

WALLACE JOHNSON

# The T'ang Code, Volume I

*General Principles*



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*The T'ang Code*

*Studies in East Asian Law*  
*Harvard University*

# The T'ang Code

Volume I, General Principles

Translated with an Introduction  
by  
Wallace Johnson

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The Harvard Law School, in cooperation with Harvard's East Asian Research Center, the Harvard-Yenching Institute, and scholars from other institutions, has initiated a program of training and research designed to further scholarly understanding of the legal systems of China, Japan, Korea, and adjacent areas. A series of publications has been established in conjunction with this program. A list of the *Studies in East Asian Law* appears at the back of this book.

*In memory of my parents*  
Wallace and Ellen Johnson,

*and for my teacher*  
Derk Bodde.



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## Preface

The field of Chinese law first attracted my interest during a two-year seminar on oriental law at The University of Pennsylvania with series of lectures by such persons as the late Ephraim A. Speiser on Akkadian law and S. N. Kramer on Sumerian law, as well as by Derk Bodde on traditional Chinese law. Some of the material that Bodde presented at that time was later further developed by him and Clarence Morris in a book on Ch'ing dynasty (1644-1911) law.

As a result of this introduction to Chinese law, I decided to attempt a complete translation of *The T'ang Code*, a text that has never been translated into any western language and yet which is certainly the most seminal legal work to have appeared in the whole of East Asian history. The first three chapters were submitted with an introduction as my Ph.D. thesis. Now, with extensive revision, they, together with the rest of the General Principles section, appear here in book form. I hope within a reasonably short time to be able to publish the remainder of my translation.

I also hope that this translation will be read not only by specialists but by the broader scholarly community interested in the history of law and the study of comparative legal institutions—persons such as historians, anthropologists, and sociologists. Therefore I have written an introduction to the translation that is aimed primarily at those who have not been trained in the field of traditional Chinese studies. Before proceeding with the translation, the general reader would do well to read the first two chapters of the introduction, which offer him a brief historical and philosophical background into which he can fit the *Code*, as well as further suggested readings on specific topics related to this book.

In the translation itself, I have tried to supply adequate notes for the specialist, while at the same time making the notes generally intelligible to those who do not have Sinological training. Thus when reference is made to other Chinese texts, I have also given a translation where such exists for the benefit of the reader who may not be competent in classical Chinese.

I am glad to have this opportunity to acknowledge the support afforded me while working on this translation by an American Council of Learned Societies Study Fellowship, a Harvard Law School Liberal Arts Fellowship, The Kansas University Endowment Association's Elizabeth M. Watkins Faculty Summer Fellowship, and The University of Kansas' Graduate Research Fund. Publication of this volume has been

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The translation could not have been completed without the willingness of others to offer criticism, and I am grateful to Derk Bodde of The University of Pennsylvania and L. S. Yang of Harvard University for their time spent in carefully reading through it and making numerous and valuable corrections and suggestions. Jerome A. Cohen of Harvard Law School and Michael Dalby of The University of Chicago gave their help in making the introduction more accurate and hence more useful. I also wish to thank Yin-lien Chin, with whom I first read the *Code* in Taiwan, and my students, Mark Allee and Rex Niswander, who made several useful suggestions. Any errors that remain are my own responsibility.

## Abbreviations

Biot	Edouard Biot, <i>Le Tcheou-li ou rites des Tcheou</i>
Deloustal	Raymond Deloustal, "La Justice dans l'ancien Annam," <i>Bulletin de l'Ecole Française d'Extreme Orient</i>
KHCPTS	Kuo-hsüeh chi-pen ts'ung-shu 國學基本叢書 [Basic Sinological Series]. Shanghai: Commercial Press, 1933, 1936
SPTK	Ssu-pu ts'ung-k'an 四部叢刊 [Collected Reprints of Works in Four Categories]. Shanghai: Commercial Press, 1920-1936

## Weights and Measures

### Length

10 li 釐	equal 1 fen 分
10 fen 分	equal 1 ts'un 寸
10 ts'un 寸	equal 1 ch'ih 尺 (slightly less than the English foot)
10 ch'ih 尺	equal 1 chang 丈
1,800 ch'ih 尺	equal 1 li 里 (approximately one-third of the English mile)

### Area

1 mou 畝	equals approximately one-sixth of an acre
1 p'i 匹 or 疋	equals a piece of cloth 1.8 ch'ih by 40 ch'ih

### Weight

1 chin 斤	equals approximately one and one-half English pounds
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NOTE: These weights and measures are taken from Balazs, "Beiträge zur Wirtschaftsgeschichte der T'ang-Zeit," *Mitteilungen des Seminars für Orientalische Sprachen zu Berlin*, 36 (1933), 49 ff.



**PART ONE**  
Introduction



## CHAPTER I

---

### Background

#### The T'ang Dynasty

The T'ang dynasty (A.D. 619-906) was one of the most important periods in Chinese history.<sup>1</sup> The preceding Sui dynasty (A.D. 589-618), it is true, must be credited with the reunification of a China that had been split into small states since the fall of the Han dynasty in A.D. 220. But the Sui triumph was short-lived. It was under the T'ang, then that the empire won political and cultural supremacy in East Asia, a position that it held for nearly three hundred years.

