

Filial Piety (*Xiao*) and the Family in Pre-*Tang* Law

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Introduction

Xiao, the term normally translated as ‘filial piety’, represents one of the most important values in Chinese culture since at least the beginning of the Western Zhou dynasty. Although it antedates Confucius, it becomes absorbed by Confucianism and eventually emerges as the central Confucian virtue¹. Filial piety has thus provided a main plank of the thesis known as ‘the Confucianization of the law’². According to this thesis, the law in the period from the Han to the Tang gradually incorporated, and made the content of legal obligations, the duties enjoined by Confucian morality. One such duty was respect for obedience to one’s parents or, in a more diluted fashion, to one’s senior relatives. From this perspective, a recent study by a Chinese scholar has argued that, during the Han dynasty itself, filial piety gradually became wholly fused with the law and so became the base of a variety of legal as well as moral obligations³. It is not the purpose of this paper to trace the precise development of the

¹ I have said more about this in *Filial Piety and the Pre-T’ang Law*, in *Summa Eloquentia. Essays in honour of Margaret Hewett*, edited by R van der Bergh (Fundamina, University of South Africa, 2002), 138-65.

² This term was introduced by T’ung-Tsu Ch’ü, *Law and Society in Traditional China* (Westport, Connecticut: Hyperion Press, 1980, first published 1960), 267-79.

³ Hou XINYI, *Xiao (Be Filial) and the Legal System in the Han Dynasty*, *Cass Journal of Law* 117 (1998), 134-47. Cai YONGDONG, *Legal Thoughts on the Jian Excavated from the Han Dynasty’s Grave in Zhangjia Mountain*, *Cass Journal of Law* 2003 (5), 139-47, has also emphasised the influence of Confucian moral principles on the treatment of filial piety in the Qin and Han *lii*.

law relating to filial piety in the period from the Han to the Tang. Rather, its purpose is to review the general thesis which treats filial piety fundamentally as Confucian virtue and hence the further thesis which holds that the incorporation into the law codes of rules concerning filial behaviour is a prime example of 'the Confucianization of the law'. The conclusion of the paper broadly is that the influence of Confucianism has been considerably overstated.

Our first problem is the meaning of 'filial piety'. *Xiao* denotes a moral value prominent in the Zhou as well as the Han period, but the question is: does it bear the same sense during the Western Zhou as during the Eastern Zhou or Han? In particular, did it experience a fundamental re-interpretation at the hands of Confucius and his followers?

It might be argued that, even though *xiao* is a pre-Confucian virtue, it is the particular interpretation given to it by Confucius that later influenced the law codes. Some modern Western scholarship might, indeed, be cited in support of such an argument. We cite two examples. Yuri Pines has argued that prior to Confucius, that is, throughout the Western Zhou period, *xiao* denoted only the worship of deceased ancestors manifested in the offering of sacrifices. It did not refer to the support of living parents. Confucius and his followers first re-interpreted *xiao* in the sense of 'nurturing one's living parents'⁴. Keith Knapp, similarly, has taken a restricted view of the meaning of *xiao* during the Western Zhou. However, he interprets it as referring at this time primarily not to the worship of deceased ancestors but to the actual feeding of living parents. During the Warring States, the *Ru* (normally taken to be the Confucians) re-interpreted *xiao* and gave it the less physical, broader meaning of 'obeying one's parents'⁵.

What makes it difficult to accept in its entirety the view either of Pines or Knapp is the evidence supplied by two references to *xiao* in the oldest section of the *Shangshu*, which goes back to early Western Zhou times. The first is from the *Kanggao*, where king Wu in his instructions to the young prince appointed to govern the former Shang heartlands urges upon him the importance of fostering proper

⁴ Yuri PINES, *Foundations of Confucian Thought. Intellectual Life in the Chunqiu Period, 722-453 B.C.E.* (Honolulu: University of Hawai'i Press, 2002), 187-99.

⁵ K.N KNAPP, *The Ru Interpretation of Xiao, Early China* 20 (1995), 195-222.

relationships between parents and children and elder and younger brothers. Particularly detestable, indeed to rank among the worst offences, are *buxiao* and *buyou*. *Buxiao* is translated by Karlgren as “when a son does not respectfully manage his service to his father”, and *buyou* as “(the younger brother) cannot respect his elder brother”⁶. The passage speaks not only of the duty of the son to the father or the younger to the elder brother but also of the reciprocal duty of the father to love his son, and of the elder brother to treat with kindness his younger brother.

The second reference comes from the *Qiugao*, a set of instructions similar to the *Kanggao*, addressed to the same prince, this time on the evils of drunkenness among his new subjects. First, the advice of king Wen is cited. Where the tilling of the soil is encouraged, the people “will willingly listen to the regular instructions of their grandfathers and fathers”. Then king Wu adds: “The people of the land of Mei (Shang)... should make whole-hearted their cultivation of the millet and hasten about serving their old men and seniors. They should diligently lead their carts and oxen and far away manage the trading of commodities and (thus) filially (*xiao*) nourish their parents⁷. The parents will be happy”⁸.

Both passages seem to be referring to the welfare of living parents at the hands of their children, not to the sacrificial offerings to be paid to deceased ancestors. Nor is it obvious that the duty of the son to the parent is merely to provide food and not to obey. Indeed, the full context of the passage from the *Qiugao* speaks of hearing (and obeying) the instructions of parents⁹.

Confucius himself in the *Lunyu* defined *xiao* as obedience to and respect for parents, not just seeing that they had adequate food¹⁰. We

⁶ B. KARLGREN, *The Book of Documents* (reprinted from *The Bulletin of the Museum of Far Eastern Antiquities* Stockholm 22, 1950), 42, para. 16; compare J. LEGGE, *The Chinese Classics* 3 (reprinted Taipei), 392-3.

⁷ The phrase *yong xiao* is explained differently by Pines (following Zha Changguo) as “Let (the people) be *xiao* [i.e. perform ancestral sacrifices] and nurture their parents”, *Foundations of Confucian Thought*, 297-8, n88.

⁸ KARLGREN, *Book of Documents*, 43, para. 5,6; compare LEGGE, *Chinese Classics* 3, 403-4.

⁹ See D Holzman, “The Place of Filial Piety in Ancient China”, *Journal of the American Oriental Society* 118.2 (1998), 187-9.

¹⁰ *Lunyu* 11.5,7 (A WALEY, *The Analects of Confucius* (London: Allen and Unwin, 1938), 88-9).

need not here go into the controversies in modern scholarship as to the exact role played by *xiao* in the thought of Confucius and his followers¹¹. The point which has to be stressed is that *xiao*, even in the sense of obedience to parents, is not a specifically Confucian virtue. It is a value which arguably played an important role in Western Zhou society, as it did in the Warring States and Han dynasty. The Western Zhou kings, just like later rulers, encouraged and promoted it.

Why do we find *xiao* so extolled by the early Western Zhou rulers? The answer is unlikely to lie just in their appreciation of it as a moral quality whose cultivation was essential for the development of the individual. What the Western Zhou kings were primarily interested in as rulers, especially after the conquest of the Shang, was the maintenance of order within their domains. Order was greatly facilitated through the inculcation of a moral and legal duty that enjoined the young to respect and obey their elders. This duty, crystallised most strikingly in the form of *xiao*, was equally useful to heads of families and rulers. *Xiao* was a virtue seen as crucial to the maintenance of order within the family and hence within society¹².

It is not surprising that *xiao* later came to be associated with another virtue, *chong* (loyalty). Just as 'order' within the family was maintained through the obedience of children to parents (and by extension of junior to senior relatives), so 'order' within the state was maintained by the obedience of subjects to the ruler. Modern scholars have pointed out the close connection between *xiao* and *chong* in the

¹¹ See, for example, PINES, *Foundations of Confucian Thought*, 197-9; YONGPING LIU, *Origins of Chinese Law. Penal and Administrative Law in its Early Development* (Hong Kong: Oxford University Press, 1998), 94-5; HOLMGREN, *Journal of the American Oriental Society* 118.2 (1998), 190; M. NYLAN, *Confucian Piety and Individualism in Han China*, *Journal of the American Oriental Society* 116.1 (1996), 2-5.

