21世纪法学研究生参考书系列

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张世明◎著

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作者简介

张世明，中国人民大学教授、博士生导师，目前在中国人民大学法学院从事经济法学等方面研究。曾获得北京市第十三届哲学社会科学优秀成果奖特等奖、中国法学会第三届“中国法学优秀成果奖”一等奖等奖项，入选“新世纪优秀人才支持计划”。先后在德国马克斯-普朗克知识产权、竞争法和税法研究所，弗莱堡大学法律系经济法研究所，美国普林斯顿高等研究院，日本东京大学从事学术研究。师从德国著名法学家费肯杰（Wolfgang Fikentscher）教授并翻译了其两卷本《经济法》。主要经济法学著作包括《经济法学理论演变研究》《企业并购法贯通论》《经济法体系化与方法论：竞争法的新发展》等，个人代表作有积十七年的努力所完成的专著《法律、资源与时空建构：1644—1945 年的中国》五卷本等。

序　言

经济法学是法学家族中的后起之秀，目前学术上对其仍是诸说纷纭。我一直以为，要使经济法能够站得起、立得住，仅对有关具体经济法律制度进行研究是不够的，而须对经济法学的概念、范畴和基本理论进行系统深入探讨，以奠定其作为一门学科的基本品格。世明教授不惧辛苦，对法学及经济法学界存在的避重就轻倾向和不时滋生蔓延的畏难情绪不以为然，独辟蹊径，对经济法学的理论渊源和流变进行研究，着重梳理经济法学术发展的脉络。此课题兼及法学、社会经济和历史的辩证思维，涉及德日英俄诸语种文献，研究难度和工作量很大，但又是建构经济法学必不可少的一项基础性工程，因此凸显其意义和价值所在，令本书在众多浅显雷同的经济法出版物中崭露头角、独树一帜。

学术著作的生命力不是依靠任何人自夸自擂而得以保持的，必须经受市场考验。理论的创新恰在于不断汲取营养，不断超越自我而最终破蛹化蝶。中国经济法的研究如果作茧自缚，故步自封，那么这个学科的生命力势将难以保持。目前的新书层出不穷，令人目不暇接，但往往急求近功，书被催成墨未浓，缺乏的是真正深思熟虑、精雕细刻的力作。国外的许多著作都是经过一版再版的打磨和修订而成为传世名著的，甚至一部书历经几代人赓续不绝的接力修订，这与中国学术界由于科研成果统计和考核的驱使而偏重出新书的取向大相径庭。古人云：磨砺当如百炼之余，急就者非邃养；施为宜似千钧之弩，轻发者无宏力。殆必千淘万漉后方能自成一家，传诸不朽。学术人的目的不在于写出多少本书，而在于使自己的一两本书经得起时间考验，确切地说，就是能解决一两个问题。只要我们以毕生精力比较好地解决一两个问题，在学术发展的脉络中建立起一个不容绕过的形胜据点，那么这毕生的精力付出就是具有绝对价值的。

目前的课题论证，往往八股文式地开宗明义言其学术价值和现实意义。实际上，如果没有现实意义，则其学术价值为零，两者是不可割裂开来的，甚至在某种程度上是相互成正比关系的。从本质而言，社会科学基本上是“应用科学”，用马克思的话来说，就是不仅用来阐释世界，还要去改造世界。这种阐释也不是就事论事的近视浅见，必须符合学术自身的规律，从大本大源进行四两拨千斤的基点式研究。社会科学的传世之作必在某种程度上是经世之作，绝不可能是对现实心不在焉的逸世之作，逸世之作必然是行之不远的。美国的霍尔姆斯（Oliver Wendell Holmes）大法官曾经说过一句名言：“法律的生命并非逻辑而系经验”（The life of law has not been logic, it has been experience）。清末法学家沈家本也说过：“不明学理，则经验者无以会其通，不习经验，则学理亦无从证其是，经验与学理，正两相需也。”灰色的理论来源于常青的实践。中国在改革开放以后形成了庞大的经济法学研究队伍，这与中国的经济发展和变革的社会现实是密不可分的。丰富的经济

