



# The Evolution of the Law of Theft from the Western Zhou (ca. 1045 BCE–771 BCE) to the Tang (618–907 CE)

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## 1. Introduction: the Pre-Qin Law

The principles which underlie the traditional Chinese law of theft up to the end of the Qing in 1911 begin to be developed after the rise of the centralised, bureaucratic state in the fourth century BCE. At this critical epoch in the social and political development of the country, the new elite of ruler and officials began to implement a policy designed to control as many aspects of the lives of the ruler's subjects as possible. Since the main objective of the state was to secure the maintenance of law and order, among the new controls instituted were laws designed to protect the property of the state and its subjects by the imposition of punishments for theft. No doubt it is correct to see these rules as designed primarily to secure good behaviour on the part of the people, but one cannot exclude the possibility of a more 'benevolent' perspective. The state arguably did recognise that individuals had a right to the undisputed possession and enjoyment of their property (subject to exactions made by the state itself) and therefore sought to protect that right.

The intervention of the early Chinese state in matters of theft took the form with which we are familiar from modern Western law, that is, the prosecution of the thief by the state authorities and the imposition of the appropriate punishment at the hands of the state, a procedure which excluded any particular role (other than evidentiary) for the parties. This way of handling theft provides a complete contrast to that generated by Roman law at approximately the same time. The rules developed by the Roman jurists from the third century BCE to the third century CE placed the focus not upon the intervention of the state as the prosecutor and punisher of thieves but upon the private right of the victim to obtain compensation from the perpetrator. Of course the Roman state, certainly by the end of the classical period, also introduced a form of criminal procedure in which thieves, instead of exposure to a delictual action for compensation on the part of the victim, were





instead tried and punished by the state. However, the main emphasis in the law was on the private right rather than the public wrong<sup>1</sup>.

What is of particular interest, when we consider the history of the Chinese rules on theft, is that, prior to the rise of the bureaucratic and centralised state, the treatment of theft resembled that developed in Roman private law, that is, the theft was treated as a matter for compensation between the thief and the victim. We know this from one precious piece of evidence, an inscription recorded on a bronze vessel (the Hu *ding*) probably cast in the period 917–866 BCE during the Western Zhou. At this time, the Chinese state did not have an effective system of central administration. The royal court might be involved in matters of litigation, but the prime movers were the noble who had suffered the wrong and the noble who had allegedly been responsible for it<sup>2</sup>.

The inscription of the Hu *ding* in part records a case in which the subordinates of a noble, Guang, at a time of famine, stole (*kou*) a large quantity of grain from Hu, the maker of the vessel. The act of theft is described by the term *kou* (rob) rather than the more usual term for theft (*dao*). This may indicate that the act of robbery was open and brazen, even forcible, but no actual details are given in the inscription. Hu referred the matter to the royal court and a prince was assigned to judge the case. The judge initially sentenced Guang to restore to Hu double the amount of grain that had been stolen, and further provided that that amount in turn was to be doubled if no repayment had been made by the time of the next harvest. Guang found it impossible to raise even double the amount of the stolen grain. In the end, it seems that the matter was settled on the basis of the surrender by Guang to Hu of a certain number of fields and men<sup>3</sup>. Although we cannot extract from this isolated case any detailed information on what may be termed the Western Zhou law of theft, the striking point is that the principle underlying the

1. O.F. ROBINSON, *The Criminal Law of Ancient Rome*, Baltimore, Maryland: The John Hopkins University Press, 1995, p. 24.
2. For the Western Zhou we have evidence only of litigation between persons of high rank, where they took the trouble to have details of the lawsuit inscribed on a commemorative bronze.
3. The main Western accounts of the Hu *ding* with translations of its inscription are: Henri MASPERO, *Le serment dans la procédure judiciaire de la Chine antique*, in *Mélanges chinois et buddhiques*, Paris 1934, III, pp. 277–280; Herrlee G. CREEL, *The Origin of Statecraft in China. Volume One. The Western Chou Empire*, Chicago and London: The University of Chicago Press 1970, pp. 181–182; Léon VANDERMEERSCH, *Wangdao ou la voie royale. Recherches sur l'esprit des institutions de la Chine archaïque. Tome II. Structures politiques, Les rites*, Paris: École française d'extrême-orient 1990, pp. 251–252; Ulrich LAU, *Quellenstudien sur Landvergabe und Bodenübertragung in der westlichen Zhou-Dynastie 1045?–771 v. Chr.*, Sankt Augustin: Institut Monumenta Serica 1999, pp. 368–383; Lutz SHUNK, *Dokumente zur Rechtsgeschichte des Alten China. Übertragung und Historisch-Philologische Kommentierung Juristischer Bronzeinschriften der West-Zhou-Zeit (1045–771 v. Chr.)*, Inaugural Dissertation: Westfälischen Wilhelms-Universität zu Münster (Westf) 1994, pp. 139–165; Laura SKOSEY, *The Legal System and Legal Tradition of the Western Zhou, ca. 1045–771 BCE*, Doctoral dissertation: University of Chicago, 1996, pp. 98–99, 132, 357–359.





judgment is that the thief should restore to the victim not just what he had stolen but an additional amount of property by way of compensation. This is no different from the principle underlying the Roman actions arising from *furtum manifestum* and *nec manifestum*.

## 2. The Qin Law of the Third Century BCE

By the third century we are in a totally different world from that of the Western Zhou. The rise and final triumph of the state of Qin in the fourth and third centuries BCE was due in great part to the effective system of central control established by the Qin rulers. To ensure this control, detailed rules were enacted, covering many aspects of the lives of the people, including the protection of an individual's property and the punishment of persons (whether officials or not) who benefited from goods to which they were not entitled<sup>4</sup>. Fortunately, thanks to an archaeological discovery in 1975, we now know a great deal about the laws of the Qin state. A large quantity of bamboo slips containing details of the Qin laws were excavated from the tomb of a minor official. Although none of the actual statutes (*lü*) on theft is extant, a detailed commentary on the statutes entitled 'Questions and Answers on Points of Law (*Falü Dawen*)' has been preserved<sup>5</sup>. This contains several discussions of liability arising on the ground of theft, in the course of which the terms of the statutory rules on theft are probably quoted. Furthermore, from the very beginning of the Han we have a reported case of 200 BCE in which there is explicitly cited a *lü* on theft<sup>6</sup>. This almost certainly was inherited directly from the Qin. Hence we can be reasonably sure that the statutes enacted by the Qin rulers in the third century BCE included the regulation of theft, though we cannot be equally sure that at this

4. For general accounts of the law of theft in Qin and Han times see A.F.P. HULSEWÉ, "The Wide Scope of Tao 'Theft' in Ch'in-Han Law", *Early China* 13 (1988), pp. 166–200; YAN Xiaojun, "Laws of Theft of Qin and Han Dynasty and their Legislative Evolution", *Chinese Journal of Law* (2004.6), pp. 137–146 (in Chinese). See also Miranda BROWN and Charles SANFT, "Categories and Legal Reasoning in Early Imperial China: The Meaning of Fa in Recovered Texts", *Oriens Extremus* 56 (2011), pp. 283–306, for discussion both of the Han law of theft and the meaning of the phrase *tongfa* ('the same law as') in Qin and Han law.
5. For the texts of these laws see part A, volume one of LIU Hainian and YANG Yifan (eds.), *Zhongguo zhen xi falü dianji jizheng* (*Rare Ancient Codes of Chinese Law*), Beijing: Kexue 1994, and for a complete translation A.F.P. HULSEWÉ, *Remnants of Ch'in Law. An Annotated Translation of the Ch'in Legal and Administrative Rules of the 3<sup>rd</sup> Century B.C. Discovered in Yun-meng Prefecture, Hu-pei Province, in 1975*, Leiden: E.J. Brill 1985.
6. Ulrich LAU and Michael LÜDKE, *Exemplarische Rechtsfälle vom Beginn der Han-Dynastie: Eine kommentierte Übersetzung des Zouyanshu aus Zhangjiashan/Provinz Hubei*, Tokyo: Research Institute for Languages and Cultures of Asia and Africa. Tokyo University of Foreign Studies 2012, p. 197. The law quoted in the case is part of the statute (*lü*) which determined the punishment according to the value of the stolen goods (see below at note 9). In the same place the text cites an ordinance (*ling*) specifying that, where an official steals, he is still to suffer the mutilating punishment prescribed for the offence and is not to be entitled on the ground of privilege to a reduction in or redemption of the punishment.





time there was a separate section of the collected statutes headed ‘statutes on theft (*dao lü*)’, as was the case in the early Han collection of statutes promulgated in 186 BCE<sup>7</sup>.

The Qin commentary *falü dawen*, although it contains no definition of the offence, distinguished between two main categories of theft: gang theft (*qun dao*), committed by two or more persons, and ordinary theft (*dao*), committed by one person, the former being punished more severely than the latter. In this paper we are concerned only with the category of ordinary (not gang) theft<sup>8</sup>. The treatment of theft in Qin law already reveals the pattern of punishment that is to characterise the traditional law throughout its history. The severity of the punishment is normally to be related to the value of the goods stolen (*zang*), but in the case of special kinds of property, the punishment, at least the minimum punishment, was fixed independently of intrinsic value.

In the case of goods which had no special significance, punishment depended upon value. Where the goods were worth more than 660 cash, the thief was to be tattooed and become a *chengdan* (earth pounder), that is, serve a period of forced labour in fetters with shaved head. Where the goods were valued at 600 or less but more than 110 cash, the thief was to have his beard shaved and become a *lichen* (bondservant), also a punishment entailing forced labour<sup>9</sup>. In both cases labour was probably for life. We have no information on the punishment for the theft of goods worth 110 cash or less, except for one strange text that specifies that, where a person had thievishly picked another’s mulberry leaves with a value of less than one cash, the punishment was 30 days labour for the government<sup>10</sup>. It is not certain that we have here a general rule for the punishment of the theft of goods worth less than one cash.

Where more than one person was concerned in the theft and the stolen goods afterwards divided between them, each was still to be liable for the whole value. This important principle, which characterised the traditional law throughout its history, can be deduced from a passage in the *falü dawen*, which states that A and B, in ignorance of each other, separately went to steal from C and happened to meet at C’s house. If the evidence showed that, before actually committing their

7. See the next section on Han law.

8. For gang theft see Geoffrey MACCORMACK, “Studies in the Traditional Chinese Law of Forcible Theft”, *The Journal of Comparative Law* 72 (2012), pp. 208–209.

9. These rules can be deduced from two passages in the *falü dawen*: D27 and D28 in HULSEWÉ, *Ch’in Laws*, pp. 129–130 (texts in *Rare Codes I*, pp. 554–555). We do not know whether the relevant Qin statute, as the corresponding Han law (see below at note 26) specified further limits in the scale of value for the punishment of thieves. For a discussion of the hard labour punishments see Geoffrey MACCORMACK, *The Hard Labour Punishments in the Ch’in and Han Dynasties of China*, in *Fides Humanitas Ius. Studi in onore di Luigi Labruna*, Napoli: Editoriale Scientifica 2007, pp. 3065–3079.

10. HULSEWÉ, *Ch’in Laws*, p. 112 (D6); LIU and YANG, *Rare Codes I*, p. 542.





thefts, they had agreed to steal together, then each was liable for the whole value of what had been taken, not just the value of his own share<sup>11</sup>.

One other important general principle is enshrined in the Qin laws, namely that the stolen goods should normally be returned to the owner. The statutes provided that, where a thief had sold the stolen property and then with the proceeds bought other goods, the latter were to be restored to the owner in lieu of those originally stolen. The commentary on the statutes explains that the purchaser of the latter might keep them<sup>12</sup>. What is not stated is whether the thief remained under an obligation to reimburse the owner, where the original goods stolen had been spent or disposed of and the thief now had nothing in their place. Here, it seems, the loss of the property was to be born by the owner who cannot expect repayment from the thief.

Special rules governed the theft of certain kinds of property, in particular that to which great public importance attached, such as materials used in state sacrifices. The Qin laws prescribed a particular punishment (unknown) for ‘thievishly (*dao*)’ digging up and appropriating the ‘preparations’ used in royal sacrifices after they had been buried<sup>13</sup>. Another, slightly corrupt, text suggests that, where the ‘preparations’ were stolen before the completion of the official sacrifice, the offender was to be fined, have his beard shaved, and become a bond servant (*lichen*). Even though he had stolen a single kidney worth less than one cash, he was still to become a bondservant<sup>14</sup>. A text, whose interpretation has caused some difficulty, implies that the punishment of forced labour known as *nai* (‘shaving of the beard’) was imposed for the theft of the seal of an assistant prefect<sup>15</sup>. Almost certainly the Qin statutes would have had further rules dealing with the theft of the seals of other officials and of official documents.

Whether land was regarded as property capable of theft is uncertain. One text specifies: ‘Thievishly (*dao*) to shift border marks is punished by redemption of shaving the beard (*nai*)’<sup>16</sup>. The border marks were small piles of earth demarcating the paths lying between fields used by different persons. The term *dao* may imply that the boundary mark was deliberately moved by a field owner with a view to adding to his field some land from another’s field or from the path. But it is

11. HULSEWÉ, *Ch’in Laws*, p. 123 (D11); LIU and YANG, *Rare Codes I*, p. 544.

12. HULSEWÉ, *Ch’in Laws*, p. 126 (D20); LIU and YANG, *Rare Codes I*, p. 549.

13. HULSEWÉ, *Ch’in Laws*, p. 128 (D23); LIU and YANG, *Rare Codes I*, pp. 551–552.

14. HULSEWÉ, *Ch’in Laws*, pp. 127–128 (D21); LIU and YANG, *Rare Codes I*, p. 550.

15. HULSEWÉ, *Ch’in Laws*, p. 159 (D116); LIU and YANG, *Rare Codes I*, pp. 601–602. Hulsewé renders the operative words of the text (*dao shu*) as ‘fraudulently copy’ the seal, but the editors of *Ernian liling* are probably right in treating the case as one of straightforward theft: PENG Hao, CHEN Wei, and KUDO Motoo (eds.), *Ernian liling yu Zouyanshu: Zhangjiashan ersiqi hao Han mu chutu falü wenxian shidu* (*The Han Laws and Casebook of 186 BCE Excavated from Zhangjiashan Tomb No. 247*), Shanghai: Shanghai guji chubanshe 2007, p. 111 n. 1.

