**“To know or not to know?”**

**The notion of 犯時不知 in Ming-Qing China’s juridical thinking and judicial practice**

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**Prolegomena**

My interest in the notion of 犯時不知 (*fanshi bu zhi*), which can be translated into English as “not being aware [of the legal consequences of one’s act] whilst committing it”, stems from a rather atypical criminal case I came across while doing research some years ago on the question of parricide and insanity in Qing-era legal culture[[1]](#footnote-1). As an introduction to the aspects that will be treated in what follows, I propose to provide here a brief summary of this case.

The facts date back to late 1734 and involve a young man called Deng Tingmei 鄧廷梅 who was found guilty of the murder of his elder brother, Deng Tingzhu 鄧廷柱, during a relapse of his mental illness. The details of the case are not of utmost importance here. What is of relevance is the process that brought about the definitive ruling. For his crime, Deng Tingmei was sentenced to beheading after the Autumn Assizes (*zhan jianhou* 斬監候), a judgement that was confirmed by an imperial edict in the spring of 1737. But this punishment was never carried out. The Board of Punishments in Beijing included Deng Tingmei in the imperial amnesty (*enshe* 恩赦) promulgated on the occasion of emperor Qianlong’s accession to the throne. Condemned but not punished, Deng was nevertheless put in jail at the request of the Board, in an effort to ensure he would do no more harm.

When compared to the unenviable penal treatment meted out to insane parricides in the strict sense[[2]](#footnote-2), the sentence pronounced in Deng Tingmei’s case did convey a form of leniency. Within its characteristic framework, which took into account kinship relations[[3]](#footnote-3), traditional Chinese law considered the link between younger and elder brothers as similar to that uniting wives and husbands. Accordingly, ordinary homicides at the expenses of husbands or elder siblings had the same punishment meted out to them: immediate beheading (*zhan lijue* 斬立決). Obviously, in Deng Tingmei’s case, mental instability was considered a mitigating factor, hence the light reduction of the sentence. Interestingly, as the documents produced during the rather long process of adjudication show, such a “leniency” was actually the result of a compromise to solve a serious quarrel that arose between the Board of Punishments, in Beijing, and the governor of Guangdong province, where the unfortunate events had taken place. It is in these circumstances that I first came across the above-mentioned notion of *fanshi bu zhi*. It was brought to the fore by governor Yang Yongbin 楊永斌 (1670-1740) in the heated debates he had with the Board while seeking to adjudicate the case, process during which the tension actually rose high between the two sides of the judicial machinery.

What was at stake was the issue of criminal intent. The Chinese legal tradition was very early on founded on this cardinal principle, which, in its most refined sense, linked punishments to intentional acts only[[4]](#footnote-4). In line with this conception, and at least from the Tang on (618-907), madness had been recognized as a mitigating factor in criminal circumstances, even though this never led to the systematic exemption from punishment of criminals recognized as mentally ill[[5]](#footnote-5). Right from the beginning, governor Yang considered that all charges against Deng Tingmei ought to be lifted on the grounds of his mental condition. In an original line of argument[[6]](#footnote-6), he resorted to statute 35 of the *Qing Code* 大清律例[[7]](#footnote-7) to try to convince the officials of the Board of adopting his stance. Entitled *Bentiao bie you zuiming* 本條別有罪名, it has been translated into English as “Specific articles having different regulations for punishment”[[8]](#footnote-8). As we will see below, it is mainly of a procedural type. What drew the attention of governor Yang to this specific law was the contents of its third paragraph, which stipulate that

In case the crime [committed] is more serious [than that provided for in a specific law], but that at the time of the deed the culprit was unaware [of the seriousness of his action], adjudicate according to the provisions for ordinary people.[[9]](#footnote-9)

其本應罪重而犯時不知者依凡人論

Had this provision been taken into consideration, homicides committed by insane individuals inside the family structure would have been assimilated to ordinary homicides by mentally ill persons. Since 1669, the latter were considered as unintentional homicides (*guoshi sha* 過失殺) and in such instances, the wrongdoer was only liable to the payment of an indemnity to the victim’s family[[10]](#footnote-10). This position fitted nicely with the unintentional character of crimes by insane individuals, largely recognised by Chinese administrators at the time and customarily expressed in their exchanges with the Board by the expression “[the culprit] was unaware of his/her act because of mental illness” (*feng fa wu zhi* 瘋發無知)[[11]](#footnote-11). Under governor Yang’s brush, the fact that this last expression closely echoes with its counterpart in statute 35 was no coincidence. In his opinion, the latter’s provisions allowed for Deng Tingmei’s mental instability to be taken into account as a an element clearing him of punishment for lack of criminal intent, rather than simply as a mitigating factor. As he phrased it in one of his exchanges with the Board’s administrators in Beijing:

[…] When folly obscured Deng Tingmei’s mind to the point he could not comprehend the world around him anymore, not even who Deng Tingzhu was, there was precisely no difference with the idea of “being unaware of one’s action whilst committing it”.[[12]](#footnote-12)

[但]鄧廷梅瘋病昏迷不省人事之時，實以不識鄧廷柱為何人，正與犯時不知無異。

As we have seen above, the task Yang Yongbin set to himself proved impossible to achieve. Without resorting to any form of subtle juridical reasoning to try to wrestle with the governor’s line of thought, and in a way which is reminiscent of the unfaltering severity it systematically advocated until the early years of the twentieth century when confronted to parricides in the strict sense committed by mentally ill individuals, the Board of Punishments sternly upheld the view that the family relation affected – in this specific case one of the most fundamental according to the traditional Chinese conceptualization of kinship – could not to be done with in a careless manner:

In the present situation, even though Deng Tingmei was overcome by a fit of madness when he beat his elder brother […] to death, […] how could one refer to this statute [35] to determine the sentence according to [the provisions] set for ordinary individuals? When a person hits an elder sibling, killing him, the social status of the parties and the respective obligations that stem from it are involved.[[13]](#footnote-13)

今鄧廷梅雖因風病昏迷打傷胞兄鄧廷柱身死，[…]何得比引此例以凡人定議，[…]弟毆胞兄致死名分攸關。

Rather than delve further into this case’s various dimensions here, let us simply note that it neatly underlines the enduring tensions between the moral and the legal facets of judicial penalization: in traditional China as elsewhere, criminal laws were expected to mete out adequate punishments as “retributions” for crimes. In what follows, I would like to turn the attention back to this notion of “not being aware [of the seriousness of one’s act] whilst committing it”[[14]](#footnote-14). If, as we have seen, the woeful consequences of a fit of madness such as the one experienced by Deng Tingmei did not qualify to be included in the legal framework drawn out by this notion – despite its appeal to our modern eyes in the above-mentioned circumstances –, what type of unlawful act or situation might have done so? To try to provide some elements of an answer to this question, I propose we follow a two-pronged path. First, we shall try to shed light on the actual meaning of the notion, in order to understand what exactly it was that it encompassed from a purely juridical point of view. Second, we shall turn to actual criminal cases in which this notion was brought forward, in order to get a better sense of the way it was not only conceptualized but also put to work. At the end of this process, I hope we might draw some conclusions on its role in the judicial framework of late imperial China, and from there, maybe even get back to the issue we actually started with, that of the unfortunate Deng Tingmei.

**The notion of *fan shi buzhi* in Qing China’s legal construct**

*Issues in translation*

As a first step, let us start by looking at the precise contents of the article itself. To do so, I will mainly resort to its phrasing at it appears in the Ming Code, where it is ranked as number 37. Its version in the Qing Code, where it appears as number 35, only slightly differs from the former through the addition of a few interlinear notes. While mine, the translation that follows is inspired by those proposed by Jiang Yonglin in his work on the Ming Code, and Paul Louis Félix Philastre (1837-1902) in is rendering of the Annamite Code, i.e. the traditional Vietnamese Code, which by and large reproduced the Qing Code[[15]](#footnote-15).

