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# THE SCOPE OF PRIVATE JURISDICTION IN EARLY IMPERIAL CHINA

The evidence of newly excavated legal documents

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## *Abstract*

As a result of the development of public penal law in early Imperial China since the 3<sup>rd</sup> century BC all kinds of private jurisdiction were severely punished. The only exception was the area of internal family offences where the state's claim to administer justice clashed with the interests of the family. This paper analyses the prosecution of internal family offences on the basis of specific cases and legal rules from the newly excavated legal documents of Shuihudi and Zhangjiashan. It examines the extent to which family households were granted their own area of jurisdiction, which internal family offences were exempt from public prosecution and in which cases the state authorities reserved the right to investigate offences committed within the family and punish the offenders. Regulation was especially required in cases of physical injuries inflicted by household members of varying rank and cases where someone reported another family member for criminal offences. The absconding of wives or private slaves as well as extra-marital sex between family members had to be regulated as well. The scrutinised legal documents show the efforts made by the legislator to protect the existing family hierarchy. Many crimes committed within the family did not have to be reported. The authorities only intervened if requested by the head of the family. For dealing with sexual offences within the family, however, the punishment was left solely to the judicial authorities.

In all the various forms of early civilisation, public penal law only developed as state power was consolidated.<sup>1</sup> China, where the first penal codes were created during the 6<sup>th</sup> and 5<sup>th</sup> BC,<sup>2</sup> was no exception in this respect.

- 1 In ancient Rome public penal law developed during the 3<sup>rd</sup> century BC (cf. Mommsen 1955: 59, 900); in the occidental High Middle Ages it did not emerge until the end of the 11<sup>th</sup> century in connection with the movement of "Landfrieden" (cf. His 1964: 8, 19, 344; Kroe-schell 1992: vol. 1, 196ff).
- 2 The most ancient Chinese penal code was the *Xingshu* 刑書 on a bronze vessel which had been enacted by the chancellor of Zheng 鄭, Zi Chan 子產, in 536 BC. During the late 5<sup>th</sup> century BC other codes were recorded in the states of Zheng and Jin on bronze vessels and bamboo slips. The penal codes of the Qin and Han dynasties were all based on the *Fajing* 法

However, while in ancient Rome and in the occidental High Middle Ages, private and public jurisdiction co-existed for a long time before public penal law finally prevailed, in China this process appears to have taken a much faster course. Here too, there were initially certain forms of private jurisdiction similar to the medieval feud for which some evidence is given in the *Zuozhuan*.<sup>3</sup> However, by the time of the Qin dynasty (221–206 BC), such private jurisdiction beyond the bounds of the family was strictly prohibited and liable to criminal prosecution. The state's claim to sole executive powers meant that the ancient Chinese judicial authorities considered themselves responsible even for offences committed within the family and reserved the right to pass sentence accordingly.

In view of the importance traditionally attached to the family hierarchy in ancient Chinese society, this practice inevitably led to explosive conflicts. These were already apparent in a statement attributed to Confucius in *Lunyu*:

The duke of She told Confucius a story that runs: In my home district (*dang* 黨) there are those who are the incarnation of up-rightness (*zhi* 直). If their father has stolen a sheep, they will bear witness to the fact. Confucius said: The upright men in my home district are different from these. The father conceals an offence for the sake of the son, and the son conceals an offence for the sake of the father. Uprightness consists in their devotion<sup>4</sup> to each other.<sup>5</sup>

Here, a plea is made for the penal law to respect the special ties of the family, which Confucius considered more important to the functioning of society than fighting crime with tough penal laws designed as deterrents.

This paper examines the area of conflict between the state's claim to administer justice and the interests of the family in early Imperial China, analysing the extent to which family households were granted their own area of jurisdiction, and exploring which internal family offences were exempt from public

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經, which was compiled by the chancellor of Wei 魏, Li Kui 李悝, in 407 BC. For the history of the early codification in China, cf. Zhang Jinfan 1992: 109f., 136f.

3 Dignitaries of the state of Jin 晉 whose families had been terribly maltreated by the powerful lineage Xi 郤 hatched a plot in 574 BC in order to revenge the suffered injury and killed three members of this lineage in public. The duke Li 厲 of Jin shut his eyes to this kind of private jurisdiction and encouraged the offenders because it fitted in well with his plans to topple the mighty lineages from power. See *Zuozhuan* Duke Cheng 17<sup>th</sup> year (*Shisan jing zhushu* ed.) 28, 1922a–b.

4 In this passage *zhong* 中 perhaps stands for the homophonous *zhong* 忠.

5 *Lunyu zhengyi* (*Zhuji jicheng* ed.) 13, 291.

prosecution and in which cases the state authorities reserved the right to investigate offences committed within the family and punish the offenders.

