REVIEWS AND ANNOTATIONS

Tomášek, Michal. Právní systémy Dálného východu I. Praha: Karolinum, 2016, 316 s.

Part I of a monograph on Legal Systems of the Far East (by M. Tomášek) is focused on historical comparison of Far Eastern legal systems. It is divided into three books entitled Background, Crossroads and Decline.

BOOK ONE – ROOTS

In the book entitled "Background" the author starts by discussing emergence of the state and points out that creation of a State requires power and territory. In case of the first state mentioned – China – the author points out a peculiar aspect of state power: here, it was seen in two forms - as military and administrative power on the one hand, and as criminally repressive power on the other. The author also claims that the state power did know the term "punishment", and yet did not know the term "law". The author then proceeds to present a series of mythical ancient Chinese state entities (ex. the Shang and Zhou states).

The author also points out that Chinese statehood was not necessarily the oldest in the Far East, and draws our attention to the territory of present-day Vietnam, proving existence of primal state entities as well, before moving on to Korea and Japan.

In the ancient Far Eastern State all power emanated from the ruler while the basis of this concept was his association with the deity, conceived differently in various Far Eastern cultures. The most sophisticated concept of association between the ruler and divine powers was the Chinese one, where the idea of direct genetic relationship between divine powers and the ruler arose in the Western Zhou state entity – the Zhou king began to conceive himself as the son of heavens and this title had been attributed to Chinese rulers until 20th century. The importance of the ruler still persists in present-day legal culture of the Far East, but the author suggests that only on a symbolic level. For example, in Japan the emperor is a symbolic being in the constitutional system with no influence on the operation of the political and legal systems of the country. In the case of China, the Empire had been dealt with decisively after the fall of the Republic in 1911 and even more vigorously by the communists after 1949.

The author also points out that the idea of link between the existence of law and state, that there is no law without a state and no state without law, did not apply quite literally in the ancient Far East. In China, the law was only understood in penal sense and a legal relationship could only occur when a moral standard was violated. Such an understanding of the law, however, had an impact on the relationship between morality and law. The moral aspect was the main one and the legal was only inferred from it. Historically, the oldest concepts of Chinese law were actually the basic legal concepts. The law began to be called *fa* only in connection with occurrence of the legists school in the middle of the 1st millennium BC. Around the same time the term *lü* emerged as well, denoting written law – statutes as its codification. Subsequently, the author presents individual codifications emerging in the Chinese environment, mainly in criminal law. He concludes that the ancient Chinese system of relationships between the natural order of things, as materialized in moral rules on one hand and penalties on the other, appears to be the most historically documented from the entire Far East.

However, he also notes that in Korea the criminally repressive power of the Kojoseon state was even codified in the Eight-Article Law, with the "eye for an eye, tooth for a tooth" principle: he who kills another will himself be put to death. Ancient Korean law was characterized by simplicity and rigor, codification was minimal and the application of criminal law was strongly linked to religious ceremonies. In Vietnamese state entities of earliest times a system of criminal repressive power is

not documented, but the author is inclined to claim that although punishment certainly existed here, the penalties were most likely imposed ad hoc for breaching or disobeying orders and their mechanism was likely neither institutionalized nor codified. He believes that here the ancient statehood was only implemented by a military and administrative mechanism and no developments of criminal law in Vietnam or other indications of Vietnamese society juridisation are documented.

Further attention is paid to family law and the author points out that family relationships most likely had matriarchal basis in ancient times. The transition from matriarchy to patriarchy in China can be traced back to the reign of Western Zhou and was not associated with any constitutional influences or even acts. Evidence of the transition to the patriarchal organization of Chinese society were fairly accurately captured in Rites of Zhou (Zhou-li) where the first important range of social relations are issues of ownership and a highly sophisticated range of social relations involves family relations. Marriage could be monogamous and polygamous, but for economic reasons monogamy was much more widespread. In case of a polygamous marriage, women were not equal to each other because the woman that the man married first according to his parents' choice held the position of chief wife, associated with various privileges. All other wives were considered minor and were have hierarchically subordinated to the chief wife.

Tomášek also points out that, unlike in China, on Japanese territory the matriarchal elements retained rather longer and a strong presence of matriarchal elements in the Japanese system is evidenced by numerous cases of rulers, queens and empresses heading the Japanese states in ancient times. In case of Vietnam he also considers that the withdrawal from matriarchy to patriarchy was much less significant in expressions than it was in China. While in the Chinese system the role of husband was clearly superior to that of his wife, Vietnamese customs worshipped the woman more as the donor of offspring.

