

But Creel maintained that this passage was a late addition to the text. See his book, *Confucius*, pp. 239-40.

87. *The Analects*, XVII/5.
88. *Zuo Zhuan*, Zhao 29.
89. Creel, *Confucius*, p. 153.
90. *Zuo Zhuan*, Zhao 5, Zhao 25.
91. *The Analects*, III/3.
92. *Ibid.*, III/26.
93. *Ibid.*, XVII/11.
94. *Ibid.*, III/17.
95. *Ibid.*, III/22.
96. *Ibid.*, III/1.
97. *Ibid.*, VI/16.
98. *Ibid.*, VIII/2.
99. See *The Analects*, XV/32.
100. *Ibid.*, IX/3.

## 4 The Origin and Early Development of Punishment (*Xing*)

Before launching into this part of the discussion, it is necessary first to briefly study the meaning of two terms, that is, *xing* (punishment) and *zui* (crime). It has been frequently noted that *xing* is one of the most important words in early legal references to China.<sup>1</sup> In the *Shuo Wen*, *xing* 刑 is written as 𠄎. Xu Shen's annotation reads, '*Xing* means to punish crimes. The character consists of the radicals *jing* and *dao*'. The *Yi Jing* says, '*jing* is *fa* [law]'.<sup>2</sup> In oracle bone inscriptions, however, there is only the pictogram *jing*, and no *xing* is to be found. Although some oracle bone scholars maintain that *jing* is equivalent to *xing*,<sup>3</sup> when one studies *jing* found in oracle inscriptions, one finds that it was actually used, without exception, for personal names or names of *fang* (states) and had no relevance to punishment or affairs of a legal nature.<sup>4</sup> Both *jing* and *xing* appeared in bronze inscriptions of Western Zhou. However, with perhaps only one exception, their use was for personal names.<sup>5</sup> Although Xu Shen's annotation for *xing* is still accepted as authoritative by many scholars,<sup>6</sup> Yang Shuda contends that Xu's version is farfetched, since there is great difficulty in relating the meaning of *jing* (literally 'a well') with that of *xing*. Yang holds that in oracle records the character *si* (死) (death) was inscribed as 𠄎, symbolizing a man lying in a coffin. Thus the original pictogram for *xing* must have been inscribed as 𠄎, consisting of the radicals meaning 'death' and 'knife'. It originally signified only the death penalty and was subsequently extended to mean punishment generally. Because the *si* and *jing* radicals are similar in their forms, *si* was subsequently confused with *jing* and finally replaced by the latter.<sup>7</sup> Yang's version is very imaginative, but we have not yet found an oracle pictogram inscribed as 𠄎. Thus, the date at which the term *xing* began to be employed to

mean punishment generally is still a question which remains to be further studied.

A second term which seems to be equally important for our present study is *zui* (罪), meaning 'offence' or 'crime'. Before the Qin dynasty, *zui* was written as 𠄎. Since the character is similar to *huang* (皇) (emperor), the people of Qin thought it offensive to the Qin Shihuangdi, and therefore replaced 𠄎 with 罪.<sup>8</sup> The original character for *zui* includes the *xin* radical (辛), which was derived from an oracle bone pictogram inscribed as 𠄎, 𠄎, 𠄎, or 𠄎.<sup>9</sup> Scholars have also noticed that there are some pictograms in oracle bone inscriptions which contain this radical. These include *pi* 𠄎 (辟), *e* 𠄎 (𠄎), *long* 𠄎 (龍), *feng* 𠄎 (鳳), and *qie* 𠄎 (妾), and so on. Why do the original character *zui* and the other words contain the *xin* radical? What is the origin of this pictogram? Various explanations have been offered,<sup>10</sup> among which Guo Moruo's version is generally considered the most reasonable.<sup>11</sup>

Guo suggested that *xin* (𠄎) was originally the pictogram of a curved knife. It came to mean offence because in ancient times people often tattooed the foreheads of captives of other *zu*, or some members of their own *zu* who committed offences, and such persons were then used as slaves (that is why the terms *qie* [female slave] and *tong* [child] contain the *xin* radical). Subsequently, ancient people employed the character for the *qing* (tattooing) punishment to generally signify offence or crime.<sup>12</sup> But, after studying the many oracle records which include *xin* and pictograms containing the *xin* radical, it is not easy to see how *xin* can be considered as originally being the pictogram of a curved knife. Guo's version seems to break down when applied to the following inscription: 'Day x x divined, Xi [enquired]: To 𠄎 (*xin*) Zu Yi?'<sup>13</sup> We know that Zu Yi was one of the kings of Shang. It is inconceivable that the inscription in question could be interpreted as meaning to tattoo the king.

By analysing oracle inscriptions which contain *xin* and comparing it with relevant pictograms, we can assume that the origin of *xin* might also be a kind of 'totem pole' for the *zu*.<sup>14</sup> The upper part (一) or (一) may represent Heaven and ancestors of the *zu*, the vertical line signifying a pole, while the curved and horizontal strokes symbolize the long strips of precious materials hung on the pole.<sup>15</sup> Thus, the original meaning of *xin* may mean to make sacrifices to Heaven and to ancestors under the totem pole of the *zu*. *Xin* was the supernatural, mysterious channel through which

the *zu* members, by making sacrifices to it, could gain the blessing of Heaven and of their ancestors.

This is why it was also seen as the symbol of a *zu*. It may then extend to mean the very existence of the supreme power of a *zu*, subsequently evolving into a certain kind of emblem of power which symbolized the supreme authority of the *zu* head, such as the white *mao* (旒) held in the hand of King Wu of Zhou. If a member violated the customs or customary laws of his *zu*, this would certainly be deemed as offending the supreme authority of the *zu* (*xin* as the symbol). Accordingly, such an act was called a *zui*, which is why it contains the *xin* radical. This new version enables us to explain more reasonably the original meaning of some important words which include the *xin* radical. For example, in oracle bone inscriptions there is the pictogram 𠄎 (*e* 𠄎). The annotation in the *Shuo Wen* reads, 'e means to give somebody a scolding. . . . The radical *qian* 𠄎 signifies vicious voice [*e sheng*].'<sup>16</sup> The explanation for the meaning of the term as a whole is generally correct, but that for the radical *qian* is wholly unsatisfactory. I would like to suggest that this pictogram may originally symbolize the situation where a member violated the customs or customary laws of his *zu*, and would be given a scolding by members of his own *zu* under the totem pole of his *zu*.

Another important pictogram is 𠄎 (*pi* 辟). In ancient texts, *pi* had the meaning of *fa* (law), but previous interpretations of this term seem to be forced.<sup>17</sup> A new interpretation might be that this pictogram vividly shows a person on his bent knees and with his back towards the totem pole, meaning that if a member violated the customary laws of his *zu*—perhaps a more serious violation than one punishable by *e*—he should kneel down under the totem pole of his *zu* and be given a more severe punishment.

### Xing in the Shang Times

Shang data on *xing* are so rare that it is impossible for us to draw even a sketchy outline of its penal system. We find in 'Tang Shi' of *Shu Jing*, when Tang of Shang addressed his people before attacking Jie of Xia, that he threatened them: 'If you do not obey the words which I have spoken, I will put you and your children to death; and you will find no forgiveness'.<sup>18</sup> 'Pan Geng' was another speech made by a king of Shang to his people when he decided to

move the capital from Yan to Yin. In this document, the king stressed that 'If there are inauspicious people who do not pursue the [proper] path, who have fallen and are disrespectful, rash and stupid, and villainous and traitorous, then I will destroy and annihilate them. I will leave none of their children.'<sup>19</sup> From these records we know only that if members of Shang Zu failed to obey the orders of their king (who was also the *zu* head), they may be put to death, and their children may also be killed thus ending the family line. In fact, in most of the ancient texts written before the Qin dynasty, there was only general mention of the 'Tang Xing' (the Punishments of Tang), and no further details—such as, the 'five punishments'.<sup>20</sup> We are merely told by Han Feizi that according to the law of Yin, whoever threw ashes on the public road should have his hands cut off.<sup>21</sup>

However, Ban Gu, a Han Confucian scholar and the author of the *Han Shu*, wrote, 'the people of Yin held the five punishments in order to deter those who were villainous, and injured in order to punish the evildoers.'<sup>22</sup> From the Han dynasty onwards the idea that the Shang had the five punishments became a widely accepted view.<sup>23</sup> Some oracle bone scholars, on the basis of their deciphering of oracle bone pictograms, also supported this view. For example, the pictogram 𠄎 was regarded as *qing* (tattooing on the face or forehead); 𠄎 was interpreted as *yi* (nose-cutting); 𠄎 as *yue* (leg-cutting); 𠄎 as *gong* (castration), and 𠄎 as *fu* (cutting off the head, the death penalty).<sup>24</sup> It is necessary to point out—as some of these authors have themselves explicitly admitted in their articles—that these authors have been influenced by ancient texts, especially the 'Lü Xing' (The Punishment of Lü) in the *Shu Jing*, and already had the preconception that there had been the five punishments in Shang times. And it is on this basis that they undertook the task of finding five corresponding pictograms in oracle bone inscriptions so as to corroborate the view prevalent since Han times.<sup>25</sup>

Nevertheless, there is some evidence which indicates that *yue* (leg-cutting) may have been used by the people of Shang. In 1971, a Shang tomb was excavated by members of the Anyang Archaeological Team of the Institute of Archaeology, Academia Sinica. According to the report of the Anyang Archaeological Team, this tomb had not been robbed.<sup>26</sup> An interesting finding was that on the Western, second-level platform of the tomb, a sacrificial human victim was found. The skeleton was well preserved, but there was

only one lower limb. The excavators believe that the body may have been incomplete when the person was still alive. Hu Houxuan maintained that this victim was clearly a slave who was cruelly maimed by the *yue* punishment.<sup>27</sup> He further suggested that in oracle bone inscriptions unearthed from the Yin ruins, there were detailed records relating to the *yue* punishment. These records and the skeleton with one leg may thus be regarded as mutually reinforcing evidence.

It has been noted that in oracle records of the Wuding period, there was a pictogram inscribed as 𠄎, 𠄎, or 𠄎. Luo Zhenyu first interpreted this as *ling* (陵),<sup>28</sup> but subsequently, many scholars concluded that Luo's interpretation was incorrect.

Although there are different opinions about whether or not 𠄎 corresponded to which ancient Chinese character, before it eventually evolved into the word *yue* (刑), scholars generally accept that 𠄎 was the original pictogram symbolizing the leg-cutting punishment.<sup>29</sup> They consider the radical on the right half of the pictogram, which was inscribed either as 𠄎 or 𠄎, clearly signifies a saw (or some kind of cutting tool) or a hand holding a saw, while the left side, inscribed as 𠄎 or 𠄎, obviously resembles the figure of a man, but with one leg shorter than the other. The pictogram as a whole symbolizes the use of a saw to cut a man's leg.<sup>30</sup> Among the oracle bone inscriptions so far discovered, Hu Houxuan noted fourteen pieces which bear relatively complete divinatory records concerning the use of *yue*.<sup>31</sup> By analysing these records, it is evident that, first, implementing *yue* was regarded by the people of Shang as an important religious event, since a diviner was always involved and a divination made. Second, it is quite clear that the employment of *yue* was only intended to injure human bodies, not to kill those after such an ordeal. This is because in many inscriptions we read records which say 'Day x x divined. x [name of the diviner] enquired: if [we] use *yue*, will [the sufferers] die or not?'. Third, the use of *yue* often involved large numbers of men. It is noted that several inscriptions record that as many as 100 persons were injured by *yue* on a single occasion.

The most interesting question relevant to our study is to whom was the cruel punishment of leg-cutting applied? Among the fourteen pieces of oracle bone, the following records are found:

[To] *yue* ten (𠄎)?

