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论集

第1卷

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◆ 韩延龙 / 主编

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卷首语

本书是《法律史论集》第一卷。

法律史学是法学的基础学科,同时又是历史学的一个重要分支。作为法学基础学科的法律史学,又依据研究对象的不同而划分为不同的门类,它包括中国法制史、中国法律思想史、外国法制史、外国法律思想史、传统法文化等,每一部门又各有其特定的研究领域和不同的研究方向,充分反映了法律史学的多元特色和丰富的内涵。

20 世纪初以来,我国学者开始采用新的方法从事法律史学的研究,发表了一批数量不多但至今仍有较高价值和广泛影响的学术论著,为本学科的确立奠定了基础。1949 年以后,我国学者运用马克思主义的立场、观点和方法探讨中外历史上的法律制度和法律思想,从而把法律史学的研究推向一个崭新的发展阶段,取得了重大进展。与此同时,外国也有一些学者潜心于中国法律史的研究,取得了不少成果。

如果说本世纪初至 1949 年,我国法律史学的研究仅仅是一些学者的学术爱好,那末,1949 年以后,特别是改革开放以来,伴随着法制建设的需要和法学教育的发展,在我国法学界逐步形成了一支数量可观的包括老中青学者在内的研究队伍。我国历史学界、民族学界、考古学界、社会学界的一些同仁,也对法律史学表现出了浓厚的兴趣和高度的关注,并时有论著发表,他们亦当是这支研究队伍的重要力量,共同携手推动法律史研究事业的发展。

法律史学既然是法学的基础学科,自有其纯学术的一面,但其

特定的社会功能和社会价值无容置辩,且已被社会所公认,而难能为其他学科所取代。法律史学的研究对象,无论是制度层面还是思想层面,都是一定经济基础的法律上层建筑,研究历史上的法律制度和法律思想,揭示其特定的内容、内在的联系和历史的发展,及其与一定形态社会的互动关系,对于我国社会主义法制建设无疑具有借鉴意义;传统法文化是传统文化的组成部分,摒弃其糟粕,汲取其精华,提高全民的法律意识,以加强社会主义精神文明建设,亦当是法史研究者肩负的义不容辞的任务;法律史学过去、现在和将来都是法学教育的基础学科,法律史学研究的深入开展,必将大大丰富法学教育的内容。

中国法律史学会是研究中外法律史和传统法文化的全国性学术团体,自1979年成立以来的近二十年间,为组织和推动法律史学的研究做了大量工作,1980年至1983年曾编辑出版过三辑《法律史论丛》,产生过相当广泛的影响,后因各种原因中断。长期以来,特别是近年来,我国一些法学刊物虽然不时刊登法史文章,终因篇幅所限,难能发表万字以上的作品,而且数量也极为有限。在这种情况下,经反复研究,我们认为很有必要开辟一块新的法史园地,定名为《法律史论集》,希望通过这块园地促进法律史学的繁荣,同时也有助于整个法学研究和法学教育的发展。

《法律史论集》每年一卷,它坚持正确的学术方向,倡导不同的学术风格,广纳百家之言,主要发表研究论文,同时开辟若干学术专栏,以加强学术交流。《法律史论集》也负有培养法史新秀的任务,选登博士研究生和硕士研究生的学位论文。

《法律史论集》的出版,得到了贾京平先生和法律出版社的鼎力襄助,同时也得到学界同仁的大力支持,在此一并致谢。

韩延龙

1998年2月10日

Preface

This book is the first volume of the Essays on History of Law.

History of law is both a basic subject of law and an important branch of history. As a subject of law, it can be further divided into Chinese legal history, the history of Chinese legal thoughts, foreign legal history, the history of foreign legal thoughts, and traditional legal culture, etc. The sub-branches above focus on different research fields and have different study topics, reflecting the multiple colors and the substantial contents in legal history.

