

北京师范大学刑事法律科学研究院
京师刑事法文库 (20)

刑法探微

Exploring
Criminal Law

李希慧 / 著

○总论篇

论行为犯的构造

论刑法时效的立法完善

.....

○各论篇

论为亲友非法牟利罪

论洗钱罪的几个问题

.....



中国人民公安大学出版社

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京师刑事法文库

总序

现代化的国家是法治国家。现代文明进步的社会是法治社会。我国依法治国、建设社会主义法治国家之基本治国方略的确立及其贯彻，对社会的发展进步至关重要。而现代刑事法治则在现代化法治国家中扮演着非常重要的角色。改革开放后的二十多年来，我国的刑事法治已经取得了长足的进步。但是，在新世纪建设社会主义法治国家的进程中，无论是刑事法学理论还是刑事法治实践，都仍需要进一步发展完善，以更为充分地发挥其应有的作用。

北京师范大学刑事法律科学研究院于2005年8月建立，系专门从事刑事法学研究的、中国刑事法学领域首家且目前唯一的、独立的实体性综合性学术研究机构。研究院以一批中青年专家学者为中坚，并聘请了包括老一辈著名刑法学家、中央政法机关专家型领导以及重要国际组织领导人在内的国内外知名刑事法专家、学者担任特聘顾问教授、专家委员会委员、兼职教授（研究员）。研究院的设立，旨在建设全国领先并与国际知名刑事法学机构看齐的新型刑事法学术机构，本着刑事法学一体化的精神，逐步全面发展中外刑法学、国际刑法学、区际刑法学、刑事政策学、犯罪学、刑事执行法学、中外刑事诉讼法学、刑事证据学、刑事司法制度等刑事法的诸多学术领域，培养高级刑事法学专门人才，为中国法学研究和高层次人才培养进行新的探索，力争为中国依法治国、建设社会主义法治国家的伟大事业在刑事法学领域作出更大的贡献。

为达此目标，研究院成立伊始即创办“京师刑事法文库”。研究院的主要成员在中国人民大学刑事法律科学研究中心工作时，亦

曾设立“刑事法律科学文库”与“国际刑法研究所文库”，并已颇具规模。为获得更为广阔的学术发展空间与学术交流平台，数位专家学者首批加入北京师范大学创立了全国首家实体性的刑事法律科学研究院。学术事业是薪火相传、继承发展的事业，为使刑事法学术事业得到进一步传承和发扬，北京师范大学刑事法律科学研究院遂在我们设立的原“刑事法律科学文库”与“国际刑法研究所文库”的基础上，重新创办两个系列著作项目，并定名为“京师刑事法文库”和“京师国际刑事法文库”。两个文库是分工不同、相辅相成的姊妹项目，前者以国内刑事法著作为范围，后者以国际刑事法著作为范围。两个文库以百年名校北京师范大学深厚的学术积淀、悠久的历史传统和浓郁的文化氛围为依托，凭借北京师范大学坚实宽广的人文社会科学和自然科学的综合实力，并广泛争取和吸纳中外刑事法学界的支持与帮助。“京师刑事法文库”的出版领域主要包括国内刑事法律与刑事法学方面（包括刑法、犯罪学、刑事执行法学、刑事诉讼法学、刑事侦查、刑事物证技术等领域）的有新意、有深度、有分量的著作与译作，也会涉及我国港澳台地区刑法暨中国区际刑事法等领域的科研成果，可以是专题研究、综合研究，也可以是论文集、有价值的文献资料等形式。作者以研究院专职、兼职研究人员为主，并向其他专家、学者开放。

我们希望通过文库形式能逐步积累学术成果，繁荣、深化和开拓刑事法领域的学术研究，促进国内外刑事法学界的交流合作，不断提高我国刑事法理论与实践水平，进而有力地促进国家现代法治之昌盛和社会的文明进步。

北京师范大学刑事法律科学研究院

院长 赵秉志 教授

谨识于乙酉年初秋

College for Criminal Law Science of Beijing Normal University Criminal Law Library of BNU

Preface

A modern country and a modern civilization should be governed by law. The establishment and actualization of the principal guideline of rule by law is crucial for our society to make progress in the efforts of constructing socialism under rule of law. Modern criminal law, playing a very important part in the development of modern society under rule of law, has achieved great progress in the past two decades since 1978 when the reform and opening - up policy was carried out. Whereas, further development and reform for both theory and judicial practice of criminal law are required in the process of building socialist legal democracy, so as to bring it into full play.

