



法学文库
何勤华 主编

法律文化史谭

Studies in the History of Legal Culture

何勤华 著



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在人类寻求智慧的旅程里

永远是山外有山

——题记

On the way of pursuing the wisdom, there is always a mountain beyond the mountain (there is always somebody or something better; one should always be modest)

——the motto of the author

总序

商务印书馆与法律著作的出版有着非常深的渊源,学界对此尽人皆知。民国时期的法律著作和教材,除少量为上海法学编译社、上海大东书局等出版之外,绝大多数是由商务印书馆出版的。尤其是一些经典法律作品,如《法律进化论》、《英宪精义》、《公法与私法》、《法律发达史》、《宪法学原理》、《欧陆法律发达史》、《民法与社会主义》等,几乎无一例外地皆由商务印书馆出版。

目下,商务印书馆领导高瞻远瞩,加强法律图书出版的力度和规模,期望以更好、更多的法律学术著作,为法学的繁荣和法治的推进做出更大的贡献。其举措之一,就是策划出版一套“法学文库”。

在当前国内已出版多种法学“文库”的情况下,如何体现商务版“法学文库”的特色?我不禁想起程树德在《九朝律考》中所引明末清初大儒顾炎武(1613—1682)的一句名言。顾氏曾将著书之价值界定在:“古人所未及就,后世所不可无者。”并以此为宗旨,终于创作了一代名著《日知录》。

顾氏此言,实际上包含了两层意思:一是研究成果必须具有填补学术空白之价值;二是研究对象必须是后人所无法绕开的社会或学术上之重大问题,即使我们现在不去触碰,后人也必须要去研究。这两层意思总的表达了学术研究的根本追求——原创性,这也是我们编辑这套“法学文库”的立意和目标。

具体落实到选题上,我的理解是:一、本“文库”的各个选题,应是国

内学术界还没有涉及的课题,具有填补法学研究空白的特点;二、各个选题,是国内外法学界都很感兴趣,但还没有比较系统、集中的成果;三、各选题中的子课题,或阶段性成果已在国内外高质量的刊物上发表,在学术界产生了重要的影响;四、具有比较高的文献史料价值,能为学术界的进一步研究提供基础性材料。

法律是人类之心灵的透视,意志的体现,智慧的结晶,行为的准则。在西方,因法治传统的长期浸染,法律,作为调整人们生活的首要规范,其位亦尊,其学亦盛。而在中国,由于两千年法律虚无主义的肆虐,法律之位亦卑,其学亦微。至目前,法律的春天才可以算是刚刚来临。但正因为是春天,所以也是一个播种的季节,希望的季节。

春天的嫩芽,总会结出累累的果实;涓涓之细流,必将汇成浩瀚之大海。希望“法学文库”能够以“原创性”之特色为中国法学领域的学术积累做贡献;也真切地期盼“法学文库”的编辑和出版能够得到各位法学界同仁的参与和关爱,使之成为展示理论法学研究前沿成果的一个窗口。

我们虽然还不够成熟,
但我们一直在努力探索……

何勤华

2004年5月1日

General Preface

It's well known in the academic community that the Commercial Press has a long tradition of publishing books on legal science. During the period of Republic of China (1912—1949), most of the works and text books on legal science were published by the Commercial Press, only a few of them were published by Shanghai Edition and Translation Agency of Legal Science or Shanghai Dadong Publishing House. Especially the publishing of some classical works, such as on *Evolution of Laws*, *Introduction to the Study of the Law of the Constitution*, *Public Laws and Private Laws*, *the History of Laws*, *Theory of Constitution*, *History of the Laws in European Continents*, *Civil Law and Socialism* were all undertaken by the Commercial Press.

Now, the executors of Commercial Press, with great foresight, are seeking to strengthen the publishing of the works on the study of laws, and trying to devote more to the prosperity of legal science and the progress of the career of ruling of law by more and better academic works. One of their measures is to publish a set of books named "Jurisprudential Library".

