亲告罪原论
——以刑事一体化为视角

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Abstract

There are five accusations about the crime handled only upon complaint prescribed in the penal code of China, which only relate to four items. But the legislation content doesn't match the important status of the crime handled only upon complaint. The reason why the legislation lags behind attributes to the weak research of the theory.

Crime handled only with complaint, in contrast to crime handled even without complaint, is classified according to prosecution condition in criminal law of continental law system. What's the base of unattached existence as crime for the crime handled only upon complaint? Why there are many accusations about the crime handled only upon complaint in the western countries, but a few in our country? Whether extending the legislation scope of the crime handled only upon complaint retaliate upon the doubt that the modern criminal law is "no human"? Could the crime handled only upon complaint become the traditional means of decriminalization when the criminal situation tend towards polarization? The crime handled only upon complaint hands the power to prosecute the misdemeanors which only infringe on the individual advantage to the individual person, which means settling this kind of criminal dispute may adopt the other manners except penality, but on earth what we need is the model of absolute private relief which excludes the authority of state, or the coordinating body, or substitute measures of penalty, which depends on the innovation of the settling dispute mechanism.

In the recently ten years criminal domain raises restorative justice and the victim-offender mediation movement, is for the purpose of the artificial center by the dispute to carry on the system to transform, take will the crime handled only upon complaint is advantageous for soon the slight crime as the research angle of view to return to original state to the criminal dispute level, will enable the dispute processing to reply also already the social relations which will destroy, will satisfy restores the just idea the need. Rectified in the modern criminal activity judicature to neglect is as for has covered the victim right flaw, realized the litigant is the victim right return specially. Thus in gives dual attention to the individual value and under the public value criminal judicature background, to the crime handled only upon complaint the legislation and the present situation research has the significant theory value and the practice significance. The crime handled only upon complaint belongs to the criminal law reasonable argument in the final analysis the question, involves the criminal law the foundation, penalty question and so on idea, criminal law system reform, criminal legislation, in which involves the very many main bodies punishment legal science the academic question, far from myself study the horizontal institute. As some scholar holds that the science of criminal law should be made up of three subsystems: the philosophic theory on criminal law, the theory on the legislation of criminal law and the theory on the administration of criminal law. Unless based upon the three related and different subsystems, the science of criminal law will not be critical in nature, and the way can not be paved for its further development.

Therefore, my attempt from theory of the crime handled only upon complaint makes a main introduction. The preliminary establishment the crime handled only upon complaint the research theory

system and the frame. This article involves the criminal law the foundation, the penalty idea, the criminal law system reform bodies punishment legal science academic question, and revolves the source question, the crime which the crime handled only upon complaint to discuss the question, the judicial reform question, the theory of value question, the system discusses the question and so on five big aspects to elaborate, advanced the scholarly research deepening which the crime handled only upon complaint.

In this article, I apply many methodologies on the respective of jurisprudence, positive law, comparative law and history. Then, with the demonstration about correlative content of the crime handled only upon complaint system, I establish the crime handled only with complaint system theory macroscopically. In order to outline the theoretical system and investigate frame of the crime handled only upon complaint, I try to set forth thereinafter around the five aspects:

Firstly, to study the root of the crime handled only upon complaint, the criminal dispute, mostly probing into the origin, the development and the means how to settle. First, make sure the crime and the right infringement concept, grasp to civil and the criminal case the minute. Next, in the criminal dispute solution model, the different dispute which the discussion different time society adopts solves the pattern. Elaborated with emphasis in the criminal law rules and regulations behavior has quite part of direct formidable sponsors is victim (namely citizen individual), how but has nothing to do with national or the social overall benefit should process; The crime handled only upon complaint system is one of ways to realize the right of victims. From the respective of jurisprudence and law, the victims gain many special provisions that are difference with the provisions in common civil action. But, with prerequisites of the principle of au-

tonomy of the will, private interests have an inherent protection to resist public power. So we must make a definition and limitation in the scope of the power of public, prosecution of prosecutorial organization to avoid the over interference which would destroy the order of the private right sphere and lead to an unnecessary over correcting. In one word, it must be limited to giving public power permission to interfere into the sphere of private law properly.

