

# The T'ang and Ming Law of Homicide

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The T'ang code, first enacted in 624 A.D. (1), was a remarkable legislative document. It succeeded in producing a statement of the law which, both in form and substance, survived for many centuries and through successive dynasties. Considerable sections of it are even to be found in the Ch'ing code which remained law until 1911. Chinese legal history, therefore, from the point of view of the codified penal law, displays a high degree of homogeneity in its development from the 6th to the 20th century A.D. Nevertheless very important changes did occur in the law and to some extent these were reflected in its most authoritative formal statement, that of the articles of the code. The Ch'ing code is a much more substantial document than the T'ang because, in addition to the actual articles (*lü*), it contains a large number of rules drawn from decisions of the highest courts or

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1) This is the first time the code was enacted in its complete form. For further details and the literature see G. MACCORMACK, *The T'ang Code : Early Chinese Law, The Irish Jurist* XVIII (1983), 132.

introduced by special imperial edict (*li*) (2). Some of its articles (*lii*) are virtually the same as those of the T'ang code, some are based on a T'ang model and some were not present in the earlier code.

In essence the Ch'ing code is an expanded and modified version of the Ming code promulgated in 1397. It was this code which for the first time significantly changed the arrangement and revised the substance of the T'ang code (3). Thus Chinese legal history for the period stretching from the T'ang to the Ch'ing can be divided into two main stages, that prior to 1397 in which the dominant element was the T'ang code and that from 1397-1911 in which the dominant element was the model furnished by the new Ming code. The changes introduced by the code of 1397 constitute the single most important factor bearing on an understanding of the development of codified penal law from the T'ang to the Ch'ing. From this appears the particular interest of a comparison between the T'ang and the Ming codes. The present study is an attempt to illustrate this point. It takes as its centrepiece book 19 of the Ming code which contains the articles on homicide (*jen ming*) and compares the treatment of the rules with that of the T'ang code for the same subject matter (4).

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2) D. BODDE and C. MORRIS, *Law in Imperial China* (1973), 63ff; M.J. MEIJER, *An Aspect of Retribution in Traditional Chinese Law*, *T'oung Pao* LXVI (1980), 200.

3) BODDE and MORRIS, *op. cit.*, 59.

4) For the T'ang code I have used the *T'ang-lü shu-i* edition, and for the Ming the *T'ang Ming-lü ho-pien* edition of HSÜEH Yun-sheng and the *Ming lü chi-chieh fu li* edition. The latter is cited according to the page numbering of the Taiwan reprint (I would like to thank Professor Paul CH'EN for making available to me a photocopy of the relevant section of this edition).

Book 19 of the Ming code is headed 'homicide' (*jen ming*) and contains twenty articles (*lü*) dealing in various ways with cases of killing, though incorporating as well injuries falling short of death or offences other than killing. The T'ang code contains no such book devoted to homicide. Instead the various provisions that contemplate acts resulting in a person's death are mainly to be found in the book on 'Violence and Robbery', that on 'Assaults and Accusations' and that entitled 'Miscellaneous Articles' (5). One sees that the compilers of the Ming code in rethinking the basic classification of the material treated the fact of killing and the offences relating to it more systematically than the compilers of the T'ang. Furthermore the grouping of the rules in a book headed 'Homicide' evidences the importance attached to killing as an offence. When the T'ang code was first compiled the emphasis was not upon killing as such but upon violent acts in general or fights, assaults and beatings. The form of the articles shows that this still to some extent remained the position in the Ming code, but the classification of the specific rules under the head of *jen ming* reveals the shift in focus. It is the fact that someone has been killed that now emerges as the most important element which a number of rules have in common and so provides the basis for their common membership of a group.

Within book 19 the articles are arranged in what appears to be a descending order of gravity. I reproduce with some

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5) I have followed the translation given by W. JOHNSON, *The T'ang Code I* (1979), 42.

modifications the headings given in the Table of Contents to STAUNTON's translation of the Ch'ing code (6).

1. Premeditated homicide (plotting to kill another).
2. Murder of an officer of the government (plotting to kill by a subordinate etc.).
3. Parricide (plotting to kill grandparents or parents etc.).
4. Killing an adulterer (including plotting by wife and lover to kill husband).
5. Widows killing their deceased husband's relations.
6. Murder of three or more persons in one family.
7. Murder with intent to mangle and divide the body of the deceased for magical purposes.
8. Rearing venomous animals and preparing poisons (with a view to killing someone).
9. Killing with an intent to kill and killing in an affray.
10. Depriving of food or raiment (so as to injure or kill).
11. Killing or wounding in play, by error or purely by accident.
12. A husband killing his culpable wife.
13. Killing a son, grandson or slave and attributing the crime to an innocent person.
14. Wounding mortally or otherwise by shooting arrows and similar weapons.
15. Wounding mortally or otherwise by means of horses and carriages.
16. Practitioners of medicine killing or injuring their patients.

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6) G.T. STAUNTON, *Ta Tsing Leu Lee* (1810, reprinted 1965), 1-li. The Ming code contains the same articles.

17. Killing or wounding by means of traps or springs (when hunting).
18. Occasioning the death of an individual by violent and fearful threats (and so driving him to suicide).
19. Compromising and concealing the crime of killing an elder relation.
20. Neglecting to give information of, or to interfere and prevent, a violent injury which is known to be intended.

Some of these provisions have no parallel in the T'ang code and hence with respect to that code represent complete innovations, although introduced into the law prior to the promulgation of the 1397 version of the Ming code. These are articles 7, 12, 13 and 18. Article 7 deals with the mutilation and cutting to pieces of a living person for magical purposes. Article 12 provides that where a wife or concubine beats or scolds her husband's paternal grandparent or parents and the husband, instead of applying to the court for the legal penalty, kills her, he is to receive 100 blows with the heavy stick. If the husband beats or curses his wife and as result she kills herself there is no liability (7). Article 13 deals with the case in which a paternal grandparent, parent, or family head deliberately kills respectively a grandson, son or slave and contrives to cast the blame onto someone else, establishing as a penalty 70 blows with the heavy stick and penal servitude for a year and a half. On the other hand if a son, grandson or slave makes use of the dead body of his

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7) The T'ang, like the Ming, code establishes a penalty for a wife who beats or curses her husband's paternal grandparents or parents (22.14).

parent, grandparent or family head in order to cast blame on another, he is to receive 100 blows with the heavy stick and penal servitude for three years (8). By article 18 a person who, on account of some affair, oppresses another to the extent that he commit suicide is to receive 100 blows with the heavy stick, and contribute 10 ounces of silver for the victim's funeral expenses.

In some cases the Ming code has taken a provision from the T'ang code as its base but substantially modified or added to it. For the moment I leave aside the Ming treatment of the main categories of killing (*mou sha*, *ku sha*, *tou sha*, *hsi sha* and *kuo shih sha*) and confine my examples to more specific cases. Book 17, article 6 of the T'ang code deals with plots to kill a certain category of relative and includes plots by a wife to kill her husband, punishing the offence with decapitation. The note to the article provides that where the wife's lover, on account of the adultery, kills the husband she is to be found guilty of the same offence even though she did not know the circumstances. The Ming code has a separate article regulating the various killings that may arise from adultery (19.4). Part incorporates the provision of the T'ang code in a slightly altered form and part is not in the earlier code. A husband who personally surprises his wife in adultery and on the spot kills both wife and adulterer is to be subject to no penalty. If he kills only the adulterer the wife is to be sentenced in accordance with the law (9). If the wife, on account of the adultery, has plotted with her lover to kill her

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8) There are further provisions of a related nature.

9) This means that she receives a beating and, at the option of the husband, is to be married or sold to another.

husband both are to be put to death, the wife by the lingering form and her lover by decapitation. If the adulterer kills the husband the wife, even though she does not know the circumstances, is to be strangled.

Both codes (10) establish as an offence the placing of an object in another's ear or nose or bodily opening, or the depriving a person of his clothing or food, with the result that the victim is injured. The penalty is graduated according to the type of wound. The Ming code adds a case not found in the T'ang, that of deliberately employing snakes to bite a person, but, more importantly, provides that where the injury received through the insertion of an object or the removal of food or clothing totally incapacitates the victim (loss of both eyes or of use of two limbs) the offender, in addition to receiving punishment, is to surrender to the victim half of his property so as to enable him to live. This shows an unusual combination of liability to punishment and obligation to compensate placed on the offender.

Both codes again impose a punishment on doctors who, in the course of treatment by drugs or acupuncture, by mistake do not follow the original prescription and so cause the patient to die. The T'ang code (26.7) simply prescribes as a penalty penal servitude for two years and a half. But the Ming code (19.16) takes a more sophisticated attitude. Another doctor is to be summoned and required to report on the case. If it appears from his investigation that the first doctor had no intention to inflict harm on the patient the death is to be treated as *kuo shih*, that is, no punishment is to be imposed but a sum of money is to be paid

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10) T'ang 18.1; Ming 19.10.

to the patient's family; the doctor, however, is to be barred from practice (11).

