

Crime and Cosmic Order

Hsu Dau-lin

Harvard Journal of Asiatic Studies, Vol. 30. (1970), pp. 111-125.

Stable URL:

<http://links.jstor.org/sici?sici=0073-0548%281970%2930%3C111%3ACACO%3E2.0.CO%3B2-W>

Harvard Journal of Asiatic Studies is currently published by Harvard-Yenching Institute.



Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/about/terms.html>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/journals/hyi.html>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

JSTOR is an independent not-for-profit organization dedicated to creating and preserving a digital archive of scholarly journals. For more information regarding JSTOR, please contact support@jstor.org.

CRIME AND COSMIC ORDER

HSU DAU-LIN 徐道鄰

MICHIGAN STATE UNIVERSITY

A Western misconception concerning Chinese traditional law that seems to have gained popularity in recent years is that the Chinese regard crimes primarily as disturbances of the cosmic order. The most recent expression of this theory is by Derk Bodde, who writes in *Law in Imperial China* (Cambridge, Mass., 1967):

... law was traditionally viewed in China—though perhaps not consciously—primarily as an instrument for redressing violations of the social order caused by individual acts of moral or ritual impropriety or criminal violence. ... such violations, in Chinese eyes, really amounted to violations of the total cosmic order because the spheres of man and nature were thought of as forming a single continuum (p. 43).

To the ancient Chinese, with their insistence upon a basic harmony existing between man and nature, a human crime—particularly a homicide—was regarded as a disruption of the total cosmic order. This disruption could be repaired only by offering or sacrificing adequate requital for what had been destroyed—a life for a life, an eye for an eye. Precisely how this should be done was less important than the fact of requital per se (p. 331).

Previously, Sybille van der Sprenkel had written in *Legal Institutions of Manchu China* (New York, 1962:)

... the ultimate source of law is traceable to the belief shared by all sections of society—or at least never openly challenged—that there was an overriding obligation to preserve the harmony of the universe, under pain of evil consequences for all, if the natural order were disturbed. It was this belief and this fear that led Emperor, officials and people to accept theoretically the necessity for the enforcement of morality, administrative requirements and legal custom (p. 127).

Before her, Joseph Needham had written in *Science and Civilisation*, Vol. II (Cambridge, 1956; reprint 1965):

If, then, all crimes and disputes were looked upon in ancient China, not primarily as infractions of a purely human, though imperial, legal code, but

rather as ominous disturbances in the complex network of casual filaments by which mankind was connected on all sides with surrounding Nature, it was perhaps the very subtlety of these which made positive law seem so unsatisfactory (p. 528).

Here Needham is probably influenced by M. J. Meijer, who wrote in *The Introduction of Modern Criminal Law in China* (Batavia, 1950):

Chinese philosophy started from the idea that heaven and earth were governed by one principle, called *tao* 道, the way, the creative principle of natural order. Any act contrary to this order in human society, resulted in a disruption of the harmony between heaven and earth, and might lead to such calamities as flood, drought, internal disorder. So that the order might by [*sic.*] preserved, heaven chose men with outstanding virtue, *tê* 德, and gave them the mandate, *ming* 命, to rule their fellow creatures (p. 2).

This, in turn, is an elaboration upon M. H. van der Valk's thesis, stated in *Interpretations of the Supreme Court at Peking: Years 1915 and 1916* (Batavia [1949]):

The law, being essentially criminal, did not primarily sanction legal rules from elsewhere: its purpose was to punish infringements of the natural order of things. Crime was in the first place considered as disturbance of the harmony of the universe and as such had to be repressed. Punishment of the crime was consequently more important than identification of the evil-doer (pp. 20-21).

But here the trail vanishes. Van der Valk gives no further reference. It may be that he had encountered something like Father Gaubil's comment on the "Hung fan" (the Grand Norm, a chapter of the *Shu ching* [Book of Documents]) of 1770: "There is supposed here a mutual correspondence between the ordinary events of the life of men, especially of kings and grandees, and the constitution of the air," which is quoted by James Legge in his 1865 translation of the *Shu ching* (*The Chinese Classics*, III, p. 342).

