

Gyula Koi*

The evolution of legal system in People's Republic of China in the last three decades

1. Introduction

Qin Shi Huang (BC 259-210) was the first emperor of the unified China. Mao Zedong (1893-1976) –in spite of all his faults- was the modern unifier of disintegrate Chinese territories as a Communist (Maoist) State in 1949. After his death, under the reign of Deng Xiaoping (1904-1997), People's Republic of China (hereinafter: PRC) launched its Reform and Opening-Up Policy.¹ which continues to this day. This policy also affected the evolution of Chinese legal branches. This essay examines the changes of the last three decades in the field of major legal branches.

2. Constitutional law

In Imperial China (BC 221-AD 1911) the role of the law and legal regulation was limited. The first outline constitution (Qinding xianfa dagang) from September of 1908 was the first written experiment. In the time of Republic of China (1912-1949) the first provisional constitution was the so-called Provisional Constitution of Republic of China (Zhongguo minguo lishi yuefa) in 1912. After Constitution 1916 and Constitution 1923, in 1936, enacted the so-called 5th of May Draft Constitution of the Republic of China (Wuwu xiancao). The Chinese Communist Party (hereinafter CCP) in 1931, in the so-called Revolutionary Basis Territories entered into force an Outline Constitution of Chinese Soviet Republic (Zhonghua Gongheguo xianfa dagang). Under the PRC rule, three constitutions was enacted after the present effective constitution: in 1954, in 1975, and in 1978. The effective constitution enter into force in 1982 (referred as 1982 Constitution).²

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¹ The most important handbook of Reform and Opening-Up (or Openness) Policy: Fulin Chi (ed.): *Panorama of Reform and Opening-up in China 1978-2012*. Beijing, China Intercontinental Press, 2019. (13) 1049. ISBN 978-750-854-0-573 For the contemporary Chinese legal instruments, see: Ministry of Justice of the PRC: *Falü fagui quanshu (Di shiquiban)*. [Laws and regulations of China]. Beijing, Ministry of Justice of the PRC, 2019. 2145. Pan Guoping – Ma Limin: *China's Laws* (Transl.: Chang Guojie). Beijing, China Intercontinental Press, 2010. 173. ISBN 978-7-5085-1719-3 In transcription of Chinese sources, this study use the pinyin transliteration, and in case of Russian sources, the international (Kniezsa) transliteration.

² Gyula Koi: The First Three Decades of Legal Reforms in the People's Republic of China. *Acta Juridica Hungarica* 52 (2011) 4. 348-367. /Referred as Koi (2011a)/. Gyula Koi: Le légisme dans la littérature de la sinologie anglaise, française, allemande, et russe. In: Balázs Gerencsér-Péter Takács Péter (eds.): *Ratio Legis-Ratio Iuris. Liber Amicorum Studia A.[ndrás] Tamás Septuagenario Dedicata*. Budapest, Szent István Társulat, 2011. 518-523. ISBN 978-963-277-257-8. /Referred as Koi (2011b)/. Gyula Koi: Droit et mentalité: deux

After the First Amendment (12 April 1988), the Second Amendment (19-29 March 1993) declared in compliance with the turning point supervening in economic policy in 1992, that China shall abide by market economy instead of planned economy, nevertheless, it also included other important supplements. It has to mention the phenomenon of building socialism with Chinese characteristics (you Zhongguo tese shehuizhuyi). The Preamble of 1982 Constitution was also supplemented by a short affirmative sentence: 'China is at the primary (!) stage of Socialism.' The 1993 Supplementary law fixed the expressions 'Socialism with Chinese characteristics', and 'Reform and Openness [policy]' (gaigé kaifang). The terms of planned economy and state planning were deleted.³

The Third Amendment (15 March 1999) in the basic principles under section 7 declared 'the theory of the 'eternal pragmatist' Deng Xiaoping, besides the conceptions of Mao Zedong. The basic concept of rule of law was incorporated under Para. 1 of Art. 5.⁴

The Fourth Amendment (14 March 2004) was adopted Ziang Zemin (1926-) ideology as one of the 'three represents' (Sangé daibiao) in the preamble of the amended 1982 Constitution. This ideology legalised the possibility of party membership for most capitalists. The reason was as follows: 'The Party [the CCP] should represent progressive productive forces, as well.' (This is antagonistically contrary to the principle of class struggle of Maoism).⁵

