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THE PUNISHMENT OF LUNATICS AND NEGLIGENTS ACCORDING TO CLASSICAL CHINESE LAW

BY KABL BÜNGER

TÜBINGEN

The two questions — whether lunatics are liable to criminal punishment, and whether the Chinese law differentiated between intentional and unintentional acts — have rightly been considered as bearing on general tenets of Sinology. We may say that they touch not only the formal and outward legal order, but also basic issues of transcendental ideas. In the field of ethnology the treatment of lunatics is held as being an important factor in determining the views of early civilizations on such topics as souls and spiritual beings, and in judging the status of insight into human nature, of medical knowledge, and of the general humanitarian ideas.

The question whether negligence is punished in the same way as intentional acts are, or whether even casual deeds and consequences of an act call for criminal prosecution, is a basic issue in the cultural and social life of every people. The solution of the question given by the law reflects the general view held with regard to the individual freedom of willpower, the opposing opinions held on this problem being sometimes expressed by the keywords determinism and indeterminism. It implies the problem of imputation in religious as well as in civil life, and the attitude towards fate and moral freedom, and responsibility. Sin and crime have a common root.

1) Abbreviations:

TLSC = *T'ang-lü-su-i* 唐律疏議 (T'ang Code with Commentaries), ed. *Ssu-yü ts'ung-k'an*, Shanghai, Commercial Press, 1936.

HT = *Hsing-t'ung* 刑統 (Code of the Sung Dynasty), ed. 嘉業堂 Chia-yeh-t'ang, 1921.

ML = *Ming-lü-chi-chieh-fu-li* 明律集解附例 (Ming Code with Commentaries and Additions), 1908.

Hsieh = *Hsieh Yün-sheng, T'ang-Ming Lü ho-pien* 薛允升, 唐明律合編 (Concordances of the T'ang and Ming Codes), Peiping, 1922.

TCHL = *Ta Ch'ing hsien-hsing hsing-lü an-yü* 大清現行刑律案語 (Penal Code of the Ch'ing Dynasty), ed. P'u-cheng-shé 普政社, 1911.

Western scholars have repeatedly held the view that, according to classical Chinese law, lunatics were liable to punishment, and that the classical Chinese law also did not distinguish between intentional and unintentional acts, that it punished the author of an act even for its mere casual consequences. These opinions of western scholars were formed at a comparatively early time and without the help of Chinese literature now available to us. They found their way into later European works and stayed there hackneyed and undoubted, without additional proof except the reference to the previous publications. Recently they have been advocated again by Mr. M. H. VAN DER VALK². The time would seem to have come to test these views by going back to the primary legal sources, and to discard those opinions which we might find unfounded or even contrary to both the positive rules of the classical Chinese law and the norms of Chinese morality.

We are fortunate in being able to follow up the two questions from the best sources since the time of the Chou dynasty until the Ch'ing dynasty, i.e., over a period of more than 2000 years. We will find that the legal provisions remained basically unchanged during this period: First, lunatics were, in principle, not liable in criminal law; second, intention, negligence and mere casualties were carefully distinguished, and the law intended to punish only a culpability in the sense of the word as reflected in the Latin word *culpa*, but it did not intend to establish a mechanical retaliation for material consequences.

As far as possible, we will avoid the discussion of legal technicalities, and we will confine ourselves to the main legal provisions without mentioning minor details nor exceptions of limited importance. We will take as starting-points the views put forth by Mr. VAN DER VALK, because they are clear-cut and convey a convenient presentation of those earlier views which we want to test.

