THE EARLY ROOTS AND DEVELOPMENT OF CHINESE CRIMINAL LAW: THE XIA AND SHANG DYNASTIES

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Abstract

Little is known about the substance, nature, and procedure of early Chinese law. This is lamentable as it is generally accepted that the Chinese legal tradition is one of the oldest enduring legal systems of the world. To address this lacuna, available records and literature on the earliest known Chinese dynasties — the Xia Dynasty (夏, c. 2000–1600 B.C.) and the Shang Dynasty (商, c. 1600–1100 B.C.) — are surveyed, with the goal to cautiously and judiciously explore the social and legal life of the earliest of Chinese civilizations. Given that penal law (punishment) constituted the essence of early imperial Chinese law, the important legal principles and practices with regard to the criminal and penal laws of that time are identified and explained, and its legal development from approximately 2000 to 1100 B.C. outlined. Particular attention is paid in the analysis and discussion of this article to two early relics from the Chinese legal tradition — the Five Punishments (五刑), and respect for filial piety (孝). Despite the fact that so little is known about the early Chinese criminal and penal laws, it is shown in this article that these two relics from the early of Xia and Shang Dynasties have had a lasting influence on the subsequent development of Chinese law, not only in the imperial times, but also to this day.

I. INTRODUCTION

It is generally accepted that the Chinese legal tradition is "the longest of any enduring political system in the world, [and it] rivals that of Roman Law in [both] its historical importance and lasting influence".[1] Yet, what we know about the substance, nature, and procedure of early Chinese Law (referring to the laws of the Xia Dynasty (夏, c. 2000–1600 B.C.) and the Shang Dynasty (商, c. 1600–1100 B.C.)), remains sparse and must be inferred from the available records of later dynasties.[2] Another difficulty in tracing the legal-

[1] JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 407 (1994); ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 1 (2011).

[2] MORRIS ROSSABI, A HISTORY OF CHINA: THE BLACKWELL HISTORY OF THE WORLD 14–15 (2014); HSIN-KANG CHANG ET AL., CHINA FIVE THOUSAND YEARS OF HISTORY AND CIVILIZATION 25 (2007).

historical development of Chinese law lies in the reckoning of ancient Chinese dates and identifying some semblance of an initiation or dawn of an organized legal system. For the earliest dynasties in Chinese history, regard is usually had to the *History of the Former Han Dynasty* (汉书) by Ban Gu (班固, 32–92 A.D.), and the *Annals of the Bamboo Books* (竹书纪年) "found in a tomb in 280 or 281 A.D., and believed to have been compiled in the feudal state of Wei (魏, 403–225 B.C.) early in the third century B.C."[3] Both sources ascribed the beginnings of Chinese civilization to the third millennium B.C., and absent any system of periodization or eponymate, relied upon the number of years a local ruler had reigned, as well as cosmological events like eclipses, to relate epoch change.[4] While there are many discrepancies in the timelines recorded in these early sources, especially with regard to the earliest dynasties in Chinese history, a sufficient documentary basis exists to cautiously and judiciously explore the social and legal life of the earliest of Chinese civilizations.[5]

At first, the idea of law that developed in China was primarily for state regulatory control, and initially covered only "those matters necessary to protect or promote state interests, and focused, to a large extent, on the signaling of state punishment".[6] This state punishment had at aim to maintain social harmony, order relationships, and observe rituals (礼, *li*), and subsequently developed into the modern criminal and penal system that exists in China today. Important, however, is that penalties were the essence of the early imperial Chinese law, as the early imperial Chinese law lacked, initially at least, "any notion of a private ordering by law, and only included rules relating to property, contracts, commercial transactions, and familial relationships for as far as it served state interests".[7]

This was also reflected in the language of law; the most important Chinese characters for law were *xing* (刑), referring to physical punishment, and *fa* (法) meaning law.[8]

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[3] C. W. Bishop, *The Chronology of Ancient China*, 52 J. AM. ORIENTAL S. 232, 232 (1932); BAN GU (班固), QIAN HAN SHU JUAN YI (前汉书卷一) [THE HISTORY OF THE FORMER HAN DYNASTY VOLUME ONE] 111 (Homer H. Duss trans., Baltimore Waverly Press 1938).

[4] Bishop, *supra* note 3, at 232–33; DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA — EXEMPLIFIED BY 190 CH'ING DYNASTY CASES 45 (1967); Sun Xiaochun, *Connecting Heaven and Man: The Role of Astronomy in Ancient Chinese Society and Culture*, *in* PROCEEDINGS OF THE INTERNATIONAL ASTRONOMICAL UNION SYMPOSIUM 98 (D. Valls-Gabaud & A. Boksenberg eds., 2011).

[5] Bishop, *supra* note 3, at 232–33.

[6] Andra le Roux-Kemp, *Lay Participation in the Adjudication of Legal Disputes: A Legal-historical and Comparative Analysis Focusing on the People's Republic of China and Its Special Administrative Region Hong Kong*, 11 TSINGHUA CHINA L. REV. 183, 204 (2018); MAY LARRY, ANCIENT LEGAL THOUGHT — EQUITY, JUSTICE, AND HUMANENESS FROM HAMMURABI AND THE PHAROAHS TO JUSTINIAN AND THE TALMUD 229 (2019).

[7] Le Roux-Kemp, *supra* note 6, at 204; MERRYMAN ET AL., *supra* note 1, at 406; BODDE & MORRIS, *supra* note 4, at 3; LARRY, *supra* note 6, at 229; KARLA W. SIMON, CIVIL SOCIETY IN CHINA: THE LEGAL FRAMEWORK FROM ANCIENT TIMES TO THE "NEW REFORM ERA" 4 (2013).

[8] SHARON GU, THE BOUNDARIES OF MEANING AND THE FORMATION OF LAW 78 (2006).

> "The former was originally derived from a graphic character meaning 'knife' and referred to the practice of corporal punishment. The latter referred to a pattern, or model, of practice. […] Both *xing* and *fa* were confined to the domain of human legal practice. The former referred to particular kinds of criminal penalty and the latter to a particular name given to a current pattern of practice".[9]

These two characters clearly illustrate the original, imperial, and penal notions of law in China, aimed at controlling and modelling behavior through sanction/criminal penalty and for social harmony.

Recognizing the fraughtness of any attempt to definitively and accurately identify the early roots of Chinese criminal law and tracing its development, this article makes a modest but important contribution: In surveying the available records and literature on the earliest known Chinese dynasties — the Xia Dynasty and the Shang Dynasty — this article offers readers an induction to the rich and complex history of Chinese law; important legal principles and practices with regard to criminal and penal law in the earliest known Chinese dynasties are identified, and their endurance and lasting influence on the development of Chinese criminal law are traced. The goal ultimately is not to devise a historical record of the dawn of the Chinese legal system, but rather to begin to understand its heritage.

Part II of this article focuses on the Xia Dynasty and specifically the Yu Punishments (禹刑) and the early prison system established in ancient China. The Shang Dynasty is discussed in Part III of the article, and the focus in this part is on the Tang Punishments (汤刑) and specific penalties that applied during this period in Chinese history. Based on this legal-historical overview, two early relics from the Chinese legal tradition — the Five Punishments (五刑), and respect for filial piety (孝) — are then considered in Part IV, with the conclusion in Part V briefly highlighting the continued importance of the lingering remnants of early Chinese laws and practices to this day.

II. THE XIA DYNASTY (夏, C. 2000–1600 B.C.)

According to the *Annals of the Bamboo Books*, we know that the Zhou Dynasty (周, c. 1100–221 B.C.) was preceded by the reign of thirty kings.[10] If each King ruled for approximately twenty years, which holds good for the late Chinese feudal period, it can be inferred that the Shang Dynasty lasted, at most, about 600 years.[11] Some sources place the Shang Dynasty between circa 1600 to 1100 B.C., while the *Annals of the Bamboo Books* itself recorded the Shang Dynasty to have lasted for only 508 years, from circa 1558 to 1050 B.C.[12] This shorter period can be explained when taking into

[9] *Id.*

[10] Other sources make mention of thirty-one kings. *See* CHANG ET AL., *supra* note 2, at 28; Bishop, *supra* note 3, at 242.

