

Religious Exemptions in Ancient China

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The issue of religious exemptions is a major feature in contemporary debates over religious freedom and equality rights. This article presents evidence of Confucianist religious exemptions in law dating back to 200 BCE in ancient China. Even with this large disparity in time, there are some surprising parallels between ancient and contemporary religious exemptions in law and the debates that have accompanied them. The article argues that religious exemptions — whether modern or ancient — run to the relationship between rights and responsibilities. It suggests modern approaches towards religious exemptions may profit from greater attention to concepts like human dignity that do not allow duties to be overshadowed by rights.

INTRODUCTION

In modern constitutional law, religious exemptions appear to pose a persistent challenge. In the course of pursuing other objectives, state actors — incidentally or intentionally — may infringe on religious freedom. But whether and when such infringement is justified is a subject of ongoing debate. This became particularly salient during COVID-19 when religious exemptions to closure orders and vaccine mandates were increasingly visible. The same debate has also spilled over into disputes between religious freedom and equality rights. The core of such questions seems to intimate the extent to which religion should be accorded special status in a legal system. While scholars have drawn upon many sources in these debates dating back to the Enlightenment, the history of religious exemptions reaches back even further. This article presents evidence of Confucianist religious exemptions in law dating back to 200 BCE in ancient China — approximately 2200 years ago. Even with this large disparity in time, there are some surprising parallels between ancient and contemporary religious exemptions in law and the debates that have accompanied them.

The paper proceeds as follows. Part I briefly introduces Confucianism as a religious and political ideology. Part II then highlights interactions between the Confucianist principle of 孝 (*xiao*) or filial piety and the law. These interactions evidence ways religion was compatibly accommodated within the context of strong state policy in ancient China. This paves the way for a comparative analysis of modern approaches to government accommodation in Part III. The article then concludes with reflections on what ancient China's practices have to offer for countries vexed by the legal challenge of religious exemptions. Ultimately, the article argues that religious exemptions — whether modern or ancient — run to the relationship between rights and responsibilities. Examples of religious exemptions in ancient China demonstrate how reciprocity in the notion of *ren* harmonizes human rights with human responsibilities. This suggests modern approaches towards religious exemptions may profit from greater attention to concepts like human dignity that do not allow duties to be overshadowed by rights.

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I. LAW, RELIGION, AND CONFUCIANISM IN ANCIENT CHINA

A close and informed look into China's past quickly reveals deeply religious aspects within Chinese society and the lives of its people. The most salient religious influence in the lives of Han Chinese (the ethnic majority ancestors of today's Chinese) is Confucianism.¹ It is natural to think of Confucianism as originating with Confucius. In reality, however, Confucius simply formalised and expounded principles that dated back to China's earliest days. These principles, such as filial piety, humaneness, loyalty, and others, were exemplified by the sage kings of ancient China.² Centuries later, Confucius recognised the need for moral reform in society and turned to those ancient sage kings for guidance. His advocated moral reforms were heavily influenced by ritual and relationship. This can be summarised in the five reciprocating relationships discussed in the teachings of Mencius, one of the foremost disciples of Confucius: father and son, sovereign and minister, husband and wife, old and young, and friends.³

The outgrowth of these fundamental relationships was a Confucian's riveted focus on filial piety. Filial piety was considered the 'ben (roots) of all benevolent action',⁴ the 'root of humanity',⁵ and 'the constant (method) of Heaven, the righteousness of Earth, and the practical duty of Man'.⁶ Filial piety was therefore foundational to the moral virtue Confucianism aimed to cultivate in society and individuals. It included far more than simply respect between father and son, or children and parents. 'For any individual, parents constitute an all-important link in their cosmic existence and continuity. They are one's ancestors: deceased ancestors after their physical death, and "living ancestors" while alive. To recompense parents for such cosmic grace, one must practice filial piety.'⁷ Only after developing filial piety could individuals begin to cultivate virtue in all aspects of their lives and fulfill the Confucian goal of developing as a morally upright individual.⁸

¹ 'Indeed, unlike most Western Societies, China was primarily and officially dominated for more than two thousand years by the semi-religious influence of Confucian philosophy': Chen Huanzhong, 'A Brief Overview of Law and Religion in the People's Republic of China' (2003) 2003(2) *Brigham Young University Law Review* 465, 465.

² Examples of filial piety are found in the *Shujing* (书经), one of the classical Chinese texts inherited and edited by Confucius: see, eg, Yongping Liu, *Origins of Chinese Law: Penal and Administrative Law in its Early Development* (Oxford University Press, 1998) 95. 'The most ancient form of Chinese religion for which a detailed record is available is the ancestor cult of the Shang royalty; the reverence for parents both living and dead was the root of the ethical system elaborated by Confucius and extended to all other social relationships; its ritual formulation in the Scripture on filial piety was one of the most widely circulated texts in imperial China and a canon of state orthodoxy': David A Palmer and Vincent Goossaert, *The Religious Question in Modern China* (University of Chicago Press, 2011) 226.

³ See Mencius, *Teng Wen Gong I*, tr James Legge, Chinese Text Project (Web Page, 13 July 2021) 4 [trans of: 孟子: 滕文公上] <<https://ctext.org/mengzi/teng-wen-gong-i>>.

