法学各科群英第一次聚首 共论六十年曲折磨难追求

The first gathering of all the disciplines of legal studies to discuss sixty years of tortuous and arduous pursuit.

中国法学的"三十年河东，三十年河西"

"Chinese Legal Studies' 'Thirty Years on the East Side of the River and Thirty Years on the West Side of the River'"[1]

首届中国法学名家论坛综述

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[1] This translation is a product of a fall 2009 course at the William S. Richardson School of Law, Readings in Chinese Law. The principal translators are third-year law students Jonathan A. Devers and Dr. Brian Mackintosh as well as professor Lawrence C. Foster.

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I. INTRODUCTION

本报记者 郭光东

Southern Weekend[2] Reporter GUO Guangle

May 28, 2009

李步云哭了

LI Buyun[3] Cried

在法学界，各个部门法学历来有召开本"门派"年会的传统，但各门各派从未齐聚一堂论剑，4 月 24 至 25 日在上海举办的首届中国法学名家论坛，因此被视作开创之举，是新中国成立六十年来法学界首次各学科专家会聚的最高层次的学术英雄会。论坛以"曲折·磨难·追求——新中国法学六十年"为主题，由《当代中国法 学名家》编委会和华东政法大学共同主办，高铭暄、江平、陈光中、马克昌、应松年、巫昌祯等新中国法学奠基人以及其他近二百位法学群英云集，共论六十年中国 法制与法学的曲折历程，探究未来之路。

In the world of legal studies, there is a tradition of holding separate annual meetings for each discipline of legal studies. However, there has never been a gathering of all the disciplines. From April 24 to 25, 2009, the Inaugural Forum of Chinese Legal Experts was held in Shanghai.

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[2] The Southern Weekly is one of China's more aggressively investigative newspapers.

[3] Li Buyun was born in 1933. He has been a member of the Chinese Academy of Social Sciences Legal Studies Research Group since 1967 and has taught at over ten Chinese universities.

Thus, it was seen as a founding act; it was the first ever meeting in the sixty-year history of the New China to include the top academic heroes from all disciplines of legal studies. The principal theme of the forum was "Tortuous, Arduous, Pursuing: Sixty Years of New China's Legal Studies." It was jointly organized by the Editorial Committee of Contemporary Chinese Legal Studies and the East China University of Politics and Law. It brought together the founders of New China's legal studies (including GAO Mingxuan, JIANG Ping, CHEN Guangzhong, MA Kechang, YING Songnian, and WU Changzhen) and nearly two hundred other leading legal scholars. Together, they discussed the tortuous sixty-year history of the Chinese legal system and Chinese legal studies, and explored the future.

论坛分大会主题论坛与分论坛，分论坛计有法理、法律史、宪法与行政法、刑法、刑事诉讼法、民法、民事诉讼法、商法、经济法、国际法、环境与资源保护法、法学教育等 12 个学科研究的回顾与展望。

The forum was divided into plenary sessions and separate sessions. The separate sessions included legal theory, legal history, constitutional law, as well as administrative law, criminal law, criminal procedure law, civil law, civil procedure law, commercial law, economic law, international law, environmental and natural resources protection law, and legal education, for a total of twelve disciplines. Each session reflected on the past and future of research in these areas.

无论在大会主题论坛还是在分论坛，无论就整个法学还是就各部门法学，当回顾 60 年来路时，论者在具体时段划分上尽管略有差异，但都大致"默契"地以改革开放起步为界，将新中国法制与法学划分为两个前后截然不同的阶段，并谓之"三十年河东，三十年河西"。

Whether in the plenary sessions or the separate sessions, whether they addressed the entirety of legal studies or an individual discipline, when reflecting on the sixty-year history, even though the speakers had differences of opinion on the specific delineation of periods of development, all agreed that New China's legal system and legal studies could be divided into two stages demarcated by the beginning of reform and opening [in 1978] which they called "thirty years on the east side of the river and thirty years on the west side of the river." 这一划分方法或许同样适用于新中国其他领域与学科，不过法制与法学却有自身独特的坎坷。当政治剧烈变迁之时，其他领域或学科尚可随政治而转向，独有法制与 法学，在"无法无天"之时，遭到"砸烂公检法"、停办法学院校等"一锅端"式的际遇。或许正因如此，法理学教授李步云在作大会主题发言时哭出声来，"你们 看看，我、郭道晖、江平、谢怀栻，

等等，哪一个不在反右、文革期间被打成右派？哪一个不遭受很多苦难？”忆起当年政治上的磨难、思想上的磨难，他哽咽着 说：“我们中国法学家很苦啊！”

This method of demarcation might also be applicable to other areas and academic disciplines in New China, but the legal system and legal studies have their own distinct frustrations. While the political scene was in turmoil, other areas or academic disciplines may well have evolved along with the politics, but it is only the legal system and legal studies, during these “lawless times” which experienced “getting rid of things with one fell swoop” -- including the smashing to a pulp of the public security organs, procuratorial organs, and people’s courts, as well as the closure of law schools. Perhaps it was just because of this that the legal theorist Professor LI Buyun, while giving the plenary speech, cried out “Look: GUO Daohui, JIANG Ping, XIE Huaishi, and I, which of us was not branded as a Rightist during the Anti-Rightist and Cultural Revolution time? Which of us did not suffer a great deal?” Remembering the political and intellectual hardships of those years, he choked up and said, “We Chinese legal scholars have led a bitter life!”