[11] Bishop, *supra* note 3, at 242.

[12] *Id.*; CHANG ET AL., *supra* note 2, at 20.

account that a form of fraternal inheritance of title[13] was practiced during this time; "a king's brothers would as a rule be older than the king's sons and would succeed to the throne at ages when less expectation of life remained to them", and some therefore ruled for much shorter periods than the approximate twenty years.[14] The question remains, however, what "dynasty" preceded that of Shang.

Historical records suggest that the Shang, some centuries prior their rise to power, occupied the extreme southwestern part of the modern Shanxi (山西), before migrating to the district of Shang in south-eastern Shaanxi (陕西) and the valley of Luohe (洛河) in the great plain of northern China.[15] Very little archaeological data and other sources are available about this period in Chinese history, which later became known as the Xia Dynasty.[16] Moreover, where reference is made to the Xia Dynasty in later records, it is usually linked to the Shang and Zhou dynasties.[17] Carl Whiting Bishop (1881–1942), the American Far Eastern archaeologist, described the Xia Dynasty as the "miraculously conceived ancestor of the Shang" and warned that the "recorded statements concerning that 'dynasty' are of such character that little reliance can be placed upon them". Indeed, the very existence of the Xia Dynasty has been questioned and evidence suggests that what is recorded about the Xia is merely a fabricated history compiled in later dynasties with the aim to make up for the lack of real records.[18] The content and merits of these views will not be considered here. The focus of this article is rather on what is known (or can be inferred) from available records and literature about the Xia Dynasty, and specifically with regard to its laws and legal system.

Both the *History of the Former Han Dynasty* and the *Annals of the Bamboo Book* attributed to the seventeen kings of the Xia Dynasty, and both sources "assert that an interregnum of forty years began about three-quarters of a century after the establishment of the dynasty".[19] Lasting approximately 440 years, the Xia Dynasty is therefore believed to have emerged as the first dynasty in Chinese history at approximately 2000 B.C.[20] As already indicated, whether this record is a genuine or fabricated folk-recollection of what had preceded the Shang Dynasty, remains uncertain to this day, but it is generally accepted that this (Xia) "dynasty" presented the advent of the Bronze Age in China.[21] According to legend, Yu (禹) was the first of the

[13] Fraternal inheritance of title was a hereditary system of the Shang Dynasty, whereby the throne was passed first to the brother of the ruler, and thereafter to the ruler's son. *See* CHANG ET AL., *supra* note 2, at 28.

[14] Bishop, *supra* note 3, at 242.

[15] *Id.* at 243.

[16] The character *xia* (夏) can be interpreted as "elegance", with a figurative meaning of "civilization". *See* CHANG ET AL., *supra* note 2, at 24–25; ROSSABI, *supra* note 2, at 14–15.

[17] CHANG ET AL., *supra* note 2, at 25.

[18] Bishop, *supra* note 3, at 244.

[19] *Id.*

[20] *Id.*; CHANG ET AL., *supra* note 2, at 26.

[21] Bishop, *supra* note 3, at 245–46.

seventeen kings of Xia (having taken over from his immediate predecessor Shun (舜)) and was responsible for building many major cities, establishing administrative posts, and introducing the first criminal laws.[22] The laws of the Xia Dynasty were for this reason referred to as the Yu Punishments (禹刑).[23]

A. The Yu Punishments (禹刑)

The Yu Punishments were mentioned in *Zuo Tradition: Commentary on the Spring and Autumn Annals* (春秋左传, hereinafter referred to as "*Zuo Tradition*"), an ancient Chinese narrative that is traditionally regarded as a commentary to *the Spring and Autumn Annals* (春秋), which is one of the Six Classics from the pre-Qin period.[24] It is written in the *Zuo Tradition* that in the sixth year of Lord Zhao (昭公六年), among the correspondence with Zi Chan (子产), a statesman of the State of Zheng (郑国), and Shu Xiang (叔向), a statesman of the State of Jin (晋国), claimed that the Xia Dynasty established a penal code called Yu Punishments.[25] This penal code was seemingly established given the widespread disorder that prevailed at that time.[26] Yet, while it is known that the Yu Punishments applied in the Xia Dynasty, little is known about its content and scope of application. For example, some suggest that the "Yu Punishments" was a generic term for the laws of the Xia Dynasty and that it regulated various matters including criminal penalties, property ownership, and patriarchal clan system affairs.[27] Others submit that the Yu Punishments was not introduced by Yu, but that it was the son of Yu, Qi (启) who had established the Yu Punishments as the customary law of the Xia Dynasty.[28] And yet a third opinion is that the Yu Punishments only referred to the criminal laws of the Xia Dynasty.[29] Like much of the other available information on the Xia Dynasty, therefore, the true nature, content, and scope of the Yu Punishments cannot be determined with certainty, but there is no doubt that the Yu Punishments referred to a form of law and/or legal regulation during that time.[30]

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[22] CHANG ET AL., *supra* note 2, at 26; Bishop, *supra* note 3, at 246.

[23] LIANG HUIXING, THE DRAFT CIVIL CODE OF PEOPLE'S REPUBLIC OF CHINA (Martinus Nijhoff Publishers 2010).

[24] The other five classics were the *Book of Poetry* (诗), the *Book of Documents* (书), the *Book of Rites* (礼), the *Book of Music* (乐), and the *Book of Change* (易). *See* CHANG ET AL, *supra* note 2, at 156–75, 178–99, 223; PU JIAN (蒲坚), ZHONGGUO FAZHI TONGSHI (DIYIJUAN: XIA SHANG ZHOU) (中国法制通史(第一卷: 夏商周)) [LEGAL HISTORY OF CHINA (BOOK I: XIA SHANG ZHOU)] 101 (1999).

[25] ZUO TRADITION, 1402–03 (Stephen Durrant et al. trans., 2016).

[26] *Id*.

[27] XUE MEIQING (薛梅卿), ZHONGGUO FAZHISHI JIAOCHENG (中国法制史教程) [TEXTBOOK OF CHINESE LEGAL HISTORY] 12 (1988).

[28] YE XIAOXIN (叶孝信), ZHONGGUO FAZHISHI (中国法制史) [LEGAL HISTORY OF CHINA] 15 (1996).

[29] ZHANG JINFAN (张晋藩), ZHONGGUO FAZHISHI (中国法制史) [LEGAL HISTORY OF CHINA] 41 (1991).

[30] HU LIUYUAN (胡留元) & FENG ZHUOHUI (冯卓慧), XIA SHANG XIZHOU FAZHISHI (夏商西周法制史) [LEGAL SYSTEMS OF XIA, SHANG AND WESTERN ZHOU: A HISTORY] 48 (2006); PU, *supra* note 24, at 101.

Specifically, with regard to criminal law — the primary focus of this article — mention is made in the *Zuo Tradition* of three offenses in the Yu Punishments; these were Hun (昏, disorder), Mo (墨, corruption), and Zei (贼, lawlessness).[31] Hun referred to "appropriating the semblance of goodness when one is evil"; Mo referred to "failing in one's official duties out of greed"; and Zei referred to "killing others without qualms".[32] According to Shu Xiang, these three offenses were established by Gao Yao (皋陶) — an ancient minister of law and generally regarded as one of the first Chinese judicial scholars — and were punishable by death.[33] From this we also know that the death penalty was a recognized punishment under the Yu Punishments. Moreover, from the *Treatise on Punishment and Law of Book of Han* (汉书·刑法志), it is also known that corporal punishment was recognized as it was stated that Yu established corporal punishment as part of the Yu Punishments and in reaction to, what he perceived, as the general decline of societal relations at that time.[34]

In addition to the *Zuo Tradition*, the *Book of Sui* (隋书)[35] also made reference to the laws of the Xia Dynasty and noted that there were five formal penalties and three thousand articles or legal provisions that applied at that time.[36] A similar remark can be found with reference to the *Rite of Zhou* (周礼), a source describing the organization and bureaucracy of the Zhou Dynasty, where Zheng Xuan (郑玄, 127–200 A.D.), an influential Chinese commentator and Confucian scholar toward the end of the Han Dynasty (汉, 206 B.C.–220 A.D.),[37] commented (with reference to the *Rite of Zhou)* that there were two hundred provisions in the Yu Punishments relating to crimes punishable by Da Pi (大辟, death penalty), three hundred provisions relating to crimes punishable by Bin Pi (膑辟, removing the offender's patella), five hundred provisions relating to crimes punishable by Gong Pi (宫辟, the mutilation of the genital organs), one thousand provisions relating to crimes punishable by Yi (劓, amputation of the offender's nose), and one thousand provisions relating to crimes punishable by Mo (墨, to carve the face of the offender and color it with pigment, *i.e.*, tattooing of the face).[38] It is also written that King Qi, the son of Yu, issued Gan Shi (甘誓), a war mobilization

[31] PU, *supra* note 24, at 101.

