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李秀清 著

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根据以上共识，我们制定了文库操作方案，对入选范围、标准、程序、学术规范等一一做了规定。社科文献学术文库收录当代中国学者的哲学社会科学优秀原创理论著作，分为文史哲、社会政法、经济、国际问题、马克思主义等五个系列。文库以基础理论研究为主，包括专著和主题明确的文集，应用对策研究暂不列入。

多年来，海内外学界为社科文献出版社的成长提供了丰富营养，给予了鼎力支持。社科文献也在努力为学者、学界、学术贡献着力量。在此，学术出版者、学人、学界，已经成为一个学术共同体。我们恳切希望学界同仁和我们一道做好文库出版工作，让经典名篇，“传之其人，通邑大都”，启迪后学，薪火不灭。

社会科学文献出版社

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作者简介

李秀清　浙江临海人，法学博士。华东政法大学教授、博士生导师。兼任全国外国法制史研究会副会长、中国法学会比较法学研究会常务副会长、上海市法学会外国法与比较法研究会会长等职。

曾在英国牛津大学（2003.1～7）、美国密歇根大学（2006.10～2007.10）、德国马克斯·普朗克欧洲法律史研究所（2013.7～2014.2）访学，2006～2007学年中美富布莱特研究学者。讲授《外国法制史》及《比较法》等课程。著有《日耳曼法研究》《中法西绎：〈中国丛报〉与十九世纪西方人的中国法律观》《所谓宪政：清末民初立宪理路论集》《所谓司法：法律人的格局与近代司法转型》，及《20世纪比较法学》《教会法原理》等合（译）著十数部。曾获上海市哲学社会科学著作一等奖、国家级教学成果二等奖等奖项，及“上海领军人才”、“全国十大杰出青年法学家”和“有突出贡献中青年专家”等称号，入选国家“万人计划”哲学社会科学领军人才。

内容提要

本书是系统阐述日耳曼法的论著，既对日耳曼法成文化的历程作了考证，又对其主要领域，诸如权力归属、身份等级、婚姻家庭、土地、动产、继承、不法行为、纠纷解决的习俗、规则和法律进行了分析，并在此基础上总结了日耳曼法的特性及地位。作者认为，不同日耳曼王国法律成文化的历程并非同步，在此过程中因吸纳罗马法等外来因素的程度不同，导致彼此的内容存在明显差异。作者还认为，传统上因以某个王国或某个时期的立法和相关资料为依据而阐述的有关附庸、马尔克、以手护手、遗嘱、赎杀金、处于法律保护之外、承审员、纠问式诉讼、司法决斗等方面的观点存在偏颇，并相应做了辨析和匡正。作者最后提出，日耳曼法虽然未能发展为成熟的法律体系，但它在世界法律史上仍具有不可替代的地位，无论在继日耳曼王国解体之后建立的欧洲新政权的法律中，还是在中世纪的地方法、王室法，及近代西方两大法系主要国家的法律文化中，均含有一定的日耳曼法因素。

Abstract

Germanic law is undoubtedly one of three important historical sources of western law besides Roman law and Canon law. In the Barbarian kingdoms, the tribal law (the *leges barbarian*) was sometimes set down in writing, from the period of the invasions of Germanic people and the fall of the Roman Empire to the disintegration of the Charlemagne Empire in ninth century and the Norman conquest of Britain in eleventh century. That was the main source of Germanic law.

The Visigothic kingdom was the first Barbarian kingdom in the territory of the Roman Empire. The law of the Visigoths had essential values and distinct characters, among which rare immemorial customs were to be founded. While, the main two codes, the *Euric code* and the *Visigothic code*, obviously embodied the trail of Roman law. In addition, the Romani remained subject to vulgar Roman law, namely the Alaric Breviary in the Visigothic kingdom.

In the Burgundian kingdom, the *Romani* remained subject to vulgar Roman law, the *Lex Romana Burgundionum*, and the Burgundians to the law of their own tribe, the *Lex Burgundionum*. The conflict between Romani and Germanis were subject to the law of Germanic law. The Lex Burgundionum was one of the greatest *leges barbarian* and even remained its force in

Burgundians after the fall of Burgundian kingdom. Meanwhile, the Lex Burgundionum reflected the merge of Germanic law and Roman law.

The *Rothair's Edict* was the first code of the Lombard kingdom. The distinct structure and the enumerative articles were main characters of it. Moreover, neither Roman law nor Cannon law had much impact on the *Rothair's Edict*. Another important law of the Lombard kingdom that should be mentioned was the *Laws of Liutprand*. The main value of the legislative history of the Lombard kingdom is the continuity of the legislation. During the process, the kings enriched the law in order to meet the various demands of the society.

