


RESEARCH ARTICLE

Adultery Law and State Power in Early Empires: China and Rome Compared

Yunxin Li 

Department of History, Simmons University, Boston, MA 02115, USA

Email: yunxin.li@simmons.edu

Abstract

As ancient China and Rome transformed into empires, both states showed an increasing interest in regulating family ethics and individuals' sexuality. Using excavated documents and transmitted texts, this article compares legal statutes and practices against illicit consensual sex in early imperial China (221 BCE–220 CE) with those in the Roman empire. On the one hand, both legal systems aimed at consolidating social hierarchies based on gender, status, and generation. On the other, the Roman and Chinese statutes had different emphases due to their respective political, social, and cultural contexts, and the actual penalties for adultery and incest differed significantly from those prescribed in the statutes. In both empires, control over individuals' sexuality facilitated state power's penetration into the family during empire-building, giving rise to laws in areas that had been largely left to customs and individual will.

Keywords: early China; Rome; law; adultery; incest; sexuality

I. Introduction

The empires of ancient Rome and China were not only coexistent in chronological terms, but also comparable in terms of size, population, state formation, and many other aspects. The comparative study of ancient Rome and China has thus generated fruitful scholarship in recent decades. Reacting against the old paradigm that treats China as an example of oriental despotism, scholars have paid increasing attention to the similarities between the two empires (Mutschler and Mittag, 2008, p. xiv; Scheidel, 2009, p. 4; Scheidel, 2015, p. 5; Beck and Vankeerberghen, 2021, pp. xiii–xiv). Such research has deepened our understanding of the two societies as well as empires in general. While the distinction between Rome and its colonies, or that between Roman citizens and non-citizens, figured more prominently in the Roman empire than in the early Chinese empires, scholars have nonetheless found interesting parallels between the two large political entities that dominated the lives of diverse populations.

Yet the comparative study of Roman and early Chinese legal systems is just beginning due to the previously limited sources from early China (before 220 CE) and the influence of stereotypes about traditional Chinese law, among other reasons. Before the discovery of excavated legal documents in the 1970s and 80s, scholars of early Chinese law mainly relied on the “Treatise of Punishments” (*xing fa zhi*) in *Han shu* (*Book of Han*), which only provides an overview of the major legal reforms throughout early China; legal cases involving the upper classes scattered in the dynastic histories, *Shi ji* (*Records of the Grand Historian*), *Han shu*, and *Hou han shu* (*Book of the Later Han*); and the masters' literature commonly associated with the “school of law” (*fa jia*) such as *Han Fei zi* (*[Writings of] Master*

Han Fei) and *Shang jun shu* (*Book of Lord Shang*), which contain some legal theories with a polemical nature but not legal statutes or cases.¹ The excavation of several sites has changed the landscape by allowing us to see early Chinese legal statutes and legal case reports in their manuscript forms. The Shuihudi manuscripts were found in Yunmeng, Hubei Province in 1975. The occupant of tomb No. 11, Xi, had served as a Qin functionary at the county level and copied legal documents probably for his own use. Likewise, the manuscripts discovered in 1983 from Tomb no. 247 in Zhangjiashan, Hubei, which date to around 186 BCE, contain rich legal documents from the early Western Han. Other recently discovered documents have also revealed new information about early Chinese law, notably the Qin documents excavated from Liye, Hunan Province, the documents illegally removed from tombs in the Yangzi River Valley and preserved at the Yuelu Academy of Hunan University, and the legal documents found at Hujia caochang, Jingzhou, Hubei Province. Together, these manuscripts have allowed scholars to revise the narrative of the harsh, punitive, and extractive early Chinese legal system and to peek into the lives of people other than male elites.

Previous comparative studies of early China and Rome have emphasized that Roman law protected individual rights and private property, whereas Chinese law centred on top-down punishments. Karen Turner and other scholars have observed that, from a comparative perspective, Roman law protected individuals' rights against the state, whereas the Chinese legal system was created mainly for the state to preserve social order and to extract resources needed to maintain the imperial apparatus (Liang, 1989, pp. 55–91; He, Weifang, 1990, pp. 203–19; Turner, 2009, pp. 52–82).² While this general statement still largely holds, it needs to be modified in light of different groups' distinct positions in the same legal system. Nor does the contrast contradict the similarities between the two legal systems. For one thing, both legal systems upheld a highly hierarchical social order. Roman law protected the rights of male citizens, but women, slaves, foreigners, and other marginalized groups were subject to various forms of physical subjugation. Likewise, the early Chinese legal system supported the hierarchies between husband and wife, father and son, or master and slave. In addition, there were other similar concerns in Roman and early Chinese law, such as debt, compensation, inheritance, and household division, which have led Zhaoyang Zhang to argue that civil law existed in early China (Zhang, 2022, pp. 7, 251).

Adultery law opens a window for us to look into both legal systems comparatively. As Rome transitioned from a republic into an empire, the rulers reinforced the state's control over individuals' sexuality, notably criminalizing illicit consensual sex. This change paralleled the creation of legal statutes against illicit consensual sex in early imperial China. The law thus served the formation of early empires by resolving the tension between state power and the private realm. If producing legitimate heirs had been a matter inside each elite family under the republic, during the Roman empire, it came to be viewed as an issue affecting the healthy functioning of the Roman aristocracy and the army. Likewise, while sexual morality had been less of a public concern in pre-imperial China, the Qin and Han rulers saw the observance of hierarchies and boundaries as a marker of civilization and social stability. This parallel is telling of both the workings of imperial power and the functions of the law in ancient empires: the criminalization of

¹ As Paul Goldin points out, the conventional term “legalism” does not translate *fa jia* accurately, nor should the term *fa* be simply translated as “law”; rather, *fa* had the broader meanings of “method” or “standard.” *Fa jia* was a term invented by the Han writer Sima Tan to describe several philosophers in the pre-imperial period including Shang Yang and Han Fei. For a more detailed discussion of the term and the philosophers, see Goldin (2011), pp. 88–104.

² Recognizing the differences in early Chinese and Roman laws, Karen Turner emphasizes that, even though the early Chinese legal system allowed few alternative voices to speak on behalf of the accused person, intellectuals still argued for certain limits on the state's use of violence and the ideal of a just, benevolent ruler. See Turner (1993), pp. 285–324.

illicit consensual sex not only embodied an imperial demand for ethical norms, but also justified the state's power over its subjects' bodies. Thus, a close comparison of early Chinese and Roman adultery laws will contribute to legal history as well as comparative empire studies.

This article compares the legal statutes as well as practices regarding adultery and incest in the contexts of early imperial Rome and China. While acknowledging the differences between the two systems, this article also highlights their common aspects that illuminate the workings of imperial authority. I argue that the state's control over sexuality played a prominent role during the transitional stage from a non-imperial regime to an empire, as rulers of new empires needed to establish their authority in both public and private realms. State intervention into the realms of family, gender, and sexuality was essential for the new imperial regimes to manage the population for administrative, financial, and military purposes, as well as to promote common ethical standards and stabilize social order. In other words, adultery law served both as a tool for social control and a means of promoting ideology, both of which were crucial for the emergence of early empires.

2. The criminalization of illicit consensual sex

As Foucault has pointed out, sexuality is one of the most useful instruments for asserting power relations, and the family is a crucial locus of power. He states that, since the nineteenth century, the deployment of sexuality has gradually become focused on the family (Foucault, 1978, pp. 103–14). While Foucault's discussion is based on the conditions in early modern and modern Europe, it is fair to say that the human body, sexuality, and the family have been intertwined with power since much earlier times. In fact, the ancient rulers already understood the significance of sexuality to manpower, inheritance, and social ethics. They thus took measures to control the human body, although their methods of exercising power were less diverse and subtle compared with power relations in modern society that Foucault describes: they relied primarily on laws and regulations.