和法律实践为经济法学研究提供了沃土，是取之不尽、用之不竭的研究资源。这也是我们研究经济法的本土资源优势所在。我同意作者在本书第一版（中国民主法制出版社 2002 年版）就提出的一个观点，即中国知识分子不能像毛泽东所说尽当“梁上君子”，不能高高在上空谈虚论，而必须扎根于中国的国情之中，面向中国经济和法律改革的实践经验。只有民族的才是世界的。中国经济法学要想真正建立自己的体系，除了积极向国外学习先进的理论之外，另一个重要方面即在于密切关注中国自身经济和法律变革的现实，使经济法学研究真正成为究心体国经野之大者的经国济民之学问。

世明在法学院读书时即与我相过从。我对其在经济法学方面所付出的努力和成果甚为赞赏。在其专著出版之际，承其雅嘱撰序，望其学成，将中国经济法学研究光而大之，乃所至愿。

史际春

2018 年 3 月 15 日

英文摘要

If Economic Law is not to be a castle in the air, a thorough investigation of previous Economic Law should be made to grasp its essence. The attempt to utilize a traditional method directly in establishing a perfect Economic Law is impossible and in vain. Now it is hard for economic law to combat Civil Law, and Economic Law would inflict self-incurred dilemma, if it was to adopt a postive research. This is the goal and the method of this dissertation.

The real founder of Economic Law in the modern sense is Pierre Joseph Proudhon, rather than Ritter. Chinese scholars tend to regard Morrlies and Dezamy as its founders. This is also a mistake. It is Proudlhon who initiated the concept of "droit economique" in history, and his thoughts of Economic Law agree with the present theory to certain extent. Proudlhon should be deemed as the father of modern Economic Law in this sense. Others can be called grandfathers, great-grandfathers or the relatives of modern Economic Law concept. Chinese scholars used to confuse this situation. From Kuhn's paradigmatic theory, we can see that the concept of Economic Law gradually gained its ground when various scholars betray the old paradigm and pursue the new one. This process is long and complicated, which seems not as we used to imagine that it is in some minds as distinguished ideologists. The theory of anti-monopoly moot has led to mistakes of explaining the origin of Economic Law in different countries with different cultures and social structures. The creation of the socialist Economic Law, at first in the former Soviet Union, had virtually nothing to do with the burgeon of the capitalist Economic Law. It is right to regard the existence of socialist thoughts as the anxiety source of the formation and improvement of the capitalist Economic Law. Secondly, socialist Economic Law and capitalist Economic Law are opposites while they are complements in their evolution. Such logic deduction was applauded among Chinese Economic Law experts for a long time: in the phrase of liberal competition capitalism. The theory allowing unrestrained freedom proposed by Adam Smith preempted the dominant status in the theory of Economic Law. With the advent of capitalist monopoly, economic crisis became more and more violent, and besides the "invisible hand", the economy necessarily demands the intervention of the visible hand of the state. The Keynesian economics provided the New Deal of Franklin D. Roosevelt with a theoretical basis, so it became the theoretical foundation for the drafting of Economic Law. However, when people build the genetic cause-and-effect chain for the Keynesian economics, the New Deal of Franklin D. Roosevelt and the creation of

German Economic Law, it is inevitable not to subject to the excruciation of positivism. The author does not believe such an assertion: the Keynesian economics supplied the guiding principle for modern capitalist Economic Law. This assertion is the stanchion of the theory of substantial intervention. Some scholars unilaterally emphasize: the state intervence has always dominate the creation of Economy Law. If the said assertion were true, Economic Law wouldn't have been created and developed in this way. Lacking the inner contradiction, crisis and tension, the research is destined for perdition. I believe that the expansion of administrative power brought us several effects. It was not only the cause of the creation of Economic Law but the also impetus for the formation and development of administrative Law. It is not that Economic Law carves up the administration Law's scope but that the administration Law definitudes its direction of more advancement. Each has its background of origination and sphere of learning, and they drive along different roads, advance together to make progress. Civil Law and Commercial law and Economic Law all serve as a solution to market failure, which caused over-burden in trading expenses. Civil Law and Commercial Law are fundamental laws for market economy, which are substitutes and cooperate in market allocation of resources. Economic Law is the basic law for market economy, which is supplemental in market allocation of resources. It is categorized as "secondary adjustment" law, which readjusts economic relations resulted from the adjustment of traditional civil and commercial law.

