

„TO ENTER A COURT IS TO ENTER A TIGER’S MOUTH”¹ THE ROLE OF LAW IN CHINA

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Introduction

Until quite recently there was no legal system in China. China has the oldest long-lasting legal history, the earliest law appeared more than 4000 years ago during the Xia Dynasty² but we have only a few pieces of archeological evidence about it. The Chinese legal tradition is distinct from the Western legal culture. Some say that a legal system does not exist in China – even those scholars who oppose this opinion still agree that the law has never had a central role in the Chinese economy and society for centuries. It is a bit hard to understand what the Chinese called law because the way of thinking about the legal sphere is different from Western traditions.³ „Traditional China held neither law nor lawyers in high esteem. Confucius maintained that a humane and harmonious society required a morally cultivated population, and that laws and lawyers would lead to a litigious society in which individuals pursued their own interests at the expense of others.”⁴

The modern Chinese lawmaking has begun in the XX. century. After the Mao-era, when Deng Xiaoping has become the leader of China, the legislative process accelerated. The new policy was called „Four Modernizations”, meaning

¹ Chinese proverb.

² According to ROGER T. AMES „*The Tso Chuan alludes to a code of penal law.*”, ROGER T. AMES: *The Art of Rulership: A Study of Ancient Chinese Political Thought*, New York 1994, State University of New York Press, p. 108.

According to Prof. HULSEWÉ „a penal code may have been available” around 1000 B.C. A.F.P. HULSEWÉ: *Ch'in and Han law*, p. 520. In *The Cambridge History of China* edited by DENIS TWITCHETT and JOHN K. FAIRBANK, *The Ch'in and Han Empires*, 221 B.C.-A.D. 220, Cambridge 2008, Cambridge University Press, (hereinafter „Hulsewé”)

³ See details: WILLIAM P. ALFORD: *Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law*, In: *Modern China*, Vol. 23, No. 4 (Oct., 1997), pp. 398-419.

⁴ RANDALL P. PEERENBOOM: *China's long March toward Rule of Law*, Cambridge 2002, Cambridge University Press, p. 345.

the modernization of industry, agriculture, science and technology.⁵ China has started to adopt the Western solutions of legal institutions. A significant legislative effort has embraced major areas of the grounds of the legal system: civil law, civil procedural law, criminal law, criminal procedural law...etc. The leaders of the country have realized that without modern legal institutions and legal norms, it will be a hard task to frame the modern Chinese state, economy and society. The mainspring of legal changes is the economic growth, therefore the birth of the new legal codes and institutions are economic necessities.⁶

The economic legislation has a direct and an indirect effect on other areas regulated by law, from the point of view of the legal culture it is a very interesting problem because the Western ideas of the legal system meet the Chinese traditional thinking and attitudes. One of the main characteristics of Chinese legal culture is the absence of individual rights. The traditional Chinese legal system was based on the people's duties and obligations. Besides, the Western legal concepts were suspect in the eyes of the leaders of the Communist Party and some high-ranking officials, the new legal regulating plans meant everything what they have learned and heard concerning the „bourgeois liberalism.” As professor Pound has pointed out: „Two ideas, sometimes held dogmatically in extreme form, have been in conflict as to the making or remaking of law in China. On the one hand, there is an idea of imitating or borrowing the latest legal ideas and doctrines and institutions of Western countries and, on the other hand, an idea of developing and adapting ancient and traditional Chinese institutions and teachings.”⁷

The „law” was considered identical with criminal law, people were aware of harsh sanctions if they have not obeyed the law. The legal norms did not have an important role in everyday life, the codified law was equivalent to penal law. On the basis of Confucian tradition the law had a marginal role within the people's relationships. The Chinese have tried to avoid the litigations and courts as the Chinese proverb says: “Win your lawsuit but lose your money”. Legal norms have not been provisions for individual interests, private law was an unknown area of legal culture. The lack of private law⁸ reinforced the tendency

⁵ This plan was accepted in december 1978 by the Third Plenary Session of the Communist Party of China.

⁶ The chinese market reforms generate other questions in the political field: how can these changes affect the one party system, the state's leading role, the democratization, the civil society...etc. see details: PITMAN B. POTTER: *Economic and legal reform in China: Whither civil society and democratization?* In: *Market Economics and Political Change: Comparing China and Mexico* EDITED BY JUAN DAVID LINDAU, TIMOTHY CHEEK, Rowman & Littlefield, 1998

⁷ ROSCOE POUND: *Comparative law and history as basis for chinese law*, In: *Harvard Law Review*, Vol. 61, No. 5 (May, 1948), pp. 749-762.

⁸ The disputes of personal and property matters were solved by mediation, conducted by respected leaders or elders on the basis of customary law and moral rules.

to resolve economical and social conflicts in other ways, that’s why people seek justice outside the formal procedures. This kind of legal and cultural tradition can be found even nowadays in Chinese society.

The role of law traditionally was an utilitarian tool of the Chinese state to achieve its goals, thus law was foremost a political tool „operated in a vertical direction with its primary concern for state interests, rather than on a horizontal plane between individuals. As such, it was not very interested in social regulations among autonomous individuals and, least of all in defending individual rights against the state.”⁹ Although China had a kind of legal system which is not comparable to the formalized structure of Western law, highly qualified lawyers were still missed until the end of the nineties¹⁰. The insufficiency of qualified lawyers is deeply rooted in the Chinese legal culture. The sphere of law was not an isolated part of society’s field as it was in the Western legal cultures, the Chinese lawyer was a state official who has investigated, charged somebody with crime and passed the judgement. The judiciary was a part of the administration.

In the last 30-40 years the Western jurisprudence has discovered the subject Chinese law, a lot of essays and books were published especially in the United States and Great Britain. In spite of the essays and books there are still blank areas especially in traditional Chinese law. Our historical sources of Chinese law are fragmented, what we know from the ancient law of China has been gathered from historical and literary works and from other documents discovered by archeologists. The first code of law that we know entirely is the Tang Code from 737. In spite of „the absence of Chinese law” introduced shortly above the Chinese legislation and application of law had a tremendous effect on other far eastern countries’ legal culture.¹¹ How can we describe this kind of law?

Meanings of law

Whatever law China has known is a form that falls short of "real" law. Chinese law has had a penal character and codified law was associated with criminal sanctions. In the Greco-Roman legal tradition civil law stands at the heart of jurisprudence. In China’s legal system there were no such civil legal norms

⁹ JIANFU CHEN: *Chinese Law: Towards an Understanding of Chinese Law, Its Nature, and Development*, Martinus Nijhoff Publishers, 1999, p. 15.

¹⁰ The Peiyang University, founded in 1895 in Tianjin is the first institution of higher learning in the history of China’s modern education when the legal education was started. In 1980 only 2000 lawyers worked in China. See details: CAI DINGJIAN: *Development of The Chinese Legal System Since 1979 and its Current Crisis and Transformation*, Culture and Dynamics, 1999. Vol. 11.

¹¹ Especially the Tang Code (737) which became a legislation model not only in China in later times but also in Korea, Japan and Vietnam.

which would have been adjusted to the human conflicts in society. We can find some rules in imperial law codes which have civil law character but these rules have primarily penal nature.¹² In imperial China, from the third century B.C. until the revolution of 1911 the role of law has not changed in any detail. There was a state law that dealt with the structure and functioning of the government; and there were legal norms that regulated the individuals' behavior. Its principal purpose was intimidation and assertion of the power of the state against attack and against disturbance of the social order. The moral code enforced by society was far much important than the penal code enforced by the imperial government and administration. Society relations were not codified so formally by law as in the West but were regulated by unofficial, well established traditions. As Confucius' teaching said: "The Master said, if you try to lead the common people with governmental regulations and keep them in line with punishments, the laws will simply be evaded and the people will have no sense of shame. If, however, you guide them with Virtue, and keep them in line by means of ritual, the people will have a sense of shame and will moreover reform themselves."¹³

This statement of Confucius has determined what the Chinese think about law from the ancient times until today. The central component of the referred moral code is the „li” which means „virtue”, „etiquette”, „code of behavior” or „rites”. „Li” covers the whole scope of proper human behaviour in the family, in human societies as well as in all economic or official dealings. „Li” contains those absolute standards which dictate human behavior, which were generally accepted and enforced by society. Between the moral code and the Chinese legal norms there was a simple connection: law was traditionally regarded as an instrument for enforcing Confucian morals.

