

ORIGINS OF THE LEGAL REGULATION OF FOREIGNERS IN CHINA

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Abstract: *Foreigners in China always stood outside the local culture, including the legal one. Under imperial codification, justice to people of non-Chinese civilisations was to be administered according to their own customs. Already in early last millennium, Chinese introduced for foreigners so-called fanfang regime. Foreigners were concentrated in restricted areas, municipal districts or streets called fanfang. They were subject to their own jurisdiction there. Their national was appointed by the Chinese authorities to exercise the jurisdiction. Foreigners were treated as equals to the Chinese only when they were deemed useful to the local monarch. The opposite was true during the times of China's semi-colonial status between 1842 and 1941 when foreigners took a position above the legal and general culture of China. The situation was reversed, therefore if the foreigners deemed a Chinese useful they treated him as equal.*

Key words: *China, foreigners, international private law, Buddhism, Islam, Jesuits*

I. INTRODUCTION

The legal status of foreigners, and in particular of Europeans, in China and in other countries of the Far East, has historically never been simple and continues to give rise to many questions today. Comparing the origins of Chinese law and our law shows that whereas the ancient Romans assumed the existence of contact with foreigners and had a special branch of law *ius gentium* dealing with such contacts,¹ the ancient Chinese on the contrary isolated themselves from foreigners. They did not think their law should take into account the existence of foreigners, let alone trading with them. However, both the Roman Empire and the Han dynasty² did consider the need for the military protection of their merchants. The Chinese protected their know-how against foreigners perhaps a bit more than the Romans. The secret of the silkworm moth was rigorously protected in China. As late as in AD 550, the silkworm's pupae and mulberry seeds are said to have been smuggled from China in hollow bamboo sticks to Constantinople by two Nestorian monks under the orders of Justinian I, the Eastern Roman (Byzantine) emperor. On the other hand, the Romans exported their glass to China without any concerns that their technology could be somehow copied.³ There were not many foreigners (barbarians) in China at that time. They were easy to distinguish due to their physiological features and they were expected to adapt to local traditions. Special rules for foreigners in China were adopted much later.

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¹ SKŘEJPEK, M. *Lex et ius: zákony a právo antického Říma [Lex et ius: Laws and the Law of Ancient Rome]*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2018.

² The Han Dynasty ruled in China from 206 BC until AD 220.

³ HULSEWE, A. F. P. *China in Central Asia. The Early Stage: 125 BC–AD 23*. Leiden, 1979.

II. FIRST FOREIGNERS IN CHINA

The first documented mass migration of foreigners into China is connected with the arrival of Buddhism and Buddhists. There are speculations that Buddhism in China dates back to the year 2 BC, when allegedly several Buddhist sutras were brought to the imperial court. According to legend, the first Buddhist missionaries came to China in the middle of first century AD, after Mingdi, the Han emperor, saw Buddha in his dream and sent emissaries to central Asia to find out about the teachings of Buddha. An imperial edict from the year AD 65 dealt with making sacrifices to Buddha and the Old Master (Laozi). The Chinese first considered Buddhism to be a barbarian offshoot of Taoism. According to a legend, at the end of his life Laozi left China riding a buffalo to bring his teachings to the “barbarians” in the West. He is said to have met Buddha himself in India and according to the legend Buddha became his pupil. It is documented that around AD 130 Buddhists were settled in Chang’an,⁴ the capital of the Han empire. The first Buddhist missionaries allegedly arrived in China in reaction to the above-mentioned initiative of emperor Mingdi. The Buddhist monks brought Buddhist sutras and in AD 68 Mingdi established in Luoyang a White Horse monastery (*Baima Si* 白马寺) to their tribute. After AD 148, when Buddhist missionary Anshigao arrived in the monastery, a school of translation was created around the monastery, which in the following 70 years translated several hundred Buddhist works. The embassies coming from the beginning of the last century from Central Asia to Chang’an included either propagators of Buddhism or at least persons knowledgeable of these teachings.⁵

Buddhism soon became very popular and influential in China. It was attractive for common people as well as for the ruling elite – many emperors converted to Buddhism, which they preferred over Taoism. It would be an exaggeration to claim that in the period of the division of China Buddhism completely overshadowed or even replaced Confucianism. On the other hand, many rulers of smaller Chinese states adopted Buddhism as the official teaching. In these states, Buddhism also had an effect on law-making and it had a remarkable influence on the development of law in China in general. It managed to take away some of the importance of the omnipotent Confucian ideology and to open the door to new teachings from abroad. Whereas Han jurisprudence was characterised by considerable harshness and did not completely disengage from the Legalist cruelty, from the third century AD onwards relatively important interventions were made in the Confucianist legal doctrine that had been unshakeable until then.⁶ Almost all dynasties ruling at the time in almost all of the existing states of politically divided China were influenced by Buddhism and Confucianism began falling into oblivion. Equality before the law is a Buddhist idea just as it is Christian, reducing punishments or abandoning the principle of mandatory respect for authorities are all Buddhist ideas, in clear contradiction to Confucianism. As Buddhists opposed the killing of and being cruel to living creatures, they also sought to reduce cruel punishments. This is why Chinese criminal law became more “humane”, influenced and accelerated by the Buddhist doctrine.