Germany is the burgeoning country of doctrine of Economic Law. Early presence of doctrine of Economic Law took the form of "enterprise law". At the early stage of foundation of Economic Law, doctrines of Economic Law in Germany mainly included *Sammel Theorie* (represented by Nusshaum). *Rechtssoziologische Auffassung* (represented by Westhoff, Rumpf, Geller, etc.). *Weltanschauliche Theorie* (represented by Hedemann, Klausing). In my opinion, Chinese academia knew little about doctrines of western Economic Law for lack of literatures. Thus, Chinese academia failed to tell the difference between the the objective theory (represented by Goldschmidt, Kaskel, Haussmann, etc.) and the functional theory (represented by Franz Bohm, Gerd Rinck, Hermann Eichler, etc.). In fact, it is reasonable for Kanazawa Yoshio to differentiate between the 'object theory' and the functional theory, which is not gilding the lily at all. The Freiburger school regarded uniform function of Economic Law to ensure free economic order. Hence the name of 'functional theory'. The postwar doctrines of Economic Law in West Germany basically developed along the lines of the 'functional theory' and Freiburger

School. Since capitalist and socialist countries adopted different basic economic system, under which countries differ greatly in legal systems regulating economic activities, scholars of West Germany in 1950's debated heavily on the subject of law for basic economic system (Wirtschaftsverfassungsrecht), which was used as an important criterion to decide the basic economy system in West Germany. This book give a summary and close examination of the focal issue at debate.

Before the end of World War Ⅱ, theories of Economic Law in Japan had three remarkable characteristics: 1. They were in the period of introducing German Economic Laws. They themselves lacked a specifically theoretical feature. 2. They did not realize, from the methodological angle, that the independence of Economic Law regulating objectives and the consistency in the regulatory principles, most researches under the name of 'Regulatory Economic Laws' were done by their own professional experience, and accepted the proposition as thunder without rain that Economic Laws should be an independent law dimension. 3. Like pre-war German, though there were theories advocating independence of Economic Law with awareness as to the methodology, there was no criterion of value at all on maintaining a competitive order in an economy. Kartell furtherance was the center of the Economic Laws in that period. After World War Ⅱ, theories of Japanese Economic Law made a sudden change, both in format and in pattern. 1. The defeat of Germany and Japan and the occupation by the U. N. army weakened the dependence of Japanese law on German law. 2. Negative theory of Economic Law was gradually off the stage. Economic Law has firmly founded its status as an independent law section. After World War Ⅱ, the independence of Economic Law became an undebatable truth. Theories of Economic Law entered a period of regular academic period of bettering itself. 3. After World War Ⅱ, economic democracy, carried out as a administrative guideline to Japanese people by the U. N. army, brought a revolutionary change to the economic structure in Japan, as well as to the legal system, and the objective of Economic Law. The introduction of engross and forbidden law based on free competition principle and the coexistence of competition restriction law made the unity of the two becoming concepts of Economic Laws a certainty, from which a new theory was derived. The author holds that the debate of the centralization of Japanese Economic Law is the clarification for the system of Economic Law. The latest research tries to suspend the debate and conciliate the relationship between the concepts and the system, as well as between systems, more clearly and better. Among them, power-divided Economic Law of Kubo Kinya and save-from-damage and supplement of market system law of Matsushio Mitsuo should be paid

more attention by us.

The tracing of Economic Law study in the Former Soviet Union (FSU) can be divided into two stages. The first stage is that before the 20th conference of Soviet Union Communist Party (SUCP). 'Two Composite Law' theory and pre-war Economic Law theory emerged during this period. The second stage is that from the 1950s till the collapse of the USSR. The unitive economic sector law theory and economic administration theory emerged during this period. The development of Economic Law of FSU was in conflict with the Civil Law. The author thinks that this debate involved political influence. Because the difference between public law and private law was abolished after the soviet revolution, the new principles of soviet law were still under research and construction. Any law school could not clearly offer an insightful examination to the nature of the revolution. The jurists of FSU advocated the Civil Law of the public law system, while they avoided the private law. The establishment of Economic Law will affect the whole system of soviet law, for the soviet Civil Law will have to deal with and be based on the concepts of 'civil people' and 'individuals' which were the key issues of private law. This might endanger the theory of soviet Civil Law. So, the jurists tried their best to avoid the Economic Law. During the cold war, for political and ideological reasons, the soviet civil jurists had to contend with modern economic law school.

