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### Author

Zhang, Zhaoyang

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Civil Laws and Civil Justice in Early China

By

Zhaoyang Zhang

A dissertation submitted in partial satisfaction of the

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Committee in charge:

Professor Michael Nylan, Chair

Professor David Johnson

Professor David Cohen

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Abstract

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by

Zhaoyang Zhang

Doctor of Philosophy in History

University of California, Berkeley

Professor Michael Nylan, Chair

Civil laws and civil justice in early China have not received sufficient scholarly attention, because scholars tend to assume that laws in pre-modern China were merely criminal laws promulgated and enforced to maintain public order. This dissertation challenges that view by analyzing excavated evidence and reexamining transmitted evidence.

Chapter One establishes the existence of civil laws in early China by examining non-criminal case reports preserved in the Juyan 居延 strips and by assessing the role of district bailiffs in handling civil disputes. Chapter Two further demonstrates the existence of civil laws and reveals the civil justice system by studying domestic statutes and how two cases of inheritance disputes preserved in the Comprehensive Discussion of Customs (*Fengsu tongyi* 風俗通義, comp. ca. 200) illustrate the application of these statutes. Chapter Three examines two important civil legal concepts: *zhi* 直 (a straight account of the facts) and *mingfen* 名分 (title and portion) to reveal the underlining notions that uniformly guided the application of the civil laws. Chapter Four, the concluding chapter, goes beyond the boundaries of civil laws to address larger issues, such as the legal ideal of reforming people's morals to reduce lawsuits, the relationship between rituals and laws, and the Classics as a source of legal authority in litigations.

Overall, I conclude that civil laws and civil justice existed in early China; and that this distinctive body of civil laws, while not systematically codified, were substantial, sophisticated, and empire-wide in application and authority.

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Zhang Zhaoyang  
September 1<sup>st</sup>, 2010

## Introduction

The nature, reach, and application of civil laws and civil justice in early China have not received the scholarly attention the subject deserves. To date, the general scholarly consensus has been to see the official legal apparatus for early China, and indeed, all of pre-modern China, as devoted exclusively to the administration of criminal justice. That same scholarly consensus until recently assumed that all civil matters were settled by custom or usage.

For example, Ōba Osamu 大庭脩, in his influential work, *Shin Kan hōseishi no kenkyū* 秦漢法制史の研究 (Research regarding the Laws of the Qin and Han, 1982), quotes and agrees with his predecessor Tanaka Kaoru's 田中薫 opinion that pre-modern China developed a unique legal system which Ōba and Tanaka designate as a statute-ordinance system (*Lüling* 律令). In this system, the laws could be divided into two parts: statutes (*lü* 律) and ordinances (*ling* 令). Statutes regulated the punishment of criminals, while ordinances comprised regulations similar to administrative laws.<sup>1</sup>

Such characterizations do not consider the possible existence of civil laws and civil justice in the legal system. Similarly, A. F. P. Hulswé, concluded in 1986:

It is characteristic for the whole of traditional Chinese law as embodied in the codes that it is solely concerned with public matters, being administrative and penal. Private law, pertaining to the family and to trade and commerce other than the state monopolies, remained outside the field of regimentation by public authorities and continued to be ruled by custom and usage.<sup>2</sup>

And, as recently as 2006, Michael Loewe wrote,

The statutes and ordinances of Qin and Han did not set out to protect men and women from the oppression of officials, though such intentions are sometimes visible in their provisions. Their purpose was to maintain law and order and to control the people and their work on the land. Carefully regulated sanctions and punishments instructed officials how to eliminate crime.<sup>3</sup>

Understandably, these scholars, prior to the most recent excavations, drew their conclusions from the fact that the transmitted laws of pre-modern China and even the excavated Qin laws (dated 306-217 B.C.) from Shuihudi 睡虎地 in 1975<sup>4</sup> are

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<sup>1</sup> Ōba Osamu 大庭脩, *Shin Kan hōseishi no kenkyū* 秦漢法制史の研究 (Tōkyō: Sōbunsha, 1982), 5-19. Ōba's work was prior to the Zhangjiashan excavation. I will discuss how the effect of the Zhangjiashan excavation has had upon the legal history of early China in this introduction.

<sup>2</sup> *The Cambridge History of China, Vol. 1: The Ch'in and Han Empires, 221 B.C.-A.D. 220*, eds. Michael Loewe and Denis Twitchett (Cambridge: Cambridge University Press, 1986) [Hereafter *CHC*], 525.

<sup>3</sup> Michael Loewe, *The Government of the Qin and Han Empires* (Cambridge: Hackett Publishing Company, 2006), 120.

<sup>4</sup> For the Shuihudi legal documents, See *Shuihudi Qinmu zhujian* 睡虎地秦墓竹簡, ed. Shuihudi Qinmu zhujian Zhengli xiaozu 睡虎地秦墓竹簡整理小組 (Beijing: Wenwu chubanshe, 1990) [Hereafter, *SHD*]. The *SHD* documents are rich and detailed in content and diverse in types, and they

apparently preoccupied with public matters. A cursory look at the excavated Qin laws or the better-known transmitted *Tang Code* illustrates their preoccupation with penal laws.<sup>5</sup> Evidence excavated from Zhangjiashan 張家山, first published in 2001, however, offers an opportunity to reassess and revise this view.<sup>6</sup>

The Zhangjiashan strips were excavated from Tomb 247 at Jiangling 江陵, Hubei 湖北 by archaeologists from the Jingzhou 荊州 Museum in 1983. There are 1,236 strips in total, dated from 202 to 186 B.C.<sup>7</sup> These finds were first reported in the *Wenwu* 文物 in 1985, with the full set of strips published in 2001 in the *Zhangjiashan Hanmu zhujian* 張家山漢墓竹簡 (Strips from a Han Tomb at Zhangjiashan), with a revised edition in 2006.<sup>8</sup> The editors classified the strips into eight texts mostly under their original titles, of which the *Zouyan shu* 奏讞書 (Reports of Cases to Be Reviewed, 228 strips in total) and *Ernian lü ling* 二年律令 (The Statutes and Ordinances of The Second Year, 526 strips in total) are very important legal documents. The *Zouyan shu* is a collection of twenty-two legal cases presumed to mostly have taken place during the period of 202 to 186 B.C. *Zou* 奏 means “to report,” and *Yan* 讞 refers to the discussion of sentences. The collection reflects the appeal procedure and details of court debates, vastly expanding the amount of historical information about the legal system as it actually functioned beyond what had hitherto been available to scholars. The *Ernian lü ling* consists of twenty-seven statutes and one set of ordinances that had been previously unknown to scholars. Among these statutes, Statutes on Households (Hulü 戶律), Statutes on Establishing Heirs (Zhihoulü 置后律), and Statutes on Registration (Fulü 傅律) clearly concern such civil matters as land ownership, division and inheritance of households, and female property “rights.”<sup>9</sup> In addition, there are also guidelines for compensation, commercial transactions, and debts as defined by other statutes.

While these examples hardly constitute a systematic or codified approach to civil laws, they are sufficient to challenge the earlier view that traditional Chinese laws were exclusively criminal and administrative. They compel us to reexamine more thoroughly both transmitted and excavated materials for evidence that may have been overlooked. With these discoveries and a renewed burst of scholarship, we have

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are the first excavated early laws. Their focus is predominantly penal, but a number of civil provisions are scattered among the penal statutes. Scholars have by and large overlooked those civil provisions.

<sup>5</sup> The Tang Code is preserved in the famous *Tanglü shuyi* 唐律疏議 (The Tang Code with Commentaries, 635). A complete translation has been made by Wallace Johnson, *The T'ang Code: Vol. I, General Principles* (Princeton: Princeton University Press, 1979); and *The T'ang Code: Vol. II, Specific Articles* (Princeton: Princeton University Press, 1997).

<sup>6</sup> See *Zhangjiashan Hanmu zhujian (ersiqi hao mu)* 張家山漢墓竹簡 (二四七號墓), ed. Zhangjiashan ersiqi hao Hanmu zhujian zhengli xiaozu 張家山二四七號漢墓竹簡整理小組 (Beijing: Wenwu chubanshe, 2001) [rev. 2006] [Hereafter *ZJS*].

<sup>7</sup> A.F.P. Hulswé, “Fragments of Han Law,” *T'oung Pao* 76, nos.4-5 (1990), 208-233; cf. Ōba Osamu, “The Ordinances on Fords and Passes Excavated from Han Tomb Number 247, Zhangjiashan,” *Asia Major* 14 (2001), 119-141, trans. David Spafford et al.; Cao Lüning 曹旅寧, *Zhangjiashan Hanlü Yanjiu* 張家山漢律研究 (Beijing: Zhonghua shuju, 2005).

<sup>8</sup> Zhangjiashan ersiqi hao Hanmu zhujian zhengli xiaozu 張家山二四七號漢墓竹簡整理小組, “Jiangling Zhangjiashan Hanjian gaishu” 江陵張家山漢簡概述, *Wenwu* 1(1985), 9-15; *Zhangjiashan hanmu zhujian* 張家山漢墓竹簡, ed. Zhangjiashan ersiqi hao Hanmu zhujian zhengli xiaozu 張家山二四七號漢墓竹簡整理小組 (Beijing: Wenwu chubanshe, 2001).

<sup>9</sup> The term “rights” is a controversial issue in studying the legal history of pre-modern China. In this dissertation, I still adopt this term “rights” when it is necessary. But readers should be aware that there was no doctrine of natural rights in pre-modern China.



begun to see that civil suits were far more common in early China than previously assumed; also, that the legal system included a body of civil statutes and some sort of orderly civil procedure. Scholars, among them the authors of the *Zhongguo mingfa tong shi* 中國民法通史 (A General History of Chinese Civil Laws, 2003), have become increasingly interested in this civil aspect of laws in pre-modern China.<sup>10</sup>

This new generation of scholarship, while understandably inspired by these new finds and fresh perspectives, runs the risk of fundamentally misunderstanding the thrust of these laws by too hastily labeling them as “civil laws.” While these materials deal with civil law-like subjects, there is a danger in applying to early China a term derived from the Roman legal tradition and that is colored by eighteenth-and-nineteenth century European ideologies.<sup>11</sup>

In the English scholarship, Philip Huang was the first to argue for the existence of civil laws in pre-modern China. In his *Civil Justice in China* (1996), he defines his use of the term “civil law” as follows:

I use civil law in the same meaning as the modern Chinese term *minfa*, or *minshi falü*. It refers to codified legal stipulations dealing with “people’s matters” (*minshi*), distinguished from “punishable matters” or “criminal matters” (*xingshi*). Its scope and content are well indicated by the headings of the four substantive books of the Republican Civil Code of 1929-30: “Obligations,” “Rights over Things,” “Family,” and “Inheritance.”<sup>12</sup>

Huang convincingly defends his use of the term “civil law” when applied to late imperial, as well as to Republican China, by expanding its domain:

The important point here is that my less restrictive usage of the term civil law enables us to examine how Chinese law dealt with civil matters at the level of both representation and practice. It will not do to dismiss Qing law from the subject of civil law simply because of the manner in which it was represented, just as it will not do to equate [China’s] Republican civil law with modern Western civil law simply because it adopted a civil code based on a German model. Such approaches would reduce the inquiry to representation alone.<sup>13</sup>

In his study of late imperial and Republican era “civil law,” Huang availed himself of documented Qing and Republican law codes and therefore conducted code-based analysis. No such law codes exist for early China. Despite scholarly reconstructions of Qin and Han laws based on materials transmitted and materials retrieved from archaeological excavations, our knowledge of the laws of early China is by and large fragmentary. Lacking a complete record of early Chinese laws and jurisprudence, and therefore no reliable way to represent or understand the legal world of early China as

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<sup>10</sup> *Zhongguo minfa tong shi* 中國民法通史, ed. Zhang Jinfan 張晉藩 (Fuzhou: Fujian renmin chubanshe, 2003). This is a very ambitious work, covering tenth century B.C. to 1911. The strength of this work is its broad theme, but its weakness is that the work lacks sufficient detail for each period.

<sup>11</sup> See John Henry Merryman and Rogelio Perez-perdomo, *The Civil Law Tradition* (Stanford: Stanford University Press, 2007), 5-6; cf. Philip Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford: Stanford University Press, 1996), 6-9.

<sup>12</sup> Huang, *Civil Justice in China*, 6.

<sup>13</sup> *Ibid.*, 8-9.

a whole and its civil aspect in particular, we must adopt a different approach more suited to the evidence available.

We currently possess a variety of statutes and cases from early China. Some have come to us as transmitted texts, some by excavation.<sup>14</sup> Whenever statutes are available, we can readily discern the legal principles at work in the way judges decided specific cases by applying those statutes. But when we have reports of cases without their relevant statutes, we will need to infer the legal principles. Thus, in this dissertation, the term “civil laws” does not imply the existence of any formal civil code. Instead, it refers to the legal principles and legal practices that deal with civil as opposed to criminal matters, with civil matters including such issues as debt, compensation, inheritance and other property issues, and just as importantly, matters that were adjudicated in “civil” proceedings, as opposed to criminal proceedings.

Another important terminological issue is my use of the term “early China.” The statutes and cases explored in this dissertation come mostly from the Han period, but I still prefer the term “early China” for four reasons. First, we will see in Chapter One that there were a number of civil provisions concerning debt and compensation in the Qin laws from Shuihudi. These Qin provisions clearly were adopted by the Han and incorporated into the Han laws. Second, the statutes regulating domestic matters, a principal subject of Chapter Two, quite likely had Qin roots. Third, the subjects of Chapter Three, two important civil legal concepts, *mingfen* denoting ownership and *zhi* denoting a straight account of the facts, both originated in the Zhanguo period, perhaps around the 4<sup>th</sup> century B.C. Fourth, a subject of Chapter Four, the presumably prevailing legal ideal of reforming people’s morals to reduce lawsuits, echoes one of Confucius’s precepts. In short, the sophisticated and substantial Han civil laws did not emerge overnight with the victory of Liu 劉 clan in 206 B.C. They were the result of centuries of pre-Han intellectual, social and political experimentation, a crystallization of the legal thoughts and practices of the pre-Han period. Therefore, the term “early China” better reflects the early development of civil laws across the many centuries from the pre-Han, through Western and Eastern Han periods, and even beyond.

In four chapters, this dissertation, “Civil Laws and Civil Justice in Early China,” will prove the existence of civil laws and civil justice in early China and reveal their sophistication and importance. Chapter one will adopt a two-step approach to prove the existence of civil laws. First, I will study non-criminal cases. I will examine cases mostly preserved in the Juyan 居延strips<sup>15</sup> to demonstrate the frequency of civil disputes concerning debt, compensation (for torts, i.e., damages and injuries), and other property disbursement matters. I will also collect and study relevant civil statutes from Shuihudi and Zhangjiashan strips. I will study the ways in which contracts were used in civil proceedings. This study will eventually demonstrate that matters that we will call “civil” were dealt in a special manner. By this, I refer to five characteristics that were not found in criminal proceedings.

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<sup>14</sup> There are four major sources: 1) A.F. P. Hulswé, *Remnants of Han Law* (Leiden: E.J. Brill, 1955) [Hereafter *RHL*]; 2) Hulswé, *Remnants of Ch'in Law* (Leiden: E.J. Brill, 1985) [Hereafter *RCL*]; 3) *SHD* legal documents; and 4) *ZJS* legal documents. *RCL* is based on *SHD*, while *RHL* is based on transmitted texts.

<sup>15</sup> The Juyan strips were excavated from the deserts and Gobi in Edsen-gol, Inner Mongolia in two separate excavations (1930s, 1970s). For details, see n. 78 in Chapter One.

- 1) Individuals, not operating on behalf of the state, were able to bring complaints against one or more persons in matters such as compensation and property disbursement and distribution.
- 2) The authorities sought to assess appropriate compensation or determine the proper disbursement or distribution of property for the successful plaintiff.
- 3) In cases of debt or compensation that resulted in a judgment assigning liability, the authorities could be asked to help the successful plaintiff collect compensation from a recalcitrant defendant, but it remained up to the plaintiff to decide if he or she would pursue the settlement.
- 4) Punishments were rarely imposed by the state on liable parties. In those cases in which a punishment was imposed, the punishment was limited to fines and excluded such punishments as forced labor service, exile, beating, confinement, mutilation, or execution.
- 5) Social status was not a factor in assessing liability. The parties involved in disputes over property were treated as equals by the authorities: a person with a higher rank had no legal privileges beyond those of a person with lower rank. The losing defendant, regardless of his/her rank, was ordered to pay the debt due to the successful plaintiff. In addition, government agencies had no privilege over individuals in matters of compensation, i.e., if someone damaged official property, that person was only required to compensate for the damage at fair value, with no other punishments attached.

Then the dissertation will turn to institutional differences between civil laws and criminal laws. I will present the views of Zheng Xuan 鄭玄 (A.D. 128-200), a leading classicist and legal expert of his time, regarding the conceptual difference between civil disputes and criminal disputes, and also the institutional differences between civil litigation and criminal litigation. In Zheng's writings, disputes over property were called *song* 訟, while legal actions that involved crimes were called *yu* 獄. From this conceptual angle, we can perceive clear institutional differences between civil litigation and criminal litigation. Among these differences, the most conspicuous one is that civil cases were preliminarily tried by district bailiffs while criminal cases were preliminarily tried by county courts. In summation, Chapter One will show the frequency of civil disputes as well as the existence of civil statutes and procedures, and will thereby demonstrate the existence of civil laws in early China in general and in the Han in particular.

Chapter Two will further demonstrate the existence and importance of civil laws and reveal the domestic justice system by studying the Statutes on Households, the Statutes on Establishing Heirs, and the Statutes on Registration. It argues that, despite the absence of codified "family law," the Han had a quite sophisticated statute-based domestic justice system. This system perhaps was inherited from its Qin predecessor, though we have little evidence to trace the extent of that legacy. The Statutes on Households covered civil issues involving *mingtianzhai* 名田宅 (title to cultivated fields and dwelling sites), household registration, household division, land transactions, last wills, and women's property "rights." The Statutes on Establishing Heirs regulated the lines of inheritance for both households and orders of honor (*jue* 爵). The Statutes on Registration regulated the establishment and registration of independent households by non-heirs.

These statutes shed light on early cases preserved in the received texts, as will be demonstrated by the application of these statutes to two cases drawn from the *Comprehensive Discussion of Customs* (*Fengsu tongyi* 風俗通義, comp. ca. 200) that detail disputes over inheritance.

Chapter Three delves into the realm of civil legal concepts, focusing on the terms *zhi* 直 and *mingfen* 名分, arguing that even though *zhi* has different meanings in different situations, within the context of civil disputes, *zhi* refers to "a straight account of the facts of the case." Ideally, the party who provides the most accurate and therefore most credible account of the facts of the case would win the suit. A primary goal of civil litigation in early China was to establish facts in order to reach a just and fair resolution of disputes. In legal contexts, the term *mingfen* or *fen* in pre-Han and Han texts, denotes ownership of both movable and real property. This is best illustrated by the provisions of *mingtianzhai* in the Han Statutes on Households, although the creation of the practice was traditionally attributed to the Qin minister, Shang Yang 商鞅 (ca. 390-338 B.C.). The striking characteristic of ownership in early China is its universality: Throughout the empire, Han subjects of all ranks had the "right" to own both movable and real property, and in civil disputes, disputants were supposed to be treated as equal parties. This universality of ownership, especially when it involved real property, was a significant development in world legal history. Together, the significance of these two notions, *zhi* and *mingfen*, on one hand reflects the emphasis on verification of facts and universality of ownership in early China's system of civil laws, while showing that the civil laws were unified and grounded on rational legal notions, rather than being just a loose conglomeration of pragmatic regulations.

Chapter Four, the concluding chapter, moves into issues beyond the strict boundaries of the civil laws carefully established by Chapters 1-3. This concluding chapter highlights the distinctive characteristics of civil laws in early China by putting them in a larger context. The chapter makes three points: 1) Even though civil laws were quite sophisticated in early China, especially Han, with clear evidence of parties settling disputes through lawsuits, the prevailing legal ideal was to reform people's morals so as to obviate the need to resort to legal action at all; 2) ethical principles, such as filial piety and revenge, deeply influenced Qin and Han laws; and 3) the Classics were often cited by judges in ways that suggest that they held equal authority with statutes in legal matters. For instance, evidence will show that the famous Han classicist Dong Zhongshu's 董仲舒 (179-93 B.C.) Classics-based legal reasoning deeply influenced the development of civil laws in the two areas of adoption and inheritance.

The dissertation concludes with the suggestion that a full exploration of the relationship between rituals and laws is needed, in order to address the fundamental issue of whether or not there was a notion resembling "rights" in pre-modern China. If better grounded, such scholarship may show an alternative path to the doctrine of natural rights, a concept fundamental to Western legal traditions. But more importantly, such studies may enable us to appreciate the subtle but fundamental differences between world legal cultures.

Overall, this dissertation demonstrates not only the existence of civil laws and civil justice in early China, but also their sophistication and importance, and illustrate their distinctiveness, thereby inviting readers to consider a convincing alternative to most conventional views of early China's legal culture.

## Chapter One: The Existence of Civil Laws in Early China

This chapter is divided into two parts. Part I of this chapter will argue that cases and statutes concerned with debt, compensation and other property disbursement matters can all be identified as elements of “civil laws” because they demonstrate five characteristics that are not found in criminal cases. Due to their importance, complexity, and wealth of information, the statutes excavated from Zhangjiashan will not be covered in either part of this chapter but will be treated separately in chapter two. Part II of this chapter will argue that these non-criminal cases and statutes should be considered as “civil laws” for two historically based reasons: First, Zheng Xuan 鄭玄 (A.D. 128-200), a leading classicist and legal expert of his time,<sup>1</sup> distinguished *song* 訟, which he used as a legal term to refer to cases that we would now call “civil,” from *yu* 獄, criminal cases. Second, there were institutional differences between litigation that dealt with non-criminal matters such as debt and compensation, and litigation that dealt with the prosecution of and punishment for crimes.

### Part I: Non-criminal Cases in Early China

Non-criminal cases in early China have generally been overlooked by scholars. However, they did exist. With the advancements in our understanding made possible by the Zhangjiashan and other recent excavations, we can now more fruitfully revisit the famous case of “Hou Li jun suo zhai Kou En shi” 侯粟君所責寇恩事, which prompted Hulsewé to speculate in 1979 on the possible existence of civil suits in early China.<sup>2</sup> The thirty-six strip text that describes the “Hou Li jun suo zhai Kou En shi” case was excavated from Juyan, Inner Mongolia, in 1974 and first published in the journal *Wenwu* 文物 in 1978. The text describes a suit brought by a military officer Li 栗 against a civilian commoner Kou En 寇恩. Li hired Kou En to sell goods for him at a specified price. When Kou En proved unable to sell the goods at the agreed upon price, Li demanded that Kou En compensate him for the shortfall. Not satisfied by the amount of compensation made by Kou En, Li brought a suit against Kou En for full satisfaction. Despite the document’s length, the record is sadly incomplete, leaving even the final disposition of the suit unclear.<sup>3</sup> We do know, however, that hearings were conducted by a local bailiff in order to determine the facts in the case and to assess the claims and liabilities of the parties.

The following is a summary of the case (See Appendix 1 for the original text and Hulsewé’s complete translation):

On January 30, A.D. 28, bailiff Gong 宮, upon receiving the complaint of Li, transmitted to him by the county court of Juyan, summoned Kou En to the district office.

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<sup>1</sup> I will discuss Zheng Xuan 鄭玄 in detail in part II of this chapter.

<sup>2</sup> A.F.P. Hulsewé, “A Lawsuit of A.D. 28,” in *Studia Sino-Mongolica*, ed. Herausgegeben Von Wolfgang Bauer (Wiesbaden: Franz Steiner Verlag, 1979), 29.

<sup>3</sup> Professor Hsing I-tien 邢義田 argues that the thirty-six strips included just a small part of the complete case concerning the dispute between Li and Kou En. See Hsing I-tien, “Handai shuzuo wenshu yongyu ‘ta ru mo’ ji ‘Jianwu san nian Hou Lijun zhai Kou En shi’ jiance dang’an de goucheng” 漢代書佐文書用語‘它如某某’及‘建武三年侯粟君責寇恩事’簡冊檔案的構成,” *Lishi yuyan yanjiusuo jikan* 歷史語言研究所集刊 70.3 (1999), 559-588.

Before questioning him, the bailiff explained the statutes governing the issues in the case. The relevant statutes covered the following:

- 1) Incidents in which the accused party is unable to provide evidence of his innocence.
- 2) Incidents involving money and goods in which the accused is charged with being intentionally untruthful.
- 3) Incidents in which the amount in dispute is 500 cash or more.
- 4) Incidents when statements of the accused party are not altered or challenged for three full days.
- 5) Incidents in which false accusations can be punished by “reversal”, (i.e., the accuser risks the same punishment that the falsely accused party stood to suffer had he been found guilty or liable).<sup>4</sup>

After setting forth the relevant laws, the bailiff questioned Kou En.

According to Kou En, one year earlier, His Honor Li, who was a military officer, enlisted two subordinates to sell fish for him. When these subordinates were unable to perform the service, they gave Li the money to hire Kou En, a civilian, to transport and sell 5,000 fish at the market in the nearby county of Lude. Kou En agreed to bring Li 400,000 cash after selling the fish. In return, Li agreed to pay Kou En one ox and twenty-seven bushels of grain, in advance, for the service. Li paid Kou En the full amount in advance, after which Kou En went to the market and sold the fish. When Kou En failed to get the full anticipated price for the fish, he sold the ox as a way of making up the difference. But even after selling the ox, Kou En only managed to bring back a total of 320,000 cash, which he delivered to Li’s wife. Kou En subsequently purchased various goods, whose combined value was 24,600 cash. Kou gave these to Li’s wife, which still left him 55,400 cash short. Kou En ordered his son to catch fish for Li for a hundred days without wages in lieu of the outstanding debt of 55,400 cash. In response to Li’s charges, Kou En claimed that he had in fact delivered to Li the full amount of his obligation.

On February 12, A.D. 28, bailiff Gong summoned and questioned Kou En for a second time. The same procedures were followed and Kou En gave the same statement.

On February 15 A.D. 28, the bailiff reported the result of his inquiry to the county court. The bailiff believed that Kou En had no liability.

On February 24, A.D. 28, the county court of Juyan forwarded Li’s testimony to the company commander of Jiaqu, where Li served. [It is worth noting that the text is corrupt here.]

Unexpectedly, Li was condemned by the county court for violating laws prohibiting “dishonesty in the administration.” Since the remainder of the text is lost, we do not know what punishment, if any, Li received.

In his commentary on the text, which he faithfully translated, Hulsewé raised the core question being examined in this dissertation when he asked:

Was it a civil suit or a criminal one? Or were cases, which in our society would be considered civil suits, inevitably drawn into the criminal sphere? Hence, was a claim automatically transformed into an accusation?<sup>5</sup>

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<sup>4</sup> In the report, the five statutes were referred to by their conventional abbreviations. Therefore, the details of the statutes are unknown. My translation of these abbreviations follows Hulsewé, “A Lawsuit of A.D. 28,” 24-25 (slightly modified).

While this was the first time that a modern scholar pondered the possibility of there being an apparatus of civil laws in early China, the distinction between civil and criminal jurisprudence and procedures was as yet impossible to make, due to the lack of relevant evidence in 1979. Even so, certain aspects of the case stand out. Especially noteworthy is the seemingly well-defined procedure followed by all parties involved, including all the officials with jurisdiction over the case. The plaintiff Li submitted his complaint to the county court, but it was appropriately handed over to the lower-ranking bailiff. This was because suits of this nature were supposed to go to the bailiff first.<sup>6</sup> The bailiff held hearings for Kou En at intervals of thirteen days in order to test the consistency of Kou En's statements, all of which suggests the prudence and refined methods for establishing the reliability of testimony. Each time, before questioning Kou En, the bailiff explained the relevant statutes, a practice that very closely echoes modern notions of due process. This practice of enumerating and explaining pertinent statutes to the parties in contention is mentioned frequently in Juyan strips. For example, Juyan new strip no. E.P.T.52.417 states:

先以證不請律辨告, 乃驗問.

[The judge] informs [the defendant] of statutes concerning false testimony in advance, then questions the defendant.<sup>7</sup>

From *ZJS* strip (Statutes) no.110, we know that this procedural step was mandated by Han laws:

吏謹先以辨告證.

The official must carefully inform the accused party or the witness [of pertinent statutes] in advance [of his giving testimony].<sup>8</sup>

These procedural safeguards, seemingly designed to both elicit truthful testimony and protect all parties from the consequences of giving false statements and making false accusations, point to the sophistication of the Han legal system. The fact that the procedure included detailed written reports, signed and dated by lower officials and forwarded to higher authorities only underscores the point. One of the more surprising aspects of this case is that Kou En, a civilian commoner, and Li, a military officer, were treated as equal parties; Li was granted no special privileges in deference to his rank and status. The other striking feature of the case is its efficiency: from the first hearing to sentencing, only twenty-six days passed.

Upon a closer reading of the text, two intriguing questions arise. First, how is it that Li, as a plaintiff, ended up being the one convicted?<sup>9</sup> Kou En was found not liable but Li was condemned on the basis of “dishonesty in administration” (*zheng bu zhi* 政不直). Second, was the nature of the case criminal or non-criminal? Because the document is corrupt, we

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<sup>5</sup> Hulsewé, “A Lawsuit of A. D. 28,” 29.

<sup>6</sup> See pp. 25-28 of this chapter.

<sup>7</sup> Juyan new strip no. E.P.T.52.417, p. 256; see *Juyan xinjian* 居延新簡 (Beijing: Wenwu chubanshe, 1990) [Hereafter *JYX*]. In this context, *Qing* 請 should be taken as a loan word for *qing* 情. This occurs quite often in Qin and Han strips. *Buqing* 不請 (情) literally means “not the real situation;” hence I translate the phrase as “false testimony.” See n. 79 below for details of the Juyan strips.

<sup>8</sup> This is in the context of offering testimony.

<sup>9</sup> In modern Western courts, a failed complaint would typically leave the complaining party with empty hands or at most, subject to court costs. False accusations would be adjudicated separately or in a counter-suit. There is no indication in the text that Kou En ever made an official complaint against Li. The charges against Li were leveled by an official at the county level.

cannot be sure of the specific offense with which the county court charged Li. We might suspect it was a matter of Li making a false claim of debt. However, since the statute referred to is titled “dishonesty in the administration,” which implies some sort of institutionalized power in performing official duties, Li’s false claim of debt should not have been the basis for the charge. Kou En, as a civilian, was not under the military administration of Li. We can reasonably assume that Li and Kou En’s relationship was based on a contract,<sup>10</sup> and we know that no institutionalized administrative power was involved. Moreover, if the basis for the charge against Li was false accusation, then the statute referred to should be “if he makes a false accusation he will be punished by reversal,” rather than “dishonesty in the administration.”<sup>11</sup>

The most likely explanation derives from the way the statutes were abbreviated. The underlying cause of Li’s offense was an abuse of administrative power. We can therefore speculate that there may have been three reasons for Li’s conviction: 1) as a military officer, Li inappropriately engaged in big-scale commercial activities; 2) before hiring Kou En, Li attempted to get two of his subordinates to sell fish for him at the market; and 3) even though Li’s subordinates did not perform the task, they did provide the funds to hire a substitute. We can justly infer that using subordinates for commercial purposes was against the rules for military officers. A comparable case from Juyan throws some light on this question. The following depicts a military officer who prevailed upon soldiers in his command to sell goats or sheep on his behalf:

[元壽二年] 張掖居延都尉博庫守丞賢兼行丞事謂甲渠鄯候言：候長楊褒私使卒并積一日賣羊，部吏故貴（四十）五不日迹一日以上，隧長張譚毋狀，<sup>12</sup> 請□<sup>13</sup>免。

[1 B.C.] Xian who is the deputy commandant of Juyan, Zhangye commandery, informs the *zhanghou* (commander) of Jiaqu company, saying: Officer in command of a platoon Yang Bao had his soldiers sell goats (or sheep) for his private gain for one day. *Buli* (officer?) Gu Gui<sup>14</sup> was absent for forty-five whole days. And Zhang Tan, who is an officer in command of a section, is not capable. Please [missing one character] remove them from their posts.

To understand this case, we first need to briefly review the organization of the military on the northwestern frontier at that time. According to Professor Michael Loewe, there were four levels of military organization: commandant headquarters (*duweifu*); companies (*houguan*); platoons (*hou*); and sections (*sui*).<sup>15</sup> A commandant controlled perhaps four companies. Each company consisted of several platoons. Each platoon consisted of several sections. See the following two charts for the details.

<sup>10</sup> Whether the contract was oral or written is not clear from the text.

<sup>11</sup> We can further argue that, if that was indeed the case, paying Kou En the claimed debt would constitute punishment. It would be very odd to base that punishment on “dishonesty in administration”.

<sup>12</sup> According to Xu Shihong 徐世虹, “*wuzhuang*” 毋狀 was a generic term, meaning “not capable” or “without achievements.” See Xu Shihong, “Juyan Hanjian zhong de ‘wuzhuang’ yu ‘zhuangci’ 居延漢簡中的‘毋狀’與‘狀辭,’” *Chutu wenxian yanjiu* 出土文獻研究 4 (1998), 52-56.

<sup>13</sup> As a convention adopted by this dissertation, the symbol □ stands for a missing character.

<sup>14</sup> I am not confident about how to render the phrase *buli gugui* 部吏故貴. However, since the other two people (Zhang Tan and Yang Bao) are both identified by their official titles first followed by their full names, I assume *guli* here is also an official title and Gu Gui, a full name.

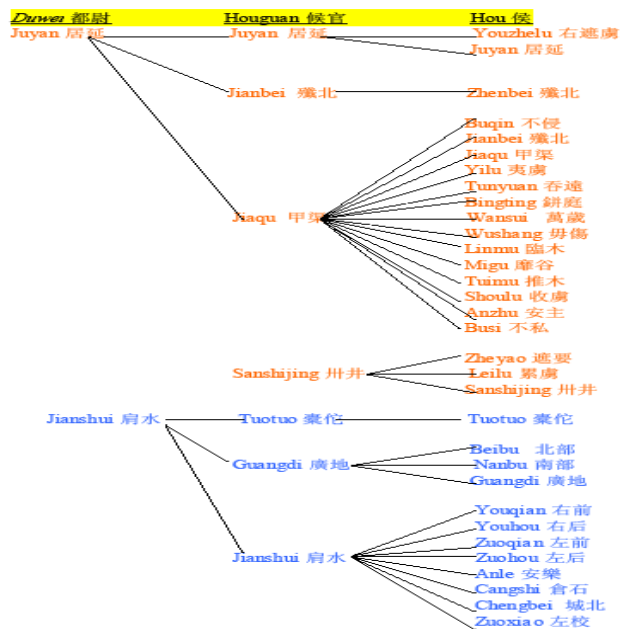
<sup>15</sup> Michael Loewe, *Records of Han Administration* (Cambridge: Cambridge University Press, 1967) [Hereafter *RHA*], vol. 1, 384.



## 1. Officers <sup>16</sup>

	<i>Duweifu</i> 都尉府	<i>Houguan</i> 候官	<i>Hou</i> 候	<i>Sui</i> 隧
Commanding Officer	<i>Duwei</i> 都尉	<i>Hou</i> 候	<i>Houzhang</i> 候長	<i>Suizhang</i> 隧長
Deputy commanders	<i>Cheng</i> 丞 <i>Wei</i> 尉 ( <i>Chengwei</i> 丞尉)	<i>Wei</i> 尉 ( <i>Saiwei</i> 塞尉)		
Other military officers	<i>Sima</i> 司馬 <i>Qianren</i> 千人 <i>Bairen</i> 百人	<i>Shili</i> 士吏		
Civil officials	<i>Yuan</i> 掾 <i>Caoshi</i> 曹史 <i>Zushi</i> 卒史 <i>Shu</i> 屬 <i>Shuzuo</i> 書佐	<i>Lingshi</i> 令史 <i>Weishi</i> 尉史	<i>Houshi</i> 候史	

## 2. Major Units in the Northwestern Frontier <sup>17</sup>



<sup>16</sup> Ibid., 387.

<sup>17</sup> Ibid., 385-386.

With this military structure in mind, we find that in the 1 B.C. case above, the removal of Yang Bao from his position as the officer in command of a platoon, was sought because he used his soldiers to sell livestock for his own private gain. Li's case parallels Yang's in that it involved a military officer attempting to use subordinates for private profit. Li's case differs from Yang's in two marked ways, however. First, Yang's case did not involve claims for debt or matters involving debt liability. Second, Yang's case did not involve payments of subordinates to a third party. In both cases, the military officers were criminally charged with "dishonesty in administration."

Having clarified the puzzle concerning Li's military status and obligations, we can now investigate the nature of the case brought by Li against Kou En. There were really two matters involved: Kou En's liability for a debt, and Li's misconduct in attempting to use his subordinates for private profits and accepting their money. The latter was clearly criminal, and Li was charged for his crime, "dishonesty in the administration," by the county court. However, regarding Kou En's liability, the nature of this matter is not very clear. It is worth noting that it was the bailiff Gong, not the county court, who decided that Kou En was not liable for any debt owed to Li. Gong merely reported the disposition of the matter to the county court. This contrasts with how Li was sentenced, suggesting a distinction in jurisdiction that we will discuss in detail in Part II. Moreover, since this suit was about debt, and since Kou En was found not liable, we can assume the case was not criminal.<sup>18</sup>

We can further question this non-criminal hypothesis by asking what would have happened if Kou En had in fact been found liable for the debt claimed by Li? If he was punished as a criminal, then the matter was clearly dealt with as a criminal case by the authorities. Put it this way: the information in the document provides us with no solid proof to determine the nature of the matter concerning Kou En's liability. If he was found liable for the debt, and if criminal punishments were applied, then the case was indeed a criminal one, despite its being lodged for a non-criminal cause, an unpaid debt.

Therefore, to determine the nature of the matter concerning Kou En's liability, we need to compare what happened under similar situations. If under similar situations the defendant was found liable and compensation was ordered but no criminal punishments were imposed, then we know that the defendant who lost was not treated as a criminal. In addition, we need to be aware that Han laws might have changed over time. To make a fruitful comparison, the cases ideally should have taken place roughly in the same time period as that of Kou En's case to reduce the risk of overlooking potential changes in the legal system.

To that end, let us examine another case, also from Juyan, concerning debt, that of Zhang Zong 張宗 vs. Zhao Xuan 趙宣.<sup>19</sup> Unlike Kou En, the defendant Zhao Xuan was found liable for the debt claimed by Zhang Zong. Zhao Xuan was required to repay the debt, but no criminal charges were brought, and no other punishments were imposed.

書曰：大昌里男子張宗責居延甲渠收虜隧長趙宣馬錢凡四千九百二十，將告宣詣官，□以□財物故不實臧二百五十以上□已□□□□□辟□。趙氏故為收虜隧長，屬士吏張禹宣與禹同治。迺永始二年正月中，禹病，禹弟宗自將驛牝胡馬一匹來視禹。□死。其月不害日，宗見塞外有野橐佗□□□□宗馬出塞逐橐

<sup>18</sup> We should not be hasty in deciding if this is a civil case since the existence of civil laws is the very issue that this chapter sets out to demonstrate. By contrast, we can readily identify a case as criminal, since criminal cases are well-studied. Thus, if the case was different from what we know about in criminal cases, then the case should be considered, at minimum, non-criminal, leaving the matter of what specific kind of non-criminal case it was for later.

<sup>19</sup> Juyan strip nos. 229.1-229.2, p. 371; see *Juyan Hanjian shiwen hejiao* 居延漢簡釋文合校, eds. Xie Guihua 謝桂華, Li Junming 李均明 and Zhu Guozhao 朱國炤 (Beijing: Wenwu chubanshe, 1987) [hereafter *JY*].

佗, 行可卅餘里, 得橐佗一匹. 還未到口. 宗馬萃僵死. 宣以死馬更所得橐佗歸宗, □不肯受. 宣謂宗曰: 強使宣行馬, 幸萃死, 不以償宗馬也. □□共平宗馬, 直七千, 令宣償宗. 宣立以口錢千六百付宗. 其三年四月中, 宗使肩水府功曹受子淵<sup>20</sup>責宣. 子淵從故甲渠候楊君取直, 三年二月盡六...[corrupted and lost here].

The report says: “Zhang Zong, a male from Dachang ward, demands debt for a horse from Zhao Xuan, who serves as an officer in command at Shoulu platoon, Jiaqu company, Juyan. In total, the debt is 5,920 cash. Summon Xuan to the office [missing one character] inform [missing one character] [him] of the Statutes [concerning]: first, being intentionally untruthful in matters of money and goods; second, [cases in which] the illegally obtained profit is 250 cash or more [missing six characters]. Mr. Zhao was once a section head at Shoulu platoon. Officer Zhang Yu was in the same camp. During the first month of the second year in the Yongshi period (15 B.C.), Zhang Yu was ill and his younger brother Zhang Zong rode a mare (*yi pi hu ma*) to visit Yu. [Soon] Zhang Yu died.<sup>21</sup> On a certain day in the same month, Zhang Zong discovered wild camels outside the pass...[Zhao Xuan] rode Zhang Zong’s horse to go out of the pass to chase the camel. He went about thirty *li*, captured a camel, and then returned. Before Zhao Xuan came back to the section, the horse suddenly died.

Zhao Xuan gave the dead horse and camel to Zhang Zong, but Zhang Zong refused to accept them. Zhao Xuan told Zhang Zong: “You forced me to ride your horse and it unfortunately died, so I do not compensate you for the horse” ... *gongping* [the meaning of the phrase is unclear]. The value of the horse of Zhang Zong was 7,000 cash. [The authority] ordered Zhao Xuan to compensate Zhang Zong. Zhao Xuan paid Zhang Zong 1,600 cash right away. In the fourth month, the third year of the Yongshi period [16 B.C.], Zhang Zong asked Shou Ziyuan, who was an officer (*gongcao*) in the Jianshu commandant headquarter (*duweifu*), to demand the debt from Zhao Xuan. Shou Ziyuan got money from His Honor Yang, who was the commander of Jiaqu company at the time [i.e., Yang was the immediate supervisor of Zhao Xuan]. In the second month of the third year....<sup>22</sup>

We know that the plaintiff Zhang Zong was a civilian commoner because the account simply identifies him as a “male” (*nanzi* 男子). By contrast, the defendant was identified by his military rank as “the officer in command of a section” (*suizhang* 遂長). Civilian Zhang claimed that military officer Zhao Xuan owed him 4,920 cash. The suit cited above was actually the third action that Zhang Zong brought against Zhao Xuan over compensation for the death of his horse, whose value was estimated at 7,000 cash. Even though the document we possess contains no clear information regarding how this dispute was first brought to the attention of the authorities, we do know that a judge estimated the horse’s value at seven

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<sup>20</sup> “Shou Ziyuan” 受子淵 is a little bit difficult to render. I think the word “Shou” here should be Ziyuan’s surname. We know that Ziyuan is a name because the following sentence says that Ziyuan got money from His Honor Yang. I tend to take Shou as his surname since it follows a pattern, i.e., the way this file addresses Zhang Yu, Zhang Zong and Zhao Xuan. When a figure first occurs, he is identified by his full name, and only then identified by the given name. Thus, I believe that Shou Ziyuan is the full name of Ziyuan and hence Shou is his surname.

<sup>21</sup> The phrase “*yi pi hu ma*” 驛牝胡馬 is hard to render. *yi* means post, *pi* means female, and *huma* means horses from the northern steppe. It seems that this particular horse was a female horse that originated from the northern steppe and was put into service at a specific post.

<sup>22</sup> *JY* strip nos. 229.1-2, p. 371.

thousand cash and ordered Zhao Xuan to compensate Zhang Zong in full for its loss. Thus, we can tell that, the case was, at least initially, strictly about compensation.

Certain facts in the case stand out. Zhao Xuan paid 1,600 cash immediately but failed to pay the rest. Zhang Zong waited a year and three months before making his complaint to the authorities. For some unknown reason, Zhang Zong complained to the Jianshui commandant headquarter, not the Juyan commandant headquarter, where Zhao Xuan served. Nevertheless, officer Shou Ziyuan at Jianshui forwarded Zhang Zong's complaint to Zhao Xuan's immediate supervisor, the company commander of Jiaqu, His Honor Yang. His Honor Yang garnished Zhao's salary for several months,<sup>23</sup> which perhaps amounted to 480 cash, and delivered it to Zhang Zong through Shou Ziyuan. Indeed, garnishing salaries to settle debts was quite a common practice, as evidenced by many other similar cases from Juyan. One report states:

官告第四候長徐卿，鄴卒周利自言：當責第七遂長季由口百。記<sup>24</sup>到，持由三月奉錢詣官，會月三日。

The official [*houguan*, company commander]<sup>25</sup> notifies the officer in command of no. 4 platoon Xu Qing: garrison soldier Zhou Li claims he is owed a debt of [missing one character] hundred by Ji You, who serves as the officer in command of the no. 7 section. Notification arrives. [Xu Qing] should go meet the official, bringing Ji You's salary of three months.<sup>26</sup>

Here, Zhou Li, a garrison soldier seeks repayment of a debt owed to him by Ji You, the officer in command of the no. 7 section. Zhou first approaches the official in charge of the case, who then enlists the debtor's immediate supervisor to garnish three months of Ji You's salary to pay off the claim.<sup>27</sup>

In the case of Zhang Zong vs. Zhao Xuan, after Zhao's salary was garnished, there was still a shortfall of 4,920 cash. Hence, Zhang Zong took this third action to demand repayment of the rest of the debt. Because the document is corrupt, we do not know the result of this third suit. However, that does not prevent us from noticing three important phenomena:

First, the case discussed above employed basically the same procedure followed in the case of Li vs. Kou En: the defendant was first informed of the pertinent statutes<sup>28</sup> and only then was a hearing held to establish the facts. In the first two actions taken by the plaintiff, the defendant was never convicted as a criminal for debt; he was simply ordered to compensate the plaintiff.

Second, the defendant, somewhat successfully, delayed payment, forcing the plaintiff to repeatedly complain to the authorities to request repayment of the debt. Significantly, the defendant did not go to jail.

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<sup>23</sup> The text is not clear on how many months worth of salary was garnished.

<sup>24</sup> Based on the context, *ji* 記 should be a type of official notification. As our evidence shows, in the Juyan strips, there are *zhaji* 札記 (letters), *shiji* 市記 (market records), and *fujì* 府記 (a type of document from the commandant headquarter). See Shen Gang 沈剛, *Juyan Han jian cihui huishi* 居延漢簡語詞彙編 (Beijing: Kexue chubanshe, 2008), 54, 68, 147.

<sup>25</sup> According to Li Junming, "guan" here refers to "houguan" 侯官. See Li Junming 李均明, *Qin Han jiandu wenshu fenlei jijie* 秦漢簡牘文書分類輯解 (Beijing: Wenwu chubanshe, 2009), 111; cf. Shen Gang, *Juyan Han jian cihui*, 155.

<sup>26</sup> *JY* strip no. 285.12, pp. 480-481.

<sup>27</sup> In addition, we can find the same practice in *JY* strip nos. 282.9 a-b, p. 472; *JY* strip nos. 213.41a-b, p. 333; *JYX* strip nos. E.P.T.51.225a-b, p. 192; and *JYX* strip nos. E.P.T. 52.88 a-b, p. 233.

<sup>28</sup> Coincidentally or not, these are very similar to the five statutes in the case of Li vs. Kou En.

Third, the defendant's service at the military post was not affected by the judgment. He still served in Jiaqu company as a section head, which explains why the defendant's immediate supervisor could garnish the defendant's salary to compensate the plaintiff in the second suit.

These features illustrate the ways in which, in suits of this nature, the authorities might help a plaintiff extract compensation from an unwilling defendant. They also show that it was up to the plaintiff to decide if he or she would pursue the legal action. Thus, even if the plaintiff won the initial case, if the defendant proved reluctant to pay, he had to repeatedly ask the authorities to help him collect the debt. By contrast, we know of no cases in which the victim of a crime needed to ask the authorities to carry out the sentence imposed by the court against the convicted. The victim had no "right" to request the execution of the case, even though he had the "right" to bring the case to the authorities. The state would punish the convicted person as it saw fit.<sup>29</sup>

One element of the case is still unclear: who actually "owned" the horse? Did Zhang privately own the horse, or did he borrow the horse from a post (*yi* 驛). We know that not all horses in the posts belonged to the state. It was not uncommon for a post to rent horses from Han subjects. For example, we have the record: "on the right column, a private horse is registered" (*you sima yipi* 右私馬一匹).<sup>30</sup> Thus, without the modifier *gong* 公 (official) vs. *si* 私 (private), we cannot determine the ownership of "Zhang's" horse. If the horse indeed belonged to the post, then Zhang would have to compensate the post for the death of the horse. According to *ZJS* strip (Statutes) nos. 433-434, if someone damaged official property, that person was required to compensate at fair value for the damage, but the person faced no criminal punishments or even fines.<sup>31</sup> Therefore if the horse indeed belonged to the state, this case then actually involved a chain of compensation: Zhang Zong compensated the post while Zhao Xuan compensated Zhang Zong. Our evidence does not mention if Zhang Zong compensated the state or not. Given the lack of evidence, we still do not know if the horse indeed belonged to Zhang Zong. However, the ultimate ownership of the horse was irrelevant to the nature of the case, because Zhang was responsible for the horse at the time and he was not on official duties. Thus the dispute was between Zhang and Zhao Xuan, not the state vs. an individual. Moreover, even if the horse belonged to the state, as just mentioned, damaging official property was not treated as a crime, only compensation was required, and no criminal punishments or fines were to be imposed. In short, we find that the authorities held no public interest in the case of Zhang Zong vs. Zhao Xuan based on its outcome and process. Only compensation was ordered, no criminal punishments were imposed on the losing party, and it was up to the successful plaintiff to pursue the accrued compensation.

With what we have learned from this case, we now can determine the nature of Kou En's case concerning debt. Since Kou En's case was very similar to the case of Zhang Zong

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<sup>29</sup> This contrast can also be observed in modern legal systems. For instance, in California, the Small Claims Court (\$7,500 and below) will not collect the money for the winning plaintiff. The court merely orders the losing defendant to pay. It is the responsibility of the winning plaintiff to pursue the civil judgment. For example, if the winning plaintiff A encounters the unwilling debtor B, A can ask the court for more help, if he is unable to collect the debt on his own. Usually, the court then entitles A to garnish up to 25% of the amount over the federal minimum wage that B earns. For details, visit <http://www.courtinfo.ca.gov/selfhelp/smallclaims/collecttips.htm> These striking similarities between the practices of modern California's Small Claims Court and how the authorities handled Zhang Zong's case that took place in 15 B.C. at Juyan surely suggest the non-criminal nature of the latter.

<sup>30</sup> *JY* strip no. 19.1, p. 29.

<sup>31</sup> See p. 18 in this chapter for details concerning the statutes.

vs. Zhao Xuan, it is reasonable to believe that even if Kou En was found liable, he would have just been ordered to repay his debt, and no criminal punishments would be imposed. Therefore, Kou En's case concerning debt was non-criminal. What makes this conclusion more likely is that the two cases took place roughly during the same time period; 15 B.C. for the case of Zhang Zong vs. Zhao Xuan, A.D. 28 for Kou En's case, reducing the risk of overlooking potential changes in legal practice over time. Thus, we have resolved Hulsewé's puzzle. The case he studied in 1979 was a combined case. The plaintiff Li's debt dispute with Kou En itself was non-criminal. However, Li committed a crime prior to hiring Kou En: Li abused his power in asking his subordinates to make profits for him and took their money when they could not do so. This crime was coincidentally discovered when the judge investigated the debt dispute.

Moreover, we can further argue that, in general, all cases that only involved debt were deemed non-criminal. By my count, the Juyan strips alone identify fifty-three cases involving debt.<sup>32</sup> Among them is a concise report from Juyan:<sup>33</sup>

自言: 責士吏孫猛脂錢百廿. 謹驗問, 士吏孫猛辭服負. 已收得猛錢百廿.  
[A certain plaintiff] complained to the authorities to demand a debt of 120 cash from a *shili* (officer) named Sun Meng for oil. [A certain official] carefully questioned *shili* Sun Meng. He admitted the debt. Now [the plaintiff] has already received 120 cash from Sun Meng.<sup>34</sup>

The report seems not to be a case document but merely a summary intended to illustrate the unidentified judge's performance of his duties.<sup>35</sup> Despite the document's lack of detail, the development of the case is clearly outlined. A plaintiff sued the defendant Sun Meng over a debt. During the hearing, the defendant admitted his debt and the authority ordered him to make compensation; no criminal punishment was indicated.

Due to the fragmentary nature of our sources, we are not certain about the final dispositions of many cases, but in cases that do note final dispositions, no criminal punishments for liability of debt have, to date, been found. Thus, we can tentatively conclude that cases concerning debt were treated as non-criminal matters by the authorities.

At this point, we should have noticed one striking feature of these non-criminal cases concerning debt: the parties, regardless their social status, were treated as equals. In the case of Li vs. Kou En, in which a military officer sued a commoner over debt, we saw that the officer enjoyed no special privileges. In the case of Zhang Zong vs. Zhao Xuan, we saw that a commoner could, without prejudice, successfully sue a military officer. In fact, even a convict could sue a military officer for debt as the case of Wang Jin vs. Dongmen Fu from Juyan illustrates:

徒王禁責誠北侯長東門輔錢. 不服. 移自証爰書, 會月十日. 一事一封. 四月癸亥尉史同奏封.

A claim was lodged by convict Wang Jin for money due from Dongmen Fu, the officer in command of Chengbei platoon; the claim was not admitted. [We]

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<sup>32</sup> See Appendix 2 for the survey.

<sup>33</sup> Or the fragmentary report is simply a summary of a case document.

<sup>34</sup> *JYX* strip no. E.P.T. 52.21, pp. 228-229.

<sup>35</sup> This was perhaps related to the Han merit system. For a review of the system, see Gao Heng 高恆, "Handai shangji zhidu kao" 漢代上計制度考, in *Qin Han jian du zhong fazhi wenshu jikao* 秦漢簡牘中法制文書輯考 (Beijing: Shehui kexue wenxian chubanshe, 2003), 320-340; cf. Michael Loewe, *The Men who Governed Han China* (Leiden and Boston: E.J. Brill, 2004), 71-74.

forward the despatch of his personally formal statement for the meeting on the tenth day of the month; one item, one sealed document. Sealed by *weishi* Tong Zou, on *guihai*, fourth month.<sup>36</sup>

In this matter, a convict named Wang Jin sued a military officer Dongmen Fu to demand repayment of a debt. The officer was required to respond to the suit and attend the hearing, even though he contested the claim. This contrasts sharply with what happened in criminal cases. For example, *ZJS* strip (Statutes) no.134 states that those who were in jail or convicted and serving their sentences as male well-builders (*chengdan* 城旦), female grain-pounders (*chun* 春), male gatherers of firewood for spirits (*guixin* 鬼薪), or female sifters of white rice (*baicui* 白粲) had no “rights” to accuse people of crimes.

年未盈十歲及繫者，城旦春、鬼薪白粲告人，皆勿聽。

Never take cases brought forward by these people. Those who are less than ten years old, those who are in the jails, or those who are convicted as male wall-builders, female grain-pounders, male gatherers of firewood for spirits or female sifters of white rice.<sup>37</sup>

From the cases thus far examined we know that one’s status did not pose an obstacle for seeking redress from authorities in claims of debt and that the outcome of these cases did not depend on the status of either party.<sup>38</sup> This contrasts sharply with criminal cases in which certain categories of convicts, due to their criminal status, were prohibited from making criminal accusations. We also see that the social status of the convicts in the system of orders of honor<sup>39</sup> was an important factor in criminal laws in determining the punishment for the convicted in two senses.

First, for most crimes, one could use one’s rank to redeem or reduce the punishment.<sup>40</sup>

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<sup>36</sup> *JY* strip no. 259.1, p. 249; cf. *RHA*, vol. 2, 11. My translation follows Loewe with slight modifications.

<sup>37</sup> This also represents a contrast between civil and criminal procedures; the criteria used to determine whether or not to take on a civil case were different from those concerning criminal cases. I will discuss this issue in the next section.

<sup>38</sup> In addition, gender was not a problem. Women could also initiate suits concerning debts against military officers. For instance, *JYX* strip no. E.P.T. 52.201 records a group of women collectively suing two officers over debts (Wang En and others vs. Xu Guang and Wang Gen): “Female Wang En and others (females?) demand debts of 440 cash and 5 *shi* of millet from *houshi* [assistant officer to the company head] Xu Guang and section head Wang Gen...” (女子王恩等責候史徐光，隧長王根，錢四百四十，粟五石...). Neither was gender an issue in criminal cases since women could make criminal accusations. While this is not a point of contrast, it is still worth noting.

<sup>39</sup> There were twenty degrees of ranks in Qin and Han: from the highest, *chou* 徹侯, to the lowest, *gongshi* 公士. These twenty degrees of ranks have been well-studied. The classic work on the subject Nishijima Sadao’s 西嶋定生, *Chūgoku kodai teikoku no keisei to kōzō: Nijittō shakusei no kenkyū* 中国古代帝国の形成と構造：二十等爵制の研究 (Tōkyō: Tōkyō daigaku shuppankai, 1961). Nishijima argued that during the Han dynasty, the orders of honor were not ranks of nobility, because the ranks were not only granted to the nobles but also generally extended to the commoners. He classified the ranks into two categories: 1) ranks for ordinary people (ranks below *wudafu* 五大夫); and 2) ranks for officials with salaries above 600 *shi* (ranks above *wudafu*). Nishijima also pointed out that having social ranks was fairly common to people in the Han dynasty, because there were many channels for them to acquire and increase their orders of honor. For instance, people who had military honors or donated grain to the state could be rewarded with social ranks, and people who were forced to emigrate from their native place to other places could be compensated with orders of honor. The emperor also often granted orders of honor to all his mature male subjects to celebrate certain ceremonials of the royal family, such as the accession of an emperor, heir, or empress.

<sup>40</sup> See *RHL*, 214-224.

As Hulsewé points out:

The practice of redemption is closely connected with the practice of taking away noble rank (orders of honor) from a holder of such rank, either partly or wholly, in lieu of other punishment, and also with the practice of affording commoners the opportunity to buy noble rank with the express purpose of using the rank to redeem punishment.<sup>41</sup>

Second, for punishments of mutilation or hard labor service, people of rank two and above, their wives, and a certain group of relatives of the imperial clan enjoyed the privilege of having their punishments automatically reduced by one degree. In this situation, without losing their ranks, their punishments could be less severe than those inflicted on people of lower ranks convicted of the same crime. As *ZJS* (Statutes) strip no. 82 makes plain,

上造、上造妻以上、及內公孫、外公孫、內耳玄孫有罪，其當刑及當為城旦舂者，耐以為鬼薪白粲。

When a person who has the rank of *shangzao* (rank 2) or above, the wife of a person at that rank, or a grandson or grand-grandson of the imperial clan, commits a crime, if he or she needs to be punished with mutilation and condemned to male wall-builders or female grain-pounders, lessen the punishment [of one degree] to *nai* (shaving off the beard and hair on the temples)<sup>42</sup> and make him or her a male gatherer of firewood for spirits or female sifter of white rice.<sup>43</sup>

In this examination of cases involving parties of different rank or status, the provocative question arises: why did creditors in positions of power bother to take their claims to court at all? Why, for instance, did not the powerful military officer Li simply send his soldiers to seize Kou En and demand payment? One reason may be that, according to *ZJS* strip (Statutes) 187, creditors were prohibited from demanding repayment of debts by force.

諸有責(債)而敢強質者，罰金四兩。

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<sup>41</sup> Ibid., 205. For detailed discussions on this matter, see Ibid., 214-222.

<sup>42</sup> *Nai* 耐 penalty, according to Hulsewé, means to shave off the beard. This means that this penalty only applied to males. See *RHL*, 130. But I find that females were also subject to this penalty. Therefore, I think Cao Lüning's 曹旅寧 interpretation is better. He argues that *nai* means to shave off the beard and hair on the temples. According to this interpretation, for females, the *nai* penalty was to shave off their hair on the temples. I adopted Cao's interpretation in this dissertation. Hence I render *nai* as "shaving off the beard and hair on the temples." See Cao Lüning, *Qinlü qintan* 秦律新探 (Beijing: Zhongguo shehui kexu chubanshe, 2002), 222.

<sup>43</sup> *ZJS* (Statutes) strip no. 82, p. 20. According to Zhu Honglin 朱红林, *neigongsun* 內公孫 refers to the grandsons of the emperor's clan while *waigongsun* 外公孫 refers to the grandsons of the empress's clan, and the word *xing* here has a specific meaning: mutilation. See Zhu Honglin, *Zhangjiashan Han jian Ernian lü ling jishi* 張家山漢簡二年律令集釋 (Beijing: Shehui kexue wenxian chubanshe, 2005), 73-74.

However, the puzzling thing here is that the imperial relatives and people who had relatively low rank were grouped together. Perhaps these so-called grandsons or great-grandsons of the imperial clan refer to very remote relatives of the imperial family. The terms might have meanings that are different from the literal translations that Zhu Honglin suggests.

According to Hulsewé, male wall-builders (*chengdan* 城旦) and female grain-pounders (*chun* 舂) were the most onerous of the hard labor punishments, while male gatherers of firewood for spirits (*guixin* 鬼薪) and female sifters of white rice (*baican* 白粲) were considered less severe. See *RCL*, 14-15.



Those who have claims of debts and venture to forcefully extort pledges are to be fined with four *liang* of gold.<sup>44</sup>

This statute implies that in disputes over debt, creditors were required to lodge their complaints with the appropriate authorities, in essence, filing a suit. Even before the Zhangjiashan Han statutes became available, we find similar regulations in the Shuihudi Qin strips. *SHD* strip (Falü wenda) no. 148 says:

百姓有責（債），勿敢擅強質，擅強質及和受質者，皆貲二甲。廷行事強質人者論，鼠（予）者不論；和受質者，鼠（予）者口論。

When the common people have debts, one should not venture unauthorizedly to extort pledges.<sup>45</sup> The unauthorized extortion of pledges, as well as accepting pledges with mutual consent are both fined with two suits of armor. It is the practice of the court that he who extorts a pledge from another person is sentenced; he who gives the pledge is not sentenced. In case of accepting a pledge with mutual consent, the person who gives the pledge is [also] sentenced.<sup>46</sup>

This prohibition against extorting pledges was deeply rooted in early China, and this prohibition reminds us that the approved method for settling disputed matters of indebtedness was to appeal to a legal system represented by designated authorities.<sup>47</sup>

Since all debts imply an agreement of some sort between parties, these agreements constitute some form of binding contract. This raises the necessary question of what form these agreements took in early China. Were these “contracts” written or oral, and did they require witnesses or notaries? In other words, on what basis could a person claim that another person owned him a debt? Hulsewé was aware of the use of contracts in early China, when he discussed the use of evidence in trials:

Written evidence is repeatedly referred to and we hear of the existence of written contracts. In the latter case we have one of the rare exceptions where we are allowed to learn something of the field of civil law; fortunately some actual contracts have come down to us, due to archeological finds.<sup>48</sup>

While Hulsewé was aware that Han laws touched upon civil matters, he believed that such legal proceedings were exceptional and limited solely to contracts. Lacking solid evidence to discuss contracts in any detail, Hulsewé simply sidesteps the subject in his *Remnants of Han Law*, despite the fact that the Classics make repeated reference to contracts.

The “Qiuguan” 秋官 chapter of *Zhouli* says:

凡有債者，有判書以治，則聽。

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<sup>44</sup> *ZJS* (Statutes) strip no. 187, p. 33. This partly blurs the distinction between criminal and civil matters. I have only found one other instances in which we find a fine stipulated in a civil matter: *ZJS* strip (Statutes) no. 253 states that if A's live stock eats B's crops, then A will be fined a certain amount of gold in addition to the compensation he/she must make to B. The statute does not say who receives payment of the fine. I suspect that the state receives it. See pp. 17-19 in this chapter for more details.

<sup>45</sup> It is worth noting that *Qianzhi* 強質 (extorting pledges) specifically means to detain the debtors by force, according to the editors of *SHD*.

<sup>46</sup> *SHD* strip (Falü dawen) no. 148, p. 215; cf. *RCL*, 162.

<sup>47</sup> Of course, creditors could behave irrationally, but that is a different matter.

<sup>48</sup> *RHL*, 11.

Whenever there is a debt [dispute], if [the plaintiff] has documentation to prove [the debt],<sup>49</sup> then [the authorities] hear the case.<sup>50</sup>

Zheng Xuan 鄭玄 (128-200) comments on the line in this way:

今時市買, 爲券書以別之, 各得其一, 訟則按券以正之。<sup>51</sup>

Nowadays, when buying something in the market, the parties involved make a contract [make several copies of the contract], and each party keeps one copy. When disputes arise, each of the parties then uses his respective copy to prove his claims.

