

# Professional Practice: Law in Qin and Han China

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Dissertation

Submitted to the Faculty of Philosophy of the Ruprecht-Karls-Universität

Heidelberg

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## **Note**

This work has been submitted as the author's PhD-thesis in 2004. Since then, the text has been revised to take into account suggestions made by the two dissertation advisers, Professor Rudolf Wagner and Ulrich Lau, for which I am grateful to both of them. Other revisions have been made to take into account the author's continuing work, together with Ulrich Lau, on the Zhangjiashan legal texts, which resulted in Lau and Lüdke 2012. Differences to Lau and Lüdke 2012 result either from insights gained after the latter work went to print, or, in rare cases, from different approaches of the two co-authors to specific issues. Primary sources and secondary literature published since 2004 have been added where these are necessary to document updates in the text. In a very selective way, secondary literature has also been introduced to position the original arguments in relation to more recent discussions. A comprehensive account of the vast literature on the Zhangjiashan legal texts published after 2004 would have resulted in a completely different kind of work, which would have been neither appropriate nor desirable. This thesis dates to a period when the Zhangjiashan texts just started to receive scholarly attention. Since then, the amount of publications dealing with them and related aspects has multiplied (Barbieri-Low and Yates 2016, in their bibliography of secondary sources in Asian languages, list an estimated 1500 works on 98 pages). Nonetheless, the author hopes that his work remains a valid contribution to the field.

Erlangen, October 2016

## **Preface**

While writing this study, a number of debts have accumulated. I probably owe most to Ulrich Lau, who first introduced me to the study of early Chinese law and showed me the riches to be derived from this still unexploited mine. I probably would never have stumbled by myself on this field,

which so far has not been in the mainstream of Sinology due to a lack of sources and attention.

When Ulrich Lau, after a seminar in Heidelberg on the *Zouyanshu*, suggested working together on a translation of this source, this became the beginning of a project that has since taken on a life of its own. We soon realised that an accessible translation of the *Zouyanshu* not only required extensive annotation, but also a detailed analysis of the legal institutions that form its background. At some stage, we decided to present this work in the form of a dictionary of the legal terminology used in the *Zouyanshu*. Over the years, this has developed into a detailed reconstruction of many of the core concepts of Qin and Han law on the basis of the presently available received and palaeographic sources. This work has been greatly furthered (and also greatly prolonged due to the necessary revisions) by the publication of the *Ernian liling* collection of statutes, dating to 186 BC and unearthed from the same tomb in Zhangjiashan as the *Zouyanshu*. The results of this co-operative project will be published as a separate volume under the envisaged title *The Craft and Terminology of Early Chinese Law – A study of the Zouyanshu and the Ernian liling*. While the present study has grown out of this larger project, it affords me the opportunity to look at some of the wider issues concerning the evolving professional field of legal practice in early China.

Throughout the pages to follow, I have included only few cross-references to the larger forthcoming work, to which the reader is directed for a detailed annotation of all the *Zouyanshu* passages quoted and for translations of most of the *Ernian liling* stipulations mentioned, as well as for a detailed discussion of the legal terms and concepts which for the most part are only very briefly explained in the following chapters.

Our co-operation on the *Zouyanshu* project has been a fortunate one for me, as I have learned much from Ulrich Lau which also has benefited the present work, not least from his keen interest in social institutions as a foundation of society and culture, his wide knowledge of early Chinese legal and non-legal sources, and his subtle understanding of the Chinese language, which is informed by an expertise in historical phonology – both a rarity among sinologists and an absolute

prerequisite for the work with palaeographic material. At the same time, I also need to apologise for the many disruptions in our work, caused by the exigencies of life and my youthful optimism which again and again caused me to gravely underestimate the effort involved.

The support of a number of other people has been essential for my work. I am grateful to all of them:

Peng Hao 彭浩, of the Jingzhou museum 荊州地區博物館 which has excavated the Zhangjiashan material, has given indispensable help in spending much time discussing the originals of this find at a time when the reproductions were not yet published.

Ziva Ben Porat extended a generous invitation to a conference on “Mediated Testimonies” held by the Tel Aviv University’s Porter Institute in April 2002. Without this, the second chapter of this study probably would never have been written.

Enno Giele not only furnished me with his as yet unpublished dissertation, but also provided stimulating insights into a number of relevant questions.

Laura Skosey generously sent me a copy of her exciting dissertation.

Catherine Yeh again and again brought a warmth and brightness that was good to have during long lonely hours among books and in front of computers.

Most important has been the unwavering support given to me by my parents, Antonia and Karl Josef Lüdke, throughout the many years of my study of this unusual choice of a subject.

Throughout the last ten years, it has been a very special privilege for me to study and work with Professor Rudolf Wagner at the Institute of Chinese Studies at Heidelberg University – not only because of the ideal conditions and the creative atmosphere he has established, his irresistible intellectual presence, and the continuous challenge to his students to realise their potential to the

fullest. Without Professor Wagner, this work would neither have begun, as the enthusiasm for China he has helped to kindle kept me into Chinese studies, nor would it have been finished. I am particularly grateful for the rare combination of complete intellectual freedom afforded to me on the one hand, and a very keen and critical interest in my work on the other. His suggestions on a number of minor and major matters have been indispensable. For all remaining mistakes and shortcomings, I alone carry full responsibility.

Heidelberg, December 2003

# Introduction: Law in China

This study is concerned with law in early China. It thus touches on a very fundamental issue: Can we speak at all of law in the context of China?

The one end of the spectrum of possible answers is marked by authors like Thomas B. Stephens, who, in a study of the Shanghai Mixed Court (1911-27), concludes that China up to and including the period of the Mixed Court, has been characterised by a “disciplinary system” that is fundamentally opposed to the “adjudicative system” of the West. In the adjudicative system, dispute resolution and the maintenance of order turn on the “balancing of the rights and duties of each party in relation to the other according to the predetermined codes”, so that “[r]ules of obligation are the heart and centre of this system”.<sup>1</sup> In contrast, the disciplinary system hinges on “the enforcement of duties without rights”, so that “[o]bedience to superiors in a hierarchy of authority is at the heart and centre of this system”.<sup>2</sup> As a consequence, “the realities of dispute resolution and the maintenance of social order in traditional China do not fit, and cannot be made to fit, into the categories, constructs, and relationships of Western jurisprudence”.<sup>3</sup> In short: The situation in China can be characterised as “order without law”.<sup>4</sup> Vandermeersch, whose view is quoted in the third chapter of this study, proves to be another proponent of the lack-of-law school when he opposes the “juridical order” characteristic of the West with the “ritual order” which distinguishes China.<sup>5</sup>

Laura Skosey is an example of the opposite approach. Referring to work done by Golding,<sup>6</sup> she

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<sup>1</sup> Stephens 1992, 4-5.

<sup>2</sup> Stephens 1992, 5.

<sup>3</sup> Stephens 1992, 3.

<sup>4</sup> This is the title of Stephens’ first chapter, Stephens 1992, 3-15.

<sup>5</sup> Vandermeersch 1985, 13-14.

<sup>6</sup> Martin P. Golding: *Philosophy of Law*. Eaglewood Cliffs, N.J.: Prentice-Hall 1975. Quoted in Skosey



defines a group of criteria for a full-fledged legal system, namely the existence of (1) laws and (2) agencies for (a) changing and making laws; (b) determining infractions of laws; (c) enforcing laws; (d) settling disputes between individuals. Applying these criteria, she finds that even the Western Zhou already “did in fact meet the standards of a full-fledged legal system”.<sup>7</sup> An early precursor of this approach can be seen, for example, in W. A. P. Martin, who found that the relationships between the Zhou period states were governed by a well-established system of international law, akin to its modern equivalent.<sup>8</sup>

There are a number of intermediate positions. Among them are those of Yates and Lewis, also quoted in the third chapter of this study, which acknowledge the existence of law in China, but subordinate it to ritual and religion.<sup>9</sup> Maybe closer to Skosey’s position are those who argue for the existence of rule of law ideas in early China, but concede that these very much remained a pipe-dream, because not much of it can be discerned in actual legal practice.<sup>10</sup>

The question of law in China assumes added urgency due to its relevance to the current state of Chinese affairs.<sup>11</sup> It is often assumed that the availability of autochthonous models of law and for the rule of law determines, or at least influences, the chances and direction of legal reforms in present-day China. For example, the editor of a volume on “The Limits of the Rule of Law in China” summarises the studies in that volume as highlighting “the great importance that Chinese leaders and intellectuals attach to scrutinising their legal heritage and its relation to current problems”.<sup>12</sup> Chinese scholars and administrators recognise that for economic reforms and the integration into the world economy to be successful, China needs legal reforms that are capable of

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1996, 249.

<sup>7</sup> Skosey 1996, 249-254.

<sup>8</sup> Martin 1894.

<sup>9</sup> Yates 1995, 333-357 and Lewis 1999, 1-23.

<sup>10</sup> E. g. Turner 2000, 8; Chang 2000, vii-xi.

<sup>11</sup> Compare Turner 2000, 8.

regulating complex economic relationships and, most importantly, provide a high degree of certainty and predictability to both foreign and local economic actors. The absence of any autochthonous models would mean that for law reform, China would have to rely entirely on foreign models of law and of the administration of law. Should, on the other hand, autochthonous models indeed be available, they might not be directly applicable to the present-day economy and society and thus probably would in most instances not offer concrete solutions for modern problems. But they might provide a framework in which new or imported legal rules, institutions and procedures can be understood and become plausible.

Arguments that either deny the existence of ‘law’ in the proper sense in China or are sceptical about its importance and its independence from realms such as ritual are often formulated in a way that is problematic on at least two important questions of method.

First of all, the proponents of such arguments tend to be confident that broad generalisations can be made across an enormous range of time and space. The difficulties with such an approach are even more obvious for the West than for China, as it overlooks the huge historical and cultural differences between, say, mediaeval and modern legal systems, or Anglo-Saxon law and Continental Law, or even between the law of the European socialist states in the 20<sup>th</sup> century and Western European law at the same time. On the Chinese side, the problems with this approach can be observed, for example, in Stephens’ study mentioned above.<sup>13</sup> His focus on the Shanghai Mixed Court is an innovative and ingenious choice for contrasting Western and Chinese law, as in the Mixed Court practitioners of both traditions met on the same bench. However, this particular experience is evaluated entirely in terms of Western, or rather, Anglo-Saxon law, and the findings are then re-superimposed on all of the Chinese legal tradition, notwithstanding the fact that the Chinese on the Mixed Court were the very last representatives of imperial Chinese law.

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<sup>12</sup> Turner 2000, 17.

A second problematic aspect of many of the arguments sceptical about the existence or importance of law in China is their tendency to (over-)emphasise the theoretical concepts underpinning legal institutions, that is, the way in and the degree to which legal institutions are reflected in philosophical, political or even legal writing. Stephens, for example, feels that at the heart of the lack of law in China lie “fundamental divergencies in the theoretical and philosophical concepts of the nature and purposes of the processes of dispute resolution and the maintenance of order in society”.<sup>14</sup> Discussions about legal theory in China mainly refer to the so-called legalist writings, primarily the Shangjun shu 商君書 and the *Hanfeizi* 韓非子. These are seen as advocating a “rule by law” (instead of a rule of law), an interpretation that tends to be influenced by the Confucian and Daoist criticism of these writings, as well as by the bad reputation that the “legalist” system of Qin had since the Han period.<sup>15</sup> However, such views themselves are influenced by the strong focus on theoretical concepts and their explicit reflection inherited from the Greek tradition, which might overlook a focus on practice and application based on concepts which are implicitly understood, rather than explicitly spelled out, but nonetheless equally valid and differentiated.

To avoid the problems of premature generalisations and of undue reliance on theoretical statements, this study, and the related larger project of reconstructing and analysing the role of early Chinese law, on the one hand, deliberately focus on a relatively small time frame, but attempt to paint as accurate and detailed a picture as possible of law and the administration of law during this time; on the other hand, they reflect a commitment to study actual legal practice in addition to the theories underpinning it.

The temporal angle of this study is the late Qin and early Han, the time which, in terms of legal

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<sup>13</sup> Stephens 1992.

<sup>14</sup> Stephens 1992, 4.

<sup>15</sup> E. g. Vandermeersch 1985, 14.

sources, is reflected in the Shuihudi and Zhangjiashan material; the core of that time span are the eight decades between the accession of King Zheng 政 of Qin (the later Qin Shihuangdi) in 246 BC and the penal reforms under the Wendi emperor in 167 BC. Within this period, the transition from Qin to Han is an important hiatus. The focus on a relatively small period of time is helpful because it offers the chance to discover important details that a broader inquiry might miss. The attention to detail, in turn, makes it possible to reconstruct both the inner logic of legal arrangements and the interrelationship of these legal arrangements with particular social and political conditions. In this way, a particular legal arrangement can be understood both in the context of the particular legal institutions and in the broader context of historical conditions of the time. It also offers the chance to study the extent to which law changed in that short period of 80 years, and in particular across the Qin-Han transition, and thereby to arrive at a measure of change and persistence in Chinese legal history. A study of Qin and early Han is also helpful because that particular point in time is a crucial period in legal history: In Qin and early Han, the legal system had just fully evolved from its Warring States precursors and acquired the form in which it became formative for more than 2000 years of imperial history. The Qing code, in force until 1911, is, in principle, a direct descendant of the Qin and Han codes. A detailed reconstruction of Qin and Han law also provides a meaningful point of reference for comparison with the law of later periods. Chinese legal institutions and legal practice, when confronted with modern Western law, might appear mere facets of a “disciplinary system”. But they might become better understandable when viewed in the light of their much earlier origin.

This study attempts not only to be specific, but also to pay attention to legal practice and the interplay between theory and practice. The importance of cultural practice in history, as opposed to an emphasis on either ideas or socio-economic realities, has long been recognised in the humanities: Studies on the French Revolution, for example, have supplemented knowledge of enlightenment thought and of the economic conditions in 17<sup>th</sup> and 18<sup>th</sup> century France with a

concern for social practices such as book printing and distribution and the thriving of literary salons and journals.<sup>16</sup> Likewise, I will argue that in China an analysis of questions such as how trials were actually conducted, how people made statements during trial, why people chose law as a profession, and what ethos guided them as legal specialists will have to supplement knowledge of the legalist literature and of the socio-economic conditions in the late Warring States and early imperial periods. Indeed, new insights will be available from a re-evaluation of legalist literature in the light of legal practice. That is, rather than viewing harsh laws as a direct result of a legalist thought advocating stern measures, it might be possible to see the same concern with predictability and equity that is visible in legal practice also reflected in the legalist writings.<sup>17</sup>

This study therefore is characterised both by its focus on Qin and early Han law and by an effort to evaluate legal practice with the same effort as legal theory. Both these approaches have been made possible only by recent archaeological discoveries of legal texts. For the first time, these give a more complete picture of early Chinese law and its practice than has been available through the sketchy evidence extractable from the dynastic histories and other received sources.

Particularly important are the discoveries at Zhangjiashan, which have yielded the *Ernian lüling*, a collection of laws in force in 186 BC, as well as the *Zouyanshu*, a collection of case records.

Even though as sources they stand at the centre of the inquiries that will follow, a full evaluation of the finds from Zhangjiashan and of related texts discovered elsewhere is beyond the scope of this study. In this regard, the translation of the *Zouyanshu*<sup>18</sup> by Ulrich Lau and myself, as well as our forthcoming dictionary of legal terminology<sup>19</sup> are important complements of the present study.

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<sup>16</sup> See, for example, Baker 1990 and Chartier 1991.

<sup>17</sup> For some of the theoretical underpinnings of an emphasis on the analysis of practice see e. g. Reckwitz 2002 and 2003.

<sup>18</sup> Lau and Lüdke 2012. An English version is in preparation.

<sup>19</sup> Lau and Lüdke forthcoming. An English version is in preparation.

My theme is law as a professional field and its specialist practitioners in Qin and Han China. I will argue, against views like those mentioned above, that in order to understand early China, it is indispensable to understand its legal institutions and legal practice, as these made an independent contribution to shaping society and the body politic. I approach this theme from three different angles, corresponding to the three chapters of this study, highlighting three mutually related aspects of early Chinese law:

The first chapter deals with the *Zouyanshu* as a case collection that mirrors the increasingly standardised and professional character of legal practice. The *Zouyanshu* is not only a *source* of early Chinese legal practice. The collection and the cases it contains also played an important role as a *part* of that legal practice: The case records formed the basis for, and thus prefigured, the judicial decisions; the collection as a whole was authoritative as a guide for judicial officials and pursued a certain agenda. The chapter therefore explores the nature and role of both the individual cases and the case collection as a whole. It deals with the questions of dating that are fundamental for an evaluation of all information which this source presents. Lastly, it evaluates the way the *Zouyanshu* records proceedings. The model it uses for this can be understood as a form that needs to be filled in by the judicial officials; an analysis of this form demonstrates not only the importance of standardised procedure in early China, but also allows to distinguish different types of proceedings, reflecting the differentiation and sophistication of early Chinese practice, and also its development.

The second chapter deals with maybe *the* paramount element in early Chinese judicial practice, namely testimony, and the way in which it was elicited and recorded by legal specialists. The role of testimony is an important determinant for any legal system, because it leads to questions like: How does a legal system deal with people who do not confess? What are its assumptions about guilt and innocence? In early China, the confession requirement – no conviction without a confession of the accused – was a direct result of the importance accorded to testimony. I will

attempt to analyse why the legal system maintained the confession requirement even in the face of the quandaries that it posed, and why it resorted to torture to resolve this quandary, only to arrive at new dilemmas: Can a confession extracted under torture be trusted? – The question of testimony in turn leads to the question of how testimony was recorded (“mediated”), as testimony in its recorded form is both the only way in which it is now, more than two thousand years later, accessible to us, and also the only form in which it played a role in judicial decisions at the time it was rendered. Therefore, it is important to know the mechanisms at work in the recording of testimony, as these will at least indirectly influence the outcome of the proceedings. These mechanisms, in turn, can be understood as a result of the professionalisation of legal practice.

The first two chapters focus on the *Zouyanshu* as one particular example of a legal source, and the eliciting and recording of testimony as one particular aspect of legal practice. The third chapter attempts to highlight the broader context of these specific themes by asking the more general questions of what role law played in early China, and to what extent it can be understood as an independent professional field of historical significance. This chapter explicitly takes up notions that ritual and religion were the dominant paradigms in early China, and that law, if at all, only had a derived function. I will show that, quite to the contrary, law was a distinct and important sphere, with legal specialists who derived a body of legal knowledge from legal literature, discussing their knowledge in a distinct terminology. Equally important is the observation that, as a consequence of this increasing professionalism, law made its distinct contribution to the body politic, not only for facilitating the exercise of authority, but also for the legitimisation of authority. I will argue that legal practice in early China reflects a realisation that, for political authority to be perceived as legitimate, it was necessary that the law was perceived as equitable and predictable. A precondition for this was a relatively high degree of specialisation and professionalism.

These remain only small contributions to the analysis and (re-)evaluation of early Chinese law

which have been made possible, and are demanded, by the new, and constantly growing, body of palaeographic legal sources. Many tasks for further research remain which go beyond the limited scope of the present study:

The starting point for any study of early Chinese law is a fuller translation and analysis of the palaeographic sources. While translations of the Zhangjiashan texts have become recently available,<sup>20</sup> the new finds also require a fresh and more systematic look at and re-translation of at least parts of the Shuihudi legal material. There is neither a systematic study nor attempt at translation of those fragments of the Juyan, Longgang, Xuanquan and Dunhuang finds that are relevant for the history of law. It is already clear that fragments that previously have been hard to interpret have become understandable by the new sources, and it is to be expected that even more could be learned from a systematic look at all those fragments that deal with law.

Similar work could be undertaken in regard to the received sources. The *Shiji* and, in particular, the *Hanshu* are rich mines for legal history that have not nearly been exploited. While Shen Jiaben<sup>21</sup> in late Qing and Cheng Shude<sup>22</sup> in the Republican period have laid the groundwork by exhaustively compiling all relevant passages, their understanding of the systematic context has been hampered by incomplete sources, a situation that has dramatically changed with discoveries such as those at Zhangjiashan.

A natural second step would be to study specific problems within early Chinese law. Questions like the treatment of intent would be of interest far beyond the circle of China specialists, especially if undertaken from a comparative perspective. Studies on subject matter such as the legal status of women and their claims to property (complementing studies such as the one by

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<sup>20</sup> Lau and Lüdke 2012; Barbieri-Low and Yates 2016.

<sup>21</sup> Shen Jiaben 1985.

<sup>22</sup> Cheng Shude 1963.



Bernhardt),<sup>23</sup> the punishment of sexual offences, or the role of gender within law would not only be interesting to legal historians, but also to sociologists and social historians.

From a more traditional perspective on history, the contribution of law to the functioning of the Chinese body politic and to the formation of the empire would need to be evaluated. While the third chapter touches on the role of law for the legitimisation of political authority, much more would need to be said about the concrete ways in which law was important for the maintenance of the body politic, for example as a tool to order society and the relationships within society; as a means for social and political control; as the rationale according to which the bureaucracy functioned; and as the universal standard that guaranteed a measure of unity throughout the empire.

A large gap of knowledge remains in regard to civil law. So far, this has been largely absent even from the newly discovered sources. However, it is exactly this conspicuous absence which requires an investigation. The most likely hypothesis is that civil law was based on contracts and custom, in contrast to the highly codified penal law, but still adjudicated by the state according to set procedures; alternative hypotheses would be that civil law conflicts were either settled by means of the penal law, or that the state did not interfere in civil law matters at all, leaving these to informal mediation. Any study of this subject faces the obstacle of extremely scarce source material. From a methodological point of view, I would therefore suggest the following approach: Start with the earliest sources that provide a substantial amount of information on civil law (which might be rather late in imperial China),<sup>24</sup> then compare the evolution of penal and administrative law from Qin/Han up to the time of these sources in order to gain an idea of the amount of change in the legal system over such a time horizon, and with this background go back to the scant

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<sup>23</sup> Bernhardt 1999.

<sup>24</sup> Studies such as Kroker 1965, Bernhardt and Huang 1994, Huang 1996 and 2001, for example, provide rather extensive information about civil law and civil adjudication in Qing China.

references of civil litigation within the early sources, the most important of which are found in the bronze inscriptions,<sup>25</sup> the *Zuozhuan*, the Baoshan Chu strips, scattered within the dynastic histories, and among the Juyan material, which contains the important and relatively detailed record of an early Eastern Han civil law suit.<sup>26</sup>

In the field of legal history, an obvious subject for new research is the question of how the highly sophisticated law of the Qin and Han periods, which became formative for imperial law right up to 1911, evolved. Most available works, many of them from China, have mainly confined themselves to listing the positive knowledge to be gained about early law from the received sources. However, Qin and Han law is visibly different both from earlier legal arrangements (such as evidenced in the bronze inscriptions<sup>27</sup>) and from those in other parts of the Chinese realm (such as reflected in the limited material available from Warring States Chu<sup>28</sup>). It remains an intriguing, but unanswered question to what extent and how Qin and Han law, despite the appearance of difference, is related to earlier models of law and to those practiced in other early Chinese states. But this is not enough: Chinese legal history needs to broaden its perspective to include much farther places. Some art historians have recently suggested that late Qin sculpture, architecture, and silverware might have been influenced by Hellenistic, specifically Greco-Bactrian, as well as Persian models,<sup>29</sup> arguing, as a result, that that “[t]he First Empire of the East can only be fully assessed if discussed in a pan-Eurasian context.”<sup>30</sup> Such influences might be more readily discernible in material objects, where similarities are not obscured by linguistic barriers (and divisions of scholarly fields according to languages and modern nation states). But if a

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<sup>25</sup> Civil litigation in the bronze inscriptions is dealt with in Lau 1999 and Skosey 1996.

<sup>26</sup> I. e. the relatively well-known Kou En case, *Juyan xinjian* E.P.F22:1-36, discussed by number of scholars, e. g. Hulsewé 1979, Lian Shaoming 1986, and Zhang Jianguo 1999, 315-345.

<sup>27</sup> See Lau 1999 and Skosey 1996.

<sup>28</sup> See Weld 2003, who describes the legal arrangements reflected in the Baoshan slips as very different from the uniform and centralised Qin system.

<sup>29</sup> Barnard 2004, Nickel 2009, Nickel 2012, Nickel 2013.

<sup>30</sup> Nickel 2013, 443.

transmission of patterns and knowledge can be shown in material culture, it will be of at least equal importance to trace possible connections in administration and law. Could it be that the vast Persian Achaemenid Empire, with its multi-layered administration, universal legal system, unified bi-metallic currency, imperial highways and public projection of imperial power e. g. by use of stone inscriptions provided some of the models that proved important for Qin's ascendancy and eventual unification of China? While some of the art historians suggesting Western influences in late Qin have assumed that Alexander the Great's push to the East was a crucial intermediary step in facilitating contact with China, the Achaemenid Empire, in the two centuries preceding Alexander, reached far enough into Central Asia to raise the question whether transmissions could have already taken place earlier.

Irrespective of whether legal innovations in Qin and Han were autochthonous or related to developments in other Chinese states or even distant empires, it is important to better understand which preconditions made their realisation possible. Questions such as the following would need to be answered: Did law derive its legitimacy and authority from the same sources in Zhou as well as in Qin/Han? Was there an evolution from religion and ritual to law, or was law very early on already a separate sphere? What are the reasons for, and effects of trends to publish law since the late Chunqiu period? What role is played by customary, and what by written law? Such a study would go back to evidence available about Zhou law from the bronze inscriptions and received sources such as the *Zuozhuan* and would then have to grapple with the difficult Baoshan texts which provide a window into the crucial Warring states transition period at the end of which stand the Shuihudi texts. Such a study would need to do more than just compile the relatively well-known passages on legal institutions, and take into account, in particular, the role of jurists and of law in life and its role in society.

This kind of analytical study of the history of law would need to be developed into the other direction as well: Prior to the archaeological discoveries, the Tang code, as the earliest received

law code, seemed to mark the beginning of the legal tradition that found its end with the Ming and Qing codes, with the Han precursors only as distant ancestors. The new sources have made clear that Qin and Han law had a much more direct influence on the Tang code, and through it on all later legal arrangements, than previously thought. Beyond the more factual problem of which specific Tang legal arrangements are derived to what extent from Qin and Han precursors, the question remains to be answered what exactly enabled the extraordinary stability of the legal structures over the entire imperial period, a stability which warrants the claim that law in China is an element of the *longue durée*.

Finally, a note on translation terminology: Stephens severely criticises as an indefensible case of “backward translation” the tendency of sinologists, by using Western legal concepts and terminology when talking about China, to “smuggle” in foreign institutions, thereby distorting and concealing “Asian reality”.<sup>31</sup> However, it will already have become apparent that I have no qualms about using terms like “law” and generally English legal terminology in the context of China. This does not imply that I think Chinese and Western law and legal institutions are “essentially” alike; but neither do I want, by choosing entirely different terms, make the statement that Chinese and Western law are “essentially” different. I start with the assumption that different societies have similar problems, but use different solutions and mechanisms to deal with them. Even though the specific institutions and concepts might differ, they can be called “law” as long as they deal with similar problems. Similarly, I use English legal terms in the translation if they suggest, in broad way, the function of the institution for which the Chinese term stands. By this usage, I intend to at least temporarily relieve the terms from their philosophical and conceptual baggage; the reader is trusted to remember that this study deals with Chinese law and that, by definition, translated terms will never be matches for the English terms which describe institutions in a different setting. Still, a surprising number of functional parallels will be observed,

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<sup>31</sup> Stephens 1992, 10-11.

which indicates that similar problems sometimes also suggest similar solutions, even across wide gaps of culture and time.

# Precedents and procedures: The *Zouyanshu* and its cases<sup>1</sup>

## *The role of the Zouyanshu within the administration of law*

When it was found, the *Zouyanshu* was an absolutely unique text: While some of its technical terminology and procedures were known (though not necessarily well understood) from the legal manuals and excerpts of Qin law excavated in 1975 from tomb no. 11 at Shuihuidi as well as from the fragments of administrative documents that had been discarded at remote desert outposts of the Han empire at Dunhuang and in the Juyan area, no equivalent text, no text that readily would fall into the same category, had ever been seen. The nature, function and purpose of the *Zouyanshu* therefore are of primary interest for any discussion of its contents.

### Documents or fiction? – The individual cases

As the *Zouyanshu* clearly is a collection of individual cases, the answer to this question will, to a great extent, depend on an assessment of these cases: Is the *Zouyanshu* a collection of legal fiction, of stories in a judicial setting that might have been just made up? Or a collection of actual case records which document real-world legal proceedings that had been conducted at a specifiable point in history?

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<sup>1</sup> This chapter evolved from a draft originally written by the author for *Exemplarische Rechtsfälle vom Beginn der Han-Dynastie: Eine kommentierte Übersetzung des Zouyanshu aus Zhangjiashan/Hubei* co-authored with Ulrich Lau (Lau und Lüdke 2012) and for the forthcoming English-language *The Craft and Terminology of Early Chinese Law: A study of the Zouyanshu and the Ernian lüling*.

I will argue that the *Zouyanshu* cases fall into three categories:<sup>2</sup>

- 1) Cases 1-18, which clearly are based on authentic documents, the basic structure of which has been kept intact even if they could have been edited or abbreviated;
- 2) Cases 19 and 20, which are in essence literary productions for which it is nearly impossible to decide to what extent they draw on actual legal and historical material;
- 3) Cases 21 and 22, in which the narration seems, to some extent, to have been arranged in a literary way, but which most probably also present historical material and which, at least in some portions, draw on actual documents.

### **Cases 1-18: authentic legal documents**

In the following discussion it is assumed that cases 1-18 date to Qin and Han, for the reasons discussed below. They must be considered copies of authentic legal documents on the following grounds:

*Zouyanshu* cases 1-18 have, first of all, a clear and explicit purpose within the administration of justice. Cases 1-5 are submitted by a prefecture (*xian* 縣)-level authority to the higher authorities,

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<sup>2</sup> The cases are not numbered on the original bamboo manuscript. The numbers used here to refer to the individual cases within the *Zouyanshu* correspond to the numbers and sequence given in Jiangling Zhangjiashan Hanjian zhengli xiaozu 1993 and 1995 as well as in Peng Hao et al. 2007. No numbers are given in Zhangjiashan ersiqi hao Han mu zhujian zhengli xiaozu 2001 and 2006, but the cases are presented in the same sequence. The sequence given in the above mentioned editions clearly is an attempt to reconstruct the original order of the cases in the *Zouyanshu* manuscript, based on the position of the bamboo slips at the time of excavation, which is depicted by the chart published as appendix 2 in Zhangjiashan ersiqi hao Han mu zhujian zhengli xiaozu 2001, 322. An analysis of this chart, in combination with the list associating the slip numbers assigned at excavation with the slip numbers assigned in the finished transcription (appendix 1 in Zhangjiashan ersiqi hao Han mu zhujian zhengli xiaozu 2001, 309-320) reveals (a) that original sequence of the first five cases in the manuscript most likely was 1-4-2-3-5 (using the numbering given/implied in the above listed editions), (b) that the sequence of cases 6-13 can only be reconstructed with some degree of uncertainty; and (c) that case 20 probably came before case 19, i. e. that the original sequence of the last nine cases most likely was 14-15-16-17-18-20-19-21-22. The sequence of the cases will be discussed in more detail below. However, for the ease of reference, the zhengli xiaozu's numbering of the cases will be used throughout.

each with the request to decide a case in which serious legal (as opposed to factual) doubts have been raised about the culpability of the accused person or persons; specifically, the question posed to the higher authorities is whether certain actions or laws which are brought up by the defendant in order to exonerate himself are indeed valid defences. Cases 6-13 are similar requests for a judicial decision submitted by a commandery (*jun* 郡) authority in cases where it is clearly recognised that the accused is punishable, but where uncertainty exists which of a number of laws or possible punishments is applicable. Cases 14-16 and case 18 are case records probably submitted by the commandery government to the imperial court (*ting* 廷) for approval of what amounts to a proposed judgement (*dang* 當). Case 17 is the record of a judicial review of an earlier conviction which the convict claims to have been wrongly made.

All of these types of legal communication are known from received sources and recently discovered manuscripts. The procedure for submitting doubtful cases to the higher authorities for decision – *yan* 讞 – is detailed in an edict enacted by the Gaozu 高祖 emperor in 200 BC.<sup>3</sup> All the *yan*-cases 1-13 are from the years immediately following 200 BC, implying that the *Zouyanshu yan*-cases were almost certainly directly based on that edict.<sup>4</sup> Other edicts stipulated that sentences of a certain severity for certain groups of people had to be submitted for imperial approval (*qing* 請),<sup>5</sup> the submission of cases 14-16 and 18 probably resulted from such rules.

Cases 16 and 18 might have been also submitted for other reasons: According to *Ernian liling*, the collection of statutes and edicts in force in 186 BC which was found in the same tomb as the

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<sup>3</sup> *Hanshu* 23, 1106; text and translation see below. Since the retrieval of the Qin bamboo slips now held at the Yuelu Academy, it is clear that the Gaozu emperor's edict of 200 BC does not reflect Han procedural innovation, but rather a re-institution and maybe streamlining of procedures that had existed in Qin for submitting doubtful cases to the higher authorities for decision. See Zhu Hanmin and Chen Songchang 2013; Lau and Staack 2016. Previously to the discovery of the Yuelu strips, *yan* 讞 was known from Qin manuscripts in administrative (i. e. non-judicial) contexts in the sense “to submit a request for permission to the higher authority” (e. g. to demolish or make structural alterations to government buildings), see *Qinlü shiba zhong* 121-123=RCL A 64.

<sup>4</sup> For dating issues see below.

<sup>5</sup> *Hanshu* 1B, 63.



*Zouyanshu*, all death sentences had to be submitted to the higher authorities for review,<sup>6</sup> a rule obviously applicable for case 16 if already in force at that time. *Shiji* and *Hanshu* contain examples where the central authorities, after having been informed of alleged illegal conduct by local dignitaries, ordered the commandery authorities to conduct an investigation and report the results<sup>7</sup> – a situation resembling that of case 18. Finally, the right of a convict to “petition for a new finding of facts” (*qi ju* 乞鞫)<sup>8</sup> if he maintained that he was innocent of the offence for which he had been convicted, the procedure documented in case 17, is mentioned in several sources,<sup>9</sup> among them the *Shuihudi* finds,<sup>10</sup> and detailed in the collection of Han law from Zhangjiashan.<sup>11</sup>

The procedure and terminology used, the legal rules applied as well as the form of recording all closely resemble other documents. A few examples shall suffice:

In regard to procedure, the formal interrogation (*xun* 訊) of the accused corresponds to the guidelines contained in the *Shuihudi Fengzhen shi*.<sup>12</sup> The fact that each fully documented case starts with a criminal complaint (*gao* 告) or ex-officio charge (*he* 劾) corresponds to the

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<sup>6</sup> *Ernian lüling* 396-397.

<sup>7</sup> E. g. *Shiji* 118, 3097=*Hanshu* 44, 2156.

<sup>8</sup> *Ju* 鞫 refers to the finding of facts which concluded the formal criminal investigation. The *ju* resulted from the statements of the defendant(s) and witnesses as well as other evidence (*Zouyanshu* 5-6, 14-15, 22-23, 32, 45-46, 64-65, 71-72, 90, 91, 120-121, 155-157). The *ju* was strictly limited to matters of fact. It preceded and was the indispensable requirement for the legal evaluation of the facts, which in turn resulted in the *lun* 論 “judgement” (or, in some cases, in a submission of the case to higher authority). The procedure triggered by *qi ju* 乞鞫 “petitioning for a new finding of facts” thus involved a re-evaluation of all matters of fact. There is no source evidence that *qi ju* could be used to merely contest a conclusion of law if the facts were not under dispute. The closest equivalent to *qi ju* in current US law would be a motion for a new trial, which, if granted, results in a re-examination of the evidence, in contrast to an appeal, which allows contesting conclusions of law, but not of fact. In current procedural law for England and Wales, both findings of fact and law can be subject to appeal, but if appellate proceedings result in a “retrial”, this also generally involves a re-examination of the evidence, resulting in a new finding of facts. See e. g. Chalmers and Leverick 2011.

<sup>9</sup> E. g. commentary to *Shiji* 95, 2664.

<sup>10</sup> *Falü dawen* 115=RCL D 95.

<sup>11</sup> *Ernian lüling* 114-117.

<sup>12</sup> *Fengzhen shi* 2-5=RCL E 2.

stipulation in the *Ernian lüling* that all investigation be based upon such a criminal complaint or ex-officio charge.<sup>13</sup>

The legal rules applied in cases 1-18 do correspond to a high degree to those known from the legal texts found at Shuihudi and Longgang, and most importantly, from the *Ernian lüling*.

The form of recording matches examples from Juyan, Longgang (for the last part of case 17) and the Shuihudi *Fengzhen shi*.

Most of these cases have not only a content that is consistent with actual documents. They also show all the linguistic vestiges of actual official communication. They use, for example, the formal expressions *gan yan* 敢讞<sup>14</sup> “we venture to submit for decision”, *gan yan* 敢言<sup>15</sup> “we venture to submit”, *ye* 謁 “we request”<sup>16</sup> and *qing* 請 “we request approval”.<sup>17</sup> These are polite formulae, used by an inferior agency in addressing its superiors, with a clear place in inter-agency communication routines. Cases 6-13 are, in this respect, an exception as they are lacking similar polite formulae. However, while they must be considered heavily abbreviated records, the full document on which the abbreviation is based is still visible behind them.

Case 18 has an original title which explicitly labels the text following the title as “records” (*bu* 簿), specifically “records concerning the review of a criminal case” (*fu yu bu* 復獄簿).<sup>18</sup>

A number of the cases even contain specific information about the communication channels along which the documents travelled. For example, three cases (no. 1, 2, and 5) include variants of the

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<sup>13</sup> *Ernian lüling* 113.

<sup>14</sup> *Zouyanshu* 1, 6, 8, 15, 17, 23, 28, 33, 36, 47.

<sup>15</sup> *Zouyanshu* 68, 92, 98, 227.

<sup>16</sup> *Zouyanshu* 7, 15, 47, 68, 98, 99, 227.

<sup>17</sup> *Zouyanshu* 98.

<sup>18</sup> *Zouyanshu* 124.

formula *ye bao shu yushi mou fa* 謁報，署獄史某發<sup>19</sup> “we request a reply; [on your reply] affix the notation ‘to be opened by Judicial Secretary X’”.<sup>20</sup> In this way, the sender of the document (a prefecture head or deputy head) in effect indicated to the addressee the return address (i. e. the responsible subordinate prefecture official) to be used for the requested decision. This ensured that the multitude of documents arriving from other government authorities at the prefecture directly reached the responsible department, and within the department the responsible official, rather than piling up in the prefect’s offices. This formula not only completely corresponds to the same type of note found on many of the Liye bamboo slips, which contain actual Qin-period administrative records from Qianling 遷陵 prefecture.<sup>21</sup> Similarly, at the end of case 17 we find the formula *teng shu Yong* 騰書雍<sup>22</sup> “forward a copy of this document to [the prefecture authorities of] Yong”. Other cases contain information about the length of the documents in terms of the number of bamboo slips.<sup>23</sup> All this information would make no sense if these *Zouyanshu* cases were fictional and would not be based on actual documents, possible abbreviations notwithstanding.

Further, cases 1-18 all contain external references to dates, localities or persons that can, to a large extent, be independently verified. Almost all dating information is consistent with independent reconstructions of the Qin and Han calendar.<sup>24</sup> Most of the prefectures (*xian* 縣) and

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<sup>19</sup> *Zouyanshu* 7, 15, 47.

<sup>20</sup> There has been a long-standing debate among scholars about the correct interpretation of this formula in the *Zouyanshu*. However, the *Liye* slips have now provided solid evidence for the solution given above. For detailed arguments and a discussion of the evidence provided by the sources see Lau and Lüdke 2012, 103-105, notes 613 and 614.

<sup>21</sup> Chen Wei et al. 2012, 2.

<sup>22</sup> *Zouyanshu* 123. See Lau and Lüdke 2012, 238 note 1184 for a detailed explanation of the phrase.

<sup>23</sup> *Zouyanshu* 68, 98, 228.

<sup>24</sup> This includes not only reconstructions such as Zhang Peiyu 1997 and Xu Xiqi 1997, but also more recent ones which take into account the latest archaeological discoveries, e. g. Zhang Peiyu 2007, 72; Li Zhonglin 2012, 65; or Xu Mingqiang 2013. For a detailed discussion of dating issues see below.

commanderies (*jun* 郡) mentioned in the *Zouyanshu* are known from other Qin and Han sources.<sup>25</sup>

At least one person mentioned in cases 1-18, can be identified as a high official in the dynastic histories.<sup>26</sup> Even one of the personal names in the *Zouyanshu* can be identified as an official mentioned in the dynastic histories, even though the *Zouyanshu* mostly gives the names of local officials who are not preserved in the received sources.

The formal organisation of these texts provides further evidence as to the character of these texts:

In contrast to cases 19 and 20, the structure of texts 1-18 is the purely sequential one typical for administrative documents: A criminal complaint or ex-officio charge is brought against somebody; the suspect and the witnesses are questioned; the suspect is confronted with inconsistencies and points of law which might establish criminal liability; a finding of fact is made; and either a judgement is passed or the case is submitted to a higher authority for decision or approval. If the case is submitted in this manner, first legal arguments (which often are extremely concise) are made, and then the decision is pronounced. The argument never follows after the decision. This basic structure remains visible even when a highly abbreviated form is used, as in cases 6 to 13. Even though the exterior goal of (most of) the documents is to obtain a decision in a doubtful case, the the content and structure of the documents are still coherent even if the ultimate decision is not recorded, such as in case 2. The absence of a final decision does not make the text itself seem incomplete (even though the reader would be interested in the result):

Case 2 looks more like a document that has not yet been dealt with at the highest level than like an unfinished story. The legal arguments that are made are short on wisdom and strong on legal

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<sup>25</sup> In particular, see the list of place names in the *Hanshu*'s "Dili zhi 地理志" (*Hanshu* 8A, 1523ff.). For an overview see also *Zhongguo lishi dituji*, which has been compiled prior to the publication of the Zhangjiashan material.

<sup>26</sup> A minister of the stables (*taipu* 太僕) called Buhai 不害 is mentioned in a *Zouyanshu* case dating to 197 BC (*Zouyanshu* 26, for the dating see below). This official is to be identified with Gongshang Buhai 公上不害, who was appointed *taipu* in 201 BC and enfeoffed as *Hou* 侯 of Jishao 汲紹侯 in 196 BC by the Gaozu emperor as a reward for his service in the campaign against Chen Xi 陳豨 (*Hanshu* 16, 605; 19B, 747; *Shiji* 18, 690). See Loewe 2000, 123.

positivism. The applicable laws and legal precedents occupy centre stage, not the particular abilities of a judge. The arguments are of an entirely technical nature. If a decision is reached, it is never commented on, as there is no need for it: The proper authority has reached a decision, and that is it. Also, the judges remain anonymous. Where a lower authority needs to identify itself as in the case of submissions, the officials concerned do so;<sup>27</sup> this is also true for the judges in the original trial of case 17<sup>28</sup> who are identified as their judgement comes under scrutiny, and for the reviewers in case 18<sup>29</sup> as they are responsible to the central government and its *yùshǐ dàfū* 御史大夫 “chief prosecutor”<sup>30</sup> who had initiated the review. But this identification is always from below to above: The lower authority’s officials are responsible to the higher authority, but for the lower officials it is enough to know that the higher authority by virtue of being the higher authority has made a decision. The officials who made that decision are not responsible to the lower level ones; therefore, they remain anonymous.<sup>31</sup> Even where the emperor personally has decided, this is mentioned only in indirect terms: the case “was brought to attention” (*yi wen* 以聞).<sup>32</sup> Again, in contrast to cases 19 and 20, not the personal ability of a famed judge is decisive, but a difference in authority. The reason for this is that these cases are based on actual documents of actual cases.

In theory, it would be conceivable that someone with exact knowledge of legal procedures,

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<sup>27</sup> *Zouyanshu* 1, 8, 17, 28, 36, 49, 51, 53, 54, 56, 58, 60, 61, 67-68, 74, 97.

<sup>28</sup> *Zouyanshu* 106, 120.

<sup>29</sup> *Zouyanshu* 124, 126.

<sup>30</sup> The traditional rendering “censor” for this office suggests a Roman censor’s powers to impose sanctions outside of the standard judicial avenues, while the role of the Chinese *yùshǐ dàfū* was, as evidenced in *Zouyanshu* case 18, to enforce the law, especially in regard to the officialdom, by means of standard procedures and punishments.

<sup>31</sup> This also holds for *Zouyanshu* case 3, which notes that the imperial decision was conveyed to the local authorities by the *taipu* 太僕 (“minister of the stables”) [Gongshang] Buhai 公上不害. The *taipu* appears here only as the transmitter of the emperor’s decision, not in his role as participant in the decision-making process. While no other of the *Zouyanshu* cases 1-18 mentions court officials by name, this might have been necessary in this case because the office of *taipu* normally did not play any role in the administration of justice. Explicitly noting that, at the time of the case, he stood in for the *tingwei* 廷尉 might have been required to avoid any doubt on the part of the recipients as to his authority to convey the decision.

<sup>32</sup> *Zouyanshu* 26, 47, 68.

terminology, and documentary format could draw up fictional case records. However, this is unlikely, for several reasons. Not least, the context of the Zhangjiashan find militates against this: The person buried in the tomb almost certainly served as an official in his lifetime, therefore he would have had access to actual legal material, which he would have perused in during his active time. None of the other texts found in the tomb are fictional or can be primarily understood as literature: the *Maishu* 脈書, a medical treatise; the *Suanshushu* 算數書, a mathematical primer; the *Helü* 蓋廬, a treatise on military and political strategy in the form of a dialogue between king Helü 闔閭 of Wu 吳 (r. 514 – 496 BC) and his advisor Wu Zixu 伍子胥; and the *Yinshu* 引書, a manual of therapeutic exercises and dietary practices. All of these texts have a practical application, none is literature. The *Ernian lüling* clearly is collection of laws in force at the time of the burial. It would be very surprising if the legal text found in immediate vicinity to the *Ernian lüling* would be of an entirely different character, i. e. not also a pragmatic text with an immediate application in the administration of law. Finally, there is simply no other example of elaborate “legal fiction” (or any other fiction which would disguise itself as documentary or pragmatic texts) until much later than Qin and Han.<sup>33</sup>

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<sup>33</sup> Barbieri-Low and Yates (2016, 98ff.) argue for a widely diverging view as to the origin and nature of the *Zouyanshu*: They contend that the *Zouyanshu*

“was compiled from the bottom up, or more accurately, across the bottom by a network of legal scribes from different places who circulated, edited, and compiled legal cases that they came across in their own jurisdiction and in government-issued compilations”,

and that the *Zouyanshu*

“was not just a practical legal case-book, as most have argued, but also the earliest extant example of ‘court-case literature’ (*gōng’àn xiǎoshuō* 公案小說), more familiar from Yuan, Ming, and Qing times. The authors (and the intended audience) of this literature were the highly literate Judiciary Scribes, who helped manage court cases. Through this edited compilation, they could be entertained in life and death by the triumphs and follies of the men of their status and occupation while educating themselves through legal precedents.” (Barbieri-Low and Yates 2016, 99).

Barbieri-Low and Yates claim that these conclusions can be derived from a “detailed textual criticism of the book itself” (98), in particular from “certain structural and stylistic anomalies” of the cases (p. 99). For example, case 22 of the *Zouyanshu* for them is a “curious hybrid”, which “in places [...] reads like a dry legal transcript, but in others [...] presents an exciting narrative, full of suspense and folly, that culminates in a satisfying resolution” (p. 100). Case 21, in the authors’ view, “had been edited and embellished, and a

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new section appended at some point in time, so that it had the dramatic effect and rhetorical flourish necessary to make Shen [i. e. the judicial official making the successful argument in case 21; M. L.] a scribal hero like Julü [the successful investigator recommended for promotion in case 22; M. L.]”

While this is a steep and intriguing hypothesis, the available evidence does not offer sufficient support for its two main elements, i. e. (a) that the *Zouyanshu* was compiled by a network of legal scribes from different places (rather than at the imperial court); (b) that a main, or maybe the primary, function of the *Zouyanshu* was to serve as literary entertainment (rather than as technical texts in the administration of justice). As for (a), to explain the presence in the *Zouyanshu* of cases from all regions of the empire and from both late Warring States Qin and early Han, such an “across-bottom” network of local scribes would have to surmount enormous geographical distances and would have had to remain intact throughout a period characterized by civil war and tumultuous change. Barbieri-Low and Yates do not offer any evidence for this, or indeed for any type of horizontal communication. In contrast, we have very rich evidence in both normative texts such as the *Ernian liling* and in actual archival records such as those from Liye of a vast and constant stream of vertical communication from local governments to the imperial court and vice versa. Also, *Shiji* and *Hanshu* not only make it clear that Qin and Han, from the beginning of the dynasty, kept vast central government archives, and that the Han had access to the central Qin archives after Xiao He secured these following the Han army’s entry to Xianyang; the histories also recount that later in Han, enormous numbers of precedents had accumulated in the archives, which were to be taken into account for the dispensation of justice; it is more than likely, that this process already started in Qin and early Han. No such evidence is available for local archives. The Liye find makes clear that local governments kept records of the documents concerning them, but there is no evidence for records concerning matters in other jurisdictions or in earlier periods. The presence of both Qin and Han cases in the *Zouyanshu* is much easier to explain if the text was compiled by officials who had access to the central archives at the imperial court, rather than by local officials for whom access to the geographically and historically wide range of cases is difficult to explain. As for (b), the earliest *gongan xiaoshuo* are much later; there is no evidence from the time in between the *Zouyanshu* and the earliest *gongan xiaoshuo* literature that would allow us to understand the *Zouyanshu* as an early precursor. Also, there is no other example of early Chinese literature which would strive to resemble official documents. The literary features and supposed “structural and stylistic anomalies” of some of the cases can be better explained as attempts to increase their argumentative efficiency and didactic value, rather than as an effort to entertain. For example, the particular stylistic features of case 22 are best explained with the stated purpose of the document, i. e. to present an efficient recommendation for promotion. *Wei yu deng zhuang* 142-170 shows that such recommendation letters followed a well-established standard format and thus shared the same stylistic features. The features of case 21, but also of cases 19 and 20 are best understood as enhancing their didactic value concerning efficient investigation and legal argumentation. The rhetorical features of the “masters”-literature of the Warring States period (to which there are clear allusions in cases 19 and 20) would seem a much apter point of reference than the later *gongan xiaoshuo* literature. Barbieri-Low and Yates point out that officials, in particular judicial officials, appear in a relatively high number of *Zouyanshu* cases. However, rather than seeing this as an effort on part of “scribes” to entertain themselves with the successes and follies of their (literary) peers, this is much better explained as an effort on the part of the central government to encourage compliance among local officials by selecting cases for the collection which present both role models of exemplary conduct and warnings against official misconduct.

Probably the most original argument made by Barbieri-Low and Yates is that some of the personal names in the *Zouyanshu* “appear ironic or curiously apt, much like the humorous or punning names seen in later Chinese drama”, as “copyists or editors tampered with these names for literary effect, for the delight of their like-minded audience” (Barbieri-Low and Yates 2016, 103). If this could be demonstrated, it would indeed require a different accentuation of our view of the *Zouyanshu*. However, the selection of which names are

considered punning seems highly arbitrary and subjective. Why should the eight names highlighted by the authors be considered puns, the many others not? The authors themselves admit that even of these eight names, some “may be merely coincidental” (Barbieri-Low and Yates 2016, 103). There is no clear principle visible according to which the names are considered puns: Some names are said to contain a literal description of the deeds of the offenders, e. g. in case 3 Lan 闌 is understood as “border jumper”, while others are said to ironically imply the exact opposite of their literal meaning, e. g. Xin 信 “trustworthy” for the “murderous Magistrate” in case 16; others still are considered phonetic puns based on homophony, e. g. the woman’s name Nan 南 is seen as “an obvious pun on the word *nán* 男 (male)” because the woman is dressed up as a man in case 3 (p. 103). All of these interpretations seem highly subjective and to rely more on the authors’ impressions rather than a rigorous semantic analysis. Even more importantly, this argument would need to be backed up by a much broader investigation of Qin and Han given names, both in received and manuscript sources. Without this, it is impossible to understand which names were considered within the range of “normal”, and which would have been unusual enough to be understood as puns. This starts with the question for which names the character used to write them can be understood as indicating their literal meaning, as opposed to names for which their character is chosen purely on phonetic grounds, e. g. to phonetically transcribe a foreign language or local dialect name. For example, the authors (plausibly) point out that in case 1 concerning the “non-Chinese tribesman Wuyou 毋憂 [...] it is more than likely that in the case record, his words were spoken in his own language and were translated into Chinese” (Barbieri-Low 2016, 33). But if this is so, then Wuyou 毋憂 most likely also is simply a phonetic transcription of his native name, rather than a pun chosen to mock him, as implied by the literal translation “Without troubles” provided by the authors for the name (Barbieri-Low and Yates 2016, 1171). A quick survey of some of the names in the *Zouyanshu* understood as “punning” hints at the very thin ground on which the authors’ argument stands: (a) The supposedly ironic name Xin 信 is a very common Qin and Han given name. Loewe 2000 lists at least 45 people with the given name *xin* 信 (or a given name containing *xin*), including eight members of the Liu family as well as Zhou Xin 周信, a conscript soldier with Liu Bang who rose to governor 郡守 in a similar way as the Xin of *Zouyanshu* case 16 might have risen to prefect, as suggested by the reference to his military experience, and also Han Xin 韓信, a pivotal figure who through his military skills paved the way of Liu Bang’s victory – nobody has suggested so far that Han Xin’s given name should be understood not as his real name, but as an ironic pun alluding to his eventual participation in a rebellion against Liu Bang. Similarly, Wu 武 is such a common Han male given name that it is highly doubtful it would have been recognised as a pun (see the numerous examples in Loewe 2000 as well as in the manuscript sources, e. g. 少内武 in *Liye* 8-164+8-1475, 庫武 in *Liye* 8-26+8-752, 8-149+8-489, 8-173). The name of the accused in case 4, Jie 解, is translated by the authors as “‘to dismember’ or ‘coming apart’” (103) and understood as a “cruel pun” on the fact that he had been subjected to mutilating punishment in the past and in the case is accused of another offence punishable by mutilation. However, Jie is a common Qin and Han given name (at least 10 examples in Loewe 2000; in manuscript sources see e. g. 燧長宋解 “watch tower head Song Jie” in *Juyan* 143.9, 蓬里公乘蘇解 “Su Jie, rank *gongsheng*, from Peng village” in *Juyan* 218.31, and again 蓬里蘇解年廿四 “Su Jie, from Peng village, age 24 years” in *Juyan* 334.34); the interpretation as a pun also runs into semantic problems: when translating *jie* 解 as “to dismember”, the authors might think of contexts such as the famous story in the *Zhuangzi* (3, 55) of the cook artfully preparing a piece of cattle, but here *jie* means “to release the meat from the joints and bones”, a sense not associated with mutilating punishments, in the context of which the word is never used (in contrast to e. g. *zhan* 斬). As for Nan 南, Loewe 2000 lists Li Nan 李南, a woman, and two women with the given name Nan but no recorded family name; in manuscript sources, it is found as a female name in *Liye* 8-145v (E V) (because of the female name *bi* 婢 in the same list of five workers), in *Juyan* 29.2 and *Juyan xinjian*



All this does not mean that the *Zouyanshu* contains the originals of the actual documents of which it is comprised. It would be more than surprising if the originals were kept by the obviously relatively low-ranking official buried in Zhangjiashan in the south of the empire, far removed from the capital. It is almost certain that the *Zouyanshu* found in Zhangjiashan contains only copies of the original documents (which possibly had undergone some kind of editing and/or abbreviation), while the originals probably were kept in the archives of the imperial court. This is also supported by the relatively consistent handwriting, which does not differ from case to case.<sup>34</sup>

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E.P.T.65:383; considering the relative overall scarcity of extant female names, this suggests that Nan actually was a very common name for women and hardly would have been recognisable as a pun. Other alleged puns also run into semantic problems: The authors treat *nei* 內 (case 12) as a synonym of *liu* “to hold back” and give its meaning as “to hold inside”, but fail to provide any evidence that it was actually used in that sense (which is different from the usual “to enter, to put inside”). Tui 厓 (case 18) is explained by the authors as “collapsed or ill-omened house”, but this word does not seem to be attested outside the *Shuowen jiezi* and much later dictionaries; a Qin/Han usage of the graph for a word with this meaning would need to be documented. Gouli 穀禮 (case 22) is explained by the authors as “He Who Considers the Rites as Childish” (p. 104), but again, no documentation is provided for this interpretation of the name. 穀 seems only to be found in the *Shuowen jiezi* (and not other Han and pre-Han literature), and there is glossed as *ru* 乳 (“breast; to breast feed; to give birth), which in turn is explained as “to breast feed” by Qing commentator Duan Yucai. “To feed/nourishes the rites” would be quite different from “to consider the rites as childish”. The second element of the name does appear as a given name in Qin and Han (Loewe 2000 lists at least six persons: Ding Li 丁禮, Zheng Li 鄭禮, and four 劉禮). The evidence for puns is insufficient for all of these names. The latter two names, in particular, do not provide any evidence for a supposed “Legalist leaning” (p. 103) of the *Zouyanshu*.

