

Chinese Law in a Multinational Society: The Case of the Liao (907-1125)

The extant sources for the study of the legal system of the Liao dynasty are limited in coverage and value. No collections of actual cases comparable to corresponding Sung and Yüan texts, above all *Yüan tien chang* 元典章 and *T'ung chih t'iao ko* 通制條格, have survived or even existed, nor do we know the exact wording of a Liao ordinance, let alone the texts of the various collections compiled in the eleventh century. The "Treatise on Punishments" 刑法志 of the *Liao History* 遼史 is the most complete source at our disposal, but it must be regarded as a rather poor compilation. The authors of the *Liao History* have mostly been content with arranging in chronological order entries bearing on law culled from other sections of the *Liao History*, chiefly the "Basic Annals" 本紀 and the "Biographies" 列傳. It would be hard to find data in the "Treatise on Punishments" that are not taken from other parts of the history. Another shortcoming of the "Treatise on Punishments" is the inordinate emphasis on court intrigues, plots, and rebellions originating with the imperial clan and the clan of the empresses. It is true that the defeat of seditious attempts was a matter for punishment, but we must doubt that the sentences recorded can be regarded as representative of judicial practice in general. They are political justice, tainted with the desire for revenge and sometimes characterized by excessive cruelty. Moreover, the treatise was conceived by its (anonymous) authors, or rather compilers, along moralistic lines. Legal institutions, legislative actions and judicial practice are seen chiefly as the result of the emperors' personalities; there were, according to the text, bad and less bad emperors.

Nevertheless the "Treatise on Punishments" cannot be ignored because it is the only surviving coherent account of law under the Liao, and together with the other data to be found in the *Liao History* it remains, however much we may regret it, an indispensable source. Apart from the *Liao History* itself, contemporary sources on Liao law are scanty. There are some isolated statements in the collected works of Sung authors, some of them going back to reports submitted by Sung envoys to the Liao court, but this is about all. These statements do certainly confirm or supplement the information contained in the *Liao History*. Some of them will be quoted in this paper.

Modern studies of Liao law have chiefly been made by Japanese scholars, except for some passing references to law in the study of Liao society in the standard work by Karl A. Wittfogel and Feng Chia-sheng. The basic Japanese work was written by Takigawa Masajirō 瀧川政沅 and Shimada Masao 島田正郎. The co-author Shimada Masao later published a comprehensive study of Liao institutions. The relevant chapters on law in that book are, however, practically identical with the earlier book. The great legal historian Niida Noboru 仁井田陞 also dealt with some aspects of the legal system of Liao. As far as I can make out no important data from the Chinese sources have been overlooked by Takigawa and Shimada. This paper therefore is greatly indebted to these two scholars, whose contributions must be regarded as indispensable.¹

The Liao state was multinational. The leading group were, of course, the Khitans, whereas the majority of the population—we do not have figures for the population broken up according to nationality—must have been Chinese. Other ethnic groups were the Hsi 奚 and the Po-hai 渤海. The latter were the inhabitants of southeastern Manchuria in the territory belonging to the former state of Po-hai, which had emerged late in T'ang times. The Po-hai were to a certain extent culturally sinicized. In addition to the ethnic groups mentioned above, there existed a multitude of different tribes in the outlying regions of the Liao empire. Among these the Jurchen were the most important; they eventually succeeded the Khitans as the leading political power in northeastern Asia. It is safe to assume that each of the ethnic groups in the Liao empire must have had in the formative period of the state its own legal tradition. The Chinese and Po-hai had been living under T'ang codified law, whereas all other peoples and tribes including the Khitan had native legal customs transmitted orally. It is to be regretted that apart from some scattered references to Khitan traditions we know next to nothing about these tribal customs. And even if we can distinguish quite a number of legal elements of a Khitan origin we should keep in mind that the *Liao History* materials are based on sources written by Chinese or sinicized Khitans and therefore use Chinese legal terminology. In addition, much of the data refer to the judicial system and jurisdiction over the Chinese.

¹ See Karl A. Wittfogel and Feng Chia-sheng, *History of Chinese Society: Liao (907-1125)* (Philadelphia: The American Philosophical Society, 1946; hereafter cited as *W/F*); Takigawa Masajirō and Shimada Masao, *Ryōritsu no kenkyū 遼律の研究* (Tokyo: Osaka yagō shoten, 1943); and Niida Noboru, *Chūgoku hōseishi kenkyū heihō 中國法制史研究刑法* (Tokyo: Tokyo Daigaku shuppankai, 1959). The "Treatise on Punishments" of the *Liao History* has been translated in Herbert Franke, "The 'Treatise on Punishments' in the Liao History: An Annotated Translation," *CAJ* 27 (1983), pp. 9-38.

Things might have been quite different among the pastoral nomads in the northern parts of the state.

