

## Introduction

There is a strange ambivalence about the study of ancient China. On the one hand, archaeological evidence as well as excavated and acquired manuscripts have provided an abundance of detailed information about material culture, textual production, administrative practice, and intellectual currents in pre-Qin to Han times. We know exactly what the bamboo strips for official communication looked like, how they were produced, and how many scribes were involved. On the other hand, some of the oldest and most basic problems in the field remain unsolved. We are still uncertain about the authorship, dating, and structure of most classical texts, and many of their fundamental terms remain poorly understood.

The latter problem is particularly important for scholars of ancient China. After all, no lesser man than Confucius allegedly called the task of “getting the terms right” his primary concern. Although his immediate focus was on the art of government, it certainly applies to scholarship: “If one’s terms are not right, then one’s speech will not be consistent, and consequently one’s task will not be achieved.”<sup>1</sup> This is more than just an anecdote. The problem of terminology is very much at the heart of scholarship. It is an essential task for every science or field of scholarship to coin its own terms, not only to distinguish itself from its non-scholarly context, but to establish itself as a field. Chemistry is highly illustrative in this regard: When it emerged as a science in the 17th and 18th century, it inherited a whole lexicon of terms from alchemy. This was a vexing problem for early chemists, who complained that their field consisted of all too many questionable terms and procedures that had never been tested scientifically. These pioneers faced the urgent task of having to replace alchemical terms with scientific ones.<sup>2</sup>

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1 *Lunyu* 13.3, 521.

2 This point is made by Stichweh 1994, 57–58.

Arguably, Sinology is in a very similar situation. It developed out of an impressive tradition of Chinese philology covering roughly two millennia, that supplied modern scholarship with textual editions, commentaries, anthologies, studies, and other material that have helped us to uncover the mysteries of Chinese culture. While this has been a boon for Sinology, it is also a burden. Despite all its merits, the heritage of pre-modern Chinese erudition ultimately is not scholarly: Neither does it belong to an academic discipline based on well-defined methods and theories, nor are its terms clearly defined. In fact, they were typically developed in a political context<sup>3</sup> without a canon of methods, standards of criticism or criteria of truth to judge their accuracy.<sup>4</sup>

“The dead hands of the mandarins still lie heavy upon us”:<sup>5</sup> modern Sinology rests on a large base of pre-modern, non-academic knowledge and terminology. While it has made significant progress in recent decades, it still is in the process of shedding its non-academic heritage. Some of Sinology’s most fundamental terms remain purely traditional: “Confucianism,” “Mohism,” “Daoism,” “Legalism,” and other labels for currents of thought are obvious cases in point. These “-isms” may look like modern terms, but they ultimately derive from traditional designations that have simply been adopted by modern Sinologists. Despite widespread unease, they have not been replaced by scholarly terms and continue to obstruct the paths of modern scholarship. It is not simply that these terms are inadequate for the concepts they describe; the problem goes even deeper. Inasmuch as traditional Chinese terms effectively separate Sinology (at least the branch that deals with ancient China) from other fields of scholarship, they offer little common ground for discussion.<sup>6</sup> Hence, historians, sociologists, and philosophers generally leave the study of “Mohism,” “Daoism,” “Legalism,” and – to a lesser extent – “Confucianism” to Sinologists.

Working largely on their own terms, Sinologists have also continued to employ many central concepts – “morals,” “ritual,” “power,” “state,” etc. – in ways that diverge from developments in other disciplines.<sup>7</sup> The latter, in turn, have had little alternative

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3 Cf. van Ess 1994, 170: „The history of Chinese thought is more a history of ideologies – even in most recent times – than we might sometimes realize.” Discussing a case which is relevant for the present paper, Goldin (2011, 90–91) observes that “Sima Tan’s criteria” in coining the term *fajia* “were purely ideological.”

4 For the case of traditional Chinese textual scholarship, which was “decidedly *non-critical*,” cf. Vogelsang 2002a.

5 Cf. Schafer 1990–1991, 26, who points out how difficult it would be for Sinologists to orient themselves “without the guidance of traditional authority.”

