

## From *Zei* 賊 to *Gu Sha* 故殺: A Changing Concept of Liability in Traditional Chinese Law

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### Introduction

If we consider the development of law in China from the Western Zhou 西周 to the Qing 清, we can readily distinguish between an earlier or immature stage and a later or mature stage. Where the line is drawn may be a matter of difficulty. Yet some statements may be uncontroversial. For example, few would disagree that the codes of the sixth century B.C. belong to the former, while the Tang code (*Tang lü shu-yi* 唐律疏議) belongs to the latter. From the later Zhou period 周 (Warring States) the use of law as the principal instrument for the government of the state is continually being developed. Experiments both in the arrangement of the rules of law and in the formulation of individual rules were made. Such experiments continued throughout the Qin 秦, Han 漢, and post-Han 漢 periods. Important improvements in the composition of the law codes were achieved in both the southern and northern dynasties, the culmination of the process being the Tang code which was itself the model for the codes of future dynasties. We are concerned here mainly with the law of the Qin 秦 and Han 漢 periods, which in the context of the evolution of law in China we classify as belonging to the early or immature stage.

The theoretical assumption underlying this study is that early law in general takes a situational approach to the problem of liability. This means that the perspective of the rules which impose liability for harm is that of the whole ‘situation’ from which the harm results. ‘Situation’ in this context points mainly to the physical circumstances of the act and not the mental state of the perpetrator. For example, the rules might say “if ‘A’ strikes ‘B’ with a weapon and kills him, ‘A’ is to be put to death,” rather than “if ‘A’ intentionally kills ‘B’, ‘A’ is to be put to death.” This does not mean that the formulation of the first rule ignores altogether the element of intention. Even the simplest peoples are able to distinguish between the intentional and the non-intentional infliction of harm and differentiate accordingly the gravity of the punishment.<sup>1</sup> The point is that reference to the perpetrator’s state of mind is implicit in, and inferred from, the external circumstances of the act. From the fact that a weapon was used to kill, the inference will be drawn that the killing was ‘intentional’ and so more serious than a killing which had occurred, for example, in the course of a violent game. It is only in the later or mature stage of legal development (in China clearly demonstrated by the Tang code) that rules imposing liability come themselves to be formulated in terms of the perpetrator’s state of mind, with distinctions correspondingly drawn between intentional, careless, and accidental acts.<sup>2</sup>

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<sup>1</sup> At one time it was commonly held that early law imposed liability on account of an act causing harm irrespective of the perpetrator’s state of mind: see, for example, F. Pollock and F.W. Maitland. *The History of English Law Volume II*, Second edition reissued with a new introduction and select bibliography by S.F.C. Milsom. Cambridge: Cambridge University Press, 1968), pp. 470-2. This approach has now been discredited: see, for example, D. Daube. *Roman Law. Linguistic, Social and Philosophic Aspects*. Edinburgh: Edinburgh University Press, 1969, pp. 161-6.

<sup>2</sup> For a more detailed discussion see G. MacCormack. “Standards of Liability in Early Law,” *Juridical Review* (1985), pp. 166-177.

The example of ‘situational liability’ addressed in this paper is encapsulated in the phrase *zei sha* 賊殺. In early Chinese law this phrase designates a certain kind of homicide, which has some affinities with the category of homicide later designated as *gu sha* 故殺 (intentional killing). However, it will be argued that it is a mistake to translate *zei* 賊 as a reference to any particular state of mind such as ‘premeditation’, ‘intent’, or ‘malice’. The word points explicitly not to state of mind on the part of the perpetrator but to the external circumstances of the act, in particular the use of violence. This means not that the early Chinese were unaware of the difference between intentional and non-intentional acts but that, when determining liability, they focused upon the concrete manifestations of an act rather than the more intangible element of the perpetrator’s state of mind. Deductions as to the state of mind (for example, whether there had been intention or not) would be drawn from the circumstances of the act.

In the context of liability for harm in Chinese law of the Qin/Han 秦/漢 period, the legal rules imposing punishments were still formulated from the perspective of the whole situation rather than a specific state of mind. This is well illustrated by the laws on homicide, which were framed with reference to the type or category of act from which death resulted. The focus of the rules was upon the ‘situation’ in which the perpetrator found himself, not upon his state of mind. This can be seen most obviously in the categories of *dou sha* 鬥殺 and *xi sha* 戲殺, the former covering homicides that occurred in the course of a fight and the latter those that occurred in the course of sport or play. But even the category of *guo shi sha* 過失殺 (accidental homicide) was understood not abstractly as ‘homicides in which there had been no intention to cause harm on the part of the perpetrator’, but rather concretely in terms of a variety of specific situations. This can be seen from the account in the *Zhou li* 周禮 of the ‘three grounds of leniency (*san yu* 三宥)’ with the explanations advanced by the Han commentators Zheng Zhong 鄭眾 and Zheng Xuan 鄭玄.<sup>3</sup> Likewise, at this time, the category of *mou sha* 謀殺 expressed the fact that the killing had resulted from a situation in which two or more persons had plotted to kill another, rather than the existence of a premeditated intention to kill.

With respect to *zei sha* 賊殺, the situation expressed can generally be denominated as one of unprovoked violence, as where one person sets upon or attacks and kills another. The circumstances show that there was on the part of the perpetrator an intention to kill, but the word *zei* 賊 itself points not so much to the existence of this intention as to the use of violence. The most frequent (although not the only) kind of *zei sha* 賊殺 appears to have been that in which some weapon such as a sharp bladed instrument was used to bring about death. The term *zei sha* 賊殺 was retained in the law after the Han 漢. It still designated a category of homicide in Jin 晉 law and was probably so used in the successive codes of the southern dynasties that largely copied the Jin 晉 code. It is the Northern Wei 北魏 code that first replaced *zei sha* 賊殺 with the term *gu sha* 故殺. The latter term came to be adopted by Sui/Tang 隋/唐 law and from there passed into the Ming 明 and Qing 清 codes. The change of name is significant because *gu* 故 itself expresses the mental element of intention and not the

<sup>3</sup> *Zhou li zhu shu ji bu zheng* 周禮注疏即補正. Taipei, 1980, 36.12b; E. Biot, *Le Tcheou-Li ou Rites des Tcheou. Tome II*. Paris, 1851, reprinted Taipei: Ch’eng Wen, 1975, pp. 355-6. See, in particular, B.E. Wallacker, “The Chinese Offense of Homicide Through Horseplay”, *Chinese Studies*, 1 (1983), pp. 264-267 (with further references).

physical element of violence. In other words, the Northern Wei 北魏 law by changing the name of *zei sha* 賊殺 to *gu sha* 故殺 changed the focus of this category of homicide. It now lay in the perpetrator's state of mind rather than in the circumstances of the act.

In its formulation of the categories of homicide, the law appears to have been conservative. In other legal contexts we find explicit recognition of the importance of intention (*gu* 故) as early as the Qin/Han 秦/漢. One example, although neither *gu* 故 nor *zei* 賊 appears in the wording, is a version of the principle already stated at the beginning of Western Zhou 西周, namely that intentional offenses should be punished more severely than inadvertent ones.<sup>4</sup> In the *Lun Heng* 論衡 (first century A.D.) the principle is cited in the form: "In punishing intentional crimes there is none that is too small (*xing gu wu xiao* 刑故無小), and in pardoning (non-intentional) faults, there is none that is too great (*you guo wu da* 宥過無大)."<sup>5</sup> The maxim is further explained as follows: "After scrutinising the heart (*xin* 心) and mind (*yi* 意) of the offender, the wise sovereign punishes intention (*gu* 故) but pardons mistakes (*wu* 誤). He increases the punishment for intentional assaults (*gu zei* 故賊), but decreases it for (non-intentional) errors (*guo wu* 過誤)."<sup>6</sup> Two points strike one in reading this explanation. The first is the explicit reference of *gu* (intention 故) to the offender's 'heart and mind', and the second is the juxtaposition of *gu* 故 *zei* 賊 in which *gu* 故 expresses the mental and *zei* 賊 the physical component of the offense.

Other examples can be found in the technical legal usage of the Qin/Han 秦/漢 period. There is evidence from the first century B.C. and the first century A.D. that both statutes and judgments used the term *gu* 故 in describing the offenses of giving false testimony or making a wrong judgment. The Han *lü* 漢律 of the first century A.D. contained a clause specifying: "Where evidence is given deliberately not in accordance with the truth (*gu bu shi* 故不實) concerning the value of property in cases where the offense is constituted by illicit goods (*zang* 贓) of a value of 500 units or more, and the statements, once completed, have not been changed after three days, the person making the false statement is to be reciprocally liable (*fan zui* 犯罪) in respect of the offense which is, in consequence of his evidence, punished too lightly (*chu zui* 出罪) or too severely (*ru zui* 入罪)."<sup>7</sup>

<sup>4</sup> See the *K'ang kao* 康誥: J. Legge, *The Chinese Classics*. Taiwan reprint, 3, p. 388, para 8; B. Karlgren, "The Book of Documents," *Bulletin of the Museum of Far Eastern Antiquities*, 22 (1950), p. 40 (8). It is generally thought that the *K'ang kao* 康誥 is a genuine document preserved from the early years of Western Zhou (E.L. Shaughnessy, "Shang shu 康誥," in M. Loewe (ed). *Early Chinese Texts: A Bibliographical Guide*. Berkeley: Institute of East Asian Studies, University of California, 1993, p. 379). However, some scholars have argued that the *Kang gao* 康誥 may have been written several centuries after its purported date: see, in particular, K. Vogelsang, "Inscriptions and Proclamations: On the Authenticity of the 'gao' Chapters in the *Book of Documents*," *Bulletin of the Museum for Far Eastern Antiquities*, 74 (2002), pp. 138-209.

<sup>5</sup> The same thought is expressed in an inverted form in one of the books of the *Shang shu* believed to have been fabricated in the fourth century A.D. *Ta Yü Mu* 大禹謨: Legge, *Chinese Classics*, 3, p. 59.

