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Jean-François Gerkens, Université de Liège
Quartier Agora, Place des Orateurs 1
Bâtiment B33 (boîte 11), BE – 4000 Liège
jf.gerkens@ulg.ac.be

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Éditorial

Jean-François Gerkens

Voici déjà le troisième volume de la RIDA dans son nouvel emballage… auquel nous espérons que les lecteurs se sont désormais habitués. Après un numéro 62 (en hommage à Jacques Henri Michel) finalement paru en janvier 2017, cette année pourrait bien devenir l'année des trois RIDA, dès lors que d'après nos prévisions (faut-il écrire espoirs ?), le numéro 64 devrait encore paraître avant la fin de l'année 2017.

Le présent numéro comporte les rubriques habituelles, avec un retour d'une chronique de la SIHDA plus complète que dans le numéro précédent, incluant à nouveau les résumés de la plupart des conférences prononcées. Comme le lecteur peut l'imaginer, la différence vient ici en partie de la discipline des conférenciers et des organisateurs de la SIHDA. J'ai dès lors fourni une traduction en français de tous les résumés dont je disposais.

Rendez-vous est maintenant donné pour la 71e session de la SIHDA à Bologne et Ravenne, dont le thème central sera : La liberté et les interdictions dans les droits de l'Antiquité. Elle se tiendra du 12 au 16 septembre 2017. Dans l'espoir de vous y rencontrer nombreux, je souhaite à chacun une bonne lecture !

Chaudfontaine, le 15 juin 2017
Jean-François Gerkens

Physical Injury and Insult in Early Chinese Law with Comparative Annotations from Other Early Laws

Geoffrey MacCormack
Université d'Aberdeen

1. Introduction

The wounding of persons of various social classes is a topic that features conspicuously in the laws of the ancient Near East, the laws of the earliest English kings, biblical law, and early Roman law as well as in early Chinese law. Considerably less comprehensive is the role assigned to insult in these collections of laws[1]. It is by no means clear even to what extent liability for a purely verbal insult was recognised as distinct from a slight upon one's honour exhibited in the form of a physical act such as a slap in the face.

The focus of the treatment of wounding and insult in this essay will be upon the early Chinese law. There are two reasons for this. First, the Chinese is still by far the least known of the various legal systems of the ancient world and, second, of all these legal systems, the Chinese shows the most developed and sophisticated set of rules with respect to both wounding and insult. Against the background of the Chinese law, details of legal rules from other early civilizations or societies are cited in an attempt to show (despite vast differences in both the dates and the nature of the legal material) what they have in common in their approach to liability for wounding or the degree to which they recognise insult as an independent wrong or offence. At the same time an attempt, elaborated in the conclusion, is made to analyse the differences in the rules from the material being compared.

The material utilised in this essay is drawn from the following sources:

1. At the outset we have to make an important clarification with respect to the meaning of the term 'law'. Only in early China do we have law in the sense of rules enacted by the sovereign (emperor) for the regulation of the subjects of the state, rules that were strictly interpreted and enforced by officials of the government. The 'laws' found in 'codes' of the Ancient Near East, the early English kings, and even in the Roman Twelve Tables appear to have been very different from those of the Chinese pattern. Generally, they are better regarded as guidelines for conduct with some normative force, yet lacking the character of prescriptive rules enforced by the courts.

(1) Chinese law as it developed from the fourth century BCE to the seventh century CE, culminating in the production of the Tang penal code, arguably the greatest of the imperial Chinese penal codes. The point to be emphasised is that Chinese law (in this context) was entirely a set of rules promulgated by the ruler or emperor for the regulation of the behaviour of his subjects, an objective accomplished in extraordinary detail[2].

(2) The laws preserved in various languages and forms from the civilizations of the ancient Near East, namely:

(i) The laws of Ur-Nammu (LU), attributed to kings of the state of Ur around the beginning of the second millennium BCE, had at this period a wide influence in Mesopotamia[3].

(ii) The laws of Lipit-Ishtar (LL) from around 1930 BCE, issued under the authority of the fifth ruler of the dynasty of Isin, powerful in southern Mesopotamia, which followed the collapse of the third dynasty at Ur[4].

(iii) A Sumerian Law Exercise Tablet from around 1800 BCE is a document used in scribal schools for the training of scribes in their future work as recorders of laws. The laws expressed in it are similar in form to those contained in the LU. For our purpose, its importance lies in the particularly interesting provisions on liability for procuring a miscarriage[5].

(iv) The laws of Eshnunna (LE) from around 1770 BCE are a collection of laws which may have been officially promulgated by the ruler of the state in the first half of the second millennium, a time when Eshnunna controlled a large part of Upper Mesopotamia[6].

(v) The laws of Hammurabi (LH) from around 1750 BCE represent the most extensive extant collection of laws from Mesopotamia. They were issued as a 'code' under the authority of king Hammurabi (reigned 1792–1750 BCE), but do not consist of legislative decrees issued by the king. Probably they contained some judicial decisions of Hammurabi and his predecessors, but they also drew on rules already stated in earlier Near Eastern collections of laws like LE. The laws appear to have been promulgated by Hammurabi as a permanent record of his concern for justice in the administration of his newly established empire[7].

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2. For a general oversight of the development of law in China see the articles on the history of Chinese law (by various authors) in Stanley N. Katz (editor-in-chief), *The Oxford International Encyclopaedia of Legal History*, New York, 2009, volume I, pp. 400–439.

3. See Martha T. Roth, *Law Collections from Mesopotamia and Asia Minor. Second edition*, Atlanta, Georgia, 1997, pp. 13–14. This work is hereafter cited as Roth.

4. Roth, *o.c.* (n. 3), pp. 23–24.

5. Roth, *o.c.* (n. 3), pp. 42–43.

6. Roth, *o.c.* (n. 3), pp. 57–58; Reuven Yaron, *The Laws of Eshnunna. Second revised edition*, Jerusalem/London, 1988, chapter 1. This work is hereafter cited as Yaron.

7. Roth, *o.c.* (n. 3), pp. 71–76; G.R. Driver – John C. Miles, *The Babylonian Laws. Volume I. Legal Commentary*, Oxford, 1952, chapter 2.

(vi) The Hittite Laws (LH) stem from the period in the latter part of the second millennium when the Hittites were in control of the central Anatolian plain (modern Turkey). The laws were first written down in the period 1650–1500 BCE and then issued in a revised form in the period 1500–1180. Although the Hittite rulers endorsed the production of these collections of laws, may even have initiated them, the laws recorded in the collection are not royal decrees. Rather they appear to have been authoritative statements of widely accepted practice or even judicial decisions selected to act as precedents for future cases[8].

The basic point to be made about the Babylonian and Hittite law collections collectively is that, in striking contrast to the early Chinese laws, they did not consist of statutes issued by the ruler for the control of his people. The laws were promulgated with the authority of the ruler and indeed may have been presented as evidence of his concern for justice, but, with possibly a few exceptions, they did not consist of individual royal edicts or proclamations. Some of the laws might have been derived from decisions of the ruler on points of law submitted to him, but many were inherited from the past as rules imbedded in the legal consciousness of the times, whatever their ultimate origin.

A linguistic difference in the formulation of the Chinese laws on the one hand and the Babylonian/Hittite laws on the other should be noted. The former use the language of 'all cases of' or 'whoever (commits an offence)', whereas the latter are typically framed casuistically, that is, in terms of a clause introduced with 'if' followed by a clause stipulating the consequence. Reuven Yaron in particular has noted that the 'if' formulation better suits rules originating in judicial decisions or the 'common law' than those enacted by edict or proclamation[9].

A point consistently emphasised by one of the leading authorities on the Babylonian codes, Raymond Westbrook, is the nature of the so-called cuneiform law codes as products of the 'scientific tradition' of the ancient Near East. Originating as collections of rules issued under the authority of the ruler, they were developed by the scribal schools as treatises on the law, concerned not with an exhaustive statement of the law but with the raising of difficult legal problems for discussion in the schools. Hence the statement of the law on any particular point may owe something to elaborations or deductions made by the scribes themselves on the basis of the original rule taken from a royal decision or the common law. Such laws, edited and transmitted by the scribes, did not operate as binding precedents for the courts, although they may have had some influence on judges as guidelines for decision making[10].

8. Roth, *o.c.* (n. 3), pp. 213–216 (contribution by Hoffner); Harry Angier Hoffner, Jr., *The Laws of the Hittites. A Critical Edition*, Leiden/New York/Köln, 1997, chapter 1. This work is hereafter cited as Hoffner.

9. Yaron, *o.c.* (n. 6), pp. 87–110

10. Raymond Westbrook, *Studies in Biblical and Cuneiform Law*, Paris, 1988, pp. 1–8; "Biblical and Cuneiform Law Codes", *Revue Biblique* 92 (1985), pp. 247–264; *A History of Ancient Near*

(3) The biblical code of the Covenant known as the *Mishpatim*, purportedly a creation of Moses around 1300 BCE, contains rules which may go back to the second millennium, although they were not written down until the ninth or eight century BCE. The origin and nature of the Covenant code are much disputed. The trend of at least some influential modern scholarship is to locate the *Mishpatim* in the same academic or scholarly tradition as the 'codes' of the ancient Near East, accepting that the casuistic formulation of the biblical rules, although not necessarily their content, was derived from the same tradition. Equally, there is no agreement as to whether the rules were intended for use by judges in courts, operated as 'self-executing laws' in a context of the private settlement of disputes, or even were no more than moral or religious injunctions. Two points, however, are clear. The rules were neither enactments of the Israelite kings nor were they authoritative statements of the law binding on judges. If utilised by the courts, they, like the rules of the ancient Near Eastern codes, functioned more as guidelines or pointers to a possible solution[11].

(4) The first statutory enactment of Roman Law, the Twelve Tables from around 450 BCE, consists of a series of rules drafted by a special board of legislators and then passed in due form by the appropriate assembly of the people. Although in political terms the Tables represented a concession by the patrician ruling class, they were designed to apply to all sections of the Roman people. Again, one has to register a doubt as to the extent to which the rules expressed in the Tables were regarded as authoritative statements of the law binding on courts[12].

(5) The earliest English law is represented by the Kentish code of Ethelbert (d. 616 CE) and the Wessex code of Alfred (r. 871–899). These 'codes' are again misleading in that, despite appearances, they are not collections of royal decrees or enactments authoritatively establishing the law. They appear to be a combination of statements of the 'common law' and rulings made by the king and his council on difficult points of law, not necessarily in the context of a judicial decision. The most

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Eastern Law, Brill, online. See also Martha T. Roth, "Mesopotamian Legal Tradition and the Law of Hammurabi", *Chicago-Kent Law Review* 71/1 (1995), pp. 13–24; H.J. Bowker, *Law and the Administration of Justice in the Old Testament and Ancient East*, tr. J. Moiser, London, 1980, Introduction.

11. See discussion in, for example: Theodore H. Robinson, *A History of Israel. Volume I. From the Exodus to the Fall of Jerusalem, 586 B.C.*, Oxford, 1952, pp. 326 et seq; Calum M. Carmichael, *The Origins of Biblical Law. The Decalogue and the Book of the Covenant*, Ithaca/London, 2002, Introduction; Bowker, *Law and the Administration of Justice*, chapter V; Bernard Jackson, "Modelling Biblical Law: The Covenant Code", *Chicago-Kent Law Review* 70/4 (1995), pp. 1745–1827, and *Wisdom Laws. A Study of the Mishpatim of Exodus 21:1–22:16*, Oxford, 2006, Part I: Introduction (with particular reference to the views of Westbrook); Anne Fitzpatrick-McKinley, *The Transformation of Torah from Scribal Advice to Law*, Sheffield, 1999.