好在随改革开放而来的“法学的春天”改变了李步云们的命运。李步云曾三次成为给中央政治局讲授法制课的课题组成员，同其他学者一道，对推动“依法治国，建 设社会主义法治国家”写入中共十五大报告和宪法，起了重要作用。“三十年河西”间，中国法制与法学从一片废墟上起步，得到长足发展，法学一度跃升为“显 学”。论坛上，专家对后三十年历程多有肯定，对未来发展也提出许多独到见解。论坛还倡议，法学学者要保守学术良知，敢讲真话，为中国法治昌明贡献心力。

Fortunately, along with the reform and opening came the “spring of legal scholarship” which changed the fate of LI Buyun and his colleagues. LI Buyun has served as a member of the Politburo’s Discussion Topic Group for Lectures on the Legal System three times. Along with other academic colleagues, he played an important function in promoting the two ideologies of “rule the country in accordance with the law and establish a Socialist rule of law country,” both of which were subsequently included in the Report of the Fifteenth Chinese Communist Party and in the Constitution. In the past “thirty years of living on the west side of the river,” the Chinese legal system and legal studies emerged from the rubble and developed substantially; legal studies rose to become a prominent area of study. At the forum, many of the specialists affirmed the history of the past thirty years and raised many unique opinions about future development. The forum also proposed that legal studies scholars must preserve academic intuitive knowledge, be willing to speak the truth, and

dedicate their mental and physical energies to the flourishing of the rule of law in China.

以下选编首届中国法学名家论坛的部分专家观点，供参考。

We have selected the viewpoints of some of the specialists at the Inaugural Forum of Chinese Legal Experts for your reference below.

法理学

II. LEGAL THEORY

中国法学与中国改革的社会动力

A. *Chinese Legal Studies and the Impetus of China's reform*

中国法学会郭道晖教授：

Professor GUO Daohui of the Chinese Legal Studies Association:

新中国建国 60 年正好应了"三十年河东，三十年河西"这句谚语。前 30 年是以阶级斗争为纲、无法无天、天天折腾的历史，后 30 年是以经济建设为中心、实行改革开放、进入法治初级阶段的历史。

The sixty years of the construction of New China perfectly fits the saying: "for thirty years the *fengshui* is good on the east side of the river, for thirty years the *fengshui* is good on the west side of the river." For the first thirty years, we were enmeshed in class struggle; those were lawless, depressing times. The last thirty years have been centered on economic reconstruction: we carried out reform and opening, we entered into the initial stage of rule of law.

后 30 年的历程，又可以分为两个阶段。一是从粉碎"四人帮"，经十一届三中全会，到十三大，这是第一个阶段，历时 10 年。80 年代初期出现的思想解放和体 制改革的大好局面，其重要动力主要动力来自于党的高级干部对文革的反思和对民主法治的强烈追求、知识精英对思想解放的追求，以及长期受一大二公体制束缚、 衣食无着的农民对农村改革的渴望。在这一时期，法学界的精英从法制废墟上挺身而出，为法制的恢复及依法治国方略与人权保障原则的确立作出了重要贡献。但 是，从上世纪 80 年代末期开始，历史又有反复，改革的重心发生了程度不同的转移，经济体制改革单轨运行，政治体制改革相对滞后。这形成了又一个历史阶段， 约 20 年。特别是在近几年里，有些领域在观念和制度上还有所后退，而且在政法领域这几年倡

言的原则与口号中，有些违背了民主法治的基本原则乃至常识。

The past thirty years can also be divided into two periods. The first starts with the smashing of the "Gang of Four"[4], and goes through the Third Plenum of the Eleventh Session of the National People's Congress to the Thirteenth Session of the National People's Congress; a ten-year period. The important and central impetus for the positive circumstance of the liberalization of thought and systemic reforms in the early 1980s was the high level party cadres' reflections on the Cultural Revolution, their intense pursuit of a democratic rule of law, the pursuit of the liberation of thought by the intellectual elite, as well as the longing for rural reform by the peasants who had no clothing or food and who had been tied up for so long by the people's communes system.

During this period, the intellectual elite rose up from the rubble of the legal system and made a great contribution toward the restoration of the legal system and the establishment of the general plan to rule the country in accordance with the law, as well as the principle of protection of human rights. However, beginning from the end of the 1980s, history changed again and the core of reform took different directions. Reform of the economic system moved off on its own track while political system reform lagged behind. This formed yet another historical period that lasted for about twenty years. Particularly in the past few years, there has been some conceptual and systematic backtracking in certain areas. Moreover, for the past few years, some of the hortatory slogans and principles in the legal-political area have gone against the basic principles of a democratic rule of law and have even become widespread.

在新的条件下，过去担当改革开放初期社会进步推动力量的阶层已经不能承担进一步推动改革的历史使命。在改革中捞到好处的官僚新贵与腐败势力已经成为改革的 阻力。知识界中的一些精英，有的已经同流合污，有的安于现状、明哲保身。今后，中国的改革动力存在于民间社会力量之中，公民维权活动推动着改革前行。当前 中国的维权主体出现了新的特点。维权的主体由单独个人进行冤假错案的上诉，发展为各界的民众维权，在公共事件中公众的参与渐成惯例。维权的领域由单纯的私 人利益，扩展到公共利益，从公民的私人利益扩展到公民的公权利。社会各界对公民维权也越来越支持，媒体和法律专业人士在维权活动中的作用越来越显著。

[4] The Gang of Four was blamed for the excesses of the Cultural Revolution. They were removed from power near the end of 1976.

Under these new conditions, the social strata, which undertook the push for the first stage of social reform and opening, can no longer undertake the historical mission of advancing and promoting reform. The newly rich bureaucrats who have gotten their hands on the benefits of reform with their corrupt power have already become obstacles to reform. Some of the elites among the intelligentsia are joining in the corruption while others are content with their present circumstance and are just playing it safe.

In the future, the motivating force behind reform will be the people's social power. Citizens' actions to protect their rights are moving reform forward. At present, there is a new special characteristic at the core of the citizens' protection of their rights. This is the use of litigation by individuals for unjust, falsified, and mistaken cases which has developed to the point where the masses in all realms are suing to protect their rights. The participation of the masses in public incidents is gradually becoming the norm. The scope of protecting rights has been expanded from purely private benefits to public benefits; from the private benefits of citizens to the citizens' public rights and benefits. All realms of society are more and more supportive of citizens protecting their rights. The function of the media and legal experts in the protection of rights is becoming more and more prominent.

