Mental States as Criteria of Liability in the T'ang Code (*)

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When a legislator wishes to frame rules imposing liability for an act or omission he may describe the facts which constitute the offence, establish the penalty, but make no explicit mention of the offender's state of mind. Sometimes the effect of such a formulation is to create an offence of strict liability in which a person who does what he should not or omits to do what he should is liable irrespective of his state of mind (1). Sometimes

(*) The T'ang code (first promulgated in 619 A.D. and the earliest of the Chinese codes to survive in its entirety) is the most significant piece of legislation in the history of South East Asia. Not only did it form the basis for many of the successive dynastic Chinese codes (some of its provisions still appearing in the Ch'ing code which remained in force until 1911), but it passed at various times into the legal systems of Korea, Vietnam and Japan. It consists of 502 articles arranged according to subject matter in 30 books. The articles are concerned with the imposition of sanctions for failure to behave in the prescribed way. They are formulated in a highly elliptic fashion, often being so brief as to be unintelligible. The most important part of the code is that of the commentary added in 653 A.D. which explains the meaning of each article and often adds further information. The commentary, a model of legal precision and analysis, is an integral part of the code. There is as yet no complete translation in a Western language. W. Johnson is in the course of preparing an English translation, the first volume of which (covering the "General Principles" section of the code) has been published (*The T'ang Code* I, Princeton, 1979). This volume contains a useful introduction which may be consulted for further details on the code.

(1) Subject to possible exceptions constituted by infancy or madness or the like.

this is not the case because the description of the offence contains a concealed reference to a state of mind. Thus a rule imposing a penalty for theft or robbery in many, although not necessarily in all, cases carries an implication that a person who takes another's goods is liable only where he knows that he has no right to them. On the other hand the legislator may introduce in his description of the facts constituting the offence a particular mental state which is thereby established as a condition of liability. This is the case where liability is made dependent upon the possessor having a particular intention or possessing certain knowledge. Finally the legislator may use language which makes it unclear whether a reference to a state of mind is being made or not. He may refer to an act being done by mistake or by accident or to something not being noticed or perceived. What is clear is that the legislator by such language wishes to stress that the offender is liable even though he has not acted intentionally or with knowledge, though the penalty might be less than in these cases. What may be unclear is whether he wishes to make some degree of personal fault on the part of the offender a condition of liability. Is the legislator postulating a "careless state of mind" on the part of the offender or is he merely saying that the offender in point of fact has not complied with certain standards or procedures or has not known or perceived something (2).

The T'ang code contains many examples of all three kinds of formulation. I propose to concentrate upon an analysis of the second and third, that is, those which use language certainly or possibly referable to a state of mind. Although such language is varied some key expressions stand out and will provide the focal points of the analysis. These are *ku*, *pu chüeh*, *pu chih*, *ts'o*, *wu* and *shih*. *Ku* in this context can always be translated by "intention", *pu chüeh* by "not perceive" and *pu chih* by "not

(2) Discussion of some of the issues raised in this article will be found in K. Bunger, Über die Verantwortlichkeit der Beamten nach klassischem chinesischem Recht, *Studia Serica* 6 (1947), 159, and The Punishment of Lunatics and Negligents according to Classical Chinese Law, *Studia Serica* 9 (1950), 1; J. Gernet, À propos de la notion de responsabilité dans l'ancien droit chinois, in L. Lanciotti, ed., *Il diritto in Cina* (1978), 127.

know". Translation of the other terms presents more difficulty. Frequently *ts'o* and *wu* can be rendered by "mistake" but this cannot be taken as an exact equivalent in all cases. *Shih* can be translated as "mistake" or "accident" but it may carry an overtone of a failure or neglect to do something. *Wu, ts'o* and *shih* have in common the fact that they all normally designate a non-intentional act or omission, but whereas this is invariably the case with *wu*, *ts'o* and *shih* are sometimes used in contexts where it does not seem to be relevant whether the mistake in question occurred deliberately or not.

Ku

Some general observations may be advanced by way of preface to the discussion of the usage of *ku* in the code. Suppose one has to consider the meaning of intention in the statement "intentionally to mix medicine not in accordance with the prescription is an offence". What one might say first is that the word "intentionally" implies that the mixer intended to perform the acts necessary for the mixing of the medicine. Then one might proceed to the more important implication that he mixes the medicine in the knowledge that he is deviating from the prescription. Strictly this is all that should be implied from the word "intentionally" itself. But the context in which it occurs, namely a rule of law which constitutes the mixing an offence, allows one to go further and imply that the mixing is for an improper or wrongful purpose, the mixer intending to commit a wrong with the medicine (3). This particular implied intention (4) must be distinguished from the motive which the mixer has for committing the wrong. The phrase "intentionally to mix medicine" permits no inference as to the mixer's motive.

An essential implication of the word "intention" when used to refer to a state of mind as a criterion of liability is that the

(3) For example it was not mixed as a joke or to demonstrate how not to mix.

(4) When I speak of "intended" or "intending" I mean something stronger than "wish", namely "resolve" or "determine".

act or omission in question is performed with knowledge of a particular state of affairs. Sometimes a rule of law instead of using the language of intention will state that a person is liable if he does, or fails to do, something in the knowledge that a particular state of affairs exists. Here what is made explicit is that element of the state of mind constituted by "knowing" and what is implied is that the act or omission is done intentionally. Sometimes the language both of knowledge and intention may be used. A rule may state that a person who knows that such and such is the case deliberately acts or fails to act in a certain way (5). One can raise the question, why should a legislator sometimes prefer the language of intention and sometimes that of knowledge? There is often a good reason for an emphasis on the element of knowledge. The legislator wishes to impose a penalty on people who behave in a certain way although they have knowledge of a state of affairs which should induce a different form of behaviour. Naturally in drafting his rule he places knowledge of the state of affairs in the forefront of the conditions entailing liability (6). However the fact of knowledge itself may sometimes assume less importance in the legislator's mind than the object to which the knowledge is to be put. Where he wishes to emphasize the wrong committed through possession of the knowledge the language of intention is preferable to the language of knowledge because it emphasizes the determination of the perpetrator to commit a wrongful act, that is, the wrongfulness of the determination itself. In the case of killing, for example, the fact that the killer knows that if he does certain acts his victim will die is less relevant than the fact of the wrongful nature of his determination to kill. Here the legislator expresses the rule imposing liability in the language of intention and not that of knowledge.

(5) The code contains numerous examples of rules imposing liability on account of the offender's knowledge of a certain state of affairs.

(6) The code, for example, contains several rules imposing liability on guards or customs officials who know that certain persons are not allowed to enter or pass and yet permit them to do so. See e.g. book 8, articles 8, 10, 11.

In the code where liability is imposed for an intentional act or omission the word normally used to express intention is *ku*. The use of the term in such contexts is interesting because it had clearly acquired a technical legal sense. This can be seen from the fact that it is very rarely used to describe a volitional state of mind considered purely as an occurrence, independently of any legal consequence. Where the legislator wishes to refer to a person's desire, intention or purpose in this neutral sense he normally uses the terms *hsin*, *i*, *ni* or *yü*. Conversely these words are never used in the formulation of the rules which impose liability for intention, although they may be used in the commentary to explain what is meant by the *ku* of the article. Consequently the essential point about the meaning of *ku* is that it expresses such intention as rules of law have determined to be one of the constituent elements of an offence. Hence it has to be understood in the context of rules of law as a term which is given meaning by the use to which it is put in the rules. At one level, therefore, its meaning can be described as functional. It functions as a means by which the law expresses decisions about liability in the form: if one has acted *ku* one is liable. Of course it is not just any decision about liability that can be expressed by means of the word *ku*. The core element in the case is that the person made liable has intentionally done or failed to do something. However the fact that *ku* not only refers to a volitional state of mind but also functions as the means by which liability on account of that state of mind is expressed permits the legislator considerable freedom in its use. By emphasizing its function as a means by which liability is expressed rather than its reference to a volitional state of mind he is able to apply it to situations where the person held liable has not in fact intended to do the act for which he is made liable. For example someone may be held liable on the ground of *ku sha* even though he has not in fact intended to kill the person for whose death he is made liable (8).