16. HULSEWÉ, *Ch’in Laws*, p. 164 (D136); LIU and YANG, *Rare Codes I*, p. 568.





perhaps unwise to read too much into the use of this specific term. The reference may have been simply to the commission of some illegal act without entailing the illicit appropriation of land.

Finally, there remain for consideration two special cases of theft, that is, 'theft' committed by one family member against another, and 'theft' committed by the misappropriation or embezzlement of government property. For the first case we find clearly enunciated in the Qin laws the principle that theft cannot be committed between parents and children. One text states that, where a child has 'stolen (*dao*)' from a parent, no official accusation can be made<sup>17</sup>. Another further states that a son who has stolen his father's slaves or cattle is not to be denounced even after the father's death<sup>18</sup>. A third text states explicitly that "a father stealing (*dao*) from his children is not a case of theft (*dao*)"<sup>19</sup>. The restriction in these texts to cases of parents and children leaves it unclear whether the authorities would have recognised and punished theft committed by other relatives against each other.

The texts on the liability of a person, whether an official or a private individual, who wrongfully appropriated government property, reveal two approaches. One is to hold that the offence is to be punished 'by the same law as theft (*yu dao tong fa*)', the other is to treat the offence as 'being theft (*wei dao*)'. Thus, the appropriation (consumption) of military rations to which one was not entitled constituted theft (*wei dao*)<sup>20</sup>. Ordinary persons who absconded with tools or arms that had been lent to them by the government, when subsequently caught, were to be made liable on the ground of theft (*wei dao*) according to the value of the property<sup>21</sup>. On the other hand, the statutes provided that, where the official in charge of a government storehouse concealed shortages in the grain or other goods kept there, the case was to be treated in the same way as theft (*yu dao tong fa*). The same formula is used to describe the liability of officials who privately borrow money stored in a prefectural treasury<sup>22</sup>.

One can see the difference between the two classes of case. Where the offence is denominated *wei dao*, we have a case of direct and unlawful appropriation of property belonging to the government, even though, as in the example of the borrowed arms or tools, the thief might initially have had a right to the possession of the property. But to conceal shortages of grain in a warehouse under one's jurisdiction or to borrow money from the treasury, which one intends to return, is to commit an act falling short of direct and unlawful appropriation of government property. Hence these offences are punished not as theft but as offences analogous

17. HULSEWÉ, *Ch'in Laws*, p. 148 (D86); LIU and YANG, *Rare Codes I*, p. 586.

18. HULSEWÉ, *Ch'in Laws*, p. 149 (D89); LIU and YANG, *Rare Codes I*, p. 589.

19. HULSEWÉ, *Ch'in Laws*, p. 125 (D17); LIU and YANG, *Rare Codes I*, p. 547.

20. HULSEWÉ, *Ch'in Laws*, p. 163 (132); LIU and YANG, *Rare Codes I*, p. 609.

21. HULSEWÉ, *Ch'in Laws*, p. 157 (D109); LIU and YANG, *Rare Codes I*, p. 599.

22. HULSEWÉ, *Ch'in Laws*, p. 129 (D26); LIU and YANG, *Rare Codes I*, p. 553.





to theft. The law of theft is to apply in the sense that the offender is punished according to the value of what he has concealed or borrowed.

### 3. The Han Law

The Qin empire collapsed in 206 BCE and was succeeded by the Han dynasty. Its founding emperor, Gaozi, despite public statements to the effect that the harsh Qin laws were no longer to be used, in fact adopted the whole structure of Qin laws, which he found equally necessary for the administration of his newly conquered territories. The main changes were probably limited to a reduction in the severity of some of the Qin penal rules.

The early collection of statutes, promulgated not long after Gaozi's death (194) in 186 BCE, contains a number of rules on theft, some relating to 'gang theft', with which we are not here concerned<sup>23</sup>, others to ordinary theft. Most of the rules are to be found in the section of the statutes headed '*dao lü* (statutes on theft)', but a few have been included in the section headed '*zei lü* (statutes on violence)'. Two general points may be made with respect to this classification of the rules. The *zei lü* are concerned primarily with the most serious offences, such as rebellion, homicide, arson, and counterfeiting government seals. Yet the section also contains two statutes concerning ordinary theft, one relating to the fraudulent alteration of a contract, the other to the theft of documents stamped with an official seal<sup>24</sup>. The reason for their appearance among the *zei lü* is that the alteration of a contract is subsumed under the general head of counterfeiting, while theft of a government document also seems to have been treated as analogous to the offence of counterfeiting. The section on *dao lü*, as one might expect, contains a number of rules relating to ordinary or gang theft, but it also has other rules defining separate and distinct offences, such as the abduction and sale of a free person or the taking of another person as hostage. Here the ground of the classification of the offence under the head of *dao lü* appears to have been the intent on the part of the offender of making an illicit profit from the act, even though the abducting or kidnapping of another person was not theft of that person and any property thereby acquired, for example as ransom, was not strictly theft of that property<sup>25</sup>.

Han law with respect to ordinary theft exhibits the same two principles as the Qin law in which punishment is correlated with either the value or the nature of the property stolen. The first statute in the section on *dao lü* specifies that, where, in a case of theft, the value of the *zang* exceeds 660 cash, the offender is to be tattooed and made a *chengdan* 'earth pounder' or *chong* 'grain pounder' (if female) convict. If the value was less than 660 but more than 220 cash, the same period of

23. See note 8 above.

24. See further below at notes 33, 53 on these texts.

25. We do not consider in this paper the offence of kidnapping a free person, but it is interesting that this offence is still in the Tang code contained in the section on 'violence and theft' (article 292).





forced labour applicable to an ‘earth pounder’ or ‘grain pounder’ was imposed, but there was no tattooing. If the value was less than 220 but more than 110 cash, the offender was to have his beard shaved and become a *lichen* ‘bondsman’ or (if female) a ‘bondswoman’. If the value was less than 110 but amounted to 222 or more cash, a fine of four ounces of gold was to be imposed, reduced to one ounce, where the value was between 2 and one cash<sup>26</sup>. These rules undoubtedly follow, at least in part, the earlier Qin rules. Clearly, the rules promulgated in 186 BCE did not remain the same throughout the Han dynasty, a period spanning four centuries, but we do not have further information as to the way in which the correlation between value and punishment changed. Equally, the Han law followed the Qin in making co-thieves each liable for the whole of what was taken. Another statute contained in the *dao lü* specifies that, where thieves plot together and proceed to steal, although each takes only a particular portion of the goods, he is still liable for the full value of what was stolen<sup>27</sup>.

The Qin principle that the stolen goods should be restored to the owner is also followed by the Han. A rule contained in the *dao lü* specifies that, where a thief has stolen from another person, on discovery of the stolen goods, they are to be restored to the owner<sup>28</sup>. We know from the Legal Treatise of the *Jinshu* (*History of the Jin Dynasty*) that, when the *Xinlü* (*New Code*) of (Three Kingdoms) Wei was drafted (third century CE), the responsible officials transferred the clause on ‘returning the stolen goods (*zang*) to the owner’ from the old Han *dao lü* to a new section of the code headed ‘restoration of the *zang*’<sup>29</sup>. This suggests that throughout the Han dynasty the rule on return of the goods to the owner remained in the *dao lü*. We still do not know the position where the thief had spent or made away with the stolen goods and had nothing in their place. Was an innocent purchaser now liable to restore the goods to the owner?

A complicating factor is introduced by another rule from the Han quoted by Zhang Sinong in his commentary to the *Zhouli* (*Rites of Zhou*). This states that stolen property, along with the weapons used to kill or wound a person, was confiscated by the authorities<sup>30</sup>. It is possible, as is suggested by article 32 of the Tang

26. PENG, CHEN, and KUDO, *Laws of 186 BCE*, p. 112 (slips 55–56). For the Han forced labour punishments, limited in time, see the convenient table in Anthony J. BARBIERI-LOW, *Artisans in Early Imperial China* (Seattle and London: University of Washington Press, 2007), pp. 228–229.

27. PENG, CHEN, and KUDO, *Laws of 186 BCE*, p. 112 (slip 58).

28. PENG, CHEN, and KUDO, *Laws of 186 BCE*, p. 113 (slip 59).

29. FANG Xuanling, *Jinshu* (*The History of the Jin Dynasty*), Beijing: Zhonghua 1974, 3.925 (this work was completed in 646 CE). See also Robert HEUSER, *Das Rechtskapitel im Jinshu. Ein Beitrag zur Kenntnis des Rechts in frühen chinesischen Kaiserreich*, München: J Schweitzer 1987, pp. 94–95, and HULSEWÉ, *Theft*, p. 178.

30. The passage from Zhang’s commentary is cited by CHENG Shude, *Jiuzhao lü kao* (*Investigations into the Codes of Nine Dynasties*) Beijing: Zhonghua, 1988), p. 110. It is translated in Édouard





code<sup>31</sup>, that the state's right to the goods arose in a case where they were stolen from the original thief by a further person. Thus, where B stole goods from A, and C in turn stole those same goods from B, the goods in C's possession were not to be restored to B, but were confiscated by the state. If this is the correct interpretation of Zhang's observation, we are left with the problem of A's position. Was he now to receive nothing, or was B (as in Tang law) still liable to pay him the value of the goods<sup>32</sup>?

We do have several examples from different times in the dynasty of punishments for the theft of particular kinds of property. The earliest is the rule contained in the *zei lü* of 186 BCE, to the effect that the theft of government documents stamped with the seal of the issuing office is to be punished with a period of forced labour known as *nai* (shaving of the beard).<sup>33</sup> This again echoes the corresponding Qin rule<sup>34</sup>. A little later, from the reign of emperor Wen (179–156 BCE), a case occurred of the theft of jade rings from the funerary temple of the Han founder, emperor Gao. The chief law officer ('commandant of justice *tingwei*') proposed that the thief be beheaded in accordance with a statute which required a memorial to be submitted to the emperor where someone stole objects from the imperial ancestral temples or personally used by the emperor<sup>35</sup>. There are two difficulties with the interpretation of this law. First it is unclear from the wording of the text whether it deals with one class of case, namely, the theft of objects used by the emperor when performing sacrifices in the imperial ancestral temple<sup>36</sup>, or with two classes of case, namely, the theft of objects from the ancestral temple or of those used by the emperor<sup>37</sup>. Second, the text of the law does not seem to have prescribed the punishment of beheading<sup>38</sup>. Rather, it established that a memorial was to be submitted with a punishment proposed for the emperor's consideration<sup>39</sup>. However, it seems

BIOT, *Le Tcheou-li ou Rites des Tcheou. Tome II*, Paris 1851 (Reprinted Taibei: Chengwen 1975), p. 363 and n. 7.

31. WALLACE JOHNSON, *The Tang Code. Volume I, General Principles*, Princeton, New Jersey: Princeton University Press 1979, p. 180.
32. For the Tang law see below at note 136.
33. PENG, CHEN, and KUDO, *Laws of 186 BCE*, p. 111 (slip 53).
34. See above at note 15.
35. SIMA QIAN, *Shiji (Historical Records)*, Beijing: Zhonghua 1972, 9.2755 (this work was completed in 91 BCE); BURTON WATSON, *Records of the Grand Historian of China. Translated from the Shih chi of Ssu-ma Ch'ien. Volume I. Early Years of the Han Dynasty 209–141 B.C.*, New York and London: Columbia University Press 1961, p. 537; HULSEWÉ, *Theft*, p. 172.
36. So Hulsewé.
37. SHEN Jiaben, *Lidai xingfa kao (Investigations of Penal Law in Successive Dynasties)*, Beijing: Zhonghua 1985, 3.1393, whose interpretation is followed here.
38. Contra Hulsewé.
39. See Yongping LIU, *Origins of Chinese Law. Penal and Administrative Law in its Early Development*, Hong Kong, Oxford, New York: Oxford University Press 1998, p. 282, 314 n. 118.





that in such cases the regular practice was the proposal of beheading, so much so that the commandant of justice in the case of the jade rings remonstrated when the emperor wished to order extermination of the offender's clan.

Later sources suggest that after the time of emperor Wen there may have been different statutes dealing with the theft of objects used in imperial sacrifices or used personally by the emperor. An early Tang commentary on the 'Book of Documents *Shujing*' notes that that under the statutes of the Han and (Three Kingdoms) Wei dynasties those who stole objects used in the state sacrifices or in the imperial ancestral temples were to be put to death regardless of the amount stolen<sup>40</sup>. A source from the second century CE quotes part of a Han statute to the effect "those who dare to steal objects used by Him Who Rides in a Palanquin (the emperor)...."<sup>41</sup>. The law probably covered things like the imperial chariots, horses, clothing, or food. Comparison with the other laws cited, in particular that cited in the case of the jade rings, suggests that the punishment prescribed by the Han statute was death.

