



清朝则例编纂研究

QINGCHAO ZELI
BIANZUAN YANJIU

李永贞 著



中国出版集团



世界图书出版公司

安徽阜阳师范学院学术资助项目

清朝则例编纂研究

李永贞 著

世界图书出版公司

上海·西安·北京·广州

图书在版编目(CIP)数据

清朝则例编纂研究 / 李永贞著. —上海:上海世界图书出版公司, 2012. 5

ISBN 978-7-5100-4721-3

I. ①清… II. ①李… III. ①档案学史 - 研究 - 中国 - 清代
IV. ①G270.92

中国版本图书馆 CIP 数据核字(2012)第 091859 号

清朝则例编纂研究

李永贞 著

上海兴界图书出版公司 出版发行

上海市广中路 88 号

邮政编码 200083

上海市印刷七厂有限公司印刷

如发现印装质量问题,请与印刷厂联系

(质检科电话: 021-59110729)

各地新华书店经销

开本: 890 × 1240 1/32 印张: 6.25 字数: 160 000

2012 年 5 月第 1 版 2012 年 5 月第 1 次印刷

ISBN 978-7-5100-4721-3/G · 316

定价: 30.00 元

<http://www.wpcsh.com.cn>

<http://www.wpcsh.com>

序

读了李永贞同志大作《清朝则例编纂研究》后,认为该书写得很好,可资治当今,垂范后世。有感而发,写上几句。

清代“则例”,是法律的补充。由于法律不可能面面俱到,因此出现了“法律空白”或“法律漏洞”。为保持法律的尊严,不可能三天两头地修改法律,这时就需要制定“则例”参佑执行,我们经常说的“下不为例”,就多少有这个意思。“则例”作为国家大法的补充,是一种辅助的法律形式。

从迄今可以见到的档案文献看,“例”在唐代就已出现,《旧唐书》载,唐高宗时详刑少卿赵仁本撰《法例》三卷,宋高宗认为查阅太繁琐,认为“何为更须作例,致使触绪多疑”(《刑法志》卷五十),遂废而不用。这说明唐朝已出现“例”,尽管皇帝认为查阅不便,但并未废弃不用。

宋朝的“例”有了很大发展,宋仁宗庆历年间诏刑部、大理寺“集断狱编为例”(王应麟《玉海》卷六十六),规定凡“法律不载者,然后用例”,“取从前所用例,以类编修”,当“律”、“例”不合时,以“律”为准,不能“引例破法”(《宋史》卷一百九十九,《刑法志》)。说明宋代不仅在司法裁断时广泛使用“例”,且已经进行“例”的编纂工作了。元朝继承了这一传统。

“例”的发达,是在明清时期。明太祖朱元璋统治晚期,洪武三十年(1397年)颁行的《大明律》,虽然没有附“例”,但其御制序中已经有了“例”的存在,如“榜文禁例”、“赎罪条例”等语。明成祖

永乐年间,条例不断增加,并逐渐形成“律例合编”,律例合用,直至明亡。

清承明制,沿用明朝成法,历经清初动乱,康熙七年(1668年)八月制订《现行则例》,即指未入律的条例,并边执行边修改,至康熙三十四年(1695年),重修律例取得成果,标志着清王朝立法开始走向成熟。

国家制定律例,必须编纂成《会典》、《则例》等典籍,人们才能遵守,法官才能执法。从档案文献看,康熙十分重视对“律例”的编纂,他统治几十年,几乎从未停止这种编纂,奠定了清代历朝重视编纂“则例”之良好传统。

清王朝是我国最后一个封建王朝,它主要靠几百万人口的少数民族,统治着一个几亿人口的泱泱大国,清初统治者很注意汲取历朝统治经验,因而清中期以前的统治阶级比较重视档案工作,编纂了大量档案文献汇编,其中包括清政府各部“则例”的编纂,它的内容集我国封建君主专制在法制建设上之大成,亦使封建法治文化达到全面成熟、硕果累累的阶段。