<sup>34</sup> Daniel Morgan (2015), based on a detailed comparison of characteristic features of certain characters, tentatively identifies two hands in the *Zouyanshu* manuscript from Zhangjiashan, which he calls “Scripteur A” and “Scripteur C”. Scripteur C, according to Morgan, appears concentrated in slips 75-84 (first half of case 16; most of the second half, slips 85-91, Morgan assigns to Scripteur A), 99-120 (case 17), 162-196 (cases 19-21), and mixed with Scripteur A in slips 217-228 (second half of case 22) (Morgan 2015, 26). According to Morgan’s analysis, while Scripteur A cannot be identified in any of the other Zhangjiashan manuscripts, Scripteur C also wrote parts of the *Suanshushu* manuscript and in one section of that manuscript can be identified with segments that pose mathematical exercise questions, which are then answered in the immediately following segment by a different hand (“Scripteur E”) (Morgan 2015, 23). This back-and-forth leads Morgan to conclude that Scripteur C acts in a kind of “leader/teacher” role, and that the interaction between the two hands in the *Suanshushu* manuscript “reflects a learning environment, wherein scripteur C is leaving assignments for scripteur E to fill out, then coming back and correcting or filling in what is wrong”. This would also provide “strong positive evidence [...] of the status of the text as a ‘real text’, not a *mingqi*.” (Morgan 2015, 25). The implications of this for the *Zouyanshu* manuscript are not fully clear, particularly in regard to the production of the manuscript and its pre-burial relation to the tomb owner. However, if this analysis holds true, it would support the conclusion that both the *Suanshushu* and the *Zouyanshu* were integral texts (rather than a random collection of mathematical problems and legal

It is also possible and indeed likely that cases 1-18 were in some way or other edited for incorporation in the *Zouyanshu*. This is particularly evident for cases 6-13, which only contain the finding of facts, the submission formula in its shortest form (*yi zui* 疑罪 “we are in doubt as to whether [the accused] is liable to punishment”), and the imperial court’s decision. It is certain that for each of these cases, a detailed record similar to those of the other cases existed, and that the *Zouyanshu* therefore only contains highly abbreviated versions of the full record. It is unclear whether in these cases only the finding of facts was submitted to the imperial court, maybe because the finding of fact was considered sufficient to decide the specific legal question (mostly simple questions of subsumption, in contrast to cases 1-5 which required detailed attention to the accused’s defence), or whether, maybe more likely, full records had been submitted originally, which then had been abbreviated for inclusion in the *Zouyanshu*, presumably because the abbreviated form was considered sufficient for the *Zouyanshu*’s purposes. However, to the extent that cases 1-18 were edited or abbreviated, the editing left the basic structure of the original judicial documents intact, which corresponds to that of other archaeological evidence. The fact that a number of case records contain segments that exclusively deal with the handling of the original documents, such as notes about the person to be addressed in the reply or the original number of slips, provides strong evidence that the *Zouyanshu* versions are close to the original documents.

***Cases 19-20: literary productions with unknown base in legal and historical fact***

Cases 19 and 20 are different from cases 1-18 in a number of respects: Both claim to record a legal case, but they have more the character of a narrative than of a documentary record. In terms of

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cases) which were written and copied in a pragmatic context during the tomb-owner’s lifetime (and not after his death in a funerary workshop specifically for the purpose of burial, as some have suspected) and which had a specific this-worldly pragmatic use.

structure, both texts are not organised around a procedural sequence, but in a way aimed at rhetorically enhancing the literary effectiveness of a narrative. Both texts first quote legal rules which are characterised as having been valid “in the past” (*yishi* 異時);<sup>35</sup> then, a concise account of the case is given, introduced by *jin* 今 “in the present case”;<sup>36</sup> after this the name of the judge is stated, in both cases an outstanding person of Chunqiu times. Next comes a dialogue between the judge and his sovereign: The judge reports his decision to the sovereign, the sovereign reacts surprised and somewhat disapproving. This is followed, at length, by the sophisticated reasoning of the judge for his decision. In the end, the sovereign can only utter his approval. This is a climactic structure: By first telling the decision in only terse words and immediately noting the disapproval of the sovereign, suspense is built up and then kept when the judge starts his reply by somewhat elaborately telling about his investigation or making general statements about the superior man. His decisive argument only follows in the end; the approving exclamation uttered by the sovereign serves to underline the wisdom of the judge. What these texts are really interested in is the latter’s wise decision. By first telling the judgement and only then the reasons, the sequential order of the documentary records is reversed for the sake of literary effectiveness.

While the documents on which cases 1-18 are based have a defined function within the administration of law – submitting a doubtful case for decision or for approval by the higher authorities –, no such function can be discerned in cases 19 and 20. Cases 1-18 exhibit no distance between the composition of the text and its content; to the contrary, the use of polite formulae of address and the notes about the handling of the documents disallows any thought about such a distance. Cases 19 and 20 on the other hand use the expression *yishi* 異時 “in the past” (literally:

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<sup>35</sup> *Zouyanshu* 162, 174-175. For the meaning of *yi shi* 異時 as “past” (contrasting with *jin* 今) see *Shiji* 6, 254 and *Shiji* 30, 1430 (with commentary by Sima Zhen).

<sup>36</sup> *Zouyanshu* 162, 175. *Jin* 今 here does not contrast with the *yi shi* introducing the case, but is used to delimit the specific case from the general rule quoted in the preceding sentence. See *Zouyanshu* 183 for a similar usage.

“in different times”), thereby making explicit the great temporal distance between the composition of the text and the events narrated in them. In cases 1-18, the actual event is the submission of the document to the higher authorities and the latter’s decision which is handed down in return; in relation to this, the offence and its prosecution are only sub-plots.

Cases 19 and 20 also do not exhibit the density of external and historical references present in cases 1-18. In cases 19 and 20, both judges can be identified as historical persons.<sup>37</sup> But these are not officials whose name survived by chance in a work of history (like that of the *taipu* 太僕 in case 3), but personages who at least since the Zhanguo period had been well-known members of the Confucian pantheon, and might have been chosen exactly for this fact. Beyond this, little more can be said than that case 19 is set in Chunqiu-period Wei 衛,<sup>38</sup> case 20 in Chunqiu-period Lu 魯.<sup>39</sup> Due to the absence of any calendrical information, dating is possible only to the extent that the lifetime of the judges can be determined from other sources.

It is also impossible to determine to what extent the legal information in cases 19 and 20 is based on historical fact. Like case 19, the *Hanfeizi* cites the stipulation that carelessness in preparing food for a ruler is punished with the death penalty,<sup>40</sup> which might be taken as evidence for the actual existence of such a rule. However, the *Hanfeizi* stories mentioning this are so similar to *Zouyanshu* case 19 that they either are the source for the *Zouyanshu* story, or derive from a common source. In either case, they cannot be used to prove the historicity of the stipulation. The *Zuozhuan* contains the notorious story in which Duke Ling 靈 of Jin 晉 has his cook killed for serving him a bear paw which is not completely cooked; however, this punishment is clearly not based on a law and is given in the *Zuozhuan* as an example of (extralegal) behaviour unbecoming

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<sup>37</sup> Details see below under the discussion of dating.

<sup>38</sup> *Zouyanshu* 168.

<sup>39</sup> *Zouyanshu* 174.

<sup>40</sup> *Hanfeizi* 31, 189.

to a ruler (*bu jun* 不君),<sup>41</sup> so that the *Zuozhuan* also cannot be counted as evidence. As for *Zouyanshu* case 20, even though the threshold amounts that trigger a more severe punishment differ, the stipulations about theft quoted in case 20 as valid in Chunqiu period Lu<sup>42</sup> are in their structure so similar to the Qin and Han stipulations<sup>43</sup> that it is impossible to decide whether we are presented with an actual early precursor of the Qin and Han rules, or if Qin and Han law is projected back into the Chunqiu period. None of the two terms for hard labour convicts used in case 20, *baitu* 白徒 and *chang* 倡,<sup>44</sup> are known from any other sources in this meaning. The term *baitu* is only found in the meaning “recruits who have not yet undergone regular military training”,<sup>45</sup> while *chang* is found in Han and pre-Han sources in the sense “performer of song, music, theatre; professional entertainer”.<sup>46</sup> In case 20, the term *xianguan shi* 縣官事 “government business; official business” is used in a supposed law of Chunqiu period Lu.<sup>47</sup> However, even though some units of territorial administration were already called *xian* 縣 in the Chunqiu period,<sup>48</sup> a systematic division of a whole state into *xian*, which is presupposed by the general stipulation quoted in case 20, was first undertaken in Qin in the fourth century BC. Most significantly, the introduction of the term *xianguan* 縣官 in this sense can be dated precisely to the year 221 BC, the year of the unification of the empire under Qin Shihuang,<sup>49</sup> based on documents found in *Liye*. These include a list of terms and designations to be replaced by new ones, including the instruction to substitute the new term *xianguan* 縣官 “government” for both the old

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<sup>41</sup> *Zuozhuan* Xuan 2,288,7.

<sup>42</sup> *Zouyanshu* 174.

<sup>43</sup> See *Ernian lüling* 55-56 for the punishment of theft in Han; the equivalent Qin rules can be deduced from *Longgang* 273, 275 and *Falü dawen* 1-2, 33-36, 38-39, 42, 49=RCL 1, 27, 28, 30, 33, 34.

<sup>44</sup> *Zouyanshu* 174-175.

<sup>45</sup> *Guanzi* 5, 15; 6, 31; 84, 415-416; *Lüshi Chunqiu* 8, 81; *Hanshu* 51, 2357. See also Li Xueqin 1995, 41.

<sup>46</sup> *Guanzi* 20, 120; 66, 339; *Shiji* 43, 1833; 125, 3195. See also Li Xueqin 1995, 41.

<sup>47</sup> *Zouyanshu* 175.

<sup>48</sup> *Zuozhuan* Cheng 6,359,13; *Zuozhuan* Ai 2,797,5.

<sup>49</sup> See page 85 below.

*wang shi* 王室 “royal house” and *gong shi* 公室 “ruling house”.<sup>50</sup> Other items on the same list are known from the *Shiji* account of how King Zheng, in the 26<sup>th</sup> year of his rule, marked his success in unifying the realm by introducing new terms and designations, most importantly *huangdi* 皇帝 for *wang* 王.<sup>51</sup> The composition of case 20 in its present form therefore can be placed with certainty after 221 BC. Most likely, the same is true for case 19.<sup>52</sup> In view of this, it is unlikely that this stipulation is authentic.

The themes discussed in cases 19 and 20 are not unique to the *Zouyanshu*. The *Hanfeizi* tells no less than two variants of a story that down to their very details closely resemble the *Zouyanshu*'s narrative about the cook suspected of tolerating a hair in his ruler's dish.<sup>53</sup> In both versions the story is set in the state of Jin 晉, and no judge is necessary to clear up the charge. In the *Hanfeizi*, the cook himself sets forth very much the same arguments as the judge in the *Zouyanshu* and with this succeeds to convince his ruler that not he, the cook, but somebody jealous of him must have placed the hair in order to harm him. In the *Hanfeizi*, the stories serve to illustrate the *cui bono* principle: To find the truth about a matter, a wise sovereign asks to whose benefit it is. While the exact story told in case 20 is not known from other sources, the point that not the scholar's clothes (*rufu* 儒服) make the true superior man (*junzi* 君子) but his knowledge and his deeds is made in the *Mozi*,<sup>54</sup> in the *Zhuangzi*,<sup>55</sup> and in the *Liji*.<sup>56</sup> The *Zhuangzi* passage, in particular, criticises the Confucian scholars for being all clothes but no substance: *Zhuangzi* convinces Duke Ai 哀 of Lu 魯 to announce the death penalty for people wearing Confucian clothes without having the

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<sup>50</sup> *Liye* 8-461r. See also Lau and Staack 2016, 153 note 752.

<sup>51</sup> *Shiji* 6, 236. Substitutions listed both in *Liye* 8-461r and the *Shiji* account include *zhi* for *ming*, *zhao* for *ling*, as well as Taishang Huang 太上皇 for Zhuang Xiang Wang 莊襄王.

<sup>52</sup> See page 85ff. below.

<sup>53</sup> *Hanfeizi* 31, 189.

<sup>54</sup> *Mozi* 48, 273.

<sup>55</sup> *Zhuangzi* 21, 132.

<sup>56</sup> *Liji* 41, 1668c.

appropriate knowledge,<sup>57</sup> with the result that after five days one single man was left wearing scholars' clothes (*rufu*) in the entire state of Lu. One of the central motifs in *Zouyanshu* case 20 – treating it as an offence to not live up to the standards implied by wearing a scholar's attire – thus turns out to be of old provenance. Significantly, both the *Zhuangzi* and *Zouyanshu* variants of this theme are set in Lu.

All of this indicates that the basic plot of cases 19 and 20 were taken from earlier material that had been in circulation for quite some time. The *Zouyanshu* introduces into these earlier narratives famous judges from the Chunqiu period and re-arranges the material so that the stories serve a new purpose: They demonstrate crucial qualities of a judicial official, namely to look beyond the surface of the evidence as it first presents itself, and beyond the surface of the letter of the law towards the principles that govern it.

For all of these reasons, cases 19 and 20 do not present documents, but narratives that have been arranged with literary means and that serve to make a didactic point. Neither the specific content nor legal background of these narratives can be affirmed as historically accurate. Nevertheless, they are interesting precisely for their didactic purpose, which is more explicit than that of the documentary records and therefore gives important hints for the evaluation of the *Zouyanshu* as a whole.

### **Cases 21-22: authentic material, presented for effectiveness in making a point**

The remaining two *Zouyanshu* cases 21 and 22 are slightly more difficult to characterise. Case 22 differs from cases 1-18 in that it not only records one particular judicial proceeding, consisting of an interrogation initiated by a criminal complaint (*gao* 告),<sup>58</sup> a finding of fact (*ju* 鞫)<sup>59</sup> and the

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<sup>57</sup> *wu ci dao er wei ci fu zhe, qi zui si* 無此道而為此服者，其罪死。

<sup>58</sup> *Zouyanshu* 197.

concluding judgement (*lun* 論).<sup>60</sup> In between this formal record, case 22 interjects a lengthy section which describes the investigation and all steps taken by the officials responsible for it in great detail, involving a change of the lead investigator. After the judgement, a further section praises the investigator's skill and achievement in solving the case. Such information is uncharacteristic and contained in no other *Zouyanshu* case. The description of the investigation has no bearing at all on any legal matters. It is arranged in a fashion to underline the almost insurmountable problems in solving the case that threatened to frustrate the investigation. This serves, first, to build up suspense, and then, when the case has been solved, to reinforce the praise that is finally heaped on the investigator and the deft and thorough measures he has taken. The material therefore seems to have been arranged with the final praise-section in mind.

However, on balance case 22 still is very close to the first category and has to be considered an actual document. In effect, case 22 is a request for a promotion of the lead investigator that was submitted to the royal Qin court.<sup>61</sup> The effort of detailing the difficulty of the investigation has the purpose of stressing the abilities of the investigator, which in turn makes the request for his promotion more convincing. While there is no comparable document within the *Zouyanshu* or the received texts, we know that requests by officials to the court to promote outstanding colleagues were routine.<sup>62</sup>

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<sup>59</sup> *Zouyanshu* 224. Both finding of fact and judgement, though not explicitly introduced by *ju* and *lun*, are clearly recognisable as such.

<sup>60</sup> *Zouyanshu* 224.

<sup>61</sup> This purpose is made explicit with the words *ye yi bu zushi* 謁以補卒史 “we request to fill with him the ranks of the secretaries-in-chief” (*Zouyanshu* 228).

<sup>62</sup> The Qin manuscripts held by the Yuelu academy contain two cases which are similar requests for promotion and closely resemble in structure, language, and contents *Zouyanshu* case 22. See *Wei yu deng zhuang* 142-170 and Lau and Staack 2016, 218-246. While the first of these two cases is very fragmentary, the second one (*Wei yu deng zhuang* 150-170) is dated to the end of 242 BC, that is, almost the exact time as *Zouyanshu* case 22 from a Han tomb, which is dated to 241 BC. Like *Zouyanshu* case 22 features a violent robbery, attempts to mislead the investigators by planting false evidence (garments typical for a convict, in this case), drag-net type searches among the general population, a suspect who raises suspicion by a change of attire (here, a new, instead of a missing, knife and scabbard), thorough interrogation and confrontation



The nature of case 22 as an actual document is further confirmed by the fact that, like cases 1-18, it can be exactly localised and dated.<sup>63</sup> The legal information contained in it, in particular the punishment for the theft, exactly corresponds to other sources.<sup>64</sup> As a document, it uses polite formulae of address and is clearly integrated in a hierarchy of authorities.

To conclude, case 22 is an actual document that diverges from the model of cases 1-18 insofar as it is a request for promotion and not concerned with legal problems as such. Because it does not focus on the actual legal decision, but on the steps taken to solve the case in order to emphasize the competency of the official suggested for promotion, it is not bound to follow the format used to document judicial proceedings for subsequent review, but follows a different format used for requests to promote judicial investigators.

More difficult is case 21, which, in some respects, looks similar to cases 19 and 20: The applicable laws are, extensively, quoted in the beginning.<sup>65</sup> The bulk of the case is made up of a discussion between a secretary to the minister of trials (*ting[wei]shi* 廷[尉]史) called Shen 申 and his superior,<sup>66</sup> a discussion which in its structure resembles the discussion between the judges in cases 19 and 20 and their rulers: A judgement made by the minister of trials and his staff is surprisingly rejected by secretary Shen, who then enters into a dialogue with his superior and

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followed by an admission of guilt and the handing down of the appropriate sentence, as well as a request for promotion of the investigators which highlights their skill and cleverness by emphasising the difficulty of the case and the danger posed by the criminal. The fact that these two closely resembling cases are from two different text collections in two different tombs from different periods suggests that such model requests for promotion were widely available, and that not only the structure, but also plot details of the underlying criminal cases were copied and adapted to ensure the greatest possible chances for the request of promotion to be granted.

<sup>63</sup> The request originates with the deputy prefect of Xianyang (*Xianyang cheng* 咸陽丞), i. e. with the prefecture-level administration responsible for the Qin capital (*Zouyanshu* 227). On dating issues see below.

<sup>64</sup> Compare *Zouyanshu* 212 (the offender's *jue* 爵-rank) and 224 (the offence and its punishment) with *Ernian lüling* 55 (punishment of theft) and 83 (privileges for holders of *jue* 爵-rank).

<sup>65</sup> *Zouyanshu* 180-183.

<sup>66</sup> *Zouyanshu* 189-196.

colleagues, which is conducted in a question-and-answer format. The case utilises a climactic structure, which ends in the approval of Shen's opinion and reversal of the earlier judgement.<sup>67</sup>

In other respects, case 21 is closer to the first category: It discusses a doubtful case which has been submitted by a lower-level authority. As the case is written from the perspective of the higher authority, it does not contain the respectful formulae that distinguish cases 1-18. However, with the instruction to the authorities of Du to pass a specific judgement, it is also part of the workings of a multi-tiered government.

While the case contains no calendrical information, Du 杜 prefecture<sup>68</sup> can be clearly identified. The officials of case 21, though referred to by name, are not illustrious people known from other sources who need to lend their fame to the decision. However, even though minister of justice (*tingwei*) Gou is not found in *Shiji* and *Hanshu* (which anyway give no complete listing of Qin officials), there is no reason to assume that he did not hold that office sometime in Qin. The legal stipulations and the procedure used are consistent with other sources. Also, the quoting of the applicable legal rules before the legal discussion is not unique to cases 19 and 20; rather, this seems to have been a general principle in legal records as – in a less elaborate form – a similar structure is found in cases 14, 15, 16, and 18.<sup>69</sup>

Therefore, it is most likely that case 21 is based on an actual decision in an actual case, but that the discussion about this decision is not recounted in the way of an accurate protocol; rather, for the inclusion in the *Zouyanshu* the case was re-arranged and edited to render it most effective as an example of legal argument and reasoning.

## Precedent book with an agenda – the *Zouyanshu* as a text

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<sup>67</sup> *Zouyanshu* 196.

<sup>68</sup> *Zouyanshu* 183, 188.

<sup>69</sup> *Zouyanshu* 65-67, 72-73, 93-95, 157-159.

## collection

### ***Compiled and promulgated by the imperial court – Evidence from the situation of the find and the text's name***

These observations about the individual *Zouyanshu* cases do not allow an immediate judgement about the character of the *Zouyanshu* as a whole, which needs to be discussed separately. Some first conclusions can be drawn from the fact that, on the one hand, the *Zouyanshu* was found in the tomb of an obviously not too high-ranking official in Southern China and that, on the other hand, it contains cases from different localities. This is a further indication that it must have been compiled at the imperial court, as only there an archive collecting cases from all over the empire is to be expected. The place of its discovery far from the capital suggests that it must have been distributed throughout the empire and was available to local officials.

This, in turn, implies that the cases were not merely collected for archival purposes. The *Zouyanshu* is visibly different from the late 4<sup>th</sup> century BC case records found in a Zhangou period Chu tomb in Baoshan,<sup>70</sup> cases in which the tomb owner was involved as judicial official and which may not have been completely concluded at the time of his death. They are also different from the fragments of case records found in Juyan, which seem to have involved local authorities there in some way or other but otherwise have not much in common with each other.

But first of all, the *Zouyanshu*, as a collection of texts, is defined by its title: *Shu* 書 is a generic term for written matter, including administrative and legal documents administrative documents of any kind. *Shu* is further specified by *zou* 奏 and *yan* 讞. The term *yan* is known since pre-dynastic Qin as a term for the submitting of a matter to a higher authority for decision. In Qin,

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<sup>70</sup> Giele 1998, item III.05; the texts have been published in Hubei sheng Jingsha tielu kaogudui 1991; for a discussion and transcription of the texts, see Chen Wei 1996; for a more recent annotated transcription see Chen Wei et al. 2009, 1-137.

such a submission was mandatory in certain cases, some of them judicial (such as the placing of anonymous letters<sup>71</sup> or the killing or shaving of one's successor son<sup>72</sup>), some of them general administrative (such as the changing or demolition of government buildings<sup>73</sup>). In early Han, *yan* acquires the more specialised meaning “to submit (a doubtful legal case) for decision (to the higher authorities)”; from then on, this became the exclusive meaning of *yan*. This change in meaning can be traced back to the following edict of the Gaozu emperor, which dates to 200 BC:

獄之疑者，吏或不敢決，有罪者久而不論，無罪者久繫不決。

自今以來，縣道官獄疑者，各讞所屬二千石官，二千石官以其罪名當報之。

所不能決者，皆移廷尉，廷尉亦當報之。

廷尉所不能決，謹具為奏，傳所當比律令以聞。<sup>74</sup>

When doubts exist in a criminal case, the responsible officials often do not dare to make a decision. As a consequence, on those who are liable to punishment no judgement is passed for a long time, while those who are not liable to punishment are held in detention for a long time without a decision being made.

From now on, criminal cases at the offices of prefectures and marshes in which doubts exist are each to be submitted for decision to the two-thousand bushel official to which the prefecture or marsh is subordinated. The two-thousand bushel official in turn applies the law<sup>75</sup> and returns a reply in the case, stating the applicable sentence.<sup>76</sup>

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<sup>71</sup> *Falü dawen* 53-54=RCL D 53.

<sup>72</sup> *Falü dawen* 72=RCL D 58.

<sup>73</sup> *Qinlü shiba zhong* 121-122=RCL A 64.

<sup>74</sup> *Hanshu* 23, 1106.

<sup>75</sup> *dang* 當 “(to consider legally apposite, to consider lawful:) to apply the law” refers here to an assessment of the legal issues at stake that is binding for the prefecture-level authorities; a *dang* is to be distinguished from the actual judgement (*lun* 論) which still had to be passed by the prefecture-level authorities. *Dang* here and below is not translated as an auxiliary verb “to have to [do something]” because otherwise the legal contribution of the higher-level authorities would not be specified, and because the procedural steps delineated (*yan* 讞, *dang* 當, *bao* 報, *yi* 議, *ju wei zou* 具為奏, *fu* 傳) are already authoritative by virtue of being included in the edict and therefore do not require an additional auxiliary verb. This interpretation of

Those cases which the [two-thousand bushel] official is unable to decide are all to be transferred to the minister of trials. The minister of trials on his part applies the law and returns a reply in the case.

For those cases which the minister of trial is unable to decide, he carefully compiles a memorial for the emperor, attaches all applicable precedents, statutes and edicts and brings it to [the emperor's] attention.<sup>77</sup>

The two-thousand bushel office mentioned was that of the commandery governor (*junshou* 郡守) in the standard chain of territorial administration (the respective offices for the capital region and in *wanguo* 王國 “kingdom-fiefs” had different names).<sup>78</sup> The edict makes clear that no independent investigations are to be conducted by the two-thousand bushel offices or the minister of trials, thus leaving matters of fact entirely to the prefectures and marches, while higher authorities had to decide on the doubtful matters of law. The *Zouyanshu* also provides ample evidence for this division of labour.

*Zou*, finally, means “to memorialise to the emperor”. On the background of his particular sources, Giele suggests that *zou* specifically refers to memorials submitted by high-ranking capital officials with direct access to the palace grounds, in contrast to *zhang* 章-memorials (translated by Giele as “petitions”) which were submitted by provincial and low-ranking officials as well as commoners.<sup>79</sup> This corresponds with the Gaozu emperor’s edict of 200 BC which stipulates that

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*dang* is also supported by Yan Shigu, who glosses *dang* as *chuduan* 處斷 “to deliberate and decide” (commentary of Yan Shigu to *Hanshu* 23, 1106).

<sup>76</sup> *Zui ming* 罪名, literally “the name of the punishment”, i. e. the applicable sentence.

<sup>77</sup> See also Lau and Lüdke 2012, 8f.

<sup>78</sup> While the exact titles varied throughout the Han, *xiang* 相 (Hucker no. 2303) was a common title for the centrally appointed 2000-bushel administrator of a fiefdom, while *jingzhao yin* 京兆尹 (Hucker no. 1192) was the most widely used term for the 2000 bushel office of governor of the capital center, i. e. the commandery-level administrator of the metropolitan region.

<sup>79</sup> Giele 2001, 119.

as a last resort, the minister of trials, was to memorialise (*wei zou*) the doubtful case to the emperor, who was the final judicial and legal authority. On the other hand, the *Zouyanshu* cases suggest that *zou* was also used by commandery heads.<sup>80</sup> However, this question can be left open in our context: It seems clear that *zou* addressed the emperor directly, and it needs to be assumed that any submission by a commandery on a judicial matter went first through the agency of the minister of trials (*tingwei*) before reaching the emperor.

The title “*Zouyanshu*” therefore refers to documents concerning doubtful cases which originally had been submitted for decision by prefectures or marches to commandery-level governments and had been passed on to the minister of trials, who finally memorialised the cases to the emperor.

The question remains to what extent the title’s claim about the case collection does actually hold true.

*shu*: It has already been argued that cases 1-18 and 22 in fact are actual documents; case 21 reproduces an actual judicial discussion, even if the exact content might have been rearranged.

*yan*: In the *Zouyanshu*, in fact only cases 1-13 and 21 were submitted as doubtful cases within the framework of the *yan*-procedure. Cases 14-16 and most likely also 17 and 18 were submitted to the imperial court (the royal court in case 17), although not as doubtful cases, but because approval of the judgement was required. Case 22, essentially a request for a promotion, and of course cases 19 and 20 within the *Zouyanshu* have the greatest distance to the *yan*-procedure in its early Han form.

*zou*: *Zou* implies the involvement of the ruler. In the *Zouyanshu*, cases 14,<sup>81</sup> 22<sup>82</sup> and most

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<sup>80</sup> *Zouyanshu* 68, 98 (reading *zou* for *feng* 奉), 154, 228.

<sup>81</sup> *Zouyanshu* 68.

<sup>82</sup> *Zouyanshu* 228.

probably case 16<sup>83</sup> use *zou* at the end of the submission and thereby indicate that the document was intended for the emperor. Cases 3 and 5 explicitly note that a decision was only made after the case had been brought to the emperor's attention (*yi wen* 以聞, see the edict of 200 BC).<sup>84</sup> In cases 19 and 20, the judicial decision is approved by the Chunqiu ruler, and case 20 even uses *zou* when the decision is first submitted to him;<sup>85</sup> even though these two cases stand out in many respects, they fulfil the requirement of a judicial decision made or approved by the ruler as the highest legal authority. Case 18 notes that on the same matter a separate memorial had been submitted (*bie zou* 別奏),<sup>86</sup> thereby indicating the personal involvement of the emperor, so that it is highly likely that the whole document was reviewed by him. Cases 17 and 21 note the involvement of the minister of trials,<sup>87</sup> while cases 1, 4, and 6-13 introduce the final decision with *ting bao* 廷報 “reply of the (imperial) court”;<sup>88</sup> this leaves open the involvement of the emperor, but at least locates the final

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<sup>83</sup> In *Zouyanshu* 98, *feng* 奉 should be emendated to *zou* 奏, which in the palaeographic script is almost identical; compare *zou* in almost identical passages in *Zouyanshu* 68 and 228.

<sup>84</sup> *Zouyanshu* 26, 47, 68. *Yi wen* 以聞, when used without an explicit object, is the standard phrase that is used when an official presents a subject directly to the ruler. Compare the following passages which carry enough context to exclude any ambiguity: *Shiji* 20, 464-465; 28, 1392; 69, 2266-2267; 101, 2746; 118, 3093-3094; *Hanshu* 44, 2152-2153. See also the edict of 200 BC on the *yan*-procedure quoted above.

<sup>85</sup> *Zouyanshu* 176.

<sup>86</sup> *Zouyanshu* 154.

<sup>87</sup> *Zouyanshu* 121, 184.

<sup>88</sup> *Zouyanshu* 7, 34, 50, 52, 53, 54-55, 57, 59, 60, 62. In these instances, *ting* clearly refers to the imperial court, not to the offices of a prefecture or commandery as is the case in *Zouyanshu* 100 and possibly *Zouyanshu* 56 and sometimes in other sources (*RCL* A 4, A 21, A 64, D 79, A 105, E 20, E21). When *ting* refers to the offices of a prefecture, this is usually either explicitly stated (*xian ting* 縣廷 “prefecture offices”) or clear from the context, see *Yong ting* 雍廷 “the offices of Yong prefecture” in *Zouyanshu* 100. The one instance where *ting* is interpreted as referring to the offices of the commandery governor clearly is an exceptional one:

「辭者辭廷。」• 今郡守為廷不為？為也。( *Falü dawen* 95=*RCL* D 79)

“Those who make a statement make the statement at the court.” – Given [an appropriate matter], are [the offices of] the commandery governor considered a “court” or not? – They are.

The expression *jin* 今 makes clear that in this rule, *ting* would ordinarily have been understood to refer to something else than the offices of the commandery governor (probably to the prefectural offices); otherwise, the *Falü dawen* question would not have been necessary in the first place. *Jin* here does not mean “now” in a temporal sense, but shifts the focus from the standard case to cases where making a statement at the commandery offices might be considered appropriate. Apart from such special cases, *ting* in the *Shuihudi*

decision at the imperial court. Only cases 2 and 15 do not contain a reference to the involvement of the emperor or of the imperial court. However, even though in these latter groups of cases (reference only to *ting* or *tingwei*, or none at all), the involvement of the emperor is not made explicit, it is very likely that they also were approved by the emperor himself. This is indicated by the distribution of the case collection throughout the Han empire, suggested by its discovery in relatively remote Jiangling. Imperial approval would have given the cases the value and legitimisation for empire-wide promulgation and at the same time a normative status similar to that of the statutes and edicts which derived their validity from their enactment by the sitting emperor and his predecessors.

If the *Zouyanshu* originated at the imperial court and was compiled as an authoritative document for empire-wide promulgation, it is most likely that the compilation work itself was the duty of the minister of trials (*tingwei* 廷尉) and his agency. The minister of trials was the highest court official overseeing judicial matters and in this function provided the link between the judicial bureaucracy and the emperor as the final authority in legal matters. The Gaozu emperor's edict instituting the *yan*-procedure, discussed above, demonstrates that all cases submitted to the court and finally to the emperor passed through his agency, and that the minister of trials must have had access to, and probably kept, an archive of precedents and other relevant legal material. After the compilation, it most likely also was the task of the minister of trials and his agency to organise the empire-wide distribution among legal officials of a case collection like the *Zouyanshu* in the emperor's name.

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legal texts routinely refers to the royal Qin court, in particular in the expression *ting xing shi* 廷行事, which refers to a binding interpretation of the statutes which could only be issued by the royal court. More to the point, *ting bao* in the *Zouyanshu* cases introduces a decision in cases which the prefecture or commandery was unable to decide; this decision certainly cannot be made by the prefecture or commandery. Also, at the same place in the procedural model (see below) where cases 1 and 4 use *ting bao*, cases 3 and 5 convey a decision by the emperor, which means that it is extremely unlikely that *ting bao* refers to anything else than the imperial court.



***Precedent book and guide on legal procedure and interpretation –  
Evidence derived from comparison with other texts***

In order to understand the *Zouyanshu*'s function, it is instructive to compare it with other texts that, while clearly different from the *Zouyanshu*, overlap in certain respects.

**The *Fengzhen shi* 封診式 from Shuihudi**

The *Fengzhen shi* 封診式, one of the texts found in Shuihudi and dating to the third century BC, is a guide to correct procedure in criminal cases. It contains instructions on how to conduct an interrogation and in which situations to resort to judicial torture; but in its main part, it is made up of model records on procedure and investigation in different types of legal cases. In some instances, explicit instructions on procedure are interspersed within the model records. The following is a typical example:

覆 敢告某縣主：男子某辭曰：「士五（伍），居某縣某里，去亡。」可定名事里，所坐論云可（何），可（何）罪赦，或覆問毋（無）有，幾籍亡，亡及逋事各幾可（何）日，遣識者，當騰騰，皆為報，敢告主。<sup>89</sup>

[How to conduct inter-agency inquiries by way of] review – [Model report:] I venture to report to the head of prefecture X: Male X made the following statement: “I am a member of the rank and file, I am from village X of prefecture X, I have absconded.” –

[For such a report] you should determine:

- his name, status and village [of registration],
- for which [offences] he has been held liable or which judgement has been passed against him,
- which punishments have been amnestied,
- and if there is any matter on which inquiries by way of review [are called for] or not, -

[in this case particularly] for how long the absconding is registered, and  
- for how many and on which days he did either abscond and/or evade service  
obligations.

Dispatch a knowledgeable person, [for all information of] which by law a copy is to be  
forwarded a copy is to be forwarded;<sup>90</sup> on all of this a reply is to be made. – [Conclude  
this report with the formula:] I venture to report to the official in charge.

As this example shows, the *Fengzhen shi* deals with criminal procedure, the different officials  
involved in it, and the way it is to be recorded. As the *Zouyanshu* cases mostly document full  
proceedings, they also can be understood as model records intended for instruction on correct  
criminal procedure. In fact, the *Fengzhen shi* reflects the same basic judicial procedures that are  
applied in the cases of the *Zouyanshu*. The *Fengzhen shi* also is an important source for  
understanding the *Zouyanshu*: It explains, for example, the procedure of *jie* 詰 “to confront (an  
accused or a witness)”,<sup>91</sup> and it provides an example<sup>92</sup> on how the procedural requirement of *bu  
jian zhe bi an zhi xiao shang* 捕奸者必案之校上 “when arresting a person for fornication, one  
has, without exception, to lay hold on him/her on the place of copulation”, which is mentioned in  
the *Zouyanshu*,<sup>93</sup> could be fulfilled. Of the *Zouyanshu*, case 22 is the closest to the *Fengzhen shi*,

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<sup>89</sup> *Fengzhen shi* 13-14=RCL E 5.

<sup>90</sup> For *teng* 騰 see Lau and Lüdke 2012, 238f. note 1184.

<sup>91</sup> *Fengzhen shi* 2-5=RCL E 2; compare *jie* 詰 and *jie* 解 in *Zouyanshu passim*.

<sup>92</sup> *Fengzhen shi* 95=RCL E 25.

<sup>93</sup> *Zouyanshu* 182-183. There has been much discussion about the understanding of this phrase, which in  
various variations is also found *Fengzhen shi* 95=RCL E 25 and *Wei yu deng zhuang* 193-206=Lau and  
Staack 2016. For a detailed overview of the arguments see Lau and Lüdke 2012, 290. The basic import of  
the phrase is clear enough from *Zouyanshu* case 21: Fornicators had to be arrested on the spot (and not, e. g.,  
only the next morning), otherwise prosecution was not permissible. Contrary to Lau and Lüdke 2016, *an* 案  
is here understood as writing *an* 按 “to grasp with the hand and press down, to lay hold on” (*Shiji* 107,  
2850=*Hanshu* 52, 2387), while *jiao* 校, based on context and semantic-syntactic considerations, is here  
understood as an elsewhere unattested noun “lair of lovers; place of copulation” which is etymologically  
related to *jiao* 交 in the sense “to copulate”; the *mu* 木 signifier might suggest a bedstead, or planks, or even  
twigs used for this purpose (Barbieri-Low and Yates 2016, 1388 note 16 independently make a similar

because it documents in detail not only the interrogation of the suspect, but all steps taken during the investigation of a robbery. This echoes the detailed model records of investigations found in the *Fengzhen shi*.

On the other hand, the *Fengzhen shi* is clearly different from the *Zouyanshu* in two important respects: (1) It is only concerned with procedure, but not with the legal issues at stake; this is evident from the fact that it does not contain any judicial decisions. In contrast, difficult legal issues are the main focus of the *Zouyanshu*, where the documentation of a full trial mainly serves to highlight the legal issues at stake. (2) Unlike the *Zouyanshu*, the *Fengzhen shi* is not concerned with individual cases. To the extent that actual case records formed its basis, these were generalised to a degree that no individual information has been left. The example quoted above is not concerned with a particular case of absconding, but with the correct steps to be taken with any such case. While in the *Zouyanshu*, the occasional use of cyclical characters instead of some personal names serves to anonymise and to draw attention to the legal issues, in the *Fengzhen shi* the use of cyclical characters for personal names and of *mou* 某 for all other individual information (such as place names) serves to generalise; in effect, this gives the individual sections the character of a form that needs to be filled in by replacing the cyclical characters and *mou* with the actual information from the case.

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suggestion). This suggestion has the advantage of preserving the locative sense of *shang* 上, which can naturally follow after a noun describing a place, but would be difficult to explain after a (nominalised) verb of action, if *jiao* 校 here were to be understood as writing *jiao* 交 “to copulate” (in the latter case, *jiao zhong* 交中 or *jiao zhi shi* 交之時 “during copulation” would be expected instead). This interpretation also would explain why the rule does not simply use the appropriate legal term *jian* 奸 “to fornicate” instead of *jiao* 交 “to copulate” which usually is reserved to animals (e. g. *Lüshi chunqiu* 11, 104): To apprehend someone “on the place of copulation” (*jiao shang* 校上) is a slightly wider standard than “during the act of fornication” (*jiao zhong* 交中 or *jian zhong* 奸中). The latter, stricter standard for the arrest of offenders might have made conviction for *jian* almost impossible.

## The *Falü dawen* 法律答問 from Shuihudi

The *Falü dawen* 法律答問, also found in Shuihudi and dating to the third century BC, is a guide to the correct interpretation of the statutes in a question-and-answer format. It contains definitions for difficult or dated legal terms, but the majority of the questions address problems concerning the correct application of the statutes. In some respects the *Falü dawen* is close to the *Fengzhen shi*, in others to the *Zouyanshu*.

The most important common point with the *Zouyanshu* is the fact the *Falü dawen* deals with legal issues, namely the correct interpretation of the statutes which forms the basis for correct judicial decisions. Unlike the *Fengzhen shi*, it is not concerned with procedure at all. The majority of the *Falü dawen* questions deal with situations that defy easy subsumption under the existing rules, either because it is not clear if a given rule is applicable at all, or because it is not clear which rule is applicable. The first type of problem – is a rule applicable or not – corresponds to legal problems dealt with in *Zouyanshu* cases 1-5 and 21, the second type of problem – which rule is applicable – corresponds to the legal issues discussed in the *Zouyanshu* cases 6-13.

Two pairs of examples will demonstrate this:

「內（納）奸，贖耐。」今內（納）人，人未蝕奸而得，可（何）論？除。<sup>94</sup>

“Supplying a person for fornication is punished by paying for redemption from shaving.” – If now a person is supplied [for the purpose of fornication], but is caught before he or she consummates the fornication, what judgement is to be passed? – [The supplier] is exempted from punishment.

This *Falü dawen* example can be compared with case 3 of the *Zouyanshu*, which concerns the following stipulation (not fully quoted in the *Zouyanshu*):

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<sup>94</sup> *Falü dawen* 65=RCL D 52.

〔從諸侯〕來誘〔…〕者磔。<sup>95</sup>

For coming [from the territory of the feudal lords] in order to lure somebody [to their territory], one is executed by dismemberment.

The *Zouyanshu* case itself is best summed up in the initial statement of the accused:

闌曰：「南齊國族田氏，徙處長安，闌送行。取（娶）為妻，與偕歸臨菑（淄）。未18出關得。」<sup>96</sup>

Lan: “Nan is of the lineage of Tian, the [former] ruling house of [the feudal state] Qi. She has been resettled to Chang’an, to where I accompanied her on her travel. But then I took her as my wife and wanted to return home to Linzi together with her. We were caught before we had crossed the border control station.”

The *Falü dawen* example concerns the legal rule that supplying a person for fornication with another person is punishable. The question posed is whether supplying a person for fornication is also punishable in a case where the fornication is not actually committed, in other words, whether it is sufficient for punishment that the action of supplying has been committed with the illegal purpose of fornication in mind even if this purpose has not been achieved. The *Zouyanshu* case concerns the same type of problem, although the question is the opposite one: Does taking a woman back to the feudal territory of Qi qualify as the offence “coming from the feudal lords in order to lure somebody to their territory” even if

(a) the accused did come to the territory of Han proper not for the purpose to lure the woman away, but for the opposite purpose of accompanying her to her resettlement place, and

(b) the accused tried to take the woman back to Qi not for the purpose of supplying her to a feudal lord’s cause, but for the personal reasons of living with his wife?

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<sup>95</sup> *Ernian lüling* 3; first three characters missing, but emended according to *Zouyanshu* 21, 22, 25.

<sup>96</sup> *Zouyanshu* 18-19; see Lau and Lüdke 2012, 117ff.

(In case 3, the emperor eventually decides that such a situation does not qualify as the offence).<sup>97</sup>

In the *Falü dawen* case, intent as the fault element (*mens rea*) of the offense is present, but not all conduct elements (*actus rei*); in the *Zouyanshu* case, all conduct elements of the offense are given, but not intent as the fault element. Both cases thus deal with the same kind of legal issue, namely the relationship between the subject's mental state and his positive actions, and the implied question whether punishment for a certain offence is called for if one of the two elements is missing.

A second pair of examples demonstrates that both texts also deal with a second type of legal problem, namely what offence is applicable to a given action:

盜封齋夫可（何）論？廷行事以偽寫印。<sup>98</sup>

What judgement is passed for illegally sealing [a document] as the overseer [of an office]? – It is the practice of the court to treat this as “forging a seal”.

Compare this *Falü dawen* section with the following *Zouyanshu* case:

••蜀守灑（讞）：

佐啟主徒，令史冰私使城旦環為家作。告啟，啟詐（詐）簿（簿）曰：治官府。疑罪。

•廷報：啟為偽書也。<sup>99</sup>

•• As Governor of Shu, I submit for decision:

When Assistant Qi was in charge of convict labourers, Secretary-in-charge Bing for private purposes employed the ‘earth pounder’ convict Huan to do work for his

household. When he told this to Qi, Qi made a fraudulent entry in the [convict] register,

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<sup>97</sup> *Zouyanshu* 26-27. This is implicit in the fact that the accused is not given the death penalty mandatory for the offence of “coming from the feudal lords in order to lure somebody to their territory”.

<sup>98</sup> *Falü dawen* 56=RCL D 45.

<sup>99</sup> *Zouyanshu* 54-55. See Lau and Lüdke 2012, 161ff.

which read: “(Huan) repairs a government building”.

We are in doubt about the punishment.

- Reply from the imperial court: [The statutory offence committed by] Qi is ‘making false documents’.

Both passages concern a fraudulent action that is perceived as clearly illegal, but to which none of the existing rules is clearly applicable, as in neither case, actual forgery is involved. In one case, a genuine (as opposed to a forged) seal is used. In the other, a genuine official makes a genuine (though fraudulent) entry in a genuine register. The problem is solved in each case by analogous application of the law: In the *Falü dawen* passage, the offence of “forging a seal” is applied because the effects of forging a seal and of misusing a seal are the same. In the *Zouyanshu* case, the offence of “making a forged document” is applied because the effects of forging a document and of intentionally making a wrong entry in a genuine document are the same.

The comparison of the *Zouyanshu* with the *Falü dawen* and *Fengzhen shi* suggests that important functions of the *Zouyanshu* included to serve as a guide for deciding certain difficult legal issues and as a model for correct procedure and documentation.

Despite these similarities, the *Zouyanshu*, documenting individual cases unlike both Shuihudi texts, clearly belongs to a different type of legal literature, which also implies that its functions go beyond those of the *Falü dawen* and *Fengzhen shi*. The *Zouyanshu* is the earliest known example of a collection of precedents. The character of these cases as precedents results from the fact that they have been decided or approved by the highest judicial authorities, which invests them with a normative character.

**Precedents mentioned in other sources: *Ting xing shi* 廷行事 and *bi* 比**

As in most legal systems, precedents played an important role in early China. The *Falü dawen*

frequently mentions *ting xing shi* 廷行事, probably best translated “practice of the court”,<sup>100</sup> when an interpretation of a law is given that does not directly follow from its wording or even runs counter to it. This implies precedents, as an interpretation not deducible from the law must have been occasioned by a particular case; however, from the limited evidence it is not clear whether *ting xing shi* specifically refers to a set of documented and archived precedents which were used in subsequent decisions, or more abstractly to a long-standing practice to settle a particular type of cases in a certain way which might not necessarily be reflected in specific archived case records.

One of the earliest direct references to precedents is found in the Gaozu emperor’s edict re-establishing the *yan* 讞-procedure. The edict stipulates that the minister for trials (*tingwei* 廷尉), before submitting a case to the emperor for decision, has to attach “all applicable precedents, statutes and edicts” (*fu suo dang bi li ling yi wen* 傳所當比律令以聞).<sup>101</sup> The word used here is

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<sup>100</sup> The translation “practice of the court” is suggested by Hulsewé in *RCL* D 30, 33, 45, and 126-130. In *RCL* D 47 and D 48, Hulsewé translates “precedent of the court”, in *RCL* D 53 “precedents of the court”. In *RCL* D 30, Hulsewé translates “practice of the court”, but in note 2 explains *xing shi* as “precedent, which suggests that to him, the two translations were equivalent. Both are interpretative, not literal translations; the difference in meaning between them is small, as a practice of deciding in a certain way sets precedents, and precedents reflect a decision practice. As the secondary opinions quoted in note 2 to *RCL* D 30 and in Lau and Lüdke 2012, 27, are not pertinent to the specific legal context of the Qin administration of justice, we have to rely on syntactic and semantic analysis: The decision for “precedent” or “practice” depends on how *xing* is understood. If it is an adjunct modifying *shi* “the court’s [already] conducted official affairs”, then the main focus is on *shi* “affairs already conducted by the court”, and these can be understood as constituting precedents. If *xing* is a (nominalised) verb with *shi* as its object “the court’s conducting of official affairs, the way in which the court conducts official affairs”, then the focus is on *xing* “the court’s conducting”, i. e. the court’s practice. In any case, *ting* must refer to the royal court (otherwise, its practice/precedents would not have the normative character implied by the *Fengzhen shi*), and *shi* should be understood as a reference to official state affairs in general, including, but not limited to judicial cases, in the same way as it is after 221 BC used in the technical term *xianguan shi* 縣官事 “government affairs” (otherwise, *zhi yu* 治獄 “trying criminal cases/criminal cases already tried” or another expression specific to judicial contexts would have been used). If this is correct, the translation “practice of the court” would have the advantage of better suggesting the general administrative meaning, as opposed to “precedents of the court”, which tend to be associated with legal precedents in the narrow sense (although one certainly can speak of administrative precedents, too).

<sup>101</sup> *Hanshu* 23, 1106. For a full quote and translation of the edict see above.



*bi* 比, literally “comparable [case]”, which is the proper early Chinese word for “legal precedent”. The instruction to the minister of trials to attach precedents as a matter of routine implies that an archive of precedents was kept at the court already in 200 BC, and the fact that actual cases from as early as 246 BC are included in the *Zouyanshu* indicates that such an archive had been kept for at least fifty years and was carried over from Qin into the Han.

In Han, precedents grew in number and importance. The *Hanshu* reports that at the end of the Wudi emperor’s reign, there were 13,472 precedents for deciding capital cases alone (*sizui jueshi bi* 死罪決事比);<sup>102</sup> the *Weishu*, with the character 萬 missing, gives the number of 3472 precedents for capital cases, and 26272 overall for the same period.<sup>103</sup> Noting the proliferation of precedents, the *Hanshu* writes:

是以郡國承用者駁，或罪同而論異·姦吏· . . 所欲活則傳生議，所欲陷則予死比·<sup>104</sup>

“For this reason, the commanderies’ and domains’ application [of the many laws and precedents] was contradictory. In some cases, though the liability to punishment was the same, the judgement was different; treacherous officials... in the cases of those whom they wished to live attached [a precedent containing] a reasoning for sparing their life, and to the cases of those whom they wished to trap (in the death penalty) they consigned a precedent for [the application of] the death penalty.

While this remark is interesting for its criticism of the potential for arbitrariness and uneven standards in an overly complicated legal system, it is even more important for the following two implications: (a) Precedents, rather than simple exegesis of the statutes, were decisive for many cases; (b) collections of precedents must have been widely distributed, as they were obviously available to at least to judicial officials in every commandery or equivalent unit of territorial administration.

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<sup>102</sup> *Hanshu* 23, 1101.

<sup>103</sup> *Weishu* 111, 2872..

<sup>104</sup> *Hanshu* 23, 1101.

**Dong Zhongshu's 董仲舒 *Chunqiu jueyu* 春秋決獄: A collection of precedents reflecting (or promoting?) the “Confucianization of the law”?**

The earliest case collection associated with a specific name is Dong Zhongshu's 董仲舒 *Chunqiu jueyu* 春秋決獄.<sup>105</sup> At the same time, due to its association with the *Chunqiu* tradition, this is the only legal work mentioned in the *Hanshu*'s “Yiwen zhi” 藝文志, where it is given as the *Gongyang Dong Zhongshu zhi yu* 公羊董仲舒治獄 in 16 *pian* 篇.<sup>106</sup> The *Houhanshu* quotes a memorial by Ying Shao 應劭 as giving the following report about the origin of the case collection: Dong Zhongshu, after having resigned from office under the pressures of age and illness, was still called on by Zhang Tang 張湯, then minister of trials, for his opinion when legal disputes at the court had arisen; as a result, Dong Zhongshu compiled the *Chunqiu jueyu* which contained 232 cases.<sup>107</sup>

If this account is to be believed, the context of its compilation would suggest that the *Chunqiu jueyu* was based on actual cases which, maybe, were decided by the court according to Dong Zhongshu's advice and thus had the force of precedents. However, the few extant cases surviving in later compilations and attributed to the *Chunqiu jueyu* do not contain any personal names, place names or at least the authorities involved. Some of these cases also sound hypothetical: It seems, for example, unlikely that a father accidentally hit by his son who came to his rescue in a fight would request from the authorities that his son would be punished with death for this.<sup>108</sup> For these reasons, it is difficult to decide to what extent Dong Zhongshu's work, if the surviving cases indeed can be attributed to it, can be considered a collection of actual precedents, or rather of

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<sup>105</sup> Information about this work and extant cases attributed to it are compiled in Cheng Shude 1963, 163-165 and Shen Jiaben 1985, 1770-1779.

<sup>106</sup> *Hanshu* 30, 1714..

<sup>107</sup> *Houhanshu* 48, 1612.

<sup>108</sup> This is assumed in the case quoted in Taiping Yulan 640 (quoted in Cheng Shude 1963, 164), as *ou fu* 毆父 “beating one's father” was only punishable by death if the father reported his child for *bu xiao* 不孝 “unfilial conduct”, see *Ernian liling* 35.

hypothetical cases devised to demonstrate certain points. Instructive for the evaluation of the *Zouyanshu* is the assumption that this case collection had a specific agenda: Its title indicates that the work, for deciding legal cases, intended to employ *Chunqiu* thinking, which earlier had not been associated with the administration of law. It is commonly assumed that this means that the *Chunqiu jueyu* advocates a radical departure from earlier Han legal practice, a Confucian turn that gives precedence to people's intentions over positive facts. In support of this view, a statement found in the *Yantie lun* is often quoted:

春秋之治獄，論心定罪，志善而違於法者免，志惡而合於法者誅。<sup>109</sup>

When trying criminal cases according to the *Chunqiu*, a judgement about [the accused's] mind is made in order to decide about his punishability: When his intentions were good, he is relieved [of punishment] even if [his actions] contravened the law, when his intentions were bad, he is punished even if his actions agreed with the law.

However, a careful analysis of the extant *Chunqiu jueyu* cases and other relevant sources would show that the *Chunqiu jueyu*, while having a specific agenda, not so much marks a radical “Confucian turn” in legal theory, in particular in view of the fact that in Qin and early Han the intentions of an accused are already taken into account (as the *Faliu dawen* and *Zouyanshu* examples quoted above show). Rather, the *Chunqiu* became attractive as an intellectual framework that allowed to discuss old questions that so far often had been decided on a case-to-case basis in a seemingly more stringent, methodological reflected and intellectually convincing way. While this hypothesis would need to be validated by a detailed study, an example will demonstrate its plausibility:

甲有子乙以乞丙，乙後長大，而丙所成育。甲因酒色謂乙曰：汝是吾子。乙怒杖甲二十。甲以乙本是其子，不勝其忿，自告縣官。仲舒斷之曰：甲生乙，不能長

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<sup>109</sup> *Yantie lun* 55, 57.

育，以乞丙，於義已絕矣。雖杖甲，不應坐。<sup>110</sup>

A has a son<sup>111</sup> B which he<sup>112</sup> gave to C; afterwards, B grew up, being raised by C. While drunk,<sup>113</sup> A told B: “You are my son”. B got angry and dealt A twenty blows with a stick.

B originally being his son, A was unable to overcome his anger [about the incident] and in person lodged a criminal complaint against [B] with the government authorities.

[Dong] Zhongshu decided in the following way: A gave life<sup>114</sup> to B, but was not able to raise [the child] and therefore gave [the child] to C, so that [B’s] rightful duties [toward A] had already ceased to exist.<sup>115</sup> Therefore, although [B] beat A with a stick, [B] should not be held [criminally] liable.

This case is not about intent or intentions (as could be argued for only two of the six extant cases attributed to the *Chunqiu jueyu*); it does, in particular, not dwell on the question whether the son assumed that A was indeed his parent. Rather, the case focuses on the duties within family relationships. Dong Zhongshu argues that by giving up the child, not only the relationship between child and parent, but also their duties towards each other have ended. Both the argument and the resulting decision correspond to case 21 of the *Zouyanshu*, where the laws about unfilial

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<sup>110</sup> Tongdian 通典 69, cited according to Shen Jiaben 1985, 1770 and Cheng Shude 1963, 164.

<sup>111</sup> When referring to children in general, *zi* 子 is used for both sons and daughters in technical legal (e. g. *Ernian lüling* 358) as well as in non-technical language; male children in general thus need to be distinguished by the term *nan(zi)* 男〔子〕, female children in general by the term *nü(zi)* 女〔子〕. However, when referring to one particular child, *nü* 女 would be expected in the case of a daughter, so that “son” is the adequate translation of *zi* in this passage. See *Shiji* 10, 427 and 18, 3095 for examples of these different usages.