It is generally acknowledged that the institutions of the Liao state were characterized by duality. Different agencies existed for dealing with the Khitans or the tribes, and for handling the Chinese population. This duality is reflected in the northern and southern administrations. Both, however, were responsible in the last instance to the emperor, so that a certain unity of government could be maintained. On the other hand, the coexistence of several legal systems was a factor for potential disunity, and many legislative actions of the Liao must be seen as an attempt to establish uniform conditions throughout the state, irrespective of nationality. Earlier studies of Liao law agree in seeing the Liao period of Chinese legal history as dominated by the antagonism between the principle of ethnicity (person-oriented law) and territoriality (uniform laws for the entire state). This has a striking parallel in early medieval Europe where the principle of territoriality gradually supplanted the principle of ethnicity. It is a development that marks the transition from the conception of the state as a federation to the modern territorial state. With this parallel in mind we can view the Liao state as being halfway between these two opposing principles. The same is also true for other states in East Asia founded by non-Chinese: the Mongolian concept of *ulus* designates less a state with geographic boundaries than a federation of tribal elements under a common ruler. We might even go a step further and say that the unifying and transcending role that Roman law played in the Middle Ages is paralleled to a certain degree by the role of Chinese law in the emerging "barbarian" states on Chinese soil and beyond.

This does not mean, however, that the principle of ethnicity was completely alien to Chinese legal thinking. The *locus classicus* in Chinese codified law is article 48 of *The T'ang Code*:

All cases involving foreigners of the same nationality who have committed crimes against each other will be sentenced following their own customary law. Cases involving those of different nationalities who have committed crimes against each other will be sentenced following Chinese law.²

The duality of the legal system in the Liao state is therefore in conformity with Chinese T'ang law. But what was certainly an exception under the

² *T'ang lü shu* 唐律疏議 (Wan-yu wen-k'u edn., n.p.: Commercial Press, 1939) 6, p. 40. The translation follows Wallace Johnson, *The T'ang Code*, Volume I, General Principles (Princeton: Princeton U.P., 1979), p. 252.

T'ang—cases involving foreigners (literally, “people outside civilization, *hwa-wai jen* 化外人)—tended to become something of a problem when the number of foreigners in a state like that of the Liao was not only very much larger but where foreigners in fact constituted the ruling group. According to T'ang law a lawsuit involving, for example, a Khitan and a Hsi tribesman would be judged according to Chinese law. This would have meant an intrusion of legal concepts entirely foreign to the tribal people. It seems indeed that ethnicity prevailed largely in the Liao state. Yü Ching 余靖, who had some first-hand experience, having been an envoy to Liao, wrote to this effect after having listed the four nationalities:³

In their dress, drink and food, and their language they each follow their own customs. If members of these four nationalities⁴ commit crimes against each other, Chinese law is applied. But if those from the same kind commit crimes against each other, the law of their original nation 姓 is applied. Therefore separate Khitan offices have been established to handle their criminal cases.⁵

In other words, what Yü Ching describes is nothing but what the T'ang code had sanctioned.

The observations of Yü Ching, who lived from 1000 to 1064 and who had been sent as an envoy to the Liao three times,⁶ refer to the middle of the eleventh century. According to him, a crime committed by a Khitan against a Chinese or vice versa would have to be punished according to Chinese law. We know, however, that this was not always the case and that there existed a discrimination against the Chinese resulting from the fact that in such cases of interethnic crimes the Khitan offender was treated according to Khitan law. In the tenth century this seems to have been generally the case. This can be seen from the account of the Khitans in the compilation titled *Tung tu shih lüeh* 東都事略, where the personality of Yen-yen 燕燕, the later Khitan empress Ch'eng-t'ien 承天, is described. She lived from 953 to 1009 and was the emperor's consort. Her son was the Sheng-tsung 聖宗 emperor, for whom she acted as regent while he was still a minor.

³ See n. 4.

⁴ Yü Ching uses the Chinese word *hsing* (“family”) but the enumeration of Khitan, Chinese, Po-hai, and Hsi makes it clear that the nationalities are meant here.

⁵ Yü Ching, *Ch'i-tan kuan i* 契丹官儀, as cited in Li E 厲鶚, *Liao-shih shih-i* 遼史拾遺 (TSCC edn.; Shanghai: Shang-wu yin-shu kuan, 1936) 15, p. 315.

⁶ These visits occurred in 1043 and 1045; see Fu Lo-huan 傅樂煥, “Sung-Liao p'ing-shih piao k'ao” 宋遼聘使表考, rpt. in *Liao shih hui pien* 遼史彙編 (Taipei: Ting-wen shu-chü, 1973), vol. 8, pp. 559-60.

