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酌定量刑情节规范适用研究

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摘　要

本书共五章十八节。

第一章主要论述什么是酌定量刑情节以及什么是酌定量刑情节的规范适用。这是论证后续各章的基础，其目的是明确论文描述的对象。第一节酌定量刑情节概论。主要解决酌定量刑情节是什么的问题。酌定量刑情节具有适用的法定性、客观必然性；刑法是酌定量刑情节的唯一形式来源；其适用的实质根据是酌定量刑情节综合表现了行为的客观危害以及行为人的主观危险性，其中表现行为客观危害的酌定量刑情节多是罪中犯罪构成的伴生事实，表现行为人主观危险性的酌定量刑情节多是罪前行为人的人身特质、环境因素和行为人行为后对罪行的反省态度；在酌定量刑情节的分类上，按照其对刑罚的影响程度，可以分为从重、从轻、减轻、免除四种情形，按照刑法对其内容的明确程度，仅有法定量刑情节和酌定量刑情节的区分，除此之外不存在其他的量刑情节；酌定量刑情节的存在有着哲学和刑法学基础。第二节主要对酌定量刑情节规范适用的基本理论进行论证。酌定量刑情节规范适用的含义有四层，其要义是通过规范的形式达致量刑的公平和正义，并最终实现刑罚目的；其表现的意义有三方面；规范适用的要求有：考量的强制性，全面性，质、量统一性，区别对待性；规范适用的必要条件有三：刑法基本原则必须固守、刑事责任必须准确定位、刑事自由裁量权必须恰当行使。

第二章论述酌定量刑情节规范适用的原则。酌定量刑情节规范适用的原则必须是量刑原则的具体化。一方面，它必须在量刑原则

的范围之内；另一方面，它又是量刑原则更具针对性的体现。按照这些标准评判，其原则有四个：依法适用原则、个别化适用原则、禁止重复评价原则、量刑均衡原则。在依法适用原则中，笔者主张对“法”作扩大的解释，把国家规定、司法解释、量刑意见等纳入法律的范畴进行常态的解释。同时，在依法适用时要注意定性分析和定量分析的统一。个别化适用原则，在抽象的立法层面上，在罪名确定的前提下，罪中酌定量刑情节决定刑罚种类的配置和可量化刑罚方式的弹性幅度，在此基础上也涵盖罪前、罪后酌定量刑情节的可能影响值；在司法层面上，罪质和分则性情节划定可以适用的法定刑幅度，罪中酌定量刑情节决定法定刑幅度内的基本刑，罪前和罪后酌定量刑情节在基本刑范围内进行调适，然后三者协同确定最后的宣告刑。就酌定量刑情节刑罚个别化而言，既可能是责任意义上的个别化（反映行为的社会危害程度），也可能是预防意义上的个别化（反映行为人的人身危险程度）。刑罚个别化适用原则在酌定减轻、酌定免除、缓刑制度上都有深刻的体现。禁止重复评价原则具体到酌定量刑情节的规范适用上，有两项基本的要求：其一，作为犯罪构成要件的基本定罪事实不能作为酌定量刑情节重复适用从而影响刑罚裁量；其二，一旦某一确定事实被确认为酌定量刑情节，对其就只能作为酌定量刑情节对待，而不能再作为另一犯罪构成事实来处理。另外，必须明确，所谓定罪剩余的犯罪构成事实可能转化为酌定量刑情节的情况（不是转化为法定量刑情节，也不是转化为刑法明确规定的情节加重犯和结果加重犯），一般只有两种存在形式：一是连续犯，二是具有两个或两个以上选择要件的犯罪构成。而这两种情况都不存在对同一行为的重复评价。同时，所谓禁止重复评价其要旨在于限制对行为在定罪或量刑的同一场域内进行重复使用，但如果行为在定罪后其犯罪构成行为的剩余在量刑领域仍有再认知的必要，那么这种评价仍然是需要肯定的。所以，当犯罪构成要件涵盖多个选择要素时，在犯罪构成上仅需评价一项要素，对下余的多个选项仍可以作为酌