今后我国的改革，将从自上而下的放权演进到自下而上的维权和争权的阶段。中国进入了民众维权的时代。维权的过程，就是官民之间、社会主体之间建立协商对话机制的过程，是公民直接参与保障人权、维护法治的过程，是形成公民社会、法治社会，同国家权力互动与互控的过程，是促进社会转型的基本动力。

China's future reform will evolve from the setting up of rights from the top-down stage to the struggle for and protection of rights from the bottom-up stage. China has entered the era of the masses protecting their rights. The process of protecting rights is a consultative, dialogue mechanism process between the government and the people and within the society. It is a process by which the citizens directly take part in the protection of rights; a process which protects the rule of law; a process which forms a civil society, a rule of law society; and a process which mutually promotes and controls national rights. This is the basic impetus to promote social change.

当今中国的知识界、法学界的志士仁人，必须面向社会，把研究和实践的重心从单方面仰赖政府自上而下改革，移向关注自下而上的民间社会动力，促进良性的非政 府组织的建立，并促进社会权力的发展

和公民社会的形成，并使具有改革愿望的中央最高层领导人能获得来自民间的舆论支持和政治信任，促使他们有依靠、有魄力 地排除官僚特权集团和既得权益势力以及极左的文革余孽的阻扰，推进改革。

Currently, those people with lofty ideas in the world of the intelligentsia and legal studies must address society and shift the focus of research and practice from unilateral, top down reform which relies on the government and move towards a social impetus from the people which emphasizes a bottom up approach and which also promotes the establishment of a positive-focused NGO structure as well as the development of social rights along with the formation of a civil society. Moreover, they must ensure that central government leaders at the highest levels who fully have the desire for reform can take advantage of the public opinion support for and trust in government coming from the people and ensure that these leaders promote reform by having the backing to bravely get rid of the rights and power of the special interest groups in the bureaucracy, along with the obstacles of the lingering sins of the far left from the Cultural Revolution.

应该研究法学本身的问题

B. *We Must Study Issues About Legal Studies Itself*

复旦大学邓正来教授认为，我国法学在改革开放以来的 30 年里取得巨大成绩，但也存在一些问题。比如，法学的主要论域讨论的还是法律与政治的关系问题，关于 法的本质的讨论、法治问题的讨论、法的现代性问题的讨论，都逃避不了政治这一主题。而法学是一门不同于政治学的学问，应该研究法学本身的问题，不能陷入政 治之中而失去法学本身的独立性。又如，过去 30 年的中国法学没有认真研究当代中国的问题，没有深入了解当下中国人的生存状况，没有努力为中国的社会问题寻 求解决办法。因此，当下的中国法学应该寻求突破，寻求建立真正的中国法学。

Professor DENG Zhenglai of Fudan University believes that while the field of legal studies has seen enormous achievements in the thirty years since reform began, there are still some issues remaining. For example, the main debate in legal studies is still the issue of the relationship between law and government. Discussions about the nature of law, rule of law, and the current nature of law cannot avoid the topic of government. And yet, legal studies is an academic discipline which is different from political studies. We must study issues about legal studies itself. We cannot get caught up in government and lose sight of the independent nature of law itself. Another example: in the past thirty years, legal studies has not diligently studied issues about contemporary China.

There is no deep understanding of the current living situation of the Chinese people. We have not endeavored to seek ways of solving China's social issues. Thus, current legal studies must seek to break through and seek the establishment of true Chinese legal studies.

法史学

接续被中断的中国法律近代化进程

华东政法大学何勤华教授认为，1949 年"废除国民党六法全书"的决策与 1952 年批判旧法观点、改造旧法人员"司法改革运动"，中断了中国法律近代化的进程，为苏联法和法学全面进军中国留出了巨大空间，使得中国法和法学游离于世界法和法学的主流之外，成为一种封闭的、狭窄的、低水平的法和法学，并导致社 会上法律虚无主义横行。直到中共十一届三中全会，上述错误才得以纠正。改革开放 30 年的历程，我们事实上将废除国民党六法全书和司法改革运动的必然性一点 点地全部消解掉了，这表明无论遭受怎样严重的挫折，中国仍然没有违背法和法学发展的延续性、继承性的一般规律。

III. LEGAL HISTORIOGRAPHY

A. *We Must Restart the Interrupted Process of the Modernization of Chinese Law*

East China Law and Politics University Professor HE Qinhua believes that the 1949 policy decision to "throw out the Six Codes of the Republic of China," together with the 1952 viewpoint of repudiating the old laws and the "judicial reform movement" to reform personnel in the old legal system all suspended the progress of modernizing Chinese law. The total advance of Soviet law and legal studies into China left an enormous void, which caused China's law and legal studies to drift away from the mainstream of the world's law and legal studies, and turned it into a kind of closed, narrow, and poor quality version of law and legal studies, and led to the rampage of legal nihilism in society. It was not until the Chinese Communist Party's Third Plenum of the 11th Session in 1978 that the above-mentioned errors were able to be corrected. In the course of thirty years of reform and opening, in fact, we dispelled the necessity of throwing out the Six Codes of the Republic of China and the judicial reform movement. This indicates that no matter how serious the setback was that we suffered, China still did not violate the general rule of the continuity and successive nature of the development of law and legal studies.

宪法学

宪法的遗憾是实施力度不够

专家们认为，宪法是根本法，虽然，宪法研究中存在很多禁区，宪法学相比较其他学科所经受的曲折和磨难更多，但是，几代宪法学人执着追求，为我国宪法的完善做出了巨大贡献。

新中国宪法学在取得巨大成就的同时，也存在不足之处，当前中国宪法的一大遗憾是宪法实施力度不够。部分与会专家分析了我国在政治层面上似乎出现的将两院制纳入"西方那一套"的认识倾向，认为在这个问题上应当正本清源，厘清概念，并在尊重宪法与宪法学发展历史的基础上认真思考。

IV. CONSTITUTIONAL LEGAL STUDIES

A. *The Regret of the Constitution Is the Inadequacy of the Strength of its Implementation*

Experts believe that the constitution is fundamental law, and yet, there are many restricted areas in constitutional research. Constitutional legal studies, compared to other branches of learning, has been even more tortuous and arduous. However, several generations of constitutional legal scholars have persistently pursued their research and have made great contributions to perfecting our nation's constitution.