Definite conclusions have only been possible in this area since the discovery of the Shuihudi and Zhangjiashan legal documents in the 1970s and 1980s, which will therefore also be analysed in the following. These are individually: the model records for correct procedure (*Fengzhenshi* 封診式) and commentaries on the penal code of the Qin (*Falü dawen* 法律答問) from Shuihudi,<sup>6</sup> as well as the criminal cases from the first years of the Han dynasty (established in 206 BC) submitted to the supreme judicial authority which served as precedents (*Zouyanshu* 奏讞書), and the penal code of 186 BC (*Ernian lüling* 二年律令) from Zhangjiashan.<sup>7</sup>

First of all, I would like to make some remarks on the family structure as reflected in the legal documents. The family (*jia* 家) as a basic social group of self-government is rarely documented,<sup>8</sup> the household (*hu* 戶) as a unit of taxation was much more relevant to the authorities.<sup>9</sup> All family members were under the command and control of the male household head (*zhu* 主). The family comprised besides the wives of the head and his unmarried children other relatives, who lived in the household (*tongju* 同居),<sup>10</sup> and male and female slaves (*chen* 臣 or *nu qie* 奴妾 in Qin time, *nu bi* 奴婢 in Han time).<sup>11</sup> Family members were collectively liable for a crime of the head. For particularly serious offences like rebellion against the emperor, parents, siblings, wives, and children

6 Shuihudi Qinmu zhujian zhengli xiaozu. For the English translation, cf. Hulsewe 1985 (henceforth: *RCL*).

7 Zhangjiashan 247 hao Hanmu zhujian zhengli xiaozu.

8 For *jia* as “family”, cf. *Ernian lüling*, slips no. 188, 278, *Zouyanshu*, slip no. 190. For *jia* in the sense of “home”, cf. *Ernian lüling*, slip no. 217, *Zouyanshu*, slip no. 193; *Shuihudi Fengzhenshi*, slip no. 8; for the translation, cf. *RCL* E3.

9 The penal code from 186 BC contains a special section of statutes concerning the households (*Hülü* 戶律), cf. *Ernian lüling*, slips no. 305–346.

10 *Tongju* “to live together” is sometimes used for all the members of the same household, cf. *Shuihudi Falü dawen*, slips no. 22, 20, 183, *Qinlü zachao*, slip no. 39, *Fengzhenshi*, slip no. 72, for the translation, cf. *RCL* D 19, C 25, D 18, D 162, E 21; *Ernian lüling*, slips no. 72, 201. As a special term it also refers to relatives living in the same household apart from the wife and children, cf. *Shuihudi Qinlü shiba zhong*, cf. slip no. 85, for the translation, cf. *RCL* A 41, *Ernian lüling*, slips no. 160, 342, 371; *Hanshu* (*Zhonghua shuju* ed.) 2, 85. The persons in question are the siblings of the head. For a further discussion of this term, cf. footnote 15 to *RCL* A 41.

11 For the structure and size of the family during the Han period, its legal and economic functions and the authority of the family head, cf. Ch’ü T’ung-tsu 1972: 3–32.



of the offender were to be executed with him.<sup>12</sup> If an offender had been sentenced to the most severe type of penal labour as “earth pounder” (*cheng dan* 城旦) his wives and children were taken into custody and enslaved, while the confiscated property including the slaves was sold.<sup>13</sup>

Four areas will be examined in which public jurisdiction clashed with the interests of the family head and where regulation was therefore required:

- the treatment of cases where physical injuries were inflicted by family or household members of varying rank,
- the treatment of cases in which individuals reported other family members to the authorities for criminal offences,
- the treatment of cases where wives or slaves had absconded from their family,
- the treatment of cases involving extra-marital sex between members of one household.

There appears to have been a considerable need for regulation with regard to injuries inflicted by household and family members. 12 of 53 bamboo slips (23%) of the text on *Zeilü* 賊律 dealing with bodily harm and homicide are devoted to this area alone in the Zhangjiashan penal code.<sup>14</sup>

The law respected the existing family hierarchy. The head of the family and his wife were free to chastise their children and slaves as they saw fit. The authorities only intervened if the victims died as a result of the chastisement:

A father or mother who beats or canes his / her child, male or female slave is ordered to pay for redemption from the death penalty (*shu si* 贖死) if the child, slave or woman slave dies as a result of the battery caused by the beating or caning.<sup>15</sup>

These fines which were imposed by the authorities were considerably lower in the hierarchy of punishments than execution, which was the sentence given for

12 *Ernian lüling*, slip no. 2.

13 *Ernian lüling*, slip no. 174; *Zouyanshu*, slips no. 122–123.

14 *Ernian lüling*, slips no. 32–44.

15 *Ernian lüling*, slip no. 39.

killing a person outside the family during a fight (*dou sha ren* 鬥殺人).<sup>16</sup> But the fines were nevertheless considerable<sup>17</sup> and could not easily be paid.

The head of the family could also chastise his wife for insubordinate behaviour (*han* 悍), a term not further defined. Here too, he would only be prosecuted if she sustained a serious injury. In the Qin period, if a man ripped off his wife's ear when chastising her or broke one of her limbs or fingers or dislocated a joint, he was at least sentenced to moderate penal labour (*nai* 耐).<sup>18</sup> At the beginning of the Han period, a husband was totally exempt from punishment as long as he did not use a weapon or a tool with blades to chastise his wife, even if he inflicted permanent injury.<sup>19</sup>

On the other hand, the authorities imposed public sentences for assault, battery and insults (*ou li* 毆詈 and *xi gou li* 隳詈) inflicted by subordinate household members on higher-ranking members.<sup>20</sup> The severity of punishment laid down in the Zhangjiashan penal code depended on the status of the family relationship that had been violated, or in other words on the position within the family hierarchy of the parties involved. A comparison with the punishments meted out for fights between non-family members makes it clear that violence towards higher-ranking relatives was considered a more serious offence.<sup>21</sup>

In the case of assault and battery among family members, the authorities only introduced criminal proceedings if an offence was reported, which the heads of families were by no means always obliged to do. This applied in particular to cases involving unfilial behaviour (*bu xiao* 不孝) and insubordinate behaviour (*ao / jiao han* 傲 / 驕悍).

