

**The Transmission of Penal Law (*lü*) from the
Han to the T'ang :
A Contribution to the Study of the Early
History of Codification in China**

Geoffrey MACCORMACK

(University of Aberdeen)

Introduction

Some preliminary observations are necessary on the use of the term 'code'. This essay distinguishes three senses in which the term may be used, designated as wide, narrow, or technical. Code in the wide sense refers to the entire collection of laws emanating from the ruler produced during a particular reign or even a dynasty. There is here no necessary reference to any specific principles of organization or to any specific arrangement of the content of the laws. Nevertheless, in point of fact, there is likely to have been some attempt to arrange compilations of different kinds of laws roughly according to the content of the rules. An example of this usage is 'the Han code' when applied to the totality of legislation enacted during the Han dynasty (206 BC – AD 220). This legislation was of great bulk and complexity. It was enacted at different times and took different forms. In no sense did it constitute a unified or coherent whole. Yet it can be said to exhibit some rough principles of division based partly upon form and partly upon substance. The form in which rules were cast, their enactment as statutes (*lü*), ordinances (*ling*), or

regulations (*k'o*) might reflect their importance and degree of permanence. Thus, rules which concerned matters deemed most important to the state, intended to have permanent force, were enacted as statutes, while those dealing with the exigencies of the moment first appeared as ordinances or regulations. Within particular compilations of laws, whether *lü*, *ling*, or *k'o*, the rules might be grouped in chapters according to subject matter.

In its narrow sense the term 'code' designates a part only of a dynasty's corpus of laws. This part may be differently constructed under different dynasties. Thus, under the Han, the phrase 'code of 186 BC' refers to a particular collection of laws compiled in 186 BC entitled the *Erh Nien Lü Ling* (Statutes and Ordinances of the Second Year), comprising both statutes (*lü*) and ordinances (*ling*), in which the statutes are arranged in 'books' or 'chapters' according to subject matter. In other dynasties the term 'code' may be used to designate a particular branch of the law, namely the statutes (*lü*) defining offences and prescribing punishments. This is the sense generally possessed by the phrases 'the T'ang code', 'the Ming code', or 'the Ch'ing code', where the word 'code' may sometimes be prefaced with the word 'penal'. In its narrow sense, the term 'code' also conveys the sense of particular or discrete collections of law promulgated or published as a whole.

The technical sense of the term 'code' has been elaborated by the work of modern scholars. On their view, a collection of laws, even where the rules are divided into sections according to subject matter, should not be called a 'code' unless its structure possesses a particular kind of coherence. The legislators should have conceived the collection as a unity in which each part stands in a predetermined relationship to each other part and in which the formulation of the individual rules themselves exhibits the links between them. Even though a collection of laws constitutes a code in the narrow sense, it still might not be a code in the technical sense. The Han code of 186 BC, for example, although divided into *lü* and *ling* with the *lü* arranged in chapters according to subject matter, is still not a code in the technical sense. It was not conceived by the legislators as a unity whose components stood in a predetermined relationship to each other. We do not find codes in the technical sense until the post-Han period.

The starting point of the investigation is the penal code (*lii*) of the T'ang dynasty (AD 618-907), one of the finest products of Chinese jurisprudence. This is a code in both the narrow and the technical sense defined above. The general object of the investigation is the historical process which culminated in the production of the T'ang code. Its particular focus is the titles of the chapters into which the T'ang code is divided and the relationship of these chapters to each other. Examination of the antecedents of these titles will help to elucidate the emergence and gradual refinement of the technical conception of a code. Hence, the investigation will also consider the historical process by which the penal *lii* came to be separated from the administrative *ling*. Although the emphasis is upon the structure and organization of the T'ang and pre-T'ang compilation of laws, occasional reference is made to the content of the law.

Identification of the various stages that marked the evolution of the penal code is complicated by the political divisions to which China was subjected in the post-Han period. According to the accounts of post-Han legal development preserved in the principal historical sources, after the fall of the Han, the Han code (in the wide sense) inherited by the Wei (AD 220-64) and Chin (AD 265-420) dynasties was subsequently transmitted in two principal lines furnished by the political division of China. One line was supplied by the southern dynasties (Eastern Chin (AD 317-420), Sung (AD 420-79), Southern Ch'i (AD 479-501), Liang (AD 502-57), and Ch'en (AD 557-89), the other by the (Toba) Northern Wei dynasty (AD 386-534). After the fall of the Northern Wei, a further fragmentation of the north into the Eastern Wei/ Northern Ch'i (AD 534-77) and Western Wei/Northern Chou (AD 535-581) dynasties occurred. The reconquest of China by the Sui dynasty (AD 580-618) brought together these lines of transmission and provided the Sui legislators with a number of possible sources for the construction of the first Sui penal code (in the narrow and technical sense), which in turn formed the model for the T'ang code. One important question we have to consider is, what tradition did the makers of the Sui code principally use, that transmitted through the south or the north, and with respect to the latter, that of the Northern Ch'i or Northern Chou?

The Han

The Han dynasty gives us examples of ‘codes’ in both the wide and narrow sense, although not the technical. Statements such as, the Han code formed the basis for subsequent legal development both in the south and the north, employ the wide sense. Although the Han produced several varieties of legislation which collectively amounted to an enormous body of rules, we do not have details of their form and content at the end of the dynasty. We know that the corpus of material was utilised by successive dynasties as the foundation of their own legislation; we have some information on the titles of books contained in the Han *lü* (statutes) or *ling* (ordinances) and even on particular rules contained in collections of *lü*, *ling*, or other forms of legislation such as *k’o*. But we do not know the exact organization or content of the Han *lü*, *ling*, or *k’o*.

However, we do have information on two Han codes in the narrow sense from the beginning of the dynasty. One of these is the *Code in Nine Chapters* (*Chiu Chang Chih Lü*), attributed to Hsiao Ho, chancellor of the Han founder. The other is the *Erh Nien Lü Ling* (Statutes and Ordinances of 186 BC), known through archaeological evidence. While nothing is known of the former code other than the titles of its chapters, the actual rules contained in the code of 186 BC have been preserved, thus giving an invaluable insight into the structure and content of an early Han compilation of *lü* and *ling*. It is worth comparing, so far as we can, the content of these two codes.

The histories tell us that Hsiao Ho collected the Ch’in laws and on their basis completed the *Statutes in Nine Chapters*¹. This compilation is said to have had as its basis the six chapters of the *Fa Ching* (*Canon of Laws*) attributed to the statesman Li K’uei of the state of Wei at the end of the fifth century BC. The six chapters were: banditry (*tsei*), theft (*tao*), imprisonment (*wang*), arrests (*pu*), miscellaneous offences (*tsa*), and specific matters concerned with the application of punishment (*chü*)². To these Hsiao Ho added three

¹ See, for example, *Han shu* (The History of the Former Han Dynasty, compiled by Pan Ku in the first century AD) (Beijing: Chung-hua, 1975), 4.1096; A.F.P. HULSEWÉ, *Remnants of Han Law I* (Leiden: E.J. Brill, 1955), 333 and compare 26.

² On the meaning of *chü* see LI XUEQIN and XING WEN, *New Light on the Early-Han Code: A Reappraisal of the Zhangjiashan Bamboo-slip Legal Texts*, *Asia Major* XIV.1 (2001), 127 and n14. Compare also HULSEWÉ, *Remnants of Han Law*, 28;

further chapters: levies (*hsing*), stables (*chui*), and the household (*hu*)³. Although we are told by the Treatise on Punishments in the *Chin shu*⁴ that the chapters of the *Fa Ching* were concerned only with the description and punishment of offences, it is likely that the chapters added by Hsiao Ho contained some purely administrative rules, that is, ones which did not specify offences and punishments.

We may here note the relevance of a further archaeological discovery, that of the laws of the state of Ch'in in the third century BC. It is these laws or their second century versions that Hsiao Ho must have collected and used as the basis for his own compilation. The Ch'in statutes (*lii*) excavated from the tomb of a low ranking official are concerned entirely with administrative matters. None of the numerous titles for groups of statutes evidenced by the excavated texts refer specifically to the principal offences or their punishment, nor do any correspond with the titles of the chapters attributed to the *Fa Ching*⁵. This does not mean that the Ch'in did not possess titles with statutes similar to those of the *Fa Ching*, merely that such statutes have not been preserved. Indeed, if we give any credence to the traditional account of the compilation of the *Code in Nine Chapters*, we may deduce that the Ch'in laws themselves preserved the six chapters of the *Fa Ching* and that it was these that were adopted by Hsiao Ho as the basis for his compilation⁶. The three

Robert HEUSER, *Das Rechtskapitel im Jin-shu. Ein Beitrag zur Kenntnis des Rechts im frühen chinesischen Kaiserreich* (München: J Schweitzer, 1987), 81.

³ *Chin shu* (The History of the Chin Dynasty, compiled by Fang Hsüan-ling in the seventh century AD) (Beijing: Chung-hua, 1974), 3.922; HEUSER, *Rechtskapitel im Jin-shu*, 81-2; HULSEWÉ, *Remnants of Han Law*, 28-9. See also the comments of SHIGA SHUZO, *A Basic History of T'ang Legislative Forms, Asia Major* V.2 (1922), 101; YONGPING LIU, *Origins of Chinese Law. Penal and Administrative Law in its Early Development* (Hong Kong: Oxford University Press, 1998), 253-63, criticising the accuracy of the traditional account.

⁴ Cited in note 3.

⁵ For details see A.F.P. HULSEWÉ, *Remnants of Ch'in Law. An Annotated translation of the Ch'in Legal and Administrative Rules of the 3rd Century B.C. Discovered in Yun-meng Prefecture, Hu-pei Province, in 1975* (Leiden: E.J. Brill, 1985) and "Qin and Han Legal Manuscripts", in *New Sources of Early Chinese History: An Introduction to the Reading of Inscriptions and Manuscripts*, edited by Edward L. Shaughnessy (Berkeley: The Society for the Study of Early China and the Institute of East Asian Studies, University of California, Berkeley, 1997).

⁶ Although the *Fa Ching* has been dismissed as a fabrication by some modern scholars (HULSEWÉ, *Remnants of Han Law*, 29-30; Timoteus POKORA, *The Canon of Laws by Li K'uei – A Double Falsification?*, *Archiv Orientalni* 27 (1959), 96-121;

chapters added by Hsiao Ho were almost certainly directly drawn from Ch'in material. We know that the Ch'in code had sections on stables (*ch'iu yüan lü* 'statutes on stables and parks') and statute labour (*yao lü*). It is also very likely that they contained a section on the household (*hu*), since the state of Wei in the fourth century BC already had 'statutes on the household (*hu lü*)'⁷. Provided we assume the broad accuracy of the historical tradition, we may infer that Hsiao Ho compiled the *Code in Nine Chapters* shortly after 207 BC, the year in which he collected the Ch'in laws⁸.