However, while New China's constitutional legal studies has achieved great success, there are also deficiencies. Today, a great regret facing the Chinese constitution is that the strength of its implementation is insufficient. Some of the conference specialists analyzed the tendency of thinking that seems to have appeared on the governmental level to incorporate the bicameral system into the derogatory phrase "western style". They believe that we should thoroughly overhaul this issue of implementation and revise the concept. Moreover, we should conscientiously think about this based on the foundation of the historical development of respecting the Constitution and constitutional legal studies.

刑法学

惩罚犯罪与保障人权应并重

武汉大学马克昌教授认为，我国刑法的机能随着国家的情况变化而变化。1949 年新中国建立后，曾长期靠政策来治国，致使直到 1979 年才颁布第一部刑法 典。这部刑法典共有 28 种死刑罪名，其中"反革命罪"占到一半以上，这反映了当时仍然十分重视用刑法武器"严惩各种反革命活动"。但随着国家的主要任务从 "以阶级斗争为纲"转入"以经济建设为中心"，实践中被以反革命罪定罪判刑的越来越少。1997 年修订后的新刑法，增加的众多新罪名也都突出表现在生产、销售伪劣产品，破坏金融和公司、企业的管理秩序，侵犯知识产权，破坏环境资源保护，贪污贿赂等领域。当前，刑法的惩罚犯罪和保障

人权的机能虽然在司法实践 中得到实现，但与刑法的要求还存在差距，特别是保障人权方面。在惩罚犯罪与保障人权的关系上，应以二者并重代替一主一次的观念，这有助于将刑法保障人权的机能落到实处，也有利于保证惩罚犯罪的质量。

V. CRIMINAL LEGAL STUDIES

A. *Punishing Criminals and Protecting Human Rights Should Be of Equal Importance*

Professor MA Kechang of Wuhan University believes that the function of China's criminal law has evolved along with the evolving situation in China. After 1949, with the founding of the New China, we used government policy [and not law] to govern the country for a long period. It was not until 1979 that we promulgated the first Criminal Code. That Criminal Code had twenty-eight different kinds of death penalty charges, over half of which were "anti-revolutionary crimes". This reflected that, at that time, we still totally emphasized the use of criminal law as a weapon to "Severely Eradicate Any Kind of Anti-Revolutionary Activity". However, along with the shift of the country's main duty from "Take Class Struggle as the Guiding Principle" to "Take Economic Reconstruction as the Core", there were fewer and fewer criminal sanctions based on anti-revolutionary crimes.

In the newly enacted 1997 Criminal Law, numerous new criminal charges prominently appeared in areas such as the production and sale of false and inferior products, the management of enterprises, infringement of intellectual property rights, as well as the protection of natural resources and damaging the environment. At present, although the dual functions of criminal law in punishing criminals and protecting human rights have been achieved in judicial practice, there are still gaps between this and the needs of criminal law, especially with regards to the protection of human rights. In the relationship between punishing criminals and protecting human rights, we should treat the two as being equally important, thus replacing the concept of only favoring one of the two at a time. This should help make the function of protecting human rights a substantial matter and is also beneficial towards safeguarding the value of punishing criminals.

建立刑事和解制度

西北政法大学贾宇教授认为，中国自 1943 年陕甘宁边区司法以来就有了刑事和解制度。刑事和解制度强调以人为本，是非常先进的司法理念。虽然它受到很多法 学家的批评，但在宽严相济的刑事政策下，建立刑事和解制度应该做大胆的改革和尝试，在罪刑法定原则的

指导下建立刑事和解制度。

B. *Establishing a Criminal Mediation System*

Professor JIA Yu of Northwest University of Politics and Law believes that China has had a criminal mediation system since 1943 in the border regions of Shaanxi, Gansu, and Ningxia. A criminal mediation system emphasizes the individual, which is a very progressive judicial concept. Although he has been criticized by a number of legal scholars, under the government policy of tempering justice with mercy, the establishment of a criminal mediation system would be a bold reform and experiment. We should establish a criminal mediation system under the guidance of legally mandated principles of criminal sanctions.

遏制重刑从立法技术开始

吉林大学李洁教授围绕"遏制重刑从立法技术开始"这个主题指出，我国 1997 年刑法规定的刑罚是很重的，有 60 多个最高可以判处死刑的罪名，并且还有很多 罪可以判处无期徒刑；罚金、没收财产刑多以并科的方式加以规定，在人身刑之外科处财产刑。本来根据我国宽严相济的刑事政策，制定出的刑法重刑不应过多，为 什么会出现重刑趋向呢？这不是因为立法者对重刑的青睐，而是由于立法技术上难度太大。此外，犯罪案件尤其是恶性案件的不断增加和传统重刑观念的影响也促使 了 1997 年刑法的重刑倾向。立法技术方面，我国在制定刑法时大面积规定罚金刑，这是与借鉴国外立法紧密相关的。但国外刑法中规定罚金刑的诸多罪名，在我 国都是不构成犯罪的，而为了追赶世界潮流，我国采取了并科的方式，这就加重了刑罚。在罪刑规定方面，为了实现公正，限制法官的自由裁量权，我国采用多个阶段连接的规定方式，使罪刑关系尽可能具体。这种方式实际上使得公正的价值目标被相当程度地弱化了。我们遏制重刑趋向，可以从以下三方面改变：首先，多罪刑 阶段的罪刑关系可以效仿国外的做法，采用交叉的方式。其次，限制司法者的自由裁量权未必一定要通过实体法，可以通过程序法来加以限制。再次，对财产刑实行并科的方法不符合我国刑法的价值方向，需要改变并科财产刑的状况。

C. *To Restrict Severe Punishments, We Must Begin with Legislative Drafting Skills*

Professor LI Jie from Jilin University, zeroing in on the topic "Restricting Severe Punishments Begins with Legislative Drafting Skills", pointed out the punishments provided for in China's 1997 Criminal Law are very severe. There are over sixty charges for which the death penalty is the highest punishment that may be imposed. Moreover, there are many other

crimes for which life imprisonment may be imposed. Many fines and property confiscation sanctions use multi-penalty methods to increase the sentence and financial sanctions are imposed along with personal punishments. Originally, based on China's policy in criminal matters of tempering justice with mercy, there should not be too many severe punishments meted out. So why do we now have this tendency towards severe punishments? This is not because the drafters were partial towards severe punishments, but rather because the technical difficulties experienced in drafting were so big. Moreover, the influence of both a constant increase in criminal cases, especially heinous cases, as well as traditional attitudes favoring severe punishments, spurred on the trend in the 1997 Criminal Law toward severe punishments.