The College for Criminal Jurisprudence Studies of Beijing Normal University, founded in August of 2005, is the first and, at present, the only academic research organ in China specializing in criminal jurisprudence that is independent and comprehensive entity. The College is staffed with a group of famous young and middle - aged criminologists as academic nucleus and a group of criminologists and scholars known home and abroad as specially invited consultative professors, member of experts committee, guest research fellows (professors), including those senior professors, leaders with judicial expertise from the central procuratorial, judicial and public security departments and leaders of some

important international academic organizations. The college, aiming at turning into a new national leading academic body which can keep pace with international prestigious organs of criminal jurisprudence, is gradually extending its research fields covering Chinese and foreign criminal jurisprudence, international criminal law, trans - regional criminal law, criminal policy science, criminology, criminal executive law, Chinese and foreign criminal procedure law, criminal evidence law, criminal judiciary and so on following the spirit of integrated criminal science. Meanwhile, the College trains high - level criminal jurisprudence professionals and makes new exploration into research of jurisprudence and cultivation of high - level professional in China. We are trying our best to make a greater contribution in the field of criminal law science to the great cause of building our socialism under rule of law.

Cherishing this hope, the College initiated the Criminal Law Library of BNU as soon as it is founded, with the working experience of Criminal Jurisprudence Library of RUC and International Criminal Jurisprudence Library of RUC which had been established in the Criminal Jurisprudence Research Center of RUC and in a rather large scale before the main staff's transfer to the College. In order to obtain a broader space for academic research, we six scholars transferred from RUC to BNU and founded this first and the only one independent academic entity in our country—College for Criminal Law Science of BNU. Learning is a continuous business, so the College re - establishes two book - series programs named "Criminal Law Library of BNU" and "International Criminal Law Library of BNU" based upon the former two libraries so as to further develop our academic cause. The two sisterly programs undertake different missions and supplement each other. The domain of the former focuses on domestic criminal jurisprudence literatures and the latter on international criminal jurisprudence literatures. Depending upon

the profound academic deposit, centuries – old historical traditions and full – bodied cultural atmosphere of the prestigious Beijing Normal University and with BNU ' s comprehensive and powerful integrative strength in both fields of humanity social science and nature science, the two libraries will attract and accept the contributions from the field of criminal jurisprudence home and abroad. The publications of Criminal Law Library of BNU cover the creative and profound works and translations on domestic and foreign criminal jurisprudence (criminal law, criminology, criminal execution law, criminal procedure law, criminal investigation and criminal evidence etc.) and those academic and research fruits in the field of extroversive criminal law (including international criminal law, comparative criminal law, foreign criminal law and criminal laws of Hong Kong, Macao and Taiwan). The publications may be of either special topics or general topics or translations of foreign literatures and codifications. The authorship is mainly entitled to full – time and guest research fellows besides other experts and scholars engaged in criminal jurisprudence.

Through these programs of libraries, we seek to help to accumulate academic fruits, to exploit and deepen and thrive the academic researches on criminal jurisprudence, to facilitate exchanges and co – operations between domestic and foreign colleagues engaged in criminal jurisprudence and to gradually improve our theoretical and practical expertise of criminal law so as to accelerate the prosperity of our country under rule of law and the progress of social civilization.

Prof. Zhao Bing – zhi
Dean of College for Criminal Law Science
Beijing Normal University
Autumn of 2005

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总论篇

试论我国刑法基本原则的几个问题

一、我国刑法基本原则的定义

关于我国刑法基本原则的定义，目前刑法理论界有不同的见解。有的将我国刑法的基本原则界定为：“在制定和适用刑法过程中，必须严格遵守的准则，它是刑法所固有的、带有全局性、根本性意义的原则。”^① 也有的人认为：“我国刑法的基本原则，就是确定刑法关于犯罪与刑罚等一系列基本问题时所遵循的原则。”^② 还有的表述为：“刑法的基本原则就是协调刑法体系内部犯罪和刑罚相互关系依据的原则。”^③ 种种表述，见仁见智。

笔者认为，要正确地界定刑法的基本原则，必须明确以下几点：

首先，必须明确刑法的基本原则不是由法律明文规定的。我国刑法的基本原则既没有见之于宪法的规定，也没有明定于刑法的自身条文，完全是由学者们以现行刑法的具体规定为主要根据，并结合我国刑法的性质、刑事政策确立的。

其次，必须明确刑法的基本原则是刑法所特有的。不强调这一点，就可能把刑法基本原则同普遍适用的各部门法共有原则混淆起来，从而把各部门法共有原则也纳入刑法基本原则的范围。

再次，应当明确刑法的基本原则是贯穿于刑法始终的，带有全

① 何秉松主编：《刑法教程》，法律出版社1987年版，第9页。

② 林准主编：《中国刑法教程》，人民法院出版社1989年版，第10页。

③ 杜波：《试论刑法的基本原则》，载《河北法学》1990年第4期。