⁴ Liu (n 2) (emphasis in original).

⁵ *A Source Book in Chinese Philosophy*, tr Wing-Tsit Chan (Princeton University Press, 1963) 20.

⁶ Confucius, *The Classic of Filial Piety: Filial Piety in Relation to the Three Powers*, tr. James Legge, Chinese Text Project (Web Page, 15 July 2021) [trans of: 孝经: 三才] <<https://ctext.org/xiao-jing>>.

⁷ Jiang Yonglin, *The Mandate of Heaven and The Great Ming Code* (University of Washington Press, 2011) 156.

⁸ 'Of all the actions of man there is none greater than filial piety . . . In the virtue of the sages, what besides was greater than filial piety?': Confucius, *The Classic of Filial Piety: The Government of the Sages*, tr James Legge, Chinese Text Project (Web Page, 19 September 2023) [trans of: 圣经: 孝治] <<https://ctext.org/xiao-jing>>.

Furthermore, filial piety in the home was expected to translate into other aspects of society, particularly in the way a sovereign would interact with his subjects.⁹ This understanding of filial piety places it at the core of Confucianism and the reciprocal relationships that form a harmonious society. The primary aim of Confucian political philosophy ran parallel to the purpose of Chinese law today in preserving order and promoting harmony.¹⁰ To achieve this goal, Confucianism focused on individual moral growth that would aggregate into a society at large. Confucius believed that, ideally, law would become unnecessary if all citizens perfected certain moral characteristics and became 君子 (*jūnzi*),¹¹ creating a social order where harmony and stability could flourish.¹²

Ultimately, Confucians trusted that cultivating virtue through ritual 礼 (*lǐ*) would be a ‘better means for achieving long term order, stability, and prosperity.’¹³ Until that time, however, law was necessary as a temporary mechanism. By contrast, the competing Legalist school of thought centered on a rigid commitment to the rule by law without any need for ritual. In the ‘ruthlessly efficient’ approach of Legalism, moral reform of individual citizens must arise out of harsh punishments and clear consequences to incentivise correct behavior.¹⁴ This left little need for promoting moral values such as filial piety if the law could provide the appropriate sticks and carrots to achieve order and harmony.¹⁵ Both approaches to social order have left traces on the legal makeup of modern China.

Importantly, whether viewing the world as a legalist or a Confucian, the social goal of law remained the same. ‘The purpose of both the Confucian and the Legal Schools was the maintenance of the social order. The difference between them lay mainly in the problem of what constituted an ideal social order and by what means such an order could be attained.’¹⁶ It is within this legal environment that filial piety became valuable. Even the most devoted Legalist recognised that filial

⁹ ‘[F]ilial piety with which the superior man services his parents may be transferred as loyalty to the ruler’: Confucius, *The Classic of Filial Piety: Amplification of ‘Making Our Name Famous’ in Chapter I*, tr James Legge, Chinese Text Project (Web Page, 15 July 2021) [trans of: 孝经: 广扬名] <<https://ctext.org/xiao-jing>>.

¹⁰ ‘Yet while Chinese law was able to adapt to accommodate societal change, the similarities in structure and content across legal codes from the Tang to the Song point to a major trait of law in China. One of its main purposes was to preserve traditional moral values, as well as to maintain the existing social and political order’: see Klaus Mühlhahn, *Criminal Justice in China: A History* (Harvard University Press, 2009) 45. Others have also noted the lack of discrimination and religious conflict in China compared to the West, which Chinese delegate to the United Nations PC Chang attributes to the Confucian emphasis on harmony over sameness: Hans Ingvar Roth, *PC Chang and the Universal Declaration of Human Rights* (University of Pennsylvania Press, 2018) 125–6.

¹¹ Often translated as ‘gentleman’ or ‘noble son,’ the word is used to describe anyone with superior or exemplary moral character.

¹² ‘The Master said, “If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good”’: see Confucius, *The Analects of Confucius: Weizheng*, tr James Legge, Chinese Text Project (Web Page, 15 September 2023) [trans of: 论语: 为政] <<https://ctext.org/analects/wei-zheng>>.

¹³ Qianfan Zhang, *Human Dignity in Classical Chinese Philosophy: Confucianism, Mohism, and Daoism* (Palgrave Macmillan, 2016) 106.

¹⁴ Derk Bodde and Clarence Morris, *Law in Imperial China* 27 (Harvard University Press, 1967).

¹⁵ One of the foremost proponents of Legalism was Han Feizi, a previous student of Confucianism. Although he did not embody everything about Legalism, Han Feizi is a useful reference for understanding how Legalism overlaps and diverges from Confucianism. ‘It is clear that Han Feizi takes filial piety seriously, however, because he devotes the whole of chapter 51 of his work, entitled “Zhongxiao” 忠孝 “Loyalty and Filial Piety”’: but see Donald Holzman, ‘The Place of Filial Piety in Ancient China’ (1998) 118(2) *Journal of the American Oriental Society* 185, 190.

