

Familyism in Ancient Chinese Criminal Law

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Abstract: Ancient China adhered to the principle of "family-state congruence" in governance, with familyism playing a significant role in maintaining feudal rule. As ancient Chinese law, particularly criminal law, developed, it gradually integrated with familyism, becoming a distinctive feature of the Chinese legal system. By studying the reasons and manifestations of the fusion of familyism and criminal law, insights can be gained to support modern legal governance.

Keywords: family, familyism, kin-based offenses, legal Confucianization

1. Introduction

Familyism refers to an ideological concept rooted in agrarian economies, organized around the family unit and aimed at safeguarding the collective interests of the group. China boasts a rich history of legal systems, where family and class have consistently held fundamental significance within the ancient legal framework. Guided by the "family-state congruence" ideology and influenced by Confucian thought, ancient China recognized the legal status of the family. One can assert that the family served as the most rudimentary judicial institution, with disputes and conflicts within the family group initially arbitrated by the clan's elders. Only when reconciliation efforts failed would they be referred to the state's judicial authorities. Given that ancient Chinese law, primarily centered on penal regulations, familyism profoundly impacted ancient Chinese criminal law. Clarifying the relationship between familyism and ancient Chinese criminal law aids in a better understanding of the social systems and value ideologies upheld jointly by ancient law, ethics, and morality, as well as in exploring its positive implications for modern legal reforms.

2. Familyism Overview

2.1. Concept and Scope of Family

In his book "Chinese Law and Chinese Society," Qu Tongzu defines the family as a group of relatives who live together, with the standard for defining a family being multi-generational cohabitation [1]. Ancient Chinese families adhered to a patriarchal system, where the father or patriarch was not only the core of family governance but also the political leader of the family, with all power concentrated at the top. Thus, in ancient China, the family revolved around paternal authority and was a collective group bound by blood, kinship, and marital relationships.

The concept of the family in the "Li Ji" (Book of Rites - Mourning Rites) is defined as, "Relatives up to the third degree of mourning, five degrees of kinship, and nine degrees of affinity." It further states, "After four generations of mourning, one is fully shorn; after five generations, one is stripped of his upper garments, implying the killing of those of the same surname; after six generations, one's kinship is exhausted" [2]. From this, it is evident that ancient China used the mourning system to determine the extent of kinship and as a standard for assessing the closeness of kinship relationships. In later times, the family's scope was generally defined as the Five Mourning and Nine Kindreds. The Five Mourning included "Zhan Cui" (shaving the head), "Qi Cui" (mourning attire), "Da Gong" (grand mourning), "Xiao Gong" (lesser mourning), and "Si Ma" (mourning for cousins); the Nine Kindreds referred to a nine-generation span, going from the paternal line, starting from the great-grandfather to the great-grandson. The mourning system was centered on the paternal line, while maternal relatives and in-laws were referred to as "external relatives."

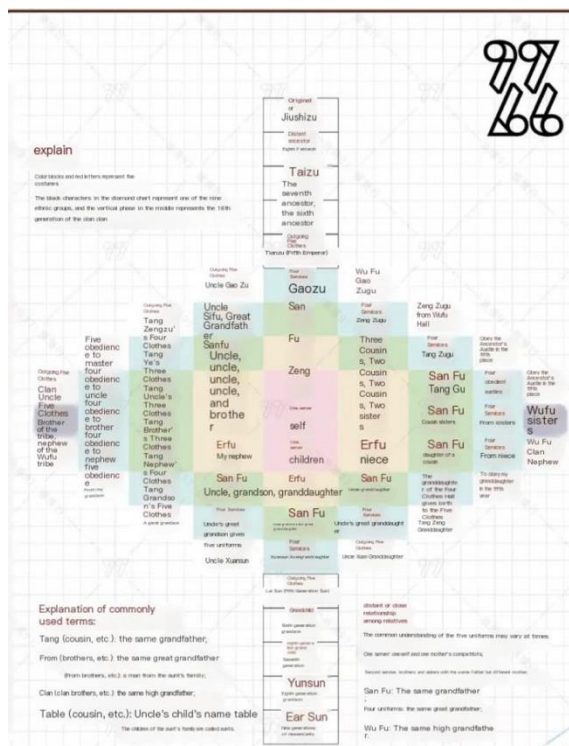


Figure 1: The Mourning System from "Chinese Law and Chinese Society".

