

NOTES ON THE DEVELOPMENT OF KOREAN LAW

Michal Tomášek*

Abstract: *Foreigners may find the Korean legal system difficult to understand because it has its own unique and traditional legal history and a system different from those of Western and other countries. Although the traditional Korean legal system has no separation of powers and the judicial function was incorporated with the executive function, Korea had its own legal system even before the modern judicial system was first introduced to Korea at the end of the nineteenth century.*

Keywords: *Korea, legal history, Chinese law, Japanese law*

It is always fairly difficult to establish criteria for when or in which country a legal culture arose. The theory of the rise of statehood in the Far East usually uses a test of whether a given state form fulfils a military-administrative or a penal repressive function. Documents about the functioning of both or some of both state functions are usually difficult to access or are unclear.

BEGINNINGS OF KOREAN LAW (2333–54 BC)

The year 2333 BC is given as the beginning of the existence of Korean law, when the Gojoseon dynasty emerged on the north of the peninsula.¹ This dynasty not only exhibited traits of military-administrative functions but its penal repressive power was even codified in the Law of Eight Articles. It is a sort of *lex talionis*, in which the principle of “an eye for an eye”, a tooth for a tooth applies: whoever kills another will himself be put to death.² Ancient Korean law is characterized by simplicity and severity. Codification was minimal, and the application of law, specifically criminal law, was strongly bound to religious rites. Just like the ancient Chinese, ancient Koreans believed in “the natural order of things”. Just as in nature certain unchangeable rules, such as that the sun rises in the morning and sets in the evening, apply, so even in societal relations natural rules exist, the maintenance of which it is necessary to protect by law. Therefore it was necessary to punish all infractions of this natural order of things without regard to the seriousness of the offence. From the ancient Korean codification it can be seen that severe punishments were established for murder or endangerment of health. So it is possible to infer that traditional Korean morality assigned great importance to the value of man, his life and creative endeavour. It is worth noting that the law protected private property with sanctions on theft.

The relationship to China and to its legal system links and divides the legal systems of the Far East. China, as the largest and most significant East Asian state created a compact legal system, the formation of which was completed at the beginning of our era in the pe-

* Professor JUDr. PhDr. mult. Michal Tomášek, DrSc. Professor of European law, Vice-Dean and Head of Department of European Law of Charles University in Prague, Head of Editorial Board of The Lawyer Quarterly. The present article was created under research project of Charles University in Prague PRVOUK 06 “Public law in context of Europeanisation and globalization”.

¹ FABRE, A. *La grande histoire de la Corée*. Paris, Favre 1988.

² CHUN SHI-YONG. *The Legal System of Korea*. Seoul 1975.

riod of the height of the government of the Han dynasty (202 BC – 220 AD). Over the course of time the Chinese legal system was accepted by neighbouring states, either willingly, as in the case of Japan, or by force, particularly in Vietnam. Korea stands somewhere in the middle between willing and forced reception.³ On the other hand, in comparison with other East Asian states, Chinese legal culture penetrated relatively early. Signs of Chinese political and also political influence are apparent in the Gojoseon state even in the 3rd century BC, a good two hundred years earlier than in Vietnam or Japan.⁴

The entrance of the influence of Chinese legal culture in Korea essentially agrees time-wise with the expansion of Confucian thought, and this still in its original, unrevised form.⁵ That is to say, in China in the year 213 BC the ruling Qin dynasty ordered the burning of all Confucian books, and failure to follow this command was subject to the punishment of “*zu-xing*”, that is the execution of not only the convicted person but also his family. Because the Qin dynasty did not govern long (until 202 BC), they did not succeed in burning all books designated for liquidation, and many books were able to be concealed. In the walls of Confucius's house, for example, texts were found that were still in the orthography of the Zhou period. The majority of texts written on bamboo tablets were, of course, lost or were jumbled up. Chinese scholars however knew texts by heart and after the fall of the Qin dynasty they began to copy them. In this way so-called “new texts” appeared, in contrast with the “old texts” that had been able to be preserved from the period prior to the government of the Qin dynasty. Among the “new texts” there was a lot of credible material, but, unfortunately, there could also be found those scholars who made up texts and published them as authentic transcriptions of “old texts”.