The “Tianguan” 天官 chapter of *Zhouli* says:

聽稱債以傅別。

Based on *fubie* [a type of contract], [the authorities] would hear cases concerning *chengzhai* [loans].<sup>52</sup>

In Zheng Xuan’s comment on the line, he writes:

稱債謂貸予, 傅別謂券書也。聽訟債者, 以券書決之。

*Chengzhai* refers to loans, and *fubie* refers to contracts. When [the authorities] hear cases concerning debt, they make judgments based on contracts.<sup>53</sup>

Recently excavated materials verify this use of contracts in early China. In the case of Li vs. Kou En, we know that there was a previously agreed upon value of the fish that Kou En took to market. This agreement implies some form of contract, either oral or written. Judging from the subsequent dispute over Kou En’s payments to Li, that contract must not have been sufficiently detailed since Kou En apparently believed that he could repay the debt in either cash or goods. Another report from Juyan states:

市券一。先以證財物故不以實。

One market contract. In advance [inform the defendant of] the statutes concerning intentionally untruthfully making false testimony in matters of money and goods.<sup>54</sup>

This fragment is obviously part of a judicial document concerning a dispute over a commercial contract. Once more, we observe the legal procedure in operation with the judge informing the defendant of the pertinent statutes. The market contract mentioned in the report was perhaps the proof provided by the plaintiff to defend himself against the charge of making false testimony.

Examples of written contracts from excavated materials are by no means rare. Archaeologist Lian Shaoming 連邵名 in 1987 conducted a survey of documents concerning

<sup>49</sup> *Quan* 券 in this context specifically refers to “contracts.” We have excavated samples of *quan*, showing that they have the essential features of binding contracts. See pp. 14-16 of this chapter for these samples.

<sup>50</sup> *Zhouli zhushu* 周禮注疏, in *Shi san jing zhu shu* 十三經注疏 (Ruan Yuan 阮元 1815 edition, rpt., Taipei: Yiwen chubanshe, 1976), 35.533.

<sup>51</sup> Zheng Xuan was a famous legal expert, and we will discuss him in detail in the next section.

<sup>52</sup> *Zhouli zhushu*, 3.44.

<sup>53</sup> *Ibid.*

<sup>54</sup> *JYX* strip no. E.P.T. 51.509, p. 213.

debts and other commercial transactions in Han strips.<sup>55</sup> Eleven of the documents he studied are contractual in nature. According to the most recent account by Li Junming 李均明, seventeen contracts involving the sale of goods have been excavated from Juyan and Dunhuang.<sup>56</sup> For example:

七月十日鄣卒張中功買阜布章單衣一領，直三百五十三。堠史張君長取錢，約至十二月盡畢已。旁人臨桐史解子房知券。

On the tenth day of the seventh month, Zhang Zhonggong, who is a garrison soldier, purchases a blue singlet made of cotton at the price of 353 cash. Zhang Junzhang, who is a *houshi* [officer], receives the money [of the first installment] and agrees that the rest will be paid by the twelfth month of the year. The witness of the contract is Xie Zifang who is a scribe from Lintong.<sup>57</sup>

In this concise contract, the date and month of the transaction, the items, price, scheduled deadline of payment, and the name of the witness are all noted. Interestingly, the year of the transaction is not indicated, which suggests that the parties assumed that the transaction would be completed within the year. Then again, not designating the year may have simply been an omission.

In *JY* strip no. 262.29, we have a similar example:

建昭二年閏月丙戌，甲渠令史董子芳買鄣卒口威裘一領，直七百五，約至春錢畢已。旁人杜君雋。

On *bingwu*, the leap month, in the second year of the Jianzhao period (37 B.C.), Dong Zifang, who serve as a *lingshi* (officer) at Jiaqu, purchases a fur robe from garrison soldier [missing one character] Wei. The price of the clothing is 750 cash and they agree to make the full payment by spring.<sup>58</sup> The witness is Du Junjun.<sup>59</sup>

While the contract is precisely dated, the spring due-date remains vague, unless the parties and the witness understood this to mean a specific date, either the Start of Spring (February 4<sup>th</sup> or 5<sup>th</sup>) or the Spring Equinox (March 21 or 22).<sup>60</sup>

<sup>55</sup> Lian Shaoming 連邵名, “Hanjian zhong de zhaiwu wenshu ji shimai mingji” 漢簡中的債務文書及買賣名籍, *Kaogu yu wenwu* 考古與文物 1987.3, 77-83; cf. Huge T. Scogin, “Between Heaven and Man: Contract and the State in Han Dynasty China,” *Southern California Law Review* 63 (1990), 1326-1401.

<sup>56</sup> Li Junming 李均明, *Qin Han jiandu wenshu fenlei jijie* 秦漢簡牘文書分類輯解 (Beijing: Wenwu chubanshe, 2009), 436-437. The seventeen contracts are *JY* strip nos. 26.1, 91.1, 163.3, 163.16, 184.3, 262.16, 262.29, 273.12, 557.4, 564.7; *JYX* strip nos. E.P.T. 52.323, E.P.T. 52.460, E.P.T. 57.71, E.P.T. 59.555, E.P.T. 222.419 a-b; *DH* strip nos. 1449 a-b, strip nos. 1708 a-b. “*DH*” stands for *Dunhuang Hanjian shiwen* 敦煌漢簡釋文, eds. Wu Rengxiang 吳初驥, Li Yongliang 李永良, and Ma Jianhua 馬建華 (Lanzhou: Gansu renmin chubanshe, 1991).

<sup>57</sup> *JY* strip no. 262.29, p. 436.

<sup>58</sup> The meaning of *zhichun* 至春 is unclear. Is it one word, which is a synonym of *lizhu* 立春 (Start of Spring) that is one of the twenty-four climatic seasons? Or does *zhichun* represent two words, *zhi* (till) and *chun* (Spring)? In the other two contracts, the word *zhi* clearly means “till”, thus, I believe that *zhi* in this contract also means “till”. However, there is another possibility: *zhichun* could read *zhi zhichun*, while the second *zhi* is dropped either for convenience or by transmission error. In addition, there is one more possibility: *zhichun* could read *zhi chunfen* 至春分 (till Spring Equinox) with the last word *fen* dropped by mistake. In sum, the *chun* here could refer to either the Start of Spring (February 4<sup>th</sup> or 5<sup>th</sup>) or the Spring Equinox (March 21<sup>st</sup> or 22<sup>nd</sup>).

<sup>59</sup> *JY* strip no. 26.1, p. 38.

<sup>60</sup> *Ibid.*

The following contract is much more precise in terms of dates and stipulated responsibilities, as it even stipulates fines for failure to meet the payment deadline.

元平元年, 七月庚子, 禽寇卒馮時賣橐絡六枚楊卿所, 約至八月十日與時小麥七石六斗. 過月十五日, 以日斗計.

On *gengzi* day, seventh month, the first year of the Yuanping period (74 B.C.), Feng Shi, who is a *qinkouzu*, sold six *tuoluo* to Yang Qing at his place. The parties agree that Yang gives Feng seasonal wheat seven bushels and six pints by the tenth day in the eighth month. If the payment is made after the fifth day of the eighth month, [the fine is] one pint of wheat per day.<sup>61</sup>

These three examples suggest that contracts were known to the common people, because the parties to these contracts were definitely not elites. They were ordinary soldiers and very low ranking officers. The basic formats of these contracts are very similar to contracts in modern societies, another indication of the sophistication of these Han contracts. It is likely that there were statutes concerning commercial contracts, based on a strip from Juyan that contains the following fragmentary information:

賈而買賣而不言, 證財物故不以實, 臧二百五....

Doing business but not admitting [agreements] in buying or selling, intentionally untruthfully making false testimony in matters of money and goods, having illicit profit over 250 cash....<sup>62</sup>

As we know from cases previously studied, especially the case of Li vs. Kou En, the phrases “intentionally untruthfully making false testimony in matters of money and goods” and “having illicit profit over 250 cash” were both conventional abbreviations for certain statutes of which the defendant was informed prior to a hearing; therefore the phrase at the beginning of the strip, “do business but not admitting [agreements] in buying or selling,” must also be an abbreviation for a statute dealing with commercial contracts. We unfortunately cannot know the details of the statute.

Despite all this evidence, our understanding of non-criminal cases is still limited. For example, even though the case of Li vs. Kou En was non-criminal and is very valuable in studying non-criminal procedures, there is a problem. The statute referred to near the end of the file was not concerned with civil matters, because, by then, the case had become a criminal case with Li as defendant.<sup>63</sup> This hybrid quality reduces the value of the case in defining the nature and form of non-criminal suits. In addition, in the other fragmentary cases discussed above, specific statutes were not cited as the basis for judicial decisions; either there were no pertinent statutes or the references to pertinent statutes were not preserved in the fragments. This phenomenon makes us wonder if these cases were tried by following customs or by relying on written laws. Were there any statutes concerning compensation? Even though customary laws were still laws, as long as they were recognized and enforced by the authorities, the existence of written laws would indicate a much greater sophistication and systematization of the legal regime in terms of dealing with non-criminal cases. Fortunately, we have a case from Dunhuang (Shao Zhong’s case), in which a statute concerning compensation is clearly referred to.

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<sup>61</sup> *DH* strip nos. 1449a-b, p. 150.

<sup>62</sup> *JYX* strip no. E.P.T. 54.9, p. 301.

<sup>63</sup> Just to remind my reader, this case consists of two separate sub-cases: liabilities of Kou En and the crimes of Li.

言律曰：“畜產相賊殺，參分償”。和令少仲出錢三千及死馬骨肉付循請平。  
Yanlü says: “When livestock [of different owners] kill each other, [the owner of the animal which killed another person’s animal] should compensate [the other person] one third of the value of the animal killed.” Thus, He (和) ordered Shaozhong to pay 3,000 cash and give back the skeleton of the dead horse to Xun to settle the case.<sup>64</sup>

We cannot reconstruct the complete case or the procedure used in the trial, because we have just this one strip, which appears out of context. No other relevant strips were found. The strip seems to be a paragraph in the middle of a report. Despite its incomplete nature, we can tell that this is a case about compensation and the judge referred to a specific statute in making his judgment.

We have a technical issue here: how to render the two consecutive words “*yan-lü*”? Is it a title for certain statutes or does the word *yan* simply mean “to state”? If “*yanlü*” is a title, what does that title mean? That is impossible to tell. Also, “*yanlü*” is never mentioned in any sources regarding Han statutes. I think it is more likely that “*yan*” means “to state.” Who is the subject? We can speculate that the subject is (judge) He 和. Thus, we can reconstruct the case as follows:

- 1) The two parties involved were Shaozhong 少仲 and Xun 循.
- 2) The cause for the suit was that Shaozhong’s animal killed Xun’s horse.
- 3) The judge was He 和.
- 4) When making his judgment, the judge referred to a certain statute that says, “When livestock [of different owners] kill each other, [the owner of the animal which killed another person’s animal] should compensate [the other person] one third of the value of the animal killed.”<sup>65</sup>
- 5) The judgment is that Shaozhong should pay 3,000 cash and give the skeleton of the dead horse back to Xun.

We can tell that in this case, when a person’s animal is killed by another person’s animal, the restitution is set at one third of the value of the dead animal (plus, apparently, the carcass). Because of the incomplete nature of the document (only one strip is preserved), we cannot determine the details of how the facts were established or how the judgment was reached. We can reasonably assume, in light of the cases studied, that hearings were held, statements were taken, and others details of the trial were carefully documented as well. What is most significant about this case is that, in making his judgment, the judge referred explicitly to the statute “Yanlü.” With some confidence, we can therefore assume that judges based their judgments on statutes whenever available.

The case also draws attention to statutes concerning compensation. We notice that there are sister statutes from Zhangjiashan.

ZJS (Statutes) strip no.50 says:

犬殺傷人畜產，犬主償之。

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<sup>64</sup> DH strip no. 2011, p. 215.

<sup>65</sup> The statute referred to demonstrates that there were indeed statutes that dealt with civil matters. We will return to this point later.

If a dog kill or wound livestock belonging to another person, the owner of the dog must compensate that person.<sup>66</sup>

ZJS (Statutes) strip no. 253 says:

馬、牛、羊、彘食人稼穡，罰主金馬、牛各一兩，四彘若十羊、彘當一牛，而令擣稼償主。

If A's horses, ox, sheep or pigs eat B's crops, then A will be fined one *liang* of gold per horse or ox. Four pigs are equivalent to ten sheep, and [ten?] pigs are equivalent to an ox. Then order A to compensate B, the owner of the crops.<sup>67</sup>

Indeed, prior to Zhangjiashan excavation, the Qin legal documents from Shuihudi already contain discussions concerning liability under similar situations.

甲小未盈六尺，有馬一匹自牧之，今馬為人敗，食人稼一石，問當論不當？不當論及賞（償）稼。

“A” is small and not fully six feet (tall). He has one horse, which he personally takes to graze. Now the horse is *bai* (frightened)<sup>68</sup> by another person and eats one bushel of another's grain. Question: is he warranted to be sentenced or is he not warranted? He is not warranted to be sentenced nor to repay the grain.<sup>69</sup>

In this case, the defendant would not be held liable and no compensation required since the owner of the horse is too young, and the damage is ultimately caused by another person, not the defendant.

The statutes mentioned above concern themselves with compensation for damages caused by one's livestock to the property of others. We find that compensation was clearly identified as a non-criminal matter; no punishments, such as forced labor service, confinement, mutilation, execution, or even fines, were attached.

Even compensation for damages to official property was also deemed a non-criminal matter. ZJS strip (Statutes) nos. 433-434 state:

亡、殺、傷縣官畜產，不可複以爲畜產....皆令以平賈償。入死、傷縣官、賈（價）以減償。亡毀傷縣官器財物，令以平賈償。入毀<sup>70</sup>縣官，賈以減償。

[If someone] loses, kills, or injures official livestock, or if these livestock cannot be recovered.... Under all these circumstances, let [the responsible person] compensate for the loss with its fair value. Compensate for [*rusi* and *rushang*]<sup>71</sup>

<sup>66</sup> ZJS (Statutes) strip no. 50, p. 15.

<sup>67</sup> ZJS (Statutes) strip no. 253, p. 43.

<sup>68</sup> The word *bai* 敗 usually means “defeat” or “spoil,” but the editors suggest that the word means “frighten” in this context.

<sup>69</sup> SHD strip (Falü dawen) no. 158, p 219; cf. RCL, 165. Here, 6 *chi*=1.57 m is used to determine one's “legal” age, i.e. the qualification for enrollment as adults. See Hulsewé's explanation for this practice in RCL, 122, 138,165. My translation follows Hulsewé.

<sup>70</sup> *Ruhui* 入毀 perhaps also refers to actions that result in the ruin of official property under circumstances that were partially forgivable.

<sup>71</sup> These two terms, *rusi* 入死 and *rushang* 入傷, are difficult to translate. The problem is the modifier *ru*. I do not know what it precisely means here. Neither the editors of ZJS nor Zhu Honglin offer any opinion as to the meaning of the word. The context shows that *rusi* and *rushing* perhaps refer to actions that caused the death or injury of official livestock under circumstances that were partially forgivable.

with a reduced value. [If someone] ruins or damages official property, order him or her to compensate for the loss with its fair value. Compensate for [*ruhui*] with a reduced value.<sup>72</sup>

Here we find that if someone damages official property, that person must compensate the state for the damage at fair value or even reduced value depending on the circumstances, and person faces no other punishment.<sup>73</sup> Thus we may conclude that compensation was carefully regulated and recognized as a non-criminal matter.

In sum, the available evidence suggests that there were non-criminal cases and statutes concerning debt, compensation and possibly contracts in early China. These non-criminal cases, accompanied by pertinent statutes, demonstrate the following features, none of which are found in criminal cases:

- 1) Individuals, not operating on behalf of the state, may bring complaints against one or more persons in such limited matters as compensation and property disbursements.
- 2) The authorities seek to assess appropriate compensation or the proper disbursement of property for the plaintiff.
- 3) A case of debt or compensation results in a judgment assigning liability. The authorities may be asked to help the successful plaintiff extract compensation from a recalcitrant defendant, but it is up to the plaintiff to decide if he or she will pursue it.
- 4) Punishments are seldom applied by the state to the party that is liable. Even if there are punishments, they are limited to fines.<sup>74</sup> They do not entail forced labor service, exile, beating, confinement, mutilation, or execution.
- 5) Social status is not a factor in assessing liability. The two parties involved in disputes over property are treated as equals by the authorities: a person with a higher rank has no legal privileges beyond those of a person with lower rank. The losing defendant, regardless of his/her rank, is ordered to pay the debt due to the successful plaintiff. In addition, government agencies have no special privileges over individuals in matters of compensation. If someone damages official property, that person is only required to compensate for the damage at fair value.

By contrast, criminal cases have five characteristics that are not found in non-criminal cases:

- 1) Individual may report certain harmful acts to the authorities, acts which the authorities perceive not only as harming the individual, but also as damaging to the public order.
- 2) According to Hulsewé, the primary goal of the authorities is to preserve public order and protect the innocent by punishing the person who commits the crime

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<sup>72</sup> *ZJS strip* (Statutes) nos. 433-434, p. 68.

<sup>73</sup> In modern societies, when a governmental agency sues an individual to demand repayment of a debt, even though the public interest is clearly involved, the case would be taken as if it involved two individuals (a legal person vs. a natural person), instead of state vs. individual. Therefore, it is still treated as a civil matter. This theoretical articulation did not exist in early China, but *ZJS strip* (Statutes) nos. 433-434 show that a similar practice did exist. One question we cannot answer is: can a slave (or indentured servant) demand repayment of debt? At this time, we know of no cases.

<sup>74</sup> See p. 18 above.

in order to deter others from committing the same crime.<sup>75</sup> Beyond that, their larger concern is to maintain cosmic harmony.<sup>76</sup>

- 3) A criminal case can only result in a conviction or an acquittal. If the defendant is convicted, he must suffer some kind of punishment, such as forced labor service, confinement, mutilation, or execution. It is not up to the victim of a crime to decide whether or not the sentence imposed by the court should be carried out. The state prosecutes and punishes the convicted as it sees fit.
- 4) Punishments are to be systematically applied. There are at least nine categories of punishments as Hulsewé points out in his *Remnants of Han Law*. They are: death penalty, extermination of relatives, boiling and burning, mutilation, castration, hard labor, exile, fines, and exclusion from office.<sup>77</sup>
- 5) The social status of the convicted in the system of twenty ranks is an important factor for the authorities to consider when determining the punishment for the convicted in two senses:<sup>78</sup> a) people of certain high ranks could receive less severe punishments than those inflicted on those of lower ranks sentenced for the same crimes; and b) for certain crimes, one can use one's rank to redeem or reduce the punishment.

These sharp contrasts show that non-criminal cases clearly differed from criminal cases. Of course, the few non-criminal cases concerning compensation and debt studied are not sufficient to establish any sort of sweeping claims. We need to know how frequently non-criminal cases occurred. The Juyan strips represent a good source for such a study at the level of a local jurisprudence, because more than 30,000 strips were excavated there over the course of two excavations (1930s, 1970s).<sup>79</sup> These strips were not explicitly pre-selected and compiled by a single hand for a particular agenda. They were raw archives in nature. Thus even if there were some selective processes involved, they were relatively free of selective bias.

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<sup>75</sup> *RHL*, 339, 341.

<sup>76</sup> *Ibid.*, 102-109.

<sup>77</sup> *Ibid.*, 102-155.

<sup>78</sup> See pp. 10-12 in this chapter for the details; cf. *RHL*, 214-224.

<sup>79</sup> Juyan strips were excavated from the deserts and gobi in Edsen-gol, Inner Mongolia in two separate excavations. The first was conducted in the 1930's by a Sino-Sweden joint archeological team, which yielded 10,272 strips. The publication of those strips was difficult in a turbulent age. The first major publication that includes 2,555 strips is the *Juyan Hanjian jia bian* 居延漢簡甲編 (Beijing: Kexue chubanshe, 1959). The complete collection of strips was published in the *Juyan Hanjian yibian* 居延漢簡甲乙編 (Beijing: Kexue chubanshe, 1980). Revisions were made by Xie Guihua 謝桂華, Li Junming 李均明, and Zhu Guozhao 朱國炤 in the *Juyan Hanjian shiwen hejiao* 居延漢簡釋文合校 (Beijing: Wenwu chubanshe, 1987). Meanwhile, Lao Kan 勞榘 published about 10,000 strips in his *Juyan Hanjian* 居延漢簡 (Taipei: The Institute of History and Philology Special Publication, 1960). The second excavation was conducted during 1972-1974 by a Gansu archaeological team, which yielded 19,400 strips. The strips were published in the *Juyan xinjian* 居延新簡 (Beijing: Wenwu chubanshe, 1990).

In addition, from 1990 to 1992, the Gansu Institute of Archaeology excavated 23,000 strips from Xuanquan 懸泉, Dunhuang 敦煌, which is very close to Juyan. These Xuanquan strips dated from 111 B.C. to A.D. 107. Unfortunately, only a selection of 300 strips has been published in *Xuanquan Hanjian shicui* 懸泉漢簡釋粹, eds. Hu Pingsheng 胡平生 and Zhang Defang 張德芳 (Shanghai: Shanghai guji, 2001). The remainder of the strips has yet to be published. It is very striking that even this small sample of the Xuanquan strips include legal documents such as wanted circulars, edicts of amnesty, and statutes. We can only imagine the many ways in which the entire collection of Xuanquan strips will contribute to our deeper understanding of Han laws.



Before we get into the details, I must admit the shortcomings of my survey and explain the criteria I use to classify the cases collected. Our cases are mostly fragmentary. In most cases, we have only one strip, and no context whatsoever in which to assess the contents. Thus, we often have to rely on key words from the fragments to infer the causes and natures of the cases. For instance, the word *ziyan* 自言 means to sue in person, so if the strip contains this keyword, we can assume that the strip somehow involves a legal case. The word *yuanshu* 爰书 means formal statement, so if a strip contains that word, we can also assume that the strip is connected with a legal case.<sup>80</sup> The word *zhai* 责 means to demand debts, so if the word appears in a strip, we can assume that that strip concerns a debt and that the nature of the case is non-criminal. We are not sure how most of the cases were tried, and my classification of them is, with only two exceptions, based on their identified causes, not outcomes. As for classifying criminal cases, given that their causes are very straightforward, such as murder and battery, no extra explanation for the classification seems needed.

However, it is worth pausing to clarify my classification of non-criminal causes for civil actions involving debt, compensation, commercial transaction, salary, and testamentary wills. Since we have seen that disputes over debt or compensation were tried by the authorities as non-criminal cases, it is reasonable to categorize cases caused by debt or compensation to fall in the category of non-criminal cases. Disputes concerning commercial transactions or salaries are very similar to disputes of debts and are often related; thus I attribute these two types of disputes to non-criminal causes as well. Last wills and testaments are also a non-criminal matter, to be discussed in detail in my next chapter. When using my classification we need to be aware that it is also possible for non-criminal disputes to become criminal (or “mixed”) cases if: 1) crimes are uncovered in the course of an investigation; and 2) someone is found to be testifying falsely (see Appendix 2 for the chart).

Due to the fragmentary nature of the sources, this survey must be tentative in nature and necessarily limited in precision and comprehensiveness. Nevertheless, such a survey invites us to see the larger picture of civil laws in early China. In total, I have identified 123 judicial cases from about 30,000 Juyan strips. There are thirty-seven criminal cases, sixty-eight non-criminal cases, and eighteen cases whose cause and nature cannot be determined. Clearly, the frequency of non-criminal cases is much higher than that of criminal cases: almost twice the latter. The exact time span of most of these cases cannot be determined because only twenty cases, non-criminal and criminal, can be specifically dated; the rest give us no clue concerning their dates.<sup>81</sup>

The overall distribution of the causes of the 104 cases whose causes are known is: Criminal causes (36 occasions): battery (9 occasions), misconduct (9 occasions), murder (5 occasions), armed fight (3 occasions), crossing the pass (2 occasions), arson (1 occasion), stealing (1 occasion), lost one’s tally (1 occasion), illicit profit (1 occasion), and upheaval (1 occasion). For three additional occasions, the cause is unclear but the sentences comport with criminal proceedings or the judicial action taken had the characteristics of a criminal investigation. Non-criminal causes (67 occasions): debts (53 occasions), commercial transactions (8 occasions), compensation (3 occasions), a real estate dispute (1 occasion), a last will (1 occasion), and a salary dispute (1 occasion).

The three major causes for criminal cases are battery, misconduct and murder, while the top three causes for non-criminal cases are debt, commercial transactions, and compensation. However, debt stands out as predominant among all the causes, accounting

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<sup>80</sup> For detailed analysis of these terms, see *RHL*, 73-80; cf. Gao Heng, “Handai susong zhidu lunkao,” 409-467.

<sup>81</sup> That does not mean the rest were not originally dated. What I mean is that the material that survives provides no clue. Among the twenty cases, non-criminal and criminal, whose dates are identifiable, the earliest one is dated to 77 B.C. (murder), while the latest one is dated to A.D. 30 (misconduct).

for about 51% of the 104 cases whose causes are identifiable and 43% among all 123 cases identified.

From the analysis above we know that in Juyan, non-criminal cases occurred much more frequently than criminal cases, and among all the cases, disputes over debt were the predominant cause. Was this phenomenon typical for the Han as a whole? While we cannot answer this with certainty, we can however speculate that the extremely high frequency of debt disputes and the high frequency of transaction disputes may have been peculiar to this region. Since Juyan was the communication hub of the Silk Road, we can imagine that its residents by and large had some direct or tangential involvement in commercial activities. Records of many cases involving inheritance and land disputes are found in transmitted Han texts that relate to regions other than Juyan.<sup>82</sup> For example, according to the *Hanshu*, the Yingchuan 穎川 commandery, which is in the middle of Han China, was notorious for frequent disputes over household divisions among its residents.<sup>83</sup> There is a very long last will excavated from Yizheng 儀征, Jiangsu 江蘇, in southeast China.<sup>84</sup> Moreover, as I mentioned at the beginning of this chapter, the Zhangjiashan strips (Hubei) yield at least three sets of statutes concerning non-criminal matters. Therefore, it is reasonable to believe that throughout the Han, non-criminal cases were quite common and that non-criminal statutes were quite abundant, even though there were probably regional differences in the type and frequency of non-criminal matters that occupied the courts.

Now the question is: How do we understand the nature of these non-criminal cases concerning debt, compensation, salary, inheritance, land disputes, and the pertinent statutes? They resemble modern civil cases and civil statutes in that they were designed – or evolved – as an orderly way for individuals to resolve disputes by providing official remedies for private complaints. However, can we call them civil laws? Are we projecting modern notions derived from the Roman law tradition on early China? I believe we can, because 1) Zheng Xuan already made a distinction that *song* 訟, when used as a legal term, referred to what we would now call “civil cases,” in contrast to *yu* 獄, criminal cases; and 2) there were institutional differences between *song* and criminal litigation.

## Part II: Zheng Xuan’s Claim on *Yu* and *Song* and a District Bailiff’s Role in *Song*<sup>85</sup>

While it is true that there was no exact term equivalent to “civil case” in the classical Chinese language, that does not mean that there was no such concept. In fact, in the second century A.D., Zheng Xuan’s 鄭玄 (A.D. 128-200) commentaries to the *Zhouli* 周禮 (ca. 400 - 10 B.C.) state that *song* 訟, when used as a legal term, referred to what we would now call civil cases, in contrast to *yu* 獄, criminal cases. Specifically, the “Dasitu” 大司徒 section of

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<sup>82</sup> In her study of Han civil procedure, Professor Xu Shihong identified twelve civil disputes from the standard histories. See Xu, “Handai mince sushong chengxu kaoshu,” 122-123. There are of course more cases in the transmitted texts than those cited by Xu.

<sup>83</sup> *Hanshu* 漢書 (Beijing: Zhonghua shuju, 1982), 28.1654.

<sup>84</sup> Chen Ping 陈平 and Wang Qinjin 王勤金, “Yizheng Xupu 101 hao Xi Han mu Xianling quanshu chu kao” 儀征胥浦 101 号西汉墓先令券书初考 *Wenwu* 1987.1, 20-23. I will discuss this document in detail in Chapter Two.

<sup>85</sup> This section is mostly based on an article that I published during the process of my dissertation writing. See Zhang Zhaoyang, “A note on Civil Cases in Early China,” *Journal of American Oriental Society*

“Diguan” 地官 chapter says: “For all the people who do not follow the moral teachings, there are *yu* and *song*. [The officials] hear the *yu* and *song* together with local overseers to decide these cases” (*Fan wan min zhi bu fu jiao, er you yu song zhe, yu you zhi zhi zhe ting, er duan zhi* 凡萬民之不服教而有獄訟者，與有地治者聽而斷之).<sup>86</sup> Zheng Xuan comments: “Disputes over crimes are called *yu* while disputes over property are called *song*” (*zheng zui yue yu, zheng cai yue song* 爭罪曰獄，爭財曰訟).<sup>87</sup> In the “Dasikou” 大司寇 section of the “Qiuguan” 秋官 chapter, Zheng’s commentary on the lines about “using two visits to court to prevent *song* among the people” (*yi liang zao jin min song* 以兩造禁民訟)” and “using the submission of two complaints to prevent *yu* among the people” (*yi liangji jin min yu* 以兩劑禁民獄),<sup>88</sup> observes that “*Song* means to sue each other over property” (*Song wei yi cai huo xiang gao zhe* 訟謂以財貨相告者), and that “*yu* means to charge another with crimes” (*yu wei xiang gao yi zui ming zhe* 獄謂相告以罪名者).<sup>89</sup> According to Zheng Xuan, there was thus a clear distinction in the legal system between cases involving property and those involving crimes, respectively designated by the categories of *song* and *yu*. In addition, Zheng emphasizes that *song* pertained to civil cases, as seen in his annotation to a line in the “Xiaguan” 夏官 chapter of *Zhouli*, which says, “If there are *song* over horses, [the official] will hear them” (*ruo you ma song ze ting zhi* 若有馬訟則聽之).<sup>90</sup> Zheng then explains, “*Song* [here] refers to people breaking their words in buying and selling [horses]” (*song wei mai mai zhi yan xiang fu* 訟謂賣買之言相負).<sup>91</sup>

Zheng Xuan’s interpretations did not win unanimous acceptance. The philologist Huang Sheng 黃生 (b. 1622) bluntly rebuffed Zheng: “The Classics include no clear language saying that cases over property are *song* and cases over crimes *yu*. Zheng is headstrong here when makes such a claim” (*zheng cai wei song, zheng zui wei yu, jing wu ming wen, Zheng te yi wei zhi shuo* 爭財為訟，爭罪為獄、經無明文，鄭特臆為之說).<sup>92</sup> Sun Yirang 孫貽讓 (1848-1908) also disagreed with Zheng in his edition of *Zhouli zhengyi* 周禮正義, citing Huang Du’s 黃度 (1138-1213): “Minor cases are called *song*, while major cases are called *yu*” (*xiao yue song, da yue yu* 小曰訟，大曰獄).<sup>93</sup> *Yu* and *song* in Huang’s view differ only in their degree of seriousness. In 1996 the historian Ge Yinghui 葛英會 challenged Zheng Xuan on the basis of archaeological materials. By analyzing the uses of *song* and *yu* in the legal documents in the “Piyu” 疋獄 section of the Baoshan 包山 strips,<sup>94</sup> Ge argued that the distinction between the two terms was not over the source of the dispute,

<sup>86</sup> *Zhouli zhushu*, 10.27.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*, 10.162.

<sup>89</sup> *Ibid.*, 34. 232.

<sup>90</sup> *Ibid.*, 30.456.

<sup>91</sup> *Ibid.*, 30.204.

<sup>92</sup> Huang Sheng 黃生, *Zigu yifu he'an* 字詁義府合按 (Beijing: Zhonghua shuju, 1984), 161-162. Huang Sheng lived in the seventeenth century. The *Zigu* and *Yifu*, originally two separate works, were combined during the Daoguang 道光 period (1821-1850).

<sup>93</sup> *Zhouli zhengyi* 周禮正義, ed. Sun Yirang 孫貽讓 (Shanghai: Shangwu yinshuguan, 1934), vol. 4, 66.28. Huang Du 黃度 was a historian and high-ranking official in the Song dynasty (960-1279). His biography can be found in Chapter 393 of the *Songshi*.

<sup>94</sup> The Baoshan strips were excavated from Tomb No. 2 at Jingmen 荊門, Hubei 湖北, in 1987, comprising 278 strips from the Chu state dating no later than 316 B.C. These finds were first reported in 1988 in Hubei Jingsha tielu kaogu dui 湖北荊沙鐵路考古隊, “Baoshan er hao mu zhujian gaishu” 包山二號墓竹簡概述 *Wenwu* 1988.5, 25-29. The entire set of strips was published in *Baoshan Chujian* 包山楚簡, ed. Hubei Jingsha tielu kaogu dui (Beijing: Wenwu chubanshe, 1991).

property or social crimes, since this section includes both criminal cases (e.g., murder) and civil cases (e.g., disputes over land). It appears also that the terms *yu* and *song* were used indiscriminately. Ge noted another pattern in the Baoshan materials: the term *song* is used when the documents point to the litigants, while the term *yu* is used when the documents refer to the authority's procedures in investigating and pronouncing judgments. On this basis, Ge argued that the difference between *song* and *yu* did not correspond to civil versus criminal cases. Rather, the two words functioned like two sides of the same coin, depending on the viewer's perspective. According to Ge, a case was called *song* by the disputing parties, but *yu* by the authorities.<sup>95</sup>

By contrast, legal historians Xu Shihong 徐世虹 and Momiyama Akira 末山明 both accept Zheng Xuan's explanations of *song* and *yu*. Xu in 2001 argued that civil cases were common in the four centuries of the Han dynasty and that *song* denoted civil litigation, just as Zheng Xuan claimed.<sup>96</sup> In Xu's survey of the term *song* in transmitted texts, including the *Shiji* (comp. 87 B.C.) and *Hanshu* (comp. A.D. 76), she found that *song* were mostly associated with cases concerning land, rent, debts, and goods. Xu found such consistency in the received texts that she argued that *song* always meant "civil litigation" during Zhou (1122-256 B.C.) and Han times. Xu also attempted to reconstruct the whole procedure of Han civil litigation by analyzing the excavated documents of civil cases from Juyan, among them, the famous case of Li vs. Kou En. Xu's arguments about *song*, while providing a welcome new perspective on early law, are, however, marred by two methodological problems. First, even if one believes that the *Zhouli* is an authentic Zhou text, Zheng Xuan's commentary on it, written during the late second century A.D., may well reflect the usage of his own time. Second, in her reconstruction of civil procedures, Xu does not show how procedures for civil litigation differed from those in criminal proceedings. Did the Han laws treat the two matters differently?

Xu's arguments about *song* were refined in two aspects by Momiyama Akira 末山明 in 2006.<sup>97</sup> First, Momiyama, by studying the case of Li vs. Kou En in the context of criminal cases from the same period, demonstrated that the state treated *song* and *yu* differently. Only the county magistrate directly heard criminal cases. After the county magistrate accepted an accusation of wrongdoing, thereby initiating a criminal investigation, the magistrate in charge of the case would send a magistrate's officer (*lingshi* 令史) to the locality of the accused to escort the accused to the magistrate's court. The magistrate and his assistants would then question the accused, applying torture if needed to secure a confession.<sup>98</sup> Finally the magistrate and his officers would determine the proper punishment for the accused, taking into account precedents and other factors. However, with *song*, even when a lawsuit was brought to the county magistrate,<sup>99</sup> the magistrate's court (*xianting* 縣庭) would refer the case downward by sending the complaint (*zhuang* 狀) to the district (*xiang* 鄉) in which the defendant lived, and it was the bailiff of the district (*xiang sefu* 鄉嗇夫) — an officer who had no authority in criminal proceedings — who would question the defendant, take

<sup>95</sup> Ge Yinghui 葛英會, "Baoshan Chu jian zhi yu wenshu yanjiu" 包山楚簡治獄文書研究, *Nanfang wenwu* 南方文物 2 (1996), 85-91.

<sup>96</sup> Xu Shihong 徐世虹, "Handai minshi susong chengxu kaoshu" 漢代民事訴訟程序考述, *Zheng fa luntan* 政法論壇 6 (2001), 122-130.

<sup>97</sup> Momiyama Akira 末山明, *Chūgoku kodai soshō seido no kenkyū* 中國古代訴訟制度の研究 (Kyōto: Kyōto daigaku gakujutsu shuppankai, 2006).

<sup>98</sup> *SHD* strip (Fengzhenshi) nos. 245-247, p. 281, show that torture is allowed but deemed an inferior method to seek facts during investigations and trials. Cf. *RCL*, 183-184. This is a point of contrast with civil cases in which torture was not applied. I will discuss the issue of torture in Chapter Three.

<sup>99</sup> Momiyama, *Chūgoku kodai soshō seido*, 155.

statements, then submit his report to the magistrate's court.<sup>100</sup> From this it seems possible that the atmosphere of a *song* was not as intimidating as that of a criminal trial.<sup>101</sup> Momiyama argues that even though the Classics provide no evidence to support Zheng Xuan's distinction between *yu* and *song*, the distinction can be discerned from references to *yu* and *song* in Qin and Han documents. Moreover, there is no particular reason why the Classics should refer specifically to such procedures. In addition, Momiyama points out that Gao You 高誘 (fl. A.D. 205-212), in his commentary to the "Meng qiu ji" 孟秋紀 section of *Lüshi Chunqiu* 呂氏春秋 (*The Annals of Lü Buwei*, comp. ca. 239 B.C.), held the same view as Zheng Xuan regarding the distinction between *song* and *yu*.<sup>102</sup> However, unlike Xu, who traced *song* as civil litigation back to the Zhou period, Momiyama avers that the distinction between *yu* and *song* made by Zheng reflected the Han situation, which might not correspond to that of the pre-Han period.

These debates reveal an interesting pattern: neither the pre-Han Classics nor the excavated documents from Baoshan provide firm evidence supporting Zheng Xuan's distinction between *yu* and *song*. On the contrary: some counter-evidence can be found in the Baoshan strips, as Ge Yinghui has pointed out. However, in the Han texts, including the *Shiji* and the *Hanshu*, evidence supporting Zheng Xuan's distinction can be found, as acknowledged by both Xu Shihong and Momiyama Akira. This suggests that the distinction made by Zheng Xuan simply reflects the situation of his own time. One cannot, in consequence, know for certain whether the conceptual distinction between *song* and *yu* existed in the pre-Han period, though it seems to have been known at least at the end of the last century of Eastern Han.

Momiyama's overall argument is thus supported by the evidence. Nevertheless, two problems remain. First, he failed to elaborate upon the important role of the district bailiff (*xiang sefu*) in civil litigation.<sup>103</sup> Second, one wants to know if the bailiff was the only authority in the district (*xiang*) authorized to handle civil cases.

The role of the district bailiff is crucial to an understanding of civil cases in early China, insofar as his absence from criminal cases itself indicates an institutional difference between civil and criminal procedures. In trying a criminal case, the case in theory should be sent upwards to the magistrate for a trial, even when the case was first taken by district officials. A statute from Zhangjiashan states:

諸欲告罪人，及有罪先自告遠離縣廷者，皆得告所在鄉，鄉官謹所書其告，上縣道官廷，士吏亦得聽告。

For those people who want to accuse someone, or who want to confess their own crimes, if they are far from the magistrate's court, they can make the accusation to the district officials. The district officials should take down the accusations and

<sup>100</sup> The *xiang* (district) was a subordinate administrative unit of a county.

<sup>101</sup> Momiyama, *Chūgoku kodai soshō seido*, 153.

<sup>102</sup> On the line, "When one decides *yu* and *song*, one must be upright and fair" (*jue yu bi zheng ping* 決獄訟必正平), Gao You 高誘 (fl. 205-212) commented: "Disputes over crimes are called *yu* while disputes over property are called *song*" (*zheng zui yue yu, zheng cai yue song* 爭罪曰獄, 爭財曰訟).

<sup>103</sup> Hulsewé, assuming that the *xianling* (county magistrate, prefect) was the lowest level of judicial authority, failed to note the role of district bailiff in the justice system. He wrote: "As in many other societies, the function of judge was exercised in China by the local administrative official, and this was also the case during the two Han dynasties. For the vast majority of commoners the only judge they came into contact with was the *hsien ling* or *hsien chang*: the prefect." See *RHL*, 81. Hulsewé's observation is correct for criminal cases, in which the county magistrate was the lowest level of judicial authority, but in civil cases, the authority was the district bailiff.

submit them to the county or march court. Officers of the county or march court could also take accusations.<sup>104</sup>

This regulation makes it clear that a criminal case could typically be reported directly to the magistrate's court with no involvement of district officials. Under extreme situations, such as those living a long distance from the magistrate's court, a case could be first reported to the district officials, who would only carefully note down the accusations before sending the case upwards to the magistrate's court for trial. By contrast, district officials, with bailiffs as their superior, played a central role in *song*. The famous thinker Wang Chong 王充 (A.D.27-97) made that contrast very clear:

鄉決疑訟,獄定嫌罪.是非不決,曲直不立,世人必謂鄉獄之吏,才不任職.  
The district [officials] judge confusing *song* [disputes], while the *yu* [jailors] determine suspected crimes. If right and wrong cannot be determined, and the *qu* and *zhi* [distorted account of the facts and straight account of the facts] cannot be established, people of the time will definitely say that the abilities of the district officials and the abilities of the jail officials are not adequate to their duties.<sup>105</sup>

The claim that “the *yu* (jailors) determines suspected crimes” is a little bit puzzling, since we know jails were a place to confine criminals, having no authority to determine facts or pass sentences. Perhaps Wang Chong's distinction indicates that only county officials and above had roles in criminal trials. According to a recent study by Song Jie 宋傑, the lowest level of jail was at the county level.<sup>106</sup> Despite of the apparent discrepancies in opinions, we find a clear division of judicial duties between the cases assigned to the district-*song* and county jailor (*yu*)-crime, confirming Zheng Xuan's claim regarding *yu* and *song*. This points to the institutional difference between civil litigation and criminal litigation. According to Wang Chong, district officials were concerned with *song* but not with crimes.

Wang Chong's claim regarding this institutional difference can be tested by looking at cases in the *Zouyan shu* 奏讞書 (Documents Presented to Higher Authorities, ca. 187 B.C.) from Zhangjiahan.<sup>107</sup> The twenty-two cases there are all criminal cases, and the preliminary trials are all conducted by county courts except in Case 17, in which the case is first taken by the village head (*tingzhang* 亭長), who is a district official,<sup>108</sup> perhaps because he initially assumes that the case involves a dispute over the ownership of an ox. Once the official realizes that the case probably involves the stealing the ox, a crime, he immediately reports

<sup>104</sup> ZJS strip (statutes) no. 101, pp. 22-23.

<sup>105</sup> Wang Chong 王充, *Lunheng jijie* 論衡集解, ed. Liu Pansui 刘盼遂 (Shanghai: Shanghai guji chubanshe, 1957), 29.571. The word “*xiang*” 鄉 was originally misprinted as “*qing*” 卿 in the received versions. Professor Qiu Xigui 裘錫圭 corrected that mistake in 1978. See Qiu Xigui, “Lunheng zhaji” 論衡札記, *Wenshi* 文史 5 (1978), 229.

<sup>106</sup> Song Jie 宋傑, “Handai jianyu jianzhi sheshi cong kao” 漢代監獄建置設施叢考, *Shoudu shifan daxue xuebao* (Shehui kexue ban) 首都師範大學學報 (社會科學版), 3 (2009), 6.

<sup>107</sup> ZJS strip (*Zouyan shu*) nos. 1-228, pp. 89-112. The *Zouyan shu* 奏讞書 is a collection of twenty-two legal cases. According to the Han legal system, when a county judge had difficulty judging a case, he should first report the case to the commandery judges, then to the superintendent of trials in the central government, and then to the emperor. The collection of these reports regarding the discussions of those legal cases formed the *Zouyan shu*, which perhaps was a reference book for officials in the Han dynasty. Cf. my description of the *Zouyan shu* in the Introduction.

<sup>108</sup> The district bailiff was the immediate supervisor of the village head (*ting zhang* 亭長). The administrative structure of a district was defined along the following lines: ten hamlets (*li* 里) formed a village, and ten villages formed a district. See Loewe, *The Government of the Qin and Han*, 47.

the case to the county court, which immediately takes over the case and begins its investigation.<sup>109</sup>

To understand civil litigation, we must fully understand the role of district bailiff, who served as the chief officer of a district. We need to first examine the title *sefu*. According to Lao Gan 勞幹 (1907-2003) and Ōba Osamu, *sefu* was a generic title for officials during the Han dynasty; as they point out, there were many kinds of *sefu* working in different offices at different levels of administration. For instance, there was a *sefu* for treasure houses (庫嗇夫 *ku sefu*) and a *sefu* for passes (關嗇夫 *guan sefu*).<sup>110</sup> The district bailiff (*xiang sefu*), as Yan Gengwang 嚴耕望 (1916-1996) observed, was an officer dispatched by the county magistrate to a particular district to represent the state's authority.<sup>111</sup> According to the *Hanshu*'s "Table of the Hundred Officials" (Baiguan gongqing biao 百官公卿表), "The [*xiang*] *sefu*'s duties are to hear cases (*tingsong* 聽訟) and to collect taxes (*shou fushui* 收賦稅)."<sup>112</sup> If *song* means "civil litigation," as Xu and Momiyama argue, the phrase *tingsong*, as used in the case of Li vs. Kou En from Juyan, must mean "to hear civil cases."<sup>113</sup>

Two other passages from transmitted texts show that the district bailiff indeed heard civil cases. Yu Yu 虞預 (ca. 285-340), in his *Kuaiji dianlu* 會稽典錄 (Records of Kuaiji, comp. ca. 300) tells us:

鄭宏為靈文鄉嗇夫，民有弟用兄錢者，未還之，嫂詐訴之宏。

Zheng Hong was the bailiff of Lingwen district. Among the villagers, there was a younger brother who borrowed money from his elder brother and never returned the money. So the sister-in-law accused the younger brother of acting falsely to Hong [in the name of the elder brother].<sup>114</sup>

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<sup>109</sup> For Case 17, see *ZJS (Zouyan shu)*, strip nos. 99-123, pp. 100-102.

<sup>110</sup> Lao Gan 勞幹, "Cong Hanjian zhong de sefu lingshi houshi he shili lun Handai junxiang li de zhiwu he diwei" 從漢簡中的嗇夫令史侯史和史吏論漢代郡縣吏的職務和地位, *Zhongyang yan jiu yuan lishi yu yan yanjiusuo jikan* 中央研究院歷史語言研究所集刊 55.1 (1983), 9-22; cf. Ōba, *Shin Kan hōsei shi*, 479-519. Neither Ōba nor Lao realized that *tingsong* means to hear civil cases. Both believed that the *xiang sefu* was charge of criminal cases.

<sup>111</sup> Yan Gengwang 嚴耕望, *Zhongguo gudai difang xingzheng zhidushi shangbian* 中國古代地方行政制度史上編 (Nangang: Zhongyang yanjiuyuan lishi yu yanyanjiusuo, 1961), 237-238.

<sup>112</sup> *Hanshu*, 19.742.

<sup>113</sup> However, there are exceptions in the usage of the word *song* in Han texts. Wang Fu 王符 (ca. A.D. 85-162), who was from the generation preceding Zheng Xuan, seems to make no distinction between *yu* and *song*, using the two terms interchangeably in the "Duan song" 斷訟 section of his *Qianfu lun* 潛夫論. According to Wang Fu, "Nowadays, even though the *yu* (criminal cases) to be decided number in the tens of thousands, the legal disputes, the occurrences of fighting, the trials handled by district officials, and the trials handled by officials in charge of jails are of the same situation. They are all caused by the lack of honesty within the people who frequently deceived others" (今一歲斷獄，雖以萬計，然辭訟之辯，斗賊之發，鄉部之治，獄官之治者，其狀一也。本皆起民不誠信，而數相給也). See Wang Fu, *Qianfulun Jian jiaozheng* 潛夫論箋校正, ed. Peng Duo 彭鐸 (Beijing: Zhonghua shuju, 1985), 5. 226. It appears that Wang did distinguish cases resolved by district officials from those resolved by the officials of the jails (*yuguan* 獄官). Perhaps Wang was not very familiar with legal terms, and was thus unaware of the subtle difference between *song* and *yu*; however, he did note their difference in legal practice.

<sup>114</sup> The final clause is a bit difficult to translate. From the context, I infer that the sister-in-law brought a lawsuit against her brother-in-law in the name of her husband, since the latter may have been reluctant to sue his brother. An alternate translation would be, "The sister-in-law pretended to act on behalf of her husband and sued the brother-in-law."

The sister-in-law presented her accusation to the district bailiff, the same bailiff who ultimately heard the case.

Second, in the biography of Diwu Lun 第五倫 in the *Hou Hanshu* 後漢書 (comp. 445) we read that:

倫後為鄉嗇夫, 平徭役, 理怨結, 得人歡心.

Lun later on became a district bailiff. He fairly administered the taxes and labor services [among the people] and he resolved their grievances. Thus he secured their approbation.<sup>115</sup>

As a district bailiff, Diwu Lun seems to have had two basic duties: apportioning taxes and labor services, and resolving grievances. The text does not specify the kind of grievances Diwu Lun resolved, but if we compare this expression from Diwu Lun's biography with that recorded in the "Table of the Hundred Officials," as noted above (*tingsong shou fushui*, "hear civil cases and collect taxes"), it seems very likely that the phrase "to resolve grievances" corresponds with the phrase "to hear cases."

The district bailiff was not the only authority in a district who could handle civil disputes. The *sanlao* 三老 also seem to have had a role in resolving civil disputes. The stele erected to commemorate Zhao Kuan 趙寬 (dated to A.D. 180) states:

三老諱寬... 優號三老, 師而不臣. 于是乃聽訟理怨, 教誨後生.

The tabooed personal name of the *sanlao* (Thrice Venerable) was Kuan.... [The governor] who honored him with the post of *sanlao* treated him as a teacher rather than as a subordinate. Thereupon he started to hear cases and resolve grievances, as well as instruct younger generations in morality.<sup>116</sup>

According to the stele, Zhao Kuan heard cases when he was a *sanlao*. Derk Bodde (1909-2003) translated *sanlao* as "Thrice Venerable," arguing that it was an honorific title conferred on persons deemed to have had a considerable number of achievements, either scholarly or political.<sup>117</sup> Yan Gengwang believed that the *sanlao* were neither clerks nor officials of the state, but they were men chosen by the state or elected by the local people to act as intermediaries between the state and its subjects.<sup>118</sup>

Regardless of how the *sanlao* came to office, their role in civil cases has been overlooked by scholars, perhaps, in part, because the *Hanshu* monograph on the bureaucracy observes only that "The *sanlao* were in charge of educating and transforming the people" (*sanlao zhang jiaohua* 三老掌教化).<sup>119</sup> The *Hanshu* reference does not invest the *sanlao* with judicial or quasi-judicial status, nor does it acknowledge any strictly judicial function attached to the title. The term *jiaohua* indicates the moral authority of the *sanlao*, the moral authority that, presumably, qualified them to arbitrate disputes. The following case shows

<sup>115</sup> *Hou Hanshu* 後漢書 (Beijing: Zhonghua shuju, 1965), 41.1396.

<sup>116</sup> *Han bei ji shi* 漢碑集釋, ed. Gao Wen 高文 (Kaifeng: Henan da xue chu ban she, 1997), 434.

<sup>117</sup> Derk Bodde, *Festivals in Classical China: New Year and Other Annual Observances during the Han Dynasty 206 B.C.-A.D. 220* (Princeton: Princeton University Press, 1975), 373-380.

<sup>118</sup> Yan Gengwang, *Zhongguo gudai difang*, 246-251.

<sup>119</sup> *Hanshu*, 19.743.



that moral arbitration was sometimes adopted as a first step in resolving civil cases<sup>120</sup> before more formal actions were taken by the authorities:

吳祐遷膠東相，民有詞訟，先令三老以孝悌喻解，祐身至閭裏和之，吏民不忍欺。Wu You was promoted to be chancellor of Jiaodong kingdom. When there were cases among the people, he would first order the *sanlao* to instruct those concerned in the precepts of filial piety and fraternal love. He then personally went to their neighborhood to reconcile the disputants. None of the clerks and people dared to cheat him.<sup>121</sup>

Notably, there is no mention of the district bailiff. In the cases referred to in this passage, we see the *sanlao* playing the crucial role of conciliator by instructing the people in moral conduct and personally arbitrating disputes. Only if the *sanlao* failed to resolve a dispute, would the chancellor, as the kingdom's chief official, personally intervene.<sup>122</sup> The direct intervention of the chancellor was clearly so unusual that it merited notice in the passage cited above. Typically, civil cases would be resolved at the much lower level of the district court presided over by the district bailiff.

The following story from the *Hanshu* captures some sense of the moral, ethical, and, arguably ritual elements involved in the administration of justice:

行縣至高陵，民有昆弟相與訟田自言，延壽大傷之，曰：“幸得備位，為郡表率，不能宣明教化，至令民有骨肉爭訟，既傷風化，重使賢長吏、嗇夫、三老、孝弟受其恥，咎在馮翊，當先退。”是日移病不聽事，因入臥傳舍，閉閣思過。一縣莫知所為，令丞、嗇夫、三老亦皆自繫待罪。

[Han Yanshou] inspected the counties and arrived in Gaoling. Among the people, there were brothers who had sued each other over land. Han Yanshou was very upset and said: “I am fortunate to hold a position where I am to be the role model for the commandery. I have failed to exemplify moral teachings and transform the people, and so blood relatives attack each other in civil litigation. This not only damages customary morality, but also humiliates the worthy senior officers, the *sefu*, the *sanlao* and the Filially Pious and Fraternal (*xiaodi*). This is my mistake, as I am the leader of Pingyi.<sup>123</sup> I should withdraw first.” That day, Han Yanshou refused to hear any court cases, pleading illness. Then, he went to the shelter belong to the post and shut himself up, so that he might reflect upon his errors. In the whole county, no one knew what to do. The magistrate (*ling*), deputy magistrates (*cheng*), district bailiff (*sefu*) and *sanlao* all had themselves bound, awaiting punishment.<sup>124</sup>

By explicit admission, the chancellor regarded the brothers' dispute as his personal failure to educate his people. In his failure, he felt that he shamed the county bureaucracy. What happened next is quite interesting: the county magistrate (*ling*), the assistant

<sup>120</sup> This is associated with the legal ideal of reforming people's morals to reduce lawsuits. See my discussion on this issue in Chapter Four.

<sup>121</sup> See the biography of Wu You 吳祐 in Xie Cheng's 謝承 *Hou Hanshu*, collected in *Bajia Hou Hanshu jizhu* 八家后漢書輯注, ed. Zhou Tianyou 周天游 (Tianjin: Tianjin guji chubanshe, 1987), 4.113.

<sup>122</sup> The chancellor is a kingdom-level post comparable to that of a governor in a commandery; see n. 125 below.

<sup>123</sup> Pingyi 平邑 was one of the three metropolitan areas of the capital Chang'an.

<sup>124</sup> *Hanshu*, 76. 3213. I will fully explore this case in Chapter Four.

magistrates (*cheng*), the *sanlao* and *sefu*<sup>125</sup> all took the ritual action of binding themselves as if they were criminals. This suggests that they all considered themselves directly responsible for the resolution of civil cases while the governor and magistrates took ultimate responsibility for the proper handling and disposition of all civil cases in their jurisdictions.<sup>126</sup>

Since at the district level both the bailiff and the *sanlao* could handle civil cases, one may ask if there was any difference between the two. It seems that the *sanlao* may have acted as an arbitrator who tried to reconcile cases, while the district bailiff acted as a judicial officer with an obligation to question the parties, record their statements, draw up preliminary reports, and submit those reports to the county officials. The authority of the *sanlao* in civil cases may have depended on his position as a moral leader in the district. Presumably, then, his decisions would have been enforced mainly by custom and public opinion. However, the authority of the district bailiff was based on his official position as a legal officer, presumably giving his judgments the force of law. An account in the bureaucratic monograph of the *Hanshu* explicitly states that the district bailiff had a duty to hear civil cases. Moreover, as the Liye 裏耶 Qin strip no. J1.984 indicates, “The district bailiff performs his duty according to the statutes and ordinances” (*Xiang sefu yi lu ling cong shi* 鄉嗇夫以律令從事),<sup>127</sup> suggesting that district bailiffs had comparable legal authority in the Qin dynasty, a likely predecessor to the district bailiffs of the Han.

Clearly, a district bailiff could not adjudicate each and every dispute in his district without having his administration crippled by an overwhelming caseload. The district bailiff, we should recall, also had other, non-judicial duties, including the administration of local taxes and managing labor service. Understandably, there was a screening process to manage the bailiff’s caseload. Plaintiffs had to present solid proof of the merits of their complaint (i.e., a credible, substantive basis for legal action) before the bailiff would take their cases. According to Zheng Xuan, in disputes over sales agreements, the parties needed to present their contract to the authorities.<sup>128</sup> Zheng Xuan’s observation is consistent with the directive found in *ZJS* strip (Statutes) no.335:

有爭者，以券書從事，毋券書，毋聽。

If there is a dispute [over inheritance], the authorities should handle the matter based on the document. If there is no document, the case will not be heard.<sup>129</sup>

Similarly, when a dispute over inheritance erupted, the one making the complaint was required to present a will<sup>130</sup> before the case could be accepted for adjudication. This emphasis on providing preliminary proof in order to weed out trivial or frivolous cases

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<sup>125</sup> It is clear, in this context, that *sefu* refers to the *xiang sefu*, because he is mentioned alongside the district *sanlao*.

<sup>126</sup> See *CHC*, 507-508. Each commandery was under a governor (*taishou* 太守). His counterpart in a kingdom had the courtesy title of chancellor (*xiang* 相), but both had comparable duties. These officials were responsible for all civil and military affairs within their territories, including the administration of civil and criminal laws.

<sup>127</sup> Hunan sheng wenwu kaogu yanjiusuo 湖南省文物考古研究所, “Xiangxi Liye Qindai jiandu xuanshi” 湘西里耶秦代簡牘選釋, *Zhongguo lishi wenwu* 中國歷史文物 1 (2003), 10; cf. Bu Xianqun 卜宪群, “Qin Han zhiji xiangli liyuan zakao: Yi Liye Qinjian wei zhongxin de taolun” 秦汉之际乡里吏员杂考—以里耶秦简为中心的探讨, *Nandu xuetan (Renwen shehui hexue ban)* 南都學壇 (人文社會科學版) 1 (2006), 2. The Liye 里耶 strips were excavated in 2002 by the Hunan Provincial Archaeological Institute. Thirty-six thousand strips were excavated in total, but have not yet been published.

<sup>128</sup> See pp. 13-14 of this chapter.

<sup>129</sup> *ZJS* (Statutes) strip no.335, p. 54.

<sup>130</sup> See my discussion on “will” in Chapter Two.

contrasts sharply to the corresponding criminal procedure in which officials were required to take all cases involving criminal conduct.

While one of the distinctive features of civil litigation in Han was the generally equal access to the courts accorded to litigants regardless of their status, this principle was not, apparently, absolute. Another potential barrier to having a case heard by a judicial officer was the relative status of the litigants. *ZJS* strip (Statutes) nos. 133-134 show that the social status of the accuser and the relationship between the accuser and the accused could serve as criteria for deciding whether or not to take a case.

子告父母, 婦告威公,<sup>131</sup> 奴婢告主, 主父母妻子, 勿聽而棄告者市。  
年未盈十歲及繫者, 城旦, 舂, 鬼薪, 白粲告人, 皆勿聽。

When a son accuses his parents, a daughter-in-law accuses her parents-in-law, a slave accuses his or her master or the parents, wife, or son of the master, do not take these cases. Instead, execute the accusers in the market place.

Never take cases brought forward by these people: those who are less than ten years old, those who are in the jail, or those who have been convicted as male wall-builders, female grain-pounders, male gatherers of firewood for spirits, or female sifters of white rice.<sup>132</sup>

Not all disputes were easily resolved. Equally convincing claims and counter-claims could stymie a bailiff, the case might involve issues not covered by the statutes, or frustrated litigants might refuse to accept the court's judgment. When a bailiff found it impossible to resolve a dispute, he could and typically did forward the case to a higher authority. To accommodate such events, there was a hierarchy of appeals in civil litigation from the district level all the way up to commandery.

The following report of an (A.D. 24 case) appeal from Juyan describes what happens when lower officials are unable to resolve a dispute over debt:

更始二年四月乙亥朔辛丑, 甲渠鄯守候, 塞尉二人移□池律曰□□□□□□□  
史驗問, 收責, 報不服。移自證爰書, 如律令。

On the *xinchou* day of the fourth month beginning with the day *yihai*, in the second year of the Gengshi period (A.D. 24), two officials, who are the *zhangshouhou* (deputy garrison commander?) and the deputy commander of the Jiaqu company forwarded [a testimony?] to Chi. According to the statute, [missing seven characters] an certain official questioned [the defendant] and decided to collect the claimed debt from the defendant. The defendant was not willing to accept the judgment. Thus the certain official reported the problem. [We] forward the testimony of the defendant, according to the statutes and ordinances.<sup>133</sup>

The dispute was initially investigated by an official who subsequently ruled in favor of the plaintiff. When the defendant refused to admit the debt, the clerk reported the problem to the two officers at Jiaqu. These officers, facing a defiant defendant, followed the procedures set forth in the statutes and ordinances, forwarding to their superiors their report

<sup>131</sup> According to Zhu Honglin, *wei* 威 refers to mother-in-law while *gong* 公 refers to father-in-law. See Zhu Honglin, *Zhangjiashan*, 100.

<sup>132</sup> We partially examined this strip earlier, but from a different angle. See p. 11 of this chapter.

<sup>133</sup> *JYX* strip no. E.P.C.39, p. 548.

on the problematic case, including testimony they had gathered. Even if this case involved a disputed debt among military men and would therefore have been handled by military officials, the appeal process followed the same pattern of appeal it would have followed had the dispute involved civilians.

Cases involving military men had a hierarchy of appeals that paralleled the hierarchy of appeals for cases involving civilians (i.e., one party is civilian or both parties are civilians). For cases involving civilians, the hierarchy of appeals beyond the original jurisdiction of the district bailiff and the *sanlao* included the assistant and county magistrate at the county level, the governor at the commandery level, and finally the chancellor.<sup>134</sup> For cases exclusively involving military men, there was a comparable hierarchy for appeals within the military system, perhaps from the deputy garrison commander up to the commandant.<sup>135</sup>

With what we have learned about the role of the district bailiff in civil litigation, we may now more fruitfully revisit Zheng Xuan's assertion that *song* meant "to dispute property." The *Hou Hanshu* tells us that Zheng Xuan was once himself a district bailiff, and that the post of district bailiff may have been his first official position:

玄少為鄉嗇夫，得休歸，嘗詣學官，不樂為吏，父數怒之，不能禁。

Xuan was a district bailiff when he was young. When he was on leave, he returned home, where he often visited the local academies. He was not happy to be a local officer. His father was angry with him many times, but he couldn't stop him [from going to the academies].<sup>136</sup>

Zheng Xuan's remark on the word *song* in his *Zhouli* commentary was presumably based on his personal experiences of drawing up reports regarding property cases when he served as a local bailiff. Apparently, he found such tasks irksome.

Given the power of a district bailiff over the lives of district residents, Zheng Xuan's youth raises questions about the qualifications for the position of district bailiff. In Zheng Xuan's case, we have an inexperienced teenager being asked to resolve potentially complex issues involving property, inheritance, commercial transactions, disputed debts, and damages. If an inexperienced, albeit precocious teenager could serve as district bailiff, was the authority invested in the post or the person when handling civil disputes? According to Wang Liqi 王利器, Zheng was probably eighteen to twenty-first years old when he served as a district bailiff.<sup>137</sup> Despite Zheng's youth, there is little question of the authority of the district bailiff in his district. Exemplary judges, of course, acquired additional moral and ethical authority depending on how judiciously they performed their duties, but it appears that the position itself was the basis of the official authority. In some instances, a district bailiff could overshadow the magistrate and governor in terms of his power over district residents, and in some instances, a district bailiff's opinion could significantly affect a person's career. For example, we read in the *Hou Hanshu*:

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<sup>134</sup> In the case of Li vs. Kou En, Li was a military officer but Kou En, a civilian. Thus, the case was handled by a bailiff, who was a civil official.

<sup>135</sup> This is speculation, but cases involving debt disputes exclusively involving military men were all resolved by military officials. We can imagine that it was impractical for the military men to use the district--county--commandery system to resolve their civil disputes since they might be stationed far from those civil officials' offices. It was much more convenient and efficient for the military to resolve their disputes within the military organization. That also served the interests of the state. The state surely did not want to see the military leave their camps in order to resolve debt disputes.

<sup>136</sup> *Hou Hanshu*, 35.1207.

<sup>137</sup> Wang Liqi 王利器, *Zheng Kangcheng nianpu* 鄭康成年譜 (Jinan: Qi Lu shushe, 1983), 33.