Secondly, to discuss the different models of how to settle the criminal dispute in different eras and societies, primarily setting forth how to deal with this situation where quite a bit direct interested parties in the acts restricted by criminal law are victims themselves. Three probe into the proper orientation of the victim's indictment in the system of the criminal theory, there into probing into the relation between the victim's indictment in the crime handled only upon complaint and the preclusion of the punishment is the key. The crime handled only upon complaint is by the victim requested for sues the important document the crime. If accusation the victim treats as merely the lawsuit anti-actually matter, then is unable to reply accusation in the situation in the victim giving up which or withdraws tells, whether crime is also tenable? If crime establishment then leaves free the personal judicature, and so on . Therefore, the crime handled only upon complaint of the victim to accuse with may punish the natural defensive matter the relations is the discussion key point actually. And attempted to reply to thought awarded the victim to consider the right of suit to break officially (investigates crime) the principle three reasons viewpoints question. Proposed the crime handled only upon complaint in the nature is to individual law profit violation crime, has demand which the special restoration compensates, investigates with the criminal judicature has the cognition the differ-

ence; because the more slight of its crime, the less harm to the country and the society, based on the sovereignty in the people and the right protection thought, lets the victim enjoy the complete prosecution decision—making power in the case, positively seeks the solution injury the way, compares in the national involvement intervention, will be more advantageous to the dispute solution, and will be more advantageous the justice which will obtain in the victim anticipated. Second, distinguishes the victim to accuse with the victim pledged, the victim forgiveness, the crime handled only upon complaint of the victim to accuse regards as generalized on to be possible to punish the natural defensive matter, but will punish the defensive matter will be actually (criminal activity) the policy reason was acknowledged from some kind, but different social or the identical social different time will be able to have the different request to the criminal policy, therefore, the discussion might punish the nature outside the traditional the system of criminal composition, then both will not conflict with the crime constitution theory, and will conform to the national criminal activity policy development need.

Thirdly, to discuss why the theory and the practice of the criminal compromise should be the first choice for the crime handled only upon complaint, at the same time, put forward how to adequately protect the victim's benefits, and maximization achieve the balance in the victim's advantage, the crime advantage, and the public advantage. So, on this historical background, the intension of non-penalty gains a fairly rapid improvement. Today, the more and more criminal law scholar believed that, the true significance criminal law, is maintaining and safeguarding the individual freedom as the starting point common law, and taking limits the national penalty power starting as own duty modern law. National public authority to belongs to the

personal right the involvement to have to be moderate right amount, the criminal law at any time all not suitably take sacrifices citizen's individual freedom as a price, is flaunting during the maintenance social order banner excessively many involvements society main body life. We believed that, the introduction criminal activity reconciliation theory and the recoverable judicial pattern, took to the crime handled only upon complaint and so on the criminal dispute non-penalty processing method, since offender no longer repels for the society, also may enable the victim to obtain the more compensating, complied with under the government by law background protects the victim benefit the thought tidal current. The crime handled only upon complaint only encroaches individual rights and interests slight criminal offense the power to prosecute to return for individual, means that the criminal dispute the solution may adopt outside the penalty the way, actually but needs to remove completely the state power in outside absolutely the private strength relief pattern, needs the community the synchronizing gear, as well as substitution penalty method being suitable, cannot leave the dispute to solve the mechanism transformation.

Fourthly, to discuss the axiology of the crime handled only upon complaint, which includes liberty, limiting criminal, and the mild criminal policy. It is believed that limitation of criminal law is a foundmental requirement to legal (law-abiding) state. Proposed introduces in the criminal law the crime handled only upon complaint the system, on the one hand has satisfied the national judicature resources scarce request, on the other hand also has satisfied the victim to the efficiency value goal pursue, thus by the least manpower, the physical resource and the financial resource, comes the greatest degree in the shortest time to satisfy the people and the society to the

justice, the freedom and the order demand. And proposed the crime handled only upon complaint uniquely has "light" the criminal policy value, and carries on the system design for it. The legislation existence of the crime handled only upon complaint, "decriminalization in fact " has provided the natural soil for the judicial practice. Because the crime handled only upon complaint enters the criminal activity judicial process by the victim whether tells for the important document, but the victim accusation the wish to be decided by some synchronizing gear measures is whether powerful, the community judicature condition whether consummates, and so on. Legislates cannot under the massive misdemeanour decriminalization condition, the expansion the crime handled only upon complaint the scope is to obviously the non-crime transition best way.

