

春風煦日論壇——刑事法叢書系列 9

論文集 1

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Anthologies 1

刑事法之基礎與界限

—洪福增教授紀念專輯—

Foundations and Limits of Criminal Law and Criminal Procedure

—An Anthology in Memory of Professor Fu-Tseng Hung—

主編 許玉秀
Edited by Yu-hsiu Hsu

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Profile of Prof. Fu-Tseng Hung

Fu-Tseng Hung, also known as Fu-Ching and

Ku-Ching, was born in Amoy, China. In 1936,

he graduated with a law degree from Amoy University in China.

He was a founding member, publisher, and co-editor of the

Journal of Criminal Law. He also founded the Journal of Criminal

Law Foundation and served as the Chairperson of its Board of Directors.

Professor Fu-Tseng Hung passed away on April 17, 2002.

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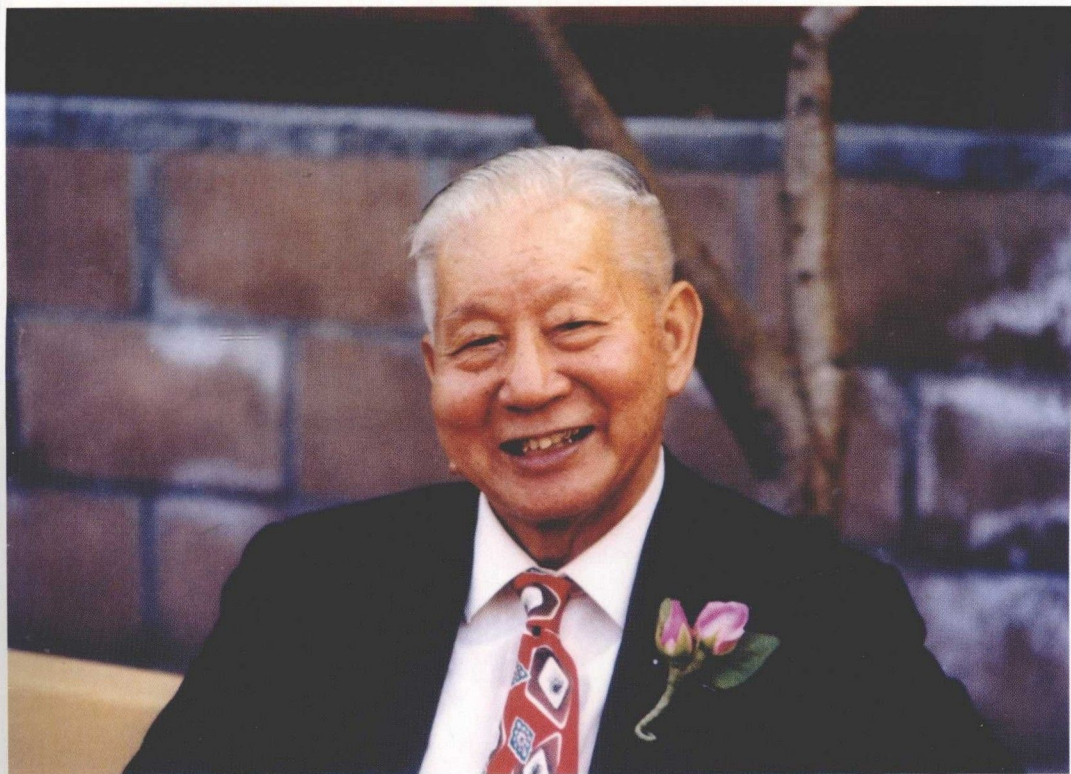
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序

林永謀

君子之澤，不僅在修之於身，式之於家，而在能流風餘韻，傳之於後，化之於世。是倡者啟其緒，和者衍其後，隨者湧泉而興雲焉。福建同安洪福增先生，字復青，南宋名臣洪皓之後，柏埔其生地也。短軀豐頤，目炯炯有光，滿面福業，一如其名，待人和易，時露至情。蘊蓄才器，通明今古，雖博習法學，仍不失儒家之道；剛而不搖，質而好義，薄視財利，忘己濟物，復多古豪俠之風。事蹟為世所傳，不煩詳引。

先生最可欽慕者，無論服公職或其後執業律師，猶亦極思精心，潛心向學，每於業餘之暇，孜孜於古典刑法基礎理論、即行為與違法性基本問題之鑽研，規模宏闊，舉凡犯罪階層理論、行為論、不作為犯、構成要件理論、因果關係、故意與過失犯、違法性理論、競合理論、共同正犯等均在其內，且寫作甚勤，著述甚豐，慧業才情，交揮並發，前後有「刑法之理論與實踐」、「刑法之基本問題」、「刑法理論之基礎」、「刑事責任之理論」、「刑法總則實例研究」、「刑法判解研究」等書問世，窮盡源委，以述其學，精思深入，罕有其匹，是以帶動犯罪理論體系之研討，開啟刑法理論與社會行為理論之研究契機，厥功至偉。蓋通本乃能通於變，稽古所以行於今，若不精於本而徒務其末，則得失可知。先生流風所被，於今關於刑事法學可謂名家輩出，實務上亦迭有佳作，其踵步先生之後，就主觀客觀刑法思想、目的行為論等之闡發，固甚可觀，另就責任刑法理論、社會行為理