Cases involving the theft of property from imperial tombs may also have been treated as falling under the law dealing with 'ancestral shrines'. The historical sources identify two such cases, although with few details. In 113 BCE some persons dug up and stole offerings of money made at the tomb of emperor Wen<sup>42</sup>, while in 62 BCE the grand ceremonialist was dismissed from office after the discovery that objects had been stolen from the tomb of emperor Wu<sup>43</sup>. However, there may have been a special law punishing with death the theft of cypress trees from the imperial mausolea<sup>44</sup>.

Special punishments were also attached under the Han to certain other kinds of property. In the early part of the Former Han the theft of weapons from a military arsenal or of goods worth 100 cash or more from the garrisons in the border regions was punishable by beheading<sup>45</sup>. One may compare a rule known to have been abolished in 42 CE under which the theft of 50 bushels of grain or more in the border commanderies was punishable by death<sup>46</sup>. The theft of horses, at least in

40. CHENG, *Investigations into Codes of Nine Dynasties*, p. 61; HULSEWÉ, *Theft*, p. 172.

41. CHENG, *Investigations into Codes of Nine Dynasties*, p. 61; HULSEWÉ, *Theft*, p. 172.

42. SIMA QIAN, *Historical Records*, 10.3242; BURTON WATSON, *Records of the Grand Historian of China. Translated from the Shih chi of Ssu-ma Qian. Volume II: The Age of Emperor Wu 140–circa 100 B.C.*, New York and London: University of Columbia Press 1961, p. 434; HULSEWÉ, *Theft*, p. 192 n. 47.

43. BAN GU, *Hanshu (History of the Former Han Dynasty)*, Beijing: Zhonghua 1975, 3.805 (this work was compiled between 58 and 76 CE); HULSEWÉ, *Theft*, p. 172.

44. CHENG, *Investigations into Codes of Nine Dynasties*, p. 113; HULSEWÉ, *Theft*, p. 172.

45. These laws are quoted in one of the decisions attributable to the statesman Dong Zhongshu (179–ca. 114 BCE): CHENG, *Investigations into Codes of Nine Dynasties*, p. 127, 164; HULSEWÉ, *Theft*, p. 173.

46. FAN YE, *Hou Hanshu (History of the Later Han Dynasty)*, Beijing: Zhonghua 1973, 1.69 (this work was presented to the throne in 445 CE); HULSEWÉ, *Theft*, p. 180; LIU, *Origins of Chinese*





the time of emperor Wu (reigned 140–86 BCE), was punished capitally; the theft of oxen was also punished more severely than that of other animals of comparable value<sup>47</sup>.

We have a few cases in which the theft of land is mentioned as an offence, but there is no evidence that the statutes themselves contained rules on this matter. In 148 BCE a royal prince committed suicide when under investigation for the offence of ‘encroaching upon (*qiu*)’ land belonging to the temple of emperor Wen, in order to build his own palace<sup>48</sup>. In 118 BCE the chancellor, Li Cai, was accused of two crimes: stealing (lit. ‘thievishly taking *dao chu*’<sup>49</sup> over thirty acres of public land, which he had then sold for a large sum of money, and ‘thievishly taking’ some land from the enclosed area of emperor Jing’s mausoleum for his own grave site. He committed suicide before interrogation<sup>50</sup>. Finally, in 29 BCE the chancellor, Kuang Heng, was accused inter alia of ‘monopolising land and stealing (*dao*) soil’. He was merely dismissed, the offence not being investigated and sentenced. It is not clear exactly to what offence this section of the indictment referred. The words may merely have been describing the main offence charged against Kuang, namely, that, even after he had become aware that a section of his fief had been mistakenly allocated to him, he had still continued to collect the land tax from the whole area. If this is correct, we have essentially an offence of ‘misappropriation of government funds’, rather than one of theft of land<sup>51</sup>.

We now turn to the other kind of special case of theft in the Han, that is, cases in which the requirement of secretly appropriating another’s property is missing. We may distinguish, as for the Qin, between cases in which the offence was still treated as theft and cases in which the same rules as for theft were to apply. The statutes of 186 BCE already contain examples of both kinds of offence<sup>52</sup>. The *zei lü* contain a rule which treats as theft (*wei dao*) the obtaining of property through the fraudulent alteration of a document in two parts (*quanshu*), such as an agreement

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*Law*, p. 293.

47. CHENG, *Investigations into Codes of Nine Dynasties*, p. 113; HULSEWÉ, *Theft*, p. 170.

48. SIMA QIAN, *Historical Records*, 6.2094; WATSON, *Records of the Grand Historian I*, p. 451; HULSEWÉ, *Theft*, p. 172.

49. The term *qiu* (encroach upon) is also used.

50. SIMA QIAN, *Historical Records*, 3.1038; HULSEWÉ, *Theft*, pp. 172–173.

51. BAN GU, *Hanshu*, 10.3345–6; HULSEWÉ, *Theft*, pp. 173–174, 181.

52. The *dao lü* of 186 BCE also contain a statute which punishes with dismemberment (the most severe of the death penalties in early Han law) members of a gang of thieves who extorted property from another through acts of intimidation (*konghe*). This clearly refers to an aggravated case of intimidation. We know that at some later stage Han law had a separate statute on obtaining property through intimidation (compare HULSEWÉ, *Theft*, p. 178), but we do not know how this offence was punished. Article 295 of the Tang code, contained in the section on ‘violence and theft’, punishes as ‘comparable to theft’ (with an increase in punishment of one degree) the obtaining of property by threats.





for sale<sup>53</sup>. The *dao lii* contain a rule specifying that a person who accepts bribes and subverts the law is to be sentenced for theft (*wei dao*) with respect to the amount of the bribe. The same punishment applies to the person who gave the bribe<sup>54</sup>.

We have some important information from other sources on the offence of receiving bribes and subverting the law (*shou qiu wang fa*). First, we should note the definition of *shou qiu* expressed in Zhang Fei's preface to the Jin code, which is equally applicable to the Han law<sup>55</sup>. Zhang defines this phrase as 'not to seek, but voluntarily give'<sup>56</sup>. The meaning is that, where someone has voluntarily offered a bribe to an official, the element of the offence denominated *shou qiu* is satisfied. If, in consequence of the bribe (whether accepted before or after the act of subversion), the law is then twisted in favour of the briber, both parties (official and giver of the bribe) commit the offence of *shou qiu wang fa*.

The text of what appears to be a different statute, one concerned with the offer of a bribe to subvert the law, is preserved on a wooden strip excavated at Dunhuang at the beginning of the twentieth century. It states:

“when expressing in words an agreement to accept a bribe to corrupt the law, both parties will be liable for the value of the illicit profit, this being considered as theft; it will be confiscated”<sup>57</sup>.

This is possibly a refinement added to the law after 186 BCE, to provide for the case in which there has been an agreement to pay and receive a bribe, but no property has actually passed. The sentence is based on the value of what has been promised as a bribe, and it is this property which is forfeit to the government<sup>58</sup>. In this statute it is expressly stated that the amount of the promised bribe is forfeit to the government, a rule that would also have applied under the law of 186 BCE to any bribe actually paid.

53. PENG, CHEN, and KUDO, *Laws of 186 BCE*, p. 96 (slip 14). We may compare also a statute (196 [slips 159–162]) contained in the section on ‘passes and markets (*guan shi*)’, which provides, first, that where traders in the market do not register their transactions and so seek to avoid liability to tax, they are to be sentenced on account of theft (*wei dao*) in respect of the amount of the concealed tax, and, second, that traders who acquire property through deception or cheating are to be punished under the same law as theft (*yu tong dao fa*). On the second part of the statute see BARBIERI-LOW, *Artisans*, p. 54. In neither case is there a physical taking of another's property, but the difference in the language suggests that the avoidance of tax owed to the state was regarded as an offence more serious than that of ordinary cheating and therefore deemed to be closer to actual theft.

54. PENG, CHEN, and KUDO, *Laws of 186 BCE*, p. 113 (slip 60).

55. Compare the remarks of SHEN, *Investigations of Penal Law*, 3.1406.

56. For the text and translation see Benjamin E. WALLACKER, “Chang Fei's Preface to the Chin Code of Law”, *T'oung Pao* 72 (1986), p. 255.

57. LIU and YANG, *Rare Codes II*, p. 92; HULSEWÉ, *Theft*, p. 176.

58. So understood by SHEN, *Investigations of Penal Law*, 3.1407 and HULSEWÉ, *Theft*, p. 176, but contra, it seems, LIU and YANG, *Rare Codes II*, p. 93, who explain the language of the statute as referring to the expression of a reason for a bribe coupled with the actual receipt of property.





From these laws relating to taking or promising bribes and subverting the law, we have to distinguish the offence of ‘listening to requests (*ting jing*)’, not contained in the collection of statutes of 186 BCE, but evidenced from later sources. The commentator Ru Shun (221–265 CE) in a gloss to a passage in the *Hanshu* (*History of the Former Han*) cites the following law:

“In all cases where people on behalf of others make requests to officials to twist the laws (*wang fa*), and the deed has already been done, constituting a case of accepting the request and acting, all are to be sentenced as robber guards (*sikou*)”,

that is, they will be required to serve a period of forced labour for two years.<sup>59</sup> There is no mention of ‘property’ in the formulation of the statute. It simply established a fixed punishment for officials who improperly granted ‘requests’ from persons to bend the law in their favour<sup>60</sup>. An example of the application of this law occurred in 118 BCE when an imperial relative, Liu Shou, Superintendent of the Imperial Clan, privately ‘listened to requests’ without notifying the imperial clan and was sentenced to have his beard shaved and become a robber guard<sup>61</sup>. Nothing is said in this case about the receipt of bribes in return for complying with the private requests.

However, in another case from 68 BCE, recorded in the *Hanshu* (*History of the Former Han*), Wang Qian, who held an important secretarial position (*shang shu*) in the palace, was found guilty of “listening to requests and accepting illicit goods totalling six million cash”. He was either executed or committed suicide<sup>62</sup>. We appear here to have an elliptic reference to two distinct offences, ‘listening to requests’ and ‘taking bribes (to subvert the law)’. Ru Shun’s citation of the *lü* on *ting qing* appears as a gloss to the passage in the *Hanshu* recording Wang’s offence. Ru was explaining the term *ting qing*, but not the import of the ‘six million cash’. Since Wang had clearly subverted the law, the money paid to him amounted to a bribe falling under the head of *shou qiu*. Hence he had committed two offences, one light (*ting qing*), one serious (*shou qiu wang fa*).

Finally, we have to consider two further pieces of evidence for the existence of a separate rule concerned with the acceptance by officials of property from persons under their jurisdiction. The first is a definition contained in Zhang Fei’s preface to the Jin code, complementing that of *shou qiu* (*wang fa*). After defining *shou qiu* as “not to seek, but voluntarily give”, Zhang adds “where an official seeks property

59. SHEN, *Investigation of Penal Law*, 3.1407; HULSEWÉ, *Theft*, p. 176.

60. HULSEWÉ, *Theft*, p. 176 misunderstands this law by supposing that it applied to a case in which a bribe had actually been paid. He reaches this conclusion because he contrasts the law on *ting qing* with that on a promise to give a bribe to subvert the law. But the proper contrast is that between the law on *ting qing* (*wang fa*) and that on *shou qiu wang fa*. In the former no bribe is contemplated, in the latter it is, whether paid or promised.

61. SHEN, *Investigation of Penal Law*, p. 1407; HULSEWÉ, *Theft*, p. 176 (wrongly assuming that the punishment was three years labour [not two]).

62. SHEN, *Investigation of Penal Law*, p. 1407; HULSEWÉ, *Theft*, pp. 176–177.





from within his area of jurisdiction and then takes it, this is a case of illicit goods obtained through theft (*dao zang*)”<sup>63</sup>. This statement is an elucidation of a Jin statute on officials who accept goods within the area of their jurisdiction. The Jin statute in turn had been derived from the Han statutes<sup>64</sup>.

The second piece of evidence is an ordinance (*ling*)<sup>65</sup> of 156 BCE concerned with the acceptance by officials of presents from persons within their jurisdiction<sup>66</sup>. This replaced earlier rules which had already distinguished between the acceptance of food and drink by officials and the acceptance of other property. A new law was necessary because, in the opinion of emperor Jing, the punishment for the former case had been too severe and for the latter too lenient. The new ordinance now provided that, where food and drink had been offered and consumed, there was to be no liability where the value was repaid, but that, where other property had been offered and accepted it was to be treated as ‘illicit goods (*zang*)’ and the official sentenced on the ground of theft, that is, punished on the scale appropriate to theft according to the value of the property. What had been given was forfeit to the government. Although the offence of acceptance by officials of property within the area of their jurisdiction is not contained in the laws of 186 BCE, it seems clear from the enactment of the ordinance in 156 that the offence must have received statutory recognition shortly after 186.

A passage in the *Hanshu (History of the Former Han)* contains a brief reference to the indictment of a high official in the central government in 55 BCE for the offence (inter alia) of accepting from persons within his jurisdiction (subordinates) illicit goods (*zang*) amounting to 250 or above (perhaps ‘cash’ has to be understood here). This is clearly a reference to the same kind of law as that contained in the ordinance of 156<sup>67</sup>.

From references in the *Hou Hanshu (History of the Later Han)* we can gather that by the first century CE the acceptance by officials of presents of food and drink by officials was not in fact punished. The making of such gifts was regarded as part of the correct etiquette for the conduct of the relationship between an official and

63. See note 56 above.

64. See SHEN, *Investigation of Penal Law*, p. 1406. On Zhang Fei’s definitions see also below at notes 99–102.

65. In the Han there does not seem to have been any material difference between a *ling* and a *lü*. See A.F.P. HULSEWÉ, *Remnants of Han Law I*, Leiden: E.J. Brill 1955, pp. 31–32; *Theft*, p. 195 n. 72.