The ancient Chinese sources use different terms for defining „law”: „fa”, „dian”, „zhi”, „du”.¹⁴ The oldest chinese term was „ling” („order” or „to order”) which can be found in oracle inscriptions from the Shang-period (1751 – 1112 B.C.).¹⁵ According to the Guanzi¹⁶ „legal statues („xian”), laws („lü”), regulations („zhi”), and measures („du”) must be patterned („fa) on the moral way.¹⁷ The chinese have traditionally called two types of norm „law”: „xing”

¹² For instance: the Tang Code prohibited marriages between men and women who shared the same surname, this crime punishable by two years of penal servitude.

¹³ *The Analects (Lunyu) in Readings of classical chinese philosophy* edited by PHILIP J. IVANHOE AND BRYAN W. VAN NORDEN, New York 2001, Seven Bridges Press, p.26. (hereinafter „Analects”)

¹⁴ GEOFFREY MACCORMACK: *Mythology and the origin of law in early Chinese thought*, In: *The Journal of Asian Legal History*, 2001 Vol. 1., p. 3.

¹⁵ Later the „ling” term became a form of legislation. See details: SHARRON GU: *The Boundary of Meaning and Formation of Law: Legal Concepts and Reasoning in the English, Arabic, and Chinese Traditions*, McGill-Queen's University Press, 2006, p. 77. (hereinafter „SHARRON GU”)

¹⁶ Compilation of chinese political and philosophical writings from the 4th-3th century.

¹⁷ SHARRON GU, Op. Cit., p. 10.

and „fa”. Originally „xing” meant punishment, in the ancient text we can discover the knife sign relating to mutilating sanctions. Fa means „model”, „standard” or „law” but mostly the meaning of „fa” is „system of law.”¹⁹ In the traditional Confucian thinking there was no significance of „fa”: in the Lunyu we can find it only twice. Later, when the penal sanctions were increasingly applied, the meaning of „fa” has changed: according to the first Chinese dictionary „fa xing ye”, i.e. „the law is punishment”. In the ancient texts the „xingfa” term is found which means „penal laws” or „criminal sanctions and laws”. The meanings of „xing” and „fa” were synonymous, it is a hard task to make a distinction between these two terms.²⁰ In the Confucian Analects „fa” is used only twice, „xing” is used four times. In later times there was a distinction between „ze”, „fa” and „li” as natural, political and human law.²¹ In the era of the Han Dynasty there were four types of law: lü (codified laws), ling (the emperor's order), ke (statutes inherited from previous dynasties), and bi (precedents).²² After the Han period the terminology of legal norms started to become unambiguous. The code was a criminal code consisting of lü (statutes), other rules called ling (ordinances), ko (rulings), shih (models) and chih (decrees).²³

The understanding of Chinese law is still a demanding task. Some are of the opinion that: "To all intents and purposes foreigners are completely in the dark as to what and how law exists in China. Some persons whose reputation for scholarship stands high would deny the right of the Chinese to any law whatsoever — incredible, but to my knowledge, a fact. Nor would it be easy to enlighten them — with their limited knowledge of the language.”²⁴

Traditional theories of law

How can we achieve a moral and political order? How can we establish a peaceful society? These were the central questions of the „hundred schools” in the Warring States period (480 B.C. – 221 B.C.).²⁵ From this „many-colored

¹⁸ From the origin of law in ancient China see: JAMES D. SELLMANN: On the Origin of Shang and Zhou Law Asian Philosophy, Vol. 16, No. 1, March 2006, pp. 49–64.

¹⁹ GERGELY SALÁT points out that on the basis of analyzing shuihudi texts the „fa” means „system of law”. In the text there are more word-groups with regard to „fa” : „falüling”, „fadu”, „falü”, „mingfa”, „fanfa”. Az ókori Qin állam büntetőjogának rendszere, manuscript, p. 94.

²⁰ Ib.id., p. 54.

²¹ SHARRON GU, Op.cit., p. 78.

²² XIN REN: *Tradition of law, and the law of tradition: law , state and social control in China*, London 1997, Greenwood Press, p. 21. (hereinafter „XIN REN”)

²³ Op. Cit. Hulsewé, p. 526.

²⁴ ERNEST ALABASTER: *Notes and commentaries on chinese criminal law and cognate topics with special relation to ruling cases*, London 1899, Luzac and Co., p. 1.

²⁵ Only half a dozen of these schools’ thought has survived this era. The Spring and Autumn period (722 B.C. – 481 B.C.) and the Warring States period were times when the old order was breaking up and the new one was not yet established. The ancient thinkers have tried to explain the reasons of moral chaos and to give a solution how to save the world from the collapse.

chaos” two ideologies have arisen: the Confucians and the Legalists.²⁶ According to Confucius²⁷ „the state and society of the Zhou-period was an ideal one, it was an ideal society in which the population was flourishing: living standards were high, with people living and working in peace and contentment; the king, princes and dukes carried out their functions perfectly in accordance with their ranks; ceremonies and music were flourishing; robbers and thieves disappeared, and the social order was stable and harmonious; people had high moral standards, setting strict demands on themselves and loving one another.”²⁸

Basically in the Confucian way of thinking the society’s structure is hierarchical in which each person has the own position and status. Everyone must act as strictly as his/her social status demands.²⁹ The society is based on the family. If family members behave in the spirit and norms of „li” there will be harmony, if the families’ life is harmonious there would be peace in the society. In the society there are five major relationships: father and son, ruler and subject, husband and wife, elder and younger brother, friend and friend. Each person’s behavior must be conducted by virtues. Family is a fundamental base of Confucian teachings. The family is not only the basic element of society but at the same time its expanded version is equal to a state. „To govern a state is similar to regulating a family which is achieved through the cultivation of individual morality as the Confucian social formula has suggested: cultivating the personality – regulating family life – ordering a state – ensuring world peace.”³⁰

In the Confucians’ teachings „li” represented positive measures for preventing crime and maintaining social order, „the function of „li” in teaching human beings to perform their separate roles well in a society the harmony of which is maintained by the fact that everyone plays his part as he should within the larger whole. The order that li ought to bind together is not simply a ceremonial order – it is a sociopolitical order in the full sense of the term, involving hierarchies, authority, and power.”³¹ Li is the crucial factor for proper governing: „The Master said, if a person is able to govern the state by means of ritual propriety and deference, what difficulties will he encounter? If, on the other hand,

²⁶ There were other schools which have left their mark on Chinese thinking but they have not influenced the legal thinking. Besides the questions referred to above Confucians and Legalists dealt with the problem of the role of law. Which is a better tool for conducting the society the „Li” or „Fa”?

²⁷ Confucius (551 – 479 B.C.). Confucius’ original teachings have been substantially expounded upon by two later philosophers, Mencius (c.372 – 289 B.C.) and Xunzi (c. 300 – 235 B.C.)

²⁸ HUANG NANSEN: *Confucius and Confucianism*, In: *Companion Encyclopedia of Asian Philosophy*, edited by BRIAN CARR and INDIRA MAHALINGAM, London 1997, Routledge, p. 483.

²⁹ As Confucius said in *Analects* 12.11.: “Let the ruler be a true ruler, the ministers true ministers, fathers true fathers, and the sons true sons.”

³⁰ XIN REN, *Op. Cit.*, p. 8.

³¹ BENJAMIN ISADORE SCHWARTZ: *The World of Thought in Ancient China*, Harvard University Press 1985, p.68. (hereinafter „SCHWARTZ”)

a person is not able to govern the state through ritual propriety and deference, of what use are the rites to him?”³² Originally the governing or government („cheng”) has meant „right” or „correct”, later even in the Analects the meaning of „cheng” is something like „penal laws”. Thus governing is associated with force, criminal sanctions and in the broader sense „the control of the instruments of punitive force”.³³

The Confucians believed that human nature can be improved by moral teachings or education. Only „li” can teach the people humanity, kindness, benevolence and compassion, the law can not do this. „Law tells people what they cannot do, without teaching them why they should not do it. Therefore, law can hold people away from trouble for a moment but can never reform them. The great harmony can be achieved only through moral persuasion and implementing Li.”³⁴ Thus the law may influence the external behavior of individuals but it can not change the attitudes of the members of society. By means of practicing „li” nevertheless the harmonious order of society can be achieved.