In the chapter on emergence of the term "law" and birth of codification the author presents individual schools and movements dealing with law and codifications. In China, the emergence of the term "law" (*fa*) is linked to the occurrence of the Legists school. It was based on a despotic mechanism under absolute control of the ruler via draconic laws and blindly loyal bureaucracy, fuelled by a system of rewards and penalties. The doctrine of Legalism fought obstinately with Confucianism (another Chinese legal ideology). Legalism was very important for the history of Chinese law as it influenced further developments of legal codification in China and also introduces the term for law (*fa*) in both the language and ideas of the people. Characteristic outcome of legalism influencing the positive law is introducing new legal terms, some of which can still be found in Chinese legal terminology. The basis of legalistic doctrine is the primacy of written law, to be enforced by iron-clad discipline involving severe penalties even for small infractions. The author, nevertheless, also points out instances of correspondence between Legalism and Confucianism, such as the absolute suppression of the individual and incentives for mutual monitoring and following of people. Confucianism, however, was a philosophy of morality, while Legalism worked with the reality of life and politics: hard-handed, with no emotions and ideals. Thus in many aspects legalism mirrors the much more recent ideas of Florentine politician and philosopher Niccolò Machiavelli.

Chinese law-making was almost entirely based on positive law, natural law staying in seclusion. Laws and regulations were paramount, and a man was merely a mechanical part of state machinery, with no regards to his will, emotions, and needs, apart from the need to eat and secure continuation of his lineage.

Traditional Chinese legal doctrine did not separate law from morality, or more precisely: the moral norm *li* was deemed considered to be the law. Publication of laws brought about a breakthrough in understanding the relation of morality and law. Disclosing laws provoked a considerable controversy. The author presents it in further pages of his work and says that despite all protests of those opposing disclosure of laws their publication continued and strengthened – laws were engraved in tripods and began to be recorded in other ways as well. The author also states that in terms of availability of historical sources the process of law codification in China before 771 BC can only be traced in the part of Chinese territory stretching north of the Yangtze river. He also points out that for 2 000 years the

hallmark of Chinese codifications was that they banned violating moral customs (*li*) without describing these customs in writing. Thus the subsidiarity of criminal law and was related to customs rather than to a standard of written law.

An important feature of classical Chinese law was its nature of "mixed law". Ancient Chinese system was based on written law, customs, and judicial precedents – case law was mainly relevant in criminal process. Chinese judicial precedents were extensive judicial decisions (here, the author points out the similarity of European and American precedents) in specific legal cases. They contained a number of legal dicta, forming rules for other judges on how to assess and decide on analogous matters. Since the Chan era precedents were an integral part of sources of Chinese law, along with the customs and norms of written law.

In further part of his work, the author deals with the organization of public administration and states that the Chinese system of public administration affected the entire Far East. In China, the state power faced very stiff competition of the power of family clans. Only by gradually overcoming decentralization and concentrating power in the hands of single ruler pre-conditions were created for the formation of an executive power directed from the centre. In Japan, we encounter great families performing administrative functions. The institution of elected elders gradually grew into one of regents controlling small appanage units. In an attempt to gain control over the individual family states the ruler awarded hereditary titles to some families, thereby creating the foundations of government institutions. Here, the author stresses that the concept of state administration in Japan has its root in hereditary titles and offices, which is different from the Chinese concept where already in the period presented by the author a tendency to appoint office holders was prevailing. In Vietnam, the gradual overcoming of decentralization created conditions for the formation of the executive power directed from the centre, and the conditions of its enforcement were similar to those in China.

The author also mentions structure of the judiciary. He points out that in China and later in all Far East countries judicial authorities were considered to be specialised authorities of state administration, dependent on the ruler. The ruler possessed the supreme judicial power. Only in early 20th century, in connection with reception of western law, a conception of courts forming a separate power, independent from the executive, took hold.

Additionally, Tomášek pays attention to Buddhism, which significantly disrupted the isolated development of law in the Far East. In China, the rapid spread of Buddhism was aided by the fact that since the 3rd century the country had been weakened by decentralization. In China Buddhism blended very smoothly in with the local environment and thinking, which was among other things also helped by the fact that, at least outwardly, it adapted well to Chinese ideologies, especially Taoism. Just like other teachings, Buddhism is reflected differently in lay or folk layers of society and differently in higher, "intellectual" circles. In the popular strata Buddhism soon became an offshoot of Chinese Taoism. Higher layers of Chinese society drew much more from Buddhism. In the case of Japan, Buddhism did not manage to quickly become widely accepted ideology in terms of its penetration into the lower strata of Japanese society. In Vietnam, Buddhism was seen as Chinese import and was disseminated in its Mahayana form.

First in China, later also in other Far Eastern countries, Buddhism had a peculiar influence on development of the law. In Chinese law it lead to its humanisation, and above all to distancing the legal doctrine from Confucian idea of "natural order of things".