66. Homer H. DUBS, *The History of the Former Han Dynasty by Pan Ku. Translation, Volume One*, Baltimore: Waverly Press 1938, pp. 310–312; HULSEWÉ, *Theft*, pp. 175–176.

67. Ban Gu, *Hanshu*, 10.3781, with the explanation of the commentator Yan Shigu (581–645 CE). The passage is completely misunderstood by Burton WATSON, *Courtier and Commoner in Ancient China. Selections from the History of the Former Han by Pan Ku*, New York and London: Columbia University Press 1974, p. 21, who translates “He (the official) deserves the same penalty as those who accept bribes and subvert the law — two hundred and fifty blows with the stick!”.





his subordinates<sup>68</sup>. On the other hand, we do have references to the prosecution of officials for the offence of *shuo suo jian* (accepting presents from persons under their jurisdiction)<sup>69</sup> and to the dismissal in 43 CE of a high official for his failure to impeach two other officials for accepting presents totalling ten million cash<sup>70</sup>.

After 186 BCE the government enacted particularly draconian statutes dealing with the theft of government property by officials. These laws seem to have been distinct from the law on the acceptance of property within one's area of jurisdiction and to have imposed particularly severe punishments in an attempt to control embezzlement. By the early part of the first century BCE the statutes contained a rule punishing with beheading officials in charge, such as magistrates or administrators of commanderies who stole (*dao*) property worth 10 catties of gold (100,000 cash) or more. The statute is quoted by the commentator Ru Shun in explanation of a case of 14 BCE in which the administrator of a commandery was held liable *inter alia* for the offence of stealing (unspecified goods)<sup>71</sup>. Officials appear to have been condemned under this law in 72 BCE<sup>72</sup>, between 42 and 37 BCE<sup>73</sup>, and in the reign of emperor Cheng (32–6 BCE)<sup>74</sup>.

Similar laws applied in the Later Han. In 39 CE a senior minister died in gaol after being accused of embezzling more than 10 million cash during the years 33–9 when he was administrator of a commandery<sup>75</sup>. From the first century CE and later we have cases in which generals or officials were accused of 'cutting off and stealing (*duan dao*)' military provisions<sup>76</sup>, tax revenues<sup>77</sup>, or official cloth<sup>78</sup>, for which the

68. FAN YE, *HouHanshu*, 4.869–70, 5.1406; HANS BIELENSTEIN, "The Institutions of the Han Dynasty Volume IV: the Government", *The Museum of Far Eastern Antiquities Stockholm* 51 (1979), pp. 135–136.

69. FAN YE, *HouHanshu*, 7.2902 and n. 4 (Yan Shigu).

70. FAN YE, *HouHanshu*, 4.1032 with n. 1; BIELENSTEIN, *Institutions of the Han Dynasty*, p. 137.

71. BAN GU, *Hanshu*, 9.2902 with n. 4; HULSEWÉ, *Theft*, p. 180.

72. BAN GU, *Hanshu*, 2.695, 11.3655–6; HULSEWÉ, *Theft*, p. 181 (the minister of agriculture had stolen from the treasury 30,000,000 cash through a fraudulent scheme).

73. BAN GU, *Hanshu*, 10.3302, referring to a district magistrate accused under this law.

74. BAN GU, *Hanshu*, 10.3368, 3387, 3425, noting two cases of magistrates accused under the law and the case of Kuang Heng in 29 BCE (above at note 51).

75. FAN YE, *HouHanshu*, 9.2566; HULSEWÉ, *Theft*, p. 181.

76. 119 CE: FAN YE, *HouHanshu*, 3.616; HULSEWÉ, *Theft*, p. 181. Compare the Qin rule on the illicit appropriation of military rations above at note 20.

77. 200 CE: FAN YE, *HouHanshu*, 8.2269; HULSEWÉ, *Theft*, p. 182.

78. Ca. 217 CE: CHEN SHOU, *Sanguo zhi (History of the Three Kingdoms)*, Beijing: Zhonghua 1973, 2.384–5 this work was presented to the throne in 297 CE); HULSEWÉ, *Theft*, p. 182.





punishment at the end of the Han was beheading<sup>79</sup>. The technical phrase *duan dao* seems to have been cited from the statutory definition of the offence<sup>80</sup>.

After this lengthy excursus on the various laws relating to bribery, listening to requests, and the acceptance of property, we may return to the statutes enacted in 186 BCE. The *zei lü* also contain three separate statutes which apply the formula ‘apply the same law as theft (*yu dao tong fa*)’. The implication is that, although the facts under consideration do not constitute theft on the part of the offender, he should nevertheless be punished as though he had committed theft. The first case deals with the liability of persons who are implicated in an act of theft, although they did not actually commit theft themselves. A person who plots to send another to steal or instructs another as to where theft can be committed, if the latter acts accordingly, is to be punished under the same law as that applicable to the actual thief<sup>81</sup>. A similar rule probably obtained in the Qin<sup>82</sup>.

Second, we have the case in which persons ‘illicitly *dao*’ smuggle property across the frontier with the concurrence of border officials. Both the actual transporters and the complicit officials are to be punished under the same law as theft. The position is the same where official envoys themselves ‘smuggle’ goods across the frontier without the necessary permissions<sup>83</sup>. It is clear that the officials who have knowledge of the smuggling or even the envoys who take unauthorised goods across the frontier have not themselves committed theft. They have effectively broken the law which prohibits certain classes of goods, such as military implements, being taken over the frontier. The position with respect to the actual smugglers is less clear. Although the word *dao* is used in the text to qualify the act of taking property across the frontier, it seems to refer more to the illegality of this act than to the fact that the smuggled goods had initially been stolen. In other words, the smugglers were held liable under the same law as theft, even though they had not actually stolen the goods to be transported across the frontier.

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79. Achilles FANG, *The Chronicle of the Three Kingdoms (220–284). Chapters 69–78 from the Tzu Chih T'ung Chien of Ss'ma Kuang (1019–1068) Volume I*, Cambridge, Mass: Harvard University Press 1952, pp. 208–209.

80. For the period of the Three Kingdoms, shortly after the fall of the Han, newly excavated texts on the administration of the kingdom of Wu (220–37) record a case in which an official was accused of the capital offence of selling official salt for rice and then converting part of the rice to his own use. The bamboo slips detailing with the prosecution do not cite the relevant statute, but it is likely that Wu simply inherited and followed the Han laws which treated as capital offences certain types of misappropriation and embezzlement of government property by officials. See HU Pingsheng, “Some Remarks on Inscribed Slips of the Sun-Wu Period Unearthed at Zoumalou, Chansha”, *Wenwu* (1999.5), pp. 45–48 (in Chinese).

81. PENG, CHEN, and KUDO, *Han Laws of 186 BCE*, p. 112 (slip 57).

82. Compare HULSEWÉ, *Ch'in Laws*, pp. 121–122 (D23); LIU and YANG, *Rare Codes I*, p. 540.

83. PENG, CHEN, and KUDO, *Laws of 186 BCE*, p. 119 (slips 74–75)





Finally, we have a case similar to that known to Qin law<sup>84</sup> in which persons, probably officials of some kind, have privately borrowed from a government storehouse or stable cash, gold, silk, grain, horses or cattle<sup>85</sup>. They are punished according to the same law as theft because they have not intended to appropriate the goods entirely to their own profit; they have merely ‘borrowed’ them with the intention of making a return.

For the Han, we can draw the broad conclusion that, during the four hundred years or so of the dynasty’s existence, three groups of offences concerned with illicit goods developed, all treated in some way as imposing liability on account of theft. The first group comprises a large number of rules concerned with what we may term theft proper, whether committed by officials or private persons. Here the content of the rules and the appropriate punishment varied according to the type of property which had been stolen, in particular whether it was property owned by the government or not. Second there is a group of offences concerning illicit acquisition or use of property by officials, whether through the taking of bribes to subvert the law, the acceptance of property from persons under their jurisdiction (with a sub-distinction between food or drink and other property), or the unauthorised borrowing of government property. The third group comprises the obtaining of property through some fraudulent act (such as the alteration of a contract) or cheating by traders in the market (whether of the government or each other).

The only legislative distinction in the formulation of the penalty for the rules contained in the second and third groups is that between ‘sentence as theft’ and ‘sentence under the same law as theft’. This difference may reflect a recognition on the part of the legislators that some offences in these groups resembled the paradigm case of theft (the physical taking of another’s property) more closely than others. It may also have marked a discrimination between offences in terms of their perceived gravity, although the level of punishment in both cases was the same.

#### 4. The Post-Han Law 220–618 CE

In the collection of statutes promulgated at the beginning of the Han some rules on theft were contained in the *zei lü*, others (the majority) in the section on *dao lü*. We do not know to what extent this classification changed during the course of the Han dynasty, but succeeding dynasties made some changes. The *Xinlü* (*New Code*) of the (Three Kingdoms) Wei dynasty (220–64), promulgated in 234 CE<sup>86</sup>, preserved the sections on *zei lü* and *dao lü*, but added a number of other sections,

84. See above at note 22.

85. PENG, CHEN, and KUDO, *Laws of 186 BCE*, p. 121 (slip 77).

86. On the distinction between ‘code’ and ‘collection of laws’ and for further details on what follows see G. MACCORMACK, “The Transmission of Penal Law (*lü*) from the Han to the T’ang”, *RIDA* 51 (2004), pp. 47–83.





including ‘intimidation and kidnapping (*qie lüe*)’, ‘soliciting bribes (*qing qie*)’, ‘fraud and deceit (*zha*)’, ‘damage and loss (*hui wang*)’, and ‘restoration of illicit goods (*zhang zang*)’. Although we have no detailed information on the particular rules subsumed under these heads, it is almost certain that some of the rules on theft were transferred from the Han *zei* or *dao lü* to one of the new sections introduced in the *Xinlü*. For example, it is likely that the rule on fraudulent alteration of contracts was transferred from the old *zei* to the new *zha lü*, while that on bribery was transferred to the *qing qie lü*, and that on the return of the stolen goods to the owner to the *zhang zang lü*.

The next important code, that of the Jin dynasty (265–419), promulgated about thirty years later in 268 CE, made further changes to the ordering of the statutes in the code. It suppressed the new categories of ‘intimidation and kidnapping’ and ‘restoration of illicit goods’. We do not know whether the relevant rules were relocated in the *zei* or *dao lü*. But it added a new section on ‘disobeying regulations (*wei zhi*)’, which is likely to have included a number of rules on misappropriation of property, whether government or private, by officials.

Finally, we have the codes developed during the Northern Dynasties, which strongly influenced the Sui and Tang codes. The Northern Wei code of 481 CE, revised in 504, followed the Jin code in keeping separate categories of *zei* and *dao lü*, as well as in retaining the sections on ‘fraud and deceit (*zha wei*)’, ‘bribery (*qing qiu*)’, and ‘disobeying regulations (*wei zhi*)’. The Northern Qi code of 564, which furnished a direct model for the Sui/Tang code, was the first to reduce the number of sections in the code from around twenty to twelve. The result was that the originally separate sections on *zei* and *dao* were now combined in one section entitled ‘violence and theft (*zei dao*)’, the section on ‘bribery’ was transferred to that on ‘disobeying regulations’, while that on ‘fraud and deceit’ was retained.

These experiments at classification reveal a significant shift in the treatment of offences that under the Han fell within the broad remit of ‘violence and theft’. By the end of the northern dynasties it had become clear that an originally undifferentiated mass of offences had now become divided into three groups. First there was the group relating to officials who took bribes. Such offences were now classified in the section of the codes headed ‘disobeying regulations’ and completely divorced from theft proper, though still concerned with ‘illicit goods (*zang*)’. Second, there was the offence of obtaining property by cheating, also separated from theft, and located in the section of the codes headed ‘fraud and deceit’. Third, there was the offence of accepting property within the area of one’s jurisdiction. This retained its connection with theft, remaining in the section on ‘violence and theft’, as no doubt had been the position in developed Han law.

The same attempt to secure a stricter demarcation between theft and other offences concerned with illicit goods can be seen in the definitions offered by Zhang Fei in his preface to the Jin code. He defined ordinary theft (*dao*) as “taking things





which are not one's own"<sup>87</sup> and forcible theft (*jiang dao*) as "bringing down one's hand and taking another's property"<sup>88</sup>. Furthermore, the essential element of theft is the act of 'taking' what belongs to another. There is already an implication that what we have acquired with the permission of the owner is not theft, although it might constitute some other offence concerned with illicit goods. Nor is there any mention in Zhang Fei's definitions of any specific intention on the part of the thief, analogous to the *animus furandi* of Roman law.

Zhang Fei's definition of theft is the first we have in the context of the statutory rules. The Han etymological dictionary, *Shuowen*, compiled in 121 CE, defined theft (*dao*) in a highly general fashion as "privately to profit from goods"<sup>89</sup>. Given the width of this definition, we can see why in Han law there was no very clear conceptual difference between the various offences concerned with illicit goods. This said, we do have in other Han sources reference to a more specific notion of theft. For example, a Han commentary on the *Zuozhuan* (*Chronicles of the Spring and Autumn*) defines theft as "take (*qu*) what is not one's own"<sup>90</sup>, while a passage in the Legal Treatise of the *Hanshu* (*History of the Former Han*), specifies the evil of "stealing by boring a hole through a wall (*chuan yu zhi dao*)"<sup>91</sup>. This focuses on the physical act of taking by describing what was certainly a common method of committing theft. In other words, while there was an understanding in the Han of a broad concept of theft, there was also recognition of the fact that in many cases the offence consisted of the specific act of secretly taking another's property. It is the 'broad concept of theft' that became increasingly circumscribed in the post-Han period.

