

宋代法律史研究之史料解構與問題分析*

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摘要

研究歷史是一種訓練，訓練我們找出有重要性的問題，分析它們、回答它們。

所謂重要，不是對研究者而言，而是對當時人而言，大都見於詔令、奏議和法律案件（如不認為是重要，為何打官司？）。從中找到史料後，必須注意三事：一，它們的種類，其中以法典的生成最為縝密，應優先利用。二，它們的性質，即使同是法典，律和令的性質不同，它們的重點就有不同。三，無論甚麼史料，解讀時必須先找出它們的邏輯結構和彼此關連，看出它們的自在圓滿，切忌先入為主，以己意強加於古人，或抽離史料的上下脈絡，牽強附會。

分析和回答問題要注意四點：一，將大問題分解為中型問題、中型問題為小問題，才能看出大問題的複雜性和切入點。法律問題往往跟日常生活有關，不妨多用常識切入，更要利用傳統的歷史六問（what / which、who / whom、when、where、why、how）。二，清楚界定研究的對象，例如有些學人把妾與婢混為一談，得出妾一方面愈來愈像「物品」另一方面愈來愈像「家屬」的矛盾。我們

* 本文原是「治史經驗談——法律、宗教、社會」演講稿，於2014年12月11日發表於國立師範大學歷史系研究生講座，增訂後得到《法制史研究》兩位匿名審查人的鼓勵和提示，謹此致謝。姊妹篇〈第十八層地獄的聲音：宗教與宋代法律史研究法〉將刊於《中西法律傳統》（2016）。

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不妨以比較法來看出妾的定義，如比較妻、妾、婢的權利和責任。三，必須分別立法與司法。如研究淫祀，我們不能因為執法者因各種原因（如貪污）不去取締淫祀而推論立法者不曾清楚界定淫祀。四，當評估是否依法而判時，須分別受害人和加害人。尤其在家屬相爭的案件裡，受害人的權利可能根據法律受到充分的保護，但加害人的罪行不一定依法受罰。對受害人來說，法律是穩定可以預期的，但對加害人則未必。

關鍵字：宋代法律史、史料、重要問題、研究方法

Anatomy of Data and Questions in the Study of Song Legal History

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Abstract

The study of history is a discipline that trains us to find out questions of importance, and then to analyze and answer them.

Importance here means being important to the people in the past, not necessarily to us at present. Most of the important questions can be found in edicts, memorials to the throne, and legal cases, as people do not go to court for matters they considered unimportant. Concerning these sources, three points are to be heeded. First, their types must be differentiated. Usually the most carefully formed are the legislative data that they must be used first. Second, their nature must be clarified. Even of the same type as legislative data, laws and ordinances are different in nature, and thus varying in focuses. Third, whatever data at hand, researchers must first find out their internal logical structure and connections. Usually legislative data are sufficiently self-explanatory that we ought to “discover” instead of “create” their meanings. Reading data “out of context” should always be avoided.

In analyzing and answering questions, four points must be noted. First, a big question must first be broken down into medium questions and then into small questions in order to reveal how complex the big question is and how to cut into it. Questions concerning daily-life such as what property right a person may have can be analyzed by a common-sense approach, and quite often by asking the six old historical questions: what /

which, who / whom, when, where, why, how. Second, all major terms must be clearly defined. Due to a mix-up of “concubine” with “maidservant”, some historians argued that concubines of the Song dynasty became more and more like commodities, while others argued that they were more and more like family members. One way to tell them apart is to compare their rights and duties with those of a wife. Third, the differences between legislation and enforcement of law should always be born in mind. In the study of illegal temples, for example, we should never assert that legislators had not clearly defined what is illegal on the ground that legal enforcers had always failed to abolish certain illegal temples. There are numerous causes, such as corruption, that could have hindered the abolition. Forth, to see whether a ruling is based on law, the judgment on the offender and that on the defender must be weighed separately. Especially in disputes between family or clan members, the rights of the defender might be protected in full accordance with the law, but the crimes of the offenders might not be punished to the same degree. As such, law is stable and predictable to the defender but not necessarily to the offender.

Keywords: Study of the Song legal history, historical sources, important questions, research methodology