16 *Ernian lüling*, slip no. 21. The usage of *dou* indicates that the victim was killed without criminal intent.

17 For redemption from the death penalty an offender had to pay two catties and eight ounces (about 634 g) of gold, cf. *Ernian lüling*, slip no. 119. This amount was equivalent to 25,000 cash, on average, cf. the commentary of Ru Chun to *Shiji* 30, 1418. For more precise dates, cf. footnote 2 to *RCL* A 44.

18 *Shuihudi Falü dawen*, slip no. 79. Cf. translation in *RCL* D 64. For a specification of *nai*, cf. *Ernian lüling*, slip no. 90: an accused who was sentenced to *nai* got his beard shaved off and was made a convict performing the most moderate penal labour (*si kou* 司寇).

19 *Ernian lüling*, slip no. 32.

20 *Ernian lüling*, slips no. 33, 35, 38, 40–45.

21 Cf. *Ernian lüling*, slip no. 28 (punishments for rowdy non-family members: fines of four or two ounces) with slips no. 33 (punishment for insubordinate wives: moderate penal labour), 35 (punishment for unfilial sons: death penalty), 40–43 (punishments for refractory daughters-in-law, younger siblings or other subordinate family members: death penalty, moderate penal labour, fines of sixteen, twelve or four ounces).

*Bu xiao* referred to a serious case of unfilialness on the part of children towards their parents. The Zhangjiashan penal code lists the following offences as justifying a report for *bu xiao*:

- injuring or killing parents with malicious intent (子賊殺傷父母),
- plotting to kill parents (子牧殺父母),
- insulting or resorting to violence against parents, grandparents or step-mothers.

If the parents wanted a public punishment for their unfilial children, they could report them to the responsible authorities. These were required to follow up the case and examine the grounds for the accusations. If the judicial inquiry concluded that the offences reported had indeed been committed, the authorities imposed the legally stipulated punishment for *bu xiao* which was the death sentence (*qi shi* 棄市).<sup>22</sup>

A model record from Qin shows how the judicial officers were required to proceed in the case of *bu xiao*:

Transcript: Commoner A of village X lodges the following report: ‘Commoner C of the same village, who is my own son, has been unfilial. I request that he be killed. I venture to make this report.’ – Forthwith Clerk E was ordered to go and seize him. Transcript of Clerk E: ‘Together with prison bond servant convict X I seized C, we caught him in the house of X.’ – Vice Prefect X interrogated C. [The latter’s] statement reads: ‘I am A’s own son. I have been truly unfilial towards A. I am not [presently] prosecuted or punished for any other offence.’<sup>23</sup>

No mention is made in the record of the grounds for the report. It can, however, be assumed that these were examined by the authorities during the course of the proceedings. The record does not include the full statement made by the accused, who evidently confirmed the accusations made by his father. Rather it has been condensed to the facts relevant to the sentence.<sup>24</sup>

22 *Ernian lüling*, slips no. 34–35.

23 *Shuihudi Fengzhenshi*, slips no. 50–51. Cf. translation in *RCL* E 18.

24 This document mainly corresponds to the passage beginning with *ju* 鞠 “finding of facts” in the procedural formulae of *Zouyanshu*, cf. slips no. 5, 14, 22, 32, 45, 64, 71, 90, 105, 120, 155.

One case in the *Zouyanshu* in which a slave<sup>25</sup> was beaten to death by his master is particularly interesting in this context. The master appears to have justified his behaviour by saying that the slave had behaved unfilially. Reporting a slave on the grounds of *bu xiao* was unusual, but evidently permitted as private slaves held a similar status to children and in a number of instances, the law treated them in the same way as children:<sup>26</sup>

The Governor of Hanzhong [province]<sup>27</sup> submitted for decision:

The Seventh Order Grandee<sup>28</sup> Chang caned his slave, so that the latter died [as a result] of battery. Before (it was discovered), Chang reported it on his own initiative.<sup>29</sup>

Since Xiangru originally had been a free man, he was (by Imperial edict) entitled to be manumitted (*mian* 免)<sup>30</sup> and to be employed in the agency of resources.<sup>31</sup> But Chang and Xiangru had agreed just not to manumit Xiangru.

