

UNDERSTANDING TRADITIONAL CHINESE LAW IN PRACTICE: The Implementation of Criminal Law in the Tang Dynasty (618-907 AD)

Norman P. Ho*

ABSTRACT

The Tang dynasty (618-907 AD) is regarded as one of China's most powerful and cosmopolitan dynasties. Its numerous achievements in the areas of literature, culture, economic development, and empire-building have influenced subsequent dynasties. The area of legal development is also not an exception. The Tang Code, a penal code which was promulgated in its finalized form in 653 AD and is the oldest imperial Chinese legal code to survive to the present-day in its entirety, is regarded as an apex in the development of traditional Chinese law. Indeed, the Tang Code served as a model penal code for later Chinese dynasties, and the philosophical spirit animating some its provisions continues to influence modern Chinese criminal law today. Given the importance of the Tang Code and the Tang dynasty more generally, it is not surprising that much has been written about the Tang Code and Tang law. Most scholarship, however, has tended to focus on the history of codification and, more specifically, the Tang Code itself. For example, most scholarship has studied its various provisions, the philosophical bases and justifications behind its various provisions, and so forth. Less research has been dedicated to actually understanding how the Tang Code was implemented and applied in society and to answer questions such as whether the application of justice (as mandated by provisions of the Tang Code) was applied consistently. Drawing on and introducing various selected historical sources (many of which have never been translated to English), this article attempts to address these questions and to discuss the implementation of law in traditional China as viewed through

* Assistant Professor of Law, Peking University School of Transnational Law. I would like to thank my colleagues at the Peking University School of Transnational Law and the National University of Singapore Faculty of Law for their helpful comments. Many thanks especially to Professor Andrew Harding of the National University of Singapore Faculty of Law for his invitation to present the research reflected in this article at the Center for Asian Legal Studies of the National University of Singapore. (Contact: nph225@nyu.edu)

enforcement of criminal law and criminal procedure (as set forth in the Tang Code) in the Tang dynasty. This article argues that the Tang Code seems to have been applied inconsistently in criminal law cases and that there appears to have been discrepancies between what the Tang Code required and how criminal law was actually implemented and enforced in Tang society. Officials tasked with deciding criminal law cases today still appear to have had substantial discretion in implementing the Tang Code. These inconsistencies and discrepancies are perhaps a testament to the diversity of approaches for governance and regulation in the Tang dynasty, which is not surprising given the geographic size and diversity of the Tang empire. Finally, given the current Chinese leadership's proclivity for citing what it considers politico-legal models in the Chinese past, it is an especially important time to enhance and better our understanding of traditional Chinese law. Overall, this article is ultimately based on the premise that we can only arrive at a full understanding of traditional Chinese law by looking at the application of historical statutes and legal provisions in practice and not simply focusing on the statutes and legal provisions in a vacuum.

INTRODUCTION

The Tang dynasty (618-907 AD) is regarded by many scholars as one of China's most powerful, cosmopolitan, dynamic, and influential dynasties.¹ Its achievements in culture, literature, economy, and empire-building were also matched by its achievements in law. The famous Tang Code, promulgated in its finalized form in 653 AD and the oldest imperial Chinese legal code that has survived to the present day in entirety, is regarded as an apex in the development of traditional Chinese law (also referred to as imperial Chinese law or dynastic Chinese law²).³ The

1. See, e.g., PATRICIA BUCKLEY EBREY, *THE CAMBRIDGE ILLUSTRATED HISTORY OF CHINA* 108 (1996); MARK EDWARD LEWIS, *CHINA'S COSMOPOLITAN EMPIRE: THE TANG DYNASTY 1* (2009); Denis Twitchett, *Introduction* to 3 *THE CAMBRIDGE HISTORY OF CHINA: SUI AND T'ANG CHINA, 589-906 A.D.* 1, 1 (John K. Fairbank & Denis Twitchett, eds., Cambridge Univ. Press 1979).

2. These three terms and their iterations—i.e., traditional Chinese law, imperial Chinese law, and dynastic Chinese law—refer to the Chinese legal system from Chinese antiquity (the Shang dynasty (1600-1046 B.C.)—which is often considered China's first dynasty whose existence can be confirmed by archeological evidence and which is therefore often taken as a starting point) up to the fall of the last Chinese dynasty—the Qing dynasty (1644-1911)—in 1911.

3. See, e.g., ALBERT CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 17 (4th ed. 2011) (explaining that the Tang Code “represented a climax in the development of law and legal scholarship in traditional China” and “the crowning summation of imperial China's legal achievement . . .”). The Tang Code is made up of two parts: an initial section laying out the general principles of criminal law and a second section laying out specific offenses and the corresponding punishment for each offense. The coverage of the Tang Code as a regulatory tool over criminal conduct was intended to be quite comprehensive—it contains a total of 502 articles, which (in the Tang Code's final promulgated version of 653) were supplemented by commentaries and subcommentaries. These commentaries and subcommentaries provide more explication of the individual articles (e.g., defining terms in the articles,

Tang Code also had a great influence on Chinese criminal law as a model penal code for subsequent dynasties.⁴ The Song dynasty (960-1279 AD) penal code, for example, largely followed the Tang Code, and approximately thirty to forty percent of the Qing dynasty (1644-1911 AD) criminal code was composed of articles adopted directly from the Tang Code.⁵ It has been argued that some characteristics of the Tang Code, such as its emphasis on confession for determining criminal guilt, still continues to exercise an influence on modern Chinese law today.⁶

Given the importance of the Tang Code to Tang dynasty law and the importance of the Tang dynasty to Chinese history as a whole, it is not surprising that there has been much scholarly study of the Tang Code, as seen most notably through the late Wallace Johnson's complete, monumental translation and study of the Tang Code.⁷ In turn, scholarship (especially in Western languages) on Tang substantive law, notably, Tang criminal law, has focused mostly on statutory analysis of the provisions of the Tang Code, with little attention given to studying actual or historical accounts of cases from the period.⁸ General books on Chinese legal history also tend to focus more on the history of codification and less on the actual implementation of the imperial law codes in Chinese society; scholars who have looked at the implementation of traditional Chinese law tend to focus on later Chinese dynasties, especially the Qing dynasty (1644-1911 AD), due largely to better availability of extant source materials from that period.⁹ We therefore know a considerable amount about

giving more explanations about the types of punishments) and were considered to be a fully integrated part of the Tang Code and which thus carried full legal force. For an overview of the Tang Code's structure, see Wallace Johnson, *Background to THE T'ANG CODE, VOLUME I: GENERAL PRINCIPLES 3* (Wallace Johnson trans., Princeton Univ. Press 1979).

4. GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 27 (1996).

5. Johnson, *supra* note 3, at 9. For an analysis of the influence of the Tang Code, see Brian E. McKnight, *T'ang Law and Later Law: The Roots of Continuity*, 115 *JOURNAL OF THE AMERICAN ORIENTAL SOCIETY* 410 (1995).

6. Wallace Johnson, *Status and Liability for Punishment in the T'ang Code*, 71 *CHI.-KENT. L. REV.* 217, 217 (1995).

7. See *THE T'ANG CODE, VOLUME I: GENERAL PRINCIPLES* (Wallace Johnson trans., Princeton Univ. Press 1979) and *THE T'ANG CODE, VOLUME II: SPECIFIC ARTICLES* (Wallace Johnson trans., Princeton Univ. Press 1997). Chinese scholars have also produced annotated versions of the Tang Code, along with translation of the entire Tang Code into vernacular modern Chinese; for example, consult TIANGLÜ SHUYI XINZHU 唐律疏议新注 [A NEW ANNOTATED VERSION OF THE TANG CODE WITH COMMENTARIES AND SUBCOMMENTARIES] (Qian Daqun 钱大群 trans., Nanjing Normal Univ. Press 2007).

8. For example of such scholarship, see Wallace Johnson & Denis Twitchett, *Criminal Procedure in T'ang China*, 6 *ASIA MAJOR (THIRD SERIES)* 113 (1993). Denis Twitchett is rightfully regarded as one of the leading historians of the Tang dynasty of the 20th century.

9. For example, see DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* (1967), one of the classic monographs in the Chinese legal history field in the West and which focuses on cases from the Qing dynasty. As another example, see JOHN W. HEAD & YANPING WANG, *LAW CODES IN DYNASTIC CHINA* (2005), one of the few monographs

the Tang Code itself and the criminal law procedure set forth in the Tang Code, but we know much less about the actual implementation of the Tang Code in Tang society. Wallace Johnson also admitted this deficiency in the understanding of Tang law, urging scholars to study the two Tang dynasty standard histories¹⁰ to find actual cases from the period to enhance our understanding of Tang dynasty law.¹¹

Indeed, to have a fuller picture of Tang dynasty law, it is also important to examine surviving accounts of actual Tang dynasty cases and to not solely rely on the Tang Code. In this regard, I share legal historian William Nelson's general methodological approach and belief "that if historians want to know what the law was, they cannot rely on statutes, but must read cases that determine what statutes mean, how statutes have been applied, and even whether they were applied at all."¹² A number of legal historians of China have argued, in more general, sweeping terms, that dynastic codes of law (such as the Tang Code) were merely models—that is, law in traditional China was often not actually applied or ex-

in English which provides a survey of dynastic Chinese legal history but focuses almost exclusively on codification. As an example of Chinese-language scholarship, see ZHENG QIN 郑秦, *ZHONGGUO FAZHISHI [A HISTORY OF CHINESE LAW]* 中国法制史 (1997), a monograph which, for material on Tang law, largely focuses on analyzing and explicating the Tang Code and other law codes—e.g., administrative law codes—from the Tang dynasty. More recently, Chinese legal historians have recognized the general need to focus more on legal practice; for example, Philip C.C. Huang, a leading legal historian of Qing dynasty China, has written that he has ". . . realized that earlier scholarship on Chinese history, due to lack of case records, had tended to rely too much on sources explicating official ideology rather than legal practice." Philip C.C. Huang, *Editor's Introduction* to *RESEARCH FROM ARCHIVAL CASE RECORDS: LAW, SOCIETY AND CULTURE IN CHINA* 1, 2 (Kathryn Bernhardt & Philip C.C. Huang eds., Brill 2014). Bernhardt's and Huang's book is an important contribution to Chinese legal history studies as it focuses on understanding traditional Chinese law in practice; however, it focuses on later Chinese history (especially the Qing dynasty and the Republican period) and not earlier dynasties, such as the Tang dynasty.

10. The preservation of the past and the writing of history have both been very serious enterprises in Chinese civilization. Among the most important historical works that were produced in imperial China were the twenty-four standard histories, or known in Chinese as the *zheng shi* 正史. These standard histories cover important events, people, and institutions of each of the various dynasties; as such, the standard histories are among the most important primary sources for the study of imperial Chinese history. One dynasty's history was usually written by the dynasty that followed it. There are two *zheng shi* which cover the Tang dynasty: the *Jiu Tangshu* 旧唐书 [*The Old Standard History of the Tang*] and the *Xin Tangshu* 新唐书 [*The New Standard History of the Tang*]. The *Jiu Tangshu* was completed in the mid-tenth century under the editorial direction of Liu Xu 刘昫 (888-947). The *Xin Tangshu* was commissioned in the mid-eleventh century and completed in 1060 under the editorial direction of Ouyang Xiu 欧阳修 (1007-1072) and Song Qi 宋祁 (998-1061). The *Xin Tangshu* was commissioned by the Song dynasty court due to perceived shortcomings of the *Jiu Tangshu*. For a discussion on the compilation history of the *Jiu Tangshu*, see DENIS C. TWITCHETT, *THE WRITING OF OFFICIAL HISTORY UNDER THE T'ANG* (1992).

11. Johnson, *supra* note 3, at 8.

12. William E. Nelson, *A Response: The Impact of War on Justice in the History of American Law*, 89 CHI.-KENT L. REV. 1109, 1127 (2014).

ecuted.¹³ Most notably, the late Japanese scholar of Chinese legal history, Niida Noboru (仁井田陞), argued that traditional Chinese laws and legal codes “. . . had little or no possibility of being enforced . . .” and therefore it would be difficult to call them actual laws *per se*.¹⁴ Instead, in Niida’s view, it would be necessary to look at a particular article of law and confirm whether it possessed practical application.¹⁵ Niida’s works, however, do not actually discuss the actual application of judicial procedure,¹⁶ and therefore arguably do not provide us with a full, specific picture of traditional Chinese law (including Tang dynasty law) in practice.