Judging from available sources, the Roman state did not make much effort to regulate illicit consensual sex under the republic. As Jane Gardner has noted:

Although some attempt was made to protect women against unwelcome sexual approaches, the law for the most part did not concern itself with the sexual activities of consenting individuals; most undesirable behavior was dealt with, if at all, within the family. (Gardner, 1986, p. 117)

Indeed, until the legislation of Augustus, the *paterfamilias* had had full responsibility for punishing those under his control for sexual misbehaviour, and the husband was entrusted to oversee his wife's chastity. Adultery justified not only divorce, but also physical violence against the adulterer, which is commonplace in early Roman literature.

Rome's transition from a republic to an empire was accompanied by the ruler's increased interest in regulating individuals' morality and sexuality through law. The first emperor, Augustus, was celebrated as "Father of his Country" on coins and inscriptions, which marked his role as father of the Roman family and head of the state. Consistently with this image, he showed great interest in regulating family, marriage, and sexual behaviour. Such interest was partly driven by his anxiety towards the lax morals of his contemporary Romans, especially the upper classes. He claimed that the Roman elites did not show enough respect for family values or sexual morals, which was harmful to the maintenance of aristocratic families and the community as a whole (Boatwright et al., 2012, p. 281). As part of his complex legislation, Augustus's *Lex Julia de Adulteriis coërcendis*

stipulated penalties for adultery (relations with married women), *stuprum* (relations with unmarried or widowed women), and incest. Adultery for the first time became a criminal offence, meaning that the right of accusation against adulterers was now open to all male adult citizens, even those with no kinship or marriage relations with the accused. The private matters were made public. While the original *Lex Julia* was not fully preserved, we can learn about it from the quotations and explanations of the law preserved in the juristic writings compiled during the sixth century CE, mainly *Digest* 48.5 and *Codex of Justinian* 9.9, 9.10, and 9.11 (Watson, 1985, pp. 318–30; Blume and Frier, 2016, pp. 2295–317). As scholars of ancient legal history know, because Justinian explicitly ordered the compilers to edit the previous legal texts for consistency and conciseness, certain parts of the statutes from the classical period and jurist opinions were likely omitted or altered before they were compiled into the *Digest*. Another problem is that we only have extracts, which limits our knowledge of the overall picture (Robinson, 1997, pp. 105–15).

A similar transformation occurred in early China. There used to be a time in pre-imperial China when adultery and incest were largely left to individual choices and resolved through personal violence. *Zuo zhuan* (“The Zuo Tradition”) records more than a dozen adultery cases and several incest cases among the upper classes in the Spring and Autumn Period. For instance, Lord Xiang of Qi had incest with his younger sister, Wen Jiang, before her marriage to Lord Huan of Lu and, after the marriage, when she and her husband visited Qi. After the husband discovered their relationship and scolded Wen Jiang, Lord Xiang murdered him (*Zuo zhuan*, 18th year of Lord Huan; Yang, 1981, pp. 151–3; Sima, 1982, 32, p. 1483; Sima, 1982, 33, p. 1530). Another example is the beautiful woman Xia Ji, who reportedly had incest or adultery with several men, leading to a chain of events including her son killing Lord Ling of Chen, Lord Zhuang of Chu taking the opportunity to defeat Chen, and the Chu minister Shengong Wuchen eloping with her to Jin (*Zuo zhuan*, 2nd year of Lord Cheng; Yang, 1981, pp. 803–6). None of the adultery or incest cases in *Zuo zhuan* is tried at a court according to legal procedures.

This relative lack of state concern over the subjects’ sexual behaviour continued to some extent during the Warring States period. One example is that Empress Dowager Xuan of the Qin state, after her husband’s death, had an affair with the Lord of Yiqu and gave birth to two sons, but later murdered the Lord of Yiqu for the interest of her state (Sima, 1982, 79, p. 2406). She later had a male favourite named Wei Choufu and considered burying Wei together with her at her death, but Wei asked a friend to dissuade her. Their conversation implies that her love affairs were not a secret (*Zhan guo ce*, 4.16; He, Jianzhang, 1990, p. 148). According to *Zhan guo ce* (*Strategies of the Warring States*), when Empress Dowager Xuan met an envoy from another state, she openly discussed her and her late husband’s positions during sexual intercourse as a metaphor for interstate relations (*Zhan guo ce*, 27.1; He, Jianzhang, 1990, p. 1009). Regardless of whether this conversation actually happened, it would be hard to even imagine these words coming out of the mouth of a noble lady in any subsequent periods of Chinese history. Of course, it was very likely that laws against adultery and incest appeared in the Warring States period. The legal statutes from Shuihudi largely reflect the Qin legal tradition since Shang Yang’s reform, and the manuscripts found at Baoshan show that the Chu had a developed legal system. But, even if such laws were practised in the Warring States period, they would not have been applied consistently on the scale of an empire until the Qin conquered all the other states.

Unlike the creation of the *Twelve Tables* in the Roman republic, which resulted from the negotiation between the plebeians and the patricians (Tellegen-Couperus, 1993, pp. 19–20), the emergence of law in China was closely tied to the state’s discipline of peasant conscripts during a time of constant warfare (Yates, 2009, pp. 23–44). Several passages in *Zuo zhuan* link the creation of laws to military activities during the late Spring and Autumn Period (Yang, 1981, pp. 544–6, 1504, 1366–7). The “Treatise of

Punishments” in *Han shu* discusses punishments from antiquity to the Han Dynasty, but devotes great lengths to warfare and statecraft, demonstrating the close relationship between the origins of Chinese criminal law and warfare. In a passage on the “five punishments,” which is attributed to the ancient sages, most of the tools listed for punishing criminals are also weapons used in warfare—armour and arms, axe and battle axe, knife and saw (Ban, 1962, 23, p. 1079; Hulsewé, 1985, p. 322). This suggests that warfare was put into the same category as the punishment of criminals. Another paragraph in the treatise tells that Guan Zhong, the famous minister of Qi during the Spring and Autumn Period, made Qi powerful by restructuring the whole society into a military organization (Hulsewé, 1985, p. 322).³ Consequently, all the men of Qi became soldiers, and the Qi laws were largely identical to military law. Shang Yang led similar reforms in the state of Qin, making military merit the major basis for the ranks of honour.⁴ No wonder that two legal cases from the Shuihudi Qin documents concern two Qin soldiers fighting over a head. In the second case, the authorities suspected that the men had murdered one of their fellow Qin soldiers because the head was wearing a Qin hairstyle (Shuihudi qinmu zhujian zhengli xiaozu, 1990, p. 153).

This close relationship between warfare and legal punishments in pre-imperial China corresponded to early Chinese political theories that considered all individuals in the All-Under-Heaven (*tian xia*), including ethnic minorities and foreign peoples, as subjects of universal sovereignty. Thus, criminals and foreign enemies theoretically belonged to the same category. This is unlike the case in ancient Rome in which violence served as a marker of social divisions—law applied to the insiders of Roman society and warfare applied to the enemies. Chinese law’s origin in warfare may have contributed to the state’s readiness to discipline its subjects’ bodies and to punish the disobedient ones by inflicting harm on their bodies.

The transition from the Warring States era to the Qin empire was accompanied by the state’s increasing attention on matters within the family. As Anne Kinney puts it, “the establishment of a complex legal system that applied to every member of the empire brought about an unprecedented transformation of the husband–wife relationship, changing it from a bond largely determined by customs, rituals, and family elders to one regulated by law” (Kinney, 2022, p. 225). The first emperor of Qin celebrated his success in

³ Here is Hulsewé’s translation: “The way of the Chou (dynasty) declined and the rules and regulations fell into decay. Coming (now to the time when) duke Huan of Ch’i appointed Kuan Chung, the country became wealthy, and the people were at ease. The duke asked (him) about the (right) way to exercise hegemony and to use the army. Kuan Chung said: ‘If you, oh Duke, desire to establish groups (of one hundred men) and squads of five men, and to make coats of armour and weapons, the large states will likewise make them, whilst the lesser states will set up (defensive) preparations, and then it will have become difficult thereby quickly to attain your purpose.’ Thereupon he created the internal administration, entrusting the military organisation to it. So the groups and squads were determined for the hamlets whilst the military administration was complete on the borders. He linked together the platoons of ten and the squads of five (so that) in staying and dwelling they shared each other’s joys and in life and death they shared each other’s grief; fortune and misfortune they had in common. Therefore, when fighting at night they heard each other’s voices, and when fighting in the day-time they could see each other, (so that) in an emergency they were fully capable of dying for each other.”