- 25 In the penal code from 186 BC only private slaves are documented. During the Han and Qin period there were three main sources of slavery. Poor families were often forced to sell their children into slavery. In addition many captives of war were enslaved. The third source was the brisk trade with non-Chinese slaves from the southern aboriginal tribes. For the history of early Chinese slavery, cf. Wilbur 1943; Ch'ü T'ung-tsu 1972: 135–159; Yates 2001.
- 26 *Ernian lüling*, slip no. 34: the same punishment for killing or injuring one's parents or one's master resp. one's master's parents, wife or children; slip no. 39: the same punishment for killing one's children or slaves as a result of the chastisement; slip no. 132: no mitigation of punishment for children and slaves who have killed their parents or master and reported their crime on their own initiative prior to the discovery; slip no. 133: children who report their parents for committing an offence or slaves who report their master will not be admitted and shall be executed.
- 27 The province of Hanzhong 漢中 was established in 312 BC by the Qin ruler (cf. *Shiji* 5, 207). Its administrative seat was located to the east of the present-day Hanzhong in southwestern Shaanxi. During the Former Han dynasty the centre of this province was moved to Xicheng 西城 which was located to the northeast of present-day Ankang, Shaanxi, cf. *Hanshu* 28A, 1596.
- 28 *Gong dafu* 公大夫 was the seventh in the hierarchy of twenty meritorious ranks (*jue* 爵) during the Qin and Han periods.
- 29 According to the Han statutes the punishment for an offender who voluntarily reported himself to the authorities before his offence was discovered (*xian zi gao* 先自告) was reduced by one degree, cf. *Ernian lüling*, slip no. 127. Chang obviously hoped to enjoy such a reduction in punishment if he voluntarily confessed that he had killed his slave.
- 30 In 202 B. C. an edict of emperor Gao was issued to manumit all persons who had sold themselves or their children into slavery because of famine (cf. *Hanshu* 1B, 54). Otherwise a slave might be freed by his master for good behaviour. But only after his master had died was a private slave given complete freedom (cf. *Ernian lüling*, slips no. 162–163).
- 31 *Shao fu* 少府 was an official title for the supreme agency of the public revenue at the imperial court and its head (cf. *Ernian lüling*, slip no. 440; *Hanshu* 19A, 731). At the level

The criminal case has been tried. We, the authorities, are not obliged to deal with the fact that Chang has used a report for the unfilial behaviour (of his slave) as a pretext / an argument.<sup>32</sup> We are in doubt how Chang is to be punished.

Reply from the court: The report used as a pretext / an argument is to be tried.<sup>33</sup>

The record here contains only a brief summary of the results of the investigation, which do not reveal any further details about exactly what happened. The law stated the exact punishment that the slave-holder was to receive: chastisement of a slave resulting in death was subject to a fine of around 25,000 cash.<sup>34</sup> In this case it was reduced to 15,000 cash because the slave-holder had reported himself.<sup>35</sup> The doubts expressed by the authorities over the sentence can therefore not have been for this reason.

The only information that is mentioned, other than the brief outline of the crime, is that as a former free man, the slave should already have been released owing to an imperial edict and would then have performed statute labour in an office of the *shao fu*. But the slave had reached an agreement with his master, not to make use of this right and to remain a slave. Statute labour was evidently not that attractive as far as the slave was concerned.

Apart from the uncertainty with regard to the status of the dead slave, the judicial authorities were also displeased that the slave-holder claimed his slave had behaved unfilially probably to justify his own actions. It is not clear whether the slave-holder mentioned it immediately when he reported himself or whether it only emerged later during the provincial authorities' interrogation.

The provincial authorities did not feel obliged to further investigate the accusations made by the slave-holder against his slave, because they believed them

of the province another *shao fu* supervised the revenue and expenditure of the governor (cf. Bielenstein 1980: 93). In its workshops Chang should work off his debts. For the function of *shao fu*, cf. Naoi Akiko 2000.

32 *Cuo* 錯 in the sense of "erroneous, mistakenly" is only proved for legal texts of the Tang period. Tentatively I interpret it as a loan graph for the homeophonous *jie* 藉 which usually means "to base / rely on, to refer to", but is also proved in the special sense "to allege". In this meaning it is written *jie* 借 in the received version of *Shijing* ode (Karlgren 1950) no. 256, 10 or with the variant *ji* 籍 in *Hanshu* 62, 2945 and the *Shijing* version of Qi (cf. Wang Xianqian 1987: 939 and Karlgren 1946, gloss no. 960). For more evidence of these loan writings, cf. Gao Heng 1989: 906–907.

33 *Zouyanshu*, slips no. 49–50.

34 *Ernian lüling*, slip no. 39. For the amount of this fine (*shu si*), cf. footnote 17.

35 Cf. *Ernian lüling*, slip no. 127 with slips no. 119 and 129. For the conversion in cash, cf. footnote 17.



to be merely an excuse. The supreme judicial authority proved, however, to be of a different opinion in its reply and ordered the case to be reopened, apparently so that the accusations could be investigated. The court made no reference to the status of the dead slave.