Some twenty years later, the *Erh Nien Lü Ling* (Statutes and Ordinances of the Second Year (186 BC) of the Reign of the Empress Lü) was put together⁹. The excavated texts constitute twenty seven

Herrlee Glessner CREEL, *Legal Institutions and Procedures during the Chou Dynasty*, in *Essays on China's Legal Tradition*, edited by Jerome Alan Cohen, R. Randle Edwards, and Fu-mei Chang Chen, (Princeton, New Jersey: Princeton University Press, 1980), 37; Jerome BOURGON, *Le rôle des schémas divinatoires dans la codification du droit chinois. À propos du Commentaire du code des Jin par Zhang Fei*, in *Divination et Rationalité en Chine Ancienne. Extrême-Orient Extrême-Occident* 21 (Paris: Université de Paris, 1999), 133-4), there do not appear to be compelling reasons to reject the traditional account accepted by other scholars (P. PELLIOU, *Notes de bibliographie chinoise, Bulletin de l'École Française d'Extrême-Orient* 9 (1909), 124 and nn1,2; Jean ESCARRA, *Le droit chinois* (Pekin: Henri Veitch, 1936), 91; Joseph NEEDHAM, *Science and Civilization in China. Volume 2. History of Scientific Thought* (Cambridge: Cambridge University Press, 1956 reprinted 1977), 523; Leon VANDERMEERSCH, *Wangdao ou La Voie Royale. Recherches sur l'esprit des institutions de la Chine archaïque. Tome II. Structures politiques, Les rites* (Paris: École Française d'Extrême-Orient, 1980), 453-44; Du ZHENGSHENG, *A Synopsis of Works on Ancient Chinese History Published in Taiwan 1982-1987*, translated by Laura A Skosey, *Early China* 14 (1989), 240; Shuga SHIZO, *Asia Major* V.2 (1992), 100; LIU, *Origins of Chinese Law*, 20).

⁷ HULSEWÉ, *Remnants of Ch'in Law*, 208-9.

⁸ See LIU, *Origins of Chinese Law*, 257. We also know of another early collection of statutes. The *Chin shu* tells us that the Ch'in ritual expert Shu-sun T'ung, who was appointed to various offices by Kao tsu, compiled a set of statutes in eighteen chapters entitled *P'ang chang lü* (Supplementary [or Extended] Statutes). These are generally thought to have focused on ceremonial and ritual matters: *Chin shu*, 3.922; HEUSER, *Rechtskapitel in Jin-shu*, 83; HULSEWÉ, *Remnants of Han Law*, 40 (21), 56, 433, 442-3 (nn24,5); LI and XING, *Asia Major* XIV.1 (2001), 146-7.

⁹ For the text see *Zhangjiashan Hanmu zhujian (ersiqi hao mu)* (Han Tomb Slips from Zhangjiashan – Tomb No. 247) (Beijing: Wenwu Chubanshe, 2001), and for discussion U LAU, *Sensationelle Funde aus Grab M247 in Zhangjiashan/Provinz Hubei. Juristische Dokumente vom Beginn der chinesischen Kaiserzeit, Rechtshistorisches Journal* 20 (2001), 255-89; LI and XING, *Asia Major* IV.1 (2001), 125-46; Oba OSAMU, *The Ordinances on Fords and Passes Excavated from Han*

books of statutes (*lü*) each with its own title and one book of ordinances (*ling*). They were found, together with other documents, in the tomb of a Han official who retired in 194 BC. Given these circumstances, it cannot be assumed that the texts constitute the whole of the Han *lü* and *ling* current in 186 BC; nevertheless they probably formed a considerable part at least of the statutes. Whereas the statutes (*lü*) appear as laws without reference to their origin, the ordinances (*ling*) consist either of imperial orders on specific points or petitions from high officials for the enactment of a regulation, the latter being marked with the word 'approved' noted at the end of each. This suggests that the characteristic mark of a *ling* at this time was not so much the content of the rule (the *Erh Nien Ling* are all concerned with authorization for entering or leaving the passes or with permission to keep horses 'within the passes') as its status as a recommendation approved by the throne.

The titles of the chapters of *lü* contained in the *Erh Nien Lü Ling*, as indeed the content of the rules, show a resemblance to those of the Ch'in statutes. There is also a discernible connection between the chapters of the *Code in Nine Chapters* and those of the *Erh Nien Lü Ling*. The six chapters of the former code allegedly drawn from the *Fa Ching* correspond to the first seven chapters of the latter. Both codes also have a chapter on the household (*hu lü*) as well as one on levies and corvée duty entitled *hsing lü* in the *Code in Nine Chapters* and *yao lü* in the *Erh Nien Lü Ling* (following the Ch'in terminology). The chapter on stables (*chiu lü*) attributed to the *Code in Nine Chapters* is not as such found in the excavated texts of the *Erh Nien Lü Ling*, but its content may have been included in that compilation, for example in the chapter on accusations (*kao lü*)¹⁰. These considerations suggest that the *Erh Nien Lü Ling* should be regarded as a revised and expanded version of the *Code in Nine Chapters*¹¹.

The content of the *lü* assembled in the *Erh Nien Lü Ling* is a mixture of the penal and the administrative. Thus the six chapters

Tomb Number 247, Zhangjiashan, translated and edited by David Spafford, Robin D. S. Yates and Enno Giele, with Michael Nylan, *Asia Major* XIV.2 (2001), 119-41.

¹⁰ For the (later) Han statutes on stables see HULSEWÉ, *Remnants of Han Law*, 35-6 (8).

¹¹ Even some of the provisions of Shu-sun T'ung's *Extended Statutes* on ritual matters may have been incorporated in the section on the appointment of officials: LI and XING, *Asia Major* XIV.1 (2001), 145-6.

which carry the same titles as those of the *Fa Ching* (*tsei, tao, chü, pu, wang, and tsa*) contain the essentials of the penal law, that is, they stipulate rules defining offences and punishments. The remaining chapters are largely concerned with administrative matters, in particular the regulation of compulsory labour and military conscription, agriculture, markets, currency, the conferring of rewards and gifts, the ranking, training, and liability of officials, the courier system, the household, and succession to rank.

We do not have details of the content of any Han legislation after the *Erh Nien Lü Ling*. From time to time collections of statutes (*lü*) were issued on a variety of topics¹². It is likely that composite collections of *lü*, that is, compilations containing a number of chapters of *lü* like the *Erh Nien Lü Ling*, continued to be published at intervals throughout the Han. The same process also appears to have characterised the production of the ordinances (*ling*). From time to time ordinances on particular topics were issued. In some cases we know the titles of the chapters into which ordinances were grouped¹³. No doubt, again, collections of ordinances comprising a number of distinct titles were sometimes issued. A different form of legislative enactment known as *k'o* appeared during the Later Han¹⁴.

In both Han dynasties officials and even the emperor frequently commented upon the length and prolixity of the code in the wide sense. Accounts of the evolution of the Han code in the Treatises on Punishments contained in the *History of the Former Han Dynasty* (*Han shu*) and the *History of the Chin Dynasty* (*Chin shu*) make clear the nature of the problems faced by those who wished to use it as a model: the code had become excessively lengthy, disorganised, and unwieldy. By the time of emperor Hsüan (73-48 BC) the statutes and ordinances (*lü ling*) were divided into three hundred and fifty one sections (*chang*). Of the individual clauses (*tiao*), four hundred and nine imposed the death penalty, increased to more than one thousand by 28 BC¹⁵. So great was the number of laws that officials were

¹² See HULSEWÉ, *Remnants of Han Law*, 32-40; A. F. P. HULSEWÉ, *Fragments of Han Law*, *T'oung Pao* LXXVI.4-5 (1990), 208-33.

¹³ HULSEWÉ, *Remnants of Han Law*, 42-7.

¹⁴ See the study by Liu DUCAI, *Textual Research of Ke in Han Dynasty*, *Cass Journal of Law* 4 (2003), 149-60 (in Chinese).

¹⁵ *Han shu*, 4.1103; HULSEWÉ, *Remnants of Han Law*, 240.

unable to consult them all, with the result anomalies occurred in the administration of justice¹⁶. A decree of emperor Yüan in 47 BC stated that the statutes and ordinances were “vexatiously numerous and not concise”¹⁷, a point repeated by emperor Ch’eng in an edict from the period 28-25 BC¹⁸.

The position did not improve under the Later Han (AD 25-221). In AD 94 the legal expert Ch’en Ch’ung submitted a memorial again urging a revision and reduction of the statutes and ordinances. He pointed out that at that time there were six hundred and ten capital offences, one thousand six hundred and ninety eight offences punished by penal servitude, and two thousand six hundred and eighty one other offences¹⁹. Despite the fact that some changes were made in the second century AD, the *Chin shu* notes that the old statutes were still too numerous, too complex, and badly organised²⁰.

We may establish certain general points about the Han code, where ‘code’ is used in the wide sense as a general term for all Han legislation whether enacted specifically as *lü*, *ling*, or *k’o*. The main components of this legislative complex were the *lü* and the *ling*. However there did not exist a single, unified body of *lü* or *ling*. In both cases there were promulgated separate or discrete bodies of rules on particular topics each with its own title. Although on occasion several such titles might be published as one compilation (as, for example, the *Code in Nine Chapters* or the *Erh Nien Lü Ling*), even by the end of the Han it does not seem as though all *lü* or all *ling* were brought together in a single document in which the rules (whether *lü* or *ling*) were organised into separate chapters according to subject matter.

The second principal characteristic of the Han ‘code’ lies in the nature of the distinction between the *lü* and the *ling*. This is defined by Tu Chou, commandant of justice at the end of the second century BC, as: “what the former emperors commanded ought to be written down as the *lü*, what the later rulers considered as right is set down as

¹⁶ *Han shu*, 4.1101; HULSEWÉ, *Remnants of Han Law*, 338.

¹⁷ *Han shu*, 4. 1103; HULSEWÉ, *Remnants of Han Law*, 339.

¹⁸ *Han shu*, 4.1103; HULSEWÉ, *Remnants of Han Law*, 340.

¹⁹ *Chin shu*, 3.920; HEUSER, *Rechtskapiteln im Jin-shu*, 68-9.