In several cases the Ming code adopts with minor modifications the corresponding T'ang provision. These may be briefly indicated. Ming 19.2,3 on plotting to kill imperial envoys, one's official superior or close relatives echo T'ang 17.5,6 and likewise Ming 19.5 on wives or concubines plotting to kill the paternal grandparents or parents of their deceased husband, or slaves plotting to kill their former family head, echoes T'ang 17.8. Ming 19.6 on the killing of three persons (not already subject to the death penalty) in one family follows T'ang 17.12. Ming 19.8 establishes a variety of offences relating to the making and keeping of *ku* poison capable of killing a person, the practising of various kinds of magic with the intention of killing or harming another, and the use of poisonous drugs to kill someone. It incorporates with some modifications and deletions three separate articles of the T'ang code (18.2,3,4). The Ming provisions on firing arrows or throwing bricks in the directions of towns or markets (19.14) or on riding horses or driving carts fast through towns (19.15), in either case with the result that someone is killed or injured, largely follow articles 4 and 5 from book 26 ('Miscellaneous Articles') of the T'ang code. Ming 19.19 on sons, grandsons or slaves who secretly make an accord with the killer of their parent, grandparent or family head is similar to T'ang 17.13, and Ming 19.20 on the liability of one whose associate threatens violence to another where he does not

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11) There are some other differences in the respective provisions.



help the person threatened or lodge information if violence has been used is a more general version of T'ang 28.6.

So far I have left out of account what may be termed the main categories of killing since they deserve a more extended treatment (12). These are *mou sha* (plot to kill), *ku sha* (deliberate killing), *tou sha* (killing in a fight), *hsi sha* (killing in a game), and *kuo shih sha* (killing by accident) (13). Although I have spoken of categories of killing the degree of generalization obtained in both codes is limited. The emphasis in the treatment of killing is partly on the factual situations from which the death results and partly on the pre-existing kin, marriage or official relationship of the parties. What may be termed the situational aspect emerges very clearly in cases such as firing arrows in the direction of towns, riding horses rapidly through towns, giving incorrect medical treatment, or placing objects in a person's ear or nose or depriving him of food or clothing. But it also appears, albeit at a more general level, in the typical situations which underly some of the main classifications, those of 'game' (14) and 'fight'. Even those categories that look more abstractly conceived, in their actual treatment, remain closely bound to

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12) Generally on killing see M.J. MEIJER, *The Concept of 'Ku-sha' in the Ch'ing Code*, in L. LANCIOTTI (ed.), *Il diritto in Cina* (1978), 85; MACCORMACK, *Ir. Jur.* XVIII (1983), 45ff, 69ff.

13) *Wu sha* (killing in error) is mentioned in both codes but does not seem to be recognized as a separate category. Certainly this is so for the T'ang code, and even in the Ming it does not seem to be singled out as a category in its own right.

14) J.D. LANGLOIS Jr, 'Living Law' in *Sung and Yüan Jurisprudence*, *Harvard Journal of Asiatic Studies* 41 (1981), 182 renders *hsi* ('game') as 'roughhousing'. B.E. WALLACKER, *The Chinese Offence of Homicide through Horseplay*, *Chinese Studies I* (1983), 259 translates the term by 'horseplay'.

factual situations. In the T'ang code *ku sha* is considered primarily as an incident of a fight (affray), and this connection is not altogether lost in the Ming code. *Kuo shih sha* is explained in terms of a series of specific situations. The most generally conceived category is that of *mou sha*, a plot to kill, but even here one can discern an underlying state of affairs in the coming together of two or more persons to make a plan.

The importance of relationships is illustrated by the distinct provisions in both codes on the killing of various classes of relatives or the killing of persons holding a specific official rank. The general principle was that it was more serious to kill a senior relative or superior officer than an ordinary person to whom one stood in no particular relationship, and conversely it was less serious to kill a junior relative or subordinate. Equally it was a very serious offence for a slave or member of a household possessing servile status to kill the family head, but a relatively light offence for the latter to kill one of the servile members of his household.

### **Mou sha**

I propose now to examine each of the categories of killing, as they appear in the two codes commencing with *mou sha*. In the T'ang code *mou sha* appears to express a plot to kill where the killing has not actually been carried out. It may, and indeed typically does, involve the formulation of a plan by two or more persons but it may also arise where only one person has made a

plan (15). In the latter case *mou sha* appears to function as the means by which attempts to kill were punished (16). The evidence for the proposition that *mou sha* in the T'ang code refers to plots to kill where the plot is not successfully achieved is the following. The commentary to book 2, article 11 states : 'Plotting to kill if the victim has already been killed is considered the same as *ku sha*' (17). Book 18, article 3.ii deals *inter alia* with death resulting from meat which has become poisonous. The commentary puts a case in which the owner of such meat, 'intending to cause injury, deliberately gives it as food to a senior relative wishing to bring about his death'. This is to be considered *mou sha*. Conversely if he gives the meat to a junior relative who dies the law of *ku sha* is to be followed. Why should the one case be considered as *mou sha*, the other as *ku sha* ? The most likely explanation is that in the former case the senior relative is not assumed to have died and hence the situation did not fall under the head of *ku sha* (18). Finally one may note the

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15) Book 17, article 9 provides : 'All cases of plotting to kill another person, penal servitude three years...'. The commentary states 'Plotting to kill another means two or more persons. If the affair is already manifest and the desire to kill not illusory, then, even if there is only one person, this is treated as falling under the same law as two persons plotting to kill'. See also JOHNSON, *op. cit.*, 267f (article 55.5).

16) An illuminating example is given in the commentary to book 6, article 11, final section (55.5 in JOHNSON's translation) : 'If someone enters another person's house carrying a knife or club, and investigation proves them to be enemies who each desire to kill the other, then even though there be only one person this situation is considered the same as a plot' (JOHNSON, *op. cit.*, 268).

17) JOHNSON, *op. cit.*, 119.

18) Cf. also book 23, article 4, final question and answer in the commentary where it is held to be a case of *ku sha* if several persons plot to kill A but at night by mistake kill B.

formulation of the article dealing with *mou sha* of an ordinary (unrelated) person 17.9 : 'all cases of plotting to kill another person, penal servitude three years; if he is injured, strangle; if he is killed, behead'. The primary situation contemplated is that first mentioned, where there is a plot to kill but it has not yet been successfully completed. Where it is successful, that is, where the victim is killed, the case would have been treated as one of *ku sha*, although the article does not explicitly state this (19).

In the Ming code *mou sha* bears a different sense. It no longer refers to attempts but to killings which have been achieved in consequence of a plot. The statement from the commentary to book 2, article 11 of the T'ang code quoted above does not appear in the Ming code; nor does the case of the poisonous meat discussed in the commentary to book 18, article 3 of the earlier code. Furthermore the formulation of the *mou sha* article in the Ming code is significantly different from that in the T'ang code. The first article of book 19 is that on plotting to kill another person. It states that in the case of a plot to kill the one who forms the idea is to be beheaded, those (accessories) who contribute their active support (*chia kung*) are to be strangled, whereas those who join in the plot but do not contribute active support are to receive 100 blows with the heavy stick and be exiled to 3000 *li*.

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19) Book 17, article 6 in the initial section of plotting to kill various categories of close relative provides that the penalty is death by beheading and does not consider the case where injury is done or the killing is achieved, this being unnecessary since the mere plot entails the most serious penalty. The rest of the article, dealing with less close relatives, does distinguish between the mere plot, injury and killing because the penalties are different. I do not think that the fact that the phrase 'plot and if the victim is killed' is found alongside the phrase *ku sha* - cf. the commentary to 17.6 - disproves the assertion made in the text.

The article - and this is the significant point - then stipulates that liability to those punishments arises only when the killing has been completed. If the victim is injured but does not die the penalties are less; if he is not even injured they are still further reduced. Hence in the Ming code the situation primarily contemplated as falling under *mou sha* is that of the actual death of the victim of the plot. Cases falling short of death are treated as subordinate and perhaps also as exceptions.

An important consequence of the different conceptions of *mou sha* in the T'ang and Ming codes is that more attention had to be paid to the nature of the intention by which *mou sha* was to be distinguished from *ku sha*. For the T'ang legislators and commentators this was not a problem since *mou sha*, if the plot was successful, created *ku sha*. This was not the position under the Ming code and it therefore became necessary to specify exactly how the intention constituting *mou sha* differed from that constituting *ku sha*. The difference was located in the time at which the intention to kill was formed. If it was formed only at the time of the actual killing itself, the offence was *ku sha*, if, on the other hand, it was formed in advance of the act, the offence was *mou sha*. The 'incorporated commentary' (*chu tsuan*) of the Ming code has the following definition of *mou sha*: 'whenever one harbours a grievance, devises means and decides upon a plan to kill a person and executes the plan he is guilty of planned homicide' (20).