In the period of the rule of the Chinese dynasty Han, in the year 108 BC, the Korean Gojoseon state fell under Chinese influence in its north region, and Korea thus for the first time came under the influence of Chinese law. The Chinese brought to the Korean land not only its own political administration and ideology but, of course, also its advanced legal system. In that period the Chinese legal system was already markedly developed and its place in the legal culture of the Far East is well comparable with the place and significance of Roman law in the legal culture of Europe. This classical Chinese law had a so-called “mixed law” character, because, as a legal system, it was based on written law, on both custom and judicial precedents. In conquered lands, including the Korean land, they especially sought to enforce public law. It is worth noting that the Chinese essentially respected the private customs of the native population, in so far as it was not in significant conflict with Chinese public law code. Customary law constituted the weakest element in the Chinese system of “mixed law”. In contrast, in the area of written law, the original Eight Articles, under the influence of Chinese domination, grew to sixty. It is possible to state that through the relatively strong penetration of Chinese influence on the Korean peninsula that the Koreans received the Chinese legal system without opposition and rather willingly, but they were also capable of preserving independence to a certain extent and maintaining the system of traditional Korean principles, particularly in private customs.⁶

³ TOMÁŠEK, M. *Dějiny čínského práva*. Praha: Academia, 2004.

⁴ TOMÁŠEK, M. *Přehled dějin vietnamského práva*. 1. vyd. Praha: Eva Rozkotová - IFEC, 2008.

⁵ KIM HABOUSH, JA HUN. *The Confucian Kingship in Korea*. Irvington, Columbia University Press 2001.

⁶ *Legal System of Korea*. Korean Culture Series 5th ed. International Cultural Foundation. Seoul, Si-sa-yong-o-sa Publ. 1982.

PERIOD OF "THE THREE KINGDOMS" (54 BC–668)

From the very beginning of this period of Korean history, named based on the three kingdoms existing on the Korean peninsula at that time - Goguryeo, Baekje and Silla, a protracted conflict existed with China. This somehow did not in any way prevent avid adoption of Chinese culture and law. At the beginning of our current era all three kingdoms displayed features based on the Chinese model in their code. Of course this was also with a Confucian ideological base of law. All three kingdoms adopted Confucianism as official ideology and paid attention to the development of Confucian educational institutions. In particular, the Silla state regarded Confucianism as the mainstay of official central power. Of course, it is necessary to note that the influence of Chinese law was not consistent. In particular the Chinese concept of forming state administration was not established. The Chinese Han dynasty introduced a graduated system of state examinations in order to minimize the influence of family groups and of the hereditary aristocracy on the state apparatus with the goal of maintaining the monopoly of the centralized imperial power. In Korea during the period of the Three Kingdoms this system did not get established. Power was concentrated in the hands of the strongest families, particularly those from which the rulers came. Public servants were recruited from the ranks of the aristocracy. A large role in the legal and political system of all three Kingdoms was played by the councils of tribal leaders, who served not only an advisory function in relation to the rulers but also at the same time, primarily in the Silla state, as the highest judicial organ.⁷

Another significant characteristic of the divergent evolution of Chinese and Korean law of this period was the treatment of relations to land. In China the Han dynasty began a gradual shortening of private ownership of land in its laws, so much that at the turn of the era there remained only an empty ownership. From such a state as this it was only a small step to the liquidation of private ownership of land, which the Emperor Wang Mang achieved in 9 AD. The Wang Mang reform legalized the liquidation of private ownership of land and slaves. Land of all types and all slaves were declared to be the property of the emperor. Against such a measure there naturally arose the opposition of those who it most infringed on, that is rich landlords, but also rich officials who themselves owned land. The emperor was unable to confront such opposition, and for this reason the land reform was repealed after three years, in 12 AD. Of course, the repealed reform left the seed of state ownership of the land in place, and from this seed in 280, when a new land reform was successfully carried out; in later centuries a perfect tree of the organization of land relations grew, which influenced the land relations in neighbouring countries, especially Japan, and, in particular, lasted in China until the fall of the empire in 1911. After all, not even the Communist republic after 1949 rejected the fruit of the imperial system of land relations.⁸ The essence of the land reform of the year 280 is the legal relationship between the state, as owner of the land, and the user. The user is able to behave towards the land as though it were his own, but he was bound by certain goal-directed purpose of this land (arable land, land for cultivating mulberry, land for cultivating hemp, etc.) In relation to

⁷ HENTHORN, W., E. *A History of Korea*. New York: Free Press, 1971.

⁸ TOMÁŠEK, M. *Dějiny čínského práva*. Praha: Academia, 2004.

the state the user of the land was burdened with certain obligations, and these both material and personal. As material obligation, for instance, that of handing over to the state a certain part of the produce from the land; as personal obligation there was, for example, the performance of some tasks or services for the state. This especially concerned state lands, given to state officials for their use, but also to other forms of obligation in the interest of the state, for example military obligation. The whole system of land relations can, with definite license, be compared to the British “*law of property*”, which a ruler has to the land and to his “subjects”, he grants “*title to the land*”, the so-called “*estate*”. In Korea, under the influence of Chinese law, the concept began to be introduced that all land belonged to the king. Nevertheless this opinion did not succeed in changing the form of basic land reform. On the contrary, the aristocracy, hereditary officials and military commanders obtained land in return for their service, or they simply took it, whereby the concept of sovereign land was taken as their own.