Since the beginning of the twentieth century, Chinese scholars started to apply new approaches to study the history of law and published a number of academic works. Although the works are not too many, they have high academic values and broad influences even in today, and established a solid foundation for this discipline. After 1949, Chinese scholars have been applying the basic principles and approaches of Marxism to study both legal history and legal thoughts, which in turn promoted the research to a new stage and resulted a great deal of significant achievements. Meanwhile many foreign scholars have focused their

studies on Chinese legal history and published many excellent works.

From the beginning of this century to 1949, it may be said that it was an academic hobby for some scholars to study history of law. From then on, especially from 1980s, a significant research team including the old, the middle aged, and the young, has emerged in this discipline following the need of legal system building and the development of legal education. Besides, some scholars in other research disciplines, such as history and ethnology, have also highly interested in legal history of law and published their works related now and then. They are certainly an important component of the research forces in history of law.

As a basic subject of jurisprudence, history of law possesses the nature of pure academic study. However, it is well known that it also possesses some social functions and values. Apparently this is indisputable and can not be substituted by other academic disciplines. The research objects of the history of law, either legal system or legal thoughts, are parts of the superstructure, which are erected on the economic foundation. Therefore, the purposes of the research works are not only to investigate the inherent contents and the developments of legal systems and legal thoughts in history, but also to disclose the relationship between the society and its legal system and legal thoughts. It is no doubt that this study has a great value to the construction of China's socialist legal system. Besides, it is one of the responsibilities for the research forces to discard the dross and select the

essence from the traditional legal culture and make use of the essence to promote the national legal consciousness to a new level. Because history of law is a basic subject of the legal education, the further development of the research activities involved will extremely enrich the legal education.

China Society of History of Law is a national academic organization to study legal history, the history of legal thoughts, and traditional legal culture. After its establishment in 1979, the society initiated many academic activities and enhanced the research level in this discipline. From 1980 to 1983, the society edited and published three volumes of Series of Essays on History of Law, which had a great influence on the research works involved. It is stopped publishing for certain reasons. Although in recent years many legal periodicals have published many articles on history of law frequently, the long articles are difficult to be published. And still many articles can not be published because of the volume of the periodicals. In light of the situations above, we decided to cultivate a new field to publish essays involved. The name of the field is Essays on History of Law and it is planned to be published one volume annually. It is hoped that the newly opened field may bring up the prosperity of the history of law and promote the studies on law and the legal education. The Essays on History of Law will hold on its correct academic orientation and advocate different studying styles. While publishing thesis, it opened some academic columns to promote the exchange of academic information. Furthermore, the Essays on History of Law owns an obligation to train promising young

scholars and publish some selected Master's thesis and Doctoral dissertations.

I would like to thank Mr. Jia Jingping, the director of Law Publishing House in Beijing and his colleagues. Because of their generous supports the Essays on History of Law is published. I am also grateful to all my colleagues in the law circle for their enthusiastic supports.

Hang Yanlong

Beijing, China

Feb. 10, 1998

目录

卷首语

韩延龙

法制史专题研究

- | | | |
|-----|---------------------|-----|
| 1 | 中国法律起源模式探索 | 李明德 |
| 14 | 夏商法律研究中的若干问题 | 李 力 |
| 41 | 汉文帝刑制改革相关问题点试论 | 张建国 |
| 61 | 孝与汉代社会及法律 | 侯欣一 |
| 88 | 两宋财计律法特点 | 赵晓耕 |
| 110 | 明代对官员犯罪的处置 | 尤韶华 |
| 135 | 清代武科考试制度 | 齐 钧 |
| 161 | 晚清“就地正法之制”研究 | 邱远猷 |
| 191 | 重评清末法律改革与
沈家本之关系 | 苏亦工 |

法律思想史专题研究

- | | | |
|-----|----------------------------|-----|
| 226 | 20 世纪之中国法律思想史学
研究及其发展蠡测 | 饶鑫贤 |
| 259 | 富之教之、允执其中及其他
——孔子治国之道略说 | 高 恒 |
| 269 | 论邓析 | 高积顺 |
| 285 | “法先王” | |

	——儒家王道政治的理想法	俞荣根
300	法家思想对汉初统治集团的影响	徐进
313	董仲舒的法律思想和司法实践	武树臣
341	“天人合一”与中国古代法律观念	徐忠明
373	程颢、程颐法律思想研究	杨鹤皋