[32] ZUO TRADITION, *supra* note 25, at 1518–19.

[33] *Id.*; Pu, *supra* note 24, at 101.

[34] SHEN JIABEN (沈家本), LIDAI XINGFA KAO SHANGCE (历代刑法考上册) [STUDY ON CHRONICLES CRIMINAL LAW (THE FIRST VOLUME)] 23 (2011); PU, *supra* note 24, at 101; QIU HANPING (邱汉平), LIDAI XINGFA ZHI (历代刑法志) [CHRONICLES TREATISES ON CRIMINAL LAW] 23 (2017).

[35] The book of Sui was written in the Tang Dynasty (唐, 618–907 A.D.).

[36] PU, *supra* note 24, at 104.

[37] YANG TIANYU (杨天宇), ZHENGXUAN SANLIZHU YANJIU (郑玄三礼注研究) [THE RESEARCH ON ZHENG XUAN'S INTERPRETATION ON THE THREE RITES] 3 (2007).

[38] HU & FENG, *supra* note 30, at 49, 75, 77, 83, 88.

order, and whoever disobeyed this order was to be punished by Nu Lu (孥戮).[39]

While it is generally accepted that Lu (戮) referred to the death penalty, the exact meaning of Nu (孥) remains uncertain.[40] It is suggested that Nu (孥) was a collective punishment requiring that the offender's wife and son, or only the offender's son also be enslaved as part of the offender's punishment.[41] Sima Qian (司马迁), the author of the *Records of the Grand Historian* (史记),[42] suggested that Nu Lu was a collective punishment whereby the offender together with his wife and children was sentenced to death.[43] Given that Nu Lu appeared in a war mobilization order, it must be noted that this was not a general criminal penalty but rather a military penalty. In fact, Nu Lu is generally regarded as one of the earliest known military penalties in ancient China.[44] Military penalties applied to soldiers or other persons involved in military activities and formed an important part of the ancient Chinese military bureaucracy and organization.[45]

Finally, in the *Classic of Filial Piety* (孝经) — a Confucian treatise giving advice on filial piety (孝)[46] — mention was also briefly made of the three thousand articles of the Yu Punishments, and it was stated that the gravest offense an offender could commit was the offense of affronting filial piety (不孝).[47] Filial piety refers to the virtue of respect for one's parents, elders and ancestors, and — as will become evident from the discussion below — has,

[39] SHEN, *supra* note 34, at 7.

[40] Jin Jingfang (金景芳) & Lü Shaogang (吕绍纲), *Tangshi Xingjie* (汤誓新解) [*The New Explanation of Tang Shi*], 1 SHIXUE JIKAN (史学集刊) [COLLECTED PAPERS OF HISTORY STUDIES] 5, 10 (1996); Yi Ning (易宁), *The Studies and Explanation on "Yu Ze Nu Lu Ru" in Shang Shu·Gan Shi* (尚书·甘誓"予则孥戮汝"考释) [*The Stuides and Explanations on "Yu Ze Nu Lu Ru" in Gan Shi of Book of Documents*] 1 SHIXUESHI YANJIU (史学史研究) [JOURNAL OF HISTORIOGRAPHY] 56, 56–57 (2002).

[41] Jin & Lü, *supra* note 40, at 10.

[42] Shi Ji (史记) [Records of the Grand Historian] is a monumental history of ancient China and the world, finished around 94 B.C. by the Han Dynasty official Sima Qian after the work had been started by his father, Sima Tan, Grand Astrologer to the imperial court. The *Records of the Historian* contains a hundred and thirty chapters in twelve basic annals, ten tables, eight treatises, records of thirty hereditary houses and seventy collected biographies, totaling over 500,000 characters. This valuable historical source had a significant impact on later generations, especially in the fields of historiography and literature, and it is said that the genre won favor with the ruling classes of succeeding dynasties and was the only pattern used by historians of later generations to compile the official "standard history". *See* CHANG ET AL., *supra* note 2, at 300–15.

[43] Yi, *supra* note 40, at 58.

[44] Chen Enlin (陈恩林), *Shilun Xianqin de Junshi Xingfa* (试论先秦的军事刑罚) [*On the Military Punishment before the Qing Dynasty*] 4 SHIXUE JIKAN (史学集刊) [COLLECTED PAPERS OF HISTORY STUDIES] 18 (1987).

[45] *Id.* at 18, 23.

[46] Originally from the character *xiao* (孝). *See* WANG LIHUA (王利华), ZHONGGUO JIATING SHI (DIYIJUAN) (中国家庭史(第一卷)) [A GENERAL HISTORY OF CHINESE FAMILY (VOL. I)] 191 (2007).

[47] The importance of filial piety, and the criminalization and punishment of behavior offending filial piety remained a constant theme throughout the history and development of Chinese criminal law. Long Daxuan (龙大轩), *Xiaodao: Zhongguo Chuantong Falü de Hexin Jiazhi* (孝道:中国传统法律的核心价值) [*Filial Morality: The Core Value of Chinese Legal Tradition*] 3 FAXUE YANJIU (法学研究) [CHINESE JOURNAL OF LAW] 176–77 (2015).

from these early dynasties to date, remained central to the development of Chinese society and criminal law.[48] Also discussed in more detail below is the reference made in the *Classic of Filial Piety* — and with regard to the Yu Punishments — to the Five Punishments; a generic term used in ancient China to describe "the standard, main punishments in the penal legal system".[49] The origin of the Five Punishments can be traced to the Shang Dynasty, and will be discussed in more detail below.[50]

B. The Early Prison System in Ancient China

From available literature and records we know that a prison system was established in ancient China from early on. Legend suggests that Gao Yao established the first prison system in ancient China during the pre-dynastic Shun period.[51] Another source mentioning the early prison system of ancient China is the *Comprehensive Meaning of Customs and Mores* (风俗通义), a book written by Ying Shao (应劭) of the later Eastern Han Dynasty (东汉, 25 B.C.–220 A.D.), and in which it is recorded that there was a prison system in ancient China since the Three Kings, which referred to King Yu of the Xia Dynasty, King Tang (汤) of the Shang Dynasty, and King Wen of the Zhou Dynasty (周文王).[52]

The early prisons in the Xia Dynasty were generally known as Lao (牢); *i.e.*, a place where cattle, pigs and other livestock were penned. This was because slaves, criminals, and livestock were all regarded as of the same genus and were for this reason kept together.[53] During the Shang and Zhou Dynasties, the term Huan Tu (圜土) was used to describe prisons and it referred to a circular cell with mud walls.[54] And later still, the term Huan Tu was substituted with the term Xia Tai (夏台), which was used to describe how Chief Tang, who ultimately brought about the collapse of the Xia Dynasty,

[48] *Id.*; HUGH D.R. BAKER, CHINESE FAMILY AND KINSHIP 68 (1979).

[49] As for the Five Punishments, Bodde and Morris said: "At first sight the number suggests a relationship with the many sequences in fives (the five colors, five notes, five tastes, five directions, and many more) constituting the Chinese politico-cosmic system dominated by the Five Elements. However, a correlation between the five punishments and these elements has never been stressed in Chinese writings and is first mentioned only relatively late (perhaps in the first century B.C.). Further, it seems possible that the term 'five punishments' may already have been known before the Five Elements system was worked out — perhaps, indeed, even before the appearance of the earliest written 'codes' of law in the sixth century B.C." The specific penalties which comprised the Five Punishments changed over time. Norman P. Ho, *Debates on Mutilating Corporal Punishments and Theories of Punishment in Traditional Chinese legal Thought*, 11 TSINGHUA CHINA L. REV. 43, 49 (2018); BODDE AND MORRIS, *supra* note 4, at 76.