No matter where van der Valk obtained his information, it certainly did not come from Chinese sources. This writer has not been able, despite extensive research, to locate any expression of this sort in any branch of Chinese literature nor in any kind of oral tradition. None of the five authors quoted above gives any Chinese reference. There are, however, a few Chinese ideas which, if inadvertently mixed up or distorted, could produce something like the concept in question. These are the theory of seasonal punishment according to the *Yüeh ling*, the

Phenomenalism of the Han Confucians, and the popular superstition concerning crime and punishment of the late-Sung Taoist persuasion.

The *Yüeh ling* (Monthly Commands)¹ claimed by Noda to be a work of around 620 B.C.,² is generally considered to date from the third century B.C. It attained the status of a classic by being included in the *Li chi* (The Book of Rites; 80–105) and was honored with an official commentary by the T'ang Emperor Hsüan-tsung in 739.³ It is almost identical with the first twelve chapters of the *Lü-shih ch'un-ch'iu* (Master Lü's Spring and Autumn Annals; 240 B.C.³), and a slightly abridged version of it forms the chapter "Shih-tse hsün" (Doctrine of the Law of the Seasons) in the *Huai-nan tzu* (Book of the Prince of Huai-nan; 120 B.C.). It is a kind of almanac for emperors. For each month activities and rituals are prescribed which the emperor should perform and prohibitions are stated which he should avoid. Exact calamities are indicated which will follow any violation of the prescribed rules. It says *inter alia*:

This first month of autumn . . . the emperor instructs his officials to review laws and regulations, to repair prisons, and to fix hand and foot cuffs. . . . The second month of autumn . . . the emperor instructs his officials to have all sentences carried out. Every execution should be an act of justice. There should neither be a case of over-harshness nor one of over-leniency. Should such a case ever occur evils will follow. . . . The last month of autumn . . . the emperor follows through justice and punishment. No guilty man should be spared.

Whether or not these rules were already known in the sixth century B.C., no observance or mention of them has been recorded in the *Tso chuan* (Master Tso-ch'iu's Commentary to the *Ch'un-ch'iu*; 430 B.C.³).

According to a memorial of 85 A.D. by Ch'en Ch'ung, it was Hsiao Ho who, when codifying the law for the Han in 260 B.C., set up the rule that the sentencing of capital crimes be limited to the last month of autumn.⁴ A decree by Emperor Chang-ti of August 31 in the same year ordered that the sentencing of (capital) criminals should be avoided during the last two months of winter. In this decree he referred explicitly to the *Yüeh ling* as a justification for the ordered pro-

¹ See Needham, *op. cit.*, Vol. III (1959), p. 195.

² *Ibid.*

³ See the "Stone Classics" cut in 837.

⁴ See the biography of Ch'en Ch'ung in *Hou-Han shu* 36.

cedure.⁵ This became a standard practice thereafter. A complete list of tabooed months and days for carrying out death sentences is preserved in the T'ang code of 653.⁶ Liu Tsung-yüan (773-819), the famous essayist, took a strong position against the *Yüeh ling*,⁷ but his polemics had little practical consequence.

In line with this practical measure was a belief that excessive killing would cause natural catastrophes. Tung Chung-shu (179-104 B.C.)⁸ remarked in his memorial presented to Emperor Wu-ti in 140 B.C.:

When sentences and punishments fail to be just, evil spirits will arise. With evil spirits accumulating below and hatred and cruelty lingering aloft, a disharmony (*pu ho* 不和) will prevail between high and low; thus the relation between the Yin and the Yang will be distorted and reversed, and unlucky omens will appear.⁹

In the same tone Pan Ku reasoned in his "Hsing-fa chih" (Legal Treatise) around 90 A.D.:

Now in the provinces and prefectures, tens of thousands of men are executed every year. Over two thousand prisons are scattered throughout the empire. How many thousand people must have died under injustice? But the various agencies handling judicial review have not salvaged a single life. That is why we still have not obtained harmony (*ho ch'i* 和氣). [But] . . . when officials no longer kill arbitrarily and laws do not tolerate conflicting interpretations, the punishment will correspond to the crime, and people's lives will be saved. Justice will then be achieved in sentence and punishment, and harmony will prevail between heaven and earth.¹⁰

That the execution of innocent people causes drought was thought to have been borne out by the case of the filial daughter-in-law of Tung-hai. During the fifties B.C., a young woman of great piety was executed by a stupid magistrate for the alleged murder of her mother-in-law. A severe drought ensued which lasted three years. When Master Yü, the father of the famous judge Yü Ting-kuo (prime minister by 51 B.C.), proved the young woman's innocence and offered sacrifices at her

⁵ See the biography of Emperor Chang-ti in *Hou-Han shu* 3.

