“明主治吏不治民”：中国传统法律中的官吏渎职罪研究

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"THE WISE RULER DISCIPLINES
HIS OFFICIALS, NOT HIS PEOPLE:"

THE TREATMENT OF OFFICIAL MALFEASANCE IN TRADITIONAL CHINESE LAW

Shikai Hu

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胡世凯博士简历

1984年在安徽大学法律系获法学硕士学位。1986年作为访问学者由国家教委公派到加拿大多伦多大学法学院。1994年获多伦多大学博士学位的同时，参加全加文科博士后竞选，以跨学科研究类总分第一的成绩获颁加拿大最高荣誉的国家级奖学金——加拿大社会科学暨人文研究委员会博士后奖学金。1994年—1996年在美国哈佛大学费正清东亚研究中心从事博士后研究，并兼任哈佛大学法学院客座研究员。1997年被加拿大多伦多大学聘为高级研究员，中国法律改革研究项目负责人并任加拿大中国研究会副会长。在国外发表的英文著述被西方学术界广泛引用，已产生较大影响。1998年初回国，现为南开大学、上海交通大学(兼职)教授。目前正在从事的研究包括国家社科基金项目“他山之石，可以攻玉：西方的中国法律研究”等大型研究课题。

代　序*

本研究以翔实的资料、透彻的分析，再现了从先秦直至唐代中国官吏渎职罪法律及其发展变化的历程。通过对《唐律》以前的这一漫长历史时期现存的法律资料进行充分研究，作者成功地论证了自己的主要论点，即官吏渎职罪是中国传统法律最重要的组成部分和核心内容；中国传统法律的发展与中国官僚体制的发展并驾齐驱，同时中国传统法律的发展也是对控制官吏的需要的回应。在此之前对中国法律的研究，或者按照西方法律概念来解读中国法律，或者试图将中国法律简单地理解为某种思想体系的体现或"自然化"——即宇宙原则的表现。本研究力辟陈说，为学术界提供了一个新颖独到、富有创见的新解读。

本研究是以时间顺序建构，从对有信史可考的商朝的资料发掘和分析为起点，按朝代顺序一直梳理到唐朝。作者对如此漫长的历史时期的法律资料有着深刻理解和把握，同时他也很巧妙地运用了自20世纪30年代以来的已有的学术成果，显示了作者很高的学术造诣和研究功底。

该研究中的主要工作之一是发掘和梳理出有关渎职罪的法

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* 本文是迪姆斯·布鲁克（Timothy Brook）教授作为博士论文书面评阅人为作为本书前身的博士论文在加拿大多伦多大学申请博士学位时写的书面评阅意见，文中所提出的中肯的改进意见已被本书作者采纳到本书中。

律。此项工作的详尽细致令人折服，从而使本研究的主要论点——“中国传统法律是专制君主强化对不断膨胀的官僚机构监控和治理需要的回应”使人信服。我本人对于作者如何说明书面的法律与实践中的法律之间的鸿沟很感兴趣。作者敏锐地意识到需要考察这一鸿沟并为此做出了很大努力。他用整整一章讨论了法律的实施，尽管可用的案例资料非常有限并且凌乱，但作者在第七章中还是阐明了刑事制裁在实际中往往转化为行政处分。如果我没有误解的话，在我看来，作者在第七章揭示了中国法律史上存在的一个很重要的矛盾现象：在正式的法典中规定了严厉的刑罚并对其如何实施加以精确的规范，而对渎职官吏处分的实际运作则在很大程度上取决于一套非正式的“游戏规则”。

既然如此，我们是否应对唐朝的官方行政记录作进一步的深入探讨？我理解作者在研究中并没有将此作为任务。但为弄清法典在多大程度得到实施从而是真正意义上的法律，这项工作似很有必要。作者令人信服地证明了自先秦到唐朝法律的一脉相承性。在我看来，法典化的法律作为占统治地位的意识形态的文本表述有其自身的生命力和延续性，而实际的司法实践并不是严格遵循纸面上的法律。在已有书面规定的法律的情况下，官员和皇帝的行为依然有很大的弹性空间，如明朝开国皇帝在实施法典过程中的一些极端残暴的做法即是一个典型的例子。因此，法典仅是中国法律的一部分，在某种意义上只是很小的一部分。以上并不是说作者在理解上有误，它只说明如果作者就书面的法律与实际操作中的法律之间的距离问题加以更系统的阐述，将使揭示法典文本的性质和作用的工作更有成效。

本研究提出的另外一个应给予更多关注的问题是中西法律概念与性质之间的差异。作者用西方官吏渎职罪的概念来解读中国法律完全是合理的。在中国刑法的分类中没有将渎职罪作为一

