

The Concept of *Tsang* in the T'ang Code

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Tsang is a significant concept in the code. It is found in the formulation of many rules on diverse topics and is one of the key notions used by the T'ang legislators (and their predecessors) in constructing a remarkably precise and integrated edifice of rules. According to Mathews Chinese-English dictionary *tsang* ⁽¹⁾ means 'booty, plunder, stolen goods, bribes'. Western translators of Chinese legal material have taken it variously as 'illicit goods' ⁽²⁾, 'pecuniary malfeasance', 'sums involved in an offence', 'illicit profit' or 'profit' ⁽³⁾, 'biens mal acquis' ⁽⁴⁾ and 'produit d'acte illicite' ⁽⁵⁾. In fact no single word or phrase can give an adequate rendering for all the contexts in which it occurs. Consequently it is better to leave it untranslated and allow the sense to appear from the context. Subject to this caveat one may say that *tsang* in the broadest sense expresses either property which the law treats as having been unlawfully acquired and with respect to which it establishes a penalty, or property which has been lost, destroyed or damaged as a consequence of someone's act with respect to which again the law establishes a penalty.

(1) N° 6705.

(2) W. JOHNSON, *The T'ang Code I* (1979), 297.

(3) TWITCHETT, *The T'ang Market System*, *Asia Major* N.S. 12 (1963), 243ff. He translates differently according to the context.

(4) G. BOULAIS, *Manuel du code chinois* (1924, reprinted 1966), 7.

(5) R. DELOUSTAL, *La justice dans l'ancien Annam*, *Bulletin de l'École Française d'Extrême Orient* 9 (1909), 113 (= article 28 n 1).

The code itself explicitly distinguishes between six kinds of *tsang* all of which it terms 'original' or 'primary' (*cheng*)⁽⁶⁾. More accurately it distinguishes between six offences which involve *tsang*. These are: forcible theft and ordinary theft⁽⁷⁾, accepting bribes and subverting the law or accepting bribes and not subverting the law⁽⁸⁾, acceptance of property by supervisory officials within the area of their jurisdiction⁽⁹⁾ and cases where liability is imposed on account of *tsang* not falling under one of the other heads (*tso tsang*). In each of these offences the penalty is graded according to the amount of *tsang* received but the ratio between amount and penalty differs. Thus the forcible thief of goods worth a piece of cloth one *ch'ih* in length⁽¹⁰⁾ is punished by penal servitude for three years, and of goods worth 10 *p'i* or more⁽¹¹⁾ by strangulation⁽¹²⁾. In the case of ordinary theft the penalty for taking goods worth a piece of cloth one *ch'ih* in length is 60 blows with the heavy stick and that for taking goods worth 50 *p'i* or more is exile with added labour⁽¹³⁾. Where a supervisory or custodial official accepts a bribe and subverts the law the scale is one *ch'ih*, 100 blows with the heavy stick, 15 *p'i*, strangulation; if he does not subvert the law, one *ch'ih* entails 90 blows with the heavy stick and 30 *p'i* exile with added labour⁽¹⁴⁾. A supervisory official who accepts goods worth

(6) See the commentaries to book 4, article 5 (= article 33 of Johnson's translation, p. 184 of the work cited note 2 above) and book 26 article 1.

(7) These offences can also be committed even though no property is taken, that is, no *tsang* are involved. See book 19, articles 12, 13.

(8) The specific article (book 11, article 6) deals only with the case of supervisory and custodial officials who accept bribes.

(9) Book 6, article 10 (= JOHNSON'S article 54, *op. cit.* 263) defines supervisory officials as those who are in charge of offices or the investigation of cases and custodial officials as those who issue orders to clerks and are in sole charge of matters or have control of jails or granaries.

(10) A *ch'ih* is slightly less than one English foot (JOHNSON, *op. cit.*, xiii).

(11) A *p'i* is a piece of cloth/silk 1.8 *ch'ih* by 40 *ch'ih* (JOHNSON, *id.*).

(12) Book 19, article 12.1.

(13) Book 19, article 13.