⁶ *T'ang-lü su-i* (T'ang Code with Commentary; 653) (Taipei, 1956), IV, p. 88; see also Bodde and Morris, *op. cit.*, p. 47.

⁷ Liu Tsung-yüan, *Ho-tung hsien-sheng chi* (Collected Works of the Master of the East-side of the River) (Taipei, 1965), I, p. 42.

⁸ For an excellent discussion of Tung Chung-shu's significance in Chinese intellectual history see Wing-tsit Chan, *Source Book in Chinese Philosophy* (Princeton, 1963), p. 271.

⁹ *Han shu* 56. Biography of Tung Chung-shu.

¹⁰ Hsing-fa chih, *Ibid.*, 23.

grave, a heavy rain poured down, bringing with it a bountiful harvest.¹¹

About twelve hundred years later, the story is repeated, at least in a drama. In "Tou-o yüan" (Wrongs of Maid Tou)¹² the great Yüan dramatist Kuan Han-ch'ing (1220-1307) immortalized the young virtuous woman of that name who, in order to spare her mother-in-law from the magistrate's inquisitory floggings, confessed to a murder she did not commit. On her execution a heavy snow fell in midsummer, followed by a three-year drought. When her father, a better judge, established her innocence and executed the real offender, heavy rain brought a good year.

Since this play in its various versions has been seen on the stage in every part of China for more than six hundred years, a belief came indeed to be "shared by all sections of society" that the undeserved death of a virtuous person would bring about a drought of long duration. It is then not the crimes themselves which "disturb nature's harmony" as our five Western authors claim but the unjust punishment of crimes. It is not the lawn that cuts one's fingers but the lawn-mower.

Much wider in scope and more sophisticated than the simple rules of the *Yüeh ling* is the doctrine of so-called phenomenalism: the theory of natural catastrophe as the result of misgovernment ("Of all calamities and strange phenomena the origin lies invariably in the faults of the government": *Ch'un-ch'iu fan-lu*, chapter 30). Anticipated by the strong belief in animism prevailing from antiquity through the Ch'un-ch'iu period, phenomenalism was elaborated into an impressive theoretical edifice by Tung Chung-shu in his *Ch'un-ch'iu fan-lu* (Luxuriant Gems of the Spring and Autumn Annals; c. 130 B.C.). The theory was further developed by Liu Hsiang (79-8 B.C.) and Liu Hsin (53 B.C.-A.D. 23) and finally culminated in the "Wu-hsing chih" (Treatise on the Five Agents) of Pan Ku's *Han shu* (History of the Han, c. A.D. 90). It is in this treatise that are specified the twenty-one types of misconduct of the emperor which cause natural calamities—

¹¹ Biography of Yü Ting-kuo, *Ibid.*, 71.

¹² An indifferent translation of the drama is included in Yang Hsien-yi and Gladys Yang, *Collected Plays of Kuan Han-ch'ing* (Peking, 1957). The story is also told in Liu Wu-chi, *An Introduction to Chinese Literature* (Bloomington, Indiana, 1966), p. 178.

untimely hunting, eating without libation will cause flood, for example—and historical events and natural phenomena of the past seven hundred years are shown as a continuous record of cause and effect between nature and men. (At times, different interpretations are offered by different authorities.) We see that only when emperors are at fault will nature respond. Not every act contrary to the order of human society will result in natural calamities (Meijer). Besides this, the “Hung fan”—the canon of the “Wu-hsing chih”—explicitly specifies that “the sovereign is to examine the character of the year; nobles and officers, that of the month; and inferior officers, that of the day.”¹³ The people have no function here. Therefore preserving the harmony of the universe is not regarded as everybody’s duty (van der Sprenkel: “Emperor, officials, people”).

Phenomenalism, despite sharp criticisms offered by some enlightened scholars like Wang Ch’ung (27–100)¹⁴ remained an official dogma through the “Treatise on the Five Agents” in the dynastic histories until the T’ang dynasty. Then came Ou-yang Hsiu (1007–1072), the great scholar and historian of the Northern Sung, who first challenged this long-standing tradition.