<sup>6</sup> *Lun heng ji jie* 論衡集解. Taipei, 1975, 11.3, p. 239; A. Forke, *Lun-Heng. Part II. Miscellaneous Essays of Wang Ch'ung*, second edition. New York: Paragon Book Gallery, 1962, pp. 46-7; Wallacker, *Chinese Studies*, 1 (1983), pp. 263-4

<sup>7</sup> Cited by Gao Heng 高恆, "Investigation of Han Slips", in Li Xueqin 李學勤 (ed), *Jianbo yanjiu* 簡帛研究 (*Research on Bamboo and Silk Documents*), Volume 2. Beijing: Publishing House of Law, 1996, pp. 228-9.

As early as the Qin秦, we find the term *gu shi*故失 used as a shorthand expression for wrongful judgments made deliberately (*gu*故) or through error (*shi*失).<sup>8</sup> During the Han漢, the technical terms *gu bu zhi* 故不直 and *gu zong* 故縱 denominated respectively the offenses of “deliberately sentencing an offender to the wrong punishment” or “deliberately letting an offender go.”<sup>9</sup> We have some references in the *Han shu*漢書 to officials sentenced for the offense of deliberately making a wrong judgment (*gu bu zhi* 故不直)<sup>10</sup> or of deliberately acquitting offenders who should have been punished (*gu zong* 故縱)<sup>11</sup> Towards the end of the former Han漢, the authorities, fearing that too many cases of *gu zong* were being prosecuted, secured an imperial edict providing that administrators of provinces were not to be considered as committing the offense of *gu zong* 故縱.<sup>12</sup>

During the Later Han 後漢 we find the terms *gu* 故 and *wu* 誤 used to designate respectively intentional or mistaken failures in administration. The surviving examples concern mistakes made by officials responsible for the copying and transmission of edicts. In A.D. 80 an error was made in the copying of an edict, as a result of which a person given an imperial pardon was executed. The jurist to whom the matter was referred said: “The laws and ordinances have both *gu* 故 and *wu* 誤. . . If there is *wu* 誤 then the text of the laws treats the matter lightly.”<sup>13</sup> This suggests that, towards the end of the first century A.D., the distinction between ‘intention (*gu* 故)’ and ‘mistake (*wu* 誤)’ was at least in some administrative contexts coming to be formally expressed in the statutory rules.

On the basis of the evidence summarised in the previous paragraphs, one may offer the following generalization. Qin秦 and Han 漢 law recognized the importance of ‘intention’, denominated *ku* 故, as a constituent element of administrative offenses, that is, offenses constituted by the manner in which officials performed their duties. The factor responsible for the explicit use of *gu* 故 in the formulation of the rules imposing punishments was the need to distinguish the case in which the official knew he was doing wrong from that in which he had committed an error through inadvertence. Hence, we have the contrast drawn in the rules between acts performed *gu* 故 and those performed *wu* 誤 or *shi* 失. Although it is also imperative in the law of homicide for the rules to distinguish between ‘intentional’ and ‘inadvertent’ acts, the distinction was implicit in the categories known already at the beginning of the Han漢 and probably inherited from the earlier law. Han 漢 legislators saw no need to reformulate those categories since the ‘situations’ which they described seemed an

<sup>8</sup> *Shi ji* 史記. Beijing: Zhong-hua, 1972, 2. 758. A different interpretation is given by R.D.S. Yates, “State Control of Bureaucrats under the Qin: Techniques and Procedures,” *Early China*, 20 (1995), p. 354.

<sup>9</sup> This definition is cited by the commentator Jin Zhuo 晉灼 (fl. ca. A.D. 208). It is possibly taken from the Han漢 legal commentary entitled *Lü shuo* 律說 (Exegesis of the Statutes): *Han shu* 漢書. Beijing: Zhong-hua, 1962, 3. 662; A.F.P. Hulsewé, *Remnants of Han Law*. Leiden: E.J. Brill, 1955, p. 253.

<sup>10</sup> *Han shu*, 3. 667-8, 10. 3224-5; Hulsewé, *Remnants of Han Law*, 258 (5), (16).

<sup>11</sup> Dubs, H.H. *The History of the Former Han Dynasty by Pan Ku II*. The American Council of Learned Societies, 1944, reprinted 1954, p. 158; *Han shu*, 9. 2914; Hulsewé, *Remnants of Han Law*, 259 (1), (2); B. Watson, *Courtier and Commoner in Ancient China. Selections from the History of the Former Han*. New York and London: Columbia University Press, 1974, pp. 114-115.

<sup>12</sup> *Han shu*, 11. 3490, 3490 n10; Hulsewé, *Remnants of Han Law*, p. 259 (3).

<sup>13</sup> Shen Jia-ben 沈家本. *Li dai xing fa kao* 歷代刑法考 (Investigation into the Penal Law of Successive Dynasties). Beijing: Zhong-hua, 1985, 3, p. 1472; Hulsewé, *Remnants of Han Law*, p. 257; R.H. van Gulik, *Tang-Yin-Pi-Shih* 堂蔭比實. *Parallel Cases from under the Pear Tree*. Leiden: E.J. Brill, 1956, pp. 134-135.

adequate basis for the imposition of liability and determination of punishment. Hence *zei sha* 賊殺 was still used to describe a category of homicide in which the ‘situation’ giving rise to the killing was that of unprovoked violence. The rest of the paper will examine the usage of *zei sha* 賊殺 in pre-Han 漢 sources as well as in the laws of the Han 漢, Qin 秦, and southern dynasties, and its replacement by *gu sha* 故殺 in the northern dynasties.

#### Pre-Han 漢 Cases of *Zei Sha* 賊殺

Although we cannot be sure of the original meaning of the word *zei* 賊,<sup>14</sup> it is worth noting Karlgren’s observation that one of the graphs making up the character is that for ‘dagger-axe’.<sup>15</sup> This already suggests the utility of the character for the description of killings which occur through violence, especially through the employment of bladed weapons.

In the *Zuo zhuan* 左傳, *zei* 賊 itself is often used to express the act of killing in contexts which suggest the employment of violence against an unsuspecting victim. There are several accounts of the assassination of nobles or rulers in which *zei* 賊 expresses the unlawful and violent act of killing.<sup>16</sup> Three passages are particularly instructive. The first relates events in Lu 魯 for the year 656 B.C. The ruler’s eldest son was advised by his stepmother to sacrifice to his deceased mother. He sent the sacrificial food and wine to his father. The ruler’s new wife (stepmother) poisoned the offerings and then gave them to her husband. He gave the flesh to a dog and ordered an attendant to drink the wine. When both died, his wife declared: “This is your eldest son’s attempt to kill (*zei* 賊) you.”<sup>17</sup> The use of *zei* 賊 is interesting because it expresses an act of killing that was not to take place through an overt act of violence. What *zei* 賊 emphasises in this context is the particular wickedness of an attempt by a son and subject to kill his father and ruler. By contrast, the ruler’s response in putting his son’s tutor to death is termed *sha* 殺 not *zei* 賊.

The second passage records the reaction of the tyrannical Duke Ling 靈公 of Jin 晉 (609 B.C.) to a minister who was in the habit of remonstrating with him. The ruler sent an emissary to assassinate (*zei* 賊) the minister, but the assassin on seeing the minister refused to obey the order and committed suicide rather than kill (*zei* 賊) an upright man.<sup>18</sup> Even though it was the ruler who ordered the killing, it was still wrong to kill a loyal minister who had committed no offense but merely offered criticism of improper acts. The fact that the proposed killing was not a lawful execution but an act of tyranny and abuse of power is expressed by the word *zei* 賊.

Finally, we have an account of a dispute over land (528 B.C.) between two Zhou 周 princes who had sought refuge in Jin 晉. One of the litigants bribed the judge with the offer of his daughter and secured a verdict in his favor. The loser then killed

<sup>14</sup> Personal communication from Professor Ulrich Lau.

<sup>15</sup> Karlgren, B. *Grammata Serica Recensa*. Stockholm: Museum of Far Eastern Antiquities, 1972, p. 240 (No. 907 a-b).

<sup>16</sup> Duke Chuang 莊公 32 (662 BC): S. Couvreur, *La Chronique de la Principauté de Lou*. Paris: Cathasia, 1951, I, pp. 207, 208; Legge, *Chinese Classics*, 5, pp. 120, 121. Duke Min 閔公 2 (660 BC): Couvreur, *Chronique*, I, p. 216; Legge, *Chinese Classics*, 5, pp. 126, 128. Duke Ting 定公 2 (508 BC): Couvreur, *Chronique*, III, p. 491; Legge, *Chinese Classics*, 5, p. 746.

<sup>17</sup> Duke His 僖公 4: Couvreur, *Chronique*, I, p. 246; Legge, *Chinese Classics*, 5, pp. 140, 142.

<sup>18</sup> Duke Hsüan 宣公 2: Couvreur, *Chronique*, I, pp. 569-570; Legge, *Chinese Classics*, 5, pp. 288, 290.

See also *Guo yu* 國語. Shanghai: Gu-ji, 1978, II, p. 399.

(*sha*殺) both his adversary and the judge in the palace of the ruler. The matter was referred to the minister Shu-xiang 叔向 who held that all three persons involved had committed capital offenses. He described the offense of the loser in the following terms: “to kill (*sha*殺) people without fear or respect (*bu ji*不忌) is *zei*賊.” He then cites an old principle (attributed to the Xia 夏 dynasty) according to which persons who commit *zei* 賊 (or who are *zei*賊) are to be put to death.<sup>19</sup> The interest of the passage lies in Shu-xiang’s 叔向 explanation of the act of killing (*sha*殺) as *zei*賊. *Zei* 賊 here appears to be an offense constituted by killing another in total disregard of the law without any good reason. It is the unlawful nature of the act rather than the means by which it is accomplished to which Shu-xiang 叔向 draws attention. Significantly, he does not offer a definition of *zei*賊 in terms of the intention or state of mind of the perpetrator.

*Zei* 賊 in the sense of ‘assassinate (a ruler)’ is also found in the *Shi ji*’s 史記 account of a famous incident. In 227 B.C., crown prince Dan 丹 of Yan 燕 sent Jing Ke 荊軻 to kill the king of Qin 秦. By a stratagem Jing Ke 荊軻 secured an audience with the king and then struck at him with a dagger. After the attack had been foiled, the king later referred to Jing Ke’s 荊軻 mission as ‘to cause *zei*賊’.<sup>20</sup> Although *zei*賊 has been taken in the general sense of ‘villainy’ or ‘evil’,<sup>21</sup> its proper sense, as in the *Zuo chuan*, seems to be ‘to commit an act of assassination’.<sup>22</sup> The particular act of *zei* 賊 here consists of an unprovoked attack with a sharp bladed weapon.

