

## A Scribe of the Commandant of the Court Overturns a Sentence for Illicit Intercourse

This section of the *Book of Submitted Doubtful Cases* text has attracted the attention of a number of scholars because of its remarkable subject matter and apparent conclusion suggesting that legal decisions on illicit sexual relations in early imperial times were different from what they had been thought to be before this case was discovered. Scholars had presumed that traditional Confucian norms had been prevalent, even given the published views of the late Jack Dull (1978), who called Han a “pre-Confucian society.”<sup>1</sup>

The text concerns the judgment to be rendered against a newly widowed woman, a resident of Du County in the Capital Area. This woman fornicated with her lover soon after her husband’s death in the back room of her house, behind the place where her husband’s coffin was laid out and where her mother-in-law, who had come to her late son’s residence, was performing the mourning rites. The next morning, the widow’s mother-in-law denounced her to local authorities, and she was arrested. The County Court was in doubt as to the proper sentence and so forwarded the case to the capital, where the Commandant of the Court and the legal officials in his ministry deliberated regarding which statutes she had violated and therefore which punishment she should receive. As Wan Rong (2006) has pointed out, this legal procedure is mentioned in other cases, but this is the only example of a record of a court deliberation, although it is hard to imagine that this is an exact record of what occurred. The officials came to the unanimous conclusion that the widow’s crime should be matched with the “secondary penalty for lacking filial piety and that for acting scornfully or like a scold,” and therefore they prepared to inform Du County that it should punish the widow by leaving her intact and imposing the hard-labor sentence of being made a grain-pounder.

At this point, the decision rendered by the top law officials accords with what has been assumed to be usual legal practice based on standard ethical

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1 For further discussions of Qin and Han marriage customs and law, cases of illicit sexual relations, and the implications of changing patterns of practice, see the most recent work, represented by Jia Liying 2010, Peng Wei 2010, and Goldin 2012; and for the historical formation of the traditional mourning system in late Warring States and early Han times, various interpretations of it, and its transformation into ritual and legal codes, see Guolong Lai 2003.

norms in early times. However, one of the Commandant's junior scribes, who had been out of the office performing government service at the time of the court deliberation, returned and presented his own argument, which completely overturned the judgment of his peers and his superior, the highest legal official in the land except the Emperor himself. He made two significant points, one legal and one moral-legal. The legal point is that the lovers were not caught in the act, as was apparently required under law: the mother-in-law only reported her daughter-in-law the morning after the event. The moral-legal point was that officials earlier failed to recognize that "the crime of contempt for a dead husband was lighter than transgression against and contempt for a living husband, and the crime of transgression against a living husband was heavier than transgression against and contempt for a dead husband." As a consequence, he concluded that the Commandant of the Court and his ministry had sentenced the widow far too heavily. The Commandant and his officials all humbly accepted the scribe's argument and agreed that they had made a mistake in sentencing. Although it is not stated, officials who failed to make a correct matching of a crime with the specifications in the statutes would have been held guilty of a crime themselves. Whether they were indeed judged to have committed official malfeasance is not recorded. Thus, the scribe's views challenge notions regarding the chastity of a widow, and even of a wife, previously held by scholars and illustrate how violations of the ethical and moral code, and the legal provisions based on them, would have been punished.

Reading this record in light of others in the *Book of Submitted Doubtful Cases* text leads us to some rather different conclusions from those held by other scholars who have studied it. First, unlike nearly all of the other case records, the names of the individuals, except for those of the mother and the officials, have been replaced by ordinals, the Chinese equivalent of letters or numbers. We suggest that the mother's name was replaced as well, but a copyist's error made it 'Su.' In this, the case reads more like the transcripts of cases in the Shuihudi tomb no. 11 form-book *Models for Sealing and Physical Examinations* than like the other cases in the *Book of Submitted Doubtful Cases* text. Lau and Lüdke (2012) believe that this case record in some ways resembles the stories in sections 4.19 and 4.20, which are set in earlier times, especially in the style of argumentation.

Second, probably one or more slips have been lost at the beginning of the text, as Xing Yitian (2008) has argued, although Lau and Lüdke (2012) do not accept this interpretation. The statutes quoted in the first line were not 'ancient' statutes, as many scholars have thought: they were recent law.

Third, it is clear that the case record is divided into two different sections. The first section contains the quotations from the statutes, the statement

of the facts of the case, and the record of the court deliberation held by the Commandant of the Court and the officials in his ministry. The second section, which starts on a new slip marked with a black dot, recounts the dramatic entrance of the absent scribe and his clever verbal rebuttal of the original decision and ends with all the officials deferring to his opinion and admitting they had been wrong. This section, so different in format and style from the first section and from the records of other cases in the *Book of Submitted Doubtful Cases* text, except for the stories in sections 4.19 and 4.20, appears to derive from a highly polished written exemplar, and it does not conclude as one would expect if it were a real legal case: instructions submitted to Du County authorities on how to punish the widow, how the errant officials were to be punished, or even the fate of the man who fornicated with the widow. This second section seems to be a literary embellishment, appended to the original case record to demonstrate, as other examples do, the brilliance of low-level scribes in solving difficult cases.