6 In this respect, the substitution of “Ruisim” for “Confucianism,” that has been adopted by several scholars in the field, does not help much: it’s all Chinese for non-Sinologists.

7 Just one example. While the concept of “power” has been intensively discussed in Western sociology (by Weber, Foucault, Luhmann, to name just a few), studies on “power” in Ancient

but to treat Sinology as a world unto itself, resulting in the marginalization of Chinese traditions in studies of philosophical, social or political thought. Important multi-volume surveys of political thought like Henning Ottmann's *Geschichte des politischen Denkens* (2001–2012) or the *Cambridge History of Political Thought* largely ignore the Chinese tradition. And, while authoritative reference works like Robert Audi's *The Cambridge Dictionary of Philosophy* (1999) or Joachim Ritter's *Historisches Wörterbuch der Philosophie* (HWdPh, 1971–2007) contain numerous articles on China, they are totally self-contained. References to the Chinese tradition in conceptual articles on “ethics,” “political theory,” “logic,” etc. are negligible, – as if the Chinese had nothing to say about these topics. This lamentable state is at least partly due to Sinology's conceptual traditionalism. If the field wishes to stay in touch with other disciplines, “getting the terms right” – pondering, refining, defining them – should be a primary concern.<sup>8</sup>

The present article will illustrate this problem on the example of “Legalism.” After discussing the problematic nature of the label itself, it will propose replacing it with the term “political realism,” which is compatible with political science. Moreover, it will discuss several core concepts of political realism – especially “politics” and “state” – and explore the perspectives that arise if we take these terms seriously.

#### “Legalism” vs. Political Realism

“Legalism” is a stepchild of Chinese tradition. The hard-nosed, amoral teachings of Shang Yang 商鞅, Han Fei 韓非, Shen Buhai 申不害, Shen Dao 慎到, and others, who emphasized a powerful state and a strong army, harsh laws, militarization and rustification of society, the destruction of family ties, and a system of mutual surveillance seemed incompatible with Confucian humanism and its respect for morals, ritual, and the “rule of men” as opposed to the “rule of law.”<sup>9</sup> Although “Legalist” teachings – especially those of Shang Yang, a Qin minister in the 4th century BC – laid the foundation for the unification of the Chinese empire in 221 BC, almost all traditional Chinese scholars have repudiated

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China – e. g. Kroker 1950, Li Feng 2009, Pines et al. 2015 – all get by without even defining the term.

8 A disclaimer is called for here. The present article is only concerned with *Western* studies of *ancient* China. It neither deals with studies of modern China, which are in much closer contact with the social sciences, nor does it discuss Chinese, Korean, or Japanese Sinology, since these have developed in quite different conceptual contexts.

9 The classic study of “Legalism” is Vandermeersch 1965; for a recent brief introduction, cf. Pines 2005.

them. “Since Han times,” Su Dongpo 蘇東坡 (1037–1101) famously wrote, “scholars have been ashamed to speak of Shang Yang.”<sup>10</sup>

Significantly, modern Sinologists seem to have been equally ashamed to speak of Shang Yang and Legalism. To this day, the number of studies on “Legalism” has been negligible, especially compared to studies on Confucianism.<sup>11</sup> This is evidence of how much traditional scholarly interests have continued to shape the research agenda of modern academic Sinology. But there is more to it: Some Sinologists have even adopted traditional moral judgments, as for example when they call Han Fei a “misguided genius” and Shang Yang an “evil genius,” or when they criticize the latter’s “alienating rhetoric.”<sup>12</sup> Such judgments indicate how strongly Sinology still falls back on its pre-scholarly heritage.