The passages considered above illustrate the use of *zei*賊 in a discussion of incidents by historians. The latter describe the act of killing as *zei*賊, but do not cite the legal rules which impose liability for *zei sha*賊殺. Historians used *zei*賊 with a primary sense of ‘in total defiance of any legal restraint’ or ‘with outrageous disregard of one’s proper duty’. Although *zei* 賊 also normally expressed the fact that the killing occurred through an act of violence, the element of violence need not be present, as in the case of the alleged attempt by the prince to poison his father. What is emphasised is the extremity of the degree to which the act of killing is wrong.

Not until the Qin 秦 laws of the third century B.C. do we have evidence of the use of *zei* 賊 as a technical legal term. Although the Qin 秦 statutes on homicide have not been preserved, it is clear from other evidence that they distinguished two categories of homicide, *zei sha*賊殺 and *dou sha*鬥殺 (killing in a fight), as well as two categories of wounding *zei shang* 賊傷 and *dou shang*鬥傷.<sup>23</sup> Unfortunately, the extant

<sup>19</sup> Duke Chao 昭公 14: Couvreur, *Chronique*, III, pp. 248-249; Legge, *Chinese Classics*, 5, pp. 654, 656.

<sup>20</sup> *Shi ji* 史記, 1.235-6, 8.2533-2535; W.H. Nienhauser, Jr., *The Grand Scribe’s Records. Volume I. The Basic Annals of Pre-Han China by Ssu-ma Ch’ien*. Bloomington and Indianapolis: Indiana University Press, p. 135; W.H. Nienhauser, Jr., *The Grand Scribe’s Records. Volume VII. The Memoirs of Pre-Han China by Ssu-ma Ch’ien*. Bloomington and Indianapolis: Indiana University Press, 1994, pp. 330-332; B. Watson, *Records of the Grand Historian: Qin Dynasty*. Hong Kong and New York: Columbia University Press, 1993, p. 42.

<sup>21</sup> Nienhauser and Watson *ibid*.

<sup>22</sup> So E. Chavannes. *Les mémoires historiques de Se-ma Ts’ien*. Paris: Ernest Leroux, 1897, II, p. 124.

<sup>23</sup> See, for example, the Qin 秦 laws labelled D83 and D99 by A.F.P. Hulswé, *Remnants of Ch’in Law. An annotated translation of the Ch’in legal and administrative rules of the 3<sup>rd</sup> century B.C. discovered in Yün Prefecture, Hu-pei Province, in 1975*. Leiden; E.J. Brill, 1985, pp. 146, 154. Texts can be found in Liu Hainian 劉海年 and Yang Yifan 楊一凡 (eds), *Zhong guo zhen xi fa lu dian ji ji cheng* 中國珍稀法律典籍集成 (*Rare Ancient Codes of Chinese Law*). Beijing, 1994, I, pp. 585-6, 594. Compare also K.C.D. McLeod and R.D.S. Yates, “Forms of Ch’in Law: An Annotated Translation of the *Feng-shen Shih*”, *Harvard Journal of Asiatic Studies*, 41.1 (1981), p. 155 n157.

texts provide no definition of *zei* 賊. The translators into English of the laws have offered two alternatives. Hulsewé has suggested ‘murderously’, ‘by murderous intent’, ‘with malice aforethought’ or ‘intentionally’,<sup>24</sup> while Yates and McLeod prefer ‘wantonly’ or ‘by wanton violence’.<sup>25</sup> The interpretation of Yates and McLeod is to be preferred. Among the Qin legal materials is a report on the discovery of a corpse headed *zei si* 賊死,<sup>26</sup> a phrase translated by Hulsewé as ‘death by murderous intent’<sup>27</sup> and Yates and McLeod as ‘death by wanton violence’.<sup>28</sup> The report draws the conclusion that the death (*si* 死) was *zei* 賊 by pointing to the following facts: the male corpse had a wound on his neck made with a blade and on his back two wounds resembling those inflicted by an axe. It is the element of violent attack with a weapon, where the wounds have been inflicted on the neck and back, that warrant the conclusion that the man had been set upon and killed *zei* 賊 rather than that he had been killed in a fight (*dou* 鬥). No reference to intent is made in the report.

Other texts give us some further clue as to the way in which *zei* 賊 was understood in Qin 秦 law. One states that, where wounds have been inflicted by sharp pointed implements like a needle or awl, the punishment varies according to whether the situation has been one of *dou* 鬥 or *zei* 賊.<sup>29</sup> This shows that the use of a dangerous implement in inflicting a wound was not in itself enough to ensure the classification of the case as *zei* 賊. The situation might have been one in which the wound had been inflicted in the course of a fight. For the wound to have been inflicted *zei* 賊, it was necessary that there should have been an element of unprovoked attack in which the victim had no real chance of resistance. One can see why the perpetrator’s state of mind would have been an insecure basis for the distinction between *zei* 賊 and *dou* 鬥, since in a fight there would have been an intention to harm, not always easily distinguishable from an intention to kill.

One text makes it plain that it is not necessary to use a sharp bladed weapon in order to be guilty of *zei sha* 賊殺 or *zei* 賊傷 *shang*. A case is put in which one person *zei* 賊 wounds another with a stick. The text defines ‘stick’ as “a piece of wood that can be used to strike.”<sup>30</sup> The idea here is that the stick is used as a weapon.

Two texts make an explicit reference to an element of ‘intention’. One puts a case of slaves plotting (*mou* 謀) to kill their master and defines ‘plot’ as “wishing to *zei sha* 賊殺.”<sup>31</sup> Here the element of intention expressed by ‘wish (*yu* 欲)’ is referable to the definition of *mou* 謀 not *zei* 賊. The plot itself shows that the attack on the master will be unprovoked. The other text puts a case in which a person while arresting another, who has committed an offense punishable by a fine, ‘on purpose (*duan* 端)’ kills the latter.<sup>32</sup> This is not a case of *zei sha* 賊殺, since the person killed

<sup>24</sup> D35 n1, E20 = Hulsewé, *Remnants of Ch'in Law*, pp. 132, 198.

<sup>25</sup> McLeod and Yates, “Forms of Ch'in Law”, p. 140 n92, though one cannot necessarily follow the authors (p. 154) in taking *zei* 賊 as used “to classify degrees of culpability.”

<sup>26</sup> Liu and Yang, *Zhong guo zhen xi fa lü dian ji ji cheng*, I, p. 662.

<sup>27</sup> E20, Hulsewé, *Remnants of Ch'in Law*, p. 198.

<sup>28</sup> Yates, “Forms of Ch'in Law,” 5.19, p. 154.

<sup>29</sup> D71, Hulsewé, *Remnants of Ch'in Law*, p. 142; Liu and Yang, *Zhong guo zhen xi fa lü dian ji ji cheng*, I, p. 378.

<sup>30</sup> D76, Hulsewé, *Remnants of Ch'in Law*, p. 144; Liu and Yang, *Zhong guo zhen xi fa lü dian ji ji cheng*, I, pp. 580-1.

<sup>31</sup> D60, Hulsewé, *Remnants of Ch'in Law*, p. 140; Liu and Yang, *Zhong guo zhen xi fa lü dian ji ji cheng*, I, p. 574.

<sup>32</sup> D104, Hulsewé, *Remnants of Ch'in Law*, p. 15; Liu and Yang, *Zhong guo zhen xi fa lü dian ji ji cheng*, I, p. 596.

was already in the position of an offender, but rather one of gross abuse of authority (later classified as *shan sha* 擅殺). The killer had the authority to arrest and not the authority to kill unless the offender offered resistance. The element of ‘purpose (*duan* 端)’ is emphasised in this context because of the necessity to distinguish the case in which an offender was killed while resisting arrest (legitimate) from that in which he had done nothing and yet was killed (illegitimate).

There remains one text which shows that even as early as the third century B.C. the law was prepared to use *zei* 賊 in a constructive or extended sense, that is, apply it to a situation to which it was not strictly applicable. The case is put in which a thief-catcher pursues and attempts to arrest an offender. The latter beats and kills the former. The legal question raised is, should the case be classified as *dou sha* 鬥殺 or *zei sha* 賊殺? Strictly it should be *dou sha* 鬥殺 since the death occurred in the course of a fight between the offender and the thief-catcher. But we are told that the ‘precedents of the court (*ting xing shi* 廷刑事)<sup>33</sup> treated the case as *zei sha* 賊殺.<sup>34</sup> The reason, not stated, is that a proper maintenance of law and order required that offenders who fought with and killed the arresting person(s) should be deemed to have committed the most serious form of homicide, *zei sha* 賊殺. We perhaps also have here the implication that the killing was ‘outrageous’, in the sense that the victims were persons (possibly officers of the law) engaged in carrying out a legal duty.

The material from the Qin 秦 laws is illuminating because it shows that the meaning of *zei* 賊 was governed to some extent by the need to distinguish *zei sha* 賊殺 from *dou sha* 鬥殺 (killing in a fight). A fight may well have involved the use of weapons, even sharp bladed ones. One could not distinguish *zei sha* 賊殺 from *dou sha* 鬥殺 simply by pointing to the existence of a weapon.<sup>35</sup> The essential distinction lay not in the presence or absence of a weapon, but in whether the killing occurred in the course of a fight or not, thus pointing to the significance of ‘provocation’.

One has here a very clear reliance upon the ‘situation’ from which the killing results as the determinant of the legal category of homicide. If the situation is that of a fight, the homicide will be treated as *dou sha* 鬥殺. If there has been no fight, the fact that a weapon has been used will normally point to a classification of the homicide as *zei sha* 賊殺.

### *Zei Sha* 賊殺 in Han 漢 Law

The Han 漢 inherited from the Qin 秦 the basic structure of its law of homicide and wounding. The code of 186 B.C. (*Er Nian Lü Ling* 二年律令)<sup>36</sup> contains in its section entitled *zei lü* 賊律 a number of rules on *zei sha* 賊殺 and *zei shang* 賊傷,<sup>37</sup> where these terms are often used in contrast to *dou sha* 鬥殺 or *dou shang* 鬥傷. No definitions are

<sup>33</sup> On this expression, see Hulsewé, *Remnants of Ch'in Law*, D30, nn 2, 3, p. 131.

