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卷 首 语

《法律史论集》第1卷出版后,法史学界的同仁们多曾对我们的工作予以肯定。论集中的一些栏目和文章也的确引起了研究者的关注,其所刊载的资料和信息为研究者的工作提供了一些帮助。同时我们也获知这本书已在海外发行,这肯定有助于使研究者的成果得到广泛的交流与传播。这都使我们感到欣慰。

与第1卷相比较,本卷在总体结构上没有做大的变动,仅在局部进行了必要的调整。这种变动意在使《论集》能够更准确地反映法律史的研究水平,更有效地交流学术信息,更大程度地发挥《论集》的功能作用。比如,增加了学位论文的内容,目的是为法史学界的新兴力量提供展示成果的机会;而学术评论的宗旨是力图加强学界之间的交流,为学界提供必要的学术信息;当然,评论形式的多样化也是我们的发展方向。同时,在内容范围上,增加了外国法律史及比较法史的研究成果,以使《法律史论集》更具有广泛性。从本卷开始,还将固定对前一年的法律史研究进行年度评述。本卷由于是首次加入这一内容,所以在时间范围上比较宽泛,包括了1998年以前的一些成果。而且,在内容上也仅限于中国法律史的范围。以后,在学术评论的内容上将包括外国法律史的内容。《法律史论集》所刊载的稿件,在保证高水平的基础上,并不排斥形式和内容上的多样性。学术研究本身是具有广泛意义的社会活动,它不应该为狭隘的框架所束缚,中国古代就有“经史皆文”的学术传统。所以,对于学者们采用的新型研究方法和理论上的创新,《论集》都将给予大力的支持。

虽然有了编辑第一卷的经验,我们在第二卷的编辑工作中仍未敢稍有松懈,反而我们感到了更大的压力,这就是如何做到使我们的工作更上一层楼,把这部《论集》越办越好。而要达到这一目的,并非我们几个编者力所能及的,它必须要得到法史学界同仁的鼎力相助。《法律史论集》为中国法律史学会主办,它也为法史学界所共同拥有。我们期待它能够成为代表我国法史界学术水平、不断创新、增进学术交流的园地。在编辑的态度上,我们并没有把这项工作仅仅做为一种事务性的工作来完成,而是更多地把它做为一项学术活动。而学术的要求是无止境的,从这个角度上而言,遗憾也是难以避免的。我们看到,《论集》在形式和内容上都还存在着诸多的不足。在形式上还有许多需要改进的地方,一项栏目的设置的缺乏创意,没能起到与内容相呼应的效果;一些为学界所广泛关心的课题还没有被突出出来。从而,我们将在以后的工作中采取更为开放的编辑形式,突出研究成果的内容,突出成果的学术内涵与价值,力求做到不以我们具有主观性的工作形式羁缚学者们的研究意趣和思想流动。古语有谓:镜不设形,故能形也。我们愿意把论集办成凸现法律史学的学术形态、反映研究成果的学术价值的一面镜子。

最后,我们仍不应该忘记对法律出版社的大力支持表示感谢,对贾京平总编的关心表示感谢,对王耀琪女士和张波先生认真负责的编辑工作表示感谢,同时也感谢所有关心中国法律史学会的工作,关心《法律史论集》的所有朋友们。

韩延龙

1999年4月8日

Preface

After the publication of the first volume of *Legal History Review*, many friends in the law circle highly commended our works. While some of its columns and articles have in deed aroused the attention of many researchers, a lot of data and information in the first volume also provided great help to the researchers concerned as well. In addition, we learnt that the *Legal History Review* is distributed overseas, so the research achievements by the authors will be known widely. All of these made us feel comfortable.

