THE DEATH PENALTY IN TRADITIONAL CHINA

Chin Kim*
Theodore R. LeBlang**

INTRODUCTION

The third earliest legal system of the world in origin is the Chinese, beginning before 2500 B.C. It is the only legal system that has survived continuously to date, a period of more than four thousand years.1 The primary purpose of this article is to exhibit capital punishment as it was actually administered in traditional China. Although the Chinese legal codes appeared quite ruthless in written form with heinous punishments being prescribed for capital as well as other offenses, the application of the law was riddled with mitigating forces and humanitarian currents. In the final scenario, it was the reduction of sentence or the remission of punishment that prevailed as the denouement. It is from this paradox that the value of this analysis derives. In traditional China the modern observer will find a pervasive Confucian ethic thriving at almost every stage of development as a humanitarian force, eroding the ruthless pillars of capital justice by filling the judicial system with one mode of penal reduction and mitigation after another.2 It is the intention of the authors to examine the death penalty and its place in the law of traditional China, tracing its development through the centuries and noting its relationship to the societal attitudes and styles of life that were part of the premodern Chinese era.


I. HISTORY OF PENOLOGY

A. An Overview

The written law of premodern China was overwhelmingly penal in emphasis. There was no formal distinction between the criminal and the civil law, rather the code of imperial laws was always a penal code; almost every chapter or section would end with a statement of penalty for its violation.

If a rule has become so settled and obvious that it has arrived at a place in the code, it ought morally to be obeyed by all; and the few who may resist must naturally be coerced by a penalty; they merit it.

Primarily, the written law was limited in scope to being a legal codification of the ethical norms long dominant in Chinese society, and was rarely invoked to uphold these norms except when other less punitive measures had failed. The law was concerned with all acts of moral or ritual impropriety or of criminal violence which seemed to be violations or disruptions of the social order. The existence of the norms of propriety was intended to deter the commission of such acts, but once they occurred, the restoration of social harmony required that punishment be inflicted to exact retribution from the doer. The form of punishment was corporal in character.

A disturbance of the social order really meant, in Chinese thinking, a violation of the total cosmic order. According to the Chinese world view, the spheres of man and nature were inextricably interwoven to form an unbroken continuum. For this reason, the official law always operated in a vertical direction from the state upon the individual, rather than on a horizontal plane directly between two individuals.

---

3 The underlying philosophy was that law is the hand maiden of ethics and that any acts which are morally wrong constitute crimes which the law should inhibit and punish. See Wu, The Individual in Political and Legal Traditions, in The Chinese Mind 344 (C. Moore ed. 1967).

4 W. Hung, Outlines of Modern Chinese Law 250 (1934). Criminal punishments were often applied in purely civil matters. Indeed the trial judge was looked upon as father in the family who was justified to use any disciplinary measure as he saw fit to regulate the conduct of his children.

5 J. Wigmore, supra note 1, at 152. All private rights have a public interest in that their violation may lead to injustice and public discontent and should therefore be repressed by penalties. This principle rests on the still broader truth that there is not a distinct line between morality and law; see Cheng, The Chinese Theory of Criminal Law, 39 J. Crim. L.C. & P.S. 461 (1948).


7 M. van der Valk, Interpretations of the Supreme Court at Peking, Years 1915 and 1916 (1949).

8 In treating law as a matter of punishment, legal philosophy maintained the conception of law as an external sanction. Thus law was seen as the monopolistic interest of the state and not the guarantee of rights or the main basis of civil disorder as it affected the citizen. In particularizing its application it strengthened the primacy of morality and the psychology of mediation. The
One writer has succinctly described traditional Chinese law as a product of Chinese society and at the same time a reflection of that society. The old law

...was for the most part penal in nature, matters of civil law being left to custom and usage and mainly to private arbitration. It was the criminal law of an absolute sovereign designed to preserve the order of heaven, to maintain the dynasty, and to keep the balance or harmony of nature. It was concerned entirely with protection against the wrongdoer; it was not primarily concerned with the protection of the accused's rights. It was designed to protect the State from the people, not the people from the State.  

B. Dynastic Development: Codification of the Law

Prior to the Han dynasty and its short lived predecessor, the Chin dynasty (221-207 B.C.), no centralized empire existed in China. At that time there were only a number of independent and mutually warring principalities. This pre-imperial age, often called the age of Chinese feudalism, is also the age that saw the formative beginnings of Chinese written law. Although there exists no counterpart in the history of Ancient China comparable to the Twelve Tables of Ancient Rome, Ancient China produced her law from her own soil and, at a very early age had her law written and codified. As early as 1100 B.C. a code of laws is

---

tension between these two implicit attitudes was bridged as long as the government kept popular confidence by the conception of the emperor (and hence of his magistrate) as "the father of the people," who "was accordingly justified in choosing appropriate and necessary methods of discipline." See Tay, Law in Communist China, 6 Sydney L. Rev. 153, 162 (1969).

4 P. CHEN, supra note 1, at 9. The old law was a prescription of punishments for either criminal acts or departures from prescribed forms or rituals. The old law punished not only long lists of acts expressly defined in the codes but also punished acts found to be crimes by analogy after their commission. It is interesting to note that under the law of traditional China, not only was the offender punished but his immediate relatives and associates were also held collectively responsible for the crime. Also, the old law was subjective rather than objective. The status of the offender with relation to his victim not only determined the amount of the punishment but often determined if any crime was committed at all, e.g., a master could strike a slave and no crime was committed, but should a slave strike a master he could be decapitated.

5 Cheng, A Sketch of the History, Philosophy and Reform of Chinese Law, in Washington Foreign Law Society Studies in the Law of the Far East and Southeast Asia 29 (1956). At a much earlier age her sages enunciated fundamental legal maxims, enjoining on the one hand that the administration of justice be humane and consecrating on the other the supremacy of law and judicial independence. The sage Emperor, Great Shun (2255-2205 B.C.) said:

Punishments should not be extended to one's descendants, rewards should be so extended. Involuntary faults should be pardoned, however great they may be; willful faults should be punished though they may be small. In cases of guilt, when there is doubt as to whether a heavier or lighter punishment should be imposed decide on the latter; in cases of merit, when there is doubt as to whether a greater or smaller reward should be
said to have been composed by Tan, Duke of Chow. In 536 B.C. certain "books of punishment" were promulgated in a certain Chinese principality. In 400 B.C. a code of six chapters was drawn up by a statesman called Li Kwei. This code, otherwise known as the "law bible" has always been deemed a pioneer work in China's history of codification. Fifty years after Li Kwei's six-chapter code, a new code appeared from the hand of Lord Shang of the powerful state of Chin. This state, which ultimately absorbed the whole empire, founded the Chin dynasty under the ruler known as the First Emperor.

By 221 B.C. the First Emperor of the Chin dynasty had overthrown the reigning house of Chou, conquered the other feudal states, abolished feudal political institutions and formed the first universal Chinese Empire. It was the dynamic and ruthlessly efficient program of the legalists that helped the state of Chin triumph successfully over its rivals in forming the new regime. The Legalist Law of Chin thus became the law of the Empire. However, its triumph was brief. The radical social and political changes which the First Emperor enforced after his conquest caused considerable derangement and unrest. Widespread rebellions followed the death of the First Emperor in 210 B.C. and his dynasty was overthrown in 207 B.C.

With the overthrow of the Chin dynasty the Legalism of the First Empire was replaced with Confucianism in the Han dynasty (206 B.C. - 220 A.D.). Nevertheless, Legalism did leave its lasting mark on the law. Its influence probably explains the continuing penal emphasis found in all imperial codes; and the resulting fact that Chinese treatment even of administrative and other noncriminal matters usually follows a

given decide on the former. . . . The object of punishment is the negation of punishment.

Id. at 31, 32.

---

11 J. Wigmore, supra note 1, at 158. This code, known as Chow Li was sought to be extirpated by the Great Burning of the Books in B.C. 212. The effort was futile and the Chow Li with many other classics was secretly preserved, its text was rescued and officially restored in the very next generation and some of its principles have doubtlessly continued as the basis of all intervening legislation.

12 W. Hung, supra note 4, at 2. The six-chapter code involved the following headings: (1) Rules governing Robbery; (2) Rules governing Larceny; (3) Rules governing Imprisonment; (4) Rules governing Arrest; (5) Miscellaneous Rules; and (6) Classification of Penalties.

