

北京师范大学刑事法律科学研究院
京师刑事法文库(6)

中国限制与逐步废止
死刑之路探索

死刑制度之

现实考察与完善建言

Investigation and Legislative Perfection
on Death Penalty System

◎主编 赵秉志



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Investigation and Legislative Perfection on Death Penalty System

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· 北 京 ·

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，逐步地、全面地发展中外刑法学、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，重新创办系列著作项目，并定名为“京师刑事法文库”。该文库以百年名校北京师范大学深厚的学术积淀、

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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。其出版领域既包括国内外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，也会涉及国际刑法、比较刑法、外国刑法、台港澳刑法等外向型刑事法领域的科研成果，可以是专题研究、综合研究，也可以是国外、境外法典、著作的介译之作。著译者以研究院专职、兼职研究人员为主，并向国内外专家、学者开放。

我们希望通过此举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

前 言

自近代西方刑法学之先驱贝卡里亚于1764年在其名著《论犯罪与刑罚》中首倡限制和废除死刑的主张以来,死刑存废之争已达近两个半世纪之久。放眼当今全球,限制、减少死刑乃至全面废除死刑已日益成为世界性的潮流与趋势。伴随着此一社会发展趋势,死刑存废问题亦已成为今日中国刑事法治领域的热点话题,而其中关于非暴力犯罪的死刑废止问题更是引起了中国社会的广泛关注。

经过实务界与理论界多年来的共同努力,中央有关领导机构已作出英明决策,决定将死刑立即执行案件的复核权收回最高人民法院。而最高人民法院也正在为现行死刑复核制度的完善和改革做充分准备。虽然这只是实务程序性的举措,但必将给中国限制、废止死刑之路带来质的突破。这样一个彰显社会文明与法治发展进步的历史性变革,当然离不开刑事法学界的积极参与和鼎力协助。就死刑制度而言,无论是刑事立法还是刑事司法,亦无论是刑事实体法还是刑事程序法,都亟须学界同仁广泛调研、深入研究,并提出切实可行的改革与完善措施。

北京师范大学刑事法律科学研究院(以下简称研究院)作为专门从事刑事法学的研究的、中国刑事法学领域首家且目前唯一的具有独立性、实体性、综合性的学术研究机构,自建立以来得到了法学界与法律实务界的广泛支持并被寄予厚望。研究院自当以促进中国刑事法治发展为己任,努力为国家刑事立法和刑事司法的改革与完善建言献策。研究院的主要成员近年来十分关注并致力于推动我国限制与逐步废止死刑的法治进步事业:2003年我们组织一批专家学者在有关报刊上率先提出并集中研讨了在中国逐步废止非暴力犯罪死刑的问题,在此基础上我们于2004年3月出版了中英文本的《中国废止死刑之路探索——以现阶段非暴力犯罪废止死刑为视角》一书,从而引起社会的关注;2004年5月我们与湘潭大学法学院合办了“死刑的正当程序学术研讨会”,并于2004年12月出版了《死刑正当程序之探讨——死刑的正当程序学术研讨会文集》一书;2004年8月和12月,我们又主持召开了“中英限制死刑适用范围合作项目系列专题论坛”第1~4次论坛,对经济犯罪、财产犯罪中的死刑废止问题进行了理论与实务相结合的探讨;2005年3月,我们与英国大使馆文化教育处联合主办了“中英死刑适用标准及死刑限制学术研

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讨会”，集中对死刑适用标准及死刑限制问题进行了研讨；在我们近几年来进行的中美、中韩等刑法学术交流活动中，死刑的改革也都成为重要议题之一。我们希望在死刑的限制与逐步废止这个关系到当代中国刑事法治进步的重大问题上作出积极的贡献。此次藉最高人民法院应用法学研究所委托研究院收集、整理法学界近期关于限制死刑罪名及替代性措施的研究成果之际，我们特将研究院专职研究人员与部分兼职研究人员近年来关涉死刑问题的重要研究成果，以及研究院主要研究人员在所组织的学术活动中收集到的部分相关重要论文汇编成集，以期为国家限制与逐步废止死刑的法治实践和相关学术研究提供参考。

当代法治先进国家和地区的发展实践证明，刑事法治的现代化程度及与之相应的刑法基础观念的普及程度，乃是一个国家、一个社会法治文明、人权事业进步的重要标志。其中，死刑的法治命运和理念至关重要。我们相信，严格限制、逐步减少乃至尽可能地早日废止中国刑事法治中的死刑，有益于中国的法治文明、人权保障和社会进步。而先行废止非暴力犯罪的死刑乃是中国废止之路理性选择的第一步。法界同仁们有责任呼吁全社会共同关注中国的死刑问题，共同为促进中国的法治现代化和人权保障事业竭诚努力。

北京师范大学刑事法律科学研究院院长

中国法学会刑法研究会会长

赵秉志 教授谨识

2005 年 10 月

Preface

There has been long debate on whether we should maintain or abolish death penalty in the world in almost two centuries, since Beccaria, who is a pioneer of modern criminal law, advocated to abolish death penalty for the first time in the world in his famous book "On crime and punishment". Viewed from the world, it is a tide and trend to restrict, reduce, even abolish death penalty with time passed by. With this developing social tendency, whether death penalty should be abolished is becoming hot issues in China, among it, the issue of abolition of death penalty in non - violent crime attracts wide concerns in society of China.