As for drafting skills, when China was drafting the Criminal Law, a large number of fines were included. This is closely related to the influence of foreign criminal law drafting. However, many criminal charges that call for financial penalties in foreign criminal laws are not even crimes under Chinese law. Rather, in order to catch up with international practice, China adopted the method of combining financial sanctions with other criminal sanctions and this has increased the severity of criminal penalties. As for determining criminal penalties under the Criminal Law, in order to be fair, we limited the freedom of the judges to determine the severity of the punishment. We used the method of combining many sections together in order to make the relationship of the punishments as concrete as possible. In practice, this resulted in the value goal of fairness to be corrupted to a certain degree.

A new trend toward restricting severe punishments can be brought about in three ways. First, the method of combining financial penalties with other criminal sanctions should emulate foreign methods by using the method of overlapping. Next, the limiting of judicial sentencing discretion does not yet need to be codified. We can pass a procedural law to limit judicial discretion. Finally, combining fines with other criminal sanctions is not in accord with the value direction of our Criminal Law. We must change this situation in which we combine financial sanctions with other criminal sanctions.

刑事诉讼法学

VI. CRIMINAL PROCEDURE LEGAL STUDIES

不能放弃自己的学术思想

A. *We Dare Not Discard Our Own Academic Thought*

中国人民公安大学崔敏教授认为：改革开放三十年刑事诉讼法学，成绩应讲够，问题要讲透。

Professor CUI Min of China People's Public Security University believes that we should have exhaustive discussions about the accomplishments of the thirty years of criminal procedure legal studies during opening and reform and the issue should be thoroughly discussed.

一、既要肯定成绩，更要反思失误，吸取经验教训。中共中央 1979 年 9 月 9 日发出《关于坚决保证刑法、刑事诉讼法切实实施的指示》（中发[1979]64 号文件），严肃批评了过去长期存在的轻视法制、以言代法、以权压法等现象，正式宣布取消各级党委审批案件的制度。当时，许多老同志看到这个文件激动得热泪 盈眶，认为它是建国以来甚至是建党以来关于政法工作的第一个最重要、最深刻、最好的文件，是我国社会主义法治建设进入新阶段的重要标志，它也为法学研究开 辟了广阔的新天地。现在的学生因为缺少历史教育，对法学历史知识的掌握极其贫乏，如对于 1979 年中央 64 号文件闻所未闻，亟需要补上历史知识这一课，以 史为鉴。

1. Since we want to affirm the accomplishments, we should even more so want to reflect on the mistakes and learn some lessons from them. The "Directive Relating to Firmly Pledging to Conscientiously Implement the Criminal Law and the Criminal Procedure Law" issued by the Central Committee of the Chinese Communist Party on September 9, 1979 (Party Publications Document Number 64, 1979), by severely criticizing such past, long-lasting phenomena as disregarding the legal system, putting oneself above the law, and oppressing the law by force, formally announced the abolishment of the system by which party committees at all levels would examine and approve cases. At that time, for many old-time comrades, tears welled in their eyes when they read the Directive. They thought the Directive was the first most beautiful, most profound, and most important political and legal document they had seen since the founding of the country and even since the founding of the Party. The Directive was an important signal that the construction of China's socialist rule of law had entered a new era. It opened a vast new world for legal studies research. For students today, because they lack historical education, their grasp of the history of legal studies is quite incomplete. If they have never heard of the 1979 Document 64 from the Central Committee of the Chinese

Communist Party, we really must supplement their historical knowledge on this and have them take this history as a lesson.

二、必须坚定不移地贯彻百家争鸣的方针。不能盲目推崇领导的思想，不能把领导的思想当然地认为是重要思想，而放弃自己的学术思想，不能把与领导人不同的思 想看成异己思想。将法学界关于国外法律的理论和实践经验的介绍当作"西化"的看法是错误的。作为真正的法学家不应该唯领导人的马首是瞻，应当有学者的良 心，为中国法治现代化出谋划策。

2. We must be steadfast and unwavering in implementing the policy of letting a hundred schools of thought flourish. We cannot blindly praise the ideology of our leaders; we cannot, as a matter of course, treat the ideology of our leaders as important ideology and abandon our own academic thought. We cannot treat any ideology that is different from the ideology of our leaders as an alien ideology. It is erroneous to view introductions by academicians to the theory and practical experiences of foreign law as "Westernization". True legal academicians should not simply follow the lead of our leaders. They should have the conscience of an academician and come up with a plan for the modernization of Chinese rule of law.

三、司法独立是法治文明的集中体现，是我国依法治国的重要目标，而不应当轻率地否定和批判。我国信访制度的实质就是忽略法院判决，否定法院权威，变相承认 权威集中于各级党政部门和领导手里。现在我国有很多否定司法独立性、权威性的做法，所以我们要千方百计的强化和保护我国宪法认可的司法独立性和权威性，要 排除万难勇往直前地追求司法独立。司法独立的道路充满曲折和磨难，但是只要我们树立信心，坚持地走下去，前途一定会是光明的。

3. Judicial independence is the central manifestation of the rule of law. It is the important goal of our country's governing in accordance with the law. It should not be rashly negated or criticized. The essence of China's petition system is that it overlooks judicial decisions and negates the authority of the courts. The system covertly acknowledges that the real authority is concentrated in the hands of the leaders and departments at each level of government and the party. Currently there are many ways in which judicial independence and authority are negated, thus, we must do all we can to strengthen and protect the independence and authority of the judiciary. We must get rid of all difficulties and bravely and directly pursue judicial independence. The road to judicial independence is full of tortuous turns and difficulties; however, all

we need to do is stand tall and confident and persist in going forward; the road ahead will certainly be bright.