13 Cheng, supra note 10, at 34.


15 As commoners under the Chin, the Han knew at first hand the suffering that its harsh rule had brought to the people. They were quick, therefore, to abolish its more offensive laws and institutions while leaving intact much of the rest of its elaborate machinery of government. Under their leadership the new regime of the Han was marked by a plebeian heartiness, vigor, simplicity and frugality in government. See T. DeBary, Sources of Chinese Tradition 149 (1964).
standard formula: "Any one who does X is to receive punishment Y."¹⁸

The gist of Legalist teaching is that government should be conducted by law sternly enforced, as opposed to government based on benevolence and conducted by men deemed to be virtuous and wise, as preached by the Confucian School.¹⁷ The Legalists believed that in governing a state, the establishment of severe punishments was necessary in order to save the masses of the living from disorder, to insure that the strong did not override the weak, that the many did not oppress the few, and that there were none of the calamities of death, destruction, bonds, and captivity.¹⁸

If you govern by punishment the people will fear. Being fearful they will not commit villanies; there being no villanies, people will be happy in what they enjoy. If, however, you teach the people by righteousness, then they will be lax, and if they are lax there will be disorder; if there is disorder, the people will suffer from what they dislike.¹⁹

Confucianism, as compared to Legalism, is far more humanitarian. The teachings of Confucius embody the ethics of traditional Chinese society. Regarded as the fundamental rules of human conduct, these teachings have been accepted as the Chinese moral standard for the last two thousand years. In juxtaposition to the Legalists, the time honored maxim of government as enunciated by Confucius is that,

If people are guided [solely] by law and order and [conformity to law] among them is enforced [solely] by punishment, they will try to avoid the punishment, but have no sense of shame. But if they are guided by virtue and order among them is enforced by Li [i.e., ethical rules of

¹⁶ D. Bodde & C. Morris, Law in Imperial China 27, 28 (1967); see Tay, supra note 8, at 160, where he notes that although the codes dealt with virtually all aspects of life they were dealt with in penal form and China had no other civil code of law. Law was thus concerned with the state interest. There was no conception of civil law as a state matter, of the resolution of disputes or of the determination of rights by an impartial legal order. Though the court had power to order restitution or compensation, every suit before a Chinese magistrate had to end in punishment either of the person complained of or the person complaining for bringing an unsubstantiated charge.

¹⁷ Cheng, supra note 10, at 34. The Legalist school is characterized by a supreme belief in the efficacy of law as a panacea of government almost to the entire exclusion of the human factor. It seems to ignore that law is, after all, made and administered by men. In contrast to this is a saying by Mencius, the Sage after Confucius, "Good intentions alone are not enough in government, nor can law prevail by itself." Id. at 31.

¹⁸ T'ung Tsu Ch'u, Law and Society in Traditional China 263-64 (1961). The Legalists not only denied the importance of benevolence and righteousness in politics saying, "A sage king does not value righteousness but he values the law." They further insisted that these two virtues had only negative values, as far as the government was concerned, and that ultimately they could only bring harm to the country. Id. at 263. See also J. Duyvendak, The Book of Lord Shang (1928).
correct conduct], they will have the sense of shame and also be re-formed [i.e., become good citizens].

Basically, what the Confucians opposed was improper punishment. The belief that punishments were supplementary to virtue and moral influence became quite popular among Han Confucianists, and as time passed, the supplementary function of punishment was increasingly emphasized. Having taken the tragic failure of the Legalists as a warning, the Han rulers and scholars worked out a penal system in which the polarity of law and morality was embodied with morality as the positive element and law as the negative element. The result was a legalization of morality. They adopted from Confucianism the substance of moral duties and at the same time adopted from the Legalists the procedure of enforcing them.

When Emperor Kao Ti of the Han dynasty first acceded to the throne of the empire (201 B.C.), three rules were found to be sufficient to maintain peace and order. Those simple rules were as follows: "Those who kill shall die; those who rob and those who cause injury shall atone for." This "three rule" law, however, was replaced in practice by the nine-chapter code of the Han dynasty developed under the guidance of Hsiao Ho. The nine-chapter code was composed of Li Kwei’s six chapters along with three chapters on Law governing Domestic Rela-

---

20 Cheng, supra note 10, at 32. The notion that strong reliance on positive law is evidence of a breakdown in the social order, of a lack of harmony between state and society, is deeply ingrained in traditional Chinese thinking. So is the notion that social harmony is threatened rather than promoted by emphasis on the individual as a separate walled-in unit, having his rights. See Tay, supra note 8, at 161.


22 Wu, Chinese Legal and Political Philosophy, in The Chinese Mind 224 (C. Moore ed. 1967). A primary factor responsible for the law of traditional China becoming the embodiment of the ethical norms of Confucianism was that in China, perhaps even more than in most civilizations, the ordinary man’s awareness and acceptance of ethical norms was shaped far more by the persuasive influence of custom than by any formally enacted system of law, i.e., the socialization of traditional Chinese moral precepts, the clan into which a person was born, the guild of which he might become a member, the group of gentry elders holding informal sway in his rural community. “[A]ll of these extra-legal bodies helped to smooth the inevitable frictions in the traditional Chinese society by inculcating moral precepts upon their members, mediating disputes, or if necessary, even imposing disciplinary sanctions and penalties.” See P. Chen, supra note 1, at 12.

23 W. Hung, supra note 4, at 250. One commentator has noted that, “The West uses the legal fiction that everyone knows the law, while China tries to make this fiction a reality. This is accomplished in part by making the normative rules of conduct readily accessible to the public and in part by keeping the rules simple and free of technicalities so laymen can understand and apply them.” See Li, Law and Penology: Systems of Reform and Correction, 31 Proceedings of the Academy of Political Science 150 (1973). Surely the “three rule” law must be commended for its simplicity and freedom from technicality.
tions and Census, Law governing Military Service, and Law governing Cattle.\textsuperscript{24}

In each of the nine dynasties after the Han there was a new code until the T'ang dynasty (618-906 A.D.) when a very comprehensive code was finally enacted.\textsuperscript{25} The T'ang dynasty is indeed the deliverer of the fundamental principles of modern law. During the reign of Kao Tsu, the first emperor of the T'ang dynasty (620-627 A.D.), a noted scholar, Chang Sun Wu Chi, by Imperial Command, completed his praiseworthy work, the "T'ang Code with Explanatory Notes" in 30 volumes, comprising 501 articles.\textsuperscript{26} This code was so reasonable and practical in character that it was substantially, if not literally, adopted by the successive dynasties of Sung (960-1272 A.D.) and Yuan (1277-1368 A.D.), though the numbers of chapters or articles and the penalties attached to various offenses may have varied.\textsuperscript{27}

The Ta Ming Code of the Ming dynasty (1368-1644 A.D.) borrowed extensively from the T'ang and Sung codes and consisted, at first appearance, of 285 articles of laws and 145 articles of administrative statutes. Repeated amendments were made after 1368 and the final edition of the code was completed in 1586. The code was far more exhaustive in form than any others then in existence, and was later treated as a skeleton for the code of the Ch'ing or Manchu dynasty (1644-1911 A.D.).\textsuperscript{28}

\textsuperscript{24} The primary source of information on the code and judicial procedure of the first lengthy imperial dynasty, that of Han (206 B.C.-220 A.D.), is A. HULSEWÉ, REMNANTS OF HAN LAW (1955).

\textsuperscript{25} T'ang China as a conservative Confucian society recognized that there had been a golden age in the past in which law had not been necessary. This was due to the moral excellence of the sage rulers of that time. There were laws, but they were simple and easily understood. Since that time, however, there had been a marked decline in the moral efficacy of men and institutions. Simplicity became scattered, sincerity was left behind, and the real punishments became necessary; thus the comprehensive and practical T'ang Code. For a worthwhile comparative analysis of the T'ang Code and the modern criminal law, see Tsai, A Comparative Study of the T'ang Dynasty Criminal Code and Criminal Legislations in Modern Times, 5 SYNOPSES OF MONOGRAPHICAL STUDIES ON CHINESE HISTORY AND SOCIAL SCIENCES 113-36 (1969).

