

PECULIARITIES OF THE BRANCHES OF LAW IN ANCIENT CHINA

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Abstract: *The purpose of this paper is to examine the historical roots of the Chinese legal system who is one of the oldest in the world. China's legal system is largely a civil law system, although found its root in Great Qing Code and various historical system. The analyzes of the Chinese law documents led to results that largely confirm that the Chinese have written their own laws since ancient times, a peculiarity which compares them, for the historical and characteristic period, with the Romans. Chinese law is a legal system integrated into a certain philosophical conception, namely Confucianism. The research methods used are: analysis, synthesis, deduction, analogy and comparison. The analysis of the Chinese legal system has allowed to reveal that different branches of law as civil law, family law, administrative law, and criminal law have some peculiarities in ancient Chinese laws that were presented in this article.*

Keywords: *law, ancient China, civil law, family law, administrative law, criminal law*

JEL Code: *K39, K30*

Introduction

The study of the sources of law in ancient China is a kind of key to discover the specifics, peculiarities and values of Chinese civilization. The Chinese legal system is one of the oldest in the world, and China is one of the oldest cradles of human civilization. (Drimba, 1984, p.2)

Western scholars on China, with only a few distinguished exceptions, have until recently shown but little interest in the study of Chinese law. We consider some reasons for this situation: the lack of information and legal training or interest among law specialists, some difficulties in style and vocabulary of the Chinese legal literature. These were the reasons that we have chosen as topic of research to analyze the peculiarities of the branches of law in ancient China.

The monumentality and relevance of the principles of Chinese law, little known in the study of European law, fascinates with its clarity, discipline, topicality and, last but not least, can represent a landmark in understanding the defining elements of the current legal system. (Bodde, 1981, p. 95)

No legal system in the world has come under the strong influence of two diametrically opposed philosophical doctrines like that of Ancient China. The ethical-

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political dogmas of Confucianism and the political-legal concepts of legalism became the defining factors of the progressive development of the law, its ideological foundations, its principles and institutions, as well as the enforcement mechanisms and the traditional legal understanding of the Chinese. (Ch'üT'ung-tsu, 1961, p. 2)

Traditional Chinese law is based on two types of sources, *li* and *fa*, the first has a moral origin and the other has a normative origin.

The ancient Chinese law can be classified into "formal" law and "informal law". "Formal law" is related to the authority of the emperor. Laws were devised by state representatives to regulate ancient Chinese society. In ancient China, the laws were characterized both by promoting the preservation of the system of different ranks among the nobles and by ensuring the control of the population.

Western scholars have studied Chinese criminal law in particular. Among the causes that caused students to encounter difficulties in the process of understanding Chinese legal principles, we mention the complexity of the Chinese administrative system. Research on informal law has also been hampered by difficulties in accessing raw information from original Chinese sources. This gave early Chinese and Western scholars the mistaken impression that there was no civil law system in imperial China.

1. Data and Methodology

The current research is a comparative work, as it describes, analyzes and interprets information, in this case a set of norms belonging to the ancient Chinese legal system, to demonstrate that this is one of the oldest in the world.

In order to analyze the peculiarities of the branches of law in ancient China, during the writing process, various research methods were used, particularly theoretical, including:

- a. analysis, by dividing the topic into paragraphs, making references to Chinese legal doctrine and regulations;
- b. synthesis, by identifying the special features of special concepts;
- c. deduction, by making conclusions on the basis of the researched material and presenting the personal point of view on the subject under the current research;
- d. analogy, by using and comparing different Chinese ancient institutions, as well as the rules of different branches of law in different moments of legal system evolution, which makes it possible to identify similar and distinctive features;
- e. comparison, by comparing the peculiarities of civil law, family law, administrative law, criminal law in ancient China.

2. Civil Law

In early China customary law covered what in the West is considered private law or civil law. We are dealing with rules dealing with aspects of contract and property. In traditional Chinese law, things were reversed compared to Western systems where civil law preceded criminal law. As a result, the regulations of the criminal code aim at:

- either directly principles of civil law: issues related to debt and usury, land transactions, loans, pledge of property, sale of goods in the markets;
- either the indirect interpretation of a civil law as a basis for a private civil suit.

So-called "civil law" in ancient China had to do with property and interpersonal relationships between individuals, while criminal law aimed at enforcing public regulations and punishing illegal behavior that affected the community. The term "civil law" originates in ancient Rome rather than China.