In the following year (1009) Yen-yen handed the government over to Lung-hsü 隆緒 [Sheng-tsung] but she died hardly one month afterwards. Yen-yen came from the Hsiao 蕭 clan and was the daughter of prime minister [Hsiao] Ssu-wen 思溫. She was clever in planning and a good administrator. The high officials in her entourage often felt the force of her command. In the beginning, if a barbarian had killed a Chinese during a brawl he had to pay a compensation of oxen and horses, but if a Chinese had done this, he was executed and in addition his family members were enslaved. Yen-yen, however, uniformly used Chinese law for her judgments.⁷

We learn from this passage that in Khitan law the payment of a fine to the family of the dead man (“Wergeld” in Germanic law) could atone for a killing if it had not been premeditated. T'ang law, on the other hand, punished the killing of somebody in an affray with strangulation—it was a capital offense. If the killing done in an affray had been effected with a sharp weapon and intent to kill, it was punished by decapitation, that is, one degree more severely, and in accordance with the article on manslaughter.⁸

Before empress Ch'eng-t'ien, therefore, the law was carried out according to a strict ethnic principle: a Khitan was punished according to his customary law, and a Chinese according to T'ang law. To use Chinese law uniformly as reported in the above passage had the result that the killer was executed regardless of his nationality. It is clear that Yü Ching's description must refer to this later period when the ethnic principle had partly been given up, at least for cases involving persons from two different nations.

The conflict between Khitan and Chinese law in cases of mutual killing is also mentioned by Ou-yang Hsiu 歐陽修 (1007-72), who had been an envoy to Liao in 1055, that is, a few years later than Yü Ching. In a report where he tries to show the domestic instability of the Liao state, he mentions the dissatisfaction of the Chinese.

If in former times a barbarian killed a Chinese, he had to pay a fine. If a Chinese killed a barbarian, he was sentenced to death. Recently we have heard that this dual law has been repealed in order to please the Chinese. But the Chinese were not able to change their feelings, and the Khitans too became angry.⁹

⁷ *Tung tu shih lüeh* 東都事略 (Taipei: Wen-hai ch'u-pan she, 1967) 123, p. 1899. For a parallel passage see *Hsi tu chih t'ung chien ch'ang pien* 續資治通鑑長編 (Taipei: Shih-chieh shu-chü, 1961) 72, pp. 21a-b.

⁸ *T'ang li shu i* 21, p. 84.

⁹ Ou-yang Hsiu, *Ou-yang Wen chung kung wen chi* 歐陽文忠公文集 (SPTK edn.) 118, pp.

This passage does not say whether the old or new rulings only concerned cases of killing during an affray or manslaughter in general. It may be assumed that only killings during an affray are meant because it seems highly improbable that Khitan customary law was content with paying a "Wergeld" fine in cases of premeditated killing.¹⁰

All this reflects legal conditions at the end of the tenth and beginning of the eleventh century. In the beginning, when Liao T'ai-tsu 太祖 came to power and expanded his dominion, no fixed rules for handling lawsuits between members of different nationalities seem to have existed. This is evident from a passage in the biography of K'ang Mo-chi 康默記. K'ang (d. 926) had been a local commander in Chi 薊 prefecture (modern Hopei, east of Peking) and was taken prisoner by T'ai-tsu when the town fell to the Khitans in 903. T'ai-tsu was impressed by K'ang's personality and attached him to his entourage.

All cases between barbarians and Chinese were handed over to Mo-chi for decision and in every case he was in harmony with the emperor's intentions. At that time all the tribes had been recently included, and no written laws (*wen-fa* 文法) had been established as yet. Mo-chi analyzed the spirit of the code (*lü* 律) and when judging the offense (literally, the seriousness or lightness) he did not deviate in the least [from the intention of the code]. All those who had been caught in the net of the prohibitions thought that he had not committed injustice.¹¹

This must refer to the time between 903 and 918 when K'ang Mo-chi was appointed to supervise the construction of the capital. His impartial handling of cases eventually won him appointment as *i-li-pi* 夷離畢 (judge) in 920. We have here a good example of what Max Weber termed Khadi justice, that is, casual adjudication with a minimum of written rules or none at all.

This was, of course, not compatible with Chinese ideas of proper judicial process. It might have been due to the influence of K'ang Mo-chi (and perhaps other Chinese advisers of T'ai-tsu) that "it was decreed to fix the laws" (*fa-lü* 法律) in 921. From then on several attempts were made on the part of the government to collect the regulations and statutes.

16a-b. For a parallel passage, see *Hsiü tzu chih t'ung chien ch'ang pien* 156, p. 4b.

¹⁰ For a case among the Jurchens where a killing in a drunken brawl was settled by paying a fine, see Herbert Franke, "Jurchen Customary Law and the Chinese Law of the Chin Dynasty," in Dieter Eikemeier and Herbert Franke, eds., *State and Law in East Asia: Festschrift Karl Büniger* (Wiesbaden: Otto Harrassowitz, 1981), pp. 219-20.

