

<https://doi.org/10.56514/cch.121.02.08>

XXIII INTERNATIONAL CONGRESS
OF HISTORICAL SCIENCES
(Poznań 2022)

Legal Cultures between Europe
and the Far East in Historical Context

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The paper considers legal transplants and their launching into legal systems of countries in the Far East, namely China, Japan, Korea and Vietnam since 1868. The author follows the impact of individual foreign legal systems stemming from Continental Law (the German subsystem and the Roman subsystem) and Common Law. The impact of German law prevailed in the Far East countries listed above, but the influence of US law primarily in modern Japan should not be underestimated. The paper deals with the transposition of foreign patterns into the respective written law, i.e., law in books. In addition, it demonstrates through concrete examples how interpretation of the law in books developed, i.e., law in action, which quite often shifted the original European meaning closer to traditional East-Asian mode of thinking.

Keywords: legal history – comparative law – legal transplants – China – Korea – Japan – Vietnam

Globalisation seems to be an incantation of our time. We can hardly enumerate all areas of human existence that are supposed to be influenced, transformed, amalgamated or divided by globalisation. Even the reception of law as one of the most common modes of its assimilation has been recently attributed primarily to globalisation and its consequences. However, it should be noted that such phenomenon is far from being exclusively contemporary, modern or even post-modern. Experience in the Far East countries indicates that the process of the reception of foreign law commenced in the second half of the 19th century when the term globalisation was used scarcely although globalisation as a process was evolving. And not only that: Japan, Korea and Vietnam assumed Chinese law about a thousand years before, which could not definitely be attributed to a global influence, but maybe, with some reservation, to a subcontinental impact.¹

Reception and transplantation

Prominent Czech legal comparatist Viktor Knapp defines the reception of law as “not only taking-over the law of one country by another country, i.e. reception in its literal meaning, but also as creating the law of one country according to a foreign pattern”.² The process of reception of European legal systems by the legal systems in the Far East commenced in a way different from that in other parts of the world. Foreign law did not fully suppress the local law, but it was functioning under conditions designated by Viktor Knapp as the so-called “colonial dualism of law, i.e., the dualism of law imported into colonies by a colonial power, and the law for the local people with the metropolitan law being stronger and serving to correct the local law, if necessary. At the same time, the new law is created according to the legal patterns of a former metropole and tends to match it.” However, that model is not typical only for the relationship between the law of European countries and the original law of the countries in the Far East. Within the Far East itself, colonial dualism was implemented much earlier in the relationship between Chinese law in its capacity as metropolitan law and Vietnamese law in its position as colonial law.

The processes of transplantation of law are interlinked with the concept of a “legal transplant”, which was coined by Scottish legal comparatist Alan Watson.

1 Michal TOMÁŠEK, *Právní systémy Dálného východu I* [Legal Systems of the Far East I], Praha 2016, pp. 109–111.

2 Viktor KNAPP, *Velké právní systémy* [The Great Legal Systems], Praha 1996, p. 214.

Watson argues that the law in a society usually develops not as a logical sprout of its own experience, but rather most legal systems are based upon borrowings from other legal systems. Legal rules, of whole legal systems, can be transmitted from one legal environment into another. However, there is a basic issue persisting, namely to what extent legal transplants are appropriate for the recipient legal environment and whether they can survive and function. If not, a legal transplant can either fall into decay or shift or change its original meaning. A successful legal transplant, in a medical sense of the word, would be developing in its new organism and would contribute to its versatile and appropriate functioning.³ Italian legal comparativist Rodolfo Sacco distinguishes essentially between two categories of legal transplantation, namely *imposition* and *prestige*. Sacco claims that the latter contains a certain portion of “gadgeteering”, where legal transplants are adopted as they are without any deeper analysis of the legal environment of the “donor”, individual segments and relevant links. The distinction between the concepts of “reception of law” and “transplantation of law” can be briefly explained as follows: while reception is the process of transferring legal concepts, institutions and/or the whole systems, transplantation, in addition to all these aspects, includes also an analysis of impacts of the reception upon the destiny and development of transmitted elements, so-called “legal transplants”.⁴


































Viktor Knapp in his distinguishing between voluntary or imposed processes of reception and transplantation notes that “in times when colonizers were bringing their metropolitan law into their colonies ... it was in fact a reverse side of reception. Metropolitan law was not accepted in colonies as a result of reception, but rather imposed upon them authoritatively by the colonial power”. Under such circumstances no one considered whether legal transplants were appropriate for their legal environment. In most cases, they were not. However, colonisers could not let inappropriate legal transplants stay aside or even die out. That was why the legal transplants were supported by force to survive for such a long time until they *de facto* replaced local legal concepts and institutions. In such a situation, legal transplants in the new social and cultural environment assumed a shifted or even different meaning compared to their original as a result of interpretation of law under the different context of other social and cultural conditions. However, it should be noted that interpretation tends to shift the meaning of legal transplants even in situations when they are accepted voluntarily. The reception of metropolitan law in

3 Alan WATSON, *Legal Transplants: An Approach to Comparative Law*, Charlottesville 1975, p. 27.






















































































4 Antonio GAMBARO – Rodolfo SACCO, *Sistemi giuridici comparati*, Torino 1996, pp. 50–51.

colonies could acquire one of three directions. First, the metropolitan legal system is fully absorbed by a respective colony without changing its original system. Needless to say, that has never happened. Second, the metropolitan legal system amalgamates with that of a respective colony. This may happen provided that the metropolitan and colonial legal systems show elements common to certain legal families. Third, the metropolitan legal system fully replaces the original legal system of a respective colony. This happens where the metropolitan legal system is dominant to such extent that the colony becomes unable to preserve its own legal culture.⁵

The origin of legal transplants in individual countries in the Far East is indicated in the following table:⁶

	Const. law	Civil law	Commerc. law	Admin. law	Criminal law	Labour law	Compet. law
China	 1912	 1929	 1914	 1929	 1912 1935	 1930	
PRC	 1949	 1950 1986 2009	 1950 [†] 1981 ^{**} 1999	 1954 1989	 1950	 1950 1994	
Hong-kong	 1841 1997	 1841	 1841	 1841	 1841	 1841	 2007 1841
Macau	 1822 1999	 1867	 1888 1999	 1945	 1852	 1867	 1999
Taiwan	 1895 1945 1945 1947	 1898 1945	 1899 1945	 1895 1945	 1895 1945 2002	 1898 1945 1984	 1991

5 Barry HOOKER, *Legal Pluralism: An Introduction to Colonial and Neocolonial Laws*, Oxford 1975, p. 182.
 6 Michal TOMÁŠEK, *Právní systémy Dálného východu II* [Legal Systems of the Far East II], Praha 2019, pp. 359–360.

Japan	 1889	 1889	 1899	 1872	 1882	 1898	
	 1889	 1898		 1890	 1907	 1947	
	 1947			 1947	 1947	 1947	 1947
Korea	 1910	 1910	 1910	 1910	 1910	 1910	
South	 1948	 1948	 1963	 1948	 1948	 1953	 1980
	 1954	 1958	 1963	 1948	 1954		
North	 1948	 1948	 1955*	 1948	 1950	 1946	
Mongolia	 1924	 1924	 1945*	 1924	 1926	 1941	
	 1992	 2002		 2004	 2002	 1999	 2010
Vietnam	 1884	 1884	 1884	 1884	 1884	 1884	
South	 1956	 1956	 1956	 1956	 1956	 1956	
North	 1946	 1950	 1960*	 1946	 1945	 1950	
Vietnam	 1980	 1980	 1980*	 1980	 1980	 1980	
	 2001	 1995	 1997	 1980	 2015	 1994	 2004
	 2005			 1996			

* Called economic law

** Called contract law

The significant encounter between European legal cultures and those in the Far East happened at the edge of the 19th and 20th centuries emerging in individual countries at slightly different times. There is the termination of shogunate in Japan in 1867, the termination of the Empire in China in 1911, in Korea as a result of annexation of the country by Japan in 1910, and the French colonisation in Vietnam completed in 1884. A certain mosaic was created thereby which encompasses the sources of legal transplantation or the foreign legal systems upon which the making of new Far-Eastern law was based. Thus, it is rather difficult to follow various sources of legal transplantation. The initial understanding was that a legal

transplant is taken over by the new legal environment, followed by its application, and only then its interpretation shows to what extent the transplant proved itself in that environment, i.e., whether its original meaning has shifted or changed. However, a certain complication in such procedure is the fact that sometimes new waves of adopting legal transplants from different legal systems substantially change the character of transplants adopted earlier. Examples include Americanisation of Japanese law after World War II (WWII) or Sovietisation of the law of those countries in the Far East which found themselves under the Soviet influence.

Continental transplants

Comparative legal studies distinguish among several great legal systems and their subsystems.⁷ It suffices, for the purposes of this paper, to focus just on continental legal system and common law. It should be noted that subsystems of German law, the law in countries with Romance languages and the Soviet subsystem turned out to be the most important for legal transplantation in the Far East.

German transplants

Transplants coming from German law are the most widely spread in the countries in the Far East not only from a historical perspective but also in consideration of recent developments. Japan was the first country which built its modern legal system upon German law. Japan as the first in the Far East realised that if it plans to join the group of World Powers it should radically reform its legal system. The best way to reach the aim was the reception of the legal system of a respected Western legal culture. The restoration of imperial power happened in consequence of the collapse of the Shogun power in 1867. Just fifteen years old Emperor Mutsuhito declared the era of Meiji (enlightened government) on 23 October 1868, which was supposed to cover the reign of one emperor. Mutsuhito's reign continued until 1912. So-called "six codes of Meiji" were adopted during that time following the German pattern: the Constitution, the Civil Code, the Business Code, the Criminal Code, the Code of Civil Procedure and the Code of Criminal Procedure.