2.2. The Emergence and Causes of Familyism

Familyism is an extension of the concept of the family and refers to the socio-ethical culture that gradually developed with a focus on blood relations to safeguard the common interests of the family group. Familyism first emerged during the Western Zhou period, with the core concept being the clan law system. The Western Zhou clan law organization was a combination of "kin of the same surname" who were united, and the dominant clan had absolute control. After the clan law system exited the historical stage, it was replaced by family heads or clan leaders, who held significant authority and served as enforcers and arbitrators within the clan. Familyism rapidly developed during the Wei and Jin dynasties and matured during the Tang dynasty.

Familyism emerged in specific socio-economic, political, and historical-cultural contexts. Ancient China was based on small-scale subsistence agriculture, requiring families to engage in agricultural labor to withstand natural disasters. Politically, the "family-state congruence" ideology was deeply ingrained in ancient China, necessitating a family system to strengthen imperial autocracy. In terms

of cultural and historical heritage, ruling elites, in their pursuit of class interests, promoted Confucian thought. Concepts like "kinship" and "respect for elders," benevolence, and ritual were core to Confucianism, and only by emphasizing family values could these principles be practically applied.

3. Manifestations of Familyism in Ancient Chinese Criminal Law

Familyism was primarily evident in the criminal law system of ancient China. It can be broadly categorized into the preservation of paternal authority, regulations regarding offenses committed among relatives (such as homicide, sexual offenses, theft), issues of concealment, and also had an influence on the execution of penalties.

3.1. Preservation of Paternal Authority

Firstly, in ancient times, direct-line elders had the right to educate and admonish their descendants. They also had the right to reprimand and punish descendants who violated their instructions. According to the "History of the Yuan Dynasty" under the provisions regarding "homicide," grandparents had the authority to reprimand their grandchildren if they violated instructions [3]. In the process of punishment, there were legal safeguards for all situations except when it resulted in death. Even if parents or elders inadvertently caused the death of their descendants during the reprimand, they could receive lighter or no punishment. However, if the descendants did not intentionally violate the instructions and were killed by their parents or elders beyond reasonable reprimand, then the parents or elders should bear criminal responsibility. If parents or elders delivered their disobedient descendants to the authorities for punishment, they would follow the wishes of the parents or elders for disciplinary action. In cases of unfilial behavior in ancient times, the law not only acknowledged the reprimand authority of parents but also gave them the right to deliver the disobedient to local authorities for punishment.

Secondly, parents had control over family property. The "Book of Rites" stated, "When the parents are alive, there is no private property." Heads of families had absolute control over family assets, a fact that was explicitly affirmed in various criminal laws throughout history. Various historical criminal laws clearly stated that juniors who lived with elders could not use family property without authorization, and even the effectiveness of descendants privately selling family property was not recognized.

Thirdly, parents had the authority to decide on the marriage of their children. In ancient times, the principle of marriage was based on parental arrangements and the saying of matchmakers. The will of the parents was a prerequisite for the formation or dissolution of marriages for their children. Paternal elders could arrange marriages for their children, issue commands, and even order the dissolution of marriages. Children had to obey the will of their parents to uphold paternal legitimacy. The law recognized the authority of the elder generation to arrange marriages, and this was supported by legal provisions.

3.2. "Unfilial Offense" Regulations

Ancient Chinese criminal law included provisions for the "unfilial offense" to support the preservation of paternal authority. The "unfilial offense" targeted descendants who committed disrespectful and offensive acts against their parents. In the social context of ancient China, where filial piety and respect for parents were highly emphasized, unfilial acts were considered grave crimes with severe punishments. The "Xiao Jing" (Classic of Filial Piety) once stated, "Among the three thousand offenses, unfilial conduct is the most heinous."