Ou-yang Hsiu argued thus: First, the correlation between natural phenomena and political events offered by the various authorities is not convincing because no limit in time or in space is set for the natural phenomenon to appear as response to the ruler’s misconduct. Second, the theory involved cannot be one of perfection because an agreement cannot be reached even between a father and son (Liu Hsiang and Liu Hsin). Third, it is not understandable why the “Chuan” (Commentary) to the “Hung fan”—which contains the main body of phenomenalistic teaching—takes account of only four of the “nine categories” and utterly disregards the rest. Finally, when Confucius compiled the *Ch’un-ch’iu*, he did not attempt to correlate recorded natural phenomena with rulers’ conduct. Thus Ou-yang Hsiu comes to the conclusion that the “Wu-hsing chih” of the traditional pattern is not only unsatisfactory, but actually harmful because the incredibility of the doctrine would cause emperors and officials alike to lose

¹³ Legge, *op. cit.*, p. 341.

¹⁴ A translation of an important part of Wang Ch’ung’s *Lun heng* (Balanced Discourses; A.D. 83) against phenomenalism is given in Chan, *op. cit.*, p. 303.

all respect for Heaven.¹⁵ Therefore, in his *Hsin T'ang shu*, he followed Confucius' practice of merely recording natural phenomena without correlating them to political events. This break with the tradition established a model which was followed by China's official historiography in subsequent dynasties.¹⁶ Phenomenalism of the "Wu-hsing chih" tradition was dead by 1060.

It is most remarkable that during the Sung, when cosmology lost its influence on Chinese historiography, its dominance was transferred with increased vigor to the area of Chinese philosophy and laid down the foundation for Neo-Confucian orthodoxy. Han philosophers had thought that "heaven, earth, and men, in their nature and in all their workings, form an inseparable trinity."¹⁷ Chu Hsi (1130-1200), the chief representative of Neo-Confucianism, on the other hand, taught:

In the universe, there are *Li* and *Ch'i*. The *Li* [理: principle] is the *Tao* that pertains to "what is above shapes," and is the source from which all things are produced. The *Ch'i* [氣: matter] is the material . . . that pertains to "what is within shapes," and is the means whereby things are produced. Hence men or things, at the moment of their production, must receive this *Ch'i* in order that they may have their bodily form.¹⁸

In other words: "All things in the universe are constituted of one and the same *ch'i*" (Chang Tsai).¹⁹ *Li* is "the immaterial and immutable principle inhering in all things, which gives them their form and constitutes their essence."²⁰ This kind of thinking may be in the back of his mind when Needham speaks of the "complex network of causal filaments by which mankind was connected on all sides with surrounding Nature" or of "a web of relationships throughout the universe, the nodes of which are things and events."²¹

¹⁵ For this argumentation, see *Hsin T'ang shu* (New History of the T'ang; 1060), 34: Wu-hsing chih (Treatise on the Five Agents), introductory paragraph.

¹⁶ Eight of the twenty-five dynastic histories have no treatise on the five agents. Needham's remark that the tradition of phenomenalism continued through all subsequent dynastic histories in their five element chapters (*op. cit.*, II, p. 247) is, therefore, incorrect.

¹⁷ William T. de Bary, *et al.*, *Sources of Chinese Tradition* (New York, 1960, reprint 1965), p. 222.

¹⁸ Fung Yu-lan, *A Short History of Chinese Philosophy* (New York, 1948, reprint 1966), p. 299.

¹⁹ *Ibid.*, p. 279.

²⁰ de Bary, *op. cit.*, p. 479.

²¹ Needham, *op. cit.*, II, p. 556.

More difficult to identify is M. Meijer's "*tao*, the creative principle which governs heaven and earth." Is it the *tao* of the *I ching* [Book of Changes] where it is said: "A Yin and a Yang: this is called *tao*"?²² But then, this *tao* only *is*, it does not *govern*. Or elsewhere: "The great virtue of heaven and earth is called 'creation.'"²³ Then it is a *te* (the virtue), not *tao* (the way), and it is *of* heaven and earth, not *over* heaven and earth. It is certainly not the *tao* of Confucius, for whom only "men can make *tao* great, but no *tao* can make great a man."²⁴ Still less can it be the *tao* of Lao Tzu because then it "cannot be told."²⁵

What, after all, is the common belief of the Chinese people concerning crime and punishment?²⁶ The least we can say is that, judging by popular tales, fiction, drama, and proverbs, it reflects neither Han phenomenalism nor Neo-Confucian cosmology, but it is a belief, at least from the eleventh century on, shaped entirely by the teachings of late Sung Taoism.