The German jurists emphasized the ethical spirits during the development of German Economic Law. The author believes that it is correlative with the style of study. The Goldschmidt's Object Theory had a great impact in the evolution of Economic Law theory in pre-war Japan. Other theories had little influence. During the Pacific war, Japan was almost isolated from other countries. The foreign books were not accessible there until the end of the war. As a result, the German Economic Law theory could not be introduced as much as previously, and Japanese jurists began to resort to their own thoughts. During this period, the Japanese jurists tried to establish their own Economic Law thought system, using their language and thought to explain and criticize Economic Law principle. Some scholars pointed out that during the period of the US occupation and later, the role and status of German law in Japan's law system seemed to be replaced by the American law, so the law principles of Japan and Germany varied further. In fact, the Japanese law principle is still compatible with the German one. The development of Economic Law theory in Japan can be divided by the epoch. After the second war, it becomes a mixed system.

Quite a few economic juristical works in our country provide a sterotyped gen-

eral delineation of Economic Law from liberalism to state interference with economy, from Roosevelt New Deal to Keynesian economics and so on, in which there is such an absence of any sound analysis of the relationship among Sherman Act, Roosevelt and Keynesian economics that it seems as if Keynesian economics is the only theoretical basis of economic jurisprudence. In fact, the author would rather believe that Freiburg School of economics has exerted, if not more, but never less influence upon Economic Law than Keynesian economics. Chinese economic jurisprudential circle has popularized Keynesian economics without knowing that German Economic Law, instead of recruiting Keynesian economics as a support in its absorption of American anti-trust law, picks up the theory of Freiburg School as a critical weapon to launch an armed attack at Keynesian's state interference theory. The theory of Freiburg School, which is rooted in German culture, is a market economy theory with German characteristics, its distinct feature and contribution doesn't lie in seeking a compromise but taking a clear-cut stance carrying forward and upholding liberal tradition in the anti-liberal historical period. In fact, the mainstream of modern Economic Law is the flexible theoretical system with Freiburg School's new liberalism as its guideline.

The author holds that the controversy of greater Civil Law versus greater Economic Law in the Chinese jurisprudential circle is of tremendous similarity and relevance to that of Civil Law versus Economic Law in the Soviet Union jurisprudential circle except that Chinese jurists are more fortunate in expressing their varying academic opinions without suffering their Russian fellows' misfortunes owing to the democratic academic environment in China since the open and reform policy. The book *On Chinese Economic Law* encompasses as many as five theories: comprehensive Economic Law theory, vertical Economic Law theory, vertical-horizontal Economic Law theory, economic administrative law theory and discipline of Economic Law theory, which are also called five schools of thought in many juristical works. On the other hand, none of the various definitions of Economic Law in these theories can be found free of the influence of the controversy of Civil Law versus Economic Law in the Soviet Union. As early as the mid 80s Mr Huaishi Xie warned that Chinese Economic Law should not take the much-trodded road for the development in Soviet Union economic jurisprudence. Yet, the thought established under the strong influence of Soviet Union in the 50s and 60s upon Chinese jurisprudence has made "object of adjustment" the research focus for all legal branches. Consequently, for nearly 20 years the controversy of Economic Law theories in China, whether close relations theory, economic relation coordination theory or macroeco-

nomic control theory, economic management theory, have mainly focused on the studies of the object of adjustment with little other progress. With the deepening of the reform and opening-up practice and the establishment of market economy system, Chinese Economic Law is drifting further away from the Soviet Union's economic jurisprudence and closer to German and Japanese economic jurisprudence systems; and the anti-trust-law, the dominant theoretical system of Economic Law is gradually gaining ground in place of the planning law at the early stage of the reform.

The rise of social jurisprudence forms basis of the legal philosophy for the emergence of Economic Law. This movement inherits the developing clue of the internal tense relationship between "ought" and "reality" in philosophical realm since Kant, and has enlightening effects on the economic law research, and results in establishment of the economic law research under the current of thought which emphasizes the the interest of the society. Using Max Weber's phraseology, the independence of the economic law research from the traditional law departments such as Civil Law and Commercial Law, which adjust economic relation, is the transformation from the law of "formal rationality" to the law of "substantive rationality". The representative of New Kantianism on Philosophy of Law is Radbruch, who is largely ignored by the law field in China. Japanese scholars of the economic law research, Kanazawa Yoshio and others, have quoted Radbruch's points in their works. But up to now, the Chinese academic circles are overclouded by a current of ignorance and know nothing about Radbruch's academic position in the development of economic law research . The New Kantianism has affinity with the setting up of the economic law research .