We know that, as in the earlier law, the punishment for ordinary theft was in general related to the value of what was stolen. But for the first time we learn that the punishment might reach death. The code at the end of the Jin provided that, where officials in charge stole goods worth five *pi* (bolts of cloth) or ordinary people stole goods worth forty *pi*, the punishment was to be death<sup>92</sup>. The only examples which we have of the application of this law relate to theft by officials. During the period 313–7 an official was sentenced to beheading for 'cutting and stealing (*ge dao*)' more than 600 *pi* of cloth belonging to the government, but was reprieved under an amnesty<sup>93</sup>. In the time of emperor Zhang (326–43) an administrator in

87. WALLACKER, *Zhang Fei's Preface*, p. 242.

88. WALLACKER, *Zhang Fei's Preface*, p. 254.

89. XU SHEN, *Shuowen jiezi* (*Explanation of Words*), Beijing: Zhonghua 1963, p. 181 upper section.

90. HULSEWÉ, *Theft*, p. 167.

91. BAN GU, *Hanshu*, 4.1112; HULSEWÉ, *Remnants of Han Law*, p. 348 (rendering the phrase *chuan yu* as 'breaking and climbing in')

92. The law is cited in a Song legal decision of 429 CE: CHENG, *Investigation into Codes of Nine Dynasties*, pp. 262–263. The rule was probably contained in the section on 'disobeying regulations'.

93. CHENG, *Investigation into Codes of Nine Dynasties*, p. 261.





the department of concerned with the palace accounts was convicted of the offence of stealing (*dao*) government curtains valued at 40 *pi* of cloth and sentenced to beheading as prescribed by the law<sup>94</sup>.

What is not entirely clear is the scope of the rule relating to private persons. It seems clear from the phrase 'officials in charge' that the liability in the first case related to theft by officials of government goods under their care or property within their jurisdiction. It is possible that the conjunction of 'officials in charge' and 'private persons' implies that the liability of the latter also was determined with respect to the theft of public goods. If so, a less draconian rule may have applied to the theft of goods from private individuals.

Some specific kinds of theft or specific examples of liability are found in the sources. A memorial offered by a Song official sometime during the years 424–454 CE stated that the opening of and stealing from graves counted as ordinary theft only if the coffin was undisturbed. Should it be disturbed a capital offence was committed<sup>95</sup>. These rules were probably those stated in the Jin code, but we do not know whether theft of goods from a grave (without disturbing the coffin) incurred a special penalty or were punished according to the value of what was taken. Further, we can deduce from a memorial submitted towards the end of the third century CE by Pei Wei, an official concerned about the excessive response of the government to trivial damage to, or theft from, imperial mausolea and the like, that under the Jin code the theft of grass or trees from imperial tombs was punished capitally. Reference is made in the memorial to a case of 289 CE in which someone had cut a branch from a thorn bush on an imperial grave site. The offender was not found, but the chamberlain for ceremonial was held liable and imprisoned<sup>96</sup>. In another case from 306–7 CE an official attached to the imperial ancestral temple was executed for the theft of objects from it<sup>97</sup>. We can further deduce from a case which arose in the time of emperor Wu (265–90 CE) that the theft of imperial property was a capital offence. An officer in the service of a royal prince is said to have been publicly executed, in accordance with the law, for the purchase of stolen imperial furs, the prince himself being pardoned<sup>98</sup>.

The Jin inherited the various Han offences concerned with the taking of bribes to subvert the law and the acceptance of property within the area of jurisdiction and re-classified them as belonging to the section on the code headed 'accepting bribes'. But obviously problems were experienced in demarcating the boundary between the distinct offences. These problems are implicit in the following elliptic definitions offered by Zhang Fei in his preface to the code. In one passage, concerned

94. CHENG, *Investigation into Codes of Nine Dynasties*, pp. 260–261.

95. CHENG, *Investigation into Codes of Nine Dynasties*, p. 262.

96. FANG, *Jinshu*, 3.935; HEUSER, *Rechtsskapitel*, pp. 135–136.

97. CHENG, *Investigation into Codes of Nine Dynasties*, p. 260.

98. CHENG, *Investigation into Codes of Nine Dynasties*, p. 260.





with analogous states of affairs, he states “denouncing (*he*) a man and taking his property” is held to be analogous to “receiving a bribe (*shou qiu*)”<sup>99</sup>. This seems to mean that, where an official threatens a person with prosecution but agrees not to proceed when offered property, he commits the offence of taking property through ‘intimidation (*konghe*)’<sup>100</sup>. This offence is analogous to, but distinct from, the offence of ‘receiving bribes and twisting the law’.

The association in this passage between ‘denouncing a man’ and ‘accepting property’ helps to explain the even more cryptic reference to ‘denunciation’ in a later passage in the preface. Here it is said that to accuse a person without specifying the particular offence constitutes ‘denouncing a person’, whereas to accuse a person with respect to a particular offence is ‘to receive a bribe (*shou qiu*)’<sup>101</sup>. The meaning seems to be that for an official to denounce a man by accusing him of a specific offence and then accepting property in order not to proceed with the denunciation is to commit the offence of *shou qiu (wang fa)*, accept property and subvert the law. If no specific offence is mentioned, we have a case of obtaining property by intimidation<sup>102</sup>.

After the collapse of the Jin dynasty, there was no unified government of the whole of the country until the establishment of the Sui dynasty in 581. China was divided between the north and the south, a period known as that of the Southern and Northern dynasties. The southern dynasties (Song, Southern Qi, Liang, and Chen) either used the Jin code as the basis for their own law or drafted codes based largely on it, but the northern dynasties, although they utilised the Jin code, went back also to the earlier Han statutes and formulated a new code which contained some important changes with respect to theft.

Considering the period as a whole, we may first note a modification of the Jin tariff for the punishment of ordinary theft established by the first of the southern dynasties, that of (Liu) Song (420–79). After the accession of emperor Wen in 424 it came to be accepted that the tariff governing the punishment of officials and commoners for ordinary theft was too severe. In a court discussion around 429 CE the point was made that minor officials who from inexperience and carelessness misappropriated government property risked death. This observation is of importance because it suggests that the boundaries of ‘misappropriation’, if not ‘theft’, were wide and might include acts where there had been no intention to appropriate for oneself the property of the government. The new rules settled by the discussion and accepted by the emperor were: where officials in charge stole goods worth 10 *pi* and commoners stole goods worth 50 *pi*, the punishment was to be death, except that, where officials of the highest rank, belonging to the *shi* (gentry) class,

99. WALLACKER, *Chang Fei's Preface*, p. 101.

100. For *konghe* see above at note 52.

101. WALLACKER, *Chang Fei's Preface*, pp. 254–255.

102. For Zhang Fei's further distinction between ‘not to seek what is voluntarily given’ and ‘accept property within one's area of jurisdiction and afterwards take it’ see above at note 64.





committed theft of goods worth 5 *pi* or more, they were still, as under the Jin code, to be put to death. The punishment immediately below death was that of military service, applicable where commoners stole goods worth 40 *pi*, and probably also where low ranking officials stole goods worth 5 *pi*<sup>103</sup>. As with the corresponding Jin rule<sup>104</sup> we cannot be sure of the precise scope of the offence relating to the theft of goods by commoners.

From the end of the southern dynasties we have recorded a brief but interesting reference to the law on accepting bribes and subverting the law. Emperor Xuan of the Chen dynasty (557–89) in 579 issued a decree which stated:

“Although the old *lü* which imposed liability on account or receiving property to subvert the law (*wang fa shou cai*) was ‘heavy’, the regulations (*zhi*) on accepting property where no subversion of the law occurred were very ‘light’....Now there can be change and persons who receive property without subverting the law (*zhi fa*) are to be sentenced in the same way as proper theft (*zheng dao*)”<sup>105</sup>.

The old *lü* to which emperor Xuan refers appears to be the code of the Liang dynasty (502–557), which had been adopted and revised by the Chen. The Liang code itself was closely modelled upon that of the Jin, so that the ‘old *lü*’ may have been the law on bribery contained in the Jin code.

The emperor’s point in part is that the severe punishments provided by the earlier law for the offence of accepting property in return for subverting the law are entirely justified. What concerns him is the discrepancy between this offence and that constituted by the receipt of property by officials where no subversion of the law was contemplated. In the latter case the punishments established by the earlier law were too light. Can we identify the particular offence or offences to which reference is here made? We can think of two possibilities, either the receipt of property by the official as a bribe without an accompanying commitment to subvert the law, or the acceptance of presents by officials from their subordinates or persons within their jurisdiction. In all likelihood, the emperor had in mind the latter of these possibilities, since the offence denominated *shuo so jian* is that most frequently evidenced in pre-Tang sources. If this suggestion is correct, we can conclude that the Chen law after 579 placed the offence of *shou so jian* in the category of those offences which were to be punished in the same way as theft (inferable from the language of the imperial order: *ke tong zheng dao* (sentence the same as proper theft).

Even on this interpretation we are left with a difficulty. We know from Zhang Fei’s preface<sup>106</sup> that the Jin code already contained a statute which punished as theft

103. CHENG, *Investigation into Codes of Nine Dynasties*, pp. 262–263. The term for theft used in this law is *tou*, equivalent to *dao*.

104. See above at note 94.

105. CHENG, *Investigation into Codes of Nine Dynasties*, p. 377.

106. See above at notes 63–64.





the acceptance by officials of goods within their area of jurisdiction. Consequently, emperor Xuan can hardly have been referring to this law. The fact that his edict uses the term *zhi* (regulations) and not the term *lü* (statutes) in describing those earlier laws, which were too light, suggests that he had in mind the kind of property represented by food and drink. We know both from Han<sup>107</sup> and Tang law<sup>108</sup> that such offerings were distinguished from, and treated less severely than, other kinds of property. Emperor Xuan may have wished that the acceptance of any kind of property by officials should be sufficient to impose liability on account of theft.

During the northern dynasties the most important codes were those produced under the Northern Wei (Toba) (386–534) and Northern Qi (550–77). From various sources we can piece together something of the evolution of the law of theft during the Northern Wei. Prior to the adoption by the Toba of Chinese law, the old tribal customs still prevailed. We are told that in the latter part of the fourth century CE, where property was stolen from the government, five times the quantity was to be repaid, where property was stolen from a private individual, ten times the quantity was to be repaid<sup>109</sup>. We can infer from a number of passages in the Legal Treatise contained in the official History of the Northern Wei (*Weishu*) that the section on theft (*daolü*) in the early Northern Wei code established death as the punishment for the theft of goods worth a certain amount. Prior to 441 the critical value was 40 *pi*, reduced in that year to 30 *pi*, but restored to the former level by a decree of 452<sup>110</sup>. A decree of 477 urged that the punishments for theft should be made more lenient. This seems to have meant that the death penalty for ordinary theft was changed from beheading to strangulation, the former being reserved for forcible theft, though it seems that the body of the strangled thief was still to be publicly exposed<sup>111</sup>. However, by the end of the dynasty, the drive in favour of leniency seems to have gone further. A comment made by an official in 534 suggests that the code (or regulations) at this time normally punished both forcible theft (*qie*) and ordinary theft (*dao*) with exile. Death would have been reserved for comparatively few cases<sup>112</sup>. In the period 508–12 an official was sentenced under the *lü* to forced labour for five years for stealing (*dao*) a large amount of cultivated land, though it is not clear whether the land was owned by the state or private individuals<sup>113</sup>. From the discussion of a *cause célèbre* in 514 we also know that at

107. See above at notes 65–68.

108. See below at note 156.

109. WEI SHOU, *Weishu (History of the [Northern] Wei)*, Beijing: Zhonghua 1974, 8.2873 (this work was completed in the period 551–4 CE); CHENG, *Investigation into Codes of Nine Dynasties*, p. 345.

110. WEI SHOU, *Weishu*, 8.2875.

111. WEI SHOU, *Weishu*, 8.2876–7.

112. WEI SHOU, *Weishu*, 8.2888; CHENG, *Investigation into Codes of Nine Dynasties*, p. 371.

113. CHENG, *Investigation into Codes of Nine Dynasties*, pp. 363–364.





this time a person who knowingly bought stolen goods was to be sentenced as an accessory to theft, that is, punished one degree less than the actual thief<sup>114</sup>.

The theft of horses or cattle appears to have been subject to special rules. A comment by a high official that a person who had been sentenced to death for the theft of a horse had been treated too severely with respect to the *lü* implies that the punishment prescribed by the code was still death, but in the form of strangulation rather than beheading<sup>115</sup>. During the Western Wei (535–77), one of the successor states to the Northern Wei, a powerful local bully, related to the ruling family, was ordered to be beaten to death for the theft of an ox<sup>116</sup>. Cheng Shude deduces from this case that the Northern Wei code (still applied in the Western Wei) punished capitally the theft of an ox. Although this is possibly correct, we have to be careful in evaluating the evidence. Putting to death by beating was not a regular punishment utilised in the Northern Wei code. Furthermore the offender in question was a well-known trouble-maker who was in the end put to death for his abusive behaviour over a number of years<sup>117</sup>.

Some passages record briefly the fate of officials who have been found guilty of accepting bribes to subvert the law, have wrongly appropriated government property, or have accepted presents from persons under their jurisdiction. Thus the *lü* (probably the section on ‘disobeying regulations’) of 481 provided that, where an official subverted the law on account of 10 *pi*, or accepted presents (*yi zang*)<sup>118</sup> worth 20 *pi* (presumably without subverting the law, he should be sentenced to death by strangulation.<sup>119</sup> A decree of 484, which introduced for the first time the payment of salaries for officials, made the law on officials subverting the law and taking bribes more severe. Where they accepted a present worth one *pi*, or subverted the law even though they had received nothing, they were to be sentenced to death by strangulation<sup>120</sup>.