In comparison with the first volume, the second volume has no big change in the whole structure but some partial modifications necessary. The changes are intended to reflect the research level in legal history more adequately and exactly, to stimulate the exchange of academic information more effectively, and to get *Legal History Review* functioned better. For example, we added a new column "Dissertation Digest" so as to show the achievements done by the new forces in this field. Because academic critics are for the purpose to strengthen the exchange of new ideas in the academic circles and offer new information, we expanded the volume for academic critics as well. Whereas the diversified critic style is the goal we are making efforts to achieve. At the same time, we increased the content for the research achievements from foreign legal history and the history of comparison law in order to cover more research fields. To begin with

this volume, we will deliver an annual review to outline the research achievements in the previous year. Because this is the first time to include this content, we also reviewed the research achievements earlier than 1998 but limited the contents only on Chinese legal history. In the following annual review we will cover foreign legal history and other fields related.

Although *Legal History Review* only publishes the papers bearing high academic value, it does not exclude the diversity of the content and style. Academic research themselves are the social activities that can not be limited in a narrow pattern. We have an ancient tradition in China that both classics and history are literary compositions. Therefore, *Legal History Review* encourages the creation of new research methods and new theories. We will give advantages to this kind of papers.

Although we got some experience by compiling the first volume, we do not dare to slack off in the compilation of the second volume. Instead this made us to feel a greater pressure and stimulates us to do our work better. Because this is a goal that can not be achieved by several editors, we hope to get more and more help from the friends in the field of legal history. The compilation of *Legal History Review* is under the auspices of China Legal History Society, so every one in the society should support the work.

In the compilation of *Legal History Review*, we do not treat it as a routine work but an academic activity. Academic creations have no limitations. Therefore, in light of this, many shortages are left there and should be improved in future volumes. For example, there are many places need to be improved in the whole structure. Some columns are short of originality and do not effectively reflect the con-

tent. And many discussion topics interested by the scholars are not highlighted well. Thus in our future compilation, we will adopt a more open method that focuses on the essence of the research achievements, and focuses the academic value of the research achievements. We are going to make efforts to avoid to limit researcher's academic interests and their creative orientations by our subjective compilation method. We would like to make *Legal History Review* as a mirror to reflect the academic status and academic value of the research achievements in this field.

At the final we should not forget to acknowledge the support by Law Publishing House. We highly appreciate the care and support from Mr. Jia Jingping, the chief editor of Law Publishing House. We also pay our high regards to editors Miss Wang Yaoqi and Mr. Zhang Bo for their great editing works. At the same time our heartfull thanks are going to all friends who are supporting the works of China Legal History Society and supporting Legal History Review.

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Han Yanlong
April 4, 1999

目 录

卷首语

韩延龙

法制史研究专题

- | | | |
|-----|------------------|-----|
| 1 | 对中国古代复仇案的诸分析 | 霍存福 |
| 47 | 中国古代民事法律文化基本特征概述 | 郭建 |
| 69 | 中国传统民事契约研究 | 李祝环 |
| 108 | 汉简中的官吏奖惩制度 | 罗鸿瑛 |
| 121 | 唐律条标探析 | 王立民 |
| 133 | 王安石变法的内容及其社会效果 | 俞鹿年 |
| 153 | 元朝民事诉讼与民事法规论略 | 陈景良 |
| 208 | 明代军犯定卫考论 | 吴艳红 |
| 231 | 明清充军同异考 | 尤韶华 |
| 264 | 清初回疆的廉政制度 | 齐钧 |

法律思想史研究专题

- | | | |
|-----|---------------|----|
| 293 | 试论周公的“明德慎罚”思想 | 刘新 |
|-----|---------------|----|

318	荀子法律思想新论	武树臣
352	明太祖朱元璋重典惩贪	邱远猷
378	晚清法制改革的逻辑与意义	徐忠明
420	论何启、胡礼垣“厚官禄以清贿赂”之 变法主张	高旭展
439	居正法律思想研究	春 杨

文献及有关考古资料研究

452	从银雀山汉简《守法守令等十三篇》看 齐国法制	李 力
463	唐代法制与典籍考辨七题	钱大群
520	明代三部代表性法律文献与统治集 团的立法思想	杨一凡
592	顺治律的初颁及其早期适用情况	苏亦工
606	浅释《清史稿·刑法志》所记“《大清律》成”	马小红