Apart from Confucianism, Buddhism strongly established itself in Korea, just as in other countries of the Far East. Buddhism arrived in China from India through Turkestan, but also by sea routes. In the Third to Sixth century in China and, by means of China, in Korea it was among the most significant ideologies in the land. The paralyzed central power was unable to maintain the official doctrine of Confucianism, and therefore Buddhism achieved considerable room in China and caught on very easily there. On the other hand, the premise that Buddhism in this time overshadowed Confucianism or in the end completely displaced it would be to exaggerate, even though it is true that many rulers of smaller Chinese states accepted Buddhism as official teaching.⁹ The first record of Buddhism in Korea comes from the year 372, when the monk Sundo supposedly brought it to the country from China. All three ruling kingdoms on the Korean peninsula before long accepted Buddhism as their official religion not only thanks to openness to receive everything that was coming from China but also as a suitable means for centralizing state power from above and for support of the administrative structure from above. Buddhism in Korea, just as in China, spoke mostly to the popular social levels. Above all, its “pantheon”, beginning with a fat, laughing Buddha, with whose arrival many later generations of Buddhists, but even the rest of Koreans, associated, even with the broad gamut of gods and spirits, with hope for a better life and with the path to blissfulness. Korean scholars studied the Buddhist sutras and tried to relate the thoughtful depth of Buddhist teaching to Confucianism. Out of this knowledge and this synthesis there had earlier arisen in China the Buddhist teaching “Chán”, later known under the Japanese name “zen”. “Chán” Buddhism primarily derived from the principle that it is necessary to teach oneself to live and enjoy life in the current moment, while one is on earth. On first sight it might appear that this was rationalistic egoism, but “Chán” Buddhists did not at all invite superficial self-indulgence. Their ideal was the free individual, freed from all worries, who will be able to live only for one’s self. In this point of view “Chán” Buddhism meant a definite break from the traditional Chinese rejection of egoism.¹⁰ Of course “Chán” Buddhists consequently did not call for suppression of collectivism but rather emphasized meditation as first. They created sudden enlightenment as the opposite of mechanical memorizing of sacred texts.

⁹ GERNET, J. *Les aspects économiques du bouddhisme dans la société chinoise du V au X siècle*. Saigon 1956.

¹⁰ DE BARY, W. T. *East Asian Civilizations*. Cambridge (Mass.), 1988.

It remains to add that in the Far East the idea of “religion” did not, as in Catholic Europe, stand for a homogenous system. The moral code elaborated Confucian teaching, but Buddhism primarily brought a concrete specification of divinity. And at the same time Buddhism brought a religious organization and religious law. Therefore Buddhism, as a strong ideology of its time, obtained the support of the powerful, and its centre, the Buddhist monasteries, became important centres of this teaching. Primarily in the state of Silla until the end of the Sixth century many Buddhist monasteries, with thousands of Buddhist monks, were founded. Buddhist monasteries enjoyed significant privileges. They were freed from taxes, and this advantageous economic position enabled them to concentrate land lots and workforce in their area and to thus acquire significant assets. Acquired properties were, it is true, communal, but a number of monks amassed great wealth, and in the framework of these monasteries the institution of private ownership, protected by local tradition, existed *de facto*. Buddhist monks were freed from numerous obligations to the state, including work and military obligations. The privileges of Buddhist monasteries gradually constituted their own legal system, which could be further characterized as “religious law” or “Buddhist law”. Buddhist law originally had the character of customary law, especially in the area of land and other property relations, but with the passage of time it acquired the form of written law. By the Sixth century an extensive collection of legal rules for the protection of Buddhist monasteries and Buddhist priests – bonze – had been created, but also for the protection of rules establishing the internal order of these monasteries and the responsibilities of bonzes. Different from China, where the Buddhist system was strictly separated from public administration, all three Korean kingdoms, on the contrary, interlinked spiritual and state administration. In particular the Silla state created a hierarchy of spiritual administration on the level of all land administrative units and summoned some monks into state service as imperial advisors.

Silla period (668–918)

The division of land on the Three Kingdom Korean peninsula markedly weakened, especially in the period when in neighbouring China the centralization of state power again strengthened. After the re-unification of China by the Sui dynasty in the year 581 the Korean Kingdom was confronted with increasingly greater pressure of Chinese power. This came to a head with the entrance of the powerful Tang Chinese dynasty (618–907) at the beginning of the Seventh century. In the end the state of Silla succeeded in the year 668 to unite the whole peninsula and force the Chinese armies out.