Enquired: if [we] *yue* (𠄎), will [they] die or not?<sup>32</sup>

Enquired: if [we] *yue* eighty (𠄎), will they die?<sup>33</sup>

Chen Mengjia considered that 𠄎, like 𠄎 (古 Gong), or 𠄎 (羌 Qiang), must be the name of a *fang*.<sup>34</sup> His view was supported by Zhao Peixin, who pointed out that the pictogram 𠄎 used as the emblem of a *zu* was also found in bronze inscriptions.<sup>35</sup> In addition, we find that in some oracle records, divinations were made about whether to capture 𠄎 or not,<sup>36</sup> and sometimes the 𠄎 was called to help the Shang to attack another *fang*.<sup>37</sup> The 𠄎 was also used by the people of Shang as a source of sacrificial victims, in one case, even as many as 500.<sup>38</sup> Although, judging by the general rules of oracle records, there is little doubt that 𠄎 was one of the *fang* in the Shang times, a different decipherment of this pictogram rendered by Guo Moruo merits attention. He deciphered 𠄎 as *zai* (宰). Based on the annotation of the *Shuo Wen*, he advocated the view that *zai* was one of the general terms used by Shang people to refer to slaves. Some oracle bone scholars have followed this version.<sup>39</sup> However, one has noted that Guo Moruo generally held that slaves in the Shang times were always captives of other *zu*.<sup>40</sup> In spite of the different opinions relating to the exact meaning of this pictogram, scholars' views are at least unanimous on one important point, that is, the 𠄎 were people of different *zu* from that of Shang. Thus, we may conclude that in the oracle records so far discovered, *yue* (leg-cutting) was employed by the Shang people to injure people of other *zu*.

It is mentioned above that most scholars accept that the death penalty existed in the Shang dynasty. Indeed, oracle bone inscriptions contained numerous records relating to killing men. As outlined in Chapter 1, during the Shang period there were frequent wars between Shang and other *fang*. During such battles members of the warring *fang* were frequently injured and killed, and it was believed that the casualties were sometimes in the thousands.<sup>41</sup> At the conclusion of a successful battle, enemy chiefs were often slain and their heads taken as trophies. The skulls of *fang* chiefs were at times used as inscription materials.<sup>42</sup> But it is noted that a number of oracle records relating to killing men were divinations made to enquire about killing war captives of other *fang* in order to make sacrifices to ancestors of the Shang. It is known that in Shang rites, war captives were often used as offerings in the same way as cattle, sheep, and young goats.<sup>43</sup> Moreover, in Anyang, the royal capital of Shang, some large tombs have been uncovered at a low mound named Hougang. In each of these tombs—which archaeologists believe to be royal burial sites—a large quantity of human skeletons and skulls have been found on the floor, on the second-level


platform, as well as in the ramps.<sup>44</sup> In addition to these large tombs, thousands of small graves were also excavated in the same area. Among these, the majority were burial sites of human skeletons, some of which were separated from their skulls, and some of which were only skulls. Together with these human graves, there were horse, elephant, and other animal burials.<sup>45</sup> Many authors consider this as clear evidence that the people of Shang *Zu* frequently imposed the death penalty upon captives of other *fang* or slaves. According to Guo's theory, some of the war captives may have become slaves of the Shang *Zu*.<sup>46</sup>


However, it is now necessary to investigate the nature of leg-cutting and victim-killing undertaken by the people of Shang. Since all scholars in this area take the view that these were punishments meted out to offenders who committed crimes, none has ever raised this question. But, if we carefully study the relevant oracle records, we will find that when Shang diviners made divinations for sacrificial rites, other *zu* that were captured and used as victims were viewed like animals. Archaeological findings prove that after they were killed, they were actually buried together with animals. Therefore, the inscriptions which recorded the use of leg-cutting and victim-killing read more like an owner disposing of his own property rather than punishing human beings. However, with the information available at present, we do not know what those who suffered the punishment of leg-cutting would be subsequently used for. In view of these facts, one may be more justified in arguing that the Shang people might merely regard such practices of leg-cutting and victim-killing as a certain kind of natural right which the victor of war was entitled to use against the captives of enemy *fang*.

Even if the people of Shang *Zu* did regard such practices as a certain kind of punishment, it was certainly not in the sense of punishments resulting from the violation of rules enjoined by members of a *zu*. At the beginning of this chapter, the origin of the term *xing* was discussed and it was pointed out that in oracle inscriptions of the Shang there was no such pictogram inscribed as 刑, and the pictogram *jing* which some scholars thought to be equivalent to *xing* was, in fact, used for personal or place names. On the basis of this analysis, it is very doubtful that the Shang people had already employed the term *xing* as an abstract concept for all practices of punishment, such as leg-cutting and victim-killing.



As we saw in Chapter 1, in Shang times all the *zu* had their own customs and customary laws. Members' violation of these rules


would surely result in some kind of punishment. According to the records of 'Tang Shi' and 'Pan Geng', if members of Shang Zu did not obey the orders of their kings, they and their children might be killed. However, from oracle records we do not know whether or not leg-cutting had been applied to members of Shang Zu. Judging from the practices of the Zhou dynasty, which applied a separate penal system to members of the élite Zhou Zu and aristocrats (corporal punishments, such as nose-cutting and leg-cutting were generally excluded from the system, as discussed in detail below), one may assume that Shang people also had a system of punishment which was employed to treat members of their own *zu*.


In fact, there are many traces in both oracle bone inscriptions and ancient texts which hint at the existence of such a system. In oracle records there is a pictogram inscribed as , which some scholars have suggested that it should be read as *gong* (鞶), which means to detain members of the king's own *zu* who were guilty of crimes.<sup>47</sup> In addition, above I have proposed a new theory as to the origin of the term *zui*. On the basis of this observation, it might be suggested that some oracle pictograms which contain the *xin* radical were actually certain punishments meted out to members of Shang Zu who violated the rules of their own *zu*. Indeed, if we compare oracle records which include *e* and *pi* with those containing *gong*, we will find that in many cases the sentence structure is very similar. For example, we read:

On the Renshen day, divined. Enquired: to *gong* at ?<sup>48</sup> [On the Renshen day, the diviner posed a question for divination, '[Shall we] have to *gong* at [a certain place]?']

Enquired: call Fu Hao to *gong*? Call to *gong*?<sup>49</sup>

Enquired: order [to] *e*  at ? [The diviner inquired, '[Shall we] order [to] *e* [certain persons] at [a certain place]?']

Order to *zuo* *e*  [or to make *e*?]<sup>51</sup>

On the Jisi day, divined. The king at  (to) *pi* (at) the gate?<sup>52</sup>

On the Renshen day, divined. Enquired: (to) *pi*?<sup>53</sup> (On the Renshen day, the diviner posed a question for divination, '[Shall we] have to *pi*?')

It is worth noting that such phrases as *dingpi* (定辟) or 'the establishment of *pi* [by officials of Shang]' and Wenwang *zuo fa* (文王作罰) or 'punishments made by King Wen [of Zhou]' also appeared in the 'Jiu Gao' and 'Kang Gao' (two of the chapters in the *Shu Jing*).<sup>54</sup> Scholars generally believe that the contents of 'Jiu Gao' (The Announcement Concerning Liquor) and 'Kang Gao' (The

Announcement to Kang) are true records of the early Zhou. 'Jiu Gao' and 'Kang Gao' will be examined in detail later in this chapter and it will be suggested that there did exist in Zhou times a dual system of punishment, i.e. one set of law and punishment applied to members of Zhou Zu, and the other applied to members of other *zu*. Therefore, it seems not a simple coincidence that some phrases referring to law and punishment used in 'Jiu Gao' and 'Kang Gao' are similar to those employed in the above oracle inscriptions. Professor G. MacCormack recently examined all terms in the *Shu Jing* and *Zuo Zhuan* which have the meaning of law or rules. He considered that the term *fa* (罰) used in 'Kang Gao' definitely refers to punishment, while the *pi* character, which occurs in 'Jiu Gao' is an expression for rule, but he found that it was difficult to decide whether *pi* expressed merely penal rules or referred to a wider range of rules regulating life within the state.<sup>55</sup> Whatever the exact connotation of the term *pi* here, it is clear—from the records of these two documents which many scholars regard as genuine<sup>56</sup>—that both Shang Zu and Zhou Zu made their own rules. But to whom did these rules and punishments apply? On the basis of careful analysis of the context, it would seem that the records imply that those rules, either the *pi* established by Shang officials, or the punishments made by King Wen, were applicable only to members of their own *zu*.

One may accept, as a result of the foregoing discussions, that if one is seeking a Shang term with which the Western term 'law' could be identified, the best candidate would seem to be *pi*. It expresses rules imposing punishments established or endorsed by certain authorities (for example, all members of a *zu* or the *zu* heads), and therefore would be readily accommodated by most Western definitions of law.

### Xing and the Variety of Laws in Western Zhou

Many scholars, especially Chinese and Japanese, believe that it is an unequivocal fact that the *wuxing* (the five punishments) existed during the Western Zhou. In advocating this view, most resort to the 'Lü Xing' of the *Shu Jing* as strong and reliable evidence.<sup>57</sup> The composition of this work was traditionally ascribed to King Mu of Western Zhou (whose traditional reign duration was 1001–947 BC),<sup>58</sup> and Jean Escarra, an eminent scholar of Chinese

law, has proposed that 'The Punishments of Lü' was dated to be from 952 BC.<sup>59</sup> This work is thus regarded by some contemporary scholars as the earliest Chinese explanation of the origin of law.<sup>60</sup> It sets forth a philosophy of law and describes the working of a legal system in some detail. *Wuxing* (five punishments) and their correct application is one of the main themes of this book. The five punishments mentioned by name were *mo* (tattooing), *yi* (amputation of the nose), *fei* (amputation of one or both feet), *gong* (castration), and *dapi* (the death penalty), but the invention of these 'five oppressive punishments' was ascribed to a 'barbarian' people, the Miao. Since the correct application of these punishments was so important to maintaining order among the people, rulers of the states were urged by the king to select merciful and discriminating persons as judges who could carefully handle all the cases. The work describes a trial in the following:

When both parties have appeared fully prepared, the court assessors listen to the five kinds of pleading. When by this means they have ascertained and verified guilt, they attribute to it one of the five punishments. If the five punishments do not meet the case, they attribute to it one of the five redemption-fines. If none of these meets the case, they attribute to it one of the five cases of error.<sup>61</sup>

Undoubtedly, if it could be conclusively proved that 'The Punishments of Lü' is a genuine document of the Western Zhou, many problems which have puzzled scholars for years would be solved. It would surely be the most valuable and important work for studying the legal system of early China.

However, many scholars have thrown doubt upon the authenticity of 'The Punishments of Lü'. Fu Sinian considers that the first sentence of this work indicates that its author was a king of the state of Lü, and not the king of Zhou at all. He observes that in fact there are several bronze inscriptions which indicate that the rulers of the state of Lü did use the title of *wang* (king). Therefore the 'Lü Xing' must be a 'foreign work'.<sup>62</sup> Fu's reading of *weiliuningwang* as 'King Ming of Lü' has been hailed by some scholars as a 'brilliant contribution'.<sup>63</sup> However, Shirakawa Shizuka's reading of *weiliuningwang* is a little different from Fu's. He interprets the term to mean that the ruler of Lü received the mandate of Heaven and became the King of Lü.<sup>64</sup> Guo Moruo has scrutinized bronze vessels from Zhou times and found that there were some concepts commonly seen in ancient documents, but which never appeared in

bronze inscriptions. He held that this fact could be used as a criterion for judging the authenticity and the date of the classics. For example, in bronze inscriptions, there was no concept of *di* (earth), as used in the sense of the earth deity and which corresponded to that of *tian* (Heaven), but both in the 'Jin Teng' and the 'Lü Xing' such a notion was employed.<sup>65</sup> Therefore, he doubted very much if these two documents were true records from the Western Zhou.<sup>66</sup> Qian Mu compared the texts of the *Zhou Li* and 'Lü Xing', and came to the conclusion:

The use of the term *fa* [law] in the sense of rules imposing punishments appeared very late in ancient books. . . . So just the very sentence itself in 'Lü Xing' which stated that 'they [the Miao people] created the five oppressive punishments, and called this *fa* [law]'<sup>67</sup> has already been an ironclad proof which indicates that 'Lü Xing' is a late work. Furthermore, in ancient books it was the term *fa* 罰 which was actually used as the general name of all punishments, and the word *xing* was only used as the synonym of cutting off the neck, or the death penalty. . . . In the 'Lü Xing', however, *xing* was given the meaning as the general name of all corporal punishments, while *fa* 罰 meant the imposition of fines.