Actually, several sets of "library" on legal science have been published in our country, what should be unique to this set of "Juris-

prudential Library”? It reminded me of Gu Yanwu’s(1632—1682) famous saying which has been quoted by Cheng Shude(1876—1944) in *Jiu Chao Lv Kao* (*Collection and Complication of the Laws in the Nine Dynasties*). Gu Yanwu was the great scholar of Confucianism in late Ming and early Qing Dynasties. He defined the value of a book like this: “the subject covered by the book has not been studied by our predecessors, and it is necessary to our descendents”. According to this principal, he created the famous work *Ri Zhi Lu* (*Notes on Knowledge Accumulated Day by Day*).

Mr. Gu’s words includes the following two points: the fruit of study must have the value of fulfilling the academic blanks; the object of research must be the significant question that our descendants cannot detour or omit, that means even if we didn’t touch them, the descendants have to face them sooner or later. The two levels of the meaning expressed the fundamental pursuit of academy: originality, and this is the conception and purpose of our compiling this set of “Jurisprudential Library”.

As for the requirement of choosing subjects, my opinion can be articulated like this: I. All the subjects in this library have not been touched in our country, so they have the value of fulfilling the academic blanks; II. The scholars, no matter at home and or abroad are interested in these subjects, but they have not published systematic and concentrated results; III All the sub-subjects included in the subjects chosen or the initial results have been published in the publication which is of high quality at home or abroad; IV. The subjects chosen should have comparatively high value of historical data, they can

provide basic materials for the further research.

The law is the perspective of human hearts, reflection of their will, crystallization of their wisdom and the norms of their action. In western countries, because of the long tradition of ruling of law, law, the primary standard regulating people's conducts, is in a high position, and the study of law is also prosperous. But, in China, the rampancy of legal nihilism had been lasting for 2000 years, consequently, law is in a low position, and the study of law is also weak. Until now, the spring of legal science has just arrived. However, spring is a sowing season, and a season full of hopes and wishes.

The fresh bud in spring will surely be thickly hung with fruits; the little creeks will coverage into endless sea. I hope "Jurisprudential Library" can make great contribution to the academic accumulation of the area of Chinese legal science by it's originality; I also heartily hope the colleagues in the area of legal study can award their participation and love to the complication and publication of "Jurisprudential Library" and make it a wonderful window showing the theoretical frontier results in the area of legal research.

We are not mature enough

We are keeping on exploring and seeking

He Qinhua

May 1st, 2004.

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中国法与法律文化

法律文化史谭



清代法律渊源考

法律渊源(德语为 Rechtsquellen, 英语为 Sources of law), 一般简称法源, 大体包含两种意义: 一是指法的本质渊源, 即法这一社会规范是从哪里来的? 它涉及的是法的来源、形成问题。如法是源自神的昭示? 还是君主的意志? 抑或是人民的“公意”? 二是指法的形式渊源, 即法的(存在)表现方式: 某一时期某一国家的法律是由哪些规范来表现的, 是由国家立法机关通过正当的法定程序制定出来的成文法规? 还是被国家认可的不成文的习惯? 抑或是在法院中被遵循适用的判例? 乃至法学家个人的著作、学说? 一般而言, 学术界在使用法律渊源一词时, 主要是在第二种意义上。

法律渊源, 是法学的基本范畴之一, 也是法学研究的一个重要课题。在西方, 无论是古罗马法学家盖尤斯(Gaius, 130—180)的名著《法学阶梯》, 还是近代法学大师萨维尼(Savigny, 1779—1861)、祁克(Gierke, 1841—1921)和惹尼(Gény, 1861—1956)的作品, 首先涉及的课题也是法律渊源。^① 对一国法律渊源的研究, 比对一国法律体系的研究更具有立体感和深度。因为法律体系比较侧重于法的静态组合; 而法律渊源则更侧重于法的动态运作——在一国的司法审判实践中,

^① 如盖尤斯著《法学阶梯》的开篇涉及的是法律渊源; 萨维尼著《现代罗马法的体系》第一卷第一编论述的是法源论; 祁克的《德意志团体法论》和《德意志私法论》、惹尼的《实存私法上的解释方法与法源》中突出论述的也是法源问题。