⁴ Shang Yang organized the entire population under Qin control into groups of five, and possibly ten, and then up into larger units, each level legally responsible for the behaviour of its members under the “mutual responsibility” (*lian zuo*) system. This hierarchical organization of the civilian society mirrored that of the army: in the Qin army, squads of five men and platoons of ten were drawn from these household units, so that one man from each of a group of five households served in the five-men unit in the army. This ensured that men serving in the army would know each other intimately and would fight to the death to save other members of the same unit. Furthermore, Shang made military success in battle the primary source of social and legal status, prestige, and economic power. He did this by instituting a system of 17 ranks, with each rank awarded for the enemies’ heads cut off by the soldier or the officer’s subordinates. See Sima (1982), 68, p. 2230.

correcting family and gender orders in his stele inscriptions as one of his greatest achievements. The Kuaiji stele inscription says:

Those who gloss over error in the name of righteousness, women with sons who remarry, unchastely turning against the dead—

Such conduct he bars at home and abroad, prohibits unlicensed behaviour, so that men and women are pure and honest.

If a husband behaves in bestial fashion, killing him will incur no guilt; thus are men made to embrace righteousness.

If a wife runs away and remarries, her sons shall disown their mother; so all will be led to clean and upright conduct.

His great rule purifies the folkways, the whole empire acknowledges its sway; it blankets the world in splendid regulations. (Sima, 1982, 6, p. 262; Watson, 1993, p. 61)⁵

In the Qin and Han legal systems, crimes related to sexual activities were all referred to as *jian* 奸, but the word itself had much broader meanings than illicit sex.⁶ As Tomiya Itaru and Robin Yates have both pointed out, it could be applied to a variety of improper behaviours, such as officials' deliberate misbehaviour in the course of their duties (Tomiya, 2014, pp. 40–7; Tomiya, 2016, pp. 439–70; Yates, 2021, p. 163). As far as illicit sex is concerned, *jian* could refer to rape (*qiang jian* 強奸) as well as various kinds of illicit consensual sex (*he jian* 和奸), including consensual sexual intercourse between unmarried men and women; adultery between men and married women (*yu ren qi he jian* 與人妻和奸); incest between siblings (*tong chan xiang yu jian* 同產相與奸/ *qin shou xing* 禽獸行); a man's consensual sex with his father's, grandfather's, uncle's, or brother's wives, concubines, and "riding slaves" (*yubi* 御婢); illicit consensual sex between an individual of commoner or higher status and an individual of debased status; illicit sex between officials and women; and illicit sex during mourning periods (*ju sang jian* 居喪奸) (Wang, 2007, pp. 105–7; Liu, 2019, pp. 230–7). Consensual sexual relations between a male master and his own female slaves (not the slaves of his family members), however, fell into a grey area (Liu, 2019, pp. 213–4). The legal statutes and legal case records related to *jian* are mainly preserved in recently excavated Qin and Han documents from Shuihudi and Zhangjiashan, in addition to the transmitted histories, *Shi ji* and *Han shu*.

Why did both ancient empires, despite their geographical distance, begin to tighten the state's control over family, marriage, and sexuality? On the one hand, it can be explained as the rulers' efforts to establish their authority and consolidate the imperial order. On the other hand, legislation in the two empires was each driven by specific concerns rooted in their respective cultural traditions and political demands. Although some laws look similar at first sight, the rationales behind them may have been different.

⁵ The Chinese original reads: 飾省宣義, 有子而嫁, 倍死不貞, 防隔內外, 禁止淫泆, 男女潔誠. 夫為寄猥, 殺之無罪, 男秉義程. 妻為逃嫁, 子不得母, 咸化廉清. 大治濯俗, 天下承風, 蒙被休經.

⁶ Liu Hsin-ning argues that the characters 奸 and 姦 are always used differently in existing excavated manuscripts from the Qin and Han: 奸 refers exclusively to illicit consensual sex, whereas 姦 broadly refers to improper and evil acts. However, given that the two characters were similar in terms of form and pronunciation, the Eastern Han dictionary *Shiming* used 奸 to explain 姦, indicating that the two characters could be used interchangeably. As Liu points out, it is possible that the characters 奸 in transmitted texts from the Qin and Han were changed to 姦 by editors during later periods, causing the confusion of the original meanings of the two characters. In any case, the two characters were both used to refer to illicit sexual intercourse after the Tang. Liu (2019), pp. 227–8.

3. Legal statutes regarding adultery and incest

Both Roman and Chinese legislations regarding adultery worked to consolidate social hierarchy, patriarchy, and family property. Under most circumstances, a male of higher status who had consensual sex with a female of lower status was tolerated, but a female of higher status who had consensual sex with a male of lower status would be punished, although the punishments she received may have been less severe than what the male of lower status received.

Some legal statutes found in Zhangjiashan suggest the same level of penalty for the male and the female engaging in illicit consensual intercourse. A statute found in both Zhangjiashan Tombs no. 247 and no. 336 states that, for a man engaging in consensual illicit intercourse with another man's wife and for the woman, the penalty is to be left intact (as opposed to mutilation) and made a wall-builder or grain-pounder, except when the man is a government official, in which case the man should be sentenced according to the crime of rape. The next statute indicates that the penalty for rape is to be castrated and made a palace bond servant (Zhangjiashan ersiqi hao hanmu zhujian zhengli xiaozu, 2006, p. 34; Jingzhou bowu guan, 2022, p. 206; Barbieri-Low and Yates, 2015, p. 617). However, a legal case report from the *Submitted Doubtful Cases* (*Zou yan shu* 奏讞書) of the Zhangjiashan manuscript quotes another statute, stating that the penalty for those having illicit intercourse was being shaved and made a bond servant or bondswoman (Zhangjiashan ersiqi hao hanmu zhujian zhengli xiaozu, 2006, p. 108; Barbieri-Low and Yates, 2015, pp. 1380–1). Whatever the usual penalty was, both documents suggest that the male and the female engaging in the same illicit consensual intercourse were treated equally. Yet another statute preserved in the Zhangjiashan manuscripts shows that male and female criminals would be treated differently if their legal statuses were different in the first place:

奴取 (娶) 主、主之母及主妻、子以為妻，若與奸，棄市，而耐其女子以為隸妾。其強與奸，除所強。(Zhangjiashan ersiqi hao hanmu zhujian zhengli xiaozu, 2006, p. 34)

A male slave taking his [widowed or unmarried] mistress, the mother of his master, or the wife or daughter of his master and attempting to make her his legal wife, or engaging in illicit intercourse with [such women]: cast [the slave] away in the marketplace and shave the woman or daughter [involved] and make her a bondswoman. Should he engage in illicit intercourse with her through force: remove [the crime] of the one who was forced. (Barbieri-Low and Yates, 2015, p. 617)

Based on this statute, the male slave would be sentenced to death while the female of higher status would become a female slave instead of receiving the death penalty. While there are no preserved Qin or Han statutes that explicitly concern a male master having sex with a female slave, the “Statutes on Establishment of Heirs” (*zhi hou lu* 置後律) in the Zhangjiashan manuscript *Statutes and Ordinances of the Second Year* (*Er nian lu ling* 二年律令) says: “Should a female slave serve [at the bedside of] her master and have a child, when the master dies, manumit the female slave and make her a freedman” (Zhangjiashan ersiqi hao hanmu zhujian zhengli xiaozu, 2006, p. 61; Barbieri-Low and Yates, 2015, p. 861).⁷ This

⁷ The original text reads: 婢御其主而有子，主死，免其婢為庶人。As Barbieri-Low and Yates have noted, “yùbi 御婢 indicates a special class of female slave, used for sexual intercourse and procreation” and “in this item, the word yù 御 functions as a verb and could be translated as ‘to serve [at the bedside of the master]’.” See Barbieri-Low and Yates (2015), p. 870. Zhang Xiaofeng has also argued that the *yubi* was a type of female slave whose status was lower than the wife's or a concubine's but higher than that of an ordinary female slave. Thus, being manumitted after the male master's death was a privilege of the *yubi* who had borne children for the master, rather than an opportunity available to all female slaves. See Zhang (2004).

statute suggests that the sexual relationship between a female “riding slave” (*yubi* 御婢) and her male owner was legal and that the female slave’s status might be improved as a result.