Thus, in the end, despite much work done on the statutory provisions in the Tang Code, various questions about Tang dynasty law still need to be answered. For example, how was the Tang Code implemented and applied in society? How did the officials tasked with enforcing the law use or not use the Tang Code? Was the application of justice, as mandated by provisions of the Tang Code, applied consistently? This article represents an attempt to answer these questions and to discuss the implementation of law in traditional China as viewed through the enforcement of criminal law and criminal procedure (as set forth in the Tang Code) in the Tang dynasty. It draws on a selected variety of sources, including accounts of criminal cases from the two Tang dynasty standard histories (as per the call of Wallace Johnson),¹⁷ extant writings from Tang dynasty

13. See, e.g., the work of Jean Escarra, Shimada Masao, and Marc van der Valk, which has advanced such an argument; their views on traditional Chinese law and legal codes as mere “models” are discussed and documented in detail in Shigeo Nakamura, *Was Traditional Chinese Law a Mere “Model”?* Part One, 1.1 INT’L J. ASIAN STUDIES 139 (2004). Geoffrey MacCormack has also argued that many of the rules in the Chinese penal codes—such as the Tang Code—were “symbolic”—that is, their retention did not rely upon the degree to which they were actually enforced; see MACCORMACK, *supra* note 4, at 51.

14. NIIDA NOBORU 仁井田陞, CHŪGOKU HŌSEISHI 中国法制史2-3 [HISTORY OF CHINESE LAW] (1963), *quoted in* Nakamura, *supra* note 13, at 144.

15. Nakamura, *supra* note 13, at 154.

16. *Id.*

17. For an overview of the standard histories of the Tang dynasty, see *supra* text accompanying note 10. One of the challenges of studying Chinese legal history before the Qing dynasty (1644-1911) is the dearth of full case decisions and written judgments that have survived from earlier periods. As such, for understanding pre-Qing dynasty law, legal historians of China need to rely on accounts of criminal cases contained in other sources, such as the standard histories—such case accounts are often short summaries of criminal cases—as full, verbatim court transcripts and/or judgments are not extant. It should be noted that, as these case accounts are not verbatim court transcripts and/or judgments, legal historians of China cannot always be absolutely certain that such accounts produce a completely accurate picture of judicial methods or procedures; a certain amount of generalization and assumption will always be required due to dearth of primary source material dealing with interpretations of law in practice. See Colin Hawes, *Reinterpreting Law in the Song: Zheng Ke’s Commentary to the “Magic Mirror for Deciding Cases*, 1 J. ASIAN LEGAL HIST. 23, 23 (2001), *available at* <http://kuscholarworks.ku.edu/bitstream/handle/1808/3846/hawes.pdf?sequence=1&isAllowed=y> (discussing the various source problems as also described in this footnote). However, this is a situation where we as legal historians

officials, and case records from manuscripts unearthed at Dunhuang (敦煌).¹⁸ This article argues that the Tang Code seems to have been applied inconsistently in criminal law cases—in some cases, articles of the Tang Code were cited specifically; in others, the relevant governing article(s) of the Tang Code were not cited. Some cases seemed to follow the correct criminal law procedure as mandated in the Tang Code, while others did not. In other words, there appears to have been discrepancies between what the Tang Code required and how criminal law was implemented and enforced in Tang society. Officials tasked with deciding criminal law cases still appear to have had substantial discretion in implementing the Tang Code. The inconsistencies associated with the application of the Tang Code have larger implications on understanding Tang dynasty history as well. These inconsistencies are a testament to the diversity of governance and enforcement of law emanating from the Tang dynasty court,¹⁹ which is not a surprise given the sheer size of the Tang dynasty empire at its territorial height. Another goal of this article is to introduce—in complete translation into English, when possible—the source material described

have to make the best with the sources we have. These case accounts in the standard histories are still valuable because we otherwise would not know of such cases, and secondly, we can assume that the authors and/or editors of the Tang dynasty standard histories (themselves officials in government) would include things they thought were important from a governance and political perspective—in that sense, these case accounts do possess some reliability. For identifying such case accounts in the Tang standard histories, I have consulted traditional Chinese legal casebooks, notably the *Zhe yu Gui Jian Bu* 折狱龟鉴补 (*Supplementing the Magic Mirror for Deciding Cases*), a Qing dynasty (1644-1911) editorial expansion by Hu Wenbing 胡文炳 of the original *Zhe yu Gui Jian* 折狱龟鉴 (*The Magic Mirror for Deciding Cases*), which was originally compiled by Zheng Ke 郑克, a Song dynasty legal official. The *Zhe yu Gui Jian Bu* contains accounts of approximately 719 cases from Chinese antiquity up to the Qing dynasty (Zheng Ke's version only contained cases dating up to the Song dynasty) from a variety of textual sources in the Chinese tradition, including the standard histories. See ZHE YU GUI JIAN BU YI ZHU 折狱龟鉴补译注 [SUPPLEMENTING THE MAGIC MIRROR FOR DECIDING CASES: INCLUDING ANNOTATIONS AND TRANSLATIONS IN MODERN CHINESE] (Chen Tongye 陈重业, ed., Peking U. Press, 2006). For a discussion of the Song dynasty *Zhe Yu Gui Jian* compiled by Zheng Ke, refer to the Hawes article cited earlier in this note. I have used Hawes's translation of the title (i.e., the title of the book, *Zhe Yu Gui Jian*).

18. Dunhuang 敦煌 is a town located in modern-day Gansu province in north-west China. It was immensely important in the Tang dynasty as it was situated near the Tang China's borders on the Silk Road and was a significant trade, communication, and economic nexus point. The Dunhuang manuscripts are a collection of important documents (including religious, political, legal, and economic records) discovered in the Mogao Caves 莫高窟 of Dunhuang by Wang Yuanlu 王圆箎 (ca. 1849-1931) in the early twentieth century. Up to 50,000 manuscripts were unearthed; these manuscripts date from the fifth to eleventh centuries and are invaluable historical sources. For a good overview of the Dunhuang manuscripts and their value as historical primary sources, see RONG XINJIANG 荣新江, EIGHTEEN LECTURES ON DUNHUANG (Imre Galambos, trans., Brill 2013) (2011).

19. I would like to thank Professor Arif Jamal (National University of Singapore Faculty of Law) for contributing this point on diversity to this Article.

above, as the case accounts and records cited in this article have never, to my knowledge, been translated into English.

This article proceeds as follows. Part I will provide an overview of Tang dynasty criminal procedure law and its requirements as set forth by the Tang Code, which will be important to understand before going to the actual accounts of Tang dynasty cases. Then, Part II will introduce and analyze various actual Tang dynasty case accounts with reference to the applicable article(s) of the Tang Code wherever possible. The article will conclude with some possible reasons for the inconsistencies and discrepancies seen in some of the cases with respect to the implementation and application of Tang law.

While the focus of this article is historical, it should be mentioned that it is an apt time to be studying traditional Chinese law, given the current Chinese leadership's use of China's cultural and historical traditions as a reference point for how to govern the country. China's president, Xi Jinping (习近平), for example, has drawn on Confucian philosophers from the Chinese past, as well as ancient Legalist philosophers such as Han Fei (韩非) (ca. 280-233 BC), as models for present-day Chinese governance.²⁰ Furthermore, an article published on the website of the Chinese Supreme People's Court upheld the Chinese tradition, specifically the Confucian classics, as an invaluable resource for Chinese legal reform today.²¹ Given the Chinese Communist Party's penchant for invoking the Chinese legal and political tradition for arguably legitimizing its current reforms, it is indeed now even more important to study the Chinese legal past on its own terms to get an accurate understanding of how Chinese traditional law functioned in society.

PART I: AN OVERVIEW OF TANG DYNASTY CRIMINAL PROCEDURE

In order to properly assess the nature of the Tang Code's application in criminal cases in Tang dynasty China and the degree to which the Tang Code was actually applied in practice, it is important to first have an understanding of the rules of criminal procedure as stipulated by provisions of the Tang Code. This section therefore provides a brief summary of Tang dynasty criminal procedure from the alleged criminal act to the sentencing and punishment phase.

Overall, at least on paper, Tang criminal procedure was generally logical, thorough, and provided quite a few protections for the accused. Crimes were classified by the Tang Code into three general groups: crimes

20. Chris Buckley, *Leader Taps into Chinese Classics in Seeking to Cement Power*, N.Y. TIMES (Oct. 11, 2014), <http://www.nytimes.com/2014/10/12/world/leader-taps-into-chinese-classics-in-seeking-to-cement-power.html>.

21. Ding Yue 丁锐, *Cong Rujia Jingdian Zhong Jiqu Fazhi Yingyang 从儒家经典中汲取法治营养 [Drawing Nutritional Sustenance from the Confucian Classics for Rule of Law Reforms]*, RENMIN FAYUAN BAO 人民法院报 [NEWSPAPER OF THE SUPREME PEOPLE'S COURT] (Sept. 29, 2014), <http://www.chinacourt.org/article/detail/2014/09/id/1453675.shtml>.

involving the ten abominations;²² crimes punished by penal servitude or a more serious punishment (more serious punishment included life exile or death; these crimes were generally classified as major offenses); and crimes punished by beating, either with the light or heavy stick.²³ Once a criminal act was committed, an accusation was the most common way a criminal case was brought to the authorities—such authority figure was usually the local magistrate²⁴ who had jurisdiction over the area in which the crime was committed.²⁵ Sometimes, the local magistrate might also discover the crime himself (i.e., without first being notified by a third party). Upon being informed of the criminal act, the magistrate was obligated to launch an investigation and attempt to make an arrest; if he did not take action, he would be punished by one year of penal servitude.²⁶ It should be noted that certain criminal acts did not need to be reported (e.g., offenses involving a master and his slaves), and there were also certain instances where the Tang Code allowed for summary punishment without a hearing before the magistrate (e.g., parents could immediately beat their children for disobedience).²⁷ However, the basic rule was still that criminal offenses needed to be prosecuted through set rules of criminal procedure.

The next step in Tang criminal procedure involved preliminary hearings. When an accusation was made, the Tang Code mandated that both the year and month of the criminal act, as well as the true facts and circumstances surrounding the offense, be set forth.²⁸ The next step involved testing the veracity of the accuser; the magistrate held hearings where he questioned the accuser on three separate days and also

22. These were certain crimes considered so terrible that they were listed under Article 6 (“The Ten Abominations”); they included the crimes of: plotting rebellion; plotting great sedition; plotting treason; contumacy; depravity; great irreverence; lack of filial piety; discord; unrighteousness; and incest. Johnson, *supra* note 3, at 17.

23. Wallace Johnson & Denis Twitchett, *T'ang Criminal Procedure*, 6.2 ASIA MAJOR 113, 133 (1993). Penal servitude, beating with the light stick, and beating with the heavy stick were among the five punishments recognized under the Tang Code; the five punishments are discussed on page 8 of this Article.

24. Magistrates (*ling* 令) were responsible for administering the lowest official jurisdictional unit in the Tang, known as the district (*xian* 县). Magistrates were not only responsible for law enforcement, but also other administrative and economic supervisory tasks in their districts. Above the district was the prefecture (*zhou* 州), administered by a prefect (*cishi* 刺史). In areas of military significance, prefectures were called commanderies (*dudufu* 都督府) and were led by commanders (*dudu cishi* 都督刺史). All of these units were organized into circuits (*dao* 道). At the top of the Tang political organizational apparatus stood the central government. See CHARLES O. HUCKER, A DICTIONARY OF OFFICIAL TITLES IN IMPERIAL CHINA 35-39 (1985); Ulrich Theobald, *Chinese History—Sui and Tang Dynasties Government and Administration*, CHINA KNOWLEDGE—A UNIVERSAL GUIDE FOR CHINA STUDIES (2000), <http://www.chinaknowledge.de/History/Tang/tang-admin.html>.

25. Johnson & Twitchett, *supra* note 23, at 115-16.

26. *Id.* at 117.

27. *Id.* at 117-18.