12. See, for example, H.F. Jolowicz – Barry Nicholas, *Historical Introduction to the Study of Roman Law. Third Edition*, Cambridge University Press, 1972, chapter 7; Carmichael, *o.c.* (n. 11), pp. 1–2; Andrew Lewis, "Roman Law", in *The Oxford International Encyclopaedia of Legal History* 5, Oxford, 2009, pp. 140–144.

extensive collection of early English laws is that of Alfred, which both built upon collections of laws established by his predecessors and constituted a typical example of the early Germanic codes widely distributed at the time throughout western Europe. Although Ethelbert and Alfred stamped with their personal authority the collections of rules issued in their names, they were not legislators either in the modern sense or in that of the early Chinese rulers. Their codes may have provided guidelines for the resolution of disputes but they were not collections of statutes binding upon the courts[13].

A few further points should be made at the outset with respect to the comparative use of the Chinese and other material. In the Chinese case, the law to be studied is that from its earliest manifestations in the fourth and third centuries BCE to its crystallization in the Tang code of the seventh century CE. The reason is partly the desire to show that the principles of the law with respect to both wounding and insult once settled by the second century BCE did not in substance change in the next thousand years or so and partly the fact that these principles, although developed earlier, are best seen or in some cases only known from their statement in the Tang code.

The various Near Eastern law codes, as well as the biblical Covenant code, although much earlier than the first Chinese laws, are of interest because they provide an opportunity to consider how the law on wounding and insult was treated in the 'cradle of civilization'. The Babylonian laws are the earliest known to have been developed in the world, in some cases in the context of an empire not dissimilar to the early Chinese.

Roman law has been selected as one element of the comparison since it formed the basis of the most important legal system to develop in western Europe under very different conditions from the development of law in Mesopotamia. Although the Twelve Tables were enacted at a date prior to the upsurge of legal development in China, the rules on wounding which they contained were still at least influential in the second and even first centuries BCE, just at the time when the Han rulers in China were issuing complex collections of laws. Excluded from the comparison is the subsequent fundamental change in the law of wounding and insult accomplished through the praetorian edict and elaborated by the jurists in the early centuries CE[14].

Another important element in the comparison is constituted by early English/Germanic law represented by the codes of Ethelbert and Alfred, the former being

13. A.W.B. Simpson, "Legal Theory and Legal History", in *Essays on the Common Law*, London, 1987, pp. 1–17; Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century. Volume I. Legislation and its Limits*, Oxford, 2001, chapter 5; Bruce R. O'Brien, "Anglo-Saxon Law", in *Oxford International Encyclopaedia of Legal History* 1, Oxford, 2009, pp. 177–184; Derek Roebuck, *Early English Arbitration*, Oxford, 2008, chapters 5, 6, 7.

14. For the treatment of *iniuria* in classical Roman law see Eric Descheemaeker – Helen Scott (eds), *Iniuria and the Common Law*, Oxford/Portland, Oregon, 2013.

roughly contemporary to the Tang code in China. Here we have an example of another significant strand in the world's legal corpus, the main rival to Roman law in Europe, culminating in the Anglo-American common law.

2. Physical Injury

The collections of laws and penal codes from the fourth and third centuries BCE to the seventh century CE, from the Qin state and empire to the Tang dynasty, yield a complex regime for the treatment of physical injury that, even in the Qin-Han period, possessed a considerable degree of sophistication. Our must detailed information comes from the Tang code in the version promulgated in 753 CE. This code itself draws upon the legislation of earlier dynasties, most of which has not survived. But archaeological discoveries of the last fifty years have brought to light extensive collections of Qin legal material from the fourth and third centuries BCE and one important collection of Han statutes from 186 BCE. From these we can see that the principal distinctions drawn in the Tang code, encapsulating the conditions under which liability was imposed for physical injury, had already been worked out many centuries earlier. The distinctions concern: (i) the difference between the striking of a blow and the infliction of a wound, (ii) the varying contexts in which a wound might be inflicted, (iii) the type of weapon used to inflict a wound, (iv) the nature of the wound and the part of the body affected, (v) the consequences of the wound, (vi) the question of self-defence, and (vii) the relationship in which assailant and victim stood towards each other (the question of status).

2.1. Distinction between Blow and Wound

The Qin laws of the third century BCE already distinguish between a blow or beating (*ou*) which produces a wound (*shang*) and one which does not, a wound being defined as 'a welt or bruise (*zhi wei*)'[15]. The punishment either for a simple blow or for one that inflicted a bruise or welt is unknown. However, the Han laws of 186 BCE, utilising the same distinction[16], specify that, where two persons have fought, the punishment for striking a blow is a fine of two ounces of gold (increased to four ounces if the victim is superior in status). If a wound has thereby been

15. A.F.P. Hulsewé, *Remnants of Ch'in Law: An Annotated Translation of the Ch'in Legal and Administrative Rules of the 3rd Century B.C. Discovered in Yün-meng Prefecture, Hu-pei Province in 1975*, Leiden, 1985, p. 143 (D77) — this work is hereafter cited as Hulsewé; Hainian Liu – Yifan Yang (eds), *Zhongguo Zhenxi Falü Dianji Jicheng (Rare Ancient Codes of Chinese Law)*, Beijing, 1994, Part A, Volume I, 579 — this work is hereafter cited as Liu – Yang.

16. See also the definition of the Han scholar Ying Shao (140–206 CE) of the term *zhi wei* as "hitting or beating a person with a stick or hand, scraping his skin so that it swells and turns black, but without breaking the skin or leaving a scar (*chuang ben*)": Gu Ban, *Hanshu (History of the Former Han Dynasty)*, Twelve volumes, Beijing, 1975, 11, p. 3796 , n. 7; Hulsewé, *o.c.* (n. 15), p. 143 (n. 1 to D72).

inflicted the punishment is a fine of four ounces of gold (irrespective of the status of the victim)[17]. It is probable that the punishment would have been more severe in the case of a premeditated assault.

The Tang code maintains the distinction between striking (*ou*) and wounding *(shang*), but adopts a different definition of 'wound'. The interlinear commentary to article 302 defines *shang* as 'the drawing of blood (*jian xue*)', thus depriving the infliction of a mere bruise of its earlier status as a wound. We do not know whether the Tang code instituted the change or adopted it from some piece of post-Han legislation. The Tang punishments are not of the same kind as the Han, being physical and not economic. A simple beating with hand, foot, or stick is punished with forty blows of the light stick. If a wound is thereby inflicted, or a different implement is used to beat (without inflicting a wound), the punishment is sixty blows with the heavy stick[18],

Comparative Notes

We have only two examples of liability for the striking of a blow, as distinct from the infliction of a wound, in the legal systems of the ancient Near East and early Rome. Both have in common the fact that the fundamental wrong (either punished or redressed through compensation) is a failure in respect. One example is the striking of a parent, punished capitally in the biblical *Mishpatim*[19] and with the amputation of the (striking) hand in the LH[20]. The other is the slap in the face, generally redressed by a payment to the victim but sometimes subject to punishment, as where the victim was of higher status than the striker. Thus the LE[21] place the 'slap in the face' in a list of injuries concerning the severing of a person's ear or nose, but the editors explain it as "a reference to a physical or social assault to a person's honour"[22], that is, as a wrong of a different order to the loss of an ear or nose[23]. The LH, where the parties are of equal status[24], and the early Roman

17. Anthony J. Barbieri-Low – Robin D.S. Yates, *Law, State, and Society in Early Imperial China. A Study with Critical Edition and Translation of the Legal texts from Zhangjiashan Tomb No. 247*, Two volumes, Leiden/Boston, 2015, 2, p. 401 (slip 28). This volume is hereafter cited as Barbieri-Low – Yates.
18. Wallace Johnson, *The T'ang Code. Volume II, Specific Articles*, Princeton University Press, 1997, p. 325. This volume is hereafter cited as Johnson.
19. Exodus 21.15.
20. Roth, *o.c.* (n. 3), p. 120 (para 195)
21. Roth, *o.c.* (n. 3), p. 65 (para 42).
22. Roth, *o.c.* (n. 3), p. 70 (para 21).
23. See also the remarks of Yaron, *o.c.* (n. 6), pp. 265, 286, n. 116 and Driver – Miles, *o.c.* (n. 7), I, pp. 412, 415, on the essence of a 'slap in the face' as an insult.
24. Roth, *o.c.* (n. 3), p. 121 (para 203, 204).

law[25] also redressed the slap in the face with a monetary payment to the victim. On the other hand, where the striker was of a lower status than the victim, the LE prescribed the punishment of a flogging in the public assembly rather than compensation. The same laws stated that, should a person's slave strike the cheek of a member of the same social class as his master, he was to have his ear cut off[26].

For early English law we have a provision in the laws of Ethelbert which imposes a *bot* (compensatory payment) for striking a man on the nose with one's fist, the compensation to be increased should the blow result in a bruise or should the flat of the hand have been used, even if no bruise resulted[27]. The reason for the distinction between striking with the fist or the flat of the hand may lie in the fact that a blow of the latter kind constituted the greater insult. The idea of 'insult' may also underlie another provision related to 'striking', that which establishes the amount to be paid as compensation for seizing another person (man only?) by the hair[28]. These particular rules do not reappear in the laws of Alfred.

In early Chinese law, while the striking of a parent was always regarded as the manifestation of a degree of disrespect constituting a serious offence, a slap in the face appears to have been treated merely as a blow inflicted with the hand, punishable on this basis, and not as a kind of insult. In Qin law, although not in the Han and later law, a slap in the face which produced a bruise would have been punished on the basis that a wound had been inflicted, not merely as the striking of a blow.

2.2. Context in Which a Wound is Inflicted

What we may term the 'situational approach' to the assessment of liability for wounding plays a considerable role in the sources. The utility of the word 'situational' lies in the fact that it emphasises the concrete form in which rules on liability are formulated, focused on the physical description of the offending act, while at the same time not excluding that some consideration of fault played a part in the legislators' assessment of the degree of liability. A number of different situations are to be distinguished.

(i) Deliberate Assaults and Fights

The Qin laws state that, when someone uses a needle or awl in a fight (*dou*) and inflicts a wound, the punishment is to be a fine of two suits of armour, but, if

25. Twelve Tables 12.4 with Aulus Gellius, *Noctes Atticae* (20.1.13), giving the anecdote of a man who amused himself by slapping people in the face and immediately paying to them the derisory compensation prescribed by the law.

26. Roth, *o.c.* (n. 3), p. 122 (para 205).

27. F.L. Attenborough, *The Laws of the Earliest English Kings*, Cambridge, 1922, pp. 11–13 (para 57, 60). This work is hereafter cited as Attenborough.

28. Attenborough, *o.c.* (n. 27), p. 9 (para 33).

the wound is inflicted with premeditation (*zei*), the punishment is to be a severe form of hard labour known as 'being tattooed and becoming a *chendan* (if male) or *chong* (if female) '[29]. Three other texts deal with another offence denominated as *zei shang* (deliberate or premeditated wounding), though none specifies the punishment to be imposed[30]. One (D81) concerns a person who unlawfully entered another's house and wounded the occupier, another (D83) an attack by bandits on persons travelling on the roads. In these cases *zei* certainly refers to premeditated or intentional attacks, even though motivated by panic, as where a burglar is suddenly surprised by the householder. But *zei* might even be applied to wounds arising from a fight, where the person inflicting the wound had shown that he intended to kill or where he had gone beyond the ordinary limits of a fight as by pursuing and wounding his fleeing opponent. Generally in Qin law *dou*, as later, appears to express a fracas or fight which developed more or less spontaneously, whereas *zei* expresses the idea of a deliberate or premeditated assault by one person on another.

Han law also supplies us with considerable information on the difference between wounding in a fight and unprovoked, deliberate wounding. The laws of 186 BCE make a clear distinction between *zei* and *dou shang*. When a person intended to kill another but merely succeeded in wounding him, this is a case of *zei shang*, punished by being tattooed and becoming a *chengdan/chong*[31]. This situation is contrasted with that in which a person is wounded during the course of a fight (*dou shang*). Here the punishment is less severe, its extent depending upon the nature of the weapon used and the type of injury inflicted[32].