This also marks the late date of the Qian's 'Lü Xing'. In Qian's opinion, the 'Lü Xing' was probably written by scholars of the Warring States period sometime after the death of Mencius (c. 390-305 BC).<sup>68</sup> The view that the 'Lü Xing' was created during the Warring States period has subsequently been supported by many authors.<sup>69</sup> Some scholars have even suggested that the 'Lü Xing' included certain documents which were not considered datable prior to the Han dynasty.<sup>70</sup> A noted scholar has affirmed that 'the late date of "Lü Xing" is now rather generally recognized . . . it cannot possibly be used as a source for the Western Zhou period'.<sup>71</sup>

However, such a judgement seems to be somewhat general. As a matter of fact, many writers still maintain that the 'Lü Xing' is a genuine document from the Western Zhou. For example, in his monograph entitled *Studies of Lü Xing*, Zeng Rongfen refuted point by point the arguments of Fu Sinian and Qian Mu, and concluded that the 'Lü Xing' was truly written during the reign of King Mu.<sup>72</sup> Some scholars hold that although the text may have been written several centuries after the event it describes, it is possible that it could have drawn upon earlier material. At least the basic

legal principles described in the 'Lü Xing' may well have been viable at the time of King Mu.<sup>75</sup> Therefore, until we have obtained irrefutable evidence that the work is genuine, or whether some parts of it are genuine and the rest open to doubt, the best approach is to leave the question open.

Here one has to point out that previous scholars who studied the legal system of Western Zhou have all been trammelled, consciously or unconsciously, by a traditional view which infuses many ancient documents, especially the 'Lü Xing'—regardless of whether they believe that the 'Lü Xing' is a genuine document of the Western Zhou—that is, none have indicated any suspicion about a central point reflected throughout in the 'Lü Xing'. The point is this: we are told that in the Western Zhou period there was a unified and 'standard' legal system under which there were unified laws, unified trial procedures and punishments, and professional judges. Such unified laws and punishments could be universally applied in all of the feudal states and to all the people. As a result, even if there were other materials which presented a quite different picture of the legal system and punishments employed in the Western Zhou,<sup>76</sup> these were frequently either ignored or misinterpreted by scholars in order to conform to that traditional view. Hence it seems that to draw a reliable picture of the legal system of Western Zhou, however fragmentary, one should first independently examine these materials, and then compare the results with the legal system, especially the system of punishment described in the 'Lü Xing'. By this, it may be possible to throw some light on this problem.

In the *Shu Jing*, the 'Kang Gao' is deemed by Creel to be 'the oldest Chinese work extant that discusses justice'.<sup>75</sup> It is an instruction given by King Wu to his younger brother Kangshu, whose fief was established in the old capital of Shang and peopled by the conquered Shang people. The text implies that both the Zhou and Shang people had their own customary laws. It seems that there may also have been two systems of punishment in which one was applicable to members of Zhou Zu and the other to the conquered Shang people. Under the dual system for administering justice, the cases in which the Shang people were involved were called *wai-shi* (external affairs).<sup>76</sup> Kangshu was instructed to entrust such cases to a special office named *niesi*,<sup>77</sup> and to allow officials in that office to follow those laws of Yin which had good principles and to decide the proper punishment.<sup>78</sup> As discussed in Chapter 1, since Zhou was

a small state when it conquered the Shang, the rulers of Zhou had to pursue a policy of conciliation in order to manage a heterogeneous population accumulated through their conquest. Some of the instructions in the 'Kang Gao' may be justifiably regarded to reflect such a policy. It states:

The King says, 'it is not you, Feng [Kangshu's name], who punish a man or kill a man; you may not of yourself so punish a man or put him to death. [And again] it is not you, Feng, who cut off a man's nose or ears; you may not of yourself cut off a man's nose or ears.'<sup>79</sup>

On the contrary, Kangshu was repeatedly warned that he should leave legal cases to the offices concerned, and let the officials use the norms of the Yin to reach verdicts and to decide punishments. Of course, he had to ensure that officials used the Yin people's 'just punishments and killings'. Therefore, Kangshu was instructed not to punish and execute Shang people according to his personal judgements. Compared with the practices of the Shang, this was no doubt a significant change. As mentioned above, captives of other *zu* were treated by the people of the Shang *Zu* like animals or personal property. The victor of war could wantonly slay, mutilate, or use them as sacrificial victims. Now the conquered were treated by the conqueror not only as human beings, but also in accordance with their own laws. This, indeed, marked the beginning of a new era in the development of Chinese law.

However, if members of the Zhou *Zu* violated the law of Zhou, such conduct would be called *zui* (crimes). In handling such cases, Kangshu was told that he should pay special attention to the issue of the violator's intention. When a member of Zhou committed a small offence, it was not a mishap but a persistence in wrongdoing, and one committed intentionally, then he should be punished severely, even by the death penalty. But in the case of a serious crime committed by a member unintentionally—by misfortune or accident—he should not be put to death nor even severely punished.<sup>80</sup> Since Zhou was originally a small state with a small population, it was apparently a matter of primary importance after the conquest to live among the natives in the newly conquered foreign land, upholding the unity of their *zu* members. For this reason, King Wu in 'Kang Gao' described the 'primary evildoers' as those who were unfilial and unbrotherly:

The son does not serve his father with respect, but greatly hurts his father's heart; the father cannot love his son, but hates him; the younger brother does not think of Heaven's brightness, and cannot be respectful to his elder brother; the elder brother likewise feels no compassion for his tender younger brother, and treats him coldly.

The king told Kangshu that he should follow the rules of punishments made by King Wen of Zhou, and punish these people without pardon.<sup>81</sup>

As mentioned in Chapter 1, in the 'Jiu Gao', we also see that when members of the Zhou Zu and the Shang people committed the same offence, there would be different consequences. In this document, which was also an order given by the king to Kangshu, King Wu attributed the decay and fall of the Shang house to the Shang people's excessive indulgence in alcohol, and for this reason he told Kangshu to use coercive methods to ban such drinking. However, Kangshu was also urged that if members of the Zhou Zu were found to be drinking intoxicating liquor in groups, he should apprehend them all and send them to the royal court of Zhou, where they would be severely punished by the king, perhaps even by the death penalty. But as to officials of Yin and the Yin people, since Yin law did not forbid drinking, if they had been addicted to spirits, they would not be killed. On the contrary, they would be rehabilitated.<sup>82</sup>

Regrettably, apart from the death penalty and amputating the nose and ears, there is no further mention of specific punishments used in Western Zhou in the ten sections of the *Shu Jing*, which is generally accepted as having been written during the Western Zhou period.<sup>83</sup> Nor is there any detailed description of trial procedures. Nevertheless, a few bronze inscriptions of the Western Zhou give us glimpses of the judicial process at work and punishments inflicted upon those found guilty of crimes. The oldest of these is the Shiqi Ding which has been dated to the time of King Cheng.<sup>84</sup> It tells us that a number of soldiers failed to follow the king—as they are obliged to do—on a military expedition. Shiqi, who was the commanding officer, and asked his friend, Hong, to bring this issue to the attention of the Commander-in-Chief, Bomaofu. He ruled that these violators should pay a fine of 300 pieces of metal. They were however, unable, to pay the fine. Bomaofu then issued an order saying:

In accord with *yi* [appropriateness], these men should be banished for failing to follow their leader to war, but now there is again an assignment of expedition. Thus they may be exempt from banishment and go out to battle under the supervision of Shiqi.<sup>85</sup>

The inscriptions on the Geyoucong Ding records a case of litigation between two men who may have been both aristocrats. From the records we know that in March, thirty-two years into the reign of King Cheng, when the king was in a great hall of the capital, Geyoucong, the maker of the vessel accused Youweimu. He said that there was a dispute between him and Youweimu over certain lands, and that the latter had failed to give satisfaction. The king then issued an order through a royal secretary, delegating Guolu to investigate the matter. Guolu, who was a royal official, resolved the case by ordering Youweimu to swear to satisfy Geyoucong or, if he failed to do so, to be banished.<sup>86</sup>

Another inscription which contains two long sections is no doubt a very important source for the study of law. The vessel was cast by a person named Yao who lived in about 900 BC and who later became a high-ranking royal official.<sup>87</sup> One section, which is more relevant to our present study, relates that in a certain year of famine, twenty men, subordinates of Kuangji, robbed ten *zi*<sup>88</sup> of grain belonging to Yao. Yao thus brought a suit against Kuangji before Donggong, a royal official. Donggong then said to Kuangji, 'Control your men! If you cannot, you will be liable to severe punishment.' Kuangji acknowledged to Yao that he was at fault and offered him, as redress, five fields and four men. Following this there is a statement made by Kuangji.

Since some of the characters are badly eroded, the sense of this statement is not clear. Some scholars think that the general meaning is that Kuangji tried to minimize his guilt,<sup>89</sup> but Yao again lodged a complaint against Kuangji with Donggong, insisting that his stolen grain must be restored. Donggong then ordered Kuangji to, 'give back to Yao ten *zi* [of grain], and another ten *zi*, making [a total of] twenty *zi*. If restitution is not made by the coming year, then [your liability will be] doubled, to forty *zi*.' Kuang then had to offer Yao two more fields and one more man. In the end, Yao received seven fields and five men altogether, and he gave up his claim on Kuangji for the extra thirty *zi* of grain. The case was finally settled.<sup>90</sup>

One of the most interesting of all bronze inscriptions, as far as



legal proceedings and punishments of Western Zhou are concerned, is the *Xun Ye*, which records the complete judgement of a lawsuit. This vessel, dating from late Western Zhou times, was cast by *Xun* and unearthed in Qishan county of Shaanxi Province where the capital of Western Zhou was located.<sup>91</sup> It says that on the Jiashen day of March, when the king was in the Upper Hall of the capital, Boyangfu pronounced the following judgement:

Muniu [name of the defendant], how insolent you are! You even have the audacity to accuse your superior [whose name is *Xun*] and as a result revert to the pledge you made before. Today, you must once again take an oath. Now, *Fu*, *He*, *Se*, *Mu*, and *Xunzao*, those five men are all in the Hall as witnesses and guarantors [of your new oath]. You may resume office only if you scrupulously abide by your pledge in the future. In accordance with *yi* [appropriateness], I should punish you with one thousand blows of the whip, and in addition (嚴殿) you, but now I pardon you. In accordance with *yi*, you should be flogged by one thousand blows of the whip, and furthermore, be punished by 罪嚴殿,<sup>92</sup> but now I generously pardon you. Instead you will be punished by five hundred blows of the whip, and you should pay three hundred *huan* of metal.

Boyangfu thus made Muniu swear once more, 'from now on I dare not bother you with great or small matters.' Boyangfu said, 'if your superior lays another [similar] complaint against you, I will punish you by one thousand flogging, and [嚴殿] you.' He then informed two secretaries of his judgement and asked them to record it. Muniu, the inscription concludes, took the pledge accordingly and paid the fine to *Xun*. The latter celebrated his triumph by using the metal to cast a record of the event in bronze.<sup>93</sup>

Although the above inscriptions are too few to draw any sweeping conclusions, by carefully examining them, it can at least be observed that these incidents have the following interesting features. First, all the litigation appears to be between nobles, or at least men of superior status,<sup>94</sup> since in the Western Zhou anyone who had the financial resources to cast a bronze vessel for himself was necessarily a man of position. Also, the defendants involved in these cases seemed to enjoy an equal, or at least similar, social standing with the makers of the bronzes.

Second, these incidents were obviously all cases of a criminal nature and not civil disputes, though it was not clear whether at that time there was any distinction between criminal and civil cases.