定量刑情节适用。量刑均衡原则有两方面的含义。首先是犯罪方面的实体性要求，即在罪名确定、法定量刑情节确定的前提下，刑罚应当与酌定量刑情节的性质和数量成正比。其次是规范适用方面的形式性要求。第一，在某一特定的范围内，各类酌定量刑情节数量的取舍和各情节的影响值、作用力应当有统一的标准。第二，类似的犯罪、类似的酌定量刑情节在特定的时间范围内应当保持适用的一致性。第三，适用主体裁量的均衡性。第四，适用客体或适用对象的规范处遇性。另外，针对酌定量刑情节的规范适用而言，该原则不能被称为罪刑相适应原则。同时，该原则强调酌定量刑情节规范适用时必须保持正当的目标和正义的方向。

第三章酌定量刑情节规范适用的规则是本书的核心部分，主要论述酌定量刑情节规范适用的基本步骤和各类酌定量刑情节的处理规则。

第一节论述酌定量刑情节规范适用的基本方法是以量化分析为原则、以定性分析为补充。然后，论述量化分析的必要性、量化分析的基本概念、定性分析的价值。笔者强调，在实证的基础上有必要积累审判经验对酌定量刑情节进行量化适用；同时，量化分析并不排斥定性分析的价值。特别是，针对特定的刑罚种类和特定的酌定量刑情节种类，在某种意义上，定性分析仍然应当居于主导地位；同时，定性分析也是衡量酌定量刑情节规范适用客观性、科学性的重要标尺。

第二节论述酌定量刑情节量化操作规则。首先，刑格是同一刑种内部划分，但各刑种间可以借助于刑格进行协调和过渡，这实际上是量化分析关键性、前提性的内容，也是从重、从轻、减轻处罚的基础。笔者认为，划分刑格确有必要，也具备实现的现实性和可操作性；附加刑各种类没有再进一步划分刑格的必要，可以以其固定种类作为刑格；主刑中管制、拘役、无期徒刑也没有细分的必要，有期徒刑划分为 8 个刑格、死刑两个刑格；主刑和附加刑一共是 14 个刑格 13 个变动区域。其次，从重、从轻、减轻处罚适用时要遵循如下步骤：

第一，依据犯罪构成（罪质或罪名）事实和分则法定量刑情节确定法定刑和量刑起点（或称基础刑）；第二，依据犯罪构成事实外伴生之罪中酌定量刑情节的决定作用调适量刑起点形成特定量刑幅度（或称基础刑基本浮动幅度）；第三，依据犯罪总则法定量刑情节和罪前、罪后酌定量刑情节再次对该量刑幅度调适，并确定可能判处的刑罚"点"；第四，从刑法基本原则出发，对刑罚点适度矫正，以确保宣告刑的公平。再次，多酌定量刑情节竞合适用方法上要遵循下列步骤：第一，甄别排列出需要权衡的酌定量刑情节。第二，依出现的顺序，计算出每个酌定量刑情节对最终刑罚量的调整幅度（如，案件中有一个从轻的情节，一个减轻的情节，一个从重的情节，假设经过对实证资料的规范，从轻情节调整幅度为基础刑浮动幅度的 1/4，减轻幅度为法定最低刑的 1/2 至法定最低刑，从重情节调整幅度为基础刑基本浮动幅度的 1/4）。第三，确定最终的宣告刑（假若具体犯罪的法定刑是 3～10 年，基础刑基本浮动幅度是 4～8 年，那么受从轻情节调整后的刑罚是 3～6 年；受减轻情节调整后的幅度是 1.5～3 年；从重情节调整后的幅度则是 2.5～5 年，最终的宣告刑应在 2.5～5 年这个幅度内取舍）。最后，酌定量刑情节量化的实现路径应当通过立法和司法的同步推进来实现。

