

THE FAMILY LAW OF THE CHINESE

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The Family Law of the Chinese by P. G. von Möllendorff

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PREFACE.

IN 1878 I read an essay on the Family Law of the Chinese before the North-China Branch of the Royal Asiatic Society at Shanghai, which appeared in the Society's Journal [N.S. vol. XIII (1879) p. 99-121]. I had been largely indebted to Mr. E. H. PARKER, H.B.M.'s Consul, for valuable notes relating to my subject, and in a lengthy review of my essay in the *China Review* [vol. VIII (1879) p. 67-107] that gentleman again added a number of suggestions and observations. These together with new investigations of my own have made it desirable to republish the old essay, with the necessary alterations and additions.

Of the legal literature of China I have principally consulted the Statute Law and the Ordinances of the present dynasty 大清律例 (*Ta-ch'ing-la-li*), of which the laws relating to the present subject have been translated by Mr. G. JAMIESON in the *China Review* [vol. X (1881) p. 77-99].

In the arrangement of the subject before me I have taken as a basis the Roman law, which, owing to its logical structure and general completeness, has become a typical system, and

has formed the foundation of the jurisprudence of all European nations. I have chiefly consulted the works of PUCHTA, MACKELDEY, DERNBURG [*Privatrecht*, 2nd ed., vol. III, 1881] and others, for the Canon law WALTER's *Kirchenrecht*.

For the Jewish law the interesting work [in German] of S. MAYER on the *Laws of the Jews, Athenians and Romans*, furnished comparisons, ideas and suggestions. Since the first edition of my essay, the *Realencyclopädie für Bibel und Talmud* [by Dr. HAMBURGER, 2 vols. and 3 Supplements (1870-1892)] has become a standard work, to which I am much indebted.

Some sentences have been quoted from MAINE's *Ancient Law*, 6th ed. 1876, and from J. F. MCLENNAN's *Studies in Ancient History*, 1876, specially chapter II, p. 13 ss. I have also made use of C. N. STARCKE, *The Primitive Family in its Origin and Development*, London, 1889.

The frequent comparisons with Jewish and Roman Law have been made with the object of proving that the Chinese laws and customs are pervaded by the same spirit of common humanity as those of other ancient peoples.

I have constantly consulted the valuable *Chinese-English Dictionary* by H. A. GILES, Shanghai, 1892, and the excellent *Nederlandsch-chineesch Woordenboek* by G. SCHLEGEL, 4 vols. 1886-90. The latter is a mine of information and far too little known. The trouble of having to use it with the help of an English-Dutch pocket-dictionary is too slight to stand in the way of its general use.

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INTRODUCTION.

As in the ancient Jewish state, the family is the unit of the Chinese; on its model the state is governed, and from the social conditions of the families the family law received its foundations. In this sense the state is called the family of the nation (國家 *kuo chia*) and prefects and magistrates are popularly styled 父母官 (*fu mu kuan*), parent officials.

The Chinese family life, with its sexual purity coupled with filial piety, has greatly contributed towards the maintenance of the Chinese nation. Everything revolves round the family as the centre, and the family circle with its natural conservatism has had a beneficial influence towards the outside world. The Chinese family life compares favourably with the somewhat too loose bonds of the occidental,—in fact, in family life China presents herself at her best.

In the Chinese mind law¹ (律例 *lü li*) and general custom (規矩 *kuai chü*) are mixed up and cannot be kept separated. A Chinese judge will always modify the rigour of the law if local usage differs from it; and a Chinese will invariably be in favour of 情理 *ch'ing li* (the application of special circumstances) in each case. In this sense the term "family law" is to be understood not merely as a statement of the Chinese family laws (*leges*) but including also general usages, which will have to enter largely into a future codification of the Chinese law, especially private law.

Tradition tells us very little of the family life of the Chinese in antiquity. Its foundations can be clearly recognised in the classical writings; in the *Shiking*, or Book of Odes, we even find traces of marriage by capture.

¹ Generally speaking the *lü* have been superseded by the *li*, but in the marriage laws the *lü* are still mostly in force.