28. *Id.* at 120.

warned the accuser of the penalties for false accusations, taking written statements of the accuser's testimony.²⁹ The next step was to arrest the accused perpetrator, who was held in prison along with the accuser pending trial.³⁰ The actual trial was then held; unfortunately, we do not have any surviving accurate evidence about how Tang trials functioned—it has been speculated that Tang trials were probably open to the public, and almost all punishments were administered publicly, possibly as a deterrent against would-be violators.³¹

The magistrate would then reach a decision after the trial; if he could not, he sought help from more senior-ranked officials.³² If the result of the trial were to establish the guilt of the accused perpetrator, the magistrate was required to write a decision (*pan* 判) on the case.³³ Perhaps most important to keep in mind for purposes of this article, the magistrate was required to cite—in a passing sentence—some article of the Tang Code, the Tang Statutes, the Tang Regulations, or the Tang Ordinances.³⁴ Article 484, “Citation of the Code, the Statutes, the Regulations, and the Ordinances in Sentencing” and the accompanying subcommentary provides the following:

Article 484.1—All sentences of crimes must cite a formal provision of the *Code*, the *Statutes*, the *Regulations*, or the *Ordinances*. Violations are punished by thirty blows with the light stick.

Article 484.2—If an article covers many offenses, it is permitted to cite only the portion that covers the crime.

Subcommentary: . . . If there is an error in citation . . . the punishment is thirty blows with the light stick. As for an article covering many offenses, this is illustrated by the General Principle “Where two or more offenses are discovered together, the heavier punishment is sentenced. . . . In repeated crimes concerning with illicit goods, the value of the illicit goods is combined in sentencing.”³⁵ Suppose a man commits the crime of robbery twice, neither one of which involves

29. *Id.* at 120-21.

30. *Id.* at 121-22.

31. *Id.* at 125.

32. *Id.* at 127.

33. *Id.* at 131.

34. *Id.* at 132. In addition to the Tang Code, the other main sources of Tang dynasty law included the Tang Statutes (*ling* 令, or administrative rules for the central government), the Tang Regulations (*ge* 格, or essentially new provisions enacted to supplement the Tang Code and the Tang Statutes), and the Tang Ordinances (*shi* 式, or administrative rules focused on specific areas of law as opposed to the Tang Statutes, which were more general in their application). For further discussion on these sources of Tang dynasty law, see Johnson, *supra* note 3, at 5-6. This Article focuses on the Tang Code as it has survived in its entirety (as opposed to the Tang Statutes, Regulations, and Ordinances, despite efforts—notably, efforts by Niida Noboru—to reconstruct the Tang Statutes) and it was the primary legal source for the administration of criminal law.

35. This general principle is set forth in Article 45 of the Tang Code. For provisions from the Tang Code, I rely on Wallace Johnson's full translation of the Tang Code. See THE T'ANG CODE, VOLUME I: GENERAL PRINCIPLES, *supra* note 7, at 235.

illicit goods. The official sentencing the crime only cites that part of the article where two or more offenses are discovered together. He does not cite that part of the article dealing with crimes concerned with illicit goods. This is permitted.³⁶

As illustrated in the above statute, failure by the magistrate to comply with Article 484 was punishable by “thirty blows with the light stick.”³⁷

The articles in the Tang Code were very specific, and therefore the Code foresaw a possibility of a criminal offense not being covered by specific article of the Tang Code. If this happened, then the magistrate would not be able to cite to an existing article of the Tang Code per the requirements of Article 484. In these situations, flexibility was provided through Article 50 of the Tang Code, which permitted the magistrate to reason by analogy to find an applicable article to cite.³⁸ The specific techniques for analogical reasoning, as set forth by Article 50, was “bringing up a lighter offense in order to make clear a heavier punishment” or “bringing up a heavier offense in order to make clear a lighter punishment.”³⁹ The magistrate would choose one of these two techniques based on how he viewed the case and what kind of punishment he felt was appropriate under the circumstances.⁴⁰ As an example of the latter technique (i.e., “bringing up a heavier offense in order to make clear a lighter punishment”), Article 50 provides a hypothetical situation to explain the meaning of analogical reasoning—Article 261 (one of the articles on violence and robbery crimes) provides that “[a]ll cases involving those who enter other people’s houses at night without cause [are punished by forty blows with the light stick] . . . [i]f the master of the house should immediately kill the intruder, he will not be punished.”⁴¹ But, what if the master of the house does not kill the intruder but only breaks the intruder’s limb or otherwise only wounds the intruder? This is offense is not specifically covered by the Tang Code, but in “bringing up a heavier offense in order to make clear a lighter punishment,” since killing the intruder would result in no prosecution (a heavier offense than mere wounding or breaking of the limbs), Article 50 indicates that “it is clear that there will be no prosecution for breaking a limb or wounding.”⁴² Since reasoning by analogy could potentially give the official deciding the question quite a bit of discretion, all cases involving reasoning by analogy had to be referred to the emperor for his approval.⁴³

The Tang Code also contained a catch-all provision to similarly deal with situations where an offense might not be covered by a specific article of the Tang Code—Article 450, entitled “Doing What Ought Not

36. THE TANG CODE, VOLUME II: SPECIFIC ARTICLES, *supra* note 7, at 554.

37. *Id.*

38. Johnson, *supra* note 3, at 37.

39. *Id.*

40. *Id.*

41. THE TANG CODE, VOLUME I: GENERAL PRINCIPLES, *supra* note 7, at 255.

42. *Id.*

43. MACCORMACK, *supra* note 4, at 31.

Be Done” set forth that there are indeed smaller offenses not covered by the Tang Code and which also could not be linked via analogical reasoning (e.g., per Article 50) with specific articles of the Tang Code.⁴⁴ In these situations, the magistrate had discretion to invoke Article 450 as he saw fit and levy punishment; his discretionary powers under Article 450, however, were limited, as he could only apply certain statutorily-mandated forms of punishment—if the offense was less serious, the magistrate could sentence the offender to forty blows with the light stick, and if the offense was more serious, eighty blows with the light stick could be inflicted on the offender.⁴⁵

Returning now to our general summary of Tang criminal procedure—following sentencing, the magistrate could inflict the appropriate punishment on the offender. The Tang Code recognized five kinds of punishments: beating with the light stick (*chi* 笞, the blows had to be divided equally on the offender’s thighs and buttocks), beating with the heavy stick (*zhang* 杖, the blows were to be divided equally in three parts among the offender’s back, thighs, and buttocks), penal servitude (*tu* 徒), life exile (*liu* 流), and death (*si* 死).⁴⁶ As a check on possible abuse of power by the magistrate, the Tang Code only allowed the magistrate to inflict the beating punishments (i.e., beating with the light stick and beating with the heavy stick) completely on his own authority at the district level.⁴⁷ For all other cases with the heavier punishments (i.e., penal servitude, life exile, or death), the magistrate was required to forward such cases for review at a higher level.⁴⁸ For the punishment of penal servitude, the prefecture was the administrative level of final decision, while the capital (i.e., the central government) served as the administrative level of final decision for the punishment of life exile.⁴⁹ For capital cases, the emperor had to approve the death sentence before it could be carried out—specifically, he had to approve the death sentence five times if the case was heard in the capital jurisdiction and three times if it was heard in another jurisdiction.⁵⁰ Furthermore, before the sentence could be executed, the magistrate or official in question had to explain the sentence to the convicted offender and his family and to seek his or her agreement to submit to the punishment; if the offender provided no such agreement, the magistrate had to hear the offender’s reasons for disagreement and further examine the case.⁵¹ If these steps were not followed, the magistrate would

44. Johnson, *supra* note 3, at 37.

45. *Id.*

46. Johnson & Twitchett, *supra* note 23, at 133.

47. *Id.* at 133.

48. *Id.*

49. Johnson & Twitchett, *supra* note 23, at 138.

50. *Id.* at 134. Criminals sentenced to death still had a chance of having their death sentence commuted—the Tang emperors often gave amnesties (an estimated 174 great amnesties were handed down in the Tang dynasty)—and there were only certain times of year when executions could usually be carried out. *Id.*

51. *Id.*

be punished by beating.⁵² Finally, it is important to note that magistrates were also criminally liable for either deliberately or erroneously assigning the wrong punishment to a criminal.⁵³

As we can see from the above summary of Tang criminal procedure as set forth by the Tang Code, the accused did enjoy certain protections (e.g., having the ability to register his disagreement with the sentence, the magistrate's detaining the accuser as well during the trial to deter false accusations). Furthermore, it is evident that the Tang Code attempted to control possible abuses of power by officials through a system of checks and balances (e.g., review of certain cases by higher-level officials), criminal liability for incorrect judgments, transparency in judicial decisions (e.g., the requirement to cite legal provisions in support of judgments), and limited discretion to assign certain punishments to offenders (e.g., magistrates, when acting on solely their own authority, being limited to the punishments of beating with the light and heavy stick).

The question, of course (as posed in the beginning of this article), is whether such written law was actually followed and implemented in practice. The next section of this article will explore this question in greater detail.

PART II: A LOOK AT SELECTED TANG DYNASTY CASE ACCOUNTS AND CASE RECORDS

Given that the cases to be examined below⁵⁴ are scattered across various sources, for purposes of this section of the article, they have been divided into four substantive groups—crimes involving religious personnel, crimes involving revenge killings, crimes involving military units, military personnel, and/or military affairs, and crimes recorded in the Dunhuang manuscripts—for ease of presentation and analysis. As stated earlier in this article, these cases arguably show the inconsistency in application of the Tang Code to criminal cases and discrepancies between what was mandated under the Tang Code and what actually occurred in the real-world implementation of Tang penal law. The conclusion section of this article will analyze the cases below with respect to temporal and geographical historical context and explain what temporal and geographical factors might account for such discrepancies and inconsistencies.

A. *Crimes Involving Religious Personnel*

Our first set of Tang dynasty cases involves religious personnel—namely, Buddhist monks. This pair of cases is particularly telling in that each case involves quite similar facts but with very different judicial and

52. *Id.*

53. Johnson, *supra* note 3, at 36. For specifics regarding the magistrate's criminal liability, refer to Article 487 ("An Official Who Decreases or Increases a Person's Punishment) of the Tang Code, see THE T'ANG CODE, VOLUME II: SPECIFIC ARTICLES, *supra* note 7, at 556-61.

54. For a discussion of methodology and sources (especially with respect to the standard histories), see *supra* text accompanying notes 10 and 17.

punitive outcomes, highlighting that the application of Tang law could be arbitrary at times.⁵⁵ The terse judicial judgment of the first case has survived in the *Quan Tang wen* (全唐文) (*Complete Prose of the Tang Dynasty*)⁵⁶ and is entitled “Judgment on Five Buddhist Monks (including Masters Yun and Yan) Who Gambled and Argued.”⁵⁷

The judgment was decided and written by Han Huang (韩滉) (723-787 AD), a Tang official who served as a chancellor during the reign of Emperor Dezong (唐德宗) (reign years 779-805 AD).⁵⁸ Han Huang was feared for his severity in rule, but also had a reputation for uprightness and frugality.⁵⁹ His judgment on this case was very concise:

When did Buddhist teachings ever permit the holding of valuables? Buddhist temples should not accumulate surplus wealth. Yet, [in the present case, the monks] gambled during the day and got drunk throughout the night. It is said that it is hard to enter Heaven, but that Hell is always open. [These five monks] shall be given to river deity to watch over, and the waves will function as their graves.⁶⁰

The second judgment, entitled “Judgment on the Case of Buddhist Monks Who Banded Together and Killed a Cow and Caught Fish,”⁶¹ was decided and written by Li Ying (李膺), an official from the middle part of the Tang dynasty.⁶² Like the judgment against Buddhist monks rendered by Han Huang, Li Ying’s judgment is equally terse:

[The Buddhist monks] have violated the prohibitions and religious disciplinary rules of the Western Paradise as well as the regulations of the Tang kingdom. They did not seriously consider the degeneration [of their hearts] and have wrongfully raised the blade of a cook. Assemble together all the Buddhist disciples/students, and then the Buddhist monks must be punished severely. Each [of the Buddhist monks] shall be punished with 30 blows from the light stick, and the

55. I am grateful to HE LEI 何蕾, *TANG DAI WEN REN YU FA LU 唐代文人与法律 [TANG DYNASTY WRITERS AND TANG LAW] 217-18 (2009) for pointing out these sources to me. My interpretation of these cases has been informed by He Lei’s reading of them.*

56. The *Quan Tang wen* (*Complete Prose of the Tang Dynasty*) is a compilation of over 20,000 pieces of writing by over 3,000 Tang dynasty authors; it was completed in 1814. See ENDYMION WILKINSON, *CHINESE HISTORY: A NEW MANUAL* 742 (2012).