学位论文精要

609	奥斯丁和他的分析法学	徐爱国
643	《问刑条例》与《大明律》比较分析	赵姗黎

学术争鸣

669	“礼不下庶人，刑不上大夫”考论	李明德
685	亚里士多德的法治与先秦法家的法治	徐祥民

民族、宗族法史研究

723	《西双版纳傣族封建社会民刑法规》试析	徐晓光
-----	--------------------	-----

734	孔氏家族宗族法研究	袁兆春
	法治现代化专题研究	
763	天理、国法、人情的冲突与整合 ——儒家之法的内在精神及现代 法治的传统资源	俞荣根
	学术评论	
787	近年来中国法律史研究概观	高 旗
813	法律考古学初议	李雪梅
831	编后记	

Contents

Preface	Han Yanlong
---------------	-------------

Studies on Chinese Legal History

An Analysis on the Cases of Vengeance in Ancient China	Huo Cunfu 1
A Survey of the Basic Characteristics of the Civil Legal Culture in Ancient China	Guo Jian 47
A Study on the Civil Agreements in Traditional China	Li Zhuhuan 69
The System of the Reward and Punishment of Officials in Han Strips	Luo Hongying 108
A Survey of the Subheadings of Tang Code	Wang Limin 121
The Content of Wang Anshi Reform and its Social Effect	Yu Lunian 133
A Survey of the Civil Procedures and the Civil Law in Yuan Dynasty	Chen Jingliang 153
On the Distance Decision of the military Exiles in Ming Dynasty	Wu Yanhong 208
On the Similarities and Differences of the Banishing Systems in Ming and Qing	

Dynasties	<i>You Shaohua</i>	231
The System of Incorrupt Government in the Area of the Hui Nationality at the Beginning of Qing Dynasty		<i>Qi Jun</i> 264

Studies on the History of Chinese Legal Thoughts

On the Thought of "Ming De Shen Fa"(Being Overt of Morality and Cautious of Punishment) by Zhou Gong	<i>Liu Xin</i>	293
A New Approach on Xunzi's Legal Thought ...	<i>Wu Shuchen</i>	318
On the Severe Punishment of Corrupt Officials by Zhu Yuanzhang	<i>Qiu Yuanyou</i>	352
The Logic and the Significance of the Legal Reform at the End of Qing Dynasty	<i>Xu Zhongming</i>	378
On the Reform Assertion "Hou Guan Lu Yi Qing Hui Lu"(Increasing Official's Salary and Reducing Bribe)By He Qi and Hu Liyuan	<i>Gao Xuchen</i>	420
A Study on Ju Zheng's Legal Thought	<i>Chun Yang</i>	439

Studies on Legal Documents and the Archaeological Data Related

A Survey of the Legal System in Qi State From Han Strips "Shou Fa Shou Ling Shi San Pian"(Thirteen Papers on Abiding by the Law and the Ordinance)
--

Excavated in Yin Que Mountain	<i>Li Li</i>	452
Seven Arguments on the Legal System and the Documents in Tang Dynasty	<i>Qian Daqun</i>	463
Three Representative Legal Documents and the Legislative Thought of the Ruling Group in Ming Dynasty	<i>Yang Yifan</i>	520
The Promulgation of Shun Zhi Code and its Early Application	<i>Su Yigong</i>	592
A Brief on the Completion of Qing Code in Legal Treatise, the Draft of Qing History	<i>Ma Hiaohong</i>	606

Dissertation

Austin and His Analytical Jurisprudence	<i>Xu Aiguo</i>	609
A Comparison and Analysis of "Wen Xing Tiao li" (Criminal Regulations and Cases) and "Ming Code"	<i>Zhao Shanli</i>	643