Once the House of Li was securely upon the throne, a vigorous policy of territorial expansion sent Chinese armies across half of Asia. Within a short time T'ang China was recognized as the most powerful and prestigious state in the Far East, and embassies began to come from foreign countries bringing tribute to the Son of Heaven. When they returned home bearing gifts and resounding titles for the rulers of their own countries, these envoys often took back Chinese ideas as well.

But not only armies went out beyond the borders of China. Many pilgrims, the most famous of whom was the Buddhist priest Hsüan-tsang, journeyed to Central Asia and even to India to visit holy places, study, and bring back Buddhist scriptures.<sup>2</sup> During the T'ang dynasty Buddhism attracted many of the best Chinese minds, and students even came from other countries to study in the great Buddhist monasteries. The best known of them, the Japanese monk Ennin, has left us a valuable picture of ninth-century China in his diary.<sup>3</sup>

Ch'ang-an, the capital of the empire, with more than two million inhabitants, was the greatest city in East Asia. Because of the wealth of T'ang China, its markets were filled with merchants and goods from as

<sup>1</sup>There exists no general, book-length treatment of the T'ang period. A good introduction for the non-specialist reader can be found in C. P. Fitzgerald, *China: A Short Cultural History*, pp. 291-374. Edwin O. Reischauer's *Ennin's Travels in T'ang China*, about a Japanese Buddhist monk who visited T'ang China, might also be useful. Among Edward A. Schafer's numerous publications on the period, *The Golden Peaches of Samarkand* gives a good picture of the wide variety of goods either brought as tribute or imported into China during the T'ang dynasty.

<sup>2</sup>Hsüan-tsang's life and career have been treated briefly by Arthur Waley, *The Real Tripitika and Other Pieces*. However, no one with an interest in China should miss reading Waley's excellent translation of some of the episodes in the magnificent picaresque novel about Hsüan-tsang's journey to India published under the title *Monkey*.

<sup>3</sup>Reischauer, tr., *Ennin's Diary*. Reischauer's *Ennin's Travels* is based on this book, but contains additional material and has a broader interest.

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far away as Java and Iran. Its streets were crowded with both Chinese and foreigners come to seek wealth, position, or learning. In seventh to ninth-century Asia, all roads led to Ch'ang-an.

Much of the brilliance of the period is due to its literature. But the renowned poets Li Po, Tu Fu, and Po Chü-yi were only the tallest trees in a dense forest of writers. Han Yü, the essayist, led a movement to revitalize prose. At the same time, he denounced Buddhism and called on his countrymen to look to Chinese philosophers. Interestingly enough, it was this "foreign" religion that inspired the invention of printing. The desire of pious Buddhists to gain merit through the reproduction of scriptures was responsible for the world's first printed book.<sup>4</sup>

The arts flourished, as well. From the few examples of T'ang painting that still survive, we can acknowledge the talent of such artists as Yen Li-pen and Chou Fang. It seems probable also that true porcelain appeared for the first time during the T'ang dynasty. The superb ceramic portrayals of horses and camels, made originally to be grave figurines, are much prized by museums and collectors today. In short, the three hundred years of the T'ang dynasty were culturally extremely rich. Not only was its prestige immense during its own time, but later Chinese dynasties and foreign countries as well were greatly influenced by T'ang achievements.

Supporting this luxuriant growth of cultural life was a solid economic and political base.<sup>5</sup> Many of the institutions that originated or reached full development during the T'ang period lasted throughout imperial China. Indeed, some of them survive even today.

Administratively, the empire was divided into prefectures and counties responsible to the central government in the capital. At the base of this pyramid was the county magistrate—the lowest official in the bureaucracy—who heard criminal cases, collected taxes, and managed a hundred and one other matters. It is he who is the hero in countless Chinese detective stories, who plays the role assigned to Sherlock Holmes or Hercule Poirot in the West.<sup>6</sup>

The emperor was at the head of the government. But obviously he could do no more than set the main lines of state policy. The offices that

<sup>4</sup>This is the *Diamond Sūtra* of 868 described in Thomas Francis Carter's *The Invention of Printing in China and Its Spread Westward*, pp. 65-66. Because of the professional quality of the printing, Carter considers it likely that the book had some precursors. Nevertheless, the *Diamond Sūtra* is the world's oldest extant printed book.

<sup>5</sup>The most recent work on economic developments during the T'ang period has been done by Denis Twitchett. Interested readers should consult his *Financial Administration under the T'ang Dynasty*, as well as his numerous articles on the subject that have appeared in *Asia Major*. The standard work on political organization in the T'ang dynasty is Robert des Rotours, tr., *Traité des fonctionnaires et traité de l'armée*.

carried out these policies, or sometimes frustrated them, were staffed by a bureaucracy partly recruited through the examination system. This system had its roots in the earlier Han dynasty (206 B.C.-A.D. 220), but really began its development only during the T'ang period.