The Frankish kingdom, the most powerful Germanic kingdom, promulgated some famous codes; The best known is *Lex Salica*, the law of The Salian Franks dates back probably to the reign of Clovis. After that there were different versions, including the *Pactus Legis Salicae* and *Lex Salica Karolina*. Another important code must be mentioned is the Lex Ribuaria, the law of Ribuarian Franks. It was influenced by *Pactus Legis Salicae*, meanwhile, it had its own characters. In addition, Charlemagne played a key role in the legislative history of the Frankish Empire.

In Britain, those Anglo-Saxon kings also promulgated a series of'statutes' (*domes*), which were nothing but the collections of the edicts of the kings. In contrast to other compilations, these English versions showed a distinctive direction from the beginning.

Most of the early kings of Germanic kingdoms were military leaders. The succession of the throne was a mixture of the election in form and the hereditary in nature. In the later period of the Germanic kingdoms, this character was showed more and more clearly. Meanwhile, the Pope began to intervene in the succession of the throne. In addition, the antrustiones of the kings became the consultants and the officials of the Curia regis because of their intimate relations with the kings, even the major domus took the dominate positions in the Curia regis. The Germanic kingdoms were divided to some shires and hundreds where there were local leaders and moots

with complex functions, but they were not autonomous areas. With the strengthening of the lords' power, the institutions of the Germanic kingdoms were in the course of feudalization in the late period of the Empires.

The status hierarchy of the Germanic people was very complex. In general, people were divided into three classes: freemen, slaves and the middle classes. Inside the three classes, they could be re-divided into different classes. On one hand, it remained some customs; on the other hand, it also showed the changes of different classes in the process of social transition. The lords and the vassals appeared in the late period of the Germanic kingdoms. That was the feudalization of the social estate of Germanic people.

The mundium was supreme in Germanic families. Everybody in the families, whether paternal or maternal, had its own legal position due to certain principles. The relationships of the families were relatively fixed and unbreakable. The marriage had two steps: the betrothal and the nuptial. The dowry was very important in Germanic marriage. The morning-gift was one of the distinct characters in Germanic marriage. These were two important parts of the wife's estates. In Germanic marriage, the principle of one husband and one wife was dominant, which emphasized the obligation of the loyalty of the spouses. The marriage among certain different classes was forbidden, especially for the marriage between freemen and slavers. Divorce was permitted in most of the Germanic kingdoms, but the divorce by simple mutual agreement was rare. As far as the matrimonial property was concerned, the separate property regimes prevailed in Germanic marriage, while in fact, the husband controlled the matrimonial property. Another character was that the families and the relatives were very important in the judicial affairs.

There were many debates on land law of the Germanic people: the best known was whether theMark based on the communal land proprietary did exist. There were some articles in terms of the principle of public land, forest and grassland in some statutes. However, it's hard to say that it is completely the same as the Mark in the period of the early Germanic kingdoms. In some

Germanic kingdoms, there were some articles of the rent and the sale of the sors in order to protect them. The royal demesne was the economic pillar of the Germanic kingdoms. In the later period of the Germanic Empires, the feudalization of the land systems appeared step by step.

In Germanic law, the chattels were rather the seisin protected by law than the real property. The recourse of chattels was the most important feature in Germanic law. Its application was differentiated by a voluntary or an involuntary loss of possession. The principle of 'Hand must Warrant Hand' and the process of 'following the trail' for finding the criminals and the stolen goods were created at that time. Meanwhile, Germanic law had its own features on sales, donation, lease, bail and pledge of the chattels. However, generally speaking, Germanic law was not a complete legal regime in terms of chattels.

The law of inheritance of Germanic people that were of huge differences among the Germanic tribes was rather the accumulation of the customs due to the special reasons than the consequence of the legislations based on the rational rules. Testamentary succession and inherit in subrogation appeared in some Germanic kingdoms at that time.

In Germanic law, there was no difference between crime and tort. They were so called offence, which were commonly homicide, personal jury, as well as theft. The punishments of the offence were mainly based on the objective principle, meanwhile, partly on the subjective principle. Compensation in case of offence was widely used, and sometimes the peace money was also required. Blood feud was no longer the main solution of the disputes, but it still existed and was limited in certain scopes. Outlawry was one of the special punishments in Germanic law. The man who was an outlaw would lose the whole rights and would not be protected by law.