¹¹ See *Liao Shih* (Peking: Chung-hua shu-chü, 1974; hereafter cited as *LS*) 74, p. 1230, and 61, p. 936, for the account given in the *hsing-fa chih* sect.

The earliest comprehensive collection of legal prescriptions seems to have been that of 1036, containing 547 articles. The next compilation was that of 1070 which, however, turned out to be impractical so that in 1089 it had to be repealed. After that date, the revised statutes of 1036 remained in force until the end of the dynasty. The basic antagonism between Khitan and Chinese laws and the application of law in cases involving persons of different nationality were certainly not solved by any of the codifications. It proved impossible to satisfy both nations within the state. We have referred above to complaints raised by the Chinese and reported by Sung envoys. But the Khitans also complained sometimes, as we can see from a passage in the biography of Yeh-lü Chung-yüan 耶律重元. Chung-yüan (d. 1063) had declined to take the throne after the death of Sheng-tsung in 1031 and therefore became a favorite of Hsing-tsung 興宗, whom he had informed of the plot. He held high offices including those of chancellor of the Northern Division and vice-regent of the Southern Capital (Peking).

Before that time if a Khitan had violated a law the rule was to follow the prohibitions and prosecutions for the Chinese, and many people suffered wrongs. Chung-yüan therefore requested in a memorial to establish a Khitan police commissioner (*ching-hsün shih* 警巡使) in each of the five capitals. A decree ordered this decision to be followed.

Indeed such offices were established in 1044. It seems that the "separate Khitan offices" mentioned in Yü Ching's account may have been these police commissions. The introduction of Khitan police commissioners must be seen as an attempt to soothe the feelings of many Khitans. We do not know if these police officials had to use Khitan law or Chinese law. What is certain is that the establishment of such offices was a concession to Khitan national resentment.

At this point we might ask to what extent written law was used in normal procedure. Was there a copy of the collected statutes on the desk of each magistrate? Probably yes. There would not be much point in putting down rules in writing unless one wanted to reach the maximum number of recipients for the sake of uniformity. The problem is not as trivial as it sounds. Codification requires literacy on the part of such users as judges and court officials. In a multilingual society like that of the Liao, where several scripts were in use (Chinese, Khitan, perhaps Uighur),¹² it would perhaps not have sufficed to have a text in Chinese. Indeed we find recorded for the year 983

¹² See *W/F*, pp. 240-53, on the various scripts under the Liao.

that the text of laws (*lü-wen* 律文) submitted by the Southern Capital (Peking) should be translated. The translation was to be organized by the minister of masses (*ssu-t'u* 司徒) of the Northern Administration. This must refer to a translation from Chinese into Khitan for the benefit of the officials of the Northern (Khitan or tribal) Administration among whom the knowledge of Chinese at that time might still have been rare.

We have so far considered the application of law under the Liao. We must also characterize the typical elements of Khitan law as reflected in the statutes of the dynasty. We have already mentioned the payment of fines as a means to settle a dispute involving the killing of a person. But there are many other features of Liao law that were originally alien to Chinese codified law. Among these we find such instruments of punishment or torture as the sandbag, the "iron gourd," the wooden sword, and the cudgel. None of these instruments has a counterpart in the T'ang code, where only the big and small stick are recognized as legitimate instruments to inflict pain (and frequently also death) on the unfortunate delinquent. Also the "devil arrows" or "demon arrows" 鬼箭, which were sometimes used to kill an offender, belong to Khitan tradition. They were whistling arrows of the kind used by the nomadic peoples of Central Asia. The idea behind all this might have been to drive away evil and demonic spirits. It is certainly not by chance that a shamaness accused of sorcery was killed by "demon arrows."¹³

Other means by which offenders were killed, such as trampling by horses, hurling from catapults, and hacking to pieces, were perhaps not at all features of the regular application of law but products of spontaneous orders given in times of a crisis. This is at least probable for the infliction of these nonstatutory punishments recorded for the last years of T'ien-tso's 天祚 reign, that is, at a time when the dynasty was about to collapse anyway and during a state of war. To bury people alive also belongs to this category of punishments. One reason for interment may have been religious. Particularly in cases where members of the imperial clan were concerned there may have existed an aversion to harming the body physically and shedding blood. The same explanation can be proposed for execution by hurling somebody from a cliff. This happened in the early times of the Liao when no fixed rules existed as yet. The text describing a jump from a cliff in 913 concerns a high dignitary. It states expressly that this was done to avoid a public execution.¹⁴

There are, however, features of Liao law that must be due to Khitan

influence and are modifications of Chinese law. Enslavement of persons was a secondary punishment in T'ang and Sung law but in Liao law it is also to be found as a punishment by itself. Hard labor—in contrast to exile—was always limited in length according to T'ang and Sung law. Under the Liao, labor service could be punishment for life, as in the states of Chin 金 and Hsi Hsia 西夏. Another punishment that was either main or secondary was tattooing. Tattooing a criminal to disgrace him as a warning for others was not uncommon in China. In Han-era law tattooing was in all probability a secondary punishment in addition to hard labor until it was abolished in 167 BC. In Liao law, however, we find tattooing as a sole punishment. In T'ang law tattooing does not seem to have been used at all.