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20) *Ming lü chi-chieh fu li*, 1462 (tr. MEIJER, cited noted 12, 94). For the intention relevant to *ku sha* see further below.

In the case where two or more persons plot to kill another both T'ang and Ming law recognize, first, that the idea of the plot may have originated with only one of the plotters, and, second, that the persons who actually carried out the killing, although involved in the plot, may not have included the one whose idea it was. These facts are taken into account through the application of the law of principal and accessory. The T'ang code explains that the person who originated the idea of the plot is to be deemed principal even though he did not participate in subsequent acts by which the plot was put into effect (21). All others involved in, or privy to, the plot, whether or not they participated in any subsequent acts, were accessories. Accessories are divided into two groups : those who act (*hsing*) and those who do not act. The first group is further divided into those who have actively contributed to the killing or injury (*chia kung*) and those who have not (22). 'Actively contribute to the killing' is defined not only as 'laying hand' (*hsia shou*) on the victim but also as crowding around him, leaving him no opportunity of retreat or escape, so that it is difficult to see who has actually delivered a blow. Provided one has been part of the general crowd around the victim, he is taken to have 'actively contributed' to the death or injury, and it made no difference whether his particular contribution was great or small (23).

To see how these distinctions are applied one may take as an illustration the provisions of article 17.9 which specifies the

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21) Commentary to 17.6.

22) See the commentary to 17.6 and article 17.9 and commentary.

23) Commentary to 17.9.

following penalties for the case of plotting to kill another person. It commences with the statement 'in cases of plotting to kill another person, penal servitude three years'. The context makes it clear that, although a plot has been formed, neither injury nor death has resulted. The statement makes no reference to principals or accessories and therefore one might think that all those joined in the plot equally receive the punishment of three years penal servitude. But in fact two articles from the 'General Principles' section of the code show that it is only the one who originated the idea (the principal) who receives the full punishment, the other members of the plot (the accessories) are punished one degree less, that is, they receive penal servitude for two years and a half. Book 5, article 6 lays down the general rule : 'In all cases where crimes are committed collectively the person who formulates the plan is the principal. The accessories have their sentences reduced one degree' (24). Article 7.ii of the same book states : 'If a specific article refers to 'all' (*chieh*), then the crime does not distinguish between principals and accessories. If it does not refer to 'all', then the law on principals and accessories is followed'. The commentary to this article in fact cites the law on plotting to kill another as an example of a provision where the word 'all' is missing, and the distinction between principal and accessory consequently applicable (25).

17.9 continues with the statement 'if the victim is injured, strangle; if he is killed, behead', and immediately afterwards explicitly introduces the distinction between principals and

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24) JOHNSON, *op. cit.*, 225 (article 42.1).

25) JOHNSON, *op. cit.*, 228 (article 43.2).

accessories in the following way : 'accessories who actively contribute to the act (*chia kung*), strangle, those who do not contribute exile 3000 *li*, and the one who originated the idea, although he did not act, is still principal'. Consequently he suffers the penalty of beheading. The reason for the specific mention of principal and accessory in connection with the case where injury or death has resulted lies in the need to distinguish two classes of accessory and to provide for the case where the person who originated the idea has himself done nothing to carry it out.

Although I have referred the rule on principal and accessory to the case of injury as well as death, it is necessary to register a doubt. The commentary in explaining the position deals only with the case of death. Hence one might infer that in the case of injury all participants in the plot were treated alike without reference to principal or accessory. However the fact that injury, like killing, involves an act of violence committed on the victim suggests that the distinction between 'actively contributing to the act' and not so contributing was equally applicable where the victim was merely injured. Furthermore the case of injury is one in which the original intention was to kill but for some reason the plotters were unsuccessful in completely realizing their aim. There does not seem to be a strong reason for applying the principal and accessory distinction only to the case of killing and not to that of injury. If this is correct the punishment for the principal in the latter case is strangulation and for the accessories, according to the general rule, it would be one degree less. Those who had actively contributed to the injury would be exiled to 3000 *li* and



those who had not so contributed would be sentenced to penal servitude for three years.

The last part of the article states 'in the case of accessories who do not act (*hsing*), decrease the punishment of those who act by one degree'. The commentary does not define what is meant by 'not acting', but merely states that the applicable punishment (where the victim is killed) is penal servitude for three years. This is one degree less than exile. Hence one can infer that those accessories who have not actively contributed to the killing fall nevertheless within the class of accessories who have 'acted'. Therefore one must take 'act' as meaning 'to have performed some act in furtherance of the plot, falling short of participation in the actual injury or killing' (26). Accessories who have not 'acted' are those who have been involved in, or privy to, the plot but thereafter have done nothing in furtherance of its object. The punishment of penal servitude for three years, stated in the commentary, applies only to the case of death. In the case of injury the punishment would be one degree less, namely penal servitude for two years and a half. Where the victim of the plot has not been injured the punishment for the principal is three years penal servitude, for accessories who have 'acted' penal servitude for two years and a half, and for those who have not 'acted' penal servitude for two years (27).

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26) An example taken from the *chu tsuan* commentary of the Ming code (*Ming lü chi-chieh fu li*, 1462) is those who act as look-outs.

27) Cf. however book 5, article 7.ii, commentary (JOHNSON, *op. cit.*, 238 (article 43.2)) which merely states: 'If two persons together plot to kill a person but the crime has not yet been carried out, the one who formulated the plan is the principal and is punished by three years penal servitude. The accessory is punished by two years and a half of penal servitude' (where no

Book 19, article 1 of the Ming code follows, with some amplification and modification book 17, article 9 of the T'ang code. It establishes that in the case of plotting to kill another the person who originates the idea (the principal) is to be beheaded, the accessories who have actively contributed to the act of killing are to be strangled, those who have not so contributed are to receive 100 blows with the heavy stick and to be exiled to 3000 *li* (28). For the case of injury the article specifies that the person who originated the idea is to be strangled, the accessories who have actively contributed to the act of wounding are to receive 100 blows with the heavy stick and be exiled to 3000 *li*, those who have not so contributed are to receive a similar beating and be sentenced to penal servitude for three years. This again, with the exception of the beating, is the same as the T'ang code.

The next section of the article states 'In the case of a plot where something has already been done (*hsing*) but the victim has not been injured, the punishment (for the principal) is to be 100 blows with the heavy stick and penal servitude for three years; and accessories respectively are to receive 100 blows'. There are then added the words 'those who have plotted together, all are liable'. These are explained in the *chu tsuan* commentary as meaning that the code for this case makes no distinction between those who have actively contributed and those who have not. All those who have 'acted' in the plot are to receive 100 blows (29).

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distinction is made between accessories who have 'acted' and those who have not).

28) This is the same as the T'ang code with the addition of the beating.

29) *Ming lü chi-chieh fu li*, 1465.

A later part of the article adds the proviso that accessories who have not 'acted' are to have their punishment reduced by one degree, that is, they are to receive a beating of 90 blows. The fact that the punishment of accessories, for the case where the victim of the plot is not injured, is merely a beating and not penal servitude represents a considerable modification of the T'ang code.

The article continues with two provisions identical to those of the T'ang code : the one who originates the idea is still liable as principal even though he does not 'act', and accessories who do not 'act' have their punishment reduced by one degree. But the final clause does not occur in the corresponding article of the T'ang code : 'where, in order to obtain property, people collectively commit forcible theft no distinction between principal and accessory is to be made, and all are to be beheaded'. A *li* enacted by the Board of Punishment in 1588 towards the end of the Ming dynasty specifies further what is meant by this section. Where those engaged in a plot to kill have performed some act in execution of the plot (but have not necessarily succeeded in killing or injuring the victim) and see and appropriate his property, the case is to be treated as one of forcible theft, with the consequence that all are to be beheaded. This applies to a case of *mou sha*, where there was no original intention to steal, the rule governing the case of violent theft (18.3) under which the thief who obtains property was sentenced to beheading<sup>(30)</sup>.

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30) For a translation of the *li* see P.L.F. PHILASTRE, *Le code annamite* II (1909, reprinted 1967), 167f.