²⁰ *Chin shu*, 3.920; HEUSER, *Rechtskapiteln im Jin-shu*, 70. See generally LIU, *Origins of Chinese Law*, 291-4.

*ling*²¹. The implication of the distinction drawn by Tu Chou is that the *lu* were the old rules handed down from age to age, even from dynasty to dynasty, whereas the *ling* were the new rules designed by the ruler to cover the contingencies of the moment²². A further implication is that the *lü* qualify as basic or fundamental rules of the empire, while the *ling* embrace matters which assist but are not crucial to the well being of the state. In the course of time certain *ling* might possibly be elevated to the rank of *lü*. In particular, once a rule was enacted as a *ling* it might, like the *lü*, come to form part of a compilation of *ling* that was transmitted from reign to reign. In that way the distinction drawn by Tu Chou might come to be seen as somewhat artificial.

The essential point is that during both Former and Later Han the *lü* and the *ling* did not possess the quality that characterised them in later dynasties, that is, the *lü* were not purely rules which defined offences and allocated punishments and the *ling* were not purely rules which defined the duties of officials and regulated the administration of the country. Equally, *lü* was not a term reserved for that section of the whole legislative corpus devoted to penal law, nor was *ling* a term used to describe that particular section devoted to administrative law. This said, it may have been the case that in the course of the dynasty rules relating to offences were more likely to be enacted as *lü* than *ling*, while rules concerned with administration were more likely to be enacted as *ling* than *lü*.

The Wei, Chin, and Southern Dynasties

After the fall of the Han and the establishment of the three successor kingdoms of Wei, Wu, and Shu, an important step in the evolution of the penal code was taken in the kingdom of Wei (AD 220-64). Initially, the rulers of the three kingdoms made no attempt to revive the corpus of Han legislation, but conducted the government by edict and issued regulations (*k'o*), the latter possibly being framed on the basis of old Han *k'o*²³. Neither Wu nor Shu attempted a more ambitious legislative programme, but in Wei during the reign of emperor Ming (AD 226-237) a new body of law predicated upon the

²¹ *Han shu*, 9.2659; HULSEWÉ, *Remnants of Han Law*, 31.

²² The *ling* forming part of the *Erh Nien Lü Ling* (note 9 above) fit this description.

²³ See Liu DUCAI, cited note 14.

lü and *ling* was put into place. The account of the legislative process recorded in the *Chin shu*²⁴ makes it plain that despite the turmoil of the last decades of the Han some versions of the Han *lü*, *ling*, and *k'o* had survived. These formed the basis of the new Wei legislation. Several comprehensive collections of laws were produced, the most important being the *New Code (Hsin lü)* in eighteen chapters, the *Ordinances for the Regions and Commanderies (Chou chün ling)* in forty five chapters, the *Ordinances for the Office of the Imperial Secretariat (Shang shu kuan ling)*, and the *Ordinances for the Army (Chün chung ling)*, as well as the revised *k'o*²⁵.

The core of the legislation was the *New Code* promulgated in AD 234. This collection of laws clearly constitutes a code in the narrow sense. According to both the *Chin shu* and the commentary to chapter six of the *T'ang Liu Tien* its base was the *Han Code in Nine Chapters*. To this was added a certain number of new chapters²⁶. However, the accounts in the two sources are not the same. The *T'ang Liu Tien* commentary simply states that emperor Ming added to the nine chapters of the Han code²⁷ a further nine chapters drawn from other Han *lü*, namely, 'intimidation and kidnapping (*chieh lüeh*)', 'fraud and deceit (*cha*)', 'damage and loss (*hui wang*)', 'accusations and impeachments (*kao ho*)', 'detention and interrogation (*hsi hsiün*)', 'judgments and prison (*tuan yü*)', 'soliciting of bribes (*ch'ing ch'iu*)', and 'restoration of illicit goods (*cheng tsang*)'²⁸.

The more detailed account in the *Chin shu* suggests that the simple picture presented by the *T'ang Liu Tien* is not entirely accurate. The *Treatise on Punishments* lists a number of changes made by the Wei legislation to the Han statutes (*lü*). First, the old statutes on specific matters concerned with the application of punishment (*chü lü*), derived originally from the *Fa Ching*, were renamed 'general principles (of punishments) (*hsing ming*)' and placed at the beginning

²⁴ *Chin shu*, 3.924-5; HEUSER, *Rechtskapiteln im Jin-shu*, 88-96.

²⁵ *Chin shu*, 3.923; HEUSER, *Rechtskapiteln im Jin-shu*, 87.

²⁶ See the discussion by Li YUSHENG, *Some Issues about the Distinction of Lü and Ling in Wei-Jin Dynasty*, *Cass Journal of Law* 5 (2003), 148-60 (in Chinese). The *T'ang Liu Tien* (Compendium of Administrative Law of the Six Divisions of the T'ang Bureaucracy) was compiled in the eighth century AD.

²⁷ This refers to the code of Hsiao Ho, above note 1.

²⁸ The passage is cited in CH'ENG SHU-TE, *Chiu-chao lü-k'ao (Investigations into the Codes of Nine Dynasties)* (Beijing: Chung-hua, 1988), 197.

of the *New Code*. Second, the statutes on stables (*ch'iu lü*), originally contributed by Hsiao Ho, were abolished, part of their content being transferred to a new ordinance on the postal and courier service (*yü i ling*). Third, a number of new chapters for statutes (*liü*) were created through the transfer of material from various kinds of Han legislation, namely, 'matters left undone (*liu*)', 'exemption from (collective) liability (*mien tso*)', 'intimidation and kidnapping', 'fraud and deceit', 'accusations and impeachments', 'detention and interrogation', 'judgments and prison'²⁹, 'soliciting bribes', 'unauthorised levies (*hsing shan*)', 'damage and loss', 'restoration of illicit goods', and 'emergencies'. Nine of these titles correspond with the nine chapters mentioned by the *T'ang Liu Tien*. The titles not mentioned by the latter source at all are 'matters left undone' and 'exemption from (collective) liability'. The chapter on 'unauthorised levies' is probably to be taken as a renaming and remodelling of the old chapter on levies added by Hsiao Ho to the *Fa Ching*.

Two further points are suggested by the account in the Treatise. First, it is possible that the new chapters on 'detention and interrogation' and 'judgments and prison' replaced the old *Fa Ching* chapter on 'imprisonment', termed in later Han collections *ch'iu*³⁰ (instead of *wang lü*)³¹. Second, there is a reference to the Han statutes on currency (*chin pu lü*)³² from which material was taken and transferred to other statutes. Since this was not one of the chapters of the *Code in Nine Chapters*, it seems that it was now suppressed and not retained as one of the chapters of the *New Code*.

These considerations suggest the tentative conclusion that the *New Code* contained the following chapters: (1) general principles of punishments, (2) theft, (3) intimidation and kidnapping, (4) banditry, (5) fraud and deceit, (6) damage and loss, (7) accusations and impeachments, (8) arrests, (9) detention and interrogation, (10) judgments and prison, (11) miscellaneous matters, (12) soliciting bribes, (13) household, (14) unauthorised levies, (15) matters left

²⁹ The phrase *tuan yü* is sometimes rendered 'decision of lawsuits'; so HEUSER, *Rechtskapiteln im Jin-shu*, 33.

³⁰ See HULSEWÉ, *Remnants of Han Law*, 33 (3).

³¹ On this point see the study by Li Yusheng cited note 26.

³² On this term see LI and XING, *Asia Major* XIV.1 (2001), 128 and n23.

undone, (16) emergencies, (17) restoration of illicit goods, and (18) exemption from (collective) liability³³.

The first point one may make is that the Wei legislators effected a considerable pruning of the Han *lü*. This occurred in two ways: a reduction in the number of the individual chapters or collections of *lü* and a reduction in the number of particular laws that qualified as *lü*. Although we do not know the number of chapters of *lü* extant at the end of the Han, the extent of the ‘code’ noted by commentators in the first century AD (above) suggests that the number may even have exceeded the twenty seven known chapters of the *Erh Nien Lü Ling*. The only specific example of the suppression of a title we have is that of the chapter on currency (*chin pu lü*). The suppression of chapters of *lü* in itself also entailed a very considerable reduction in the number of specific *lü*. In addition, the compilation of the *New Code* entailed either the abolition or reclassification of rules contained in the chapters that were retained. While some rules were placed in one of the new chapters of *lü*, others were relegated to the ordinances (*ling*).

A statement in the *Chin shu* seems to contradict the conclusion that the *New Code* achieved a considerable reduction in the Han *lü*. It is said that, although there was an increase in the ‘principal statutes (*cheng lü*)’, the supporting laws (*pang chang*), the ordinances (*ling*), and the regulations (*k’o*) were all decreased³⁴. However, the reference to an increase in the ‘principal statutes’ is predicated upon the fact that the starting point for the *New Code* was the *Code in Nine Chapters* not the totality of the chapters of *lü* found at the end of the Han. Hence the statement cannot be taken as proof that the Han statutes were actually increased in number. There is nothing surprising in the statement that the total number of Han *ling* and *k’o* was decreased, even though they still exceeded in bulk the eighteen chapters of the *New Code*.

The second point is that the Wei legislators viewed the whole corpus of legislation as a unitary whole in which each part bore a particular relationship to each other. This is evidenced not only in the tripartite relationship between *lü*, *ling*, and *k’o* but also in the

³³ This follows the reconstruction of Li Yusheng (note 26 above). There are different reconstructions in Etienne BALAZS, *Le traité juridique du “Souei-chou”* (Leiden: E.J. Brill, 1954), 208, and HEUSER, *Rechtskapiteln im Jin-shu*, 33.

³⁴ *Chin shu*, 3.925; HEUSER, *Rechtskapiteln im Jin-shu*, 96.

relationship between the individual chapters of *lü* and in the allocation of rules to chapters. The relationship between *lü* and *ling* will be considered below. As to the organization and structure of the *New Code* itself, the renaming and reordering of the chapter on ‘general principles’ show that the legislators now had a clearer conception of the role of ‘general principles’ in the structure of the code on penal law. Further, the *New Code* is obviously more than just a regrouping of earlier Han laws with the addition of some new rules. The classifications it introduces suggest changes and improvements in the way in which offences were defined. For example, the *New Code* introduces, apparently for the first time, chapters regulating offences denominated generically as ‘fraud and deceit’, ‘intimidation and kidnapping’, and ‘soliciting bribes’. There is here evidenced a more precise conceptualisation of offences related to the illegal acquisition of property than is apparent in the Han code of 186 BC.