The slave-holder had not behaved by any means in accordance with the law. He was supposed to report an unfilial slave to the authorities and hand him over for punishment. Instead he had beaten him to death on his own authority. Obviously, the slave-holder had reasons for wanting to circumvent a public sentence for his slave. An investigation by the authorities could have concluded that his charges were unjustified. The law accorded slaves namely the right to defend themselves (*zi song* 自訟)<sup>36</sup> against false charges, although their objections had to be substantiated:

If male and female slaves appeal against accusations on their own behalf (*zi song*) without due diligence, then a male slave's left foot is cut off and a female slave is tattooed on forehead and cheekbones, and they are handed over to their master.<sup>37</sup>

The two examples dealt with here illustrate the right reserved by the state to impose the death penalty for serious offences committed within the family. Punishments for lesser cases of unruliness by subordinate members of the household (*ao / jiao han*) were likewise only imposed if they were reported by the head of the family.

It was evidently not common to have insubordinate wives punished by the authorities. With insubordinate slaves, however, the case was different:

[Male and female slaves who beat or insult their master, their master's]<sup>38</sup> parents or wife and children are executed in public. If a male or female slave is insubordinate towards his or her master and the latter requests to have him or her killed, then they are in the same way executed in public; if he requests to have his or her [foot] cut off or to otherwise mutilate him or her, then [the foot] is cut off or he or she is mutilated.<sup>39</sup>

The model records from Shuihudi provide examples of how proceedings against insubordinate slaves were to be conducted:

36 Cf. *Hanshu* 78, 3286.

37 *Ernian lüling*, slip no. 135.

38 As a complement to the lacuna I propose 奴婢毆詈主, 主父.

39 *Ernian lüling*, slip no. 44.



[How to proceed when somebody is] reporting a slave [for insubordination] – Transcript: Commoner A of village X bound and [committed for trial] presented to the authorities the male C; he reported: ‘C is my slave. He has been insubordinate: he does not work in the fields and he does not follow my orders. I request that he be sold to the government, that [his left foot] be cut off and he be made an earth pounder convict, and that I may receive the proceeds of the sale.’ – Interrogation of C: His statement reads: ‘I am A’s slave. It is true that I was insubordinate and did not obey A. A has never on his own accord manumitted me. I have no illnesses, and I am not presently prosecuted for any other offence.’ – Clerk X was ordered to examine [C] for illnesses, [with the result that] he is not ill. – Treasurer X and Assistant X were ordered to establish C’s value according to the correct market price before Vice Prefect X: C is a person of average quality, his value is so and so many cash. – Vice Prefect X made the following report to the head of township X: ‘The male C has been placed under formal criminal investigation; his statement reads: I am the slave of commoner A of village X. You shall determine his name, status and village [of registration], for which [offences] he has been prosecuted or sentenced, which punishments have been amnestied, and if there is any matter on which official [inter-agency] inquiries [for purpose of review] are called for or not, if A has ever on his own accord manumitted C and again has enslaved him or not. Seal and guard [his property and dependents] belongings in accordance with the statutes. When this [order] reaches you, report [its arrival] in writing.’<sup>40</sup>

The example cases involving physical injuries inflicted by relatives and those that reported unfilial and unruly behaviour among subordinate household members clearly show the efforts of the legislator and the judicial authorities to avert the more brutal excesses of the private jurisdiction exercised by the heads of families while at the same time protecting the existing family hierarchy through the penal law.

Dividing up the responsibility for punishing unfilialness and insubordination in families between the judicial authorities and the family head did not, however, mean that all problems were solved as regards the treatment of criminal offences committed against family members.

The penal law reforms of Shang Yang around 350 BC stipulated that members of paramilitary five and ten-man units were duty-bound to denounce the crimes of their neighbours and failure to do so resulted in severe punishment.<sup>41</sup> Those who knew about a crime but failed to report it often received the punishment legally prescribed for the crime itself. But the Zhangjiashan code by contrast listed only a few offences in which members of the household (*tong ju*)

40 *Shuihudi Fengzhenshi*, slips no. 37–38. Cf. the English translation in *RCL* E 15.

41 *Shiji* 68, 2230.

were expressly obliged to report each other.<sup>42</sup> This leaves the following questions:

- Under what circumstances was it a punishable offence to know about a crime committed by another household member and not report it?
- Under what circumstances was it not permitted or even a punishable offence to report a crime committed by another household member?

The following regulation in the penal code from the Qin period will help to answer the last question. Here the term *jia zui* 家罪 – which Hulsewe translates as “household crimes” – is used:

[Quote from the statutes:] As regards the sentencing of household members who (*jia zui*;) at home committed an offence? / concealed an offence? / in the father's [life-]time, and this is only reported after the father's death, the [report] shall not be admitted.

*Jia zui* appears to have been a term which was not easily understood even at the time. One of the commentaries defines it as follows:

What is meant by *jia zui*? [Answer:] Concerning *jia zui* [the following is to be said]: If the father kills or injures another person, and this is reported after the father has died, [the offence] shall not be tried.<sup>43</sup>

A second commentary confirms that *jia zui* did not only refer to concealed offences committed by the father but also to those committed by other family members:

When father and son live together and [the son] kills or injures his father's male or female slaves or livestock or steals it, and somebody reports this after the father has died, then [the report] is not to be admitted – this is meant by *jia zui*.<sup>44</sup>

The fact that *jia zui* is not simply a composite of two nouns is made clear by the nominalised verbal phrase *fu shi jia zui ye* 父時家罪也 quoted in the first regulation. *Zui* could be a verb here. Its usage as a verb in legal terminology is proven in the sense of “to be punished” or “to commit an offence”. Syntactically

42 *Ernian lüling*, slip no. 72–73 (report for taking a person as hostage for ransom) and no. 201 (report for illegally casting coins).

