

Was the Ordeal Known in Ancient China?

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One of the many enigmas raised by archaic Chinese legal procedure is that concerning the possible use of the ordeal. The fundamental difficulty arises from the fact that very little is accurately known of legal procedures adopted either in the early Chou kingdom (founded around 1100 BC) or in the various states into which China became fragmented prior to the establishment of the Ch'in empire in 221 BC. A work entitled the *Chou Li* (Ritual or Rites of Chou), probably composed during the Warring States Period (475-221 BC) (1), has some details on the conduct of legal proceedings under the Chou kings. These details are sparse and difficult to interpret; nor is it entirely clear to what extent the *Chou Li* was describing an ideal system imagined by its authors to have existed rather than actual practices

1) See H. G. CREEL, *The Origins of Statecraft in China I: The Western Chou Empire*, University of Chicago Press, Chicago and London 1970, 478-80; W. G. BOLTZ, *Chou li*, in M. LOEWE (ed), *Early Chinese Texts: A Bibliographical Guide*, University of California, Berkeley 1993, 24-32.

of the period from around 1000-770 BC, the heyday of the Chou kingdom (2).

Before we consider the evidence supplied by the *Chou Li* and other sources, we have to define more closely what is to be understood by 'ordeal'. Normally the ordeal is thought to be the subjection of a person suspected of having committed an offence to some unpleasant physical test, the outcome of which is held to determine guilt or innocence. Common examples, found in many societies, are the drinking of poison, the handling of hot metal or stone, or immersion in water. Sometimes death results from the test, in which case guilt is presumed. Sometimes death does not result, but the test has still indicated guilt, in which case the accused will be put to death, or otherwise punished by those administering the ordeal. The underlying idea is that the gods, spirits, or supernatural powers in general have disclosed the truth by determining the outcome of the test. The application of the test may therefore be accompanied by an oath on the part of the accused in which he protests his innocence and calls down upon himself divine punishment should he not be telling the truth. The last point suggests the reason why the term 'ordeal' has also been applied to the oath itself, even though no physical test is imposed at the same time. Where the accused swears that he is innocent, he may be left to the punishment of the gods should he

2) This is the period which is usually entitled Western Chou. The Eastern Chou period (770-221 BC) is marked by the effective dissolution of the kingdom into a number of separate states with the Chou king exercising merely nominal sovereignty.

be lying, and not subjected to secular punishment. From this perspective the oath itself is regarded as exposing the individual to the 'judgment of god' and so is treated as a kind of ordeal (3).

The ordeal, whether by physical test or oath, is normally used only where the evidence is insufficient to determine guilt or innocence. Should the accused have been caught in the act, as it were, or should there be other satisfactory indications of his guilt in the form of witnesses or tangible evidence, there is no need to resort to the ordeal. Divine or supernatural guidance is required only where human ability is unable to determine whether a person suspected of a wrong has actually committed it or not. Sometimes, indeed, the ordeal also functions as a resolution of last resort, that is, an accused, even where the evidence is against him, may entrust himself to the judgment of the gods for the revelation of the truth.

In the case of archaic China we have to inquire whether there is any evidence of the ordeal in the sense either of a physical test or the oath itself. Although it has been suggested that there is trace in the sources of a 'hot stone' ordeal (4), the texts which most clearly suggest the use of an ordeal concern an animal and

3) For some general remarks on ordeals see R. DEKKERS, *Des ordalies en droit romain, Revue internationale des droits de l'antiquité* I (1948), 55-62.

4) See R. H. VAN GULIK, *T'ang-Yin Pi-Shih: Parallel Cases from under the Peartree*, E. J. Brill, Leiden, 1956, 46ff. There is some evidence that under the Shang, the dynasty that preceded the Chou, divination was practised in order to determine whether the gods approved the application of a particular punishment. See L. VANDERMEERSCH, *Wangdao ou La Voie Royale* II, École française d'extrême-orient, Paris 1980, 182ff.

an oath. We examine separately the evidence for the existence of these two kinds of ordeal.