Tattooing a criminal was a punishment for thieves under the Liao. A text written by Wu Tseng 吳曾 in about the 1140s quotes a treatise by Ssu-ma Kuang 司馬光 (1019-86) on the laws of the Khitan ("Ch'i-tan chih fa" 契丹之法):

If somebody of the people steals for the first time he is tattooed on his wrist with the character *tsai* 賊 ("thief"). After the second offense his [lower] arm is marked, after the third, his elbow and after the fourth, his back. After a fifth offense his head is cut off. Thus it is not necessary to enter them into the registers and yet the crimes cannot be concealed.¹⁵

On the other hand we are informed in the "Treatise on Punishments" of the *Liao History* and elsewhere that thieves were punished according to the value of the stolen goods. The death penalty was incurred for thefts of goods worth ten strings of cash or more (prior to 1019). After 1019 the theft of goods worth twenty-five strings or more was a capital offense, and after 1070, that of goods worth fifty strings or more. The apparent contradiction is easily resolved if we accept the explanation given by Takigawa and Shimada: Khitan customary law punished theft according to the number of offenses, and Chinese law according to the value of the stolen goods. Indeed, the *T'ang Code* has a provision to this effect. If things other than money were the objects of robbery by stealth the punishment was fifty strokes with the light stick if the goods had no appreciable value. Theft of one foot of textiles was punished with sixty strokes of the heavy stick, for one bolt this was raised by one degree. Theft of five bolts brought one year of hard labor, and

¹⁵ Wu Tseng 吳曾, *Neng kai ch'ai man lu* 能改齋漫錄, Pi-chi hsiao shuo ta-kuan edn. (Shanghai: Chin-pu shu-chü, n.d.) 13, p. 6b. See also W/F, p. 500, n. 23. I was unable to find the original source in the works of Ssu-ma Kuang.

¹³ On this case see LS 7, p. 74; and 61, p. 938.

¹⁴ LS 1, p. 8. On the rebellion, see W/F, pp. 411-13.

for each bolt more was raised by one degree. Fifty bolts resulted in a sentence of exile with hard labor.¹⁶

A curious custom of the Khitans and also of the Jurchens was permission to steal freely for three days on the thirteenth day of the first month of the lunar year. This custom is described in various texts. But not everything could be stolen with impunity; if the value of the stolen thing exceeded ten strings of cash, the case was treated according to normal law. "Free stealing" was allowed during the first full moon of the year, which would correspond roughly with carnival time in the West, and which was apparently in northern China and among the tribal population in the tenth and twelfth centuries a period of general licentiousness. The point was, at least as far the Jurchen custom went, that the stolen good had to be redeemed with a banquet at the expense of the original owner. In other words, it might have been a custom in which a contest of ingeniousness would determine who had to pay the bill for a feast. We may surmise that similar ideas were also the basis for this custom among the Khitans. Chinese law did not make exceptions for such offenses during a period of general merrymaking.

In many cases the Liao history has recorded the punishments that were meted out for specified crimes. Thanks to the painstaking labor of Takigawa and Shimada all these cases have been arranged according to the section of the *T'ang Code*, and in each case the punishment prescribed by the *T'ang Code* is compared with the sentence passed under the Liao. Invariably the Liao law provided a heavier punishment than did the T'ang law. We shall quote here only two examples, taken from the "Treatise on Punishments" of the *Liao History*. The first concerns a man from the Five Division tribes who accidentally started a fire that spread to the holy ground of the Mu-yeh shan 木葉山, the holy mountain of the Khitans. This was a capital offense, but the emperor pardoned him so that he got off with a beating. The *T'ang Code* had a provision for exactly the same kind of offense. If somebody started a fire within the precincts of the imperial mausoleums, he was punished with one year of hard labor. If the whole forest burned down, the culprit was exiled to a distance of 2,000 *li* (about 700 miles). If the fire had been started outside the holy precincts and the fire spread into the protected area, the punishment was lower by one degree. But the death penalty for this kind of crime was a Liao innovation. Some time earlier in 973 a close attendant of the emperor had by mistake knocked over a holy flag. This also had been a capital offense but the emperor pardoned him and let him get off with a

beating. The *T'ang Code* too had a provision for damaging holy or imperial things, but the punishment was the same as for theft and, if the offense had been committed unintentionally, by two degrees less.¹⁷

