



法学文库

何勤华 主编

# 律学考

Study of Lv Xue

何勤华 编

2



商务印书馆

法学文库 主编 何勤华

# 律 学 考

何勤华 编

商务印书馆

2004年·北京

图书在版编目(CIP)数据

律学考/何勤华编. —北京:商务印书馆, 2004

(法学文库)

ISBN 7-100-04166-X

I. 律… II. 何… III. 法学—研究—中国 IV. D920.0

中国版本图书馆 CIP 数据核字(2003) 第 045331 号

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## 上海市重点学科项目

法 学 文 库

Lǚ XUE Kǎo

律 学 考

何勤华 编

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商 务 印 书 馆 出 版

(北京王府井大街36号 邮政编码 100710)

商 务 印 书 馆 发 行

北 京 瑞 古 冠 中 印 刷 厂 印 刷

ISBN 7-100-04166-X/D·346

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2004 年 12 月第 1 版

开本 880 × 1260 1/32

2004 年 12 月北京第 1 次印刷

印张 19½

印数 5 000 册

定价: 38.00 元



何勤华 男，1955年3月生，上海市人。北京大学法学博士，曾留学日本东京大学法学部。现为华东政法学院院长，教授，博士生导师。

出版著作有《西方法学史》、《法律文化史论》、《中国法学史》（两卷）、《20世纪日本法学》等，发表论文130余篇。

享受国务院专家特殊津贴。兼任中国法学会常务理事，全国外国法制史研究会会长。

1999年，被评为“中国十大杰出中青年法学家”。

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## 内 容 简 介

律学，与经学、玄学、理学等一样，是中国古代特有的学术，作为中国古代法学的主体部分，其发展演变不仅对中国古代法律的实际运作有着指导意义，而且对中国古代法学的成长以及整个学术的发达，也起着非常重要的作用。然而，与研究经学、玄学和理学等的著作汗牛充栋形成强烈对比的是，自清末至今，在律学研究领域，海内外尚无一部著作面世。这不能不说是我国学术界的一大遗憾。

本书将编者多年来收集到的30余篇中日两国学者关于律学研究的论文汇集(编译)在一起，对中国律学的基本内涵、特征、发展演变以及与中国古代法学、吏学、谳学和讼学的关系，秦汉、魏晋、隋唐以及宋明清各个朝代律学之诞生和发展的进程，先秦名学对秦汉之后律学的诞生与发展的影响等，进行了比较系统、深入的考证与研究。

本书的编辑出版，填补了中国学术界在古代律学研究方面的空白。不仅适合法学专业的教师、硕士生和博士生阅读，也可以作为哲学史、经济史、社会史、文化史专业研究人员的参考书。

**痛苦是事业成功的母亲**

**寂寞是学术辉煌的父亲**

——编者题记

The success of a career is the product of hardship and suffering

The exhilarating accomplishment of learning is the reward for solitude and loneliness

——the motto of the compiler

## 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 *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 1<sup>st</sup>, 2004

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# 中国传统律学述要

怀·效·锋

律学在中国古代法文化苑中一枝独秀,律学发展的形态及其所取得的成就,是衡量中国古代法制文明的重要尺度。

律学实质上就是中国古代的法学,它发轫于商鞅变法,兴起于汉、繁荣于魏晋、成熟于唐、衰微于宋元、复兴于明,至清而终结。律学每一发展阶段所取得的成果,都将古代法制文明向前推进一步。律学的发展是以先驱者留给后人的文化思想材料作为前提的,这中间的继受关系便是律学发展的真实过程。

商鞅改法为律,为律学的产生和发展提供了载体。他改法为律的目的是强调法律的统一适用,以调整急速变动的社会关系,确认新建立的制度,为此需要准确地解释法律。律学一发端就建立了官方解释之制。《商君书·定分》中说:“诸官吏及民有问法令之所谓也于主法令之吏,皆各以其故所欲问之法令明告之。”这不仅表明了法律的解释权由官府垄断,而且还表明了律学所讲求的就是“法令之所谓”,即律学以解释法条为根本特征。秦朝以吏为师,《云梦秦简·法律答问》就是官吏解释法律的物证。《法律答问》先引秦律原文,然后就律文中的术语概念,定罪量刑原则与具体内容作出解释,其目的在于法律的准确适用。《法律答问》反映了律学依附于官府的状况。

两汉律学适应大一统的需要,以引经注律为重要特征。通过引经注律,为引礼入法开辟了捷径。西汉硕儒董仲舒引经决狱,以《春秋》微