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## HOMOSEXUAL OFFENCES IN CH'ING LAW

BY

M. J. MEIJER

The *Ta Ch'ing Lü Li* 大清律例 seems to have embraced the principle that sexual intercourse could only be permitted among married persons. Marriage was taken in a broad sense, including concubinage and the relationship with one's slave girl. All other intercourse was punished, fornication by beating with the heavy bamboo from 80 to 100 strokes, depending on whether the woman was married and the fornication had taken place at home or whether she had been conducted to another place.<sup>1</sup> When the woman had consented both parties were punished.<sup>2</sup> The offence was only prosecuted when the parties had been caught in the act.<sup>3</sup> Fornication with a child less than 12 years old was considered rape.<sup>4</sup> Rape was punished by strangulation subject to revision, attempt at rape by permanent banishment and bambooning.<sup>5</sup> Rape with murder entailed beheading without delay. These provisions were already included in the Ming Code.

As far as I know, the *Ta Ch'ing Lü Li* was the first code which introduced provisions against homosexual intercourse. Whether before that time homosexuality had been an offence and the provisions on heterosexual intercourse had been analogically applied is not certain but very probable, at least for the more serious crime of rape. The first provision on buggery is first found in 1679, it was amended in 1707, and revised in 1733, 1740, 1819 and 1852. In its

<sup>1</sup> *Ta Ch'ing lü-li hui-chi pien-lan*, (henceforth Code) ch. 33, pp. 1a-2b. Cf. Bibliography. A *li* of later date in this section (K'ang-hsi 19th year, 1680, revised in 1724 according to the *Ta Ch'ing lü-li t'ung-k'ao* Ch. 33, pp. 2b-3b), prescribed punishment for fornication by military personnel and civilians of one month wearing the change and 100 strokes of the heavy bamboo no matter whether the woman was married or not or whether ordinary fornication or fornication after elopement had taken place. The *li* originally referred to fornication by bannermen with women in the household of officials, military officers and other bannermen. Hsüeh Yün-sheng in his book *Tu li ts'un i* p.1081 is of the opinion that it should be abrogated.

<sup>2</sup> Code Ibid.

<sup>3</sup> Ibid. Official interlineary comment.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

final version, which is found in the 33rd Chapter of the Code, called "Fornication" (*Fan-chien* 犯姦) it reads as follows:<sup>6</sup>

I. Evil rascals (*ou-t'u* 惡徒) who by force seize sons and younger brothers of decent citizens and commit buggery upon them (*chi-chien* 雞姦) shall whether they killed their victims or not be sentenced in accordance with the *li* on dissolute criminal elements (*kuang kun* 光棍), the ringleaders shall be beheaded without delay, the accomplices who have also committed buggery shall be sentenced to strangulation subject to revision, the others who took part in the offence shall be deported to Heilungkiang and serve as slaves to the armoured soldiers.

II. a. Those who, though not acting in conjunction, have committed buggery with and killed the son or younger brother of a decent citizen as well as those who have abducted a young boy below the age of ten and by force committed buggery upon him shall as evil dissolute elements be beheaded without delay.

b. When the boy had not yet been twelve years of age but above ten, the punishment shall be beheading subject to revision.

c. When the boy had given consent, the offender shall be considered as those who have fornicated with a young girl of twelve years old or younger and be sentenced for rape to strangulation subject to revision.

III. a. When only one person has committed buggery by force without inflicting injury, he shall be sentenced to strangulation subject to revision, but when the victim had been injured, though not fatally, the sentence shall be beheading subject to revision.

b. Those who commit attempt at buggery with violence without inflicting injury shall be punished by 100 strokes of the heavy bamboo and permanent banishment at 3000 *li*. When injury has been inflicted by means of a knife, the sentence shall be strangulation subject to revision.

IV. Those who commit buggery with consenting males shall be punished in accordance with the *li* on military men and civilians who commit fornication namely by 100 strokes of the heavy bamboo and wearing the cangue for one month.

V. When there are indications that a false accusation of buggery has been lodged, the person who lodged the false accusation shall be punished by the punishment for the offence of buggery (*fan-tso* 反坐) when at the trial the truth has been revealed. Capital punishment in such cases shall be reduced by one degree, only when the punishment would have been beheading without delay shall he be sentenced in accordance with the *li* on rascally knaves who stir up trouble and commit violence and be punished by military banishment at the extreme borders at 4000 *li*.<sup>7</sup>

These subtle distinctions in punishment naturally resulted from the desire to establish for every offence its exact equivalent in punishment. A respectable trait in the code, but an illusion.

<sup>6</sup> *Tu li ts'un i*, no. 366, 3 (henceforth TLTI)

<sup>7</sup> Code Ch. 33, pp. 5a-7a. *Kuang-kun* is a general name for rootless, asocial violent ruffians.

The similarity of the provision with the provisions on heterosexual offences is clear, and probably homosexual intercourse between consenting males would also only be prosecuted when the parties had been caught in the act.

The original text of the provision had been much simpler, as is usual. It had been proposed by the Board of Punishments and approved by the Emperor, it covered only the first paragraph, never mentioned the "other offenders" and buggery between consenting males was punished fornication with a woman with her consent. The reference to the *li* on dissolute criminal elements dates from 1707. Up to 1733 the provision had not been included in the Code, it probably had existed as an administrative directive, a *chang-ch'eng* 章程, in that year it became a *ch'eng-li* 成例. The version of 1740 concurs largely with the text as it has been given above, an attempt by the *Lü-li-kuan* 律例館, the drafting committee of the Board of Punishments, to reduce the punishment for 16 and 17 year old boys who had committed attempt at rape was foiled by protests from the provinces.<sup>8</sup> The amendments of 1819 and 1852 were of minor importance.

Besides this provision, the chapter on fornication still contained two other articles which refer to homosexual crimes. One is a *li* which punishes attempt at rape of a young girl below twelve years or at buggery of a boy of that age by deportation to Heilungkiang and slavery to the armoured soldiers there. It is therefore an extension of the *li* translated above paragraph III, b. It dates from 1767 and the place of banishment has been several times changed.<sup>9</sup> The other *li* is more interesting, it says that when a man had sexual intercourse with a woman or a decent citizen's son or younger brother with their consent, but the woman or the boy had later on offered resistance "for some other reason" and the man had then tried to rape her or bugger him and killed her or him at that time, he would stand trial for homicide be it planned, voluntary homicide or homicide in an affray. This means that because of the previous consent of the victim, the assailant would be sentenced to death subject to revision and not to death without delay. The "other reason" means any other reason but remorse and shame.<sup>10</sup> As the result of the consent at previous intercourse, the partner had lost the reputation of a "decent person."