It is very surprising that the punishments mentioned in these inscriptions were only flogging, banishment, independently applied fines,<sup>95</sup> and restitution of stolen goods—we find virtually no mention of the *Wu Xing* at all. Creel suggests that the king or his officials rarely imposed drastic penalties, such as capital punishment and mutilation of the body, on feudal lords and men of rank because the latter were backed by armies, or by strong kinsmen. 'To kill such persons was decidedly dangerous, leaving open the distinct possibility of revenge.'<sup>96</sup> However, it is perhaps more likely that in the Western Zhou period these punishments, which were recorded in the above inscriptions, and perhaps still others, constituted in themselves a distinct system of punishment which may only be applicable to members of the Zhou Zu and the aristocrats. Since reliable information is limited at present, we know little about the nature of the system of punishment that had been applied to people of other *zu* and people of low status.

Third, there is no indication that those persons who sat as arbitrators of cases were professional judges. In all of these incidents, one thing that seems to be clear is that the arbitrator occupied a position superior to that of the parties. The former was probably himself a feudal lord, and at the same time a high-ranking royal official. It appears that the arbitrator could reach a verdict and decide what punishments should be imposed upon the culprit solely at his own discretion. There is no mention, or even implication, in these inscriptions that the arbitrator invoked a unified law, either customary law or written codes, as the basis of his judgement.

Finally, a notable feature of these cases is that only when a noble had a dispute with a counterpart would he have to refer the matter to a superior, even to the king. We find in bronze inscriptions virtually no mention of cases and punishments relating to ordinary people. It is likely—though this is speculation—that the feudal lords in their own fiefs possessed undisputed authority to impose various punishments on persons of humble status who were under their direct rule. The former regarded their power of punishment as a natural right and the victims were persons so obscure that it was not necessary to record their fate. Thus, it is very doubtful that in Western Zhou there was a unified law and a unified penal system which could be universally applied in all the feudal states and to the members of the Zhou Zu, the aristocrats, and the common people.

### The Xing of the Spring and Autumn Period

In comparison with the Shang and Western Zhou, there is far more material with which to study law and punishment in the Spring and Autumn period. As Creel has indicated, works which concern that time are so numerous that to treat all issues of that period adequately would require a book of great length.<sup>97</sup> Here the focus is on a few issues which are closely related to the foregoing treatment of law and punishment of the Shang and Western Zhou times. The main source which used here is the *Zuo Zhuan*.

With regard to law and punishment of the Spring and Autumn period, one issue of controversy has for many years centred on whether or not written law codes were first made during this period. A theory which has long been supported by many distinguished scholars of Chinese law is that law codes first appeared in China only in the sixth century BC, perhaps even as late as in the third century BC.<sup>98</sup> But some scholars contend that as early as in the Shang times, some laws may already have been written down, and that there is clear evidence which indicates that law codes were in existence continuously during the Western Zhou and the Spring and Autumn period.<sup>99</sup> Scholars of each side have persisted in their own views, and the controversy is bound to continue until unequivocal evidence is found.

This raises the question: was there a unified law, whether customary law or written codes, which could be universally applied in all of the feudal states in the Spring and Autumn period? In some recently published works, the writers have generally and vaguely mentioned that in the early days of Spring and Autumn period, the bulk of the feudal states still employed the law of Zhou. But they have failed to furnish any evidence.<sup>100</sup> As a matter of fact, an examination of available sources indicates the contrary. There are, of course, some considerations which might seem to favour the accepted view. Thus, we find in the *Zuo Zhuan* that officials of some feudal states accidentally attributed the origin of their laws to the Zhou. For example, in 535 BC, an official of the State of Chu, when accused of offending the Viscount of Chu, appealed to 'the laws of King Wen [of Zhou]' for justification.<sup>101</sup> Again, when Confucius was consulted about the affairs concerning taxation in 484 BC, he pointed out that 'the statutes of the Duke of Zhou' were still in existence and should be followed by those who were in government.<sup>102</sup> But against these sketchy indications, we find abun-

nant records which seem to indicate that many states had their own laws.

In an often-quoted paragraph from the *Zuo Zhuan*, a learned historiographer has recorded the land, people, and precious items bestowed on various feudal lords in the early days of the Western Zhou. In the *gao* (announcements) addressed to them, Kangshu of Wei and the Duke of Lu were instructed 'to commence governance according to the principles of Shang, but [to remember] that their boundaries were defined according to the rules of Zhou', while the prince of the state of Jin was admonished to commence his governance according to the principles of Xia, but with his boundaries defined by the rules of Rong.<sup>103</sup> This coincides with the account of 'Kang Gao'. As has been argued in this chapter, it seems that in the State of Wei different laws may have been applied by the ruler to cases in which Shang and Zhou peoples respectively were involved. But in the State of Jin, the above record implies that from the very beginning Zhou law did not apply, but the principles of Xia and the rules of Rong constituted the laws of that state. Moreover, the *Zuo Zhuan* relates several incidents in which officials who took charge of the government of Jin rectified the laws of Jin, but there was no indication that such rectifications were made according to the law of Zhou.<sup>104</sup> Thus it is not surprising that in 526 BC, when Shuxiang, a learned scholar-official of Jin, was consulted by the then chief minister of Jin about a criminal case in which two great officers were killed by another great officer, the former invoked not the Zhou law, but *Xia Shu* (the Books of Xia), and proposed the punishments which he thought to be proper in accord with *Xia Shu*.<sup>105</sup>

Some may argue that the reason that the law of Zhou was seldom mentioned in the State of Jin was because, in the Spring and Autumn period, the king could no longer effectively exercise his power, and, as the lord of Jin exclusively administered justice in his own state, he simply ignored the Zhou law. As regards the exercise of political power, such an argument may be true. However, so far as *li* and law are concerned, it seems untenable. The *Zuo Zhuan* records that when a chief minister of Jin visited Lu in 540 BC, though the Marquis of Jin was at that time the 'Lord Protector', the visiting official held the *li* of Zhou in great esteem.<sup>106</sup> It is also found that in 591 BC, Shihui, the then chief minister of Jin, was sent by the Marquis of Jin to settle a dispute in the royal house, where the king entertained him. Since this official demon-

strated his ignorance of the *li* of Zhou, the king lectured him on its main elements. When he returned to Jin, Shihui rectified the laws of Jin (probably those affecting ceremonies) in accordance with the *li* of Zhou.<sup>107</sup> Therefore, on the basis of the information contained in the *Zuo Zhuan*, the conclusion is that the State of Jin seems to have had its own laws and that the law of Zhou did not apply.

In the Song, the state was founded by a Shang prince, and the law was attributed to Song ancestors. The *Zuo Zhuan* relates that in 513 BC, the Duke of Song one night dreamt that he would die. He called the six ministers together the next morning, and asked them to employ simpler funeral rites than for his predecessors after he died, since he thought that as the ruler of Song and the head of their *zu*, he had not been able to serve his uncles and elder brothers well.<sup>108</sup> Zhongji, the chief minister, replied:

...if your grace, for the sake of the altars, should privately diminish any of the accompaniments of your feasts, we, your servants, should not presume to have any knowledge of it. But as to the laws of the State of Song, and the rules for life and death, there are the ordinances of our former rulers.

He stressed that if they failed to observe the laws, this would constitute an unpardonable offence, and they would suffer regular punishments.<sup>109</sup>

In the State of Chu, when a chief minister became the viscount in 535 BC (the ruler of Chu actually bore the title *wang* or king), he built the palace of Zhanghua and recalled a number of exiles to fill the offices. These included a gatekeeper employed by Wuyu, who was then the director of Wu district. Subsequently, Wuyu tried to seize the gatekeeper from the viscount's palace, but he himself was arrested and accused of having committed a serious offence. When Wuyu was brought before the viscount, he quoted the law of Zhou to defend himself, saying, '[A] law of King Wen [of Zhou] says, "[M]ake great inquisition for fugitives". However, he also resorted to the law of Chu at the same time, adding, '[O]ur former ruler, King Wen [of Chu] made the law of Pu'ou, which provides, "[H]e with whom the thief conceals his goods is as guilty as the thief". It is worth noting that in Wuyu's eyes, these laws were of equal standing. This was clearly shown by his use in another sentence of the phrase 'the laws of the two [Kings] Wen'.<sup>110</sup>

Another issue that deserves enquiry is the question of whether or not the state monopolized the power of punishment in the Spring and Autumn period. We do find that various states would have an official who specially took charge of criminal cases and punishment. This official was called *sikou* (the Director of Crime),<sup>111</sup> in the States of Lu, Zheng, and Song. However, with the information available, it is not clear what the exact scope of his jurisdiction was. The *Zuo Zhuan* records a conversation between the chief minister and the director of crime of Lu in 550 BC. Since at that time Lu was beset with a multitude of robbers, the chief minister urged Zang Wuzhong, the *sikou* of Lu, to deal with them effectively. He stressed that the chief duty of the director of crime was to eradicate the problem of robbers.<sup>112</sup> In 540 BC, Gongsun Hei, a great officer of Zheng, was about to raise an insurrection in order to remove the head of the You Zu and to take his place in the government, but he failed in this attempt. As a result, he was forced to commit suicide by Zichan, the chief minister of Zheng. In the denunciation speech addressed to Gongsun, Zichan implied that the director of crime might impose a punishment upon great officers who committed serious offences.<sup>113</sup>

In the southern States of Chu and Chen, the Director of Crime was called *sibai*. From an account in the *Zuo Zhuan*, we learn that in Chu, if generals who led troops on military expeditions were defeated by the enemy, they would be liable to punishment and sometimes even be put to death by the *sibai*.<sup>114</sup> Nevertheless, we find that the rulers and other officials, while discharging administrative duties, also administered justice. For example, we read that when robbery became a problem in Huanfu in Zheng, the chief minister of Zheng led his troops and attacked the robbers of Huanfu, killing them all.<sup>115</sup> In the State of Jin, the magistrate of a local district, being unable to determine a case, referred it to the capital, where the matter was handled by the chief minister. Also in Jin, during military actions, the ruler and the *simin* (the minister of war) had the power to punish anyone who failed to obey orders or to fulfil his duty properly. At the battle of Chengpu, Duke Wen and the *simin* of Jin were responsible for three great officers put to death for their offences and their fate was made known to the whole army.<sup>116</sup> The rulers of Lu seem also to have personally administered justice. In 684 BC when the Duke of Lu was asked about his virtue, he replied, '[I]n hearing cases, whether small or great, although I may not be able to search them

out thoroughly, I always [render judgement] in accordance with reason.<sup>117</sup>

However, a careful study of the records in the *Zuo Zhuan* also shows that the heads of various *zu* still possessed considerable authority over the members of their own *zu*, including the power of punishment. Although during the Spring and Autumn period, *zu* began to disintegrate and individual families gradually became the basic units of society, there were still many large and strong *zu* in almost all the states. These *zu* had their own walled cities and armies. Many members of these *zu* still deemed their *zu* to be a self-contained social entity and thus devoted their first loyalty to their own *zu*. The *zu* heads enjoyed indisputable authority within their own *zu*. Therefore, we find that a *zu* head of Wei (who was also a minister of that state) was able to lead his armies into his own city, and revolt against his lord, the Prince of Wei. In 548 BC Luanying, a *zu* head and a great officer of Jin, after being exiled for two years, returned to Quwo, the city of his *zu*. Being assured that the men of Quwo were still loyal to him, Ying led the men-at-arms from Quwo, and, entering the capital of Jin during the day, attacked the chief minister of Jin who had driven Ying from Jin. Since Ying was incapable of getting support from other prominent *zu* of Jin, his attempt failed.