## Ku Sha and Tou Sha

Intentional killing (*ku sha*) and killing in a fight (*tou sha*) are best treated together. In both codes they appear in the same article, though the connection between the two is stronger in the T'ang than in the Ming code. In the T'ang code *ku sha* appears as an incident of a fight; if the choice of weapons is such as to evidence an intention to kill, the participant in a fight who kills another participant is judged under the law of *ku sha* not under that of *tou sha*. In the corresponding article of the Ming code the treatment of *ku sha* primarily as an incident of a fight has disappeared; the section of the article on *ku sha* is linguistically and logically detached from that on *tou sha*, so that the two expressions more clearly designate separate categories of killing than is the case in the T'ang code. Nevertheless even in the Ming code *ku sha* and *tou sha* are closely associated in the thought of the legislator. The fact that they appear in the same article is not due just to an unreflecting adoption of the arrangement of the corresponding T'ang article (with some modification). Both *ku sha* and *tou sha* enshrine an 'evil intention' with respect to the victim, in the one case to kill him and in the other to inflict harm, which distinguishes them from killing in a game (*hsi sha*), killing in error (*wu sha*) or killing by accident (*kuo shih sha*). Furthermore, as is evident from the discussions of the Ming commentators, in practice many cases of *ku sha* did result from fights. Where a fight did end with the death of one of the participants the main problem for the law was to determine whether the offence should be treated as *ku sha* or *tou sha*. The

fact that *mou sha* in the Ming code covered all cases of premeditated killing also contributed to the association of *ku sha* with fights, since the impulse to kill arising more or less instantaneously with the act of killing was again likely to appear in the context of a fight. For these reasons one reaches the somewhat paradoxical result that although the conceptual distinction between *ku sha* and *tou sha* is clearer than it was in the T'ang code, the connection in practice was stronger. By this I mean that the factual situation in many cases of killing would have presented a difficulty of classification : was the relevant offence that of *ku sha* or *tou sha* ?

The T'ang code in book 21, article 5 provides : 'where a person is killed in a fight (*tou sha*), the offender is to be strangled; if a knife (bladed instrument) is used or the killing is intentional (*ku sha*) he is to be beheaded; although on account of a fight, where resort is had to military weapons and someone is killed, the offence is *ku sha*; if, not on account of a fight, one intentionally (*ku*) wounds another, the penalty is one degree more than that for inflicting injury in the course of a fight; if, on account of a fight, a participant after an interval of time returns and kills or injures his opponent the law of *ku sha* or intentionally wounding is to be followed (31).

The structure of the article shows clearly that the dominant concept in the mind of the legislators was that of 'fight'. This is not surprising since fights are in practice one of the most common sources of killing. It is the notion of 'fight' which leads the legislators to their first example of *ku sha*, that in which a knife is

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31) For a translation and discussion see MEIJER, cited note 12, 87f.

used in a fight to kill someone. Only after this has been stated does one find inserted the general reference to *ku sha*. This is followed by another specific instance of *ku sha* arising from a fight, that in which on account of a fight resort is had to military weapons (32). Then follows the section on intentional (*ku*) wounding defined as occurring not on account of a fight, and that dealing with the case where a fight is apparently finished but later one participant returns and kills another (33).

Although the notion of 'fight' provides the focus for the article and although the specific examples of *ku sha* mentioned are 'incidents' of a fight, one can also see that *ku sha* was taken as occurring independently of a fight. Both the general reference to 'or *ku sha*' and the clause on intentional wounding suggest this. The commentary provides further instructive information. It states first that in the case of a fight there is originally no intention to kill (lit. *sha hsin* 'kill mind') and then defines the phrase 'if a knife is used or the killing is intentional (*ku sha*)' as meaning 'if one fights and uses a knife then one has an intention to cause harm (lit. *hai hsin* 'harm heart'), or if one kills not on account of a fight or quarrel, without an affair or incident (*wu shih*), this is called *ku sha*'. From this it appears that the touchstone for distinguishing *ku sha* from *tou sha* was the presence or absence

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32) What is meant is that the fight starts without such weapons but during its course one participant snatches up and uses, for example, a spear or sword.

33) The commentary explains this as a case in which the anger generating the fight is gone, the parties have separated and then one returns and kills or wounds the other.

of an intention to kill (34). Use of a knife in a fight was conclusive evidence of an intention to kill and therefore any resultant death was treated as a case of *ku sha*. The same implication of the presence of an intention to kill can be made in the other two specific situations put : that where, in the course of a fight, resort is had to a military weapon, and that where a participant returns after a fight is finished and kills his opponent.

It is worth noting that the 'intention to kill' necessary to characterize an offence as *ku sha* is not conceived abstractly, as something distinct from the facts which reveal it. Intention (*hsin*) is mentioned only in connection with specific factual situations (a fight, use of a knife in a fight). There is no mention of intention in the explanation of *ku sha* given in the commentary. Nor is there any attempt to define the kind of intention characterizing *ku sha* as distinct from that characterizing *mou sha*. The emphasis in the commentary is that *ku sha* occurs where there has been a killing not on account of a fight, without an affair or incident (*wu shih*). The implication is that in such a case there is an intention to kill, but it is the facts from which the intention is inferred that occupy the foreground in the legislator's thought. These are presented negatively not positively. It is the absence of a fight or the lack of an incident or affair that constitutes *ku sha*. One can see what is meant by 'not on account of a fight', but what does the phrase 'without affair or incident (*wu shih*)' mean? The interpretation of this phrase in fact caused problems for T'ang

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34) In the context of the commentary the phrase *hai hsin* must be given a meaning equivalent to that of *sha hsin*

legal officials as can be seen from an opinion of the poet Po Chü-i which has been preserved.

In 822 Po Chü-i, then occupying the post of Grand Secretary of the Grand Secretariate, was asked to advise the emperor in a case in which a husband, angry with his wife, had beaten her so severely that she had died. The legal issue was whether the husband should be punished under the law of *tou sha* or that of *ku sha*. The two highest judicial bodies, the Supreme Court of Justice and the Ministry of Justice (Board of Punishments) had already decided in favour of *tou sha*. One of the points upon which they relied was that the death had resulted from an 'incident or affair' (*shih*) and therefore could not be considered as falling under the head of *ku sha*. Po Chü-i advised that this opinion was incorrect, advancing two principal arguments. First, the context showed that the phrase of the commentary 'affair or incident' meant the same as 'fight', and second that unless the word *shih* was interpreted in this sense, the absurd result would follow that no one could ever be convicted of *ku sha* since in every case of killing an 'incident or affair' (for example, anger) could be asserted as its ground. Po Chü-i's opinion was approved by imperial edict and thereafter became established as the law (35).

One might advance two comments with respect to Po Chü-i's opinion. In the first place it is possible that, prior to 822, the relevant clause of the commentary defining *ku sha* was construed

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35) For a full account see B.E. WALLACKER, *The Poet as Jurist : Po Chü-i and a Case of Conjugal Homicide*, *Harvard Journal of Asiatic Studies* 41 (1981), 507. The memorial is cited at length in the commentaries following article 19.9 in the *T'ang Ming-lü ho-pien* edition.



more broadly and in particular that 'affair or incident' was not taken as synonymous with 'fight'. In the second place it remains possible that even after the restrictive interpretation introduced by Po Chü-i there were still some cases of killing which were not treated as *ku sha* for the reason that they proceeded from an 'affair or incident' which was not constituted by a fight. I am thinking of provisions such as those which treat as *ku* the killing of a son by his father where the former has not transgressed or disobeyed orders (book 22, article 13) or the killing of the grandson's wife by the grandfather where there has been no beating, scolding or other offence by the wife (book 22, article 14). These provisions can be analysed as ones in which the killing lacks 'reason' or 'justification', and it seems not impossible that they should have been held to fall within the ambit of the phrase *wu shih* where *shih* is given the sense of 'reason' as well as that of 'affair or incident'.

The corresponding article of the Ming code (19.9) is formulated rather differently. It is composed of three sections, viz :

- (i) where a person is killed in a fight one does not ask whether hands, feet, other articles or metal knives were used, in all cases the punishment is strangulation;
- (ii) in cases of *ku sha* the punishment is beheading;
- (iii) where several people make a plot and together strike another with the result that he dies, those who with their own hands (*hsia shou*) have inflicted wounds to be deemed mortal are to be strangled, the one who originated the plot is to receive 100 blows

with the heavy stick and be exiled to 3000 *li*, the others involved are each to receive 100 blows with the heavy stick.

The whole of the article is drawn from various provisions of the T'ang code but substantial modifications have been introduced. The first section suppresses the distinction found in the earlier code between the infliction of blows with hands, feet or other articles, and those with sharp bladed weapons (36). In consequence the distinction between *tou sha* and *ku sha* appears more clear cut. The specific examples of *ku sha* in the T'ang code (where a knife is used in a fight and where a participant, once the fight is over, returns and kills his opponent) are both omitted in the Ming code, the first because the law was changed, and the second because its specific inclusion in the article was held to be unnecessary. The third section is a modified version of an article of the T'ang code (21.7) specifically concerned with the case of those who collectively beat another in consequence of a plot. Under this article the person or persons who, after a plot, delivered the blows which caused death are themselves to be put to death (strangled), the instigator of the plot, assuming he is not included in this class, is to be punished one degree less, that is exiled 3000 *li*, and the other members of the plot are to be

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36) Cf. T'ang code 21.1 (dealing with assaults committed with hands, feet or other articles), 21.3 (dealing with assaults committed with sharp bladed weapons) and 21.5 (distinguishing between killing in an ordinary fight and killing in a fight where knives are used). The code distinguishes military weapons (such as bows and arrows, swords, javelins and spears) from ordinary metal knives and other articles. Within the class of 'other article' it includes a weapon (presumably also a knife) where the blade or point is not used. See 21.1,3,6 and their respective commentaries and cf. MEIJER, cited note 12, 88 n. 12. The Ming code suppresses the category of 'military weapons' and

punished two degrees less, that is, each is sentenced to penal servitude for three years. The main difference between the two codes lies in the treatment of the plotters who have neither delivered the blows causing death nor instigated the plot. The Ming penalty of 100 blows with the heavy stick is considerably less than the T'ang penalty.