There were many types of examinations, and among them one that led to a degree in law.<sup>7</sup> To gain this degree, students had to answer satisfactorily seven out of ten questions on criminal and administrative law. However, the study of law was not so popular in T'ang China as the study of literature, and only a small minority of the candidates sat for the law degree.

Above this governmental machinery stood the censorate. The censors were not so much concerned with the actual administration of the government as with its quality. It was their duty to denounce the corruption or maladministration of officials to the throne. When they felt it necessary, individual censors even criticized the actions or policies of the emperor himself, sometimes at the cost of their lives.

### T'ang Legislation

In the first years of the dynasty a series of criminal codes and administrative statutes were promulgated in order to govern the empire effectively. Though based on earlier sources, T'ang legislation has been more important historically than that of any other dynasty. The names of many important officials of the early years of the dynasty are connected with these legal compilations. The great criminal code entitled *The T'ang Code* (*Ku T'ang-lü shu-yi*, 故唐律疏議, hereafter referred to as *Code*) is always associated with the T'ai-tsung emperor's (reigned 627-649) brother-in-law, Ch'ang-sun Wu-chi (?-659), one of the most powerful statesmen of the time.

Though only the *Code* has survived in entirety, we know from historical sources, as well as from still extant fragments, that there was a large body of written law in effect during the T'ang period.<sup>8</sup> There were four main divisions: the *Code* (*lü* 律), the *Statutes* (*ling* 令), the *Regulations* (*ko* 格), and the *Ordinances* (*shih* 式). The *Statutes*, the general

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<sup>6</sup>The detective story flourished in China long before Edgar Allen Poe started the genre in the West. The late Robert van Gulik, the well-known Dutch scholar, published a whole series of excellent detective stories in the Chinese style starring Judge Dee, a famous magistrate of T'ang times.

<sup>7</sup>See des Rotours, tr., *Le Traité des examens*.

<sup>8</sup>A list of at least the major compilations and revisions is given in Karl Büniger, *Quellen zur Rechtsgeschichte der T'ang-Zeit*, pp. 238-245. A good discussion of the different kinds of law operative in the T'ang dynasty can be found in Twitchett, "The Fragment of the T'ang Ordinances of the Department of Waterways Discovered at Tun-huang," pp. 23-36.

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administrative rules for the central government, were the most important of these latter three.

While much of the *Statutes* has been recovered,<sup>9</sup> only portions of the *Regulations* and *Ordinances* have been found. In a recent study, Professor Twitchett has concluded that the *Regulations* served as a means through which new provisions and rulings could be introduced as supplements to the *Code* and *Statutes*.<sup>10</sup> The *Ordinances* seem to have been administrative rules concerned with limited areas of law, in contrast to the *Statutes*, which were general.<sup>11</sup> Other, less important groups of laws have survived in name only.<sup>12</sup>

The imperial government was primarily concerned with the prevention and punishment of crime. Other forms of conflict resolution were left to private means. Mediation and guild law were probably the effective agents here; we have no records. Yet commercial law was of great importance during the T'ang dynasty. This has become known only in the present century through the mass of contemporary manuscripts discovered at Tunhuang and Turfan in western China.<sup>13</sup> Most of these manuscripts preserve works of literature or religious texts. But a sizable number of them consist of tax rolls, household registers, contracts, bills of sale, and even parts of the *Code*, the *Statutes*, and the *Regulations*. Although a great number of the manuscripts are housed in the Bibliothèque Nationale and the British Museum, very little work has been done on them by Western scholars.<sup>14</sup>

The *Code* had many precursors in Chinese history. But how early did written law or codified law exist in China? According to the *Tso Commentary* (*Tso chuan*), laws were inscribed on a bronze vessel in 536 B.C., more than a thousand years before the T'ang dynasty. Hithertofore, this has been assumed to have been the first time that laws were ever written down in China.

<sup>9</sup>One of the outstanding achievements of modern Japanese scholarship on China is Niida Noboru's recovery of a great portion of the T'ang statutes by searching out quotes of the statutes in *The T'ang Code* and other works of and on the T'ang dynasty. The results of his research were published in his *Tōryō shūi* (The T'ang Statutes Re-collected).

<sup>10</sup>Twitchett, "A Note on the Tunhuang Fragments of the T'ang Regulations (*ko*)," pp. 380-381.

<sup>11</sup>Twitchett, "The Fragment of the T'ang Ordinances," p. 36.

<sup>12</sup>A discussion of these various legal compilations is found in Twitchett, "Tunhuang Fragments of the T'ang Regulations," p. 375.

<sup>13</sup>Twitchett, "Chinese Social History from the Seventh to the Tenth Centuries," recounts both the history of these documents and how they can be used to advance our knowledge of the period.

<sup>14</sup>The obvious exception is Denis Twitchett. But Jacques Gernet has also made use of the material in his "La Vente en Chine d'après les contrats de Touen-houang (IX<sup>e</sup>-X<sup>e</sup> siècles)."