The period of the rule of the Tang dynasty in China is considered, if not directly as the pinnacle, then certainly as the golden age of Chinese literature and culture, all theatre and art on the whole. The Tang period is, of course, also the golden age of Chinese law. It is not even an overstatement to claim that the Chinese legal system reached, in the Tang period, its peak perfection and world renowned. Tang law expanded into neighbouring countries and permanently influenced the local legal systems there.¹¹ In the year 620 the first Tang emperor, Gao-zu, ordered lawyers to prepare a new Tang codification. The first edition of

¹¹ PALÁT, A., PRŮŠEK, J. *Středověká Čína*. Praha: Academia, 2001.

the **Codex of the Tangs** was carried out in the year 624. The text was afterwards repeatedly re-worked and came into being in its definitive version in the year 651. In the year 653 the Explanation of the Codex of the Tangs was published, which became the fundamental document of the codification of Tang law. While Tang criminal law did not mean any basic upheaval in the legal evolution of China to that time, while respecting the structure of the so-called “Five Punishments”; the Tang legal system brought overall change to the system of administrative law. The new codification, Six Tang Laws, came out of the ancient Chinese concept of six branches of administrative offices, the so-called “six laws” and their corresponding six administrative offices. The Tangs filled out this ancient Chinese framework with new content not only as concerns the content of the “six laws” but also in terms of the concept of six administrative offices, called since the Tang period “the six ministries”.¹²

In the year 645 the Japanese emperor Tenji proclaimed an era in his country, the motto of which symbolizes the goals of government: an era of “great changes”, in Japanese *Taika*. The essential contribution of the Taika reforms in the area of law was the extensive and first collective Japanese codification. Its concept and structure was clearly influenced by the Chinese codification of the Tang dynasty. The Edict of Taika, proclaimed in the year 646, was inspired particularly in the area of state administration by Chinese central administration and land administration, even though with certain modifications; for example, in place of “six ministries” the Japanese principle of “eight ministries” functioned, etc. Also in Korea in the Seventh century Chinese law strongly asserted itself. Historical findings of the codification of the Silla dynasty bear witness to its great similarity to the Codex of the Tangs, especially in the area of the functioning of local administration and the system of land relations.¹³

Although the Japanese and Koreans tried to fill out the Chinese experience, they did not ever succeed in achieving the perfection of the system of Chinese state administration, particularly of state examinations. The thought of competitive selection of candidates for state administration appeared already in the First millennium BC, but to a greater extent it began in the Third century BC. In that period officials mostly came from houses of nobility, and even from the clergy. After the abolition of the privileges of nobility during the Han dynasty for the original motive of bringing quality workers into state administration, the purpose was added of limiting the power of large noble houses, which were making hereditary claims on important positions in state administration. Since the Han period competition became practically the only possibility to enter into the governing elite and to prepare oneself for governing the state in the spirit of the Confucian traditions.¹⁴ The system of selecting state officials through the aid of examinations had manifold meaning. First it ensured that qualified, experienced and enterprising people got into state service. Moreover they were people stimulated by official advancement and, due to this, they were efficient people.¹⁵ Furthermore the system of state examinations limited the influence of

¹² TOMÁŠEK, M. *Dějiny čínského práva*. Praha: Academia, 2004.

¹³ TOMÁŠEK, M. *Přehled dějin japonského práva*. 1. vyd. Praha: Eva Rozkotová - IFEC, 2007.

¹⁴ KRACKE Jr., E. A. *Civil Service in Early Sung China*. Cambridge (Mass.) 1953.

¹⁵ BALASZ, E. *Chinese Civilisation and Bureaucracy*. London 1964.

powerful groups and influential houses. In essence, that is, it excluded hereditary privileges of power and in this also diminished the danger of creating fractions and powerful interest groups. In Japan and Korea the situation actually came to one in which members of the aristocracy by birth and owners of large plots of land pushed themselves into functions of power. Considering that in not even one of the mentioned Far East states was any land reform able to be achieved, this resulted most of all in the concentration of large land properties. This situation contributed in Korea in the Tenth century to the destruction of the state of Silla and in Japan a hundred years later to abandoning the model of the imperial state and to the entrance of the Shōgunate and its government of military commanders.

GORYEO PERIOD (918–1392)

The legal system of the state of Goryeo was linked to the reception of Chinese law not only in codification but also in the conception of the state and political systems. The crisis of the Silla state taught the rulers of Goryeo that the Chinese conception of state leads to strengthening of centralized autocratic power and to the weakening of the influence of powerful interest groups.

In the area of central administration the system of “six ministries” (Ministry of State Administration, Ministry of Military Affairs, Ministry of Taxation, Ministry of Law Enforcement, Ministry of Rites and Ministry of Public Works) was strengthened. In accord with the Chinese example the system of “three powers” was assumed. This was not, of course, a matter of division of executive, legislative and judicial power, which we are familiar with from European political and legal teaching. Judicial power was a component of executive power, and the ruler held legislative power in his hands, so executive power in the traditional Chinese sense of the word included even these two components. As two further powers in the Chinese conception were the power of inspecting and the power of testing. The Goryeo state established the Chinese system of state examinations as an instrument for strengthening the central power of the king. King Sungjong even let the State University (Kukchagam) be founded in the year 992 for the education of officials.¹⁶ The Goryeo state, also in accord with the Chinese model, established an agency of inspection power, the so-called “censorate”.