The Butting Animal

Essentially the literature preserves an account of two traditions in which use is made of a one horned animal, variously understood by commentators and scholars as a goat, ram, ox, or unicorn, for the determination of guilt or innocence. One tradition is preserved in a late Han (25-220 AD) collection of material entitled the *Lun Heng* (Discussions Weighed in the Balance), whose author, Wang Ch'ung, sought to offer a naturalistic explanation of supernatural phenomena (5). The other is recorded in the writings of the philosopher Mo Tzu who founded the school of thought known after him as Mohism in the fourth century BC.

Wang Ch'ung, noting the fact that in Han times public buildings were adorned with pictures of the legendary Minister of Justice, Kao Yao, and an animal called the *hsieh-chai*, cites an explanation which identifies the *hsieh-chai* with a one horned goat (6). This animal possessed the ability to distinguish the guilty from the innocent. When Kao Yao was trying criminal cases and was unsure whether the accused was guilty, he ordered

5) This work was probably compiled in the latter half of the first century AD. See T. POKORA and M. LOEWE, *Lun heng*, in *Early Chinese Texts* (cited note 1), 309-12.

6) The same character (*yang*) designates either 'goat' or 'sheep'; hence Wang Ch'ung equally could be referring to a one horned ram.

the goat to butt him. The goat obliged by butting a person who was guilty and leaving alone one who was innocent. Wang Ch'ung himself accepts the truth of this account of the conduct of judicial proceedings by Kao Yao, but denies that the animal really possessed the supernatural quality of distinguishing the guilty from the innocent. His rationalistic explanation is that Kao Yao used a one horned goat in order to convince a credulous populace that the divine powers were assisting in the determination of guilt (7).

Certain comments may be made on Wang's account. Kao Yao in one tradition was the minister appointed by the legendary emperor Shun (traditionally assigned to the third millennium BC) to superintend the control of crime and the administration of the punishments. He is located in a 'golden age' of the past in which the country was governed by a sage ruler, and virtue rather than wrongdoing characterized the behaviour of the people. Nevertheless, according to the tradition, the imposition of punishments was necessary even at this time (8). In order to ensure that full justice not only was done but was seen to be done, Kao Yao, where the evidence was not sufficient to establish guilt or innocence, had recourse to the services of a

7) The edition of the *Lun Heng* used is that included in the *Ssu pu ts'ung k'an* collection. For the text see the section of book 17 entitled *Shih-ying* (Auguries Verified), translated by Alfred FORKE in *Lun-Heng II: Miscellaneous Essays of Wang Ch'ung*, 2nd ed, Paragan book Gallery, New York 1962 (reprint of 1911 edition), 321-2.

8) On Kao Yao as minister of crime see J. LEGGE, *The Chinese Classics* 3 (Taiwan reprint), 44f, 57f; D. BODDE and C. MORRIS, *Law in Imperial China*, University of Pennsylvania Press, Philadelphia 1973, 559f.

special animal, the *hsieh-chai*. It is implicit in Wang's account, although he seeks to minimize the implication, that the animal was believed to have an infallible ability to distinguish the guilty from the innocent. This ability was, we may assume, believed to be derived from the supernatural powers or the gods.

Other traditions show that Kao Yao may have had a special connection with goats. Mark LEWIS has argued that Kao Yao was believed to be an ancestor of a group of tribes in the western and north-western part of China surnamed Ch'iang, described in an early dictionary as being the 'goat race' (9). LEWIS suggests that the goat was the 'sacred totemic animal' of the Ch'iang people (10). If this hypothesis is correct, Wang Ch'ung's account of Kao Yao and the *hsieh-chai* may reflect a tradition of a tribal group to which Kao Yao belonged having a special relationship to the goat. In this context it would be quite conceivable that goats, or a particular kind of goat, were used to determine guilt or innocence in doubtful cases.

The account in Mo Tzu is rather different from that of Wang Ch'ung. It concerns the use of an animal, which may be a goat or a ram (11), for the determination of a difficult legal case. There is no mention of Kao Yao, the dispute arising in the state of Ch'i in the early eighth century BC. However Ch'i was one of the states

9) Part of the character for Ch'iang is itself the character for 'goat/sheep'.