Recently, however, Professor Creel has asserted that written law was in existence during the first half of the first millennium B.C.<sup>15</sup> His evidence comes from certain documents of that time, and a particular Chinese character used several times in those texts to mean law or statute. Professor Creel further believes that at least some of these laws were organized in a systematic way. That is, that they formed a code.

The first actual reference to a code is to one supposedly compiled in the fourth century B.C. by a certain Li K'uei. It is stated that Li, who was the tutor to Marquis Wen of Wei (reigned 424-387 B.C.), brought together the laws of all the states existing at that time and formed them into a code, the *Canon of Laws* (*Fa ching* 法經). This story, however, is first recorded in the seventh-century A.D. *History of the Chin Dynasty* (*Chin shu*). And the existence of a law code so early as Li K'uei's time is at least questionable.<sup>16</sup>

However, the prefatory remarks in the first chapter of the *Code*, which were written by Ch'ang-sun Wu-chi, do assume the existence of this *Canon of Laws*, stating that it was transmitted and expounded by Shang Yang (d. 338 B.C.).<sup>17</sup> Shang Yang, or the Lord of Shang, rose to be prime minister in the state of Ch'in, and is credited with a reform of that state's laws circa 350 B.C. It was this state of Ch'in that later unified China for the first time, and during the short period of its rule instituted a great number of political and economic changes, some of which were to last throughout the imperial period.<sup>18</sup> In 1975, as a result of an archeological excavation in Hupei Province, portions of the Ch'in code were found. These laws, which are written on bamboo strips, and which do indeed seem to have formed a code, are the earliest that we definitely know to have existed in China.<sup>19</sup>

During the following Han dynasty, Hsiao Ho, who was chancellor to its founder, is said to have selected from among the Ch'in laws those he thought suitable, and added others to make a code. But only a few of these provisions have survived. They have been aptly described as remnants by Professor Hulsewé in his excellent book on Han law.<sup>20</sup> It is only by having read laboriously through the histories of the period, contemporary authors, and surviving records that Professor Hulsewé

<sup>15</sup>Herrlee G. Creel, *The Origins of Statecraft in China, Volume One: The Western Chou Empire*, p. 165.

<sup>16</sup>See Timoteus Pokora, "The Canon of Laws by Li K'uei, a Double Falsification."

<sup>17</sup>See p. 52.

<sup>18</sup>See Derk Bodde, *China's First Unifier*.

<sup>19</sup>Study Group for Ch'in Bamboo Slips from Yunmeng, "Yunmeng Ch'in-chien shih-wen" (A Transcription of Ch'in Dynasty Inscribed Bamboo Slips Unearthed at Yunmeng, Hupei Province).

<sup>20</sup>Hulsewé, *Remnants of Han Law*, Vol. 1.

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has succeeded in giving us at least a partial picture of law at that time.

The later, pre-T'ang codes are supposed to have been based on that of the Han, but only individual articles or fragments of articles are still extant.<sup>21</sup> Hence, the T'ang dynasty is the earliest time from which we can obtain an accurate picture of the range of Chinese criminal law during the imperial period and the structure of ideas that underlay its provisions.

*The T'ang Code* is divided into two parts: an initial section expounding the general principles of criminal law, and a second section setting forth the specific offenses covered, together with the punishment for each such act. Though the section on general principles contains only 57 of the 502 articles of the *Code*, it comprises nearly one-third of the whole work. Such a division between general principles and specific offenses seems to have been used in all the previous Chinese codes. Even in Li K'uei's supposed *Canon of Laws*, the last chapter is entitled "Generalities."

This method of organization for a law code is not uncommon. Indeed, the present day German criminal code, the *Strafgesetzbuch*, has the same two divisions as *The T'ang Code*. In our Western tradition, however, the origin of a separate section dealing with the principles of administration seems to go back to Roman law. In the long history of East-West contact there is no evidence of the exchange of legal ideas until modern times.

Unfortunately, none of the case records of court hearings has survived from the T'ang period. Neither do we have any condensed reports of cases such as the *Conspectus of Criminal Cases* (*Hsing-an hui-lan*), which has proved such a fertile source of legal material for the Ch'ing dynasty (1644-1911).<sup>22</sup> However, a group of decisions (*p'an* 判) written by eminent scholars in response to legal questions put to them in examinations is still preserved in the encyclopedic *Collection of Literary Masterpieces* (*Wen-yuan ying-hua*), which was brought together at the end of the tenth century.<sup>23</sup>

Moreover, many actual cases must be recorded in the two T'ang histories. The late Dr. van Gulik suggested that one way to begin would be to search out the cases contained in the biographies of famous judges in the histories. But we must wait for someone with the patience and

<sup>21</sup>The best work on pre-T'ang law in a Western language is Etienne Balazs, tr., *Le Traité juridique du "Souei-chou."* Ch'eng Shu-te brought together a large portion of the fragments of pre-T'ang laws in his *Chiu-ch'ao lü-k'ao* (Research on Law during the Nine Dynasties).

<sup>22</sup>Derk Bodde and Clarence Morris, *Law in Imperial China, Exemplified by 190 Ch'ing Dynasty Cases*.