清王朝确实使我国封建君主专制制度进入史无前例的高峰时期。一提到“专制”,似乎就没有法制了,其实,清前期的几位统治者,如康熙、雍正、乾隆等,还是很在意完善、健全封建法制的,清朝则例编纂的成就就证明了这一点。

以史为戒,鉴往知来。古往今来,人类任何自觉的言论行动,以及一切努力奋斗,无一不是用历史的经验和教训,作为衡量现实行动的唯一准绳。人们只能从档案的记载中去钩沉索引、稽古探微,洞察历史的真实面貌,清朝则例档案,就是我们温故知新的宝贵档案文献。

档案是人类思想、言论、行动的历史记录。人类自从有了文字,进入到文明社会,就形成了档案,随之形成档案文化。由于档案是记录而非创作,因而当一人或一事不同文献记载各异时,人们总是以档案记录为准,档案的凭证作用和参考作用最权威,是谓“今人赖以知古,后人赖以知今”。

档案多为手稿孤本,这既说明档案珍贵,又使档案原件难以永久保存,造成利用不便,因而,自孔子开始,就试图将档案文献编纂成书,广为传播、此失彼存。我国是纸张、印刷术的故乡,因而我国古往今来档案文献编纂事业极为发达,历朝都十分重视这项工作,并使编纂成果汗牛充栋、浩如烟海,这是中华民族和全世界宝贵的文化遗产之一,亦是我们后人应认真学习、研究的宝贵精神财富。

李永贞的硕士学位,是在中国人民大学法学院完成的,这使她获得了较扎实的法学理论知识。继而她又以高分“过关斩将”,考入中国人民大学信息资源管理学院,攻读博士学位。在读博期间,她凭借自己的努力,有幸参加了“国家撰修清史工程”(简称“修大清史”)和“中国人民解放军档案馆档案著录”等国家级科研项目的撰写工作。至于她参加有关信息资源管理的国家级和省部级科研项目,就更多、更不在话下了。

正是在上述学习和科研基础上,李永贞才能够完成《清朝则例编纂研究》这部跨学科,包含清史、法学、档案、编辑等内容的综合理论专著,她若没有上述学习和研究经历,完成此专著是不可想象的。

作为李永贞的博士生导师,我在教她三年的教学实践中,觉得她不仅学习刻苦、成绩优秀、勤于笔耕、文章不断,而且还有一种为事业拼搏献身的精神,有一件事至今仍给我留下深刻的印象。

2008年上半年,李永贞正在中国人民大学住校学习博士课程必修课,她背井离乡,远别亲人,其困难可想而知。彼时安徽阜阳突然流行一种儿童传染病(手足口病),且来势汹汹。李永贞万般无奈,将不到五岁的儿子带到北京,她问我能否带着孩子来上课,我认为课堂是神圣的,要保证课堂效果,就让她不用来上课,在学生宿舍照顾小孩。但我上课时,却见李永贞也来了,一问之下方知她将儿子锁在宿舍里了。我担心小孩一个人在屋里发生意外,遂让她停课回宿舍,但她却坚持到下课。这使我联想到最近的报载:某名牌大学某位教师为了所谓港台影星的到来,竟让全班同学旷课。可见李永贞的学习至上态度,更值得表扬。

IV 清朝则例编纂研究

“则例”档案编纂可见之史虽短,可溯之源甚长。在我们今日面临完善社会主义法制的形势下,研究、借鉴清朝则例编纂的经验,很有意义。

刘耿生
于中国人民大学
2011 年 11 月 26 日

摘 要

我国的档案文献编纂工作源远流长,从春秋时代孔子编订“六经”算起,档案文献编纂工作历代相因,不断发展,其规模之巨大,成果之丰富,是世界上任何其他国家所不能比拟的。在我国古代乃至近代文献中,尚未发现有关档案文献编纂学的专门著述,档案文献编纂学作为一门独立的科学科目只是到了现代才开始形成。但是,历史上的文献编纂活动及其积累的大量成果,都凝聚着关于档案文献编纂学丰富的原始素材。一些学者、文献学家、历史学家、法学家,在文献整理编纂和史学研究的实践中,把对目录学、校勘学、历史编纂学、法学的研究与对档案文献编纂的理论和方法的研究熔为一炉,对档案文献编纂的原则与方法进行了认真的探讨和总结,提出了许多有价值的见解,为我国档案文献编纂学的形成与发展提供了珍贵的思想资料。辩证地传承这一文化历史遗产,是丰富和发展档案文献编纂学的必要措施。