114. WEI SHOU, *Weishu*, 8.2882; CHENG, *Investigation into Codes of Nine Dynasties*, p. 353. For an account of this famous case see Geoffrey MACCORMACK, *Sale of a daughter in a Northern Wei Case of AD 514*, in Frederico Maria d’IPPOLITO (ed.), *Scritti per Gennaro Franciosi*, Satura editrice 2007, III, pp. 1558–1572.

115. CHENG, *Investigation into Codes of Nine Dynasties*, p. 362.

116. CHENG, *Investigation into Codes of Nine Dynasties*, p. 378.

117. See Scott Anthony PEARCE, *The Yu-wen Regime in Sixth-Century China*, Doctoral dissertation: Princeton University 1987, p. 355.

118. The phrase *yi zang* is explained in the *Hanyu Dacidian (Dictionary of the Chinese Language)* (Hanyu Dacidian chubanshe, n.d.), small print version, III, p. 5380 as referring to officials who accept presents or bribes. See also the translation of the Legal Treatise of the *Weishu* into modern Chinese contained in GAO Chao and MA Jianshi (eds.), *Zhongguo lidai xingfa zhi zhuyi (Annotated Translation of the Legal treatises in the Chinese Dynastic Histories)*, Chenchun: Jilin Renmin chubanshe 1994, p. 157 n. 2, where the editors explain *yi zang* as “give a present which is received as a bribe”.

119. WEI SHOU, *Weishu*, 8.2877; CHENG, *Investigation into Codes of Nine Dynasties*, p. 352.

120. CHENG, *Investigation into Codes of Nine Dynasties*, p. 352.





The distinction drawn in the *lü* and the decree between ‘violating the law (*wang fa*)’ and ‘accepting presents (*yi zang*)’ can be explained in two ways. On the first explanation we have the text of one law containing two clauses: ‘where property is received but the law is not subverted (*yi zang*)’ and ‘where property is received and the law is subverted (*wang fa*)’. Although the text specifies *wang fa* without the additional words *shou qiu* (accept bribes), we can reasonably infer that the latter requirement was understood as a complement of the former. Certainly the Legal Treatise of the *Weishi*, after citing the law on *wang fa* and *yi zang*, states that “the path of accepting bribes was thereby blocked”<sup>121</sup>. The second explanation supposes that we have a compressed reference to two distinct laws, one dealing with the receipt of bribes for the subversion of the law, the other with the acceptance of presents by officials from their subordinates or persons within their jurisdiction. On either explanation, we have evidence that the Northern Wei court adopted the same strict policy towards the acceptance of presents by officials as emperor Xuan of the Chen<sup>122</sup>.

Whichever is the correct explanation of the phrase *wang fa*.....*yi zang*, we know that the Northern Wei *lü* from at least the middle of the fifth century CE contained a clause on officials accepting presents from persons under their jurisdiction. During the period 466–71 emperor Xuan promulgated a decree stating that supervisory officials, who accepted presents from persons under their jurisdiction of (at least) one sheep and one measure of wine, were to be put to death. Those who gave the presents were to be sentenced as accessories, that is, one degree less than death (exile). However, one official remonstrated with the emperor that the relentless application of this law would simply lead to corrupt officials taking extra care and meritorious officials being incriminated on account of some thoughtless act. He proposed that there should be a return to the old law (*fa*) contained in the code (*lüling*). The emperor accepted this proposal and rescinded the decree<sup>123</sup>. The ‘old law’ may be a reference to the rule on *yi zang* contained in the code of 481 and its subsequent revisions.

To return to the law of *wang fa* (subverting the law): there is some indication that the *lü* on *wang fa* (subverting the law) may have applied to two different kinds of case, that in which a bribe had been accepted to subvert the law (no doubt the usual occurrence) and that in which there had been subversion of the law without the acceptance of a bribe. A decree of emperor Gaozong in 463, referring to the abuse of the exploitation of the people’s labour, provided that officials who summoned people for *corvée* duty without authority were to be sentenced in the same way as that for subverting the law (*lun tong wang fa*)<sup>124</sup>. The implication of

121. WEI SHOU, *Weishu*, 8.2777.

122. See above at note 105.

123. CHENG, *Investigation into Codes of Nine Dynasties*, p. 379.

124. CHENG, *Investigation into Codes of Nine Dynasties*, p. 377.





the words *lun tong* (sentence the same as) may be that the law on *wang fa*, even if primarily designed for the acceptance of a bribe, might still be applied by analogy in cases of subversion of the law where no bribe had been accepted.

Another offence treated in terms of subversion of the law, also concerned with abuse of the law on *corvée*, is documented for the period 519–25. At this time people attempted to avoid the *corvée* by becoming Buddhist monks, with the result that there was a great increase in the number of monasteries. Accordingly, imperial decrees began to prohibit the unauthorised construction of monasteries. Officials who established monasteries without permission from the throne were to be treated as having subverted the law (*yi wang fa lun*), the severity of their punishment being in proportion to the value of the labour used in the construction<sup>125</sup>. A decree of 538, returning to the same problem of a proliferation of monasteries, provided that officials were not permitted to construct monasteries. Where they disobeyed, they were to be treated as having subverted the law (*yi wang fa lun*) and sentenced according to the value of the labour<sup>126</sup>.

The formulation *yi wang fa lun* in these decrees is of interest. It shows that by the end of the Northern Wei the technical expression *yi...lun*, familiar from the Tang code<sup>127</sup> was employed under the Northern Wei in the formulation of a law to express the fact that the offence defined is to be punished in the same way as the offence now specified. The phrases *lun tong wang fa* and *yi wang fa lun* both have the one import: the offence in question is not identical with ‘subversion of the law’ but is to be sentenced in the same way as that offence. This already reminds us of the distinction in the Qin/Han laws drawn between the sentencing of an offence as theft or by the same law as theft.

Under the Sui (581–618), the dynasty which again reunited China under one government, particularly draconian rules were introduced with respect to theft. These rules appear on the whole to have introduced by imperial decree punishments more severe than those established in the penal code. The decrees prescribing the new punishments were issued in an unsuccessful attempt to stem a rising wave of banditry. Thus, by a decree of 596 the theft of one *sheng* (pint) of provisions intended for the frontier defences was to be punished with the death of the offender and the enslavement of the members of his household<sup>128</sup>. Around the same time, another decree, although quickly repealed, punished with death the

125. CHENG, *Investigation into Codes of Nine Dynasties*, p. 377.

126. WEI SHOU, *Weishu*, 8.3047; LEON HURVITZ, *Wei Shou on Buddhism and Taoism*, Kyoto 1956, p. 100 (mistranslating *wang fa* as ‘having broken the law’).

127. Article 53: JOHNSON, *Tang Code I*, p. 263.

128. WEI ZHENG, *Suishu (History of the Sui Dynasty)*, Beijing: Zhonghua 1973, 1.40, 3.714 (this work was presented to the throne in 636 CE); CHENG, *Investigation into Codes of Nine Dynasties*, pp. 437–438; ÉTIENNE BALAZS, *Le traité juridique du “Souei-Chou”*, Leiden: E.J. Brill 1954, p. 83, 174 n. 274.





thief even of one piece of cash<sup>129</sup>. A little later in 612 a draconian decree provided that for all cases of secret theft (*qie dao*) or more serious theft, the offender was to be decapitated immediately without reference to the throne<sup>130</sup> irrespective of the value of the property taken<sup>131</sup>. This unprecedented approximation of ordinary to forcible theft did not survive the collapse of the dynasty.

From the Sui we have clear evidence of the growing importance of Buddhism and Daoism within the state, although the law of Northern Qi may have shown similar influence<sup>132</sup>. An edict of 601 provided that the theft of Buddhist or Daoist statues, or that of the images of other gods, was to be treated as falling under the abomination of 'depravity (*budao*)'<sup>133</sup>. It is likely that the punishment was strangulation<sup>134</sup>. The same edict may also have provided that the theft of Buddhist or Daoist statues by a Buddhist or Daoist monk was to be treated as falling within the more serious 'abomination' of 'contumacy (*oni*)', punishable with decapitation<sup>135</sup>.

## 5. The Tang Law (618–907)

So far we have been able to identify a variety of rules concerning theft from the third century BCE to the seventh century CE. But apart from the few rules included in the Han collection of statutes promulgated in 186 BCE, we have not been able to say a great deal about the way in which the rules were classified in the collections of statutes or penal codes. The Tang is the first of the great imperial penal codes to have been preserved in its entirety. It not only allows us to appreciate the more sophisticated approach that had evolved by the seventh century for the treatment of offences involving the acquisition of illicit goods, but also allows us to see comprehensively the essential principles and characteristics of the law of theft which the traditional law retained until the fall of the Qing in 1911.

First of all, we can see that the Tang code adopted the following classification for the various rules concerned with 'theft'. The introductory section of the code on 'general principles (*mingli*)' sets out the circumstances governing the return of 'illicit goods (*zang*)'. In the case of theft, double the value of the stolen goods is to be returned to the owner. This applies whether or not they are still in existence or have been exchanged for other goods (which represent them). The only exception

129. WEI ZHENG, *Suishu*, 3.714; CHENG, *Investigation into Codes of Nine Dynasties*, pp. 437–438; BALAZS, *Traité juridique*, pp. 84–85.

130. Normally capital sentences required the approval of the throne before execution.

131. WEI ZHENG, *Suishu*, 3.717; BALAZS, *Traité juridique*, p. 92 with 184 n. 310.

132. CHENG, *Investigation into Codes of Nine Dynasties*, p. 404.

133. This is one of the ten kinds of offence, known collectively as the 'ten abominations', listed in the code as particularly reprehensible, although not all the individual offences entailed death.

134. WEI ZHENG, *Suishu*, 1.46; CHENG, *Investigation into Codes of Nine Dynasties*, p. 438; BALAZS, *Traité juridique*, p. 178 n. 290.

135. BALAZS, *Traité juridique*, p. 178 n. 290.





is that constituted by the punishment of death or exile. A thief so sentenced is not required to make repayment of stolen goods which have been consumed<sup>136</sup>.

The section on ‘administrative regulations (*zhizhi*)’ contains articles on several distinct offences concerned with the unauthorised taking or borrowing of property by officials. In no case is the offence treated either as theft or as comparable to theft. Three different methods of punishment are relevant. In two cases a fixed punishment is imposed. Article 106 punishes officials who borrow imperial clothing or other articles personally used by the emperor with penal servitude for three years, reduced to one year if the object borrowed had not in fact been used by the emperor<sup>137</sup>. Article 135 punishes both the person who asks an official in charge ‘to bend the law (*qu fa*)’<sup>138</sup> and the official who accedes to the request with a beating of 50 blows with the light stick, increased to 100 blows with the heavy stick for both parties where the request has been implemented<sup>139</sup>.

Two important offences concerned with the improper acquisition of goods by officials are punished according to a special scale (differing in each case), which relates the severity of the punishment to the value of the illicit goods (*zang*). Article 138 deals with the offence on the part of supervisory or custodial officials of receiving property and subverting the law (*shou cai wang fa*), already known to the early Han law eight centuries earlier. Where the value of the ‘bribe’ amounted to one *chi* (approximately one foot) of silk, the punishment was to be a beating of 100 blows with the heavy stick, increased by one degree for every further *pi* of silk<sup>140</sup>, strangulation being imposed once the bribe was valued at 15 *pi* or more. As in the Northern Wei law<sup>141</sup> a distinction was drawn between the salaried and the unsalaried official. In the latter case the punishment was reduced by one degree, but the offender was still liable to strangulation where the bribe amounted to 25 *pi* of silk or more<sup>142</sup>.

136. Article 33: JOHNSON, *Tang Code I*, pp. 154–159. Article 34 (JOHNSON, pp. 189–191) details the rules for the calculation of illicit goods. We do not know the origin of the rule on double return. It may go back to, and be an attenuation of the old Northern Wei tribal custom of returning to the owner a multiple of what had been stolen (above at note 109).

137. Wallace JOHNSON, *The T'ang Code Volume II, Specific Principles*, Princeton, New Jersey: Princeton University Press 1997, p. 75.

138. *Qu fa* (twist the law) seems to have the same sense as *wang fa* (subvert the law). See *Hanyu Dacidian II*, p. 2974.

139. JOHNSON, *Tang Code II*, pp. 104–106. Compare the Han statute on ‘listening to requests and subverting the law’, above at note 59.

140. One *pi* was a piece of silk 1.8 by 40 *chi*.

141. See above at note 120.

142. JOHNSON, *Tang Code II*, pp. 108–109. Under article 139 (JOHNSON, p. 109) an official who accepted the bribe only after completion of the act subverting the law was to be sentenced for an offence ‘comparable to subversion of the law (*zhun wang fa lun*)’.





Article 140<sup>143</sup> deals with the offence of supervisory officials who accept property within the area of their jurisdiction (*shou so jian lin cai wu*). The *shuyi* explains that this deals with the case of officials who for their own private purposes accept property. The scale adopted for punishment is: where goods worth one *chi* of silk have been taken, the official is to receive a beating of 40 blows with the light stick, increased by one degree for every one *pi* of silk taken. At eight *pi* the punishment is penal servitude for one year, and at fifty *pi* exile to 2000 *li* (approximately 700 miles). This scale imposes a punishment considerably lighter than that imposed by the scale utilised for the offence of accepting property and subverting the law<sup>144</sup>. From the *shuyi* commentary to articles 144 and 145<sup>145</sup> we know that any property accepted by an official from a person under his jurisdiction was forfeit to the government unless it had been extracted by pressure, in which case it was to be restored to the owner (though not double the value as for illicit goods which had been stolen).