爰延字季平，陳留外黃人也。清苦好學，能通經教授。性質慤，少言辭...後令史昭以為鄉嗇夫，仁化大行，人但聞嗇夫，不知郡縣。

Yuan Yan, whose byname was Jiping, was a native of Waihuang county, Cheniu commandery. He was poor but studious. He could completely understand the Classics and teach others. His personality was sincere and he did not speak much...Later, he was enrolled as a district bailiff by the staff of the magistrate, and benevolent morality was greatly extended. People [in the district] only knew the bailiff without knowing the magistrate and governor.<sup>138</sup>

Yuan Yan, as a district bailiff, was such an authoritative and eminent figure in the district that the local folks held him in high esteem so that his authority eclipsed respect for the magistrate and governor. In another report in the *Hanshu* we find:

鮑宣字子都，渤海高城人也。好學明經，為縣鄉嗇夫所非，宣坐免。

Bao Xuan, whose byname was Zidu, was a native of Gaocheng, Bohai commandery. He loved studying and clearly understood the Classics. He was impeached by the district bailiff of his county and hence removed from his office.<sup>139</sup>

The telling point in this report is that the post of district bailiff was clearly one with significant responsibilities. Since it was the bottom rung of the official hierarchy, the position was typically a first posting for elite youth and their introduction to a career in officialdom. But if a young district bailiff did well in his post, he would be promoted to a higher level, as we find in this account from the *Hou Hanshu*:

朱邑字仲卿，廬江舒人也。少時為舒桐鄉嗇夫，廉平不苛，以愛利為行，未嘗笞辱人，存問耆老孤寡，遇之有恩，所部吏民愛敬焉。遷補太守卒史，舉賢良為大司農丞，遷北海太守，以治行第一入為大司農。

Zhu Yi, whose by name was Zhongqing, was a native of Shu county, Lujiang commandery. He was a district bailiff at Tong, Shu county, when he was young. He was fair and kind, had the virtues of loving and benefiting others, and never beat or humiliated people. He cared for the elders and people who had no sons or husbands. He treated them with kindness, and [consequently] was loved and respected by his subordinates and the people. He was promoted to fill a vacancy on the staff of the governor, then was recommended as Wise and Good (*xianliang*), and became an assistant superintendent of agriculture (*dasinong cheng*). He was then promoted to be the governor of Beihai commandery, and later went to the imperial court serving as superintendent of agriculture, due to his good administrative record.<sup>140</sup>

Zhu Yi's story illustrates a typical career trajectory for a successful official in the Han dynasty.

Recalling, for a moment, the career of Zheng Xuan in light of the preceding passage, we see that even a young bailiff could earn great respect in his district, the degree of that respect being a reflection of his ability. Moreover, a district bailiff (regardless of age) would

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<sup>138</sup> *Hou Hanshu*, 48.1618.

<sup>139</sup> *Hanshu*, 72.3086.

<sup>140</sup> *Ibid.*, 89.3635.

most likely have had a team of experienced runners working for him and on whose judgment he could rely.

Zheng Xuan's personal experience as a district bailiff, even though he disliked the job, unquestionably gave him early and valuable insights into the legal world, especially into the nature of civil cases. He eventually became one of the leading legal authorities in early China. As the *Jinshu* 晉書 (comp. 644) reports:

漢承秦制, 蕭何定律....後人生意, 各為章句. 叔孫宣、郭令卿、馬融、鄭玄諸儒章句十有餘家, 家數十萬言....言數益繁, 覽者益難. 天子於是下詔, 但用鄭氏章句, 不得雜用餘家.

The Han dynasty inherited the Qin system. Xiao He fixed the statutes.... Later generations had their own understandings and all annotated the law code differently. There were more than ten experts who wrote “chapter and verse” (*zhangju*) commentaries, including Shu Sunxuan, Guo Lingqing, Ma Rong, Zheng Xuan and other classicists. Each master's commentary was about a hundred thousand phrases long. The more complicated the phrases became over time, the more difficult the readers found them to be. Therefore, the Son of Heaven (Wendi of the Wei) issued an edict, which said that only Zheng Xuan's *zhangju* annotations were to be adopted, and that one need not incorporate all the other experts' [opinions].<sup>141</sup>

According to this account, during the Han dynasty, there were many different interpretive traditions, which introduced great confusion into legal practice. To mitigate this confusion, Wendi of the Wei (r. 220-226) decreed that Zheng Xuan's interpretations would become the official interpretation.

Zheng's legal works have been lost for centuries, but recently Long Daxuan 龍大軒 has identified one hundred and ninety-three fragments of Zheng's legal works in Zheng's commentaries to the Classics, the *Shiji*, and the *Hanshu*. These fragments of Zheng's work are the most numerous of the 543 fragments of legal commentaries of fifteen early scholars that have been discovered by Long.<sup>142</sup> The empire-wide establishment of Zheng's legal authority in the early third century gives us yet another reason to trust Zheng's claims about the nature of civil litigation.

In conclusion, we find that, during the Han dynasty, civil cases were clearly distinguished from criminal cases in theory, in institutions, and in procedures. In legal theory, civil litigation and arbitration were both subsumed under the rubric of *song* (cases about property) while criminal proceedings were identified as *yu* (cases about crimes). Just as we found five contrasts between the respective domains of civil and criminal cases, we find comparable points of contrast when it comes to institutions and procedures:

- 1) Civil complaints typically go first to the district bailiff, not the county court. The authorities decide whether or not to take on a case, according to a set of written guidelines that are different from those applied in criminal cases.<sup>143</sup> Even when a complaint is mistakenly first submitted to the county court, the county court sends the complaint down to the district bailiff.

<sup>141</sup> *Jinshu* 晉書 (Beijing: Zhonghua shuju, 1974), 30.922-923.

<sup>142</sup> Long Daxuan 龍大軒, “Handai lü zhang ju xue kao lun” 漢代律章句學攷論 (Ph.D. diss., Xinan zhengfa daxue 西南政法大學, 2006), 17-46.

<sup>143</sup> See pp. 25-29 in this chapter.

- 2) The bailiff summons the conflicted parties to hearings in order to assess liability. No arrest or detention is involved.<sup>144</sup>
- 3) We know of no cases concerning disputes over property in which torture is used to extract testimonial evidence.

In contrast, the institutions and procedures for criminal cases have the following characteristics:

- 1) The report, regardless of where it is first received, is typically submitted to the county court for preliminary investigation. The authorities decide whether to take the case or not, depending on a set of written guidelines, which differ from the guidelines for civil cases.<sup>145</sup>
- 2) Upon receiving the report, the county court sends law-enforcement officers to arrest and detain the suspect for interrogation. District bailiffs and other officials at the district level play no role in the interrogation. Only the county court and superior courts have the authority to try cases of criminal nature.<sup>146</sup>
- 3) Torture is allowed and often applied, when deemed necessary.<sup>147</sup>

Overall, given these differences and those enumerated earlier in Part I, further buttressed by Zheng Xuan's distinction between *song* and *yu*, we can see how civil cases and criminal cases were differentiated by terminology, by institutions, by procedures, by goals, and by outcomes.<sup>148</sup> Hence, we are compelled to conclude that civil laws did exist in early China and that they were different and separate from criminal laws.

In the next chapter, we will turn our attention to the three sets of civil statutes

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<sup>144</sup> See p. 25 in this chapter; cf. Momiyama, *Chūgoku kodai soshō*, 153

<sup>145</sup> See pp. 29-30 in this chapter.

<sup>146</sup> See p. 24 in this chapter; cf. Momiyama, *Chūgoku kodai soshō*, 153.

<sup>147</sup> Momiyama, *Chūgoku kodai soshō*, 153.

<sup>148</sup> Civil and criminal cases did, nevertheless, share certain procedures and institutions. First, except for the use of torture, the trial techniques and process are identical in civil and criminal trials. According to Professor Michael Loewe's research, a criminal trial had four stages: A) the accused gives his or her statement of what happened, B) the officials question the accused for an explanation of his/her actions, C) the officials question other parties to cross-check the statements, D) the officials discuss among themselves what statutes or ordinances The review process for both civil and criminal cases was very possibly identical. If the county court had problems trying a case, it reported the case to higher authorities for review. This hierarchical system of review – from county court to the commandery court to the central authority, the superintendent of trials (廷尉 *tingwei*) – is called *yan* 讞, in the *Zouyan shu* 奏讞書 (Documents Presented to Higher Authorities, ca. 187 B.C.) from Zhangjiashan. The characteristic of this system shared by both civil and criminal cases is that legal decisions could be appealed to higher courts (See Loewe, *The Government of Qin and Han*, 61).

Indeed, civil laws and criminal laws are sometimes blurred in practice even in modern societies. For instance, English criminal courts can include a 'compensation order' in the sentence that they impose, thus bringing elements of civil law into the criminal process. See Martin Wasik, "Compensation Orders and Civil Liability," *The Modern Law Review* 48.6 (1985), 707-711. Some civil systems also allow for the imposition of 'punitive damages,' which are intended to punish the defendant. See *Black's Law Dictionary*, 448.

Overall, even beyond Zheng Xuan's distinction between *yu* and *song*, we find that the differences between criminal cases and civil cases, at least among those we have found, are substantial and far surpass the similarities.

excavated from Zhangjiashan. These statutes are concerned with such significant domestic matters as inheritance, household division, and the property rights of women. The sheer existence of these statutes reinforces our conclusion that civil laws existed in early China. While a detailed discussion of the statutes from Zhangjiashan should logically belong to this chapter as further demonstration of the existence of civil law in Han, the wealth of significant information contained in these sets of statutes demands an independent chapter.



## Chapter Two: Domestic Justice System

This chapter will further demonstrate the existence of civil laws in early China, especially the Han, by focusing on the statutes regulating domestic issues. We should be clear that this study of the evolution and application of civil laws does not presume or even argue for the existence of a uniform, empire-wide code of “family law” that governs “marriage, divorce, adoption, child custody and support, child abuse and neglect, paternity, juvenile delinquency, and other domestic-relations issues.”<sup>1</sup> However, even though there was no such codified body of “family law” in early China, we do find a quite sophisticated system of justice that managed domestic matters during the Han period, if not earlier. This justice system was based on statutes, including the Statutes on Households (Hulü 戶律), the Statutes on Establishing Heirs (Zhihoulü 置后律), and the Statutes on Registration (Fulü 傳律). These statutes will be designated as “domestic statutes” in this dissertation.

This chapter, divided into two parts, is devoted to this domestic justice system. Part I will review and synthesize previous scholars’ work on the domestic statutes and address a number of issues that are still being debated, such as the possible Qin roots of the Han Statutes on Households, the function of wills, and the status of women in households. Part II will demonstrate the implementation of Han domestic statutes in the context of two stories from the *Fengsu tongyi* 風俗通義 (Comprehensive Discussion of Customs, comp. ca. 200) that detail disputes over inheritance. I will argue that the disposition of these two cases closely followed Han legal principles and procedures, and, as such, illustrate the Han domestic justice system in action.

### Part I: Domestic Statutes

#### A) Background and Scholarship

The Statutes on Households, the Statutes on Establishing Heirs, and the Statutes on Registration were all excavated from Zhangjiashan. Their excavation provoked a new wave of scholarly interest in the Han domestic justice system. Prior to their excavation and publication in 2001, scholars were almost entirely unaware of the existence of statutes dealing with domestic matters beyond the Statutes on Households, which had been cited by name only for many centuries.

Ban Gu’s 班固 (A.D. 32-92) well-known “Treatise on Penal Laws” (Xingfa zhi 刑法志) from the *Hanshu* neglects to mention any specific statutes. Ban Gu merely states that chancellor Xiao He 蕭何 (257-193 B.C.) compiled the Statutes in Nine Chapters (*Jiuzhanglü* 九章律), without offering further details:

三章之法不足以禦姦，於是相國蕭何摭秦法，取其宜於時者，作律九章。

The laws of Three Sections proved insufficient to restrain villainy, so the chancellor Xiao He gathered together the laws of Qin and, choosing those that were most suitable for those times, he made the *Statutes in Nine Chapters*.<sup>2</sup>

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<sup>1</sup> *Black’s Law Dictionary*, 510.

<sup>2</sup> *Hanshu*, 23.1096; cf., *RHL*, 333. My translation follows Hulsewé with slight modifications.

Perhaps Ban Gu, having risen to prominence after the successful restoration of the Han by Emperor Guangwu 光武 (r. A.D. 25-57), took the efficacy and existence of Han laws for granted and presumed his peers' familiarity with those laws, never imagining that the details of those laws would one day become obscure. Or perhaps, intending his treatise as a critique of mutilating punishments, Ban Gu never set out to describe the whole legal system in details. As Hulswé speculated:

It might be preferable to say that Ban Gu never attempted to describe the system at all, as it must have been familiar to his readers, but rather that he stresses a few aspects only... Actually we are forced to conclude that Ban Gu in writing this treatise never set out to give a complete description of the legal system, but that he used this historical treatment of the punishments as a long and complicated introduction to defend a personal standpoint in the ever recurring dispute about the question whether the mutilating punishments should be maintained or abolished.”<sup>3</sup>

In any case, prior to the Zhangjiashan excavation, the lacunae in Ban Gu's description of the laws frustrated historians eager to understand the details of Han laws in general and the domestic statutes in particular.

The first mention of the Han Statutes on Households appears in the received texts about four centuries after the fall of the Han dynasty in 220. The *Tanglü shuyi* 唐律疏议 (Tang Code with Commentaries, comp. 635) states:

漢相蕭何承秦六篇律，加廢興戶三篇，迄於后周，皆名戶律。北齊以婚事附之，名為婚戶律。隋開皇以戶在婚前，改為戶婚律。

During the Han dynasty, chancellor Xiao He received six chapters (*pian* 篇) of Qin Statutes. He added three new chapters to it: the Statutes on Stables, the Statutes on Levies, and the Statutes on Households. Till the Later Zhou period (Northern Zhou, 557-581), the Statutes on Households had been always named “Statutes on Households.” The Northern Qi (550-577) attached statutes concerning marriage matters to the Statutes on Households and named it “Statutes on Marriages and Households.” During the Kaihuang period of the Sui (581-600), [entries on] households were placed before those dealing with marriages, and the statutes were renamed the “Statutes on Households and Marriages.”<sup>4</sup>

Based on this text, we can assume that some form of the Han Statutes on Households was still available in the Tang dynasty (618-907). The Tang Statutes on Households and Marriages incorporated the Han Statutes on Households after a long process of transmission, with major reshaping during the Northern Qi period, when Statutes on Marriage were added to the Statutes on Households to create the precedents for Tang Statutes on Marriages and Households.

We do not know when or the extent to which the Han Statutes on Households were lost.<sup>5</sup> However, when Shen Jiaben 沈家本 (1840-1913) first started to reconstruct Han

<sup>3</sup> *RHL*, 313.

<sup>4</sup> *Tanglü shuyi* 唐律疏議, ed. Liu Junming 劉俊明 (Beijing: Zhonghua shuju, 1983), 12.211. In addition, the “Xingfazhi” of the *Jinshu* echoes the *Tanglü shuyi*, saying that Chancellor Xiao added three new chapters, including the Statutes on Households, Levies, and Stables, to the transmitted Qin law to create the Statutes of Nine Chapters. See *Jinshu*, 30.992.

<sup>5</sup> Hulswé noticed that the “Jingjizhi” of *Suishu* does not mention the Han code. Thus he believed that the loss of the Han law was due to its revision in the Jin dynasty. See *RHL*, 26. This speculation, unsupported by evidence, is not very convincing.

statutes in his voluminous *Hanlü zhiyi* 漢律摭遺 (Miscellanea of Han Laws), he lamented the absence of evidence relating to the Statutes on Households.

按戶律目無可靠, 其事以賦役為重, 故以賦役居先, 唐戶婚律四十四條, 前廿五條並戶事, 餘條略依其次序編入。

There are no regulations from the Statutes on Households to be examined. Because taxes and labor services were considered important business, I put [the reconstructed] provisions regarding taxes and labor services first. [In addition], among the forty-four provisions in the Tang Statutes on Households and Marriages, twenty-five provisions are about household matters. I compiled them in the reconstructed statutes approximately according to their original sequence.<sup>6</sup>

While admitting the absence of early extant materials relating to the Statutes on Households, Shen nevertheless attempted to “reconstruct” the statutes, basing his reconstruction on two assumptions. First, he assumed that taxes and labor services were the primary concerns of the Han Statutes on Households. Second, he believed that the Tang Statutes on Households and Marriages preserved the Han Statutes on Households. To reconstruct the lost Han statutes, Shen collected provisions regarding taxes and labor services scattered throughout the *Shiji*, the *Hanshu*, and the *Hou Hanshu*, then combined these historical references with twenty-five stipulations on households from Tang law. Unfortunately, Shen’s first assumption is not supported by the Statutes of Households from Zhangjiashan, and his second assumption ignores the likelihood of changes in the household statutes in the centuries from the Han to the Tang.<sup>7</sup>

A few decades after Shen, another great scholar Cheng Shude 程樹德 (1877-1944) shared Shen’s frustrations, when Cheng attempted to reconstruct Han laws in his “Hanlü kao” 漢律考 (A Study on Han Statutes), a part of his monumental project entitled *Jiu chao lü kao* 九朝律考 (A Study of the Statutes of Nine Dynasties).<sup>8</sup> However, Cheng did not follow Shen’s speculative approach to reconstructing the Statutes on Households. Cheng simply reiterated the *Tanglü shuyi*’s limited account of the transmission of the Han Statutes on Households.<sup>9</sup>

In the 1950s, Hulswé noticed the following provision, attributed to the Han Statutes on Households compiled by Ying Shao in the *Fengsu tongyi*:

The commanderies of Hanzhong, Ba and Shu, and Guanghan were allowed autonomously to select the period for the Dog Days.<sup>10</sup>

If this provision was indeed included in the Statutes on Households, it must have been some special emendation addressing the peculiar circumstances of Hanzhong 漢中, Ba 巴 and Shu 蜀, and Guanghan 廣漢. It does not seem to fit within the scope of topics typically covered by the household statutes.

<sup>6</sup> Shen Jiaben 沈家本, *Hanlü zhiyi* 漢律摭遺 (Taipei: Shangwu yinshu, 1976), 14.1. This book has twenty-two *juan* in total and contains many pieces of fragments of various Han statutes preserved in the *Shiji*, the *Hanshu*, the *Hou Hanshu*, classicists’ commentaries on the Classics and medieval encyclopedias.

<sup>7</sup> For a detailed comparison between Cheng’s reconstruction and the excavated statutes, see Zhang Boyuan 張伯元, “Hanlü zhiyi yu Ernian lü ling bikan ji” 漢律摭遺与二年律令比勘记, in *Chutu falü wenxian yanjiu* 出土法律文獻研究 (Beijing: Shangwu yinshuguan, 2005), 1-38.

<sup>8</sup> Cheng Shude 程樹德, “Hanlü kao” 漢律考, in *Jiuchao lü kao* 九朝律考 (Beijing: Zhonghua shuju, 1963),

<sup>9</sup> *Ibid.*, 15.

<sup>10</sup> *RHL*, 36.

In 1975, two decades after Hulsewé's work, a fragment of the Statutes on Households belonging to the pre-unification Wei state (403-225 B.C.) was found at Shuihudi along with a valuable trove of Qin laws. This find provided the first piece of hard evidence for the existence of these types of statutes in early China. The Wei fragment shows that the Han Statutes on Households had precursors in the Zhanguo period (475-221 B.C.). Despite its importance, the fragment unfortunately supplied few details regarding statutes on households, and thus failed to stimulate significant research. Ōba Osamu, in his *Shi Kan hosesshi no kenkyū* (1982), only briefly mentioned the fragmentary statutes, confining his discussion to dating.<sup>11</sup> Hulsewé, in his *Remnants of Ch'in Law* (1985), merely translated the fragment without elaboration or commentary.<sup>12</sup>

Before the Zhangjiashan excavation, our knowledge regarding the Statutes on Establishing Heirs and the Statutes on Registration was even more limited than our knowledge of the Statutes on Households. No previously transmitted or excavated texts mentioned them, nor were any fragments preserved.<sup>13</sup> The situation changed dramatically in 2001 with the publication of Zhangjiashan strips, which provided scholars with authentic materials on Han laws. Among them, *ZJS* strip (Statutes) nos. 305-346 identify themselves as Statutes on Households, *ZJS* strip (Statutes) nos. 367-390 identify themselves as Statutes on Establishing Heirs, and *ZJS* strip (Statutes) nos. 354-365 identify themselves as Statutes on Registration. These three sets of statutes govern the creation, division, and perpetuation (inheritance) of households (*hu* 戶). Specifically, the Statutes on Households covers issues involving the administration of five household units, the practice of *mingtianzhai* 名田宅 (see below),<sup>14</sup> rules for household registration, and rules for household division. The Statutes on Establishing Heirs regulates the lines of inheritance for both households and orders of honor (*jue* 爵). The Statutes on Registration regulate the establishment and registration of independent households by non-heirs.<sup>15</sup> Even though we do not know if the statutes unearthed at Zhangjiashan were complete or if they had been altered since Han times, we can be confident that these statutes address many important issues relating to domestic activities. With the Zhangjiashan finds shedding light on cases preserved in received texts, it is now possible for scholars to study the domestic justice system of Qin/Han with far greater sophistication and accuracy than ever before.

In fact, ever since publication of the materials from Zhangjiashan, the domestic statutes have attracted scholarly attention. To date, four important works have appeared: 1) Li Junming 李均明, "Zhangjiashan Hanjian suojian guifan jicheng guanxi de falü" 張家山漢簡所見規範繼承關係的法律 (The Laws Regulating Inheritance as Seen from Zhangjiashan

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<sup>11</sup> Ōba, *Shin Kan hōseishi*, 69-71. Ōba argued that the date of the fragment should be the 25<sup>th</sup> year of the Marquis Wu of the Wei, instead of the 25<sup>th</sup> year of the King Anli of the Wei as the editors believed.

<sup>12</sup> *RHL*, 208.

<sup>13</sup> The Han Statutes on Registration was unknown prior to the Zhangjiashan excavation. An abstract of the Qin Statutes on Registration (Fulü 傅律) was found from Shuihudi, in the *Qinlü zachao* 秦律雜抄 (Miscellaneous Abstracts of Qin Statutes) in the 1975. But based on the abstract, the Qin Statutes on Registration mainly prescribed fines and hard labor for mistakes in registering people for their labor services. That content, however, is completely absent from the Han Statutes on Registration excavated from Zhangjiashan. This is puzzling. This phenomenon perhaps shows that the Qin Statutes on Registration and the Han Statutes on Registration are perhaps two different collections of statutes, even though they have the same title. Or, since both the Qin materials and the Han materials on these statutes that we possess are incomplete, we simply cannot make an accurate assessment. See *SHD*, 143; cf. *RCL*, 115.

<sup>14</sup> We will discuss *mingtianzhai* in chapter three.

<sup>15</sup> Besides the provisions on household registration for non-heirs, these statutes have other provisions unrelated to households, such as the welfare that the elders enjoyed from the state.

Han Strips, 2002);<sup>16</sup> 2) Yun Jae-seug 尹在碩; “Shuihudi Qinjian he Zhangjiashan Hanjian fanying de Qin Han shiqi houzi zhi he jiaxi jicheng” 睡虎地秦簡和張家山漢簡反映的秦漢時期後子制和家系繼承 (The Heir System and Household Inheritance in the Qin and Han Periods Reflected in Shuihudi Qin Strips and Zhangjiashan Han Strips, 2003);<sup>17</sup> 3) Ochiai Hiroki 落合悠紀, “Kan ‘Ninen ritsu ryō’ ni okeru shaku to ko no keishō: Keishō yoteisha ni tsuite no ichi kōsatsu” 漢‘二年律令’における爵と戸の繼承-繼承予定者についての一考察 (The Inheritance of Households and Orders of Honor Based on the Statutes of the Second Year: An Investigation of the Candidates for Heirs, 2007);<sup>18</sup> and 4) Liu Xinning 劉欣寧, *You Zhangjiashan Hanjian Ernianlüling lun Han chu de jicheng zhidu* 由張家山漢簡二年律令論漢初的繼承制度 (Discussing the Inheritance System in the Early Period of the Han Based on the *Ernian lü ling* from Zhangjiashan, 2007).<sup>19</sup>

Li Junming was the first to use the domestic statutes to study the issue of inheritance during the Han dynasty. In his article, he points out that the Zhangjiashan strips contain more than twenty relevant provisions. He classifies those statutes in two major categories: statutory inheritance (laws that govern inheritance by statute) and testamentary inheritance (laws that govern inheritance based on the last will and testament of the deceased). The former he further subdivides into three subjects: inheritance of status, inheritance of household property, and determination of the order of succession for rightful heirs. He argues that “inheritance of status” meant to inherit the orders of honor and the privileges of the deceased household head, after which inheritance of the household property could take place. He finds the line of inheritance, however, differed, depending on whether one inherited the household or inherited the order of honor of the deceased. Regarding testamentary inheritance, Li argues that it was also regulated by the Statutes on Households, supporting his argument by citing an excavated document entitled “Xianling quanshu” 先令券書 which he identifies as a last will and testament.<sup>20</sup>

Li’s research was very preliminary. Its major contribution lay in the reconstruction of two parallel but logically separable lines of inheritance: the inheritance of order of honor and the inheritance of household property. In making this observation, Li provided a valuable framework for further work on the statutes.

Yun Jae-seug’s scholarship built on Li’s initial study, giving Li’s insights much greater substance and coherence. In his article, Yun first argues that the Han Statutes on Establishing Heirs had precursors in Qin laws that defined the notion of *houzi* 後子 (heir). He then focuses on the Han Statutes on Establishing Heirs and relevant provisions from other domestic statutes. He demonstrates that Han laws defined the following sequence for establishing an heir for a deceased head of household: sons, daughters, father, mother, brothers, sisters, widow, grandfather, and grandmother. The sons who were candidates for

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<sup>16</sup> Li Junming 李均明, “Zhangjiashan Hanjian suojian guifan jicheng guanxi de falü” 張家山漢簡所見規範繼承關係的法律, *Zhongguo lishi wenwu* 中國歷史文物 2 (2002), 26-32.

<sup>17</sup> Yun Jae-seug 尹在碩, “Shuihudi Qinjian he Zhangjiashan Hanjian fanying de Qin Han shiqi houzi zhi he jiaxi jicheng” 睡虎地秦簡和張家山漢簡反映的秦漢時期後子制和家系繼承, *Zhongguo lishi wenwu* 1 (2003), 31-43.

<sup>18</sup> Ochiai Hiroki 落合悠紀, “Kan ‘Ninen ritsu ryō’ ni okeru shaku to ko no keishō: Keishō yoteisha ni tsuite no ichi kōsatsu” 漢‘二年律令’における爵と戸の繼承-繼承予定者についての一考察, *Hō shigaku kenkyūkai kaihō* 漢史學研究會會報 12 (2007), 81-87.

<sup>19</sup> Liu Xinning 劉欣寧, *You Zhangjiashan Hanjian Ernian lü ling lun Han chu de jicheng zhidu* 由張家山漢簡二年律令論漢初的繼承制度 (Taipei: Guoli Taiwan daxue chuban weiyuanhui, 2007).

<sup>20</sup> For the document, see my discussion on pp. 50-55 in this chapter.

the role of heirs were called *zinan* 子男 (sons) with the principal heir designated as *houzi*.<sup>21</sup> The principal heir enjoyed such privileges as representing the household in ancestor worship, adopting the designation as head of household head with its appropriate order of honor, and had the first choice of portion when the household property was divided. Yun then analyzes household transmissions (*daihu* 代户), household establishments (*lihu* 立户), and household divisions.

Yun notices that the line of the inheritance for households was quite different from that of establishing heirs, except that the *houzi* in both cases had first position in the sequence. According to Yun, the most visible difference between the two lines appears in the status of widows: in establishing heirs, the widow was seventh in line, but in household transmission, the widow was third. Yun argues that this disparity reflects the significant influence that widows in general had over household management during the Han dynasty. Regarding household divisions, Yun argues that the statutes “direct” the sons to divide the household property equally,<sup>22</sup> unless this equal division is expressly countermanded by the ultimate authority of the parents, as expressed in a will.

Yun’s article greatly contributes to our understanding of these domestic statutes, yet Yun made a serious mistake. Yun believes that when daughters inherited the position of heads of households, they could only inherit the household property (land and houses), but could not inherit the orders of honor of the deceased head of household. Yun based his conclusion on the mistaken notion that females could not hold any order of honor in Han society.<sup>23</sup> However, as I will elaborate below, women could and did hold orders of honor.

Ochiai Hiroki’s article focused on the line of inheritance as regulated by the provisions found in *ZJS* strip (Statutes) nos. 369-371, 379, and 380. After reviewing the research of two experts, Ikeda Yuichi 池田雄一 and Tomiya Itaru 富谷至, and taking up questions they did not fully address, Ochiai advanced three major points: (1) differences in the lines of succession with regards to the inheritance of order of honor and the inheritance of households indicate that kinship was the crucial factor in determining the former, while the dictates of maintaining the communal life of the household was a more critical factor in determining the latter; (2) the fact that *nu* 奴 (traditionally render as “slave”)<sup>24</sup> could succeed as heads of households means that the state put a high value on maintaining household continuity; and (3) when siblings inherited from siblings, they needed to register in the same household. As an afterthought, Ochiai wondered why there was no place for adopted sons in the line of inheritance.<sup>25</sup>

Liu Xinning’s book is the most systematic and least problematic treatment of the topic to date. It synthesizes previous studies and raises many interesting new questions. After carefully analyzing the domestic statutes and offering her own interpretations of doubtful passages and phrases, Liu argues that there were two major characteristics of inheritance

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<sup>21</sup> *Houzi* 後子 is ideally the eldest son born by the principal wife. If she had no sons while the husband had concubines, the *houzi* should be the eldest son born by a concubine. If there was a divorce and then remarriage, the *houzi* should be the eldest son of the new wife. Among brothers, those who lived under the same roof with that of the deceased had priority over those who lived apart, and the eldest brother had priority over the younger ones. The same rule was applied to sisters. See Yun, “Shuihudi Qinjian he Zhangjiashan Hanjian,” 33-35.

<sup>22</sup> Yun is not cautious enough here. The statutes that we possess are not clear on this matter, even though I tend to believe that equal inheritance might be the case. See p. 46 for my discussions.

<sup>23</sup> *Ibid.*, 36.

<sup>24</sup> Slave is the conventional translation for the Chinese term *nu* 奴. But since in the Han period, *nu* could inherit their masters’ households, *nu* did not refer to “slave” in the strict sense of the word.

Perhaps it is better to render *nu* 奴 “indentured servant.”

<sup>25</sup> This is a good question, but a straightforward answer is that adopted sons, once they were adopted, were treated exactly the same as natural sons. We will see a case of an adopted son’s “right” to inherit households in Chapter Four.

during the Han dynasty. First, in contrast to the equal-share principle that prevailed in medieval and late imperial China, by which all sons were entitled to be full heirs, the Han laws established a single heir for each household. That heir inherited the order of honor and the status of household head, along with all privileges that went with those designations, and also commanded a major share in the household property.<sup>26</sup> But Liu is wrong on the latter point. We know that sons quite likely divided the household property equally, a subject that I will address later.<sup>27</sup> Second, Liu argues another contrast: in contrast to medieval and late imperial Chinese laws that held that inheriting the responsibility of maintaining ancestral sacrifices was central and prior to the inheritance of household and any orders of honor, the Han statutes did not touch upon the issue of ancestral worship. Liu concludes that inheritance laws only governed secular privileges.<sup>28</sup>

Overall, Liu clarifies many issues. For instance, she points out that the term *xianguan* 县官, which occurs frequently in the Zhangjiashan strips, did not refer to county officials but was, rather, a generic term referring to the state and sometimes even the Son of Heaven.<sup>29</sup> She also found that the term *sishi* 死事 also had a particular meaning, “died in the battlefield or while performing official duties.” Regarding the establishment of heirs, she noted that those who had received the *nai* penalty (shaving off of beard and hair on the temples)<sup>30</sup> could not become heirs, and that those who committed suicide were prohibited from designating heirs.<sup>31</sup> The problem with Liu’s research is that her conclusion claims certain distinctive characteristics for the Han laws on inheritance, in contrast with later laws on inheritance, but fails to provide a sufficient description of the laws on inheritance in the post-Han period. Thus, these presumed distinctive characteristics of Han laws are insufficiently demonstrated.

The four scholarly works described above set the stage for this study and provided a valuable initial agenda for examining the questions surrounding the nature and function of domestic statutes in the context of civil laws in general. Being inspired by these works, I will provide a synopsis of the Domestic Statutes.

## B) A Synopsis of the Domestic Statutes

In the following synopsis, I will not attempt to reconcile the differences in opinions among various scholars. Rather, I will simply review two areas of agreement regarding the inheritance of orders of honor and the inheritance of households,<sup>32</sup> deferring discussion of scholarly differences to a later section of this chapter.

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<sup>26</sup> Liu, *You Zhangjiashan Hanjian*, 143-148.

<sup>27</sup> See my discussion on this matter on p. 46 in this chapter.

<sup>28</sup> Liu, *You Zhangjiashan Hanjian*, 163-168. I agree with Liu on this conclusion, but her reasoning was partially wrong. She said that since women and elders could be designated heirs and they had no responsibility of performing ancestor worship, thus inheritance laws only governed secular privileges. But there are two problems. First, why cannot elders perform ancestor worship? Second, women did have a role in ancestor worship as we know from ritual canons.

<sup>29</sup> Liu, *You Zhangjiashan Hanjian*, 31. Michael Loewe also discussed this term. According to him, “In the majority of cases, *xianguan* 县官 refers indiscriminately to organs of government, whether central or provincial, without any specification.” See Loewe, “The Organs of Han Imperial Government: *Zhongdu guan*, *duguan*, *xianguan* and *xiandao guan*,” *Bulletin of the School of Oriental & African Studies* 71.3 (2008), 510.

<sup>30</sup> See n. 42 in Chapter One.

<sup>31</sup> Liu, *You Zhangjiashan Hanjian*, 38-39, 53-67; cf. *ZJS* (Statutes) nos. 390, 375, pp. 61, 60. This provision indicates that those who committed suicide were prohibited from having an heir, even if they had suitable candidates. This is very severe a punishment for committing suicide.

<sup>32</sup> They both belong to the category of statutory inheritance, which was delineated by the Statutes on Establishing Heirs and the Statutes on Households. The inheritance of household includes the status of household head and household property.

Han laws distinguished between inheriting orders of honor (rank or title) and inheriting households (property and status within the household). The circumstances of one's death sometimes affected how the deceased's order of honor would be passed on to an heir, as Han laws distinguished between those who died in the course of carrying out official duties and those who died otherwise. The laws governing the inheritance of households established a two-step process: only after the head of household was determined was the household property divided among the heirs.

### I) The Inheritance of Orders of Honor

ZJS Strips (Statutes) nos. 369-371 deal with those who died while carrying out their official duties.

為縣官有為也，以其故死若傷二旬中死，皆為死事者，令子男襲其爵。毋爵者，其後為公士。毋子男以女，毋女以父，毋父以母，毋母以男同產，毋男同產以女同產，毋女同產以妻。諸死事當置後，毋父母、妻子、同產者以大父，毋大父以大母與同居數者。

A person is counted as “dying on duty,” if he dies while performing an official duty, or if he is wounded while performing an official duty and then dies within twenty days. Let his son inherit his order of honor [intact].<sup>33</sup> If the person had no order of honor, his heir will be made a *gongshi*. If there is no son, let the daughter inherit the order of honor, and if there is no daughter, let the father inherit the order of honor, and if there is no father, let the mother inherit the order of honor, and if there is no mother, let the brother inherit the order of honor, and if there is no brother, let the sister inherit the order of honor, and if there is no sister, let the wife inherit the order of honor. For those who die on duty and should establish heirs, if they have no parents, no wives or children, and no siblings, let their grandfathers become their heirs. If they have no grandfathers, let their grandmothers who reside in and are registered in the same households with them become their heirs.<sup>34</sup>

In brief, the ranking of heirs is: sons (*zinan*), daughters, father, mother, brothers, sisters, widows, grandfather, and grandmother. Notably, in the special circumstances of someone dying while performing official duties, the orders of honor are not diminished when passed down. In the more typical circumstances of someone dying while not performing official duties, the order of honor would be diminished by steps. Moreover, if the deceased, at the time when he was performing an official duty, had no order of honor, his heir would be granted one level of honor, upgrading that person to the rank of *gongshi* 公士 (the lowest order of honor in twenty orders).

ZJS strips (Statutes) nos. 367-368 concern those who died while not performing official duties.

疾死置後者，徹侯後子為徹侯，其毋適(嫡)子，以孺子[子、良人]子。關內侯後子為關內侯，卿後子為公乘，五大夫後子為公大夫。公乘後子為官大夫，公大夫後子為大夫，官大夫後子為不更，大夫後子為簪嫻，不更後子為上造，簪嫻後子為公士。其毋適(嫡)子，以下妻子、偏妻子。

<sup>33</sup> We know that in this situation, the orders of honor were passed down intact because there are no indications of them being reduced in the provisions.

<sup>34</sup> ZJS Strips (Statutes) nos. 369-371, p. 59.



To establish heirs for those who died of illness, the heir-son of a *chehou* becomes a *chehou*. If there are no sons born by the wife, let the sons born by *ruzi* (a type of concubine) or *liangren* (a type of concubine) become heirs. The heir-son of a *guanneihou* becomes a *guanneihou*; the heir-son of a *qing* becomes a *gongsheng*; the heir-son of a *wudafu* becomes a *gongdafu*; the heir-son of a *gongsheng* becomes a *guandafu*; the heir-son of a *gongdafu* becomes a *dafu*; the heir-son of a *guandafu* becomes a *bugeng*; the heir-son of a *dafu* becomes a *zanniao*; the heir-son of a *bugeng* becomes a *shangzao*; the heir-son of a *zanniao* becomes a *gongshi*. If there are no sons born by the principle wife, let the sons born by the *xiaqi* (a type of concubine) and *pianqi* (a type of concubine) become the heirs.<sup>35</sup>

With an exception made for the two highest orders of honor, *chehou* and *guanneihou*, the remaining orders are decreased two steps when they are passed down to heirs. When sons inherit their father's order of honor, sons of the principal wife took precedence over sons born of concubines. Elder brothers took precedence over their younger brothers, but only after the mother's status is taken into account. Only after the inheritance of the order of honor was settled was the question of who was to inherit the household resolved.

## II) The Inheritance of Household

As previously mentioned, disposition of the household required two steps: resolving who was to acquire the title status of head of household and distributing the household's property among the heirs. Unlike the laws governing inheritance of an order of honor, the laws for the inheritance of the status of household head made no distinction between the circumstances of the deceased's end, meaning, it was irrelevant whether the deceased was performing official duties at the time of his death or not.

*ZJS* strip (Statutes) nos. 379-381 state:

死毋子男代戶，令父若母。毋父母令寡，毋寡令女，毋女令孫，毋孫令耳孫，毋耳孫令大父母，毋大父母令同產子代戶。同產子代戶，必同居數。棄妻子不得與後妻子爭後。

After the death [of a head of household], if there is no heir-son to inherit the household, let the father or mother inherit the household. If there is no father or mother, let the widow inherit it. If there is no widow, let the daughters inherit it. If there are no daughters, let the grandchildren inherit it. If there no grandchildren, let the grandparents inherit it. If there are no grandparents, let the nephews inherit the household. When nephews inherit the household, they must have co-habited in the household [with the deceased household head]. The sons of divorced wives are not allowed to compete with the sons of later legal wives.<sup>36</sup>

*ZJS* strip (Statutes) no. 383 continues:

死毋後而有奴婢者，免奴婢以為庶人，以口人律口之口主田宅及餘財。奴婢多，代戶者毋過一人，先用勞久、有口子若主所言吏者。

<sup>35</sup> *ZJS* strips (Statutes) nos. 367-368, p. 60. According to the study of Wang Zijin 王子今, *ruzi liangren xiaqi pianqi* in the quotation all belong to the category of concubines. See Wang Zijin, "Pianqi xiaqi kao" 偏妻下妻考, *Huaxue* 華學 6 (2003), 151-152.

<sup>36</sup> *ZJS* Strip (Statutes) nos. 379-381, pp. 60-61.

After one's death, if there are no possible heirs except for slaves, let them become commoners, and grant them the land, house and other household property, according to the Statutes (missing one character). If there are many household slaves, only one of them can inherit the household.<sup>37</sup>

It appears that in ordinary circumstances the siblings of the dead household head were excluded from inheritance, but nephews were not. This somewhat puzzling arrangement is made even more troubling by the inclusion of slaves in the line of succession. I suspect that there might be some sort of textual corruption. *Tongchanzi* 同產子 should be rendered as *tongchan* 同產 and (*tongchan*) *zi* (同產) 子.<sup>38</sup> With this adjustment, the line of succession becomes: *zinan*, parents, widow, daughters, grandchildren, grandparents, siblings, nephews, and finally household slaves.

Once the new head of household was designated, distribution or division of the household property among heirs followed. *ZJS* strip (Statutes) nos. 312-313 state:

不幸死者,令其後先擇田,乃行其餘.它子男欲為戶,以為其口田予之.其已前為戶而毋田宅,田宅不盈,得以盈.宅不比,不得.

For those who have unfortunately died, let their heirs<sup>39</sup> choose the lands first, then distribute the rest [among the other siblings of the heirs]. Other sons who want to establish their households, let [missing one character] be given them. Those who have established their households but have no lands and dwellings, or those whose amount of land and dwelling does not fulfill the quota, let them inherit land and a dwelling to meet the quota. If their houses are not adjoining [that of the deceased], they are not allowed to inherit the house.<sup>40</sup>

How was the property divided? Was it divided equally? *ZJS* strip (Statutes) no. 385 suggests an answer:

□□□□長(子),次子,□之其財,與中分其共為也及息.

[missing four characters] the eldest son, younger sons, [give?] them their property. Equally let them have a fair share of what they produced together and the interest on it.<sup>41</sup>

The strip is corrupt and very difficult to understand. Despite these uncertainties, since only sons are mentioned here, and since the word *zhongfen* 中分 suggests an equal-share practice,<sup>42</sup> we can be relatively confident in concluding that household property was divided more or less equally among the surviving sons. This conclusion is supported by cases in the received texts, which, according to Liu Xinning, include five cases of dividing household property equally among sons.<sup>43</sup> For instance, the *Taiping yulan* 太平御覽 (Imperial Observation for the Grand Peace, comp. 984) quotes an earlier text, *Xu qi xie ji* 續齊諧記 (comp. ca. 500), which describes an incident during the reign of Emperor Cheng 成 (33-37

<sup>37</sup> *ZJS* Strip (Statutes) no. 383, p. 61.

<sup>38</sup> Liu Xinning and Ochiai Hiroki also engaged in similar speculation. See Liu, *You Zhangjiashan Hanjian*, 95-96; Ochi, "Kan 'Ninen ritsu ryō'," 85-86.

<sup>39</sup> From my previous discussion, we know that the heir also inherits the status of the household head.

<sup>40</sup> *ZJS* strip (Statutes) nos. 312-313, p. 52.

<sup>41</sup> *ZJS* strip (Statutes) no. 385, p. 61.

<sup>42</sup> Liu, Cao, and Li are all in agreement on this line of interpretation.

<sup>43</sup> Liu, *You Zhangjiashan Hanjian*, 146-148.

B.C.). Tian Zhen's 田真 joint household consisted of three brothers. Unable to get along with one another, they decided to divide the household, splitting the property into three equal portions.<sup>44</sup>

If our understanding of *ZJS* strip (Statutes) no. 385 is correct, and if we view *ZJS* strips (Statutes) nos. 312, 313, and 385 as a group, we have solid reason to believe that after the death of a father, his household property would be divided equally among his sons. The only privilege enjoyed by the primary heir (typically the eldest son of the principle wife), who, by his place in the line of succession inherited the status of household head, was being allowed to choose his portion of the property first, with the remaining property distributed (presumably by the new head of household) equally among the other sons. The amount of land inherited by these other sons seems to be limited by a quota based on their order of honor. A second provision required that the houses of these other sons had to be adjacent to the original household.<sup>45</sup> The role of daughters in this process is unclear. It is worth noting that *ZJS* strips (Statutes) nos. 312, 313, and 385, all of which deal with household division, make no mention of daughters. If we accept that no significant information is missing from these statutes, it appears that daughters were not guaranteed a share in the division of household property, presumably because they had already received their portions in the form of dowries. However, nothing in these statutes explicitly prohibits daughters from participating in divisions of household property. We know of at least two circumstances in which daughters would routinely participate. First, if there were no sons or widows, daughters would become the designated heirs and their inheritances would be regulated according to the provisions stated in *ZJS* strips (Statutes) nos. 312, 313, and 385. Second, as we will discuss in a later section devoted to testamentary inheritance, if the deceased head of household decided to pass property to a daughter by composing a will or testament, that will would take precedence. Another way of stating this is that the statutes served as a kind of probate regulating inheritances when the head of household died intestate.

For convenient reference, the following chart summarizes the line of succession in matters of inheritance:

		Household Inheritance		Rank Inheritance	
1st	Sons	1st	Eldest son born by the principal wife		Same as left
		2nd	Younger sons born by the principal wife		
		3rd	1st	Sons born by a later wife	
			2nd	Sons born by a divorced wife	
4th	Sons born by concubines				
2nd	Daughters			Father	
3rd	Father			Mother	
4th	Mother			Widows	Principal wife
					Concubines
5th	Brothers			Daughters	
6th	Sisters			Grandsons	
7th	Widow (principal wife)			Grand-grandsons	
8th	Grandfather (male lineage)			Grandfather (male lineage)	
9th	Grandmother (male lineage)			Grandmother (male lineage)	
10th				Siblings	
11th				Nephews	
12th				Slaves	

<sup>44</sup> *Taiping yulan* 太平御覽 (*sibucongan*), vol. 11. 421.9.

<sup>45</sup> Liu, *You Zhangjiashan Hanjian*, 122-123.

(This chart above is based on Yun Jae-seug's chart with revisions. See Yun, "Shuihudi Qinjian he Zhangjiashan Hanjian," 35)

This chart illustrates the areas in which inheritance of orders of honor and inheritance of household status and property overlap and where they diverge. Both types of inheritance follow the same simple line of succession when the principle heirs are (*zinan* 子男). The complexities begin with household inheritance.

The inheritance of orders of honor was much more restricted and involved a much smaller pool of candidates than the inheritance of households (property and household head status). Most likely, this was because orders of honor were "gifts" granted to subjects by the throne while households were productive units. The continuity of households was crucial to maintaining good social order, and so the state was predisposed to seek the preservation of households. The distribution of orders of honor, however, entailed legal privileges, whose value is illustrated by the observation that "the practice of redemption is closely connected with the practice of taking away noble rank (orders of honor) from a holder of such rank."<sup>46</sup> If the state was too generous in granting orders of honor, those orders would be devalued, thus defeating the very purpose of granting them. Consequently, the state adopted strict rules governing who was eligible to inherit a given order of honor. The special exemptions made for the holders of the two highest orders of honor, the *cheshou* and *guanneiyou*, and for those who died in the course of fulfilling their official duties, demonstrates the state's interest in keeping its orders of honor restricted. The fact that, for all heirs outside the exempted groups, the statutes required the demotion of inherited orders of honor by two grade levels underscores the state's interest in maintaining the value of its bestowed honors.

### C) Issues Still Being Debated

The preceding review of scholarly works shows that there are outstanding questions that deserve further exploration and clarification:

#### I) The Possible Qin Precursor to the Han Statutes on Establishing Heirs.

The scholar Yun Jae-seug proposed such a relationship. Yun found three pieces of evidence to support his claim:

擅殺、刑、髡其後子，讞之。何謂後子？官其男為爵後，及臣邦君長所置為後太子，皆為後子。

When somebody without authorization kills or mutilates or shaves his heir-son, this is to be reported. What is the meaning of the term "heir-son"? His son, making him heir to the aristocratic rank order of honor, as well as the heirs-apparent established by the princes or chiefs of states that are subjects [of Qin] are all heir-sons.<sup>47</sup>

戰死事不出，論其后。又后察不死，奪后爵，除伍人。不死者歸，以為隸臣。

When someone has died in battle for the service without surrendering, a decision is taken [to reward] his heir. When again later it is shown that he did not die, the

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<sup>46</sup> *RHL*, 205.

<sup>47</sup> *SHD* strip (Falü dawen) no. 72, p. 182; cf. *RCL*, 139. My translation follows Hulsewé with slight modifications.

heir is divested of the order of honor. The men of his group of five are freed [of punishment]. The man who had not died is made a bond-servant on his return.<sup>48</sup>

從軍當以勞論及賜, 未拜而死, 有罪法耐遷其後.

For someone who dies before he can be awarded an order of honor based on his merit in battle, the order of honor can be transferred to his heir, except when the heir has committed crimes subject to the *nai* punishment (shaving off the beard and hair on the temples).<sup>49</sup>

Yun believed that these provisions defined who could become the heir-son, the privileges that the heir-son enjoyed, and the legal status of the heir-son. He argues that the Qin already had such laws concerning the establishment of heirs.<sup>50</sup> Yet a closer look at Yun's evidence reveals that the texts he cites are less concerned with inheritance in general than with special, one might even say, extreme circumstances. While Yun demonstrates that the notion of heirs did exist under the Qin and that those notions were reflected in Qin laws that dealt with the privileges available to certain heirs, Yun fails to demonstrate that Qin laws regulated the broader issue of how one established heirs. It is quite possible that the reason these statutes were not concerned with how one established heirs in general was because inheritance was typically subject to either local custom or the testamentary will of heads of households.<sup>51</sup> The statutes cited by Yun appear to deal only with the privileges granted to the heirs already established. Yun sidesteps the distinction between granting privileges to established heirs and establishing heirs, very different issues that should not be conflated.

There is, however, one piece of evidence from the Qin period that may suggest the existence of statutes governing the establishment of heirs. This evidence comes from the Zhangjiashan strips. Early in an account in the *Zouyanshu* of a case of illicit sex (Case 21),<sup>52</sup> we find the following citation of an old statute:

故律曰: 死夫以男為後. 毋男以父母, 毋父母以妻, 毋妻以子女為後.

An old statute says, "At the death of a husband, one takes the son as the heir. If there is no son, the man's father or mother is taken as the heir. If there are no parents, then the wife is taken. If there is no wife, then one takes a daughter as the heir."<sup>53</sup>

The statute cited clearly addresses the issue of establishing an heir. It regulates a line of inheritance: sons, parents, wife, and daughters. The greater question is what is meant by the binome "old statute." Just how old was this "old statute?" Since the *Zouyanshu*

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<sup>48</sup> *SHD* strip (Fengzhenshi) nos. 37-38; cf. *RCL*, 117. My translation follows Hulsewé with slight modifications.

<sup>49</sup> This line is hard to understand. Hulsewé admits that he couldn't understand the statement. See *RLC*, 82-83. I did not adopt his translation for this particular fragment because he did not translate the word *hou*. My translation of course is also tentative. Its focus is on the word *hou*, which should be rendered as "heir." In addition, this reference to the *nai* (shaving off the beard and hair on the temples) punishment is very interesting. We find the same reference in the *ZJS* strip (Statutes) no. 390, p. 61. A person who was punished with *nai* was not qualified to inherit any order of honor. This partially explains why *nai* (shaving off the beard and hair on the temples) was a severe punishment. Those who received this penalty were disqualified from enjoying many privileges.

<sup>50</sup> Yun, "Shuihudi Qinjian he Zhangjiashan Hanjian," 31-33.

<sup>51</sup> It is also possible that we simply don't have the relevant statutes anymore.

<sup>52</sup> *ZJS* strip (*Zouyanshu*) no. 180, p. 108.

<sup>53</sup> My translation follows Michael Nylan, "Notes on A Case of Illicit Sex from Zhangjiashan: A Translation and Commentary," *Early China* 30 (2005-06), 27.

collection was compiled no later than 189 B.C.,<sup>54</sup> only seventy years after the fall of the Qin dynasty, the illicit sex case must have taken place earlier. But how much earlier? Very possibly, the old statute referred to in the *Zouyanshu* was indeed a Qin statute.<sup>55</sup> If so, this reference is the single piece of evidence that we have found for the existence of Qin Statutes on Establishing Heirs.<sup>56</sup> Therefore, it is very likely that not only was the notion of heir expressed in Qin laws, but it is likely that statutes regulating the establishment of heirs also existed in the Qin period.

## II) Will and Testimonial Inheritance<sup>57</sup>

Following the 1984 discovery of a document entitled “Xiangling quanshu” 先令券书, from Tomb 101 at Xupu 胥浦, Yizheng 儀征, Jiangsu 江蘇 province, scholarly attention shifted to issues involving wills and testamentary inheritance. A complete transcript of the document, quoted below, was published in the *Wenwu* in 1987 by Chen Ping 陳平 and Wang Qinjin 王勤金.

元始五年九月壬辰朔辛丑, 高都里朱凌, 凌廬居新安里, 甚疾其死, 故請縣鄉三老、都鄉有秩、佐、里師里譚等為先令券書。凌自言有三父, 子男女六人皆不同父。欲令子各知其父家次子女: 以君、子真、子方、仙君父為朱孫; 弟公文父衰近君; 女弟弱君父曲阿病長實。

嫗言公文年十五去家自出為姓, 遂居外, 未賞持一錢來歸。嫗予子真、子方自為產業。子女仙君、弱君等貧毋產業。五年四月十日嫗以稻田一處、桑田二處分予弱君。波田一處分予仙君。於至十二月公文傷人為徒, 貧無產業。於至十二月十一日仙君、弱君各歸田於嫗, 讓予公文。嫗即受田, 以田分予公文, 稻田二處、桑田二處, 田界易如故, 公文不得移賣田予他人。

時任知者里師、伍人譚等及親屬孔聚、田文、滿真, 先令券書, 明白可以從事。On the tenth day of the ninth month of the fifth year of the Yuanshi reign period [A.D. 5], Zhu Ling of Gaodu village, who lived in Xin'an village, was extremely close to death. Therefore, he requested the Thrice Venerables of the county and district, the large district bailiff (*youzhi*), the *zuo*, the *lishi*, *litan*, and others, to draw up his will.

[Zhu] Ling himself spoke of there being three fathers, as well as six sons and daughters by different fathers. “I want to let each of them to be [made] aware of his or her father and his or her place within the household. The sons and daughters Yijun, Zizhen, Zifang, and Xianjun have Zhu Sun as their father. My younger brother Gongwen had Shuai Jinjun of Wu as his father. My younger sister Ruojun had Bing Changbin of Qu'a as her father.

<sup>54</sup> See n. 106 of Chapter One; cf. my description of the *Zouyan shu* in the Introduction.

<sup>55</sup> Since Zhangjiahan strips date to 196-189 B.C., the case must take place no later than 189 B.C.

<sup>56</sup> There is a problem here: what if this *Zouyan shu* is not a legal casebook, but a set of hypothetical cases? Professor Zhang Zhongwei 张忠炜 from Renmin University, in his “Du *Zouyan shu* Chunqiu anli santi” 讀奏讞書春秋案例三題 (unpublished), recently argued that at least two cases that supposedly took place during the Spring and Autumn period are fictional. Zhang argues that they were used to illustrate Qin and Han laws. This problem is not a real problem for us. Whether or not the collection is a legal casebook does not change the evidence here, because, even if they were hypothetical cases, they were clearly used to illustrate and explain the statutes of the Han periods and were designed by strictly following legal principles. In other words, at minimum, they were reflections of the legal practices of that time.

<sup>57</sup> According to the *Black's Law Dictionary*, p. 329, the word “will” means “a document by which a person directs his or her estate to be distributed upon death.”

The aged widow says, “At age fifteen, Gongwen left home to go out to establish a household under his own surname, and he never sent back any cash to support us. I personally gave land to Zizhen and Zifang. The aforesaid daughters Xianjun and Ruojun are poor and they lack property. On the tenth day of the fourth month of the fifth year [of the Yuanshi reign period], I gave one field of rice and two fields of mulberry to Ruojun, and I gave one field of paddy to Xianjun until the twelfth month. Gongwen injured a person and was sentenced to penal servitude, so he is poor and lacks property, too.

On the eleventh day of the twelfth month Xianjun and Ruojun are each to return these fields to me, and I will cede them to Gongwen. When I receive the fields, I will give the two fields of rice and two fields of mulberry and to Gongwen. The boundaries of the fields are to remain as they were before, and Gongwen may not transfer the fields in sale to anyone else.”

The officials in office now and the witnesses are: the *lishi*, people of the same five household unit, [Tian] Tan, etc., and the relatives Kong Ju, Tian Wen, and Man Zhen. The will is clear. Its provisions can be followed.<sup>58</sup>

This document was dated A.D. 5, during the reign of Emperor Ping 平 (9 B.C. - A.D. 5). Chen Ping and Wang Qinjin point out that this was the first time this sort of document, a *xianling* 先令 had been found. They render “*xianling*” as “pre-mortem will,” based on the annotation of Yan Shigu 嚴師古 (581-645) in the biography of “Jing shisan wang” 景十三王 (Thirteen kings during the reign of Emperor Jing) in the *Hanshu*, which says: “The term *xianling* refers to the last will made prior to the death [of the testator]” (*Xianling zhe, yu wei yiling ye* 先令者預為遺令也).<sup>59</sup> Chen and Wang analyze the document, “Xianling quanshu,” as follows: an old widow who married three husbands had six children by them. In A.D. 5, her eldest son Zhu Ling, who was dying, invited local officials to witness his will.<sup>60</sup> The will stipulated that Xianjun and Ruojun, who were siblings of Zhu Ling, would have to return land to their mother, the aged widow, by the 12<sup>th</sup> month of the year. The aged widow then intended to grant the lands to her son, Tian Fen, who was due to be released from jail sometime before the 12<sup>th</sup> month of the year. Chen and Wang further speculated that this excavated text, when viewed in the context of other information about *xianling* in received texts, shows that during the Han dynasty wills were widely used.<sup>61</sup> Publication of the “Xianling quanshu” by Chen and Wang immediately attracted scholarly attention, in particular, Bret Hinsch’s 1998 study of the document, “Women, Kinship, and Property as Seen in a Han Dynasty Will.”<sup>62</sup> Hinsch has no doubt that this document is a will and that it serves as eloquent evidence of the place of testimonial inheritance in Han.

The highly developed form of the Xupu will attests to legal precedents for employing this sort of device. The handling of wills seems to have been a routine part of Han dynasty local government administration. By addressing a wide range of local functionaries, this document shows the enforcement of wills to have been a duty shared by various minor officials in the local bureaucracy. The recourse to

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<sup>58</sup> Chen Ping 陳平 and Wang Qinjin 王勤金, “Yizheng Xupu 101 hao Xihan mu Xianling quanshu chu kao” 儀征胥浦 101 號西漢墓先令券書初考 *Wenwu* 1 (1987), 20. My translation follows Bret Hinsch, “Women, Kinship, and Property as Seen in a Han Dynasty Will,” *T’oung Pao* 84 (1998), 3-4.

<sup>59</sup> Wang and Chen, “Yizheng Xupu 101 hao Xihan mu,” 21-22.

<sup>60</sup> This is a misreading of the document. The testator was the old widow, not her son. I will discuss this point in detail later.

<sup>61</sup> Wang and Chen, “Yizheng Xupu 101 hao Xihan mu,” 22.

<sup>62</sup> Bret Hinsch, “Women, Kinship, and Property,” 1-20.

official administrative apparatus shows the division of household property to have been of interest to more than just household members. Upon the death of a head of household a will placed the distribution of property under state jurisdiction. The document thus helps correct the stereotype that early Chinese law as concerned almost exclusively with criminal rather than civil cases.<sup>63</sup>

In 2000, however, Wei Daoming 魏道明 questioned the view that testimonial inheritance existed in pre-modern China.<sup>64</sup> Wei defines testimonial inheritance as “a person disposing of personal property based on his or her own free will, which is unrestrained by and takes precedence over any statutory inheritance.” Given his definition, Wei argues that the *xianling quanshu* was not a will because the testator was the elder brother, Zhu Ling, who did not own the property to be disposed. His mother owned it. But Wei’s argument collapses for the simple reason that he erroneously identifies the testator as Zhu Long, the elder brother. If we read the document closely, we will find that in the narrative, Zhu Ling called the officials together to witness the will. It is Zhu Ling’s voice that dominates the first part of the narration, clarifying the issues of kinship, specifically, which sibling was born to which father. Zhu Ling then completely disappears from the remainder of the document. The central figure of the narrative is the aged widow since she is the one dispersing the household property among her children. Thus, it is the aged widow, not the elder brother, who is the actual testator. In other words, the *xianling* was the will of the aged widow, not her son Zhu Ling. Having corrected this misunderstanding of the text, we can now more accurately interpret what is meant by *xianling* and how wills functioned in Han society.

In A.D. 5, Zhu Ling, who was the eldest brother, lay dying. He felt the household property needed to be clearly dispersed among his siblings and certain other kinship matters needed to be clarified. Therefore, he suggested that his mother, already quite elderly, make a will, which she did. The major issue to be addressed in the will was division of the household property. Had the document been drawn up simply to let siblings know who their respective fathers were, there would have been no need to call upon the local officials as witnesses. In the will, the aged widow disposed of her household property among her remaining children. Thus, contrary to Wei’s interpretation, we find that Zhu Ling’s role in the process is minor. Perhaps Wei was misled by Chen and Wang’s original archeological report that asserts that Zhu Ling was the head of the joint household, leading Wei to misidentify him as the testator.<sup>65</sup> But even the identification of Zhu Ling as the head of household is wrong. If Zhu Ling was the head of the joint household, he could have disposed of the household property on his own. Clearly, Zhu Ling’s aged mother was in charge of the household property, and, as such, would be considered the head of the joint household. Which raises the question of why the aged widow was the head of household.

Hinsch’s hypothesis is revealing. He argued that after widow’s first husband died, she returned to her natal family along with her son Zhu Ling. He bases his assumption on the fact that the document indicates that Zhu Ling’s original village was Gaodu village but that he lived in Xin’an village. Hinsch further speculated that the widow’s natal family lacked a son and that “they brought in a son-in-law to oversee the household’s assets.”<sup>66</sup> The widow remarried twice, bringing two new husbands to her natal household, both of whom died. Thus, the power exercised by the widow as described in the document was “possibly

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<sup>63</sup> Ibid., 15.

<sup>64</sup> Wei Daoming 魏道明, “Zhongguo gudai yizhu jicheng zhidu zhiyi” 中國古代遺囑繼承制度質疑, *Lishi yanjiu* 歷史研究 6 (2000), 156-165.

<sup>65</sup> See Chen and Wang, “Yizheng Xupu 101 Hao Xihan mu,” 24-25. Indeed, not only Wei, but Bret Hinsch also mistakenly treated Zhu Ling as the subject of the will.

<sup>66</sup> Hinsch, “Women, Kinship, and Property,” 5.



explicable through the uxorilocal nature of her two final marriages. She was simply controlling the property of a natal household that she never left.”<sup>67</sup>

One year after Wei’s article, the publication of Zhangjiashan strips in 2001 added new fuel to the debate. Discussions focused mainly on the following provisions in the Statutes on Households:

ZJS (Statutes) strip nos. 334-336:

民欲先令相分田宅、奴婢、財物，鄉部嗇夫身聽先令，皆參辦券書之，輒上如戶籍。有爭者以券書從事；毋券書，毋聽。所分田宅，不爲戶，得有之，至八月書戶。留難先令、弗爲券書，罰金一兩。

If a person wants to dispose of real estate, slaves, and property with a *xianling* (pre-mortem will), the district bailiff should listen to his or her will in person. Everything needs to be written in three copies and submitted by following the same procedure for household registers.<sup>68</sup>

Given these provisions, many scholars were convinced that “*xianling*” meant “will” and that testamentary inheritance was acknowledged and protected by the law. However, following Wei, Cao Lüning 曹旅寧 insisted that neither will nor testamentary inheritance existed during the Han dynasty. In 2005, Cao argued that the provisions quoted above did not refer to testamentary inheritance, but referred to how a head of household divided the household property during his or her lifetime among his or her children.<sup>69</sup> In 2008, Cao elaborated his argument into a theory that he called an “inheritance system centered on household division,” basically reiterating his belief that the provisions stated in the text were solely concerned with household division.<sup>70</sup> Cao’s problem lies in his understanding of what constitutes a will. As we know, the function of a will is to dispose of property freely, which makes a will the means to an end, namely, a clearly defined, ideally uncontestable division of household property. Such prescience on the part of a head of household was not only proper but demonstrated a laudatory concern for the future equanimity of his or her descendants. The provisions from the Zhangjiashan document clearly use the term *xianling* to describe the disposition of property based on a will, and also imply that such wills were officially witnessed and documented.

Reinforcing this interpretation is a long-overlooked case from Juyan, which received a brief mention in my first chapter’s survey of Juyan cases.<sup>71</sup> The *JY* strip nos. 202.8-15 report:

□尊延□神爵元年正月卅日。二月卅日。知之當以父先令、戶律從。父病臨之縣南鄉見嗇□<sup>72</sup>□破胡<sup>73</sup>□□□□謹之。慎侯強奉酒食察事□□為□券書家財物一錢□□□到二年三月癸丑。

[missing one character] *zunyan* [missing one character], the thirtieth day, the first month, the first year of the Shenjue period (61 B.C.) and the thirtieth day, the

<sup>67</sup> Ibid., 20.

<sup>68</sup> ZJS (Statutes) strip nos. 334-336, p. 54.

<sup>69</sup> Cao, *Qinlü xintan*, 313-317.

<sup>70</sup> Cao Lüning 曹旅寧, “Ernian lü ling yu Handai jicheng fa” 二年律令與漢代繼承法, *Shaanxi shifan daxue xuebao (Zhaxue shehui kexue ban)* 陝西師範大學學報 (哲學社會科學版) 1 (2008), 62-68.

<sup>71</sup> See Chapter One, 21.