The Chinese family (家 *chia*) embraces, like the Attic *oikos* and the Jewish *mishpachah*, all members of the same household which stand under one head or *pater familias* (家長 *chia chang*, 家主 *chia chu*, 家君 *chia chün*), without distinction, whether they have entered the family through marriage or adoption, and including servants and slaves.² It is obligatory that all members of the family bear the same family name (姓 *hsing*) as in India, Greece, and Rome.³ Even with adoption a kind of *quasi* relationship is formed.

In the oldest time of Chinese history the number of families may have been the same as the number of clans; the ancient term 百姓 *po hsing* (the Hundred Family names, the people) occurs in the *Shuking* [I, 2 and frequently].⁴ The idea that there exists a kind of relationship between families bearing the same name has lived up to the present time [see below—"Impediments to Marriage"].

Within the family the Chinese distinguish four grades of relationship, which follow according to the proximity of descent, without distinguishing thereby between consanguinity (內親 *nei ch'in*) and affinity (外姻 *wai yin*). Genealogical tables are given in the 大清律例 (*ta ch'ing lä li*), vol. I, fol. 1-6. Compare W. H. MEDHURST, *Journ. Ch. B.R.A.S.*, 1853, "Marriage, Affinity, and Inheritance in China" [see also Dr. LEGGE's *Liki*, vol. I, p. 202-209]. C. N. STARCKE [*The Primitive Family*, p. 201-3, 206, 238] discusses the different terms of Chinese relationship, but his authorities

² The Prussian *Landrecht* [I, 1, § 3] also includes the servants in the family.

³ McLENNAN, *l.c.*, p. 217.

⁴ See VON DER GABELENTZ, *Chinese Grammar*, p. 360.—S. WELLS WILLIAMS [in his *Syllabic Dictionary*, p. 1242] dates back the beginning of family names to over 3,000 years, without, however, quoting any authority in support of this statement. See also H. A. GILES, "The Family Names," *Journal Ch. B.R.A.S.*, vol. XXI (1887) p. 236. G. JAMIESON, "Note on the Origin of the Family Names," *Ch. Rev.*, vol. X. (1861), p. 88-98.

were not free from error. The Relationships are presented by G. SCHLEGEL in his *Woordenboek* [vol. I, p. 1343] in a tabular form, in which, however, the relationships by adoption are omitted, the others are given in the Tsiang-tsiu (Amoy) dialect of the lower classes. A. J. MAY has compiled a list of all relationships in the *China Review* [vol. XXI (1894), p. 15-39], which also is not quite complete and expressed in Cantonese. G. JAMIESON [*China Review*, vol. X (1881), p. 199-200] gives also a table of the 宗 kindred on the male side only.

The above-mentioned four grades of relationship, with the legal time for mourning, given hereafter, are taken from the useful little letter-writer *宦鄉要則* (*huan hsiang yao tsê*, Important Rules for the Officials and the People), by LU JUN-HSIANG (陸潤庠), Shanghai, 1892, 2 vols. 16°.

1st grade.—Term of mourning three years (usually reduced to 27 months). Called 斬衰 *chan ts'ui* (mourning garments with frayed edges). *For man and wife*: the husband's parents. *For wife and concubine*: the husband.

Term of mourning one year. Called 期年 *chi nien*. *For man*: sons, wife of eldest son, grandsons (descended from wife), uncle and his wife, daughters if unmarried, brothers, sister if unmarried, nephew (brother's son), niece (brother's daughter) if unmarried. *For wife*: her parents and grandparents. *For concubine*: wife of husband, husband's parents, sons (her own and those of the wife and of other concubines). This term of one year is also kept by a man of double *sacra* (一子雙就 *i tsü shuang t'iao*) on the death of his own parents.

Term of mourning five months. Called 齊衰 *tsü ts'ui* (mourning garments with unhemmed, but even cut edges), with the addition 杖期 *chang ch'i*, i.e. in the lifetime of the parents. *For man*: the great-grandparents, the great-great-