Before proceeding to the application of these *li*, some general remarks should be made. On the strength of the available material

<sup>8</sup> *Lü-li t'ung-k'ao*, Ch. 33, pp. 5a-6b.

<sup>9</sup> *Ibid.* p. 9b-10a. TLT 366, 7.

<sup>10</sup> TLT 366, 10. The *li* dates from 1775.

it is not possible to conclude to what extent punishment for illicit heterosexual or homosexual intercourse between consenting parties actually was imposed. The requirement that parties ought to have been caught in the act could well result in relatively few sentences for both kinds of sexual intercourse. Furthermore, it should be noted that the punishments were comparatively light and rarely found their way into the collections of largely capital, cases, they were administered at district level. Finally it should be remembered that such cases were generally compounded and rarely came to court. Especially homosexual cases, though homosexuality was tolerated by society to a certain extent, it was certainly not approved of, and offered a splendid opportunity for blackmail. Yet it appears that a shopkeeper could live together with his assistant without sustaining any prejudice in his trade on account of his propensities.

In 1741 the Board of Punishments had to give its opinion on a case in which a homosexual couple had been living together for years. The older man, Cheng Hsiang-sung, one morning had risen early while his companion was still sleeping. When he woke him up, the younger man, Chang Ch'i-wei, playfully pulled the silk cord which kept Cheng's trousers in place and put it around his own neck, offering the ends to Cheng to pull him up. They started romping together, became excited and tumbled down from the bed. Unfortunately the cord became stuck some way or other and tightened around the youth's neck, strangling him. The older man did not immediately realize the danger and when he did, the cord was embedded deeply into the neck and he could not pull it loose until it was too late. Cheng then was tried not for deviant sexual behaviour, but for "homicide in a game" (*hsi-sha* 戲殺) No criticism on their way of life was voiced in the Board's memorandum, the case was handled as any other homicide in a game like sword fighting. Cheng was sentenced to strangulation subject to revision which punishment was in such cases usually reduced to banishment or less.<sup>11</sup>

In some cases the question of consent was irrelevant, namely when the dominating party had been of a higher status than his partner.

One such case happened in 1818 in Hupei. A district director of Confucian studies (*chiao-yü* 教諭) with the title of *chü-jen* 舉人 had been discovered having homosexual relations with a 14 year old pupil. When threatened with accusation, he still had the insolence to threaten the boy's father in return with an accusation for irreg-

<sup>11</sup> *Ch'eng-an hui-pien* (cf. Bibliography) Ch. 19, p-7a.

ularity in the management of the clan. The father was not prepared to condone the teacher's relationship with his son and went to court. The case was reported to the governor, who, apparently afraid, sought the advice of the Board of Punishments, a regular procedure in difficult cases.<sup>12</sup> Such requests were usually handled by the *Lü-li-kuan*. The Bureau in its reply referred to a *li* by virtue of which Confucian teachers who beat and injured their pupils would be considered as near senior relatives, like elder brothers or paternal uncles, and receive nominal punishment, if any. But that provision referred to the situation when there was reason for beating, it could not very well be analogically applied in this case. Moreover, the assimilation with a senior relative could only refer to that particular situation, it would be wrong to consider the teacher in all respects as a senior relative, the rules of mourning did not apply to him. His relation with his pupil was an *i* relation, one of obligation without kinship. It was true, the Bureau said, that in preceding cases of this kind the teacher indeed had been identified with a senior relative, in one case he had fornicated with his pupil's wife, in another he had committed buggery with a ten years old pupil. In the former case he had been sentenced to deportation to Heilungkiang and in the latter to be beheaded. In sexual matters the relationship was not an advantage, it was, by analogy, incestuous. The Bureau was far from happy with the assimilation. The assimilation with Buddhist and Taoist priests or monks was not feasible either. For them the situation was different, there was a *li* against their fornicating in general, an act which they should abstain from. When they had sinned, they had to wear the cangue in their temple for two months, were bamboed with 100 strokes and returned to the laity.<sup>13</sup> Homosexual cases caused no difficulty, the *li* was simply analogically applied "it happened all the time". The Bureau then hit on the solution that Confucian teachers were "teachers of men", like magistrates. When magistrates fornicated with women from the district which they ruled they would be punished two degrees more severely than ordinary mortals.<sup>14</sup> Under that rule the punishment would not exceed temporary banishment. The Bureau

<sup>12</sup> The case is found in the *Hsing-an hui-lan* (henceforth H AHL, cf. Bibliography) Ch. 52 p. 3281-3283. Consulting the Board by communication (used among equals) was regular practice among governors or governors-general. After the Revolution of 1911 the practice was continued between provincial courts and the Supreme Court of Peking (*Ta-li-szu*) cf. H.M. van der Valk, *Interpretations of the Supreme Court at Peking*, Batavia 1949.

<sup>13</sup> Code, Ch. 33, p. 39b.

<sup>14</sup> *Ibid.* p. 36a.

found that punishment too light with a view to the man's attempt at intimidation of the boy's father. Finally they preferred to apply the *li* on "criminal elements who create disturbances and harm the people"<sup>15</sup> which entailed deportation to the extreme borders with military duties. The "stupid pupil" who had curried favour with his teacher by consenting to his wishes was punished by wearing the cangue and being bamboed. Thus the teacher was allowed to retain his head and the pupil received the standard punishment for homosexual activity, or was it rather for toadeating than for being a "hare"?

The preferential treatment of officials in Chinese law is well known, amongst other things they accumulated merit, but there were limits for cases of manifest undignified behaviour. In 1809 an official of the Li-pu 吏部, the Board of Personnel, had been leading a life of debauchery, associating with ruffians and teachers of boxing, besides which he had a homosexual relation with his barber, who kept a "soft pergola" (*kan p'eng-tzu* 乾棚子) meaning a male bordello. The official, however, was not the barber's only client. Out of jealousy, the official mobilized his boxing friends and administered a good hiding to his rival in the barber's favours. The man was injured and the case went to court in Peking, which meant that it was handled by a section of the Board of Punishments. The section was not willing to treat the case as an ordinary case of homosexuality or of injury in an affray, but requested the Emperor to issue a rescript authorizing the official to be stripped of his rank and deported to Urumchi, the barber was punished by three years banishment for keeping the establishment<sup>16</sup> and the boxing friends for taking part in an affray and inflicting injury to the same punishment as the barber.<sup>17</sup>

Bordellos were often held by barbers and keepers of bathhouses and the law contained a special *li* for the male variety.<sup>18</sup>

Some legal difficulty was caused by a case of 1824, when a Buddhist priest had forced a ten years old boy to have homosexual intercourse with him. The boy, who was probably mentally deficient, admitted to having been abused by someone else before. As such he was not a decent person any longer and the provision for rape would not be applied. The Commander-in-chief of the Chinese (Green) Army of Peking, who prosecuted the offender, however, refused to punish him for intercourse with consent only and applied the pro-

<sup>15</sup> Code Ch. 25, p. 2a.