A later version of the Han statutes on the distinction between deliberate wounding and wounding in a fight is preserved in an account of an incident that occurred in 7 BCE. In dealing with an attack on an individual outside the gates of the imperial palace, the chief law officer (*tingwei*) cited a statutory rule to the effect that, where in the course of a fight someone was wounded with a cutting weapon, the punishment was being left intact and becoming a *chengdan/chong*. At this time such a sentence entailed hard labour for four years. On the other hand, in a case of *zei* (*shang*), the punishment was increased by one degree to becoming a *chengdanchong* with head shaved and wearing an iron collar, equivalent to hard

29. Hulsewé, *o.c.* (n. 15), p. 142 (D71); Liu – Yang (eds), *o.c.* (n. 15), p. 578. *Chengdan* denotes the heavy work to which male convicts were put, such as the building of walls and fortifications, whereas *chong* denotes the pounding of grain to which female convicts typically were assigned.

30. Hulsewé, *o.c.* (n. 15), p. 132 (D35), pp. 145–146 (D81), p. 146 (D83); Liu – Yang (eds), *o.c.* (n. 15), pp. 584, 585–586. The third text (D35) simply refers to the offence of 'deliberate wounding (*zei shang*)' without further specification of context.

31. Barbieri-Low – Yates, *o.c.* (n. 17), p. 399 (slips 22, 23, 25, 26). At this time labour appears to have been for life.

32. Barbieri-Low – Yates, *o.c.* (n. 17), p. 401 (slips 27, 28). See further below in the sections on 'nature of the weapon' and 'type of wound'.

labour for five years[33]. Although the statutes cited deal only with the case in which a sharp bladed implement was used, they reveal the principle that a wound inflicted *zei* was punished one degree more severely than a wound inflicted during a fight. Hence, if an implement other than a sharp bladed weapon had been used, such as a stick, for which we do not have details of the punishment, the punishment for *zei* would still have been one degree more severe than that for *dou*.

Like the Qin/Han law and certainly like the laws of the intervening dynasties (now lost), the Tang code distinguished between *doushang* (wounding in a fight) and *gushang* (intentional wounding). The punishment for *gushang* was one degree more severe than that for *doushang*. In this respect the Tang law incorporates the same principle as the earlier Han law. But the treatment of the distinction in Tang law is rather more sophisticated than that in Qin/Han law. The first part of the relevant article in the Tang code (306), dealing with killing, distinguishes killing in a fight, for which the punishment is strangulation, from intentional killing, for which the punishment is beheading. It then posits two situations in which the killing, although it occurs in a fight, is to be treated in the same way as intentional killing, that is, punished with beheading. The first situation is that in which both parties used sharp implements, the second that in which the killer has used a military weapon. One has to infer from this that, should a fight of this kind have resulted in a wound and not death, the offence would be treated as *gushang* and not *doushang*. The final clause of the article puts a further case in which a wound inflicted in relation to a fight is to be treated and punished as a wound intentionally inflicted. This is the situation in which the parties to the fight initially separate and then, after a short interval meet again, when one wounds the other[34].

Comparative Notes

In the ancient Near Eastern material and even in early Roman law we have an intriguing distinction between those situations in which the infliction of a wound/injury is described with no indication of the context and those in which it is either clear or readily inferable from the formulation of the rule that the wound/injury was inflicted deliberately or occurred in the course of a fight, even though the exact context may still remain unclear. Sometimes, as has been observed by a number of commentators, the actual description of the injury permits the inference that the wound has been inflicted either deliberately or in the course of a fight[35]. Thus, the LU specify the use of a weapon to cut off another's foot or nose, to break a bone,

33. *Hanshu*, 10, pp. 3395–3396; A.F.P Hulsewé, "Assault and Battery at the Palace Gates", in Paola Daffinà (ed), *Indo-sino-tibetica. Studi in honore di Luciano Petech. Studi orientali IX*, Rome, 1990, pp. 191–200.

34. Johnson, *o.c.* (n. 18), II, pp. 331–333.

35. See, for example, Yaron, *o.c.* (n. 6), p. 265; Westbrook, *Studies in Biblical and Cuneiform Law*, p. 76; Dieter Nörr, "Zum Schuldgedanken im altbabylonischen Strafrecht", *ZSS* 75 (1958), pp. 1–31; Guillaume Cardascia, "Le caractère volontaire ou involontaire des atteintes

or to knock out a tooth[36]. The description of the injury coupled with the reference to a specific implement by which it was caused[37] suggest that the case is either one of a deliberate attack or of an injury sustained in the course of a fight. The laws of Lipit-Ishtar specify the 'striking' of a woman so as to cause a miscarriage, where the description of the offence implies a deliberate blow, though not necessarily an intent to procure a miscarriage[38].

Sometimes we can go further and infer with some degree of probability whether the wound was inflicted deliberately or in the course of a fight. The LE contain an interesting series of rules that seem to contemplate two different situations. The rules for physical injury first enunciated specify the biting and so severing of another's nose, the blinding of an eye, the knocking out of a tooth, the severing of an ear, or the cutting off a finger[39]. These rules are followed by further rules which seem to focus specifically on some kind of fight or quarrel: the knocking down of another in the street with the result that his hand or foot is broken[40], the striking of another with the result that his collar bone is broken[41], and the infliction of other injuries in the course of a fight[42]. Can we conclude from the juxtaposition of the texts that the first set just deals with deliberately inflicted injuries, while the second deals with injuries inflicted in the course of a fight? In terms of fault, the difference between the two groups would be that, where the injury had been deliberately inflicted, there had been an intention to bring about that particular injury, but, where it had occurred in the course of a fight, although there may have been an undifferentiated intention to harm, there had been no (antecedent) intention to cause a specific type of injury.

However, we have to avoid stressing too far the presence in the texts from LE of a distinction between a wound deliberately inflicted and one incurred in the course of a fight, where there had been no antecedent intention to inflict that particular wound. It remains possible that the differentiation between the two groups of texts lies not in the type of intention to harm, resulting in a wound, but in the part of the body injured (ear, nose, finger, tooth, as against hand, foot, collarbone, other

corporelles dans les droits cuneiforms", in *Studi in onore di Cesare Sanfilippo* VI, Milano, 1985, pp. 161–207.

36. Roth, *o.c.* (n. 3), p. 19 (para 18–22).

37. The texts are defective on this point. The only complete formulation (para 20) specifies a club with which another's bone is broken.

38. Roth, *o.c.* (n. 3), pp. 26–27 (para d, f). For miscarriage see further below at notes 69, 98, 103–105.

39. Roth, *o.c.* (n. 3), pp. 65–66 (para 42, 43). A 'slap in the face' in also included in this list of injuries (above).

40. Roth, *o.c.* (n. 3), p. 66 (para 44 [conjectural restoration], 45).

41. Roth, *o.c.* (n. 3), p. 66 (para 46).

42. Roth, *o.c.* (n. 3), p. 66 (para 47 [conjectural restoration]).

minor injuries) and in the way the injury was inflicted (by biting or cutting on the one hand and striking on the other).

We also have a problem with the interpretation of a series of provisions in the LH dealing with the blinding of a person, the breaking of another's bone, or the knocking out of another's tooth, where the 'compensation' is either talio (the infliction of a like injury on the perpetrator) or a monetary payment, depending on the respective status of perpetrator and victim[43]. The texts make no mention of the kind of implement by which the wound in question was caused. Hence there is nothing in the wording of the rules to suggest that the ground of liability was anything else than the actual injury itself. But it still remains possible that the unstated, though well understood, assumption of the framers of the rules, was the occurrence of the injury in a situation that betrayed some kind of intention, either that to cause the particular injury or an undifferentiated intention to harm resulting in the infliction of an injury of the kind specified in the laws[44].

The HL introduce a new dimension from the perspective of fault since in one case they explicitly distinguish between an 'accident' and a 'quarrel'. Generally, the laws specify a range of injuries (blinding, knocking out a tooth, injuring the 'head'?, breaking a leg, biting off nose, tearing off ear, causing woman to miscarry) for which monetary compensation was prescribed, the amount depending upon whether the victim was a free person or a slave[45]. Although the original version of these laws says nothing of the circumstances under which the injury in question was inflicted, in one case, that of blinding, a later version of the law is preserved. This specifies that the level of compensation to be paid should the injury have been inflicted by 'accident' is half that payable should the injury have been inflicted in the course of a 'quarrel'. This brief addendum may indicate that in other cases, too, the typical 'situation' contemplated by the framers of the rules was that of a fight or quarrel (perhaps comprising also an unprovoked attack), coupled with an additional recognition of circumstances that could be qualified as 'accidental' yet resulted in injury. 'Accident' in this context almost certainly covers both what has been caused through carelessness and the result of a pure accident.

Despite the isolated reference to 'accident' and 'quarrel' in the HL it still seems that the main factor controlling the level of liability was the nature of the injury. We can infer this from one rule which specifies that, where a (minor) injury was inflicted and the victim merely temporarily incapacitated, the liability of the perpetrator was limited to the payment of medical expenses and the provision of a substitute for labour, plus a final payment on recovery[46].

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43. Roth, *o.c.* (n. 3), p. 121 (para 196, 201).

44. See the literature cited in note 35 above.

45. Roth, *o.c.* (n. 3), pp. 218–219 and Hoffner, *o.c.* (n. 8), pp. 21–29 (para 7–9, 11–18).

46. Roth, *o.c.* (n. 3), p. 218 and Hoffner, *o.c.* (n. 8), p. 24 (para 10).

Occasionally, we find more specific information on which we may base the 'situational' aspect of the infliction of a wound. In the LE and LH as well as in the *Mishpatim* we have some indication that a distinction was drawn between wounding in the course of a fight and wounding resulting from an unprovoked attack. One clause of the LE (44/5) appears to say that, where in the course of some kind of difference of opinion[47] one man threw another to the ground and broke his arm or leg, there was to be monetary compensation[48]. Another, where the text again is defective with respect to the critical term, may establish the payment of a fine where a man is injured in a brawl[49].

Fortunately, we have a clear text from the LH, which specifies that, where one strikes a free man in an affray and inflicts a wound, the assailant may subsequently swear that he did not strike 'knowingly' and thereby limit his liability to the payment of medical expenses[50]. There has been some difference of opinion over the meaning of the word 'knowingly', rendered by Roth as 'intentionally'. In their general commentary to the laws Driver and Miles state that the injury in question was not one of the more serious wounds specified in other laws, such as a broken limb or a blinded eye[51]. In their legal commentary the same authors gloss 'knowingly' as ' (not) with intent to kill or seriously injure'[52]. This is probably the correct explanation[53], although Nörr finds it incomprehensible that a blow struck in the course of a fight could be described as 'non-intentional', even in the sense attributed to it by Driver and Miles[54].

We have another clear example from biblical law of liability for wounds inflicted in the course of a fight as distinct from that for wounds inflicted in a deliberate attack. The Covenant Code contains a clause on striking and wounding a person in a quarrel with a stone or the foot. Should the victim recover, the liability of the person inflicting the wound is to be limited to payment of medical expenses and lost earnings[55]. We may compare a clause of the Roman Twelve Tables, which, although not on its face limited to injuries received in the course of a fight, may

47. Unfortunately the text is defective with respect to the critical term. Yaron, *o.c.* (n. 6), p. 90 suggests 'altercation', but mentions other alternatives.

48. The Roth edition supposes the case to be one on which a man knocked down another in the street: Roth, *o.c.* (n. 3), p. 66 (para 44–45). If this is correct, the circumstances of the knocking down could be various (not necessarily resulting from a quarrel)).

49. Yaron, *o.c.* (n. 6), p. 71n comments that "the rendering 'in a brawl' is ad sensum only". Compare Roth, *o.c.* (n. 3), p. 66 (para 47).

50. Roth, *o.c.* (n. 3), p. 122 (para 206).

51. G.R. Driver – John C. Miles, *the Babylonian Laws. Volume II*, Oxford, 1955, pp. 249–250.

52. Driver – Miles,, *o.c.* (n. 7), I, p. 412. compare Yaron, *o.c.* (n. 6), p. 288 who holds that the purpose of the oath was to enable the striker to clear himself of the imputation of intent.