Pre-eminent among the popular teachings of the Taoist religion is the *T'ai-shang kan-ying p'ien* (Treatise of the Exalted One on Response and Retribution), transmitted by Li Ch'ang-ling²⁷ (d. 1008) which, "if popularity of books must be measured by either the number of copies in which they appear or the devotion of their readers . . . will probably have to be assigned the first place of all publications on the globe."²⁸ According to this treatise, men are constantly watched over for their actions and thoughts, good or bad, by spirits outside and inside themselves:

Further, there are the three councilor spirit-lords of the northern constellation (三台北斗神君), residing above the heads of the people, recorders of men's crimes and sins, cutting off terms of from twelve years to a hundred days.

²² *I ching*, Hsi-tz'u (Appendix): 1.

²³ *Ibid.*, :2.

²⁴ *Analects*, 15:28.

²⁵ *Lao Tzu*, 1.

²⁶ A valuable reference is Clifford Plopper, *Chinese Religion Seen through the Proverbs* (Shanghai, 1935).

²⁷ Oyanagi Shigeta 小柳司氣太, *Dōkyō gaisetsu* [Outline of Taoist Religion], trans. Ch'en Ping-ho, 1926 (Taipei: reprint, 1966), p. 88.

²⁸ Teitaro Suzuki and Paul Carus, *T'ai-shang kan-ying p'ien: Treatise of the Exalted One on Response and Retribution* (La Salle, Ill., 1944), p. 3.

Further, there are three body-spirits (三尸神) that live within man's person. Whenever Keng Shen day comes, they ascend to the heavenly master and inform him of men's crimes and trespasses.²⁹ On the last day of the month the Hearth Spirit, too, does the same.³⁰

If a man's heart be awakened to the good, though the good be not yet accomplished, good spirits verily are already following him. If a man's heart be awakened to evil, though evil be not yet accomplished, evil spirits verily are already following him.³¹

Unlike the *Treatise on Response and Retribution* which appeared in two imperial editions (ordered by the Emperor Li-tsung of the Sung [r. 1225-1264]³² and by the Shun-chih Emperor of the Ch'ing [preface dated 1656])³³ and to which commentaries have been written by such eminent scholars as Hui Tung 惠棟 (1697-1758) and Yü Yüeh 俞樾 (1821-1907),³⁴ the *Yü li* 玉歷 (Jade Calendar) is a simple tract intended for the uneducated. This work, first published in 1098, claims to have been compiled by the Great Emperor of the Underworld (Feng-tu ta ti 酆都大帝) on April 8, 982 and revealed to the Taoist monk Tan Ch'ih 談痴 on October 18, 1030 for propagation in the human world.³⁵

According to this tract, there are in the underworld ten different courts, each with jurisdiction over a series of specified crimes. Every person after death must go through all ten courts in succession in order to receive punishment for every crime or sin he has committed in his lifetime. Suicides go to the first court; matchmakers of bad faith, quack doctors, etc., to the second; those inciting litigation, jail breakers, etc., to the third; tax and rent evaders, thieves of bricks or stones from paved roads, etc., to the fourth; tomb robbers, forest arsonists, etc., to the fifth; those hoarding grain for profit, eating beef or dogs,

²⁹ The custom of staying awake on each *keng-shen* day (the fifty-seventh day in the Chinese sexagesimal cycle) had even reached Japan; see Fu Ch'in-chia 傅勤家, *Chung-kuo tao-chiao shih* [History of Chinese Taoist Religion] (Taipei, 1966), p. 195 and Kubo Noritada 窪徳忠, *Kōshin shinkō no kenkyū* 庚申信仰の研究 (Tokyo, 1961).

³⁰ Carus, *op. cit.*, pp. 51-52.

³¹ *Ibid.*, p. 65.

³² Morohashi, *Dai kanwa jiten*, p. 2808, no. 5834.257.