The term *minlü* (民律) or *minfa* (民法) began to be used with the meaning of "civil law" in the late Qing Dynasty (清) and the Republic of China when the rulers tried to reform the traditional Chinese legal system with reference to Western law.

Given the relatively short history of this term, it is difficult to distinguish between *minlü* or *minfa* (civil law) and "criminal law" in ancient China. Zhang Zhaoyang believes that there was no civil law in Ancient China. The civil laws at that time were concerned only with the safeguarding of public rules and the power of the ruler. (Zhaoyang, 2014, p.14)

Recent research has shown that most of a magistrate's work involved resolving civil disputes, although the classic view was that Chinese judges were reluctant to intervene as arbitrators in any kind of civil dispute.

From this perspective, the reluctance of the judges to spend more time on these trials was determined by the fact that the Chinese civil administration was few in number while the workload of the magistrates was very high. Furthermore, early 21st-century scholars such as Philip Huang believed that the justice system in ancient China was not only fair and efficient, but also frequently used to settle disputes.

3.The Right of Ownership

The use of property in ancient China was classified into two categories, namely: above-ground rights (*tianpi*) and underground rights (*tiangu*). Thus, if they paid taxes and received official documents from the government, people who owned subsoil rights could claim ownership but had no rights to actively use the land. In return, owners of topsoil paid the owner of the subsoil a fixed rent (or a share of the income from what was produced on the land) not only for the right to cultivate and live on that land, but also for the right to independently sell or lease the land to another party. As a result, the party that owned the basement had no right to actively use the land or evict the landowner as long as another party held surface rights. (Kuchera, 2012, p.5)

Land, like other forms of property, was seen as owned collectively by the family and not by individuals within the family.

Another concept related to property rights in ancient China was *dianmai* (典賣/典), more commonly known as *huomai* (活賣/活卖), or conditional sales of property that allowed the seller (i.e. his family) to buy back the land at the original price (without interest). The concept was that the land, having been owned by one family for generations, should remain in the same family. From the Sui Dynasty onwards, women could not own

property directly, and for land to remain in the same family, it had to pass between male heirs following the rule of primogeniture.

Land in ancient China began to be sold and bought, divided into smaller lots or united into larger ones. As a result, in the beginning, the people only had the right to use the land they received, the state retaining its most important role in economic life. Later, a tendency develops to transform possessions into private property. From the middle of the first century BC in some kingdoms commercial transactions began with the land. The Qin period was marked by the intensive development of private land ownership due to the redistribution of the land fund and its transfer into the hands of the new nobility.

The presence of a representative from both parties at the sale-purchase deed was mandatory. According to some sources, women or state slaves were also not entitled to these purchases. The deed of sale was written in red cinnabar on copper tablets. The explanation lies in the fact that the old tradition was to record such acts with the blood of animals brought as an offering. Land or labour rental contracts were also practiced.

In order to stimulate agriculture, it was stipulated the right of everyone to work the land left fallow or abandoned by the owner. After a certain period, they were registered in the cadastral register under the name of the person who worked for them. In ancient China, especially in the first century BC, a series of laws were issued that aimed to protect small peasants who owned land and those who ended up in slavery due to debt.

In addition to land, slaves were subject to property rights. During the Yin period, slaves were the property of the state (having a status similar to that of cattle), and although they were owned by private individuals, they were not yet subject to sale and purchase. During the Zhou period, both the exchange and purchase of slaves became possible. In the V-III centuries B.C. there were two categories of slaves: public and private, with private slavery playing an increasingly important role. During the Qin period, the slave trade was free and quite widespread.

The custom of pawning one's children for debts was present throughout China. They were turned into slaves if their parents did not redeem them. Emperor Udi issued a decree freeing all slaves who had not committed heinous acts that would warrant punishment and came from families of free people. Those who sold themselves because of hunger, those forced into slavery and women forced into concubinage were also freed. It was forbidden to mark the slaves and those who opposed their release were subject to a series of punishments provided by the legislation in force at that time.

4. The Law of Obligations

Different types of contracts were known to Chinese Starodawong law. One of these was a barter agreement, which is gradually giving way to the contract of sale. A written contract was required when conducting commercial transactions, and a fee was paid in addition. The state controlled the purchase and sale agreements. In the IV-III centuries B.C. a special clerk recorded this category of transactions. For example, the contract for the sale of slaves was drawn up through a written "red document".

