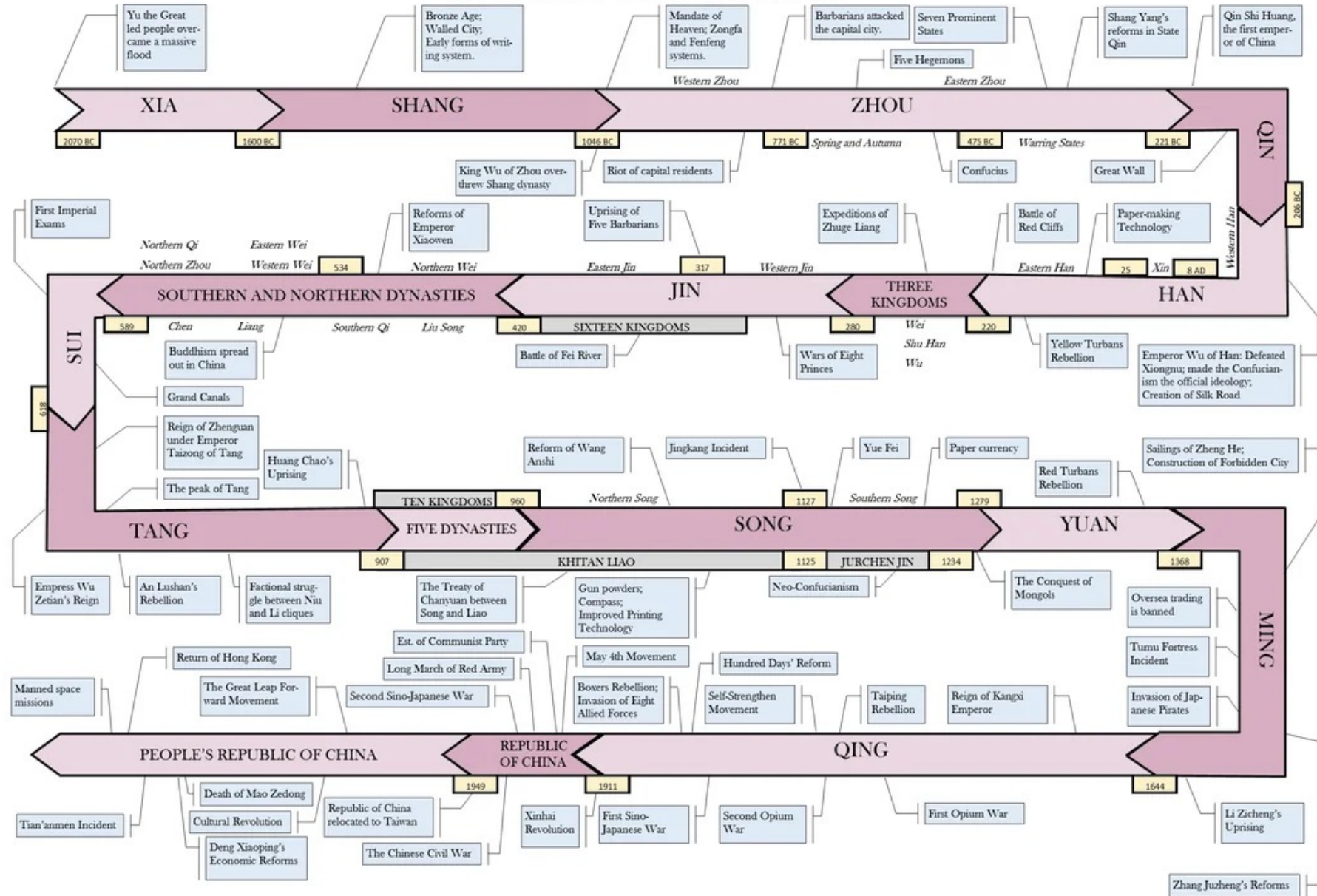


# 灋、刑、律、禮

# THE ANCIENT CHINESE LAW

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# TIMELINE OF CHINESE HISTORY



The ancient Chinese law was based on a诸法合体 (*Zhufa hetu*) model

Within this context the 法 (*fa*) = was (and is still nowadays) representing the Law in its objective meaning and the law as a source of Law

The nowadays 法 derives from 灋

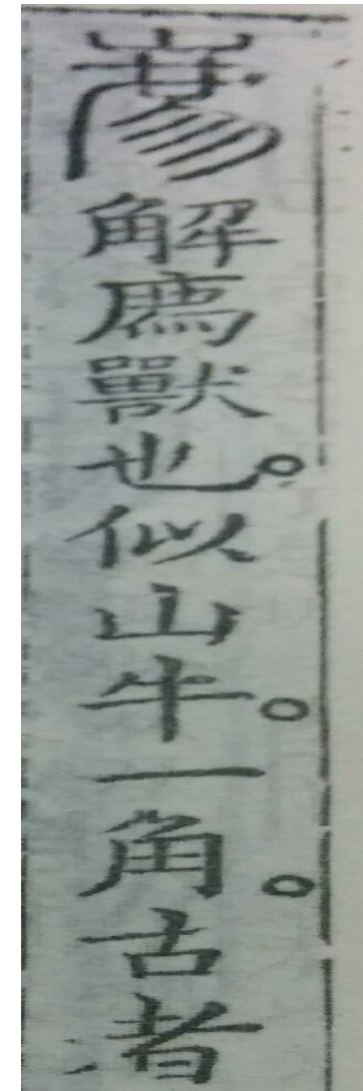
# 漚

Is built on:

- the 3 dots radical for “water” 氵 (*sandianshui*),
- a unicorn 廌 (*zhi*),
- the verb “to go” 去 (*qu*)

## The 说文解字 (Shuowen Jiezi)

An ancient Chinese etymological dictionary elaborated by Xu Shen during the Eastern Han dynasty, its first edition dates back to **121 a.D.**, describes the **unicorn** as:

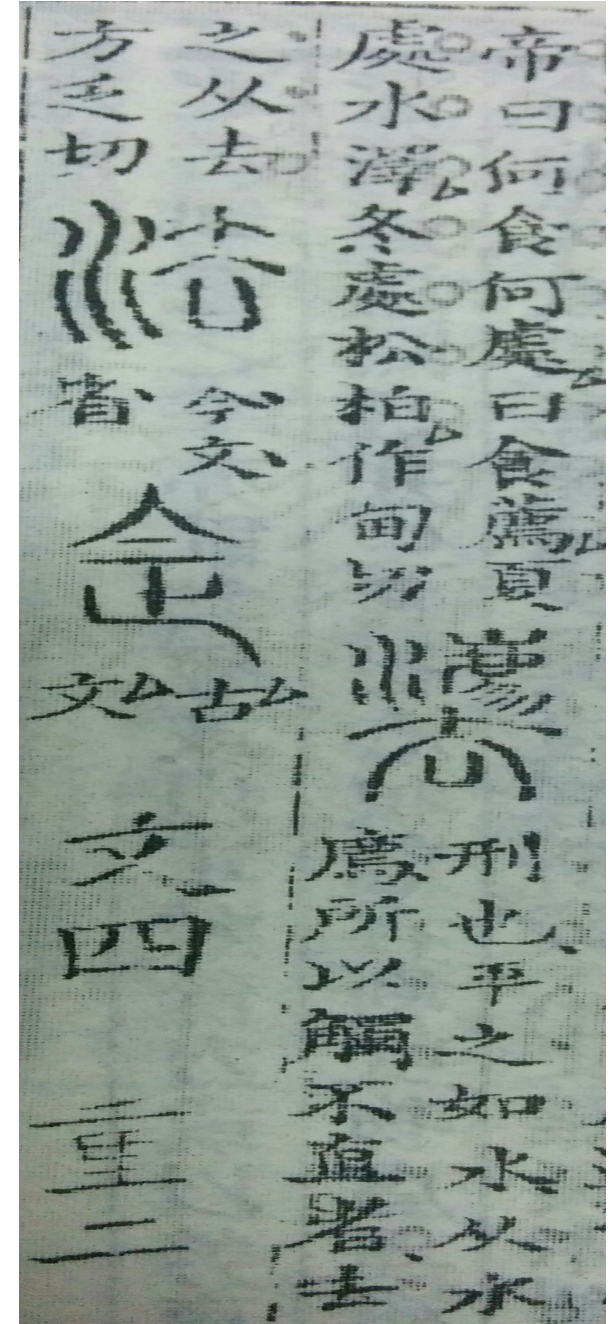






With regard to 灋  
we read in the 说文解字  
(*Shuowen Jiezi*) that:

“灋、井 𠂔 也，  
平之如水，从水，  
廌所以觸不值者去之，  
从去”



## Scholars interpreted it as:

- recalling the idea of **justice and equality**
- recalling the idea of **equity** (Zhan Maohua) – and therefore possible to be considered in connection with the *aequum* in the Celsus' definition
- recalling the idea of a **sanction**: «灋、井 卪 也»

From 井 卪 derives the nowadays 刑 *xing*, the sanction: 刑法 is the way the «**criminal law**» is called in modern Chinese



In **modern Chinese** there is another word **often connected to 法** in order to designate the **Law in its objective meaning**: which is 律 (*lǜ*) in the compound 法律

Nowadays, differently from 法, **in general 律 is not employed without being combined with 法** in order to refer to the objective Law

He Qinhua explains that:

**律 in its first usage** within the context of the law was in the 军律, the military laws, and later on the **meaning of the 律 broadened to include the crimes**

It is possible to read from 说文解字 that:

律、均布也。从彳聿聲。呂戍切

Chinese scholars remark that (Zhai - He): from the connection established at the beginning (律、均布也) it is clear the **reference to an ordered division** (平均的分布)

The character is made by the combination of the 彳 (*chi* – people, persons) and the 聿 (*yu* the hand, and object used with the hands, such as a writing brush)

In the **comment notes** provided in the 说文解字

(律) 均布也。均律雙聲。均古音同匀也。易曰。師出以律。尚書。正日。同律度量衡。爾雅。坎律銓也。律者所以范天下之不一而歸於一。故曰均布也。从彳。聿聲。呂戍切。十五部。

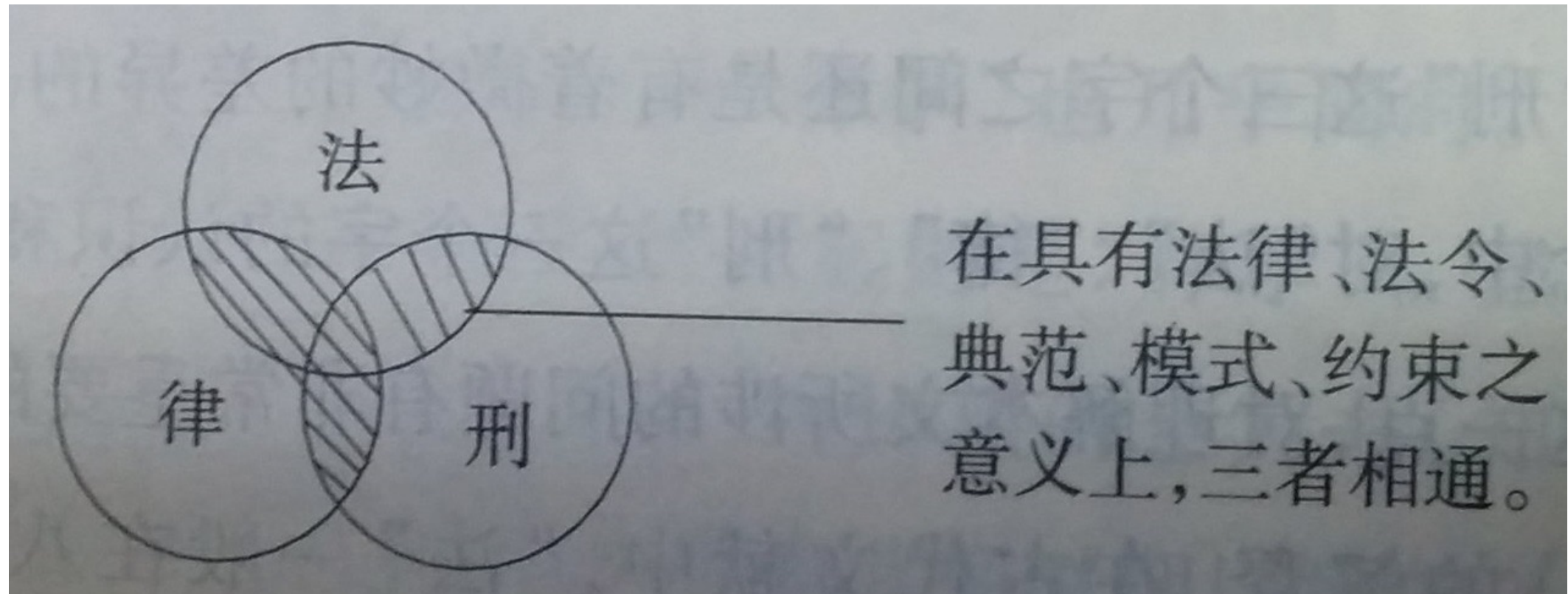
It is possible to find a reference to **sounds arranged in a certain order**: 均律雙聲。均古音同匀也。

In the **Book of (易) Yi**: we read that **師出以律** and therefore that **the troops getting out have to abide by the 律** - and therefore that **they have to be arranged in a proper order**.

Chinese scholars (Zhai) explain that **the music was giving the cadence to the troops within the context of the military activities** and the meaning evolved to include also the crimes since some military were also used in the case some crimes were put in place (He Qinhu) given the fact that **there was not such a clear distinction between military and ‘civil’ police**

In the **(爾雅) Erya** we read that **律者所以範天下之不一而歸於一** **things happening under the sky should be regulated on the basis of the same rules**, and therefore the next step would have been to get the meaning of **«putting this in order», «giving order to things»**

He Qinhua: among the terms 法、刑、律 there are some common meanings:  
objective Law – statute – paradigm – model ...