⁴ LIŠČÁK, V. The Silk Road and the Advent of Buddhism to China. *Archív orientální*. 1997, Vol. 65, No. 3, p. 300.

⁵ KÜNG, H., CHING, J. *Křesťanství a náboženství Číny [Christianity and the Religions of China]*. Praha, 1999.

⁶ TOMÁŠEK, M. *Právní systémy Dálného východu I [Legal Systems of the Far East I]*. Praha: Karolinum, 2016.

The spreading of Buddhism resulted in the foundation of Buddhist monasteries, which became important centres for these teachings and received support from the powerful in individual Chinese states.⁷ Towards the end of the fifth century there were close to 1,800 Buddhist monasteries with more than 24,000 Buddhist monks on the territory of modern China. These monasteries enjoyed special privileges – they were exempt from tax and this economic advantage enabled them to accumulate land and a workforce in their vicinity and to acquire considerable assets. The assets were held in common ownership, however, many monks amassed significant wealth. *De facto*, the institution of private ownership protected by local customs existed in these monasteries. Buddhist monks were exempt from various duties to the state including compulsory labour and military service. The privileges of Buddhist monasteries gradually constituted a special legal regulation which could be referred to as “religious law” or “Buddhist law”. Buddhist law originally had the character of customary law, especially in the field of land and other property relations, however over time it developed into written law. By the 6th century an extensive body of legal rules existed in China to protect Buddhist monasteries and the Buddhist clergy, the bonzes, including the internal rules of these monasteries and the obligations of bonzes. Buddhist law and its regulation of property relations also indirectly influenced the “secular” system of law. Despite the effort from the beginning of the millennium to reform land ownership in China towards state ownership for the benefit of the emperor, Buddhist monasteries were allowed to own land.⁸ Of course, this meant a certain disruption to the system of state-owned land and the existence of private ownership and rights in property. Although the state carried out a massive attack against Buddhist monasteries in the middle of the 9th century, expropriating their land and subordinating it to the system of state-owned land, the period of the existence of private ownership of land and movables within the monasteries added some contours to the still very foggy concept of private law within Chinese law.⁹

Buddhist monasteries enjoyed extraterritoriality. Individual monks and bonzes were legally subordinated, and accountable, to their superiors. State officials in China did not have the right to interfere directly in the internal operation of the monasteries, a status which continued basically until the times of the republic. In some periods of history, the state established special offices in charge of Buddhist monasteries. The principles of Buddhist law were based on the ideas of Buddhist teachings. The prevailing principles were equality before the law and the obligation not to harm any living creature. Both were unprecedented in China and contributed to reforms of the content of “secular” law. The main principles of Buddhist law included: not killing living creatures; following vegetarianism in the monasteries; prohibiting bonzes from getting married or from lending money at an interest; prohibiting someone from becoming a bonze simply to avoid compulsory labour and military service; and prohibiting bonzes from sacrificing living creatures and allowing the sacrifice of fruit and vegetables instead. Bonzes could only be punished under special Buddhist law rather than “secular” laws. Special registers of bonzes and their deaths were

⁷ TSUKAMOTO, Z. *A History of Early Chinese Buddhism: From Its Introduction to the Death of Hui-yüan*. Transl. by Leon Hurvitz. Vol. I. and II. Tokyo: Kodansha International, 1985.

⁸ CRESPIGNY de, R. *A Biographical Dictionary of Later Han to the Three Kingdoms (23–220 AD)*. Leiden, 2007.

⁹ TOMÁŠEK, M. *Dějiny čínského práva [History of Chinese Law]*. Praha: Academia 2004.

established, and bonzes were not subject to the duty to pay tribute to the emperor and his family. It is important to note that Buddhist law was not a special regime for foreigners, because both Chinese and non-Chinese bonzes lived in the monasteries. But still the monasteries constituted special legal enclaves, which is relevant for the development of legal enclaves for foreigners.

