# (株) 刑補 说之检讨



◆ 中国政法大学出版社



● 中国政法大学出版社 2017・北京

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### 图书在版编目(CIP)数据

"德主刑辅"说之检讨/李德嘉著. 一北京: 中国政法大学出版社, 2017. 11 ISBN 978-7-5620-7861-6

I.①德··· II.①李··· III.①儒家-哲学思想-研究 IV.①B222.05 中国版本图书馆CIP数据核字(2017)第279220号

"德主刑辅"说之检讨

书 名

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出版者 中国政法大学出版社

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电 话 010-58908633(第七编辑部) 58908334(邮购部)

承 印 固安华明印业有限公司

开本 880mm×1230mm 1/32

印 张 10.25

字 数 239 千字

版 次 2017年11月第1版

印次 2017年11月第1次印刷

定价 38.00元

中国是世界著名的文明古国之一,法制的历史不仅悠久 而且辗转相承历 4000 余年而迄未中断,其连续性、系统性、 典型性为世界法制历史之最。因而被公认为中华法系,自立 于世界法系之林,其影响及于东方世界。

中国古代的法律体系发展至唐代已经成熟和基本定型,内含刑法立法、行政立法、民事立法、经济立法、诉讼立法等内容,成为诸法并存的相当完备的法律体系。不仅如此,在古代重伦常关系的国情影响下,调整尊卑伦常秩序的礼的规范不断入律,形成了"德礼为本,刑罚为用"的互相结合的法制特殊的发展规律,成为中华法系的主要表征。

在 4000 多年的中国法制历史中,蕴涵了古圣先贤杰出的 理性的法律思维,并且综合了儒法墨道诸子百家的学说为一 炉,构建了中国法制发展深厚的文化基础。

在 4000 多年的法制历史中,也凝聚了治国理政的丰富经验,成为一座宏大的智库,为我们建设法治中国储备了最丰富的资源。

中国古代是以农立国的政治经济文化发展不平衡的统一 多民族的大国,在这样的国情背景下,中国法制历史的发展与国情息息相关,带有深刻的国情烙印,形成了独立的发展

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传统。但历史的发展是不能斩断的,尽管世易时移,固有的 国情的因子仍与当代中国有着千丝万缕的联系。所以,要尊 重法制历史的传统。

总之,中国法制历史有着极其深厚的法文化的积淀,也有着在治国理政上可为当代借鉴的史鉴价值,而且还为我们建立当代的中华法系提供参考。

基于此,我们编辑了"法律溯源丛书",选取法制史学杰出的青年才俊的著作,编辑成书,期望在法学这个春生的花圃中,植下一株新葩,借以弘扬中华传统法文化,开启一个新的智库之门,以有裨于依法治国的宏大事业。本书以青年的法制史学者为主要对象,但也不限于此,切盼法史界的学者共同维护滋养这株新葩,使她茁壮成长。

张晋藩 2016年12月3日 将中国传统法律思想的核心或特征以"德主刑辅"四个字来描述或概括,始于20世纪30年代中国法律史学科的奠基人杨鸿烈。此论影响之大,不止于法律史学界将其奉为不刊之论,整个法学界乃至史学界对此皆鲜有异词。一代又一代的学人从相同或不同的视角,运用相同或不同的史料对这一论断进行阐释、补充,在半个多世纪的研究中,有关德主刑辅的论著汗牛充栋。但是,近二三十年来,在中国法律史学领域中关于这一问题的研究似乎有些沉寂。究其缘由,也许是关于这一问题的研究已经到了事倍功半、难有所获的阶段。

然而,中国传统法律思想核心与特征的归纳、分析实属 学科的基础问题的研究,"德主刑辅"不仅是学习中国法史 初入门者必须面对的问题,也应该是法律史学科的研究者必 须面对的问题。学科的研究论著日益增多,而学科基础问题 的研究却日见沉寂,对于一个学科的发展与学术的进步而言 是值得警惕的。因为这种现象的背后有着学人的无奈甚至是 堕落。因为基础问题的研究需要梳爬前人的成果,费时费力 却未必能出"新",更甚者也许会落入以往研究的窠臼而无