10) M. E. LEWIS, *Sanctioned Violence in Early China*, State University of New York Press, Albany 1990, 198.

11) See note 6 above. The rendering 'goat' is generally accepted in this paper.

descended from the Ch'iang (goat) people (12), and therefore the use of goats in legal proceedings may appear less surprising than would be the case among peoples who had no special affinity with this animal. Mo Tzu relates that two ministers of the Duke of Ch'i had been engaged for three years in a law suit without a resolution proving to be possible. Eventually the ruler ordered the two men to bring one goat (13) and make a sacrifice at the altar of the God of the Earth. Each disputant was to swear to the truth of his case by the solemn form of oath known as *meng*. At this point there is an important uncertainty or ambiguity in the text. On one version, that which seems to be preferred by the Chinese commentators, the throat of the goat is slit and its blood sprinkled on the altar (14). However, it may be that the text should be taken in the sense that blood was drawn from the goat and sprinkled on the altar, but that the goat was not thereby killed (15). After the rite of sprinkling the blood had been performed, each disputant then stated his case to the God. The first to speak was not

12) LEWIS, *op. cit.*, 199.

13) This animal is often taken to be a ram, but, in view of the association between Ch'i and the Ch'iang people, may better be understood as a goat.

14) This follows the translations of Yi-piao MEI, *The Ethical and Political Works of Motse*, Ch'eng Wen, Taipei 1974 (reprint of 1929 edition), 164; B. WATSON, *Mo Tzu*, Columbia University Press, New York and London, 1963, 99; H. MASPERO, *Le Serment dans la procédure judiciaire de la Chine antique*, *Mélanges chinois et bouddhiques* III, Paris 1934, 287. The translation by VANDERMEERSCH, *Wangdao* II, 443 is slightly different. For the text see *Mo-tzu chi-chien*, ed. CHANG Ch'un-i (Taipei reprint, 1982), 283-4. See also A. C. GRAHAM, *Mo tzu*, in *Early Chinese Texts* (cited note 1), 336-341.

15) So, it appears, M. GRANET, *Danses et légendes de la Chine ancienne* I, Presses Universitaires de France, Paris 1959, 142.

interrupted, but, before the second had completed his recital, the goat arose, butted him, broke his leg, and threw him down on the place at which the oath was being taken. The text is corrupt at this point and it is not clear whether the goat's act resulted in the death of the perjurer or not and, if so, whether his death was deemed to have occurred through the intervention of the angry God. Even should the victim have survived the attack made upon him by the goat, we can assume that the ruler would have put him to death on the ground that his guilt was now amply demonstrated (¹⁶). Mo Tzu concludes his account by stating that the people of Ch'i and the feudal lords all believed that the gods would punish anyone who took a false oath.

An important preliminary point requires clarification. If the text is to be treated as evidence that the law suit was resolved through the subjection of the parties to an ordeal which consisted in the butting of the guilty party by a goat, then one cannot suppose that the goat was actually put to death prior to the act of butting. It seems that there are three possible approaches to the incident of the sprinkling of blood from the goat and its subsequent 'coming to life' and butting the guilty. First, it may have been the case that those in charge of the sacrifice believed that the goat had had its throat properly cut. In fact the cutting had not been thorough enough and the goat still lived. At a particular point in the proceedings it arose and butted the second litigant

16) Only GRANET (previous note) takes the text in the sense that the goat struck the perjurer to death; MEI, WATSON and MASPERO (cited note 14) suppose that he was struck down by the goat onto the altar. VANDERMEERSCH (note 14) has a quite different interpretation.

who happened to be in the course of making his solemn statement. On this interpretation the act of the goat could well have been regarded as a prodigy or a specific example of divine intervention (17). Second, the throat of the goat may not have been cut, at least so as to cause death, but a wound may have been inflicted simply in order to draw blood (18). Third, there may have been a confusion in the tradition recorded by Mo Tzu between the ceremony of the *meng* oath (involving the sacrifice of a victim) and the use of a butting goat as a means of determining guilt or innocence. In other words, on the third approach, we have to suppose that two or perhaps three goats were employed in the resolution of the original dispute, one or two being sacrificed in the ritual of the *meng* oath (19), one being used to butt the guilty.