The main task of the censorate was to determine whether all members of the state administration carried out their functions properly, whether this did not lead to interference with obligations from state officials, or whether state officials did not even abuse their authority. Because the judiciary was a component of state administration, the censorate performed its functions of inspection also on judges. During its inspection activities the censorate obtained a lot of other important information. It learned about moods in the state, about prospective threatening dissatisfaction in certain regions, or about potential unrest. Therefore it was able to effectively inform the ruler about everything that was happening in the country and what might have significance for the further progress of the state.¹⁷ The

¹⁶ *Dragons Progress Development Administration in Korea*. Gerald E. Caiden, Boon Woong Kim (eds.). West Hartford Connecticut, Kumarian Press 1991.

¹⁷ PALÁT, A., PRŮŠEK, J. *Středověká Čína*. Praha: Academia, 2001.

activity of the censorate fell appropriately into a triad of powers – executive, inspectorial and testing – and in modern terminology it could be said that these were allotted according to some sort of system of “*checks and balances*”, on the basis of which one of the separately constituted state powers requests the cooperation of another state power. Never, however, in such a way as in later European and American democracies for the purpose of safeguarding laws for the government or even for protection of basic human rights. In China and in Korea it was a matter of something else. State administration had to be effective for absolutist management of the state but at the same time loyal, so that officials would not be able to abuse their station at the expense of the emperor.

In the Goryeo period it was not only a matter of stabilization of the Korean legal order but also a distinct leaning toward the Chinese, that is Chinese-Vietnamese-Korean, legal family.¹⁸ As emphasized above, approximately from the Tenth century the territorial influence of the Chinese legal system on the Far East was weakening. Japan in particular begins to extricate itself from this influence and moves over to a new system, the so-called “state of orders and punishments”.¹⁹ In Japan, on one hand, they did not manage to significantly establish the Chinese system of state (that is, imperial) ownership of land. Further the competitive system of selection of state officials did not take hold. Both led in their own way to the result of strengthening military autocracy and the creation of the Shogunate, where the emperor was only a mere puppet. Beyond this, the traditional Japanese understanding of the world considered a mobile military force as primary, while the official was solely wage-earning staff. In China it was precisely the opposite. The foundation of the state was the official, whereas the soldier was merely a mercenary.²⁰

In the period of the diversification of East Asian laws into the Chinese legal family and the Japanese legal family, Korea leaned towards the Chinese system. Not only because it had taken hold in the country relatively well but also for external reasons. In the Fourteenth century China and Korea became victims of the Mongolian invasion. The Mongolians, who respected Chinese law, not only assumed it for themselves but also through their expansions contributed to its further widening and strengthening, particularly in Korea, where the Goryeo dynasties held control for a full 90 years, or in Vietnam. In contrast, the failure of the Mongolian campaigns in Japan understandably influenced further development of Japanese law, and this also in connection with the internal political situation.

JOSEON PERIOD (1392–1910)

The fall of the Yüan dynasty in China and the accession of the Ming dynasty meant not only the restoration of Chinese law of the pre-Mongolian period but also a significant strengthening of the influence of Chinese law on Korean law. In this same period of the Ming dynasty in China, in Korea the Joseon dynasty came into power, which let the codification the Codex of the Great Mings be translated into Korean and allowed some specific

¹⁸ DAVID, R. *Les Grands systèmes de droits contemporains*. Paris 1971.

¹⁹ MEHREN, A. von et al. *The Law in Japan*. Cambridge (Mass.) 1963.

²⁰ LANCIOTTI, L. *Il Diritto in China*. Firenze 1978.

elements of Korean law be enriched by it. In the year 1397 the Joseon dynasty published in Korea the Six Laws for Government and Salvation. This codification, of course, was by far not a Korean copy of the Chinese codification. Inspiration from Chinese law derives from its long-time influence on Korean law, but the Six Laws for Government and Salvation arose as a collection of the decrees from the last kings of the Goryeo dynasty, including a list of private law customs of the time. From this it follows that, just as in China, so also in Korea at the end of the Fourteenth century the principle of recognizing the law of ancestors and binding to the best traditions of the national law of the pre-Mongolian period strongly applied.

The Korean codifications were definitively completed in the mid-Fifteenth century with the acceptance of the penal law codification, The Collection of Criminal Law, from the year 1453 and the codification of administrative law, The Great Codex of State Administration, from the year 1470.²¹ Chinese and Korean law bear witness to great closeness in the Fourteenth and Fifteenth centuries. It is true that small differences existed here – for example, in hereditary law in China only male descendants inherited, while in Korean law inheritors of both sexes were equal; nevertheless, until the beginning of the Twentieth century both legal systems evolved in very close association.

