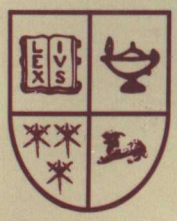

第6卷·第2辑

北大法律評論

PEKING UNIVERSITY LAW REVIEW

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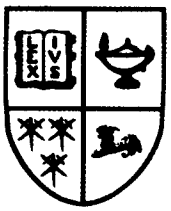

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《北大法律评论》编辑委员会

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《北大法律评论》　编辑委员会

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Vol. 6, No. 2 (2005)

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编者按语

本辑主题研讨:死刑问题。自贝卡里亚以降,死刑存废的论争一直是各种社会心理与价值判断之间激烈交锋的场所。而当死刑存废问题在一个国家成为矛盾的焦点时,几乎必定是这个国家的制度与社会观念同人权保障等新兴诉求在新旧交叠之际产生了冲突。21世纪初叶的中国,正是处在了这样一个关节点上。于是一些与死刑相关的刑事案件受到社会舆论的空前关注,决策者应对公众舆论挑战的过程,也许就酝酿着即将到来的巨大变革。这正是我们将站在这个领域最前沿的学者的声音作为本辑主题研讨内容的原因。作为一个不仅仅限于智识领域的社会问题,死刑问题的根本解决取决于学者、民众与决策者在法律、道德、社会情感以及政治生活等领域里的多重博弈,最后达致一个结构复杂的均衡状态。本辑收录的死刑专辑五篇文章揭示出研究这个复杂结构所可能展开的更为丰富和多元化的思路。

陈兴良《关于死刑的通信》以书信体的形式展现了专业学者与一个普通公民在死刑问题上的对话与交流。人道与宽容是这篇文章的基调。作者认为死刑的真正废除有赖于政治家的决策,而后者则常常掣肘于民意,因此需要通过宣扬和培育社会宽容来淡化乃至祛除一般民众的复仇心理。该文的有趣之处,不仅在于书信体的写作方式本身,更在于这一次并非是将学者理想赋予虚拟的波斯人,而是来源于一位中国公民的真实来信。这就使得作者的阐述具有了坚实的附着,也成为知识分子在专业话题上参与和影响公众舆论的一次个人实践。

陈兴良的另一篇文章《受雇佣为他人运输毒品犯罪的死刑裁量研究》虽然同样源起于一封死囚的来信,但是更具体地着眼于两个具体案例,通过分析裁

判理由，对于受雇为他人运输毒品犯罪的死刑适用提炼出相应的裁判规则。不是单独研究规范或案件，而是从法院公开的司法判决书出发，对所涉及到的相应罪名进行“判例刑法学”研究，是作者近年来值得关注的学术动向，也是我们收录这篇文章的原因之一。此外，文中由毒品案件的死刑适用延伸到死刑复核权上收至最高人民法院的论证，在当下极具现实意义。

梁根林的《中国死刑控制论纲》立足于当下具体国情和犯罪态势的现实制约，从十个方面就我国死刑控制的路径选择和制度建构进行了系统的设计。尽管主题和结构使得文章以一种宏大叙事的面目出现，但是作者在把握宏大蓝图的思路与细致的技术论证之间张力上的深厚学术素养，使得该文的内容坚实有力。论文中随处可见作者在具体制度设计上的良苦用心：在缩小死刑适用范围方面，提出“规限、转让、废止”死刑罪名的三种解决途径；制定具有操作性的死刑案件量刑指南；以及对刑罚结构与刑罚环境趋轻的深入分析等等。

周光权的《死刑的司法限制》的视角切近更为具体的微观层面，以司法实践中适用死刑几率最大的犯罪为研究对象，寻求限制死刑适用的具体司法措施。目前死刑适用率最高的犯罪当属故意杀人罪、抢劫罪和故意伤害罪，其是否适用死刑，很大程度上取决于有无伤亡结果的出现。文章以此为切入点，就限制相应犯罪的死刑司法适用问题加以分析，批驳了实务中一旦有被害人死亡，就需要有人“偿命”的习惯性思维和做法，展示出一种在现行刑法规定趋重的条件下限缩死刑适用可能性的务实态度。