The term “Legalism” is clearly part of this heritage. It is a translation of the Chinese term *fajia* 法家 – coined, no less, by an astrologer more than 2,000 years ago. Sima Tan 司馬談 (d. 110 BC) father of the great historian Sima Qian 司馬遷 (145–ca. 86 BC) was the first to define “schools” of thought in ancient China. These included the Yin-Yang school, the Confucians, the Mohists, the Logicians, the Daoists – and *fajia*.<sup>13</sup> The latter, he wrote, “were stern and had little kindness, but their rigid differentiation between ruler and subject, superiors and inferiors should not be altered.”<sup>14</sup>

Remarkably, this term is still in use, although Sinologists have long since acknowledged that it is woefully inadequate. Paul Goldin recently summarized the arguments against the term’s use. He discusses, among other things, the fact that *jia* is not a “school of thought;” that *fa* 法 does not simply mean “law;” that Sima Tan’s neologism is “partisan and anachronistic;” and that the term is not a useful heuristic device to subsume such diverse thinkers as Han Fei, Shen Dao, Shen Buhai, Shang Yang and others.<sup>15</sup> We may add to this the problem mentioned above, namely, that the term “Legalism” is incompatible with general scholarly discourse.<sup>16</sup>

10 *Su Shi wenji* 5, 156: 自漢以來，學者耻言商鞅。

11 Especially the *Shangjun shu* has been woefully neglected. The last century has seen one English translation (Duyvendak 1928), one Russian (Perelomov 1968), one French (Lévi 1981), and two Japanese (Yoshinami 1992, Moriya 1995) as well as a handful of book-length studies (e. g. Kroker 1950, Vandermeersch 1965, Zheng Liangshu 1989, and Zhang Linxiang 2008). This is changing at this very moment, however, with the books of Pines 2017 and Vogelsang 2017.

12 Cf. Mote 1971, 121, Lewis 1999, 611, and Pines 2012, respectively.

13 Smith 2003.

14 *Shiji* 130, 3289: 法家嚴而少恩；然其正君臣上下之分，不可改矣。

15 Goldin 2011.

16 So is the term “légisme / Legismus,” which French and German scholars prefer: the distinction does not make any difference concerning the problem at hand. It is highly doubtful whether any “-ism” can be an adequate translation of an ancient Chinese term; cf. Spira 2015.

Although “Legalism” is often associated exclusively with Chinese thought,<sup>17</sup> it is also used outside of Sinology. To non-Sinologists, however, “Legalism” means something quite different than the “amoral science of statecraft” of ancient China.<sup>18</sup> Rather than being concerned with statecraft, Legalism “places great faith in the power of law and legal institutions to solve problems” to the extent that it expects “law and legal institutions to resolve moral and policy disagreements that in other countries would be resolved by political, religious, or communal institutions.”<sup>19</sup> The political scientist Hans Morgenthau (1904–1980) illustrates its meaning in his book *Politics Among Nations*. He cites the Soviet attack on Finland in 1939, which “confronted France and Great Britain with two issues, one legal, the other political. Did that action violate the Covenant of the League of Nations and, if it did, what countermeasures should France and Great Britain take?” The first answer was obvious, since “the Soviet Union had done what was prohibited by the Covenant.” Interestingly, this answer to the legal question led France and Great Britain to decide on “joining Finland in the war against the Soviet Union” and they were only stopped from doing so “by Sweden’s refusal to allow their troops to pass through Swedish territory.” Morgenthau argues that “If this refusal by Sweden had not saved them, France and Great Britain would shortly have found themselves at war with the Soviet Union and Germany at the same time.” And he concludes:

“The policy of France and Great Britain was a classic example of *legalism* in that they allowed the answer to the legal question, legitimate within its sphere, to determine their political actions. Instead of asking both questions, that of law and that of power, they asked only the question of law; and the answer they received could have no bearing on the issue that their very existence might have depended upon.”<sup>20</sup>

So *that* is Legalism: an overriding concern with legal questions that encroaches on other spheres and invalidates their specific concerns. The example shows just how far removed this understanding is from what Sinologists call “Legalism.”<sup>21</sup> For so-called “Legalist”

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17 Cf., for example, the *Encyclopaedia Britannica*, vol. 7, 243, or Ritter et al. 1971–2007, vol. 5, 166, which treats the term only with reference to Chinese philosophy.

18 Graham 1989, 267.

19 Posner 2009, xii, with reference to Tocqueville’s statement about the USA: “There is almost no political question in the United States that is not resolved sooner or later into a judicial question.” Similarly, in Christian theology “Legalism” means adherence to divine law over personal faith.