The Korean legal order of the Joseon period was elaborated on to great perfection in the sphere of criminal procedure. Criminal proceeding was governed by the principle of inquisition. The judge – the inquirer – centralized in his hand all procedural acts, and he himself collected all material pointing to conviction, but also to the defence of the accused, and he alone also made the decision in the matter. The accused was the passive party of the trial and his rights were very limited. The Korean judicial trial did not, in principle, have the form of a suit as is the modern accusatorial process, where the plaintiff is master of the suit (*dominus litis*). In Korean procedural law the regulations of jurisdiction were substantially worked out, and this as:

- subject-matter jurisdiction,
- personal jurisdiction,
- instance jurisdiction.

From the viewpoint of subject-matter jurisdiction, apart from municipal courts, military courts also existed for prosecuting military persons or military criminal acts. In the capital city of Seoul there existed a special court for land registry and population statistics. With respect to personal jurisdiction priority was given to the principle of *forum domicilii*. Consequently if the criminal act was committed elsewhere than in the jurisdiction of the domicile of the accused, the court where the criminal act was committed must request the court in the domicile of the accused to issue a warrant.

During its decision making the court proceeded from a presumption of guilt. The main goal of the process before the court at the time was not to prove the guilt of the accused, which was presumed, but rather to obtain his confession. An explicit and written declaration of the accused that he feels guilty, which the accused must sign in his own hand,

²¹ CHUN SHI-YONG. *The Legal System of Korea*. Seoul 1975.

was considered a confession. Should he not know how to sign in writing, his thumb print took the place of his signature. The court was supposed to obtain a confession above all with the aid of proof; if the means of proof did not suffice, even persuasive means of physical force were permitted. The degree of using physical force in obtaining a confession was mostly given by law or judicial precedent, but in practice it often depended on the volition of the court official. When there was a new king or on important occasions an amnesty was proclaimed. Traditional Korean law recognized only one form of amnesty, a grant of grace, or a lessening of already ordered punishments. In a practical sense amnesty thus was applied solely to sentences of imprisonment or exile, which could be in this way shortened by a few years.

When Japan established the Meiji reform in the year 1868, this change meant a rebuilding of Japanese law not only in accord with the Western model, mostly the German example, but the Japanese model also influenced neighbouring states, primarily China and Korea.²² While Chinese legal reform at the turn of the Nineteenth and Twentieth centuries was relatively protracted, the Korean government introduced a written constitution as early as the year 1894. In this same year the Office of Legal Affairs was established, which assumed the legislative functions but also the highest function of justice. The separation of judicial and legislative powers came about by a royal decree in the year 1895.

PERIOD OF JAPANESE DOMINATION (1910–1945)

Different from other countries of the Far East, which coped with the reception of western law directly through confrontation with individual families of continental or Anglo-American law – for example, in Japan with German law, in Vietnam with French law, etc. Korea assumed Western legal system almost by exception, “filtered” through Japan. It was subject to Japan from the year 1910 until the end of the Second World War. The Japanese behaved in Korea as colonizers, and so they imposed on the country their own relatively well developed legal order, built after the Meiji reforms mainly in accord with the German model.²³

As some sort of external appearance of the organic nature of the new codification of law, accepted in accord with foreign models, in the Japanese environment, there is its collective title “The Six Laws”.²⁴ The codification of Japanese law is, since the periods of the Meiji, in reality structured as six main codifications:

1. Constitution;
2. Civil Code;
3. Commercial Code;
4. Criminal Code;
5. Code of Civil Procedure;
6. Code of Criminal Procedure.

²² JOUON DE LONGRAIS, F. *L'Est et l'Ouest, institutions du Japon et de l'Occident comparées*. Paris 1958.

²³ KITAGAWA, Z. *Rezeption und Fortbildung des europäischen Rechts in Japan*. Frankfurt 1970.

²⁴ KAWASHIMA, T. *The Legal Consciousness of the Japanese*. Tokyo 1967.

The Constitution of the Great Japanese Empire, also called the Meiji Constitution, was declared on 11 February 1889, the day symbolically associated with the anniversary of the declaration of the Japanese state in the year 660 BC. The ceremony of handing over of the Constitution by the emperor into the hands of the prime minister was to symbolize the inviolability of the Constitution as a gift of the emperor. However, it was not only a symbol of an act of presentation. The Constitution was in fact drafted as an expression of the supreme power of the emperor. The emperor was eternal, untouchable and sacred and became the source of all power – executive, legislative and, in a certain sense, also judicial. In the sphere of executive power, he appointed the prime minister and the government; he declared war and made peace, ratified international agreements; he was the highest commander of the army and the military navy. He named generals and leaders and officials of the general army staff and of the military navy. The Japanese theory of constitutional law names this constitutional conception, derived from the absolute power of the Emperor, “the imperial system”.