III. ARRIVAL OF MUSLIMS

Islam started to spread into China from the Arabian Caliphate which by AD 632 developed into a large Muslim-Arabian empire. Chinese sources referred to the Caliphate as *Tashi* (大食) and it soon became a rival to China. The oldest Chinese name for Islam *tashi fa* (大食法) dated back to the Tang dynasty and originated from this term.¹⁰ From the semantic point of view it is worth noticing that the last character 法 (*fa*) means law. The Chinese correctly assessed the Muslims as people who carry their law with them. Islam had an important influence on Chinese law. Muhammad, the founder of the Caliphate, was interested in Chinese culture and sent an embassy to China as early as 620. According to one of the hadith accounts (records of the words of the Prophet) Muhammad said: “Seek knowledge even if you have to go as far as China.”¹¹ The year 651 is the official date of arrival of Islam to China, when the third Caliph sent his envoys to Chang’an, to the Tang emperor Gaozong. Muslims started to settle in Chinese towns from that time onwards.

Islam, also denoted in China as “the pure and true teaching” (*qingzhen jiao* 清真教) penetrated China at the time of the Tang dynasty not only via the Silk Road connecting China with Central Asia, but also via the sea through the seaport of Guangzhou.¹² In Guangzhou, Islam was professed mainly by merchants, and the first mosque in China, called *Huáishèng Sì* (怀圣寺), was established there early as 627. Islam was not as popular among the Chinese as Buddhism. The teaching of Islam was more influential in the area of Guangzhou, but also among the non-Chinese population of the North-West, currently the Uyghurs. The sacred places of Muslims in China were located on merchant roads from the Guangzhou seaport, and they served not only for worship activities but also for trade and as logistics centres for caravans of traders. After the destruction of Guangzhou in the second half of the 9th century during the rebellion against the government, the Muslim communities in the area were crushed. Islam was renewed in China several hundred years later, but even then it did not reach the level of influence of Buddhism or even Confucianism. Towards the end of the Tang dynasty, about 100,000 Muslims lived in Guangzhou alone and up to half a million in the entire Tang empire.¹³

¹⁰ The Tang Dynasty ruled in China between 618 and 907.

¹¹ SHOUYI, B. (ed.). *An Outline History of China*. Beijing: Foreign Languages Press, 1982, p. 217. Cf. also LUBICA OBUCHOVÁ, L. Žít v čistotě a pravdě. Muslimové na čínském území. [To Live in Purity and Truth. Muslims on the Chinese Territory] In: *Variace na korán. Islám v diaspoře. [Variations on Quran. Islam in Diaspora]*. Archiv orientální. Česká řada. Vol. 1. Praha: Orientální ústav AV ČR 1999, pp. 135–174.

¹² ELIADE, M. CULIANU, I. P. (in cooperation with H. S. Wiesner). *Slovník náboženství. [A Dictionary of Religions]*. Translated by Milan Lyčka. Praha: Český spisovatel 1993, p. 97.

¹³ LIŠČÁK, V. *Čína – Dobrodružství Hedvábné cesty. Po stopách styků Východ – Západ. [China: The Adventure of the Silk Road. Tracing Back the Contacts between the East and the West]*. Praha: Setup, 2000.

The considerable inflow of a Muslim population into China raised the question of the relationship to foreigners and their legal regulation. The Chinese traditionally avoided foreigners, which is why they tended to create separate legal regulations for foreigners. Sima Guang, a historian from the Song dynasty,¹⁴ wrote that during the Tang dynasty “foreign guests” (*huke* 胡客) lived in Chang’an, with some living there with their families for more than four decades. They lived happily on the income from leased land and none of them wanted to go back to their homeland. Instead of the designation used by Sima Guang, during the Tang dynasty the less respectful name *fan* (藩) was used, which can be translated neutrally as “foreigners” or also as “aliens”. It dates back to the Zhou dynasty,¹⁵ when the name was used to refer to everybody who comes from a territory outside of the traditional nine Chinese provinces (*jiuzhou* 九州). Over time, this term began to be used for everybody coming from a foreign country (*fanguo* 藩国) and these people were referred to as *fanmin* (藩民) or *fanren* (藩人). The immigrants were mostly men, often foreign merchants. And if they got married in China and children were born from the marriage with their Chinese wife, the children were designated as native immigrants (*tusheng fanke* 土生藩客). According to an imperial decree from 628, foreign merchants (*fanshang* 藩商) who left China were not allowed to take their concubines with them. The decree also imposed a duty to keep exact records of marriages of Chinese women with foreigners. Foreigners were concentrated in restricted areas, municipal districts or streets called *fanfang* (藩方). They were subject to their own jurisdiction there. For Muslims, an Arab was appointed by the Chinese authorities to exercise the jurisdiction. Under the Tang Code, justice to people of non-Chinese civilisations was to be administered according to their own customs.¹⁶