(7) Sometimes the word *wang* is used to express what is knowingly and falsely done, e.g., book 12, article 4; book 25, article 14.

(8) See further below and cfr my The T'ang Code, *The Irish Jurist* (1983).

What I have said as to the function of *ku* has to be understood as the comment of an external observer, someone attempting an analysis of the language of the code in accordance with criteria with which its framers may not have been familiar. The T'ang legislators are unlikely themselves to have been conscious of the function of the word *ku* in the propositions about liability that they established or even perhaps to have been aware of the precise extent to which it referred to a volitional state of mind. Indeed it is doubtful whether the legislators worked with a strict or precisely defined notion of intention. They offer no general definition of *ku* and the explanations which are to be found in the commentaries to specific articles invoke varying kinds of states of mind. Hence in the investigation of the meaning of the word *ku* one has to distinguish between three processes: the meaning of "intention" considered abstractly, the function of *ku* in statements imposing liability, and the actual content given to *ku* by the framers of the code. It is to this third process that I now turn.

Sometimes, as in the context of killing, the word *ku* is explained by a phrase which imports the idea of intending or wishing. Occasionally indeed the word *ku* itself is used in such explanatory phrase. Thus Book 2, article 11 speaks of *ku sha* and the commentary states that this expression means "not on account of fighting or beating or quarrelling but *ku* kill". *Ku* here can be taken only as "intentionally" or "deliberately". Book 18, article 3.ii deals with liability in respect of poisonous meat and the commentary puts a case in which someone intending harm (*hai hsin*) deliberately (*ku*) gives poisonous meat to an honourable elder wishing (*yüi*) his death. Here a series of phrases including *ku* is used to emphasize the element of intent in the act. The reason for this unusual accumulation of phrases expressing the fact of intending appears to lie in the legislator's concern to demonstrate a case of plotting to kill (*mou sha*); the implication is that the supplier attempted to, but did not succeed in, killing the recipient. Possibly *ku* (as distinct from *hsin* or *yüi*) is used because it carries an implication of "wrongdoing" as the content of the intention.

Usually *ku* in the context of killing is explained by the word *hsin*. Apart from the example just considered one has Book 25, article 6 and commentary where killing in a fight is distinguished from *ku sha* on the ground that there is no *sha hsin* (lit. "kill mind"), and the treatment of killing resulting from a fight in which sharp bladed weapons are used as *ku sha* is explained on the ground that there is *hai hsin* (lit. "harm/destroy mind"). Further the presence or absence of an original *sha hsin* is used to explain a distinction applied to "accidental" killing. If in the course of a fight a bystander is accidentally killed the killing is still treated as falling under the head of killing in a fight because there was originally no *sha hsin*, but if several persons have plotted to kill A but by mistake at night kill B instead, the case is treated as *ku sha* because here there was an original *sha hsin* (9). It is clear that the reason for the explanation of *ku sha* as involving *hai hsin* (10) or *sha hsin* is the need to distinguish it from killing in a fight where no such intention is present.

Frequently *ku* is explained by reference to knowledge of some particular circumstances (11). Book 15, article 12 provides that where an ox or dog which has once gored or bitten someone is deliberately let loose (*ku fang*) by its owner and kills or injures a person the owner is liable on the ground of killing or injuring in a fight with a decrease in penalty of one degree (12). The commentary explains *ku fang* as meaning "knowing that the dog or other animal has the disposition and ability to gore, kick or

(9) Book 23, article 4, final question and reply.

(10) *Hai hsin* may mean either intent to injure or intent to destroy. It must have the latter sense here.

(11) Sometimes the phrase "not by means of the truth" is used to explain the meaning of *ku* (e.g. book 9, article 2; book 25, article 23). This carries the implication that the true circumstances are known but disregarded.

(12) Interestingly the previous article provides that if a dog or other animal is deliberately let loose and kills or injures someone else's animal, the case is treated as falling under the head of *ku* killing or injuring. The fact that an animal is less important than a human being and therefore attracts a smaller penalty if it is killed or injured seems to have influenced the treatment of the case and led to its being classified as *ku* killing or injuring.

bite". In the case of meat which has become poisonous it is stated that a person who knows that the meat has already caused illness but deliberately (*ku*) gives it to another to eat is liable for any resulting illness or death ([13]). Here *ku* is explained as knowing the meat is poisonous and yet giving it to another. Possibly the word *ku* is inserted (although it appears redundant) to reinforce the point about knowledge, or possibly it carries an added implication of "intending to do wrong" ([14]). There are many cases in which liability is imposed on an official for deliberately giving a wrong judgement (*ku ju ch'u*). Although little is said by way of explanation of *ku* its basic sense seems to be that the official made liable knew circumstances which should have prevented his reaching the decision which he did reach ([15]). Again there are many rules in the code which impose a liability on an official who deliberately allows (*ku tsung*) someone to do a prohibited act. In this context *ku* is explained as knowledge of the relevant circumstances. For example book 7, article 1 prohibits unauthorized entry of inter alia the imperial ancestral temple and provides that the guards who deliberately allow (*ku tsung*) unauthorized persons to enter are guilty of the same offence. The commentary defines *ku* as "knowing they are not proper persons to enter but letting them enter" ([16]).

A different state of mind which might be invoked as explanatory of *ku* is that which evidences the motive for the act. Thus book 18, article 6.i. imposes a penalty for destruction of, or injury to, a corpse. The note to 6.iii states that in all cases the thought or purpose is hatred (*o*), and in the commentary there is a further explanation to the effect that "injure" means "deliberately (*ku*) injure" and that there is no malicious mind or hateful intent (*o hsin*) where the person who has destroyed or abandoned a corpse has acted in accordance with the instructions

(13) Commentary to book 18, article 3.ii.

(14) Other cases where *ku* is defined in terms of knowledge: book 20, article 9; book 25, articles 7, 14.

(15) Cfr book 5, article 4.ii; book 25, article 23; book 30, article 1.

(16) Similar cases: book 7, article 17; book 25, article 9, question; book 26, article 18; book 28, article 7.

of the deceased. If one puts all this together one obtains the impression that deliberately to destroy, abandon or injure a corpse was understood as the performance of these acts from a motive of hatred. The reason for explaining *ku* in this context by reference to motive is supplied by that fact that someone might intentionally destroy or abandon (or perhaps even injure) a corpse without committing an offence, as where he had received prior instructions from the deceased so to act.

Book 23, article 13 punishes by strangulation sons or grandsons who accuse their parents or paternal grandparents of an offence. The commentary explains that the duty of the son is to advise and admonish his parent; he is not to cast aside proper conduct and out of perverse feeling deliberately (*ku*) inform on his parent. The implication is that the son acts out of a perverse motive of hatred or dislike; the word *ku* (strictly unnecessary) appears to have been added to emphasize the wrongfulness of the act of informing where it proceeds from such a motive.