In return for *zu* members' loyalty, it seems that the *zu* head would assume the responsibility for looking after their welfare and protecting them. The *Zuo Zhuan* relates that in 541 BC when Zichan, the chief minister of Zheng, was going to banish You Chu to the State of Wu, for injuring a great officer of Zheng, he had first to consult with You Ji who was then the head of the You Zu, and the latter accepted Zichan's decision. In another case, Chen Ni, a member of the strong Chen Zu in the State of Qi, had killed a man and Kan Zhi, who was then in charge of the government of Qi, arrested him. But Kan had a bad relationship with the head of the Chen Zu. Subsequently, Chen Ni was rescued by other members of his *zu*, and this caused a fight between Kan's followers and members of the Chen Zu, which ended with Kan's death.<sup>118</sup>

The fact that the head of a *zu* could impose punishments, even the death penalty, upon his *zu* members may be seen as a manifestation of his supreme authority within the *zu* organization. One passage records that in the State of Jin a member of the Zhao Zu had an affair with his nephew's wife. As a result, he was banished by the head of his *zu* to the State of Qi. In 538 BC Shusun Bao, the

head of one of the three strongest *zu* in the State of Lu, put Meng, his eldest son and successor, to death, because Bao had been deceived by a slanderer and thought that his son had deliberately humiliated him.<sup>119</sup>

In the early days of the Spring and Autumn period, the *zu* heads' power of punishment over their *zu* members was, to some extent, recognized by the state. We read that after the battle at Bi in 588 BC, the States of Chu and Jin exchanged great officers who were captured in that battle. Zhi Ying, the captured great officer of Jin, when interrogated by the Viscount of Chu, made the point clear that since he had been taken prisoner by the enemy and thus had brought humiliation upon the army of Jin, his father, the head of his *zu* and a minister of Jin, by requesting permission from the Marquis of Jin, could execute him in the ancestral temple of his *zu*. However, it appears that later *zu* heads in the State of Jin were forbidden to punish members of their respective *zu*. The *Zuo Zhuan* relates that because two members of the Qi Zu exchanged their wives, Qi Ying, the head of the Qi Zu, proposed to seize them. He consulted a great officer and the latter advised him to leave the two men alone in order to avoid any possible trouble. Ying said, 'this is just private punishment of our Qi Zu, so does it have anything to do with the state?' Accordingly, he seized both men. This, however, resulted in his own arrest, and, after one of his great officers killed the two men, finally led to his death.<sup>120</sup>

A conclusion may be drawn from the above information. It appears that in the early days of the Spring and Autumn period, both state officials and the heads of *zu* exercised the power of punishment. The reason may lie in the fact that many *zu* heads were also ministers or great officers of the states where their *zu* lived. As a result, when studying the punishments they imposed upon members of their *zu*, it is often difficult to distinguish their exercising the power of punishment as state officials, from their action as the *zu* heads. However, it seems that the general trend was towards the state's monopoly of the right to punish.

The last problem which we will deal with here is no doubt one of the most controversial issues in the domain of early law and punishment in China—did *xing* apply to great officers? The controversy originates from a statement found in the *Li Ji*, which says, 'Li does not extend down to the common people; punishments do not extend up to *dafu* [great officers].'<sup>121</sup> Various interpretations have been rendered for this saying. It is impossible to list all

of them. Here one can only pick out a few that are typical. Thus, the Han scholar Jia Yi's version may be seen as representative of the tradition which maintains that in ancient times punishments were not meted out to nobles and *dafu*. His argument was that since great officers were highly educated men and sensitive to shame, they were supposed to behave in a manner that accorded with *li*. Therefore, it was not necessary to punish them. Even when some of them were at fault, for the sake of showing respect to the ruler, they would not have to be punished.<sup>122</sup> But many scholars have refuted this theory. They have pointed out that in ancient texts there were numerous records which indicated that men of the rank of *dafu* and higher were punished constantly and put to death with great frequency and sometimes in considerable number.<sup>123</sup>

Obviously, in light of so much reliable evidence, the traditional view held by Jia Yi and others is untenable. Also, there are serious difficulties in all the versions, based chiefly on grammatical analysis. Other theories, such as those advanced by Xia, Ch'ü, and Creel, are also not wholly convincing. By this, I mean that these scholars, relying on unequivocal evidence, all correctly indicated that in the Spring and Autumn period punishments were actually applicable to great officers, but their reasoning was either too superficial (Xia and Creel), or mistook effect for cause (Ch'ü). This may be due to two reasons. One is that when they were discussing this issue, their field of vision was in fact confined merely to the Spring and Autumn period. The other is that, as I have argued above, their thought was fettered, consciously or unconsciously, by the inveterate tradition which took it for granted that from the Western Zhou onwards there had been a unified system of law and punishment which could be applied to all people and in all feudal states. Therefore, although they all noticed that in the sources of the Spring and Autumn period, there were various records which indicated that punishments were applicable to *dafu*, they failed to provide a penetrating analysis.

In my view this issue should be considered in a broader historical context, that is, from the Shang through the Western Zhou to the Spring and Autumn period, and traditional ideas should be put aside. Only in this way can we reach a new solution. In this chapter, it is suggested that in Shang times there may have existed two systems of punishment. One system seems to have been applicable only to members of the Shang Zu. The central concept of this system was *zui* (offence), which was the violation of the rules of *zu* or offending the authority of *zu* head, and the punishments were

*gong*, *e*, *pi*, and perhaps still others which we still do not know about. The other system was applied to peoples of other *fang*. The punishments included leg-cutting, execution, torture, among others. There is reason to question the tradition which affirms that in the time of Western Zhou there was a unified system of 'five punishments', being universally applicable to all men. By examining inscriptions on some bronze vessels, we find that actual punishments meted out to nobles included flogging, banishment, and fines. Thus it seems that in the Western Zhou period there may also have been two systems of punishment.

Bearing this in mind, when we look at the sources of the Spring and Autumn period, we are strongly inclined to assume that in this period too there may have been two systems of punishment. On the one hand, scrutiny of the *Zuo Zhuan* reveals clear evidence which indicates that certain corporal punishments, such as boring inside the ear,<sup>124</sup> nose-cutting,<sup>125</sup> and leg-cutting, were applied to the common people. In 539 BC the Duke of Qi was criticized (though indirectly) by a great officer for the excessive use of amputation as a form of punishment.<sup>126</sup>

On the other hand, however, we see that apart from a few exceptional cases, those punishments were only very rarely applied to great officers and nobles. Xia Zengyou, in his work, enumerated many incidents which show that *dafu* did suffer various punishments that differed from the so-called *wuxing*, but Xia was concerned only to prove that corporal punishment was generally not applicable to nobles and he failed to provide a thorough enough analysis for our purposes.<sup>127</sup> However, in examining the records of *Zuo Zhuan*, one finds that in the Spring and Autumn period, punishments inflicted on *dafu* were not at all random. As a matter of fact, the death penalty, forced suicide, banishment, and imprisonment (*zhi*), which the aristocrats, the great officers, and even the rulers of states had suffered constituted a unique system of punishment.

If great officers committed the most serious offences, such as rebellion against their ruler, plotting to rebel, or murdering another great officer, they were usually put to death. In 694 BC a minister of the king suffered the death penalty for plotting to murder King Zhuang of Zhou therefore allowing the king's brother to claim the throne.<sup>128</sup> In 675 BC a prince and six great officers of Zhou revolted against the king. After a year, when, with the help of the Earl of Zheng and the Duke of Guo, the king finally quashed

the rebellion, all seven men were put to death.<sup>129</sup> In 618 BC five *dafu* of the State of Jin were executed for murdering a minister.<sup>130</sup> Sometimes, after a rebellion was suppressed, the whole *zu* of the rebellious great officer could be obliterated.<sup>131</sup>

Forced suicide was employed as a punishment when great officers committed less serious offences for which the imposition of the death penalty was unjustifiable. Typical cases of such offences recorded seem to include: leading armies on military expeditions, but being defeated by the enemy,<sup>132</sup> or being involved in a power struggle in the ruler's house and being defeated,<sup>133</sup> or affronting one's ruler with offensive language.<sup>134</sup>

Among those punishments applicable to great officers, it is noted that banishment (*liu, fang*) was used with the greatest frequency. It was employed by rulers of all of the feudal states, and meted out to great officers who had committed various offences.<sup>135</sup>

The employment of seizure (*zhi*) as a punishment appears to be a little complicated. Usually, seizure was used by one state to punish great officers, diplomatic envoys, and sometimes even rulers of other states. Again, various offences could result in imprisonment. In most cases, nobles were merely detained for a short time. However, in the eyes of the aristocrats, this was a great humiliation for a state whose men had been seized and also a degrading punishment for the noble who was detained by other states.<sup>136</sup> In some cases, it seems that seizure was equivalent to imprisonment, which was itself a punishment.<sup>137</sup>

The reason for the existence of a separate system of punishment applicable to great officers may lie in the fact that in the Spring and Autumn period, although individual families gradually emerged as the basic unit of society, *zu* organization was still in existence. In most of the states, almost all of the great officers were sons, brothers, and other relatives of the ruler. The great officers were also close or distant relatives of each other. In each state, the prince in fact played the roles of both the ruler of state and the head of *zu*, and under many circumstances it was difficult to distinguish the practice of his power as the ruler of state from that as the *zu* head. Therefore, inflicting punishment upon great officers often reflected the continuing importance of the *zu*, and indeed was in some way also thought to be punishment of the *zu* to which the great officer belonged. This is particularly reflected in two interesting features which we find in the *Zuo Zhuan*.

First, if an officer committed the most serious offence (e.g. rebel-

lion), in some cases, not only he himself would be executed, but members of his *zu* might also be extinguished. This was known as *miezu* (extermination of the *zu*). Such offenders usually had no choice. The severity of *miezu* as a punishment lies in the fact that the line of a *zu* would be extinguished. Nobles of the Spring and Autumn period regarded this as a very serious matter. However, when a great officer committed a less serious offence, he might sometimes be given a choice, that is, either he was put to death or banished and his descendants banned from succeeding to his position. He could also commit suicide or exile himself in exchange for the continuation of his *zu* line. We find that a number of *dafu* did choose the latter course of action. In fact, some passages appear to indicate that the idea underlying such punishments as forced suicide and banishment was to avoid killing the ruler's kinsfolk.<sup>138</sup>

Second, when the ruler or chief minister imposed punishments upon a great officer, they had to gain the recognition of all the great officers in their state. The forms of recognition varied from state to state. In some, when a great officer was banished, the chief minister would be required make a special covenant known to all great officers. Alternatively, all great officers gathered in the grand temple of the state and a covenant was made in order to show public repudiation of the banished officer.<sup>139</sup> This was particularly reminiscent of the *e* punishment of the Shang. In the southern states, on such occasions, a certain action would be carried out in order to show the approval of all the nobles. One passage relates that in 513 BC when the chief minister of Chu made an attack upon the house of a great officer who was accused of plotting an insurrection, he ordered that all nobles in the capital should burn the house of the offender.<sup>140</sup>

The *Zuo Zhuan* records another incident in which the action adopted by nobles of the State of Song is rather unusual: a great officer committed a serious crime and the Duke of Song at first wanted his immediate banishment, but a minister advised the duke not to take any action for some time. Later, however, the nobles of Song released a mad dog into the offender's house. They followed it there, and the offender, frightened, fled the state to Chen.<sup>141</sup> Although the forms taken were different, the underlying idea seems to be the same, namely to show public repudiation of the offenders. If through inflicting punishments the offenders only suffered physical pain, then by taking these actions, they would also be denounced morally.

To end our investigation of *xing*, it may be suggested that there was no significant change in the conception of *xing*, which was always employed to denote punishment. However, the original idea of *zui* may be quite different from its later meaning. As this chapter's analysis shows, the original concept of *zui* signified not only the committing of a crime, it also meant that the offender would be publicly condemned or repudiated by his *zu* members under the totem pole or in the ancestral temple, particularly when the crime was serious. In the next chapter we will study *meng* and see how it served as a transitional device between customary law and written codes.