<sup>16</sup> TLTJ 375-02.

<sup>17</sup> HAH, Ch. 52, p. 3266.

<sup>18</sup> *Ibid.* Ch. 52, pp. 3285-3286.

vision for rape with reduction of one degree to permanent banishment, 100 strokes of the heavy bamboo and return to the laity, which was just deserts for the "lewd boy-buggering rascal".<sup>19</sup>

Buddhist monks were far from popular with the law. In 1819 a case happened in which a monk, Tseng-liang, had regularly had homosexual relations with two of his colleagues. At some occasion he had quarrelled with one and beaten and injured him. At the advice of his other friend, he fled and started to wear woman's clothes and was given the advice that were he ever caught, he should say that he had been subjected to homosexual relations with the other monk since he had been twelve. He was caught and followed the advice. Travesty as a woman together with "solliciting money and confusing the people's minds" was an offence for which generally the *li* on sorcery<sup>20</sup> was applied, which provided for a punishment of strangulation subject to revision. The Commander-in-chief of the Chinese army at Mukden could not sentence Tseng-liang under that provision as he had wanted to, because he had never sold talismans or practiced sorcery, but he had dressed up as a woman and so confused the people's minds as well as practiced homosexuality and therefore his punishment was reduced by one degree to banishment for life, 100 strokes of the heavy bamboo and wearing the cangue for two months. The monk who had advised him to lodge the false complaint that he had been forced to have homosexual relations from his 12th year onward by the one who had been beaten up was prosecuted for instigating false accusation of a crime which would have led to capital punishment and was also banished and bamboosed.<sup>21</sup> Travestites apparently were severely prosecuted, not so much because of homosexuality but because their activities were often narrowly related with sorcery and deceit. Whether they had committed heterosexual or homosexual offences made no difference. In 1807 the Board of Punishments sentenced a man who had entertained homosexual relations with a young man who was apparently of age, to be strangled without delay, because he was a "fairy fox" (travestite), practiced sorcery and diagnosed illness by gazing into the smoke of incense, his homosexual partner was sentenced to deportation because he had assisted the man in sorcery. A year later another, also a travestite but not homosexual, was punished the same way.<sup>22</sup>

As we have seen, the *li* punished attempted rape of a young boy below twelve years of age by deportation to Heilungkiang as a slave

<sup>19</sup> *Ibid.* Ch. 52, p. 3266.

<sup>20</sup> Code Ch. 16, p. 21a.

<sup>21</sup> HAHN Ch. 10, pp. 822-823.

<sup>22</sup> *Ibid.*

to the armoured soldiers. There are several cases in the collections.<sup>23</sup> When the child had been very young and had moaned, the offender sometimes, seized by feelings of pity, had abandoned his designs halfway or he had stopped because he feared that the noise would be heard. Such facts earned him the qualification that he was not a completely hardened criminal or that he still was “capable of fearing the law.” In such cases practice allowed the provincial authorities to insert a plea for mercy in an appendix to the memorial by which they reported the crime to the emperor, but the request could only be to change beheading without delay into beheading subject to revision and the chances that the man would retain his head were slim.<sup>24</sup> When the boy had been between 12 and 15 years old, the *li* on attempted rape of a woman was applied by analogy and the punishment amounted to 100 strokes of the heavy bamboo and wearing the cangue for a month.<sup>25</sup> When attempts had been made by several persons together, the law on attempts at rape by turns (*lun-chien* 輪姦) was applied and all persons involved except the victim were deported.<sup>26</sup>

It is entirely in accordance with the Chinese sense of responsibility to hold a person accountable for indirect consequences of an offence which he could not have foreseen. A tragic example is a case which happened in Peking in 1824. Meng K'ai had had homosexual relations with Meng Hsiao-p'o with the latter's consent, his age is not mentioned. When Meng Ying-ch'uan, Hsiao-p'o's father, had discovered the affair “his heart was full of anger and hate”. When later he saw the two again whispering together, his anger flared up again and he beat his son to death. Meng K'ai was held accountable for the fate which had befallen his lover, though he was not punished for homicide, but by applying the *li* which punishes an adulterer by 100 strokes of the heavy bamboo and temporary banishment for three years when the adulteress had been killed by her husband<sup>27</sup> In another case an attempt had been made to rape a nine years old boy. The offender should have been sent to Heilungkiang, but the boy had gone to the offender's father and told the story. When the

<sup>23</sup> cf. note 9.

<sup>24</sup> HAML *Hsü-pien* (cf. Bibliography) Ch. 28pp.4421–4423, several precedents are referred to. The law does not especially refer to this possibility, but it seems to have been allowed in practice. Cf. also pp. 4419–4421, and 4423–4424.

<sup>25</sup> HAML Ch. 52, p3268

<sup>26</sup> Ibid. p. 3267.

<sup>27</sup> HAML *Hsü-tseng* (cf. Bibliography) Ch. 8, p. 4279. The *li* is found in the Code Ch. 26, pp 2a-3b. The *li* was only applicable when the woman had been killed some time after the adultery had been committed.

boy's father had taken the case to court, the offender's father had gone to the boy's house and rebuked the father, not satisfied with that, he had stood before the house shouting abuse. The boy's father was so annoyed with his loss of face, that he strangled his own son. The original offender was held responsible for the boy's death and had his punishment increased to military banishment in an unhealthy region.<sup>28</sup>

Another kind of indirect fatal consequences of homosexual relations is found in attempts to force triangle situations. In 1824 an official in Peking had entertained a steadfast relation with his hired labourer. Then he had suddenly been visited with the idea that his wife should also participate in their sex life, but when he twice had attempted to force her and beaten her when she refused, the lady had committed suicide. The considerations of the section of the Board which handled the case were as follows:

"The fact that the offender had homosexual relations with his hired labourer earns him already the reputation of being a disgrace to the corps of officials. On top of that he ordered I-lan (the labourer) to fornicate with his wife which entirely destroys the relation between husband and wife. When we, because he beat his wife at those occasions apply to him the *li* on mothers-in-law who force their daughters-in-law to join in debauchery together with them<sup>29</sup>, we feel that the circumstances still float above the law [in other words, the law does not cover the facts] and it would not be sufficient punishment for such wicked officials and for protecting the people's morals. The official must be judged by the *li* on mothers-in-law who force their daughters-in-law into engaging in prostitution and sentenced to strangulation subject to revision.<sup>30</sup> I-lan, who followed his order to lay down with his employer's wife, not only did not refuse to do so but even secretly desired to commit the act. In accordance with the *li* on labourers who sport with the wives of their employers without accomplishing their purpose<sup>31</sup>, he shall be sent into military banishment in an unhealthy region.