¹² On the point see M. KERN, *The Stele Inscriptions of Ch'in Shih-huang: Text and Ritual in Early Chinese Imperial Representation* (New Haven, Connecticut: American Oriental Society, 2000), 167-70; PINES, *Foundations of Confucian Thought*, 199-200. Some writers have stressed the importance of the (non-Confucian) concepts of 'patrilinealism' and 'patriarchy' in Zhou society, both of which underline the pre-eminent position of the senior male in the family and society and place *xiao* in its anthropological context: P. EBREY, *Women, Marriage, and the Family in Chinese History*, in *Heritage of China. Contemporary Perspectives on Chinese Civilization*, edited by PS Ropp (Berkeley, Los Angeles, and Oxford: University of California press, 1990), 197-223; B. HINSCH, *Women in Early China* (Lanham, Boulder, New York, and Oxford: Roman and Littlefield, 2002), 10-11, 48-9, 55, 139-40, 161-3.

Xiaojing, a work which became influential in government from the time of the Western Han dynasty. The stress in the *Xiaojing* is just as much on loyalty to the ruler as on obedience to parents; indeed, the former follows from the latter¹³. The same point appears in the complementary work to the *Xiaojing*, the *Nüxiaojing*, attributed to a Miss Zheng in the middle of the eighth century AD. This work has a section headed 'Bringing Order through Filial Piety' which stresses the importance of filial piety for the maintenance of order in the family, so enabling the people better to serve their rulers¹⁴.

Both the *Xiaojing* and the *Nüxiaojing* are normally considered 'Confucian' writings, but we see the same kind of point made by the 'legalist' author Han Fei. In the collection of essays attributed to Han Fei there is one headed *Chong Xiao* (chapter 20). In this essay Han Fei cites approvingly the principle: "The official serves the ruler, the son serves his father, the wife serves her husband. If these things are done then all under heaven is ordered; if these three are not done then all under heaven is in chaos"¹⁵. Equally, we find the notoriously 'legalist' First Emperor extolling 'the way of filial piety (*xiaodao*)' in his stele inscriptions¹⁶. It is not helpful to attempt to characterise such statements in terms of the dichotomy between 'Confucianism' and

¹³ HOLMGREN, *Journal of the American Oriental Society* 118.2 (1998), 191-2; NYLAN, *Journal of the American Oriental Society* 116.1 (1996), 4; Ikeda TOMOHISA, *The Evolution of the concept of filial piety (xiao) in the Laozi, the Zhuangzi, and the Guodian bamboo text Yucong*, in *Filial Piety in Chinese Thought and History*, edited by A Chan and S Tan (London and New York: Routledge Curzon, 2004), 25. Generally on the relationship between 'filial piety' and 'loyalty' see Lee CHEUK-YIN, *The Dichotomy of Loyalty and Filial Piety in Confucianism: Historical Development and Modern Significance*, in *Confucianism and the modernization of China*, edited by S Krieger and R Trauzettel (Mainz: v. Hase & Koebler, 1991), 96-115.

¹⁴ P. EBREY, *The Book of Filial Piety for Women Attributed to a Woman Née Zhang* (ca. 730), in *Under Confucian Eyes. Writings on Gender in Chinese History*, edited by S Mann and Y Cheng (Berkeley, Los Angeles, and London: University of California press, 2001), 47-69.

¹⁵ *Hanfeizi jichi* (Hong Kong, 1976), II, 1107-8; N. KUTCHER, *Mourning in Late Imperial China. Filial Piety and the State* (Cambridge University Press, 1999), 13; W.K. LIAO, *The Complete Works of Han Fei Tzu. A Classic of Chinese Political Science. Volume II* (London: Probsthain, 1959), 312. There is linguistic evidence to suggest that chapter 51 may have been written by a Qin or Han scholar after Han Fei's death in 233 BC. See Hsü DAU-LIN, *The Myth of the "Five Human Relations" of Confucius*, *Monumenta Serica* XXIX (1970-71), 30.

¹⁶ KERN, *Stele Inscriptions of Ch'in Shih-huang*, 13.

‘Legalism’, or to suppose that such apparently ‘legalist’ statements in truth betray the influence of Confucianism¹⁷.

Laws Relating to Xiao

1. *Principal Offences*

The interest of the state in the maintenance of order through the inculcation of the value of submission to authority, whether exhibited in the person of the father or the ruler, accounts, fundamentally, for the inclusion in the Qin, Han and later codes of an increasing number of rules concerned with *xiao*. The Qin laws of the third century BC already provide for the punishment by the state of an unfilial child. The models of case reports (*yuanshu*) found in the collection of laws include two that deal with erring sons. In one a father has denounced his son to the authorities and requested them to fetter his feet and banish him for life to Shu; the authorities complied with the request¹⁸. We are not told the ground of the father’s denunciation but it may have been behaviour on the part of the son regarded as unacceptable by the father. Another document records a denunciation by a father precisely on the ground that the son had been unfilial (*buxiao*). He requested the authorities to put the son to death. The arrest of the son is ordered; under interrogation he confesses the offence. It is not stated whether he is actually put to death, but it seems likely that the authorities were prepared to accede to the father’s wishes¹⁹. Another text (not from the *yuanshu*) even puts a case in which an aged person

¹⁷ Compare KERN, *Stele Inscriptions of Ch’in Shih-huang*, 167-8, criticising the analysis of the Qin laws on *buxiao* as an amalgam of Confucianism and Legalism in D BODDE, *The State and Empire of Ch’in*, in *The Cambridge History of China. Volume 1. The Ch’in and Han Empires 221 B.C. – A.D. 220*, edited by D Twitchett and M Loewe (Cambridge: Cambridge University Press, 1986), 75-6.

¹⁸ *Zhongguo Zhenxi Falü Dianji Jicheng*, edited by Liu Hainian and Yang Yifan, Part A, volume 1 (Beijing, 1994), 658; K.C.D. MCLEOD and R.D.S. YATES, *Forms of Ch’in Law: An Annotated Translation of the Feng-chen shih*, *Harvard Journal of Asiatic Studies* 41 (1981), 148-50 (5.16); A.F.P. HULSEWÉ, *Remnants of Ch’in Law. An annotated translation of the Ch’in legal and administrative rules of the 3rd century B.C. discovered in Yün-meng Prefecture, Hu-pei Province, in 1975* (Leiden; Brill, 1985), 195-6 (E17).

¹⁹ *Zhongguo Zhenxi Falü Dianji Jicheng*, A, 1, 660; MCLEOD and YATES, *Harvard Journal of Asiatic Studies* 41 (1981), 150-2 (5.17); HULSEWÉ, *Remnants of Ch’in Law*, 196-7 (E18).

denounces someone else's son for being unfilial (*buxiao*), requesting that he be put to death²⁰.

Another aspect of 'unfilial behaviour' is considered in the Qin laws. The *lü* provided: "children denouncing their father or mother.....are unofficial denunciations; they are not to be accepted"²¹. There are a number of problems with the precise interpretation of this text, into which we need not here go. It is sufficient to note that the Qin law in the third century BC already prohibited a child from bringing an accusation against a parent. It is likely that such conduct would have amounted to *buxiao*.

We have further valuable information on the law of the Qin empire contained in a case decided by the highest court around 200 BC²². Although this decision was made in the first years of the Han dynasty, the laws which it cites are almost certainly those adopted from the Qin *lü*. The case did not concern *buxiao* as such, but the conduct of a widow who, while mourning at the coffin of her deceased husband, had intercourse with a man. The very fact that the court used the offence of *buxiao* as an analogy justifying the punishment of the widow already testifies to the importance in law of this notion²³. However, more important is the information revealed by the judgments as to the actual (Qin) *lü* on *buxiao*. Two statutes²⁴ are cited, one to the effect that *buxiao* entailed the punishment of abandonment

²⁰ *Zhongguo Zhenxi Falü dianji Jicheng*, A, 1, 571; HULSEWÉ, *Remnants of Ch'in Law*, 147-8 (D85).

²¹ *Zhongguo Zhenxi Falü Dianji Jicheng*, A, 1, 587; HULSEWÉ, *Remnants of Ch'in Law*, 148-9 (D87).

²² This forms part of the *Zouyanshu* (*Reports on Doubtful Cases*), now published as part of a collection entitled *Zhangjiashan Hanmu Zhujian* (247hao mu) (Beijing: Wenwu, 2001), 227-8 (slips 180-96). On the case see U. LAU, *Sensationelle Funde aus Grab M247 in Zhangjiashan/Provinz Hubei. Juristische Dokumente vom Beginn der chinesischen Kaiserzeit*, *Rechtshistorisches Journal* 20 (2001), 283-8, and *Die Rekonstruktion des Strafprozesses und die Prinzipien der Strafzumessung zu Beginn der Han-Zeit im Lichte des Zouyanshu, in Unde folge nun dem, was mein Herz begehrt. Festschrift für Ulrich Unger zum 70. Geburtstag*, edited by R Emmerich and H Stumpfheldt (Hamburg: Hamburger Sinologische Gesellschaft, 2002), 382-91.