汪明亮的《死刑量刑法理学模式与社会学模式》提出两种死刑量刑模式：一种是所谓的法理学模式，系指严格依照刑法条文规定，对已有的可能判处死刑的犯罪事实加以判定，并据此作出死刑裁量的过程；二是死刑裁量的社会学模式，系指在刑法条文规定之外的可能判处死刑案件的社会结构对刑罚裁量产生影响的过程。文章指出，死刑量刑之社会学模式是导致“同罪异罚”、量刑不平等的原因，进而提出避免该社会学模式发生作用的具体途径。尽管对于死刑问题中所蕴含的社会因素能否予以简单的价值判断以及作者的社会学分析模式是否规范，可能见仁见智，但是在过往以哲学探讨为主的死刑存废问题研究之外，拓展出新的视角和研究路径，作者的探索和努力是值得嘉许的。

除了死刑专题的讨论，本辑还收录了一篇犯罪学论文：刘广三和单天水的《犯罪是一种评价》。该文鲜明地提出“犯罪是一种评价”的命题，从国家、社会以及犯罪学学者三种评价主体的角度展开，分别对各个主体内容的评价共性和个性予以评述。该文的视野宽阔，思路清晰，一定程度上推进了我国犯罪学理论在价值论方面的研究进程。

孙斯坦的名字在中国学界已经不陌生了，他和另外两位作者合作的《法和经济学的行为学方法》是其编辑的同名著作的导论部分。该文应用行为经济

学的相关原理对传统法律经济学的基本假设提出了质疑和挑战，并试图建立一种新的法律经济学研究进路，是行为主义法律经济学的纲领性论文，也是西方法律经济学的最新发展。该文同时暗示，法律经济学流派众多，方法并非一成不变，在中国学界刚刚引入法律经济学研究的今天，扩展思路、关注理论发展的前沿动向也许是有必要的。

本辑刊载的几篇思想史和制度史研究的文章，都从某种历史的演进中发现了以往研究忽视的问题，并在此基础上进行了推进。高全喜的《论宪法政治》是作者一个写作计划中的先导部分，通过对西方思想史的梳理，试图找到一条有别于日常政治的宪法政治的理论路径。作者特别对比分析了施米特与阿克曼德宪法政治思想，认为两者之间存在着某种异曲同工之妙。当然，梳理思想史并非最终目的，作者的旨趣在于中国的宪法问题，希望借由这种思想为我们提供一种可资借鉴的新视角。

张千帆的《从管制到自由》考察了英美国家处理流浪乞讨问题的历史经验以及迁徙权的宪法保障在美国的历史演进，得出结论：迁徙权是市场经济和人权意识发展到一定程度的必然产物。在法制统一的国家里，它是公民权的题中应有之意，应当受到宪法保障。迁徙自由的宪法保障不仅对于市场经济的发展是必要的，而且也是国家统一和公民平等的重要体现。显然，中国问题也是作者思考的立足点所在。

劳东燕的《自由的危机：德国"法治国"的内在机理与运作逻辑》一文则通过梳理德国"法治国"概念的流变，发现"法治国"代表者国家结构中将个人主义与国家目的相统合的一种努力，它所固有的注定导致自我毁灭的内在紧张在于：其目标是要促进具体的个人自由和解放，但这种目标却试图借助于抽象的不受限制的国家权力，依靠国家的立法性控制和个人的完全服从来实现。作者还对"法治国"与普通法法治进行了比较，认为两者差异的重要根源之一在于双方为经营自由的事业所凭借的制度技术，即"法治国"的体系性建构方式与普通法法治中实践导向的技艺理性。