The general cruelty of Liao penal law reached, it seems, a peak under the Mu-tsung 穆宗 emperor. The *Liao History* records with depressing frequency his savage treatment of the hunting personnel recruited from the tribes and of his personal servants. Certainly there existed no legal justification for his acts. It would also be wrong to assume that he was sanctioned by Khitan customary law—why should he not have been one of the irresponsible and savage rulers sometimes met in history?¹⁸ He was, as we are told, a drinker and may have committed many of his cruelties when intoxicated. In a rare fit of self-criticism, he said to his officials:

If somebody commits an offense he must be punished according to the law. If we sometimes are furious and should therefore implicate the innocent, you officials must give us a severe admonition instead of obeying our whims.¹⁹

Justice dealt out under strong emotion or under the influence of drink remained a problem at the Khitan court. In 1014 the Sheng-tsung emperor instructed his officials that if he had promoted somebody or pardoned a crime when drunk, this should not take effect immediately but be brought up again the following day. When he was sober again, we might add.

As under Chinese dynasties, procrastination was a permanent evil. Cases were delayed and detained persons rotted in prison while awaiting a trial. Over and over again the "Basic Annals" of the *Liao History* record that officials were sent out to the provinces to review cases and to investigate prisoners. I have counted over sixty such entries between 913 and 1100. In some cases it is recorded that the emperor or acting empress-dowager personally reviewed the judgments.

It is hard to say if the administration of justice under the Liao was worse than under other alien dynasties, which also found it necessary to apply Chinese law, either original or modified. In any case the Liao dynasty had a relatively sophisticated bureaucratic apparatus for dealing with criminal

¹⁷ *T'ang lü shu* i 27, p. 50.

¹⁸ The cruelty of Mu-tsung against his gamekeepers and hunters has a striking parallel in late feudal Europe. Bernabò Visconti in the 14th c. was as bad as Mu-tsung: "If any of his 500 hunting dogs was not in good condition, he would have the keepers hanged and all poachers as well" (Barbara Tuchman, *A Distant Mirror: The Calamitous 14th Century* [Penguin Books, 1979], p. 240).

¹⁹ This was in 958; *LS* 6, p. 74.

¹⁶ *T'ang lü shu* i 19, p. 64.

cases. If the judges were Chinese and could read the legal texts there was at least some chance of avoiding nonstatutory punishments or unauthorized decisions. If the judges were, however, Khitans with little or no knowledge of Chinese, the situation would have been different. There exists an interesting account of how the government and the judicial process functioned in the Liao state. It was written by Su Ch'e 蘇轍 (1039-1112), who had been an envoy to the Liao in 1089 and who has not much good to say about the Liao system. He too, of course, mentions discrimination against the Chinese, but in his view the lower classes were treated worse than the rich and powerful. The text is part of a report submitted after Su's return from the north.

The rule of the northern court is lenient with the Khitans and harsh with the Chinese (literally, the people of Yen). This has been so for a long time. But when I collected information from the dignitaries in the prefectures this side of the mountains, this evil [of discrimination] happened only in criminal cases where small people had brawls and killed or wounded others. As to the rich and powerful families of the Yen people, they did not seem to have been much better off. The Khitans frequently spend the winter months in the region of Yen. Whether they roam about with their herds, or whether they take up a fixed abode, they always stay in places that are barren by nature. Nobody dares to infringe upon them or to tax their lands. At the same time their levies and labor services are very light. It is easier to make the Chinese pay (or, the Chinese are made to pay instead). Each time a government measure calls for urgent mobilization, a "heavenly messenger" with a silver plaque goes to the Chinese households, and county clerks are requisitioned. These [men] go into action with whips and sticks, and frequently the rich families suffer violence. Jade, other valuables, and sons and daughters are taken away, and nobody dares to show compassion. The people of Yen in particular think this a hardship. The laws and ordinances are not clear, and it is regarded as a normal practice to take bribes and to sell decisions. This is obviously the normal custom of the barbarians. As to their court, the provinces and counties, there exist regulations in a crude way in order to maintain a hierarchy (literally, high and low), but they have no power to keep these apart.²⁰

This is not at all a flattering picture. It boils down to this: the rich were made to pay, whereas the poor suffered more than the rich from ethnic discrimination in court, and bribery was an accepted practice in the judiciary.

²⁰ Su Ch'e, *Luan ch'eng chi* 樂城集 (SPTK edn.) 41, pp. 13b-14a.