The third point concerns the relationship between the *lü* and the *ling*. One set of rules is denominated *lü* (the *Hsin lü*), other sets are denominated *ling* or *k’o*. The terms *lu* and *ling* seem here to be used to differentiate quite separate collections of rules. Shuga Shizo has commented that *lü* as a concept is first clearly seen in Chinese legal history in the designation of the Wei (penal) code³⁵. This points to the fact that the *Hsin lü* supplies the first evidence we have of a collection of rules separately designated *lü* in contrast to another set (other sets) designated *ling*. We may go further and suggest that it was the Wei legislators who essentially established the basic distinction between *lü* and *ling* present in T’ang legislation. The old definition of Tu Chou no longer applies³⁶. The term *lü* in the conjunction *lü ling* designates specifically the body of penal laws in which the emphasis is on the prescription of punishments for offences, whereas *ling* designates the body of administrative laws in which the emphasis is on the definition of offices and the duties pertaining to them³⁷.

A further consequence may be drawn. The penal code (*lü*) is now established as a unity, a collection of rules incorporated in a single document, possessing its own structure and coherence. On the one hand, it no longer contains rules of a purely administrative nature;

³⁵ *Asia Major* V.2 (1992), 103. See also in particular Li Yusheng cited note 26.

³⁶ See note 21 above.

³⁷ See also below at note 41 on Tu Yu.

they are relegated to the *ling*. On the other, although penal rules may still exist outside the particular code denominated *lü*, as in the form of edicts or *k'o*, there are no separate collections of rules denominated *lü* standing outside the ambit of this code. At the same time, one has to be aware of two senses in which the term *lü* might be used. It might designate the penal code as a whole, as in the phrase *Hsin lü* (New Code), but it might also designate individual chapters of that *lü*, as in the phrase *tsei lü* (statutes on banditry/violence). This usage is followed by the later law.

Just under four decades after the enactment of the Wei *New Code* the law was again recast by the newly arisen Chin dynasty (AD 265-420). Within a few years of the accession of the first Chin emperor a new penal code was produced (AD 268). The Wei statutes were completely recast, the eighteen chapters becoming twenty in the Chin code. The *Chin shu*, describing the changes, states that the Chin legislators took as their starting point the old Han *Code in Nine Chapters*. This implies that they disregarded the Wei legislation and went, as the Wei drafters had themselves, directly back to Han models. Nevertheless, it is difficult to believe that the Chin legislators did not have before them the codification achieved by their predecessors. According to the *Treatise on Punishments*, the Chin added to the nine chapters of the Han code eleven further chapters making twenty chapters in all. Several changes were made to the *New Code*. The chapter on stables (*chü lü*), abolished by the Wei, was restored by the Chin. Further several of the new chapters introduced by the Wei were now suppressed: intimidation and kidnapping, matters left undone, emergencies, restoration of illicit goods, and exemption from liability. The Chin themselves introduced new chapters on 'the palace guard (*wei kung*)', 'water and fire (*shui huo*)', 'passes and markets (*kuan shih*)'³⁸, 'disobeying regulations (*wei chih*)', and 'lords of the earth (feudal lords) (*chu hou*)'. Finally the Wei chapter on 'general principles' was divided into two, one termed 'names of punishments (*hsing ming*)', dealing with the nature of the punishments, and the other 'principles of law (*fa li*)', dealing with the way in which the punishments were to be applied³⁹.

³⁸ This had been a title of both the Ch'in and Han *lü*: HULSEWÉ, *Remnants of Han Law*, 56-7; LI and XING, *Asia Major* XIV.1 (2001), 128 and n17.

³⁹ *Chin shu*, 3.927; HEUSER, *Recht kapiteln im Jin-shu*, 105-6.

The Treatise refers to certain matters, such as military affairs (*chün shih*), farming and agriculture (*tien ming*), and traffic in alcohol, which required regulation only in times of uncertainty. Hence, rules on these and similarly classifiable topics were included not in the *lü* (statutes) but in the *ling* (ordinances) completed in forty rolls (*ch'uan*). The term *ch'uan* seems to have the same sense as *pien* or *chang* (chapter), since we are told that the whole of the *lü ling* comprised sixty *ch'uan*. This account of the *ling* suggests that the *lü* (twenty chapters) consisted of rules deemed permanently necessary, whereas the *ling* (forty chapters) consisted of rules required by the exigencies of the time⁴⁰. Tu Yu, one of the commissioners appointed to draft the code, stated the distinction between the *lü* and the *ling* in the form: “The *lü* is that which standardises crime; the *ling* is that which establishes a measure for affairs”⁴¹. Here we have the first authoritative statement of the distinction between the *lü* as concerned with the penal law and the *ling* with the administrative. It is interesting, however, that many administrative rules appear to have been contained not in the *ling* but in a body of laws termed *ku shih* (‘old affairs’ or ‘precedents’). The Treatise describes the *ku shih*, of which there were thirty books, as general guidelines and principles used by the local authorities for the conduct of the administration⁴². However, it does seem apparent from the titles of the books of *ling* which have been preserved in the commentary to the *T'ang Liu Tien*⁴³ that many matters connected with the appointment and functions of officials, as well as with the administration of the punishments, were regulated in the *ling*.

The Chin legislators can be regarded as continuing and developing the work of systematisation and classification of the laws begun by the Wei. The titles and arrangement of the *lü* were somewhat different

⁴⁰ *Chin shu*, 3.927; HEUSER, *Rechtskapiteln im Jin-shu*, 106.

⁴¹ For the text see *T'ai-ping yu-lan* (Imperially Revised Encyclopaedia of the T'ai-ping Era, compiled in the tenth century AD) (Beijing: Chung-hua, 1985), 638.7a, p859, translated by Shuga Shizo, *Asia Major* V.2 (1992), 103.

⁴² *Chin shu*, 3.927; HEUSER, *Rechtskapiteln im Jin-shu*, 106-8. See also William Gordon CROWELL, *Government Land Policies and Systems in Early Imperial China* (University of Washington doctoral thesis, 1979), 189-91; Lu LI, *Analysis of 'Past Practices' in the Dynasties of Han, Wei and Jin*, *Cass Journal of Law* 6 (2002), 133-49 (in Chinese).

⁴³ The titles are reproduced in BALAZS, *Traité juridique du "Souei-Chou"*, 209.

from those characterising the *New Code*, but the Chin *lü*, like its Wei counterpart, sought to achieve a classification and ordering of offences that best reflected social and political requirements. In after years the Chin *lü*, that is, that part of the whole legislation which defined offences and imposed punishments, was praised for its equity, clarity, and simplicity. Wang Chih, the official responsible for drafting a code for use in the Southern Ch'i (AD 479-501)⁴⁴ said that, when he studied the Chin *lü*, he found the text simple, the terminology concise, and its intention conforming to the great (moral) principles⁴⁵. Modern scholars have also noted its virtues⁴⁶. One, indeed, has argued that the Chin *lü* was the first proper code produced in China, in the sense that it was not just a heterogeneous collection of disparate statutes but an ordered and coherent whole in which each section was constructed with reference to the other sections and in particular to the governing principles set out in the first two sections⁴⁷. Yet the Chin code should not be construed too much in isolation from the tradition out of which it grew. The transformation of a collection of disparate rules organized predominantly according to subject matter into an integrated whole was the fruit of a long period of experimentation in the techniques of drafting performed by legal specialists. The Wei *New Code*, for example, already possessed the same kind of structural unity as the Chin code.

The Eastern Chin (317-420), Sung (420-79), and Southern Ch'i (479-501) dynasties in the south largely followed the Chin code and made no major legislative changes. At the end of the fifth century a penal code containing around 1530 articles had been prepared in Southern Ch'i, based on the Chin code with the commentaries of Chang Fei and Tu Yu. Before coming into force, the code was

⁴⁴ This code was never brought into force (*Sui shu* [History of the Sui Dynasty compiled by Wei Cheng in the seventh century AD] [Beijing: Chung-hua, 1973], 697; BALAZS, *Traité juridique du "Souei-Chou"*, 34).

⁴⁵ *Nan Ch'i shu* (History of the Southern Ch'i Dynasty, compiled by Hsiao Tzu-hsien in the sixth century AD) (Beijing: Chung-hua, 1972), 3.835; BALAZS, *Traité juridique du "Souei-Chou"*, 103 n41.

⁴⁶ Benjamin E. WALLACKER, *Chang Fei's Preface to the Chin Code of Law*, *T'oung Pao* LXXII.4-5 (1986), 264-8; Doris HEYDE, *Überlegungen zu den Rechtskodifizierungen der Jin Zeit*, *Altorientalische Forschungen* 9 (1982), 229-36.

⁴⁷ BOURGON, *Extrême-Orient Extrême-Occident* 21 (1999), 129-42, with a discussion also of the possible influence of the *I ching* (Book of Changes) on the code.

destroyed, but an exact memory of it was preserved in the family of Ts'ai Fa-tu. Ts'ai, being able to recite the provisions of the lost code, was placed in charge of drafting the code of the Liang dynasty (502-557). An edict of 502 established the principles upon which the new code was to be prepared, the most important being the removal of superfluous language and the detection and elimination of inconsistencies in the articles and commentaries. These principles were implemented by a special commission which in 503 produced the draft of the *lü* in twenty chapters. The headings of the chapters were virtually identical with those of the Chin *lü*, with the exception that the chapter on 'lords of the land' was replaced with one on 'granaries and storehouses (*ts'ang ku*). The Liang *lü* appears in general to have been a revised version of the Chin *lu* with few substantial changes⁴⁸. In addition, the Liang produced a collection of ordinances (*ling*) in thirty books and one of regulations (*k'o*) also in thirty books⁴⁹, the latter probably replacing the Chin 'precedents (*ku shih*)'.

The short lived Ch'en dynasty (557-89) produced a revised and extended version of the Liang code, probably completed in 566. The *lü* were now arranged in thirty books, the titles of which have not survived. According to the Treatise on Punishments contained in the *History of the Sui Dynasty* (*Sui shu*), the Ch'en code was merely a compilation drawn from the laws of preceding dynasties, vast and unwieldy. Despite the multiplicity of its headings it was neither well ordered nor clear⁵⁰. It is unlikely that this particular code had any significant influence in the later development of the law.