第三节论述刑罚的酌定免除规则。首先，是刑法第 37 条的理解问题。第一，刑法第 37 条中的犯罪情节仅应理解为酌定量刑情节，该条立法的意旨在于通过对酌定量刑情节的适用以达非刑罚化的目的。第二，该条也并非针对分则中的所有罪名，酌定免除刑罚的犯罪必须是相当轻微的犯罪。第三，从用语和措词上分析，刑法第 37 条中的酌定量刑情节从本质上讲指罪中酌定量刑情节。但从"应然"的角度分析，也不应排斥罪前、罪后酌定量刑情节的价值。在这一方面，刑法第 37 条这一法条存在着不小的欠缺。其次，是酌定免除的适用条件。第一，所涉犯罪客体的专属性。一是应当以刑期而非以犯罪涉嫌的罪名来作判断标准。犯罪的法定刑中主刑最高是有期徒

刑三年以下且必须存在有其他的主刑或附加刑，另外，单处附加刑的犯罪也应当包括在内。二是对应于刑法对同类客体的规定，应当把轻微犯罪所涵盖的范围主要定位在刑法分则第四章的侵犯公民人身权利、民主权利罪、第五章的侵犯财产罪、第六章的妨害社会管理秩序罪、第九章的渎职罪。同时需要指出的是，刑法37条所涉犯罪的主体应限定为自然人犯罪而不应把法人犯罪包括在内。第二，酌定量刑情节必须是综合从宽处罚的走向。酌定量刑情节的绝对多数应当是从宽处罚的情节或者说各酌定量刑情节的综合影响必须是正面、积极的。必须要强调的是，各酌定量刑情节必须综合为用，共同促进量刑的正面化评价。特别是，要切实关注罪后酌定量刑情节的存在状况。第三，犯罪行为所致物质损害已经确定并停止。第四，社会伦理对非刑罚处理办法的认可。第五，酌定免除的程序要件。刑法第37条对酌定免除的程序限制并未明确，这是一项重大失误。笔者建议增加规定：免予刑事处罚时必须报经本级审判委员会核准。

第四节论述刑罚的酌定减轻规则，主要明确以下几个问题：一是酌定减轻处罚制度的价值何在？二是为什么要借助于酌定量刑情节而非其他制度来实现刑罚的减轻功能？三是“案件的特殊情况”如何把握？四是现行酌定减轻制度适用现状及如何改进？五是酌情减轻时如何操作？首先，就酌定减轻制度的价值而言，主要是以下几个方面：实现一般正义与个别正义的辩证统一；调适法律和现实的矛盾；实现正义和功利的相济为用。其次，从立法技术上讲有许多手段都可实现刑罚减轻，但这些手段在适用中都有自身的缺陷。而相对于法定量刑情节、法律解释、刑事政策、司法判例制度，酌定量刑情节更能全面实现刑罚减轻的功能。再次，是对酌定减轻制度中“案件的特殊情况”的理解。这些情况的主体是酌定量刑情节，但不排斥非酌定量刑情节的适用。当然，这些非酌定量刑情节的事实必须在广义的法律中予以规定，且具有存在的超常态性、偶发性。再次，现行酌定减轻制度存在立法和司法上的缺陷，需要反省。笔者对如何改善

进行了相关设计。

第四章主要论述酌定量刑情节规范适用的障碍及完善途径。第一节论述酌定量刑情节的存在形式、“估堆式”量刑方法、适用环境给酌定量刑情节的规范适用造成了障碍。第二节对酌定量刑情节规范适用的实体制度进行了建构。首先，要规范不同主体间酌定量刑情节适用的权限划分，这也可以称为适用主体的规范化；其次，要分类、分级逐步规范各种酌定量刑情节，这也可以称为适用客体（对象）的规范化。第三节论述通过立法化对酌定量刑情节规范适用的完善。在实体法上，要明确酌定量刑情节的内容和地位；明确酌定量刑情节的规范适用；施行《量刑指导意见》。在程序法上，要明确独立的量刑程序；明确量刑建议制度。第四节论述为了借助司法化来达到酌定量刑情节规范适用的目的，就要采用判例制度、深化量刑规范化改革、改革判决书。