The text of the Ming article is divided into the following three paragraphs (*jie* 節):

本條別有罪名 :

- 凡本條自有罪名，與名例罪不同者，依本條科斷。

- 若本條雖有罪名，其有所規避罪重者，自從重論。

- 其本應罪重，而犯時不知者，依凡人論。謂如叔姪別處生長，素不相識，姪打叔傷，官司推問，始知是叔，止依凡人歐法。又如別處竊盜，偷得大祀神御之物，如此之類，並是犯時不知，止依凡人論，同常盜之律。 本應輕者，聽從本法。謂如父不識子，毆打之後，方始得知，止依打子法，不可以凡毆論。

Specific articles having different penal denominations:

- In all cases where a specific article has a penal denomination that differs from those in the “laws on definitions and rules”, adjudicate according to the specific article.

- Although a specific article includes a given penal denomination [for the crime committed], if the motive or intent was to avoid [indictment for] a more serious crime, adjudicate according the provisions set for the more serious [crime].

- In case the crime [committed] is more serious [than that provided for in a specific law], but that at the time of the deed the culprit was unaware [of the seriousness of his action], adjudicate according to the provisions for ordinary people. This means for example that in the case of an uncle and his nephew in the male line who have always lived in distant places and therefore do not know each other, if it happens that the nephew hits his uncle and wounds him, and that during the investigation the officials come to know that [the victim] is the uncle, the adjudication should follow the provisions for brawls among ordinary individuals. Or if [a person] commits a robbery in another locale and ends up with objects used for the great sacrifice to the imperial spirits, the situation also pertains to the notion of unawareness [of the seriousness of the action] when committing it, [and there too] the adjudication should only follow the provisions for ordinary individuals, according to the statute on ordinary thefts. In case [the crime] is less serious, adjudicate according to the law [providing for the crime committed]. This means for example that if a father has never known his son, and that this relationship becomes known only after he has beaten his son, adjudication should only follow the provisions included in the statute on hitting a son, and not those for brawls among ordinary individuals.

Some observations on the above translation may be useful here. First, it will be noted that I resort to “penal denomination” to render the Chinese 罪名into English. In this, I part quite a ways from Jiang Yonglin’s use of “regulations for punishment” and from Philastre’s “disposition” (in French), which can be rendered by “provision”[[16]](#footnote-16). If one sets aside the fact that the term penal denomination reflects more closely the actual meaning of the original Chinese compound, my choice stems from the idea that China’s age-long tradition of codified law was anchored in a legislative process in which jurists strove to classify crimes into well defined categories, subsumed by precise penal denominations. In turn, these penal denominations were to provide for clear-cut punishments. Ideally, for the local magistrate, the process of adjudicating a case came down to the requirement to pick out among all the penal denominations included in the Code the one most adequate for the crime investigated, choice from which a sentence would stem, so to speak, automatically[[17]](#footnote-17). The above statute sets a procedural framework for dealing with cases in which, for various reasons, the acts committed could be linked to more than one category of crime. I thus feel that the term penal denomination to render *zuiming* here, is more adequate than the “regulations for punishment” adopted by Jiang Yonglin, and more precise than the “provision” to which Philastre resorted to.

The second point I would like to address is linked to my English rendering of the second paragraph of the statute. Here too, I part from Jiang’s translation, which is as follows: “Although the specific articles have specified regulations for punishment, if the criminals [use those articles] to circumvent the law [*guibi*], and the crimes result in heavier penalties, they shall be punished in accordance with the heavier penalties”[[18]](#footnote-18). The option I have followed is linked to some annotations about this passage found in some Ming era commentaries of the Code. The editor’s note to this statute in the *Da Minglü jijie fuli* 大明律集解附例 (Commented edition of the Great Ming Code with substatutes appended), for example, glosses the terms *gui* and *bi* (規避) as respectively *qiutan* 求探[[19]](#footnote-19) or *qiuli* 求利, “seeking profit”, and *huibi* 迴避 or *tuozui* 脫罪, “avoid” or “elude punishment”. It does make clear, though, that the meaning of the compound itself ought not necessarily to be limited to these interpretations only[[20]](#footnote-20). It seems to me that while the translation “avoid” or, for that matter, “circumvent”, is adequate, the wider semantic dimension of *guibi* must be conveyed in a manner or another, thus my use of the terms “motive” and “intent”. In this, I try to follow the explanations provided in the commentaries of Wang Kentang 王肯堂 (1549-1613) and Lei Menglin 雷夢麟 (mid Ming).

In his famous *Dulü suoyan* 讀律瑣言 for example, the latter explains that while a crime committed may correspond to a penal denomination found in the Code – in other words, fit with the law (*helü* 合律) –, when inquirying on the reasons which led to it, one may well find out that the culprit, by committing it, actually sought to avoid being indicted for a more serious crime he or she was involved in (*yuan qi suo fan zhi xin*, *huo you suo guibi zuizhong zhe* 原其所犯之心, 或有其規避罪重者)[[21]](#footnote-21). In a similar vein, Wang Kentang signals that, when investigated, the circumstances (*qing* 情) of an illegal action may well reveal that the main motivation for the perpetrator was to conceal a more serious wrongdoing of his (*er qi qing you suo guiqiu bimian zhong yu ben zui zhe* 而其情有所規求避免重於本罪者). One of the examples he provides is that of an official indicted for not having reported what ought to have been reported (*ying zouqing er bu zouqingzhe* 應奏請而不奏請者)[[22]](#footnote-22). In ordinary circumstances, the law provided for 100 strokes of the heavy stick for such an administrative wrongdoing. But as Wang points out, if the investigation revealed that the official received a bribe in order not to report the matter, or by doing so sought to avoid another indictment, then the amount of the bribe or the nature of the crime thus avoided should be assessed, and, if in either case the punishment exceeded 100 blows of the heavy stick, the official ought to be punished according to the provisions dealing with the more severe unlawful conduct[[23]](#footnote-23).

In both instances, my feeling is that the accent is not set as much on the fact – albeit correct – that an individual may *use* the law in order to evade a more severe punishment, which is the option adopted by Jiang, rather than on the idea that once thoroughly investigated, the circumstances of the original and more serious misbehaviour may well come to light, revealing thus the inner motives or intent of the perpetrator. In this respect, the prasing of the Qing version of the statute offers an interesting addition. The character *xin* 心 is added as an interlinear note in the second part of the paragraph – *qi xin you suo guibi zuizhongzhe* 其心有所規避罪重者 ­–, thus giving some credit to the option stressing “inner motives” or “intention”, a point well relayed by Philastre in his French rendering : “Si, bien qu’une faute soit punie par un article spécial, le coupable en la commettant a eu (*en lui-même*) l’intention de se soustraire aux conséquences d’une faute plus grave, on suivra naturellement la loi (*qui prononce la peine*) la plus sévère (*et qui est relative à la faute dont le coupable a cherché à éviter la punition*)”[[24]](#footnote-24).

I am of course aware that the preceding observations are, in a way, very limited in scope, that they do not necessarily introduce decisive distinctions in our understanding of the general contents of the statute, and that they could very well be considered as somewhat specious. Still, from the point of view of translation, especially in a domain as specific as that of China’s legal literature, precision and lexical consistency should be of central concern[[25]](#footnote-25).

This being said, and since the third paragraph does not raise similar translation issues, let us briefly analyze the nature of this statute in relation to its contents.

*The contents of the statute*

Here, the official commentary appended to the statute in the Qing Code is of great help[[26]](#footnote-26). It shows that the aim of this statute was to provide a guideline for magistrates as to how to distinguish, in the process of adjudicating a case, between the statutes pertaining to the laws on rules and definitions (*mingli lü* 名例律), and the statutes and substatutes codified in the six other sections of the Code, which, as is well known, were organized along the lines of the six main spheres of public administration (*li* 吏, *hu* 戶, *li* 禮, *bing* 兵, *xing* 刑, *gong* 工). The former, as the commentary explains, bring together the rules that frame the legal workings of all the others (*minglizhe*, *zhu lü zhi fanli ye* 名例者, 諸律之凡例也), whereas the latter provide the penalties to be applied to specific misconducts and crimes. In order for similar acts, but with different degrees of seriousness, not to be taken into consideration through the same provisions, the *Bentiao bie you zuiming* statute proposes some standards of distinction. The first, which is expounded in the opening paragraph, states that for a given crime, if the penalty included in the statute specifically drawn out to deal with it differs from that provided for in the laws on rules and definitions, the former ought to be applied. By giving preeminence, when deemed necessary, to specific laws over those drafted to offer general procedural and penal orientations, the legislator aimed at bridging the gap which, in time, would inevitably distance the former and the latter, if only because of the ever-evolving forms of criminality and the correlated unfolding codification process[[27]](#footnote-27).