<sup>34</sup> D53, Hulsewé, *Remnants of Ch'in Law*, p. 138; Liu and Yang, *Zhong guo zhen xi fa lü dian ji cheng*, I, pp. 569-70.

<sup>35</sup> We do not know whether Qin 秦 law already had a rule corresponding to the Tang 唐, namely that killing in a fight with a sharp bladed implement was deemed to be intentional. See further below at note 86.

<sup>36</sup> This code is written on bamboo slips excavated from a Han tomb in 1984. It was first published in Beijing in 2001: *Zhang Jia Shan Han Mu Zhu Jian (Er Si Qi Hao Mu)* 張家山漢竹簡(二四七號墓) (*Han Slips Excavated from Tomb Number 287 in Zhangjiashan*).

<sup>37</sup> Slips 21-3, 25 (p. 137), 34, 38 (p. 139), 40 (p. 140).



given, but the contrast between *zei* 賊 and *dou* 鬥 suggests that the former referred to acts of violence that did not occur in the course of a fight, that is, where there had been no immediate provocation and the victim was not taken and overcome by surprise. One clause deals with the *zei sha* 賊殺 or *zei shang* 賊傷 of another's domestic animal.<sup>38</sup> *Zei* 賊 must bear a similar sense in this context, that is, express the killing or wounding of an animal that had not attacked the offender. Another clause speaks not of *zei sha/shang* 賊殺/傷 but of the *zei* 賊 burning of a city, official buildings, or government storehouses.<sup>39</sup> We cannot explain *zei* 賊 in the context of arson in quite the same way as in the context of killing or wounding. The editors explain *zei* 賊 as 'intentional, deliberate (*gu yi* 故意)'. One cannot altogether rule out such an explanation, which points to the perpetrator's state of mind. But it is more likely that *zei* 賊 points to the external circumstances of the act, in particular the element of attack or violence.

We have four references to *zei* 賊 in later Han statutes. The *zei lü* 賊律 at the end of the first century B.C. contain a clause imposing a punishment of penal servitude for four years on persons who in a fight wounded another with a cutting weapon and providing that in cases of *zei* 賊 the punishment is to be one degree more, that is, penal servitude for five years.<sup>40</sup> *Zei* 賊 in this formulation has been translated as 'murderous intent'<sup>41</sup> or 'premeditated murder'.<sup>42</sup> However, as we shall see from the discussion of the case in which the clause is cited,<sup>43</sup> it is better to construe *zei* 賊 as a reference to the external circumstances of violence (not being a fight) under which the wound was inflicted.

The statutes on arrest (*bu lü* 補律) of the first century B.C. contain a clause which provided: "Where enemy soldiers have fled to a frontier beacon post to surrender, or had come from outside the frontier to surrender, but the guards *zei sha* 賊殺 them, the offenders are to be cut in two at the waist and their wives and children are to provide labor as robber guards."<sup>44</sup> *Zei sha* 賊殺 in this context cannot have the sense of 'premeditated or intentional killing', because any killing of an enemy soldier could be so described. *Zei* 賊 refers not to the state of mind of the guards in killing the enemy soldiers, but to the fact that the killing of the soldiers in the particular circumstances of surrender was wrongful.

A clause of the statutes on stables (*jiu lü* 廄律) from the same period, or perhaps the first century A.D., provided: "When domestic animals *zei sha* 賊殺 each other, one third of the value is to be paid as an indemnity to restore harmony (between

<sup>38</sup> Slip 49, p. 141.

<sup>39</sup> Slip 4, p. 134.

<sup>40</sup> *Han shu*, 10. 3395.

<sup>41</sup> A.F.P. Hulsewé, "Assault and Battery at the Palace Gates", in P Daffinà (ed), *Indo-sino-tibetica. Studi in onore di Luciano Petech. Studi Orientali IX* (1990), p. 196; *Remnants of Han Law*, p. 254

<sup>42</sup> S.A. Queen, *From chronicle to canon. The hermeneutics of the Spring and Autumn, according to Tung Chung-shu*. Cambridge: Cambridge University Press, 1996, p. 66; it is in any case mistaken to refer *zei* 賊 in this clause to murder rather than wounding.

<sup>43</sup> See note 62 below.

<sup>44</sup> Slip discovered in Ma-quan-wan 馬圈灣 (Tun-huang 敦煌) in 1979, probably dating to the end of the first century B.C. (compare M. Loewe, "Han administrative documents. Recent finds from the North-West," *T'oung Pao* LXXII (1986), p. 302). For the text and comment see Gao Heng, "Investigation of Han Strips," pp. 233-4.

the owners).<sup>45</sup> Hulsewé takes *zei* 賊 in the sense of ‘to hurt so as to kill’.<sup>46</sup> But the suggestion of the editors of *Rare Codes* that the meaning is to be gathered from a comparison with article 206 of the Tang 唐code<sup>47</sup> is more plausible. This article deals with dogs who ‘spontaneously’ kill or wound another person’s domestic animals. The term used to describe the act of killing or wounding is *zi sha shang* 自殺傷, where *zi* 自 points to the fact that the dog has acted spontaneously, of its own accord, without being instigated by its owner. *Zei* 賊 in the Han 漢clause appears to have a similar sense: the animal has acted spontaneously, of its own accord, without human provocation.

An edict of emperor Cheng 成 in 20 B.C. provides that, where a child aged 6 or under committed inter alia the offense of *zei dou sha* 賊鬥殺, a petition was to be sent to the throne, so that there might be a reprieve from the death penalty.<sup>48</sup> We have here a reference to the offenses of *zei sha* 賊殺 or *dou sha* 鬥殺 (killing in a fight) established by the *zei lü* 賊律. Hulsewé misunderstood the phrase *zei dou sha* 賊鬥殺 by taking it as ‘who had killed people in a murderous fight’<sup>49</sup>. *Zei* 賊 and *dou* 鬥 have to be taken as disjunctive expressions. Shen Jia-ben 沈家本 glosses *zei* 賊 as *hai* 害 (to inflict harm, to kill) and notes that in the Tang 唐code (article 306) the *shu-yi* 疏議 commentary explains *gu sha* 故殺 by reference to *hai xin* 害心 (intention to kill). He concludes that the *zei sha* 賊殺 of Han 漢law is the same as the *gu sha* 故殺 of Tang 唐law.<sup>50</sup> This conclusion is not justified. The *zei sha* 賊殺 to which emperor Cheng 成 refers does not convey the same range of ideas as the *gu sha* 故殺 of Tang 唐law. While the latter clearly refers to the perpetrator’s state of mind, the former refers to the external circumstances of the act, in particular, the unprovoked use of violence. This is especially apparent in the present case, since it is somewhat artificial even to conceive of a child aged six or under forming an ‘intention to kill’.

The *zei lü* 賊律 of the second century A.D. contained a clause on *zei* 賊 cutting down trees<sup>51</sup>. The interpretation of *zei* 賊 in this context has given trouble. Hulsewé takes it simply as ‘injuring’,<sup>52</sup> Heuser as ‘felling’,<sup>53</sup> while Shen Jia-ben 沈家本 suggests ‘with intention (*you xin* 有心)’.<sup>54</sup> It is doubtful whether Shen’s suggestion is correct. *Zei* 賊 appears to refer more to the physical circumstances of the act than the state of mind of the feller of the trees. It perhaps expresses the unlawful nature of the act of destruction.

For more exact information on the meaning of *zei* 賊 we have to look at other material from the Han, namely, the terms of actual indictments and the details of judicial cases. We have preserved an indictment in a case of *zei sha* 賊殺 from the latter half of the first century B.C. It relates that when one guardsman met another

<sup>45</sup> Preserved in a bamboo slip discovered at Tun-huang 敦煌 in 1907. See Liu and Yang, *Zhong guo zhen xi fa lü dian ji ji cheng*, II, p. 108; Gao Heng, “Investigation of Bamboo Slips”, pp. 226-7.

<sup>46</sup> Hulsewé, *Remnants of Han Law*, p. 257.

<sup>47</sup> W. Johnson, *The Tang Code. Volume II. Specific Articles*. Princeton, New Jersey: Princeton University Press, 1997., p. 192.

<sup>48</sup> *Han shu*, 4. 1106.

<sup>49</sup> Hulsewé, *Remnants of Han Law*, pp. 299, 344-5.

<sup>50</sup> Shen Jia-ben, *Li dai xing fa kao*, 3, p. 1466.

<sup>51</sup> *Jin shu* 晉書. Beijing: Zhong-hua, 1974, 3.924.

<sup>52</sup> Hulsewé, *Remnants of Han Law*, p. 33.

<sup>53</sup> R. Heuser, *Das Rechtskapitel im Jin-shu. Ein Beitrag zur Kenntnis des Rechts im frühen chinesischen Kaiserreich*. München: J. Schweitzer, 1987, p. 90.

<sup>54</sup> Shen Jia-ben, *Li dai xing fa kao*, 3, pp. 1452-3.

(apparently an enemy) he grasped his sword and, upon seeing that the other held a wooden cudgel, followed him and struck him from behind, inflicting three wounds on the neck. The victim died from these wounds within ten days and the attacker was charged with *zei sha* 賊殺.<sup>55</sup> The editors of *Rare Codes* gloss *zei* 賊 as ‘intentional (*gu* 故意)’ and take *zei sha* 賊殺 as being the same as *gu sha* 故殺 in the Tang 唐 code. However, one should note that there is no reference to intention in the words of the indictment. The conclusion that the guardsman has committed the offense of *zei sha* 故殺 is drawn from the facts of unprovoked violence, enumerated in the indictment, namely, that he followed his victim and struck him from behind with his sword.