A certain relief from the harshness of Liao law was brought about by amnesties. As under Chinese rulers, these amnesties could either be local or general. The reasons for proclaiming an amnesty were not much different from those observed under Chinese dynasties. The accession of a new ruler and the adoption of a new reign title were regularly accompanied by an amnesty. Other reasons were the birth of a prince, the recovery of the emperor or a member of the imperial family from illness, or the performance of such rituals as the rebirth ceremony, state rituals, or a visit to a Buddhist temple. Altogether something like 70 amnesties are recorded from 916 to 1106, 34 of which were general amnesties. This figure must be compared with that for the T'ang which issued 174 general amnesties in roughly 300 years. The T'ang therefore had three times more amnesties per time unit. And even if we take into account local amnesties under the Liao the ratio would still be lower than that for T'ang-era general amnesties. Clemency and forgiveness certainly were not characteristics of Liao rule.²¹

It would be easy to explain the severity of Liao laws and their application by the "barbaric" national character of the Khitans. At least this is how it appeared to Sung observers. Li Wei 李維, who had been an envoy to the Liao, stated the following in a memorial of 1064:

The laws of the barbarians are extremely harsh. If a crime is punishable by death they will certainly slaughter and brutally massacre. Their ruler once said, "The Khitans are wild animals. They cannot be ruled with written laws as can the Chinese."²²

We should therefore not be surprised at the harshness of the laws if even the Khitan emperor held this opinion of his subjects. Law was in his view a deterrent against future crimes. Confucian ideas of self-perfection and benevolent government played only a minor role in the Liao state. But we should also not forget that the Khitans were a people of pastoral nomads. Practically everybody had a horse, and when mounted, a criminal can flee much more easily and it is difficult to pursue an offender in the steppes. If, however, he was caught, he was in for it. We could add here a general observation. The more difficult it is to arrest somebody and the more equally accessible technical means of domination are to everyone, giving equal chances to offenders and officers of the law, the crueller is the punishment once the culprit is caught. This can be shown for the European Middle Ages

²¹ Amnesties were not only relatively rarer under the Liao than under the T'ang, they were also sometimes delayed through incompetence. See *LS* 86, p. 1322.

²² *Hsi tzu chih t'ung chien ch'ang pien* 64, pp. 4b-5a.

and it is certainly true for China too. A sedentary population can be more easily controlled than a nomadic one, even if the forces of the law have technically no great advantage over the subjects. The absence of a civilizing ideology alone cannot explain the cruelty of the "barbarians."

In the preceding passage we have tried to show the differences between Khitan and Chinese concepts of penal law. There existed also differences in the marriage systems. Chinese law prescribed exogamy; marriages between those having the same surname 姓 were tabooed by convention and prohibited by law. For the Khitans and all other non-Chinese tribes in the Liao state this was different. These people had no family names, and it would have been difficult to identify tribal names with the Chinese concept of "family" surname. Nevertheless, some Liao officials tried to extend Chinese rules of exogamy to the Khitan population. In 1074 a memorial proposed the compilation of a list of family names "to make the marriages between men and women harmonize with the code of proper behavior."²³ The emperor, however, rejected this attempt to impose Chinese exogamy rules upon the Khitan population. This is to some extent surprising because the imperial Yeh-lü 耶律 clan observed strict exogamy: the Liao emperors always married daughters of the Hsiao clan. The refusal of the emperor in 1074 is therefore probably due to his reluctance to change the marriage customs of his own tribesmen.

Other features of Khitan society too were in sharp contradiction with Chinese concepts of law and propriety. The Khitans practiced the levirate; that is, a man was entitled to marry the wives of his deceased brother. It seems that levirate marriage may even have been compulsory. The Khitans also had the sororate, but this was abolished in 940 when a decree abolished the rule that after the death of an elder sister the younger should succeed her. No parallel edict about the levirate is known so that we have to surmise that levirate marriage remained the practice among the Khitans and other tribes throughout the dynasty.

Marriage by elopement ("wife-stealing") was another custom of the Khitans that must have been repulsive to the Chinese. In China, tradition demanded that a marriage be concluded between two families through a marriage-broker, whereas both the Khitans and the Jurchens had marriage by elopement. This does not mean, however, that brides were actually abducted against their will. The description of these customs by Sung observers makes it clear that individuals had the freedom to choose a mate.

The whole procedure was more or less a generally recognized and ritualized custom with many playful elements.²⁴ For the Khitans and the Jurchens "wife-stealing" was an accepted way to contract a marriage. It cannot be regarded as an anachronistic barbarism.

Although we have no clear indication in the sources, we must conclude that in the field of marriage law and regulations a permanent antagonism between Chinese and Khitan concepts existed. It is also certain that the Khitan court and nobility tried to keep their native customs alive. One means of achieving this was the prohibition of intermarriage. The empresses had to come from the Hsiao clan, and Chinese or Po-hai girls could only join the harem as concubines. But as a rule a Khitan might not marry a Chinese. It was decreed in 941 that Khitans who held Chinese offices should follow Chinese customs and were allowed to intermarry with the Chinese. From this we must infer that Khitans in the Northern Administration were forbidden to marry Chinese, and that there existed a general interdiction on mixed marriages. On the other hand, the Khitan aristocracy was supposed to marry only socially equal partners. In 1019 it was decreed that members of the so-called Horizontal Tents and the Three Households, that is, from noble lineages close to the emperor, could not intermarry with lesser tents and lineages. This kind of prohibition has, to my knowledge, no counterpart in the Chinese law codes. The prohibition of intermarriage with barbarian tribes at the border issued in 1094 had, unlike the two other interdictions, no racial, national or class background, but must be seen as a political move in a time of growing unrest at the northern borders of the state.²⁵