The Fifth Amendment (11 March 2018) adding Hu Jintao's (1942-) Scientific Outlook on Development, and Xi Jinping (1953-) Thought to the Preamble of 1982 Constitution. The legal text removing the term limits (the limited time frame) of ruling for the President and Vice President of PRC. It means, that the office of president take for life (without term-and time limit).⁶

The 1982 Constitution as The basic rights and duties of citizens (Art. 33-65), respected the basic human rights, recognized of major importance this legal institution.⁷

The constitution specifies the following rights:

- (1) Right to citizenship
- (2) Equality before the law
- (3) Right to vote/elected
- (4) Freedom of speech/press/assembly/organisation, procession and demonstration
- (5) Freedom of religion
- (6) (Other) citizenship rights
- (7) Right to human dignity
- (8) Inviolability of the residents of citizens

exemples chinois. In: Ádám Boóc – Balázs Fekete (eds.): *Il me semblait que j'étais moi-même ce dont parlait l'ouvrage - Liber Amicorum Endre Ferenczy*. Budapest, Patrocinium, 2012. 181-189. ISBN 978-615-5107-86-3

³ Koi (2011a) 354-358.

⁴ Koi (2011a) 358.

⁵ Koi (2011a) 358-359.

⁶ 1982 Constitution of PRC (2018 Amendment) webcache.googleusercontent.com (March 28, 2019).

⁷ Koi (2011a) 359.

- (9) Freedom and privacy of correspondence
- (10) Right to criticism, and making suggestions
- (11) Right to petition
- (12) Right to compensation
- (13) Right to work
- (14) Right to rest
- (15) Right to retirement
- (16) Right to material assistance⁸
- (17) Right to education
- (18) Freedom to engage in scientific research and cultural pursuits⁹
- (19) Women's rights

The constitution specifies the following duties:

- (1) Duties prescribed under Constitution and other laws
- (2) Respect and protect human rights
- (3) Duty of work
- (4) Duty of education
- (5) 'One child policy' and family policy
- (6) Parents' duty to raise and educate their minor children, the grow-up children shall comply with the duty, support, and assists their parents
- (7) Violation of freedom of marriage are prohibited
- (8) Protecting of Chinese citizens¹⁰
- (9) Exercise the freedoms and rights
- (10) Safeguarding the unity of the country
- (11) Keep State secrets
- (12) Defence of the Motherland
- (13) Doing military service
- (14) Paying taxes

⁸ For elderly, ill, and disabled persons.

⁹ Freedom to engage in scientific research, literary and artistic creation and other cultural pursuits.

¹⁰ The PRC protects the lawful rights and interests of Chinese citizens and its family members in abroad. (Right to overseas Chinese returning home).

3. Administrative law

The public administration was a very important legal institution of the Imperial China, but this fact not meant the appearance of an ancient administrative law.¹¹ The administrative law exists in 1950's as several internally circulated textbooks.¹² It presuming Soviet influences in this case. In 1984, in PRC nationwide were only 100 people involved in teaching and researching administrative law. By the mid-1990s, theories on administrative law were described as 'exploding'.¹³

Soviet influence soon declined with the introduction into the Chinese Academia of pre-1949 Chinese literature on administrative law, and pre-1949 Taiwanese literature on administrative law. It means the appearance and influences of the thoughts of old traditional theses, because the first Chinese administrative law textbook was born in 1983.¹⁴

The 1980's were a critical period in the development of the teaching and scholarship on administrative law in the People's Republic of China. Four books of Soviet administrative law were translated between 1983 and 1988. Leading administrative law scholars in China began to take an active part in the planning and drafting of new legislation in the domain of administrative law, such as the landmark Law of Administrative Litigation enacted in 1989, the first law of its kind in the PRC's history. Scholarly contributions continued to be made to the creation of other parts of contemporary PRC administrative law, including the State Compensation Law (1994), the Administrative Punishment (Penalties) Law (1996), the Administrative Supervision Law (1997), the Administrative Review Law (1999), the Law of Legislation (2000), the Administrative Licensing Law (2003), and the Administrative Coercion Law (2011).¹⁵