This asymmetry between the male and the female was consistent with the Qin and Han legal systems’ overall tendency to treat women differently from men. As Mizuma Daisuke has pointed out, although the Qin and Han statutes sometimes prescribed lighter physical punishments for the female than the male who committed the same crimes, which could be partly due to women’s ability to reproduce, a wife beating her husband would be subject to heavier punishments than the husband beating his wife (if the husband claimed that she was a shrew) (Mizuma, 2007, pp. 111–5 and throughout). Miyake Kiyoshi argues that the different treatments of men and women had their roots in the historical formation of Chinese law: the earliest Chinese law-makers designed the system for male subjects, as exemplified by the punishments of castration and guarding the border, and later expanded legal punishments to females with certain adjustments (Miyake, 2007, pp. 368–93).

Likewise, Roman adultery law also protected male privileges. As Gardner observes, in principle, “a married woman was guilty of adultery if she had sexual relations with any man other than her husband, a man only if the woman was married, and his own marital status was irrelevant.” Moreover, a man could prosecute his wife, but a wife could not prosecute her husband (Gardner, 1986, p. 127). Like the case in early imperial China, a married man had the legitimate choice of having sex with his female slaves, but a woman’s sexual relations with a male of lower status would be considered adultery.

These similarities may be unsurprising given that both societies were patriarchal and hierarchical. However, the Roman and Chinese law-makers’ motivations were not the same. As Gardner argues, certain aspects of the law suggest that Augustus was mainly concerned with protecting the upper classes’ marriages, for “the forfeiture of one-third of their property, loss of the right of receiving inheritances, and ban on marriage to freeborn Romans were penalties whose effect would be felt mainly at the upper levels of society” (Gardner, 1986, p. 130). In other words, this regulation of the body was associated with the upper classes’ access to marriage alliances and economic resources. O. F. Robinson points out that infamy was also a consequence of conviction in the Roman context because “a convicted paramour lost his power both to testate and to receive under a will” (Robinson, 1995, p. 66), which seems more applicable to the upper classes than to the lower classes. By contrast, although the Chinese law also protected legitimate marriage, it placed much emphasis on the two adulterers’ relative positions in the desired social and family hierarchies, showing that one of its main goals was to uphold social order. Almost all the Chinese statutes concerning illicit sex clearly state the social and familial relationships between the involved parties, and the penalties varied by their relative positions.

Other notable differences between the early Roman and Chinese legal statutes lie in the categorization, definition, and penalties for illicit consensual sex. The Chinese word *jian* was an umbrella term for all kinds of illicit sex, and *he jian* included illicit consensual sex both with married women and with unmarried women. In Rome, however, the *Lex Julia* set adultery (relations with married women) apart from *stuprum* (relations with unmarried or widowed women). Although the law sometimes uses the two terms interchangeably, *stuprum* took on a more restricted meaning since then (Robinson, 1995, p. 121).⁸ This phenomenon reflects Augustus’s emphasis on confining sex within the boundary of legitimate marriage. The legal procedures prescribed in *Lex Julia* also indicate that the law was mainly intended to regulate the adultery of married women, for it first gives the husband the right to accuse the adulterous woman, which does not easily apply to single women (*Digest* 48.5.4, 12 (11).6, 15 (14).2).

⁸ According to Elaine Fantham, in the early republic, *stuprum* referred to any “public disgrace or disgraceful act” and only secondarily and later referred to “unsanctioned sexual intercourse.” See Fantham (2011), p. 117.

Another difference is that incest was punished much more severely in China than in Rome. Qin and Han statutes prescribed public execution for incest. As is stated in the “Answers to Questions on Legal Principles and Statutes” (*fa lü da wen* 法律答問) of the Shuihudi manuscripts, “If those who have the same mother and different fathers commit illicit consensual sex, what is the penalty? Public execution” (Shuihudi qinmu zhujian zhengli xiaozu, 1990, p.134).⁹ Similarly, the following statute appears in the “Miscellaneous Statutes” of the Zhangjiashan manuscripts:

同產相與奸，若取（娶）以為妻，及其所取（娶）皆棄市。其強與奸，除所強。
(Zhangjiashan ersiqi hao hanmu zhujian zhengli xiaozu, 2006, p. 34; Jingzhou bowu guan, 2022, p. 206)

[For a brother and sister] born of the same [mother] who engage in illicit intercourse together, or [a brother] who takes [a sister] and attempts to make her his legal wife, as well as the [sister] whom he attempted to take in marriage: in every case, cast [the criminal] away in the marketplace. Should he engage in illicit intercourse with her through force: remove [the crime] of the one who was forced. (Barbieri-Low and Yates, 2015, p. 617)

Incest was punished less severely in Rome than in early China. *Incestum*, as a special type of *stuprum*, came under the operation of the *Lex Julia de Adulteriis*, but the term *incestum* did not explicitly distinguish between endogamy and incest between primary kin. The usual penalty for incest, as for *stuprum* in general, was relegation to an island (Gardner, 1986, pp. 126–7).

A third difference is that having illicit consensual sex during a mourning period was a crime in early imperial China but not in Rome. In the Qin and Han, the crime of “having illicit sex during a mourning period” (*ju sangjian*) was intertwined with the crime of “being unfilial” (*bu xiao* 不孝), which deserved public execution. In the trial of a case concerning a widow having illicit sex with her lover during her mourning period for her deceased husband, the judge and the clerk cited a statute: “When the father or mother of the husband dies and is not yet buried, one who engages in illicit intercourse beside the corpse matches lacking filial piety. ‘Lacking filial piety: cast [the criminal] away in the marketplace’” (Barbieri-Low and Yates, 2015, pp. 1382–3).¹⁰

Last but not least, in China, the specific penalties were always determined based on the criminal’s relative position in the familial and social systems compared with that of the person whom he had offended. This was also true for illicit sex cases. A man who had illicit sex with the wife or “riding slave” of his superior would be sentenced more heavily than one who had sex with the wife or female slave of his inferior. As a statute in the Zhangjiashan documents prescribes:

復兄弟、季父伯父之妻、御婢，皆黥為城旦舂。復男弟子、季父伯父子之妻、御婢，皆完為城旦。(Zhangjiashan ersiqi hao hanmu zhujian zhengli xiaozu, 2006, p. 34)

Engaging in illicit sexual relations, with either the wife or riding slave of one’s elder or younger brothers, father’s younger brothers, or father’s elder brothers: in every case, tattoo [the criminal] and make [him or her] a wall builder or grain-pounder.

⁹ The original text reads: 同母異父相與奸，可（何）論？棄市。

¹⁰ The original text reads: 夫父母死，未葬，奸喪旁者，當不孝。不孝棄市。

Engaging in illicit sexual relations, with either the wife or riding slave of the male children of one's younger or elder brothers, or the sons of one's father's younger or elder brothers: in every case, leave [the criminal] intact and make [him or her] a wall-builder or grain-pounder. (Barbieri-Low and Yates, 2015, p. 619)

In other words, a man's sexual relations with another man's wife or female slave were considered an offence to that man, and therefore the legal punishment varied according to the two men's relative positions in the normative hierarchies.