<sup>112</sup> Strictly speaking, the gender of A (and also that of C) is not indicated in the text. In particular, *sheng* 生, used below in the text with A as subject, can not only take a woman (“give birth to”), but also a man as subject, see for example *Houhanshu* 48, 1607.

<sup>113</sup> *yin jiuse* 因酒色. *Jiuse* seems to be used in the meaning “state of drunkenness” only in post-Han sources (*Sanguozhi* 64, 1429), while the more general meaning “wine and women; licentiousness” is earlier (*Hanshu* 82, 3376; 98, 4015). This might indicate that the specific wording of the passage is a later paraphrase of the case on which Dong Zhongshu gave his opinion.

<sup>114</sup> *sheng* 生. See footnote above.

<sup>115</sup> *yu yi yi jue yi* 於義已絕矣, literally “in regard to rightful duties [A] had already been cut off [from B]”.

conduct are found inapplicable in the case of woman who engages in fornication besides the coffin of her deceased husband: The relationship between a husband and wife requires that the wife treats her husband with the highest respect, but the death of the husband terminates not only the relationship, but also the wife's legal duty to respectful conduct, in the same way as a child cannot be held accountable on a charge of *bu xiao* 不孝 committed against a deceased parent. The crucial methodological difference between the *Zouyanshu* case and the Dong Zhongshu case is that in the former, the principle that showing disrespect to one's father after his death would not result in criminal liability is stated and agreed on, but not substantiated. In the Dong Zhongshu case, the concept of *yi* 義 "righteousness, righteous duties", which is grounded, among others, in the *Chunqiu* tradition, is introduced and used to substantiate the decision. This constitutes an attempt to find a universal concept which reaches beyond the immediate legal rules, a concept with a claim to universal validity, in order to justify a decision in a case for which straight subsumption does not seem to work and therefore interpretation is required, as the applicable legal rules are silent about the issue at hand and cannot provide guidance.

The approach in *Zouyanshu* case 21 is to identify a potential interpretative principle independently from explicit legal or other norms, test its validity by applying it to different situations, starting with the most straightforward, non-controversial situations and gradually establishing its applicability in more difficult ones, thereby convincing the audience of judicial officials that this principle should be consistently applied. The consensus about the validity of the principle is not presumed from the outset, but gradually arrived at. The legitimation of the principle is sought not in an external ethical framework, grounded in non-legal texts, but in the ultimate consensus of the judicial officials about the applicability of the principle to the most basic situations, and in a step-by-step demonstration that the more controversial situations, in their core, correspond to the most basic ones. In contrast, in the *Chunqiu jueyu* case, the decision is legitimised by reference to an ethical principle, *yi* 義, grounded in texts which derive their claim

to validity from the perspicacity of the sages to whom they are linked, similar to the way in which the statutes derive their claim to legitimacy from the the current, but even more important from the former rulers who enacted them.

In terms of actual legal content, a case heralded as emblematic for the “Confucianization of the law” arrives at the exact same conclusions as one from Qin which supposedly stands at the exact opposite ideological end. This suggests that the crucial change was not one of legal substance. Rather, for legal specialists, trained to decide cases based on norms found outside the case at hand, i. e. in the statutes and edicts, it must have been attractive to have at their disposition an even more fundamental layer of norms beyond the legal rules, which could provide a basis for reproducible decisions in those cases where the legal rules failed to provide clear guidance, either because they did not seem to address the specific situation at hand, or because they seemed mutually contradictory.

### **Other named precedent collections**

In addition to Dong Zhongshu’s *Chunqiu jueyu*, the received literature mentions a number of other Han named case collections, which are even closer to the *Zouyanshu* in that they are not so much associated with a particular scholar, but directly with the court as highest judicial authority; their origin also lies not so much in an intellectual tradition, but in exigencies of the administration of justice. Most important among them are the *Tingwei jueshi* 廷尉決事 of unknown origin, but probably from Eastern Han, to which four extant legal cases are attributed,<sup>116</sup> as well as the *Cisong bi* 辭訟比 in seven *juan* 卷 and the *Jueshi dumu* 決事都目 in eight *juan* 卷. The latter two were submitted to the emperor by Bao Yu 鮑昱 (10?-82 AD) and acquired the force of law after imperial approval.<sup>117</sup> According to the *Dongguan Han ji*, their agenda was to simplify

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<sup>116</sup> Information and cases compiled in Cheng Shude 1963, 33-34 and Shen Jiaben 1985, 1779.

<sup>117</sup> *Houhanshu* 46, 1548-1549.

the complicated legal system and to impose a unified interpretation of the law in order to guarantee legal certainty and a speedy resolution of law suits.<sup>118</sup> Three extant cases are attributed to the *Cisong bi*, which is said to have been compiled by Bao Yu's aide Chen Chong 陳寵.<sup>119</sup>

### ***The Zouyanshu's specific agenda – Evidence derived from internal analysis***

The comparison of the *Zouyanshu* with the *Shuihudi* texts has shown that one of its functions must have been to serve as a guideline for procedure and for the solution of tricky legal issues. In addition, its cases, by virtue of having been decided by the imperial court or the emperor himself, had the authority of precedents, which played an important role in the legal system. However, the fact that the *Zouyanshu* seems highly selective, including cases from all over the empire and both from Qin and Han, and in particular the addition of different material alongside the *yan* 讞-cases proper, including stories (cases 19 and 20) which clearly want to make a point, suggests that the *Zouyanshu*, like some of the later case collections, had an agenda that went beyond its purposes as precedent collection and interpretative/procedural guide.

Therefore, the question has to be asked according to which criteria exactly those cases that are included in the *Zouyanshu* were selected. In other words, which points did the court, as the presumed compiler of the *Zouyanshu*, intend to make, on which points did the court intend to educate local judicial officials? The absence of explicit information, such as a preface stating the *Zouyanshu's* purpose, does not allow any definite conclusions. However, the recurrence of certain themes does support some inferences. I will deal here only with those aspects of the *Zouyanshu* that go beyond its functions as a collection of precedents for correct decisions and as model records for the correct application of the core judicial procedure (i. e. for those steps required to

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<sup>118</sup> *Dongguan Han ji* 14.3/91/21-23.

<sup>119</sup> Information on the *Jueshi dumu* and *Cisong bi* as well as extant cases are compiled in Cheng Shude 1963, 32-33 and Shen Jiaben 1985, 1768-1769.

arrive at a finding of facts).

### Providing models for the *yan* 讞-procedure

A first important function of the *Zouyanshu* most likely was to educate local judicial officials not only about criminal procedure in general, but also about the *yan* 讞-procedure in particular. This is suggested by the fact that *yan* is part of its title, that the majority of cases (13 of 22) had been submitted for decision, and by the extraordinary closeness of the *Zouyanshu*'s compilation between 196 BC and 185 BC<sup>120</sup> to the edict of 200 BC re-establishing the *yan*-procedure in Han – not more than ten years, but probably only five years. We now know that a similar procedure for higher-level review of doubtful cases already existed in Qin.<sup>121</sup> Also, it is likely that at least some of the Han officials, especially local career officials such as judicial secretaries (*yushi* 獄使) and secretaries-in-charge (*lingshi* 令史), had already served under the Qin and therefore some knowledge of the procedure.<sup>122</sup> However, the edict of 200 BC addresses existing shortcomings

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<sup>120</sup> For dating of the *Zouyanshu* see below.

<sup>121</sup> The *Wei yu deng zhuang* makes clear that a procedure for submitting doubtful cases to the higher authorities, also called *yan*, already existed in Qin. See Zhu Hanmin and Chen Songchang 2013 as well as Lau and Staack 2016.

<sup>122</sup> This could well have applied for the owner of tomb 247 in Zhangjiashan. Though the entry *xiang wei Han* 降為漢 “submitted to become a Han [subjected]” under the year 202 BC, almost certainly a biographical note, in the calendrical table found in the tomb (*Lipu* 2) refers to the change of rulership from Xiang Yu's Chu to Liu Bang's Han, the likelihood that the tomb owner already served under the Qin can be deduced from other information: The entry *bing mian* 病免 under the year 194 BC in the calendrical table must mean that the tomb owner had served as an official. The presence of a dove-finial staff in his coffin confirms that he was at least 70 years of age at the time of his burial in 186 BC or early 185 BC, as such a staff was a special honour bestowed on those who had reached an age of 70 to 75 years, depending on rank (*Ernian lüling* 355). This means that the tomb owner was born not later than 255 BC, and possibly a few years earlier. The owner of tomb 11 at Shuihudi became an official in Qin at age 18 (*Biannianji*). Assuming that the owner of Zhangjiashan tomb 247 was a career official, too, who started his official career at a similar age, he would have served as an official at least since 237 BC. This means he would have been an official for at least 17 years in pre-unification Qin, for probably 12 years in post-unification Qin, for probably 7 years under the insurgent Chu kingdom during the Qin-Han interregnum (assuming he served where he was buried), and 9 years under Han until he retired in 194 BC. Thus, in the course of his career he would have experienced considerable changes in political circumstances and with this in administrative practices and legal arrangements. As an experienced Qin career official, he might have been quite valuable for a Han rulership intent on securing their power.



and the administration of justice, especially a backlog in cases which were left undecided due to difficult legal issues. Therefore, it can be assumed that the existing problems, coupled with uncertainty about the applicable procedures under the new regime and a possible shortage of experienced local officials after the devastations of the wars made it necessary not only to re-establish the *yan*-procedure to ensure a speedy resolution of doubtful cases, but also to educate officials not only on what type of legal problems were to be submitted for decision, but also what format was to be used. Both points are well served by the *Zouyanshu*. Its *yan*-cases all deal with legal issues which are easily understood as falling into the two categories already mentioned, namely (a) uncertainty about which offence has been committed in cases that cannot literally subsumed under one of the existing laws (cases 6-13), and (b) uncertainty whether an offence has been committed at all in cases where the accused brings forward arguments for his justification that do not *prima facie* seem unreasonable (cases 1-5). Even more important, some of the *yan*-cases contain remarks by the court about the quality of the original submission: In case 3, the imperial court states that the “you indeed have ascertained [the facts] submitted for decision” (*yan gu you shen* 讞固有審),<sup>123</sup> taking up and confirming the prefecture’s assertion, concluding its

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<sup>123</sup> *Zouyanshu* 26. *Gu* 固 is here understood as an adverb which serves to affirm the *shen* 審 which concludes the prefecture’s finding of facts. While there is agreement that the expression *yan gu you shen* is a comment made by the higher authority on the prefecture’s submission, there is some uncertainty about its correct translation and interpretation. Lau and Lüdke (2012, 128 note 710 to *Zouyanshu* 26) translate “die Vorlage ist verlässlich und auch in den Tatsachen gesichert” (the submission is reliable and also ascertained in regard to the facts), understanding *you* 有 as writing *you* 又 and *gu* 固 as a stative verb in paratactic construction with *shen*. This is possible, but *gu* 固 is not found elsewhere in legal documents as a word on par with the technical term *shen*. *Yan gu you shen* is found twice in the *Wei yu deng zhuang*, where it introduces, as in the *Zouyanshu*, the higher authority’s reply to the submission. Lau and Staack (2016) translate *yan gu you shen* in *Wei yu deng zhuang* 28f. as “what you submit is indeed unambiguous” (p. 114), but in *Wei yu deng zhuang* 42 as “your submission is reliable and unambiguous” (p. 127). In note 584 (p. 114), Lau and Staack explain that, in their opinion, *yan gu you shen* both in the *Zouyanshu* and in the *Wei yu deng zhuang* expresses that “the higher authorities criticise a submission as unnecessary because the points on which doubts are raised in fact appear to be ‘unambiguous’ (*shen* 審) facts”. This interpretation is hardly plausible. In effect, the authors claim here that *shen* means “unambiguous” in the sense of “presents no doubtful questions of legal interpretation”. However, such a use of *shen* is nowhere attested. In the legal manuscripts, *shen* always refers to the basic facts, not to the matters of legal interpretation which are at stake in the *yan*-submissions both in the *Zouyanshu* and *Wei yu deng zhuang* (this also applies to *Wei yu*

finding of facts (*ju* 鞫), that those facts “have been ascertained” (*shen* 審). In contrast, in case 4 the prefecture is admonished by the court because “as the statutes are explicit on this, by law the case should not have been submitted for decision” (*lü bai, bu dang yan* 律白，不當讞).<sup>124</sup> The *Zouyanshu* is also valuable as an instruction on how to submit a case for decision, as it fully documents five such submissions, including the formulae that introduce and conclude them. The information contained in these formulae serves the bureaucratic purposes of identifying the officials involved with the case at the prefecture level and of clearly communicating the purpose of the document to the higher authorities, but it has no bearing on the legal issues and would therefore have been unnecessary in a mere collection of legal precedents.

### **Suggesting techniques for effective investigation**

The *Zouyanshu* also lent itself to educate local judicial officials about techniques of effective investigation. This is the theme especially of cases 19 and 22, but also of case 17: Case 22 on its surface is a request for promotion. However, as such it would have had no meaning for local officials not concerned with that particular promotion. The official in question is suggested for higher office because he has managed to solve a particularly difficult case, in which the offender has resorted to considerable cunning in order to put the investigators on the wrong track and to

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*deng zhuang* 140, where a basic fact, not a matter of legal interpretation is in doubt). The (unstated) reason for the authors’ claim is the higher authority’s subsequent comment *bu dang yan* 不當讞 “by law this should not have been submitted” in *Wei yu deng zhuang* 30. But, first of all, it is far from clear whether this comment refers to the full submission, or only to parts of it (i. e. to the punishment of the people involved in the arrests in question, but not to the punishment of officials involved in the original trial). More importantly, in none of the other two instances where *yan gu you shen* is found is there any indication that the submission would have been considered unnecessary. Therefore, *yan gu you shen* should simply be understood as an affirmation, made by the higher authorities, that the finding of facts submitted by the lower authority is complete and sufficient to decide any doubtful matters of law, whether or not the higher authority deems those points of doubt as serious enough to have warranted submission in the first place (if a submission had been found *bu shen* 不審 “not factually ascertained”, the submission presumably would have been returned for further investigation to the lower-level authority, with no comment at all made by the higher authority on matters of legal interpretation).

<sup>124</sup> *Zouyanshu* 35. *Bu dang yan* 不當讞 is also found in *Wei yu deng zhuang* 30.

throw suspicion on somebody else. When nothing else seemed to help, the judicial secretary in charge of the case went public and appealed for people to come forward with clues, very much in a way modern police forces would act when faced with an investigative cul-de-sac. The reason for the inclusion of the case in the *Zouyanshu* must have been that it describes in detail this and the other investigative means crucial for cracking the case, thereby providing a model for other judicial officials. Case 19, though set in the Chunqiu period and probably of little value in Han in terms of legal issues, can be read as an appeal not to rely on the first impression when investigating an offence, but to carefully evaluate the situation, factor in all possible causes and to resort to logic when drawing conclusions. Case 17, finally, illustrates the considerable risk that a wrong judgement might be passed (and that the responsible officials make themselves liable to punishment for this) if, instead of investigating all leads thoroughly, torture is applied too early and indiscriminately.

#### **Warning against undue reliance on torture**

Case 17, in particular, can be read as warning not to use torture before all other means have been exhausted and when the statements of the accused are not contradicted by hard evidence. In case 17, the accused under torture wrongly incriminates an acquaintance of conspiring to steal a cow with him. Instead of verifying the acquaintance's alibi with independent witnesses (a step which in the retrial finally exonerates the acquaintance), the investigating officials resort to torture to extort a confession. This contrasts with the positive example of case 22, where torture is only threatened to the accused as a means to extract a confession after his explanations become indefensible in the view of both hard physical evidence and mutually consistent statements of multiple independent witnesses.

#### **Warning against official misconduct**

In a relatively large number of *Zouyanshu* cases, officials, some of them high-ranking, are not the

investigators, but themselves the objects of criminal investigation; this includes at least three prefects (*ling* 令) and two judicial secretaries (*yushi* 獄史). As the law specified (mostly minor) punishments for many instances of negligence or even ineffectiveness in office, some prosecutions were part of an official's professional risk; an example is the case of a soldier posted at the border who did not manage to apprehend a fugitive slave,<sup>125</sup> or the case of a constable (*qiudao* 求盜), eventually acquitted, who had to resort to force when making an arrest and then was faced with a charge of causing injury.<sup>126</sup> But other cases seem to make a point of reminding officials, especially those in a position of responsibility, to act strictly according to the law and to sternly warn them against overstepping their authority or even engaging in criminal behaviour. Cases 9-10 and 12 can be read as warning officials that false records will be punished in the same way as the forging of documents even if they did only write down false information and did not resort to actual forgery.<sup>127</sup> Case 13 makes it clear that even accepting favours as trivial as a piglet and some wine will be punished as bribery.<sup>128</sup> Even more relevant are cases 15, 16, and 18: Case 15 makes the point that an official who commits theft in office will be prosecuted like everybody else, and, unlike everybody else, will not be granted any reduction in punishment or opportunity to redeem himself from it.<sup>129</sup> Case 16 concerns a prefect who has ordered the killing of a subordinate because the latter did not submit to all of his wishes. The crime is vigorously prosecuted without regard to the prefect's position, rank or the alleged insubordination of the subordinate, and before being sentenced to death, the prefect is sternly admonished during his interrogation:

信，長吏，臨一縣，上所信恃，不謹奉灋（法）以治，<sup>130</sup>至令蒼賊殺武。

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<sup>125</sup> *Zouyanshu* 53.

<sup>126</sup> *Zouyanshu* 36-48.

<sup>127</sup> *Zouyanshu* 54-57, 60.

<sup>128</sup> *Zouyanshu* 61-62.

<sup>129</sup> *Zouyanshu* 69-74.

<sup>130</sup> *Zouyanshu* 86.

Xin, as a senior official you oversee a prefecture and thus are trusted and relied upon by the ruler. Nevertheless, you did not conscientiously uphold the law in order to govern according to it. You even carried matters so far as to order Cang to kill Wu with malice.

In case 18, a similar reproach is levelled against a prefect who passed only lenient sentences (rather than capital punishment) on deserters in a military campaign, with the intent to reassure a restive population in recently conquered border territory. During his prosecution on the orders of the Qin court and before his eventual conviction to a hard labour punishment, the prefect his reprimanded:

見罪人，不以法論之。 。 。 雖論奪爵令或〈戍〉，而毋法令。人臣當謹奏〈奉〉法以治。<sup>131</sup>

Though you realised [that you were dealing with] offenders, you did not pass judgement on them according to the law... Even though you passed the judgement to take away their ranks and to call them up into the [regular] army, you nonetheless [in doing so] did not follow the statutes and ordinances. Yet it befits His Majesty's vassals to conscientiously uphold the law and govern according to it.

The phrase *jin feng fa yi zhi* 謹奉法以治 is identical here and in case 16, suggesting that the inclusion of these cases in the *Zouyanshu* is no coincidence, but reflects a conscious choice. The words used to rebuke the two prefects highlight the concern that local officials strictly adhere to the law and do not overstep their authority. This concern was even more acute because of the vastness of the territory the newly formed Qin and Han empires sought to administer. In the absence of modern communication and infrastructure, any attempt at directly running day-to-day affairs from the centre was doomed to fail. Therefore, the establishment of central control relied to a large extent on the degree to which the law was effective in conveying the authority of the

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<sup>131</sup> *Zouyanshu* 146, 149-150. See Lau and Lüdke 2012, 199ff.

central government down to the local level and ensuring the compliance of local officials. Case 18 demonstrates that in the case of lapses in adhering to the law, it could take many months, and the dispatch of investigators over several hundred kilometres, to rectify the situation.<sup>132</sup>

### **Insisting on due process**

An important aspect of the *Zouyanshu* is its emphasis on due process, an emphasis which, going beyond a mere pre-occupation with correct procedure and a full investigation, also includes giving fair consideration to the accused. This is particularly important in a system which did not know any separation of powers, and where the local officials had to reconcile the conflicting aims of effective law enforcement and delivering justice or at least equity. This dual concern is, for example, reflected in the edict of 200 BC, which cites as reasons for the establishment of the *yan* 讞-procedure the two existing shortcomings of, on the one hand, offenders not being timely punished and, on the other hand, innocents languishing in prison if a case is not quickly decided due to uncertainty about legal issues. While both lawlessness and the perception of injustice would have undermined the legitimacy of the state, any system with little formal separation of powers tends to subordinate equitable dispense of justice to the requirements of law enforcement, the results of which can be more easily measured. In such a situation, the *Zouyanshu* advocates the strict application of harsh punishments wherever they are warranted, but not if this comes at the cost of justice. Cases 1-5 emphasise that any statement of the accused with the potential to exonerate him must be fully considered, and that the case has to be submitted to the higher authorities for decision if there is any doubt about the validity of the accused's arguments. In case 21, it is a matter of course that an offence, even if there is no doubt that it has been committed, cannot be punished if a procedural requirement has not been met. And even if there is agreement that the offence is quite reprehensible, it is inadmissible to punish it as another offence by way of

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<sup>132</sup> *Zouyanshu* 125-128.

faulty analogy.

### **Demonstrating good legal reasoning**

Finally, the *Zouyanshu* can be understood as a demonstration of methods and techniques for legal reasoning. While it does not reflect on them, it contains a number of quite sophisticated examples that demonstrate the application of these methods and techniques. Among them are the technique of teleological reduction,<sup>133</sup> i. e. the extrapolation of a given norm's ultimate aim, in order to decide about its applicability; the use of precedents for the same purpose,<sup>134</sup> and the analogous application of a norm to a situation not directly covered by an existing norm.<sup>135</sup>

## **The significance of the *Zouyanshu* as a record of facts and a normative text**

Due to the small number of cases and the *Zouyanshu*'s selectivity, it is impossible to judge how representative the *Zouyanshu* cases are for the way in which the administration of justice was actually conducted in Qin and Han. However, above and beyond preserving the actual records of a small number of trials, the *Zouyanshu* indicates how the administration of justice was supposed to be conducted in the view of the central authorities. That is, while the individual *Zouyanshu* cases should be taken as accurate descriptions of the trials they record and as such have a descriptive value, for an evaluation of their wider significance and of the *Zouyanshu* as a collection of cases a normative reading is most appropriate.

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<sup>133</sup> *Zouyanshu* 21-22 (case 3).

<sup>134</sup> *Zouyanshu* 23-25 (case 3).

<sup>135</sup> *Zouyanshu* cases 9-12 and 21.

## *Dating of the Zouyanshu and its cases*

The *Zouyanshu* poses several problems of dating; at question are

- a) the date at which each of the events reported in the individual *Zouyanshu* cases took place;
- b) the date at which each of the *Zouyanshu* cases was first recorded;
- c) the date at which the *Zouyanshu* was first formed as a body of texts; and
- d) the date when the copy of the *Zouyanshu* found in Zhangjiashan tomb 247 was written down.

### **The *terminus ante quem*: The date of the tomb**

Of equal importance for all of these questions is the date when the *Zouyanshu* manuscript was entombed in Zhangjiashan, which is the *terminus ante quem* for all dating questions. This date can be derived quite precisely from the finds in Zhangjiashan. A comparative analysis of the artefacts found together with the bamboo texts in Zhangjiashan tomb 247 shows that the tomb is later than the Qin tombs of Shuihudi in Yunmeng, and close to the Western Han tombs of Fenghuangshan in Jiangling.<sup>136</sup> As the former of these tombs date to 260-217 BC, the latter to 179-141 BC,<sup>137</sup> this gives a time frame for Zhangjiashan tomb 247 of 217-141 BC. More exact dating is possible when the texts found in tomb 247 are taken into account: Most importantly, the tomb contained a calendrical table (*lipu* 曆譜) which lists the cyclical characters (*ganzhi* 干支) for the first day of each month (*shuo* 朔) from the fifth to the twelfth regnal year of the Gaozu emperor (202-195 BC), for the seven years of the Huidi emperor's reign (194-188 BC) and for the first two regnal years of the empress Lü (187-186 BC). Even though the calendrical table does not explicitly name the reign periods, these can be deduced without ambiguity from the sequence of the year numbers and,

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<sup>136</sup> Jingzhou diqu bowuguan 1985, 7-8.

<sup>137</sup> Giele 1998, items IV.03-IV.04 and V.01-V.05a.



first of all, from the series of cyclical characters.<sup>138</sup> Besides these calendrical details, the table also provides some biographical information: A broken strip probably belonging to the first year in the table (202 BC), notes ...*Xin xiang wei Han* 新降為漢 “Xin<sup>139</sup> submitted to become a Han [subject]”,<sup>140</sup> i. e. as a former subject of Xiang Yu’s Chu kingdom submitted to Liu Bang’s authority, who in the same year had secured victory over Xiang Yu, thus was able to extend his reign over the whole Chu area and consequently proclaimed himself emperor.<sup>141</sup> Under the first year of the Huidi emperor (194 BC), the calendrical table notes *liu yue bing mian* 六月病免 “in the sixth month, relieved [from office] due to illness”.<sup>142</sup> It can be assumed that this piece of biographical information pertains to the person buried in the tomb. This can be inferred from biographical data found in other tombs, such as the information contained in the *Biannianji* of

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<sup>138</sup> Compare Zhang Peiyu 1997 and Xu Xiqi 1997. Of the 173 *shuo*-days for which the *ganzhi* are still legible in the *lipu*, only 3 *ganzhi* combinations differ from the values calculated by Zhang and Xu, and in each of these 3 cases only by 1 day. Such minor discrepancies are not uncommon and seem to be caused by some uncertainty about the exact distribution of *dayue* 大月 (30-day months) and *xiaoyue* 小月 (29-day months) in the early Chinese calendar; for this problem see also below.

<sup>139</sup> *Lipu 2*. As the strip is broken before the character 新 *xin*, it cannot be determined with absolute certainty that *xin* really is a personal name, though this remains most likely and has been accepted by most scholars (e. g. Barbieri-Low and Yates 2016, 106, who follow Lau and Lüdke 2012, 11). Neither in the four examples of its use in the *Zouyanshu* (9, 12, 14, 38) nor in the many places where it is used in *Shiji* and *Hanshu* is the phrase *xiang (wei) Han* 降(為)漢 ever modified by a stative verb (such as *xin*) in adverbial usage, but often preceded by a personal name as its subject (e. g. *Shiji* 16, 783f., 790). *Xin* 新 is known as personal name in Han (e. g. *Hanshu* 15B, 491). *Xin jiang* 新降 occurs 17 times in the *Houhanshu*, 15 of these in the “Nan Xiongnu liezhuan 南匈奴列傳”, often in expressions such as *suo xin jiang* 所新降, *xin jiang zhe* 新降者, or *zhu xin jiang Hu* 諸新降胡, always referring to Xiongnu tribespeople who have “recently been subjugated”, as opposed to minority people who had been part of the Han empire for a longer period (*Hou Hanshu* 89, 2952, 2954, 2955, 2959). In all of these instances, *xin* is used as an adjective to modify a nominal use of the transitive verb *jiang* 降 (the transitive use is explicit from the use of *suo* 所 in one case), in contrast to *Lipu 2* and to the examples in *Zouyanshu*, *Shiji* and *Hanshu*, where we find a verbal use of the intransitive verb *xiang* 降 (intransitive use evident because the person who has submitted functions as the explicit or implicit grammatical subject of *xiang*). Even if the slip *Lipu 2* is broken, in the context of this calendrical table a distinction between “recently submitted” versus an unstated “submitted earlier” does not seem to make sense.

<sup>140</sup> On *xiang wei Han* see *Zouyanshu* 9; 12; 14; 38.

<sup>141</sup> *Shiji* 8, 378-380.

<sup>142</sup> *Lipu* 10.

Shuihudi tomb 11, which is consistent with the age and probable profession of the person buried there.<sup>143</sup> As the calendrical table ends with the year 186 BC, is safe to assume that the burial in tomb 247 took place in 186 BC or very shortly thereafter. This is consistent with information derived from other texts excavated from tomb 247: The early Han collection of statutes has the original title *Ernian lüling* 二年律令 “Statutes and edicts [in force in/since] the second year”.<sup>144</sup> The “second year” referred to in the title most likely is the second regnal year of empress Lü (186 BC), as some of the statutes grant explicit privileges to descendants of Lü Gong 呂公,<sup>145</sup> the Lü empress’ father (died in 202 BC, posthumous title: 呂宣王).<sup>146</sup> These privileges were extended to fewer generations of descendants of all other kings (*wang* 王), a status accorded to brothers and sons of the Gaozu emperor Liu Bang 劉邦. It is therefore evident that the *Ernian lüling* values the Lü family higher than the Liu family. Also, the Lü empress’ father in the *Ernian lüling* is referred to by his posthumous title Lü Xuan Wang 呂宣王, about which the *Hanshu* explicitly notes that it was only conferred retroactively (*zhui* 追) in 187 BC by the Lü empress after she had assumed imperial power.<sup>147</sup> As the relatives from her lineage were quickly persecuted after the death of the Lü empress,<sup>148</sup> the *Ernian lüling* must date to her reign period.<sup>149</sup> Therefore, for the purposes of

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<sup>143</sup> Shuihudi Qin mu zhujian zhengli xiaozu 1990, 3; Hulsewé 1985, 1.

<sup>144</sup> *Ernian lüling* 1v.

<sup>145</sup> *Ernian lüling* 85; Zhangjiashan ersiqi hao Han mu zhujian zhengli xiaozu 2001, 133 and 2006, 7.

<sup>146</sup> *Shiji* 8, 344; *Hanshu* 1A, 3; 18, 679; 97A, 3939.

<sup>147</sup> *Hanshu* 18, 679; 97A, 3939.

<sup>148</sup> *Hanshu* 97A, 3939f.

<sup>149</sup> Most scholars have followed the Zhangjiashan ersiqi hao Han mu zhujian zhengli xiaozu (2001, 133 and 2006, 7) to identify the “second year” in the title *Ernian lüling* with the second regnal year of empress Lü, though a few scholars have suggested that the “second year” refers to either the second regnal year of the Gaozu emperor (201 BC) or of the Huidi emperor (193 BC), see the list in Peng Hao et al. 2006, 87 note 1 to *Ernian lüling* 1v. Li Li (2009, 345-354) gives an overview of the arguments for the different positions. For example, Cao Lüning (2005, 1-12), argues that because the character *ying* 盈, which also forms the Huidi emperor Liu Ying’s 劉盈 personal name, is not tabooed in the *Ernian lüling*, it cannot date to Huidi’s reign or later. However, beyond a few isolated examples of taboo characters, Cao Lüning fails to back this argument up by a comprehensive analysis of the use and non-use of taboo characters in legal manuscripts, does not address the question to what extent character taboos would have applied after an emperor’s death, and fails to mention contradicting evidence, such as the multiple use of *zheng* 正, which, if taboos would

the following discussion and to be on the safe side, 180 BC shall be assumed as *terminus ante quem*, even though both the *lipu* and the *Ernian lüling* indicate that the burial Zhangjiashan tomb 247 took place in 186 BC or very shortly thereafter.

It would be tempting to assume that at least the legal material found in the tomb dates to the time before the tomb owner was relieved from office in 194 BC; however, the example of the *Ernian lüling* shows that the tomb owner either had an interest in, and access to, legal material even after his retirement, or that colleagues, friends or family members were able to supply him with the most up-to-date legal material for his last journey.

## The date of the events and proceedings reported in each case

The first dating question pertains to the events reported in each individual *Zouyanshu* case.

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have been strictly observed in legal manuscripts, should have been tabooed on account of the Qin ruler's name Ying Zheng 嬴政 in texts presumably dating from his reign. Even if taboo characters were used in legal texts, it is entirely possible that the taboo did not apply any more after the emperor's death, especially for texts written either before or after the emperor's reign. Cao Lüning calls into question the *Hanshu's* very explicit statement that the title Lü Xuan Wang 呂宣王, mentioned in *Ernian lüling* 85, was conferred by the Lü empress to her father only retroactively in 187 BC, but does not supply any supporting evidence beyond the contention that the *Shiji* was composed earlier than the *Hanshu*, but this observation is of limited help, as the *Shiji* does not give any date for the introduction of the Lü Xuan Wang title, as Cao Lüning himself observes. Absent evidence calling the *Hanshu* version in question, *Ernian lüling* 85 must date from 187 BC or later. Also, there is no evidence that would indicate that slip *Ernian lüling* 85 was later inserted into a manuscript copy that had been produced earlier; e. g., there is no obvious difference in handwriting between *Ernian lüling* slip 85 and the following slip 86, which does contain the character *ying* 盈. In conclusion, it is most likely that the *Ernian lüling* copy found in Zhangjiashan tomb 247 was produced in 187 BC or later (even though, of course, it contains many rules that already had been in force from much earlier), and that the "second year" referred to in its title is the second regnal year of empress Lü. However, it has to be noted that a different interpretation of the title does not necessarily imply a different date *ante quem* for the Zhangjiashan texts. E. g., even if the title is understood to refer to a (supposed) original creation of the Han code in the second regnal year of the Gaozu emperor (205 BC, i. e. a very early date in view of the fact that victory over Xiang Yu had not yet been secured), this would still not question the *Ernian lüling* as further evidence for the date *ante quem* as long as it is accepted that the Zhangjiashan version contains stipulations such as *Ernian lüling* 85 added in 187 BC or later.

Cases 19 and 20 are set in the Chunqiu period: Case 19 in the state of Wei 衛,<sup>150</sup> case 20 in the state of Lu 魯.<sup>151</sup> No actual dates are provided, and the incumbent rulers who make an appearance in the respective cases are not mentioned by name, but simply referred to by *jun* 君 “ruler”.

However, the person entrusted with the task of the judge is named. In both cases these are famous personages known from received texts who also appear in the *Zuozhuan*: In case 19, the judge is Shi You 史猷,<sup>152</sup> who is to be identified with Shi Qiu,<sup>153</sup> style Zi Yu 子魚, an official in the state of Wei who flourished 544-534.<sup>154</sup> In case 20, the judge is Liuxia Ji 柳下季, another name of Zhan Huo 展獲, who flourished 634 BC.<sup>155</sup>

The events reported in case 19 are therefore set in the second half of the sixth century BC, the events of case 20 in the second half of the seventh century BC. However, the fact that these two cases involve famous persons of the Chunqiu period does not imply a judgement about their historicity, which is questionable.<sup>156</sup>

To summarise the results for cases 19 and 20:

- case 19: 2nd half 6th century BC

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<sup>150</sup> *Zouyanshu* 168.

<sup>151</sup> *Zouyanshu* 174.

<sup>152</sup> *Zouyanshu* 163, 170, 173.

<sup>153</sup> Both *you* GSR 1096t and *qiu* GSR 1096q are part of the same phonetic series. Both the judge in case 19 and the Shi Qiu mentioned in other texts are said to live in Wei. On the identification see Zhangjiashan ersiqi hao Han mu zhujian zhengli xiaozu 2001, 226 note 4 and Li Xueqin 1995, 41.

<sup>154</sup> The dates are derived from the mentioning of Shi Qiu under the 29<sup>th</sup> year of Duke Xiang of Lu (544 BC) (*Zuozhuan* Xiang 29,546,11) and a story involving Duke Ling of Wei who reigned 534-493 BC (*Hanshi waizhuan* 7.21, 55). Shi Qiu is also mentioned in *Zuozhuan* Ding 13,8,12; *Xunzi* 4, 32; 6, 58; and *Lunyu* 18, 335.

<sup>155</sup> The date is based on Liuxia Ji being mentioned under the 26<sup>th</sup> year of Duke Xi of Lu (634 BC) (*Zuozhuan* Xi 26,197,3). Liuxia was the name of his fief, Ji as well as Qin 禽 where his courtesy names (*zi* 字), Zhan his lineage name (*shi* 氏), Huo his given name (*ming* 名), and Hui 惠 his posthumous title (*shihao* 諡號). Liuxia Ji is also mentioned in *Zhuangzi* 29, 426; *Lunyu* 21, 388; 18, 340; *Mengzi* 10, 397; and *Zuozhuan* Wen 2,232,12.

<sup>156</sup> See the arguments above.

- case 20: 2nd half 7th century BC

The other cases in the *Zouyanshu* are set in Qin or Han. This clearly follows from the following evidence, among others:

- a) They refer to the multi-tiered Qin/Han system of territorial administration (*li* 里 “villages” – *xiang* 鄉 “township” – *xian dao* 縣道 “prefecture or march” – *jun* 郡 “commandery” – *ting* 廷 “imperial court” as seat of the central government) and use the Qin/Han titles for the officials that are responsible for the administration of law at each level of government (*ling* 令 “prefect” on the *xian*-level, *shou* 守 “governor” at the *jun*-level, *tingwei* 廷尉 “minister of trials” at the central government, to name but the most important);
- b) They use Qin and Han place names (most obvious is Xianyang 咸陽 for the Qin capital in cases 17<sup>157</sup> and 22<sup>158</sup>);
- c) Some of them refer to datable external events, such as the civil war 209 to 202 BC during which Liu Bang and Xiang Yu competed for power,<sup>159</sup> or the resettlement of families from Qi to Guanzhong at the turn of the year from 199 to 198 BC;<sup>160</sup>
- d) The legal procedure as well as the legal terminology used in these cases closely resemble, sometimes in a more evolved form, the procedure and terminology known from the Qin legal texts of Shuihudi.

Most importantly, point (a) in particular implies a date *post quem*, insofar as cases 1-18 and 21-22 must be from some time after 350 BC, when Qin moved its capital to Xianyang 咸陽 and instituted the multi-tiered system of territorial administration with its corresponding officials

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<sup>157</sup> *Zouyanshu* 103, 106, 111, 114

<sup>158</sup> *Zouyanshu* 227

<sup>159</sup> *Zouyanshu* 9-14, 38, 88-90.

<sup>160</sup> *Zouyanshu* 18.

associated with the reforms of Shang Yang 商鞅.<sup>161</sup>

Most of these Qin or Han cases in the *Zouyanshu* (cases 1-18, 21-22) contain some calendrical information. This can refer to different points of time in relation to the case, namely the time

- when the events under judicial scrutiny happened (E),
- when judicial proceedings were initiated (J),
- when the case was submitted to a higher authority (S),
- when a decision was reached by the lower authority or conveyed by the higher authority (D).

However, none of the cases explicitly provides the reign period, i. e. we find only “eleventh year”<sup>162</sup> instead of “eleventh year of Gaozu” and so forth. Still, under the premise that all cases except 19 and 20 are from after 350 BC (the *terminus post quem*) and from before 180 BC (the *terminus ante quem*), exact dating is fairly straightforward when using the calendrical information supplied in the texts themselves. Ambiguities in regard to the reign period can be resolved in most cases, because the cyclical characters given in the *Zouyanshu* for a particular day appear only in certain months; even better is the situation if the *Zouyanshu* provides cyclical characters for the first day of the month (*shuo* 朔), as it is rare that more than one of the possible months in different reign periods has the same *shuo*.

In this way, the following dates can be calculated without any doubt for the events and proceedings recorded in the *Zouyanshu* (with E referring to the time of the event in question, J to the time of the initiation of judicial proceedings, S to the time when the case was submitted, and D to the time when the decision was made):

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<sup>161</sup> *Shiji* 5, 203; Bodde 1986, 35.

<sup>162</sup> *Zouyanshu* 1.

- case 1: 196 BC (J, S)
- case 2: 196 BC (J, S, E), 201 BC (E)
- case 3: 197 BC (S, D)
- case 5: 197 BC (S, J)
- case 14: 199 BC (D), 200 BC (S)
- case 15: 200 BC (S)

It is noteworthy that in this list cases of the same type (see below) were submitted at roughly the same time: cases 1-3 and 5, all requests for decision of a doubtful case (*yan* 讞), were submitted in 196 and 197 BC, while cases 14 and 15, probably requests for approval of a sentence, were both submitted in 200 BC. Also, the fact that cases 1-3 and 4 (see below) are all from *after* 200 BC is consistent with the record in the *Hanshu* that the procedure for submitting doubtful cases (*yan*) was re-established in Han by the Gaozu emperor in 200 BC.<sup>163</sup>

This leaves the following more complicated cases:

- case 4: 200-197 BC, probably 197 BC (S):

The only calendrical information in this case is “twelfth month, day *renshen*” (*shier yue renshen* 十二月壬申),<sup>164</sup> i. e. a month and day are given, but no year. However, the request for decision (*yan* 讞) is submitted by “Deputy Prefect Xi of Hu 胡 Prefecture”. As a person with the same name and title in the same prefecture also appears in case 3,<sup>165</sup> which is from 197 BC, it is

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<sup>163</sup> *Hanshu* 23, 1106; full text and translation see above. As noted above, the Yuelu documents show that a similar procedure for submitting doubtful legal cases to higher authority for decision already had existed in Qin (see Lau and Staack 2016).

<sup>164</sup> *Zouyanshu* 28.

<sup>165</sup> *Zouyanshu* 17.

plausible to assume that both cases were submitted by the same Deputy Prefect Xi, and therefore are from around the same time. Within the two decades preceding and following the year 197 BC (207 BC – 186 BC), the twelfth month of the year 204 BC, of each of the years 201-197 BC and of each of the years 190-186 BC contain a day *renshen*. Of these years, 204 BC is very improbable, because it is both rather far from 197 BC, the year of case 3, and also conflicts with the record that the procedure for submitting doubtful cases was re-established in Han only in 200 BC, a record which is consistent with all cases that can be dated with certainty. The same argument also excludes the year 201 BC. The years 190-186 BC (5<sup>th</sup> year of the Huidi emperor – 2<sup>nd</sup> year of empress Lü) are too far from 197 BC on the other end and also would, improbably, make case 4 the only case in the *Zouyanshu* from after the Gaozu reign. Therefore, case 4 is almost certainly from one of the years 200-197 BC, but most probably from 197 BC in view of the fact that all other *yan*-cases were submitted either in 197 BC or 196 BC even if not originating from the same prefecture.

- cases 6-13: 200-195 BC (S):

These cases are all very short and contain no calendrical information at all. But like cases 1-5, they all contain a request for the decision of a doubtful case (*yan* 讞), albeit submitted not by a prefect (*ling* 令), but by a commandery governor (*jun shou* 郡守) at the next higher level of territorial administration. Therefore, they should be from after 200 BC, the date of the re-establishment of the *yan*-procedure in Han. As no *Zouyanshu* case which can be dated with certainty is later than the Gaozu reign, they should also be not later than 195 BC.

- case 16: 201 BC (E, J):

This case contains three dates with month and cyclical character for the day, but no year. Since in the time frame in question the cyclical characters fit only for the sixth year of Han Gaozu, the case must be dated to 201 BC.



- case 17: 246 BC (J, D, E), 247/246 BC (E)

This case contains cyclical characters for three days in the twelfth, second, and fourth months, respectively, of the “first year of rule” and for one in the tenth month of the “second year” of rule, namely:

元年十二月癸亥<sup>166</sup> (first year, twelfth month, day *guihai*)

二月癸亥<sup>167</sup> (second month, day *guihai*)

四月丙辰<sup>168</sup> (fourth month, day *bingchen*)

二年十月癸酉朔戊寅<sup>169</sup> (second year, tenth month with the first day *guiyou*, day *wuyin*)

No reign name is mentioned, but the calendrical information completely fits<sup>170</sup> the first (247 BC) and second (246 BC) years of the reign of King Zheng 政 of Qin, who as Shi Huangdi 始皇帝 in 221 BC founded the Qin empire and reigned until 210 BC. Peng Hao,<sup>171</sup> however, places the dates in the years 210 and 209 BC, in the first and second year of Huhai 胡亥, the second Qin emperor, who reigned under the name of Ershi 二世 from 209 to 207 BC. This is based on the case record’s use of the term *jiāping* 嘉平 for the winter sacrifice, which according to the *Shiji* was officially introduced only in 216 BC.<sup>172</sup> However, the *shuò*-day given in *Ernian lüling* 121 for the “second year” does not fit the known *shuò*-days for the second year of the Ershi emperor Huhai.<sup>173</sup>

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<sup>166</sup> *Zouyanshu* 99-100.

<sup>167</sup> *Zouyanshu* 106.

<sup>168</sup> *Zouyanshu* 99.

<sup>169</sup> *Zouyanshu* 121.

<sup>170</sup> This is confirmed both by older calendar reconstructions (Xu Xiqi 1997, 1191-1194, and Zhang Peiyu 1997) as well as by more recent ones which take into account the latest archaeological discoveries, such as Zhang Peiyu 2007, 72; Li Zhonglin 2012, 65; or Xu Mingqiang 2013.

<sup>171</sup> Peng Hao 1995, 43.

<sup>172</sup> *Shiji* 6, 251.

<sup>173</sup> *Jisi* 己巳 according to Xu Xiqi 1997, 1267; Huang Yinong 2001, 63; Zhang Peiyu 2007, 73; Li Zhonglin 2012, 66; and Xu Mingqiang 2013, i. e. preceding *guiyou* by four days in the sexagenary cycle, too much for a calculation mistake. Furthermore, according to these calendar reconstructions, neither in the twelfth nor in the second month of the first regnal year of the Ershi emperor there was a day *guihai* 癸亥, and also

Therefore, Peng Hao needs – implausibly – to further infer that the case record erred in assuming that the reign count was already changed in 210 when Huhai accepted the throne, and not only one year later as confirmed by all historical sources. In Peng Hao’s theory, the “second year” mentioned in *Zouyanshu* case 17 would then correspond to the year commonly recorded as the first year of the Ershi emperor’s reign. However, even for this year (210-209 BC), the *shuò*-day does not fit.<sup>174</sup> As this, after Peng Hao’s article, has been corroborated by two independent palaeographic sources from Yuelu und Zoujiatai, a date in the Ershi reign can be excluded with a high degree of certainty. The only plausible options, and the only ones for which all the date information fits, are the first two years of the reign of King Zheng 政 of Qin. For the problem why the term *jiāping* 嘉平, three decades before its official introduction, is used in this case record, two solutions seem possible: As the term in this case record is used by common people within direct speech during their interrogation, not by officials, it might be the case that the term was already in popular use before it replaced the term *là* 臘 in 216 BC by imperial edict in official documents.<sup>175</sup> Another possibility is that *là* 臘 was replaced by *jiāping* 嘉平 in a later copy of the document, on account of the terminological change decreed in the meantime.

- case 18: 220 BC (J):

This case gives precise dates for the review of the original decision, but not for the events in question. Still, it is clear that the events must have taken place shortly before the judicial proceedings which are the subject of this document. According to the case record, the judicial review started in the “second month of the twenty seventh year”. This must refer to the Shi Huangdi emperor of Qin, as the conquest of Chu 楚 which is mentioned in the text falls into his

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no day *bingchen* 丙辰 in the fourth month of that year.

<sup>174</sup> The tenth month of the first year of the Ershi emperor’s reign is given as *jiaxu* 甲戌 in Xu Xiqi 1997, 1265; and, based on an actual excavated sources from Zhoujiatai and Liye, as *yihai* 乙亥 in Huang Yinong 2001, 63; Zhang Peiyu 2007, 73; Li Zhonglin 2012, 66; as well as in Xu Mingqiang 2013.

<sup>175</sup> see Li Xueqin 1995, 38.

reign; also, in the time frame in question, only his reign stretches over more than 27 years. While all other dates in the text accord with the available calendar reconstructions, the only problem concerns the last date mentioned in the text, which the editors transcribe as 廿八年九月甲午<sup>176</sup> “28<sup>th</sup> year, ninth month, day *jiawu* 甲午”. However, on both sets of published photographs,<sup>177</sup> the characters before *nian* 年 and *yue* 月 are all but effaced, so that the transcription cannot be verified. In Qin Shihuang’s 28<sup>th</sup> year, the 9<sup>th</sup> month does not contain a day with the cyclical characters *jiawu* 甲午.<sup>178</sup> This discrepancy probably is to be explained either as an error of transcription by the editors, a writing mistake either in the original document or a subsequent manuscript copy, or by a calculation error made when composing the original document, or a combination of these. The case contains a detailed account of the total time required for the judicial review.<sup>179</sup> Adding the day count given there to the dates given for the commencement of review proceedings at the beginning of the case,<sup>180</sup> one arrives in the tenth month of Qin Shihuang’s 29<sup>th</sup> year (November 219), a month which also contains a *jiawu* 甲午 day. In any case, after the day count has been identified as belonging to *Zouyanshu* case 18, all scholars, despite some differences regarding specific details, are in agreement that the judicial review started in the second month of Qin Shihuang’s 27<sup>th</sup> year (April 220 BC) and ended either late in his 28<sup>th</sup> year (September/October 219 BC) or very early in his 29<sup>th</sup> year (November 219 BC).

- case 21: 247-209 BC (D):

This case contains no calendrical information at all. The laws and official titles quoted clearly mark the case as belonging to the Qin/Han legal and administrative tradition. Peng Hao considers

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<sup>176</sup> *Zouyanshu* 126.

<sup>177</sup> Zhangjiashan ersiqi hao Hanmu zhujian zhengli xiaozu 2001 and Peng Hao et al. 2007.

<sup>178</sup> Xu Xiqi 1997, 1246; Huang Yinong 2001, 63; Zhang Peiyu 2007, 73; Li Zhonglin 2012, 65; Xu Mingqiang 2013.

<sup>179</sup> *Zouyanshu* 127-128.

<sup>180</sup> *Zouyanshu* 125.

it a Qin case, because he assumes that in the *Zouyanshu* the cases are arranged according to a chronological principle, with the pre-Han cases placed at the end roughly in descending chronological order (this presupposes that the Zhengli xiaozu's transcription reflects the original sequence, reconstructed on the basis of the position of the bamboo slips in the tomb at the time of their discovery).<sup>181</sup> As all other cases in the second half of the *Zouyanshu* (cases 17-22), in his opinion, are from Qin and Eastern Zhou, case 21 must be from Qin, too.<sup>182</sup> Also, Peng Hao bases his dating on the name of Du 杜 prefecture found in the case,<sup>183</sup> as this was renamed to Duling in Han. While this latter argument is not pertinent (Du 杜 prefecture was renamed Duling 杜陵 only in 65 BC on account of the construction of the Xun emperor's mausoleum nearby,<sup>184</sup> thereby not excluding any date prior to 65 BC), there are other important considerations which support that the case is set in Qin. In form and structure, the case is notably different from those *Zouyanshu* cases dating clearly to Han, which are all presented as trial documents (or their excerpts) following a uniform bureaucratic format. In contrast, case 21 in some structural aspects more resembles cases 19 and 20, which also do not record any dates and start with a presentation of applicable laws. More importantly, a number of the laws quoted in case 21 diverge in wording and

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<sup>181</sup> Appendix 2 in Zhangjiashan ersiqi hao Han mu zhujian zhengli xiaozu 2001, 322 presents a diagram of the relative location of the bamboo slips to each other at the time of their discovery. An analysis of this diagram allows the conclusion that case 2 should be placed between cases 4 and 5, that the order of cases 19 and 20 should be reversed, and that the order of cases 6-13 is basically plausible, but cannot confirmed with certainty. All of this does not affect Peng Hao's theory, even though format, not chronology more likely was the primary criterion for the arrangement. It is not clear whether the slips contained any more definitive evidence of their order, and if so, whether such evidence is currently still preserved. Bamboo manuscripts discovered more recently (since ca. 2007), such as the Qin manuscripts collected at the Yuelu Academy or the Warring States manuscripts held at Tsinghua university, often have on their back diagonal marks or even slip numbers that allow, in many cases, a definite reconstruction of the original order of the slips in a manuscript. It is likely that many earlier discoveries, such as the Zhangjiashan slips, might have contained similar marks, which are unknown or may have been lost because archeologists and palaeographers, before ca. 2007, paid insufficient attention to the decipherment and preservation of the backside of bamboo slips.

<sup>182</sup> Peng Hao 1995, 43.

<sup>183</sup> *Zouyanshu* 183, 188.

<sup>184</sup> *Hanshu* 28A, 1544; 8, 253; commentary to *Shiji* 8, 367; commentary to *Shiji* 129, 3281.

content from the 186 BC collection of the Han statutes. *Aohan* 勢悍<sup>185</sup> is not known from the 186 BC collection or any other extant Han legal source as an offence, while it is mentioned as such in Qin.<sup>186</sup> The statute on *jian* 奸 “fornication” quoted in case 21 also differs from the relevant stipulations in the 186 BC statute collection. The law in case 21 is a general rule that punishes *jian* “fornication” with *nai* 耐 “shaving” and a less severe form of penal labour, without making further specifications concerning the status of the persons involved.<sup>187</sup> This is congruent with another Qin rule that punished *na jian* 納奸 “supplying for fornication” with paying a redemption fee from the *nai* punishment, also without making further specifications about the status of the persons involved.<sup>188</sup> In contrast, no rule from Han is extant that would punish *jian* in general, irrespective of marital and kin status. In particular, the *Ernian lüling* contains only rules stipulating punishments consensual *jian* between people in certain household or family relationships with each other and also stipulates more severe punishments in these cases. For example, for consensual *jian* involving a married woman, both parties are punished with the most severe form of penal labour.<sup>189</sup> Also, legal texts from Qin are the only other sources which mention the procedural rule regarding the arrest of fornicators that is central to case 21.<sup>190</sup> Furthermore, Gou 穀 as the name of the incumbent *tingwei* 廷尉 militates against dating the case to Han, as the name is not found in the *Hanshu*’s table of government officials, which lists five holders of this office by name for the years 202 to 186 BC alone.<sup>191</sup>

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<sup>185</sup> *Zouyanshu* 181.

<sup>186</sup> *Fengzhen shi* 37=RCL E 15 (using the phonologically equivalent writing 橋悍)

<sup>187</sup> *Zouyanshu* 182.

<sup>188</sup> *Falü dawen* 65=RCL D 52.

<sup>189</sup> *Ernian lüling* 192.

<sup>190</sup> *Fengzhen shi* 95=RCL E 25 and *Wei yu deng zhuang* 193, 198, 204, 206. On the rule see note 93 above.

<sup>191</sup> *Hanshu* 19B, 746-753. In Qin, Gou Li 穀禮 is found as the name of a deputy prefect of the capital Xianyang in the year 241 BC (*Zouyanshu* 227); even though it is perhaps unlikely that this is the same person, at least this demonstrates that Gou could be part of personal names in Qin.

Case 21 therefore almost certainly dates to Qin, most likely to 247-209 BC.<sup>192</sup>

- case 22: 241 BC (J, S):

This case contains the dates “sixth month, day *guimao*” (*liu yue guimao* 六月癸卯),<sup>193</sup> without designation of a year and *shuo*-day, as well as “sixth year, eighth month beginning with day *bingzi*, day *renchen* (*liu nian ba yue bingzi shuo renchen* 六年八月丙子朔壬辰).<sup>194</sup> According to earlier calendar reconstructions, which were based on the Zhuanxu calendar, no eighth month of a sixth year begins with a *bingzi* day, while in 241 BC, the sixth year of King Zheng 政 of Qin, the later Shi Huangdi, the second day of the eighth month is a *bingzi* day, so that the difference would have been only one day.<sup>195</sup> However, more recent calendar reconstructions which take the palaeographic evidence into account all give *bingzi* as the *shuo*-day of the eighth month in the sixth year of King Zheng.<sup>196</sup> Consequently, the sixth month of the same year also contains a

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<sup>192</sup> Arguments against a Qin date have been advanced early on by Li Xueqin (1995, 40), first of all on the ground that the character *zheng* 正 (in case 21 found in the official title *tingwei zheng* 廷尉正) is, contrary to assumed practice in Qin sources, not replaced by a taboo character which would avoid the given name of King Zheng 政, the later Qin Shihuangdi. However, manuscript texts dating to 246-210 BC also do not avoid the character *zheng* 正 (廿四年正月 in *Longgang* 116; 正月丁卯 in *Zhoujiatai Lipu* 29.2; 正月 in *Biannianji* 3.2, 14.2, 25.2; 以平正賈 in *Fengzhen shi* 39=RCL E 15; 行正旗下 in *Zouyanshu* 212; in the Shuihudi manuscript texts alone, 133 instances of the character *zheng* 正 are found). Also, according to the chronological tables of the *Shiji* (16, 767, 779), *zheng* was only tabooed in the second year of the Ershi emperor, so that *duan yue* 端月 begins to be used instead of *zheng yue* 正月 only in the years 208 and 207 BC. Furthermore, Li Xueqin also argues for a Han date on the grounds that, based on An Zuozhang 安作章 and Xiong Tieji 熊鐵基 (*Qin Han guanzhishi gao* 秦漢官制史稿. Jinan: Qilu shushe 1984, pp. 148, 154-155, 156), the official titles *tingwei zheng* 廷尉正 and *tingwei jian* 廷尉監 existed only since Han. However, according to the *Tongdian* 通典 both titles were already established in Qin (although Li Xueqin calls this into doubt). Finally, the *Wei yu deng zhuang* attests that the *yan* 讞-procedure for submitting doubtful cases, on which case 21 is based, already existed in Qin. See Lau and Lüdke 2012, 16-18.