Law is not a proper tool to practice the virtue in the teachings of Confucius, moreover law is just a temporary solution for removing those members of the society whose behavior seriously threatens the harmonious social order. „Making the laws public focuses attention, not on the achievement of the highest quality of social harmony possible, but on the lowest level of participation required by society.”³⁵ Thus legal rules were regarded as a necessity, applied by the state to maintain social order. „When society was functioning peacefully and harmoniously, law was something to be avoided, because resort to law was seen as essentially an admission of the loss virtue and failure in human and communal relations. More laws did not make for a better or more peaceful and harmonious society.”³⁶

The Warring States period’s other significant school is the Legalist school („Fajia”). They have sought an alternative solution to the power vacuum of the declining Zhou-dynasty. In the „Art of Ruling” chapter of Huainanzi³⁷ there is a definition where law comes from: „Law comes from rightness (yi), rightness from the various kinds of right measure, and right measure is consistent with the human heart of mind. This is the crucial factor in proper order (zhi).”³⁸ The Legalist thinkers contrary to confucians believed in the power of the state to make legal rules. They have assumed that the punishments are a

³² Analects, 4.13.

³³ SCHWARTZ, Op. Cit., p. 103.

³⁴ XIN REN, Op. Cit. p. 21.

³⁵ PEREENBOOM, Op. Cit., p.29.

³⁶ LI ZHAOJIE: *Traditional chinese world order*, In: Chinese Journal of International Law 2002 (Vol.), p. 41.

³⁷ Huinanzi is a philosophical compilation containing legalist, confucian and daoist writing from the 2nd century B.C.

³⁸ MACCORMACK, Op. Cit., p. 4.

crucial factor to control society. While the Confucians have believed that man is born good, legalists believed in man's malignity. Anyone can commit a crime, only harsh penalties could enforce the proper behavior. According to Shang Yang³⁹ „nothing is more basic for putting an end to crimes than the imposition of heavy penalties.”⁴⁰ The uniform application of law is the key element to strengthen the power of law. During the Warring States Period (B.C. 481 – 221) Shang Yang, the minister of Qin state was the first who has translated the legalist theory into the practice extraordinarily efficiently. The Shang Yang's reforms⁴¹ have increased the state's power in competition with six other states contending for hegemony in China. Shang Yang believed that the key point for the rising of the state's power is the law the ruler has to equally apply to all men and must punish even the small offenses. The government can not pass legal norms on grounds of the ruler's or any other person's own interest: “When the ruler and officials are lax in executing the laws and allow private interests to take over, there will be chaos. Therefore, establish laws and clarify duties, and do not allow private views to infringe the laws. Then you will have good government.”⁴²

If we would like to summarize the essence of legalism we may mention rewards and punishments by which to keep all people in order. In the legalists' way of thinking the law is an instrument for obtaining and maintaining social order and political control. The uniform law is the only tool for governing the state effectively, and it must be applied to all individuals equally. All members of the society are subject to law (the ruler, the minister, the superior, the inferior, the noble and the humble.) The key element of law is punishment, as Han Fei⁴³ once said:” it is by means of strict penalties and heavy punishments that the affairs of state are managed.”⁴⁴ Han Fei summarizes the functions of law as follows: „In governing a state, the regulating of clear laws (fa) and establishing of severe punishments (hsing) are done in order to save the masses of the living from disorder, to get rid of calamities in the world, to insure that the strong do not override the weak and the many do not oppress the few, that the aged may complete their years and the young and orphaned may attain maturity, that the border regions not be invaded, that ruler and minister have mutual regard for

³⁹ Shang Yang was the major Legalist thinker and statesman. As a chancellor of Lord Xiao of Qin (r. 361–338B.C.), he initiated a series of profound reforms that turned tate of Qin into the strongest power and unifier of the Chinese world.

⁴⁰ XIN REN, Op. Cit., p. 21.

⁴¹ Shang Yang's reforms involved a land -, an administrative-, a political-, and a legal reform.

⁴² ROGER V. DES FORGES, QIANG FANG: *Were Chinese Rulers above the Law? Toward a Theory of the Rule of Law in China from Early Times to 1949*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896910, p. 6.

⁴³ Han Fei (ca. 280 – 233 B.C.) was philosopher and Legalist thinker. His book, the „Hanfeizi”, one of the most cited Legalist writing.

⁴⁴ JIANFU CHEN, Op. Cit., p.11.

each other and father and son mutually support one another, and that there be none of the calamities of death, destruction, bonds and captivity. Such indeed is the height of achievement.”⁴⁵

On the basis of the legalists’ „program” Qin has managed to defeat each state and established the first universal Chinese empire in 221 B.C.⁴⁶ Among others the published law as the key element of the legalists’ ideas has led to Qin’s success. The other crucial factor was the centralization of power. One important element of the legal reform was the initiation of group responsibility. According to this, the society was divided into five or ten families and if any member of these groups has committed a crime not only these men had to be punished but also each member of the group.⁴⁷ In the consolidation of the first emperor’s power, the most important role had the Prime Minister Li Si.⁴⁸

Summarizing the Confucian and legalist theories concerning the role of law we can say: „A central issue in the Confucianist-Legalist debate was therefore whether society should be governed (i) by unwritten rules of proper behavior (*li*) transmitted by one generation to the next and enforced by peer pressure or, instead, (ii) by written, published laws (*fa*) specifying punishments for its breach. Confucianists took the former position; Legalists took the latter.”⁴⁹

Although the Chinese society has been basically built on the basis of Confucian values, from a legal point of view the Legalist theories can be considered as important as the Confucian especially in view of the political institutions and practices. The Chinese imperial political tradition is „outside Confucian, inside legalist.”⁵⁰ The imperial era has ended in 1911 but the Legalists’ influence on politics has not come to an end. In 1973 Mao Zedong has launched a nationwide campaign to popularize the teachings of the Legalists and criticize the

⁴⁵ DERK BODDE: *Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China*, In: Proceedings of the American Philosophical Society, Vol. 107, No. 5, p. 386.

⁴⁶ Ying Zheng, the king of the Qin state, assumed the title of Qin Shi Huangdi, and became the First Emperor of China.

⁴⁷ Probably, the group responsibility was not Shang Yang’s idea, this was a living practice in other states, see details Op. Cit., SALÁT p. 146.

⁴⁸ Li Si has tried to abolish the feudal aristocracy and he has expanded the bureaucracy’s power and applied the legalist ideas about punishments. He has also wanted to abolish the confucian tradition, that’s why he has ordered to burn all the written confucian books and literature. The past must be abolished, if anyone has tried to refer to a past and criticize the present must be put to death with all members of his family.

⁴⁹ JOHN W. HEAD: *Codes, Cultures, Chaos, and champions: common features of legal codification experiences in China, Europe, and North-America*, In: Duke Journal of Comparative Law, 2003 Vol. 1, p.11. (hereinafter: „HEAD”)

⁵⁰ ZHENGYUAN FU: *China’s Legalists: The Earliest Totalitarians and Their Art of Ruling*, New York 1996, M.E. Sharpe, p. 7. (hereinafter „FU”)

Confucian way of thinking. This movement has led to the Cultural Revolution.⁵¹ From the time of the Han-dynasty Confucianism has become a state ideology („imperial confucianism”) and affects the legal thinking significantly.

Law codes of ancient China

From the time before the unification of China we have a number of historical, philosophical and literary documents from which we can gather informations concerning legal norms and the application of laws. The dating and interpretation of these texts are still subject of debates among scholars. It seems impossible to draw up a coherent picture of this period's legal environment.

The most ancient historical source on law which is generally regarded as authentic is the Kang Gao from the „Book of Documents” („Shijing”). In this document King Wu has given instructions to the younger prince Feng.⁵² In the other chapter of „Shijing” („Punishments of Lü” – „Lü xing”) there are provisions on how to apply law. The earliest code we know is called „Xing-shu”, the „Book of Punishments” which was engraved on bronze tripod vessels.⁵³ The code got lost but we can surmise its sociopolitical and legal significance from a letter which was sent to the Zheng state's ruler in 536 B.C.: „At first, I considered you [as my model], but now I have ceased to do so. The ancient kings deliberated on [all the circumstances], and determined [on the punishment of crimes]; they did not make [general] laws of punishment, fearing lest it should give rise to a contentious spirit among the people. But still, as crime could not be prevented, they set up for them the barriers of righteousness, sought to bring them all to a conformity with their own rectitude, set before them the practice of propriety, and maintenance of good faith, and cherished them with benevolence”.⁵⁴

In this letter there is an often-quoted part which describes the dangers of written laws: “When the people know what the exact laws are, they do not stand in awe of their superiors. They also come to have a contentious spirit, and make their appeal to the express words, hoping peradventure to be successful in their argument. They can no longer be managed.”⁵⁵ Probably the Qin state had its own „Criminal Code Vessel”. Again, this code got lost but there is a comment from Confucius in which he criticized the inscribing of written punishments in

⁵¹ FU, *Ib. id.*, p. 8.