During the Qin and Han periods, unfilial acts were subject to relatively severe punishments. In the Han Dynasty, as Confucianism became dominant due to the "suppression of the hundred schools of

thought," the family-oriented legal ideology was established. Dong Zhongshu introduced the core principles of familyism and initiated the "Three Guiding Principles and Five Constants," which became tools for maintaining relationships between rulers and subjects and between fathers and sons. Thus, if descendants disobeyed the instructions of their parents, it was considered unfilial, and the scope of the "unfilial offense" was expanded. The "Zhangjiashan Bamboo Slips from the Han Tomb" mentioned: "If a son kills his parents, or a servant kills his master's parents or wife, all shall be put to death. If a son violates his parents' orders and the parents accuse the son of unfilial conduct, and if his wife or wife-to-be is the accuser, they shall be imprisoned and shall not be able to redeem themselves or be ransomed." [4] In the Northern Wei period, disrespectful behavior towards parents was punished by shaving. In various dynasties, punishments for the "unfilial offense" were intensified, and after the Qi and Sui dynasties, unfilial behavior was classified as one of the "Ten Heinous Crimes." The Tang Code included the "Ten Heinous Crimes," and "unfilial conduct" was one of them. It included behaviors such as insulting and cursing grandparents, parents, and disobedience to their instructions, living with parents' deaths and remarrying, causing distress, and other acts that went against the principles of filial piety and respect for elders. [5] In the Qing Dynasty, the "Qing Penal Code" abolished the practice of "lingchi" and changed the punishment for killing parents to beheading. For instance, the "Xing'an Huijian" records a case:

Bai Penghe quarreled with his sister-in-law, Bai Geshi, after an unsuccessful attempt to borrow lamp oil. He shouted and argued in the street, and Bai Geshi came out to reason with him. Bai Penghe picked up a clod of earth and threw it at his sister-in-law. His mother, Bai Wangshi, came out to intervene and was accidentally killed. The Ministry of Justice proposed to punish him with "lingchi" for killing his parents, but the Emperor ordered that the case be changed to execution by beheading, as throwing a projectile that caused the death of his mother was unintended [6].

From these cases, it is evident that descendants could be held criminally responsible even if they did not intend to kill their parents.

3.3. The Principle of "Approximate Five Mourning to Determine Guilt"

During the Wei and Jin periods, with the further development of Confucianism, the "Jin Lu" (Laws of the Jin Dynasty) first established the principle of "Approximate Five Mourning to Determine Guilt" [7]. This principle determined the criminal responsibility of cases involving offenses among relatives based on the proximity of mourning periods and was an important principle for judging the guilt of relatives who committed crimes against each other. The "Approximate Five Mourning to Determine Guilt" was specifically applied to cases of relatives within the nine kinships, determining the nature of the offense and its severity based on the mourning relationship. Taking the example of an assault offense, if an elder assaulted a junior, the punishment was light. However, if a junior assaulted a senior, the punishment was more severe based on the proximity of mourning. In cases of theft committed among relatives, the punishment was determined based on the proximity of mourning, with closer mourning relationships resulting in lighter penalties. Offenses among relatives included cases of homicide, sexual offenses, and theft among relatives.

In cases of homicide among relatives, the principle followed the idea that parents had the right to instruct their descendants. Consequently, the younger generation did not bear the responsibility for harming the elder generation, and instead, the law imposed heavier penalties on descendants who committed offenses against their parents.

In cases of sexual offenses among relatives, which includes incest, ancient societies had strict taboos regarding sexual relationships within the family. Therefore, throughout history, punishments for incest were extremely severe. In Han legal codes, incest was considered a bestial act, and by the Tang Dynasty, incest offenses were treated with even more stringent penalties compared to general sexual offenses. The Tang Code stipulated that for common sexual offenses: "No-husband sexual

offenses entail one year of penal servitude, husband-related sexual offenses entail two years, rape adds one level, and causing injury adds one level." In the Yuan Dynasty's "Xingfa Zhi" (Record of Criminal Law), there were similar provisions for common sexual offenses: "No-husband sexual offenses receive seventy-seven lashes, husband-related sexual offenses receive eighty-seven lashes, and reducing one level for attempts. For rape, the husband receives the death penalty, while the unmarried receives one hundred and seven lashes, with a reduction of one level for attempts." In cases of incest, the penalties were more severe. If someone committed incest with a sibling of the same generation or with their sibling's spouse, the Tang Code mandated three years of penal servitude for both men and women. For rape in such cases, the penalty was exile for two thousand li (a Chinese unit of distance), and if injuries were caused, the punishment was strangulation. In the Qing Dynasty, offenses involving incestuous acts within the same clan or with spouses within the same clan were subject to heightened penalties.