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成果可言。这种研究显然无法适应当前科研机构及高校考核、评职称等成果量化的需求。在不合理制度的掣肘下,畏难取巧成为时尚,猎奇式的哗众取宠与拾人牙慧的人云亦云的"成果"枝节芜杂,即使在同一个学科中学人也难以寻觅到共同的话题而自说自话。

鉴于此,德嘉博士的这本书就尤为珍贵。大约在四五年前,我在苏州大学与同仁交流,几位老师同时向我推荐李德嘉来人大读博士,不同的老师在介绍中都会举出二三例来说到德嘉的一个突出特点,就是"爱读书"。德嘉的硕士学位论文是探讨"德主刑辅"的问题,得知了德嘉硕士学位论的题目,我便认同了各位老师的介绍。不久,德嘉将刚刚完成的学位论文交给我,这篇在苏大老师们悉心指导下的论文后来获得了校级优秀毕业论文。在阅读这篇论文时,我感完有来获得了校级优秀毕业论文。在阅读这篇论文时,我感完不获得了校级优秀毕业论文。在阅读这篇论文时,我感完不变到德嘉果然是"爱读书",甚至是"酷爱读书"。在确定博士学位论文题目时,我虽然主张德嘉继续对"德主刑辅"问题作学术史的梳理并将硕士论文中的观点加以补充完善,但我也同时向他说明了做这个题目的"危险性"。

博士生三年转眼即过,德嘉的博士学位论文《"德主刑辅"说之检讨》业已完成,并受到评审与答辩委员会老师们的好评。这个好评来之不易也当之无愧。首先,德嘉用不长的篇幅精炼地叙述了"德主刑辅"说问世以来有关学术研究成果,透过对纷纭歧义的学术观点的评骘,得出了以"德主刑辅"描述或概括中国传统法律核心并不准确。其次,在对以往学术研究的检讨中,德嘉认为用"德本刑用"来概括或阐释中国传统法的主流思想也许更为恰当,因为这是古人对立法、司法实践的自我总结,较之于"德主刑辅"的归纳更

为客观。再次,由此"德"不应再作"德主刑辅"观点下的"道德""自律"之解释,而是古人创造的一种"治理模式"。"德本刑用"的"德"是统治者政治统治合法性的基础,而"教化"之本意也并非是制造"顺民",其更深远的意义在于"化民成俗",养成百姓自我管理的习惯。从"德主刑辅"到"德本刑用"可以说既是学科基础问题研究的突破,同时也为时代法治的需要提供了古人的智慧与借鉴。

一时代的学术研讨必有一时代所聚焦的问题,必有一时代的学术特点,这一论点自民国以来已为学界所普遍认知。然而,在学术研究中,更多的时候却是有一些相同的问题,而每一代学人都必须面对。这些问题就是学术研讨的基本或基础问题,对这些问题的研讨琢磨,时代无法局限之,而学术研究舍此则难以推进。不同时代延续不断地研究同一问题更是思想史研究中的常态。因为如此,我们可以看到,数千年之前学界争论不休的问题,生活在今天的我们依然要面对。如果学术研究只关注时代而不重视基础的研究,所谓成果则难免失于短视浮躁;若只重视基础而忽视时代的要求,学术研究也难免缺乏生气。惟两者兼顾者方可称为上乘之作,德嘉此书在学术基础问题的研究与时代特色两方面兼长并美。是为序。

飞+**£** 2017年夏

"德主刑辅"是近现代学者对中国古代儒家"德刑关系"思想所总结出的重要学术概念,其内容是认为儒家以德教为主要的社会治理手段而法律只是辅助。这一概念已经成为总结古代儒家"德刑关系"思想的不刊之论。然而,如果我们重新审视古代儒家对"德刑关系"问题所进行的讨论尤其是儒家提出"德"这一重要思想命题的意义时,就会发现"德主刑辅"说并不能很好地概括儒家"德刑关系"思想的实际内涵。本文对"德主刑辅"说的检讨将从五个方面展开:

第一,是对"德主刑辅"说的由来进行学术史的梳理。回顾"德主刑辅"说形成的学术史,我们发现这是一个在西方法治话语冲击下而产生的近代学术概念。近代学者研究中国古代的法制文化与观念时往往以西方的现代法治观念为参照物,从而得出中国古代主流法律思想中缺少西方现代意义上的法治的结论。"德治"作为一种儒家独特的社会治理方式,由于无法在现代西方法治思想中找到相对应的概念,因此被归入法治的对立面。近代学界往往将"德治"等同为道德治国,以为"德治"就是强调君主的个人德性对于治理的意义,因此是一种典型的人治论。在近代对儒家"德治"的

普遍误解之下,学者将儒家的"德刑关系"思想概括为"德主刑辅"并且将"德主刑辅"的内涵定位在道德与法律的主次关系范畴,认为"德主刑辅"就是在社会治理的手段中以道德为主而法律则居于次要的地位。事实上,将"德主刑辅"理解为道德为主而法律居于辅助的地位,不仅未能对古代"德"与"刑"的观念作出全面理解,也未能准确概括儒家思想中德与刑的关系。

第二,是对"德"与"刑"的概念进行辨证。儒家之"德"观念主要包涵以下三个维度的内容。首先,立德政,儒家将"德"视为是君主统治的正当性根据;其次,行德治,"德"意味着新的治理模式,在政治上以人为本,施行仁政,同时要求培育社会自治力,实现垂拱而治;最后,施德教,德教是儒家培育社会自我治理能力的手段,目的是使百姓自觉践行"德",最终实现自治。"刑"的最初涵义与"刑罚"相关,但是经过先秦法家的发展,"刑"逐渐具有了社会治理模式的意义。如果可以将儒家的治理模式称之为"德治",那么与之相对应的法家治理模式就可以称之为"德治",那么与之相对应的法家治理模式就可以称之为"刑治"。"刑治"与"德治"之对立并非只是具体策略上的不同,最终追求的目标也大相径庭。先秦儒法两家关于"德"与"刑"的对立,代表了两种不同价值观念、不同政治理念的治理模式的差异。

第三,是对儒家思想中"德"与"刑"的关系进行辨证。儒家德刑关系思想渊源于西周时期"明德慎罚"的主张。先秦儒家继承了西周的"礼治"传统,他们坚持以德礼教化的方式来治理社会,警惕因过度运用"刑"的手段而对社会造成的负面影响。西汉时期思想家董仲舒对德刑关系思

想的阐释最具有代表性。董仲舒针对汉初因袭秦朝"刑治" 所带来的弊政。提出了"任德不任刑"的政治法律主张。概 括起来,董仲舒"任德不任刑"的思想主张主要包含了两个 方面的思想内涵:首先,是以"天人感应"说来总结德刑关 系,提出"阳德阴刑"的主张,认为"德"与"刑"都是调 整社会的重要手段,两者相辅相成。其次,董仲舒提出"任 德不任刑"的主张是在社会管理模式的层面要求施行儒家的 "德治",并没有否认"刑"在社会管理中的作用和价值。就 调整社会的手段而言,董仲舒将"庆赏刑罚"比喻为一年之 四时,认为在社会管理当中,"刑"与"德"犹如一年四季, 不可或缺。自汉武帝独尊儒术之后,儒家"德礼为本、政刑 为用"的思想逐渐成为主流,并且深刻影响了大一统时期社 会治理模式的特点。汉武帝之后,中国大一统时期的治理模 式以儒家"德治"理想为基础塑造了大一统时期的统治精 神,同时,兼采法家"刑治"模式中的合理成分,在社会管 理模式上体现出了礼乐刑政综合为用的总体特点。因此,简 而言之,不妨将大一统时期的德刑关系概括为"德本刑用", 只有将"德"置于"本"的位置才能真正认识古代社会治理 模式的特点。