Fifthly, to study the legislative design, mostly narrating the foreign legislative content and technique of the crime handled only upon complaint, for example, making a comparative comment on the accusation, classification, system of prosecution and power to prosecute, and on this base, bring forward the legislative design. And promote the development of the theoretical investigation of the crime handled only upon complaint. We must admit the system of crime handled only upon complaint has been used in nearly all over the world. And the system of crime handled only upon complaint can protect public interests in our country, which are practical and feasible. Our legislation should extend the range of this kind of crime in reasonable extent. And it is necessary to draw the legislation results from other countries. So, as a new system, especially as a system that eliminates an intervention of public power to the private interests, it will cause many objections inevitably because of its difference to traditional criminal theory.

中 文 摘 要

刑法规定告诉才处理的犯罪即亲告罪，但是我国亲告罪立法仅有《刑法》总则第98条和《刑法》分则四个条文五个罪名，其立法内容之单薄、形式之简约与亲告罪的重要地位远不相符。而立法的滞后与理论研究的薄弱息息相关。亲告罪属于法定的犯罪二元分类之一种，其作为犯罪独立存在的依据究竟是什么，何以在工业文明发达的西方国家设置较多而我国立法寥寥，扩大亲告罪的立法范围是否可以还击“渺无人迹的现代刑法”的质疑，在犯罪态势呈两极分化的今天，亲告罪可以成为向非犯罪化的过渡手段吗？亲告罪把仅侵犯个人权益的轻微刑事犯罪的追诉权交还给个人，意味着这种刑事纷争的解决可以采取刑罚之外的方式，但是究竟需要把国家权力完全排除在外的绝对私力救济模式，还是需要国家或是社区中间者的协调机构，以及替代刑罚手段的适用，都离不开纷争解决机制的变革。有学者指出，只有在理论刑法学、立法刑法学和司法刑法学三个既相区别又相联系的子系统的基础上建构刑法学体系，才能使刑法学具有批判意识和理性精神，才能为刑法学的发展开辟道路。因此，本文力图从理论、立法、司法层面建立亲告罪研究的理论体系和框架并且围绕亲告罪的本原问题、犯罪论问题、司法改革问题、价值论问题、制度论问题五大方面阐述。本文运用法理分析法、实证分析法、比较分析法以及历史分析法，通过对构建亲告罪制度相关内容的论述，从理论上较为宏观地确立了亲告罪研究的理论体系。

晚近十年刑事领域掀起恢复司法或是刑事和解运动，旨在以纷争的当事人为中心进行制度变革，以亲告罪为研究视角便于将轻微犯罪还原到刑事纷争的层次，使纠纷的处理能恢复业已破坏的社会关系，满足恢复正义理念的需要，矫正现代刑事司法中忽略乃至于掩盖了被

害人权利的缺陷，实现当事人特别是被害人权利的回归。因而在兼顾个人价值和公共价值的刑事司法背景之下，对亲告罪的立法与现状研究具有重大理论价值与实践意义。

因此，本文试图围绕以下五个方面阐述，大体勾勒出亲告罪研究的理论体系和研究框架：

第一，亲告罪的本体论问题——刑事纷争。探讨亲告罪的问题即刑事纷争的起源、发展及解决方式。首先，厘清犯罪与侵权概念，把握民事与刑事案件的界分。其次，在刑事纷争的解决范式上，探讨不同时期社会所采取的不同纷争解决模式。重点阐述了刑法所规制的行为中有相当一部分直接利害关系人是被害人本人（即公民个人），而与国家或社会整体利益无关应如何处理；引入刑事纷争这一概念，可以更好地说明刑民交叉领域，发生在公民之间的轻微刑事冲突及其解决。这类犯罪的纷争本身存在于犯罪人与被害人之间，而不是犯罪者与国家之间。将犯罪概念的原貌还原，即将侵害个人法益的犯罪还原到刑事纷争的层次，不仅区别于公民具有完全处分权的民事纠纷，更是可以由此突出被害人在刑事事件中的地位及其处分权能，符合当前保护被害人权益运动的发展趋势。亲告罪制度作为被害人权益实现的方式之一，从法理和法律上获得了区别于普通民事诉讼的特别地位。然而，个人法益本身固有相对于公权力的天然屏障，使得我们需要对检察机关公诉权的范围进行一个合理的界定与限制，从而避免过度地干预扰乱私权领域的自身调节秩序。