It is likely that the answer lies in the third explanation. On the one hand, the text is to some extent corrupt, and, on the other, the details have been so compressed that some confusion or running together of facts may well have occurred. We know from the account of legal procedure in the *Chou Li*, discussed

17) Cf. MASPERO's citation of a passage from a Sung source to the effect that the people of Ch'i considered the butting by the goat to be a divine prodigy, *op. cit.*, 288.

18) So the interpretation of GRANET (note 15).

19) On *meng* cf. S. COUVREUR, *Mémoires sur les bienséances et les cérémonies (Li Ki)* I.i, Cathasia, Paris 1950, 92; VANDERMEERSCH, *op. cit.*, 455ff. It seems that normally where several parties swore the *meng* oath only one animal was sacrificed. However, the *Chou Li*, in the context of a law suit, supposes that each party contributes a sacrificial victim (see note 34 below).

below, that each of the parties to a dispute, when swearing the solemn *meng* oath brought with him his own animal for sacrifice. Hence it is likely that the goat which the Duke ordered the disputing ministers to bring was intended not for sacrifice, but for determining which of them was speaking the truth.

Do we have concealed in the accounts of Wang Ch'ung and Mo Tzu a memory of an old tradition according to which the early Chou rulers or at least some of the states into which the Chou kingdom fragmented resorted to an ordeal for the resolution of doubtful legal cases? The question has aroused considerable controversy, some scholars asserting ⁽²⁰⁾ and some denying ⁽²¹⁾ that the evidence discloses the existence of an ordeal constituted by the entrusting of the decision in the case to the butting of a one horned animal. One cannot make an a priori assumption as to whether the early Chinese resorted to an ordeal involving the use of some material object or not. Comparative investigation has shown that most archaic or simple societies have known ordeals

20) GRANET (cited note 15), 14f; E. J. M. KROKER, *Rite, Gesetz und Recht (Grundlagen der Rechtsordnung im alten China)*, Österreichische Zeitschrift für öffentliches Recht 19 (1969), 102f (though emphasising that the decisive point in the Mo Tzu passage is the sacrificial oath by which the judgment of the gods is obtained); VAN GULIK (cited note 4), 48 (on the *Lun Heng* passage only); T'ung-tsu CH'Ü, *Law and Society in Traditional China*, Hyperion Press, Connecticut 1980 (reprint of 1961 edition), 208 (also referring only to the *Lun Heng*); LEWIS (cited note 10), 198f; LIANG Zhiping, *Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture*, *Journal of Chinese Law* 3 (1989), 59 (referring only to the *Lun-Heng*).

21) MASPERO (cited note 14), 286ff; VANDERMEERSCH (cited note 14), 443f.

of this kind (22). Yet it must remain theoretically possible that there existed societies which constituted an exception.

The essential issue is whether the actual evidence (the accounts of Wang Ch'ung and Mo Tzu) can plausibly be interpreted as disclosing the existence of an ordeal revolving around the use of a butting animal. From this point of view it is important to consider the generality of Wang's account in contrast to the specificity of Mo's. Taken in itself the story of the two disputing ministers of the court of Ch'i would not support the conclusion that the authorities in Ch'i regularly resolved doubtful cases by the use of a butting animal. We might prefer to conclude that the activity of the goat (or ram) reported by Mo Tzu was believed either to be a 'divine prodigy' (23) or an unusual and unexpected accident (24). However, what Mo Tzu relates should be considered in the light of Wang Ch'ung's report that Kao Yao regularly made use of a one horned animal for the resolution of doubtful cases. Two independent records of the use of a horned animal to determine the truth through the butting of the guilty party, especially if both relate traditions associated with persons or people for whom the goat was a totemic animal (25) suggest that the incident recorded by Mo Tzu may not have been unique. In the light of Wang Ch'ung's remarks on Kao Yao we may

22) See the article by DEKKERS, cited note 3.