Two other offences are classified as falling under the head of ‘accepting goods within one’s area of jurisdiction’. Under article 143<sup>146</sup> supervisory officials who make unauthorised use of the labour of persons under their jurisdiction<sup>147</sup> or borrow the use of slaves, cattle, carts, boats and the like are punished according to the value of the labour (of the person) or the rent (of the property) under the scale prescribed for taking goods within one’s area of jurisdiction. Article 145<sup>148</sup> punishes officials who practise extortion on a large scale, perhaps by assembling persons under their jurisdiction and compelling them to make presents to other people. Where the officials did not actually acquire anything, they are still to be punished for the offence of accepting property within their area of jurisdiction. Where they had acquired property, the offence of ‘soliciting property and taking it (*qi qu*)’ was committed<sup>149</sup>.

The most common method of punishment adopted for the class of offence under consideration is that defined by article 389 from the ‘miscellaneous articles (*zha liu*)’ section of the code<sup>150</sup>. This specifies that, where one commits an offence making one liable on account of illicit goods (*zuo zang zhi zui*), the punishment

143. JOHNSON, *Tang Code II*, p. 110.

144. A further distinction is made in the article between ‘soliciting the property and taking it (*qi qu*)’ and ‘forcibly soliciting and taking (*jiang qi qu*)’. In the former case the punishment was increased by one degree, and in the second the offence was now to be punished as ‘comparable to subverting the law’, where the maximum punishment would be exile to 3000 *li* (approximately 1000 miles).

145. See below at notes 145, 156.

146. JOHNSON, *Tang Code II*, pp. 14–16.

147. For the contrary position in Northern Wei law see above at note 124.

148. JOHNSON, *Tang Code II*, pp. 116–117 (where the translation is inadequate).

149. For this offence see note 144 above.

150. JOHNSON, *Tang Code II*, p. 456.





is regulated according to the following scale. Where the value of the illicit goods is one *chi* of silk, the punishment is to be a beating of twenty blows with the light stick, increased by one degree for every *pi*, with a maximum punishment of penal servitude for three years. There are many offences involving illicit goods punished under this article<sup>151</sup>. It is readily apparent that the range of punishment applicable to offences classified as *zuo zang* is considerably less severe than that applicable to either the offence of accepting property and subverting the law or that of accepting property within the area of one's jurisdiction.

Of the offences with which we are concerned, there are four which are subsumed under the head of *zuo zang*. Article 136<sup>152</sup> seems to contemplate the situation in which officials accept bribes in returning for some favour that does not amount to subversion of the law. In such a case they incur liability for *zuo zang* with an increase of two degrees, reduced to one degree if they are unsalaried. The increase of two degrees means that the maximum punishment is now capital (strangulation). Article 137<sup>153</sup> punishes private persons on the basis of *zuo zang*, where they offer a bribe to secure subversion of the law, the punishment being decreased by two degrees should no subversion occur. Article 142<sup>154</sup> punishes on the basis of *zuo zang* officials who borrow property within the area of their jurisdiction, but makes the offence that of 'accepting property' if no return is made within 100 days<sup>155</sup>. Finally, article 144<sup>156</sup> makes officials who accept presents of dead animals, such as pigs or sheep (for food), or other comestibles liable on the basis of *zuo zang*. For other kinds of property, such as cattle or rice, the offence is that of 'accepting property within the area of one's jurisdiction'. There is an important difference between the two offences in that, where the goods fall under *zuo zang* they are to be restored to the owner, but where they fall under 'accepting property' they are forfeit to the government.

Illegal acquisition of land is treated in the section on 'household and marriage (*huhun*)', with an important clarification of the relationship between this offence and theft contributed by the *shuyi* commentary. Article 165 on 'the illegal cultivation of public or private land' uses the term *dao* in its formulation: "all cases of 'stealing (*dao*)' public or private land which is under cultivation....". The *shuyi* explains this on the basis that, since land cannot be moved, its illegal acquisition is not the same as 'true theft (*zhen dao*)'<sup>157</sup>. The implication appears to be that

151. For an overview of offences classified as *zuo zang* see Geoffrey MACCORMACK, *The Concept of Ts'ang in the Tang Code*, *Revue internationale des droits de l'antiquité* 33 (1986), pp. 25–44.

152. JOHNSON, *Tang Code II*, pp. 106–107.

153. JOHNSON, *Tang Code II*, p. 107.

154. JOHNSON, *Tang Code II*, pp. 112–114.

155. From this offence one has to distinguish the more serious offence of the unauthorised borrowing of government property by officials (article 212 below at note 164).

156. JOHNSON, *Tang Code II*, p. 116.

157. JOHNSON, *Tang Code II*, pp. 139–140.





'theft' is used with respect to the crops grown on the land, since their appropriation amounts to moving and so stealing another's property. The punishment is relatively light: a beating of ten blows with the light stick for one *mou* of land, increased by one degree for every further ten *mou* up to a beating of 60 blows with the light stick, and from there by one degree for every twenty *mou* up to a maximum punishment of penal servitude for one year.

Again, article 166 deals with the offence of wrongfully (*wang*) laying claim to public or private land or 'stealing (*dao*)' it by trade or sale. The *shuyi* here distinguishes three separate offences: wrongful claim to land, privately and furtively (*qie*)<sup>158</sup> trading, and stealing (*dao*) and selling to a person. The commentary now states that, although the term *dao* is used in the formulation of the article, the case is not one of theft, since land cannot be moved from its fixed place<sup>159</sup>. In principle (*li*) it is different from movables and therefore the punishment is graded not according to the values of the illicit goods (*zang*) but according to the acreage wrongfully appropriated<sup>160</sup>. The punishment shows that this offence was regarded as more serious than that of 'illegal cultivation of public or private land', though still less serious than that of theft. For one *mou* or less a beating of fifty blows with the light stick was imposed, increasing by one degree for every further four *mou* until a beating of 100 blows with the heavy stick was reached, at which point there was an increase on one degree for every further ten *mou*, the maximum punishment being penal servitude for two years<sup>161</sup>.

The section on 'public stables and warehouses (*jui ku*)' contains further rules on officials who misappropriate government property, as well as some rules relating to horses and cattle, the other rules on this topic being found in the section on 'violence and theft (*dao zei*)'<sup>162</sup>. We take first the rules on horses and cattle. Article 203<sup>163</sup> on the killing of government or private horses or cattle is concerned primarily to impose a fixed punishment (penal servitude for one year and a half), where a person intentionally (*gu*) kills a horse or ox (and the like) owned by the government or another person. However, the article also illustrates the technique sometimes adopted in the code of combining a fixed punishment with a punishment based on the value of the illicit goods (*zang*). The carcass of the animal killed is to be treated as the 'stolen or illicit goods'. Should the value of the carcass, according to the scale appropriate to theft, warrant a punishment more severe than penal

158. The word *qie* frequently has the meaning of 'thief' or 'to steal'.

159. On the significance of 'moving' see below at note 173.

160. JOHNSON, *Tang Code II*, p. 141.

161. We may compare in the formulation of the article 168 on the illicit use of another person's grave plot the two phrases *dao geng* and *dao zang*, the former referring to the theft of crops cultivated on another's grave plot and the latter to 'stealing' the use of another's grave plot for one's own burial (JOHNSON, *Tang Code II*, pp. 142–143).

162. See further below at note 180.

163. JOHNSON, *Tang Code II*, pp. 188–189.





servitude for one year and a half, then the offence is to be treated as ‘comparable to theft (*zhun dao lun*)’ and punished accordingly, that is, the offence in effect shifts from killing to theft. The fact that the intention of the perpetrator was to kill and not steal is reflected in the fact that the offence is treated not as theft but as comparable to theft. According to a rule stated in the ‘general principles’ (article 53), this means that the same rules are applied as for theft, with the exception that the punishment cannot exceed exile to 3000 *li*<sup>164</sup>.

With respect to officials who borrow government property we also have an interesting distinction between ‘theft’ and ‘being comparable to theft’. Article 212 specifies that, should supervisory or custodial officials without authority borrow government property for their own use, the offence is to be treated as theft (*yi dao lun*) or as ‘comparable to theft (*zhun dao lun*)’ depending upon whether or not a written record has been made. If there is a written record — indicating a lesser degree of culpability — the offence is only ‘comparable to theft’. The *shuyi* notes that to borrow government property without making a written record of the loan is the same as ‘true theft (*zhen dao*)’. In either case, whether the offence is true theft or only comparable to theft, the scale applied for the calculation of the punishment is two degrees higher than for ordinary theft<sup>165</sup>. Whereas article 212 contemplates unauthorised borrowing of goods in public storehouses or treasuries by officials with the responsibility of keeping them safe, article 213<sup>166</sup> by contrast deals with supervisory or custodial officials who take and use government property like clothing, carpets, or curtains or lend it to others. Here the offence is neither theft nor comparable to theft but is punished as *zuo zang* with a decrease of two degrees<sup>167</sup>.

The section on ‘fraud and counterfeit (*zha wei*)’ contains rules on the obtaining of property by deceit or cheating. Article 373 states generally that the obtaining of property by cheating (*zha qi*) from the government or a private person is to be treated as ‘comparable to theft’<sup>168</sup>. Article 374 treats the special case of obtaining property by forging documents or making unauthorised additions or deletions to a document. Documents are specified as being either ‘official’ or ‘private’, the latter category including contracts for the sale of property and the like. Should a party fraudulently alter such a contract in order to secure a financial advantage he was to be sentenced on the basis of an offence ‘comparable to theft’<sup>169</sup>. Although the commentary does not explain why the obtaining of property by cheating is not theft itself, but only comparable to theft, one can see that the absence of the physical

164. There were in fact some other differences between ‘theft’ and ‘being comparable to theft’, the most important being that in the latter case the rule requiring repayment of double the value of the stolen goods to the owner did not apply (JOHNSON, *Tang Code I*, p. 262).

165. JOHNSON, *Tang Code II*, p. 201.

166. JOHNSON, *Tang Code II*, p. 303.

167. On *zuo zang* see above at note 150.

168. JOHNSON, *Tang Code II*, p. 438.

169. JOHNSON, *Tang Code II*, p. 440.





element of theft, the taking of an object that does not belong to one, would make it difficult for the law to treat cheating as theft. Yet the use of forgery to make a profit at the expense of another was sufficiently similar to the physical appropriation of the latter's property to justify a classification of the offence as 'comparable to theft' rather than as a miscellaneous offence concerned with illicit goods (*zuo zang*).

We now come to the section on 'violence and theft' which contains the most important rules governing ordinary theft. The principles determining the punishment of the thief are in essence the same as those already found in the Qin/Han and later law. Article 282<sup>170</sup> punishes attempted theft with a beating of 50 blows with the light stick. Where the thief has succeeded in taking goods, he is to be punished on a scale according to their value. Where the goods are worth one *chi* of silk, a punishment of 60 blows with the heavy stick is imposed, increased by one degree for every *pi* of silk. Where the value of the stolen goods amounts to five *pi*, the punishment is penal servitude for one year. Thereafter it increases by one degree for every five *pi*, reaching a maximum at life exile with added labour where the value is 50 *pi*.

Ordinary theft (defined as taking goods while being hidden) is not a capital offence unless special circumstances are present. One such special case is the theft by supervisory or custodial officials of property within their area of jurisdiction (article 283)<sup>171</sup>. The theft of goods by officials has to be distinguished from the mere acceptance of property (whether or not pressure was applied). Actual theft is a much more serious offence. The punishment is the same as that for ordinary theft with an increase of two degrees, but, where goods to the value of 30 *pi* of silk have been stolen, the punishment is strangulation. Another special case is that of the commission of theft on three separate occasions, where each separate offence has entailed the punishment of life exile. On conviction for the third offence, the thief is to be sentenced to strangulation (article 299)<sup>172</sup>.

A separate article (300)<sup>173</sup>, unusually for the code, does not deal with the punishment for an offence, but defines the circumstances under which the theft of property is committed. This shows that the physical element (the nature of 'taking') was the most important consideration in the minds of the legislators, not the nature of the thief's mental state, whether he had the intention to steal or not. Here the Tang code makes more explicit what had been merely adumbrated in the earlier law<sup>174</sup>. The article distinguished the 'taking' necessary to constitute according to the kind of property stolen. In the case of ordinary goods, there was theft only if they were removed from the place in which they were kept, though for

170. JOHNSON, *Tang Code II*, p. 292.

171. JOHNSON, *Tang Code II*, p. 293.

172. JOHNSON, *Tang Code II*, p. 320.

173. JOHNSON, *Tang Code II*, p. 322.

174. See above at notes 87–91.





small valuable objects such as precious stones it was enough if they were concealed in the hand without being removed from the place<sup>175</sup>. Animals kept in enclosures, such as horses or cattle, were deemed to have been stolen only once that had been led out of the enclosure. Birds (falcons) or animals given to running away, such as dogs, were stolen only once they were under the real control of the taker, while objects too heavy to be moved single-handedly, such as blocks of stone or lumps of wood, were stolen only once they had been placed on a cart preparatory to removal.

Several articles deal with the theft of special kinds of property for which a fixed punishment (not dependent on value) was prescribed. Thus, the theft of objects used in state sacrifices, imperial seals, imperial clothing and other property, imperial decrees or other official documents, tallies for the gates of the imperial palace, and trees or plants from the imperial grave sites had specific punishments prescribed in the code. Only in the case of theft of the imperial seals was the punishment capital<sup>176</sup>. The theft of Buddhist or Daoist statutes (article 276)<sup>177</sup>, prohibited military weapons (article 275)<sup>178</sup>, coffins and burial clothing (article 277)<sup>179</sup> was treated in a similar fashion. In no case was the punishment capital.