7 René DAVID, *Les grands systèmes de droit contemporain*, Paris 1971, pp. 22–25.

The first German transplants were incorporated into the Japanese Constitution Meiji promulgated on 11 February 1889, i.e., on the day symbolically linked to the anniversary of the declaring of the Japanese State in 660 B.C. However, the Meiji Constitution, when compared to its Prussian counterpart, showed certain differences. Unlike in the Prussian conception, an emperor became the holder of all power in the state being the representative of the “eternal and uninterrupted” imperial line. The Japanese theory of constitutional law designates such constitutional conception derived from the sovereign power of the emperor as “imperial establishment” (*tennōsei*). From the ideological perspective, imperial establishment encompassed so-called “national learning” (*kokugaku*) standing not only against so-called “Chinese learning” (*kangaku*), but also against “Western learning” (*rangaku*). The basic concept of the constitutional ideology was an absolute uniqueness of the Japanese state polity (*kokutai*). The imperial family in its permanent continuity was its axis. This was the basis of the Japanese nation emphasised as an exceptional national identity endowed with traits, character and abilities which are missing in other nations. Itō Hirobumi, father of the Meiji Constitution, defined the conception of the Japanese nation based upon the German conception of a nation (*Volk*) including its exclusiveness and supremacy. The Japanese nation was interpreted through Confucian categories as an eternal and unchangeable result of the natural order.⁸ Japanese legal positivist Hozumi Yatsuka defined the *kokutai* system in legal terms and deduced that the Japanese nation is a “family state” since all Japanese are descendants of one common national ancestor who was also the antecedent of the emperor; as a result, all Japanese are racially interlinked.⁹

The constitutional tie with an emperor always represented a significant issue in the course of reception of Western legal patterns by the legal systems of the Far East. The historical background of the position of a monarch was totally different from that in European constitutional monarchies. For example, a similar problem occurred in China after 1906, when Empress Dowager Cixi, Regent of the Qing Dynasty, promised that a constitution would be adopted. The tie between an emperor and the people expressed in a constitution clashed with the conception of an emperor as “Son of Heaven”. However, the Chinese conception permitted that an emperor might become disliked by Heaven and could be replaced by another mon-

8 Kazuhiro TAKII, *The Meiji constitution: the Japanese experience of the West and the shaping of the modern state*, Tokyo 2007, p. 52.

9 Richard H. MINEAR, *Japanese tradition and western law: Emperor, state, and law in the thought of Hozumi Yatsuka*, Cambridge (Mass.) 1970, pp. 56–60.

arch. Such approach was absolutely unimaginable in Japan. The issue of the constitutional tie of an emperor remained unsolved in China and, in fact, need not have been, as the Empire collapsed in 1911. The Japanese concept of an emperor as deity and direct genetic successor of Amaterasu, Goddess of the Sun, was reflected in the Meiji Constitution in the concept of an emperor as the holder of the supreme constitutional powers. Although the Prussian constitution emphasised the position of a monarch on the top of the hierarchy of constitutional powers, the Meiji Constitution went even further. The Prussian Constitution guaranteed that the king was untouchable; the Meiji Constitution considered an emperor not only as untouchable, but also sacred. Under the Meiji Constitution, the emperor combines in his person all elements of Japanese sovereignty and all power stems from the emperor, not from the people. That was how the Japanese concept of sovereignty in the Meiji Constitution became different from most European countries and from the American concept. The father of the Japanese Constitution Itō Hirobumi commented on it that the relationship between the emperor and the Japanese state is that between brains and the rest of the body.¹⁰ The Japanese emperor was an antipode of the British “King-in-Parliament”.

In 1912, Tatsukichi Minobe, Professor of Tokyo Imperial University, published a conception designating the emperor not as a sacred subject standing above the state, but as the supreme authority/body of the state. The emperor was part of the state mechanism and as such he is obliged to respect laws. Minobe's theses were based upon the teaching formulated by German legal philosopher George Jellinek, and upon the conception of the British constitutional monarchy. Some of Minobe's ideas were quite close to the idea that the emperor is not above the state, but the rule of law is. Minobe warned against increasing power of the army in Japan resulting from the fact that the emperor was the commander-in-chief of the armed forces. He suggested that the emperor's powers in that respect should have been subject to parliamentary control.¹¹ Minobe's ideas were opposed by the theory formulated by another professor of the Tokyo Imperial University, namely Shinkichi Uesugi. He identified the emperor with the state not only due to the emperor's moral authority, but also as being a direct descendant of Amaterasu, Goddess of the Sun. Tatsukichi Minobe was supported more by academics whereas Shinkichi Uesugi was popular among the emerging military clique, which condemned the institutionalisation of the emperor as improper within academic discourse. The

10 Hirobumi ITŌ, *On the Constitution of the Empire of Japan*, Tokio 1906, p. 3.

11 Herbert P. BIX, *Hirohito and the Making of Modern Japan*, New York 2000, pp. 79–80.

clique declared that the emperor is undoubtedly a holder of the supreme power in the state and called for eradication of the institutional conception of the emperor. Ideological victory of the military circles in that “battle” in 1935 fostered their position in the state, which became a military dictatorship becoming quite close to the Shogunate system with one ostensible difference: the new military system considered the emperor to be the supreme and untouchable authority. Unlike Shoguns, the system did not isolate the emperor, but accentuated him and the emperor’s will had rather marginal impact upon a majority of military decisions.¹² That argument was used, inter alia, during the post-war defence of the position of emperor and of Emperor Hirohito himself.

The German Civil Code of 1896 is the most significant transplant from German law in the Far East. At that time, it was the most modern codification of civil law in the world. Japan published its Civil Code in 1898 following the German pattern. The German Civil Code as well as its Japanese manifestation influenced the Chinese civil law codification between 1929 and 1931; however, it should be noted that China approached the reception of foreign legal transplants with certain circumspection. Chinese lawyers devoted almost 50 years to the preparation of the codification of civil law and carried out many comparative analyses with substantial help by civilists from abroad. In addition to analysing in detail the Japanese Civil Code, they focused primarily on the Swiss Civil Code 1907 and the Swiss law governing obligations from 1911. They worked with the Brazilian Civil Code 1916, the Russian Civil Code 1922, and also with the Siam Civil Code from 1923–1925 and the Turkish Civil Code 1926. From the comparative perspective, the new Civil Code resembled the German Civil Code. The area of obligations was inspired by the Swiss Obligations Act. The final Chinese text was a mosaic of foreign institutions of civil law appropriately intertwined with the manifestations of traditional Chinese legal thinking. The latter was supported by extensive case law of the Supreme Court of China, which had worked with concepts and institutions of foreign law since 1910.¹³

Soon after 1945, South Korea also turned to the German legal system and German legal doctrine. Both appeared to be closest to the Korean legal thinking as they formed the basis of Japanese law under whose influence Korea existed for thirty five years. Unlike Japan, the Anglo-American model of the *rule of law* was not declared in Korea, but the German concept *Rechtsstaat* was preferred. This is the

12 Wilhelm RÖHL et al., *History of law in Japan since 1868*, Leiden – Boston 2005, pp. 55–57.

13 Jean ESCARRA, *Le droit chinois*, Paris 1936, pp. 176–177.

state where the rule of law is implemented by the state itself rather than beyond the state itself. Even great experts such as Gustav Radbruch or Hans Kelsen¹⁴ intended to participate in the reform. However, it did not happen. Gustav Radbruch passed away and Hans Kelsen based his engagement upon the condition that Korea would unify, which did not happen. As already mentioned, it is necessary to consider how a legal transplant “behaves” in the new legal environment. The best evidence of such process can be found in the judgments of courts. Initially, courts in the Far-Eastern countries resorted to interpretation of foreign legal transplants according to their traditional Confucian principles. That tendency is not only continuing, but appears to be even more distinctive. It should be noted that Confucianism has been considered a successful doctrine assisting the East-Asian countries in reaching the economic balance with, or even¹⁵ prevalence over the West.

Judicial interpretation of the Japanese Civil Code not only follows the German conception, but also takes into account Confucian principles and the tradition and peculiarities of ancient Japanese law, which was reflected in the Code itself.¹⁶ The South Korean Civil Code also provides, in particular in its Part One – General Provisions, wide space for interpretation especially of certain institutions. For example, provisions for good faith, abuse of law, public order and due managerial care were formulated by the legislature in anticipation of completing their content by case law. This is what has been happening primarily in judgments of the Supreme Court. The Civil Code expressly states that should there be no explicit provision applicable to a concrete civil law situation, custom would be used. Should there be no custom the common sense rule would be used. The Code authorises judges to fill in the gaps in the written civil law; however, the common sense rule is not specified nor restricted.¹⁷ The Chinese Civil Code, valid since 1949 only in Taiwan, indicates the German approach in support of case law, but, to a certain extent, also the Japanese approach.

A disadvantage of Confucian principles is their conflict with certain principles of modern law, such as the principle of equality and prohibition of discrimination. For example, the original wording of the Japanese Civil Code of 1898 con-

14 Gustav RADBRUCH, *Vorschule der Rechtsphilosophie*, Heidelberg 1948, pp. 51–52.

15 Chongko CHOI, *East Asian Encounters with Western Law and the Emergence of East Asian Jurisprudence*, in: Michal Tomášek – Guido Mühlemann (eds.), *Interpretation of Law in China – Roots and Perspectives*, Prague 2011, pp. 106–107.