20 Morgenthau 1978, 4–15.

21 It may be observed that the term is used quite differently in modern Chinese studies, as well. Cf. Perry 2012, 126–7, on the “Legalism” of Liu Shaoqi and the Anyuan workers’ club, by which she means “legal activities” as opposed to Mao’s “revolutionary line.”

thought in ancient China was all about the *political* sphere. This is a point that all researchers agree on: “Legalist” thought is primarily concerned with questions of power, the state, and effective rulership.<sup>22</sup> It is quintessentially political, not legal, thought.

Interestingly, an editorial note appended to Goldin’s article raises the question about “what English rendering might now be best employed to represent *fajia*” and stresses that this “still remains a significant problem to be addressed.”<sup>23</sup> If one assumes (as I did above) that it is essential for every field of scholarship to coin its own terms, the answer to this question is plain: it is best to employ no English rendering at all. Instead of grappling with an adequate translation of *fajia*, it seems preferable to get rid of this pre-scholarly label altogether and replace it with a modern academic term. The term I propose is *political realism*.<sup>24</sup>

Political realism is based on the premise that interests come before values. Morals or ideologies do not matter in politics, only the interests of the state, which are pursued through the use of power. The crucial point – as Hans Morgenthau, one of the fathers of modern political realism, again pointed out – is that political realism “sets politics as an autonomous sphere of action and understanding apart from other spheres, such as economics, ethics, aesthetics, or religion.”<sup>25</sup> Indeed, this appears entirely germane to

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22 A. C. Graham’s designation of Legalism as an “amoral science of statecraft” (Graham 1989, 267–285) has already been quoted; Hui 2005, 18, observes that “Legalism [...] is single-mindedly concerned with how to preserve and strengthen the state.”

23 Goldin 2011, 101.

24 To be sure, this is not an entirely new idea. Other authors have proposed the term political realism before, but in a rather intuitive, everyday sense, without thoroughly elaborating its meaning. Cf., for example, Waley 1959, 151, who seems to simply take “realism” in a colloquial sense: “they held that [...] government must be based upon ‘the actual facts of the world as it now exists.’ They rejected all appeals to tradition, all reliance on supernatural sanctions and trust in supernatural guidance. For this reason, the term ‘Realist’ seems to me fit.” (Graham 1989, 269, also observes that “legalists” “start not from how society ought to be but how it is,” without, however, calling the realists.) R. P. Peerenboom and Roger T. Ames (1999, 133) also hold that “the Legalists were political realists,” without, however, expanding on the thought. Cf. also the long discussion by Fischer 2012, who nonetheless retains the old term: “since no one has come up with a better term, I shall stick with ‘Legalism’” (p. 201, n. 2). Roger Boesche explicitly compares Shang Yang to the “first great political realist: Kautilya” (Boesche 2001), calling him an “uncompromising realist with no interest in moralizing about politics” (Boesche 2008, 64), but also “an idealist who believed that after some period of time, the laws would be obeyed with no questions asked, order would flourish” etc. (ibid., 68). A standard introduction to the theory of international relations also links realism to ancient China, but associates it with *Sunzi* (Goldstein and Pevhouse 2013, 43).

25 Morgenthau 1978, 5.

*Shangjun shu* 商君書, *Han Feizi* 韓非子, and other realist texts. Ultimately, they are not about law, but politics as an autonomous sphere that follows its own logic and thus sets itself apart from other spheres.<sup>26</sup> To clarify this point, the following section will discuss the concept of politics and its development in ancient Chinese political realism, especially in the *Shangjun shu*.

### The Birth of Politics

The beginning of the *Shangjun shu* is a truly remarkable piece of literature. The first chapter, which is staged as a debate at the court of Duke Xiao of Qin, describes nothing less than the birth of politics.<sup>27</sup> It concentrates the social differentiation of politics – which, in reality, must have taken place over centuries – in one single dramatic scene. The historical background of this debate is described in *Han Feizi*:

古秦之俗，君臣廢法而服私，是以國亂兵弱而主卑。商君說秦孝公以變法易俗而明公道，[...]。

According to the traditional customs of Qin, the rulers and ministers abandoned the rules and served their private interests. Therefore, the state fell into anarchy, the military was weak, and the ruler demeaned. The lord of Shang persuaded duke Xiao of Qin to change the rules, alter the customs and to clarify the public principles [...].<sup>28</sup>