[50] PU, *supra* note 24, at 149.

[51] ZHANG JINPAN (张晋藩), ZHONGGUO GUDAI FALÜ ZHIDU (中国古代法律制度) [CHINESE ANCIENT LEGAL SYSTEM] 23 (1992).

[52] *Id.* at 24.

[53] PU, *supra* note 24, at 117.

[54] ZHANG, *supra* note 51, at 24.

was imprisoned by Jie (桀), the last king of the Xia Dynasty.[55] The term Xia Tai was therefore also often used to refer to the prisons of the Xia Dynasty.[56]

These early prisons did not, however, serve the same function that prisons or penal institutions serve today. While wrongdoers could be detained in prison for a considerable period of time (sometimes even years) before the final execution of their sentence, their sentence, *per se*, was not imprisonment, but another penalty that was to be executed at a future date and it therefore required that the offender be detained in the interim.[57] Or, the sentence imposed was a form of penal servitude which necessarily also required that the offender be detained.[58] The character *tu* in Huan Tu, for example, meant "to walk on foot" and referred to the offender being marched on foot from the place where he was being detained to the place where he was to perform labor.[59] Thus, similar to the development of penal law in the West, where aside from debtor's prisons imprisonment as a form of punishment and sentence in itself only really developed in the late eighteenth and early nineteenth century, the contemporary notion of the prison also developed much later in China, and falls beyond the scope of this article which focuses exclusively on penal law in early China.[60]

III. THE SHANG DYNASTY (商, C. 1600–1100 B.C.)

According to available records and legend, the Shang Dynasty lasted between 500 to 600 years and was ruled over by seventeen generations of kings.[61] The Shang Dynasty enjoyed consolidated sovereignty from the reign of Pan Geng (盘庚), who settled the Shang capital in Yin (殷, the present Anyang in Henan Province) in 1300 B.C., until its collapse approximately two hundred years later.[62] The Shang Kingdom consisted of two sectors, the first being the internally governed area with the Shang King as its central ruling authority and the second being the external areas which, although under the King's influence, were not under his direct control but rather under the control of appointed officials or traditional chiefs governing on the King's behalf.[63] Yet, even during this period of consolidated sovereignty, subdued external areas remained, which were only subject to the Shang King in name.[64] Thus, while the internally governed areas were strictly controlled, the second sector

[55] PU, *supra* note 24, at 118.

[56] *Id.*

[57] BODDE & MORRIS, *supra* note 4, at 79.

[58] Bodde & Morris suggest that women sentenced to exile or death may have had their sentences commuted to a fixed-term imprisonment or life imprisonment respectively. This prison term was then to be served in the home district of the offender. *Id.*

[59] *Id.* at 81.

[60] *Id.*

[61] CHANG ET AL., *supra* note 2, at 28.

[62] *Id.* at 29.

[63] *Id.*

[64] *Id.*

and further external areas enjoyed a relatively loose governing under the authority of delegated officials and/or traditional chiefs.[65]

A. The Tang Punishments (汤刑)

According to the *Zuo Tradition*, the *Mencius* (孟子) written by Mencius (孟子, 372–289 B.C.) and his students,[66] and the *Records of the Grand Historian*, the criminal laws and penalties in the Shang Dynasty were known as the Tang Punishments, arguably ascribed to Chief Tang who, according to legend, overthrew the Xia Dynasty.[67] The Tang Punishments were the basic law of the Shang Dynasty and applied throughout the territory.[68] Unfortunately, the original Tang Punishments had been lost, making a careful textual analysis of the criminal and penal laws of this time impossible. Reliance must consequently be placed on secondary sources.

According to the *Master Lü's Spring and Autumn Annals* (吕氏春秋),[69] there were approximately three hundred offenses mentioned in the Tang Punishments, and there was no one graver than the crime against filial piety,[70] which referred to the virtue of respect for one's parents, elders, and ancestors.[71] A rule preserving filial piety and taking the form of a set of instructions issued by King Wu of Zhou (周武王) to a younger prince King Kang (周康王) and for the purpose of governing the fief, was espoused in the Kang Gao (康诰) — a chapter of Zhou which formed part of the *Book of Documents* (尚书)[72] — and is the earliest known, recorded example of a legal principle or rule in ancient China.[73] Unfortunately, not much is known about the three hundred recognized offenses in the Tang Punishments, and only a few of these offenses were mentioned and explained in the available records of subsequent dynasties.

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[65] *Id.*

[66] *Mencius* (孟子) is a collection of anecdotes and conversations of the Confucian thinker and philosopher Mencius on topics in moral and political philosophy, often between Mencius and the rulers of the various Warring States.

[67] PU, *supra* note 24, at 134; CHANG ET AL., *supra* note 2, at 27–28.

[68] PU, *supra* note 24, at 135.

[69] Lüshi Chunqiu (吕氏春秋), also known in English as *Master Lü's Spring and Autumn Annals*, is an encyclopaedic Chinese classic text compiled around 239 B.C. under the patronage of the Qin Dynasty Chancellor Lü Buwei, and "was meant to provide a comprehensive principle for the governance of the state". The main point was to follow the monthly ordinances of Heaven that could be determined through astronomical observations. Sun, *supra* note 4, at 100.

[70] Xing Sanbai, Zui Mozhong yu Buxiao (刑三百, 罪莫重于不孝) an ancient sting from Lüshi Chunqiu states that of all the criminal offenses, being unfilial is the worst.

[71] PU, *supra* note 24, at 135.

[72] *Book of Documents* (尚书), is a collection of rhetorical prose attributed to figures of ancient China, and served as the foundation of Chinese political philosophy for over 2,000 years.

[73] Matthew LeFande, *Aspects of Legalist Philosophy and the Law in Ancient China: The Chi'in and Han Dynasties and the Rediscovered Manuscripts of Mawangdui and Shuihudi* (Nov. 2000), http://cpi-va.us/AncientChinaLaw.pdf (last visited Apr. 13, 2021).

The following three offenses and penalties were recorded in the *Book of Documents*:[74] Bu Ji Bu Di (不吉不迪) refers to having in an improper manner not followed the instructions for righteous behaviors as prescribed by Pan Geng, a King of the Shang Dynasty. This offense was essentially a moral prescription for human behavior. The penalty for this offense was a collective punishment whereby the offender together with his or her family were put to death. Dian Yue Bu Gong (颠越不恭) means an uncontrollable and unbridled person who had breached legal regulations and failed to follow the King's orders, and here too a collective punishment of the death penalty applied. Zan Yu Jian Gui (暂遇奸宄) indicates defrauding others, being treacherous, or an evildoer. The penalty for this offense was the death of the offender together with all his or her family members who were, according to the prescribed penalty for this offense, jointly charged together with the offender for the same offense.

A further four offenses and penalties from the Tang Punishments were recorded in the *Master Lü's Spring and Autumn Annals*, *Mozi* (墨子),[75] *Han Feizi* (韩非子),[76] and *Records of the Grand Historian*.[77] These were: Bu Xiao (不孝) means violating filial piety. Wu Feng (巫风) was an offense aimed at governors in the Shang Dynasty who were addicted to songs and dances and were for this reason liable to be fined. Qi Hui Yu Gong Dao (弃灰于公道) refers to dumping of dust on a public street. According to the *Han Feizi*, a person who dumped dust in a public street had to be punished by amputating that person's arm. The reason for this rather draconian penalty for a seemingly harmless offense (dumping dust in a public street) was that such behavior often caused strife and fights with pedestrians. Thus, it was argued that the commission of this offense warranted a severe penalty. Bu You Gong Yu Min (不有功于民) was an offense aimed at governors in the Shang Dynasty and referred to instances where such governors wasted manpower and money by requesting a great bustle of masons and carpenters without any good reason to do so.

In addition to the Tang Punishments, a separate criminal ordinance detailing specific offenses and penalties for government officials also applied and was known as the Tang Punishments of Officials (官刑).[78] The primary purpose of this Tang Punishments of Officials was to stabilize the social order of the Shang Dynasty and contribute to the efficiency of the operation of governors.[79] Reference was made to this special criminal ordinance in *Mozi*, according to which the Tang Punishments of Officials had already been

[74] PU, *supra* note 24, at 146–47.