在上述历史研究之外，赵西巨的《欧盟法中的司法审查制度：对〈欧共体条约〉第230条的释读》是具体制度研究方面的优秀之作。文章评述了在欧盟司法审查体制中处于核心地位的基于《欧共体条约》第230条的无效行为之诉，着重梳理了欧盟法院司法审查权限的范围，自然人和法人作为非特权申请者在涉及较为广泛公共利益的无效申请之诉中所面临的障碍与困境以及法院司法审查的依据。作者对欧盟法有过专门的深入研究，笔触与视角精准细腻，为我们准确理解欧洲司法审查制度的机理提供了有价值的参考。

本辑收录了三篇民法和程序法方面的论文。霍海红的《证明责任：一个功能的视角》是程序法方面不可多得之作。文章对证明责任的功能进行了系统

的梳理和界定,试图将人们从举证责任作为提供证据责任这一狭窄的视点中带出,从除了裁判功能以外的效益功能、批判功能、规则功能以及立法技术功能的角度,全面且深入地考察了证明责任在理念和制度上的价值。该文一个突出的特色在于主张并充分论证了证明责任的实体规范属性,认为其预置于实体法中而主要通过诉讼程序得以实现,而证明责任同实体规范的关系在于,证明责任的分配使得实体规范的目标在法律技术上能够得以实现。

丁春艳的《论私法中的优先购买权》对优先购买权作了总论性的梳理和分析。文章的梳理工作非常充分,其分析不仅建立在法律基础之上,而且将司法解释、行政法规、规章和规范性文件考虑在内,使得论证在十分坚实的基础上展开。该文最突出的特点在于其逻辑上的细密和周延,充分考虑了各种可能的情形并给出有说服力的解决方案,作者扎实的理论功底和素养可见一斑。

许德风的《论合同法上信赖利益的概念及对成本费用的损害赔偿》在分析了期待利益存在的缺陷之后,讨论了信赖利益制度。由于信赖利益也存在诸多缺陷,促使作者试图探索一种新的解决方法。文章指出,信赖利益与期待利益的核心是净利润、成本与费用的支出两个要素,并在此基础上建立了自己的关于成本费用损害赔偿的理论。该文主要的贡献在于其对传统概念的努力超越,在一种新的解决问题思路的背后蕴涵着作者另辟蹊径的勇气和智慧。此外,该文提供了一个很好的比较法背景,对我国的立法及司法实践均有参考价值。

本辑惟一一篇评论是赵晓力的《要命的地方:〈秋菊打官司〉再解读》。与以往解说该影片的风格和内容不同,他把电影文本分为5个主题,通过对文本全面细致的阐释,试图揭示出台词对话中隐含着的易为观众所忽略的"微言大义"。《秋菊打官司》不仅仅是"法律多元"的问题,也不仅仅是"送法下乡"的问题,它更多表达了对中国乡土社会中一种原始的生命力观念的赞颂。现代的国家法律可以不承认这种生命的本能,但却不能忽视它的力量。同样,我们可以不赞成秋菊,但一定要先理解她的诉求。

北大讲坛收录了著名公司法学者约翰·H.法勒(John H. Farrar) 2004年在北京大学法学院进行的演讲《寻求比较公司治理恰当的理论视角与方法论》。法勒从社会科学层面为比较公司治理研究与比较法之间的关系这个根本性难题的解决,提供了更为开放的视野。法勒指出,比较法因过于狭隘和混乱而无法为处于复杂变革时期下的比较公司治理提供一个恰当的方法论上的进路,因此有必要超越法律考察自治规则和惯例。值得注意的是,法勒通过对路径依赖和全球化现象的分析,得出全球性的合同概念和自治规则网络可能比公司和民族国家更为重要的结论。比较公司治理的方法论是这个领域研究中最富哲学性和开放性的部分,法勒不仅提供了新的视角,还为反思和领悟比较公司治理学术中的历史偏见及现实发展提供了一条新的进路。