(14) Book 11, article 6.

one *ch'ih* within his area of jurisdiction is punished by 40 blows with the light stick, the maximum punishment for accepting goods worth 50 *p'i* or more being exile to 2000 *li* ⁽¹⁵⁾. For the miscellaneous class of *tsang* offences (*tso tsang*) the penalty starts with 20 blows for one *ch'ih* and progresses to a maximum of three years penal servitude ⁽¹⁶⁾. It is these differences in the calculation of the penalty that account for the division into the six classes of *tsang*. There are numerous offences in the code which determine the penalty by reference to *tsang*. Scales giving the relation between *tsang* and penalty are not set out for each individual offence. Instead the code provides that the offence is to be treated in the same way as, or as comparable to, one of the six basic *tsang* offences ⁽¹⁷⁾.

It seems that *tsang* are qualified as 'primary' or 'original' in two different senses. There is a reference to the fact that they constitute the six 'basic' categories under one or other of which all remaining kinds of *tsang* are to be subsumed. But there is also a reference to a rather different kind of quality. *Tsang* are 'primary' or 'original' in the sense that they are the actual physical objects which have been appropriated or otherwise misused. A contrast is drawn with *tsang* which are the product of the actual physical objects, namely the value of the labour of a human or animal or the rent of property such as mills and shops. The standard case is that of an official who makes use of the labour of persons under his jurisdiction or borrows from such persons their slaves, cattle, horses, mills, shops, carriages or boats. In these cases the *tsang* consists of the value of the labour, which is assessed at three *ch'ih* of silk per day ⁽¹⁸⁾, and of the

(15) Book 11, article 8. One *li* is approximately one third of an English mile (JOHNSON, *op. cit.*, xiii).

(16) Book 26, article 1. On this see P. SEIDEL, *Die Sanktion der ungerichtfertigten Bereicherung im chinesischen Recht der T'ang-Zeit, Oriens Extremus* 22 (1975), 137.

(17) For the distinction between 'being treated in the same way' and 'as comparable to' another offence see below.

(18) Calculation of the value of 'borrowing' another's slave, horse, domestic animal or cart is made on the same basis.

rent for the mill, shop or boat borrowed⁽¹⁹⁾. As will be seen the distinction between the actual physical object and the value of the labour or the use taken from the object is important in the context of the ultimate fate of the *tsang*.

Characteristically the code is able to deal in a neat and concise way with a large number of different situations by classifying them as falling under the head of one of the six main *tsang* offences. In some cases the effect is to ensure that the penalty established for the main offence is also the penalty for the offence subsumed under it. But in other cases, where there is held to be some significant difference between the states of affairs constituting the two offences, the penalty or some feature of it is not the same. The framers of the code used two techniques to achieve this result. First, they might vary the relationship between the main offence and that held to fall under it. If the latter was stated to be treated in the same way as the former⁽²⁰⁾, then all the penal consequences of the main offence attached to it, but if it was stated to be merely comparable to the main offence⁽²¹⁾ not all the penal consequences of the latter attached. More is said on this below. Second, a specific variation in the penalty could be established through the enactment that the penalty for the subsidiary offence was to be so many degrees more or less than that for the main offence⁽²²⁾ or by stating that it should be subject to an upper limit. Some illustrations of the applications of these techniques follow.

The kidnapping of a slave is treated in the same way as forcible theft, the penalty being determined according to the value of the slave (*tsang*) on the scale laid down for that offence. How-

(19) Book 4, article 5.iii commentary (JOHNSON, article 33.2, *op. cit.*, 186f); book 4, article 6.iii,iv (JOHNSON, article 34.2,3, *op. cit.*, 190f); book 11, article 11.

(20) A *i* B *lun* where A is the subsidiary and B the main offence. See book 6, article 9.iii (JOHNSON, article 53.4, *op. cit.*, 263).

(21) A *chun* B *lun*. See book 6, article 9.i,ii (JOHNSON, article 53.2,3, *op. cit.*, 262).