在中国档案文献编纂过程中,有关政典法令的编纂是从唐朝开始的。唐朝的《唐律疏议》是我国保存至今的最早的法律文集,《唐六典》收入了许多唐代诏令。宋朝法典档案文献的编纂主要有《宋刑统》、“编敕”、“条法事类”。《元典章》、《通制条格》是元朝政府的档案文献和案例的汇编。《明会典》是根据 12 种明代律例、训诰等档案文献汇编而成的。清朝《大清会典》、《大清会典则例》、清朝各部院的“则例”等,都是依据档案文献编纂而制定的。

清朝是中国封建社会的最后一个王朝。清朝档案文献编纂工作

作为中国古代封建社会文化进程的一个重要组成部分,是它的延续和总结;并且清朝又是处于近代社会的开端,近代西方科学技术、文化的传入,促进了中国档案文献编纂工作由古代传统模式向近代模式的转变,为近代档案文献编纂工作的发展奠定了基础。

清朝的档案文献编纂主要有《实录》的编纂、《起居注》的编纂、“诏令”的编纂、“奏书”的编纂、《大清律例》的编纂、《会典则例》的编纂、“方略”的编纂等重要内容。《大清律例》和《会典则例》的编纂是清朝档案文献编纂的重要组成部分,也是清王朝通过立法定例治理国家、加强专制统治的重要手段。

清朝“会典”和“则例”的编纂材料来源十分广泛。清朝各衙门整理的文书档案材料,查抄实录,各种史书、政书、诏令、政令,选录的有关御旨和臣工条奏,各种典籍图书等,如《永乐大典》、《古今图书集成》、《钦定大清一统志》等等,都是清朝编纂律典、则例的档案资料。

“律”与“例”是清朝两种非常重要的法律表现形式,它们构成了清代行政立法和刑事立法的主要内容。尤其是“则例”的编纂对清朝和近现代的法律都产生了重要的影响。

“律”,是自秦汉以来历代王朝迄今最正统、最持久、最稳定的法律形式。律的形式起源比较早,“自魏文侯以李悝为师,造《法经》六篇,至汉萧何定加三篇,总谓九章律,而律之根基已见。”^①魏晋朝以后,律不断地发展完善,随着隋唐时期唐代律疏的颁行,标志着“律”这一法律表现形式的基本成熟。

“例”,作为中国传统法律体系中判例性质的一种法律表现形式,发源于唐代,明清时期使用得比较广泛。明清两朝的例主要有条例、则例、事例三种形式。一般说来,条例是作为律的补充和辅助的刑事规范,其制定通常需要经过一定的程序,如明代的《问刑条例》、清代历朝各部院纂修的则例等。所谓“条例”,即一条一条的例。条例陆续产生,增加或减少失当的情况难免出现,所以到一定的时候就必须