By contrast, as far as the surviving parts of the *Lex Julia* are concerned, the Roman law did not make much effort to treat male adulterers differently on the basis of their kinship relations with the offended husbands. Rather, it emphasized the legal procedures, especially the persons allowed to make accusations and the time windows. According to *Lex Julia*, the husband ought to divorce his wife as soon as he found the adultery, or he would be liable for *lenocinium* (pandering) (*Digest* 48.5.2.2, 2.5, 2.6, 2.7, 12 (11).13, 15 (14)). In the first 60 days (*Digest* 48.5.4, 12 (11).6, 15 (14).2), only the husband or the woman's father had the right to accuse her of adultery, but the male adulterer had to be accused and tried first (*Digest* 48.5.5). If he were found guilty, the woman then could be tried; if not, and the woman had re-married, she could not be tried. When the two months had passed, any person could bring the accusation of adultery within the next four months (*Digest* 48.5.2.9, 48.5.4.1, 48.5.14 (13).4, 48.5.16 (15).5). This level of detail regarding legal procedures is not found in the corresponding Chinese statutes.

4. Legal practices: adultery and incest cases

As is always the case, there were discrepancies between statutes and legal practices in both early China and Rome. The sentences for specific cases did not strictly correspond to the prescriptions in legal statutes in either society. Specifically, the actual punishments for the Roman upper classes tended to be stricter compared with those in legal statutes. By contrast, the punishments that the Han upper classes received were sometimes lighter than those prescribed in the statutes. When Han male elites were simultaneously accused of illicit sex and other crimes, however, they often received punishments based on the more serious crimes.

In Rome, as *Lex Julia* left the power of prosecuting adulterers to the father of the woman and partially to the husband, the legal practice largely depended on the father and the husband's attitudes. Since the statute prescribed that the father could kill the adulterer if the adultery was found at his home but must kill his daughter at the same time (*Digest* 48.5.24 (23).4), it is reasonable to think that many fathers would choose not to do so. If this was the scenario, the statute would have resulted in the father killing neither his daughter nor the male adulterer. Then, what could have been the real effects of the law? At least the law reaffirmed the father's authority over his daughter and deterred potential male adulterers from intruding into a household that had a patriarch. Moreover, if the adulterers were found at the father's house but not executed by the father on the spot, the law would leave them the possibility of changing their behaviour.

While the Princes had a great deal of freedom in setting the punishment (Cohen, 2008, p. 213), Augustus sentenced his unchaste daughter Julia and her lovers, as well as his daughter's daughter, to exile or death, although he used his power as *paterfamilias* without recourse to the *Lex Julia*. Tacitus commented that Augustus "exceeded the humane penalties sanctioned by our ancestors and his own legislation" (*Tac. Ann.* 3.24.2f). A reasonable explanation is that Augustus's main target was the aristocracy and that he tried to deter potential adulterers with severe punishments for his own family members. As Mary T. Boatwright points out, women of the imperial family were held to high moral standards and

were thus liable to the charges of non-normative female sexuality (Boatwright, 2021, p. 81). Besides the cases of Julia the Elder in 2 BCE and Julia the Younger in 8 CE, documented adultery charges in Rome often involved women of the Julio-Claudian family, such as Appuleia Varilla (Tac. *Ann.* 2.50), Aemilia Lepida (Tac. *Ann.* 3.22–23), Claudia Pulchra (Tac. *Ann.* 4.52; cf. *Ann.* 4.66.1; Cass. Dio 59.19.1), Julia Livilla (Cass. Dio 59.22.6–8), Agrippina the Younger (Cass. Dio 59.22.6–8.), and (Claudia) Octavia (*Ann.* 11. 26–38; Suet. *Claud.* 26.2, 29, 36, 39.1), and the crime was sometimes linked with *maiestas*, or treason.¹¹ These cases indicate that the law was applied at least occasionally in the early Roman empire, but we are uncertain of how strictly it was executed in the whole society or during later periods of the Roman empire.¹² The judicial procedure also changed over time. As Peter Garnsey and O. F. Robinson have both observed, the *quaestiones* (public courts), which were responsible for the trial of adultery cases and other cases involving public crimes in the early empire, had become defunct in the Severan age and been superseded by the procedure *extra ordinem* (Garnsey, 1967, pp. 56–60; Robinson, 1995, p. 59).

While the early Chinese statutes prescribed the standard penalties for adultery, the actual punishments found in available sources varied significantly. A statute found in both Zhangjiashan Tombs no. 247 and no. 336 states that, for a man engaging in consensual illicit intercourse with another man's wife and for the woman, the penalty is to be left intact and made a wall-builder or grain-pounder (Zhangjiashan ersiqi hao hanmu zhujian zhengli xiaozu, 2006, p. 34; Jingzhou bowu guan, 2022, p. 206). The same statute has been found in the Dunhuang Xuanquan manuscripts, showing that it was circulated across the empire (Hu and Zhang, 2001, p. 9). Nevertheless, the penalties prescribed in the statutes varied by the man and the woman's respective legal status, whether they had kinship, and whether they committed illicit intercourse during a mourning period (Gu and Liu, 2009, pp. 78–80). The penalties in legal practice were complicated by even more factors. According to Hu Pingsheng and Zhang Defang's study of *Shi ji* and *Han shu*, the actual penalties for adulterers varied from as light as being bereft of the marquis title to as heavy as public execution (Hu and Zhang, 2001, p. 10). The reasons may have included the discretion of the judge, special circumstances of the case, the statuses of the adulterers, and the emperor's intervention. An important factor was whether the adulterers were accused of other crimes at the same time. By summarizing the 46 cases involving illicit consensual sex among the nobles recorded in *Shi ji* and *Han shu*, Jia Liying concludes that in only five cases were the criminals punished primarily for their sexual conduct; most of them were punished mainly because of other crimes (Jia, 2006, p. 93). This phenomenon suggests that the Chinese laws on illicit sex were often used for additional accusations instead of being stand-alone causes for legal cases. Perhaps the early Chinese state was less interested in regulating all the sexual conduct of its subjects than what it appeared to be in the official rhetoric.

Two cases committed by members of the imperial lineage illustrate the great variety of actual penalties for illicit sexual conduct. The King of Dai, whose name was Nian, had a long-term incestuous relationship with his younger sister, Ze, resulting in her giving birth to a baby. After being investigated by the authorities, Nian was debased to the status of commoner and exiled to Fangling. At the same time, he was granted a domain of 100 households (Ban, 1962, 47, pp. 2211–2). The penalty he received was much lighter than what the statute prescribed. In another case, Prince Dan, son of the King of Zhao, was accused of having sex with his own daughter and his elder sister. Dan was first imprisoned and

¹¹ Other Julio-Claudian imperial women were involved in trials that did not combine adultery and treason. See Boatwright (2021), pp. 71–5.

¹² As Mary T. Boatwright notes, after Domitia Lepida's case in 54, no imperial women is known to have been tried publicly, "although the literary sources incriminate a number on various charges and insinuations." Boatwright (2021), pp. 69–75.

sentenced to the death penalty but was finally released after some time due to the emperor's amnesty. He was sentenced to the death penalty because he had "committed many crimes" (*wei jian shen zhong* 為奸甚眾) and Emperor Wu was angry at him (Ban, 1962, 53, p. 2421). But a more important context was that Emperor Wu was trying to weaken the power of the regional kings, as evinced by his "Order to Expand Favours" (*tui en ling* 推恩令)—a decree that encouraged them to divide their territories among all their sons. The two cases demonstrate that a person's other conducts, his relationship with the emperor, and changes in the court's policies could all affect the actual punishments that he received.

The local judges' discretion also contributed to the inconsistencies in the actual penalties during early imperial China. In the *Submitted Doubtful Cases* from the Zhangjiashan manuscripts, there is a case in which a widow in Du County had illicit sex with a man shortly after her husband's death and was accused by her mother-in-law. At first, the judge decided that the woman should be sentenced to the same penalty as being unfilial because a woman ought to respect her husband to the same extent as her parents. But then a clerk named Shen argued that the offence against a deceased husband should be lighter than the offence against a living husband, and the judge agreed to lighten the penalty for this woman (Zhangjiashan ersiqi hao hanmu zhujian zhengli xiaozu, 2006, p. 108; Barbieri-Low and Yates, 2015, pp. 1376–93).¹³

In early Chinese legal practice, punishments for the crime of "having illicit sex during a mourning period" varied enormously, especially when members of the imperial lineage were involved and when the accused had committed multiple crimes. *Shi ji* and *Han shu* record six cases in which members of the upper class conducted illicit sex during their mourning periods for their father, mother, or the wife of their father's uncle. One of them deserved the death penalty according to the authorities' suggestion but then was only deprived of a feudal county; one was deprived of kingship and exiled to Fangling; two committed suicide; one received no penalty for his sexual behaviour but later committed suicide due to treason; and the last was the deposed emperor, the King of Changyi, who allegedly had committed other deviant behaviours according to the powerful regent Huo Guang (Jia, 2006, p. 97). What was really at stake, it seems, was not their illicit sexual behaviours per se, but their positions in political struggles and their relationships with those in power at the imperial court.

