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СОВРЕМЕННОЕ ПРАВО И ФИНАНСОВО-БАНКОВСКИЙ СЕКТОР КИТАЙСКОЙ РЕСПУБЛИКИ НА ТАЙВАНЕ*

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АННОТАЦИЯ

Статья посвящена исследованию правовой системы Китайской Республики на Тайване, особенностям нормативно-правового регулирования финансового и банковского сектора экономики. Отмечаются характерные черты права современного Тайваня, на формирование которого оказало влияние традиционное право древнего Китая, нравственное учение великого Конфуция, романо-германская (континентальная) правовая традиция. Подчеркивается развитость законодательства в финансово-банковской сфере, наличие в правовой системе Китайской Республики основных актов правотворчества, регулирующих данную сферу: Закон о банках, Закон о Центральном банке, Закон о векселях и др. Особое место в законодательном регулировании финансово-банковской сферы принадлежит Закону о противодействии отмыванию денег, который активно применяется тайваньскими правоохранительными органами в борьбе с легализацией доходов, полученных преступным путем. Так, к различным срокам тюремного заключения недавно были приговорены бывший Президент Тайваня Чэнь Шуйбянь и его супруга У. Шучжэнь. В целом законодательство Тайваня достаточно развито, а его правотворческий и правоприменительный опыт представляется весьма полезным для отечественной юридической науки и китаеведения в целом.

Ключевые слова: Тайвань; правовая система; банковское право; финансовое право; Китай; Конфуций; законодательство; право Китая; смертная казнь; Китайская Республика.

MODERN LAW AND FINANCIAL-BANKING SECTOR OF THE REPUBLIC OF CHINA IN TAIWAN**

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ABSTRACT

This article is dedicated to investigation of the legal system of the Republic of China on Taiwan, peculiarities of the legal regulation of the financial and banking sector in economy. Emphasize characteristic features of the law of modern Taiwan, the traditional law of ancient China, the moral teaching of the great Confucius, Roman-

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Germanic (continental) legal tradition. Emphasizes the development of legislation in the financial and banking sector, presence in the legal system of the Republic of China the main acts of law-making, regulating this sphere: The Banking Law, the Law on the Central Bank, the Law of the Bills of Exchange, and others. The special place in the legislative regulation of financial and banking sector belongs to the Law on Prevention of Money Laundering, that is actively used by Taiwanese law enforcement agencies fighting against the legalization of proceeds from crime. So, the former President of Taiwan – Chen Shui-bian and his wife recently have been sentenced to various terms of imprisonment. In general, the legislation is sufficiently developed in Taiwan, and its law-making and law-enforcement experience would be very useful for the domestic legal science and Sinology in general.

Key words: Taiwan, legal system, banking law, financial law, China, Confucius, legislation, law of China, death penalty, Republic of China.

THE PLACE OF THE FINANCIAL-BANKING LEGISLATION IN THE LEGAL SYSTEM OF TAIWAN

This article is dedicated to investigation of the legal system of the Republic of China on Taiwan, peculiarities of the legal regulation of the financial and banking sector in economy. Emphasize characteristic features of the law of modern Taiwan, the traditional law of ancient China, the moral teaching of the great Confucius, Roman-Germanic (continental) legal tradition. Emphasizes the development of legislation in the financial and banking sector, presence in the legal system of the Republic of China the main acts of law-making, regulating this sphere: The Banking Law, the Law on the Central Bank, the Law of the Bills of Exchange, and others. The special place in the legislative regulation of financial and banking sector belongs to the Law on Prevention of Money Laundering, that is actively used by Taiwanese law enforcement agencies fighting against the legalization of proceeds from crime. So, the former President of Taiwan – Chen Shui-bian and his wife recently have been sentenced to various terms of imprisonment. In general, the legislation is sufficiently developed in Taiwan, and its law-making and law-enforcement experience would be very useful for the domestic legal science and Sinology in general.