\textsuperscript{26} W. HUNG, supra note 4, at 3. Of the T'ang dynasty legal compilations only the fundamental law (lu) is complete. The administrative status (ling), the regulations (ko), and the ordinances (shih) which were rules amplifying the administrative statutes, are no longer extant. See JOHNSON, THE T'ANG CODE: AN ANALYSIS AND TRANSLATION OF THE OLDEST EXTANT CHINESE PENAL CODE 3 (1968).

\textsuperscript{27} Cheng, supra note 10, at 34; Cohen, Teaching Chinese Law, 19 AM. J. COMP. L. 655, 659 (1971). It is important to note here that in addition to its profound effect on Chinese law, the T'ang Code exerted an enormous influence on the development of law in Asia. In Japan both the Code and the administrative statutes were adopted with only minor changes. In Vietnam even so late a code as that of the Le dynasty of 1483 was largely based on the T'ang Code. While little research has been done on traditional law in Korea, it seems evident that the T'ang Code was influential in that country as well. See JOHNSON, supra note 26, at 6.

\textsuperscript{28} W. HUNG, supra note 4, at 3.
The Manchus, having been foreigners in China, sought to rule through heavy reliance on the legal system of the Ming dynasty, and thus borrowed much from the Ming Code in creating the Ta Ch’ing Lu Li. The Ch’ing Code was compiled in definitive form in 1740 and consists of 436 sections that contain a greater number of statutes and approximately 1800 substatutes. It is an unrivalled contribution to China’s codification of laws for which the Manchu dynasty is entitled to great praise.

As the legal codes of traditional China developed, they clearly grew in size and scope. Being primarily collections of rules for regulating human conduct, their progressive complexity reflected a growing need to deal with new and more involved patterns of human behavior and interaction. Yet, consistently throughout more than two thousand years of growth, the laws of China continued to be penal in emphasis. Violations of prescribed standards of conduct resulted in the application of prescribed forms of punishment. From this scheme there was no variation. As already noted, anyone who did X received punishment Y. The concept of punishing those persons who violated established rules of behavior was firmly imbedded in traditional Chinese legal thinking. It is only the manner and form of punishment that was subject to change during the course of Chinese history. In the following section, the aspects of punishment in traditional Chinese law will be analyzed and particular emphasis will be placed on the development and application of the death penalty.

II. PUNISHMENT AND THE DEATH PENALTY

A. Forms of Punishment

Wu hsing, “the five punishments,” is the generic term used by the Chinese from antiquity until the present century to designate their major legal penalties. At first blush the number indicates a correlation with the many sequences of five (the five senses, five notes, five colors, five tastes, five directions, and many more) constituting the Chinese politico-cosmic system dominated by the Five Elements. A relationship be-

---

29 Ta Ch’ing Lu-Li, Ta Tsing Leu Lee, Being the Fundamental Laws of the Penal Code of China (Thomas transl. 1810).
30 D. Bodde & C. Morris, supra note 16, at 76. In accord with Chinese philosophy there exist five elements: Metal, Wood, Water, Fire and Earth which are the five principles of the Universe as expounded by the ancient Greek philosophers. The Five Elements system is probably the most notable example of the Chinese interpretation of the universe in terms of orderly arrays of things all neatly packaged, graduated, and correlated with one another. An illustration of a similar mode of thinking in the Chinese legal sphere is the penal ladder with its step by step progression from
between the five punishments and these elements has never been stressed in Chinese writings and it seems possible that the punishments came into existence some time prior to the creation of the Five Element system. For example, according to tradition it was the non-Chinese barbarian Miao people who in the twenty-third century B.C. first created the five punishments (wu hsing), which they then called fa (law).\textsuperscript{31}

Throughout the ages the content of the term has changed greatly and the punishments have oscillated between severity and mildness.\textsuperscript{32} In pre-imperial China it referred exclusively to the corporal punishments of tattooing,\textsuperscript{33} amputation of the nose, amputation of one or both feet, castration\textsuperscript{34} and death. During the Han dynasty, the five punishments were greatly mitigated. Tattooing and amputation of the nose and feet were abolished by imperial edict in 167 B.C., and castration, probably abolished at an earlier date but then revived again, was finally ended in the second decade of the second century A.D. During the Han, in short, all corporal punishments other than death and beating were replaced by varying forms of penal servitude.\textsuperscript{35}

During the Period of Disunity (220-580 A.D.), the five punishments underwent further changes and each of them, instead of remaining a single punishment, became a category embracing graduated degrees of the same punishment. Finally in the Sui Code of 581-583 A.D. (the prototype of the surviving T'ang Code of 653 A.D.) the five punishments assumed the standard forms which, with minor changes and additions, the lightest punishment of ten blows with a light stick all the way to death by slicing. This system may be interpreted as a complex device for "measuring morality with a quantitative exactitude . . . whereby any offense ranging from the most trivial to the most serious may be requited with the utmost precision." \textit{Id.} at 100.

\textsuperscript{31} \textit{Id.} at 76. Fa is an important word in Chinese traditional legal terminology. It is the generic term for positive or written law as an abstraction and has been used to mean separate laws. Wu hsing includes punishment per se as well as written prohibitions whose violation would result in punishment. See P. CHEN, \textit{supra} note 1, at 13.


\textsuperscript{33} Tattooing was one of the major punishments of antiquity. Following the abolition of it and other corporal punishments in 167 B.C. it was used only occasionally during the rest of the Han dynasty and the four centuries of the period of Disunity that followed. During the Sui and T'ang dynasty it was not used at all but from 940 A.D. onward it was revived as a means of marking some criminals sent into exile. See D. BODDE & C. MORRIS, \textit{supra} note 16, at 96.

\textsuperscript{34} As a principle of punishment castration was abolished sometime before 167 B.C., but it was reintroduced during the later Han period in commutation of the death penalty, at least as early as 146 B.C. It was again abolished in the second decade of the second century A.D., and it does not seem to have been reintroduced. The name for castration is "the punishment of rottenness" and to be castrated was called "to be sent to the silkworm house." See A. HULSEWÉ, \textit{supra} note 24, at 127.

they have held ever since:

1. Beating with Light Stick (5 degrees: 10-50 blows)
2. Beating with Heavy Stick (5 degrees: 60-100 blows)
3. Penal Servitude (5 degrees: 1-3 years)
4. Life Exile (3 degrees of distances: 2,000-3,000 li) \[3 \text{ li} = 1 \text{ mile}\]
5. Death (2 degrees: strangulation, decapitation)\(^{36}\)

Among later additions, the most important has been a third degree of death penalty, death by slicing. A more severe form of exile known as military exile was appended to the standard 3 degrees of life exile. In addition, the two standard death penalties of strangulation and decapitation came to be divided into two subcategories known as "immediate" execution and execution "after the assizes." The subcategory "after the assizes" designated a less severe form of the particular punishment. As listed in the Ch'ing Code of 1740 the five punishments were:

I Light Bamboo: 5 degrees of beating (10-50 blows)
II Heavy Bamboo: 5 degrees of beating (60-100 blows)
III Penal Servitude: 5 degrees plus 3 supplemental degrees
IVa Life Exile: 3 degrees plus 1 preliminary degree.
IVb Military Exile: 5 degrees plus 1 supplemental degree
V Death: 2 standard degrees plus 1 supplemental
  1a - Strangulation (chiao) after the assizes (chien hou)
  1b - Decapitation (chan) after the assizes
  2a - Strangulation, immediate (li chueh)
  2b - Decapitation, immediate
  3 - Death by slicing (ling ch'ih)\(^{37}\)

Ever since the Sui Code of 581-583 the standard death penalties in increasing order of severity have been strangulation and decapitation. Describing the procedure for strangulation, Alabaster states:

The executioner throws the victim down upon his face and then sits astride him twisting a cord around his neck; then as speedily as he can—though slowly in effect—he strangles his victim. If the executioner is not skillful the experience must be worse than that of hanging prolonged, bad as that is.\(^{38}\)

---

\(^{36}\) D. Bodde & C. Morris, supra note 16, at 77.
\(^{37}\) Id. at 78.
\(^{38}\) E. Alabaster, Notes and Comments on Chinese Law 62 (1899). Upon examination of the text and pictures in Niida Noboru, Study of Chinese Legal History (4 vols.) (1959-1964), the technique was only one among several. Included in the illustrations is one showing the victim tied to a post being strangled by an executioner standing behind him. Another depicts the presence of two executioners who stand on both sides of the victim whom they strangle by twisting the rope
Concerning the procedure for decapitation, we are told by Alabaster,

The criminal does not lay his head upon a block to be chopped off by an axe, but is placed kneeling with his hands tied behind him. One assistant holds him in position by the rope with which his hands are tied, another pulls his head forward [seizing his queue for this purpose] and with one stroke of his sword the executioner whips it off.\(^\text{39}\)

There can be little doubt that strangulation is a slower, more painful death than decapitation; however, it has always been regarded as the less severe punishment for social and religious reasons. In accord with the tenets of Chinese filial piety, a person’s body is not his own property but rather a bequest from his parents. The mutilation of one’s body is therefore considered to be unfilial. Strangulation, however, leaves the body intact and is thus superior to decapitation. Furthermore, strangulation leaves the spirit of the executed man an intact body which it can continue to inhabit.\(^\text{40}\) It is apparent that the forms of death sentences themselves represented an ascending scale of intensity with strangulation being preferable to beheading because it did not mutilate the body.