Some authorities in the field of Chinese economic law studying believe that the kernel point of V. Laptev's "vertical-horizontal unification theory" is to maintain the highly concentrated economic system in USSR, and the reform is inapplicable at present time for setting up the market economy in China, and they are determined to abandon it. But the author never thinks so. We should not dump the baby with the bath water, especially under the present historic situation of disciplinary burgeoning of Chinese economic law research, it may coincide with the law of the negation of negation better, to enrich the theory "empty structure" of the identity in V. Laptev's "vertical-horizontal unification theory" with new contents of the market economy. During the evolution of the Science of Economic Law, W. Eucken, Böhm and Grossmann, Doerth, Westhoff, and others kept on seeking the theory of economic order for a long time. As to the discussion about economic freedom and

economic order, the author holds that it is most intolerable to be limited to disserting some "big words" or principles again and again, lacking in weight and matter, and become sterling "indigence of pholosophy". Indeed, no society can perform well in the state of absolute order or absolute disorder. The normal state of social stability and development shall only realize freedom in order and order in freedom. Order is the dialectical synthesis of order-disorder. However, we shouldn't stop at the superficial rant of the relationship between freedom and order, it is not easy to gain the balance between freedom and order. Attempting to resolve the contradiction of them with poor theory construction, as what Max Weber said, is just the redundance of ethics of intention, and the absence of ethics of responsibility. At present, order is formed centering on freedom, and freedom evolves inside order. At the present time, foreign scholars pay little attention to the concept of indigenous culture, substitute it with local culture, and transform knowledge into wisdom. But Chinese scholars are still disputing about localization just like the two boys disputing the different sizes of Sun at morning or at noon in the age of Confucius. In fact, the discussion on "Chinese in system, Western in utility", which has lasted over a century, is still under debate. The antinomy of such aphorism will rotate if we advance with practical reason. The aim of Sinicization is to quarry the specificity and characteristics of Chinese society, then to perform social theoretical discovery and verification, with the speciality of Chinese social and historical background and culture tradition at the root. The most important aspect of Chinese economic law research is to make use of methods of law-sociology in profound scrutiny and examination of the operating system of Economic Laws, to set up substantial theory by piecemealing empirical data. Humanism is a precious heritage either in Orient, or in Occident. Though un-humanism such as *material* or *capital* is excluding the living space for Humanism, advocating Humanism for the Economic Law research will not be merely a null outcry.

目　录

第一章

研究旨义和方法导论

第一节　研究意义

不断增长的历史厌倦症成为20世纪下半叶的特征，这不仅在中国学术界如此，在西方亦然。当代社会科学正企图用自以为是的理性思维以及日趋精巧的现代研究方法努力将历史思想的作用驱走，使历史研究日趋“边缘化”。然而，马克思和恩格斯曾提出一个极其重要的命题：“我们仅仅知道一门唯一的科学，即历史科学。”① 马克思是普罗米修斯式的贤人智士，他正是用历史唯物史观之光，照亮了长期在黑暗晦暝中摸索的社会历史领域，揭开了长期覆盖在社会机体上的帷幕。“历史无用论”的确在中国学术界仍然广有市场。实际上，“无用”之物往往有大用，但在急功近利的人眼中无非屠龙之术而已。法国年鉴学派的第二代宗师、被世人称为“历史学教皇”的费尔南·布罗代尔（Fernand Braudel）提出的“大时段”理论强调，犀利的现时性结构分析营建的深刻理论往往所反映的社会“层面”却像剃须刀那样薄，而历史学对总体形象的粗线条勾勒，却能展示社会发展的趋向。② 厚重的历史要求我们不能荒唐地用短尺去丈量，必须以追求通观的态度去探索历史的远因近故。尽管我们的才、学、识可能力有不逮，绠短汲深，但如果我们坐井观天而自矜于闭门造车构筑起的那些高明理论，则势必不免庄子所讥之“朝菌

① 马克思，恩格斯. 马克思恩格斯全集：第3卷. 中共中央马克思、恩格斯、列宁、斯大林著作编译局编译. 北京：人民出版社，1972：20.

② 费尔南·布罗代尔. 法兰西的特性. 顾良，张泽乾，译. 北京：商务印书馆，1994：12.