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“Marco Polo and Chinese Law”

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9. 马可·波罗与中国法律

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文章指出,马可·波罗是个商人,缺乏起码的法律知识,所以书中没有详尽记述、评价元朝的政治规章制度,没能系统地向西方介绍中国当时的法律和行政管理状况。然而,他所述及的一些有关政治和法律的段落却成了西方人研究中国和蒙古法律制度的最最原始的资料。他那有关司法问题(特别是有关刑法和刑事诉讼法方面的问题)的记载最受重视。文章引用了书中的一些段落,并根据中国法律史,对中国法律机构及其制度作了综述。

MARCO POLO AND CHINESE LAW

Renzo Cavalieri

Even if we limit our analysis to the part dedicated to China, there are at least ten chapters in *The Travels of Marco Polo* (*Il Milione*) which deal—often in only two or three lines—with legal topics in the strictest sense of the word.

In the first place, there are references to the criminal justice system which, due to their number and importance, represent the nucleus of Marco Polo's observations regarding Chinese law.

These are notations regarding theft, murder, violation of the evening curfew, the procedure for arrests, capital punishment, corporal punishment and related sentences, and monetary redemption.

Secondly, in order of importance, there are references to

constitutional order: the administrative system of the provinces, the Mongol tradition, the figure of the emperor, the two councils of barons, and the institution of pardon.

There are also a number of observations regarding the revenue system and laws governing corporations and markets.

Finally, there are sporadic references to matters of private law. Here it is particularly difficult to distinguish between actual legal themes and simple observations of custom, not only because the references are few and scattered, but also because in China, as a result of an ancient tradition, relations between private individuals were regulated not by the law (*fa*), but rather by morals and rites (*li*). In any case, to cite some examples, there are references to marriage and concubinage, Islamic law, the loss of goods and possessions, and the regulation of gaming and barter.

It would appear that there is ample material; and yet, because of the briefness and vagueness of the descriptions, and due to the total lack of systematic order of the references, Polo's account can in no way furnish an adequate description of the legal system which was in effect in China during the Yuan dynasty.

In fact, Marco Polo, although an exceptionally gifted observer was unable as a whole to understand and evaluate the social organisation and political philosophy of the Chinese, nor was he capable of synthesising the information he had gathered, with analytical commentary.

This is because at the time, a poorly educated merchant such as Polo did not possess the logical and linguistic tools necessary for the task: European culture, and the study of law in particular, were just beginning to develop such tools, and only many centuries later would they be understood and available to many levels of the social fabric.

Before taking a look at some of Marco Polo's observations on the penal system and the administrative model of China, a brief historical introduction may be useful.

Traditionally, the Mongols made use of an extremely simple system of laws, designed for a nomadic, warlike people, whose principal activity was the raising of livestock. This system had been partially codified by Genghis Khan in a collection of tribal customs, edicts and imperial maxims called the Great Yassa.

But once they had invaded in China and founded the Yuan dynasty (1271), the Mongols had to adapt their legal system for the needs of a settled civilisation such as that of the Chinese; the laws of the Yuan dynasty (definitively codified in 1316), therefore, represent a departure from the traditional Mongol prototype, re-utilising and developing, in both form and substance, the fundamental principles of the traditional Chinese legal system, found, above all, in the legal code of the T'ang.

The principal element of innovation introduced with the Mongol invasion was a system of racial discrimination, unknown under previous Chinese dynasties.

The population of the empire was divided into four classes, based on ethnic groupings (Mongols, peoples of central Asia, Northern Han and Southern Han Chinese). Mixed marriages were forbidden. All administrative functions were hereditary, and all such positions occupied by Mongols; civic administrators were also Mongols or, less frequently, foreigners (especially Muslims). Penal laws were lenient for Mongols, and extremely severe for the Han Chinese; only a Mongol court could try the case of a Mongol defendant.

As far as the penal code was concerned, which was about half of the entire body of legislation of that era, the Yuan, for the most part, recycled — with the racial variants mentioned

above — the model of the “five punishments” (wu xing), in effect for more than six centuries in China.

This model called for the division of crimes into five categories, each with a different form of punishment: death, exile, hard labour, heavy flogging, light flogging.

On the subject of criminal justice, Marco Polo writes:

“Justice is administered in the following manner. If a man steals some small thing, for which the death penalty is not required, he is punished by seven strokes of the cane, or seventeen, twentyseven, thirty-seven, forty-seven and so on, in increments of ten, up to one hundred and seven, according to the value of the object stolen. Many die under these thrashings. If a man steals a horse, or another object the theft of which calls for the death penalty, he is cut in two with a sword. If, however, he is able to pay for the object stolen, and is prepared to pay nine times its value, his life is spared. For murder, there is no escaping the death penalty. Anyone who so much as makes the mere gesture of striking another with a weapon is punished by the amputation of one hand. If a wound has been inflicted by the offender, he is punished by the infliction of the same wound.”