This change of rules (*bianfa* 變法) is what the debate in *Shangjun shu* 1 is all about. Later, the word *bianfa* took on the meaning “reform,” and, indeed, Sinologists usually speak of the “reforms” of Shang Yang. However, this word does not appear to do justice to the momentousness of the changes in question. The discussion is not about specific rules that are to be changed, but about whether it is appropriate for the ruler to change rules *at all*. This is a much more fundamental question which goes to the heart of politics itself. The debate between the duke, Shang Yang and two conservative nobles from Qin, begins thus:

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26 Compare Boesche 2008, 73, who likens the *Shangjun shu* to Kautilya’s (fl. 300 BC) “science of politics” (72), which “separated political thought from religious speculation” (73).

27 According to the historical information we possess, this debate should be dated to c. 359 BC. However, it is highly unlikely that it actually took place. Firstly, two of its participants, Du Zhi and Gan Long, do not seem to have been contemporaries of Shang Yang (Qian Mu 1985 3.73, 227). Secondly, large parts of the discussion appear (almost) verbatim in *Zhanguo ce* 19.4, 653–667, where they are placed in an entirely different context, namely the court of King Wuling of Zhao, 307 BC: apparently, these were not individual utterances but *common-places* used by authors wherever they were deemed fitting.

28 *Han Feizi* 14, 101.

孝公平畫，公孫鞅、甘龍、杜摯三大夫御於君，慮世事之變，討正法之本，求使民之道。

Duke Xiao discussed his plans. The three dignitaries Gongsun Yang, Gan Long, and Du Zhi were in attendance of the lord. They pondered the changes in contemporary affairs, discussed the basics of rectifying the rules, and sought the right way of leading the people.<sup>29</sup>

In the very first paragraph, the medium of politics is addressed: *power*. They “sought the right way of leading the people,” and the verb *shi* 使 translated as “lead” means “to make someone do something.” It thus implies what Max Weber defines as “power,” namely, “every possibility within a social relation to enforce one’s will against resistance, no matter what that possibility is based on.”<sup>30</sup> Power, in other words, entails the possibility of making somebody do something they would not otherwise do. The discourse of power is ubiquitous in the *Shangjun shu*: not only those passages that explicitly address a facet of “power,”<sup>31</sup> but every utterance that uses the innocuous verb *shi* (e. g. to “make the people give priority to the things they hate,” to “make the people rejoice in war,” etc.) is about power.<sup>32</sup>

The problem, then, is how to exert power. Shang Yang’s answer is clear: it takes a “change of rules” (*bianfa*). This may seem self-evident, since making and enforcing generally binding rules is the basic function of politics. In fact, politics may be defined as “human action that aims to produce and enforce generally binding rules and decisions [...] within and between groups of people.”<sup>33</sup>

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29 *Shangjun shu* 1.1, 6–7. Note that in this article I will not address the manifold philological issues involved in the translation of the *Shangjun shu* (for this purpose, the very first sentence above would require a substantial note). For these, the reader is referred to the extensive notes in Zhang Jue 2012.

30 Weber 1980, 28. On the unbroken validity of this definition, cf. Patzelt 2013, 39–40. On power as the medium of politics, cf. Luhmann 2000, 18–68.

31 Instead of one overarching term for “power,” Old Chinese distinguished at least three terms: *quan* 權 and *wei* 威, both approximating Latin *auctoritas*, as well as *shi* 勢, which roughly equals *potestas*. For a pioneering study concerning the *Shangjun shu*, cf. Kroker 1950. However, more in-depth research on these facets of “power” is needed before we can gain an adequate understanding of the concept in ancient China.

32 *Shangjun shu* 5.8, 83: 使民必先行其所惡 (emended according to Tao Hongqing); *Shangjun shu* 18.3, 211: 能使民樂戰者，王。According to the concordance by Lau and Chen 1992, 127–128, the verb 使 appears 85 times in the *Shangjun shu*, which makes it one of the most frequent full words in that text.