I. WERE LUNATICS PUNISHED ACCORDING TO THE CLASSICAL CHINESE LAW?

Mr. VAN DER VALK states: "We know for certain that at a much later stage of the classical Chinese law³ lunatics were held responsible

- 2.) In an article "The Revolution in Chinese Legal Thought," *Pacific Affairs*, XI 66-80 (March, 1938), and also in the old and well reputed Sinological journal *T'oung Pao*, XXXVIII (1948) 339-343 when reviewing my book *Quellen zur Rechtsgeschichte der T'ang-Zeit* (*Monumenta Serica*, Monograph Series IX), Peking, 1946.
- 3.) Mr. Van der Valk refers to the law at the end of the Ch'ing dynasty. The book he is reviewing deals with the T'ang dynasty, i.e. about 1000 years earlier than the Ch'ing. The question whether the law of the Ch'ing dynasty should properly be called 'classical' is debatable.

for their acts, cf. ALABASTER, *Notes and Commentaries on Chinese Criminal Law*, 1890, p. 93." Having another opinion would be "in contradiction with some fundamental notions of ancient China (Cf. also my article in *Pacific Affairs*, March, 1938, "The Revolution in Chinese Legal Thought").

What, then, was the law of the T'ang dynasty (618-906 A. D.) relating to this question (1); what were the fundamental notions of ancient China (2); and what was the law of the Ch'ing dynasty (1644-1912) about which ALABASTER writes (3)?

(1) The T'ang Code, in its first part dealing with general provisions of law, stipulates (TSL 4/3a-7a):

"(I) A person of at least 70 years, or of not more than 15 years of age, or a person being an invalid of the second degree, may redeem himself from a punishment not higher than banishment⁴. (There follow some exceptions of rather limited importance)

"(II) 1. When a person of 80 years of age or more, or of not more than 10 years, or an invalid of the third degree has forfeited the death penalty because of having committed rebellion, high treason, or homicide, the case has to be submitted to the Emperor for his decision.

2. When (such a person) has committed larceny or an assault he likewise (as stated above) may redeem himself from the punishment.

3. In all other (cases of crime) the person is not liable to punishment.

"(III) On persons of 90 years of age or older, or of not more than 7 years no penalty can be inflicted, even when they have forfeited death sentence." (There follow provisions about the punishment of people who ordered or instructed old or young persons exempted from punishment to commit a crime, and about the indemnification to be paid by people who profited by a crime committed by a person exempted from punishment)

年七十以上十五以下及廢疾犯流以下收贖。八十以上十歲以下及篤疾犯叛逆殺人應死者上請，盜及傷人者亦收贖，餘皆勿論。九十以上七歲以下雖有死罪不加刑。

Here we are concerned with the invalids. The old Chinese law, even before the T'ang dynasty, distinguished three degrees of invalidity⁵, each degree being defined rather casualistically by statutes. These

4) Higher than banishment (流 liu) is capital punishment (死 ssü); lower are hard labor (徒 t'u; deportation), corporal punishment with the big stick (杖 chang) and with the light stick (笞 ch'ih).

5) Ts'an-chi, fei-chi, and tu-chi 殘疾, 廢疾, 篤疾.

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regulations were of importance, not only in criminal law, but also e.g. for exemptions from public forced labour, taxes, for getting leave from government office, and in other respects.

Invalidity of the second or medium degree is defined by the T'ang statutes as follows: "Lacking of one limb. broken hip or backbone⁶, imbecility (ch'ih-ya), dwarfishness...etc."⁷ On another passage we find: "Invalidity of the second degree comprises imbecility (ch'ih-ya), dwarfishness...etc. Invalids of the third (highest) degree are lunatics (tien-k'uang), persons lacking two limbs...etc."⁸

The same expressions for the second and third degrees of invalidity we find again in the law codes of the Sung, Ming, and Ch'ing dynasties.⁹

Ostensibly the law of the T'ang dynasty already made the fine distinction between two grades of mental disturbances, a lighter one (ch'ih-ya), belonging to the second degree of invalidity, and a more severe kind (tien-k'uang), comprised in the third degree of invalidity. This state of the Chinese law existing in the 7th century A.D. or earlier complies with our modern European law codes. We may properly call these two grades of insane people imbeciles and lunatics respectively.

If we scrutinize the above quoted article of the T'ang Code for the punishment of the two kinds of insane people we find: The imbeciles could redeem themselves from all penalties, except capital punishment and some other special cases, by paying money the exact amount of which was legally fixed.¹⁰ This is a rather liberal and humanitarian regulation compared with some modern laws of nowadays.