The Northern Dynasties

In the north the history of codification starts with the Northern Wei (AD 386-534). The originally nomadic T'o-pa people who acquired control of north China at the end of the fourth century AD gradually absorbed Chinese customs and, particularly for the conduct of government, wholeheartedly adopted Chinese institutions. From the

⁴⁸ *Sui shu*, 3.697-8; BALAZS, *Traité juridique du "Souei-Chou"*, 34-7, 104-5 (n41), 106-7 (nn48,9), 208.

⁴⁹ *Sui shu*, 3.700; BALAZS, *Traité juridique du "Souei-Chou"*, 43, 209.

⁵⁰ *Sui shu*, 3.702; BALAZS, *Traité juridique du "Souei-Chou"*, 49-51, 125-7 (nn130-2).

early days of the T'o-pa empire importance was attached to the establishment and settlement of the *lü ling*, the *lü* being the penal and the *ling* the administrative law. Particular attention was paid in this respect to the 'old precedents (*ku shih*)', which in this context must have meant the laws of the Han, Wei, and Chin dynasties. We first here in 398 of an imperial decree ordering the settlement of the *lü ling*. The two officials (Ts'ui Hsüan-po and Teng Yüan) principally concerned with the drafting of the first code are noted in their biographies as persons well acquainted with the 'old precedents'⁵¹. Perhaps this first effort was regarded as unsatisfactory. In 431 emperor T'ai wu who had succeeded to the throne in 426 ordered the minister over the masses Ts'ui Hao to revise and settle the *lü ling*⁵², paying particular attention to the Han, Wei, and later codes⁵³. Ts'ui himself appears to have been a student of Han law⁵⁴. The penal code (*lü*) produced by Ts'ui is said to have contained 390 clauses, though we have no specific information as to the number or titles of the books⁵⁵. Revisions were made in 452⁵⁶, but the most important developments occurred in the reign of the emperor Kao tsu (AD 471-500), who accelerated the reception of Chinese institutions. From at least 477 the emperor gave considerable attention to the reform of the *lü ling*, ordering his officials to consult the old laws and precedents and revise the code. A new penal code (*lü*) with 832 clauses was promulgated in 481, then revised further in 487 and 492. Finally, after

⁵¹ *Wei shu* (History of the Northern Wei Dynasty, compiled by Wei Shou in the sixth century AD) (Beijing: Chung-hua, 1974), 1.33, 2.621,635, 8.2873.

⁵² *Wei shu*, 1.79, 8.2874.

⁵³ Commentary to the *T'ang Liu Tien* cited in Ch'eng Shu-te, *Chiu-chao lü-k'ao*, 346.

⁵⁴ *Shih chi* (Historical Records, compiled by Ss'ma Ch'ien in the first century BC) (Beijing: Chung-hua, 1959), 2.428 n4 citing a commentary added in the eighth century entitled the *so yin*, and HULSEWÉ, *Remnants of Han Law*, 385-6, where a quotation from a Han commentary is (mistakenly) attributed to Ts'ui Hao. Both SHEN CHIA-PEN (*Li-fu hsing-fa k'ao (Investigations into the Penal Law of Successive Dynasties)*) (Beijing: Chung-hua, 1985), 3.1390-1) and CH'ENG SHU-TE (*Chiu-chao lü-kao*, 359) suppose that Ts'ui himself wrote the preface to the Han statutes cited by the *so yin*.

⁵⁵ Commentary to the *T'ang Liu Tien* cited above at n53.

⁵⁶ The relevant passages from the sources are cited by CH'ENG SHU-TE, *Chiu-chao lü-k'ao*, 346-7.

Kao tsu's death in 500, his successor ordered a further revision in 504⁵⁷.

There is some doubt as to whether the Northern Wei legislators in the early part of the fifth century had access to original versions of the Han laws or merely had to rely on Han law as already transmitted through the Wei and Chin codes. Ch'eng Shu-te cites some features of Northern Wei law which in his view did not characterise the southern tradition⁵⁸. We also know that Ts'ui Hao was familiar with a preface to the Han code (*Han lü hsü*)⁵⁹. This is likely to have been a commentary written in Han times. Consequently, there is some reason to think that the Northern Wei *lü ling* had for their source Han models that had not been transmitted in the form of the Wei and Chin legislation. This does not exclude the likelihood that this legislation itself also had a strong influence upon the Northern Wei innovations. Nor is it impossible that the Liang code of 503 influenced the Northern Wei revision of 504.

Although the Treatise on Punishments in *The History of the Northern Wei Dynasty* (*Wei shu*) does not record the titles of the Northern Wei code (of 504), the modern scholar Ch'eng Shu-te has reconstructed the following twenty chapters: (1) 'general principles (of punishments) (*hsing ming*)', (2) 'application of the law (*fa li*)', (3) 'the imperial palace and guard (*kung wei*)', (4) 'violation of regulations (*wei chih*)', (5) 'household (*hu*)', (6) 'stables and herdsmen (*chü mu*)', (7) 'unauthorised levies (*shan hsing*)', (8) 'banditry (*tsei*)', (9) 'theft (*tao*)', (10) 'assaults (*tou*)', (11) 'detention and interrogations (*hsi hsün*)', (12) 'fraud and deceit (*cha wei*)', (13) 'miscellaneous (*tsa*)', (14) 'arrests and flights (*pu wang*)', (15) 'judgments and prison (*tuan yü*)', (16) 'corruption (*ch'ing ch'iu*)', (17) 'accusations and impeachments (*kao ho*)', (18) 'passes and markets (*kuan shih*)', (19) 'water and fire (*shui huo*)', and (20) 'marriage (*hun yin*)'⁶⁰. If this list is correct⁶¹, it is striking that

⁵⁷ *Wei shu*, 1.144,168, 8.2876-8.

⁵⁸ *Chiu-chao lü-k'ao*, 339.

⁵⁹ See note 54 above.

⁶⁰ *Chiu-chao lü-k'ao*, 350-2. The same list, albeit in a different order, is given by BALAZS, *Traité juridique du "Souei-Chou"*, 208.

⁶¹ Titles 1-15 are evidenced directly from references in the *Wei shu*, *T'ung tien* (an encyclopaedia compiled by Tu Yu in the eighth century AD), and *T'ang lü shu-i*.

eighteen of the twenty titles are directly paralleled in the Chin code. The titles are identical with the exception that the Chin 'stables (*chiu*)' becomes the Northern Wei 'stables and herdsmen (*chiu mu*)', and the Chin 'arrests (*pu*)' becomes the Northern Wei 'arrests and flight (*pu wang*)'. The two Chin titles omitted in the Northern Wei code are 'destruction and loss (*hui wang*)' and 'lords of the earth (*chu lii*)'; they have been replaced by the titles on 'assaults' and 'marriage'. The code of 504 was admired by contemporaries for the excellence of its arrangement⁶².

A comparison of the titles of the chapters of the Northern Wei code with those of the Chin might suggest that the latter was the principal model for the former. However, Ch'eng Shu-te came to a different conclusion, noting that on the whole the northern Wei code was based directly on the Han code. He cited certain features of the Northern Wei legislation present in Han law but not found in the later southern dynasties: the severe treatment of offences of *pu tao* and deceit, the requirement that executions should be carried out in the last month of winter, and the system of deciding doubtful cases after deliberation and consideration of the principles of the Spring and Autumn. These features can be explained by the fact that the two officials primarily responsible for the settlement of the *lü ling* in the reign of Shih tsu (AD 424-52) were Ts'ui Hao and Kao Yun. Ts'ui was an expert in the Han *lü*, while Kao was a student of the Spring and Autumn Commentary entitled *Kung yang*⁶³. One should not attach undue importance to these points. Although the legislators may have drawn particular points directly from Han sources, they appear essentially to have relied upon Wei and Chin precedents for the structure and content of the *lü* and *ling*.

Little is known of the content of the ordinances (*ling*). Only a few titles of the chapters into which they were divided have been preserved. These show that the rules dealt with the duties of officials and the ranks (*p'in*) which they held. Ch'eng Shu-te supposes that the Northern Wei *ling* were revised and modified version of Han and Chin models⁶⁴. The Northern Wei also produced collections of

⁶² W.F.J. JENNER, *Memories of Loyang. Yang Hsüan-chih and the lost capital (493-534)* (Oxford: Clarendon Press, 1981), 150.

⁶³ *Chiu-chao lü-k'ao*, 339.

⁶⁴ *Chiu-chao lü-k'ao*, 391-2. See also *Wei shu*, 2.353.

regulations now termed *ko*⁶⁵, but nothing is known of their arrangement or content⁶⁶.

It is perfectly possible that Northern Wei legislators, especially in their first experimentation with the production of penal and administrative rules, drew directly upon Han sources for some material. Nevertheless, it seems that from the beginning the Northern Wei *lü ling* was a relatively sophisticated legal instrument. It is likely that the Wei-Chin legislation was used directly as a model for the structure and arrangement of the Northern Wei legislation. From the beginning there was a clear distinction between the *lü*, confined to an elaboration of the penal law, and the *ling*, containing the rules prescribing the way in which the administration of the state was to be conducted. The *lü* certainly, and probably also the *ling*, constituted codes in the narrow and technical sense. Indeed, the *lü ling* complex itself can also be regarded as such a code since it seems to have been drafted at the same time, the intention of the legislators being to produce a unified code of penal and administrative rules with interlocking parts.

In the third decade of the sixth century the Northern Wei empire suffered internal divisions and began to fragment. For a short period, until the re-unification of China under the Sui (581-618), the north was divided into the Eastern Wei (534-550) which established the Northern Ch'i dynasty (550-77) and the Western Wei (535-557) which established the Northern Chou dynasty (557-81). The Northern Wei legislation with modifications continued to be recognised in Eastern and Western Wei, but the Northern Ch'i and Northern Chou each produced its own penal code. The Northern Chou penal code (*Ta lü*) of 563 consisted of one thousand four hundred and thirty seven articles distributed between twenty five chapters. The titles of these chapters show the various influences of the Chin, Liang, and Northern Wei codes⁶⁷. The *Ta lü* was restricted to penal statutes. There was no corresponding revision and publication of the ordinances (*ling*).

⁶⁵ Karl BÜNGER, *Quellen zur Rechtsgeschichte der T'ang Zeit*. Neue, erweiterte Ausgabe, mit einem Vorwort von Denis Twitchett. Herausgegeben von Roman Malek (Sankt Augustin: Institut Monumenta Serica; Nettetal: Steiger Verlag, 1996), 39.

⁶⁶ CH'ENG SHU-TE, *Chiu-chao lü-k'ao*, 390.

⁶⁷ Details in *Sui shu*, 3.707; BALAZS, *Traité juridique du "Souei-Chou"*, 64-5, 150 (n192), 208.