<sup>72</sup> From the context, we know that “se...” 嗇□ should be *sefu* 嗇夫, district bailiff.

<sup>73</sup> “...Pohu” □ 破胡 is not easy to translate. There are two possibilities. Pohu 破胡 is a given name and the missing character in front of Pohu is the last name of Pohu. Or, it is a place name.

second month, [the first year of the Shenjue period]. [Someone] knew that one should follow the *xianling* (pre-mortem will) of the father and also the Statutes on Households. When the father was ill, he went to the Nanxiang district of the county to see the district bailiff Puhu [missing three characters] carefully noted it. Shenhou [the son's name?] served the food and wine and observed the situation... made... a will concerning family property and cash...till the *guichou*, the third month, the second year of Shenjue period (60 B.C.).<sup>74</sup>

This fragment seems to come from the middle of a case report. The initial phrase of the fragment “[missing one character] *Zunyan* [missing one character]” 尊延 is incomprehensible, but the word *zun* 尊 in classical Chinese often refers to one's parents. In context, it seems that this *zun* indicates the father. Thus, *yan* may be part of his name. There is no confusion about the two dates: the thirtieth day, the first month, the first year of the Shenjue period (61 B.C.) and the thirtieth day, the second month, and presumably also the first year of the Shenjue period. The end of the fragment also includes a date, *guichou*, the third month, the second year of [Shenjue?] period (60 B.C.?). Thus, we know that the case refers to an incident that occurred no later than 60 B.C. Even though we cannot reconstruct the whole story in detail, the case clearly involved a *xianling* made by a father to dispose of his household property. It is striking that the Statutes on Households were invoked to justify the validity of the *xianling*. We know the father went to Nanxiang district to see the district bailiff,<sup>75</sup> in compliance with the provision in *ZJS* strip (Statutes) no. 334:

If a person wants to dispose of real estate, bond-servants, and property with a *xianling* (will), the *sefu* of the district should listen to his or her will in person.<sup>76</sup>

This evidence from Juyan contradicts Cao Lüning's narrow understanding of *xianling* as a household division document produced during the lifetime of the head of household. This text clearly demonstrates that a *xianling* was, in fact, a will, incorporating the intentions of the household head concerning the disposition of the household property upon his or her death.

### III) The Status of Women in the Household

Due to the limits of our sources, I will only focus on two female roles: daughter and widow. I will discuss the status of daughters and widows in the context of inheritance and household management.

As we have already seen, inheritance in early China distinguished between the inheritance of orders of honor and the inheritance of households. The *Baihutong* 白虎通 (comp. A.D. 79) provides a purported answer to the question of why women could not inherit an order of honor.

婦人無爵何? 陰卑無外事, 是以有三從之義。

Why can't females have orders of honor [of their own]? They are *yin* and humble and have no business outside the household. Therefore, they adhere to the principle of the “three followings.”<sup>77</sup>

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<sup>74</sup> *JY* strip nos. 202.8-15, p.315.

<sup>75</sup> See my discussion on district bailiff on pp. 25-29 in Chapter One.

<sup>76</sup> *ZJS* strip (Statutes) no. 334, p. 54.

<sup>77</sup> *Baihutong*, 1.7.

However, this line has been often misread by scholars to mean that women could not have any orders of honor. Perhaps that prompted Yun Jae-seug in 2003 to infer that since women could not hold orders of honor, they could never inherit them.<sup>78</sup> But women in the Han could and did have orders of honor and could and did inherit them. There are many examples in the *Shiji* and the *Hanshu* of orders of honor being conferred upon women by emperors. For example, the emperor made the sister-in-law of Emperor Gaozu 高祖 (r.206-195 B.C.) the Marquise of Yin'an 陰安.<sup>79</sup> The wife of Xiao He was made the Marquis of Zan 鄼, and the wife of Fan Kuai 樊噲 was made the Marquise of Linguang 臨光 by Empress Dowager Lü 呂 (r. 187-180 B.C.).<sup>80</sup> Similar examples from the Eastern Han period (A.D. 25-220) can also be found. For example, three daughters of the King of Donghai 東海, Liu Jiang 劉疆, were made marquises by Emperor Ming 明 (r. 58-75).<sup>81</sup> These women were from elite families with high rank, making their experiences atypical for the society as a whole. Nevertheless, these examples all show that women could have orders of honor.

There were moreover at least two formal channels by which ordinary women, i.e., women from non-elite families, could inherit orders of honor. *ZJS strip* (Statutes) nos. 369-370 regulate the inheriting of orders of honor when the original honor holder died while on duty. Those statutes listed a line of succession that begins with the son, followed by daughter, father, mother, brother, sister, and wife.<sup>82</sup> We see that women (daughter, mother, sister, and wife) could inherit orders of honor, even though they fell far behind their male counterparts in the line of succession. A story from the *Shiji* adds authority to the observation that women could inherit orders of honor. During the sixth year of Gaozu's reign (201 B.C.), the duke of Lu 魯 died in a battle. Since he had no children, his mother Ci 疵 inherited his order of honor as the duke of Lu.<sup>83</sup> The event occurred approximately a decade before the compilation of the Zhangjiashan Han statutes and thus does not directly corroborate *ZJS strip* (Statutes) nos. 369-370. However, even if we assume that there were no laws on the issue of inheritance prior to the composition of the Zhangjiashan Han statutes, the story from the *Shiji* chronicles a widow becoming the head of household after her husband's death and also inheriting his order of honor. This event is consistent with *ZJS strip* (Statutes) no. 386:

寡為戶後, 予田宅, 比子為後者爵.

When a widow becomes heir to her husband, grant her the land and houses. [Also] she inherits her husband's order of honor, just as an heir-son who inherits it from his father.<sup>84</sup>

A document excavated from a tomb dated to the reign of Emperor Wen (r. 180-157 B.C.) demonstrates that this provision was obeyed. The document contains the line:

新安戶人, 大女燕關內侯寡.

<sup>78</sup> I need to note that when I was about to file my dissertation, I found that Yun has changed his opinion on this issue in his very recent article "Qin Han funü de jichan chenghu" 秦漢婦女的繼承承戶, *Shixue yuekan* 12 (2009), 115-125. Yun now also holds that women could inherit ranks. Chapter Two was basically done in Spring 2009, hence my critique of Yun here. In addition, in his very recent article, Yun also notices the two pieces of excavated evidence that I am studying here (the *guanneiyou* widow from Xi'an and the land dispute document from Dongpailou). Since his analysis is quite different from mine, I still keep mine.

<sup>79</sup> *Shiji* 史記 (Beijing: Zhonghua shuju, 1977), 10. 416. See Ru Chun's 如淳 annotation.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Hou Hanshu*, 42.1424.

<sup>82</sup> See pp. 43-45 in this chapter for the statutes.

<sup>83</sup> *Shiji*, 18.917.

<sup>84</sup> *ZJS strip* (Statutes) no. 386, p. 61.

Adult female Yan, a *guanneiyou* widow, who serves as the head of her household in Xin'an.”<sup>85</sup>

Xin'an 新安 must be a place name. *Huren* 戶人 could mean “household members” but if we follow the reading of Professor Hsing I-tien 邢義田, *huren* is a specific term referring to the head of household in Qin and Han documents.<sup>86</sup> Opinions differ on the meaning of the phrase *guanneiyou gua* 關內侯寡. In 1994, the archaeologist Huang Shengzhang 黃盛璋 studied the line quoted above and argued that since women could not have orders of honor, when the widow of a noble became head of the household, she was addressed by the title of her [deceased] husband's order of honor.<sup>87</sup> Huang rendered the *guanneiyou* (Marquise of the Area within the Passes) as the order of honor of the deceased husband, not as the order of honor of the widow, rendering the phrase *guanneiyou gua* 關內侯寡 as “the widow of the Marquise of the Area within the Passes.” Liu Xinning agrees with Huang.<sup>88</sup> However, if we apply *ZJS* strip (Statutes) no. 386 to the phrase in question, and if we recall that *ZJS* strip (Statutes) no. 367 states without qualification that the heir to the Marquise of the Area within the Passes was, in fact, made the Marquis of the Area with the Passes, it is very clear that, there being no sons, the order of honor in question was passed down to and hence belonged to the Marquis's widow.<sup>89</sup> The fragment is clear evidence that the provisions of the statutes governing the inheritance of orders of honor also applied to women and were duly implemented.<sup>90</sup>

*ZJS* strip (Statutes) nos. 379-380 show that women could inherit household property. A document excavated in 2005 from Dongpailou 東牌樓, Changsha 長沙, self-titled “Guanghe liunian jian Linxiang Li Yong, lidu daozei Yin He shangyan Li Jian yu Jing Zhang zheng tian xiang hecong shu” 光和六年監臨湘李永、例督盜賊殷何上言李建與精張淨田自相和從書 (Agreement regarding the land dispute between Li Jian and Jing Zhang, submitted by *Jian Linxiang* [Inspector of Linxiang] Li Yong and *Lidu daozei* [Routinely Inspecting Robbers and Thieves] Yin He in the six year of the Guanghe period) provides an example of a daughter automatically becoming her father's heiress, the only extraordinary element being that the daughter was his only child.<sup>91</sup> This document, dated to the sixth year of the Guanghe period (A.D. 183), was produced during a turbulent time for the Han dynasty. Various revolts were taking place, and the Yellow Turbans were about to launch the rebellion

<sup>85</sup> *Jinzhou Gaotai Qin Han mu* 荊州高臺秦漢墓, ed. Jinzhou bowuguan 荊州博物館 (Beijing: Kexue chubanshe, 2000), 223.

<sup>86</sup> Hsing I-tien 邢義田, “Longshan Liye Qin Qianling xiancheng yizhi chutu mouxiang Nanyang li shi tan” 龍山里耶秦遷陵縣城遺址出土某鄉南陽里試探, [http://www.bsm.org.cn/show\\_article.php?id=744](http://www.bsm.org.cn/show_article.php?id=744); cf. Hsing's conference paper, “Qin Han xiang li de hukou yu fuyi xingzheng” 秦漢鄉里的戶口與賦役行政 (Sep. 24, 2008, unpublished).

<sup>87</sup> Huang Shengzhang 黃盛璋, “Jiangling Gaotai Han mu xin chutu gaodice, qiance yu xiangguan zhidu fafu” 江陵高臺漢墓新出土告地策, 遺冊與相關制度發復, *Jiangshan kaogu* 江漢考古 2 (1994), 41-44.

<sup>88</sup> Liu, *You Zhangjiashan Hanjian*, 158.

<sup>89</sup> See pp. 43-45 in this chapter. Those orders of honor below the top two orders of honor *chehou* 徹侯 and *guanneiyou* 關內侯 were reduced by two levels before they were passed down to the heirs.

<sup>90</sup> It is also a piece of evidence showing that a widow could inherit the household.

<sup>91</sup> Wang Su 王素, “Changsha Dongpailou Donghan jian du xuanshi” 長沙東牌樓東漢簡牘選釋, *Wenwu* 12 (2005), 69-75; cf. *Changsha Dongpailou Donghan jian du* 長沙東牌樓東漢簡牘, eds. *Changsha shi wenwu kaogu yanjiu suo* 長沙市文物考古研究所 and *Zhongguo wenwu yanjiusuo* 中國文物研究所 (Beijing: Wenwu chubanshe, 2006), 10-11. This document is very complicated and difficult to translate. See my appendix for a complete transcription and tentative translation. In addition, Miranda Brown and Rafe de Crespigny present a summary of the document in their recent article, “Adoption in Han China,” *Journal of the Economic and Social History of the Orient* 52 (2009), 239-242.

that would soon lead to the downfall of the dynasty.<sup>92</sup> However, from this document, we find that, despite the turmoil, Han laws regarding inheritance were still being observed, disputes over land were still being heard by the local authorities, and legal documents were still being routinely drafted and preserved.

The “Guanghe” document referred to above was a report submitted by judicial officials in A.D. 183 regarding an agreement between Li Jian 李建 (plaintiff), Jing Zhang 精張 (defendant), and Jing Xi 精昔 (defendant) resolving a land dispute. In the text, the three men were simply identified by the title “adult male” (*danan* 大男), with no reference to any orders of honor, implying that they were all commoners.<sup>93</sup> Li Jian was the eldest son of a lady named Xi Zheng 昔姪. Xi Zheng was the only daughter of the male Xi Zong 昔宗, who had had no sons. When Xi Zong died, Xi Zheng inherited his property, which was eight *shi* 石 (*mu*?) of land.<sup>94</sup> However, Xi Zheng died soon after inheriting the property. Xi Zheng’s two uncles, Jing Zhang and Jing Xi, occupied her lands,<sup>95</sup> preempting the claims of Xi Zheng’s legitimate heir, Li Jian, who, at the time, was too young to protect her legacy. Years later, the now-mature Li Jian brought a lawsuit against Jing Zhang and Jing Xi to reclaim his mother’s land. Eventually, the parties reconciled and reached an agreement. In the brokered deal, Li Jian got back six *shi* while Jiang Zhang and Jing Xi kept two *shi*, split between them.

Xi Zheng’s husband, Li Sheng 李升, was still alive when his wife’s legacy was seized by her two uncles, and was also still alive when Li Jian brought his lawsuit against his grand-uncles. Even though Li Sheng was the late Xi Zheng’s husband, he took no action to claim his wife’s property. From Li Jian’s statement, we know that his mother’s property was supposed to pass directly to him, not his father. This implies that the property in dispute belonged exclusively to Xi Zheng and that her husband had no prior claim. Even though we cannot find any legal provision that governs this situation, we do have provisions, such as *ZJS* strip (Statutes) no. 384, that state that a wife had exclusive rights over property inherited from her natal family.

女子為戶，毋後而出嫁者，令夫以妻田宅盈其田宅。宅不比，弗得。其棄妻，及夫死，妻得復取以為戶。棄妻，畀之其財。

When a female becomes the head of a household, if when she marries, she has no heirs [to succeed her], let her husband take the land and houses of his wife up to his own quota. If the houses [she had] are not adjacent to her husband’s, the husband cannot take them. When the husband divorces his wife or when the husband dies, the wife can retrieve her property and become a household head

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<sup>92</sup> See *CHC*, 327-374.

<sup>93</sup> Brown and Crespigny also speculate in the same way. See Miranda and Crespigny, “Adoption in Han China,” 240.

<sup>94</sup> In the document, the unit for measuring the land is *shi* 石. This is very difficult to understand. *Shi* (bushel) is usually a unit of weight, not area. Professor Nylan suggests that *shi* perhaps refers to how much grain the field could produce (private communication). In any case, I simply have no idea how to convert the *shi* into *mu*. Since this is not a crucial problem for our study, I set this problem aside.

<sup>95</sup> This act of occupying other people’s land, if confirmed, should be considered as a crime. That explains why there was an officer *lidu daozi* 例督盜賊 (Routinely Inspecting Robbers and Thieves) involved in the case. Even though the function of this officer is not very clear, the title suggests he had a role in criminal cases, since *dao* 盜 and *zei* 賊 were clearly crimes in Han laws. For the details on *dao* and *zei*, see Tomiya Itaru 富谷至, “Ninen ritsu ryō ni mieru horitsu yōko” 二年律令に見える法律用語, *Tōhō gakuho* 東方學報 76 (2003), 240-250; cf. Hori Tsuyoshi 堀毅, *Shin Han hōseishi ronkō* 秦漢法制史論攷 (Beijing: Falü chubanshe, 1988), 210; Hulswé, “The Wide Scope of *tao* Theft, in Ch’in-Han Law,” *Early China* 13 (1988), 166-200.

In addition, Li Jian’s statement mentioned that Xi Zheng had thirteen *shi* of land in total, but we know she only inherited eight *shi* from her father. Perhaps this suggests that the other five *shi* came from her dowry.

again. When a husband divorces, he gives the wife her property back.<sup>96</sup>

According to *ZJS strip (Statutes)* no. 345 a married woman could not be head of household while her husband is still alive.

人妻者不得為戶。

The wife cannot set up a separate household on her own [when her husband is still living].<sup>97</sup>

While a woman could inherit the status of head of household, when she married, she had to yield the status of household head to her husband. She was also required to bring her inherited property to the new household. However, marriage did not mean that she gave up all rights to her property. According to the *ZJS strip (Statutes)* no. 384, the husband was supposed to manage the property on her behalf. In the case of divorce, the wife was entitled to reclaim her pre-marriage property in order to establish a new household on her own.

*ZJS strip (Statutes)* no. 384 sheds additional light on the case of Xi Zheng's legacy. Even though Xi Zheng inherited her parents' property, as long as she was married, she could not serve as an independent head of a household. Yet, because she had a son Li Jian as heir, she did not need to bring the property that she inherited from her natal family into her husband's household. In a sense, the central issue in this case is whether a woman's inherited property becomes the joint property of the household which she joins through marriage. Given the disposition of the case, the answer is that it does not; Xi Zheng's property passed from her parents, through her, to her son. The basis of Xi Zheng's uncles' claim was that they had managed Xi Zheng's property on behalf of Li Jian since, at the time of her death, Li Jian was too young to serve as an independent head of a household. They also claimed that, having contributed to the funeral of their brother (Xi Zheng's father), they were entitled to some recompense. Without seeking official guidance, the uncles simply seized the property as compensation. Li Jian's adult claim on the property was based on this line of transmission: from his grandfather Xi Zong to his mother Xi Zheng, then to himself Li Jian. Xi Zheng's "right" to inherit her father's property was crucial to her son Li Jian's claim.

Turning from the inheritance of orders of honor and inheritance of households to daily household management, we can see from the *Xianling quanshu* that a widow could become a head of household with full control of the household property. She also had the "right" to dispose of that property with a will. The legal basis for that practice can be found in the *ZJS strip (Statutes)* no. 386 which stipulated that when a widow became heir to her husband, she inherited her husband's land and houses.

Based on his reading of the Statutes on Establishing Heirs and the Statutes on Households, the historian Gao Kai 高凱 in his recent article of 2008 identifies six situations in which women could become heads of household:<sup>98</sup>

- 1) if a grandson dies, his mother could inherit his household, with the restriction that she should not drive out her parents-in-law, invite a new husband into the household or steal her son's property (*ZJS strip [Statutes]* nos.337-338 );
- 2) when a father dies without sons or father to succeed him, his mother could inherit his position as head of household (*ZJS strip [Statutes]* no.379);

<sup>96</sup> *ZJS strip (Statutes)* no. 384, p. 61. The 2001 version of *Zhangjiashan* has a slightly different rendering. This dissertation follows the 2006 edition.

<sup>97</sup> *ZJS strip (Statutes)* no. 345, p. 36. Here, *renqi* 人妻 (someone's wife) stands in stark contrast to *gua* (widow).

<sup>98</sup> Gao Kai 高凱, "Cong Juyan Hanjian kan Handai de nühu wenti" 從居延漢簡看漢代的女戶問題, *Shixue yuekan* 史學月刊 9 (2008), 82-92.

- 3) if a husband dies with no sons or parents, his widow could succeed him as head of household (*ZJS* strip [Statutes] no.379 );
- 4) if a father dies with no sons, parents, or wives to succeed him, his daughter could succeed him (*ZJS* strip [Statutes] no. 379 );
- 5) a grandmother could succeed if the grandsons have all died and the grandson had no sons, parents, wives, daughters, grandsons, or grandfather to succeed him (*ZJS* strip [Statutes] no. 380 ); and
- 6) when a husband divorced his wife, his wife could retrieve the property she had received as dowry from her natal family and set up her own household. (*ZJS* strip [Statutes] no. 384).

Given the range of situations covered by these six possibilities, it seems likely that female heads of household were quite common in the Han dynasty. This speculation is confirmed by the standard histories of the Han. They record more than twenty occasions between 180 B.C. - A.D. 85 when the emperor granted cattle and wine to female heads of household.<sup>99</sup> In addition, a strip from Xuanquan 懸泉 also refers to female heads of household.

彌軒武都裏戶人,<sup>100</sup> 大女高者君, 自實占家當, 乘物.

The adult female Gao Zhenjun, who is a household head at Wudu, Lihan, registers her household property, transportational facilities.<sup>101</sup>

According to Gao Kai, the excavated document collection, “*Limin tianjiabo*” 吏民田家菑 (Documents concerning Government Land Rented Officials and Commoners), dating to 235, fifteen years after the fall of the Han dynasty, in the Wu 吳 kingdom, mentions eighty-six female heads of household.<sup>102</sup>

One may ask if female heads of household enjoyed the same privileges as their male counterparts. Liu Xinning believed that when widows or daughters became household heads, they could only manage or use the household property on behalf of their deceased husbands, but could not dispose of it freely.<sup>103</sup> Liu’s assumption, however, is not supported by any evidence. On the contrary, we have already seen a case in which an elderly woman in A.D. 5 used a will to dispose of her household property.<sup>104</sup>

Additional evidence is found in the “Treatises on Food and Money” (Shihuo zhi 食貨志) of the *Hanshu*:

巴寡婦清, 其先得丹穴, 而擅其利數世, 家亦不訾. 清寡婦能守其業, 用財自衛, 人不敢犯. 始皇以為貞婦而客之, 為築女懷清臺.

The ancestors of Widow Qing from Ba commandery acquired a cinnabar mine. They benefited from it for several generations and their family properties were too many to count. Widow Qing was able to preserve the family business and use the

<sup>99</sup> Ibid.

<sup>100</sup> *Huren* 戶人 means household head. See n. 85 in this chapter.

<sup>101</sup> *Dunhuang xuanquan*, 96.

<sup>102</sup> Gao Kai, “Cong Juyan Hanjian kan Handai,” 89. This collection was excavated from Zoumalou, Changsha, Hunan in October, 1996 by local archaeologists. It is basically a compilation of farming land leases between the households and the Wu state during the Three Kingdoms period. The entire collection was published in 1999 in the report, *Changsha Zoumalou Sanguo Wujian* 長沙走馬樓三國吳簡 (by Wenwu Publishing House).

<sup>103</sup> Liu, *You Zhangjiashan Hanjian*, 156-161.

<sup>104</sup> See pp.50-53 of this chapter.

family wealth to protect herself, and thus no one dared to offend her. The First Emperor regarded her as a formidable woman of principle, honored her as a guest, and built a high platform named as “Lady Incorrupt” [to honor her].<sup>105</sup>

While this incident occurred during the reign of the First Emperor of the Qin (r. 247-210 BC), prior to the promulgation of the Han Statutes that we are studying, it illustrates the fact that, even in the pre-Han period, widows enjoyed a great degree of autonomy, not only in managing their households but also in managing their family businesses. Even though our scanty evidence does not allow us to establish the principle that all widows who became heads of household enjoyed the privilege of disposing of their household property, no counter-evidence has been found that shows that they were forbidden to do so. In all likelihood, widows enjoyed such privileges.

## Part II: Two Cases from the *Fengsu tongyi*<sup>106</sup>

A close study of two cases from the *Fengsu tongyi* offers an opportunity to enhance our understanding of inheritance issues in the Han.

Case 1 goes:

陳留有富室翁, 年九十無子. 取田家女為妾. 一交接, 即氣絕. 後生得男, 其女誣其淫佚有兒, 曰: 我父死時年尊, 何一夕便有子? 爭財數年不能決. 丞相邴吉決獄<sup>107</sup>云: 吾聞老翁子不耐寒, 又無影, 可共試之. 時八月, 取同歲小兒, 俱解衣裸之, 此兒獨言寒. 復令並行日中, 獨無影. 大小歎息, 因以財與兒.

A rich gentleman from Chen Liu was ninety years-old but he had no son. He took a girl from the Tian family as his concubine. Right after they copulated for the first time, he died. Later, a son was born from that union. The daughter of the gentleman accused the concubine of having had an illicit relationship [with another man] and of giving birth to his son: “When my father passed away, he was already aged. How could a son be born after just one night together?” The dispute over the property couldn’t be resolved for several years. Chancellor Bing Ji came to the court to judge the case. He said: “I learned that a son born by an old man cannot bear cold [since the aged cannot bear it either]. In addition, he has no shadow.” This was in the eighth month. Several children of the same age as the son were brought to court. All were stripped naked, but only the son of the concubine complained of the cold. When Bing Ji let them all walk out into the sun at midday, only the son had no shadow. The old and the young all exclaimed. [Bing Ji] thus took the property [of the father] and gave it to the son.”<sup>108</sup>

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<sup>105</sup> *Hanshu*, 91.3686.

<sup>106</sup> This section is mostly based on an article that I published during my dissertation writing. See Zhang Zhaoyang, “Zhangjiashan Ernian lüling yu *Fengsu tongyi* zhong liang ze gushi de duidu” 張家山二年律令與風俗通義中兩則案例的對讀. *Shilin* 4 (2009), 127-131.

<sup>107</sup> I think there is perhaps a mistake here: the word “*jueyu*” 決獄 in the text should be “*duansong*” 斷訟, since the nature of the case is a dispute over property and that was called *song*. See my first chapter on *song*. This mistake could be the compiler's original mistake, or it could be a mistake that occurred during transmission of the text. I think the later is more likely because Ying Shao was a famous legal expert who would have known the difference between *song* and *yu*.

<sup>108</sup> *Fengsu tongyi*, 587 (Yiwen 逸文). (Is this the right format?)



Information newly acquired from the Statutes on Establishing Heirs helps to clarify the events described in this case report. On the surface, this was a clash between an elder daughter and her newborn half-brother (and, by proxy, the boy's concubine mother) over the disposition of the household's property. However, delving deeper, we find the story to be much more complicated.

The events described probably took place sometime between the fourth year of Yuankang 元康 (62 B.C.) and the third year of Wufeng 五鳳 (55 B.C.), during the reign of Emperor Xuan 宣 (r. 73-49 B.C.), since Bing Ji, identified as the current chancellor, became chancellor during that time frame, according to his biography in the *Hanshu*.<sup>109</sup> Chenliu commandery (present-day Kaifeng, Henan province), the residence of the rich old man, was a prosperous commandery located approximately 500 km. from the capital Chang'an. Let us review the facts of the case: the old rich gentlemen had no son; therefore he took a concubine (*qie* 妾).<sup>110</sup> He died after a single act of intercourse. We can assume that he left no will to guide his heirs in how to dispose of his legacy. His sudden death, the presence of the concubine and her unexpected pregnancy created an inheritance crisis. Everyone with a claim on the property had to wait to see if the concubine would give birth to a son. Such prudence was actually enjoined in the provisions pertaining to the Statutes on Establishing Heirs, as stated in *ZJS* strip (Statutes) no. 376:

其寡有遺腹者,須遺腹產,乃以律為置爵戶后.

Should there be a widow who is pregnant, one must wait until the baby is born before the inheritance of the household and the order of honor can be determined according to the statutes.<sup>111</sup>

In the absence of other male children, if a son was born, he would become the legal heir even if his mother was a concubine. *ZJS* (Statutes) nos. 379-383 states:

疾死置後者,徹侯後子為徹侯,其毋適(嫡)子,以孺子[子、良人]子...簪孀後子為公士. 其毋適(嫡)子,以下妻子、偏妻子.

To establish heir-sons for those who died of illness, the heir-son of a *chehou* becomes a *chehou*. If there are no sons born by the wife, let the sons born by *ruzi* and *liangren* become successors...If there are no sons born by the wife, let the sons born by the *xiaqi* and *pianqi* become successors.<sup>112</sup>

<sup>109</sup> We need to consider the possibility that officials were often addressed by the highest positions they achieved in their lives. However, I think that should not be the case here. Ying Shao was very specific in mentioning official titles. In the second case, which we will discuss later, Ying Shao introduced the Judge He Wu as: "The governor at that time was the Grand Minister over the Masses He Wu." Thus, Yin Shao specified that He Wu, whose highest post was a Grand Minister over the Masses, was indeed a governor at the time when the second case took place. If Yin Shao was consistent, and if Bing Ji was not a chancellor when the case was tried, we would expect Yin Shao to mention Bing Ji's real post in addition to his highest post "chancellor". Since Bing Ji was only addressed as "chancellor", we can believe that Bing Ji was indeed a chancellor when he tried the case. In addition, the biography of Bing Ji in the *Hanshu* does not indicate that he once served as the governor of Chenliu commandery. If my understanding is correct, this story suggests that a civil case could reach the highest authority in the system: a chancellor. This speculation, however, cannot be cross-checked by other evidence. This story is the only place where a chancellor tried a property dispute.

<sup>110</sup> *Qie* 妾 was a very generic term, referring to concubines. There were many different types of concubines such as *ruren* 孺人, *xiaofu* 小婦, *pangqi* 旁妻, *pianqi* 偏妻, and *xiaqi* 下妻, as Wang Zijin argued. See Wang, "Pianqi xiaqi kao," 151-152.

<sup>111</sup> *ZJS* strip (Statutes) no. 376, p. 60.

<sup>112</sup> *ZJS* (Statutes) nos. 379-383, pp. 60-61.

This particular provision pertains to the inheritance of orders of honor, but it could also apply to the inheritance of household property. As we know, the highest tiers in both types of inheritance designated the sons.<sup>113</sup> Since we know that the rules governing the inheritance of orders of honor were much stricter than those governing the inheritance of household property, if sons born of concubines were counted in the first tier when considering orders of honor, surely they would also be counted in the first tier when determining the disposition of household property.

In the case under examination, a healthy son was born. In keeping with the provisions regulating statutory inheritance, this newborn son became the heir to the legacy. The adult daughter was understandably upset. If this newborn son inherited the property of her rich father, she would be left little besides her dowry. Refusing to believe that a single union between her aged father and the concubine could conceive a child, she insisted that the son must be illegitimate, even though she had no way of proving it. We can imagine that the local authorities must have felt that, even without conclusive evidence, the daughter had a reasonable claim, but, following the procedures for handling doubtful cases, they must have reported this case to higher authorities.<sup>114</sup> The case eventually reached the highest authority in the system, the chancellor, Bing Ji. Bing Ji followed the common wisdom that a child from the loins of an aged father would be more susceptible to cold than other children of the same age, and that such a child would cast no shadow.<sup>115</sup> Despite the subjectivity and popular beliefs at play, Bing Ji determined to his satisfaction that the son had the characteristics appropriate to the child of an aged father, and therefore ruled that the son was a legitimate heir.<sup>116</sup>

An interesting hypothetical question to ask, in terms of household inheritance, is what if the “tests” had proven the son illegitimate? Would the daughter have inherited the household property? As seen earlier, *ZJS* strip (Statutes) nos. 379-383 regulate a long line of candidates for household inheritance<sup>117</sup> of which only the topmost need concern us here: son-father-mother-*gua* (widow)-daughter. In cases where there were no sons, the parents became the first candidates for inheritance. The parents of the rich ninety year-old man must have been long dead, making the legitimate widow or *gua* 寡 next in line. Scholars tend to interpret the word “*gua*” as “*gua qi*” 寡妻, or “widowed wife.”<sup>118</sup> If the principal wife, who was the mother of the daughter, had still been alive, the whole matter of inheritance would have been easily resolved; the official wife as widow would have inherited the household property. When she died, again, in the absence of sons, the property would go to her daughter by statutory inheritance, or simply by the widow’s will.<sup>119</sup> But in this case, the principal wife pre-deceased her rich husband, raising the question of whether the concubine

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<sup>113</sup> See my chart on p. 47 in this chapter.

<sup>114</sup> See pp. 30-31 of Chapter One on the hierarchy of appeals. This case, however, is unusual. It is the only evidence that shows a property dispute could reach the chancellor.

<sup>115</sup> The belief that the son born by an aged father must be weak might have some sort of scientific basis, but the theory “no shadows under the sun” is unlikely. So I suspect the test implied some sort of magic. We are not told of the whole process of the test, so I cannot judge how it worked. In addition, the meaning of *ying* (shadow) was perhaps not literal.

<sup>116</sup> There is another possibility: both Bing Ji and the daughter were not aware of the logic I mentioned. Thus they both believed that the test indeed “proved” the paternal relationship between the son and the old gentleman from Chen Liu.

<sup>117</sup> *ZJS* strip (Statutes) nos. 379-38, p. 60-61.

<sup>118</sup> For instance, Zhu Honglin annotates that this *gua* 寡 refers to the wife of the deceased. See Zhu, *Zhangjiashan Hanjian*, 231.

<sup>119</sup> Widows made wills in the Han dynasty as we know from the “Xianling quanshu” from Yizheng, Jiangsu. See my previous discussions on this matter on pp. 50-53 of this chapter.

could assume the status of legal widow (*gua*) and hence become the rightful heir. To answer this question, we first need to understand the status of concubines.

Scholars have generally agreed that in the Han period, it was proper for an elite husband to take a wife and multiple concubines, but the status of those concubines remains an issue of debate. Qu Tongzu 瞿同祖 (1910-2008), for one, believed that prior to the twentieth century, concubines were not considered family members, and thus enjoyed no privileges whatsoever.<sup>120</sup> But Tao Yi 陶毅 argued the opposite by pointing to passages in the *Tanglü shuyi* that suggested that concubines enjoyed domestic privileges that were similar to, if somewhat less than those of legal wives.<sup>121</sup> Since Tao's evidence was limited to Tang law, his argument may not apply to the Han period. Zhao Yupei 趙裕沛 touched upon this issue in his recent work, *Liang Han jiating neibu guanxi ji xiangguan wenti yanjiu* 兩漢家庭內部關係及相關問題研究 (Research on Domestic Relationships and Relevant Issues in the Two Han Dynasties, 2006).<sup>122</sup> Zhao basically made two assertions. First, the relationship between the husband and concubines was loose, insofar as the husband could easily rid himself of concubines and the concubines could also leave the husband and freely choose to discontinue the relationship. Second, the concubines had much lower status in a family than that of the wife.<sup>123</sup> Since Zhao provided no evidence, we cannot judge the accuracy of Zhao's assertions. However, contrary to Zhao's views, evidence from the Han laws shows that concubines sometimes enjoyed a certain status akin to that of the wife:

毆父偏妻父母...若毆妻之父母，皆贖耐。其臭詬詈之，罰金四兩。

Whoever beats the parents of the concubines... will all be punished with *nai* (shaving off the beard and hair on the temples), just as if he were beating the parents of the principle wife. Those who scolded them [the parents] will be fined four *liang* of gold.<sup>124</sup>

Since beating or scolding the parents of one's concubines incurred the same punishment as beating or scolding the parents of one's wife, these provisions attribute nearly equal status to concubines and wives. Moreover, if we read the provisions governing inheritance carefully, we find that the line of succession was very extensive, extending from eldest sons to "slaves." Nevertheless, concubines were not singled out as an independent category. If "slaves" had a place in the line of inheritance, it stands to reason that concubines must also have had a place. Therefore, the only reasonable supposition is that concubines were included in the category of "widow" (*gua*). According to the Statutes on Establishing Heirs, the widow took precedence over daughters in statutory inheritance. Thus, if the principle wife was dead or absent, the concubine could probably inherit the property. In other words, in our case of the concubine's son, even if the daughter had won the case, proving that the son was not a legitimate heir, she still could not have inherited the property of the gentlemen. Curiously, the case report makes no reference to the relative positions of concubine and eldest daughter in the line of succession, something that the chancellor and even the litigants must have known. The chancellor was, arguably, obliged to focus on the

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<sup>120</sup> Qu Tongzu 瞿同祖, *Zhongguo falü yu Zhongguo shehui* 中國法律與中國社會 (Shanghai: Shangwu yinshuguan, 1947), 142-148.

<sup>121</sup> Tao Yi 陶毅, *Zhongguo hunyin jiating zhidu shi* 中國婚姻家庭制度史 (Beijing: Dongfang chubanshe, 1994), 291-292.

<sup>122</sup> Zhao Yupei 趙裕沛, *Liang Han jiating neibu guanxi ji xiangguan wenti yanjiu* 兩漢家庭內部關係及相關問題研究 (Wuhan: Hubei renmin chubanshe, 2006), 176-180.

<sup>123</sup> *Ibid.*, 175-184.

<sup>124</sup> *ZJS strip* (Statutes) nos. 42.43, p. 14.

issue as presented to him, namely whether or not the child was legitimate. The daughter may have had additional reasons for pressing the issue for so long and at such enormous cost.

I speculate that if the daughter could demonstrate that the concubine had an illegitimate son, that meant that the concubine had illicit sex with someone other than her father, putting the concubine in extreme jeopardy. There are two possible consequences: 1) If the illicit sex took place when the rich old man was still alive, the concubine would be punished with the *nai* penalty (shaving off the beard and hair on the temples) and enslaved as a bond-servant, in accordance with *ZJS* strip (*Zouyanshu*) no. 182: “Those who commit illicit sex will be punished with *nai* penalty (shaving off the beard and hair on the temples)<sup>125</sup> and enslaved as bond-servants (male or female)” (奸者，耐為隸臣妾).<sup>126</sup> Additionally, the concubine would lose her claim of inheritance since those who received *nai* penalty (shaving off the beard and hair on the temples)<sup>127</sup> were deprived of that privilege. 2) If the illicit sex took place after the old man’s death, the act itself was not punishable.<sup>128</sup> However, if the concubine made false statements during the trial, she could be charged on that basis. When the suit was brought by the daughter, the son was still an infant, thus the concubine was obligated to respond to the suit on behalf of her son. Since her sexual activities were crucial factors in establishing the legitimacy of her son, she faced the inquiries of the authorities charged with establishing the facts. If she denied her illicit sex, and if that fraud was discovered, she perhaps would still be deprived of her privilege of inheritance and even jailed. In pressing the case, the daughter, at the very least, had the satisfaction of knowing that the concubine was forced to live with the anxiety of potentially grave punishments.

Case 2: A second case from the *Fengsu tongyi* is equally interesting:

沛郡有富家公，資二千餘萬，小婦子年裁數歲，<sup>129</sup>頃失其母，又無親近，其大婦女甚不賢。公病困，思念惡女爭其財，兒判不全，因呼族人為遺令云：悉以財屬女，但遺一劍與兒，年十五，以還付之。其後兒大，姊不肯與劍，男乃詣郡自言求劍。

謹案：時太守大司空何武也，得其辭，因錄女及口，省其手書，顧謂掾史曰：女性強梁，口復貪鄙，其父畏賊害其兒，又計小兒正得此財，不能全護，故且俾與女，內實寄之耳，不當以劍與之乎？夫劍者，亦所以決斷也。限年十五者，度其子智力足以自活，此女必不復還其劍，當聞縣官，縣官或能證察，得以見伸展也。凡庸何能思慮強遠如是哉！

悉奪取財以與子，曰：弊女惡口濫飽十五歲，亦以幸矣。於是論者乃服，謂武原情度事得其理。

There was a rich gentleman from Pei commandery (present-day Xuzhou, Jiangsu province) who had more than twenty million cash in property. He had a son born by his concubine, who was only a few years old. The child’s mother had died and he had no close relatives. The daughter born by the principle wife was not particularly honorable. When the gentleman was very sick, he was concerned that the daughter would fight for the property, and his son would be [wrongly] deprived of a certain portion of the property. Therefore he called together his

<sup>125</sup> See n. 42 in Chapter One.

<sup>126</sup> *ZJS* strip (*Zouyan shu*) no. 182, p. 108.

<sup>127</sup> See n. 31 in this chapter.

<sup>128</sup> See the illicit case.

<sup>129</sup> “*Xiaofu*” 小婦, according to Yan Shigu 嚴師古 (581-645), means “concubines.” In his commentary on the “Biography of Yuanhou” 元后 of the *Hanshu*, Yan explains, “*Xiaofu* means concubines” (*xiaofu qieye* 小婦妾也). See *Hanshu*, 98.4021n6. Cf. Wang Zijin, “Pianqi xiaqi kao,” 151-152.

clansmen and made a will, saying: “All the property I have is to be given to my daughter but for a sword left for my son. When he is fifteen years old, the sword should be given to him.” Later, the son grew up, but the elder sister begrudged him the sword. The son then went to the commandery court to submit a complaint to ask for his sword.

My considered judgment: The governor at that time was the Grand Minister over the Masses, He Wu. When he received this complaint, he called the daughter... After examining the handwritten document, he looked at his assistants and said: “The daughter’s personality is strong, greedy, and mean. The father was worried that she might badly harm the son. The father also calculated that even if the son got the whole property, he would not be able to protect it. Therefore, the father temporarily gave the property to the daughter. In fact, he just wanted the daughter to safeguard it. Why didn’t he give the daughter the sword? A sword is to ‘cut off.’ The fifteen years’ time limitation was because he thought his son would be grown up after fifteen years, and he figured that the daughter would defy his wishes and would fail to give the sword to the son, and so the matter would be brought to the officials for adjudication. The officials might then be able to find the truth, and the real intention would be known and extended. How could an ordinary person so deeply and forwardly think like this?!” Therefore, He Wu confiscated all the property from the daughter and gave it to the son, saying, “It is fortunate enough that this mean daughter has been warmly clothed and well-fed for fifteen years.” Thus, those who discussed the case were all convinced and said that He Wu had traced the origin of the circumstances and found the reason for them.<sup>130</sup>

This events described in this story must have taken place a few years before the first year of Suihe 綏和 period (8-7 B.C.), near the end of the reign of Emperor Cheng 成 (8 B.C.), since, according to his biography in the *Hanshu*, that was when He Wu served as governor of Pei commandery.<sup>131</sup> Unlike the previous case in which the father died without leaving a will, this case centers on the issues surrounding a father’s final will: the circumstances under which it was written, the testator’s intent, the manner of its writing and execution, the subsequent actions of the beneficiaries, the legal challenges, and the judge’s ruling. According to the rules for statutory inheritance, the eldest daughter by the man’s principle wife should have inherited the household property only if her much younger half-brother, the son of the father’s concubine, died. As the case report makes clear, the son was not only too young to establish his claim. He no longer had a mother and did not even have close relatives to help him. The rich man was understandably anxious about his son’s fate, given his assessment of his daughter’s character. The report offers a valuable snapshot of how, at that point in Han society, a last will and testament was made, providing such details as the gathering of witnesses, a declaration, and the fact that the final will was handwritten by the testator. The events described comport with provisions in the Statutes on Households, *ZJS* (Statutes) strip nos. 334-335:

民欲先令相分田宅，奴婢，財物，鄉部嗇夫身聽其令。皆三辦券，書之，輒上如戶籍。

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<sup>130</sup> *Fengsu tongyi*, 588.

<sup>131</sup> *Hanshu*, 86.3484. The specific date cannot be inferred. However, from He Wu’s biography in the *Hanshu*, we know that he served as the governor of Pei commandery a few years before the first year of the Suihe period (8-7 B.C.).

If a person wants to dispose of real estate, male and female “slaves,” and property through a will, the bailiff of the district big or small should listen to his or her will in person. Everything is to be written down in three copies and submitted by following the same procedure as for household registers.<sup>132</sup>

Since, in following the prescriptions set forth in this regulation, wills were to be submitted to the authorities “by following the same procedure as for household registers,” to understand the process of filing and keeping records of wills, we first need to know the procedure for household registration. *ZJS* (Statutes) strip no. 328 reads:

恆以八月令鄉嗇夫, 吏, 令史相襍案戶籍, 副藏其廷。

Always order the district bailiff, officers, and the assistant magistrate to check the household registers in the eighth month. Make an extra copy of each document and keep it in the county court.<sup>133</sup>

Since there was cooperation between local *xiang sefu* and the official from the county administration, and since the word *fu* (“extra”) indicates that there were at least two copies made for a register, we can deduce that separate copies of the register were kept by the local *xiang sefu* and the county court. We also know that the statute required three copies of a will. We can reasonably assume that this third copy was kept in the family. Such a system virtually eliminated the possibility of forging wills, since, during a trial, the presiding judge could cross-check the three copies for inconsistencies.

The case includes one divergence from the procedure prescribed by the statute: only the clansmen were called in as witnesses to the father’s final testament, but, in this case, no officials had been summoned. Perhaps Ying Shao, who edited the case report, merely oversimplified the narrative, or the old gentleman was unfamiliar with the procedure for making a will.<sup>134</sup> The father’s bequest of all his property to the daughter and nothing but his sword to the son is, on the surface, very odd. Even stranger is the stipulation in the will that the daughter was to keep the sword in trust for fifteen years before releasing it to the son. The terms of the will were binding since testimonial inheritance took precedence over statutory inheritance.<sup>135</sup>

As the case reveals, the father’s true intention was to give his son all his property, but, accurately assessing his daughter’s character, he shrewdly constructed the ruse of the sword as a way of ultimately fulfilling his wishes. The gift of the sword was also, we gather, symbolic. In giving the sword to the son, the father was saying that, fifteen years hence, the property should be cut off from his daughter. The vocabulary used in the report to describe the son’s legal action to claim his testamentary inheritance, i.e., his father’s sword, is very subtle: *ziyan* 自言 was indeed a legal term that refers to the action of submitting a complaint. This usage appears frequently in Han legal contexts, as demonstrated in the following passage:

永始五年閏月己巳朔丙子, 北鄉嗇夫忠敢言之。義成里崔自當自言為家私市居延。

<sup>132</sup> *ZJS* (Statutes) strip nos. 334-335, p. 54.

<sup>133</sup> *ZJS* (Statutes) strip no. 328, p. 54.

<sup>134</sup> The statutes tell us what was supposed to be done, but not what was always done. Many people might not know the correct procedure.

<sup>135</sup> For daughters to inherit property through a will was not uncommon during the Han; cf. the famous *xianling quanshu* from Xupu, Yizheng, Jiangsu, which we studied earlier in this chapter.

On *bingzi*, the leap month with *yisi* the first day, the fifth year of Yongshi period (12 B.C.), the district bailiff of Beixiang dares to say that Cui Yidang submits a complaint saying that he went to Juyan market to do personal business for his family.<sup>136</sup>

官移居延書曰：萬歲里張子君自言責臨之長徐...

The officials forwarded the document to Juyan, saying: Zhang Zijun from Wansui ward submitted a complaint to demand the repayment of a debt from Xu, who is the officer in command of Lizhi section...<sup>137</sup>

[尉吏李鳳]自言故為居延高亭亭長...證所言。<sup>138</sup>

[The Inspector Li Feng] submitted a complaint saying that he was previously the head of Gao village at Juyan... testified what he said.

In addition, the word *ci* 辭 in the phrase *de qi ci* 得其辭 also has a specific meaning: it refers to testimony, as we see below:

劾狀辭曰：公乘日勒益壽里，年卅歲，姓孫氏...

The testimony says: This *gongshen* from Yishou ward, Rile county is thirty years old, and his last name is Sun...<sup>139</sup>

劾狀辭曰：公乘居延臨仁里，年卅一歲，姓毋。

The testimony says: This *gongshen* from the Linren ward, Juyan county was thirty-one years old, and his last name is Wu.<sup>140</sup>

In terms of procedure, the case also diverges from the statutory norm. Typically, a civil suit makes its way up the bureaucratic chain from district bailiff, to the county court, and finally to the commandery.<sup>141</sup> Perhaps because the case involved a very rich family, the son was allowed to bypass the lower courts and appeal directly to the highest authority in the commandery. Governor He Wu's examination of the will conforms to a provision set forth in *ZJS* strip (Statutes) no. 335:

有爭者，以券書從事。毋券書，毋聽。

If there is a dispute, the authorities should handle the matter based on the document. If there is no document, the case will not be heard.<sup>142</sup>

While He Wu's deciphering of the riddle of the sword makes for a satisfying story, it raises questions about how much discretion a senior judge could have in making a judgment. If he strictly followed the statutes, the only issue before him was the matter of the sword. Had he ruled strictly, he would have simply ordered the daughter to deliver the sword to the son in keeping with the statutes governing testamentary inheritance.<sup>143</sup> But clearly, He Wu went

<sup>136</sup> *JY* strip no.15.19, p. 10.

<sup>137</sup> *JY* strip no. 132.36, p. 93.

<sup>138</sup> *JY* strip no.178.30, p. 121.

<sup>139</sup> *JY* strip no. 20.7, p. 13.

<sup>140</sup> *JY* strip no. 45.12, p. 32.

<sup>141</sup> See my previous discussion on this matter in Chapter One.

<sup>142</sup> *ZJS* strip (Statutes) no. 335, p. 54.

<sup>143</sup> The statute from Zhangjiashan doesn't really discuss such imaginative readings. Of course, it doesn't prevent them, either. This built-in ambiguity in the statutes gave He Wu much leeway in interpreting the

much further. His goal, as a wise judge, was to see justice done and the true intention of the testator satisfied. Given his decision to supplant the literal terms of the will with his understanding of the testator's deeper intention, He Wu apparently felt he needed to explain the rationale for his decision (or the chronicler or editor felt that the decision needed explanation). The *lunzhe* 論者 (discussants?)<sup>144</sup> were convinced that He Wu had “gotten at the principle by tracing back and deliberating upon the circumstances” (*yuan qing duo shi de qi li* 原情度事得其理). This emphasis on the “principle” (*li*) behind the resolution of civil disputes presaged Chen Shi's 陳寔 (104-187) concept of civil disputes, since he believed that resolving such disputes entailed a search for establishing facts through an appeal to legal principles (*li* 理).<sup>145</sup>

Opinions differ on the meaning of the case and its resolution. Wei Daoming, whom we encountered earlier, argued that the case history demonstrates that the inheritance rights of the son were inalienable, since, in the end, He Wu ordered the property to be given to the son.<sup>146</sup> In my opinion, Wei misreads the story. The daughter did in fact get the property in conformity with the rules governing testamentary inheritance. In the absence of the father's will, the son would have been designated the heir according to the rules governing statutory inheritance. Since the father could freely dispose of his property through a will, the case history illustrates the fact that the rules for testamentary inheritance trump those for statutory inheritance. He Wu ordered the daughter to give the property to the son, as stipulated in the will, because, as He Wu interpreted that will, he determined that the true intention of the testator was that the son should inherit the property. In other words, He Wu followed the order of precedence, acknowledging the greater authority of testament over statute. Significantly, He Wu never once questioned the validity of the will, nor did he argue that the will was invalid. He did not argue that the “rights” of the son were inalienable. Instead, He Wu based his decision on his understanding of the “true” meaning of the will. These two facts – that the daughter got the property through her father's will and that she lost the property through a reinterpretation of the will – demonstrate that the will was indeed the determining factor in disposal of the property in this dispute.

The two cases examined above were both disputes over property between a son born of a concubine and a daughter born of the principle wife, and both involved wealthy families. In some ways, these two cases remind us of the almost commonplace observation that, then and now, legal battles over inheritances among the members of rich families are perhaps so intense because the stakes are so high. But these two cases also show something very important to life in the Han: that daughters were not necessarily disinherited in favor of sons. Seniority and the status of one's mother seem to have been an important factor in determining status within a household. In the first case, the elder sister, as daughter of the principle wife, probably presumed that she had higher status than her younger half-brother born of a concubine, and such a presumption of superiority may have motivated her to challenge her brother's inheritance. In the second case, the elder sister was so proud and greedy that she

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document. We simply do not have sufficient evidence to understand why He Wu could have this leeway in interpreting the will in such a manner, because the statutes we have are incomplete.

<sup>144</sup> I am not sure who the *lunzhe* (discussants?) were. In the story, it seems that their opinions carried some weight in confirming He Wu's judgment.

<sup>145</sup> For more details on Chen Shi's view, see my discussion on p. 77 of this chapter and pp. 90-92 of Chapter Three. The result of the case was indeed strange. The father's will could be interpreted quite differently than what He Wu did: the father indeed wanted to give all the property to the daughter and he wanted his son to become a hero through his own efforts and for that reason, bequeathed the sword, a symbol of heroes, to his son. He Wu personally was irritated by the greediness of the daughter and sympathetic to the son, so he interpreted the will differently from its literal meaning in order to punish the daughter and help the son. The discussants might have felt the same, or they just might have agreed that He Wu affirmed the true meaning of the will.

<sup>146</sup> Wei, “Zhongguo gudai yizhu jicheng,” 163-164.



ignored the rightful claim of her younger brother to her father's sword.

A third example highlights many of the same issues surrounding the cases just examined. According to the *Shiji*, the powerful Emperor Wu learned that he had an elder sister living in Changling 長陵, a mausoleum town near Chang'an. He also discovered that his half-sister was the daughter of a commoner father and Empress Dowager Wang 王, the issue of the Empress Dowager's first marriage.<sup>147</sup> Upon learning of this, the emperor sent an inspector to investigate. The inspector found the elder sister still living at her home. The emperor went to the village, accompanied by his cavalry. The sister was so frightened by the unexpected arrival of the imperial cavalry that she hid herself. She was eventually found and brought into the imperial presence.

武帝下車泣曰：嘯！大姊，何藏之深也！詔副車載之，迴車馳還，而直入長樂宮。行詔門著引籍，通到謁太后。

Emperor Wu descended from his carriage and cried: "Ah, elder sister, why did you hide yourself so well?" He then summoned a side carriage (*fuche*), to transport her back to Chang'an, where he had her sent straight through to the Changle Palace. While on the way back to capital, he ordered envoys to send ahead a message to notify the empress dowager that [his sister] would be paying her a visit.<sup>148</sup>

The emperor's actions reveal his great respect toward his elder sister. He cried and addressed the lady as "elder sister." He placed her in a side carriage right beside his own.<sup>149</sup> Without hesitation or delay, he brought his newly-found sister to their mother. During the family reunion,

武帝奉酒前為壽，奉錢千萬，奴婢三百人，公田百頃，甲第，以賜姊...有子男一人，女一人。男號為脩成子仲，女為諸侯王王后。

Emperor Wu raised his wine cup to toast the Empress Dowager and his elder sister. He gave his sister ten million cash, three hundred slaves, one hundred *qing* of official land, and mansions.... His sister had one son and one daughter. The son was enfeoffed as *xiucheng zizhong*,<sup>150</sup> and the daughter was married off to a king as a queen.<sup>151</sup>

If the Son of Heaven was regarded as a role model for the people, the extraordinary respect the emperor demonstrated toward his elder sister was surely meant to say something about family values in the Han dynasty. Whether the emperor was sincere in paying such respects

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<sup>147</sup> Emperor Wu's mother had two marriages. She first married a commoner, then she divorced and married Emperor Wu's father, Emperor Jing 景 (r. 156-141 B.C.).

<sup>148</sup> *Shiji*, 49.1981-1982.

<sup>149</sup> Regarding the status of the accompanying carriage (*fuche* 副車), the *Hanyi* 漢儀 says: "The imperial carriages of the Son of the Heaven are such: What the Son of Heaven took is called the carriage of Golden Root. He rides six dragons to manage all under Heaven. There are one five colored sitting carriage (*anche* 安車) and one five colored standing carriage (*liche* 立車), both being driven by four horses. That was the accompanying carriage for five seasons (Spring, Summer, transitional period from Summer to Autumn, Autumn, and Winter)" (天子法駕，所乘曰金根車，駕六龍，以御天下也。有五色安車，有五色立車，各一，皆駕四馬。是為五時副車). Thus, we know the status of accompanying carriages was very high, only next to the emperor's main carriage. See *Hanyi* 漢儀, in *Hanguan liuzhong* 漢官六種, ed. Zhou Tianyou 周天游 (Beijing: Zhonghua shuju, 1990), 200.

<sup>150</sup> *Xiucheng zizhong* 脩成子仲 appears to a noble title.

<sup>151</sup> *Shiji*, 49.1982.

to an elder sister whom he did not even know or if he was just making a public statement is not relevant. The story illustrates just how important elder sisters could be among siblings. In short, this story involving Emperor Wu and his elder sister reinforces a significant aspect of the two *Fengsu tongyi* cases, that elder sisters held generally and legally acknowledged status within their families.

While one can reasonably ask if the two *Fengsu tongyi* cases were real or fictional, both cases pointedly illustrate Han legal principles and procedures in action. Granted, both narratives have legendary elements. It is unlikely that a ninety-year old man could impregnate a woman so quickly or that a father could predict future events so well.<sup>152</sup> Still, as illustrations of Han legal principles and procedures, they remain invaluable, especially since Ying Shao, the compiler of the *Fengsu tongyi*, was a famously recognized legal expert. Ying Shao's reputation is acknowledged in this passage from the *Hou Hanshu*:

初, 安帝時河間人尹次、潁川人史玉皆坐殺人當死, 次兄初及玉母軍並詣官曹求代其命, 而縊而物故。尚書陳忠以罪疑從輕, 議活次、玉。劾後追駁之, 據正典刑, 有可存者。

Previously, during the reign of Emperor An, Yin Ci from Hejian and Shi Yu from Yingchan both were sentenced to death for murder. Yin Chu, the elder brother of Yin Ci, and Jun, the mother of Shi Yu, both went to see the authorities with proposals to have themselves killed as substitutes for their relatives. They then committed suicide by hanging. The Secretariat Chen Chong argued that Yin Ci and Shi Yu should be given more lenient punishments and be spared the death penalty. Ying Shao later corrected him, in such a way as to correct the precedents and penal laws, so his judgment was worth preserving.<sup>153</sup>

Indeed, Ying Shao had very comprehensive knowledge of Han laws. As Michael Nylan observed, based on this following account of Ying Shao in the *Hou Hanshu*:

When the Han court moved to the interim capital at Xuchang in A.D. 196, Ying Shao set about reconstructing and augmenting the ancient law codes and casebooks which had been destroyed in the burning of Luoyang or lost in the court's subsequent moves. Two hundred and eighty rolls of legal writings.... were prepared for the edification of the Han court.<sup>154</sup>

As a result of that project, Ying Shao submitted to the throne a book named *Hanyi* 漢儀 (Principles of the Han), in which "he reconstructed and corrected the Han statutes and ordinances."<sup>155</sup> Ying Shao's legal expertise lends even greater authority to accuracy of the two case reports from the *Fengsu tongyi* as descriptions of the legal practices of the time.

## Conclusion of Chapter Two:

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<sup>152</sup> Or, He Wu deliberately reinterpreted the will of the father to punish the greedy daughter.

<sup>153</sup> *Hou Hanshu*, 48.1610.

<sup>154</sup> Michael Nylan, "Ying Shao's *Feng su t'ung yi*" (Ph.D. diss., Princeton University, 1982), 52. For a detailed study on Ying Shao's views on laws, see Nylan, "Ying Shao," 92-135.

<sup>155</sup> *Ibid.*, 52.

The domestic justice system is only one domain of the civil laws. These statutes and cases mostly concerned the disposition of property. Consistent with the characteristics we found in Chapter One, no criminal penalties are attached to the statutes or in the dispositions of the cases studied above. We now see that the district bailiff played an important role in matters of domestic justice, just as in Chapter One, the district bailiff played a crucial role in resolving civil cases in general. As we have seen from *ZJS* strip (Statues) no. 334 and *JY* strip nos. 202.8-15, district bailiffs served an important function in matters of testimonial inheritance, serving as witnesses to the making of wills. Indeed, in my survey of the domestic statutes, the “district bailiff” is referred to five times, far more frequently than the other three officials who are also mentioned: *lingshi* 令史 (twice), *lizhu* 吏主 (twice), and *li* 吏 (once). These characteristics all compel us to consider domestic statutes and cases concerning inheritance as an integral part of the civil laws, a further reminder that civil laws were very much a part of life in the Han and in early China in general.

Combining our analyses from Chapters One and Two, we can conclude that the civil laws had at least two pillars: laws concerning economic disputes (debts, compensation, and commercial contracts) and laws concerning domestic matters. While it is useful to distinguish between these two domains of civil laws, they are essentially one, insofar as both are concerned with property, an observation that comports with Zheng Xuan’s generalization that civil cases are disputes over property.

Civil cases seem to have been common, civil statutes were abundant, and the civil justice system was quite sophisticated. Such sophistication demands a sensitivity to legal principles, principles by which judicial authorities can be guided in disposing of the wide array of specific cases and sorting through the idiosyncrasies of individual disputes and the conflicting claims of the litigants.

Zheng Xuan’s contemporary, the statesmen Chen Shi 陳寔, who was famed for his resolution of civil disputes,<sup>156</sup> believed that the purpose of hearing cases was to establish facts (*zhi* 直) through an appeal to legal principles (*li* 理).<sup>157</sup> The biography of Chen Shi in the *Hou Hanshu* says that when Chen was the magistrate of Taiqiu 太丘 county, a certain clerk was anxious about the *song* (civil cases), so the clerk suggested that Chen forbid all of them. Chen replied: “Civil disputes are meant to establish facts. If I prohibit them, to what can *li* 理 be applied? Do not impose any restraints [on civil disputes].”<sup>158</sup> Obviously, Chen Shi’s understanding of the *song* may have been more elevated than that of the ordinary people involved in civil cases, but it seems clear that Chen’s goal was to have civil cases instill the notion of *zhi* through an appeal to legal principles.<sup>159</sup> Thus, we shall carefully examine this notion in the next chapter.

Given the dominance of property issues in this system of civil justice, following Zheng Xuan’s definition of *song* as “disputes over property,” the next, and arguably most significant concept that must be addressed is how the people of Han understood “ownership.” I contend that, during the Han and in early China in general, this concept or notion of ownership was conveyed by the term *mingfen* 名分, another principal subject of the next chapter.

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<sup>156</sup> Chen Shi’ biography in the *Hou Hanshu* says that when he was outside the capital, whenever there was a civil dispute (*song*), the parties always came to him to seek his judgment. (When Chen Shi retired from his official career, he withdrew into the countryside.) He probably was not a district bailiff. Rather, he was most likely a *sanlao* serving as an arbitrator in civil disputes. His judgments were authoritative because they were deemed fair and convincing. People voluntarily adopted his judgments without complaints. See *Hou Hanshu*, 62.2066.

<sup>157</sup> I will discuss this notion in the “*zhi*” section of next chapter.

<sup>158</sup> *Hou Hanshu*, 62.2066.

<sup>159</sup> I will fully explore this story in Chapter Three.

### Chapter Three: The Legal Concepts *Zhi* 直 and *Mingfen* 名分 (*Fen* 分)

This chapter focuses on the terms *zhi* 直 and *mingfen* 名分. I will argue that even though *zhi* has different meanings in different situations, in the context of civil disputes, *zhi* refers to a simple, straight-forward, unadorned account of the facts of the case. Ideally, the party who provides the most accurate and therefore most credible account of the facts of the case will win the suit. The primary goal of civil litigation in early China was to establish facts, and thereby justify one's claim.

In legal contexts, the term *mingfen* denoted ownership of both movable and real property. The striking characteristic of ownership in early China was the principle of equal legal standing of all people regardless of social status. Han subjects of all ranks had the "right" to own both movable and real property; and in civil disputes, disputants were supposed to be treated as equal parties. The significance, in legal practice, of these two notions, *zhi* and *mingfen*, reflect the emphasis on verification of fact and equality of standing in early China's system of civil law.

#### Part I: The Concept of *Zhi* 直 ("A Straight Account of the Facts")

This section will argue that the term *zhi* 直 refers to an unadorned, "straight" account of the facts in civil disputes. This particular meaning of *zhi* is not obvious, since *zhi* has various connotations and meanings depending on context.

##### A) Various Meanings of "*Zhi*," Not Related to Civil Disputes

In its most common usage, "*zhi*" indicates "straightforwardness," as conveyed in the expression, "straight as an arrow." The Way of Zhou was praised as *zhi* in the "Great East" (Dadong 大東) ode of the *Book of Songs*.

周道如砥，其直如矢。  
The Way of Zhou is like a whetstone.  
It is as straight as an arrow.<sup>1</sup>

This verse was interpreted by the commentator Zheng Xuan (A.D. 127-200) as follows:

如砥，貢賦均平；如矢，賞罰不偏。  
The analogy to the whetstone refers to taxation that is equally and fairly [applied], whereas the arrow metaphor refers to rewards and punishments that are [administered] without bias.<sup>2</sup>

Thus, according to Zheng Xuan, in this context *zhi* refers to the quality of the impartial administration of rewards and punishments, and literally, to officials acting "as straight as arrows."

In the *Analects*, this sense of *zhi* as meaning "straight" [i.e., appropriate] treatment of others also occurs, and Confucius used it to praise the integrity of Scribe Yu 史魚 (fl. 5<sup>th</sup> century B.C.) of the Wei 衛 state:

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<sup>1</sup> The *Book of Songs*, Mao no. 203.

<sup>2</sup> *Maoshi zhengyi* 毛詩正義 (Hongkong: Zhonghua shuju, 1964), 13.438.

直哉史魚! 邦有道, 如矢; 邦無道, 如矢。

*Zhi* [straight] indeed was the Scribe Yu! When the Way prevailed in the land, he was straight as an arrow; when the Way ceased to prevail, he was straight as an arrow.<sup>3</sup>

Confucius may even have been alluding to the “Great East” verse just cited. This usage of *zhi* is subsequently elaborated in three additional early texts that provide concise definitions of *zhi*. The *Five Conducts* (*Wuxing pian* 五行篇) from Guodian 郭店, dated no later than 300 B.C., says:

中心辯然而正行之, 直也。

To be able to be analytical in the heart and then act upon that analysis, as is appropriate, is *zhi*.<sup>4</sup>

When used in this way, *zhi* refers to appropriate conduct.