<sup>23</sup>See the discussion and references to articles on this subject in Twitchett, "The Fragment of the T'ang Ordinances," p. 25, note 1a; and Hulsewé, *Han Law*, 1, 4.

ability of Professor Hulsewé to read through the 455 chapters of the histories and bring the legal material to light.

The *Code* had great influence on later Chinese criminal legislation. The following dynasty, the Sung (960-1270), accepted the *Code* with only minor changes. All too little is known of Yüan (1279-1368) law, but that part which is still extant shows great resemblance to the *Code*.<sup>24</sup> During the Ming dynasty (1368-1644), there was a major reorganization of the criminal code and the number of articles was reduced. Further revision was ordered in the Ch'ing period. Yet one scholar has estimated that thirty to forty percent of the Ch'ing criminal code consists of articles taken over unchanged from *The T'ang Code*.<sup>25</sup>

The *Code* also strongly influenced the development of criminal law in other East Asian countries.<sup>26</sup> T'ang China served as a model for the then emerging Japanese state in many ways, and both the *Code* and the *Statutes* were adopted by Japanese emperors intent on the reorganization of their government.<sup>27</sup> Later, in the tenth century, Korean law was also influenced by the *Code*. And even as late as the fifteenth century, a large part of the *Code* was taken over either without alteration or only slightly modified by the Vietnamese Le dynasty.<sup>28</sup> Indeed, it can be safely asserted that the *Code* has been the single most influential piece of legislation to appear in East Asia.

### Philosophy of Law in *The T'ang Code*<sup>29</sup>

In other civilizations law has been seen as the gift of some god or gods; not so in China. The *Code*, and indeed other writings of Ch'ang-sun Wu-chi, are quite specific in ascribing the creation of the law to the great sage rulers of antiquity.<sup>30</sup> It is stated that during the reigns of the (legendary) emperors Yao and Shun there were very few crimes owing to the high moral standards that were followed in those days. The view of society expressed in the *Code*, and which is a main theme of Chinese thought, is that those ancient times were a golden age from which there has been a steady decline.

<sup>24</sup>See Paul Ratchnevsky, *Un Code des Yuan*.

<sup>25</sup>Hsüeh Yün-sheng, quoted in Bodde and Morris, *Law in Imperial China*, p. 63.

<sup>26</sup>Yang Hung-lich, *Chung-kuo fa-lü tsai Tung-ya chu-kuo chih ying-hsiang* (The Influence of Chinese Law in East Asia), is the earliest study on this subject. The latest serious work is Niida Noboru's *Chūgoku hōseishi kenkyū: keihō* (A Study of Chinese Legal History—Criminal Law), pp. 301-596. Niida has summarized his views in English in "Chinese Legal Institutions of the Sui and T'ang Periods and Their Influence on Surrounding East Asian Countries."

<sup>27</sup>There is an enormous literature on this subject. Most of the important works are listed in Twitchett, "The Fragment of the T'ang Ordinances." See also the discussion and books and articles listed in Mitsusada Inoue, "The *Ritsuryō* System in Japan."

## 10 Background

With this decline, standards of morality were no longer sufficient to maintain order, and so laws became necessary. Thus morality and law are the two principal supports of society—morality first, but if it fails then punishment is the answer. The punishments are intended to inspire awe and to be dreaded, hence they are modeled on the thunder and lightning. Certainly one of the aims of the *Code* is to act as a deterrent; to fill the prospective law-breaker with fear for the consequences of his act.

But the primary purpose of law is to maintain a balance in society and a harmony between the human and the natural worlds. In this, the *Code* reflects the thought of the Han philosopher Tung Chung-shu (179?-104? B.C.).<sup>31</sup> His view of the universe was holistic, that is, the human and the natural worlds are linked together so that actions in the human world will bring about a corresponding reaction in the natural world. The universe then is anthropocentric, and the most important connection between the human and natural worlds is the emperor, whose actions can have either a beneficial or harmful effect on both the human and the natural orders.

Tung attempted to explain all phenomena in terms of certain general principles. The most important of these were the *yin* and *yang*, the alternating negative and positive forces in the universe; and the five elements (earth, wood, metal, fire, and water). The sun, man, imperial grace, spring, and summer are all dominated by the *yang* principle. But the moon, woman, death penalties, fall, and winter are under the *yin* influence. Then there are five basic notes in music, five colors, five important human relationships, and five directions (the center is the fifth) to correlate with the five elements.

An offense is regarded as a disruption of society that must be restored by the proper punishment. But punishments in the human sphere that are too heavy can bring about a reaction in the natural world—epidemics, floods, and droughts are commonly mentioned. In such cases the emperor must take steps to reduce punishments and so alleviate the sufferings of the people.<sup>32</sup> This belief in the connection between human

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<sup>28</sup>There exists a French translation of this code by Raymond Deloustal which was made in the early part of this century. However, Vietnamese scholars at Harvard Law School are presently making another translation into English.

<sup>29</sup>The basic work in the field of legal philosophy has been done by Derk Bodde. His views are given in the first section of Bodde and Morris, *Law in Imperial China*. But see also the articles listed in that bibliography.

