

## Jurisdiction, Penal Code, and Cultural Confrontation under Mongol-Yüan Law

The T'ang-dynasty code is generally viewed as the prototype for subsequent legislation in imperial China. Characterized by Confucian ideology, the work preserved the political and socio-economic structure of a nation of sedentary agriculturalists and city-dwellers. The legal requirements and concepts of nomadic peoples outside sedentary China, however, were quite different. Hence, when the Mongols subjected parts or all of China to their rule and established the Yüan dynasty (1272-1368) contradictions in legal views arose as part of a wider cultural confrontation. At first, the conquerors tried unsuccessfully to force their laws upon the subjugated people. Nomadic law, wholly concerned with the facts of life on the steppe, was incapable of meeting the complex requirements of an urban and rural, chiefly agrarian population. In a second phase, the conquerors introduced a dualistic system of rule. One set of laws governed the conquerors' own people, while the set of laws indigeneous to the conquered Chinese was enforced among the latter.<sup>1</sup> Finally, the legal concepts and norms of the conquered people began to influence the conquerors themselves. Thus Chinese legal norms and principles eventually prevailed.

Coercion and arbitrariness characterized the relations between the Mongols and their subjects during the first years after the conquest of north China. As seen in the writings of the Khitan nobleman Yeh-lü Ch'u-ts'ai 耶律楚材 (1189-1243), the pacification of the land did not result in the enforcement of a system of laws, and powerful Mongolian lords were able to make decisions of life and death. At the least instance of disobedience, instruments of torture were applied and entire families exterminated, the scope extending even to infants.<sup>2</sup> In occupied territories the employment of Mongolian judges, known as *jarghuchi*, failed to halt such arbitrariness.<sup>3</sup>

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<sup>1</sup> This dualistic system applied also to the situation of the Khitan conquest dynasty; see Karl A. Wittfogel and Feng Chia-sheng, *History of Chinese Society: Liao (907-1125)* (Philadelphia: The American Philosophical Society, 1949), p. 198.

<sup>2</sup> See N. Ts. Munkuev, *Kitaiskii istoriicheskii o perykh mongol'skikh khanakh* (Moscow: "Nauka," 1965), p. 72.

<sup>3</sup> On the *jarghuchi*, see Tamura Jitsuzo 田村實造, *Chūgoku seifuku ōchō no kenkyū* 中國征伐朝の研究 (Kyoto), pp. 444-63; Shen Chia-pen 沈家本, "Li tai hsing-fa k'ao" 歷代刑法考, in idem, *Shen Chi-i hsien-sheng i-shu* 沈寄移先生遺書 B, pp. 13b-14a.

At the time of Chinggis Khan (1155-1227), the *jarghuchi* exercised judicial authority over the princes, the imperial sons-in-law, the men of the bodyguard (*kesigtai*), the ayimagh-Mongols, and the Inner Asians (*se-mu* 色目). After the conquest of north China, their authority was extended over the Han Chinese people. The *jarghuchi* were primarily warriors, however, and were familiar neither with the way of life of the indigenous people of China nor with the language. Under these conditions, the struggle in the north by the local people to resuscitate the traditional legal system took a prominent place in the confrontation between the Mongols and the Chinese. Thus the activities of the Mongolian judges were subjected to severe criticism.

The following illustrative anecdote is recounted by the contemporary Bujir (Pu-chih-erh 布智兒).<sup>4</sup> He had been appointed by the great khan to serve Möngke (r. 1251-1259) together with the Muslim Yalawach to serve as the supreme judges in Yen-ching 燕京 (modern Peking). Bujir once put twenty-eight people to death, while at the same time he released a horse thief after having him flogged with a club. But most unfortunately for the thief, a witness present at the occasion presented Bujir with his sword as a gift. In order to test the quality of the blade, Bujir had the thief recalled and cut off his head.<sup>5</sup>

A Han Chinese, Hsü T'ing 徐霆, who from 1235 to 1236 paid a formal visit to the Mongols as a member of an embassy from the Southern Sung, accused the Mongolian judges of corruption.<sup>6</sup> No doubt the Mongolian judges did accept gifts, for that was a common custom.<sup>7</sup> But such generalized accusations by the Chinese contrast sharply with the testimony given by chroniclers elsewhere in the Mongolian empire. The historian Rashtd ad-Din speaks admiringly about the just and humane administration of law in Persia by the first Mongolian judge Shigi-khutukhu.<sup>8</sup> And according to testimony by Ibn Batthuta, another contemporary chronicler, the decisions made by the *jarghuchi* in Persia were just. In his words, "they could not be suspected of favoring either of the parties and could not be bribed with gifts."<sup>9</sup> The Georgian chronicler Orbeliani, too, speaks

<sup>4</sup> He descended from the Tokhtorilday (T'o-t'o-li-t'ai 脫脫里台) Mongols; biography in *Yüan shih* 元史 (Peking: Chung-hua shu-chü, 1976; hereafter *YS*) 123, pp. 3021-22, which, however, does not contain this anecdote.

<sup>5</sup> *YS* 4, p. 58.

<sup>6</sup> P'eng Ta-ya 彭大雅 and Hsü T'ing 徐霆, *Hei-ta shih-hieh* 黑鞑事略, ch. 92.

<sup>7</sup> The officials were not paid salaries before Khubilai's time. In later Mongolian legislation judges were granted a portion of the fines (*yisü*) levied in the sentences. 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* (Wiesbaden: Franz Steiner, 1961), pp. 174-75.

<sup>8</sup> L. A. Khetagurov, trans., *Sbornik letopisei* (Moscow-Leningrad, 1952) 1, pp. 1, 107.

<sup>9</sup> C. Defrémery and B. R. Sanguinetti, trans., *Voyages d'Ibn Batoutah*, 2d edn. (Paris, 1879) 4, p. 11.

of the impartiality of Mongolian justice.<sup>10</sup> In this light, the unfavorable accusations against Mongolian justice by the Chinese seem to contain ulterior motives. The decisions of the Mongolian judges were guided by legal concepts which naturally did not conform to Chinese tradition; and the Chinese, on their part, sought to curb the legal powers of the *jarghuchi*.

## JURISDICTIONAL MATTERS UNDER THE REIGN OF KHUBILAI

The accession to the throne of Khubilai (r. 1260-1294) brought about a change in the policies pursued by the ruling Mongols. Whereas the earlier khans had been solely concerned with the exploitation of the subjugated population and did not interfere with the social life of the Chinese, Khubilai endeavored to advance the process of integration of the conquerors and the conquered.<sup>11</sup> In his struggle for the throne, Chinese advisers had provided critical assistance, and after his accession Khubilai continued to require their assistance in order to keep check on the potentially uncooperative forces within the empire.