53. It has parallels in the Chinese treatment of intent in *dousha* (killing in a fight).

54. *ZSS* 75 (1958), pp. 22–23.

55. Exodus 21:18.

nevertheless have referred primarily to such a situation. This is the rule on *os fractum*, specifying that where a person's bone had been broken by the hand or a stick, a fixed financial penalty was to be paid to the victim[56].

There is thus some evidence of varying degrees of cogency that some early legal systems, like the Chinese, recognised a distinction between the deliberate infliction of a wound and the non-deliberate in the sense of infliction during the course of a fight or even an accidental collision. Certainly the conceptual distinction between those injuries inflicted intentionally and those inflicted non-intentionally appears less clearly from the Near Eastern (including biblical) and Roman data than it does from the Chinese, and it is not reflected at all in early English law.

But it is still the case that we have to allow for factors other than the degree of fault as relevant to the determination of liability. Of these factors the most important is the nature of the injury itself, in particular the part of the body affected and the severity of the injury to that part. The nature of the weapon by which the injury was inflicted may also have been relevant as a subsidiary consideration. As in the Chinese data, a sharp bladed or pointed metal implement was understood as capable of inflicting more serious injuries than other implements such as a stick. Furthermore, the nature of the implement or weapon used to inflict the wound may have permitted an inference as to the intention in the mind of the perpetrator. As we have seen, such an inference was utilised by the Tang code.

(ii) Wounding in the Course of a Game or Sport (*xishang*)

The surviving texts give us evidence on this point only from the Han and Tang dynasties, but we can assume that the laws of other dynasties also treated as a special case injuries inflicted in the course of a game or sport. The Han laws of 186 BCE and the Tang code take very different perspectives. The Han statute specifies that there is to be no liability if an injury is inflicted in the course of a game[57]. On the other hand, the Tang code imposed a basic punishment two degrees less than that for wounding in a fight, but provided that the decrease was to be only one degree, should the game have involved weapons or have been played in a dangerous place[58].

The reason for the difference in the Han and Tang perspective is that the Han law approximates *xishang* to accidental wounding (*guoshishang*), whereas the Tang code approximates it to wounding in a fight (*dousha*). The Tang legislators[59] saw the element of contest in a game or sport as resembling, though being less fraught with bad consequences, the contest characterising a fight. Injuries suffered

56. Twelve Tables 12.4, on which Artur Völk, *Die Verfolgung der Körperverletzung im frühen Römischen Recht*, Wien/Köln, 1984, pp. 144–156. See further below under 'nature of weapon'.

57. Barbieri-Low – Yates, *o.c.* (n. 17), p. 399 (slip 21).

58. Article 338: Johnson, *o.c.* (n. 18), II, p. 382.

59. We do not know what earlier law, if any, the Tang were following.

in the course of a game do not seem to have been recognised as a distinct ground of liability in the other legal systems we have been considering.

(iii) Accidental Wounding (*guoshishang*) or Wounding by Mistake (*wushang*)

Strictly, we have to distinguish between a case of wounding by accident, as where one slipped and hurt another, and wounding by mistake, as where a hunter, aiming at a bird, hit a person. The distinction is reflected in the terminology, 'accident' being designated with the expression *guoshi* and 'mistake' with the expression *wu*. The problem is to determine whether in the period from the Han to the Tang these two kinds of wounding were treated in the same way or differently. There were certainly some differences in the approach of the law during this period, but precision is difficult to establish.

The Han laws of 186 BCE specify that, in the case of wounding which occurs *guoshi*, there is to be no liability[60]. We do not know whether *guoshi* (accident) here is also to be understood as comprising *wu* (by mistake). Our next piece of evidence comes from the much later code of the Jin dynasty (265–420 CE). Towards the end of that dynasty, some time between 405 and 419, a huntsman was out shooting birds. By mistake (*wu*) one of his arrows struck but did not wound the local military commander who happened to be making an excursion to the same area. The relevant rule of the code provided that the punishment for *guo wu shang* was to be penal servitude for three years. The phrase *guo wu* appears to refer both to cases in which the wound had been inflicted accidentally (*guo*) and to those in which it had been inflicted by mistake (*wu*). The latter is illustrated by the case in point where there was an intention to shoot at a bird, but the arrow by mistake hit a person. However, since the military commander, although struck by an arrow, was not wounded, the authorities were content to impose a fine instead of penal servitude[61].

Unless we assume that the rule of the Jin code on *guo wu* wounding applied only to the case in which the victim possessed a particular rank (as the military commander), we have a situation dramatically different from that of the Han code. Under the latter there was no liability for accidental (or mistaken) wounding. Under the Jin code, not only was there liability, but the punishment was the relatively severe one of penal servitude for three years.

The position in the Tang code was again different. Treating wounding in a fight as the paradigm case, the code provided that for accidental wounding (*guoshishang*) the punishment for wounding in a fight was to be redeemable. The appropriate amount of copper was to be paid to the victim. Further, we can infer

60. See n. 57.

61. The relevant passage is cited in Shuda Cheng, *Jiuzhao lükao (Investigation into the Laws of Nine Dynasties)*, Beijing, 1988, p. 244. See Also R.H. van Gulik, *Tang-Yin Pi-Shih. Parallel Cases from under the Pear Tree*, Leiden, 1956, pp. 187–188.

from the relevant article that cases of wounding by mistake (*wushang*) were to be treated in the same way as accidental wounding. The article illustrates the meaning of 'accident (*guoshi*)' with a number of examples, one of which is hunting animals or birds and (by mistake) wounding a person[62].

Comparative Notes

There is very little evidence in the ancient Near Eastern or early Roman law of an explicit recognition of liability for accidental wounding. We have already noted the isolated reference to 'accident' in the Hittite laws on blinding. Our only other example comes from the Sumerian rules on liability for procuring a miscarriage. The laws stated in a teaching document from around 1800 BCE contain two provisions relating to miscarriage, prescribing differential compensation according to the circumstances in which the miscarriage had occurred. Should a person merely 'jostle' a woman and so cause her to miscarry, the compensation to be paid her is half that to be paid should he (intentionally) have struck her a blow with the same result[63]. The language of the law makes it clear that a contrast is being drawn between a miscarriage produced through something like an accidental (even careless) collision in the street and one produced through a blow intentionally struck in the course of a quarrel or indeed even as a direct physical assault.

(iv) Capsize of Boat

Injuries consequent upon the capsize of a boat, in particular a ferry for passengers, was given special consideration in the Han and Tang laws and probably also in the laws of the intervening dynasties. The Han laws of 186 BCE deal in some detail with the death of or injury to passengers on a ferry boat or damage to property carried on the boat. Such 'accidents' might occur in consequence of the capsizing of the boat or of some operation connected with the boarding, transit, or disembarkation of passengers and animals. The law specifies that, where a passenger has been injured (*shang*), the ferryman (*chuan ren*) is to be permitted to redeem the hard labour punishment known as *nai* (shaving of the beard), while the overseer of boats (*chuan sefu*) and other responsible officials (*li ju*) are to be permitted to redeem the punishment of exile (*jian*). However, no compensation (*fu*) is payable to the injured person[64].

Article 427 of the Tang code deals with death, injury, or damage to property arising from the faulty maintenance of a boat or errors in the way it has been navigated (so as, for example, to bring about a collision with another boat). If anyone is wounded in consequence of failures of this kind, the captain of the boat is to be punished three degrees less than the punishment imposed for the infliction of a

62. Article 339: Johnson, *o.c.* (n. 18), II, pp. 383–384.

63. Roth, *o.c.* (n. 3), p. 43 (para 1,2).

64. Barbieri-Low – Yates, *o.c.* (n. 17), p. 393 (slips 7, 8).

wound in a fight, while the official in charge (*ju si*) at the time is to be punished four degrees less. For example, if a person suffered a broken bone, the captain was to be sentenced to penal servitude for one year and a half, the official in charge to penal servitude for one year. Significantly, the article adds that there is to be no liability if the disaster has been caused by unexpected winds or waves[65].

The formulation of the Tang article is interesting because at first sight it looks as though it is making a distinction between what in modern law would be called loss arising from negligence and loss arising from accident. Yet it would be a mistake to read this distinction into the wording of the article. The Tang legislators are not thinking in terms of a dichotomy between negligence and accident, but, following many centuries of legislation on boat 'accidents', are dealing with typical situations and imposing liability not according to an abstract test of negligence or accident, but according to what precise facts have occurred.

(v) Setting of Traps in Improper Places

One law from the Han collection of 186 BCE puts a case in which a person has dug a pit or set a trap in a place where either activity is not permitted. Should such a pit have been dug or a trap set and in consequence someone had been wounded, the offender was to sentenced to the form of hard labour known as remaining intact and becoming a *changdan/chong*[66]. The rule of the Tang code in a similar situation was that the punishment should be one degree less than that for wounding in a fight. The article (394) adds the further point that, should the pit have been dug or the trap set in a permitted place, but no warning notice had been displayed, the punishment was to be three degrees less than that for killing in a fight[67].

(vi) Other Situations

The Tang code puts numerous other situations in which a liability for wounding arises. Many of these, as the capsizing boat or the digging of a pit or the setting of a trap, undoubtedly were regulated by the laws of previous dynasties, but no details have survived. The Tang provisions may be summarised as follows. In most cases the situation is approximated to that of wounding in a fight, but there is a decrease of punishment of one degree: reckless driving of carts or galloping horses through cities, with the result that someone is wounded (article 392)[68]; shooting arrows at city walls or official or private houses, with the result that someone is wounded (article 393)[69]; intentionally causing a disturbance in the market or other

65. Johnson, *o.c.* (n. 18), II, pp. 460–461.

66. Barbieri-Low – Yates, *o.c.* (n. 17), p. 701 (slips 251, 252).

67. Johnson, *o.c.* (n. 18), II, pp. 460–461.

68. Johnson, *o.c.* (n. 18), II, pp. 438–439. If the driver or rider was on government or urgent private business, the wounding was to be treated as 'accidental (*guoshi*)'.

69. Johnson, *o.c.* (n. 18), II, pp. 459–460.

places where people gather, with the result that someone is wounded (article 423)[70]; cutting open a dike in order to steal water, with the result that someone is injured (article 425)[71]; accidentally starting a fire within the grounds of an imperial mausoleum, with the result that someone is injured (article 428)[72]; casual travellers lighting a fire in a field and thereby causing injury (article 430)[73]; and accidentally starting a fire in a government building, with the result that someone is wounded (article 435)[74].

In one situation in which the wounds have in fact been inflicted intentionally, the punishment is reduced to that for wounding in a fight: breaking a tooth or limb of a criminal who is not resisting arrest (article 452)[75]. The same approach is taken in the case where a supervisory official (or someone on his behalf), acting in a public affair, used a large stick, hands or feet to beat a person, with the result that the victim suffered an injury amounting to the breaking of a bone or worse. The official is to be punished on the basis of wounding in a fight with a decrease of two degrees. Should an edged or pointed weapon have been used to inflict the injury, the punishment was to be the same as that for wounding in a fight (article 483)[76].

Some other situations in which wounds were inflicted also received special regulation, the punishment possibly being more severe than that for wounding in a fight. Where a prisoner fought with officials and escaped, if someone was wounded, the punishment was to be the most severe short of death: life exile with added labour (article 465)[77]. If someone gave a prisoner an edged or pointed weapon with which he wounded someone, the punishment (for the supplier of the weapon) was to be penal servitude for one year (article 470)[78].

2.3. Nature of the Weapon

Another important factor controlling liability was the nature of the weapon, in particular, whether the wound had been inflicted by a stick, hand or foot, or by a sharp pointed or edged implement like a knife or military weapon. The Qin laws

70. Johnson, *o.c.* (n. 18), II, p. 486.

71. Johnson, *o.c.* (n. 18), II, p. 425. If the dike was cut intentionally, that is, maliciously, any subsequent injury to a person was to be treated as 'intentional wounding (*gushang*)'.