[75] *Mozi* (墨子), is an ancient Chinese text from the Warring States period (476–221 B.C.) that expounds the philosophy of Mohism.

[76] *Han Feizi* (韩非子), is an ancient Chinese text attributed to the foundational political philosopher Han Feizi.

[77] PU, *supra* note 24, at 136, 146–47.

[78] HU & FENG, *supra* note 30, at 55.

[79] *Id.*

mentioned in the *Books of the Ancient Kings* (先王之书) — an unspecified early record of the writings of ancient kings. Later this Tang Punishments of Officials was also mentioned by Shen Jiaben (沈家本), one of the Ministers of Legal Reform appointed in 1903 towards the end of the Qing Dynasty (清, 1636–1912 A.D.), in his *Study on Chronicles Criminal Law* (历代刑法考).[80]

B. Specific Penalties Recognized and Applied in the Shang Dynasty

The penal laws of the Shang Dynasty were seemingly more varied and developed than that of the Xia Dynasty. For example, in the *Xunzi* (荀子),[81] it was noted that specific penalties developed in the Shang Dynasty each with its own descriptive title.[82] The following six Shang penalties are mentioned in available sources and records:[83] Pao Ge (炮格), a penalty that involved the offender walking on a copper cylinder that was anointed with oil and heated with fire. If the offender fell, death was imminent. Hai (醢), a penalty that involved killing the offender by pounding his or her body into a meat paste. Fu (脯), a penalty in terms of which the offender's body was dried out to resemble jerky. Duan Shou (断手), which involved the amputation of an offender's hand as a penalty for wrongdoing. Fa Si (罚丝), a penalty requiring the offender to pay the government a certain quantity of silk. And, Yi Tian (劓殄), a penalty whereby the offender and all his or her descendants were killed.

In addition, an oracle bone script referencing five punishments and the military penalty of Nu Lu — as discussed above — is generally believed to have been the origin of the so-called Five Punishments, a generic term used in ancient China to describe "the standard, main punishments in the penal legal system".[84] These were Mo (墨)/Qing (黥), a penalty that required the carving and tattooing of the offender's face; Yi (劓), a penalty whereby the nose of the offender was amputated; Yue (刖), a penalty requiring that the foot of the offender be amputated; Gong (宫), a penalty whereby the criminal's genitalia were amputated; Da Pi, the death penalty; and the military penalty of Nu Lu.

IV. RELICS OF EARLY CHINESE CRIMINAL AND PENAL LAW IN SUBSEQUENT DYNASTIES

A. The Five Punishments (五刑)

The first relic of early Chinese criminal and penal law that became a standard fixture in the laws of subsequent dynasties is the Five Punishments. With their origin in the Shang Dynasty and featuring prominently in the laws

[80] SHEN, *supra* note 34, at 8; PU, *supra* note 24, at 136–37.

[81] *Xunzi* (荀子) is an ancient Chinese collection of philosophical writings attributed to Xun Kuang, a 3rd century B.C. philosopher usually associated with the Confucian tradition.

[82] SHEN, *supra* note 34, at 8.

[83] PU, *supra* note 24, at 148–54.

[84] Ho, *supra* note 49, at 49; SHEN, *supra* note 34, at 8, 181; PU, *supra* note 24, at 150–55; BODDE & MORRIS, *supra* note 4, at 76.

of the Western Zhou Dynasty (西周, c. 1100–771 B.C.), the Five Punishments became a standard feature and principal part of the penal laws (and legal codes) of subsequent dynasties, including the Great Qing Legal Code (大清律例) of the Qing Dynasty. In each dynasty, the Five Punishments — referring to the standard or main penalties of the penal legal system — were further developed and amended to meet the specific needs of that time and to reflect the prevailing ideologies of penalty and crime.

It can generally be observed that the Five Punishments developed in two phases: the slavery Five Punishments and the feudal Five Punishments.[85] The slavery Five Punishments were established in the Xia Dynasty and were further developed in the Shang Dynasty, to ultimately reach its pinnacle of development in the Western Zhou Dynasty.[86] In the Western Zhou Dynasty, the Five Punishments included Mo (墨), Yi (劓), Fei (非), Gong (宫), and Da Pi (大辟).[87] Mo was similar to the Mo/Qing of the Shang Dynasty and entailed the carving of words on the offender's body, mostly the face, and also coloring the offender's face with pigment (tattooing). As the pigment penetrated the skin, the words carved became a permanent and humiliating mark for the offender.[88] Yi was also applied in the Shang Dynasty and required that the nose of the offender be amputated.[89] And Fei was similar to the penalty of Yue from the Shang Dynasty, and required that the foot of the offender be amputated. Gong in the Shang Dynasty was a penalty whereby the criminal's genitalia were cut off and it retained this character in the Zhou Dynasty where it referred to the mutilation of an offender's genitalia, while Da Pi was a collective term referring to the various modes of executing the death penalty.[90]

Particularly noteworthy with regard to the development of the Five Punishments in subsequent dynasties was the abolishment of the mutilation punishments by Emperor Wen of Han (汉文帝) during the Western Han Dynasty (西汉, 206 B.C.–24 A.D.).[91] Subsequent to the formal abolishment of the mutilation punishments, the following penalties applied:

> "[C]onvicts who had been sentenced to the [mutilation punishment] of tattooing were instead punished by the wearing of a cangue, shaving of the head, or around four years of forced labor. Those who had been sentenced to amputation of the nose were instead punished with beating — specifically, 300 blows of the bastinado. Those who had been originally sentenced to amputation of the left foot were instead punished with 500 blows of the bastinado, while those who had

[85] CHEN PENGSHENG (陈鹏生), ZHONGGUO FAZHI TONGSHI (DISIJUAN) (中国法制通史(第四卷)) [GENERAL HISTORY OF CHINESE LEGAL SYSTEM (VOL. IV)] 201 (1999).

[86] CHEN, *supra* note 85, at 201.

[87] PU, *supra* note 24, at 148.

[88] *Id.* at 198.

[89] *Id.*

[90] *Id.* at 198–99.

[91] BAN, *supra* note 3, at 355; CHANG ET AL., *supra* note 2, at 307–15.

originally been sentenced to amputation of the right foot were instead punished to death."[92]

However, many of these mutilation punishments prevailed nonetheless,[93] while formally, beating became the most serious non-capital penalty.[94] It is interesting to note that different opinions exist as to whether Gong, one of the slavery Five Punishments, was also abolished with Emperor Wen's legal reform.[95] The general consensus seems to be that Gong was indeed abolished but was later revived — although not formally recognized — since the reign of Emperor Jing (汉景帝).[96] Other noteworthy legal developments with regard to the Five Punishments during the first phase of its development can be traced to the Three Kingdoms (三国时期, 220–280 A.D.), where efforts were concentrated on establishing a new set of Five Punishments.[97] In the Northern Wei (北魏, 386–534 A.D.), for example, Liu (流, exile), although having been practiced before, was established as a formal statutory penalty forming part of the Five Punishments.[98] During this period, therefore, the Five Punishments consisted of the following: Zhang (杖, to beat the offender with wood), Bian (鞭, to beat the offender with a strap), Tu (徒, whereby the offender was deprived of their personal freedom and committed to forced labor), Liu (流, exile) and Si (死, the death penalty).[99]

The second phase of the legal development of the Five Punishments, when the feudal Five Punishments were established, can be traced to the Sui Dynasty (隋), when the Five Punishments consisted of Chi (笞, flogging with thorns), Zhang (杖, beating with wood), Tu (徒, the deprivation of personal freedom and forced labor), Liu (流, the penalty of life in exile), and Si (死, death penalty).[100] The Five Punishments in this phase were subsequently adopted by the Tang Dynasty (唐, 618–907 A.D.), where the Five Punishments underwent further legal reform and development. During the Tang Dynasty, for example, the Five Punishments were generally described as having a total of twenty degrees of severity.[101] These degrees of severity reflected the moral and criminal condemnation of the offense committed and were translated into a mitigated or aggravated penalty, for each of the Five Punishments. For example, beating a person using one's hands or feet was a

[92] Ho, *supra* note 49, at 51.