<sup>193</sup> *Zouyanshu* 197.

<sup>194</sup> *Zouyanshu* 227.

<sup>195</sup> Xu Xiqi 1997, 1202; Zhang Peiyu 1987, 217.

<sup>196</sup> Zhang Peiyu 2007, 73; Li Zhonglin 2012, 65; Xu Mingqiang 2013. The difference of one day results from a slightly different distribution of *dayue* 大月 (30-day months) and *xiaoyue* 小月 (29-day months) in the palaeographic finds, as compared to what the earlier reconstructions had assumed.

*guimao*-day, so that the year is also consistent with the other date in the text. The non-calendrical evidence also strongly supports placing the text in 241 BC: The Qin capital Xianyang is mentioned,<sup>197</sup> which was renamed Changan in the sixth year of the Gaozu emperor,<sup>198</sup> so that the latter's reign can be excluded. The use of *dian* 典 as a taboo character for *zheng* 正 “village head”<sup>199</sup> also indicates that the case is set during King Zheng's reign.

Case 22 therefore can be dated to 241 BC with certainty.<sup>200</sup>

These results for the remaining cases can be summarised as follows:

- case 4: 200-197 BC, probably 197 BC (S)
- cases 6-13: 200-195 BC (S)
- case 16: 201 BC (E, J)
- case 18: 220 BC (J)
- case 21: 247-209 BC (D)
- case 22: 241 BC (J, S)

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<sup>197</sup> *Zouyanshu* 227.

<sup>198</sup> *Shiji* 22, 1120.

<sup>199</sup> *Zouyanshu* 197; the same taboo character is consistently used in the Shuihudi-texts for the village head (*Qinlü shiba zhong* 14=RCL A7; *Qinlü zachao* 32=RCL C 20; *Falü dawen* 98, 198=RCL D 81, D 177; *Fengzhen shi* 10, 52, 63=RCL E 3, E 19, E 21), see RCL A 7 footnote 11. The village head was called *lizheng* 里正 before (*Hanfeizi* 35, 253) and after (*Hanshu* 90, 3673) Ying Zheng's 嬴政 reign first as King Zheng of Qin and then as Qin Shihuangdi. However, in case 22 the character 正 *zheng* is only tabooed as part of the village head's title and is used in other instances (*Zouyanshu* 212); the same is true for the Shuihudi texts, where *zheng* also is not avoided if not part of the title.

<sup>200</sup> *Wei yu deng zhuang* 150-170, which is very similar to case 22 in format and contents, can be dated to one year earlier, i. e. 242 BC, which is further evidence for the dating of *Zouyanshu* case 22. See Lau and Staack 2016, 229ff.

## The date of the compilation of each case report

In principle, the date of the events and proceedings reported in each case does not determine the time when the case record itself was compiled. However, the fact that most *Zouyanshu* cases originally were judicial documents implies that these documents were drawn up exactly at the time when the proceedings took place. As more than one government agency is involved in many cases, a step-by-step compilation must be assumed, e. g.: The local prefecture authority first undertook its own investigation, then formulated its submission, later the responsible court officials added their opinion, finally the emperor's decision was attached to the document. This layer-by-layer process is easily discernible and made explicit in all those cases where different dates are provided for the submission of the case, for the submission to a higher authority and/or the decision (see the notes to the dates given above). But altogether, due to their nature as documents, there is no chronological distance between the proceedings recorded in the texts and their recording in a document. This is also true for case 22, which has to be considered an actual document. Therefore, for all cases except 19-21, the dates given above with the sigla J, S, and D also refer to the time of the original compilation of the case record.

Case 21 presents the discussions at the imperial court concerning a case submitted for decision in edited form. Based on the available evidence, it is not possible to decide when the editing took place, beyond that obvious fact that this must have happened after the compilation of the original documents on which the *Zouyanshu* case is based and before the compilation of the *Zouyanshu* itself.

Cases 19 and 20 are not actual documents, but narratives with a strong literary and rhetorical character about events the historical accuracy of which cannot be determined. An analysis shows that both texts, though telling a Chunqiu period story, can have been written not earlier than in post-unification Qin, and possibly only in early Han. Firstly, the texts themselves make their great



temporal distance explicit by referring to the time of the events they talk about as *yishi* 異時 “in the past”.<sup>201</sup> Secondly, text 20 translates the terms supposedly used for labour convicts in Chunqiu period Lu into their Qin/Han equivalents.<sup>202</sup> This last point in particular excludes an origin either outside of pre-unification Qin, or prior to Warring States Qin. Thirdly, and most importantly, the texts make use of a vocabulary that is not attested at all or not in the relevant sense in texts earlier than in post-unification Qin. This vocabulary appears both in the narrative and in quotes of legal stipulations which allegedly date back to Chunqiu times. Examples are 臥 in the nominal sense “sleeping place”,<sup>203</sup> or the technical legal term *he* 劾 “to bring an ex-officio charge”.<sup>204</sup> Most significantly, the introduction of the term *xianguan* 縣官 in the sense “government affairs, official business”<sup>205</sup> can be dated precisely to the year 221 BC, based on documents found in Liye. These include a list of terms and designations to be replaced by new ones, including the instruction to substitute the new term *xianguan* 縣官 “government” for both the old *wang shi* 王室 “royal house” and *gong shi* 公室 “ruling house”.<sup>206</sup> Other items on the same list are known from the *Shiji* account of how King Zheng, in the 26<sup>th</sup> year of his rule, marked his success in unifying the realm by introducing new terms and designations, most importantly *huangdi* 皇帝 for *wang* 王.<sup>207</sup> The composition of case 20 in its present form therefore can be placed with certainty after 221 BC. Most likely, the same is true for case 19. The more expanded technical term *xianguan shi* 縣官事

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<sup>201</sup> *Zouyanshu* 162, 174. See note 35

<sup>202</sup> *Zouyanshu* 175. See notes 45 and 46.

<sup>203</sup> Compare *Zouyanshu* 167-168 with *Hanshu* 77, 2380. In earlier sources, the verbal sense “to sleep” is common. The earliest passage for nominal usage given in the *Hanyu da cidian* is *Hanshu* 70, 1872 (a slightly different worded parallel passage is found in *Shiji* 70, 2619).

<sup>204</sup> The earliest use of *he* 劾 is found in late Warring States legal texts found at Shuihudi (*Xiaoliu* 54, 55=RCL B 26, 27).

<sup>205</sup> *Zouyanshu* 175.

<sup>206</sup> *Liye* 8-461r. See also Lau and Staack 2016, 153 note 752.

<sup>207</sup> *Shiji* 6, 236. Substitutions listed both in *Liye* 8-461r and the *Shiji* account include *zhi* for *ming*, *zhao* for *ling*, as well as Taishang Huang 太上皇 for Zhuang Xiang Wang 莊襄王.

“government business; official business” is only known from Han sources<sup>208</sup> and is not attested earlier; however, this might be due to a lack of sources.

It would be tempting to place the composition of cases 19 and 20 in Qin, as this would neatly divide the *Zouyanshu* in a first part with cases 1-16 composed in Han and a second part with cases 17-22 composed in Qin. However, composition of cases 19 and 20 in Qin is doubtful. Based on what we know about the intellectual history of Qin, it would be surprising to find both cases attached to the *Chunqiu*-personages that appear in both cases as judges and which are taken from the Confucian pantheon.<sup>209</sup> Case 19 is a variant of a *Hanfeizi* story where no judge appears; why would a judge associated with Confucian texts be introduced for this text in Qin? In case 20, the *ru* 儒-scholar certainly is presented as all clothes and no substance and thus not in the best light. However, it would be too simple to interpret case 20 as pursuing a Qin agenda in demonstrating the superiority of Legalism over Confucianism. This would rely on too simple an understanding of the intellectual world in Qin and early Han, where *ru*-scholars cannot yet be fully associated with “Confucianism”, and fixed “schools” had not yet fully developed. Rather, the *ru*-scholar in case 20 should be seen as embodying a class of specialist officials, the ritual specialists, which is here contrasted with a representative of the separate class of judicial officials. Both the fact that the judge is taken from “Confucian” texts and that the *Liji*, where Confucius himself makes the point that the *junzi* is made not by his dress, but by the learning, shares a topos with this case,<sup>210</sup>

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<sup>208</sup> A typical example is found in *Ernian lüling* 267: 吏有縣官事而無僕者，郵為炊；有僕者，假器 “If an official is on government business, but has no servants, the courier station shall cook from him; if he has servants, it shall lend him [kitchen] utensils.” Other examples are found in *Ernian lüling* 46, 48, 183, 422; *Zouyanshu* 180; *Hanshu* 13, 2427; 59, 2655. In most of these, *xianguan shi* is preceded by *yi* 以, as in *Zouyanshu* 175. The term *xianguan* on its own is very common in Han sources, but unknown in earlier ones. An isolated example in the military chapters of the *Mozi* (*Mozi* 71, 370) does not change this picture, as (a) the context is insufficient to definitively decide whether the term is used in its Qin/Han technical meaning; (b) the *Mozi* chapter itself, at least according to some scholars, might have been composed in Han (Graham 1993, 337), a view which finds support in *Liye* 8-461r; and (c) in any case, *Liye* 8-461r offers exceptionally strong evidence for the exact date of the introduction of the term.

<sup>209</sup> See above.

<sup>210</sup> *Liji* 59, 1668c.

should warn against premature simplifications.<sup>211</sup> All in all, the intellectual fluidity and multi-facetedness of cases 19 and 20 probably fits better into early Han than in Qin.

## The date of the compilation of the *Zouyanshu* case collection

With this information, it is fairly easy to determine when the *Zouyanshu* was first compiled as a case collection. The collection must date from after 196 BC, which is the last date mentioned in the *Zouyanshu* cases, and from before 185, the *terminus ante quem*. With the absence of any material clearly dating from after 196 BC, it is likely that the *Zouyanshu* was put together close to that date, i. e. around 195 BC. This would coincide with the last year in which the tomb owner was in office (he left office in 194 BC);<sup>212</sup> however, it has to be kept in mind that the collection of statutes found in his tomb dates from 186 BC, the year before or the year of his death, that is from the time after his relief from office.<sup>213</sup>

## The date of the *Zouyanshu* copy found in Zhangjiashan

It is unlikely that the *Zouyanshu* manuscript found in Zhangjiashan is the original manuscript of that text. Containing cases from all over the empire which obviously served as models and precedents, the *Zouyanshu* must have been compiled at the capital and distributed to the localities. The manuscript found in the tomb of a relatively low- or, at best, middle-ranking person far removed from the capital therefore should be a copy, which must have been made after 196 BC (the latest date in the *Zouyanshu*) and not later than 186 BC (the date of the tomb).

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<sup>211</sup> See Lüdke 2014 for detailed arguments.

<sup>212</sup> *Lipu* 10, see above.

<sup>213</sup> See pages 61ff. above.

## *The sequence of the cases*

Early on, Peng Hao has argued that the *Zouyanshu* cases are arranged according to a chronological principle, with the pre-Han cases placed at the end roughly in descending chronological order.<sup>214</sup> In order to understand the principles according to which the *Zouyanshu* cases have been arranged, it is first necessary to re-examine to what extent the sequence of the cases in the Zhengli xiaozu's transcription reflects the original sequence within the scroll recovered from the tomb. The only available basis to do so is the diagram of the relative location of the bamboo slips to each other at the time of their discovery which has been published by the Zhengli xiaozu.<sup>215</sup> The conclusions derived from an analysis of this diagram can be briefly summarized as follows:

- Case 2 should be placed between cases 4 and 5, as slips 17-27 (case 3) and 28-35 (case 4) are in the diagram located to the *inside* of slips 8-16 (case 2). This means that the two cases from Jiangling prefecture (cases 2 and 5) originally were placed beside each other, in the same way as the two cases from Hu prefecture (cases 3 and 4) originally were placed beside each other.
- The order of cases 19 and 20 should be reversed, with case 19 following case 20, as slips 162-173 (case 19) in the diagram *follow* slips 174-179 (case 20) in the same layer of the scroll in clockwise direction (the general direction of the scroll).
- The order of cases 6-13 is basically plausible, but cannot be confirmed with certainty, as each of these short cases consists of only one or two slips, and as it is difficult to determine whether the location of one or two single slips corresponds to the original sequence, or whether the slips have been dislocated by forces operating on the scroll after interment, as is the case with other slips.

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<sup>214</sup> Peng Hao 1995, 43.

- Generally, it is likely that the slips were in the correct sequence when the scroll was placed into the tomb, i. e. it is unlikely that more than a few single slips, if any at all, were bound into the scroll in the wrong place. This conclusion is based on the fact that specific types of irregularities in the sequence of the slips were concentrated in specific areas of the wrapped-up scroll at the time of discovery. This can be better explained with forces operating on specific parts of the wrapped-up scroll after its deposition into the tomb. If a large number of slips had been incorrectly bound, their location would have been more random after wrapping up the scroll. As a consequence of this observation, the situation of the scroll after discovery is not inconsistent with its being used during the lifetime of the tomb owner. There is no reason to assume that the scroll was specifically produced for burial (while sloppy binding might have been an indication for this).

As a result of this analysis and of the preceding analysis of the nature of the cases, as well as of the following analysis of their format and structural features, the following principles for placing the cases in the *Zouyanshu* can be postulated:

1. Primary organising principle is the format and type of the cases:
  - a. Fully-documented *yan*-cases, submitted by prefecture-level authorities (cases 1-5, Han).
  - b. Extracts of *yan*-cases, submitted by commandery authorities (cases 6-13, Han).
  - c. *Qing*-cases (requests for court approval of sentence), submitted by commandery authorities (cases 14-16, Han).
  - d. *Fu*-cases (reviews), with the reviews conducted by commandery authorities (case 17: *qi ju*-review; case 18: review on order of *yushi dafu*; both Qin).

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<sup>215</sup> Appendix 2 in Zhangjiashan ersiqi hao Han mu zhuyuan zhengli xiaozu 2001, 322.

- e. Historical cases involving ruler and individual judge (cases 19 and 20; situated in Eastern Zhou).
  - f. Cases exemplifying legal argumentation in detail (case 21, a *yan*-case from Qin) and criminal investigation (case 22, a recommendation for promotion from Qin).
2. Secondary organising principle is the locality which submitted the case originally, as cases submitted by the same authority are placed together. There are too few cases to determine whether there is a principle guiding the order of localities (e. g. from North to South).
  3. Within each major category, the date of each case does not seem to be a factor in arranging the sequence.
  4. The general chronological order (Han cases preceding Qin cases) seems to be a by-product of the arrangement according to format, rather than a guiding principle, as all cases following the same format are chronologically close together.

### ***A form to be filled in: The procedural model***

It is evident from mutual comparison that those *Zouyanshu* cases most likely based on actual documents not only record trials conducted according to a strict procedure, but that the records themselves follow a strict pattern. In fact, this pattern reflects the procedure and at the same time is itself part of the procedure, as the recording was an integral part of the administration of justice.<sup>216</sup>

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<sup>216</sup> Case records with more or less uniformity of pattern are not unique to the field of law. Elizabeth Hsu (2010) has studied Western Han medical records preserved in the *Shiji*, which are important not only for understanding similarities and differences in the recording of cases in different fields of specialisation in early China, but also evaluating the crucial role of case narratives in the production and development of knowledge. The latter theme is explored in depth by the different essays in Furth et al. 2007 (in her

The *Zouyanshu* documents can be thought of being constructed by filling in some kind of “form”.

While this form is utilized in the *Zouyanshu*, in its completed case records the form is already filled in; this means that the form itself becomes latent. It therefore needs to be reconstructed by analysing the structural parallels of different cases, which become apparent when their form is abstracted from their specific content, and when recurrent formulae are isolated.

While the different forms underlying *Zouyanshu* case records are not immediately visible as such, there is at least one almost contemporary extant text which contains similar procedural forms in an explicit way, namely the *Fengzhen shi* from Shuihudi. These have a slightly different perspective than the *Zouyanshu*: The *Fengzhen shi* exclusively concern procedural steps to be taken at the inquest stage of criminal trials, that is, before a finding of fact (*ju 鞫*) was made, while the *Zouyanshu* contains the procedure up to and including the final judgement and any review conducted by higher authorities. The *Fengzhen shi* are model records for the communication between different officials within a prefecture, while the *Zouyanshu* contains records of communication between prefectures and higher-level authorities. Finally, the *Fengzhen shi* not only present the naked form, but also intersperse explicit instructions to the responsible officials; in contrast, the *Zouyanshu* contains neither the blank form nor instructions, but the result of filling in the form, i. e. full case records. Despite these differences, the *Fengzhen shi* is instructive on a number of points:

1. They demonstrate that the formal structure of trial records was not a mere subconscious side-effect of the practice of recording, but that procedural forms were consciously

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introduction, Furth states that the “project of thinking with cases in China came to self-consciousness through the production of texts that gradually acquired a systematic and public character in the tenth century CE and after.” It might be asked whether the Qin and Han legal as well as the medical case records are not sufficient ground to assume that the process described by Furth – a self-conscious thinking with cases reflected in systematic and public texts – had much earlier origins than the 10<sup>th</sup> century). Giving support to the importance of case records throughout imperial history, Barbara Volkmar (2007) describes Ming period medical cases.

developed, prescribed and applied.

2. Through their composition as a combination of model records and procedural instructions, they show that procedure and record were inseparably interlinked: Correct procedure implied, as an intrinsic element, records that were formally correct; and the records were only correct in so far they recorded correct procedure.
3. Their original title *Fengzhen shi* 封診式 “Models for sealing and inspection” shows that there was a proper Chinese term for the “form” used in recording legal proceedings, namely *shi* 式 “model”. I will use this term henceforth for the procedural form underlying the legal records.

The use of such a model served bureaucratic and judicial purposes. It allowed for efficient dispensation of legal matters. It served as a checklist which ensured that every necessary procedural step was taken. It simplified the work of the record-keeping authority, which only needed to fill in a given form instead of deliberating on the appropriate form for the record on a case-by-case basis. For the supervising authorities, it ensured that information was standardised and could be quickly retrieved at the position assigned to it. It made concise records possible which nevertheless included all relevant information. From a judicial point of view, it ensured that the correct procedure was adhered to so that a judgement would not become invalid for procedural reasons. It served as a filter which extracted from the often chaotic flow of information only that which was relevant to the legal issues of the case at hand. It therefore prefigured the judicial decision, which could only be based on the information which the model allowed.

The analysis of this form is therefore crucial not only for the understanding of early Chinese legal records, but also for the understanding of the administration of justice in general.



## Reconstruction of the procedural model for specific cases

In the following, I will try to reconstruct the procedural model – or rather the most important of the different models – underlying the *Zouyanshu* case records. I will use, in some respects, the format of the *Fengzhen shi* models: There, the names – but not the rank – of those persons playing an immediate part in the formal inquest as accused, witness or person lodging a criminal complaint (*gao* 告) are (mostly) replaced with cyclical characters of the *tiangan* 天干 cycle (*jia* 甲, *yi* 乙, *bing* 丙, *ding* 丁 etc., translated as “A”, “B”, “C”, “D” etc.). Most other individual information which refers to place, time, or the names of the investigating officials or of people not immediately related to the formal inquest is replaced with *mou* 某, translated as “X”. Some information, such as a specific offence or a person’s rank and official position, is retained in the *Fengzhen shi*, but replaced by expressions such as *mou zui* 某罪 “offence X”, *mou jue* 某爵 “Xth rank” or *mou guan* 某官 “holder of office X” in my reconstruction of the *Zouyanshu* model.

The resulting hypothetical models of the *Zouyanshu* are considerably more abstract than the *Fengzhen shi* models which, true to their purpose, still contain a fair amount of specific information characteristic for the type of case for which they provided procedural guidance. It is also not known if explicit models – *shi* 式 – actually existed for the *Zouyanshu* records, i. e. models that are closer to my reconstruction than to the *Fengzhen shi*. However, the *Fengzhen shi* demonstrate that the idea of a procedural model and a form used in recording is not anachronistic.

I will start by extrapolating the model for those cases which share a large amount of structural similarities, i. e. cases 1-5, 6-13, 14 and 15, and 16 respectively (cases 17-22 will in this first step not be used for the extrapolation of the model due to their more unique structural features; however, I will discuss in the following section to what extent they conform to the procedural model). The cases in each of these groups can be assumed to be constructed around the same procedural model. I will deal in the section following the reconstruction with the question of how

these models, or elements within them, are modified in the remaining cases. Case 16, though basically belonging to the same group as cases 14-15, is analysed separately because of a number of structural differences.

The reconstruction of the model offered below aims to present the most evolved version of the form. This means that structural elements present in at least one case are reproduced even if they are missing in other cases. On the other hand, if a case involves several people in the same role (accused, witness etc.), only the elements pertaining to one of them are given; it will be understood that the structural elements for one person are duplicated in the resulting record if more than one person is involved in the same role. Pointed brackets < > indicate optional elements. Horizontal slashes ( | ) indicate alternatives within a formula. Round brackets ( ) are used to delineate the alternatives within a formula from the rest of a sentence, i. e. to indicate where the first alternative begins and where the second alternative ends; round brackets are not necessary if the alternatives are themselves optional and thus enclosed in pointed brackets, or if the alternative phrase starts at a new line, or ends with a line break. Double horizontal slashes ( || ) are used to delineate second-level alternatives, i. e. when one of the alternative formulae in itself already includes alternative formulations.

### **Cases 1-5<sup>217</sup>**

*Header of a prefecture-level authority's submission of a case to the higher authority for decision due to doubts on matters of law:*

某年某月某某朔某某，<sup>218</sup>

X-th year, x-th month with day xx as its first day, day xx.

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<sup>217</sup> For full translation and discussion of these cases, see Lau and Lüdke 2012, 92ff. (case 1); 107ff. (case 2); 117ff. (case 3); 128ff. (case 4); 135ff. (case 5).

<sup>218</sup> *Zouyanshu* 1; 8; 17; 36.

某（縣 | 道）〈令〉<sup>219</sup>某、丞某敢讞之：<sup>220</sup>

We,<sup>221</sup> X, prefect of X (prefecture | marsh), and X, deputy prefect, venture to submit the following case for decision:

*Documentation of the formal inquest conducted at the prefecture level:*

〈迺〉某月某某，<sup>222</sup>

<Past><sup>223</sup> x-th month, day xx,

〈某官〉〈某爵〉甲〈告 | 辭〉曰：「……乙為某。」<sup>224</sup> | 劾曰：……乙為罪。<sup>225</sup> | | 〈某官〉〈某爵〉甲詣（男子 | 女子）乙告為某。<sup>226</sup>

<Holder of official position X> A <a holder of the Xth rank> <brought the following criminal complaint | brought the following claim>: ... B did [punishable action] X. || Ex-officio charge: ... B did [punishable action] X. || <holder of official position X> A <a holder of the Xth rank> presented to the authorities a (man | woman) called B and brought a criminal complaint against him/her for doing [punishable action] X.

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<sup>219</sup> The explicit designation *ling* 令 is not present in the introductory formula of any of the cases and here inserted for clarification only.

<sup>220</sup> *Zouyanshu* 1; 8; 17; 28; 36.

<sup>221</sup> The first person is used throughout the translation in order to stress the nature of these texts as actual documents, which requires us to assume that this formula introducing the submission was actually written down by the officials mentioned in it, not by a distant outsider who narrates the fact of the submission. In particular, the polite *gan* “I/we venture to...” makes only sense in a first-person statement.

<sup>222</sup> *Zouyanshu* 1; 8; 28; 36.

<sup>223</sup> *Nǎi* 迺 (also written 乃) “this past (specified day or month)”, when used before dates in which no year or neither month nor year was given, indicated that the date so marked was the one immediately preceding the time of speaking. In this way, “incomplete” date references consisting only of day and month, or even only of the day, are unambiguous as long as the time of speaking is known (*Fengzhen shi* 96, 17, 81=RCL E 6, 8, 22; *Zouyanshu* 100, 102; *Juyan* 3.14, 13.6, 49.18, 311.9; 乃 *nǎi Juyan* 82.2, 306.12; *Shiji* 6, 422; *Hanshu* 9, 281; 25B, 1262; 72, 3092; 81, 3359; 99B, 4159).

<sup>224</sup> *Zouyanshu* 8-9; 36-37.

<sup>225</sup> *Zouyanshu* 17-18.

<sup>226</sup> *Zouyanshu* 1-2; 28.

〈今〉乙曰：

「……。」（它如甲。| 它如劾。）<sup>227</sup>

<Inquest:><sup>228</sup> Statement of B:

“……” (Everything else corresponded to A’s complaint. | Everything else corresponded to the ex-officio charge.)

丙曰：

「……。」（它如甲〈、乙〉。| 它如劾。）|| 丙言如〈劾及〉乙。<sup>229</sup>

Statement of C:

“……” (Everything else corresponded to A’s complaint <and B’s statement>. | Everything else corresponded to the ex-officio charge.) || C made statements corresponding to <the ex-officio charge and> B’s statements.

詰乙：

「〈律……。〉

……，（乙|某人）（〈實〉〈即〉|非）某事〈也〉〈已〉：（〈乙〉為某。|乙〈……，〉當以律某章論。）||……某當也。〈乙〉為某。||（乙非當得為某也，而為某。|乙宜為某，乃為某。）〈是〉〈即〉律某章〈也〉。||乙〈雖……〉實為某。〈是〉〈即〉律某章〈也〉。<sup>230</sup>

<sup>227</sup> *Zouyanshu* 2-3; 9-10; 18-19; 28-29; 37-39, 39-40.

<sup>228</sup> The primary purpose of *jin* 今 here is not to mark the following as occurring in the present (“now”, as opposed to “in the past”), but to mark the beginning of the formal inquest conducted by the prefecture officials, as opposed to the complaint, claim, or ex-officio charge which initiates the inquest, but is not part of it.

<sup>229</sup> *Zouyanshu* 3; 10-11; 19; 29-30; 31-32; 40-41.

<sup>230</sup> The clauses extrapolated here are those of *Zouyanshu* cases 1-5. They are given here by way of example to illustrate the basic structure of the confrontation. Other phrasing might be used in other cases. However, whatever the variation, characteristic for the content of the confrontation is the adversative structure: Stating the general legal status and consequent duties – contrasting this with the defendant’s actions – classifying, explicitly or implicitly, the defendant’s actions as punishable. In essence, the basic logical structure is that of a syllogism, with the statement of the legal status or duties taking the position of the

何解？」<sup>231</sup>

Confrontation of B:

“The statutes stipulate……

……, thus (you | person X) (<in fact> <already> had <nothing else than> | had not) legal status X:  
(Nonetheless, you did [punishable action] X. | Therefore, <……,> by law judgement is to be  
passed on you for statutory offence X.) || ……X was lawful. Nonetheless, you did [punishable  
action] Y. || (Even though by law you were not permitted to do X, you nonetheless did X. | You  
were obliged to do X but instead did Y.) <This> constitutes <nothing else than> statutory offence  
X. || <Although……,> in fact you nonetheless did X. <This> constitutes <nothing else than>  
statutory offence X.

What defence do you offer?”

乙曰：

「……；毋它解。」<sup>232</sup> | 「……；〈吏以為〈即〉律某章；〉存吏〈當，〉〈罪，〉毋解。」

<sup>233</sup> | 「〈……；〉罪，毋解。」<sup>234</sup>

Response of B:

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major premise, the defendant's actions that of the minor premise, and the statement of punishability the conclusion, against which the defendant is finally asked to defend himself (*he jie* 何解). This structure is typical for *Zouyanshu* cases 1-5, where the questions in dispute concern matters of law, not matters of fact. In cases focusing on the factual reconstruction, the basic structure would be to confront the defendant with his statements and contradicting evidence, see e. g. *Zouyanshu* cases 17 and 22.

<sup>231</sup> *Zouyanshu* 4-5, 11-12; 19-20, 21-22; 30-31; 41-42, 44.

<sup>232</sup> *Zouyanshu* 13; 44-45.

<sup>233</sup> *Zouyanshu* 5; 43-44. The fact that *li yi wei* <*ji*> *lü mou zhang* 吏以為〈即〉律某章 is part of the procedural model (and not only particular to the individual case) is supported by *Wei yu deng zhuang* 130, in which records a defendant's response to the confrontation (*jie* 詰) as follows: 上以識為劫媿，臯（罪）識，識毋（無）以避，毋（無）它解。臯（罪）“Only insofar as you, the authorities, regard me as having coerced Wan and therefore consider me liable to punishment, I have no means to avoid this, will not bring forth any further defence, and would be liable to punishment.”

<sup>234</sup> *Zouyanshu* 20-21, 22; 31.

“……; no further defence will be brought forth.” | “……; <however, you,<sup>235</sup> the interrogating officials, consider [my actions] <nothing else than> to constitute statutory offence X; and> only under the premises of <how> you, the interrogating officials, <apply the law>, I <would be liable to punishment and> would not have a valid defence. || <……;> I am liable to punishment and have no valid defence.

問：

如辭。 | 乙……。 <它如辭。 > <sup>236</sup>

Result of inquiries:

Corresponding to the above statements. | B…… <Everything else corresponds to the above statements.>

診：

如辭。 | ……。 <它如辭。 > <sup>237</sup>

Result of inspection:

Corresponding to the above statements. | …… <Everything else corresponds to the above statements.>

鞫 <之 >：

乙……。 <得 >。 <皆 > 審。 <sup>238</sup>

Finding of facts:

B…… <He/she has been caught.><sup>239</sup> <All of> this has been ascertained as fact.

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<sup>235</sup> *li* 吏, the generic term for officials or even the authorities, is here used as a second-person address for the specific officials conducting the interrogation.

<sup>236</sup> *Zouyanshu* 5; 13-14; 22; 32; 45.

<sup>237</sup> *Zouyanshu* 45.

<sup>238</sup> *Zouyanshu* 5-6; 14-15; 22-23; 32; 45-47.

<sup>239</sup> The formulaic *de* 得 “he/she has been caught” often (not always) concludes the finding of fact before the assertion that its contents have been ascertained as fact (*shen* 審). The most likely reason for including *de*

*Submission formula, concluding the prefecture-level authority's submission of the case for decision:*

疑乙罪。〈繫。〉〈它縣論。〉

We are in doubt as to B's liability to punishment. <He/she is held in detention.> <In all other matters we have passed judgement on the prefecture-level.>

敢讞之〈，謁報〉，<sup>240</sup>署〈獄史〉某發。<sup>241</sup>

We therefore venture to submit the case for decision <and request a reply>, [on your reply] affix the notation "to be opened by <judicial secretary> X".

*Alternative options for a judicial decision, argued probably at the higher authority:*

〔比〕<sup>242</sup>

[Wording of an applicable precedent]

吏當 | 吏議：

〈……，〉乙〈……，〉〈當〉〈以律某章論，〉〈某罪〉。<sup>243</sup> | 〈乙……，〉不當論。

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probably was in order to fix the exact point in the chain of events when the accused had been caught, as in some cases this had a bearing on the legal evaluation and the eventual judgement, e. g. when the offender was caught before the punishable action had been begun or completed. This is, for example, the case in case 3 of the *Zouyanshu*, where the finding of facts states *wei chu guan de* 未出關得 "They were caught before they had crossed the frontier post", which probably precluded prosecution for the particular offense of crossing the border without authorization (but not for others).

<sup>240</sup> *Zouyanshu* 6-7; 15; 23; 32-33; 47.

<sup>241</sup> *Zouyanshu* 7; 15; 47. See also note 20 above.

<sup>242</sup> *Zouyanshu* 23-24; the term *bi* 比 is not used in the *Zouyanshu*, but is the proper term for a precedent (see discussion above).

<sup>243</sup> The minimal form is either *Yi dang yi lü mo zhang lun* 乙當以律某章論 (determining the applicable offence in the statutes explicitly, merely implying the consequent punishment) or *Yi mou zui* 乙某罪 (specifying the punishment explicitly, merely implying the underlying offence), but the more expanded form *Yi dang yi lü mou zhang lun, mou zui* 乙當以律某章論，某罪 (specifying both the applicable offence and consequent punishment) is also found, see *Zouyanshu* 34. See *Zouyanshu* 188 for *lü zhang* 律章 as the proper term a specific section of the statutes, identified by the description of the punishable action, i. e. the offence.

| 當為庶人。 | 除乙。<sup>244</sup>

We apply the law as follows | We argue the following legal opinion:

<.....,> as for B <.....,> <by law> <judgement is to be passed on him/her for statutory offence X,> <he/she is to be subjected to punishment X>. | <As for B,.....,> by law no judgement is to be passed on him/her. | By law B is to be made a commoner. | B is to be exempted from punishment.

或曰：

〈.....，〉乙〈.....，〉〈當〉〈以律某章論，〉〈某罪〉。 | 〈乙.....，〉不當論。 | 當為庶人。 | 除乙。<sup>245</sup>

Other opinion:

<.....,> as for B <.....,> <by law> <judgement is to be passed on him/her for statutory offence X,> <he/she is to be subjected to punishment X>. | <As for B,.....,> by law no judgement is to be passed on him/her. | By law B is to be made a commoner. | B is to be exempted from punishment.

*Decision made at the imperial court or by the emperor himself:*

〈某年某月某某朔某某，廷尉某謂某〈縣 | 道〉嗇夫：

讞〈某官〉〈某爵〉乙，讞固有審。〉<sup>246</sup>

< X-th year, x-th month with day xx as its first day, day xx. X, minister of trials, notifies the stewards of X <prefecture | marsh>:

In regard to the case of <holder of official position X> B <a holder of the Xth rank> which you

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<sup>244</sup> *Zouyanshu* 7, 14-16, 24-25, 33-34, 47. The possible options have been extrapolated from both the *li yi* 吏當 / *li dang* 吏議-sections and the *huo yue* 或曰-sections of *Zouyanshu* cases 1-5, as it is assumed that that options found in one type of section could equally be part of the other section as well, as both give alternative opinions which, in principle, are interchangeable, depending on the case at hand. E. g., in *Zouyanshu* cases 1-5 we find *chu Yi* 除乙 only as part of a *li dang* section (*Zouyanshu* 48), but not as part of a *huo yue*-section, but it is understood that in a different case this could be the other way around.

<sup>245</sup> *Zouyanshu* 7; 14-16; 24-25; 33-34; 47. Here, too, the possible options have been extrapolated from both the *li yi* 吏當 / *li dang* 吏議-sections and the *huo yue* 或曰-sections of *Zouyanshu* cases 1-5, see footnote above.

<sup>246</sup> *Zouyanshu* 26.



have submitted for decision: You indeed have ascertained all relevant facts of the case submitted for decision.>

廷報〈曰〉 | 廷以聞：

〈乙〉〈當〉〈〈以〉律某章論〈之〉〉〈某罪〉。 | 不當論。 | 當為庶人。 | 除乙。<sup>247</sup>

Reply from the court | The court has brought the case to the emperor's attention, resulting in the following decision:

<As for B,> <by law> <judgement is to be passed on him/her for statutory offence X,> <he/she is to be subjected to punishment X >. | By law no judgement is to be passed. | By law B is to be made a commoner. | B is to be exempted from punishment.

〈律白，不當讞。〉〈它如律令。〉<sup>248</sup>

<As the statutes are explicit on this, by law the case should not have been submitted for decision.>

< Everything else is to be ordered in correspondence with the statutes and edicts.>

### Cases 6-13<sup>249</sup>

*Header for a commandery's submission of a case because of judicial doubts:*

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<sup>247</sup> *Zouyanshu* 7; 26-27; 34-35; 47-48. In *Zouyanshu* cases 1-5, we find either the form *dang mou zui* 乙某罪 (specifying the punishment) (*Zouyanshu* 7, 27, 48) or *lü mou zhang lun zhi* 律某章論之 (specifying the punishable action as reference to the appropriate section of the statutes) (*Zouyanshu* 35), but not both combined. However, based on a comparison with the *li yi* 吏當 / *li dang* 吏議 and *huo yue* 或曰-sections (in essence proposed judgements), where the combined form appears once (*Zouyanshu* 34), the use of the combined form should have been possible in a decision. *Bu dang lun* 不當論 and *dang wei shuren* 當為庶人 are both not found in imperial decisions in *Zouyanshu* cases 1-5; however, the use of these options in the *li yi* 吏當 / *li dang* 吏議 and *huo yue* 或曰-sections implies that, in other cases, these also would have been possible outcomes.

<sup>248</sup> *Zouyanshu* 27, 35. In *Zouyanshu* cases 1-5, *ta ru lüling* 它如律令 is used only once after an imperial decision (*Zouyanshu* 27), the same is true for *lü bai, bu dang yan* 律白，不當讞 (*Zouyanshu* 35). In these cases, both are not found combined, and three of the five cases contain neither.

<sup>249</sup> For full translation and discussion of these cases, see Lau and Lüdke 2012, 145ff. (case 6); 152ff. (case 7); 158ff. (case 8); 161ff. (case 9); 164ff. (case 10); 168ff. (case 11); 173ff. (case 12); 177ff. (case 13).

某郡守讞：<sup>250</sup>

As governor of commandery X, I<sup>251</sup> submit for decision:

*Summary (i. e. finding of fact) of the formal inquest, which probably had been conducted at prefecture level:*

〈……〉〈某官〉〈某爵〉甲為某〈……〉。<sup>252</sup>

<……> <Holder of official position X> A <a holder of the Xth rank> did [punishable action] X  
<……>.

*Submission formula, concluding the commandery's submission:*

疑罪。<sup>253</sup>

We are in doubt as to the liability to punishment.

*Decision of the imperial court:*

廷報：

甲律某章也。 | 甲當以律某章論。 | 甲當某罪。<sup>254</sup>

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<sup>250</sup> *Zouyanshu* 49; 51; 53; 54; 56; 58; 60; 61.

<sup>251</sup> Cases 6-13 are summaries of documents, not the full documentation of the cases. This is, for example evidenced by the fact that these cases lack the polite formulae of address. The most plausible conjecture is that these summaries were prepared at the imperial court as an abstract of the much fuller records archived there. The first person is still used in translation, based on the assumption that actual documents form the basis for these cases.

<sup>252</sup> *Zouyanshu* 49-50; 51-52; 53; 54; 56; 58-59; 60; 61-62. In *Zouyanshu* 53, the accused is not the grammatical subject of the sentence (though the offence for which he is held liable is clearly indicated). This variation is not recorded separately in the reconstructed form.

<sup>253</sup> *Zouyanshu* 50; 52; 53; 54; 57; 59; 60; 62.

<sup>254</sup> *Zouyanshu* 50 (?); 52; 53; 54-55; 57; 59; 60; 62. In *Zouyanshu* 50, the court replies *cuo gao dang zhi* 錯告當治, with *cuo gao* 錯告 possibly writing *chou gao* 酬告 “criminal complaint made in reaction” (see Lau and Lüdker 2012, 151 note 800). *Cuo gao* 錯告 is not known at all from extant sources, *chou gao* 酬告 only from *Falii dawen* (100=RCL D 84, written *zhou gao* 州告). Therefore, it is not clear whether *cuo/zhou/chou gao* refers to any statutory offence, or is an interpretative/explanatory term. As *Zouyanshu* case 6 concerns an untypical situation which, on the basis of the available source material, is not fully understood, the

Reply from the court:

The statutory offence committed by A is X. | By law judgement is to be passed on A for statutory offence X. | By law A is to be subjected to punishment X.

### **Cases 14-15<sup>255</sup>**

*Documentation of the formal inquest, submitted by the commandery authorities to the imperial court:*

某年某月某某，<sup>256</sup>

X-th year, x-th month, day xx.

某（縣 | 道）丞某劾 | 言：<sup>257</sup>

X, as deputy prefect of X (prefecture | marsh), brought the following ex-officio charge | reported the following:

〈某官〉〈某爵〉甲為某〈……〉。<sup>258</sup>

<Holder of official position X> A <a holder of the Xth rank> did [punishable action] X <……>.

甲曰：

「誠為某……。罪。」它如劾 | 它如書。<sup>259</sup>

Statement of A: “It is true that I did X……. I am liable to punishment.” (Everything else corresponded to the ex-officio charge. | Everything else corresponded to the documents.)

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decision in this case is not used for reconstructing the procedural model, and *dang zhi* “by law, this is to be tried”, in particular, is not included as one of the options.

<sup>255</sup> For full translation and discussion of these cases, see Lau and Lüdke 2012, 181ff. (case 14); 191ff. (case 15).

<sup>256</sup> *Zouyanshu* 63; 69.

<sup>257</sup> *Zouyanshu* 63; 69.

<sup>258</sup> *Zouyanshu* 63; 69.

<sup>259</sup> *Zouyanshu* 63-64; 69-71.

乙言如甲。<sup>260</sup>

B made a statement which corresponded to that of A.

問：

甲……。它如辭。<sup>261</sup>

Result of inquiries:

B…… Everything else corresponds to the above statements.

鞠：

甲……。審。<sup>262</sup>

Finding of facts:

A…… This has been ascertained as fact.

*The commandery authority's proposal for a judgement, attached to the submission: :*

當：

甲某罪。<sup>263</sup>

We apply the law as follows:

A is to be subjected to punishment X.

〈律：……。〉令〈曰〉：……。<sup>264</sup>

<The statutes stipulate: ……> The edicts stipulate: ……

以此當甲。<sup>265</sup>

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<sup>260</sup> *Zouyanshu* 64; 71.

<sup>261</sup> *Zouyanshu* *Zouyanshu* 64; 71.

<sup>262</sup> *Zouyanshu* 64-65; 71-72.

<sup>263</sup> *Zouyanshu* 65; 72.

<sup>264</sup> *Zouyanshu* 65-67; 72-73.

<sup>265</sup> *Zouyanshu* 67; 73.

In accordance with this, we have applied the law to A.

*Identification of the responsible officials:*

某郡守某、守丞某、卒史某治。<sup>266</sup>

Tried by X, governor of commandery X, X, deputy governor, and X, secretary-in-chief.

*Submission formula, concluding the commandery authority's submission of the case for imperial approval:*

〈某年某月某某朔某某，某郡守某敢言之。上奏某數牒，謁以聞。乙縣論。敢言之。〉<sup>267</sup>

<X-th year, x-th month with day xx as its first day, day xx. As governor of commandery X, I venture to report the above. I submit X bamboo slips for the emperor and request that these be brought to his attention. Judgement on B has been passed on prefecture-level. I venture to report this.>

### **Case 16<sup>268</sup>**

*Ex-officio charge brought by the commandery governor, including an account of the antecedent events:*

某郡守行縣掾某縣獄：<sup>269</sup>

As governor of commandery X, on a tour of inspection through the prefectures, I examined the following criminal case of prefecture X:

某月某某，某縣〈令〉<sup>270</sup>甲爰書：<sup>271</sup>

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<sup>266</sup> *Zouyanshu* 67; 74.

<sup>267</sup> *Zouyanshu* 68.

<sup>268</sup> For full translation and discussion of this case, see Lau and Lüdke 2012, 217ff.

<sup>269</sup> *Zouyanshu* 75.

<sup>270</sup> *ling* 令, which is missing in this place in case 16, is added for clarity.

Official record, dated to x-th month, day xx, made by A, prefect of X prefecture:

.....<sup>272</sup>

[Contents of the record:] .....

.....<sup>273</sup>

[Further facts raising suspicion.]

某月某某，某郡守某劾曰：.....<sup>274</sup>

On day xx of the x-th month, I therefore brought the following ex-officio charge: .....

*Documentation of the formal inquest, probably conducted by commander officials:*

復之：<sup>275</sup>

Review of the case:

.....<sup>276</sup>

.....

乙曰：「.....。」它如劾。<sup>277</sup>

Statement of B: “.....” Everything else corresponded to the ex-officio charge.

甲曰：「.....。」它如乙。<sup>278</sup>

Statement of A: “.....” Everything else corresponded to B’s statement.

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<sup>271</sup> *Zouyanshu* 75-76.

<sup>272</sup> *Zouyanshu* 76.

<sup>273</sup> *Zouyanshu* 76.

<sup>274</sup> *Zouyanshu* 77-78.

<sup>275</sup> *Zouyanshu* 78.

<sup>276</sup> *Zouyanshu* 78-79.

<sup>277</sup> *Zouyanshu* 80-81.

<sup>278</sup> *Zouyanshu* 82-84.

丙、丁曰：「……。」它如乙。<sup>279</sup>

Statements of C and D: “……” Everything else corresponded to B’s statement.

詰丙、丁、甲：「甲……，為某；丙、丁……，為某。皆何解？」<sup>280</sup>

Confrontation of C, D, and A: “A, you……, nevertheless you did [punishable action] X; C and D, you……, nevertheless you did [punishable action] X. What defence does each of you offer?”

丙等皆曰：罪，毋解。<sup>281</sup>

Reply of each of C etc.: “I am liable to punishment and have no valid defence.”

……。<sup>282</sup>

……

診問：乙、甲、丙、丁……。它如辭。<sup>283</sup>

Result of inspection and inquiries: B, A, C, and D…… Everything else corresponds to the above statements.

鞠之：乙……；甲……；丙、丁……。審。<sup>284</sup>

Finding of facts: B……; A……; C and D…… This has been ascertained as fact.

*Proposal for judgement, probably made at commandery level, attached to the record:*

律：……。以此當乙。<sup>285</sup>

The statutes stipulate: …… In accordance with this, the law is to be applied to B.

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<sup>279</sup> *Zouyanshu* 85.

<sup>280</sup> *Zouyanshu* 85-87.

<sup>281</sup> *Zouyanshu* 87.

<sup>282</sup> *Zouyanshu* 87.

<sup>283</sup> *Zouyanshu* 88-90.

<sup>284</sup> *Zouyanshu* 90-91.

<sup>285</sup> *Zouyanshu* 93.

律：……○。以此當甲。<sup>286</sup>

The statutes stipulate: …… In accordance with this, the law is to be applied to A.

律：……○。以此當丙、丁。<sup>287</sup>

The statutes stipulate: …… In accordance with this, the law is to be applied to C and D.

當之：甲、乙、丙、丁皆當某罪。繫。<sup>288</sup>

We apply the law as follows: A, B, C, and D by law all are to be subjected to punishment X. They are held in detention.

某縣〈令〉<sup>289</sup>某、丞某、獄史某治。<sup>290</sup>

Tried by X, prefect of prefecture X, X, deputy prefect, and X, judicial secretary.

*Submission of the case to the imperial court for approval, probably by the commandery authorities:*

敢言之。甲、乙為某；丙、丁為某；……。<sup>291</sup>

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<sup>286</sup> *Zouyanshu* 94.

<sup>287</sup> *Zouyanshu* 95.

<sup>288</sup> *Zouyanshu* 96.

<sup>289</sup> *ling* 令, though not present in place in case 16, is again added for clarity.

<sup>290</sup> *Zouyanshu* 97.

<sup>291</sup> *Zouyanshu* 92. This strip, which in Zhangjiashan ersiqi hao Han mu zhujian zhengli xiaozu 2001 is placed between strips 91 and 93, is here tentatively placed between strips 97 and 98, as in Lau and Lüdke 2012, 216 (see note 1059 on p. 216 and appendix IV on p. 359). Strip 92 should be part of the same submission formula as strip 98, which both starts and ends with *gan yan zhi* 敢言之, almost identical to case 14 (see *Zouyanshu* 68). Also, with the proposed arrangement of slip 92 between slips 97 and 98, the facts contained in slip 92 are stated by the commandery authorities. In contrast, the solution proposed by the Zhengli xiaozu would result in the same facts restated twice by the prefecture officials listed in slip 97. Instead, in the proposed new arrangement, the commandery authorities, in the course of attaching their submission formula, confirm the prefecture's findings, which makes much more sense in explaining why the same facts are stated twice. Also, with this new arrangement of strip 92, the structure of the case would much better correspond to that of cases 14 (*Zouyanshu* 65-68; same submission formula) and 18 (*Zouyanshu* 157-161; same structure of the proposed judgement); both cases present additional information like that in *Zouyanshu* 92 at the very end of the record. Finally, in the drawing depicting the original location of the slips at the time of excavation given in Zhangjiashan ersiqi hao Hanmu zhujian zhengli



We venture to report this case. A and B did [punishable action] X; C and D did [punishable action] X; .....

為奏當某數牒。上，謁請，謁報。敢言之。<sup>292</sup>

We have prepared X bamboo slips with a [proposed] application of the law for submission to the emperor. We submit this his majesty, requesting approval of the judgement and requesting a reply.

We venture to report this.

## Variations of the model: Mechanisms of procedure and recording

In the previous section I have identified, by comparing structurally equivalent cases and extrapolating their shared formal features, the procedural model in its most basic form. I will now proceed to employ this model as an instrument for further analysis. In the following sections, I will show, on the one hand, that the different procedural models underlying the different cases can be understood as variations of one and the same basic model, and on the other hand, that the

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xiaozu 2001, 322, slip 92 follows slips 96 and 97, though the three slips are reversed in direction (anti-clockwise rather than clockwise as most of the scroll) and removed from the neighbouring slips. The fact that these slips are in the vicinity of slips 115 to 119 in the next layer, which also have been dislocated and reversed in direction, could be an indication that both segments (96-97-92 and 115 to 119) in both layers had been subjected to the same physical process after interment. This would be consistent with the slip order 96-97-92 being the original one. However, as the processes operating on the scroll after interment are hardly understood, these arguments are very tentative. A different solution would be to place *Zouyanshu* slip 97 after slip 91 and before slips 92 and 93 (leaving slip 92 at the place suggested by the Zhengli xiaozu), i. e. *before* the “application of the law”, with the result that the judgement would have been proposed by the commandery. This would also, similar as the option discussed above, avoid the the same authority asserting the same fact twice. However, cases 14, 15, and 18 do not provide structural parallels for this. Furthermore, it depends on the understanding of slip 97 whether such a placement (between slips 91 and 92) would violate the principle found in all other *Zouyanshu* cases that the authority which conducts the core inquest also provides an evaluation, either in form of a judgement (*lun*), an application of the law (*dang*), or a statement of legal doubt (*yi zui*) (if the system had provided the possibility to pass the records of an inquest on to the higher authority without a legal evaluation by the lower authority, the edict of 200 BC instituting the *yan*-procedure would not have been necessary). See note 304 below.

<sup>292</sup> *Zouyanshu* 98.

different ways in which the model is employed in each case signals different procedural options appropriate for different judicial situations. In the course of this analysis, I will group the *Zouyanshu* cases into a number of categories on the basis of how the procedural model is employed.

In a concluding section, I will show how the increasingly sophisticated administration of justice reflected in the *Zouyanshu* cases was an element that facilitated the government of a state expanding in territory and the transition to the imperial model of the Chinese body politic.

### ***The yi shi-category: Cases 19 and 20 from early Han narrating Chunqiu law cases***

As discussed above, these two texts probably originate in early Han and narrate stories with legal content which are set in the Chunqiu period, with a famous judge as the main protagonist in each of the two cases. Their most characteristic feature is that they insert a considerable temporal distance between their narration and the events they narrate by using the introduction *yi shi* 異時 “in different times”. They do not follow the strict formal pattern to which the other texts adhere and are clearly not actual administrative documents. The judge fulfils his role not by virtue of any position in an administrative organisation, as far as is visible. The communication that takes place is not inter-agency, but a very personal one between judge and sovereign. The only formal respect in which they correspond to the other texts is that the relevant legal norm is quoted in the beginning, before the actual legal deliberations. These two cases form their own category within the *Zouyanshu*. With their possible Han (or Qin) origin, they are of limited value for a reconstruction of the procedural model or its development. We cannot deduce from them more than this: At the time of their composition, probably in early Han, it was considered a plausible scenario that Chunqiu period criminal cases were delegated by the sovereign to a judge of his choice, who conducted an investigation for which hardly any formal procedure applied, and

suggested a judgement to the sovereign who then approved it or not. The *Zouyanshu* provides no basis to judge the accuracy of such assumptions.

### ***The lun-category: Cases 17 and 22 from pre-imperial Qin***

Case 17 dates to 246 BC, case 22 to 241 BC; both cases thus are from to around the same time in the pre-imperial era of Qin and are the earliest in the *Zouyanshu* that clearly are actual documents. Case 17 records the re-investigation of the case of an already convicted suspect who turns out to be the victim of a judicial error, while case 22 basically is a request to promote a judicial official who has distinguished himself during the prosecution of a crime that had been particularly difficult to solve. Both cases are significant because they are the only ones within the *Zouyanshu* which document a full criminal proceeding at the prefecture-level from the initial criminal complaint up to the sentencing, thus presenting the normal case of criminal procedure and the procedural model in its most basic form. Their most characteristic feature, when compared to the other cases, is that they contain a final judgement (*lun* 論) at prefecture level.

#### **Case 17: The original trial conducted at prefecture level**

In case 17, the record of the original prefecture trial is enclosed within the documentation of the re-investigation, as the first step there is to go back to the record of the original proceedings. This original record, from a structural point of view, has the following characteristics:

- a) Proceedings are initiated by a criminal complaint (*gao* 告) of punishable action made to the authorities.
- b) After this, the case already employs, in its most basic form, the standard procedural model that forms the core of all later cases in the *Zouyanshu*, namely a formal inquest which (1) consists of an interrogation (*xun* 訊), starting with initial statements (*ci* 辭) of the accused and witnesses, followed by confrontations (*jie* 詰) (posed by the interrogator) on unclear points and the

interrogated person's statements in defence (*jieci* 解辭), and (2) a finding of fact (*ju* 鞫) which concludes the core inquest.

The record of prefecture proceedings does neither note inspection (*zhen* 診) nor inquiries (*wen* 問); however, the retrial in case 17 as well as case 18 demonstrate that inquiries and inspection, if called for, were already a part of these early cases; during the original prefecture proceedings in case 17, there was simply no need to resort to them. This is consistent with the later records, which also document inquiry and inspection only if these had been actually conducted.

- c) This core inquest is followed by a judgement (*lun* 論). The record notes the content of the judgement, its date and the officials passing it.

#### **Case 22: Standard trial conducted at prefecture level**

Case 22 is, within the *Zouyanshu*, the closest to the original trial of case 17 in terms of the procedural model. Case 22 is also initiated by a criminal complaint (*gao*); after this, the core inquest follows with the interrogation (*xun*), including confrontations (*jie*), and the finding of fact (*ju*); the case concluded by a judgement (*lun*, although here not explicitly introduced as such) after the finding of fact. However, the record modifies the basic model in two respects:

- a) In between the interrogation, a description of all investigative steps taken is interspersed in chronological order. This is due to the document's purpose of recommending the lead investigator for a promotion as a reward for his deft work. A consequence of this is that the inspection undertaken is narrated at the point in the chronological sequence where it actually took place and not summarised before the finding of fact. The date of the judgement and the names of the officials responsible are irrelevant for the purpose at hand and left out. Even though supplemented by additional information, the basic structure of the procedure remains intact in the account.

b) The commendation of the lead investigator's work and his recommendation for higher office is an additional layer of administrative communication which has no bearing on the judicial procedure that deals with a robbery and therefore is not taken into account within this discussion. The request for promotion is submitted by the deputy prefect of Xianyang (*Xianyang cheng* 咸陽丞), a prefecture-level position. This indicates that the prefecture-level authorities were responsible both for the actual investigation and the request for promotion.

### Case 17: The petition for a new finding of facts

The proceedings triggered by a convict's petition for a new finding of facts in case 17 adhere to the same basic model, but modify it on some points that are, in terms of structure, more significant than the insertion of additional information in case 22:

a) At the place of the criminal complaint, the case quotes the convict's "petition for a new finding of facts" (*qi ju* 乞鞫); i. e. the formula

甲告曰：「……乙為某。」 "A brought the following criminal complaint: '..... B did [punishable action] X.'"

is replaced with

甲乞鞫曰：「……不為某，某縣以甲為為某，論甲某罪。」 "A petitions for a new finding of facts by stating: '.....I did not do [punishable action] X. However, the authorities of prefecture X held that I did [punishable action] X and passed the judgement to subject me to punishment X.'"

b) After the wording of the petition, the beginning of the re-investigation is marked in the record by the expression *fu* 覆 "review". Between this and the record of new investigations, inspection, and inquiries, the record of the original trial is inserted. The point of insertion is marked by the formula *shi qi gu yu* 視其故獄 "reexamination of the original trial", after which the record of the original trial follows. The end of the insertion is marked by *jin* 今 "during the review"; after

this, the record of the new interrogation, inspection, and inquiries follows.

- c) At least in *Zouyanshu* case 17, the result of inspections (*zhen* 診) conducted during the re-investigation is not noted as a summary before the finding of facts (*ju* 鞠), but immediately after related interrogation statements. The reason for this probably is that the inspections in this case not only served to immediately verify the interrogation statements, but also to inform the further investigation and thus were required to understand the progression of investigative steps.
- d) At the place of the judgement (*lun*), we find instead a record of the minister of trials (*tingwei* 廷尉) communication to the authorities of the prefecture where the convict was held. This included the result of the re-investigation, i. e. the new finding of facts, and instructions about the steps required by it.