类，也并不意外。这一差异揭示在中国传统法律的本质问题上应当是内涵极为丰富的，值得进一步做深入系统的探讨的。中国法律的分类体系是如何影响中国法律的制定？用西方的法律概念来解读中国法律体系还可以得到哪些理论成果？对于这些作者似应在正文中展开讨论而不应仅限于在注释中加以说明。

作者把他的有关方法论的讨论也放在脚注中，而不是放在正文中展开。从某种意义上看，这篇研究有两条主线：一条是在正文中讨论的法律的发展演变，另一条是在注释中展开的对本研究方法论的讨论、法律产生发展的历史背景的说明和对现存历史资料真伪的考证。这种做法总体上看不无道理，然而对有些与作者的主题至关重要的问题（例如，关于渎职罪的定义），似应放到正文中详细讨论为宜。我觉得作者如把注释中的有关法律发展的历史背景特别是许多重要的史料考证工作放在正文中的话，将会使他的论证更有说服力。

尽管还有以上种种改进空间，但瑕不掩瑜，我认为本研究对我们正确理解中国法律作出了重大贡献，达到了授予博士学位的要求。

迪姆斯·布鲁克*

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* 哈佛大学博士，斯坦福大学教授

PREFACE*

This thesis provides a thorough and careful reconstruction and analysis of official malfeasance law in China up to the T'ang dynasty. Working mostly from the extant legal statutes for this long period, culminating in the T'ang Code, the author is able skillfully to defend his principal argument, which is that official malfeasance was the most important category of criminal offense in traditional Chinese law, and that law in China developed in tandem with the development of state bureaucracy and in response to the need to control officials. In getting away from previous analyses that either read Chinese law in terms of western notions of law, or sought to essentialize of naturalize Chinese law as an expression of cosmic principles, this analysis establishes a new, sensible, and much needed reinterpretation.

The thesis is structured chronologically, beginning from the earliest records of the Shang and moving by state and dynasty forward to the T'ang. The author shows himself to be well acquainted with most of the cod-

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* This is an appraisal on Shikai Hu's Ph. D dissertation written by Timothy Brook, the internal appraiser, who holds a Ph. D from Harvard University and is a professor of University of Toronto and Stanford University. The suggestions made by the appraiser have been applied in this book accordingly.

ified law through this period; also, he works intelligently from the secondary literature written since the 1930s. His command of sources is good.

The identification and enumeration of statutes relating to official malfeasance, which the author sets as his main research task in the thesis, is impressively exhaustive, and has the cumulative effect of establishing his view of Chinese law was directed to controlling the state bureaucracy. One concern I would raise with his analysis is the difficult matter of the gap between written law and actual legal practice. The author shows sensitivity to the need for examining this gap (this reader is one of the "students of the social sciences" that he refers to on p. 8) and he devotes an entire chapter to the matter of implementation. Despite the thinness and inconsistency of sources concerning actual cases of prosecution and punishment, the author is able to show in Chapter Ⅶ the extent to which penal sanctions were in practice commuted to administrative penalties. If I have not misunderstood the findings of Chapter Ⅶ, it seems to me that they point to an important contradiction in Chinese legal history between a formal code of law that imposed harsh penalties and drew precise distinctions, and an informal set of what might be called "rules of the game" that determined in practice how delinquent officials would be handled.

Against which, then, should we read the record of T'ang administration? I recognize that the author has not set himself this task, but the question doen suggest that it may be necessary to acknowledge some ambiguity regarding the extent to which the Code can be taken as signifying Chinese "law". The impressive continuities the author demonstrates between pre－Ch'in and T'ang law indicate to me that codified statutes, as textually fixed statements of normative ideology, can take on lives and lin-

eages of their own, and that judicial practice may accordingly depart from what is on the books. The founding Ming emperor's maniacal implementation of the most extreme punishments in the Code (p. 197), for example, might better be read as less a "typical" confirmation of the power of codified law than as an instance of exceptional reversion to the Code in the face of well established contrary expectations about how not just officials, but emperors, should act. The Code is only a part, and in some ways only a small part, of Chinese law. None of this is to suggest that the author is in error, only that it might be profitable for him to reflect more on the nature of the Code as text.

Another gap that deserves more explicit consideration in a thesis of this sort is that between Chinese and Western legal categories. The author 's approach via the Western concept of "malfeasance" is entirely justifiable, and its non－alignment with Chinese categories of criminal activity to be expected. Yet this gap is surely more productive for reflection on the nature of Chinese law than the few scattered comments in footnotes suggest. How did Chinese classification systems affect the way in which laws were written? What is the analytical gain in using a Western concept? This shouldn't be left to the notes.

