

## On the Pre-Tang Development of the Law of ‘Treason’: *moufan*, *dani*, and *pan*

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The most serious offenses known to the traditional Chinese law were those concerned with disloyalty to the state and emperor, namely, ‘plotting rebellion (*moufan* 謀反), ‘great sedition (*dani* 大逆),’ and ‘treason (*pan* 判).’ In the Tang 唐, Ming 明, and Qing 清 codes, these offenses constituted the first three of the ‘ten abominations 十惡.’ Their place at the top of the hierarchy of offenses was marked by the severity of the punishment, in that a large number of the relatives of the principal offenders were involved in liability. Such ‘collective liability’ survived until the last decade of the Qing. The rules defining the offenses and allocating the punishments were already worked out in detail in the Tang code from which they passed with some modifications into the codes of the later dynasties. However, they were not an innovation of the Tang legislators in the seventh century A.D. From the beginning of the Han 漢 in the second century B.C. we have evidence of statutes punishing different kinds of disloyalty to the throne. In later centuries and dynasties there occurs both a gradual refinement of the nature of the offenses of ‘disloyalty,’ and a settlement of the principles governing the range and type of ‘collective liability.’

The purpose of this essay is to trace, where possible, the development prior to the Tang 唐 of the rules on disloyalty to the state. The specific questions to be asked are: can we identify the various stages in the pre-Tang development of the law of rebellion, sedition, and treason; can we assess which dynasties made contributions of particular importance; and, in particular, can we detect any specific role played by legal development in the south or the north?

### The Tang Rules

The Tang code of A.D. 653, characteristically, has a set of well-integrated, subtly distinct rules governing behavior that might loosely be described as disloyalty to the state. Information on such behavior is contained in two different sections of the code: General Principles (*mingli* 名例) and Violence and Robbery (*zeidao* 賊盜). The former lists the ‘ten abominations,’ the offenses held to be the most wicked and depraved, placed by the legislators at the beginning of the code to emphasise their iniquity. The first three abominations respectively are *moufan* (plotting rebellion), *dani* (great sedition), and *pan* (treason). The latter section allocates in detail the punishments for these offenses.

*Moufan* is defined as “plotting to endanger the Altars of the Soil and Grain (*sheji* 社稷).”<sup>1</sup> This phrase seems to express in symbolic form the reigning dynasty (not just the reigning emperor) by whose virtue the safety and prosperity of the country are ensured. The plotters are to be decapitated, their fathers and sons aged 16 or above strangled, their sons aged 15 or below, mothers, unmarried daughters, wives, concubines, including the wives and concubines of executed sons, paternal grandfather, grandsons in the male line,<sup>2</sup> brothers, unmarried

<sup>1</sup> Article 6: Wallace Johnson, *The T’ang Code. Volume I, General Principles* (Princeton, New Jersey: Princeton University Press, 1979), 63.

<sup>2</sup> The term *zu sun* 祖孫 seems to be used in the narrow sense of paternal grandfather and grandsons in the male line, not in the broader sense of grandparents and children. Article 52 (Johnson, *T’ang*

sisters, and personal retainers enslaved, and their property (including slaves) is to be forfeit to the government. More distant male relatives, namely, the brothers of the plotters' fathers and the sons of the plotters' brothers, are to be exiled to 3,000 *li* (approximately 1,000 miles).<sup>3</sup>

The punishments are carefully graduated according to three distinct criteria: the perceived degree of guilt, age, and gender. The first of these criteria is the most important. It allocates liability according to the degree of relationship between those primarily responsible, who bear the heaviest burden of guilt, and various classes of their relatives, whose guilt progressively diminishes as the distance in relationship increases. The criteria of age and gender are subsidiary, providing grounds for the substitution of a non-capital penalty for death. The result of the application of these criteria is that all those principally concerned in the plot are to receive the more severe of the two death penalties, decapitation.<sup>4</sup> Their close agnatic male relatives including sons if aged 16 or above are to receive the less severe form of execution, strangulation. On the other hand, women involved in collective liability as well as sons aged 15 and under are allowed to keep their lives but are still enslaved. More distant male relatives are merely to be exiled.

The criteria of age and gender together with a further criterion, that of disability, also furnish grounds for special consideration or complete exemption from liability. Four classes of person seem altogether to have been exempted from punishment on the ground of collective liability. These are men aged 80 or above, men of any age who suffer from 'incapacity (*duji* 篤疾), that is, those who are totally blind, deprived of the use of two limbs, or insane, women aged 60 and above, and women of any age who are 'disabled (*feiji* 廢疾),' that is, those without the use of one limb, with a deformed back, dumb, or feebleminded. One notes again the greater leniency accorded to women. The relevant provision (Article 248) does not deal with the case in which such aged or infirm men or women are included among the principal plotters. However, Article 30 specifies that where persons (whether male or female) who are aged 80 or above or are 'incapacitated,' have committed inter alia the offense of *moufan*, a petition is to be sent to the throne on their behalf to request clemency.<sup>5</sup>

Article 248 then makes implicit reference to a principle which pays attention to the actual consequences of an act. Should an act intended to cause harm in fact not fully succeed in its objective it may be punished less severely. Thus, should there be a plot to rebel but the plotters were unable to secure followers, the principals are still to be decapitated, but the range of collective liability is considerably reduced. Their fathers, sons, mothers, unmarried daughters, wives, and concubines are merely to be exiled to 3,000 *li*, and their property is not to be confiscated. Where there was not even a real plot but merely

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*Code I*, 258) specifies that the term *zu* (paternal grandfather) includes paternal great and great-great grandfathers and the term *sun* (grandson) includes great and great-great grandsons in the male line. It appears that women at these levels (grandmothers and granddaughters etc) were not involved in liability.

<sup>3</sup> Article 248: Wallace Johnson, *The T'ang Code. Volume II, Specific Articles* (Princeton, New Jersey: Princeton University Press, 1997), 239-40.

<sup>4</sup> Its severity depended upon the fact that the offender went into the next world with his body incomplete.

<sup>5</sup> Johnson, *T'ang Code I*, 171.

talk about reasons for rebellion, so confusing the people, the case was to be treated as falling under a separate law on ‘evil words.’ (Article 268) under which the most severe punishment is strangulation for the perpetrators.<sup>6</sup> Under another article, persons who merely spoke wildly about rebellion are to be sentenced to exile to 2,000 *li* (approximately 666 miles).<sup>7</sup>

Article 248 also deals with the second abomination, that of *dani*, defined as plotting to “destroy the ancestral temples, tombs, or palaces of the reigning house.”<sup>8</sup> The significance of this definition appears to lie in a particular focus upon attempts to replace the reigning emperor, even though there was no intention to remove the dynasty as such.<sup>9</sup> The article distinguishes between *dani* itself and *moudani*. In the first case, where acts to implement the ‘sedition’ have already taken place, the punishments are to be the same as for *moufan*. One notes here the subtle equation of plotting rebellion with acts of sedition, by which the distinction in gravity between rebellion and sedition is marked. By contrast, should there merely be a plot to commit great sedition, only the plotters themselves are to be punished (by strangulation), their relatives incurring no liability.