57. The entire *Quan Tang wen* is conveniently now available online. This judgment can be found in *juan* 卷 (chapter) 434 of the *Quan Tang wen*. See QUAN TANG WEN 全唐文 [COMPLETE PROSE OF THE TANG DYNASTY], <http://ctext.org/wiki.pl?if=gb&chapter=148698>.

58. Han Huang’s韩滉 official biography appears in *juan* 129 of the *Jiu Tang shu* 旧唐书 [*The Old Standard History of the Tang*]; see LIU XU 刘昫 (888-947) ET AL., *Jiu Tang shu* 旧唐书 [THE OLD STANDARD HISTORY OF THE TANG] 3599-606 (Yang Jialuo 杨家骆 et al. eds., 1981).

59. *Id.* at 3603.

60. QUAN TANG WEN, *supra* note 57. All English translations in this article, unless otherwise indicated, are mine.

61. This judgment can be found in *juan* 955 of the *Quan Tang wen*. See QUAN TANG WEN 全唐文 [COMPLETE PROSE OF THE TANG DYNASTY], *available at* <http://ctext.org/wiki.pl?if=gb&chapter=921066>.

62. HE, *supra* note 55, at 218.

punishment shall be administered [publicly] in the Buddhist temple courtyard.⁶³

Unfortunately, the historical record does not provide us much information with the context behind these two cases, and we know extremely little about Li Ying's background (his official biography is not contained within the Tang standard histories). Since the two cases deal with Buddhism, it is necessary to provide some historical context here regarding Buddhism's status in the Tang. Buddhism itself was introduced to China in the Han dynasty (206 BC -220 AD), and by the latter part of the Han dynasty, Buddhist communities had been set-up in different parts of China.⁶⁴ Buddhism's influence grew substantially in the Tang dynasty and was supported by the central government. For example, Emperor Taizong (唐太宗) (reign years 626-649 AD) awarded tax-exempt land to Buddhist monasteries⁶⁵ and also provided patronage and support for the translation of Buddhist texts into Chinese,⁶⁶ and Empress Wu (武则天) (reign years 690-705 AD) funded the construction of Buddhist buildings⁶⁷ and awarded court privileges, court positions, and gifts to Buddhist monks.⁶⁸ Wealthy Chinese also donated land to Buddhist monasteries as well.⁶⁹ As a result of these benefits from the public and private sector, Buddhist monasteries became very affluent, and Buddhist institutions and personnel began to involve themselves in secular activities—for example, given their large landholdings, Buddhist institutions were able to draw upon peasants to farm their estates, and their enjoyment of tax-exempt status allowed them to increase their land holdings and to invest profits into other businesses.⁷⁰ Buddhist monasteries established banks, inns, and also ran loan businesses.⁷¹ The monks themselves also enjoyed the privileges associated with public and private sponsorship—they wore expensive silk clothes and enjoyed luxurious meals.⁷²

Largely due to its economic and political success (which at times came via corrupt pathways) and its status as a foreign-source religion, Buddhism began to run out of favor with Tang emperors in the ninth century, which culminated in the mid-ninth century suppression of Buddhism.⁷³ In 843 AD, Emperor Wuzong (唐武宗) (reign years 840-846 AD) launched a campaign against Buddhism—Buddhist monks who broke monastic regulations were defrocked, thousands of Buddhist nuns and monks were expelled, Buddhist texts and images were destroyed or

63. *Id.*

64. MORRIS ROSSABI, A HISTORY OF CHINA 114 (2014).

65. *Id.* at 137.

66. *Id.* at 145.

67. *Id.* at 140.

68. *Id.* at 141, 145.

69. *Id.* at 149-50.

70. *Id.* at 150.

71. *Id.*

72. *Id.*

73. *Id.* at 162.

defaced, monastery estates and land were confiscated, and thousands of monasteries and rural temples were destroyed.⁷⁴ This campaign of religious persecution—one of the very few in all of Chinese history⁷⁵—finally ended with the death of Emperor Wuzong in 846 AD.⁷⁶

What are the implications of this discussion of Buddhism to our understanding of these two cases? Although we cannot be sure when exactly Huang Han and Li Ying's judgments were handed down, we can deduce (based on Huang Han and Li Ying's dates) that the judgments were written prior to the start of the suppression campaign against Buddhism, which suggests that they were not necessarily acting as part of a central government-sponsored anti-Buddhism campaign.

The two judgments both involve rather similar facts; in both cases, Buddhist monks were found guilty of improper behavior (gambling and drinking, and cooking meat and fishing) and sentenced. However, the punishments were quite different—Han Huang sentenced the Buddhist monks to death by drowning, whereas Li Ying sentenced the Buddhist monks under his jurisdiction to beating with the light stick, a much more lenient punishment. In other words, these cases have already demonstrated two very different approaches being taken by different officials. Furthermore, neither Han Huang's nor Li Ying's judgment cites a specific provision of the Code, the Statutes, the Regulations, or the Ordinances, as required under Article 484 of the Tang Code as discussed earlier in the paper. Therefore, the next question to ask is, what does the Tang Code have to say (if anything) regarding these offenses?

None of the articles in the Tang Code are on point. Article 57—"References to Daoist Priests and Nuns"—makes clear that all references in the Tang Code to Daoist priests (monks) and nuns also include Buddhist priests (monks) and nuns.⁷⁷ The Tang Code also covers certain proscribed behaviors by Daoist priests and nuns (which would also include Buddhist priests and nuns per Article 57), including illicit sexual intercourse by Daoist priests and nuns and certain relationships between Daoist priests and their masters,⁷⁸ but no specific article deals with the acts of Daoist or Buddhist priests and nuns drinking, gambling, cooking, hunting, or fishing. Given this situation, Huang Han and Li Ying would have two options under the Tang Code—either to reason by analogy per Article 50 of the Tang Code, or to rely on Article 450, the catch-all provision of the Tang Code which punishes the act of "doing what ought not to be done." However, it is important to recall the inherent limitations of Article 50 and Article 450, as discussed earlier in Part I of the Article—reasoning by analogy had to be approved by the emperor, and the maximum penalty under Article 450 was eighty blows by the light stick.

74. *Id.* at 163.

75. *Id.* at 162.

76. *Id.*

77. THE TANG CODE, VOLUME I: GENERAL PRINCIPLES, *supra* note 7, at 270.

78. *Id.* at 270-71.

Taking these provisions into account, neither Huang Han nor Li Ying's judgment adheres to the Tang Code. There is no reasoning by analogy involved in the judgments, and Article 450 is not cited, so it is unclear what provision of the Tang Code was being applied. Li Ying's pronouncement of a sentence of 30 blows with the light stick does fit within the permitted punishment parameters of Article 450, but again, he did not cite the article, which is in itself a violation of Article 484 of the Tang Code. There is also no evidence to suggest that Han Huang's death sentence was in agreement with the requirements of the Tang Code—first, even if Han Huang relied on the catch-all provision of Article 450, drowning was not a permitted punishment under Article 450. Furthermore, as discussed earlier in Part I, per Tang criminal procedure law, it was necessary to first receive the approval of the emperor before a death sentence could be carried out; there is no evidence to suggest that Huang Han sent a memorial to the emperor prior to carrying out the death sentence. The method of capital punishment used by Huang Han—drowning—itself was also a violation of the Tang Code, as drowning was not one of the prescribed execution methods under the Tang Code. Article 5 of the Tang Code—“The Two Death Penalties”—provides that “[t]he two death penalties are strangulation and decapitation.”⁷⁹ Furthermore, although Tang Buddhist religious rules governing the behavior of Buddhist monks are no longer extant today, it is safe to say that the offenses committed by the executed Buddhist monks would not have been serious enough to merit punishable by death.⁸⁰ Finally, there is nothing in Huang Han's official biography in the Tang standard histories to suggest that he was punished by the central government for his not following the provisions of the Tang Code—this lack of official punishment itself is also a violation of the Tang Code (e.g., violations of Article 484 would have been punishable by thirty blows of the light stick).

Thus, from these two examples, one can see a disconnect between what the Tang Code prescribed and how it was actually implemented in practice. These two cases also show that the application of criminal law and criminal punishment could be quite arbitrary at times, with the official judging the case enjoying broad discretion. Indeed, there is evidence in the historical record to suggest that Huang Han personally may not have favored Buddhism as much as other officials did—for example, at one point during his official career, he ordered that mansions and houses for officials be built from parts of certain Buddhist temples and also ordered certain Buddhist temples be dismantled so that protective barriers could be built for military defense purposes.⁸¹ Thus, this judicial discretion may have allowed Huang Han to express his attitude toward Buddhism in imposing a harsh sentence for the Buddhist monks.

79. THE TANG CODE, VOLUME I: GENERAL PRINCIPLES, *supra* note 7, at 59.

80. See HE, *supra* note 55, at 218.

81. LIU XU, *supra* note 58, at 3601.

B. *Crimes Involving Revenge Killings*

The next set of cases to be examined involves revenge killings. This is an interesting subset of cases as it allows us to compare different jurisprudential approaches taken towards revenge killings—a type of crime not covered by any provision of the Tang Code. The diversity of approaches taken toward prosecution of the murderer (i.e., the person committing the revenge killings) again highlights the inconsistency of the application of the provisions of the Tang Code. In addition, the regulation and punishment of revenge killings in general were also topics of discussion among leading Tang officials at the time; therefore, these cases will also allow us to get a glimpse of how certain Tang officials thought of (or did not think of) the Tang Code during legal and policy debates.

The act of revenge in retaliation for murder frequently elicited sympathy in traditional China, and such acts of vengeance were often not legally punished or prohibited.⁸² The Tang Code contains no specific article on revenge in retaliation for murder. For homicide generally, the Tang Code distinguished between six kinds of killing: (1) premeditated murder where intention was formed prior to killing; (2) intentional murder where the intention to kill was formed only at the moment of the killing; (3) mistaken killing where the intention was to kill someone else than the actual victim; (4) killing in a fight where the original intention was only to injure; (5) killing in a dangerous sport or game; and (6) an accidental killing where there was no intention to kill or harm.⁸³ If we were to just apply the Tang Code plainly, it would appear that most revenge killings should fall under the heading of premeditated murder (since it is common for people avenging a murdered comrade to plan out his/her act of revenge killing against the murderer) and therefore should be punished by decapitation (if the revenge killing was carried out successfully), per Article 256 (“Plotting to Kill a Person”) of the Tang Code.⁸⁴

The first case to be examined dates to 811 AD; it was apparently so significant that Emperor Xianzong (唐宪宗) (reign years 805-820 AD) ordered that officials serving in the imperial court discuss the case among themselves and proffer suggestions on how to dispose of the case.⁸⁵ The *Xin Tang shu* (新唐书) (*The New Standard History of the Tang*) relates the facts of the case and imperial plea for assistance:

There was a man named Liang Yue (梁悦) from Fuping (富平).⁸⁶ His father was murdered by Qin Guo (秦果), who was subsequently

82. Michael Dalby, *Revenge and the Law in Traditional China*, 25 AM. J. LEGAL HIST. 267, 267-68 (1981). Dalby's article is the most comprehensive treatment of the subject of revenge killings and traditional Chinese law in English. For additional discussion of traditional Chinese perspectives on revenge, see also James McMullen, *Confucian Perspectives on the Akō Revenge: Law and Moral Agency*, 58 MONUMENTA NIPPONICA 293, 296-98 (2003).

83. MACCORMACK, *supra* note 4, at 38.

84. THE TANG CODE, VOLUME II: SPECIFIC ARTICLES, *supra* note 7, at 252.

85. Dalby, *supra* note 82, at 285.

86. Fuping 富平 was located in what is now modern-day Shaanxi 陕西 province.

killed by Liang Yue in revenge. Liang Yue then went to the district magistrate to give himself up. The imperial court decreed: “according to *The Book of Rites*,⁸⁷ the son and the person who killed his father cannot co-exist under the same Heaven. However, the law provides that one who murders another must face capital punishment. Ritual propriety (*li* 礼) and law are both the fundamentals of the emperor’s commands and teachings. It is hereby ordered that this case be submitted to the Department of State Affairs⁸⁸ for discussion.”⁸⁹

Han Yu (韩愈) (768-824 AD), a prominent official and now considered one of the most famous and important writers in Chinese history,⁹⁰ proffered the following advice—as one of the aims of this article is to introduce relevant primary sources in their entirety, a full translation of Han Yu’s memorial follows, accompanied by this article’s analysis.⁹¹

There are countless references to sons avenging their fathers in the *Spring and Autumn Annals*,⁹² the *Book of Rites*, the *Rites of Zhou*,⁹³ classical philosophical texts, and the ancient histories. None of these sons had been met with censure, and none of them faced capital punishment. The most appropriate way [to deal with these kinds of revenge cases] would be to have detailed laws on them. However, our current laws lack such provisions. This is not due to gaps or omissions during the drafting of our laws—for if revenge killing against a father’s murderer is not permitted, this would injure the heart of a son who is filial. On the other hand, if revenge killing against a father’s

87. *The Book of Rites*, or *Li Ji* 礼记 in Chinese, is one of the classic texts of the Confucian canon. For much of Chinese history, it was thought to have been compiled by Confucius. Today, most scholars agree that the text was most likely compiled and edited by Han dynasty scholars. *The Book of Rites* describes the government system and rites of the Zhou dynasty (1046–256 B.C.).