²³ We may compare another case from the *Zouyanshu*, decided in the reign of Gaozu after 200 BC, in which a master who had beaten his slave to death sought to justify his action on the plea that the slave had been *buxiao*, although this turned out not to have been so: *Zhangjiashan Hanmu Zhujian* (247hao mu), 216-7 (slips 49-50); Lau, *Rechtshistorisches Journal* 20 (2001), 281-2.

²⁴ For these statutes see also the code of 186 BC at note 29 below.

in the market (beheading), the other to the effect that instigating or instructing (*jiao*) another to be unfilial constituted an offence next in order to *buxiao* itself, that is, the punishment entailed was tattooing and performing labour as a *chengdan chong*²⁵.

There does not appear to have been a definition in the *lü* of the kind of behaviour that constituted *buxiao*. But the *dingweishi* Shen (clerk to the commandant of justice), who gave the (dissenting) opinion that finally resolved the case, cites two examples of behaviour that constituted *buxiao*: a failure on the part of a son to provide food for his father for three days, and a failure on the part of a son to listen to and obey the teaching and instructions of his father²⁶.

We may now turn to the evidence of the code of 186 BC itself²⁷. This is likely to have followed the Qin code. The provisions of the Han code are highly illuminating since, even more than the Qin laws of the third century, they show that the law had developed comprehensive rules on different aspects of ‘unfilial’ behaviour well before the date at which any specific Confucian influence can be shown to have influenced the legislators. The *zeilü* contain two important statutes. The first stipulates that, where a child *zei* (intentionally) kills or wounds a parent, the punishment is to be exposure of the head in the market²⁸. This was a more severe punishment than simple beheading. It shows that parricide was a more serious offence than the deliberate killing of another (unrelated) person.

The second statute is a composite of various other rules concerned with unfilial behaviour²⁹. It establishes the punishment of abandonment in the market (beheading without exposure of the head) in the following circumstances: (i) where a child has plotted to kill a parent, (ii) where a grandchild or child has beaten or cursed a paternal grandparent, a concubine (or second wife) of a paternal grandfather, or a stepmother, and (iii) where a child has been denounced by a

²⁵ Zhangjiashan Hanmu Zhujian (247hao mu), 227 (slips 181-2).

²⁶ Zhangjiashan Hanmu Zhujian (247hao mu), 227 (slips 189-91).

²⁷ This code, entitled *Ernian lüling*, has also been published in Zhangjiashan Hanmu Zhujian (247hao mu). It is cited here according to its title. See also Cai YONGDONG, *Cass Journal of Law* 2003 (5), 140-2, although his (Confucian) interpretation of the Han statutes of 186 BC differs from that presented here.

²⁸ *Ernian lüling*, 139 (slip 34).

²⁹ *Ernian lüling*, slips 35-7).

parent to the authorities as 'being unfilial (*buxiao*)'. The next section of the article elaborates the position with respect to denunciation. A parent may not denounce a child as unfilial where that child has committed an offence entailing the punishment of being a *chengdan chong* or *guixin baican* or a more serious punishment, or where the child has become someone's slave. The reason seems to be that in the first case the child should be punished only for the specific offence he has committed, and in the second that the parent no longer had rights over the child. Should the parent be aged 70 or over, a denunciation of unfiliality must be made three times, each on a different day. This seems designed to minimise the chance of frivolous or unwarranted denunciation. Finally, should one instigate or teach (*jiao*) a child to be unfilial, the punishment is to be tattooing and becoming a *chengdan chong*. This rule is clearly taken from the Qin statutes³⁰, and we must suppose that the other rules have likewise been derived from the Qin laws.

Another important provision is contained in the *gaolü*. One statute states inter alia that, where a child accuses a parent to the authorities of having committed an offence, the accusation is not to be heard and the child is to be abandoned in the market³¹. This is a more general version of rules already present in the Qin laws of the third century BC³². It appears to be a corollary of the prohibition of accusation that a child should conceal the offence of a parent. Yet it is not until 66 BC that we hear of a specific privilege of concealment. In that year emperor Xuan issued a decree which commented on the love between parent and child and the bond between husband and wife. He ordered that, where a child took the lead in concealing (*xien ni*) a parent, a wife concealed her husband, or a grandchild concealed a grandparent, there was to be no liability (that is, as an accessory to the offence of the person concealed)³³. The point perhaps is that the law was intended to give the child, grandchild, or wife immunity from prosecution where they had taken some active step in hiding or otherwise helping a parent, grandparent, or husband who was wanted

³⁰ See above at note 25.

³¹ *Ernian liling*, 151 (slip 133).

³² See above at note 21.

³³ H.H. DUBS, *The History of the Former Han Dynasty by Pan Ku. Volume Two* (American Council of Learned Societies, 1944), 224.

by the authorities for an offence. Such active support was distinct from a mere failure to accuse. Under the code of 186 BC, specific punishments were imposed on a person who ‘concealed (*ni*)’ another’s offence; no exception was made for children in relation to parents³⁴. One may interpret emperor Xuan’s edict on concealment as a strengthening of the earlier prohibition of accusations against parents.

The rules on filial piety found in the Han code of 186 BC passed not only into the law of Eastern Han, but also into the laws of the Wei, Jin, southern, and northern dynasties. There might from time to time be significant differences in the level of punishment. For example, a fragment of the Han *zeilü*, unearthed at Dunhuang, states that for beating a parent the punishment is to be penal servitude for two years, while for cursing it is reduced to a fine of one catty of gold³⁵. This fragment, which represents the law of a period no earlier than the first century BC, is of interest because the punishments are far lighter than those known in any other epoch for the same offence.

The Tang code, drawing on the law of the earlier dynasties, has an elaborate array of offences concerned with ‘filial piety’, scattered through a number of books. We need not recite here the details of the principal offences. For our purpose, what is significant is that two of the ‘ten abominations (*shio*)’ are concerned with them. The fourth abomination entitled ‘contumacy (*oni*)’, commences with the offences of beating or plotting to kill one’s paternal grandparents or parents³⁶. The seventh, entitled ‘lack of filial piety (*buxiao*)’, comprises the offences of bringing accusations against one’s paternal grandparents or parents, cursing them, having a separate household register or separate property in their lifetime, failing to support them, as well as various other ‘unfilial’ acts³⁷. Disobedience to the instruction of parents or paternal grandparents is not specifically included in the offences falling under the abomination of *buxiao*. But article 348 seems to subsume such behaviour under the head of ‘failing to support’: “All cases of sons or grandsons in the male line who violate

³⁴ *Ernian lüling*, 155 (slip 167).

³⁵ *The Institute of Archaeology of Gansu Province. A General Account of Inscribed Slips of the Han Dynasty from Xuanquan and Dunhuang*, *Wenwu* 2000 (5), 36.

³⁶ Article 6: W. JOHNSON, *The T'ang Code Volume I. General Principles* (Princeton, New Jersey: Princeton University Press, 1979), 66.

³⁷ Article 6: JOHNSON, *T'ang Code I*, 74-7. see further below at note 95.

orders, or who are deficient in support of their elders, are punished by two years penal servitude³⁸. The final abomination on ‘incest (*neilun*)’ includes the specific offence of illicit sexual intercourse with a concubine of one’s father or paternal grandfather³⁹.

It is impossible, in the light of the evidence from the Qin laws and the Han code of 186 BC, to explain the inclusion in the Tang code of the offences relating to ‘filial piety’ as a result of the influence of Confucian teaching on the legislators. The code simply inherited and built upon a long history of offences concerned with filial piety. This tradition originated in and was maintained by considerations that had nothing specifically to do with Confucianism, even though it came to be supported by that ideology. But this still leaves us with the possible argument that the classification of the offences concerned with ‘filial piety’ as falling within the fourth or seventh abomination is due to Confucian inspiration. With respect to this possibility, we may make two points. First, the actual terminology of ‘ten abominations’ may well have been derived not from Confucian, but from Buddhist teaching. Sui emperor Wen, the initiator of the Kaihuang code that provided the model for the Tang code, was a devote Buddhist⁴⁰. The second point is that the underlying reason for the emphasis in the Tang code, as in earlier codes, on the offences concerned with ‘filial piety’, and their classification by the Sui and Tang codes as falling within the ‘ten abominations’ is the concern of the state with order in the family as the foundation for loyalty to the emperor. It is significant that the abomination of *oni* follows immediately after the first three abominations on plotting rebellion and other behaviour subverting the authority of the state.