Article 249 deals with certain points relating to collective liability in general. It is inserted at this point in the code because Article 248 provides the most extreme example of the application of such liability. Article 250 deals with the case in which persons have talked about rebellion but have formed no actual plot. Article 251 then turns to the offense of treason (*pan*), the third abomination, defined in article 6 as “betraying the country or serving rebels.”<sup>10</sup> It distinguishes between the case in which there has been merely a plot to commit treason and that in which steps have been taken to implement the plot. In the former case, the plotters are to be strangled, in the latter they are to be beheaded. In both cases, their wives and sons are to be exiled to 2,000 *li*. The article further applies the principle of harmful consequences. Where the plotters have succeeded in recruiting a hundred men or more, or where the number is less but some actual harm has been done, the range of collective liability is increased. The fathers, mothers, wives, and sons of the plotters are to be exiled to 3,000 *li*.<sup>11</sup> Daughters in these cases are not included in the range of collective liability, even though the article uses a general term (*zi*子) capable of expressing daughters as well as sons. This is because a definition contained in the ‘General Principles’ section of the code states that in cases of collective prosecution, other than plotting rebellion, great sedition, and the making or keeping of *gu* 蠱poison (Article 262), the term ‘children’ is to be understood as referring only to ‘sons.’<sup>12</sup>

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<sup>6</sup> It seems that instead of “it is self evident that this is following a calamitous way” (Johnson, *T’ang Code II*, 241) we should translate “naturally follow the law on ‘evil words.’”

<sup>7</sup> Article 250: Johnson, *T’ang Code II*, 244-5

<sup>8</sup> Johnson, *T’ang Code I*, 64.

<sup>9</sup> Compare the remarks of R. Deloustal, “La Justice dans l’Ancien Annam. Traduction et Commentaire du *Code des Le*,” *Bulletin de l’École française d’Extrême-Orient* 11 (1911), 313 n2 (Article 410); P. L. F. Philastre, *Le Code Annamite. Tome Second*, seconde édition (Taipei: Ch’eng-wen, 1967, reprint of original edition of 1909), 13.

<sup>10</sup> Johnson, *T’ang Code I*, 65.

<sup>11</sup> Johnson, *T’ang Code II*, 245-6.

<sup>12</sup> Article 52: Johnson, *T’ang Code I*, 260. For the Tang law of collective liability, see Wallace Johnson, “Group Criminal Liability in the T’ang Code,” in *State and Law in East Asia. Festschrift Karl Büniger*, edited by Dieter Eikemeir and Herbert Franke (Wiesbaden: Otto Harrassowitz,

The remaining sections of the essay will consider what can be learnt of the pre-Tang history of the offenses of disloyalty. A distinction in treatment will be made between the content of the offenses themselves and the imposition of collective liability that they entailed.

### Han Law

We know that the codes of the Han dynasty (206 B.C. – A.D. 221) contained rules formulated in terms of *moufan*. The *Ernian lüling* 二年律令 (Statutes and Ordinances of 186 B.C.), promulgated in the early years of the dynasty, introduces *moufan* only as part of a complex of provisions concerned with various kinds of ‘disloyalty.’ An article contained in the chapter on violence (*zeilü* 賊律) provides that, should cities, towns, or army garrisons revolt (*fan* 反) and submit to the ‘feudal lords,’ or should those in charge of cities or garrisons abandon or surrender them in the face of attack by the ‘feudal lords,’ or should persons *moufan*, the principals were to be cut in two at the waist, while their fathers, mothers, wives, children, brothers, and sisters, irrespective of age were to be beheaded.<sup>13</sup> This law clearly contemplates the main danger to the state as arising from the fiefs granted to the relatives and supporters of the emperor. The central term *fan* was used to describe defection or surrender to these lords, acts which the Tang code would have classified as *pan*. In this context the clause “should persons *moufan*” appears to point to the case in which persons plotted to defect to the ‘feudal lords.’ However, it must also have possessed the more general sense of ‘plotting to rebel (against the throne),’ since it also covered situations in which the feudal lords themselves (relatives of the emperor) conspired to usurp the throne.<sup>14</sup>

The same term *fan* seems also to have been central in the formulation of the statutory rules on disloyalty one hundred years later. At the time of the ‘rebellion.’ of the crown prince in 91 B.C., we are told that those who had followed the crown prince and raised troops were exterminated together with their families under the *fanfa* 反法 (the laws relating to rebellion).<sup>15</sup> Here *fan* appears to have been used in a very broad sense, expressing any act of disloyalty to the ruler.

It is unlikely that Han law ever developed a specific offense of *dani*, corresponding to the second of the Tang abominations.<sup>16</sup> In Han contexts *dani*, or more frequently the phrase *dani wudao* 無道, is used to describe behavior regarded by the state as the most reprehensible and depraved, behavior that threatened the moral foundations of society. The underlying sense of *dani* is that of subversive behavior undermining the fundamental human relationships, for example, that between ruler and subject (*moufan*) or that between parent and child (matricide). From this point of view, we find *dani* either added as an epithet to indicate the

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1981), 145-58. For the post-Tang law, see Paul H. Ch'en, “Disloyalty to the State in Late Imperial China,” in *State and Law in East Asia*, 159-83.

<sup>13</sup> *Zhangjiashan Hanmu zhujian (ersiqi hao mu)* 張家山漢墓竹簡 (二四七號墓) (Beijing: Wenwu Chubanshe, 2001), 133 (slips 1, 2).

<sup>14</sup> See the example of *fan shang* 反上 in 177 B.C., below at note 17.

<sup>15</sup> *Hanshu* 漢書 (Beijing: Zhonghua, 1975), 9.2882; A. F. P. Hulswé, “Royal Rebels”, *Bulletin de l'École française d'Extrême-Orient* 69 (1981), 317.

<sup>16</sup> The third term found in the Tang code, *pan*, seems in Han times to have been used as a synonym for *fan*. See the examples of *pan* and *pan ni* cited in *The Encyclopaedic Dictionary of the Chinese Language, Volume 2* (Taipei: Chinese Culture University, 1993), 2228 (no. 3227 and 3227.10).

special heinousness of *moufan* or used as a substitute for that offense. It is not always easy to distinguish these two usages.

Possible examples of the use of *dani* as an epithet qualifying *moufan* are the following. In 177 B.C., a royal prince who led out his troops in revolt was convicted of rebelling against the emperor (*fan shang* 反上), deceiving the people, and committing *dani*.<sup>17</sup> In 154 B.C., a noble's son, intending to incriminate his father, plotted rebellion (*moufan*) and was held to be liable on account of *dani budao* 不道.<sup>18</sup> The same assessment is made of Liu An's 劉安 plotting against the emperor (*moufan*) in 122 B.C.,<sup>19</sup> of the attempt in 80 B.C. by various persons to murder the regent, dethrone emperor Zhao 昭, and establish a new emperor,<sup>20</sup> of the plots against the throne by a royal prince in A.D. 70-1,<sup>21</sup> and of an alleged attempt by emperor Huan's 桓 younger brother to make himself emperor in A.D. 172.<sup>22</sup>

Possible examples of the use of *dani* as an alternative expression for *moufan* are the following. In 154 B.C., the leaders of the seven states who had conspired to revolt against emperor Jing 景 are said to have committed *dani*; they had raised troops and committed *fan*.<sup>23</sup> Liu An's initial preparations for revolt in 139 B.C. are described as *nishi* 逆事 (an affair of *ni*).<sup>24</sup> The plot of the brothers Ma 馬 against the life of emperor Wu 武 around 88 B.C. is described in one source as *moufan*<sup>25</sup> and in another as *mou wei ni* 謀為逆 (plotting to cause *ni*).<sup>26</sup>

There are also many examples of 'disloyal.' behavior held to constitute *ni* or *dani* under circumstances in which there has been no actual attempt to raise a rebellion. In these cases *ni* again expresses subversive behavior undermining the foundations of the state. In 198 B.C., a plot by an individual to kill the emperor is described as *mouni*.<sup>27</sup> In 160 B.C., the commandant of justice held that theft of jade rings from the mortuary temple of the Han founder, Gaozu 高祖, did not constitute a *ni* offense warranting extermination of the offender's family, though the removal of earth from the imperial grave mound, and so disturbing the coffin,

<sup>17</sup> Homer H. Dubs, *The History of the Former Han Dynasty by Pan Ku. Translation, Volume One* (Baltimore: Waverly Press, 1938), 248; A. F. P. Hulsewé, *Remnants of Han Law I* (Leiden: E. J. Brill, 1955), 162 (1).