23) So MASPERO, *op. cit.*, 288.

24) VANDERMEERSCH, *op. cit.*, 444.

25) LEWIS, *op. cit.*, 198.

suggest a tentative conclusion that the rulers of Ch'i regularly resorted to a butting animal for the resolution of doubtful cases.

A possible objection to this conclusion has been strongly urged by the great French sinologist Henri MASPERO. In his contention the two accounts, that of Wang Ch'ung and that of Mo Tzu, have nothing to do with each other. The former relates to a mythical one horned animal called the *hsieh-chai* which appears to be an animal resembling the unicorn, whereas the latter describes a prodigy associated with an ordinary sacrificial ram. According to MASPERO, Mo Tzu is describing a judicial 'ordeal' in use among the people of Ch'i, but this ordeal was constituted simply by the swearing of a solemn oath (*meng*)⁽²⁶⁾. The *meng* itself involved the sacrifice of an animal to the gods who were believed to inflict immediate punishment on a person who swore falsely. MASPERO concedes that the particular incident of the animal coming to life and butting the guilty may have been borrowed by Mo Tzu from the legend of Kao Yao.

The difficulty with accepting MASPERO's interpretation is that the act of butting seems central to the process by which the guilty party is determined in the dispute recorded by Mo Tzu. Although an oath is taken and, indeed, may have been held to be indispensable, it is the physical attack by the animal which makes manifest the falsity of the statement. It is not easy to deduce from Mo Tzu's words the fact that the determination of the truth was

26) MASPERO, cited note 21; cf also VANDERMEERSCH, cited note 21.

left to the oath itself, the butting animal merely being a peripheral and unforeseen part of the proceedings. We have to remember that the Duke of Ch'i, when determining the way in which the dispute was finally to be resolved, had ordered both parties to bring one goat. This already suggests that the goat was to play an important role, distinct from that of being merely the animal customarily sacrificed in the swearing of the *meng* oath. The very fact that the supply of the goat was entrusted to the parties is significant. It does not appear that the ruler kept a special pool of goats reserved for the resolution of disputes.

Furthermore, Wang Ch'ung in describing the *hsieh-chai* employed by Kao Yao for the selection of the guilty uses the same character (*yang*) as that used by Mo Tzu in describing the animal which butted the guilty litigant. This is the character that designates indifferently a goat or a sheep. According to MASPERO, Wang employs the term *yang* as a variant for *hsieh-chai* either to meet the demands of the rhythm of the passage or to give a rational explanation of what appeared to be a supernatural occurrence. No such animal as a unicorn (*hsieh-chai*) in fact existed. Therefore Wang sought to explain the unicorn as being in fact an ordinary one horned ram. While MASPERO may be correct, there is a simpler and perhaps preferable explanation of Wang's use of the term *yang*. This is that he himself understood the *hsieh-chai* used by Kao Yao to be in fact a one horned goat or ram which was believed to have the power to distinguish the guilty from the innocent. Wang, therefore, was probably referring to the same kind of animal as Mo Tzu. If this conclusion is acceptable, we have to consider two further points: why does

Mo Tzu not refer to the *hsieh-chai*, and why does he not say that the animal was one horned?

The answer to both these questions can be derived from the assumption that the *hsieh-chai* in origin (whatever later tradition made of it) was an ordinary goat possessed of one horn (27). Whether it was a goat born with one horn or whether a normal two horned goat had one horn removed is a question that has to remain unresolved. The essential point is that the special term *hsieh-chai* was applied to such one horned goats as were used in the judicial process for the resolution of doubtful cases. If this is correct, it is perhaps not surprising that Mo Tzu's account refers merely to a goat and does not use the special term *hsieh-chai*.