第五章强调要保证酌定量刑情节的规范适用就必须营造良性的司法舆论环境。首先，以许霆案折射的社会现象为切入点对适用环境进行了一般性考察，并认为要保证环境的良性，一要建立社会意识正常、正当的反应机制；二要使适用主体保持理性化的判断。其次，分析了民意与酌定量刑情节规范适用的关系。一方面，民意不是酌定量刑情节；另一方面，民意却是衡量酌定量刑情节是否规范适用的试金石。具体而言，民意对酌定量刑情节的规范适用有如下作用：民意可验证酌定量刑情节适用是否具有公正性、科学性；民意可客观反映行为的社会危害性；民意在一定意义上能够反映行为人的人身危险性；刑法分则中情节犯、情节加重犯中对情节轻重的判断，实质上也是以民意为参考标准的。再次，是社会形势与酌定量刑情节规范适用的关系。笔者指出，一方面，社会形势不是酌定量刑情节；另一方面，社会形势通过刑事政策和对行为样态的刑法价值评价影响酌定量刑情节的规范适用。

Abstract

This paper has 5 chapters and 18 sectors, including 170,000 words. What are discretionary circumstances of sentencing and its standardization is discussed in the first chapter, which is the basis of other chapters . In the first sector, what is discretionary circumstances of sentencing is discussed. The author introduces it is statutory and mandatory when discretionary circumstances of sentencing is applied. The criminal law is the only form of source. Its substances of the plot is based on overall performance of the objective hazards and the perpetrator's subjective risk. The performance of the sentencing discretion of the plot are mostly associated with crime constitute and the performance of personality are mostly pre-crime physical characteristics, environmental factors and behavior reflect the attitude of the offense. The classification of discretionary sentencing in the plot, in accordance with their degree of influence of punishment can be divided into heavier, lighter, relief, exemption. The existence of the discretionary sentencing plot have philosophy and criminal law basis. In the second sector, The author believes that discretionary sentencing plot's standardization application has four meanings. its essence is to achieve the sentencing of fairness and justice; the significance of their performance is in three areas; the necessary conditions for its

application are three-fold: to stick to the basic principles of criminal law, criminal liability must be accurate positioning, the criminal must be appropriate to the exercise of discretion.

The second chapter discusses applicable principles of the discretionary sentencing plot . The author pointed out that the sentencing discretion of the plot must be a standard application in sentencing practice. On the one hand, it must be within the scope of the principles of sentencing; the other hand, it is more specific than the principles of sentencing. Judging in accordance with the criteria established, the principles are four: application principle according to the law, and individualized application principle, prohibiting duplicable evaluation principle, the principle of a balanced sentencing. About applicable principle in accordance with law, the author advocated "law" can be broadened the state regulations, judicial interpretations, opinions law areas . At the same time, on application principle according to the law, we must pay attention to qualitative and quantitative united analysis . With regard to applicable principles of individual-oriented, the author pointed out that in the abstract level, determining charges under the premise of the crime plot is right. INDIVIDUALIZED application principle have a profound expression in discretionary mitigation, discretionary relief, probation system. Prohibiting duplicable evaluation principle has two basic requirements: First, the basic elements of a criminal constitute can not be the discretionary sentencing circumstances ; Second, once the facts have been recognized as a determining sentencing plot, its plot can only be treated as a discretionary, not another crime. The fact that to deal with. In addition, the remaining discretionary sentencing