43 *Shuihudi Falü dawan*, slip no. 106. Cf. translation in *RCL* D 88.

44 *Shuihudi Falü dawan*, slip no. 108. Cf. translation in *RCL* D 89.

speaking, *jia* could also be interpreted as a verb. However, the use of *jia* as a verb in the sense “to view / treat as a family” is rare.<sup>45</sup> So far there is no proof that *jia* was used in the sense of “to treat as intimate, to hide from the eyes of strangers, to conceal”, which in the context of the legal commentaries would make most sense in my opinion.<sup>46</sup>

When reading the commentaries quoted above, one is given the strong impression that the authorities in Qin were little interested in the reporting and following up of particular offences committed inside families. This impression is confirmed by a further regulation from the Qin penal code which is quoted in the bamboo texts from Shuihudi:

If a child reports his father or mother, if a male or female slave reports his/her master, then the report shall not be admitted if it is not *gong shi gao* 公室告 [about an offence which has] to be reported to the government authorities. [Question:] What is meant by *fei gong shi gao* 非公室告? [Answer:] When a head of a family kills, mutilates or shaves bald his child, male or female slave, this is referred to by *fei gong shi gao* and [a report] shall not be admitted. If [a child or slave] still lodges a report, then the reporting person will be punished.<sup>47</sup>

The key terms *gong shi gao* and *fei gong shi gao* are defined on another occasion as follows:

What is meant by *gong shi gao*? [Answer:] With malice killing or injuring or robbing a stranger are cases of *gong shi* ‘offences which have to be reported to the government authorities’. If a child robs his father or mother, if a father or mother on their own authority kill, mutilate or shave bald their child, slave or woman slave, these are not cases of *gong shi gao* to be reported to the government authorities’.<sup>48</sup>

The stipulations from the Qin penal code quoted here show quite clearly that children were not permitted to report their parents to the authorities, even if they had killed one of their other children or slaves or if the child concerned had suffered injury at the hands of his or her parents. The same ban applied to household slaves. If I have not misunderstood the content of the commentary quoted

45 *Hanshu* 77, 3247.

46 Homeophonous words like *gu* 故 “old familiar, confidant”, *gu* 固 “secure”, *ku* 庫 “(where something is kept in a safe place:) storehouse” seem to be cognates of *jia* which can be interpreted as “(the place) where somebody feels secure”. In the context of this word family a meaning like “to keep something to oneself” would be suited for *jia*, too.

47 *Shuihudi Falü dawen*, slip no. 104. Cf. translation in *RCL* D 87.

48 *Shuihudi Falü dawen*, slip no. 103. Cf. translation in *RCL* D 86.

above, children were, on the other hand, obliged to report their parents to the authorities if the victim was not a member of the household. This regulation was abolished in the penal code of 186 BC. From then on, children could not report their parents to the authorities, nor slaves their masters or their masters' immediate relatives nor wives their husbands' parents. Failure to observe this resulted in the death penalty:

If a child reports his father or mother, if a daughter-in-law reports her parents-in-law, if a slave or slave woman reports his/her master, the master's parents, wife or children, then [the report] shall not be admitted and the reporting person is to be executed in public.<sup>49</sup>

While children could not escape family liability if their parents were convicted of a criminal offence – because they were not allowed to report their parents – wives were rewarded for denouncing their husbands. A woman who reported her husband's crimes to the authorities was freed of any liability and was even allowed to retain her dowry:

If a husband has committed an offence and his wife reports this prior to discovery, she is not subjected to confiscation. Are the slaves, clothes or vessels of her dowry to be confiscated or not? They are not to be confiscated.<sup>50</sup>

The next area in which public jurisdiction clashed with the interests of the family head was the prosecution of absconding by wives or slaves. A wife absconding and thereby leaving her husband was treated as a regular absconder and punished according to the time absconded. Leaving her husband was not considered as an aggravating circumstance. Absconding for one year and more was punished by “shaving” (*nai*)<sup>51</sup> which also implied mild penal labour as “robber guard” convict (*si kou*). The statutes generally applied mitigating rules for women who committed an offence.<sup>52</sup> That is why in the case of absconded women shaving was regularly replaced with a sum equivalent to redemption from shaving. Only if a woman committed a second offence of absconding punishable by “shaving”, she had to perform the less severe penal labour as a “bondwoman” convict (*li qie* 隸妾).<sup>53</sup> In both cases the authorities reserved the

49 *Ernian lüling*, slip no. 133.

50 *Shuihudi Falü dawen*, slip no. 170. Cf. translation in *RCL D* 149 and *Ernian lüling*, slip no. 176.

51 *Ernian lüling*, slip no. 157.

52 *Ernian lüling*, slips no. 88–89.