³³ Oyanagi, *loc. cit.*

³⁴ *Ibid.*

³⁵ A good portion of the *Jade Calendar* is reproduced in Plopper, *op. cit.*, pp. 324-354. See also Wolfram Eberhard, *Guilt and Sin in Traditional China* (Berkeley, 1967), pp. 24-59.

etc., to the sixth; those who were too lenient towards their pupils or pretended drunkenness in order to insult superiors, etc., to the seventh; those guilty of filial impiety, to the eighth; violators of statutes or regulations decreed by the emperor of this world, producers of pornographic books or pictures, etc., to the ninth; deceased Confucian scholars, Buddhist or Taoist monks who, by citing the *I ching* or the sutras have succeeded in avoiding the tortures in the preceding courts, are dealt with in the tenth court.

Except for the first and the tenth, each of the other eight courts has one major and sixteen minor hells, each providing a special form of torture. Hunger, ice, etc. are attached to the second court; plucking out eyes, extracting finger and toe nails, etc., to the third; pouring boiling water over the hands, etc., to the fourth; slicing the heart, to the fifth; eating needles, submersion in feces and urine, etc., to the sixth; extracting the tongue, boiling in oil, etc., to the seventh; opening the chest, cutting the body to pieces, etc., to the eighth; pouring boiling water over the entire body, exposure to wasps and scorpions, etc., to the ninth. The victim, after suffering the pains of each torture, recovers instantly, fully intact, and is ready for the fresh pain of the next torture. But whoever, upon hearing the true message of the *Jade Calendar*, realizes his sinfulness, repents, pledges never to repeat the evil act, and pledges to copy or order duplicates of the *Jade Calendar* for free distribution, will escape all the tortures that are in store for him.

If dissemination by donation of the *Treatise on Response and Retribution* was proclaimed to be a great merit,³⁶ this applies equally to the *Jade Calendar*. And the latter reached even more people than the *Treatise* because it was usually circulated in illustrated editions—and how the sophisticated tortures of the 136 hells must have appealed to the illustrating artists!—and was, as a gruesome kind of comic book, a favorite item in each child's collection.

Much more impressive than any illustration in the *Jade Calendar* are the "torture hells" in the temples of the East Mountain God (Tung-yüeh miao 東嶽廟) or of the city god (*ch'eng-huang miao* 城隍廟) in the provincial and prefectural capitals. These contain figures of devils and demons in wood or clay, often half-life-size, wielding realistic torture instruments by means of moving parts, and figures of

³⁶ Carus, *op. cit.*, p. 3.

bloody victims with hands or feet chopped off or quivering in a frying pan. (Famous for its really impressive torture-hells is Fengtu in Szechwan.) Since these temples were to be periodically worshipped at by local magistrates, this constituted a sort of legalized superstition.

If there was in China any belief concerning crime and punishment "shared by all sections of society," it was that no crime or sin could ever escape detection by the watchful spirits over one's head or inside one's body, that for every crime committed in life one would finally be tortured in the underworld, or that the imperial code was valid even in the other world, but it was not a belief that "there was an overriding obligation to preserve the harmony of the universe" (van der Sprenkel). (A popular belief has it that animated corpses—the Chinese version of a vampire—would cause drought,³⁷ but Mrs. van der Sprenkel certainly does not have these in mind.)

Fanciful but incorrect is M. Meijer's assertion that heaven gives the mandate to a virtuous ruler so that harmony in the natural order may be preserved. The term *t'ien ming* 天命, which was in use already in early Chou times, acquired in subsequent centuries a variety of meanings. (Wing-tsit Chan enumerates five theories of the mandate of heaven.)³⁸ But in political parlance the term is usually employed in the way that it is used in the *Shu ching*,³⁹ the *Shih ching*,⁴⁰ and the *Mencius*.⁴¹ And in all these classics the term is used primarily in relation to a ruling house rather than to an individual person, as in de Bary's well-formulated definition: "The 'Mandate of Heaven' (*t'ien ming*), the divine election by which a *new dynasty* was empowered to set up its rule" [*italics mine*].⁴²

Still less is the term used in relation to the harmony in the natural order. The concept of Yin-Yang had not yet been developed into a working theory. It should not be forgotten that Shu Hsing, the historiographer of the Chou, stated in 644 B.C.: "It is not from the develop-

³⁷ See J. J. M. de Groot, *The Religious System of China*, 1892 (Taipei reprint, 1964), p. 761.