However we can say that:

法, seems to be the term having the closest connection with the idea of *ius* as a tool to deliver the *iustitia*

刑, has a closer connection with the idea of the **sanction**, and it is actually still used with this meaning

律, is more related to the idea of the **order, of paradigm, of the rules** (and set of rules) to **regulate human activities**



**The ancient Chinese Law (法, 律, 刑) – to a large extent – was a written law**

For instance, from the Zhou Chronicles we can read that already in 536 a.C. Zi Chan (Kingdom of Zheng) required **for some rules to be ‘published’ in a written form** in order to match the requirements from the society asking for the possibility to know the rules **so to limit the aristocracy privileges of arbitrarily awarding capital sanctions.**

These rules were written on a **metal tripod** known as the 铸刑书 (*Zhuxingshu*)

It is possible to draw a **parallelism with the Law of XII Tables** promulgated in Rome almost a century later.

# The Confucian and the Legalism Schools

Rujia (儒家) and Fajia (法家)

**Confucian School** (Kong Zi /Confucius) **highly relying on the *li*** (禮), the rite, the custom

**Legalism School** (Han Fei) **highly relying on written laws and harsh punishments**

**Fei Anling:**

Even if **Confucianism became the official ideology** the **Legalism School** had a **strong influence** on the ancient Chinese law as well...

## Written law in ancient China:

Beside the already mentioned 铸刑书 it can still be recalled, for instance:

**The 法经 (*Fajing*),** Classical on Laws (IV b.C. or V after Christ? Still not clear among the scholars...)

**Qin Code, strong influence of the Legalism School (Han Fei)**

**Han Code, stronger influence from Confucianism**

## Written law in ancient China:

唐律疏议 (*Tanglü Shuyi*), Tang dynasty Code (624 d.C.), later on a commentary was added (653 d.C.)

Zhang Jinfan:

Strict structure, articles and comments are integrated in a systematic way; the legislator has been required to summarize the ancient legislation, to find similarities and differences between crimes and to collect together those having similarities etc.

12 books arranged in a 'logical order' with a book on the general part and the otherwise devoted to specific crimes

## Written law in ancient China:

Even if we have evidences of the fact that what was later on called as *Seidenstraße*, **the Silk Road, was already operative**, and there have been contacts registered between Rome and China such as in the case of:

Lijian (骊靬)

A Senatusconsultum under Tiberius

References to Daqin (大秦) in the Hou Han Shu (yearbook)

**Logics in its Greek elaboration was at the time still unknown in China**

## Written law in ancient China:

The first written evidences of an appearance of the Greek logics date back to several centuries after the Tang dynasty: they can be found in the 名理探, *Mingli tan*, by the Portuguese Jesuit Francisco Furtado and Li Zhizao published in 1631

The term currently used to designate the logics, 逻辑, *luoji*, as a phonetic loan from the English “*logic*” can be traced back to the XVIII or XIX century

However, in the *Tanglü Shuyi* it is possible to find a fairly high degree of systematical organization.



## Written law in ancient China:

Zhan Maohua highlights some features of the Tang law that are quite similar to features that can be found in the Justinianus I Codes as well, simplification of the contents of the law, logical-systematical arrangement, etc.

The Tang law inspired all the Codes of the following dynasties up to the 大清律例 (*Daqing Lvli*)

Each dynasty after getting in power promulgated its code by substantially using the previous one as a foundation in terms of structure etc. and by just modifying the specific rules

**The concentric tributaries system and the influence on the law (and the legal language) of other Countries:**

**The Chinese model influenced also from a linguistic point the law of other Asian Countries such Japan for the Ritsu Ryō 律令 , Korea, etc.**

The Chinese perspective towards what was outside of China was that of a concentric system of tributaries Countries having the *Zhongguo* (中国) at its core and the *yi* (夷) the barbarians, outside of it.

**The Silk Road and the foreign trade/relationships:** from *Lijian* (利賁) and its ‘relationship with Rome’ to the merchant age and the arrival of the Jesuits such as (Matteo Ricci, Giulio Aleni, etc.)

**1689 Nerčinsk Treaty** (Latin official language – Jesuits)

## The 禮 (*li*)

The 禮 (*li*), 礼 in its simplified version is a ‘social phenomenon’ that emerged in ancient China and became one of the fundamental elements of the ancient Chinese law

«“the ceremonies of ‘Li’ (rites) started by Sui Huang (a legendary person who had invented making fire by drilling the wood), while the definition of ‘Li’ (rites) was given by ‘Huang Di’ (Yellow Emperor, a legendary ruler)”»

## II 禮 (*lǐ*)

**We read from the Shuowen Jiezi:** 禮履也。所以事神致福也。从示从豊，豊亦聲。

At the beginning is possible to find a connection between the *lǐ* and 履(*lǚ*), a term nowadays used together with 行(*xíng*) to refer to the «**performance**»

The radical 礻 (on the left) recall the **semantic area of the holy, the supernatural, the spiritual**, etc.

豊, which is also providing the sound, represents what originally was **jade vase used in the rituals connected to worshipping of the ancestors and/or supernatural beings**

## II 禮 (*li*)

The word 禮 from **starting** designating representing the **ritual vessel**, designated the **rite itself** and then **gradually** it acquired the meaning of a **behavioural rule or system of rules**

“at the beginning, ‘Li’ (rites) was the **ritual vessels which contained jades to serve the Supernatural Beings**; later, ‘Li’ (rites) was referred to as the **drinking offered to them**, and finally, ‘Li’ (rites) had become **the rituals in their service.**”

## Zhang Jinfan:

«Naturally, “Li” (rites) was closely **connected with “Tian” (heaven), “Di” (earth), ghosts and spirits during the early stages of times**, because at the end of the **primitive society**, the levels of production and technology were extremely low, and **people venerated and mystified by all natural phenomena and the events**, such as birth, death, illness and old age.

Especially, “Li” had made it **mandatory for people to worship the spirits**, which had provided **ideological and historical foundations** for “Li” (rites) to be changed into the **mandatory rules of conducts in the later class society**, though these two kinds of mandatory rules were quite different in nature»



## Zhang Jinfan:

«Because “Li” (rites) was available to local customs and had acted as much of a **spiritual deterrent**, after entering the class society, it was given more weight by the rulers.

In the **Xia (2070 B.C.–1600 B.C.)** and the **Shang Dynasty (1600 B.C.–1046 B.C.)**, through the action of “displaying the utmost filial piety towards the spirits”, the **rulers who had exalted the virtue of “Tian Ming” (the Mandate of Heaven)** had successfully **changed “Li” (rites) into a standard of behaviors** that had reflected the will of the ruling class and had met the needs of government.

Hence, from the reference to the ceremonials for worshiping spirits, “Li” (rites) was further **“extended in meaning and finally was turned into a general term to include all ‘Li Yi’ (rites and etiquette)”**.»