<sup>18</sup> Dubs, *History of Former Han I*, 313.

<sup>19</sup> *Shiji* 史記 (Beijing: Zhonghua, 1959), 10.3094; Burton Watson, *Records of the Grand Historian of China. Translated from the Shih chi of Ssu-ma Ch'ien. Volume II. The Age of Emperor Wu 140 to circa 100 B.C.* (New York and London: Columbia University Press, 1961), 386.

<sup>20</sup> Homer H. Dubs, *The History of the Former Han Dynasty by Pan Ku. Translation, Volume Two* (American Council of Learned Societies, 1944, reprinted 1955), 164-6; Hulsewé, *Remnants of Han Law*, 162 (5).

<sup>21</sup> *Hou Hanshu* 後漢書 (Beijing: Zhonghua, 1965), 1.117, 5.1429; Hulsewé, *Remnants of Han Law*, 163 (9).

<sup>22</sup> *Hou Hanshu*, 2.313, 7.1798; Hulsewé, *Remnants of Han Law*, 165 (10); Rafe de Crespigny, *Emperor Huan and Emperor Ling. Being the Chronicle of Later Han for the years 157-189 AD as recorded in Chapters 54-9 of the Zizhi tongjian of Sima Guang. Volume One: Translation* (Canberra: Australian National University, 1989), 55-6, and Volume Two: Notes, 345-6.

<sup>23</sup> Dubs, *History of Former Han I*, 313, and see also *Hanshu*, 8.2302; Hulsewé, *Remnants of Han Law*, 162 (2).

<sup>24</sup> *Shiji*, 10.3082 and compare 3085-6; Watson, *Records of Grand Historian II*, 386-9 and compare 372.

<sup>25</sup> Dubs, *History of Former Han II*, 118.

<sup>26</sup> *Hanshu*, 9.2961.

<sup>27</sup> Dubs, *History of Former Han I*, 122; Hulsewé, *Remnants of Han Law*, 164 (1).

would have constituted such an offense.<sup>28</sup> In 66 B.C., certain persons involved in the plan to rebel (*moufan*) instigated by the commander in chief arranged the poisoning of the empress and attempted to poison the heir apparent. This particular offense was described as *moudani* and *niluan* 亂 (confusion) *budao*.<sup>29</sup> In the same year an attempt to kill the emperor was described as *ni*.<sup>30</sup> A memorial of 60 B.C., construed as a request that the emperor should abdicate, was deemed to be *dani budao*.<sup>31</sup> In 8 B.C., Chunyu Zhang 淳于長, a former companion of emperor Cheng 成, had accepted presents from the dismissed empress Xu 許 in return for a promise to restore her to her position as empress. He was accused of *dani* and sent to prison, where he died, his wife and children being exiled.<sup>32</sup> An edict of Guangwu 光武 in A.D. 25 declared that attempts on the life of his predecessor would be treated as *dani*.<sup>33</sup> In A.D. 92 a plot to kill the emperor was described as *ni*,<sup>34</sup> while in A.D. 121 an allegation that relatives of the deceased empress dowager Deng 鄧 had plotted to dethrone emperor An 安 was described as *dani budao*.<sup>35</sup>

The foundations of the state might be undermined not just through ‘disloyalty’ but also through the disregard of norms derived from human relationships. We have two examples from Han sources of such behavior qualified as *dani*. In 145 B.C., the commandant of justice stated that matricide was *dani*.<sup>36</sup> The outrageous behavior of a bandit or ‘knight errant’ executed with his family in 125 B.C., who had committed multiple killings and other crimes was described as *dani wudao*.<sup>37</sup>

The language found in decrees of amnesty is also revealing. In one decree from the year A.D. 65 the phrase *dani wudao* is used to include all the most serious offenses, including *moufan*; persons guilty of such offenses are to be relieved from death and castrated.<sup>38</sup> Other amnesties either expressly exclude from their scope offenses described as *moufan dani* sometimes with the addition ‘and all offenses which ought not to be forgiven,’ or occasionally state that such offenses are to be pardoned (decrees of A.D. 30, 72, 73, 134, and 147).<sup>39</sup> In this usage *moufan* seems to express the single most serious offense, while *dani* is used collectively to cover a range of other subversive offenses.

The Han material surveyed above clearly shows that *dani* was not used in Han law in the restrictive sense it acquired as the second of the Tang abominations. Nor did the offense of *moufan* itself correspond exactly to the

<sup>28</sup> *Hanshu*, 8.2311 with n4; Hulsewé, *Remnants of Han Law*, 161.

<sup>29</sup> Dubs, *History of former Han II*, 225-6; Hulsewé, *Remnants of Han Law*, 162 (6).

<sup>30</sup> *Hanshu*, 11.3600; Hulsewé, *Remnants of Han Law*, 164 (3)

<sup>31</sup> *Hanshu*, 10. 3247; Hulsewé, *Remnants of Han Law*, 164 (6).

<sup>32</sup> Dubs, *History of Former Han II*, 360-1, 416; *Hanshu*, 3.708, 10.3355, 11.3732; Hulsewé, *Remnants of Han Law*, 158.

<sup>33</sup> *Hou Hanshu*, 2.524; Hulsewé, *Remnants of Han Law*, 165.

<sup>34</sup> *Hou Hanshu*, 1. 173; Hulsewé, *Remnants of Han Law*, 164 (7).

<sup>35</sup> *Hou Han shu*, 3.616; Hulsewé, *Remnants of Han Law*, 164-5 (8).

<sup>36</sup> *Tongdian* 通典 (Beijing: Zhonghua, 1996), book 116, 4.4283; Dubs, *History of Former Han I*, 323 and n7.5.

<sup>37</sup> *Hanshu*, 11.3704; Burton Watson, *Courtier and Commoner in Ancient China. Selections from the History of the Former Han by Pan Ku* (New York and London: Columbia University Press, 1974), 230; Hulsewé, *Remnants of Han Law*, 160.

<sup>38</sup> Shen Jiaben 沈家本, *Lidai xingfa kao: fu Jiayi wencun* 歷代刑法考: 附寄籀文存 (Beijing: Zhonghua, 1985), 2.549; Hulsewé, *Remnants of Han Law*, 243 (3).

<sup>39</sup> Shen, *Lidai xingfa kao*, 2.563, 575; *Hou Hanshu*, 1.49, 119.

*moufan* of Tang law, a point confirmed by the following consideration. The Tang code had defined *moufan* in terms of ‘endangering the altars of the soil and grain (*sheji*),’ and *dani* in terms of ‘plotting to destroy the ancestral temples (*zong miao* 宗廟), tombs, or palaces of the reigning dynasty.’ This distinction is not evident in the Han. In one case from 174 B.C. the offense of *moufan* itself is glossed as ‘intending to endanger the (imperial) ancestral temples and the altars of soil and grain (*zong miao sheji*).’<sup>40</sup> The phrase *zong miao* is also sometimes used to explain more fully *moufan*. The revolt of the seven kings in 154 B.C. is described as ‘*fanni wudao* 反逆無道, intending to endanger the ancestral temples (*zong miao*).’<sup>41</sup> In 66 B.C., the plot to poison the empress (*moudani*) and the attempt to poison the heir apparent (*niluan budao*) are described as endangering the ancestral temples (*zong miao*).<sup>42</sup> This, taken in isolation, would fit the Tang model, but the *ni* offense of poisoning the empress has to be placed in the general context of the offense of *moufan* committed by the inspirer of these acts (the commander-in-chief He Yu).