72. Johnson, *o.c.* (n. 18), II, pp. 492–493.

73. Johnson, *o.c.* (n. 18), II, pp. 493–494. Should a farmer accidentally start a fire or light it at the wrong season for the burning of growth, the punishment was to be two degrees less than that for wounding in a fight.

74. Johnson, *o.c.* (n. 18), II, pp. 495–496. Injury in consequence of arson is treated as 'intentional wounding (*gushang*)'.

75. Johnson, *o.c.* (n. 18), II, pp. 513–515.

76. Johnson, *o.c.* (n. 18), II, pp. 552–554.

77. Johnson, *o.c.* (n. 18), II, pp. 528–529.

78. Johnson, *o.c.* (n. 18), II, pp. 537–539.

contain two rules on the use of sharp pointed or edged implements. One states that, if an object like a needle or awl is used to inflict a wound (the implication here is that the implement is used in fight), the punishment is to be a fine of two suits of armour. But should the injury have been inflicted deliberately (*zei*), that is, not in a fight, the punishment is to be increased to the form of hard labour known as being tattooed and becoming a *changdan/chong*[79]. The other rule deals with the use of swords or other sharp bladed weapons in a fight. Should one of the participants in a quarrel draw his sword and cut off the topknot of another[80], he is to serve the kind of hard labour known as being an intact *chengdan/chong* (that is, without being tattooed)[81]. This law is generalised in the Han laws of 186 BCE as: when in a fight a sword, spear, lance, hammer, or stick is used and a person is wounded, the perpetrator is to become an intact *chengdan/chong*[82].

The Tang code has detailed rules set out in articles 302–4[83]. A basic distinction is drawn between liability based upon the nature of the instrument used to inflict a wound and liability based upon the nature of the wound. The former ground of liability (for the latter see the next section) relates to the position where only a simple wound has been inflicted, that is, the skin has been broken and blood drawn. In this case the punishment depends upon the type of object used to inflict the wound. The code draws a broad distinction between hands or feet and 'other objects' (like sticks). Should a wound have been inflicted with hands or feet, the punishment is to be a beating of 60 blows with the heavy stick; should an 'other object' have been used, the punishment is to be increased to 80 blows.

However, within the category of 'other objects' a further distinction has to be drawn. The use of lethal kinds of 'object' such as a military weapon, metal implements with sharp points or edges, boiling liquids, or fire attracts more severe punishments. In the case of boiling liquids or fire, the punishment for the infliction of a simple wound is penal servitude for one year, increased, in the case of military type weapons, to penal servitude for two years.

Comparative Notes

Underlying the Chinese rules, albeit seldom explicitly articulated, appears to be the notion that the use in a fight of a dangerous weapon (often described as 'sharp-edged' or 'military') evidenced an intention to inflict a mortal injury and therefore transferred any wound inflicted from the category of 'wounding in a fight' to that of 'intentional wounding', with a corresponding increase in punishment. Such a notion appears most strongly in the Tang article on killing in a fight

79. Hulsewé, *o.c.* (n. 15), p. 142 (D71); Liu – Yang (eds), *o.c.* (n. 15), p. 578; see also above at n. 29.

80. On removal of hair as a wound see below at notes 94, 99; contra Hulsewé, p. 142 (D70 n.2).

81. Hulsewé, *o.c.* (n. 15), p. 142 (D69); Liu – Yang (eds), *o.c.* (n. 15), p. 573.

82. Barbieri-Low – Yates, *o.c.* (n. 17), p. 401 (slip 22).

83. Johnson, *o.c.* (n. 18), II, pp. 324–329.

(*dousha*), where it is stated that the use of a 'sharp-edged' or 'military' weapon on effect changes the category to intentional killing (*gusha*)[84].

We do not find evidence of this kind of thinking in the laws of the ancient Near East or early Rome. There is spasmodic evidence that the nature of the weapon used to inflict an injury was relevant to the determination of the punishment. The biblical *Mishpatim* provided that, where a man used a stone or his fist in a fight to injure another, provided the latter was able to walk away, liability was limited to payment of medical expenses and loss of earnings[85]. An increased degree of liability may have been imposed should a sharp bladed implement have been used in the fight. If so, any increased liability was probably predicated upon the nature of the injury rather than upon an implicit recognition of an intention to kill or inflict a mortal wound.

The LU also specify differing liability for injuries caused by the use of a club or a cutting implement, but it is clear that the level of compensation was determined by the kind of injury, not by the recognition of an implicit intention to kill or not[86]. Equally, in the Roman law of the Twelve Tables we may have an implicit reference to a distinction in liability according to the nature of the weapon used. The clause on *os fractum* specifies the breaking of a bone (probably in a fight) through the use of hands or a club, establishing the appropriate compensation, whereas that on *membrum ruptum* (the destruction of a limb) specifies *talio* unless the parties reach an agreement as to composition. Although this clause does not in its extant formulation specify the nature of the implement by which the victim's limb has been destroyed, it has been suggested with a degree of plausibility that the legislators had in mind some kind of metal instrument or weapon[87]. If this interpretation of the clauses on *os fractum* and *membrum ruptum* is correct, the conclusion to be drawn is still that liability was conditioned by the nature of the wound and not by the presence or absence of an assumed intention to kill.

The early English law in the laws of Alfred contains a curious provision on death or injury inflicted by a spear. If a man was carrying a spear (properly) on his shoulder so that it was level and it struck another person, there was no liability. But should the point have been raised three fingers or more above the shaft, there was liability for the payment of wergeld or compensation should the point strike and kill or injure another. The text in this context even raised the question of intention. Should the victim or his family allege that the death or wound had been inflicted deliberately (so making the perpetrator liable to a fine payable to the king as well

84. Article 306: Johnson, *o.c.* (n. 18), II,, p. 331.

85. Exodus 21:18–19. See also the discussion in: Jackson, *Wisdom Laws*, *o.c.* (n. 11), pp. 172–185; Carmichael, *o.c.* (n. 11), *Origins of Biblical Law*, pp. 114–116.

86. Roth, *o.c.* (n. 3), p. 19 (para 18–21).

87. See F. de Zulueta, *The Institutes of Gaius. Part II. Commentary*, Oxford, 1953, p. 217; Jolowicz – Nicholas, *o.c.* (n. 12), *Historical Introduction*, p. 171, n. 8. On *os fractum* see Völk cited above at n. 56.

as to the payment of compensation to the victim or his family), then the latter might swear an oath disclaiming such an intention and so avoid liability for the fine[88]. This addendum clearly shows a recognition by the law of the distinction between deliberate assaults and death or injury inflicted through carelessness or by accident, comparable to that disclosed by the Chinese rule on the use of military weapons in a fight. Nevertheless, we cannot extrapolate from this specific instance of the carrying of a spear and attribute to early English law a general rule specifying different consequences for deliberate and non-deliberate assaults[89].

2.4. Type of Wound

The law at all periods established a penal tariff for wounds in which the gravity of the punishment depended both upon the part of the body injured and the extent of that injury. The Qin laws provided that the tearing of a lip or the biting of another's face or cheekbone was to be punished in the same way as the infliction of a bruise or welt (the punishment is unknown)[90]. The form of hard labour known as *nai* (lit 'shaving off the beard') was to be imposed for the tearing of an ear[91]. The same punishment was to be applied where, in a fight, one of the participants bit off the nose, ear, finger, or lip of another[92]. The breaking of a tooth was punished, although the nature of the punishment is not given[93]. Pulling out another person's hair entailed the punishment of becoming an intact *chengdan/chong*[94]. For procuring a miscarriage there was also a fixed punishment (unknown)[95].

We have a few further details from the Han laws of 186 BCE. Where a person in a fight, using an implement other than a sword, spear, or other sharp pointed weapon[96], blinded another in one eye, broke a limb, tooth, or finger, dislocated a joint, or severed a nose or ear, the punishment was to be the form of hard labour known as 'shaving (*nai*)'[97]. Should a person strike a woman and bring about a miscarriage, the punishment again was the form of hard labour known as *nai* and becoming a *lichen* (bond servant). However, the law adds the interesting rider that,

88. Compare the provision on the swearing of an oath in Roth, *o.c.* (n. 3), p. 122 (para 206) and above at n. 50.

89. Attenborough, *o.c.* (n. 27), pp. 79–80 (para 36), on which see Sir Frederick Pollock – Frederic William Maitland, *The History of English Law before the Time of Edward I. Second Edition. Volume I*, Cambridge, 1968, p. 53; Wormald, *Making of English Law*, p. 282.

90. Hulsewé, *o.c.* (n. 15), p. 143 (D72–73); Liu – Yang (eds), *o.c.* (n. 15), pp. 578–579.

91. Hulsewé, *o.c.* (n. 15), p. 141 (D65); Liu – Yang (eds), *o.c.* (n. 15), p. 575.

92. Hulsewé, *o.c.* (n. 15), p. 142 (D68); Liu – Yang (eds), *o.c.* (n. 15), p. 577.

93. Hulsewé, *o.c.* (n. 15), p. 143 (D74); Liu – Yang (eds), *o.c.* (n. 15), p. 579.

94. Hulsewé, *o.c.* (n. 15), pp. 141–142 (D66); Liu – Yang (eds), *o.c.* (n. 15), pp. 576.

95. Hulsewé, *o.c.* (n. 15), pp. 205–206 (E23); Liu – Yang (eds), *o.c.* (n. 15), pp. 671–674.

96. For the position where such implements were used see above at n. 80.

97. Barbieri-Low – Yates, *o.c.* (n. 17), p. 401 (slips 27, 28).

should a pregnant woman engage in a fight and receive a blow from her opponent, so causing a miscarriage, the punishment was to be a fine of four ounces of gold[98].

The Tang code provides a comprehensive tariff, which applied in all cases of injury other than the infliction of a simple wound (or removal of a tuft of hair), irrespective of the kind of object used to inflict the injury. If in a fight a tooth was broken, an ear or the nose injured, the sight in one eye damaged, a finger or toe broken, or a bone fractured, the punishment was to be penal servitude for one year. The punishment was to be increased to penal servitude for one year and a half, should two or more teeth, fingers, or toes have been broken, or the victim have been rendered bald[99]. Breaking a person's ribs, damaging the sight in both eyes, or causing a woman to miscarry were all injuries punished by penal servitude for two years[100]. Breaking a limb, dislocating a joint, blind one eye entailed a punishment of penal servitude for three years. Where two or more such injuries had been inflicted, so causing the victim to become 'incapacitated (*du ji*)', or where the tongue had been cut out, or a man's sexual organs destroyed, the punishment was to be exile to 3000 *li*[101].

Comparative Notes

On this topic we have a great deal of comparative material. The LE specify biting and severing the nose or an ear, blinding an eye, breaking a tooth, severing a finger, breaking an arm or the collarbone, as well as the infliction of (unspecified) minor injuries[102]. The LU specify the breaking of a bone, the cutting off a foot or nose, and the breaking of a tooth[103]. The LH distinguish between putting out an eye, breaking a bone, knocking out a tooth, striking a cheek, and procuring a miscarriage[104]. The HL have: blinding a person, knocking out a tooth, injuring the head, breaking an arm or leg, severing the nose or an ear, and procuring a miscarriage[105]. Biblical law also stipulated legal consequences for the infliction of different kinds of injury, including blinding, knocking out a tooth, and miscarriage[106]. Finally, the XII Tables in Rome distinguished between the loss of a limb (*membrum ruptum*), the breaking of a bone (*os fractum*), and other (presumably more minor) injuries

98. Barbieri-Low – Yates, *o.c.* (n. 17), p. 403 (slop 31).

99. Article 303: Johnson, *o.c.* (n. 18), II, pp. 327–328.

100. Article 304: Johnson, *o.c.* (n. 18), II, pp. 328–329.

101. Article 305: Johnson, *o.c.* (n. 18), II, pp. 329–331. A *li* is roughly one third of an English mile.

102. Roth, *o.c.* (n. 3), pp. 65–66 (para 42–47).

103. Roth, *o.c.* (n. 3), p. 19 (para 18, 19, 22).

104. Roth, *o.c.* (n. 3), pp. 121–123 (para 196–213).

105. Roth, *o.c.* (n. 3), pp. 218–219 (para 7–18); Hoffner, *o.c.* (n. 8), 21–29.

106. Exodus 21: 18–19, 22–25. For the difficulties in the interpretation of 22–25 see Bernard S. Jackson, "The Problem of Exodus 21:22–5 (*Ius Talionis)*", in *Essays in Jewish and Comparative Legal History*, Leiden, 1975, pp. 75–107, and *Wisdom Laws*, *o.c.* (n. 11), pp. 209–239.