Further evidence that the original legal case record was reworked into a literary story might be found in the unusual name given to the Commandant of the Court, Gou 穀. This graph means either 'Ignorant' or 'Baby' and is a rather insulting appellation. It also appears in the case record in section 4.22 in the name of the Assistant Magistrate of the Qin capital Xianyang, who is called Gouli 穀禮 (He Who Considers the Rites as Childish). Could the Commandant of the Court really have been so named during the late Qin or early Han period? While it is not known who replaced Li Si 李斯 as Commandant of the Court after unification and the establishment of the Qin Empire in 221 BCE, the names of the early-Han Commandants have been preserved by Ban Gu 班固 in the *History of the Han* (Han shu 漢書), and none bears the given name Gou, or 'Ignorant.' We therefore believe that this name is most likely to have been created for literary purposes, as a kind of pun for the enjoyment of the text's scribal audience. Would it not have raised a laugh to read that a lowly scribe had completely outwitted and out-argued, with his superior knowledge of the law, the senior legal official in the empire, a man who evidently did not know what he was talking about? How could he? His name was Ignorant!

If this text is a literary story partially based on a real case, we must be careful in drawing conclusions about the actual ethical and moral relationships that existed during the late Qin and Han periods and how they were enforced by the application of legal statutes. As Peng Wei (2010, 187–90) points out, even though scholars hold that marriage law was introduced into statutory law only in the Tang Code, there were most likely some forms of marriage law as early as Qin times. Certainly, from the evidence of this case, items in *Answers to Questions on Legal Principles and Statutes* from Shuihudi, and other more

recently retrieved legal materials, it seems that the Qin authorities had established definite rules regarding what was accepted as a legal marriage and therefore what constituted illicit intercourse, not to mention a host of other related legal matters, such as those concerning inheritance matters, legal responsibility for family members, and so on.

... because of...<sup>1</sup>

The statutes state: “When the death [of a male householder] occurs, thereupon take the [eldest] son and make him the heir [to householder status]. When there is no son, take the mother or father [of the deceased]; when there are no parents, take the principal wife [of the deceased]. When there is no principal wife, take a daughter and make her the heir [to householder status].”<sup>2</sup>

The statutes state: “For all cases when someone is working for the government,<sup>3</sup> and his father, mother, or principal wife dies, [180] he is to return home for the mourning leave<sup>4</sup> for thirty days; for [paternal] grandparents or [siblings] born of the same [mother],<sup>5</sup> fifteen days.”<sup>6</sup>

“[For cases of acting] scornfully<sup>7</sup> and or like a scold:<sup>8</sup> leave [the criminal] intact and make [him or her] a wall-builder or grain-pounder. Hobble the feet<sup>9</sup> with iron and make [him or her] transport salt from the counties of Ba [Commandery].”<sup>10</sup>

[The penalties for the statutes] on ‘instructing others to be lacking in filial piety’ are secondary [in severity] to those of the statutes on ‘lacking filial piety.’<sup>11</sup> [181]

“For one who is lacking in filial piety: cast [the criminal] away in the marketplace.”<sup>12</sup> Second [in severity] to being cast away in the marketplace is undergoing tattooing and being made a wall-builder or grain-pounder.

“For one who holds Knight of the Realm [rank] or the wife of one who holds Knight of the Realm [rank] who matches undergoing tattooing: leave him or her intact.”<sup>13</sup>

“For one who engages in illicit intercourse: shave [the criminal] and make [him or her] a bond servant or bondwoman.”<sup>14</sup>

One who attempts to arrest those engaged in illicit intercourse must investigate it<sup>15</sup> [182] and have caught them in the act.<sup>16</sup>

Now, Du [County]<sup>17</sup> submits [the following case] for decision by higher authorities:<sup>18</sup>

D, the Knight of the Realm[-ranked] husband of woman A, became ill and died.<sup>19</sup> The coffin was placed for mourning atop the [elevated foundation] of the hall [of the house].<sup>20</sup> The burial ritual had not yet been completed, and she [woman A], together with D’s mother, Su,<sup>21</sup> mourned into the night,

circumambulating the coffin and crying.<sup>22</sup> [Woman] A, together with the man, [183] C, went to a bedroom behind [the room] where the coffin lay and engaged in consensual illicit intercourse. The next morning, Su denounced A to the officials.<sup>23</sup> We, the officials [of Du County], arrested and apprehended A, but are in doubt as to what crime A is guilty of.<sup>24</sup>