In 1272, the Chinese were exempted from the jurisdiction of the *jarghuchi*.<sup>12</sup> Yet after the death of the corrupt minister Ahmad and the failure of the Chinese minister Lu Shih-jung 盧世榮 (?-1285), the Mongolian response ultimately affected matters of legal jurisdiction. In 1285 the Chinese were again made subject to the jurisdiction of the Mongolian judges.<sup>13</sup> Consequently, the Chinese began once again to lodge complaints against the judges.

In an extant petition dating from 1292, the *jarghuchi* are accused of deliberately prolonging legal procedures and of making incorrect decisions. The petitioner requested that criminal cases be placed under the jurisdiction of the local county administrations rather than the *jarghuchi*.<sup>14</sup> Criticism was also directed against the supreme judicial authorities in the Mongolian capital Ta-tu. A report issued by the imperial investigating censors (*chien-ch'a yü-shih* 監察御史),<sup>15</sup> dating from the year 1302, pointed out that in cases of serious crimes submitted to the Supreme Mongolian Judge (*yeke jarghuchi*), the Mongolian secretaries (*bichachi*)

<sup>10</sup> M. F. Brosset, *Histoire de Géorgie* (St. Petersburg, 1850) 1, p. 486.

<sup>11</sup> See Ratchnevsky, "Khubilai Khan," in *Die Grossen der Weltgeschichte* (Zurich: Kindler Verlag, 1973), p. 765.

<sup>12</sup> See Paul Ratchnevsky, *Un code des Yuan* (Paris: Librairie Ernest Leroux, 1937; hereafter, *Code*) 1, p. 53.

<sup>13</sup> This is known from a document dated to 1317; see Shen Chia-pen, annot., *Yüan tien chang* 元典章 (Taipei: Wen-hai ch'u-pan-she, 1964; hereafter *YTC*) 49, p. 19a.

<sup>14</sup> *YTC* 40, p. 19a.

<sup>15</sup> On the functions of these officials, see *Code* 1, p. 175 ff.

did not transcribe the proceedings into Chinese. It was thus not possible, the report claimed, to recheck the case records or to inquire into the details of allegations. Furthermore, the reports stated that breaches of the law and mistakes in its enforcement must necessarily be very common. A request was made that in the future a Chinese secretary be appointed to translate such files and and that furthermore the tribunal of censors (*yü-shih t'ai* 御史臺) should commission a Mongolian and a Chinese investigating censor to be responsible for checking. After examination by these officers, if no breach of the law is discovered, a report of their findings should be submitted to the censor's office and the files closed according to the law.<sup>16</sup>

Chinese demands for reforms, however, were answered only after the enthronement of emperor Jen-tsung 仁宗 (r. 1311-1320). In the document concerning the renewed jurisdiction of the Mongolian judges, mentioned above, imperial command also limited the judicial authority of the *jarghuchi* to the members of the four bodyguards, the princes of the blood, the imperial sons-in-law, the "Yellow Tartars," the Inner Asians, and the myriarchs of the "E-lo-ssu" (Russians).<sup>17</sup>

During the first years of his rule, Khubilai's attention was completely devoted to the struggle with his brother Arigh-böke. The Mongols at that time had no legal code nor personnel capable of establishing and maintaining an orderly legal administration in the occupied territories. Khubilai, however, introduced a dualist legal administration that followed the prototype initiated by the Jurchens during their rule of north China under the Chin dynasty (1115-1234). The system of law offices (*fa-ssu* 法司) instituted by the Chin was continued by the Mongols and applied to the Chinese, the Kōryō (Koreans), and the Po-hai, whereas the Mongols, Inner Asians, Khitans, and Jurchens were subjected to the jurisdiction of the *jarghuchi*. The formal legal code of the Chin, or *T'ai-ho lü* 泰和律, which had been based primarily on the T'ang code, continued to be applied. However, the judgments pronounced by the *fa-ssu* on the basis of the Chin code were not considered final until they had been affirmed by the Ministry of Justice. As a rule, the judgments so made were generally mitigated to a considerable extent by the Ministry.

After the conclusion of the war with his brother, Khubilai was able to devote himself more fully to internal matters of governance. His main concern was to strengthen the authority of the ruling government and to curb the powers of the autonomous administrations in the regions, but he was also deeply committed to curbing the jurisdiction of the special courts. After the conquest a

great part of the population had been subjected to the rule of the feudal lords. The lords had their own administrations and exercised their own jurisdiction within their territorial fiefs. At first Khubilai was not in a position to abolish completely the privileges of the lords, but he was able to punish those who exceeded their competences. The lord Buyanligh Khaya (Pu-yen-li Hai-ya 不眼里海牙) was brought to trial in 1262 by edict of the emperor because he had arbitrarily executed three counterfeiters.<sup>18</sup> Gradually under Khubilai the judicial powers of the feudal lords were reduced to matters that fell under the categories of private litigation and minor criminal cases. Serious criminal cases and disputes between members of different communities were given over to civil authorities appointed by the throne in conjunction with representatives of the lords. But in such cases the decisive authority was held by the government official.

Similar proceedings were prescribed for persons involved in criminal or civil cases, but who were not subject to the administration of a feudal lord. An imperial order of April 7, 1311, contains the following points:

1. if an appanage-holder (*t'ou-hsia* 投下) or a member of an auxiliary military division (*t'an-ma-ch'ih* 探馬赤; Mong.: *tammachu*) commits an illegal act involving the civil population 民,<sup>19</sup> then for criminal matters such as illicit sexual intercourse and theft the case should be dealt with by the local civil authorities 有司 in accordance with the law;<sup>20</sup>
2. in more serious criminal matters, however, a mixed court (*yüeh-hui* 約會) is to be convened;
3. should the representatives of the feudal lord in the case fail to appear after three summonses, the civil authorities shall conclude the case and send a report to the office for administrative control (*lien-fang ssu* 廉訪司) for further examination.<sup>21</sup>

The institution of mixed courts was introduced when county administrations (Tsong-kuan fu 總管府) were established in 1265.<sup>22</sup> At that time the judicial authority exercised by the civil administration over the civil populace in its territory was staggered according to the rank of the administration within the overall governmental hierarchy. The maximum punishment that could be meted

<sup>16</sup> YS 5, p. 85.

<sup>19</sup> The term *min*, "people," denotes in a narrower sense the rural population and excludes the ethnic and professional groups who were registered in special lists.

<sup>20</sup> The term *yu-ssu* refers to civil authorities commissioned to administer the population.

<sup>21</sup> On this office, see *Code* 1, p. 180 ff.

<sup>22</sup> See Ebisawa Tetsuo 海老澤哲雄, "Yakukai ni kansuru oboegaki" 約會に関する覺書, Odake Fumio 小竹文夫 and Okamoto Yoshi 岡本敬, eds., *Genshi keihōshi no kenkyū yakuchū* 元史刑法志の研究譯註 (Tokyo: Kyōiki shoseki, 1962), pp. 69-87, and the literature cited.