In addition to strangulation and decapitation there is another form of death, the severest of all, which does not go back to antiquity.\(^\text{41}\) It is the ling chi'h, or death by slicing. The punishment consists of slowly slicing the body to pieces while the offender is alive, thus aiming at the total destruction and mutilation of the criminal as far as was humanly possible.\(^\text{42}\) As the intention was to prevent the continued existence of the criminal’s spirit in recognizable form; the slicing would still be carried out even if he had committed suicide.

The slicing death, or lingering death, is in full accord with the idea that the punishment should correspond with the seriousness of the sin against the natural order. Thus, it was applied only for the most heinous crimes. These included high treason, rebellion, patricide, murder of the husband, mutilation of a living person, witchcraft and other offenses

\(^{39}\) E. Alabaster, supra note 38, at 59.

\(^{40}\) D. Bodde & C. Morris, supra note 16, at 92; see Cohen, supra note 27, at 656.

\(^{41}\) One tradition dates the introduction of this punishment to the dynasty of Liao who ruled portions of North China from 907 to 1123. There are records indicating at least six instances where rebels underwent execution by ling chi'h. See D. Bodde & C. Morris, supra note 16, at 94. Another tradition dates the ling chi'h back to the reign of the Sung Emperor Shen-tsung (1068-1085). Sources agree, however, that the slicing death was first officially included as a punishment in the code of the Yuan dynasty (second half of the 13th century). See S. Van der Sprenkel, Legal Institutions in Manchu China 62 (1962).

\(^{42}\) Meijer, The Introduction of Modern Criminal Law in China 26 (1967).
collectively known as the "Ten Abominations." One writer has indicated the "Ten Abominations" to be: rebellion; high treason; rioting; patricide; murder; sacrilege; unfilial conduct; discord; failure in duty to one's neighbor; and incest.43

In the words of Alabaster, the slicing death is described:

Here the offender is tied to a cross and by a series of painful but not in themselves mortal cuts, his body is sliced beyond recognition. . . . This punishment . . . is inflicted not so much as a torture, but to destroy the future as well as the present life of the offender. He is unworthy to exist longer either as a man or recognizable spirit. . . . As spirits to appear must assume their previous corporeal forms he can only appear as a collection of little bits. It is not a lingering death, for it is all over in a few seconds, and the coup de grace is generally given the third cut. . . . In short, though the punishment is severe and revolting, it is not so painful as the half-hanging, disembowelling, and final quartering practiced in England not so very long ago.44

Shen Chia-Pen remarks that the codes do not describe the procedure for carrying out the slicing death which was an esoteric technique individually transmitted by each executioner.45 Generally speaking, the executioner inflicts eight cuts (pa tao) upon his victim. The eight cuts are made successively upon the victim's face, his 2 hands, 2 feet, breast and stomach, with the final cut slicing off the head.46

In the much longer discussion of Niida Noboru, there is an indication that Shen Chia-Pen only deals with the bare essentials of the slicing death. According to Niida, as many as 24, 36, 72, or even 120 cuts may have been suffered by victims of this form of punishment. Included among reproductions of several gory woodcuts in Niida's work is one depicting a victim tied to a cross with three of his limbs lying on the ground nearby and the executioner hard at work severing the fourth. A particularly notorious execution was that of the Ming Eunuch Liu Chin, by slicing in 1510, as a punishment for the man's gross political machinations. According to Niida, the eunuch's body was cut in excess of 4,700 times, each cut being accompanied by a blow of the whip.47

---

43 Cheng, supra note 5, at 463.
44 E. Alabaster, supra note 38, at 57-58.
45 Hence even between such nearby cities as Peking and Pao-ting fu slight variations may be found. See D. Bodde & C. Morris, supra note 16, at 93; see Shen Chia-Pen, Fen K'ao, in Bequeathed Writings 47, 48 (1929).
46 D. Bodde & C. Morris, supra note 16, at 93; Shen Chia-Pen, supra note 45, at 47, 48.
47 D. Bodde & C. Morris, supra note 16, at 93-94. For Niida's lengthy discussion of all aspects of death by slicing see Niida Noboru, supra note 38, at 153-71. For the particular points noted here see id. 158-59. Niida avoids documenting the account of Liu Chin's execution and it may well be popular tradition rather than actual history.
In addition to the "five punishments" there existed several supplemental or substitute punishments. Included among these were: 1) tattooing, which from about 940 A.D. onward was revived as a means for marking some criminals sent into exile; 2) whipping, which was used on occasion as a substitute for beating with the stick; 3) torture, which was used within specified limits for extracting confessions from suspects who would refuse to admit guilt; 4) wearing of the Cangue, a large rectangular collar made of blocks of wood and worn around the neck so as to prevent the user from being able to touch his face with his hands: and, 5) exposure of the head (hsiao-shih) or of the corpse after execution. This last supplemental punishment dates back to pre-imperial China and was used in most dynasties up to and including the Ch’ing. After decapitation or death by slicing, the severed head of the criminal would be hung up in a cage and left for days or weeks at the execution ground or other public spot for everyone to witness. These expositions were considered to be greatly humiliating to the dead person’s spirit and thus a more severe degree of punishment. Exposition would usually occur in cases where particularly notorious criminals, such as bandits and rebels, were executed. The practical value of such expositions lay in the deterrent effect.

Shen Chia-Pen has conveniently assembled figures for the number of offenses legally punishable by death under successive dynasties before the Ch’ing. Beginning with the T’ang they are as follows:

**TANG CODE OF 653**
- Strangulation: 144
- Decapitation: 89
- Total: 223

**SUNG CODE OF 963**
- Same as T’ang plus 60 other capital offenses added during dynasty
- Total: 293

**YUAN CODE OF 1277**
- Total of 135 capital offenses (including for the first time 9 punishable by death by slicing)

---

50 Excepting the sharp decline in Yuan, unexplained by Shen and quite unusual in light of the Mongol reputation for severity and harshness, these figures are remarkably consistent. See D. Bodde & C. Morris, *supra* note 16, at 102.
MING CODE OF 1397

Slicing: 13  Immediate Decapitation: 38
Immediate Strangulation: 13
Decapitation after assizes: 98
Strangulation after assizes: 87  Total: 249

20 others in statutes;
13 miscellaneous  Grand Total: 282

CHING CODE OF 1740

Slicing: 30  Immediate Decapitation: 222
Immediate strangulation: 71
Decapitation after assizes: 218
Strangulation after assizes: 272
Miscellaneous: 12  Total: 813

Note: The Ch'ing Code is higher only because of a proliferation of statutes.51

By remaining always under 300 the T'ang, Sung, Yuan and Ming Codes compare favorably with those of eighteenth century Britain where "more than 300 crimes from murder to petty thefts were punishable by death."52

B. Punishment and Filial Piety

As previously noted, the criminal law of traditional China consisted principally of five punishments which were directed at numerous offenses and violations of established rules of conduct. Of these, disobedience to one's parents was considered by many to be the most heinous crime. According to Confucius, filial piety was the root of all good conduct and if the family was to remain strong, as it must in accord with principles of "cosmic order" and "natural harmony," there must be proper respect and reverence to elders. The criminal law of China sought to enforce this proper respect by punitive sanctions. A person who caused his parent's death, directly or indirectly, intentionally or accidentally, was liable to capital punishment. If an offspring directly and intentionally

51 Actually the Ch'ing code is rather mild in character which is all the more remarkable because it is substantially the reproduction of the T'ang code enacted more than 13 centuries ago. In contrast, the Twelve Tables of the Romans allowed creditors to cut up the body of an insolvent debtor.