^① 见苏亦工《明清律典与条例》,中国政法大学出版社2000年版,第167页。

把条例分类整理加以编纂,汇编成册,进入条例编纂工作。

关于清代律例关系的论述问题,从中华民国以来,学术界一直存在这样的一种观点,认为清朝的律已经形同虚设,几乎只是具体的条文,丧失了律本身的功能,而例却比律优先、活跃,有时甚至出现用例打破律的情况,曾经“以例破律”、“以例代律”的情况形成了统治者用“例”统治天下的局面。这种观点的重要依据之一,就是来自《清史稿·刑法志》中关于律例关系的一段论述:“盖清代定例,一如宋时之编敕,有例不用律,律既多成虚文。而例遂愈滋繁碎,其间前后抵触,或律外加重,或因例破律。”就是说,清代制定的条例,就像宋朝的编敕表现形式一样,在司法实践中,有例就不使用律,律就成了虚设的条文。而例越来越多,有的例前后矛盾等,出现了以例破律的情形。笔者以为,上述这段论述存在着以点带面、以偏概全的问题,并没有全面分析论述律例的关系。清代律例关系的主要内容应该像《清朝通志》所叙述的:“律以定罪,例以辅律。”^①律是定罪量刑的标准,例只是补充辅助律的。在作用上,例是律的补充;在地位上,例依附于律,并不独立存在。至于重例轻律、以例代律的现象,是司法实践中存在的一种弊端,是在法律实施过程中出现的非正常现象,应该是政府官方一直设法避免并极力纠正的一种偏差,并不能反映律例关系的真正实质。

清朝律例关系的主旨是以律为主导,例为补充、辅助和变通,律例并行而决不是偏废某一方,两者相辅相成,互相补充。相互替代只是有条件的,不是普遍的。用哲学的术语来表述就是,律例是一对矛盾的统一体,两者既互相对立,又互相统一,互为前提、互为条件,同时并存。如果说律是以不变应万变的话,例则是以变应变,比较灵活。所谓“律守一定,例则因时变通”。^②又所谓“律者一定之法,例者无定之权。以一定教无定而使万变不越乎范围”。^③

① 见《清朝通志》卷七十六,浙江古籍出版社1998年版,第7205页。

② 见王凯泰《重修律例统纂集成序》,节选自《大清律例增修统纂集成》。

③ 见孙士毅《新增成案所见集全编序》,节选自《成案所见集》。

与律例关系相似,清代中央法规与地方法规以及行政法中清会典与则例的关系都与律例关系有着根本相同的地方。清朝在行政法典、法规与则例的制定方面,确立了一个基本原则,即把指导总体的法律制度“律”立为典,如《康熙会典》等;具体的实施“细则”定为则例,如《户部则例》、《兵部则例》等。凡是“典”都以六部为纲要,经皇帝制定颁发实施;“则例”就按部门分别制定,经皇帝钦准颁行,其法律效力与法典相同。这样,清代的行政立法就达到了以“会典”为大纲,以“则例”为细目的规范化形式。清代则例的编纂与发展,是我国早期行政立法史的一大贡献。

史学家们在评论则例的历史意义时曾说:“清以例治天下,一岁汇所治事为四季条例,采条例而为各部署则例。新例行,旧例即废,故则例必五年一小修,十年一大修。采则例以入会典,名为会典则例或事例。”^①清代先后修例一百余种,其中最重要的是六部则例,现保存下来的汉、满两种文字的则例有五十多种,其中较有代表性的有《六部现行则例》和《六部则例》。

因此,可以认为,清朝法律形式运用的基本原则是强调基本法律(律典)的主导作用,发挥灵活性则例的补充、辅助和变通作用。清会典是基本法,则例服从基本法,是基本法实施的具体细则。清朝统治者可以根据自己的需要制定和颁布各种则例,实施细则,发挥其各自的作用,使之共同维护其封建统治。这也是清代编纂众多则例的根本目的。本书分五章内容重点对清代则例的编纂进行系统研究和分析。

第一章,律例档案编纂渊源;

第二章,清朝则例编纂概论;

第三章,清朝会典与则例编纂;

第四章,清朝则例编纂详析;

第五章,清朝则例编纂作用。

本书力图从档案编纂学、史学、法学、考证学等多角度系统地对

^① 见邓之诚《中华二千年》卷五,中华书局1958年版,第531页。

清代则例进行梳理和研究,以期有助于研究清朝这一代大王朝的政治、经济、法律、文化制度等,希望对我国的清史研究能起到抛砖引玉的作用,亦算是笔者的一点小心愿。

Abstract

Chinese archival documents compilation has a long history, it began from “the spring and autumn era”, Confucius compiled “*Six Bibles*”, archival documents compilation continued development era by era. It had so large amount and rich fruits in the world that any other country could not compare with our country on this point. In ancient and modern document compilation, there was not yet the specific archival documents compilation as an independent subject. Archival documents compilation subject began to form in modern times.