Islam did not have as strong an impact on Chinese law and its legal and philosophical perception of society as Buddhism did, nevertheless it definitely influenced a range of elements of Chinese law during the Tang dynasty. The ideas of Tang law carried over from the preceding period were still based on Confucianism, but it no longer had the form in which the teaching was formulated by Confucius, the prominent Chinese ancient thinker. Rather, it had the form of the official ideology of the Han dynasty enriched with some elements of Islam and Buddhism. Islam had a much greater influence than Buddhism on the underdeveloped system of private law. As Islamic law applies *ratione personae* primarily to persons rather than states, it is logical that the institutions of Islamic law were in particular the institutions of family law and the law of succession. At the time of the spreading of Islamic law into China during the Tang dynasty, Islamic law greatly enriched Chinese private law. This trend is reflected in the Tang Code (*Tanglü* 唐律) created between 624 and 653. The Islamic spirit may be perceived in an important private law passage focused on issues of marriage, family, inheritance, and birth register.¹⁷ Thanks to Islam, these provisions became an important element of Tang law in comparison to the previous period.

¹⁴ The Song dynasty ruled in China between approximately 960 and 1279.

¹⁵ The Zhou dynasty ruled in China between approximately 1025 and 771 BC.

¹⁶ ZHANG, J. *The Tradition and Modern Transition in Chinese Law*. Springer Verlag: Berlin – Heidelberg, 2014.

¹⁷ BEZOUŠKOVÁ, L. *Islámské rodinné právo. [Islamic Family Law]*. Praha: Leges, 2013.

IV. LEGAL REGIME OF EUROPEANS IN CHINA

The best-known European who travelled to China was Marco Polo. Starting in 1275 he spent 17 years in the court of Kublai Khan, the founder of the Yuan dynasty.¹⁸ He was favoured by the monarch, Kublai Khan admired the fact that Marco Polo could speak four languages. However, Marco Polo could not speak Chinese – this was not necessary in a Mongolian court. The monarch also appreciated Marco Polo's travel experience and his extensive knowledge of the world. Thus Kublai Khan put Marco Polo in charge of inspection trips to the remoter parts of his empire, for example, to central and north Vietnam or the Altai mountains. After a two-year stay in Khan's court, Polo became a member of his secret council. He was later put in charge of a large administrative area with a seat in today's Hangzhou. Some historical sources even state that he was a prefect of Yangzhou city, however, this cannot be verified as there are no mentions of Marco Polo in contemporary Chinese sources.¹⁹ For this paper it is relevant to say that Marco Polo was not subject to any special regulation of foreigners. It is, however, important to remember that Kublai Khan himself was not Chinese, he was Mongol and in fact all high-ranking officials were Mongols and therefore foreigners.

The Christian missionaries to whom Polo opened the door to China were also not subject to any special regime for foreigners. In 1289, the pope sent John of Montecorvino, a Franciscan priest, on mission to China in response to an earlier request from Kublai Khan to send Christian scholars to his country.²⁰ John of Montecorvino built a Catholic church in Beijing, baptised several thousand Chinese, and established the Beijing archbishopric. The Catholic mission existed in China until the end of the Mongolian dynasty Yuan in 1368.²¹ The Catholic missions brought Catholic Canon Law to China, but this had a negligible influence compared to the legal systems of other religions. The Mongolian rulers of China showed a remarkable degree of religious tolerance.²² They supported Lamaist monasteries, were open to learning about Nestorianism, and did not reject Roman Catholics either. The Lamaist monasteries enjoyed extraterritoriality and were governed by their own legal regime. There were many more such monasteries than Catholic entities, which were also governed by their own legal regime but externally had to respect the Chinese legal order. Lamaists, in contrast, were exempt from some provisions of secular law.

In 1493, Pope Alexander VI issued a bull under the title *Inter caetera*, where he defined the demarcation line for overseas expeditions and colonies. The bull was confirmed one year later by the Treaty of Tordesillas. The imaginary boundary dividing the global influence between Spain and Portugal led from the North Pole to the South Pole approximately 500 km from the Cape Verde islands. The Western Hemisphere was allocated to Spain and

¹⁸ The Yuan Dynasty ruled in China between 1271 and 1368.

¹⁹ HAW, S. G. *Marco Polo's China: a Venetian in the Realm of Kublai Khan*. London, New York, 2006.

²⁰ BROOK, T., WALT van PRAAG, M., BOLTJES, M. *Sacred Mandates: Asian International Relations since Chinggis Khan*. Chicago, 2018.

²¹ PELLIOT, P. *Les Mongols et la papauté*. Paris, 1923.

²² DAWSON, C. *The Mongol Mission: Narratives and Letters of the Franciscan Missionaries in Mongolia and China in the Thirteenth and Fourteenth Centuries*. London, New York, 1955.

the Eastern Hemisphere to Portugal. Within the spirit of the Treaty of Tordesillas, the Portuguese expanded their colonies to the East until they came close to China. In 1553 the Portuguese used bribes to gain access to the Macao peninsula for an annual rent of 500 silver Teals. They started building the city of Macao *Cidade do Nome de Deus, de Macau, Não há outra mais Leal* (the City of the Name of God, there is none more Loyal), which in 1573 was separated from the Chinese territory by a wall. Macao became the first Western colony in China and at the same time the first place where the law of a European state was applied on Chinese territory.

