



法学文库  
何勤华 主编

# 出土法律文献研究

Study on Disentombed Legal Documents

张伯元 著

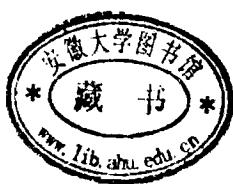


商務印書館

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张伯元 男，1942年生，江苏无锡人。现为华东政法学院法律古籍整理研究所研究员。主要从事中国古代法律文献的整理和秦汉法制史的研究，出版专著《法律文献学》（获司法部优秀成果三等奖）、《古书存亡史话》等5部，发表《法律文献考订例释》（曾获上海社科优秀论文三等奖）、《“爵戍”考》等论文40余篇。

## 内 容 简 介

本书收录了作者有关出土法律文献研究方面的论文22篇。书中涉及张家山汉简、居延汉简、睡虎地简、银雀山简中的法律史料，作者将它们与传世文献结合起来，对秦汉律的特征作了广泛的考察和研究。

本书有三个鲜明特点：一、涉及面广，比较全面地反映出当前出土法律文献的概貌；二、采用了传统的考据学方法，言必有据；三、文贵出新，本书多有独到之见。

在学术界，简帛研究已经成为一门显学。本书以出土法律文献研究为视角，纵横开合，会给读者颇多启迪。

## 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

## 2 出土法律文献研究

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 Cao* (*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 its 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 1<sup>st</sup>, 2004

## 序

研究我国古代法制,除存世的法律古籍,如历代法典、历代刑法志等之外,在地下考古发掘所取得的丰硕成果中,诸如甲骨卜辞、钟鼎碑石、简牍帛书、敦煌写本、吐鲁番文书等载体所记录的法律史料,特别是近年来新出土的大量秦汉律令简牍,为我国古代法律史的深入探索和研究提供了极其宝贵的第一手资料。然而,据我所知,以往在法史学界研究这一繁难而枯燥课题的学者寥若晨星。其原因虽是多方面的,但其中一个重要原因是与法史学界对研究这一课题的重要性和紧迫性认识不足,有密切关系。

在我结识的朋友中,华东政法学院法律史研究中心研究员张伯元先生是热心于法制简牍研究的一位。他的新著《出土法律文献研究》即将出版,我不仅为他能取得新的成果而高兴,而且,更为他在秦汉法制与出土简牍相结合的研究方面做出的努力而感到由衷的敬佩。《出土法律文献研究》一书共 22 篇,侧重于秦汉,涉及银雀山简、睡虎地简、居延简、张家山简……讨论的面相对较宽;此书的写作主要采用了考据的方法,有法律语词的解说,有简牍的编联排序,有案例的复原,有对秦汉律令条文的诠释等等;全书求真务实,贵在创新。虽然是涓涓细流,但新见迭出,发人未发,启人深省。也许有些问题还不很成熟,有些问题还可以商榷,但他的这种探索精神无疑是值得我们学习和发扬的。

法律史研究要求我们开阔视野,要敢于走向法律史研究的前沿。从狭义理解,可将秦汉简牍视为出土文献。出土法律文献较早引起学

术界轰动的是湖北云梦睡虎地秦律的出土。那时候我们得力于考古、历史学界先期打下的解读基础,从而廓清了秦国、秦朝法律的面貌。1983年,张家山汉简《二年律令》、《奏谳书》的出土,又将汉律的研究推到了法律史研究的前沿。其后,陆续不断地有官文书发现,如1987年湖北荆门包山2号墓出土战国包山楚简,1996年10月湖南长沙走马楼出土三国吴简,2002年4月湖南龙山里耶古城址一号井发现大批秦简等等。我们如何从法律史的层面上来审视和研究这些官文书,是一个全新的课题。学海无涯,需要我们高瞻远瞩;学术之途未有穷期,我们须上下而求索。

我们寄希望于青年学者,希望老一辈专家学者提携和带动年轻的学者,形成老中青三结合的梯队结构,使出土法律文献研究后继有人,长盛不衰。对青年法史学者而言,重要的是夯实多学科综合的知识和提高赅博融通的研究能力。近些年来国内外许多大学、研究机构组织了出土简牍的研读班,毫无疑问它是一种切磋砥砺和集思广益的好办法。对青年法史学者自身而言,除了拥有坚实的专业基础知识外,还应尽可能兼通考古、历史、古文字、古文献等相关学科的知识,不断提高法律史的研究能力和水平。我衷心祝愿可畏后生,后来居上!