文献研究

388	《吕刑》考释	马小红
419	《法经》略考	何勤华
435	唐令拾遗补·序	(日)池田温 黄正建 李锦秀译
442	《唐律·职制》与唐代文官制度	俞鹿年
469	西夏《天盛律令》及其 法律文献价值	史金波
496	22种明代稀见法律文献 版本述略	杨一凡
520	《皇明条法事类纂》与《条例全文》 的比较考述	张伯元
541	康熙十九年《刑部现行则例》 的初步研究	沈厚铎

法制现代化专题研究

549	外部影响与内发力量 ——中国法制现代化的动因机理	公丕祥
-----	-----------------------------	-----

法史新资料

570	沈家本日记摘钞	[清]沈家本
-----	---------	--------

学者专访

596

著名学者瞿同祖先生访谈录

高旭晨

Contents

Preface Hang Yanlong

Studies on Chinese Legal History

- An Approach on the Original Mode of
Chinese Ancient Law *Li Mingde*
- Questions on the Research of the Legal Systems
in Xia and Shang Dynasties *Li Li*
- A Brief Analysis on the Reform of
Punishment System and the Questions Involved
in the Period of Emperor Han Wen *Zhang Jianguo*
- Filial Piety and Law in Han Dynasty *Hou Xingyi*
- Financial Law in North and South Song
Dynasties *Zhao Xiaogeng*
- Punishment on the Official Crimes in Ming
Dynasty *You Shaohua*
- Military Examination System in Qing Dynasty *Qi Jun*
- A Study on the Summary Execution in the
End of Qing Dynasty *Qio Yuanyou*
- A Review on the Relationship between the Legal
Reform in the End of Qing Dynasty and Shen

Jiabao *Su Yigong*

Studies on the History of Chinese Legal thoughts

A Brief View on the Research of the History
of Chinese Legal Thoughts in Twentieth Century
..... *Rao Xinxian*

Rich People, Teach People, and in the Middle
of Road, and so on: a Brief Study on Confucius'
Thought of Managing State Affairs *Gao Heng*

On Deng Xi *Gao Jishun*
"Following Ancient Sages"—Confucian

Ideal Law in State Affairs *Yu Ronggen*

The Influence of Legalists' Thought on the
Politicians in the Early Han Dynasty *Xu Jing*

Dong Zhongshu's Legal Thoughts and His
Judicial Decisions *Wu Shuchen*

"Heaven and Earth" and Ancient Chinese
Legal Ideas *Xu Zhongming*

A Study on Cheng Hao and Cheng Yi's
Legal Thoughts *Yang Hegao*

Studies on Legal Documents

A Study and Explanation on Lu Code *Ma Xiaohong*

A Brief Study on Fa Jing *He Qinhua*

Preface for Tang Ling Shi Yi Bu	<i>Ikeda On</i>
Zhi Zhi in Tang Code and the Civil Service in Tang Dynasty	<i>Yu Lunian</i>
Tian Sheng Lu Ling in West Xia Dynasty and its Value	<i>Shi Jingbo</i>
A Brief Study on Twenty Two Uncommon Legal Documents in Ming Dynasty and Their Editions	<i>Yang Yifang</i>
A Comparative Study on Huang Ming Tiao Fa Shi Lei and Tiao Li Quan Wen	<i>Zhang Boyuan</i>
A Preliminary Study on Xing Bu Xian Xing Ze Lie in the Nineteenth Year of Kang Xi in Qing Dynasty	<i>Shen Houduo</i>

Studies on Legal Modernization

External Impacts and Internal Forces the Driving Elements and Mechanism of the Modernization of Chinese Legal System	<i>Gong Pixiang</i>
---	---------------------

Legal Documents

Excerpts of Shen Jiaben's Diary	<i>Shen Jiaben</i>
---------------------------------------	--------------------

Academic Interviews

An Interview with Qu Tongzu, a Famous
Scholar in Legal History *Gao Xuchen*