



法学文库
何勤华 主编

日耳曼法研究

Germanic Law

李秀清 著



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李秀清，女，1966年生，浙江临海人。华东政法学院法学博士、教授，兼任《华东政法学院学报》主编、全国外国法制史研究会秘书长。1990年留校至今，讲授《外国法制史》及《比较公法学》等课程。曾在英国牛津大学法律系（2003年1月至7月）访学。主要研究方向为法律史、比较法，尤好奇并感兴趣于被人遗忘或冷落的课题。曾在《中国社会科学》发表“中国移植苏联民法模式考”，另在重要法学类期刊上发表论文三十余篇，出版合著、译著、点校十数部，并为“中国近代法学译丛”的编委、“各国法律发达史系列”的主要参与者。

内 容 简 介

本书为系统阐述日耳曼法的论著，既对日耳曼法成文化的历程作了考证，又对其主要领域，诸如权力归属、身份等级、婚姻家庭、土地、动产、继承、不法行为、纠纷解决等方面的习俗、规则和法律进行了分析，并在此基础上总结了日耳曼法的特性及其地位。作者认为，不同日耳曼王国法律成文化的历程并非同步，在此过程中因吸纳罗马法等外来因素的程度不同而导致彼此的内容存在明显差异。作者还认为，传统上因以某个王国或某个时期的立法和相关资料为依据而阐述的有关附庸、马尔克、以手护手、遗嘱、赎杀金、处于法律保护之外、承审员、纠问式诉讼、司法决斗等方面的观点存在偏颇，并相应作了辨析和匡正。作者最后提出，日耳曼法虽然未能发展为成熟的法律体系，但它在世界法律史上仍具有不可替代的地位，无论在继日耳曼王国解体之后建立的欧洲新政权的法律中，还是在中世纪的地方方法、王室法及近代西方两大法系主要国家的法律文化中，均含有一定的日耳曼法因素。

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 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 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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