Wang Mingyang (1916-2008) the late law professor at the China University of Political Science and Law (since 1983 to 1986), who stayed in France from 1948 to 1958 for doctoral study and postdoctoral research, produced his famous trilogy. This book series began with *British Administrative Law* (1987), and continued *French Administrative Law* (1989), and later finished *American Administrative Law* (1995). This last monograph –a two volume work of approximately 1 million Chinese characters in length, based on his research visit to the US in the 1980's.¹⁶

¹¹ Koi (2011a) 348-353., 361-362. Some important contemporary sources of legal literature: Edgar Tomson – Jyun Hsyong Su (coll.): *Regierung und Verwaltung der Volksrepublik China*. Dokumente zum Ostrecht Band VII. Verlag Wissenschaft und Politik, Köln, 1972. 542. ISBN 3-8046-8448-3 Aleksandr Petrovič Popov: *Političeskiye sistemy i političeskie režimi v Kitaje XX veka*. Moskva, Izdatelstvo Ekzamen, 2007. 287. ISBN 5-472-02358-0

¹² Jianfu Chen: *Chinese Law: Context and Transformation*. Leiden-Boston, Martinus Nijhoff Publishers, 2008. 770. ISBN 978-900-4165-0-45 See the page 207. main text, and footnote 3.

¹³ Chen (2008) 207.

¹⁴ Albert Hy Chen: The Chinese Tradition. In Peter Cane – Herwig CH Hoffmann – Eric C Ip – Peter Lindseth: *The Oxford Handbuch of Comparative Administrative Law*. Oxford, Oxford University Press, 2021. xv, 1140. 79-96. ISBN 978-0-19-87998-6 See the page 93. The first publicly distributed Chinese administrative law-related textbook: Wang Mincan – Zhang Shangshuo (eds.): *Xingzhengfa Gaiyao* [Administrative law textbook]. Beijing, 1983. 178. Publishing House of Law. (With the bookchapters of 13 different Chinese legal scholars).

¹⁵ Hy Chen (2021) 92.

¹⁶ Hy Chen (2021) 92-93.

Since the publication of the first textbook of administrative law in 1983, and the first textbook of the law of administrative litigation in 1990. For this phenomenon, the role of administrative law became more important. The importance of Chinese administrative law it shows the changes in the frame of textbooks of administrative law. They typically include the basic principles of administrative law, administrative actions (*xingzheng xingwei*), administrative legal relationship, administrative actors (*zhuti*), administrative legislation, administrative procedure, administrative liability, administrative review, administrative compensation, and administrative litigation, too.. There are many special types of administrative actions, such as administrative punishment, administrative licensing, administrative coercion, administrative adjudication, administrative contracts.¹⁷

A final institution of the traditional East Asian law with resonances in modern administrative law is the centuries-old tradition of commoners petitioning higher levels of government for relief from actions of the lower level. This system allowed to petitioners to appeal for relief both to higher levels of the bureaucracy. The system of 'letters and visits' that exists in China today, while formally a creature of the socialist legal system of the PRC, operates in a similar way, like the petition system of Imperial China.¹⁸

4.Criminal law and criminal procedure law

In the ancient times, the Chinese law contained criminal law rules in larger part. 158-159 This rules disappeared in the ancient Tang Code (AD 624), the old Ming Code (1368-1644) and Qing Code (1644-1912) as the rules of criminal law.¹⁹ In 1979, the Chinese authorities produced a comprehensive Criminal Code. In 2007, bring this code closer to internationally accepted standards for criminal justice. The 1979 Criminal Code was one of the first major codes, to be promulgated in the post-Mao China. It is a comprehensive code along a European Continental model with Soviet influences. It consisted of only very general, too simplified principles. The code contains 192 articles.²⁰

Following the German model, the 1979 Criminal Code divided into two parts: General principles (*zongze*), and specific provisions (*fenze*). The general principles define the purposes and application scope of the law as well as notions of crime and criminal liability. They also provide rules on sentencing, parole, and statutory limitations. Specific provisions define and elaborate various crimes and offences, and their consequent penalties. This overall structures is retained in the 1997 revised Criminal Code. The general provisions stay intact from 1979 in the course of 1997 reforms. The important legal principles are next: *nullum crimen sine lege*, *nulla poena sine lege*, and the Abolition of Analogy. (It seems, but the Code not stated, but recognizes *nulla poena sine crimine* principle, too).²¹

¹⁷ Hy Chen (2021) 93.