## Zhang Jinfan:

«The starting point and the **ultimate goal of Zhou Gong's** [Western Zhou - 1046-771 b.C.] **establishment of “Li”** (rites) were [...] (**showing respect to nobility represented by the emperor**) and [...] (**showing respect to relatives represented by parents**).

The former, which was given a meaning of **loyalty, was to maintain the monarchical power**, i.e. “in a state there are only one sovereign”; the latter, which was given a meaning of **filial piety, was to maintain the paternal power**, i.e. “in a family there is only one who is equally honorable”»

## Zhang Jinfan:

«In order to exaggerate the mysterious color of “Li” (rites) and to **increase its deterrent effect**, Confucianists had connected “Li” (rites) with the unfathomable “Tian Di” (heaven and earth) to explain the super-social emergence of “Li” and to defend that it was in compliance with “Tian Dao” (The Way of Heaven) to govern the country and to control the people under the guidance of the principles of “Li” (rites)»

«Because “Tian” (heaven) was constant, “Li” (rites) which was produced by “Tian” (heaven) and which had functioned as the operation of the contracting and developing movements in “Tian Di” (heaven and earth) was also constant. Therefore, the violation of “Li” (rites) also meant the violation of “Tian” (heaven); once the law of “Tian” (heaven) was violated, severe punishments, namely, heavenly punishments should be imposed. This had obviously shown that the theory of “Li” (rites) was politically oriented.»

Zhang Jinfan:

«In the late Qing Dynasty, in order to resist the impact of the western culture, the emperors of Qing had raised the banner of “marking the distinctions between ‘Yi’ (barbarians) and ‘Xia’ (China)” in order to show the determination to retain the traditional principles of “Li” (rites), which was viewed as the quintessence of culture with a history of thousands of years»

Therefore, «“Li” (rites) was not only regarded as the spiritual backbone of the Chinese people, but the embodiment of Chinese civilization and cultural development»

Zhang Jinfan:

**“there are different rules of ‘Li’ (rites) for different social status”. In Zhou Dynasty, different rules of “Li” (rites) were made for the emperors, the senior officials, the noblemen, and commoners according to their different social status»**

**«“Li” (rites) was the criterion for the underlying principles of the relations between the noble and the humble, the superior and the inferior, and the near and the distant relatives. The rules of “Li” varied from person to person according to their gradations of ranks and privileges; therefore, the functions of “Li” (rites) were to test the rationality of the gradations of ranks and their hierarchical structures, and in turn to make them constant and stabilized»**

## Zhang Jinfan:

Confucius «“‘Li’ (rites) is necessary for the management of a state”, and he believed that “where ‘Li’ (rites) prevails, the government will be in good order; where ‘Li’ (rites) is neglected, everything will fall into disorder and confusion”»

(Zhang Jinfan) «“Li” (rites) was not only the administrative principles of the state, but the power to keep the spirit together so that the state would not lose its people, the rulers would not lose their ministers, the noble would not lose the humble, the superior would not lose the inferior.»



## Zhang Jinfan:

«As to the relationship between “Li” (rites) and “Yue” (music), “Li” (rites) focused on distinguishing the differences in the society, such as those between the noble and the humble; while “Yue” (music) focused on seeking the similarities. In other words, **through “Yue” (music), an internal harmony would be achieved and the conflicts would be resolved.**

**When coordinating together, “Li” (rites) and “Yue” (music) could not only strengthen the affections between the father and the son, but also show the orderly relationship between the old and the young, and establish the different social status of the high and the low»**

**... So to avoid the need to implement the « ‘Wu Xing’ (the five forms of punishments in ancient China, i.e. “Mo”: tattooing on the face or forehead of the offenders with indelible ink, “Yi”: cutting off the nose, “Fei”: cutting off the left or right foot or both feet, “Gong”: castration, and “Da Bi”: the capital punishment), no worries for the common people, and no reasons for ‘Tian Zi’ (the son of Heaven or the emperor) to be angry ...”»**

Zhang Jinfan:

Therefore, *li* and *xing* «were two measures taken by the rulers to govern the countries. In the establishment of “Li” (rites) by Zhou Gong (the Duke of Zhou), the importance of enhancing moral instructions and reducing punishment of the subjects were stressed, which had intricately combined the instructional function of “Li” (rites) and the compulsory function of “Xing” (punishment) together.

“Li” (rites) was defined as the positive rules, which could “prevent the crimes before they have been committed”; while “Xing” (punishment) was the negative, which could “prohibit the crimes after they have been committed”»

Maxims: «De Zhu Xing Fu»; «Da De Xiao Xing»

Zhang Jinfan:

«Confucius proposed that people should not get their riches and honors and change their low and humble positions by violating “Li”»

Confucius did also complain about the writing of rules on a bronze vase because, «**by showing the statute law to the public**, the traditional rules of “Li” (rites) had been broken, and **“the social hierarchy of the noble and the humble had been violated”**»

## The relationship between the *li* and the law

Zhang Jinfan:

«Although “Li” (rites) and law were independent of each other, the special functions of “Li” that had regulated the rules of human behaviors and social order had made it necessary and possible to introduce “Li” (rites) into law»

«the confrontation between Confucianism and legalism was also the confrontation between the clarification of the distinctions of “Li” and the impartial implementation of law. However, after the Warring States, in the dynasties of Qin and Han, “Li” (rites), as a discriminatory rule for people’s conducts, started to integrate, and even to amalgamate with law which was a fair and equitable rule for everyone»

## The relationship between the *li* and the law

Zhang Jinfan:

«The introduction of “Li” into law was made gradually.

The Confucian classics had gone through a process in which they were applied first as the guidelines on legislation as well as the interpretations of law, and then the Confucian classic, *Chun Qiu* ( Spring and Autumn Annals ), was especially used as a basis for the legal judgments.

In such a long process, “Li” was continuously legalized, at the same time, law was continuously moralized. Especially, the establishment of “San Gang” (the three cardinal guides—ruler guides subject, father guides son, and husband guides wife) had enhanced the position of “Li” (rites) and provided law with the most basic contents»

# The ‘modernization’ (现代化) and the role of Japan

Gordon:

*“in the 1600s the Tokugawa did cut off trade with countries that insisted on selling religion together with material goods”*

**After a peasant rebellion which took place in 1637 – 1638 the military government started being concerned about the possible influence of the Christian religion**

**Among other things it forbade all the foreigners to travel around in the Country and to sell books**

Gordon:

English “had already abandoned the Japanese trade in 1623. The Spanish followed in 1624. When the Portuguese were forced to leave [1639], only the Dutch remained. They were content to keep their religious ideas to themselves and focus only on trade. They took up residence on a tiny outpost in Nagasaki harbor, a landfill island called Dejima”

However, it was not a complete closing that had been put in place: «the reach and rapidity of the modernizing projects of the new Meiji regime owed much to gradual earlier changes in the cultural and socioeconomic spheres, as well as to growing calls for reform in late Tokugawa times»



Gordon:

the *bakufu* (幕府), the Military Government, “forbade the import of “Christian books” beginning in the 1640s, but books on practical topics such as surgery or navigation were allowed, and a small flow of Western books, as well as Chinese translations, arrived in Japan over the following decades.