<sup>30</sup>*Sui shu* 25/1a; Balazs, *Traité juridique*, p. 29.

<sup>31</sup>A good discussion of Tung Chung-shu's thought is found in Yu-lan Fung, *A History of Chinese Philosophy*.

<sup>32</sup>See T'ung-tsu Ch'ü, *Law and Society in Traditional China*, pp. 213-218.

activity and the occurrence of natural phenomena is probably one of the reasons for the lack of flexibility afforded in sentencing by the *Code*. Once the magistrate had an understanding of all the facets of the case, he had no leeway in sentencing; the exact sentence provided by the *Code* had to be given. Thus throughout the empire a particular crime would be met with precisely the same punishment. The theory behind this is that if a certain punishment had been decided upon for a crime, then assigning a lesser punishment would not be a sufficient response and a heavier punishment might provoke some natural disaster.

With such a theory serving to temper the administration of punishment, there was concern about the validity of accusations. If the accuser had made a false accusation he would receive the same punishment that would have been administered to his intended victim. This would serve to restore the social balance that had been affected by the false accusation.

Confession of crimes such as robbery, and return of the stolen goods, could also repair the damage done by the crime, and in such cases the thief would not be punished. Indeed, the *Code* states that even if crimes such as rebellions were confessed before any action had taken place, the rebels could escape the severe penalties for that offense.

The *Code* also reflects the position of the emperor as the most important link between the human and the natural worlds as well as the head of the government. Offenses that involve the emperor or the imperial house are on a different level from those against other persons. In such cases not only the criminal but also his family members would be executed and their possessions confiscated by the state. Such crimes head a list of ten categories of offenses that were regarded as particularly heinous. Not only were the punishments especially severe for persons who committed such offenses, but certain other procedural protections, usually available to those convicted of other crimes, were not allowed to them.

Another dominant theme expressed in the *Code* is that social and political status affects a person's liability for punishment. The followers of Confucius in the first centuries before Christ were opposed to both a written law code and to liability for punishment, at least for ordinary offenses, for those persons who were of higher social or political standing than the ordinary person. The guiding principle for such favored classes should be morality (*li*); law was for the common people.<sup>33</sup>

<sup>33</sup>"Ritual does not extend down to the common people, punishments do not reach up to the officials." *Li chi*, "Ch'ü li"; Seraphin Couvreur, *Li ki ou Mémoires sur les bienséances et les cérémonies*, 1, 53. See the very good treatment of Confucius found in Creel, *Confucius, the Man and the Myth*.

## 12 Background

The Confucians likewise advocated hierarchical distinctions within the family group. Fathers, and indeed all elders, should have the loyalty and obedience of the junior members of the family. The *Code* institutionalizes this idea by allowing family members to conceal each other's offenses. Offenses by superiors against inferiors should be punished less heavily than those against equals in status. Similarly, offenses against superiors by inferiors should be punished more heavily.

In this, the Confucians were opposed to the Legalists, who stressed the need for a written law code that would be applicable to everyone and emphasized the state as the highest object of loyalty. The *Code* represents a harmonizing and a compromise of the views of these two opposing factions.

It will be apparent from reading the next chapter that much of the section of the *Code* on General Principles is devoted to guaranteeing some classes of persons a reduction of punishment for certain types of offenses, and/or the right to pay a fine instead. But all such provisions for leniency are extremely specific both as to the offenses that are covered and the degree of leniency allowed. Moreover, in certain cases those in official position or who were heads of families would receive more punishment than ordinary persons.

But none of the legal benefits allowed to various types of persons could be invoked in cases that endangered either the emperor or the state. Neither were relatives permitted the right of concealment of such offenses by family elders; indeed, if the elders did try to conceal such a crime, they were likely to become involved in that person's punishment.

The *Code* also reflects an attempt by a centralized, bureaucratic state to extend and protect its power throughout all of China. This is certainly another reason why the local magistrate was permitted no discretion at all in the sentencing of cases. He had to provide for each case some relevant article of the *Code*, the *Statutes*, the *Regulations*, or the *Ordinances* to justify his decision. Failure to do so would result in being punished himself. Moreover, any case that required punishment beyond beating had to be reviewed by higher authorities—in the case of the death penalty, permission had to be given by the emperor himself. The emperor could also, if he felt circumstances justified it, increase punishment as well as ameliorate it.

In order to make the administration of justice as automatic as possible, the *Code* attempts to foresee all possible circumstances that would have to be taken into consideration for any particular case. Take, for example, the crime of robbery, which is not only distinguished by whether or not force was used but, in addition, has separate articles dealing with the theft of government documents, Buddhist images, articles connected with national sacrifices, and weapons, each with a

different punishment. And if no article could be found to fit exactly a given offense, there is provision for making a judgment by analogy with some crime that is covered in the *Code*.

The status of the defendant is also covered in detail, since it has relevance to the punishment assigned for any particular crime. Mention has already been made of provisions that favored certain classes of persons. Certain others, who may be called the inferior classes, were punished more heavily for some crimes than were the largest group of the population, who may conveniently be called commoners.