³⁸ Chan, *op. cit.*, p. 78.

³⁹ *Shu ching*, 8: K'ang kao (Announcement to K'ang, duke of Wei, 1110 B.C.); 10: Chün Shih (Prince of Shao, d. 1156 B.C.).

⁴⁰ Ode 267.

⁴¹ *Mencius* 5A:5; 1B:8.

⁴² de Bary, *op. cit.*, p. 174.

ment of the Yin and Yang that good fortune and evil are produced. They are produced by men themselves.”⁴³ But when eventually the idea of man’s active role in the natural order achieved dominance under the Han, the theory of heaven’s mandate underwent a radical revision. It was now not the house of the virtuous men which was to receive the mandate but the house which was patronized by the power of one of the Five Agents. (The house of Han, in order to conform to the various cosmological theories and historical interpretations of the different schools of phenomenalism, changed four times the identity of their patron agent: earth, water, earth, fire.⁴⁴) As Hsi Hung 眭弘 claimed in 79 B.C., even a virtuous ruler of illustrious tradition of good government cannot prevent the house next in succession from receiving the mandate.⁴⁵ Mr. Meijer’s assertion is, therefore, in contradiction to the teachings of Han phenomenalism, which he otherwise enthusiastically espouses.

Somewhat strange is the fact that even under the dominance of phenomenalism, explicit statement about the emperor’s function of “preserving nature’s harmony” was extremely rare,⁴⁶ although implicit statements were somewhat more common. Ch’en P’ing 陳平, prime minister from 189 to 178 B.C., observed: “The prime minister’s function is to assist the emperor in regulating (*li* 理) the Yin and the Yang, facilitating the four seasons to run their regular course and allowing all things in the universe to thrive in natural peace.”⁴⁷ About a hundred years later, Ping Chi 丙吉, another prime minister (59 to 55 B.C.), after showing little concern about violent riots in the streets of the imperial capital, was greatly disturbed at seeing a panting ox during early spring because, as he explained, “a prime minister’s function is to harmonize the Yin and the Yang [in the universe].”⁴⁸ Ever since that time “harmonizing the Yin and the Yang” (*t’iao-li yin-yang* 調理陰陽) has become in literary Chinese a synonym for

⁴³ *Tso chuan*, Duke Hsi: 16 (Legge, p. 171).

⁴⁴ *Han shu* 25: Chiao ssu chih (Treatise on Imperial Sacrifices), particularly the concluding paragraph. A simplified version is given in de Bary, *op. cit.*, p. 200.

⁴⁵ *Han shu* 75: biography of Hsi Hung.

⁴⁶ Wang Fu, *Ch’ien-fu lun* (Essays of the Hidden Scholar; A.D. 140), “Pen-cheng lun” (On the base of government) (Taipei, 1963), p. 1927.

⁴⁷ *Han shu* 40: biography of Ch’en Ping.

⁴⁸ *Ibid.* 74: biography of Ping Chi.

"prime minister." To associate it with "emperor" would be a grave mistake.

Little harm is done when some Western scholars disregard post-Sung superstition and claim Han phenomenalism as the Chinese people's common belief concerning crime and punishment. But it is more disturbing when some of them say that in Chinese thinking "punishment of the crime was more important than identification of the evil-doer" (van der Valk), or that "the disruption of the cosmic order [crime] could be repaired only by offering adequate requital for what had been destroyed. Precisely how this requital should be done was less important than the fact of requital *per se*" (Bodde).

That such an axiom—the exact opposite of legal thinking—would prevent any legal system from developing and maturing, is obvious. But the Chinese "over the centuries, developed a complicated, expanding legal system."⁴⁹ Moreover, the characteristic feature of Chinese law, as seen by a modern American jurist, is its demand that the punishment should exactly fit each crime. Professor Morris, the co-author of *Law in Imperial China*, says:

There is significance of the first order in the recurring denomination by the Chinese of their penal laws as punishments (*hsing*) instead of as statutes (*fa* or *lü*). . . . The *Lü hsing* . . . is focused on the need to assign suitable punishments to acts already known to be criminal The ancient feudal king who speaks in the *Lü hsing* . . . urges "reverent carefulness" in assessing the right punishment for each wrongdoing. . . . Two millennia later we find the Chinese still preoccupied with fitting the punishment to the crime (pp. 495–496).