Academic Argument

A Survey of "Li Bu Xia Shu Ren, Xin Bu Shang Da Fu" (the Rites do not Reach the Common People, the Punishment do not Reach the Officials)	<i>Li Mingde</i>	669
Aristotle's Rule by Law and Legalists' Rule by Law	<i>Xu Xiangmin</i>	685

Studies on the Legal Histories of Minority Nationality and Patriarchal Clan

- A Preliminary Survey of "Feudal Civil and
Criminal Regulations of Dai Nationality
in Xi Shuan Ban Na" *Xu Xiaoguang* 723
- A Study on the Regulations of Kong
Patriarchal Clan *Yuan Zhaochun* 734

Studies on Legal Modernization

- The Conflicting and Reorganizing of Heavenly
Principles, State Laws, and Human Feelings
——the Inherent Spirit of the Confucian School
for Legislature and the Traditional Resources for
the Rule by Law in Modern Times *Yu Ronggen* 763

Academic Reviews

- A Review on the Studies of Chinese Legal History
in Recent Years *Gao Qi* 787
- A Preliminary Opinion on Legal Archaeology *Li Xuemei* 813

Postscript 831

法制史研究专题

对中国古代复仇案的诸分析*

霍存福

目 次

- 一、复仇原因的一般分析
- 二、复仇者的结构分析
- 三、复仇者的身份分析
- 四、复仇者的命运与复仇案的结局分析
- 五、复仇泛滥的情况分析
- 六、复仇者的观念分析

按道理,“国家的出现,结束了复仇的历史,代之而起的是刑罚权的行使。”^① 因为随着氏族制度的没落和瓦解,血族复仇的基础不复存在了。但中国的情况不是如此。

氏族制的遗留在中国的延续时间之长,贯穿于整个奴隶制时

* 本文对复仇案的探讨,以秦汉以还为限。春秋时代较特殊,将另文讨论。

① 陈兴良著:《刑法的人性基础》,中国方正出版社 1996 年 1 月版,第 410 页。

代。这就是被中国人称之为“宗法制”的东西。中国人强大而浓厚的报复心理,就是源于宗法制的亲疏内外的差别。这从沿袭下来的语汇中仍然可以寻见端倪:“家仇”表明其为家,“私仇”表明其为私,“亲痛仇快”与“内举不避亲,外举不避仇”之“亲”、“仇”的分野,显示的也正是亲属、家族与外族、外人的对立甚至敌意。

传统宗法社会,家为生活共同体,内、外、亲、仇的观念就是在这种气氛和环境中的延续和强固起来的。这自然来自于原始的血族复仇。血族复仇正是近亲复仇的滥觞。这一方面演化为法律或礼制的国家公共权力的统一行动——报复刑主义,另一方面,在惯性上仍难免存在私人复仇的个人行为。

然而,血族复仇(及范围已经变小的近亲复仇)的环境条件(氏族共同体及其遗留)在宗法社会解体后的封建社会早已经不存在了,只是由于儒家从伦理方面的激扬,才再次显出它的重要性。^①更由于它与血族复仇所遵循的“以牙还牙”、“以眼还眼”的同态复仇的报复、报应相一致,再与“杀人者死,伤人者刑”这一在血族复仇基础上产生的报应刑原则相符合,遂在很大程度上受到法律(刑法)原则的或明或暗的巨大支持。因此,在中国,经学或礼学中的那些出发点本是限制复仇的言论所包含的允许、鼓励复仇的因素,到后来竟是被作为复仇的绝对根据无限地利用起来。

一、复仇原因的一般分析

对复仇的分析,首先得从复仇的背景原因的分析开始。

复仇的具体原因可能是不同的,但一般原因却不外两个:一是加害者(主要是杀人犯,下同)未受惩,国家没有追诉犯罪,社会没

^① 此点不应小觑。西汉末周党被乡佐侮辱,后到外地从师读《春秋》,“闻复仇之义”,才回来找乡佐决斗的。见《后汉书·周党传》、《太平御览》卷481引《东观汉记》。