(22) For degrees of penalty see G. MACCORMACK, *The T'ang Code: Early Chinese Law, The Irish Jurist XVIII* (1983), 133f.

ever the article specifies that no penalty greater than exile to 3000 *li* is to be imposed⁽²³⁾. The result is that no matter how high the value of the slave the death penalty cannot be incurred⁽²⁴⁾. Where someone deliberately sets fire to another's house or structure and takes property both the property taken and that lost through the fire constitute the *tsang* and are treated as having been forcibly stolen. Their value is calculated and the penalty prescribed for forcible theft is imposed⁽²⁵⁾. If someone for a reason unconnected with robbery assaults another then afterwards sees property and seizes it the case is treated as one of forcible theft. But since there was originally no intention to steal, where the value of the *tsang* taken justified the death penalty, the offender is to be sentenced merely to exile with added labour⁽²⁶⁾.

Many offences are subsumed under the head of ordinary (non-forcible) theft. These may be divided into two groups: offences which are to be treated in the same way as theft and those which are to be treated as comparable to it. In the first group are comprised cases in which someone has made a personal profit from illegal conduct as officials in charge of inspecting government horses and selling those which are unfit who personally pocket profits made from their sale⁽²⁷⁾, market officials

(23) Book 20, article 7.

(24) The same limitation does not apply to the penalty for taking property which the slave has with him, also assessed according to the scale for forcible theft. But the penalty on this account cannot be added to that for the kidnapping of the slave. Whichever is the heavier is to be imposed. See the commentary to book 20, article 7.

(25) Book 19, article 14.

(26) Book 19, article 16. If the goods are merely 'stealthily taken' the case is treated as ordinary theft.

(27) Book 15, article 2. The article provides that the relevant officials are to make regular inspection of government horses to select those which are old or otherwise unfit for use. If their examination and selection is 'not by means of the truth' they are to be punished by a beating whose severity depends upon the number of horses involved. If, in addition, there is an increase or decrease in value where the *tsang* entails a penalty heavier than that already provided (on this see below) there is also liability on amount of *tsang*. The commentary (if I am interpreting it

who establish unfair prices in the markets and thereby personally profit⁽²⁸⁾, those who make a profit by exchanging personal for government property or vice versa⁽²⁹⁾ or those who use unfair measures for the giving out or taking in of official goods and thereby make a personal profit⁽³⁰⁾. Similarly one who profits from another's labour by appropriating some material product on which the latter has expended effort (for example, mown and stored grass) is treated as a thief⁽³¹⁾. Also included are certain cases in which officials 'borrow' government property, viz. the borrowing of official articles by supervisory or custodial officials where there is no written record⁽³²⁾, and the private employment by officials of 'corvée labour' which should be applied to government service⁽³³⁾. Forcibly to take fruit from government or private land is treated as ordinary not forcible theft⁽³⁴⁾. Finally the offence of inducing a slave to leave his master or of knowingly to sell an absconding slave (instead of handing him to the government) also falls into this group⁽³⁵⁾.

One offence deserves a special comment. Officials in charge of granaries or storehouses who deliberately allow thieves to escape are held to have incurred the same penalty as the thieves⁽³⁶⁾. Yet in this case the commentary makes it clear that the officials are not in all respects to be treated as though they had committed theft themselves. For example the rule requiring double repayment (*pei tsang*)⁽³⁷⁾ is not to be applied⁽³⁸⁾.

correctly) contemplates a situation in which the old, useless horses are to be sold, and the liability on account of *tsang* arises where this is not done 'by means of the truth' with a resultant increase or decrease in the value of the horses (provided there is no personal profit by the official).

(28) Book 26, article 31.

(29) Book 26, article 4. See also below at note 50.

(30) Book 26, article 32.i.

(31) Book 20, article 5.

(32) Book 15, article 17 and commentary.

(33) Book 18, article 24.

(34) Book 27, article 19.i.

(35) Book 20, article 7.

(36) Book 15, article 16.i.

(37) On this see below.

(38) There are also a number of clear cases of theft which are indi-

If one takes the essence of theft to be removal of another's property without his permission one can see why a number of offences are classified not as theft itself but as comparable to theft. The main criterion for membership of this class appears to be the negative one of a clear failure to satisfy the conditions for theft itself. Otherwise the offences so classified have little in common. First there are a number of offences in which property is obtained by intimidation or deceit. One might say here that such offences resemble theft but cannot be classified as theft because to all appearance the property is obtained with the consent of the owner. Using blackmail or intimidation to obtain property is treated as comparable to theft but the penalty is increased by one degree⁽³⁹⁾. Obtaining property by deceit⁽⁴⁰⁾ or through the falsification of private or government documents⁽⁴¹⁾ is also treated as comparable to theft but here there is no increase in penalty. Some other offences which are not described in the language of deceit or fraud may in fact have been thought to be instances of these notions. Thus those who obtained a profit from the manufacture or sale of defective articles⁽⁴²⁾ or who used privately made, unfair measures in the markets with the result that there have been profits or losses⁽⁴³⁾, or merchants who used unfair practices to obtain profits in the market⁽⁴⁴⁾ are all sentenced for having committed an offence comparable to theft.