The most steadfastly held principle that affected the penal system of imperial China was that the punishment meted out should fit each crime (p. 541).⁵⁰

Professor Bodde, himself, is impressed again and again by the Board of Punishments' "concern for correctness and precision." He has rightly observed how the Board makes "an interesting distinction between 'killing a son and *then* falsely imputing the act to another person,' as against 'killing a son *in order* to impute the act falsely to

⁴⁹ Bodde and Morris, *op. cit.*, p. v.

⁵⁰ This is what John C. H. Wu described as "the old Chinese tradition of fitting the punishment to the concrete individual person rather than to the abstract nature of the crime." See "The Status of the Individual in the Political and Legal Traditions of Old and New China" in Charles A. Moore, ed., *The Chinese Mind* (Honolulu, 1967), p. 355.

another.'” Or, “that the Statutes Commission goes to great lengths . . . to determine whether an offender’s crime was that of killing in an affray or of ‘unauthorized killing’—despite the fact that the penalty for either offense is the same.” Or, that “the Board rejects the sentences proposed by the provincial courts and replaces them with others based on a different statute, even though the resulting penalties remain unchanged.” Or, “the Board . . . takes great pains to pronounce sentence itself or to confirm sentences proposed at the provincial level, upon offenders who have already died before the cases even reach Peking” (p. 180). Is it possible that such an exacting jurisprudence could adhere to the idea that to punish is more important than to punish whom?

But how is such a misunderstanding to be explained? Probably it is the idea of “requital,” of “a life for a life”—“where the fact of the requital itself really counts rather than who precisely is the person who has to make the requital” (Bodde)—that has caused some confusion in these authors’ reasoning about the Chinese concept of punishment.

That a man who kills another man should be killed himself—a rule of almost every human society—was a principle of Chinese law since at least the Han. But the idea of “requital” as a guiding principle in assessing punishment is of much later date. It seems that it became current not much earlier than the 1750s. By that time it was usually adhered to in cases of armed mass-affray (*hsieh tou* 械鬥) where several persons participated in attacking one person, but none of them could be ascertained as the one delivering the fatal blow. If one of the seized suspects happened to die in jail, then the principle of “requital” became operative in that none of the other suspects would be sentenced to “immediate” execution, but only to a death penalty “after the assizes,” which would generally be commuted to exile or life sentence after a few years. It is a principle of limiting death penalties without hurting the feelings of the victim’s survivors. But it is not a general principle of Chinese criminal law. The Chia-ch’ing Emperor, a skilled jurist on the throne, stated in a rescript of September 21, 1802:

The principle of “a life for a life,” pronounced in an imperial decree in 1753, refers merely to cases of armed mass-affray. Should one adhere to this saying literally [and indiscriminately], then at the autumn assizes all the cases involving a death, either by killing or from injuries, would have to be

classified as "deserving execution," and the class of "deferred execution" simply be eliminated. Does this make any sense?⁵¹

A half year earlier, in February 1802, he rejected a censor's request to have the Board of Punishment publish their rules concerning the handling of cases at the autumn assizes. In his rescript, he argued:

Think just of this: in the innumerable cases handled in each province in each year, there are a myriad variations and subtleties. In many cases where the same statute has been violated, a slight difference in actual circumstances would make one case deserving of "immediate execution" and another only of "deferred execution." How can we just publish some ready-made formulas and thus exclude all expedient modifications? Now, in reviewing cases for the autumn assizes, each officer in the directorate and in the departments of the Board of Punishments advances his opinions and arguments and comes only after careful deliberation and discussion to an agreed sentence which will exactly fit the actual circumstances of the case. Why should they mechanically adhere to some fixed rules and thus forfeit the advantage of reasonable modifications?⁵²

This imperial rescript most eloquently elucidates the principle of fitting the punishment to the crime, under which a rule of such generality as "a life for a life" would hardly find acceptance.

⁵¹ *Jen-tsung shih-lu* (The Veritable Record of the Chia-ch'ing Emperor) (Taipei reprint, 1964), p. 1429.

⁵² *Ibid.*, p. 1292.