The Roman and Chinese rulers' different attitudes toward the upper classes reflected their respective concerns in political practice. Augustus and subsequent Roman emperors, who insisted on prosecuting adulterers, were concerned with the morality of the upper classes and their own public images as moral reformers. The Chinese emperors, however, were less obsessed with executing specific statutes but more concerned with the overall conduct and power of the accused. If a member of the imperial lineage had a good relationship with the emperor and did not pose a threat to the throne, he would likely receive a lighter penalty than was stipulated in the law. A possible explanation for this difference is that the Roman emperors still needed public support to secure their positions due to the legacies of the Roman republic, whereas the Chinese emperors were anxious about the competition from other male members of the imperial lineage who were also eligible for the throne.

¹³ Michael Nylan has analyzed this case in much more detail, arguing that the revision of the judgment may also have been based on the possibility that the widow was not in a social relation of dependency or co-residency with her parents-in-law, which means that she owed no obligation to her husband's patriline after his death. See Nylan (2005–06), pp. 40–2. In addition, several scholars have pointed out that this part of debate may have been added to the case as a literary work with a sarcastic tone, as indicated by the unusual name of the judge: "Ignorant." See Barbieri-Low and Yates (2015), pp. 1376–93. Whether or not this was a real case, it does show that multiple voices regarding widow chastity existed in early imperial China, some of which were vastly different from the gender norms in late imperial China.

5. Adultery law and state power

As the previous sections have demonstrated, while the adultery laws in the two early empires appeared to have centred on regulating sexual intercourse, the motivations and the effects of these legislations were more about power. The criminalization of illicit consensual sex reflected the power dynamics within the state and the family, facilitated power struggles between the ruler and the aristocracy, and recognized male domination. In the sense that these laws helped the imperial state to control individuals' bodies and manage populations, they played crucial political roles in the early empires.

The *Lex Julia* was passed by Augustus as part of his campaign for the moral reform and eugenics of the Senate and the equites. The sexual morality of the upper classes had been a concerning issue, judging from Tacitus's writings and other roughly contemporary literary sources that highlighted the promiscuity of the Roman upper class. Richlin comments that Augustus "was trying to legislate shame into the upper orders—an endeavor doomed to failure . . . as if, by making this moral judgment true in law, Augustus could instill it in the conscience of the nobility" (Richlin, 1981, p. 45). While it may seem naïve to attempt to transform morality through legislation, if Augustus's adultery and marriage laws were understood as ideological expressions, they probably did reinforce Augustus's public image as the father of his people, the first citizen, and a just ruler. As L. de Ligt points out in an analysis of the sumptuary laws of the late republic, legislations specifically aimed at restricting the privileged classes, even if they were rarely enforced, can be understood in terms of their symbolic value (De Ligt, 2002, pp. 1–45). Moreover, such legislations could potentially deter overt sexual misbehaviour. Even though the law did not put an end to adultery, knowing the legal consequences could have led to some individuals' self-discipline.

Besides the moral concern, other social and political considerations might have contributed to Augustus's legislation on sexuality and marriage. Susan Treggiari argues that "the need to encourage nuptiality and reproductivity in order to supply Rome with soldiers and administrators appears to have been most prominent in the minds of Augustus and his advisers" and that "the laws would also serve to encourage the upper classes to breed sons to succeed them in their dignities and property" (Treggiari, 1996, p. 889). Given the frequency of wars during Augustus's reign, the number of soldiers was likely an important concern for him. However, it remains unclear whether the need for encouraging reproductivity and increasing the number of soldiers was the primary motive, given that adultery does not necessarily reduce reproductivity. Moreover, although there were constant wars during the age of Augustus and therefore the need for a supply of soldiers, the republican period had always been at war, yet there had been no such legislation before Augustus. Instead of simply encouraging reproduction, the emphasis of Augustus's law was likely to ensure that the upper classes would produce legitimate children, which guaranteed not only the supply of soldiers but also legitimate succession within the elite families. This goal corresponds to the widely recognized purpose of marriage in Roman society: the production of legitimate children who would inherit their fathers' names and properties.

Subsequent Roman emperors' attention to marriage and adultery law further reflected their diverse concerns. Tiberius encouraged the reversion to family jurisdiction over unchaste married women (Suet. *Tib.* 35.1), and he intervened in the case of Appuleia Varrilla to lessen the penalty (Tac. *Ann.* 2.50). He also took measures to check women who attempted to evade legal punishments by registering as prostitutes (Suet. *Tib.* 35.2; Tac. *Ann.* 11.8.5). Domitian revived *Lex Julia* in his attempt to restore domestic and civic virtues, which suggests that he had been unsatisfied with the insufficient number of prosecutions (Treggiari, 1996, p. 893). Diocletian's legislation prohibited incestuous marriages, which, as Judith Evans Grubbs points out, "condemns close-kin marriage as

both un-Roman and offensive to the gods of the Romans, uniting concerns with private morals, public safety, and religious piety” (Grubbs, 2015, p. 115). Thus, the regulation of illicit sex continued to be seen as a public issue that affected the empire’s stability and ideological legitimacy.

Likewise, the state’s surveillance of the population was of political significance in early imperial China. The Qin and Han states managed the population through a household registration system, and they heavily restricted population movement for administrative efficiency and security purposes. Not only did absconders deserve legal punishments, but those who married absconders, whether intentionally or not, also violated the law. Two cases in the Zhangjiashan manuscript *Submitted Doubtful Cases* illustrate the state’s tight control over both population movement and individuals’ sexuality and marriage. The first case is about two eloping lovers from Qi who lived during the founding stage of the Han Dynasty, when the government restricted the movement of people between the territories of the regional lords and the territory managed directly by the imperial court as well as cross-border marriages. A male judiciary scribe named Lan, whose hometown was Linzi (former capital of the Warring States polity Qi), had been charged with relocating a woman named Nan, a member of the former ruling house of Qi, to the Han capital Chang’an.¹⁴ Having developed a relationship with her along the way, Lan hid her in a carriage and attempted to leave the Capital Area heading east. After the two lovers were arrested, the legal case revolved around the issue of exactly what crimes they should be sentenced for. As an expert in legal matters, Lan was willing to admit to the lesser crimes of “engaging in illicit intercourse” and “hiding an absconder,” but not the capital crime of “coming from [the territories of] the Regional Lords to lure.” This case was finally reported to Emperor Gaozu, who selected the more lenient sentence for Lan (Zhangjiashan ersiqi hao hanmu zhujian zhengli xiaozu, 2006, p. 93; Barbieri-Low and Yates, 2015, pp. 1195–206).¹⁵

The second case concerns a mutilated man unwittingly marrying a female absconder. A man named Jie, who had been mutilated and made a convict labourer because of his previous crime, obtained a wife named Fu from a man named Ming. In fact, Fu was an absconder who had run away from her tax obligations and probably from another marriage. Fu had taken advantage of a loophole in an imperial edict to conceal her history of abscondence, registered herself at Ming’s place, and became his servant. This case was forwarded to the Commandant of the Court in the capital because the county and commandery officials held different opinions over whether Jie should receive a lighter punishment than someone who intentionally committed the crime of marrying an absconder. Yet the Commandant declared that the statutes were quite clear and that Jie should be punished without any mercy, sentencing Jie to have his left foot amputated and once again be made a convict labourer (Zhangjiashan ersiqi hao hanmu zhujian zhengli xiaozu, 2006, p. 94; Barbieri-Low and Yates, 2015, pp. 1207–15).¹⁶ Together, the two cases demonstrate that the Han court attempted to minimize both unauthorized population

¹⁴ The relocation of the ruling elites of the former Warring States polities to the Chang’an area was the Han court’s strategy of weakening these elites’ ties with their native regions and reducing their threat to the new Han regime.

