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也談清代犯罪存留養親的現代價值

——一個學術史的回顧與思考

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犯罪存留養親從北魏到清代前後施行達一千四百多年，其法外施恩、孝親仁慈的一面一向受到較多宣揚和肯定，但可能縱容罪惡、給被殺者家庭造成二次傷害的一面也備受爭議，清末法制改革後未再保留。此後近百年間的學術研究大多持批評態度，但近年有較多學者建議汲取其合理因素，改革現行刑罰制度。但這些立論在資料上多有站不住腳的地方。考察清代犯罪存留養親的司法實踐，其中表現出來的司法理性和司法技巧似乎更值得今人關注和借鑒。

關鍵詞：犯罪存留養親、沈家本、司法理性、現代價值

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Postponement and Pardon of Punishment in Order to Support Parents or Grandparents: An Exploration of Its Modern Value Based on a Historical Review

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Postponement and pardon of punishment in order for the convicted to support parents or grandparents was an important legal practice in ancient China, one which lasted for over 1,400 years from the Northern Wei Dynasty to the Qing Dynasty. Pardon beyond the law, filial piety and mercy were much advocated and affirmed, but the possibility of mercy encouraging crime and causing further injury to the victim's family also made it the subject of controversy; thus it was not retained after the legal reforms in the late Qing Dynasty. Over the past century, most research has adopted a critical attitude towards this practice. In recent years, however, a number of scholars have published academic papers suggesting that reasonable aspects of this practice should be adopted to reform the current penal system. These arguments are for the most part not well-grounded in the historical materials. A thorough investigation of the Qing practice of postponement or pardon of punishment in order to support family elders and of the legal rationales and techniques expressed therein would provide a better basis for us to reflect on this issue today.

Keywords: Postponement and pardon of punishment in order to support parents or grandparents, Shen Jiaben, legal history

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