2. Breach of Mourning Obligations

So far we have considered what may be termed the ‘core’ offences constituting *buxiao*. Our argument has been that their presence in the Tang and pre-Tang law codes cannot be explained as a result of

³⁸ W. JOHNSON, *The T'ang Code Volume II, Specific Articles* (Princeton, New Jersey: Princeton University Press, 1997), 399.

³⁹ JOHNSON, *T'ang Code* I, 82.

⁴⁰ See in particular Zhou DONGPING, *New Explanation of the Origin of the “Ten Evils” on the Kaihuang Statutes of the Sui Dynasty*, *Chinese Journal of Law* 2005 (4), 133-7.

Confucian influence. However, we also have another group of offences that developed later and appear to have been treated as less serious manifestations of *buxiao*. These embrace a variety of misdeeds that might be committed while in mourning for a parent, amounting collectively to a failure to comply with the proper mourning rituals. Can we discern in this group of offences more obvious traces of Confucian influence? With respect to the ritual obligation to mourn a parent, we may distinguish the period of time for which mourning was required from the kind of act prohibited during mourning.

From the perspective of the administrative and penal law, the obligation to mourn a parent for three years arises in the context of leave granted officials. The government, faced with the practical necessities of administration, had to consider whether it was feasible to allow officials, especially those with large responsibilities, to leave their posts to mourn a parent, and, if so, for how long they should be permitted to be away. Although most of our information comes from the Han, there is extant one relevant Qin statute.

The case from the *Zouyanshu* already cited contains a reference to a statute (*lǚ*) that almost certainly was taken from the Qin law. This stated: “All those who serve in a district office (*xian*) return home for a visit of condolence (*ning*)⁴¹ of thirty days when a parent or their wife has died; for a visit of fifteen days, when a grandparent or sibling has died”⁴². This shows that under the Qin lower ranking officials (not those at the top of the government or in charge of the administration of commanderies) had a statutory right to return home upon the death of a parent to take part in the funeral rites. We do not know what rules, if any, applied to the highest ranking officials. On this matter our earliest information comes from the beginning of the Han.

A memorial submitted by the legal specialist Chen Zhong in AD 116, seeking to defend a rule that officials should mourn the death of a parent for three years, cites a *ke* of Xiao He, emperor Gaozu’s chancellor. This conferred on *dachen*, a term explained by Shen Jiaben as referring to the highest officials of the state (*gong* and *qing*)

⁴¹ On this term see below at note 45.

⁴² *Zhangjiashan Hanmu Zhujian* (247hao mu), 227 (slips 180-1). I have followed the translation of U. LAU and M. LÜDKE in their forthcoming *Dictionary of Han Law*, the draft of which first drew my attention to this statute.

⁴³, the right of *ninghao*⁴⁴. The term *ninghao* appears to refer to the particular rules concerned with leave to complete mourning rites and not to those concerned with leave granted for some other reason. The commentator Yan Shigu (AD 581-645) glosses *ning* as “to dwell at home and wear mourning garments”⁴⁵. The *ke* thus granted a small number of high officials the right to leave office, return home, and mourn for a parent. Two questions suggest themselves: to what group of persons was the regulation applied, and how long was the period of leave.

So far as can be deduced from the brief reference in Chen Zhong’s memorial, Xiao He’s law was restricted to a small group of high officials. We have already seen that that officials staffing the district offices were permitted to return home for thirty days to mourn a parent, a privilege that at least later was extended to ordinary persons subject to corvée. In 66 BC emperor Xuan issued an edict applicable to ordinary persons, stating that, where a man was liable to be called up for government service but had within the previous three months suffered the death of a grandfather, grandmother, father, or mother, he was to be allowed to return home to bury the deceased. This decision appears to have been incorporated into the *ling*⁴⁶. In line with the principle of the *ling*, soldiers on garrison duty on the frontier appear regularly to have been granted permission to return home for the funeral rites of a parent⁴⁷. It thus seems that throughout the Former Han, officials and ordinary persons subject to corvée were regularly granted leave to return home to bury their parents (or grandparents) and perform the mourning ceremonies.

The length of time for which leave was granted by Xiao He’s regulation is not known, but is unlikely to have been less than the thirty days specified in the Qin statute. Emperor Wen’s testamentary

⁴³ Shen JIABEN, *Lidai Xingfa Kao* (Beijing: Zhonghua, 1985), 3.1662.

⁴⁴ *Houhanshu* (Beijing: Zhonghua, 1965), 46.1561; HULSEWÉ, *Remnants of Han Law Volume I. Introductory Studies and an Annotated Translation of Chapters 22 and 23 of the History of the Former Han Dynasty* (Leiden; Brill, 1955), 50 (c).

⁴⁵ *Hanshu* (Beijing: Zhonghua, 1962), 11.337 n9; H.H. DUBS, *The History of the Former Han Dynasty by Pan Ku. Volume Three* (Baltimore: Waverly Press, 1955), 24 n3.8.

⁴⁶ The edict is cited in a memorial of Chen ZHONG: *Houhanshu*, 46.1560. See also DUBS, *History of the Former Han Dynasty II*, 223-4 with 224 n9.7.

⁴⁷ M. LOEWE, *Records of Han Administration. Volume One. Historical Assessment* (Cambridge: University Press, 1967), 83, citing documents of 42 BC.

edict of 157 BC stated that the mourning after the burial of his coffin should be limited to thirty six days⁴⁸. This edict seems to have settled the rule for officials who suffered the loss of a parent, and may have been treated as applying to officials of all grades. Around 15 BC Di Fangjin, the counsellor-in-chief (*chengxian*), on the death of his mother, laid aside mourning thirty six days after the burial of the coffin, not daring to exceed the regulations of the state⁴⁹.

Towards the end of the Former Han, a significant change was introduced. In 7 BC under emperor Ai the erudites (*boshi*) were granted leave (*yuning*) to return home and mourn for three years on the death of a parent⁵⁰. This is the first time we have evidence of a three year mourning period granted to a group of officials. Emperor Ai's edict was probably used later by dowager empress Deng as a justification for her own reforms⁵¹.

At the beginning of the Later Han, in the confusing conditions of the time, we are told that emperor Guangwu abrogated the regulations (*dian*) of *haoning* relating to *dachen*⁵². That this abrogation came to be applied to all officials is suggested by an enigmatic statement of the commentator Meng Kang (ca. AD 180-260) to the effect that in the time of emperor He (reigned AD 89-106) the kinds of official leave known as *cihao* and *yuhao* were discontinued (*yue*)⁵³. *Cihao* ('leave bestowed') refers to leave granted at the discretion of the throne generally on account of illness, while *yuhao* ('leave granted')

⁴⁸ H.H. DUBS, *The History of the Former Han Dynasty by Pan Ku. Volume One* (Baltimore: Waverly Press, 1938), 270.

⁴⁹ *Hanshu*, 84. 3416; J.J.M. DE GROOT, *The Religious System of China. Its Ancient Forms, Evolution, History and Present Aspect. Manners, Customs and Social Institutions Connected Therewith* (Taipei: Southern Materials Center, 1982, reprint of original edition of 1894), II, 572.

⁵⁰ DUBS, *History of the Former Han* III, 24.

⁵¹ See below at note 60.

⁵² Guangwu's abrogation is cited in two memorials of 116 AD: *Houhanshu*, 46. 1560, 1561.

⁵³ *Hanshu*, 1A. 6 n1. This may be linked with a comment in the Treatise on Rites in the *Songshu*. Here we are told that at the beginning of the reign of emperor An (AD 107-126) *changli* (on these see below at note 56) frequently deserted their posts (and took mourning leave). Accordingly, it was ordered that they were not to mourn for their parents and leave office. Afterwards officials remained in office and did not mourn for three years on the death of a parent (*Songshu* (Beijing: Zhonghua, 1974), 15.387).

refers to leave, regulated by the *ling*⁵⁴, to which officials were entitled on the ground of the excellence of their administration⁵⁵. It is probable that *haoning*, leave granted to mourn a parent, fell under the head of *cihao*.