52 The comparison favors Ming China among whose total of 282 nominally capital offenses no less than 198 (labelled "after the assizes" plus 13 "miscellaneous offenses") were in the actual practice commonly—though not invariably—commutable to something less than death. See D. BODDE & C. MORRIS, supra note 16, at 103; see N.Y. Times, May 17, 1965, at 34, col. 2.
killed a parent, he received the most severe capital punishment — death by slicing.\(^3\)

Punishments for the violation of rules protecting the father, sovereign, elder, brother and friend were particularly severe. Punishment "was the dosed retribution for disruption of the natural order. The severity of the punishment was supposed to correspond to the seriousness of the disturbance of the natural harmony."\(^4\) This accounts for the gradation of punishment for the offenses against parents. Although intentional and accidental causing of death were both subject to capital punishment, a sentence of death by slicing for the intentional act indicated that this was a greater disruption of natural harmony than an accidental act, which carried a sentence of decapitation.\(^5\)

The following case example of a mischance killing of a father-in-law in Ch'ing China provides some insight: In 1831, one Mrs. Han accidentally caused an injury to her father-in-law which resulted in his ultimate death. Such an injury, when resulting in death, normally calls for the heaviest of all penalties—death by slicing. Eighteen years prior to Mrs. Han's case, however, a similar case had occurred in which a son by mischance killed his parent. The circumstances of the case had so aroused the compassion of the Chia Ch'ing Emperor that he had issued an edict reducing the penalty to immediate decapitation. On the basis of this precedent, therefore, we find Mrs. Han's penalty similarly reduced.

Mrs. Han's case was further complicated by the fact that while awaiting sentence she had given birth to a child. According to statute a woman guilty of a capital crime who gives birth to a child while awaiting execution is allowed to live and care for the child for 100 days before undergoing execution—unless her crime is so heinous as to call for death by slicing, in which case her death is postponed for only 30 days. It was decided to allow her the full 100 days, since the punishment of immediate decapitation had superceded that of slicing. Apparently no one questioned or even sensed the enormity of either of the two punishments.\(^6\)

The severity of punishment for filial impiety is manifest not only in...
cases where there has been death, but where there was merely injury or even the scolding of an elder or parent. In the T’ang, Sung, Ming and early Ch’ing times, scolding in general received little attention, but the scolding of a parent or grandparent was punished by strangling. In case of striking, the law did not discriminate between cases where the parents were uninjured, injured slightly, or injured seriously, as the only element of the violation was the act of striking. Nor did the law discriminate between injury by intent or by mistake.

During Han times the question of “striking by mistake” came up for discussion. Two men were fighting. The son of one, seeing that his father’s opponent was trying to kill his parent with a knife, took up a stick to beat the attacker. Unfortunately, as he did so he struck his father. Some considered that the son should be charged with beating the father and beheaded for his act. Tung Chung-shu (2nd century B.C.) held that since the son intended to save his father from harm he harbored no malicious intent; and, according to the principle of Chung-shu, guilt was not only an exception to the rule in Han times but in subsequent dynasties as well.

The high regard for filial piety in traditional China occasionally yielded interesting and unexpected outcomes in criminal proceedings. There is a well known story in the Confucian Analects in which Confucius was told about a person so upright that he had informed the authorities of the fact that his father had stolen a sheep. “With us,” Confucius commented dryly, “uprightness is different from this. The father conceals the son and the son conceals the father. Therein lies the uprightness.” The son was later executed on the grounds that the loyalty he

---

87 Examination of the punishments for filial impiety in the law of the various dynasties reveals that all codes operated on the same principle: such offenses were punished more severely than analogous actions not directed against a parent or grandparent. See T’ung Tsu Ch’u, supra note 19, at 43.

88 In the Revised Ch’ing Criminal Code the punishment is given as “detention in prison for strangling” (Ch’ing hsien-hsing hsing-lu 26a) since dismemberment had been abolished and beheading was the heaviest penalty. See id.

89 The exception is that of the Yuan law which prescribed execution only in cases where parents were clearly injured by their children. See id. at 44.

90 Id., cases enumerated in pp. 45-51.

91 Confucius, Analects XIII at 18; see, e.g., T. DeBary, supra note 15, at 18; D. Bodde & C. Morris, supra note 16, at 39-40; Cheng, supra note 5, at 465 where he prefaces the story with the following:

The fundamental step toward the achievement of humanity is filial piety. The consideration of filial piety by Confucius emphasized the patriarchal line. The direct blood relation was supposed to make the community stable. This made for the large family system and for considering the nation as an enlarged family system. The ethical relationship, mores, and folkways were supposed to be served as law. Even though the relatives committed crimes they should be punished by the moral code not the legal code and eventually their crimes should be concealed by their filial or pious children.
showed his ruler in reporting his father’s crime was outweighed by the resulting disloyalty to his father. Similar punishments were imposed in analogous cases where a wife reported her husband or parent-in-law for misdeeds. The right of concealment is not permitted, however, in cases of treason or rebellion. Obviously, when the Confucian state truly felt threatened it was willing to forego its Confucian precepts.

C. Taboos in Punishment

In accord with Confucian teaching, the concept of “natural harmony” as expressed in varying degrees of explicitness underlies a great deal of Chinese thinking. The basic theory was that the human and natural worlds were so closely interlinked through numerous correlations that any disturbance in one would induce a corresponding disturbance in the other. This close unity, which was felt to prevail throughout the whole creation and which could be maintained to the benefit of mankind by closely adapting human activities to the actions of nature, found distinct expression in the domain of law and in particular in the application of punishment. For this reason we may note a definite subordination of law to the movements of nature.

In Ancient China spring and summer were considered periods of growth and maturation, autumn and winter, periods of destruction and concealment. This was held to be an unchangeable principle of the natural order, and everything in the universe was governed by it. Human behavior, especially political behavior, was correlated with the four seasons.

Execution was a means of taking life. Therefore, it had its place in the natural order and all executions had to be carried out in the autumn.

---

42 D. Bodde & C. Morris, supra note 16, at 40.
43 Id. at 41. On the whole topic of concealment see T'ung Tsu Ch'U, supra note 19, at 70-74 where, at 74, he states:

It is clear that when there was no conflict between sovereignty and family, between loyalty to the state and filial piety, both principles were recognized and encouraged. But when the two were in conflict sovereignty took precedence and loyalty to the state was the crucial issue.

44 D. Bodde & C. Morris, supra note 16, at 44. If the ruler, for example, shows an overfondness for women this will lead to an excess of the yin principle in the human world (since the yin is feminine), which in turn will cause a corresponding excess of yin in the world of nature. Inasmuch as one of the many correlates of yin is water, the concrete result may well be disastrous floods. In order to avoid this kind of situation, therefore, it becomes the ruler’s prime duty to cultivate himself morally to see that his institutions accord with natural order, and to maintain cosmic harmony by the correct performance of ritualistic observances in which sympathetic magic plays an important part.

45 A. Hulsewé, supra note 24, at 103.
46 T'ung Tsu Ch'U, supra note 19, at 218.
and winter seasons and not in the seasons of growth and maturation when they would be in conflict with the natural order. A violation of this practice would hamper the process of nature and cause disaster. It was thus stated that the government should discontinue all serious legal proceedings and refrain from applying punishment, especially executions, in the spring and summer months.

In Han times serious cases were brought between autumn's beginning and the winter solstice and no judgments were handed down in the "twelfth month" when spring began.67

The time for execution was similarly restricted. In addition to the ban on spring and summer executions, the summer solstice and the winter solstice were included in a similar ban because of their crucial importance as days of transition between the seasons. In an attempt to avoid any possible human interference with these cosmic changes, governmental activities were halted in the days immediately preceding and following each solstice.68 Officials who failed to observe the established patterns were severely penalized.69

Han practices regarding taboo periods were followed by later dynasties; however, in the T'ang dynasty there was a notable proliferation of such taboo periods. In addition to the taboo on executions and the trial of serious cases from the beginning of spring to the autumnal equinox, there were also taboos connected with religious days and ceremonies. The first, fifth, and ninth months, being the months of Buddhist fasting, were months in which slaughter was prohibited, as were the ten specified days of fasting in every other lunar month. No executions, including immediate executions, were permitted to take place during these specified months and days. Also, on days of great sacrifice, no reports were permitted nor could a death penalty be carried out.70 Officials were not permitted to either prepare or sign an order of punishment on these days.