The author's unwillingness to air his methodological suppositions is visually evident in his tendency to subordinate such considerations to footnotes, rather than present them for closer inspection in the main body of the text. At some points, in fact, the thesis becomes a double text: the discussion of law proceeding up in the main body, and the discussion of methodology, history and source－evaluation going on down in the notes. The author's decisions as to what goes in footnotes are often judicious (e. g., p. 40, n. 59), yet sometimes matters critical to the author's ap-

proach demand more careful scrutiny, as, for example, the definition of "malfeasance" (p. 1, n. 1). I also found that as a historian I wanted some of the historical background for the development of law brought into the main body of the text, e. g., he place of penal codes in traditional law (p. 3, n. 4); distinctions among Chinese terms for law (p. 80, n. 15; p. 104, n. 68); the codification of law (p. 87, n. 31; p. 98, n. 56). Similarly, the author's discussions of many of his important sources are also consigned to footnotes when their presence in the text might have strengthened the force of his argument.

Despite these reservations, I feel satisfied that this thesis constitutes a significant contribution to our knowledge of Chinese law, and recommend its acceptance in partial fulfillment of the requirements for the degree of Doctor of philosophy.

Timothy Brook, Ph. D

摘　要

中国传统法律中官吏渎职罪的重要性可以在数量惊人的官制官规或曰以律治吏的规则和这些规则的复杂性与严密性中反映出来。这种对官吏渎职的重视和将其编入各种刑事与行政法律中表明了中国传统法律制度的一个主要特征：以律治吏、惩治官吏渎职罪是中国传统法律的核心内容，中国传统法律的发展演变是加强对官吏进行治理的回应，尽管这是中国传统法律炳彪于世界古代法律之林的最重要的特色和对世界法律文明最重大的贡献，并对了解中国传统法律的性质、内在逻辑和精神实质至关重要，但却在国内外的中国法律史研究中迄未得到应有的关注，遑论全面深入系统的研究。

本书试从中西法律传统比较的角度，通过考察早期中国法律中官吏渎职罪的起源和主要发展阶段（从最初阶段至唐朝）对中国传统法律的这一重要领域详加探讨。本书通过对现存资料深入发掘试对官吏渎职罪的起源和发展做尽可能详细的追溯和描述，但本书的重点放在对云梦秦简中反映的秦国法律和《唐律》所反映的唐代法律中的官吏渎职和其它有关官吏犯罪的规定进行全面的考察与剖析。本书中使用现代刑法学的基本概念，是将它们作为进行系统研究的框架而不是将它们作为评价标准，以此为研究中国传统律法提供一个新的视角。据此，中国传统法律可分解成

三个主要组成部分：通常包括在刑法典中的犯罪，涉及家族伦理的犯罪和官吏渎职罪。官吏渎职罪法律是通过以律治吏来强化对官僚机器监控和督责的重要工具，它和涉及家族伦理的犯罪不仅取向和作用不同，而且理念内涵和发展逻辑也大异其趣，前者逐渐取代后者受到更大重视成为中国传统法律的核心内容。这样，中国传统法律主要充当了国家官僚体制内部组织与监控增效的工具。

ABSTRACT

The importance of official malfeasance in traditional Chinese law is shown by the surprisingly large quantity of rules concerning it and the complexity and sophistication of these rules. This emphasis on official malfeasance and its codification into various forms of criminal and administrative laws indicate one of the chief characteristics of the traditional Chinese legal system: the practice of regulating officials rather than the people. This practice has rarely been acknowledged or studied, although it is an essential aspect of the Chinese legal tradition and crucial for gaining insight into it.

This study attempts to fill the lacuna by examining the origin and major stages of development of the official malfeasance in early Chinese law, from earliest times to the T'ang Dynasty (A. D. 618－907). The genesis of the law on the treatment of official malfeasance is traced in as much detail as sources will allow, but the focus is placed on an extensive exploration of the treatment of official malfeasance as well as of official crimes other than malfeasance under Ch'in State law (? －221 B. C.) as revealed in the Yun－meng texts and under the T'ang law as revealed in its Code of A. D. 653.

This study provides a new perspective on traditional Chinese criminal

law by using fundamental legal concepts in modern criminology not as the standard but rather as the format for systematic research. It thus explains the law by dissecting it into its three major components: crimes normally included in the criminal code, crimes concerning family relationships, and crimes concerning bureaucracy. Official malfeasance, the main system of negative sanctions for bureaucratic control, and the crimes concerning family ethics developed not only in different directions but also under different guiding principles. The former ultimately received greater emphasis than the latter and became the central feature of the law in its evolution. Traditional Chinese law thus served primarily as a tool for the internal organization and maintenance of the state bureaucracy.

目　录