Equally, the practice of granting ordinary persons subject to corvée leave to return home to bury a parent seems to have been discontinued in the first century AD. In 116 AD Chen Zhong in a memorial to the dowager empress Deng argued that the old *ling* of Xuandi permitting persons subject to corvée to have leave to bury a parent or grandparent should be revived and followed. The dowager empress agreed⁵⁶.

The reluctance to grant officials leave to return home and mourn on the death of a parent was temporarily reversed in the reign of Andi (AD 107-126). In the period 114-116, it was decreed that *changli* or below who did not mourn on the death of a parent were not allowed to be appointed controllers of cities or receive promotion (*dien cheng xuanju*)⁵⁷. *Changli* here seems to be a technical term designating junior officials ranking from 400 to 100 bushels⁵⁸. The decree is of particular interest on two grounds. First, it dealt only with relatively junior or low ranking officials. The reason seems to be that the departure from their duties for three years⁵⁹ was seen as less harmful to the efficiency of the administration than the departure of high officials. Second, no actual offence was constituted by a failure to mourn. Officials who infringed the decree merely incurred some disadvantage in their careers.

The dowager empress Deng, wishing to extend the rule on leave for mourning to higher officials, the shepherds or regional governors (*mu*) and governors (*shou*), remitted the matter for consideration to the highest group of officials, the *gong* and *qing*. They held that the

⁵⁴ *Hanshu*, 79.3304; HULSEWÉ, *Remnants of Han Law*, 50 (d).

⁵⁵ In general see HULSEWÉ, *The Ch'in Documents Discovered in Hupei in 1975*, *T'oung Pao* LXIV (1978), 204-8.

⁵⁶ *Houhanshu*, 46. 1560.

⁵⁷ *Houhanshu*, 39.1307; DE GROOT, *Religious System of China* 2, 574 (holding that *changli* refers to "high dignitaries and officers of lower rank").

⁵⁸ C.O. HUCKER, *A Dictionary of Official Titles in Imperial China* (Stanford, California: Stanford University Press, 1985) No. 153.

⁵⁹ That the period was for three years is suggested by the subsequent discussion of the extension of the decree to the *dachen*.

proposal was not convenient, the importance of the duties of these officials being sufficient to displace the ritual requirements of mourning. The one dissenter was Liu Kai, then one of the three *gong* as minister of education (*situ*). He argued strongly that the 'way of filial piety (*xiaodao*)' should be followed. High ranking officials in particular should honour the mourning rituals in order to set an example to others. The empress dowager supported Liu and in 116 issued a decree permitting *dachen*, officials ranking at 2000 bushels, and regional inspectors (*cishi*) to leave office on the death of a parent, return home, and mourn for three years⁶⁰.

The specific mention of three years in the decree for the *dachen* and other high officials suggests that the same period applied to the *changli*. The language of the decree is permissive. The operative verb is *ting* ('allow'). While this may have been construed as imposing an obligation on high officials to leave their posts and mourn for three years, it is clear that no specific offence of failing to mourn, attracting a defined punishment, had been created. The period of three years, much longer than the thirty six days allowed under the Former Han regulations, followed the accepted ritual prescriptions, as endorsed by Confucius⁶¹.

Opposition to the three year rule continued. On the empress dowager's death in 121, her policy was reversed. Permission for *dachen* and officials ranking at 2000 bushels or above to mourn for three years was withdrawn (*duan*)⁶². The debate occasioned by the withdrawal illustrates a range of arguments. The officials who had memorialised in favour of discontinuing mourning for three years relied upon the former practice of the Han, namely, Guangwu's discontinuance of the regulations (*dian*) governing *haoning*. Guangwu's act is itself described as a 'precedent (*gushi*)'. Chen Zhong, opposing the move, cited inter alia the *Xiaojing* on mourning

⁶⁰ *Houhanshu*, 5.226, 39.1307; DE GROOT, *Religious System of China* 2, 574-5; M. LOEWE, *The conduct of government and the issues at stake (A.D. 57-167)*, in *Cambridge History of China* I, 300.

⁶¹ *Lunyu* 17.21 (WALEY, *Analects of Confucius*, 214-5). Several passages in the *Liji* testify to Confucius's view that officials should abstain from public service during the three year mourning period: S. COUVREUR, *Mémoires sur les bienséances et les cérémonies* (Paris: Cathasia, 1950), I.i, 220, 287, 318; I.ii, 463.

⁶² *Houhanshu*, 5.234. DUBS, *History of the Former Han* III, 41 wrongly takes *duan* in the sense of 'decide' or 'reaffirm'.

as a manifestation of love for parents, the dictum of Confucius that mourning should be for twenty five months⁶³, and Xiao He's *ke* on *haoning*. The eunuchs, however, found the practice of three year mourning to be inconvenient and rejected Chen's defence. The new rule was made a *ling*⁶⁴. It is, nevertheless, likely that high officials were still permitted to return home to bury a parent, but not to remain secluded in mourning for three years.

In AD 154 under Huandi regional inspectors and officials ranking at 2000 bushels were again permitted to leave to mourn for a parent for three years⁶⁵. In 156 such permission was extended to eunuch officials (*chongguan*). But again in 159 permission for regional inspectors and officials ranking at 2000 bushels was withdrawn (*duan*)⁶⁶. This seems to have remained the position until the end of the Han. In AD 166 Xun Shuang was recommended to the throne as 'most filial (*zhixiao*)' and appointed as a gentleman of the interior (*langchong*), whereupon he submitted a memorial in which, after pointing to an ancient Han regulation requiring all persons to read the *Xiaojing* and the practice of recommending persons as 'filial and incorrupt (*xiaolian*)' to be officials, he stressed that proper filial duty lay in completing the fullest mourning for parents. The present rule according to which *gong*, *qing*, and officials ranking at 2000 bushels were not allowed to return home for three years to mourn a parent was most certainly not the way to honour the path of filial duty (*xiaodao*). Xun criticises Di Fangjin⁶⁷ who, not daring to exceed the regulations, had mourned only thirty six days for his mother. He concludes with a plea to restore the full period of mourning prescribed by the old rites. The plea was not accepted and Xun abandoned his post⁶⁸.

⁶³ *Lunyu* 17.21.

⁶⁴ *Houhanshu*, 46.1560-1.

⁶⁵ *Houhanshu*, 7.299. According to the Treatise on Rites in the *Songshu*, already in 127 some eunuch palace attendants (*zhongchangshi*) were ordered to mourn for three years on the death of a parent (15.387).

⁶⁶ *Houhanshu*, 7.304. See also R. DE CRESPIGNY, *Emperor Huan and Emperor Ling. Being the Chronicles of Later Han for the years 157-189 AD as recorded in Chapters 54 to 59 of the Zizhi tongjian of Sima Guang* (Canberra: Faculty of Asian Studies, Australian National University, 1989), I, 8; II, 278-30.

⁶⁷ See above at note 49.

⁶⁸ *Houhanshu*, 62.2051-2; Ch'en CH'YÜAN, *A Confucian Magnate's idea of political violence: Hsüan Shuang's (128-190 A.D.) interpretation of the Book of Changes*,

The fact that the decrees granting or withholding leave to mourn for three years, with the exception of that dealing with the *changli*, specify only high ranking officials suggests that they did not apply to officials of lesser rank. This in turn suggests that the decree on the *changli* remained in force for the remainder of the dynasty. It is significant that Xun Shuang in 166 only requested restoration of leave for high ranking officials. The implication is that lower ranks were still permitted leave to mourn for three years.

The suggestion that most officials were expected to return home on the death of a parent and mourn for three years receives some confirmation from the inclusion in the code at the end of the Han of statutes regulating such leave. Ying Shao (ca. AD 140-203) cites a rule from the Han *lǚ* to the effect that persons who have not completed three years mourning where a parent has died are not to be recommended or selected for office (*xuanqu*)⁶⁹. It is probable that this rule has some relation to dowager empress Deng's edict on *changli*⁷⁰. It suggests that her ruling came to be incorporated in the code as *lǚ* or *ling*, perhaps being extended to all classes of official other than those ranking at 2000 bushels and the like. It may even have applied to expectant officials. Persons who infringed the mourning rules were excluded from entry into office or further promotion if already an official. No doubt there was some variation in the strictness with which the statute was enforced⁷¹.