16 W. RÖHL et al., *History of law of Japan*, p. 186.

17 Korea Legislation Research Institute, *Introduction to Korean Law*, Berlin – Heidelberg 2013, p. 115.

tained an extensive application of obligatory respect to parents (*kō*). Children were obliged to ask their parents for their consent to the children's marriage. The recent text of the Civil Code contains only few remains of that principle. The context of modern interpretation of law would hardly accept the traditional Confucian principles applicable to family relations, namely those constituting inequality between men and women. In 1994 in Taiwan, the Council of Grand Justices declared as non-compliant with the constitutional principle of equality between men and women those provisions of the Civil Code 1931 under which the parental rights regarding the child may be exercised only by the father. In 1998, the Council of Grand Justices declared as non-compliant with the principle of equality between men and women the provision of the Civil Code under which the residence of the wife was determined automatically according to the residence of the husband even in case the spouses agreed otherwise. The Justices claim that a free choice of the place of residence is an expression of the equal right of both husband and wife in their common marriage.¹⁸ The Constitutional Court of South Korea stated in 1998 that exclusion of women from traditional Korean rituals of ancestor veneration *jong-joong*, and from related property relations is contradictory to the constitutional principle of equality of gender. Equality of gender as a reason for abandoning the traditional principle of Korean law was declared by the Constitutional Court in 2001, when it found as unconstitutional the principle of registration of families (*boju*) according to the male head of the family clan, particularly that part of the principle where his succession was to be transmitted not to his widow but to the oldest male member of the family clan. As for the prohibition of discrimination, the Constitutional Court considered the constitutionality of all provisions of the Civil Code prohibiting marriage among individuals with the same surname (*dong-song dong-bon*). The Court in its judgment from 1997 reached the conclusion that the respective provisions of the Civil Code were unconstitutional because they violated the fundamental right to enter into marriage upon a free choice, which restricted one's sexual self-determination. Subsequently, the National Assembly modified the respective provisions in such a way that it is prohibited to enter into marriage between close relatives.¹⁹

However, it should be noted that Confucian principles in private law in the contemporary Far East are not necessarily extinct. Courts maintain the opinion

18 Fa-lo CHANG, *The Legal Culture and Legal System of Taiwan*, Alphen aan den Rijn 2006, pp. 51–52.

19 Korea Legislation Research Institute, *Introduction*, pp. 135–137.

that the principles could apply to the protection of rights of older people. For example, the Japanese Supreme Court in its judgment from 1964 stated that a mother who had acquired land in good faith from her oldest son, but had forgotten to register the transfer of property, may not have her property rights encroached upon. The Court, in the reasoning of the judgment, invokes the principle of good faith, that was included in the Civil Code after the adoption of the Constitution in 1946, and the principle of veneration of ancestors. Similarly, the South-Korean Constitutional Court, in its judgment from 1998 confirmed the sustainability of the Confucian principle of veneration of ancestors, when the Court decided that a rightful owner of a residential premise may not eject from that residence a debtor's parents who are unable, due to health reasons, to find jobs nor another accommodation.²⁰

A certain paradox can be traced in that German case law and the Far-Eastern case law found a meeting point thanks to the Confucian tradition. It applies primarily to the judicial interpretation of a transplant from German law, namely so-called "property conveyance contract" (*dinglicher Vertrag*). German understanding of a property conveyance contract establishes a consensual transfer of property, which should be distinguished from an obligation to transfer property. The former as an abstract contract, unlike for example a sales contract, does not constitute an obligation except for a duty to make a contract in compliance with contract law; as a result, it by itself contravenes the principles of the law of obligations. The transfer of property is considered as a voluntary act resulting from preceding juridical acts by the respective parties. It should be noted that traditional East-Asian law does not distinguish between obligations and property rights and that is the context within which property transfer and its legal consequences are usually interpreted. The German dual construction of transfer of a thing, i.e., the distinction between a juridical act allowing for the transfer of a thing as such (*Verfügungsgeschäft*) and a juridical act constituting an obligation (*Verpflichtungsgeschäft*) was adopted by both the Japanese Civil Code 1898 and the Chinese Civil Code 1931.

The conception of property conveyance contract and its distinction from a contract constituting an obligation has often been considered as hardly understandable outside the territory of Germany. However, in China as well as in Japan, the conception established itself quite easily. The reason undoubtedly lies in the traditional Chinese legal thinking, which did not differentiate between obligations and property rights. In 1939, the Supreme Court confirmed such interpretation for

20 Hiroshi ODA, *Japanese Law*, Oxford 2009, p. 120.

the whole China. However, today's Taiwan slightly differs from the German conception as, instead of property conveyance *contract*, it prefers the term property conveyance *agreement* to make it clear that it is non-obligation, or rather a quasi-obligation juridical act.²¹ The distinction between the transfer of property and the obligation to transfer property give rise to complications particularly with respect to determining whether the juridical act and its consequences are valid or not primarily in relation to comparative interpretation under German law, which need not be always fortunate. For example, the conception of unjust enrichment as stipulated in the Korean Civil Code is interpreted in the sense of the German Civil Code in such a way that everyone having obtained, without any legal reason, a benefit from property or another person's service and causing harm to that person is obliged to return such benefit. This interpretation gives rise to a question whether invalidity of a juridical act has an impact upon effects of the property transfer.²² The South-Korean Supreme Court followed the case law of the Japanese Supreme Court arguing that invalidity of a juridical act deprives the property transfer of effects against third parties, but the German interpretation is to the contrary. In this context, the French solution would be more appropriate, considering the juridical act resulting in unjust enrichment as non-existent ab initio (*nul et non avenue*).

Romance transplants

Elements from French law, Portuguese law and Italian law were adopted in the form of transplants from the Romance legal subsystem by countries in the Far East.

French law

Transplants from French law started to be forcibly imposed by the colonial rule in Vietnam. Under the Treaty of Hué of 6 June 1884 Vietnam became a French protectorate for almost 60 years until 1941. The application of French law during the French occupation was different in different parts of Vietnam depending on the status acquired by the respective territory of the country. French Indochina was composed of three protectorates – Annam, Cambodia with Laos and Tonkin, one

21 Fa-lo CHANG, *The Legal Culture*, pp. 129–131.

22 Korea Legislation Research Institute, *Introduction*, pp. 128–129.

colony – Cochinchina, and one Leased Territory of Guangzhouwan. One aspect was common to all three territories. French people were subject exclusively to French law and in no way could they be subject to local substantive law or Vietnamese courts. Even local people were subject, to a various extent, to French law and French courts. In addition to French law, the traditional Vietnamese Gia Long Code from 1815 applied, but only to the local Vietnamese inhabitants. Application of law was not territorial but *ratione personae*. Every person was carrying their law with them. For example, a person from Annam occurring in Tonkin was subject to the law of Annam, etc. French people were subject to the law of Metropolitan France. In Annam and Tonkin, having the status of protectorates, certain provisions of the Gia Long Code applied in addition to French law; however, the Code became rather obsolete in the 1830s and 1840s and ceased to be applied.²³

Launching the French *Code civil 1804* in Vietnam could be considered as a positive consequence of the French colonial power. In Vietnam, as well as in other countries in the Far East, the conception of private law had not been sufficiently developed until then. The very mature French Civil Code undoubtedly positively contributed to the development of their legal culture. The codification of civil law following the French model, entitled “The Principles of Civil law” (*Précis de droit civil*) and promulgated on 10 March 1883, was applied in Cochinchina and in three towns with the French concession – Hanoi, Haiphong and Danang. The Codification adopted provisions of the French Civil Code regarding natural and juridical persons, personal status and registers, marriage, divorce, paternity, adoption, guardianship, etc. However, it did not contain provisions for obligations and contracts. Vietnamese courts applied directly the original *Code civil* to those areas. The French concept of dualism of civil law and business law resulted in the promulgation of the Commercial Code of Annam (*Code de commerce*) in 1912. In Tonkin, the Civil Code of Tonkin was promulgated in 1930 (*Code civil du Tonkin*), which was inspired not only by the French Civil Code, but also by the Swiss Civil Code. Certain traditional customs were included, primarily those applicable to marriage, family relations and inheritance. The newly adopted rules were sensitive and susceptible as to the traditional customs falling within the ambit of civil law in the same way as during the ancient reception of Chinese law in Vietnam. In Annam, between 1936–1939, the Civil Code of Annam was promulgated (*Code civil de l’Annam*), essentially following the Tonkin codification.

23 Pierre-Richard FERAY, *Le Viet-nam*, Paris 1984, pp. 27–30.

As for criminal law, French law applied in Cochinchina; Vietnamese were initially subject to the Gia Long Code. In 1901, the governor general issued an order under which all persons in the territory of Cochinchina were subject exclusively to French law. In Annam and Tonkin, French criminal law applied just to French people; local people were subject to the Gia Long Code in certain cases. The French Criminal Code (*Code pénal*) from 1810 was complemented, for its application within those territories, with material elements of crimes against the French Administration, such as conspiracy and insurrection, for which the harshest punishments were imposed. Some provisions regarding such crimes were issued even by the local puppet government. In 1921 in Tonkin, the criminal code following the French model was adopted. In Annam, the criminal code was adopted in 1935, also following the French pattern. In Cochinchina, the criminal code was complemented with a special minor offences act allowing for fast-track punishing by the police in case of any sign of protest against the French rule. Such crimes were subject to harsh punishments.

The justice system in individual parts of Vietnam was dependent on the type of status of a respective territory. The system of French courts was established in Cochinchina in 1867, to whose jurisdiction both French and local people were subject. The application of substantive law by those courts initially functioned on the principle of mixed law. French people were subject to French law and local people to the law of the Nguyen dynasty. Such practice was abolished in 1901 and exclusive application of French substantive and procedural law was introduced. In addition to the system of general courts, there were military courts which were to harshly punish any sign of opposition against French authorities. In Tonkin, there were initially two systems of courts, namely French courts with jurisdiction over French citizens and other foreigners, and Vietnamese courts with jurisdiction over local people. Later, a three-instance system of courts was constituted with a French citizen being always the chair of a panel. In 1921, special legislation governing the judiciary was adopted in Tonkin, namely the Organisation of Judiciary Act (*loi sur l'organisation judiciaire*), the Code of Civil Procedure (*Code de procédure civile*) and the Code of Criminal Procedure (*Code de procédure pénale*). Specialised civil or commercial panels were missing in the new system from 1921. General courts had jurisdiction over all civil, commercial and criminal cases. Vietnamese judges as single judges could decide in the first instance. Chairs of panels in higher instances had to be French. The most extensive relative autonomy of the Vietnamese judicial system was preserved in

Annam. The Code of Civil and Commercial Procedure (*Code de procédure civile et commerciale*) was adopted in 1912.²⁴

In addition to French general and military courts, there always existed the traditional Vietnamese judicial system where the executive and judicial branches were not divided. The French system of prosecution was absent there; as a result, the judge had to execute all steps in both pre-trial procedure and the trial. Old Vietnamese courts did not respect the presumption of innocence principle nor other procedural rights known in France. For example, the decision of a judge to remand someone in custody was discretionary without any fixed rules. Although the French introduced the right to defence into Vietnamese law, the traditional Vietnamese courts usually disrespected that right. In Tonkin, a defendant was allowed to choose the defence lawyer only in proceedings before the highest instance of court. The highest Vietnamese official in the province acted as a second-instance judge at the same time. The highest – third – instance was the Minister of Justice of the Vietnamese imperial court. Both judicial systems were bound by litispendence, but that had only a theoretical significance. A French citizen never had the case considered by a Vietnamese court. Vietnamese courts were obliged to decide all cases in all three instances irrespective of whether a case had been appealed before any of the lower courts. However, French courts, without any doubt, had much larger significance than Vietnamese courts. It should be justly noted that French courts were more impeccable from our current perspective. French judiciary was independent of the Executive, it respected the rights of parties to proceedings, including rights unknown in Vietnam, such as the presumption of innocence, the right to a defence lawyer and the right to refuse to testify against oneself. The French instituted a system of independent prosecutors and investigating judges. Civil proceedings in the Vietnamese territory acquired modern features and the significance of French colonisation appears to be rather positive if civil substantive and procedural law is considered. The French judiciary proceeded in Vietnam in a strong repressive mode; between 1902–1912 French courts sentenced 24 380 persons to death penalty or punishment for life. Despite that it can be admitted that both criminal substantive law and criminal procedure were humanised. Particularly, cruel and torturous punishments surviving in Vietnamese law (unlike in Chinese law) until the 19th century, were eliminated.²⁵

24 Chu Hoang Hu NGUYEN, *Prameny práva ve Vietnamu do roku 1945* [Sources of law in Vietnam until 1945], Praha 2001, pp. 70–80.