The T'ang dynasty had, by far, the most taboo periods. Others included rainy days, nighttime and the four days of full moon, new moon, and the first and last quarter. Thus, less than two months of the year remained for scheduling executions.71 It should be noted, however, that

---

67 Id. at 219; see Hou-Han shu, 3, 46, 166, 23a; 25, 11a-14b; and see Wilhelm, Fröhling und Herbst des Lü Be We (1938).
69 Evidence indicates that officials who failed to observe regulations in Han times were subject to a year's imprisonment. In Ming times the punishment for violations was eighty strokes. See T'ung Tsu Ch'u, supra note 19, at 219-20.
70 T'ang hui-yao, 41, 1a-b, 2b-4b; T'ang lu su-i, 30, 10b, see T'ung Tsu Ch'u, supra note 19, at 219-20.
in line with usual Confucian thinking, the taboo periods were not permitted to apply in cases of treason or where slaves had killed their masters or the like. Presumably such acts were regarded as of such social and cosmic enormity that delay in punishing them would be even worse than failure to follow the natural pattern.

Through the Ming dynasty the taboos established in the T'ang dynasty went virtually unchanged. In the Ch'ing Code of 1740, however, there were sharp changes which resulted in a shrinkage of the taboo periods to mere symbolic vestiges of what they had once been. In Ch'ing times, except in cases subject to immediate execution, criminals were to be executed after autumn began. Taboo periods consisted of the first month of spring and the last month of summer plus the period from ten days preceding until seven days following the winter solstice and from five days before until three days after the summer solstice. The government also discontinued all judicial activities on sacrificial days, fast days, and on the eighth day of the fourth month, the Birthday of Buddha. Nevertheless, the total of forbidden time was less than three months.72

III. THE ADMINISTRATION OF CHINESE JUSTICE

A. Magistrates and the Trial Process

As judge of the court of first instance, the magistrate conducted investigations of criminal cases, issued warrants for arrest, examined witnesses and suspects, decided the case and rendered sentence in accord with the detailed prescriptions of the penal laws and statutes, and supervised its execution.73 He had all authority and was responsible to the Emperor for maintaining law and order and for keeping the people contented and prosperous.

Anyone had the right to petition the magistrate to investigate a case and once a charge had been set in motion the magistrate was bound by law to obtain a conviction.74 It was for the Chinese judge to elicit all
available information to help him in reaching a decision. The criminal procedures were normally secret and inquisitorial, not only during pretrial investigation, but also during the interrogation of the accused that was euphemistically called the hearing or the trial. There was no place for defense counsel in such proceedings. Thus, at every stage in the process the fate of the accused depended entirely on the degree of conscientiousness and ability of his captors. The process had no place for independent actors who would defend the accused against the abuses of those who administered it.

There existed a distinct presumption of guilt which the defendant was forced to rebut. This principle was not based so much on harshness as on the idea that the truly good citizen would never become involved with the law; thus, “even a completely innocent person being falsely accused is guilty because he is a party to a disturbance of peace in the particular locality. This is an affront to the magistrate’s administration.”

The duty of the judge was to “wring the truth” out of those brought before him. As a result, many innocent persons confessed to crimes they never committed. Never having arrived at a conception of what constituted proof beyond reasonable doubt, the Chinese relied on extorting a confession of guilt by torture when necessary. This tendency was reinforced by the rule that a defendant could not be convicted unless he

accused was innocent, he had to prosecute the accuser for bringing a false or malicious accusation. Typically in such situations anyone who made an accusation deemed to be false was required to suffer the punishment which the crime he denounced would have merited. See S. VAN DER SPRENKEL, supra note 41, at 66, 67.

Cohen, Continuity and Change in China: Some “Law Day” Thoughts, 24 S.C. L. REV. 3, 11 (1972). The only body of men who are supposed to have a special knowledge of law are the legal secretaries (shih-yé) who are usually attached to the superior provincial courts. See G. JAMIESON, CHINESE FAMILY AND COMMERCIAL LAW 7 (1970).


T’ANG-YIN-PI-SHI, PARALLEL CASES FROM UNDER THE PEAR-TREE 56 (R. van Gulik transl. 1956), a 13th-Century Manual of Jurisprudence and Detection. Van der Sprenkel enlarges on this concept by stating that the goals of the legal system resting on the basic Chinese idea of “natural harmony” and the absence of ideas of natural rights were to fix responsibility for disturbance, even by accident, to assign punishment, to deter others from committing the same mistake and to restore order. The only justice it could be said to aim at was the awarding of just deserts and that might include punishment for one who, according to English law, would be judged innocent. “The very fact that a legal case had arisen was seen as an indication of disturbance and some action had to be taken to restore the situation.” See S. VAN DER SPRENKEL, supra note 41, at 7.

Sylvester, supra note 6, at 576.

S. VAN DER SPRENKEL, supra note 41, at 74. The best Chinese judges were aware of the problems involved in accepting a confession of guilt under such circumstances and some would continue their investigation when not satisfied with a confession that was obtained. Usually a judge’s doubts would prove correct but such conscientiousness was probably the exception; see T’ANG-YIN-PI-SHI, supra note 77, at 77.
TRADITIONAL CHINESE DEATH PENALTY

confessed. Numerous legal instruments of torture were recognized (e.g., “finger compressor,” “water tube,” “suspension from above,” “burning the joints,” “heating the body for a day after the person had been made to drink oil,” etc.).

The atmosphere of the proceedings was one of total obeisance before imperial power and of complete dependence on the judge’s specific and often moral assessment of the particular case before him, which often opened the road to corruption and arbitrariness. The judge would sit at the end of a long hall in formal attire, behind a high bench. The suspects and witnesses knelt on the stone floor, flanked by guards and lictors. When a magistrate wished to use torture, he tossed down bamboo chips from a container on his bench, each representing a given number of strokes, or otherwise indicating a specific torture device to be used. The lictors then hurried forward to carry out the indicated punishment. The situation was hardly conducive to asserting one’s rights or even to telling the truth, if what one had to say was adverse to the desires of the magistrate.

Ironically, it seems to have been assumed that in the investigation to fix responsibility for what had occurred in a specific case, the truth was bound to emerge. However, in practice this was not the case. In most instances, trial magistrates were inexperienced and overworked. They were frequently unable to speak local dialects and depended for outside...

---

80 K. Wittfogel, Oriental Despotism at ch. 5(c) (1957). Wittfogel refers to a description in the Arthashastra at 269 (1293):

Those whose guilt is believed to be true shall be subjected to torture. They could be given the six punishments, the seven kinds of whipping, the two kinds of suspension from above and the water tube.

Regarding persons who have committed grave offenses the famous book is even more specific. They could be given:

the nine kinds of blows with a cane: 12 beats on each of the thighs; 28 beats with a stick of the tree. . . .burning one of the joints of a finger after the accused has been made to drink rice gruel. . . .causing him to lie on coarse grass for a night in winter. These are the 18 kinds of torture. . . . Each day a fresh kind of torture may be employed.

Cf. J. Doolittle, 2 Social Life of the Chinese, 335-46 (1865).

81 J. Watt, supra note 73, at 12. The atmosphere of the courtroom is vividly portrayed in contemporary works. In a case from the Scholars, the magistrate was confronted with a somewhat perplexing crime. A salt convoy passing through his district had been robbed and the case was taken to the local magistrate by the helmsman and a clerk. The magistrate rejected the story as portrayed by the helmsman claiming that such a thing could not happen in a quiet law abiding district like his, and the helmsman was given 20 strokes with the bamboo until “his flesh was torn to shreds.” The young clerk, terrified to see the magistrate pointing at him and reaching for another bamboo chip immediately volunteered whatever the magistrate wanted to hear. He begged for his life and upon the polite intervention of a scholar travelling with the convoy, the magistrate concluded with a warning to the boatmen that they be more careful in the future. Wu Ching-tzu, The Scholars 570-72 (1957).
investigation upon a staff whose reputation for venality was legendary. Agents of the magistrate who succeeded in arresting suspects who were subsequently convicted, received an official reward. This led to the practice of constables loosely arresting the wrong persons and then using illegal instruments of torture to extract confessions in advance of trial. False accusations were also made in order to create an occasion for extortion and, in some instances, because the agents themselves would suffer punishment if the culprit were not caught within a legally prescribed period of time.\(^3\) In addition, witnesses could be bought to testify either to a person's innocence or guilt, and in a population where many lived at subsistence level, some were able to make a living engaging in this practice. Thus, the criminal process operated with particular harshness and especially upon the impecunious, the uninfluential, and in too many instances, upon the innocent.