¹⁶ Qu Tongzu, *Law and Society in Traditional China* (Mouton, 1961) 226.

piety played a powerful role in Chinese social order even when adherents to its custom did so out of cultural peer pressure rather than religious duty. Because it mirrored the relationship between sovereign and subject, filial piety could be justified in China's political realm due to its value in regulating the fundamental relationships necessary to the Confucian understanding of the ideal society.

Had political expediency been its only virtue, however, filial piety would not have persisted across the cultural hydraulics of China's dynastic rule. Filial piety endured as an individual religious obligation manifested in daily life and not just a political or philosophical ideal. As one scholar explains it, 'filial piety is more than a secular attitude; it has become part of religious ritual and a constituent element of spirituality'.¹⁷ The role of parents and ancestors as creators in Confucianism can be viewed as a parallel to a transcendent Creator in monotheistic traditions. 'In both cases, the Christian saints and the Chinese paragons of filial piety, we are in the presence of men and women moved by the noblest of motives . . . love for Christ and God in the West, filial piety for parents in China.'¹⁸

This religious duty associated with filial piety was so pervasive that it influenced all aspects of Chinese life for centuries, including law. Yet, just as it does today, prioritizing the conscience of individuals over public interests has the potential to hinder governance. As Han Feizi argued many centuries ago, unfettered deference to filial piety could lead to a weak military where sons evade battle by caring for aged parents.¹⁹ Thus, filial piety also endured because of the Confucian ability to manage each fundamental relationship through reciprocity. This was largely achieved due to the Confucian virtue of 仁 (*ren*). The concept of *ren* can be understood as 'two-man mindedness', meaning that every relationship requires considering the impact of one's actions on another.²⁰ Consequently, when the obligation to parents ran contrary to the state, *ren* acted as a limiting principle that would ensure one Confucian relationship did not overtake another. The following section traces one prominent way that Confucianism influenced the law through exemptions created to accommodate filial piety. In doing so, it also demonstrates how *ren* encouraged attention to reciprocal responsibilities that conscientious objectors owed to the state.

II. RELIGIOUS EXEMPTIONS IN ANCIENT CHINA

While other aspects of Confucianism and other schools of Chinese philosophy certainly influenced ancient China's law on religion,²¹ the impact of filial piety was among the most prominent and lasting.

¹⁷ Yao Xinzong, *Introduction to Confucianism* (Cambridge University Press, 2000) 202.

¹⁸ Holzman (n 15) 198.

¹⁹ Han Feizi, *Han Feizi: Basic Writings*, tr Burton Watson (Columbia University Press, 2003) 107.

²⁰ Roth (n 10) 143.

²¹ Another area of law influenced by Confucian thought, though not discussed here, was punishment. This included severe punishments for those who failed to demonstrate filial behavior in society. Such violations might include 'to accuse to the court . . . , to cast a spell on . . . , or to curse with bad language. . . paternal grandparents, parents, husband's paternal grandparents or parents; while paternal grandparents or parents are still alive, to establish a separate family registration . . . or separate property . . . or to fail to provide sufficiently for them . . . ; during the period of mourning for parents, to arrange for one's own marriage . . . , to make music . . . , or to take off mourning garments and put on ordinary clothing . . . ; on hearing of the death of paternal grandparents or parents, to conceal and not to mourn the death . . . ; or to state falsely that paternal grandparents or parents have died.'): Yonglin (n 7) 18. Notably, two of China's 'Ten Abominations' (十惡) — the worst offenses to society and punishable by death — related to filial piety:

While many legal rules ebb and flow with the trends of their times, the moral appeal of filial piety pervaded multiple dynasties across the centuries — an influence only recently explicitly removed from China's legal system.²² Moreover, although Confucianism did not enjoy unanimous support throughout the entirety of Chinese antiquity, filial piety still commanded special status in the law. This status is best understood through the ancient religious exemptions made to accommodate the practice of filial piety.

The term 'religious exemption' as used in law today can be understood as relieving responsibility to perform a legal duty in order to perform a religious obligation. In this, there is an acknowledged hierarchy between duties to the government and duties to conscience that occasionally diverge. Many examples from ancient China evidence a religious exemption in this sense: where one's Confucian duty to parents conflicted with duty to the sovereign, the laws of society would often defer to the individual's conscientious objection. As will be shown, however, placing the parent-child relationship over obligations to the ruler and state was not inherently contradictory. If anything, Confucius indicates the opposite: filial piety *enhances* respect for state officials because each is based on a reciprocal responsibility flowing from *ren*.²³ It is this framing that breaks from many of the modern conflicts of rights over religious exemptions that tend to fixate on rights rather than reciprocal responsibilities.