The evidence summarised above suggests the following conclusions. *Moufan* itself was a specific offense in Han law that might cover any of the acts distinguished by the Tang code as *moufan*, *dani*, or *pan*. *Dani* was used to describe a wide range of subversive acts often, although not exclusively, directed against the throne. Sometimes it might designate an act of disloyalty specifically damaging the throne, which yet did not amount to *moufan*. Although the phrase might in some circumstances stand for a specific offense, such as *moufan*, it had not yet acquired the restricted and specialised sense accorded it in the Tang code.

The punishment for offenses amounting to *dani wudao*, including *moufan*, was particularly draconian throughout the Han. The commentator Ru Shun 如淳 who flourished in the period A.D. 221-265 says that according to the (Han) statutes (*lü* 律), in cases of *dani wudao* the offender’s father, mother, wife, children, brothers, and sisters are all to be beheaded (‘abandoned in the market’).<sup>43</sup> This formulation corresponds more or less exactly with that found at the beginning of the Han in the *Ernian lüling*.<sup>44</sup> Ru Shun himself was presumably quoting from the code in force at the end of the Han.<sup>45</sup> This suggests that formally the rules on collective liability for offenses such as *moufan* remained the same throughout the Han. From a passage in the *Jinshu* 晉書,<sup>46</sup> we can deduce that ‘fathers and mothers,’ in the rule included paternal grandfathers and grandmothers and that ‘children,’ included grandchildren in the male line.

The draconian nature of the punishment is evident from the fact that no account was taken of gender or age. All relatives within the prescribed class were to be beheaded. Two further points may be made. First, it is possible that Ru Shun was quoting only part of the relevant rules; more remote relatives may have been specified as liable to punishments falling short of death. Second, in practice special imperial edicts dealt with all cases of rebellion and the like. After the judicial investigation had been concluded and the guilty determined, the emperor

<sup>40</sup> *Shiji*, 10.3077; Watson, *Records of Grand Historian II*, 362

<sup>41</sup> *Hanshu*, 8.2302.

<sup>42</sup> Dubs, *History of Former Han II*, 225-6.

<sup>43</sup> *Hanshu*, 1.142 n3; Shen, *Lifu xingfa kao*, 3.1414.

<sup>44</sup> See note 13 above.

<sup>45</sup> The citation from Ru Shun glosses a passage in the *Hanshu* relating to the year 154 B. C, but the commentator himself is unlikely to have been quoting from the statutes in force at that time.

<sup>46</sup> Cited at note 47.

by edict apportioned the punishments. These might not accord with the exact prescriptions of the formal law. Some relatives who should have been executed might be reprieved, while others, not subject to capital punishment under the code, might still be executed.

### The Wei, Jin, and Southern Dynasties

Some isolated pieces of information are available for the Wei 魏 (Three Kingdoms), Jin 晉, and southern dynasties 南朝. First, we have a somewhat elliptical reference to changes made by the Wei code of A.D. 234, which itself utilised much Han material. We are told that one change made to the Han *zeilü* concerned offenses committed with respect to the imperial ancestral temple. The text of the *Jinshu* states: “even if one verbally criticises as well as attacks the imperial ancestral temples (*zong miao*) or tombs, this is to be considered as *dani wudao*. The principal offenders are to be cut in two at the waist, but the collective liability of relatives is not to extend to paternal grandparents or grandchildren”.<sup>47</sup> The most plausible interpretation of this statement is that the Wei code was reclassifying an existing offense as falling under the general head of *dani wudao*. This offense was that of verbally attacking a deceased emperor or physically attacking the imperial ancestral temples or tombs. It had not previously been recognised as constituting *dani wudao*.<sup>48</sup>

A further change was made by the Wei legislators to an offense denominated as *moufan dani*. This phrase appears to express just the offense of plotting rebellion, additionally qualified as *dani*. An especially severe punishment, not contained in the *lüling*, was introduced: the principal offenders were to be cut into pieces and have their heads exposed, their homes were to be flooded, and the three clans of their relatives exterminated.<sup>49</sup> What suggests that *dani* here merely qualifies *moufan* and does not express a separate range of offenses is the fact that the punishment for criticising a deceased emperor or attacking the imperial ancestral temple, an offense amounting to *dani wudao*, is much less severe than that now stated.

It is possible that the codes of the Jin dynasty (A.D. 265-420) reformulated the rules on disloyalty in terms of the distinctions found in the Tang code. This may have been the case even though, as is shown by some Jin sources, the Han terminology continues to be used.<sup>50</sup> What suggests this possibility is that the code of the Liang 梁 dynasty (A.D. 502-556), promulgated in 503, was largely based upon the Jin code. The Liang code appears to have distinguished between the

<sup>47</sup> *Jinshu* (Beijing: Zhonghua, 1974), 3.925, and compare the divergent interpretations in Gao

Chao 高潮 and Ma Jianshi 马建石 *Zhongguo lidai xingfa zhi zhu yi* 中国历代刑法志注

⊠, Changchun: Renmin Chubanshe, 1994), 84 n7, 85 and Robert Heuser, *Das Rechtskapitel in Jin-shu. Ein Beitrag zur Kenntnis des Rechts im frühen chinesischen Kaisereich* (München: J. Schweitzer, 1987), 98. Hulsewé (*Remnants of Han Law*, 115-6, 158-9), citing Shen Jiaben, appears to draw too general a conclusion from the words of the *Jinshu*.

<sup>48</sup> Compare the decision of the commandant of justice in the case of the ‘jade rings’, above at note 28.

<sup>49</sup> *Jinshu*, 3.925; Heuser, *Rechtskapitel in Jin-shu*, 98

<sup>50</sup> An Eastern Jin amnesty of A. D. 405 refers to “*moufan dani* or lesser offenses” (Shen, *Lifu xingfa kao*, 2.595). *Dani*, as in Han contexts, seems either to gloss *moufan* or to express a range of behavior qualifying as subversive.



three offenses of *moufan*, *xiangpan*,<sup>51</sup> and *dani*.<sup>52</sup> No definitions are given, but the context (that of collective liability) and the grouping together of the offenses suggest that they had a content similar to that of the corresponding Tang offenses.

However, we still find in Liang decrees of amnesty a usage of *dani* which recalls the broad sense of the Han. These decrees refer to both *pan* and *dani*. Decrees of 546 and 547 note what must have been a common case of *pan*, the flight of offenders to the north (*tao pan*逃判).<sup>53</sup> Here *pan* appears to denote the specific offense defined as *pan* in the code. A decree of 546 reduces the range of relatives liable for offenses other than *dani*.<sup>54</sup> *Dani* seems here to be used as a shorthand for all subversive offenses attracting a full range of collective liability, that is, *moufan*, *pan*, and *dani* in the strict sense, as distinguished in the code of 503.

The code of the Chen 陳dynasty (A.D. 557-88) probably inherited from the Liang clauses relating to the distinct offenses of *fan*, *pan*, and *ni*. The evidence for this supposition is supplied by the terms of a decree of 573.<sup>55</sup> This decree states that in the past the families of persons convicted of the offenses of *fanshi panni*反噬 had been put to death. The problem is to identify the specific offenses covered by this phrase. *Fanshi* (literally ‘rebel and bite’) in this context stands for *moufan*, but it is difficult to know whether *panni* expresses one offense (that constituted by ‘treason’) or two offenses, *pan* expressing treason and *ni* great sedition. Although the phrase often has the former sense, it is possible that it should here be understood as a shorthand for two separate offenses: treason and great sedition. What suggests that this might be the case is the order of the offenses given in the Liang code, first *moufan*, second *pan*, and third *dani*. The phrase *panni* of the Chen decree may echo this order. If we interpret the decree as mentioning the three offenses of *moufan*, *pan*, and (*da*)*ni*, then we may further suppose that these offenses were contained in and regulated by the Chen code.