The contract was made in writing and verbally in the presence of witnesses. When concluding a contract for the purchase and sale of land, the presence of community representatives was required. Their names were entered in the deed of sale. The contract related to things that were not withdrawn from circulation, both movable and immovable.

The acquisition of land, slaves, weapons and other goods by contract and even donation was quite widespread. In the late Zhou era, the loan contract was formalized, and usury developed. The loan contract was drawn up with a debt receipt, the object of the contract could be money, grain or other consumable goods. Clauses relating to the debt, the registration of guarantees, the postponement of payment, the depositing of a deposit, the issuing of written undertakings were stipulated.

The creditor's inability to pay resulted in his having to sell his land, his family members into slavery, and often himself. The development of the loan contract led to the emergence of "debtor's slavery". In China, there was a form of renters living off the earnings of lending operations. Moneylenders often became merchants or government officials. They got rich by collecting loan interest that ranged from 5 to 20 percent per year.

In the V-III centuries B.C. land lease contracts were often concluded.

Lease contracts in ancient China were of two types: leasing land (lease) and hiring labour (personal employment). During the Qin period, the owner received 50% of the harvest as rent. In addition, the tenant paid state taxes. The ruination of community peasants and artisans led to the need to sell their labour to third parties for a certain period of time for a fee. Thus, they had to perform various jobs in agriculture, trade, handicrafts, in the building and repair of various constructions. Remuneration for work was given in monetary form or in kind (cereals, vegetables, materials).

5. Family Law

In Ancient China, during the Zhou era, the family was patriarchal with an ancestor cult. The husband had power of control over his wife, children, slaves and servants. The woman was completely dependent on the power of her husband, she had no personal property, her rights regarding inheritance were limited. The marriage was concluded by the parents.

Family ties were strong. At the head of a large family was the oldest man to whom all were subordinate: husbands and concubines, sons and grandsons, wives and their children, slaves and servants. The head of the family acted as the ruler, owner of the property. The concept of "father" was marked by the hieroglyph "fu" which expresses "the hand that held the rod", a symbol of punishing family members for disobedience. The foundations of marriage and family law were based on Confucian ideas about the family as the primary social cell, operating on the basis of natural laws in the general system of social order.

The main purpose of marriage was the reproduction of the family which was achieved primarily through the birth of male children, "so that a person can properly serve the deceased ancestors and be able to continue his line" (as written in Li Tzu). Lack of offspring was seen by Confucians as a manifestation of filial disrespect, the most serious of all types of parental disrespect.

In order to conclude a marriage, it was necessary to meet a number of conditions. The marriage was performed by the families of the bride and groom or by the groom himself, being concluded with a private agreement. In the event of its violation, not only certain material sanctions were provided, but also the criminal punishment of elderly people in the family.

Initially, marriages between relatives were allowed, then later they were prohibited, in addition establishing the rule that the bride and groom should not bear the same surname, in order not to mix related families by mistake. The lack of surnames in Chinese society led to a certain exception to this strict rule - when the husband bought a "secondary wife" (Li Tzu, Book I). There was little chance of a woman leaving her husband or protesting against it.

Marriage age limits were fixed: for men from 16 to 30 years, for women from 14 to 20 years, the state ensuring that they were respected. For this purpose, according to Chou Li's testimony in "Book XI" there was a special official who was in charge of drawing up lists of men and women who had reached the age limit and who checked whether they respected their obligations to the ancestors.

One of the fundamental principles of the established social order was the following: "One husband - one wife". He was acting in a strange way, demanding only the wife's strict fidelity to her husband. The husband could have "secondary" wives and women (mistresses), especially in the case of the wife's infertility, their number being determined according to the man's social status.

Obstacles to marriage were certain periods of mourning for the husband and his parents, as well as certain crimes committed by one of those who intended to marry. Marriages between people of different social classes were also prohibited, involving criminal liability, especially in the case of marriages of free people with slaves. A free man who married a slave was punished like a thief.

In traditional Chinese law, unlike most other Eastern legal systems, divorce was encouraged or directly ordered under the threat of criminal punishment in case of "violation of civil rights". Reasons for divorce were considered sufficient if the husband claimed that his wife was disrespectful to her husband's older relatives, was barren, seriously ill. Other reasons could be those related to the damage caused by insults, beatings, injuries, etc., to the husband and his relatives. The request for divorce could be made not only by spouses but also by their family members.