A prominent example of religious exemptions for the Confucian idea of filial piety was the principle of mutual concealment. These laws allowed, and even required, children to hide their parents from the state if their parent had committed a crime. The basis for this law came straight from the text of *The Analects of Confucius*: 'The father conceals the misconduct of the son, the son conceals the misconduct of the father. Uprightness is to be found in this.'²⁴ Generally, only serious crimes committed such as treason, sedition, or rebellion were not included under the concealment exemption.²⁵ All other criminal acts were 'almost outside the reach of the formal criminal justice apparatus, since they effectively denied the justice agencies the opportunity to detect and punish many crimes committed within the privacy of the family'.²⁶ The evidence for the strength of this provision points directly back to the prominent Confucian religious obligation placed upon children to honor their parental creators. Because of the need to preserve this fundamental relationship, Chinese rulers embraced mutual concealment. From at least the Han Dynasty onward, concealment has been recognised by the laws of every dynasty — a period of over 2000 years.²⁷ It is likely due to the expected reciprocal benefits of

parricide (murder of parents or grandparents as opposed to of a stranger which was not as harshly punished) and incest (specifically having an affair with the spouse or concubine of one's father, grandfather, or older brother); Victor Cunrui Xiong, *Emperor Yang of the Sui Dynasty: His Life, Times, and Legacy* (State University of New York Press, 2006) 136.

²² These religious exemption laws for filial piety continued to exist through the Qing (final) dynastic legal code: see *The Great Qing Code*, tr William C Jones (Oxford Clarendon Press, 1994) 66–7.

²³ 'All too often people believed that [filial piety] meant blind obedience first to one's family elders and then to anyone else in authority. But this was to misunderstand the reciprocal nature of filial piety': John H Berthrong and Evelyn Berthrong, *Confucianism: A Short Introduction* (Simon and Schuster, 2000) 57.

²⁴ Confucius, *The Analects of Confucius: Zilu*, tr James Legge, Chinese Text Project (Web Page, 15 July 2021) 18 [trans of: 论语: 子路] <<https://ctext.org/analects/zi-lu>>.

²⁵ This is likely due to the fact that filial piety was intended to preserve social order and these crimes were direct attacks at the order and stability of society: see Yonglin (n 7) 41–2.

²⁶ Mühlhahn (n 10) 52.

²⁷ Liu (n 2) 96–7. Some have noted that after the Tang, this principle was expanded to include a broader range of relatives and not just parents: see Tongzu (n 16) 70.

broader social harmony from strong family relationships that government officials sought to preserve mutual concealment over centuries of Chinese history.²⁸

Beyond mutual concealment, filial piety also served as an evidentiary boost in sentencing, even to the point of a religious exemption. These legal cases featured a principle known as 取法深情 (*bending law to promote sentiment*) where filial piety could be invoked in a defendant's favor. One example from the Ming Dynasty involved a father who committed bribery to save his son from punishment. Upon discovery of his bribes, the emperor decided not to prosecute the father for his crime. The emperor explained, 'father and son are the most intimate relatives for human beings. With love deeply rooted in his heart, the father was so eager to save his son's life that he ignored what principle would not tolerate. . . . But his sentiment should be considered. Pardon him'.²⁹

In another Ming Dynasty case, a son petitioned to stand in for his father's punishment (beating with a heavy stick and banishment). When Emperor Zhu Yuanzhang got word of this son's religious devotion to filial piety, he pardoned both father and son stating: 'What a beautiful thing this is! Let's bend the law in this case so as to promote the love between father and son, making them good examples for the realm'.³⁰ Intriguingly, in neither case did the fathers or sons seek out (as far as we know) a religious exemption or claim it as a matter of right. Instead, both rulers saw that granting an exemption would promote better governance than enforcing the law as written. Once again, the reciprocal nature of *ren* in Confucian relationships demonstrates why duty was more important than entitlement in these cases.

A final category of law dealing with filial piety was direct exemptions and accommodations made for criminals who needed to care for an aging parent. In the event an only son's incarceration or even execution would leave one or both parents without support, officials would sometimes commute criminal sentences to allow for this religious duty to be carried out. Similar to mutual concealment, this practice in the law was common across many dynastic periods. Although these cases represented adherence to a religious principle of ancient origin, the practice was quite regularly used even in the last few centuries.³¹ Furthermore, exemptions to fulfill these obligations were not viewed as a legal 'loophole for escaping punishment',³² but instead, as Qing Dynasty jurist Shen Jiaben advocated, 'as a matter of morality, not punishable by law'.³³

The procedure for obtaining this exemption was somewhat circuitous. Criminals accused of serious crimes could appeal to this defence using the assize courts. These typically involved cases of sensitive matters, such as determinations of capital punishment, and were referred to the emperor or another elite to either offer clemency or approval of the punishment.³⁴ An assize court could decide the case in

²⁸ '[A man's] regulation of his family may be transferred as good government in any official position': see Confucius, *The Classic of Filial Piety: Amplification of "Making Our Name Famous" in Chapter I*, tr James Legge, Chinese Text Project (Web Page, 19 September 2023) [trans of 孝经: 广扬名] <<https://ctext.org/xiao-jing>>.

²⁹ Yonglin, (n 7) 40, quoting *Huang Chang-chien, Veritable Records of the Great Ming Taizu* (Academic Sinica, 1962) 2377–8.

³⁰ *Ibid* 39.

³¹ See Bodde and Morris (n 14) 193.

³² *Ibid* 223–4.

³³ Shiping Hua, *Chinese Legal Culture and Constitutional Order* (Routledge, 2019) 3.

