事责任进行科学的界定。在明确理论上关于刑事责任的根据分歧产生的原因后，笔者认为，应当结合我国的犯罪论体系来论述刑事责任的根据，并明确“刑事责任的根据”的含义，来正确认定刑事责任的根据。刑事责任的根据是多层面的，对刑事责任的根据的研究也是多层面的，包括哲学层面、法律层面、事实层面。

刑事责任的根据与刑事责任的本质之间具有密切的关系，二者也存在诸多的不同，这是我们开展刑事责任理论研究必须明确的。刑事责任的本质是刑事责任所固有的，决定刑事责任的存在、发展的根本性质或根本属性。刑事责任本质与刑事责任的根据二者相互影响，具有密切的联系。刑事责任的本质可以为研究刑事责任的根据提供指导，刑事责任的根据也说明了刑事责任的本质的来源。刑事责任的本质和刑事责任的根据是存在区别的，两者分别从不同的角度来说明刑事责任。刑事责任的本质是刑事责任所固有的，决定刑事责任的存在、发展的根本性质或根本属性。而刑事责任的根据即刑事责任的来源，实际上就是指如何认定刑事责任的决定力的问题，也即究竟是什么决定刑事责任是否存在及存在的大小。对于刑事责任的本质与刑事责任的根据的关系的正确把握，有助于我们进一步研究二者，并在刑事责任这一基本问题的统领下，丰富刑事责任理论的研究。

刑事责任的地位，概而言之，即指刑事责任所处的位置，从不同的角度看，有刑事责任在刑法理论中的地位、刑事责任在刑事立法中的地位、刑事责任在刑事司法中的地位。我国目前的刑事立法中对于刑事责任的应有地位并没有得到体现，司法实践中刑事责任的地位也没有受到应有的重视，无论是刑事

立法还是刑事司法，都没有摆脱“犯罪——刑罚”这一模式的束缚，这都与刑事责任在我国刑法理论中的应有的地位没有确定有关，正确评价刑事责任在我国刑法学体系中的地位，对完善我国的刑法理论、刑事立法、刑事司法都将产生深远影响。可以说，有关刑事责任的地位与刑事责任的根据之间是密切联系的，从不同的角度所界定的刑事责任的根据可以为正确确定刑事责任在相关层面的地位准确定位，同样，对于刑事责任的地位的不同定位，也会影响我们发掘刑事责任的根据。所以说，刑事责任的根据与刑事责任的地位二者之间是密切联系的。当然，刑事责任的根据与刑事责任的地位是从不同的层面论述刑事责任的，因而二者的差异性也是十分明显的。

当然，刑事责任的根据作为刑事责任的基础理论，还涉及到刑事责任的其他范畴，主要是刑事责任的目的、刑事责任的原则。刑事责任的目的是国家制定、追求或使犯罪人承担刑事责任的目的，包括根本目的——防卫社会和直接目的——预防犯罪。

刑事责任的根据与刑事责任的目的在学说流派上具有一定的对应关系，刑事责任的目的影响、制约着刑事责任的根据，而反之，刑事责任的根据是实现刑事责任的目的的重要保障，二者之间关系密切，但同时，它们之间也存在较大的区别，侧重点各有不同。

刑事责任的原则是国家制定、追究或使犯罪人承担刑事责任应当遵循的基本准则，包括刑事责任主客观相统一原则和刑事责任自负原则。刑事责任的根据与刑事责任的原则之间具有密切的联系，表现为刑事责任的原则贯穿于刑事责任的根据之中，但二者在侧重点、地位上存在较大的差别。

Abstract

The criminal responsibility is an important problem in the criminal law theory that is coincided with crimes, penalty and the Criminal Law. To some extent, among criminal legislation, justice, and criminal theories, there is a great deal of issues involved with the criminal responsibility. The whole criminal law theory is based on the criminal law theory, and it' s subject matter are the scale of criminal responsibility, the extend of criminal responsibility, the reason to find out the criminal responsibility and how to find out the criminal responsibility which promote the Criminal organism to movement, change and development . The criminal responsibility is not only a link between crime and penalty, but also has its own concrete, independent value. It is a tradition of non-discrimination in various criminal provisions of the qualitative nature. China' s criminal law provides for more than 400 hours on each of the specific form of crime is not the same, but different crimes can compare

to a certain penalty, mainly because the reasons for the different crime includes a common value factor-criminal responsibility. Because there was criminal liability awareness, research and criminal responsibility in the proper status of the criminal law is not commensurate with the criminal law theory, and other issues compared to the study of criminal responsibility is a lag, premature sexual characteristics, such phenomena, including The true essence of two factors: On the one hand was the research of criminal responsibility did not arouse sufficient attention; on the other hand, criminal rightful place in the penal system have not been established, the theory of criminal responsibility is the most important basic issue-the issue is about criminal liability under, and in accordance with the study of criminal responsibility is of great significance.