《北大法律评论》(2005)
第6卷·第2辑·页335—340
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EDITOR'S NOTES

Death penalty is our focus topic in this volume. Since Cesare Bonesana Beccaria, there is never short of debates on death penalty which has long been concerned by various social psychology and values. When whether death penalty should be preserved comes into highlight of debate in a country, there must a clash between the existing system and emerging appeals of protection of human rights. At the beginning of 21st century, China is faced with the same difficult choice. Death-penalty-related cases drew great attention from the public with an expectation of abolishment of death penalty, which challenge the decision-makers. As an issue far beyond intellectual area, death-penalty-related issue would be solved through sophisticated reaction among scholars, the public and the decision-makers in the process of legislation, politics as well as moral life. The articles in this volume try to enhance and improve the conventional approach in this area.

Correspondence Concerning Death Penalty by Chen Xing-liang shows us the dialogue concerning death penalty between a scholar and a citizen by correspondence. Chen's attitude is humanism and tolerant. He argue that the abolishment of death penalty relies on the decision of legislators, who are representatives of the public, therefore it is important to cultivate social tolerance in pubic awareness to eliminate revanchism. The author's inspiration comes from a real Chinese citizen's letter instead of a fictitious Persian. The appeal of a prisoner sentenced to death provides us with a rare opportunity of understanding humanism and tolerance. The article is also an effort made by scholars to influence the public opinion on a professional issue.

A Research on the Criminal Liability of the Employee in Drug Transportation Crime by Chen Xing-liang also comes from a letter from a prisoner awaiting for execution. Compare with the general conclusion in Correspondence Concerning Death Penalty, this article concentrates on two cases. Chen concludes the judgment rule by analyzing the application of death penalty in the two being employed to transit drug fro others crime cases. Recently, Chen put an emphasis on the "criminal case law" study based on the judgment by courts. Moreover, it is significative to extend the discussion of application of death penalty in drug-related-cases to retraction of the power of check of death penalty by the Supreme Court.

Established in the current restrictions, The Macroscopical Perspectives on the Control of Death Penalty in China by Liang Gen-lin systematicaily designs the path of control of death penalty in China. Although the article's topic and structure is very extensive and grand, the suggestions on detailed institutions are included: three solutions on restricting application of death penalty; a feasible guidance of condemnation in death-penalty-related cases, etc. obviously, the author is good at shifting between inspiring general idea and making use of delicate techniques of argumentation.

The Judicial Restraint on Death Penalty: On the Point of Judging the Result of Casualties by Zhou Guangquan is more microscopical. Zhou concentrates on the judicial restraint on application of death penalty by studying those crimes in which the criminals have greater probability of being sentenced to death, including intentional homicide, robbery and intentional harm. whether criminals who commit these crimes will be sentenced to death depends on the result of casualties. On this point, Zhou rebuts the current practice of linking death penalty simply to the death of victim, showing a practical attitude of constricting application of death penalty under the severe punishment in the penal code.

In Jurisprudence and Sociology: Two Patterns during Adjudicating the Death Penalty by Wang Ming-liang, nomological pattern refers to the process of adjudicating on existing malefactions according to the penal code; sociological pattern refers to the process of exerting influence on the adjudication of death penalty by those malefactions beyond the policing of penal code. Wang argues that the sociological pattern is the reason of unequal adjudications, and suggests an approach to avoid the working of sociological pattern. Granted, the value of social factors in death-death-related-issues cannot be evaluated simply, and people will have different opinions on the sociological approach adopted by Wang; but past and current discussion on the

issue are mostly philosophical, therefore Wang's efforts on exploring new approach is praiseworthy.