For the post-Han and pre-Tang period, the scattered information we have suggests there is considerable variation in the rules governing leave for officials to mourn parents. In the time of emperor Ming of the Wei (reigned AD 227-240), the regulations (*zhi*) specified that an official (*li*) should return to duty after mourning a parent for 100

T'oung Pao LIV (1968), 80-1, and *Confucian, Legalist, and Taoist thought in Later Han*, in *Cambridge History of China* I, 802-3.

⁶⁹ *Hanshu*, 87B. 3569 n6.

⁷⁰ See above at note 57.

⁷¹ The matter is further complicated by the commentator Ru Shun (ca. 221-65 AD) who cites a rule from the Han *lǚ* to the effect that, where officials ranking at 2000 bushels or higher *haogui* (are granted leave) or *haoning* (return home to mourn a parent), they are to proceed by the most direct route, provided their way does not lie near the imperial residence (*Hanshu*, 79.3304 n5, so interpreted by HULSEWÉ, *T'oung Pao* LXIV (1978), 206-7). The most likely explanation is that this statute applied to high ranking officials who were granted leave to return home and bury a parent, but not to remain in mourning for three years.

days⁷². The succeeding Jin dynasty, established in 265, first enacted regulations under which all officials were required to return to duty after seeing to the burial of a parent's coffin. However, in 286 the regulations were changed to permit *dachen* to complete the period of three years in mourning the death of a parent. A *ling* was enacted to this effect⁷³. Although the expression *dachen* suggests that at this time lower ranking officials were not given permission to mourn for three years, later in the dynasty the rule appears to have been more widely enforced. At the beginning of Eastern Jin (317-419) a member of the *shi* class who held the position of junior rectifier (*xiaochongzheng*) mourned for only one year on the death of his stepmother. He was impeached, held to have failed in his duty of filial respect (*xiaojing*), and debarred from office for life⁷⁴.

The northern dynasties evidence a dramatic change in perspective. Not only is failure to mourn for the requisite period of time made a statutory offence prescribed by the penal code, but the punishment was severe. This is already clear from a provision of the Northern Wei *lǚ* current in 513. In that year a military commander, Yi Longhu, on the death of his father was granted leave of absence (*jijia*) for 27 months. He mistakenly counted in this time an intercalary month and then applied to return to duty. His application was deemed to have been made in the 26th month of mourning and therefore to have infringed a provision of the statutes on disobeying regulations (*lǚweizhi*). This stated that, where an official before completion of the three year period of mourning concealed his grief and requested a return to duty (*mao ai qiu shi*), he was to be sentenced to penal servitude for five years. The use of the term *mao ai* is interesting because it suggests that the rule cited was only part of a statute which differentiated the penalty according to the time at which mourning was improperly discontinued. The Tang *shuyi* commentary to article 121 (below) explains *mao ai* as referring to the period after the completion of the 'heart mourning' of 25 months but before the *tan* offering to the deceased parent in the 27th month. The implication is

⁷² *Sanguozhi* (Beijing: Zhonghua, 1959), 24.687.

⁷³ *Jinshu* (Beijing: Zhonghua, 1974), 12.634; 44.1252; *Songshu* 15.3913; JEN-DER LEE, *Women and Marriage in China during the Period of Disunion* (University of Washington doctoral dissertation, 1992), 218 n64.

⁷⁴ *Jinshu*, 70. 1868-70; LEE, *Women and Marriage in China*, 195-6.

that, should the failure to mourn have occurred prior to the 25th month, the punishment would have been even more severe.

The *Weishu* reports an elaborate discussion of the rites by the commandant (*lingjun*), Yuan Zhen, and the gentleman of the interior to the three dukes (*sangong langchong*), Cui Hong. These two officials differed in their interpretation of the article. Yuan Zhen held that it should be applied since Yi had in fact made a request for office in the 26th month. He should therefore be sentenced to penal servitude for five years. Cui Hong, on the other hand, treated Yi's misdeed as relatively light, being an oversight produced by excessive hurry. He proposed a whipping of fifty blows. We are not told the final outcome⁷⁵.

The Tang rules appear to have been influenced by the Northern Wei, although the punishment for failure to mourn after the 25th month is considerably less severe. Articles 20 and 121 of the Tang *lü*, echoing the language of the Northern Wei article, specify that persons who "violate mourning by seeking office during the period of mourning for parents (*mao ai qiu shi*) are to be deprived of office and in addition be sentenced to penal servitude for one year"⁷⁶. The commentary in small characters to article 121 further specifies: "This refers to mourning for the father and mother (after the period of 'mourning in the heart (*xinsang*)' is over but) before completion of the *tan* ceremony"⁷⁷. The *shuyi* commentary to article 20 adds the point (following the Northern Wei) that intercalary months are not to be counted in the computation of the months for which mourning is necessary⁷⁸.

The *shuyi* commentary to article 121⁷⁹ offers an important analysis of the varying legal consequences entailed by a failure to complete proper mourning. In fact, three distinct offences are to be distinguished: (i) that designated *mao ai*, referring to discontinuance of mourning after the 25th month but before completion of the *tan*

⁷⁵ *Weishu* (Beijing: Zhonghua, 1974), 108 (4).2796-9.

⁷⁶ JOHNSON, *T'ang Code* I, 131; II, 91.

⁷⁷ JOHNSON, *T'ang Code* II, 91, who translates "This refers to the mourning for the father or mother when the 'heart mourning' period is not over and when the *t'an* ceremony has not yet been performed". As will be seen below, this distorts the sense of the commentary, as explained further in the *shuyi*.

⁷⁸ JOHNSON, *T'ang Code* I, 131.

⁷⁹ This section of the commentary is not translated by Johnson.

ceremony in the 27th month, for which the punishment was penal servitude for one year; (ii) that constituted by failure to complete the *tan* ceremony itself, for which black outer and yellow inner clothing was worn⁸⁰, where the offence fell within the words of article 120 specifying penal servitude for three years should the son remove mourning clothes and wear ordinary clothes before the end of the 27th month⁸¹; and (iii) that constituted by a son ceasing to mourn and seeking office within the correct period of mourning (*zhengsang*), that is, within 25 months, his conduct now amounting to being ‘unfilial (*buxiao*)’, for which the punishment was penal servitude for three years.

One further technicality is important. The phrase in the small commentary stating “as well as within the period of ‘mourning in the heart’ ” is explained by the *shuyi* as referring to the mourning obligation imposed on the son of a concubine or the son of a mother who has been divorced. Such sons owe ‘decreased (*jiang*)’ mourning. They incur a punishment of penal servitude for one year (not three years on account of being unfilial) should they seek office while ‘mourning in the heart’ for 25 months⁸².

The rules stated by the T’ang code represent the culmination of a chequered process, beginning somewhat hesitatingly during the Han, in which the state as a matter of policy gradually came to place the value of filial piety as exhibited in the duty to mourn above the administrative inconvenience caused by the departure of high ranking officials from their posts. The importance attached by the Tang government to the duty to mourn, following a line already charted in the northern dynasties, was underlined by the introduction of specific punishments for breaches of the mourning obligations.

We can detect a comparable development in the rules prohibiting improper behaviour during mourning. Emperor Wen’s testamentary edict of 157 BC states that the people of the empire should mourn only three days at his death. There was to be “no prohibition of taking

⁸⁰ JOHNSON, *T’ang Code* I, 131 n19.

⁸¹ JOHNSON, *T’ang Code* II, 88.

⁸² On this provision see N.E. KATKOV, *The Domestication of Concubinage in Imperial China* (Harvard University doctoral dissertation, 1997), 69. He suggests that it “might be interpreted as indicating that a concubine’s son [or the son of a divorced mother] did not mourn his mother formally at all in terms of the five mourning grades”. See also the remarks of HINSCH, *Women in Early Imperial China*, 139-40.

a wife or of marrying off a daughter, of making sacrifices or of drinking wine or eating meat”⁸³. The formulation suggests that these acts were already prohibited by the rites during the period of mourning, but they do not appear to have constituted specific legal offences. There are references in the *Hanshu* and *Houhanshu* to punishments imposed on nobles for committing illicit sexual intercourse while in mourning for a parent, but they do not seem to have been sentenced under any specific statutory rule relating to mourning⁸⁴.

