

從秦《法經》到漢蕭何作《九章律》 和傍章律^{*}

——秦漢律典體系演進新論

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摘要

中國古代的法律體系經歷了從戰國時期秦國的法、律、令體系向漢代的律、令制體系的演進過程。雲夢秦簡、張家山漢簡《二年律令》的發現，以及傳世文獻《魏律·序略》、《魏書·刑罰志》、《唐律疏議》等對戰國時期李悝制定《法經》之事皆有明確的記述，說明魏國李悝制定《法經》六篇毋庸置疑。商鞅從魏入秦，也把魏國李悝制定的《法經》帶到了秦國。儘管古代文獻中有

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過商鞅「改法為律」的記述，但在秦代仍習慣稱《法經》六篇為「秦《法經》」或「秦法」。雲夢秦簡《語書》中多次提到了秦代的法、律、令三字，筆者認為其中的「法」就是指「秦《法經》」六篇，秦代的法律體系是以法、律、令為核心的法律體系。近年來，國內外許多學者認為西漢蕭何並未作《九章律》，筆者通過對《史記》、《漢書》等文獻資料進行梳理，認為從漢元年（前206）劉邦進入關中到西元前202年漢高祖統一全國後，總共進行過三次大規模的立法活動：第一次是在漢元年劉邦初入關中時頒佈的「約法三章」；第二次是從漢二年（前205）到漢高祖統一全國之前，由丞相蕭何制定了《九章律》，《九章律》是蕭何根據「秦《法經》」六篇和秦代的興、廋、戶三篇秦律改編而成，《九章律》開啟了中國古代法、律結合的新體例；第三次是在漢高祖統一全國之後，命「蕭何次律令，韓信申軍法」，蕭何此次「次律令」的成果是制定了「傍章十八篇」，《晉書·刑法志》記述由叔孫通制定的「傍章十八篇」與史實不符。

關鍵字：秦《法經》、雲夢秦簡、法律令、二年律令、《九章律》

From Fa Jing in the Qin Period to the Nine Chapter Law composed by Xiao He in Han Dynasty and Pong Chapter Law – A New Analysis of the development of Qin-Han legal system

Zheng, Xian-Wen

Abstract

The legal system in Ancient China experienced the development of legal form from Fa Jing, Lv and Ling in Warring States and Qin period to Lv and Ling in Han period. The discoveries of Qin Bamboo Slips Unearthed at Yun-meng, Bamboo Slips Buried in the Han Dynasty Tomb in Zhangjia Shan—The Second Year Law as well as those documents handed down for generations: We Shu Preface, Wei Shu Treatise on penal law, Tang Law and etc. explicitly record the affairs described in Fa Jing composed by Li Kui in Warring States, which indubitably indicates that it was Li Kui who came from Wei state that laid out Fa Jing Six Chapters. Moreover, Shang Yang who used to be subjected to Wei state also contributed to the introduction of Li Kui's Fa Jing Six Chapters. Although there were records about Shang Yang "change Fa into Lv" in ancient documents it was still a usual practice that people called Fa Jing six chapters as Qin Law or Qin Fa Jing. Lv, Fa and Ling these three Qin Dynasty dictions appear repeatedly in Qin Bamboo Slips Unearthed at Yun-meng. Based on this discovery, I believe that the "Fa" mentioned above is exactly the Qin Fa Jing six chapters and these three dictions are the core of Qin Dynasty's legal system. Recent years, some domestic and

overseas scholars hold the view that Western Han Dynasty Xiao He did not compose Nine Chapter Law, while according to my combing of Chinese historical textual documents such as Han Shu, Shi Ji and other related materials, I take for granted that from the first year of Han era(206 B.C.) Liu Bang entered the central Shaanxi plain to 202 B.C. he eventually unified China, there were three activities about modifying legislation in big scales: firstly, at the first year of Han era, Han Gao Zu Liu Bang primarily promulgated a “Three-point Law”; the second time was from the second year of Han era (205 B.C.) to the year Han Gao Zu unifying China, the prime minister of Han---Xiao He drafted Nine Chapter Law, based on the recomposing of Qin Fa Jing six chapters and three Qin Lv: Xing, Jiu and Hu, which created and established a new legal system style that was composed of Fa and Lv; the third time happened after Han Gao Zu unified China, he ordered Xiao He to revise legislation and Han Xin to declare military law. The revision of legislation settled the foundation of “Pong Chapter eighteen Chapters” and it is opposite with the record of Jin Shu Xing Fa Zhi which declares it was Shu Suntong that composed “Pong Chapter eighteen Chapters”.

Keywords: Qin Fa Jing, Qin Bamboo Slips Unearthed at Yun-meng, Fa Lv Ling, the Second Year Law, Nine Chapter Law