(*iniuria*)[107]. Clearly, as in Chinese law, the most important factor determining the level of liability and hence the punishment was the nature of the injury. Criteria such as the presence of an intention to injure, or the infliction of a wound in the course of a quarrel or in consequence of an accident, might have been material but were not the focal point of the laws.

The most exhaustive lists of wounds to parts of the body and different types of wound are to be found in the early English laws. The laws of Ethelbert and Alfred not only specify the payments to be made to the victim for the loss of an ear, tooth, or eye, or the breaking of a bone, but they include many other parts of the body and in addition specify different kinds of injury to particular limbs or parts[108]. The whole thrust of the laws is upon the part of the body which has been injured and the exact nature of the injury. There is no reference to the circumstances in which the injury has been inflicted[109], whether by deliberate assault, in a fight, or by accident.

The list of injuries specified in the ancient Near Eastern and early English laws echoes the standard injuries specified in the Chinese laws (severing of nose, ear or finger, breaking a tooth or bone, blinding an eye, procuring a miscarriage). Further, just as the Chinese laws proportion the punishment to the gravity of the injury or the body part affected, so the other laws determine the level of compensation by the same criteria. Yet these laws lack both the degree of complexity and the sophistication of analysis which we find in the Tang code, evidenced in the number of situations from which injuries arise, the relevance of intention, and the distinction between two separate grounds of liability, one constituted by the nature of the wound, the other by the implement used to inflict the wound.

2.5. Consequences of the Wound

The central principle governing the consequences of a wound, characterising the law throughout the imperial period, was that of *bao gu*. Under this principle, the person who inflicted the wound was liable on account of wounding provided the wound healed within a specified period of time or did not lead to death within that time. If the victim died from the wound within the time limit, the offender was made liable on account of homicide. The time limits, varying at different periods and under different conditions, were based upon the nature of the wound initially inflicted.

The principle of *bao gu* is already given effect in the Han laws of 186 BCE. These provide that, if a person is wounded in a fight (*doushang*), but dies within twenty days, the person inflicting the wound is to be liable for killing (*dousha*)[110].

107. F. de Zulueta, *The Institutes of Gaius. Part I. Text with Critical Notes and Translation*, Oxford, 1946, p. 229 (3.223).

108. Attenborough, *o.c.* (n. 27), pp. 9–15 (Ethelbert, para 34–72), pp. 87–93 (Alfred, para 44–77).

109. The exception is the case of the spear above at n. 89.

110. Barbieri-Low – Yates, *o.c.* (n. 17), p. 399 (slip 24).

The History of the Former Han (*Hanshu*) records the case of a noble who was executed in 126 BCE for wounding a man who died within twenty days[111]. In fact the principle may be much older. He Xin (129–82 CE) in his commentary on the *Gongyang*[112], written in the second century CE, supposes that it was in operation in the middle of the sixth century BCE. He explains that an individual who had wounded a prince at that time was liable for wounding should the victim die outside the period of responsibility (*gu*), but for killing should he die within that period[113].

We have preserved in one of the excavated strips from the Han border areas a reference to a provision from the statutes on convicts (*yin lü*) enacted shortly after 186 BCE. The fragment of the statutes quoted in the strip states, "where someone had given a prisoner a military or sharp bladed weapon, a rope, or other object capable of causing death, should the prisoner as a result wound himself or another person who dies within the period of twenty days for responsibility (*gu*), he is to have his head shaved and become a *chengdan/chong*"[114]. Another strip from the Han dynasty gives part of an indictment in which the victim of a blow with the shaft of a lance died within ten days. The person who struck him was therefore held liable for premeditated killing (*zei sha*)[115].

It seems that, after a wound had been inflicted, the person who struck the blow had the responsibility of caring for the victim for a certain number of days (that is, the statutory period of responsibility). Should the latter die within that period, the former was to be liable for killing. We can infer that this was the position during the Han from an explanation given by the Tang commentator Yan Shigu (581–645 CE) on an elementary work on language (*Jijui pian*) written by Shi You (fl. 43–33 BCE)[116].

The Tang code regulates in detail *bao gu*, stipulating different periods of time according to the implement used to inflict the wound or the seriousness of the injury. The underlying idea is that the more deadly the implement, the longer should be the period of time necessary for survival. Thus, where the wound had been inflicted by hand or foot, the period was ten days; if by another implement, twenty days; if by a sharp bladed weapon, fire, or boiling liquid, thirty days. Should the injury have amounted to the breaking of a limb, the disabling of a joint, or the

111. A.F.P. Hulsewé, *Remnants of Han Law. Volume I*, Leiden, 1955, pp. 271.

112. This is one of the principal commentaries written to elucidate the historical classic *Chun Chiu (Annals of the Spring and Autumn)*.

113. Shude Cheng, p. 110 (duke Xiang 7).

114. Liu – Yang (eds), *o.c.* (n. 15), pp. 102, 189–190. This law may antedate 167 BCE, the date at which emperor Wen abolished the old style mutilating and hard labour punishments.

115. Liu – Yang (eds), *o.c.* (n. 15), Volume 2, pp. 190–191. The 'ten days' here may be referring not to the time limit specified in the relevant statute (which appears to have been twenty days), but to the point in time at which the victim actually died.

116. The relevant portion of Yan's commentary is cited by Shude Cheng, p. 110.

fracturing of a bone, the period was to be fifty days[117]. The code also contains one provision relating to the healing of a wound. We do not know whether earlier laws had a similar provision. If a limb was broken, a joint dislocated, or an eye blinded, the punishment was to be penal servitude for three years, reduced to two years should the injury have healed within the prescribed time (as specified above)[118].

Comparative Notes

Some of the ancient Near Eastern laws contain provisions which differentiate liability according to whether the victim of a wound recovers or dies, but there is nothing resembling the detail of the Chinese *bao gu* system. The LH in two cases (striking a person in an affray[119] and striking a woman so as to produce a miscarriage[120]) distinguish liability according to whether the victim survives or dies, but do not establish a time limit between the infliction of the injury and the occurrence of death. One of the Hittite laws details the consequences of the infliction of a minor injury which is healed: payment for a substitute to do the victim's work and the further payment of a sum of money both to the victim and the doctor who tended him[121]. Biblical law also specifies that, where a person receives in a fight a (minor) injury from which he recovers, he is to receive compensation for loss of earnings and have his medical expenses paid[122].

2.6. Self Defence

Only in the Tang code do we find a specific provision that introduces self defence as a ground of mitigation. Article 310, after stating the general rule that each participant in a fight is liable with respects to the wounds he has inflicted on another, adds an important proviso. If one person 'follows (*hou*)', that is, responds to an attack by another, he is acting 'in the right (*li zhi*)' and so, should he inflict a wound, the normal punishment is to be reduced by two degrees[123]. The idea is that when in a fight one party can be clearly identified as the aggressor and the other as a person forced to defend himself, the latter is to be entitled to a decreased punishment for wounding. Although we find no statutory recognition of self defence prior to the Tang code, that is not to say that the principle was not acknowledged in the earlier law. There is no relevant comparative material to be adduced.

117. Article 307: Johnson, *o.c.* (n. 18), II, pp. 333–334.

118. Article 305: Johnson, *o.c.* (n. 18), II, pp. 329–331.

119. Roth, *o.c.* (n. 3), p. 122 (para 206–207).

120. Roth, *o.c.* (n. 3), pp. 122–123 (para 209–214)

121. See above at n. 46.

122. See above at n. 55.

123. Johnson, *o.c.* (n. 18), II, pp. 339–340.

2.7. Status

One of the most important considerations in the determination of the punishment for wounding was the status which the parties (person inflicting wound and victim) occupied in relation to each other. The general principle applied that, if the person inflicting the wound was inferior in status to the victim, the punishment was to be higher than in the converse case, where the offender was the superior in status. There were many refinements in detail, correlated with the particular status in question.

(i) Slaves or 'Mean Person' and Free Persons

We have some fragmentary information from the Han. One of the laws compiled in 186 BCE provided that, where a slave hit a commoner or person of higher rank, his cheeks were to be tattooed and then he was to be returned to his owner[124]. We do not know the punishment for the case in which the slave actually inflicted a wound on a free person. That it was severe is suggested by an edict of emperor Guangwu, the founder of the Later Han (25–220 CE) promulgated in 35 CE, which abolished the rule that a slave who shot at and wounded a free person with an arrow was to be beheaded[125].

For more detailed treatment we have to look to the Tang code. Under article 320, where a slave inflicted a light wound upon a commoner, the usual punishment was to be increased by two degrees, reduced to one degree if the offender had been a member of the servile class known as 'personal retainer'. Should the wound have amounted to the breaking of a limb, dislocation of a joint, or the blinding of an eye, the slave was to be strangled (the punishment for a personal retainer being exile). Conversely, where a commoner beat and wounded a slave, in all cases, irrespective of the nature of the wound, there was to be a reduction in the normal punishment of two degrees (one degree if the victim was a personal retainer)[126].

(ii) Paternal Grandparents, Parents, Parents-in-Law, and Other Relatives of a Higher Generation

The punishment for wounding a close relative of a higher generation was more severe than that for wounding a non-relative, but its severity depended upon the precise relationship. The Qin laws punished the simple striking (without inflicting a wound) of a grandparent with the most severe form of hard labour (tattooing

124. Barbieri-Low – Yates, *o.c.* (n. 17), p. 401 (slip 30). Special rules also applied to convicts who struck free persons (slip 29).

125. C. Martin Wilbur, *Slavery in China during the Former Han Dynasty (206 B.C. – A.D.25)*, New York, 1967, pp. 147, 468 (document 138).

126. Johnson, *o.c.* (n. 18), II, pp. 342–344.

and becoming a *chengdan/chong*)[127]. More comprehensive rules have survived in the Han laws of 186 BCE, revealing an increased degree of severity for a child who wounded a parent or paternal grandparent. A child who deliberately (*zei*) wounded a parent was to be beheaded with exposure of the head in the market place, while a child or grandchild who struck a parent or paternal grandparent was to be beheaded ('cast away in the market')[128]. Under the Tang, and certainly earlier, the offence was treated as one of the most serious known to the law. In Tang law, the beating of a parent or paternal grandparent constituted one of the 'ten abominations (*shi o*)', namely, 'contumacy (*o ni*)' and was punished with the more severe of the two death penalties, beheading[129].

The striking or wounding of a parent-in-law is the subject of special regulation. The Han laws of 186 BCE imposed merely a light punishment for the beating by the husband of his wife's father or mother. He was allowed to redeem the minor hard labour punishment known as 'shaving (*nai*)'[130]. On the other hand, the beating by a daughter-in-law of her mother-in-law seems to have been treated as a much more serious offence. In a case which arose during the period 74–79 CE, a daughter-in-law had boxed her mother-in-law's ears. There appears to have been no statutory rule precisely in point. The famous judge Bao You recommended that the punishment be just short of death, namely, exile[131]. The Tang code, again, is even more severe. The mere striking of a parent-in-law by a daughter-in-law entailed strangulation, increased to beheading where a wound had been inflicted. The offence constituted another of the 'ten abominations', that known as 'discord (*bu mu*)[132].