The lunatics, in principle, were altogether exempted from punishment. There were two exceptions: Firstly, in cases of a forfeited death-penalty for rebellion, high treason and murder in which the Emperor reserved himself the right to give the final sentence himself. In the first two cases this seems to be rather conclusive because rebellion and high treason, according to the conception of the Chinese law, were considered to be direct offences against the imperial dynasty and its

6) Whatever this may mean in the medical sense.

7) *TLSI* 29/7b, quoting the contents of a ling, i.e. as we know from other sources the 戶令 hu-ling (regulations about the population): 廢疾依令一支廢腰脊折, 廢瘡, 侏儒等. The same passage occurs in *HT* 29/8a.

8) *HT* 12/4b: 戶令 ... 廢瘡, 侏儒, ... 如此之類爲廢疾 ... 癲狂, 二支廢 ... 爲筋疾

9) *HT* 4/2b; *ML* 1/54b; *TCHL* 3/1a; Boulais, *Manuel du Code Chinois*, Shanghai, 1923, No. 136; Staunton, *Ta Tsing Lee Lee*, London, 1810, p. 23-4. It is to be noted that in the codes of the Ming and Ch'ing only a few instances for the two degrees of invalidity are mentioned the full enumeration being left to other statutes.

10) *TLSI* 1/19a-22a

celestial mandate¹¹. Secondly, in cases of offences against property (larceny) and of assault the lunatic was not completely exempted from liability. He had to pay a fixed amount of money, and in certain cases also damages. The law required a pecuniary compensation to be paid to the victim of the offence, and therefore, from technical-juridical reasons it was necessary to leave this way open for the victim to obtain the pecuniary compensation. But the offender did not suffer any criminal punishment proper.

For the T'ang law, therefore, we have to say that lunatics were not responsible for criminal actions, except possibly in a very few special cases like rebellion, etc.

(2) Far from finding the punishment of lunatics a characteristic of the classical Chinese law, and from seeing it in conformity with "general tenets of Sinology and Chinese law," I should say that if such were the positive Chinese law it would be most astonishing and in contradiction with fundamental principles of the religious ethics, and philosophical morals as taught by the Confucian school and as otherwise embodied in the Chinese law codes and statutes. I am thinking here of the principle of having pity with the aged and the weak as we find it in passages of the *Li-chi*, the *Shu-ching*, and other early sources.¹²

This principle of morality has at an early date found its way into the statutes of the Chinese Empire. In the *Chou-li* we find the following passage:¹³ "Il y a trois cas de grâce: premièrement, le cas où l'inculpé est un enfant très jeune; secondement, le cas où c'est un vieillard très-âgé; troisièmement, le cas où c'est un idiot, un imbécile." To this passage Biot quotes a Han commentator from the 1st century A.D. as saying:¹⁴ "Ainsi, sous les Han, les individus qui n'ont pas atteint huit ans, ou qui ont dépassé quatre-vingt ans, ne peuvent être condamné juridiquement que lorsqu'ils ont tué de leurs propres mains."

The passage from the *Chou-li* is quoted by the official commentary to the T'ang Code as precedence and direct model for its own provision which we have translated above: "The *Chou-li* has the regulation of the 'Three (reasons for) Graces'; firstly, for the very young and tender; secondly, for the old and very old ones; thirdly, for the idiots and imbeciles.

11) Rebellion and high treason were, by the very words of the legal provisions, styled as religious offences. Cf. *TLSI* 1/23b, 24a.

12) Cf. section V of the Royal Regulations (Lodge *SBE* XXVII, 240ss; Couvreur, *Li Ki*, I 312-320) and the story of Duke Hsiao of Ch'in (Chavannes, *Mém. Historiques*, II 62). Cf. also Ph. H. Chi in *BEFEO* IX (1909), 106.

13) Biot, *Le Tcheou-Li*, Paris, 1851, II 356.

