

在嚴刑與慎恤之間： 明代〈監守盜〉律的司法難題*

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過去認為傳統中國法律體系傾向透過「懲罰的殘忍性」來達到約束的效果。本文透過明代〈監守自盜倉庫錢糧〉律的研究，發現明初雖以嚴刑作為手段嚇阻犯罪，但由於刑度過於嚴格，反而造成社會對監守盜人犯的同情，死刑不容易被執行，徒增拘禁成本及反覆審錄的作業。當國家嘗試以「雜犯死罪」方式來調和死刑標準時，卻又因為過於寬鬆而導致犯罪率的提高。加上國家對於犯罪者返贓的期待、不同身分的人群在判決執刑時的差異化對待，以及共犯結構可能產生的作用，使得這條規定看似嚴格的律法，實際的規範能力出現極大的落差。

從明代〈監守盜〉律刑罰的調整，可以看到司法在贓與罪之間的拉扯。明代〈監守盜〉律滿貫判決呈現出不斷地在刑度上調整與在追贓技術上進化。政府一方面作為法律的執行者，需要在「嚴刑」與「慎恤」之間找到平衡點；另一方面，作為貪污案的受害者，又必須在法律的嚇阻效力之外，思考各種返贓的可能性。這樣的雙重身分，影響了律法的實施效果，為明中後期貪污問題的擴大埋下了伏筆。

關鍵詞：監守自盜倉庫錢糧律、大明律、雜犯死罪、充軍

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Between Tolerance and Strictness: A Judicial Problem of the Law of *Jianshoudao* in the Ming Dynasty

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The traditional Chinese legal system has long been considered to have achieved restraint through “cruelty of punishment.” This article, however, focuses on the Ming-dynasty law of *jianshou zidao cangku qianliang* (“superintendents and keepers stealing provisions and money from the treasuries and storehouses”) to show another side of Chinese legal history. In the early years of the Ming Dynasty, the government promulgated a very cruel law to stop staff from stealing property from the warehouses they managed. But the law was too strict; even a tiny infraction could result in a death sentence. As a result, society as a whole sympathized with staff charged with minor forms of corruption, and the strict law was unable to produce the desired effect. The costs of detention and trials substantially increased. The government tried to balance the death penalty with a special law named *zafan sizui* (death sentence for crimes of less importance). But the new law was too lenient and led to an increase in the crime rate. Moreover, different social classes were treated differently in sentencing, the government expected the stolen property (which was always state property) to be returned, and the possible effects of a structure of complicity resulted in the law appearing strict, but having only a limited effect.

From the revisions of the punishments of the Ming-dynasty law of “managers who steal,” the tension in the law between recovering stolen property and punishing crime can be seen. The law on “managers who steal”

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shows an evolution in which the judgments continually adjust the degree of the penalty and the methods to recover property. The government on the one hand acted as the implementer of the law and had to find a balance between “strict punishment” and “mercy”; on the other hand, it was the victim in cases of corruption, and apart from the deterrent effect of the law, it had to consider all kinds of possibilities to recover property. This kind of dual identity influenced the effectiveness with which the law was executed, and foreshadowed the expansion of corruption in the mid- to late Ming.

Keywords: *Jianshou zidao cangku qianliang*, Great Ming Code, *zafan sizui*, banishment