88. The Department of State Affairs, or the *shang shu sheng* 尚书省, was the working administrative agency of the Tang dynasty central government, one of the most powerful departments in the Tang government apparatus.

89. OUYANG XIU 欧阳修 (1007-1072) ET AL., *XIN TANG SHU* 新唐书 [THE NEW STANDARD HISTORY OF THE TANG] 5587 (Yang Jialuo 杨家骆 et al. eds., 1981).

90. Charles Hartman, one of the leading scholars of Han Yu, writes that Han Yu “ranks among the most important personalities in the history of traditional Chinese culture.” Han Yu is famous today as one of the principal advocates for a prose style called the “literature of antiquity” (*gu wen* 古文) and as a leading proponent of a return to Confucian moral values (in opposition to the Tang embrace of Buddhism). See CHARLES HARTMAN, *HAN YÜ AND THE T'ANG SEARCH FOR UNITY* 3 (1986).

91. This memorial is also discussed in Dalby. See Dalby, *supra* note 82, at 286-89. Dalby, however, does not provide a full English translation of the memorial. My reading and translation of Han Yu’s memorial has been informed by Dalby’s discussion.

92. The *Spring and Autumn Annals* (*Chun qiu* 春秋) is a history of the twelve dukes of the ancient Chinese state of Lu (鲁) from roughly 722 to 481 B.C. Its structure is akin to that of a historical outline or timeline, reporting facts in a chronological and succinct fashion. Authorship of the *Spring and Autumn Annals* was traditionally attributed to Confucius.

93. The *Rites of Zhou* (*Zhou li* 周礼) dates back to about the third century B.C. It is an important primary source text that provides information on the political and administrative system of the Zhou dynasty. The text discusses various officials in Zhou government and details their responsibilities and how they should perform their duties.

murderer is permitted, then people would be able to murder others with the approval of, and in reliance on, the law. The law would therefore not be able to prohibit the killing of others.⁹⁴

Han Yu began his memorial by drawing upon general principles from important classical Confucian texts—using sweeping and absolute language, he unequivocally stated that despite the “countless” examples of sons avenging their murdered fathers, not one was subject to legal punishment. He then proceeded to explain why the Tang Code did not contain a provision specifically dealing with these revenge killings—having a specific provision banning such killings would be harmful to society, as it would interfere with the expression of filial piety, one of Chinese culture’s most cherished and important virtues. At the same time he emphasized that, having a specific provision permitting revenge killings would cause lawlessness and weaken the law’s ability to deter and punish homicide. Note that Han Yu did not mention or discuss in detail penal codes from earlier periods in Chinese history. He chose to draw on the Confucian classics, philosophical texts, and historical texts as his textual anchors. Han Yu continued:

Although law [ultimately] is derived from the hands of the sages, it is implemented by the relevant officials. The Confucian classics have clearly provided that such officials [and their behavior] must be restricted. Indeed, when you exhort such officials to judge cases according to principles in the Confucian classics, they instead go off and rely strictly and exclusively upon existing legal provisions. On the other hand, when you have judicial officials deciding cases based on legal provisions, those who specialize in the Confucian classics will censure [such decisions] by references to principles in the Confucian classics.⁹⁵

Here, Han Yu made clear that although law has its special, almost “divine” origins from the ancient sage kings of Chinese civilization, implementation of law is the responsibility of officials. His other major point here seems to be that, in deciding cases—and especially those cases such as revenge killings without a clear legal provision on point—an official cannot simply blindly apply the law, but he must also take into account principles from the Confucian classics. In other words, a balance should be achieved between applying the law and considering other principles outside the letter of the law. Han Yu then continued his memorial with a discussion of specific principles and rules extrapolated from the Chinese Confucian classics:

According to the *Rites of Zhou*: “if it was right or justified to kill someone, then the victim’s relatives and friends shall not be able to exact revenge, and those who take revenge [on behalf of the victim] must be put to death” . . . Sons may take revenge for victims killed for no proper or righteous reason. [These principles] are the basis for the cycles and back-and-forth of murdering and then taking revenge

94. OUYANG XIU, *supra* note 89, at 5587-88.

95. *Id.* at 5588.

among the common people. According to Gongyang Gao (公羊高),⁹⁶ “when a father should not have been executed but has nevertheless been executed, then the son can avenge him.” Gongyang Gao, however, was referring to a situation where the father may have committed a crime but nevertheless should not have been executed—indeed, the character Gongyang Gao used for the word “to execute” was the Chinese character of (*zhu* 诛), which describes the killing of someone by someone in a position of higher authority—i.e., it does not refer to killing and revenge by and among the common people. The *Rites of Zhou* also say: “before taking revenge on an enemy, you must inform the authorities in advance, and then you will not be committing a crime when killing the enemy.” What the *Rites of Zhou* mean here is that if one is about to take revenge, one must first inform the government authorities in advance—if this is done, one would not be committing a crime in carrying out his revenge killing. Although both the *Rites of Zhou* and Gongyang Gao discuss revenge, the “revenge” they refer to is not quite the same. One set of circumstances involves revenge killings by and among the common people—as per the *Rites of Zhou*. The propriety of such revenge killings can be discussed and debated, as we are doing at present. The other set of circumstances involves executions by officials in authority—as per the *Gongyangzhuan* (公羊传).⁹⁷ These revenge killings [against such officials] are not something we should encourage in the present day. As for the *Rite of Zhou*’s requirement of advance notice prior to revenge killing—minors and the weak, as well as those who have a desire for revenge in their hearts and are simply waiting for the right [and perfect] moment to take vengeance, would probably not be in a position to inform the authorities in advance of their taking revenge. Thus, the notice requirement is probably not suitable for the present-day either.⁹⁸

As discussed earlier, Han Yu began his memorial by clearly indicating he would be drawing upon the Confucian classics (as well as other ancient texts) as a basis for his memorial. Here, Han Yu provided a deeper, more specific contextual analysis, attempting to show the distinctions between what the *Rites of Zhou* and the Gongyao Gao had to say about revenge killings. In other words, Han Yu believed that it was too simplistic to just say that all revenge killings are justified and supported by the classical Confucian texts. Han Yu argued that in cases involving common people, based on the *Rites of Zhou*, sons could avenge fathers who were killed for no justifiable reason, but people could not carry out revenge killings on behalf of a victim if the murder of the victim was justified. Furthermore, Han Yu made clear that the “propriety” of revenge

96. Because of the terse nature of the *Spring and Autumn Annals*, certain commentaries were written to the *Spring and Autumn Annals* to provide more background and explanations regarding events chronicled in the *Spring and Autumn Annals* texts. One commentary is known as the *Gongyangzhuan* 公羊传; authorship has traditionally been attributed to Gongyang Gao 公羊高, who was a disciple of Zixia 子夏, a disciple of Confucius.

97. A discussion of the *Gongyangzhuan* is set forth above. See *supra* note 96.

98. OUYANG XIU, *supra* note 89, at 5588.

killings among common people could be discussed and debated, implying that there would be times when such revenge killings could be accepted, and perhaps even encouraged. However, in cases involving executions of subjects by officials in authority positions, revenge against such officials (if the executions were not justified) should not be encouraged.⁹⁹ Han Yu also dismissed the notice-requirement solution offered by the *Rites of Zhou*, arguing that it was not pragmatic. He then ended his memorial with his solution:

In light of this, we should not lump capital punishment and amnesty together. We should adopt the following rule: “if there is a person who has avenged his father, the incident should be clearly set down in writing with all relevant details and submitted to the Department of State Affairs, and officials should be convened to discuss the incident before reporting to the emperor to allow him to take all circumstances into account in deciding the case.” Such an approach would also not violate the teachings in the Classics.¹⁰⁰

Han Yu’s solution at first glance may seem rather disappointing—he does not, after all, give a specific solution as to how to handle or sentence Liang Yue. Han Yu’s point seems to be the importance of flexibility in deciding revenge killing cases—since no revenge case would be absolutely the same with respect to its facts and circumstances, it would be necessary to consider each case on its own merits before reaching a decision.¹⁰¹ As we can also see from his conclusion, Han Yu reaffirmed the importance of the teachings and principles in the Confucian classics. In the end, we know that the imperial Tang court decreed that Liang Yue was to be punished by exile (to present-day) Guangzhou province given that his motive was to redress an injustice for his father and also due to his giving himself up¹⁰²—life exile was of course a much lighter sentence than the death sentence for successful, premeditated killings under the Tang Code.

What implications, therefore, does Han Yu’s memorial have on this article’s focus on the implementation of the Tang Code? First, it is significant that Han Yu did not discuss previous penal laws; more importantly, he did not discuss Article 50 of the Tang Code, which was designed precisely for situations (such as revenge killings) which were not covered by a specific provision of the Tang Code. Nor did Han Yu apply Article 50 anywhere in his memorial—for example, he did not reason by analogy to other provisions on homicide. Rather, Han Yu premised his discussion on classical Confucian texts and other pragmatic considerations. As Michael Dalby has argued, it appears that Han Yu elevated revenge killings as a very special crime¹⁰³—in other words, a crime that was too important to be subject to the Tang Code’s provision. Finally, Han Yu’s memorial

99. Dalby, *supra* note 82, at 287.

100. OUYANG XIU, *supra* note 89, at 5588.

101. Dalby also makes a similar argument. See Dalby, *supra* note 82, at 287.

102. OUYANG XIU, *supra* note 89, at 5588.

103. Dalby, *supra* note 82, at 288.

is telling as it shows us how some of the Tang's most accomplished and powerful officials actually reasoned through legal issues—indeed, we might say that pure legal reasoning (such as the analogical reasoning set forth by Article 50) is conspicuously absent in Han Yu's memorial. In short, his memorial again is evidence that the Tang Code was not necessarily strictly applied in certain cases and that it also did not necessarily feature into important legal and judicial debates in the highest levels of Tang government. Again, flexibility and discretion outside of the Tang Code seems to have been valued more than strict implementation and interpretation of the Tang Code.