制定《刑事执行法》解决执行乱

西南政法大学徐静村教授认为，我国目前的刑事执行问题较多：一是现行的刑事执行的相关规定比较分散，存在大量的矛盾冲突和不协调之处。二是目前刑事执行呈 现出多单位、多机关、多元化的状态，公安、司法行政机关、法院并存，没有形成统一的刑事执行机关。我国有必要制定《刑事执行法》来专门对刑事执行问题加以 规范。以减刑、假释问题为切入点，通过对四川宜宾的监狱实地调研后发现：一是罪犯考核制度存在很大问题。考核只注重劳动表现，忽视思想教育、改过自新等内 容，造成了劳动力好，评分就高，劳动力差，即使再努力也无法获得假释的怪现象。二是没有分级处遇待遇，没有对不同的罪犯区分不同的情况进行管理，造成了老 犯、新犯、病犯、残犯、重犯、轻犯"一锅煮"的局面，致使刑法的个别化问题不能得到解决。三是减刑、假释程序十分混乱。目前的减刑、假释由监狱集中申报， 中级法院集中审批，且各中级法院没有专门审理减刑、假释案件的法庭，临时派遣的法官不到监狱调查，而是只看材料指标，按比例审核，只起到了"橡皮图章"的 作用，不仅会产生公正性的问题，也可能会产生不廉政的问题。减刑涉及原判决的改变问题，应该更加慎重。四是减刑、假释的比例存在很大问题。全国的平均减刑 比例在 30%左右，而不涉及原判决改变，只涉及执行方法变化的假释，在四川省的比例仅 1%-2%，河南省更是只有 0.01%。其原因即在于"倒查制度"的 存在，即罪犯假释后又犯罪的，要追究狱警和法官的责任，导致狱警不敢申报假释。

B. *Formulating a Criminal Law Implementation Law to Resolve Confusion in the Implementation of Criminal Law.*

Prof. XU Jingcun of Southwest China University of Politics and Law believes that there are a relatively large number of issues with China's current implementation of criminal law. The first problem is that the relevant criminal law implementation provisions are relatively scattered and there are numerous contradictions, conflicts, and uncoordinated aspects among them. The second issue is the recent emergence of multiple entities and agencies, as well as multi-faceted circumstances. The public security departments, judicial administrative organs, and courts are all there, but they have not formed a unified criminal implementation organ. China must draft a "Criminal Law Implementation Law" that would expertly standardize the issues with the implementation of criminal law.

Addressing reduction of sentences and parole as a starting point, an on-site investigation of a prison in Sichuan province found: first, the criminal review system had enormous problems. The review only paid attention to a prisoner's labor performance and neglected such things in the file as the prisoner's ideological education and having turned over a new leaf. The review system results in the strange phenomenon of prisoners with high labor performance receiving high marks, but a prisoner whose labor performance is lacking, even if they try harder, being unable to gain parole.

Second, there is no differentiation in the treatment of prisoners. There is no management based on distinguishing different situations for different kinds of prisoners. It creates a situation where recidivists, first offenders, sick prisoners, violent criminals, perpetrators of major crimes, and minor criminals are all mixed together. As a result, the issue of differentiating between prisoners cannot be resolved.

Third, the procedure for reduction of sentences and parole is completely chaotic. The prison sends a consolidated report of pending reduced sentences and paroles to the Intermediate Court, which does a consolidated review and approval. Moreover, the Intermediate Courts have no specialized courts to hear sentence reduction or parole cases. The temporarily assigned judge does not conduct an investigation at the prison. The judge only looks at the quotas in the materials and reviews them for proportionality. The judicial review functions are no more than a rubber stamp. Not only can this generate issues of unfairness, but also issues of dishonest government. Reductions in sentencing impacts issues about changes in the initial sentencing by the courts and thus ought to be undertaken more cautiously.

Fourth, there is a big problem with the rates of sentence reductions and paroles. Nationwide, the average rate of sentence reductions is around 30%, but that has not impacted changes in the initial sentencing by the courts. There is, however, an impact on changes in the way in which paroles are implemented. In Sichuan, the parole rate is barely 1%-2%, and in Henan, the rate is only 0.01%. This disparity between parole rates and reduced sentence rates is caused by the existence of an "upside down review system." That is, after a criminal has been paroled and then commits another offense, the responsible prison officials and judges are held responsible, resulting in prison officials who do not dare to submit petitions for parole to the courts.

解决刑事执行现况问题的思路：一是将刑法第 81 条中“假释后不致再危害社会”改为“承诺假释后不致再危害社会”，使责任由被假释者

承担，废除“倒查制 度”。二是在法院中设立刑事执行审判庭，专门审理减刑、假释案件，且一般以开庭审理方式进行，并让其他罪犯旁听，这样不但加强了程序的公开性，也起到了教 育和示范的作用。三是对于非监禁刑，全部由司法行政机关统一执行，并在司法行政机关中专设司法执行处（科），连同民事执行一起，由该机构执行。在此机构中 设司法执行员，专门负责监外执行、保外就医、假释、缓刑、管制等刑事执行工作，做到刑事执行的统一，并加强司法行政机关的责任。刑事执行法应该与刑法、刑 事诉讼法形成三足鼎立之势。

Here are a few thoughts for solving the current problems in the criminal law implementation system: Change the language in Article 81 of the Criminal Law from "After parole, do not again harm society" to "Promise that, after parole, you will not again harm society." This makes the parolee bear the responsibility and abolishes the "upside down review system". In court, establish criminal law implementation courts specializing in hearing sentence reduction and parole cases, and moreover, generally use open trials, and also let other criminals observe, and in so doing, not only strengthen the open trial process, but also serve as an educational and exemplary function.