The second and third standards both deal with the adjustments to apply to the penal responsibility of an individual in relation with the question of the degree of criminal intent. We have seen above how the second paragraph of the statute calls for accrued severity in punishment if it can be proven that by perpetrating a given wrongdoing, the culprit actually intended to avoid indictment for a more serious one. The third, in turn, approached the question from the opposite end, that is, through the notion of unawareness of the seriousness of one’s action whilst committing it (*fanshi bu zhi* 犯時不知). Here, like in the previous paragraph, ciminal intent *per se* is not at stake – the crime has indeed been perpetrated. Rather, the problem tackled is how to determine the degree of penal responsibility of the perpetrator when it can be proven that he was not aware of the actual extent of his act. Two situations are taken into consideration in the statute: a. the investigation reveals that the crime committed is actually more serious than considered at first ; b. it reveals that the crime is less serious. In both cases the penal responsibility is reduced, but by different means. In the first instance, the magistrate is ordered to adjudicate without taking into consideration the aggravating circumstances brought to the fore by the investigation, whereas in the second, he is asked to take the mitigating circumstances into account.

It is interesting to note here that among the three examples provided to make the precise meaning of both these standards explicit, two involve inter-family relations: that of a nephew and his uncle, on the one hand, and that of a father and a son, on the other, with, in both instances, the agnate relationship being ignored by the parties involved[[28]](#footnote-28). It is precisely this ignorance of the existence of an otherwise highly bonding kinship relation, especially from the standpoint of the law, which allows, in each case, for the diminution of the degree of penal responsibility, and thus the mitigation of the punishment. In this perspective, a nephew who, having never known of the existence of one of his patrilineal uncles (the reverse being also true), hits this uncle during a brawl, will be sparred the systematic harshness of the punishments meted out to juniors commmitting unlawful acts against seniors in the family sphere, his case being adjudicated along the lines of ordinary affrays involving individuals non-related through family ties. A similar stance is adopted in the second illustration, but with a nuance: to our modern eyes, the “unawareness” criterion should probably have resulted, in both instances – that of a junior hitting an unknown senior and that of a senior hitting an unknown junior –, in the same juridical solution, the forsaking of the family relationship as unrelevant to the case. It could be that this was considered unacceptable to China’s legislators because leaving aside the family bond in this second instance – in other words, also adjucating those cases according to ordinary brawls –, would have resulted in the penalty meted out to the wrongdoer being more severe than if the relationship were to be taken into consideration. The option devised – require that the kinship link discovered during the investigation be, this time, considered relevant – can readily be related to the emphasis put on kinship bonds in traditional Chinese law, especially the penal leniency with which senior generations were customarily treated by the empire’s judiciary. But if we set aside this dimension, which does feel peculiar from a contemporary juridical standpoint, the reasons for this option being espoused simply boil down to the necessity of upholding legal coherence. As we have seen, this specific paragraph of the statute vies to clear an individual of part of his penal responsibility, and thus condemn him to a lighter penalty, due to his unawareness of the seriousness of the act he committed. Letting such a loophole persist, that might result in more rigorous condemnations, was not an option.

At this point, it seems clear that the notion of “unawareness of the seriousness of one’s crime” was linked, in China’s legal build-up, to such cardinal principles as criminal intent and penal responsibility. Let aside the examples provided in the text of the law itslef, it should be noted, though, that the four characters that compose the expression *fanshi bu zhi* are, to my knowledge, never glossed or explained independently in the wide array of Code commentaries and juridical treatises that have been handed down to us in time, and which are but two of the “genres” that make up the enormous written production of imperial China’s legal and administrative culture[[29]](#footnote-29). One of the rare comments I have come across is found in Lei Menglin’s *Dulü suoyan*, where the author, after having paraphrased the appropriate passage of the statute, simply adds that this all stems from the pity or sympathy that ought to be expressed towards the unawareness of the culprit (*min qi xian yu buzhi ye* 憫其陷於不知也)[[30]](#footnote-30) – the latter thus appearing in the guise of an unfortunate actor of destiny.

What should we make of this apparent lack of interest for this notion, of its seeming lack of appeal to the late imperial jurists? Could it be that its legal framing was actually clear to all so that its use caused no serious concern? This is what the official commentary to the Qing Code seems to imply in its conclusion to the passage devoted to the *Bentiao bie you zuiming* statute: “Just like in the case of the examples on brawls and thefts presented in the interlinear notes, if in all circumstances the seriousness of a case is thoroughly evaluated, the correct [judgement] will then be reached” (*ru xiaozhu suo yin douou qiedao deng jie quan qingshi zhi qingzhong er wu de qi zhong zhe ye* 如小註所引鬥毆竊盜等類皆權情事之輕重而務得其中者也)[[31]](#footnote-31). It could also be that this notion, and possibly even the whole statute, were actually marginal ones in traditional China’s legal framework. In order to get a better sens of these issues, I propose we now turn our gazes toward actual judicial practice.

***Fanshi bu zhi* in practice**

*The notion and its links to the rest of the Code*

Before turning to the presentation and analysis of some cases during the adjudication of which the notion was called into play, it may be useful to provide a few comments on its “pedigree” and on its articulation with other notions and statutes included in the Code.

First, it should be noted that it already appears in what is considered to be the first extant Chinese imperial code, that of the Tang dynasty (618-907), where it is part of the statute entitled *Bentiao bie you zhi* 本條別有制[[32]](#footnote-32). The proximity in phrasing with the Ming and Qing-era versions is evident, and not only in the statute’s title:

本條別有制:

諸本條別有制，與例不同者，依本條

即當條雖有罪名，所為重者自從重。

其本應重而犯時不知者，依凡論；本應輕者，聽從本。[[33]](#footnote-33)

Obviously, the principles expounded through this specific article were considered important quite early on among China’s traditional jurists. Two remarks, here: first of all, as Xue Yunsheng underlines, contrary to its Ming and Qing counterpart, the phrasing of the second paragraph in the Tang Code does not make any allusion to the culprit trying to avoid being indicted for a more serious crime. It simply considers the act itself, calling for a stricter punishment if its nature was more serious than that provided for in the specific article (*wei Tanglü suo wei zhongzhe zi cong zhong, xi jiu benshi qubie cong zhong lun* 惟唐律所為從重者自從中，係就本事區別從重論). In a somehow characteristic way, Xue concludes with a prudent criticism of the Ming legislators, pointing to the fact that the addition of the term *guibi* 規避 in the Ming version was enacted despite the fact that the Tang article, as glossed through the official commentary (*Shuyi* 疏議), was replete with examples providing all the necessary explanations for its use (*ciwai sui tiao jieshizhe poduo, Minglü gaiwei you suo guibi, yu Tanglü bu tong* 此外隨條解釋者頗多，明律改為有所規避，與唐律不同)[[34]](#footnote-34). The second remark is that the examples that illustrate the meaning of the third paragraph in the Ming and Qing codes – 1. uncle and nephew unaware of each other’s existence, 2. thief unaware of what he has just stolen, 3. father and son unaware of each other’s existence – are the exact same ones put forth in the Tang commentary[[35]](#footnote-35). In other words, present from the onset of China’s tradition of codified law (so to speak)[[36]](#footnote-36), this statute, albeit in its modified form, remained a sufficiently central component of legal thought to be still included, more than half a millenium later, in the judicial construct which was to frame the whole of China’s late imperial period.