¹⁵ As Barbieri-Low and Yates (2015) point out: “Nan’s sentence is not recorded in the case record, but it is clear from her lover’s sentence that she was probably punished for the serious crime of ‘absconding and going over to [the territories of] the Regional Lords.’ The statutory punishment for both crimes was undergoing tattooing on the face and being made a hard-labor convict” (p. 1196).

¹⁶ As Barbieri-Low and Yates (2015) explain: “Normally, the sentence for marrying an absconder was to undergo tattooing on the face and be made a wall-builder. But since Jie had been tattooed for a previous crime and had his nose cut off for a subsequent offence, he was sentenced to have his left foot amputated and once again be made a convict laborer” (p. 1208).

movement and unauthorized marriage or sexual intercourse by keeping all individuals registered and by enforcing relevant statutes.

The legislation on illicit sex in early imperial China was also part of a larger ruling strategy designed to reinforce ideological unity across the empire. The increasing prominence of moral discourses and the state's efforts to establish social hierarchies contributed to a legal system that upheld gender and generational hierarchies within the family. This principle is reflected in the statutes that having sex during one's mourning periods for relatives would result in legal punishments; that a man who had sex with a female slave of his father or uncle should be sentenced to penal servitude; and that those committing incest deserve the death penalty. The Han ruling class, claiming that the Qin dynasty's rapid collapse was due to the Qin rulers' continued reliance on military force after the empire's unification, sought to solidify the Han regime through less visible forms of control (Sima, 1982, 6, pp. 282–4). Part of their ideological project was to emphasize family ethics through edicts and the legal system.

Whether the Confucianization of Chinese law started in the Han has been a contested issue. Ch'ü T'ung-tsu argues that some Han scholars who followed Confucius had started infusing classical rituals into legal practices.¹⁷ However, excavated legal documents from Qin and Han indicate that many aspects of early Chinese law were far from "Confucian" compared with those of the Tang and the Qing, not to mention that Confucianism itself changed considerably from the pre-imperial period to the Eastern Han, which adds another layer of complexity to the question. Based on existing evidence, Tomiya Itaru and Hsing I-tien have both pointed out that the Confucian five-degree mourning system did not become the legal standard of kinship until the late Eastern Han (Hsing, 2008, pp. 135–47; Tomiya, 1998, p. 268). Nor was women's legal status in early imperial China consistent with the typical Confucian ideas. As Robin Yates has demonstrated, women in the Han were legally allowed to be household heads, own and inherit property, and enter a plea in court in their own names, which would become uncommon in later times of Chinese history (Yates, 2021, p. 176). Michael Nylan and Anne Kinney have also found that women in early imperial China enjoyed much more autonomy than women in late imperial China, largely due to the Qin state's efforts to reduce household size (Nylan, 2005–06; Richlin, 1981, pp. 34–6; Kinney, 2022, p. 244). On the other hand, the legal documents analyzed in this article indicate that the hierarchies between father and son, emperor and minister, husband and wife, and higher classes and lower classes started to be integrated into Chinese statutes in the Qin and Han (Zeng, 2021, pp. 98–101; Goldin, 2012, pp. 16–30). Yoon Jaesuk has also observed that the Zhangjiaohan legal documents prescribe heavier punishments for offences against family members than the same offences against people outside of the family, and that the closer the kinship between the two parties, the heavier the punishments were (Yoon, 2004, pp. 62–3). This legal protection of hierarchical relations was generally consistent with Confucian values, but these ideas regarding family hierarchies were not exclusively Confucian; rather, they seemed to have been shared across different intellectual traditions including Confucianism, "legalism," and others. An incest case that happened during Emperor Wu's reign indicates that the Han authorities' concern over family ethics was connected to their views of the cosmological order and civilization as well. According to *Shi ji*, the King of Yan, whose name was Dingguo, had

¹⁷ In his 1947 book, *Zhong guo fa lü yu Zhong guo she hui*, Ch'ü argued that the Confucians and legalists ceased their dispute on the necessity of law in the Han, but the Confucianization of Chinese law did not start until after the Han. In his 1948 article, "Zhong guo fa lü zhi ru jia hua," Ch'ü changed his opinion, contending that Han Confucians such as Jia Yi and Gongsun Hong had begun to influence legal policies and legal cases with classical texts and rituals. This view was incorporated into the English version of his book, *Law and Society in Traditional China*. Liu Yongping argues against Ch'ü's view of the Confucianization of law in early China but, as Randall Peerenboom comments, goes too far in rejecting the idea that the *li* reflected Confucian concerns for hierarchical roles and claiming that Confucius was egalitarian. See Ch'ü (1947); Ch'ü (1948); Ch'ü (1961); Liu (1998).

sexual relations with his father's concubine, took his younger brother's wife as a concubine, and had sexual intercourse with his own three children. Emperor Wu ordered his officials to discuss this case. These officials concluded: "Dingguo conducted the behaviour of the beast, disrupted human ethics, and is against Heaven. He should be put to death" (Sima, 1982, 51, p. 1997).¹⁸ Their comment echoes a paragraph in the classic *Li ji* (*The Classic of Rites*):

鸚鵡能言，不離飛鳥；猩猩能言，不離禽獸。今人而無禮，雖能言，不亦禽獸之心乎？夫唯禽獸無禮，故父子聚麀。是故聖人作，為禮以教人。使人以有禮，知自別於禽獸。（Sun, Shen and Wang, 1989, 1.10, pp. 10–1）

The parrot can speak, and yet is nothing more than a bird; the ape can speak, and yet is nothing more than a beast. Here now is a man who observes no rules of propriety; is not his heart that of a beast? But if (men were as) beasts, and without (the principle of) propriety, father and son might have the same mate. Therefore, when the sages arose, they framed the rules of propriety in order to teach men, and cause them, by their possession of them, to make a distinction between themselves and brutes. (Legge)

In the classicist view, humans are distinguished from beasts in that they follow rituals to maintain social and familial order. Thus, the severe penalty for illicit sex during mourning periods coincided with the spirit of classical rituals, in which the mourning system occupied a central position. Although the actual rituals practised in the Han were not as rigid as those prescribed in the classical texts, with the increasing celebration of filial piety among Han rulers and elites, having illicit sexual intercourse during the mourning periods for one's parents came to be viewed as unfilial. The statutes against illicit sex during mourning periods thus also served as an ideological expression of the imperial state. In Paul Goldin's words, the incorporation of family hierarchy into early Chinese law indicated "a revived moralistic consciousness in government" (Goldin, 2012, p. 30).

A common function of the Roman and Han adultery laws was to justify the state's takeover of the power of killing from private hands. The states of both empires restricted the private killing of adulterers within the household. Under the *Lex Julia*, the father of the adulterous woman had the right of killing her and her adulterer at the same time if the adultery was found in his home (*Digest* 48.5.24 (23).4), whereas the husband, even if discovering the adultery in his home, did not have the right of killing his wife but only the limited right of killing certain types of adulterers, such as a pimp, a singer or a dancer, one convicted of a criminal offence and not restored to full civil rights, or a freedman of his immediate family (*Digest* 48.5.25 (24)). By transferring the right of killing the adulterers partly to the father of the woman, the law shows the imperial power's endeavour to restrict the authority of the husband as the rulers worked to extend state power into private realms. As O. F. Robinson puts it, although Augustus might have had other considerations, his legislation of making *crimina publica* adultery and *stuprum* was "more likely because he wished jurisdiction in all matters to go through the courts, which, ultimately, he controlled" (Robinson, 1995, p. 58). Likewise, in early imperial China, the adulterers could be killed by the woman's husband only when they were caught during the act. A case in the *Models for Sealing and Investigating* (*feng zhen shi*) from Shuihudi mentions that the accuser had arrested the two adulterers on the spot (Shuihudi qinmu zhujian zhengli xiaozu, 1990, p. 163). A case in the *Submitted Doubtful Cases* (*Zou yan shu*) from Zhangjiashan was debated in court because the adulterers were not caught during the act (Barbieri-Low and Yates, 2015, pp. 1380–5). In the report, the judges cite a legal statute that

¹⁸ The Chinese original reads: 定國禽獸行，亂人倫，逆天，當誅。

“[o]ne who attempts to arrest those engaged in illicit intercourse must investigate it and have caught them in the act” (Barbieri-Low and Yates, 2015, p. 1381). Two cases in the Yuelu documents also show that, under the Qin law, it was important to catch those engaging in illicit sex during the act, otherwise the authorities would not prosecute them (Zhu and Chen, 2013, pp. 196–213; Yates, 2021, p. 167). This restriction prevented domestic violence under the excuse of adultery and strengthened the state’s monopoly of legitimate force—a key definitive element of state power in many social theories.