33 Patzelt 2013, 22: “Politik ist jenes menschliche Handeln, das auf die Herstellung und Durchsetzung allgemein verbindlicher Regelungen und Entscheidungen (d. h. von ‘allgemeiner Ver-



“Changing the rules” is everyday business in a political system. But this debate is not about a matter of routine. The duke himself points out the issue’s inherent difficulties: “Now I want to govern by changing the rules, alter the rites and instruct the hundred lineages – but I am afraid that all under heaven will criticize me.”<sup>34</sup> Apparently, Duke Xiao is not apprehensive about the change of specific “rules,” but about a change of rules *as such*. What is at stake, therefore, is not a routine political question but the essence of politics itself. The emphatic protest of the duke’s conservative advisors stresses the matter’s seriousness. First, Gan Long speaks:

今若變法，不循秦國之故，更禮以教民，臣恐天下之議君。

Now, if Your Highness changes the rules without adhering to the old customs of the Qin state, and alters the rites in order to instruct the people, I am afraid that all under heaven will criticize Your Highness.<sup>35</sup>

A second advisor, Du Zhi, next argues in a similar vein:

臣聞之：利不百，不變法；功不十，不易器。臣聞：法古無過，循禮無邪。君其圖之！

I have heard that unless the advantage is a hundredfold, one should not change the rules, and unless the achievements are tenfold, one should not alter the devices. I have heard that taking antiquity and a rule keeps from mistakes, and that following the rites keeps from evil. May you, my lord, consider this!<sup>36</sup>

Clearly, “changing the rules” was out of the question for traditional thinkers. Indeed, the very idea must have seemed inconceivable. The “rules” were the unwritten conventions and observances of the ancestors, a sort of customary law governing social roles and obligations within kin groups.<sup>37</sup> In a segmentary society, they embodied the autonomy of the lineages; the foundation of their identity and legitimacy, which derived precisely from this tradition.<sup>38</sup> The conservative advisors of Lord Xiao use the word *fǎ* in this – literally –

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bindlichkeit’) in und zwischen Gruppen von Menschen abzielt.” Cf. also Luhmann 2000, 254: “Als ‘Politik’ kann man jede Kommunikation bezeichnen, die dazu dient, kollektiv bindende Entscheidungen durch Testen und Verdichten ihrer Konsensancen vorzubereiten.”

34 *Shangjun shu* 1.2, 7: 今吾欲變法以治，更禮以教百姓，恐天下之議我也。

35 *Shangjun shu* 1.3, 10.

36 *Shangjun shu* 1.4, 11.

37 The fact that they were unwritten is significant. “In Europe the distinction between law and custom is ultimately based on what was written and what was not” (Goody 1986, 129); only under written law could the conscious “change of rules” become an issue (cf. note 40).

38 Cf. Chang 1983, 35: “The lineage (*tsu*) itself was probably the most important social framework for coercion; *tsu* rules were the society’s fundamental law. [...] Thus, the leader of a *tsu*

customary sense when they remind him that “a wise man obtains good government without altering the rules.”<sup>39</sup> The suggestion that these observances that had been passed down from time immemorial were *not* eternally valid must have seemed quite impertinent.<sup>40</sup> Yet this is precisely Shang Yang’s assertion: “Former generations did not have the same teachings, so which tradition should one take as a model? The thearchs and kings did not turn to one another, so which rites should one follow?”<sup>41</sup> Times *change*, which is why the great rulers of antiquity “all established laws [*fa*] appropriate to their times, and instituted rites corresponding to the tasks at hand: rites and laws are settled according to the times.”<sup>42</sup>

In Shang Yang’s understanding, *fa* has undergone a decisive change of meaning; it has become a *political* concept. All rules, he argues, are subject to contestation and change and, indeed, must be actively contested and changed:<sup>43</sup> a premise that undermined the identity of China’s old lineages. If it is true “that Shang Yang’s single most important reform was the overhaul of Qin’s hereditary aristocratic system,”<sup>44</sup> then it is epitomized in his call to “change the rules.” The very possibility of changing the “rules” imbued them with an entirely new quality. Unwritten conventions and observances became written statutes; what used to be valid within kinship groups became binding

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was not only the head of a lineage or sublineage but also a military commander, and his orders in civic as well as military affairs were to be obeyed. Defiance of a *tsu* leader could be punished severely, by mutilation or even death.” In a similar vein Liu Yongping 1998, 12, emphasizes “that in the early days the customary law of a particular *zu* was applicable only to its own *zu* members and there was not a unified law which could be universally applied to members of various *zu*.”