Some other relatives of a higher generation are also mentioned in the laws. The Han laws of 186 BCE punished the beating (without wounding) of a brother or sister of one's father or mother (*tong chan*) with the form of hard labour known as shaving the beard (*nai*) and becoming a bond servant (*lichen/qie*)[133]. On the other hand, the beating of a parent of one's father's concubine, or the wife one's father's brother, or the brother or sister of one's paternal grandparents (*tong chan*), or the brother or sister of one's husband's father or mother merely entailed redemption of the punishment of *nai*[134]. In Tang law the beating or wounding of one's father's uncle, aunt, or sister, or a maternal grandparent was punished one degree more

127. Hulsewé, *o.c.* (n. 15), p. 141 (D63); Liu – Yang (eds), *o.c.* (n. 15), pp. 574–575.

128. Barbieri-Low – Yates, *o.c.* (n. 17), p. 403 (slips 34, 35).

129. Article 329: Johnson, *o.c.* (n. 18), II, p. 366.

130. Barbieri-Low – Yates, *o.c.* (n. 17), p. 405 (slip 43).

131. Jiaben Shen, *Lidai xingfa kao (Studies of Penal Law in Successive Dynasties)*, Four volumes, Beijing, 1985, 3, p. 1459.

132. Article 329: Johnson, *o.c.* (n. 18), II, p. 366.

133. Barbieri-Low – Yates, *o.c.* (n. 17), p. 405 (slip 41).

134. Barbieri-Low – Yates, *o.c.* (n. 17), p. 405 (slips 42, 43).

severely than the punishment for beating or wounding an elder brother or sister (below)[135].

(iii) Older Relatives of the Same Generation: Brothers and Sisters

At the beginning of the Han the beating (*ou*) of an elder brother or sister was punished with the form of penal servitude known as 'shaving (*nai*) and becoming a bond servant (*lichen*)'[136]. By the end of the Han it seems that the punishment had been settled at penal servitude for four years[137]. Just after the end of the Han the important 'New Code (*Xin lü*)' of (Three Kingdoms) Wei increased the punishment to penal servitude for five years, reduced again to four years in the code of the Jin dynasty[138].

The Tang legislated comprehensively. The beating of an elder sibling was punished with penal servitude for two years and a half. Should a light wound have been inflicted, the punishment was to be increased to penal servitude for three years; should a bone have been broken, the culprit was to be exiled to 3000 *li*. But should a limb have been broken, an eye blinded, or the wound had been inflicted with a knife, the punishment was to be strangulation. In the case where the blow or wound had been inflicted 'accidentally (*guoshi*), there was to be a decrease of punishment by two degrees in each of the situations enumerated above[139].

(iv) Husband Beating/Wounding Wife and Vice Versa

The earliest laws deal with the case of the 'obstreperous wife'. The Qin laws of the third century BCE provided that a husband who beat and wounded a refractory wife by tearing her ear, breaking a limb or finger, or dislocating a joint was to be sentenced to the form of forced labour known as 'shaving of the beard (*nai*)'[140]. The same rule appears in the Han laws of 186 BCE in the form: if a husband beats and strikes his shrewish wife without using a sharp bladed weapon, he is not to be liable for any wound inflicted. Conversely, should a wife beat her husband (even without inflicting a wound) she was to be sentenced to shaving (*nai*) and becoming a bond servant (*liqie*)[141]. We do not know the rule of the Jin code on a husband beating a

135. Article 328: Johnson, *o.c.* (n. 18), II, p. 365.

136. Barbieri-Low – Yates, *o.c.* (n. 17), p. 405 (slip 41).

137. This may be inferred from a passage in the Legal Treatise of the *Jinshu (History of the Jin Dynasty)*: Xuanling Fang, *Jinshu*, Ten volumes, Beijing, 1974, 3, p. 925; Robert Heuser, *Das Rechtskapitel im Jin-Shu. Ein Beitrag zur Kenntnis des Rechts im frühen chinesischen Kaiserrecht*, München, 1987, p. 99. Shen, *Lidai xingfa kao*, *o.c.* (n. 131), 3, pp. 1459–1460, mistakenly supposes the punishment to have been penal servitude for three years.

138. Shude Cheng, p. 239.

139. Article 328: Johnson, *o.c.* (n. 18), II, pp. 364–365.

140. Hulsewé, *o.c.* (n. 15), p. 141 (D64); Liu – Yang (eds), *o.c.* (n. 15), pp. 575.

141. Barbieri-Low – Yates, *o.c.* (n. 17), p. 403 (slips 32, 33).

wife, but a wife who beat and wounded her husband[142] was to be sentenced to penal servitude for five years[143].

In Tang law a husband who beat and wounded his wife was to be punished two degrees less than that for an equivalent wound inflicted on an unrelated person. There was no liability for merely beating a concubine, only for breaking a tooth or inflicting a more serious injury, in which case the punishment was to be two degrees less than that for inflicting a like injury on a wife. Accidental wounding of a wife or concubine incurred no liability. When there was liability, no action could be taken unless the wife or concubine herself brought the accusation, a rule which in itself provided considerable protection for violent husbands[144].

Conversely, where a wife simply beat her husband, she was to be sentenced to penal servitude for one year. Should a serious wound have been inflicted, she was to receive a punishment three degrees higher than that for the infliction of such an injury in a fight (between unrelated persons). A concubine was punished one degree more seriously than a wife. Even in the case of accidental wounding, there was still liability, the punishment being two degrees less than that for beating and wounding in a fight. Again, no action could be taken unless the husband personally made an accusation[145].

(v) Senior Relatives Beating or Wounding Juniors

Only one or two rules survive from the Qin/Han period. While in Qin law generally it seems that a father incurred no liability for hitting or even wounding his children, one rule made an exception: if a father mutilated or shaved the son who was his heir, the matter might be reported, presumably by the son, to the authorities[146]. We may perhaps infer that there was no punishment for beating a son or his wife.

By contrast, we have detailed rules from the Tang, although these cannot be treated as an innovation of that dynasty. Under article 328 there was no liability for beating or wounding a younger brother or sister unless the wound resulted in death[147]. Equally, under article 329 there was no liability for beating or wounding a son, unless he died[148]. Under article 327, where a senior relative (whether by generation or age) inflicted upon a junior a wound entailing 'breaking' of a part of the body, the punishment was to be one or more degrees less than that for inflicting

142. The text does not specify the nature of the wound.

143. Shude Cheng, p. 243; Ch'ü T'ung-Tsu, *Law and Society in Traditional China*, Westport, Connecticut, 1980, p. 105.

144. Article 325: Johnson, *o.c.* (n. 18), II, pp. 359–360.

145. Article 326: Johnson, *o.c.* (n. 18), II, pp. 360–362.

146. Hulsewé, *o.c.* (n. 15), p. 139 (D58); Liu – Yang (eds), *o.c.* (n. 15), p. 572.

147. Johnson, *o.c.* (n. 18), II, pp. 364–366.

148. Johnson, *o.c.* (n. 18), II, pp. 366–367.

a like wound on an unrelated person. The precise amount of decrease depended upon the mourning relationship between the parties. Where the victim was within the fifth degree of mourning, the decrease was one degree less, where he was within the fourth or third degree, the decrease was two degrees. For more closely related juniors it seems that there was no liability[149].

(vi) Beating or Wounding a Social or Official Superior

Our present information comes from the Han and Tang dynasties. The laws of 186 BCE contained two relevant provisions. First, when a convict (a person sentenced to gather firewood for the spirits) beat a commoner or person of higher rank, he was to be tattooed and become a *chengdan/chong*[150]. Second, where a person in the district court (such as a party or witness in a case) struck a subordinate official (*li*) on the staff of the court, he was to be sentenced to 'shaving of the beard (*nai*). Should the official struck be of a certain rank or should a subordinate beat an official of a higher rank (*wudafu* or above), the punishment was to be tattooed and become a *chengdan/chong*[151].

Under the Tang code, beating a commoner carrying an imperial decree, one's departmental head, prefect, or county magistrate, or the beating by a clerk of a senior official of his own unit, was punished by penal servitude for three years. Should a wound have been inflicted, the sentence was increased to exile to 2000 *li*. The offence became capital (strangulation) if a tooth was broken or more serious injury inflicted.[152]

Comparative Notes

Status is also an important determinant of liability in the laws of the ancient Near East and early Rome, but the provisions of these legal systems are much less complex than those of the Chinese[153]. The most significant difference in status lay in the distinction between the free and the servile classes of the population. Only in the LH do we have recognition of a number of class distinctions within the category of the free, resembling those operative in Chinese law. Babylonian society in the time of Hammurabi had an upper class which itself contained different levels of status, a commoner class, and a slave class. The rules on liability

149. Johnson, *o.c.* (n. 18), II, p. 364. For beating and wounding a child of one's wife by a former husband see article 333 (Johnson, *o.c.* [n. 18], II, p. 372).

150. Barbieri-Low – Yates, *o.c.* (n. 17), p. 401 (slip 29).

151. Barbieri-Low – Yates, *o.c.* (n. 17), p. 407 (slip 46).

152. Article 313: Johnson, *o.c.* (n. 18), II, p. 343, with more detail on the beating of officials of different ranks. See also articles 313–319 (Johnson, *o.c.* [n. 18], II, pp. 344–352).

153. The early English laws do not specify the relevance of status in the context of wounds, although they do in the context of homicide.

for slapping another person's face[154] show different degrees of liability depending upon the precise statuses occupied by the person slapping and his victim. The same distinctions, although less clearly articulated in the texts, probably also determined the degree of compensation payable in the various cases of physical injury itemised in the laws[155]. The HL regularly distinguish liability according to whether a free person or a slave has been wounded, but do not evidence the more complex social divisions apparent in the LH[156]. For early Roman law we have only the reference in the Twelve Tables to the difference in the level of compensation for the breaking of a bone (*os fractum*) according to whether the victim was a free person or a slave[157].

There is little explicit evidence in the material we are considering of the way in which relationships within the family determined the level of compensation where one relative wounded another. Indeed, we find clear rules only on the striking (without wounding) of a parent, punished by death in the *Mishpatim* and by the amputation of the striking hand in the LH (only for the striking of the father)[158]. To these we may add a *lex regia* ascribed to the Roman king Servius Tullius in the sixth century BCE, which provided that a son who struck his father was to be sacrificed to the household gods[159].

3. Insult

Verbal abuse, the insulting or cursing of another person, is already evidenced in the earliest sources as an offence distinct from that of beating or wounding, albeit only in the context of verbal abuse of a senior relative or social/political superior. The Han laws of 186 BCE contain several relevant provisions, relating both to senior relatives and official superiors. The abuse or cursing (*xi gou li*) of an elder brother or sister or the brother of one's father or mother is punished by redemption from tattooing[160]. The abuse or cursing of a concubine of one's father, the wife of one's father's brother, the brother or sister of one's paternal grandparents, a sibling of one's husband's parents or of one's husband, or the father or mother of one's wife (all senior relatives) is punishable with a fine of four ounces of gold[161].

Where someone (a litigant) in the district office cursed (*li*) a subordinate official belonging to the court, he was to suffer the hard labour punishment known

154. See above at n. 21–26.

155. Roth, *o.c.* (n. 3), pp. 121–123. The LE may have operated the same kind of status based liability, but the evidence is far from clear (see Yaron, *o.c.* [n. 6], chapter 5).

156. Roth, *o.c.* (n. 3), pp. 218–219; Hoffner, *o.c.* (n. 8), pp. 22–29.

157. Twelve Tables 12.4.

158. See above at notes 20, 21.

159. Festus: *plorare*; M. Kaser, *Das römische Privatrecht. Ersterer Abschnitt. Das altrömische, das vorklassische und klassische Recht,* Second edition, München, 1971, p.62, n. 11.

160. Barbieri-Low – Yates, *o.c.* (n. 17), p. 405 (slip 41, translating 'shaming and cursing').

161. Barbieri-Low – Yates, *o.c.* (n. 17), p. 407 (slip 46)

as 'shaving of the beard *(nai*)' But should the official abused be of a higher rank, or should a subordinate official abuse an official of the rank of *wudafu* or above, the punishment was the most severe form of hard labour, being tattooed and becoming a *chengdan/chong*. It is expressly provided that this law does not apply to a case in which a senior official has cursed (*li*) a subordinate on account of some official matter[162].

