

# 從黜邪崇正到破除迷信： 清末民國<sup>1</sup>「妖術傷殺人」律例的近代化\*

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## 摘要

自清末以來，法律界人士對妖術傷殺人之行為的評價，自異端行為逐漸轉變為無法產生實際損害的迷信行為，除了以傷殺人為實現妖術之手段的部分仍受到禁止外，在《大清新刑律》等已近代化之中國刑法中，相較於在中國傳統刑律裡，妖術傷殺人之行為或不再受明文規範，或不再遭處嚴刑，甚或不再受處刑罰。但這段轉變的過程非一蹴即至，其間有一段「妖術」在刑法上之定位不明的過渡階段。儘管在清末之刑律修訂中，妖術傷殺人律例悉遭廢除，然而晚清法律界中人並非皆視「妖術」為無法產生實際損害之迷信，是以當時「妖術」在《大清新刑律》中之定位並不明確，妖術傷殺人是否為《大清新刑律》所禁止亦不清楚。此後，隨著科學主義下的破除迷信風氣漸長，在二十世紀的二零與二零年代，民國法律界對妖術傷殺人之行為乃逐漸普遍採用「迷信犯」的說法，雖然當時仍有可間接禁止部份妖術傷殺人之行為的法律、命令，但基本上當時之民國法律界已視妖術傷殺人之行為為不可能造成實際損害的迷信行為，在處刑上由得減朝向不罰發展。就這段過程，姑稱之為「妖術傷殺人在中國近代刑法上的迷信化」。

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<sup>1</sup> 此所稱民國，係指民國二十四年（1935 年）以前之民國時期。

\* 在本文寫作過程中，黃源盛教授提供了寶貴的意見，陳秀芬教授指出了重要的資料，特此致謝。本文初稿完成後，曾蒙柳立言先生閱讀一遍，就本文各處指謬質疑，獲益良多！本文摘要之英文稿係承蒙黃嘉美女士（美國加州律師公會會員）代為撰成，該稿撰寫過程中並承姚兆鑫先生參加商討並協助完稿，併此致謝。惟文責仍應全由作者承擔。

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## From Expelling of Heterodoxy to Breaking of Superstition

### abstract

From the late Qing Dynasty to the early period of the Republic, following the change in the mainstream legal values, the perception of the act of maiming or murder through the practice of witchcraft evolved from that of heterodoxy to superstition. As regards the Chinese criminal law in recent history, with the exception of attempted maiming or murder through the practice of witchcraft, which was still prohibited, maiming or murder through the practice of witchcraft was no longer forthwith punishable with severe penalties; there was in fact a tendency towards the elimination of punishment. This evolution did not happen overnight. It went through a transition during which the legal status of witchcraft was ambiguous. Although all the statutes pertaining to the maiming and murder of mankind through the practice of witchcraft were abolished during the amendment of the penal code at the late Qing Dynasty, not the whole legal profession considered “witchcraft” a mere superstition, thus rendering whether the legal prohibition of “witchcraft” in the amendment of the penal code was unclear. As the trend towards the breaking of superstition gained momentum under the western influences of science in the 1920's and 1930's, by the time the legal profession moved from the Qing Dynasty to the Republic, it had generally accepted the notion that the offenses associated witchcraft were offenses for superstition. While certain laws or orders still existed which were meant to punish indirectly or prevent maiming and murder through the practice of witchcraft, the practice of parasite poison, spells or talismans and treatment by witchcraft were basically perceived to be superstitions incapable of causing real harm and subject to a tendency towards reduced or eliminated punishment.