For the Wei we have an anecdote told of the poet Ruan Ji, an individual well known for his unconventional behaviour. While in mourning for his mother (ca. 255), he attended a party given by the de facto ruler, Prince Wen (Sima Zhao), eating meat and drinking wine. A high official held that this behaviour conflicted with filial piety (*xiao*), which the prince was striving to encourage. He proposed that Ruan Ji should be exiled in order “to set right the teaching on public morals”. The prince in fact found an excuse for Ruan Ji’s behaviour in the fact that, being ill with grief, he was entitled to under the rites⁸⁵ to eat meat and drink wine⁸⁶.

The commission of prohibited acts during mourning was taken seriously under the Jin. An instructive case is reported from the beginning of Eastern Jin during the reign of emperor Yuan (AD 317-23). Liu Wei was then rectifier to the counsellor-in-chief (*chengjiang sizhi*), a position which carried responsibility for the impeachment of misbehaving officials. He took his duties seriously and rapidly reported to the throne three officials for their disregard of the mourning rites. First, Wang Jizhi, instructor to the heir apparent, had married while still in mourning for the wife of a younger brother of his father. The imperial edict in response ordered that this practice should henceforth stop. Second, the master of ceremonies in the East Hall (*dongge jiji*), Yan Han, while in mourning for his father’s younger brother, gave his daughter in marriage. The imperial response

⁸³ DUBS, *History of the Former Han* I, 268.

⁸⁴ See *Hanshu*, 14.417, 16.537; *Houhanshu*, 14.559.

⁸⁵ See COUVREUR, *Mémoires sur les bienséances et cérémonies* II.1, 226.

⁸⁶ R.B. MATHER, *Shih-shuo Hsin-yü. A New Account of Tales of the World by Liu I-ch’ing with commentary by Liu Chiün* (Minneapolis: University of Minnesota Press, 1976), 372 (23.2); D. HOLZMAN, *Poetry and Politics. The life and works of Juan Chi (A.D. 210-263)* (Cambridge: Cambridge University Press, 1976), 79-80.

is not recorded in this case. Third, Liang Kang, a provincial governor (*tashou*), on the day before he was due to complete mourning for his wife invited a number of officials, in all more than thirty, to a musical entertainment. Liu in his indictment stressed the importance of proper respect for the mourning rites and proposed that Liang should be dismissed from office and deprived of his noble rank. His guests, who had acted contrary to the rites in attending an auspicious occasion while their host was in mourning, should each be fined one month's salary. The emperor acceded to these proposals⁸⁷. It is clear from this account that the Jin *lǚ* or *ling* did not contain specific rules making it an offence to take a wife, give a daughter in marriage, or hold a musical entertainment while in mourning for a relative. Each case was treated as an infringement of the mourning rites and handled by the throne on a discretionary basis.

Material from the southern dynasties suggests the same basic pattern of response as obtained under the Jin⁸⁸. There were no specific offences embodying acts held to be contrary to the rites. Under the Song, a district magistrate in AD 457 was held liable for not behaving in accordance with the rites (*wuli*) while in mourning for his mother, but his punishment is not recorded⁸⁹. In 460 Zhou Lan, who had been administrator (*neishi*) of a commandery, fell into disfavour with the regional authorities and the emperor. When he was remiss in following the regular mourning rites for his mother, the emperor had the authorities impeach him on the ground that he had not mourned in accordance with the rites (*wuli*). The imperial edict stated that he ought to be executed, but instead ordered him to be sent in chains to a border commandery. He was in fact killed on the way⁹⁰. Under the Southern Qi, a magistrate in 481 was held liable for feasting and indulging in pleasure in the period after the death of his father, who had emigrated to the north. He was impeached for failing to conform to public standards of morality (*qingyi*) and demoted to become a prison aide (*yucheng*). In 494 the murder of the Southern Qi ruler, Yulin Wang, at the age of 22, was justified in part on the ground that

⁸⁷ *Jinshu*, 39.1835-6.

⁸⁸ On this material see also H. BIELENSTEIN, *The Six Dynasties, Vol. II, Bulletin of the Museum of Far Eastern Antiquities Stockholm* 69 (1997), 62-3, stressing the influence of Confucianism.

⁸⁹ *Songshu*, 81.2077.

⁹⁰ *Songshu*, 82. 2101.

he had not mourned properly for his father, indulging in sexual pleasures and feasting during the period of mourning⁹¹. Under the Liang, Wang Zhenxin was executed for failing to behave in accordance with the rites (*wuli*) during the period of mourning for his father⁹².

The cases noted above show that during the southern dynasties a common charge was that a noble or official had acted contrary to the rites (*wuli*) in performing a prohibited act during the period of mourning for a parent. The penal codes of the southern dynasties do not themselves appear to have framed these breaches of *li* as offences. Impeachment was sometimes grounded in political factors. Punishment was a matter for the discretion of the throne.

We do not know whether the Northern Wei codes or even those of the later northern dynasties contained rules that made the commission of prohibited acts during mourning an offence. Around 500, a prince who had succeeded to his father's fief was impeached and deprived of his rank for listening to music and indulging in drink and other pleasures during the period of mourning for his mother. He was reinstated in consequence of an amnesty. The report of this case makes no mention of any relevant statutory rules⁹³.

The first evidence we have of statutory rules⁹⁴ is supplied by the Tang code which has a well-worked out set of rules on acts prohibited during mourning. Under article 120 persons who concealed the death of a parent and failed to mourn were to be exiled to 2000 *li*. Should anyone begin mourning but revert to ordinary clothing or make music before the period was completed, the punishment was to be penal

⁹¹ *Nan Qishu* (Beijing: Zhonghua, 1972), 4.72; H. BIELENSTEIN, *The Six Dynasties, Vol. I, Bulletin of the Museum of Far Eastern Antiquities Stockholm* 68 (1996), 176-8, holding that these accusations were stock propaganda.

⁹² *Liangshu* (Beijing: Zhonghua, 1973), 3.177.

⁹³ *Weishu*, 21A.543.

⁹⁴ We should note, however, a decree issued in AD 319 by Shi Loh, a warlord in control of the state of Zhao in northern China. The decree prohibited inter alia the taking of a wife by persons in mourning: *Jinshu*, 105. 2736; DE GROOT, *Religious System of China* 2, 612. Further, one of the *Regulations in Nine Articles (Zhaochi jiu tiao)* issued in AD 579 by emperor Xuan of the Northern Chou permitted marriage with a member of one's mother's clan lacking male heirs, provided neither bride nor groom was in mourning (*Zhoushu* (Beijing: Zhonghua, 1971), 1.161; É. BALAZS, *Le traité juridique du "Souei-Chou"* (Leiden: Brill, 1954), 156 (n218); LEE, *Women and Marriage in China*, 56).

servitude for three years⁹⁵. Listening to a theatrical performance was punished by penal servitude for one year. Happening upon music or a party by chance and listening or participating was punished by 100 blows with the heavy stick⁹⁶. Under article 179, marriage during the period of mourning for parents was punished by penal servitude for three years. To take (or become) a concubine was punished by penal servitude for one year and a half⁹⁷. Further, the ‘abomination (o)’ of *buxiao*⁹⁸ included arranging one’s marriage (or giving a daughter in marriage), making music, or replacing mourning garments with ordinary clothing. Taking (or becoming) a concubine and listening to a theatrical entertainment are not included⁹⁹.

The formulation and organization of the rules concerned with mourning in the Tang code exhibit three important features. First, there has been a thorough integration of what were historically two distinct sets of rules, one concerned with leave to mourn a parent granted to officials and the other with acts prohibited during mourning, probably also seen as applicable only to officials or members of the ‘upper class’. The Tang code groups both sets of rules under the single head of acts prohibited during mourning, be it the seeking or retention of office or some other act. Second, the broad formulation of the rules encompasses ordinary persons as well as officials. Anyone who performed one of the prohibited acts committed a punishable offence. Nevertheless, one may question both whether the rules were seriously intended to be enforced on so wide a scale and, if they were, whether such enforcement was practical¹⁰⁰.

⁹⁵ See also above at note 79.

⁹⁶ JOHNSON, *T’ang Code* II, 88. The punishments were reduced in the case of mourning for other relatives.

⁹⁷ JOHNSON, *T’ang Code* II, 30, again with reduced punishments in the case of mourning for other relatives.

⁹⁸ See also above at note 37.

⁹⁹ JOHNSON, *T’ang Code* I, 76 (article 6).