Book 25, article 17 provides that those who induce others to commit an offence (whether the latter knew or not) and then procure their arrest or denunciation in the hope of obtaining a reward or from a motive of hatred or jealousy, are liable to the same penalty as those who commit the offence. The commentary in dealing with the case of those who are unknowingly induced to commit an offence states that they are deliberately (*ku*) entrapped. Probably *ku* refers to the motives of wishing to obtain a reward or of hatred or jealousy mentioned in the article and again emphasizes the wrongful nature of the betrayal as proceeding from such motives.

Book 27, article 3.ii provides that deliberately (*ku*) to break open a dike with the result that someone is killed (by the escape of water) is *ku sha*. The commentary explains *ku* as "not on account of stealing water but because there is dislike or a grudge or fear that the water will harm oneself". The reason the legislator has to understand (*ku*) here in terms of the particular motive actuating the person who breaks open the dike is that he does not wish to treat all cases of death resulting from the intentional breaking open of the dike in the same way. Where

the dike is broken open intentionally but the motive is to obtain water and someone is killed the offence is not *ku sha* ([17]).

Thus the precise mental state to which *ku* refers varies according to the objectives of the legislator. He may, as in the context of rules imposing liability for killing, wish to stress the presence of an intention, resolve or wish to bring about a particular result. In other cases, as where liability is imposed on the ground of *ku tsung* (deliberately allowing), it is more relevant to stress the fact that the offender knows about, was aware of, a certain state of affairs. Finally there are cases in which it is the motive of the offender that constitutes the essence of the offence, and hence is specified in explanation of *ku*. In all cases *ku* expresses the fact that an intentional act has been committed but sometimes it is explained by reference to a state of mind other than intending itself, namely that characterized either by knowledge of a certain state of affairs or by the existence of a particular feeling or thought constituting a motive for the act.

Imposition of liability predicated upon intention or knowledge is often constrasted with that predicated upon some non-intentional state of affairs. The words or phrases commonly found to express such a state of affairs are "not perceiving" (*pu chüeh*), "not knowing" (*pu chih*), and those expressing mistake, *ts'o*, *wu* and *shih*. It is clear that these expressions in practically all cases emphasize the point that the act or omission in question has not been performed or omitted intentionally or with knowledge of a particular state of affairs. It is less clear whether they imply a judgement as to the offender's state of mind, that is, whether they reflect on the part of the legislator a notion that the offender should have applied his mind more closely to what he was doing, with the implication that if he had he would not have performed the offending act or omission. Did the legislator impose liability merely on the ground that the act or omission had occurred, albeit unintentionally or without knowledge or

(17) The same article (3.i) provides that in this case the penalty for killing in a fight with a decrease of one degree is to be imposed.

perception of a particular state of affairs, or on the ground that the offender had failed to exercise his mental powers in a normal or reasonable way ([18])? In order to answer this question it is necessary to examine the usage of the various phrases which describe non-intentional liability.

Not Perceiving and Not Knowing

These phrases are very frequently used in contrast to "knowing (a certain state of affairs)" or "deliberately allowing (*ku tsung*)" ([19]). They express a particular factual state of affairs, namely that in a given situation the official, guardsman or other person made liable has not known or not perceived something. They do not point to the reason for the lack of knowledge or perception and therefore cannot be taken as expressing a careless or inattentive state of mind. However either from the context in which the phrase is used or from an explanation added in the commentary to the article one can often discern the kind of situation the legislator had in mind. Sometimes it is clear that he is contemplating a situation of strict liability, that is, intends the mere fact of non-knowledge or non-perception of itself to impose liability. But in quite a few cases the legislator instances as the typical case of liability one in which there has been some carelessness on the part of the person who has not known or not perceived. This does not mean that an act of carelessness was a necessary condition of liability, merely that a particular situation (evidencing lack of care) was what the legislator primarily had in mind. It remains possible that liability was imposed even though the person who had not known or not perceived could show that he had been in no way careless. Furthermore sometimes an act of carelessness does appear to be a necessary condition of liability, or at least of liability to a certain degree of penalty. The article or commentary may specify that in circum-

(18) I prefer to put the question in this form rather than in terms of the confusing terminology of "objective" and "subjective liability".

(19) "Not perceiving" and "not knowing" refer to similar though not identical states of affairs as can be seen from the examples below.

stances where the "offender" could not reasonably have known or perceived there is no liability or that the penalty is less than that for the case where he could reasonably have known or perceived. The position is not put in this way. The code does not speak of "reasonably not perceive" or "reasonably not know". It describes a particular state of affairs from which the reader may infer that it was reasonable not to perceive and so on.

I consider a number of the rules from the code imposing liability on guards or officials in various circumstances. Book 7, article 1.i punishes those who without authority enter the gates of the imperial ancestral temple or the imperial grave area with penal servitude for two years. 1.ii adds the case of those who obtain unauthorized entry of these places by climbing over the walls, for which the penalty is three years penal servitude, and provides further that the guards on duty at the relevant time who have not perceived the unauthorized entry in any of these cases incur a penalty two degrees less than that of the principal offender. So far as one can tell it is here the very fact of not perceiving which imposes liability. The exercise of, or failure to exercise, proper care is irrelevant. 1.iii provides that the officers on supervisory duty are also liable to a penalty, one degree less than that of the guards. Again the liability is intended to be strict. Finally 1.iv contrasts the case of *ku tsung*: the guards have known the circumstances of the entry and permitted it. They are subject to the same penalty as those making the unauthorized entry.

Articles 2 and 3 of the same book deal with cases of unauthorized entry of the imperial palace and its various sections. Article 4 then defines further what is to be considered as unauthorized entry. 4.i provides that entry by persons who are not on the register of permitted persons kept at the gates or by those who falsely take the name of someone on the register is to be treated as unauthorized entry. 4.iii provides that in the case where a person has falsely taken the name of another on the register and so procured entry through the palace gates and the guards do not know this the penalty applicable to the latter is eighty blows with the heavy stick, a penalty lighter than that

otherwise established for "not perceiving" an unauthorized entry.

The first point to note is that the article says "not know" instead of "not perceive". The reason is that the guards have in fact perceived the entry; the case is not one in which the intruder has slipped in unnoticed. They have noticed him and allowed him to enter but only because they have been deceived as to his identity. Hence the code speaks of "not knowing the fact that the name is falsely assumed" rather than of "not perceiving". The second relevant point is the reason given in the commentary for the lighter penalty introduced for this case. Where a false name (which is on the register) is assumed there is prima facie evidence that the person declaring it has authority to enter; it is difficult to distinguish between the authorized and the unauthorized entirely from appearance. The implication is that the guards have not been personally at fault. It would be unreasonable to expect them always to be able to detect just from appearance that a person claiming to be someone whose name was on the register was in fact an unauthorized person. In other words in a concrete situation where there is likely to have been no lack of care and where the guards have been deceived there is still liability but the penalty is lighter than that applied in cases of "not perceiving".

The relationship postulated by the code between the principal case of "not perceiving" an unauthorized entry and the subordinate case of "not knowing" is not entirely clear. Possibly "not knowing the fact that a false name was assumed" was treated as falling within the general class of "not perceiving" and as constituting an exception to the strict liability imposed for the case of "not perceiving". But possibly, and I think even probably, the legislators in this context distinguished "not perceiving" and "not knowing (a particular circumstance)" as two separate offences. On this view the latter could not have been treated as a case of "not perceiving" because the person who assumed the false name was in fact perceived by the guards (20).