<sup>16</sup> YTC 14, pp. 16b-17a; see *Code* 1, pp. 309-10.    <sup>17</sup> YTC 14, pp. 16b-17a.

out by a subprefecture, for example, under its own authority was 57 blows of the light stick. For a prefecture it was 87 blows of the heavy stick. For cases where the punishment called for was compulsory labor, exile, or execution, mandatory reports had to be sent, following the initial judicial investigation and trial, to the Ministry of Justice and the appropriate *jarghuchi*.<sup>23</sup>

Transfer of judicial power to the civil authorities in these ways was in keeping with preferences embodied in the Chinese legal tradition and enabled the Chinese to exercise influences on the question of jurisdiction. Although in the civil administration the person in authority was a Mongol, in the role of *darughachi*, in practical terms the actual manager of governmental affairs was the *p'an-kuan* 判官, a post usually filled by a Chinese. Furthermore, in 1286 legal matters were officially transferred to Chinese hands by the institution of the position of *t'ui-kuan* 推官, "judge," which post was also usually filled by a Chinese.<sup>24</sup> But even though Chinese legal concepts were influential at lower levels in the legal system, the Mongols themselves had the decisive say at the highest levels.<sup>25</sup>

The institution of the Tsung-kuan fu at the level of the county administrations was a step toward making the jurisdictional system uniform. Special jurisdictions—units not covered under the regular Tsung-kuan fu—were systematically reduced in number, while criminal cases were assigned to the civil authorities. Matters that we would consider civil cases were decided by mixed courts at which the representatives of the civil administration served as advisers and the decisions themselves were made by government officials.

An article in the statutes pertaining to the county administrations states that if a criminal case or a matter involving litigation should occur among the appanage-holders or among members of households of "various categories" (*chu se-hu* 諸色戶), the matter should be jointly dealt with by the competent local *darughachi* and the county official. Furthermore, it states that in such cases the binding decision shall be made by the civil official. And if the *darughachi* should fail to appear at the joint session so convened, the civil official shall enforce his verdict entirely on his own authority.<sup>26</sup>

It is clear from an ordinance issued by the Central Secretariat (Chung-shu sheng 中書省) on January 31, 1301, that the judicial authority of the appanage-holders was subjected to restrictions. According to the ordinance, the appanage-

holder was not represented in matters involving serious crimes punishable by the death penalty or in matters involving crimes of robbery, theft, counterfeiting, and others committed within his territory. Final decisions in such cases were pronounced by the government officials assigned to the territory in accordance with the established laws of the realm. The ordinance makes it clear that representatives of an appanage-holder were to be called only in cases involving brawls, and litigation concerning such civil matters as status, marriage, family property, and debts. Should the representatives fail to appear after three summonses, the civil official was to decide the case on his own authority in accordance with the established laws.<sup>27</sup>

### *Military Jurisdictions*

In addition to the holders of appanages, the armed forces constituted another relatively autonomous institution within the state. Army commanders regarded the soldiers under their command as their own people. The soldiers in turn were subject to the jurisdiction of their superior officers. In the military camps (*a'urugh*; Chin.: *ao-lu* 奧魯) the camp commander exercised disciplinary authority over the soldiers' families.<sup>28</sup> Early in the 1270s Khubilai's centralizing policies made themselves felt in the area of military administration. In December of 1272, for example, the camp administrations were abolished and their power transferred to the *darughachi* of the civil administration.<sup>29</sup> The mixed judicial courts (*yüeh-hui*) were also introduced into the military. By dint of a decision taken by the Ministry of Justice in the second month of the 12th year of the Chih-yüan 至元 reign (March 1275), illegal acts committed by and among Mongolian soldiers, leading to damage, were to be dealt with by an official of the Mongolian camp administration in accordance with the procedures applied in Ching-chao and Nan-ching (that is, the two main capital cities). In the event of there being no camp administration head on the scene,<sup>30</sup> the civil authority was to exercise sole responsibility over the judicial investigation.<sup>31</sup>

In such situations, if the crime under investigation was a serious one, it was to be handed to the county administration for trial, and after the case was con-

<sup>27</sup> *YTC* 53, pp. 31a-b.

<sup>28</sup> The families of soldiers in active service lived in camps originally administered by the Supreme Council for Military Affairs, but in 1272 administration was transferred to the county authorities. See *Code* 1, p. 54, n. 2 (where *oghruksh* should be corrected to *a'urugh*).

<sup>29</sup> *YS* 7, p. 144; whether this provision was generally implemented seems doubtful. As emerges from the texts cited below, in the years 1273 and 1275 the camp administrations exercised jurisdiction in civil matters and minor criminal offenses.

<sup>30</sup> The earlier order to abolish camp administrations may not have been universally enforced.

<sup>31</sup> *YTC* 39, p. 8b.

<sup>23</sup> *Code* 1, pp. xii-xiii.    <sup>24</sup> *Code* 1, p. 34.

<sup>25</sup> There are many instances of imperial orders: "Beat the evil one to death!" Khubilai was ostensibly aware of his impulsive character, for he had ordered that death sentences of this sort not be carried out. Once he ordered his minister: "When I command you in a bad temper to have a culprit put to death, do not have him killed but delay the execution one or two days and resubmit the matter to me." See *Code* 1, p. 3.

<sup>26</sup> *YTC* 53, p. 30a.

cluded a report was to be sent to the Ministry of Justice. A category of "miscellaneous" illegal deeds was to be submitted to the court for the general administration of military camps;<sup>32</sup> this is known from a decision issued by the Supreme Council for Military Affairs (Shu-mi yüan 樞密院) on July 3, 1273.<sup>33</sup>

Litigations between soldiers and civilians were to be dealt with by officials of the military, and civilians were tried by officials of the military and civil administrations at a joint court.<sup>34</sup> But in cases of serious crimes committed by members of the military against civilians, conflicts of jurisdiction could occur. According to a petition to the throne found in *Yüan tien-chang* 元典章,<sup>35</sup> one of the most important extant collections of Yüan legal documents, civil authorities had jurisdiction over the more serious crimes of robbery and murder. This document dates from 1308, during the reign of Qayishan (emperor Wu-tsung 武宗; r. 1307-1311), but it pertains to practices current during the reigns of Khubilai and Temür (emperor Ch'eng-tsung 成宗; r. 1294-1307). Cases involving litigations over family property and land ownership, brawls, and other lesser crimes, however, were handled differently. In such cases, the military officer in command convened a mixed court. The same document also points out that in cases involving crimes between soldiers and civilians where damage was suffered by both parties, the dispute was to be resolved through a negotiation process in joint sessions with the civil officials at a mixed court. We also read in the Basic Annals of *Yüan-shih* 元史, an entry dated April 8, 1301: "Should an officer 軍士 kill someone, consort with prostitutes, or steal, a military and a civilian official shall jointly carry out the investigation [trial]."<sup>36</sup>