BOOK TWO – CROSSROADS

Here the author states that, one by one, all countries around China took over Chinese scripture, and hence the introduction of Chinese scripture in Japan, Korea or Vietnam is unavoidably linked to emergence of written law.

The Chinese can also be seen as pioneers of division of powers – just not of the division of legislative, executive, and judicial powers. Here, judicial power was part of the executive one, and legislative power was in the hands of the ruler. In the Tang conception the two other powers were con-

trolling power and testing power. The controlling power was performed by an independent control office called Censorate. Its duties and activities are described in further pages of this work. In this context the *guanxi* phenomenon is also dealt with. Even with the Censorate, all the safeguards, and a system of state examinations the traditional Chinese bureaucracy was not free of corruption and protectionism, and in some periods significant role was played by personal connections – *guanxi*. The *guanxi* phenomenon is an inherent part of Chinese culture (including Chinese legal culture), and with the dissemination of Chinese law to neighbouring states it spread to those states as well. It could best be translated into English as "propinquity", familiarity involving no family, but rather connections and relationships, linked interests, and common goals.

Gradually, the developed political and legal system was becoming more and more of an example for the Japanese state of Jamato. For example, the new model of state organisation in Japan introduced the Chinese system of appointing officers. The offices were not supposed to be awarded according to hereditary titles (as had been the case in the past), but rather according to skills and merits. Chinese language also influenced the formation of written Japanese, including its legal terminology. An attempt to introduce Chinese-inspired Censorate also occurred in Japan, and in criminal law the Japanese took over the Chinese possibility for privileged castes to pay-off their penalties in money.

In the Japanese Heian period (lasting until 1192) a crisis of Chinese model in Japanese legal system occurred, laying foundations for a peculiar Japanese model of law. One of the basic causes of divergence of Japanese and Chinese law was the abandoning of basic Chinese concepts by Japanese legal practice. The crisis of Japanese law and state deepened in 11th and 12th centuries, mainly by the crisis of imperial power and thus also by a crisis of the central government.

Gradually, the Japanese law drifted more and more away from its Chinese predecessor, even developing further in its own way. Thus the legal systems of the Far East were differentiated into Chinese (or Chinese-Korean-Vietnamese) and Japanese legal systems. Chinese law was mixed in nature, relying on written law, on customs, as well as on judicial precedents. Japanese law seemingly kept this structure, but ordering norms gradually gained on importance within it. Eventually the Japanese legal system took shape of a peculiar legal system, not denying, however, the elements of inspiration it had taken in Chinese law.

In conclusion of this part the author claims that while in ancient times the Chinese legal system was exclusive in the Far East, medieval era witnessed the mighty Chinese legal culture clearly influencing the surrounding states. However, in other countries the Chinese legal system underwent certain development resulting in emergence of variations of the Chinese model. The divergence was greatest in Japanese legal system, characterised by the author, in terms of comparative law, as a peculiar legal system. Korean and Vietnamese law showed only some mutations of their Chinese model, often reflecting national specificities.

BOOK THREE – DECLINE

In the third part of his work the author presents "conservation" of Chinese, Vietnamese, and Japanese law. In a chapter on neutralisation of traditional law he points out that for centuries the legal systems of the Far East were developing isolated from development of continental and common law legal systems, with the exception of few rare contacts with the West. It was not until the economic, political, and military expansion in 19th century that the Far East was drawn into world events. Continental and common law legal systems brought about isolation of Far Eastern law and its gradual (and uneven) adaptation to these legal systems.

Western powers brought their own law into eastern Asia, and ignored local laws and courts. Japan was the fastest to understand this new situation, introducing norms of western, mainly German law in the Meiji reform of late 19th century. Later occupation of Korea by Japan involved imposing modern Japan law on Korea as well. French occupation of Vietnam also brought French law to that territory. Eventually even the Chinese, resisting reception of western law for longest, acknowledged the need

to modernise their law. In the beginning there were attempts to look for links between traditional Chinese legal thought and western legal doctrine, but eventually the 1920-30s witnessed reception of western law, mainly filtered via Japan.

This statement concludes Part I of Legal Systems of the Far East. This book is devoted to historical comparison of Far Eastern legal systems, mainly in the territory of China, Japan, Vietnam and Korea, until the reception of western law. It includes a detailed outline of a range of legal concepts, and also involves the religious and philosophical context.

It must be said that the presented analysis of historical developments of law in the Far East before it became influenced by reception of western legal concepts is well-performed. The book is recommendable both to scholars focusing on this issue and to wider public of readers. Looking forward to Part II, currently being prepared by the author!

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