This prohibition was relaxed in 1720. A modest tradition of Dutch-language scholarship of the West took root, primarily in Nagasaki. Its practitioners looked into Western natural science, medicine, and botany in particular and compiled a dictionary and maps”

Masini remarks that **in 1811 a Government Office for the translation of the Dutch books has been established.**

Since at the time the Dutch were the main source of information about the ‘west’, the ‘studies on the west’ were defined **Rangaku (蘭學) ‘studies on the Dutch’**.

**Therefore, compared to China at the time Japan was more opened to accept the ‘western’ culture since its elite was already used to certain kind of ideas**

**For instance, the Rousseau’s Social Contract has been translated and published**

Students have been sent to **study in the Netherlands** already in the '60s of the **XIX** century and then students have been sent to **other Countries** as well...

To the **Iwakura Mission** took part some of the prominent figures of the Meiji Government, they were (Gordon) “**powerfully motivated the ensuing shopping spree in the mall of Western institutions**, from central banks and universities to post offices and police forces”.

The result was that **they have been asked for their institutions to be aligned with those of the foreign Countries** in order to be in **condition to overcome the unequal treaties**.

For the **Meiji** in order to put in place its restoration it became of crucial relevance to **undertake reforms** which will allow to overcome the extraterritoriality privilege connected to the unequal treaties

The **Ritsu Ryo** system had to be substituted with a more modern system

European scholars have been invited to teach and to cooperate in the reform **process**: among those an important role was played by **G. E. Boissonade** de Fontarabie

The first **Universities date back to 1869** and there were foreign scholars teaching in foreign languages

Since **1874 Roman Law was taught**, the first to teach it was the English **William Grigsby** by using the *Iustiniani Institutiones*

His aim was to let the students «*understand Roman law as a precursor of English law and to grasp both of them in a parallel context*»

The courses on law were first offered in foreign languages and then there have been Japanese scholars who started teaching in Japanese language

Norio Kamiya remarks **that the biggest problem these scholars had to face was the translation of the foreign legal notions into Japanese language**, and such a problem had to be solved in order to elaborate the codes as well

It had been **therefore created a new legal lexicon to express these ‘new’ legal notions** (there have been French-Japanese legal dictionaries already from the middle of the 80s)

In the 仏和法律字彙 (Futsuwa hōritsu jii), **French-Japanese legal dictionary published in 1886** by Fujibayashi Tadayoshi e Kada Kuninori, are already possible to be found **legal neologism in a fair amount**, for instance:

民法 Code civil,

债权 Créance,

权利，法律 Droit,

物上权 Droit réel,

不动产 Bien-fonds

Beside those there are many other terms that are still used in the **legal Chinese**: 损害 and 损害赔偿, 赠与, 利息, 代理, 动产, 占有者, 解除, 连带, 使用权

Assistant Secretary for Asia Francis Bertie , who was the British chief negotiator, was disappointed with Japan's inability to provide “full information as to the laws which would be enforceable upon British subjects on the cessation of consular jurisdiction.”

Later, when Bertie insisted on examining the Japanese codes , **Aoki replied that “if any existed they would be in either German or French,”** as Japan had modeled its codes on German and French codes.

**Aoki, however, did assure British officials that if the Japanese government failed to promulgate the codes in the five-year transition period, extraterritoriality would remain in place.**



**British acceptance of Japan's adoption of the civil law traditions of Germany and France, but not Anglo-American common law, was attuned with British insistence of domestic legalization compatible with a positive legal order.**

**On July 16, 1894, Britain and Japan signed the Aoki-Kimberley Treaty ending British extraterritoriality in Japan.**

**With the treaty, Japan provided a diplomatic note to Britain declaring that the Japanese government would not ask to have the Aoki-Kimberley Treaty enforced until all Japanese Codes were in full operation.**

**A Japanese Constitution and the Codes were already in force at the end of the XIX Century.**

**For the Civil Code there was a Boissonade Project based on the Code Napoléon and on the Italian 1865 Civil Code which was promulgated in 1890...**

**Nonetheless it did not come into force**

Since it has been substituted by another Project more inspired by the German *Pandektenrecht*.

The latter was approved and came into force in 1898 - 2 years earlier than the German BGB itself! - and in 1899 the Aoki-Kimberly Treaty came into force

# The Qingmo (清末) and the beginning of China's modernization

## Perdue on the **Canton Trade System**:

«Under the system established by the Qing dynasty to regulate trade in the 18th century, **Western traders were restricted to conducting trade through the southern port of Canton** (Guangzhou).

They could only reside in the city in a limited space, including their warehouses; they could not bring their families; and they could not stay there more a few months of the year.

Perdue on the **Canton Trade System**:

**Qing officials closely supervised trading relations, allowing only licensed merchants from Western countries to trade through a monopoly guild of Chinese merchants called the Cohong.**

**Western merchants could not contact Qing officials directly, and there were no formal diplomatic relations between China and Western countries. The Qing emperor regarded trade as a form of tribute, or gifts given to him personally by envoys who expressed gratitude for his benevolent rule.**»

## Perdue on the trade balance between England and China:

«As the volume of trade grew, however, the British demanded greater access to China's markets.

Tea exports from China grew from 92,000 pounds in 1700 to 2.7 million pounds in 1751. **By 1800 the East India Company was buying 23 million pounds of tea per year at a cost of 3.6 million pounds of silver.**

**Concerned that the China trade was draining silver out of England, the British searched for a counterpart commodity to trade for tea and porcelain.**

**They found it in opium**, which they planted in large quantities after they had taken Bengal, in India, in 1757»

## Perdue on the attempts to establish diplomatic relations with China

Lord George Macartney's mission to the court in Beijing in 1793 aimed to promote British trade by creating direct ties between the British government and the emperor.

Macartney, however, portrayed his embassy as a tribute mission to celebrate the emperor's birthday. He had only one man with him who could speak Chinese.

When he tried to raise the trade question, after following the tribute rituals, Macartney's demands were rejected.



Perdue on the attempts to establish diplomatic relations with China

His gifts of astronomical instruments, intended to impress the Qing emperor with British technological skills, in fact did not look very impressive: the emperor had already received similar items from Jesuits in earlier decades.

Macartney's failure, and the failure of a later mission (the Amherst embassy) in 1816, helped to convince the British that only force would induce the Qing government to open China's ports.

Differently from Japan, basically beside the Jesuits, all the other missionaries or the merchants were considered like *yi* (夷) barbarians

However, as a consequence of the opium wars and the related unequal treaties, China opened some schools aimed at the study of the western culture and science – it was necessary to study the language as well and to create a lexicon to reproduce the western notions

Among the most important language schools could be mentioned the: 同文馆 (*Tongwenguan*) for the 总理衙门 (*Zongli Yamen*) and the Shanghai Arsenal's language school, the 江南机器制造局翻译馆 (*Jiangnan jiqi zhizao ju fanyiguan*) etc.