(20) Book 7, article 5 deals with persons who have by means of false

Book 12, articles 1-3 deal with the registration of households and their constituent members (21). Article 1 establishes the penalties for cases in which the family head fails to register his household or registers it incorrectly. "Register" here means to supply the village headman with the relevant details. Article 2 provides that where the village headman does not perceive the failure to register a household or the particulars in respect of which a registration is incorrect he is to receive a punishment whose severity depends upon the number of individuals omitted or incorrectly described. If he knows the circumstances he receives the same penalty as the family head. The commentary explains that it is the duty of the headman to superintend the households under his jurisdiction, to receive the "declarations" (containing household particulars) from the family head and on their basis to prepare the register. "Not to perceive" an omission or an error of itself imposes liability irrespective of whether there has been any actual carelessness on the part of the headman. Yet the stress in the commentary on the headman's duties suggests that the framers had in mind primarily a case where he had been careless in the performance of these duties. Or perhaps one should say that the assumption underlying the provision is that a vigilant headman who carried out his duties properly would have perceived omissions and errors in the "declarations" made to him by family heads. Nevertheless it does not seem that a headman could in fact plead that he had taken every care as a defence to a prosecution under the article.

Article 3 sets out the penalties imposed on officials of the region or district who do not perceive the omissions or deficien-

names substituted themselves as guardsmen or have procured the substitution of others. The liability of the officers in charge depends upon whether they knew of and allowed the substitution (where the penalty is the same as that of the principal offender) or upon whether they did not perceive the persons who had improperly substituted themselves or others (penalty two degrees less than that of the principal offender). "Not perceive" rather than "not know" seems to be used because the reference is to perceiving or not perceiving the individuals concerned in the substitution.

(21) See BUNGER, *St. Serica* 6 (1947), 174ff.

cies in the register. 3.i provides that where they know the circumstances the law relating to the village headman is to apply (that is, they incur the same penalty as the family head). A note to 3.i distinguishes between the case where no written register has been kept at all and the case where there is a register but its records are defective. In the former case the chief officials of the district and region are liable as the principal offenders (subordinate officials being liable as accessories) and in the latter the secretaries directly responsible for the register are liable as principals and their superiors as accessories. According to the commentary the chief officials are liable as principals where there is no register because it is their duty to check that there is, a duty which they have "disregarded and omitted (*wei shih*)". This appears to be ascription of liability to the chief officials on the ground of their personal fault, that is, their carelessness in failing to check that registers were being kept. On the other hand where there is a written register it is the responsibility of those in charge of the records to check that it is in order. If it is not they are the persons liable as principals. Again it is the presence of personal fault, failure to check that a register entrusted to one is properly kept, which determines who is liable as principal. Reduced liability as an accessory is less obviously related to personal fault (22).

Book 15, article 15 deals with the problem of thefts from government storehouses. 15.i provides that those in charge of the

(22) BUNGER remarks, *op. cit.* 175f, that the provincial and district officials (unlike the village headman) were not in a position personally to see that the families within their jurisdiction had performed their duty to register, and adds: "sie waren vielmehr auf die Ausübung ihrer allgemeinen Aufsichtspflicht über die untergeordneten Behörden dauernd zur sorgfältigen Erfüllung ihrer Aufgaben anzuhalten. Wenn sie nun trotzdem nach dem Gesetz für die genannten ursprünglichen Taten verantwortlich waren und bestraft wurden, so kann die Begründung dafür und eine Schuld der Kreis- und Provinzialbehörden nur in einer vermuteten oder fingierten Verletzung ihrer allgemeinen Aufsichtspflicht gefunden werden". I am not sure that this takes adequate account of the explanation in the commentary to article 3.i which in fact BUNGER neither mentions nor translates.

guards should search persons leaving the storehouse and establishes a penalty for failure to search. It further provides that if, as a result of failure to search, persons are enabled to steal goods the guards in charge receive a penalty two degrees less than that of the actual thieves. If it is night time those on duty who do not perceive the theft (presumably again in the consequence of a failure to search) are punished three degrees less than the actual thieves. The commentary adds nothing substantial to the points made in the article. This specifically links the "not perceiving" on the part of those in charge of the guards with a failure to carry out a particular duty, namely to search those leaving the storehouse. It seems reasonable to infer that the legislators would have supposed culpability in most cases where a search had not taken place, that is, they would have assumed that there had been carelessness on the part of the guards. However again one cannot say that carelessness is a necessary condition of liability. It would not have been open to the guards to plead as a defence that although they had taken every care someone had still managed to slip out without being searched. Yet the special rule applied to the case of theft at night shows that the legislators did take account of what could reasonably be expected of the guard. At night it would have been easier for someone to evade a search and hence the penalty for this case is reduced by one degree.

15.ii provides that the chief custodians of the storehouse who do not perceive the theft are to be punished according to the value of what was stolen, the maximum penalty being two years penal servitude. On the face of it no particular act of carelessness on the part of the chief custodians seems to have been contemplated by the legislators. They appear to have intended to impose a strict liability. This impression is borne out by the next section of 15.i which provides that where the keeping of the storehouse has not been conducted in accordance with the proper regulations and as a result there has been theft, there is respectively an increase in penalty of one degree. The commentary explains that this means that the guards (on day or night watch) have their penalties increased where the guard has not been kept in accor-

dance with the regulations, and the chief custodians have their penalty increased where they have failed to see that locking and sealing have been properly done. The increase in penalty is based upon a breach of duty (in the case of the guards a second breach of duty). Although such breach of duty would not necessarily have been the result of carelessness, in most cases carelessness would have played some part. It is likely that the legislators viewed the probability of carelessness as justifying the increase in penalty, even though proof of absence of carelessness in a specific case would not have been a defence (23).

Book 5, article 4.iii (24) provides that where officials work together and one of them commits a "private offence" the others who do not know the circumstances are liable only on the ground of mistake (*shih*). As an example the commentary gives the case of a judge who subverts the law and acquits a person who has committed an offence punishable by one year's penal servitude. The other officials concerned with the case who do not perceive are liable under the law governing mistaken acquittals (*shih ch'u*). The phrase used in the text of the article ("not knowing the circumstances") refers to the circumstances under which the "private offence" is committed (for example, the taking of a bribe) and the "not perceiving" of the commentary refers to the failure to detect that a wrong sentence has been given. It appears that the legislator here intended to impose a strict liability since both the article and commentary mention only the fact of "not knowing" and "not perceiving" and say nothing of breach of a duty to examine or check (25).

However another section of the same article (4.vii) (26) shows

(23) The final sections of 15.i and 15.ii deal with the case of *ku tsung*.

(24) See W. JOHNSON, *The T'ang Code* I (1979), article 40.2 (p. 218).

(25) Cfr BUNGER, *op. cit.*, 170 who states: "Hat ein Beamter eine solche 'heimliche Tat' begangen, so werden seine Kollegen, die das Vergehen nicht bemerken, nur wegen Fahrlässigkeit, also weiterhin um eine oder mehrere Stufen geringer, bestraft". However it is difficult to accept that liability was limited to cases of Fahrlässigkeit, as perhaps BUNGER himself recognizes at p. 172.