⁵² See details, SALÁT Gergely: *Büntetőjog az Ókori Kínában*, Budapest 2003, Balassi, p. 83-91.

⁵³ Tripod vessels symbolized authority and political power holding during the Zhou dynasty.

⁵⁴ WANG HSIAO-PO and L. S. CHANG: *The Significance of the Concept of 'Fa' in Han Fei's Thought System*, In: *Philosophy East and West*, Vol. 27, No. 1, p. 35 (hereinafter „WANG”)

⁵⁵ HEAD, *Op. Cit.*, p. 12.

513 B.C.: „If the ministers and great officers would keep them in their several positions, the people would be able to honor their higher classes, and those higher classes would be able to preserve their inheritances. There would be nothing wrong with the noble or the mean. We should have what might be called the [proper] rules [‘tu’] ... When those rules are now abandoned, and tripod with penal laws on them are established instead, the people will study the tripods, and not care to honor their men of rank. But when there is no distinction between the noble and the mean, how can a state continue to exist?”

Although we have no archeological evidence of written laws from the Zhou-period, we can determine the existence of written laws as a fact from other historical sources. As Wang points out: „They are promulgated, that is, the prescriptions of fa (in the sense of positive law) are made public. They specify uniform behavioral norms as well as the uniform application of punishment for the general public, that is, for the noble and the common alike, hence, embodying the concept of ch’i which undermines the privileged position of the noble and its ideological foundations, namely, li and tu. Everyone is equal before fa. These penal codes, therefore, intensified the conflict between Confucianism and Fa Chia, between fa and ch’i on the one hand and li and tu on the other.”⁵⁶

From around 400 B.C., we know about a law code composed of six parts called „Canon of Laws” („Fajing”) which was systematically put together by Li Kui. The „Canon of Laws” can be considered every later code’s basis because the reforms of Shang Yang were based upon the Fajing, these rules were applied by the Qin and Han state as well. The Han laws were adopted by later dynasties.⁵⁷ By the time of the Qin-dynasty we may suppose an existing legal code. The first archeological evidence about the existence of the code is a tomb where bamboo slips were found with the text on them.⁵⁸ Secondly, the Qin state has realized the legalist theories of law, as Shang Yang has stated „nothing is more fundamental in removing evil than severe punishment”. Thirdly, the cited texts in Hanshu⁵⁹ are derived from an earlier code, „the Han code originated in the Qin code.”⁶⁰ Moreover the Hanshu expressis verbis refers to a compilation of rules: „Ch’in put together Shang Yang’s laws of mutual responsibility and created [under him] the execution of kindred to the third degree [parents,

⁵⁶ WANG, Op. Cit., p. 3.

⁵⁷ According to the majority of sinologist scholars’ point of view the Fajing never existed, although Li Kui was not a fictional person. Op. Cit., SALÁT, p. 96.

⁵⁸ The tomb was found in Hubei at Shuihudi in 1975. In the tomb a certain Mr. Xi was buried who was a state official in 217 B.C. (the date of the last bamboo slip). Concerning the translation and explanation of the Shuihudi documents see Op. Cit., SALÁT, supra note 10.

⁵⁹ An official history of the Han dynasty compiled by Fan Ye in the 5th century.

⁶⁰ LI XUEQIN AND XING WEN: *New Light on the Early-Han Code: A Reappraisal of the Zhangjiashan Bamboo-slip Legal Texts*, p. 14. <http://www.ihp.sinica.edu.tw/~asiamajor/pdf/2001a/6%20XingPDF.pdf>

brothers, wife and children, but the term is somewhat ambiguous]. In addition to bodily mutilation and capital punishment, there were the punishments of chiseling the crown, extracting ribs, and boiling in a cauldron.”⁶¹

Although the Qin Code got lost, some parts of shuihudi texts „must have belonged to the Ch'in code.”⁶² The discovered bamboo slips contain only a small part of the original code because the owner of the tomb was a lower ranked administrative official who had to decide mostly in administrative cases.⁶³ The most repressive sanction was the death penalty, the shuihudi documents mention four types of it.⁶⁴ The next step was the mutilation⁶⁵ which was applied in tandem with hard labor. The punishments could be redeemed, even the death penalty.⁶⁶ The Qin Empire's innovation, on the base on Legalists' theories, was the total political control through the administration and enforced legal norms. This new way of state politics has survived the Empire's collapse and it was adopted by all successive dynasties.

From the era of the Han-dynasty we have no archeological evidence of an existing law code, but undoubtedly there was some kind of legal compilation. „We know that the corpus of material was utilized by successive dynasties as the foundation of their own legislation; we have some information on the titles of books contained in the Han *lü* (statutes) or *ling* (ordinances) and even on particular rules contained in collections of *lü*, *ling*, or other forms of legislation such as *k'o*. But we do not know the exact organization or content of the Han *lü*, *ling*, or *k'o*.”⁶⁷ The Han leaders right after the consolidation of their power promulgated a „new” law code around 200 B.C which was based on the Qin Code. Xiao has collected the Qin laws in „Code In Nine Chapters”. According to the Hanshu: „... Chancellor Xiao collected and sorted the Qin code, adopted that which was appropriate to the current time, and made a code in nine chap-

⁶¹ DERK BODDE: *The state and empire of Ch'in*, p. 54., In: *The Cambridge History of China* Edited by DENIS TWITCHETT AND JOHN K. FAIRBANK, *The Ch'in and Han Empires, 221 B.C.-A.D. 220*, Cambridge 2008, Cambridge University Press.

⁶² BODDE, Op. cit., p. 49.

⁶³ SALÁT Op. cit., p. 134.

⁶⁴ There were: „*qi shi*” („casting away in the market place”), „*zhan*” („cutting in two at the waist”), *sheng mai* („to be buried while alive”) and „*sha shui zong*” („strangulation into water”). There were other types of death penalty which are mentioned by Hanshu. Op.cit. SALÁT, p. 135.

⁶⁵ The texts mention five types: amputating the left foot, rhinectomy, tattooing, and shaving the head. Op.cit., p. 136.

⁶⁶ SALÁT, Op. Cit., p. 144.

⁶⁷ GEOFFREY MACCORMACK: *The Transmission of Penal Law (lü) from the Han to the Tang: A Contribution to the Study of the Early History of Codification in China*, p. 5., <http://www2.ulg.ac.be/vinitor/rida/2004/Maccormack2.pdf>

ters”.⁶⁸ A new archeological evidence has made it clear that there was a legal continuity between the Qin and the Han-dynasty.⁶⁹ The system of punishments of the Han Code was nearly the same as it was regulated in the Qin Code but some of the cruel criminal sanctions were later abolished. Emperor Hui’s (194 – 86 B.C.) statute mandated that „when a person above 70 or under 10 committed a crime, he shall not be immured under the law.”⁷⁰ The edict of Emperor Wen (180 – 157 B.C.) abolished the mutilating punishments, other harsh punishments were substituted by lighter sanctions.⁷¹ According to the statute of Emperor Jing (156 – 149 B.C.) „a prisoner who was above age 80 or under 8, or pregnant or a midget should not wear a cangue or shackles while in custody.”⁷²

The Han rulers have started to establish a new kind of state ideology („imperial Confucianism”) which meant the „Confucian-legalist amalgam”. The ruler could apply the system of punishments and rewards to keep the individuals in order but the Confucianism was necessary for the functioning of the administration.⁷³ In 124 B.C. the Imperial Academy was founded, the basis of learning and examinations were the Confucian classics.⁷⁴ The confucianization of Chinese law was a long process which ended with the compilation of the Tang Code. The Han rulers essentially reduced the rigour of the Qin laws. According to the Han shu, “[w]hen the Han arose and the Eminent Founder for the first time entered the passes, he restricted the law to three sections [and] . . . rejected and removed the vexations and cruelties, and the host of the people greatly rejoiced.”⁷⁵ The Han rulers have not thrown away the Legalist institutions, rather they have tried to harmonize the Confucian and Legalist ideas and to make a clear distinction between „fa” and „li”, according to Yia Ji⁷⁶ : „With

⁶⁸ These were: (Statutes on Theft and Robbery), (Statutes on Offenses), (Statutes on Imprisonment), (Statutes on Arrest), (Miscellaneous Statutes), (Statutes concerning the Specifics), (Statutes on Households), (Statutes on Dereliction), and (Statutes on Stables). LI XUEQIN, XING WEN: *New Light on the Early-Han Code: A Reappraisal of the Zhangjiashan Bamboo-slip Legal Texts*, Asia Major XIV.1 (2001), p.138.