53 *Ernian lüling*, slip no. 158.

right to pass sentence and to punish the absconded woman. There are not any stipulations concerning women who returned home of their own accord. Nevertheless the family head was probably not forced to commit his contrite wife for trial and could punish her at his own discretion. But if she had become the wife of another man and had children by him, she had to be surrendered to the authorities and punished according to the statute on “taking an absconded person as wife”:

In cases of taking another person's wife or an absconded person as wife, as well as of becoming an absconder's wife, both the one who takes as well as the one who is taken as wife and those who act as match-makers are without exception tattooed and made 'earth pounder' or 'grain pounder' convicts, if they knew the truth. If the real punishment of the person in question is more severe, judgement is to be passed according to the statute on concealing an offender. Those who do not know about it [redeem the punishment of 'shaving'].<sup>54</sup>

During the Qin and Han dynasty separate rules in the penal law applied to criminal slaves. Apart from the death penalty for the most serious offences, there were only two punishments for them: Slaves were tattooed (*qing* 黥) on the forehead (*yan* 顏) and cheekbones (*kui* 頤) for all offences ranging in severity from those ordinarily punishable with mutilation and penal labour down to those punishable with shaving or banishment. If slaves only committed minor offences that for free people would have been punished by paying a redemption fee (*shu* 贖) or a less severe fine (*fa* 罰), they were given one hundred blows with the cane.<sup>55</sup> After the authorities had executed these punishments they sent the slaves in both cases back to their owner. In accordance with these rules slaves were punished for absconding by having their forehead and cheekbones tattooed and being returned to their owner, irrespective of the time for which the slave had disappeared. Only if slaves returned to their owner or the owner's close relatives and friends of their own accord they could escape the mutilation and were punished with one hundred blows of the cane.<sup>56</sup> In this case, and in cases where the owner or his close relatives and friends have searched for the slave by themselves and traced him or her, it was permissible for the owner to not present the slave to the authorities and thus spare him or her official punishment:

54 *Ernian lüling*, slips no. 168 and 171.

55 *Ernian lüling*, slip no. 122.

56 *Ernian lüling*, slip no. 159.



If a male or female slave has absconded but then either returns of his/her own accord to his/her master or the master's close acquaintances or the master himself, the master's parents, children or household members search and of their own catch him/her, then in cases where the judgement is to be passed to give the person in question back to his/her master, but where the latter wishes not to present him/her to the authorities for judgement, [his wish] is to be granted in both cases.<sup>57</sup>

The judicial authorities faced a particularly difficult problem when it came to the prosecution of illicit sexual relations (*jian* 奸) within the family. Not all forms of extra-marital sex within the household were a punishable offence. If a man had sexual relations with one of his female slaves, for example, he was not subject to criminal prosecution. Here the penal code merely stated that any children born of such relations were to be handed over to the master and considered his slaves.<sup>58</sup>

The state authorities only intervened in cases of extra-marital sex which represented a gross violation of the family hierarchy (sexual relations between a male slave and his mistress or master's daughter)<sup>59</sup> or relations which broke a prevailing moral taboo (incest between siblings<sup>60</sup>, sexual relations with the wife or concubine of the father<sup>61</sup>).

Sexual relations between a married woman and another man could also not be punished within the family but had to be brought before the authorities who were obliged to sentence both the adulteress and her partner – as long as both were acting in mutual consent – to the harshest form of penal labour but not additional mutilation:

All those who fornicate with another person's wife in mutual consent as well as those women with whom they fornicate are made 'earth pounder' or 'grain pounder' convicts without mutilation. If fornication is committed by an official, judgement is passed for fornicating by force / rape. Those who by force fornicate with another person are castrated and made eunuch bond servant convicts.<sup>62</sup>

A precedent case from the *Zouyanshu* shows the kind of dilemmas the authorities sometimes got into when prosecuting internal family offences. In this par-

57 *Ernian lüling*, slip no. 160.

58 *Ernian lüling*, slip no. 188.

59 *Ernian lüling*, slip no. 190.

60 *Ernian lüling*, slip no. 191.

61 *Shiji* 18, 884; 51, 1997; 95, 2667; *Hanshu* 38, 2001.

62 *Ernian lüling*, slips no. 192–193.



ticular case<sup>63</sup>, a woman had had sexual intercourse with another man during the mourning ritual for her dead husband and was therefore charged with adultery:

Now the husband of woman A from Lu in district Du, First Order Grandee D, had died of an illness. When the coffin of the deceased was on the bier in the hall and had not been buried, A performed with D's mother Su the obsequies during the night. They surrounded the coffin and wailed, but then A went together with a man C into a room behind the coffin to fornicate with mutual consent. On the next day dawn, Su reported A to the authorities who arrested A, but were in doubt how to punish her.<sup>64</sup>

Mrs. Su accused her daughter-in-law of unlawful sexual relations between a married woman and another man, a punishable offence. However the authority in charge had a procedural problem to overcome. An additional legal requirement had to be fulfilled before criminal proceedings could be opened:

Whoever arrests fornicators under all circumstances has to check up on them on the spot that the persons in question perform the act of copulating.<sup>65</sup>

As one model record from Qin shows, the person who had caught the couple in the act was obliged to apprehend them at the scene and hand them over to the authorities immediately.<sup>66</sup> In this case, however, the mother-in-law of woman A failed to apprehend the couple at the scene and did not report them to the authorities until the next morning. For this reason, woman A could no longer be prosecuted for adultery. The prefecture found itself unable to establish what sentence to impose. The supreme judicial authority, to whom the case was then referred, turned to an analogy construction to determine the sentence, drawing on other internal family offences, *bu xiao* and *ao / jiao han*, which were normally only investigated and prosecuted by the authorities if reported by the head of the

63 For an explanation of this complicated case in greater detail, cf. Ulrich Lau 2002: 382–391.

64 *Zouyanshu*, slips no. 183–184.