25 *Ibidem*.

Vietnamese, unlike Japanese or later Chinese, could not decide by themselves what part of foreign law should have been adopted; however, we can reasonably assume that they would have not voluntarily chosen the reception of French law in its entirety. Such assumption is supported by the fact that the influence of French law became gradually weaker in direct correlation to the weakening of French colonial rule, until it totally disappeared. French law survived for a few years after WWII in South Vietnam, but the unification of the South and the North of the country caused French law in Vietnam to vanish definitely.²⁶

The transplantation of French law in Japan had good prospects in the beginning. In 1869, the Japanese government had the French Criminal Code translated into Japanese. Subsequently, the whole set of the Napoleonic codification was translated and, as a result, many European legal concepts and institutions were introduced into Japanese. Parisian professor Gustave Émile Boissonade de Fontarabie was charged, in 1872, with inserting French codes in the Japanese environment. First, he prepared drafts of the Criminal Code and the Code of Criminal Procedure that were promulgated in 1880 and came into force in 1882. Those were the first statutes of new law in Japan. What was new was not only the codification itself but also the principle that laws should be publicly promulgated and binding on everyone in the same way. All Japanese became equal before the law. Those codes clearly defined principles of criminal liability and punishability of conduct, and the new modern system of punishments was launched.²⁷

The Criminal Code 1882 was influenced by its French origination. It was a European and modern regulation corresponding with all requirements of foreign powers with respect to the reform of Japanese law. The principles *nulla poena sine lege*, equality before the law and the prohibition of retrospective application of criminal provisions were included. Boissonade argued that the best way was that judges should be provided with a wide range of discretion; as a result, there is just one legal definition in the Code. Interpretation of other provisions was left for courts to deduce. Boissonade respected some Japanese traditions such as a milder punishment for an offender who voluntarily surrendered to respective authorities. Although that principle originated in Chinese law it was fully accommodated within Japanese law. Boissonade used that principle not only regarding the crimes of murder and manslaughter, but also with respect to property crimes where the offender returned the stolen property to its possessor. The construction of provi-

26 M. TOMÁŠEK, *Právní systémy Dálného východu II*, pp. 188–191.

27 W. RÖHL et al., *History of law in Japan*, pp. 612–614.

sions regulating criminal liability for attacks against the imperial family represented a certain difficulty. Needless to say, similar provisions existed in all European monarchies but Boissonade understood well the holiness and inviolability of the Japanese Emperor. Provisions protecting the untouchability of the Emperor *lèse-majesté* were incorporated to the satisfaction of all those concerned, and survived in Japanese law until 1946, when Americans insisted on its repealing in order to remove the violation of the equality before the law principle. Despite the massive impact of French codification in the beginning, the development of Japanese criminal law eventually merged with the general tendency of the reception of German law. The Criminal Code 1882 was fully replaced by the Criminal Code 1907 drafted according to the German pattern.²⁸

Gustave Émile Boissonade initiated the first comprehensive codification of criminal procedure in 1880, namely the Code of Criminal Investigations. Both the title and the content unambiguously indicated that it was inspired by the French Code of Criminal Investigations 1808 (*Code d'instruction criminelle*). The institutions of an investigating judge and prosecutor in pre-trial procedure were introduced in the Code, thus following the French pattern. As in France, three-instance proceedings were introduced in Japan. Brand new elements in the Japanese criminal procedure were the right to a defence lawyer, the presumption of innocence and principles of evidence acquisition. Theoretically, a defence lawyer was supposed to be procedurally equal with the prosecutor, but in practice it was not the case for a long time. The right to a defence lawyer was initially granted only for the trial; subsequent amendments of criminal legislation expanded the right to other stages of criminal procedure in consideration of the seriousness of the respective crime allegedly committed. The Code of Criminal Investigations, following the French model, instituted regular and extraordinary remedies including a complaint against the violation of law (*requête respectueuse*). The general tendency to depart from French law and to swing to German law resulted in the adoption of the Code of Criminal Procedure in 1890, which was expected to follow its German pattern. However, it was drafted in a hurry and, as a result, many elements of the original Code of Criminal Investigations, i.e., French elements, were preserved. The final text of the Code did not pose any substantial problem as the German and French conceptions of criminal procedure were not conspicuously different. Germany maybe assigned less importance to procedural rights of an accused person and defendant, which was closer to Japanese thinking. Regardless, Japan adopted a Ro-

28 Ibidem, pp. 614–616.

mance-Germanic model of continental criminal procedure with the conception of judge-investigator, in whose hands all threads of the procedure gathered – the judge-investigator primarily collected evidence and had discretion to assess it. The position of judge in the Japanese system became extraordinarily strong, as wide space for discretion was provided also by substantive law.²⁹

A civil code was expected to be drafted according to the French model. Professor Boissonade finished his Civil Code draft following the French *Code civil* in 1889 so that it could have come into force in 1894. However, a huge wave of opposition sprang up. Particularly, the conservative part of Japanese society claimed the new Civil Code was in conflict with “traditional Japanese morals”. As a result, Parliament withdrew the draft of the Civil Code and ordered that a new draft should be prepared. Gustave Émile Boissonade de Fontarabie prepared a new draft of the Commercial Code according to the French pattern in 1890, but its destiny was the same as was in the case of his Civil Code draft. A short period of the reign of French law in the course of reception of foreign legal systems by Japanese law terminated in consequence of the refusal of the French conception of civil law. Subsequently, Japanese law found itself under the prevailing influence of German law.³⁰ To summarise the development, the French Civil Code 1804, in particular, was totally unconceivable and inappropriate for the legal thinking in the Far East. The Code was based upon the spirit of time of its origination, namely the Enlightenment and the Rousseauian conception that people are equal, free and endowed with inviolable rights. That was in opposition to the Confucian natural order and associated strict hierarchy of social relations. On the other hand, the German Civil Code abandoned the Enlightenment conception. Business people for whom the Code was primarily drafted, were interested in profits rather than in philosophy. Such approach was understandable in both China and Japan as its pragmatism was close to their thinking. It was definitely closer to them than the French Civil Code philosophising in an incomprehensible European manner.

Portuguese law

Transplants from Portuguese law have been geographically restricted to Macao. In 1553, Portugal assured through bribes their use of the peninsula Macao. They start-

²⁹ Ibidem, pp. 697–698.

³⁰ H. ODA, *Japanese Law*, p. 18.

ed to build the town Macao – *Cidade do Nome de Deus, de Macau, Não há outra mais Leal* (Macao: the city of the name of God, no other is more faithful), which was separated from China by a wall in 1573. Macao became the first Western possession in China, and the first region in the Chinese territory where the law of a European state became applicable.³¹ In 1557, when Portugal finally acquired Macao, Chinese written law of the Ming Dynasty along with local customs in private law applied. The Portuguese acted as business people rather than as colonisers. They followed their regulations, primarily in business law, but they respected the Chinese rule. On the other hand, Chinese authorities respected that dispute resolution among Portuguese was subject to the jurisdiction of Portuguese authorities according to the principle that foreigners were to solve their conflicts by themselves.³² Chinese authorities appointed Portuguese who were to execute jurisdiction under Portuguese law. Chinese who converted to Christianity were also subject to the Portuguese legal regime. During the first decades of the presence of Portuguese in Macao, the impact of their legal culture upon the Chinese legal culture was marginal. There were contacts of some legal concepts and institutions from both sides, but there was no interest on the Portuguese side to pursue their legal culture by force, and no need on the Chinese side to look for potential legal transplants in the Portuguese legal system.³³ Peaceful co-existence (*convívio*) between the Portuguese and Chinese lasted until 1793, when the decree of Portuguese Queen Mary I (*Providências Régias D. Maria I*) clearly declared the intention of Portugal to assume the sovereignty over Macao including the implementation of Portuguese law.

In Macao, peaceful co-existence of Portuguese law and Chinese law ended in 1822, when the Constitution of Portugal declared that Macao was a component part of Portugal. In 1845 Portugal declared Macao as an open port, abolished the Chinese customhouse and established their own. Macao Chinese were subject to taxes; in 1849, the jurisdiction over local Chinese people was transferred from Chinese officers to Portuguese courts. The unequal treaty between China and Portugal in 1888 (Sino-Portuguese Treaty of Peking) contained an agreement signed by Chinese government representative Prince Ch'ing that Macao would be subject to permanent occupation by Portugal and that Portugal without Chinese consent

31 Michal TOMÁŠEK, *Právo na Hedvábné cestě* [Law on the Silk Road], Praha 2022, pp. 186–187.

32 Michal TOMÁŠEK, *Origins of the Legal Regulation of Foreigners in China*, The Lawyer Quarterly, 2021, Vol. 11, No. 1, pp. 70–82.