論等之闡述，亦極燦然，而整個刑事法學之發展，更是方興未艾，先生居風氣之先，啟蒙餘緒，迄今後學猶受其惠。

民國四十五年先生與徐師世賢、韓師忠謨、林師紀東、孫師德耕暨師輩之李元簇、梁恒昌、周治平、裘朝永諸先生創辦刑事法雜誌，其時物資艱難，今非昔比，法律學者欲覓一可發表研究心得之所，多不可得，固不獨刑事法學為然，端賴有此一刑事法專業園地之在，其後諸家刑事法大作遂多見於此；然因其非大眾性刊物，基金之外，雖偶有政府獎助、社會些微捐助，畢竟仍不足以支應，經營極為困難，先生為激勵後學，獎勵後進，其不敷者，長期以來，均由先生私人款項挹注，前後達千萬，雜誌之能四十餘載而未中輟者，先生與有力焉，先生固非創其始，觀其成而已。寒暑更易，於今耆年宿望凋散略盡，然魁儒碩彥並生挺出，刑事法學之研究，風起雲湧，蔚成盛業，此實先生為之倡也，緬懷老輩風範，追維前人盛德，實不勝感念之至。

余讀先生之文也甚早，但識先生本人則甚晚，猶憶民國四十八年秋間，余為大學三年級上學期生，因前時於暑假參加高考律師考試，倖獲錄取，時間稍裕，遂思涉獵，以補不足，而於系圖書室獲睹刑事法雜誌，於後先生大作不斷見之於本雜誌，讀其文因乃心儀其人，迨民國八十三年秋，余由最高法院庭長改任司法院大法官，於某一集會上始獲識先生，距初悉先生之名已三十五年，先生固已八十高齡，余自撫鬢絲，亦垂垂老矣，雖僅請益片刻，快慰之情，時歷數年，猶如昨夕，原期先生百歲以上壽，不意去歲四月仙逝。余綜觀先生一生，服官則秉性周謹，狷介不偶；為學則折衷其間，不立崖岸，讀書治學、修身立德，均足為來學矜式，永留後者楷則。執教各大學專精於刑事法學諸青壯學人，追維先生

學行，於先生捐館一年前夕，各以續學之作，集成一冊，曰：「刑事法之基礎與界限」，而索序於余。竊維古之君子，其德而荷道者，必帥而掖諸後進，輔而翼之後學，而後，後者固有所階而進，前者亦有所託而傳。先生開我國刑法基礎理論研究之先河，使後繼者續其遺緒而得加發揚，其於先生固無憾矣，惟世情漓薄，如撰稿諸教授者，以學子仁人之心，不忘前人遺澤，豈易得哉！宜乎作範上庠，開往繼來，振采揚芬，後來居上也。是為序。

PREFACE

A virtuous person not only exercises self-discipline, but also sets an example in parenting, which extends his or her influence to future generations. Such progenitors begin new eras, while their followers implement and expand their visions.

A descendant of Hao Hung, a renowned statesman in the Second Soong Dynasty, Professor Fu-Tseng Hung, also known as Fu-Ching Hung, was born in Bor-Pu, Tung-Ann County, Fujian Province, China.

As his name connotes, Professor Hung was stocky, energetic, gracious, approachable and sincere. Knowledgeable about history and trained as a legal scholar, he treated people according to Confucius' teachings. He was impartial, unwavering, unpretentious, ethical, non-materialistic, generous, and chivalrous. His contributions to society -- too many to detail here -- are widely known in the legal community.

Professor Hung is most remembered for his research on the fundamental theories of classical criminal law, which continued during his career in public service and, later, in the practice of law. This research covered a wide range of topics, including the distinction between wrongdoing and attribution, actus reus, criminal omission, corpus delicti, causation, mens rea and mistake, theory of wrongfulness, concurrence, and derivative liability. A talented and prolific writer, Professor Hung published The Theory and Practice of Criminal Law, Fundamental Issues of Criminal Law, Theoretical Foundations of Criminal Law, Theories of Criminal Responsibility, Case Studies of the General Part of Criminal Law, and Annotation of Criminal Cases.

Understanding fundamental principles helps one to cope with contingencies. Professor Hung's unequalled comprehensive reasoning

and profound legal thinking inspired the study of crime theories, a field that continues to attract growing interest. His contributions to criminal law covered such areas as objectivism and subjectivism, teleological and social theories of acting and criminal responsibility. Today, we can attribute the continuing expansion of criminal jurisprudence -- with its proliferation of outstanding scholars and publications -- to Professor Hung's substantial work in criminal law.