Commandant of the Court Gou, Administrator of Law Enforcement<sup>25</sup> Shi, Inspector of Law Enforcement<sup>26</sup> Hong, and Scribe of the Commandant of the Court<sup>27</sup> Wu, and others,<sup>28</sup> comprising thirty persons, deliberated how to match [184] her.<sup>29</sup>

They all stated: “[According to the] statutes, for the order of establishing an heir upon a death, the principal wife is after the father and mother.<sup>30</sup> [Only] when the wife dies and one returns home [from office] for burial and mourning, does this share the same categorical principle with [mourning for] the father and mother.<sup>31</sup> Calculating it according to the statutory order for the establishment of heirs, as well as according to the obligations between people,<sup>32</sup> the husband is respected and honored in relation to the wife.<sup>33</sup> [185] The wife serves the husband, as well as undertakes mourning for him at the proper place of mourning.<sup>34</sup> She matches being secondary in precedence to the husband’s father and mother, as in the statutes. The wife being secondary in precedence for becoming an heir after the husband’s father and mother, when the father or mother of the husband dies and is not yet buried, one who engages in illicit intercourse beside the corpse<sup>35</sup> matches lacking filial piety.<sup>36</sup> ‘Lacking filial piety: cast [the criminal] away in the marketplace.’ Being secondary [in severity of penalty] to lacking filial piety [186] matches undergoing tattooing and being made a wall-builder or grain pounder. ‘Acting scornfully or like a scold: leave [the criminal] intact.’

“We matched her [with her crimes]: The wife is to honor the husband and matches being secondary in precedence to the father and mother[-in-law].<sup>37</sup> Now, since the husband of A died, and she was not sad and grieving, and she engaged in consensual illicit intercourse with a male beside the corpse, apply<sup>38</sup> [187] the two sections in the statutes concerning the secondary penalty for lacking filial piety and that for acting scornfully or like a scold.<sup>39</sup> Even though the arresters did not investigate them in the act,<sup>40</sup> [woman] A matches being left intact and made a grain-pounder. [We] inform<sup>41</sup> Du [County] to sentence [woman] A.” [188]

● Now Scribe of the Commandant of the Court Shen was being employed for government service<sup>42</sup> and came back later.<sup>43</sup> He rejected the matching of the Commandant of the Court. In a deliberation,<sup>44</sup> he stated: “The matching was not correct. The statutes state: ‘Lacking filial piety: cast [the criminal] away in the marketplace.’ Suppose there is someone who has a living father and does not feed him for three days, how then would officials sentence the son?” [189]

Commandant of the Court Gou and the others said: “He matches being cast away in the marketplace.”<sup>45</sup>

[Shen] further stated: “Someone has a dead father and doesn’t sacrifice at his tomb for three days. What sentence does the son match?”

Commandant of the Court Gou and the others said: “He does not match being sentenced.”

[Shen further stated]: “There is a son who does not obey his living [190] father’s instructions, and one who does not obey his dead father’s instructions. Which is the more serious crime?”

Gou and the others said: “There is no crime in not obeying a dead father’s instructions.”

[Shen] further stated: “To marry oneself off while one’s husband is still living, or to marry oneself off while one’s husband is dead, [191] which is the more serious crime?”

Commandant of the Court Gou and the others said: “For one who marries herself off while her husband is still alive, as well as for one who takes such a woman in marriage: in every case, tattoo [the criminal] and make [him or her] a wall-builder or grain pounder.<sup>46</sup> She who marries herself off after her husband is dead and the one who takes her in marriage are both without guilt.”<sup>47</sup> [Shen] further stated: “To show contempt for<sup>48</sup> [192] a living husband, or to show contempt for a dead husband, which is the more serious crime?”

Gou and the others said: “Showing contempt for a dead husband is not to be sentenced.”

[Shen] further stated: “A husband is acting as an official and residing at his office, and the wife is residing at home and daily<sup>49</sup> engages in illicit intercourse with another male, and the officials attempt to arrest them [193] but do not catch them in the act.<sup>50</sup> How are they to be sentenced?”

Gou and the others said: “They do not match sentencing.”

[Shen] stated: “Commandant and Scribes, in your deliberations [just now], you all considered that the crime of contempt for a dead husband was lighter than transgression against and contempt for a living husband, and the crime of transgression against a living husband was heavier [194] than transgression against and contempt for a dead husband. Now, [woman] A’s husband died, she [did not] mourn but showed contempt for her husband and engaged in illicit intercourse with a male next to the corpse, and the arresters did not investigate them in the act. Is not being left intact and made a grain-pounder also too serious?”<sup>51</sup> [195]

Gou and the others said: “In truth, we made a mistake [in sentencing] it.”<sup>52</sup> [196]