⁶⁹ As Li Xueqin and Xing Wen have pointed out „In the Zhangjiashan Han code, many statutes share the same titles with those in the Shuihudi Qin code. There are far more shared titles than the nine titles of the Nine-Chapter Code.” p .15.

⁷⁰ XIN REN, Op. cit, p.41.

⁷¹ *Kínai filozófia és vallás a középkor hajnalán*, szerk.: HAMAR IMRE, SALÁT GERGELY, Budapest 2005, Balassi Kiadó, p. 47.

⁷² XIN REN, Op.cit., p. 41.

⁷³ JOHN KING FAIRBANK, MERLE GOLDMAN: *China: A New History*, Harvard University Press 1998, p. 62.

⁷⁴ Ib. id., p. 67.

⁷⁵ HEAD, Op. Cit., p. 18.

⁷⁶ Jia Yi (201-168 B.C.) was a Confucian scholar.

human sagacity and wisdom, we can learn things that already occurred, but we cannot be aware of things that will happen in the future. By the same token Li can prevent sinfulness before it occurs, but law can reprimand wickedness after the wrong has occurred. Therefore law is to be used for curbing evil, while Li has a difficult task that requires a lifetime to accomplish. Li cultivates people, virtue and benevolence, whereas punishment penalizes abominations.” Like yin and yang „you cannot dispense either punishment or moral persuasion and put sole reliance on the other.”⁷⁷

This kind of concept of harmonization was propounded more clearly by Dong Zhongshu⁷⁸ as follows: in the relationship of „li” and law, the former has supremacy, „the emperor has sacrosanct power in governing the country and enacting the law, establishing the three authorities – the emperor’s authority over his children, a father’s authority over his children, and a husband’s authority over his wife – as the fundamental principles of law and punishment and officially solidifying Confucian ideology and prohibiting heretical beliefs.”⁷⁹ The public rejection of some legalist ideas did not result in a rejection of written law as a desirable means of leading society. Right after the consolidation of the new dynasty a new law code was compiled continuing the legalist tradition, which emphasized the significance of written law as the basis of the ruler’s power. This „regard for written law” theory can be noticed in the case of all successive dynasties. The centralization of power and the concept of a „mandate of heaven”⁸⁰ has become a reality through two millennia. The success of the Han-Dynasty „rested in part on the creation of a hybrid system of government administration that drew on the inherited strength of both the recent past (the Qin, implementing Legalism) and the more distant past (the pre-Qin, rooted in Confucianism).”⁸¹

Summarized, the Han rulers have mitigated the rigour of punishments, some of them were abolished, they have built the Confucian ideas into the legal norms and adopted Xunzi’s theory, namely that the punishment fits the crime, the system of hierarchy concerning social status is reflected in laws becoming realities until the fall of the Chinese imperial state.

⁷⁷ XIN REN, *Op.cit.*, p. 21.

⁷⁸ Dong Zhongshu (169-104 B.C.) was a Confucian scholar of the Western Han Dynasty.

⁷⁹ *Ib.id.*, p. 21.

⁸⁰ The „mandate of heaven” originates from the Shang dynasty (ca 1766–1040 BC), this idea was further developed in the Zhou-period.

⁸¹ HEAD, *Op.cit.*, p. 22.

The Tang Code

The fall of the Han Empire (220 B.C.) was followed of four centuries of political disunion.⁸² In the kingdom of Wei a new penal code was written, the „New Code” („Xin lü”) in eighteen chapters in 265.⁸³ Later several changes were made to the „New Code” but the most interesting change was conceptual: one of the new chapters called „general principles” which „was divided into two, one termed ‘names of punishments (*hsing ming*)’, dealing with the nature of the punishments, and the other ‘principles of law (*fa li*)’, dealing with the way in which the punishments were to be applied”.⁸⁴ The „Xin lü” was the first Chinese law code which was not just a collection of different norms but also „an ordered and coherent whole in which each section was constructed with reference to the other sections and in particular to the governing principles set out in the first two sections.”⁸⁵ In the next centuries there were no major legislative changes made to the „New Code” although new penal codes were written in nearly every state.⁸⁶ The Confucianism strengthened its role of legislation, moreover „Confucianists were involved in the actual drafting of legal codes”.⁸⁷ The Confucian influence can be noticed in Xiao Wendi’s rule: “A person who commits a crime punishable by death but whose parents or grandparents are very old and have no other children or grandchildren or other relatives to take care of them shall [not have to suffer the death penalty but shall] instead be permitted to live and take care of his parents or grandparents.”⁸⁸

The Sui-Tang dynasties (589-907) reestablished the Chinese Empire constructing one of the most prospering times of China. The founder of the Sui dynasty promulgated a new law code in 581.⁸⁹ Although the Kaihuang Code („Kai Huang Lü”) got lost, scholars agree to its essential influence to the Tang Code („Tang Lü Shi”). Right after the rise of the new dynasty⁹⁰ the new legal code was promulgated in 624 which contained 500 articles. This compilation

⁸² Three Kingdoms (220 A.D. – 280), Jin Dynasty (265-420), Southern & Northern Dynasties (420-589).

⁸³ The code was promulgated in 234. The Han Code in Nine Chapters was amended with new paragraphs, for instance „intimidation and kidnapping” or „judgments and prison”. See details Maccormack, p. 18.

⁸⁴ *Ib. id.*, p. 15.

⁸⁵ *Ib. id.*, p. 17.

⁸⁶ For example the Northern Chou penal code („Ta lü”) of 563 consisted of one thousand four hundred and thirty seven articles distributed into twenty five chapters. See details MACCORMACK, p. 18-24.

⁸⁷ HEAD, *Op. Cit.*, p. 23.

⁸⁸ *Ib. id.*, p. 24.

⁸⁹ Yang Jian, the short-lived dynasty founder, assumed the throne in the North in the same year. *Op. cit.* HEAD, p. 25.

⁹⁰ Li Yuan, a member of an aristocratic family, led a rebellion that succeeded in capturing the Sui capital at Chang’an (Xian) in 617.

has more revisions, the final version we have today is the version of 737. The significance of the Code is outstanding: it was a legislation model not only for the subsequent dynasties but also for some East Asian countries (Korea, Vietnam, Japan). In the Tang era a „remarkably stable, efficient governing system was built and reinforced through social norms and informal hierarchies that survived for over 1,200 years”.⁹¹

The Tang Code includes 502 articles organized into 12 books. One of the main characteristics of the code is the Confucian view of society. The social rank determined an individual's liability for punishment which originates from the „Book of Rites” („Liji”) stating: “Punishments do not extend up to the Great Officials.” This privilege was one of the „Eight Deliberations” regulated by the Tang Code. The „Eight Deliberations” meant that the group of persons in question could not be sentenced without the emperor's consent and if they were found guilty, the emperor had a right to decide which criminal sanction would fit the crime committed. Secondly, „there may also have been other laws at that time which lessend punishment for the upper classes”.⁹² According to the Tang Code other social groups had other privileges: „Article 10 permitted to a broader group of persons possessing still lower official rank a degree of reduction for punishments of life exile or less, and lastly, Article 11 gave all members of the bureaucracy the right to redeem punishment by payment of copper”.⁹³ In the case of committing ten crimes („Ten Abominations”) all deliberations and privileges were cancelled.⁹⁴ If someone committed the most heinous serious crimes⁹⁵, not only this person was executed but also his family was punished: “Plotting rebellion and great sedition are criminal to the utmost degree of censure and extinction. Such crimes defy the whole family and the eradication of evil must reach to the roots.” The implication is that the whole family in some way has shared the evil of the individual who has rebelled, and so all deserve to be punished.”⁹⁶

⁹¹ Hayden WINDROW: A short history of law, norms, and *social control* in. *Imperial China*. In: *Asian-Pacific Law and Policy Journal*, Vol. 7. (2006), p. 284. (hereinafter „WINDROW”)

⁹² WALLACE JOHNSON: Limitations on Legal Privilege in The Tang Code, p. 24. <http://jalh.ku.edu/article/johnson2007.pdf>

⁹³ *Ib.id.*, p. 25.

⁹⁴ These were those crimes which harm the integrity of the emperor and the state (rebellion, sedition, treason...etc.)