The penalty of 100 blows with the heavy stick imposed by the article of the Ming code on the 'other persons' involved in the plot was afterwards held to be inequitable since it did not distinguish between those who may have inflicted no wound at all and those who may have inflicted serious wounds. Consequently in 1588 the Board of Punishments introduced a *li* making an important change in the law. This accepted the distinctions made in the articles of the code between those whose blows had actually brought about the death of the victim, the instigator of the plot and 'the other persons' involved. But it divided the class of 'other persons' into two further classes, those who were found to have been carrying a lethal implement such as a spear or sword with which they had inflicted a mortal wound on the victim, and those who either had not carried a lethal weapon or, if they had, had not inflicted a mortal wound. The latter class were still to receive the statutory penalty of 100 blows with the heavy stick, but the former were to receive the much heavier punishment of military services on the frontiers. At first sight it is not entirely clear what constitutes the difference between those who had brought about the death of the victim and so were subject to the punishment of strangulation and those who had inflicted a mortal wound with a lethal weapon and so were subject merely to

frontier military service. The expression *hsia shou* used of the former but not of the latter suggests the difference was between administering the blow or blows which brought about the death, and causing a serious wound which did not directly kill the victim.

The commentaries to the article and the *li* (37) pay considerable attention to the question of intention. It is recognized that many cases of *ku sha* arise either out of a fight or out of a situation in which there has initially been merely a plot collectively to beat another person. When a death results how is one to know which is the appropriate offence, *tou sha*, *ku sha* or 'plotting and collectively beating' ? Furthermore in cases where there is no fight and no plot collectively to beat one has the problem of distinguishing *mou sha* from *ku sha*. Neither the article nor the *li* gives any indication of the nature of the mental element constituting *ku sha*. Hence the commentators find it necessary to demarcate the boundaries between *ku sha* on the one hand and *mou sha*, *tou sha* and 'plotting and collectively beating' on the other, in terms of the intention requisite for the former.

The most comprehensive definition of *ku sha* is given in the *so yen* commentary (38). It discusses the situation arising from a fight where a person is being beaten with hands, feet or other articles (including a knife) and puts the case where an assailant intends (*ku i*) to inflict a severe beating and kills his opponent. Where there is originally an evil mind (*hsin*), the wish

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37) Those in the *T'ang Ming-lü ho-pien* edition.

38) Rendered by MEIJER, cited note 12, 94 as 'Desultory Notes on the Lü'.

to cause death, and the victim in fact dies, the offender should be beheaded. The words *ku sha* are defined as expressing a situation in which the idea of killing (*i*) moves from the mind (*hsin*). To have at the given moment (*lin shih*) the intention or impulse to kill (*i yu sha*) which is unknown to others is to have the intention requisite for *ku sha* (39). Two important elements of this definition are the fact that the intention is formed 'at the given moment' (referring to the act of killing) and the fact that it is not known to others. Both elements distinguish the intention requisite for *ku sha* from that requisite for *mou sha*. For the latter it is necessary that the intention be formed prior to the act of killing, whether or not two or more have plotted together, and, for the case where there is an actual plot, it is necessary that the intention of one be known to and shared by the others (40).

The very fact that the intention proceeded from the heart at the time of the killing and was not known to others itself presented serious difficulties of proof. How was the presence of such an intention to be determined? The most obvious method was to look at the circumstances of the killing and see if an intention to kill could reasonably be inferred, and this is in fact the method adopted by the commentaries. In particular they single out as particularly relevant two circumstances: the presence or absence of a state of enmity between the parties, and the extent to which in a fight one participant had unnecessarily resorted to excessive force. The commentary entitled *tu lü p'ei hsi* states that

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39) Cf. also MEIJER, *ibid.*

40) Cf. also the *chu tsuan* commentary, *op. cit.* 1497-8, which distinguishes between the cases of *ku sha* and 'together plotting' according to whether the 'idea' (intention) is known to others or not.

*ku sha* does not refer to any case in which one has a reason for killing, or deliberately kills. Thus the killing of an enemy is not necessarily *ku sha*. The commentary states that where one is daily preoccupied with the enmity of another, then happens to see that person, and kills him at that moment (*lin shih*), this is *mou sha* and not *ku sha*. On the other hand if one comes across a former enemy (without previously being conscious of and brooding on the enmity) and beats him so that he dies this is *ku sha*, the necessary intent here being inferable from the previous state of enmity.

Having dealt with the case of enmity the same commentary turns to the case of two persons (not former enemies) who engage in a fight. If one yields but the other persists in striking until he has deprived him of life, how, says the commentator, can this not be *ku sha*? In such a case there is formed at that time (*lin shih*) an intention (*hsin*) to kill, even though there is no such intention prior to the fight. Whenever one participant can put up no further resistance but falls exhausted, or implores mercy, or falls wounded to the ground, and yet is killed the same analysis can be made. A similar situation may arise in a case where several have plotted to beat another. Originally they intend merely to beat, but if, inflamed by the victim's opposition or insults, they cry 'kill ! kill !' and the victim dies from their blows the offence becomes that of *ku sha* (41).

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41) Cf. also the *chu tsuan* commentary, *op. cit.* 1497-8, which distinguishes between *tou* and *ku sha* as follows : 'where two persons fight each other and both lack the wish to kill, but one by chance inflicts a severe wound on the other and so causes his death, this is called *tou sha*; but if one has first formed the intention of killing the other - supply, not being such as to constitute *mou sha* - and beats the other to death, this is called *ku sha*'.

From the discussion in the commentaries it can be seen that intention was the most important criterion by which *mou sha* was distinguished from *ku sha* and *ku sha* from *tou sha* and 'plotting and collectively beating'. The commentaries also find the notion of intention helpful as a means of explaining the penalties prescribed for specific offences. The *chi chu* commentary explains that the severe punishment (military service on the frontier) introduced for those who have plotted to strike another and have borne lethal weapons with which they have inflicted mortal wounds is justified since there is practically an intention (*hsin*) to kill. One notes again how the intention is inferred from the circumstances. The *chien hsien* commentary justifies the infliction of a punishment of 100 blows with the heavy stick on those plotters who were present at the beating but did not in fact inflict any blows on the ground that they had the intention (*hsin*) of contributing to an evil beating.

The great Ch'ing legal scholar, Shen Chia-pen, in a study of the history and meaning of *ku sha* considered that the Ming code had taken a retrograde step in focusing upon the concept of intention in the abstract rather than upon concrete situations. From the T'ang code it was clear that use of a sharp-bladed weapon in a fight entailed the punishment for *ku sha* if a death was thereby caused; no separate examination of motive or intent was necessary. Under the Ming code, on the other hand, one had to ask not only was there a specific intent to kill, but also was such an intent premeditated or merely formed at the moment of the act. Shen quite rightly pointed to the difficulties of proof; how was a magistrate to determine what an accused really intended

(42) ? Yet he may to some extent have exaggerated the problem. Any legal system faced with issues of intention has to suppose that an individual possessed such an intention as can reasonably be imputed to him from the circumstances of the case, in particular from his own outward behaviour. The commentaries drawn upon above show that Ming jurists were also aware of this fact. They recognized the problem of determining the nature of an individual's intention and argued in effect that what must be looked at are all the circumstances of the case, including the relationship between offender and victim and the precise way in which the killing was accomplished.

One now passes to a group of provisions, found in various places in the T'ang code but brought together in one article in the Ming, which have in common the fact that there is no directly manifested intention to harm or kill the victim. It is probably this fact which underlies the bringing together of these provisions in the Ming code in one article (43). They comprise *hsi sha* (killing in a game), *wu sha* (killing in error), *ku shih sha* (killing by accident) and certain cases of killing arising from deceit. Book 23, article 6 deals with *hsi sha* and provides that where someone is killed or injured in a game the punishment is that for

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42) I have used the *Chung-hua shu-chü* edition of SHEN Chia-pen's legal writings entitled *Li Tai Hsing Fa Kao* (1985). His essay on *ku sha* is in volume 4 at 2063 (see esp. 2070f). SHEN's views are summarized by MEIJER, cited note 12, at 90, 94, 97f.