But in addition to social status, there were other factors of youth, age, sex, and mental and physical condition that could lessen punishment for many offenses. Moreover, these factors were operative in all cases, so that even members of the inferior classes could benefit from them. The recognition in a law code that such personal factors should be taken into consideration in sentencing seems to be the outstanding positive feature of traditional Chinese law.<sup>34</sup>

These basic ideas formed the theoretical base underlying the individual articles of the *Code*. After the fall of the T'ang dynasty, the *Code* continued to dominate Chinese criminal legislation until the end of the imperial period. Then, with the collapse of the Ch'ing dynasty and the founding of the Republic of China in 1912, Western law gained favor, as it had earlier in Meiji Japan. Later, when Mao Tse-tung came to power in 1949, Russian law became influential. So the *Code* has now been pushed into the background. Despite this, certain of its concepts—confession, for instance—are very much alive even today. Thus for some 1,300 years *The T'ang Code* has played the dominant role in East Asian law, a period of time rivaled only by the *Corpus Juris Civilis* in Western Europe.

<sup>34</sup>These ideas, in fact, can be traced back to the *Rites of Chou* (*Chou-li*), a constitutional document of approximately the third century B.C., which has been translated by Edouard Biot, *Le Tcheou-li ou rites des Tcheou*. Creel, *Statecraft in China*, p. 478, does not think that this represents any actual practice at that time, and I agree. But see also the opposite view in Sven Broman, "Studies on the Chou Li."

## CHAPTER II

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### General Principles of *The T'ang Code*

#### Harmony of Law and Nature

The provisions of the *Code* attempt to reinforce harmony with the natural world through compliance with the *yin-yang* and five elements theories. Indeed, the *Code* itself represents the *yin*—the dark side of social control—in contrast with the *yang* influence of ritual, morality, and education.

The best example of the importance of the *yin-yang* theory is the restriction on carrying out the death penalty.<sup>1</sup> Death was under the *yin* or negative power. Thus there were two death penalties—strangulation and decapitation—two being a *yin* number.

Because of this, executions were carried out only during that part of the year when the *yin* influence was in the ascendant, the fall and winter seasons. Should criminals be put to death during the seasons when the *yang* power was rising, a poor harvest might result. In addition, there were other auspicious days, such as the equinoxes and the solstices, as well as Buddhist fast days, when executions were banned. Altogether, there were so many of these forbidden days that it has been estimated that fewer than sixty days of the year were available for executions.<sup>2</sup> Should an official violate one of these taboo days, he could be punished by as much as one year of penal servitude.<sup>3</sup>

The influence of the five elements theory in the *Code* is well illustrated by the preference for groups of five. It was traditionally supposed to have contained 500 articles, though there are 502 as it is now constituted. There are also five punishments. The subcommentary to Article 1 of the *Code* states that the sages created the five punishments in imitation of the five elements.

#### *The Five Punishments*

1. light stick: 10, 20, 30, 40, and 50 blows
2. heavy stick: 60, 70, 80, 90, and 100 blows
3. penal servitude: 1, 1½, 2, 2½, and 3 years

<sup>1</sup>A general discussion of this practice is given in Bodde and Morris, *Law in Imperial China*, pp. 46-48. The details as they pertained to T'ang law are based on Hulsewé, *Periodieke executie- en slachtverboden in de T'ang tijd en hun oorsprong*.

<sup>2</sup>Bodde and Morris, *Law in Imperial China*, p. 47.

<sup>3</sup>Article 496.

4. life exile: 2,000, 2,500, and 3,000 *li*
5. death: strangulation and decapitation

As can be seen, there are also subcategories of fives for the light stick, the heavy stick, and penal servitude. Then there are three distances of life exile and two death penalties, so that these major punishments also total five.

Other instances of categories of five are the five important degrees of family relationship, the division of official privileges at the fifth rank, and the particularly serious crimes punished by the five kinds of life exile. Not all of these may have resulted from conscious attempts to correlate the *Code* with the five elements, but groupings of five are certainly numerous and suggestive.

### False Accusation, Reparation, and Amnesty

In a society which believes that punishment of the innocent can cause natural disasters, there is justifiable concern over false accusation. During a trial, every effort, including even torture within specific bounds according to the offense, was made to get the accused to confess his guilt of the charge against him. But if the accused would not confess, the next step was to interrogate his accuser for the possibility of false accusation.<sup>4</sup> When it then came out that the accusation was false, the accuser was punished with the penalty for the crime of which he had accused the innocent person.<sup>5</sup>

If the person falsely accused was a commoner or a member of the inferior classes, reciprocal punishment did not present a problem. Were the offense punished by two years of penal servitude, the person who made the false accusation was so sentenced. But the case was more complex when officials or members of the Buddhist or Taoist clergy were involved as the original accused. Officials who were found guilty of certain offenses would be forced to resign from office. Monks and nuns could be required to return to lay status. A table was given for such offenses, which equated resignation from office or forced return to lay status with so many blows of the heavy stick.