In concluding we might ask whether the Liao period was nothing but a fleeting episode without a lasting imprint on Chinese legal history, or if perhaps some elements of Liao law survived into the Chin and Yüan periods. As far as the Jurchens are concerned we do indeed find a great continuity for their predynastic period. Many features of Jurchen customary law were parallel to those of the Khitans, such as the paying of *Wergeld* in cases of killing, the punishment of the sand-bag, free stealing, and the marking of criminals. Also in family law the Jurchens originally had the same customs as the Khitans, including levirate marriage and marriage by elopement. After the establishment of the Chin dynasty and the conquest of northern China some of the Liao laws were taken over in the newly conquered territories along with Sung law. Our sources mention repeatedly that in compiling a law code, Liao regulations were adopted also. The punishment of thieves as

²³ LS 89, p. 1350. See also *W/F*, pp. 203 and 264.

²⁴ For the sources, see *W/F*, p. 277, n. 197.

²⁵ LS 25, p. 303; *W/F*, p. 266.

reported in the *Chin History* (*Chin shih* 金史) reminds us strongly of the Liao laws against theft in the case of Chinese offenders. These punishments were more severe than the corresponding T'ang-code articles. Other features of Liao law were considered sometimes as being too severe by comparison. This can be seen from a memorial submitted by Liang Su 梁肅 (d. 1188) to the emperor Shih-tsung 世宗 of the Chin dynasty. Liang first points out that under some rulers the punishments were more severe than under others and quotes as an historical example the abolition of mutilating punishments under the emperor Wen 文 of Han. The memorial then continues:

Now we have adopted the laws of the last period of Liao. Whoever is sentenced to one year of hard labor gets one hundred blows with the heavy stick. This means that he receives two punishments for one crime. This was a hard punishment even for those times. But now we have had peace for a long time and we should use moderate laws. I am grieved indeed that the officials still use those severe laws. If from now on somebody has committed a crime punishable by hard labor, we should leave it at that and not in addition sentence him to a beating.²⁶

This suggestion was, however, not accepted by the emperor so that the Liao practice of dual punishment was continued.

The continuing influence of Liao law under the Mongolian Yüan dynasty is more difficult to assess. The Mongols had taken over the T'ai-ho 泰和 code of 1201 from the Chin, and if there were Liao elements in Yüan law at all, they must have been transmitted by the Chin code, which remained in force until January, 1272. As far as Mongolian customary law is concerned one would expect similarities with Khitan legal customs because of the numerous Khitan elements in early Mongolian civilization. But thus far no systematic study of Khitan traditions in Mongolian civilization has been made, and we must be content for the moment to point out this future line of research. It is well known that in Yüan China no law code was compiled. Many laws and ordinances have, however, survived so that we can obtain an overall picture of Yüan law, chiefly through the collections of cases and specific regulations. The laws against theft as recorded in *Yüan tien chang* are quite similar to the Liao laws. We find there the same combination of tattooing and hard labor as in Chin and Liao law. The differentiation according to the number of offenses in Yüan law is also a Liao feature inherited via the Chin code. Another similarity which might have ultimately come from Liao

law is discrimination against the Chinese. "In all quarrels of Mongols with Chinese, if the Chinese is manhandled the Chinese may not reciprocate, but he is allowed to complain to the authorities."²⁷

When trying to characterize Liao law we could perhaps suggest the following tentative formulations. The legal system of the Liao, like so many other Liao institutions, was dual and based on ethnic discrimination. Chinese T'ang law was adopted selectively, and many T'ang articles were taken into Liao law as far as the wording of the offense is concerned, with, however, punishments of a more severe nature. Attempts to unify penal law failed repeatedly, and no comprehensive new code was established. Arbitrariness was common for sentences pronounced at the imperial court, and judicial administration at the lower levels suffered from insufficiently trained personnel as well as from the usual corruption, which, however, was certainly not an exclusive feature of Khitan rule.

²⁷ *Yüan shih* 元史 (Peking: Chung-hua, 1976) 105, p. 2673. On fines and *Wergeld* under the Yüan, see Paul Ratchnevsky, "Die mongolische Rechtsinstitution der Busse in der chinesischen Gesetzgebung der Yüan-Zeit," in H. Franke, ed., *Studia Sino-Altaica: Festschrift für Erich Haenisch zum 80 Geburtstag* (Wiesbaden: Franz Steiner, 1961), pp. 169-79.

LIST OF ABBREVIATIONS

LS *Liao shih* 遼史

W/F Wittfogel and Feng, *History of Chinese Society: Liao (907-1125)*

²⁶ *Chin shih* (Peking: Chung-hua, 1975) 89, p. 1984.