The decision of the Board's directorate was that I-lan's punishment was still insufficient, they sent him as a slave to the Mohamedan regions. The wife was recommended for a posthumous honorific pennant.<sup>32</sup>

Such cases were no exception, we find three of them in the period from 1804 to 1824 in the Hsing-an hui-lan, but there are earlier examples in other collections.<sup>33</sup>

<sup>28</sup> HAML Ch. 52, p.3264.

<sup>29</sup> Code Ch. 26, p. 153a.

<sup>30</sup> *Ibid.*

<sup>31</sup> Code Ch. 33, p. 32b. The punishment for the accomplished act was beheading without delay.

<sup>32</sup> HAML Ch. 33, pp. 2172-2173

<sup>33</sup> HAML Ch. 33, pp. 2171-2172. In a case of 1745 the partner who had

Protest suicides by young people who had been subjected to homosexual rape, accomplished or attempted, seem to have occurred with some regularity as well. Three cases are given in 14 years. Attempt followed by the victim's suicide was visited by strangulation subject to revision with classification for actual execution<sup>34</sup>, the accomplished act by beheading subject to revision with the same classification. Another example is found in 1827. In such cases, however, the burden of proof became important. In all handbooks for magistrates we find warnings not to rely on unsubstantiated statements in cases of rape, fornication or adultery, because the offences were perpetrated in secrecy and seclusion and the facts were mostly difficult to prove. What was true for the heterosexual offences also applied to the homosexual ones. False accusations were the order of the day. The considerations in the following case therefore are interesting. The Shansi section of the Board of Punishments had to comment on a case which happened in 1830.<sup>36</sup> The shopkeeper Kao Chien-shun had two young people in his service, a cook by the name of Tu and a shop assistant, Yü. In the evening Kao spent usually some time talking with the young men in the room upstairs which they shared. One night when he came upstairs Tu was already asleep, but Kao told Yü to wake him up in order that the three of them could have a chat. When Tu did not respond soon enough, Kao in jest pulled the covers back and together with Yü sniggering commented on the whiteness of Tu's naked buttocks. The result was that Tu became very angry, he shouted that such talk would make him lose face and insulted Kao. Yü separated them and told them to apologize and go to bed. A few days later Yü told the story as a joke to a friend of his, but somehow the tale was reported back to Tu, who took the matter so seriously that he cut his throat. The case came to court and Kao was sentenced to three years temporary banishment by applying analogically the *li* on those who held obscene conversation in front of a woman who then committed suicide for anger and shame<sup>37</sup>. A reduction of one degree had been allowed in view of the circumstances.

The Board's directorate considered, however: "When men are

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married killed his former lover when he wanted to fornicate with his wife. Sentenced for planned homicide. *Ch'eng-an hui-pien* Ch. 17 p. 85a.

<sup>34</sup> HAHL Ch. 35, p. 2241.

<sup>35</sup> HAHL Ch. 35pp. 2241, 2242 For an earlier case (1745) *Ch'eng-an hui-pien* Ch. 19, p. 117a.

<sup>36</sup> *Ch'iu-yen chi-yao* (cf. Bibliography) II, p. 897.

<sup>37</sup> Code Ch. 26, p. 152a. The case is found in HAHL Ch. 35, pp 2241-2242

living together they inevitably harbour grudges against one another, they tell each other ribald jokes, enjoy obscene talk and play practical jokes upon each other. Among men the rules of propriety are relaxed. The *li* in question only refers to women." The Board further considered that Kao used to jest and laugh with his personnel, they poked fun at each other. The present was only a case of light banter, moreover, Yü had also been present. Kao had had no homosexual designs. Tu had been ashamed only "because Yü had talked to others. When we assume that Kao had caused him to commit suicide, 100 strokes of the heavy bamboo and the cangue for one month are amply sufficient punishment." (He could probably redeem the punishment as well).

From causing suicide, the cases lead us to homicide in connection with homosexuality. These are by far the majority. A small part consists of blackmail cases, where the blackmailed party, usually the older man, kills the blackmailer who had earlier consented: Such cases were generally judged as intentional homicide (*ku-sha* 故殺), the provocation was not considered an excuse. The offender was sentenced to beheading subject to revision and in practice classified for actual execution.<sup>38</sup>

By far the greater part of the cases are cases of self-defence, where a young man or a boy resists an older man who assaults him with the intent to have homosexual intercourse.

Homicide in self-defence was very rarely acknowledged as an excuse in Chinese law. When the assailant himself had been a serious criminal and he had resisted arrest arms in hand, the prosecuting party was considered to have committed *k'o-sha* 科殺 and would not be prosecuted. In most other cases killing a person guilty of some crime was called *shan-sha* 擅殺, unauthorized homicide, which was not condoned but sometimes could be a mitigating circumstance and the law allowed reduction of punishment. *Shan-sha* has an element of arrogance, taking the law in one's own hands, being presumptuous, disregarding another person's life even when he had been only a criminal. Only the Emperor should decide whether a person deserved death.

The provincial authorities, however, always had to handle cases, they were never allowed to deny justice. When there was no law pertinent to the case, they had to apply one by analogy. Sentences

<sup>38</sup> The case is found in a document marked 000756 kept in the Institute of History at the Academia Sinica in Taipei. It is a so-called "yellow list" which was submitted by the "Nine Dignitaries" at the Autumn Assizes to the Emperor for marking the names of those who had to be executed.

for assault with the intent to commit buggery were originally sentences where the law was analogously applied. The central government later became desirous of uniformity in the application of the law in this extensive empire. It was not favourably impressed with a development which would inevitably have led to the use of free discretion by the provincial authorities. Such development was considered infringement of the Emperor's position as *judex supremus*. The result was an ever more detailed and cumbersome legislation. Some provisions read like a handbook of criminal law and a bad one at that. The meandering sentences are sometimes confusing and often contradict other provisions. Some of the later Chinese jurists, Hsüeh Yün-sheng is one of them, commented on the disadvantages of such obtrusive legislation, but they had to be careful, because in final analysis their arguments must lead to dissatisfaction with the whole system.

A typical example of such legislative monstrosities is the *li* which deals with self-defence against a person who commits indecent assault with the intent to commit buggery, ending in homicide of the assailant.<sup>39</sup> It is found in the chapter "Homicide" of the Code, section "Homicide of an Adulterer", because of the similarity to women who kill would-be rapists in self-defence. The text is given in the appendix since it is complicated. The provision requires three general conditions which must be fulfilled before any mitigation of punishment for homicide could be considered.