After joint efforts for years from practical and theoretical fields, concerned leading apartment in central government has already made a wise decision to recover supreme court the approval right of death penalty. Supreme court has been preparing for the perfection and reform of present approval system of death penalty. Although it is a kind of procedural measure, it will bring in the road of abolish death penalty in China a breakout in quality. Of course, such a reform reflecting the historical change of social civilization and development of governing with law, is inseparable with the active participation and great aids from theoretical field of criminal law. As to death penalty system, no matter the criminal legislation and judicial practice, substantive criminal law and procedural criminal law, are waiting for theoretical field to carry out wide investigation, discuss in depth, and put forward practical suggestion on measures of reform and perfection.

As the first and only substantive, comprehensive, independent research institute in China at present, which specialized in research of criminology, the Research Institute of Criminology of Beijing Normal University(RIC), has been widely supported by practical and theoretical fields and been paid high expectation since its establishment. RIC should take the promotion of development of modernization of criminology as its task, and make utmost endeavor to put forward suggestions for the national criminal legislation and criminal judicial reforms. The main members of RIC paid great attention to and devoted themselves

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to the course of promoting the restriction and gradual abolition of death penalty in China recently. We organize some experts and scholars putting forward for the first time and discussing intensively on the gradual abolition of death penalty in non - violence crime in 2003. With this base, we published the book "The Road Of The Abolition Of The Death Penalty In China - Regarding The Abolition Of The Non - violent Crime At The Present Stage" in March, 2003, which has already attracted concerns in society. In May, 2004, we and law school of Xiang Tan University jointly hosted " Forum On Due Process Of Death Penalty" , and published the book "Discuss On Due Process Of Death Penalty" in December, 2004. In August and December 2004, we hosted four times of " China And UK Cooperation Program Of Series Forum On Limiting Application Of Death Penalty" , which focus on the discuss of abolition of economic crimes and property crimes with the combination of practice and theory. In March, 2003, we and the culture and education communication apartment of UK embassy jointly hosted " China And UK Forum On Application Standard And Restriction Of Death Penalty" , which focus on issues of application standard and restrictions of death penalty. Among the academic communication with USA and South Korea, the death penalty reform has always been one of the most important topic. We hope that we can do active contribution to the limit and gradual abolition of death penalty, which is the key issue during the advance of modernization of criminal law in China. Taking advantage of the opportunity to collect and organize the academic papers on limit and substitute measure of death penalty on behalf of application law research institute of supreme court, we specially edited this book, which collects the academic papers by full - time and part - time research staff, and part of the most important academic papers collected by the staff during the academic activities hosted by main staff, in order to provide reference for the practice of national restriction and gradual abolition of death penalty and its academic research.

The developed practices of advanced countries and areas in law has proved that, the degree of modernization of criminal law and the spread width of corresponding fundamental idea of criminal law, are key symbol of human rights, as well as key symbol of advance degree of a country and the law civilization of a society, in which the fate of death penalty and its concept are very important. We believe that, restrictive limit, gradual abolition, even total abolition of death penalty as soon as possible, are beneficial to China's law civilization, human rights safeguard and social advance, and the first step during this road of death penalty abolition in China should be the abolition of death penalty in non - violence crimes. Colleagues in academic community of law have responsibility to appeal the whole

society to concern on the issue of death penalty abolition in China, and jointly do contribution to the courses of law modernization and human rights safeguard in China.

Dean of Criminal Law College, Beijing Normal University
Chairman of Criminal Law Association of China, Law Association of China

Zhao Bingzhi

Oct. 15, 2005

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毛泽东死刑思想研究

赵秉志*

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(二) 准确把握毛泽东死刑思想中“死刑”的内涵

(三) 坚持毛泽东死刑思想的合理内核，努力促进我国死刑制度的完善

毛泽东思想是中国共产党建党和新中国建国的指导思想，对于中国社会当代与未来发展的影响举足轻重。现行宪法将毛泽东思想载入序言，确定了其在国家政治体制与制度中的地位。在今天建设社会主义法治国家的进程中，如何使毛泽东思想的精髓与这一目标相融合并促进之，对于法学工作者来说，是一个应予重视的课题。就刑事法的领域而言，毛泽东同志从政治斗争与政权建设而阐发的一些政策思想，对于我国刑事政策的确立具有重要的指导意义。其中，毛泽东同志关于死刑的思想，更是直接而显著地影响到我国刑法的立法、司法和刑法理论。对毛泽东同志的死刑思想进行研究，一方面，可以更加深入地理解我国现行死刑制度的历史渊源及其进展，从而检讨死刑制度在立法与司法上的得失；另一方面，有助于从我国死刑发展过程中所表现出来的政治斗争的政策向刑罚制度的嬗变，来重新审视我国当

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