³⁴ See Bodde and Morris (n 14) 134–5. Such cases were typically reviewed in autumn to represent the oncoming death of nature.

one of four ways: defer punishment, grant clemency out of compassion, exempt due to filial piety, or endorse the punishment.³⁵ When a filial piety exemption was granted, the criminal's sentence would be commuted, sometimes in drastic reversals. For example, during the Qing dynasty, a criminal who was either the sole support of parents or sole surviving descendant to carry out ancestral sacrifices 'commonly had his death penalty reduced to 40 blows of the heavy bamboo and two months wearing of the cangue'.³⁶ Earlier on in the Yuan Dynasty (1276–1368 CE), 'a son who killed somebody to avenge his father was sometimes forgiven by the law', seeing his actions as an extension of filial duty.³⁷

The fact that capital offences could be reduced or even removed under conditions of filial piety suggests the eminent status it held in Chinese society. Particularly within a strong, centralised state such as imperial China that placed paramount importance on social order and harmony, it almost seems paradoxical to grant such a broad exemption to the law. Of course, this does not mean that filial piety was completely beyond the reach of the criminal justice system. There remained limits such as when filial piety to family ran up against loyalty to the state. Although these instances remained rare (such as the case of rebellion), they remained a point of theoretical contention. The general view of the state was that 'sovereignty took precedence, and loyalty to the state was the crucial issue' in moments of irreconcilable conflict.³⁸ Yet, from the perspective of Confucius, 'one's first loyalty should be to one's family'.³⁹ In practice, however, there is no substantive evidence that these opposing philosophical stances ever resulted in serious social disturbance.

As highlighted in each of the examples above, the reciprocal nature of *ren* in filial piety was key to the government's willingness to accommodate conscientious objections. Beyond filial piety, Confucianism casts all relationships (including between sovereign and subject) in terms of obligations rather than rights. The law was charged with protecting the state from impeding an individual's fulfillment of religious obligation required by filial piety. It was not an individual's right to take care of his or her parents that kept them from punishment, but instead a mutual recognition that the moral duty placed on them should not be interfered with by the state.

Likewise, those committing rebellion were directly inhibiting the state in its obligation to provide order in society for the governed. It is the purpose of law to preserve space for those obligations. Importantly, when religious obligations are recognised by the state as such, they may be just as compelling for protection as rights are. The state is not primarily protecting the people from its unsavory tendencies — as a rights-based approach would suggest — but instead works in its own interest by allowing legal space for religious obligations to be fulfilled. While the result looks the same as a rights-centered approach, highlighting space for fulfilling obligation encourages the populace to do much less demanding of rights and more reminding (to both themselves and the government) of their most important responsibilities.

³⁵ Ibid 138–9. Deferral of punishment often meant selecting one of the other three options at a future point in time. Compassion was somewhat fluid and seems to rely more on the ruler's discretion.

³⁶ Ibid.

³⁷ Hua (n 33) 18.

³⁸ Tongzu (n 16) 74.

³⁹ Liu (n 2) 96–7.

In review, this section has modelled the interaction between law and religion through the lens of the Confucian concepts of filial piety and *ren*. It has argued that China's history is characterised by examples of accommodation and reciprocity in state respect for religious beliefs. This analysis of law and Confucianism in pre-modern China points to several important elements for the discourse on religious exemptions today. First, religious exemptions in ancient China did not emerge out of a comprehensive philosophy of natural law and natural rights like it has in the West. Instead, Chinese religion such as Confucianism emphasised duties over rights including the reciprocity required to maintain the most basic relationships in society. Second, because of these origins, the law on religion served as a tool to pragmatically meet pressing social needs and aimed to accomplish the state's compelling interest in stability and harmony. However, this did not inevitably subvert religion to the government's aims in all cases. Although government interest served as the impetus for accommodating and even exempting criminals from serious punishment, the reason for doing so was to preserve the religious obligations that flowed from filial piety.

Before proceeding to modern examples of religious exemptions, it may be useful to point out some limitations of using filial piety, *ren*, and Confucianism as a comparator for religious accommodation today. First, the preceding analysis on law and religion in pre-modern China has focused primarily on Confucianism. Although this is particularly useful due to its continued and widespread influence on Chinese society, there are many counterexamples that could be used to argue Confucianism is not representative of Chinese law and religion. For example, some rulers in Chinese history were largely influenced by the Legalist view that filial piety, while useful, was most effective when 'subservient to absolute loyalty to the state that universal peace and prosperity can be achieved'.⁴⁰ This should indicate that the explanation given above regarding Chinese law and Confucian teachings represents one prominent — though not universal — approach to accommodating Confucian beliefs.

In addition to this, Confucianism did not have an absolute monopoly on the pre-modern Chinese religious market. Both Daoism and Buddhism factored prominently into the development of law and religion in China. Although they share the fluid religious nature of Confucianism, neither Daoism or Buddhism obtained a similar level of enduring influence on Chinese political philosophy and government that Confucianism had historically achieved.⁴¹ Even today, Confucianism is not one of the five state recognised religions, perhaps due to its assumed and inherent influence on China's state and social structure. Other faiths such as Catholicism, Protestantism, and Islam also began to emerge, yet their legal treatment in China was somewhat skewed due to their perceived connection to foreign influence.⁴²

With all this in mind, Confucianism in modern China remains both a dominant religious and social force that cannot be ignored. Similar to the ways Christianity has pervaded US culture and social life, Confucianism is often bound up with what it means to be Chinese. For these reasons, it is helpful to consider how viewing Confucianism's influence on ancient China can inform modern law and policy dealing with religious accommodations.