V. LEGAL REGIME OF FOREIGNERS IN MACAO

In 1557, when the Portuguese finally gained access to Macao, the Chinese written law of the Ming dynasty²³ applied there, in conjunction with local private law customs. The Portuguese behaved like merchants rather than colonialists. They followed their own law, mainly commercial law, and in principle respected the Chinese authorities. The latter also respected that the Portuguese bodies had jurisdiction over the disputes between the Portuguese in line with the principle that foreigners solve their disputes themselves.²⁴ Similarly to Muslims in the period of the Tang dynasty, the Portuguese also settled in the designated districts (*fanfang* 藩方). The Chinese authorities appointed the Portuguese who were to administer justice under Portuguese laws. The Chinese who converted to Christianity were also subject to the Portuguese legal regime. In the first decades of the Portuguese stay at Macao, their legal culture influence on the Chinese legal culture was minimal. There was contact between some legal concepts and institutions from both sides, but the Portuguese had no intention of imposing their legal culture by force, and the Chinese felt no need to look for potential grafts from the Portuguese legal system.²⁵ The peaceful coexistence between the Portuguese and Chinese in Macao (*convívio*) continued until 1793, when the decree of Portuguese Queen Maria I (*Providências Régias D. Maria I*) clearly declared the intention to take over the sovereignty of Macao including the application of Portuguese law.²⁶

The law of the Ming dynasty completely ignored the developments in the time of the Mongolian occupation, and sought to draw on purely Chinese traditions, in particular those from the Tang dynasty. In 1368 a new criminal code consisting of 280 articles was issued, and as it was more or less a transitional legal rule, in 1373 it was substituted with a new criminal code called the Great Ming Code (*Da Minglü* 大明律). This code was substantially amended in the years 1389 and 1397, when the emperor ordered that it never be changed again. This is why amendments containing case law were appended to it. The precedents (*shili* 事例) took over and strictly maintained the case law of the preceding periods. During the Ming dynasty, a new section of case law was gradually created to deal with the economic offences associated with the growth of business, banking, and finance.

²³ The Ming Dynasty ruled in China between 1368 and 1644.

²⁴ HAI J. L. *Outline of the Macau Legal History*. Ji Lin: Ji Lin University Press, 2009.

²⁵ VALADAS, A. M. Questão das Terras em Macau – Doutrina. *Revista Jurídica de Macau*. 1997, No. Especial.

²⁶ HESPANHA, A. M. *Panorama da História Institucional e Jurídica de Macau*. Macau, 1995.

Unfortunately, the case law focused on state regulation of these fields rather than on their modernisation.

The typical feature of Ming dynasty policy was to isolate the country from external influence. Protection of the border at the Great Wall of China was a key focus. The paranoia of the Ming government resulted in a policy prohibiting maritime trade (*hanjin zhengzhi* 海禁政策) in 1371. The Great Ming Code, among others, also reintroduced the discriminatory extraterritoriality for foreigners from the Tang period. A special regime applied to foreigners – for example, foreign merchants were not allowed to deal directly with Chinese merchants, they were required to negotiate through government agents. The Ming did not necessarily want to discriminate against foreigners, rather they wanted them to assimilate. Hence during the Ming dynasty, marriages of Chinese men to foreign women were supported while contact between foreign men and Chinese women was considered to be “defamation of race”. According to the *fanfang* principle, foreigners were to stay in Macao, and under certain conditions they could also travel on Chinese territory. The activities of the Jesuits, which covered almost all of China, attest to this. According to David Emil Mungello, an American historian, from the time of the colonisation of Macao until 1800, a total of 920 Jesuit missionaries were active in China with the majority being Portuguese (314) and French (130).²⁷

VI. EXCEPTIONS FOR JESUITS

The Jesuits established a permanent mission in Macao in 1563. In 1579, a Jesuit College was founded there and the Jesuits openly admitted their ambitions to penetrate to the territory of continental China. An Italian, Matteo Ricci, was a particularly notable figure among the Jesuit missionaries. He studied contemporary and classical Chinese, read Confucianist books, and studied Chinese scholarship and culture. He created the first map of Western style in China – A Map of the Myriad Countries of the World (*Ta Ying Quan Tu* 大瀛全图). Ricci, together with fellow Jesuit Michele Ruggieri, are presumed to have written the first bilingual dictionary of Chinese and a European language. It was a Portuguese-Chinese dictionary, for which they created a system of transcription of Chinese into the Roman alphabet.²⁸ Matteo Ricci was a great mathematician and cartographer and when he reached Beijing in 1598, the emperor was so impressed by his knowledge (in particular of astronomy which the Chinese considered very important) that he appointed Ricci a counsellor in 1601. An imperial astronomical office was established where Ricci and his followers developed astronomy, geography, the art of memory, and a range of other fields that the Chinese considered important. The emperor also provided generous support to Ricci to create the first Chinese atlas *Zhifang wajji* (職方外紀).²⁹ The death of Matteo Ricci in 1610 is related to a circumstance that is interesting from the legal perspective. According to the Great Ming Code in the spirit of *fanfang* principle, Europeans who died on Chinese