1. The assailant must have been 10 or more years older than the offender.
2. There must have been witnesses on the spot who could testify conclusively that the facts had taken place as alleged by the accused.
3. The assailant must have confessed to the assault before he had died, or his relatives must have acknowledged that he had had homosexual tendencies.

When these basic conditions had been fulfilled, the result was not necessarily impunity for the offender, but at least the security that he would not be prosecuted for planned or intentional homicide or for homicide in an affray. Such sentences entailed capital punishment subject to revision at the autumn assizes and meant at least a year in prison before the final decision was rendered. Prisons were unhealthy places and according to Hsüeh Yün-sheng 薛允升 80 to 90 per cent of the inmates never lived till the day when their case was concluded.<sup>40</sup>

<sup>39</sup> Code Ch. 26, p. 45a-47b.

<sup>40</sup> TLTI p. 1266.

The first condition refers to age, the two others concern the burden of proof. The age difference is then more precisely defined.

When the offender had been 15 years of age or younger and he had killed the assailant then and there when the assault took place, and presumably when the facts had been proved, the offender would not be prosecuted at all. When he had killed the man later he would be sentenced to 100 strokes of the heavy bamboo. In fact this meant 40 strokes of a somewhat lighter bamboo stick and even that could be bought off. In the countryside Chinese boys often went to the mountains with knives to cut grass and therefore they could use the knife to defend themselves.

When the offender was a boy of 16 or older and he had killed the assailant on the spot and at the time of the assault, he would be punished by 100 strokes of the heavy bamboo and three years of banishment to a neighbouring province and when he had not killed the man then and there, the banishment would escalate to permanent banishment at 3000 *li*. Naturally the conditions 1 to 3 ought to be fulfilled.

Some variations on the theme of age follow:

The offender was 15 years old or younger, he had killed the man there and then, the basic conditions mentioned under 1 and 2 had been fulfilled but the assailant had not confessed before he died. The boy's punishment then would be 100 strokes of the heavy bamboo and temporary banishment for three years. The same punishment applied when the assailant had been less than 10 years older than the accused and the conditions 2 and 3 had been fulfilled.

When the offender had been 16 years of age or older and 1 or 3 of the basic conditions had not been fulfilled, the punishment would be in both cases strangulation subject to revision for unauthorized homicide but recommendation would be made that the Emperor at the Autumn Assizes would compassionately consider the case.

The situation that the accused and the assailant had been of the same or nearly the same age was then envisaged by the law. In such cases the allegation of assault with the intent to commit buggery was viewed with scepticism. The chances that such accusations would be fabricated in order to cover up some more obvious reason for fighting between male adults were considered more probable. In such cases the law on the ordinary forms of homicide would be applied. Such suspicions are fairly obvious, but the addition that when no other reason for the fight had been found during the trial, the *lü* on planned or intentional homicide or on homicide in affray still would apply, but the classification at the Autumn Assizes would be stay of execution, shows moderation.

The final part of the provision deals with the situation when a homosexual relation had existed, but one of the parties had repented and wished to terminate the relationship. When he then offered resistance to his former lover when the latter tried to force him or threatened him and the accused in self-defence killed him, the accused would whatever the difference of age with the assailant had been, be sentenced to strangulation subject to revision for unauthorized homicide (and usually treated with leniency.)

The history of the *li* is fairly complicated. It is obvious that with all these distinctions it is the result of continuous amendment. It is in fact a combination of two *li*, one of 1777 and one 1795. The former had imposed permanent banishment for a male person who had killed the man who had assaulted him with the intent to commit buggery, which means one degree reduction from the punishment for homicide in an affray. The conditions were conclusive proof by witnesses and confession of the assailant before his death or acknowledgement by the deceased's relatives of his homosexual tendencies. The case would then be brought before the Emperor, who could reduce the punishment still further. In that way the accused escaped the long procedure at the Autumn Assizes to have his punishment reduced. The Board of Punishments had earlier blocked a proposal by the judicial Commissioner of Shantung in 1737 to apply analogically the *lü* on unauthorized homicide by the owner who had killed someone who at night had penetrated into his house without valid reason, in which case there would be no prosecution at all. The Board's argument at the time was that sexual crimes were committed "in the dark", were difficult to prove and could easily be alleged in order to justify an ordinary homicide.<sup>41</sup>

An imperial edict of the 10th month of the 48th year of Ch'ien-lung (1783) ordered all magistrates to carefully verify the ages of the offender and the assailant; when the latter was much older than the offender it was "clear that he had taken advantage of the youth and weakness of the offender". In 1788 the condition that the assailant had to be 10 or more years older was introduced into the *li*.

In the 12th month of the 58th year of Ch'ien-lung (January 1794) the Board of Punishments had to comment upon a memorial of the Governor of Honan concerning a somewhat more complicated case. A male person had been assaulted in his sleep by another man who was only four years older than he was, he had shouted and cursed so that the neighbours had come to his rescue. The next day,

<sup>41</sup> *Ta Ch'ing lü-li ken-yüan* (cf. Bibliography) Ch. 23, p. 35a. The *li* is found in Code XXV p. 35a.

however, the assailant had apparently made some sarcastic remarks about the other man's straightness and cast doubts upon it, which had caused the other party to fear for his reputation and made him so angry that in confusion he had drawn his knife and killed his opponent. The Governor had applied the *lü* on unauthorized homicide of a criminal who had not offered resistance to arrest, with a sentence to strangulation subject to revision. There was no doubt that the assault had taken place and it was necessary to make a difference between a case like this where the man had defended himself and one of a violent criminal who had killed his opponent during a fray. The Board followed his argument and pleaded for some relaxation of the requirement of the age difference of 10 years and also proposed that when the confession of the assailant was not available, it would be sufficient when during the trial no other cause of the quarrel could be discovered. All this was formulated in a separate *li* which was incorporated into the Code in 1795.<sup>42</sup>

The two *li* referred to above were amalgamated in 1801 when the next revision of the Code took place.<sup>43</sup>

The last revision of the *li* happened in 1825. The year before the Section for Kwangtung had asked relaxation of the burden of proof and the severity of punishment for young men who had killed their assailants. The request was made in connection with a case of such kind where the assaulted person had been 16 years of age, the three conditions had been fulfilled and still he had, in accordance with the *li* then in force, to be sentenced to permanent banishment at three thousand *li* and bambooning. The section had proposed that the *li* be revised in the sense that young people were treated with greater leniency, more in accordance with the measures applied to women who had killed would-be rapists in self-defense. The Section argued that admittedly women were of a frail disposition and would only in emergencies resort to homicide in self-defence (*shou-shen* 守身), but having been subjected to rape meant loss of chastity and irreparable damage to their reputation. For men the situation was different. They always flocked together, slept together and when someone tried to approach them with indecent proposals, they just could turn away and their reputation would be none the worse for it. But when they were violently assaulted no man "with some human feelings" would voluntarily submit to being homosexually abused and they would

<sup>42</sup> *Ibid.* p. 46a.