What is something of a puzzle is that Mo Tzu makes no reference to the fact that the goat was or should have been one horned. There are several possible explanations for this omission. One has already been noted in a different context, namely, that the version of the goat ordeal utilized by Mo Tzu had already confused the role of the ordinary goat (or the other animal) used as a sacrifice in the procedure of the oath (*meng*) with that of the one horned goat used in the ordeal of butting. A second is that Mo Tzu simply omitted the detail that the goat brought by the litigants was one horned, on the ground that the emphasis in the resolution of the dispute was on the act of butting itself, not on the precise characteristics of the animal which

27) No particular importance attaches to whether the animal was a goat or a ram; I am here following LEWIS's supposition (notes 10, 12, 25) that the animal was associated particularly with a 'goat people'.

butted. A third explanation would suppose a greater flexibility in the use of butting animals than is suggested by the tradition concerning the *hsieh-chai* alone. In the state of Ch'i at the time in which the dispute between the two ministers was located it is possible that any goat might have been used in the ordeal. If this were the case, we would also have an explanation of the fact that the parties might bring their own animal; it did not have to be one kept specially by the ruler or official in charge of the hearing of law suits. It is thought here that the third explanation has at least a certain degree of plausibility.

The paucity of the evidence and the difficulties of interpretation presented by the two principal texts make firm conclusions impossible. Yet on balance it does seem that an ordeal which made use of an animal for the determination of guilt or the resolution of doubtful cases was known in Chou China. The animal used was equipped with at least one horn. It resolved the dispute or determined the guilt by butting the person who was not telling the truth. There are certain indications that the animal employed in this ordeal was a goat, but we cannot rule out the possibility that other horned animals, in particular rams, were also used. In one source the animal is stated to have possessed a single horn, in the other it appears to be a question of a normal two horned animal. This suggests that there may have been some variation in practice. Possibly the ideal was the use of a one horned animal, but in fact two horned animals may also have been used.

The Oath

We have already seen that MASPERO interpreted Mo Tzu's account of the dispute between the Ch'i ministers as disclosing evidence of resort to an ordeal. However, the ordeal in question was not the act of butting by the goat (ram) but the swearing of the solemn *meng* oath by the disputants. On this interpretation the *meng* oath constituted an ordeal in the sense that the person taking it exposed himself to the 'judgment of the gods'. Should what he state to have occurred not in fact be the truth, the gods would reveal the falsity by visiting their anger on the perjurer. Thus, for MASPERO, the Ch'i minister who swore falsely was immediately struck down by the gods. The goat (ram) was simply the agency through which the divine anger was expressed.

First, we should consider more closely the sense in which the oath might be considered to be an ordeal. MASPERO himself notes that legal historians commonly distinguish proof by means of an oath from ordeals and reserve the name 'ordeal' for the widely found tests by fire, water or poison and the like. However, he points out that it is difficult always to distinguish the two institutions and cites the Victorian anthropologist Sir Edward TYLOR for the proposition that an oath whose falsity was believed to produce an immediate adverse consequence for the perjurer is a true ordeal (28). MASPERO's treatment of at least certain kinds of oath as ordeals can perhaps be justified, but we

28) No citation is given for TYLOR.

would have to add that the effect of the divine anger need not be immediate. The gods might punish the perjurer or even his descendants at any time they chose (29). From this perspective the oath must be considered an ordeal of a rather different kind from the physical. Not only does it not expose the accused to any unpleasant physical test but, more importantly, it may result in no immediate ill effect, even should the oath in fact have been false.

Second, we have to consider what other evidence there may be of the oath as an ordeal in archaic Chinese legal procedure. It is well known that regular legal procedure in China throughout the entire imperial period from the foundation of the Ch'in dynasty in 221 BC to the collapse of the Ch'ing in 1911 did not make use of the oaths in any sense. Neither the parties nor the witnesses were required to take an oath when giving their evidence. However, for the pre-Ch'in period there is evidence that oaths were used. The principal information comes from the *Chou Li* which purports to describe the institutions of the Chou kingdom. Some remarks on legal procedure are necessary in order to place in context the role assigned to the oath.