²⁷ MUNGELLO, D. E. *Curious Land: Jesuit Accommodation and the Origins of Sinology*. Hawaii, 1989.

²⁸ BROCKEY, L. M. *Journey to the East: The Jesuit mission to China, 1579–1724*. Harvard, 2007.

²⁹ SPENCE, J. D. *The Memory Palace of Matteo Ricci*. London, 1984.

territory had to be cremated and buried in Macao. The emperor Wanli made an exception for Ricci and allowed his remains to be buried in a Buddhist temple in Beijing.³⁰

The activities of Jesuits in China may be referred to as the most extensive and significant presence of Europeans and European culture in China up until then. The reasons why they succeeded where other Europeans failed may be summarised in two points. First and foremost, they learned the Chinese language, became acquainted with Chinese culture, and were able to deal with the Chinese at an appropriate intellectual level. They could offer to the Chinese scholarly knowledge that was interesting to them, particularly that of astronomy. They probably did not offer any legal knowledge, but even if they did the Chinese were not likely to be interested. The Chinese did not consider the law a science, they considered it a mere utilitarian instrument to manage society. Due to their success the Jesuits were granted numerous exemptions from the *fanfang* foreigners' regime during the subsequent reign of the Qing dynasty.³¹

During the reign of the new dynasty, the position of Jesuits was unclear. The Manchurian Qing dynasty did not reject anything Chinese, they knew that the Chinese culture was more developed than theirs, and so they listened to the opinions of foreigners as the Ming rulers had before them. Some Jesuit missionaries appealed to the new rulers with their scholarly knowledge, which they considered potentially useful. One such missionary was the Flemish Jesuit Ferdinand Verbiest, who started working in China in 1659. He was a great astronomer and as such he was appointed the director of the national observatory in Beijing. He was a personal friend of the Emperor Kanxi, to whom he taught geometry, music, and philosophy. When Ferdinand Verbiest died in 1688, he was granted the privilege to be buried in Beijing and the emperor awarded to him a posthumous name – something that had never been done for another European before or after him.³²

In the context of numerous exemptions from the *fanfang* regime for foreigners in general and Jesuits in particular during the early rule of Qing dynasty, it is necessary to point out that Qing was not a Chinese dynasty, it was Manchurian, meaning that in fact the rules were foreigners in China themselves. This was reflected in a restatement of the law. Immediately after the new dynasty began their rule, the emperor established a special law-making institution *lüli guan* (律例馆) in 1645 tasked with creating a code of law that would be comprehensible for all ethnic groups of the empire, in particular the Manchu and the Han. The Great Qing Code (*Da Qing lüli* 大清律) was issued the following year. In the preamble, the emperor wrote that in the interest of renewed social order and legal certainty it was necessary to create a code based on the Great Ming Code and Manchurian customs.³³ It is not considered very innovative in the history of Chinese law.³⁴ However, com-

³⁰ RICCI, M. *Della entrata Compagnia di Giesù e Christianità nella Cina*. Macerata, 2000.

³¹ The Qing dynasty ruled in China between 1644 and 1911.

³² CAMPBELL, T. J. *The Jesuits, 1534–1921; a history of the Society of Jesus from its foundation to the present time*. New York, 1921.

³³ BODDE, D., CLARENCE M. (eds). *Law in Imperial China: Exemplified by 190 Ch'ing dynasty Cases*. Cambridge, MA: Harvard University Press, 1967.

³⁴ TOMÁŠEK, M. *Dějiny čínského práva [History of Chinese Law]*. Praha: Academia, 2004.

pared to the Great Qing Code it was more comprehensive. The Great Ming Code contained slightly over 700 laws and subordinate legislation, whereas the Qing Code included more than double that. This was primarily due to the very detailed regulation of criminal law. The first book of the Code deals with “five punishments” (*wuxin* 五刑), which constituted the backbone of the old Chinese criminal law system. It contains detailed provisions on the facts of the offences. Similarly to the codes of the preceding dynasties, it does not include any civil law provisions, but it protects ownership and family relations through criminal sanctions. The criminal procedure was elaborated in detail. Five out of seven divisions of the Code are dedicated to state administration by individual jurisdictions (government officials, taxes/fiscal law, rituals, the military, and public works).³⁵ In contrast to the previous legal regulations, the administrative law rules were expanded to include a number of provisions concerning the superiority of the Manchu in various legal relations. After conquering China, the Manchurian monarchs did not introduce any major organisational changes in the administrative structure and management of the country. However, they appointed members of the Manchurian aristocracy to all key positions in the state government because they did not trust the Chinese officials, not even those who had changed sides. As their legal ideology they used Confucianism enriched with elements of their dogmas and doctrines.