43) See below for the Ming analysis of 'game'. There is a full account of the T'ang and Ming provisions on 'killing in a game' in WALLACKER's study, cited note 14.



killing or injury in a fight with a decrease of two degrees. The effect is that the maximum punishment under the article is penal servitude for three years. A note inserted in the article specifies that 'game' means an activity involving the use of force where the participants are still playing harmoniously. This point is also stressed in the commentary where it is said that it is absolutely necessary that at the moment when someone is killed (or injured) the players are in accord and not out of hatred glaring at each other in anger. The next section of the article introduces an important qualification. If knives are used in the 'game', or if the participants are scaling a high place or crossing a precipice or have entered water, and as a result someone is killed or injured, the punishment is decreased by only one degree, that is, the maximum is now exile. The commentary states that where the participants are using knives or engaged in a dangerous activity (such as climbing a high place) caution is necessary. If they 'play' in these circumstances - the sense seems to be, if they fool or lark around - the situation is different from that of the ordinary 'game' and hence the higher penalty is justified.

After a statement on the position of persons, not holding office, who are entitled to the privilege of reducing their punishment by payment of copper <sup>(44)</sup>, the article provides that if the 'game' is not characterized by a harmonious accord or if certain categories of senior relative are involved (and one is injured or killed), even though there is harmony, in both cases the activity does not count as a 'game', and the law relating to killing or injury in a fight is to be followed. This reinforces the point that

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44) This is not relevant in the present context.

an activity cannot be a 'game' if the participants are quarrelling, or, more precisely, ceases to be a game at the point when they begin to quarrel. The implication is that there is now an intention to cause harm. More interesting is the consequence of the involvement of senior relatives. This shows how the status of the parties can have a decisive influence on the categorization of an offence. Since it is improper for junior relatives to 'play' with senior relatives any such activity, even though conducted in a perfectly harmonious fashion, cannot count in law as a 'game'. If a senior is injured or killed the case must be treated as though there had been a fight with resultant death or injury (45).

The treatment of *hsi sha* in the Ming code is both simpler and stricter than that of the T'ang code. It places killing in a game as the first item in book 19, article 11 and equates this offence with that of killing or injury in a fight. This formulation reveals three changes that have been made to the T'ang law : the penalty for killing in a game is now death by strangulation, no distinction is drawn between games merely using force and those involving knives or conducted in dangerous places, and the specific provision on games involving senior relatives has disappeared (46).

The *chien hsien* commentary defines a 'game' as an activity in which the participants clearly permit the mutual striking of blows in a struggle to see who wins and who loses. The difference from a fight lies in the element of 'accord'. To illustrate

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45) The penalty would be higher than in the case of a fight involving unrelated persons.

46) In fact since the Ming code equates killing in a game with killing in a fight there is no need to stipulate this as a special case.

this the commentary quotes the definition of 'game' given in a pre-T'ang source, the *hsing fa* chapter of the *Ts'in shu* (47), namely that 'two persons, acting in accord inflict harm on each other' (48). From this definition the commentary draws the conclusion that where the participants know that what they are doing may result in harm to each other and yet have agreed to engage in the activity, then any injury or death which thereby occurs cannot proceed from lack of intention (*pu i*). Therefore the case is the same as that of killing in a fight. One might infer from these words that the commentator holds killing in a fight and killing in a game to exhibit the same kind of mental element, that is, the intention of the participants to inflict injury on each other. The difference would be that in a fight the participants have not consented to be injured, in a game they have. It is not, however, certain that the commentary should be understood in this sense. The difference between a game and a fight does not reside merely in the presence or absence of a consent to be injured. In a fight the participants intend to harm each other; victory is gained by the one who beats the other into submission or makes him incapable or fighting further. In a 'game' the primary object of the participants is not to inflict harm on each other but to win according to the rules of the game by an exercise of skill. Sometimes, as in the case of a boxing or wrestling match (49), the exercise of the appropriate skill necessarily involves the infliction

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47) See volume 3 of the *Chung-hua shu-chü* edition, 928.

48) PHILASTRE, *op. cit.*, II 229 translates : 'les deux parties sont d'accord ensemble et se font réciproquement du mal'.

49) These are examples of a 'game' given in the *chu tsuan* commentary, *op. cit.*, 1507.

of some harm on one or both of the contestants. But even here the intention is not to inflict injury as such but to demonstrate one's superiority in skill through the subjecting of the other to some physical distress.

A closer look at the language of the commentary will show recognition of the fact that a 'game' does not exhibit the same kind of intention to injure as a fight. What is said is not that the participants in a game intend to injure each other, albeit by accord, but that they know that what they are doing is the kind of thing likely to cause harm and so cannot be said to act with an absence of intention. To know that an act is likely to lead to harm is not the same as having the intention of causing harm; the hesitant way in which the reference to intention is made suggests that the commentator would have been reluctant to state emphatically that the participants in a game intend to harm each other. What he does want to do is to bring out an association between harm and intention to justify the treatment of killing or injury in a game in the same way as killing or injury in a fight. Hence one may reaffirm the conclusion, already stated above, that the compilers of the Ming code include *hsi sha* in a group of offences marked by the absence of an intention specifically and directly to harm the victim (50).

A further commentary on the Ming article (51) quotes another definition of 'game', this time a negative one from the

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50) The *chu tsuan* commentary, *op. cit.* 1507, explaining the assimilation of a 'game' to a fight says that although the former does not involve 'beating' there is still death or injury caused through the infliction of a blow.

51) *T'ang Ming-lü ho-pien* edition.

*hsing fa* chapter of the *Ts'in shu* : 'to fight with the addition of military weapons (or) within (in proximity to) water or fire cannot constitute a game' (52). This is followed in the commentary with the statement that the T'ang provision on 'games' involving the use of knives reflects the same idea. Do these references justify one in holding that 'game' in the Ming article on *hsi sha* excluded activities of the kind described ? I suggest that one should not draw this conclusion. If one did the position in the Ming code concerning 'games' involving knives or weapons or played in dangerous surroundings would remain unclear. They could not be directly subsumed under the head of *tou sha* because the element of accord precludes their being treated as fights proper. Hence the better view is to treat the commentary as illustrating the old (pre-Ming) conception of 'game'. The Ming code itself held that it made no difference whether knives or weapons were used, or whether the circumstances surrounding the play were dangerous : in all cases the activity for the purpose of the provision of *hsi sha* constituted a 'game', provided the essential conditions of 'use of force' and 'accord' were met.

The T'ang code does not seem to have recognized *wu sha* (killing in error) as a separate category of killing. Book 23, article 4 from the section on 'Assaults and Accusations' provides that if one of the participants in a fight *wu* kills a bystander, the killing is to be treated as falling under the head of *tou sha*. But if the punishment under that law is death, a decrease of one degree is to be applicable, making the maximum punishment exile to 3000 *li*. The article further provides that a participant in a fight

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52) Volume 3, 928f (cited note 47).

who falls on a bystander and so brings about his injury or death is to be treated as falling under the law of killing or injuring in a game. Where the participant in a fight *wu* kills someone who is helping him there is a respective decrease in punishment of two degrees.

According to the commentary the first part of the article covers the case where, in a fight between A and B with knives or cudgels, A, intending to strike B, instead strikes a bystander C and kills him, and the second part the case where A's foot or hand slips, he stumbles and falls on C bringing about his death (but does not directly strike him). It is said that the *wu* killing of a bystander (the first situation) is to be treated as a case of killing in a fight, rather than as a case of accidental killing (*kuo shih sha*) because there was originally present an intention to harm (*hsin hai*). The penalty imposed for the *wu* killing of a helper depends upon the circumstances of the death : was he killed directly in mistake for the assailant (*tou sha* with decrease of punishment by two degrees) or through one of the contestants falling upon him (*hsi sha* with a decrease in punishment of two degrees).

Two questions and answers raising problematic cases are given in the commentary. The first puts the following situation. A and his son B plot to beat C, but in the course of carrying out the plot, B *wu* hits A and brings about his death. Should the law of *wu* killing a helper be followed, or that of the *kuo shih* killing of a father by his son ? The answer states that strictly the *wu* killing of a helper cannot be considered as a *kuo shih* killing because it arose originally out of a fight. However in the present case the application of the law on *wu* killing a helper would lead

to a lesser punishment than that on the *kuo shih* killing of a father by his son. Hence in accordance with the general principle under which the law constituting the more serious offence is to be followed, B should be sentenced under the *kuo shih* law to exile to 3000 *li*.

The second question puts a situation in which several persons have plotted to kill A. At night one hits out hurriedly and *wu* kills B. What punishment should be imposed? The answer relies upon the fact that the original circumstance out of which the killing arose was a plot to kill and not a fight. Had the mistaken killing arisen from a fight, one could still apply the law of *tou sha* since originally there was no intention to kill (*hsin sha*). But where the circumstance from which the killing arises is a plot to kill there is originally an intention to kill (*sha hsin*). Therefore, despite the fact that the actual killing was *wu* the appropriate offence is that of *ku sha*.