14) Biot l.c. footnote 3.

Today, those who are ten years old correspond to the very young and tender ones; those of eighty years to the old and very old ones; and the invalids of the third degree to the idiots and the imbeciles. They all correspond to that regulation about the 'Three Graces' (san shè) (of the *Chou-li*).¹⁵

We do not exactly know what shè (grace) actually means in the *Chou-li*. But if it does not mean complete exemption from criminal prosecution, it certainly means a lessened criminal liability.

We see from the quotation in the T'ang Code that its provision can rightly claim a precedence of high value, and that the rule belongs to the oldest stock of Chinese legal thinking, that it may truly be called a "fundamental notion of ancient China."

If we try to determine the spirit and the motive of this rule in the classical Chinese law we are lead to call them moralizing. Originally, the rule is not induced by rational thinking based on medical knowledge or insight. It is not based on the assumption of a diminished power of discernment on the part of the delinquent. But it is an outflow from the feeling of pity as we find it in the old Chinese ethics. This is clearly shown by the juxtaposition of the insane with the old people and the young children, as noted already in the *Chou-li*.¹⁶

To emphasize this motive of the classical Chinese law we may refer to the modern European law. In the British law, as it stood before the French revolution, an insane person could be exempted from punishment only if he was "totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast."¹⁷ Since the trial of M'Naughten's case in 1843, it is held necessary to "be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."¹⁸ Here it is not a feeling of pity, nor ethical consid-

15) *TLSI* 4/4b; 周禮三赦之法，一曰幼弱，二曰老耄，三曰蠢愚。今十歲合於幼弱，八十是老耄，篤疾蠢愚之類，並合三赦之法。

16) It may be noted that women in general, and femmes enceintes especially, are not mentioned in those early texts of the *Chou-li* and the *Li-chi*. But later on, in the T'ang Code, we find provisions about the commuting of their penalties. These provisions possibly have been created under Buddhist influence during the Northern dynasties where Buddhism flourished and from where the Sui dynasty (589-618 A. D.) took some legal and religious institutions.

17) From a judgment of 1724 quoted by Harris' *Criminal Law*, 14th ed., by A. M. Willshe, London 1926, p. 14.

18) Quoted from Harris l. c. p. 16.

rations but reason that leads to the legal rule. This could be shown even more ostensibly by referring to the continental European law since the French revolution.¹⁹

3) How is it that Mr. VAN DER VALK is convinced that the classical Chinese law punished lunatics, and that this would be in harmony with "some fundamental notions of ancient China?"

It is true that ALABASTER l. c. p. 93 says about the Ch'ing law: "Lunatics are held responsible for their acts, but the ordinary penalty applicable is commuted," and p. 95 "It must however be borne in mind that so far as concerns the sentence, lunacy is no defence."²⁰ But ALABASTER here is basing his report entirely on decisions of law courts, not even once mentioning the Chinese statutes. It stands to reason that by referring only to some decisions of law courts he might have noticed only part of the rules actually in force, that some rules of law might have escaped his attention. It would appear that the cases noted by ALABASTER do not deal with all the points of the law.

What, then, were the provisions of the Ch'ing Code?

When taking the translation of BOULAIS, a work easily accessible to everyone, we see the following. Regarding our question the main provisions of the law (律 lǜ) were only slightly changed compared with the text of the T'ang Code, and the alterations did not touch the basic principle of exempting lunatics from punishment.²¹ But there are some additional provisions (例 lì) appended to the main provisions. At the Ch'ing time this procedure was quite usual, traditional feeling prohibiting the formal alterations of the main text of the law code while permitting changes in substance by the lì. The main text, therefore must always be read together with the additional provisions.

The additional provisions introduced by imperial edicts have indeed altered the main provisions of the law as concerning lunatics to a certain degree. But the additions were made only at a rather late time, i. e. as far as I see during the 18th century.²² Furthermore, these alterations

19) Cf., however, *TS'U* 4/7b where it is said in the commentary: "The very young and the very old people all have an inferior power of discernment 少智力. Therefore, if someone is ordering or instructing them (to commit a crime) only this person is liable to punishment." These words show a similar rational thinking as in the modern European law. The original moralizing motive, however, still prevailed.