Other offences, however, involve merely destruction or loss of property or damage to property with no necessary element of deceit or profit. Possibly the connecting link is the fact that the owner has been deprived of property where it is lost or destroyed

vidually punished in the code because the nature of the object stolen requires some special treatment, such as the theft of imperial seals or of prohibited weapons. See book 19, articles 4,1,6,7,8,9.

(39) Book 19, article 15.

(40) Book 25, article 12.

(41) Book 25, article 13.

(42) Book 26, article 30.i.

(43) Book 26, article 32.

(44) Book 26, article 33.

is not one adopted explicitly by the code but it may reflect to some extent assumptions which guided the legislators to a decision that liability on account of *tsang* should be imposed. My first category is that in which officials have unlawfully taken the property of others but not in circumstances deemed sufficient to warrant liability under the more serious offences of taking bribes and subverting the law or accepting property within the area of jurisdiction. Thus persons who accept property from another in order to make a petition on his behalf are liable on account of *tsang* (with an increase in penalty of two degrees) ⁽⁶²⁾ as are supervisory officials who borrow property from persons under their jurisdiction ⁽⁶³⁾, improperly make use of the labour of certain classes of officials under their jurisdiction ⁽⁶⁴⁾ or accept pigs or sheep as provisions ⁽⁶⁵⁾, and those who extort property from others by means of their office or influence ⁽⁶⁶⁾.

My second category is that of the wrongful discharge of their duties by officials in matters involving property where no personal profit has been made. Several offences of this group concern taxes. Village headmen or other officials who fraudulently alter the particulars of the household registers so as to decrease or increase the taxes due are liable on account of the *tsang*, that is, the amount by which the taxes have been improperly in-

(62) Book 11, article 4. The article applies to all persons other than supervisory officials or influential persons. The most obvious case of its application would be that of a junior official. Those who give the property are liable on account of *tsang* with a decrease in penalty of three degrees.

(63) Book 11, article 10. Here it is the mere fact of borrowing which imposes liability, unless the property consists of clothing, utensils or trinkets in which case it is the failure to return after thirty days which imposes liability. By book 15, article 18 supervisory or custodial officials who privately borrow non-productive government property like clothing, bedding or implements within the area of jurisdiction are liable on the ground of *tsang* if the property is not returned within ten days. Cfr also above at notes 59, 60.

(64) Book 11, article 11.ii. 11.iii treats in the same way cases of borrowing or employing within the area of jurisdiction other people's slaves, animals, carts and so on.

(65) Book 11, article 12.

(66) Book 11, article 16. Here the penalty is decreased by one degree.

creased or decreased, provided that all taxes collected have been remitted to the government⁽⁶⁷⁾. In times of natural disasters such as drought or floods the areas affected are entitled to a remission of taxes. If the officials in charge improperly levy taxes or, alternatively, fail to levy them when they should they are liable on the ground of *tsang*⁽⁶⁸⁾ as they are in other cases where persons are entitled to exemption and yet taxes are wrongly levied (or, conversely, wrongly not levied in cases where there should be no exemption)⁽⁶⁹⁾. Under the same head liability is imposed on officials who disperse unnecessarily large amounts of government property for such purposes as building or sacrifices or entertainments⁽⁷⁰⁾, and on those in charge of issuing or receiving government stores where there is a surplus or deficit⁽⁷¹⁾. Supervisory officials are not permitted within their jurisdiction to entrust the transport of taxes to others. If they do and any profit (*tsang*) is made they are liable on this account⁽⁷²⁾. Officials who raise levies for forced labour without informing their superiors or obtaining permission⁽⁷³⁾ or in cases for which there is no legal authority⁽⁷⁴⁾ are liable on account of *tsang*. Similarly liable are those responsible for the construction of public works where the buildings cannot be used in time or the work has to be done again⁽⁷⁵⁾ or those who employ labour but do not use it⁽⁷⁶⁾. Market officials who estab-

(67) Book 12, article 4.