Yet not all revenge killing cases ended with sympathy (and a lighter punishment) for the avenger. One case dating from the early-mid eighth century involved young, minor-age defendants who, despite substantial public sympathy, were ultimately still executed on recommendations by some officials to strictly apply the criminal law—yet, interestingly, the case account does not record to what specific legal provision such officials relied upon in making their recommendation. Given the dramatic nature of the facts around this case, I give below a translation of the case account. First, the case account lays out the facts and circumstances surrounding the case:

Zhang Xiu (张琇) was from Jie (解) district in Hezhong (河中) prefecture.¹⁰⁴ His father, Zhang Shensu (张审素), served as a chief for military forces in Xi (郫) prefecture.¹⁰⁵ There was a man named Chen Cuanren (陈篡仁) who falsely accused Zhang Shensu of [arrogantly] passing himself off as a person with superb, outstanding military skills and also of privately employing soldiers. Emperor Xuanzong (唐玄宗) (reign years 712-756 AD) became suspicious of Zhang Shensu, and ordered Yang Wang (杨汪), an investigator censor, to go and investigate the matter. Chen Cuanren then also falsely accused Zhang Shensu and another man, Dong Tangli (董堂礼) (a military coordinator) of plotting a rebellion. After this, Dong Tangli then placed Zhang Shensu in . . . prison, and quickly rushed to Xi prefecture to look more closely into the accusation of plotting rebellion. Dong Tangli was extremely enraged and killed Chen Cuanren. He also then dispatched 700 soldiers to surround Yang Wang and forced Yang Wang to submit a memorial to Emperor Xuanzong which would clear Zhang Shensu's name. Not long after, certain petty officials banded together and killed Dong Tangli. As a result, Yang Wang extricated himself and decided that Zhang Shensu was indeed guilty of plotting a rebellion. Yang Wang then executed Zhang Shensu and confiscated his family assets. Zhang Xiu (张琇) and his brother, Zhang Huang (张璲), who were both still quite young, escaped After a long time, they went back home. Yang Wang changed his [given] name to Wanqing (万顷). Zhang Xiu at the time was 11 years old, and his brother Zhang Huang was 13 years old. They killed Yang Wanqing (i.e., previously known as Yang

104. Jie 解 district was located in what is now modern-day Shanxi 山西 province.

105. Xi 郫 prefecture was located in what is modern-day Sichuan 四川 province.

Wang) . . . in the night—Zhuang Huang hit Yang Wanqing’s horse [with an ax], and Zhang Xiu killed Yang Wanqing, who was too surprised to resist. The two brothers then proceeded to write down their reasons for killing Yang in a document and tied the document to the ax. They then raced . . . to prepare themselves to kill the person who had falsely accused their father and then to turn themselves into the authorities. As they were passing through Sishui (汩水),¹⁰⁶ they were [soon] apprehended by the authorities, who sent a memorial to the throne on the matter.¹⁰⁷

The crime of which Zhang Shensu was accused—plotting rebellion—was a crime listed as one of the ten abominations, the most serious offenses under the Tang Code.¹⁰⁸ The penalty for plotting rebellion would have been decapitation.¹⁰⁹ To avenge their father, the Zhang brothers killed Yang Wang (who later changed his name to Yang Wanqing) and plotted to kill “the person who had falsely accused their father,” who presumably was Chen Cuanren (although the case account does not make it explicit, we can assume that they did not know Chen Cuanren had already been killed by Dong Tangli). It is also not clear whether Yang Wang executed Zhang Shensu without justification—Yang Wang, after all, appears to have been a victim himself (i.e., he was surrounded and forced to proclaim Zhang Shensu’s innocence).

What does the Tang Code have to say about the Zhang brothers’ crimes? As mentioned earlier in the article, the Tang Code did not contain a specific provision on revenge killing. The brothers’ crime would have likely fallen under the provisions on a successful premeditated murder, which would have carried a penalty of decapitation. One important factor is the age of the brothers—they were both under fifteen years of age when they committed the murder. Under Article 30 of the Tang Code, persons fifteen years of age or less (and, incidentally, seventy years of age or more) could “redeem” all crimes punished by life exile or less, save for particularly serious crimes.¹¹⁰ In other words, such persons could “redeem” the crimes by payment of copper and thereby avoid punishment.¹¹¹ Here, since the brothers’ crime would have been most likely punished by death (a heavier offense than life exile), they would not have been able to redeem their punishment in reliance on Article 30. The other possibility would be to engage Article 50 and to reason by analogy, given the special circumstances of their crime.

The historical record continues the case account and tells us about the debates at the imperial court:

Zhang Jiuling (张九龄) (who served as Secretariat Director) and others praised the brothers’ strong expression of filial piety and their

106. Sishui 汩水 was located in modern-day Shandong 山东 province.

107. OUYANG XIU, *supra* note 89, at 5584.

108. The “ten abominations” were discussed previously. *See supra* note 22.

109. THE T’ANG CODE, VOLUME I: GENERAL PRINCIPLES, *supra* note 7, at 18.

110. *Id.* at 30, 169.

111. *Id.* at 169-70.

uprightness; they argued that the brothers should not be executed. Pei Yaoqing (裴耀卿) (who served as Director of the Chancellery) and others, however, collectively memorialized that this exemption from capital punishment should not be allowed. Emperor Xuanzong agreed with Pei and his group. The emperor said to Zhang Jiuling: “They are indeed filial sons, and for the sake of filial righteousness, they have been willing to sacrifice their lives. Executing them could help make them whole, but granting them amnesty would bring harm to our laws. In most causes, who among sons would not be willing to be filial? Thus, there would be no end in sight if people kill for the sake of revenge.” In the end, Emperor Xuanzong adopted the recommendation set forth by Pei Yaoqing, while commentators considered this decision an injustice. The emperor indicated that execution would take place via the issuance of an imperial edict.¹¹²

Unfortunately, the historical record does not give us great detail about the particulars of Zhang Jiuling’s and Pei Yaoqing’s arguments—for example, we do not know their full, precise reasoning or on what texts or legal provisions (if any) they based their recommendations. However, similar to the Han Yu memorial, there is no explicit mention of the Tang Code (for example, there is no mention at all about reasoning by analogy or any legal provision for that matter). There is, however, a generic reference to upholding the “law.” There is also no discussion on the character of Yang Wang and whether or not he was himself more a victim or whether he was similar to Qin Guo in the Liang Yue case discussed earlier. However, we do know that Zhang brothers’ act elicited much sympathy. The story of the Zhang brothers ends rather dramatically:

Eventually, at the time of the brothers’ execution, food was given to them to eat. Zhang Huang had no appetite to eat. Zhang Xiu looked perfectly at ease, and said, “What regret could there possibly be with going to the underworld to meet the ancients!” There was no one who did not take pity on them; they wrote a eulogy for the brothers and posted it on the side of the road and also collected funds to bury the brothers . . . because they were afraid that enemies of the brothers might come and dig up their corpses, they also constructed numerous tombs so that others would not know the brothers’ true resting places.¹¹³

Despite not having much information regarding some facts of the case, the Zhang brothers case nevertheless gives us a glimpse of a revenge killing case that ended with the death penalty for the avengers, despite what appears to be overwhelming sympathy for the brothers both at court and in the general public-at-large—the results of this case highlights the inconsistency of the application of criminal law as it pertained to revenge killings in the Tang (especially when compared to the approaches taken in the Liang Yue case).

112. OUYANG XIU, *supra* note 89, at 5584-85.

113. *Id.* at 5585.

C. *Crimes Involving Military Units, Military Affairs, and/or Military Personnel*

In this section, we will examine three criminal cases, all of which involve military units, military affairs, or military personnel. These three cases continue to support the argument that there was a discrepancy between what the Tang Code required and how it was implemented in society.

The first case account shows a Tang dynasty official carrying out capital punishment without taking certain procedural steps as required under the Tang Code:

Liu Gongchuo (柳公绰) (763-832 AD) . . . was a native of the area near the Tang capital of Chang'an (长安) He later served as prefect of Kai (开) prefecture.¹¹⁴ Kai prefecture was located near areas where ethnic minorities (i.e., non-Han peoples) lived. Bandits frequently threatened the prefecture. An official serving under Liu Gongchuo remarked: "the military strength of our prefecture is not sufficient to defeat the bandits. As such, we should just allow the leader of the bandits to fill an important post in our prefecture [to placate him]." Liu Gongchuo replied: "Are you in cahoots with the bandits? How could you make a mockery of the law?" Liu Gongchuo then immediately had this official executed, and the bandits led their armies away.¹¹⁵

Liu Gongchuo did not follow Tang criminal law procedure as set forth in the Tang Code. First, as a prefect, he did not have the authority to order an execution of a criminal because executions could only proceed with the approval of the emperor. Furthermore, as discussed in Part I of the Article, it was necessary to memorialize the emperor three times before an execution could be carried out if the case was heard outside the jurisdiction of the Tang capital of Chang'an. Here, there is nothing to suggest that Liu Gongchuo submitted the necessary memorials. Finally, there is no citation to any specific provision of the Tang Code as was required by Article 484 (or, if no provision was on point for the committed crime, Article 50 could have been utilized, but there is no evidence to suggest that Liu Gongchuo relied on Article 50). Similar to the language used by the emperor in the Liang Yue case, there is only a generic mention of "law" without any further explanation. Indeed, there were arguably provisions on point in the Tang Code that could have been cited. For example, Article 232.1(a) of the Tang Code sets forth that "all cases of informing the enemy of a secret campaign are punished by decapitation"¹¹⁶ or perhaps the article on plotting treason (especially given Liu Gongchuo's charge that condemned official was "in cahoots with the bandits") which states that "all cases of plotting treason are punished by strangulation."¹¹⁷

114. Kai 开 prefecture is located in modern-day Sichuan province.

115. OUYANG XIU, *supra* note 89, at 5019.

116. THE T'ANG CODE, VOLUME II: SPECIFIC ARTICLES, *supra* note 7, at 222.

117. This is Article 251.1. See THE T'ANG CODE, VOLUME II: SPECIFIC ARTICLES,

Liu Gongchuo's proclivity for summary trials and judgments became even more extreme. In the following case account, he became judge and executioner all in one, which even concerned Emperor Xianzong (唐宪宗) (reign years 805-820 AD) himself:

[Later on], Liu Gongchuo accepted an appointment as the administrator of Chang'an. As he was on the way to Chang'an to begin his new post, he came across an officer of the Tang Army of Inspired Strategy¹¹⁸ who was riding on his horse and who would not make way for Liu Gongchuo. Liu then killed him right at the scene. Emperor Xianzong (唐宪宗) was incensed and detested Liu's unauthorized killing of the army officer. Liu Gongchuo responded, "the officer's actions were not just disrespectful to me, but they also belittled your majesty's laws and commands." Emperor Xianzong responded: "You've already killed the military officer, and yet you did not report the facts and your killing up the chain—how is this proper?" Liu Gongchuo replied: "I should not have been the one to report this matter. The military officer died on the downtown streets, and so it was the responsibility of the Imperial Insignia Guard (a unit of the imperial bodyguard) to report the matter. If the military officer had died in a lane, it would have been the responsibility of a patrolling inspector to have reported the matter." Emperor Xianzong heard this [and let the matter drop].¹¹⁹

Here, based on the case account, Liu Gongchuo completely dispensed with any semblance of procedure, himself executing the army officer for what he perceived as disrespectful behavior. Of particular note is that his actions drew the ire of Emperor Xianzong, who criticized him specifically for not following lawful procedural step of reporting the matter to the higher authorities. Yet, in the end, Liu Gongchuo was not punished; rather, Emperor Xianzong let the matter drop. This short case account shows us that the dispensation of justice could indeed be arbitrary, and officials who did not follow the Tang Code were not necessarily sanctioned by higher authority figures in government.

The next case also involves an officer in the Tang Army of Inspired Strategy—this officer was delinquent in his repayment of debts:

An officer in the Army of Inspired Strategy named Li Yu (李昱) borrowed 8,000 *guan*¹²⁰ from a rich man in Chang'an. Three years passed, and he still did not pay this man back. Xu Mengrong (许孟容) (743-818 AD)¹²¹ dispatched his lower officials to arrest Li Yu and take him into custody. He also ordered that Li Yu agree to set a date

supra note 7, at 245.

118. The Army of Inspired Strategy was part of the Imperial Armies—i.e., elite soldiers stationed in the capital city, Chang'an. See XIAOSHAN YANG, *METAMORPHOSIS OF THE PRIVATE SPHERE: GARDENS AND OBJECTS IN TANG-SONG POETRY* 41 (2003).

119. OUYANG XIU, *supra* note 89, at 5021.

120. This was a premodern Chinese term of measurement meaning "strings of coins."

121. Xu Mengrong 许孟容 served as administrator of Chang'an 长安.

for repayment, and remarked: “If you do not pay the man back in accordance with the deadline, you will be executed.”¹²²

According to the case account, troops in the capital (such as Li Yu) had come under the influence of the palace eunuchs, who themselves curried and enjoyed much favor with the emperor. As a result, the troops became arrogant, and officials were afraid to regulate their behavior.¹²³ Xu Mengrong, however, was not one of these officials:

Xu Mengrong, however, was upright and was not afraid. He did not fear prosecuting the troops according to the law. This shocked the imperial soldiers, and they complained to Emperor Dezong (唐德宗) (reign years 779-805 AD) that they were being treated wrongfully by Xu Mengrong. The emperor immediately ordered the eunuchs to issue an order to allow Li Yu to return to the army. However, Xu Mengrong kept Li Yu in detention and refused. The eunuchs tried again to come to take Li Yu away, but Xu Mengrong stubbornly sent the following memorial: “I know that because I have disobeyed the imperial decree, I should be put to death. However, I have been tasked with governing the capital for the sake of the emperor, and as such, I should help the emperor stamp out flagrant and arrogant behavior. As long as Li Yu does not repay the money he borrowed, he will not be permitted to leave.” The emperor agreed to Xu Mengrong’s approach as he was impressed with Xu Mengrong’s dedication to his post. After this case, the arrogant behavior [previously exhibited by the imperial army] subsided, and Xu Mengrong’s authority grew.¹²⁴

Here, as with previous cases we have looked at, we see an official like Xu Mengrong enjoying substantial discretion in applying punishment. As with the previous cases, there is no citation to a specific provision in the Tang Code or any legal provision. The Tang Code does appear to have a provision on point—the closest provision is Article 398, which covers “Debtors who violate a contract by not making payment.”¹²⁵ Article 398.1(a) provides that “all cases in which a debtor violates a contract by not making payment are punished by twenty blows with the light stick for a violation that lasts twenty days and involves a debt of goods worth one *chi*’h of silk or more, with one degree of punishment added for each further twenty days, and with a maximum punishment of sixty blows with the light stick.”¹²⁶ Article 398 increases these punishments for debts of goods worth more than one *chi*’h of silk (e.g., for a debt of goods worth thirty *ch’ih* of silk, the punishment is increased two degrees).¹²⁷ While the facts provided by the case account do not make clear whether an actual contract existed, there was no discussion or citation of this provision by Xu Mengrong—or any legal provision—which again would have been a violation of Article 484 in his pronouncing sentence.