第四,是分析儒家"德本刑用"思想在社会治理方面的 意义, 从社会治理模式的角度来分析儒家"德刑关系"思 想。"德刑关系"思想在历史上的制度与实践主要体现在以 下三个方面: 一是在国家制度的层面上严法治吏, 宽法待民, 最大程度地限制国家权力对正常生活秩序的干预,实现以德 化培育社会自治力的主张; 二是在社会治理的模式中礼乐与 政刑并重,实现法律渊源的多层次和治理手段的多元化;三

是儒家"德治"社会治理模式的重要特征之一是侧重于教化 在治理中的作用,儒家并不满足于以人伦秩序重塑国家制度; 并且希望在法律的适用过程中体现对人伦价值的保护。

第五,以法理学的观点分析儒家"德本刑用"思想,探 寻儒家"德治"式社会治理的现代意义。儒家"德治"的内 容不仅限于百姓的日常伦理, 而且更将这些日常伦理、民间 习俗以国家法律的形式加以确认。儒家"德治"的意义在于 将国家通过强制性法令所建构起来的外部秩序以德化的方式 内化为百姓自觉遵守的内在秩序。传统社会依靠儒家的德礼 教化形成了民间社会的共同价值观念与社会力量,以自下而 上的手段激发社会的自治力量。在今天的法治建设中, 我们 应该注意社会治理方式的转变和创新, 激发社会组织的活力。 这中间首先面临的就是如何理顺政府与社会之间的关系,实 现政府治理和社会自我调节、居民自治的良性互动。儒家 "德治"依靠接受儒家价值观洗礼的士君子在民间社会以教 化的方式推行官民上下普遍接受的一套共同的价值观念,维 系了古代社会的共识。从这方面讲、儒家"德本刑用"的德 刑关系思想对当下的社会治理方式的改进有启迪的意义,在 社会治理的方面,儒家的"德治"完全可以成为法治的 补充。

关键词: 德主刑辅 德治 德教 德刑关系

"Rule of morality with its priority to penalty" is an important academic concept proposed by scholars drawing conclusion to Chinese ancient concept "Relation of Morality and Penalty". The development of "rule of morality with its priority to penalty" penetrates the whole history of Chinese Confucian legal thought. In the field of legal thought, the studies about "rule of morality with its priority to penalty" are numerous. In the very early of 1930s, scholars already raised the concept of "Relation of Morality and Penalty" and conducted research into it. However, when reviewing the Confucian idea of "Relation of Morality and Penalty" is not a perfect conclusion of Confucian relation of virtue and penalty. Thus, this paper will analyze the "rule of morality with its priority to penalty" from the following five angles:

First, this paper will review the history of "rule of morality with its priority to penalty". After the review, it is found that this modern concept is influenced by western discourse. When doing the study of Chinese ancient legal culture, modern scholars always employ western modern legal culture as reference. Thus, it will easily draw the conclusion that there is no western modern legal culture in ancient Chinese legal culture. Besides, "rule of virtue" is a unique Confucian

way of social governance. There is no corresponding concept in modern western law, and thus rule of virtue is treated as the opposite to the rule by law. In modern times, scholars believe that the concept "rule of virtue" puts emphasis on significance of virtue of empirors, which is mistakenly equal to the rule of man. The essence of "rule of morality with its priority to penalty" is simply concluded as major and minor relation of virtue and penalty respectively, believing that the major way of social governance is virtue and the minor way the law. Actually, this kind of understanding is a partial comprehension of ancient concept of virtue and penalty and an inexact conclusion of Confucian idea of virtue and penalty.

Secondly, the concepts of virtue and penalty will be discriminated. There are three dimensions of Confucian idea of virtue. The first one is to establish virtue rule. Confucian treats morality as the legitimate source of empirical governance. The second is the implementation of virtue of rule. "Virtue" means a new governance model that benevolent government will be implemented on the basis of people oriented thought in politics meanwhile social independent governance with the aim to realizing governance without interference from empire. The last one is to implement moral education. Moral education is the means that Confucianism employs to nurture social independent governance with its aim to enable the common people to practice virtue with self-consciousness, with its ultimate goal to realize social independent governance. The meaning of "punishment" primarily is related to penalty. However, the legal experts in Qin Dynasty interpret this term more than just "penalty", not even to correspond to modern term of "penalty". In the Spring and Autumn and the Warring States