The histories contain a number of references to nobles held liable for the offense of *zei sha* 賊殺.<sup>56</sup> However, few of the references describe the facts constituting the offense. One notes that a member of the imperial family, indicted in 56 B.C. for *zei sha* 賊殺, had killed slaves with a knife.<sup>57</sup> There was clearly an act of violence which, given the status of the victims, could not be considered as occurring in a fight. A passage added to Si-ma Qian’s 司馬遷 *Shi ji* 史記 by Chu Shao-sun 褚少孫 in the second half of the first century B.C. gives some details of the judicial investigation into an accusation brought by Zhao Guang-han 趙廣漢 66 B.C. against the wife of his enemy, the chancellor Wei Xiang 魏相. It had been alleged that in 71 B.C. she had *zei sha* 賊殺 one of her maids. In fact the investigation found that the maid had not been killed with a weapon (*bing ren* 兵刃) but had committed suicide after a reprimand for an offense.<sup>58</sup> This points to the same sense of *zei sha* 賊殺 as in the case of 56 B.C., that is, the killing of a slave by the master with a knife or the like.

Zhao Guang-han 趙廣漢 himself later in 66 B.C. was impeached both for the *zei sha* 賊殺 of innocent persons and “deliberately investigating lawsuits not by means of the truth (*gu bu yi shi* 故不以實).”<sup>59</sup> It is the second offense which in fact explains the force of *zei* 賊 in this context. Zhao 趙 had not personally killed the innocent persons, but he had misused the judicial process in order to send them to the executioner. He was thus in the same position as a person who had used an axe to strike and kill another. The element of intention expressed by *gu* 故 does not form part of the meaning of *zei* 賊. It constitutes an essential part of the external circumstances showing that the killing had to be treated as *zei* 賊. Should Zhao 趙 have inadvertently made an error and condemned an innocent person to death, the killing would not have been treated as *zei* 賊. A similar case occurred in 55 B.C. when Zhang Chang 張常, the governor of the capital, was accused of the *zei sha* 賊殺 of innocent persons and of “having been deliberately untruthful in the investigation of a lawsuit (*gu bu zhi* 股不直

<sup>55</sup> See a wooden document discovered at Ju-yan 居延, Liu and Yang, *Zhong guo zhen xi fa lu dian ji cheng*, II, pp. 190-1.

<sup>56</sup> *Shi ji* 史記, 10. 3077, *Han shu*, 7. 2141, Hulsewé, *Remnants of Han Law*, p. 255 (3), and B. Watson, *Records of the Grand Historian of China. Volume II. The Age of Emperor Wu 140 to circa 100 B.C.* New York and London: Columbia University Press, 1961, p. 362; *Han shu*, 3. 662, Hulsewé, pp. 255-6 (5); *Han shu*, 3. 664, Hulsewé, p. 256 (6); *Han shu*, 10. 3234, Hulsewé, p. 256 (7); *Han shu*, 2. 487, Hulsewé, p. 256 (8); *Shih chi* 史記, 8. 2687, *Han shu*, 10. 3205, Hulsewé, p. 256 (9); *Han shu*, 2. 489-90, Hulsewé, p. 256 (10); *Han shu*, 2. 412, 8. 2421, Hulsewé, p. 256 (11); *Han shu*, 10. 3374, Hulsewé, p. 256 (12); *Han shu*, 8. 2218, Hulsewé, p. 256 (13); *Han shu*, 10. 3425, Hulsewé, pp. 256-7 (15).

<sup>57</sup> *Han shu*, 8. 2421, Hulsewé, p. 256 (11).

<sup>58</sup> *Shi ji* 史記, 8. 2687. See also *Han shu*, 10. 3205, Hulsewé, p. 256 (9); C.M. Wilbur, *Slavery in China During the Former Han Dynasty 206 B.C. – A.D. 25*. 1943, reprinted New York: Russell & Russell, 1967, pp. 373-5.

<sup>59</sup> *Han shu*, 10. 3205, Hulsewé, p. 258 (4).

)."60 The case in fact had been one in which the governor had had a minor official who had offended him arrested and tried at great speed so that the proceedings could be completed before the end of the winter (the season for executions). The victim was then put to death.<sup>61</sup>

The most instructive judicial account of *zei* 賊 occurs not in a case of *zei sha* 賊殺 but in one of *zei shang* 賊傷.<sup>62</sup> The facts were that Xue Kuang 薛況 employed Yang Ming 陽明 to wound and disfigure his enemy Shen Xian 申咸, so incapacitating the latter from taking up a position at court. Yang 陽 intercepted Shen 申 outside the palace gates, cut off his nose and lips, and inflicted eight further wounds on his body. The authorities who first investigated the case reported to the throne that this act of mutilation was "fierce and vile, without any awe or restraint (*jie jie wu suo wei ji* 桀黠無所畏忌)."<sup>63</sup> and could not be considered the same as wounds inflicted in the course of a fight by angry persons. The offense amounted to 'great irreverence (*da bu jing* 大不敬)', that is, was a monstrous act of disrespect to the emperor, for which the punishment was beheading.

The commandant of justice disagreed with this conclusion. He pointed out that the root of the matter was a private quarrel between Xue 薛 and Shen 申. Although the incident took place outside the gates of the imperial palace, the wounds were inflicted in the road. From this perspective, the case was no different from that of ordinary persons engaged in a quarrel and fight. The point of this argument was to show that the offense should not be treated as *da bu jing* 大不敬. The commandant of justice did not mean that the wounds themselves should be treated as though they had been inflicted in the course of a fight. He concluded on the facts (the unprovoked act of violence) that the offense was one of *zei shang* 賊傷 for which the punishment was penal servitude. Since there was a dispute between the authorities as to the proper disposal of the case, the emperor asked his ministers for their advice. Most approved the view of the commandant of justice.

The point of special interest is the finding by the investigating authorities that the wounds had been inflicted "without awe and restraint (*wu suo wei ji* 無所畏忌)." This is a similar expression to that which we have already met in the case decided by Shu-xiang 叔向 in 528 B.C.<sup>64</sup> The commandant of justice did not disagree with this particular finding of fact. It was the total lack of restraint manifested in the attack on an unsuspecting victim that showed the offense to be *zei shang* 賊傷 and not *dou shang* 鬥傷.

There is one further case to consider. This involved *xi sha* 戲傷 (killing in a game) not *zei sha* 賊殺. It is a decision of Bao Yu 鮑昱, a judge who flourished around A.D. 75, recorded by Ying Shao 應邵 (latter half of the second century A.D.) in his *Feng-su tong* 風俗通. On the occasion that Du Shi 杜士 took a wife, there was mutual play (*xi* 戲). One of the guests, Zhang Shen 張妙, tied up Du Shi 杜士 and gave him twenty punches, then further suspended him by his feet. There are two versions of the

<sup>60</sup> *Han shu*, 10. 3225, Hulsewé, p. 258 (6).

<sup>61</sup> *Han shu*, 10. 3223.

<sup>62</sup> *Han shu*, 10. 3395. See, in particular, Hulsewé, "Assault and Battery at the Palace Gate," pp. 191-200.

<sup>63</sup> Hulsewé, "Assault and Battery at the Palace Gate", p. 195.

<sup>64</sup> See note 19 above.

decision given by Bao Yu 鮑昱. In one,<sup>65</sup> he is said to have held that Zhang Shen's 張妙 mind (*xin* 心) from the beginning lacked the intention (*yi* 意) of *zei hai* 賊害 (inflicting harm *zei* 賊). Hulsewé translates the relevant part of the decision as “When after wine people frolic together, we have to consider their original ideas (lit. ‘hearts’, *xin* 心); they are without the intention of *zei hai*, destructive harm 賊害.”<sup>66</sup> Here *zei* 賊 appears still to express the element of violence in the act of killing. Bao Yu's 鮑昱 point is that, although there was the appearance of violence, proper consideration of the facts showed that there had been no intention to cause death or injury. The phrase *zei hai* 賊害 refers to the external circumstances of an act (violence resulting in harm), not to the offender's state of mind.

Another version of the case preserved in the *Tai ping yu-lan* 太平御覽 employs a different form of words.<sup>67</sup> This states that from the beginning, the perpetrator's mind or intention (*yi* 意) lacked *zei hsin* 賊心. Wallacker translates: “If one probes to the basic idea (of the play), there is no malicious heart (*zei hsin* 賊心).”<sup>68</sup> However, it is by no means obvious that *zei* 賊 has to be taken in the sense of ‘malicious’, that is, as a reference to the perpetrator's state of mind.<sup>69</sup> *Zei xin* 賊心 may simply carry the implication of a heart intent upon doing violence, where *zei* 賊 expresses the physical fact of violence and not the mental element of intention.

The survey of statutory and judicial data from the Han permits the conclusion that in Han 漢 law *zei sha* 賊殺 and *zei shang* 賊傷 were technical terms for a certain category of homicide or wounding. This category was characterised by the infliction of injury through the use of force but can be distinguished from the category of killing or wounding in the course of a fight where force also was used. When the act occurred *zei* 賊, the violence was unprovoked, but rather inflicted in a sudden assault which took the victim by surprise. There are cases of what may be termed ‘judicial murder’ in which an official who has abused the judicial process in order to secure the conviction and execution of an enemy is also held guilty of *zei sha* 賊殺. Here, although the violence by which the victim met his end was apparently legitimate (an act performed by the executioner in the course of his duties), the circumstances of the condemnation showed that it was illegitimate and so *zei* 賊, responsibility of course resting with the official who had procured the condemnation and not with the executioner. In such cases it is the unlawful nature of the act of killing expressed in the abuse of the judicial process, rather than the element of violence (also present), which underlies the meaning of *zei* 賊. Of course, the abuse of the judicial process itself derives from an intention to do wrong, a fact expressed in the description of the offense as *gu bu yi shi* 故不以實. But the fact that the homicide activated by the abuse is still described in terms of *zei* 賊 points here to the ‘situation’ (the outrageous disregard of duty on the part of the sentencing official) from which the killing results.

<sup>65</sup> Ying Shao 應邵. *Le Fong Sou T'ong Yi* 風俗通義. Pékin: Centre franco-chinois d'études sinologiques, 1943, p. 107.

<sup>66</sup> Hulsewé, *Remnants of Han Law*, p. 253.

<sup>67</sup> *Tai-ping yu-lan* 太平御覽. Beijing: Zhong-hua, 1985, 846.10a, p. 3783.

<sup>68</sup> Wallacker, “The Chinese Offense of Homicide Through Horseplay,” pp. 268-9.

<sup>69</sup> Compare, however, the explanation of *zei xin* 賊心 given in the *Grand dictionnaire Ricci de la langue chinoise*. Paris-Taïpei: Instituts Ricci and Desclée de Brouwer, 2001, VI, p. 68 (No. 11342) as “coeur mauvais, perfide, hypocrite, sans scrupule.”