122. LIU XU, *supra* note 58, at 4102.

123. *Id.*

124. *Id.*

125. THE T’ANG CODE, VOLUME II: SPECIFIC ARTICLES, *supra* note 7, at 464.

126. *Id.*

127. *Id.*

The next case involves yet another soldier in the Army of Inspired Strategy—this soldier did not pay his taxes, which was a criminal offense under the Tang Code:

Li Pin (李频) (818-876 AD) . . . was appointed magistrate of Wugong (武功) district¹²⁸ in the mid-ninth century . . . at the time, many commoners near the capital put themselves out as members of the Imperial Army of Inspired Strategy. Consequently, they [and the Army of Inspired Strategy soldiers] became arrogant, but the local officials were very tolerant of their behavior and were afraid to deal with them according to the law. After Li Pin became magistrate, [he came across] an Army of Inspired Strategy soldier named Shang Junqing (尚君庆). Shang Junqing had failed to pay his taxes for 6 years, and yet still audaciously and freely moved in and out of the village. Li Pin secretly ordered Shang's colleagues to argue with him [i.e., he fabricated a dispute]. Shang Junqing then came to Li Pin's office to request a sentence or judgment on his colleagues, but Li Pin [used this opportunity of Shang Junqing's visit] to immediately arrest and imprison him. He proceeded to then lay out all of Shang Junqing's crimes, requesting that the administrator of Chang'an execute him. He also asked Shang Junqing to pay all of his unpaid taxes. Li Pin showed no leniency to those under his jurisdiction. The crafty and cunning were all shocked at this, and they became pacified and instead strove to carefully obey the law—the district was indeed now under control.¹²⁹

The Tang Code has a provision that would have been precisely on point with respect to Shang Junqing's crime of tax evasion—Article 217 (“Required Payment of Taxes”) sets forth that “[i]n all cases of required payment of taxes or other articles that should be turned over to the government, where there is avoidance, or the articles are fraudulently concealed and not paid, or are cleverly counterfeited or damaged, what is lacking is calculated and punished as comparable to robbery.”¹³⁰ In other words, tax avoidance will be punished as robbery—Article 53.2 of the Tang Code sets forth that “references to cases sentenced as comparable to taking bribes and subverting the law, comparable to robbery and the like, mean that the punishment is limited to life exile to 3000 *li* but is otherwise comparable.”¹³¹ Therefore, the death penalty would not be a permitted form of punishment under the Tang Code.

However, despite such punitive limitations mandated by the Tang Code, Li Pin still pushed for the execution of Shang Junqing, which was not in accordance with the Tang Code. Furthermore, like the previous cases we have examined, he did not mention any specific provision of the Tang Code, despite their being a specific provision on point. Indeed, out

128. Wugong 武功 district was located in what is now present-day Shaanxi 陕西 province.

129. OUYANG XIU, *supra* note 89, at 5794.

130. THE T'ANG CODE, VOLUME II: SPECIFIC ARTICLES, *supra* note 6, at 205.

131. *Id.* at 262.

of all the cases we have examined, the facts of this case arguably most closely match the coverage of a specific provision of the Tang Code.

Finally, it is important to remember that the Tang Code itself granted certain privileges, such as the reduction of punishment and the ability to redeem punishment via payments, to officials on active duty in the civil and military branches of the Tang government.¹³² Although the previous cases we have looked at in this section do not make clear what the specific rank of the military personnel defendants were, there is no discussion at all in the case accounts of each of the defendants' possible right to these privileges. The most extreme example, of course, is Liu Gongchuo's immediate execution of the army officer on horseback, which would have afforded no opportunity at all for the officer to even claim any privilege. This is another possible violation of the Tang Code.

D. *Crimes as Recorded in the Dunhuang Manuscripts*

The last two cases to be examined in this section come from the Dunhuang manuscripts¹³³—specifically, a collection of legal judgments from the Anxi (安西) protectorate, a Chinese outpost region in the northwest established by the Tang empire in 640 AD.¹³⁴ This was a very important region for the Tang, as it functioned as an important commercial and economic region on the Silk Road. Anxi protectorate, also known as the Tang Protectorate of the Pacified West, helped the Tang empire keep control over its western territories (located in what is now modern-day Xinjiang (新疆) province).¹³⁵ The cases in this collection date to approximately 665 AD. They are thus older cases than the cases we have so far looked at in this article. What is particularly significant about these legal judgments is that they are *actual* legal judgments—that is, they are not case accounts, but rather judgments and verdicts drafted by Tang dynasty officials in Anxi protectorate. As such, they are also important sources for understanding the real-world application of the Tang Code. Unfortunately, not many of these legal judgments have survived to the present-day, and many that have survived are damaged. Furthermore, the selected judgments we will examine from this collection show officials that seem to be faithfully (or more faithfully, as compared to the previous cases we have looked at) applying and implementing the Tang Code and

132. THE T'ANG CODE, VOLUME I: GENERAL PRINCIPLES, *supra* note 7, at 25.

133. The Dunhuang manuscripts and their importance as historical sources were previously discussed. *See supra* note 18.

134. This collection of legal judgments, known in Chinese as the *Lin de an xi pan ji* 麟德安西判集 [Collection of Legal Judgments from Anxi Protectorate], is catalogued among the Dunhuang manuscripts as P. 2754. More background regarding the textual history of this collection of legal judgments may be found in Xie Mei 解梅, *P. 2754 Tang Anxi Pan Ji can juan* 唐安西判集残卷 [Study of Dunhuang MS: P.2754: Fragments of Court Verdicts of Anxi Protectorate in the Tang Dynasty], 5 DUNHUANG YANJIU 敦煌研究 [DUNHUANG RES.] 89 (2003).

135. Ulrich Theobald, *Chinese History—The Western Territories*, CHINA KNOWLEDGE—A UNIVERSAL GUIDE FOR CHINA STUDIES, <http://www.chinaknowledge.de/History/Altera/xiyu.html#xizhou> (last updated Oct. 23, 2011).

following its provisions — in other words, these two cases actually appear to follow the criminal procedure law as set forth of the Tang Code. Thus, from these examples, we can further see inconsistency in the application of the Tang Code, especially when compared with the previous cases we have examined.

The first legal judgment we examine here was entitled “Judgment on Yuan Xiaoren (元孝仁) and Wei Dashi (魏大师) of Yi (伊) prefecture¹³⁶ and their Forgery of a Seal.”¹³⁷ It was written by a district magistrate; his identity is unknown. To summarize the facts of the case: a man of Yi prefecture named Wei Dashi was drifting, wandering and loitering about for a considerable period of time.¹³⁸ We are also told that his “character lacked honesty” and that his return back to Yi prefecture was delayed because he was afraid of being punished by being beaten with the heavy stick.¹³⁹ At some point, Wei Dashi also met another man named Yuan Xiaoren; they were both “petty people” and together counterfeited a seal.¹⁴⁰ The district magistrate then wrote in his judgment that Wei Dashi should be punished by exile for the two crimes of counterfeiting the seal and drifting aimlessly.¹⁴¹

What did the Tang Code have to say about these two crimes? The relevant legal provision for Wei Dashi’s first crime of wandering about aimlessly is Article 462 (“Drifting Aimlessly to Other Places”) which states:

462.1(a): All cases of those who do not run away but drift aimlessly to other places are punished by ten blows with the light stick for the first ten days, increased by one degree for each further ten days, and with a maximum punishment of one hundred blows with the heavy stick.

462.1(b): If a person who has official business at another place remains there and does not return after his business is completed, his punishment is the same.

462.1(c): If a person is working to gain profit or studying to be an official, he is not punished

136. Yi 伊 prefecture was located in what is now present-day Xinjiang 新疆 province. It was one of the three prefectures set up by the Tang government in the western territories, and was comprised of three districts: Yiwu 伊吾, Rouyuan 柔远, and Nazhi 纳职. Yi prefecture was geographically important as it was an oasis in the desert and used as a supply area for the Tang armies. *See id.*

137. The full original text of this verdict may be found in the ZHONGGUO ZHENXI FALÜ DIANJI JICHENG 中国珍稀法律典籍集成. *See* ZHONGGUO ZHENXI FALÜ DIANJI JICHENG 中国珍稀法律典籍集成 [COLLECTION OF RARE WORKS OF CHINESE LAW] 270 (*Yang Yifan* 杨一凡 & *Liu Hainian* 刘海年 eds., 1994).

138. *Id.* My reading of this judgment has been informed by Gu Lingyun 顾凌云, *Tangdai shipan de panan yiju yanjiu* 唐代实判的判案依据研究 [*Research on the Legal Bases of Actual Judgments from the Tang Dynasty*], 1 DUNHUANGXUE JIKAN 敦煌学辑刊 [J. ON DUNHUANG STUD.] 46, 47 (2014).

139. ZHONGGUO ZHENXI FALÜ DIANJI JICHENG, *supra* note 137, at 270.

140. *Id.*

141. *Id.*

Subcommentary: Does not run away means a person is not trying to avoid service but simply drifts to another place . . .¹⁴²

The Tang government had an interest in making sure people stayed where they were registered given census and tax concerns, and hence it criminalized the crime of drifting about aimlessly to other places.¹⁴³ While the facts are thin on the number of days Wei Dashi drifted, we do know that it was for a “prolonged” period of time, and given that Wei Dashi was afraid of being punished by the heavy stick, we can infer that the nature of his drifting would have been serious enough to merit beating by the heavy stick. Furthermore, while the facts cannot provide absolutely clear confirmation, we can assume that Wei Dashi was not working to gain profit or studying to be an official (given the magistrate’s judgment on punishing Wei Dashi for the crime of drifting).

As for the crime of counterfeiting seals, the Tang Code contains multiple provisions for counterfeiting seals; certain situations were to be punished by life exile, while others were to be punished by penal servitude. For example, Article 363 (“Counterfeiting the Seal for Official Documents”) contains some of the following provisions:

Article 363.1(a): All cases of counterfeiting the seal for official documents are punished by life exile at a distance of 2,000 *li*.

Article 363.1(b): For other seals, the punishment is one year of penal servitude.

Commentary: Counterfeit means to imitate and use. How they are used is not relevant.

Subcommentary: . . . But the seal must have been completed in order for the crime to be punished by life exile at a distance of 2,000 *li* Other seals mean those used by prefectures to seal letters or for trade in domestic animals

Article 363.2(a): Counterfeiting the seals for official documents from former times and because of greed applying them to documents that are then used is punished by two years of penal servitude . . .¹⁴⁴

The facts in the judgment do not give specifics of Wei Dashi’s crime as it relates to the seal; we know only that he counterfeited a seal with Yuan Xiaoren. However, based on the magistrate’s ultimate judgment that Wei be punished by exile, we can infer that Wei Dashi was probably in violation of Article 363.1(a).

