

何處得申冤？秦與漢初乞鞫審理型態*

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乞鞫，乃罪犯或其家屬對判決不服乞求重新審理之制。本文聚焦在《嶽麓書院藏秦簡（叁）》（以下簡稱《嶽麓（叁）》）與張家山漢簡《奏讞書》三份乞鞫案例，從文書結構分析著手，釐清相關單位權責，以對前人論點提供折衷或推進。

首先關於秦漢審理管轄權，學界有案發地與受理告發地縣廷主審等論點。本文彙整既有研究，指出至少有三類例外性的審訊型態。其次，乞鞫案的審理地學者有「原審縣道」與「非原審縣道」二說。本文指出三件乞鞫案都是在「罪犯關押地」進行審理，與是否為原審縣道無關。本文並舉出數則亦於罪犯關押地進行審理之例，澄清案件審理地與審理機關不必然相同。第三，部分學者主張罪犯不會向原審縣道乞鞫。本文指出《嶽麓（叁）》案例11即是罪犯向原審縣道乞鞫。第四，早期學界認為刑徒亦有戶籍，洛陽東漢刑徒墓誌磚出土後學者提出新解，主張刑徒喪失戶籍、身分改隸判決之獄。然《嶽麓（叁）》案例12罪犯遭夏陽縣判罪，其身分卻標示為「重泉隸臣」，有學者將重泉視為罪犯的戶籍地。本文釐清來龍去脈，再次印證庶民遭判為刑徒後即喪失戶籍之說。

秦漢審理型態有其制度規範，面臨變化多端的實況與資源限制，實務執行須有彈性。這是法制史重建的難處之一。

關鍵詞：乞鞫、秦漢律令、簡牘、嶽麓秦簡、奏讞文書

* 本文修改自筆者碩士論文〈嶽麓秦簡奏讞文書之文書格式與審理型態研究〉（臺北，國立臺灣大學歷史學系碩士論文，2018）第4章部分內容。初稿曾宣讀於「第九屆出土文獻與法律史研究學術研討會」（2019.10.12-13，上海華東政法大學），感謝會議主持人鄭顯文老師、評論人姚遠老師惠賜寶貴意見。研究寫作期間，承蒙劉欣寧、閻鴻中、邢義田、甘懷真、游逸飛等師長的悉心提點指導，及本刊匿名審查專家、高震寰學長亦惠賜諸多重要修改建議，謹此致謝。

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Whence to Redress Injustice? Types of Trial Involving a Petition for a New Finding of Fact in Qin and Early Han

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The petition for a new finding of fact (*qiju*, 乞鞠) in the Qin and early Han Dynasties was a system in which prisoners or their families refused to accept a sentence and filed for a re-examination of the case. Focusing on the three cases of filing a petition for a new finding of fact that appear in *Qin Bamboo Slips of Yuelu Academy Collection, Volume III* (hereinafter, *Yuelu III*) and *Book of Submitted Doubtful Cases (Zouyan Shu, 奏讞書)* of early Western Han excavated from Zhangjiashan Tomb No. 247, this study starts with an analysis of the structure of the documents and then further clarifies the authority and responsibilities of relevant units. In so doing, it provides a compromise among or an advance on previous arguments.

First of all, in regard to jurisdiction in the Qin and Han Dynasties, scholars have different arguments about the trials conducted in the original place where the case happened or in the county court where the accusation was accepted. After combing through the existing studies, this study points out that there were at least three different exceptional types of trial. Secondly, scholars also have different arguments about whether the re-examination of the petition for a new finding of fact should take place in the original or non-original trial institutions. However, since the three reference cases all proceeded in the places where the prisoners were detained, the re-examination had nothing to do with the original trial institutions; other cases are also provided to prove this point. Thirdly, some

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scholars believe that criminals would not file a petition for a new finding of fact to the original trial institution. Nevertheless, as indicated in this study, Case 11 in *Yuelu III* is exactly a case in which the prisoner filed such a petition with the original trial institution. Lastly, in earlier times, the common belief in academic circles was that the prisoners also had household registrations. But after the epitaphs of prisoners in the Eastern Han Dynasty were unearthed in Luoyang, scholars put forward a new interpretation, advocating that prisoners lost their household registrations and were made subordinate to the unit of the place where the judgment was made after being sentenced. Nonetheless, Case 12 in *Yuelu III* reveals that the identity of the criminal convicted in Xiayang County was actually marked as that of a bond-servant in Chongquan, which led some scholars to the opinion that Chongquan was the criminal's domicile. After a thorough exploration of the context, this study reconfirms the argument that common people lost their household registrations after being sentenced as prisoners.

The trial types in the Qin and Han dynasties had their own system norms. However, in the face of ever-changing situations and resource constraints, the practice could be flexible. This is also one of the difficulties faced in the reconstruction of the history of the legal system.

Keywords: Petition for new findings of fact, legal codes of Qin and Han, excavated documents, Qin bamboo slips of the Yuelu Academy, documents of submitted cases