Important changes to the law of collective liability applied in offenses such as *moufan* were made during the Wei and Jin dynasties. One principle, established under the Wei in A.D. 255<sup>56</sup> and reaffirmed under the Jin around 300,<sup>57</sup> exempted from the range of collective liability daughters of the principal offender who had been married prior to the commission of the offense. A similar exemption must also have been accorded to married sisters. A second principle established by the Jin in A.D. 325 provided that female relatives of the offender involved in collective liability should no longer be executed but instead should be forfeit to the state as slaves.<sup>58</sup> This principle was followed by the Liang code

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<sup>51</sup> This interpretation follows the punctuation of the *Suishu* 隋書(Beijing: Zhonghua, 1973) in taking *xiangpan* as a term for a single offense, but the words may possibly refer to two separate offenses. See below at note 87.

<sup>52</sup> *Suishu*, 3.699; Étienne Balazs, *Le traité juridique du “Souei-Chou”* (Leiden: E.J. Brill, 1954), 42

<sup>53</sup> Shen, *Lidai xingfa kao*, 2.601, 652.

<sup>54</sup> *Liangshu* 梁書 (Beijing: Zhonghua, 1973), 1.90; Shen, *Lidai xingfa kao*, 2.702; Balazs, *Traité juridique du “Souei-Chou”*, 49, 111 n75.

<sup>55</sup> *Chenshu* 陳書 (Beijing: Zhonghua, 1972), 1.86.

<sup>56</sup> *Jinshu*, 3.926; Heuser, *Rechtsskapiteln im Jin-shu*, 102-3.

<sup>57</sup> *Jinshu*, 3.927; Heuser, *Rechtsskapiteln im Jin-shu*, 107.

<sup>58</sup> *Jinshu*, 1.163; Shen, *Lidai xingfa kao*, 1.84.

which provided that for the offenses of *moufan*, *xiangpan*, *dani* or more serious<sup>59</sup> the principal offenders were to be cut in two at the waist, their fathers, sons, male siblings by the same mother, irrespective of age, were to be beheaded, while their mothers, wives, unmarried sisters,<sup>60</sup> as well as the wives, sons, unmarried daughters, and concubines of the persons who were to be beheaded were to be forfeit to the state as slaves. In all cases the property of those involved in liability was to be confiscated.<sup>61</sup> There is no specific mention of paternal grandparents or grandsons in the male line, but the decree of 546, already noted, states that these relatives were incriminated in offenses amounting to *dani*.<sup>62</sup> Their punishment is not stated, but may have been enslavement.

Although the Chen code, promulgated around A.D. 566, probably followed the Liang code in applying collective liability to the offenses of *moufan*, *pan*, and *dani*, the decree of 573, already noted,<sup>63</sup> adopted a more lenient approach. It stated that, whereas formerly for the offenses of *fanshi panni* the families of the principal offenders were put to death, recently it was decreed to be sufficient to expose the head of the principals (those who had actually committed the offense), permitting their sons to continue the family line.<sup>64</sup> Family members may have had a non-capital sentence substituted for death. In practice this policy of leniency was not always followed.<sup>65</sup>

We may recapitulate the main contribution of the Wei, Jin, and southern dynasties to the laws on disloyalty to the state in two propositions. First, by the end of the period there is evidence that the penal code made a formal distinction between *moufan*, *dani*, and *pan*, but we cannot be sure of the precise definition of these three separate offenses. Although the evidence comes from the codes of the later southern dynasties (Liang and Chen), it is possible that the tripartite distinction had already been elaborated earlier, perhaps by the Jin legislators. Second, the Wei and Jin penal codes introduced two important modifications to the rules on collective liability: (i) the married daughters or sisters of the principal offenders were excluded from liability, and (ii) all women involved in collective liability, that is, those who were not principal offenders themselves, were exempt from capital punishment.

### The Northern Dynasties

For the northern dynasties we have a number of isolated references to offenses of 'disloyalty' under the Northern Wei 北魏, though it is difficult to obtain a clear picture of the development of the rules in the successive codes. From an early period the dynasty adopted the terminology of the Han period. It is possible that the Han formulations were known through the medium of the Jin code, but we cannot altogether rule out direct knowledge of some version of the Han laws. The first recorded attempt we have of the organization of the government along

<sup>59</sup> The phrase 'more serious' may refer to offences such as matricide or parricide. It is probable that the Liang code, like the Chen (*Suishu*, 702; Balazs, *Traité juridique du "Souei-Chou"*, 51), contained a clause on *oni* (the fourth Tang abomination), dealing with offences committed against close senior relatives.

<sup>60</sup> Unmarried daughters, omitted from the text, would also have been included.

<sup>61</sup> *Suishu*, 699; Balazs, *Traité juridique du "Souei-Chou"*, 42 (requiring modification).

<sup>62</sup> See note 54 above.

<sup>63</sup> See note 55 above.

<sup>64</sup> *Chenshu*, 1.86.

<sup>65</sup> Compare the passages cited in Cheng Shude 程樹德, *Jiuchao lü kao* 九朝律考 (Beijing: Zhonghua, 1988), 197.

Chinese lines comes from A.D. 339, the year in which plans were made to establish offices and delegate authority to officials.<sup>66</sup> At the same time, rules modelled on Chinese law came to be introduced.

The Legal Treatise of the *Weishu* says that in 339 the law provided that persons who committed the offense of *dani* together with their relatives, male and female, irrespective of age, were all to be beheaded.<sup>67</sup> *Dani* here, as in Han law, seems to have been used for a whole range of serious offenses including *moufan*. The draconian punishment also echoes this law. The legal reforms enacted nearly one hundred years later show a similar approach to the description of the offenses of disloyalty, but moderate the punishment. The code (*lüling*) of A.D. 431 provided that for all cases of *dani budao* the principal offenders were to be cut in two at the waist, males on the same register were to be put to death, except those aged 14 or under who were to be castrated, while females were to be forfeit to the government as slaves.<sup>68</sup> The substitution of castration for death may have had antecedents in Han practice (although we know of no Han law authorising it),<sup>69</sup> while the rule on enslavement of women was probably taken from the Jin code. We know also that under the code of 431 adopted sons were still to be involved in liability should their natural fathers have committed the offense of *moufan*. The memorial quoting this rule states that it makes manifest the gravity of the offense of *dani*.<sup>70</sup>

Around twenty years after the enactment of the code of 431, the rules on the punishment of young boys involved in collective liability appear to have been changed. A memorial submitted to the throne shortly after the accession of Gaozong in 652 proposed that, where boys aged thirteen or less had not been involved in the principal plot, their lives should be spared and they should be forfeit to the government as slaves.<sup>71</sup> A version of this proposal preserved in Zhu Xi's 朱熹 *Conspectus of the Universal Mirror* (*Tongjian gangmu* 通鑑綱目) specifies that it applies to cases of *moufan*.<sup>72</sup> The emperor approved the proposal. However, the exact change effected in the law is not clear. Prior to the change, it seems that boys castrated on the ground of collective liability were also slaves of the government. After the change, they were slaves but not subject to castration. Nevertheless, castration did not disappear altogether as a punishment imposed in cases of collective liability. We are told that the son of Ping Ya 平雅, a participant in the *moufan* instigated by Fa Xiu 法秀 in 481 (below), was held liable to the punishment of castration.<sup>73</sup>

The phrase *dani* is frequently found during the fifth and early sixth

<sup>66</sup> *Weishu* 魏書 (Beijing: Zhonghua, 1974), 1.12; Jennifer Holmgren, *Annals of Tai. Early T'o-pa History according to the first chapter of the Wei-shu* (Canberra: Australian National University, 1982), 68.