Xunzi 荀子 (313-238 B.C.) provides a second definition of *zhi* in the “Self-cultivation” (Xiushen 修身) chapter

是是非非謂之知, 非是是非謂之愚, 傷良曰讒, 害良曰賊. 是謂是, 非謂非, 曰直. To recognize as right what is right and as wrong what is wrong is called “wisdom.” To regard as wrong what is right and as right what is wrong is called “stupidity.” Doing injury to honorable people is “slander.” Doing harm to honorable people is “destructive behavior.” “Straightforwardness” (*zhi*) is calling right what is right and wrong what is wrong.<sup>5</sup>

In contrast to practical wisdom, which refers to the proper recognition of right and wrong in a given situation, we find that *zhi* 直 is directed outward and refers to the action taken, specifically one’s straightforwardness when speaking to others about right and wrong. Perhaps influenced by his teacher Xunzi, Han Fei, in the “Explaining Laozi” (Jielao 解老) chapter of the *Han Feizi*, defines *zhi* in a similar way when interpreting this line from the *Laozi*, “*Zhi* but not unbridled/ bright but not shining” (直而不肆, 光而不耀):

所謂直者, 義必公正, 心不偏黨也。

What we mean by *zhi* is that, in doing one’s duty, to act always impartially and honestly, with an unbiased heart.<sup>6</sup>

<sup>3</sup> *Analects*, 15.6. My translation follows Arthur Waley, *The Analects of Confucius* (New York: Vintage Books, 1938), 194.

<sup>4</sup> *Guodian Chumu zhujian* 郭店楚墓竹簡, ed. Jingmen shi bowuguan 荆門市博物館 (Beijing: Wenwu chubanshe, 1998), strip (*Wuxing*) no. 34, p. 150. The *Wuxing pian* 五行篇 (Five Conducts) was excavated from Shayang 沙洋county, Hubei province in 1993 along with other texts. For a detailed study of the *Wuxing*, see Ikeda Tomohisa 池田知久, “Kakuten Sokan ‘Gogyō’ no kenkyū” 郭店楚簡〈五行〉の研究, *Guodian Chujian guoji xueshu yantaohui lunwenji* 郭店楚簡国际学术研讨会论文集 (Wuhan: Hubei renmin chubanshe, 2000), 210-239; cf. Mark Csikszentmihalyi, *Material Virtue: Ethics and the Body in Early China* (Leiden: Brill, 2004).

<sup>5</sup> *Xunzi xinzhu* 荀子新注 (Beijing: Zhonghua shuju, 1979), 2.17. My translation follows John Knoblock, *Xunzi: A Translation and Study of the Complete Works* (Stanford: Stanford University Press, 1988), vol. 2, 153.

<sup>6</sup> *Han Feizi yizhu* 韓非子譯注, annot. Zhang Jue 張覺 (Shanghai: Shanghai guji, 2007), 6.200.

Han Fei's definition of *zhi*, while maintaining the emphasis on straightness, inserts the notion of an unbiased heart, which may imply intentionality.

It is relevant that the notion of *zhi*, emphasizing honest conduct without biased intention, underlies the Qin and Han penal laws. Making biased and therefore dishonest judgments is defined as the crime of “not straight” (*buzhi*), in the Shuihudi manuscript entitled “Answers to Questions concerning Laws” (Falü dawen 法律答問, strip no. 463), which poses the question: “In pronouncing judgments in criminal cases, what is meant by *buzhi*?” (*lun yu he wei buzhi* 論獄何謂不直) To which, the author of the text answers:

罪當重而端輕之, 當輕而端重之, 是謂“不直。”

When a crime warrants a heavy [punishment], but the judge purposely makes it lighter, or when it warrants a light [punishment], but the judge purposely makes it heavier, that is the meaning of *buzhi* [“not straight,” meaning “biased” and “unfair”].<sup>7</sup>

*Buzhi* was therefore defined as “purposely” (i.e., intentionally, *duan* 端) handing down judgments in which the punishment is not appropriate to the crime. It is important to note that the Qin laws clearly distinguish *buzhi* from “unintentionally making a mistake in judging or punishing a crime” (*shixing* 失刑).

Another Shuihudi strip in the same “Falü dawen” section (strip no. 148) explains the difference between *buzhi* and *shixing* through a hypothetical case:

士五(伍)甲, 以得時直(值)臧(贓), 臧(贓)直(值)過六百六十, 吏弗直(值), 其獄鞫乃直(值)臧(贓), 臧(贓)直(值)百一十, 以論耐, 問甲及吏可(何)論? 甲當黥為城旦; 吏為失刑罪, 或端為, 為不直。

Let us say that the *shiwu* 士伍 A [commits a theft]. At the moment of capture, the criminal profit is to be evaluated. What if the value of the illegal profit is more than 660 cash, and the officials do not evaluate it until the case is tried, or what if the value of the profit to the criminal is 110 cash, and [A] is then sentenced to having his beard shaved off? Question: How are A, as well as the officials, to be sentenced?” “A warrants tattooing and enslavement as a wall-builder. As for the officials, it may be [a case of] making a mistake in punishing a crime. But if they did it on purpose, it is *buzhi*.”<sup>8</sup>

Because the officials significantly undervalued the illegal profits, they gave the thief an overly lenient punishment. In this case, the issue is how to rectify an earlier error. In this hypothetical situation, the prescription is that the thief should be given the heavier punishment he deserves, and that the intentions of the presiding judges should be assessed by their superiors. If the superiors determine that the presiding officials intentionally underestimated the value of the stolen items, those officials were liable to be charged with the crime of *buzhi*. Alternatively, the superiors could determine that the presiding officials simply committed an unintentional mistake (*shixing* 失刑). The importance of intention, as attested by the legal distinction made between *buzhi* and *shixing*, makes it abundantly clear that *buzhi* describes intentionally unfair or biased judgments.

<sup>7</sup> SHD strip (Falü dawen) no. 93, p. 115; cf. RCL, 144. My translation follows Hulsewé (slightly modified).

<sup>8</sup> SHD strip (Falü dawen) no. 148, p. 127; cf. RCL, 130. My translation follows Hulsewé (slightly modified).

The Qin and Han states considered “not straight” acts committed by its bureaucrats to be serious crimes, and “not straight” judges were punished accordingly. For example, the *Shiji* says:

三十四年, 適治獄吏不直者, 築長城及南越地.

In the thirty-fourth year [of the First Emperor of Qin, 213 B.C.], the emperor ordered the officials who had been *buzhi* when trying criminal cases to [be sent to] build the Great Wall or exiled to Nanyue.<sup>9</sup>

Similarly, the *ZJS* strip (Statutes) no. 93 states that “not straight” judgments are prohibited and that those who commit such violations are to be seriously punished:

鞠獄故縱, 不直, 及診, 報, 辟故弗窮審者, 死罪, 斬左止 (趾) 為城旦, 它各以其罪論之.

In trying a penal case, [if the judges] deliberately release a criminal, if they are *buzhi*, if they purposely do not make the facts clear when investigating, reporting, or hearing the case, or if the case concerns a crime that merits the death penalty, the judges shall have their left toes cut off and be enslaved as *chengdan* [wall-builders]. In other cases, each will be sentenced according to the seriousness of the crime they handed down.<sup>10</sup>

In a related passage, the character *zhi* (“straight”) is used when assessing the propriety of testifying against one’s own father in a criminal proceeding. The *Analects* records a famous debate between Confucius and the Duke of She 葉.

葉公語孔子曰: 吾黨有直躬者, 其父攘羊, 而子證之. 孔子曰: 吾黨之直者異於是. 父為子隱, 子為父隱, 直在其中也.

The Duke of She informed Confucius, saying, “Among us here there are those who may be styled *zhi* [upstanding] in their conduct. If their fathers have stolen goats, these sons will bear witness to the fact.” Confucius said, “Among us, in our part of the country, those who are *zhi* [upright] are different from this. The father conceals the misconduct of the son, and the son conceals the misconduct of the father. *Zhi* is to be found in this.”<sup>11</sup>

In this exchange, the Duke of She praised as *zhi* the conduct of his state’s subjects who were so principled that they were even willing to testify against their fathers who had committed theft. Confucius, however, disputed the alleged association between principled behavior and reporting one’s parents to the authorities. He presented an alternative interpretation of *zhi*, in which fathers and sons would never report each other to the authorities lest the all-important bond binding father and son be broken. At root, the Duke of She and Confucius disagree over which relationship, ruler-subject or father-child, held greater authority in the sociopolitical order; their disagreement addressed the very definition of *zhi*.

Similar stories of stealing goats occur in the *Han Feizi* and the *Lüshi chunqiu* 呂氏春秋 (The Annals of Lü Buwei, comp. 239 B.C.). The *Han Feizi* says:

<sup>9</sup> *Shiji*, 6. 253.

<sup>10</sup> *ZJS* (Statutes) strip no. 93, p. 22.

<sup>11</sup> *Analects*, 13.18. My translation follows Legge, vol. 1, 270; cf. Waley, 175.

楚之有直躬，其父竊羊，而謁之吏。令君曰：殺之。以為直於君而曲於父，報而罪之。以是觀之，夫君之直臣，父之暴子也。

In Chu there was one whom we deem to be *zhi*. When his father stole a goat, he reported him to the officials. The magistrate said, “Execute him [the son]!” [The magistrate] thought the son was *zhi* to the ruler but *qu* [crooked] with respect to his father, so [the magistrate] reported his crime and charged the son. For this we observe that the *zhi* subject of a ruler may be a vicious son of his father.<sup>12</sup>

In this story from the *Han Feizi*, the magistrate decided that it was so important to promote the father-son bond that he ordered the execution of the son who had reported his father. By contrast, a story from the *Lüshi chunqiu* portrays a son as skillfully managing his conflicting loyalties, for which he earns a good reputation, even though Confucius scorns him as someone angling for fame. The *Lüshi chunqiu* says:

楚有直躬者，其父竊羊而謁之上，上執而將誅之。直躬者請代之。

將誅矣，告吏曰：父竊羊而謁之，不亦信乎？父誅而代之，不亦孝乎？信且孝而誅之，國將有不誅者乎？

荆王聞之，乃不誅也。孔子聞之曰：異哉直躬之為信也，一父而載取名焉。故直躬之信，不若無信。

In Chu there was one whom we might call *zhi*. When his father stole a goat, he reported him to the authorities. The authorities arrested the thief and were about to execute him when his honest son requested that he be allowed to be executed in his father’s place.

When the son was on the point of being executed, he announced to the officer: “When my father stole a goat, I reported him. Is this not the true meaning of being honest? When my father was about to be executed, I offered to take his place. Is this not the true meaning of being filial? If you execute one who is both honest and filial, then whom will the state not execute?”<sup>13</sup>

When the King of Chu learned of this, he decided not to execute the man. But when Confucius heard of this, he said: “Remarkable, indeed, is the person who regards his own *zhi* as honesty! It was merely at the expense of his father’s [reputation] that he was able to gain a reputation. Therefore, it would be far better to lack honesty altogether than to practice the so-called ‘honesty’ of this type of *zhi*.”

These stories from the *Han Feizi* and *Lüshi chunqiu* both reflect an ongoing tension between loyalty to one’s ruler and the laws of the state versus loyalty to one’s father as head of the household and family, the same tension displayed in the debate between Confucius and the Duke of She. Yet, despite some minor variations, the term *zhi*, in both cases, is used to address the issue of ideal conduct in the courts and ultimately refers to a sense of being “straight as an arrow” in assessing the character of a person’s conduct.

In a third sense, *zhi* refers to “due requital,” the basis for a primitive sense of justice. When someone asked Confucius what he thought of the idea that one uses gracious acts or favor (*de* 德) to repay injury (*yuan* 怨), Confucius answered: “With what then will you

<sup>12</sup>*Han Feizi yizhu*, 19.685-686.

<sup>13</sup>*Lüshi chunqiu yizhu* 呂氏春秋譯注, ed. Zhang Shuangdi 張雙棣 (Beijing: Beijing daxue chubanshe, 2000), 11.298; cf. John Knoblock and Jeffrey Riegel, *The Annals of Lü Buwei* (Stanford: Stanford University Press, 2000), 251-252. My translation follows Knoblock and Riegel (slightly modified).



requite favor? Requite injury with justice (*zhi*), and requite favor with favor” (何以報德? 以直報怨, 以德報德).<sup>14</sup> Kong Anguo glossed this passage as, “This *de* 德 refers to the *de* of obligation and favor (德, 恩惠之德) “, but he neglected to explain what *zhi* referred to, perhaps because he considered it obvious.<sup>15</sup> Zhu Xi 朱熹 (1130-1200) explained it this way:

與其所怨者, 愛憎取捨, 一以至公而無私, 所謂直也。

Concerning those people whom he holds a grudge against, in the matters of loving and hating, choosing or rejecting, he shall treat them with perfect impartiality, with no selfishness – that we call *zhi*.<sup>16</sup>

This interpretation of *zhi* emphasizes fairness or unbiased attitude in the treatment of others. However, in the original *Analects* context, *zhi* refers to proper punishment or a demand for due compensation, not merely to conduct that causes injury or reciprocates favor. Rendering the term *zhi* as “due requital” comes closest to its core meaning. This sense of *zhi* can also be found in a passage from the *Hanshu*:

太原上黨又多晉公族子孫, 以詐力相傾, 矜夸功名, 報仇過直。

In addition, in Taiyuan and Shangdang there are many descendants of the Jin ruling line. They strive to outdo each other by deceit and force; they boast of their achievements and fame; they seek revenge in ways that exceed what due requital requires (*zhi*).<sup>17</sup>

Yan Shigu glossed this passage as: “*Zhi* 直 is interchangeable with *dang* 當, meaning ‘what is warranted’” (*zhi yi dang ye* 直亦當也). Hulsewé explained why he used the word “warranted” to translate *dang*, when used as a verb:

I have recently been told that my rendering of *tang* [*dang*] by “warranted; warranting,” is contrary to correct English usage. However, I have not corrected this. Perhaps this unidiomatic expression will remind the reader that *tang* basically means “to be equivalent; to outweigh; to counterbalance,” in the sense that the negative effect of the crime is neutralized by the punishment. In theory, it is the crime which is *tang* and not the criminal; this meaning would not come out clearly if *tang* had been rendered as “to deserve; to merit,” both words with moral overtones which are wholly absent in the Chinese term.<sup>18</sup>

Hulsewé’s explanation of how he rendered *dang* can serve as a model for how to understand *zhi* when used in the sense of “due requital.”

A fourth and related sense of *zhi* depends on its contrast with *qu*, in which *zhi* describes one’s strength and *qu* describes one’s weakness. The *Zuozhuan* contains a story about the famous battle at Chengpu 城濮, fought between Jin and Chu in 632 B.C.; in that battle, the Jin general Zifan ordered his army to retreat when his army was attacked by the Chu general. When questioned by his aides about his decision, Zifan replied:

<sup>14</sup> *Analects*, 14.36. My translation follows Legge, vol. 1, 288 (slightly modified).

<sup>15</sup> *Lunyu jishi* 論語集釋, ed. Cheng Shude 程樹德 (Taipei: Yiwen yinshuguan, 1965), vol. 2, 30.884.

<sup>16</sup> *Ibid.*, 30.885.

<sup>17</sup> *Hanshu*, 28b.1656.

<sup>18</sup> *RCL*, 5. Hulsewé used *tang* in the original text, following Wade-Giles Romanization.

師直為壯，曲為老，豈在久矣。微楚之惠不及此，退三舍辟之所以報也。背惠食言，以亢其讎，我曲楚直，其眾素飽，不可謂老。

When an army is *zhi*, it is strong; by contrast, if an army is *qu*, it is weak. [The strength of an army] certainly does not depend on the length of time [in the battle field]. But for the kindness of Chu, we should not be in our present circumstances, and this retreat of three days' march is to repay that kindness. Were our army to show ingratitude for that and eat its words, confronting Chu as its enemy in battle, we should be *qu* and Chu would be *zhi*. Its soldiers have high morale, and they cannot be pronounced old [and weary].<sup>19</sup>

The background for this story is that Chong'er 重耳, a noble scion of the Jin line who eventually became Duke Wen 文 of Jin (r. 636-628 B.C.), once took refuge in Chu to escape political strife in Jin. In Chu, he was well received by his host, King Cheng 成 of Chu (r. 674-626 B.C.). The future duke promised that if the armies of Jin and Chu were ever to meet on the battlefield, he would order his army to retreat by the distance of a three-day march (*sanshe* 三舍) in order to repay the king's kindness.<sup>20</sup> The passage cited above exemplifies the *Zuozhuan's* typical emphasis on the value of due recompense (*bao* 報), as David Schaberg has noted.<sup>21</sup>

However, what makes this passage from the *Zuozhuan* stand out is the pairing of the words, *qu* and *zhi*, in the context of a confrontation between two parties. By this formulation, *qu* would cause a party's weakness (*lao* 老), which in turn leads to defeat in battle, and, by contrast, *zhi* results in the second party's strength (*zhuang* 壯), promoting victory. Chu was deemed to be *zhi* because Duke Wen of Jin was willing to acknowledge a kindness received from Chu, even if this meant retreating by the distance required for a three days' march. This gloss for *zhi* allows for drawing analogies in the legal realm, with promises analogous to debts and expectations of satisfaction comparable to a creditor's claim.<sup>22</sup> While the arenas of commerce and war are clearly different, the marketplace is often characterized as a battlefield. As we have just seen, *zhi* can and has been used in both contexts.

## B) *Zhi* as a Straight Account of the Facts (True Facts) in Civil Disputes

The *Yantielun* 鹽鐵論 (Discourses on Salt and Iron, comp. ca. 70 B.C.) contains a passage in which the counselor (*dafu* 大夫) and the Wise and Good (*xianliang* 賢良) debated the consequences of the elite's propensity to indulge in luxuries.<sup>23</sup> The counselor defended the elite's style of living, his opponent harshly criticized it. To demonstrate the extravagance and greed of the powerful elites, the latter referred to a well-known case:

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<sup>19</sup> *Zuozhuan zhushu* 左傳注疏, Lord Xi 28 僖, 16.272-273. All references to the *Zuozhuan* cite the *Shisanjing zhushu* 十三經注疏 (Ruan Yuan 阮元 1815 ed.; rpt., Taipei: Yiwen chubanshe, 1965). My translation follows Legge, vol. 5, 209 (slightly modified).

<sup>20</sup> This story is in the *Zuozhuan*, Lord Xi 23, 15.252. Cf. David Schaberg, *A Patterned Past: Form and Thought in Early Chinese Historiography* (Cambridge and London: Harvard University Press, 2001), 216-217.

<sup>21</sup> Schaberg, *A Patterned Past*, 191-221.

<sup>22</sup> It is defined as "a claim that a creditor has against a debtor." See *Black's Law Dictionary*, 205.

<sup>23</sup> *Yantielun jiaozhu* 鹽鐵論校注, annot. Wang Liqi 王利器 (Beijing: Zhonghua shuju, 1992), 6.405-410. The *Yantielun* compiled by Huan Kuan 桓寬 (81 B.C.- A.D. 9), dealt with debates on state policies such as government monopoly, laissez faire, etc., between ministers (*dafu* 大夫), who are sometimes identified with Sang Hongyang 桑弘羊, and Sang's critics, who are described as the Literati (*wenxue* 文學) or Wise and Good (*xianliang* 賢良). See Michael Loewe, *Crisis and Conflict in Han China* (London: George Allen and Unwin Limited, 1974).

故武安丞相訟園田，爭曲直人主之前。

Therefore, Marquis Wu'an and the chancellor [Dou Ying 竇嬰] had a dispute over orchards and cultivated fields. They fought over the twisted and straight account of the facts (i.e., who was telling the truth) in front of the ruler.<sup>24</sup>

This case refers to a real estate dispute brought before Han Wudi (r. 141-87 B.C.) between chancellor Tian Fen 田蚡 (d. 131 B.C.), Marquis of Wu'an 武安, and Dou Ying 竇嬰 (d. 131 B.C.), Marquis of Weiqi 魏其, who had served as a chancellor before Tian Fen.<sup>25</sup> In their dispute, each questioned the other's account of the facts (*qu* 曲 and *zhi* 直).

This particular usage of *qu* and *zhi* is consistent with its use in a passage from the judge Lu Gong's 魯恭 (32-112 A.D.) biography in the *Dongguan Hanji* 東觀漢記 (Records of the Han Imperial Library, comp. ca. A.D.196),

建初中...宿訟許伯等爭陂澤田，積年州郡不決。恭平理曲直，各退自相責讓。

In the first year of the Jianchu period (A.D. 76), there was a long-standing civil dispute in which Xu Bo and some others were fighting over paddy fields. This case could not be resolved by the provincial or commandery [courts] for several years. [Lu] Gong was able to fairly discern the distorted account of the facts [*qu*] from the straight account of the facts [*zhi*], so the disputants all yielded, criticized themselves, and yielded in the dispute.<sup>26</sup>

The key to resolving this difficult land dispute was in distinguishing *qu* and *zhi*.

But why were *qu* and *zhi* so important? We find a possible answer in the works of the famous thinker Wang Chong 王充 (A.D. 27-ca.100). In his *Lunheng* 論衡 (Doctrines Evaluated, comp. ca. A.D. 90), Wang Chong offered his view on the antonyms *qu* and *zhi*, as applied to lawsuits, by associating them with another pair of antonyms, right (*shi* 是) and wrong (*fei* 非).

鄉決疑訟，獄定嫌罪，是非不決，曲直不立，世人必謂鄉獄之吏才不任職。

The district [officials] judge confusing *song* [disputes], while the *yu* [jailors] determine suspected crimes. If right and wrong cannot be determined, and the *qu* and *zhi* [distorted account of the facts and straight account of the facts] cannot be established, people of the time will definitely say that the abilities of the district officials and the abilities of the jail officials are not adequate to their duties.<sup>27</sup>

If we pay attention to the verbs that precede the respective pairs of antonyms, *zhi* and *qu*, and *shi* and *fei* (right and wrong), we find that the pair *zhi* and *qu* take the verb “to establish” (*li* 立), whereas *shi* and *fei* use the verb “to settle or judge” (*jue* 決). Therefore, in Wang Chong's view, judicial officials were responsible for establishing facts (*zhi* or *qu*) in a dispute and rendering judgment based on the circumstances. By this construction, a “straight account of the facts” (*zhi*) and right (*shi*) are set in opposition to “distorted account of the facts” (*qu*) and wrong (*fei*).

<sup>24</sup> Ibid., 6.401.

<sup>25</sup> This case is recorded in the *Shiji*, 107.2849; cf. Wang Liqi's footnote 11 on page 403 in the *Yantielun jiaozhu*.

<sup>26</sup> *Dongguan Hanji* 東觀漢記 (Beijing: Zhonghua shuju, 1985), 19.174.

<sup>27</sup> We previously encountered this passage in Chapter One, 41. As I argued there, jailers belonged to the county court. There were no jails (*yu*) at the district level.

In another passage, Wang Chong expressed a similar opinion with greater clarity.

一堂之上, 必有論<sup>28</sup>者; 一鄉之中, 必有訟者. 訟必有曲直, 論必有是非. 非而曲者為負, 是而直者為勝.

In a court, there are sure to be judges. Within [even] a single village, there are sure to be disputants. In any dispute, there are sure to be some distorted accounts of the facts (*qu*) and some straight accounts of the facts (*zhi*). In any judgment, there are sure to be some right and some wrong points. Those who are wrong and who provide a distorted account of the facts (*qu*) are the losing parties, and those who are right and provide a straight account of the facts (*zhi*) should win.<sup>29</sup>

In analyzing this passage, we need to point out two additional matters. First, if Wang Chong strictly used *song* to refer to legal cases, as he seems to do in this passage, he was probably referring to civil disputes, since he refers to winners and losers in the case. But what if Wang Chong was referring to both civil and criminal cases? We know that *qu* and *zhi* are used in the context of the discussions of disputes (“In any dispute, there are sure to be some distorted accounts of the facts and some straight accounts of the facts [*qu...zhi*].”) Yet, as we shall see in the following example, these words are employed as adjectives to characterize the disputants who made statements before the court. The usage of “right” and “wrong,” in parallel with “distorted account of the facts” and “straight account of the facts” seen in the earlier passage occurs here as well.

Elaborating on Wang Chong’s generalization, we see that in any suit, there are two groups: the officers who draw up the case summaries (*lunzhe* 論者) and the disputants (the defendant and the claimant). Drawing up the case requires sorting out *zhi* (a straight account of the facts) and *qu* (a distorted account of the facts), whereas a judgment involves a decision over right and wrong based on those facts. A dispute may be characterized as a conflict between *zhi* and *qu*, while a judgment begins with assessing the veracity of the disputants’ presentation of the facts and ends with a decision on what is right and what is wrong based on that determination of fact. For Wang Chong, *zhi* was essential to winning a dispute since the purpose of all legal proceedings, civil and criminal, was to establish facts in order to pass down fair and impartial judgments. Ideally, a good judge recognizes the straight account of the facts (*zhi*) and rewards with due restitution the party who provided that straight account. Of course, in the real, less than ideal world, the first obligation of the judge is to determine which disputants’ version of the facts was “straighter,” i.e., “more *zhi*” than the other’s. Fair and impartial judgment is, then as it is now, a goal, not a given.

Like Wang Chong, Zheng Xuan stated that *zhi* referred to straight accounts of the facts, and Wei Zhao 韋昭 (204-273) stated that *qu* referred to distorted accounts of the facts; departing from Wang Chong, both Zheng Xuan and Wei Zhao limited the application of *qu* or *zhi* to the realm of civil disputes. Specifically, Zheng’s commentary concerned the following line from the *Zhouli*:

以兩造禁人訟, 入束矢於朝, 然後聽之.

Use [the requirement that there be] two visits to court to restrict suits among the people. Before a suit is heard, the disputants should present arrow bundles to the court.<sup>30</sup>

<sup>28</sup> *Lun* 論, in a legal context, means “to judge, to decide, to sentence.” See *RHL*, 80; cf. *RCL*, 186, n. 5.

<sup>29</sup> Wang Chong 王充, *Lunheng* 論衡 (Shanghai: Shanghai guji chubanshe, 1990), 3.35a.

<sup>30</sup> *Zhouli zhushu*, 34.517.

Zheng Xuan interpreted this as follows:

訟, 謂以財貨相告者. 造, 至也. 使訟者兩至, 既兩至, 使入束矢乃治之也. 不至, 不入束矢, 則是自服不直也. 必入矢者, 取其直也. 《詩》曰其直如矢.

*Song* 訟 refers to “suing others over property. “*Zao* 造 means “to come.” [In a civil dispute], order the disputing parties to both come [to the court]. After they have both come [to the court], order each of them to present a bundle of arrows, and then the judge will take their case. Failure either to appear in court or to present a bundle of arrows should be tantamount to admission that one lacks a straight account of the facts. The disputants must present their arrows to symbolize the straightness of their account of the facts. As the *Odes* says, “It is to be as straight as an arrow.”<sup>31</sup>

Zheng Xuan commented on the *Zhouli*'s prescription to present a bundle of arrows prior to a hearing as part of the judicial ritual. Two features are worth noting in Zheng's interpretation. First, he clearly places the ritual of presenting arrows in the context of civil litigation, not merely because he pointed out that *song* refers to disputes over property,<sup>32</sup> but also because he characterizes the parties as disputants and uses the language of “summoning” and “default judgment” for failure to appear, the language of civil law. In criminal cases, the accused would be arrested and brought to the court. In theory, at least, it should be impossible for him to avoid an appearance in court.<sup>33</sup> Second, Zheng Xuan asserts that failure to present a bundle of arrows constitutes, in effect, an admission of a lack of factual accuracy in one's account (*buzhi*), insofar as the arrows symbolized the straightness of one's account of the facts (*zhi*). Any party providing a distorted account of the facts should lose his civil suit, just as a straight account of the facts should result in a positive outcome for the claimant or defendant in a civil suit.

One may ask whether the compound *buzhi* here could simply mean “dishonest” or “deceitful.” If so, one might argue that *buzhi* merely functions as an ordinary adjective, rather than a specialized legal term. In other words, are *zhi* and *buzhi* prescriptive terms, idealized goals, and therefore terms of jurisprudence, or are they merely descriptive, acknowledgement of degrees of credibility in conflicting accounts? Two reasons suggest that *zhi* and *buzhi* can and do function in this context as legal terms. First, the legal ritual that Zheng Xuan described endows *zhi* and *buzhi* with strong legal overtones. Second, *buzhi* is the object of the verb *fu* 服 (admit or confess), which is also a strong legal term that appears frequently in Qin and Han case reports.<sup>34</sup> Thus, by tradition and practice, the chief elements of all jurisprudence, *zhi* and *buzhi* are used prescriptively rather than descriptively.

Since the *Zhouli* is mostly a prescriptive text written about Western Zhou, we cannot know whether there was any ritual in Qin or Han in which arrows were presented. An alternative explanation concerning the presentation of arrow bundles was proposed by Chen Huan 陳煥 (1786-1863) and Wang Yuansun 汪遠孫 (1789-1834). Both scholars argued that the bundle of arrows represented a deposit made by the parties before asking for a judgment.

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<sup>31</sup> Ibid.

<sup>32</sup> I remind my readers that Zheng defined *song* as referring to disputes over property, in contrast to *yu*, disputes over crimes. See my discussion in Chapter One, 35-36.

<sup>33</sup> See my summary of Momiyama's study on this issue on pp. 24-25 in Chapter One.

<sup>34</sup> This term *fu* (admit or confess) occurs in both civil cases and criminal cases. Hulswé discussed how this term *fu* was used in criminal cases: “In the statement made during trial, the accused had ‘to submit,’ *fu*, i.e., he had to admit the truth of the accusation.” For detailed discussions, see *RHL*, 77.

The losing party would then be fined one bundle of arrows.<sup>35</sup> However, we have already seen that Zheng Xuan, at least, linked the presentation of arrows as integral to the core function of civil litigation, which was to reveal which party provided a straight account of the facts (*zhi*).

Wei Zhao expressed a comparable opinion in interpreting a similar account in the *Guoyu* 國語 (comp. 4<sup>th</sup> century B.C.), especially concerning this phrase:

坐成以束矢。

When the authorities agree to take the case, [the disputants] present arrow bundles [to the court].<sup>36</sup>

Wei Zhao interpreted this as follows:

坐成，獄訟之坐已成也。十二矢為束。訟者坐成，以束矢入於朝，乃聽其訟。兩人訟，一人入矢，一人不入則曲，曲則服，入兩矢乃治之。矢，取往而不反也。周禮“以兩造禁人訟，入束矢於朝，然後聽之”也。

*Zuocheng* 坐成 means that the authorities agree to take a case, criminal or civil. Twelve arrows make up a bundle. When the authorities agree to take a case, the disputants each present a bundle of arrows to the court, and then the court hears their case. When the two parties in the dispute engage in a civil dispute, if one disputant presents a bundle of arrows while the other person fails to do so, then the former party is deemed to be *qu*. The person who is deemed to be *qu* then has to admit his distorted account of the facts. If two [bundles] of arrow are presented, then the case will be heard. The “arrow” signifies “going but not returning” [i.e., that one will not retract his words]. As the *Zhouli* says, “Use two visits to court to restrict suits among the people. Before a suit is heard, the disputants should present arrow bundles to the court.”<sup>37</sup>

In interpreting the term, *zuocheng* 坐成, Wei Zhao specified that the term was applicable in both *yu* and *song*, which shows his awareness of the distinction between *yu* and *song*.<sup>38</sup> Clearly, Wei Zhao was mindful of the line in the *Zhouli* annotated by Zheng Xuan, and his interpretation seems to adopt Zheng Xuan’s interpretation in the *Zhouli*, with the difference that Wei Zhao also introduces the term *qu*. Wei Zhao stated that not presenting an arrow bundle was equivalent to admitting one’s distorted account of the facts (*qu*). In any case, according to Zheng Xuan and Wei Zhao, *zhi* simply referred to the straight account of the facts in a civil dispute, while *qu* referred to a distorted account of the facts. The two commentators’ understanding of *zhi* and *qu* confirms the observation we have already made concerning the use of these terms by Wang Chong.<sup>39</sup>

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<sup>35</sup> This interpretation is found in Chen Huan’s and Wang Yuansun’s annotations to a similar prescription of presenting arrow bundles in the *Guoyu*. See *Guoyu jijie* 國語集解, ed. Xu Yuanhao 徐元浩 (Beijing: Zhonghua shuju, 2002), 6.230.

<sup>36</sup> *Guoyu jijie*, 6. 230. The date of the compilation of this text is controversial. According to the recent study of David Schaberg, the core of the *Guoyu* and the *Zuozhuan* were compiled in the 4<sup>th</sup> century B.C., though both texts contain many later interpolations. See Schaberg, *A Patterned Past*, 8.

<sup>37</sup> *Guoyu jijie*, 6.230.

<sup>38</sup> This suggests that *zuocheng* 坐成 as a legal term applied to both civil and criminal cases while the ritual of presenting arrow bundles applied to civil cases (*song*) only. The ritual, in the depictions of Zheng Xuan and Wei Zhao, implied two equal parties contesting each other.

<sup>39</sup> We should ask: is it possible that the arrow bundles were intended to demonstrate disputants’ good faith? This is possible in theory. However, that was not how Zheng Xuan and Wei Zhao interpreted the ritual, and our

A slightly different way of looking at these terms is to ask whether the words *zhi* and *qu*, in the context of civil disputes, are ordinary words or technical terms. I think the latter is the case. First, as observed earlier, in the *Yantielun*, *qu* and *zhi* refer to accounts of facts only, without any moral connotations, strongly suggesting that they were legal terms. Second, in Zheng Xuan's description of arrow bundles, *buzhi* and *zhi* were clearly used as legal terms. Third, one more piece of evidence to support the idea that these are legal terms is provided by Wei Zhao's annotation on a land dispute case recounted in the *Guoyu*, even though the use of *buzhi* is very puzzling.

邢侯與雍子爭田，雍子納其女于叔魚以求直。及斷獄<sup>40</sup>之日，叔魚抑邢侯，邢侯殺叔魚與雍子于朝。

Marquis of Xing and Yongzi had a dispute over land. Yongzi presented his daughter to [the judge] Shuyu to seek *zhi*. On the day of trial, Shuyu put down [the evidence of?] Marquis Xing. Marquis Xing then killed Shuyu and Yongzi in court.<sup>41</sup>

This dispute presumably occurred sometime in the mid-sixth century B.C. in Jin. Wei Zhao annotated this line, “Yongzi presented his daughter to [the judge] Shuyu to seek *zhi*,” with the following phrase: “As he had no intention to give a straight account of the facts, [Yongzi] hence resorted to bribery to establish his [distorted] version of the facts as ‘straight’” (不直，故賄以求直). As all our evidence above implies, to achieve the ideal outcome of a fair and impartial judgment in a civil case, “to establish facts” was sufficient to establish one's claims and realize the goal of fairness and impartiality.

In reality, one can resort to bribery to “establish facts,” but ideally, all facts should be established according to legal principles, those principles being *zhi* and *buzhi*, *zhi* and *qu*. This ideal is reflected in Chen Shi's stories, which drew us to this inquiry into *zhi* in the first place.

吏慮有訟者，自欲禁之。寔曰：訟以求直，禁之理將何申？其勿所拘。

There was a certain official who was worried about civil disputes. He reported to Chen Shi [his concerns] and wanted to prohibit them. Chen Shi replied: “Civil disputes are meant to establish facts. If I prohibit them, to what can *li* 理 be applied? Do not impose any restraints [on civil disputes].”<sup>42</sup>

The *song* in the passage most likely refers to civil disputes, not only because *song*, as a legal term can mean “civil disputes” but because elements of the story indicate that the topic was civil disputes. Since the lower-ranking officials suggested that Chen Shi prohibited *song*, *song* here could not have referred to criminal cases. Criminal cases involved actions that disturbed public order and threatened the stability of society. Officials were bound by duty to take action against them. Hearing criminal cases was the primary duty of a county court, as prescribed in the statutes. *ZJS* strip (Statutes) no. 116:

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overall analysis of civil litigations in this dissertation shows that good faith was not a concern. We do not find good faith to a significant concern in any of the civil cases that we have studied.

<sup>40</sup> The passage uses the term *duanyu* 斷獄 to indicate the hearing of the land dispute. This supports the claim that the terminological distinction between *song* (civil dispute) vs. *yu* (criminal dispute) might not have existed in pre-Han period, as Momiyama argued. This dissertation agrees.

<sup>41</sup> *Guoyu jijie*, 15.443. Chronologically, the *Guoyu* is earlier than the *Yantielun*. I discuss the *Guoyu* passage after the *Yantielun* passage, even though the *Guoyu* passage is earlier, since my focus in the *Guoyu* passage is on Wei Zhao's annotations, which date later than the *Yantielun* passage.

<sup>42</sup> *Hou Hanshu*, 62.2066. We briefly mentioned this story in Chapter Two.

乞鞫者各辞在所县道，县道官令、长、丞谨听，书其乞鞫，上狱属所二千石官，二千石官令都吏覆之。

Those who ask for their cases to be reviewed should all report to [the officials] in the county or march where they reside. The county or march magistrate and deputy magistrates [shall] carefully listen to [what they say], note it down, and submit their statements to the official whose salary is 2,000 *shi* and has responsibilities over the criminal case. The official whose salary is 2,000 *shi* [shall] order his assistants to review these cases.<sup>43</sup>

While this passage deals with the procedural matter of how officials in the county courts or their jurisdictional equivalents are to handle appeals, the use of the term *yu* 狱 implies that these procedures apply to the management of criminal cases. As the passage cited above demonstrates, local officials were duty-bound to hear criminal cases; hearing such cases was not left to the official's discretion. By contrast, the subject of Chen Shi's story is being asked to decline to hear cases, and thus, those cases must be cases involving civil disputes.

The meaning of *li* 理 in the passage cited above is a bit obscure. A.C. Graham rendered *li* as “pattern” in discussing its usage in the *Laozi* 老子.<sup>44</sup> But the legal expert Peerenboom preferred to render *li* as “principle,” drawing on his studies of *li* in the excavated silk manuscripts from Mawangdui, observing that “*Li* are underlying patterns inherent in nature; they are the principles that structure the natural order.”<sup>45</sup> In our context, we can perhaps render *li* as “legal principle.”

Contrary to much mischaracterizations of jurisprudence in early China, the term “legal principle” was clearly used in early China. When annotating this phrase “one must investigate and must apply laws” (惟察惟法), from the “Marquis Lü on Penal Laws” (Lüxing 呂刑) chapter of *The Book of Documents*, commentator Kong Anguo said:

惟當清察罪人之辭，附以法理。

One must thoroughly investigate the statements of the culprits and attach [relevant] legal principles to them.<sup>46</sup>

The phrase *fali* (legal principles) also occurs in Zhang Yu's 張禹 (d. A.D. 113) biography in the *Dongguan Hanji* and Wang Huan's 王渙 (d. A.D. 105) biography in the *Hou Hanshu*. Zhang Yu was praised for understanding *fali* well, while Wang Huan was praised for being able to resolve difficult cases according to *fali* (legal principles).<sup>47</sup> Thus we have reason to render *li* as “legal principle” in the passage from Chen Shi. As such, Chen Shi was describing an idealized civil procedure: given that establishing facts was the goal of civil disputes, the best way for a disputant to press his claims was to appeal to legal principles.

Chen Shi's assertion is consistent with this passage from the *Daofa* 道法 silk manuscript from Mawangdui,

道生法。法者，引得失以繩，而明曲直者。故執道者，生法而弗敢犯也。法立而弗

<sup>43</sup> ZJS strip (Statutes) no. 116, p. 24.

<sup>44</sup> A. C. Graham, *Disputers of the Tao* (La Salle: Open Court, 1989), 286.

<sup>45</sup> R. P. Peerenboom, *Law and Morality in Ancient China: The Silk Manuscripts of Huang-Lao* (Albany: State University of New York Press, 1993), 46-47.

<sup>46</sup> *Shangshu zhushu*, 19. 302. *Fu* 附 is rendered as “to join, to add, to attach,” by Hulsewe. See *RHL*, 389, n. 200.

<sup>47</sup> *Dongguan Hanji*, 11.90; *Hou Hanshu*, 66.2469.



敢廢也。

The Way gives birth to the laws. The laws are what draw the line between gain and loss and clarify distorted versus straight accounts of the facts. Therefore the one who grasps the Way makes the laws but dares not break it. After the laws are established, he dares not abolish them.<sup>48</sup>

This passage, in addition to other passages in the *Daofa*, triggered a challenge from Peerenboom to Needham's widely accepted theory that China produced no theory of natural law and Chinese laws were always contingent upon the emperors who were the law-givers.<sup>49</sup> Notably, the function of the laws here is said to be to distinguish distorted and straight accounts of the facts, those being two types of facts associated with loss and gain. While this passage may be about the laws in general, it is consistent with our observation that civil litigation was meant to establish facts, a process that ends in one litigant's defeat and the other's victory.

As we shall see, establishing facts was also a crucial element of criminal trials, but it appears that a different term was applied. The very beginning of "Models for Sealing and Investigating" (*Fengzhenshi* 封診式) from Shuihudi states:

治獄，能以書從（蹤）其言，毋治（答）諒（掠）而得人請（情）為上。治（答）諒（掠）為下。有恐為敗。

If in trying criminal lawsuits it is possible by means of documents to track down a person's words, obtaining the facts about him without using the bastinado is the best; applying the bastinado is inferior, for when there is fear, everything is spoiled.<sup>50</sup>

Notably, the phrase "*de ren qing*" 得人請（情） denotes "to obtain the facts about the person." In the trial procedure, torture was allowed but regarded as an inferior method in obtaining facts. The text further explains,

凡訊獄，必先盡聽其言而書之，各展其辭，雖智（知）其誣，勿庸輒詰。其辭已盡書而毋（無）解，乃以詰<sup>51</sup>者詰之。詰之有（又）盡聽書其解辭，有（又）視其它毋（無）解者以復詰之。詰之極而數誣，更言不服，其律當治（答）諒（掠）者，乃治（答）諒（掠）。治（答）諒（掠）之必書曰：爰書，以某數更言，毋（無）解辭，治（答）訊某。

In all cases of interrogating suspects in a criminal lawsuit, one should first listen fully to his [or their] words and note these down, [letting] each [of the persons questioned] set out his statement. Although [the investigator] knows that he is lying, there is no need to inquire [on this] every time. When his statement has

<sup>48</sup> Chen Guying 陳鼓應, *Huangdi sijing jinzhū jinyi* 黃帝四經今注今譯 (Beijing: Shangwu yinshuguan, 2007); cf. Robin D.S. Yates, *Five Lost Classics: Tao, Huang-lao, and Yin-yang in Han China* (New York: Ballantine Books, 1997), 21-25. Yates translates *fa* 法 as "law."

<sup>49</sup> Peerenboom, *Law and Morality*, 76-84. Haga Yoshinobu 芳賀良信 also noted the passage quoted here and argued that the text was meant to guide and restrain the rulers. Haga Yoshinobu, *Rei to hō no kangeki: Zenkan seiji shisō kenkyū* 禮と法の間隙：前漢政治思想研究 (Tōkyō: Kyūko shoin, 2000), 218-235. For Needham's theory, see Joseph Needham, "Human Laws and Laws of Nature in China and the West," *Journal of the History of Ideas* 12.1 (1951), 3-30.

<sup>50</sup> See, *SHD strip* (Fengzhenshi) no. 1, p.147. My translation follows Hulsewé, *RCL*, 183 (slightly modified).

<sup>51</sup> Loewe rendered *jie* as indictment, but Hulsewé rendered *jie* insist. In this passage, *jie* is used in the context of inquiring the suspect, so insist sounds better.

been completely noted down, and it cannot be understood, then insist on the points [which need] insisting. When, having insisted, one has again fully listened and noted down the explanatory statements, one looks again at other unexplained points and insists again on these. When one has insisted to the limit, but [the suspect] has repeatedly lied, changing his words and not submitting, then, for those persons whom the statutes warrant to be bastinadoed, bastinado them. When bastinadoing him, be sure to note down: “Report--Because X repeatedly changed his words and made no explanatory statement, X has been interrogated with the bastinado.”<sup>52</sup>

When a person repeatedly lied and refused to submit, torture could be applied, but a pre-condition governed that application, according to this provision: “For those persons, whom the statutes warrant to be bastinadoed, bastinado them.” This is somewhat vague. There are two possibilities: 1) according to the statutes, some group of persons, regardless of the nature of the crimes, was subject to torture while other groups were not, or 2) some crimes, regardless of the status of the criminals, were subject to torture while other crimes were not. In either case, even if a culprit refused to submit, torture would not necessarily be applied to force him to admit his guilt. This seems to suggest that under certain circumstances, judges could pass judgment based solely on the facts they had found, without the need for culprits to admit guilt (服 *fu*).

The feature above is consistent with the emphasis on establishing facts in civil litigation, with the important reminder that torture had no place in civil disputes. Moreover, there are numerous cases in the Juyan strips where we find reports of authorities passing judgment after conducting hearings and establishing the facts, even when the party who was liable refused to admit his or her liability. For example, a fragment from 32 B.C. says:

建始元年九月辛酉朔庚午，□□官令殲北候官收責。不服負。

On the day *gengwu* of the 9<sup>th</sup> month beginning with the day *xinyou*, in the first year of the Jianshi period (32 B.C.), [missing two characters] officials ordered the company commander of Jianbei<sup>53</sup> to collect a debt. However, the debtor refused to admit owing the debt.<sup>54</sup>

Since the authorities ordered the commander of Jianbei to collect a debt, we know that they had already established that the here-unnamed person was liable even though the debtor refused to admit his debt. Similarly, this fragment from A.D. 24 says:

更始二年四月乙亥朔辛丑，甲渠鄯守候，塞尉二人移□池。律曰□□□□□□□□史驗問，收責，報不服。移自證爰書，如律令。

On the *xinchou* day of the fourth month beginning with the day *yihai*, in the second year of the Gengshi period (A.D. 24), two officials, who are the *zhangshouhou* (deputy garrison commander?) and the deputy commander of the Jiaqu company forwarded [a testimony] to Chi. According to the statute, [missing seven characters] a certain official questioned [the defendant] and decided to collect the claimed debt from the defendant. The defendant was not willing to accept the judgment. Thus the certain official reported the problem. [We]

<sup>52</sup> *SHD* strip (Fengzhenshi) nos. 2-5, p.148. My translation follows Hulsewé, *RCL*, 184 (slightly modified).

<sup>53</sup> Jianbei 殲北 is a military unit in Juyan. See my chart of the major military units on Chapter One, p.5.

<sup>54</sup> *JYX* strip no. E.P.T. 51.228, p. 192.

forward the testimony of the defendant, according to the statutes and ordinances.<sup>55</sup>

We studied this fragment in Chapter One while discussing the appeal system.<sup>56</sup> Here, I draw our attention to this fact: the authorities had clearly held hearings and decided liability, but the losing party refused to admit the debt and was determined to contest the judgment.

Taken together, these two fragments demonstrate that establishing facts was sufficient for the authorities to determine liability in civil litigation, with no need for a confession or admission of liability from the losing party. Yet, as we have seen, the losing party could still appeal to higher authorities to contest the judgment. Overall, we find that *zhi* (a straight account of the facts) was an important notion in civil litigation, reflecting the emphasis on verification in civil procedure. Further, all available texts point to the rational orientation of civil law in early China, and the rationality demonstrated in that legal system's concern with evidence and evidentiary fact.<sup>57</sup>

## Part II: *Mingfen* 名分 as “Title and Portion”

This section will argue that the term *mingfen* refers to “title and portion.” “Title” is defined in modern Western sources as:

The union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself.<sup>58</sup>

The “*Dingfen*” (定分) chapter of the *Shangjunshu* 商君書 (comp. ca. 3<sup>rd</sup> century B.C.) supplies an interesting story illustrating *mingfen* 名分:

一兔走，百人逐之，非以兔可分以為百，由名分之未定也。夫賣兔者滿市，而盜不敢取，由名分已定也。故名分未定，堯，舜，禹，湯且皆如物而逐之；名分已定，貧盜不取。

One rabbit runs. A hundred people pursue it. This is not because the rabbit could be divided into a hundred pieces. It is because the title to the rabbit (*mingfen*) has not been determined. Now, as we all know, the market is crowded with people who sell rabbits, but thieves dare not steal them, because the *mingfen* there has been determined. Therefore, if the title is not yet determined, even [the sage-kings] Yao, Shun, Yu or Tang would [think it fair game] to approach the object and pursue it, but if the title is determined, even a poor thief would not steal it.<sup>59</sup>

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<sup>55</sup> *JYX* strip no. E.P.C.39, p. 548.

<sup>56</sup> Chapter One, p. 31.

<sup>57</sup> For the civil laws' stress on evidence, see Chapter One, p. 30.

<sup>58</sup> *Black's Law Dictionary*, 1243.

<sup>59</sup> *Shangjunshu zhushi* 商君書注釋, ed. Gao Heng 高亨 (Beijing: Zhonghua shuju, 1974), 5.145. My translation follows J.J.L. Duyvendak, *The Book of Lord Shang* (London: A. Probsthain, 1928), 168 (slightly modified). The book was traditionally attributed to Shang Yang, who served as a minister of Duke Xiao of Qin (r. 361-337 B.C.). The date of compilation of the text is controversial. The received text cannot possibly originate entirely from the hand of Shang Yang. It has been regarded as suspect since the Song period. Maspero believed that some of the passages were a product of the Six Dynasties. According to *Early Chinese Texts*, “Chapter 26 could not entirely be from the hand of Shang Yang because it alluded to institutions and events after the death of

Similar stories occur in four other early texts: the *Yinwenzi* 尹文子 (comp. ca. 3<sup>rd</sup> century B.C.), the *Lüshi chunqiu* 呂氏春秋 (comp. 239 B.C.), the *Shuoyuan* 說苑 (comp. ca. 20 B.C.), and the *Hou Hanshu* 後漢書 (comp. 445). The *Yinwenzi* says:

雉兔在野,眾人逐之,分未定也;雞豕滿市,莫有志者,分定故也。

When pheasants and rabbits are in the wild, everyone will chase after them, because the title (*fen*) to them has not been determined. However, when chicken and pigs fill the market, no one thinks of chasing after them [to catch them], because their titles have been determined.<sup>60</sup>

The *Lüshi chunqiu* says:

今一兔走,百人逐之,非一兔足为百人分也,由分未定。由分未定,尧且屈力,而况众人乎!积兔满市,行者不顾,非不欲兔也,分已定矣。分已定,人虽鄙,不争。

Now let us suppose that a rabbit is running, and a hundred people are chasing after it. This is not because there is enough rabbit meat to be shared by a hundred people, but because the title to it has not yet been determined. Because the title has not been determined, even [a sage like] Yao would exhaust every ounce of his strength [in the chase], not to mention the masses! Many rabbits fill the marketplace, but passersby do not give them a second look. This it is not because they do not want these rabbits but because their title has been determined already. After their title has been determined, even dolts will not fight over them.<sup>61</sup>

The *Shuoyuan* says:

夫一兔走於街,萬人追之;一人得之,萬人不復走。分未定,則一兔走,使萬人擾;分已定,則雖貪夫知止。

Now let us suppose that a single rabbit runs on the street, and ten thousand people pursue it. Once a single person captures it, the rest of the crowd will no longer run after it. When the title has not yet been determined, the rabbit on the run will cause ten thousand people to get all excited [at the prospect of owning it]. But once the title has been determined, even greedy people know to stop.<sup>62</sup>

The *Hou Hanshu* says:

世稱萬人逐兔,一人獲之,貪者悉止,分定故也。

As the proverb goes, when ten thousand people chase after one rabbit, as soon as

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Shang Yang.” See the entry in *Early Chinese Texts: A Bibliographical Guide*, ed. Michael Loewe (Berkeley: Society for the Study of Early China, 1993), 368-376.

<sup>60</sup> *Yinwenzi jiaozheng* 尹文子校正, ed. Wang Kailuan 王愷鑾 (Shanghai: Shangwu yinshuguan, 1935), 11-12.

<sup>61</sup> *Lüshi chunqiu yizhu*, 17.532; cf. John Knoblock and Jeffrey Riegel, *The Annals of Lü Buwei: A Complete Translation and Study* (Stanford: Stanford University Press, 2000), 431-432. *Qu li* 屈力 is a bit difficult to render. According to Gao You's 高誘 (fl. 205-212) annotation, *qu* means “to exhaust,” thus *qu li* means to “exhaust every ounce of one's strength.” See *Lüshi chunqiu (Gao You zhu)* 呂氏春秋 (高誘注) (Shanghai: Shanghai shudian chubanshe, 1986), 17.212.

<sup>62</sup> *Shuoyuan jiaozheng* 說苑校正, ed. Xiang Zonglu 向宗魯 (Beijing: Zhonghua shuju, 1987), 3. 74.

one person captures it, all the greedy people stop [their pursuit], because the title has been determined.<sup>63</sup>

These five stories compel our attention, because they remind us of similar pronouncements by the famous Roman jurist Gaius (fl. A.D. 130-180) regarding the capture of wild animals, as preserved in the *Digest* (comp. 533). Gaius said:

All animals that are captured on land, on sea, or in the air, that is to say, wild beasts and birds, as well as fish, become the property of those who take them.... For what does not belong to anyone by natural law becomes the property of the person who first acquires it.<sup>64</sup>

Gaius justified the practice by asserting that people could obtain the ownership of certain properties by a law of nature that was universally observed in accordance with natural reason. The principle that Gaius was illustrating is identical to the principle illustrated by the Chinese stories about rabbits. Clearly, a concept resembling ownership did exist in early China, whereby “ownership” is defined as “the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others.”<sup>65</sup>

We can classify these five rabbit stories into two different groups depending on whether they use the term *mingfen* or *fen*. Only the *Shangjunshu* story employs the binome *mingfen* 名分, while the others employ *fen* 分. This may be because the *Shangjunshu* is the earliest text supplying the most complete account or because a subtle difference distinguishes the *Shangjunshu* story from others (see below). We will first study the four stories using *fen* before turning to the *Shangjunshu* story to consider the binome *mingfen*.

#### **A). Rabbit Stories on *Fen* from the *Yinwenzi*, *Lüshi chunqiu*, *Shuoyuan*, and *Hou Hanshu*.**

We can classify these four stories into two sub-groups based on their narrative structure: 1) the *Yinwenzi* and *Lüshi chunqiu* stories, and 2) the *Shuoyuan* and *Hou Hanshu* stories. The stories in sub-group 1 share a basic narrative structure in which the chaotic situation of a horde chasing down free rabbits is contrasted with the orderly situation of a marketplace in which merchants sell rabbits. The stories in sub-group 2 share a slightly different narrative structure: the chaotic scene of people in pursuit of a free-running rabbit is contrasted with the orderly situation that occurs once the rabbit is captured by one person.<sup>66</sup>

In the two stories of sub-group 1, the animals are all free and in the wilds. People try to capture them because they belong to no one. The *Yinwenzi* story neglects to identify who owns these animals; the *Lüshi chunqiu* story simply observes that a single rabbit is not big enough to be shared by all one hundred hunters. Ownership in the wild remains an open

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<sup>63</sup> *Hou Hanshu*, 74a. 2838. Ju Shou 沮授 (d.201) was a strategist of warlord Yuan Shao 袁紹 (d. 202).

<sup>64</sup> Before the ellipsis, see *The Digest of Justinian*, Book XLI, Title I, in *The Civil Law: Including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions*, ed. Samuel Parsons Scott (Clark: Lawbook Exchange, 2001), vol. 3, 154. After the ellipsis, see *Ibid.*, 156.

<sup>65</sup> For the definition of ownership, see *Black's Law Dictionary*, 933. These stories were taken out of their contexts, because I believe there is a legal concept embedded in the details of these stories. Put it this way: these stories are unintentional evidence for a concept resembling ownership in early China. I will discuss this in detail later.

<sup>66</sup> Analysis of these four stories ultimately requires that we put them in their original context, and when we do so, we find that these stories all refer to notions of ownership, even if the stories do not explicitly speak about the laws.

question, while, in the marketplace, all the chickens, pigs, and rabbits belong to someone specific, title to these animals having already been determined. By the rules and practices of the marketplace, no one would ever try to acquire a chicken, pig, or rabbit without paying for it. The individual merchant holds title to the animal until transferred to the buyer through the implied contract of an exchange of money for meat. Title determines an object's legal and actual status.<sup>67</sup>

While both texts take as a given that, in the marketplace, shoppers acknowledge the individual merchants' titles to their goods, we all know that there were thieves in early China. In the idealized marketplace imagined in the two texts, thievery does not occur. Both texts, more importantly, imply a system in which either unwritten (i.e., customary) or written laws protect a person enjoying his possessions against theft, and ensure that he can seek redress for stolen possessions. Our inferences are corroborated by *ZJS strip* (Statutes) no. 59, which says:

盜盜人，臧見存者皆以畀其主。

If a thief robs a person, [when the thief is caught], all the stolen objects that remain shall be given back to their [rightful] owner.<sup>68</sup>

Therefore, when title over an object has not yet been determined, the object is open to competing claims, but once title has been determined, the object is legally possessed by its owner, whose interests are protected by the laws.

If the two stories above both allude to the legal protection afforded one's title to an object, the two stories in the *Shuoyuan* and the *Hou Hanshu* emphasize the exclusivity attached to any title.

Now let us suppose that a single rabbit runs on the street, and ten thousand people pursue it. Once a single person captures it, the rest of the crowd will no longer run after it. When the title has not yet been determined, the rabbit on the run will cause ten thousand people to get all excited [at the prospect of owning it]. But if the title has been determined, even greedy people know to stop.<sup>69</sup>

As the proverb goes, when ten thousand people chase after one rabbit, as soon as one person captures it, all the greedy people stop [their pursuit], because the title has been determined.<sup>70</sup>

Both passages feature a dramatic contrast between huge numbers of people trying to capture a rabbit on the run and the sudden end of the pursuit, once the rabbit is caught. That vivid contrast serves to highlight the exclusivity of the title conferred via the successful pursuit. In general, only one person or family may enjoy title to an object at a given time.

One more example reinforces these observations. A story in the *Shiji* features the newly established Emperor Gaozu 高祖 (r. 206-195 B.C.) who accused the strategist Kuai

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<sup>67</sup> One detail is worth noting: in the *Yinwenzi* story there are a number of free objects (pheasants and rabbits) and in the *Lüshi chunqiu* story only one free object (a single rabbit). This shows that whether objects with no titles are many or few, people will strive to acquire them without paying for them, if their title and status have not been determined. As the famous commentator to the *Lüshi chunqiu*, Gao You 高誘 (fl. 205-212), glossed the phrase “*fen wei ding*” 分未定: “People will desire those objects whose [title] has not yet been determined” (未定者，人欲望之). See *Lüshi chunqiu* (*Gao You zhu*), 17.212.

<sup>68</sup> *ZJS strip* (Statutes) no. 59, p. 16.

<sup>69</sup> See n. 62 of this chapter.

<sup>70</sup> *Ibid.*

Tong 蒯通 (fl. 209- 194 B.C.),<sup>71</sup> a follower of the powerful general Han Xin 韓信 (d. 196 B.C.), of urging Han Xin to turn against Gaozu. Kuai Tong defended himself by arguing:

秦失其鹿，天下共逐之，於是高材疾足者先得焉....當是時，臣唯獨知韓信，非知陛下也。

The Qin dynasty lost the deer [a metaphor for the throne] and all under Heaven joined in its pursuit. Thereupon, he with the tallest stature and the swiftest feet seized it first [and so ascended the throne].... At that time I knew only Han Xin. I did not know your Majesty.<sup>72</sup>

Kuai Tong was using the analogy of capturing a deer to describe the legitimacy of the Han house. Kuai Tong argued that, before Liu Bang captured the throne, the throne was available to many competitors, and so it was legitimate for Kuai Tong to help anyone in such an open competition. Crucial to Kuai Tong's argument is the prevailing assumption that the person who first captures the deer gains undisputed title to it, and, thus, by analogy, Gaozu obtained the throne simply because he was the first to seize the "deer." Kuai Tong's argument convinced Gaozu, and he freed Kuai Tong without any further charges.<sup>73</sup> This example from the *Shiji*, taken with the other examples cited here and all the civil cases studied in previous chapters, further reinforces the conclusion that the concept of exclusive title, with its clear implication of individual ownership, was broadly accepted by early Western Han times.<sup>74</sup> To underscore this point, let me cite one final case.

臨淮有一人，持一匹縑到市賣之，道遇雨而披戴，後人求共庇蔭，因與一頭之地；雨霽，當別，因共爭鬥，各云：“我縑。”詣府自言。

太守丞相<sup>75</sup>薛宣劾實，兩人莫肯首服。宣曰：“縑直數百錢耳，何足紛紛，自致縣<sup>76</sup>。”呼騎吏中斷縑，各與半；使追聽之。後人曰：“受恩。”前撮之。縑主稱冤不已。宣曰：“然，固知當爾也。”因結責之，具服，俾悉還本主。

There was a certain person from Linhuai, who brought a piece of silk with him to sell at the market. On his way [to market], it rained, so he covered himself with the silk [to protect himself against the rain]. Afterwards, a stranger asked to share the cover with him. The person gave the stranger a place for his head, but when the rain stopped and they were about to set off on their separate ways, they started to fight over [the ownership of the silk], with each claiming the silk as his own. So they came to court to speak on their own behalfs.

When Governor Xue Xuan interrogated them, neither was willing to admit that his claim was false. Xue Xuan said: "This piece of silk is only worth a few hundred cash. It is not worth fighting over and bringing a case to court." He then

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<sup>71</sup> According to Michael Loewe, Kuai Tong 蒯通 was a native of Qi and "his activities are described in a manner that is reminiscent of the tales of the protagonists of pre-imperial days." See Michael Loewe, *A Biographical Dictionary of the Qin, Former Han and Xin Periods (221 B.C. - A.D. 24)* (Leiden and Boston: Brill, 2000), 212.

<sup>72</sup> *Shiji*, 92.2629. My translation follows Watson, *Records of the Grand Historian*, 83.

<sup>73</sup> *Ibid.*

<sup>74</sup> We have not found an independent term indicating ownership, but that "ownership" was implied by the term "title" (*mingfen*).

<sup>75</sup> Xue Xuan should be a Governor at the time, but the highest position he achieved in his lifetime was Chancellor. Therefore, he is given the title *Taishou Chengxiang* (Governor Chancellor) here.

<sup>76</sup> I shall remind my read that according to Loewe, "In the majority of cases, *xianguan* 縣官 refers indiscriminately to organs of government, whether central or provincial, without any specification." See Loewe, "The Organs of Han Imperial Government," 71.3 (2008), 510.

ordered an officer in his cavalry to split the silk in half, giving one-half to each of the disputants. [After dismissing them from the court,] Xue ordered his men to follow and eavesdrop on them. The stranger said: “I got an unexpected favor!” and he went forward to grab the silk. The real owner of the silk couldn’t stop complaining about the unfairness of the judgment. [Xue’s subordinates went back and reported what they had heard to Xue Xuan.] Xue Xuan said: “Right, now I know what ought to be done.” [He sent an officer to bring them back.] Then, he interrogated the stranger again. The stranger confessed every detail [of his dishonesty]. Xue Xuan ordered the stranger to return the silk to its original owner.

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Admittedly, this story has a puzzling feature: we would not expect this kind of civil dispute to appear before the commandery court, since such a case would have had to have skipped two preliminary levels, the district and county. Despite this peculiar feature, the narrative matches what we know of the general procedures for Han civil litigation. The silk in dispute obviously had a rightful owner, the would-be seller. But the would-be seller, en route to the market, had his ownership of the silk unexpectedly challenged.

The location is important. If the merchant had arrived in the market, there would have been witnesses who could reasonably assume that the merchant was the rightful owner of the silk. Moreover, the merchant’s ownership would probably have been verified by two types of documents: inventories submitted to market officials and contracts concerning transactions. According to the recent study by Zhang Jihai 張繼海, no later than Western Han times, marketplaces in China were well organized and overseen by designated officials.<sup>78</sup> According to the *Shiji*, both registered merchants<sup>79</sup> and unregistered peddlers and traders were required to report the estimated values of their goods to the officials.

諸賈人未作賈貸賣買，居邑稽諸物，及商以取利者，雖無市籍，各以其物自占。Those traders who engage in the secondary occupations [i.e., commercial activities] such as lending and loaning money on credit, or who live in the towns and have storehouses of various goods, and those merchants who sell goods to gain profits, even if there are no marketplace registers [because the town is too small?], should each self-assess the values of their goods and report them to the officials.<sup>80</sup>

Guo Pu 郭璞 (276-324) glossed the word *zhan* 占 as follows:

占，自隱度也。謂各自隱度其財物多少，為文簿送之官也。若不盡，皆沒入於官。*Zhan* 占 refers to “self-assessment.” It means that each seller by himself assesses the values of his goods, writes them down on a report, and submits the report to

<sup>77</sup> *Fengsu tongyi jiaozhu*, 11. 589.

<sup>78</sup> Zhang Jihai 張繼海, *Handai chengshi shehui* 漢代城市社會 (Beijing: Shehui kexue wenxian chubanshe, 2006), 220-263, especially 233-235.

<sup>79</sup> Merchants were required to register themselves with the officials called “marketplace registers” (*shiji* 市籍). See *Ibid.*

<sup>80</sup> *Shiji*, 30.1430. *Zuozhuan*, Lord Xuan 宣, Year 12, distinguishes *shang* 商 (“merchants” who operate over fairly long distances) from *gu* 賈 (“traders” who sell products in the marketplace). The term “traders” also includes “moneylenders,” as is clear from this chapter. For further information, see Zeng Weihua 曾維華, “Shi *Shiji* Huozhi liezhuan zhong de yishi men” 釋史記貨殖列傳中的倚市門, *Xueshu yuekan* 學術月刊 5 (2000), 88-89.



the officials. If the report is not complete, [those goods not included in the report] will all be confiscated by the proper officials.<sup>81</sup>

This requirement, on one hand, was designed to facilitate tax-collection, but, on the other hand, it could also be viewed as a legal means to acknowledge and document the merchants' ownership of their goods, since the reports were essentially inventories. Since all unreported goods would be confiscated, we know that "the officials" referred to in the passage above were officials in charge of supervising the marketplaces, and that those officials were responsible for checking the accuracy of the inventories submitted to them. Such an inventory, once substantiated, could be used as proof of ownership in the event of a dispute over title. Zheng Xuan adds further information to this picture:

市買為券書以別之, 各得其一, 訟則案券以正之.