(26) See JOHNSON, *op. cit.*, article 40.6 (p. 222).

that some limitation was placed on the strictness of the liability. Normally officials responsible for checking documents were liable where they failed to detect an error. This section of the article states that where the obscurity of the terms of a document (its language and style) makes it impossible to know through examination that an error has occurred, there is no liability. The commentary specifies that those who examine the document in the course of a review of a case will find it difficult to perceive the error and therefore where they do not perceive it they are not liable. This is another example in which a demonstrable absence of carelessness on the part of those who do not perceive affects liability, in this case precluding it altogether.

Book 24, article 18 provides that where officials at government posting stations issue horses to those not authorized to use them the extent of their liability depends upon whether they know the circumstances or not. The commentary explains the meaning of "not know the circumstances" as "where the officials responsible for the issue of the horses have completely failed to make an investigation and further do not know the (true) circumstances". It is clear from this that a condition of liability is a failure by the officials to carry out a duty of investigation. Although the commentary does not discuss the reasons for the failure to investigate there is a reasonable implication that what the legislators primarily had in mind was an act of carelessness on the part of the officials, as where they simply had not bothered to make an investigation at all. The liability of the post house officials resembles that of the guards at the storehouse who have failed to search a person leaving with the result that a theft is accomplished. In both cases liability is founded upon a breach of duty in all probability brought about by carelessness, even though it would not be open to the offender to establish a defence that all due care had been taken.

The article further provides that there is no liability where the person (improperly) obtaining a horse has produced the appropriate tally or warrant. This is explained in the note and commentary as referring to a situation in which the tally or warrant has been stolen or forged. In such cases, it is said, even

by examination the truth cannot be perceived and known. The mention of "perceive" as well as "know" is probably due to the fact that in this case there has been an investigation and yet the officials cannot as a result of perception know that the tallies have been stolen or forged. In the case where no investigation has been made it is sufficient to speak of "not knowing the circumstances" since there has been nothing to constitute an object of perception ([27]). One again has here a precisely defined factual situation where no liability is entailed. The reason, one may infer, is that by no exercise of care could the officials have detected the lack of authorization.

Book 8, article 14 deals with the liability of those whose duty it is to watch at frontier towns and prevent the entry or exit of villainous persons (robbers or spies). If those who watch do not perceive the passing of such persons they incur a punishment of penal servitude for one and a half years. The commentary specifies more closely the extent of the duty imposed on the watchers: their concern is with those who pass on roads which can be seen by the eye. "Not perceiving" is here given the most literal interpretation as what is within the range of vision and yet is not noticed. There is a clear implication that if wrongdoers had passed on the road within the eyesight of those appointed to watch for them they should have been noticed. Failure to perceive in many cases would be directly attributable to some act of carelessness or inattention. At the same time liability is still imposed for the mere fact of "not perceiving"; a plea that all care had been exercised would not have been acceptable as a defence.

Book 9, article 2 deals comprehensively with examinations.

(27) One may compare the language used in book 26, article 30 which imposes a liability for defective articles not only on their manufacturer or seller but also on the relevant market, district and regional officials. The extent of the liability of the officials depends upon whether they know the circumstances or whether they have not perceived (the defect). The commentary places "perceiving" in the context of investigation; the officials are liable for "not perceiving" where they have examined the article and failed to notice its defect.

Officials are made liable for recommending improper persons as candidates, for wrongful conduct of the examinations and for wrongful assessment of their results. The fourth part of the article distinguishes between the case where the official "receives" (that is, trusts) the words (of the candidate) and does not perceive their errors and the case where he knows they are erroneous but allows them to be acted upon. The commentary explains the case of "not perceiving" as one in which the officials recommending candidates for the doctoral examinations or conducting the examination of merits ([28]) "receive" the words of the candidate or the official whose performance is under review and do not perceive their mistakes or omissions. In such a case the penalty is one degree less than that for the ordinary case where the recommending or examining official unintentionally makes a mistake ([29]). "Receiving" the candidate's words thus counts as a mitigation probably because the official has acted on the basis of what he had been told and had not acted without receiving any information from the candidate or making any proper inquiry. One can say that he had been less careless in the former than in the latter case, even though some degree of carelessness would have been present in his failure to check the accuracy of the candidate's statement.

The conclusions suggested by the rules which have been considered above may be summarized as follows: (i) where liability is imposed on account of "not perceiving" (or "not knowing") it is the fact of not perceiving or not knowing which imposes liability, that is, no reference is made by the phrases *pu chüeh* or *pu chih* themselves to the circumstances responsible for this state of affairs or to any particular state of mind on the part of the offender; (ii) sometimes it is clear from the context that the legislator in fact wishes to impose a strict liability in the sense that he does not contemplate the "not perceiving" or the "not knowing" as arising from a breach of duty or an act of carelessness; but (iii) sometimes the legislator

(28) An annual review of an official's performance determining his promotion or demotion.

(29) See below under *shih*.

does link liability for not perceiving with breach of a particular duty. Where this is the case he probably had in mind situations in which the breach had resulted from carelessness, even though liability was still strict in the sense that absence of carelessness or other personal fault did not constitute a defence; and (iv) sometimes the behaviour which could reasonably be expected of persons in given situations was taken into account in the determination of the penalty, suggesting that the legislator in a clear case where there was no carelessness imposed a lighter penalty than that imposed in other cases, or no penalty at all.

Ts'o

The meaning of *ts'o* in the code is "mistake". It may be found by itself or in conjunction with another word, especially *shih* (30). Essentially *ts'o* seems to express a mistake in the performance of a duty or in the assertion of a claim. Sometimes there is simply a reference to the fact that a mistake has occurred, for example in the preparation of the imperial medicine where the correct prescription is followed (31) or of an official document (32), in leaving the palace by the wrong gate (33), in writing the place of destination for a courier (34) and in claiming a free person to be a slave (35). Sometimes the nature of the mistake is explained. Thus Book 7, article 14 regulating the opening of the gates of the imperial palace at night establishes a penalty for *ts'o* with respect to the tallies or the unlocking of the gate. The commen-

(30) I cannot determine whether *ts'o* expresses a particular kind of mistake different from the kind expressed by the word with which it is conjoined.

(31) Book 1, article 6, commentary (JOHNSON, *op. cit.*, 72). However the commentary to another article (book 9, article 12) gives as an example of *ts'o wu* in the preparation of the imperial medicine the case of the weight of the ingredients being incorrect as where there is too much of one, too little of another.

(32) *Ts'o shih*: book 5, article 4.

(33) Book 7, article 8.

(34) *Ts'o wu*: book 10, article 13.

(35) Book 26, article 13.

tary explains the mistake with respect to the tallies as the use of tallies which do not relate to the opening and shutting of the gates, and that with respect to unlocking the gate as the failure to follow the usual procedure (36). Book 9, article 10 on court sacrifices and assemblies imposes a penalty on guards or attendants who make mistakes (*shih ts'o*) or fail to observe the proper ceremony. The note and commentary give as examples: shouting out the words of the ceremony, and sitting or standing in an incorrect posture. A mistake (*shih ts'o*) in carrying out the terms of an imperial decree is defined as omitting to carry out the purport of the decree (37), and *ts'o shih* in the drafting of an imperial decree appear to be mistakes in the formation of the characters or the use of the wrong character (38).