## Notes

1. Derk Bodde and Clarence Morris, *Law in Imperial China*, Cambridge, Mass.: Harvard University Press, 1967, p. 11; Yang Honglie, *Zhongguo falu jada shi* (A History of the Development of Chinese Law), Shanghai: Shangwu yinshuguan, 1930, p. 26; Cai Shubeng, *Zhongguo xingfa shi* (A History of Chinese Criminal Law), Guilin: People's Press, 1983, p. 99; Geoffrey MacCormack, 'Law and Punishment in the Earliest Chinese Thought', *The Irish Jurist*, 20 (1985), p. 336.
2. Xu Shen, *Shuowen jiezi* (An Etymological Dictionary of Ancient Chinese Characters) (reprint), Beijing: Zhonghua shuju, 1965, p. 106.
3. Luo Zhenyu, *Yinxu Shuqi Kaoshi* (Research and Interpretation of Inscriptions from the Yin Ruins), N. P., 1915 (hereinafter cited as *Kaoshi*).
4. Cf. Li Xiaoding, *Jiagu wenzi jishi* (A Variorum of the Pictographs Inscribed on Oracle Bones), Taipei: Academia Sinica, 1965, p. 1741. In fact, Luo Zhenyu himself also classified *jing* into the category of place names, *Kaoshi*.
5. Cf. Guo Moruo, *Liang Zhou jinwenci daxi kaoshi* (Textual Research and Annotations on the Outline of Bronze Inscriptions of the Two Zhou), Beijing: Science Press, 1957; Shirakawa Shizuka, *Kimbun tsushaku* (A General Annotation on Bronze Inscriptions), Tokyo: Hakusenshu Bijusukanishi, 1-46 (1962-77). In the inscriptions of Maogong Ding, the character might have the meaning of punishment. Cf. Shang Chengzuo, *Yinxu wenzi leibian* (Classification of Inscriptions from the Yin Ruins), N. P., 1923; Gao Honglin, 'Maogong Ding jishi' (A Collective Interpretation of the Inscriptions on Bronze Tripod of Maogong), *Shida xuebao*, 1 (1956), pp. 67-109.
6. Cf. Zhou Fagao, *Jinwen gulin* (An Etymological Dictionary of Ancient Chinese Bronze Inscriptions), (16 vols.), Hong Kong: Hong Kong Chinese University, 1974-5, Vol. 7, pp. 3300-01.
7. Yang Shuda, *Jiweiju xiaoxue shulin* (Collected Etymological Studies of Ancient Chinese Conducted at Jiweiju), Beijing: The Academy of Sciences of China, 1954, p. 85.
8. Xu Shen, *Shuowen*, p. 309.
9. In *Shuo Wen*, Xu Shen lists 𠄎 and 𠄏 as two separate radicals. But many scholars have indicated that they were actually variant forms of *xin*. Cf. Wang Guowei, 'Shi sie (*xue*), xia' (An Interpretation of *Sie* (*Xue*): part 2), in *Guantang jilin* (Collected Works of Guantang), 20 juan (fascicles), N. P. 1921, Fascicle 6; Guo Moruo, 'Shi zhigan' (An Interpretation of *Zhigan*), in *Jiagu Wenzi Yanjiu* (Research on Oracle Inscriptions), Shanghai: Zhonghua shuju, 1931, p. 14 (hereafter cited as *Yanjiu*).
10. Cf. Luo Zhenyu, *Kaoshi*; Wang Guowei, 'Shi sie'.
11. Li Xiaoding, *Jiagu wenzi*, p. 4286.
12. Guo, 'Shi zhigan', pp. 12-17.
13. Luo Zhenyu, *Yinxu Shuqi Qianbian* (Fascicle One of Inscriptions from the Yin Ruins), N. P., 1913, 1.1.3 (hereinafter cited as *Qianbian*).
14. Ding Shan claims that the character 𠄎 is derived from the oracle bone pictogram 𠄎 or 𠄏 which signified by the totem poles which were usually carved in the forms of various birds, animals, or monsters and decorated with strips of precious materials. In the early days of the Qing dynasty, there was still the ceremony in which a pine pole was erected to sacrifice the Heaven. When the emperor attended the ceremony himself, the royal priests would hang strips

of clean papers on the pole for him. The many princes, while guarding the pole, also hung their strips one by one. Cf. Ding Shan, *Jiaguwen suojian shizuo jiqi zhidu* (The Clans and their Institutions as Seen in Oracle Inscriptions), Beijing: Science Press, 1956, pp. 3-4. See also 'Lizhi' in *Qing shi gao*.

15. In oracle bone inscriptions, the characters 龍 and 鳳 were inscribed as 𠄎 and 𠄎 (Cf. Guo, 'Shi zhigan', p. 13). It is probable that the radicals 𠄎 and 𠄎 may just symbolize the skin of serpents and the plumes of peacocks (or, possibly, of phoenix) hung on the totem poles of the Long and Feng Zu. In the 'Mu Shi' of *Shu Jing*, we find that before the decisive battle of Mu'ye in which Zhou and its allies defeated the army of Shang, when King Wu addressed his army, in his left hand he carried a battle-axe, yellow with gold, and in his right hand he held a white *mao*, or ensign, which he brandished. The character *mao* 旄 was written in the *Shuo Wen* as 旄. It is noted that the *mao* ensign of King Wu consisted of several white yak-tails, suspended as streamers from a staff and that the curved strokes constituting the radical 𠄎 are similar to 𠄎. Cf. Qu Wani, *Shang Shu jinzhū jinyi* (Modern Annotations and Interpretation of the Book of History), Taipei: Shangwu yinshuguan, 1969, p. 71; and James Legge (trans.), *The Chinese Classics*, (5 vols.) (reprint), Hong Kong: Hong Kong University Press, 1960, Vol. 3, pp. 300-01.

16. Xu Shen, *Shuo Wen*, p. 33.  
 17. Cf. Xu Shen, *Shuo Wen*, p. 187; Luo, *Kaoshi*.  
 18. *Shu Jing*, Legge, Vol. 3, p. 175.  
 19. *Ibid.*, it is noted that scholars generally believe that 'Tang Shi' and 'Pan Geng' were written during the Warring States period. Most scholars think that the word *yi* in this passage generally means 'to cut' and 'to kill'. Cf. Qu Wani, *Shang Shu jinzhū*, p. 61; Bernhard Karlgren, 'The Book of Documents', BMFEA, 22 (1950), p. 24 (hereinafter cited as *Documents*). But Legge (in *The Chinese Classics*, Vol. 3, p. 241) translates it as 'to cut off noses'.  
 20. See 'Feiyue' in *Mo Tzu*; 'Wanzhang' in *Mencius*; *Zuo Zhuan*, Zhao 6.  
 21. Han Fei, *The Complete Works of Han Fei Tzu*, (trans.) Wen-kuai Liao, 2 vols., London: Arthur Probsthain, 1939, Vol. 1, p. 294.  
 22. 'Dong Zhongshu zhuan' in *Han Shu* 56.  
 23. Cf. Shen Jiaben, *Lidai xingfa kao* (Research on Criminal Law of Past Dynasties), (4 vols.) (reprint), Beijing: Zhonghua shuju, 1985, Vol. 1, pp. 10-11; Kwang-chuh Chang, *Shang Civilization*, New Haven: Yale University Press, 1980, p. 201.  
 24. See Guo, 'Shi zhigan', pp. 15-17; Zhao Peixin, 'Jiaguwen zhong suo jian de Shangdai wuxing' (The Five Punishments of the Shang Dynasty as Seen in Oracle Inscriptions), KG, 2 (1961), pp. 107-10 (hereafter cited as 'Shangdai wuxing'; Shen Wenchuo, 'Fu yu ji' (Fu and Ji), KG, 5 (1977), pp. 335-8.  
 25. We will deal with the problems of *wuxing* or the 'five punishments' and the authenticity of 'Lü Xing' later in detail.  
 26. Zhongguo kexueyan kaogu yanjiusuo Anyang fajuedui, '1971 nian Anyang Hongang fajue jianbao' (A Brief Report on the Excavation at Hongang of Anyang in 1971), KG, 3 (1972): 14-25.  
 27. Hu Houxuan, 'Yindai de yuexing' (The Leg-cutting Punishment of the Yin Dynasty), in Zhonghua shuju (eds.), *Wenshi luncong* (Collected Essays on Literature and History), Hong Kong, 1974, p. 73 (hereafter cited as 'Yuexing').  
 28. Luo, *Kaoshi*, p. 59.  
 29. Cf. Tang Lan, *Yinxu wenzi yanjiu* (Research on Inscriptions from the Yin Ruins), Teaching materials, Beijing University, Vol. 1, 1934; Ding Shan, *Zhongguo gudai zongjiao yu shenhua kao* (A Study of Ancient Religion and Mythology of China) (reprint), Shanghai: Ywen Press, 1988, p. 132; Zhao Peixin, 'Shangdai wuxing', p. 107; Zhang Zhenglang, 'Shi jiaguwen e, li, yun san zi'

(Interpretation of Three Oracle Pictographs, viz. E, Li, Yun), *Zhongguo yuwen*, 4 (1965), pp. 296-8.

30. Ding Shan, *Zongjiao yu shenhua kao*, p. 132; Zhao, 'Shangdai wuxing', p. 107; Hu, 'Yuexing', p. 74.  
 31. Hu, 'Yuexing', p. 88.  
 32. Cf. Luo, *Qianbian*, 6.30.6 and 6.55.5.  
 33. Cf. Hu, 'Yuexing', p. 91.  
 34. Chen Mengjia, 'Shangdai de shenhua yu wushu' (The Mythology and Witchcraft during the Shang Times), YJXB, 20 (1936), pp. 486-576.  
 35. Luo Zhenyu, *Sandai jilin wencun* (Records of Bronze Inscriptions of the Three Dynasties), N. P., 1918, 6.49, and 12.46.  
 36. Cf. Dong Zuobin, *Yinxu wenzi yibian* (Fascicle Two of Inscriptions from the Yin Ruins), Nanjing: Academia Sinica, 1948-49, 2572, and 5288; Hu Houxuan, *Zhan hou nan bei suo jian jiagu lu* (Records of Oracle Bones Seen in the North and South after the War), Beijing: Laixunge, 90; Luo, *Qianbian*, 6.6.6.  
 37. Luo, *Qianbian*, 7.25.1, 6.30.5; Dong Zuobin, *Yin huo buci xieben* (Records of Newly Discovered Oracle Inscriptions), N. P., 1928, 97.  
 38. Luo Zhenyu, *Qianbian*, 7.9.2, 6.29.5; Hu Houxuan, *Zhan hou jing jin xin huo jiagu ji* (A Collection of Oracle Bones Newly Discovered in Beijing and Tianjin after the War), Shanghai: Qunyi Press, 1949, p. 1255.  
 39. Hu, 'Yuexing', p. 91; Shen Wenchuo, 'Fu yu ji', p. 335.  
 40. Guo, 'Shi chenza' (An Interpretation of Chen and Za), in *Jiagu wenzi yanjiu*, op. cit., pp. 1-6.  
 41. Cf. Chang, *Shang Civilization*, pp. 227-30 and 248-52; Yu Xingwu, 'Cong jiaguwen kan Shangdai shehui xingzhi' (The Nature of Shang Society Discerned from Oracle Inscriptions), *Dongbei renmin daxue renwenkexue xuebao*, 2 (1957), pp. 97-136.  
 42. In 'Zhongguo nuli shehui de renxin he renji, xiapiar' (The Human Burial and Human Sacrifice of Chinese Slave Society, Part two), Hu Houxuan enumerated eleven human skull fragments with inscriptions, W. W., 8 (1974), pp. 56-7.  
 43. Cf. for example, Luo, *Qianbian*, 8.12.6, and Luo, *Yin xu shuqi houbian (shang)* (Fascicle Two of Inscriptions from the Yin Ruins, Part one), N. P., 1916, 21.10 (hereinafter cited as *Houbian*); Ye Yuxen, *Tieyun cang gui shiyi* (A Collection of Inscribed Shells Omitted by Tiejyun), N. P., 1925, 1.12, 1.13; Guo Moruo, *Yinqi cuibian* (A Fascicle of the Essence of Yin Inscriptions) (reprint), Beijing: Science Press, 1965, p. 447.  
 44. Cf. Liang Siyong and Gao Quxun, *Houjiazhuang da mu* (The Great Tombs at Houjiazhuang), Nos. 1001-04, 1217, 1500, and 1550, Taipei: Academia Sinica, 1962-1976; Guo Baojun, '1950 nian chun Yinxu fajue baogao' (A Report on Excavation of the Yin Ruins in Spring of 1950), KGXB, 5 (1951), pp. 1-61.  
 45. Gao Quxun, *The Royal Cemetery of the Yin Dynasty at Anyang, Bulletin of the Department of Archaeology and Anthropology*, National Taiwan University, 13-14 (1959), pp. 1-9; Anyang fajuedui, 'Anyang Yinxu nuli jisi keng de fajue' (Excavation of Slave-sacrifice Pits of the Yin Ruins in Anyang), KG, 1 (1977), pp. 20-36.  
 46. Cf. Zhao Peixin, 'Shangdai wuxing', p. 107; Shen Wenchuo, 'Fu yu ji', p. 336; Yang Xizhang and Yang Baocheng, 'Cong Shangdai jisi keng kan Shangdai nuli shehui de rensheng' (The Human Sacrifice of Shang Slave Society as Seen from the Sacrificial Pits of Shang Times), KG, 1 (1977), pp. 13-19.  
 47. Yan Yiping, 'Yin Shang xingfa zhi' (Treatise of Criminal Law of the Yin), *Zhongguo wenzi*, 5 (1981), pp. 66-8.  
 48. Luo, *Qianbian*, 4.4.1. [ ] may be the name of a place.  
 49. Liu E, *Tiejyun cang gui* (Inscribed Shells Collected by Tiejyun), N. P., 1903, 244.1.