<sup>43</sup> *Ibid.* Ch. 24, p. 15a. Hsüeh Yün-sheng places the combination in 1824 which is wrong.

resist and kill in self-defence. Especially young men who defended themselves would deserve “pity” as much as women. The arguments were accepted and the more lenient treatment of young people dates from that time (1824).<sup>44</sup>

Also in the same year another addition was made to the provision which aimed at assimilating cases which involved homosexual rapes with rape of women, namely the passage which deals with a situation in which the man had first given his consent to homosexual relations with his partner, but later repented, offered resistance and killed the other man when he had become violent. Irrespective of the age difference between the two parties, the offender would be sentenced to strangulation subject to revision for unauthorized homicide, which in practice meant either “compassionate consideration” (*k'o-ching* 可矜) or stay of execution at the Autumn Assizes.<sup>45</sup>

Another attempt to reduce punishments for males who had resisted indecent assault by assimilating their position with that of women was made by the Court of Revision the next year. It was foiled by the Board of Punishments who said that there had been enough leniency in these cases by then. The differences between man and women in such situations was too great. “Men often sleep together and are not afraid of touching each other. Such circumstances breed sometimes irregular sexual relations, which are then cleverly concealed and embellished. If we simply handle the situation as in the case of women, men would certainly immediately pretend in cases of violent homicide that their crimes had been provoked by assault with the intent of committing buggery. Their craftiness has no end. What could we do against them?”<sup>46</sup>

What has been observed in legislation is reflected in the cases. Since generally the agents were older men and the patients young and vigorous, the authorities were reluctant to accept the necessity of killing the agent in self-defence. Their reason is logical: “Why had the patient not struggled free and fled? Why had the incident taken place when no one else was at home?” “Why should the employer have waited for years when he had had the opportunity every day?” “Why had the young man not cried for help?” Always there is in the background the suspicion that homosexual assault is used as a cover for ordinary homicide in order to avoid heavy

<sup>44</sup> H AHL Ch. 27 pp. 1819. 1821 cf. Appendix paragraphs Ic, IIa, IIIa,b.

<sup>45</sup> H AHL CH. 27 pp. 1821–1822 Appendix Paragraph IV.

<sup>46</sup> H AHL Ch. 27, pp. 1823. 1827.

punishment. On the other hand there is a genuine sense of pity and sometimes of respect for a young man who refuses to submit and puts up resistance and the contrast with women who kill rapists is felt to be unjust. Yet no one has ever proposed to establish a honorific gate for a male person who had died in a struggle of this kind.

We can more or less follow the development of the Board's phobia of false accusations. In 1689 a young man of 20, Huang Ta, had met with a certain Lin whose age was not known. The two apparently got along well together until Lin took Huang to a quiet place and forced him to consent to have homosexual relations by threatening him with a knife. Huang agreed out of fear, but when Lin bent down to undo Huang's trousers, Huang saw his chance to secure the knife and "trembling with fear" stabbed him wherever he could hit him. Lin died the next day. The Governor was satisfied that the facts were true and sentenced Huang for unauthorized homicide of a criminal guilty of a capital crime (100 strokes of the heavy bamboo)<sup>47</sup>. The Board agreed.<sup>48</sup> In 1757 we find a resistance case in which the Governor of Shansi had proposed a similar sentence, but the Board disagreed "because such charges are easily trumped up in order to justify more serious crimes. It is therefore preferable to reduce the punishment (for homicide in an affray?) at your discretion and request the Emperor to decide the case."<sup>49</sup> In 1809 the Board even went so far as refusing the statements of witnesses who confirmed that the assailant before he had died had confessed to have assaulted the man who had injured him. The Board demanded that the confession had been made before a magistrate after interrogation.<sup>50</sup> It would seem that such onerous burden of proof would practically prevent the person who had been assaulted to escape a sentence for homicide, yet this position was maintained by the Board in decisions of 1815, 1817 and 1825.<sup>51</sup> The provincial authorities, according to the Board, were too much inclined to accept unsubstantiated statements by witnesses and to conclude to self-defence of the accused. They also tended to confuse the words *sheng kung* 生哄, confession prior to death, in the *li* with testimonies of witnesses who were present on the spot (*tang ch'ang kung-cheng* 當場哄證).

<sup>47</sup> Code Ch. 35, p. 12a-b.

<sup>48</sup> *Li-an ch'uan-chi* (.Cf. Bibliography) Ch. 12, p-15a.

<sup>49</sup> *Lu-li t'ung-k'ao* Ch. 20, p. 15a-b.

<sup>50</sup> HAHL Ch. 27, pp. 1818-1819.

<sup>51</sup> HAHL *Hsü-pien* Ch. 14, pp. 2290-2293.

As we have seen, in 1824–1825 the burden of proof had been alleviated for young people of 16 and below, but for men above that age, the Board became more and more suspicious. In 1830 the Section for Feng-t'ien reported about a case in which a young man of 23, Liu Ch'i, had met with a certain Yang of uncertain age probably around 30. They got along well and Yang invited Liu to stay with him at the house of one of his friends. Liu agreed, but during the night Yang assaulted Liu and tried to rape him. Liu defended himself with the step of a waterwheel which was lying about. Yang died of his wounds. The Governor had sentenced Liu for unauthorized homicide, but the Section was of the opinion that the story was rather spurious. "A man who simply agrees to sleep with another man whom he does not know, seems to be a doubtful sort of man."<sup>51</sup> The Governor was told to retry the case. In 1857 the Board issued a similar ruling in the case of a young man who always had borrowed money from his maternal uncle, until one night, when they were sleeping together, the uncle had suddenly tried to rape him. In the struggle which followed he had chopped uncle to death. The Governor, who did not believe the story either, had sentenced the young man to beheading subject to revision for intentional homicide, but the Board was of the opinion that in that case the final sentence at the Autumn Assizes would probably be stay of execution (*huan-chüeh* 緩決) and the act looked like planned homicide. Moreover, the young man's mother had slept practically next door, why had she not interfered when the fight was going on?<sup>51</sup>