⁴⁰ 'It is only in the last great philosopher of the Golden Age, the Legalist Han Feizi, that we find an outright condemnation of filial piety and the requirement of absolute obedience to the state rather than to one's parents': Holzman (n 15) 190.

⁴¹ See Huanzhong (n 1).

⁴² See Koen Wellens, *Freedom of Religion or Belief in China: Experiences from the Sino-Norwegian Human Rights Dialogue* (2010) 54.

III. RELIGIOUS EXEMPTIONS IN MODERN LAW

Like ancient China, modern constitutional law in many countries deals with religious exemptions.⁴³ It is a familiar and ongoing legal debate that covers many jurisdictions and topics. Legally endorsed religious exemptions are typically enforced by either proactive legislative rules or reactive judicial review. Many countries involve some degree of both.

In the United States, for example, religious objectors began as early as the Revolutionary War, where Quakers were granted an exemption to military service by the Continental Congress.⁴⁴ By contrast, the Constitutional Court of South Korea found a constitutional right to conscientious objection in military service, declaring art 5 of the country's *Military Service Act* unconstitutional.⁴⁵ On the issue of ministerial exceptions, which enable churches and religious organizations to make employment decisions based on their doctrine, there is also variety in approaches. Australia proactively created a ministerial exception through both state and federal legislative regimes.⁴⁶ In the United States, the ministerial exception continues to be primarily a protection originating in the judiciary.⁴⁷

The debates over religious exemptions were particularly salient during COVID-19.⁴⁸ First, COVID-19 introduced a wave of closure orders from governments. Some of these COVID closure orders provided for religious exemptions while others refused to treat religion any better (and arguably, sometimes worse) than comparative substitutes.⁴⁹ Additionally, religious exemptions featured prominently in debates over vaccine mandates and whether the government must

⁴³ The idea of religious exemptions is also commonly referred to as conscientious objection — reflecting the use of freedom of conscience among many countries. Because freedom of conscience tends to reflect only individual objections, rather than institutional, religious exemptions is used throughout to capture the broader meaning that encompasses both individual and institutional objections. Cf Javier Martinez-Torron, 'Martinez-Torron on Religious Exemptions', *Law and Religion Forum* (Conference Paper, 15 September 2022) <<https://lawandreligionforum.org/2022/09/15/martinez-torron-on-religious-exemptions/>>.

⁴⁴ Michael McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion' (1989) 103(7) *Harvard Law Review* 1468–9.

⁴⁵ See Choe Sang-Hun, 'South Korea Must Offer Alternatives to Military Draft, Court Rules', *New York Times* (online, 28 June 2018) <<https://www.nytimes.com/2018/06/28/world/asia/south-korea-military-service-conscientious-objectors.html>>.

⁴⁶ See Paul T Babie, 'Ministerial Exceptions, Religious Exemptions, and Anti-Discrimination Legislation: Reciprocal Lessons from Australia and America', *Canopy Forum* (Blog Post, 19 August 2020) <<https://canopyforum.org/2020/08/19/ministerial-exceptions-religious-exemptions-and-anti-discrimination-legislation/>>.

⁴⁷ See *Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 565 US 171 (2012); *Our Lady of Guadalupe School v Morrissey-Berru*, 140 S Ct 2049 (2020).

⁴⁸ Some scholars argue that evidence of historical judicial religious exemptions support modern religious accommodations from neutral and generally applicable law: see Stephanie H Barclay, 'The Historical Origins of Judicial Religious Exemptions' (2020) 96(1) *Notre Dame Law Review* 55. Others argue that religious exemptions cannot arise from the text of the First Amendment when neutral and generally applicable laws precede any knowledge that an accommodation could be required: see Nicolas Quinn Rosenkranz, 'The Subjects of the Constitution' (2010) 62 *Stanford Law Review* 1209, 1265–7. See generally Philip A Hamburger, 'A Constitutional Right of Religious Exemption: An Historical Perspective' (1992) 60 *George Washington Law Review* 915.

⁴⁹ See Mark L Movsesian, 'Law, Religion, and the COVID-19 Crisis' (2022) 37(1) *Journal of Law and Religion* 9; Brady Earley, 'Contagions, Congregations, and Constitutional Law: Reciprocity and Religious Freedom in the 1918 and 2020 Pandemics' (2021) 10(3) *Oxford Journal of Law and Religion* 359.

accommodate religion.⁵⁰ At the core of many of these debates is the question of whether and to what extent religion should be accorded ‘special’ status through religious exemptions.⁵¹ Can ancient China provide any reasons supporting or dismissing this claim?