Zei Sha 賊殺 in the Law of the Jin 晉 (A.D. 265-419) and Southern Dynasties 南朝 (A.D. 420-588)

Although we have some details of the Jin laws on *zei sha*, we do not have any information on the position in the southern dynasties. Since these dynasties inherited the Jin 晉 code to which they appear to have made few substantive changes, the likelihood is that they also retained the categories of *zei sha* 賊殺 and *zei shang* 賊傷.

The *zei lü* 賊律 of the Jin 晉 code still utilised the category of *zei sha* 賊殺. Our main information comes from the definitions which the jurist Zhang Fei 張斐 elaborated in his preface to the code, but we also have recorded in the *Jin shu* 晉書 a case of homicide denominated as *zei sha* 賊殺. The text<sup>70</sup> describes the assassination of a high official in A.D. 291 as a case of *zei sha* 賊殺 but notes that the circumstances of the killing did not disclose a *mou* 謀 or plot to kill. Cheng Shu-de 程樹德 has drawn from this observation the illegitimate inference that the Jin 晉 code distinguished between *gu sha* 故殺 and *mou sha* 謀殺.<sup>71</sup> The correct inference is that the code distinguished between *zei sha* 賊殺 and *mou sha* 謀殺. There is no indication that *zei sha* 謀殺 is to be understood in a sense other than that it bore in the Han 漢 *zei lü* 賊律.

Zhang Fei 張斐 defines both the terms *zei* 賊 and *gu* 故. The latter is defined as “As to those (criminal acts in which the perpetrator) knowingly commits it, we call it ‘intent’.”<sup>72</sup> This definition is referable primarily to the range of administrative offenses which might be committed intentionally or by error. One standard example, as under the Han 漢, is that of ‘deliberately conducting a judicial investigation not in accordance with the truth (*gu bu zhi* 故不直)’. That *gu* 故 in Jin 晉 law was not referable to homicide is shown by the fact that the definition of *zei* 賊 is given in a context which examines the various categories of killing. Zhang Fei 張斐 defines in turn the technical terms *dou* 鬥, *xi* 戲, *zei* 賊, and *guo shi* 過失. *Zei* is taken to be “without any particular ground to hack and strike.”<sup>73</sup> Wallacker translates “In the absence of (justifying) change (in circumstances) to hack and strike, we call it ‘malice’.”<sup>74</sup> However, there does not seem any justification for reading into *zei* 賊 the element of a state of mind. The definition itself suggests that *zei* 賊 has to be understood as a physical state characterised by unprovoked violence. Hence, the renderings of Heuser (*Gewalttätigkeit*)<sup>75</sup> and Heyde (*Gewalttät*)<sup>76</sup> are to be preferred. One of the reasons for Wallacker’s understanding of *zei* 賊 as ‘malice’ is the fact that the definition which immediately follows glosses *guo shi* 過失 (‘accident’) as “not thinking (*bu yi* 不意) by mistake to violate (the law).”<sup>77</sup> Here there is a specific reference to the state of mind characterised by a failure to advert to the consequences of one’s action. Wallacker supposes that the previous definition (*zei* 賊) balances the definition of *guo shi* 過失 by

<sup>70</sup> *Jin shu*, 4. 1060.

<sup>71</sup> Cheng Shu-de 程樹德, *Jiu-chao lü-kao* 九朝律考 (A Study of the Legal Systems of the Han-Sui Dynasties), 1926, reprinted Beijing; Zhong-hua, 1988, pp. 242-3.

<sup>72</sup> *Jin shu*, 4. 928; B.E. Wallacker, “Chang Fei’s Preface to the Chin Code of Law,” *T’oung Pao* LXXII (1986), p. 236.

<sup>73</sup> *Jin shu*, 4. 928.

<sup>74</sup> “Chang Fei’s Preface ...”, p. 238 (8).

<sup>75</sup> Heuser, *Rechtsskapitel im Jin-shu*, p. 112.

<sup>76</sup> D. Heyde, “Der von Zhang Fei verfasste Kommentar zum Gesetzeswerke der Jin”, *Altorientalische Forschungen* 11 (1984), p. 362.

<sup>77</sup> “Chang Fei’s Preface...”, p. 238 (9).

referring to the presence of an intention to do evil. However, one should not read too much into the juxtaposition of the terms *zei* 賊 and *guo shi* 過失. It must be seen as significant that Zhang Fei's 張斐 definition of *zei* 賊 concentrates on the physical aspect of violence and makes no reference to intention.

Further definitions offered by Zhang Fei 張斐 supply some interesting examples of situations deemed by the law to fall within the ambit of *zei sha* 賊殺. Two situations are said to resemble (and so to be treated as) *zei* 賊, even though they might at first sight look like 'accidents (*guo shi* 過失)'. These are: to gallop a horse in a crowded place in a city, or to shoot an arrow in the direction of a house or crowd of people, with the result in either case that someone is killed.<sup>78</sup> Equally what looks like a case of killing in a fight ought to be treated as *zei sha* 賊殺, as where a person of high rank fights with a person of low rank and either killed the other.<sup>79</sup> Finally, we have a situation in which the killing might be treated as *xi* 戲 or *zei* 賊 according to the emotional state of the parties: should a happy child kill an angry child it is *xi* 戲, where the element of 'game' is emphasised, but should an angry child kill a happy child, it is *zei* 賊, where the element of unprovoked violence is emphasised.<sup>80</sup> The general point Zhang Fei 張斐 is making with these examples is that it is essential to look at all the circumstances of the case before arriving at the correct category of homicide. Proper evaluation of the circumstances of a case may show that it should be treated as falling within the serious category of *zei sha* 賊殺, even though at first sight it appears to fall within a different category. This process of classification is not one of deciding whether there is or is not an intention to kill, or whether such an intention should be imputed to the perpetrator, but of whether different situations contain elements which justify their treatment in the same way as the standard case of *zei sha* 賊殺, that of unprovoked violence.

#### Gu Sha 故殺 in the Law of the Northern Dynasties 北朝 (A.D. 386-589)

We have seen that in the law of the Han 漢, Jin 晉, and southern dynasties cases of homicide were treated as falling under *zei sha* 賊殺 not according to the criterion of whether an intention to kill could be shown or not, but according to the external circumstances of the act, in particular the degree of violence and the possibility of resistance on the part of the victim. This is not the approach which we see in the formulation of the Northern Wei 北魏 (A.D. 386-534) rules on homicide. We do not have preserved the rules governing the different categories of homicide, but we do have the rules governing the killing of a child by a parent as stated in the code in force in the first quarter of the sixth century. The statutes on fighting (*dou lü* 鬥律) contained the following provisions: "Where a paternal grandparent or parent becomes angry and kills a grandchild or child with a weapon (*bing ren* 兵刃), the punishment is to be penal servitude for five years; should the victim die from a beating (for example, with a stick), the punishment is to be penal servitude for four years. But if there has

<sup>78</sup> *Jin shu*, 4. 929; Wallacker, "Chang Fei's Preface....", p. 243; Heuser, *Rechtskapitel im Jin-shu*, pp. 114-5; Heyde, "Der von Zhang Fei verfasste Kommentar....", p. 363.

<sup>79</sup> *Jin shu*, 4. 928; Wallacker, "Chang Fei's Preface....", p. 243 (though compare the different interpretation in "The Chinese Offense of Homicide Through Horseplay," p. 271; Heuser, *Rechtskapitel im Jin-shu*, p. 114; Heyde, "Der von Zhang Fei verfasste Kommentar....", p. 363.

<sup>80</sup> *Jin shu*, 4. 930; Wallacker, "Chang Fei's Preface....", p. 258; Heuser, *Rechtskapitel im Jin-shu*, p. 120; Heyde, "Der von Zhang Fei verfasste Kommentar....", p. 367.

been hatred and an intention to kill (*gu sha* 故殺), the punishment in each case is to be increased by one degree.”<sup>81</sup>

Several points are suggested by this clause. First, it deals with a special case and does not state the general rules on the categories of homicide. Second, the focus is still upon the particular incidents characterising the killing, the relationship between perpetrator and victim, the nature of the implement used (weapon or stick), and whether there had been provocation or not (suggested by the ‘anger’ of the grandparent or parent). Third, among the relevant circumstances are the state of mind of the parent or grandparent. This is evident not so much from the reference to anger, which explains the resort to chastisement, but from that to ‘hatred (*ai zeng* 愛憎) present in the heart (*xin* 心)’. It is the presence of this emotion that takes the offense to a different level of seriousness. Fourth, the most significant point, the legislators are not content with a reference to ‘hatred in the heart’ as the explanation for the increase in punishment. They interpolate an additional reference to the perpetrator’s state of mind with respect to the act in question, that is, the intention to kill (*gu sha* 故殺). This is the first time we find the abstract concept of intention used in the formulation of the statutory rules on homicide as a determinant of punishment.

Despite the use of the term *gu sha* 故殺 in the clause on parents and grandparents killing their children or grandchildren, we cannot be entirely sure that the Northern Wei 北魏 code had substituted *gu sha* 故殺 for *zei sha* 賊殺 as a category of homicide. The code still contained a section entitled *zei lü* 賊律, but we have preserved from it only details of the rules on *mou sha* 謀殺 (plotting to kill).<sup>82</sup> In some contexts a term other than *gu sha* 故殺, expressing an intention to kill, might be used. The code provided that there should be no liability where an offender died ‘unexpectedly (*xie hou* 邂逅)’ in the course of a beating administered on the orders of an investigating official. In a case which arose shortly after 516 a military official had caused a subordinate to be beaten to death on the ground of a minor offense. The official, even though the offender had confessed, still ordered the beating to continue, shouting ‘strike and kill’. A high official asked to advise the empress dowager on the case said that the circumstances showed that there had been ‘an intention to kill (*sha xin* 殺心)’. This took the homicide out of the class of ‘unexpectedly dying’ and justified a sentence of death.<sup>83</sup> Although this account shows that the authorities in homicide cases might construct their reasoning in terms of the presence or absence of an intention to kill, it does not assist us in determining whether the code had a general category of *gu sha* 故殺.