Finally one may note from the T'ang code a rather different kind of *wu sha*. Book 16, article 21.ii provides that, where there is construction or demolition work in progress and the preparation and planning have not been done with care, if (as a result) someone is killed by mistake (*wu*), the person responsible is to be sentenced to penal servitude for one year and a half. *Wu sha* here expresses a killing which is not intentional but which has proceeded from a background of carelessness. The situation is very different from that contemplated in the *wu* killing of a bystander or helper.

The Ming code (19.11) confines *wu sha* to the kind of case in which A intends to kill or injure B but by mistake kills or

injures C. It retains the case of the person killed as a result of carelessness in the undertaking of demolition or construction work but defines the relevant offence as *kuo shih sha* (book 29, article 2). The treatment of *wu sha* also shows some difference from the corresponding provisions of the T'ang code. Article 11 assimilates the case in which a participant in a fight *wu* kills or injures a bystander to the case of killing or injury in a game, applying to both cases the punishment prescribed for killing or injury in a fight. So far as the *wu* killing of a bystander is concerned this is the same as the T'ang provision except that there is no reduction of one degree where the appropriate punishment is death. But there is no special provision in the Ming code for the case in which the person fighting falls on a bystander thereby injuring or killing him, or for the case in which he *wu* kills a helper. One may readily assume that the first case was held to fall under the rule governing the *wu* killing of a bystander (53). The article then adds the case of *mou sha* or *ku sha* where one of those involved (other than the intended victim) *wu* kills a bystander. The rule is formulated in a more general way than that in the T'ang code and presented in an article (not as part of the commentary), but the classification of the killing is the same : it is to be treated as *ku sha*. Hence it is difficult to conclude that *wu sha* in the Ming code has standing as a separate category.

In its section on 'Fraud and Counterfeit' the T'ang code contains a provision which establishes that one who brings about another's death or injury through deceit is liable under the law

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53) The father and son case would still be governed by the principle of the heavier offence.



relating to killing or injury in a fight (book 25, article 24). A note inserted at the end of the article gives as examples : knowing a ford is deep or muddy or that a bridge is rotten or a boat is leaking, and yet deceiving a person into crossing (with the result that he is drowned or otherwise harmed). The Ming code simply takes these examples and inserts them into the text of article 11 as follows : if one knows a ford to be deep or muddy but falsely states that it is passable or shallow, or knows that a bridge is decayed, or a boat leaks and is not capable of ferrying a person, but deceitfully says that they are strong and solid so inducing another to cross as a result of which he is drowned or otherwise harmed, the punishment is as for killing or injuring in a fight. The formulation is thus more specific and concrete than that of the T'ang code. Probably these rules on killing brought about by deceit were incorporated in the article dealing with *hsi sha*, *wu sha* and *kuo shih sha*, rather than in that on *tou* and *ku sha* because the actual intention to kill or injure was less clear or less directly manifested, than the intention to harm apparent in a fight or the intention to kill constituting *ku sha* (54).

*Kuo shih sha* (accidental killing) is one of the most important categories in both codes. Book 23, article 7 of the T'ang code states : 'in cases of accidental (*kuo shih*) killing or injuring someone, follow the manner in which the death or injury

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54) WALLACKER, cited noted 14, 281 suggests that the cases of killing arising from deceit were grouped with *hsi sha* because they were looked upon as 'practical jokes'.

occurs (55) and treat as redeemable (by payment of copper)'. The note added to the article states : 'This refers to what ear and eye do not reach, what thought and care do not reach, for example, several people lift an object too heavy for their strength or climb a high place or traverse a dangerous passage and one stumbles, so causing another's death, or, during a hunt of wild beasts, someone is shot'. The commentary adds the examples of throwing a brick or tile and not hearing the sound of anyone or seeing anyone appear (illustrating the phrase 'what the ear and eye do not reach'), and throwing a tile or rock in a lonely place where one would not expect people to be and accidentally (*wu*) killing someone (illustrating the phrase 'what thought and care do not reach'). Although I have rendered the phrase *kuo shih* by 'accidental' in preference to 'negligent', the various examples suggest that no single English term is an adequate rendering of *kuo shih*. It covered cases both of death caused by accident without anyone's fault and those of death caused through someone's carelessness (56).

Neither the article nor the commentary specifies who is to receive the copper by way of redemption. However it is clear from other sources that the money was to be paid to the family of the person killed (57). The underlying idea appears to have been

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55) This means that one looked in each case at the facts to see whether the cause of death or injury could be treated as accidental.

56) See G. MACCORMACK, *Mental States as Criteria of Liability in the T'ang Code*, RIDA XXXI (1984), 70f. Cf. also WALLACKER, cited note 14, 283 f.

57) For example, the commentary to book 30, article 1 of the code states that in a case treated as *kuo shih sha* the redemption payment is to be paid to the family of the deceased.

as follows. The fact that someone had caused another's death in itself entailed the forfeiture of the life of the offender. However where the offender was innocent of any intention to kill or harm, even of the kind of 'intention to harm' characterizing a 'game', he was allowed to redeem his life by payment of a sum of money. By grace of the emperor this payment was permitted to pass into the hands of the family of the victim. But it does not seem to have been regarded by the law as compensation for the economic loss suffered by the family.

The concluding part of the Ming article states that in a case where a person is killed or injured *kuo shih*, one is respectively to decide in accordance with the offence of killing or injuring in a fight. However it continues with the statement that, in accordance with the law a redemption payment is to be received and paid to the family of the victim. The formulation of the clause is interesting. It shows that even where a killing or injury had occurred *kuo shih* there should strictly be a punishment imposed on the scale prescribed by the law relating to killing or injuring in a fight. However the fact that the death or injury has occurred without intention on the part of the person responsible, and possibly without any fault at all, presents a sufficient degree of mitigation for exaction of the punishment to be relinquished in favour of a payment to the family. One therefore has a clear case of payment fulfilling a double function. It functions on the one hand as a punishment in lieu of the physical punishment otherwise applicable, and on the other as a provision to the family of the victim of the means of meeting certain expenses incurred

through the death or injury. Hence the payment can be said to have both a penal and a compensatory function.

A note to the article defines *kuo shih* in the same way as the T'ang code and gives the same examples, with some additions. The examples added are (i) a boat which one is steering is pushed by the wind, (ii) a horse which one is riding is frightened and runs away, and (iii) a cart which one is pushing begins to roll downhill and cannot be stopped by one's own strength. The conclusion of the note is instructive since it explains the reason underlying the treatment of the situations described as examples of *kuo shih*: 'In all these cases there is from the beginning no intention (*i*) of harming another, but a person is accidentally (*wu*) killed or injured. Therefore the law on killing in a fight is to be followed but redemption allowed, the payment to be made to the family of the person killed or injured as a means of supplying funeral or medical expenses' (58). The specific allocation of the payment to funeral or medical expenses incurred by the family of the person killed or injured is not known in T'ang law. It is derived through Yüan law from Mongolian custom (59).

T'ang law had no general requirement that a person who had killed another should make a contribution to the victim's funeral expenses. The payment in the case of *kuo shih sha* was technically a means by which the offender was permitted to redeem his life; as a matter of grace it was allowed to pass to the

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58) The *chu tsuan* commentary, *op. cit.* 1509, if I have understood it correctly, adds the explanation that the point of the payment in the case of death is to bring about a peaceful settlement (*an*) between the families.

59) See Paul Heng-chao CH'EN, *Chinese Legal Tradition under the Mongols* (1979), 52f.

victim's family. Possibly in practice this sum might be devoted to funeral expenses, but the law did not specify this as the object secured by the payment. The position in Ming law was different. As a result of Mongolian influence in the Yüan dynasty the codified law began in cases of homicide to require the payment of funeral expenses. The redemption paid in cases of *kuo shih sha* now appears to have been regarded as one of such payments. There is, however, some difficulty in ascertaining the precise Ming rules on the subject of funeral expenses; part of the problem is that the rules are not consistently set out. Some appear in the code, others are added at different times by statute (*ling*) or special ruling (*li*).

The Ming code itself requires the payment of funeral expenses in certain cases of homicide but by no means in all. For example article 19.15 provides that where a horse is ridden (or cart driven) in a deserted village or in the country and as a result someone is killed, the rider (or driver) is to receive a beating of 100 blows with the heavy stick and pay ten ounces of silver to the victim's family as a contribution towards funeral expenses (*mai tsang ch'ien*). By article 19.17 a hunter who (inter alia) digs pits without displaying the prescribed warning notices and so brings about someone's death is to receive a beating of 100 blows and three years penal servitude and pay ten ounces as *mai tsang chi'en*. Article 19.18 specifies that a person who drives another to commit suicide is to receive a beating of 100 blows and to pay ten ounces as *mai tsang chi'en*. Article 19.11 in the section on *kuo shih sha* and accompanying note provides that the redemption

payment is to be used for the burial of the victim (60), but does not stipulate the amount. A *li* following the article states that this is to be 12.43 ounces of silver.