《出土法律文献研究》是一个方兴未艾和举步维艰的课题,张伯元先生在担任繁重的教学工作之余,又潜心撰写出颇有难度的力作,诚属难能可贵。在此我特向法律史界的同仁推荐这本书。是为序。

谢桂华\*

2004年盛夏 于北京

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\* 谢桂华,中国社会科学院历史研究所研究员、简帛研究中心主任、中国秦汉史学会副会长。

## Preface

Studying on Chinese ancient legal systems, besides existing ancient law books, such as statute books and criminal documents of the past dynasties, many other materials recorded on historical relics were found in the dirt archaeology excavation, such as oracle inscriptions on tortoiseshells, inscriptions on ancient bronze objects and tablets, bamboo slips (Jian) and silk manuscripts (Bo), hand-written books of Dun Huang, and scriptures of Tulufan. In particular, the large amounts of laws and decrees recorded on recently unearthed bamboo slips in the Qin and Han Dynasties' have provided uncommonly found first-hand documents for an in-depth study on Chinese ancient law history. And yet, as far as I know, in the academic community of law history, scholars working on the intricate subject of ancient legal systems are not in the majority. Many factors may contribute to this, and one important reason is that the academic community has not attached due importance on this subject.

Among all my friends, Mr. Zhang Boyuan, a fellow researcher working with research center of law history in the East China University of Politics and Law is dedicated to the study of law documents recorded on bamboo slips, also his newly-written book entitled *Study on Disentombed Law Documents* will be published soon. I am not only

very pleased with the fruitful results he has achieved on this area, but also sincerely admire his efforts to study disintombed bamboo slip manuscripts with the legal systems in the Qin and Han Dynasties. The new book encompasses 22 chapters, focusing on the study of laws in the Qin and Han Dynasties. The study of bamboo slips (Jian) written in ancient china has been touched upon. For example, Yinqueshan Jian, Shuihudi Jian, Juyan Jian and Zhangjiashan Jian, have provided an extensive area for discussion. This book has employed an approach of textual research to explain legal terminologies, to number the bamboo slips (Jian), to reproduce ancient legal cases, to expound legal provisions in the Qin and Han Dynasties. The arguments of this book primarily derive from archaeological facts while combined with innovative ideas. It delineates the argument bit by bit with new insights, which provokes readers to have a deep thought. However, it is possible that some minor details need to be deliberately considered. But the exploring spirit of the writer on this particular subject will be a perfect example for us to follow and carry forward.

This study demands us to broaden our vision and encourage ourselves to lead the research in the law history. In a narrow sense, bamboo slips of the Qin and Han Dynasties are deemed as disintombed historical documents. And the earliest law documents that evoked great repercussions in the academic community are the bamboo slips of the Qin Dynasty found in Shuihudi in Yunmeng, Hubei province. Thanks to the solid foundation built by the community of archaeologists and historians that we can distinguish legal systems from the Qin Empire to the Qin Dynasty. The documents of *laws and de-*

*crees enacted in the 2<sup>nd</sup> year of the Han Dynasty and collection of convicted cases in the Qin Dynasty* excavated in Zhangjiashan in 1983, have highlighted the importance of the study of laws in Han Dynasty. And then, other governmental documents were discovered one after another, among all those are bamboo slips in Baoshan of the Chu Empire unearthed in Jingmen Baoshan Grave No. 2 in Hubei province in 1987, bamboo slips in Wu Empire of the Three Kingdoms discovered in Zoumalou, Changsha Hunan province on Oct. 1996, bamboo slips in the Qin dynasty found in the ancient City of Liye at Well No. 1 in Longshan, Hunan province on April 2002. Hence, how to study these governmental documents from the perspective of law history is a newly developed subject for us to delve into. The way of learning is endless, and we need to take a broad and long-term view, work hard and look forward to achieve tremendous progress.