This trend toward civilian authority over the military in criminal matters became even more pronounced, judging from another entry of the Basic Annals, corresponding roughly to March of 1304. An order was issued according to which soldiers who committed an indecent act, theft, fraud, or counterfeiting were without exception to be subject to the jurisdiction of civil authorities.<sup>37</sup> Even within the military itself, the authority of the superior officers to impose punishments on their soldiers was subject to limitations. An order dating from 1265 makes it clear that the arbitrary execution of a soldier who had committed an infraction was prohibited. In cases of serious crimes, it was required that the officer submit a report to the emperor.<sup>38</sup>

Joint deliberation of criminal and other legal matters was fraught with difficulties. The military authorities were naturally not always in a hurry to send representatives to the county government offices, for the distances involved in

such journeys were often very great and the proceedings protracted. The order cited immediately above also points out that in cases of murder, the body of the victim in the summer would often have decomposed before the legally prescribed inquest had taken place. Furthermore, the military authorities were generally accustomed to the exercise of judicial authority over members of the military and had occasionally extended that authority into matters that were purely civilian.

#### *Jurisdictions of Clergy and Occupation-Groups*

Under Mongolian rule, the Buddhist clergy enjoyed certain privileges of status. Quite frequently, however, the clergy abused their status and their influence at court in order to interfere in secular legal matters. Despite Khubilai's inclinations towards Buddhism, he was determined to secure the judicial authority of the state over the religious communities. A document dated March 12, 1303, indicates that such crimes as murder, theft, and seditious speech were matters for the civil authorities, whereas litigation with the civilian lay population over ownership of land and other minor matters were to be decided through joint hearings by the civil administration and the Buddhist administrative agency, the Hsüan-cheng yüan 宣政院 (Office of Buddhist and Tibetan Affairs).<sup>39</sup> Under Temür, this office petitioned to have its jurisdiction extended to include serious crimes, but the emperor refused.<sup>40</sup>

Ch'eng-tsung confirmed the competence of the civil judicial authorities in criminal matters involving the Buddhists in an edict issued in the spring of 1298. According to this edict, delinquent Buddhists were to be sentenced by the civil authorities on their own authority and discretion, while for minor criminal cases the trials were to take place with the presence and participation of an official of the Buddhist administration. Should the latter fail to send a representative, a punishment would be imposed.<sup>41</sup>

Under the reign of Ayurbarwada (emperor Jen-tsung 仁宗; r. 1312-1320), an edict dated July 10, 1313, declared that any and all disputes between members of the Buddhist or Taoist communities, unless they involved serious crimes, should be resolved by the head of the monastery. If the head of the monastery (or presumably his agent) did not appear at the trial, the case was to be decided by the civil authorities alone in accordance with the prevailing law of the state. The imperial investigating censors and administrative supervising officials (*lien-*

<sup>32</sup> *Tia-fan* 雜犯, "miscellaneous criminal acts," included mostly offenses against public order. See the special section of the code in *YS* 105, p. 2688.

<sup>33</sup> *YTC* 39, p. 8b. <sup>34</sup> *YS* 19, p. 409. <sup>35</sup> *YTC* 53, pp. 32a-b. <sup>36</sup> *YS* 20, p. 434.

<sup>37</sup> *YS* 21, p. 452. <sup>38</sup> *YS* 6, p. 106.

<sup>39</sup> On its functions, see *Code* 1, pp. 151-52. See also, Herbert Franke, "Tibetans in Yuan China," in John D. Langlois, Jr., ed., *China under Mongol Rule* (Princeton: Princeton U.P., 1981), pp. 31-14, on the Hsüan-cheng yüan.

<sup>40</sup> *YTC* 39, pp. 10a-b. <sup>41</sup> *YS* 19, p. 418.

*fang-ssu*) were ordered to ensure that the proceedings took place without delay.<sup>42</sup>

A regulation dated March 6, 1313, put the Taoists on the same level as the Buddhists. The regulation also prohibited the officials of the Taoist supervisory agency, the Chi-hsien yüan 集賢院,<sup>43</sup> from interfering in litigation between Taoists and lay persons since such cases were under the sole jurisdiction of the civil authorities.<sup>44</sup> The Yüan rulers sought to deal even more rigorously with jurisdictional problems involving the Muslims. An edict of November 14, 1311, specified that the Islamic judges, or *kadi* (Chin.: *ha-ti* 哈的) were forbidden to adjudicate major as well as minor "public" criminal matters and litigations over civil status, marriage, and taxation. These latter "civil" litigations were to be adjudicated by the civil authorities.<sup>45</sup>

Yüan law empowered the heads of various occupational associations to prosecute their members. Khubilai issued a regulation whereby criminal cases, however, were withdrawn from such jurisdiction. But in other cases, such as proceedings between physicians and the "hundred families," the head of the physicians' association was invited to attend the court session. The sentence, however, was to be pronounced by a civil official. Should the head of the association fail to appear at the court session, or should he fail to support the decision of the court, a report to that effect was to be sent to the Ministry of Justice and the case was to be investigated further.<sup>46</sup> Similar rules governed cases involving musicians, as we know from an imperial command of 1299,<sup>47</sup> and cases involving saltern workers, as we know from a 1302 decision of the Council of Ministers.<sup>48</sup>

#### PRINCIPLES OF MONGOLIAN LAW AND THEIR IMPACT ON PENAL CODES

A fundamental issue in the question of jurisdiction is that the state presupposed the existence of a universal code of laws, but no such code was ever enacted by the Yüan state. As noted above, the Chin code known as the *T'ai-ho lü* had been employed for a time by the Yüan, but late in 1271 it was invalidated by Khubilai.<sup>49</sup> No replacement code was ever promulgated. The compilation known as *Chih-yüan hsün ko* 至元新格 (*New Regulations of the Chih-yüan Era*),<sup>50</sup> promulgated after the conquest of south China, contained administrative regulations

that were universal in nature, but they could not serve as the basis for jurisdictional questions in criminal cases. Instead, jurisdictional questions were generally settled on the basis of precedents, or general rules 體例. But when there were no such precedents to serve as guidelines, or if circumstances were especially doubtful, the authorities turned to the Ministry of Justice for decisions. These in turn became precedents for later cases once they had been confirmed by the Council of Ministries or by the emperor himself.