33 António Manuel HESPANHA, *Panorama da História Institucional e Jurídica de Macau*, Macau 1995, pp. 30, 45.

would not cede the Macao territory to any other country. The strengthening of Portuguese dominance in Macao along with the weakening of Ch'ing rule accelerated the reception of Portuguese law in the colony. When basic codes were adopted in Portugal itself the codes commenced to apply in Macao immediately after their promulgation, primarily the following: the Criminal Code (*Código Penal*) from 1852; the Civil Code (*Código de Seabra*) from 1867; the Code of Civil Procedure (*Código de Processo Civil*) from 1876, and the Commercial Code (*Código Comercial*) from 1888.³⁴ Along with those codes of the metropolitan Portuguese law, there were special regulations in Macao covering the colonial dualism of laws, namely the Treaty of Friendship and Commerce with China from 1862 (*Tratado de Amizade e Comércio com a China*) confirmed by the Treaty from 1888, the Code of Chinese Customs and Practices in Macao (*Código dos Usos e Costumes dos Chinas de Macau*) from 1909, and the Act of 11 April 1856 (*Lei de 11 de Abril de 1856*), applicable to the transfer of uncultivated land in overseas territories.³⁵ Enforcement of Portuguese law in Macao during the 19th century was executed by force rather than by voluntary reception. However, the Code of Chinese Customs and Practices in Macao shows that the Portuguese respected some Chinese customs of local people. The Code encompassed customs in the Chinese provinces Guangdong and Guangxi, in particular in the area of family and succession law; it also showed one the paradoxes of legal transplantation, namely that the original law remains the carrier of real legal identity, which is gradually squeezed out by transplants. The Act governing transfers of uncultivated land in overseas territories was intended by Portuguese to compel local inhabitants to register their relations to land for the purposes of their use or constructions. Native inhabitants including Macao Chinese were often unable to satisfy the statutory requirements and found themselves in an unlawful position regarding their land, of which the colonial administration took advantage.³⁶ Portuguese laws were applied either directly, or their application was subject to reservation to respect local customs and usages mainly in family and succession law. Since the Portuguese in their colonies generally respected local habits they allowed Macao people to carry out gaming and betting. Another reason for such benevolence was that it was a prosperous business. Gaming and betting were legalised in Macao by Portuguese colonial authorities in 1850. Macao thus became

34 Haiou LIU, *Outline of Macau Legal History*, Jilin 2009, pp. 2–19.

35 Michal TOMÁŠEK, *Jedna země – dva systémy výkladu práva* [One country – two systems of legal interpretation], *Právník* 2017, Vol. 156, No. 4, pp. 280–285.

36 Io Cheng TONG – Yanni WU, *Legal Transplants and the On-Going Formation of Macau Legal Culture*, *ISAIDAT Law Review*, 2011, No. 2, p. 17.

the “Monte Carlo of the Far East” and since then, the gaming business has been a significant part of Macao economy and culture, including legal culture. It cannot be said that Portuguese law got fully used to the legal thinking of Macao Chinese. However, during four centuries of Portuguese staying in Macao, Macao culture, arts and literature pushed ahead, which undoubtedly moderated the conflict between both legal cultures. Macao, for more than three hundred years, was an important naval crossroad and the application of modern rules of Portuguese law was beneficial for business as well as local people.

The prospect of returning Macao to China gave rise to the requirement that a new legal order should be constituted there, which would avoid the application of Portuguese codes and, at the same time, would allow Macao to be independent of the People’s Republic of China as it had promised. The process of so-called localisation of law (*lokalização jurídica*) was launched.³⁷ Its objective was to unite Portuguese law with Chinese customs into the uniform legal culture of Macao. The process took into account local social conditions where the majority of inhabitants were ethnic Chinese, which made Macao different from the former metropole. On the other hand, hundreds of years of coexistence caused both cultures, including legal cultures, to become habituated to one another; thus, it was necessary to ensure that the whole process would continue under the new circumstances. If compared with a similar situation in Hong Kong, at the same time preparing for its return to China, the process in Macao was more complex. The law in Hong Kong was based upon English common law whilst the Macao system was formed upon the continental system of law where courts apply and interpret primarily the written law. Should the written law have not existed the autonomous application and interpretation of their own law, as promised to Macao, would not have made any sense. It took twenty years until the return of Macao to China in 1999, during which basic codes were adopted, particularly the Civil Code, the Commercial Code, the Code of Civil Procedure, the Criminal Code, the Code of Criminal Procedure, the Labour Code, etc., primarily according to the Portuguese legal tradition, but with participation of local Chinese experts and in consideration of their opinions. The application and interpretation of law was based upon Portuguese law. However, Portuguese law itself had changed during those years. Portugal joined the European Communities in 1986 and the process of harmonisation of

37 Sun TONGPENG, *Uma reflexão sobre a Lokalização Jurídica de Macau*, Administração – Revista de Administração Pública de Macau, Direcção dos Serviços de Administração e Função Pública, 1998, No. 42, p. 1005.

Portuguese law with law of other Member States of the Community and later the European Union began. Needless to say, Portuguese law played no dominant role in the harmonisation process. However, at the time when the law of the People's Republic of China was substantially modernised following the "Western" legal conception with many American features, and in comparison to Hong Kong and its dynamic case law, one significant concern arose, namely that clinging to traditional Portuguese law might cause Macao to become a "museum" of law. An exclusive legal culture can exist only when it contains exclusive elements. Therefore, the most important step would be to consider to what extent Confucian elements were still alive in the legal culture of Macao, particularly in the legal thinking of Chinese inhabitants who had been brought up in an environment of "Western" values including law.

Italian law

Italian transplants have been rather rare in the Far-Eastern environment. To be precise, there is one in the Chinese Criminal Code 1935, which is still applicable, although with partial amendments, in Taiwan. The Italian Criminal Code 1930 (*Codice penale*) became a substantial model for that Chinese Criminal Code. The Italian Criminal Code was drafted under the rule of Benito Mussolini and coordinated by his Justice Minister Alfred Rocco; that is why it is sometimes called "*Codice Rocco*". The Code became one of the best and most progressive codifications of criminal law of that time. It is applicable in Italy, with certain modifications, until now. Foreign influences, primarily the influence of the Italian Criminal Code 1930, were incorporated into Chinese legislation sensitively and with balance. Considering the subject-matter applicability of the Code, most old Chinese delicts regarding the protection of family were excluded from criminal liability so that legal regulation of family relations could be primarily covered by civil law. Criminal liability was derived either from intention or negligence. Many definitions of criminal concepts show a high degree of preciseness, in particular with respect to the stages of a crime (preparation-attempt-completion) and accessoryship (complicity, inciting). In addition to aggravating and mitigating circumstances corresponding to a modern conception of criminal law and having nothing in common with the old Chinese fatalist conception, special laws stipulated specific aggravating and mitigating circumstances with respect to political offences. For

example, a higher degree of criminal liability was set for crimes committed with a motive hostile to the Kuomintang regime.³⁸ On the other hand, a mitigating circumstance was introduced for Communists if they had voluntarily surrendered to the Nanking government. Even that application practice survived in Taiwan until quite recently.

Transplants from common law

Legal transplants from common law were enforced within the legal systems in the Far East with many difficulties. Despite certain similarities such as the use of customs and judicial precedents, common law appeared to be almost unacceptable for the Far-Eastern countries due to its emphasis on individuality and the rights of an individual. It is then quite understandable that common law was introduced rather by force, particularly by Britain in Hong Kong and, after WWII, by Americans in Japan.

Hong Kong

The first transplants from British law applied in Hong Kong soon after it was colonised by Brits. Before colonisation by the British Monarchy, Hong Kong as part of the Chinese Empire was subject in public law to the written law of the Qing Dynasty; private transactions among common people were governed by local customs. Customs gradually played a more extensive role in the life of the local inhabitants, and the role grew proportionately to the weakening of the influence of central rule in Beijing. 26 January 1841 is considered the date of formal commencement of the British colonial administration in Hong Kong. Charles Elliot, colonial administrator of Hong Kong and the main British representative for commerce with China, published soon thereafter two substantial declarations whereby colonial dualism of law was installed. The first declaration of 29 January 1841 stated that local Chinese inhabitants were to follow Chinese laws and customs, whilst British citizens and other foreigners were to enjoy security and protection under British law. The second declaration of 1 February 1841 guaranteed the freedom of worship for the Chinese population, as well as the freedom to follow their own customs and habits

38 J. ESCARRA, *Le droit chinois*, pp. 216–220.

within their family clans, which were subject to the control of British authorities.³⁹ Promulgation of the Letters Patent (The Hong Kong Charter) of 6 April 1843 transferred Hong Kong under the exclusive rule of Queen Victoria. The Supreme Court Ordinance N. 15 of 21 August 1844 stipulated that “the law of England shall be in full force in the said Colony of Hongkong, except where the same shall be inapplicable to the local circumstances of the said Colony, or of its inhabitants”.⁴⁰ Chinese laws and customs remained in force until their replacement by British regulations; at the same time, reception of English law in Hong Kong was ongoing. The reception was not forcible and respected the basic principle of natural law, namely the rule of law principle. It turned to be rather difficult during the transitional period to determine when and to what extent the local law and especially customs could restrict the ongoing application of British laws.