The *Chou Li* appears to distinguish two varieties of law suit, one denominated by the word *sung* and the other by the word *yu*. The late Han commentator Cheng Hsuan explained the *sung* as 'by reason of property bring mutual accusations'. This seems to refer to the fact that the parties were engaged in a dispute about

29) Cf G. GLOTZ, *L'Ordealie dans la Grèce primitive*, Arno Press, New York 1979 (reprint of 1904 edition), 123, 124 (treating the oath as a weakened type of ordeal derived ultimately from the more physical forms).

property ⁽³⁰⁾. On the basis of this evidence *sung* is generally taken to refer to a civil as distinct from a criminal action. Cheng Hsuan explained the *yu* as 'mutually inform by reason of specific offences'. This seems to refer to the fact that each party is accusing the other of having committed a specific offence, or perhaps that one is making the accusation and the other is making a denial, alleging in his turn that the accusation is false ⁽³¹⁾. Hence *yu* is generally taken to refer to a criminal suit in which one party is accusing the other of having committed a criminal offence.

There is some difficulty in understanding the terms *sung* and *yu* as referring to two different kinds of legal action, one civil and one criminal. For example, a dispute about property could also involve allegations that a criminal offence had been committed, as in the case of theft. It has been argued that it is a mistake to rely entirely upon the observations of Cheng Hsuan. Rather, the terms *sung* and *yu* should be understood as referring to different stages of the same (civil) action. *Sung* would designate the original plaint and *yu* the actual arguments conducted before the

30) *Chou-li chu-shu*, 34.4b; VANDERMEERSCH, *op. cit.*, 460: Ce qu'on appelle plainte (*sung*), c'est l'accusation réciproque en vue (d'une condamnation sur) des biens.

31) *Chou-li chu-shu*, 34.5a; VANDERMEERSCH, *op. cit.*, 461: Ce qu'on appelle dénonciation (*yu*), c'est l'accusation réciproque en vue d'une inculpation.

judge⁽³²⁾. In this essay the more traditional treatment is followed, *sung* and *yu* being taken as referring to different kinds of legal action. No compelling reason has been adduced for setting aside the testimony of Cheng Hsuan.

The *Chou Li* describes two different procedures by which a civil (*sung*) or a criminal (*yu*) suit might be instituted. One is described in the section which discusses the function and duties of the official entitled Grand Controller of Bandits, and the other in the section on officials entitled Controllers of Oaths. In the former context a suit is said to be instituted by the deposit by each party either of a bundle of arrows (in the case of a *sung*) or of a certain amount of copper (in the case of a *yu*). Cheng Hsuan's commentary explains that failure by either party to deposit the arrows or copper constitutes an admission of being in the wrong⁽³³⁾. It is not made clear in the text whether failure to deposit results in the lack of hearing of the action altogether or in the condemnation by the judge of the party in default. The implication of Cheng's comment that failure to deposit constitutes an admission of wrong is that the party in default is ipso facto deemed to have lost the action and so was condemned.

32) MASPERO, *op. cit.*, 268f, especially 269 n2, followed by C. S. GOODRICH, *Some Remarks on Arrows in the Ancient Chinese Legal Process*, *Journal of the American Oriental Society* 82 (1962), 534 n17, but *contra* VANDERMEERSCH, *op. cit.*, 460f.

33) *Chou-li chu-shu*, 34.4b,5b; E. BIOT, *Le Tcheou-li ou rites des Tcheou II*, Ch'eng Wen, Taipei 1975 (reprint of 1851 edition); VANDERMEERSCH, *op. cit.*, 460-1. Generally see also MASPERO, *op. cit.*, 268ff; GOODRICH, *op. cit.*

In the second context, that of the official who dispenses the oaths, the *Chou Li* states that, where either a criminal or a civil suit (*yu sung*) is instituted, each party is required to swear a solemn oath which contains a curse invoked on the swearer in the event of perjury (*meng tsu*). According to the procedure described in the text each party is to bring a sacrificial animal. After the oaths have been taken, the presiding official offers the sacrificial wine and the flesh of the victims to the gods⁽³⁴⁾. Cheng Hsuan in his commentary explains that this procedure has the effect of discouraging litigation since a person who is not sincere in his allegation will not dare to take the oath. Should a dishonest party nevertheless swear, the gods will visit him with misfortune⁽³⁵⁾.