Abuse or cursing might in an official context be constituted by plain criticism. During the reign of Han emperor Cheng (37–7 BCE), an individual in a court audience criticised the imperial tutor, a former chancellor, and other high officials for failing to give proper advice to the throne. The emperor held that a junior official who publicly in a court audience abused (*shan*) superiors and insulted (*ru*) the imperial tutor committed an unpardonable capital offence. In the end, in this particular case, the offender was pardoned[163].

The Tang code contains a series of articles punishing persons who 'cursed (*li*)' superiors or senior relatives. The only circumstances under which insulting words imposed liability appear to have been the following: (i) a concubine cursing husband, 80 blows with the heavy stick[164], (ii) junior relatives cursing elder brothers or sisters, 100 blows with the heavy stick, father's brothers or their wives, father's sisters, or maternal grandparents, penal servitude for one year[165], (iii) grandchildren or children cursing paternal grandparents or parents, death by strangulation[166], (iv) wife or concubine cursing husband's paternal grandparents or parents, penal servitude for three years[167], (v) wife or concubine who has remarried cursing her deceased husband's paternal grandparents or parents, penal servitude for two years, (vi) wife or concubine cursing senior relatives of the husband for whom she wore mourning for three months or more, the punishment depending upon the length of mourning, being one degree less than that imposed on the husband for cursing the same category of relative[168], (vii) slaves or personal retainers cursing their masters,

162. Barbieri-Low – Yates, *o.c.* (n. 17), p. 407 (slip 46). A fragment of the Han statutes, probably from the first century CE, refers to the cursing (*li*) of subordinate officials, palace eunuchs, or officials of the rank of *wufada* or above on account of an official matter, but the text does not specify punishments: The Institute of Archaeology of Gansu Province, "A General Account of Inscribed Slips of the Han Dynasty from Xuanquan at Dunhuang", *Wenwu* 2000 (5), p. 36 (in Chinese).

163. Gu Ban, *Hanshu (History of the Former Han Dynasty)*, Twelve volumes, Beijing, 1962, 9, p. 2915; Burton Watson, *Courtier and Commoner in Ancient China. Selections from the History of the Former Han by Pan Ku*, New York/London, 1974, pp. 116–117. We may also note a case of 29 BCE in which a noble was deprived of his fief for inter alia cursing (*ma*), when drunk, his wife, who was an imperial relative (*Hanshu*, 3, p. 670).

164. Article 326: Johnson, *o.c.* (n. 18), II, p. 362.

165. Article 328: Johnson, *o.c.* (n. 18), II, pp. 364–365.

166. Article 329: Johnson, *o.c.* (n. 18), II, pp. 364–365.

167. Article 330: Johnson, *o.c.* (n. 18), II, p. 368.

168. Article 334: Johnson, *o.c.* (n. 18), II, p. 374.

exile (converted into a beating of 200 blows with the heavy stick), or their master's year of mourning relatives or maternal grandparents, penal servitude for two years (converted into 160 blows with the heavy stick[169], (viii) cursing messengers bearing imperial decrees or one's military commander, district magistrate, or prefect, or subordinates cursing officers in charge of the sixth rank or above, 90 blows with the heavy stick[170].

We see that even in the Tang code there is no rule punishing the cursing or verbal abusing of one person by another who stands in no particular relationship to him. The earliest evidence for such an offence comes from the Ming dynasty[171].

Comparative Notes

Apart from an isolated reference in the *Mishpatim* to the capital offence of cursing one's father or mother[172], we have no references in the laws of the ancient Near East now extant or in early Roman law to what we may describe as pure verbal abuse. The only other evidence of a liability for 'insult' is that where the insult is manifest in a physical act, the slapping of another person's face, documented both in the ancient Near Eastern law[173] and in early Roman law[174]. Hence, so far as the available evidence goes, we have to conclude that in these legal systems, the law relating to insult, compared with Chinese law, was still at a most rudimentary stage of development[175].

Early English law contains a few rules that appear to be predicated upon the notion of 'insult', although overtly they are concerned with some kind of physical attack. We have already noted the rule on seizing a person by the hair in the laws of Ethelbert[176]. Here the most important factor in the assessment of the compensation may have been the element of insult rather than the actual physical hurt. The laws of Alfred establish the compensation to be paid where a commoner woman is seized by one of her breasts. Although the context suggests that this act was construed as a preliminary stage to a sexual assault, the insult to the woman again probably

169. Article 323: Johnson, *o.c.* (n. 18), II, p. 356 and compare pp. 249–250.

170. Article 312: Johnson, *o.c.* (n. 18), II, p. 343.

171. See Yonglin Jiang, *The Great Ming Code/Da Ming lü*, Seattle/London, 2005, p. 190 (article 347). The origins of this general rule may lie in Yuan law. See Paul Ratchnevsky, *Un code des Yuan. Tome quatrième*, Paris, 1985, p. 238 (778).

172. Exodus 21:17

173. See above at n. 21–24, 26 and further the discussion in Roth, "Mesopotamian Legal Traditions and the Laws of Hammurabi", *Chicago-Kent Law Review* 71/1 (1995), pp. 13–39.

174. See above at note 25.

175. Roman law by the classical period in the first and second centuries CE had certainly developed a highly nuance law of insult, where the level of compensation was determined by the rank of the victim.

176. See above at note 28.

determined the level of compensation[177]. Another law from the same collection reverts to the topic of hair. Compensation is to be paid to a commoner where his hair has been cut off to insult him, the amount to be increased should he have been tonsured or had his beard removed. Here the underlying theme of insult is made explicit in the text of the law[178]. There is one early legal system, hitherto ignored in this study, which shows a more developed law of 'verbal injury' than is apparent elsewhere in the ancient world, namely, that of ancient Greece and Graeco-Roman Egypt[179]. A law attributed to the Athenian lawgiver Solon in the sixth century BCE punished with a fine the utterance of particularly offensive words or expressions directed against another, provided they were spoken in a public place, such as a temple or tribunal, or on a public occasion, such as the games. This is not an open-ended law punishing any type of insult, wherever uttered, but is limited to a tightly limited group of specific slanders uttered publicly[180]. However, evidence from the papyri shows that by the third century BCE there had developed in Egypt there had developed a general remedy for indiscriminate insults, not limited by place or occasion, subsumed under the general head of 'hubris'[181].

4. Conclusion

The material we have surveyed in this essay has brought to light two contrasting models for the administration of justice that operated in the ancient and early medieval world. The first model, illustrated above all by early China, is that in which the state, especially its ruler, devises a comprehensive strategy for the control of the behaviour of its people through the enactment of detailed legislation. Disputes and offences are then adjudicated by officers of the state (judges) in the light of this legislation, a process which entails the identification and interpretation of the rules specifically relevant to the nature of the dispute of the definition of the offence.

177. Attenborough, *o.c.* (n. 27), p. 71 (para 11). Compare also p. 73 (para 18) on the seizing of a nun by her breast or clothing.

178. Attenborough, *o.c.* (n. 27), p. 79 (para 35).

179. See in general Joseph Mélèze-Modrzezewski, " 'Paroles néfastes' et 'vers obscenès'. À propos de l'injure verbale en droit grec et hellénistique", in J. Hoareau-Dodineau – P. Texier (eds), *Mélanges Pierre Braun*, Limoges, 1998, pp. 569–585. I am most grateful to the anonymous reviewer for drawing my attention to this important study and to the editor for making available a copy to me.

180. *Plutarch's Lives*, Dryden translation revised by A.H. Clough, Five volumes, New york, I, p. 198 (*Life of Solon*); *Greek Orators I. Antiphon and Lysias*, translated by M. Edwards – G. Usher, Chicago, 1985, pp. 147–155 (*Contra Thermnestes*).

181. R. Taubenschlag, *The Law of Graeco-Roman Egypt in the Light of the Papyri (332 B.C. – 640 A.D.)*, Second edition, Warsaw, 1955, pp. 435–438.

The second model, illustrated by the 'codes' of the ancient Near East, the biblical *Mishpatim*[182], the early English laws, and possibly even the early Roman law expressed in the Twelve Tables, is that of the settlement of disputes and the punishment of offences by representative figures in the community (judges) working against a background of rules commonly accepted as applying within the society, supplemented by decisions taken by the ruler or other recognised authority on particular questions. Under this model, decisions of the ruler on points of law, where they exist, do not have the binding authority of a legislative or statutory rule, but rather function as authoritative guidelines which leave judges with a considerable measure of discretion.

Another important contrast between the Chinese material on the one hand and the ancient Near Eastern, biblical, early English, and early Roman on the other is that constituted by the opposition of 'punishment' and 'compensation'. The standpoint of the early (and indeed later) Chinese rulers was the control of the people through penal laws which identified offences and specified the appropriate punishments. Hence both 'wounding' and insult' were offences defined in the codes for which the appropriate punishments were prescribed. The other legal systems, by contrast, preferred to treat wounding and insult primarily in terms of wrongs for which appropriate compensation was to be paid to the victim.

Given these considerable differences in the nature, structure, and operation of the two contrasting models, it is still of great interest to establish what may almost be termed a *ius gentium* in the treatment of assaults and wounds. In every case the essence of the approach is the selection of a particular part of the body which has been injured or of a particular type of wound (such as that inflicted by a knife or through the application of fire) and the determination of an appropriate legal response. Such response may vary. In the Chinese system it is always a punishment, in all the other systems it is either positive compensation (a monetary payment to the victim) or what we may term negative compensation, *talio* (the infliction of a like injury on the perpetrator).[183] In other words, none of the legal systems within the geographical and time spans under consideration here have reached the stage of predicating its response upon a general concept of 'wounding', albeit differentiated into categories of gravity. It is striking that traditional Chinese law, unlike English or Roman law, never reached this stage. The treatment of liability for wounding is the same in the Qing code (1664–1911) as it was in the Tang.

Although all our early legal systems took the same fundamental standpoint in their response to assaults, there is still one significant difference between the Chinese and the other systems (apart from differences derived from the contrasting models we have already identified). Only in early Chinese law, at least by the time of the Tang, do we find a completely worked out grounding of liability according to

182. This is not, however, the view of Jackson cited above at n. 11.

183. It seems a mistake to treat *talio* as a form of punishment rather than a kind of negative compensation, as is sometimes done.

the presence or absence of an intention to wound or indeed, where there is a state of mind that generically might be described as an 'intention to wound', according to the precise nature of that intention (intention to kill, intention to cause a particular type of injury, intention to hurt or subdue as in a fight).

This is not to say that the early Chinese texts offer a fully worked out analysis of fault in the context of assault; they do not. But they do, on the one hand, make a clear distinction between intentional and accidental wounding and, on the other, point to a number of differences in factual situations (unprovoked assault, wounding in a fight, wounding in a game, and so on) which evidence different degrees of fault that can be expressed in terms of the presence or absence of a particular kind of intention. Some of the other legal systems also evidence a distinction between different contexts in which a wound was inflicted such as unprovoked assault, a fight, or even an accidental jostle, but none attains the detail and sophistication of the Chinese rules. Such detail and sophistication are explicable on the ground of the origin and development of Chinese law as a comprehensive system of rules for the maintenance of order and the control of the population. The Chinese statutes were systematically developed over many centuries (from the third century BCE to the seventh century CE) by officials who were experts in the construction and application of legal rules.

We can also detect some striking similarities in the early laws relating to insult. With one significant exception, we do not find a general law under which the verbal abuse or insulting of another constituted a wrong or a crime. What we have is limited recognition of a liability for insult in two situations. One is the case in which a physical assault is committed but the injury consists more in the humiliation of the victim than in physical suffering. The most common example is that of the 'slap in the face'. The other situation is constituted by the verbal abuse or cursing of a parent or a social or political superior. In both cases the underlying wrong is a disparagement of a person's honour or self-respect. The exception is constituted by the law of Graeco-Roman Egypt, itself developed on the basis of a more restrictive Athenian law. By the third century BCE in Egypt there does appear to have developed a general remedy for insult, a position not obtained in China until the Ming[184].

184. I would like to thank the anonymous reviewers of this article for their very helpful suggestions.

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Sommaire

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