Despite a non-forcible transplantation of English law into the legal environment of Hong Kong the situation was rather complicated. Should we accept the general presumption that transplantation is always easier where the legal cultures of the donor and recipient are close to each other, it should be emphasised that the English legal culture was very remote from that in China – even more remote than the legal culture of countries in Continental Europe. The traditional Chinese legal culture is based upon all-embracing Confucian social harmony. English common law is based upon the adversarial system and independent legal professions. The adversarial system, with confrontation of parties to proceedings, was in absolute contradiction to the Chinese conception of dispute resolution. The continental inquisitorial system was a bit closer to the Chinese understanding; as a result, China and some other countries in the Far East adopted elements of the continental system of procedure rather than the confrontational and individualistic system of common law. The main norms of social relations in China were moral customs (*li*), whilst law was looked down upon. Confucius taught that looking for solutions via legal disputes was not in compliance with the natural order of things; as a result and unlike in Europe, the system of legal professions was not developed in the traditional Chinese law. The Hong Kong Charter not only constituted the position of a governor, but also the legislative council as the governor’s advisory and law-making body. The official language for the creation and application of law was English and translations into Chinese were rather scarce. Local people with no knowledge of

39 M. TOMÁŠEK, *Jedna země – dva systémy výkladu práva*, p. 276.

40 SUPREME COURT ORDINANCE loo. 15 of 1844.

English were unable to become acquainted with the new system of law and had no chance to be admitted to any legal profession.⁴¹

British law and traditional Chinese law had some features in common, primarily their relation to customs. Brits applied their customs sensitively and with respect to local customs primarily in the area of family law and successions law. Respect for Chinese customs bore fruit to Brits particularly when the British colonial administration expanded, upon the Beijing Convention 1860, from Hong Kong to the North to the South-Western part of the Kowloon peninsula. In 1898 the British-Chinese Agreement was signed whereby Britain obtained the lease of so-called New Territories and Lantau Island for 99 years. With continuing spreading of British law into those territories Brits soon realised that Chinese in the New territories differed from those in Hong Kong; as a result, they issued an ordinance that local private law customs in New Territories take precedence over some orders applicable to Hong Kong. After 1858, colonial dualism of law was determined by the non-discrimination policy whereby the British Government forbade a dominant position of any ethnic group or class. Chinese customs, in the light of the equality doctrine, remained the source of law in Hong Kong. With time, the population of Hong Kong became familiar with, and got used to British customs, which appeared to them more modern in many aspects. Hong Kong inhabitants, for example, started to prefer personal independence over traditional ties with family clans. The New Territories Regulation Ordinance 1910 provided that Chinese customs should be respected in the area of family law and successions law in New Territories, but public law, particularly criminal law, should be based upon common law.⁴² Brits launched the system of mixed courts in Hong Kong. Their jurisdiction was over cases where at least one party was Chinese; they applied local customary law. However, it turned out in practice that British assessors – real judges, knew little about local customs; as a result, they preferred to apply British customs.⁴³ Considering procedural rules, the adversarial system was carried through, which strengthened the role of an individual and weakened the traditional social schemes of the Chinese society. That was how procedural law in Hong Kong became quite close to British law. Chinese inhabitants in Hong Kong were slower in absorbing

41 Lei CHEN, *Legal Culture and Legal Transplants, Hong Kong Report*, ISAI DAT Law Review 2011, No. 2, pp. 3–6.

42 Peter WESLEY-SMITH, *An Introduction to the Hong Kong Legal System*, Oxford 1999, p. 215.

43 David FAURE, *Custom in the Legal Process: The Inheritance of Land and Houses in South China*, in: Proceedings of the Tenth International Symposium on Asian Studies, Hong Kong 1978, p. 477.

metropolitan law than were people in Macao; but the legal culture of common law brought to Chinese people in Hong Kong the sense for individual enforcement of their rights, which was important for their destiny after 1997 when Hong Kong was returned to China.

Brits in Hong Kong and New Territories respected not only traditional customs within family and succession law, but also held in esteem Chinese customs regarding land relations. From the perspective of legal comparison, it should be noted that the English system of land relations had some features identical with the Chinese system. The first common feature was that the owner of all land in China was the emperor, as was the monarch under British law of property, who only leased estate to his subjects. Unlike the English system where the title to land was conferred primarily on individuals, the South Chinese system of land relations was based on conferring the title to land on family clans. The fundamental principle of old Chinese land relations was their permanence. That was secured through the *mortis causa* transmission of rights to use land, i.e. succession within the respective family clan. When the head of the clan died his rights to land transferred to his oldest son or, alternatively, to the person who was responsible for providing oblation for the cult of ancestors and was in charge of a “chantry field”. In addition to devolving the rights to land by succession, customs in the Hong Kong and New Territories area allowed for the *inter vivos* transmission of the right to land within a wider family clan; the head of a family clan was allowed, in the course of his life, to ensure the continuance of the rights to land by passing the rights to another male member of their wider family, such as to a half-blood brother or cousin. Traditional modes of transmitting rights to land *inter vivos* or *mortis causa* were confirmed in the New Territories Regulation Ordinance; however, every single transmission had to be reported to the British authorities which were to approve it and record which member of the respective family was to exercise the right on behalf of the user of the land, and to represent him. In the absence of such procedure, the British colonial administration was authorised to remove the land from the user.⁴⁴

The Application of English Law Ordinance 1966 stipulated that the common law and the rules of equity shall be in force in Hong Kong so far as they are applicable to the circumstances of Hong Kong or its inhabitants; and subject to such modifications as such circumstances may require. British, or more precisely English, law was applied in Hong Kong either directly or upon the monarch’s ordinances. In 1985, the common British-Chinese declaration was adopted under

44 P. WESLEY-SMITH, *An Introduction to the Hong Kong Legal System*, pp. 199–201.

which Hong Kong was supposed to become again part of China in 1997; the People's Republic of China promised that the local legal system would continue to exist including the system of judiciary and courts of appeal. That was why it was important to ensure that in Hong Kong there would be a comprehensive legal system within the jurisdiction of local authorities, i.e. that legal relations whose regulation had been subject to British law were to be governed by regulations adopted and issued by authorities in Hong Kong. Since the People's Republic of China guaranteed its full respect for Hong Kong law it was necessary that the democratic law of Hong Kong should consistently regulate all legal relations in order to prevent a situation when legal relations "forgotten" by the law of Hong Kong would be *via facti* subject to the law of the People's Republic of China. The legislative framework of the government of Hong Kong determined that local laws in the area of civil law, civil aviation, sea transport and admiralty jurisdiction should be prepared and adopted. In 1989, the government of Hong Kong was given the authority to draft laws which would include obligations of the British Crown resulting from international treaties and relating to Hong Kong, to apply on the territory of Hong Kong. Hong Kong applied the British system of judiciary and sources of procedural law. One of the main features was the principle of binding judicial precedents. The most important requirement for the continuance of the law of Hong Kong after its return to China were legal guarantees of human and civil rights and basic freedoms. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were consistently followed in Hong Kong since their coming into force in 1976, primarily through the relevant legislation and judgments of courts. The Charter of Fundamental Rights for Hong Kong was adopted in the form of an ordinance on 6 June 1991. Every citizen of Hong Kong who believed that his or her basic human rights and freedoms were violated, had the right to raise the respective claim before a Hongkongese court. At the same time, judicial review of legal regulations issued by Hongkongese authorities was allowed.⁴⁵

45 Kevin P. LANE, *Sovereignty and the Status Quo: The Historical Roots of China's Hong Kong Policy*, New York 1990, rew. The China Law quarterly, 1991, p. 128.

Japan

Americans perceived Japanese law as a system of European continental law after the defeat of Japan in WWII. The main eyesore was the Meiji Constitution that was considered as a synopsis for Japanese militarism. Americans were dissatisfied with certain provisions of the Criminal Code and certain rules within procedural law, and with the absence of competition law. Unlike post-war Western Germany where democratically thinking German lawyers were allowed by the Allies to draft a new constitution of Germany, a new constitution in Japan was drafted by lawyers from the American occupation administration. Although the draft included some elements of the Meiji Constitution it was, as a whole, the reflection of the US Constitution in combination with British constitutional features. The Japanese Constitution came into force in 1946. There were many complicated and sensitive issues, such as the position of the emperor, which was initially intended by Americans to be abolished as such. Eventually, the conception of a symbolic role of the emperor was adopted. Sovereignty of the country stems not from the emperor, but from the people. All powers of the emperor are derived from the people. The emperor has no executive nor political powers. The emperor plays a symbolic role within the legislative procedure, namely the right to promulgate laws. The government is responsible for all activities of the emperor, which underlines the emperor's symbolic role. The emperor, with the consent of the government, convenes the sessions of Parliament, dissolves the lower chamber, announces that parliamentary elections be held, appoints and removes ministers, declares amnesty, grants honours, ratifies international treaties, accepts the credentials of plenipotentiaries, and performs ceremonial functions.⁴⁶ The conception of succession to the imperial throne deserves attention. The first-born male descendant is to become the successor to the throne. However, certain opinions arose that such regulation violates the constitutional provision for gender equality, which were accentuated by the fact that there had been no male descendant in the imperial family for a long time. The situation changed in 2006 when a son was born to the brother of the crown prince.

Respecting fundamental rights and freedoms became one of the main constitutional principles. Unlike the terminology of the Meiji Constitution, the new Constitution 1946 consistently uses the term "citizen". It indicates thereby a certain shift from the vertical relation of Japanese as subjects of the emperor from whom all the state power was derived, to the horizontal relation between

⁴⁶ H. ODA, *Japanese Law*, p. 28.

the state and its citizens from whom the state derives its sovereignty. Constitutionally guaranteed rights, according to the American model, are of an individual nature and should protect citizens against the abuse of state power. Unlike the preceding conception of the Meiji Constitution, where the basic rights could have been restricted in compliance with a secondary (sub-constitutional) legal regulation, the conception of the new constitution did not allow for it. The new constitution, following the US Constitution, introduced the concept of separation of the state and religious societies; that was introduced both as a general principle and express prohibition in its article 89 to use public funds for the benefit of religious societies. Public funds must not be used to finance publicly beneficial activities unless that is carried out under the public control. The Westminster system, namely British constitutional customs, became the model for the construction of the legislative branch. Contrary to the original American ideas to introduce a one-chamber parliament, the bicameral conception established by the Meiji Constitution was preserved at the end of the process at the insistence of the Japanese.⁴⁷

The British concept of “King in Parliament” applies in Japan *mutatis mutandis*. Parliament is convened by the emperor, but, unlike the British Monarch, the emperor does not attend the session. His speech is read by the Prime Minister. The position of the Japanese cabinet has changed radically if compared to the Meiji Constitution. The Westminster system has been incorporated not only into the structure of the legislative branch, but also into the executive branch as the government is answerable to Parliament. The government needs to receive the confidence of Parliament; should it fail the government must resign as a whole. The significant contribution of Americans to the cultivation of modern Japanese law was the US pressure to institute independent judiciary. Japanese post-war judiciary absorbed many elements of American law, but certain principles of continental law were preserved. Surprisingly, one of them was the division of procedure into civil, administrative and criminal proceedings, which had been absent in the traditional Japanese law and was required to be implemented within the Meiji reforms. On the other hand, an example of discontinuity with respect to the former development of judiciary could be the fact that in 1947 the activities of the Administrative Court were closed, and the role of the highest instance in administrative justice was assumed by the Supreme Court. The Supreme Court has become, in compliance with the

47 W. RÖHL et al., *History of law in Japan*, pp. 57–58.

American model, the peak of the pyramid of Japanese judiciary; as a result, it also serves as a constitutional court.⁴⁸

The most significant transplant from American law into Japanese law is the system of competition law, which was in fact imposed upon Japan. The Antimonopoly Act was adopted in Japan in 1947. It should be noted that Americans tried to enforce in Japan those principles of antitrust law that had been refused in the US itself, for example the ban for business companies to hold shares of other companies. Since the idea to regulate the concentration of economic power was incoherent with Japanese thinking, the law could not properly function. In 1953, soon after the formal termination of American occupation, the provisions of the law were moderated in that respect.⁴⁹ In 1955, many exceptions were permitted and, as a matter of fact, the law has not been properly functioning until today. The best example of difficult functioning of the American antitrust system in Japan is the actual operation of horizontal conglomerates (*keiretsu*). They are based upon personal or family ties; considered from the perspective of “Western” antitrust law those conglomerates are on the border between cartels and monopolies, i.e., they have elements of both practices. Americans were unsuccessful in eradicating traditional Japanese opinions regarding the interconnection of the government and business, personal and family ties among businesses and life-long loyalty to the employer.