20) At a later date, in his book published in 1906, *Notes on Chinese Law and Practice Preceding Revision*, p. 76, Alabaster holds the same view in saying: "The insane are held responsible for their acts, but the ordinary penalty applicable is commuted...."

21) *TCHL* 3/1a; Boulais l. c. no. 136; Staunton l. c. p. 23-24.

22) I conclude this from a note of Phillastre, *Le Code Annamite*, 2nd ed., Paris, 1909, II 226a., mentioning that two of the additional provisions which were also introduced in the law code of Annam date from the time of Ch'ien-lung. A sufficiently commented copy of the Ch'ing Code is not available to me at the present time.

concern only cases of homicide, but no other crimes. Therefore, in cases of other offences the main provisions of the law were still in force. Finally it should be noted that these additional provisions use another term for lunatics (瘋疾 feng-chi) which is not known to the T'ang Code.

The additional provisions about the punishment of lunatics as reported by BOULAIS may be condensed to this: When a lunatic kills one person he is not held responsible, but his guardians suffer a light penalty for not having taken proper care of him (l. c. no. 1287). If the lunatic kills two persons he shall be condemned to strangulation but subject to later revision of the sentence à l'amiable by the higher court. It is only when he has killed three persons (or two if they belong to one and the same family) that the lunatic is condemned to decapitation and to be executed at due time (l. c. no. 1289).

These provisions look rather strange. We might, however, succeed in understanding them if we consider them in context with the other provisions about lunatics introduced at the same time by the Ch'ing. Most of these provisions give rather detailed and strict rules about how a lunatic should be treated in his family, announced to the authorities etc. Among these rules the provisions about the punishment of lunatics are discriminately inserted. The rules about taking care of the lunatics have ostensibly been induced by the idea of protecting the community from them. The same idea, it seems to me, also explains the newly introduced rules about the punishment of lunatics. Otherwise, also, it would be quite unreasonable to exempt a lunatic from punishment when having committed one homicide but to punish him for three. The idea of the law seems to have been that as soon as the lunatic had committed three homicides he was considered to be dangerous to the common weal and his guardians unable to supervise him properly. Only then, as a means of self-protection of the community, the lunatic was to be executed. Therefore, the additional provisions are limited to homicide; other offences the lunatic might commit were not considered severe enough to diverge from the general rule still prevailing that lunatics should not be held responsible in criminal law. The dangerous condition of the lunatic, but not his guilt were considered by the legislator when giving the new rules. This also may explain the new expression (feng-chi) introduced into the law code during the Ch'ing dynasty; it might comprise only those lunatics who are ferocious and dangerous to the public.

But whatever the reason of the Ch'ing emperors might have been for changing the old rule of the classical Chinese law in this respect, the principle of exempting a lunatic from criminal persecution also prevailed during the Ch'ing dynasty.

We may safely say that the exemption of lunatics from punishment

is a fundæmental notion of ancient China and a principle of the Chinese law from the Chou dynasty until nowadays.²³

II. DID THE CLASSICAL CHINESE LAW KNOW THE DIFFERENCE BETWEEN INTENTION AND NEGLIGENCE?

Mr. VAN DER VALK finds fault with my "repeated insertion of the word 'intentionally' in translations of articles from the *T'ang-lü su-i*""²⁴ asserting: "The general distinction between offences committed intentionally and by negligence was unknown in classical Chinese law, as has been shown by ALABASTER, *passim*. Its existence during the T'ang dynasty would consequently be a very remarkable feature, but it may not arbitrarily be assumed."

I will try to show that the distinction between intention and negligence is one of the oldest accomplishments of Chinese legal thinking, that it has attained in the T'ang Code a rather high technicality, and has been maintained in the Chinese law codes until the end of the Ch'ing dynasty without being altered. When discussing the legal rules I shall restrict myself to the main provisions leaving out some special rules which existed for cases of crimes between parents and children, master and slaves, etc.