In terms of the procedural model, case 17 provides on the one hand some additional detail (result of inspections, review of previous records), but also additional choices for the initial step of the procedure (petition for new finding of facts instead of criminal complaint) as well as for the final step (information about the result of the re-investigation and accompanying instructions conveyed by the minister of trials, instead of judgement passed by the local authorities).

### ***The dang-category: Case 18 from imperial Qin and cases 14-16 from the first years of Han***

Cases 14-16 and 18 are all later than the two *lun*-cases and earlier than the *yan*-cases collected in the *Zouyanshu*. Case 18, from 220 BC, dates to the imperial period of Qin, while cases 14-16, from 201-199 BC, date to the very first years of the Han empire. They present some significant modifications to the basic procedural model. Their most characteristic feature is that instead of a judgement (*lun* 論), they all contain an “application of the law” (*dang* 當), essentially a proposed

sentence which is submitted to the higher authorities for approval. It is not entirely clear why in these cases only an “application of the law”, awaiting confirmation, was made. The *Ernian lüling* required that all death-penalty cases as well as all cases involving killing another person by accident (*guoshi sha ren* 過失殺人) or during a game (*xi er sha ren* 戲而殺人), i. e. all cases that either already had resulted in the death of another person or might result in the death of the defendant, were to be submitted to the commandery for review.<sup>293</sup> This rule would obviously have been applicable in the death penalty case 16, but not in cases 14, 15, and 18; also, case 16 is further submitted to the imperial court, which is not required by the *Ernian lüling*. We know from other sources that certain more severe sentences against certain groups of privileged people required imperial approval. The *Hanshu* records one such rule:

春，令郎中有罪耐以上，請之。<sup>294</sup>

In the spring [of 200 BC, the seventh year of his reign, the Gaozu emperor] stipulated by edict that imperial approval was to be requested if Gentlemen of the Interior (*langzhong*) had become liable to the punishment of ‘shaving’ or a more severe punishment.

It is likely that similar, non-extant, stipulations, were in force for other groups of people. In each of the cases 15, 16 and 18, the defendant holds the office of prefect (*xian ling* 縣令);<sup>295</sup> since prefects were appointed by the central government, it is highly probable that a sentence against them, resulting in their removal from office, required approval by the imperial court. On the other hand, case 14 concerns a judicial secretary (*yushi* 獄史);<sup>296</sup> for this office, it is not clear to what extent the central government was involved in their appointment.<sup>297</sup> In case 16, approval is sought

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<sup>293</sup> *Ernian lüling* 396-397.

<sup>294</sup> *Hanshu* 1B, 63.

<sup>295</sup> *Zouyanshu* 69, 86, 143.

<sup>296</sup> *Zouyanshu* 63.

<sup>297</sup> *Ernian lüling* 482 could be read to indicate that all types of *shi* 史 in the prefectures and marches were appointed by the *taishi ling* 太史令 at the imperial court, but the exact mechanisms for the appointment and promotion of local officials would have to be further investigated.

for sentences against other people with no or even lower official positions,<sup>298</sup> while sentences against other people involved are not submitted.<sup>299</sup> However, all people (including the prefects in cases 15 and 16) for whom approval was sought held the ninth *jue* 爵-rank (*wu dafu* 五大夫) or higher<sup>300</sup> and were given a proposed sentence involving shaving (*nai* 耐) or a more severe punishment.<sup>301</sup> It is therefore possible to conclude that imperial approval was required for sentences at least involving shaving against persons holding the ninth rank or higher.<sup>302</sup>

### Case 18

Case 18, an investigation of a prefect's conduct in office, records, like case 17, full judicial proceedings, which in this case, however, are carried out not by prefecture officials, but by officials from the next higher level of administration, the commandery. Case 18 modifies the basic model in the following respects:

- a) In the place of the criminal complaint, we find the account of the dates when a document originating with the chief prosecutor (*yushi dafu* 御史大夫) and ordering the investigation arrived at the commandery. This is followed by an exact account of the time spent for investigating the case, for investigation-related travelling, and for recovering from illness. The investigation seems to have been originally triggered by an ex-officio charge (*he* 劾) brought by the governor of the commandery (Cangwu 蒼梧) to which the prefecture in question was subordinated.<sup>303</sup> This ex-officio charge first resulted in investigations conducted by local

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<sup>298</sup> *Zouyanshu* 92-98.

<sup>299</sup> *Zouyanshu* 90. The reason for this, in the first place, certainly was that two lower-ranking people were dead and absconded respectively. As *Ernian lüling* 396-397 did not require imperial approval for death-penalty cases in general, it still is most likely that the submission to the emperor was triggered by the rank and severity of the punishments in question.

<sup>300</sup> *Zouyanshu* 64, 69, 92.

<sup>301</sup> *Zouyanshu* 65, 72, 96.

<sup>302</sup> For a detailed tabulation of the ranks, positions, and punishments involved in the relevant cases see Lau and Lüdke 2012, 46.

<sup>303</sup> *Zouyanshu* 134, 154. See Lau and Lüdke 2012, 248f. note 1225.



prefecture officials; then, on the chief prosecutors (*yushi dafu* 御史大夫) order, in a review of the case conducted by judicial officials from a neighbouring commandery (Nanjun 南郡), i. e. by a higher-level authority which was not directly superordinated (and therefore independent). As an ex-officio charge already had been brought in this case, the chief prosecutor's main action consisted in re-assigning the case to the neighbouring province, which most likely did not constitute a second ex-officio charge. The record of the formal inquest follows after the above-mentioned account concerning the receipt of the chief prosecutor's document and the time required for investigation, travelling, and illness. This record follows the standard procedural model and is introduced by *jin fu zhi* 今復之 "[Record of] the review", with *jin* not marking the time as the present, but delineating the review record from the introductory statements.

b) Case 18 records an extensive inquiry (*wen* 問) after the interrogation and before the finding of facts (*ju*), mainly consisting of a report by the commandery officials conducting the review which goes beyond the already recorded interrogation statements.

c) Significantly, case 18 introduces, after the finding of facts, the procedural element characteristic for this category of cases: In the place of the judgement (*lun*), we find an "application of the law" (*dang*), which has the effect of proposing a sentence, as well as a legal reasoning supporting it. The reasoning is in the form of an explicit subsumption and employs the following pattern: First, statutes and edicts are quoted; after this, the formula *yi ci dang jia* 以此當甲 "in accordance to this, the law is to be applied to A" follows; finally, the proposed judgement is introduced by *dang zhi* 當之 "we thus apply the law as follows". The responsible officials are not identified at this stage, and no date is given, as this information is already provided in the beginning of the document. The document is concluded with an account of the number of persons interrogated. No submission formula is included, maybe because it was evident that the commandery investigators had to report back their findings to the imperial

prosecutor (*yushi*) who had ordered the investigation, or because any segments recording the submission to another authority were not included in the *Zouyanshu* for this document.

## Case 16

A problem in case 16 is that not all procedural segments can clearly be assigned to a specific government authority, due to the nature of the case, the unusual use of placeholders instead of actual names in the segment identifying the responsible officials, and questions as to the correct arrangement of the bamboo slips 92-97.<sup>304</sup> The most likely interpretation is that all relevant

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<sup>304</sup> The problems are as follows: (1) Nature of the case: Ordinarily, such a case would have been handled at prefecture level, with the inquest conducted mostly by a judicial secretary (*yushi*), and the decision made by prefect, deputy prefect, and responsible judicial secretary. However, in this case the only judicial secretary who is mentioned in the case had been killed, and the prefect turned out to be responsible for his death (and almost certainly would not have participated in the investigation from the beginning, as the commandery governor's ex-officio charge (*he*) strongly implied local government collusion). Probably, no deputy prefect was appointed at the time, as none is mentioned by name. Therefore, all relevant officials had either been killed, come under suspicion, or their position was vacant. (2) Use of placeholders: *Zouyanshu* 97 lists, with placeholders instead of names, "prefect A of Xinqi, deputy prefect B, and judicial secretary C" as having dealt with/tried the case (新鄴甲、丞乙、獄史丙治). *Zhi* 治 usually refers to all aspects of a criminal case, including interrogation, inquiries, and the final decision (or submission). If new officials had been appointed for the vacant positions at some stage during the investigation, it is not clear why their names were not noted. This case also replaces the name of the *qiudao* 求盜, a witness, with 甲, and of the *xiaozhang* 校長, one of the accused, with 丙 (assuming that these are placeholders, too, and not real names). Since these latter two clearly are real people, this would make it at least plausible that the three new officials by placeholders are also real participants and not fictive ones waiting to be appointed (contrary to Barbieri-Low and Yates 2016, 1304 note 47, see below). However, it is not clear why, unlike in all other *Zouyanshu* cases, no real names are given for investigating officials (*Zouyanshu* case 21 also uses placeholders for some of the parties involved, but gives real names for the judicial officials). Even more perplexing is that in case 16, the same placeholders are used for different people: 甲 both for the *qiudao* and the new prefect; and 丙 both for a death-penalty defendant and the new judicial secretary (it can be safely excluded that both are the same person). (3) Arrangement of the slips: Unlike almost all other *Zouyanshu* slips, the slips *Zouyanshu* 92-98 each contain only one, complete sentence. As the sentences do not run across slip boundaries, there is no internal evidence from the text which would support, or exclude, a particular arrangement. In the absence of any information about other marks that might originally have been available (such as markings on the back of the slips, which were not observed, or not paid attention to, after excavation), the correct order of slips 92-98 must be inferred from a structural comparison with similar cases (in particular cases 14, 15, and 16). See also footnote 291 above. There are the following options to resolve this: (1) A new prefect, deputy prefect, and judicial secretary were appointed immediately at the beginning of the investigation, immediately after the commander governor had brought the ex-officio charge which implicated the previous prefecture officials. The new officials thus would have conducted at least the investigation and made the finding of facts, and, possibly, could also have proposed the judgement

(*dang* “application of the law”). An argument for this is that the *zhi* 治 used in *Zouyanshu* 97 (新鄴甲、丞乙、獄史丙治 “prefect A of Xinqi, deputy prefect B, and judicial secretary C [*zhi*:] have dealt with/tried the case”) usually refers to all aspects of a criminal case, including interrogation, inquiries, and the final decision (or submission). However, there is no record that the old prefect was relieved immediately, and that a new prefect, and/or judicial secretary, and/or deputy prefect had been appointed so quickly (there might not have been sufficient legal basis for this at this early stage, and new appointments might have required some time); also, if the latter had been the case, their names should have been given, rather than replaced by placeholders in *Zouyanshu* 97. Also, the use of *fu zhi* 復之 in *Zouyanshu* 78 implies, as it does in cases 17 (*Zouyanshu* 99: *fu* 覆) and 18 (*Zouyanshu* 129: *jin fu zhi* 今復之), that the investigation is conducted by the higher authority, i. e. commandery officials in this case. This is also supported by the fact that the formula [...] *xian lun* 縣論 [on the other defendants] the prefecture has passed/will pass judgement” is found as part of the *wen* 問 “(inter-agency) inquiries”, indicating that the inquiries were conducted by an authority different from the prefecture (but by 縣論 also indicating some kind of previous or future prefecture involvement). (2) The new prefecture officials were appointed at a later stage (i. e. after the previous prefect’s involvement had been established) and did not conduct the investigation (and probably did not make the finding of facts), but made the application of the law (*dang*). This would solve most of the problems of option (1) (*zhi* could maybe be used even if only a judgement was proposed), but still does not explain why the actual names of the new officials were not given. (3) No new prefecture officials had been appointed. This would require to understand *Zouyanshu* 97 as a formulaic placeholder for officials to be appointed in the future, in the sense: “the new prefect A, new deputy prefect B, and new judicial secretary C will/are to deal with the case” (i. e. after they have been appointed). This option is preferred by Barbieri-Low and Yates 2016, 1297 and 1304 note 47. However, no other list of judicial officials responsible for a case found in the *Zouyanshu* (*Zouyanshu* 67, 74, 106) points to future, rather than completed involvement; also, it is not quite clear what future work would be left for the new prefecture officials, as all investigative and judicial work already seems to have been done (by the commandery officials, in this option). The best way to make sense of this option therefore would be to place slip 97 after the finding of facts between slips 91 and 92 and read it as connecting to *xian lun* 縣論 in slip 91 (which does, in fact, point to the involvement of prefecture officials), as follows: …縣論…新鄴甲、丞乙、獄史丙治 “[on the other defendants] the prefecture will pass judgement…prefect A, deputy prefect B, and judicial secretary C, after having been appointed, will try these” (however, as Barbieri-Low and Yates 2016 interpret *xian lun* as *xuan lun* 懸論 “judgement has been suspended”, in their version in fact not much would remain for the prefecture officials to do). (4) Taking *Zouyanshu* 97 as a notional placeholder required for procedural reasons, but not indicating any present or future actual involvement of prefecture officials. *Ernian liling* 396 requires that in death penalty cases like the present one, a review by the commandery is conducted after the prefecture has concluded its investigation (*yu yi ju* 獄已具); if this is understood as a procedural prerequisite for a commandery-level review, it could not have been fulfilled if the judicial personnel at the prefecture had either been killed or implicated, so that a notional list of (non-existing) officials would have been required. However, there is no evidence whatsoever for such legal fictions in early Chinese law. On the other hand, the stipulation 二千石官、二千石官丞謹掾、當、論，乃告縣道官以從事 (“the two-thousand bushel official or or the deputy of the two-thousand bushel official conscientiously examines [the results of the review conducted by subordinate commandery-level officials], applies the law, and passes judgement [in the case to be reviewed] and then notifies the officials at the prefecture or march to settle matters accordingly”) in *Ernian liling* 396-397 might imply that the “application of the law” (*dang*) was made by commandery officials, not prefecture officials in case 16. This would exclude options (1) and (2) above and make option (3) the most plausible one.

procedural steps were conducted by the commandery, and that only lesser punishments within the system of collective liability were dealt with by the prefecture authorities.<sup>305</sup> The case is initiated by the commandery governor, the review of the case with the inquest, resulting in a finding of facts, most likely is also conducted by commandery officials, who probably were also responsible for the “application of the law” (*dang* 當), resulting in the proposal of a sentence.<sup>306</sup> In this case, we find the following modifications of the basic procedural model:

- a) In case 16, an ex-officio charge (*he* 劾) takes the place of the criminal complaint; in this instance, the ex-officio charge is brought by the responsible commandery governor. The ex-officio charge is preceded by an account of the circumstances which precipitated it; while these provide important background and clues for the investigation, they probably have no legal bearing on the judicial proceedings as such.
- b) The inquest proper, with interrogation (*xun*), confrontation (*jie*) and finding of fact (*ju*), closely follows the basic model. Before the finding of fact, the results of an exhaustive inquiry (*wen* 問) are recorded, much as in case 18. The exhaustive inquiries might have been characteristic for these review (*fu* 復)-type cases conducted by a higher authority, one of whose primary responsibilities was to make enquiries with other agencies, especially the lower-level ones, concerning steps already taken.<sup>307</sup> Before *wen* “[result] of inquiries”, we also find the single character *zhen* 診 “[result of] inspection”. Rather than a binomial expression, the form to be filled in might here become visible on the surface level, i. e. *zhen* might head an item in the form which is left blank. If this is the case, we would need to read:

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<sup>305</sup> *Zouyanshu* 90: 布、餘及它當望(坐)者縣論. As Bu 布 had died and Yu 餘 absconded, this most likely referred to punishments within the system of collective liability.

<sup>306</sup> In view of *Ernian liling* 396-397, see footnote 304 above.

<sup>307</sup> The correct reading of a passage in *Ernian liling* 396 might be 二千石官令毋害都吏復案問 “the two-thousand bushel official orders impeccable commandery investigators to subject the case to review investigations and review inquiries” (i. e. *not* reading 聞 for 問), thereby stressing inquiries as a crucial element of review proceedings. See also *Fengzhen shi* 7, 14, 41, 44 for *fu wen* “review inquiries”.

診：—。 Result of inspection: [not applicable].

問：某某・・・。 Result of and inquiries: Such-and-such...

- c) As in case 18, the inquest is concluded after the finding of fact with an “application of the law” (*dang*); the pattern of legal reasoning (explicit subsumption) is exactly the same as in case 18. This “application of the law”, like the whole inquest, probably has to be located at the commandery level.<sup>308</sup>
- d) The “application of the law” (*dang* 當) is either preceded or followed (depending on the placement of slip 92 in the reconstruction of the slip order) by an introductory formula for the commandery’s submission of the case to the imperial court, immediately followed by an affirmation of the finding of facts and a more precise re-statement of the result of inquiries.
- e) The document concludes with the main submission formula, the central expression of which is the request for approval of the sentence (*ye qing* 謁請). From the text, it is not entirely clear which official makes the submission. The commandery governor who introduces himself in the first sentence of the document is the most likely candidate by far. In effect, the bracket that has been opened with the first-person record of the governor’s actions in the beginning is closed with the first-person submission formula.

### Cases 14 and 15

Cases 14 and 15 are in their content and with the very visible involvement of the commandery very close to cases 18 and 16 discussed above. Cases 14 and 15, like 18 and 16, record proceedings against prefecture officials who also hold a relatively high-rank. As in case 18 and

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<sup>308</sup> *Ernian lüling* 396-397 provides evidence for this, see note 304 above, even though it is not clear that case 16 at this stage is a commander review case because of the capital offences involved (making *Ernian lüling* 396-397 applicable), or because of the governor’s ex-officio charge (which would leave the applicability of *Ernian lüling* 396-397 in doubt).

probably case 16, in the two cases the investigation is conducted and judgement is proposed by the commandery to which the respective prefecture is subordinated. Case 14, like case 16, is explicitly submitted to the higher authorities. It probably should be assumed that case 15 (as case 18) is an example of the same type of submission, although the concluding submission formula is not included. Both cases modify the basic procedural model in the following ways:

a) In case 14, proceedings are initiated by the ex-officio charge (*he*, noted at the place of the criminal complaint *gao*) brought by a deputy prefect against a judicial secretary, who almost certainly was the deputy prefect's immediate subordinate.<sup>309</sup> The report triggering proceedings in case 15 is made by a prefect, alleging theft on the part of the prefect heading another prefecture in the same commandery; the report containing the allegation is introduced by *yan* 言 “makes a report”, not *he* “brings an ex-officio charge”, although the allegation is made by an official. The reason for this might be that the prefect is not an superior of his colleague, who was situated on the same level of the administrative hierarchy. It is possible that ex-officio charges (*he*) could only be brought by officials who were superiors of the accused person, or in whose area of responsibility an offence had been committed. The legal force of the *yan* 言 -report seems to have been the same in this case as that of a *he*.

b) No confrontation (*jie*) is recorded as part of the core inquest, almost certainly because the defendants in both cases had already admitted criminal liability (*zui* 罪) in their initial statements (*ci*), making a confrontation unnecessary. Both case records note the results of inquiries (*wen*) immediately before the finding of fact (*ju*). Almost certainly, the core inquest was conducted not on the prefecture level, but by commandery officials. This is indicated by the use of *zhi* 治 “tried by...” at the end of the record after a list of commandery officials. Generally, *zhi* after the names of officials involved in a case, indicates that these officials not

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<sup>309</sup> *Zouyanshu* 63 and 64, see Lau and Lüdke 2012, 181ff., especially notes 897, 898, and 906.

only were responsible for the judgement (*lun*) or “application of the law” (*dang*), but also for the investigation which formed the basis for the latter.

- c) After the finding of facts (*ju*), an “application of the law” (*dang*) is recorded, as in cases 18 and 16. However, the pattern of legal reasoning (i. e. explicit subsumption) is changed to following order: “We apply the law as follows” – Quote of statutes and edicts – “In accordance with this, the law has been applied to X”. That is, the sequence is reversed: The application of the law is stated upfront and only then substantiated, while in the earlier cases the application of the law is developed from the subsumption.
- d) This is followed by the formula *moumou zhi* 某某治 “tried by XX”, which identifies the responsible commandery officials (governor, *shou* 守; deputy governor, *shoucheng* 守丞; and secretaries-in chief, *zushi* 卒史), which not only indicates that the “application of the law” had been made by these officials, but also, as argued above, that the whole inquest had been conducted on commandery level.
- e) In case 14, but not in case 15, the application of the law is followed by a submission formula, which requests that the case be brought to the emperor’s attention (*ye yi wen* 謁以聞), making clear that his approval for the sentence was necessary. The formula includes the date of the submission and identifies the commandery governor as the submitting official. Also included is the additional information that a judgement was passed by the prefecture on the the other person implicated in the case.

### **The yi zui-category: Cases 1-13 and 21 from ca. 197-196 BC**

Cases 1-13 and 21 all date from around 197-195 BC. Their common characteristic feature is that they all are *yan* 讞-submissions, i. e. they were submitted to a higher authority with the explicit request for a decision due to legal doubts (*yi zui* 疑罪) that could not be resolved at the prefecture

as the lowest level of the administration of justice. The procedure for this had been, on the basis of Qin models, re-established by the Gaozu emperor's edict of 200 BC. While these *yan*-cases either explicitly utilise the basic procedural model or clearly are based on it, they also modify and extend the form to take account of the involvement of different levels of the government.

### Cases 1-5

Cases 1-5 all can be dated to 197 and 196 BC and as fully documented *yan* 讞-cases form the core of the *Zouyanshu*. All these cases were first tried at prefecture level and then submitted for decision to the higher authorities according to the *yan*-procedure described in the edict of 200 BC. In terms of content, most of these 5 cases concern the question whether the accused is liable to punishment at all in view of the arguments he or she has brought in his or her defence.<sup>310</sup> In terms of formal organisation, they introduce the following modifications to the basic procedural model:

a) The case is introduced by variations of the formula *mou xian mou, cheng mou gan yan zhi* 某縣某、丞某敢讞之 “We, X, prefect of X prefecture, and X, deputy prefect, venture to submit the following case for decision”; this is usually preceded by the date of the submission. This introductory formula already signals the eventual submission of the case and forms with the submission formula which follows the statement of legal doubt (see d) a bracket around the part of the document that originates with the prefecture-level authorities.

b) The legal act triggering the proceedings and the core inquest follow the established model:

Proceedings are initiated in all cases by either a criminal complaint (*gao*) or ex-officio charge (*he*).<sup>311</sup> The core inquest is conducted according to the established pattern: Initial statements (*ci*)

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<sup>310</sup> In *Zouyanshu* case 3, the question is whether the accused has committed only the lesser or also the more severe of two offences in question. The option of acquittal does not seem to be an option.

<sup>311</sup> The *ci* 辭 “claim” in case 2 (*Zouyanshu* 8) introduces what is eventually interpreted as a criminal complaint, although originally it most likely was intended as a civil action in order to clarify the property status of the slave woman, possibly in order to avoid the risk of prosecution for *gao bu shen* 告不審 “a criminal complaint not true to the facts” if the claim turned out to be unfounded).



of the accused and possible witnesses are followed by a (if necessary repeated) confrontation (*jie*) and the accused's reply; if inspections (*zhen*) and/or inquiries (*wen*) are required, their results are noted before the finding of fact (*ju*), which in turn concludes the core inquest.

c) Cases 1-5 present a third option for the slot of the judicial evaluation which comes after the finding of fact: Instead of a judgement (*lun*) or application of the law (*dang*), we find here the formula expressing “doubts as to the liability to punishment” of the accused (*yi jia zui* 疑甲罪). The context makes clear that these doubts either can either relate to the question of whether the accused is criminally liable at all (*Zouyanshu* cases 1-2, 4-5) or of the extent to which he/she is criminally liable (*Zouyanshu* case 3). To this, in most of the cases statements are added indicating that the accused is kept under detention (*xi* 繫) and that judgement on other related matters or other people implicated in the case has been passed by the prefecture (*ta xian lun* 它縣論). Together, these statements define the precise extent to which a higher-level decision is required, i. e. which matters are doubtful, and on which the prefecture authorities are able to decide themselves.

d) The prefecture's submission is concluded by a submission formula, consisting of the core expression *gan yan zhi* 敢讞之 which is distinctive for this type of document, often followed by an explicit request for a reply (*ye bao* 謁報) and the name of the judicial secretary to which the reply should be addressed (*shu yushi mou fa* 署獄史某發). This latter piece of information at the same time defines which judicial official is responsible for the case and specifies a return address for the higher authority's decision, ensuring the prompt delivery to the at the prefecture. The introductory *gan yan zhi* 敢讞之-formula (see a above), together with the concluding *gan yan zhi* 敢讞之 formula, together form a bracket clearly delineating the prefecture's contribution to the document.

e) With no judicial decision yet being included, the form is still incomplete. After the submission

formula, all of cases 1-5 present a judicial argument, either introduced by *li dang* 吏當 “we, as the responsible officials, apply the law as follows” or *li yi* 吏議 “we, as the responsible officials, argue the following legal opinion”; both of these formulae introduce what in essence is a proposal for a judgement. In four of the five cases, this in turn is followed by a counter-argument, introduced by *huo yue* 或曰 “other opinion”, which proposes an alternative judgement. These make explicit the alternative options for the decision of the case, the existence of which is the reason for the submission as doubtful, as the existence of these alternatives in the case at hand implies that none of the can be *prima facie* excluded. These adversarial arguments are preceded in one case (*Zouyanshu* case 3) by the quotation of a precedent; the first opinion is then based on the similarity of the case at hand to this precedent.<sup>312</sup> In another case (*Zouyanshu* case 4) explicit reasons are given for both the argument and the counter-argument.<sup>313</sup> The simple designation *li* 吏 “the responsible officials” or even “the responsible authorities” leaves open which officials exactly make these arguments. The prefecture officials are unlikely, as the prefecture’s submission has already been concluded before the arguments are added. Also, according to the edict of 200 BC regarding the *yan*-procedure, it was the responsibility of the higher authorities (commandery-level or *tingwei*) to assess the legal issues at stake by preparing “an application of the law” (*dang*) for the case,<sup>314</sup> the same term (*dang*) which often introduces the legal arguments following the *yan*-submissions in the *Zouyanshu*. In contrast, the edict requires of the prefectures and marches simply to “submit doubtful cases for decision”; any additional requirement for the prefectures to attach legal arguments presumably would have run counter to the edict’s stated purpose to speed up the dispensation of justice.<sup>315</sup> If prefecture officials most likely are not the

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<sup>312</sup> *Zouyanshu* 23-25.

<sup>313</sup> *Zouyanshu* 33-34.

<sup>314</sup> See note 75 for arguments why *dang* should be understood in the sense “to apply the law to a case” in the edict of 200 BC (*Hanshu* 23, 1106), and not as an auxiliary verb.

<sup>315</sup> Nonetheless, some scholars have argued that the prefecture-level authority should be identified as

authors of the *li dang/li yi – huo yue* opinions, this would leave either officials at the commandery or the imperial court (i. e. at the agency of the *tingwei*), as, according to the edict of 200 BC, a *yan*-submission was passed on by the prefecture to the relevant commandery-level authority and then, if necessary, to the minister of trials (who in turn could memorialise it to the emperor). An argument for the origin of the judicial opinions at commandery level is that otherwise no trace of the commanderies' involvement would be found in these cases, while involvement of the imperial court is explicit in almost all of them (except case 2, which breaks off before a final decision is communicated). The *Zouyanshu* offers no clear evidence for locating the *li dang/li yi – huo yue* opinions either at the commandery or the imperial court: While it could be argued that case 21 demonstrates that controversial discussions were held at the *tingwei*'s agency, there is no reason to think that similar arguments could not also be made by commandery officials (Zheng Xuan, in his 2<sup>nd</sup> c. AD commentary to the *Zhouli*, mentions that Han commanderies and feudal domains regularly sent their officials to present to the *tingwei* their *yi* 議 “legal opinions”).<sup>316</sup> Similarly, it could be

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making the arguments (Ikeda 2002, 142-143; Gao Heng 2008, 347; see also Lau and Lüdke 2012, 58f. for a brief overview of the discussion). Lau and Staaek (2016, 26; 111 note 571), following Zhu Hanmin and Chen Songchang (2013, 102 note 42) now see *Wei yu deng zhuang* 24 as confirming this view, as in that *yan*-case from the Yuelu manuscripts, the commandery's final decision seems to diverge from *both* options presented in the *li yi/huo yue*-section. This is seen as evidence that the two alternative proposals for a judgement must be attributed to the prefecture officials. However, it is, first of all, not entirely clear to what extent the final decision really diverges from the *li yi/huo yue*-section, as the latter is incomplete, and not all of the relevant rules are extant. More importantly, it seems entirely possible that the final decision made at the commandery authority diverges from the initial evaluation made by officials at the same authority, either because the discussion had in the meantime evolved (*Zouyanshu* case 21 would provide an example for this possibility), or because an important official, such as the commander governor, had not been involved in the initial legal evaluation and disagreed with both options presented by his judicial staff (in the same way as the emperor could disagree with the options presented to him; *Zouyanshu* case 4 could be seen as an example for this). For *Wei yu deng zhuang* case I.1, therefore it is more likely that the *li yi/huo yue*-opinions in *Wei yu deng zhuang* 24 were prepared by *zushi* 卒史 at the commandery, and that the governor, in his final evaluation (*Wei yu deng zhuang* 28-30) disagreed with both opinions (to the extent that disagreement can be verified). See below.

<sup>316</sup> *Zhouli* 35, 877b: 如今郡國亦時遣主者吏詣廷尉議者. Zheng Xuan, in this passage, compares the submission of difficult legal cases at the Zhou royal court with the Han procedures.

argued that the attachment of a precedent in *Zouyanshu* case 3 might point to the *tingwei*'s agency, as the edict of 200 BC only requires the *tingwei* to attach the applicable laws and precedents (*bi* 比). However, *Zouyanshu* cases 14 and 15 are unambiguous in that commandery officials also might include the wording of applicable laws; even if these are not *yan*-cases, there is no reason to assume that these would have been handled differently. However, the strong document character of *Zouyanshu* cases 1-5 means that it would be even more unlikely than a prefecture adding material outside the *gan yan zhi* 敢讞之-bracket (see points a and d above), that a government authority not mentioned at all in the document should have added material without identifying itself in the documents. All Qin and Han administrative documents take great care to identify the different government agencies involved. If the *li dang/li yi – huo yue* opinions would have been attached by an agency other than those already mentioned in the document, this would have been clearly indicated. Therefore, it is most plausible to assume that the *li dang/li yi – huo yue* opinions were added by officials at the agency which is then identified as the one making the decision in the case. These opinions probably were intended in order to make the legal issues explicit, establish decision alternatives, and thereby facilitate an efficient decision-making process. While the decision in *yan*- and other cases itself involved the head or deputy head of the decision-making agency (the commandery governor, the *tingwei*, or the emperor himself),<sup>317</sup> the opinions probably were added by his subordinates. This also explains why in some cases, the final decision diverges from the opinions.<sup>318</sup> If Zheng Xuan's commentary quoted above<sup>319</sup> is correct in asserting that in Han, commandery officials were sent to argue their cases in person at the *tingwei*'s agency, it is even possible that the *li dang/li*

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<sup>317</sup> This is discernible as a general principle in all *Zouyanshu* cases which list the officials involved in the decision. *Ernian liling* 102-106 makes clear that on the prefecture-level, only the prefecture head and his regular deputy were allowed to decide legal cases and submit them for decision.

<sup>318</sup> Notably in *Zouyanshu* 35 (case 4) where the final decision states that the case should not have been submitted, something not indicated in the opinions. This presumably also applies for *Wei yu deng zhuang* 28-30, see note 315 above.

<sup>319</sup> See note 316 above.

*yi – huo yue* opinions reflect arguments made in such a setting. But given the strict documentary format in Qin and Han, it seems highly unlikely that these opinions were made at, or sent up, by another agency than the one recorded as making the decision. For *Zouyanshu* cases 1, 3, 4, and 5, which identify the imperial court as the agency where the decision was made, this means that the opinions probably were formulated by officials at the *tingwei*'s agency (for case 2, neither decision nor decision-making authority are available). In cases where the decision was made by the commandery governor, the opinions would have been formulated by commandery officials.<sup>320</sup>

f) The *li dang/li yi – huo yue* opinions are followed by the final decision made, in these *Zouyanshu* cases, at the imperial court, except in case 2 which seems incomplete in this respect. The decision states the appropriate punishment or an exemption from punishment. The decision is noted in the following ways: Cases 1 and 4 note simply *ting bao* 廷報 “reply from the court”, which leaves open whether the decision was made or approved of by emperor or made by the minister of trials on his own authority; however, the title *Zouyanshu* of the whole case collection still suggests the direct involvement of the emperor, as *zou* 奏 specifically refers to submissions to the throne. Case 5 introduces the final decision by *ting yi wen* 廷以聞 “the court has brought the [the case] to [the emperor's] attention”, thus designating the decision as the emperor's. Case 3, similar to case 17, is concluded by a more detailed record in which the official carrying out the duties of the minister of trials informs the prefecture about the emperor's decision, which again is introduced by *ting yi wen* 廷以聞. Sometimes the court adds to this a comment on the prefecture's submission, either approvingly (case 3)<sup>321</sup> or with criticism (case 4).<sup>322</sup>

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<sup>320</sup> As in *Wei yu deng zhuang* 24.

<sup>321</sup> *Zouyanshu* 26. See note 123 above.

<sup>322</sup> *Zouyanshu* 35.

## Cases 6-13

Cases 6-13, like cases 1-5, all record *yan*-submissions which request from the higher authorities a decision for a doubtful case. Unlike cases 1-5, they are all submitted by a commandery governor instead of the prefecture head, contain no dates, are highly abbreviated, and concern the question what offence has been committed, not whether an offence has been committed at all. With their lack of polite formulae, they are best considered as abstracts of full trial records. It is likely that the abstract was prepared at the court for the purpose of inclusion in the *Zouyanshu*, as the full proceedings and the accused's arguments had no bearing on the more technical question what offence had been committed (in contrast to the question of whether an offence has been committed, where the accused's arguments in his defence are essential). In terms of structure, we find the following abbreviations of the standard model:

- a) The cases are simply introduced by the short statement *mou jun shou yan* 某郡守讞 “as governor of commandery X, I submit for decision”; the polite *gan* 敢 “I venture” is missing.
- b) The core inquest is not documented, but its result concisely stated in factual terms; this summary of the inquest almost certainly is to be identified with the finding of fact (*ju*) of the original inquest.
- c) After this, the legal doubt is expressed simply by *yi zui* 疑罪 “we are in doubt as to the liability to punishment”, rather than by the fuller formulae of cases 1-5. This forms a bracket with the initial submission statement, much like the introductory and concluding submission statements of *gan yan zhi* 敢讞之 in cases 1-5.
- d) The expression of judicial doubt is immediately followed, without alternative legal opinions being recorded, by the decision of the court, introduced by *ting bao* 廷報. Due to the particular legal issues at stake in these cases, the decision states the applicable statutory offence (except

in cases 8 and 13), rather than the punishment as in all other *Zouyanshu* cases.

### Case 21

It has been argued above that case 21 is not a legal record in the strict sense, but a re-arranged and edited account of the judicial arguments in one particularly interesting case. As such, it is not bound by the procedural model. However, the impact of the procedural model is still recognisable:

- a) The case at issue is summarised by a short factual statement<sup>323</sup> which most likely is to be identified with the finding of fact (*ju*) in the original case records.
- b) The account of the case is concluded with the formula *yi jia zui* 疑甲罪.<sup>324</sup> In this, the echo of the formulaic language of the original document is recognizable. The formula clearly marks the case as one that has been submitted for decision using the *yan*-procedure.
- c) The standard form of an “application of the law” (*dang*) by way of explicit subsumption is recognisable: First, the applicable statutes are quoted; then the applicability is not simply stated (as in *yi ci dang jia* 以此當甲), but extensively discussed; the resulting (preliminary) decision finally is introduced by *dang zhi* 當之 “we apply the law as follows to the case”.<sup>325</sup>
- d) Opposing judicial arguments are made, corresponding to the *li yi/li dang – huo yue* section in the case records. These are, again, much more extensive than the arguments in the other *Zouyanshu yan*-cases which contain little, if any, reasoning, but simply state a position. In comparison with case 21, the arguments in the actual case records seem abbreviated. It is conceivable that many cases which reached the *tingwei* were discussed in similar detail as in

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<sup>323</sup> *Zouyanshu* 183-184.

<sup>324</sup> *Zouyanshu* 184

<sup>325</sup> *Zouyanshu* 187.

case 21, even though though the discussion likely was not as rhetorically polished and structurally elaborated as the edited version in case 21, and even though all that remained of these discussion in the standard records of cases 1-5 mostly were the mere decision alternatives, as required by the model.

- e) In case 21, the order to inform Du prefecture about the decision reached<sup>326</sup> corresponds to the *ting bao* formula introducing the decision in the case records of *Zouyanshu* cases 1 and 3-5.

## Result: The full procedural model

Looking at all of the Qin and Han cases together, we can summarise the findings as described below. I will, according to the criteria developed above, identify different segments in the procedural model and determine which elements are mandatory, which optional, and for which several alternatives exist.

- 1) The **initiation of proceedings**. This segment is mandatory, and there are several alternative elements for it, i. e. criminal proceedings can be initiated by
  - a) a criminal complaint (*gao* 告), brought by a private person or a lower-ranking official (often with police duties, such as a *ting zhang* 亭長); sometimes, a (property-related) claim (*ci* 辭), could take the place and have the same legal force as a *gao* if the claim implied criminal wrongdoing on the part of the other party, as seen in *Zouyanshu* case 2;
  - b) an ex-officio charge (*he* 劾), brought by an official with jurisdiction against a person in his jurisdiction; sometimes, a (high-ranking) official made a report (*yan* 言) containing an allegation of criminal wrongdoing instead, if he had no jurisdiction over the person accused of wrongdoing, as seen in *Zouyanshu* case 14;

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<sup>326</sup> *Zouyanshu* 188.



- c) a petition for a new finding of facts (*qi ju* 乞鞫), made by a person convicted for an offence.
- 2) The **core inquest**, also mandatory. The core inquest consists of the following elements, some of which are optional, but none of which can be replaced by an alternative element:
- a) Initial statement(s) (*ci* 辭) of the accused and possible witnesses. This element is mandatory.
- b) Confrontation (*jie* 詰) of the interrogated person(s). Optional: It was not necessary if a witness's account did not contain any contradictions or if an accused had already admitted criminal liability (*zui* 罪) in his/her initial statement. If there was a confrontation, the accused's reply (*jieci* 解辭) is mandatory. If necessary, the confrontation is repeated until the accused's reply contains an (at least conditional) admission of criminal liability.
- c) The result of inspections (*zhen* 診). Optional: Only noted if inspections were necessitated by the case.
- d) The result of the inquiries (*wen* 問). Optional: Only noted if inquiries were necessitated by the case.
- e) Finding of facts (*ju* 鞫). Absolutely mandatory, being the basis for the judgement. This is the only element of the core inquest which is included in the highly abbreviated case records 6-13.
- 3) The **judicial evaluation**, made by the agency which conducted the core inquest. This segment is mandatory. There are three alternative elements for this segment, i. e. the authority making the finding of facts can then evaluate the case by:
- a) A judgement (*lun* 論), simply stating the appropriate sentence. This was usually final, except in cases where a petition for a new finding of facts (*qi ju* 乞鞫) was made, which

might result in the overturning of the judgement.<sup>327</sup>

b) An application of the law (*dang* 當) to the case, in effect making a proposal for a judgement, which for its validity required approval by a higher authority. The application of the law is either preceded or followed by a quote of the relevant statutes and edicts as well as by the formula *yi ci dang jia* 以此當甲 “in accordance with this, the law is to be applied to A”, which explicitly states the relevance of the quoted stipulation to the case at hand. A mere “application of the law” (*dang*), as opposed to a full judgement (*lun* 論), implies that the case is submitted to the higher authorities (i. e. the imperial court in all relevant *Zouyanshu* cases). Therefore, a submission formula is usually required. This would include the phrase *gan yan zhi* 敢言之 (“We venture to report this”), and a request for approval (expressed by the phrase(s) *ye qing* 謁請 “we request approval”, and/or *ye bao* 謁報 “we request a reply”, and/or *ye yi wen* 謁以聞 “we request that it be brought to the emperor’s attention [i. e. in order to obtain his approval]”). Additional information for the higher authorities can also be inserted, such as about the ongoing detention of the accused or an assurance that all related issues have been/will be adjudicated at the local level.

c) A statement of legal doubt, using the formula *yi jia zui* 疑甲罪 “we are in doubt as to A’s liability to punishment”. A statement of legal doubt implies that the case is submitted to the higher authorities for decision (*yan* 讞). Therefore, a submission formula is usually required, which would include at least the phrase *gan yan zhi* 敢讞之 “we venture to submit this case for decision” and often also an explicit request for a reply (*ye bao* 謁報 “we request a reply”). Additional information for the higher authorities might also be inserted, such as about the ongoing detention of the accused or an assurance that all related issues have been/will be

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<sup>327</sup> *Wei yu deng zhuang* 14 shows that under certain circumstances, a new judgement (*geng lun* 更論) supplanting the earlier one could be passed under certain circumstances. In *Wei yu deng zhuang* 14, this is required by an ex-officio charge brought by an *yushi* 御史. See Lau and Staack 2016, 101f.

adjudicated at the local level.

- 4) Legal opinions. Only required for cases submitted as doubtful. The opinions probably were attached by judicial officials within the agency making the final decision. Two opposing opinions are juxtaposed, introduced by the formulaic *li dang/li yi* 吏當/議 – *huo yue* 或曰 “we apply the law as follows/we argue the following legal opinion” – “other opinion”.
- 5) Decision of the higher authorities. Mandatory in the case of a submission for decision. The decision (stating the appropriate sentence, or the applicable statutory offence, or an exemption from punishment) is either introduced by *ting bao* 廷報 “reply from the court”, *ting yi wen* 廷以聞 “the court has brought the case to the emperor’s attention” (implying that the following decision has been made by the emperor personally), or a fuller record about the conveying of the court’s decision.<sup>328</sup>

## ***Facilitating imperial rule: The role of judicial procedure***

The sophisticated division of judicial labour reflected in the procedural model helped to facilitate the rule of an expanding imperial polity. The procedures developed for the administration of law to which the *Zouyanshu* testifies can be seen as answers for the exigencies of the efficient administration of an expanding territory and population. These required division of judicial labour among, and meaningful judicial interaction between, government agencies at different levels, making full use of the possibilities offered by a multi-tiered system of territorial administration.

A three-tiered territorial government (prefectures, commanderies, royal court) forms the background to all Qin and Han cases in the *Zouyanshu*, from those dating to pre-unification Qin in

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<sup>328</sup> *Wei yu deng zhuang* 25 shows that a decision made not at the court, but by a commandery governor would be introduced by *mou jun shou jia bao*... 某郡守甲報...

the middle of the third century BC to those from the early Han years in the early second century BC. The fact that in all of these cases, the same procedural model is employed by judicial authorities on different government tiers demonstrates how well established it already was in pre-imperial Qin, and that it was so ingrained in judicial practice that it was carried over into Han without modification.

In some of the cases, judicial proceedings are conducted at only one tier of government, with no judicial interaction between authorities on different levels. In case 17, the prefecture passes a final judgement; when the convict petitions for a new finding of facts (*qi ju*), the re-investigation is conducted by the higher authority, without involvement of the prefecture,<sup>329</sup> when the final decision (which overturned the original verdict) is communicated to the prefecture authorities, these play only an executive role, without influencing the outcome. Case 22 is conclusively tried by the prefecture and submitted to the higher authorities only for the purpose of recommending a promotion, an issue unrelated to the legal decision.

Cases 14-18 demonstrate real judicial interaction between different tiers of government: In cases 14 and 15, charges are brought by prefecture officials, the inquest is conducted by the commandery, and the proposed judgements are submitted to the imperial court for approval. In 16, the charge is brought by the commandery governor, the inquest is (probably) conducted by commandery officials, and the case again is submitted to the imperial court for approval. In case 18, charges are originally brought by the commandery against the head of a subordinated prefecture, but, on orders of the imperial court, a review with a full inquest is conducted by officials from a neighbouring commandery, who in turn propose a judgement for approval by the imperial court.

In all of these *Zouyanshu* cases (17, 22, 14-18), the assignment of judicial responsibilities to

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<sup>329</sup> See *Ernian lüling* 116-117.

different government tiers was a *static* one, with the type of investigation determining which agency would conduct it.

In contrast, the cases involving *yan*-submissions (1-13, 21) demonstrate a *dynamic* delegation of judicial labour: Only those cases were to be submitted for decision in which legal doubts existed, with the result that higher authorities would become involved only when necessary. Their involvement was not determined at the outset of the inquest by the type of case, but only after the conclusion of the inquest when, after all questions of fact had been resolved, matters of law still remained in doubt. This dynamic distribution of judicial work was an important element in the effective administration of an expanding territory and population: It ensured, on the one hand, that the higher levels of government would not be overburdened with routine issues, while guaranteeing, on the other hand, that the central government retained its prerogative for setting precedents and insisting on a uniform application of the law throughout the empire. Only those cases would reach the central government which were not clearly covered by existing laws, exposing situations for which the law needed to be developed further by issuing binding interpretations for these situations. Thereby, the central government ensured that it was the only authority entitled to make law by issuing precedents. The *Zouyanshu* demonstrates that it also took care to make these new precedents known throughout the empire.

# Mediated legal evidence: Testimony in early Chinese legal texts<sup>1</sup>

## *Testimony: First-person voices in the trial records*

One of the most striking and immediate impressions from reading the *Zouyanshu* is the great importance of testimony, which is reflected in the high proportion of the text recording first-person statements. This is significant because the *Zouyanshu*, in its direct quotes of slaves and servants, conscripts and convicts, is one of the very few texts that ostensibly preserve the voice of common people of early China. But a question at least equally important is which role testimony plays in judicial proceedings, and which relevance is accorded to the statements of an accused or witness, as this is an important factor for evaluating a legal system.

Not only is the importance of testimony evident in the *Zouyanshu*. Equally striking is the sense of uniformity imposed on the testimony by its placement within a coherent schema of recording judicial procedure. This sense of uniformity is, to a large extent, evoked by the way testimony is written down. In addition to the question of the role of testimony as such, a second question therefore must be what rules govern the recording of testimony in the written documents, and what consequences these rules have for the testimony itself. This latter question concerns the mediation of testimony, which is crucial not only for a critical reading of the trial records as historical sources, but also because the written record, far from serving merely archival purposes, was the basis for, and thus determined, all judicial decisions in early China.

This chapter therefore is concerned with two basic issues: The mechanics of testimony, and the

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<sup>1</sup> An earlier version of this chapter was presented at the conference “Mediated Testimonies”, organised by The Porter Institute for Poetics and Semiotics of the Tel Aviv University, held in Tel Aviv on April 10<sup>th</sup> 2002. I would like to thank the Porter Institute and in particular Professor Ziva Ben-Porat for her invitation and generous support.

mechanics of writing testimony down.

The first-person testimony of the *Zouyanshu* and other early legal sources contrasts with the first-person voices audible in the early philosophical and historical literature. It has long been recognised that the requirements of a specific philosophical and political agenda shaped the statements presented, and that these statements were further refined by the requirements of committing the philosophical and political discourse to the written medium, such as the striving for literary effectiveness.<sup>2</sup> This chapter will attempt a similar analysis for the first-person voices present within the early legal sources, which are not primarily governed by a philosophical or political agenda (even though the cases of the *Zouyanshu* were almost certainly collected with a certain purpose in mind, this is not the case for the individual case records which contain testimony in the first place), but by the imperatives of bringing a criminal case to a resolution.

This chapter attempts to identify the determinants in early Chinese law and legal practice that shaped not only the way in which testimony was given, but also the way in which it was written down – that is, the forces that were responsible for the specific effects of the mediation process.

## *The role of testimony within criminal procedure*

### Facts: Testimony in early Chinese trials

#### ***The blueprint***

In order to understand the function of testimony in early Chinese criminal procedure, it is important to understand its context, that is: the basic structure of criminal procedure. This

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<sup>2</sup> For a convenient overview of some of the forces working on first person voices in the early literature, see Nienhauser 1988, especially pages 691f. (on dialogue and monologue as stylistic devices in the *Shiji* 史記) and 337-339 (on the determinants of rhetoric in the *Zhuzi baijia* 諸子百家). See also Durrant 2001 (on the literary features of historical writing) and Harbsmeier 2001 (p. 902) who maintains that according to the conventions of traditional Chinese prose, direct reported speech is not mimetic transcription.

structure can be understood as the *blueprint* that assigns testimony its crucial role:

All formal criminal proceedings in Qin and Han China were initiated by either a criminal complaint (*gao* 告), which was made to the authorities by private persons, or an ex-officio charge (*he* 劾), which was brought by officials specifically charged with the administration of justice. Such a criminal complaint or charge triggered for the responsible officials the duty to summon and, where necessary, to arrest the accused and potential witnesses and to conduct a formal inquest. The aim of the inquest was to arrive at a finding of fact (*ju* 鞫), which, very much like in the modern American system, arrived at a conclusion about the relevant facts, but did not contain any judgement about the legal questions at stake. The finding of fact in turn formed the basis for the concluding judgement (*lun* 論), which was the result of the legal deliberations and which pronounced either the punishment (*zui* 罪) for the accused or his acquittal. In certain cases, the judgement was replaced by a submission of the case to a higher-level authority (*yan* 讞 or *qing* 請), either because there were questions of law about which the local judicial authority was in doubt (*yi zui* 疑罪; the submission was then called *yan* 讞), or because the case involved issues which required higher-level approval (the submission was then called *qing* 請). In these cases, the final decision was made by the higher authorities, which issued a reply (*bao* 報), thereby instructing the local authorities about the appropriate judgement.

During the inquest proper, which was initiated by the initial criminal complaint or charge and concluded with the finding of fact, the evidence was gathered, and it is here that testimony comes into play.

In Qin and Han China, three methods of gathering evidence were used during the inquest:

- 1) interrogation (*xun* 訊) of the accused or of witnesses, that is: the eliciting of testimony;
- 2) physical inspection (*zhen* 診), i. e. the forensic examination of physical evidence such as



implements used in the crime, a dead body or a crime scene;

3) inquiries (*wen* 問) with other government agencies about relevant information held there, such as information from the tax and household registers.

This means that early Chinese law knew, in addition to the interrogation that aims at testimony, proto-scientific (*zhen*) and bureaucratic (*wen*) methods of evidence-gathering.

However, the sources and in particular the *Zouyanshu* strongly suggest that the central, crucial method was interrogation, i. e. the eliciting of testimony, and that the other two methods of interrogation merely played a supporting role. This is not only indicated by the relative small space inspection and inquiry take up in the case records, compared with the large proportion assigned to testimony,<sup>3</sup> but also by more substantial observations:

Inspection and inquiry sometimes produced information which was important for the technical calculation of punishment. For example, a rank (*jue* 爵), which had to be confirmed with the office keeping the household registers, in many cases entitled to a reduction of the sentence.<sup>4</sup> But mostly inspection and inquiry had the ancillary function of providing the material with which the interrogated person was confronted. In other words, the main purpose of inspection and inquiries was to help elicit a more complete and truthful testimony.

Of still greater consequence is the fact that a trial could only be finished when no inconsistencies in the testimony remained, i. e. when the accused either had confessed or the investigating officials had been convinced that the testimony in which the accused maintained his innocence was truthful. In no surviving Qin or Han case a conviction was based on physical evidence or

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<sup>3</sup> See, for example, *Zouyanshu* 36-48 or 99-123.

<sup>4</sup> *Ernian lüling* 82-85.

bureaucratic information alone, without testimony of the accused confirming his guilt.<sup>5</sup>

A case-in-point is case 22 of the *Zouyanshu*, which presents the judicial officials with the following situation: An unknown attacker has stabbed a woman from behind, taken her money and run away. Neither the victim nor anybody else has caught a glimpse of the attacker, but the knife is retrieved from the woman's back. A thorough investigation eventually turns up a suspect about whom not much more is known than that he used to wear a knife at his belt, but does not do so any more; the suspect vehemently denies any involvement in the robbery. Finally, a man comes forward who produces a knife scabbard which he confirms to have been given to him by the suspect. Close inspection (*zhen*) of the knife from the crime scene and the scabbard provided to the authorities by the man reveals a characteristic, matching defect and colour pigments from the knife clinging to the scabbard, thereby clearly implicating the suspect in the offence. However – and this is the important point – the judicial officials do not contemplate a conviction based on this evidence, but insist on a confession, for which they even resort to the threat of torture. This finally leads to a confession, and only then a prompt conviction is possible.<sup>6</sup>

An important consequence of this insistence on a confession is that in early Chinese law, there is not, and cannot be, something like a right to silence. If a confession is indispensable for conviction, granting the suspect a right to silence would thwart any prosecution. A right to silence can only be conceded if there is sufficient confidence that other evidence can ensure, in principle, a conviction – a condition which in early China obviously was not met.

### ***The agenda***

The observations made so far suggest the place of testimony within the structure of criminal

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<sup>5</sup> See Conner 2000 for a discussion of the confession requirement and the associated problem of torture in the Qing (1644-1911) criminal justice system.

<sup>6</sup> *Zouyanshu* 197-228.

investigation, that is, within the blueprint which assigns testimony its central role. However, this context does not fully explain the crucial role of testimony. A necessary further step is the analysis of the purpose and aims of testimony, in other words, it will be relevant to understand the *agenda* operating on testimony.

The purpose of any criminal procedure is to determine if an accused should be convicted or acquitted. If testimony is crucial for this, then this has two consequences:

- 1) Eventual conviction or acquittal must already be reflected within the testimony itself. In Qin and Han China, this was framed in the following way: The testimony either had to contain a “valid defence” (*jie* 解) of the allegations contained in the charge, or an admission on the part of the accused that he had “no valid defence” (*wu jie* 無解) and therefore was liable to punishment.
- 2) It absolutely had to be assured that the testimony containing a “valid defence”, or admission of a lack of such, was accurate and reliable, as the outcome of the trial depended on this.

The agenda of interrogation, the agenda operating on testimony, is therefore to either obtain a reliable confession or a valid defence.

For achieving this aim, the Qin and Han legal specialists used a technique of alternately giving the accused or witness room to present his statement (*ci* 辭) and then confronting (*jie* 詰) him with any remaining inconsistencies or other contradicting evidence. This technique is well documented both in the excavated trial records and legal manuals, as the following instructions in a legal manual of the third century BC demonstrates:

訊獄 凡訊獄，必先盡聽其言而書之，各展其辭，雖智（知）其訑，勿庸輒詰。  
其辭已盡書而毋（無）解，乃以詰者詰之。詰之有（又）盡聽書其解辭，有（又）

視其它毋（無）解者以復詰之。<sup>7</sup>

(How to conduct) interrogation in a criminal case – As a general rule for conducting interrogations in criminal cases, you have to first hear [the accused person(s) and any witnesses] fully out and record their oral statements in writing, with each [accused or witness] separately presenting his own statement uninterrupted. Even if you know that someone lies, there is no need to confront him immediately [with other evidence or inconsistencies]. Once someone's statement has been completely recorded in writing, and he/she has no valid defence, confront him with those matters which require confrontation. When confronting him, again hear him fully out and record the statements he offers in defence. Then again look at further matters for which he has no valid defence and again confront him on these matters.

This source describes a back-and-forth process in which the interrogator achieves the eliciting of the most accurate testimony by consciously alternating between the role of passive listener and very active questioner. This shows a keen awareness that

- 1) all testimony will be coloured by the questions asked and the expectations implicit in them;
- 2) testimony, on the other hand, must be brought “to the point” at some stage, i. e. the agenda must be pressed.

These early instructions attempt to reconcile these two often contradictory aims by giving the accused or witness first room to develop his statement and then – and only then – insisting on a resolution of discrepancies.

A crucial element in these instructions is the continuous recording by writing all testimony down, a point which will be discussed more in depth later.

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<sup>7</sup> *Fengzhen shi* 2-3=RCL E 2

## **The options**

Any agenda determines *options* that are available for a response. It is already obvious that an agenda which consists in resolving a criminal case either with a confession or a valid defence implies the following two basic options:

- 1) Offering a valid defence, thereby attempting to refute the charge and to ensure acquittal. If an accused takes this option, this is signalled in the records by the formula *wu ta jie* 無它解 “no further defence will be brought forth”.<sup>8</sup> However, the interrogating officials had to agree that the defence was at least potentially sufficient to achieve exoneration. That is, in the officials’ view at least all matters of fact had to be cleared up. If a suspect had admitted to culpable behaviour, but insisted that his behaviour was justified on legal grounds – the situation in *Zouyanshu* cases 1 to 5 –, the investigators either had to agree with this assessment, or, if they were in doubt, at least to consider the validity of the justification possible. In this latter situation, matters of law being at stake, the officials had to submit the case to the higher authorities for decision (*yan* 讞). In either case, the testimony of the accused was concluded with the formula *wu ta jie* 無它解. Otherwise, i. e. if not all matters of fact had been resolved and there was no potentially valid legal justification, *wu ta jie* would not have been added; instead, the interrogation would have continued, possibly under torture if the interrogators saw no other means to come to a resolution.
  