The theft of horses or cattle<sup>180</sup> was regulated by article 279<sup>181</sup>, conjoining the separate acts of stealing and killing: “All cases of stealing horses or cattle belonging to the government or a private person and killing them, penal servitude for two and a half years”<sup>182</sup>. The underlying idea is that the animals have been stolen in order to be killed, so that their flesh and hides can be used or sold. The *shuyi* explains that horses and cattle (especially oxen) are treated differently from other animals because they are of military use to the country. Hence there is a minimum punishment for their theft and killing, since, we may deduce, their services are lost to the country. However, the commentary adds (in accordance with article 280<sup>183</sup>) that if, according to the value of the *zang* (that is, the carcase), the punishment under the

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175. This contrasts with the Roman rule making simple ‘*contrectatio* (handling)’ the touchstone for theft.

176. Articles 270, 271, 273, 274, 278 (JOHNSON, *Tang Code II*, pp. 278–280, 281–284, 288–289).

177. JOHNSON, *Tang Code II*, p. 265.

178. JOHNSON, *Tang Code II*, pp. 284–285.

179. JOHNSON, *Tang Code II*, pp. 286–287.

180. The term *niu* (cattle) primarily refers to oxen and cows.

181. JOHNSON, *Tang Code II*, p. 289. See also above at note 162.

182. CHENG, *Investigation into Codes of Nine Dynasties*, p. 278 makes an odd mistake in treating the reference to ‘killing’ in the article as the punishment (death) for the theft of the animal.

183. JOHNSON, *Tang Code II*, p. 289. Under this article, where the minimum punishment prescribed by the law for a particular kind of property (such as an official seal) would be less than that appropriate to its market value, then it is the latter which is to be applied with an increase of one degree.





scale for theft would exceed two years and a half penal servitude, then the case is to be punished as one of ordinary theft with an increase of one degree<sup>184</sup>.

The section on 'violence and theft' also contains several rules on the special features of 'theft' within the family. Although we have little evidence of such rules prior to the Tang<sup>185</sup>, it is certain that in essence the Tang rules also were drawn from earlier codes. The Tang code established two important principles for this category of theft: theft was only recognised as occurring between relatives who did not live together, and the punishments, whose extent depended upon the degrees of relationship involved, were more lenient than those imposed for theft between non-relatives. Article 287 provided that, where a person stole from a relative from whom he was wearing mourning for three to five months, the punishment was to be one degree less severe than that for theft between unrelated persons; if the mourning was between five and nine months the punishment was two degrees less; and if for one year three degrees less<sup>186</sup>.

The position was quite different in the case of relatives who lived together. Here it was not the concept of theft but that of 'improper use' that was applied. Within the group of relatives living together the distinction between 'senior' and 'junior' was crucial. It was only relatives of a lower generation or of the same generation but younger who might commit the offence of 'improper use'. Should such junior relatives without permission privately make use of family goods they were to be punished according to a particular scale of value. The punishments were light, starting with ten blows of the light stick, and in no case might exceed 100 blows with the heavy stick. The reason for the introduction of the offence of 'improper use' rather than the application of theft itself to the case is that junior members of the household were regarded as having a share in the family property and so could not be considered as 'stealing' what they already owned. On the other hand, the management of the family property was in the hands of the head of the family, the senior male, and, without his permission, junior members had no right to dispose of it.

One other aspect of the Tang law of theft is worth considering as an illustration of the degree of technical proficiency and sophistication, which the penal codes by this time had attained. This is the distinction between 'multiple' and 'recidivist' thefts, the former referring to two or more thefts committed before any one of them has been discovered, and the latter to two or more convictions for theft.

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184. To illustrate the distinctive qualities of horses and cattle, the commentary cites the case of the stealing and killing of a yak. Since the yak is not an animal used for riding (as in the army) or for cultivating the soil, there is no minimum punishment and the offence is to be punished on the basis of ordinary theft.

185. Compare, however, the Qin rules above at notes 17–19.

186. JOHNSON, *Tang Code II*, p. 301. In the case of 'forcible theft' the rules were different (article 285, JOHNSON, p. 297).





Multiple thefts are dealt with in both the ‘general principles’ and ‘violence and theft’ sections of the code. Article 45 in the ‘general principles’ establishes the general rules, according to which, where two or more offences are discovered at the same time, the offender is to be punished only for the more serious. Should he have already been sentenced for an offence and then a further, more serious, offence committed prior to his conviction comes to light, he is to receive as additional punishment only the difference between the punishment already received and that for the newly discovered offence<sup>187</sup>.

The general rule is applied in cases of ‘repeated offences (*pan fan*)’ involving the acquisition of illicit goods as follows. Where such offences have been committed in the same period of time, the total value of the goods illicitly acquired is assessed and the offender is held liable for half this amount.<sup>188</sup> Suppose a person has committed two thefts from two different households. In one goods worth 5 *pi* of silk were taken, entailing a punishment under the code (article 282) of penal servitude for one year, and in the other goods worth 15 *pi* were taken, entailing a punishment of penal servitude for two years. The total value of the stolen goods amounts to 20 *pi*, so that the thief is to be sentenced for half this amount. The punishment for the theft of goods worth 10 *pi* is penal servitude for one year and a half. Where the thief has already been sentenced for the first offence and the second is then discovered, the additional punishment to be imposed is penal servitude for half a year, commuted, it seems, to a beating of 20 blows with the heavy stick (article 27)<sup>189</sup>.

To these rules the *shuyi* commentary to article 282 from the section on ‘violence and theft’ adds a gloss. The commentary first, echoing article 45, states that, if a person commits repeated thefts in one family or at the same time steals from several families, the value of the goods stolen is totalled and then halved to determine the punishment. However, it then adds “If most of the illicit goods comes from one place so that combining them and sentencing for one half of the whole would not be the heaviest punishment, the punishment is for what would carry the heaviest punishment”<sup>190</sup>. This, in effect, is an illustration of the general rules stated in article 45 that, where two or more offences are discovered together, only the more serious is sentenced<sup>191</sup>. Thus, if a person commits several thefts which come to light at the same time, but the most valuable goods come from only one of these thefts, he is to be sentenced only for that theft. The important proviso is that the punishment for this offence should be more severe than the punishment based on half the value of the total amount of the illicit goods.

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187. JOHNSON, *Tang Code II*, pp. 235–237

188. Article 45: JOHNSON, *Tang Code I*, pp. 237–238.

189. JOHNSON, *Tang Code I*, pp. 156–160.

190. JOHNSON, *Tang Code II*, pp. 292–293.

191. JOHNSON, *Tang Code I*, p. 235.





For recidivist thefts the relevant rules are again distributed between the 'general principles' and 'violence and theft' sections of the code. Article 29<sup>192</sup> states the general principle. Where a person, after an offence has been disclosed (*fa*), that is, has been brought before the court, and, in the case of an offence entailing the punishment of penal servitude or exile, has been sentenced and despatched to the place of exile or labour<sup>193</sup>, and then commits a further offence, he is to be sentenced separately for that offence. Should the first offence and the second offence both entail the punishment of exile, the punishment for the second offence is to be converted into a beating with the heavy stick and three years of labour at the place to which the offender was exiled for the first offence. The same rules are to apply where the offender, sentenced to exile for a first offence, commits further offences at the place of exile.

A further rule is found in the section on 'violence and theft'. Article 299<sup>194</sup> deals with the case in which a thief, who has already been convicted (*duan*) twice for theft, commits a third theft. Should each of the three offences have entailed the punishment of penal servitude, he is now for the third offence to be sentenced to exile; should each have entailed the punishment of exile, he is now to be sentenced to death by strangulation. The article added a qualification of great importance. In calculating the three offences, only thefts that occurred after an amnesty were to count. If a person committed theft and then was pardoned under an amnesty, this conviction did not count for the purpose of the rule on three convictions.

Consideration of these rules on multiple and recidivist thefts shows that there was an important difference in the code in the treatment of the two kinds of case. Where a person had committed more than one theft, his punishment varied according to whether it was classified as 'multiple' or 'recidivist'. Should it be 'multiple', that is falling within the class of 'disclosed at the same time', he was to be sentenced only to half the total of the combined value of the *zang* or for that theft in which the most considerable amount of property had been obtained (whichever would yield the greater punishment). Should it be 'recidivist', that is, be committed after conviction for a first theft, he was to receive the full punishment for the second theft, and, should it be a third offence, might incur a further degree of punishment even reaching death.

## 6. Conclusion

The treatment of theft which we find in the Tang code is essentially that which we find in the later imperial codes. In particular, albeit with modifications, we find

192. JOHNSON, *Tang Code I*, pp. 166–169.

193. This is the apparent meaning of the phrase *ji pei* in the text of the article as explained in the *shuyi* commentary (referring only to penal servitude). JOHNSON, *Tang Code I*, p. 166 translates *pei* as 'assign punishment'.

194. JOHNSON, *Tang Code II*, pp. 320–322.





in the Ming and Qing codes the principles by which the punishment for secret theft is determined by reference either to the market value of the goods stolen or to their intrinsic nature, as well as the principle specifying the return of what has been stolen to the owner, although the requirement to repay double has been discarded. We also find the principle that each co-thief is liable for the whole of the property taken, not just his share, and the classification of offences as 'being theft' or as 'comparable to theft'. Yet these same principles and mode of classification already antedate the Tang code by many hundreds of years, since we find them applied already in the Qin and early Han law. We have yet a further example — another is supplied by the law of homicide — of an astonishing continuity in the statutory law over a period of legal development extending for more than two thousand years.

From Qin and Han times, what is seen in the evolution of the law of theft is essentially a refining of the principles by which offences were classified and a more detailed working out of the rules that were to govern the specific offence denominated 'theft (*dao*)'. If we consider Han law, which still to a great extent followed Qin law, we can see that the term *dao* expressed a broad category of 'wrongful acquisition of another's property', generically described as 'theft', which in fact included a number of specific and quite distinct offences. Thus, the three offences of obtaining property through the fraudulent alteration of a contract, accepting bribes and subverting the law, and accepting property within the area of one's jurisdiction were all classified as species of theft. On the other hand, the planning of theft without participation in the act, the unlawful smuggling of prohibited goods across the frontier, and the private borrowing by officials of goods from government storehouses were all offences which were to be punished by the same law as theft (equivalent to the later formula of 'being comparable to theft').

We cannot chart the exact process by which this broad assemblage of offences under the broad umbrella of 'theft' came gradually to be dissolved. One factor that stands out in the process is the analytic distinction drawn by Zhang Fei in his preface to the Jin code between 'taking bribes (which had been freely given)' and 'accepting goods from persons within one's jurisdiction', the latter but not the former offence being classified as theft. The sparse information we have from the Northern Wei code of the late fifth century CE also suggests that by this time a number of distinct offences, all differentiated from theft, applied to officials who in various ways made a profit from their position.

In the Tang code we find three clearly differentiated groups of offence all concerned with the acquisition of illicit goods, revealing further development in the process of classification. There is first the set of rules dealing with officials who take bribes or accept goods within the area of their jurisdiction (the principal articles being 138 and 140). Here (without mention of theft) the punishment is determined by reference to appropriate scale of value set out in the article. This contrasts significantly with the position both in Han law, where the two offences





(‘taking bribes’ and ‘accepting goods’) were punished by the same law as theft, and in Jin law, where ‘accepting goods’ was still treated as theft.

Next we have a group of offences, each punished under the head of *zuo zang*, comprising acceptance of property in return for a favour (article 136), borrowing goods within one’s area of jurisdiction (article 142), and accepting presents of food and drink (article 144). Han law provided that officials who privately borrowed government property were to be sentenced under the same law as theft, whereas the Liang and Chen codes, probably also the Jin, treated the acceptance of presents by officials as theft.

The third group consists of one offence, that constituted by supervisory and custodial officials who ‘steal’ goods entrusted to their care or the property of persons under their jurisdiction. This is not only classified as theft but is punished two degrees more severely than ordinary or secret theft. Here we have evidenced the distinction, now firmly recognised, between the actual theft of goods by officials from persons under their jurisdiction and their acceptance of goods offered to them by subordinates (whether spontaneously or under pressure from the official).

In one case the Tang law follows that of the Han. Under the laws of 186 BCE a person who made a profit through the fraudulent alteration of a contract or a trader in the market who obtained property through cheating was to be sentenced under the same law as theft. In the Tang code all offences of obtaining property through fraud or cheating were treated as ‘comparable to theft’ (article 373).

We also find in the Tang code an authoritative, even conclusive, analysis and settlement of issues that may not have been entirely resolved in the previous law. The essential requirement of theft, that there be a physical taking of another’s property to which one was not entitled, appears to have been recognised from the third century BCE and no doubt even earlier, although the first extant definition in a legal context adverting to this requirement is that offered by Zhang Fei in his preface to the Jin code. However, not until the Tang code do we find evidence of detailed rules by which the concept of ‘taking property’ was elucidated. These rules show in the first place that the property in question must be ‘movable’ and in the second the kind of physical act necessary to constitute ‘removal’ with respect to different kinds of object. As a consequence of this analysis of ‘taking’ we can also see how and why the concept of ‘theft’ was inappropriate in the context of the illegal acquisition of land.

Such illegal acquisition, as the *shuyi* commentary explains, is not theft because land physically cannot be moved. The offence, therefore, has to be defined separately and made subject to a different scale of value for the determination of the punishment.

Again, the problem of multiple and recidivist thefts had certainly received some attention in the pre-Tang law. For example, there were already rules on the additional punishment to be incurred by a thief on his third conviction. But it is not until the Tang code that we see worked out in detail the nature of the distinction





between 'multiple' and 'recidivist' and the specific rules which governed each of these two kinds of repeated theft, a distinction that was of fundamental importance in the transformation of the law of ordinary theft that occurred under the Qing in the eighteenth and nineteenth centuries.