Ts'o thus expresses the fact that a mistake has occurred. The emphasis generally seems to be on the fact that the correct way of performing an act has not been followed or that the correct basis for a claim is not present. Normally *ts'o* refers to cases in which the failure to carry out the correct procedure is not deliberate. Perhaps it invariably does so. But one cannot be entirely sure. In the case of the failure to observe the correct procedure in court sacrifices or assemblies it does not seem to be relevant whether the shouting of words or the disrespectful posture was deliberate or not. The evidence does not suggest that one can take *ts'o* as being primarily expressive of any particular mental state, whether one of intention or, more significantly, one marked by lack of attention to the task in hand.

Wu

In its widest sense *wu* means "what is not intentional". Acts which take place *wu* may be defined in terms of *fei ku* ("not deliberate"). Thus a person without authorization who enters

(36) Book 8, article 6.iii, commentary illustrates mistake with respect to locking the door by a case in which the key does not fit the lock.
(37) Book 9, article 22 and note.
(38) Book 9, article 23, commentary.

the upper section of the palace hall and carries weapons or reaches the presence of the emperor is to be beheaded. But in a case of *mi wu* he may petition the emperor for clemency. The commentary defines *mi wu* as "not deliberately (*fei ku*) making an unauthorized entry" (39). Acts committed *wu* may be contrasted with those committed *ku*; again the force of *wu* is to express the lack of intention. Thus a contrast is drawn between *ku* and *wu* preparing imperial boats which are infirm (and the like) (40), between *ku* and *wu* creating a disturbance in the market (with the result that someone is killed) (41), between *ku* and *wu shih* causing damage by fire or water (42), between *ku* and *wu* destroying gravestones or stone animals (43) or official and private articles (44), and between *ku* and *wu* killing of official or private horses and cattle (45). Further the context may make it clear that *wu* has the sense of "non-intentional", as is the case where an old opinion is cited to the effect that the punishment for offences committed *wu* may be redeemed by the payment of copper (46), or where persons *wu* break into the imperial procession (47), or where mixed drugs instead of food are *wu* brought to the imperial kitchen (48), or where the rules governing the presentation of food to officials are *wu* violated (49), or where various kinds of articles are destroyed *wu* (50).

Although *wu* always implies that the act or omission which it

(39) Book 7, article 2.iii. *Mi* itself means inter alia "to be confused, go astray, commit an error". See also book 23, article 6 (*wu* mixing of medicine not in accord with the original prescription with the result that if someone dies the case is treated as a *fei ku* offence); book 7, article 8 (workmen who *wu* do not leave the palace after completing their task).

(40) Book 1, article 6, section 8, commentary (JOHNSON, *op. cit.*, 73).

(41) Book 27, article 1.

(42) Book 27, article 12.

(43) Book 27, article 20.

(44) Book 27, article 23.

(45) Book 15, article 8.

(46) Book 1, article 5, question and reply (JOHNSON, *op. cit.*, 61).

(47) Book 7, article 17.

(48) Book 9, article 17.

(49) Book 9, article 12.

(50) Book 25, articles 13, 16, 20.

qualifies occurred unintentionally its specific reference is sometimes more to the element of mistake than to that of non-intention. In this case it is used with the same sense as *ts'o* and indeed may be joined with this word. Thus mistakes in mixing or labelling the imperial medicine are described as *wu* or *ts'o* (51), and *wu* with respect to labelling is illustrated by a case in which pills are described as powders or a "hot" medicine as "cold" (52). Mistakes in preparing the emperor's food through not following the rules specified in the cook book are also described as *wu* (53), as are mistakes in the making of the imperial boats which turn out not to be strong (54). All these mistakes in connection with the imperial medicine, food or boats are treated as cases of strict liability. It is stated that the doctor in following the prescription is not allowed to make a mistake (55), that those preparing the imperial food must show reverent attention to the cook book (56) and that the workmen making the imperial boats must use their mind and strength to the utmost (57). These statements are interesting. In other cases of non-intentional acts or omissions liability is strict, even where the likely reason for the act or omission is carelessness, and yet one finds no explicit statement about the need to take care. The reason for the emphasis on the need to use the utmost care in matters concerning the emperor may be the wish of the legislators partly to underline the importance of services to the emperor and partly to justify the

(51) Book 1, article 6, section 6 (JOHNSON, *op. cit.*, 71f) ; book 9, article 12.

(52) Book 1, article 6, commentary (JOHNSON, *op. cit.*, 72). See also above under *ts'o* and book 26, article 7.

(53) Book 1, article 6, section 7 (JOHNSON, *op. cit.*, 73) and see book 9, article 12, commentary for examples (from the cook book) of combinations of food to be avoided.

(54) Book 1, article 6, section 8 (JOHNSON, *op. cit.*, 73) and see also book 9, article 13.

(55) Book 9, article 12, commentary.

(56) Commentary to book 1, article 6, section 7 (JOHNSON, *op. cit.*, 72).

(57) Commentary to book 1, article 6, section 8 (JOHNSON, *op. cit.*, 73). Compare also the liability of a guardsman who draws his sword *wu* in the presence of the emperor; he is liable irrespective of the circumstances of the mistake (book 7, article 16.v).

severity of the penalty imposed for mistakes (death by strangulation).

In the context of reports to the throne or other official documents the code uses *wu* to express mistakes which attract liability. The liability appears to have been strict in the sense that the person who made the mistake could not plead as a defence that all possible care had been exercised. A distinction is drawn between written and oral submissions to the throne. If a taboo name is mistakenly used or some other mistake occurs the penalty in the case of the oral submission is less than that in the case of the written ([58]). If in an oral submission the mistake (other than the use of a taboo name) is not such as to cause the intention or purport of the submission to be lost there is no penalty. *Wu* in documents is defined as being the addition or subtraction of characters or the writing of erroneous characters (*ts'o shih*). Except in the case of submissions to the throne "allowable" mistakes attract no penalty. "Allowable" means a mistake which is readily apparent on inspection of the document ([59]).

Sometimes one is given a hint or even a description of the circumstances under which the mistake designated by *wu* occurs. Thus failure to lock the palace gate at night is described with the phrase *wang wu* ([60]). *Wang* shows that the mistake has occurred through a lapse of memory on the part of the person responsible ([61]). The *wu* killing of official or private horses and cattle is explained with the phrase "what the eye does not see, what the mind does not intend". The first part is illustrated with the case in which the animal killed is not in a place where horses and cattle are normally tethered or pastured, and the second by the case in which a person wishes to kill wild beasts but mistakenly kills a domestic animal ([62]). Where there is

(58) The same applies in the case of other documents.

(59) See book 10, articles 1-3 and their respective commentaries.

(60) Book 7, article 14.ii.

(61) Similar usage in book 8, article 6.iii; book 9, article 23 (forgetting to carry out an imperial order).

(62) Book 15, article 8.ii and commentary. Compensation is to be paid to the owner of the animal but no penalty is exacted from the offender.

construction or demolition work to be done and the preparation and planning have not shown care and by mistake (*wu*) someone is killed, those responsible incur a penalty of penal servitude for one and a half years (63). Several articles determine the liability of *wu* killing where the surrounding circumstances suggest personal fault even though there was no intention to kill the particular victim. The two most important cases are the *wu* killing of someone in the course of a robbery or of a fight. Such killing, even though it occurred accidentally or by mistake, is not treated as redeemable by payment of copper because of the unlawful nature of the killer's original intention: to rob or to inflict injury in a fight (64).