- 2) Admitting to criminal liability, in effect offering a confession. This means that the accused agrees that he has committed a culpable action and also does not have a legal justification for it. This is signalled in the records by the formula *zui, wu jie* 罪，無解 “I am liable to punishment and cannot offer a valid defence”.<sup>9</sup>

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<sup>8</sup> *Zouyanshu* 13, 45, 145, 148.

<sup>9</sup> *Zouyanshu* 21, 22, 31, 87, 150.

There was at least one additional option when matters of law were concerned, i. e. matters where the question is “how is a given action to be evaluated in terms of the law?”, as opposed to matters of fact where the question is “has he done it or not?”. This additional option in matters of law is the following:

3) Admitting to criminal liability only under the condition that the official’s legal interpretation proves correct. This is signalled in the case records by the formula *cun li dang: zui, wu jie* 存吏當罪無解 (where *dang* and *zui* can be left out) “only under the premise of how you, the interrogating officials, apply the law, I would be liable to punishment and could not offer a valid defence”.<sup>10</sup> This implies that the accused and his interrogators agree on the factual account, i. e. all matters of fact are settled and the accused admits to some action that is punishable in principle. However, disagreement exists on the legal evaluation of the accused’s action. The accused thinks that a valid justification exists, while the officials maintain the opposite. This option differs from the “valid defence” (option 1) in that it actually contains an admission of criminal liability, albeit a conditional one, which necessitates the end of the interrogation, unlike the “valid defence”, which causes an end to the interrogation only if the officials agree that, at least potentially, it provides exoneration. This option also differs from

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<sup>10</sup> *Zouyanshu* 5, 43. *Cun li dang* literally means “only when keeping in mind how you, the interrogating officials, apply the law”. *Cun* 存 “to exist, to persist, to survive” is here used in the mental realm, for which shades of meanings such as “to keep in mind, to let one’s thoughts linger at” (ode 93,1), “to observe attentively, to examine, to inspect” (*Mengzi* 7, 304; *Xunzi* 2, 12; *Zhuangzi* 17, 249), “to look out for, to pay attention to” (*Shiji* 117, 3053), and “to look after, to take into one’s care” (*Lüshi chunqiu* 2, 12) are attested. In the same way as *cun* 存 “to exist, to persist, to survive” and *wang* 亡 “to cease to exist, to perish, to die” are antonyms in the physical realm, *cun* 存 “to keep in mind, to contemplate, to pay attention to” and *wang* 忘 “to lose from one’s mind/memory, to forget, to be oblivious of” are antonyms in the mental realm (*wang* 忘 is etymologically derived from *wang* 亡, see Schuessler 2007, 507, who refers to Ulrich Unger, *Hao-ku* 20, 1983). The use of *cun li dang: zui, wu jie* 存吏當罪無解 (*Zouyanshu* 43-44) or simply *cun li: zui, wu jie* 存吏罪無解 (*Zouyanshu* 5) expresses a legal *proviso*, i. e. an acceptance of criminal liability only under the condition that the legal interpretation of authorities is correct, triggering a judicial review of the matters of law which are at stake in the case by way of a *yan* 讞-submission to the higher authorities. Therefore, “only under the premises of what you consider lawful” is an appropriate translation of *cun li dang* in a technical legal context.

the unconditional admission of criminal liability (option 2) in that the accused in effect demands a review of the legal issues at stake, which might ensure his acquittal or a more lenient punishment. In the *Zouyanshu*, cases in which the accused ends his testimony with *cun li dang*: *zui*, *wu jie* are always marked as doubtful and submitted to the higher authorities for decision (*yan* 讞).

In the *Zouyanshu*, examples for all of these options are found:

Case 22 offers an example for a simple confession. To illustrate the techniques used to elicit the confession, the full interrogation will be quoted:

When the suspect is first apprehended and is told that a witness has seen him wearing a belt with a scabbard and knife which are now missing, he responds in his initial statement with flat-out denial:

「為走士，未嘗佩（佩）鞞刀、盜傷人，毋望（坐）也。」<sup>11</sup>

“I have been a soldier running errands.<sup>12</sup> I have never worn a knife in a sheath<sup>13</sup> as a pendant on my belt or injured another person for the purpose of stealing. I have not been held liable [for any offence].”

Even when he later is told that another witness called Pu in the meantime has testified that he was

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<sup>11</sup> *Zouyanshu* 214.

<sup>12</sup> *Zoushi* 走士 seems to be some kind of title or function and also appears in Qin inscriptions (*Qin fengni* 1070-1071; see Zhangjiashan ersiqi hao Hanmu zhujian zhengli xiaozu 2006, 112 note 29. The *Ernian liling* lists the official titles *daxing zoushi* [ling] 大行走士〔令〕 “[Director of] *zoushi* in the office of the Minister of Feudal Relations” and *Weiyang zoushi* [ling] 未央走士〔令〕 “[Director of] *zoushi* in the Weiyang palace”, both with a salary rank of 600 *shi* 石 (equivalent to a prefecture head) (*Ernian liling* 460-461). These were relatively high-ranking officials at the imperial court which were in charge of some kind of runners, possibly message runners. For a lack of further context, the translation attempts to render the literal sense.

<sup>13</sup> See Sun Ji 1991, 135 and 133 illustration 34-20, as well as Hayashi Minao 1996, illustration 2-164 for depictions of a leather sheath for a belt knife.

given a scabbard by the suspect, the latter insists on his denial:

「未嘗予僕鞞，不智（知）云故。」<sup>14</sup>

“I have never given a scabbard to Pu. I do not know why he would have said that.”

At this stage, the knife used in the stabbing and the scabbard turned in by Pu are inspected (*zhen*) and found to have unique matching characteristics. As a result, the scabbard is positively identified as belonging to the weapon used in the crime. The suspect modifies his statement when confronted with this evidence:

「得鞞予僕。前忘，即曰『弗予』。」<sup>15</sup>

“I have found the scabbard, then I gave it to Pu. Earlier I had forgotten about this, therefore I said: ‘I did not give it to him.’”

With the suspect still denying the possession of the knife, the suspect’s wife and daughter are questioned, who confirm that the suspect earlier had possessed a knife and scabbard which they now miss. Confronted (*jie*) with this statement, the suspect is forced to admit the possession of the knife, but still denies the robbery:

「買鞞刀不智（知）何人所，佩（佩）之市，人盜絀（抽）刀，即以鞞予僕。前曰『得鞞及未嘗佩（佩）』，謾（謾）。」<sup>16</sup>

“I bought the sheath and the knife from an unknown person.<sup>17</sup> When, wearing them as a belt pendant, I went to the market, somebody pulled out the knife to steal it. Thereupon I gave the sheath to Pu. I have lied when I said earlier ‘I have found the sheath, but I have never worn it as a belt pendant’”

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<sup>14</sup> *Zouyanshu* 216.

<sup>15</sup> *Zouyanshu* 217.

<sup>16</sup> *Zouyanshu* 218-219.

<sup>17</sup> In the phrase *mǎi bǐng dāo bù zhī hé rén suǒ* 買鞞刀不智（知）何人所, *suǒ* 所 marks the indirect object,



The conflicting statements and the incriminating evidence required the interrogators to insist with the questioning and would have justified the use of torture, according to early Chinese instructions for investigations.<sup>18</sup> The interrogators in our case therefore confront (*jie*) the accused with the discrepancies between his various statements, for which he is unable to offer a valid defence (*wu jie* 無解). When furthermore threatened with torture, the suspect finally confesses and reveals his full plan. The record of his statement is concluded with *zui* “I am liable to punishment”, signalling the nature of the final statement as a full confession:

「貧急毋作業。恆游（遊）旗下，數見賈人券言（焉）。雅欲□（剽）盜，詳（佯）為券，操。視可盜，盜置券其旁，令吏求賈市者，毋言孔。見一女子操篋但（篋）錢，其時吏悉令黔首之田救蝻，邑中少人。孔自以為利，足刺殺女子奪錢，即從到巷中，左右瞻毋人，以刀刺奪錢去走。前匿弗言。罪。」<sup>19</sup>

“I am very poor and have no work. I regularly went to the marketplace, where<sup>20</sup> I have frequently seen the tallies of the traders. As I always wanted to carry out a robbery,<sup>21</sup> I informed myself how to make a tally and carried it with me. I also looked whom I could rob. During the robbery I would place the tally at this person’s side in order to induce the authorities to search for a trader, while I would not be suspected. Then I saw a woman holding an umbrella in her hand, [carrying] cash in a covered basket. At that time the authorities had ordered the general populace in total to the fields to fight the locusts. Therefore, few people were in town. I thought that this was a good opportunity, sufficient to kill the woman with a stab and to take away her money. I followed her into the lane,

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as elsewhere in the *Zouyanshu*.

<sup>18</sup> *Fengzhen shi* 3-5=RCL E 2, see below for translation and discussion.

<sup>19</sup> *Zouyanshu* 220-224.

<sup>20</sup> *Yan* 言 is here understood as writing the pronominal substitute *yān* 焉. *Yán* 言 in the sense “...and then he said that” would be unlikely within direct speech introduced by *yuē* 曰.

<sup>21</sup> *Piao* 剽 implies the use of illegal force (*Shiji* 58, 2089=*Hanshu* 47, 2213; *Shiji* 122, 3144), but is not known as a technical legal term.

and when I did not catch sight of anybody left and right, I stabbed her with my knife, took away her money, and ran away. Up to now I have concealed and not admitted this. I am liable to punishment.”

*Zouyanshu* case 5 offers an example both for (a) what turns out to be a valid defence, and (b) an admission to criminal liability only under the condition that the official’s legal interpretation proves correct. This case involves a former slave called Wu, against whom, despite now being officially registered as a free man, his former owner had brought a criminal complaint for absconding, as well as a constable (*qiudao* 求盜) called Shi who arrested the alleged absconder based on the criminal complaint, but without knowing his true status. The alleged slave resisted his arrest, and in the ensuing fight both Wu and Shi injured each other, raising the question whether any, or both, of them had committed an offence. The situation is summed up in the following statement made by Shi’s superior, a station head called Tuo:

「士五（伍）軍告池曰：『大奴武亡，見池亭西，西行。』」池以告與求盜視追捕武。武格（格）鬪，以劍傷視；視亦以劍傷武。」<sup>22</sup>

“Jun, rank and file, lodged the following criminal complaint with me: ‘The adult slave Wu has absconded, but has been seen to the west of your station, travelling westwards.’ Pursuant to this criminal complaint, together with Constable Shi I pursued and arrested Wu. Wu in resistance put up a fight and with his sword injured Shi; Shi, for his part, also injured Wu with his sword.”

During interrogation, the supposed slave Wu in his initial statement (*ci* 辭) admits causing the injury, but insists that he should not have been arrested in the first place, implying that he is not legally responsible for the consequences:

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<sup>22</sup> *Zouyanshu* 36-37.

「故軍奴。楚時去亡，降漢，書名數為民。不當為軍奴。L視捕武，誠格（格）鬪、以劍擊傷視。」它如池。<sup>23</sup>

“Originally I was Jun’s slave, but during the [reign of Xiang Yu in] Chu I absconded, submitted to Han, and got myself entered into the household register; [as a consequence,] I became a free man. Therefore, by law I am not to be made Jun’s slave. It is true that, when Shi came to arrest me, I put up a fight in resistance and with my sword attacked and injured Shi.” Everything else corresponded to Tuo’s [statement].

In their confrontation (*jie* 詰) of Wu the interrogators, however, assert that the criminal complaint lodged by Wu’s former owner Jun, though erroneous, provided a legally valid basis for the arrest and that it would have reasonable for Wu to allow the arrest as he always would have had the opportunity to clear up the matter afterwards. Wu, in his response, offers a conditional confession: He accepts criminal liability only under the condition that this legal interpretation proves correct.

•詰武：「武雖不當受軍弩（奴），L視以告捕武。武宜聽視而後與吏辯是不當狀，乃格（格）鬪，以劍擊傷視。是賊傷人也。何解？」

•武曰：「自以非軍亡奴，毋罪。視捕武，心恚，誠以劍擊傷視。吏以為即賊傷人，存吏當，罪，毋解。」<sup>24</sup>

• Confrontation of Wu: “Even though by law you were not to endure enslavement by Jun, Shi came to arrest you pursuant to a criminal complaint. Therefore, you were obliged to obey Shi and only afterwards argue with us that this [i. e. the record of the criminal complaint] was an unlawful charging statement.<sup>25</sup> But instead, you put up a fight in

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<sup>23</sup> *Zouyanshu* 37-39.

<sup>24</sup> *Zouyanshu* 41-44.

<sup>25</sup> In *bian shi bu dang zhuang* 辯是不當狀, *shi* is understood as a demonstrative modifying *zhuang* and referring back to the *gao* 告 “report” in the preceding sentence, *bu dang* as “not corresponding to the law” as elsewhere in legal usage, and *zhuang* as the technical term for a charging statement (i. e. the written

resistance and with your sword attacked and injured Shi. This constitutes [the statutory offence of] injuring another person with malice. What defence do you offer?”

• Wu: “Since I am of the opinion that I am not Jun’s absconded slave, I am not liable to punishment. When Shi came to arrest me, I got infuriated, and it is true that I then attacked and injured Shi with my sword. But you are of the opinion that this constitutes nothing else than [the statutory offence of] injuring another person with malice’,<sup>26</sup> and only under the premise of how you apply the law I would be liable to punishment<sup>27</sup> and not have a valid defence.”

Wu’s interrogation is complemented by that of constable Shi, who maintains in his initial statement that the resort to force, which resulted in Wu’s injuries, was both necessary and justified:

「以軍告與池追捕武。武以劍格（格）鬪，擊傷視。視恐弗勝，誠以劍刺傷武而捕之。」它如武。<sup>28</sup>

“Pursuant to Jun’s criminal complaint, together with Tuo I pursued and arrested Wu. Wu

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record, made by the authorities, of the former slave owner’s *gao*). Alternatively, *shi* could be understood in the sense “right, correct”, and *zhuang* as “behaviour”, resulting in the translation “...argue with us whether the behaviour was correct or not lawful”. However, as antonym of *shi* in the everyday sense “right, correct” one would expect *fei* 非 instead of the more technical *bu dang*. As the former slave Wu explicitly rejects the claims about his status made in his former owner’s *gao*, it seems most appropriate to understand *zhuang* in its technical legal meaning. Also, understanding *zhuang* as “behaviour” requires clarification whose behaviour is referred to. It can hardly refer to Wu’s behaviour, as he does not question the lawfulness of his actions. The other option is that it refers to the arrest, but *zhuang* referring to an official action would seem unusual. From the perspective of the legal officials, it makes more sense to question the charging statement (which was in fact unlawful) than the arrest (which, under the law, was not unlawful as long as it was undertaken pursuant to a report, even if the report itself was inaccurate, see *Ernian lüling* 152).

<sup>26</sup> An additional complexity in this case is the fact that since Qin, injuries caused in resistance to a lawful arrest was treated as *zei* 賊 “malicious”, though technically only qualifying as the less severe *dou* 鬥 “during a fight” (*Falü dawen* 66=RCL D 53; compare the incompletely preserved provision starting with *Ernian lüling* 152). However, this is taken for granted in the case and not a problem.

<sup>27</sup> →Zui 罪. <sup>28</sup> *Zouyanshu* 39-40.

<sup>28</sup> *Zouyanshu* 39-40.

put up a fight in resistance with his sword, and attacked and injured me. I feared I would not prevail, and it is true that I arrested Wu after having stabbed and injured him with my sword.” Everything else corresponded to Wu’s [statement].

Following this, the interrogators now confront constable Shi. They are doing this using exactly the argument Wu has made on his behalf, as if assuming the role of Wu’s attorney (there was no legal representation in early China). That is, in confronting Shi, the constable, the judicial officials are inverting the perspective and employ the opposite argument they had used against Wu:

• 詰視：「 武非罪人也， 視捕、以劍傷武。何解？」

視曰：「軍告武亡奴。亡奴罪，當捕，以告捕武。武格（格）鬪傷視。視恐弗勝，誠以劍刺傷捕武。毋它解。」<sup>29</sup>

• Confrontation of Shi: “Although Wu was not a person liable to punishment, you still injured him with your sword when you arrested him. What defence do you offer?”

Shi: “Jun brought a criminal complaint against Wu for being an absconded slave. An absconded slave is liable to punishment and thus by law has to be arrested. I [went to] arrest Wu pursuant to the criminal complaint,<sup>30</sup> but Wu put up a fight in resistance and injured me. I feared that I would not prevail over him. It is true that I arrested Wu after stabbing and injuring him with my sword. No further defence will be brought forth.”

Shi insists on his earlier argument that using force in making the arrest was legitimate and necessary. As a result, both defendants make the mutually exclusive assertion that their respective actions were justified: Shi has advanced a defence that is accepted by the officials as potentially

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<sup>29</sup> *Zouyanshu* 44-45.

<sup>30</sup> This statement refers to the statutes, which, on the condition that the arrest was based on a complaint or an ex-officio charge, mandated that exemption from punishment be granted to those who injured or killed a person resisting his/her arrest, even if the person to be arrested was not liable to punishment (*Ernian lüling* 152).

exonerating, so that they do not insist on a confession. Wu also in effect insists on his arguments, but his conditional confession opens the way for concluding the stage of the proceedings conducted at the lower level of the prefecture, and for the case to be submitted to the emperor as the highest judicial authority, who finds Wu guilty and acquits Shi,<sup>31</sup> an outcome which in no way was predetermined beforehand.

### ***The problem of torture***

One important, but very problematic issue closely connected with the crucial role of testimony for determining guilt and innocence is torture. This follows from the insistence that, as long as matters of fact are concerned, the accused's testimony either contains a confession or a "valid defence" that is accepted by the investigating officials as such. As there is no other option, there is not, and cannot be, a conviction without a confession. This, however, causes a quandary: It is the judicial officials who decide if a defence is considered sufficient to exonerate the accused from a charge, while it is the accused who decides if he confesses or not. This means that even in cases where the judicial officials had good reason to believe that the accused's defence was not satisfactory, the accused still could avoid conviction by refusing a confession.

It is clear from the sources that the main purpose of torture, which usually was executed by means of caning and seems to have been rather commonly used, was to break this quandary by extracting a confession and not primarily to gain information. In particular, there is no indication in the available sources that torture would have served to extract factual evidence which then could be used to independently verify the criminal charge and the confession. The Qin period manual quoted below<sup>32</sup> states the extraction of a confession of the only purpose of torture. It presupposes that the confrontation of the accused with all other evidence has been exhausted before torture is

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<sup>31</sup> *Zouyanshu* 47-48.

<sup>32</sup> *Fengzhen shi* 3-5=RCL E 2.

applied, and it does not mention any further verification of the confession. The case records show the same: In *Zouyanshu* case 22, the guilt of the accused has already been established quite clearly by independent means, and only a confession is missing, which is then gained by threat of torture. After this, no further investigative steps are mentioned. The original trial documented in *Zouyanshu* case 17 also concludes with the accused's confession, after which no further investigation is conducted. Had there been any further investigation, it already would have become clear in the original trial that the confession cannot be reconciled with independent facts – this is only established by the higher-level review of the case conducted on the convict's request. Together with the alternating unguided statements and confrontations mentioned before, torture therefore, from the viewpoint of the interrogators, belonged to the early Chinese “truth arsenal”, i. e. to those techniques which were deemed conducive to ensure accurate testimony.

This is reflected in the legal manual of the third century BC mentioned above; the passage about interrogation techniques already quoted continues:

詰之極而數訛，更言不服，其律當治（答）諒（掠）者，乃治（答）諒（掠）。治（答）諒（掠）之必書曰：爰書：以某數更言，毋（無）解辭，治（答）訊某。<sup>33</sup>

When he has been confronted to the utmost and still repeatedly lies, changes his statements and does not confess, then subject him to torture by caning if according to the statutes applicable for the case he has to be tortured by caning. If you torture him by caning, it is mandatory to make the following entry: “Protocol: ‘Because X repeatedly has changed his words and has not offered a statement which would provide a valid defence, I interrogated X with the application of the cane’”.

These instructions make clear that the purpose of torture was to extract a confession, and that its use was mandatory if the interrogating officials were not satisfied with the suspect's defence. The

source also makes clear that it was up to the subjective judgement of the officials if they deemed a suspect's statements to be lies or not. A favourable reading of the above source would suggest that torture was only allowed if the suspect's statements were either contradicted by other evidence or were demonstrably inconsistent. But even if this reading is correct, there is no evidence whatsoever that there were any objective safeguards to check if these conditions were met.

However, there clearly was awareness in early China that the use of torture poses terrible dilemmas. There was always the danger that a suspect, guilty or not, would die from torture.<sup>34</sup> Moreover, torture risks defeating its own purpose. While it aims to ensure truthful testimony, there is always the possibility that the accused will confess even to the untruth under threat of physical coercion. Famous is the example of the influential Qin chancellor Li Si 李斯, who, after the death of the First Emperor, in 208 BC was accused of rebellion at the instigation of Zhao Gao 趙高 and wrongly confessed to this most serious of all capital crimes “because he could not withstand the pain”:

趙高治斯，榜掠千餘，不勝痛，自誣服。<sup>35</sup>

“When Zhao Gao tried [Li] Si, he had him tortured with the cane, dealing him more than thousand blows. Because [Li Si] could not withstand the pain, he made a confession, thereby falsely incriminating himself.”

The danger of false confessions was recognised by the early Chinese, as seen in the stipulation quoted above, where torture is an ultima ratio, and in the following, related, stipulation found in the same source:

治獄 治獄，能以書從迹其言，毋治（笞）諒（掠）而得人請（情）為上；治（笞）

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<sup>33</sup> *Fengzhen shi* 3-5=RCL E 2.

<sup>34</sup> *Hanshu* 17, 641; *Hanshu* 77, 3262 together with *Hanshu* 77, 3257.

<sup>35</sup> *Shiji* 87, 2561; other examples of wrong confessions: *Hanshu* 76, 3214; *Zouyanshu* 109.



諒（掠）為下一有恐為敗。<sup>36</sup>

[How to] try criminal cases – When trying criminal cases, it is best to be able to obtain the truth concerning a person by means of tracing [the interrogated person’s] statements through written record, without resort to torture with the cane; it is only the second-best option to resort to torture with the cane, as it is to be feared that things will end in failure.

The *Zouyanshu* case records both show that torture and the threat of torture were routinely used<sup>37</sup> and in fact resulted in miscarriages of justice,<sup>38</sup> but also that there were remedies in the latter case. Case 17 concerns a man who is incriminated by the actual thief as a participant in the theft of a head of cattle, confesses and consequently is convicted to mutilation and penal labour.<sup>39</sup> However, after the punishment has been carried out, the convict exercises his statutory right<sup>40</sup> to “petition for a new finding of facts” (*qi ju* 乞鞫), claiming to have been wrongfully convicted.<sup>41</sup> The investigation reveals that both the allegation made by the actual thief<sup>42</sup> as well as the convict’s confession<sup>43</sup> were extracted under torture, while not enough attention was paid to contradicting evidence. As a result, the convict is immediately released and given the status of *yinguan* 隱官, a status which probably implied some form of government employment to secure a means of living for a mutilated ex-convict who otherwise would not have had many options. Also the convict is given compensation for all of his property lost as a result of the conviction, and the state buys back his wife and children who had been sold into slavery.<sup>44</sup> At the same time, the officials

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<sup>36</sup> *Fengzhen shi* 1=RCL E 1

<sup>37</sup> *Zouyanshu* 106-121, 220.

<sup>38</sup> *Zouyanshu* 120-121.

<sup>39</sup> *Zouyanshu* 99-106.

<sup>40</sup> See *Ernian lüling* 114-115 for the early Han statutes governing this right; the institution of *qi ju* 乞鞫 is known since predynastic Qin, see *Falü dawen* 115=RCL D 95.

<sup>41</sup> *Zouyanshu* 99.

<sup>42</sup> *Zouyanshu* 118.

<sup>43</sup> *Zouyanshu* 109.

<sup>44</sup> *Zouyanshu* 121-123.

responsible for his interrogation and conviction, even though having acted without intent, were almost certainly punished with a heavy fine.<sup>45</sup> We know from other sources that officials who knew that a confession was wrong and therefore acted with intent were even given the same punishment as the victim of the miscarriage of justice.<sup>46</sup> The inclusion of case 17 in the *Zouyanshu*, a collection of model cases that most probably was distributed throughout the empire, suggests that it was intended as a warning against excessive reliance on judicial torture, particularly when combined with sloppy investigation.<sup>47</sup>

Even though the instructions to interrogators cautioned about the dangers of torture, even though there were punishments for officials who used torture to extract false confessions and based wrong judgements on these, and even though there were mechanisms in place to correct wrongful convictions resulting from torture, these problems remained acute, were repeatedly criticised and led to some reforms. An example is found in a memorial submitted by Lu Wenshu 路溫舒, then a secretary to the minister of trials (*tingwei shi* 廷尉) in the central government, to the emperor in 74 or 67 BC, almost 200 years after the Qin sources quoted above, which deals with serious shortcomings in the Han administration of justice. The memorial charges that remand prisoners, in fear of death, frequently make wrong statements under torture because they cannot bear the pain. “Under the cane”, Lu Wenshu claimed, “anything can be extracted” (*Chui chu zhixia, he qiu er bu de?* 捶楚之下，何求而不得?).<sup>48</sup> As a result, the Xuandi emperor decreed in 66 BC that the commanderies and nominal feudal domains had to report to the emperor all cases where a remand

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<sup>45</sup> *Ernian lüling* 95-98 stipulates that for unintentional errors of justice (*fei gu er shi* 非故也而失), the responsible officials had to pay the redemption (*shu* 贖) fee corresponding to the wrong punishment; for the actual amounts see *Ernian lüling* 119. Equivalent rules most likely applied in Qin, for which we know that both intentional and unintentional errors of justice resulted in punishment of the responsible officials (*Falü dawen* 33-36=RCL D 27, 28).

<sup>46</sup> *Ernian lüling* 93-98, with the exception that a wrong death sentence was punished with mutilation and penal labour; again, the existence of an equivalent rule in Qin is most likely.

<sup>47</sup> *Zouyanshu* 99-123.

<sup>48</sup> *Hanshu* 51, 2370.

prisoner had died during detention either as a result of torture or of deprivation.<sup>49</sup> In spite of these reforms, there is no evidence that the basic contradiction of risking the untruth when forcing somebody to the truth was ever satisfactorily resolved in traditional China.

## Analysis: The crucial role of testimony – reasons and functions

Testimony of witnesses and of the suspect is at the centre of early Chinese criminal procedure. It was crucial for the decision about guilt or innocence of the accused. The options taken by the accused within his testimony determined the outcome of the trial. Even the availability of torture as an interrogation method, with the aim to force further, complete and non-contradictory testimony, is evidence of the indispensability of testimony for a judgement.

These points raise, on a more analytical level, the question of the reasons for and the functions of this crucial and indispensable role of testimony and, in particular, of the confession requirement. Why is it that within the framework of early Chinese criminal procedure, no conviction was properly possible without an admission of criminal liability on the part of the accused?<sup>50</sup>

I will argue that three aspects, taken together, can explain this: The relative higher importance early Chinese culture assigned to testimony versus forensic-scientific or bureaucratic methods of proof; the notion that a confession is the definite proof; and the affirmation of the current order

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<sup>49</sup> *Hanshu* 8, 253.

<sup>50</sup> The *qi ju* 乞鞫-case *Wei yu deng zhuang* 189-207 indicates that, while a confession certainly was required in the original trial, it was admissible for the reviewers in *qi ju* proceedings to uphold the original verdict even if the accused had retracted his confession after the original judgement and insisted on his innocence during the *qi ju* proceedings. That is, the confession requirement did not apply to *qi ju* proceedings, as long as the accused had confessed during his original trial. This case also indicates that a confession given, during the original trial, without the use of torture created a presumption in the *qi ju* proceedings that it was correct. In contrast, in *Zouyanshu* case 17 (*Zouyanshu* 99-123) the demonstrable use of severe torture clearly placed the original confession under doubt.

and eventually of the legitimacy of the state that the giving of testimony and of a confession implies.

### ***The relative trustworthiness of testimony***

The decisive role of testimony indicates that early Chinese culture assigned a higher degree of trustworthiness to testimony, compared to forensic-scientific or bureaucratic methods of establishing proof. This point would merit a separate treatment which also takes into account cultural spheres other than law; for the moment, it must remain a hypothesis. In our modern cultures we know that both models are powerful. For example, somebody who intends to advertise a new product can either use scientifically accurate comparative tests, or the testimonials of happy customers. Often, even in our science-dominated world, the second option is considered the more effective. The power of testimony is also attested by the extremely important role which pop, film and sports stars play in advertising. Every advertisement with a prominent face can be understood as testimony in favour of a product. However, in contrast to early China, modern cultures tend to place a high degree of trust in scientific evidence in many areas of life, and this is particularly true in the area of forensics where fingerprints or a DNA analysis can shatter any testimony. In early China, this is not the case, despite the fact that the early Chinese were on a comparatively high level in terms of (proto-) scientific techniques and forensic expertise. The early sources contain, for example, instructions on the criteria that needed to be fulfilled to determine a death as suicide; these display a high degree of medical knowledge.<sup>51</sup> But there is no indication that such forensic evidence ever could obviate testimony of witnesses and the confession of the accused.

While this to some extent explains the significance of testimony in general, further aspects need to be considered to account for the importance that is accorded particularly to the testimony of the

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<sup>51</sup> *Fengzhen shi* 63-72=RCL E 21.

accused and his admission of criminal liability in a confession.

### ***Confessions as ultimate evidence***

A confession by the accused conceptually is the piece of evidence that cannot be disproved. It is the “ultimate evidence, the piece of evidence which made further investigation unnecessary”, to phrase it in the words of Michel Foucault who finds this same preoccupation with a confession in 17<sup>th</sup>/18<sup>th</sup> century France.<sup>52</sup> In essence, with his confession, the accused becomes the principal witness against himself, delivering testimony that cannot be contradicted because the prosecuted and the witness for the prosecution are one and the same person. Because of this, the requirement to obtain a confession works as a safeguard against wrongful conviction: Only when the accused is a witness against himself, conviction is justified. If even the accused testifies his guilt, then a miscarriage of justice should be impossible. The reliance on such a safeguard is attractive in a system that has no fully evolved set of procedural safeguards. It requires a high degree of trust in the state’s ability to extract a confession of an offender even if the latter knows that with a confession, he ensures his own punishment. However, when the state, as in early China, does not fully trust in its own ability to facilitate a confession by interrogation alone and allows torture to be used to achieve this result, the confession requirement loses its efficiency as a safeguard to the degree that torture is used against non-confessing suspects.

### ***Affirmation of the state’s legitimacy***

With his providing testimony and, eventually, a confession, the accused affirms the legitimacy of the state which prosecutes him. The state needs to make sure that the accused provides testimony and makes a confession because his very co-operation in his own conviction will be the ultimate affirmation that the order created by the state is the only legitimate one. At the same time, the co-operation of the accused acknowledges that the interest in a well-ordered society transcends

even his own interest in self-preservation. Because of this, it was the intrinsic interest of the state to obtain a confession. The state insisted on a confession, because this very confession affirmed its legitimacy. Vis-à-vis the accused, the interrogator represents the legitimate authority of the state. Allowing the accused to insist on an – from the interrogator’s view – implausible denial would represent a defeat of this legitimate authority.

## *Mediating testimony by writing it down*

The blueprint that assigned testimony its place in early Chinese criminal proceedings, the agenda that governed judicial testimony, and the way in which these determined the options when giving testimony have been the focus of the analysis above.

An important aspect remains to be discussed: The recording of testimony. The Qin period interrogation instructions already quoted require the full and immediate recording of any statements made. Only when an oral statement had been completely recorded in writing (*qi ci yi jin shu* 其辭已盡書) was it permissible (*jie* 詰) to confront the accused or witness with remaining inconsistencies.<sup>53</sup> This was to be followed through for any further statements. It is evident from the trial records contained in the *Zouyanshu* and similar sources that great care was taken to implement these instructions in actual judicial practice.

Therefore, I will now shift the focus to the process of writing down testimony, that is: to the question of how testimony was mediated in the trial records.

I will argue that

(1) only the writing down of testimony, the mediation, granted it its significance; and

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<sup>52</sup> Foucault 1976, 50f.

<sup>53</sup> *Fengzhen shi* 2-3=RCL E 2.

(2) the blueprint, agenda and options, which are described above, actually were only put into full effect in the process of making testimony part of a written trial record.

## Facts: How is testimony mediated?

The following immediate observations on the surface of the record can be made about the way in which testimony is written down in the early Chinese trial records:

### ***Use of direct speech***

Direct speech is used. This is evident from the fact that testimony is almost always introduced by *yue* 曰,<sup>54</sup> the standard marker of direct speech in classical Chinese. In contrast, *wei* 謂, a marker of indirect speech which sometimes is found *within* a statement<sup>55</sup> if the speaker reports what a third person has said, never *introduces* a statement. In particular, the use of the third person to refer to the speakers themselves in the Chinese original is standard practice within direct speech and therefore needs to be consistently translated as “I”.

### ***Omission of most of the interrogators' questions***

All questions, apart from the formal confrontation statements that served to challenge the interrogated person, are left out from the record. It is, for example, obvious that the initial statement of the interrogated person was the answer to questions put to him or her by the interrogator. However, these questions are not recorded.

### ***Abbreviation and elimination of redundancy***

In the written record, testimony is heavily abbreviated. It is extremely unlikely that during

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<sup>54</sup> *Zouyanshu* 2, 3, 5, 9, 10, 13, 18, 20, 22, 28, 29, 31, 37, 39, 40, 43, 44, 63, 80, 82, 85, 87, 100-104, 106, 108, 110-112, 115, 117-119, 129, 133, 134, 141, 147, 150, 151, 198, 200-205, 212, 214-218, 220.

<sup>55</sup> *Zouyanshu* 80, 83, 105, 107, 108, 112, 113, 114, 129, 133, 134, 199

interrogation people made the very economical statements recorded in the trial documents. In the written record, the rambling flow of oral speech is condensed to the shortest possible form. In particular, it can be observed that the written record

- a) only contains information relevant to the case at hand, and
- b) hardly contains any redundant or repetitive information.

This implies that the written record is highly selective in that it leaves out from the original oral statements all information that is either considered irrelevant or redundant. This abbreviation of the oral testimony for the written record is made explicit in the documents. When information has already been presented in an earlier statement of the same or another person or in a record that has been introduced earlier, it is left out and the case records simply use the formulae *ta ru mou* 它如某 “everything else corresponded to [the statement of] person X”;<sup>56</sup> *ta ru he* 它如劾 “everything else corresponded to [the contents of] the ex-officio charge”;<sup>57</sup> *ta ru shu* 它如書 “everything else corresponded to [the contents of] the documents”;<sup>58</sup> *ta ru ci* 它如辭 “everything else corresponded to the statements made”;<sup>59</sup> *ta ru qian* 它如前 “everything else corresponded to [this person’s] earlier [statements]”;<sup>60</sup> or *ta ru [gu] yu* 它如[故]獄 “everything else corresponded to [the findings of] the original trial”.<sup>61</sup> These formulae indicate that at this place, information considered identical in content to some earlier information is not recorded again in the documents.

In contrast, it cannot be observed in the case records that testimony is expanded or extended

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<sup>56</sup> *Zouyanshu* 3, 10, 11, 29, 30, 40, 41, 85, 119, 134, 138.

<sup>57</sup> *Zouyanshu* 19, 64, 71, 81.

<sup>58</sup> *Zouyanshu* 71, 133.

<sup>59</sup> *Zouyanshu* 32, 64, 90, 154-155; this formula is in the *Zouyanshu* exclusively used in the section that records the results of inquiries *wen* 問.

<sup>60</sup> *Zouyanshu* 105, 111.

<sup>61</sup> *Zouyanshu* 111, 115, 116.



during the mediation process in the sense that additional information is introduced. Clearly, during the recording, testimony often was reformulated, using formal legal language;<sup>62</sup> this probably led in some cases to a more explicit or more complex wording compared to the original oral statements. But there is no indication that any information is introduced to the record by the legal officials that was not part of the interrogated person's statement.

More than the other two points – direct speech, suppression of questions – the process of abbreviation and elimination of redundancy determines how testimony is presented in the early Chinese trial records. The abbreviation required great skill from the record keeper. On the one hand, the record had to be selective insofar as it only should select the relevant information from the oral statements. On the other hand, it could *not* be selective insofar as all contradictions, unclear points etc. were to be preserved, even if there was a need of – and precisely for the purpose of – clearing them up later.

It is to a large part through this abbreviation and selection that the agenda is brought to effect, because the agenda provides the criterion for selection: Which pieces of information serve the purpose of providing a valid defence, or of supporting an admission of criminal liability? This is made explicit by the fact that the formulaic expressions with which the record-keeper replaces the everyday speech of the testimony are an integral part of the abbreviation process and at the same time are exactly the vehicle that signals which of the possible options open for testimony is chosen by the person interrogated. As a consequence, the process works in two steps:

- 1) The agenda determines the questions which in turn influence the answers.
- 2) Of the answers, only those parts that conform to the agenda are preserved.

The process of abbreviation of redundancy has an inherent relationship with the fact that the legal

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<sup>62</sup> See the discussion below.

officials use technical language when recording a case: The statements of the interrogated persons are reduced to their essence by recording them in technical language; technical formulae signal where information is eliminated as redundant. However, it would be misleading to say that oral statements are abbreviated and redundant information eliminated *because* they are recorded in legal language. Rather, the abbreviation is necessitated by the requirements of judicial procedure: to select the information relevant for the legal issues at hand, and to distinguish between information that is substantially new and thus needs to be taken into account separately in the judicial deliberation on the one hand, and information that is basically repetitive and does not need to be deliberated separately on the other hand. Technical legal language provides the means for the selection and differentiation, but is not in itself the cause for it.

## Analysis: The effects of the mediation process

Direct speech, suppression of all questions other than those used for formal confrontation (*jie* 詰), and selection are three important mechanisms at work in the recording of testimony in early China. The functions and effects of this mediation process are important for the following reason: In contrast to both the modern continental European and Anglo-Saxon systems of criminal law, for which oral pleadings in front of a full court are essential, the decision of any criminal case in early China was, as far as we can tell from the available sources, based on the written record alone, i. e. there was no open court trial. The accused and witnesses had no opportunity to directly address the judges, other than through their recorded testimony. The *Zouyanshu* provides evidence for this: On the local level of the prefecture (*xian* 縣), verdicts were arrived at by a panel consisting of the prefect (*ling* 令), the deputy prefect (*cheng* 丞), and judicial secretaries (*yushi* 獄史).<sup>63</sup> The prefect and deputy prefect were both appointed by the central government and were responsible for all prefecture affairs, while the judicial secretaries were locally appointed officials to whom

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<sup>63</sup> *Zouyanshu* 97, 106, 119-120.

law-enforcement and important tasks in the administration of justice were delegated. The judicial secretaries actually conducted the interrogations and therefore had direct contact with the witnesses and accused. On the other hand, the prefect and deputy prefect, who would have had the final word if disagreements arose, did not routinely have any direct contact with those whose testimony they read and on whom they had to pass judgement.<sup>64</sup> Also, according to Han regulations, people were not to be arrested and transferred for interrogation to the investigating authority if only smaller offences<sup>65</sup> were at issue.<sup>66</sup> The same was probably true in most civil law suits.<sup>67</sup> Instead, defendants and witnesses made a deposition in front of an official of the nearest sub-prefecture (*xiang* 鄉 “township”) authority, which committed it to writing and passed it on to the authority adjudicating the case.<sup>68</sup> Finally, if a case was submitted to a higher authority for approval of the judgement or for decision in the case of doubtful legal matters, only the written record was submitted and thus formed the sole basis for the eventual judicial decision. Only in very limited circumstances – in capital cases and cases involving the killing of another person,<sup>69</sup> as well as in petitions for a new finding of facts (*qi ju* 乞鞫) submitted by the accused<sup>70</sup> – the higher level authorities conducted an independent investigation, including a fresh interrogation of witnesses and the defendant.

For these reasons, it was testimony in its mediated form that mattered. As a consequence, it is

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<sup>64</sup> *Zouyanshu* case 17 is particularly relevant for this question: The judgement (*lun* 論) is passed by a panel consisting of the deputy prefect and three [judicial] secretaries (*Zouyanshu* 106, 119-120; the position of prefect was probably vacant at the time). However, the interrogation, which is recounted in detail when the case is re-tried, was conducted by only one of the [judicial] secretaries (*Zouyanshu* 107-109, 114, 119).

<sup>65</sup> I. e. those punishable with a redemption fee (*shu* 贖) or an even less severe penalty.

<sup>66</sup> *Juyan* 157.13, 185.11. It is not known when this rule came first into force.

<sup>67</sup> See the example of the early Eastern Han Kou En case, where the defendant gives his version of the events to a township (*xiang* 鄉) official who records and forwards it; the entire law suit seems to have been conducted in writing (*Juyan xinjian* E.P.F22:1-36).

<sup>68</sup> *Juyan xinjian* E.P.S4.T2:101.

<sup>69</sup> *Ernian luling* 396-397. It is unclear if the expression *fu'an* 復案 “review and investigate” implied that in all capital cases and cases involving the killing of another person full new inquest was conducted.

necessary to analyse the meditation process and its effects and functions, as these had an immediate impact on the judicial decision. Certainly, practical exigencies played a role in determining the way in which testimony was recorded: An understaffed imperial administration required conciseness in administrative communication, and with the relatively unwieldy writing media of bamboo slips and wooden tablets, drawn-out discussions would have quickly translated into manuscripts of a weight and volume difficult to handle. However, I will argue that the way in which testimony is mediated is motivated by more than these practical requirements, such as an awareness that testimony had to be edited in a certain way to be effective, and that even if the original motivation of the editing process could be traced back to practical exigencies, the mechanisms at work in the mediation process have consequences that cannot be reduced to mere practical necessities.

### ***Standardisation***

One of the most visible effects of the mediation process is the standardisation of all testimony both in its context and content. All testimony seems to be filled in into one identical form. In fact, as has been shown above, the judicial officials had so-called “models” (*shi* 式) which instructed them on the standard way of recording a law case, including the testimony given.

The standardisation served bureaucratic and judicial purposes. It served bureaucratic purposes because it ensured that all officials throughout the empire used the same format, guaranteeing that all required information was present (in essence, the model record worked as a checklist), and that the responsible officials on all levels immediately could find the relevant situation at the place where they expected it, making the records effective and avoiding ambiguity in regard to what piece of information belonged into which category of evidence. Standardisation also served judicial purposes because it ensured that all cases were comparable and could be evaluated

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<sup>70</sup> *Ernian liling* 116-117; *Zouyanshu* 99-123.

according to the same unified criteria, with the result that the same abstract laws could be applied to them. This means that the judicial evaluation of the case is already prepared by its recording. In other words: The recording is a necessary prerequisite for the actual legal work which applies techniques such as subsumption.

As regards the question of political power, the standardisation of testimony throughout the empire, which is particularly evident in the *Zouyanshu* case records that originate in different regions, means that the unified central state has asserted itself and its agenda. The standardisation is mandated by procedural models that the central authority has declared binding. A consistent failure to adhere to these models would question the central authority, while adherence means an affirmation of its power.

### ***Loss of control of the testifier over his testimony***

By writing the testimony down, abbreviating and rephrasing it, the judicial officials who did the recording took control of the testimony, and with them the state that they represented. This is very different from an open court situation where the testifier presents his testimony orally to the judge and jury and thus has full control over what, and how, testimony is given. Relying on testimony in its mediated form during the decision-making process requires a high degree of trust in the abilities of the people who are responsible for the mediation.

This is reinforced by the fact that, according to our knowledge, there was no equivalent to the signing of one's statement, a process by which people interrogated by the police in many modern jurisdictions retain some control over their testimony. There is also no indication that, *prior* to the judgement, people had an opportunity to read the record of their testimony or that it was read out to them. There is evidence that *after* the judgement, at least the finding of fact and the sentence was read out to the convicted person. This is implied in the institution of *qi ju* 乞鞫 "petition for a

new finding of fact”, already found in pre-dynastic Qin,<sup>71</sup> since to petition for a “new finding of fact” pre-supposes that the convict is aware of the original finding of fact, as is clearly attested in the *Zouyanshu*.<sup>72</sup> Zheng Zhong (5 BC – 83 AD) mentions the practice of *du ju* 讀鞫 “reading out the finding of fact”.<sup>73</sup> Furthermore, Jin Zhuo 晉灼 of the 3<sup>rd</sup> century AD, commenting on the *Shiji*, explicitly states: “When a criminal case has been concluded, the wording of the finding of fact and the document containing the punishment are read out to the remand prisoner; in cases where the remand prisoner calls these incorrect (*cheng kuang* 稱狂) and thus wishes to petition for a new finding of fact, this is to be granted.”<sup>74</sup> However, these sources only indicate that the finding of fact and the sentence, but not the testimony, was read out, and that this was done only after the judgement had been passed.

For the testifier, the mediation of his testimony represented a trade-off: On the one hand, the loss of control entailed the risk that his testimony was misrepresented or presented in a way disadvantageous to the testifier. On the other hand, the mediation had three effects that potentially worked to his advantage: The preservation of immediacy and authenticity, the granting of efficiency and significance, and the imbuing of his testimony with a confidence and knowledge in legal matters on par with that of the record-keepers.

### ***Immediacy and authenticity***

The recording of testimony had the effect to preserve its immediacy and thereby grant it authenticity. This is particularly important because the accused and the witnesses addressed their judges mainly through the written record. In this situation, the amount of immediacy retained in

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<sup>71</sup> *Fali dawen* 115=RCL D 95.

<sup>72</sup> *Zouyanshu* 99.

<sup>73</sup> *Zhouli* 35, 873b.

<sup>74</sup> *Shiji* 95, 2664; the Zhonghua shuju edition of the *Shiji* erroneously writes *Jin ling* 晉令 instead of Jin Zhuo 晉灼. For the correct writing see *Qinding siku quanshu*, *Shiji* 95, 11b.

the record determines to what extent testimony retains its authenticity and power. The effect of immediacy is achieved by the use of direct speech and by the suppression of any unnecessary questions preceding or interrupting the testimony, but also by the abbreviation of the original oral statements. This is due to a paradoxical effect: Oral statements need a certain degree of redundancy and inconsistency to come across as authentic; otherwise they appear memorised or read from a manuscript. The opposite is true for a written statement: Undue redundancy and grammatical inconsistencies would in the reader only draw the attention to the fact of their nature as being recorded statements. Only a certain amount of editing and smoothing imbues an oral statement with the kind of unemphatic air that draws attention to its content instead to the fact of its being written down.

### ***Efficiency and significance***

The recording of testimony also ensured that the voice of the accused or witness was significant and efficient in the judicial process. This involves a second paradox: Exactly because the statement, in the mediation process, is alienated from its originator, it gains efficiency and significance in the judicial process. This is because the selection and abbreviation ensured that the testimony was coherent and to the point, and that no important point would get lost among a large amount of unrelated information. The contrast between the testimony presented orally and the testimony presented in the medium of the written record therefore also is one between the unfiltered, but ineffectual testimony originally presented orally, and the filtered, but effective testimony that becomes relevant in judicial proceedings.

### ***Apparent confidence and knowledge in legal matters***

The judicial officials, by the very writing down of testimony, invested the interrogated people with the same amount of legal knowledge and self-confidence they possessed themselves. The editing of the testifiers' statements according to the criteria of the judicial officials means that in

the record, the testifiers speak through the mouth, or rather the brush, of the record-keeping officials. It is little surprising that the accused judicial secretary in *Zouyanshu* case 3 gets into legal arguments with his peers who interrogate him:

• 詰蘭：「闌非當得取（娶）南為妻也，而取（娶）以為妻，與偕歸臨菑（淄）。是闌來誘。。」

└闌曰：「來送南而取（娶）為妻，非來誘也。。」<sup>75</sup>

• Confrontation of Lan: “Even though<sup>76</sup> by law you were not permitted to take Nan as your wife, you nonetheless took her as your wife and wanted to return home to Linzi together with her. This [means that] you [committed the statutory offences of] coming [from the feudal lords] in order to lure [somebody to their territory]...”

Lan: „I only came here in order to accompany Nan, in the course of which I took her as my wife. This does not constitute [the statutory offence of] coming [from the feudal lords] in order to lure [somebody to their territory]...”

Even the slave woman in *Zouyanshu* case 2 gets into the same kind of legal arguments with her interrogators, and in the written record she insists with the same self-confidence on her point of view and does so with even more perseverance:

• 媚曰：「故點婢。楚時去亡，降為漢，不書名數。點得媚，占數復婢媚，賣祿所。自當不當復受婢，即去亡。」。

• 詰媚：「媚故點婢。雖楚時去亡，降為漢，不書名數。點得，占數媚，媚復為婢，賣媚當也。去亡，何解？」

• 媚曰：「楚時亡。點乃以為漢，復婢，賣媚。自當不當復為婢，即去亡。毋它解。」

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<sup>75</sup> *Zouyanshu* 19-20.

<sup>76</sup> *Fēi* 非, which most often negates a noun phrase, is here used in front of the verb to negate a verbal phrase (same in *Zouyanshu* 20, 31, 87). Harbsmeier (1981, 19-22) paraphrases the meaning of *fēi* in such cases as “it isn’t the case that”. The subordination of the clause, in an adversative sense, is expressed by the *ér* 而 preceding the following clause.



- Mei: “Originally I had been Dian’s slave woman, but during the [reign of Xiang Yu in] Chu. I had absconded and submitted to become a Han [subject]. I had not got myself entered into the household register. Dian caught me, and, by having me entered into the register [as his slave woman], enslaved me again. Then he sold me to<sup>78</sup> Lu. But I myself considered lawful that I was not, by law,<sup>79</sup> to endure enslavement again. Therefore, I absconded.”...
- Confrontation of Mei: “You originally were Dian’s slave woman. Even though you absconded during [the reign of Xiang Yu in] Chu and submitted to become a Han [subject], you did not get yourself entered into the household register. When Dian caught you and had you entered into the register, you therefore again had become a slave woman. It thus was lawful that he sold you. However, you still absconded. What defence do you offer?”
- Mei: “During the [reign of Xiang Yu in] Chu I had absconded. Dian therefore had to consider me a Han subject. Instead, he again enslaved and then sold me. Since I myself considered lawful that I was not, by law, to be made a slave woman again, I absconded. No further defence will be brought forth.”

In reality, slave woman Mei might well have been uneducated, frightened and intimidated by the proceedings against her. But the important point is that the mechanics of mediating testimony by recording it in writing require that in the written protocol she very much appears an equal to her legally trained interrogators. Therefore, even in the face of a confrontation with serious legal

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<sup>77</sup> *Zouyanshu* 9-13.

<sup>78</sup> *Suo* 所 functions here as grammatical marker of the indirect object. In this function, *suǒ* is placed after the indirect object in cases where otherwise the coverb *yú* could be used *in front*. The same usage is found in *Fengzhen shi* 51=RCL E 18; *Zouyanshu* 10, 29, 41; *Qinlü shiba zhong* 126=RCL A 74.

<sup>79</sup> The first *dang* 當 is understood as the putative transitive verb (*qu sheng*) “to consider lawful”, while the second *dang* 當 is understood as the auxiliary (*ping sheng*) “by law is to”, which is here negated.

arguments against her, she insists that her renewed enslavement was illegal and that she was entitled to abscond. This can even be observed in the terminology: When the slave woman, called Mei, says: “I myself considered lawful that I was not, by law, to endure enslavement again” (*zi dang bu dang fu shou bi* 自當不當復受婢), she uses the same term *dang* 當 that refers to a legal opinion delivered by judicial officials at the end of a trial.

A third paradoxical effect of the mediation of testimony therefore is that this process, in a way, empowers the testifiers: it gives their statements the same kind of legal confidence that their interrogators possess.

The open court model of judicial proceedings where the witnesses, and in particular the accused, directly and immediately address judge and jury, requires the presence of attorneys who translate the statements made before the court into legal language and evaluate these statements for their legal consequences. In Qin and Han China, where we have no evidence whatsoever of attorneys, this role is fulfilled to some extent by the record-keeping officials. It is their responsibility to record the statements in a way that ensures that they are related to the legal questions at stake, and that their legal implications are immediately clear.

The mediation process fulfilled this function regardless of the degree of legal knowledge which a defendant or witness commanded. The *Zouyanshu*, among other sources, demonstrates that in Qin and Han China, even ordinary people had a surprisingly good knowledge about the legal institutions surrounding them. An example is the commoner Jiang 講 of *Zouyanshu* case 17, who is aware of his statutory right to petition for a new finding of fact in his case.<sup>80</sup> In case 2, the slave woman Mei 媚 knew that, by submitting as a Chu subject to the Han during the civil war, she would become a free person. Less clear is why she did not register: She might not have known about this additional requirement, or she might have consciously avoided registration in order to

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<sup>80</sup> *Zouyanshu* 99.

avoid tax and service obligations. In any case, the confident way and the technical language by which she maintains her innocence in the record must be ascribed, to a large degree, to the editing of her statements by a judicial official. The amount of necessary translation into legal language certainly decreased proportionally to the legal knowledge of the witness or the defendant (in the extreme case, the testifier was a jurist himself, as in *Zouyanshu* case 3). However, even if this was the case, the mediation process had the potential to fill any remaining gap in legal certainty.

## *Conclusions*

Testimony played a crucial role in early Chinese judicial procedure, which relied on testimony for finding the truth and determining guilt. In the early Chinese documents, we find the strong conception that first-hand testimony constitutes a privileged form to gain access to the truth, as opposed to other forms of inquiry and proof-seeking that do not involve the narration of personal experiences. This caused testimony to be placed in the centre of all judicial proceedings and to become the primary means both for determining what really happened, and whether an action constituted a punishable offence or not. One important consequence is that a confession was required from the accused in order to pronounce him guilty. The confession requirement served, in principle, as a safeguard against wrongful conviction and at the same time implied an affirmation of the legitimacy of the state that punished the offender. The confession requirement also had the consequence that the state resorted to judicial torture when evidence indicated the guilt of a suspect who otherwise would not confess.

The importance accorded to testimony in turn caused a strong concern for the reliability and accuracy of testimony. In the documents, we clearly perceive an awareness that these depended to a large degree on the way in which the judicial officials asked and listened during testimony. This awareness is reflected in rules for asking and listening, in the techniques prescribed for interrogation, and in the legal provisions regarding testimony. In particular, the evolving rules

about the use of torture reflect a growing awareness that the use of judicial torture had the potential to jeopardise the aim of obtaining reliable and accurate testimony.

The testimony gained by these interrogative techniques and under these legal provisions was only significant as part of the judicial procedure insofar as it was recorded in writing, as judicial decisions primarily were based on the written record. This had important consequences: The listeners have an invisible, but heavy presence in the recorded testimony, since the records reflect what the listeners understood and perceived as important. The recording of statements gave the judicial officials even more control over the testimony than their role as questioners and listeners. The mechanisms at work in the transfer from oral testimony to a written record not only led to a standardisation of recorded testimony that reflects the needs of a imperial bureaucracy, but also had the paradoxical effects of, on the one hand, taking away control of his testimony from the testifier, and on the other hand granting his testimony significance and authenticity, and elevating it to a level of judicial knowledge and confidence identical with that of the judicial officials who did the recording, thus empowering the testifier.

# The role of law in early China<sup>1</sup>

## *Law vs. ritual and religion as the dominant paradigm*

There is an influential school in the literature on China which holds that the paradigms by which early (and indeed all of traditional) China is best understood are ritual and religion. Proponents of this school tend to understand other spheres like law only as a function of ritual and religion. Four examples – three China specialists, one founding father of sociology – shall suffice:

(1) Léon Vandermeersch, in a 1985 article on “the Chinese conception of the law”<sup>2</sup> contrasts what he calls the “juridical order” with the “ritual order”: The juridical order is based on the concept of individual rights and the correlating concept of personal liberty, while the ritual order emphasises spontaneity (*ziran* 自然) and dispenses completely with any idea of rights or of liberty.<sup>3</sup> Thus China never knew law in the proper sense. The Chinese, says Vandermeersch, have instead always upheld as their model “the administrator who never intervenes”, while those who are administered “[act] under the influence of his virtue, in spontaneous conformity with the norms of the social order”.<sup>4</sup> Phenomena that might look like law in China are explained by the fact that “ritualism has always felt the need for mechanisms of a juridical type”.<sup>5</sup> These mechanisms were provided by the Legalists, who, however only provided a “pseudo-law”, because “it had nothing to do with the idea of right[s]”, but “was formulated purely and simply as an instrument of government” and found its realisation in the “extraordinary penal apparatus built up in Qin” which “was designed and operated to force all social activity into channels which served the ends

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<sup>1</sup> This chapter is based in part on a paper presented at the XIII. Conference of the European Association for Chinese Studies, which was held in Turin from Aug. 30<sup>th</sup> to Sept. 2<sup>nd</sup> 2000.