65 *Ernian lüling*, slips no. 182–183. *An* in the phrase *an zhi jiao shang* 案之校上 means in the legal language “to check on the spot” (cf. *Shiji* 87, 2559). *Zhi* as object refers to the offenders and is also the subject of the following subordinate clause. *Jiao shang* is a variant of *jiao shang* 交尙 in the sense of modern *jiao pei* 交配 “to copulate”. Usually *jiao* was used for the copulation of animals (cf. *Lüshi chunqiu* [Zhuzi jicheng ed.] 11, 104). But it could also be used in a figurative sense for men (cf. *Hanshu* 38, 2001). *Shang* denoted “to marry a princess of the imperial house” (cf. *Shiji* 87, 2547; 57, 2072; *Hanshu* 72, 3064), but it could also be used in a broader sense for “to marry (a high-ranking official as the daughter of a merchant)” (cf. *Shiji* 117, 3047).

66 *Shuihudi Fengzhenshi*, slip no. 95. Cf. translation in *RCL* E 25.

family. The matter was further complicated by the fact that woman A had not committed an offence against her mother-in-law but against her dead husband, and *bu xiao* applied not to the insubordination of wives but of children, or – at the most – of slaves. The supreme judicial authority therefore first drew up a list of the family relations in order of rank, using the rules which apply for appointing heirs when the head of the family dies.<sup>67</sup> According to these rules, the wife was in third position after the son and heir and the parents of the husband. As the relationship between the parents and the children was designated as *xiao*, the disrespect to the husband was, in the opinion of the judicial authority, a “secondary unfilialness” (and thus subject to a milder punishment) because the wife came immediately behind the parents of her husband in the line of inheritance.<sup>68</sup>

The sentence for “unfilialness” was public execution (*qi shi*).<sup>69</sup> Secondary unfilialness received the next punishment down in the hierarchy, namely the harshest form of penal labour for women as a tattooed grain pounder convict (*qing wei chong* 黥爲舂).<sup>70</sup> Because the offender’s husband had been awarded the lowest rank of merit, the woman was not subjected to mutilation.<sup>71</sup> The sentence that was finally passed corresponded exactly to that given for *ao han*,<sup>72</sup> an offence which in the opinion of the court could also include the breach of duty by a woman towards her dead husband. In the hierarchy of punishments applicable at the time, the sentence was one level higher than that prescribed for unlawful sexual relations.

On completion of this complicated process of sentencing, a judicial secretary who had just returned from duties elsewhere<sup>73</sup> proved, with the aid of similar cases, that the sentence would only have been justified if the woman had cheated on her husband while he was still alive, because the duties of a wife towards her husband did not continue past death.<sup>74</sup> In this specific case, the legal basis for sentencing the woman simply did not exist.

The palaeographic legal documents dealt with here by no means bear out what Confucians criticised as the authorities’ general disregard for family ties during

67 *Zouyanshu*, slip no. 180.

68 *Zouyanshu*, slips no. 186–188.

69 *Ernian lüling*, slip no. 35; *Zouyanshu*, slip no. 182.

70 *Zouyanshu*, slips no. 186–187.

71 *Zouyanshu*, slips no. 182, 183.

72 *Zouyanshu*, slips no. 181, 188.

73 *Zouyanshu*, slip no. 189.

74 *Zouyanshu*, slips no. 192–195.

the Qin and early Han dynasty. Rather they show the efforts made by the legislator to protect the existing family hierarchy through the penal law.

The state authorities granted the heads of family extensive rights to chastise the members of their household for their misdeeds. Only when it came to carrying out executions or the mutilation of household members did the authorities take over to avert the more brutal excesses of private jurisdiction, although they were then also required to investigate the validity of the charges before passing sentence.

In a society where it was otherwise a strictly enforced duty to report any crime, many offences committed within families did not have to be reported. The authorities only intervened if requested by the head of the family. If concealed offences within the family were discovered after the death of the family head, none of the relatives who covered for the offender could be prosecuted. Children and slaves were in any case not permitted to report the killing or injuring of household members by the family head or his wife. This regulation was extended at the beginning of the Han period to include offences committed by the head of family against outsiders, although children and slaves nevertheless remained liable for such offences and could be punished as accessories or accomplices with the same sentence as the offender. Wives, on the other hand, and members of the household who were of the same generation as the family head (*tongju*) were encouraged to report him if he committed an offence and were rewarded by being freed from any family liability for the crime and exempt from punishment.

In early imperial China, the judicial authorities claimed sole responsibility for dealing with sexual offences within the family and did not allow the offenders to be chastised by the heads of family. However clear evidence had to be provided before such offenders could be prosecuted by the authorities.

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