In the *Shu-ching*, Canon of Shun, we find the following passage; "He (Shun) gave delienations of the statutory punishments, enacting banishment as a mitigation of the five great inflictions; with the whip to be employed in the magistrates' courts, the stick to be employed in schools, and money to be received for redeemable crimes. Inadvertent offences and those which might be caused by misfortune were to be pardoned, but these

23) The rules about the punishment of lunatics, especially those in the Ch'ing Code; might not easily to be detected at the first glance because the different expressions for invalidity do not suggest to compriss also imbeciles and lunatics. Also Staunton and Boulaïs in their translations of the Ch'ing Code do not explain exhaustively what is meant by invalidity because the commentaries to the Ch'ing Code themselves care not to be complete on this point. Even Ou Koel-hing who in his thesis *La peine après le code des T'ang* (Shanghai 1935), p. 35 is touching the problem did not find out the rules of the T'ang Code although they are much clearer than those of the Ch'ing Code. But Mr. van der Valk could have found out the point even from the European literature: Deloustal, in *BEFEO* IX (1909), p. 105-6, is translating invalids of the third degree by impotents defining them "c'est à dire des personnes privées de raisons, de deux membres ..." and adding in a footnote: "C'est exactement le texte de l'article correspondant du code des T'ang (IV, 2b), à part... Cet article, complété de notes, a été conservé presque intégralement dans le code actuel..."

24) He refers specially to p. 94, note 75 of my book where I translate the Chinese expression 故 ku by vorsätzlich, equivalent to the English intent or intention.

who offended presumptuously or repeatedly were to be punished with death.””²⁵

Likewise in the *Shu-ching*, in the Announcement to the Prince of K'ang, the contents of which in many ways refers to criminal law, the emperor admonishes one of the feudal princes in the following way: “Oh! Fung, deal reverently and understandingly in your infliction of punishments. When men commit small crimes, which are not mischances, but purposed, themselves doing what is contrary to the laws, intentionally, though their crimes be but small, you may not but put them to death. But in the case of great crimes, which are not purposed, but from mischance and misfortune, accidental, if the offenders confess unreservedly their guilt, you may not put them to death.””²⁶

We do not know whether such legal thinking actually existed in those legendary times to which the quoted passages refer and which by Chinese tradition are put at the 23rd and 12th centuries B. C. respectively. But we may at least accept them as prevailing already sometime during the Chou dynasty (ca. 1027-256 B. C.). We likewise do not know the exact meaning of the words rendered by LEGGE by ‘purpose’, ‘intentionally’, ‘mischance’, ‘accidental’, and by COUVREUR by ‘délibération’ ‘obstination’, ‘erreur’, ‘inadvertence’ and ‘accident’. But we find the clear expression of the general idea that non-intentional acts were to be dealt with less severe than intentional ones, i. e. that a differentiation was made between these two kinds of actions.

This we find confirmed by the following passage in the *Chou-li*, i. e. a handbook of government institutions of the Chou dynasty: “Il y a trois cas d'ingulgence: premièrement, le cas d'ignorance; secondement, le cas de faute involontaire, troisièmement, le cas de négligence ou d'oubli.””²⁷

To this BIOT, whose translation we have followed, quotes the following commentary from the 2nd century A.D.: “Exemple du premier cas:

25) Legge, CC, III, 38-39. Cf. also Couvreur, *Chou King*, 2nd ed., 1916, 18-19.

26) Legge, CC, III, 388, Couvreur, l. c. 197 translates: “Oh! Fung, ayez soin d'appliquer les châtimens avec intelligence. Un homme commet un crime qui n'est pas des plus graves; mais il le commet avec délibération, obstination dans le mal et volonté de violer la loi. Son crime est volontaire; bien qu'il ne soit pas très grave, il doit être puni de mort. Un autre commet un grand crime, par erreur, inadvertence ou accident, sans obstination dans le mal. La faute n'a pas été volontaire; après qu'il a avoué son crime sans déguisement, il n'est pas juste de le punir de mort.”