We know that other rules of the Northern Wei 北魏 code concerned with serious offenses were formulated in terms of *gu* 故. In a case of 514 concerned with the sale of a free person there is cited a clause stating: “Where one knows a person has seized and stolen property, but deliberately (*gu* 故) buys, sentence as accessory (to the thief).”<sup>84</sup> On the basis of this slender evidence we might infer that the Northern Wei 北魏 legislators had a preference for describing with the term *gu* 故 states of mind in which the offender knew he was doing wrong or intended to do wrong. They may

<sup>81</sup> *Wei shu*. Beijing: Zhong-hua, 1974, 8. 2886; Cheng, *Jiu-chao lü-kao*, pp. 357-8; T’ung-tsu Ch’ü. *Law and Society in Traditional China*. 1961, reprinted Westport, Connecticut: Hyperion Press, 1980, pp. 23, 41.

<sup>82</sup> *Wei shu*, 8. 2882; Cheng, *Jiu-chao lü-kao*, p. 353.

<sup>83</sup> *Wei shu*, 6. 2005; Cheng, *Jiu-chao lü-kao*, p. 360.

<sup>84</sup> *Wei shu*, 8. 2881; Cheng, *Jiu-chao lü-kao*, p. 353.



further have wished to emphasise the element of intention in homicide and so replaced the term *zei sha* 賊殺 with *gu sha* 故殺.

Some confirmation of the suggestion that the Northern Wei 北魏 code had a category of *gu sha* 故殺 is supplied by the rules of the Sui 隋 (A.D. 581-618) code of 581. This code was influenced by the code of the Northern Qi 北齊 (A.D. 550-577), which was derived from the Northern Wei 北魏 code. We know that the Sui 隋 code had a category of homicide denominated *gu sha* 故殺, since a clause provided that officials who committed inter alia the offense of *gu sha* 故殺 should still be disenrolled, even though an amnesty had reprieved them from death<sup>85</sup>.

#### *Gu Sha* 故殺 in Tang 唐 (A.D. 618-907) and Later Law

The direct model for the Tang 唐 code of A.D. 624 was the Sui 隋 code of 581. It is probable that the Tang 唐 took its provisions on *gu sha* 故殺 from the Sui 隋. Article 306 states that, where a person is killed in the course of a fight, the killer is to be sentenced to strangulation. But should a knife (*jen* 刃) have been used, or should there have been a case of *gu sha* 故殺, the punishment is to be beheading. Further, should a weapon (*bing jen* 兵刃) have been used in a fight, resulting in the death of a participant, the killer is to be sentenced for *gu sha* 故殺. The last part of the article, as well as mentioning ‘deliberate wounding’ (*gu shang* 故傷), for which the punishment is one degree more severe than wounding in a fight,<sup>86</sup> puts the case in which there has been a fight, the participants have broken off, and after a short interval have met again with the result that one kills the other. This is to be treated as *gu sha* 故殺 and not as killing in a fight.<sup>87</sup>

The article itself thus firmly locates *gu sha* 故殺 in the context of a fight in which a weapon has been used. Nothing is said about *gu sha* 故殺 as ‘intentional killing’. The *shu-yi* 疏議 commentary, added in 653, first introduces a reference to a state of mind, although it is interesting to note that this occurs in the explanation of *dou sha* 鬥殺 and not *gu sha* 故殺. The commentary defines cases of ‘fighting and beating (*dou ou* 鬥毆)’ as those in which “from the beginning there had been no intention to kill (*yuan wu sha xin* 元無殺心),” but someone had been killed in the course of a fight. It next explains the phrase of the article stating “by means of a knife or *gu sha* 故殺” as “where one fights and uses a knife, one then has an intention to cause harm (*hai xin* 害心), or where, not on account of a fight and quarrel, lacking any preceding incident (*shi* 事), one kills, this is *gu sha* 故殺.” Some one hundred and fifty years later, in 822, the poet and jurist Bo Ju-yi 白居易 in a famous opinion determined that the phrase “lacking any preceding incident” meant the same as “not in the course of a fight.”<sup>88</sup>

The commentary in its specific explanation of *gu sha* 故殺 still adverts to the occurrence of a fight as the decisive factor. *Gu sha* 故殺 is committed where someone

<sup>85</sup> *Sui shu* 隋書. Beijing: Zhong-hua, 1973, 3. 711; É Balazs. *Le traité juridique du “Souei-Chou”*. Leiden: E.J. Brill, 1954, p. 75

<sup>86</sup> This still follows the substance of the old Han rule. See note 41 above.

<sup>87</sup> Johnson, *T’ang Code*, II, pp. 331-2.

<sup>88</sup> On Bo’s opinion see B.E. Wallacker, “The Poet as Jurist: Po Chü-i and a Case of Conjugal Homicide,” *Harvard Journal of Asiatic Studies* 41 (1981), pp. 507-26; G. MacCormack, “The Traditional Chinese Law of Homicide, Po Chü-i and the *Eiusdem Generis* Principle,” *Chinese Culture* XXXV. 3 (1994), pp. 7-14.

is killed not in the course of a fight, that is, where there has been some overwhelming act of violence or surreptitious attack, precluding any possibility of resistance. It is only from the definition in the commentary of ‘fight and beat’ that one is able to infer that, conversely, *gu sha* 故殺 is characterised by the presence of an intention to kill. Such an intention will be inferred from the situation. For example, the use by one participant in a fight of a knife will give rise to the inference that he intended real harm. This is held to be tantamount to an intention to kill. Equally, such an intention might be inferred where one participant in a fight, after the fight had broken up, returned and killed his opponent.

One other reference to *gu sha* 故殺 in the context of *mou sha* 謀殺 (plotting to kill) is also instructive. ‘Plotting’ is defined in the code as involving “two or more persons,” but it is also said: “if the circumstances of the plot are clear and evident then one person may be considered to be the same as two persons.” The latter case is explained in the commentary with the following example: “If someone enters another person’s house carrying a knife or a club, and investigation proves them to be enemies who each desires to kill the other, then even though there be only one person, this situation is considered the same as a plot.”<sup>89</sup> Although *mou sha* 謀殺 covers the case in which the intention to kill has been premeditated, we note again that the approach of the Tang 唐 legislators is still based on actual situations from which such an intention might be inferred (the coming together of two or more persons to make a plan, or the illicit entry of an armed intruder into his enemy’s house).

In Tang law *mou sha* 謀殺 as a category of homicide applied only to the case in which the plot to kill had been unsuccessful. Should it have been fulfilled and the death of the victim accomplished, we are told in the *shu-yi* 疏議 commentary that the homicide is one of *gu sha* 故殺.<sup>90</sup> This shows not just that the Tang legislators made no clear distinction between a premeditated intention to kill and one formed at the time of the act itself, but that *gu sha* 故殺 in the context of a ‘plot to kill’ was still explained in terms of particular situations from which an intention to kill was inferable.

We recall that in the Jin 晉 code two extended cases of *zei sha* 賊殺 were homicide resulting from the galloping of a horse in a city or the shooting of arrows in the direction of people. These examples passed into the Sui 隨 code and from there into the Tang 唐 code. In the course of their transmission important changes in the rules occurred. The classification of *zei sha* 賊殺, now termed *gu sha* 故殺, was retained only in one case: the shooting of arrows in the direction of the imperial palace.<sup>91</sup> Where arrows were shot in the direction of a city wall, road, or a person’s

<sup>89</sup> Article 55; W. Johnson, *The T’ang Code Volume I, General Principles* (Princeton, New Jersey: Princeton University Press, 1979), p. 268.

<sup>90</sup> Article 18; Johnson, *T’ang Code*, I, p. 119. I would like to thank the editor, Professor W. Johnson, for suggesting, rightly, that caution is necessary in the interpretation of the words of the commentary to article 18: “where a plot to kill (*mou sha* 謀殺) a person has resulted in the death of the victim, (this is) also the same as (*gu sha* 故殺).” Article 18 specifies the offenses for which an official is still to be disenrolled despite an amnesty. In this context the expression “also the same” may simply mean that both *mou sha* 謀殺 (where the victim has been killed) and *gu sha* 故殺 are offenses falling within the scope of the article, the point being that an unsuccessful plot to kill is not included. This is undoubtedly one point made by the commentary. However, the somewhat elliptic phraseology also seems to imply that a successful *mou sha* 謀殺, at least where one person alone had planned the killing, was not to be distinguished from *gu sha* 故殺.

<sup>91</sup> Article 73; Johnson, *T’ang Code*, II, p. 36.

house, and someone was killed, the case was to be treated as *dou sha* 鬥殺 (killing in a fight) with a reduction in punishment of one degree, that is, exile instead of strangulation.<sup>92</sup> Where a horse was galloped through a city or crowd of people and someone was killed, the case was also to be treated as *dou sha* 鬥殺 with a reduction in punishment of one degree<sup>93</sup>.

The Tang 唐 evidence suggests that with the substitution of *gu sha* 故殺 for *zei sha* 賊殺 the emphasis for the legislators came to be placed rather more upon the mental state of intention than the physical act of violence. *Gu sha* 故殺 as a category of homicide was seen as an act accompanied by an intention to kill. However, we should note two points about the treatment of *gu sha* 故殺 in the Tang 唐 code: the definition of the term was still not divorced altogether from the ‘situation’ which gave rise to it, and the ‘intention’ characterising *gu sha* 故殺 (intentional killing) was not clearly distinguished from that characterising *mou sha* 謀殺 (plotting to kill).

The Ming 明 legislators first appear to have made clearer the difference between *gu sha* 故殺 as a concept focused upon a mental state and the actual situation from which it sprang, to have made a more explicit definition of *gu sha* 故殺 in terms of intention to kill, and to have distinguished the intention to kill constituting the offense of *gu sha* 故殺 from that constituting the offense of *mou sha* 謀殺.