Punishments not involving jail sentences should all be left to the administrative judicial organs for unified implementation. Moreover, we should set up specialized judicial implementation offices (sections) in the administrative judicial organs and link these cases with the implementation of civil law matters, both of which would be implemented by these agencies. The judicial implementation staff in these agencies would be solely responsible for criminal law implementation work such as medical releases, paroles, reduced sentences, supervision of the system, as well as for the unification of criminal law implementation. Moreover, we should strengthen the responsibility of the administrative judicial organs. The new Criminal Law Implementation Law, together with the Criminal Law and the Criminal Procedure Law would form the three legs of the bronze Ding vessel.

民 法 学

寻 找 现 代 的 《 民 法 典 》

部分学者提出，新中国民法学发展的六十年就是一个“寻找《民法典》”的进程。八十年前，我们在外力的压迫和推动下为追求民族自强创造了自己的民法典—— 《中华民国民法典》；但是六十年前，新政权革故鼎新，废弃六法全书，抛弃了这部民法典；随后的三十年中，因缺乏内在的社会驱动力，几次《民法典》的立法都 未成功；最近的三十年，我国实行渐进式的改革开放，寻找《民法典》的进程也随之逐步向前，在《民法通则》制定后，基本方向就确立为通过单

行立法的模式逐渐 完善我国的民事立法，以致形成最终的《民法典》。

有学者认为，关注民法的现代性，可能是今后民法学的重大历史任务。已经走过的路更多的是续接传统，接下来则需更多关注民法的现代化。对于将来的民法典制 定，有学者提出：应吸收各方面的专家，如法学家、政治家、民族学家、社会学家、语言学家、哲学家、经济学家等等，要真正实现全社会参与；也有学者认为：学者们需要静下心来，在司法判决中，在社会生活中去寻找和发现中国民法典，制定出真正符合现实而不是天马行空式的民法典。另有学者认为，在将来的民法学发展 中，需注意民事主体身份差异的现实，仅仅在亲属关系中探讨身份问题是不够的。过去的误解在于，认为有身份就有特权，所以民法学者都不愿意谈身份问题。但是 身份是社会结构的客观存在，也是市民社会的客观存在，不仅仅是家庭关系中才有的内容。

VII. CIVIL LAW

A. *Civil Law Legal Studies' Search for a Modern Civil Code*

Some scholars point out that the past sixty years of the development of New China's civil law studies is best characterized as "searching for a Civil Code". Eighty years ago, under the oppression and pushing of foreign forces, and in order to bring about the self-strengthening of the people, we created our own civil code - the Civil Code of the Republic of China. But then, sixty years ago, the new political regime "discarded the old and established the new", throwing out the Six Codes of the Republic of China, including the Civil Code. During the ensuing thirty years, due to a lack of internal social motivation, several attempts at Civil Code legislation were all unsuccessful. During the most recent thirty years, China implemented gradual reform and opening, and along with this, the process of searching for a Civil Code moved forward slowly. After drafting the General Principles of Civil Law, we established the basic model of enacting a series of standalone laws in order to gradually perfect China's civil law legislation so that these laws would ultimately form a Civil Code.

Some scholars believe that focusing on the modernity of civil law is probably the greatest future historical duty of civil law legal studies. A good deal of the work up to now has been a continuation of past tradition. For the future, we need to focus more on the modernization of civil law. To draft the civil law of the future, some scholars propose that experts from every discipline ought to be included, such as legal scholars, political scientists, ethnologists, sociologists, linguists, philosophers, and economists. We must truly engage all of society. There are also some scholars who believe that scholars need to focus on looking for and discovering China's civil code in court decisions and in social life. That

would produce a civil code truly in accord with reality and not simply some lofty language. Other scholars believe that in developing the future civil code one must pay attention to the reality of the differences in the status of civil subjects. It is not enough to merely explore status issues in family relationships. In the past, misunderstandings came from thinking that if you have status you have special rights. Therefore, civil law scholars were not willing to speak about status issues. But status is the objective reality of social structure, as well as the objective reality of urban society, not just the substance of family relations.

民事诉讼法学
群体诉讼行得通吗？

中国人民大学江伟教授认为，中国的民事诉讼法学是在艰难曲折的过程中向前发展的，因为这个学科一直受到冷遇。他引用中国政法大学杨荣馨老师一句"很经典的 话"，在法学界，民事诉讼法学是轻中之轻。第一轻，是"民"字号，在"民"字号里面还有实体法和程序法，重实体轻程序，这不第二个轻嘛。民事诉讼法学发展 到今天最大的一个问题就是要理论联系实际，对实践当中发生的问题没有能够从理论上进行解释，比如当事人的问题，比如民政局能不能当被告，民政局替流浪汉主 持权利，是不是公权侵犯了私权？另外比如三鹿奶粉这种案子应不应当受理？就是群体诉讼在中国是不是能够适用等等很多的问题。

VIII. CIVIL LITIGATION LEGAL STUDIES

A. *Will the Actions of the Civil Procedure Legal Studies Community work?*

China People's University Professor JIANG Wei believes that civil procedure legal studies is developing forward, but the process has been arduous and tortuous because this discipline has always been given the cold shoulder. He cites Chinese University of Politics and Law Professor YANG Rongxin's classic statement: In jurisprudence circles, even among neglected subjects civil procedure legal studies is relatively neglected. Civil law itself is a neglected discipline and, within civil law, there is substantive civil law and procedural civil law. Substantive law is always favored and procedural law is not. Thus, is not civil procedure studies the most neglected discipline? The greatest issue facing the development of civil procedure studies to this day is the link between theory and practice. We have not been able to advance a theoretical explanation for issues that occur in practice. For example, take the issue of the term "party". Can a municipal Bureau of Civil Affairs be named as a

defendant? Can it advocate rights on the behalf of a vagrant? Can civic rights violate personal rights? As another example, should a case like the San Lu [melamine tainted] powdered milk case be heard in court? Can class action lawsuits be used in China? There are so many issues.