As opposed to the previous cases we have examined, the magistrate in this case did explicitly cite the Tang Code when deciding how to punish Wei Dashi for both crimes and to support his ultimate judgment that Wei Dashi be punished by exile—he wrote: “according to the Tang Code, when there are two [punishments], the heavier punishment should

142. THE TANG CODE, VOLUME II: SPECIFIC ARTICLES, *supra* note 7, at 525-26.

143. Xie Mei, *supra* note 134, at 90.

144. THE TANG CODE, VOLUME II: SPECIFIC ARTICLES, *supra* note 7, at 420.

be sentenced.”¹⁴⁵ This was the correct reference to, and application of, Article 45 (“The Heavier of Two Punishments is Sentenced”) in the Tang Code—which provides that “in all cases where two or more offenses are discovered together, the heavier punishment is sentenced.”¹⁴⁶ As discussed earlier in the article, under Tang criminal procedure law, exile was the heavier punishment, and hence it appears that the magistrate’s judgment was correct and adhered to Tang law. It is important to also remember, however, that district magistrates under the Tang Code only had the authority to administer punishments of beating with the light or heavy stick. Punishment by exile had to be reported up to and approved ultimately by the central government. Indeed, the magistrate concluded his judgment by remarking that he was reporting his recommended sentence for Wei Dashi up to the authorities in Yi prefecture for their review.¹⁴⁷ Presumably, this would have worked its way up the chain ultimately to the central government in the capital. At the very least, it appears that the magistrate was going through the proper approval channels,¹⁴⁸ which was a very different approach than the approach taken by Liu Gongchuo.

Thus, as compared to the previous cases examined by this Article, the legal judgment on Wei Dashi seems to adhere more closely to the requirements of the Tang Code—the Tang Code was cited (which seems to satisfy Article 484), and the proper procedure was followed for approval of the sentence of exile. However, there were some inconsistencies in this judgment. First, it is important to note that the magistrate did not actually explicitly cite to Article 484 by number—he referred only to the “Tang Code.” Second, he did not cite the actual articles for the crimes of drifting aimlessly and counterfeiting seals (as reproduced above). Third, the actual legal reasoning—that is, the application of law to facts—is not made very clear. For example, based on the recitation of facts given by the magistrate, one cannot be sure which provision on counterfeiting of seals is relevant. One can only infer that Wei Dashi violated Article 363.1(a) (and not the crimes of counterfeiting seals which carried the lesser penalty of penal servitude) based on the magistrate’s final judgment. In other words, the facts seem quite sparse.

The next case also contains an actual citation to the Tang Code—specifically, the catch-all clause, Article 450 (“Doing What Ought Not To Be Done”).¹⁴⁹ It too is from the collection of verdicts from Anxi protectorate dating to approximately 665 AD.¹⁵⁰ The case involved a former official by the name of Guo Wei (郭微), who originally served as a government attendant. He was later sent to Erting (二庭) (located in Anxi protectorate) to serve as an official overseeing Tang military agro-colo-

145. ZHONGGUO ZHENXI FALÜ DIANJI JICHENG, *supra* note 137, at 270.

146. THE T’ANG CODE, VOLUME I: GENERAL PRINCIPLES, *supra* note 7, at 235.

147. ZHONGGUO ZHENXI FALÜ DIANJI JICHENG, *supra* note 137, at 270.

148. Xie Mei, *supra* note 134, at 90.

149. THE T’ANG CODE, VOLUME II: SPECIFIC ARTICLES, *supra* note 7, at 510.

150. The full-text of this case can be found in ZHONGGUO ZHENXI FALÜ DIANJI JICHENG 中国珍稀法律典籍集成. See *supra* note 137, at 273-74.

nies.¹⁵¹ During his tenure, Guo Wei did not heed the difficulties experienced by soldiers working on the military agro-colonies and was a selfish, ineffective manager.¹⁵² He also did rather strange things, such as beating and whipping the cows in the military agro-colonies.¹⁵³ The official judging the case believed that Guo Wei should be punished, but could not find an application provision on point in the Tang Code.¹⁵⁴ As discussed earlier in the article, in these circumstances, he could have reasoned by analogy with reliance on Article 50. The other option would be to rely on the catch-all provision of Article 450 (“Doing What Ought Not To Be Done”), which provides:

Article 450.1: All cases of doing what ought not to be done are punished by forty blows with the light stick.

Commentary: This refers to where neither the [Tang Code] nor the [Tang Statutes] have an article dealing with the behavior, but which it is reasonable should not be done.

Article 450.1: If it is reasonable that the crime should be punished more heavily, the punishment is eighty blows with the heavy stick. . . .¹⁵⁵

Recall that the discretionary power afforded by Article 450 was limited by the type of punishments that could be handed out; punishments were limited to, at maximum, eighty blows with the heavy stick. In the Guo Wei case, the official wrote that “according to the *Miscellaneous Articles* of the Tang Code, those who do what ought not to be done are punished by forty blows”¹⁵⁶ Unfortunately, the judgment ends (the remainder is no longer extant), but we can see that this official cited to a specific provision of the Tang Code in his judgment (although he did not name the specific article by number, he cited to Article 450 by referring to the “*Miscellaneous Articles*,” which is the category of articles in which Article 450 falls under), which is similar to the approach taken in the Wei Dashi case.

Looking at these two selected Dunhuang judgments together, we can see that they adhered to the Tang Code more faithfully than the

151. *Id.* at 273. My reading of this case has been informed by both Gu, *supra* note 138 at 47-48, as well as Xie Mei, *supra* note 134, at 92. “Military agro-colonies” refers to the *tuntian* 屯田, which can be literally translated as “scion fields.” They were set up by the Tang government in border regions, and most of them employed soldiers who worked the land to supply garrisons with grain and other foods. Any surplus crops went to the government authorities. Ulrich Theobald, *Chinese History—Tuntian* 屯田 “military agro-colonies”, CHINA KNOWLEDGE—A UNIVERSAL GUIDE FOR CHINA STUDIES, <http://www.chinaknowledge.de/History/Terms/tuntian.html> (last updated Aug. 12, 2013). I use Theobald’s translation of *tuntian* as “military agro-colonies” in this Article.

152. ZHONGGUO ZHENXI FALÜ DIANJI JICHENG, *supra* note 137, at 274.

153. *Id.*; Xie Mei, *supra* note 134, at 92.

154. ZHONGGUO ZHENXI FALÜ DIANJI JICHENG, *supra* note 137, at 274.

155. THE TANG CODE, VOLUME II: SPECIFIC ARTICLES, *supra* note 7, at 510.

156. ZHONGGUO ZHENXI FALÜ DIANJI JICHENG, *supra* note 137, at 274.

previous cases discussed in this article. Namely, both judgments cited to provisions of the Tang Code, and the magistrate in the Wei Dashi case appeared to have followed correct Tang criminal procedure in reporting his required punishment up the authority chain given his lack of authority to impose the punishment of exile. Taking into account the other cases we have examined (e.g., the cases involving Buddhist priests, military personnel, and revenge killings) into account with these two Dunhuang cases, we can clearly see that the administration and implementation of Tang criminal law as provided via the Tang Code was not consistent.

CONCLUSION

As we have seen through the examined cases, the Tang Code was applied inconsistently in criminal law cases. In some cases (such as the Dunhuang cases), specific articles were cited in support of the official's judgment, but in others, there was no citation, or even discussion, of legal provisions. Some cases appeared to follow the correct criminal law procedure as set forth in the Tang Code, notably the limits on what punishments certain administrative levels of Tang government could levy, while others appeared to ignore proper criminal procedure law requirements. Although not the primary focus of this article, it is now worth stepping back and asking what historical reasons, especially temporal and geographic factors, may account for the different approaches taken by officials in some of the cases we have examined, even if we can only make educated speculations.

First, out of all the examined cases, why do the Dunhuang cases (i.e., the cases from Anxi protectorate) appear to be most faithful to the Tang Code? The two Dunhuang cases date back to approximately 665 AD, the mid-seventh century, which was a period of great power and expansion of the Tang empire; from 626 to 683, the Tang militarily expanded its borders, defeating several non-Chinese peoples especially in the expansion westward.¹⁵⁷ This was a period, in other words, when the central government in the capital of Chang'an was at its height and when "[Tang] prestige in Asia reached its zenith."¹⁵⁸ The Tang Code was promulgated by the central government for application throughout the Tang empire, and given the central government's strength during this period, it may have been in a better position to actually enforce and ensure that local officials, such as the Anxi protectorate officials, were accurately and consistently implementing the provisions of the Tang Code. This may explain why the Dunhuang cases adhered more closely to what the Tang Code required. Another possibility is that the central government focused much of its attention particularly on what was happening in Anxi protectorate, and thus was in a position to more closely monitor officials working there. Anxi protectorate was, as mentioned earlier in the Article,

157. JACQUES GERNET, *A HISTORY OF CHINESE CIVILIZATION* 238 (J.R. Foster & Charles Hartman trans., Cambridge U. Press, 2d ed. 1996).

158. *Id.*

an important area for trade and commerce, given the Silk Road. The central government also kept a close eye on the area due to continued fears of invasion from non-Chinese peoples.¹⁵⁹

Why do the non-Dunhuang cases show a lack of application of the Tang Code? Han Huang's execution of the Buddhist priests who gambled and argued may be possibly explained by his lack of favor toward Buddhism generally, as speculated earlier in the article. As for Liu Gongchuo's summary execution of the army officer on horseback and Xu Mengrong's refusal to release the debtor-soldier, both of these cases likely occurred in the late-eighth century and early ninth-century, and both involved judgments against what was perceived as arrogant soldiers of the Army of Inspired Strategy. It is important to note that during the time of Liu Gongchuo's and Xu Mengrong's judgments, the Tang central government was no longer as powerful as it was during the mid-seventh century. The An Lushan (安祿山) rebellion from 755-763 AD devastated the Tang empire; the Tang central government lost control over much of its territory¹⁶⁰ and had to contend with invasions from groups such as the Tibetans, who advanced as far as the capital of Chang'an in the 760s.¹⁶¹ Despite a restoration of Tang power between about 780-850 AD,¹⁶² the central government never reached the levels of its power and control as it had experienced in the seventh century. For example, regional governors frequently asserted themselves against the imperial court with eunuchs gaining considerable power as well within Chang'an,¹⁶³ and military governors exercised considerable power—all forces threatening the central government.¹⁶⁴ Given this continuing decline of the imperial court, officials such as Liu Gongchuo and Xu Mengrong may have been particularly sensitive and mindful of protecting the power of the imperial court—after all, the cases occurred right in or near the capital, Chang'an. Officials such as Liu Gongchuo and Xu Mengrong may have desired to limit the power of the soldiers to avoid possible military rebellion again (such as the An Lushan rebellion) or recalcitrance (hence, Li Gongchuo's concern with the officer on horseback's disrespect toward his “majesty's laws and commands” and Xu Mengrong's stubbornness in letting the soldier-debtor go). There may have also been concerns with the growing arrogance of the Army of Inspired Strategy, as explained by the case accounts, and

159. Ulrich Theobald, *Chinese History—The Western Territories*, *supra* note 135. For example, as Theobald notes, the Western Turks rebelled in 650, and their khan did not surrender until 662. Anxi protectorate also continued to be threatened by Tibetan troops as well.

160. Ulrich Theobald, *Chinese History—Political History of the Tang Dynasty* 唐 (618-907), CHINA KNOWLEDGE—A UNIVERSAL GUIDE FOR CHINA STUDIES, <http://www.chinaknowledge.de/History/Tang/tang-event.html#anlushan> (last updated May 17, 2013).

161. GERNET, *supra* note 157, at 260-61.

162. *Id.* at 266.

163. ROSSABI, *supra* note 64, at 160.

164. Theobald, *Chinese History—Political History of the Tang Dynasty* 唐 (618-907), *supra* note 160.

with the growing control of the Army of Inspired Strategy by the court eunuchs,¹⁶⁵ which would have been a threat to the emperor's power. One other possibility is that individuals like Liu Gongchuo and Xu Mengrong were more wedded to the general Confucian philosophical predilection for moral education rather than law as a regulatory tool;¹⁶⁶ as such, they may have had a mistrust or dislike of legal codes such as the Tang Code.

To conclude, although the cases examined in the Article show us that the application and implementation of the Tang Code was not fully consistent, we should not necessarily pass a negative normative judgment on these practices. Furthermore, it may be too extreme to suggest, as some legal historians have, that the Tang Code was a mere model, especially as we have evidence of legal judgments that seem to have been quite faithful toward the provisions of the Tang Code. It would also be unfair and anachronistic to use modern, twenty-first century standards for evaluating the rule of law in the Tang dynasty. Instead, it is more helpful to understand these inconsistencies as highlighting the diversity of governance approaches in the Tang empire in different periods of time and different places. They also are a testament to the complexity of traditional Chinese law and a further affirmation that it is not possible to fully understand Chinese legal history without looking at the application of law in traditional Chinese society.

165. YANG, *supra* note 118, at 41.

166. MACCORMACK, *supra* note 4, at 11.