67. Karlgren, *Documents*, p. 74.
68. Qian Mu, 'Zhou Guan zhuzuo shidai kao' (A Study of the Time of Zhou Guan's Composition), *YJXB*, 11 (1932), pp. 2223-6 and 2228-34.
69. Cf. Qi Sihé, 'Xi Zhou shidai zhi zhengzhi sixiang' (The Political Thought of Western Zhou Times), *Yanjiing shehui kexue*, 1 (1948), p. 32; Bodde and Morris, *Law in Imperial China*, pp. 495, 560; Creel, *Origins of Statecraft*, pp. 161, 463. Creel further points out that 'not only the "five punishments", but an almost innumerable series of other fives, as well as numerous threes, stamp the "Punishments of Lü" as coming from not earlier than Warring States time'. See his 'Legal Institutions and Procedures during the Chou Dynasty', in Jerome Cohen, R. Randle Edwards and Fu-mei Chen (eds.), *Essays on China's Legal Tradition*, Princeton: Princeton University Press, 1980, p. 53, n. 88, p. 43.
70. Noah E. Fehl, 'Notes on the "Lü Xing"', Proposing a Documentary Theory', Hong Kong: *Chung Chi Journal*, 9 (1969), pp. 10-36.
71. Creel, *Origins of Statecraft*, p. 463.
72. Zeng Rongfen, *Lü Xing yanjiu* (Research on the Lü Xing), Taipei: Taiwan xuesheng shuju, 1977.
73. Geoffrey MacCormack, 'The "Lü Xing": Problems of Legal Interpretation', *Monumenta Serica*, 37 (1986-87), p. 35.
74. For example, some documents in the *Shu Jing*, some material in the *Shi Jing*, and especially inscriptions on several bronze vessels which will be dealt with later.
75. Creel, 'Legal Institutions', p. 29.
76. Scholars have given various interpretations to the term *waishi*, but all seem to be unsatisfactory. Cf. James Legge, *The Chinese Classics*, Vol. 3, p. 390. Jiang Sheng's explanation (in *Shang Shu jizhu yinshu*) was that it meant 'judicial affairs'. Since in ancient times legal cases were heard at the outer court, they were thus called 'outside affairs'. His version is, though followed by many scholars (cf. Qu, *Shang Shu jinzhu*, p. 101; Karlgren, *Documents*, p. 40), also farfetched and unsatisfactory.
77. The term *niesi* is often explained as referring to law. See Qu, *Shang Shu jinzhu*, pp. 101-02; MacCormack, 'Law and Punishments', p. 336. However, judged from the context, it is more likely to mean 'the judicial office'.
78. Karlgren, *Documents*, p. 40.
79. Legge, *The Chinese Classics*, Vol. 3, pp. 389-90. From the context, we have good reason to believe that here the term 'man' refers to the Shang people.
80. Karlgren, *Documents*, p. 40.
81. *Ibid.*, p. 42.
82. *Ibid.*, p. 46.
83. Regarding the authenticity of these sections, see Qu, *Shang Shu jinzhu*; Creel, *Origins of Statecraft*, pp. 447-60.
84. Guo Moruo, *Liang Zhou jinwenci daxi tulu kaoshi* (Pictures, Textual Research and Annotations on the Outline of Bronze Inscriptions of the Iwo Zhou), Beijing: Science Press, 1957, p. 26a (hereinafter cited as *tulu kaoshi*); Shirakawa, *Kindun isushaku*, Vol. 13, pp. 753-61.
85. Cf. Zhou Fagao, *Jinwen lingshi* (Scattered Interpretation of Bronze Inscriptions), Taipei: Academia Sinica, 1951, pp. 38-88; Chen Mengjia, 'Xi Zhou tongqi duandai (2)' (Western Zhou Bronze Vessels Dated, Part 2), *KGXB*, 10 (1955), pp. 85-6; Feng Zhuohui, 'Xi Zhou junfa panli, "Shiqi ding" shuyi' (A Precedent of Western Zhou Military Law: Interpretation and Discussion of Shiqi Tripod), *Renwen zazhi*, 5 (1986), pp. 97-100.
86. Cf. Guo, *tulu kaoshi*, p. 127a. He dates this vessel to the reign of King Li (878-842 BC).

50. Luo, *Qianbian*, 4.28.5. The last pictogram of this piece is incomplete. Judging from the general grammar of oracle records, it is probably a place name. Luo Zhenyu thought that 𠄎 was a certain official who was in charge of farmland (*kaoshi*, Vol. 2, 20). Cf. also Luo, *Qianbian*, 6.29.7, 6.34.6, and *Houbian*, Part 2, 8.1.
51. Luo, *Houbian*, Part 2, 10.5.
52. Luo, *Qianbian*, 4.15.7.
53. *Ibid.*, 4.7.5. Cf. also Luo, *Qianbian*, 2.23.1, and *Houbian*, Part 1, 12.1.
54. Qu, *Shang Shu jinzhu*, pp. 101-02, 111; Karlgren, *Documents*, pp. 42 and 46.
55. MacCormack, 'Law and Punishment', pp. 336-37.
56. Cf. Herring G. Creel, *The Origins of Statecraft in China*, Chicago: University of Chicago Press, 1970, pp. 450-1; Qu, *Shang Shu jinzhu*, pp. 96 and 106. Their works are numerous. Here one can just list several important ones: Xu Chaoyang, *Zhongguo xingfa suyuan* (The Source of Chinese Criminal Law), Shanghai: Shangwu yinshuguan, 1933, pp. 159-98; Chen Guyuan, *Zhongguo fazhi shi* (A History of Chinese Legal System) (reprint) Beijing: Zhongguo shudian, 1988, pp. 260-3; Zhang Jinfan, Zhang Xipo and Zeng Xianyi, *Zhongguo fazhi shi* (A History of Chinese Legal System), Beijing: People's University Press, 1981, pp. 55-8; Niida Noboru, *Chügoku hoseishi kenkyü: keiho* (Research on the History of Chinese Legal System: Criminal Law), Tokyo: Tokyo daigaku shuppankai, 1959, pp. 57-61; Nishida Tachiro, *Chügoku keiho shi kenkyü* (Research on the History of Chinese Criminal Law), Tokyo: Iwanami shoten, 1974, p. 210.
58. Various versions of Zhou chronology have been given. For example, the duration of King Mu's reign given by Chen Mengjia was 947-928 BC (*Xi Zhou niandai kao* (A Study of Western Zhou Chronology) (reprint) Macau: Huaxia Press, 1977); Shirakawa Shizuka argues that the duration of King Mu's reign was 998-969 BC (*Kindun isushaku*, Vol. 45).
59. Jean Escarra, 'Law, Chinese', New York: *Encyclopedia of the Social Sciences*, 1933, Vol. 9, p. 251.
60. Bodde and Morris, *Law in Imperial China*, p. 13.
61. Karlgren, *Documents*, pp. 74-8.
62. Fu reads the first sentence as '[W]hen the King of Lü had enjoyed the state for a hundred years, he was very old and senile'. Cf. Fu Simian, *Dadong xiaodong shuo* (A Version of the Great East and Small East), *ZYLYSJ*, 2 (1930), pp. 7-8; Fu Simian, 'Jiangyuan' (A Study of the Origin of Jiang), in *Fu Simian quanji* (The Complete Works of Fu Simian), (7 vols.), Taipei: Lianjing Publishing Company, 1980, Vol. 3, pp. 30-1; Fu Simian, *Zhongguo gudai wenxue shi jiangyi* (Teaching Materials of the History of Ancient Chinese Literature), in *Fu Simian quanji*, Vol. 1, pp. 81-2. However, many scholars read this sentence as '[W]hen the prince of Lü received his charge, the King had enjoyed the state for a hundred years, and he was very old and senile'. The 'King' refers to King Mu of Zhou. See Karlgren, *Documents*, p. 74; Qu Wani, *Shang Shu jinzhu*, p. 176.
63. Chen Pan, 'Chunqiu dashibiao leguo jue xing ji cummiebiao zhuan' (Commentary on the Chronicle of Major Events of Spring and Autumn Period and Chronicle of States, Titles of Officials, and their Survival and Extinction), *Zhongyang yanjiuyuan liyusuo zhuankan*, 52 (1969), p. 422.
64. Shirakawa, *Kokotsu kinbungaku ronsō* (Collected Essays on Oracle Bone and Bronze Inscriptions), Kyoto: Horyu shoten, 1958, p. 107.
65. Karlgren, *Documents*, pp. 35, 74.
66. Guo, *Jinwen suo wu kao, san, di* (A Study of the Characters Not Found in Bronze Inscriptions, three, Di) in *Jinwen cong kao* (Collected Studies of Bronze Inscriptions), Vol. 1, (3 vols.), (reprint), Beijing: People's Press, 1954, pp. 31b-2b.

87. *Ibid.*, pp. 96b-7b, 102b, and 112a-b.
88. Guo Moruo (*Ibid.*, pp. 98b-9a) claims that a *zi* was equivalent to 200 handfuls.
89. Creel, 'Legal Institutions', p. 33; Guo Moruo, *Liang Zhou jinwenci daxi* (An Outline of Bronze Inscriptions of the Two Zhou), Tokyo: Bunkyo shoten, 1931, p. 82.
90. Guo, *ulu kaoshi*, pp. 96b-9a. Creel holds that 'the settlement was apparently not made until the following year, when forty *zi* would have been due. But in consideration of the other payments Yao agreed to be content with only the return of the ten *zi* that had been stolen.' See *Origins of Statecraft*, n. 98 at p. 182.
91. Qishanxian wenhuaguan, 'Shaanxisheng Qishanxian Dongjiacun Xi Zhou tongqi fajue jianbao' (A Brief Report of the Excavation of Western Zhou Bronze Vessels at Dongjiacun of Qishan County, Shaanxi Province), *W. W.*, 5 (1976), pp. 28-33.
92. Tang Lan considers that (殷) should be read as *duo wu*. The first character means tattooing and the latter means to cover the offender's head with a black cloth. The two were used together as one punishment. And (殷) was also a punishment. (殷) should be read as *chu* which meant to dismiss an offender from office ('Shaanxisheng Qishanxian Dongjiacun xin chutu Xi Zhou zhongyao tongqi mingci de yiwen he zhushi' (Interpretation and Annotations of Inscriptions on the Important Bronze Vessels of Western Zhou Newly Excavated at Dongjiacun of Qishan County, Shaanxi Province), *W. W.*, 5 (1976), pp. 58-9, hereafter cited as 'Xi Zhou zhongyao tongqi'). Li Xueqin thinks that (殷) and (殷) are synonyms which both mean tattooing ('Qishan Dongjiacun Xun ye kaoshi' (Textual Research and Interpretation of the Xun Ye of Dongjiacun, Qishan County), *Guwenzi yanjiu*, 1 (1979), p. 153). Their decipherment of these two words are followed by many writers. However, after carefully studying their grounds of argument, one feels that their conclusion seems to be forced. (殷) and (殷) may be certain punishments we do not know, so I just leave the characters to stand.
93. Tang Lan, 'Xi Zhou zhongyao tongqi', pp. 58-9; Li Xueqin, 'Xunye kaoshi', pp. 149-56; Liu Hainian, '2,800 nian qian de yifen susong panjue' (A Judgment Dated 2,800 Years Ago), in Liu Hainian and Yang Yifan (eds.), *Zhongguo gudai falü shi zhishi* (Knowledge of Ancient Legal History of China), Harbin: People's Press, 1982, pp. 35-43.
94. Bodde and Morris, commenting on the translations by Henri Maspero of Western Zhou bronze inscriptions involving litigation, writes, 'the disputes of which we have knowledge are all between members of the aristocracy, that is, between men who were more or less social equals, and do not involve any of the common people' (*Law in Imperial China*, p. 48, n. 95). The only exception may be the incident recorded in the Shiqi Ding. Creel concludes that here 'the defendants (*zhong pu*) were definitely humble men' ('Legal Institutions', p. 33); Tang Lan, however, thinks that *zhong pu* were 'high-ranking slaves' ('*Yong qingongqi mingwen lai yanjiu Xi Zhou shi*' (Making use of Inscriptions on Bronze Vessels for Study of Western Zhou History), *W. W.*, 6 (1976), p. 33). One would like to point out that, judging from the context, it is not wholly justified to regard *zhong pu* (literally, the multitude of servants) as 'humble men'. They may have been warriors and thus enjoyed special status.
95. A point which is worth special notice is that such fines were not the redemption-fines mentioned in the 'Lu Xing' where redemption-fines are alleged to have been used as substitute to the five punishments.
96. Creel, *Origins of Statecraft*, p. 191.