Yet, in the Ming and Qing codes as, for that matter, in the Tang code, the notion of *fanshi bu zhi* itself is only very seldom encountered. In the former, it appears once only, in statute 37[[37]](#footnote-37). The Qing code can boast of one additional occurrence, as interlinear note to statute 295 (*gongjian shangren* 弓箭傷人), which addresses the issue of the penal consequences for individuals shooting arrows (or other types of projectiles, such as stones or bricks for example), for no proper reason, towards cities or other sites of residences. After the presentation of the scale of punishments meted out for the different possible consequences to others – no physical harm done, injury, and death –, the third paragraph of the *Bentiao bie you zuiming* statute is appended as interlinear note (without the examples), as the benchmark for adjudicating cases where the victim is a family member[[38]](#footnote-38). Thus, yet again, the notion of *fanshi bu zhi* appears here in direct relation with affairs involving kins.

If we pursue the same line of investigation, but this time with regard to the practical connections the whole *Bentiao bie you zuiming* statute might have maintained with other statutes in the code, two more links appear[[39]](#footnote-39). The first draws together the principle formulated in the second paragraph with that found in statute 26 (Qing code), entitled “When two crimes are discovered simultaneously, adjudicate according to the provisions pertaining to the more serious” (*er zui ju fa yi zhong lun* 二罪俱發以重論)[[40]](#footnote-40). The echo between the two ideas developed here is very clear and, in a sense, is in part reminiscent of what modern jurists refer to as “double jeopardy”. What this last expression indicates is the interdiction to prosecute a person a second time for a given crime after an acquittal or a prior conviction, or to condemn someone to double punishment (or more) for the same offense. In a different approach, what statute 26 provides for is the interdiction of multiple convictions, and thus of multiple punishments, even in case different crimes are discovered to have been comitted by the same individual. Of two crimes, rather than sentencing the culprit according to both and adding up the two punishments, only the most serious was to be adjudicated. With the characteristic level of detail found throughout the Chinese late imperial codes, in this statute, the legislators also provided for a host of related possibilities[[41]](#footnote-41), thus conveying a sense of the very minute framing of the whole judiciary process as they wished to see it delineated on paper[[42]](#footnote-42).

The second link that can be drawn is between the contents of the third paragraph of the *Bentiao bie you zuiming* statute, which includes our companion notion of *fanshi bu zhi*, and the principle expounded in statute 23 (Qing code)[[43]](#footnote-43), entitled “Committing crimes before becoming aged or maimed” (*Fanzui shi wei laoji* 犯罪時未老疾)[[44]](#footnote-44). Here, the implicit notion that brings together these two statutes is related to the sympathy or pity that ought to be shown towards some criminals because of their peculiar situation at the time of their deed. Statute 23, and its counterpart, statute 22 – “Redeeming punishment by those who are aged, juvenile, or disabled” (*Laoxiao feiji shoushu* 老小廢疾收贖)[[45]](#footnote-45) – provide for crimes committed by elderlies and juveniles (respectively 70 years of age and above, and 15 years of age and under) and by individuals suffering of physical handicap. In such circumstances, substatute 22 states that the individuals involved ought to be granted the possibility to redeem their punishment against a given sum of cash (*shoushu* 收贖). Here again, a very subtle gradation is included, balancing the age or the degree of disability and the type of wrongdoing committed. What statute 23 tackles, in turn, is the question of how to procede with the adjudication when a crime was committed before the perpetrator reached the age of 70, but discovered only after, or if the criminal was a youngster when he committed his deed, which was discovered only after he or she came of age (for disabled, the limit being set at the articulation of the period preceding and subsequent to their suffering a permanent disability). In such instances, the judicial standpoint was to resort to clemency, in other words, and along the gradation set in statute 22, to sentence according to the specific provisions for elderlies, youngsters and disabled.

Although tempting, it would be too far-stretched to consider unawareness of one’s deeds as an underpinning for the leniency extended to these categories of individuals. The legislators may well have had this idea in mind, especially when discussing the cases of seniors over 90 and children under 7, both described as having less discernment (*shao you zhili* 少有智力) and having possibly accomplished their deed under the influence of a third party (*ruo you jiaoling zhi zhe* 若有教令之者)[[46]](#footnote-46). But the absence of any allusion to mental illness, which is not even listed among the disabilities here, does not allow for a strong argument to be made. Thus, it is probably safer to consider that the link drawn between the notion of *fanshi bu zhi* and the contents of statute 23 in the comments to the Qing code translated by Philastre, is indeed associated to the sympathy some specific categories of criminals could raise for themselves, an aspect which echoes with Lei Menglin’s remark quoted above.

At the end of this overview of the way the notion of *fanshi bu zhi* and the statute that encloses it resonate with the rest of China’s late imperial legal construct, we find ourselves, by and large, facing once again the question of criminal intent and its correlate, penal responsibility. In this specific sphere of legal thought, Chinese jurists have made important contributions, reflected in the sophisticated architecture of criminal liability one can find exposed, among others, in the codes of the late imperial period. Providing a detailed description of it here would prove a task far exceeding the ambitions of this contribution. My aim will thus be to draw a general picture, in order for us to consider the extent to which the notion of *fanshi bu zhi* was actually called into play in such a context. The main sources for this endeavour will be specific cases drawn from archival funds and various collections of criminal cases, all dating back to the Qing dynasty.

*The construct of criminal liability*

As mentioned above, the gradation of criminal intent was rendered in a very sophisticated way in the penal and administrative codes of the late imperial period. Its most complete depiction appears in the section on homicides (*renming* 人命), where one can make out four basic distinction as to the levels of intent. The first, labelled *mou* 謀, can be renderd as premeditation, and is, as today, the one which provides for the most severe penal consequences. Next comes *gu* 故, which implies a clear intention to do harm, but no plans prepared beforehand, no clearcut preparation of the upcoming crime. In other words, the wrongdoing was deliberately committed, but not premeditated. The third level is that of homicides or injuries occuring in the course of an affray (*dou* 鬥). Its penal consequences are less serious than the previous mainly because it considers acts which can be considered as non-deliberate – *i*.*e*., someone not willingly getting involved in a brawl and ending up inflicting injuries or death to the other party.

The last level, the most complex one, tackles in three distinct divisions the progression towards “unintentionality”. It is dealt with in statute 292 (Qing code), which is entitled “Killing or injuring in play, by negligence or unintentionally” (*Xisha, wusha, guoshi shashang ren* 戲殺, 誤殺, 過失殺傷人)[[47]](#footnote-47). The idea of killing or injuring “in play” relates to situations such as an engagement in martial arts or cases where a party, for the fun of it, tricks the other into doing something, ending up in dire consequences – for example, getting someone to cross a pond by asserting its water is shallow, while actually knowing that it is deep. The notion of negligence, by which I render the Chinese *wu* 誤 (generally translated by mistake)[[48]](#footnote-48), is yet again linked to brawls that had resulted in injuries or death, but with the victim not a direct actor of the fight (*pangren* 旁人). The intention to hit and thus the risk of harming, or even killing someone, was characterised, but in an instance of the victim being a third party not taking part in the fight, a difference was made as far as the law was concerned. Finally, the progression winds down to unintentional acts (*guoshi* 過失), which are defined, in the legal context, through the following expression: “[acts whose consequences] neither the senses not the intelligence [of the perpetrator] could have led [him/her] to perceive or conceive” (*ermu suo bu ji*, *silü suo bu dao* 耳目所不及，思慮所不到). If such circumstances could be shown to have pertained, the culprit was authorized to redeem his punishment through the payment of a sum in cash. He or she was also to pay a compensation to the family of the victim[[49]](#footnote-49).

The above description only conveys part of the sophistication with which taditional Chinese jurists have approached the whole issue of intentionality. The code, especially in its Qing version, included in time an ever longer list of provisions, codified in its substatutes, dealing with a wide array of circumstances pertaining to this question, whether linked to the sphere of kinship relations or dealing with affairs involving ordinary individuals. In such a construct, carving out a space for the specific use of the notion of *fanshi bu zhi* appears in principle uneasy, for, as we have just seen, the field of “intentionality” was already well endowed with. There, maybe, lies the reason for its relative discretion inside the compendiae of codified laws, I pointed out above. But despite this form of saturation, the actual process of adjudication of a series of criminal cases shows that it was in fact put to use. Let us thus see in what circumstances and to what result.