⁹⁵ These were the rebellion “to plot to endanger the Altars of Soil and Grain [the ruler and his state]” and great sedition “to plot to destroy the ancestral temples, tombs, or palaces of the reigning house.”

⁹⁶ The punishment was „decapitation of all persons involved in the crime, be they principles or accessories; strangulation of the criminals' fathers and sons; enslavement of their mothers, daughters, grandfather, great-grandfather, great-greatgrandfather, grandsons, great-grandsons, and great-great-grandsons in the male line, brothers and sisters, his and his sons' wives

The social status also determined the punishment. If a commoner committed a crime against a slave, the punishment was two degrees less than a slave had got, would he have committed the same crime.⁹⁷ The political status had more significance in some cases: „active duty officials of the third rank and above, titular officials of the second rank and above, and persons with noble titles of the first rank”— were to be given special consideration in the imposition of punishment.⁹⁸ The Tang Code preserved the hierarchical system of the patriarchal family. Some crimes could be committed only against the male members of the family. The punishments depended on „the generation, age, sex, and mourning period relationship between the criminal and the victim.”⁹⁹ Those obligations which originated from theories of Confucianism transformed society into an enormous family headed by the emperor. According to the Code: “The king ... acts to shelter and support, thus serving as the father and mother of the masses. As his children, as his subjects, they must be loyal and filial.”¹⁰⁰

Forgiveness and mercy are an important part of the Confucian’s theories and important human virtues. „Those over eighty, under ten, or incapacitated who partook in rebellion, sedition, or murder and therefore required a death sentence were allowed to send a petition to the emperor.” There were social groups which cannot be sentenced to the most serious punishment: „Persons over ninety or under seven could not receive the death penalty under most circumstances.”¹⁰¹ Besides, if someone had a specific individual attribute they were not sentenced as rigorous as other members of the society: „a pregnant woman shall not be sentenced to death, a person over eighty or under ten, a blind person or a midget, shall be given a lenient sentence.”¹⁰² Mercy, as part of Confucian tradition was the emperor’s right, to approve more lenient punishments and sometimes to reprieve the man sentenced to death.¹⁰³ The Confucian virtues „li” were at the center of human behavior as a mixture of long-lasting customs and traditions. The negligence of this kind of obligation will be pun-

and concubines, and any retainers and slaves owned by any of the above individuals. Furthermore, the possessions and real property of all the above people were confiscated by the state.” WINDROW, *Op. Cit.*, p. 296.

⁹⁷ There are a lot of similar cases in the Code, for example if a slave struck a commoner and broke a limb, the punishment was strangulation; but if a master killed a slave who had committed some offense, the penalty was only one hundred blows with the heavy stick. HEAD, *Op. Cit.*, p. 29.

⁹⁸ If they committed a capital crime „a memorial sent up [to higher authorities] requesting authorization to consider and fix a penalty.” HEAD, *Op. Cit.*, p. 28.

⁹⁹ The „use of abusive language” against one’s parents or paternal grandparents qualified as lack of filial piety and warranted decapitation. WINDROW, *Op. Cit.*, p. 290.

¹⁰⁰ *Ib.id.*, p. 292.

¹⁰¹ *Ib.id.*, supra note 298., p. 294.

¹⁰² XIN REN, *Op. Cit.*, p. 41.

¹⁰³ *Ib.id.*, p. 42.

ished. There was a general clause in the Tang Code, on the basis of this „catch-all” paragraph anybody could be punished. „Anyone who does something which should not be done shall be sentenced to forty blows of the light stick. In serious cases, the sentence shall be eighty blows of the heavy stick.”¹⁰⁴

Summarized, the Tang Code is a great achievement of a long Chinese legal history. Although the instruments of leading a society were different from the Confucian and Legalist point of view, they were incredibly similar on how the criminal punishment should be administered in order to preserve the imperial order and social harmony in Chinese society. The principles of legal codification were clear: defending the emperor and the state, preserving social harmony and imperial order, harsh penalties for the committer of most malicious crimes, the usage of collective responsibility, differential treatment of offenders according to their social status and relationship to the victims and in some cases use of leniency and mercifulness.

Codifications under the Ming and Qing-dynasty

The Song dynasty (960 – 1279) adopted the Tang code which was a model for the Jin dynasty’s code („Taihe Lü) in 1234.¹⁰⁵ Under the Mongol rule there was a new code called „Chiyuan Xinge” promulgated in 1291. The Yuan code’s compilers used a mixed model, they built in parts of former Chinese legislation and the Mongolian customs and institutional features.¹⁰⁶ The final version of the Ming Legal Code¹⁰⁷ („ Da Ming Lü”) was issued in 1397 containing 606 articles, from which only 31 were new, every other part was taken from the Tang Code.¹⁰⁸ The new provisions added to protect currency and coinage regulate taxation and expenditure and prevent misuse of government material and production, punish the forgers and smugglers, deal with administrative manners.¹⁰⁹

¹⁰⁴ *The Cambridge History of China* Edited by Denis TWITCHETT AND John K. FAIRBANK: *The Ming Dynasty, 1368 – 1644, Part 2*, Cambridge University Press, 2008, p. 179. (hereinafter „CHC Ming”)

¹⁰⁵ The Jin dynasty (1115 – 1234) was founded by nomadic people in North China.

¹⁰⁶ *The Cambridge History of China* edited by Herbert FRANKE, Denis TWITCHETT, John KING FAIRBANK: *Alien Regimes and border States (907 – 1368)*, Cambridge University Press, 1994, p. 518.

¹⁰⁷ The Ming Legal Code contains three former versions of the compilation: The great Ming Commandment („Da Ming ling”), the August Ancestral Instruction („Huang Ming zuxub”), the Placard of People’s Instructions („Jiaomin bangwen”). See details: EDWARD L. FARMER: *Zhu Yuanzhang and Early Ming Legislation*, Leiden 1995, Brill, p. 64.

¹⁰⁸ GUANQIU XU: *World Eras Volume 7: Imperial China, 617-1644*, Gale Cengage 2002, p. 251.

¹⁰⁹ EDWARD L. FARMER, Op. Cit., p. 79.

The Qing Code, the last imperial law compilation was still the imprint of Legalist and Confucian theories and „laws were viewed as a set of definitions of punishments for wrongdoing.”¹¹⁰ The first version of the code was issued in 1646, has five revisions in the next hundred years, and the final version was promulgated in 1740.¹¹¹ The Qing Code dealt with those matters which were felt to require punishment. „Most of what we would call "civil" cases, e.g. suits for breach of contract, are not mentioned in the Code, although we know that magistrates heard such cases.”¹¹² Although the code dealt mainly with criminal matters, some chapters contain „civil law” matters as the Chinese called „minshi” („people’s matters”) like debts, markets, land and houses, marriages, family division.¹¹³

The role of law in the 20th Century

By the end of the 19th century the 2000 years old Chinese Empire became its own prisoner. The Qing have decided to reform the legal institutions but they have come too late and the history swept away the oldest empire of the world. In 1905 the cruelest punishments (beheading of the corpse, beheading, slow slicing...etc.), the collective responsibility and torture were abolished, physical punishments were replaced by fines.¹¹⁴ The new criminal code under the title of „Current code as revised and approved” was promulgated in 1910 and it remained in force until 1928. The compilation of a civil code and a commercial code was started but the dynasty fell before it was passed.¹¹⁵ At the turning point of the twentieth century the Chinese society has started to change, the social progression seemed irreversible but the changes were not dramatic, 95 percent of the population lived in rural surroundings.¹¹⁶ After the fall of the Qing dynasty (1911), China came under the control of rival warlords and had no government strong enough to establish a new legal code. After 1927 Chiang Kai-shek and the Guomindang government attempted to compile Western style legal rules but most of the new laws were discarded, they had no chance to develop new and modern legal institutions when there was a continuous strug-

¹¹⁰ CHC Ming, Op. Cit., p. 178.

¹¹¹ John W. HEAD AND YANPING WANG: *Law Codes in Dynastic China*, Carolina Academic Press, 2005, p.200.

¹¹² William C. JONES: *Studying the Ch'ing Code-The Ta Ch'ing Lü Li*, In: *The American Journal of Comparative Law*, Vol. 22, No. 2 (Spring, 1974), p. 340.

¹¹³ Kathryn BERNHARDT AND Philip C.C. HUANG: *Civil law in Qing and Republican China*, Stanford University Press, 1999, p. 1.