<sup>67</sup> *Weishu*, 8.2873; Cheng, *Jiuchao lü kao*, 345.

<sup>68</sup> *Weishu*, 8.2844; Cheng, *Jiuchao lü kao*, 346.

<sup>69</sup> During the first century A.D. castration on a number of occasions was substituted for death as the punishment for male and female (here taking the form of enslavement) offenders (see, for example, *Hou Hanshu*, 1.80,81), but, contrary to the opinion of Ulrike Jugel, *Politische function und soziale Stellung der Eunuchen zur späteren Hanzeit (25-220 n. Chr.)* (Wiesbaden: Steiner, 1976), 63-4, these have no specific connection with the castration of relatives of offenders on the ground of collective liability.

<sup>70</sup> *Weishu*, 3.920, partially quoted by Cheng, *Jiuchao lü kao*, 359.

<sup>71</sup> *Weishu*, 3.920.

<sup>72</sup> The relevant passage is cited by Cheng, *Jiuchao lü kao*, 373

<sup>73</sup> *Weishu*, 6.2032; Cheng, *Jiuchao lü kao*, 367.

centuries as a shorthand reference to the most serious offenses, including *moufan*. Memorials of 444 and 466 proposed that, except for offenses of *dani* and direct killing, exile should be substituted for the death penalty.<sup>74</sup> A decree of 474 in one version stated that, where offenders were not involved in *dani*, punishment stopped with the individual.<sup>75</sup> A decree of 477 specified that for offenses ranging from *dani* down to *zei* (banditry), offenders were to be stripped and beheaded in the market.<sup>76</sup> In 481 the Buddhist monk Fa Xiu was executed on account of *moufan*. The decree, discussing the question of collective liability, said that the authorities had been correct to propose the extermination of his various relatives since Fa Xiu had plotted “*mou wei dani* (plotted *dani*),” though the emperor was prepared to exercise some clemency in this respect.<sup>77</sup> *Dani* is here used as a substitute for *moufan*, since the latter offense was held to fall within its general range. A court discussion held in the period 500-1 on the liability of adopted sons proposed that such sons should be involved in liability where the adopting (not the natural) father had committed a *ni* offense, so abandoning the position taken in the earlier law.<sup>78</sup> *Ni* in this context also seems to refer to a whole range of serious offenses, including *moufan*. In 513 the brother of an official held guilty of *ni* was reprieved from execution, merely being removed from the roll of officials and reduced to the status of a commoner. An official, referring to the particular degree of clemency shown by the reprieve, stated that liability in cases of *fanni* was heavy.<sup>79</sup> The language suggests that *fan* (rebellion) is here treated as a species of the general form of wrongdoing designated (*da*)*ni*.

From the latter part of the fifth century we also have references to what appears to be a distinct offense of *pan* with a sense resembling that of the third Tang abomination. In 472 some people in the eastern capital fled to the ‘barbarian.’ state of the Rong Rong 戎戎. They were held guilty of *moupan* and exiled to certain districts as military households.<sup>80</sup> *Pan* here appears to express the offense of desertion to a foreign state. In a court discussion on the proper use of the cangue in 508 several officials memorialised that the great cangue should not be used except for offenses amounting to *dani waipan* 外判.<sup>81</sup> The phrase *waipan* refers to cases in which persons have defected from the Northern Wei and fled to a foreign power. *Dani* appears to designate the whole range of behavior subverting the institutions of the state. In a case which arose in the period 517-9 an official argued that certain rewards proposed for arresting officers were applicable only should the offense(s) of *panni* 判逆 have been committed.<sup>82</sup> While *pan* itself points to the offense of desertion, we cannot determine whether *ni* simply qualifies *pan* as a subversive act or whether *panni* is a shorthand expression for *dani waipan*.

These references to *dani waipan* or *panni* do not point to the existence of a specific offense of *dani* corresponding to the second Tang abomination. Other

<sup>74</sup> *Weishu*, 8.2874; Cheng, *Jiuchao lü kao*, 367

<sup>75</sup> *Weishu*, 8.2876. A fuller version of the decree specifies the offence in question as *moufan dani* (*Weishu*, 1.146; Cheng, *Jiuchao lü kao*, 366.

<sup>76</sup> *Weishu*, 8.2877-8.

<sup>77</sup> *Weishu*, 1.150; Cheng, *Jiuchao lü kao*, 366.

<sup>78</sup> *Weishu*, 4.1186-7.

<sup>79</sup> *Weishu*, 1.136; Cheng, *Jiuchao lü kao*, 368.

<sup>80</sup> *Weishu*, 8.2880; Cheng, *Jiuchao lü kao*, 369.

<sup>81</sup> *Weishu*, 8.2879.

<sup>82</sup> *Weishu*, 8.2886.

citations of *dani* or *ni* are equally inconclusive. In 496 persons opposed to the move of the capital from Pingcheng to Loyang conspired to keep the heir apparent in the old capital, raising troops for this purpose. They were sentenced on the ground of *mouni* (plotting *ni*).<sup>83</sup> Here *ni* seems to refer to behavior threatening the good order of the state, which yet does not amount to *moufan*; it does not appear to be the kind of behavior defined in the second Tang abomination.

In a case which arose during the period 516-7 the commandant of justice cited a provision from the *zeilü* according to which persons who had committed the offense(s) of *moufan dani* should be beheaded with exposure of the head.<sup>84</sup> It is not clear here whether *dani* expresses (i) a qualification of *moufan*, indicating that it falls within the general class of behavior described as *dani wudao*, (ii) all subversive behavior other than *moufan*, or (iii) the specific sense of ‘great sedition,’ as in the Tang code. The third possibility appears less likely than the other two. In a further case which arose in the period 517-9, it is said by one official that certain measures of collective responsibility should be imposed only in cases of *dani*.<sup>85</sup> The reference appears to be to all subversive behavior undermining the state.

The Northern Wei terminology on disloyalty still, even at the end of the dynasty, betrays a strong reliance upon the Han. This is shown particularly in the use of the expression *dani*. The evidence suggests that (*da*)*ni* was the general term for all subversive behavior undermining the foundations of the state, finding particular application in contexts of disloyalty. Species of (*da*)*ni* in this sense are *moufan*, *pan*, and perhaps even *ni*. *Moufan*, whose parameters appear to have been wide, designates the specific offense of ‘plotting rebellion,’ *pan* the specific offense of ‘desertion to the enemy,’ and *ni* might be used to describe offenses that exhibited elements of disloyalty without amounting to *moufan* itself. There is no clear evidence that *dani* ever designated a specific offense of ‘great sedition,’ corresponding to the second of the Tang ‘abominations’.

It is in the law of the later northern dynasties that we can see most clearly parallels to the Tang classifications. The first code to have instituted a list of the ten most serious offenses seems to have been that of the Northern Qi 北齊. The code of 564 lists the first four of these as *fanni*,<sup>86</sup> *dani*, *pan*, and *xiang* 降.<sup>87</sup> *Xiang* may be the specific offense of ‘surrendering to the enemy’ as distinct from merely going over to or joining a foreign state.

We know that the compilers of the Northern Qi code drew on ‘precedents’ supplied by the much earlier codes of the Wei (Three Kingdoms) and Jin dynasties.<sup>88</sup> It is not impossible that they also drew upon material in the Liang code which, as we have seen, distinguished between the offenses of *moufan*, *xiang/pan*, and *dani*. The Northern Qi code retains these offenses but changes the order, placing *dani* behind *moufan* and ahead of *xiang/pan*.