39 *Shangjun shu* 1.3, 10: 智者不變法而治。

40 This is not to say that customary rules never changed; they did. But in the case of unwritten rules, the “process of adjustment of norms that constantly takes place [...] is imperceptible because norms have only a verbal, an oral existence, so that rules that are no longer applicable tend to slip out of the memory store. But write down the norms in the form of a code or statute and you then have to make deliberate and conscious efforts to effect any alteration” (Goody 1986, 139).

41 *Shangjun shu* 1.4, 11: 前世不同教，何古之法？帝王不相復，何禮之循？ This point is made even more explicit in the social history presented in *Shangjun shu* 18.1, 208, which culminates in the conclusion that “the times have changed” (故時變也)。

42 *Shangjun shu* 1.4, 11: 各當時而立法，因事而制禮。禮法以時而定。 Cf., in a similar vein, *Han Feizi* 54, 475: 法與時移。

43 As far as I can see, this idea first appears in the texts of political realism. It is the logical consequence of a view of history which is neither based on tradition nor on cyclical repetition but on the evolutionary sequence of different stages. On this view of history, cf. Vogelsang 2007, 264–290, and Pines 2013.

44 Pines 2014a, 23.

for everybody; and regulations based on mutual acceptance became imposed. In short: when Shang Yang speaks of *fa*, he no longer means “rules” but *law* – not customary law, upheld by lineages, but *positive law*, enforced by the state.<sup>45</sup> Legal disputes ceased to be private matters, as it were, which could be reconciled by certain agents of the ruler but mainly required the initiative of the adversaries.<sup>46</sup> Now the state acted on its own motion – indeed it *had* to act. It needed “laws that guarantee the enforcement of laws” lest the settlement of disputes revert to lineage law.<sup>47</sup>

Thus the discussion about changing the rules is no simple *querelle des anciens et des modernes*; nor is it merely about Shang Yang’s specific politics. The rift goes much deeper: it is about *politics itself*. Arguably, the awareness of historical change not only necessitated new political decisions but actually created politics as an independent sphere of action. Of course, generally binding rules and decisions had existed earlier in Chinese history, but likely on a much smaller scale. In a world where action is determined by the conventions of the ancestors, there is little room for decision-making. Most of the time, one simply follows tradition: “No decisions are made, but the order of Heaven and Earth is simply represented” ritually.<sup>48</sup> In such a world, even the ruler himself is only entitled to engage in *ritual* acts.

Sinologists stress time and again how important rituals were in ancient China. We read, for instance, that “Ritual has been a central concern of Chinese culture for at least four thousand years” and the “ritual texture of early China” is one of the “central aspects

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45 The very fact that laws are no longer eternal but may be *changed* is a defining moment of positive law; cf. Luhmann 1993, 533: “Deshalb kann die Positivität des Rechts auch als Zulassung von Rechtsänderungen begriffen werden. Die alte Form der Bindung an ‚Höheres‘ wird ersetzt durch eine ständig neu auszuhandelnde Kombination von Bindung und Änderung. Die Unterscheidung *de lege lata* / *de lege ferenda* entfaltet die Paradoxie, daß das Recht genau deshalb gilt, weil es geändert werden könnte.” It bears emphasis that positive law is a modern concept. While useful for analysis, it should be recognized that neither Shang Yang nor any of his contemporaries shared this concept. It is even doubtful whether the ancient Chinese possessed an abstract concept of “law”; they likely thought in terms of individual “laws” rather than a collective plural, “the law.”