27) Biot, l.c. 11, 356. The Chinese expressions for the three indulgences (san yü 三宥) are: 不識 pu-chih; 過失 kuo-shih; and 遺忘 i-wang. Plath, “Gesetz und Recht im alten China” (*Abh. d. Bayer. Ak. d. Wiss.*, X [1865] 99), renders these expressions by ‘unwiscentlich; unfreiwillig sich verfehlen; Vergesslichkeit.’

on veut se venger de A, on voit B; on croit que c'est A, et l'on tue. — Exemple du deuxième: On lève une hache pour couper (du bois); et, involontairement, l'on atteint un homme. — Exemple du troisième: On est séparé par un rideau mince, et oubliant qu'il y a quelqu'un derrière, on lance contre lui une arme ou une flèche. — Dans ces trois cas, il n'y a pas de contravention, commise en connaissance de cause."²⁸

The last two examples given in the commentary should be classified as negligence according to the meaning this word has today when used by the general public and in legal texts.

The expression for the second class of the 'Three cases of indulgence', i. e. kuo-shih which BIOT translates by 'faute involontairement', will again be found in all the law codes since the T'ang dynasty.

Reference to the three cases of indulgence of the *Chou-li* is also to be found in the *Li-chi*, in its chapter of the Royal Regulations²⁹ supposed to be compiled during the Han dynasty in the second century B. C.³⁰ Here we find mentioned only the expression san-yu (three cases of indulgence), or as LEGGE calls them the three mitigating conditions, but no explanation what they mean. We may, however, rightly assume them to be the same as stated in the *Chou-li*, although the *Chou-li* might not have been recovered at the time when the Royal Regulations are supposed to have been compiled.³¹ The commentaries to the *Li-chi* dating from the Han dynasty do not hesitate to give to each of the three indulgences the same name as they have in the *Chou-li*.³²

We will pass straight to the T'ang dynasty, although some material relating to our question can be shown also for the intermediate dynasties.

In the T'ang Code the differentiation between intentional and non-intentional offences is quite elaborated. We find distinctions between pre-meditation (complot, 謀 mou), intent (故 ku), negligence (過失 kuo-shih), and mistake (失 shih, or synonymously 失錯 shih-ts'o). All through the code we meet these expressions, and they are explained in several passages of the commentaries to it. It is, however, in the chapter about homicide that we find the most exact definitions for some of the expressions.

The idea in making these distinctions is, as in European law, to give

28) Biot, l. c. note 2.

29) Legge, *SBE*, XXVII, 237: "When they (the three ducal ministers) had once more reported it to the king, he considered it with the three mitigating conditions, and then only determined the punishment." Couvreur, *Li Ki*, I 307 translates "trois causes de pardon".

30) Legge, l. c., p. 18.

31) Legge, l. c., p. 19 quoting the Ch'ien-lung editors of the *Li-chi*.

32) Cf. Legge, l. c., p. 237 note 1: "Ignorance, mistake, forgetfulness". Couvreur, l. c., I 307 note. "l'ignorance, l'inadvertence et l'oubli".

some general means of graduating the punishments. Generally a premeditated crime is punished more severely than one committed with simple intent; and the latter more severely than negligence. We will deal here only with intent and what we have called negligence (*kuo-shih*).

As far as I can see, the translation of 故 *ku* by 'intent' (in German *Vorsatz*) has never given rise to any doubt or deviation in translating. Also ALABASTER uses the word intent.³³ The Chinese law seems to have conceived the meaning of the word intent (*ku*) exactly corresponding to our ideas. The commentaries of the law code when explaining it, will speak of 'heart' (心 *hsin* or 本心 *pen hsin*) what we might translate by 'to set the mind on something', 'purpose' or with similar expressions.³⁴

It must have been known to Mr. VAN DER VALK that the classical Chinese law made the distinction between intentional and non-intentional acts, and that it made a considerable difference regarding punishment. What can he, therefore, mean by stating that "the general distinction between offences committed intentionally and by negligence was unknown in classical Chinese law"? He might mean that the term *kuo-shih* should not be translated by negligence. Unfortunately he does not state how he wants this word to be translated.