With Professors Shr Shiang Hsu, Chung-Mo Han, Gee-Dong Lin, Deh-Girn Sun, Yuan-zu Li, Heng-Tsang Liang, Chi-Ping Zhou, and Tsiao-Yueng Chiou, Professor Hung founded the Criminal Law Journal in 1956. It was considered a milestone in academic research, particularly on criminal law. With the scarcity of resources in those days, legal scholars had few outlets for publishing their research. This academic journal, not surprisingly, attracted many outstanding articles.

Since it had limited circulation, however, the Journal faced grave financial challenges with every issue. While it received financial support from the foundation that helped to establish it -- as well as occasional government assistance and limited donations from the larger community -- it still could not make ends meet. Professor Hung wanted to encourage young scholars to maintain their scholarship and consistently used his personal funds to cover the deficits, which exceeded several hundred thousand U.S. dollars. Professor Hung and his support are the main reasons why the Criminal Law Journal has continued without interruption for 46 years.

Though most of the Journal's founders and early contributors have passed on, their efforts have produced many second-generation scholars with high levels of achievement. We are grateful for Professor Hung's contributions and attribute the strength of current research in criminal law to his vision and indispensable support.

After passing the bar examination in the summer of 1959, during my sophomore year, I had time the following semester to venture into academic journals. In the department library, I

discovered the Criminal Law Journal and enjoyed reading Professor Hung's frequent articles and dreamed of meeting him.

In fall of 1994, when I was transferred from head of the Supreme Court to Justice of the Constitutional Council, I finally met Professor Hung -- 35 years after first reading one of his articles. Professor Hung was in his 80s, and I was no longer young. Though our encounter was brief, I was excited by Professor Hung's presence, and my memory of that meeting remains as fresh as if I had met him yesterday. I truly had hoped that Professor Hung would have lived beyond 100, and I did not expect him to pass away last April.

Professor Hung lived an exemplary life. As a public employee, he was disciplined and impartial. As a scholar, he was open-minded and objective -- and not influenced by a personal or political agenda. He set a remarkable example in character and scholarship for future law educators and legal professionals.

Professors at various universities have contributed articles to this anthology and dedicated it to Professor Hung in memory of his contribution to the discipline. I am honored to be asked to write this preface.

A true scholar leads the way into uncharted territory for subsequent researchers. A true scholar provides a compass for others to follow as they extend his vision and expands the knowledge base of the discipline.

In the fundamental theories of criminal law, Professor Hung was such a pioneer. He laid the foundation for developing the field and marked a path for doing so. Professor Hung had no regrets about a life devoted to the advancement of criminal law. I can only hope, in this changing world, that the authors of this anthology will gratefully receive the torch he has passed down and continue the race to advance the field of criminal law to inspire legal scholars and professionals in years to come.

Lin, Young-Mou

Translated by John Song

洪福增君生平序

洪葛文杏

先夫名福增，字復青，別號谷青，福建省同安縣人。生於一九一三年九月十五日(民國二年農曆八月十五日)，歿於二〇〇二年四月十七日(民國九十一年農曆三月初五日)。一九三六年六月畢業於廈門大學法商學院法律系，一九三七年七月七日蘆溝橋事變，抗日軍興，投筆從戎，一九五一年九月任國防部軍法局上校副局長，旋晉升為少將副局長，一九五四年六月因病請辭。病癒後，改業律師，以維護當事人合法權益，保障人權，深受當事人之讚許，在律師界負有盛名，一九九四年六月二十四日退休，不再執行律師業務。

先夫自俸甚儉，樂善好施，博覽群書，好學不倦，業餘之暇，從事刑事法學以及明史研究，著有「刑法之理論與實踐」、「刑法之基本問題」、「刑法理論之基礎」、「刑事責任之理論」、「刑法判解研究」、「刑法總則實例研究」、「洪芳洲公年譜」等書。自一九七一年八月至一九八〇年七月兼任國立政治大學法律研究所教授，培育人才。

一九五七年五月，先夫與刑事法學專家徐世賢、林紀東、韓忠謨、李元簇、梁恆昌、周冶平、裘朝永、孫德耕等共同創辦「刑事法雜誌」，曾任該雜誌發行人兼編輯委員，一九八六年十二月十五日創設「財團法人刑事法雜誌社基金會」，曾任該基金會董事長。由於該雜誌係以宣揚刑事法教育，促進法治，消弭犯罪安定社會為宗旨，不以營利為目的，故定價低廉，僅酌收工本費而已，以致年年虧損，不敷之數，均由先夫及子女捐款彌補，迄未動用基金。

先夫於住院期間對刑事法雜誌業務及經費問題，時在念中。逝世後，承蒙諸位董事及編輯委員鼎力支持，繼續發行，生生不息，亦可慰其在天之靈。

茲承春風煦日論壇發行人許玉秀教授於先夫逝世週年，出版特刊，以資紀念，存歿均感，謹此致謝。