For those accused persons who lacked funds or official connections there was even further hardship. These persons were forced to wait out the process of trial and review in dismal prisons where they were kept in chains and had to depend on food sent by relatives or friends. Guards often subjected prisoners to unauthorized brutality, frequently in the hope of extortion.\(^4\) Not only were Chinese prisons places where subjects were kept before and during their trials, but they were housed by convicted criminals as well. Few people remained alive if they had to stay long in a prison.\(^5\)

B. Review of Capital Sentences and the Assizes

In Imperial China all death sentences as well as many other major sentences had to be confirmed before the highest judicial body in the capital and even by the Emperor himself before they could be carried out. The ordinary death sentence was either immediately executable or it included the standard phrase—after the assizes. This phrase indicated that the sentence could not be executed until reviewed at the Autumn Assizes annually held in the capital, at which time it was often reduced to a lesser sentence. It should be noted that even the sentence of immediate execution was subject to the Emperor's fiat and thus as equally subject to revision as were the cases for the assizes. The difference was


\(^4\) Yen, Penal Reform and Criminology in China, 22 J. Crim. L.C. & P.S. 576 (1931). All prisons were in the hands of petty officials and the management of a prison was considered a dirty job. Revenue and deterrence were twin conceptions in dealing with criminals and bribery and torture were common practices; cf., C. Hucker, The Censorial System of Ming China 284 (1966).

that a sentence of immediate execution was immediately investigated while the others followed the routine of the assizes.  

The requirement in Chinese law of careful scrutiny of each capital case at the highest level, including imperial ratification before life might be taken, is probably a heritage of Confucianism. In 592 A.D., Emperor Wen of the Sui dynasty forbade the pronouncement of final judgment upon capital cases at the prefectural level. Such cases were ordered to be transmitted to the capital for judgment and review by the Court of Revision (ta li ssu), considered to be the supreme judicial organ. In turn, the judgment of this Court was to be submitted to the Emperor for final ratification.

Similar care in handling capital cases is seen in the T'ang, Ming and Ch'ing times. By the latter period the Board of Punishments, one of the six major boards or ministries, had become more powerful and more important than the previously esteemed Court of Revision. Nevertheless, the Court continued to exist and its main business was to join in the making of decisions on capital cases by working in conjunction with members of the Board and of the Censorate (tu-ch'a yuan). These three bodies constituted what were known as the Three Judicial Authorities. In practice, whenever a department of the Board met for the purpose of considering a capital case, the deliberations were attended by a censor from the Censorate and a secretary or assistant secretary from the Court of Revision. These participants were not of the highest rank and for that reason the deliberations at their level were known as the Assemblage of the Lesser Judiciary (hui hsiao fa).

After these deliberations, the resulting decisions were submitted to the Directorate of the Board of Punishments. Members of the Court of Revision and the Censorate were again enlisted to aid in the deliberations. These men, however, were of higher rank. Thus, the deliberations conducted by these men were called the Assemblage of the Greater Judiciary (hui ta fa). If the Assemblages disagreed in their judgments the case would either be returned to the Lower Assemblage for renewed discussion or sent back to the Provincial Court for reconsideration.

---

86 MIEJER, supra note 42, at 28.
87 D. BODDE & C. MORRIS, supra note 16, at 131, 132. In 631 A.D. Emperor Tai tsung of the T'ang dynasty became exasperated on one occasion upon discovering that an innocent man had been executed. His often quoted remark was: "Human life is of the utmost importance, for once dead, a man cannot live again." With these words he ordered that henceforth, before execution of a capital sentence, it must be submitted to the Emperor for reconsideration two days prior to the execution, again one day prior, and no less than three times on the day of execution itself. See id. at 132 and SEEBÜNGER, QUELLAN ZUR RECHTSGESCHICHTE DER T'ANG-ZEIT 95-97, 147-48 (1946).
88 D. BODDE & C. MORRIS, supra note 16, at 133.
however, local officials had been charged with injustice a remand would not be considered. Rather, the Emperor might order a Governor-General or Governor of the province to retry the case, or he might send an Imperial Commissioner for that purpose. If the Assemblages agreed in their judgment but differed jointly from the decision of the Provincial Court, the case would be remanded for reconsideration in the province. Remand, however, would only occur in this situation if the suggested sentence of the Provincial Court had been lighter (e.g., strangulation) than that agreed on by the Assemblages (e.g., decapitation). If that were not the case, once the Assemblages were in agreement, a memorial would be sent to the Emperor for endorsement.\footnote{Id. at 133; Ch’u, supra note 19, at 7; S. van der Sprenkel, supra note 41, at 68.}

Normally judgments were endorsed by the Emperor; however, it was within his discretion to disagree and return a rescript of disapproval. A postponement of execution or a reduction of the sentence would then result. Under the Ch’ing Code the formulas for reducing or increasing punishments reflected a Confucian humanitarianism. Increases were by degree within a category (e.g., from strangulation after the assizes to decapitation after the assizes and so on up to death by slicing). For reductions, however, each category counted as a degree (e.g., from immediate strangulation to either military or ordinary exile).\footnote{D. Bodde & C. Morris, supra note 16, at 101.}

If the penalty approved by the two Assemblages and endorsed by the Emperor called for immediate death, this fact was relayed down the line to the district where the case originated and where execution was carried out by the Board of War, responsible for the executing of capital sentences. If the execution coincided with a taboo period, it was delayed until the end of such period. Though not carried out immediately, the nature of the judgment made death inevitable. If a revised penalty called for strangulation or decapitation after the assizes, the decision routed the case into an entirely new set of complicated and delaying procedures.\footnote{Id. at 134.}

The assizes system came into being after the Ming dynasty. It was an entirely natural outgrowth of earlier cautiousness toward the taking of human life exemplified in the T’ang dynasty by the insistence upon repeated memorializing to the Emperor for approval before the carrying out of execution. The assizes allowed for great imperial mercy in the reduction and commutation of sentences and also permitted responsible officials a final opportunity to see that injustices in the provinces were
not permitted.\textsuperscript{92} There were two kinds of assizes: Autumn Assizes (ch’iu shen) and Court Assizes (ch’ao). The Autumn Assizes handled all cases originating in the provinces where the sentence included the “after the assizes” stipulation, and the Court Assizes handled the same kind of cases originating in Peking.

The Autumn Assizes were scheduled for a day within the first ten days of the eighth lunar month, when autumn was about half over. On the appointed day, participating jurists who included prominent officials from nine chief ministries, the six Boards, the Court of Revision, the Censorate, and the Office of Transmission, examined the “after the assizes” cases and confirmed or altered their provisional classification.\textsuperscript{83}

The Court Assizes were the same as those of autumn except that their condemned criminals, being all from Peking, were allowed to appear in person to utter a final plea for themselves. These Assizes were held either the day before autumn or around the beginning of November.\textsuperscript{94}

From the Ta Ch’ing hui tien (53/2a) we learn that,

the various stages of the proceedings were reported in a loud voice and “listened to by the multitude of the humble”—statements indicating that these highest judicial proceedings, like those in the lowest district court, were open to the public. The whole description carries a strongly archaic flavor reminiscent of the tradition as described by van Gulik of the “Priest-King of a hoary antiquity, holding court in the open, in the shade of a tree.” We may strongly suspect that in the overwhelming majority of cases, the judgments reached in public by this ad hoc body during its one day session were little more than pro forma ratifications of the decisions already privately reached by the officials really professionally concerned.\textsuperscript{95}

The Assizes were clearly a product of Confucianism. They provided Chinese authorities broad leverage in commuting death sentences. Use of the “after the assizes” addendum set in action procedures that often resulted in commutation. Thus, because of this mitigation device, the Chinese codes were able to contain black letter punishment clauses that

\textsuperscript{92} C. Hucker, supra note 84, at 238. As a valuable aside it should be noted that in a similar fashion, censors, supervising secretaries and officials of the Ministry of Justice, were frequently sent out to conduct judicial review for prisoners awaiting punishment in local prisons. Judicial review in the provinces seems to have served partly as a substitute for the ratification otherwise conducted by the Court of Revision, but for the most part it supplemented the ratification of sentencing.