may be converted into the circumstances of the case (not converted to a statutory sentencing plot, nor is it converted into aggravated Criminal) . At the same time, the author also believes that prohibiting duplicable evaluation principle is to limit the re-use of behavior as a conviction or sentence on the same domain, if the acts still have re-cognition necessary in the other areas, then such an evaluation is still necessary. The author pointed out that the principle of balanced sentencing has two implications. The first is substantive requirement which insists penalty should be proportional to the nature and quantity of plot. Followed is form requirements . First, in a particular areas, application of all kinds of discretionary sentencing plot should have a unified standard. Second, a similar crime, a similar sentencing discretion of plot in a specific time frame consistency should be maintained . Third, same person should remain balance when he sentences same plots. Fourth, the application of the same object should be normal. Addition, the principle emphasis on maintaining a legitimate target and the direction of justice.

The third chapter, applicable rules is the core part of this paper. In this section, the author mainly discusses discretionary circumstances of sentencing's applied standards and the basic steps .

In the first sector, basic method of the discretionary plot of sentencing, the author highlighted: The basic method is based on the principle of quantitative analysis and qualitative analysis as a supplement. Then, they are discussed that the need for quantitative analysis, the basic concept of quantitative analysis and the value of qualitative analysis. The author stressed that it is necessary on the

basis of evidence which has accumulated to quantify the application of plot. At the same time, quantitative analysis does not exclude the value of qualitative analysis. In particular, on the penalties for specific types and specific types of discretionary sentencing plot, in a sense, qualitative analysis should continue to be dominant; the same time, qualitative analysis is also a measure of discretionary sentencing norms .

In the second sector, quantitative operational rules is discussed. In this section, first of all, the author pointed out that cells division must be within the same kinds of criminal punishment, but each species can be coordinated and transited by means of criminal punishment cell, which in fact is the key content of a quantitative analysis but also the basis for punishment of heavier, lighter, reducing, exemption. I believe that is necessary for cell division of punishment, but also can be achieved ; it is not necessary for cell division of additional punishment to further divide; among principal penalty imprisonment punishment is divided into eight cells, the death penalty two punishment cells; principal penalty and additional penalties are a total of 14 cell division and 13 changing regions.

Second, it is heavier, lighter, reducing plot's application of penalty methods. I believe that application should follow the following steps: first, according to criminal constitute (the crime of quality or charges) and the sub-plot of special principles to determine the statutory penalty and sentencing of Legal Sentence starting point; second, Sentencing starting plot are adjusted based on the facts that are associated with acts which constitutes a crime; third, according to general principles of statutory penalties of crime

and remaining crime plot adapt the sentencing starting point once again; Fourth, on principles of criminal law, a modest correction can be done in order to ensure a fair criminal declaration.

Third, it is about multi-plot's competing of discretionary sentencing. Methods in their application should follow the following steps: first, screening and arrangement about the circumstances of the sentencing discretion is a need. Secondly, according to the appearing order, each sentencing discretion of the circumstances can be calculated its adjustment volume of the ultimate penalty (for example, the case, there is a attenuating circumstances, and one mitigating circumstance, an aggravating circumstances, assuming that the empirical data through the right norms, attenuating circumstances's sentence adjustment is 1 / 4, mitigating's range of upper and lower limit of the maximum sentence is 1 / 2, aggravating 's sentence adjustment is 1 / 3). Third, determination about the final declaration of punishment is made. (for example, in a specific crime, Legal Sentence of 3 years to 10 years, basic sentence is 4 years to 8 years, the penalty adjusted by the attenuating circumstances is 3 years to 6 years; the penalty adjusted by the mitigating circumstances is 1. 5 years ～ 3 years; the penalty adjusted by aggravating circumstances is 2 years to 4 years, the final declaration of punishment should be within 2 years to 4 years .). Lastly, it is the path of realization. The author argued that the legislative and the judiciary methods should be adopted to achieve the synchronization forward.