*The notion of “unawareness” and its echo in criminal cases*

1. Non-kin related cases

First, it may be useful to provide a short description of the corpus of the cases I have used. It comprises twenty-nine affairs, spanning the two centuries going from 1703 to 1907. Seven of them are drawn from Qing era archival holdings, and the rest from various case collections[[50]](#footnote-50). Approximately two-thirds go back to the Jiaqing (1796-1820) and early Daoguang (1821-1850) eras. This aspect is not in itself relevant from a quantitative point of view, but we will see that it does go along with an evolution in the way “unawareness” was actually resorted to in the judicial process. Two last points of importance may be put forth here. First of all, out of the twenty-nine cases reviewed here, all but one are associated to a homicide ; second, of these twenty-eight homicides, four only involve individuals not linked to one another by kinship relations. To say things differently, twenty-four of the present cases involve kins, and the last affair to be accounted for concerns two members of a same patronymic clan, but who were not linked by any grade of mourning (*fuzhi* 服制). Even though this whole sample cannot be considered in any way relevant from a quantitative standpoint, the imbalance does convey a sense of what it was exactly that was involved when the *fanshi bu zhi* notion came into play.

Let us start by a brief presentation of the four non-kin related affairs. The first dates back to 1808 and involves a certain Ma Diancheng 馬墊成, manager of an inn somwhere in Henan province[[51]](#footnote-51). During the night of October 17, 1808, the inn was attacked by robbers and one of the clients, a man named Li Deyu 李得玉, flying for his life, hid in the backyard of the premises. Whilst trying to chase the robbers away, Ma Diancheng went through the backyard and heard a noise. Suspecting that one of them had hidden there, he called out for the person to identify himself, without response. Having discerned the position of the individual in the dark, he ran forward and stabbed him a first time. Fearing the man would get back up and respond, he then stabbed him several times, causing his death. This affair was most probably inserted in the part of the *Xing’an huilan* (刑案匯覽) devoted to *fanshi bu zhi* not because the notion was used in the adjudication process – it actually wasn’t –, but because the compilers of the collection certainly considered it should have[[52]](#footnote-52). Indeed, it does provide some insights on the type of situation in which the notion could be brought forth: most commonly brawls or some sorts of aggression, in which the defendant had used force with dreadful consequences, without knowing whom he was actually fighting against.

This is well conveyed in the remaining three “ordinary” cases: the first, found in a *shuotie* (說帖) dated 1814, involves a blind man who, having stumbled in the street, inadvertently banged into another individual. The latter having yelled at him, the two got into a short fight, which ended as soon as the blind man understood from the onlookers that his opponent happened to be a soldier patrolling the streets. On the grounds of the blind man’s unawareness of his actual deed, the governor of Hubei province, where the facts had taken place, sentenced the culprit to the same punishment as if the fight had opposed two ordinary individuals[[53]](#footnote-53).

In a smiliar, yet more dramatic situation, dating back this time to 1822, two public officers drowned while they tried to escape a group of people who had mistakenly taken them for robbers. This unfortunate event took place in Guangdong province, and yet again during night time. Suspecting – without reason – a shop owner named Fu Juzhong (傅巨中) of hiding suspect individuals in his shop, the two men raided the house on one rainy night. Woken up in the middle of the night by their banging on his door, Fu, after having received no indication of who they were, first asked them to come back in the morning. The group refusing to leave, he suspected they had come to rob his place, and thus made use of an alarm signal known to the villagers, who rapidly congregated. The two and their group fled, but fell in the river while trying to get back on their boat. This time, the *fanshi bu zhi* notion was put forth by the Board of Punishment, whose administrators rejected the first sentence proposed by the governor of the province. Where the latter had called for immediate strangulation for Fu, on the grounds of his deed having resulted in the loss of two lives he considered as pertaining to one family (*zhisi yi jia er ming* 致死一家二命) – that of the civil administration –, the Board evoked the “unawareness” of the defendant to turn the sentence into strangulation after Automn Assises, rejecting all together the idea of low level administrators as belonging to one family[[54]](#footnote-54).

The last case, here, was adjudicated by Zhili province in 1826, and resulted in the same sentence, strangulation after the Assises, as stipulated in the statute on death occuring during a brawl (*dousha* 鬥殺). The affair involved yet another public officer, on a duty to arrest gamblers. According to the very basic information provided in our source[[55]](#footnote-55), the man, dressed in ordinary clothing (*dai zhanmao shen chuan bianyi* 戴氈帽身穿便衣), was mistaken by one of the gamblers to be a swindler. In the affray that resulted, the officer lost his life. By putting forth the unawareness of the culprit, which the investigation made clear, the governor of Zhili was in a position to adjudicate without taking into consideration the status of the victim, a member of the local administration.

It would of course be daring to draw a general conclusion from these fews cases. Neverthless, they do provide a first framework for interpretation. As mentioned above, all of them include violence committed in the wake of a fight, resulting, generally, in severe consequences. The “unawareness” called for in order to mitigate the punishment relates in general to the context – night time (with or without a situation of tension or crisis), ordinary rather than official clothing, physical disability – and results, in the latter three cases, in the possibility to set aside the status of the victims, all public officers. As we will see, this was a central aspect of the handling of cases in which family ties existed. On the basis of these few comments, it seems that the notion of *fanshi bu zhi* can partly be associated, in the gradation of criminal intentions devised in China’s legal culture, to the notion of negligence (*wu* 誤) we have mentioned above. Both share the violence resorted to by the defendant, which proscribed, in the system as it was designed, the possibility to designate the act as unintentional. But the “unawareness” advocated does add a nuance: the fact that in the context, as the above example tend to show, the defendant could not have known the penal extent of his or her act, a point the jurists felt had to be taken into account in the adjudication process.

2. “Unawareness” inside the family structure

When we turn our gazes towards the affairs involving kins, the preceding comments hold true. The context was yet again central for the unawareness to be advocated. In all the cases I have reviewed, the defendant attacked his victim during the night, when unable to discern who exactly took part in the brawl. But here, another factor pertaining to the context added weight to this first dimension: the fact that the defendant was up at night, and often armed, because prior events had led to a state of suspicion. The following example will make this clear[[56]](#footnote-56). On the evening of May 3, 1703, Fan Huang 樊璜 and his son, Fan Chongyou 樊崇友, coming back from Zhijiazhuang 智家莊, where they had gone the day before to buy trees, stopped at Fan Ke’s 樊珂 place to get some food, before returning to their home. Fan Huang was Fan Ke’s older cousin (*simafu xiong* 緦麻服兄), they lived in the same village and had always been in good terms, as the investigation that followed the unfortunate events that took place that night was later to make clear. As the Fans father and son were about to leave, they saw Fan Ke’s ox tied up to a tree, just outside the entrance of the house, and for no explainable reason, decided to steel it. Having noticed the theft, but unable to imagine it could have been committed by his elder cousin, Fan Ke called out to some neighbours and went out at night after the robbers, armed. After having spotted two individuals pulling an ox, Fan Ke ran after them, yelling at them to identify themselves. Fan Chongyou, afraid, ran away, while Fan Huang stood quietly waiting in the dark, with a knife in his hand. In the affray that followed, Fan Huang remained dead, at which point Fan Ke realized who it was he had just killed. The highest authorities of the (unamed) province where the facts took place decided, after a thorough investigation, to lift all charges against him. To do so, they resorted to statute 388 (Qing code), entitled “Criminals resisting arrest” (*Zuiren jubu* 罪人拒捕), which provided that in case a criminal holding an weapon was killed while resisting arrest, no charges would be brought against the perpetrator (*zuiren chizhang jubu qi buzhe gesha wulun* 罪人 持仗 拒捕其捕者格殺勿論). To provide for the kinship relation involved, the Board of Punishment added a note about the notion of *fanshi bu zhi*, clearing Fan Ke of the increased penal liability the senior-junior kin dimension automatically added to such circumstances.