Naturally, the status and quality of the assailant and the assaulted person were of importance for the self-defending party. A hired labourer who killed his employer, who enjoyed a kind of quasi parental status, would be liable to be beheaded without delay.<sup>52</sup> When in 1796 a hired labourer who had been assaulted with the intent of committing buggery killed his master, the Governor of Shantung cleverly tried to get his subject off with a lighter punishment. He adduced two precedents, one of an employee's wife who had been assaulted with the intent of committing rape by her husband's employer and had resolutely cut off the man's penis with fatal result. She had then been sentenced to permanent banishment which was redeemable (1746). The other precedent was a case in which the employee's boss also had not been able to keep his hands off his employee's wife and the husband had tried to poison him, in that case the labourer had been sentenced to strangulation subject to revision. The Governor wanted the same kind of leniency for his accused. The Board, besides being unhappy with the presentation of the case, rebuked the Governor for having adduced cases which had not been

circulated as permissible to be adduced, but finally they compromised on a sentence of beheading subject to revision. The "Nine Dignitaries" (*Chiu ch'ing* 九卿), who advised the Emperor at the yearly revision of capital sentences, recommended leniency so that probably the labourer was allowed to live.<sup>52</sup>

The moral quality of the person who had killed an assailant who intended to commit buggery with him was also a factor which determined his punishment. In 1786 a shopkeeper in Kwangtung of 55 years of age called Li Hsiang-hsi had made the acquaintance of a 16 years old boy Sun Shuang-hsi, they had kept up homosexual relations for three years before the young man's mother discovered the fact and beat the truth out of him. She then informed the boy's uncle, who arranged a compromise. Li paid up, kowtowed and the matter seemed to be settled. Sun Shuang-hsi was sent to live with his uncle in a neighbouring village. When he visited his mother a year later and, being alone, was sitting in front of the house, Li passed by and started a conversation. He then asked Sun to start all over again, but was refused. Li then became nasty, entered the house with Sun and threatened him with a knife. Sun, being the stronger took the knife from Li and stabbed him to death. There had been no witnesses and Li had not confessed. The Governor proposed a sentence for homicide in a fray, which meant strangulation subject to revision but recommended a reduction of one degree to permanent banishment. The Emperor was to give the final decision. The case was sent to the Board, who ruled that the provision in question only referred to decent persons. Since Sun had had homosexual relations with Li for years, he could not very well claim an unblemished reputation. He should therefore be sentenced for intentional homicide to be beheaded subject to revision. The case was referred back to the Governor for retrial and revision of the sentence. The Governor in his reply stressed the similarity of this case to that of a repenting woman who after having initially consented, repented and killed her paramour when he tried to rape her. He compromised by sentencing Sun for homicide in an affray to strangulation subject to revision without the original request for reduction. The Board then agreed.<sup>53</sup> In another case, 30 years later, a comparatively young man suddenly felt pangs of conscience after having entertained homosexual relations with the same man for 10 years. He claimed to have killed the old partner when the latter had refused to believe in his moral regeneration and had tried to force him to submit. Neither the Governor nor the Board were inclined to believe it. Result:

<sup>52</sup> *Po-an hsin-pien Hsü-pien* Ch. 3, pp. 3461-3463.

<sup>53</sup> *Ibid.* 3445-3349.

intentional homicide with beheading subject to revision.<sup>54</sup> The same year another youth claimed a similar miraculous conversion after having prostituted himself “for money and goods” to the same man for years. When the latter tried to subdue him, he was stabbed to death. The Governor’s attempt to find leniency for the offender found no sympathy at the Board.<sup>55</sup> The year 1817 produced more such cases, in one of them a young man had been seduced after having been offered a good amount of spirits, but when the partner tried a second time without spirits, a struggle developed in which he was mortally wounded. The Governor of Shensi this time was severe and wanted to sentence the young man for intentional homicide to beheading subject to revision, but the Board, apparently considering the circumstances of seduction under the influence of liquor as a mitigating factor, decided for unauthorized homicide.<sup>56</sup>

Stories of intervening mothers with sons who later repented and killed insistent lovers are frequently found in the collections. They have probably led to the insertion of the paragraph IV in the provision on resistance to assault (cf. Appendix) in 1824–1825, which was at least a more reasonable approach than the simple condemnation for “indecent” which perhaps was prevalent before. Still one has to be cautious, bigotry and tolerance existed side by side in traditional Chinese law and much more material is needed in order to make a fair evaluation of a general kind, though the available amount is certainly not negligible. The key lies probably in the evaluation of the Autumn Assizes. Though we do not have too much to go by in that field, the provisions in the Regulations for the Assizes give some indication.

I. When a person who had killed a man who had assaulted him with the intent to commit buggery had been sentenced for unauthorized homicide to strangulation subject to revision (cf. Appendix, paragraphs III and IV) he would, when he was a “decent” man, receive compassionate consideration at the Autumn Assizes, when he was not a decent man his case would be classified for stay of execution.<sup>57</sup>

II. When there had been no proof at all of the alleged assault, but no other reason could be found for the struggle and a sentence had been passed for planned intentional homicide or homicide in an affray, the classification would always be stay of execution.<sup>58</sup>

<sup>54</sup> HAHN Ch. 27, pp 1816–1817.

<sup>55</sup> *Ibid.* p. 1816.

<sup>56</sup> *Ibid.* pp. 1815–1816.

<sup>57</sup> *Ch’iu-yen chi-yao* I. p. 248.

<sup>58</sup> *Ibid.*

These regulations seem to mean that when no conclusive proof of indecent assault could be furnished, but the indications were such that no other reason for the fight could be proved either, the offender's life would be spared.

*Summary and Conclusions.*

Having given a survey of the law and the various types of cases, we should summarize our findings and attempt to draw some conclusions. In the first place, it is clear that the law made no difference between extra-marital sexual intercourse between man and woman and between two men, provided both parties had acted of their own volition. The prohibition of fornication may have been motivated by the desire to protect existing marriages against adultery or to protect the chastity of women before they were married. In that way the purity of descent would be guaranteed and the ancestral cult officiated by the proper descendant. In homosexual cases the chastity of the males was only once introduced into the considerations of a case but that was done in order to explain a youth's indignation when he was forced to submit to homosexual abuse. Male chastity seems to have been a fairly complicated concept, it was not endangered by extra-marital intercourse with an unvirtuous woman. Whether the same could be said of intercourse with an univrtuous man is not so clear. Possibly the motive for prohibiting homosexual intercourse could be attributed to the fear that some men would not be able to fulfil their duties towards their ancestors and fail to produce offspring at all. That idea, however, is never expressed in the law or in any case which has been studied. The same can be said of a possible notion that homosexuality would be unnatural. The natural course would be that through the interaction of *yang*, the male and *yin*, the female forces everything was produced and the course of the universe determined. The accumulation of two male elements could therefore be disturbing the natural processes. Such notions may have been entertained by some circles in society, but law and judicature were silent on the subject.