(68) Book 13, article 6.

(69) Book 13, article 9 and cfr 10.

(70) Book 15, article 23 and commentary.

(71) Book 15, article 27. The commentary explains that there is a surplus where more property is taken than is issued and a deficit where new or superior property is given in exchange for old or inferior.

(72) Book 15, article 23. 'Profit' here seems to mean the difference between what is due as tax and what is actually collected. Such profit is to be returned to the owner, the taxpayer.

(73) Book 16, article 17 and cfr also 17.i.

(74) Book 16, article 18. Liability attaches where such labour has been used for ten days or more.

(75) Book 16, article 19.

(76) Book 16, article 21.

lish unfair prices in the market are held liable on account of *tsang* with respect to the difference between the fair and the actual price⁽⁷⁷⁾ and officials who use incorrect measures for the receipt or disbursement of government goods are also liable on account of *tsang* with respect to what is lost or gained thereby⁽⁷⁸⁾.

The third category includes offences dealing with the destruction or loss of property or damage to it. Those who kill animals, other than horses or cattle, belonging to their relatives⁽⁷⁹⁾ or who let loose government or private animals which destroy or eat government or private property⁽⁸⁰⁾ are liable on account of *tsang*. Officials responsible for the storage of goods in warehouses are liable if they do not observe the regulations on keeping the goods dry and aired with the result that they deteriorate⁽⁸¹⁾. The destruction of Buddhist or Taoist statues on which much effort and labour have been expended is punished according to the value of the *tsang*, taken here to be the value of the labour expended⁽⁸²⁾. Deliberate destruction of a person's grave-stones or stone animals is treated in a similar way⁽⁸³⁾. Where someone deliberately creates a disturbance in the market with the result that property is lost⁽⁸⁴⁾ or breaks a dike to steal water and property is lost in the resulting flood⁽⁸⁵⁾ he is liable on the ground of *tsang*. Where there is a flood caused by the failure to keep dikes in repair the penalty is decreased by five degrees⁽⁸⁶⁾. The same decrease in penalty applies where property is lost or damaged through a failure to observe the correct rules for ensuring that boats are kept seaworthy and navigated

(77) Book 26, article 31. Cfr also above at note 28.

(78) Book 26, article 32.i. Cfr also above at note 30.

(79) Book 15, article 11.

(80) Book 15, article 15.

(81) Book 15, article 19.

(82) Book 19, article 7.

(83) Book 27, article 21.

(84) Book 27, article 1.

(85) Book 27, article 3. Cfr also above at note 46.

(86) Book 27, article 2.

properly⁽⁸⁷⁾. In the case of accidental fires which damage other people's property the penalty is decreased by three degrees⁽⁸⁸⁾. To eat fruit on government or private land or to throw away or destroy it entails liability on account of *tsang*⁽⁸⁹⁾.

In my fourth category I have placed offences in which someone obtains another's property improperly where the circumstances are not sufficient to constitute theft, fraud or the like. Knowingly to buy stolen property imposes liability on account of *tsang*⁽⁹⁰⁾ but the penalty is decreased by one degree. On the other hand acquiring property in the knowledge that it has been obtained by deceit from the government or a private person attracts no decrease in penalty⁽⁹¹⁾. To receive another's property on trust and unlawfully to use or spend it⁽⁹²⁾ or to seize property from a debtor in excess of the debt⁽⁹³⁾ imposes liability on account of *tsang*. Where someone finds hidden articles on another's land and keeps them, the share due to the landowner is estimated and liability imposed on account of *tsang* with a decrease in penalty of two degrees⁽⁹⁴⁾. There is no decrease in penalty where lost property is found and not handed to the government within five days unless the property is privately owned in which case there is a decrease in penalty of two degrees⁽⁹⁵⁾. Property obtained by blackmail is treated as imposing liability on account of *tsang* where the blackmailer has a 'reason' or 'ground' for his threat⁽⁹⁶⁾.