In the recent years Republic of China (the RC) in Taiwan (中華民國) causes much interest to foreign and Russian scientists, though not well-enough studied in comparison with the progress in studies of the PRC. Nevertheless, Taiwan history, its peoples' customs and traditions, traditional Chinese culture are of certain interest in the Russian Chinese studies. The RC's state order, legislature and

especially financial-banking law system have certain specifics. It is common knowledge that Taiwanese authorities have made a great success in the banking and financial spheres, their experience is of practical and theoretical interest for Russian scientists, the lawmaker and the adjudicator.

Taiwan, the island in the Pacific Ocean, 150 miles from the eastern coast of the PRC has a thousand years history. The first mentions of the Chinese appearance on the island refer to the Sui dynasty (589–619 AD), though its colonization began in the later period. The administrative control of the Chinese authorities firstly spread over the adjoining Taiwan the Pescadores islands, then over the whole Taiwan [1, p. 24–129]. Formed in 1911 the Republic of China after the Second World War spread its jurisdiction on Taiwan and the adjoining islands. On termination of the destructive civil war and a new state, the Peoples' Republic of China, formation by the Communist Party on the 1st of October 1949, the authorities of the Republic of China (Guomindang party) fled to Taiwan and continued there their activity. The representative of the Republic of China is known to seat in the United Nations Organization until 1971.

The basis of the legal system of Taiwan is its Main Law, the Constitution of the Republic of China [2, 72 p.], adopted on the 22nd of December 1946 by the National Assembly (abolished in 2006). It was revised several times, herewith due to the constitutional reforms conducted in 1992¹. The Constitution has 14 chapters and 175 articles. The Preamble of the Constitution of the Republic of China in

¹ URL: <http://zh.wikipedia.org/wiki/中華民國憲法增修條文> (in traditional Chinese) (application date: 04.09.2014).

contrast with the enormous Preamble of the active Constitution of the PRC of 1982 consists only of one phrase, obligating all people to observe it “constantly and unfailingly”.

According to the principles of the Constitution “the Republic of China is based on the “Three People’s Principles” and presents itself a democratic republic of people, managing by people and for the people” (1 article). The “Three People’s Principles” (三民主義) present themselves a political-legal doctrine, formulated by the famous Chinese revolutionary, Guomindang party’s founder Sun Yat-sen (孫逸仙). They include the principles of nationalism, people’s sovereignty and people’s welfare (until lately the subject in the educational system in Taiwan). The specified doctrine got its practical fixing in the active Constitution and the RC legislative acts. Due to this system in Taiwan there acts a unique system of the division of powers supposing the interaction between legislative, executive, judicial, control and examination (selective) branches of state powers. Each of them is executed by the branch chamber (Yuan).

In the General Program of the state construction on the 4th of December Sun Yatsen wrote: “In the process of the construction of the RC the national government’s activity is based on the revolutionary program of the “Three People’s Principles” and the Constitution of the five Powers”(point 1). And hereafter: “the state power is divided into five independent from each other Powers: legislative, judicial, executive, control and examination. The executive power is presented by the president, the legislative power by the parliament and the judicial by the judges. To execute examination and control powers it is also necessary to create independent organs. When the Constitution of the five Powers takes effect the state is to attract people to perform administrative functions only in accordance with the Constitution. Public servants before that what proceeds with their duties have to take exams, which will put an end to the use of people without any difference” [3, p. 29].

According to the Constitution the Sovereign and the Commander-in-Chief of the RC is the President (35 article and 36 article). He is also the chairman of Taiwan’s National Security

Council and National Unification Council. The highest state administration organ of the RC (the Government) is the Executive Yuan (53 article), the highest legislative organ (the Parliament) is the Legislative Yuan (62 article), the highest judicial organ is the Judicial Yuan (77 article), the highest examination organ, the Examination Yuan, is in charge of exams undertaking, service appointment, registration and qualification for job positions etc. The highest control organ in the state is the Control Yuan (90 article), which realizes the authority on submitted for its consideration on impeachment, blame and audit [4, 200 p.]. In the Republic of China there exists created in 1948 the Council of Grand Justices, the element of the constitutional control in Taiwan [5, 153 p.]. This organ is unique and its existence enriches the specifics of the legal system of the Asian region as a whole.