<sup>2</sup> Vandermeersch 1985.

<sup>3</sup> Vandermeersch 1985. 13.

<sup>4</sup> Vandermeersch 1985, 13-14.

<sup>5</sup> Vandermeersch, 1985, 14.

chosen by those in power, by which the state was to increase its wealth and expand its empire”.<sup>6</sup> This intolerable regime was, according to Vandermeersch, the primary reason why Qin was overthrown by the Han, who abolished the Qin system and henceforth used what was left of the “pseudo-law” “solely for the repression of wrong-doing”, while the “principles of ritualism were to govern all other aspects of social organisation”.<sup>7</sup>

(2) Robin Yates in a 1995 article on the “state control of bureaucrats under the Qin”<sup>8</sup> feels obliged to first stress that “in early China bureaucratic procedure was closely linked to the cosmological or to the divine”.<sup>9</sup> A large part of the article is then devoted to an attempt at substantiating this claim, which rests (a) on a very strong interpretation of the often-mentioned requirement for judicial officials to be pure, which Yates does not interpret, as might be expected, to refer to incorruptibility, but to a “discourse of purity and pollution” with cosmological implications;<sup>10</sup> (b) the observation that, according to *xingming* 刑名 theory, any activity of a bureaucrat is the logical counterpart to the inactivity of the Dao and the ruler who is at one with it;<sup>11</sup> (c) the fact that, along with the legal texts, hemerological manuals were found in the same tomb in Shuihudi, which, even if nothing is known about the daily routine of the bureaucrats, must have been “an integral part of administrative praxis in the Qin” according to Yates.<sup>12</sup> The following detailed and very insightful account of the techniques and procedures used by the state to control its bureaucrats, which is based on the legal texts of Shuihudi, is kept very factual. This maybe makes sense, since the principles of administration and law have already be found in the “cosmological” and the “divine” and it would therefore not be promising to attempt to find different principles in the

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<sup>6</sup> Vandermeersch, 1985, 14.

<sup>7</sup> Vandermeersch, 1985, 14.

<sup>8</sup> Yates 1995, 331-365.

<sup>9</sup> Yates 1995, 333.

<sup>10</sup> Yates 1995, 333-337.

<sup>11</sup> Yates 1995, 337-338.

<sup>12</sup> Yates 1995, 339-342.

sphere of law itself. Interestingly, though, this whole factual account manages without taking further recourse to the “cosmological” and the “divine”, with one exception: When Yates comes to the rule that a wife was not legally liable for theft committed by her husband unless she consumed wine and meat with him, he relates this to the custom of Western Zhou and Shang times when the kings “bound their supporters to themselves by presenting to them the wine and meat of sacrifice, thus incorporating them into the sacrificial process of communion with the ancestral gods of the ruling lineage”.<sup>13</sup>

(3) Mark Edward Lewis, in his 1999 book on “writing and authority in early China”,<sup>14</sup> puts forward the thesis that writing was “employed in state and society to generate and exercise power”.<sup>15</sup> The earlier theocratic states were organised around the ancestral cult and used writing to communicate with the dead. During the Warring States transition these religiously potent forms of writing were used to lend authority to institutional innovations, with the effect that “even in the developed bureaucracy the palpable religious origins of many practices, the overlap of the forms of cult and administration, and the incorporation of new state practices into the imagined realm of the dead blurred any separation between politics and religion”.<sup>16</sup> Lewis therefore dismisses as misleading the contemporary discourse in which the “law” (*fa* 法) of the Legalists and the “ritual” (*li* 禮) of the Confucianists are sharply opposed, as “actual archaeological materials” show that Warring States law and legal practice is based in Zhou religious ritual.<sup>17</sup> One specific example which serves to support this thesis is the observation, originally made by Donald Harper, that *jie* 詰, in the legal texts a technical term for interrogation, is also used as a term in exorcist ritual. Lewis concludes from this that law derives its function from religious ritual: “In both spheres

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<sup>13</sup> Yates 1995, 357.

<sup>14</sup> Lewis 1999.

<sup>15</sup> Lewis 1999, 1.

<sup>16</sup> Lewis 1999, 13.

<sup>17</sup> Lewis 1999, 18.

order is maintained through the identification of malefactors [i. e. demons in religious ritual, offenders in legal practice; M. L.] and the application of graded responses sufficient to counteract the threat imposed or damage inflicted.”<sup>18</sup>

(4) Closely related to these conceptions are those which maintain that in traditional China, administration was a matter for literati-officials with a generalist outlook who had been schooled in the classics, but beyond this were, at most, only distinguished as *wen* 文 “literary” versus *wu* 武 “military” officials with no further specialisation. Even though – or probably exactly because – he was not a sinologist, Max Weber is a particularly influential proponent of this view. He is also a very instructive one, as in his work the relationship between conceptions of the organisation of the traditional Chinese polity and of the role of religion in society is particularly transparent. Weber writes:

Under the old regime in China a thin stratum of so-called officials, the mandarins, existed above the unbroken power of the clans and commercial and industrial guilds. The mandarin is primarily a humanistically educated literatus in the possession of a benefice but not in the least degree trained for administration; he knows no jurisprudence but is a fine writer, can make verses, knows the age-old literature of the Chinese and can interpret it.<sup>19</sup>

In order to understand why this has grave implications for Weber, the context of his argument needs to be kept in mind. Weber’s fundamental concern is explaining the uniqueness of modern Western economic, political, and legal institutions. On the economic

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<sup>18</sup> Lewis 1999, 23.

<sup>19</sup> Weber 1961, 249. Fort he German original, see Weber 2011, 299 (also reprinted in Weber 1990, 815): “Im chinesischen Ancien Régime saß über der ungebrochenen Macht der Sippen, Gilden und Zünfte eine dünne Schicht sogenannter Beamter, der Mandarinen. Der Mandarin ist in erster Linie ein humanistisch gebildeter Literat, der eine Pfründe besitzt, selbst aber nicht im geringsten für die Verwaltung geschult ist, keine Jurisprudenz kennt, sondern vor allem Kalligraph ist, Verse machen kann, die Jahrtausende alte Kultur der Chinesen kennt und sie zu interpretieren imstande ist.“



front, the unique and most important Western phenomenon is capitalism and its institutions; in political and legal terms, the unique phenomenon is what Weber calls the rational-legal state.<sup>20</sup>

By asserting that officials in traditional China were schooled in verse and literature, but had no training in administration and law, that China therefore lacked a *Fachbeamtentum*, Weber intends to demonstrate that traditional China does not conform to the specifically modern Western structural type of rational-legal authority, but to the structural type of traditional (or ‘patrimonial’) authority.<sup>21</sup> The reason why China did not develop rational-legal forms of government is to be found in the specific attitude of the Confucian literati officials towards religion. Although Confucianism is basically rational in nature, it left the power of religion untouched, because it had to rely on it to legitimate the traditional order:

A patrimonial officialdom, finding itself in a position of absolute power and monopolizing both the official and priestly functions, could indeed have none but a traditionalist mentality regarding literature. The sanctity of literature alone guaranteed the legitimacy of the order which supported the position officialdom. [...] For these [...] reasons Confucianism has not made the slightest attempt ethically to rationalize the existing religious beliefs. It presupposed as an element of the given secular order the official cult which which was managed by the emperor and the officials, and the ancestor cult of the housefather.<sup>22</sup>

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<sup>20</sup> Weber xxviii ff. For the German original, see Weber 1963, 1ff.

<sup>21</sup> Weber 1978, 1047ff. For the German original, see Weber 1990, 608ff.

<sup>22</sup> Weber 1951, 164f. For the German original, see Weber 1963, 453: “In der Tat konnte ein in absoluter Machtstellung befindliches und dabei zugleich die offizielle Priesterfunktion monopolisierendes Patrimonialbeamtentum nicht anders als traditionalistisch gesonnen sein in bezug auf eine Literatur, deren Heiligkeit allein die Legitimität der seine eigene Stellung tragenden Ordnung verbürgte. [...] Der Konfuzianismus hat aus diesen [...] Gründen auch nicht den geringsten Versuch gemacht, den bestehenden religiösen Glauben ethisch zu rationalisieren. Den offiziellen Kultus, der durch den Kaiser und die Beamten erfolgte, und den Ahnenkult des Hausvaters setzte er als Bestandteil der gegebenen weltlichen Ordnung voraus.“

As a consequence of the unbroken power of religious magic, any attempt to initiate a transformation towards rational-legal models of administration was bound to fail:

The Chinese state changed over to administration through trained officials in the place of humanistically cultured persons as early as the 7th and 11th centuries but the change could be only temporarily maintained; then the usual eclipse of the moon arrived and arrangements were transformed in reverse order. It cannot be seriously asserted, however, that the spirit of the Chinese people could not tolerate an administration of specialists. Its development, and that of the rational state, was rather prevented by the persistence of reliance upon magic.<sup>23</sup>

To sum up, for the very tangible reason of preserving power and the traditional rationale for its exercise, the paramount role of ritual and religion cannot be touched; but because of this powerful role, 'rational' institutions such as law cannot play any significant part in the exercise of authority, and as a consequence the administration remains in the hands of generalists educated in literature, not specialists trained in law.

I will contest these conceptions and argue

1) that law, at least from Warring States China onwards, was a separate and distinct conceptual field which was different from either ritual or religion, and that this is discernible, for example, from the fact that there were legal specialists who shared a distinct knowledge and terminology as well as distinct techniques;

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<sup>23</sup> Weber 1961, 250. Fort he German original, see Weber 2011, 300 (also reprinted in Weber 1990, 815): "Zur Verwaltung durch ein Fachbeamtentum an Stelle eines humanistisch gebildeten ist der chinesische Staat schon im 7. und 11. Jahrhundert übergegangen. Aber nur vorübergehend ließ sie sich durchsetzen; dann trat die übliche Mondfinsternis ein, und die ganze Sache wurde wieder umgeworfen. Daß etwa die chinesische Volksseele das Fachbeamtentum nicht ertragen hätte, kann im Ernst nicht behauptet werden. Sein Aufkommen (und damit das des rationalen Staates) wurde vielmehr durch die Ungebrochenheit der Magie verhindert."

- 2) that, even if administration in Qin and Han China did not correspond to the Prussian model of the *Fachbeamtentum*, these legal specialists were influential because both low and high officials, in particular those with judicial responsibilities, were drafted from among them, and because officials with no specialist background relied on their legal knowledge; and
- 3) that law had its own distinct historical contribution, which is found in its role in establishing, organising and maintaining the state, and in its role in legitimising political power.

## *Law as a distinct field of knowledge and practice*

For the present purposes, I would suggest the following criteria to distinguish a field of knowledge and professional practice:<sup>24</sup>

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<sup>24</sup> There is a large body of literature on the sociology and history of professionalism, which for a long time has been oriented on the 19<sup>th</sup> and early 20<sup>th</sup> century ideal of the traditional or “status” professions (e. g. law and medicine) of England and the United States (see Abbott 1988, 3-4; Abbott 2001, 12166). Typical is Talcott Parsons’ statement that “the development and increasing strategic importance of the professions probably constitute the most important change that has occurred in the occupational system of modern societies” (Parsons 1968, 536). Parsons’ emphasis on the modern Western, particularly American, university system (Parsons 1968, 539-545; six of the ten pages of Parsons’ influential 1968 encyclopaedia article deal with the interrelationship of professions and the universities) is also characteristic for this approach.

Since the first systematic analysis of ‘the professions’ was published in 1933 by Alexander Carr-Saunders and Paul Wilson (*The Professions*. Oxford: Oxford University Press 1933. Quoted in Abbott 1988, 4 and Abbott 2001, 12166), sociologists have attempted to define traits that would allow to distinguish professions from non-professional occupations. Widely quoted is Millerson’s comprehensive survey which lists as the six most frequently mentioned characteristics: possession of a skill based on theoretical knowledge; provision of training and education; testing of competence of members; organisation; adherence to a code of conduct; and altruistic service (Geoffrey Millerson: *The Qualifying Associations. A Study in Professionalization*. London: Routledge & Paul; New York: Humanities Press 1964. Quoted in Waddington 1996, 677; see also Abbott 1988, 4).

This “traits-approach”, common until the 1960s, has been widely criticised within sociology for leading to static results and “strangl[ing] inquiry” (Abbott 2001, 12166). Since the late 1960s, it has been replaced with more sceptical interpretations, first the “power-approach”. While the earlier Parsons conceptualised professions as rationalist, universalist, and exercising functionally specific authority (Parsons 1954; compare Abbott 2001, 12167), power theorists viewed professionalisation as a process of asserting power and control in society. In this latter perspective, the professions’ claims of specialised knowledge, altruistic behaviour and adherence to ethical standards are seen as rhetoric employed to obtain special privileges from the state (see Waddington 1996, 677). Even more recent approaches view professionalism as

- a) The presence of a community of specialists, recognisable by some kind of specialised training and experience, who
- b) share a body of knowledge which
- c) is transmitted through a corpus of expert literature and about which they
- d) communicate in technical language.

A traditional account of the evolution of legal specialists, legal knowledge and legal literature is

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characterised neither by specific traits nor specific social structures, but by an inherent and ongoing competition with other professions and occupational groups over jurisdiction of work, so that “a profession [is] anything that compete[s] like one”(Abbott 2001, 12167f.; the main reference for this approach is Abbott 1988).

All these approaches are geared towards the historically particular phenomenon of the modern Anglo-American (and to a lesser extent, Western Continental European) professions and thus are of limited value for the study of early China. It is, for example, extremely unlikely that the ‘professional’ jurists I am concerned with were organised in anything like a professional organisation; importantly, they are also distinct from the typical professionals of traditional sociological literature in that they worked for the state in a bureaucratic setting, rather than in free practice.

The particularity of these approaches, however, has also been recognised by sociologists who see a need to broaden their historical and geographic perspective and to take into account more recent developments. These sociologists, for example, find that the Anglo-American model of largely self-regulating professions which have carved out independence from the state ill fits the French and German situation where traditionally a high number of professionals have worked in state settings and even have enjoyed more prestige than their peers in independent practice (Abbott 2001, 12167f.; Siegrist 2001, 12156). On the other hand, recent tendencies for professionals to increasingly work in or for large-scale organisations such as globalised private service firms, as well as within state agencies, has led to a new appraisal in which “bureaucracy”/“organisation” and “professionalism” are not any longer thought of as inherently antagonistic (Hinings 2001). As a result, sociologists of professions have noted: “If the pattern of associational professionalism that gave rise to the field itself is either dead or transformed, then the field must retheorise its objects of scrutiny. Abbott’s test – a profession is an occupation that competes by retheorising others’ work – presupposes fixed and organised occupations of a kind that simply may not exist under modern conditions of employment.” (Abbott 2001, 12168). Within Western sociology, the question of professionalism thus is being redefined in broader and more inclusive terms as the question of “how expertise is organised in a society” (Abbott 2001, 12168). It is in this latter sense - role and organisation of institutionalised expert knowledge within a society – in which I would like to adopt the terms “professional” and “professionalism” for China. My own criteria for a professional field then are to be understood neither as an attempt to equate early Chinese legal experts with the historically specific European and North American phenomenon of the ‘professions’, nor as an (methodologically outdated) attempt to define universal criteria applicable to all forms of professionalism in every kind of social and historical settings. Rather, the criteria given are intended as a heuristic device for the purpose of evaluating whether legal modes of thought and action were historically significant in early China, and if yes, what significance they possessed vis-à-vis other modes of social practice.

provided by Cheng Shude in the introduction to the “Lüjia kao” 律家考 chapter of his *Hanlü kao* 漢律考.<sup>25</sup> Legal studies (*lǚxue* 律學) thrived for the first time in the Warring States period with the *Fajing* 法經, attributed to the Wei chancellor Li Kui 李悝,<sup>26</sup> and the legalist treatises of Shang Yang 商鞅, Shen Buhai 申不害, Shen Dao 慎到, Hanfei 韓非, and others, all mentioned in the bibliographical treatise (“Yiwen zhi” 藝文志) of the *Hanshu*.<sup>27</sup> The burning of the books of the ‘hundred schools’ during the Qin is significant because from then on law became the prerogative of officials. According to Cui Zusi 崔祖思 of the Southern Qi (479-501), since the Han there existed legal experts who for generation after generation passed on their profession to their descendants and who assembled up to several hundred students whom they taught law.<sup>28</sup> In regard to legal literature, the *Jinshu* states that in the Han, the laws’ complexity and lack of consistency led to controversies and in the consequence to a rich legal literature, including a body of *zhangju* 章句-commentaries which was increasingly voluminous and increasingly difficult to master; the Confucian scholars Shusun Xuan 叔孫宣, Guo Lingqing 郭令卿, Ma Rong 馬融 and Zheng Xuan 鄭玄 contributed substantially to the staggering amount of the more than 7,732,200 words to which the *zhangju*-commentaries grew.<sup>29</sup> The importance of legal studies in Han is underlined by the fact that when Wen Weng 文翁, as Governor (*shou* 守) of Shu 蜀, in order to advance this backward border commandery selected about ten talented junior officials for training in the capital, he explicitly instructed some of them to study law.<sup>30</sup> At the end of the Eastern Han, with

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<sup>25</sup> Cheng Shude 1963, 178-179. The *Hanlü kao* is part of Cheng Shude 1963, the full *Lüjia kao* chapter is Cheng Shude 1963, 178-191.

<sup>26</sup> For Li Kui and the *Fajing*, see *Jinshu* 30, 922.

<sup>27</sup> See *Hanshu* 30, 1735.

<sup>28</sup> See *Nanqishu* 28, 519.

<sup>29</sup> See *Jinshu* 30, 923.

<sup>30</sup> See *Hanshu* 89, 3625. Wen Weng is also important for establishing public schools, setting the precedent for a policy that soon was implemented on an empire-wide scale (*Hanshu* 89, 3626). On Wen Weng, compare Loewe 2000, 582f. (it is unclear why Loewe writes that Wen Weng became Governor of Shu “probably towards the end of Wendi’s reign” when both *Hanshu* 89, 3625 and *Hanshu* 28B, 1645 clearly write that that he was appointed to this post towards the end of the Jingdi emperor’s reign, i. e. around 142 BC).

the instability ensuing after the Dong Zhuo 董卓 rebellion and the fall of the dynasty, legal studies fell into decline. In this situation, Wei Ji 衛覲 in Wei 魏 requested in a memorial to establish the post of Academician for the Statutes (*lü boshi* 律博士) in order to institutionalise legal teaching, arguing that even village heads (*baili zhangli* 百里長吏) should understand the law.<sup>31</sup> This office persisted throughout the following dynasties and was only abolished in the Yuan period.

Cheng Shude relies in this sketch entirely on received sources, some of which are much later than Qin and Han and difficult to substantiate. In the following, I will supplement Cheng Shude's overview with an analysis of available information on legal specialists and their technical knowledge, literature and language, drawing both on the biographical detail of the traditional histories and on the rich mine of the newly excavated sources which allow for substantial new insights. For example, while Cheng Shude had to rely on the legalist philosophical literature for the history of pre-Qin legal studies, it is now obvious that legal specialists and technical legal literature existed well before the Han – the legalist literature certainly indicates that even before the Qin unification, an eminent concern existed in early China regarding questions connected with law and its role in government, but it does not display the level of sophisticated practical knowledge that is evident in the palaeographic material.

## Career jurists

The advent of the career jurist in China falls into the Warring States period, at the latest.<sup>32</sup> While a

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<sup>31</sup> *Sanguozhi* 21, 611.

<sup>32</sup> Evidence for earlier periods is either inconclusive or would require further analysis. For an example see Skosey's treatment of the "Legal Bureaucracy" in Western Zhou (Skosey 1996, 162-178); she argues that while the administration of law during that period might not have been autonomous and persons involved in it might have had other duties, it nonetheless was "very hierarchical and bureaucratized". For a fuller picture, it would be necessary to know more about the background of the people involved in the administration of law who ranked below the high ranking members of the central administration whose names appear as arbiters in the inscription.

story remains to be told about how a legal profession evolved as a result of the administrative and legal reforms of the late Chunqiu and Warring States periods, I will here concentrate on the result of that process in the Qin and Han.

Typical for a professional field is the presence of an employment sector for specialists who are defined by their specific responsibilities in relation to other professions and who are perceived as a distinct group by people who do not share in their trade, and by the availability of training that confers the qualification necessary for employment as a professional.

The sources show that there were substantial employment opportunities for legal specialists, who also had distinct responsibilities within the bureaucracy. The few posts in the central administration which specifically were responsible for judicial issues are well known, namely the minister of trials (*tingwei* 廷尉)<sup>33</sup> and his staff, as well as the chief prosecutor (*yushi dafu* 御史大夫) and his staff. But to fully appraise the pre-eminent role of legal experts within the administration, it is even more important to look at the local level. We know from the *Zouyanshu* and other sources that most law enforcement and judicial tasks in the prefectures were delegated to judicial secretaries (*yushi* 獄史),<sup>34</sup> in contrast to the prefect (*ling* 令) and deputy-prefect (*cheng* 丞), who together had the overall responsibility for the administration of the prefecture. The Yinwan strips show that each prefecture had, corresponding to its size, one to three judicial secretaries.<sup>35</sup> While the Yinwan strips date from late Western Han, these numbers are consistent with other sources like the *Zouyanshu*, which mentions at least one *yushi* in a number of cases,<sup>36</sup>

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<sup>33</sup> The English rendering of official titles follows mostly Giele 2001; for a general description of the various officials' responsibilities see Hucker 1985.

<sup>34</sup> *Zouyanshu* 61, 75, 97, 130, 197, 203, 227.

<sup>35</sup> *Yinwan* 2a-2b.

<sup>36</sup> *Zouyanshu* 61, 75, 97, 130.

and even five different ones in the prefecture responsible for the Qin capital of Xianyang 咸陽.<sup>37</sup>

The responsibilities of the judicial secretaries covered the whole spectrum of the enforcement and administration of law. They had to supervise police work within the prefecture; while most tasks of day-to-day policing were delegated to specialised personnel, such as constables (*qiudao* 求盜) and generally the staff posted at local stations (*ting* 亭), the co-ordination of all law enforcement activities rested with the judicial secretaries.<sup>38</sup> They initiated and supervised legal proceedings when criminal offences were reported to the authorities; they conducted investigations and the formal inquest into the offence, including the interrogation. In contrast, up to the actual passing of a judgement, the prefect and deputy prefect most likely did not get involved in a case; their role was limited to receiving reports and assigning a particular judicial secretary to a particular case.<sup>39</sup>

Already during the stage of the investigation, a thorough knowledge of the law was important, as not only matters of fact were investigated during the inquest, but also matters of law addressed. Specialised legal knowledge was even more crucial during the actual adjudication of a case, which also was an important task of the judicial secretaries who, together with the prefect and deputy-prefect, were members of the panel that passed judgement.<sup>40</sup>

While the judicial secretaries had a paramount role in local legal matters, they were supported in their duties by a relatively large number of subordinate staff and low-level functionaries on which they could draw on an ad-hoc basis. The officials charged with police duties have already been mentioned. Station heads were among those officials who could receive a criminal complaint alleging an offence and then at least in some instances had to make an independent decision

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<sup>37</sup> *Zouyanshu* 197-198 and 203.

<sup>38</sup> *Zouyanshu* 61, 75.

<sup>39</sup> *Zouyanshu* 197-198, 203.

<sup>40</sup> *Zouyanshu* 97.



whether the criminal complaint warranted search and arrest or not.<sup>41</sup> Other staff was available for taking deposits, investigating crime scenes, conducting forensic examinations, supervising prisons, recording trials, and preparing legal documents.<sup>42</sup> While few specifics are known about the people filling these posts, it is clear that they required legal knowledge and that these were the posts to which young people who had received legal training<sup>43</sup> usually were first drafted.

The same structure and division of responsibilities is replicated on the next higher level of territorial administration, the commandery (*jun* 郡). While overall administrative responsibility lay with the governor (*shou* 守) and deputy governor (*shoucheng* 守丞), the enforcement and administration of law was entrusted to a number of locally appointed secretaries-in-chief (*zushi* 卒史). The *Yinwan* strips mention nine secretaries-in-chief overall for Donghai 東海 commandery in late Western Han. It is very likely that only some of them specialised in legal matters. The *Zouyanshu* mentions for the commandery Nanjun 南郡 three secretaries-in-chief responsible for an individual Qin case,<sup>44</sup> and one secretary-in-chief dealing with two Han cases.<sup>45</sup> The sources indicate that at the commandery level, administration was organised into various departments (*cao* 曹) and that among them was a “judicial department” (*juecao* 決曹), which was led by one or more “secretaries of the judicial department” (*juecao shi* 決曹史).<sup>46</sup> As the *Yinwan* strips do not list any such functionaries, it is likely that this was but another name for those secretaries-in-chief who were in charge of legal matters. Like their counterparts in the prefectures, the secretaries-in-chief in charge of judicial matters (*zushi/juecao shi*) were responsible for the enforcement and administration of law within their jurisdiction. In particular, they investigated

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<sup>41</sup> *Zouyanshu* 36-37.

<sup>42</sup> See for example the various supporting staff in the *Fengzhen shi*.

<sup>43</sup> On legal training see page 170 and *passim* in the biographical information given for some jurists below.

<sup>44</sup> *Zouyanshu* 124.

<sup>45</sup> *Zouyanshu* 67, 74.

<sup>46</sup> See Chen Mengjia 1980, 99ff. According to Chen’s sources, one secretary (*shi* 史) was assigned to the judicial department of a commandery. On this office see also *Hanshu* 51, 2368 and 76, 3227.

those cases that were assigned to the commandery either by the statutes, such as the compulsory review of all capital cases and cases involving somebody's killing,<sup>47</sup> or by the central government on a case-by-case basis.<sup>48</sup> If required, they conducted a formal inquest and participated, together with the governor and deputy governor, in the actual adjudication.<sup>49</sup>

Biographical information shows that people actually trained for these judicial posts and made a career in them. Such information is scarce for Qin and the early decades of the Han, for which *Shiji* and *Hanshu* are generally not rich in biographical information. Also, in this early period military exploits in the unification of the empire and the civil war were maybe the most important qualification for high office, so that few jurists would have risen to those highest posts on which *Shiji* and *Hanshu* contain information, while the local jurists escaped their attention. However, some information can be gleaned from the tombs that have yielded the legal texts.

In addition to the legal texts – excerpts from statutes and detailed explanations on their implementation, instructions for the resolution of doubtful legal problems, model records – and the two hemerological texts that Yates mentions, a chronicle was found in the Shuihudi tomb that contains information about a certain Xi 喜 who is almost certainly to be identified with the tomb owner.<sup>50</sup> This chronicle shows that the tomb owner is an example of a Qin official who made a career in the administration of law on prefecture level. The chronicle notes that in 243, when Xi was aged 19 and had already served in the military for about one year in some administrative function, he was given the post of secretary (*shi* 史)<sup>51</sup> in Anlu 安陸<sup>52</sup> prefecture.<sup>53</sup> Two years later,

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<sup>47</sup> *Ernian liling* 396-397.

<sup>48</sup> See e. g. *Zouyanshu* 124-126 for such the assignment of a case involving a prefecture in Cangwu 蒼梧 commandery to neighbouring Nanjun 南郡 commandery. The assignment was made by the chief prosecutor (*yushi dafu* 御史大夫) at the imperial court.

<sup>49</sup> *Zouyanshu* 67, 74.

<sup>50</sup> Shuihudi Qin mu zhujian zhengli xiaozu 1990, 3.

<sup>51</sup> The character in front of *shi* 史 is not legible on the bamboo strip, so that it is not clear what exact position

he was made a secretary-in-charge (*lingshi* 令史) in the same prefecture, and after one further year transferred to the same position in nearby Yan 鄆<sup>54</sup> prefecture. As secretaries-in-charge sometimes are noted in connection with legal cases, he might already have been very much involved in legal matters at this time.<sup>55</sup> In 235 BC, Xi, now aged 27, was explicitly assigned to try criminal cases in Yan prefecture. In this year, the chronicle notes *Xi zhi yu Yan* 喜治獄鄆 “Xi tried criminal cases in Yan”, a wording that suggests that Xi held a legal position of responsibility, in which he was, on his own or with others, in charge of trials. Four years after the unification of the empire by Qin Shihuang, in 217 BC, the chronicle ends. This probably also is the date of Xi’s death at the age of 45. Between 235 and 217, the chronicle notes that Xi participated in two military campaigns (in 234 and 232 BC), but no new administrative assignments. In view of the fact that almost only legal texts were found in his tomb, it is very likely that after brief periods of military service, Xi returned to his old position in Yan and continued to work as a legal official with responsibility for trials until his death.

The Zhangjiashan tomb contained, besides a collection of statutes and edicts from early Han and the *Zouyanshu*, a text on mathematical problems, two medical manuals, a calendrical chart and a military-strategic dialogue between king Gailü of Wu and his advisor Wu Zixu. This indicates an interest of the tomb owner not restricted to law; on the other hand, the excavators note that the tomb owner was of rather high age and might have been interested in the medical texts for the private purpose of maintaining his health.<sup>56</sup> The calendrical table found in the Zhangjiashan tomb

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Xi took up; it must have been a low-level administrative assignment. The editors suspect that the missing character is to be emended to *yu* 御 (Shuihudi Qin mu zhujian zhengli xiaozu 1990, 10 footnote 48 to strip 11b.

<sup>52</sup> *Zhongguo lishi dituji* 11-12,2\*5. Anlu was subordinated to Nanjun 南郡 commandery

<sup>53</sup> *Biannianji* 11b.

<sup>54</sup> *Zhongguo lishi dituji* 11-12,2\*5.

<sup>55</sup> The *Fengzhen shi* alone mentions *lingshi* fourteen times in such roles.

<sup>56</sup> Zhangjiashan Han mu zhujian zhengli xiaozu 1985, 15. The age is indicated by the presence of a

contains only the personal information that Xin, most likely the tomb owner, submitted to the Han in 202 BC and was relieved of his office in 194 BC due to illness,<sup>57</sup> indicating that the tomb owner served as an official, probably on the local level of a prefecture, during the reign of the Gaozu emperor. As we do not have any information that medical specialists were normally employed by the state as officials, it is likely that the medical texts indeed express a personal interest, while the legal texts point to a, probably lifelong, occupation in a capacity concerned with legal matters.

While information on professional jurists is relatively scarce for Qin and the early Han decades, this situation changes in the later decades of the Western Han. Military merit not any more being paramount for employment in high office, more jurists had a chance to rise to those high offices to which the *Shiji* and *Hanshu* pay their primary attention. The general higher density of biographical information available from the decades immediately preceding the compilation of the histories also contributes to this fuller picture, which reveals that some of the people who are well known for their thoughtful memorials, attainment of high position and courageous opinions expressed at crucial historical junctures have a professional background as career jurists. The following analysis systematically looks at all people for whom the *Shiji* and *Hanshu* record that they served, at least for some time, as local judicial officials on prefecture or commandery level. Specifically, the analysis will try to answer the question what qualified these officials for their judicial posts, how did they attain these, and which further career options were opened by their local judicial appointments. Due to the nature of the sources, which neglect local officials unless they later attained very high office, information is only available for a relative small number of people. This is certainly not a representative sample. Nonetheless, we gain precious general information about the role of judicial officials, and the avenues open to them.

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dove-finial staff, which was conferred as a special privilege to those 70-75 years of age, depending on rank (see *Ernian lüling* 355).

<sup>57</sup> *Lipu* 2, 10.

Yu Gong 于公<sup>58</sup> is an example of a jurist who made a career in legal positions at the prefecture and commandery level and gained recognition in them. By virtue of being the father of the famous Yu Dingguo 于定國, Yu Gong is one of the few local jurists on whom the histories include biographical information even though they never rose to offices beyond the local and regional level. The *Hanshu* reports that Yu Gong first served as judicial secretary in a prefecture (*xian yushi* 縣獄史), then as an official in the judicial department of a commandery (*jun juecao* 郡決曹)<sup>59</sup> and finally as *jueyuping* 決獄平 “arbiter for deciding trials”, an office that is not well documented, but the name of which makes clear that it was concerned with the decision of judicial cases, probably on the local or regional level.<sup>60</sup> Yu Gong is best known for the case of a young woman, who, having been widowed at a young age, nevertheless continued to care for her aged mother-in-law in a self-sacrificing way, steadfastly refusing to re-marry. When the mother-in-law committed suicide in order to relieve her from the burden of caring for her, the mother-in-law’s natural daughter reported the daughter-in-law for killing her mother. Consequently, the daughter-in-law, after having made a wrong confession under torture, was sentenced to death by the prefecture. Yu Gong became involved in the case when it was submitted to the commandery for the mandatory review of any death-penalty case and strongly argued for the innocence of the woman, but was overruled by the governor. Yu Gong finally was vindicated when a three-year long disastrous draught was interpreted as heavenly retribution for the unjust execution.<sup>61</sup>

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<sup>58</sup> Yu is the family name, Gong an honorary title, not the first name.

<sup>59</sup> Although not explicitly stated, it must be assumed that Yu served as secretary of the judicial department (*juecaoshi* 決曹史, see above), as he the account makes clear that he was directly answerable to the commandery governor.

<sup>60</sup> *Hanshu* 71, 3041.

<sup>61</sup> *Hanshu* 71, 3041-3042. On Yu Gong, see also Loewe 2000, 660 (Loewe erroneously interprets *gu* 姑 in *Hanshu* 71, 3041 as “aunt”; while *gu* also refers to the father’s sister, it is the common designation of the husband’s mother, see *Erya* 4, 63b, *Zuozhuan Zhao* 28,724,16f, and *Zuozhuan Xiang* 2,415,5 with a classical passage on the wife’s filial duty to care for her mother-in-law – *fu yang gu* 婦養姑. In the *Hanshu*

Yu Gong's son Yu Dingguo is an example of a jurist who demonstrates that legal careers did not stop at the prefecture or commandery level, but that legal training and achievements in at the local level enabled judicial officials to rise all the way to the highest judicial offices of the empire. Yu Dingguo was first taught law by his father and after the latter's death also became judicial secretary in a prefecture (*xian yushi* 縣獄史), followed by a post in the judicial department of a commandery (*jun juecao* 郡決曹), thereby duplicating, at first, the career of his father. But then he was recruited to the central government and filled the post of secretary to the minister of trials (*tingwei shi* 廷尉史), where he was assigned to try attempts at rebellion against the emperor, i. e. very high-profile cases. His talents evident, he was promoted to the 1000-bushel office of palace prosecutor (*yushi zhongcheng* 御史中丞).<sup>62</sup> When, following the Zhaodi emperor's death in 74 BC, Liu He 劉賀 was enthroned as emperor, Yu Dingguo submitted a politically risky memorial criticising the latter's conduct as immoral. Shortly after, Huo Guang 霍光, the empire's dominant official, not only engineered Liu He's disposal and replacement with the Xuandi emperor, but also requested that all officials who had memorialised against Liu He should be promoted out of turn. As a result, Yu Dingguo was given the 2000-bushel office of palace advisor (*guanglu dafu* 光祿大夫),<sup>63</sup> where he held the quasi-judicial responsibility of arbitrating matters concerning the Imperial Secretariat (*ping shangshu shi* 平尚書事). After some years he was transferred to the 2000-bushel office of superintendent of the imperial hunting park (*shuiheng duwei* 水衡都尉),<sup>64</sup> his only non-judicial appointment before becoming chief minister later in his life, and then being appointed as minister of trials (*tingwei* 廷尉), the highest judicial post within the empire which he

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passage, the context is that of a woman who exhibits an exemplary degree of filial piety by caring for her mother-in-law even after her husband's early death – *xiao fu...yang gu...* 孝婦...養姑... Therefore, the meaning “mother-in-law” is clearly intended). – Generally, Loewe, in his paraphrases of *Shiji* and *Hanshu* information, focuses on the later stages of officials' careers and provides relatively few details about the early more specialised appointments of Han officials with a legal background.

<sup>62</sup> Hucker 1985 no. 8174.

<sup>63</sup> Hucker 1985 no. 3349.

<sup>64</sup> Hucker no 5497.

held for the exceptionally long period of 18 years. To attain this office, he entirely relied on his legal training and experience in previous posts, as he only devoted himself to classical studies (in his case in the *Chunqiu*) after he had become minister of trials. He rose even higher, becoming chief prosecutor (*yushi dafu* 御史大夫), which, supervising the legal conduct of officialdom, also can be considered a legal appointment, and finally chief minister (*chengxiang* 丞相).<sup>65</sup>

Lu Wenshu 路溫舒 is the example of an official who, unlike Yu Dingguo, did not come from a lawyer family, but saw a career in law as his chance to escape from a humble background. He rose through various judicial posts at the local, regional and central government levels and his achievements as a jurist were finally rewarded with a posting as commandery governor. Lu Wenshu spent his youth as a shepherd, but then decided to apply for the position of a judicial official, and for this purpose took up the study of the laws and ordinances (*qiu wei yu xiao li, yin xue lüling* 求為獄小吏，因學律令). Having proven himself in junior judicial posts, he was promoted to the post of judicial secretary in a prefecture (*xian yushi* 縣獄史), and soon his opinion was sought on all doubtful cases within the prefecture. When the commandery governor realised his talent, he had him promoted to secretary of the commandery judicial department (*juecao shi* 決曹史). Lu Wenshu then pursued some studies in the *Chunqiu*, which seems to have helped his promotion to deputy prefect of Shanyi 山邑. Relieved from this office for some offence, he was demoted to some commandery office. After this intermezzo, the incumbent minister of trials recruited Lu Wenshu for an assignment as head of the department for judicial memorials and submissions (*zouyancao yuan* 奏讞曹掾<sup>66</sup>), an official responsible for preparing the memorials concerning those cases for which the minister of trials intended to seek the

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<sup>65</sup> *Hanshu* 71, 3042-3045. On Yu Dingguo, see also Loewe 2000, 659f.

<sup>66</sup> *Hanshu* 51, 2368 writes *zoucao yuan* 奏讞曹掾 “head of the memorials department”; however, according to Hucker 1985 no. 7044 such an office is only known to have existed under the chief of staff (*taiwei* 太尉) and probably also under the chief minister (*chengxiang*), but not under the minister of trials, while the latter is known to have had a 奏讞曹 in his agency.

emperor's decision. Some time later, Lu Wenshu was given the post of a secretary to the minister of trials (*tingwei shi* 廷尉史). In this capacity, he recommended to the emperor some reforms in the conduct of trials and treatment of prisoners, which were approved. This proved to be Lu Wenshu's breakthrough: In recognition of his merits, Lu Wenshu was promoted to positions where he was fully in charge of an administrative agency, first to the 600-bushel post of director of one of the treasuries in the kingdom of Guangyang (廣陽私府長),<sup>67</sup> and subsequently to deputy governor of the capital west (*you fufeng cheng* 右扶風丞), probably also ranked 600 bushel.<sup>68</sup> Lu Wenshu's career culminated in his appointment to the powerful 2000-bushel office of commandery governor in Linhuai (臨淮太守).<sup>69</sup>

Bing Ji 丙吉 is a further example of a jurist whose career in legal posts at the local and central level prepared him for the highest offices. Bing Ji first specialised in legal studies (*zhi lüling* 治律令) and worked as a judicial secretary (*yushi* 獄史) in Lu 魯. Having distinguished himself in this post, he was promoted directly to the 1000-bushel office of inspector of the right to the minister of trials (*tingwei you jian* 廷尉右監). Dismissed for an unknown charge, he went to serve under one of the regional commissioners, but was called back to the capital to handle some of the cases that were connected to the witchcraft affair of 91 BC. After he again had himself proven in a judicial capacity, he faced no obstacles in a career that took him to highest office. He rose to the non-judicial post of chief clerk to Huo Guang 霍光, the then-general-in-chief (*da jiangjun* 大將軍), only to be promoted first to the prestigious post of palace advisor (*guanglu dafu* 光祿大夫), then to chief prosecutor (*yushi dafu* 御史大夫) and finally even to chief minister (*chengxiang* 丞相). Bing Ji is described as an official who started out as a “junior legal official” (*fa xiao li* 法小

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<sup>67</sup> Hucker 1985 no. 5624.

<sup>68</sup> The *you fufeng* ranked 2000 bushel and was one of the officials in the metropolitan region who was equivalent to a provincial governor, together with the governor for the capital center (*jingchaoyin* 京兆尹) and the governor for the capital east (*zuo fufeng* 左扶風.).

<sup>69</sup> *Hanshu* 51, 2367-2372. On Lu Wenshu, see also Loewe 2000, 418f. (*yu xiao li* 獄小吏 in *Hanshu* 51, 2367 likely does not mean “prison official”, but rather “junior judicial official”).



吏) and only later pursued some studies in the *Shijing* and ritual classics.<sup>70</sup>

Wang Zun 王尊 is an example of a man from a humble background for whom a legal career proved a stepping stone to higher, non-specialist offices mainly in regional administration.

Orphaned at an early age, Wang Zun was entrusted to the care of his uncles who sent him to tend sheep in the marches. However, he secretly devoted himself to studies and mastered the clerical script. At the age of 13, he applied successfully for the position of a junior judicial official (*yu xiao li* 獄小吏) in a prefecture and after some years was transferred to a post in the office of the commandery governor. His ability to answer any question regarding the implementation of imperial edicts was noted by the governor, who entrusted Wang Zun with responsibility for the prisons in the commandery. After resigning for reasons of illness, he took instructions in the *Shangshu* 尚書 and *Lunyu* 論語, but was soon recalled to take responsibility for the trials held under the governor's jurisdiction and was made secretary of the commandery judicial department (*jun juecao shi* 郡決曹史). After some further years, he was chosen to serve on the staff of the Youzhou 幽州 regional inspector (*cishi* 刺史). His work as a legal specialist prepared Wang Zun for appointments where he was fully responsible for an agency: After his term in Youzhou, Wang Zun was successively appointed head of the salt commission (*yanguan zhang* 鹽官長) in Liaoxi 遼西; made prefect of Guo 虢, at some stage with responsibility for other prefectures in the area; governor of Anding 安定; colonel, with responsibility for transport, to the general-protector of the Qiang (*hu Qiang jiangjun zhuan xiaowei* 護羌將軍轉校尉); prefect of Mei 郿; regional inspector (*cishi* 刺史) of Yizhou 益州; administrator (相) of Dongping 東平; colonel for internal security (*sili xiaowei* 司隸校尉); prefect of Gaoling 高陵; advisor (*jian dafu* 諫大夫); palace advisor (*guanglu dafu* 光祿大夫); acting, and subsequent substantial governor of the capital centre (*jingchaoyin* 京兆尹); regional inspector (*cishi* 刺史) of Xuzhou 徐州; governor of Dongjun 東

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<sup>70</sup> *Hanshu* 74, 3142-3145. On Bing Ji, see also Loewe 2000, 12f. (as described above, Loewe's rendering of *yushi* 獄史 as "prison official" does not suggest the actual role of a judicial secretary with oversight over all legal matters in a prefecture).

郡. While none of these posts carried specialised judicial duties, Wang Zun was noted for a style of administration which frequently framed issues in legal terms, gave priority to the enforcement of law and order and frequently challenged people to live up to their legal duties, pronouncing harsh punishment on people who failed to do so. This style led to criticism and caused Wang Zun to be dismissed, only to be recalled when other approaches failed.<sup>71</sup>

The information about the role of judicial officials within the bureaucracy as well as the biographical information about specific jurists, taken together, show that law was an attractive career path that was actively pursued; this is indicated by the use of words like *qiu* 求 in some biographies. The sources mention that a training in law was a requirement for such a career. While the sources in several instances mention the humble background of the jurists, it is unclear whether legal training was particularly attractive for people from such families, either because it was more easily available than an education in classical learning, or because it offered better employment opportunities. In some instances, young men had the opportunity, like Yu Dingguo, to obtain a legal education at home, especially if their father or other relatives were jurists. But legal training seems to have been also available outside of the family. It is unlikely that jurists were completely self-taught, if only for the reason that a study of law required access not only to the current laws, but also to legal literature (see below). At least in the later decades of the Western Han period, it seems to have been common for jurists who aspired to higher, non-specialised office to complement their training with classical education. But such training was only taken after a distinguished judicial post, usually at commandery level, already had been attained; others took classical education only very late, such as Yu Dingguo who was already minister of trials. In the latter's case, it is not clear if his studies in the *Chunqiu* were a requirement for his advancement to chief prosecutor (*yushi dafu* 御史大夫) and chief minister (*chengxiang* 丞相), or more a matter of prestige or personal interest; however, it has to be kept in mind that since

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<sup>71</sup> *Hanshu* 76, 3226-3238. On Wang Zun, see also Loewe 2000, 566f.

around the middle of the second century BC, it had become fashionable to treat legal problems in a *Chunqiu* framework, one of the dominant intellectual trends of the time.<sup>72</sup> Even if no formal requirement for his further advancement, Yu Dingguo might therefore well have been aware that his *Chunqiu* studies were suited to enhance his intellectual standing as a legal specialist. On the other hand, it is unlikely that a classical education was a career factor in Qin and the first Han decades, when classical learning was either not valued or was surpassed in importance by military merits.<sup>73</sup>

The typical initial employment goal for a young lawyer seems to have been one of the numerous low-level judicial posts at the prefecture which usually are not further specified but simply summed up in terms like *yu xiao li* 獄小吏. It is probable that many officials with more or less legal training spent a lifetime moving between such posts, but for an ambitious and capable jurist, the next career goal was an appointment as judicial secretary (*yushi* 獄史) in a prefecture. If he distinguished himself, the following step was a judicial post in a commandery, mostly as secretary of the judicial department (*jucao shi* 決曹史), an appointment shared by all of the Han officials mentioned, with the exception of Bing Ji, who seems to have jumped this step. *Zouyanshu* case 22 is instructive on the circumstances in which a judicial official could be promoted to the equivalent

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<sup>72</sup> See the discussion of Dong Zhongshu's contribution to legal studies in the first chapter. On the *Chunqiu* as a framework for legal issues in Han, see Cheng Shude 1963, 163-177 and Shen Jiaben 1985, 1770-1778.

<sup>73</sup> For a critical appraisal of "Legal Education in Ch'ing China" see Chang 1994. Though some 2000 years removed from the period of the present inquiry, Chang's account of the significant role and the education of legal secretaries in the Qing suggests some important parallels with early imperial China. For example, Chang reports that legal secretaries did much of the actual legal work at different levels of the government (Chang 1994, 304-307); thus "the importance of the legal secretaries' service cannot be exaggerated" (Chang 1994, 302). According to Chang, law was often the career choice for poor, but talented students (Chang 1994, 303), who were mostly trained as apprentices by experienced legal secretaries. Their education consisted both in practical training in the handling of actual cases and the study of legal literature, including collections of laws, commentaries on these, and precedents (Chang 1994, 304-310). Their training also had a strong ethical dimension (Chang 1994, 310-313). Chang concludes that, although legal training in Qing was not as widespread as in modern societies, the education of Qing legal specialists compares well with modern Chinese law schools for its breadth, practical as well as theoretical orientation, and ethical outlook (Chang 1994, 319-321).

post at the next higher administrative level of the commandery: This case record contains the request to grant such an advancement to a judicial secretary who has solved an exceptionally difficult case.<sup>74</sup> There were several options after attaining the highest judicial office in a prefecture or commandery: For most jurists, such an appointment was certainly the crowning of their career. The example of Yu Gong, for whom an altar was erected, demonstrates that it was possible to achieve a high reputation or even fame in such a local office. Other jurists, such as Lu Wenshu, Bing Ji and in particular Yu Dingguo, went on to specialised judicial posts in the central government, typically being appointed to the staff of the minister of trials. From there, Yu Dingguo went on to become minister of trials himself and keeping this post for an exceptional long time. Bing Ji was promoted to positions that, while not primarily concerned with the administration of law, required legal knowledge. Lu Wenshu, on the other hand, was rewarded for his merits as a jurist in the central government with non-specialised appointments. A third career path is exemplified by Wang Zun, for whom the local office of a commandery judicial secretary proved a stepping stone to appointments of importance that did not per se require legal training.

These are only a few examples of legal experts, chosen because they highlight the different options for a career in law. However, these are by far not the only known Han jurists. Cheng Shude alone compiled in the *Lǚjia kao* 律家考 chapter of his *Hanlǚ kao* 漢律考 information about some 75 people from both Western and Eastern Han who either specialised in law or made a distinct contribution to the study or practice of law.<sup>75</sup>

It is evident that in no way all, or not even the majority, of early Chinese officials were jurists by trade, but the examples given demonstrate that law was one, and maybe a particularly important option for young people aspiring to official appointment, and for some people even a vehicle to

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<sup>74</sup> *Zouyanshu* 227.

<sup>75</sup> Cheng Shude 1963, 178-191 (the *Hanlǚ kao* makes up the first *juan* 卷 of the *Jiuchao lǚkao* 九朝律考, i. e. Cheng Shude 1963).

reach high office at a level that would otherwise have been out of their reach. But the legal profession did not only prove important for the career of some, the importance of legal professionals, especially in local administration, also can hardly be overestimated.

In legal matters, the prefect and deputy-prefect on prefecture level and the governor and deputy governor on commandery level quite certainly had the last word in cases of disagreement, as the episode demonstrates in which Yu Gong's objections to a death sentence were overruled. However, the jurists' influence in the day-to-day running of legal affairs must have been substantial: When Lu Wenshu's biography states that in his first post as a young man, all doubtful matters in the commandery were referred to him (*xian zhong yi shi jie wen yan* 縣中疑事皆問焉<sup>76</sup>), then this means in practice that the centrally appointed prefect deferred to his junior, and presumably much younger, subordinate in all instances where a case was not clear-cut. We know little what, if any, regular training prefects and governors were given. While some of them might have had a background in law themselves, it is likely that the ordinary prefect or governor did not receive much of a legal education. In this case, they would have depended almost entirely on the legal specialists in their agencies. It is likely that the responsibility of legal specialists extended to other areas than just criminal law, which, as the primary means for controlling the populace and asserting the power of the state, was important enough on its own. But as the Zhangjiashan and Shuihudi legal sources reveal, criminal and administrative law was not clearly separated. The legal experts therefore must have played an important role in all administrative matters. Evidence of this is Wang Chong's observation within the Lun Heng that "when a civil official disposes of a matter, he cannot but inquire with the legal experts; therefore, in regard to the affairs of the prefectural offices, absolutely nothing surpasses in importance the laws and edicts" (*Wenli zhi shi bi wen fajia; xianguan shiwu mo da faling*. 文吏治事必問法家縣；官事務莫大法令。).<sup>77</sup> *Fajia*

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<sup>76</sup> *Hanshu* 51, 2367.

<sup>77</sup> *Lunheng* 121.

法家 in this passage clearly refers to legal experts, not the philosophical school of the legalists; it is a shorthand for *falü zhi jia* 法律之家 or *faling zhi jia* 法令之家 which is used elsewhere in the text. The text deals with the disposal of practical affairs, not philosophical questions. It clearly does not suggest that a local administrator should read legalist theory, which does not talk about specific “laws and edicts”. This point is driven home by the fact that Wang Chong feels obliged to defend the Five [Confucian] Classics against people who would say: *Lüling, Han jia zhi jing!* “The statutes and edicts – those are the true classics of the Han!”<sup>78</sup>

The presence of a professional community of legal experts is also confirmed by another passage of the *Lunheng* which singles out the *falü zhi jia* 法律之家 “legal experts” and compares them with the respective communities of the scholars of Confucian learning (*rusheng* 儒生) and of the civil officials (*wenli* 文吏). This passage is remarkable for the way in which it mocks the shallow learning of the legal experts by subjecting them to a mock interrogation presented according to the blueprint of a trial record.<sup>79</sup>

## Expert legal knowledge

A second criterion for distinguishing and defining law as a conceptual and professional field is that there is a distinct body of knowledge in which the legal specialists share.

In any legal system, the body of legal knowledge consists, on the one hand, of the abstract legal rules, and on the other hand of the techniques used to apply those abstract rules to the concrete and manifold situations of real-life cases. The specific knowledge of a jurist consists in the techniques necessary to successfully apply the abstract normative rules to actual situations even though the manifold experience of real life defies a neat classification into abstract categories. It is, however, not necessary that these techniques and the relationship between norms and the methods for their

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<sup>78</sup> *Lunheng* 121.

application are theoretically reflected; a practical familiarity is sufficient. In addition to the norms and the methods for their application, a jurist must know the formal procedure which facilitates the application of the rules to individual cases, as a formalised procedure is one of the means that serves to ensure that rules are applied with uniformity.

In early China, both a set of rules and techniques for their application are present. A large set of sophisticated administrative and penal stipulations, contained in statutes and edicts, was used in Qin and Han times. An attempt at the beginning of the Han period to replace the whole Qin legal corpus with three rudimentary rules that regulated killing, injuring and stealing only<sup>80</sup> was very short-lived, and the complex legal canon of the Qin was revived and adapted for the requirements of the new dynasty.<sup>81</sup> Qin and Han also had a standardised and sophisticated procedure for the adjudication of legal matters; this is evident from sources such as the *Fengzhen shi* or the *Zouyanshu*, but also from Juyan.

The *Zouyanshu* and other palaeographic texts show clearly that the early Chinese jurists had at their disposal a large arsenal of sophisticated techniques for the application of the legal norms. These techniques of argument and reasoning were quite different from the professional techniques used by religious or ritual experts. The aim here is to show only that such techniques existed and were commonly used, but not to present a detailed and complete analysis. Four of these techniques will be briefly discussed as examples:

*Subsumption*: Most of those parts of the *Falü dawen* that are not concerned with definitions can be understood as guidelines to subsumption in difficult cases. This text and others like the *Zouyanshu* show both that subsumption was used as a matter of routine, and an awareness that subsumption sometimes was difficult, especially if two conflicting norms seemed applicable to

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<sup>79</sup> *Lunheng* 126-127.

<sup>80</sup> *Shiji* 8, 362. See also below.

<sup>81</sup> *Hanshu* 23, 1096.

the same case. In these instances, the correct alternative was either prescribed in the legal literature – the *Falü dawen* itself serves this purpose –, or the legal practitioners had to rely on other techniques, such as the ones discussed in the paragraphs following, to arrive at the best solution.

*Teleological interpretation*, that is: establishing the purpose of a given norm in order to decide if it is applicable. An example of this is provided in case 3 of the *Zouyanshu*. The question there is if the defendant's marrying of a woman from Qi 齊, who had been resettled to Guanzhong 關中 for political purposes, and his attempt at taking her back to Qi qualifies as the offence of “coming from the feudal lords in order to lure somebody to their territory” (*cong zhuhou lai you* 從諸侯來誘).<sup>82</sup> The accused argues that he came to Guanzhong not with the intention to lure somebody away to a feudal domain, but with the aim of accompanying the woman to Guanzhong for resettlement; thus, his marrying her is unrelated to his arriving in Guanzhong. This means that the accused insists on a literal interpretation of the law. The interrogating officials, in contrast, argue with the purpose of the law: They maintain that one of the aims of the law is to forbid exactly such marriage alliances; thus they maintain that this *telos* must guide the interpretation of the rule, even though it might go beyond or be contrary to its wording.<sup>83</sup>

*Decision by precedent*: In *Zouyanshu* case 3 mentioned above, the question is whether bringing a resettled woman back to Qi after accompanying her to Guanzhong and then marrying her qualifies as the offence of “coming from the feudal lords in order to lure somebody to their territory”. In this case, the proponents of an affirmative answer bring up the precedent of a slave woman who joined her brother in Zhao 趙 after having been employed in the Zhao capital in connection with wall-building work there. This slave woman was convicted for “absconding to

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<sup>82</sup> See *Ernian liling* 3.

<sup>83</sup> *Zouyanshu* 17-27.



the feudal lords” (*wang zhi zhuhou* 亡之諸侯).<sup>84</sup> The implied argument is the following: The slave woman committed “absconding to the feudal lords” even though she had no intention of political interference and switching allegiances, but merely had the purely personal motive of joining her relative. Therefore, the accused in the case at hand is guilty of the correlating offence of “coming from the feudal lords in order to lure somebody to their territory” even though he came to Guanzhong for legitimate reasons and attempted to take the woman back to Qi not with an intention of political interference, but purely for the personal motive of wanting to be with his wife. In terms of legal technique, the raising of this precedent is interesting in two respects: (a) The judicial officials correlate the two offences of *cong zhuhou lai you* and *wang zhi zhuhou*. This is already hinted at earlier when the officials maintain that the woman’s being guilty of *wang zhi zhuhou* implies that the person taking her to Qi must be guilty of *cong zhuhou lai you*. However, the precedent takes this correlation even further, making a point that requires further abstractive work, namely that the legal requirements for both offences are the same. That is, it is claimed that both offences are to be treated as analogous in their requirements. (b) The judicial officials reduce the precedent to the aspect in which it is relevant to the case at hand. This aspect is the question of the motives for the potentially punishable action, namely personal motives – living with a relative – vs. an intention to interfere politically. This is the crucial intellectual operation for this judicial technique. The precedent is raised to show that the motive is irrelevant, i. e. the accused is punishable regardless of the fact that he had an innocent motive.