Indeed the expression *kuo-shih* has been translated by ALABASTER and others by 'accidental'. This might have been known to Mr. VAN DER VALK. But even if wanting to follow the rendering of ALABASTER, he should have made it clear that instead of the European distinction between intent and negligence the classical Chinese law distinguishes between intent and accidental. By simply stating his above quoted denial he is misleading us to believe that the Chinese law considered intentional crimes to be at the same level as crimes committed by negligence or by accident, that both kinds were treated and punished alike as was most certainly not the case.

Does, then, the whole question shake down to a mere quarrel about words? I do not think so, and I propose to follow up this question furthermore because it refers to a problem that for more than a century has disturbed the relations between Chinese and foreigners, and often enough is still giving raise to comments in the daily newspapers

The question is: Did the classical Chinese law, and does the modern

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- 33) Alabaster, l. c., p. 222: "killing with afore-thought, killing with intent"; p. 294: "murder deliberately planned or with sudden intent". By the words 'killing with afore-thought' and 'deliberately planned' Alabaster is rendering the Chinese expression 謀 *mou*, by 'intent' and 'sudden intent' the Chinese 故 *ku*.
- 34) Cf. e. g. *TLSI* 23/7b: 殺心 the mind (purpose to kill); 22/5b: 本心; 21/7a 元無殺心 originally not having the intent to kill.

Chinese law of to-day, punish only such unintentional acts which we consider as negligence, or does it also punish those actions which we classify as committed or having occurred by mischance without any neglect on the side of the author of the act?

The Chinese law will give us the answer.

The T'ang Code explains the expression *kuo-shih*, which I call negligence, by giving instances in the text of the legal provisions themselves³⁵ and by explaining the instances furthermore in the official commentaries to the code.³⁶ The four instances for *kuo-shih* given by the code and their explanations in the commentaries are:

1. "The ears or eyes (of the wrongdoer) do not reach (the victim, or the place where the victim is standing)." Explanation of the commentary: "If someone, having neither heard the noise of another person, nor seen someone else forthcoming, throws a brick, or discharges an arrow (and thereby kills or wounds the other person)."

2. "Or if his care does not go that far." The commentary: "That means: If on an originally remote and lonely place where the presence of other people is not to be expected, someone throws a brick or a stone, and by mistake kills or wounds somebody thereby."

3. "If some people together lift a heavy burden without having enough strength to master it, or some people together climb up some higher place where there is some danger involved, and one of them stumbles (hurting or killing one of the others); or if while attacking an animal (the hunter) kills or wounds some person by mistake."

4. "And in similar cases." Commentary: "That means for instance: If some people together, while being occupied with arresting a criminal, by mistake kill or wound a bystander."

Surveying the instances given above the general reader as well as a lawyer will be inclined to consider some of them as being grossly beyond the limit which we are accustomed to draw for criminal negligence. We have, however, to draw the attention to two considerations.

Firstly, all of the instances given above have a common denominator: In all of the cases the person held liable has himself set, before the accident, some kind of dangerous condition; by shooting an arrow, throwing a brick, climbing a tree, etc. No instance is mentioned without this charac-

35) *TLSt* 23/10b: (1) 耳目所不及, (2) 思慮所不到, (3) 共舉重物力所不制, 若登高履危足跌, 及因擊禽獸, 以致殺傷 (4) 之屬皆是。

36) *TLSt* 23/11a (I omit the words of the legal provisions quoted in the above footnote which are repeated in the commentary): (1) ...耳不聞人聲, 目不見人出而致殺傷。 (2) ...謂本是禽獸之所, 其處不應有人投瓦及石, 誤有殺傷。 (3) (no comment) (4) 謂之屬者謂若共捕盜賊, 誤殺傷旁人之類。