Periods, "virtue" represents conciliation and civilization relying on soft power while "penalty" represents "punishment" and "punitive expedition" on the basis of coercive force of state. Gradually, "penalty" is opposed to "virtue". Opposed to Confucian governance model of "virtue", legalists raises the concept of govern the country by law. Given that Confucian governance model can be called "rule of virtue", legalists' governance model can be called "rule of penalty". The differences between "rule of virtue" and "penalty" are not only about concrete strategy but also the ultimate goals. The opposites between Confucianism and legalism in Pre-Qin Dynasty indicates different values, political ideas and governance models.

The third is about the discrimination between "virtue" and "penalty" in Confucian theory. The relation of Confucian virtue and penalty can be traced back to proposition "more benevolence, less punishment" in Xizhou period. The Confucianism in Pre-Qin inherits tradition of rites originated from Xizhou period. Confucianism insists that the society be governed by virtue and rites, alerting to the negative effects caused by overwhelming legal penalty. In Xihan period, the most representative interpretation of relation of law and penalty is produced by the thinker Dong Zhongshu. Aiming at the political disadvantages, Dong Zhongshu raised the legal proposition of virtue-ruling over torture-ruling. Dong Zhongshu's proposition can be concluded into two aspects; the first one is about relation of virtue and law from the perspective of interaction between heaven and mankind, proposing that virtue is prior to punishment, believing that "virtue" and "penalty" are both important means to governing society, supplementing each other. The second is that Dong Zhongshu proposes that

virtue - ruling is over torture - ruling, restricted at the social governance model level, without denying the works and values of penalty and law in social governance. In terms of means of adjusting society, Dong Zhongshu compares "award and penalty" as four seasons all the year around, indispensable in social governance. Since Emperor Hanwu's exclusive dedication to Confucianism, Confucian thoughts of virtue and penalty gradually become mainstream, significantly influencing characteristics of social governance model in unification period. After Emperor Hanwu, the spirit of governance model in unification period is based on rule of virtue from Confucianism and rule of penalty from Legalism, which indicates integrative characteristics of social governance model. To be brief, the relation of virtue and penalty in unification period can be concluded as primary position of virtue and supplementary position of penalty in social governance.

Forthly, by analyzing the significance of Confucian thought of primary and supplementary position of virtue and penalty in social governance, the relation of virtue and penalty will be analyzed from the social governance model perspective. The concept of the relation of virtue and penalty is concluded into three aspects; the first one is the harsh law on official and benevolent law on common people, restricting the interference with common people's life from government power to the greatest degree, to realize social independent governance via moralization. The second is that rites and penalty will be implemented equally in social governance model, to realize several degrees of sources of law and diverse methods of social governance. The third is that one of important features of Confucian rule by virtue is that the extra importance of effects of civilization on social governance. As a

result, Confucianism is more reflecting human value by applying the law than reshaping state system.

The fifth is the analysis of Confucian idea that virtue is primary position and penalty supplementary position in social governance by nomology, probing into modern significance of social governance in Confucian rule of virtue model. The content of Confucian rule of virtue is to legalize the daily ethics and folk custom. The significance of Confucian rule of virtue is that the external order established by forceful law is transformed to the internal order observed by common people. In traditional society, the common value and social force is shaped by Confucian virtue and moralization while the bottom-up way of governance ignites vitality of social independent governance. In current establishment of legal governance, we should pay attention to the transformation and innovation of social governance and inspire the vigor of social organization. In the midst, the ultimate issue is to face how to deal with the relation of politics and society, and how to realize good interaction of government governance, social self-adjustment and people self-governance. Confucian rule of virtue relies on intellectual officials who accept the Confucian values to popularize Confucian values with aim to sharing the same values so as to maintain the consensus in ancient society. In this aspect, the Confucian relation of virtue and penalty enlightens the improvement of modern social governance which can be fully supplemented by Confucian rule of virtue.

**Key Words:** rule of morality with its priority to penalty rule of virtue moral education the relation of virtue and penalty/