¹¹⁴ *The Cambridge History of China: Late Ch'ing, 1800-1911, Part 2*, edited by Denis TWITCHETT AND John K. FAIRBANK, Cambridge University Press, 2008, p. 408.

¹¹⁵ The models of the criminal, civil and commercial code were the Japanese and German codes. *Ib. id.*, p. 409.

¹¹⁶ *Ib. id.*, p. 535.

gle with the communists and the Japanese army and while there was a huge social, economical and political crisis in the country.¹¹⁷

After a hundred years of anarchy, military defeating and humiliation, Mao Zedong became the modern unifier of the Chinese empire, similar to the first emperor (Qin Shi Huangdi) in 221 B.C. or the Ming founder Chu Yuan-chang in 1369.¹¹⁸ The ideology of the new power was clear, as Mao stated in 1949, „lean to one side” that is the model is the Soviet Union.¹¹⁹ The communists had to battle not only with the imperial cultural heritage but also with Western ideas which had an influence on the Chinese economy and political, legal theories from the start of the twentieth century. „China's revolutionary leaders chose the easiest path for creating a new China by keeping it within the inherited framework of supreme authority, indoctrinated bureaucracy, and pervasive orthodoxy that could keep China in order. The Marxism that served as the modern form of this old motif, however, proved better at seizing and maintaining power than at economic modernization.”¹²⁰

When the People's Republic of China (PRC) was established on October 1, 1949, the state's new leaders have been facing problems long ago. One of the main factors for solving the social and economic problems was the law. The law which became an instrument in the hand of the state's leaders like in any former autocratic dynasty in imperial China. The law became an instrument to control the economy and society, an instrument to punish all individuals who had not obeyed the orders of the totalitarian state. The Chinese-socialist law had public law character and the major instrument of communist policy was the criminal prosecution. Although each former legal code has been abolished and the new codes were not ready in the early fifties, the Chinese Communist Party has found the way to sentence the enemies of the new power. The most frequently applied law that dealt with the political crimes is “Regulations of the People's Republic of China for the Punishment of Counterrevolutionaries” approved by the Central People's Government Council in 1951.¹²¹

¹¹⁷ The National Government has promulgated Western style law codes, among others a procedural code, a civil code, a system of courts, company-, banking-, and commercial laws.

¹¹⁸ Mao tried to abolish the traditional Chinese culture but he was unable to avoid the influence of Chinese culture. As Lin Bao characterized: „Mao is wearing the skin of Marxism, practicing the doctrines of Confucianism, and applying the methods of Qin Shi Huang.” See details: KANG XIAOGUANG: *Confucianization: A Future in the Tradition*, In: Social Research Vol 73 : No 1, 2006, p. 119.

¹¹⁹ *The Cambridge History of China: The People's Republic, Part I, The Emergence of Revolutionary China, 1949-1965* General edited by Denis TWITCHETT AND John K. FAIRBANK, Cambridge University Press, 2008, p. 32.

¹²⁰ *Ib.id.*, p. 38.

¹²¹ Two legal codes have been in force that time, the Marriage Law and the Land Law of 1950. See details: FRANZ MICHAEL: *The Role of Law in Traditional, Nationalist and Communist China*, In: The China Quarterly, No. 9, p. 142.

The role and functions of law have not differed from other socialist countries. „No realm of freedom for the individual or for any social group protected by law or a moral code exists under the present system. Law is clearly defined in them as a “weapon” of the state to enforce Communist policy, and, since policy changes, “law” has to be elastic and everchanging. The structure through which this “law” is applied can be well established, in fact has to be established, in an orderly fashion. The courts and the system of prosecution have to function smoothly under the direction of the Party and State. But law in the sense of norm no longer exists. Law as the protection and expression of the position of the individual and of the manifold complex of human relationships that make up society, is no longer needed. The social order is to be reduced to that of a monist Communist power system, the totalitarian state.”¹²² The Mao era labelled capitalists, as many judges, lawyers, and academics were persecuted, the majority of them has been sent to the countryside to „learn from peasants”. Law was the instrument of CCP’s politics, the „real law” meant the mass mobilization campaigns, party policies, administrative regulations and police brutality.

The functions of law and mainly the legal environment did not differ too much in the Imperial China and Mao’s China. The role of law was only to strengthen the state, the state punishes or rewards and the horizontal relations of the society are not subjects of legal institutions, especially individual rights. There was a tiny separation between law and politics, the ruler could make law, and the magistrates were trained by the orthodox state ideology. There was no isolated legal sphere, there was no need for jurists if the law is equal to the political will, the independent judiciary remained an unknown idea. The state’s power was not limited by legal norms. The law had administrative and penal nature, the purpose of the law was to enhance government efficiency, the lower-level officials’ duty was to fulfill the centralized power’s will. „During all periods, but even more so during the Mao era, the state emphasized ideology and sought to control the expression of heterodox views, especially views that challenged the authority of the state. Just as the principle of the supremacy of law gave way to the prerogative of the ruler or the leadership of the Party, so was the principle of equality of all before law compromised by the Confucian emphasis on social hierarchies and status, and by the Socialist distinction between the people and the enemy.”¹²³ When Mao died the economy was in shambles, „the legal system has been destroyed. The Ministry of Justice was shut down, along with the Procuracy. Only a handful of law schools existed, though there were few professors around to teach, and no students. No one wanted to study law. There were only 2000 lawyers, many of them trained before 1949.”¹²⁴

¹²² *Ib.id.*, p. 147.

¹²³ PEERENBOM, *Op. Cit.*, p. 47.

¹²⁴ PEERENBOM, *Op. Cit.*, p. 9.

In 1979 Deng Xiaoping became the new leader of the Chinese state. The central task for the country was the economic development instead of class struggle and political movements, the goal was to achieve „the four modernizations”, that is, modernization of agriculture, industry, defense, and science and technology. Deng’s new policy was based on the economic growth which spilled-over to the political and social sectors. The new legitimacy’s frame were mainly the economic achievements, the market economy has replaced the planned economy. „Now family life and the personal activities of individuals are no longer under the complete control of the government as was the case in the Mao Zedong era. Nowadays, the Chinese Communist Party (CCP) generally leaves you alone if you do not challenge its authority. Even if you do, it will still leave you alone unless you openly challenge it in the public. The CCP has turned to passive defense from its previous active aggression. It may be said that market orientation has not only changed China's economic structure, but also its political and social structure, and even its culture and ideology.”¹²⁵

In the eighties many new codes were enacted, which were crucial for the foreign investments. In 1979 new laws were passed by the National People’s Congress, some of them never existed in China.¹²⁶ By the end of 1997, 328 laws, 770 administrative regulations and 5200 provincial regulations were passed. „As a result of the formulation of these laws, China has been transformed from a country that completely lacked a legal system to one that has a basic set of essential laws.”¹²⁷ In the early nineties the Chinese legal reform entered in the second phase, the PRC had to frame new laws and regulations in line with Western legal norms. The acceleration of the reform has been closely linked to China’s intention to join the World Trade Organization (WTO). The background of this program was Jiang Zemin’s new policy („tifa”): “ruling the country in accordance with law and establishing a socialist country ruled by law” (*yifa zhiguo, jianshe shehuizhuyi fazhiguo jia*).¹²⁸

¹²⁵ KANG XIAO GUANG, *Op. Cit.*, p. 79.

¹²⁶ The Criminal Law, Criminal Procedural Law, Organization Law of the Local People’s Congresses and Local People’s Governments of the PRC, Election Law, Organization Law of the People’s Courts, Organization Law of the People’s Procuratorates, and the Sino-Foreign Equity Joint Venture Law. See details: CAI DINGJIAN: *Development of The Chinese Legal System Since 1979 and its Current Crisis and Transformation*, In: *Cultural Dynamics*, 1999, Vol. 11., p. 136

¹²⁷ *Ib. id.*, p. 137.

¹²⁸ Jean-Pierre CABESTAN: *The Political and Practical Obstacles to the Reform of the Judiciary and the Establishment of a Rule of Law in China*, In: *Journal of Chinese Political Science*, Volume 10, Number 1, April 2005, p. 44.