During the Western Wei and Northern Chou it seems that the place of the *ling* was taken by regulations termed *chih* or *shih*. In other words, the content of the Northern Wei *ling* may have been preserved but the relevant collections of rules given a different name⁶⁸.

The Sui Treatise on Punishments criticises the *Ta lii* as excessively severe, too cumbersome, and oppressive without being effective⁶⁹. Although it did not provide a principal model for later ages, it was not without any influence on the subsequent history of codification. More significant for its later influence was the Northern Ch'i penal code of 564. This was a much less unwieldy legal instrument than the Northern Chou code, comprising nine hundred and forty nine articles arranged in twelve chapters. The titles of the chapters were: (1) 'definitions and general principles (*ming li*)', (2) 'prohibitions with respect to the imperial guard (*chin wei*)', (3) 'marriage and the household (*hun hu*)', (4) 'unauthorised levies (*shan hsing*)', (5) 'disobeying administrative regulations (*wei chih*)', (6) 'deceit and fraud (*wei cha*)', (7) 'quarrels and litigation (*tou sung*)', (8) 'banditry/violence and theft (*tsei tao*)', (9) 'arrests and judgments (*pu tuan*)', (10) 'damage and loss (*hui sun*)', (11) 'stables and pastures (*chiu mu*)', and (12) 'miscellaneous (*tsa*)'. The titles seem to have been drawn largely from the Northern Wei code. In several cases two Northern Wei titles were combined to form one Northern Ch'i title. One chapter ('damage and loss') has parallels in the codes of the Wei, Chin, and Liang dynasties, but not in that of the Northern Wei⁷⁰.

That the Wei and Chin codes (perhaps also the Liang) had a considerable influence on the content of the Northern Ch'i code is suggested by a remark in the *Sui shu*. It is said that the code followed the 'precedents' (*ku shih*) constituted by the codes of the Wei (Three Kingdoms) and Chin dynasties⁷¹. The same work also comments that the code was technically sound, composed and administered by well

⁶⁸ On the *chih* and *shih* see Sui SHU, 3.707; BALAZS, *Traité juridique du "Souei-Chou"*, 64, 147 (n189); Scott Anthony PEARCE, *The Yu-wen Regime in Sixth Century China* (Princeton University doctoral dissertation, 1987), 484-6.

⁶⁹ *Sui shu*, 3.709; BALAZS, *Traité juridique du "Souei-Chou"*, 69.

⁷⁰ *Sui shu*, 3.705; Balazs, *Traité juridique du "Souei-Chou"*, 58-9, 134-9 (nn166,7), 208.

⁷¹ *Sui shu*, 3.705; BALAZS, *Traité juridique du "Souei-Chou"*, 59.

qualified legal experts, and constituted a fair and effective instrument for the administration of justice⁷².

The Northern Ch'i also produced forty books of ordinances (*ling*)⁷³. They were classified according to the names of the twenty eight departments of state which themselves were grouped into six ministries concerned respectively with officials, the palace, the rites, the army, justice, and finance. This arrangement itself betrays very clearly the administrative focus of the *ling*. Each government office had its functions defined by a set of *ling* bearing the name of the office. In addition to the books of regular *ling*, there were two books of 'provisional ordinances' (*ch'üan ling*) dealing with matters not deemed to be of sufficient importance for inclusion in the 'settled law (*ting fa*)'. We also hear of 'provisional regulations (*ch'üan ko*)', which may have supplemented the rules on offences contained in the *lii*⁷⁴.

The Sui

The Sui was founded by Yang Chien, a general who had become de facto ruler of Northern Chou (which had already in 577 defeated and absorbed Northern Ch'i) in the last years of that dynasty. In 581 he forced the abdication of the last Northern Chou ruler, assumed the title of Wen ti, and proclaimed himself founder of a new dynasty. Within a few years Wen ti had conquered the southern state of Ch'en and consolidated his rule over the whole of China. The establishment of the Sui dynasty and the subsequent reunification of the country were marked in legal terms by the successive enactment of three penal codes. The first, promulgated in 581 shortly after Wen ti's accession, was termed the New Code (*Hsin lii*), containing in all one thousand seven hundred and thirty five articles, arranged in twelve books: (1) 'definitions and general principles (*ming li*)', (2) 'prohibitions relating to the imperial guard (*wei chin*)', (3) 'administrative regulations (*chih chih*)', (4) 'the household and marriage (*hu hun*)', (5) 'stables and storehouses (*chiu ku*)', (6) 'unauthorised levies (*shan hsing*)', (7) 'theft and banditry/violence (*tao tsei*)', (8) 'quarrels and litigation (*tou*

⁷² *Sui shu*, 3.706; Balazs, *Traité juridique du "Souei-Chou"*, 63.

⁷³ The commentary to the *T'ang Liu Tien* specifies fifty books.

⁷⁴ *Sui shu*, 705, 706-7; CH'ENG SHU-TE, *Chiu-chao lü-k'ao*, 406-9; BALAZS, *Traité juridique du "Souei-Chou"*, 59, 63, 145-6 (n186), 209.

sung'), (9) 'deceit and fraud (*cha wei*)', (10) 'miscellaneous (*tsa*)', (11) 'arrests and escapes (*pu wang*)', and (12) 'judgments and prison (*tuan yü*)'⁷⁵. The edict promulgating this code stressed that the imperial intention was to introduce a more equitable penal regime by abolishing the crueller punishments and generally making the punishments lighter than they had been under the Northern Chou. An influential member of the commission charged with the revision of the *lü ling* at the time was Pei Cheng whose father had held high judicial office under the Liang in the south. Pei's biography tells us that he selected his material from the Wei, Chin, Southern Ch'i, and Liang codes, studying the treatment of offences in those codes as light or heavy and making an equitable compromise. On questions of doubt it was his opinion that was followed by other members of the legislative commission⁷⁶.

In 583 the emperor, considering the code still too severe, ordered a further revision. The result was a much reduced version of the *Hsin lü* containing only 500 articles. The brevity, clarity, and systematic structure of the *K'ai-huang* code, as it came to be called, recommended it as the direct model for the T'ang code⁷⁷.

The titles of the new code closely resemble those of the Northern Ch'i code, although there are some differences. The title 'administrative regulations' replaces the more traditional title 'disobeying administrative regulations', and the phrase used to describe the title 'arrests and escapes' follows the Northern Wei rather than the Northern Ch'i terminology. The Northern Ch'i chapter on 'arrests and judgments (*pu tuan*)' is divided into two chapters, 'arrests and flight (*pu wang*)' and 'judgments and prison (*tuan yü*)', both placed at the end of the code. Here the Sui legislators appear to have followed the terminology and order of the Northern Chou code, the concluding chapter of which is entitled 'judgments and prison'. The Northern Chou title itself is taken from the Northern Wei code. The

⁷⁵ The number of articles and the titles of the books are inferred from the account in the *Sui shu* of the revised code of 583, cited below at note 77.

⁷⁶ *Sui shu*, 5.1549; BALAZS, *Traité juridique du "Souei-Chou"*, 148-9 (n190).

⁷⁷ *Sui shu*, 710-2; BALAZS, *Traité juridique du "Souei-Chou"*, 73-4, 76-9, 168 (n234), 169-70 (nn251,2), 208; BÜNGER, *Quellen zur Rechtsgeschichte der T'ang Zeit*, 75-6, 142, 145. See also Zhang XIANCHANG, *The Revision of the Decrees of Kaihuang Reign and its Position in Chinese Legal History*, *Cass Journal of Law* 4 (2002), 154-60 (in Chinese).

K'ai huang code suppresses the chapter on 'damage and loss' found in the Northern Ch'i code, its content being transferred to the statutes on miscellaneous matters (*tsa lü*). Furthermore, the Sui produced a more logical ordering of the chapters than had obtained in the Northern Ch'i code. At the beginning came the chapter on 'general principles for the application of the punishments', then came the chapters on offences connected with the emperor and the administration, then seven further chapters on other offences, and finally two chapters on the procedure for handling offences.

The impression we obtain is that Wen ti (even though he had been ruler of Northern Chou) deliberately chose as the model for his own legislation the Northern Ch'i and not the Northern Chou code. The reason perhaps lay in the acknowledged strength of the Northern Ch'i legislative tradition and the fact that its code was no doubt regarded as more 'progressive' than the somewhat archaising, unwieldy, and severe code of the Northern Chou. We also know that particular substantive provisions of the Northern Ch'i code, such as the clauses on the 'ten most serious crimes'⁷⁸ were also taken directly into the Sui code. Yet we are also told that the commission responsible for the first draft of the code in 581 drew upon the Wei, Chin, and Liang codes⁷⁹. This suggests that the content of the Sui code, as distinct from its organization, was strongly influenced by the southern codes.

Before the end of the Sui one further code was produced under Wen ti's successor, emperor Yang, in 607. Known as the *Ta yeh* code, it also contained 500 articles, but they were arranged in eighteen not twelve books. The titles of the books suggest that the Northern Chou code had a considerable influence upon its composition⁸⁰. This code had no influence upon the later development of the law.

The Sui legislators also concerned themselves with other forms of legislation. At around the same time as the production of the first Sui *lü*, work was commenced on a new version of the ordinances (*ling*). These were promulgated in 582 as the *New Ordinances (Hsin ling)* in thirty books, and further revived in the *Ta yeh* period (AD 605-616)⁸¹.

⁷⁸ See further below at note 113.

⁷⁹ Southern Ch'i is also mentioned, but the code of that dynasty seems to have been merely a version of the Chin code.

⁸⁰ The titles are set out by BALAZS, *Traité juridique du "Souei-Chou"*, 208-9.

⁸¹ CH'ENG SHU-TE, *Chiu-chao lü-k'ao*, 440, 446.

The titles, preserved in the commentary to the *T'ang Liu Tien* differ from those of the Northern Ch'i books of *ling*, but indicate a similar content: regulation of the various departments and functions of government⁸². The *lü* and *ling* constituted the fundamental penal and administrative law of the dynasty, rarely changed and perhaps rarely directly applied in practice. The effective tools of government were constituted by the rules laid down in imperial edicts dealing with the issues and emergencies of the day. From the great mass of edicts were drawn compilations of rules termed *ko* and *shih*. *Ko* covered both penal and administrative matters, while *shih* covered administrative matters of relevance to specific departments and localities⁸³.