However, history literature and the compilation of activities, accumulated the results of the archival documents compilation of the study of the original material. Some scholars, documentalist, historians, jurists, put the bibliography, collation, historiography, jurisprudence and archival documents compilation of the theory and methods of research together in research of literature and science of history in the compilation of practice. They put forward many valuable views on archival documents compilation of the formation and developed valuable ideas of critical data. It is necessary to enrich and develop the archival documents compilation subject to critically inherit the cultural and historical heritage.

Chinese archival documents compilation began to compile the relevant laws, decrees and rules from the Tang Dynasty. *Tang Lv Shu Yi*

of the Tang Dynasty is the earliest law anthology preserved to today, *Tang Liu Dian* collected many imperial edicts and orders of the Tang Dynasty. In the Song Dynasty, there was a law archival documents compilation of *Song Xing Tong*, “*Bian Chi*”, “*Tiao Fa Shi Lei*”. *Yuan Dian Zhang*, *Tong Zhi Tiao Ge* was the archival documents and cases compilation of the Yuan Dynasty. *Ming Hui Dian* was compiled on the basis of twelve laws, cases and commands. *Da Qing Hui Dian*, *Da Qing Hui Dian Ze Li*, other cases of other Ministry and Court and so on, were compiled on the basis of the archival documents.

The Qing Dynasty is the last era of chinese feudalistic society in China. In the Qing Dynasty, archival documents compilation worked as an important part of ancient chinese feudalistic society, and it was also a summary and conclusion of the Qing Dynasty. Besides, the Qing Dynasty was the beginning of the modern society, the introduction of modern western science, technology and culture promoted the transition model of chinese archival documents compilation from ancient tradition to modern style, which laid the development foundation for archival documents compilation of modern society.

In the Qing Dynasty, the archival documents compilation was made up of the chronicles(memoirs), *QiJuZhu* compilation, imperial decrees and orders, imperial memorials, *Big Qing Dynasty Laws and Cases*, *Canons and Regulations*, Strategy Plans. The compilation of *Big Qing Dynasty Laws and Cases* and *Canons and Regulations* were important for the qing dynasty and also an important part of the archival documents compilation, which were also the tools and methods the Qing Dynasty strengthened despotism and ruled governance.

In the Qing Dynasty, the compilation archival documents of Canons and Regulations were rich and wide. Official instruments and archival documents arranged by the other ministries and courts, copied chronicles, all sorts of history books, dulcimers, decrees and orders,

commands and relevant imperial orders and so on, such as *Yong Le Da Dian*, *Gu Jin Tu Shu Ji Cheng*, *Qin Ding Da Qing Yi Tong Zhi*, which were the archival documents of compiling laws and regulations.

Law and regulation were two kinds of important legal forms in the Qing Dynasty. They formed the main parts of administrative law and criminal law in the Qing Dynasty. Especially the compilation of regulation gave effects on the laws of the Qing Dynasty and modern laws.

Law, was the most orthodox, lasting and steady legal form since the Qin Dynasty and the Han Dynasty. The origin of law was very early. “Since Weiwenhou (Wei Duke) looked upon likui as his teacher, enacted six *Law Bibles*, to the Han Dynasty Xiaohe added three books, amounted to Nine Chapters Law, the origin of law was clear.” After the Wei Dynasty and the Jin Dynasty, Law continuously developed, it embodied the ripe form of law with the issue for enforcement of Tang Law during the Sui and Tang Dynasty.