When one buys goods in the market, each [of the two parties] should make copies of every contract. Each of the two parties keeps one copy of the contract. Should any disputes arise, [the authorities] will judge the case based on the contract.<sup>82</sup>

Thus, in a marketplace, legal ownership of goods was clearly established by at least two written documents, both of which would be available to the courts should disputes arise.

However, since the would-be seller in our current case had not yet arrived at the marketplace, there were no witnesses, no inventory submitted to the market officials, and no documentation of transactions. Lacking any of the customary and legally approved proofs of ownership, the merchant was vulnerable to the challenge of this opportunistic stranger. Once challenged, the burden of proof fell to the merchant, presumably the silk's rightful owner. With no way to prove that the silk was his, the merchant's only recourse was to submit his claim to the courts. Absent documentary evidence (inventories or transaction records) and witness testimony (marketplace merchants and shoppers), the judge needed to find some other way of ascertaining the silk's rightful owner. While feigning indifference, the judge, determined to find the "straight" facts, interrogated the stranger so deftly that the stranger ultimately confessed his malfeasance.

Our analysis of these many examples demonstrates that there was a clear concept of property ownership in early China, and that the judicial authorities recognized their duty to protect rightful owners against dishonest claims. The principle of protecting ownership against theft and false claims incorporates other, non-legal social and moral attitudes, in particular an attitude toward those who would steal or defraud legitimate owners. A passage from the *Yinwenzi's* rabbit illustrates this concern:

私不行, 非無欲, 由分明, 故無所措其欲.

Selfishness will not get a person success, not because there are no selfish desires, but because when the title (*fen*) is clear, there are no places for one's selfish desires [to operate].<sup>83</sup>

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<sup>81</sup> *Shiji*, 30.1430, n. 6.

<sup>82</sup> Cheng, "Hanlü kao," 122. Cheng recovered this regulation based on Zheng Xuan's commentary in the "Qiuguan" 秋官 chapter of *Zhouli*.

<sup>83</sup> *Yinwenzi jiaozheng*, 11.

If these selfish desires relate to property, the *fen* here must refer to title, but insofar as selfish desires also aim, through immoral possession of property, to raise a person's social status (also *fen*), the passage also points to larger social issues.

The use of *fen* in the rabbit story from the *Lüshi chunqiu* further illustrates this point:

諸侯失位則天下亂，大夫無等則朝廷亂，妻妾不分則家室亂，適孽無別則宗族亂。

When feudal lords lose their proper places, all under Heaven falls into chaos; when counselors step out of their proper ranks, the court falls into chaos; when there are no distinctions between the wife and concubines, the household falls into chaos; and when there are no distinctions among sons born by the legal wife and sons born by concubines, the clan falls into chaos.<sup>84</sup>

Just as *fen* was applied to rabbits, here, by analogy, *fen* is applied to designated social roles and the norms attached to them.

In the *Shuoyuan* story, in a speech ascribed to the minister Qu Jian 屈建 (d. 545 B.C.), *fen* is employed in reference to claims on the throne, making explicit the analogy with claims of ownership of a rabbit pursued by many. We recall the story says: “When the title has not yet been determined, the rabbit on the run will cause ten thousand people to get all excited [at the prospect of owning it]. But once the title has been determined, even greedy people know to stop.”<sup>85</sup> Then, the story continues,

今楚多寵子而嫡位無主，亂自是生矣。夫世子者，國之基也，而百姓之望也；國既無基，又使百姓失望，絕其本矣。本絕則撓亂，猶兔走也。

Now since [the King of] Chu has many favorite sons but no heir-apparent, chaos will arise from there. As for the heir-apparent, he is the basis of the state and the hope of the people. [Without him], the state has no basis, and the people lose their hopes for the future. [Not to appoint an heir] is to cut off the root of the state. When the root is cut off, [the state will descend into] chaos, just as in the story of the rabbit on the run.<sup>86</sup>

Not appointing an heir-apparent is equated with a free-running and as yet unclaimed rabbit, an analogy that is even more clearly articulated in the statement, “When the title (*fen*) has not yet been determined, the rabbit on the run will cause ten thousand people to get all excited [at the prospect of owning it].”<sup>87</sup> In this construction, *fen* corresponds to the legitimate claim on the title of heir-apparent (*zhu* 主), a convergence of social role and ownership. The *Hou Hanshu* rabbit story seems to allude to a similar sense of *fen*.<sup>88</sup>

Even though *fen* appears in early texts in contexts that deal with prescribed social roles and the apportioned share of goods that accrue to those playing those roles, these four rabbit stories all attest to the fact that in early China, *fen* referred to “title” with the implication of ownership. While the stories cited above deal only with movable property

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<sup>84</sup> *Lüshi chunqiu yizhu*, 17.532. My translation follows Knoblock and Riegel, *The Annals of Lü Buwei*, 431 (slightly modified).

<sup>85</sup> See n. 62 of this chapter.

<sup>86</sup> *Shuoyuan jiaozheng*, 3.74.

<sup>87</sup> *Ibid.*

<sup>88</sup> In the *Hou Hanshu*, 74a. 2838, the story is followed by these words ascribed to the minister Ju Shou 沮授 (d. 201): “[Yuan] Tan is the eldest son and should become the heir-apparent. However, [you, Yuan Shao 袁紹] rejected him and ordered him to live outside [of the capital]. The calamities began from there, certainly” (譚長子，當為嗣，而斥使居外，禍其始此).

(animals or goods), not land (i.e., real property), when we turn to the earliest known story concerning title, the *Shangjunshu* rabbit story on *mingfen*, we will find that ownership in early China covered both movable and real property.

### B) The *Shangjunshu* Rabbit Story and the Practice of *Mingtianzhai* 名田宅 (Title to Cultivated Fields and Dwelling Sites)

Traditionally, *mingfen* has been understood to mean social roles and the normative behavior prescribed for those roles. However, the binome *mingfen* in the *Shangjunshu* rabbit story clearly means “title,” implying ownership. More importantly, in the overall context of the book, *mingfen* underlines the practice of *mingtianzhai*, actual ownership of real property.<sup>89</sup>

In both narrative structure and detail, the *Shangjunshu* story closely resembles the rabbit stories of the *Yinwenzi* and *Lüshi chunqiu*. In all three, we are presented with an initially chaotic situation, with people running after a rabbit whose ownership has not yet been determined, that gives way to an orderly situation once ownership has been determined. Given these parallels, the term *mingfen* in the *Shangjunshu* rabbit story must also refer to ownership or “title,” with “title” here denoted by the binome *mingfen*: a title and the portion (or due share) entailed. This point is not obvious at first glance since the explanation that follows the rabbit story appears to give *mingfen* a rather different meaning than it carries in the story itself.

When taken in context, the subject of this story is the function of properly decreed laws and edicts. The postscript to the story includes the following:

今法令不明, 其名不定, 天下之人得議之, 其議人異而無定. 人主為法於上, 下民議之於下, 是法令不定, 以下為上也. 此所謂名分之不定也. 夫名分不定, 堯舜猶將皆折而姦之, 而況眾人乎?

Now if the laws and edicts are not clear, nor the names and title determined, the subjects under Heaven will be able to debate them, and those who debate them will disagree and nothing will be determined. If the ruler of men makes laws above, but below his subjects debate them, this means that the laws and edicts have not been determined and subjects have become superiors. This we call “*mingfen* not yet determined”. Now, as we all know, when *mingfen* is not yet determined, even Yao and Shun would both be tempted to do wrong, not to mention ordinary people.<sup>90</sup>

Here, the phrase “*qi ming bu ding*” 其名不定 is quite difficult to contextualize. In the sentence, the *ming* seems to refer to the names of laws and ordinances. But what are the names of laws and ordinances? Why would those names be of such concern to all subjects under Heaven that they would want to debate those names? Moreover, where is *fen* in the greater context? With these questions in mind, we find that the text concludes:

故聖人必為法令置官也, 置吏也, 為天下師, 所以定名分也. 名分定, 則大軸貞信, 民皆愿慤, 而各自治也.

Therefore the sages set up offices and appointed officials for the sake of the laws and edicts, who would act as models of authority for the entire realm, so as to

<sup>89</sup> I suggest that the relationship between *mingtianzhai* and *mingfen* is this: *ming* is the same, while *tianzhai* (land) corresponds to *fen* (portion). See p. 105 in this chapter for the proof.

<sup>90</sup> *Shangjunshu zhushi*, 5.145. My translation follows Duyvendak, *The Book of Lord Shang*, 168.

determine everyone's title and proper share (*mingfen*). Once these were determined, the very crafty would become sincere and trustworthy, and the subjects all honest and guileless, with each one restraining himself or herself.<sup>91</sup>

Unfortunately, these passages provide little guidance in resolving our questions about the usage of *mingfen*. Perhaps, because the “Dingfen” chapter was compiled by different hands in different time period,<sup>92</sup> the difficulties that we are encountering may be due to inconsistencies among the various compilers. However, if we view *mingfen* in the larger context of the *Shangjunshu*, we find that *mingfen* is associated with a particular type of decree, the orders of honor, which links it with the practice of *mingtianzhai* credited to minister Shang Yang 商鞅 (ca. 390-338 B.C.), to whom authorship of the *Shangjunshu* was attributed.

An earlier chapter of the *Shangjunshu*, “Within Borders” (Jingnei 境内), opens with this line:

四境之內，丈夫女子皆有名於上，生者著，死者削。

Within the four borders, adult males and females are known by name to their superiors. When they are born, their names are registered, and when they die, their names are expunged from the records.<sup>93</sup>

The remainder of the chapter deals with military and civilian orders of honor:

軍爵，自一級已下至小夫，命曰校徒操士。公爵，自二級已上至不更，命曰卒。

The military orders of honor from the highest order down to the lowest order of *xiaofu* 小夫 are called *xiaotu* 校徒 and *caoshi* 操士. The official [civilian] orders of honor from the second degree upwards to the degree of *bugeng* 不更 are called *zu* 卒.<sup>94</sup>

According to historian Koga Noboru 古賀登, the ranking system was described here in order to explain an historical event: Shang Yang, who served as a minister of Duke Xiao of Qin (r. 361-337 B.C.), established nine orders of military honor and sixteen orders of civilian honor during his reforms. These orders of honor, both civil and military, were bestowed on individuals according to their military merits. The state would then grant them farmland, housing sites, and servants according to their rank in the orders of honor. For instance, a person with the lowest military honor was granted one *qing* (頃) of cultivated land, five *mu* (畝) for a dwelling site, and one servant who, in peacetime, was to serve the person six days a month and in wartime was to accompany him as a military aide.<sup>95</sup>

<sup>91</sup> *Shangjunshu zhuizhi*, 5.146. My translation follows Duyvendak, *The Book of Lord Shang*, 169 (slightly modified).

<sup>92</sup> See n. 59 of this chapter.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, 4.122. My translation follows Duyvendak, *The Book of Lord Shang*, 143 (slightly modified). This passage is a bit confusing when it mentions *xiaotu* 校徒 and *caoshi* 操士. According to Koga, *xiaotu* and *caoshi* were the lowest military ranks, which were equivalent to *xiaofu* 小夫 and *gongshi* 公士 in civilian ranks. See Koga Noboru 古賀登, “Shin Shō Ō no gunsei gunkō hōshō to mibunsei” 秦商鞅の軍制軍功褒賞制と身分制, *Shakai keizai rekishi* 社會經濟歷史 40.4 (1974), 339.

<sup>95</sup> Koga, “Shin Shō Ō no gunsei gunkō,” 335-360. Koga Noboru argued that the “Jingnei” 境内 chapter describes the situation of the Qin state in the late Zhanguo period, because the system described by the chapter

Thus, in the larger context of the arguments in the *Shangjunshu*, *mingfen* seems associated with the orders of honor (*ming*) and the portion (*fen*) of cultivated fields, dwelling sites, and servants attached to them. To determine the *ming* was to determine the appropriate distribution of land and servants. Ownership of real property derives from this practice. As the *Shiji* says:

明尊卑爵秩等級, 各以察次名田宅。

[Shang Yang in 359 B.C. ordered the state's officers] to distinguish the high-ranking from the low-ranking and to clarify the hierarchy of the orders of honor and salaries, so that each person could claim cultivated fields and dwelling sites, according to his position in the hierarchy.<sup>96</sup>

Admittedly, given the paucity of evidence, we cannot prove that this reform, attributed to Shang Yang, was carried out in Shang Yang's time (ca. 350 B.C.). If subjects only had the privilege of using the land but could not transfer their titles to it, then the argument that *mingfen* in the *Shangjunshu* refers to the distribution of lands becomes doubtful, since the word "title" implies ownership not temporary allotment. However, we can be confident that the practice attributed to Shang Yang was certainly in place in Han times since the practice was reflected in provisions concerning *mingtianzhai* from Zhangjiashan.<sup>97</sup>

What does *mingtianzhai* mean? Literally, *ming* means "name" or "title," *tian* means "cultivated field," and *zhai* typically means "dwelling," though in this particular case, it refers to a "dwelling site."<sup>98</sup> Historians have long puzzled over the term *mingtianzhai*. Faced with a paucity of source material, no one could explain the term in detail or with any certainty until the discovery of the "Statutes of Households" from Zhangjiashan. The *ZJS* (statutes) strips nos. 313-316 stipulate, with notable precision, the parameters of individual claims to cultivated fields and dwelling sites determined by rank.

1) Regarding cultivated fields:

關內侯九十五頃. 大庶長九十頃. 駟車庶長八十八頃. 大上造八十六頃. 少上造八十四頃. 右更八十二頃. 中更八十頃. 左更七十八頃. 右庶長七十六頃. 左庶長七十四頃. 五大夫廿五頃. 公乘廿頃. 公大夫九頃. 官大夫七頃. 大夫五頃. 不更四頃. 簪褭三頃. 上造二頃. 公士一頃半頃. 公卒, 士五 (伍), 庶人各一頃. 司寇, 隱官各五十畝.

*Guanneihou* 關內侯 [can claim] ninety-five *qing* [of cultivated field], *dashuzhang* 大庶長 ninety *qing*, *sicheshuzhang* 駟車庶長 eighty-eight *qing*, *dashangzao* 大上造 eighty-six *qing*, *shaoshangzao* 少上造 eighty-four *qing*, *yougeng* 右更 eighty-two *qing*, *zhonggeng* 中更 eighty *qing*, *zuogeng* 左更 seventy-eight *qing*, *youshuzhang* 右庶長 seventy-six *qing*, *zuoshuzhang* 左庶長 seventy-four *qing*, *wudafu* 五大夫 twenty-five *qing*, *gongcheng* 公乘 twenty *qing*, *gongdafu* 公大夫 nine *qing*, *guandafu* 官大夫 seven *qing*, *dafu* 大夫 five *qing*, *bugeng* 不更 four *qing*, *zanniao* 簪褭 three *qing*, *shangzhao* 上造 two *qing*, *gongshi* 公士 one and a

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is consistent with how the "Dingfa" 定法 chapter of the *Han Feizi* describes Shang Yang's reforms. See *Ibid.*, 335-336.

<sup>96</sup> *Shiji*, 68.2230.

<sup>97</sup> *ZJS* strip (Statutes) nos. 305-345, pp. 51-56.

<sup>98</sup> Zhu Shaohou 朱紹侯, "Lun Handai de mingtian (shoutian) jiqi pohuai" 論漢代的名田 (授田) 及其破壞, *Henan daxue xuebao* (*Shehui kexue ban*) 河南大學學報 (社會科學版) 1 (2004), 36.

half *qing*, *gongzu* 公卒, *shiwu* 士伍, and *shuren* 庶人 one *qing*, and *sikou* 司寇 and *yinguan* 隱官 fifty *mu* [i.e., one-half *qing*].<sup>99</sup>

2) Regarding dwelling sites:

宅之大方卅步。徹侯受百五宅。關內侯九十五宅。大庶長九十宅。駟車庶長八十八宅。大上造八十六宅。少上造八十四宅。右更八十二宅。中更八十宅。左更七十八宅。右庶長七十六宅。左庶長七十四宅。五大夫廿五宅。公乘廿宅，公大夫九宅。官大夫七宅。大夫五宅。不更四宅。簪裊三宅。上造二宅。公士一宅半宅。公卒，士五（伍），庶人一宅。司寇，隱官半宅。欲爲戶者，許之。

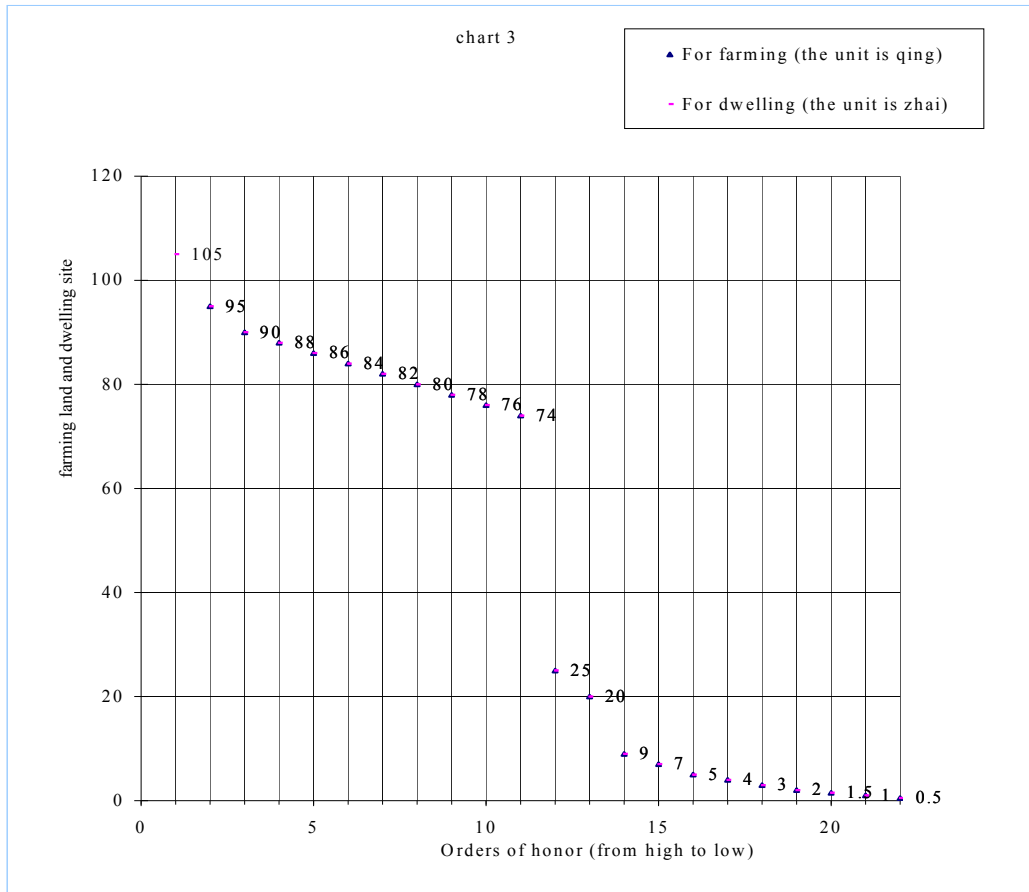
The area of one *zhai* is thirty square feet [in Han measure]. A *chehou* 徹侯 [shall receive] one hundred and five *zhai* [of dwelling site]; a *guanneiyou* 關內侯 ninety-five *zhai*; a *dashuzhang* 大庶長 ninety *zhai*; a *sicheshuzhang* 駟車庶長 eighty-eight *zhai*; a *dashangzao* 大上造 eighty-six *zhai*; a *shaoshangzao* 少上造 eighty-four *zhai*; a *yougeng* 右更 eighty-two *zhai*; a *zhonggeng* 中更 eighty *zhai*; a *zuogeng* 左更 seventy-eight *zhai*; a *youshuzhang* 右庶長 seventy-six *zhai*; a *zuoshuzhang* 左庶長 seventy-four *zhai*; a *wudafu* 五大夫 twenty-five *zhai*; a *gongcheng* 公乘 twenty *zhai*; a *gongdafu* 公大夫 nine *zhai*; a *guandafu* 公乘 seven *zhai*; a *dafu* 大夫 five *zhai*; a *bugeng* 不更 four *zhai*; a *zanniao* 簪裊 three *zhai*; a *shangzao* 上造 two *zhai*; a *gongshi* 公士 one and a half *zhai*; a *gongzu* 公卒, *shiwu* 士伍, or *shuren* 庶人 one *zhai*; and a *sikou* 司寇 or *yinguan* 隱官, one-half *zhai*. If a person who [has newly received his portion of cultivated fields and dwelling sites] wants to establish an [independent] household [, instead of merging them into his old household], that is permitted.<sup>100</sup>

Based on this information, we can construct the following chart:<sup>101</sup>

<sup>99</sup> *ZJS* (statutes) strip nos. 310-313, p. 52. One *qing* 頃 is about 4.6 hectare. See Hulsewé, “Ch’in-Han Weights and Measures,” in *RCL*, 19. These orders of honor have not been translated by Michael Loewe or other authoritative historians, hence I adopt this solution: *pinyin*+characters.

<sup>100</sup> *ZJS* (statutes) strip nos. 314-316, p. 52.

<sup>101</sup> This chart reverses the order of the ranks during the Han dynasty, taking rank 1 to be highest (named as rank 20 in the sources; and rank 2 to be the *guanneiyou* (rank 19 in Han sources), etc. In the Han dynasty, the higher the number, the higher the rank.



The horizontal axis of the chart represents the orders of honor, *jue* 爵. During the Han dynasty, there were twenty (or possibly twenty-one?) orders of honors: from the highest, *cheshou* 徹侯, to the lowest, *gongshi* 公士. Each order of honor was associated with a clearly defined claim to farmland and dwelling sites, ranging from 105 *qing* + 105 *zhai* to 1.5 *qing* + 1.5 *zhai*. In addition, commoners, such as *gongzu* 公卒, *shiwu* 士伍 and *shuren* 庶人, and even those who were socially discriminated against (e.g., the *sikou* 司寇 and *yinguan* 隱官) were also granted shares in the land distribution system.<sup>102</sup> Notably, from the highest rank, *cheshou* 徹侯, to the eleventh, *zuoshuzhang* 左庶长, the amounts of land which one was entitled to claim declined gradually. However, there is a very steep decline in lands granted to those below the eighth rank (*zuoshuzhang* 左庶长). Evidently rank nine (*wudafu* 五大夫) marks a sharp break, since the holders of rank eight (*zuoshuzhang*) can claim almost three times the amount of land as the holders of rank nine (*wudafu*). From the rank *wudafu* down to the *sikou* and *yinguan*, the land each holder can claim once more declines very gradually. Clearly, the system was designed to create a sharply defined social gap between those holding the rank of *wudafu* rank or higher and those below *wudafu*. Even with these disparities, it is

<sup>102</sup> The precise meaning of *yinguan* is a matter of debate. Recently Michael Loewe has argued that *yinguan* referred to “persons who were “concealed in the offices” or were kept “in the concealed offices”; he pointed out that “[It is] a category which is seen principally in the legal material from Shuihudi and (more frequently) in that from Zhangjiahan.” See Michael Loewe, “On the Terms *baotzi*, *yinggong*, *yinguan*, and *shou*: Was Zhao Gao a Eunuch?” *Toung P’ao*, 91(2005), 314.

worth noting that the system granted all eligible adults a share in land.<sup>103</sup> In short, the system was hierarchical but inclusive, intended to serve a very broad range of the population across different social strata.

On what basis, then, do we call the practice described above *mingtianzhai*? *ZJS* strips (Statutes) nos. 323-324 state:

諸不為戶, 有田宅附令人名, 及為人名田宅者, 皆令以戍邊二歲, 沒入田宅縣官。為人名田宅, 能先告, 除其罪, 有 (又) 畀之所名田宅, 它如律令。

For those people who do not establish their own households but attach their farmland and dwelling sites to other people's names on the registers, or those people who claim title to farmland and dwelling sites (*mingtianzhai*) on behalf of others, let them all [be punished by being sent to] guard the frontiers for two years, and let their farmland and dwelling sites be confiscated by the local officials who represent the central government. For those people who claim title to farmland and dwelling sites (*mingtianzhai*) on behalf of other people, if they report their own fraudulent claims before they are discovered, their crimes will be forgiven and they will be granted the land that they have claimed. All other affairs should be handled according to the statutes and ordinances.<sup>104</sup>

This regulation clearly shows that, at the time, the practice of claiming title to lands was called *mingtianzhai*. In this system, based upon one's rank in the orders of honor, a person was entitled to claim a certain amount of land and register that property with the local authorities, thereby establishing a registered household.<sup>105</sup>

The duly registered head of household owned the cultivated field and dwelling site, not just the privilege of using them. The principle of ownership is underscored in two crucial ways: First, one could give or sell one's land to others. *ZJS* strip (Statutes) no. 321 states:

受田宅, 予人若賣田宅, 不得更受。

After one receives farmland and dwelling sites, if he or she gives or sells the land to others, he or she is not allowed to receive new land.<sup>106</sup>

The purpose of this provision was to prohibit those who give or sell their land to others from claiming new land from the state. This provision clearly implies that giving or selling land to others was legal. Second, the cultivated field and dwelling site to which a person held title could be inherited by that person's heirs.<sup>107</sup> Yet in the process of inheritance, title to the rank (*ming*) – but not title to the cultivated fields – was automatically reduced by two degrees, before being passed on to the heirs, with the notable exception of the nobility (ranks nineteen and twenty). Prior to Emperor Wu's reign, title to cultivated fields and dwelling sites was to be divided more or less equally among all the sons, again, with an exception for the nobility (ranks nineteen and twenty).<sup>108</sup> So we see that title to rank (*ming*) could be separated from the

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<sup>103</sup> This pattern is consistent with Nishijima's classification of ranks for officials and ranks for ordinary people. In Nishijima's classification, the dividing line is also *wudafu*.

<sup>104</sup> *ZJS* (Statutes) nos. 323-324, p. 53.

<sup>105</sup> The following statement is puzzling: "If they report their own fraudulent claims before they are discovered, their crimes will be forgiven and they will be granted the land that they have claimed." It seems that, in this case, those who committed fraud by claiming land for others, still received benefits and rewards at those others' expense, if they made timely confessions.

<sup>106</sup> *ZJS* strip (Statutes) no. 321.

<sup>107</sup> See Chapter Two, pp. 43-48 for inheritance.

<sup>108</sup> *Ibid.*, 44.



portion (*fen*) in inheritance laws. In this regard, even though a subject's title and portion of land was not absolutely inalienable, it was substantially integrated.

All land transactions had to be reported to the officials and documented. If the officials failed to process the documentation on time, they would be fined. *ZJS* strip (Statutes) nos. 322 says:

代戶, 質賣田宅, 鄉部, 田嗇夫, 吏留弗定籍, 盈一日, 罰金各二兩.

In the situation of inheriting the household or buying or selling farmland and dwelling sites, if the district bailiff, the bailiff of land, and other related officials delay the process or fail to compile the proper documents, they will be fined two *liang* of copper per day.<sup>109</sup>

This provision further confirms the subjects' ownership over their cultivated fields and dwelling sites.

In the following story from the *Shuoyuan* that deals with the distribution of land, the verb used is *fen* 分 (participate, divide), which reinforces our understanding that *mingtianzhai* corresponds to *mingfen* in that *ming* remains the same, while land (*tianzhai*) corresponds to the portion (*fen*):

晉文公問政于咎犯, 對曰: 分熟不如分腥, 分腥不如分地, 割以分民 而益其爵祿, 是以上得地而民知富, 上失地而民知貧...

Duke Wen of Jin asked Jiu Fan on governance, and he answered: To divide and grant cooked [meat] is not as good as to divide and grant raw [meat]. To divide and grant raw [meat] is not as good as to divide and grant land. Divide [it] into pieces and grant them to the people and add to their orders of honor and salaries. Therefore, when the ruler acquires land, then the people know they are enriched. When the ruler loses land, the people know they have become poor...<sup>110</sup>

The key message of this passage is that, by dividing land into pieces and granting them to the people according to their orders of honor and salaries, the subjects will have a common interest with the ruler. The "people" here perhaps refers to those in the officialdom since "salary" is mentioned in the passage. There is no evidence in the *Zuozhuan*, the *Guoyu*, or other pre-Han texts to indicate that Jin ministers in the reign of Duke Wen (r. 636-628 B.C.) invented such a practice. Very likely, the author Liu Xiang 劉向 (77-6 B.C.), was projecting the *mingtianzhai* practice of his own time back to the pre-Qin time of Duke Wen of Jin, even though Liu Xiang seems to limit the beneficiaries to officials. But, as we have seen, Han provisions concerning *mingtianzhai* included commoners in the prescribed distribution of land. Those provisions requiring land conferrals seem to have had an unforeseen consequence, as witnessed by the lament of minister Gong Yu 貢禹 (ca. 129-47 B.C.) to Emperor Yuan (r. 49-33 B.C.):

民棄本逐末, 耕者不能半. 貧民雖賜之田, 猶賤賣以賈.

People abandon their primary occupation [farming] in order to pursue secondary occupations [i.e., commercial activities]. Now, farmers are less than a half of our

<sup>109</sup> *ZJS* strip (Statutes) no. 322, p. 53. According to Zhu Honglin, *daihu* 代戶 means "to inherit the household." See Zhu, *Zhangjiashan*, 201.

<sup>110</sup> *Shuoyuan jiaozheng*, 7.168.

population. Even though we grant cultivated fields to the poor, they still sell them cheaply in order to do business.<sup>111</sup>

The important point here is that Han laws concerning land ownership applied to all imperial subjects, with those subjects classified according to twenty hierarchical orders of honor, with the high-ranking elite enjoying special legal privileges.<sup>112</sup> This feature of all-inclusiveness clearly parallels the provisions concerning inheritance that we studied in Chapter Two. Even household slaves had a place in the sequence of household inheritance whereby they could inherit their masters' households when there was no other rightful heir.<sup>113</sup>

Consistent with this all-inclusive feature is the empire-wide (“all under Heaven”) implementation of Han laws as a whole. This was the case for most of the Western Han and Eastern Han. We are not sure about the situation in the very early period of the Western (206-174 B.C.). When Liu Bang established himself as the emperor, he enfeoffed various kings who were not from the Liu clan to assist him in ruling the empire. Those kings had nearly autonomous power. They may have been able to make their own laws. But over time, their independence was whittled down. By 174 B.C., nearly all the formerly autonomous kingdoms were in the hands of the Liu family, except for the small state of Changsha. Once members of the Liu clan were in charge, the head of the Liu clan, the emperor, expected them to obey Han laws.<sup>114</sup> For example, in 174 B.C. the King of Huainan 淮南, Liu Zhang 劉長 (r. 196-174 B.C.), was charged with unauthorized law-making: “He made his own laws and ordinances without authorization, and did not use Han laws” (擅為法令, 不用漢法).<sup>115</sup>

For most of Western Han and Eastern Han, imperial subjects throughout the empire, from all social strata, enjoyed legally defined ownership of real property in accord with the *mingtianzhai* provisions. They also surely enjoyed ownership of personal property, as demonstrated by the “rabbit” stories. This universality of ownership rights and inclusion in an integrated hierarchical system of social ranking comports with our earlier observation that both elites and commoners resorted to the civil justice system to seek protection of their interests, and that in civil litigation the disputants were mostly treated as equal parties regardless of their ranks.<sup>116</sup>

As historian Yu Zhenbo 于振波 recently argued, it may be that, beginning with the reign of Emperor Wu (r. 141-87 B.C.), the practice of *mingtianzhai* gradually declined because the state had less free land to grant to its subjects.<sup>117</sup> But Gong Yu's words show that the practice of granting land and dwelling sites still occurred during the reign of Emperor Yuan. Moreover, the gradual collapse of the *mingtianzhai* practice had little to do with the imperial subjects' “rights” to own real property.<sup>118</sup> All the land and inheritance disputes that

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<sup>111</sup> *Hanshu*, 72.3075. There is an alternative interpretation of the story. The practice could be a charity: granting land to the poor. But this alternative interpretation does not contradict our interpretation; the crucial point is that the state did grant land to the lower strata of the society, not just officials.

<sup>112</sup> Loewe, *The Government of the Qin and Han Empires*, 119-150; cf. *RHL*, 4-11.

<sup>113</sup> See Chapter Two, p. 45. I remind my reader that “slave” is the conventional translation for the Chinese term *nu* 奴. But since in the Han period, *nu* could inherit their masters' households, *nu* did not refer to “slaves” in the strict sense of the word.

<sup>114</sup> For details of the political changes from 206-174 B.C., see *CHC*, 110-127.

<sup>115</sup> *Hanshu*, 44.2141.

<sup>116</sup> One's order of honor entailed certain legal privileges in criminal litigation, but not in civil litigation. See Chapter One, pp. 10-12.

<sup>117</sup> Yu Zhenbo 于振波, “Zhangjiashan Hanjian zhong de mingtianzhi jiqi zai Handai de shishi” 張家山漢簡中的名田制及其在漢代的實施, *Zhongguo shi yanjiu* 中國史研究 1 (2004), 29-40.

<sup>118</sup> Legally speaking, in the worst case, even if the state stopped granting land to imperial subjects, those subjects still could retain their “rights” to own and dispose real property.

we have reviewed support this claim. As a reminder that ownership was society-wide, we have the following land transfer document, dated A.D. 169:

建甯二年八月庚午朔五日,河內懷男子王未卿,從河南街郵部男袁叔威,買臯門亭部十三陌西袁田三畝.畝賈價三千一百,並直九千三百.錢即日畢.時約者袁叔威.沽酒各半,即日丹書鐵券爲約.

On the 5<sup>th</sup> day of the 8<sup>th</sup> month beginning with the day Gengwu, in the 2nd year of the Jianning period (A.D. 169), a male from Henei named Wang Weiqing buys from a male named Yuan Shuwei three *mou* of his land to the west of the border of the 13th station of Gaomen precinct (*tingbu* 亭部). Each *mou* is worth 3,100 cash. In total, the value is 9,300 cash. Payment of the money is completed on the same day. Yuan Shuwei is present when the agreement is made. Buying wine, each party drinks half of it [to bind the transaction]. On the same day, an iron contract in red ink is made to record the agreement.<sup>119</sup>

Since the two parties, Wang Weiqing 王未卿 and Yuan Shuwei 袁叔威, are simply referred to as “male,” they must have been commoners without orders of honor. This document, which concerns land transfer among commoners, further demonstrates that the notion of land ownership existed at the lowest level of society.

The following is a land transfer document, dated A. D. 184:

光和七年九月癸酉朔六日戊寅,平陰男子樊利家從雒陽男子杜譚子、子弟□買石梁亭部桓千東比是陌北田五畝,畝三千,並直萬五千,錢即日(異)[畢].

田中根土著,上至天,下至黃,皆□□並.田南盡陌,北,東自比譚子.西比羽林孟□.若一旦田爲吏民秦胡所名有,譚子自當解之.時旁人杜子陵,李季盛.沽酒各半,錢千無五十.

On the 6<sup>th</sup> day, which is the day *wuyin*, the 9<sup>th</sup> month beginning with the day *kuiyou*, in the 7<sup>th</sup> year of the Guanghe period (A.D.178-184), Fan Lijia from Pingyin purchased five *mu* of land from Du Gezi and his younger brother X. The east limit of the land is in conjunction with the north border of Shimo village, Shiliang precinct. One *mu* is worth 3,000 cash. In total, the price is 15,000 cash. The payment is fully made the same day.

The middle root of the land is in the soil. From the Heaven above down to the Yellow Springs, all [missing two characters] the south limit of the land reaches to the end of the *mo*, the north and east of the land is next to that of Du Gezi, and the west limit of the land is next to Yulin Meng [missing one character]. As soon as the land is entitled to Qin Hu, Du Gezi shall automatically dissolve his title over the land. At the time, the witnesses are Du Ziling and Li Jisheng. The parties purchase wine and each drink a half of it. The price of the wine is 950 cash [1000-50].<sup>120</sup>

<sup>119</sup> Luo Zhenyu 羅振玉, *Zhensong tang ji gu yiwen* 貞松堂集古遺文 (Beijing: Beijing tushuguan chubanshe, 2003), 347-348; cf. Niida Noboru 仁井田陞, *Chūgoku hōseishi kenkyū* 中國法制史研究 (Tōkyō: Tōkyō daigaku shuppankai, 1980), vol. 2, 403-422, especially 418-419. Niida already surmised that private land ownership existed in early China. He noticed the term *mingtian* 名田 in the *Hanshu* and several excavated land transfer documents dated in the Eastern Han Period. Given the paucity of evidence at the time of his study, he couldn't pursue his point further.

<sup>120</sup> Luo, *Zhensongtang*, 349-351; cf. Niida, *Chūgoku hōseishi*, 429-430.

Lu Xiqi 魯西奇 recently argued that this document might not reflect an actual land transfer, since the land described very likely refers to a piece of imagined land in the underworld, making this a religious land transfer.<sup>121</sup> Regardless of whether this transaction involves real or imagined land, the document clearly reflects commonly accepted notions of the legal process of transferring a land title. Taking special note of the construction, *wei ...suomingyou* 為...所名有, we find that the core verb phrase is *mingyou* (literally, “to claim the title to and possess the object”), further confirming our understanding of ownership of land, especially the way in which *ming* is used as referring to title.

The following Juyan fragment is undisputedly a contract concerning a real land transfer. There are no mentions of the underworld, and the document specifies that the seller must make good the deficit if the amount of the land transferred proves not to be as large as what had been agreed upon.

置長樂里樂奴田卅五畝。<sup>122</sup> 賈錢九百錢，畢已。丈田即不足計畝數環錢。旁人淳于次孺，王充，鄭少卿，古酒旁二斗，皆飲之。

To purchase 35 *fan* of land from Le Nu of Changle district [Juyan county]. The buying price is 900 cash. The payment is already made. We will measure the land. If the area is not as large as it is specified, Le Nu shall return the money by calculating the deficit. The witnesses are Chunyu Ciru, Wang Chong, and Zheng Shaoqing. Buy two *dou* of wine, the two parties and the witnesses all will drink it.

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Based on the “rabbit” stories and these examples of land transfer, we can confidently conclude that the Han authorities had a universal and complete commitment to the concept of imperial subjects’ ownership of both movable and real property. Imperial subjects were also clearly aware of their property “rights,” going so far as to apply those “rights” to the underworld. This universal “right” of ownership, especially when it involved real property, was anything but trivial in world legal history. By contrast, in the Principate period of the Roman Empire (27 B.C.-A.D. 284), just as Roman law was taking its final shape, only

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<sup>121</sup> Lu Xiqi 魯西奇, “Handai maidiquan de shizhi yuanyuan yu yiyi” 漢代買地券的實質淵源與意義, *Zhongguoshi yanjiu* 中國史研究 1 (2006), 47-68, especially 52-53; Tomiya Itaru 富谷至, “Yomi no kuni no tochi baibai: Kan Gi Rikuchō baichiken kō” 黃泉の国の土地売買--漢魏六朝買地券考, *Ōsaka daigaku kyōyōbu kenkyū shūroku (Jinbun shakai kagaku)* 大阪大学教養部研究集録 (人文社会科学) 36 (1987), 1-32; Ikeda On 池田温, “Chūgoku rekidai boken ryakukō” 中国歷代墓券略考, *Tōkyō teikoku daigaku tōyō bunka kenkyūjo* 東洋文化研究所紀要 86 (1981), 193-278, especially 193-202. In addition, my translation consulted Yang Shuda 楊樹達, “Han Fan Lijia mai di qianquan ba” 漢樊利家買地鉛券跋, *Jiweiju jinwen shuo* 積微居金文說 (Beijing: Zhonghua shuju, 1997), 234.

In his article, Lu argued that all the land transfer documents excavated from Eastern Han tombs were not about real land transfers in this world but, reflecting popular beliefs, were, instead, transfers of imagined land in the underworld. Therefore, according to Lu, the A.D. 169 document also concerned buying land in the underworld. I disagree with Lu’s over-generalization. Unlike other documents, the language of this document includes no indications of the underworld whatsoever. There is simply no evidence to support an assertion that the document concerns imagined land transfer in the underworld. By contrast, Niida treated all the excavated land transfer documents as documentations of real land transfers, not imagined ones (Niida, *Chūgoku hōseishi*, 429-430). There is actually a third interpretation. According to Anna Seidel, there were land contracts for the dead. Seidel, “Buying One’s Way to Heaven: The Celestial Treasury in Chinese Religions,” *History of Religions* 17.3 (1978), 423-424.

Thus, neither Niida nor Lu may be entirely right. As a general principle, we need to examine the details of a particular land contract to determine its nature.

<sup>122</sup> This appears to be a unit of measure, but I am not sure what it is.

<sup>123</sup> *JY* strip 557.4, p. 653, cf. Zhang, *Zhongguo minfa*, 170-171.

Roman citizens (who comprised less than 15% of the population prior to the grand enfranchise in A.D. 212) had real property rights, while the majority of the free inhabitants, provincial subjects, had no real property rights at all.<sup>124</sup> As George Mousourakis, an expert on Roman law, pointed out:

With the exception of those territories belonging to communities which had been granted the *ius italicum*, provincial lands could not be subject to private ownership according to the rules of the Roman *ius civile* (dominium ex iure Quiritium). Land belonging to a community as a whole, on the other hand, was usually seized by the Romans and was disposed of in various ways: a part was sold and the proceeds were deposited into the Roman public treasure (aerarium); a part was left to tenants who were required to pay a fixed rent to the Roman state; and a part was left in the hands of the community to which it originally belonged, although it became subject to taxation.<sup>125</sup>

In conclusion, the prominence of the notion of *zhi* (a straight account of the facts) in civil litigation points to the importance of verification in civil procedures and the emphasis on evidence in general. The universally accepted concept of *mingfen* (*fen*) shows that, at least in Han times, imperial subjects of all ranks enjoyed ownership throughout the empire, both for movable property and real property. This is consistent with the fact that civil disputants were treated as equal parties, regardless of their ranks. These two concepts demonstrate that the early civil laws were grounded on and unified by quite rational notions, not just a conglomeration of pragmatic regulations.

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<sup>124</sup> This involves the sharp division between citizens and provincial subjects, as well as the sharp division between free inhabitants and slaves in Roman society. The numbers of citizens varied throughout the Principate period, due to changes in citizenship policies as well as natural population growth. According to the A.D. 14 census, the Roman Principate had 4,937,000 citizens, including women and children. Modern historians estimate the entire population at 45.5 million. Claudius (r. A.D.41-54) opened more channels for provincial subjects to acquire citizenship. Under Flavian (r. A.D. 69-96), efforts to expand the franchise intensified. By A.D. 164, the population reached approximately 61.4 million, though it remains difficult to accurately assess the number of citizens. Nonetheless, according to Professor Carlos Norena, until the late 2<sup>nd</sup> century A.D., citizens made up only about 15% of the whole population (private communication). See A. N. Sherwin-White, *Roman Citizenship* (Oxford: Clarendon Press, 1973), 225-236; cf. *The Cambridge Ancient History* (Cambridge: Cambridge University press, 2006), 812.

<sup>125</sup> George Mousourakis, *A Legal History of Rome* (New York: Routledge, 2007), 120.

## Concluding Chapter: Beyond Civil Laws

This chapter will explore three issues that lie beyond the boundaries established in previous chapters: the legal ideal of reforming people's morals to reduce lawsuits, the influence of ethical principles on laws, and the relationship between the laws and the Classics. I will argue three points: first, even though civil laws were quite sophisticated in early China, especially Han, with clear evidence of parties settling disputes through lawsuits, the prevailing legal ideal was to reform people's morals to reduce lawsuits; second, ethical principles, such as filial piety and revenge,<sup>1</sup> deeply influenced Qin and Han laws; and third, the Classics were often cited by judges in ways that suggest that they held equal authority with statutes in legal matters.

I believe putting early civil laws in their larger context is essential for a fuller picture of the justice system. This chapter will illuminate the distinctive characteristics of early civil laws as they relate to social harmony, their collaboration with ethical principles, and the overlapping authority of statutory laws and the Classics in actual legal practice.

### Part I: The Legal Ideal of Reforming People's Morals, Especially by Promoting Ritual Yielding,<sup>2</sup> to Reduce Lawsuits

The existence and importance of civil laws in early China are now beyond doubt. In summary, our sources show that civil statutes and civil legal notions emerged in the fourth century B.C., with a system of civil statutes developing during the Qin and Han periods.<sup>3</sup> This early civil justice system had five features that demonstrate its accessibility and sophistication: 1) civil disputes were quite common, even among family members who regularly sued one another over property issues; 2) the authorities considered resolving civil disputes their responsibility; 3) civil disputes were mostly resolved by district bailiffs, but disputants had the right to appeal to the county court, and then to the commandery court; 4) specific statutes were devoted to civil disputes involving compensation, debt, contract, and inheritance; and 5) the civil laws were based on notions such as *zhi* and *mingfen* that reveal the role of verification of facts and ownership of property in legal thinking.

Paradoxically, despite the sophistication of the civil justice system and the frequency of civil cases, the presumably prevailing legal ideal was to reform people's morals, especially by promoting ritual yielding, to reduce lawsuits, instead of refining and perfecting the laws.<sup>4</sup> Many Han judges whom our sources portray as benevolent and fair held that in an ideal world,

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<sup>1</sup> Filial piety and revenge are not ritual principles for the following reasons: In Han times, filial piety was no longer strongly associated with rituals, as Knapp has argued (see n. 41 in this chapter). Revenge, according to Professor David Johnson is "a rather primitive notion, far older than Confucian teachings. However, it could in some cases be made to appear as an act of filial piety" (private communication). Due to these considerations, I call filial piety and revenge "ethical principles."

<sup>2</sup> For this term, ritual yielding, see my discussion on n. 23 in this chapter.

<sup>3</sup> Maria Khayutina recently pointed out that there are references to cases of land transfers and disputes in Western Zhou bronze vessel inscriptions. See Maria, "Marital Alliances and Affinal Relatives in the Society and Politics of Zhou China in the Light of Bronze Inscriptions," (forthcoming in *Early China*). This demonstrates that disputes over property existed in China very early on. However, those disputes may or may not have been resolved by following formal legal principles (either written or customary). More research is needed to determine the nature of those disputes.

<sup>4</sup> This ideal appears to be applicable to both civil and criminal cases. But I will argue that this ideal mostly tied to civil disputes. See my discussion on pp. 116-117 of this chapter.

there should be no civil suits. Their ultimate goal in hearing civil cases was to achieve greater social harmony above and beyond simply granting each party his or her due. This goal is reflected in Han dynasty accounts of an antique paragon of justice, the Earl of Shao, otherwise known as Shao Bo 邵伯.

Shao Bo was one of the two famous ministers credited with putting the Zhou on a firm footing in early 11<sup>th</sup> century B.C.. The earliest story about him appears in the poem “Sweet Pear” (Gantang 甘棠) in the *Book of Songs*,<sup>5</sup> a reference that was then elaborated in the *Hanshi waizhuan* 韓詩外傳 (compiled ca. 160 B.C.):

昔者周道之盛,邵伯在朝,有司請營邵以居。邵伯曰:嗟!以吾一身而勞百姓,此非吾先君文王之志也。於是出而就蒸庶於阡陌隴畝之間而聽斷焉。邵伯暴處遠野,廬於樹下,百姓大悅,耕桑者倍力以勸。

In the old days, when the way of the Zhou was magnificent, the Earl of Shao was at court. Some officials asked to build a palace at Shao for him to live in. The Earl of Shao said: “No! To make the commoners toil for my own sake is certainly not what my ancestor, the King of Wen, intended.” Whereupon the duke went out to reach the commoners between the paths and dikes in the field and to hear disputes and give out judgments there. The Earl of Shao exposed himself in the far-off fields and dwelt under a [sweet pear] tree. The people greatly rejoiced. The tillers of the fields and tenders of the silkworms doubled their labors, because he had encouraged them.<sup>6</sup>

It appears that Shao Bo, who was famous for his impartial judgments, became the paragon of benevolence and justice in the Han period, if not earlier. His image reflected in the Han account is that of a benevolent local lord who went out into the remote areas of the countryside to guide and help the commoners, bringing his wisdom to bear on their problems and to deliver relief and happiness. It is worth noting that our passage specifies that Shao Bo heard disputes and passed judgments (*tingduan* 聽斷), suggesting the importance of bringing justice to the commoners. Underscoring this image is Shao Bo’s devotion to King Wen, his father and ruler, and to the way of the Zhou. Readers will recall that King Wen was a byword for benevolence, and that the way of Zhou was deemed to be straight (*zhi* 直), i.e., fair and impartial. The “Great East” (Dadong) poem in the *Book of Songs* says: “The way of Zhou is like a whetstone, and straight (*zhi*) as an arrow.”<sup>7</sup>

This Han interpretation of the story of Shao Bo perhaps simply projected features of Han legal ideals back onto his biography. We know that Shao Bo was revered as a paragon of mercy and justice by members of the Han governing elite, insofar as he was frequently invoked in passages appraising the achievements of famous Han judges.<sup>8</sup> Moreover, as K. E. Brashier in 2005 observed:

When alluding to the Sweet Pear tree poem, Han sources depict the Earl of Shao

<sup>5</sup> *The Book of Songs*, Mao no. 16.

<sup>6</sup> *Hanshi waizhuan jishi* 韓詩外傳集釋, ed. Xu Weichi 許維遛 (Beijing: Zhonghua shuju, 1980), 1.28; cf. James Robert Hightower, *Han shih wai chuan: Han Ying's Illustrations of the Didactic Application of the Classic of Songs* (Cambridge: Harvard University Press, 1952), 36-37.

<sup>7</sup> *The Book of Songs*, Mao no. 203.

<sup>8</sup> We know of four occasions: 1) the biography of Wang Ji 王吉 (d. 84 B.C.) on *Hanshu* 72.3058, and the biography of Feng Yan 馮衍 (d. A.D. 30) on *Hou Hanshu* 28a.968; and 2) the two commemorative stele entitled “Xianyu Huang bei” 鮮于璜碑 (A.D. 165), and “Han gu guchengzhang Tangyin ling Zhang jun biao song” 漢故穀城長蕩陰令張君表頌 (A.D. 186). See *Han bei jishi*, 285, 490.

[the Earl of Shao] ‘holding court’ (*shuzhi* 述職), ‘passing judgments’ (*tingduan* 聽斷), or ‘carrying out justice and governance’ (*jueyue zhengshi* 決獄政事). The Eastern Han commentator Zheng Xuan explains that ‘the Earl of Shao listened to the litigations of men and women.’<sup>9</sup>

In sum, the central theme in the lore of Shao Bo is how a fair judge can bring about great social harmony, i.e., transform the people.<sup>10</sup>

In the extant sources, we find seven judges who were deemed to resemble Shao Bo in transforming their jurisdictions. The cases they reportedly handled were all typically civil in nature: Han Yanshou 韓延壽 (d. 57 B.C.) and Xu Jin 許荆 (fl. A.D. 90), appear in the sources as judges adjudicating difficult disputes between brothers over land;<sup>11</sup> Lu Gong 魯恭 (A.D. 38-119), appears as a judge presiding over a case that involved a borrowed ox;<sup>12</sup> three judges, Wu You 吳祐 (fl. 2<sup>nd</sup> century), Cai Yan 蔡衍 (d. 167) and Liu Ju 劉矩 (d. 168), are all credited with the successful handling of numerous civil disputes;<sup>13</sup> and finally, Chen Gang 陳綱 (fl. 2<sup>nd</sup> century), reportedly handled a dispute of an unspecified nature between brothers.<sup>14</sup> The accounts of these judges are so highly idealized that their stories appear to be normative depictions of morally idealized jurisprudence. Nevertheless, such hagiographical accounts are invaluable if we wish to understand prevailing Han ideals as opposed to actual legal practices. What made these model judges exemplars was the way in which they supposedly transformed the behavior of the subjects who lived within their jurisdictions.

We first encountered Han Yanshou’s story from the *Hanshu* in Chapter One. It involved a dispute between two brothers over the ownership of land. Han Yanshou, then governor, traced the origin of the dispute to his own personal failure to educate his people by moral suasion. Han Yanshou retired to his own rooms to reflect upon his errors while his subordinates bound themselves as if they were criminals. The narrative continues:

此兩昆弟深自悔，皆自髡肉袒謝，願以田相移，終死不敢復爭。延壽大喜，開閣延見，內酒肉與相對飲食，厲勉以意告鄉部，有以表勸悔過從善之民。延壽乃起聽事.... 延壽恩信周隄二十四縣，莫復以辭訟自言者，推其至誠，吏民不忍欺給。

The two brothers deeply repented. They both shaved their hair, undressed themselves [a ritual to demonstrate one’s sincere repentance], and apologized, and they were willing to yield the land to the other. [Moreover, they vowed] down to their deaths, never to dare to dispute anything else. Han Yanshou was greatly delighted [by this]. He opened the gates to invite them in for a meeting, for which he provided wine and meat, and ate and drank with them. He forcefully urged them to report their intentions to the districts, so that they might make an example

<sup>9</sup> Brashier, K.E., “Symbolic Discourse in Eastern Han Memorial Art: The Case of the Birchleaf Pear,” *Harvard Journal of Asiatic Studies* 2 (2005), 299. In his article, Brashier translated “*gantang*” 甘棠 as “birchleaf pear,” which I have amended to “sweet pear tree,” following the standard translation, as in Legge, vol. 4, 16.

<sup>10</sup> We can further deduce that there would be no lawsuits in the transformed jurisprudence, since people would be living together in harmony. The fundamental assumption underlying this ideal is that justice and social harmony are inseparable. Of course, in reality, justice often disrupted social harmony. For example, family members sued each other over property issues during household division or inheritance. The focus of this discussion is the belief that justice can bring forth social harmony, and that social harmony as the ultimate goal justifies the moral approach that a judge should adopt in handling disputes.

<sup>11</sup> For Han Yanshou, see *Hanshu*, 76.3213; for Xu Jing, see *Hou Hanshu*, 76.2472.

<sup>12</sup> *Hou Hanshu*, 25.874

<sup>13</sup> *Hou Hanshu*, 64.2101; *Hou Hanshu*, 67.2208; *Hou Hanshu*, 76.2476.

<sup>14</sup> Chang Ju 常璩, *Huayang guozhi* 華陽國志 (Beijing: Zhonghua shuju, 1985), 10B.160.



of those who repeated their faults and followed the good. Han Yanshou, only at that point, started to hear cases [again]...Han Yanshou's generous favors and reliability benefited the twenty-four counties [in his jurisdiction], so much so that the people no longer presented claims at court for adjudication. [Han Yanshou] exhibited the deepest integrity (誠), so neither his officials nor the ordinary people could bear to cheat him.<sup>15</sup>

The message imbedded in this passage is that Han Yanshou's self-critical approach not only successfully resolved this particular case, it also eventually transformed the twenty-four counties of the entire commandery.

A similar story is told in the *Dongguan Hanji* about Wu You:

民有相爭訴者, 輒閉閣自責, 然後科其所訟, 以道譬之。

Whenever the people brought disputes and litigation, he (Wu You) always closed the doors and reflected upon his own faults. Then he would hear the cases and instruct the [disputing] parties in the Way.<sup>16</sup>

Xu Jing's story employs the same tropes:

和帝時, 稍遷桂陽太守...嘗行春到耒陽縣, 人有蔣均者, 兄弟爭財, 互相言訟. 荊對之歎曰: 吾荷國重任, 而教化不行, 咎在太守. 乃顧使吏上書陳狀, 乞詣廷尉. 均兄弟感悔, 各求受罪. 在事十二年, 父老稱歌.

During the reign of Emperor He (r. A.D. 89-105), he (Xu Jing) was gradually promoted until he became governor of Guiyang...He once in spring inspected Leiyang county, where there was a certain person named Jiang Jun, who had been involved in a property dispute with his brothers, in which each accused the other of wrongdoing in a civil suit. Xu Jing responded to it with a sigh, saying, "I bear an important responsibility for the state, and if its moral teachings do not prevail, the blame lies with me, as governor." Therefore, he turned back and had his scribe submit a report to explain the situation and ask that it be referred to the superintendent of justice. Jiang Jun and his brothers repented, and each requested to receive punishment [rather than having the governor be punished]. He (Xu Jing) served in his post for twelve years and the local elders praised him in songs.<sup>17</sup>

Lu Gong handled two difficult cases, a dispute over land and a dispute concerning a borrowed ox:

訟人許伯等爭田, 累守令不能決, 恭為平理曲直, 皆退而自責, 輟耕相讓。

The litigants Xun Bo and others were engaged in a dispute over some farm land. A succession of previous magistrates couldn't determine the [rights and wrongs of] the case. Lu Gong made the principles fair and just and distinguished straight accounts of the facts and distorted accounts of the facts. Thus the parties all

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<sup>15</sup> *Hanshu*, 76.3213.

<sup>16</sup> *Dongguan Hanji*, 20.189. I remind the reader that the story we encountered in Chapter One is from Xie Cheng 謝承, *Hou Hanshu*, where the story is slightly different from that given in the *Dongguan Hanji*. In Xie Cheng's *Hou Hanshu*, when a civil dispute arises, Wu You first sent the *sanlao* to instruct the parties in the virtues of filial piety and fraternal love as the first step in his attempt to resolve a dispute. No mention is made of Wu's self-criticism. But these two details of the hagiography are not in contradiction.

<sup>17</sup> *Hou Hanshu*, 76.2472.

retired and criticized themselves. They [even] laid down their ploughs so as to yield to one another.<sup>18</sup>

亭長從人借牛而不肯還之，牛主訟於恭。恭召亭長，令歸牛者再三，猶不從。恭歎曰：是教化不行也。欲解印綬去。掾史泣涕共留之，亭長乃喟悔，還牛，詣獄受罪，恭不問。於是吏人信服。

The head of a certain village borrowed an ox from someone and then refused to return it to its owner. Lu Gong summoned the head of the village, whose name was Dui, and repeatedly ordered him to return the ox. Still Dui did not comply. Lu Gong sighed: “This shows that [the court’s] moral teachings do not prevail.” So he wanted to take off his seals of office and quit his job. The members of his staff all wept and asked him to stay. The head of the village then regretted his action. He returned the ox and came [on his own initiative] to the jail to receive his punishment. Gong pardoned him and did not formally interrogate him, whereupon the officials and ordinary people all sincerely submitted [in their hearts to his decisions].

Chen Gang, we are told, resolved a civil dispute among at least two brothers over a non-specified problem:

陳綱字仲卿，成固人也。...三府並辟舉茂才，拜弘農太守。初至，有兄弟相爭，自相責引退，是后無訟者。

Chen Gang’s styled name is Zhong Qing; he was a native of Chenggu. The bureau of the Three Lord all recommended him as “Flourishing Talent” (*maocai*). Later on he was appointed governor of Hongnong. When he first arrived [in that post], there were [two?] brothers who brought suits against each other. [Chen Gang] blamed himself [for their obstinacy] and retreated [from the public view], after which [there] were no more civil disputes.<sup>19</sup>

The four stories above all mention moral teachings (*jiaohua* 教化) without specifying precisely what kinds of moral teachings were being undermined by litigation. These teachings can probably be traced to the same principles that informed the ritual canon *Liji* (comp. ca. 2<sup>nd</sup> century B.C.),

故昆弟之義無分，然而有分者，則辟子之私也...異居而同財，有餘則歸之宗，不足則資之宗。

Therefore, brothers should not divide [the household] in principle. However, when there is such a division, it then acknowledges the sons’ selfishness...[Brothers] may live separately but still regard the family wealth as common. And when they have surpluses, they should be sent back to the clan [common fund]. And when someone is in need, then the clan will subsidize that person [and his family].<sup>20</sup>

<sup>18</sup> *Dongguan Hanji*, 19.174. I shall remind my reader that I discussed this case in Chapter Three when studying *zhi* (a straight account of the facts).

<sup>19</sup> *Huayang guozhi*, 10B.160. The original passage provides no clues about when Chen Gang served in the post, and Chen Gang does not appear in any extant sources, such as the *Hanshu* or the *Hou Hanshu*. We do know that Chen Gang must have been active before the fourth century since the author Chang Ju (291-361), who cited his case, was active in the fourth century. Therefore, Chen Gang very possibly lived in the Han period or the Three Kingdoms period (A.D. 220-280).

<sup>20</sup> *Liji*, 30.356.

Given the abundant examples of divisions of inherited wealth, land, and property, and the clear evidence of frequent disputes over the fairness of those apportionments, we know that this ideal was seldom followed by the people. First, as Lai Mingchun's dissertation on household morphology in early China shows, simple households (parents and their children) and household divisions were the norm in Qin and Han times. The sources mention extended households (three-generations) and joint households (in which adult siblings lived together) as exceptional.<sup>21</sup> Second, the received and excavated sources supply abundant evidence that disputes over property among brothers were frequent. A passage from the *Huainanzi* 淮南子 (comp. 139 B.C.) offers a caustic view of such household divisions:

當今之世，醜必托善以自為解，邪必蒙正以自為辟....分別爭財，親戚兄弟構怨，骨肉相賊，曰周公之義也。

In today's world, whoever does something ugly surely pretends to be kind to make excuses for himself, and whoever is evil surely pretends to be righteous to get away with his or her evildoing... When it comes to dividing up the household and disputes over property, close kin [including] brothers have grievances against each other, while flesh and blood relatives harm one another. And this they call the principles of the Duke of Zhou.<sup>22</sup>

The phrase “today's world” (*dangjin zhi shi* 當今之世) draws attention to how widespread the phenomena was, at least in the opinion of the text's author or compiler. The foregoing cases of land disputes among brothers reinforce this view. If an exemplary judge regarded such land disputes among brothers as a sign of moral collapse and a prompt for self-criticism, why, then, do we not see Lu Gong blaming himself for the dispute between Xu Gong and the counter-claimants? We can assume that if the disputants were not close kin, the offense against morality was probably deemed to be correspondingly less severe, and, as such, Lu did not feel morally obligated to criticize himself for failing to inculcate moral teachings on behalf of the throne. But if the disputants were not close kin, which, by

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<sup>21</sup> Makino Tatsumi 牧野巽 (1905-1975) argued that a nuclear family of four or five members prevailed in the Han dynasty. See Makino, “Kandai ni okeru kazoku no ōkisa” 漢代における家族の大きさ, *Kangakkai zasshi* 漢學會雜誌 3.1 (1934), 32-42. Beginning with Makino's study in 1934, scholars have debated the issue of family size in early China. For example, Shimizu Morimitsu 清水盛光 argued that there were two typical types: big families were typical for rich elite families, while small families were typical for ordinary peasant families. However, Moriya Mitsuo 守屋美都雄 disagreed with both Makino and Shimizu by arguing that the typical family in the Han was the “three generation big family” (*sanzokushi* 三族制) that included an old couple, their sons and daughter-in-laws, and the grandchildren. See Shimizu, *Shina kazoku no shokōzō* 支那家族の諸構造 (Tōkyō: Iwanami Shoten, 1942), 127-136; Moriya, “Kandai kazoku no keitai ni kansuru shiron” 漢代家族の型体に関する試論, *Shigaku zasshi* 史學雜誌 52.6 (1941), 35-43. For a detailed review on this topic, see Iio Hideyuki 飯尾秀幸, “Chūgoku kodai ni okeru kazoku kenkyū o megutte” 中國古代における家族を研究めぐって, *Rekishi hyōron* 歴史評論 12 (1985), 69-70.

This dissertation adopts Lai Mingchun's estimation in “Family Morphology in Han China” (Ph.D. diss., University of Toronto, 1995), 1-30, 220-225. Lai's work is the most comprehensive study to date on this topic. His estimation is consistent with the household registration records excavated from Yinwan 尹灣. The “Jibu” 集簿 (Register, 15 B.C.) excavated from Yinwan shows that the Donghai 東海 commandery had 266,290 households, consisting of 1,397,343 individuals. Thus, the average size of each household was 5.2 individuals, confirming the estimation that a typical Han household was one couple with three children. See *Yinwan Hanmu jianqu* 尹灣漢墓簡牘, ed. Lianyungang shi bowuguan 連雲港市博物館 (Beijing: Zhonghua shuju, 1997), 77; cf. Michael Loewe, *The Men Who Governed Han China: Companion to A Biographical Dictionary of the Qin, Former Han and Xin Periods* (Leiden and Boston: Brill, 2004), 60.

<sup>22</sup> *Huainanzi* 淮南子 (Shanghai: Shanghai guji, 1989), 20.225b.

inference, meant that their dispute did not rise to the level of a moral offense, why would the parties to the dispute criticize themselves after the case was resolved?

A likely answer may be supplied by Liu Ju's 劉矩 (d. 168) account, which points to the significance of ritual yielding (*lirang* 禮讓)<sup>23</sup>:

稍遷雍丘令, 以禮讓化之. 其無孝義者, 皆感悟自革. 民有爭訟, 矩常引之於前, 提耳訓告, 以為忿恚可忍, 縣官不可入, 使歸更尋思. 訟者感之, 輒各罷去.