Fan Ke’s case is interesting for, as the first in our sample, it tends to show that the family relationship involved could be set aside by the judicial apparatus in the early Qing period, when clear evidence pointed to serious mitigating factors. This echoes with similar positions adopted at the time by provincial administrators as well as by the central judicial authorities in Beijing, in other affairs involving kinship bonds[[57]](#footnote-57). As in these other instances, though, here too, time seems to have brought about a tightening of the penal approach to crimes committed inside the family sphere.

A case dating back to 1739, in which a certain Li Wenkui 李文魁 killed his elder brother Li Wenzheng 李文正, may serve as a first example. The details of the affair are not central: partly drunk, the two got into a brawl, Li Wenzheng hitting the younger Li Wenkui who resisted the temptation to respond until he couldn’t take it anymore, finally resulting in the death of the elder. For this deed, which involved as central a relation as the one we saw at play in the introduction when discussing Deng Tingmei’s crime, Li Wenkui was first sentenced to immediate decapitation, according to the statute on younger brothers killing the elders. But what the investigation revealed was that Li Wenkui had never known he and Li Wenzheng were uterine brothers: their mother having died when Li Wenkui was still very young, he had been adopted into another line of the Li family, a fact no one had ever mentioned in front of him. Based on this finding, the governor of Zhili, Sun Jiagan 孫嘉淦 (1683-1753), proposed to mitigate the sentence by resorting to the notion of *fanshi bu zhi*. The proposal, accepted by the Board of Punishments, should have led to Li Wenkui being sentenced to strangulation after the Assises, according to the statute on homicides resulting from brawls. But considering the kin relationship involved, neither governor Sun, nor the Board’s administrators could consider such a solution as acceptable. Li was thus condemned to decapitation after the Assises, and, as a bannerman, sent to the jails of the Board to wait for the revision procedure of the next fall[[58]](#footnote-58).

This case is revealing, for it shows the force of kinship in the face of the law: even though he had never known about his family bond to Li Wenzheng, and even though the judicial administration was ready to acknowledge this fact by resorting to the provisions on “unawareness” as expounded in statute 35, it was unthinkable for its members to treat Li Wenkui in the way the statute actually provided for, that is, as a man whom no direct family bond linked to his victim. Among our cases, this precise one is also somewhat peculiar, because of the nature of the bond affected. Its “severity” was not exactly typical of the way similar affairs were taken into consideration at the time, and up to the first decades of the nineteenth century. In 1754 and 1764, in two cases where a junior killed a senior (in the first instance a paternal uncle and in the second an elder cousin), both in similar contexts – at night time, while the defendant was watching the crops in the fields, the senior came to steal and was killed in the fight that ensued –, the two defendants, on the basis of their “unawareness”, were sentenced to strangulation after the Assises, in accordance with the same statute 388 mentioned above, which provided that in case a criminal was killed while *not* resisting his arrest, the perpetrator was to be convicted following the provisions for homicides resulting from a brawl (*dousha* 鬥殺)[[59]](#footnote-59).

A series of such cases compiled by Wang Jinzhi 汪進之 in his *Shuotie bianli xinbian* 說帖辨例新編[[60]](#footnote-60), tends to show that up to the first decades of the nineteenth century, the judiciary continued to consider such cases in which generational seniors were discovered, at night, stealing – crops, oxen, or other – and killed by a junior while trying to escape, worthy of a form of clemency with regard to the kinship relation involved: the perpetrators were either condemned to strangulation after the Assises, or, more lenient yet, spared the death penalty all together and sentenced to penal servitude (*tu* 徒), generally for a period of three years. This position officially revised in 1819, the last year of the Jiaqing emperor’s reign. That year, a similar case reported from Jiangxi province prompted a thorough revision of such affairs in the wake of the compilation of new substatutes (*zuanxiu li shi* 纂修例時) at the Board, work which led to the adoption of a uniform mode of treatment. This provided that from then on, affairs of the sort where a theft was suspected, leading to a homicide (*yi zei zhi bi* 疑賊致斃), if they involved ordinary individuals, they would be dealt with through the statute on homicides resulting from brawls, but if family relations were involved, the sentence was to be drafted in accordance with them (*dang an fuzhi keduan* 當按服制科斷)[[61]](#footnote-61). As far as the judicial practice was concerned, this lead juniors convicted in such instances to being condemned to immediate beheading. The possible mitigating circumstances could thereafter be added as a note at the end of the memorial proposing the sentence, in order for the Board to review them in view of possibly applying some leniency. The recourse to the notion of *fanshi bu zhi* was moreover strictly limited to such circumstances described as leading to “rightful outrage” (*yifen* 義忿) from the part of the junior party. The example provided is that of a junior subjected to a rape by a senior, resulting in the former killing the latter[[62]](#footnote-62).

As later cases tend to show, the 1819 procedural turn seems to have had a definite impact. Cases of the sort we have analyzed above appear thereafter mainly dealt with through these new provisions, and whereas the *fanshi bu zhi* notion does not completely disppear, its mitigating potential, at least in kin related cases, was not acknowledged anymore as it had been in the course of the eighteenth and early nineteenth centuries[[63]](#footnote-63).

**Conclusion**

I have tried to approach, here, the question of criminal intent as it has been developed in China’s traditional legal culture, through the specific notion of *fanshi bu zhi* 犯時不知 (“being unaware [of the seriousness of one’s crime] whilst committing it”). By and large, this notion has been left aside from previous analysis up to now. As I have endeaoured to show, it appears quite early in the official legal codes of the Chinese empire and has remained included in them until they were discarded all together in the early twentieth century. When studying the way it was taken into account in the everyday judicial practice, one can point out several aspects. First, even though it does not seem to have been essential to the running of the judiciary, it was resorted to quite regularly in a series of instances, at least up to the first decades of the nineteenth century. In particular, it was quite commonly used in cases of affrays inside the family structure, where its mitigating potential allowed to set aside the status of the senior parties and thus limit the criminal liability of junior defendants.

Another interesting point is the proximity this notion maintains with that of negligence (*wu* 誤) in the construct of criminal intent. Like in the case of negligence, the effective outburst of violence which characterizes the acts which the notion of fanshi bu zhi encompasses, makes it difficult, inside the specific system of intentionality devised in the traditional Chinese context, to define such acts as unintentional. Their violent dimension points to a will to do harm, which could not be related to purely unintentional deeds.

Finally, an analysis of extent cases during the adjudication of which the notion was called into play tends to show that its use was redefined in the first decades of the nineteenth century. In the process, its mitigating potential was effectively limited, especially in the cases it was most often resorted to, those involving junior members of a family having killed “by unawareness” a senior. This tendency appears to reflect other similar trends at the time, most notably in the way insane criminals were more strictly brought under the yoke of the law, especially those having done harm inside their family structure. Thus, to get back to our initial starting point – in other words the affair of Deng Tingmei –, whereas what preceeds would seem to indicate that the notion of *fanshi bu zhi* brought forth by governor Yang at the time in order to try to clear Deng of any criminal liability for lack of criminal intent could indeed have been taken into account by the Board of Punishments in Beijing, had it wanted to, its actual strict position, stemming in good part from the actual kinship link involved in this instance (the brotherly bond, one of the most fundamental), was to become dominant later on, seemingly setting the tone for Qing China’s traditional judiciary in its consideration of crimes committed inside the family structure.