The T'ang

The T'ang code, as it is known today in the edition of 737, was gradually put together in the period 618-53. From the account of its evolution given in the Treatise on Punishments in the *Old History of the T'ang Dynasty* (*Ch'iu T'ang shu*) it is clear that the principal model for its compilation was the Sui code of the *K'ai-huang* period. The T'ang founder, Kao tsu, after first promulgating a 'code' (*yüeh fa*) containing twelve articles in which only the offences of homicide, theft, desertion from the army, and treason were punished with death, ordered the compilation of new statutes based upon a revision of the Sui *lü ling* produced in the period 581-600. The later Sui code from the *Ta yeh* period (605-616) was considered too draconian to be suitable for the new dynasty. Initially, only a decree containing fifty three articles was produced, but in 624 a penal code (incorporating the decree), largely following the Sui code of 583, was promulgated. On T'ai tsung's succession in 627 further changes were contemplated, designed to make the punishments still more lenient. One interesting, though short lived, change introduced in the early years of the reign was the substitution in fifty cases of amputation of the right foot for strangulation. This was a direct incorporation into the law of a punishment not regularly employed since the early Han. However, the revival of amputation as a punishment proved to be controversial and in 632 it was replaced with exile to 3000 *li* coupled with labour for three years. In 637 a revised version of the code was published. This

⁸² See BALAZS, *Traité juridique du "Souei-Chou"*, 209.

⁸³ See Shiga SHUZO, *Asia Major* V.2 (1992), 104-5.

appears to have followed the structure and content of the code of 624, merely reducing the severity of the punishments. At the beginning of the succeeding reign (650-84) further revisions were made, the most notable being the addition to the code in 653 of the *shu-i* commentary⁸⁴.

The T'ang legislators, of course, did not confine their attention to the promulgation of a new *lü*. They also followed the Sui example in producing collections of *ling*, *ko*, and *shih*. These were initially modelled on the Sui precedents but, especially in the case of the *ko* and *shih*, came increasingly to incorporate changes made by the T'ang emperors themselves. It was the rules contained in the *ko* and *shih* that constituted the effective apparatus for the conduct of government⁸⁵.

A study of the headings of the twelve chapters of the T'ang penal code together with the explanatory *shu-i* commentary permits us to establish certain propositions concerning the history of the code. The T'ang legislators had, as instructed by the emperor, adopted the twelve chapters of the Sui *K'ai huang* code, but this code had been subject to a variety of influences.

The opening chapter on 'general principles (*ming li*)', in substance going back to the pre-Han legislation, had been first divided by the Chin code into two sections, a model followed both by the later southern dynasties and the Northern Wei. However, the Northern Ch'i combined these two sections into one chapter with the name *ming li*, a change followed by the Sui⁸⁶.

The second chapter on 'the imperial guard and prohibitions (*wei chin*)' originated under the Chin as 'the imperial palace and guard (*wei kung*)'. So it remained until the Northern Ch'i added a number of rules on 'prohibitions' relating to customs barriers and changed the

⁸⁴ The history of the early T'ang *lü* is recorded in the *Ch'iu T'ang shu* (Old History of the T'ang Dynasty) (Beijing: Chung-hua, 1975), 6.2133-41; BÜNGER, *Quellen zur Rechtsgeschichte der T'ang Zeit*, 75-100. It is summarised by BÜNGER, 23-30; Wallace JOHNSON, *The T'ang Code. Volume I, General Principles* (Princeton, New Jersey: Princeton University Press, 1979), 39-40; Howard J. WECHSLER, *The Founding of the T'ang Dynasty: Kao-tsu (reign 618-26)*, in *The Cambridge History of China. Volume 3. Sui and T'ang China 589-906. Part I*, edited by Dennis Twitchett (Cambridge: Cambridge University Press, 1979), 178-9, 206.

⁸⁵ See especially BÜNGER, *Quellen zur Rechtsgeschichte der T'ang Zeit*, chapter 3 and Shiga SHUZO, *Asia Major* V.2 (1992), 103-5.

⁸⁶ JOHNSON, *T'ang Code I*, 52-3.

name to 'prohibitions and the imperial guard (*chin wei*)'. The Sui followed the grouping but reversed the terms of the title (*wei chin*)⁸⁷. We may deduce from the reversal of terms that the Sui changed the Northern Ch'i order, placing the rules on prohibitions after instead of before those on the imperial guard.

The third chapter on 'administrative regulations (*chih chih*)' goes back to the Chin code in which it appeared under the title 'disobeying regulations (*wei chih*)'. This name was kept by all subsequent dynasties until it was changed by the Sui to 'administrative regulations (*chih chih*)'⁸⁸.

The original form of the fourth chapter ('household and marriage (*hu hun*)') was a chapter on the household (*hu*) found in the Han and later codes. The Northern Ch'i attached to the chapter the rules on marriage, giving the new chapter the title 'marriage and the household (*hun hu*)'. The Sui adopted the chapter but reversed the terms of the title (*hu hun*)⁸⁹. This reversal may have been accompanied by a change in the ordering of the topics within the chapter.

The fifth chapter on 'public stables and warehouses (*chiu ku*)' had had a somewhat convoluted history. The Han code contained a chapter on 'stables', abolished by the Wei, but restored by the Chin with the addition of a section on herdsmen. The chapter was now entitled 'stables and herdsmen (*chiu mu*)', but the addition of *mu* was dropped by the later southern codes. The Northern Wei code, after some experimentation, finally reverted to the name 'stables and herdsmen (*chiu mu*)'. This title was retained by the Northern Ch'i and Northern Chou, but the Sui added a section on storehouses and renamed the chapter 'public stables and warehouses (*chiu ku*)'⁹⁰.

According to the *shu-i*, the sixth chapter on 'unauthorised levies (*shan hsing*)' had originated in the Han code of Hsiao Ho as the chapter entitled 'levies (*hsing*)'. The Wei added the word 'unauthorised (*shan*)' to the title. This was again deleted by the Chin so that the chapter during the southern dynasties was known simply by the Han title of 'levies'. The Northern Ch'i restored a reference to

⁸⁷ Wallace JOHNSON, *The T'ang Code. Volume II, Specific Articles* (Princeton, New Jersey: Princeton University Press, 1997), 15.

⁸⁸ JOHNSON, *T'ang Code II*, 59.

⁸⁹ JOHNSON, *T'ang Code II*, 121.

⁹⁰ JOHNSON, *T'ang Code II*, 178 (requiring some correction).

‘unauthorised’, but placed the word *shan* after the word *hsing*, while the Sui reversed the two words yielding the title *shan hsing*, as under the Wei⁹¹. This account does not accord with details given by other sources. The commentary to the *T’ang Liu Tien* lists the thirteenth title of the Chin code as ‘unauthorised levies (*shan hsing*)’⁹². Further, the Legal Treatise of the *Sui shu* gives the fourth title of the Northern Ch’i code as ‘unauthorised levies’⁹³. Ch’eng Shu-te suggests that the corresponding title in the Northern Wei code was also ‘unauthorised levies’⁹⁴. Accordingly, it is possible that the account in the *shu-i* is mistaken and that codes in the south and north generally retained the Wei title of ‘unauthorised levies’.

The seventh chapter on ‘violence and robbery (*tsei tao*)’ had for many centuries from the Han to the Northern Wei been known in the codes as two chapters, one entitled ‘violence (*tsei*)’ and the other ‘robbery/theft (*tao*)’. The Northern Ch’i combined the two chapters into one entitled ‘violence and robbery’, the Sui adopting the same term⁹⁵.

The eighth chapter on ‘assaults and accusations (*tou sung*)’ was the result of a number of changes introduced in the northern dynasties. The Wei *Hsin lü* had separate chapters on ‘accusations (*kao ho*)’, ‘detention and interrogation (*hsi hsün*)’ and ‘judgments and prison (*tuan yü*)’. These chapters were inherited by the Chin and southern dynasties. The Northern Wei in the period 477-500 for the first time introduced a separate chapter on ‘assaults (*tou*)’ by splitting it off from the Chin chapter on ‘detention and interrogation’, retaining the balance of this chapter under its old name. The Northern Ch’i then took the chapter on ‘assaults’ and added to it material on accusations, suppressing the original chapter on ‘accusations (*kao ho*)’ and calling the new chapter ‘assaults and accusations (*tou sung*)’. The latter was inherited by the Sui⁹⁶.

The ninth chapter on ‘fraud and deceit (*cha wei*)’ was first created by the Wei through the subtraction of the relevant articles from the

⁹¹ JOHNSON, *T’ang Code II*, 211.

⁹² CH’ENG SHU-TE, *Chiu-chao lü-k’ao*, 233.

⁹³ See note 69 above.

⁹⁴ *Chiu-chao lü-k’ao*, 351.

⁹⁵ JOHNSON, *T’ang Code II*, 239.

⁹⁶ JOHNSON, *T’ang Code II*, 325.

chapter on 'violence (*tsei*)'. After its establishment by the Wei, the heading of the chapter was not changed either in the south or the north and passed into the Sui *K'ai huang* code⁹⁷. The same can in substance be said of the chapter on 'miscellaneous affairs (*tsa*)', dating from the pre-Han era. Apart from a minor change in wording made by the Northern Chou, the heading of this chapter remained constant in the Han and post-Han periods⁹⁸.

The first part of the title of the eleventh chapter on 'arrests and flight (*pu wang*)' goes back to the pre-Han period and is retained in all the Han and post-Han codes. However, the term 'flight (*wang*)' was not added until the Northern Wei. The Northern Chou and the Northern Ch'i replaced 'flight' with respectively 'running away (*t'ao*)' and 'judgment (*tuan*)'. The Northern Ch'i title 'arrests and judgments (*pu tuan*)' is significant because it shows that material contained in the final T'ang chapter, 'judgments and prison (*tuan yü*)', was then grouped with the chapter on 'arrests'. The Sui returned to the Northern Wei title of 'arrests and flight (*pu wang*)', so also abandoning the rearrangement of the Northern Ch'i⁹⁹.

The final title on 'judgments and prison (*tuan yü*)' goes back to the Wei. It was retained by all subsequent dynasties until the Northern Ch'i, which combined the chapter with that on 'arrests', under the title 'arrests and judgments (*pu tuan*)'. The Sui in this respect followed the Northern Chou which had retained the original chapter¹⁰⁰.

This summary of the history of the titles of the twelve chapters of the T'ang code shows that the main influence with respect both to the wording of the titles and the arrangement of the material on the *K'ai huang* code (followed by the T'ang) was the Northern Ch'i code. In five cases the Northern Ch'i had made a change followed by the Sui (chapters 1,2,4,7,8). In four other cases the Sui title was the same as that of the Northern Ch'i (chapters 3,6,9,10)¹⁰¹. Only with respect to the three remaining chapters was there a significant departure from the Northern Ch'i model. Chapter 5 followed a change made by the

⁹⁷ JOHNSON, *T'ang Code II*, 419.