The Civil Code was proclaimed as Act No. 89 from 27 April 1898. Above all the general part of the Civil Code contained a detailed regulation of legal subjectivity. Considered as legal subjects were natural persons, including conceived children not yet born, as well as juridical persons. The legal capacity of natural persons was restricted by age as well as by gender. Only the amendment of the Civil Code from the year 1947 also gave full capacity for legal actions to married women. The Civil Code resolved restricting of capacity for legal actions for reason of mental ability by adopting the institution of a guardian. Consent of an authorized state institution was needed to establish the juridical person. The concept of property rights corresponded with the concept in the German civil code. The Civil Code introduced into Japanese law, and by means of it also into Korean law, the continental concept of property rights; but also institutions such as possession, common property ownership, tenancy, easement, or mortgage. Even though both Japanese and also Korean law accepted the principle which gave preference to individual ownership over that of the family clan, the law had to, out of respect for traditional morals, recognize the institution of family clans and heads of family. As mentioned above, in the Japanese Civil Code there even appeared some elements of French law, for example that the possession of movable assets is considered as ownership. In connection with the tradition of land relations in the Far East, including Japan, the principle of *superficies solo cedit* did not apply according to the Japanese Civil Code. A construction built on the land of somebody else could be the property of the builder. In the sphere of the law of obligation the Civil Code introduced thirteen nominate contracts – sale, exchange, donation, lease, use, procurement of things and service, or for carrying out work, delivery, deposit, incorporation, instalment payment, compromise and settlement. The Japanese Civil Code took note of certain developments as far as the concept of liability is concerned. Originally it dealt only with fault liability. Within time there also appeared liability without fault. New family law introduced the concept of marriage as an agreement that had to be closed before a state authority. Marriages closed only by way of traditional ceremonies were not illegal, but legally did not exist, even though a number of Japanese remained in them. The concept of marriage as an agreement made divorce easier, which became possible not only by court decision but also by mutual agreement of spouses. Inheritance law was linked to principles of line of descent according to traditional Japanese law. The heir of the head of the family clan was

the oldest male descendent, who succeeded the head of family in all family relationships, both possessions and family governance. The traditional line of descent was abolished in 1947.²⁵

Japan established the dualism of civil and business code, by which it differentiated itself, for example, from China, where the reform of the 1930s was based on the codification of commercial law contracts in civil law and of legal personality in commercial law relations; they amended specific rules, for example the General Act on Businessmen from the year 1914 or the Act on the Regulation of Business Corporations from the year 1931.

The reason for this difference between the present day Japanese and Chinese legal system can be the reality that Japan, just like China, traditionally pressed for state regulation of business, especially foreign. Nevertheless, on account of the instability of political power, state dirigisme of commercial relations was unsuccessful in Japan in being brought into realization to the same extent as in China, where officials became the sole instruments of managing business. Perhaps this is dependent also on the different position of officials in Japan and on the position of Japanese businessmen, who were so low in the old Shogunate hierarchy that it was not of much worth to military nobles to deal with them. No matter how it was, after the Meiji reforms the commercial law was successfully established in Japan without difficulties which were comparable, perhaps, with the establishment of the Civil Code.²⁶ From the year 1881 the state conducted very liberal politics towards business, and state interferences were very limited. Not until after the great economic crisis were principles of state intervention announced in Japan, in the year 1930; for example, the obligation of companies to create cartels was well established, to conduct mergers, and the state more vigorously monitored the movement of goods. The Commercial Code was proclaimed as Act No. 48 of 9 March 1899, and since the year 1910 was also applied in the Korean territory.²⁷

The Criminal Code was passed in Japan as Act No. 45 of 24 April 1907, valid in Korea from the year 1910. Just as in China the new Japanese criminal codex meant a profound step away from traditional criminal law, which in countries of the Far East always belonged to the most developed legal branches. At least the apparent unity of the new criminal law with ancient traditions was supposed to express in China and in Japan or Korea the conception of the so-called “Five Punishments”. However, in not one country in the Twentieth century was it a matter of the ancient system of punishments, created in China already in the Second millennium BC, but of a system of modern punishments following Western codifications, that is the death penalty, imprisonment and forced labour, imprisonment without forced labour, fines, deprivation of freedom, confiscation of things.²⁸

The Code of Civil Procedure and the Law on Courts was passed in Japan as Act No. 29 of 21 April 1890. The Code of Civil Procedure took over all fundamental principles of continental civil procedure law as a principle of publicity, a principle of free assessment of evidence or a principle of the homogeneity of procedure. The procedure of conciliation

²⁵ WANG, D. T. C. *Les sources du droit japonais*. Genève 1978.