It is instructive to compare the cases in which the code makes no provision for the payment of funeral expenses. These include not only the main categories *ku sha*, *tou sha* and *hsi sha* but also certain specially regulated cases of homicide. The article on the insertion of objects into a person or the removal of his food or clothing (61) provides that where the victim dies the offender is to be strangled. Nothing is added about funeral expenses. Likewise the article on the firing of arrows in the direction of towns (62) merely provides that, where someone is killed, the person firing the arrow is to receive a beating of 100 blows and to be exiled to 3000 *li*. Significantly the first part of article 19.15 punishes those who cause a person's death through riding horses or driving carts in the streets of a town (without sufficient reason) by a beating of 100 blows and exile to 3000 *li* and, in contrast to the later part, says nothing about funeral expenses. From these examples one might conclude that, under the code, funeral expenses were only authorized where the circumstances of the killing justified a sentence of penal servitude or less.

However a rather different picture emerges from the statutory material and the commentaries annexed to the articles of the code. A statute - the *ta Ming ling* - provides that where a

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60) Interestingly it does not use the technical expression *mai tsang ch'ien*.

61) 19.10; see above.

62) 19.14; see above.

person has killed another, been sentenced to death and then reprieved by an amnesty, he should pay 20 ounces of silver to the family of the deceased. If payment of the full amount would impoverish him, half only need be paid. The text of the statute does not specify that this amount is a contribution to the funeral expenses of the victim. This becomes clear from the *chi chieh* commentary which distinguishes between three classes of payment :

- (a) where a person kills another and in consequence forfeits his own life, his family is to pay 10 ounces of silver towards the funeral expenses (*shao mai yin*) (63).
- (b) where the offender does not forfeit his life he is to pay 20 ounces of silver.
- (c) where the offender ought to forfeit his life but is reprieved by an amnesty he also pays 20 (the case enacted in the *ta Ming ling*).

What is unclear here is the scope of class (b). On the face of it every case in which a person who has killed someone in circumstances entailing a penalty less than death is included. But one knows that in certain of these cases the code itself specified a payment less than 20 ounces. Hence one has to conclude that the commentary is referring to a different group of cases. This group may have comprised killings where the statutory penalty was less than death but greater than penal servitude, viz. exile to 3000 *li*

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63) This appears to be the phrase used in the Yüan dynasty for the funeral payment (lit. 'silver for the burning and burial expenses'). See CH'EN, *op. cit.*, 52.

(64), as well as those in which the statutory penalty was death but special circumstances secured its reduction. An example of this kind, referred to in a further commentary (65), is that in which the offender is the sole support of his parents and is allowed his life so that he may continue to care for them (*liu yang*) (66).

### Conclusion

The main points of contrast between the treatment of the categories of killing in the T'ang and Ming codes may be summarized as follows. *Mou sha* of itself in the T'ang code expresses a premeditated attempt to kill, whether resulting from a plot between two or more persons or from the plan of a single person. The phrase 'plot and if the victim is killed' shows that a successful killing consequent upon a 'plot' was not an ordinary case of *mou sha*; in fact it appears to have been treated as *ku sha* (67). Since this is so the commentary does not need to consider whether the intention requisite for *mou sha* is different from that

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64) Apart from the examples given above one may cite the rules of interpretation stated in book 6, article 9 : where an article of the code with respect to an offence entailing the death penalty provides that someone is to be liable 'with the same offence' or that his offence is to be 'comparable' to the capital offence, the penalty is to be reduced to exile to 3000 *li* plus a beating of 100 blows with the heavy stick. Cf. PHILASTRE, *op. cit.*, I 265; the Ch'ing provision translated is the same as the Ming.

65) This comes after the text of the *li* on *kuo shih sha* in the T'ang *Ming-lü ho-pien* edition.

66) For a discussion of the Ch'ing law on funeral payments see BODDE and MORRIS, *op. cit.*, 338ff.

67) On the other hand 'plot and if the victim is injured...' was not treated in the same way as intentional wounding (*ku shang*) since the penalty (in view of the original intention to kill) was much higher.



requisite for *ku sha*. On the other hand in the Ming code the perspective is changed. *Mou sha* now comprises a killing resulting from a plot or plan; the unsuccessful attempt is designated with the phrase 'plot to kill but not injure'. *Mou sha* has to be distinguished from *ku sha* and hence the commentaries give considerable attention to the difference in the intention relevant to each category. For *mou sha* the intention to kill has to be formed in advance of the actual killing, for *ku sha* it is necessary that the intention be formed at the moment of killing or during the fracas from which it results.

One should also note another difference between the codes, reflecting what appears to have been a more lenient approach adopted by the Ming legislators for cases in which no harm has actually resulted. Where there is a plot to kill but the victim escapes injury the T'ang code still imposes a heavy punishment on the accessories. For those who have 'acted' the sentence is penal servitude for two years and a half, and for those who have 'not acted' penal servitude for two years. The Ming code suppresses here the distinction between 'act' and 'not act' and punishes all accessories with a beating of 100 blows with the heavy stick (68). The standpoint of the Ming legislators seems to be that the principal who originated the idea of killing should still receive a heavy sentence (three years penal servitude and a beating of 100 blows) but that the accessories, even though

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68) This rule applies where there is a plot and something has been done in furtherance of it; if nothing has been done at all the punishment of the accessories is one degree less.

something has been done, should receive a much lighter sentence since the plot has not been effective.

*Ku sha* is more narrowly conceived in the Ming code than in the T'ang. On the one hand premeditated killing (clearly *mou sha* under the Ming code) was treated under the T'ang as the same as, or not sharply differentiated from, *ku sha*. On the other hand an important T'ang category of *ku sha*, that in which someone is killed in a fight involving sharp-bladed weapons, would have fallen under the Ming concept of *tou sha*. An important aspect of the Ming refining of the concept of *ku sha* has again been the attention given in the commentaries to the kind of intention by which *ku sha* is to be distinguished from *mou sha* and *tou sha*, as well as from the related but distinct offence of 'together plotting and collectively beating' a person who dies from his wounds. It is clear from these accounts that there was a considerable practical difficulty in determining whether in a given case a killing should be deemed to fall under the head of *ku sha* or *tou sha*. At the same time on the theoretical plane the Ming code does make a sharper distinction between *ku* and *tou sha* than the T'ang.

Both codes identify as a distinct offence that in which several persons plot to attack another, subsequently collectively strike him and inflict wounds from which he dies. One of the problems faced by the legislators was the allocation of liability as between the principal and the accessories. In dealing with the accessories the Ming code adopts a more lenient approach than the T'ang. According to the latter the accessories who have not inflicted the mortal wounds are to be sentenced to penal servitude for three years, whereas under the former they are to receive only

a beating of 100 blows with the heavy stick. The reason for the Ming leniency is again derived from the harm caused. The accessories in question have neither originated the plot nor contributed significantly to the (unintended) death of the victim; hence their punishment should be relatively light. Later in the dynasty a *li* introduced a harsher rule according to which those accessories who had inflicted serious wounds with a lethal weapon (spear, sword) were to be sent for military service on the frontiers.

The Ming code takes a stricter approach to *hsi sha* than the T'ang. Both codes emphasize that one does not have a case of killing in a game unless two conditions are met : there is a use of force and yet the participants are acting in accord. But the T'ang punishes such killing at two degrees less than the punishment for *tou sha*, with the exception of games involving a particular hazard such as the use of sharp-bladed weapons, where the punishment is only one degree less. The Ming, however, suppresses the distinction between dangerous and other games and imposes in all cases the same punishment as for *tou sha*. As a result the commentaries appear to have difficulty in identifying the precise nature of the intention relevant to *hsi sha*. On the one hand they wish to find an intention to harm, in order to explain why the killing should be treated in the same way as a killing that occurs in a fight, and on the other they have to recognize the fact that since the context is one of a 'game' and not a 'fight' the participants must be in harmony. This ambivalent approach is reflected in the treatment of *hsi sha* in the code. The punishment is the same as that for killing in a fight (*tou sha*) but *hsi sha* itself

is placed in a different article along with accidental and various other kinds of unintended killing.

In essence the Ming treatment of *kuo shih sha* is the same as the T'ang. The minor point of difference derives from a more far reaching change in the law, stemming from Mongolian practice, introduced by the Yüan dynasty and preserved by the Ming. This is the requirement in cases of homicide that the offender (or his family) should make a contribution to the funeral expenses of the victim. Such a contribution might or might not (depending on the circumstances) be an addition to the punishment (the extent of which again depended on the circumstances) suffered by the offender. In the case of *kuo shih sha* the payment, strictly constituting the redemption for the punishment of strangulation, was brought within the general class of contributions to funeral expenses.