Before studying on this basic problem of the foundation of criminal responsibility, it is necessary for us to give a research to this basic problem of criminal responsibility itself, and get a scientific, rational view of its concept and characteristics. Because the criminal theory of our country is relative too slow in the research of this basic theoretical question of criminal responsibility, has not pay enough attention, and the method, angle of study are different, so as to the concept, characteristic of criminal responsibility, our criminal theories have not given a better research, and which deeply restricted the development of our criminal theories, including the criminal responsibility. In order to define the concept of criminal responsibility properly, at first, we should proceed from the attributes of criminal responsibility and give a proper understanding, and on the basis, it is necessary for us to classify and compare the concept of criminal re-

sponsibility of domestic and international, analyze the reason why the differences are, and draw lessons from them, further more, we should combine criminal theories with the practice of our country to get a concept of criminal responsibility that can relatively reflect our China's criminal theories and practice. In the continent law system of German, Japanese etc, the concept of "criminal responsibility" is seldom used in criminal theories and its practice, even if use the concept, it is the pronoun of "have the nature of responsibility", that is, criminal responsibility is regarded as an another important element which behind the nature of constituting conditions, the nature of law breaking in crimes' constitutes, "criminal responsibility" and "has the nature of responsibility nature" basically use in the same meaning. Because the theory of crime constitutes of our country is similar to that of the former Soviet Union and Russia, different views about the concept and other theories of criminal responsibility in our country can find the embryonic form in the former Soviet Union and Russia. Such as some theories about the criminal responsibility in the former Soviet Union and Russia: the theory of legal relationship, the theory of legal liability, the theory of legal obligation, the theory of negative comments. However, for the influence of the tradition of the common law system, the criminal scholars of the country of Great Britain and America seldom discuss the concept of criminal responsibility, also seldom to define the concept of criminal responsibility, but to form each key element of criminal responsibility. As to this treatment, it seems that the concept of criminal responsibility all need not to speak openly. In the criminal theory of Great Britain and American, the general theories of criminal responsibility are not been

paid its proper attention and expansion, however, for they have given a wide understanding to criminal responsibility, all key elements involved in crimes constitutes are depicted and discussed under the title of "criminal responsibility" or "the basic principle of criminal responsibility". The current criminal law of our country does not stipulate the concept of criminal responsibility, as noted previously, the early criminal theories of our country seldom give a study on criminal responsibility, to a great extent, criminal responsibility is considered as the synonym of criminal penalty. Our criminal theories began to study on criminal responsibility in the eighties of 20th century, all the followed studies are influenced by the former Soviet Union and Russia study directly, relevant results of research are all the results followed from the former Soviet Union, all the theory research results of our country in criminal responsibility can find its embryonic form in Soviet Union researches. In a word, reviewing all the different views of criminal responsibility in the criminal theory of our country, we and find some attributes of criminal responsibility from different angle, but to understand the concept of criminal responsibility, it still has some deficient, and it is not overall enough either. As the author, I consider that in order to get an accurate understand of the concept of criminal responsibility, at first, we must clarify the reasons why there are such difference between these different views, and on this basis, combine with criminal theories and practice of our country, give a comparatively scientific definition to the concept of criminal responsibility. So the Criminal responsibility refers to a kind of certain legal responsibility that based on the serious deeds committed by behaviors (include individuals and units) which endangering

the society deeply, and on behalf of our country, according to the criminal legislation to adopt, the ways of whose realization include criminal punishment and none criminal punishment. This concept can define criminal responsibility accurately from more concrete respects than before, and contain the basic attributes of criminal responsibility. Combined with our criminal theories themselves and the practice of our current criminal legislation, criminal responsibility possesses the following characteristics: 1, Criminal responsibility is the value factor of contacting crime and penalty; 2, criminal responsibility is the most severe legal responsibility, and have the property of supplementing; 3, the realization of criminal responsibility is timely; 4, criminal responsibility is a kind of legal responsibility unified with subjective and objective factors; 5, criminal responsibility is a kind of individual responsibility; 6, criminal responsibility has the nature of retribution and preventative; 7, criminal responsibility is the starting point and home of criminal judicatory. According to different standards, criminal responsibility can be roughly divided into the following classifications: 1, Personal criminal responsibility and unit criminal responsibility; 2, legislative responsibility and judicial responsibility; 3, probable criminal responsibility and confirming criminal responsibility; 4, single criminal responsibility and multi-criminal responsibility; 5, intention criminal responsibility and chance criminal responsibility; 6, doing criminal responsibility and none doing criminal responsibility; 7, individual criminal responsibility and unit criminal responsibility.

Criminal responsibility under the theory of criminal responsibility is the most important one, which involves the entire system of

criminal law and criminal responsibility theory building, both theoretical system is the foundation of criminal responsibility, but also the entire criminal justice system in this building a strong foundation, both on the criminal responsibility of rationality and feasibility of the entire criminal justice system need. To some extend, no criminal responsibility based on the existence of the criminal and penal system has become passive water, the wood without this. Therefore, criminal liability is based on our understanding, and the criminal responsibility of the entire criminal justice system research foundation and logical starting point, it can be said that almost the entire penal system with all the problems of criminal responsibility and under. According to the criminal responsibility of a correct study, it must be made clear the meaning of the term "criminal responsibility under", I think, from about the characters of "foundation" in mind, the criminal responsibility under criminal sources, we are actually referring to the decision of how to identify the issues of criminal responsibility, that is what is decided and the existence of criminal responsibility existence size. From the perpetrator side, on the basis of criminal responsibility is the grounds on which the perpetrators of criminal responsibility and criminal responsibility size reasons, from the national side, it is the answer to the origin countries for the perpetrator of criminal responsibility, this shows that is the basis for criminal liability for acts of the national criminal and perpetrator of criminal responsibility regarding the validity and legitimacy of this subject matter including rationality and legitimacy. Reasonableness is also called ethical nature, which is what we normally say criminally prosecuted on the basis of ethical (based on the philosophy), and legitimacy is