A complaint about this unsystematic situation was voiced by the Chinese critic Cheng Chieh-fu 鄭介夫 (fl. 1306): "There are rules 例 that could fill a thousand tomes, but no generally applicable norms 法." Cheng submitted a request to the throne for the commission of experienced dignitaries to compile a law code that would accommodate the customs of the peoples of the south as well as those of the north. Cheng was not alone: other Chinese advisers at the Yüan court urged the promulgation of a law code. Khubilai's successor Ch'eng-tsung commissioned the Chinese Ho Jung-tsu 何榮祖 (ca. 1228-ca. 1306) to compile a code, which eventually was titled *Ta-te lü ling* 大德律令 (*Code of the Ta-te Era*). But it was not promulgated. The emperor rejected it with the words, "What was good in the past need not be good in our time and [thus what we adopt today] need not necessarily be derived from the past. Only what is appropriate for our time should be adopted."<sup>51</sup>

The Yüan emperors thus refused to introduce traditional Chinese law as the universal law for the Mongolian empire. Only under the reign of Shidebala (emperor Ying-tsung 英宗; r. 1320-1323) were large legal compendia based on Chinese models adopted and promulgated. These were *Ta Yüan sheng cheng Kuo-ch'ao tien chang* 大元聖政國朝典章, usually referred to as the *Yüan tien-chang*, and *Ta Yüan t'ung chih* 大元通制 (*Comprehensive Institutes of the Great Yüan*),<sup>52</sup> both of which contained edicts and administrative regulations, as well as legal principles and court decisions, thus laying the basis for a uniform resolution of jurisdictional questions.

The legislation of the Yüan period, as transmitted by the official dynastic history of Mongolian rule, *Yüan shih*, had a basis in the large compendium known

*Chih-yüan hsün-ko*, see Paul Heng-chao Ch'en, *Chinese Legal Tradition under the Mongols: The Code of 1291 As Reconstructed* (Princeton: Princeton U.P., 1979).

<sup>42</sup> For the two quotations, see *Code* 1, pp. xiv-xiv. Here we see a radical difference between Mongol and Chinese attitudes towards correct rule. The Mongols were oriented towards the present and took into account real conditions, but the Chinese were oriented towards the past and sought to maintain the fiction—at least in a formal sense—of the continuity of ancient institutions.

<sup>43</sup> On *YTC*, see Shen Chia-pen, "Lü-ling," included in his *Shen Chi-i hsien-sheng i-shu*, ch. 8, pp. 6a-b; Herbert Franke, *Geld und Wirtschaft in China unter der Mongolen-Herrschaft* (Leipzig: Otto Harrassowitz, 1949) p. 11 ff.; and *Code* 1, pp. xix-xx. On *Ta Yüan t'ung chih*, see Franke, *Geld und Wirtschaft*, p. 12; *Code* 1, pp. xvii-xix.

<sup>44</sup> *T'ung chih t'iao ko* 通制條格 (Peking: Kuo-li Pei-p'ing t'u-shu-kuan, 1930) 29, pp. 5b-6b.

<sup>45</sup> The Chi-hsien yüan administered the State University (Kuo-tzu chien 國子監), Taoist doctrine, yin-yang prognostication experts, ritual sacrifices, and magic; see *Code* 1, p. 106, n. 2.

<sup>46</sup> *T'ung chih t'iao ko* 29, pp. 5b-6b. <sup>47</sup> *YTC* 53, p. 11b.

<sup>48</sup> *YTC* 53, p. 50b; see *Code* 1, p. 28, n. 3.

<sup>49</sup> *YTC* 53, pp. 30b-31a. <sup>50</sup> *YTC* 53, pp. 34b-35a. <sup>51</sup> *YS* 7, p. 138.

<sup>52</sup> See *Code* 1, pp. xii-xiii; fragments survive in *YTC*. For a reconstruction and annotation of

as *Ching shih ta tien* 經世大典, published under the reign of Tugh Temür (emperor Wen-tsung 文宗; r. 1329-1332).<sup>53</sup> It too comprised legal principles uncharacteristic of the legislation enacted by the first Yüan rulers. The *Yüan shih's* "Treatise on Penal Law," which was compiled later, on the basis of *Ching shih ta tien*, shapes legal principles in the traditional form of a Chinese code. The arrangement of the material, the style, and terminology all follow the Chinese pattern. Certain articles are taken verbatim from the T'ang code.

Deviations from traditional Chinese ways of determining jurisdiction were more pronounced in actual practice than as revealed in compilations, mostly because Mongols of high status could ignore the legal constraints on their authority. In the imperial edict of 1301 mentioned above, Bürelgidei (Pu-lien-chitai 不憐吉歹) and other officials in the provincial government of Honan pointed out that in all litigations between Mongol and Chinese, the actual investigations and trials were carried out by the former.<sup>54</sup>

Moreover, military authorities generally assumed judicial powers over the population in their territories. A document of 1284 remarks that the local garrison commands accepted for adjudication cases of all sorts that had been lodged by civilians.<sup>55</sup> Police authorities often exceeded their official powers, according to an imperial edict issued in 1299.<sup>56</sup> And interference by official emissaries in adjudication of the civil authorities was sufficiently widespread to warrant an imperial prohibition in 1302. Buddhists, too, frequently ignored the law, presuming upon their influence at the imperial court. A regulation of 1267 prohibited officials of the Buddhist administration from interfering in court cases involving the lay population.<sup>57</sup> The Buddhists sometimes freed murderers, including women who had killed their spouses, on the occasion of religious festivals.<sup>58</sup> According to a petition presented to the throne in 1291, it was universally known that the Buddhist authorities exceeded their powers concerning punishment of monks and nuns, failed to examine the appropriateness of sentences, and failed to determine the truth of accusations. These same authorities are said to have placed wooden collars on the necks of the accused monks and nuns, and then to have thrown them in chains into dungeons where they lived in promiscuity.<sup>59</sup>

The distorted picture of Yüan law, caused by efforts to mold the legislation of the Yüan era in the shape of traditional Chinese lawbooks, also shows up in the Yüan penal system. The penal code as presented adopted the traditional Chinese scheme of five punishments. But the punishments administered under

the Yüan differed in certain ways. The Yüan dynasty employed grades of punishment whereby the numbers of blows of the light or heavy stick did not increase decimally.<sup>60</sup> The term *ch'ih* 笞, "bamboo lash," was retained for flogging with the light stick.<sup>61</sup> For the most heinous crimes, execution by dismemberment (*ling-ch'ih ch'u-ssu* 凌遲處死), sometimes called "slow slicing," and flogging were introduced. An aggravated form of exile was introduced whereby prisoners were sent for military service to remote areas.<sup>62</sup> Penalties for Mongols, however, are not mentioned.