However, concerning the law, only a few works have been translated and mainly related to international law

Wang Jian talks about a *gongfa shidai* (公法时代)

*Gongfa* at that time, differently from now, was not designating the public law, but the public international law that is now designated as the *guojifa* (国际法) and more specifically as the *guojigongfa* (国际公法)

The only translation of legal texts that would have been of a certain relevance beside the public international law area was the **translation of the French 6 Laws/Codes**

**The 6 Laws should have been:**

the Constitution,

the Criminal Code,

the Criminal Procedure Code,

the Civil Code,

the Commercial Code

Civil Procedure Code

**Instead of the Constitution it has been decided to translate the Law on forests!**

This translation went almost ignored

Furthermore, **differently from Japan, the translations were not made by jurists**, but also those concerning the international law texts were made by people having expertise in other subjects

For instance, **the 6 Laws/Codes were translated by Anatole Billequin and his language assistant**, but Billequin was an **expert in chemistry** and also the other people involved in the translation activities were not having legal knowledge

**Differently from Japan, China seemed not to be interested in changing its condition** and was not giving much of relevance to the unequal treaties

However, the few intellectuals who were more prone to putting in place a reform plan such as **Liang Qichao, already in 1896 noticed that these legal translations** made by people who were not having legal knowledge **were rather deceptive** as well as that, as Kang Youwei remarked, many of them were not concerning ‘relevant topics’ such as military subjects, etc.

**China’s domestic pressure towards a reform started becoming more and more strong since China lost a war against Japan in 1895**

**Liang Qichao in 1897** while opening the *Datong yishu ju* established by him and Kang Youwei as a first private translation house in China not managed by missionaries remarked that:

To enable all the talents of the country to study western languages and read western works would require a long, long time. I am afraid we could not wait [...] So, **if we do not hasten to translate, what we are accustomed to calling the reform of laws will be nothing but empty words [...]**

Although some works have been translated at public institutions such as the Peking Tongwenguan, the Tianjin Naval Academy and the Shanghai Arsenal, **in thirty years they have not translated into Chinese more than one hundred works and now they have even suspended that activity. [...]** it is too late.

[...] Japanese will be the main language and the western languages will be secondary; (we will translate), in the first place, political works and secondly technical ones ”.

After the aforementioned Sino-Japanese war and after so much pressure coming from the intellectuals, Japanese language schools opened in the *Tongwenguan* as well as in other places.

Until **1895** only **12 Japanese** works had been translated, **between 1896 and 1911** have been translated **958 works, among which 366 on social sciences...**

The *Zongli Yamen* started sending students to Japan in **1896**, in **1905 – 1906** there were **about 8000 Chinese students in Japan.**



After the **boxers' rebellion** and other **inequal treaties**, the Qing dynasty started being **subject to pressure from outside and from inside**: the **need to put in place a radical modernization** was not much under discussion anymore...

For instance, art. 12 of the **British Commercial Treaty** stipulated in Shanghai in **1902** provided that:

“China having expressed a strong desire to reform her judicial system and to **bring it into accord with that of Western nations**. Great Britain agrees to give every assistance to such reform, and she will also be **prepared to relinquish her extra-territorial rights** when she is satisfied that the state of the **Chinese laws**, the arrangement for their administration, and other considerations warrant her in so doing”

A large amount of **students were sent abroad** and **foreign scholars were invited to China**.

As already remarked by Liang Qichao, given the **similarities in the language**, culture etc. the **main inspiration** was being taken from **Japan** and then **also from other Countries**

A **Constitution was elaborated in 1907**, a Civil Code had been drafted etc...

The **dispute between the School of Li and the School of Fa**

However, at this time had been made choices which exerted influence on what happened in the following decades up to the current time

Since the last years of the XIX century the first Universities have been established

The first book on Roman law is dating back to 1903

Li Guilian: the Americans teaching law at the *Beiyang Daxuetang* (北洋大学堂) in Tianjin were ‘filling the stomach’ of the Chinese students with US case law so that the result was that these students could not work in the legal field, but they have been eventually employed for diplomatic or commercial tasks in matters where the US were involved

The dispute between the School of Fa, the 礼法之争 (*lifa zhi zheng*)

**School of Fa: 法治派 Fazhipai or 法理派 Falipai** was advising to **look at the foreign experience** (a lot of attention paid to the Roman Law tradition based models) in order to put in place the **modernization**

Among its most influential members: **Shen Jiaben** (沈家本) and **Wu Tingfang** (伍廷芳)

**Shen Jiaben** has been appointed as the head of the *Xiuding falü guan* (修订法律馆)

The dispute between the School of Fa, the 礼法之争 (*lifa zhi zheng*)

**School of Li:** 礼教派 **Lijiao pai** was advising to undertake a **systematization of the 礼, *li***, and therefore of the Chinese customs in order to put in place the modernization

Among its most influential members: **Zhang Zhidong** (张之洞) e **Lao Naixuan** (劳乃宣)

With a scientific and systematic approach in the study of the law huge improvements took place:

For instance, see art. 711 of the Napoléon Code: La propriété des biens s'acquiert et se transmet par succession, par donation entre vifs ou testamentaire, et par l'effet des obligations

第11条

凡有操持物主之权于其产业、田地、项上者，其事始，或系实授于人，或由相继接产而得，或如某人有一身于其子等生前曾为实授之命，而后承分而得者，均可有操持物主之权。

财产之所有权取得及其转移之方法，有由承继、或给予、或遗赠及债务之结果。

From the 诸法合体 *zhufa hetu* model to the 诸法分立 *zhufa fenli* model

大清民律草案 The Qing Civil Code Draft

总则

债权

物权

亲属

继承

Fairly similar to the Japanese Code

Mainly inspired by the German model but also the French and the Swiss models were taken into account

**A Japanese expert took part to the Commission who elaborated the first 3 books**

**Members of the School of li in the Commission drafting the last two books**

## 大清民律草案 The Qing Civil Code Draft

**It was a unitary Code for the civil and commercial law** since – how it has been remarked by the Chinese scholars – **China did not experience a season of a merchant law as Europe did.**

While in Europe we went...

From the **Ius Mercatorum**

To the **Ius Mercaturae**

To the **Unitary codes** (but not everywhere)...