VII. EXTRATERRITORIALITY FOR FOREIGNERS

The open attitude of the Qing dynasty to Jesuit missions was an exception in their policy. With the exception of the Jesuits, the dynasty insisted on the isolation of China and borders impermeable to foreigners. And despite this exception, in 1724 the emperor prohibited the spreading of Christianity and the activities of Jesuit missions were then limited to Macau. It was just a matter of time until foreigners would return to China, even if with the use of force. It happened in 1841 after China lost the so-called Opium War to Great Britain, and was forced to sign unequal treaties first with Great Britain and later with the remaining powers. The first such treaty was called the Treaty of Nanking of 1842, and under this treaty China had to open five ports to foreign trade. One year later, in 1843, Great Britain imposed on China the Humen Treaty, “the collateral treaty on trade in five treaty ports”. This treaty granted to British citizens in the treaty ports the right of extraterritoriality and introduced consular jurisdiction, i.e., the judicial authority of British consuls rather than Chinese courts. The British were allowed to create their settlements in the treaty ports and to manage them. Great Britain also gained the most favoured nation clause, meaning that any privileges that would be granted to another state in China in the future would also apply to Great Britain. Unequal treaties were imposed on China by the USA in 1844 (the Treaty of Wangxia) and France in the same year. In 1858 China entered into a similar unequal treaty with Russia. In 1898 China accommodated the requirements of Germany with a 99-year lease of the Qingdao naval base. By the end of the 19th century, foreign

³⁵ JONES, W., C. *The Great Qing Code: A New Translation*. Oxford: Clarendon Press; New York: Oxford University Press, 1994.

powers gained considerable influence over parts of Chinese territory which were small in terms of area but significant in terms of strategic and economic importance.³⁶

The foreigners' regime was to some extent based on the traditional *fanfang* system; however, it was far from discriminatory to foreigners, rather it was beneficial to them. The regime applicable to foreigners was further detailed in the Treaty of Shimonoseki, which had to be signed by China in 1896 after it lost a war with Japan. The treaty stipulated that foreigners, their families, and their homes are inviolable. Foreigners and their families had freedom of movement in China and were free to choose their place of residence, they were exempt from the application of Chinese laws and from the authority of Chinese courts in both criminal and civil matters. They were subject to consular jurisdiction and were free to choose their employees. Under the most favoured nation clause contained in the treaties previously concluded with other states (i.e., France, Germany, Russia, and Great Britain), the rights granted to Japan automatically applied to all the other states.³⁷

Such was the origin of the legal regime of foreign concessions in China up to the 1930s. Foreign concessions were exempt from the territorial jurisdiction of Chinese law, they passed completely to the hands of foreign powers who considered them conquered territories. Capitulation had in addition to the personal element, i.e., extraterritoriality for the benefit of foreigners, also the territorial element, i.e., extraterritoriality for the benefit of foreigners on a specific territory. All executive power, army, police, justice, and administration was ceded to the occupying state. Foreigners lived in the foreign concessions physically separated from the influence of the Qing authorities and politically independent of the Qing government. Although the foreigners represented a minority in the foreign concessions, the majority population, the subjects of the Qing emperor, were also subject to the authority of foreign consuls. This is why a mixed court of justice was established in 1864 in the British consulate in Shanghai. Even though its jurisdiction was not clearly defined it served as a branch of the general court in Shanghai with special personal jurisdiction over citizens of the Qing state resident in the international concession. It was considered a mixed court because the Chinese judges presided over cases together with foreign lay judges who defended the interests of the treaty powers. The foreign judges mostly had no legal education, they were administrative employees of the British consulate headed by the British Consul, and their purpose was to protect British citizens' economic and political rights. Chinese law was supposed to be applied in this court, but the British judges sitting on the panel decided which Chinese rules took precedence over others and how they should be applied. After the fall of the empire in 1911, foreigners took over full control of the mixed courts and had the discretion to appoint the judges of these courts. This situation continued until 1927, when the government of Chiang Kai-shek decided that the Chinese would not be subject to these courts' jurisdiction and that the justice would be administered to them by the relevant Chinese courts outside of the foreign concessions' borders.³⁸

³⁶ TOMÁŠEK, M. *Právní systémy Dálného východu I [Legal Systems of the Far East I]*. Praha: Karolinum, 2016.

