Foreword

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In recent years, learned journals have proliferated world-wide and it might well be asked why a new on-line periodical devoted to Asian Legal History should be added to the large number of already existing specialized publications. But East Asia has a long and distinguished history of legal development that has been too little studied in the past and is only now attracting deserved scholarly interest so that a new forum for the discussion of individual topics and for comparative research seems to be called for. Already in the fifth century B.C. Chinese philosophers were debating the nature and purpose of law and we have documentation of this legal tradition over more than 2,000 years. Moreover, Chinese law was adopted in Korea and Vietnam and to a certain extent also in Japan, so that the Chinese legal sphere included more or less the whole of East Asia. Also the sedentary peoples of Central Asia, above all the Uighurs, in the Middle Ages took over many elements of Chinese law.

The unparalleled continuity of Chinese legal thought and institutions does, however, not mean that the basic features of law remained unchanged. The medieval dynasties of conquest such as the Khitan state of Liao (907-1125), the Jurchen Chin state (1115-1234) and the Mongol Yüan dynasty (1271-1368) have left a deep impact on Chinese law, so that the interaction of Chinese and alien legal elements has become a promising field of study. Another relatively recent development concerns the legal content. It is well known that Chinese codifications over the centuries deal primarily with what we might call penal and administrative regulations. The successive codes were formulated and issued by a bureaucratic state that regarded law as a restrictive and coercive tool for shaping human society according to preconceived and immutable ideals. Very little on private law, such as the law of contracts and property, could be deduced from the text of the codes.

This situation has nowadays changed considerably. Many documents on sales, mortgages and other transactions between individuals or groups have been found in the 20th century in Central Asia, dating mostly from the first millennium A. D. In addition, local archives and newly discovered or hitherto neglected printed collections of decisions in civil law suits include a rich documentation of private law in all its aspects. We are therefore much better informed about Chinese private law than fifty or eighty years ago. This too is a development that will certainly be reflected in the content matter of the new journal.

The only other legal sphere outside China that has an equally long history is that of Roman Law and its various modern adaptations. In this context we should remember that even today Roman Law proper is still used in some parts of the world, for example in Scotland and, unlikely as it seems at first glance, South Africa. The influence of Roman legal concepts pervades subliminally even our studies of Asian legal history. Concepts like property, possession or purchase and sale derive ultimately from the corresponding Roman, that is, Latin words and their definition. It is therefore a legitimate question to ask to what degree these concepts can be applied to the Chinese legal tradition and whether they are identical or should be modified when studying Asian legal history. What exactly corresponds in Chinese law to the concept of property (*dominium*)? Such

questions may perhaps lead to a deeper understanding of Chinese legal thought and serve as a reminder that our accepted western notions are possibly not as universal as we would like to think.

We can also notice a fundamental difference between law in China and in the sphere of Roman law. In medieval Europe jurisprudence has emerged as a field of intellectual logical inquiry and ratiocination and been adopted into the university curricula. The development of legal thought in Europe has therefore been largely non-governmental and academic as a result of the efforts of many generations of individual scholars and their schools. A similar phenomenon can be observed in Islamic and Jewish law, where exegesis and adaptation of the revealed canon was in the hands of individual thinkers and not institutionalized. In traditional China up to the 19th century no jurisprudence in the western sense had evolved. It is true that there existed legal specialists under the successive dynasties but they were all civil servants, mostly in the Ministry of Punishment (*xing-bu* 刑部), and not independent scholars. Legal studies as an academic subject have therefore been a relatively recent innovation in early 20th century China.

In the future the study of Asian legal history will perhaps not only deal with single historical topics but also try to explore hitherto unknown territory. Tibet is now a part of China but our knowledge of law in Tibet and its history is deplorably scanty. On a more general level attention might also be drawn to fundamental phenomena that we encounter in all known legal systems. Three of these will be outlined briefly below.

The first is the question of legal transfer or legal acculturation. We find examples not only in modern times such as the introduction of Common Law in Hong Kong, but also in the past. The adoption of Chinese law in Korea and Vietnam or Chinese legal influence on the peoples of Central Asia are further instances of legal transfer which deserve to be studied. Another fundamental question concerns the origin of law. What is the relation between *religio* and *ius*? In most if not all civilizations a god or supernatural being was believed to have created cosmic order, followed by human attempts to preserve this order and to achieve secular control of human society. In this respect it is sometimes difficult to distinguish clearly between legal regulation and morals which both seem to jointly condition human behavior even if they are not identical. What is legally permitted or enforced may not always be moral--an eternal conflict that has pervaded human life since times immemorial. As a third field one could mention the antagonism and occasional interaction between law on one hand and customs or usages on the other. When looking at social reality we might perhaps discover that the letter of codified law is sometimes a superstructure, an abstraction under which unwritten local or societal customs continued to be observed.

In closing I wish to express the personal hope that the above sketchy remarks might underline the desirability of this new journal that will certainly develop into an international forum for a deeper study of Asian legal history.