In cases of theft among relatives, there were specific principles and economic reasons that set it apart from general theft offenses. The degree of punishment for theft among relatives was inversely related to the proximity of mourning relationships. The closer the mourning relationship, the lighter the charge and punishment. The "Tang Lu Shuyi" stipulated the penalties for theft among relatives: "Theft of clothing from 'si ma,' small and grand mourning, is reduced by one level, 'da gong' by two levels, and those mourning the same as for parents by three levels." The Yuan Dynasty followed the Tang Code's rules, and the Ming and Qing legal codes also included those who were "without mourning relations" in their calculations. In such cases, a reduction by one level meant a two-level reduction for "si ma," three levels for "da gong," four levels for those mourning the same as for parents, and five levels for those in the "grand mourning" category.

The reason for the difference in the punishment for theft among relatives compared to homicide and sexual offenses among relatives lies in the unique legislative and economic aspects. On one hand, the establishment of legal provisions for offenses among relatives aimed to maintain family harmony. Offenses among relatives were determined based on the proximity of mourning relationships. The closer the mourning relationship, the more forgiving the act of theft was perceived, resulting in reduced penalties, which contributed to family harmony. On the other hand, in economic terms, elders in the family had a moral responsibility to provide assistance and support to their juniors in times of need. Thus, if descendants resorted to theft due to poverty or hardship, their penalties under the law could be reduced, and the family often showed leniency. However, there were exceptions; if the theft was not driven by extreme poverty or desperation, there was no opportunity for reduced penalties:

A provincial scholar named Tao Yuchun ran a pawnshop in Suxi County and entrusted his niece's son, Tao Rengguang, with the task of managing jewelry. Rengguang stole the goods and fled. Soon, he was found and captured. The county authorities proposed to treat Rengguang according to the precedent of reducing the punishment by one level for stealing from a mourning relative. However, it was noted that Tao Rengguang was a niece's son of Tao Yuchun, and the kinship was quite distant. Besides, he had been assigned to work in the pawnshop, and it was not a situation comparable to those with no one to care for them. Therefore, the customary law should not be applied in his case [7].

From this, it can be seen that the penalties for theft among relatives were influenced by various factors, including mourning relationships, economic conditions, and the specific circumstances of each case.

3.4. Concealment and Complicity Issue

The concept of "concealment" in ancient Chinese criminal law is quite unique. It refers to a situation where relatives within a certain scope can mutually conceal and aid in crimes, and this practice is legally recognized. From the state's perspective, it desires citizens to abide by the law and actively

report criminal activities. However, this approach contradicts ethical values. Confucianism advocates "father conceals for his son, and son conceals for his father," and it obligates cohabiting relatives to hide the crimes of each other. Throughout history, the respect for Confucianism has led to legal recognition of the legitimacy of concealment. After the Tang Dynasty, the scope of relatives eligible for concealment gradually expanded, no longer limited to those within the mourning relationships but extending to "cohabiting relatives." This means that any cohabiting relatives, regardless of their mourning relationships, could apply this provision. By the Ming and Qing Dynasties, this practice was extended to include in-laws, fathers-in-law, and sons-in-law. The law prohibits relatives from reporting each other for crimes, and it also stipulates that relatives are not required to testify against each other in court. After the Tang Dynasty, the law explicitly stated that relatives should not testify for those they are concealing, and those who violated this were subject to criminal responsibility. If descendants actively reported their relatives, it was considered a breach of filial piety. Consequently, throughout history, the law prohibited descendants from reporting their grandparents and parents' actions.

However, the principle of concealing crimes among relatives only applied to ordinary crimes, not to major charges such as rebellion, treason, or insurgency. This demonstrates that when there was a conflict between the interests of the nation and those of the family, the interests of the nation took precedence.

3.5. Substitutionary Punishment, Suspended Sentences, and Exemptions from Punishment

In ancient China, the hierarchical structure of ethics and family was of the utmost importance. When someone violated the criminal law and required punishment, there were situations where, due to the pleas of their relatives, they could have their sentences reduced. Although there were no explicit legal provisions, the rulers of ancient times, in their pursuit of maintaining moral and ethical norms, would often rule in favor of leniency to reduce sentences in such cases. The story of "Tiyin Jiufu" during the Han Dynasty is the best example. During the Liu Song Dynasty, a commoner named Sun Sa committed a crime punishable by death. His brother, Sun Ji, requested to serve the sentence on his behalf, but Sun Sa refused. Sun Ji's wife permitted him to inform Sun Ji of the following: "You are the head of the family, how can you allow your younger brother to bear the punishment? Moreover, with the whole family on the brink of extinction, if you assign the burden to your younger brother, the family's fortune will not be established. You already have two sons, and if he dies unmarried, the family line will be cut off. Hence, the emperor's decree states that Sun Ji and Sun Sa are both suitable, and their honorable conduct can be examined. They are particularly allowed to substitute for each other. The provincial authorities will exercise their discretion in this matter, and they are both granted twenty bolts of fine silk fabric" [8].