³⁷ ESCARRA, J. *La Chine, Passé et Présent*. Paris, 1937.

³⁸ TOMÁŠEK, M. *Právní systémy Dálného východu II [Legal Systems of the Far East II]*. Praha: Karolinum 2019.

In addition to the parallel operation of different judicial bodies, extraterritoriality was reflected in the application of the law of *ratione personae*. Therefore, the jurisdiction of British consular courts was not limited only to a specific territory, and they could have jurisdiction over British citizens anywhere in China. Although it was often argued that the purpose of extraterritorial jurisdiction was primarily to protect the interests of foreigners, it was often advantageous also for the Chinese. A Chinese could, for example, make a mock property transaction for the benefit of a British citizen and British courts could immediately get involved in actions to protect such property also in favour of the Chinese citizen. A similar mechanism was used in business law cases where foreign companies were used to obtain judicial protection for the business interests of Chinese citizens. It is estimated that approximately a half of the business law cases tried by mixed courts were in fact disputes to protect the property interests of the Chinese rather than those of foreigners. Although the British disposed of huge potential for the use of extraterritoriality to assert their interests against the Qing government, they were unable to control the dynamics of the entire operational process of the mixed courts. The rules of mixed courts resulted in the practical application of new concepts and institutions, within which there was interaction between the Chinese and foreign addressees of the law, often for the benefit not only of the foreigners but also the Chinese.³⁹

From the point of view of international law, the foreigners' regime in foreign concessions contributed to the creation of a curious situation of blurred boundaries between private and public international law. The international law regime of the entire country had an impact on the international law regime applied to individuals. Under the unequal treaties, citizens of foreign powers were granted privileges that were and still are unprecedented in international law. In addition to the above-mentioned extraterritoriality of jurisdiction, other privileges included, for example, tax immunities, advantages related to usufructuary lease, military and maritime privileges, the basically unlimited right to navigate inland rivers of China, etc. The whole set of immunities and privileges of foreigners was very complex from the perspective of the relationship between private and public international law. From the point of view of public international law, China has never been deprived of state sovereignty and its sovereignty has never been restricted. The majority of the rules constituting the foreigners' regime on its territory was imposed on China through unequal treaties, and the maintenance, changes to, or cancellation of such rules depended on the discretion of the treaty powers.⁴⁰

China was a signatory to a number of treaties which naturally became an integral part of its national legal order. From a theoretical perspective, the unequal treaties form part of public international law, which assumes the free will of China as their signatory, however, China had no freedom in deciding whether or not to become a signatory. In this spirit China could, for example, decide to seize enemy ships as an act of public international law. On the other hand, the Chinese government's measures concerning the regime of foreigners, e.g., free navigation of foreign ships on Chinese rivers, have the character of

³⁹ ESCARRA, J. *Le Droit Chinois. Conception et évolution*. Paris: Librairie du Recueil Sirey, 1936.

⁴⁰ ESCARRA, J. *La Chine et le droit international*. Paris: A. Pedone, 1931.

rules of private international law, in other words, they are special covenants between China and foreign powers from 1861, 1862, 1898, and 1902. In a broader sense, all covenants between China and foreign powers concerning the privileges granted to foreigners have the character of rules of private international law. Clearly, due to their exceptional status they cannot be classified in any of the categories that private international law has created. In China itself the concept of a special legal regime for foreigners was nothing incomprehensible or exceptional. The Tang dynasty or the Ming dynasty codes contain provisions concerning the delictual behaviour of persons standing “outside of civilisation” (*huawei ren* 华外人). In other words, a special legal regime “for barbarians” was assumed to exist. So, from the perspective of Chinese legal traditions it was normal for private international law to maintain special provisions for foreigners. However, the integration of such privileges into treaties against which China continuously protested meant that the country’s sovereignty was effectively limited. Furthermore, these limitations on China’s sovereignty benefited only specific states rather than all states of the contemporary international community.

The historical origin of the foreigners’ regime in China bears witness to the attitude of the Chinese to foreigners but also to the foreigner’s attitude to the Chinese. Foreigners in China always stood outside the local culture, including the legal one. They were treated as equals to the Chinese only when they were deemed useful to the local monarchs, as in the case of Jesuit astronomers. The opposite was true during the times of China’s semi-colonial status between 1842 and 1941 when foreigners took a position above the legal and general culture of China. The situation was reversed, therefore if the foreigners deemed a Chinese useful they treated him as equal. As modern China likes to relate to its historical tradition, it is important to understand the origins of the foreigners’ regime in the Chinese context for example also for the purposes of the New Silk Road project.