Keiretsu are groups of firmly interlinked business companies undertaking business activities among themselves. Historically, this form stems from Japanese family businesses. The original understanding was undoubtedly exceeded, but their internal cohesion has survived. What is typical for *keiretsu* is mutual shareholding for the purposes of business cooperation, stabilisation of manufacturing and corporate management. The personal component stands in the foreground, which is alien to American or European understanding where the property component is the main element. *Keiretsu* can have many forms. One is a chain of suppliers and customers primarily in the automobile industry. They are functioning through the established trading contacts. For example, suppliers of component parts for cars are primarily small and middle-sized businesses in which the buyer holds property shares or can dispatch its management. The main advantage is the precise functioning of the supplier-customer relationship; a disadvantage is the impossibility for external business entities to penetrate such chains. This is what particularly Ameri-

48 H. ODA, *Japanese Law*, p. 55–56.

49 *Ibidem*, p. 328.

can corporations have complained of. The Japanese Antimonopoly Act has been rather lenient towards such practice as if it would not be interested to have foreign companies on its market. The Japanese law reacts only when the *keiretsu* practices affect the interests of the Japanese consumer, such as in the case of suppliers of home appliances where *keiretsu* attempted to block supplies for newly established discount shops.⁵⁰ *Keiretsu* includes a bank, and several business establishments in different industries that are interlinked via mutual shareholding and managerial structures. Japan has to face criticism by the US that *keiretsu* violates antitrust law and restricts access of American corporations to the Japanese markets. The Japanese Fair Trade Commission has arrived at the conclusion that mutual shareholding inside those groupings does not exceed 20 % and that a majority of shares are held by owners outside the groupings. As a result of Japanese interpretation of antitrust regulation, there is no danger of monopolisation. The *keiretsu* system, as understood by the Japanese Fair Trade Commission, is not in contradiction with free competition. Its economic rationality is primarily based upon its efficiency and quality. The Commission argues that building and maintaining long-term business ties based upon price, quality or level of services is not contrary to the Antimonopoly Act. Although the interpretation of the Act might seem lenient towards respecting traditional Japanese trade practices, it should be noted that the Japanese Antimonopoly Act does not include any penalties for the formation of personal ties upon which *keiretsu* are built.

The People's Republic of China

The basis of Chinese private law is the Romanic-German private law system of Continental Europe upon which new laws were constituted and interpreted. Certain elements of traditional private law were preserved that are maintained in the written law and judge-made law. Interestingly, private law of the People's Republic of China has been more and more influenced by the common law system, particularly in interpretation of certain concepts, but common law elements penetrate also the written law. For example, the making of special legal regulations to cover special situations is an Anglo-American practice to fill in the gaps in case-law. China has taken over such practice, although not in relation to its case-law but to solve insufficiencies of basic codifications. Many elements of the Anglo-American system of

50 Ibidem, pp. 353–354.

law can be found in branches of the law of the People's Republic of China, as is contract law and consumer law; the principle of *stare decisis* has also been supported in order to mitigate the inconsistency of judicial decisions and/or to fill in the loopholes in legislation.

In the 2010s, the impact of the Chicago School upon the People's Republic of China strengthened, namely the economic approach to law or the relation between law and economics. The spirit of that influence can be seen, at the level of doctrine, in the interpretation of the principle of compensation of damage resulting from contractual liability. In order to use the Chicago doctrine of economisation of law in a more elaborate way, legal education should be complemented with economic education; needless to say, so far there are not many legal-economic experts in the People's Republic of China. An advantage of the economic approach to law is the analysis of the ratio between costs and returns. A more extensive application of economisation of law in the People's Republic of China is prevented by differences between continental law, upon which the Chinese law has been based, and common law. Due to those differences, some concepts of the economic approach to law are hardly applicable in the People's Republic of China. For example, the concept of "efficient breach" cannot be used under the conditions of the Contract Law 1999, where a breach of contract by one party makes the other party entitled to damages. As a result, the concept of "freedom to breach" is absent in the Chinese system of civil law. Despite the obstacles, the significance of the Anglo-American law for the development of contract law in the People's Republic of China should not be underestimated.⁵¹ The Contract Law Act 1999 included certain concepts of common law, such as offer and its acceptance, foreseeability of damage and liability for damage, floating charge in property law, and criminal harm with respect to damage liability. In addition, certain rules for the sale of products were launched, including the regulation of supplies, relating passage of ownership, risks and instalment sale. Common law principles were absorbed in the Tort Liability Law 2009. It contains concepts of fault-based liability and strict liability, both coming from common law. Some Anglo-American principles of liability are included, such as liability of employers, operators, organisers of social or sports events, schools, etc. Special attention is paid to liability for car accidents, patient-doctor relationship, and possessor of animals, all primarily reflecting American case-law. The same applies to liability for defective products. Decision-making of

51 Lou JIANBO, *The Evolution of Commercial Law in the People's Republic of China*, in: Wen-Yeu Wang (ed.), *Codification in East Asia*, Heidelberg 2014, pp. 91–104.

Chinese people's courts, including the Supreme Court, has been supportive of introducing those common law principles in their case law.⁵²

Soviet transplants

Legal systems of Marxist countries in the Far East were influenced by transplants from Soviet law from the end of WWII until the collapse of the Soviet Union. Soviet transplants constituted a subset of transplants from European continental law, mainly German law. In 1922, Vladimir Ilyich Lenin ordered that a civil code be prepared. As a result, civil law was codified first in the Soviet Federal Socialist Republic, and subsequently in other Union republics according to the model of German Civil Code 1896.⁵³ The pandect structure of the codification was taken over, primarily dividing the code into property law, obligations and succession law. Unlike the German model, the Soviet model preferred separate family law. Civil law was regarded by Soviets as the regulation of property relations, under which it was not considered appropriate to include family relations. As a result, marriage and family relations were regulated by special legislation. The content of the Soviet conception of civil law was radically different from that in German law, primarily due to the Marxist conception of ownership and to the state-regulated obligations. A special feature of Soviet law was the distinction between so-called kinds and forms of ownership. Whilst until then, civil codes were based upon the old Roman principle "*res una – ius unum*", Marxist theory enforce the distinction of kinds and forms of ownership according to their relations to so-called "means of production". That is why ownership existed in two forms: state ownership the substance of which was property common to all people (national property), and cooperation ownership the substance of which was property of people's cooperatives. Ownership rights of individuals were admitted by law (constitutions or civil codes) only as a transitional form to become extinct in future. The basis was that, in the transitional "period of building socialism", it was necessary to recognise as an object of ownership also items not acquired by work of the owner.⁵⁴

52 Liu QIAO – Ren XIANG – Zhang ZHENXING, *A Report on Commercial Codification in China, with Focus on General Provisions*, in: Wen-Yeu Wang (ed.), *Codification in East Asia*, Heidelberg 2014, pp. 81–90.

53 V. KNAPP, *Velké právní systémy*, p. 117.

54 Jan DVOŘÁK – Karel MALÝ et. al., *200 let Všeobecného občanského zákoníku* [200 Hundred Years of the General Civil Code], Praha 2012, pp. 180–187.

Marxist construction of ownership opposed the principle that ownership is an absolute dominion over a thing and everyone has a duty not to disturb the ownership, since Marxists considered that principle as an unlimited right of one and the duty of others. It should be noted that the conception of restricted ownership corresponded to the traditional mentality of the far East. The Soviet theory and practice criticised the German-Austrian right of an owner to use and enjoy the object of ownership as the owner wished (*nach Belieben*), or with full discretion (*nach Willkür*). Such regulation of the right of ownership, as the Marxist critics claimed, allowed for appropriation of the surplus in the form of a surplus product and further accumulation of the acquired surplus. The Soviet conception refused one of the principles applicable to ownership in the German Civil Code, namely *superficies solo cedit*.⁵⁵ Denying that principle was also close to the mentality of traditional legal systems in China, Mongolia, Korea and Vietnam.