[Liu Ju] gradually was promoted to the magistracy of Yongqiu, where he transformed [the local customs] through the ritual of yielding. Those who [until then] had had no filial piety and sense of duty were all moved [by his model] and awakened to the need to reform themselves. When the local people had quarrels or civil disputes, Liu Ju always brought them into his presence, lent them an ear, and closely admonished them. By this means he let them know that they could have managed their anger and spats themselves, and they should not get officials involved. Then he had them go home and think it over. The litigants were moved, and each thereupon quit [trying to gain property].<sup>24</sup>

Here we find Liu Ju, in his capacity as a local judge, encouraging, even commanding, ritual yielding. The theory driving his actions appears to be that if the people learn to yield to one another, disputes will be privately resolved and eliminate the need for civil litigation, thus achieving the greater goal of creating social harmony.

We find a similar pattern in all five stories: when disputes are brought to the attention of the judges, they are reluctant to take formal legal action to resolve those disputes. Instead, they typically criticize themselves for a personal lack of virtue and their failure to set a good example, at which point the litigants are moved to repent and criticize themselves, yielding to one another, peaceably resolving their own disputes, thereby bringing great social harmony to the whole territory within the judge's jurisdiction. This scenario is highly moralistic in that the key to resolving the disputes was ritual yielding, which was considered a moral teaching. In addition, the judges' self-criticism was undoubtedly a moral stance.<sup>25</sup> Clearly, local officials in their capacity as judges felt that their position required them to try to reform people's morals, in the hopes of creating a healthier social environment that would be conducive to the reduction or, ideally, the elimination of lawsuits.

This ideal of reforming people's morals, especially by promoting ritual yielding, to reduce lawsuits, inspired by the judges' self-criticism, seems to be applicable to both civil and criminal cases. However, the extant sources only show that judges applied this practice of self-criticism to promote ritual yielding in civil cases. By contrast, in criminal cases, if a crime was brought to the attention of the judges, they typically applied the statutes to the best

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<sup>23</sup> *Lirang* 禮讓 is hard to render. There are two possibilities: 1) ritual yielding, meaning the specific rituals that express the ideal of yielding, and 2) ritual and yielding. I think the first choice is preferable. I rule out the second one because this phrase "ritual and yielding" seems to suggest that yielding itself is parallel to ritual in significance, endowing too strong a meaning to yielding alone. I chose "ritual yielding" because on one hand, *li* 禮 clearly refers to ritual, but on the other hand, in our stories, the emphasis is always on yielding. In addition, we may consider yielding a moral value. As we know, rituals and morals in pre-modern China were often intertwined.

<sup>24</sup> *Hou Hanshu*, 76.2476.

<sup>25</sup> Self-criticism was a quite common practice in Han China. Even Han emperors often practiced self-criticism. This is reflected in the edicts preserved in the standard histories. I shall devote an independent article to this issue.

of their abilities in determining guilt and assigning punishment.<sup>26</sup> As an edict by Emperor Jing dated to 156 B.C. says: “The bastinado is the means to teach them [the people]; let there be established ordinances [fixing the size and heft of] the stick” (笞者, 所以教之也, 其定箠令).<sup>27</sup> Ban Gu’s treatise also urges authorities to deter crime by making potential criminals fear the consequences of criminal actions.

罪至重而刑至輕, 民無所畏, 亂莫大焉. 凡制刑之本, 將以禁暴惡, 且懲其未也. 殺人者不死, 傷人者不刑, 是惠暴而寬惡也.

When the crimes are extremely grave, but the punishments are extremely light, the people have nothing to fear. There is no greater disorder than this. In all cases, the basic issue in regulating punishments is to prohibit violence and wrongdoing and to deter crimes before they happen. Not to have those who kill people die, and not to have those who wound people punished, is to be kind to be the violent and to be lenient to the evil.<sup>28</sup>

Perhaps because civil suits were considered less destructive of the public order, the judges had more leeway to resort to moral suasion. While many factors surely contributed to the inclination among the Han governing elite to nurture social harmony to reduce civil lawsuits through the promotion of ritual yielding, this ideal has deep philosophical roots. One of the earliest expressions of this ideal is a precept put forward by Confucius:

聽訟, 吾猶人也. 必也使無訟乎!

When hearing cases, I am as [capable as] all the other judges. But I must cause there to be no cases of litigation!<sup>29</sup>

This precept was further associated with Confucius’s general view on laws and rituals.

子曰: 導之以政, 齊之以刑, 民免而無恥. 導之以德, 齊之以禮, 有恥且格.

Confucius says: Lead the people by regulations and keep them in order by punishments, then they will flee from you and lose all self-respect. But lead them by virtue and keep them in order by established ritual principles, then they will keep their self-respect and come to you.<sup>30</sup>

While Confucius was not discussing civil laws, per se, but rather expressing his preference for ritual principles in guiding society, evidence shows that Confucius’s sayings were quoted during court debates, demonstrating his influence on the Han legal system.<sup>31</sup> We know that Confucius’s emphasis on moral force was reiterated and developed by many Han

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<sup>26</sup> There are stories where a moral exemplar moved thieves to quit their criminal activities. For instance, Chen Shi’s 陳寔 biography in *Hou Hanshu*, 62.2067, tells a story of a thief who was attempting to sneak into Chen’s house to steal from him, but was moved by his moral power. Those stories are of a different nature compared to the stories of ritual yielding that we have studied. The former are not lawsuits in nature, but the latter are cases that have been officially brought to the attention of the authorities to seek their judgment.

<sup>27</sup> See, *Hanshu*, 23.1100.

<sup>28</sup> *Hanshu*, 23.1111. My translation follows Hulsewé, *RHL*, 347. This actually in a sense explains why penal laws were so complicated in early China, and indeed, pre-modern China.

<sup>29</sup> *Liji*, 60.986.

<sup>30</sup> *Analects*, 2.3. My translation here follows Legge; cf. Waley, 88.

<sup>31</sup> We will soon encounter a case in which Confucius’s sayings were quoted during the court debate. See p. 193 in this chapter.

thinkers. For example, the famous classicist Dong Zhongshu 董仲舒 (179-93 B.C.) once urged Emperor Wu,

古者修教訓之官，務以德善化民。民已大化之后，天下常亡一人之獄矣。今世廢而不脩，亡以化民，民以故棄行誼而死財利，是以犯法而罪多，一歲之獄以萬千數。

In the ancient times, [the state] cultivated and trained the officials to surely use virtues and benevolence to transform the people. After they were transformed, no one went to jail all under Heaven, always! In today's world, we abandoned [those moral teachings] and do not cultivate them. We have no means to transform the people. Thus, they have abandoned virtues and died for wealth and profits. Therefore, law-breakers and criminals are abundant. The criminal cases number thousands each year.<sup>32</sup>

Another master, Yang Xiong 楊雄 (53 B.C.-A.D. 18) held:

民可使見德，不可使見刑。見德則純，見刑則亂。

We can let the people see virtues, but cannot let them see penal laws. If they see virtues, they are pure, but if they see penal laws, they are disordered.<sup>33</sup>

The famous thinker Wang Fu (ca. A.D. 76-157) made it plain by quoting Confucius in his “*dehua*” 德化 chapter (Moral transformation”) of *Qianfu lun*:

是故上聖不務治民事，而務治民心。故曰：聽訟，吾猶人也。必也使無訟乎！

Therefore, a supreme sage surely does not administer people's business, but surely administers people's heart. Thus, [Confucius] says: “When hearing cases, I am as [capable as] all the other judges. But I must cause there to be no cases of litigation!”<sup>34</sup>

This recurring emphasis on reforming people's morals can be nicely summarized by Peerenboom's theory of the “Politics of Harmony.” He argued that Confucius offered “an ethic of virtues of qualitative excellence in interpersonal relations (*ren* 仁) and harmony among social beings.”<sup>35</sup> And,

Confucius's jurisprudence, in making the sage responsible for engineering and ensuring the smooth operation of a harmonious social order, constitutes ‘a rule of man.’ There are, of course, still laws. Hence Confucianism<sup>36</sup> remains a rule of law broadly construed to entail the existence of the legal and enforcement mechanisms necessary to ensure the ability of society to function.<sup>37</sup>

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<sup>32</sup> *Hanshu*, 56.2515. Dong was talking criminal cases, but his argument could be easily applied to civil cases as well.

<sup>33</sup> Yang Xiong 楊雄, *Fayan zhu* 法言注, ed. Han Jing 韓敬 (Beijing: Zhonghua shuju, 1992) 9.212.

<sup>34</sup> *Qianfu lun jian jiaozheng*, 8.376.

<sup>35</sup> Peerenboom, *Law and Morality*, 128.

<sup>36</sup> I would respectfully note that “Confucianism” is perhaps a wrong term. What Peerenboom really means here is *ru* teachings. For discussions concerning this term “Confucianism,” see Michael Nylan, *Five “Confucian” Classics* (New Haven: Yale University Press, 2001), 364-366.

<sup>37</sup> *Ibid.*, 132. This statement touches upon the issue of “rule of law” vs. “rule of man.” Obviously, it is difficult to put the legal system of early China in either of these categories.

This ideal of reforming people's morals, especially by promoting ritual yielding, to reduce lawsuits, had a significant impact on the legal development of imperial China. On the one hand, realization of this ideal, together with many other factors, restrained Han China from more fully developing its system of civil laws beyond the quite substantial and rational levels it achieved, as this dissertation has demonstrated.<sup>38</sup> On the other hand, this ideal inspired later dynasties to develop a unique mechanism for resolving civil disputes that stressed reconciliation. We find the echo this tendency as late as the Qing (1644-1911), during the so-called "the third realm of justice," where we find a comparable emphasis on peace-making compromise, described by Philip Huang in his *Civil Justice in China: Representation and Practice in the Qing* (1996).<sup>39</sup>

Having noted that the key to achieving this ideal was to reform the morals of the people, our attention is drawn to the influence of ethics on the justice system. Actually, Joseph Needham already observed that in the Han, laws were firmly embedded in ethics.<sup>40</sup> The influence of ethical thinking was not limited to civil laws. Thus, in the following section, I will expand my inquiry from civil laws into the realm of criminal laws as well.

## Part II: Ethical Principles and Laws

I maintain that two ethical principles, filial piety and revenge, deeply influenced the Qin and Han laws. What precisely was filial piety? In its earliest formulation in Shang and Western Zhou, the term referred to offering sacrifice to one's dead ancestors, but very early on, duties to living parents also became part of the definition.<sup>41</sup> During the pre-Han period, the term filial piety experienced a series of subtle changes in meaning, as Keith Knapp

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<sup>38</sup> Besides this ideal, I can think of two other factors: the inability of the dynasty to have enough officials in local administration, and the rise of the big clans in the Eastern Han, where negotiations between members and between clans would tend to be done by the parties themselves.

<sup>39</sup> Huang, *Civil Justice in China*, 110-137, especially, 135-137. Huang distinguished the third realm of justice from strictly informal justice and strictly formal justice. The former referred to customary practices while the later referred to magisterial adjudication. The third realm designates a system in which formal and informal justice operated on relatively equal terms. "The magistrate's opinion, to be sure, carried all the weight of the official legal system. But that opinion was expressed within an ideology that differed to informal justice, so long as that justice worked within the boundaries set by the law. Thus, magistrates routinely accepted peacemaking compromise settlements worked out by community and kin mediators in preference to continuing on to court adjudication" (p. 136).

<sup>40</sup> Joseph Needham, *Science and Civilization in China* (Cambridge: Cambridge University Press, 1956), vol. 2, p. 214.

<sup>41</sup> The most extensive research on this topic is Harry Hsin-i Hsiao, "Filial Piety in Ancient China: A Study of the Hsiao-ching" (Ph.D. diss., Harvard University, 1978). Hsiao, by studying the *Documents*, the *Odes*, and the Zhou bronze vessel inscriptions, argues that in the Western Zhou period (ca. 1046-771 B.C.), the concept of filial piety referred to offering sacrifices to the ancestors and to commemorating them in the heart (pp. 79-80). Ikezawa Masaru 池澤優, by studying the usage of the word *xiao* in bronze inscriptions, traces the origin of the notion to ancestor worship in the Western Zhou period. See Ikezawa, "Saishu Shunjū jidai no kō to sosen saishi ni tsuite" 西周春秋時代の孝と祖先祭祀に就いて, *Tsukuba daigaku chiiki kenkyū* 筑波大学地域研究 10 (1992), 57-119. Keith Knapp believed that the original meaning of *xiao* was to provide food offerings to one's ancestors. See Knapp, "The Ru Interpretation of Xiao," *Early China* 20 (1995), 199. Michael Nylan also argued that filial piety was originally associated with ancestor worship but was later expanded to mean duties to living parents. See Nylan, "Confucian Piety and Individualism in Han China," *Journal of the American Oriental Society* 116.1 (1996), 2-3.

argued:

By contrasting the meaning of *xiao* in Western Zhou and Spring and Autumn period sources with its meaning in *ru* philosophical texts of the early and late Warring States period, one may see that the *ru* masters fundamentally reinterpreted *xiao*. Namely they de-emphasized one of *xiao*'s earliest meanings, feeding one's elders, and instead accentuated a derivative meaning of obeying one's parents, and by further extension, obeying one's lord. This reinterpretation adapted the concept of *xiao* to the emerging dominance of the household and bureaucratic state in place of lineage and kingdom.<sup>42</sup>

According to Knapp, from the late Zhanguo period onwards, filial piety referred not only to the care and feeding of one's elders, but, more importantly, to obeying one's parents.<sup>43</sup> However, we need to remain aware that filial piety was a very complicated notion. Filial piety had a hierarchy that mirrored social status. The Han-era *Classic of Filial Piety* (*Xiaojing* 孝經) delineates five levels of filial piety corresponding to five different social strata, from the Son of Heaven (*tianzi* 天子), local lords (*zhuhou* 諸侯), ministers (*qing daifu* 卿大夫), men in service (*shi* 士), to commoners (*shuren* 庶人).<sup>44</sup> Among these five levels, caring for one's parents is prescribed for commoners.

用天之道, 分地之利, 謹身節用, 以養父母, 此庶人之孝也。

Use the way of the heaven, share the benefits of the earth, and be cautious about one's own person and be frugal, in order to take care of one's parents. This is the filial piety of commoners.<sup>45</sup>

With this notion of filial piety in mind, we now examine how the values of filial piety influenced criminal and civil laws.<sup>46</sup>

With respect to criminal laws, "lack of filial piety" was a crime in Qin and Han laws. Perhaps we should not expect filial piety to have become a legal principle in early China since the Legalists, who were traditionally believed to be the masterminds behind the promulgations of laws in early China, held very negative views toward filial piety.<sup>47</sup> For example, *The Book of the Lord Shang* attacks filial piety along with other *ru* values as not

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<sup>42</sup> Keith Knapp, "The *Ru* Reinterpretation of *Xiao*," 197.

<sup>43</sup> Knapp regards obeying one's lord (*zhong* 忠) as a further extension of filial piety by analogy to obeying one's parents (p. 217). In any case, my treatment of filial piety is here restricted to domestic settings. In addition, Knapp argues that feeding one's parents was de-emphasized by the *ru* masters (pp. 218-219). I disagree with this analysis. I believe that the notion of filial piety acquired a broader meaning through the re-interpretation of the *ru* masters.

<sup>44</sup> Nylan's dissertation argues that the scope of *xiao* in the *Classics of Filial Piety* was expanded from the conventional definition of *xiao* alluded to by Mencius. See Nylan, "Ying Shao," 186-190.

<sup>45</sup> *Xiaojing zhushu*, 3.6, in the *Shisanjing zhushu* 十三經注疏 (Ruan Yuan 阮元 1815 edition, rpt., Taipei: Yiwen chubanshe, 1965).

<sup>46</sup> *Xiao* was very important in criminal laws as well, in that lack of filial piety (*buxiao* 不孝) was considered a serious crime in Qin and Han laws. See Nylan, "Ying Shao," 177-178; Wakae Kenzo 若江賢三, "Shin Kan ritsu ni okeru fukyōzai" 秦漢律における不孝罪, *Tōyōshi kenkyū* 東洋史研究 55.2 (1996), 249-282; Liu Min 刘敏, "Cong Ernian lüling lun Handai xiaoqin de falühua" 從二年律令論漢代孝親的法律化, *Nankai xuebao* (*Zhexue shehui kexu ban*) 南開學報 (哲學社會科學版) 2 (2006), 91-98.

<sup>47</sup> Martin Kern has argued that the Qin was not simply "Legalist" and anti-traditional. He pointed out that the First Emperor's stele celebrate *xiao*. See Kern, *The Stele Inscriptions of Ch'in Shih-huang: Text and Ritual in early Chinese Imperial Representation* (New Haven: American Oriental Society, 2000). His study is in agreement with my observation here: Qin laws also emphasized *xiao* and hence not simply "Legalist."



only useless but even harmful to the state.

國有禮有樂, 有《詩》有《書》, 有善有修, 有孝有悌, 有廉有辯. 國有十者, 上無使戰, 必削至亡; 國無十者, 上有使戰, 必興至王.

If, in a country there are the following ten evils: rites, music, odes, history, virtue, moral culture, filial piety, brotherly duty, integrity and sophistry, the ruler cannot make the people fight and dismemberment is inevitable; and this brings extinction in its train. If the country has not these ten things and the ruler can make the people fight, he will be so prosperous that he will attain supremacy.<sup>48</sup>

The *Han Feizi* 韓非子 specifically attacks Confucius's idea of filial piety as something deadly harmful to the state:

魯人從君戰, 三戰三北. 仲尼問其故, 對曰: 吾有老父, 身死莫之養也. 仲尼以為孝, 舉而上之. 以是觀之, 夫父之孝子, 君之背臣也.

There was a man of Lu, who followed the ruler to war. He fought three battles, and ran away thrice. When Confucius asked him his reason, he replied: "I have an old father. Should I die, nobody would take care of him." So Zhongni (Confucius) regarded him as a man of filial piety, praised him, and exalted him. From this it can be seen that the dutiful son of the father was a rebellious subject of the ruler.<sup>49</sup>

Despite such attacks, we find references to filial piety in the earliest known legal documents in China, the Shuihudi Qin legal documents. Qin laws treated acts deemed lacking in filial piety as a serious crime, namely the crime of "lack of filial piety" (*buxiao zui* 不孝罪), as Wakae Kenzo 若江賢三 pointed out in 1996.<sup>50</sup> Unfortunately, even though the term *buxiao zui* occurs twice in the Shuihudi Qin legal documents, these references provide no explanation of what constituted a lack of filial piety. Wakae, however, suggested that scolding and blaming one's parents were considered *buxiao*.<sup>51</sup> Wakae based his conclusion on the following evidence: in order to eliminate the prince-apparent Fusu 扶蘇 (d.210 B.C.), an edict forged by Zhao Gao 趙高 (d. 207 B.C.) in 209 B.C. charged Fusu with *buxiao* and, in the name of the First Emperor of the Qin, ordered him to commit suicide. The basis for the charge was that Fusu held a grudge against his father, the First Emperor of the Qin.

[扶蘇] 乃反數上書直言誹謗我所為, 以不得罷歸為太子, 日夜怨望.

However, on the contrary to [express his gratitude], [Fusu] frequently submitted letters to me to blame me directly for what I did for him [which he should have appreciated]. Fusu felt hatred all the days and nights, because he was not able to withdraw [from the frontier] and come home to become the prince-apparent.<sup>52</sup>

Wakae also found that Han laws from Zhangjiashan also punished the crime of "lack of filial piety." *ZJS strip* (Statutes) nos. 35-37 state:

子牧杀父母, 毆詈泰父母, 父母, 假大母, 主母, 后母, 及父母告子不孝, 皆弃市....教人不孝, 黥为城旦舂.

<sup>48</sup> *Shangjunshu zhuzhi*, 1.29-30. My translation follows Duyvendak, *The Book of Lord Shang*, 107

<sup>49</sup> *Han Feizi yizhu*, 19. 680.

<sup>50</sup> Wakae, "Shinkanritsu ni okeru fukyōzai," 249-282, especially, 280-280.

<sup>51</sup> *Ibid.*, 256.

<sup>52</sup> *Shiji*, 87.2511.

If a son murders his parent, beats or scolds his grand-parents, his [natural] parents, his parents [who adopt him], the principal mother [the principal wife of the father], and the later mother [the later wife of the father], or the parents accuse the son lack of filial piety, under all these circumstances, the son shall be executed in the marketplace.... If a person teaches others to act in an unfilial manner, that person will be tattooed and enslaved as a wall-builder [for males] or grain-pounder [for females].<sup>53</sup>

*ZJS strip (Zouyan shu) nos. 181-182* restate the statute quoted above:

教人不孝, 次不孝之律. 不孝者弃市, 弃市之次, 黥為城旦春.

If a person teaches others to act unfilially, his crime is to be punished one degree less than that of lack of filial piety. Those who commit the crime of lack of filial piety shall be executed in the market. One degree less than executing in the market is to be tattooed and enslaved as a wall-builder [for males] or grain-pounder [for females].<sup>54</sup>

Based on this evidence, Wakae concluded that Qin and Han laws defined *buxiao zui* as including the offences of scolding or blaming one's parents and beating one's parents or grandparents. The penalty for the crime was execution in the market place.

Actually, we have more information regarding the crime called "lack of filial piety." Case no. 21 in the *Zouyan shu* from Zhangjiashan indirectly refers to filial piety. According to the text, sometime around 190 B.C., a mother-in-law accused her daughter-in-law of having consensual sex with a male near the coffin of the daughter-in-law's recently deceased husband. For unspecified reasons, the case eventually came before the superintendent of trials for his review. He and his junior staff initially considered the widow guilty and sentenced her to hard labor. However, a court scribe challenged the sentence. After serious debate, the case was ultimately dismissed on the recommendation of the court scribe.<sup>55</sup> What makes this account relevant to our examination of filial piety is that during the debate, the court scribe questioned his judicial colleagues:

律曰:不孝棄市.有生父而弗食三日, 吏且何以論子? 廷尉穀等曰: 當棄市.有死父, 不祠其家三日,子當何論? 廷尉穀等曰:不當. 有子不聽生父教于不聽死父罪重? 穀等曰: 不聽死父教毋罪.

According to the statutes, "A person who is unfilial deserves execution in the marketplace. If a living father had a [son] who failed to feed him for three days, how should an officer of the court sentence the son?" He should be executed in the marketplace," said the *tingwei* Xiao and others. "Let us suppose that the father has died, and his son does not offer cult in his house for three days. What sentence does the son deserve?" "He ought not to be sentenced." "And suppose there is a son who ignored his father's injunctions while his father alive? Who is reckoned to have committed the more serious crime: a son who disobeyed his dead father's injunctions or a son who ignored the injunctions of his father while alive?" "We should

<sup>53</sup> *ZJS strip (Zouyan shu) nos. 35-37*, 13.

<sup>54</sup> *ZJS strip (Zouyan shu) nos. 181-182*, p. 108. These two finds in 1996 were very significant yet problematic since the complete strips from Zhangjiashan were not published until 2001. Wakae had to piece together his evidence from various articles that published excerpts of the strips.

<sup>55</sup> *ZJS strip (Zouyan shu) nos. 180-196*, p. 108. For a detailed study on this case, see Michael Nylan, "Notes on a Case of Illicit Sex from Zhangjiashan: A Translation and Commentary," *Early China* 30 (2005-6), 25-45.

not hear a case involving a dead father's injunctions; [the son] would have committed no crimes."<sup>56</sup>

The authorities agreed that: 1) a son's failure to feed his living father would constitute a criminal lack of filial piety, but failure to offer cult to his dead father would not; and 2) a son ignoring the injunctions of his living father would constitute a criminal lack of filial piety, but disobeying his dead father's injunctions would not. To put it another way, while offering sacrifice to one's ancestors was an important aspect of filial piety, failure to do so did not rise to the level of a criminal offense, nor did disobeying the teachings of one's dead father. These distinctions point to a pragmatic pre-occupation of the state: acts of filial piety involving living parents had a much more immediate impact on the social order.

Turning to the question of civil laws, Han civil laws that reflect concerns with filial piety emphasized the feeding of one's parents or grandparents and, by extension, taking care of one's elders. To that end, the civil laws stipulated civil penalties for those who neglected their elders, and stipulated privileges for the elderly. A provision from the Statutes on Households directs:

孫為戶,與大父母居,養之不善,令孫且外居,令大父母居其室,食其田,使其奴婢,勿買賣. 孫死,其母而代為戶. 令毋敢逐(逐)夫父母及入贅....

When the grandson is the household head and lives under the same roof with his grandparents, if the grandson does not take good care of his grandparents, [the authorities] should order the grandson to live temporarily outside the home and order the grandparents to live in his house. They should feed themselves with his land, and employ his servants, male or female. They should not buy or sell [his land, house, or servants]. When the grandson dies, and his mother replaces him as the household head, order her not to drive out her parents-in-law and invite a new husband into the household....<sup>57</sup>

Above and beyond the pragmatic social need to take care of the elders in a household, absent any other formalized social welfare system, the notion of filial piety gives these legal guidelines a moral or ritual underpinning. Since the subject here is grandchildren rather than children, the prescriptions contained in the passage quoted above clearly imply that the obligations of filial piety are inherited along with the title of head of household and the household's land and property. The death of a father or his incapacitation raises questions of filial obligations as they affect the well-being of all the surviving members of the household. Of particular concern are the filial obligations of the grandson when the grandparents are still members of the household (and at least seventy years old or unable to be self-supporting) and when other adult sons are dead or otherwise absent. This concern for the well-being of aged grandparents underscores the prescription contained in *ZJS* (Statutes) strip no.342:

夫妻皆疲病,及老年七十以上,毋異其子.

If the husband and wife are both sick and they cannot work or they are above seventy years old, do not allow the [main] son to live separately.<sup>58</sup>

*ZJS* strip (statutes) nos. 337-339, cited above, all deal with such three-generational

<sup>56</sup> *ZJS* strip (*Zouyan shu*) nos. 189-191, p.180; cf. Nylan, "Notes on a Case," 32. My translation follows Nylan.

<sup>57</sup> *ZJS* (statutes) strip nos. 337-339, p. 55. We notice that in this particular situation, the widow could not freely remarry if she served as head of household and assumed responsibility of taking care of the elders.

<sup>58</sup> *ZJS* strip (Statutes) no. 342, p. 55.

households. In such a household, if the father is alive, he is obliged to care for his own father. If the father dies, his (eldest) son becomes the head of household and is obliged to accept his father's filial duties to his grandparents in addition to satisfying his on-going filial duty to his mother. If the grandson fails to care for his grandparents, he risks being deprived of his privileges as head of household. If the grandson dies, his mother becomes head of household, and must accept the filial duty of taking care of her parents-in-law.<sup>59</sup> Principles of filial piety govern the restructuring and redefining of household relationships in all of these possible situations.

Filial piety is also the implied principle that governs the situation described in the *ZJS* strip (Statutes) no. 408:

諸當行粟，獨與若父母居老如晚老，若其父母罷癯者，皆勿行。

For those who ought to transport grains [for the state], the sons are all exempted from the duty if they live alone with their parents who are aged, or if the parents are very old and/or disabled.<sup>60</sup>

The labor service exemption referred to here incorporates an implied obligation to care for one's elders. The state is willing to forego the corvée duty owed by these sons and grandsons in exchange for the sons and grandsons fulfilling their filial duties. In a sense, given the requirement of sons and grandsons to care for their elders, this labor service exemption can be understood as an implicit reward for those who fulfill their filial duties.

As we have just seen, the obligations of filial piety go beyond service to one's own parents. In a broader sense, respecting one's elders is also an aspect of filial piety or an extension of filial piety. According to the *Kongzi jiayu*, in a conversation between Zengzi 曾子 (505-435 B.C.)<sup>61</sup> and Confucius concerning the Way of the Enlightened Former Kings (*mingwang* 明王), Confucius said: "If superiors respect the elders, then their subordinates will become more filial" (*shang jing lao, ze xia yi xiao* 上敬老，則下益孝).<sup>62</sup> This idea of filial piety extended to elders in general can be observed in *ZJS* strip (Statutes) nos. 354-357, which stipulate the welfare privileges granted to the very elderly. For instance, *ZJS* strip (Statutes) no. 355 states:

大夫以上年七十，不更七十一，簪嫗七十二，上造七十三，公士七十四，公卒，士伍七十五皆受杖。

[All these people shall be granted staffs]: *daifu* above seventy years old, *bugeng* above seventy-one years old, *zanniao* above seventy-two years old, *shangzao* above seventy-three years old, *gongshi* above seventy-four years old, and *gongzu* or *shiwu* above seventy-five years old.<sup>63</sup>

In other words, elders above a certain age (70-75), should be granted staffs appropriate to their status. From the so-called "Ten Jade Staff Documents" (*Yuzhang shi jian* 王杖十簡), dated to 10 B.C. and excavated from Wuwei 武威, Gansu 甘肅 in 1959, we know that these staffs were symbols of royal respect. The "Ten Jade Staff Documents" has

<sup>59</sup> The reader should note that the mother could become the head of household if the son had no sons, according to *ZJS* (Statutes) no. 379, p. 60.

<sup>60</sup> *ZJS* strip (Statutes) no. 408, p. 64.

<sup>61</sup> Tradition made Zengzi 曾子 a disciple of Confucius and a filial exemplar. Traditionally, Zengzi was believed to be the compiler of the *Classic of Filial Piety*.

<sup>62</sup> *Kongzi jiayu shuzheng* 孔子家語疏証, ed. Chen Shike 陳士珂 (Beijing: Zhonghua shuju, 1985), 1.11.

<sup>63</sup> *ZJS* strip (Statutes) no. 355, p. 57.

been carefully studied by many accomplished historians.<sup>64</sup> According to these studies, these documents granted various privileges to those who were at least seventy years old. For example, one decree from the “Ten Jade Staff Documents” states:

制: 詔御史: 年七十以上杖王杖, 比六百石入官府不趨更....民有敢毆辱者達不道棄市. 建始二年九月甲辰下.

Decree: An edict is hereby proclaimed to the imperial counsellor: those men of 70 years of age on whom a jade-staff has been bestowed shall have status comparable with that of officials of 600 *shi* 石 grade. They are permitted to enter offices and official courtyards without hurrying.... Any person who ventures to summon them for attendance or to treat them with insult or contumely shall be subject to treatment as if he were guilty of gross moral turpitude. Promulgated on the day *jiazhēn*, of the ninth month of the second year of Jianshi (7th November, 31 B.C.).<sup>65</sup>

Given that filial piety was so fundamental to the Han political and social orders, it should come as no surprise that its influence pervaded the Han legal world. As Nylan recently argued:

The *Classic of Filial Duty* (*Xiao jing* 孝經) provided the most systematic exposition of the idea that filial duty undergirds political loyalty. Elsewhere analogies constructed between families (*jia* 家) “below” and the ruling house (*guo jia* 國家) “above” likened the ruler’s position vis-à-vis his people to that of parents to children or husbands to wives.<sup>66</sup>

Filial piety was a notion that inextricably linked public order and private interests. By incorporating principles of filial piety, civil laws could anticipate the simplest and most complicated situations involving households and inheritance, the kind of situations that often provoked the most divisive conflicts, the kind most likely to prompt lawsuits.

Just as filial piety influenced the legal system, the ethical principle mandating revenge exerted an influence on the articulation and interpretation of both civil and criminal laws. In a way, revenge and filial piety are related concepts. As Anne Cheng has argued, the duty of vengeance appeared to be “the absolutizing of filial piety.”<sup>67</sup> Violent attacks motivated by filial revenge were never treated as simple murder or battery since avenging an injury to

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<sup>64</sup> Chen Zhi 陳直, “Gansu Wuwei Mozuizi Hanmu chutu Yuzhang shi jian tong kao” 甘肅武威磨阻子漢墓出土王杖十簡通考 *Kaogu* 3 (1961), 160-162, 165; Guo Moruo 郭沫若, “Wuwei Yuzhang shi jian shangmian” 武威王杖十簡商免, *Kaogu xuebao* 考古學報 5 (1965), 1-6; Ōba Osamu, “Kandai no no ketsugotōhi: Tamatsue jū kan hairetsu no ichian” 漢代の決事比- 王杖十簡配列の一案, *Kense daigaku bungaku ronshū* 関西大学文学論集 25 (1975), 271-287; Tomiya Itaru 冨谷至, “Tamatsue jū kan” 王杖十簡, *Tōhō gakuho* 東方學報 64 (1992), 61-113; Michael Loewe, “The Wooden and Bamboo Strips Found at Mo-Chū-Tzu (Kansu),” *Journal of the Royal Asiatic Society of Great Britain and Ireland* 1 (1965), 13-26.

<sup>65</sup> My translation follows Loewe, “The Wooden and Bamboo Strips,” 19-20 (slightly modified). This decree differs slightly from ZJS strip (Statutes) no. 355. Strip 355 contains two criteria for its eligible grantees, orders of honor and age, while the “Ten Jade Staff Document” contains only one criterion, age. While the “Ten Jade Staff” edict is consistent with the strip 355 in spirit, it appears to be more generous to its beneficiaries in terms of expanding and equalizing privileges for elders.

<sup>66</sup> Nylan in *China's Early Empires* (forthcoming, 2010).

<sup>67</sup> Anne Cheng, “Filial Piety with a Vengeance: the Tension between Rites and Law in the Han,” in *Filial Piety in Chinese Thought and History*, ed. Alan K. L. Chan (London: Routledge Curzon, 2004), 36-39. But filial piety is not the whole of revenge, because men also revenged the deaths of brothers. See page 130 for the story.

one's parents brought maintaining public order and the rendering of familial obligation into direct conflict. For example, in 7 B.C., Xue Kuang 薛況 (d. A.D. 3), son of the famous judge Xue Xuan 薛宣 (fl. 20-15 B.C.),<sup>68</sup> hired a third party to attack the academician Shen Xian 申咸 near the palace to take revenge on Shen Xian for Shen Xian's supposedly false accusation against Xue Xuan. Xue Kuang's action triggered a heated debate among the central authorities at the court of Emperor Ai 哀 (r. 7-1 B.C.), who personally presided over the case. Officials were divided into two camps. The assistant to the imperial counselor and others argued that the offence was heinous and that Xue Kuang should be executed at the marketplace.

況朝臣,父故宰相,再封列侯,不相敕丞化,而骨肉相疑,疑咸受修言以謗毀宣。咸所言皆宣行跡,眾人所共見,公家所宜聞。

況知咸給事中,恐為司隸舉奏宣,而公令明等迫切宮闕,要遮創戮近臣於大道人眾中,欲以鬲塞聰明,杜絕論議之端。桀黠無所畏忌,萬紅謹譁,流聞四方,不與凡民忿怒爭崗者同。

臣聞敬近臣,為近主也。禮,下公門,式路馬,君畜產且猶敬之。春秋之義,意惡功遂,不免於誅,上浸之源不可長也。況首為惡,明手傷,功意俱惡,皆大不敬。明當以重論,及況皆棄市。

[Xue] Kuang was a minister of the court. His father [Xuan] was a former grand counselor who was twice enfeoffed as an adjunct marquis, but who failed to instruct his son so that he would receive the transformative influence [of the emperor]. Suspicion also existed between the close relatives, as [Xue Kuang] suspected that Shen Xian had received instructions from [his uncle, Xue] Xiu to slander [his father] Xuan. All that [Shen] Xian said of Xuan's doings, however, was recorded, and was witnessed by numerous people, so the authorities should have known about them.

[Xue] Kuang knew that [Shen] Xian was a palace steward and he feared that [Shen] Xian would write a memorial against Xuan on behalf of the metropolitan commandant. So he openly commanded [Yang] Ming and others to wait near the palace watchtowers to intercept Shen Xian. [Yang Ming] wounded a close underling of the emperor along the main route to the palace in the midst of a crowd, desiring to impair his hearing and sight to impede and sever the source of these discussions and deliberations. He was cruel and crafty, lacking any sense of awe or fear. The noisy swell of the multitudes has spread rumors of the incident to the four corners of the empire. [Yang Ming's actions] are not commensurate with [the statute dictating punishment for] 'ordinary people who become angry and incensed and consequently quarrel and fight.'

We, your subjects, have heard that one shows respect for members of the imperial coterie because they are close to the ruler. The rites dictate that one dismounts at the palace gates and one bows to the horses of the ruler's carriage. That one shows respect even to the ruler's animals is a precept of the *Spring and Autumn Annals*. Thus when the intent was evil, one is not pardoned from punishment, even if meritorious results follow. The spring that floods that overflowed above cannot be allowed to persist. [Xue] Kuang initiated the crime and [Yang] Ming wounded [Xian] with his own hands. When both the act and the intent were evil, this corresponds to [the crime] 'great disrespect.' It is appropriate

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<sup>68</sup> The same Xue Xuan 薛宣, according to the *Fengsu tongyi*, once resolved a dispute over the ownership of a piece of cloth. See Chapter Three, 145-146.

to apply the most severe punishment to [Yang] Ming. He and [Xue] Kuang should both be executed in the marketplace.<sup>69</sup>

In rebuttal, the superintendent of trials argued for mitigation of the punishment:

律曰：崗以刃傷人，完為城旦，其賊加罪一等，與謀者同罪。詔書無以詆欺成罪。傳曰：遇人不以義而見痕者，與瘡人之罪鈞，惡不直也... 孔子曰：必也正名。名不正，則至於刑罰不中；刑罰不中，而民無所錯手足。今以況為首惡，明手傷為大不敬，公私無差。春秋之義，原心定罪。原況以父見謗發忿怒，無它大惡。加詆欺，輯小過成大辟，陷死刑，違明詔，恐非法意，不可施行。聖王不以怒增刑。明當以賊傷人不直，況與謀者皆爵減完為城旦。

The statute states: “When a person wounds another with a sharp object during a brawl, [condemn the accused] to hard labor while [allowing the accused] to remain physically intact. When there is premeditated murder, increase the punishment by one degree, so that the punishment is commensurate with one who has plotted murder.” An imperial edict states: “Do not rely on slanderous lies to construe a crime.” The *Commentary* states: “When a person treats someone unrighteously and thereby precipitates a physical assault, it is equivalent to the crime of assaulting another; that person is guilty of an injustice.”...

Confucius said: “What is necessary is to rectify names.” If names are not correct, then penalties and punishments will not hit the mark, and if penalties and punishments do not hit the mark, then the common people will not know where to put their hands and feet. Now to maintain that since [Xue] Kuang initiated the crime and [Yang] Ming wounded [Shen Xian] with his own hands, both are [guilty of] ‘great disrespect’ is to cause the public and the private realms to lack any distinction. According to a righteous principle of the *Spring and Autumn Annals* one must probe to the original intentions to determine the crime. When you probe to the source of Kuang’s intentions you will find that he was angered by the slander against his father. He did not commit any other more serious crime. If you rely on slanderous lies and knit together small transgressions to construe a serious crime and thereby entrap [Xue Kuang] in the death penalty, you will defy the enlightened edict [of the emperor concerning slander]. I fear this verdict runs contrary to the intent of the law and should not be put into effect. The sage kings did not increase punishments on account of their anger. [Yang] Ming is not warranted to be punished as committing the crime of “intentionally injuring people.” [Xuan] Kuang and the accessory criminal [Yang Ming] should be demoted in rank and sentenced to serve hard labor while remaining physically intact.<sup>70</sup>

The emperor invited the other officials to express their opinions. Chancellor Kong Guang 孔光 (64 B.C.-A.D. 5) and imperial counsellor (*dasikong* 大司空) Shi Dan 師丹 (d. A.D. 3) agreed with the assistant to the imperial counselor, but the general, the academicians (*boshi* 博士), and the court gentlemen (*yilang* 議郎) all agreed with the superintendent of trials. The superintendent’s argument prevailed, thus Xue Kuang received a reduced sentence.<sup>71</sup>

<sup>69</sup> *Hanshu*, 83.3395. My translation follows Queen, *From Chronicle to Canon*, 165-166.

<sup>70</sup> *Hanshu*, 83.3395-3396. My translation follows Queen, *From Chronicle to Canon*, 166-167.

<sup>71</sup> This actually shows that the emperor relied on the opinion of the majority to make the final judgment.

It is important to note that, during the debate, the assistant to the imperial counselor never referred to any statutes. He cited a ritual principle to illustrate the culprit's transgression of ritual propriety and a "principle from the *Spring and Autumn Annals*" (*Chunqiu zhiyi* 春秋之義) to justify his advocacy for harsh punishment, as noted by Sarah Queen.<sup>72</sup> By contrast, the superintendent of trials cited one statute and one imperial edict, offering a legal basis for his argument. To enhance his argument, he also referred to Confucius's idea of the "rectification of names" (*zhengming* 正名), as well as a line from the *Spring and Autumn Annals* and an unknown tradition. As Sarah Queen, an expert on Dong Zhongshu, analyzed the case in 1996:

The spokesmen for both sides of the legal argument cited the identical principle from the *Spring and Autumn Annals* to establish the importance of intent when considering the proper punishment for Xuan Kuang. However, their evaluations of Xuan Kuang's intent differed.<sup>73</sup>

I would add that the key issue in Xue Kuang's case was his motivation: was revenge, prompted by a desire to defend his father's reputation, sufficient justification for his actions? The superintendent of trials believed that Shen Xian had, in fact, defamed the character of Xue Xuan, and therefore his son, Xue Kuang, was obligated as a matter of filial piety to defend his father's reputation and therefore deserved a reduced sentence. This case reveals a certain uneasiness when dealing with revenge and slander. On the one hand, as Queen pointed out, the superintendent of trials considered the case "a private and unofficial matter," suggesting that it should be designated a case of family revenge.<sup>74</sup> Nevertheless, the real question is if a slander against one's father deserved a revenge of murder from the filial son? This question reminds us a line in the *Hanshu* that we encountered in Chapter Three, "They seek revenge in ways that exceed what due requital requires."<sup>75</sup> The superintendent of trials argued that, since a man had been killed, the authorities were obliged to take action against the offender. The disagreement among the officials centered on the degree of the punishment. This ambivalence about revenge, arising from the conflicting obligations of filial piety and maintaining social order, implicitly reveals the influence of ethical principles on the laws.

The ritual canons and other Classics sanction revenge by a son for his father's death.<sup>76</sup> For instance, the "Quli" 曲禮 says:

父之仇弗與共戴天，兄弟之仇不反兵，交遊之仇不同國。

One should not live under the same Heaven with the murderer of one's father. One should never turn aside one's weapon if one encounters the murderer of a brother. One should not dwell in the same state with the murderer of a friend.<sup>77</sup>

The famous classicist Kong Yingda annotated the passage in this way:

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<sup>72</sup> Consistent with Dong Zhongshu's dicta, we see the *Spring and Autumn Annals* being treated as a source of legal principles. We will discuss this matter in detail later.

<sup>73</sup> Queen, *From Chronicle to Canon*, 167-168. She argued that this case shows that motive was a factor in judging cases.

<sup>74</sup> *Ibid.*, 167.

<sup>75</sup> *Hanshu*, 28b.1656.

<sup>76</sup> According to Makino Tatsumi 牧野巽, the "Quli" 曲禮 and "Tangong" 檀弓 chapters of the *Liji*, the *Baihutong* 白虎通, the *Gongyang zhuan* 公羊傳, and the *Zhouli* 周禮 all encourage sons exacting vengeance for their fathers' deaths. See Makino, "Kandai ni okeru fukushu" 漢代における復讐, in *Makino Tatsumi chosakushū* 牧野巽著作集 (Tōkyō: Ochanomizu shobo, 1980), vol. 2, 3-20

<sup>77</sup> *Liji*, 3.57.



父之仇，弗于共戴天者....此不共戴天者，謂孝子之心，不許共仇人戴天，必殺之乃止。

One should not together uphold the same Heaven as the murderer of one's father....This phrase "not together upholding the same Heaven" means that the heart of a filial son does not allow him to together uphold the same Heaven as the enemy [who murdered his father]. The son must not stop until he has killed the enemy.<sup>78</sup>

Certainly among the *ru* masters there were disagreements over the question of how and when to carry out acts of vengeance. For instance, Xu Shen in his *Disputes concerning the Five Classics* (*Wujing yiyi* 五經異議, comp. ca. A.D. 100) disagreed with the *Gongyang* traditions about revenge:

公羊說，復百世之讎。古周禮說復讎可盡五世之內... 謹案，魯桓公為襄公所殺，其子在莊公與齊桓公會，春秋不讎。又定公是魯桓公九世孫，孔子相定公與齊會與夾谷，是不復百世之讎也。從周禮說。

The *Gongyang* traditions encourage vengeance for one hundred generations. The ancient *Zhouli* encourages revenge within five generations only. Carefully note: The Duke Huan of Lu was killed by Duke Xiang of Qi. The son of Duke Huan participated in the meeting between Duke Zhuang of Lu and Duke Huan of Qi, yet the *Spring and Autumn Annals* does not criticize the son. In addition, Duke Ding of Lu was the ninth generation grandson of Duke Huan of Lu. Confucius assisted Duke Ding to meet the Qi ruler at Jiagu. These facts suggest that one should not take vengeance even for one hundred generations. I follow the saying of the *Zhouli*.<sup>79</sup>

Generally speaking, however, the sanction, if not the encouragement of vengeance, seems to have had a huge impact during the Han, given its widespread practice.<sup>80</sup> Makino collected from the received texts ninety-eight passages concerning vengeance in the Han dynasty.<sup>81</sup> The motivating factors included the murder or humiliation of one's parents or siblings. For instance, one passage in the *Hou Hanshu* says:

安丘男子毋丘長，與母俱行市，道遇醉客辱其母，長殺之而亡。

Wuqiu Zhang, a male from Anqiu, went to the market with his mother. On their way, they ran into a drunken person who insulted Wuqiu Zhang's mother. Wuqiu Zhang killed the drunken person and then he ran away.<sup>82</sup>

Official attitudes towards vengeance were mixed. On one hand, according to

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<sup>78</sup> *Liji*, 3.57.

<sup>79</sup> This passage from Xu Shen's *Wuying yiyi* 五經異議 is preserved in Zheng Xuan 鄭玄, *Bo Wujing yiyi* 駁五經異議 (*Sikuquanshu* 四庫全書 edition, Taipei: Taiwan Shangwu yinshuguan, 1983), vol. 182, 318. Zheng, on this particular issue, agreed with Xu.

<sup>80</sup> Or if the popularity of taking revenge was not due to any encouragement from the Classics, it was perhaps rather that the people customarily exacted vengeance and that the Classics simply acknowledged that fact.

<sup>81</sup> Makino, "Kandai ni okeru fukushu," 3-20; cf. Li Longxian 李隆獻, "Handai yijiang fuchouguan de xingchang yu quanshi" 漢代以降復仇觀的省察與詮釋, *Taiwan daxue wenshi xuebao* 臺灣大學文史學報 68 (2008), 39-78; Qiu Libo 邱立波, "Handai fuchou suojian zhi jing lü guanxi wenti" 漢代復仇所見之經律關係問題, *Shilin* 史林 3 (2005), 80-110.

<sup>82</sup> *Hou Hanshu*, 64.2101.

Makino's study, in eight cases the avenger was forgiven or even praised. For example, in Yang Qiu's 陽球 case:

郡吏有辱其 [陽球]母者, 球結少年數十人, 殺吏, 滅其家, 由是知名. 初舉孝廉, 補尚書侍郎.

One or more commandery officials insulted the mother of Yang Qiu. Yang Qiu made a pact with dozens of youths, who killed the official(s) and exterminated the family or families. Therefore, Yang Qiu became famous. First he was recommended as Filially Pious and Incorrupt (*xiaolian* 孝廉) and later he filled the vacancy of the attendant secretariat (*shangshu shilang* 尚書侍郎).<sup>83</sup>

On the other hand, a great deal of evidence shows that the laws forbade vengeance. Makino found seventeen cases in which the avengers evaded the authorities after carrying out their acts of revenge. For example, in Wang Chang's 王常 case (ca. A.D. 9):

王莽末, 為弟報仇, 亡命江夏.

Near the end of Wang Mang's reign, [Wang Chang] avenged his younger brother's death and then he ran away to Jiangxia [far from home].<sup>84</sup>

Makino interpreted this inconsistency among the cases as a conflict between laws and their execution: laws treated vengeance as a crime of murder, but the prevailing mores did not approve of punishments in cases involving "justifiable" revenge. Indeed, this ambivalent attitude concerning revenge is best reflected in an incident from ca. A.D. 80, in which an imperial precedent for forgiving an act of vengeance was established.

建初中有人侮辱人父者, 而其子殺之, 肅宗賞其死刑而降宥之, 自後因以為比. 是時遂定其議, 以為輕侮法.

During the Jianchu period (A.D. 76-84), someone insulted another person's father, and so the son killed the man. Suzong (i.e., Emperor Zhang 章帝) commuted the death penalty and forgave the son. Thereafter, he required that the case be followed as a precedent. This even then settled the deliberations, and the case became the law concerning humiliation.<sup>85</sup>

However, this law was soon repealed during the reign of Emperor He 和 (r. A.D. 89-105), following the memorial of minister Zhang Min 張敏 (d. A.D. 112), who argued that this law encouraged murder. Despite the uneasiness, "vengeance was perceived as a duty as well as a, if not legal, at least legitimate sanction" throughout the Han.<sup>86</sup>

Filial piety and attitudes toward revenge clearly influenced how laws were applied in early China. This influence is connected with the influence of the Classics on the laws in general. We should recall that in the debate over Xue Kuang's revenge case, both camps referred to the *Spring and Autumn Annals* to enhance their arguments. In addition to

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<sup>83</sup> *Hou Hanshu*, 77.2498.

<sup>84</sup> *Hou Hanshu*, 15.578. Wang Chang later became one of the leaders of the anti-Wang Mang 王莽 (r. A.D. 8-23) rebellion.

<sup>85</sup> Suzong was Emperor Zhang's temple name. The word *shi* 贖 means "to spare someone." See *Gudai Hanyu cidian*, 1438. This piece of case law was repealed during the reign of Emperor He (r. A.D. 89-105).

<sup>86</sup> Anne Cheng, "Filial Piety with a Vengeance," 39.

underscoring the relationship between the laws and the Classics, we find the Classics being frequently cited as a source of legal authority.

### Part III: Laws and the Classics

Both Michael Nylan (1982) and Sarah Queen (1996) have extensively studied the relationship between the laws and the Classics.<sup>87</sup> Queen pointed out:

Dong's legal interpretations of the *Spring and Autumn Annals* influenced Chinese jurisprudence in significant ways. During the Han dynasty as wide variety of officials adopted his mode of citing the *Spring and Autumn Annals* as both a code of ethical principles and book of legal precedents. Therefore it became standard practice to cite the *Spring and Autumn Annals* as a source of legal authority. In this respect, Dong's new readings liberalized the legal corpus. Administrators often employed precedents from the *Spring and Autumn Annals* established by Dong Zhongshu and his disciples as a model for leniency rather than harshness, and as means to humanize the cruel and impersonal laws inherited from the Qin."<sup>88</sup>

Dong Zhongshu's efforts were probably not intended to humanize the early laws. As this dissertation demonstrates, imputing cruelty to the laws in the era before and during Dong's career was a rhetorical trope. There were civil statutes in early Western Han that were anything but cruel. Indeed, Dong's efforts seem to have been devoted to addressing issues that were difficult to adjudicate by means of existing statutes, as we find in his *Cases Tried on the Basis of the Spring and Autumn Annals* (*Chunqiu jueyu* 春秋決獄). According to Ying Shao, as recorded in the *Hou Hanshu*:

董仲舒老病致仕, 朝廷每有政議, 數遣廷尉張湯親至陋巷, 問其得失. 於是作春秋決獄二百三十二事, 動以經對, 言之詳矣.

When Dong Zhongshu was old and sick, he tendered his resignation. But whenever the court had a discussion of governmental matters, they repeatedly sent the superintendent of trials Zhang Tang personally to the mean alley [where Dong lived] to ask about the merits and mistakes [of the matters under discussion]. Thereupon Dong wrote the *Chunqiu jueyu*, comprising two hundred and thirty-two cases, always using the Classics to respond and explaining in detail.<sup>89</sup>

Only six fragments of this work have survived. Several were studied by Nylan in 1982 and five were translated and studied by Queen in 1996. I believe the extant fragments are likely to be summaries of the precedents given in the *Chunqiu jueyu*, rather than original case records.<sup>90</sup> Still, it is worth noting that except for Case 4 ("A was an attendant in an

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<sup>87</sup> Nylan, "Ying Shao;" Queen, *From Chronicle to Canon*. Cf. Nylan's review of Queen's work, in *Harvard Journal of Asiatic Studies*, 57.2 (1997), 629-638.

<sup>88</sup> Queen, *From Chronicle to Canon*, 228.

<sup>89</sup> *Hou Hanshu*, 48.1612.

<sup>90</sup> We will soon find that two cases in the *Chunqiu jueyu* were cited as authoritative in an appeal. This links with the topic of case law in early China. I shall devote an independent article on this issue later.

armory”), the other cases all concern family relationships. Cases 1 and 2 (“A had no son” and “A had a son...”) are about adoption. Case 3 (“A lord was hunting”) also concerns the parent-child relationship, even though it is ostensibly about animals. Case 5 (“A’s father B was arguing with C”) also concerns family ties. Case 6 (“A’s husband B was taking a boat”) concerns a widow’s remarriage. A closer look at Case 1 will give us a sense of the style of the argument:

時有疑獄曰：甲無子，拾道旁棄兒乙養之，以為子。及乙長，有罪殺人，以狀語甲，甲藏匿乙。甲當何論？

仲舒斷曰：甲無子，振活養乙，雖非所生，誰與易之？詩云：螟蛉有子，蜾蠃負之。春秋之義：父為子隱。甲宜匿乙而不當坐。

At the time a doubtful criminal case went like this: A had no son. By the side of the road, he came upon an abandoned baby boy B, which he raised as his own. When B reached adulthood, he committed the crime of murder. After he related the circumstances to his father A, A hid him. How should A be judged?

Dong Zhongshu’s decision said: A had no son and so he rescued and raised B. Although A did not sire B, for whom would he have exchanged B? The *Odes* says, “The moth has its young, but the wasp sustains them.” It is a righteous principle of the *Spring and Autumn Annals* that the father conceals his son [from the legal authorities]. It was right for A to hide B and A does not warrant adjudication.<sup>91</sup>

Even though there was some hesitation about identifying this case as a criminal case, it dealt with the relationship between father and son, a relationship considered crucial to the public order and therefore a subject of concern to officials. Moreover, the case involved an adopted son’s legal status: whether the adopted son enjoyed the same legal protections as a natural son. Dong was guided by passages from the *Book of Songs* and the *Spring and Autumn Annals* in reaching his conclusion that adopted sons did enjoy the same legal status as natural sons. By pronouncing this judgment, he implicitly argued that the father-son bond (even the father-adoptive son bond), in which the “natural feelings” of the parent would compel him to shield the child, should take precedence over one’s loyalty to the ruler in extreme cases.

This Case and Case 2 (“A has a Son...”), both from the *Chunqiu jueyu*,<sup>92</sup> were classified as criminal cases but both also involved the civil matter of an adopted son’s status. Both cases became influential precedents in civil litigations concerning adoptions and inheritance. In A.D. 330, both cases were cited by an elite lady in her memorial to the emperor concerning the status of her adopted son and his inheritance rights.<sup>93</sup>

Lady Yu, the principal wife of minister He Qiao 賀喬 (d. A.D. 330), adopted her brother-in-law’s son. Subsequently, a concubine of He Qiao gave birth to a son. One year before He Qiao died, the adopted son was sent back to his biological parents, lest he inherit the household. When He Qiao died, lady Yu sought to have her adopted son returned so that

<sup>91</sup> Cheng Shude, *Jiuchao lü kao*, 164. My translation follows Queen, *From Chronicle to Canon*, 144.

<sup>92</sup> Case 2 is preserved as follows: “A had a son B who was entrusted to C. B was raised to adulthood by C. On one occasion, his face flushed with intoxication. A confessed to B: ‘You are my son.’ B was angered and beat A with a staff twenty times. Since B was originally his son, A could not overcome his anger and reported him to the prefecture officials. Dong Zhongshu judged the case stating: ‘A sired B. He was unable to raise him and entrusted him to C. A had already severed the obligations binding father and son. Although B beat A, B does not warrant adjudication.’” See Queen, *From Chronicle to Canon*, 143-144. The judicial opinion concerning adoption expressed in Case 2 is consistent with that in Case 1: father-son bond was cultivated through nurture, not simply by blood.

<sup>93</sup> Du You 杜佑, *Tongdian* 通典 (Shanghai: Shanghai renmin chubanshe, 1988), vol. 3, 69.431-432

he might inherit the household. In her argument, she quoted the two cases judged by Dong, saying:

董仲舒命代<sup>94</sup> 純儒, 漢朝每有疑議, 未嘗不遣使者訪問, 以片言而折中焉. 時有疑獄曰: 甲無子, 拾道旁棄兒乙養之以為子... 又一事曰: 甲有子乙以乞丙, 乙後長大而丙所成育...

Dong Zhongshu has been famous for generations as a pure *ru*. When the Han court had doubtful cases, [the authorities] always sent messengers to visit Dong. He fairly settled those cases with simple words. At the time a doubtful criminal case went like this: A had no son. By the side of the road, he came upon an abandoned baby boy B, which he raised as his own...

Another case went like this: A had a son B, who was given to C. [Hence] B grew up due to C's nurturance...<sup>95</sup>

We know that the authorities differed in their opinions on the merits of Lady Yu's argument, even though our documents do not indicate how the case was eventually decided. What is clear, however, is that after four centuries, Dong's Classics-based legal reasoning was still considered to be authoritative.

Dong was not alone in citing the Classics when trying cases in the Han. Cheng Shude collected twenty-one Han cases that were judged by referring to principles drawn from the *Spring and Autumn Annals*.<sup>96</sup> Evidently, Dong and others promoted the Classics, especially the *Spring and Autumn Annals*, as a source of legal precedents, on a par with the statutes and edicts. In an extreme case, there even appeared an attempt to apply classical principles to revise the entire body of statutory laws. Chen Chong 陳寵 (d. A.D. 106) in A.D. 94 argued that the statutes and ordinances of his time were too complicated and that their interpretations were too diverse. Chen Chong urged the emperor to amend and emend the statutes according to classical principles:

宜令三公, 廷尉平定律令, 應經合義者, 可使大辟二百, 而耐罪, 贖罪二千八百, 并为三千. 奚刪除其餘令, 與禮相應.

[The throne] should order the Three Lords (*sangong* 三公) and the Superintendent of Trials to make more impartial and fix the statutes and ordinances. If those statutes and ordinances are to be in accord with the Classics, we should cause there to be 200 crimes with the death penalty and 2,800 crimes that receive the *nai* or *shu* (redemption) penalty. Together [those categories of crimes] would total 3,000. We should excise the remaining ordinances, so that [the number] would be in accord with the rituals.<sup>97</sup>

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<sup>94</sup> This phrase “*mingdai*” 命代 is hard to render. My translation here is tentative. I suggest that *ming* 命 is a loan word for *ming* 名 (fame) while *dai*, as a noun, refers to generations. Thus, *mingdai* means “being famous for generations.” There is another possibility that we shall seriously consider. The phrase could be an editorial mistake during the transmission of the text.

<sup>95</sup> *Tongdian*, vol. 3, 69.431-432.

<sup>96</sup> Among them, five cases related to family relationships, even though they were all deemed criminal cases. This feature is perhaps due to the fact that the sources available to Cheng Shude were predominantly standard histories.

<sup>97</sup> *Hou Hanshu*, 46.1554. Here, Chen Chong seems make no distinction between classical principles and ritual principles. While Chen explicitly refers to the rituals as the model for revising statutes and ordinances, he also alludes to the Classics in general.

As a vivid instantiation of the quasi-legal status of the Classics as a whole, both the statutes and the Classics were presumably written on strips that were 2.4 Han feet long.<sup>98</sup> The *Yantielun* says: “The statutes are 2.4 feet long. [This rule] has been observed from the ancient time to today” (*er chi si cun zhi lü, gu jin yi ye* 二尺四寸之律, 古今一也).<sup>99</sup> The *Lunheng* says: “The patterned words of the sages were written on strips of 2.4 feet long. We teach and study them day and night” (*er chi si cun, shengren wenyu, zhao xi jiang xi* 二尺四寸, 聖人文語, 朝夕講習).<sup>100</sup>

This conflation of the Classics and laws implies a deep familiarity with both the Classics and the statutes among judges. It also says something about their training. The topic of legal training has been studied by Cheng Shude 程樹德 (1877-1944) in his *Hanlü kao* 漢律考 (Studies on Han Laws, 1926),<sup>101</sup> and more recently, in 1983, by Hsing I-t'ien 邢義田, in his study of the Qin and Han periods.<sup>102</sup> Based on a careful reading of the *Shangjunshu* and Shuihudi Qin strips, Hsing argued that during the Qin dynasty, judicial officials were also teachers, passing on their legal knowledge to the next generation of judges. According to Hsing, this manner of transmitting legal knowledge began in the late Zhanguo period in various states, before being consolidated and promoted by chancellor Li Si 李斯 (280-208 B.C.) following the Qin unification in 221 B.C.<sup>103</sup> Hsing further argued that after the fall of the Qin, such legal knowledge was highly valued, even though Han officials were reluctant to acknowledge the legal legacy inherited from its predecessor. For example, according to the *Hanshu*, Dong Zhongshu believed that the relationship between laws and classical teachings was similar to the relationship between *yin* and *yang*, with each mutually assisting the other.<sup>104</sup> Legal knowledge was valued in the Han because mastery of that knowledge was considered an important skill for those who would enter the civil service. For instance, in 117 B.C., Emperor Wu identified four broad categories that officials should master; the third category concerned laws:

三科曰明曉法令, 足以決疑, 能案章覆問, 文中御史。

The third subject is called “understanding the laws and ordinances,” [which means] having enough legal knowledge to resolve confusing cases and to be able to interrogate the suspects according to the [appropriate] sections of the laws, and to have one’s writings suit a royal counsellor.<sup>105</sup>

By the time of the Eastern Han, there were seven positions in the central government reserved for legal experts.<sup>106</sup> Moreover, a common criterion for assessing officials’

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<sup>98</sup> What I am discussing here are the regulations. In actual practice, the situation was much more complicated. See Hu Pingsheng 胡平生, “Jiandu zhidu xin tan” 簡牘制度新探 *Wenwu* 2000.3, 66-73.

<sup>99</sup> *Yantielun jiaozhu*, 10.595.

<sup>100</sup> *Lunheng jijie*, 12.258.

<sup>101</sup> Chapter 8 of *Hanlü kao* is devoted to this topic. See Cheng, *Jiuchao lü kao*, 178-196.

<sup>102</sup> Hsing I-t'ien 邢義田, “Qin Han de lüling xue: jianlun Cao Wei lübooshi de chuxian” 秦漢的律令學: 兼論曹魏律博士的出現, *Zhongyang yanjiuyuan lishi yuyan yanjiusuo jikan* 中央研究院歷史語言研究所集刊 54.4 (1983), 51-101.

<sup>103</sup> *Ibid.*, 61-67. The regulations concerning disciples were general regulations, not limited to students who were pursuing legal knowledge.

<sup>104</sup> *Ibid.*, 71-72; cf. *Hanshu*, 56. 2502.

<sup>105</sup> Wei Hong 衛宏, *Hanjiuyi* 漢舊儀 (Beijing: Zhonghua shuju, 1985), 6.a.

<sup>106</sup> Hsing, “Qin Han de lüling xue,” 75-76. These posts included: attending secretary in charge of documents (*zhishu shiyushi* 治書侍御史), assistant to the superintendent of trials (*tingwe izheng* 廷尉正), inspector to the superintendent of trials (*tingwei jian* 廷尉監), judicial referee (*tingwei ping* 廷尉平), gentleman of the palace in

capabilities was their acquaintance with statutes and ordinances. As a testament to the importance of legal knowledge for officials, in the excavated Han strips, the phrase “being fairly knowledgeable about the statutes and ordinances” (*pozhi liling* 頗知律令) frequently appears in reports concerning the merits of officials.<sup>107</sup> Given the value ascribed to legal expertise, it comes as no surprise that legal training flourished during the Han dynasty. This training had, as Hsing amply demonstrated in his essay, three main characteristics: 1) judicial officials were the teachers of legal knowledge, 2) legal study became a “family business,” so that it eventually evolved into different interpretative traditions, and 3) experts tended to be versatile in both the Classics and the laws.<sup>108</sup>

In 2005, Hsing’s work was greatly developed by Long Daxuan, who systematically studied the lineages of jurists sketched by Hsing.<sup>109</sup> Identifying fifteen influential jurists who were active in annotating statutes and ordinances, Long Daxuan classified these jurists according to three periods.<sup>110</sup> He demonstrated that legal training and classical learning often overlapped, with many legal experts learning the Classics and many classicists learning the laws.<sup>111</sup> Long Daxuan enumerated nine pairs of experts, among them, the jurist Huang Ba 黃霸 (d. 51 B.C.):

[黃霸] 少學律令, 喜為吏...夏侯勝<sup>112</sup> 非議詔書大不敬, 霸阿從不舉劾, 皆下廷尉, 繫獄當死. 霸因從勝受尚書獄中.