Conclusion

The slow legal changes have started in China in the middle of the 19th century. The legal reforms’s models were the German and the Japanese legal institutions. The changes have rapidly accelerated after the fall of the last dynasty especially in the Nanjing decade. This process was stopped in the Mao-era and it was resumed when Deng Xiaoping has become the leader of China. In the last 150 years the Chinese society has changed fundamentally. The last two decades’s legal reforms have deepened this metamorphosis. The judiciary statistics show us that the Chinese society is aware of its rights and demands more and more. In 1987 the Chinese courts handled less than 2 million cases while in 1995 there were 4.5 million cases, in 2001 nearly 6 million trials were before the judges.¹²⁹ Besides, there is an enormous development of the legal profession, in 2004 there were 200.000 judges¹³⁰ (compared to 70.000 in 1998) and 130.000 lawyers (compared to 41.000 in 1990).¹³¹ The better chinese laws are harmonized in the Western style the more jurists are needed to handle the conflicts. The handling of civil conflicts is still out of the sight of the courts in most cases, this indicates the survival of traditions. One fifth of the trials are civil cases and more than half of them are criminal cases.¹³²

Despite the rapid legal changes the Chinese state has still an autocratic one-party system, where human rights exist only on paper. The „rule of law” is a „thin rule of law”¹³³, torture in criminal proceedings is an existing practice, there is a deep social, economical and legal gap between the coastal areas and the mainland of China where the poor localities are controlled by corrupt bureaucrats...etc. In the past few years China has undergone a significant legal reform in which different areas of law were involved: civil-, commercial-, administrative-, family-, criminal- and environmental law. „But legislation still remains an exercise in policy formulation and enforcement that is the province of the state exercising its mandate to govern. Legislation that is the product of initiative by autonomous social groups, is rarely if ever considered a legitimate part of the exercise.”¹³⁴ Contrary to the reforms which come from the power centurms of the state, the society changes slowly, the traditions’ binding force is stronger than the law. For instance, family laws are aimed at curbing domestic violence but in the family hierarchy wives were subordinate to their hus-

¹²⁹ *Ib. id.*, p. 49.

¹³⁰ Only 10% of the judges and half of the lawyers had a degree in law.

¹³¹ *Ib. id.*, p. 52. 130.000 chinese lawyers is still a small number, in India there are more than 500.000 lawyers.

¹³² *Ib. id.*, p. 52.

¹³³ PEERENBOM, *Op. Cit.*, p. xiii.

¹³⁴ Pitman B. POTTER: *The Chinese Legal Sytsem, Globalization and Legal Culture*, London and New York 2005, Routledge, p. 20.

bands who traditionally had the „right” to use violence. „The effectiveness of administrative litigation and other means of reining in bureaucracy is diminished by a low level of legal consciousness among citizens who are unaware of their rights, and the persistent influence of a paternalistic tradition in which the ruled are expected to defer to mother and father officials (*fumu guan*) much as children defer to their parents. Thus, even when citizens do know their rights, they are often reluctant to challenge abusive administrative officials.”¹³⁵

The Chinese modernization through law faces the same challenges as in the first half of the twentieth century. How can the Chinese state harmonize the Western solutions of the legal system with Chinese traditions? The ambivalent approach to modernization is indicated by a classic slogan: „Chinese learning for fundamental principles and Western learning for practical applications.” This means that „the path for modernization would consist in retaining the Chinese — basically a quasi-Confucian, autocratic, anti-democratic, and to some extent autarkist — system while adopting “Western” scientific, engineering, and technological know-how.”¹³⁶

In the nineties, the prominent members of the CCP have found the modern Chinese state’s ideology, a Chinese-style socialism mixed with neo-Confucian ideology and Western solutions. The purpose was to build a harmonious society and to „put the people first”.¹³⁷ At the heart of the new ideology there was the „Eight shames, Eight honor” formula: „Love the country, do it no harm./Serve the people, do no disservice./Follow science, discard ignorance./Be diligent, not indolent./Be united, help each other and make no gains at someone else’s expense./Be honest and trustworthy, do not spend ethics for profits./Be disciplined and law-abiding, not chaotic and lawless./Live plainly, struggle hard and do not wallow in luxuries and pleasures.”¹³⁸ We can say „there is nothing new under the sun” citing a Confucian scholar¹³⁹: “Establish a [humane] purpose for heaven and earth; build up a good life for the people; and open up the vista of peace for millennia.”

¹³⁵ PEERENBOM, Op. Cit, p. 9.

¹³⁶ WILLY WO-LAP: *Chinese politics in the Hu Jintao era: New leaders, new challenges*, New York 2006, East Gate book, p. 260.

¹³⁷ *Ib. id.*, p. 34.

¹³⁸ SUN WUKONG: *Beyond Confucius and communism*, In: Asia Times Online, 2007 Oct 3, <http://www.atimes.com/atimes/China/IJ03Ad02.html>

¹³⁹ Zhang Zai (1020–1077).

SUMMARY

**“To Enter a Court is to Enter a Tiger’s Mouth”,
The Role of Law in China**

ATTILA KORMÁNY

The development of law in China is unique, especially when examined through European eyes. The Chinese legal system is one of the oldest in the world. For more than two thousand years its structure and institutions evolved without outside interference, and it served as a model for neighbouring countries of Asia. This unity and uninterrupted continuity marked both the legal system and the cultural life of China down to the fall of the empire. Certain legal institutions that had emerged in ancient times played a dominant role in Chinese legal logic as recently as the twentieth century. Two schools of philosophy: Confucianism and Legalism played an undeniable role in that because they conserved the legal system.

Until the birth of the modern Chinese state, public law, especially criminal law, dominated Chinese law. The relation of the state and the individual was in the focus of law while – contrary to the European legal tradition – private law was ignored. As law only functioned as a tool of state-dominated criminal law – and magistrates administered law – it could offer no assistance whatsoever in resolving disputes of economic or social character. As a consequence, the Chinese do not consider law as a norm that can serve as a regular tool for settling disputes. Instead, they do everything in their power to avoid the slightest need for litigation.

Only in the final third of the twentieth century did this tradition of thousand years begin to wane when legislation and the application of law were reshaped according to Western patterns. Nevertheless, traditional Confucian thought and a matching approach to the interpretation of law are still powerful components of China’s cultural life alongside Communist ideology.

RESÜMEE

**„Das Gericht betreten heißt so viel, wie zwischen
die Zähnen eines Tigers gelangen“
Die Rolle des Rechts in China**

ATTILA KORMÁNY

Die Entwicklung des Rechts in China ist einzigartig und unterscheidet sich in bedeutendem Maße von der Rechtsentwicklung jedes anderen Landes. Insbesondere gilt dies aus europäischer Sicht. China verfügt über eines der ältesten Rechtssysteme der Welt. Es hat im Laufe von mehr als zweitausend Jahren seine eigene Struktur und seine eigenen Rechtsinstitutionen ohne fremden Einfluss herausgebildet und dient den umliegenden asiatischen Ländern als Modell. Diese Einheit und Kontinuität, die nicht nur in der Entwicklung des Rechts, sondern auch in der chinesischen Kultur aufzufinden war, manifestierte sich bis zum Untergang des Kaiserreichs als existierende Wirklichkeit. Bestimmte Rechtsinstitutionen, die bereits in der Antike entstanden waren, regierten bis ins zwanzigste Jahrhundert die Logik des Funktionierens des chinesischen Rechts. Eine unbestreitbare Rolle spielten dabei die beiden philosophischen Strömungen (Konfuzianismus und Legismus), die die Rechtssphäre konservierten.

Bis zur Entstehung des modernen chinesischen Staates war das chinesische Recht grundsätzlich staatsrechtlich, genauer gesagt hatte es einen überwiegend strafrechtlichen Charakter. Das Recht funktionierte in der Relation Staat – Individuum und beschäftigte sich – abweichend von den europäischen Traditionen – nicht mit privatrechtlichen Verhältnissen. Da das Recht ausschließlich als Mittel der staatlichen Strafpolitik diente, die von Magistraten angewandt wurde, stellte das Recht bei der Lösung von wirtschaftlichen und gesellschaftlichen Streitigkeiten keinerlei Hilfe dar. Als Folge dessen betrachten die Chinesen das Recht als Norm nicht als ein ordentliches Mittel zur Lösung von Streitfällen, sondern versuchen sogar den Anschein zu vermeiden, dass sie das Instrumentarium des Rechts zu Hilfe rufen.

Diese auf mehrere Jahrtausende zurückblickende Tradition begann sich erst im letzten Drittel des zwanzigsten Jahrhunderts zu verändern, indem die Gesetzgebung und die Rechtsanwendung dem westlichen Muster angenähert wurde, auch wenn neben der chinesischen kommunistischen Ideologie die traditionelle konfuzianische Denkweise und die dieser entsprechende Rechtsauffassung immer noch als bestimmend angesehen werden können.