6. Conclusion

In both the early Roman empire and early imperial China, the state took legal measures to prohibit illicit consensual sex in order to consolidate the new imperial order administratively and ideologically. While each empire grounded these legal statutes and practices in its cultural tradition, both empires extended state power into the private realms that had been largely left to customs and individual will. This phenomenon shows that the establishment of an empire involved, on the one hand, the breadth of its reach through military expansion and political integration and, on the other hand, the depth of its penetration from the public into the private realm. The state’s regulation of sexuality constituted part of the empire-building project, which entailed clearer ethical norms and more control of the subjects’ bodies than in pre-imperial times.

In the sense that the two empires both consolidated the state and the ruler’s power through controlling bodies, Foucault’s concept of biopolitics is relevant for understanding imperial power in the ancient world. While directly applying Foucault’s concept to ancient times would risk anachronism, political control of the individual’s body and sexuality undeniably existed in the ancient world. In Foucault’s *The History of Sexuality*, biopower refers to modern, non-violent, diffused means of power over life and the population, as opposed to the pre-modern forms of sovereignty and law, “whose arm par excellence is death” (Foucault, 1978, p. 144). Therefore, the law is largely out of the picture in Foucault’s analysis of the history of sexuality. In his other renowned work, *Discipline and Punish*, Foucault argues that the pre-modern death penalty as a public spectacle was replaced by the new disciplinary power over the body found in places such as schools, hospitals, and military barracks, which led to the birth of the modern prison (Foucault, 1995, passim). Both of these works point to a radical break between power in the pre-modern world and power in the modern era.¹⁹

However, although the ancient Roman and Chinese states wielded power over individuals’ bodies largely through law and force, the link between power and control over the human body bears a striking continuity from ancient to modern societies. Some scholars have gone so far as to argue that “biopolitics”—in the general sense of control over the human body—existed in the ancient world. Focusing on Augustus’s *Res Gestae* and Tacitus’s *Annals*, Shreyaa Bhatt argues that the absolute sovereignty of the emperor did not preclude the advancement of techniques to classify, hierarchize, and normalize individuals or the discourses about the enhancement and protection of the population (Bhatt, 2017, pp. 72–93). Likewise, Maurizio Meloni challenges established views about the history of biopower by focusing on ancient Roman writings and practices of corporeal permeability. Through an analysis of three Roman institutions—bathing, urban architecture, and the military—Meloni shows that

¹⁹ In his final lectures on governmentality, however, Foucault reincorporated law and sovereignty into a triangular power nexus of sovereignty-discipline-government. See Foucault (2009), p. 107. In this framework, what changed after the eighteenth century was not a replacement of the “legal age” by the “disciplinary age,” but rather a shift in “the system of correlation between juridico-legal mechanisms, disciplinary mechanisms, and mechanisms of security.” Foucault (2009), p. 8.

technologies aimed at fostering and regulating life did exist in classical antiquity at the population scale (Meloni, 2021, pp. 91–115).

Regardless of whether the term “biopolitics” in the strictly Foucauldian sense applies to the ancient world, this study has complicated the Foucauldian view of the pre-modern period, demonstrating that the state’s regulation of the human body and sexuality existed in early empires and that it functioned not purely through force. Even though they may not have been strictly executed, legal statutes against adultery and incest could be read as the law-makers’ ideological expressions and be used for political manoeuvring. In the words of Charles Sanft, the law in early imperial China was a form of political communication that “reached from the very top of society to the bottom” through documents publicly posted and read (Sanft, 2014, pp. 134–45). These legal statutes spread the ruler’s positive public image, set ethical norms for imperial subjects, and gave the ruler space for manipulating power by exercising their discretion in legal cases. Thus, laws on adultery and incest contributed to the state power’s extension to the human body in various ways.

This study also sheds light on the legal regulations of sexuality in later periods of Chinese history. Although each historical period presented its unique problems, a common concern of imperial states throughout Chinese history was to maintain proper hierarchies in both the public and private spheres, especially when significant social changes were challenging orthodox values. Matthew Sommer argues that, in the eighteenth century, the Qing state initiated new efforts to enforce rigid gender roles to cope with disturbing social and demographic changes, criminalizing all kinds of sexual behaviour that fell outside the boundary of heterosexual marriage (Sommer, 2002, pp. 8–15). This change echoes the transition from the pre-imperial to the early imperial period in both early China and Rome, which brought rapid demographic shifts and interregional integration, necessitating increased state control of the subjects’ bodies.

Of course, the legal treatments of illicit sexual intercourse varied significantly across societies and changed over time in Chinese history. This article has outlined some major differences between early China and Rome, especially in terms of the legal procedures, the severity of punishments, and the enforcement of legal statutes on the upper classes. Other scholars have paid attention to how the law changed between early imperial China and late imperial China. Shimokura observes that the mother and the wife generally had higher statuses in the Qin and Han legal systems than in the legal systems after the Han. For instance, incest in the Qin and Han was defined as illicit sexual intercourse between siblings born by the same mother rather than the same father (Shimokura, 2005, pp. 156–9). Compared with the Qin and Han statutes, the Tang code specified the kinship between the involved parties according to their mourning obligations to each other, indicating the formal incorporation of Confucian rituals into the law since the Taishi Code of the Western Jin dynasty (Chen, 2001, p. 111; Zhu, 1985, pp. 111–8; Hsing, 2008, p. 135). The Tang code continued the prohibitions of illicit sexual intercourse or marriage during the parents’ mourning periods and of those between people of debased status and people of commoner status, but the Tang code regulated more categories of illicit sexual intercourse than the Qin and Han legal statutes did, including those involving Buddhist or Daoist clergy (Zhangsun et al., 1983, pp. 253–74, 493–7).

The state’s regulation of sexuality and marriage in late imperial China became even more comprehensive than that of the Tang. Shimokura notices that the Ming and Qing codes included several new crimes related to illicit consensual sex compared with the Tang code, namely “allowing one’s own wife and concubines to commit illicit sex (*zong rong qi qie fan jian* 縱容妻妾犯姦),” “daughter-in-law falsely accusing her father-in-law of raping her (*wu zhi weng jian* 誣執翁姦),” “government officials having intercourse with prostitutes (*guan li su ji* 官吏宿妓),” and “buying decent people’s children as prostitutes or entertainers (*mai liang wei chang* 買良為娼)” (Shimokura, 2005, p. 110; Agūi et al., 2015,

pp. 303–31). As Matthew Sommer demonstrates, the Qing legal system was concerned with all kinds of sexuality that challenged heterosexual marriage, such as prostitution and sodomy. The Qing state's emphasis on gender roles—defined by marriage—rather than status also appeared to have been a new phenomenon (Sommer, 2002, p. 5). Despite the significant changes from early imperial China to late imperial China, however, it is clear that the imperial state had lasting concerns over its subjects' sexuality, body, and family ethics. As is discussed in Chaoran Ma's article in the same Special Issue, the state's surveillance of the gendered body continued into the late nineteenth and early twentieth centuries during the creation of modern Chinese prisons.

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