97. Creel, 'Legal Institutions', p. 34.
98. T'ung-tsu Ch'u, *Law and Society in Traditional China*, Paris: Mouton, 1961, pp. 170-1; Henri Maspero, 'Le Régime Fœdal et la Propriété Foncière dans la Chine Antique', in Maspero, *Mélanges Posthumes*, Paris: Civilisations du Sud, 1950, Vol. 3, p. 139; Anthony F. P. Hulsewé, *Remnants of Han Law*, Leiden: E. J. Brill, pp. 5-6, 331 and 366-7.
99. Creel, *Origins of Statecraft*, pp. 162-78; 'Legal Institutions', pp. 27, 29 and 34-5.
100. Zhang Jinfan, Zhang Xipo and Zeng Xianyi, *Zhongguo fazhi shi*, p. 77; Zhou Mi, *Zhongguo xingfa shi* (A History of Chinese Criminal Law), Beijing: Mass Press, 1985, p. 137.
101. *Zuo Zhuan*, Zhao 7, Legge, Vol. 5, p. 616.
102. *Ibid.*, Ai 11, Legge, Vol. 5, p. 826.
103. *Ibid.*, Ding 4, Legge, Vol. 5, p. 754.
104. *Ibid.*, Wen 6, Xuan 16, Cheng 18, Zhao 29, Legge, Vol. 5, pp. 243-4, 331, 409, and 732.
105. *Ibid.*, Zhao 14, Legge, Vol. 5, p. 656.
106. Cf. *Ibid.*, Zhao 2, Legge, Vol. 5, p. 583.
107. *Ibid.*, Xuan 16, Legge, Vol. 5, p. 331. Du Yu wrote, 'it relates that the *li* of Zhou has long been cast aside in Jin'. But Li Zongtong thinks that this indicates that Jin originally did not use the *li* of Zhou. See Li Zongtong, *Chunqiu Zuo Zhuan jinzhu jiyi* (Modern Annotations and Interpretation of the Spring and Autumn and Zuo Zhuan), Taipei: Shangwu yinshuguan, 1971, p. 609, n. 7.
108. This refers to the events that occurred in Zhao 20 when Duke Yuan of Song put to death and banished a number of great officers; Legge, Vol. 5, pp. 682-3.
109. *Zuo Zhuan*, Zhao 25, Legge, Vol. 5, p. 711.
110. *Ibid.*, Zhao 7, Legge, Vol. 5, pp. 615-16.
111. Creel, 'Legal Institutions', p. 40.
112. *Zuo Zhuan*, Xiang 21, Legge, Vol. 5, p. 490.
113. *Ibid.*, Zhao 2, Legge, Vol. 5, p. 584.
114. *Ibid.*, Wen 10, Legge, Vol. 5, p. 256.
115. *Ibid.*, Zhao 20, Legge, Vol. 5, p. 684.
116. *Ibid.*, Zhao 28, Xi 28, Legge, Vol. 5, pp. 208, 212, and 728.
117. *Ibid.*, Zhuang 10, Legge, Vol. 5, p. 86.
118. *Zuo Zhuan*, Xiang 26, Xiang 23, Zhao 1, Ai 14, Legge, Vol. 5, pp. 524, 500-1, 578, and 838.
119. *Ibid.*, Cheng 5, Zhao 4, Legge, Vol. 5, pp. 35, 357, and 599.
120. *Zuo Zhuan*, Cheng 3, Zhao 28, Legge, Vol. 5, pp. 352, and 726. The first incident occurred in 588 BC, and the second in 512 BC.
121. 'Ouli' in *Li Ji* (trans.), James Legge, *The Li Ki*, in Max Müller (ed.), *The Sacred Book of the East* (50 vols.), Oxford: The Clarendon Press, 1885, Vol. 27, p. 90.
122. *Han Shu* 48 and 22b-23a. Cf. Yang Hegao, *Jia Yi de falü sixiang* (The Legal Thought of Jia Yi), Beijing: Mass Press, 1985, pp. 28-30. See also *Baihu Tong*, 8, 18a; Xun Yue, *Shen jian*, 1, 4b-5a.
123. Cf. Cai Shuheng, *Zhongguo xingfa shi*, pp. 192-3. Cai quoted various arguments put forward by scholars who were against the version claiming that punishments were not applicable to *dafu*. In view of this, Creel holds that the controversial passage in the *Li Ji* was undoubtedly written by some officials as an expression of hope ('Legal Institutions', p. 39). T'ung-tzu Ch'u shared Creel's opinion in the point that this saying at first was just a certain theoretical assumption. But he further suggested that later 'these assumptions found practical application, and they led to the legal recognition of the privileges of the ruling class, whose members were not punished even when they broke the law' (*Law and Society*, p. 172). Another version followed by some students was proposed by Xia Zengyou who, basing his analysis on the records of the *Zuo*

*Zhuan*, considered that the true meaning of this statement was that *rousing* or corporal punishments were not applicable to *dafu* (*Zhongguo gudai shi* (Ancient History of China), Shanghai: Shangwu yinshuguan, 1933, p. 181). Many other scholars have tried to solve this problem mainly through grammatical analysis and rendered various explanations. For example, Cai Shuheng thinks that in this statement *shang* ('to reach up') should be understood as to mean 'aggravating', while *xia* ('to extend down') as meaning 'mitigating'. Thus, the text in question should be interpreted as 'although great officers know the penal law, their responsibility for offences should not be aggravated; the common people's responsibility for offences should not be mitigated though they have no knowledge of it' (Cai, *Zhongguo xingfa shi*, p. 192). This, however, seems to be an extreme interpretation. For more examples, see Li Qiqian, 'Zai yi: "li bu xia shu ren, xing bu shang dafu"', ('Li Not Extended Down to Common People; Punishments Not Extended Up to Great Officers' Reconsidered), *Zhongguo gudai shi luncong*, 3 (1981), p. 132; Xie Weiyang, "'Li bu xia shuren, xing bu shang dafu' bian" ('Li Not Extended Down to Common People; Punishments Not Extended Up to Great Officers' Distinguished), *Xueshu yuekan*, 8 (1980), p. 37, and so on.

124. *Zuo Zhuan*, Xi 27, Legge, Vol. 5, p. 201.
125. *Ibid.*, Zhao 13, Legge, Vol. 5, p. 648.
126. *Ibid.*, Zhao 3, Legge, Vol. 5, p. 589.
127. Cf. Xia, *Zhongguo gudai shi*, pp. 181-2.
128. *Zuo Zhuan*, Huan 18, Legge, Vol. 5, p. 71.
129. *Ibid.*, Zhuang 21, Legge, Vol. 5, p. 101.
130. *Ibid.*, Wen 9, Legge, Vol. 5, pp. 252-4.
131. The *Zuo Zhuan* records several such incidents occurred in various states. Cf. Xuan 4, Xuan 13, and Xiang 23, (Legge, Vol. 5, pp. 297, 322, and 503).
132. See the *Zuo Zhuan*, in 597 BC after having been defeated by the army of Chu, the commander-in-chief of Jin armies requested the ruler of Jin to permit him to commit suicide, but he was remitted. Legge rendered the words *qing si* (lit. to request death) as meaning 'to suffer the death penalty' (Legge, Vol. 5, p. 321). Li Zongtong has suggested that *qing si* meant to be allowed to commit suicide (*Chunqiu Zuo Zhuan jinzhū*, pp. 589-90). Judging from the context, Li's explanation is better than Legge's. Cf. also Xi 28, Zhao 23, Legge, Vol. 5, pp. 210 and 700.
133. *Zuo Zhuan*, Zhuang 14, 32, Min 2, Xi 10, Legge, Vol. 5, pp. 92, 121, 129, and 157.
134. *Ibid.*, Xi 33, Ai 11, Legge, Vol. 5, pp. 225 and 825-6.
135. In our sources, there are numerous records indicating that banishment was inflicted upon great officers. Here one just lists a few cases. See the *Zuo Zhuan*, for example, in 696 BC it was used in the State of Wei, 609 BC in Jin, 591 BC in Lu, 568 BC in Song, 542 BC in Qi, Legge, Vol. 5, pp. 79, 286, 335, 428, and 551.
136. *Zuo Zhuan*, Zhuang 17, Xi 4, Xiang 11, Xiang 18, Legge, Vol. 5, pp. 96, 141, 454, and 477.
137. *Ibid.*, Xi 28, Zhao 13, Zhao 23, Legge, Vol. 5, pp. 12, 652, and 698.
138. *Ibid.*, Zhuang 32, Xiang 23, Xiang 29, Zhao 1, Zhao 2, Legge, Vol. 5, pp. 121, 503, 551, 578, and 584.
139. See *Zuo Zhuan*, in the state of Lu, such covenants were made in 591, 574, and 548 BC, and in the state of Zheng, in 541 BC, Legge, Vol. 5, pp. 335, 399, 503, and 557.
140. *Ibid.*, Zhao 27, Legge, Vol. 5, p. 722.
141. *Ibid.*, Xiang 17, Legge, Vol. 5, p. 475.

## 5 A Study of the Covenant (*Meng*)

In the domain of ancient Chinese law, and especially compared with *li* and *xing*, the *meng* (covenant) is perhaps the institution which has been least studied. Among the writers who have taken an interest in the *meng*, most have regarded it as one of the common elements of rudimentary Asiatic international law and failed to reveal its other aspects as a legal instrument.<sup>1</sup> The rare exceptions worth mentioning are the works of W. A. C. H. Dobson and M. E. Lewis.<sup>2</sup> Although in his article on the *ming* and the *meng* Professor Dobson made some general efforts to examine the *meng* as a legal instrument, he mainly devoted his attention to the covenant as a means of structuring international relations between the feudal states. Furthermore, since his paper was written more than twenty years ago, the main sources he used were the records of the *Chunqiu* and *Zuo Zhuan*—at that time he was not able to use the archaeological excavations of numerous covenants discovered in Houma in 1965 and in Wenxian in 1979. (These documents, however, will be referred to in this book.)

In this respect, Lewis's work provides some detailed analysis of the available data on the Spring and Autumn period. However, the latter chiefly approached the covenant in light of sanctioned violence, and only concentrated on its general social functions during the social changes of that period. As a result, he touched little upon the influence which the *meng*, as an important legal instrument, may have exerted on the early development of Chinese law. Also, it must be pointed out that Lewis has been none too careful in his utilization of the early sources, often drawing without necessary qualification on such works as the *Zhou Li*, the *Li Ji*, and others to prove some of his fundamental points. Moreover, none of the earlier scholars have ever tried to trace the origin and development of *meng* in the broad context of social changes between the Shang and the Spring and Autumn period. Many questions per-