In ancient China the woman did not have the possibility to leave her husband or to protest the divorce. According to the rules of the time, the wife had to stay with her husband in the "life of the earth and the grave" and could not marry a second time (Li Tzu, Book XI). But also, the husband, in the situation where he asked for a divorce without reason, was threatened with a punishment consisting of hard labour. He could not divorce if the wife had nowhere to go or if she was mourning her parents, etc. The husband's responsibility for his wife was also expressed by the fact that for all her crimes, except for a serious crime or

treason, he had to pay her bail. In ancient times, a father could sell his children, except for the eldest son, who enjoyed several advantages over the other children.

In wealthy homes, polygamy and harems with slave concubines were widespread. A specific form of marriage was that of a relationship in which a man was married to several female sisters at the same time. Thus, the eldest sister became the main wife. The rest of the women were declared young wives or concubines. The main wife held a privileged position. All the younger wives and concubines of her husband were to respect and obey her. At the same time, among ordinary people, very often men and women did not start a family.

After marriage, the woman lost contact with her former family. The husband's power over her and the children was very great. The wife had no property, could not make transactions, could not speak in court. The dowry and all family property were administered by the husband. The wife was to remain for the rest of her life in isolation, being in a special half of the house. She was considered a great sinner if she left her husband's house. In one treatise it is said that "if a woman did not die in her room, then the tablet of her spirit should not be placed next to the tablet of her husband". The head of the family was responsible for the mistakes of his family members. He had the right to punish his family members. He was allowed to beat younger sons, wives or grandsons to death. As a rule, the father was not penalized for these "educational" measures.

Sons and grandsons who tried without permission to break away from the extended family or seize part of the wealth were harshly punished. Kinship ties, position in the family hierarchy determined the extent of punishments for violating family or social rules. For example, the theft by the father from the son was not considered a violation, instead denouncing the elder was forbidden.

The husband who did not divorce an unfaithful wife was punished, and her murder together with the lover was considered normal.

6. Hereditary Right

In the early stages of the development of Chinese society, the younger brother of the deceased was considered the heir to the family's patrimony. During the Shan-Yin period, hereditary legal relations change. Gradually, it was established that the father's fortune would be inherited by his eldest son from his first wife. In the absence of sons, other relatives of her husband were called to inherit. This order was officially recognized during the Zhou period. In addition, in the absence of sons and relatives, the widow of the deceased was called to inherit the property.

The heirs were responsible for the debts of the deceased. Later, the right to inheritance was recognized for both men and women, but, among the descendants, the former had priority in the inheritance. In addition to the mass of property and in cases established by law, rank, title, position was subject to inheritance.

In the case of inheritance of property, sons received equal shares, unmarried daughters - half of the sons' inheritance, and married daughters received nothing. The father had no

right to disinherit his sons, to increase the share of one son at the expense of another. Under Chinese law, donating land for religious or charitable purposes was permitted.

7. Administrative Law

Analyzing the documents of that period, we can conclude that the elements of administrative law were relatively well developed in ancient China. Their foundations were laid during the Zhou Dynasty. If we analyze the administrative structure, we find that the emperor occupied a privileged position, being above the law. Thus, the sovereign could both make the law as he saw fit and ignore the laws of the time.

Sometimes the emperor could change a capital decision submitted by the central judicial bodies for approval, but he always did this with reference to the facts of the particular case and took care to explain in his sentence the reasons for the proposed change. Occasionally the emperor even accepted a protest from his officials if they felt that the change was not right and accepted that they had to act according to the existing law.

Although there are no collections of administrative laws that have survived to this day, about half of the Tang Code (71 articles) was recreated by the Japanese scholar Niida Noboru (1904-1966) and published in 1933 under the title "Collection surviving Tang Dynasty laws". This was accomplished by collecting and analyzing over a hundred Chinese sources from the Tang period containing fragments of laws.

A revised and expanded edition, including the author's reconstruction of the texts and a comparison of Chinese and Japanese law, was published in 1997. In 1989, a Chinese translation of the study was published. (Noboru, 1989, p.7)

Fragments of administrative legislation and Tang laws survive in other collections and in their original form among the Dunhuang manuscripts. The most significant one was discovered in 1999 in the Tianyi Ge Library (Tianyi Pavilion) in Ningbo city.

8. Criminal Law

China's criminal law was based on the principles of orthodox Confucianism combined with the ideas of legalism. The main purpose of the law was determined by the repression for the commission of an illegal act. The rules of criminal law were vague.