On the assumption that the writer of the *Chou Li* was not indulging in pure invention, we have described what appear to be two different procedures for the commencement of legal actions in the pre-Ch'in period. At least, we may say that some of the states into which China was divided at this time adopted these procedures. Whether they actually go back to the beginning of the Chou kingdom is difficult to determine. What cannot be ascertained from the *Chou Li* passage are the precise circumstances under which resort was had to the deposit of the

34) One notices here an important difference between this account, focusing upon the procedure by way of oath, and the account of Mo Tzu, focusing upon the ordeal by means of the butting goat. In the *Chou Li* each of the parties is to bring an animal for sacrifice; in Mo Tzu the whole point is that both parties bring only one animal between them.

35) *Chou-li chu-shu*, 36.13b; BIOT, *op. cit.*, 361; MASPERO, *op. cit.*, 292; VANDERMEERSCH, *op. cit.*, 463f.

arrows and copper or to the swearing of the solemn oath. It does not seem likely that both procedures were employed for the same law suit. Was the distinction drawn in terms of the subject matter of the suit, the ability to supply arrows or copper, or the status of the litigants? We cannot tell. The most one can establish is that, under certain (unspecified) circumstances, the parties might resort to an oath at the start of either civil or criminal proceedings. We also have to observe that it is uncertain whether the judge might declare whether an oath was to be taken or not, or whether the parties themselves might make the choice.

The text of the *Chou Li* does not explain the function of the oath. The Chinese commentators state that a person who was not sincere in his claim would not dare to take the oath, and hence the procedure by way of oath served to reduce litigation. The reason an insincere litigant will not dare to take the oath, according to the commentator Cheng Hsuan, is that a false oath will attract the attention of the spirits to whom the sacrifice has been made and so entail misfortune for the perjurer. From this it appears that the swearing of the oath itself was not treated as determining the question of guilt or innocence. The taking of the oath by both parties was simply a precondition for the investigation into the facts to be conducted by the judge. What determined the outcome of the case was the failure by either party to swear. However, it is not easy to determine the precise consequence of such failure. It does not seem that the unwillingness of either party to swear always resulted in the fact that the case was taken no further. In some cases this might have been the result, as where a person who accused another of an offence, or sought to recover property

from another, in the end failed to take the oath ⁽³⁶⁾. However, where the person accused of having committed a criminal offence or the person from whom property was sought refused to take the oath, it does not seem as though proceedings could then have been altogether abandoned. Under these circumstances failure to swear may well have been taken as an admission of guilt, with the result that the judge, without making a further investigation, immediately pronounced a sentence of condemnation.

As portrayed in the *Chou Li* and its commentaries the oath functions not as an ordeal but as a preliminary step in legal proceedings. Adverse consequences follow not from the taking of the oath but from the refusal to swear. At this point we have to indulge in a certain degree of speculation. If we ask, how did the oath come to acquire the function in legal proceedings which it is assigned in the *Chou Li*, we may speculate that this function already represents a development from its original function. Originally the oath may have been a free standing, independent mechanism for the determination of guilt or innocence, at least in certain cases. On this supposition a person accused of an offence, where no clear and incontrovertible evidence indicated guilt, might swear an oath in solemn form that he was innocent. The effect of the oath was to engage the attention of the gods or spirits. Should the accused have sworn a false oath, death or other misfortune would fall upon him and possibly also upon his

36) Even here it is possible that the case was treated as one of false accusation and the appropriate punishment for this offence imposed.

descendants at the hands of the gods (37). In this sense, if these speculations are acceptable, we can say that the archaic Chinese law knew the oath as an ordeal. Although the ordeal of the butting goat seems to have involved the swearing of an oath as one of its components (38), the oath alone may also have been used as an ordeal. It was not necessarily combined with some physical test.

37) Cheng Hsuan's commentary, noted above, shows that this belief was still retained after the oath had lost its specific character as the determinant of guilt or innocence, and had become merely the first step in legal proceedings.

38) It is probably unwise to infer from the account in Mo Tzu alone that the taking of an oath was always necessary where recourse was had to the butting animal.