(87) Book 27, article 5.

(88) Book 27, article 8.

(89) Book 27, article 19.

(90) Book 20, article 10.

(91) Book 25, article 12.i.

(92) Book 26, article 9.

(93) Book 26, article 11.

(94) Book 27, article 25.

(95) Book 27, article 26.

(96) Book 19, article 15, commentary where the example is given of A trampling down B's crops and being threatened with legal action by B in order to induce payment of more than the compensation for the damage.

There remain a few offences which I have not placed in any of the above categories: taking prohibited weapons and illegally crossing the frontier⁽⁹⁷⁾, deceitfully avoiding labour service⁽⁹⁸⁾, and the delivery of property in the event of a dispute to the wrong party whether the government or a private person⁽⁹⁹⁾.

In order to make clear the variety of states of affairs subsumed under each of the main *tsang* offences I have adopted a mode of exposition different from that of the code itself. As a result clarity in one respect has been achieved at the cost of obscurity in another. Although the code has a rough grouping of offences according to their subject matter, it does not place together all cases of liability under one particular offence. For example a number of the offences dealing with theft or accepting property within the area of jurisdiction are grouped together but others which are held to fall under one of these heads may be found in different contexts. In particular the cases in which liability is imposed on account of *tsang* (*tso tsang*) are found scattered throughout the code. One reason for the code's failure to treat together all offences of the same kind lies in the particular technique of exposition it has adopted, a technique followed throughout the code not just in the area of law constituted by the various *tsang* offences. It is this technique which my method of exposition has obscured. Where the T'ang legislators wish to establish a penalty for an offence they describe the principal elements at the beginning of the article and state the penalty. They then proceed either in the article or in the commentary to consider some variation in the facts, that is, some variation either in the acts or omissions held to constitute the offence or in the status of the persons involved. These variations may be dealt with in two ways. The article or commentary after establishing the main offence may provide that in variant X the penalty is to be increased or decreased by a certain number of

(97) Book 8, article 12.

(98) Book 25, article 19.i. Here the liability on account of *tsang* is according to the value of the labour of which the government has been deprived.

(99) Book 15, article 20.

degrees, or that in variant X the penalty is that for a different (though normally related) offence. In the context of *tsang* offences one frequently finds the introduction of a variant where the penalty is shifted to that for a different offence. I give two examples from a large number that could be adduced.

Book 27 article 19 deals with the taking of fruit from a government or private orchard. It starts by specifying that those who unlawfully eat the fruit are liable on the ground of *tsang*, and proceeds by establishing that those who throw away or abandon the fruit are liable on the same ground. But if persons take and remove the fruit the offence is stated to be comparable to theft. The next part of the article starts by considering the position of officials in charge of the government orchards where the fruit is grown. If they voluntarily give the fruit to others they are liable on the ground of *tsang* with an increase in penalty of one degree. The article now reverts to the position of those who take the fruit and introduces the variant of force. Those who forcibly take commit an offence which is to be treated as theft. The officials in charge in such a case are not liable where they report the facts immediately to the authorities⁽¹⁰⁰⁾. The article concludes with the statement that the penalty for those who consume without authorization government food or drink is the same. In the commentary this statement is explained as meaning that those who eat or drink without authorization government food or wine are liable on the ground of *tsang* but that those who throw it away or destroy it commit an offence comparable to theft just as those who take and remove it.

Book 11 article 10 deals successively in its three parts with the following situations: (i) officials who borrow property from those under their jurisdiction are liable on the ground of *tsang*, (ii) if such property is not returned within 100 days, the offence is treated as the acceptance of property within the area of jurisdiction, (iii) where force or intimidation has been used the

(100) The position where the official does not report is not stated. Possibly he would have been held also to have committed theft of the fruit.

penalty under the appropriate offence is increased by two degrees, (iv) where a profit has been made through buying or selling from or to those under one's jurisdiction the offence is treated as soliciting property within the area of one's jurisdiction⁽¹⁰¹⁾, (v) if force has been used to compel the trade any resulting profit entails the same penalty as that for accepting bribes and subverting the law, (vi) where the official has not paid what he owes under a contract within fifty days of the time stipulated for payment he is treated as having accepted property within the area of jurisdiction⁽¹⁰²⁾, (vii) where clothes, utensils or some trifling object have been borrowed and not returned within thirty days liability is on the ground of *tsang*.