The legal system of Taiwan is exclusive. It includes fundamental bases of the ancient (traditional) Chinese law formed as a result of deep philosophical dispute between great Confucius and legists. Traditional western legal system also essentially influenced its formation, as a result it can be referred to the Roman-Germanic legal family with the elements of Anglo-Saxon law. It is worth mentioning that after defeating in the Civil war Guomindang party took away to Taiwan not only scientific and cultural elites of the state, some of its historic documents and ancient books but also Confucius spirit, old system of writing and preserved legislature. According to the well-known Japanese researcher of the law: “Guomindang regime possessed relatively developed legal system. At the end of the 20-s — the beginning of the 30-s there were worked out Criminal and Civil Codes, Financial and Taiwan territorial sea Law, Entrepreneurship Law, Taiwan Code of Civil Procedure, Land Law etc. Though they all presented only the combination of articles originated from the West European countries and Japan’s laws with the articles codified common Law of the old China” [6, p. 24].

The new Communist authorities of the PRC are known to have cancelled progressive enough for those times Guomindang legislation: “Kuomintang’s Complete Book of the Six Major

Laws" (or of Six Branches of Law) (六法全书) [7, p. 69–79]. The decision of its cancelling in the liberated regions was officially drawn up by the normative decree of the CCP Central Committee in February 1949 [8, p. 1–3]. Before this, in its appeal about the modern political situation made on the 14th of January 1949 Mao Zedong put forward a slogan: "To cancel false Constitution and to cancel false laws" [9, p. 93], which decided the fortune of Guomindang legislation in the newly born legal system of a newly formed Chinese state. Guomindang legislation cancelling happened for exclusively ideological reasons: it was recognized as more reactionary, hostile and wasn't studied by the authorities. Instead of the cancelled old legislation the courts and the governmental organs were suggested following resolutions expressed in programs, regulations, orders, provisions and other documents promulgated by the people's governments and by the People's Liberation Army and in case of their absence by the "policy of people's democracy".

After the Communist Party authorities' enemies fleeing to Taiwan Guomindang legislation continued acting in a changed way and until now as a foundation of the whole legal system of the RC. Complete Book of the Six Major Laws includes legislative acts in the sphere of constitutional, civil, criminal, administrative (including here labor, financial, land legislation) material and procedure legislation.

Unfortunately, until now the unique "Code of laws" hasn't been translated into Russian.

Besides the acting Constitution, Criminal and Civil Codes should be referred to the fundamental acts of lawmaking forming the legal system of the RC. The norms fixed in the Civil Code directly regulate financial and banking systems of Taiwan. It is worth mentioning that according to Central Regulation Standard Act all acts of lawmaking adopted on the territory of the RC are divided into 4 main types: fa (law), lu (statute), tiaoli (rules), tongze (general regulations). Article 21 fixes the inadmissibility of the contradiction of the laws to the Constitution, and regulations acts to the laws.

Some special interest from the point of view of the comparative legal science presents the

Criminal Law of Taiwan which according to its contents looks very much alike the traditional law of the ancient China. Yet in 1912, a year after the Manchu dynasty dethronement the President of the Republic of China ratified the temporary code of the Criminal laws, the Criminal Code of laws consisted of 411 articles. Then already in 1928 after several revisions the name of the Criminal Laws Code was changed for the Penal Code [10, 84 p.]. Later this Code was in force in the version of 1935 and consisted of 357 articles. The analysis of the specified document allows to give a high estimation of the norms fixed in it at that time. One could obviously state that "almost as a whole originated from the Japanese Penal Code, and partially from the legislation of France, Belgium, Germany, Holland the Penal Code of 1928 puts into the Penal Code of China many completely new ideas and institutions, which getting through the prism of the Chinese people's outlook, created by a thousand years' culture absolutely independent and sharply different from that of the West, got a completely peculiar character under the influence of this latter outlook" [11].