*Analogy of statute:* This involves the application of a statute by way of analogy to a case which strictly speaking is not covered by it; nonetheless, the application is considered justified because the case is not covered by any other law and because it is analogous to the cases which are originally covered by the law. Case 21 of the *Zouyanshu* offers a sophisticated attempt at a kind of “double analogy” of statute. In the case to be decided, a woman has had sex with another man

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<sup>84</sup> *Zouyanshu* 23-25.

during the mourning rites for her deceased husband, literally besides the latter's coffin. This would qualify as "fornication" (*jian* 奸), however, for a conviction the procedural requirement of *bu jianzhe bi an zhi jiao shang* 捕奸者必案之校上 "when arresting a person for fornication, one has, without exception, to lay hold on him/her on the place of copulation"<sup>85</sup> must be fulfilled. While the available sources make the specific implications of the rule not entirely clear, it is not disputed that the requirement is not fulfilled in this particular case, obviously because the woman is only arrested the next morning by the authorities after they have received a criminal complaint brought by the woman's mother-in-law. The judicial officials in the agency of the minister of trials to whom the case has been submitted therefore seek for an alternative legal basis that would allow to punish the woman's conduct nonetheless. They propose to convict the woman for "instructing somebody to unfilial conduct" (*jiao ren bu xiao* 教人不孝), an offence punishable by penal labour as a tattooed 'earth pounder' or 'grain pounder' convict.<sup>86</sup> Since (a) unfilial conduct (*bu xiao* 不孝) only covers offences that are committed against one's parents (not one's husband), and since (b) the woman has not instructed anybody, but acted on her own, this requires a double analogy. The argument for the analogy, or rather the two analogies, can be summed up as follows:

(a) A woman owes her husband respect. This is due to the mutual obligations between people (*renshi* 人事) and reflected in the legal obligation for a woman to furnish her husband's funeral. This is similar to the respect that children owe to their parents, which is also reflected in their obligation to furnish a parent's funeral. Since the respect owed to one's parent and the respect owed to one's husband are, in principal, alike, it is justified to apply in an analogous way the law about unfilial conduct, which punishes acts displaying a serious lack of respect to one's parent, to acts displaying a serious lack of respect to one's husband. (b) However, the respect to be paid by a wife to her husband, while principally alike, is of a lesser degree than a child's respect towards his or her parents. Therefore, the woman's behaviour in the case at hand is to be treated as unfilial

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<sup>85</sup> *Zouyanshu* 182-183. See footnote 93 above.

<sup>86</sup> Compare *Ernian lüling* 36-37.

conduct of a “lesser degree”. While the statutes do not expressly define such an offence, they accord a punishment one degree less severe than for actual unfilial conduct to “instructing another person to unfilial behaviour”. It is therefore justified to apply this less severe punishment to disrespectful behaviour to one’s husband.<sup>87</sup>

This double analogy requires a complicated intellectual operation. It demands the abstraction that the dominant issue of the case is about the lack of respect within a family relationship. It further demands the identification of a law that regulates such a relationship; as no law regulates lack of respect within family relationships in general, a further abstraction is required to find a suitable law, in this case the law on unfilial behaviour. Even when the two concrete forms of conduct – fornication besides one’s husband’s coffin and unfilial behaviour towards a parent – are reduced to the essential point of “lack of respect”, it is further necessary to recognise that both types of conduct, while essentially alike, are different in degree. This in turn demands that a second law is identified that is related in its content. It is then necessary to deduce the fact that the law regulates conduct less serious by one degree from the fact that the punishment is less serious by one degree.<sup>88</sup>

The arguments recounted here are eventually rejected. However, the rejection is based not on a claim that the analogy is inappropriate, but that wrong assumptions were made about the legal consequences of the law that is used in the analogy. The arguments for the rejection can be rephrased as follows: If a child behaves unfilially towards his or her parent after the latter’s death, this would not be punishable.<sup>89</sup> Therefore, if the law is to be applied in an analogous way to the case at hand, the woman is not punishable since her husband already has died. I. e., The analogy is correct, but the conclusions drawn from it are wrong.

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<sup>87</sup> *Zouyanshu* 180-188.

<sup>88</sup> The explicit and implicit arguments presented in case 21 are, in fact, even more complicated than this slightly simplified account.

These four examples show that in early China, legal specialists had at their disposal a number of techniques that they routinely used to apply abstract norms to the concrete situations of real life.

## Expert literature

A third criterion is that the body of knowledge and techniques in which the legal specialists share is transported by a corpus of expert literature.

Our knowledge about legal literature in early China remains sketchy and is based to some extent on the random selection of texts that has been excavated from tombs. Only tiny fragments of Han legal literature have survived within the received texts. The *Hanshu*'s "Yiwen zhi" 藝文志 does not list any legal literature, apart from the Dong Zhongshu's *Chunqiu jueyu*, which is classified as a *Chunqiu* text;<sup>90</sup> it is unclear to what extent Dong Zhongshu's text was actually used in legal study and practice. However, the absence of legal literature in the *Hanshu* catalogue is not too surprising: After all, the "Yiwen zhi" is, according to its title, a treatise of texts related to the six classics. Other literature, such as works on military strategy (*bingfa* 兵法), is included in the "Yiwen zhi" only when it can be considered canonical. To be more precise, the criterion for inclusion in the treatise seems to be that a piece of literature is associated with a school. However, as far as we know, there were no schools devoted to the preservation of different canonical traditions related to the statutes. While the statutes were normative texts, their function and institutional role required that neither different textual nor different interpretative schools could be accepted. While different opinions about the correct interpretation of the law arose when they were applied, such differences were, at least in principal, resolved at the highest judicial level, the imperial court, which issued a binding decision.

But even without information from the bibliographic treatises of the dynastic histories, we know

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<sup>89</sup> *Zouyanshu* 189-190.

that the legal literature was rich and manifold.

Primary sources of law were, of course, the statutes and edicts which were distributed throughout the empire. The only available substantial collection of Han law is the *Ernian lüling* 186 BC found in Zhangjiashan.<sup>91</sup> Excerpts and quotes of Qin law are contained in the Shuihudi texts, while fragments of Han statutes are contained in other palaeographic material such as the Juyan strips; further information can be reconstructed from the dynastic histories.<sup>92</sup>

The Shuihudi texts include at least three different types of technical legal literature: The *Qinlü shiba zhong*, *Xiaolü*, and *Qinlü zachao* sections are probably best understood either as imperial edicts, as Zhang Jianguo argues,<sup>93</sup> or as instructions on the implementation of statutes that did not originate directly with the emperor, but with high-level judicial officials at the court. Despite their modern Chinese titles, it is evident from a comparison with the actual statutes collected in the *Ernian lüling* from Zhangjiashan, a direct successor of Qin law, that these Shuihudi texts are not to the most part not actual statutes. For example, the early Han *Xiaolü* contained general instructions on how often the contents of stocks and granaries were to be accounted for; the Shuihudi text called “*Xiaolü*” by the modern editors details the procedure for doing this.

While these text types, statutes and edicts and, maybe, an additional layer of instructions on the execution of the statutes, contain the positive norms, other types of literature deal mainly with the techniques of their application and with procedure. A first type of legal literature in this category is the *interpretative guide*. The *Falü dawen* from Shuihudi, which uses a question and answer format, is an example for this: On the one hand, it provides explanations for difficult, or dated

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<sup>90</sup> *Hanshu* 30, 1714.

<sup>91</sup> *Ernian lüling*.

<sup>92</sup> For near-exhaustive compilations of legal information in the received sources see Shen Jiaben 1985 and Cheng Shude 1963.

<sup>93</sup> Zhang 1999, 18-32.

terms that were not (any more) easily understandable in late Qin; but its major part are instructions about the correct application of the statutes that deal mostly with subsumption problems: Typically, the question concerns a situation (a) for which either two competing rules equally offer themselves for subsumption; (b) for which it is unclear if the situation can be subsumed under a given rule or not; or (c) for which there is no explicit rule available, so that a solution must be sought by analogy. The answer to these questions provides the correct alternative, sometimes with a short explanation. The *Falü dawen* presupposes a high degree of legal knowledge, and thus is addressed to legal specialists, as in most cases only a short description of the situation is given, so that the problem is evident to the reader only when he is aware of the full context of legal rules that are possibly applicable.

The *procedural guide* is another type of legal literature and complements the interpretative guide. An example for this is found in the *Fengzhen shi* “Models on sealing and investigating” from Shuihudi. While some of the individual sections of this text might be based on actual cases, the text does not qualify as a collection of model cases, but rather as detailed instructions on how to proceed when dealing with criminal cases of different types. The text is clearly addressed to practitioners of the law. The individual sections are a mixture of a model record and the instructions necessary to proceed with the case. The *Fengzhen shi* thus tells the judicial officials what to do in a certain type of case, what report to write to his superiors, and how to record the proceedings. The texts are characterised by the consistent use of blanket names such as *jia* 甲, *yi* 乙, *bing* 丙 “A, B, C” for personal names and *mou* 某 for place names. This stresses their function as generalised prototypes rather than individual precedents. In contrast, precedents contain at least the original place name which allows the identification of the deciding authority, which is essential because only this gives the precedent its binding force. The occasional (*Zouyanshu*) or consistent (later collections) use of cyclical characters for personal names in precedent collections thus serves to anonymise, but not to generalise the cases. A case only is a valid precedent when it

is recognisable as an individual case that has been decided by a legitimate authority. This is not the case for the *Fengzhen shi*. Even more important is the fact that judicial decisions are completely absent in the *Fengzhen shi*, which makes them useless as precedents, which are characterised by the particular judgement in a specific case. Even when the *Fengzhen shi* provides procedural guidelines and model records for both the steps to be taken before the passing of a judgement and after the passing of a judgement, the judgement itself is not dealt with and left out.

A text type of primary importance is the *case collection*. Its main function was to assemble precedents that could be used to conduct and decide other legal cases. Like the interpretative guides, their focus is on the decision of a difficult legal question, a case which cannot easily be subsumed under an existing rule. But unlike the interpretative guides, they refer to actual cases. This takes into account that the complexity of real-life cases - which sometimes defies straightforward subsumption and requires authoritative decisions, hence the precedents - becomes only apparent in the actual administration of law and cannot be fully conceived beforehand. As real cases, they at least sometimes also document the correct procedure. This may not be their main focus, but it is recognised that a correct decision also depends on correct procedure, and that for some legal problems to become fully apparent, the proceedings must be taken into account, e. g. if an accused objects to a legal interpretation during his interrogation. But unlike the procedural guides, the protocol of the investigation is dispensable in those cases where the legal problem is already summed up in the finding of fact, while the judgement is always indispensable. As a special type of case collection, *precedent collections* are distinguished from both interpretative and procedural guides, as well as from more random collections of cases (like the cases from the Baoshan tomb, which were found in that particular constellation because they all were dealt with by the tomb owner), by the fact that they contained actual law cases that had been decided by an authority whose view on the legal issues at stake was binding for the lower judicial bodies. The most authoritative precedents were those either decided by the emperor or compiled

in his name. An example of this is the *Zouyanshu* unearthed in Zhangjiashan, which at the same time is the earliest known precedent collection. However, we know from other sources that other such collections existed and that, in fact, precedent collections played a paramount role in the Han administration of law. The *Hanshu* reports that until the end of the rule of the Wudi emperor, 13471 precedents for deciding capital cases (*sizui jueshi bi* 死罪決事比) alone had been accumulated. Even more significant is the *Hanshu*'s criticism that the profusion of legal rules and large number of precedents also had negative effects:

是以郡國承用者駁，或罪同而論異·姦吏· . . 所欲活則傅生議，所欲陷則予死比·<sup>94</sup>

“For this reason, the commanderies’ and domains’ application [of the many laws and precedents] was contradictory; in some cases, the offence being the same, the judgement was different; treacherous officials... in the cases of those whom they wished to live attached [a precedent containing] a reasoning for sparing their life, and to the cases of those whom they wished to trap [in the death penalty] they consigned a precedent for [the application of the] death [penalty].

The *Zouyanshu* and the precedent collections mentioned in the *Hanshu* probably were compiled by the agency of the minister of trials (*tingwei* 廷尉)<sup>95</sup> and distributed in the emperor’s name.<sup>96</sup>

Other collections were associated with the names of respected jurists and judicial officials. Bao Yu’s 鮑昱 *Cisong bi* 辭訟比 and *Jueshi dumu* 決事都目<sup>97</sup> as well as Dong Zhongshu’s 董仲舒

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<sup>94</sup> *Hanshu* 23, 1101.

<sup>95</sup> This can be inferred from the mentioning of Zhang Tang 張湯 and Zhao Yu 趙禹, two important ministers of trials under the Wudi emperor, in *Hanshu* 23, 1101.

<sup>96</sup> See page 35ff. above.

<sup>97</sup> For information and extant cases attributed to these as well as information on other known case collections see Cheng Shude 1963, 30-35 as well as Shen Jiaben 1985, 871 and 1767ff. The *Cisong bi* was submitted to the emperor by Bao Yu, but compiled by Chen Chong 陳寵.



*Chunqiu jueyu* 春秋決獄<sup>98</sup> are probably only two examples of a common genre of legal literature.

Legal texts clearly have not been favoured by history and tradition for preservation, and the excavated legal texts provide only a small window to the literature that must have been available. But it is not so much the quantity of the extant legal texts, but their complexity and diversity that indicates the existence of technical legal literature as its own genre.

## Legal terminology

A fourth criterion for law to qualify as a distinct realm is the availability of a technical terminology that is used in the expert literature and by the legal professionals to discuss questions in their field.

A technical term is characterised by its being either not used in everyday language, or in a meaning that is more or less different from its meaning in everyday language. The amount of difference between the meaning in technical and everyday language determines the degree to which a term is technical.

On a more analytical level, a technical term is distinguished by its position within a web of differences that are only meaningful in a technical field, and by its relationship to matters or concepts that are inherent to that same technical field. In other words, a technical term derives its meaning from its contrast with other technical terms, and from its referring to a technical matter or concept. The first criterion is at the level of language, the second on the level of the world language refers to.

The degree of a term's technicality is therefore defined by the degree to which a semantic contrast between different, related terms is only meaningful in the technical language, and by the degree to

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<sup>98</sup> Cheng Shude 1963, 163-165 and Shen Jiaben 1985, 1779ff. compile extant cases attributed to Dong Zhongshu and information about his work.

which the matter or concept the term refers to is specific to the technical field.

A few examples will illustrate this: *Qiu* 求 “to search”, *zhui* 追 “to pursue”, and *de* 得 “to catch” are terms at the lower end of the spectrum of technical specificity. *Qiu* refers to the search of a suspected offender whose whereabouts are not known; typically, the process of *qiu* will yield the information that enables a pursuit.<sup>99</sup> In contrast, *zhui* refers to the pursuing of a fugitive for whom the whereabouts or other information sufficient to track him down are known; *zhui* presupposes that such information already exists.<sup>100</sup> *De*, on the other hand, does not refer to search and pursuit as such, but to their successful conclusion, the catching of a suspect, hence the common expressions *qiu de* 求得 “searched for and caught (somebody)”<sup>101</sup> and *qiu fu de* 求弗得 “searched for, but did not catch (somebody)”.<sup>102</sup> However, the contrast between these terms is a similar one in everyday language: *Qiu*, *zhui*, and *de* can, for example, be used for the search, pursuit, and catching of animals;<sup>103</sup> significantly, the combined expression *qiu fu de* is also found in such contexts.<sup>104</sup> The object is, of course, a different one, but this is not an issue at the level of semantic contrasts. The reason why these terms still can be treated as technical terms is that in legal contexts they imply legal facts and institutional arrangements: For example, *zhui* was a legal duty for local officials if any case of killing, injuring or robbery occurred within their jurisdiction and they could be punished for a failure to do so;<sup>105</sup> if the owner of an absconded private slave searched (*qiu*) for the latter himself and caught (*de*) him, he was allowed to spare the slave the

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<sup>99</sup> *Zouyanshu* 61, 205, 210.

<sup>100</sup> *Zouyanshu* 37, 39.

<sup>101</sup> *Zouyanshu* 9, 226.

<sup>102</sup> *Zouyanshu* 76, 203, 225.

<sup>103</sup> *Hanshu* 36, 1954 (a shepherd boy searches – *qiu* – for a sheep lost within Qin Shihuang’s mausoleum and accidentally sets fire to a burial chamber); *Shiji* 25, 1241 (Jie and Zhou, the infamous last rulers of the Xia and Shang Dynasties, were allegedly able to wrestle wolves with their bare hands and to pursue – *zhui* – four horses at once on foot); *Qinlü shiba zhong* 6 (dogs of the common people which enter forbidden parks are only to be killed if they pursue – *zhui* – or catch animals).

<sup>104</sup> *Zouyanshu* 102 (unsuccessful search for a cow).

<sup>105</sup> *Ernian lüling* 140-143.

otherwise mandatory punishment which also would have decreased the slave's value for his owner.<sup>106</sup> Thus, these terms are technical because they not only, like an everyday term, refer to an isolated action, but also to the institutional arrangements surrounding it.

*Dou* 鬥 “in a fight” and *zei* 賊 “with malice”, on the other hand, do not contrast in the everyday language; they derive their technical meaning from a semantic difference that is only meaningful in the realm of law. In everyday speech, *dou* “to fight” would contrast<sup>107</sup> with synonyms such as *zhan* 戰 “to conduct a military fight, to battle”,<sup>108</sup> or *zheng* 爭 “to struggle, to compete”.<sup>109</sup> *Zei*, on the other hand, in everyday speech meaning “malefactor, villain” would contrast<sup>110</sup> with words such as *jian* 姦 “to be villainous, wicked; wicked person, villain”.<sup>111</sup> However, in the legal language, both terms are in a meaningful relationship, as they both are used to qualify the seriousness of certain offences such as *sha ren* 殺人 “to kill another person” or *shang ren* 傷人 “to

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<sup>106</sup> *Ernian liling* 160.

<sup>107</sup> In *TLS*, the lexemes *dou*, *zhan*, and *zheng*, together with further lexemes, are all members of the synonym group “FIGHT”; their semantic differences are described as follows: “The current general word for any form of conflict or competition is *zheng* 爭 (ant[onym] *rang* 讓 ‘give polite precedence to’). However, the word specifically focusses on competition rather than physical violence. [...] *Dou* 鬥 [...] (ant[onym] *que* ‘withdraw from conflict’) refer[s] to physical interpersonal violence and struggle. [...] *Zhan* 戰 (ant[onym] *he* 合 ‘make peace; hold the peace’) normally refers to armed conflict [...]”

<sup>108</sup> *Shiji* 48, 1962 ; 65, 2163; 68, 2231 (as a result of the consistent implementation of Shang Yang's laws, the people of Qin exhibited courage when warfare had to be conducted in the name of the common good, but they did not dare to enter into private fights – *min yong yu gong zhan, qie yu si dou* 民勇於公戰，怯於私鬥).

<sup>109</sup> *Shiji* 70, 2302 (two tigers who compete – *zheng* – for a piece of meat will necessarily end up in a fight – *dou*);

<sup>110</sup> In *TLS*, the general meaning of *zei* within the synonym group “VILLAIN” is explicitly distinguished from its more legally coloured senses: “The most general and comprehensive term for a villain is *zei* 賊, and the basic association is with the damage he does. There is no special association with murder or thievery.” The lexeme relation of a “Contrast” is postulated for *zei*/VILLAIN and *jian*/WICKED, the latter of which is defined in the synonym group “WICKED” as follows: “*Jian* 姦 (ant[onym] *liang* 良 ‘of the good sort, decent’) refers to sheer human depravity with no supernatural or sinister overtones.”

<sup>111</sup> *Hanshu* 26, 1308 (*zeichen* 賊臣 “villainous ministers” used synonymously with *jianren* 姦人 “villainous persons” who are divined to be present in the palace); *Hanshu* 77, 3262 (a villain – *zei* – being characterised by his wicked heart – *jian xin* 姦心); *Hanshu* 99A, 4073 (*jianchen* 姦臣 used synonymously with *zeichen* 賊臣).

injure another person”. *Zei shang ren* 賊傷人 refers to the more serious act of afflicting injury in a pre-meditated way, while *dou shang ren* 鬥傷人 refers to the less serious act of causing injury in the heat of the moment, i. e. spontaneously in a situation that developed into a fight. Without this contrast on the semantic level, *dou* would not be a meaningful technical term. On the level of legal institutions, each of the two terms implies legal arrangements, most importantly a specific punishment: *Zei shang ren* was punished with penal labour as a tattooed ‘earth pounder’ or ‘grain pounder’ convict,<sup>112</sup> while a lesser punishment applied for *dou shang ren*, depending on the type of weapons used and the severity of the injury caused.<sup>113</sup> On the other hand, *zei* and *dou* also provide an example for the fact that the semantic contrast between the two terms does not always need to be reflected in the legal arrangements they refer to, as there was, for example, the same punishment specified for *zei sha ren* and *dou sha ren*.<sup>114</sup>

One characteristic of the semantic contrasts between different technical terms is that they do not lend themselves to an easy classification into synonyms and antonyms: While in everyday speech, *gao* 告 and *he* 劾 would be considered synonyms for “to accuse”, the crucial point in the legal language is the difference between these two terms, namely that *gao* “criminal complaint” refers to an accusation to the authorities about an offence or an offender made by a person in a private capacity or as a low-level official with police duties, while *he* “ex-officio charge” refers to an accusation made by an official regarding matters or persons within his jurisdiction.

A definite indication that a given term can be identified as a technical legal term is encountered when that term is consistently used in alternation with other terms at the same position of a legal form. A simple example is the form used by the statutes, namely:

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<sup>112</sup> *Ernian lüling* 25.

<sup>113</sup> *Ernian lüling* 27-28.

<sup>114</sup> I. e. *qi shi* 棄市 “casting away on the marketplace” (probably referring to public beheading) according to *Ernian lüling* 21.

Action A necessitates consequence B.

In such a simple form, all actions that are filled in at position A, and all consequences that are filled in at position B, will be considered legal terms, namely specific offences and punishments. The reason for this is that they are only meaningful in a legal context in relation to such a form, and in relation to the other terms that can be filled in at the same position. For example, it is unclear what the punishment of *nai* 耐 exactly implied. Some commentators claim that *nai* meant shaving off the offender's beard,<sup>115</sup> while others maintain that it remained wholly intact.<sup>116</sup> It also cannot have meant a complete shaving of the head, as this was called *kun* 髡.<sup>117</sup> However, while this difficulty poses a translation problem, it is marginal to the understanding of *nai* as a technical term, which is defined by *nai* being the punishment for such-and-such offences, and by being more severe than a fine *fa* 罰, but less severe than penal labour as an 'earth pounder' or 'grain pounder' convict (*wei chengdan chong* 為城旦舂). Again, the severity of the punishment is not specified by its actual content (for which it would be necessary to know its correct meaning), but by its relation to other punishments, which is observable by its position in other forms that specify to which lesser punishment a given punishment could be reduced.<sup>118</sup>

A more complex example for the definition of a technical term by the form within which it is employed is provided by the form used to record judicial procedure. The early Chinese trial records can be understood of conforming to a particular form, or model, that is filled in with the specific information from the case at hand.<sup>119</sup> The full technical meaning of a term is constituted

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<sup>115</sup> This seems to have been originally claimed by Tang scholar Kong Yingda in commentary to the *Liji* (Li Liyun, 1422b); all modern scholars seem to follow this opinion, though without providing further evidence (Shen Jiaben 1985, 303; Hulsewe 1985, 130; Xu Fuchang 1993, 280; Li Jing 1985, 249; Zhang Jinfan 1992, 194; Du Zhengsheng 1990, 289-293).

<sup>116</sup> Commentary of Ying Shao to *Hanshu* 1B, 63.

<sup>117</sup> *Shuowen* 9B, 454; *Hanling* 漢令 cited according to Jiang Sui in commentary to *Shiji* 81, 2446; commentary of Ying Shao to *Hanshu* 1B, 63.

<sup>118</sup> For example *Ernian lüling* 127-130.

<sup>119</sup> For a detailed analysis, see pages 74ff. above.

only by (a) the contrast with the terms that precede and follow its own position, as well as (b) by the contrast with the terms that could be used at the same position in its stead. For example, in terms of different positions within the sequence, the *ci* 辭 “initial statement” of an accused in the trial records contrasts with the *gao* 告 “criminal complaint” that precedes it and the *jie* 詰 “confrontation” that follows; similarly, the *ju* 鞠 “finding of fact” will be preceded by the *wen* 問 “[result of] inquiries” and *zhen* 診 “[result of] physical inspections”, and will be usually followed by a *lun* 論 “judgement”. In terms of alternatives at the same position of the sequence, the *gao* 告 “criminal complaint” could be replaced by a *he* 劾 “ex-officio charge”, while the *lun* 論 “judgement” (which pronounces a sentence) could be replaced by a *dang* 當 “application of the law” (which merely proposes a sentence), or the *yan* 讞-formula with which a decision (concerning the applicable sentence) was requested from a higher authority. Each of these procedural choices signifies alternatives that contrast with each other, and through this contrast, define each other. The *gao* 告 “criminal complaint”, for example, is as much defined by its place at the beginning of the formal procedure, triggering an inquest, and by the fact that it is not a *he* 劾 “ex-officio charge” which could trigger the inquest in the same way as a *gao*. This is also the reason why it is appropriate to translate the technical terms with the closest English equivalent that suggests their technical function, and not their etymological origin or everyday meaning. *Ju* 鞠, for example, is an archaic word, originally meaning “to exhaust, to strain to the limit”; its function within judicial procedure, though, is best suggested by the translation “finding of fact”, even though the etymology of the Chinese word as such in no way contains a reference to “facts”. For the same reasons, a translation of the terms for specific punishments as “punishment of the x-th degree” would be conceivable; the more literal translations like “‘earth pounder’ convict” are a compromise that takes into account that “punishment of the x-th degree” would sound overly artificial in a target language that designates punishment not by degrees, but in more concrete ways such as by fines, prison terms etc.

## Law as the most natural thing even for a child

In Qin and Han, the expert field of law, complete with legal professionals, a body of expert knowledge, a canon of legal literature and a legal terminology was so well established and taken as a matter of course that even children could get satisfaction from playing “lawyer” – and could surprise their parents with their proficiency in imitating the skills, appearance and manner of an actual legal practitioner. The *Shiji* tells a childhood story about Zhang Tang 張湯, who was to become a famous minister of trials under the Wudi emperor:<sup>120</sup>

張湯者，杜人也。其父為長安丞，出，湯為兒守舍。還而鼠盜肉，其父怒，笞湯。湯掘窟得盜鼠及餘肉，劾鼠掠治〔笞〕<sup>121</sup>，傳爰書，訊鞠論報，并取鼠與肉，具獄磔堂下。其父見之，視其文辭如老獄吏，大驚，遂使書獄。<sup>122</sup>

Zhang Tang originally was from Du prefecture. Once, Tang still being a child, he had to keep care of the house when his father, who was at the time deputy prefect of Changan,

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<sup>120</sup> Zhang Tang served in this function from 126 to 124 BC according to *Hanshu* 19B, 772. In the sources, neither the childhood story is dated, nor Zhang Tang’s exact age given. If Zhang Tang in his mock trial really scrupulously adhered to the law in force at the time (which after all is the point of the story), the episode would need to have taken place before 148 BC when the *zhe* 磔-punishment was abolished by the Jingdi emperor and replaced by the *qi shi* 棄市-punishment (*Hanshu* 5, 145). The first report of Zhang Tang’s involvement in official affairs states that he made every effort to help Tian Sheng 田勝 at the time when the latter was detained in Changan 長安 (*Shiji* 122, 3138; *Hanshu* 59, 2637). This must have been before 141 BC, since after his release and immediately after the Wudi emperor’s accession to the throne in 141 BC, Tian Sheng, on account of his status as younger half-brother of Jingdi’s Empress Wang 王, was ennobled as Lord (*hou* 侯) of Zhouyang 周陽 (*Shiji* 19, 1024-1025; *Shiji* 107, 2842 with commentary; commentary to *Shiji* 122, 3138; *Hanshu* 6, 155; *Hanshu* 18, 686). If we tentatively assume that Zhang Tang was then in his twenties, he would have been born sometime between 172 BC and 162 BC. Zhang Tang died in 115 BC when he was caught up in an intrigue, charged with crimes and as a result committed suicide (*Shiji* 122, 3142-3144; *Hanshu* 59, 2644-2645; *Hanshu* 19B, 774-775; commentary to *Shiji* 30, 1434 puts his death to 114 BC; *Shiji* 61, 3125 with *Hanshu* 19B, 781 implies 116 BC as the date of his death, *Shiji* 122, 3147 with *Hanshu* 19B, 775 implies 117BC). On Zhang Tang, compare Loewe 2000, 692f.

<sup>121</sup> *zhi* 治 in the received versions of *Shiji* and *Hanshu* is most probably a loan writing for *chi* 笞 with the meaning “to cane” and specifically, especially in combination with *lüe* 掠, “to subject to judicial torture with the cane”. This loan writing is common in the palaeographic sources (Shuihudi FZS 1, 4f.=RCL E 1f.). The expression 掠笞 is well attested (*Shiji* 70, 2279; *Shiji* 2664=*Hanshu* 2076; *Hanshu* 60, 2660).

<sup>122</sup> *Shiji* 122, 3137; see also *Hanshu* 59, 2637.

went out. When his father upon his return found out that rats had stolen a piece of meat, he became angry and caned Tang for this. Tang thereupon dug out the rats' hole and caught the thievish rat as well as what was left from the meat. Then he brought an ex-officio charge against the rats, subjected them to judicial torture with the cane, transmitted a protocol [to inform the higher-level authorities], interrogated [the rats], made a finding of fact, passed judgement and [requested] a reply [from the higher authorities to obtain the mandatory approval of a death sentence], seized both the rats and the meat, drew up the trial documentation and below the main hall executed the rats by dismemberment. When his father saw all this, he realised that the expressions used by his son matched those of an experienced judicial official. He was very surprised, and consequently employed him for drawing up the documents of actual trials.

Little Tang, making a point out of being as true to reality as possible, conducts his mock trial in a way that exactly resembles an actual trial; in the process, he displays the expert knowledge of an actual jurist. In the text, this is reflected by the use of the appropriate legal terms: *He* 劾, *lüechi* 掠答, *chuan yuanshu* 傳爰書, *xun* 訊, *ju* 鞠, *lun* 論, *bao* 報, *jue yu* 具獄, *zhe* 礫. The technical specificity and difficulty of these terms is evidenced by the fact that some of them were hardly comprehended by the Tang commentators, even though they are used as a matter of course by a child in the *Shiji* and *Hanshu* accounts; only the recent archeological finds have enabled us to more fully understand them.<sup>123</sup>

The terminology used in the account refers to tasks and procedures which, mastered so surprisingly well by little Tang, can only be understood by placing them in the context of the whole legal system and which are very distinct from anything specialists in other fields had to undertake.

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<sup>123</sup> In particular the Shuihudi and Zhangjiashan finds.



- *he* 劾 “to bring an ex-officio charge”: Impersonating a judicial prefecture official, little Tang knew that the appropriate action was *he* and not *gao* 告 “to lodge a criminal complaint with the authorities”, as a *gao*-complaint was only lodged by private persons or lower-level personnel with police duties. Tang also knew that a *he* was indispensable; without it, he would not even have been allowed to interrogate the culprit.<sup>124</sup> The *he* was also crucial because its exact content determined the whole proceedings: By law, the judicial officials were only allowed to investigate the original charge. It was an offence to venture into other matters than those set force in the original charge.<sup>125</sup>
  
- *chuan yuanshu* 傳爰書 “to transmit a protocol”: Zhang Tang not only applies correct criminal procedure as such, but also displays an awareness of the institutional setting within which this took place. The officials within a prefecture had to inform the prefecture head by transmitting a protocol about any legal case in which they became involved,<sup>126</sup> and the prefecture authorities in turn had to inform the commandery as the next higher administrative level in the same way about any matters of importance and the legal steps taken.<sup>127</sup> Such *yuanshu* had to be transmitted at different stages of the procedure. In particular, such a protocol had to be made if a suspect had been interrogated under torture, noting the reasons why resort to torture had been necessary.<sup>128</sup> The *yuanshu* kept the higher officials informed and in particular enabled them to supervise the proceedings, which included appropriate intervention when discrepancies arose.<sup>129</sup>
  
- *xun* 訊 “to interrogate”: Interrogation was an elaborate procedure, in which the accused first

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<sup>124</sup> *Ernian liling* 113.

<sup>125</sup> *Ernian liling* 113.

<sup>126</sup> E. g. *Fengzhen shi* 6-7, 13-14, 19-20=RCL E 4, E5, E9.

<sup>127</sup> *Zouyanshu* 75-76.

<sup>128</sup> *Fengzhen shi* 5=RCL E 2.

<sup>129</sup> *Zouyanshu* 77-78.

was to be given room to present his version of the matter in question. If any inconsistencies remained in his account, the accused was “confronted” with matters of fact or matters of law which might contradict his story. This is the phase of the interrogation which is called *jie* 詰 and to which Lewis alludes. But it is difficult to find a ritualistic or even exorcist nature: The *jie* served to achieve the aim of the confrontation, namely to either elicit a valid defence (*jie* 解) of the accused’s actions, or to have him confess his guilt. If he did not so, then further investigation and interrogation was necessary if the unresolved matters pertained to matters of fact, or the case was referred to a higher authority for decision if a matter of law stood in question. The reasons for the confession requirement, which necessitated the *jie*-procedure, have to do with the paramount role of testimony within legal proceedings, the re-assuring nature of a confession as ultimate evidence, and the affirmation of the legitimacy of the state and its proceedings that a confession implied.<sup>130</sup> There existed also a well documented concern that miscarriages of justice could occur, thus the *jie* with its aim to extract a confession was probably seen as the best method to pre-empt this possibility.

- *lüechi* 掠答: “to subject to judicial torture with the cane”. The confession requirement created the quandary that conviction was not possible if the accused stubbornly refused to confess even if his statements were inconsistent or if other evidence indicated his guilt. In such a situation, the interrogating officials were allowed to break the quandary by resorting to judicial torture (*lüe* 掠), which regularly was carried out by caning (*chi* 答). In Qin and Han, there was a recognition of the risks associated with torture, in particular the forcing of wrong confessions and the causing of irreparable injuries or even death. Judicial officials therefore were instructed to avoid torture if possible and, if necessary at all, to use it only as a last resort. In 144 BC, some years after Zhang Tang conducted his mock trial, regulations about the size of the cane and the manner in which it was to be applied, aimed to reduce the danger of

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<sup>130</sup> See the second chapter above on “Mediated Testimony” for a more in-depth treatment of these issues.

permanent injury and death, came into force;<sup>131</sup> in 66 BC, imperial oversight over torture was further strengthened<sup>132</sup> after the same Lu Wenshu mentioned above had complained in a memorial about the negative consequences of torture.<sup>133</sup>

- *ju* 鞠 “to make a finding of fact”: The finding of fact had to contain only the facts, but no legal evaluation, and had to refrain from implying any prejudice in regard to the final judgement. Questions of fact were almost always decided by the lowest authority; while questions of law could be referred to higher authorities. The finding of fact was crucial because it had a large bearing on the final judgement. This step therefore required great skill from the judicial official, as he had to make a decision which facts were potentially relevant for the legal evaluation. This implied that he not only had to know the full context of possibly applicable norms, but also their potential effects for the evaluation of the facts at hand.
- *lun* 論 “to pass a judgement”: The judgement pronounced the applicable sentence. It had to fully take into account questions of fact as well as of law, both pertaining those related to the offence at hand and those related to the legal status of the accused. The process of passing a judgement implied the application of the relevant laws to the facts of the case, as stated in the finding of fact. This required not only a full knowledge of the legal rules, but also mastery of the legal techniques discussed above, as not all cases offered themselves for a clear-cut subsumption.
- *bao* 報 “to issue a reply [to a request by a lower authority for the approval or the making of judicial decision]”: Again, little Tang displays keen knowledge of the procedural rules and

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<sup>131</sup> *Hanshu* 23, 1100, with commentary by Ru Chun. Zhang Tang’s mock trial must have taken place before 148 BC, as he still uses the *zhe*-punishment, which was abolished at that date; this is also consistent with the biographical information (see below).

<sup>132</sup> The Xuandi emperor decreed in 66 BC that the commanderies and nominal feudal domains had to report to the emperor all cases where a remand prisoner had died during detention either as a result of torture or of deprivation (*Hanshu* 8, 253).

institutional settings. Any judgement in a death penalty case tried on prefecture-level had to be approved by the commandery to which the prefecture belonged.<sup>134</sup> The prefecture forwarded the trial documentation; the commandery then reviewed the case and issued a reply (*bao*).

- *ju yu* 具獄 “to draw up the trial documentation”: A full documentation had to be drawn up for every trial. It served not only archival purposes, but also was the basis for review by the higher levels of government. It therefore served as a means to make local governments accountable to the central government.<sup>135</sup>
- *zhe* 磔 “to execute by dismemberment”: As little Tang made a point of adhering to the actual law in force at the time, this punishment implies that he dug up at least five rats<sup>136</sup> from their hole. With this, their offence qualified as “stealing in a group” (*qun dao* 群盜), requiring *zhe* as the applicable punishment for this offence.<sup>137</sup> That is, little Tang was aware of the crucial difference between simple “stealing” (*dao* 盜) and the various offences of stealing qualified by certain aggravating circumstances. The simple stealing of a piece of meat, presumably

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<sup>133</sup> *Hanshu* 51, 2370.

<sup>134</sup> *Ernian lüling* 396-397, where *gao* 告 is used for the reply of the commandery; however, *bao* is used for the same action throughout the *Zouyanshu* (7, 15, 34, 47, 50, 52, 53, 55, 57, 59, 60, 62, 98) and in *Hanshu* 23, 1106.

<sup>135</sup> *Ernian lüling* 396 requires that in all cases involving the death penalty or the killing of a person, after completing the trial documentation (*yu yi ju* 獄已具), the case had to be submitted for approval to the appropriate commandery-level authority (縣道官所治死罪及過失、戲而殺人，獄已具，勿庸論，上獄屬所二千石官).

<sup>136</sup> The Chinese original does not explicitly mention a plurality of rats, but leaves the option open. The Shiji author, not a lawyer himself, might have missed this crucial point; or he might have taken it as a matter of course and did not deem an explicit account of the number of rats necessary.

<sup>137</sup> *Ernian lüling* 65-66. The *zhe*-punishment was generally abolished in 148 BC by the Jingdi emperor and replaced with the *qi shi* 棄市-punishment (“casting away on the market place”, probably referring to public beheading) (*Hanshu* 5, 145). This is consistent with biographical information on Zhang Tang which indicates that his mock trial must have taken place some time before 148 BC.

worth only a few cash, would have merely resulted in a fine of gold<sup>138</sup> (which the rat might have been unable to come up with anyway). In contrast, if one of the aggravating circumstances listed in the statutes was present, e. g. if physical coercion had been used in the course of stealing, if death or injury had been caused to accomplish it, or if five or more people had organized in a group<sup>139</sup> to commit the offence, the property offence qualified for the death penalty.<sup>140</sup> The *zhe*-punishment was to be executed at a public place, presumably at the market place<sup>141</sup> as the central place of the settlement where the local government resided. Accordingly, little Tang's choice of venue "below the main hall" (*tang xia* 堂下), that is at the central place in the courtyard of a residential villa below the elevated main hall, was just appropriate.

Law was such a natural part of early Chinese life that it could lend itself to children's play. But Zhang Tang's mock trial was at the same time play and the first step to actual legal employment. When his father enlisted him for the recording of actual trials, this was the beginning of a splendid career in law that took him all the way up to the position of minister of trials, the highest legal assignment in the empire.

## *Legitimate rule: The role of law*

### Law as a means to rule the body politic

The palaeographic evidence suggests that in Qin and Han, law was not only recognised as an

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<sup>138</sup> *Ernian lüling* 55-56.

<sup>139</sup> *Ernian lüling* 62.

<sup>140</sup> *Ernian lüling* 65-66.

<sup>141</sup> Such as was the case for the lesser death penalty of *qi shi* 棄市, where this is implied by its very designation, literally "to cast away on the marketplace", which makes the public aspect of the execution explicit. Ying Shao, in commentary to *Hanshu* 12, 145, claims that *zhe*-executions were carried out on the market place, though it is not clear whether Ying Shao understood the difference between *zhe* and *qi shi*.

independent professional field, but also proved an efficient means for organising and controlling both the populace and official activities. This means that we have to modify a picture in which an over-stretched state bureaucracy relies primarily on ritual performance to ensure compliance by a largely autonomous society. Quite to the contrary: The state does not attempt to regulate everything<sup>142</sup> – but in the areas which the state wants to regulate, it ensures compliance down to the local level.

In doing so, the state also uses legal procedure as a means to solve one of the primary dilemmas of a territorial empire: The centre cannot anymore decide everything, because then it would collapse under the large amount of administrative decisions to be taken. But it also cannot leave everything to the localities, because then the unity of the empire would be endangered. The palaeographic evidence suggests that complex legal procedures played an important role in solving this dilemma. One example is the procedure of submitting doubtful cases to the next higher authority for decision to which the *yan* 讞 in “*Zouyanshu*” refers. The *Zouyanshu* contains ample illustration for this: Cases for which no clearly applicable regulation or precedent existed were to be submitted for decision to the higher authorities, thus avoiding that different local administrations came to different conclusions. But clear-cut cases were explicitly not allowed to be submitted, thus ensuring the efficiency of the central government operations and avoiding that it was overburdened with the case load. The *Zouyanshu*, for example, contains one case in which the local government is admonished: *Lü bai, bu dang yan*. 律白，不當讞。 “The statutes are explicit on this, by law the case should not have been submitted for decision”.<sup>143</sup>

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<sup>142</sup> The fact that many offences committed outside of office, and especially within the sphere of the family, were only prosecuted by the authorities when a criminal complaint (*gao* 告) was received implies that there was broad latitude for unofficial settlement of conflicts and redress of wrongs particularly within the family and clan. On the other hand, the state asserted its control within its own bureaucracy, when offences were committed by strangers, when public order was in danger, and whenever people turned to the state to seek an official settlement.

<sup>143</sup> *Zouyanshu* 35.

## Legitimising rule: “Rule of law” practices

From the palaeographic material unearthed it becomes obvious that the life of the officials as much as that of the general populace was at least as much affected by invisible web of legal obligations placed on them by the statutes and edicts, as by the visible performances of state ritual. But if this is true, then it can also be expected that political power derived its legitimisation as much from the legal arrangements as from ritual. There is, of course, a long-standing discourse in the West which stresses that a just regime is essentially characterised by its just laws and that legitimate rule is a rule of law. For China, though, many scholars would take issue with the notion that legitimate rule was equated with anything else than the proper set of rites, which distinguishes a good ruler from a bad and, in general, Zhou, Qin or Han rule from barbarian rule.

But at least from the Warring states period onward, a strong case can be made for the existence of an awareness in early China that just laws play a crucial role for a legitimate regime. For the philosophical literature, Karen Turner has argued that “rule of law ideals” can be identified in early Chinese thought.<sup>144</sup> At least as significant is the actual political and legal practice.

One telling example is found in the actions taken by the first Han ruler at the beginning of his reign: After Liu Bang 劉邦 entered Guanzhong 關中, his claim to imperial authority was not yet consolidated, even though he had received from the last Qin emperor the imperial seal and insignia. The first thing he did in this situation was not to hold some ritual performance, but to call all the district elders of Guanzhong together to announce that they had long enough suffered under the cruel laws of the Qin and that therefore, from now on, the law should consist of only three articles which regulate killing, causing bodily injury and stealing.<sup>145</sup>

There is obviously an element of propaganda in this account, and in fact the Han soon took over

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<sup>144</sup> Turner 1992.

basically the whole corpus of the Qin law.<sup>146</sup> But this is not the point here: Exactly because Liu Bang's action so obviously aims to achieve a publicity effect, it illustrates that he thought it crucial for the consolidation of his power to demonstrate the just nature of the laws he was going to apply.

More important than this public performance, however, is the actual legal practice. In Qin and early Han legal practice, a number of elements can be found which not only are indispensable to modern rule-of-law ideas, but also in early China would have made the claim plausible that the law supported an equitable and just regime:

1) Exercise of power according to the law.

There is plenty of evidence that this was considered important: The *Zouyanshu* contains the case of a prefect who orders the killing of a subordinate because the latter did not follow his instructions in a private matter.<sup>147</sup> He is not only prosecuted for murder and sentenced to death, but also during the proceedings admonished that he is not allowed to kill of his own authority, even though as a prefect he has the powers of a judge. As a consequence, he is reproached by his interrogators: "You did not conscientiously uphold the law and govern according to it!" (*bu jin feng fa yi zhi* 不謹奉法以治)<sup>148</sup> – a phrase that is found in other *Zouyanshu* passages as well.<sup>149</sup>

Even the emperor, although he embodies the highest legislative and judicial authority, is not above the law; he just, unlike the prefect, cannot be the object of ordinary legal proceedings: The *Hanshu* recounts a case where a commoner inadvertently endangers the personal safety of the

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<sup>145</sup> *Shiji* 8, 362; see also *Hanshu* 1A, 22-23

<sup>146</sup> *Hanshu* 23, 1096. The extent to which Qin law was taken over into the Han becomes also clear from the similarities of the legal system reflected in the Shuihudi finds from Qin and the Zhangjiashan finds from Han.

<sup>147</sup> *Zouyanshu* 75-98.

<sup>148</sup> *Zouyanshu* 86.

<sup>149</sup> *Zouyanshu* 149.



Wendi emperor; for this the commoner is given a pecuniary fine (*fa* 罰) by Zhang Shizhi 張釋之, then minister of trials. Little surprising, the emperor considers this punishment much too lenient.

But the minister of trials insists on the validity of his decision and replies:

「法者天子所與天下公共也·今法如是，更重之，是法不信於民也·且方其時，上使使誅之則已·今已下廷尉，廷尉，天下之平也，壹傾，天下用法皆為之輕重，民安所錯其手足？唯陛下察之。」<sup>150</sup>

“The law is something in the impartiality of which the heaven’s son and the realm under the heaven partake together. Since the law in this case provides for the said punishment, to manipulate it in order to make it harsher would cause the law not to be trusted by the people. If, at the time of the incident, Your Majesty had had the person punished on the spot,<sup>151</sup> then that would have been it [implying that nobody could have done anything about it, although it would not have been right – M. L.]. But now Your Majesty has already entrusted the case to the Minister of trials, and the Minister of trials is the one who embodies equity in the realm under the heaven. If he wavers only once, the application of the law in the realm under the heaven in all cases would become harsher or more lenient because of this – but then where shall the people place their hand and feet?<sup>152</sup> – May your majesty think carefully about it!”

Though it takes the emperor some time, he in the end agrees with this assessment.<sup>153</sup>

## 2) Remedies against unjust action.

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<sup>150</sup> *Hanshu* 50, 2310.

<sup>151</sup> The first *shi* 使 in the text has to be understood as a counterfactual conditional “suppose; if” (see Harbsmeier 1981, 272ff.), the second *shi* 使 in the standard verbal sense “to order”.

<sup>152</sup> The last sentence takes up Confucius’ verdict *Xingfa bu zhong ze min wu suo cuo shou* 刑罰不中則民無所措手足 “When the punishments are not right on the mark, then the people have nothing to place their hand and feet” (*Lunyu* 13, 115).

<sup>153</sup> *Hanshu* 102, 2754-2755

If the state exercised its judicial power in an unjustified way, there were legal remedies. This is illustrated by one case of the *Zouyanshu* from the first years of King Zheng 政, the later Qin Shihuang, in which a person is punished for theft by tattooing and hard labour (*qing wei chengdan* 黥為城旦) due to a false allegation. This man, already having been made a convict, exercises his statutory right<sup>154</sup> to demand a new finding of facts in his case. It is found that his supposed accomplice had lied, and that his own confession was extracted by torture. As a result, the conviction is revoked, compensation is paid for his property that has been confiscated, his wife and children, who have already been sold into slavery, are bought back by the state, and, since regular employment might have been difficult after the disfiguring and humiliating punishment of tattooing, he was given some kind of official employment removed from the public eye (*yinguan* 隱官).<sup>155</sup>

### 3) Accountability of officials who do not apply the law.

There is a strong emphasis on this in the case records. In the case mentioned above, for example, the responsible officials were almost certainly punished for the unjust conviction.<sup>156</sup> This was the case in all miscarriages of justice, whether they were committed intentionally or not.<sup>157</sup>

### 4) Precedence of proper procedure.

In early China, there was an awareness that for a legal decision to be considered just, it is not

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<sup>154</sup> The Han version of this right is found in *Ernian lüling* 114: 罪人獄已決，自以罪不當欲乞鞠者，許之。 “When a person liable to punishment, after a decision has been made in his case, is of the opinion that his punishment is not applicable to him under the law and therefore wishes to petition for a new finding of facts, this is to be granted.”

<sup>155</sup> *Zouyanshu* 99-123.

<sup>156</sup> The finding of fact states that the four officials involved “committed a judicial error when passing the judgement” (*lun shi zhi* 論失之). This was a punishable offence in Qin (*Falü dawen* 33-36=RCL D 27, 28) and probably was punished in the same way as in Han, namely with a redemption fee for tattooing (贖黥) (*Ernian lüling* 95-96).

<sup>157</sup> See *Ernian lüling* 93-98 for the punishment of (intentional) perversion of justice (*bu zhi* 不直) and (unintentional) judicial errors (*shi* 失).

enough that it is valid in its material substance, but it must also have been arrived at by the proper procedure, which safeguards against arbitrariness. The important role of proper procedure in early Chinese law is highlighted, among other evidence, by the case in the *Zouyanshu*, already mentioned above, in which a young woman, while performing the mourning rites for her deceased husband, has sex with another man, in a room just behind her husband's coffin. The husband's mother, also present at the mourning rites, is not amused by this and lodges a criminal complaint with the authorities against her daughter-in-law the next morning, who then – only then – is arrested. The authorities have no doubt at all about the accuracy of the accusation – the woman probably has even confessed to it, but there still is a problem: She cannot be convicted for the relevant statutory offence of “fornication” (*jian 奸*), because there is a procedural rule that, as far as we understand it, specified that fornicators are to be arrested in the spot,<sup>158</sup> therefore an arrest made “the next morning” does not suffice. This leads in the end, to the acquittal of the woman.<sup>159</sup> Even though the judicial officials clearly do not like it and try to find interpretations of the law that would allow convicting the woman for other offences which, strictly speaking, have not been committed but for which no equivalent constrictive procedural rule existed, they eventually give precedence to the integrity of the procedural requirement.

5) Publicity, which implies two things: The law is no secret, and the proper application of the law is not a pure matter of fiat, but open to public discussion.

Law in China was publicly accessible since Zi Chan 子產 as chancellor of Zheng 鄭 had the laws cast in bronze in 536 BC,<sup>160</sup> and in later periods, there is a clear understanding that new laws were

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<sup>158</sup> *Zouyanshu* 182-183: *bu jian zhe bi an zhi xiao shang* 捕奸者必案之校上 “when arresting a person for fornication, one has, without exception, to lay hold on him/her on the place of copulation”. See note 93 above for this interpretation of the rule and the scholarly discussion about it. Whatever the exact understanding of the terms used, there is no question that a conviction of the woman for “fornication” is not possible for the sole reason that the procedural rules on the proper arrest of fornicators have not been followed.

<sup>159</sup> *Zouyanshu* 180-196.

<sup>160</sup> *Zuozhuan* Zhao 6,607,3ff.

to be promulgated throughout the empire. The *Zouyanshu*, for example, quotes an edict which after the end of the civil war between Liu Bang and Xiang Yu in 202 BC required all people without registration to register themselves within thirty days after the edict reached their respective localities.<sup>161</sup> The content makes clear that the edict was to be announced publicly. But not only were the contents of the law publicly announced, its application was also open to discussion on all levels: The *Zouyanshu*, for example, contains the transcripts of cases where the accused quite stubbornly insist that their action was legally justified, and even if in the end they acknowledge to the opposite legal interpretation with which they are confronted by the investigating officials, they do so only conditionally, triggering submission of the case as doubtful to the higher authorities for decision.<sup>162</sup> In the case of the woman who has sex behind her husband's coffin, the minister of trials as highest judicial official in the empire has already reached a "guilty"-verdict when he is convinced of the opposite by a subordinate official.<sup>163</sup> The episode in which Zhang Shizhi argues against the emperor Wen shows that it was expected that legal officials contradicted even the emperor if they were convinced of their point of view.

#### 6) Specificity of the law in order to avoid arbitrary interpretation.

An attempt at specificity and objectifiability can be clearly determined in early Chinese law. An indication for this is the strong tendency to qualify culpable behaviour not according to the mental state of the offender, which is difficult to determine and liable to subjective interpretation, but according to the objective circumstances in which an offence is committed. For example, the different forms of homicide (murder, manslaughter, negligent homicide) which in most modern systems are distinguished by different degrees of intent, are in early China primarily distinguished by the situation in which the killing occurs, thus we find: Killing with malice (*zei sha ren* 賊殺人) (where malice qualifies a behaviour, not a state of mind) – killing in a fight (*dou sha ren* 鬥殺)

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<sup>161</sup> *Zouyanshu* 65-66.

<sup>162</sup> E. g. *Zouyanshu* 1-27 and 36-48.

<sup>163</sup> *Zouyanshu* 184-196.

人) – inadvertent killing (*guoshi er sha ren* 過失而殺人) – killing committed during an amicable game or competition (*xi er sha ren* 戲而殺人).<sup>164</sup> The provision which serves Yates to illustrate the religious nature of the law is more plausibly interpreted in this context: An objective situation – the consumption of luxury goods – justifies the assumption that the wife had gained knowledge about the theft committed by her husband, and no further, problematic inquiry into the state of her mind was necessary.

## Conclusions

The discussion above leads to the following conclusions:

1) To say that legal rules regulated the behaviour of the populace and the officialdom, that matters down to the local level are decided in the framework of the law, and that a just administration of justice is seen as crucial does not mean to deny the important role of religion and ritual both in the daily life of the inhabitants of early China, and in justifying political authority. In fact, there are important points of overlap: Law regulated, at least in some respects, ritual and religion. The obligations to one's parents and superiors, which can be stated as ritual obligations, were recognised by the law both by providing more severe punishments for causing harm to these and by classifying certain actions such as cursing or beating committed against one's parents as the capital offence of “unfilial conduct” (*bu xiao* 不孝).<sup>165</sup> On the other hand, there are important aspects in which ritual affected the administration of law: Autumn or winter<sup>166</sup> was considered an appropriate time to carry out executions, based on concepts evident in the *Yueling* 月令 chapter of

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<sup>164</sup> E. g. *Ernian lüling* 21.

<sup>165</sup> *Ernian lüling* 35. Properly speaking, *bu xiao* was not an offence in itself, but a type of report made to the authorities by parents against their children, implying the request to punish the children with death. Besides beating and cursing (*ou li* 毆詈), pursuing to kill (*mu sha* 牧殺) to kill a parent or grandparent qualified for such a report.

<sup>166</sup> e.g. *Hanshu* 76, 3202

the *Liji*,<sup>167</sup> while amnesties often were declared at the time of natural disaster and thus clearly served to regain the order of the cosmos. But the principles according to which people were found liable to punishment in the first place have very little to do with either ritual or religion. It is important to stress that law remains a distinct and very important aspect of early Chinese life that cannot be collapsed into any other sphere.

2) This better understanding of early Chinese legal practice has consequences for our understanding of the philosophical reflections about law. It has long been understood that, in particular, Legalist thought is connected with the laws of Qin. This is clearly true, for example in the way how punishments and rewards were balanced against each other. But the relationship is often thought of as a one-way-street: Legalism is seen as advocating draconian laws as a means to further the ruler's interest, and from this it is concluded that legal practise served only the brutal aims of the state. But if the analysis above proves correct, the opposite approach would be called for, and we would have to re-think our understanding of legalism in the light of the new evidence about legal practice. This would mean to recognise the awareness that law is only efficient if it is equitable as an integral part of the "legalist spirit" of the time.

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<sup>167</sup> *Liji* 16, 1373a.

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