In Germanic kingdoms, there were no special so-called courts and judges in charge of the litigation. The judges had to deal with the military and administrative affairs besides litigation. They are judges and officials at the same time. Generally, only the wise man might become the judge, which

was called "the finder of law". In Frankish Empire, the Charlemagne Reform made the trial systems more simple and fixed by creating the position of schöffen. In Germanic law, the distinction drawn between civil procedure and criminal procedure did not exist, nor did the appeal. The litigation process embodied a strong feature of formalism. The parties played key roles in the process of summons, quoting and hearing in the beginning, while the courts took this position in the procedure of the inquisition later. Generally, the defendant was liable of quoting. There were many different kinds of evidence, including witness, confession, and document. But the special evidence included oath, compurgator, ordeal, and judicial duel.

In the Middle Ages, though Germanic law differed widely in various kingdoms, they were rooted on the same tradition in terms of origin, language, religion, culture, etc. Therefore, they were much in common, especially on values and spirits. Generally, the structure of the Barbarian Codes was confused and concrete. Meanwhile, the process and the proprieties were particularly emphasized. The conditionality of the communities had great impact on the exercise of rights and obligations. Germanic law adopted the principal that an individual remains subject to the law of his own origin. In addition, Christianity gradually had a great influence upon Germanic law. Meanwhile, the Roman law had a great impact on it in terms of principals and systems. Therefore, Germanic law had a feature of compatibility. In fact, Germanic law did not become a perfect legal system even by the collapse of the Germanic empires. But it could not be denied that Germanic law played a great role in western legal history, because we can find out the trail of Germanic law from the law of the later new European regimes, from local law and royal law in the Middle Ages, and even from the legal culture of Common law and Civil law.

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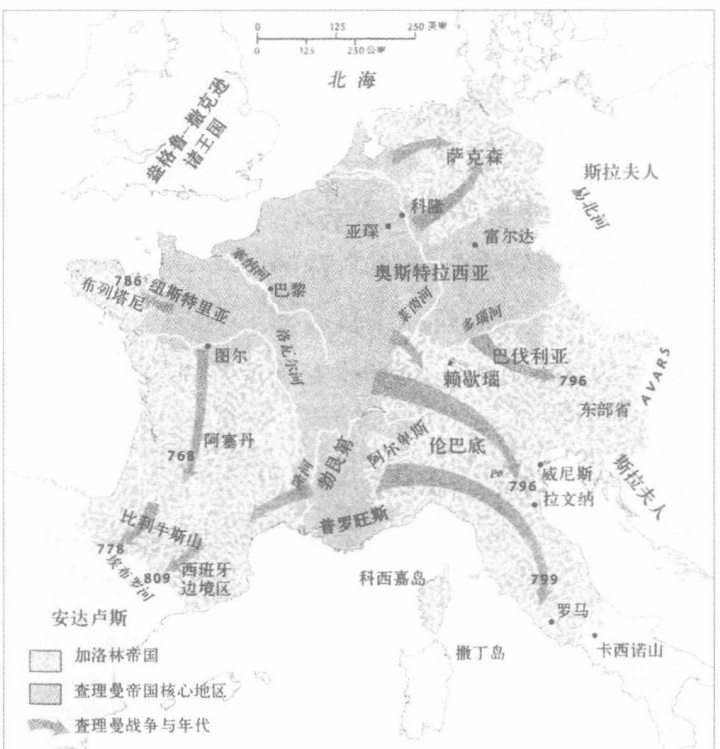

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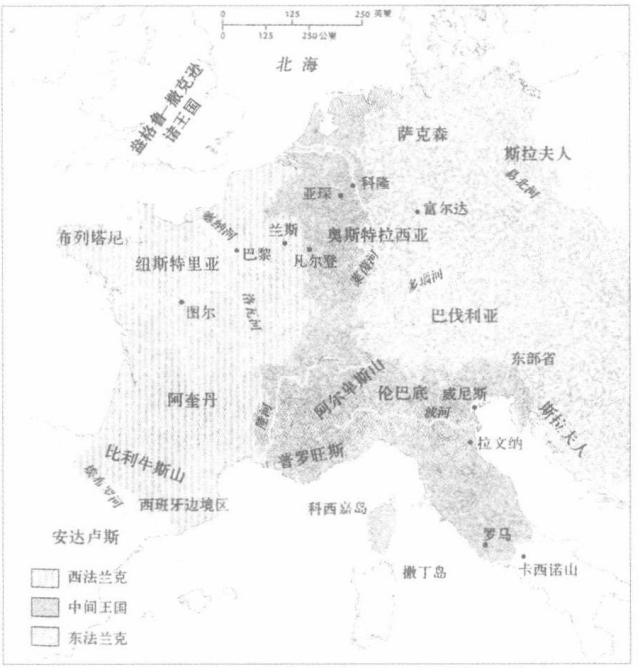

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