We hope that elder professionals and experts can educate and instruct young researchers to establish a study team formed by the elder, the middle aged researchers and the youngsters, and train youngsters to be qualified successors. We also hope that young researchers will have a comprehensive multidisciplinary knowledge, further improve their research abilities between interdisciplinary subjects. Nowadays, many universities and research institutes home and abroad have organized their own working teams in studying on disintombed bamboo-slip manuscripts, and this can be regarded as an effective method to brainstorm and pool different ideas. For young researchers themselves, besides a full command of their professional study, they should also extend their knowledge to archaeology, history, ancient

Chinese characters, and ancient documents so as to polish their researching abilities. I sincerely wish that the youngsters themselves can gain enormous achievements to outdo the last generation.

*Study on Disentombed Law Documents* is a new subject with paramount importance. This is an uphill struggle. However, Mr. Zhang Boyuan has delved into this area. He has completed this book outside his tight teaching schedule. His endeavor on this study is commendable. I would like to take this opportunity to seriously recommend this book to all counterparts in the academic community of law history and write this as a preface to this book.

Xie Guihua<sup>①</sup>

Written in Beijing

Summer of 2004

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<sup>①</sup> Xie Guihua, professor in history research institute of Chinese Social and Scientific Academy, director of research center in bamboo slips and silk manuscripts, deputy chairman to the association of Chinese history in the Qin and Han Dynasties.

由赵继君英译。



# 前 言

除传世的法律文献外,近百年来地下考古发掘出土了大量的简牍,其中不乏法律史料。特别是近二三十年来,秦汉律令的发现,填补了秦汉法制史上的许多空白,为中国法学研究开辟了一个崭新的天地。

以往的秦汉法制研究,大都囿于纸本文献之上、法学史界之内,画地为牢,孤军奋战,而如今,古代法制史的研究成了热门的课题,不仅有法史学界的学者参与,而且许多历史学界、考古学界的专家也在潜心整理和研究着出土法律文献,不仅为研究法制史的学者提供了最好的释文文本,而且许多高质量的专题学术论文不断涌现,形成了一个蔚为壮阔的研究热潮。<sup>①</sup>

王国维曾经说过,“中国纸上之学问,赖于地下之学问者,固不自今日始矣。”(《最近二三十年中中国新发见之学问》)陈寅恪先生也说:“一代之学术,必有其新材料与新问题。取用此新材料,以研求问题,则为此时代学术之新潮流。”“此古今学术之通义,非彼闭门造车之徒所能同

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<sup>①</sup> 曾记得 1975 年湖北云梦睡虎地出土秦律(包括《语书》《秦律十八种》《秦律杂抄》《法律答问》《封诊式》等多种)的当年,学术界热烈而亢奋的研讨场景还如在目前。1978 年文物出版社就出版了平装本《睡虎地秦墓竹简》,其后又出了精装本(印刷两次);1981 年中华书局出版论文集《云梦秦简研究》,在论文集的前言中这样说:“参加过睡虎地秦墓竹简整理小组的李学勤、裘锡圭、张政烺、于豪亮、高恒、刘海年、舒之梅、唐赞功、李均明等同志,曾对与秦简有关的各个方面的问题做过一些研究,写出了一些专题论文。另外,没有参加秦简整理小组的马雍、吴荣曾、吴树平、熊铁基、王瑞明、高敏等同志,也利用秦简进行了一些研究,写出了一些专题论文。”其涉及面之广、其阵容之强、其水平之高,同类文献的研究无法与之相比。法学界有代表性的《秦律通论》(栗劲著)应运出版,填补了法制史上秦律研究的空白。