²⁶ TANIGUCHI, T. *La loi et la coutume au Japon*. Paris 1979.

²⁷ MEHREN, A. von et al. *The Law in Japan*. Cambridge (Mass.) 1963.

²⁸ MOITRY, J. H. *Le droit japonais*. Paris 1988.

was a peculiarity of procedural law in the Far East. In Chinese law one traditionally considered it as indecent to appear before a court, and so even ancient Chinese law gave precedence to settling conflicts through good faith, through conciliation.²⁹ The Japanese adopted this principle with their acceptance of Chinese law, and it was reflected in the Japanese conception of civil trial after the Meiji reforms, just as it was reflected in the fundamental reform of the Chinese trial in the 1930s. The Japanese conciliation process after the Meiji reforms also adopted some principles of French and Scandinavian law.³⁰ This was, above all, the judicial enforceability of conciliation and also the composition of conciliation courts of one professional judge and at least two lay judges. A special amendment was developed in Japan in the sphere of conciliation procedure in family law matters.

The Code of Criminal Procedure was passed in the year 1907 along with the Criminal Code and was filled out by the Prison Law, No. 28 of 28 March 1908. Just as in the sphere of substantive criminal law, the Code of Criminal Procedure accepted the continental principles of criminal process, including right of defence, prohibition of torture as a means of extorting evidence, *nulla poena sine lege* principles, etc. The series of provisions on military justice corresponded with the Japanese tradition of the special position of soldiers. The militarization of Japanese society, particularly in the 1930s, managed to use and develop these provisions in extensive, applied perfection.

Neither civil nor criminal procedures were familiar with the principle *stare decisis*. Each court had the possibility of respecting or not respecting the decisions of other courts, including courts of the highest instance.³¹ In practice, however, judicial precedent had great significance, which was also one of the remnants of Far East law. A judge, of course, did not have to respect precedents, but in such instances he could almost certainly count on it that his decision would be changed by the higher courts. Over time the number of decisions of great seriousness of the Supreme Court built up. It is therefore necessary to consider judicial precedents as a meaningful source of material of Japanese and Korean law.



Korean history is characterized by ceaseless delimitation by its powerful neighbours: China and Japan. If Korea had its own Palacký, then it might compare its own historical fate with the fate of the Czechs between Germany and Russia. Korea markedly distinguished itself from both powers as early as the year 1446, when King Sejong introduced Korea's own ideographic writing.

Korea did not demarcate itself only in its writing system but also in its law. The constitutional reform of the year 1988 gave the country a constitutional court in accord with the German model, through which South Korean law again demarcated itself from Japanese law, just as it had far earlier after the Second World War. In the year 1948 the renowned German legal philosopher Gustaf Radbruch wrote about the influence of German law in Korea, that it was so deeply rooted in the country that the Americans did not manage to

²⁹ NODA, Y. *Introduction au droit japonais*. Paris 1966.

³⁰ TSUNODA, W., T. *Sources of Japanese Tradition*. New York 1958.

³¹ TANAHA, H. *The Japanese Legal System*. Tokyo 1982.

replace it with the American system, even when it asserted itself in the recent past into public law, mostly in criminal process law. Radbruch considered Japan “an indirect medium” of German law and called for the direct acceptance of further legal transplants from Germany.³² Even Hans Kelsen, during the 1950s, was prepared to be involved in the formation of the new Korean law, of course with the assumption that the country would be unified.³³ Korea, which had been under the influence of Japanese law since the year 1910, accepted idiomatic codification of family and inheritance law in the year 1947 following the German model without Japanese influence. On the other hand, the series of laws in the sphere public law, primarily in criminal procedural law, is today in South Korea more a reflection of American rather than European law. Korea is a big investor in our country. It is therefore good to know specific details its legal system has. Definitely it does not fit in with one system, neither with Chinese law, nor with Japanese law. On the contrary, primarily in private law, including business law, it has more and more in common with European law. This can be a benefit for us.

Given a thousand year old friction with China today’s South Korean law is rather indifferent to Chinese law. This is not a surprise. Chinese law there, just as elsewhere in the democratic world, has the stigma of communist influence. But even if China were to rid itself of this stigma, it is not possible to expect from South Koreans a large attraction to the Chinese system. They consider China a dangerous hegemony, against which they intend to defend themselves even in the future.

³² RADBRUCH, G. *Vorschule der Rechtsphilosophie*. Heidelberg 1948.

³³ CHONKO CHOI. East Asian Encounters with Western Law and the Emergence of Asian Jurisprudence. In: TOMÁŠEK, M., MÜHLEMAN, G. (eds.). *Interpretation of Law in China – Roots and perspectives*. Prague: Karolinum, 2011.