The Persian historian Juvaini observed that it was common for the Mongols to send convict laborers whose death sentence had been commuted to the battlefield under the principle that they would prefer to die in battle.<sup>63</sup> This custom was also noted by the Chinese writer P'eng Ta-ya 彭大雅, who remarked in his travelogue: "If a culprit is not executed, he is sent, as a punishment, to serve in the 'braves' troops (*bādur*, Chin.: *pa-tu-tu* 八都魯). Whoever remains alive after the third or fourth battle shall be amnestied."<sup>64</sup> The dispatch of criminals to the front was practiced under the Yüan, as is confirmed by an article of the code found in *Yüan shih*: "A Mongol who in the course of a brawl or under the influence of drink causes the death of a Chinese, shall be sent to an expeditionary corps and pay for the funeral expenses of his victim."<sup>65</sup> The *Yüan shih's* Basic Annals report that on October 2, 1282, a certain Neüder (Nieh-wu-tieh 捏兀迭) was sent to the expeditionary army in Champa in order to atone for a crime.<sup>66</sup> In the same year the emperor approved a central government agency's proposal to send those found guilty of capital crimes, with the exception of those guilty of extremely heinous crimes, to join the armies then fighting in Japan, Champa, and Burma.<sup>67</sup> A certain Saljudai (San-chu-tai 散竹帶) was absolved from the death penalty for his crime a few years earlier because of his previous merits, and was ordered to join the vanguard troops on a major campaign.<sup>68</sup> And in 1273 some thirteen criminals who had been sentenced to death for committing homicide during a brawl were relieved of the death penalties and sent to join the army on the front.<sup>69</sup>

<sup>60</sup> Khubilai changed the usual ten increases per grade in the number of blows of the stick, as found in the Chinese system. He directed that one blow be eliminated in the name of heaven, a second in the name of earth, and a third in his own name. The effect was that penalty grades increased by ten to totals ending in seven; see *Code* 1, p. 3, n. 3.

<sup>61</sup> See *Code* 1, p. 6.

<sup>62</sup> On this punishment, see Shen, "Hsing-fa k'ao" 8, pp. 9a-b; *Code* 2, p. 63, n. 2.

<sup>63</sup> John Andrew Boyle, trans., *The History of the World Conqueror by 'Alā ad-Dīn Ata-Malik Juvainī* (Cambridge, Mass.: Harvard U.P., 1958) 1, p. 53.

<sup>64</sup> P'eng and Hsü, *Hei-ta shih-lieh*, p. 15b. See Ch'i-ch'ing Hsiao, *The Military Establishment of the Yuan Dynasty* (Cambridge, Mass.: Harvard U. P., 1978), pp. 94 and 218 (n. 59).

<sup>65</sup> *YS* 105, p. 2675, article 832; trans. in *Code* 4, p. 259.

<sup>66</sup> *YS* 12, p. 245. <sup>67</sup> *YS* 12, p. 248. <sup>68</sup> *YS* 6, p. 112. <sup>69</sup> *YS* 8, p. 152.

<sup>53</sup> Further details on this work may be found in Shen, *Lü-ling* 8, pp. 7a-9b; and *Code* 1, pp. xxx-xxi.

<sup>54</sup> *YTC* 53, p. 31a. <sup>55</sup> *YTC* 53, p. 4b. <sup>56</sup> *YTC* 53, pp. 5a-b. <sup>57</sup> *YS* 6, p. 113.

<sup>58</sup> *Code* 1, p. lxxx. <sup>59</sup> *Code* 1, p. lxxix.

An imperial edict issued by Khubilai in 1264 introduced a special kind of forced labor. According to the edict, recidivist thieves, after receiving appropriate corporal punishment, were to be assigned to serve for five years as auxiliary policemen, who were assigned to their home districts and placed under the supervision of local officials. They were forbidden to leave their home areas without authorization, and during their period of probation as auxiliaries they were supposed to help the authorities to trace and arrest thieves and robbers. If they committed no further offenses, the district chief was empowered to request the deletion of the individual's name from the register of policemen, provided a neighbor was willing to serve as guarantor. The rules also specified that if a given policeman successfully traced or apprehended an armed robber, two years of service would be taken off his total obligation of five years, and if he apprehended two armed robbers he would be relieved of all remaining service obligations. Apprehension of a thief reduced his service by one year. Conversely, if a policeman committed a punishable act, he would be obliged to remain in this semiservile capacity for the rest of his life.<sup>70</sup>

A well-known institution of Mongolian law was the "devastation." During the Yüan period this punishment was employed in cases of offenses committed against the security of the state. Family or household members associated with the criminal were enslaved by the state and their property was confiscated.<sup>71</sup> Such penalties had been imposed for cases of treason under the T'ang code; but the Mongols applied them more widely.

Enslavement of a criminal's family members, characteristic of Mongolian law, thus became an inherent part of Yüan law. In the military, superior officers who were unable to enforce discipline among their troops or who through excessive severity brought about troop desertions were punished, their families enslaved, and half their property confiscated.<sup>72</sup> The *darughachi* of the county of Jao-chou 饒州, one Yügürül (Yü-ku-lun 玉古倫), who had arbitrarily spent more than 4,000 piculs of grain, was sentenced to flogging and his family members were enslaved.<sup>73</sup> In another case, Chinese military deserters were executed and their families enslaved,<sup>74</sup> and in yet another, officials—both Chinese and Muslim—who neglected their duties were threatened with execution and the enslavement of their families.<sup>75</sup>

The principle of atonement lay at the basis of the Mongolian penal system. In Yüan legislation criminals were required to compensate the families of their

victims in cases of homicide, bodily injury, and theft of cattle.<sup>76</sup> A murderer was required to pay fifty *liang* (ounces) of silver as a fine to underwrite the cost of the victim's funeral. This rule was changed slightly in 1282 by imperial edict, at the request of Yeh-lü Chu 耶律鑄 (1221–1285). Under the new rule, the criminal was required to deliver a daughter and four *ling* in paper currency to the family of the victim.<sup>77</sup> If the death was caused by an animal, the animal's owner was required to hand over the animal to the victim's family in compensation.<sup>78</sup> In cases of injury leading to the victim's incapacitation, the criminal was obliged to pay twenty *ling* in paper currency to cover the victim's medical treatment.<sup>79</sup>

Cattle stealing was punished in the Yüan era according to Mongolian customary law even if the thief was a Chinese. For each animal stolen, the thief was obliged to give nine animals to the owner, and in the event that the thief was unable to provide them, he was obliged to hand over his wife or his son.