The punishment for the offence when committed by consenting parties was light in the eyes of the law. A hundred strokes of the heavy bamboo may seem lethal to us, in practice it amounted to 40 strokes of a lighter stick, far from pleasant but survivable. The cangue was a square wooden collar to be worn day and night. One could move about, but it was obvious for everybody what the matter was. Perhaps some ladykiller would even be proud to wear it as an advertisement, but not a homosexual offender. The last remark does not

mean that there was violent hostility against homosexuality. There certainly was concern of the parents that their son would be drawn into the homosexual orbit. They would send the boy to a relative in a neighbouring village in order to remove him from the influence of a homosexual whose acquaintance he had made. In that way they tried to save the boy's reputation. Being called a *t'u-tzu*, a hare, or a *wang-pa*, a tortoise, was not flattering, but it was also a more generally pejorative. The Chinese way of swearing is using such invectives. Still, the social censure did not prevent a shopkeeper to live with his male assistant without sustaining any prejudice in his trade. It seems that one could be a perfectly honest homosexual. It was, however, sometimes a reason for a young man to commit suicide out of fear of losing his reputation as a *liang jen*, a decent man. He would feel "soiled", but it seems that that feeling would apply especially to the passive member of a homosexual relation, he would be considered a male prostitute, which was, of course, unbearable. This was understood by the law as well and if the facts were proved, the assailant would be held responsible for the youth's death. A 14 year old pupil who, when he was old enough to know what he was doing, dedicated himself to his teacher's pleasure with an eye to other advantages, would be punished, but it is not quite clear whether he was punished rather because he was a toad than a tortoise.

The law and the cases do not inform us about the incidence of homosexuality. The reason is not only that such cases remained at the district level and seldom were important enough to appear in the collections of grave cases, probably more important is the fact that they were usually settled within the community as long as there was no question of rape or homicide. The threat of monetary sacrifice and of loss of reputation offered great opportunities for blackmail and these were exploited with gusto. The result was, of course, homicide of blackmailers which in no way could be excused or granted reduction of punishment. Those crimes were generally considered intentional homicides (*ku-sha* 故殺).

Whenever homosexual offences were accompanied by or had caused homicide, the punishments were severe. It is still remarkable that even in such cases, except when children had been molested, the tone of the sentences is restrained. There is hardly a presumption of guilt or expression of censure at the homosexual behaviour of the parties.

It is true that in cases of homicide in self-defence against homosexual assault the burden of proof was very onerous indeed. The reason was certainly not encouragement of such assaults by making

resistance unattractive, but a deeply felt apprehension that self-defence was alleged to cover the gratification of rage at having been assaulted and therefore the use of greater force than was reasonable or even that self-defence had been alleged in order to mask murder and the settling of an old account.

On the whole it should be said that the handling of homosexual cases in traditional Chinese law seems to have been wiser and more moderate than the way such cases were handled in Europe at that time. Between 1730 and 1732 in the Dutch Republic 276 sentences have been pronounced in cases of "sodomy", at least 75 persons were hanged, no cases of molestation of children were included.<sup>59</sup>

#### APPENDIX

Translation of the Provision in Chapter XXVI, pp. 45a-47a. (Numbers and letters added by translator).

I. a. When a male person having resisted indecent assault has killed the man who assaulted him and that man had been ten or more years older than the offender and there have been witnesses on the scene of the assault and they had given conclusive evidence and the deceased has before he died confessed in such a way that his confession constituted sufficient proof of his having assaulted the offender or when the relatives of the deceased have made a reliable statement acknowledging [the fact of his homosexuality], when the three foregoing conditions have been fulfilled, the offender shall not be prosecuted for planned or intentional homicide or homicide in an affray.

b. When the person who has been assaulted was less than 15 years old and he has killed the assailant on the spot and at the time of the assault, he shall not be prosecuted at all. When he has killed the assailant at some other time, he shall receive 100 strokes of the heavy bamboo, but may redeem the punishment.

c. When the assaulted person was 16 years old or older and he has killed the assailant at the time of the assault, the punishment shall be 100 strokes of the heavy bamboo and three years of temporary banishment. When he has killed the assailant at some other time, the punishment shall be 100 strokes of the heavy bamboo and permanent banishment at 3000 *li*.

II. When though the assailant had not confessed before he died, but had been 10 or more years older than the offender who has killed him and there is conclusive proof that he had been killed in defence against indecent assault and for no other reason, or though he had been less than 10 years older but the evidence that he had been killed in defence is conclusive and he had confessed to have committed the assault or when his relatives have reliably testified acknowledging that fact, when one of the foregoing three conditions has been fulfilled and:

a. The offender is less than 15 years old and he killed the assailant at the time of the assault, he shall be sentenced to 100 strokes of the heavy bamboo and temporary banishment of three years, both redeemable in accordance with the *lü*. When he did not kill the assailant at the time of the assault, he shall receive 100

<sup>59</sup> *Spiegel Historiae*, Nov. 1982, *Geschiedenir van de homoseksualiteit in Nederland*, several contributors.

strokes of the heavy bamboo and be permanently banished at 3000 li, also redeemable in accordance with the *lü*.

b. when the offender is 16 years old or more, no matter whether he had killed the assailant at the time of the assault or not, he shall in both cases be sentenced to strangulation subject to revision for unauthorized homicide.

III.a. When the deceased and the offender have been of the same age or when there only had been a difference of three or five years and at the trial it has become apparent that the deceased had been killed for another reason and that the allegation of self-defence had only been a crafty subterfuge, the offender shall still be sentenced in accordance with the *lü* on planned or intentional homicide or on homicide in an affray as the case may be and at the Autumn Assizes the case shall be classified for actual execution or stay of execution.

b. When the offender has stated that he had acted in defence against indecent assault but there are no witnesses and no confession of the deceased before he died, but at the trial no other reason for the deceased's death has become apparent, the offender shall still be sentenced in accordance with the *lü* on planned or intentional homicide or homicide in an affray, but the case shall be classified for stay of execution at the Autumn Assizes.

IV. When there first had been a homosexual relation, but later one party had repented and terminated the relationship, and there is conclusive proof that indeed he had terminated that relationship but when he has been forced to submit to homosexual intercourse and then killed the other party, there will be no prosecution for planned or intentional homicide nor for homicide in an affray, but without inquiring into the question whether there had been a difference of age between the offender and the deceased, the offender shall in all cases be sentenced for unauthorized homicide to strangulation subject to revision. When, however, there had been a different reason for the homicide, the offender shall still be sentenced for planned or intentional homicide or for homicide in an affray.

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