For the legal scholar, this description — which is also the longest discussion of legal matters in Polo’s account — appears seriously incomplete, but sufficiently precise, and even the last two sentences do appear to have some historical foundation, though in effect they contain observations which are inexact and incomplete.

The punishment of flogging described in the section cited above was an ancient, uninterrupted Chinese tradition: but before the Mongols, the number of strokes was usually calculated beginning with the number ten (10, 20, 30...), while, as we have seen, at the time of Kublai Khan the number seven was

used. Some sources, perhaps a bit too romantic, attribute this reduction in the number of strokes to Kublai Khan himself, who is said to have eliminated one for Heaven, one for the Earth, and one for himself.

It is true that, as Polo narrates, in traditional Mongol law, wide use was made, of the institution of payment of fines in order to avoid punishment; but Polo omits the fact that Yuan legislation permitted this practice only partially, instituting other forms of financial punishment which, rather than replacing the main form of punishment, were added to it, at the expense of the offender or his family.

In the eyes of the modern observer, the legal system of the Yuan dynasty was one of plunder, designed for the systematic exploitation of China, permeated with racism and a certain vein of sadism, which led to the generalised use of certain punishments — such as death by cutting the victim into slices — which, previously, had been reserved only for the most heinous of crimes.

Nevertheless — hard as it is to believe, considering also the notoriety of the Mongols in the Western imagination — the Yuan dynasty was not the most cruel or severe of the great Chinese dynasties: for example, the Yuan code reduced the number of crimes punishable by death, as compared to previous penal codes, and there was a remarkably tolerant attitude regarding the practice of various religions and the sciences.

The judges were also relatively clement: it might be interesting to note that, according to the *Dynastic Annals*, in 1291, exactly seven hundred years ago, only 55 death sentences were executed in the empire, and although this figure is perhaps too formal to be credible, it is still an extraordinarily low number for the time (or even, perhaps, for the present day).

As far as the political-institutional order is concerned, at

the time of Marco Polo two developments of great importance took place.

First of all, as we have observed, forms of racial discrimination were established throughout the empire, which characterised the entire period of Mongol occupation.

Secondly, a process of assimilation by the Chinese civilisation began with respect to the Mongol system of power. In the decades which immediately precede Polo's journey, the chiefs of the Mongol clans realised that, in order to govern China, they would have to make use of the traditional legal codes of earlier dynasties, and adapt to the Confucian administrative model, with ministries and state examinations for bureaucrat-scholars.

Marco Polo doesn't make mention of either of these developments, perhaps because of his lack of the logical and linguistic tools necessary to describe them, or perhaps because of his lack of perspective, being too completely immersed in the context of Mongol power to observe such phenomena, or perhaps, more simply, because neither the racial laws nor the assimilation of Chinese law by the administrative order of the Mongols was useful information for a travelling merchant.

To be precise, a brief mention of the loss of Mongol identity is made in the chapter entitled "In which we speak of the Tartars and their laws", in which Polo writes: "These customs I have described are those of the true Tartars: but I must also mention that, today, they have been greatly corrupted. The customs of the Tartars in Cathay have been greatly influenced by the habits, manners and customs of the idolators, and, for the most part, they have completely abandoned their traditional laws(...)"

In other passages, regarding government bodies, Polo writes much about the emperor (but rarely about his institutional

role) and provides hints about the management of the public affairs of the provinces, speaking of two councils of nobles, one in charge of military matters, the other for civil affairs.

In one case, Polo also remarks on the existence, in each province, of a "judge" and his scribes, who take care, in his words, of "all of the things which are necessary in the province to which they are assigned".

That is all. Marco Polo did not understand that the institutional stability of the Mongols in China, which he so often had occasion to appreciate, was based not only on the military and organisational power of the invaders, but more than anything else on their adoption of the traditional Chinese constitutional model:

If he had been able to overcome his limitations, if he had had a chance to further investigate the historical context of the situation he encountered, Marco Polo would have understood that the governing Mongols had, at that point, been absorbed by the Celestial Bureaucracy, and perhaps he would have told us about Confucianism and the examination system, leaving a priceless cultural legacy to the Western world.

Instead, the West had to wait for the lengthy work of the missionaries, and the rise of the culture of the Enlightenment, before an understanding of the Chinese administrative model could give rise to modern systems of state exams, and perhaps to the great principle of the French Revolution of opening all public jobs to those who demonstrate the most talent.

Thank you for your kind attention.