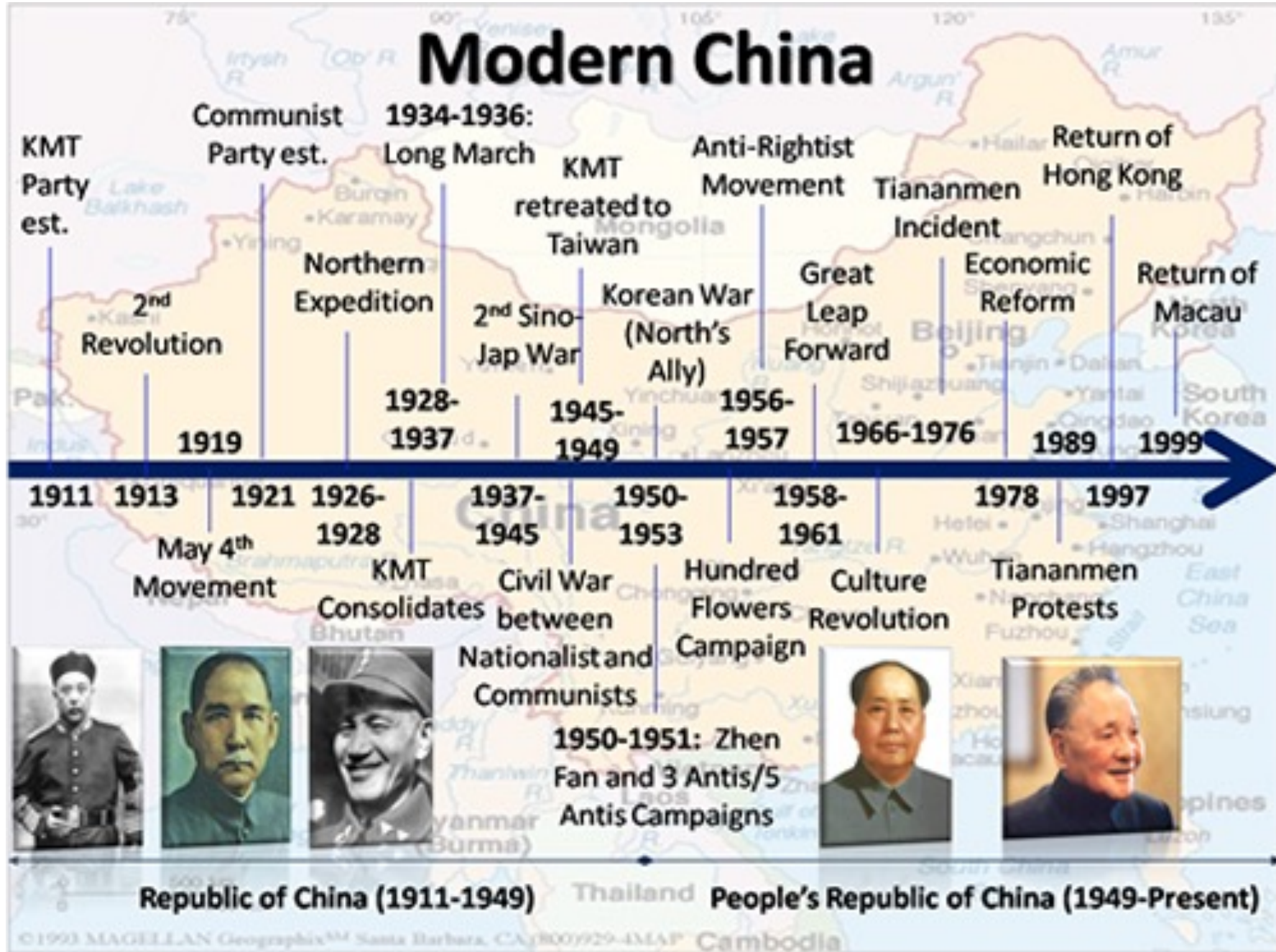
## **First half of the XX Century (Republic of China)**

### **1911 Revolution and 5 Constitutions:**

- (1) 《中華民國臨時約法》 (1912) (56 Artt.)
- (2) 《中華民國約法》 (1914) (68 Artt.)
- (3) 《中華民國憲法》 (1923) (141 Artt.)
- (4) 《訓政時期約法》 (1928) (Nanjing Government)
- (5) 《中華民國憲法》 (1947)

## **1949 foundation of the People's Republic of China**

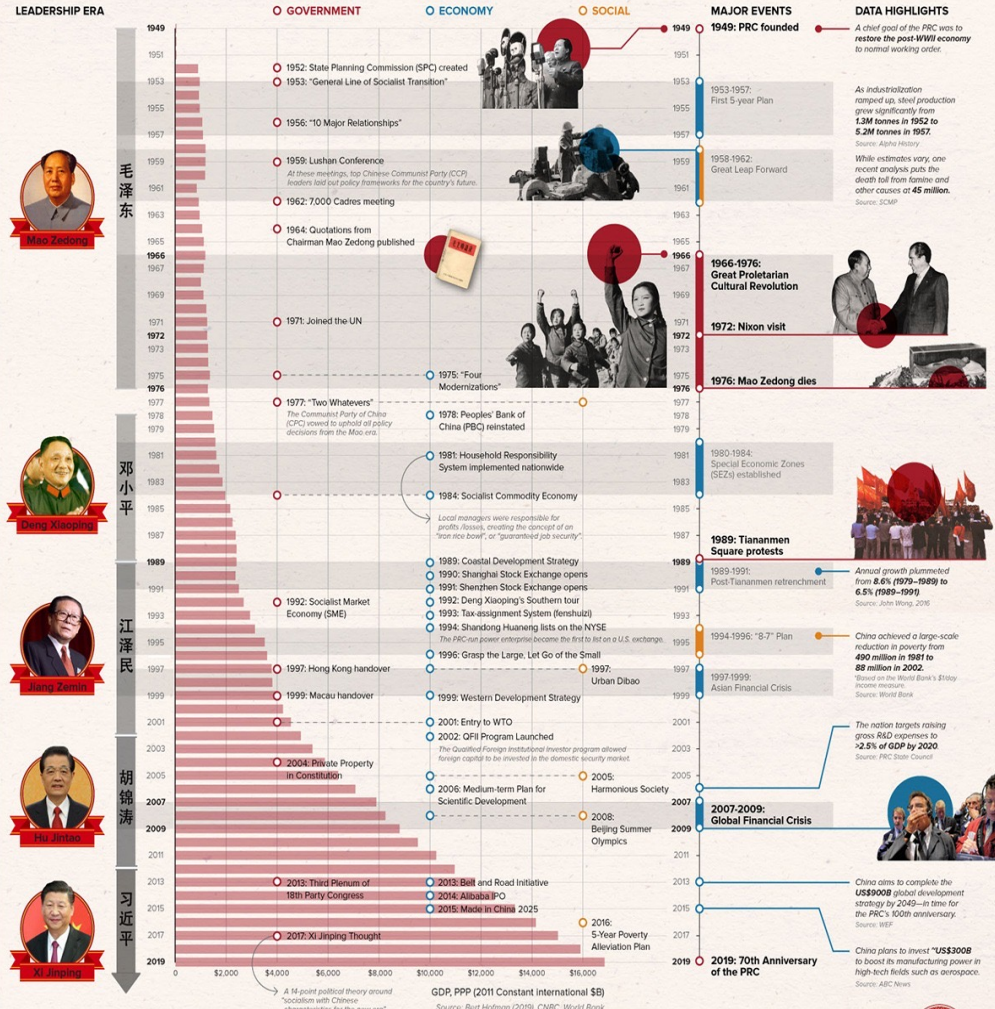
# Modern China





# 70 YEARS OF ECONOMIC DEVELOPMENT AND POLICY IN THE PEOPLE'S REPUBLIC OF CHINA

October 1, 1949 marked the founding of the Peoples' Republic of China (PRC). Below is an abridged list of events and policies that influenced the country's transformation to a global superpower.