The *Code* is also concerned with balancing injustice that has already resulted in punishment either through wrongful conviction of the innocent or too heavy a sentence for a guilty party. When the person who suffered unjustly was known and the facts were clear, such a person received reparation from the government. But if natural disasters oc-

<sup>4</sup>Article 478.

<sup>5</sup>Article 342; Deloustal 501.

## 16 General Principles of The T'ang Code

curred that could not be linked with any particular person, more general remedies were used.

Reparation was limited, however, to sentences of penal servitude or life exile. Apparently a mistaken beating was not serious enough to warrant any reparation. But it seems strange that no provision was made for mistaken execution. It is possible that this was because no one could be executed without the emperor's consent, and the *Code* cannot consider the possibility of a mistake by the emperor.<sup>6</sup>

For each year of penal servitude served either by someone who was, in fact, innocent or who was guilty but whose sentence was too heavy for his crime, two years of taxes and labor services would be remitted.<sup>7</sup> When less time had been served, fifty days was considered to be the same as a year. For still shorter periods, relief from certain taxes was granted according to a fixed scale.

Such exemption from taxes and labor services was not affected by other factors. Thus, if a person had a year's relief from taxes and labor services, and there was a flood or drought in that year so that there was a general exemption from taxes and labor services by imperial decree, the person's private relief would be carried over to the next year.

The emperor also had other means at his disposal whereby he could counterbalance the effects of too-heavy punishments.<sup>8</sup> Amnesties, in particular, were announced at the beginning of a reign, on the emperor's birthday, or at other auspicious occasions, and not just because of fear that too-heavy punishments might bring famine. There were 174 great amnesties during the almost three hundred years of the T'ang dynasty, and certainly many more less general awards of imperial grace.<sup>9</sup> Great amnesties reached throughout the empire, while others were limited to particular regions or particular offenses. Thus the sentence of almost any criminal had some chance of being lessened or even canceled by amnesty.

There were also decreases of sentences and revisions, most often

<sup>6</sup>I am indebted to Dr. Fu-mei Chang for this suggestion.

<sup>7</sup>Article 44.

<sup>8</sup>A general treatment of ways to balance the effects of too-heavy punishments is found in Ch'ü, *Law and Society*, pp. 213-218. The famous memorial of Ch'en Tzu-ang to the Empress Wu on this subject is translated in Bünger, *Quellen*, pp. 108-118. See also Eugene Feifel, *Po Chü-ı as a Censor*, p. 225.

<sup>9</sup>Hsü Shih-kuei, *Chung-kuo ta-she k'ao* (Researches into Great Amnesties in China), p. 94. Hsü gives lists and official explanations but has very little analysis. There is also a discussion of various types of amnesties in Tai Yen-hui, *T'ang-lü t'ung-lun* (General Principles of The T'ang Code), pp. 330-344. However, the best treatment is found in Shen Chia-pen, *Shen Chi-yi hsien-sheng yi-shu, chia-pien* (Bequeathed Writings of Mr. Shen Chi-yi [Shen Chia-pen], first series), I, 230-357.

because of natural disturbances, such as plagues of locusts. Decreases of sentences were general, but revisions concerned individual criminals.<sup>10</sup> The cases of these persons were examined to determine whether or not their sentences were proper. The officials then memorialized the throne as to what action they favored.

### The Ten Abominations

Most of the offenses covered in the *Code* are simply set forth in the appropriate part of the section on specific articles. But certain crimes were considered so heinous that they were listed also under Article 6, entitled "The Ten Abominations." Since the criminal acts brought together here were held to be especially reprehensible, an examination of them will help to throw light on the values of T'ang society.

#### *The Ten Abominations*

- |                            |                         |
|----------------------------|-------------------------|
| 1. plotting rebellion      | 6. great irreverence    |
| 2. plotting great sedition | 7. lack of filial piety |
| 3. plotting treason        | 8. discord              |
| 4. contumacy               | 9. unrighteousness      |
| 5. depravity               | 10. incest              |

It might now be advisable to read through the translation of Article 6 in order to become familiar with the particular crimes covered under these ten categories. Here it is sufficient to state that the crimes included within the ten abominations are those that endanger the emperor or the state, those that are committed by subordinate members of the family or bureaucracy against their superiors, those that threaten the existence of the family, and those that involve black magic.

The procedure in dealing with crimes that came within the ten abominations was markedly different from that ordinarily used. None of the privileges allowed special groups, such as members of the bureaucracy, was permitted in cases of violation of one of the ten abominations.<sup>11</sup>

Not all of the crimes included within this category were punished by the death penalty. However, they were commonly all explicitly exempted from the provisions of amnesties.<sup>12</sup> Even in special cases that were pardoned, the criminals were deprived of whatever rank they had, and any goods or real property that had been confiscated by the state were not returned.<sup>13</sup>

<sup>10</sup>Shen, *Bequeathed Writings*, I, 353-354.

<sup>11</sup>Articles 8, 9, 10, and 11. Privileged groups are discussed in the fourth part of this chapter.

<sup>12</sup>See, for example, the amnesty of 635 quoted in the subcommentary of Article 488.

<sup>13</sup>Articles 18 and 32.