A characteristic of the traditional Chinese criminal procedure is that we could characterize it as an "inquisitorial" type system in which the one who played the role of judge (usually the district magistrate) was the one who actually conducted the entire public investigation related to committing a crime.

The criminal was seen as a "vile man", his "evil" being determined by the fact that he was the bearer of criminal, criminal vices, which, depending on the nature of the crime, could destroy either the whole world or order, harmony in the social group in which the perpetrator belonged to.

According to the Confucian principle, when a person is guided by goodwill, he does not break the law. This opinion served as the basis for a specific doctrine regarding the

form of guilt. The criminal will begin to be taken into account when determining the punishment. A number of requirements for considering the will of the offender have been enshrined in law since 120 BC. This was why Chinese law began to classify crimes into premeditated and deliberate illegal acts that were committed with intent, without it, or by mistake. Thus, one type of punishment was imposed for the commission of intentional slander, another lighter type of punishment was imposed for a denunciation, which was eventually confirmed. The type of punishment for causing bodily harm was determined on the basis of whether it was inflicted with "vile intent" or during a fight.

The concept of crime was associated with the manifestation of a person's criminal will. The measure of the guilt and the severity of the punishment were determined by the spiritual state of the guilty.

Chinese jurists distinguished the mastermind of the crime and his accomplices. In criminal law, the mitigating and aggravating circumstances defined by the intellectuals who studied Confucianism, called for showing respect for the elderly, compassion for children and pregnant women.

In ancient China, the following types of crimes were identified: intentional and deliberate, committed intentionally and unintentionally, committed by mistake. Concepts such as stages of crime, murder, attempted crime, complicity in crime, the organizer or person who planned the crime, group crime, mitigating and aggravating circumstances were known.

From the perspective of Confucian morality, the classification of crimes includes the "10 evils":

1. The conspiracy of rebellion against the emperor
2. Serious disobedience
3. Conspiracy, betrayal
4. Disobedience, disobedience
5. Injustice, depravity.
6. Expressing great disrespect.
7. Expression of filial disrespect
8. The disagreement
9. Injustice
10. Incestuous sexual relations

The following types of crimes were classified:

a) State crimes: treason against the emperor, rebellion, conspiracy against the emperor, rebellion, disobedience to the emperor's orders, speaking evil against him, possession of prohibited literature, etc.;

- Crimes against property: robbery, destruction of someone else's property, theft of property, animals, documents;
- Offenses against the person: murder (intentional, reckless, in combat), bodily harm (injury), slander, assault, slander, abuse, etc.;
- against family members: adultery, rape, seduction of a woman by an official, disrespect towards parents, husband, older relatives.

- Offenses against morality: disrespecting the father or the eldest in the family;
b) Offenses against order / leadership: bribery, receiving a gift from subordinates, absenteeism, revealing state secrets, disobeying the head of state, disobeying the boss, disobeying the boss's order, desertion, cowardice, disrespect for the authorities, failure to show up until the deadline at the meeting place etc. (Faizullina, 2013, p.10)

The prescribed sanctions were:

- Death penalty;
- Transformation into a slave;
- Corporal punishment;
- Fine.

According to the Tang Dynasty Code, the punishments could be:

- hits with sticks (from 10 to 100);
- the death penalty (beheading, strangulation, dismemberment of a corpse);
- hard work (from 1 to 3 years);
- distance from 2000 to 3000 *li* (1-500 km).

Conclusions

As we underlined in the introduction of this research, the law specialists in the Western countries have not approached the benchmarking of ancient Chinese law branches. So, this article identifies the peculiarities of civil law, family law, administrative law, criminal law as components of the Chinese legal system that helps us to understand the beginning of law development in this region of Asia.

It should be noted that, contrary to what one might think, the Chinese have written their own laws since ancient times, a peculiarity which compares them, for the historical and characteristic period, with the Romans. (Gernet, 1985, p.102)

Analyzing the evolution of the legal system in ancient China, we note that when considering the establishment of a new law, care was taken to evaluate its relationship with the existing law. Laws were made through government officials, then brought to the attention of the emperor for him to authorize and enforce on his subjects. (Shouyi, 1997, p.74)

Equality before the law has never been officially accepted as a legal principle and legal practice. The traditional Chinese legal system, as an instrument of the emperor, never met powerful counterparts and therefore never tolerated the existence of foreign powers and legal rules other than those of the sovereign. (Semigin, 1999, p.63) In ancient China the people never attributed their laws to a divine lawgiver.

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