Soviet law governed all relations resulting from obligations in a uniform mode; however, unlike the German model, it did not recognise a special category of commercial obligations. The Soviets claimed that production and distribution in the socialist system had totally different prerequisites, forms and provisions. This did not mean that no provisions were applicable to the system of the planned national economy; particularly sales contracts, barter contracts and forwarding contracts were acceptable. As a result, Soviet codification of civil law included several types of contract, traditionally assigned in the German system to their Commercial Code, including some business principles, such as the principle of solidarity, increased liability for defects, etc. The Soviet codification of civil law, under the influence of the German Civil Code, recognised the general concept of the law of obligations; the reason for the creation of obligations were certain juridical acts, particularly contracts, and unlawful acts, particularly causing damage. The continuity of the earlier division between contractual obligations and non-contractual obligations was preserved in theory. In addition, Soviet law introduced the third mode of forming an obligation, namely those obligations based upon the “implementation of the economic plan”. Unlike German and Austrian conceptions of obligations relating to rights *in rem*, the new Soviet conception of obligations was intended to assist the fulfilment of a unified economic plan and to be fully subordinate to it. The principle of the planned national economy often stemmed from the Constitution. Administrative interventions in the freedom of contract of par-

55 Анатолий Васильевич ВЕНЕДИКТОВ, *Очерки по гражданскому праву*, сб. ст. под ред. О. С. Иоффе, Ленинград 1957, pp. 5–20.

ties were allowed in the interests of the fulfilment of tasks of the economic plan; as a result, obligations resulting from administrative acts acquired a special significance and a new category of economic contracts was established. The old principle of freedom of contract was outweighed by the principle of public interest. In addition, the traditional principle of equality of contracting parties was also abandoned. Categories of state legal entities were formed with different names in different countries; those entities were entrusted with state property and its “operative administration” and were ordered how to manage that property. State legal entities had the strongest position in the hierarchy of contractual relations. A bit weaker position was held by people’s cooperatives as the protection of cooperative ownership was weaker if compared to the protection of state ownership. Legal regulations provided for preferential treatment of state legal entities in various legal relations. An individual had the weakest position. State administrative authorities could impose upon, or define, certain obligations in relation to the fulfilment of the state plan. The respective authorities could change the content of obligations or even cancel them in connection to the development of fulfilment of the state plan. They could, via administrative acts, interfere with obligations through, in particular, imposing a duty to enter into a specific contract; if it appeared to them to be necessary, they were permitted to change and cancel obligations resulting from already concluded contracts. Such legal relations were governed by special laws which were designated as “economic law”.⁵⁶

After WWII, the Soviet Union brought its law into several countries in the Far East.⁵⁷ In Korea and Vietnam, their political development did not allow that Soviet law be spread on their whole territory. South Korea, after the cease-fire in the Korean war of 1950–1953, was under the control of the United States, which brought in some elements of the US legal system. The south of Vietnam remained under the influence of French law for many years. An interesting situation emerged in China. After Communists grasped the power in 1949 one could easily assume that the influence of Soviet law would quickly spread all over China. However, the Chinese were rather reserved as to a mechanical reception of alien law. They took Soviet law as a supermarket – they chose only what they considered beneficial from the perspective of their pragmatic needs. In addition, when Communists assumed

56 V. KNAPP, *Velké právní systémy*, pp. 144–148.

57 Ján GRONSKÝ, *Prehľad politického a ústavného vývinu ľudovodemokratických zemí* [An outline of political and constitutional development in countries with people’s democracy], Praha 1954, pp. 139–150.

the power in China there emerged certain rivalry and distrust towards the neighbouring superpower. The Chinese have always emphasised “Chinese peculiarities”. That was why their new ideology was not called Marxism-Leninism, as was the case in all other countries under the influence of the Soviet Union, but rather “Marxism-Leninism and Mao-Ce Tung’s ideas”, so-called “Sino-Marxism”.⁵⁸ They constituted an original model of law which was inspired by Soviet law, but did not copy it explicitly.

Conclusion

At the edge of the 19th and 20th centuries, there was a significant encounter of European legal cultures with those in the Far East, with each country at a slightly different time: in Japan, it was the end of Shogunate in 1867; in China, the end of the empire in 1911; in Korea, annexation by Japan in 1910; and the French colonisation in Vietnam completed in 1884. There emerged a certain mosaic where foreign legal systems were inlaid and were the source of the Far-Eastern law. There was sometimes a certain complication when new waves of legal transplants from other legal systems substantially changed the character of former transplants. This happened after WWII as a result of Americanisation of Japanese law, or as a result of Sovietisation of law in the Far-Eastern countries which found themselves under the influence of the Soviet Union. The biggest impact in the far East could be identified with respect to transplants from German law. First this occurred in Japan, which built its modern legal system upon German law during the period of Meiji reforms between 1868 and 1912. China took the model of German law for the creation of their civil code in 1929–1931. However, China did not mechanically copy the German original. The legislature studied regulation of civil law also in other countries. Obligations in the Chinese Civil Code were inspired by the Swiss law of obligations. The influence of French law in the Far East could be considered rather marginal. Initially, France imposed its law upon the territories under their control in Indochina. Japan, in the beginning of their reforms, studied French codification; but at the end, they resorted to the German Civil Code representing the most modern civil codification of that time. The French Civil Code 1804

58 Michal TOMÁŠEK, *Odras Říjnové revoluce v právních systémech Dálného východu* [Reflection of the October Revolution in the legal systems of the Far East], *Právník* 2017, Vol. 156, No. 11, p. 962.

turned out to be incomprehensible and inappropriate for the Far-Eastern legal thinking. The French Code incorporated the spirit of its time, namely the tradition of Enlightenment and the concept of Rousseau that people are equal, free and endowed with imprescriptible rights. Such approach was absolutely incompatible with Confucian natural order and strict hierarchy of social relations. In contrast, the German Civil Code abandoned the Enlightenment conception. Business people, for whom the Code was primarily written, were interested in profits rather than in philosophy. Such understanding was comprehensible in China and Japan as its pragmatism was close to their thinking. It was much closer to them than the incomprehensibly philosophising French Civil Code. Portuguese law had a great impact in Macao. Some isolated transplants came from Italian law, namely the Chinese Criminal Code 1935 was based upon the Italian codification considered as most modern at that time. Legal transplants from common law were spread in the British colony Hong Kong after 1841. After WWII, Americans imposed upon defeated Japan the American-British constitutional model as well as the system of competition law. The functioning in practice of the latter can be seen as a typical example of a conflict between law in books and law in action. Since the idea to regulate the concentration of economic power was absolutely incomprehensible to the Japanese, the respective statute could not properly function. In 1953, soon after the formal termination of the American occupation, the provisions in the statute were moderated, and in 1955 many exceptions were introduced. The law, in fact, does not properly apply until today due to the decision-making of the Japanese Fair Trade Commission and Japanese courts. In conclusion it should be noted that the development of modern law in the Far East contributed in a way to the formation of multinational empires there, in the sense that the presence of foreigners in Chinese harbours, later in Japan, Korea and to a certain extent in Vietnam too, assisted in forming not only legal systems in those countries, but also their social and political environment and relations.

Právní kultury mezi Evropou a Dálným východem v historickém kontextu

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Na přelomu 19. a 20. století dochází k významnému setkání právních kultur evropských s právními kulturami Dálného východu, přičemž v každé zemi v poněkud jiné době. V Japonsku je to konec šógunátu v roce 1867, v Číně konec císařství roku 1911, v Koreji anexe Japonskem v roce 1910 a konečně ve Vietnamu francouzská kolonizace, dovršená roku 1884. Vytváří se tak určitá mozaika, do níž zapadají zahraniční právní systémy, z nichž tvorba nového dálnévýchodního práva čerpala.

Jistou komplikací byla skutečnost, že leckdy docházelo k novým vlnám přijímání právních transplantátů z jiných právních řádů, které zásadně měnily tvář transplantátů předchozích. Stalo se tak po druhé světové válce amerikanizací japonského práva nebo sovětizací práva těch zemí Dálného východu, které se ocitly pod sovětským vlivem. Největšího vlivu dosáhly na Dálném východě transplantáty z německého práva. Nejprve v Japonsku, které na německém právu vystavělo svůj moderní právní systém v období reforem Meiji v letech 1868–1912.

Jako další země sáhla po německém vzoru Čína při tvorbě svého občanského zákoníku z let 1929–1931. Ovšem Čína německou předlohu mechanicky nekopírovala. Zákonodárci studovali také občanskoprávní úpravy jiných zemí. Celá obligační část čínského občanského zákoníku je inspirována švýcarským obligačním právem. Spíše zanedbatelný byl na Dálném východě vliv francouzského práva. To nejprve vnutila Francie jí ovládaným územím v Indočíně. Rovněž Japonci zprvu studovali francouzské kodifikace, ovšem nakonec sáhli po nejmodernějším občanském zákoníku své doby – německém BGB (Bürgerliches Gesetzbuch).

Francouzský občanský zákoník z roku 1804 byl pro dálnévýchodní právní myšlení zcela nepochopitelný a nevhodný. Vychází z pojetí ducha doby svého vzniku, totiž z osvícenecké a rousseauovské koncepce, že lidé jsou si rovni, jsou svobodní a jsou obdařeni nezadatelnými právy. To bylo pochopitelně zcela nespojitelné s konfuciánským přirozeným pořádkem věcí a přísnou hierarchií společenských vztahů. Naproti tomu německý občanský zákoník osvíceneckou koncepci opustil. Podnikatele, pro něž byl především vytvořen, zajímal více zisk než filozofie. To bylo srozumitelné i v Číně či Japonsku, kde jeho pragmatismus byl tamnímu myšlení

blízký. Byl jim jistě bližší, než pro ně evropsky nesrozumitelně filozofující občanský zákoník francouzský.

Velký vliv mělo samozřejmě portugalské právo v Macau. Ojedinelé jsou transplantáty z práva italského, konkrétně čínský trestní zákoník z roku 1935 vytvořený podle tehdy nejmodernější úpravy italské. Právní transplantáty z *common law* se uplatnily po roce 1841 v britské kolonii Hongkong. Po druhé světové válce vnutili Američané poraženým Japoncům zejména ústavní model podle amerického a britského vzoru, ale hlavně systém soutěžního práva. Jeho fungování v praxi je typickým příkladem rozporu mezi *law in books* a *law in action*. Jelikož myšlenka regulovat soustředění ekonomické moci byla Japoncům naprosto cizí, zákon nemohl začít náležitě fungovat. Už v roce 1953, krátce po formálním ukončení americké okupace, byl zmírněn. V roce 1955 byly povoleny četné výjimky. V plném rozsahu vlastně nefunguje dodnes hlavně díky rozhodovací činnosti japonské antimonopolní komise a japonských soudů.

Vývoj moderního práva na Dálném východě přispěl svým způsobem k formování tamních multinacionálních říší ve smyslu, že přítomnost cizinců v čínských přístavech, později v Japonsku, Koreji a koneckonců i ve Vietnamu, utvářela nejen tamní právo, ale i společenské a politické poměry.