## **First half of the XX Century (Republic of China)**

**Because of the Revolution the Qing Project did not get into force**

Another Project had been elaborated in 1925-1926, but again for political reasons, it did not get into force)

**Civil Code Promulgated between 1929 and 1931** inspired by the German, French and Swiss models

**1949 Foundation of the People's Republic of China – Previous laws abrogated** and the Civil Code stays in force in Taiwan while **on the Mainland a Soviet inspired system** (already tested in the areas under the Communist Party's control) had been **put in place**

## PRC from its foundation to the Cultural Revolution

1949 previous Laws had been abrogated

After the a 'Provisional Constitution' dating back to 1949 a Constitution has been promulgated in 1954 and then a new one in 1975 (only 30 arts.)

1949 – 1957 Inspiration taken by the Russian Soviet model

1958 – 1968 Socialist system but more 'original'

1968 – 1977 Cultural Revolution and less relevant role for the law from a formal pov: legal nihilism

# 1978 – 改革开放政策

(REFORM AND OPENING POLICIES)

After the death of Mao and the overturning of the Gang of Four, Deng Xiaoping reached the leadership of the Party and a new phase unfolded

## Zhang Weiwei: *The Allure of Chinese Model*

*The main features of the Chinese transition are:*

***People matter*** - Since 1978, China has pursued a down-to-earth strategy for modernization, and has focused on meeting the most pressing needs of the people. The architect of China's reform, Deng Xiaoping, argued that China could only "seek truth from facts," not from dogmas, and all reforms must take account of local conditions and deliver tangible benefits

***Constant experimentation*** – SPECIAL ECONOMIC ZONES / 股份化/ the trial program(s) for the outbound investments / Shanghai and other Free Trade Zones

## Zhang Weiwei: *The Allure of Chinese Model*

***Correct sequencing and priorities*** - China's post 1978 change has had a clear pattern: easy reforms first, difficult ones second; rural reforms first, urban ones second; changes in coastal areas first, inland second; economic reforms first, political ones second. The advantage is that the experiences gained in the first stage create conditions for the next stage – Trickle down effect

***Gradual reform - not big bang.*** China rejected "shock therapy" and worked through the existing, imperfect institutions while gradually reforming them and reorienting them to serve modernization – it should be a 60 years plan

***Selective learning*** - China has retained its long tradition of "selective cultural borrowing"

***The 'one size fits all' model does not work***



1985



2015





# Shanghai Pudong:



Deng Xiaoping – Yang Zhenshan - Jiang Ping and the Codification undertook step by step

The 单行法 (*danxingfa*) and the Law on General principles of civil law of the PRC as a 小民法典 (*xiao minfadian*)

The model of the Sun and the planets and/or the 私法上的百科全书 (*sifashang de baikequanshu*)  
Encyclopedia of private law

In 2014 there were already statutes in place providing rules with regard to the areas of law that are usually covered in a **Civil Code**, including the areas where the reaching of an **agreement** has been a bit **more complex** (for instance the **Law on the real rights** took **13 years to be drafted** mainly due to a discussion on whether to keep the **collective ownership** or not)...

It was rather becoming more and more **pressing the opposite problem**: there were already **more than 250 单行法** (*danxingfa*) in force among which many were dealing with civil and commercial law matters and it started becoming fairly **necessary to improve the coordination among them**





On October 23<sup>rd</sup> the decision to draft a Civil Code has been endorsed at the highest political level and the work started – it was organized in two steps (两步, *liangbu*): draft the book on the general part and then the other books as a second step

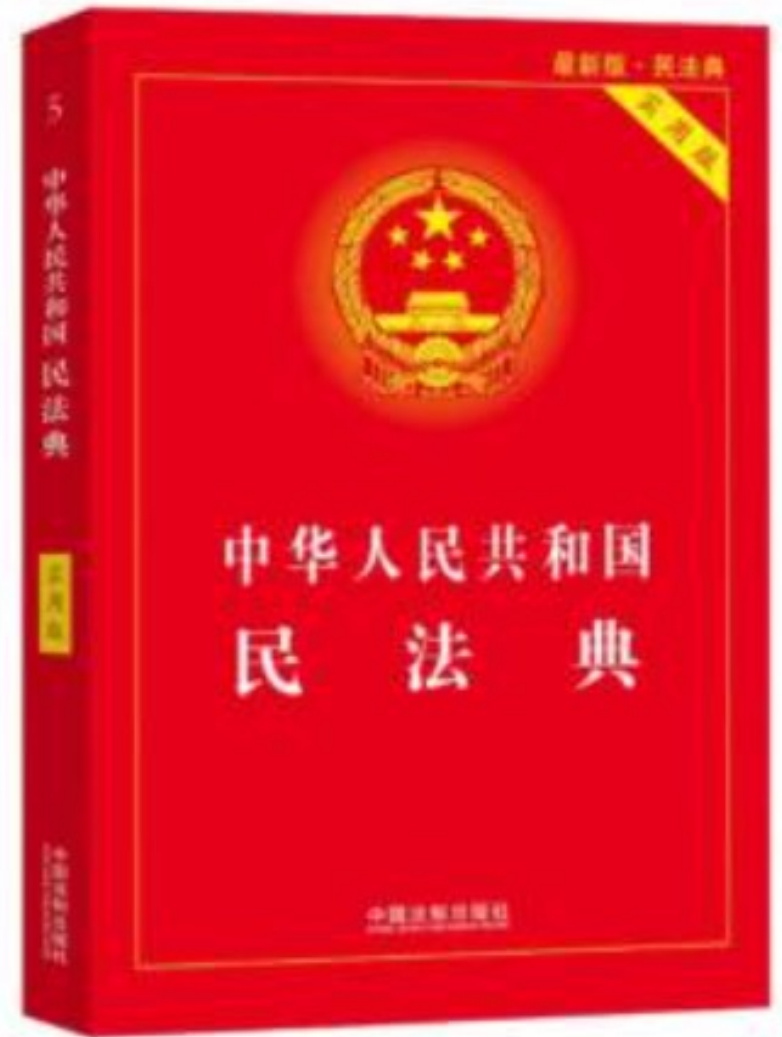


On May 28th 2020, the Civil Code has been approved by the plenary session of the National People's Congress with 2879 votes in favor, 2 against and 5 abstentions



Based on an up-to-date version of some the *danxingfa* approved in the previous years the Code features 1260 divided into 7 books:

- Book on the general part,
- Book on the real rights,
- Book on contracts,
- Book on the personality rights,
- Book on family law,
- Book on the m.c. successions,
- Book on tort liability



The **scientific notions and legal schemes** connected to the **‘Roman Law grammar’** have been taken sometimes in their **bourgeois versions**, sometimes in their **socialist versions**: since China’s society is based on the hybrid 社会主义市场经济, the “**socialist market economy**” **its legal system should be arranged accordingly** given the fact that it is providing its foundation.

These notions and legal schemes are **of course ‘metabolized’ in the light of the multi-millennia Chinese culture** and the values it expresses in the XXI century