第二，亲告罪的犯罪论问题——可罚性。探讨被害人的告诉在犯罪论体系中的正确定位。其中，亲告罪中的被害人告诉与可罚性阻却事由的关系是探讨的重点；亲告罪是以被害人请求为起诉要件的犯罪。如果将被害人的告诉仅仅当做诉讼阻却事由，则无法回答在被害人放弃告诉或撤回告诉的情况下，其犯罪还是否成立？如果犯罪成立而任由私人司法，其依据何在？等等。因此，亲告罪中的被害人告诉与可罚性阻却事由的关系是本文探讨的重点。并试图回答对认为授予被害人告诉权来打破官方（追诉犯罪）原则的三个理由的观点的质

疑。首先提出亲告罪在性质上是对个人法益的侵害的犯罪，具有特别的恢复补偿的诉求，与刑事司法追诉具有认知的差异；其次因其犯罪情节轻微，对国家和社会危害也较小，基于主权在民和权利保护的思想，让被害人在案件中享有完全的起诉决定权，有利于鼓励当事人积极寻求解决方式，相较于国家的介入干预，将更有利于纷争的解决，更有利于被害人获得所期待的正义。应区别被害人告诉与被害人承诺、被害人宽恕（谅解），将亲告罪中的被害人告诉视为广义上的可罚性阻却事由，而处罚阻却事由是从某种（刑事）政策的理由被承认，而不同社会或者同一社会不同时期都会对刑事政策有不同的要求。因此，在传统的犯罪成立要件体系之外探讨可罚性，则既不与犯罪构成理论相冲突，又符合国家刑事政策的发展需要。

第三，亲告罪的司法改革问题——刑事和解。探讨在替代刑罚思想改革的趋势下，为何刑事和解理论与实践应是亲告罪等轻微犯罪的首选，同时提出了如何充分保护被害人利益，在被害人利益与犯罪人利益及公共利益之间最大限度地实现三者平衡。今天，越来越多的刑法学者认为，真正意义上的刑法，是以维护和保障个人自由为出发点的习惯法，是以限制国家刑罚权的发动为己任的现代法。国家公权力对属于私人权利的介入必须适度适量，刑法在任何时候都不宜以牺牲公民的个人自由为代价，打着维护社会秩序的旗号过多介入社会主体生活之中。我们认为，引进刑事和解理论与恢复性司法模式，作为对亲告罪等刑事纷争的非刑罚的处理方法，既可以使犯罪人不再为社会所排斥，又可以使被害人得到最大限度的补偿，顺应法治背景下保护被害人利益的思想潮流。亲告罪把仅侵犯个人权益的轻微刑事犯罪的追诉权交还给个人，意味着这种刑事纷争的解决可以采取刑罚之外的方式。

第四，亲告罪的价值论问题——自由、谦抑。首先是实现自由法理价值。其次是体现刑法的谦抑性价值。最后重点探讨亲告罪如何体现“轻轻”刑事政策价值。其中，谦抑性刑法是法治社会的基本要求。本文提出在刑事法律中引入亲告罪制度，一方面满足了国家司法

资源的稀缺性要求，另一方面也满足了被害人对效率价值目标的追求，从而以最少的人力、物力和财力，在最短的时间内最大限度地满足人们及社会对正义、自由、秩序的需求。最后提出亲告罪具有独特的“轻轻”刑事政策价值，并为之进行制度设计。亲告罪的立法存在，为司法实践中“事实上的非犯罪化”提供了天然土壤。由于亲告罪是否进入刑事司法程序以被害人是否告诉为要件，而被害人的告诉意愿又取决于一些协调机构的措施是否有力、社区司法条件是否完善，等等。立法上在不能将大量轻微犯罪除罪化的条件下，扩大亲告罪范围显然是向非犯罪化过渡的最好路径。

第五，亲告罪的制度论问题——立法设计。主要是对国外亲告罪立法内容与立法技术概况的介绍，例如对亲告罪的罪名与种类、亲告罪的追诉机制、亲告罪的诉权与告诉权人作一比较评析。在此基础上，提出亲告罪的立法上的大体设计，推进了亲告罪的学术研究向实践的转化深化。亲告罪制度已在世界范围内得到了较为普遍的承认与应用。亲告罪制度对于保障国家利益和社会公益，具有现实性和可行性。我国应扩大亲告罪的范围，以符合法治社会的要求。虽然，亲告罪制度作为一项新的制度，尤其是一项涉及排除或限制公权力对私法益进行干预的制度，在构建过程中，必然因其固有的制度风险而存在着相关的反对意见。

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