The active Penal Code of the Republic of China preserved fixed in the last century principles and norms added their contents with contributed for time amendments (total 31, the latest one was adopted on the 18th of June 2014). In the PRC as well in Taiwan there exists the capital punishment, death penalty (6 people were executed, 7 death sentences were passed in 2013)², and criminal policy to the criminals is exceedingly hard. The rights of the crime suspect are protected by the Constitution. It is important to notice that article 2 in Chapter 2 of the Constitution of the Republic of China "Citizens' Rights and Duties" (the eighth article) clearly points out to inadmissibility of the detention of the person "otherwise as on the grounds of corresponding to the procedure installed by law, with the exclusion of detentions on the place of the crime" (Part 1). In Part 2 is fixed: "No person can be sentenced or penalized otherwise as on the grounds of corresponding court procedure installed by law. "Not a

² Six death-row inmates executed. TaipeiTimes. 20.04.2013. URL: <http://www.taipetimes.com/News/front/archives/2013/04/20/2003560175> (application date: 04.09.2014).

single person can be convicted or penalized otherwise as on court decision according to the determined procedure, installed by law. Any arrest, detention, reprobation or punishment notwithstanding the procedure, worked out by law, can be declined". In accordance with the acting Criminal Procedure Code of the Republic of China the suspected and the accused of a crime are under the protection of the law, they are provided with the right of the reception of the legal assistance (article 27). Herewith it is clearly fixed: "at realization of the arrest or detention, one should pay attention to the personality and dignity of the accused of a crime" (article 89).

Some special place in legal the system of Taiwan belongs to the civil legislation. If in the People's Republic of China hitherto the Civil Code is not adopted, in Taiwan it has been acting for a long time (however, similar to that in the PRC, the Tax Code is not adopted either). We shall notice as far back as in May 1931 in Guomindang China there came into action the Civil Code of the Republic of China, designed by the authorities with on the Japanese Civil Code of 1898 bearing in mind and the German Civil Code of Laws dated back to 1900 [12, 327 p.]. It contained rather progressive for those times norms. So, for instance, the Code contained the norm supposing civil responsibility of the officials purposefully violated their obligations to the third parties or did their interests harm (Point 1, article 186).

Acting at present the Civil Code of the Republic of China is a system making act of lawmaking in the civil legislation of Taiwan, its contents is rather bulky (total 1225 articles). Besides it, the civil legislation forms other important legal documents: Enforcement Act of the Part of General Principles of the Civil Code, Enforcement Act of the Part of Obligations of the Civil Code, Enforcement Act of the Part of Rights in Rem of the Civil Code, Enforcement Act of the Part of Family of the Civil Code, Enforcement Act of the Part of Succession of the Civil Code.

The Civil Procedure Law of the Republic of China includes the following acts of the lawmaking: The Civil Procedure Code, Enforcement Act of the Part of the civil

procedure of the Civil Code and others. The particularity of the specified above legislative acts is concluded in referring them to the list of the legal procedure documents that in principle corresponds to the logic of the provisions kept in them.

But the most extensive sphere by the amount of adopted legal documents is the financial-banking sphere of the Republic of China. And it isn't accidental. Taiwan is known to have made an unprecedented success in the researched sphere of public relations. Started in the 2000-s the financial reform and the reform of the banking system brought the Republic of China to a firm economic growth. The large-scale transformations started exactly with the contributing changes to the acting legislative acts: Banking Act, Financial Institution Mergers Act, Insurance Law. There were urgently adopted the Financial Holding Company Law and Taiwan's Financial Assets Securitization Act.

So, for instance, in the course of legislative registration of the financial-banking reform there was fixed the right of the financial organizations formed as the result of the merging not to pay not to pay stamp duty and the Capital Gains Tax connected with the cost increase of the land allotments. The losses, formed in the connection with the fact, that to the third party there are sold the rights to reimburse with discount the "problem" credits of the merging banks, were allowed to redeem for 15 years after merging. For the first time the lawmaker also allowed the foreign financial institutions to purchase and own 100% of Taiwan banks. With the purpose of the regulating of the gained "problem" indebtedness the Law about financial institutions' merging approbated the creation of the specific companies on the crisis control of the assets [13, p. 161–170].