The article in the code of the Ming 明 dynasty (A.D. 1368-1644), which introduces *gu sha* 故殺,<sup>94</sup> is headed ‘fight and beat as well as *gu sha* 故殺 a person’. This shows that the earlier connection in the minds of the legislators between killing in a fight and intentional killing has been retained. The article is divided into three parts. The first deals with killing in a fight (punished with strangulation), the second with intentional killing or *gu sha* 故殺 (punished with beheading), and the third with plotting to beat a person and causing death (where the person inflicting the wound causing death is to be punished with strangulation, the person who formed the idea of the attack with 100 blows and exile to 3000 *li*里,<sup>95</sup> and the others involved with 100 blows with the heavy stick). In explaining this provision, commentators from the late Ming 明 and early Qing 清 (A.D. 1644-1911) concentrate upon the state of mind of the offender. They analyse the difference between the state of mind characterising *mou sha* 謀殺 from that characterising *gu sha* 故殺. Although they also refer to a number of particular situations, their focus is upon the evidence which allows one to infer that the perpetrator had the intention to kill. The law has decisively shifted its emphasis from a concern with the physical circumstances of an act of homicide to the identification of the perpetrator’s state of mind.

Three commentaries may be cited to show the importance attached to the mental element in homicide (what the modern law terms *mens rea*) by the law of the late Ming 明. The earliest is the *Du lü suo yan* 讀律所言 (Miscellaneous Notes on Reading the Code), compiled by Lei Meng-lin 雷薨麟 in 1565.<sup>96</sup> Lei has pertinent

<sup>92</sup> Article 393; Johnson, *T’ang Code*, II, pp. 459-60.

<sup>93</sup> Article 392; Johnson, *T’ang Code*, II, p. 458.

<sup>94</sup> *Ming lü ji jie fu li* 明律集解附例 (*Ming Code with Commentary and Sub-statutes*), Taiwan reprint 1969, 19.9, p. 1496; Jiang Yonglin, *The Great Ming Code/Da Ming lü*. Seattle and London: University of Washington Press, 2005, p. 173.

<sup>95</sup> One *li*里 is approximately one third of an English mile.

<sup>96</sup> On this commentary see J.D. Langlois, Jr., “Ming Law”, in D. Twitchett and J.K. Fairbank (eds). *The Cambridge History of China. Volume 8. The Ming Dynasty, 1368-1644, Part 2*. Cambridge: Cambridge University Press, 1998, p. 213.

comments upon both the article dealing with *mou sha* 謀殺 and that dealing with *gu sha* 故殺 and *dou sha* 鬥殺. He defines the phrase ‘*mou sha ren* 謀殺 (plot to kill a person)’ in the former article<sup>97</sup> as referring primarily to “two or more persons,” but then adds the point already made in the small commentary to article 55 of the Tang 唐 code,<sup>98</sup> to the effect that, where the circumstances of the plot are manifest, one person may be considered the same as two persons. Lei then sums up his explanation of *mou* 謀 in the words: “Therefore, where in general one has an enemy whom one hates and wishes to kill, whether the plot is formed in the mind of the individual or arranged with others, there is first the forming of a plan and then the act of killing.”<sup>99</sup> The essential point is that the intention necessary for *mou sha* 謀殺 must be premeditated, that is, formed prior to the act of killing. It is evidenced though a plan to kill made either with others or formed only in the mind of the perpetrator.

In his commentary on the article dealing with *dou sha* 鬥殺 and *gu sha* 故殺, Lei is concerned to differentiate the two offenses through the presence or absence of an intention to kill. Cases of *dou sha* 鬥殺 are defined as those in which persons become angry, quarrel, and fight, with the result that one of the participants is killed. The fact that there has been no intention (*xin* 心) to kill justifies the imposition of the punishment of strangulation rather than beheading. Lei then repeats the point that the killing is to be treated as *dou sha* 鬥殺 only should there be lacking the idea (*yi* 意) of killing a person. Should one of the parties to what appears to be a fight intentionally (*ku yi* 故意) inflict a savage beating and kill the other, there is demonstrated an ‘evil intention’ (*e hsin* 惡心), a wish to bring about death, and the case has to be treated as *gu sha* 故殺. Lei does not state explicitly that such an ‘evil intention’ must be formed at the time of the fight or beating. Indeed, later in his commentary he remarks that the characteristic of *gu sha* 故殺 is that “the intention (*yi* 意) to kill moves from the heart (*xin* 心) and is not something that can be known to or followed by others. If the intention to kill (*yi gu* 意故) is first communicated to others, who are to implement it, one has *mou sha* 謀殺 and not *gu sha* 故殺.<sup>100</sup> Although these words suggest that the intention marking *gu sha* 故殺 is to be defined by reference to absence of communication and not the time of formation, one may still perhaps infer that Lei, in distinguishing *gu sha* 故殺 from *dou sha* 鬥殺, had in mind the fact that the intention to kill was formed at the time of or during the fight.

The second commentary is the *Zuan zhu* 纂註 (Incorporated Commentary) appended by Gao Ju 高舉 to his edition of the Ming code published in 1610, *Ming lü ji jie fu li*<sup>101</sup>. This largely follows the approach of the *Du lü suo yan*, distinguishing *gu sha* 故殺 from *mou sha* 謀殺 according to whether the intention was communicated to others or not, and *dou sha* 鬥殺 from *gu sha* 故殺 according to whether one of the participants in the fight had formed the intention (*xin* 心) to kill. The point is also made that *mou* 謀 means ‘forming a plan, deciding on a stratagem for killing’, whereas *gu* means simply ‘having the intention to kill (at the time of the act)’<sup>102</sup>.

<sup>97</sup> *Ming lü ji jie fu li*, 19.1, p. 1461.

<sup>98</sup> See note 89 above.

<sup>99</sup> *Du lü suo yan* 讀律所言. Beijing, 2000, p. 345.

<sup>100</sup> *Du lü suo yan*, pp. 352-3.

<sup>101</sup> Langlois, “Ming Law,” p. 212; W. Franke, *An Introduction to the Sources of Ming History*. Kuala Lumpur: University of Malaya Press, 1968, 6.3.3 (10).

<sup>102</sup> *Ming lü chi chieh fu li*, pp. 1462, 1497-8. See also the remarks of M.J. Meijer, “The Concept of *Ku-sha* in the Qing Code”, in L. Lanciotti (ed), *Il diritto in Cina* (Firenze: Leo S. Olschki, 1978), pp. 93-4.

The third commentary, the *Du lü pei xi* 讀律佩觿 (Bodkin [for unpicking knots] to be worn on the girdle, when reading the code), written by the early Qing scholar, Wang Ming-de 王明德, was published in 1674.<sup>103</sup> It presents a more subtle analysis of the states of mind relevant to *mou*謀, *gu*故 and *dou sha*鬥殺 than that of the earlier commentaries. First, let us take the distinction between *mou sha*謀殺 and *gu sha*故殺. Here the fundamental point is not that the intention to kill has not been communicated to others, since this may characterise *mou sha* 謀殺 as well as *gu sha*故殺, but whether the intention to kill has been habitually stored in the mind or not. Both *mou sha* 謀殺 and *gu sha*故殺 imply the killing of a person who may be designated an enemy. But in one case (*mou sha*謀殺) the enmity is ever present in the mind, in the other (*ku sha*故殺) it is not. Thus, suppose a person has cherished hatred against his enemy, happens by chance to meet him, and then kills him. Although there has been no plot or stratagem for the killing, this is still *mou sha* 謀殺 because there has been a continual intention to kill. The killer has merely taken advantage of a favorable opportunity to implement that intention. But suppose an original enmity had been forgotten. The two former enemies might meet, quarrel, and fight. The previous hatred might revive and one might kill the other in circumstances which show that there had been an intention to kill (as where he continued to beat after the other had submitted or the onlookers had urged them to separate). What is implied by this section of the commentary is an inference of an intention to kill not present at the time of the meeting but formed during the fight. The intention is inferred both from the previous enmity and the circumstances of the fight. Here for the first time it is made absolutely clear that the intention characterising *gu sha*故殺 must be formed at the time of the act resulting in death.

The commentary next considers the significance of the placing of the section on *gu sha*故殺 between the section on *dou sha*鬥殺 (killing in a fight) and that on *tong mou gong ou* 同謀共毆 (together plot and collectively fight). Wang Ming-de's argument appears to be that *gu sha* 故殺 was inserted between these two offenses because its nature has something in common with both situations, that is, a quarrel and fight as well as a plot to beat someone might give rise to a homicide that has to be classified as *gu sha*故殺. This is the case where two parties are quarrelling and fighting but one persists in beating the other even after he has submitted or been wounded and falls to the ground. Further, in the case where several persons have combined to beat another, it is possible that they might be roused to kill because the victim refuses to yield and taunts or insults his attackers. Should they become inflamed and shout 'kill him', it is clear that an intention to kill has been formed. In all cases, Wang Ming-de adds, it is necessary that the victim die at the time of the fight or attack in the very spot at which it takes place<sup>104</sup>.

Using the terminology of the common law, we can say that by the late Ming and early Qing 清 the law (legislation and opinions of legal experts) had come to pay as much attention to the *mens rea* as the *actus reus* in the offense of homicide. So far as we can tell from the formulation of the rules, the law of the Han 漢 and southern dynasties emphasised the *actus reus* (the actual circumstances of the deed) and paid

<sup>103</sup> Langlois, "Ming Law," p. 213.

<sup>104</sup> The commentary is cited by Xue Yun-sheng 薛允升 in his *Tang Ming lü ho pian* 唐明律合編 (*The Tang and Ming Codes Compared*), 18. 18b-19a. Compare also G. MacCormack, *Traditional Chinese Penal Law*. Edinburgh; Edinburgh University Press, 1990, p. 191. For further discussion of *gu sha*故殺 in Qing law see Meijer, "Concept of Ku-sha in the Ch'ing Code."

little explicit attention to the *mens rea*, the mental state of the perpetrator. That the position began to change significantly in the law of the Northern Wei 北魏 is suggested by the substitution of *gu* 故 for *zei* 賊 in the formulation of the rules defining the categories of homicide. But it is not until the Tang 唐 that we have clear evidence of an approach to homicide that paid explicit attention to the perpetrator's mental state as well as to the physical aspects of the offense. Even so, the treatment of *mens rea* is muted. The *shu-yi* 疏意 commentary says relatively little of the differing states of mind characterising *mou sha* 謀殺 and *gu sha* 故殺 or of the circumstances from which an intention to kill might be inferred. Not until the late Ming 明 and early Qing 清 do jurists appear to have given adequate attention to the analysis of the *mens rea* necessary for the two most serious categories of homicide (*mou sha* 謀殺 and *gu sha* 故殺).<sup>105</sup>

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