¹⁰⁰ C. BENN, *Daily Life in Traditional China. The Tang Dynasty* Westport, Connecticut and London: Greenwood Press, 2002), 274-5 presents the rules of the Tang code on mourning as though they were actually followed in practice. We know that under the Song dynasty Zhu Xi, when a senior administrator in the province of Fujian around 1190, issued a proclamation threatening the application of the legal penalties to those who did not fully comply with the mourning prescriptions for a parent. On this see E.S. RAWSKI, *A Historian’s Approach to Chinese Death Ritual*, in

Third, the legal obligations involved in respect for mourning were not only incorporated in the penal code as specific offences, but, in the case of mourning for a parent, even brought within the scope of the abomination of *buxiao*.

Can we see in the gradual incorporation by the penal law of various aspects of the mourning regulations prescribed by the rites an example of the 'Confucianization of the law'? Two preliminary points should be stressed. First, the description of mourning rites in 'classics' such as the *Liji* does not imply that only Confucius and his followers considered that death of a relative should entail a solemn burial and mourning. Although the *Liji* has been portrayed as "a selection from a collection of Confucian texts assembled in the early Han"¹⁰¹, it is difficult to accept that the principle that a son should bury and mourn a parent to the accompaniment of certain rites was itself exclusively advocated by Confucius and his followers. The *Mozi* contains well known attacks on the extravagance and length of the mourning rituals ascribed to the *ru* (not necessarily to be identified with the Confucians), but even in this work it is accepted that there should be a ritual of mourning, though the mourners should return to their occupations as soon as possible after the burial¹⁰². While the rule that mourning for a parent should last into the third year may have been particularly favoured by the *ru* and then later by the 'school' that adopted the teachings of Confucius, most sections of society would have accepted the desirability of some period of mourning. For example, the testamentary edict of Han emperor Wen in stating the period of mourning to be observed after his death and listing the prohibited acts was expressing a general conception of the importance of mourning held in society, not an exclusively Confucian view.

Death Ritual in Late Imperial and Modern China, edited by J.L. Watson and E.S. Rawski (Berkeley, Los Angeles, and London: University of California Press, 1988), 30; Ron-Guey CHU, *Chu Hsi and Public Instruction, in Neo-Confucian Education. The Formative Stage*, edited by Wm. T de Bary and JW Chaffee (Berkeley, Los Angeles, and London: University of California Press, 1989), 266-7; P. Ebrey, *Confucianism and Family Rituals in Imperial China. A Social History of Writing about Rites* (Princeton, New Jersey: Princeton University Press, 1991), 118.

¹⁰¹ EBREY, *Confucianism and Family Rituals*, 21.

¹⁰² *Jie Zang*: B. WATSON, *Mo Tzu. Basic Writings* (New York and London: Columbia University Press, 1963), 76.

The second point is this. When the throne attached legal consequences to a breach of the mourning rites advocated by the Confucian scholars and officials, the reason cannot be assumed to be a desire to implement Confucian ritual or morality. Other factors may have been relevant, such as the desire to promote the efficiency of the administration or, in particular, the desire to strengthen the stability of the family and hence of society by reinforcing the difference between family roles. The latter desire has, of course, often been associated with Confucianism. For example, Norman Kutcher in his study of Ming and Qing funeral rites observes: "In Confucian political philosophy, the state was required to encourage the filial piety of its officials by ensuring they mourned their parents properly"¹⁰³. The problem arises from the gloss of this 'political philosophy' as 'Confucian'. The interest of the state lay in securing the loyalty of its subjects and obedience to the throne. In pursuing this interest through support for filial piety and mourning for parents, the state was not acting out of a disinterested desire to bring about an ideal society as conceived by Confucian ideology.

The history of the legal rules granting officials leave to mourn for a parent is different from those prohibiting the commission of certain acts during mourning. The former appear earlier than the latter, probably because of the effect of leave on the conduct of the administration. The departure of officials, especially those with important responsibilities, from their posts had practical consequences for the conduct of the administration. Hence, the matter had to be regulated by the government. We have evidence that this was so at the beginning of the Han, and no doubt the Qin too had relevant regulations. All sections of society would have recognised the desirability of allowing an official to return home to mourn and bury a parent. There is nothing specifically Confucian in this. In normal times the state undoubtedly was prepared to grant leave to an official to return home to mourn and bury a parent, though, where conditions were unsettled, persons entrusted with great responsibility might not be permitted to leave their posts even for this reason.

Against this background we may postulate a possible Confucian influence in the following respects: the making obligatory of leave for an official to mourn a parent, the extension of the period of leave to

¹⁰³ KUTCHER, *Mourning in Late Imperial China*, 2.

three years (twenty seven months), and the strengthening of the sanctions to be imposed on an official who failed to take mourning leave and use it properly¹⁰⁴. We may wonder whether the first of these factors was ever strictly enforced. It is noticeable that the intermittent legislation in the second century AD granting leave to high officials to mourn for three years is couched in the language of permission and not obligation ('allow – *ting*'). Leave to mourn for three years must always, in the last resort, have been subject to the conditions of the time and the requirements of the state. It is true that the proposers of the Later Han legislation made appeals to the views of Confucius or his followers. Obviously, the view of the Master was regarded as significant support. But it is still difficult to be sure whether the underlying motive of dowager empress Deng, for example, was love of Confucianism as such or a concern for the stability of the family and society. Equally, the gradual replacement of administrative sanctions (Later Han) with punishments for failure to complete mourning for twenty seven months may be explicable on the ground of an increasing Confucian influence on the legislators. Just as, perhaps more, likely is the desire of the central government to exert more control over its subjects through the reinforcement of values associated with filial piety (*xiao*).

Similar considerations apply to the legislative history of the prohibition of certain acts during mourning. The first clear evidence we have that such acts constituted statutory offences is the Tang code. However, we can perhaps infer that the Sui and later northern dynasties had also taken the same approach. Most of these acts fall within the 'abomination' of *buxiao*. The Sui code introduced the 'ten abominations' (*oshi*)¹⁰⁵, but the Northern Qi code already had distinguished a group of 'great offences in ten clauses' (*chongzui shitiao*)¹⁰⁶, while the Northern Zhou code treated with particular

¹⁰⁴ Even Yongping Liu, who is on the whole critical of the 'Confucianization of law' thesis, admits an exception in the case of the mourning rules: "In the opinion of Confucius, on the death of his parents, a son should go into mourning for three years. Therefore, the imperial codes would punish the son dared to marry, to be an official, or be entertained with music during the period of mourning" (*Origin of Chinese Law*, 331).

¹⁰⁵ *Suishu* (Beijing: Zhonghua, 1973), 12.711.

¹⁰⁶ *Suishu* 12.706.

severity certain specific offences¹⁰⁷. Within both these special groups was included *buxiao*. It is likely, though not certain, that *buxiao* in the Northern Qi, Northern Zhou, and Sui codes included the same prohibited acts during mourning as the Tang. For the earlier dynasties we have sporadic references to persons sentenced on the ground of ‘acting contrary to the rites (*wu/feili*)’ where they misbehaved during mourning. There were at this time no standard offences regulated by the codes and punishments were at the discretion of the throne.

We cannot assume that either the initial treatment of the prohibited acts as infringements of *li* that merited punishment or the later conversion of those acts into statutory offences was due only to a desire to impose criminal liability for breaches of Confucian morality. The ‘criminalization’ of the prohibited acts has to be placed in the context, already emphasised, of the central government’s interest in promoting a clearly structured, stable family¹⁰⁸. Strict observance of mourning requirements for a parent strengthened the idea of filial piety and this in turn reinforced the idea of order within the family and state. Although Confucius and his followers also favoured a stable family structure in which filial piety and proper mourning played a crucial role, they were not motivated by the same objectives as the state. The imperial government wished to secure and maintain control over the population. Its task was facilitated by the acceptance throughout society of a principle of social order under which juniors owed respect and obedience to seniors. The emperor and his officials counted as ‘political’ seniors. Hence they merited the same respect and obedience from the people at large as the senior male within the family was owed by the members of his household. The imperial government promoted the value of filial piety and enshrined its obligations in the penal code in order to maximize its control of the people¹⁰⁹.

¹⁰⁷ *Suishu* 12.708.

¹⁰⁸ See also the observations of HINSCH, *Women in Early Imperial China*, 83.

¹⁰⁹ This is a revised version of a paper presented at a conference on Chinese legal history held in Beijing on the 16th and 17th September 2006 under the auspices of the China University of Political Science and Law.