[Huang Ba] studied statutes and ordinances when he was young. He was delighted to serve as an official...Xiahou Sheng committed a heinous crime by criticizing an imperial edict. Huang Ba agreed and followed him, without indicting him. Their cases were both sent to the superintendent of trials, who had them bound and put into jail, where they awaited execution. Hence, Huang Ba received [the teaching of] the *Book of Documents* from Xiahou Sheng in the jail.<sup>113</sup>

Regarding Yu Dingguo 于定國 (111-40 B.C.), the standard history tells us,

少學法于父. 父死, 後定國亦為獄吏....定國乃迎師學春秋, 身執經, 北面備弟子禮.

When [Yu] was young, he learned the laws from his father. After his father died, Yu Dingguo, on his part, became a jail officer....Yu Dingguo only then met a teacher with whom he studied the *Spring and Autumn Annals*. Holding the

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charge of the seals (*shangfuxi langzhong* 尚符璽郎中), the head of Luoyang market (*Luoyang shizhang* 洛陽市長), and the vice head of Luoyang market (*Luoyang shicheng* 洛陽市丞).

<sup>107</sup> Hsing, “Qin Han de liling xue,” 74-75.

<sup>108</sup> Hsing, “Qin Han de liling xue,” 85-91.

<sup>109</sup> We briefly encountered Long’s work in Chapter One.

<sup>110</sup> According to Long, the early stage includes Du Yannian 杜延年 (d. 52 B.C.), Yu Dingguo 于定國 (111-40 B.C.), and Chen Xian 陳咸 (d. 15 B.C.). The period of development includes Du Lin 杜林 (fl. A.D.8-47), Guo Gong 郭躬 (A.D. 1-94), and Chen Chong 陳寵 (d. A.D. 106). The flourishing period includes Xu Shen 許慎 (A.D. 58-147), Ma Rong 馬融 (A.D. 79-166), Zheng Xuan 鄭玄 (A.D. 127-200), He Xiu 何休 (A.D. 129-180), Ying Shao 應劭 (A.D. 153-196), Fu Qian 苻潛 (fl. 2<sup>nd</sup>-3<sup>rd</sup> century), Wen Ying 文穎 (fl. 2<sup>nd</sup>-3<sup>rd</sup> century), Wu Xiong 吳雄 (fl. A.D. 143-153), and Zhong Hao 鍾皓 (A.D. 121-189). See Long, *Handai lüzhangjuxue*, 8-11.

<sup>111</sup> Long, *Handai lüzhangjuxue*, 126-127. In total, Long gives nine pairs of examples.

<sup>112</sup> Xiahou Sheng 夏侯勝 (fl. 86- 70 B.C.) was a famous classicist of the time. His specialty was the *Book of Documents*.

<sup>113</sup> *Hanshu*, 89.3627.

Classics in person, he faced north [in the position of a subject], and performed the full ritual of a disciple.<sup>114</sup>

Classicists also studied the laws. One example given by Long Daxuan is He Bigan 何比干 (fl. 126-73 B.C.):

[何比干], 字少卿, 經明行<sup>115</sup>修, 兼通法律.

[He Bigan], whose style name was Shaoqing. He clearly understood the Classics and built up his virtues. He also was fully conversant with the laws.<sup>116</sup>

Another is Feng Kun 馮緄 (d.167):

君諱緄, 字皇卿, 幽州君之元子也. 少耽學問, 習父業, 治《春秋》, 《韓詩》倉氏, 兼律大杜.

The gentleman's tabooed name was Kun and his style name, Huangqing. He was the eldest son of a gentleman from Youzhou. When he was young, [Feng Kun] was addicted to learning. He practiced his father's business, studying the *Spring and Autumn Annals*, the *Odes of Han Tradition*, together with the statutes of the Elder Du tradition.<sup>117</sup>

Textual evidence also shows that famous classicists in the Han sometimes used the Han statutes to annotate the Classics. For example, in explaining the phrase, "Debase him in his debasedness" (*jian ye qi jian* 賤也其賤), from the *Gongyang Commentaries* to the *Spring and Autumn Annals*, He Xiu 何休 (A.D.129-182) said:

賤而去其爵者起見其卑賤. 猶律文立子奸母, 見乃得殺之也.

A person is debased, hence [the state] strips away the person's rank is to make visible that person's low and debased status. This is similar to the [Han] statute saying that if an adopted son has sex with his mother, whoever catches them in the act may kill him.<sup>118</sup>

In his annotation to the phrase "the officials in charge set out the vessels and sacrifices" (*yousi guan chen qimin* 有司官陳器皿) in the *Liji*, Zheng Xuan said:

器皿, 其本所賚物也. 律: 棄妻, 畀所賚.

Those vessels for sacrifices were the objects originally bestowed. The statute says: when someone divorces his wife, he shall give back what she was bestowed [in her dowry].<sup>119</sup>

With such a strong emphasis on both legal training and study of the Classics, it is not surprising that many famous classically trained judges emerged during the Han dynasties.

<sup>114</sup> *Hanshu*, 71.3042.

<sup>115</sup> *Xing* 行 here means virtue (*dexing* 德行). See *Gudai Hanyu cidian*, 1746.

<sup>116</sup> *Hou Hanshu*, 43.1480.

<sup>117</sup> See "Cheji jiangjun Feng Hun bei" 車騎將軍馮緄碑, in *Lishi, Lixu* 隸釋, 隸續, ed. Hong Gua 洪适 (Beijing: Zhonghua shuju, 1986), 7.13-15. Elder Du 大杜 shall refer to the jurist Du Yannian 杜延年; see n. 538 above.

<sup>118</sup> *Gongyang zhuan*, 4.54.

<sup>119</sup> *Liji*, 43.755. Zheng's quotation here seems to refer to *ZJS* strip (Statutes) no. 384, p. 61.



This phenomenon invites us to rethink the term of *ru* 儒 in early China.<sup>120</sup> As in the case of Zheng Xuan and many others, they were capable of both annotating the Classics and the statutes, of engaging in scholarly pursuits and adjudicating cases. This interplay between Classics and laws also leads us to rethink how people in early China thought about laws. Evidently men concerned with the laws in early China did not accord law the exalted status in enjoyed in the Western tradition.

## Conclusion

All the issues addressed in this chapter, namely, the legal ideal of reforming people's morals, especially by promoting ritual yielding, to reduce lawsuits, the influence of ethical principles on the shaping and interpretation of statutes and ordinances, and the conflation of laws and the Classics, point to one fact: laws were not regarded as the singular supreme force guiding human society in early China (actually, in all of pre-modern China).

Actually, in the same manner, rituals were as important as laws.<sup>121</sup> As Ban Gu stated:

聖人既躬明哲之性，必通天地之心，制禮作教，立法設刑，動緣民情，而則天象地。故曰：先王立禮，則天之明，因地之性也。刑罰威獄，以類天之震曜殺戮也；溫慈惠和，以效天之生殖長育也。《書》雲天秩有禮，天討有罪。故聖人因天秩而制五禮，因天討而作五刑。

Since the sages possessed enlightened and wise natures, they fully understood the wishes of Heaven and Earth as their model and example. Hence it is said that the former kings in establishing ritual rules “took the brightness of Heaven as their model and conformed to the nature of the Earth. So in making ritual rules, in providing instruction, in establishing laws and in instituting punishments, always conforming to the feelings of the people, they took Heaven and Earth as their model and examples. Hence it is said that the former kings in establishing ritual rules “took the brightness of Heaven as their model and conformed to the nature of the Earth. [They made] punishments and penalties and [they had] awe-inspiring lawsuits, by means of which they emulated the killing and destruction of Heaven's thunder and lightning. They were kind and gentle, benevolent and harmonious, by means of which they imitated the productive and fostering action of Heaven.” *The Book of Documents* says: “Heaven advances those who possess rituals,” “Heaven punishes those who commit crimes.” Therefore, the sages according to Heaven's advancing instituted the Five Rituals, and according to the Heaven's punishing they made the Five Punishments.<sup>122</sup>

Even though Ban Gu was discussing penal laws, his discussion also captures his view of the relationship between laws and rituals in general. They were characterized as the two hands

<sup>120</sup> There are several studies on this topic. Michael Nylan, *Five “Confucian” Classics* (New Haven: Yale University Press, 2001); cf. Nicolas Zufferey, *To the Origins of Confucianism: The ‘Ru’ in Pre-Qin Times and during the Early Han Dynasty* (New York: Peter Lang, 2003).

<sup>121</sup> The relationship between ritual and Classics is very tricky, because ritual canons are Classics. But still there was a difference. In legal practices, the Classics (*jing* 經) usually refer to the *Spring and Autumn Annals* and sometimes also refer to the *Book of Songs*.

<sup>122</sup> *Hanshu*, 23.1080. My translation follows Hulsewé, *RHL*, 321-322.

of the sage-kings in maintaining and sustaining human society.

The relationship between rituals and laws is worth a further study. Such a study would shed light on a fundamental question that this dissertation cannot possibly answer: on what theoretical basis, did the laws protect one's property in early China (or in pre-modern China in general)?<sup>123</sup> I suggest that scholars who pursue this issue pay particular attention to the work of Xunzi. Xunzi regarded the rituals as nurturance.

故禮者養也。芻豢稻粱，五味調香，所以養口也；椒蘭芬苾，所以養鼻也；雕琢刻鏤，黼黻文章，所以養目也；鍾鼓管磬，琴瑟竽笙，所以養耳也；疏房櫺貌，越席床第幾筵，所以養體也。故禮者養也。

Thus, the meaning of ritual is to nurture. The meat of pastured and grain-fed animals, rice and millet, blends and combinations of the five flavors, are what nurture the mouth. The fragrances of peppercorns and orchids, aromas and bouquets, are what nurture the nose. Carved and polished [jade], incised and inlaid [metals], and [fabrics] embroidered with the white and black axe emblem, the azure and black notched-stripe, the azure and crimson stripe, the white and crimson blazon, are what nurture the eye. Bells and drums, flutes and chime-stone, lutes and zithers, reed pipes and reed organs, are what nurture the ear. Spacious rooms, secluded chambers, mats of plaited rushes, couches and bed mats, armrests and cushions, are what nurture the body. Thus rituals are what nurtures.<sup>124</sup>

For Xunzi, this nurturance entails hierarchical differentiations (*bie* 別).

君子既得其養，又好其別。曷謂別？曰：貴賤有等，長幼有差，貧富輕重皆有稱者也。

When the gentleman has been nurtured by these things, he will also be fond of ritual distinctions. What is meant by “distinctions”? I say that these refer to the gradations of rank according to nobility or baseness, disparities between the privileges of old and young, and modes of identification to match these with poverty or wealth, insignificance or importance.<sup>125</sup>

This hierarchy is based on the nobility or baseness of one's contribution to the well-being of the community, not blood. Such a hierarchy encourages social mobility: a commoner could become a prime minister through ritual cultivation, and a prince could be demoted to a commoner if he fails to observe rituals. This idea is most clearly expressed in the “Kingly Regulation” chapter (Wangzhi 王制) of the *Xunzi*:

雖王公士大夫之子孫也，不能屬於禮義，則歸之庶人。雖庶人之子孫也，積文學，正身行，能屬於禮義，則歸之卿相士大夫。

Although they are the descendants of kings and dukes or knights and grand officers, if they are incapable of devotedly observing the requirements of ritual and moral principles, they should be relegated to the position of commoner. Although they are the descendants of commoners, if they accumulate culture and learning, rectify their character and conduct, and

<sup>123</sup> This dissertation cannot answer this question, because this question is too big. It involves many equally big and fundamental questions, such as social privileges and ritual principles in contrast to rights and natural law. Hence, further research is needed.

<sup>124</sup> *Xunzi*, 19.1b. My translation follows Knoblock, vol. 3, 55.

<sup>125</sup> *Ibid.*

are capable of devotedly observing the requirements of ritual principles and justice, they should be brought to the ranks of a prime minister, knight or grand officer.<sup>126</sup>

Thus, if we combine this sense of ritual as nurturance and ritual as a reflection of social hierarchy based on merits, and if we further associate these aspects of ritual with the distribution of resources,<sup>127</sup> we arrive at what feels very much like a meritocracy:

When the people go about their daily lives trusting (correctly) to the justice of a system that allocates resources according to societal contributions, each person feels confident that he will receive his due share of the goods that have long been accounted ‘good’ by ordinary men, as well as by the wise: long life, wealth, rank, a good name, social standing, beauty, honor, and freedom.<sup>128</sup>

Interestingly, the provisions of *mingtianzhai* in the Statutes on Households from Zhangjiashan also assumed the hierarchical organization of society and the existence of sumptuary regulations. The Han society was arranged hierarchically according to orders of honor, with twenty (or twenty-one) degrees, and land was distributed to imperial subjects according to their ranks. With certain limitations, ranks could be inherited, but one also could accumulate rank by merit, and thereby move up in the hierarchy.<sup>129</sup> One’s place in this hierarchy, based on a combination of blood inheritance and meritorious action, defined the “due-ness” of each person’s share in the fundamental resource, land.<sup>130</sup> Underlining this, we seem to discern a notion that each person should own what was due to him/her and not be dependent on a ruler’s arbitrarily granted favors and rewards.

Therefore, as hinted above, I believe that a further study of the relationship between laws and rituals might resolve the fundamental issue of determining the principles on which the laws in early China that protected a person’s property were based. Such a study would need to address this question without invoking or borrowing from doctrines of natural law that sanction rights in the Western legal traditions. Thus, such a study would not only contribute to a deeper understanding of both laws and rituals in pre-modern China, but also invite us to appreciate the subtle but fundamental differences between world legal cultures.

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<sup>126</sup> *Xunzi* 9.1. My translation follows Knoblock, vol. 2, 94 (slightly modified).

<sup>127</sup> “Nurturance” implies some sort of resource distribution. The passage in the *Xunzi*, “Thus, the meaning of ritual is to nurture. The meat of pastured and grain-fed animals, rice and millet,” refers to sumptuary regulations.

<sup>128</sup> *Ibid.*, 114. Here I adopt Professor Nylan’s interpretation, but Professor Johnson holds a different opinion, “The notion of ‘societal contributions’ is not clear. I do not think it agrees well with the kind of hierarchy *Xunzi* had in mind. The system allocated resources on the basis of rank or status, not “societal contributions” (private communication).

<sup>129</sup> See my summary of Nishijima’s study on orders of honor on footnote 39; cf. my discussion on *mingtianzhai* in Chapter Three.

<sup>130</sup> If we believe Sima Qian, *mingtianzhai* was credited to Shang Yang’s reform in 359 B.C., prior to *Xunzi*. In the *mingtianzhai* practice, blood was still an important factor on determining one’s rank in two senses: 1) the top two ranks would be transmitted to their heirs intact; and 2) other ranks would be demoted two degrees before being transmitted to their heirs. Perhaps *Xunzi* was reflecting upon the practices in his time and was trying to improve them. He argued for completely excluding the concern of blood relations from the hierarchy and transforming it into a pure meritocracy. *Xunzi* argued that the descendants of a prince could be demoted to the ranks of commoners if they failed to cultivate themselves, and that commoners could become princes. We should recall that there was no emperor in *Xunzi*’s time, and so, strictly speaking, prince was the highest rank in the nobility.

## Appendix 1: The Case of Li 栗 vs. Kou En 寇恩 (A.D. 28)

建武三年十二月癸醜朔乙卯，都鄉嗇夫宮以廷所移甲渠候書召恩詣鄉。先以證財物故不以實，臧五百以上，辭已定，滿三日而不更言請者，以辭所出入，罪反罪之律辨告，乃爰書驗問。恩辭曰：潁川昆陽市南裏，年六十六歲，姓寇氏。去年十二月中，甲渠令史華商、尉史周育當爲候粟君載魚之鱒得賣。商、育不能行。商即出牛一頭，黃、特、齒八歲，平賈值六十石，與它谷十五石，爲[谷]七十五石，育出牛一頭，黑、特、齒五歲，平賈值六十石，與它谷卅石，凡爲谷百石，皆予粟君，以當載魚就直。時，粟君借恩爲就，載魚五千頭到鱒得，賈直：牛一頭、谷廿七石，約爲粟君賣魚沽出時行錢卅萬。時，粟君以所得商牛黃、特、齒八歲，以谷廿七石予恩顧對直。後二、三[日]當發，粟君謂恩曰：黃、特、微庾，所得育牛黑、特，雖小，肥，賈直俱等耳，擇可用者持行。恩即取黑牛去，留黃牛，非從粟君借牛。恩到鱒得賣魚盡，錢少，因賣黑牛，並以錢卅二萬付粟君妻業，少八歲（應爲“萬”）。恩以大車半側軸一，直萬錢；羊韋一枚爲橐，直三千；大笥一合，直千；一石去廬一，直六百，庫索二枚，直千，皆置業車上。與業俱來還，到第三置，恩余大麥二石付業，直六千，又到北部，爲業賣（應爲“買”）肉十斤，直谷一石，石三千，凡並爲錢二萬四千六百，皆在粟君所。恩以負粟君錢，故不從取器物。又恩子男欽以去年十二月廿日爲粟君捕魚，盡今[年]正月、閏月、二月，積作三月十日，不得賈直。時，市庸平賈大男日二鬥，爲谷廿石。恩居鱒得付業錢時，市谷決石四千。以欽作賈谷十三石八鬥五升，直鱒得錢五萬五千四，凡爲錢八萬，用償所負錢畢。恩當得欽作賈餘谷六石一鬥五升付。恩從鱒得自食爲業將車到居延，[積]行道廿餘日，不計賈直。時，商、育皆平牛直六十石與粟君，粟君因以其賈予恩已決，恩不當予粟君牛，不相當谷廿石。皆證也，如爰書。

建武三年十二月癸醜朔戊辰，都鄉嗇夫宮以廷所移甲渠候書召恩詣鄉。先以證財物故不以實，臧五百以上，辭以定，滿三日而不更言請者，以辭所出入，罪反罪之律辨告，乃爰書驗問。恩辭曰：潁川昆陽市南裏，年六十六歲，姓寇氏。去年十二月中，甲渠令史華商、尉史周育當爲候粟君載魚之鱒得賣。商、育不能行。商即出牛一頭，黃、特、齒八歲，平賈值六十石，與它谷十五石，爲谷七十五石。育出牛一頭，黑、特、齒五歲，平賈值六十石，與它谷卅石，凡爲谷百石，皆予粟君，以當載魚就直。時，粟君借恩爲就，載魚五千頭到鱒得，賈直：牛一頭、谷廿七石，[約]爲粟君賣魚沽出時行錢卅萬。時，粟君以所得商牛黃、特、齒八歲，以谷廿七石予恩顧對直。後二、三日當發，粟君謂恩曰：黃牛微庾，所將（得）育牛黑、特，雖小，肥，賈直俱等耳，擇可用者持行。恩即取黑牛去，留黃牛，非從粟君借牛。恩到鱒得賣魚盡，錢少，因賣黑牛，並以錢卅二萬付粟君妻業，少八歲（萬）。恩以大車半軸一，直萬錢；羊韋一枚爲橐，直三千；大笥一合，直千；一石去廬一，直六百，庫索二枚，直千，皆置業車上。與業俱來還，到弟（第）三置，爲業余大麥二石。凡爲谷三石，錢萬五千六百，皆在業所。恩與業俱來到居延後，恩欲取軸、器物去。粟君謂恩：汝負我錢八萬，欲持器物？怒。恩不取器物去。又恩子男欽，以去年十二月廿日爲粟君捕魚，盡今年正月、閏月、二月，積作三月十日，不得賈直。時，市庸平賈大男日二鬥，爲谷廿石。恩居鱒得付業錢時，市谷決石四千。並以欽作賈谷，當所負粟君錢畢。恩又從鱒得自食爲業將車，坐斬來到居延，積行道廿餘日，不計賈直。時，商、育皆平直牛六十石與粟君，因以其賈與恩，牛已決，不當予粟君牛，不相當谷廿石。皆證也，如爰書。

建武三年十二月癸醜朔辛未，都鄉嗇夫宮敢言之。廷移甲渠候書曰：去年十二月中，取客寇恩爲就，載魚五千頭到鱒得，就賈用牛一頭，谷廿七石，恩願沽出時行錢卅萬。以得卅十二萬。又借牛一頭以爲糶，因賣，不肯歸以所得就直牛，償不相當廿石。書到。驗問。治決言。前言解廷郵書曰：恩辭不與候書相應，疑非實。今候奏記府，願詣鄉爰書自證。府錄：令明處更詳驗問。治決言。謹驗問，恩辭，不當與粟君牛，不相當谷廿石，又以在粟君所器物

直錢萬五千六百，又爲粟君買肉，糝三石，又子男欽爲粟君作賈直廿石，皆[盡] [償] [所] [負]粟君錢畢。粟君用恩器物幣（敝）敗，今欲歸恩，不肯受。爰書自證。寫移爰書，叩頭死罪死罪敢言之。

●右爰書

十二日己卯，居延令守臣移甲渠候官。候[所]責男子寇恩[事]，鄉口辭，爰書自證。寫移書[到]口口口口口辭，爰書自證。須以政不直者法亟報。如律令。掾黨、守令史賞。建武三年十二月候粟君所責寇恩事。

Jianwu 3rd year, 12th month-of which the first day was *guichou*-on the day *yimao* (i.e. the 3rd day of the 12th month, or 30 January A.D. 28), the bailiff of the Cheif-town district Gong, because of the letter of [Li] the commander of Jiaqu transmitted by the [county's] court, summoned Kou En to proceed district office. I explained to him the statutes concerning: (1) [when the defendants] has no means to prove; (2) in matter of money and goods to be intentionally untruthful; (3) when the illegally obtained profit is 500 cash or more; (4) when the statement by the defendant is definite and after fully three days the discrepancies in his words; and (5) [If he makes a false accusation] he will be punished "by reversal." Thereupon I noted down the enquiry stated: "I am from the ward south of the market in kunyang in Yingchuan commandery. I am sixty-six years old, and my family name is Kou. In the course of the 12th month of last year, the chief clerk of Jiaqu Hua Shang and the police clerk Zhou Yu were about to charge a cart with fish and to go to Lude to sell these for His Honor the commander Li. Hua Shang and Zhou Yu were unable to go. Hua Shang then provided a yellow ox of eight years old, at the normal price valued at sixty bushels of grain, together with fifteen bushels grain, in all seventy-five bushels. Zhou Yu provided another black ox of five years old, valued at sixty bushels, together with forty bushels of other grain, in all being 100 bushels. They gave everything to His Honor Li, to represent the value of my hire for transporting the fish. At this time, His Honor Li hired me, Kou En, as a laborer to transport 5, 000 fish to Lude, the price being one ox and twenty-seven bushels of grain; it was agreed that I should sell the fish on behalf of His Honor Li for 400, 000 cash. At the time His Honor Li gave me, Kou En, the yellow ox, eight years old, which he had obtained from Hua Shang, and twenty-seven bushels of grain as the price of my hire. Two or three days later, when I was about to start, His Honor Li said to me, Kou En: "The yellow ox is thin; the black ox which I have obtained from Zhou Yu, although, is fat; the value of both is equal. Select the one you can use and take it along." I, Kou En, then took the black ox left the yellow ox; it is not so that I borrowed a draught animal from His Honor Li. When I, Kou En, had arrived at Lude and had completely sold the fish, the case received was too little. Accordingly, I sold the black ox, and combined I took 320, 000 cash and handed these to His Honor Li's wife Ye, [i.e. I was] 80, 000 cash short. I then took one axle for a large cart, worth 10, 000 cash; a goatskin made into a bag, worth 3, 000 cash; a box, worth 1, 000 cash; a container with the capacity of one bushel, worth 600;two... ropes, worth 1, 000, and I placed all these on Ye's cart. I turned back together with Ye. Having arrived at No.3 replay station, I bought two bushels of barley which I gave to Ye; value 6, 000 cash. Again, when we arrived at the Northern Division, I bought for Ye ten catties of meat, value one bushel of grain, per bushel 3, 000 cash. All together 24, 6000 cash; all this is at Ye's palace. Because I owed His Honor Li money, I did not take back my things. Furthermore, my son Qin had been catching fish for His Honor Li, starting on the 20<sup>th</sup> day of the 12th month of last year, for the whole of this year's 1st month, the intercalary month and the 2nd month, in all working during three months and ten days, but he did not received his wage. At the time the average price of hired labor for an adult man being two pecks per day. This amounted to twenty bushels of grain. At the time when I, Kou En, was at Lude and handed over the

money to Ye, the fixed market price for grain was 4, 000 cash per bushel. Taking thirteen bushels, eight pecks and five *sheng* from the wages of Ch'in's work, valued in money at Lude at 55, 400 cash, this made 80, 000 in all. Hereby repayment of the money I owed was completed. I, Kou En, am entitled to six bushels, one peck and five *sheng* of Ch'in's wages. From Lude I provided my own food and led the cart for Ye to Juyan; in all I was on the road for more than twenty days, but I did not calculate the wage. At the time, Hua Shang and Zhou Yu both valued the ox at sixty bushels and gave it to His Honor Li, and his Honor Li accordingly gave it to me at this price; this has already been settled. I, Kou En, am not warranted to give His Honor Li an ox, nor the equivalent of twenty bushels. All this I declare, in accordance with the record.

Jianwu 3rd year, 12th month-of which the first day was kuichou-on the day wu-chen [i.e. the 16th day of the 12th month, or 12 February A.D. 28], the district bailiff of Cheif-town, because of the letter of [Li] the commander of Jiaqu, transmitted by the county court, summoned Kou En to proceed to the district office. I explained to him the statutes concerning (1) [when the defendants] has no means to prove; (2) in matter of money and goods to be intentionally untruthful;(3) when the illegally obtained profit is 500 cash or more;(4) when the statement by the defendant is definite and after fully three days the discrepancies in his words;(5) [If he makes a false accusation] he will be punished "by reversal." Thereupon I noted down the enquiry. Kou En stated: I am from the ward south of the market in Kunyang in Yingchuan commandery. I am sixty-six years old and my family name is Kou. In the course of the 12th month of last year, the chief clerk of Jiaqu, Hua Shang, and the police clerk Zhou Yu, were about to charge a cart with fish and to go to Lude to sell these for His Honor Li, the commander. Hua Shang and Zhou Yu were unable to go. Hua Shang then provided a yellow ox of eight years' old, at the normal price value at sixty bushels, together with forty bushels of other grain, in all 100 bushels of grain; they gave everything to His Honor Li to represent my hire for transporting the fish. His Honor Li engaged me, Kou En, as a hired laborer to transport 5, 000 fish to Lude, their price being one ox and twenty-seven bushels of grain. It was agreed that I should sell the fish on behalf of His Honor Li for 400, 000 cash. At the time, His Honor Li gave me, Kou En, the yellow ox, eight years old, which had had obtained from Hua Shang, and twenty-seven bushels of grain as the price of my hire. Two or three days later, when I was about to start, His Honor Li said to me, Kou En: "The yellow ox is thin; the black ox which I have obtained from Zhou Yu, although smaller, is fat; the value for both is equal. Select the one you can use and take it along." I, Kou En, then took the black ox away and left the yellow ox; it is not so that I borrowed an ox from His Honor Li. When I, Kou En, had arrived in Lude and had completely sold the fish, the cash received was too little. Accordingly, I sold the black ox, and combined, I took 320, 000 cash and handed these to His Honor Li's wife Ye, [i.e. I was] 80, 000 cash short. I then took one axle for a large cart, worth 10, 000 cash; a goatskin made into a bag, worth 3, 000 cash; a large box, worth 1, 000 cash; one container with the capacity of one bushel, worth 600; two...ropes, worth 1, 000, and I placed all these on Ye's cart. I turned back together with Ye. Having arrived at the Northern Division, I bought for Ye ten cattles of meat, value one bushel. Having arrived at No. 3 relay station, I bought for Ye two bushels of barley. All together three bushels of grain and 15, 600 cash; all this is at Ye's place. After I, Kou En, together with Ye had arrived in Juyan, I wished to take the axle and the other things away, but His Honor Li said, Kou En: "You own me 80, 000 cash, and you wish to take these things!" As he was angry, I, Kou En, did not dare to take the things away. Furthermore, my son Qin had been catching fish for His Honor Li, starting on the 20th day of the 12th month of last year, for the whole of this year the intercalary month and the second month, in all working three months and ten days, but he did not receive his wage. At this time, the average price for hired labor for an adult man being two pecks a day. This

amounted to twenty bushels. When I, Kou En, was at Lude and handed the money to Ye, the fixed market price for grain was 4, 000 cash. Taking the grain for Ch'in's wage together, this fully balances the money I owe to His Honor Li. I, Kou En, moreover, from Lude provided my own food and led the cart for Ye and cut grass; in going to Juyan I was all in all more than twenty days on the road, but I did not calculate the wage. At the time, Hua Shang and Zhou Yu both valued the ox at sixty bushels and gave it to His Honor Li, and he accordingly gave it to me as; so [the question of the ox] is settled. I am not warranted to give the ox to His Honor Li, nor the equivalent of twenty bushels. All this I declare, in accordance with the record.

Jianwu, 3rd year, 12th month-of which the first day was *guichou*-on the day [i.e. the 19th day of the 12th month or 15 February A.D. 28], the district bailiff of the Chief-town Gong begs to report. The letter of the commander of Jiaqu, transmitted by the county court, reads: "In the course of the 12th month of last year, I engaged the non-resident laborer Kou En as a hired labor to transport 5, 000 fish to Lude. For the price of his hire, I used an ox and twenty-seven bushes of grain. Kou En undertook to sell the fish for 400, 000, but for these he received 320, 000 cash. He also borrowed an ox which he used as a draught animal. Eventually he sold it, and he is unwilling to return it by means of the ox which was the price of his hire; his repayment does not cover twenty bushels." When the document has arrived, hold an enquire, come to a decision and report.

Earlier, the letter dispatched to the county office by courier service, read: "The statement by Kou En does not tally with the commander's letter; it is suspected that it is untrue." Now the commander has addressed himself to the *fu* (commandant headquarter?) [missing several characters]. The *fu* has decreed: Orders for a clear settlement; investigate in greater detail, come to a decision and report." I have carefully enquired and Kou En has state that he is not warranted to give the ox to His Honor Li, nor the equivalent of twenty bushels. Also, the things in His Honor Li's place have a value of 15, 600 cash; moreover, on behalf of His Honor Li he has bought meat and bought grain, three bushels; also, his son Ch'in worked for His Honor Li at a wage of twenty bushels. All this has fully repaid the money he owed to His Honor Li; it is finished. His Honor Li, because Kou En's things were poor and dilapidated, now wishes to return these to Kou En and does not want to accept them. In the record, Kou En of his own accord testifies this. I hereby copy and forward the record; knocking my head and meriting the death penalty, I beg to report this.

The foregoing are the records.

In the 13th month, on the day *yimao* [i.e. the 27th day of the 12th month or 24 February A.D. 28], The temporary-magistrate Cheng, forward this to the company command of Jiaqu. The case of the charge against the man Kou En by the commander ...[illegible]...The district...[illegible]...statement, the record with the testimony. Copied...[illegible]...the record with the testimony.

He must be condemned according to the rule for "dishonesty in the administration." [To be dealt with] in accordance with the statutes and ordinances. The bureau chief Tang, the temporary magistrate's clerk Shang.

The case of the charge against Kou En by the commander, His Honor Li.

(My translation follows Hulsewé, "A lawsuit of A.D. 28, " in *Studia Sino-Mongolica*, ed. Herausgegeben Von Wolfgang Bauer [Wiesbaden, Franz Steiner Verlag, 1979], 23-34)

## Appendix 2: A Survey on Juyan Legal Cases

Number	Causes	Date	Strip nos.	Nature
1	armed fight	67 B.C.	JY strip no.118.18	criminal
2	armed fight	n/v	JY strip no.148.45	criminal
3	armed fight and battery	n/v	JY strip no.13.6	criminal
4	unclear (arresting the suspect)	n/v	JYX strip no. E.P.T. 56.127-128	criminal
5	arson	n/v	JYX strip no.E.P.T. 52.207	criminal
6	banditry	n/v	JYX strip no.E.P.T. 5.15-16	criminal
7	battery	A.D. 29	JYX strip nos.E.P.T. 68.179-195	criminal
8	battery	n/v	JYX strip no.E.P.T. 65.414	criminal
9	battery	n/v	JYX strip nos.E.P.T. 68.13-26.b	criminal
10	battery	n/v	JY strip no.133.15	criminal
11	battery	n/v	JY strip no.135.1	criminal
12	battery	n/v	JY strip nos.143.27, 143.32-33	criminal
13	battery against one's parents	n/v	JY strip no.122.7	criminal
14	battery or murder	n/v	JY strip no.3.35	criminal
15	battery?	n/v	JY strip no.27.1a	criminal
16	crossing the pass	n/v	JYX strip no.E.P.T. 51.411	criminal
17	crossing the pass	n/v	JYX strip nos.E.P.T. 68.34-40	criminal
18	illicit profit	n/v	JY strip no.4.1	criminal
19	leaving one's post without permission	n/v	JYX strip no. E.P.F. 22.527	criminal
20	lost <i>fu</i> 符 (tablet)	n/v	JYX strip nos. E.P.F. 22.169-172	criminal
21	misadministration by a military officer	1 B.C.	JYX strip no.E.P.T. 59.548a-b	criminal
22	misconduct in performing duties	61 B.C.	JYX strip no.E.P.T.5 6.255	criminal
23	misconduct in performing duties	n/v	JYX strip nos.E.P.T. 44.30a-c	criminal
24	misconduct of police	n/v	JY strip no.395.11	criminal
25	misconduct of soldiers in performing non-	n/v	JY strip no.33.19	criminal



	combat duties			
26	misoperation in performing duties	A.D. 29	JYX strip nos.E.P.T. 68.81-68.107	criminal
27	misoperation in performing duties	A.D. 30	JYX strip nos.E.P.T. 68.134-68.161	criminal
28	murder	n/v	JYX strip no.E.P.T. 51.275	criminal
29	murder	n/v	JYX strip no.E.P.T. 58.99	criminal
30	murder	n/v	JY strip no.562.15	criminal
31	steal public property and run away	A.D. 30	JYX strip nos.E.P.T. 68.54-68.80	criminal
32	upheavals	n/v	JY strip no.27.21a	criminal
33	misconduct (using state-owned arms to hunt)	n/v	JY strip no.12.1b	criminal
34	unclear (criminal sentence)	n/v	JYX strip no.E.P.T. 53.181	criminal
35	unclear (criminal sentence)	n/v	JYX strip no.E.P.T. 56.344	criminal
36	murder	ca. 77 B.C.	JY strip no.88.5	criminal
37	murder?	n/v	JYX strip no.E.P.T. 5.299-300	criminal?
38	compensation? (losing state-owned livestock)	n/v	JYX strip no.E.P.T. 57.85	non-criminal
39	compensation (concerning a dead horse)	n/v	JY strip no.46.34	non-criminal
40	compensation (concerning a dead horse)	n/v	JYX strip nos. E.P.F.2 2.187a-201	non-criminal
41	debt	12 B.C.	JY strip nos. 506.9a-b	non-criminal
42	debt	13 B.C.	JYX strip no.E.P.T. 50.22-23	non-criminal
43	debt	14 B.C.	JY strip nos.229.1-2	non-criminal
44	debt	24 B.C.	JYX strip no.E.P.T. 52.88a-b	non-criminal
45	debt	24 B.C.	JY strip nos.157.5a-b	non-criminal
46	debt	24 B.C.	JY strip nos.213.41a-b	non-criminal
47	debt	45 B.C.	JY strip nos.282.9a-b	non-criminal
48	debt	51 B.C.	JYX strip no.E.P.T. 53.186	non-criminal
49	debt	A.D. 24	JYX strip no. E.P.C. 39	non-criminal
50	debt	ca. 62 B.C.	JYX strip no.E.P.T.59.8	non-criminal
51	debt	n/v	JYX strip no.E.P.T..4.92	non-criminal

52	debt	n/v	JYX strip no.E.P.T. 5.4-5.7	non-criminal
53	debt	n/v	JYX strip no.E.P.T.51.8	non-criminal
54	debt	n/v	JYX strip no.E.P.T. 51.194	non-criminal
55	debt	n/v	JYX strip no.E.P.T. 51.519	non-criminal
56	debt	n/v	JYX strip no.E.P.T. 52.21	non-criminal
57	debt	n/v	JYX strip no.E.P.T. 52.110	non-criminal
58	debt	n/v	JYX strip no.E.P.T. 52.247	non-criminal
59	debt	n/v	JYX strip no.E.P.T. 52.319	non-criminal
60	debt	n/v	JYX strip no.E.P.T. 52.487	non-criminal
61	debt	n/v	JYX strip no.E.P.T. 52.496a-b	non-criminal
62	debt	n/v	JYX strip no.E.P.T. 52.506	non-criminal
63	debt	n/v	JYX strip nos.E.P.T. 58.45a-b	non-criminal
64	debt	n/v	JYX strip no.E.P.T.5 9.13	non-criminal
65	debt	n/v	JYX strip no.E.P.T.61.1	non-criminal
66	debt	n/v	JY strip no. 3.2	non-criminal
67	debt	n/v	JY strip no. 3.4	non-criminal
68	debt	n/v	JY strip no.3.6	non-criminal
69	debt	n/v	JY strip no.6.16	non-criminal
70	debt	n/v	JY strip no.6.17	non-criminal
71	debt	n/v	JY strip no.26.9a	non-criminal
72	debt	n/v	JY strip no.27.23	non-criminal
73	debt	n/v	JY strip no.30.7	non-criminal
74	debt	n/v	JY strip no.35.4	non-criminal
75	debt	n/v	JY strip nos.35.12, 135.21	non-criminal
76	debt	n/v	JY strip nos.56.31-32	non-criminal
77	debt	n/v	JY strip no.132.36	non-criminal
78	debt	n/v	JY strip no.145.1	non-criminal
79	debt	n/v	JY strip nos.145.36, 145.24, 317.4	non-criminal
80	debt	n/v	JY strip no.157.12	non-criminal
81	debt	n/v	JY strip no.158.3	non-criminal
82	debt	n/v	JY strip no.178.8	non-criminal
83	debt	n/v	JY strip nos.185.27a-b	non-criminal
84	debt	n/v	JY strip no.190.34	non-criminal
85	debt	n/v	JY strip no.193.30	non-criminal
86	debt	n/v	JY strip no.201.7	non-criminal

87	debt	n/v	JY strip no.214.34	non-criminal
88	debt	n/v	JY strip nos.217.15, 19	non-criminal
89	debt	n/v	JY strip no.483.3	non-criminal
90	debt	n/v	JY strip no.507.14	non-criminal
91	debt (a female initiated the suit)	n/v	JYX strip no.E.P.T. 52.201	non-criminal
92	debt	n/v	JYX strip no.E.P.T. 51.255	non-criminal
93	debt and other matters	n/v	JYX strip nos. E.P.F. 22.1-36	non-criminal
94	land and houses dispute	n/v	JYX strip no.E.P.T. 40.47	non-criminal
95	last will	60 B.C.	JY strip nos.202.9-15	non-criminal
96	salary	n/v	JY strip no.178.3	non-criminal
97	transaction	32 B.C.	JYX strip no.E.P.T.51.228	non-criminal
98	transaction	n/v	JYX strip no.E.P.T.51.314	non-criminal
99	transaction	n/v	JYX strip no.E.P.T.57.97	non-criminal
100	transaction	n/v	JYX strip no.E.P.T. 59.923	non-criminal
101	transaction	n/v	JYX strip no. E.P.C. 3	non-criminal
102	transaction	n/v	JY strip no.198.6	non-criminal
103	transaction (buying land)	2 B.C.	JY strip nos.505.37a-b	non-criminal
104	transaction (not being able to make a payment)	n/v	JYX strip no.E.P.T. 51.199	non-criminal
105	unclear	15 B.C.	JYX strip no.E.P.T. 59.57-58	unclear
106	asking back public property	28 B.C.	JYX strip nos.E.P.T. 59.1-2	unclear
107	chasing wild camels	n/v	JYX strip no.E.P.T.5.97	unclear
108	taking away a drum	A.D. 28	JYX strip nos. E.P.F. 22.329-332	unclear
109	unclear	n/v	JYX strip no.E.P.T.4.40	unclear
110	unclear	n/v	JYX strip nos.E.P.T. 51.264-51.272	unclear
111	unclear	n/v	JYX strip nos.E.P.T. 52.280a-b	unclear
112	unclear	n/v	JYX strip no.E.P.T.52.417	unclear
113	unclear	n/v	JYX strip no.E.P.T. 53.173	unclear
114	unclear	n/v	JYX strip no.E.P.T. 56.183	unclear
115	unclear	n/v	JYX strip nos. E.P.F.	unclear

			22.556	
116	unclear	n/v	<i>JYX</i> strip nos. E.P.T. 25.25a-b	unclear
117	unclear (appeal)	n/v	<i>JYX</i> strip no.E.P.T.7.40	unclear
118	unclear (appeal)	n/v	<i>JY</i> strip no.206.31	unclear
119	unclear (explaining pertinent statutes by the judge)	A.D. 29	<i>JYX</i> strip nos. E.P.F. 22.288	unclear
120	unclear (explaining pertinent statutes by the judge)	n/v	<i>JYX</i> strip no.E.P.T. 51.290	unclear
121	unclear (explaining pertinent statutes by the judge)	n/v	<i>JYX</i> strip no.E.P.T. 51.509	unclear
122	unclear (explaining pertinent statutes by the judge)	n/v	<i>JYX</i> strip no.E.P.T.54.9	unclear
123	unclear (explaining pertinent statutes by the judge)	n/v	<i>JY</i> strip no.38.27	unclear

Note: *JX* stands for *Juyan Hanjian shiwen hejiao* 居延漢簡釋文合校, eds. Xie Guihua 謝桂華, Li Junming 李均明 and Zhu Guozhao 朱國炤 (Beijing: Wenwu chubanshe, 1987). *JXY* stands for *Juyan xinjian* 居延新簡, ed. Gansu sheng wenwu kaogu yanjiusuo 甘肅省文物考古研究所 (Beijing: Wenwu chubanshe, 1990).

### Appendix 3: A Tentative Study on “Divine Trials”

The radical *xie* of the word *fa* 灋 (law) seems to be a fossil of “divine trial.” The *Shuowen* explains *xie* as a radical to *fa* as such: “*Xie* is the animal used to butt the party who do not provide straight facts and get rid of it.” In another place, the *Shuowen* states similarly:

廌, 解廌, 獸也. 似山牛, 一角. 古者決訟,<sup>131</sup>令觸不直.

*Xie*, or *xiezhi*, is an animal. It looks like a mountain ox with one horn. In the ancient times, [when judges were] trying cases, *xie* was ordered to butt the party that does not provide straight facts.<sup>132</sup>

One feature stands out: the reliance on an animal as an aide to the judge during a trial, which confirms the myth of “divine trial.” Although the *Shuowen* does not give further details, the *Mozi* paints a fuller picture:

昔者齊莊君之臣, 有所謂王裏國, 中裏微者, 此二子者, 訟三年而獄不斷. 齊君由謙殺之, 恐不辜; 猶謙釋之, 恐失有罪, 乃使之人共一羊, 盟齊之神社. 二子許諾. 于是掘穴, 剗羊而澆其血. 讀王裏國之辭, 既已終矣; 讀中裏微之辭, 未半也, 羊起而觸之, 折其腳, 祧神之而敲之, 殪之盟所.

Long ago, in the time of Lord Zhuang of Qi (r.794-731 B.C.), there were two ministers named Wangli Guo and Zhongli Jiao. These two men had been engaged in a lawsuit for three years, with no judgment handed down. Lord Zhuang thought of executing them both, but he was afraid of killing an innocent man. He also thought of acquitting them both, but he was afraid of setting free one who was guilty. He therefore ordered the two men to bring a goat and take an oath on the Qi altar of the soil. The two men agreed to take the oath of blood. The throat of the goat was cut, its blood sprinkled on the altar, and Wangli Guo’s version of the case read through to the end. Next Zhongli Jiao’s version was read, but before it had been read half through, the goat rose up, butted Zhongli Jiao, broke his leg, and then struck him down on the altar.<sup>133</sup>

Basically, the passage depicts a story of a trial with a goat as the ultimate judge. But how could a goat judge a case? Since the *Mozi* used this story to illustrate the existence of supernatural beings, one could infer that in the story, the goat either instantiated or was possessed by a god.<sup>134</sup> This inference is supported by two clues: the trial took place in a temple, which endowed the whole process with a supernatural atmosphere, and a blood covenant ritual binding the two parties to divine authority was performed. The goat was obviously the instrument of the divine authority in handing down a divine judgment.

Like the *Mozi*, the *Lunheng* recounts a story of trial by a divine animal:

儒者說云: 解豸者, 一角之羊也, 性知有罪. 臯陶冶獄, 其罪疑者令羊觸之, 有罪則觸, 無罪則不觸. 斯蓋天生一角聖獸, 助獄為驗, 故臯陶敬羊, 起坐事之. 此則神奇瑞應之類也.

The *Ru* declare that the *xie* unicorn is a goat with one horn. By instinct, it knows the guilty party. When Gao Yao was administering the prisons he was doubtful

<sup>131</sup> As we argued, in the Han period, *song* in a strict legal sense meant civil disputes, while its meaning was broader, sometimes including criminal disputes, in pre-Han times. See pages XX on Chapter One. Here, we are not sure whether Xu Shen used the word *song* to convey its contemporary meaning or its archaic meaning, matching the time period he was discussing.

<sup>132</sup> *Shuowen jiezi zhu*, 10.8.

<sup>133</sup> *Mozi*, 8.84. My translation follows Burton Watson, *Mozi: Basic Writings* (New York: Columbia University Press, 2002), 102.

<sup>134</sup> The inference is due to the fact that this story is under the chapter “Minggui” 明鬼 or “to illustrate ghosts/spirits.”

about the guilt of a certain party, so he ordered this goat to butt the guilty party. It would butt its head against the guilty, but spare the innocent. Probably this was a sage animal born with one horn; there is proof that it helped in judicial proceedings. Therefore, Gao Yao held it in high respect, and he put it to use it on all such occasions. This animal, then, belonged to the class of supernatural auspicious creatures.<sup>135</sup>

In the story, a divine animal *xie* unicorn was invoked as the last resort in difficult cases. This is essentially the same kind of practice as that depicted in the *Mozi*. If the divine animal *xie* unicorn is the root of the character *fa* as Xu Shen said, we may say that the concept of law in early China was remotely associated with the belief of divine justice.<sup>136</sup>

In the Qin and Han litigations, as far as we know, divine trials did not have a place, but this very ancient practice still had some influence in the Qin and Han legal systems. At least, it found a place in the symbolic world and became the symbol of legal authority. For instance, Cai Yong 蔡邕 (A.D. 132-192) in his *Duduan* 獨斷 (comp. A.D.189) said that there was a type of hat, namely the *xie* unicorn hat or legal hat, for legal authorities in the Qin and Han dynasties.

法冠，楚冠也，一曰柱後惠文冠。高五寸，以纚裹鐵柱卷。秦制，執法服之。今御史，廷尉監，平，服之。謂之獬豸冠。

The legal hat is a hat of Chu origin. It is also called *zhuhou huiwen* 柱後惠文 hat. Its height is five *cun* ...According to the rule of the Qin period, people who ministered the laws wore the hat. Nowadays, imperial counselors, inspectors to the superintendent of trials (*tingwei jian* 廷尉監), and judicial referees (*tingwei ping* 廷尉平) wear it. It is called *xie* unicorn hat.<sup>137</sup>

In addition, the images of *xie* unicorn and the legendary judge Gao Yao were painted on the walls of the court of the prefectures to evoke the myth of divine trial. In Wang's own words:

猶今府廷畫臬陶，魃(角虎)也。

This is like the court of the prefecture today, where images of Gao Yao and *xie* unicorn are depicted.<sup>138</sup>

Therefore, we seem to find the traces of divine trials in the pre-Han period that still had their social relics in Han China.

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<sup>135</sup> *Lunheng jijie*, 17.171b. My translation follows Alfred Forke, *Lun-heng* (New York: Paragon Book Gallery, 1962), vol. 2, 321 (slightly modified).

<sup>136</sup> Bodde, "Basic Concepts of Chinese Law," 378.

<sup>137</sup> Cai Yong 蔡邕, *Duduan* 獨斷, in *Hanwei congshu* 漢魏叢書 (rpt. Shanghai: Shanghai Hanfen lou, 1925), vol. 9, 2.14. Cai Yong thought there was a mistake in the shape of the hat: it had two horns. He believed that the hat should have just one horn since *xie* unicorn had only one horn. So he criticized: "*xie* unicorn is the name of an animal. It perhaps has one horn. The [legal] hat of today has two horns but named as *xie* unicorn. That is wrong" (豸獸名，蓋一角。今冠兩角以獬豸為名非也). However, perhaps Cai Yong was wrong. He was not aware that the *xie* unicorn was originally nothing but an ordinary goat in the very ancient practice of divine trial, as the story in the *Mozi* has showed.

<sup>138</sup> *Lunheng jijie*, 17.171b. My translation follows Forke, vol. 2, 313.

#### **Appendix 4: The Demand of Ordinary People for Justice**

In early China, ordinary people had a “right” to demand for justice and they often exerted that “right.” Due to the nature of our sources, which are preoccupied with the concerns of the governing elite, the ordinary people's voices are often lost, but even the

scanty evidence that we have suggests that ordinary people did not always passively wait for justice to be delivered to them by the authorities.

The members of the governing elites clearly recognized that the all human being had the basic sense of justice and its expression was a natural tendency, as can be seen from the following speech ascribed to Zhang Huan 張奐 (A.D.103-181):

凡人之情, 冤則呼天, 窮則叩心. 今呼天不聞, 叩心無益, 誠自傷痛.

*In all cases, it is human feeling that when we feel aggrieved, we cry out to Heaven, and when we feel pushed to the limit and at our wit's end, we beat our breasts. Now, I cry out to Heaven, but I have not been heard. I beat my breast, but to no avail. This truly harms and afflicts me.*<sup>139</sup>

Aside from discussing the many commonalities between the feelings of members of the governing elite and the lowest-status commoners, our sources also show ordinary people and members of the elite demanding justice at least in three ways:<sup>140</sup> they cried out to redress the injustices they had encountered, commoners and members of the elite alike; they honored the impartial judges for their honesty and fairness (going so far as to dedicate shrines to them even while the officials were living!); and they protested against injustices through collective actions.

In the first situation, people cried out to redress the injustices that they witnessed, including the suffering of righteous officials. According to the *Hanshu*, during the early reign of Emperor Zhao (r.86-74 B.C.), the magistrate of Weicheng 渭城, Hu Jian 胡建 was forced to commit suicide, because he refused to bend to the will of those who wanted him to wrongly charge his subordinates with crimes, after the arrest of a guest of the powerful princess Gai 蓋 (d.80 B.C.) in her palace.<sup>141</sup> The ordinary people treated Hu Jian as a hero, and, in partial requital for the injustice he had suffered, they dedicated a shrine to him, which Ban Gu said was still standing 150 years later:

建自殺. 吏民稱冤, 至今渭城立其祠.

[Hu] Jian committed suicide. The county officials and people all claimed that he had suffered an injustice. They set up a shrine to him that even today is in Weicheng.<sup>142</sup>

Similarly, in 6 B.C., people cried for redressing the injustices that Empress Dowager Feng suffered from Empress Dowager Fu 傅 and Emperor Ai 哀 (r.6-1 B.C.). The public outcry encouraged principled officials to challenge Empress Dowager Fu and Emperor Ai three times. The story goes like this:

初, 傅太后與中山孝王母馮太后俱事元帝, 有卻, 傅太后使有司考馮太后, 令自殺, 眾庶冤之. [司隸] [劉]寶奏請覆治, 傅太后大怒, 曰: 「帝置司隸, 主使察我? 馮氏反事明白, 故欲撻舋以揚我惡. 我當坐之.」

上乃順指下寶獄. 尚書僕射唐林爭之, 上以林朋黨比周, 左遷敦煌魚澤障候. 大司馬傅喜, 光祿大夫龔勝固爭, 上為言太后, 出寶復官.

<sup>139</sup> *Hou Hanshu*, 65.2142.

<sup>140</sup> Here I do not discuss the appeal process, since that process depended upon trust in the justice system. Instead I speak of the people's demand for justice by other means, which itself constituted a judgment about the performance of the justice system.

<sup>141</sup> Princess Gai 蓋 was the elder sister of Emperor Zhao 昭 (r. 86-74 B.C.).

<sup>142</sup> *Hanshu*, 67.2914.



Earlier on, Empress Dowager Fu and Empress Dowager Feng, who was the mother of the Filial King of Zhongshan, both serve (i.e., were married to) Emperor Yuan, and there were conflicts between them. [When Emperor Ai 哀 ascended the throne], Empress Dowager Fu ordered official(s) to investigate Empress Dowager Feng and then order her to commit suicide. The commoners thought this unjust. [Director of Internal Security] Liu Bao sent a memorial asking to review the case. Empress Dowager Fu flew into a rage and said: “The emperor appointed the internal security mainly to inspect me? Feng's treason case was very clear. You deliberately find fault with me in order to blacken my name. I shall see that you are charged with a crime.”

[Emperor Ai] then followed her will and put Liu Bao in jail. Deputy Director of the Secretariat Tang Lin contested the decision. Emperor Ai charged Tang Lin with “to forming partisan units for selfish ends” and demoted him to serve as a *zhanghou* [commander] at Yuze in Dunhuang commandery. Marshal of State Fu Xi and Counsellor of the Palace Gong Sheng really challenged that decision. So the emperor informed the Empress Dowager to release Liu Bao and reinstall him in his post.<sup>143</sup>

In another case reported in the *Huayang guo zhi* 華陽國志 (*Records of the States South of Mt. Hua*, comp. ca. 314), in A.D. 3, the famous minister He Wu was forced to commit suicide by Wang Mang, who thought He Wu to be an obstacle to Wang's achieving his ambition of usurping the throne. However,

眾咸冤之, 莽欲厭眾心, 賜武曰刺侯, 子況嗣。

The multitude all thought [the pressure on He] unjust. In order to satisfy the hearts of the multitude, Wang Mang posthumously enfeoffed He Wu as Marquis of Ci, and let his son He Kuang succeed to the noble title.<sup>144</sup>

As noted above, some people dedicated shrines or temples to fair officials to praise them, even if they did not wish to indirectly criticize the throne or its representatives.<sup>145</sup> For instance, the *Hanji* 漢紀 (comp. ca. A.D. 200) biography of Luan Bu 樂布 (d. 154 B.C.) reports,

樂布有功封歙侯, 為燕相, 有治, 民為之立生祠。

Luan Bu had merits and so he was enfeoffed as Marquis of Xi. He served as chancellor of Yan, which was well-ruled. The local people dedicated a shrine to him when he was alive.<sup>146</sup>

This case only speaks of Luan's excellent administration (which presumably included his decisions as judge), but other instances directly speak of erecting shrines and a temple to honor the achievements of fair judges. The *Shuoyuan* says, for example,

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<sup>143</sup> *Hanshu*, 77.3261.

<sup>144</sup> *Huayang guozhi*, 10a.4.

<sup>145</sup> See appendix X for a detailed chart on shrines and temples dedicated to benevolent officials. Here I will just give a few examples to illustrate my point. Of course, these shrines and temples were not merely to appraise the fairness of those officials in administrating justice, but justice was an important factor that motivated the local people to praise those officials.

<sup>146</sup> *Hanji* 漢紀 (Beijing: Zhonghua shuju, 2002 ), 9.140.

丞相西平侯于定國者，東海下邳人也。其父號曰于公，為縣獄吏決曹掾，決獄平法，未嘗有所冤...東海郡中為于公生立祠，命曰于公祠。

Yu Dingguo, Chancellor and Marquis of Xiping, was a native of Xiapi, in Donghai commandery. His father was honored as “Lord Yu” [by the local people]. When he was a junior judge in the criminal division of the county court, he judged criminal cases fairly according to the laws and he never inflicted an injustice [on anyone]....The people in Donghai commandery dedicated a shrine to him when he was still alive and they called it “the Shrine of Lord Yu.”<sup>147</sup>

The *River Classic Commentary* (*Shuijingzhu* 水經注, comp. ca. 525) reports the existence of a shrine dedicated to Zhuo Mao 卓茂 (fl. 1<sup>st</sup> century A.D.) in Mi 密 county,

恭而有禮。人有認其馬者，茂與之曰：若非公馬，幸至丞相府歸我。<sup>148</sup>遂挽車而去，後馬主得馬，謝而還之。任漢黃門郎，遷密令。舉善而教，口無惡言，教化大行，道不拾遺，蝗不入境<sup>149</sup> 百姓為之立祠，享祀不輟矣。

[Zhuo Mao] was respectful and courteous. A certain person once lost his horse. Zhuo Mao said to him that if his horse was not the man's horse, he should do him the favor of coming to the offices of the chancellor to return the horse to him. Then he [gave the man the horse, then] pulled his carriage with his own hands and left. Later on, the man found his own horse, and so he apologized and returned Zhuo Mao's horse.

Zhuo Mao was appointed as the gentlemen of the yellow gate of the Han and then he was transferred to serve as the magistrate of Mi county. He raised the good persons and propagated moral teachings. Never once did he speak ill or wrongly, so the moral teachings of the dynasty were carried out on a large scale. No one picked up lost items on the road, and locusts did not invade the county. The ordinary people dedicated a shrine to him, and offerings have never been interrupted down to today.<sup>150</sup>

The image of Zhuo Mao here is that of a typical benevolent judge, such as we have encountered earlier. His story first occurs in the *Dongguan Hanji* and then in the *Hou Hanshu*, but both texts fail to mention the shrine.<sup>151</sup> If we believe the report by Li Daoyuan 酈道元 (d. 527), Zhuo Mao's shrine had continuously received offerings for at least half a millennium.

Other accounts put other people building temples and erecting commemorative stele for benevolent judges. For instance, during the reign of Emperor He (r. A.D. 89-106), “[When Xu Jin died], local people at Guiyang 桂陽 built a temple and planted one or more steles to commemorate him” (桂陽人為立廟樹碑).<sup>152</sup>

Dedicating shrines or temples to fair judges confirms what Ban Gu said, “They passed away but they have left their kindnesses behind. People have lingering thoughts about them

<sup>147</sup> Xiang, *Shuoyuan jiaozheng*, 5.108-109; cf. *Hanshu*, 71.3041.

<sup>148</sup> Zhuo Mao worked as a clerk in Chancellor Kong Guang's bureau at that time.

<sup>149</sup> This is a conventional phrase in describing a benevolent official's achievement. We need not take it too literally.

<sup>150</sup> *Shuijingzhu jiaoshi* 水經注校釋, annot. Chen Qiaoyi 陳橋驛 (Hangzhou: Hangzhou daxue chubanshe, 1999), 22.391.

<sup>151</sup> *Dongguan Hanji*, 13. 471-473; *Hou Hanshu*, 25.871-872

<sup>152</sup> *Hou Hanshu*, 76.2472. We encountered Xu Jin's story earlier. He was famous for resolving a dispute between two brothers and thereby transforming the whole territory in his jurisdiction. See n. XX in Chapter Four.

and they long for them.” At the same time, this sort of activity could also be viewed as the local people’s constructive effort to reward officials who embodied justice for them. That did not mean that the people always employed constructive means; sometimes, when they confronted what they regarded as an extreme injustice, they responded with violence. The *Shiji* recounts a story in which the local people who suffered under an abusive judge Yin Qi 尹齐 (fl. 2<sup>nd</sup> century B.C.) in Huaiyang 淮阳 commandery planned to burn his corpse.<sup>153</sup> This story also occurs in the *Lunheng* with a bit more elaboration: Wang Chong comments that the Yin family had to resort to extraordinary measures to preserve the integrity of the corpse.

淮阳都尉尹齐, 为吏酷虐, 及死, 怨家欲烧其尸, (尸) 亡去归葬...曰: 尹齐亡, 神也, 有所应....或时吏知怨家之谋, 窃举持亡, 惧怨家怨己, 云自去.

The Commandant of Huaiyang, Yin Qi, was cruel and abusive. When he died, the families who had suffered injustices from him planned to burn his corpse. However, the corpse disappeared and was buried ...[The family of Yin Qi] said: “That Yin Qi’s corpse has disappeared testifies to a miracle.”... Perhaps the officials at the time knew of the plan of those resentment-filled families, so the officials secretly carried the corpse away. Because they were terrified that those families would then resent *them*, they said that the corpse had disappeared on its own.<sup>154</sup>

The *Hanshu* supplies an even more striking story, where the authorities admitted that a major rebellion in Haiqu 海曲 county during the reign of Wang Mang 王莽 (r. A.D. 9-23) was caused by a grave injustice, with the result that the participants were pardoned:

初, 吕母子为县吏, 为宰所冤杀. 母散家财, 以酤酒买兵弩, 阴厚贫穷少年, 得百余人, 遂攻海曲县, 杀其宰以祭子墓. 引兵入海, 其众浸多, 后皆万数. 莽遣使者即赦盗贼, 还言「盗贼解, 辄复合. 问其故, 皆曰愁法禁烦苛, 不得举手.

Earlier on, the son of Mother Lü was a county official who was wrongly killed by the magistrate. She spent her wealth to buy wine and weapons and crossbows, and she secretly treated hundreds of poor youths, and enlisted them in her army, and then she attacked Haiqu county. She killed the magistrate and offered him in sacrifice to her son. She then led her army to the sea, [where they lived on islands], and her followers grew more numerous day by day, till she had several tens of thousands followers.

Wang Mang sent his envoy [to deal with the situation]. He immediately pardoned all the bandits. He returned and reported to [Wang Mang]: “The bandits melted away, but soon they gathered again. I asked them the reason, they all said that they were worried about the laws were too complicated and harsh, so they had nowhere to raise their hands [to make a living].”<sup>155</sup>

In the same manner, the *Huayang guozhi* recounts that in A.D.179, seven clans of the Bandun 板楯 tribe in Hanzhong 汉中 commandery rebelled, due to their sufferings at the hands of the local officials. The emperor initially wanted to send armies to put down the

<sup>153</sup> *Shiji*, 122.3151.

<sup>154</sup> *Lunheng jijie*, 21; cf., Paolo Santangelo, *Love, Hatred, and Other Passions, Questions and Themes on Emotions in Chinese Civilization* (Leiden and Boston: E.J. Brill, 2006), 350.

<sup>155</sup> *Hanshu*, 99b. 4150-4151.

rebellion. However, a local official Cheng Bao 程包 (fl. 2<sup>nd</sup> century) argued against taking that action:

板楯七姓, 以射虎为业, 立功先漢. 本為義民...長吏鄉亭, 更賦至重;僕役過於奴婢, 箠楚過於囚虜;至乃嫁妻賣子, 或自剝割. 陳冤州郡, 牧守不理. 去闕庭遙遠, 不能自聞. 含怨呼天, 叩心窮谷. 愁於賦役, 困於刑酷....如臣愚見權之, 遣軍不如任之州郡.

The seven clans of Bandun tribe make shooting tigers their occupation. They made contributions to Former Han. Originally they were dutiful people....The county and district officials burdened the Bandun tribe with heavy taxation. They forced them to work harder than slaves;they whipped and flogged them more harshly than they did criminals in jail. Hence, they had to marry off their wives and sell their children, or mutilate themselves [to avoid hard labor service]. They reported the injustice they suffered to the provincial and commandery officials, who did not set things aright. They were too far from the imperial court, so they have not found a way to let their voice be heard by Your Majesty. They cried out to Heaven for the grievances that they have suffered. They beat their breasts for their extreme hardships. They were worried about taxes and labor services;they were hindered by harsh penalties.... According to my humble opinion, sending troops will be less effective than holding the provincial Pastor and commandery governor responsible for [redressing their grievances].<sup>156</sup>

The emperor was persuaded and he ordered the governor to pardon the rebels, at which point the rebellion was over.<sup>157</sup>

As a whole, these activities reflected the desires on the part of the people to encouragement improvements in the justice system through the praise and blame of specific local officers. The people's demand for justice caused the authorities to address the needs of the people and to make the justice system fairer. For instance, Emperor Yuan 元 (r. 49-34 B.C.) once charged his chancellor and imperial counsellor with this:

惡吏負賊, 妄意良民, 至亡辜死. 或盜賊發, 吏不亟追而反繫亡家, 後不敢復告, 以故浸廣. 民多冤結, 州郡不理, 連上書者交於闕廷...今丞相、御史將欲何施, 以塞此咎? 悉意條狀, 陳朕過失.

Evil officials betray their duties and recklessly and with intent harm the people – so much so that the innocent even lose their lives. In some cases, when their destructive behavior is discovered, officials do not immediately pursue them. Instead, the officials arrest those who have fled. They dare not complain, so the injustice grows. The people are full to bursting with grievances. The regional and commandery courts do not redress their grievances;so the royal court is full of people who constantly submit appeals... Now, what are you, the chancellor and imperial counsellor to do to prevent the blameworthy acts? You should thoughtfully and thoroughly draw up a list of the cases, and lay before me the mistakes.<sup>158</sup>

With this imperial edict the emperor hoped to stop widespread injustices, some of which could be traced to the very highest offices in the land. Moreover, the emperor was willing to

<sup>156</sup> *Huayang guozhi*, 1.7; cf. *Hou Hanshu*, 86.2843.

<sup>157</sup> *Huayang guozhi*, 1.7.

<sup>158</sup> *Hanshu*, 71.3040-3041.

admit his own responsibility in allowing gross injustices to happen. This leads us conclude that it was the people's "right" to demand for justice in early China.

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