The material summarized in the preceding paragraphs indicates that *wu* may express a range of mistaken acts or omissions where the only constant element is that the act or omission occurred unintentionally. In some cases a strict liability is imposed and no account is taken of personal fault. But in other cases personal fault was taken into account although the precise extent to which it was held to be relevant cannot always be determined. Where someone was accidentally killed in the course of a robbery or a fight the killer's initial unlawful intention to take another's goods or to injure another (65) was the personal fault considered as decisive for the determination of liability. In the case of demolition or construction work the liability for someone's accidental death is grounded upon a failure to take proper care in the conduct of the work. There is here personal fault in the sense that the workmen or supervisors did not properly engage their minds in the performance of their task. Where horses or cattle are killed in circumstances falling within the rubric "what the eye does not see, what the mind does not

(63) Book 16, article 21.ii and commentary.

(64) For examples and detailed discussion see book 23, article 4 with commentary and questions and answers; book 20, article 1 and commentary; book 17, article 10, first question and answer.

(65) The case of a fight requires qualification since no distinction seems to have been drawn between fighting by way of aggression and fighting in self-defence.

intend", the position with respect to personal fault is less clear. While the case might be that the offender was personally at fault in that he had not made any investigation at all before hurling his missile or firing his arrow, equally he would fall within the rubric if he had taken every possible precaution and yet by some mischance still procured the death of an animal (66).

Shih

The pattern of usage for *shih* is similar to that for *wu*. Possibly *shih* had acquired a more technical usage in that it is the word regularly found in rules which impose liability for certain types of non-intentional wrong, as the giving of a mistaken judgement (*shih ju ch'u*) or for "accidental" (67) killing (*kuo shih sha*). But it is difficult to detect any difference in the actual meaning of the two terms. Like *wu*, *shih* always expresses something done or omitted unintentionally and, also like *wu*, it frequently expresses simply the absence of intention. Liability for wrong decisions or judgements given *shih* is contrasted with that for those given *ku* (68), and in one place *shih* in this context is explicitly defined as non-intentional (*fei ku*) (69). However one should note that liability on the ground of *shih* giving a wrong decision is applied not only to the official or judge who makes the decision but also to such of his colleagues, superiors and inferiors as are within the limits of the rules of collective lia-

(66) The phrase "what the eye does not see, what the mind does not intend" (as an explanation of *wu* in this context) cannot be interpreted in the same way as the phrase "what ear and eye do not reach, what thought and care do not reach" used in the context of *kuo shih sha* (see below under *shih*). The *wu* killing of the animal (in contrast to the *ku* killing) must cover both cases where there has been carelessness and cases where there has not.

(67) This should not be taken as an accurate rendering of the phrase *kuo shih* for all cases of its occurrence.

(68) e.g. Book 2, article 7.ii (JOHNSON, *op. cit.*, article 14.2, p. 103); book 5, article 4.i.ii and commentary (JOHNSON, article 40, p. 216f); book 29, article 6; book 30, articles 3, 4, 9, 16, 17.

(69) Book 30, article 16, commentary.

bility. Hence *shih* in this context acquires a range of meaning which can be understood only from an examination of the rules which define exactly which officials under which circumstances are liable on the ground of *shih* making a wrong decision (70). Other cases in which the prime reference of *shih* is to the absence of intention are breach of the rules for the supply of food to officials (71), the escape of animals which damage property (72), failing to present oneself when the army is due to start (73), incorrect estimate of materials and labour for public works (74), causing fires (75) and delay in reporting certain facts to the authorities (76).

Shih may express not so much the fact that something has occurred unintentionally (although normally this will be implied) as the fact that an error has been made. Thus one has failure to carry out the terms of an imperial order described as *shih* (where the idea or purpose of the order has not been understood) (77). Mistakes in memorials or other documents are described as *ts'o shih* (78) or *shih* (79). Mistakes in sacrificial or

(70) One example: book 2, article 7.ii (JOHNSON, cited note 68) refers to *ku shih* in the context of sentencing. The commentary illustrates this with a case in which a judge deliberately (*ku*) decreases a person's offence. His superior who does not know the circumstances (and does not correct the decision) is liable on the ground of *shih*.

(71) Book 9, article 18, commentary (*wu shih*).

(72) Book 15, article 15. *Shih* is explained in the commentary as not deliberately (*fei ku*) setting loose the animal.

(73) Book 16, article 7. Here because of the gravity of the offence the same penalty (beheading) is imposed for *shih* as for *ku* failing to appear.

(74) Book 16, article 18.

(75) Book 27, articles 6, 8, 9.

(76) Book 30, article 19, commentary.

(77) Book 2, article 10.ii question and answer (JOHNSON, *op. cit.*, 114); book 9, article 22 and commentary (using the expression *shih ts'o*). Cfr also the commentary to book 9, article 23 and book 10, article 1 where *shih* in the drafting of an imperial decree is taken to be failure to carry out its purpose or intention.

(78) Book 5, article 4.iii, commentary (JOHNSON, *op. cit.*, article 40.3a, p. 220); book 9, article 23, commentary and book 10, article 3 where *ts'o shih* is used in the sense of mistake in the actual characters.

(79) Book 5, article 4.iv and v, commentary (JOHNSON, *op. cit.*, article

court ceremonial (speaking the words too loudly, adopting an improper posture) are described as *shih ts'o* and *shih* (80). Errors committed in the ceremony of offering the imperial carriage to the emperor (adopting an incorrect posture) are described as *kuai shih* (81). Such error in the performance of a ceremony is interesting because the offender's state of mind appears to be irrelevant. Even were the act infringing the rule committed intentionally it still seems as though it would have been described in terms of *shih*.

Instances of personal fault falling short of deliberate misconduct may be expressed by *shih*. Book 9, article 2 imposes a penalty on officials who *shih* recommend unsuitable persons as candidates for the examinations. The commentary explains *shih* as a case in which the official believes that the candidate is worthy of recommendation. He does not out of private interest knowingly put forward an unsuitable person, but simply fails to investigate whether the character of the candidate is virtuous. There is a clear implication that the official has been careless in the performance of a duty in that he has not applied his mind properly to the question of the candidate's suitability. The senior officials of the district and province to which a village belongs are liable if they do not perceive that the village headman has made no written household returns. The commentary explains that they have the responsibility for investigating the returns. Their failure to do so is described as *wei* (disregard) *shih* (82). *Shih* here expresses a personal fault on the part of the officials in question constituted by their failure to investigate whether household registers had been returned.

Conjoined with the word *kuo* (83), *shih* is used in the code to express one of the categories of killing. Where a killing occurs

40.4 and 5, p. 221). The commentaries employ the expression *kuai shih*; it is difficult to see the exact force of *kuai* (translated by JOHNSON as "contradiction").

(80) Book 9, article 10 and commentary.

(81) Book 9, article 15 and commentary, and for *kuai* see note 79.

(82) Book 12, article 3, commentary to note.

(83) *Kuo* means inter alia "error, fault".

kuo shih no punishment is imposed, but the killer is permitted to redeem his offence by the payment of copper (84). The note and commentary to the article gloss *kuo shih* as "what ear and eye do not reach, what thought and care do not reach". Illustrations given are the throwing of a brick or tile when one does not hear or see anyone (referable to "what ear and eye do not reach"), the throwing of a tile or rock in a lonely place where there ought not to be anyone and accidentally (*wu*) killing someone, the lifting by several people of an object too heavy for their strength where one stumbles and someone is killed, climbing with others a high place or traversing a dangerous passage where one person's foot slips and someone is killed, and killing someone by chance when hunting wild beasts (apparently referable to "what thought and care do not reach").