Finally there deserve to be noted certain special techniques and rules concerned with the calculation of the penalty under the various *tsang* offences. An important technique employed by the code is the qualification of *tsang* as 'light' or 'heavy'. An article may establish a penalty for a particular offence but provide that if the *tsang* are 'light' or 'heavy' the penalty appropriate to a different offence is to be applied. What this means is that if the calculation of the *tsang* according to the scale appropriate to the offence under consideration would yield a penalty *lighter* than that of another relevant offence it is the latter which is to be followed. On the other hand the offence under consideration may not itself provide for the calculation of *tsang*. Yet there may be another relevant offence under which *tsang* are calculated. If the penalty under the latter offence, calculated according to the value of the *tsang*, would be *heavier* than that established by the initial offence it is the one to be followed. Thus the general effect of the technique is to

(101) By book 11, article 8.i this offence is punished one degree more severely than that of accepting property within the area of jurisdiction.

(102) The commentary adds that where he fails to pay within the period of fifty days his offence is that of not paying debts due under contract. Book 26, article 9 establishes the penalty of failure to pay what is owed under contract according to the value of what is owed and the length of time for which the debt has been outstanding.

ensure that the heavier of two available penalties is to be applied. Some examples follow.

Where someone takes prohibited articles across the frontier he is liable on the ground of *tsang*. But if the *tsang* are 'light' the law on privately having or privately making such prohibited articles is to be followed⁽¹⁰³⁾. The meaning is that where calculation of the value of the prohibited articles would yield a lighter penalty than that for the possession or making of them the penalty under the latter offence is applied. The commentary gives the example of a lance and a suit of armour. If someone takes a lance worth thirty *p'i* of silk, on the calculation appropriate to the scale for liability on account of *tsang*, the penalty is two years penal servitude. The penalty for private, unauthorized possession of a lance is one and a half years penal servitude. Therefore, the commentary states, one follows the general law on *tsang* liability and not the specific rule relating to lances. On the other hand if a person takes one suit of armour across the frontier the specific rule relating to armour is to be followed, under which private possession entails a penalty of exile to 2000 *li*, because the maximum penalty under the general liability on account of *tsang* is penal servitude for three years⁽¹⁰⁴⁾.

Where supervisory or custodial officials borrow for their private use government slaves or animals or, having borrowed them, lend them to others, the penalty is 50 blows with the light stick. But if, on the calculation of the *tsang* (that is, the usage of the slave or animal), the penalty would be heavier the offence of receiving property within the area of jurisdiction governs the situation⁽¹⁰⁵⁾. Neither the article nor the commentary states how the value of *tsang* is to be calculated. But the meaning can only be that if, according to the scale established for the offence of receiving property within the area of jurisdiction, the amount

(103) Book 8, article 12.

(104) The commentary states 3000 *li*, apparently a mistake for 2000. Cfr also book 25, article 13; book 29, article 4.

(105) Book 15, article 14.

of *tsang* borrowed would entail a penalty heavier than 50 blows with the light stick the heavier penalty is to be applied.

Book 13 article 6 provides that where areas have been affected by drought, rain, plagues of locusts or other natural disasters the officials in charge are to report the circumstances to ensure remission of taxes. If they do not report or if they make a false report they are punished with 70 blows of the heavy stick. If in consequence taxes have been improperly levied or have not been levied although they should have been, and the *tsang* are 'heavy', the official incurs liability on account of *tsang*. The commentary explains that the amount of taxes improperly levied or not levied is to be calculated. If on the appropriate scale the resulting *tsang* would lead to a penalty heavier than the 70 blows prescribed for the basic offence that heavier penalty is to be imposed. The appropriate scale is that established for the offence of liability on account of *tsang* (*tso tsang*)⁽¹⁰⁶⁾.