1. For the case, see Hong Hongxu 洪弘緒, Rao Han 饒瀚 (comp.), *Cheng’an zhiyi* 成案質疑, 1755 edition, *j*. 20, “Fights and brawls”, p. 35a-37b. [↑](#footnote-ref-1)
2. All along the Qing dynasty, up until the first years of the twentieth century, individuals suffering from a mental condition convicted of having killed their parents or grand-parents were systematically sentenced to live dismemberment (*lingchi* 凌遲). See my “Insanity and parricide in late imperial China (eighteenth-twentieth centuries)”, *International Journal of Asian Studies*, 10, 2 (2013), pp. 115-141. [↑](#footnote-ref-2)
3. As is well known, the traditional Chinese penal system distinguished between crimes committed by commoners and crimes committed inside the kinship structure. One guiding principle in this last instance was that younger generations were seen as inferior in status when compared to elder generations. Adjudicated according to the respective status of the parties involved, a crime committed by a member of a younger generation against an elder would thus be systematically meted out by a more severe punishement than in the reverse situation. This difference can be vividly grasped in the following extreme cases: whereas parricide was systematically meted out by dismemberment, infanticide on the contrary would in most cases be meted out by a far more lenient punishment, and almost never by capital punishment. For interesting insights on these questions, see Françoise Lauwaert, *Le meurtre en famille. Parricide et infanticide en Chine (XVIIIe-XIXe siècles)*, Paris, Editions Odile Jacob, 1999. [↑](#footnote-ref-3)
4. In *The Quality of Mercy: Amnesties and Traditional Chinese Justice*, Honolulu, University of Hawai‘i Press, 1981, p. 2, Brian McKnight dates the influence of this notion back to the founder of the Western Zhou dynasty in the twelfth century BC. See also Timothy Brook, Jérôme Bourgon, Gregory Blue, *Death by a Thousand Cuts*, Cambridge (Mass.), London, Harvard University Press, 2008, chap. 1, who provide interesting developments on this topic. [↑](#footnote-ref-4)
5. For insights on the debate which developed around this issue see Karl Bünger, “The punishment of lunatics and negligents according to classical Chinese law”, in *Studia Serica*, vol. IX-2 (1950), p. 1-16 ; Anthony Hulsewé, *Remnants of Han Law: Introductory Studies and an Annotated Traanslation of Chapters 22 and 23 of the “History of the Former Han Dynasty”*, Leiden, Brill, 1955 ; Nakamura Shigeo 中村茂夫, *Shindai keihô kenkyû* 清代刑法研究 (Studies on Qing Criminal Law), Tokyo, Tôkyô Daigaku shuppankai, 1973 ; Martha Li Chiu, “Insanity in imperial China : a legal case study”, in Arthur Kleinman and Tsung-yi Lin (eds.), *Normal and Abnormal Behaviour in Chinese Culture*, Dordrecht, Boston, London, D. Reidel Publishing Co., 1981 ; Vivien Ng, *Madness in Late Imperial China*, Norman (Okla.), London, Universizy of Oklahoma Press, 1990. [↑](#footnote-ref-5)
6. One that I have found nowhere else developed in the cases I have worked on for the research mentioned above, note 2. [↑](#footnote-ref-6)
7. Here, my numbering of this statute follows that established by Huang Ching-chia in his edition of Xue Yunsheng’s *Duli cunyi* (5 vols., Taipei, Chinese Materials and Research Aids Service Center, 1970). When referring to the *Ming Code* (大明律) or different editions of the *Qing Code*, I resort to its actual number in the succesion of statutes of each edition. [↑](#footnote-ref-7)
8. See Jiang Yonglin, *The Great Ming Code*, Seattle, University of Washingont Press, 2004, p. 43 (where the statute is number 37). [↑](#footnote-ref-8)
9. See Xue Yunsheng, *Dulin cunyi* (Huang Ching-chia edition), p. 134. [↑](#footnote-ref-9)
10. See *Da Qing huidian shili*, 1899 edition, Shanghai, Shangwu yinshuguan, 1909, *j*. 805, p. 12ab (where we can see that this decision was codified in 1727); Xue Yunsheng, *op*. *cit*., *j*. 34, p. 849. [↑](#footnote-ref-10)
11. This expression can be found in many judicial reports devoted to homicides by mentally ill persons, to the point that in can be considered as a sort of juridical *locus classicus* of such affairs. See for example Zhang Guangye 張光月 (comp.), *Li’an quanji* 例案全集, 1737 edition, *j*. 22, “Homicides”, p. 26ab. [↑](#footnote-ref-11)
12. Hong Hongxu, Rao Han (comp.), *op*. *cit*., *j*. 20, p. 35b-36a. [↑](#footnote-ref-12)
13. *Ibid*., p. 35b. [↑](#footnote-ref-13)
14. Below I will resort to the pinyin rendering of this expression, *fan shi buzhi*, which has the advantage of being concise. [↑](#footnote-ref-14)
15. See Jiang Yonglin, *op*. *cit*., p. 43-44 ; P.-L.-F. Philastre, *Le Code annamite*, 2 vols., Paris, Ernest Leroux Editeur, 1909 (Taipei, Ch’eng-wen Publishing Co., 1967), vol. 1, p. 256-258. [↑](#footnote-ref-15)
16. Jiang Yonglin translates the statute’s title as “Specific articles having different regulations for punishment” and Philastre by the French “Du cas où l’article applicable contient quelque disposition différente des règles de définition”. [↑](#footnote-ref-16)
17. This ideal could never be fully achieved of course, if only because of the innumerable variety of human criminal conduct. But the underlying principle is noteworthy, for, by advocating the necessity, in the judicial process, to correlate criminal acts to predefined prohibitions – i.e. penal denominations – and from there to predefined and clearly and precisely expressed punishments, it strongly echoes with some cardinal notions of the modern legal tradition, first and foremost the legality principle. On the latter in relation with pre-modern China’s legal tradition, see Jérôme Bourgon, “The principle of legality and legal rules in the Chinese legal tradition”, in Mireille Delmas-Marty and Pierre-Etienne Will (eds.), *China, democracy, and law: a historical and contemporary approach*, Leiden, Boston, Brill (Handbook of Oriental Studies. Section 4, China ; vol. 26), 2012. [↑](#footnote-ref-17)
18. See *op*. *cit*., p. 43. [↑](#footnote-ref-18)
19. More commnly used as 探求. [↑](#footnote-ref-19)
20. See *Da Minglü jijie fuli*, *j*. 1, p. 85b-86b. [↑](#footnote-ref-20)
21. See *Dulü suoyan*, reprint Beijing, Falü chubanshe, 1999, *j*. 1, p. 55-56 [↑](#footnote-ref-21)
22. I use here Wang’s phrasing, which is a bit different than that found in the Code: *shi ying zou bu zou* 事應奏不奏, which is found as statute 68 in the Ming Code (65 in the Qing Code). [↑](#footnote-ref-22)
23. See Wang Kentang, *Wang Yibu xiansheng jianshi* 王儀部先生箋釋, *j*. 1, p. 236-239. [↑](#footnote-ref-23)
24. See *op*. *cit*., p. 256. The italics here feature the interlinear additions of the Qing phrasing. [↑](#footnote-ref-24)
25. As far as translation work is concerned, these are two of the views shared by the group of scholars who actively take part in the research program “Legalizing space in China”. One of the team’s goals is precisely to provide French and English translations of parts, if not all, of late imperial China’s legal codes. For more information, see [www.lsc.chineselegalculture.org](http://www.lsc.chineselegalculture.org) [↑](#footnote-ref-25)
26. See Huang Entong 黃恩彤 (comp.), *Da Qing lüli anyu* 大清律例按語, 1847 edition (“boards stored at the Haishan xianguan” 海山仙館, in Canton), *j*. 1, p. 131a-132a ; Philastre, *op*. *cit*., p. 257. [↑](#footnote-ref-26)
27. The expansion of the number of codified sub-statutes (tiaoli 條例) starting from the first half of the eighteenth century may well have been spurred by the systematization of the codification process, which seems to have originated in the late Ming, before gaining considerable momentum during the Yongzheng and early Qianlong reigns. But it can also be considered as a reflection of the legislators’ effort to frame the diversity of criminal behaviour. [↑](#footnote-ref-27)
28. Taken in the strict sense, the terms *shu* 叔 and *zhi* 姪 (or 侄) mean uncle and nephew belonging to the patrilineal group, as Jiang Yonglin aptly points out in his translation. [↑](#footnote-ref-28)
29. For some insights on this massive production, see Pierre-Etienne Will (ed.), *Official handbooks and anthologies of imperial China: A descriptive and critical bibliography* (work in progress). [↑](#footnote-ref-29)
30. See *Dulü suoyan*, *j*. 1, p. 56. [↑](#footnote-ref-30)
31. See Huang Entong (comp.), *Da Qing lüli anyu*, *loc*. *cit*. [↑](#footnote-ref-31)
32. No original edition of this code seems to have survived, but its contents can be found, among others (?), in Xue Yunsheng’s 薛允升 (1820-1901) famous combined study of the Tang and Ming codes: *Tang Ming lü hebian* 唐明律合編 (reed. Beijing, Falü chubanshe, 1998). The statute appears here as number 49. [↑](#footnote-ref-32)
33. See *Tang Ming lü hebian*, p. 76. Wallace Johnson’s translation goes as follows:

“Specific articles having different regulations:

- All cases in which a specific article has a different regulation from that in a principle follow the specific article.