Yüan law also provided that anyone who exposed a false accusation was entitled to the wife and children of the accuser and, in addition, to a payment in paper money.<sup>80</sup> If anyone was found guilty of violating the monopoly concerning the production of alcoholic beverages, his wealth and property were confiscated and his children enslaved by the state.<sup>81</sup> Khubilai ordered that the wives and female slaves of the rebel Shih Pi 史弼 be sent to the capital and given to the state falconers.<sup>82</sup>

According to Mongolian law, a bankrupt debtor was to be handed over to his creditor. Yüan legislation provided that a robber or a thief who was unable to return the stolen property was required to work off his debt.<sup>83</sup> A slave found guilty of robbery or theft was to become the possession of the owner of the stolen property.<sup>84</sup> Moreover, financial penalties played an important role in the Yüan penal system. In cases of violations of state monopolies, half the assets of the guilty persons were confiscated by the state.<sup>85</sup> In cases of murder, or the illegal manufacture of weapons, similar penalties were imposed.<sup>86</sup>

<sup>70</sup> In contrast to cattle rustling, where compensation was to be paid to the owner, the fine for the theft of property had a public character. The fine was confiscated in favor of the state treasury and served partly to remunerate the informer.

<sup>71</sup> *YS* 10, p. 248.

<sup>72</sup> *YS* 105, p. 2678, articles 906–7; trans. in *Code* 4, pp. 306–7. This provision matched the legal sentiments of the Mongols. According to the Mongolian code of 1640, the owner of the animal or the cowherd responsible was required to pay a fine. See K. F. Golstunkii, *Mongolo-oiratskie zakony 1640 goda* (St. Petersburg: Imp. Akademii nauk, 1880), p. 45.

<sup>73</sup> *YS* 105, p. 2673, article 796. <sup>74</sup> *YS* 12, p. 250. <sup>75</sup> *YS* 12, p. 253. <sup>76</sup> *YS* 12, p. 257.

<sup>77</sup> *YS* 104, p. 2664; trans. *Code* 4, p. 177.

<sup>78</sup> *YS* 104, p. 2664; trans. *Code* 4, p. 178. *YTC* 49, pp. 216–222a.

<sup>79</sup> *Code* 2, pp. 145–48, 161–63, 166.

<sup>80</sup> *YS* 105, p. 2676; trans. *Code* 4, p. 270; and *YS* 105, p. 2681; trans. *Code* 4, p. 326.

<sup>70</sup> *YTC* 49, p. 47a.

<sup>71</sup> *YTC* 41, p. 16a.

<sup>72</sup> *YS* 10, p. 198.

<sup>73</sup> *YS* 10, p. 209.

<sup>74</sup> *YS* 10, p. 215.

<sup>75</sup> *YS* 10, p. 215.



The authors of the "Treatise on Penal Law" found in *Yüan shih* emphasize the mildness of penalties applied during the Yüan era.<sup>87</sup> In actual fact, the penalties imposed by the Yüan rulers were considerably milder than those exacted by the Jurchen rulers under the preceding Chin dynasty. Under the Yüan, cruel methods of torture were outlawed.<sup>88</sup> Employees of the prisons were required to ensure that prison cells were sprinkled and swept.<sup>89</sup> Prisoners without relatives or who were indigent were given food by the authorities, and sick prisoners were provided with oil, coal, and straw mats. The law stipulated that if lack of medicine caused a prisoner's death, the responsible official was held accountable. Sick prisoners were supposed to be relieved of the wooden collar (cangue), leg irons, and chains, and a warden to provide care. In winter, sheepskin blankets, stoves, and wood were to be provided for heating. Pregnant women were permitted to leave prison under bond to deliver their babies. Female prisoners who were pregnant but who had no relatives to whom they could go, and those who had committed capital crimes, were to be attended by midwives at the time of delivery. Conforming to the spirit of the Confucian tradition, Yüan law specified that if a person sentenced to death should be the only son of parents who were more than seventy years of age, he was entitled to send a plea for mercy directly to the throne. Old people, minors, the handicapped, and the incapacitated were permitted to redeem their prescribed punishments by cash payments.<sup>90</sup>

In Khubilai's time, the central government approved on the average just under ninety executions per year. For two years in the mid-1280s the number exceeded the average, reaching as high as 278. This was due to the state's suppression of rebellions in connection with the military expeditions into Japan and Champa. In general, however, it seems that the number of executions, given the large population and the frequency of rebellions, was remarkably low. One must also consider that amnesties were frequent and far-reaching, so that many people subject to punishment did not have to serve full sentence. Amnesties might be proclaimed upon the accession to the throne of an emperor, an imperial birthday, or because of an imperial illness; they were also prompted by natural calamities, such as droughts and floods, which were regarded as inauspicious signs.

During the final years of their rule in China, the Mongols began to lose their grip. For purposes of control, they reintroduced mutilation and other corporal punishments. These were counterproductive, merely increasing Chinese anger and resentment.

<sup>87</sup> *Code* 1, pp. 3-4. <sup>88</sup> *Code* 1, p. 312. <sup>89</sup> *YTC* 40, pp. 12a-b.

<sup>90</sup> The pertinent articles of code for the above points are all listed in *YS* 105, p. 2690.

## WOMEN, THE FAMILY, AND ETHNIC STATUS

The Mongolian influence on family law in the Yüan period was pronounced. The right of the head of a family to punish family members became limited under Yüan law. A father who killed his son while in a drunken state was sentenced to seventy-seven blows.<sup>91</sup> The killing of a newborn was punishable, as was the killing of a son or grandson.<sup>92</sup> A husband who killed his wife because of a minor offense by the wife was sentenced to death under Yüan law.<sup>93</sup> And a man who killed an innocent slave was subjected to eighty-seven strokes.<sup>94</sup> The division of family property among the sons was allowed while the parents were still living, and a son was permitted to establish his own household apart from that of his parents, with their consent.<sup>95</sup> The Mongolian rulers opposed certain practices that were in traditional Chinese eyes held to be acts of filial affection and therefore worthy of high praise. The offering of flesh from one's own body as a cure for sick parents, and other such practices, were forbidden under Yüan law.<sup>96</sup> These rulings touching on matters of filial practice altered traditional Chinese principles.

Chinese, as well as Mongolian, women were generally treated more favorably than under traditional Chinese law.<sup>97</sup> According to a 1237 order issued by the Council of Ministers, a thirteen-year-old girl was declared heiress to her father's plot of land.<sup>98</sup> And a decision of 1271 held that a widow, even if she had no sons, could inherit a part of the family assets in the event of her husband's death,<sup>99</sup> a rule applicable even to concubine slaves.<sup>100</sup> The legal status of women did not curtail their right to engage in litigation until 1313, when such a restriction was proclaimed by emperor Jen-tsung.<sup>101</sup> In the carrying out of penal sanctions, women under Yüan law were granted certain considerations. They were exempted from branding (as were Mongols),<sup>102</sup> and with the exception of a few crimes were allowed to keep their clothes on when being flogged. Pregnant

<sup>91</sup> *Code* 4, pp. 265-66; *YTC* 42, p. 20b. <sup>92</sup> *YTC* 42, p. 21b.

<sup>93</sup> *YS* 105, p. 2677; trans. *Code* 4, p. 278. <sup>94</sup> *YS* 105, p. 2677; trans. *Code* 4, p. 280.