商 法 学

中 国 的 商 法 过 于 重 安 全 轻 效 益

专家们认为，追求效率是现代商法的价值追求，但中国商法存在着重视安全远胜于效率的误区，相对保守，过分运用行政手段。商法应当防止在过度追求安全价值中 丧失创新效益，因为：过分注重安全价值，将限制商主体的市场竞争，不利于培育商主体的市场创新意识；过分注重安全价值，固守传统观点，将错失诸多发展机 会；过分注重安全价值，将导致行政职权的膨胀，不利于提高商主体的国际竞争力。我国商法应在安全和效益两大价值中作出科学抉择——效益价值应当是第一位 的。

IX. COMMERCIAL LAW LEGAL STUDIES

A. *Chinese Commercial Law Overemphasizes Security and Underemphasizes Efficiency*

Experts believe that Chinese commercial law legal studies places too much emphasis on security and overlooks efficiency. The value of modern commercial law is its pursuit of efficiency, but Chinese commercial law has many mistaken areas where it emphasizes security and sacrifices efficiency. As opposed to being modern, Chinese commercial law is conservative and makes excessive use of administrative measures. Commercial law ought to prevent the loss of efficiency and innovation rather than excessively pursue the value of security. Excessively emphasizing security will restrict the fundamental elements of market competition. It is not beneficial to the cultivation of an innovative, market-oriented mentality. The excessive emphasis on the value of security, which is a conservative, traditional mentality, will interrupt many development opportunities. The over-emphasis on the value of security will lead to the inflation of administrative power. It is not beneficial for increasing China's international competitive strength. Our country's commercial law should make a scientific choice a between the values of security and efficiency—the value of efficiency should come first.

经 济 法 学

宏 观 调 控 也 要 遵 守 法 律 程 序

华东政法大学陈少英教授认为，宏观调控遵守法律程序的问题，便

是政府控权、限权的问题。政府之所以要进行宏观调控，是因为市场缺陷，市场弊病，政府要干 预，要调控，但是，政府也会出现失灵，因此，经济法不仅是干预市场的法，也是干预政府的法。从去年年底到现在，我们多次对存款准备金率、存贷款基准利润进 行调控，税法方面去年年底也出台了增值税转型、印花税下调、存款利息税暂免等措施，这些都是调控政策，但是，我们到底采取了哪些法定程序？依据税收法定主 义和预算法定主义，我们确实还存有很多问题。就税法而言，税收最新的定义是税收是换取公共产品和公共服务的价格，税收法律关系是公法上债权债务关系，而且 刑法中已将偷税罪改为逃避纳税义务罪。在这些基本理论不断更新的同时，我们的政府也应"与时俱进"，4 万亿救市方案毕竟是政府单方意志下的行为，在监管机 制缺失的背景下，纳税人的权利无法得到应有保护，就理论而言，纳税人有监督用税权，但在这里却缺乏相应的机制予以保障，对此，我们应进行反思。

X. ECONOMIC LAW LEGAL STUDIES

A. *Macroeconomic Controls Must Also Abide by Legal Procedures.*

East China University of Political Science and Law Professor CHEN Shaoying believes that the issue of macro-controls' compliance with legal procedures is really an issue of government's right to control or limit. The government's reason why it wants to implement macro-controls is because of market defects and malpractice. The government wants to intervene and control. However, the government itself can also malfunction; thus, economic law is not only market intervention law, but also government intervention law. Since the end of last year, we repeatedly implemented controls over the deposit-reserve ratio and base savings interest rates. On the tax law side, at the end of last year, we also launched a number of measures such as a value-added tax (VAT) transformation, a downward reduction of stamp duties, and a temporary suspension of taxes on bank deposit interest. All these are control policies. However, in the end, did we adopt any legally-mandated procedures?

As for the tax laws, we indeed still have very many issues. The newest definition of tax revenue is that it is the price for the exchange of public goods and services. The legal relationship of tax revenues is the relationship between creditors and debtors under public law. On the other hand, in criminal law, the crime of stealing taxes has already been changed to the crime of evading the obligation to pay taxes. At the same time these basic theories continuously rejuvenate, the government also ought to "keep up with the times". The four trillion RMB economic stimulus plan, at the end of the day, is a unilateral action taken by the government on its own volition. In the context of the lack of a supervisory mechanism, there

is no way for the taxpayers' rights and benefits to receive the protection they should have. Theoretically, taxpayers have supervisory power over the use of taxes, but in this respect, however, we lack the corresponding mechanisms to protect their rights and benefits. We should reflect on this.

国 际 法 学

依 法 治 国 的 " 法 " 应 包 括 国 际 法

中国社科院法学所刘楠来教授认为，我国在如何国际法与国家法治建设的关系上存在误区。过去讲依法治国主要是国内法，现在逐渐认识到依法治国的"法"也应该 包括国际法，国际法在依法治国中扮演着非常重要的角色。作为国际社会一员，加入国际条约后就应及时制定与修改相应国内法，以履行国际条约义务。但很多人没 有意识到这一点，而是担心可能影响主权、利益。许多国际法问题的认识偏差，原因在于国际法学者对国际法研究和宣传方面的不够不足。国际法不仅仅是对外交往 的工具，对我们的现代化也很重要。

XI. INTERNATIONAL LAW LEGAL STUDIES

A. *The Term "Law" in the Phrase "Govern the Country in Accordance with the Law" Must Include International Law*

Professor LIU Nanlai at the Chinese Academy of Social Sciences' Law Institute believes that there are inconsistencies in the relationship between how China is handling international law and its construction of the rule of law. In the past, when we spoke of "governing the country in accordance with the law", we primarily referred to domestic law. Now, it has gradually become recognized that the term "law" in the phrase "govern the country in accordance with the law" also must include international law. International law plays a very important role in "governing the country in accordance with the law". As a member of the international community, after joining an international treaty, we must timely formulate and amend corresponding domestic laws so as to fulfill our international treaty commitments. However, many people have not realized this; rather, they are anxious about the possibility that it will affect China's sovereignty and interests. Our understanding of many international law issues is erroneous. The root cause lies in the insufficiency and inadequacy of international law research and dissemination by our international law scholars. International law is not only a tool for foreign contacts, it's also very important for our modernization.

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