- However, where more than one article may be appropriate, whichever has the heaviest punishment will be followed.

- Cases that are basically more serious but ib which the circumstances are not known at the time the crime is committed are sentenced following the ordinary law. However, those cases that are basically less serious are sentenced according to the basic circumstances.”

See his *The T’ang Code. Volume 1, General Principles*, Princeton, Princeton University Press, 1979, p. 252-254. Yet again, I would amend here the translation of the second paragraph of the statute in the following way : “Even though the specific article includes a penal denomination, if the act perpetrated is more severe, follow the provisions for the more serious [crime]. [↑](#footnote-ref-33)
34. *Tang Ming lü hebian*, p. 88, where Xue provides parts of the *Shuyi*’s comments. For a complete translation of these comments, see Wallace Johnson, *loc*. *cit*. [↑](#footnote-ref-34)
35. See Wallace Johnson, *op*. *cit*., p. 254. [↑](#footnote-ref-35)
36. Archeological finds, recent and less, have dug up a host of legal and administrative documents, some going as far back as the Former Han dynasty (206 BCE - 8 CE) at least. But to my knowledge, none has been considered as constituting an example of a complete legal and administrative code, of the likes of the Tang code and its successors. [↑](#footnote-ref-36)
37. Neither statute 37 of the Ming code, nor statute 35 of the Qing code ever saw a substatute directly linked to them codified. [↑](#footnote-ref-37)
38. For the complete text of Qing statute 295 (as it appears in the 1740 edition of the Code), refer to <http://lsc.chineselegalculture.org/eC/DQLL_1740/5.6.4.295>. Hereafter, the links to specific statutes will similarly be based on the 1740 edition of the Code. [↑](#footnote-ref-38)
39. I follow here the information in Philastre, *op*. *cit*., p. 258, translating comments to the Qing code I have not yet been able to identify in the Chinese sources. [↑](#footnote-ref-39)
40. This statute appears at rank 25 in the Ming code. For the complete text of the Qing version, refer to <http://lsc.chineselegalculture.org/eC/DQLL_1740/5.1.2.26>. As a reminder, paragraph two of the *Bentiao bie you zuiming* statute asserts that if a wrongdoing was committed in order to avoid indictment for another more serious one, the sentence must follow the provisions for the most serious. [↑](#footnote-ref-40)
41. For example, in the case the two (or more) crimes were of similar seriousness, the sentence was to be edicted only according to the provisions for one of the two. And if the culprit had already been sentenced for a crime at the time of the discovery of another one, more serious, he committed, the magistrates were not to simply add the adequate punishment for the second crime to the first conviction, but were required to balance the new sentence by taking into account the first punishment already meted out. [↑](#footnote-ref-41)
42. As always, it would be interesting to further investigate whether this principle was actually upheld in practice. [↑](#footnote-ref-42)
43. See Philastre, *op*. *cit*., p. 258. [↑](#footnote-ref-43)
44. I borrow the translation to Jiang Yonglin (in the Ming code, this staute apperas at rank 22). For the text of the statute, see <http://lsc.chineselegalculture.org/eC/DQLL_1740/5.1.2.23>. [↑](#footnote-ref-44)
45. Here again, I brrow the translation from Jiang Yonglin (the statute is ranked 21 in the Ming code). For the statute itself, see <http://lsc.chineselegalculture.org/eC/DQLL_1740/5.1.2.22>. [↑](#footnote-ref-45)
46. See the last interlinear note of statute 22. [↑](#footnote-ref-46)
47. See <http://lsc.chineselegalculture.org/eC/DQLL_1740/5.6.4.292>. [↑](#footnote-ref-47)
48. See Jiang Yonglin, *op*. *cit*., p. lxii for example. I prefer to use negligent here, in part because I think it fits better with the types of crimes included in this category, and because I use unintentional to render *guoshi*. Both terms, *wu* and *guoshi*, are semantically very close, conveying the meaning of “error”, “mistake”. Also see L. Gabbiani, art. cit., p. 131-134. [↑](#footnote-ref-48)
49. The *locus classicus* for such cases is as follows: a son preparing tea burns himself while pouring the boiling water, thus letting go of the teapot, which breaks on the ground: the mother, rushing over from another room to see what happened, slips on the puddle of water, cuts herself on a shard and dies some days later from an infection. See Françoise Lauwaert, *Le meurtre en famille. Parricide et infanticide en Chine (XVIIIe-XIXe siècles)*, Paris, Editions Odile Jacob, 1999, p. 176-177. [↑](#footnote-ref-49)
50. Archival holdings include Palace memorials (*zhupi zouzhe* 硃批奏摺), copies of Palace memorials by the Grand Council (*lufu zouzhe* 錄副奏摺) and the holding of memorials by the Jilin general (Jilin jiangjun 吉林將軍). All are held in the Number One Archives in Beijng (Di yi lishi dang’anguan 第一歷史檔案館). As for case collections, I have resorted to compendiae of *shuotie* (說帖) as well as more classic case collections, such as the *Xing’an huilan* 刑案匯覽 or the *Cheng’an zhiyi* 成案質疑. [↑](#footnote-ref-50)
51. See *Xing’an huilan* (Beijing, Falü chubanshe reed., 2006), *j*. 6, p. 397-398. It was drawn from a Ministry pf Punishment *shuotie*, dated 1811. [↑](#footnote-ref-51)
52. This affair actually gave rise to a series of infractions during the adjudication process, which led to false testimonies and finally to the death in jail of two of the persons convicted, Ma Diancheng and an individual named 孫得潮. Since the details of this affair are not utterly important here, I let the interested reader turn to the original source for more information. [↑](#footnote-ref-52)
53. *Xing’an huilan*, *loc*. *cit*., p. 395. The blind man was condemned receiving thirty blows of the small stick (chi 笞). We are not told if, as suggested by statute 22 on disabled committing crimes, he was able to redeem is punishment. [↑](#footnote-ref-53)
54. *Ibid*., p. 395-397. See also Dai Guoyuan 戴郭元 (comp.), *Xinzuan Xingbu shuotie leibian* 新纂刑部說帖類編, *j*. 5, p. 39a-41b. The governor based his claim about the family connection on the fact that the principal public officier involved had actually hired his underling, a relation he thus compared to that of a master and his apprentice (or dependent). [↑](#footnote-ref-54)
55. See *Xing’an huilan*, *loc*. *cit*., p. 395. [↑](#footnote-ref-55)
56. See *Cheng’an zhiyi*, *j*. 1, “Bentiao bie you zuiming”, p. 1ab. [↑](#footnote-ref-56)
57. See L. Gabbiani, art. cit., p. 117-123. [↑](#footnote-ref-57)
58. See *Bo’an xinbian* 駁案新編, *j*. 3, p. 12a-15b. [↑](#footnote-ref-58)
59. See respectively Min Wobei 閔我備 (comp.), *Cheng’an xinbian erji* 成案新編二集, QL 28 edition, *j*. 2, p. 77a-78b ; *Bo’an xinbian*, loc. cit., p. 7a-11b. [↑](#footnote-ref-59)
60. See *j*. 34, p. 1a-5b. [↑](#footnote-ref-60)
61. *Ibid*., p. 4ab. [↑](#footnote-ref-61)
62. *Ibid*., p. 4a. [↑](#footnote-ref-62)
63. See memorial 03-3903-034, dated DG 26.5.1 ; memorial 04-01-26-0074-035, dated TZ 4.7.29 ; memorial 04-01-26-0079-053, dated GX 21.4.13 [↑](#footnote-ref-63)