Taiwan quickly recovered after the financial crisis of 2009. The financial-banking sector practically didn't suffer. The economy of the Republic of China continues to grow, it possesses a more favorable investment climate yielding by this factor only to a few states. The basis of Taiwan economy form small and medium enterprises which actively use the

services of the financial-banking sector. Many large world banks have their representations in Taiwan. Taiwan large Holdings actively purchase companies abroad. It all indicates the right direction of Taiwan authorities activity within the framework of legal regulation of the Republic of China's banking and financial spheres.

Banking — financial legislation of the Republic of China is rather developed and consists of several acts of lawmaking. It includes not only laws but also by-law normative-legal acts, the number of which significantly exceeds the former ones. It isn't accidental. A Chinese lawmaker both in the PRC and in the Republic of China prefers not to hurry with adopting hardly changeable codified acts of lawmaking, preferring to them uncoordinated by-law documents of a local nature³. So, it is the easiest way, on the level of by-law rule-making, to regulate fast and painless an important banking and finance sphere for economic development of the region.

To the main legal documents in the concerned sphere the following should be referred The Banking Act of the Republic of China, the Central Bank Act, Credit Cooperatives Act, Insurance Law, Securities and Exchange Act and many others. We should notice that in the mentioned above acts of lawmaking there are clear and efficient normative provisions which let the subject of (law) enforcement" free development in the active legislation limits. There are almost no norms establishing endless control of the participants of the financial and banking sector but clearly prescribed mechanisms of realization by the entrepreneurs of their real rights and freedom.

One of the main direction of the financial policy of the Republic of China is the reinforcement of the fiscal policy restructuring directed to improve the financial condition in Taiwan and to the reinforcement of its competitiveness in the international arena. The government plans gradually to decrease the budget deficit, search for new directions of the source of income, restructure state finance. There is

being prepared the project of the amendments of Enforcement Rules of the Income Tax, providing to increase the tax rate for the rich and the decrease of it for the low-income groups.

In Taiwan an important role in the financial-banking sector regulation plays money laundering fight. In the Republic of China there acts the Money Laundering Control Act adopted on the 3rd of October 1985 (with further amendments). Though the concerned act of lawmaking has only 17 articles, its importance for the legal system of the Republic of China is hard to overestimate. Its norms aim at prevention and fight with the legalization of the income obtained by the criminal way.

Finishing the present research we came to the several the most important conclusions:

1. The legislation of the Republic of China in Taiwan is unique. It got the peculiarities of the traditional law of the ancient China, high principles of Confucius philosophy and also the institutions of the Roman-Germanic (continental) legal family.

2. Taiwan legislation is exceedingly extensive and developed enough. The legal traditions, legal consciousness and law enforcement procedure in the Republic of China has very deep roots referring to the sources of the ancient China legislation. There is the institute of the death penalty, law violence and responsibility. All these let us say about Taiwan law specifics.

3. Financial and banking systems are completely and all-round regulated by the Taiwan legislation. Fundamental acts of lawmaking are adopted and successfully applied; the Banking Law, the Law on the Central Bank, the Law on Prevention of Money Laundering etc. At the beginning of the previous century there was adopted the Civil Code, the provisions of which after additional revisions and changes didn't stop being actual at present.

4. The legislation sphere of the Republic of China lacks some very important codified acts of lawmaking. So, hitherto the Tax Law hasn't been adopted yet. As it seems, Taiwan lawmaker prefers local normative by-law acts for operative regulation of the developing public relations in the economic sphere to bulky and hardly-changeable legal documents. It is not accidental

³ URL: <http://zh.wikipedia.org/wiki/陳水扁家庭密帳案> (in Chinese) (application date: 04.09.2014).

that most legal acts in the banking and financial sphere are of подзаконный nature.

In the conclusion it is worth mentioning the importance of studying the experience of the Republic of China in the banking and financial sphere for the Russian legal and economic science to use it in its practical and scientific activity.

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МЕЖДУНАРОДНАЯ ЖИЗНЬ

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