¹⁸ John Ohnesorge: Administrative law in East Asia: A comparative-historical analysis. In Susan Rose-Ackerman – Peter L. Lindseth (eds.): *Comparative Administrative Law*. Cheltenham – Northampton (MA), Edward Elgar, 2013. xviii., 668. 78-91. ISBN 978 1 84844 642 7 See: page 81.

¹⁹ For the history of the ancient (imperial) Chinese criminal law, see: Henri Maspero – Étienne Balazs: *Histoire et institution de la Chine ancienne des origines au XIIe siècle après J.C. Text révisée par Paul Demiéville*. Paris, PUF, 1967. 323. Derk Bodde – Clarence Morris: *Law in Imperial China. Zhonghua di guo da falü*. Beijing, Zhongxin Chubanshe, 2016. xiv, 558. ISBN 978-750-865-9671

²⁰ Chen (2008) 261.

²¹ Chen (2008) 266.

The Code stated in Article 4 '[A]ll citizens are equal in the application of the Law. No privilege whatsoever is permissible before the Law.' The so-called 'Marxism-Leninism-Mao Zedong Thought' as the guiding ideology of the 1979 Criminal Code.²² The next guiding principle is the proportionality (*Zuixing xiang shiying*), which one is very important, too.²³

Territorial and extraterritorial application is an important legal principle, too. The Criminal Code is applicable to offences committed by any person (Chinese or foreigner) including offences committed abroad ships or aircrafts of the PRC. However, the criminal responsibility of foreigners who enjoy diplomatic privileges and immunity will be resolved through diplomatic channels.²⁴

In 1997, and in 2007 the Criminal Code was revised.²⁵ On the basis of the Supreme People's Procuratorate Opinion on the Names of Offences in the Specific Provisions of the Criminal law, issued on 25 December 2007, the 1979 stipulated original eight types of crime substantially amended or supplemented. The revised law now contains ten type of crimes in ten chapters, these are include 414 criminal offences.²⁶

- (1) Crime endangering state security;
- (2) Crime endangering public security;
- (3) Crime undermining the socialist market economy order;
- (4) Crime infringing the personal rights or democratic rights of citizens;
- (5) Crime encroaching upon property;
- (6) Crime disrupting social order and its administration;
- (7) Crime endangering the interests of national defence;
- (8) Crime of bribery and embezzlement;
- (9) Crime of malfeasance;
- (10) Crime in violation of military duties.

Not the structure changed significantly, which stipulating crimes, but the Specific provisions of Criminal Code has been substantially expanded through the implementation of various decisions and supplementary provisions issued by National People's Court.²⁷

Some Chinese legal scholar stated that the 1979 Criminal Code and the 1997 Criminal Code are separate laws, but it seems, the 1997 Criminal Code is a comprehensive (global) modification of the 1979 Criminal Code. Wei 202.: Up to May 1, 2014 the special criminal law and eight amendments amended the 1997 Criminal Code. The most important amendment affected the capability of the subject of crime. Full capability means the bear criminal liability (a natural person, who has reached the age 16 with a normal mental state). Relative capability

²² Chen (2008) 270.

²³ Chen (2008) 272.

²⁴ Chen (2008) 279.

²⁵ Chen (2008) 281.

²⁶ Chen (2008) 281. footnote 112.