The most common scenario for suspended sentences was the "retention to support aged parents" system. This practice first appeared during the Northern Wei Dynasty. It applied when the offender had committed a crime that did not belong to the category of "the ten heinous crimes" and had elderly direct-line relatives who needed care. If there were no other adult males within the family except the offender, and the family required someone to support the elderly until their death, the family could apply to the emperor for a suspended sentence. After the elderly relatives passed away, the offender would then serve their sentence. It is essential to note that the concept of retaining the offender to support their parents originated from the principle of showing filial piety and supporting one's aged parents. It was not intended to condone the crime. However, there was an exception. If the offender had been disrespectful to their parents on a regular basis at home and their presence in the household did not fulfill the role of supporting their parents, but rather added to the parents' distress, this would contradict the fundamental values of filial piety. In such cases, the offender was not eligible for a suspended sentence.

4. The Integration of Familism with Ancient Chinese Criminal Law

4.1. Supremacy of Imperial Authority: Upholding Class Rule

The ancient Chinese monarchical autocracy followed a centralized governance model where all power was concentrated under imperial authority, radiating down from the emperor. The entire society adhered to ethical and moral principles, further serving the interests of the ruling class. Family units, organized by households, formed the foundation of local governance, supporting the national rule. The state recognized the legal rights of families and granted certain judicial and administrative authority to heads of households. Disputes and conflicts within the family were adjudicated within the family, preserving family stability and harmony. As a result, some cases that would typically be adjudicated by the government were resolved within the family, saving judicial resources and promoting social stability. This further solidified the interests of the ruling class. Thus, the manifestation of familism in ancient criminal law was driven by the need to safeguard the interests of the ruling class.

4.2. Economic Foundation: Small-scale Agricultural Economy

Ancient Chinese economy was based on subsistence agriculture, characterized by planned and organized large-scale agricultural activities. Given the dependence on manual labor for agricultural work and the vulnerability to natural disasters, family units were essential for expanding arable land and ensuring self-sufficiency. Ancient China was primarily an agrarian society, with a significant portion of state revenue derived from agriculture. The state protected family units to increase agricultural production, thereby enhancing tax revenues.

4.3. Cultural Influence: The Confucianization of Legal Principles

Confucianism, with its emphasis on ethics and moral principles, underpinned the concept of differentiation based on kinship, rank, and status. Starting from Emperor Wu of Han's policy of "banishing the hundred schools and promoting Confucianism," Confucianism became the dominant ideology underpinning the rule of successive ruling classes. Confucianism became intertwined with legal principles. The Confucian school of thought advocated for harmonious families and societies, emphasizing the importance of filial piety. These ideas became integrated into the legal framework, with the state incorporating notions that protected family interests and contributed to societal stability. The Confucianization of legal principles began during the Han Dynasty and gained prominence in subsequent dynasties. This gradual fusion had a profound and lasting impact. Consequently, ancient criminal law, in its focus on kin-based crimes, penalties, and sentencing, absorbed the ideals of familism, shaping a distinct feature of the Chinese legal system.

5. Conclusion

Familism persisted in ancient Chinese criminal law for an extended period, with specific historical reasons for its existence. It was not only a necessity for the ruling class of the time but also held broader significance in terms of maintaining social stability and extending the ideals of Confucianism that emphasized filial piety. Moreover, the integration of familism with criminal law has provided valuable ideological inspiration for modern legal system development. We can draw lessons from the fusion of familism and criminal law to better serve the reforms in modern legal construction. While certain provisions within familism that allow for the concealment or harboring of crimes committed by relatives contradict modern legal principles and should be abandoned, the integration of familism and criminal law, to some extent, can promote social harmony and stability, reducing the occurrence

of certain crimes. Therefore, in dealing with familism, we should persist in reform, retaining its essence while discarding its shortcomings, guiding it to align with the core values of modern legal principles, and providing nourishment for modern legal system development.

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