The Northern Zhou code of 563 appears to have been similar to the Northern Qi in this respect. It singles out as particularly heinous certain offenses named as *oni* (惡逆 ‘contumacy’), *budao* (不道 ‘depravity’), *dabujing* (大不敬 ‘great

<sup>83</sup> *Weishu*, 2.361 and compare 4.1186

<sup>84</sup> *Weishu*, 8.2884; Cheng, *Jiuchao lü kao*, 356.

<sup>85</sup> *Weishu*, 8.2886.

<sup>86</sup> *Ni* 逆 in the phrase *fanni* 反逆 glosses *fan* 反 making explicit the subversive nature of the act.

<sup>87</sup> *Suishu*, 3.706; Cheng, *Jiuchao lü kao*, 403; Balazs, *Traité juridique du “Souei-Chou,”* 62-3.

<sup>88</sup> *Suishu*, 3.705; Balazs, *Traité juridique du “Souei-Chou,”* 59

irreverence'), *buxiao* (不孝 'lack of filial piety'), and *neiluan* (內亂 'incest').<sup>89</sup> These correspond respectively to the fourth, fifth, sixth, seventh, and tenth of the Tang abominations. It is likely that *moufan*, *dani*, and *pan* were also included in the Northern Zhou category of the most serious offenses, since we are told that "for cases of theft and robbery, as well as *moufan*, *dani*, *xiang*, *pan*, and *oni*, where exile ought to be imposed (on the ground of collective liability), the offender's own household is to be reduced to servile status as a 'bondsman household.'" <sup>90</sup> The inclusion of *moufan*, *dani*, *xiang*, and *pan* in the same phrase as *oni* suggests that the former belong to the same class of heinous offenses.<sup>91</sup>

The Sui 隋code of 581 followed the Northern Qi regulations on the ten most serious offenses, but for the first time described them as 'abominations.' It listed the first three as *moufan*, *moudani*, and *moupan*, suppressing *xiang*.<sup>92</sup> This is the model followed by the Tang code. An amnesty of 612 excludes from its scope inter alia *moufan*, *dani*, and *yaoyen* ('evil words').<sup>93</sup> This suggests that *pan* was regarded as less serious than *moufan* or *dani*, at least from the point of view of possibility of forgiveness.

Although we do not have details of the actual content and varying punishments for the 'disloyalty.' offenses in the Northern Qi, Northern Zhou, and Sui codes, we can establish a few points about the range of collective liability prescribed for these offenses. The Northern Qi and Northern Zhou dynasties appear to have followed a policy which favoured penal servitude or enslavement. In Northern Qi in 573 certain persons were accused of *fan* on the ground of the content of advice given to the emperor. They were beheaded, their male relatives were sent to the northern frontier for penal servitude, though young males were castrated, their wives and daughters, as well as their sons' wives were forfeit to the government as slaves, and their property was confiscated.<sup>94</sup> The point is that none of the relatives was executed; all incurred some form of servitude. The castration imposed on young males seems still to follow the old Northern Wei rule. The Northern Zhou rule, already noted, according to which the families of persons sent into exile on the ground of collective liability were to become 'bondsmen households,' suggests the adoption of a similar policy, although we do not know how many family members of the offender were actually executed. Some caution is necessary in the interpretation of the data. The formal rules contained in the Northern Qi and Northern Zhou codes may have been considerably more severe than the policy actually followed by the government.

The Sui regulations were severe. The code of 581 provided that, for the

<sup>89</sup> *Suishu*, 3.708; Cheng, *Jiuchao lü kao*, 419; Balazs, *Traité juridique du "Souei-Chou,"* 66.

<sup>90</sup> *Suishu*, 3.708; Balazs, *Traité juridique du "Souei-Chou,"* 68; Scott Pearce, "Status, Labor, and Law: Special Service Households under the Northern Dynasties," *Harvard Journal of Asiatic Studies* 51.1 (1991), 107.

<sup>91</sup> Some of these offences are also noted in an amnesty of 579 which excludes from its scope the offences of *fan*, *pan*, *oni*, and *budao*, as well as other offences not exempted by the terms of an ordinary or regular amnesty: Shen, *Lidai xingfa kao*, 2.695. Shen does not seem to be correct in asserting that the wording echoes the Han formula *moufan dani wudao*. The terms of the Northern Zhou amnesty have a more precise, technical sense than the Han phrase.

<sup>92</sup> *Suishu*, 3.711; Cheng, *Jiuchao lü kao*, 433; Balazs, *Traité juridique du "Souei-Chou,"* 75.

<sup>93</sup> Shen, *Lidai xingfa kao*, 2.610; Brian E. McKnight, *The Quality of Mercy. Amnesties and Traditional Chinese Justice* (Honolulu; University of Hawaii Press, 1981), 44.

<sup>94</sup> *Beishi* (Beijing: Zhonghua, 1974), 4.1186 with n57; Cheng, *Jiuchao lü kao*, 402; Albert E. Dien, "Yen Chih-t'ui (531-591 +): A Buddho-Confucian," in *Confucian Personalities*, edited by Arthur F. Wright and Denis Twitchett (Stanford, California: Stanford University Press, 1962), 60.

offenses of *dani*, *moufan*, and *pan*, the fathers, sons, and brothers of the principal offenders were all to be beheaded, while their families were to be forfeit to the government as slaves.<sup>95</sup> The implication of this statement is that both males (sons) and females (wives and daughters) were to be enslaved. There is no indication that young males were to be castrated. We can infer from a case which arose in 637 (below) that paternal grandparents and grandchildren in the male line were also to be enslaved. From the point of view of collective liability no distinction is made by the Sui regulations between *pan* and the other two offenses.

The Sui rules were initially followed by the Tang code in the version of 624. However, a revision of the law conducted in 637 led to changes. At that time a case arose in which an elder brother of a person sentenced on the ground of *moufan* appeared in the list of those to be executed submitted to the emperor for approval. The emperor was disturbed, first because the paternal grandparents and grandchildren in the male line of such offenders were only enslaved or exiled, and second because a distinction should be drawn between two kinds of *fanni*, that in which troops were actually mobilised and that in which ‘evil words’ to inspire revolt were uttered without practical effect. *Fanni* is here used as a shorthand for the two most serious offenses constituting disloyalty: *moufan* and *dani*.<sup>96</sup> As a result of the emperor’s concern the officials recommended that in the case where troops were mobilised brothers (like grandparents and grandchildren) should be enslaved instead of executed, while in the case of ‘evil words’ they should merely be exiled.<sup>97</sup> The first proposal was incorporated in the code of 653, but the second appears to have been rejected, brothers in such a case not being involved in collective liability (article 248, above). Certain statements both in the *Jiu Tangshu*<sup>98</sup> and book 39 of the *Tang Huiyao*<sup>99</sup> suggest that in practice grandparents and grandchildren or brothers may have been exiled instead of enslaved, or perhaps that regulations prior to 653 substituted exile for enslavement.

### Conclusion

#### 1 Crystallization of the Offenses of *moufan*, *dani*, and *pan*.

Under the Han (*mou*) *fan* initially appears to have expressed both acts in which the offender transferred his loyalty from the emperor to one of the princes ruling a state which owed allegiance to the emperor, and direct acts of revolt against the throne. Later it came to express generally a variety of acts of disloyalty including those which came to be designated as *dani* and *pan*. The word *pan* itself is not widely used in the description of offenses of disloyalty, but *dani* especially in the phrase *dani wudao* is frequently found. It denotes a wide range of subversive

<sup>95</sup> *Suishu*, 3.711; Balazs, *Traité juridique du “Souei-Chou,”* 74. The passage from book 86 of the Tang encyclopaedia *Tang huiyao* 唐會要 (Beijing: Zhonghua, 1998), 3.1569, cited by Jacques Gernet, *Buddhism in Chinese Society. An Economic History from the Fifth to the Tenth Centuries*, translated by Franciscus Verellen (New York: Columbia University Press, 1995), 344 n40 on the ‘old regulations’ refers to this position.