²⁷ Chen (2008) 281.

means a natural person who has reached the age 14, but not the age 16. No capacity means a natural person, which has not reached the age 14, or a mental patient, who is unable to recognise or control his own conduct.²⁸

At the turn of the 20th century a major criminal reform by the Qing dynasty reduced the number of capital offences from 800 to 20. The 1979 Criminal Code prescribed 28 capital offences in 15 articles. In 1997 this number increased: 80 capital offences contained in over 50 criminal law provisions. This incorporation the code would make the Chinese Criminal Law 'Death Penalty Code.'²⁹

Later, in few years, this number increased 68, and 55 capital offences. In 2011, China abolished this number 13 (four type of smugglings /cultural relics, precious metals, precious animals and their products, ordinary freights and goods/; four type of frauds /negotiable instruments, financial instruments, letters of credit). Other cases are next: false invoicing of tax purposes; forging and selling value-added tax invoices; larceny; instructing in criminal methods, and two type of excavating and robbing (cultural sites and ancient tombs, and hominids and fossil vertebrate animals).³⁰ Some Chinese legal scholar accepting a frank opinion the possibility of abolishing the capital punishment in PRC in the near future.³¹

The criminal procedural law based on the 1979 Criminal Procedural Law of the People's Republic of China (July 7, 1979). This legal instrument is valid from 1 January, 1980. This law formulated in the light of the concrete experiences of the people of all China's nationalities, in the protect of the people.³²

5. Civil law and civil procedure law

Contemporary civil and commercial law in the PRC is mainly product of the 20th century. This changes in the form of state positive law was a result of modern law reform on the way of European Continental law.³³

In the traditional positive law there was no such concept, and no conception of civil law. The the notion civil law (*minfa*) has only a short history in China (under Japanese influence, which based on German grounds). The Japanese legal scholars helped to draft the first ever distinct civil code in the Chinese history, but it was never promulgated. The first complete Civil Code (in five books) was enacted by the Guomindang Government between 1929-1930, which largely based on Qing Draft. This Civil Code is not applicable in Mainland China.³⁴

After for attempts (1949, 1964, 1979, 1998) the new Civil Code was promulgated in 2020. The last draft divided into for parts: the General Part, The Property, the Family, and the Contracts.³⁵

²⁸ Wei Changdong – Qian Xiaoping: The Enactment, Evolution and Development of Criminal Law of the People's Republic of China – Preface the Criminal Law of the People's Republic of China Published in Hungary. in: István László Gál (ed.): *Criminal Code of the People's Republic of China*. Budapest, Schadowwolf Kft., 2017. 579. ISBN 978 963 123 527 2 See: page 58 and 202. Chen (2008) 281.

²⁹ Chen (2008) 298.

³⁰ Zhou Zhenjie: The Death Penalty in China: reforms and its future. *Waseda Law Review* 30 (2012) 1. 1-14.

³¹ Wei-Qian (2017) 201-205.

³² Criminal Procedural Law of the People's Republic of China, Art. 1. <http://english.mofcom.gov.cn>

³³ Chen (2008) 327.

³⁴ Chen (2008) 328.

³⁵ Chen (2008) 332-338.

In terms of family law reform, the May 4th Movement of 1919 drew a line between traditional and modern China. In the conception of family (*fenjia*) the lineage (*zong*) and clan (*zu*) system are significant concepts.³⁶ Wang Feiran (1904-1994) president of the Beijing Municipal People's Court commented up the upcoming promulgation of the PRC's first Marriage Law in a broadcast of the Central People's Broadcasting Station. new law and its role in the making of a new China under New Democracy. Wang explained, that the new law was special, because it was the first law to adopt the mass line as a legislative principle (*lifa fangfa*). Marriage law was the result of the social changes and reforms.³⁷ In the course of early 1953 ideological campaigning and dissemination the role of the Marriage Law Implementation Campaign (*guan che hun ying fa yun dong*) was highlighted, as an ideological tool.³⁸ The so-called „General Legal Knowledge” articles (*fali changshi*) informed citizens, male and female on this topic– contribute to the construction of a better society.³⁹