The treatment of filial piety in pre-modern Chinese law draws some cursory parallels to modern religious exemption laws in Western constitutional democracies. For example, the idea of mutual concealment is very similar to the use of priest-penitent privilege — an accommodation granted to clergy from testifying against a criminal who has revealed committing a crime during confession. This religious freedom principle continues to pervade legal jurisdictions throughout Europe, North America, and areas of the Pacific.⁵² Another closely related concept is the ministerial exception.⁵³ Similar to the ways that filial piety can exempt otherwise criminal acts from punishment, the ministerial exception allows religious organizations an exemption from antidiscrimination law. In each instance, although the basic law seeks to generally prevent certain types of behavior, the religious autonomy of an organization or individual is given sufficient space to function and follow the dictates of conscience.

But beyond these superficial parallels, the special status of filial piety in ancient Chinese law is instructive. A key feature of robust accommodations for religion in China anciently was the expectation of reciprocity between states and citizens. Although not strictly Western like natural law or explicitly divine in origin, the Confucian ideal of *ren* presents a good beginning.⁵⁴ This Confucian concept emphasises the importance of reciprocity and places obligations rather than rights in the foreground. Although both are necessary ingredients in a successful society, the rhetoric of rights is likely to be far less compelling to the state than an insistence on space to fulfill religious obligations.

With this in mind, models of religious accommodation need not be identical in their philosophical or moral underpinnings; rather each must maintain some connection to the reciprocal

⁵⁰ See Justin Nortey, ‘Americans Skeptical about Religious Objections to COVID-19 Vaccines, but Oppose Employer Mandates’, *Pew Research Center* (Research Paper, 31 March 2022) <<https://www.pewresearch.org/short-reads/2022/03/31/americans-skeptical-about-religious-objections-to-covid-19-vaccines-but-oppose-employer-mandates/>>; Mark E Wojcik, ‘Sincerely Held or Suddenly Held Religious Exemptions to Vaccination?’ (5 July 2022) 47 *American Bar Foundation Human Rights Magazine*; Shalailah Medhora, ‘Vaccination Crackdown: Australia Announces End to Religious Exemptions’, *The Guardian* (online, 18 April 2015) <<https://www.theguardian.com/society/2015/apr/19/vaccination-crackdown-australia-announces-end-to-religious-exemptions>>.

⁵¹ Cf Micah Schwartzman, ‘What if Religion is Not Special?’ (2012) 79(4) *University of Chicago Law Review* 1351; Christopher C Lund, ‘Religion is Special Enough’ (2017) 103(3) *Virginia Law Review* 48; Andrew Koppelman, ‘Is it Fair to Give Religion Special Treatment?’ [2006] *University of Illinois Law Review* 571.

⁵² Several early cases in the United States set forth the priest-penitent privilege in law: see, eg, *People v Philips* (NY Ct Gen Sess, 1813) reported in William Sampson, *The Catholic Question in America* (Da Capo Press, 1813); ‘Commonwealth v. Cronin,’ (1856) 4(8) *The American Law Register (1852-1891)* 465. This was not only true in the United States; the priest-penitent privilege also has precedent in Europe, Canada, Australia, and New Zealand: see generally Robert John Araujo, ‘International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the Priest-Penitent Privilege Under International Law’ (2000) 15(3) *American University International Law Review* 639.

⁵³ See *Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 132 S Ct 694 (2012).

⁵⁴ Several other scholars have already recommended this approach. See WC Durham, Jr and Brett G Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (Aspen, 2nd ed, 2019) 83–4; Zhang (n 13) 45–99.

responsibilities that flow from human rights like religious freedom. One way that some have emphasized a narrative of reciprocity and responsibility in constitutional democracies is through human dignity. Human dignity has been explained as both the lodestar and telos of human rights and religious freedom.⁵⁵ This is because human dignity can serve as ‘a basis for finding common ground regarding human rights’ and ‘provides an approach for building bridges between various normative justifications for human rights’.⁵⁶ Perhaps most importantly, human dignity means that ‘rights are characterized by reciprocity and involve corresponding duties’.⁵⁷ Human dignity thus parallels the function of *ren* in ancient China by connecting rights and responsibilities with what it means to be human.⁵⁸

As shown by the example of exemptions for filial piety in China, having a modern narrative of reciprocity grounded in human dignity can help to reorient attention away from human rights and back to human responsibilities. For example, when a government is faced with a request for a religious exemption, it retains the responsibility to provide evidence as to the impact of the law with and without a religious exemption. If it can demonstrate that creating a religious exemption will threaten a fundamental goal of the state, then there is a strong argument that no such exemption is required under the law. Therefore, religious exemptions in this view rely critically on the governmental responsibility to demonstrate the necessity of unexempted compliance rather than a special status or right that certain religious citizens are entitled to.

A probable critique to this view is the fact that the religious objector and the government are typically not the only two parties impacted by the decision to provide a religious exemption. As many scholars have noted, religious exemptions may implicate an added cost on third parties that do not directly benefit from the religious exemption.⁵⁹ So this still seems to treat religious objectors better than third parties. Returning to Confucianism responds to this concern. As already discussed, Confucianism is founded on maintaining fundamental relationships and reciprocity. Consequently, there is not only a governmental responsibility but also a *reciprocal responsibility* from religious actors. When a religious actor requests an exemption from law, the duty falls upon them to use that exemption for the public good. Therefore, although the burdens shift away from a religious

⁵⁵ See Brett G Scharffs, Ján Figel, and Jane H Wise, *Points of Light* (International Center for Law and Religion Studies, 2021) ix.