There has been some controversy over the interpretation of the phrase "what ear and eye do not reach, what thought and care do not reach". One view treats it as a statement of liability on account of negligence (85). This is probably wrong. Literally regarded the phrase seems to express "what could not in the circumstances have been seen or heard, or what could not have been contemplated by the exercise of thought and care". Some of the examples, however, might strike a modern reader as rather awkward illustrations of the phrase interpreted in this sense. Where people lift a beam too heavy for their strength, climb high places or traverse dangerous passages it might be thought that they ought to have contemplated the possibility of accidents and hence have exercised special care or not have undertaken the venture at all. But it is probable that the T'ang legislators attributed the death in these situations to external circumstances which in their view could not have been avoided through the exercise of care and thought at the time (86). Hence one has strict

(84) Book 23, article 7.

(85) BUNGER, *St. Serica* 9 (1950), 13f.

(86) Compare the rule establishing liability for killing in a game where the penalty is increased if the game is dangerous and due care is not taken with the result that someone is killed (book 23, article 6 and commentary).

liability in the sense that the fact of someone being killed imposes a liability on the person from whose act the death resulted. On the other hand the fact that there was deemed to be no carelessness or other personal fault determines the nature of the penalty as payment of copper. More accurately, perhaps, it allows the normal range of punishments imposed on people who kill others to be "redeemed" by payment of copper (87).

Since *kuo shih sha* constitutes one of the basic categories of killing it is applied in the code to a wide variety of states of affairs which result in someone's death. The only common factor in these cases is that the killing was not intended. For example, book 15, article 11 provides that an ox which has once gored or kicked someone must be marked or fettered in a certain way and dogs known to be violent should be killed. If these provisions are not observed and the ox or dog (acting of its own accord) kills someone the law of *kuo shih sha* is applied. The same article (11.i) goes on to provide that where a person has been hired for a fee (*ku*) to cure an animal or without reason excites it and is killed or injured the owner is not liable. A note to the article specifies that where someone has been asked to cure the animal but no fee is paid (*ch'ien*) the law of *kuo shih* is to be followed. As an explanation for the absence of liability in the case where a person is hired to cure the animal the commentary cites the fact that a fee has been paid.

Where meat has become poisonous it should be destroyed immediately by the owner. If this is not done and someone eats it and dies the owner is liable under the law of *kuo shih sha* (88). If a person on urgent public or private business drives a cart or rides a horse in the city and thereby kills someone, the penalty is that for *kuo shih sha*, and if the death is the result of the horse becoming frightened and unmanageable the penalty is decreased by two degrees (89). If a supervisory official on account of a

(87) Recently on the meaning of *kuo shih* see M.J. MEIJER, review of NAKAMURA Shigeo, *Studies in Ching Law* (in Japanese), *T'oung Pao* LXVI (1980), 350.

(88) Book 18, article 3.ii.

(89) Book 26, article 4.

public matter beats a person and so brings about his death he is liable under the law of *kuo shih sha* (90).

The reason for the application to these cases of the law of *kuo shih sha* probably varied according to the circumstances. In the case of the dangerous animal and the poisoned meat there was clearly fault on the part of the owner in the sense that he had not observed the duty enjoined on him by the law. Such fault in most cases is likely to have proceeded from carelessness. However the owner of the animal or the meat has not himself brought about the death in the sense of directly and immediately causing it and hence the law may have been content with the imposition of the lightest available penalty. Where a person had been asked to cure an animal and was killed or injured the reason for applying the *kuo shih* law and so providing for the payment of copper to his family is the fact that no fee has been paid. Payment of a fee entails acceptance of the risk of death or injury by the person hired and hence the owner of the animal is not liable at all. The same applies where a person brings upon himself death or injury through his own fault as by exciting the animal without reason. On the other hand, the person on urgent business and the official do directly and immediately bring about another's death. There may even have been personal fault in the sense that the horse was driven recklessly (91) or the beating was excessive. Nevertheless the killing was still deemed to fall under the head of *kuo shih* probably because the urgency of the business or the public interest involved provided a sufficiently mitigating circumstance.

Conclusion

If one takes fault in the sense of a blameworthy state of mind the only clear case consistently recognized in the code is that of intending or knowing on the part of the person made liable.

(90) Book 30, article 1.

(91) One notes the decrease in penalty where the fault of the driver might be questionable.

It is not of course the state of mind in itself which is punished but the act or omission held to be attributable to it. The code frequently establishes a negative state of mind as a condition of liability by attaching penal consequences to acts or omissions attributable to "not knowing" or "not perceiving". All that is meant by these phrases is that the person made liable (or perhaps held to be exempt from liability) has not in fact known or perceived a particular state of affairs. There is no necessary implication that such lack of knowledge or failure to perceive is blameworthy in the sense that he should have known or perceived, and therefore no necessary reference to an "inattentive" state of mind.

Normally, although not invariably ([92]), the punishment where there is intention or knowledge is more severe than where there is lack of knowledge or failure to perceive. But the latter "states of mind" still attract liability. Hence one can speak of a liability imposed on the ground of intending or knowing contrasting with a strict liability in the sense that the offender's particular state of mind (granted that it was not one of intending or knowing) is irrelevant. One cannot, however, leave the matter here because the framers of the code use "not knowing" or "not perceiving" in two rather different kinds of context. Sometimes it is clear that the legislators intend to impose a strict liability in the sense that they regard the question whether all due care was exercised or not as irrelevant. Yet in other cases the context shows that the legislators in imposing a liability for "not perceiving" or "not knowing" had in mind cases in which there had been a failure to perform a particular duty (with the further implication that failure to perform would normally be the result of carelessness) or some specific act of carelessness had occurred.

Where liability flows from a breach of duty it may remain strict in the sense that an assertion that all care had been exercised would not, even if proved, have been acceptable as a defence. The legislator wishes to impose liability in effect for carelessness and achieves this result through a formulation which

(92) See note 73 above.

covers situations in which there has been no carelessness as well as those in which there has. The particular formulation chosen ("not knowing" or "not perceiving") provided an easily ascertained and convenient basis for the determination of liability. At other times, however, it is a particular situation disclosing lack of care which is held to attract liability or one showing no lack of care which is held to mitigate or exclude liability.

"Mistake" or "accident" is expressed variously in the code by the terms *ts'o*, *wu* or *shih* or some combination of these. The context shows whether the reference of the term is to the fact that a mistake in procedure has occurred, to the fact that something has been done unintentionally, to the fact that there has been no personal fault or to the fact that there has been carelessness. There is no separate recognition of carelessness as a criterion of liability, no recognition of what in modern law would be called a category of negligence. Yet there is recognition of carelessness as a mental state which should attract liability.

Neither the articles nor the notes attached to them specifically mention carelessness or any state of mind that could be described as careless. The commentary occasionally explains the provisions of an article by a reference to the need for care or a failure to exercise sufficient care and foresight. Such references show that the writers of the commentary regarded such mental states as relevant for the proper comprehension of a provision. By and large, however, references to care or carelessness or to attentive or inattentive states of mind are not explicit. Where the code does wish account to be taken of carelessness it normally describes a specific situation and establishes whether there is or is not to be liability in that situation. Care or carelessness is implicit in the specific situation. It is not abstracted and presented as an independent criterion for attaching, diminishing or removing liability ([93]).

(93) I am most grateful for help generously given by Dr. M.J. Meijer and Professor A.F.P. Hulsewé.