A penalty of penal servitude of one and a half years is imposed for the deliberate killing of government or private horses or cattle, but if the *tsang* are 'heavy' the offence is comparable to that of theft. Under the law of ordinary theft the taking of goods worth 15 *p'i* of silk entails a penalty of two years penal servitude. Thus if a horse worth so much is deliberately killed this is the appropriate penalty, not the one and a half years penal servitude stipulated as the minimum⁽¹⁰⁷⁾. Those who gamble with property are punished with 100 blows with the heavy stick. Where the *tsang* are 'heavy' the offence is comparable to that of theft. This means that where one wins goods worth 5 *p'i* of silk on a bet the penalty (under the scale for the calculation of *tsang* applied to the offence of ordinary theft) is penal servitude for one year⁽¹⁰⁸⁾.

In the case of 'repeated' offences a special rule governs the calculation of *tsang*. 'Repeated' means either that an offence has been committed on a number of different occasions, for example,

(106) Similar cases in book 13, articles 9, 10.

(107) Book 15, article 8.

(108) Book 26, article 14. Other examples: book 15, articles 2, 15; book

several different acts of theft, or that one offence has been committed against three or more persons, for example each member of a group of three or more persons is robbed by the same person at the same time⁽¹⁰⁹⁾. The law does not impose a penalty separately for each offence or with respect to each individual wronged. It strikes a balance between the total amount of *tsang* involved and the amount relevant to a particular offence or person. This is achieved by accumulating the *tsang* and halving the total. The commentary to the article already cited gives the following example: 'If, in one day, an official takes goods worth eighteen *p'i* of silk from three sources within the area under his supervision, or if three persons give goods worth eighteen *p'i* of silk and send them to him at the same time; in each case the sentence is for one half the value, or nine *p'i*'⁽¹¹⁰⁾. A note to the same article established an important exception to this rule. In the case of supervisory or custodial officials who take bribes or are given goods on account of some matter by three or more persons or who repeatedly take bribes with respect to one matter or who commit repeated thefts within the area under their jurisdiction, the *tsang* are accumulated but not halved⁽¹¹¹⁾.

The ultimate fate of the *tsang* depends upon a number of factors. In the first place a distinction is drawn between 'primary' or 'original' *tsang* and *tsang* constituted by the value of labour or rent. It is only to the 'original' *tsang* that the rules determining ultimate fate apply⁽¹¹²⁾. The normal rule is that the 'original' *tsang* are to be returned to the owner whether a private person or the government. Where they have been 'expended' the equivalent is to be returned except, for reasons of compassion, in a case where the penalty is death or life exile⁽¹¹³⁾. The normal

16, article 17.i; book 19, articles 2, 6, 8, 9; book 25, article 15; book 26, articles 30, 33; book 27, articles 3, 8, 26.

(109) Cfr book 6, article 1.iii (JOHNSON, article 45.2a-i, *op. cit.*, 237).

(110) JOHNSON'S translation, *op. cit.*, 238.

(111) JOHNSON, *op. cit.*, 241.

(112) Book 4, article 5.iii (JOHNSON, article 33.2, *op. cit.*, 186).

(113) Book 4, article 5 (JOHNSON, article 33). The commentary to 5.i

rule is qualified in two cases. First, where there is theft double the *tsang* are to be returned to the owner. The reason for this qualification is stated to be that cases of theft are more serious than other cases involving *tsang* because of the offender's desire for another's property⁽¹¹⁴⁾. It is in this context that the distinction between offences treated as theft and offences treated as comparable to theft is important. The rule requiring repayment of double applies only in the former case, not the latter. The second qualification concerns the case in which both parties, those who supply and those who take the *tsang*, are considered to be implicated in the offence. Here the *tsang* are not returned to the owner but confiscated by the government. This qualification applies where persons have given property to officials as bribes or to seek favours, or where private persons possess forbidden articles such as military weapons⁽¹¹⁵⁾ ⁽¹¹⁶⁾.

(JOHNSON, 33.1b) states: 'Offences for which a person is sentenced to death or to be sent into life exile because of *tsang* are very serious. In most cases the family property has been broken up and the *tsang* already expended. There is pity because of the sentence to life exile or death and the *tsang* need not be repaid', JOHNSON, *op. cit.*, 186.

(114) Book 4, article 5.ii (JOHNSON, article 37.1.d).

(115) See Book 4, article 4 (JOHNSON, article 32).

(116) I would like to thank Dr. W. DOLBY for his help with a number of passages.