<sup>95</sup> *Code* 2, p. 97 ff.

<sup>96</sup> Paul Ratchnevsky, *Historisch-Terminologisches Wörterbuch der Yuan-Zeit Medizinwesen* (Berlin: Akademie-Verlag, 1967), p. 25.

<sup>97</sup> Ch'ü T'ung-tsu, *Law and Society in Traditional China* (Paris: Mouton, 1961), pp. 103-4.

<sup>98</sup> *YTC* 19, pp. 14a-b. <sup>99</sup> *YTC* 19, pp. 12a-b. <sup>100</sup> *YTC* 19, pp. 12a-14a.

<sup>101</sup> *YS* 105, p. 2671; trans. *Code* 4, p. 226. The rule was based on the belief that "shameless" women were inclined to be quarrelsome and bring false accusations, or misrepresent their husbands or sons before the court and that they would stick unyieldingly to their false testimony. Furthermore, it was generally held that young widows would prolong legal proceedings in order better to display their physical charms. They would exchange daring words and indecent jokes with the onlookers, visit tea houses and wine taverns, and spend their nights in the cells of Buddhist and Taoist monasteries engaged in indecent pursuits.

<sup>102</sup> *YS* 104, p. 2656; trans. *Code* 4, pp. 106-7.

women were permitted to leave the prison under bond in order to deliver their babies.<sup>103</sup>

Marriage between women of free status and male slaves was tolerated under Yuan law as long as the woman's participation was voluntary.<sup>104</sup> The consent of the woman was required in marriages involving a daughter of a slave and a free man. It should be noted that in both cases, the wishes of the female party were the necessary condition for the legality of the marriage; no mention is made of parental consent. Illicit sexual relations, however, were punished quite strictly under Yuan law. Adultery, for example, was punished by eighty-seven strokes.<sup>105</sup> Severity of the law in this respect seems to conflict with the relative laxity in sexual relations that was customary among Inner Asians. In fact, Chinggis Khan had ordered draconian punishments for illicit sexual relations, with the aim of preserving law and order.<sup>106</sup>

In medieval times the principle of equality before the law was generally unknown. Whereas in traditional China an individual's legal status (usually by occupation-group) was accepted as a yardstick for determining legal privileges, under Yuan rule it was ethnic identity. The population was divided into four, chiefly ethnic classes: Mongols, Inner Asians, Han people of the north, including Jurchens and Khitans, and Man-tzu (the southern Chinese). Of these, the Mongols and Inner Asians enjoyed special status before the law. As noted, they were exempted from branding and were not subject to the customary Chinese family rules.<sup>107</sup> Offenses involving only ethnic Mongols conveyed special provisions. The death sentence for homicide was commuted to military service at the front.<sup>108</sup> Cattle theft was punished according to Mongolian law. A Mongol who injured a foreign slave with a sword was permitted to settle the case privately.<sup>109</sup>

<sup>103</sup> YS 105, p. 2690; trans. Code 4, pp. 413-14.

<sup>104</sup> Under this provision the female thereby acquired the status of slave. Such marriages were generally undesirable because of the disputes that could arise over the status of any children who were born; see Code 2, p. 135.

<sup>105</sup> YS 104, p. 2653; trans. Code 4, p. 47.

<sup>106</sup> The *jasagh* (Chinggis Khan's rules and instructions) punished adultery by death irrespective of whether the adulterer was married or not. See Curt Alinge, *Mongolische Gesetze* (Leipzig: T. Weicher, 1934), p. 203. Carpini adds that when a woman committed adultery, she was punished by death, too; see Dom Jean Becquet and Louis Hambis, trans. and annot., *Jean de Plan Carpini: Histoire des Mongols* (Paris: Adrien-Maisonneuve, 1965), p. 50. See also the statements by Rubruck, in Anastasius van den Wyngaert, *Sinica Franciscana* (Qaracchi-Firenze: Collegio di S. Bonaventura, 1929), p. 186, and Kirakos of Ganjak, the Armenian chronicler, in John Andrew Boyle, "Kirakos of Ganjak on the Mongols," *CJF* 9 (1963), p. 202.

<sup>107</sup> YS 104, pp. 2658, 2665; trans. Code 4, pp. 125-26, 184. The provisions governing marriage and mourning are expressly inapplicable to Mongols and Inner Asians. See YTC 30, pp. 3b, 12b.

<sup>108</sup> See Paul Ratchnevsky, "Die mongolischen Grosskhane und die buddhistische Kirche," Johannes Schubert and Ulrich Schneider, eds., *Asiatica: Festschrift für Friedrich Weller zum 65 Geburtstag* (Leipzig: Harrassowitz, 1954), p. 503.

<sup>109</sup> YS 105, p. 2673; trans. Code 4, p. 243.

The laws also distinguished between Mongols and non-Mongols in cases of violations of the state monopolies.<sup>110</sup>

The ethnic Chinese were subjected to discriminatory legislation. If a Mongol beat a Chinese in a brawl, the latter was not permitted to return the blows but only to lodge a formal complaint.<sup>111</sup> Chinese were not permitted to hunt or to practice boxing, fencing, or wrestling.<sup>112</sup> The possession of weapons and horses by Chinese was a punishable offense.<sup>113</sup> Discrimination against Chinese even went to the extent of forbidding off-duty Chinese soldiers, policemen, and lictors from bearing arms, which had to be turned in to the Mongolian *darughachi*.<sup>114</sup>

In conclusion, although certain Chinese ethical principles were incorporated into later Mongolian law during the long cultural confrontation and melding, in general the influence of Chinese legal thinking on the Mongols was not significant. The Mongolian penal system remained fundamentally intact, based mainly on the system of financial penalties, most of which bore the character of private compensation; and Chinese-style corporal punishments were adopted only in a few instances.<sup>115</sup> The subtle distinctions made by the Chinese as to motive and intent in criminal behavior never came to play a major role in Mongolian sentencing. Rather, such objective circumstances as the amount of damage remained decisive: the concepts of attempted action and mitigation were barely mentioned. Thus, after the Mongols' return to the steppes, their own traditional customary law was revived.

<sup>110</sup> Code 2, p. 156. <sup>111</sup> YS 105, p. 2673; trans. Code 4, p. 242; YTC 44, p. 8a.

<sup>112</sup> Ch'ü, *Law and Society*, p. 203. <sup>113</sup> *Ibid.*, p. 202. <sup>114</sup> See the texts in YTC 35 and 38.

<sup>115</sup> See Alinge, *Mongolische Gesetze*, p. 71.

#### LIST OF ABBREVIATIONS

Code	Paul Ratchnevsky, <i>Un code des Yuan</i>
YS	<i>Yuan shih</i> 元史
YTC	<i>Yuan tien-chang</i> 元典章