<sup>96</sup> Karl Büniger, *Quellen zur Rechtsgeschichte der T’ang Zeit*. Neue, erweiterte Ausgabe, mit einem Vorwort von Denis Twitchett. Herausgegeben von Roman Malek (Sankt Augustin: Institut Monumenta Serica; Nettetal: Steyer Verlag, 1996), 83 n29. Compare the different usage cited above at note 86.

<sup>97</sup> *Jiu Tangshu* 舊唐書 (Beijing: Zhonghua, 1975), 6.2136; Büniger, *Quellen zur Rechtsgeschichte der T’ang Zeit*, 82-4.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Tang huiyao*, 2.708-9; Büniger, *Quellen zur Rechtsgeschichte der T’ang Zeit*, 193-4.

behavior which undermines the moral or political foundations of the state. In this sense it might refer to specific acts of disloyalty amounting to *moufan*.

In the post-Han period we see a gradual refining of the offenses evidencing disloyalty. Under the (Three Kingdoms) Wei dynasty the offense of criticising deceased emperors or damaging the imperial ancestral temple was reclassified as behavior amounting to *dani*, although it was distinguished from *moufan* itself. The process of differentiation probably continued under the Jin, but we do not have clear evidence of a distinction between the three offenses of *moufan*, *dani*, and *pan* until the Liang code of 503. The same tripartite distinction was almost certainly adopted by the code of the last southern dynasty, the Chen. It also seems to have influenced the development of the code in the north. Although there is no unambiguous evidence that the codes of the Northern Wei dynasty utilised the distinction, it appears in the codes of the successor northern dynasties, in particular that of the Northern Qi. The three offenses were taken from the Northern Qi code by the Sui code in which they were classified as the first three of the ten abominations. The Tang code (as well as the later codes) followed the Sui model.

Very few details of the actual content of the offenses have been preserved in the sources. With respect to *moufan*, it appears certain that the very wide scope accorded this offense under the Han was restricted in the later law, but we do not have enough evidence to determine the details of the evolution of the offense. With respect to *dani*, it appears that part of the Tang abomination, namely, plotting to destroy the imperial ancestral temple, had its roots in the clarification by (Three Kingdoms) Wei of the offense of criticising or attacking the imperial ancestral temple. The notion of attacking the temple may have been incorporated in the offense of *dani* developed in the later southern dynasties, from whence it passed into Sui and Tang law. Possibly 'defamation' of deceased emperors was treated in the same way, though in Tang law this may have been subsumed under the separate offense of 'criticising the emperor.' (article 122). With respect to *pan*, we can discern signs of an extension in the scope of the offense. The codes of the later northern, and perhaps also those of the later southern, dynasties contained two related offenses denominated *xiang* and *pan*. The former designated surrender to the enemy, the latter going over to a hostile power. Both these offenses were combined in the Tang abomination of *pan*.

The general point to be emphasised is that the working out of the distinction between *moufan*, *dani*, and *pan* as technical offenses concerned with different types and degrees of disloyalty was primarily the achievement of the southern dynasties. From there the distinctions passed into the codes of the later northern dynasties and from there into the Tang code.

## 2 Development of the Rules of Collective Liability

Although *moufan*, *dani*, and *pan* were not the only offenses attracting the liability of relatives of the offender, they were those in which the most extreme manifestation of such liability appeared. In this context two fundamental changes occurred in the post-Han and pre-Tang period. First, the range of relatives subject to execution was diminished, and, second, the criteria of gender and age were accepted as grounds for leniency, so ensuring that women and young males involved in collective liability were no longer to be put to death. The formal rules maintained throughout the Han dynasty were particularly severe. All those involved in collective liability irrespective of gender or age were to be beheaded. The range of persons to be executed was wide: paternal grandparents, parents,



wives and concubines, children, brothers and sisters, and grandchildren in the male line.

During the Wei, Jin, and southern dynasties there was a progressive dilution of the severity of the rules imposing liability on the relatives of an offender. The Wei excluded grandparents and grandchildren from liability for the offense of criticising deceased emperors or damaging the imperial ancestral temple. Under this dynasty for the first time married daughters (or sisters) were declared exempt in all offenses for which collective liability was imposed. The rationale was that their liability should follow their husband and not their father or brother. Under the Jin the important principle was established that women involved in collective liability might not be executed; instead they were to be enslaved. However, none of the southern dynasties appears to have permitted a reprieve from death on the ground of age. A series of Han decrees and ordinances<sup>100</sup> conferred certain privileges upon the old and the young, but these do not seem to have applied in cases of collective liability. The first citation of formal rules according leniency on the ground of age in cases of collective liability come from the north. Northern Wei legislation introduced the rule under which the sons aged fourteen or below of persons who plotted revolt were to be castrated instead of executed. It appears also that an attempt was made in the middle of the fifth century to replace castration with enslavement. Neither the southern nor the northern dynasties furnish examples of leniency accorded to persons involved in collective liability on the ground of mental or physical disability.

We cannot trace the precise antecedents of the Tang rules giving special consideration to the aged and the disabled in cases of collective liability. It is not likely that these rules were a complete innovation of the Tang. On the other hand, the Tang legislators do appear to have introduced two important changes tending to mitigate the severity of the rules. One was the reduction in liability of brothers of the principal offenders from death to enslavement. The other was the establishment of a strict separation between the offenses of *moufan* or *dani* and lesser offenses of disloyalty. In the latter case the range of relatives involved in collective liability was considerably reduced and the punishments were non-capital. As we have seen, this approach was not without earlier precedent, but the thoroughness with which it was applied seems to have been a Tang innovation.

When we consider the origins of the Tang code we have to distinguish between its direct source, the *Kaihuang* code of the Sui dynasty, and the indirect sources, that is, the data utilised by the Sui code itself. Investigation of the indirect sources leads us to consider the relative contribution of developments in the south and the north, both legal traditions being derived ultimately from the Han. We cannot press the dichotomy between south and north too far since the most important southern codes, those of the Jin and Liang dynasties, undoubtedly influenced the construction of the codes in the north. Consequently, what was initially a southern innovation may have passed into the northern codes and from there into the Tang code. This said, we can establish that the rule in the Tang code relating to the collective liability of women goes back to the reforms made in the (Three Kingdoms) Wei and Jin dynasties. They were incorporated in the Sui code, for which the Liang code was an important source. On the other hand, the only clear parallel for the Tang rule on the enslavement of sons aged 15 or

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<sup>100</sup> Summarised in Hulsewé, *Remnants of Han Law*, 298-300.

under of the principal offenders is the Northern Wei rule, introduced around 452, that sons aged 14 or under were to be forfeit to the government. It is probable that this Northern Wei precedent passed into the codes of the later northern dynasties and from there into the Tang code. It may also have been adopted by the Sui legislators, though the summary of the Sui rules on collective liability does not mention it.

On other matters we cannot establish certain conclusions. The rule that paternal grandfathers and grandsons in the male line should be enslaved and not put to death may have been derived from the later southern codes or it may have been taken from the policy of enslavement and penal servitude followed by the Northern Qi and Northern Zhou dynasties in cases of collective liability. Equally, we do not know the origin of the Tang rule which treated as special cases relatives who were aged or disabled. Unfortunately, no rules on these matters have been preserved in the pre-Tang law. It is possible that the southern codes allowed aged or infirm relatives to escape execution or other punishment since these codes granted leniency to such classes of person in other contexts. If so, such rules may have influenced the Tang legislation, though we do not know whether they had first entered the later northern codes.