⁵⁶ Punta Del Este Conference, ‘Punta Del Este Declaration on Human Dignity for Everyone Everywhere: Seventy Years After the Universal Declaration of Human Rights’, *International Center for Law and Religion Studies* (December 2018) §2.

⁵⁷ *Ibid* §4.

⁵⁸ In fact, *ren* is often translated today as ‘humaneness’.

⁵⁹ ‘Accommodations to religious beliefs or observances . . . must not significantly impinge on the interests of third parties’: Douglas NeJaime and Reva Siegel, ‘Religious Accommodation, and Its Limits, in a Pluralist Society’ in William N Eskridge, Jr and Robin Fretwell Wilson (eds), *Religious Freedom, LGBT Rights, and the Prospects for Common Ground* (Cambridge University Press, 2019) 69, 74. See also Frederick Mark Gedicks and Rebecca Van Tassell, ‘Of Burdens and Baselines: Hobby Lobby’s Puzzling Footnote 37’ in Chad Flanders, Zoe Robinson, and Micah Schwartzman (eds), *The Rise of Corporate Religious Liberty* (Oxford University Press, 2015) 327–30; Christopher C Lund, ‘Religious Exemptions, Third-Party Harms, and the Establishment Clause’ (2016) 91(4) *Notre Dame Law Review* 1375. But see Mark S Storslee, ‘Religious Accommodation, the Establishment Clause, and Third-Party Harm’ (2019) 86(2) *University of Chicago Law Review* 871; Carl H Esbeck, ‘When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?’ (2017) 59(3) *Journal of Church & State* 357, 362–9; Stephanie H Barclay, ‘First Amendment “Harms”’ (2020) 95(2) *Indiana Law Journal* 331, 366–81.

objector in one context, their responsibility takes on a comparatively greater stance in other realms. As in any good relationship, there is give and take required of both sides.

To highlight one example of what reciprocity founded on trust and human dignity may look like, COVID-19 has provided a useful case study. While media tended to highlight examples of religious leaders and organizations resisting closure orders, there were also many religious organizations that complied, encouraged physical distancing measures among their followers, and disseminated accurate information about vaccines. In fact, many countries that were seen as models in responding to COVID-19 worked with religious organizations to fight the spread of the virus.⁶⁰ This correlation is not coincidental or even specific to the COVID-19 pandemic.⁶¹ As governments fulfilled their responsibility to bring evidence, religious groups responded with added effort to fight the pandemic. And when exemptions were requested, religious organizations took it as their responsibility to personally place limits on physical contact in the ways that they could (consistent with their worship).⁶² In sum, these reciprocal relationships created trust just as Confucian thought encouraged thousands of years ago.

CONCLUSION

Drawing from ancient evidence in Chinese law, this article has offered parallels to the current debates over religious exemptions in Western constitutional democracies. This has led to the suggestion that the Western liberal models of religious accommodation, founded in a theory of natural law and natural rights, are not the only philosophical bases for religious exemptions. Using Confucian concepts such as *ren* to ground China's approach to religious accommodation, religious exemptions worked within ancient China's pragmatic legal system to hollow out space for fulfilling religious obligations. Importantly, this orients religious exemptions on responsibilities rather than just rights. While still far from perfect, the ideological weight of Confucianism has the potential to place important aspects of religious autonomy outside of state control while still promoting the goals of social order and harmony.

Importantly, China's model may be useful for other Asian nations with authoritarian governments that tend to emphasise community obligations over individual rights — particularly in the emphasis on reciprocity and *ren*. Additionally, future research may also consider ways that religious freedom in the West can benefit from more pragmatic approaches to issues that have proved ideologically intractable, just as China's religious freedom can benefit from ideological grounding in line with pragmatic national values. Where a heavy Western focus on ideology in religious exemptions fails to resolve complicated disputes with other important social values, there

⁶⁰ See Earley (n 49) 378–82.

⁶¹ Indeed, similar evidence from the 1918 Spanish Flu pandemic leads to similar conclusions: *ibid* 378–86.

⁶² See, eg, 'Religious Responses and Engagement on COVID-19 Vaccines,' *Berkeley Center for Religion, Peace and World Affairs* (Consultation Paper, 18 December 2020) <<https://berkeleycenter.georgetown.edu/publications/religious-responses-and-engagement-on-covid-19-vaccines>>; Katherine Marshall, 'What Religion Can Offer in the Response to COVID-19' *World Politics Review* (online, 26 May 2020) <https://www.worldpoliticsreview.com/wp-content/uploads/2020/06/WPR_What_Religion_Can_Offer_in_the_Response_to_COVID_19.pdf>. One specific example described a local Christian community in Alaska that offered its church as a critical care site for COVID-19 patients: Megan Pacer, 'A Look Inside the Hospital's Alternate COVID-19 Care Site' *Homer News* (online, 8 April 2020).

may be instances where the ancient Chinese model of pragmatism is useful. The same may also be true of focusing on responsibilities before rights. The analysis ultimately suggests that models of religious accommodation will continue to mold and shape as national governments navigate the competing concerns between freedom of religion and other important interests.