\textsuperscript{93} D. Bodde & C. Morris, supra note 16, at 136, 137.

\textsuperscript{94} Id. at 137.

\textsuperscript{95} Id.
might deter wrong doing. The reluctance of the codifiers to depart from the older expressions of horrible harshness exemplifies a typical Chinese reverence for tradition. The "after the assizes" punishment allowed for adherence to tradition while at the same time permitting increased humanitarianism.

After a sentence was considered at the Assizes there were four possible dispositions:

1. Postponement of execution (huan chuch)
2. Compassion may be observed (k'o chin)
3. Remain at home to care for aged parents or take care of ancestral sacrifices (liu-yang ch'eng ssu)
4. Circumstances demand execution (ch'ing shih)

Certain common offenses, such as killing by mischance or thrice repeated theft, were almost automatically placed in category 1. The result would usually be reduction of sentence to one of the forms of exile. In the case of young persons, usually age 15 and below, or in the case of old persons, usually age 70 and above, and in the case of persons who were either mentally or physically infirm, compassion would normally be observed (category 2). Other extenuating circumstances would also result in a disposition of compassion. If compassion were observed, the death penalty would normally be reduced to exile or penal servitude. In category 3, sentences were usually reduced to blows of the bamboo or wearing of the cangue. These redemptions were permitted since execution or commutation into banishment or penal servitude would be contrary to the harmony in the universe leaving the parents uncared for during life and their spirits after death without the necessary sacrifices.

* Under T'ang law persons over 70, under 15, or physically and mentally infirm were allowed redemption for crimes punishable by exile or less. Persons over 80 and less than 10, as well as the physically and mentally handicapped, were allowed to petition for redemption in cases of rebellion or murder, and persons over 90 or less than 7 were not subject to the death penalty in any case. See Johnson, supra note 26, at 30.

* In certain instances where a criminal had sincerely confessed his guilt to authorities before his crime became known to them, he might be eligible for observation of compassion. This was a result of Confucian confidence in the possibility of human reform. If the crime were made known by another person who by not bringing an accusation before the court could have protected the criminal, it was considered the same as if the criminal himself had confessed. See id.

* See, e.g., Meijer, supra note 42, at 28; D. Bodde & C. Morris, supra note 16, at 138-42; Bünger, The Punishment of Lunatics and Negligence According to Chinese Classical Law, 9 Studia Serica 1, 16 (1950). When someone within the household reached adulthood, and the services of the convicted offender were no longer necessary, the original sentence would be reinstated, usually within a year. Note also, that this form of penal reduction was not usually available to persons who had been convicted at the ten abominations. See Johnson, supra note 26, at 30.
Category 4 was the only category leading to execution and offenders would be placed into subcategories: officials; family offenses; and others. The Emperor had final say on these and some could be spared for a year to have subsequent reconsideration of their cause. Offenders could thus spend several years in jail waiting to have their sentences commuted. If, however, an execution were postponed from year to year for three years successively without a decision being made on the form of commutation, capital punishment would usually be revised into perpetual banishment at 3,000 li.

The procedure that has been outlined was not universal in its application. It did not extend to bandits and rebels as these persons were considered to be outside of the law. They could be tried and executed in the locality where they were captured with only a report of their case going to higher levels and no need to wait for imperial ratification.

In considering the Chinese procedure governing capital cases in conjunction with the system of assizes, it would seem that the harsher aspects of Chinese law are somewhat more blunted than they may first appear. Some authors even describe the law of Imperial China to have been more humane and intelligent than its western counterpart, and in some respects it may well have been. Theft, for example, merited the death penalty only when the value exceeded 120 ounces of silver or was thrice committed, the third time in excess of 50 ounces. In pre-industrial England, up to 1818, the death penalty was given for stealing goods valued at a mere 5 shillings.

**Conclusion**

The penal system of traditional China dealing primarily with crimes

---

89 Since Confucius advocated government by gentlemen and by rite, the Chinese legal theory and code are governed by the concept of rites, and government officials are supposedly so well trained in Confucian moral and ethical doctrines that those who govern are immune from punishment. If the ruler is good, he will select virtuous officials; if the officials are good, they will govern the country well; and, if the country is well governed, the people will follow the moral and ethical principles that are proper. Since an Emperor may be deemed bad if his officials are not virtuous, there may be instances where officials are granted special pardons if they had been “unjustly” convicted. See Cheng, supra note 5, at 462. Cf., Johnson, supra note 26, at 22, for a detailed description of privilege and immunity from punishment for nobility officials and others. The higher the legal status of an individual, the greater the exemption from punishment. Commutation to a lesser punishment is seen in 5 different ways: deliberations, petition, resignation from officer, reduction of penalty, or redemption.

100 D. Bodde & C. Morris, supra note 16, at 143.

101 G. Hudson, Europe and China 328 (1931). Likewise, as Hudson depicts, in 1814, Parliament after first rejecting the bill, “consented to abolish disembowelling alive as part of the statutory penalty for treason, and henceforth the Englishman could express his disgust at the atrocities of the Chinese penal code.”
against property and the person, and founded on the earliest of penological theories, that to punish was to deter, continued without substantial change until the first decade of the twentieth century. That, however, was exactly the problem. As world values grew and developed, Chinese criminal procedures and punishments remained the same. For some 300 years over 400 million people had lived under the shelter of the Ch'ing Code, itself an embodiment of almost 2,000 years of legal development. No law, however, can be adaptable forever, no matter how carefully it was drafted.

A new era was setting in and the old Imperial Code was found to be quite inadequate in coping with new social developments. The nineteenth century saw ever increasing penetration of European power and commercial activity into China and the consequent disintegration of the Ch'ing administration and a direct confrontation between Chinese and European Law. Reform sentiment grew and in 1900, following the Boxer rebellion, two viceroys submitted a petition to the Emperor for the change of Chinese laws. Among other things, this reform effort addressed itself to the traditional capital punishments. Reformers correctly pointed out that the rather cruel punishments served to stir up the sadistic trends in the human soul rather than to deter people from evil. It was further argued that in order to truly practice Confucian humanism it was advisable to stop all types of severe punishment. In any event, the cruel capital punishments were felt to degrade China in the eyes of foreigners, and in the first part of the twentieth century the severest capital punishments were abrogated. Lingering death or death by slicing and exposition of the head became immediate beheading; immediate beheading became immediate strangulation; beheading after the assizes was changed into strangulation after the assizes; and, immediate strangulation was commuted to strangulation after the assizes; where the old law imposed strangulation after the assizes the punishment remained as it was.

In modern day China capital punishment still exists. But so does it exist in many other nations of the world. The controversy as to the propriety of such a form of punishment rages on and that must remain the topic of some other writing. However, there is much to be learned from the traditional Chinese era and the methodology of the judicial processes of that period. At first blush it appears to be a world of cruel

---

102 Liang, Modern Law in China, in Washington Foreign Law Society, Studies in the Law of the Far East and South East Asia 46 (1956). It would appear that the prime defect in the Ch'ing Code was the indiscrimination between civil and criminal law. Defendants in civil cases or even plaintiffs were often punished with criminal penalties.
and harsh punishment where the death penalty was readily employed and not so readily challenged. In practice this was not the case. Adherence to a concept of natural order prohibited trials and executions in taboo periods related to nature and religion. As well, the humanitarian teachings of Confucian sages yielded a complex system of review for all capital cases which frequently resulted in commutation of executions. Should the review procedures affirm imposition of a capital sentence in a specific case there was always the Emperor’s fiat. Guided by the Confucian “ethic” and the realization that “to forgive is divine” the Imperial pardon was often exercised. Finally, the system of assizes, a self-styled ritualistic exercise in compassion, permitted broad discretion in allowing officialdom and nobility to ceremoniously indulge in wholesale commutation of capital sentences. The end result was a judicial system whose strict letter of law yielded readily to a humanitarian spirit. Thus, in examining the development and application of capital punishment in the oldest living legal system, the interested observer will note a manifest, although not necessarily self-evident, predilection for avoiding the taking of human life even where the written law clearly calls for nothing less.