



京师刑事法学博士文库 (14)

现代刑事纠纷及其解决

MODERN CRIMINAL
DISPUTES AND RESOLUTION

何 挺 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世界或者国内一流水平,培养了大批国家栋梁之才。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

大器。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际与国内地位极不相称。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法学院。两院相继成立并得以迅速良性发展，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，在建院不长的时间里，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。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院所培养的法学博士、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，却不至于和者甚寡。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；江海不拒细流，故能成其大”。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 Criminal Law Science of BNU

Preface

After a careful plan and preparations, "Doctorial Series of Criminal Law Science of BNU" 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 catering for the requirements of this era.

Being in a proper situation means that at the time of the establishment of "the Series" 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 that 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 Imperial University of Peking founded in 1902. After a century of development, through a century of accumulation, she has built up a deep seated cultural foundation and good environment of the humanities; what's more, her disciplines of the humanities and social science have reached to the world standard or at the level of First Class in Chi-

na. She has nurtured and brought up large numbers of National Talents. Firm and steady style and the conception of “studying to teach and acting to set an example” for 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” just like “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 Criminal Law Science of BNU” avoided the congenital deficiency from the very beginning.

No need for reticence, compared with many ripe and steadily developed disciplines, the Law Science in Beijing Normal University is still very young. For varieties of reasons, the 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 made the Law Science of Beijing Normal University not only lose the chance of development in 1990s, but also not match with her famous international and national status as well. Now we are glad that 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 criminal law scientific field specializing in criminal research and the talents cultivation.

Based on the Faculty of Beijing Normal University, Law School of Beijing Normal University was founded on July 26, 2006. Successive founding and rapid development 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 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 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 absorbed not only many middle and young law experts who hold deep seated academic foundation, good scientific research ability and academic influence home and abroad, but also 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 Criminal Law Science of BNU" to support young law doctors and postal doctors to publish their

fruits 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 Criminal Law Science of BNU".

"Doctorial Series of Criminal Law Science of BNU" is designed for 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 Criminal Law Science of BNU" will choose the fruits merely according to its high quality. The works that are creative and of high quality can be chosen. Editorial Board of Doctorial Series of Criminal Law Science of BNU will positively contact the new doctors who 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, to 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 houses, listening to criticisms with an open mind from our fellow scholars and social

readers. We hope the works of Editorial Board of Doctorial Series of *Criminal Law Science of BNU* can find and know affairs of human lives, communicate common saying, even though they belong to the works of the elite; 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 meet our bosom friends while playing the music of flowing water.

“Mount Tai 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 *Criminal Law Science of BNU* 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 to 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 *Criminal Law Science of BNU*
March 3rd, 2007

序

现代社会的刑事法律在不断精细化和专业化的过程中也存在着脱离真实社会情境的隐忧。刑事实体法用一个个逻辑严密的罪名将产生于不同社会情境下的行为划分为若干种类，不同社会情境下的“社会行为”经过刑事实体法的规范与整理，被型塑为整齐划一的由主体、客体、主观方面和客观方面等要件构成的“法律行为”并投入刑事司法的流水线。刑事诉讼程序被塑造为国家与被追诉者展开对抗的舞台，即使程序规定和证据规则日益细密，也不过是循着个人与国家抽象利益对抗这一传统路径并不断增加这种对抗的实质合理性与形式合理性而已，刑事诉讼程序的开展远离犯罪行为发生的社会情境，不关心程序的开展是否会对发生犯罪并受犯罪影响的社会情境产生什么样的效应。“法令滋彰，盗贼多有”，脱离社会情境的刑事法律在控制犯罪、保障人权并进而维护社会秩序的实际效果上可能不尽理想。因此，现代刑事法律在向更为精细化与专业化发展的同时，如何保持与社会情境的互动，是摆在立法者、司法者和研究者面前的一个课题。

何挺的博士论文《现代刑事纠纷及其解决》就是应对上述课题的一种尝试。该文选取了“刑事纠纷解决”这一视角，试图用产生于真实社会情境但又为刑事法律所规范

的“刑事纠纷”来拉近刑事司法制度与社会情境之间的距离。作者认为，刑事纠纷是一种加害人与被害人之间通过犯罪这一特殊的外在形式表现出来的不协调的关系。在国家介入追究犯罪之前，刑事纠纷即已产生于由加害人、被害人及其他相关人员构成的社会情境并对社会情境产生反作用；而在国家介入之后，受现代刑事法国家追诉主义的影响，国家取代被害人成为与加害人在“台面上”对抗的主体，加害人与被害人之间的刑事纠纷隐身于刑事案件和国家与加害人之间的对抗之后直至被完全遮蔽；当案件经过刑事司法程序的处理后，国家因实现了对加害人的刑罚权而功成身退，而尚未妥善解决的刑事纠纷仍会回到真实的社会情境中，并可能对社会产生较大的消极影响。与民事纠纷不同，刑事纠纷的解决具有较强的规范性。由于犯罪涉及国家和社会的利益，从理论上来说，国家不鼓励、不支持甚至不允许加害人和被害人在国家刑事司法制度之外自行解决刑事纠纷。从这个角度来说，国家刑事司法制度对于解决刑事纠纷责无旁贷。基于上述，作者进一步认为，国家刑事司法制度应当在密切联系社会情境的基础上，超越仅处理刑事案件的局限，以同时解决刑事纠纷为导向进行相应的调整。

该文的选题产生于作者跟随我进行刑事和解实证研究的过程中，源于对司法实践的深入观察，因而极富现实意义。在长时间深入基层的调查活动中，在大量鲜活的真实案例中，作者切身感受到刑事纠纷无法在刑事司法制度内得到妥善解决所可能导致的各方面问题，并引发了其对刑事纠纷及其解决的系统思考。同时，作者并不满足于仅仅

探讨刑事纠纷解决的制度构建，而是就刑事纠纷及其解决展开了系统的理论研究，填补了这一领域研究的空白，也具有较高的理论价值。例如，作者充分论证了“刑事纠纷”这一概念，以关系的不同特点为标准将刑事纠纷划分为不同的种类，提出了刑事纠纷解决的四方面内涵，研究了现代刑事纠纷解决的理念基础、纠纷解决观在刑事司法中的引入和现代刑事纠纷解决的理论模型，这些都具有较强的学术创新性。

何挺作为我指导的硕士研究生和博士研究生，在上学期期间就参与了我的许多课题研究，博士毕业后就职于北京师范大学刑事法律科学研究院，又成为我的同事。多年来，我一直欣喜地关注着他在各方面的进步与成长，如今他的博士论文即将出版，我作为老师甚感欣慰，希望他在今后的研究中能结出更为丰硕的成果。

是为序。

宋英辉

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