



京师刑事法学博士文库 (3)

普遍管辖原则研究

Research on Principle of Universal Jurisdiction

黄俊平 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，不成大气。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，让北师大法学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。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 cultivated 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 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

自 20 世纪以来,国际犯罪跨国化及组织化发展的态势日益加剧,国际社会不得不从各个层面加紧建立或完善预防与控制国际犯罪的法律机制。但是,由于国际刑法的直接实现方式存在先天不足,属地原则等传统管辖原则也有其固有缺陷,为防止犯有恶行的人逃避惩罚,国际社会开始关注不依赖法院与犯罪案件的紧密关联就可依其进行刑事管辖的普遍管辖理念。由此可见,能够弥补传统管辖原则存在的管辖漏洞,防止罪犯借此逃脱法网,应当是普遍管辖原则的主要价值所在。但是,与国际社会对普遍管辖原则此起彼伏的立法运动相比,国内外关于普遍管辖原则的理论研究显得相当薄弱,关于普遍管辖原则的科学内涵及基本问题少有人进行系统研究。因此,黄俊平同志以此作为博士论文选题,具有重要的理论意义和实践价值。

《普遍管辖原则研究》一书在考察普遍管辖观念历史沿革的基础上,辨析了普遍管辖原则的内涵等基本问题,阐释了普遍管辖原则的确立依据,分析了普遍管辖原则的适用条件,审视了普遍管辖原则的现状并提出了进行完善的若干设想。该书的创新之处在于:对普遍管辖原则含义的双重构造、对该原则与其他管辖原则以及与国际刑事法院管辖权之间关系的理性思考、对普遍管辖原则理论依据的多层剖析、对普遍管辖原则适用条件的严格把握以及对

普遍管辖原则完善措施的合理设想。这些独到见解对于增加人们对普遍管辖原则及其价值的了解与肯定，对于充分发挥其打击国际犯罪、维护世界和平的作用都十分有益。当然，由于国内外关于普遍管辖原则的研究尚不深入，加之国际犯罪本身的错综复杂与国际局势的风云变幻，书中有些观点有待深入挖掘，有些内容也有待进一步充实，前者如普遍管辖原则的法律依据，后者如普遍管辖原则对中国刑事法治的影响。

总之，《普遍管辖原则研究》一书是刑法学及国际刑法研究中一部具有开拓性的学术成果。本书资料丰富，内容充实；结构合理，逻辑清晰；论证充分，观点明确；表述严谨，文笔流畅；引注准确，符合学术规范。愿本专著的出版能引起理论界与实务界的关注与好评，也愿黄俊平同志百尺竿头，更进一步。

是为序。

王书志

二〇〇六年五月一日
于北京师范大学

引 言

人类怀着失落的心情告别了 20 世纪，这是一段值得纪念却不值得留恋的岁月。在过去的一个世纪里，科技的发展提高了人类的文明程度，但同时也增大了犯罪行为的规模与危害性；全球化的迅猛发展，使人们在各个领域内的交流与合作日益密切，同时也促使了犯罪行为有组织性、跨国性的联盟化发展。和平与安全是人类永恒的主题，但是国际犯罪却威胁着人类的生存。2001 年美国“9·11”恐怖袭击事件令人震惊，数千生命瞬间被瓦砾与废墟吞噬。而今天，世界各地的恐怖活动更是愈演愈烈：西班牙马德里的连环爆炸，不断出现的人质危机等，频频上演的人间悲剧一次次震撼着人们的心灵，一点点侵蚀着人类的安全感。

在包括恐怖主义犯罪在内的已经威胁到人类生存根基的暴行面前，人类比以往任何时候都更加深切地认识到：“地球上任何一个国家，不论它多么富有和强大，都不能在超越国境的全球性问题的困境中保全自己，”^① 人类必须团结起来共同维护人类的共同利益——世界的和平、安全与发展，为了这一目标，各国必须在刑事司法领域中大力合作，严厉打击违反国际法的国际犯罪行为。

在同国际犯罪作斗争的过程中，“为了防止罪犯逃避惩罚，任何国家都有权利或义务将那些实施恶行者绳之以法，只要其处于该国的实际控制之下”这样一个理念正得到越来越广泛的赞同。这就是普遍管辖理念，而直接依据这一理念所确立的就是普遍管辖原则。

① 梁西主编：《国际组织法》，武汉大学出版社 1998 年版，第 420 页。