[93] XU SHIHONG (徐世虹), ZHONGGUO FAZHI TONGSHI (DI'ERJUAN) (中国法制通史(第二卷)) [GENERAL HISTORY OF CHINESE LEGAL SYSTEM (VOL. II)] 508 (1999).

[94] Ho, *supra* note 49, at 50–51.

[95] XU, *supra* note 93, at 509.

[96] SHEN, *supra* note 34, at 169–71; XU, *supra* note 93, at 509.

[97] QIAO WEI (乔伟), ZHONGGUO FAZHI TONGSHI (DISANJUAN) (中国法制通史(第三卷)) [GENERAL HISTORY OF CHINESE LEGAL SYSTEM (VOL. III)] 511 (1999); XUE JING (薛菁), WEIJIN NANBEI CHAO XINGFA TIZHI YANJIU (魏晋南北朝刑法体制研究) [A RESEARCH ON THE CRIMINAL SYSTEM IN WEI, JIN AND THE SOUTHERN AND NORTHERN DYNASTIES] 210 (2006).

[98] SHEN, *supra* note 34, at 243.

[99] XUE, *supra* note 97, at 217–18.

[100] CHEN, *supra* note 85, at 22–23.

[101] *Id.* at 201.

criminal offense punishable by sixty blows of Zhang.[102] The penalty was increased to eighty blows if the victim was wounded, in that blood was drawn or if the victim was seized by his or her cranial hair or was grabbed by his or her throat or collar.[103] And if the victim was a relative of the offender of the same generation but older and of the fifth degree of mourning,[104] the penalty was further aggravated into one hundred blows.[105] Likewise, if the victim was an elder brother or sister of the offender, the penalty was increased to two and one-half years of Tu, and if the victim was a paternal uncle or aunt, or the offender's maternal grandparents, the penalty was increased to three years of Tu.[106] A clear standard was also detailed in the Tang Code (唐律疏议) with regard to the addition and abatement of penalty, and it was also possible to supplement any of the Five Punishments with additional accessory penalties such as depriving an official from his position and/or confiscating property.[107] The Five Punishments reached a mature and complete stage of development under the law of the Tang Dynasty and were also adopted by subsequent dynasties. It is important to note that even after the formal abolishment of the mutilation punishments, legal reformers remained hesitant to expand the number of penalties and insisted that there could only be five.[108]

The legacy of the Five Punishments was preserved in the laws of modern-day China. For example, both the Criminal Law of Republic of China (中华民国刑法) of 1928 and 1935, and the 1942 Draft General and Specific Provisions of the Criminal Law of Shaan-Gan-Ning Border Region (陕甘宁边区刑法总、分则草案), provided five principal penalties.[109] The five principal penalties in the Criminal Law of Republic of China, both the 1928 version and 1935 version, are the death penalty, life imprisonment, fixed-term imprisonment, criminal detention, and fine.[110] In the 1942 Draft General and

[102] WALLACE JOHNSON, THE T'ANG CODE, VOLUME II: SPECIFIC ARTICLES 325 (1979).

[103] *Id.* at 326.

[104] Degrees of mourning referred to a mourning dress system — Wu-Fu (五服), which originated from the patriarchal clan system (宗法) of the Western Zhou Dynasty (周朝). The first time the concept appeared in a legal code was during the early Western Jin Dynasty (西晋, 265–316 A.D.), with reference to the principle of Zhun Wu-Fu (准五服). The principle of Zhun Wu-Fu not only prescribed the duration of mourning periods and mourning garb to be worn, but was also used to determine the severity of the penalty of the offenses having been committed amongst relatives. In defining the degrees of relationship between members of a family unit and their next of kin, it was possible to discern how severe the penalty ought to be. Wu Fei (吴飞), *Wufu Tu yu Gudai Zhongguo de Qinshu Zhidu* (五服图与古代中国的亲属制度) [*The Wu-Fu Diagram and the Relatives System in Ancient China*] 12 ZHONGGUO SHEHUI KEXUE (中国社会科学) [SOC. SCI. IN CHINA] 162, 163 (2014); QIAO, *supra* note 97, at 195; BODDE & MORRIS, *supra* note 4, at 36.

[105] JOHNSON, *supra* note 102, at 362.

[106] *Id.* at 364–65.

[107] CHEN, *supra* note 85, at 206–07.

[108] SHEN, *supra* note 34, at 181.

[109] ZHAO BINGZHI (赵秉志) & CHEN ZHIJUN (陈志军), ZHONGGUO JINDAI XINGFA LIFA WENXIAN HUIBIAN (中国近代刑法立法文献汇编) [COLLECTION OF CRIMINAL LAW LEGISLATION DOCUMENTS IN MODERN CHINA] 560, 696, 809 (2016).

[110] Article 49 of the Criminal Law of Republic of China (1928); Article 33 of the Criminal Law of Republic of China (1935); *Id.* at 560, 696.

Specific Provisions of the Criminal Law of Shaan-Gan-Ning Border Region, the five principle penalties are the death penalty, compulsory education under restraint, assigned labor service without restraint, fine, and admonition.[111] Moreover, in Article 28 of the first Criminal Law of the People's Republic of China of 1979, as well as in Article 33 of the current Criminal Law of 1997 (most recently amended in 2020), the number of principal penalties are also five: public surveillance, criminal detention, fixed-term imprisonment, life imprisonment, and the death penalty.

B. Filial Piety (孝)

In addition to the endurance of the Five Punishments in Chinese criminal law from their origins in the Shang Dynasty to date, filial piety has — since its early references in the context of the Yu Punishments in the *Classic of Filial Piety*, and later with regard to the Kang Gao (康诰) of King Wu of Zhou in the Western Zhou Dynasty — also endured in Chinese criminal law. Filial piety essentially refers to the virtue of respect for one's parents, elders, and ancestors.[112] Behavior affronting filial piety was not only criminalized from early on (as was evident from the discussion above), but filial piety was also used as a tool for political and legal ends, to ensure loyalty to the State through surveillance and (collective) punishment.[113]

For example, during the Zhou Dynasty, the legal principle Qin Qin Xiang Yin (亲亲相隐) applied, which essentially proclaimed that it is not a criminal offense to harbor or conceal kinsfolk offenders.[114] This legal principle was derived from Confucian theory and was based on the notion that filial piety outweighs any other legal duties or obligations, as the parent-children relationship is the most fundamental relationship of the whole society.[115] Given that Confucius therefore considered filial piety as the source of social order and harmony, the legal principle of filial piety was also reflected in political and social goals, especially when dealing with social disorder and violence.[116] This legal principle was formally recognized in the Sui Dynasty and Tang Dynasty and taken up in the legal codes and rules of subsequent dynasties.[117] Some sources even suggest that family members who did not conceal the misconduct of their kin were liable to criminal penalties

[111] Article 18 of the Draft General and Specific Provisions of the Criminal Law of Shan-Gan-Ning Border Region (1942); *Id.* at 809.

[112] BAKER, *supra* note 48, at 68; Long, *supra* note 47, at 176–177.

[113] Long, *supra* note 47, at 176.

[114] XU, *supra* note 93, at 502.

[115] Norman Ho, *Legal Realism and Chinese Law: Are Confucian Legal Realists, Too?* 13 TINGHUA CHINA L. REV. 127, 137 (2020).

[116] *Id.* at 137; LUNYU (论语) [CONFUCIUS ANALECTS, WITH SELECTIONS FROM TRADITIONAL COMMENTARIES] ch. 1.2 (Edward Slingerland trans., 2003).