The third sector is the rules of discretion waive. First of all, the problem is the understanding of the Criminal Code 37. In my opinion, first, among Article 37 of the Penal Code, the

circumstances of the crime only to be understood as discretionary sentencing plot, which is the legislative intent that through the application of the circumstances to achieve the purpose of decriminalization. Second, the article is not aimed at all sub-charges, the crimes whose penalties are waived must be a very minor crime. Third, from the analysis of language and the wording of the Penal Code 37 the plot refers to the discretionary sentencing plot that appear in the course of crime. However, from the point of "it ought to be", it should not be excluded the discretionary sentencing plots that appear before the crime and after the crime. In this regard, Article 37 of the Criminal Code is not a small gap.

Secondly, it is about the applicable conditions of discretionary exemption. The conditions are: first, the exclusive object of the crime. On one hand, its judged criteria should be a term of imprisonment rather than on charges of alleged crimes. Legal Sentence of crime in the principal penalty is imprisonment up to three years and must be the existence of the other principal penalty or additional punishment, and another single additional punishment of crime should also be included. On the other hand, the corresponding provisions of the Criminal Code should be covered by chapter 4, chapter 5, Chapter 6 and chapter 9. Also we must point out that the Penal Code offenses covered by the main body 37 should be limited to natural person, corporate crime should not be included. Second, The plot of the absolute majority of the sentencing discretion plot should be lenient punishments or the combined effect of sentencing discretion plot must be positive. Must be emphasized that the sentencing discretion of the plot must be consolidated to promote a positive sentencing Evaluation. In

particular, the practical concerns must be on the plots which are after the crime situation. Third, the material damage caused by criminal acts have been identified and stopped. Fourth, the social ethics' recognition about non-punitive approach. Fifth, discretionary exemption program restrictions did not clear, I think this is a major mistake. It can be increased: exempted from criminal punishment must be reported to the trial Committee .

The fourth sector is penalty rule of discretion to reduce. First, in terms of the value of discretion to reduce, mainly are the following aspects: to achieve the dialectical unity of the general justice and individual justice ; to adjust the contradiction between law and reality; to achieve justice and utilitarian . Secondly, from the legislative technical, there are many means lowering the penalties can be realized, but these tools in its application has its own flaws. Contrast to the statutory plot, the legal interpretation, criminal policy, jurisprudence system, discretionary sentencing plot can fully realize the relief function. Once again, is the understanding about "special circumstances of the case,". In my opinion, these circumstances mainly is discretionary sentencing plot, but the plot does not exclude the application of non-discretionary sentencing. Of course, these facts must be in the broader provisions of the law, and may be the existence of super-normal. Finally, the current system has legislative and judicial shortcomings, to reflect on. The author carried out the question how to improve the relevant design.

The fourth chapter is about applicable barriers and the ways of improvement. In the first sector, I pointed out that existence form of the sentencing discretion, "estimate pile type" sentencing

methods, the applicable environment create obstacles. In the second sector, the sentencing standard-based system is constructed. First of all, the need to standardize the inter-subjective division of authority, which also may be called for the person's standardization ; Second, it is gradually standardizing the variety of circumstances, which also may be called for the object (object) standardization. The third Sector discusses the legislation improvement of the plots. The author stressed that the substantive law make it clear that the content and status of discretionary circumstances of sentencing; and make it clear that the application norms of discretionary circumstances of sentencing and the implementation of "sentencing guidance." In procedural law, we must clearly separate sentencing proceedings and specific sentencing recommendation system. The fourth sector discusses the means of justice to achieve the application standardization. I pointed out that the case system should be adopted; at the same time, it is needed that deepen the reform of sentencing standardization and reform the verdict.

The fifth Chapter stressed the need to create a sound legal environment in order to ensure normal application of discretionary circumstances of sentencing. First, through find the refraction phenomenon of Ting Xu case as the starting point of social environment, the author research the application of a general inspection, and think that to ensure a benign environment, it is needed that establish a conscious and normal legitimate response mechanisms; at the same time, keep the main make rational judgments. Secondly, the author analyzes the relationship between public opinion and discretion of the sentencing norm. In my