The civil law institution of contracts in the form of customary law has a history at least as long as the known history of China. The enactment of 1999 Contract Law contains the principal rules, and the 1986 Draft Civil Code to serve a gap-filling function as a stand-by law.⁴⁰ As a comprehensive basic law, the 1999 Contract law contains the scope of application of the law, the limit for filing a law suit, the determination of validity of contract, subrogation of rights, the right to annul certain contractual transactions, and the role of third party in contract, the rules of interpretation of contract, and some civil procedural rules. This law divided into three parts: General Provisions, Special Provisions and Supplementary Provisions. This rule consisting of 23 Chapters, and 428 articles. The General dogmatic part most important legal institutions are: general principles, formation, legal effect, performance, alteration and transfer, termination, liabilities, and other stipulations. The Special (Specific) part regulates 15 specific type of contracts, namely sale and purchase of goods; the supply of electricity, water, gas, and heating; gifts; loans; leasing; lease financing; hiring of work, construction projects, transportation; technology; storage; warehousing; trust; commissioning agencies; and brokerage.⁴¹ The Promulgation of the General Provisions apparently marks the end of the Chinese effort to draft a civil code to replace the one that was repealed when the People's Republic was founded in 1949. Instead of a civil code, they have promulgated the general part of a German-style or pandectist civil code, and no special parts are to follow; at any rate not in the near future.⁴²

In December, 2002, an important step made forward, scilicet, a 216 pages long Draft Civil Code, which divided into 9 books.

(1)General principles

(2)Property law

³⁶ Jennifer Althanger: Simplified Legal Knowledge in the Early PRC: Explaining and Publishing the Marriage Law. in: Li Chen – Madeleine Zelin: *Chinese Law. Knowledge, Practice and Transformation, 1530s to 1950s*. Leiden-Boston, Brill, 2012, 770. 342-366. ISBN 978-90-04-28848-5 See: page 345 footnote 18.

³⁷ Althanger (2012) 345.

³⁸ Althanger (2012) 343.

³⁹ Althanger (2012) 346.

⁴⁰ Chen (2008) 450.

⁴¹ Chen (2008) 451.

⁴² William C. Jones: A Translation of the General Provisions of Civil Law of the People's Republic of China. *Review of Socialist Law* 13 (1987) 4. 357-386. ISBN 0165-0300 See: page 357.

- (3)Contracts
- (4)Human Dignity and Civil Rights
- (5)Marriage
- (6)Adoption
- (7)Law pertaining to inheritance
- (8)The order of civil law liability
- (9)International private law.⁴³

The first unabridged and amply Civil Code of the PRC (Zhonghua Rénmin Gonghéguo Minfa Dian) was enacted in 28 May, 2020, and the legal text was enter into force in 1 January, 2021. This legal regulation consists of 1260 articles, which divided into seven books.

- (1)Book 1 General provisions, each law of persons (natural and juridical, too); civil rights; agency; civil liability; period calculations.
- (2)Book 2 Property rights, establishment; alteration; transfer; extinction; ownership; usufructuary rights; possession.
- (3)Book 3 Contracts; typical contracts; quasi contracts.
- (4)Book 4 Personality rights (other law of persons), rights of life; body and health; name; portrait rights; information protection.
- (5)Book 5 Marriage; family; divorce, adoption.
- (6)Book 6 Inheritance (legal and testamentary), bequest, handling of inheritance.
- (7)Book 7 Tort liability. Damages, liability for subjects, products, motor vehicle accidents, medical damages, environmental pollutions, ecological damages. Supplementary provisions.⁴⁴

Our last topic is civil procedure law. The 1982 Provisional Civil Procedural Law provided that, the law was applicable to the settlement of administrative disputes when substantive laws granted courts jurisdiction over such disputes. This legislation has provided the legal basis of administrative litigation. Historically was not recorded civil code before the introduction of Western law, towards the end of Qing dynasty (pre-1912).⁴⁵ The 1982 Provisional Civil Procedural Law was suspended by the 1990 Civil Procedure Law. Under this provision, the court would only accept administrative disputes if the original administrative decision was made under the law, which specifically provided the mechanism for judicial adjudication.⁴⁶

⁴³ Koi (2011a) 365.

⁴⁴ Jun Xu: Minfadian fenbian caoan shouci tiqing shenyi [The first time submit of the Civil Code's partial Draft for review] *Renmin Ribao* [People's Daily] 16 June 2021 npc.gov.cn Wang Chen: Guanyu /Zhonghua Rénmin Gongheguo Mindianfa (Caoan)/ de shuoming [Explanation of the Draft Civil Code of the PRC] Xinhua News Agency.npc.gov.cn

⁴⁵ Chen (2008) 246.

⁴⁶ Chen (2008) 246. footnote 249.