Regulation, was one sort of form of traditional laws in China, it began in the Tang Dynasty. Regulation mainly had three forms: rule, regulation and case in the Ming Dynasty and the Qing Dynasty. Generally speaking, Rule was the supplement and help of law. Its enactment needed necessary process, for example the Ming Dynasty *Criminal Rule*, all ministries and commissions in the Qing Dynasty compiled regulations and so on. Rule, in fact was one case and one case. Which continuously came into being, sometimes added, sometimes decreased, and necessarily it had to be compiled again.

About the relationship between law and regulation in the Qing Dynasty, since Min Guo era(1912), there was always one viewpoint: in the Qing Dynasty, law had no much use, it was the law, it didn't work. But regulation was prior to law, especially sometimes regulation instead of law, and formed the thing: regulation ruled the world. This viewpoint came from one paragraph of discussion in the *Qing History • Criminal*

law: “regulation in the Qing Dynasty, was like compiled orders in the Song Dynasty, when regulation existed, law didn’t work, law was only nominal, while regulation was more and more, sometimes regulations were each other conflicted and so on.” I think, the above viewpoints were not complete and correct. In fact, the relationship between law and regulation in the Qing Dynasty should be like this, *General Rule of the Qing Dynasty* said: “law was used to sentence crimes, while regulation helped law.” In function, regulation was the supplement of law; in position, regulation was attached to law. The viewpoint of “regulation instead of law” was a kind of false phenomenon. But it was one kind of informal phenomenon in legal practice, which the officials tried to avoid and correct. It didn’t reflect the essence of relationship between law and regulation.

The relationship between law and regulation in the Qing Dynasty was: law was the guide, regulation was the supplement, they both were important, which were mutually complete. Mutual substitution was conditional, but not common. In philosophical terminology speaking, law and regulation were a pair of the identity of opposites, the two not only were with each other, as co-unity, mutually premise, mutually conditional and co-exist. If the law was to change the status, then regulation was based on transformation strain. The so-called “law must be abided by, due to regulation when the alternative.” Also so-called “law is certainly the law, regulation was not given the right to. A certain religion with no fixed status does not extend beyond the scope of peace.”

It was similar to the relationship between law and regulation, the relationship among the Qing central government regulations and local laws and regulations. And administrative law was fundamentally similar to the administrative code and regulations. Therefore, it can be considered: the fundamental principles of the use of legal forms in the Qing Dynasty was to emphasize the dominant role of basic laws, play the additional,

augmentative and alternative role of flexibility regulations.

The rulers in the Qing Dynasty may play the role of all kinds of regulations according to their different characters and functions, play the role of their respective strengths to jointly safeguard the feudal rule.

The Qing Dynasty in the enactment of administrative code and regulations, established a basic principle: the legal system would guide the overall legislation for the Code, such as *Emperor Kangxi Council Code*, etc; It would put specific implementation details for the regulations, such as *The Regulations of Ministry Hu*, *The Regulations of Ministry Bing* and so on, where the Code were Six Ministries as the key link, implemented, formulated and issued by the emperors; the regulations were partly built by separation and department by Chin quasi-enactment, which had the same legal effect as the Code. In this way, the Qing Dynasty reached the executive and legislature in order to put the Code as the key link, the form of cases for the purpose of standardization. Especially for the cases of the formulation in development. It was a great achievement to the administrative legislature in the Qing Dynasty.

Historians, commenting on the historical significance of the cases had said: "the Qing Dynasty ruled the world by way of the regulation, one-year-old regulations were used for four seasons Ordinance, to adopt legislation for the deployment of the cases. The new routine worked and old cases wasted, so the cases must be little compiled once every five years, overhauled once a decade, to adopt the regulations in order to join the Code, called the canonical cases, or cases." The Qing Dynasty had a hundred kinds of amendments, the most important thing was the cases of Six Ministries, they had been preserved down with the Hanzu, Manzu words more than 50 kinds of cases, of which *the Cases of Six Ministries* and *Six Ministries Regulation* are more representative. This paper contained five chapters which systematically studied and analysed the