[117] YU RONGGEN (俞荣根), RUJIA FA SIXIANG TONGLUN (儒家法思想通论) [GENERAL THEORIES OF CONFUCIANIST LEGAL CONCEPTIONS] 294 (2018).

themselves.[118] A case in point is the Great Qing Code which prescribed 100 blows of Zhang (杖, beat with a heavy bamboo) and three years of Tu (徒, penal servitude) if a person made an accusation (even if the accusation was true) against his paternal grandparents or parents, or if a wife or concubine made an accusation against her husband or husband's paternal grandparents or parents. If the accusation was eventually found to be false, the accuser was sentenced to death by Jiao (绞, strangulation).[119]

During the Qin Dynasty (秦, 221–206 B.C), strict legalism prevailed and kinship structures during this time served a surveillance function to ensure that everyone followed the law. Households were, for example, grouped together in units and were required to exercise mutual surveillance over one another, sharing mutual responsibility by way of collective punishment for the misconduct and wrongdoing of its members. Concealment of any misconduct or wrongdoing during this time was in itself an offense punishable by law.[120] Also during the Qin Dynasty, the mutilation punishments of Nai Xing (耐刑) and Kun Xing (髡刑)[121] effectively and very visibly to the general public, caused an offender to transgress his or her filial duties. The penalty of Nai Xing required that the offender's beard be shaved, while Kun Xing required that the offender's head be shaved.[122] These two penalties may not seem harsh today, but influenced by Confucianism at that time, it was generally believed that a person's body — whether hair or skin — is a gift from his or her parents and ancestors, and must, according to the principle of filial piety, be respected and not damaged in any way.[123] Thus, although Nai Xing and Kun Xing were less intrusive and cruel than other mutilation punishments of that time and did not render the offender physically disabled, these two penalties were nonetheless still regarded as mutilation punishments as they crippled the offender socially; the shame and loss of status offenders suffered for not "keeping their bodies in good form as an expression of their respect and

[118] *Id.*

[119] DAQING LÜLI (大清律例) [THE GREAT QING CODE] 322 (William C. Jones trans., Oxford University Press 1994).

[120] The legalists made no distinction between "kindred and strangers", nor did they differentiate between nobles and peasants. Everybody, according to legalists, were to be judged as one before the law. SIMA QIAN (司马迁), RECORDS OF THE GRAND HISTORIAN — QIN DYNASTY 92 (Burton Watson trans., Columbia Press 1993); BODDE & MORRIS, *supra* note 4, at 22.

[121] It is said that the penalty of Kun Xing is derived from the mutilation punishment Gong Xing, which involved physical castration. The nobles enjoyed a special immunity not to be punished by way of Gong Xing, but rather for their hair and beard to be shaved instead. This special immunity allowed for the nobles to grow back their hair and beard subsequent to the penalty having been meted out, something that would not have been possible subsequent to Gong Xing, for example. It was from this exception that the Nai Xing and Kun Xing ultimately developed. XU, *supra* note 93, at 153; LI JIN (栗劲), QINLÜ TONGLUN (秦律通论) [General Theories of the Qin Code] 250 (1985).

[122] XU, *supra* note 93, at 155–56.

[123] In the *Classic of Filial Piety* (孝经) it was said, for example, that it is the duty of every child to remain undamaged as an "expression of gratitude towards their father and mother for the gift of life". (身体发肤，受之父母，不敢毁伤，孝之始也。) Ho, *supra* note 49, at 52; OLIVIA MILBURN, *Disability in Ancient China*, *in* DISABILITY IN ANTIQUITY 107 (Christian Laes ed., 2017).

gratitude to their parents and ancestors", were the essence of the penalty imposed, and caused offenders so sentenced a considerable psychological and social burden.[124]

Later, from the Jin Dynasty (晋, 265–420 A.D.) onwards, harsh penalties were tempered by considerations for filial piety and kinship relations. For example, during this period in Chinese history, the elderly age of a family member under the offender's care was often taken into consideration as a mitigating factor in penalty. This concession was formally recognized in law during the Northern Wei Dynasty (北魏, 386–532 A.D.), and according to *the Book of Wei* (魏书), if an offender's parents or parental grandparents had reached the age of seventy and there were no other adult children or other relatives within the second-degree of mourning, a petition could be submitted for the Emperor's special consideration to have a particularly harsh penalty — like the death penalty or life in exile — commuted.[125] This sentencing practice was referred to as Cun Liu Yang Qin (存留养亲, also known as Liu Yang 留养), and can be translated as "survive and stay to support close relatives". Since the Tang Dynasty, this practice was formally included and further developed in the legal codes of subsequent dynasties.[126]

Also during the Tang Dynasty, Article 6 of the *Tang Code* regulated the Ten Abominations (十恶) which, together with the Five Punishments, constituted the Tang criminal and penal legal framework.[127] Derived directly from the WuDe Code (武德律) and the KaiHuang Code (开皇律), the Ten Abominations referred to the criminalization and penalty of the most severe crimes.[128] The KaiHuang Code was the first Code, since the Qin Dynasty and Han Dynasty, to comprehensively and completely describe the most severe crimes, while the WuDe Code was the first statute code of the Tang Dynasty.[129] The Ten Abominations were transplanted from Buddhism, which permeated Chinese thought since the Han Dynasty, when explorers to the western regions returned with Buddhist sutras and assisted with their translation.[130] After numerous Buddhist sutras were translated, the theories of Buddhism soon became widely recognized and engrained in Chinese society and so, the concept of the Ten Abominations deriving from Buddhist theories also became a part of Chinese society and law.[131] In detailing the most

[124] XU, *supra* note 93, at 156; Ho, *supra* note 49, at 52; MILBURN, *supra* note 123, at 107.

[125] QU TONGZU (瞿同祖), ZHOGNGUO FALÜYU ZHONGGUO SHEHUI (中国法律与中国社会) [CHINESE LAW AND CHINESE SOCIETY] 74–75 (2010).

[126] *Id.* at 74.

[127] LI JIAOFA (李交发) ET AL., ZHONGGUO FAZHI SHI (中国法制史) [CHINESE LEGAL HISTORY] 163 (2001); YANG TINGFU (杨廷福), TANGLÜ YANJIU (唐律研究) [RESEARCH ON TANG CODE] 100–01 (2012).

[128] THE TANG CODE I — GENERAL PRINCIPLES 62 (Johnson Wallace trans., 1979).

[129] YANG, *supra* note 127, at 98; CHEN, *supra* note 85, at 147.

[130] GUI QIXUN (桂齐逊), GUOFA YU JIALI ZHIJIAN: TANGLÜ YOUGUAN JIAZU LUNLI DE LIFA GUIFAN (国法与家礼之间: 唐律有关家族伦理的立法规范) [BETWEEN THE NATIONAL LAW AND THE FAMILY RITES — THE LEGISLATIVE NORMS OF TANG LAW ON FAMILY ETHICS] 37 (2007).

[131] Although, the content of the Ten Abominations in Buddhist theories and the Ten Abominations in the Tang Code (唐律疏议) was not exactly the same. *See id.*

serious of the offenses that fell within the ambit of the Five Punishments, lack of filial piety (不孝) was listed in the Tang Code as the seventh of the Ten Abominations. It included any accusation or cursing of one's paternal grandparents or parents, having a separate household register or separate goods while the paternal grandparents or parents were still alive, arranging one's own marriage, making music or removing mourning garments during the mourning period of the death of a parent, concealing the death of paternal grandparents or not to mourn such death and to state falsely that one's paternal grandparents or parents had died.[132]

In the Great Ming Code (大明律) of the Ming Dynasty (明, 1368 - 1644), any disobedience to the family patriarch was punishable by law.[133] For example, if someone did not obey the decree of his/her grandparents or parents, or fell short in supporting the grandparents or parents, such a person was liable to be punished by Zhang with 100 blows.[134] Likewise, parents could be punished for negligently causing the death of any of their children.[135] The express permission of the family patriarch was required for the marriage of any child, and within a marriage, the husband had the right of guardianship over his wife and this husband-wife relationship was, in many respects, similar to the father-son relationship.[136] While many of the legal rules and principles pertaining to filial piety disappeared from the Chinese legal system by the end of the Qing Dynasty, imprints have remained in Chinese social life, culture, and traditions.[137]

To some extent, the law also still recognizes the importance of filial piety today. For example, the 2013 Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly (most recently amended in 2018) provides in Article 18 that those who do not live together with their elderly family members shall visit or make contact with their elderly family members on a regular basis.[138] In Article 261 of the Criminal Law of the People's Republic of China (1997, most recently amended in 2020), it is also provided that any person who refuses to fulfil this duty to support an elderly family member may be sentenced to a fix-term imprisonment of up to five

[132] THE TANG CODE I — GENERAL PRINCIPLES, *supra* note 128, at 60–61, 74–77.