Apart from the death penalty, we have another article in criminology: Crime is a Kind of Evaluation by Liu Guang-san. Liu constructs his argument from three points of view: the state, the society and scholars. He discusses the proposition "crime is a kind of evaluation" by analyzing the individuality owned by and commonness shared by different evaluators. The article improves the research of axiology in criminology by its broad perspective and strong contemplative faculties.

The name of Cass Sunstein is not strange to Chinese academe. A Behavioral Approach to Law and Economics written by Sunstein and another two co-authors is the introduction of a book with the same name edited by Sunstein. The article oppugns and challenges the basic assumptions of traditional law and economics with correlative principles of behavioral economics. As an outlined paper in this field and the latest development of western law and economics, it attempts to find a new approach to the law and economics research. The article also implies that law and economics has many genres and various research approaches. It is necessary for Chinese academe, into which law and economics research has just been brought, to extend its thought and pay attention to the latest development of this theory.

This volume also contains several articles concerning intellectual and institutional history, all of which find some problems neglected by previous research from certain historical evolvement and do further research on them. On Constitutional Politics: Another Perspective of the Rule of Law Theory by Gao Quan-xi is part of one of his writing projects. This article demonstrates a development of western intellectual history on constitutional politics, and seeks to find a theoretical path different from the normal politics theory. He particularly compares the thought of Carl Schmitt with that of Bruce Ackerman, holding that they are almost equally satisfactory in result. The Chinese constitutional problems could be enlightened by the demonstration of history. In this aspect, the theory provides us with a new perspective.

From Regulation to Freedom: the American Constitutional Transformation on the Freedom of Movement and Its Implications for China by Zhang Qian-fan explores the British and American historical experience in the treatment of beggars and vagabonds, and the evolution of American constitutional protection of the freedom of movement. The final conclusion is that the freedom of movement is a product of simultaneous development of market economy and rights consciousness. In a state uniform in law, the freedom of movement is inherent in citizenship, thus necessarily re-

quiring constitutional protection, which is not only indispensible for economic development, but the very symbol for national unification and equality. This research is obviously oriented towards Chinese problem of the freedom of movement.

Freedom in Crisis: Rethinking the Mechanism and the Logic Foundation of the German Rechtsstaat by Lao Dong-yan holds that the Rechtsstaat represented an effort to combine individualism with the state goal in state structure by demonstrating the history of the Rechtsstaat theory and its features. There is an inherent self-destructive danger threatening the Rechtsstaat. That is, the goal of Rechtsstaat was to promote personal liberty, but it tried to achieve the goal by exercising the boundless state power. The article also compares the Rechtsstaat with the rule of law under Common Law tradition and comes to the conclusion that the distinctness between two concepts stems partly from different institutional techniques supporting personal liberty in the mode of systematic construction in the Continent Law family and artificial reasoning in the Common Law family.

Judicial Review System in EU Law: Study on Article 230 of EC Treaty by Zhao Xi-ju describes and comments on the annulment action based on Article 230 which is central in the EU judicial review by observing its interpretation and application by European Court of Justice. The author is an expert on the study of EU law, who makes a convincible argument based on reliable material and literature. The article examines the scope and extent of the judicial review by ECJ, the obstacle unprivileged applicants including natural and legal persons face when challenging decisions addressed to other persons with the concern of social welfare, as well as the standards of judicial review. The article provides us with a profound understanding of the mechanics of judicial review system in EU law.

We have three articles in civil law and procedure law. The Burden of Proof: A Perspective of Function by Huo Hai-hong is trying to define the burden of proof systematically. It breaks the traditional narrow perspective regarding the burden of proof simply as a burden of providing evidence in courts. In addition to its function of judgment, the article examines the conceptional and institutional value of the burden of proof from a comprehensive perspective including benefit-cost function, criticism function, obligation attribution function as well as legislative techniques function. A contribution of the article is to prove that the burden of proof is attributed to substantive law essentially whereas realized in procedural law. The relationship between the burden of proof and substantive law is that the former makes purposes of the latter impossible technically.