⁹⁸ JOHNSON, *T'ang Code II*, 456.

⁹⁹ JOHNSON, *T'ang Code II*, 511 (with some words omitted).

¹⁰⁰ JOHNSON, *T'ang Code II*, 536.

¹⁰¹ On chapter 6 ('unauthorised levies') see above at notes 91-4.

Sui, chapter 11 followed the Northern Wei terminology, and chapter 12 followed the Northern Chou terminology and placing.

Conclusion

Although the Northern Ch'i code, to judge from the transmission of its structure, had the most direct influence upon the Sui/T'ang code, it is still striking how many titles or components of titles go back to the Wei/Chin codes and even to the Han and pre-Han compilations. From this perspective, it seems that in some fundamental respects the T'ang code owes much to legal developments that had already occurred in China prior to the political division of the country into the north and south. It is the mediation of Han/Wei/Chin law through the northern conduit that had the greater influence on the law of the re-unified China. Two factors account for the importance of the northern, as distinct from the southern, tradition. The Sui rulers who re-unified the country were themselves from a northern family with their power base in the north. Further, the rulers of the northern dynasties appear to have been particularly concerned with the constant refinement of the codes as instruments of government and so encouraged frequent revision of the laws. This can be seen especially under the Northern Wei, a phenomenon probably to be linked with the sinicising policy of that dynasty.

We may recapitulate the essential features marking the evolution of legislative forms, in particular of the penal codes, from the Han to the T'ang. First, we have the process already under way well before the Han of producing compilations of laws in which the governing principle of the organization is that of subject matter. 'Subject matter' is here concerned not with the sophisticated demarcation of the penal from the administrative but with the social behaviour or procedures which are to be regulated. Hence, we have divisions of subject matter according to the use of violence, the taking of property, the employment of labour by the state, or the treatment, including arrest, of persons suspected of having committed offences. Such divisions already characterise the compilation of laws entitled the *Fa Ching* enacted in the state of Wei at the end of the fifth century BC. From there they passed into the compilations of Ch'in and Han laws. As the state assumed more and more control over the lives of the people, the number of laws proliferated. This in turn led to an elaboration of the

system of classification according to subject matter, as we are now able to appreciate for the early years of the Han through the discovery of the *Erh Nien Lü Ling* with its twenty seven books of *lü*.

Successive promulgations of laws even during the Han will have involved some degree of experimentation and change both with the nature of the divisions used to classify the rules and with the classification of particular rules themselves. Generally speaking, the aim of the legislators was to reduce the number of divisions in order to make the compilations more effective as instruments of government. But reduction in itself would not have achieved this purpose. Care had to be taken to ensure that the divisions retained in the compilations, particularly in that portion primarily concerned with offences and punishments, reflected the most important areas of behaviour that required regulation. Consequently, from time to time existing headings might be dropped and new ones introduced. At the same time, particular rules might also be dropped from the compilations or reclassified under a different heading. We have already seen examples of this process from the compilation of the Wei and Chin penal codes.

Within the main divisions of 'chapters' there might also occur a further grouping of rules according to subject matter. The clearest examples come from the later northern codes, the Northern Ch'i and the Sui. From the way in which a composite subject matter is brought under one heading (for example, 'the imperial guard and prohibitions' or 'stables and warehouses') we can see that the one chapter deals with different, though related, matters. From the changes in the order of the words in the titles of chapters we can infer that changes were also made in the grouping of the rules within the chapter. Such internal groupings within chapters constitute part of the attempt by the legislators to achieve ever greater clarity in the presentation of the offences and punishments.

While the promulgation of compilations of laws arranged in chapters according to subject matter has a long history prior to the fall of the Han, the next step in the structuring of the compilations is not clearly evidenced prior to the Wei. This step, marking the production of a code in the technical sense, involves the conception on the part of the legislators of the compilation as a unified and coherent whole in which the component parts stand in a particular relationship to each other. This point is best illustrated by consideration of the relationship

between the chapter(s) setting out the general principles for the application of the punishments and the chapters defining the specific offences. The way in which the punishments are to be applied to the latter will not be fully intelligible without reference to the principles stated in the opening chapter(s). Already the coherence of the compilation is demonstrated through the placing of the chapter(s) on general principles at its beginning. Once the reader is familiar with these, he is in a position to consider properly the succeeding chapters on 'specific offences'. A secondary aspect of the coherence of the compilation is the relationship between the chapters on specific offences themselves. Does it matter, for example, in what order they occur? One cannot be sure whether the Wei and Chin legislators, or even those responsible for the southern and northern codes, gave much thought to this point. However, the structure of the Sui *K'ai-huang* code seems to have followed a well thought out plan, as can be seen from statements contained in the T'ang *shu-i* commentary. This explains that the section on 'the imperial guard and prohibitions' follows directly upon that on 'general principles' "because of veneration of the emperor...and because the offences...are especially serious"¹⁰². Next follows the section on 'administrative regulations' because there is a logical connection between the imperial guard and the establishment of offices¹⁰³. The chapter on 'household and marriage' is considered naturally to follow that on 'administrative regulations'¹⁰⁴. The reason, not stated, appears to be that marriage and the household constitute the obvious starting point for offences committed by private persons. The chapter on 'stables and storehouses' is considered naturally to follow 'household and marriage', although the precise connection is not made clear¹⁰⁵. The chapter on 'unauthorised levies', dealing with military matters and conscription, follows because, according to the *shu-i*, "we must be prepared against the unexpected"¹⁰⁶. The *shu-i* further explains that, since the chapter on 'unauthorised levies' is concerned with "forbidding the unauthorised levies of soldiers and horses" (who

¹⁰² JOHNSON, *T'ang Code II*, 15.

¹⁰³ JOHNSON, *T'ang Code II*, 59.

¹⁰⁴ JOHNSON, *T'ang Code II*, 121.

¹⁰⁵ JOHNSON, *T'ang Code II*, 178.

¹⁰⁶ JOHNSON, *T'ang Code II*, 210.

would engage in violence), the following chapter is that on ‘violence and robbery’, which “concerns the prevention of violence and robbery”¹⁰⁷. This in turn is naturally followed by the chapter on ‘assaults and accusations’, dealing with lesser acts of violence or attacks on others¹⁰⁸. According to the *shu-i*, “after assaults and accusations, fraud and counterfeit must next be guarded against”¹⁰⁹. The thought implicit here is that ‘fraud and counterfeit’ should follow ‘assaults and accusations’ because it deals with loss caused through deceit, not force. Next comes the chapter on ‘miscellaneous articles’, because it contains various matters not included in the previous chapters on specific offences¹¹⁰. Finally there are the two ‘procedural’ chapters on ‘arrests and flight’ and ‘judgments and prison’. The former, dealing with offenders fleeing punishment, naturally comes after the chapters which allocate punishment to offences¹¹¹, while the latter, dealing with judgments, the culmination of the criminal process, fittingly concludes the code.

Within the chapters themselves, the rules were structured in a particular way to avoid unnecessary repetition or duplication. One example from the T’ang code may be given. Article 92 from the chapter on ‘administrative regulations’, dealing with the liability of examining officials for failures in the conduct of various kinds of examinations, distinguishes between deliberate and non-deliberate offences. The punishment for ‘error’ is less than that for ‘intention’. The article and commentary then specify that other articles in the same chapter dealing with errors are to follow the same rules on decrease of punishment¹¹².

Structuring of the subject matter of the code also involved the critically important separation of penal and administrative rules, correlated with a redefinition of the terms *lü* and *ling*. *Lü* came to designate the penal code itself, from which all purely administrative rules were excluded. *Ling*, conversely, designated the compilation of rules which defined offices as well as the ranks and duties of the

¹⁰⁷ JOHNSON, *T’ang Code II*, 239.

¹⁰⁸ JOHNSON, *T’ang Code II*, 325.

¹⁰⁹ JOHNSON, *T’ang Code II*, 419.

¹¹⁰ JOHNSON, *T’ang Code II*, 456.

¹¹¹ JOHNSON, *T’ang Code II*, 511.

¹¹² JOHNSON, *T’ang Code II*, 62-3.

persons occupying them. This basic distinction seems already to have been completed by the Wei and to have passed in to the legislation of both the southern and northern dynasties. By the time of the compilation of the Sui *lü* and *ling*, it had become standard practice.

The main thrust of this paper has been an attempt to show that, although the Sui/T'ang rules largely followed the format of the Northern Ch'i code, the essential qualities of the penal code had already emerged in the Wei/Chin period, that is, prior to the division of China and the emergence of the southern and northern dynasties. Hence, the particular contribution of the northern legislation to the T'ang code should not be over-valued. Although this is not the place for a study of the transmission of the substance of the penal law from the Han to the T'ang, mention should be made of a remark of the legal scholar Ch'eng Shu-te in his collection of material relating to the pre-T'ang law. Ch'eng observes that the T'ang and later law belong to the northern tradition, the southern being deprived of influence through the subjugation of Ch'en by Sui. He instances as hallmarks of northern (as distinct from southern) law the punishments of exile (*liu*) and penal servitude (*t'u*), the two forms of execution (beheading and strangulation), and the ten abominations¹¹³. Let us take these examples in order. Exile, although used as a punishment in Ch'in/Han times appears first to have been established as a regular punishment, ranking immediately below death in order of severity, by the Northern Wei. Penal servitude was a punishment widely used in all dynasties, but the T'ang term *t'u* was introduced by the Northern Wei. Strangulation as the second (and less serious) of the two regular capital punishments was also introduced by the Northern Wei. The term 'ten abominations', used by the Sui *K'ai-huang* code is an adaptation of clauses in the Northern Ch'i code defining the ten most serious offences. But the actual content of the 'abominations' in many cases goes back to the Han. These cases undoubtedly provide examples of the influence of the northern law, especially that of the Northern Wei, upon the T'ang and later law. In the case of the punishments of exile and strangulation, the influence is especially significant. But it is arguably a distortion to use material of this kind to suggest that the T'ang is a code belonging to the northern, not the

¹¹³ *Chiu-chao lü-k'ao*, 339.

southern, tradition. Such a view obscures the fact that the essential features of the T'ang code go back to the Wei and Chin penal codes, even though its format is derived largely from the Northern Ch'i code.