[133] Xu Hong (徐泓), *Mingdai de Jiating: Jiating Xingtai, Quanli Jiegou ji Chengyuan jian de Guanxi* (明代的家庭：家庭形态、权力结构及成员间的关系) *[Family in Ming Dynasty: Family Form, Power Structure, and Member Relationship*], 4 MINGSHI YANJIU (明史研究) [MING STU. J.] 188, 179–96 (1996).

[134] *Id.* at 188.

[135] *Id.*

[136] *Id.*

[137] Long, *supra* note 47, at 192; LIANG, *supra* note 23, at 155.

[138] "Family members shall care for the mental needs of the elderly, and shall not ignore or cold-shoulder the elderly. Family members living apart from the elderly shall frequently visit or greet the elderly. Employers shall, in accordance with the relevant provisions of the state, ensure the rights of the supporters to have the family visit leave." Zhonghua Renmin Gongheguo Laonianren Quanyi Baohu Fa (2018 Xiuzheng) (中华人民共和国老年人权益保障法(2018修正)] [Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly (2018 Amendment)] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 29, 2018, effective Dec. 29, 2018), art. 18 (Chinalawinfo).

years, if the circumstances so warrant.[139] If the circumstances are not sufficiently serious so as to warrant a criminal penalty, then the person who had abandoned their elderly family members or other relatives unable to support themselves would be detained for not more than five days, or would receive a warning in terms of Article 45 of the Public Security Administration Punishments Law (2006, most recently amended in 2012).[140]

In addition, the respect for and preservation of close kinship relationships, articulated in the spirit of the ancient principle of Qin Qin Xiang Yin, whereby it was legal to harbor or conceal kinsfolk offenders, can also be found in the Criminal Procedural Law of the People's Republic of China since its second Amendment in 2012. The Criminal Procedural Law of the People's Republic of China (1996, most recently amended in 2018) provides in Article 193 that the spouse, parents or child of an accused person shall not be compelled to testify as a witness against that accused. All other witnesses, in contrast, can generally be compelled by the People's Court to testify.[141] And finally, according to Article 2 of the Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Criminal Cases on Cover-up or Concealment of Crime-Related Income and Proceeds Therefrom (2015, most recently amended in 2021), if an offender covers up or conceals an economic crime committed by a close relative, the criminal circumstances are regarded in mitigation of penalty in the same manner in which the offender would have received mitigation in penalty when confessing to the crime, showing repentance, returning the concealed illegally obtained money, or making compensation.[142] Besides these contemporary

[139] "Whoever refuses to fulfill his duty to support an aged person, minor, sick person or any other person who cannot live independently, if the circumstances are flagrant, shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention or public surveillance." Zhonghua Renmin Gongheguo Xingfa (2020 Xiuzheng) (中华人民共和国刑法(2020修正)) [Criminal Law of the People's Republic of China (2020 Amendment)] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 26, 2020, effective Mar. 1, 2021), art. 261 (Chinalawinfo).

[140] "Anyone who commits any of the following acts shall be detained for not more than 5 days or shall be given a warning: (1) Maltreating his (her) family member; the maltreated person requests for punishing him or her; or (2) Abandoning any person who hasn't the abilities of living by himself and shall be supported by him (her)." Zhonghua Renmin Gongheguo Zhian Guanli Chufa Fa (2012 Xiuzheng) (中华人民共和国治安管理处罚法(2012修正)) [Public Security Administration Punishments Law of the People's Republic of China (2012 Amendment)] (promulgated by Standing Comm. Nat' People's Cong., Oct. 26, 2012, effective Jan. 1, 2013), art. 45 (Chinalawinfo).

[141] "Where, after being notified by a people's court, a witness refuses to testify before court without justifiable reasons, the people's court may force the witness to appear before court, unless the witness is the spouse, a parent, or a child of the defendant." Zhonghua Renmin Gongheguo Xingshi Susong Fa (2018 Xiuzheng) (中华人民共和国刑事诉讼法(2018修正)) [Criminal Procedure Law of the People's Republic of China (2018 Amendment)] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Oct. 26, 2018), art. 193 para. 1 (Chinalawinfo).

[142] "Where the act of covering up or concealing crime-related income and proceeds therefrom complies with the provisions of Article 1 of this Interpretation, and the offender confesses to his or her crime, shows repentance, returns the illegally obtained money, makes compensation, and falls under any of the following circumstances, it may be determined that the criminal circumstances are minor and the offender may be exempt from criminal punishment. (1) The offender falls under any circumstance where a lenient punishment

examples of filial piety in the laws of mainland China, filial piety is notably also recognized in the laws of other areas in Greater China. For example, according to Article 272 of the Taiwan Criminal Code, a person who takes the life of a lineal blood ascendant, or attempts or prepares to do so shall be subject to the same penalty prescribed for such an offense committed against other non-related victims, but the penalty would be increased "up to one half".[143] The prescribed penalties are set out in Article 271 of the Code and include, for example, a term of not less than ten years' imprisonment for murder and attempted murder and a term of not less than two year's imprisonment for having prepared to commit a murder. The maximum prescribed penalty is the death penalty and life imprisonment.[144]

Despite the fact that so little is known about the early Chinese criminal and penal laws, it is evident that at least two relics from the early Xia and Shang Dynasties — the Five Punishments and respect for filial piety — have had a lasting influence on the subsequent development of Chinese law, not only in the imperial times, but also to this day.

V. CONCLUSION

This article traced the early roots and development of Chinese criminal and penal law in the Xia and Shang Dynasties. Given the general lack of authoritative and detailed sources and records available on these early dynasties in Chinese history, the substance, nature, and procedure of early Chinese law remain indeterminate and can only be inferred from what has been written in subsequent dynasties. In this article, the most important and known legal principles and practices of the early dynasties were identified, and the lasting influence of two specific relics — the Five Punishments and respect for filial piety — were considered.

Having originated in the Shang Dynasty, the Five Punishments became a standard feature and principal part of the penal laws (and legal codes) of

shall be imposed; (2) the offender covers up or conceals the crime-related income and proceeds therefrom for any close relative, and commits the first or causal offense; (3) any other minor circumstance." Guanyu Shenli Yanshi, Yinman Fanzui Suode, Fanzui Suode Shouyi Xingshi Anjian Shiyong Falü Ruogan Wenti de Jieshi (2021 Xiuzheng) (最高人民法院关于审理掩饰、隐瞒犯罪所得、犯罪所得收益刑事案件适用法律若干问题的解释(2021修正)) [Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Criminal Cases on Cover-up or Concealment of Crime-Related Income and Proceeds Therefrom (2021 Amendment)] (promulgated by Sup. People's Ct., Apr. 13, 2021, effective Apr. 15, 2021), art. 2 (Chinalawinfo).

[143] "A person who takes the life of another shall be sentenced to death or life imprisonment or imprisonment for not less than ten years. An attempt to commit an offense specified in the preceding paragraph is punishable. A person who prepares to commit an offense specified in paragraph 1 shall be sentenced to imprisonment for not more than two years." Zhonghua Minguo Xingfa (2020 Xiuzheng) (中华民国刑法(2020 修正)) [Criminal Code of the Republic of China (2020 Amendment)] (promulgated by Ministry of Justice (Taiwan), Dec. 31, 2020, effective Jan. 20, 2021), art. 271.

[144] "A person who commits the offense set forth in the preceding paragraph against his lineal blood ascendant shall be subject to the punishment prescribed for such an offense by increasing it up to one half." *Id.* art. 272.

subsequent dynasties, including the Great Qing Legal Code of the Qing Dynasty.[145] Likewise, respect for filial piety was first referenced in the context of Chinese criminal and penal law in the Yu Punishments of the Xia Dynasty and subsequently developed into an enduring and characteristic feature of Chinese criminal and penal law. Even in the laws of the People's Republic of China today, remnants of these two early relics can still be found.

The absence of authoritative records on the early history of the Chinese legal tradition by no means renders impossible a cautious and judicious exploration of the legal rules and principles as these existed at that time. The task at hand is indeed arduous and the sources scarce, but, as is evident from this article, the traces of the rich and varied history of Chinese law can still be observed today.

[145] PU, *supra* note 24 at 159, 198; SHEN, *supra* note 34, at 181.