46 Cf. the analysis of Western Zhou “law suits” by Skosey (1996) and Lau (1999), which show how flexible the system was, how much it centered on the adversaries stating their respective cases (with the help of supporting witnesses), appealing to transcendent forces with oaths, and reconciliation through gift-giving and feasting. These elements disappeared from legal procedure with the institution of state laws.

47 *Shangjun shu* 18.4: 法必行之法。

48 Ottmann 2001, 13.

of early Chinese cultural history.”<sup>49</sup> But whenever rituals determine the course of action, politics – in a meaningful sense – is not needed. Only when traditional rules are no longer simply accepted, do they need to be discussed, changed and created: only then political decisions need to be taken. Greek antiquity is said to have given birth to politics in its true sense through “the discovery of action, of choice and of decision-making.”<sup>50</sup> A similar observation may be made for the Zhanguo period in China. In the face of historical change (spurred by iron technology, population growth, the rise of cities, large-scale warfare, migration, literacy, etc.) and contingency, the issue of decision-making took on unprecedented dimensions. Only now did it become a *problem* that needed to be discussed and dealt with in earnest; only now was a sphere of action conceivable that deals specifically with this problem. This sphere of action – “politics” – emerged with the possibility of “changing the rules”: precisely this moment is captured in the discussion at the court of Duke Xiao.<sup>51</sup>

The need for genuine political decision-making gave rise to some basic questions: *Who* is to decide and how are divergent opinions to be dealt with? Duke Xiao himself addresses these very problems when he says: “Now I want to govern by changing the rules,” and adds that he is “afraid that all under heaven will criticize me.” Apparently, the ruler fears dissent from a political public of sorts.<sup>52</sup> Shang Yang’s answer to this fundamental concern is significant:

君亟定變法之慮，殆無顧天下之議之也。且夫有高人之行者，固見負於世；有獨知之慮者，必見驚於民。語固曰：「愚者暗於成事，智者見於未萌。民不可與慮始，可與樂成。」郭偃之法曰：「論至德者不和於俗，成大功者不謀於眾。」

You, my lord, have already made up your mind about changing the rules, so you should not care about whether all under heaven criticizes it. Moreover, whoever excels others in his deeds, will be rebuffed by his contemporaries; and whoever harbors independent thoughts, will be disregarded by the people. A saying goes: “The ignorant are unaware

49 McDermott 1999, 1, and Kern 2005, VII.

50 Ottmann 2001, 12–13.

51 Again, it bears emphasis that “politics” were not invented in one fell swoop; the debate described in *Shangjun shu* 1 telescopes the development of centuries into a single scene.

52 Although it is not entirely clear who this public consists of, the duke is certainly not thinking of the “people” *in toto* but of the elite: perhaps the *guoren* – the elites in the capital – who are known to have attacked reformers previously (for example Zichan, when he introduced taxes in Zheng, cf. *Zuozhuan*, Zhao 4, 1254); or even elites from other states, who may also criticize policies abroad (cf. the case of Zichan’s penal laws, which were criticized by Shuxiang of Jin, *Zuozhuan*, Zhao 6, 1274–1276). Note that “all under heaven” apparently extends further than the state of Qin – but whom exactly it implies is a point that awaits further research.

even of accomplished deeds, but the wise recognize them even before they appear; with the people, one cannot deliberate over the beginning of an affair but only rejoice in its completion.” A rule by Guo Yan says: “He who discourses on the highest virtue does not harmonize with the vulgar, and he who achieves great success does not consult with the masses.”<sup>53</sup>

In other words, political decision-makers can disregard divergent opinions from outsiders. Since “people” are “ignorant” of political affairs, their opinion is irrelevant. This tenet appears in several classical texts, as, for instance, in *Lunyu*: “The people can be led to follow something, but they cannot be led to understand it,” and in *Xunzi*: “With the superficial, it is not worth to fathom depths; with the ignorant, it is not worth to consult about wisdom; and with a frog in a deep well, it is not worth discussing the pleasures of the Eastern Sea.”<sup>54</sup> But this viewpoint is most prominent in the texts of political realism. *Guanzi* puts it as follows: “With the people, one can never deliberate over the beginning of an affair but only rejoice in completed achievements”; and *Lüshi chungiu*, quite similarly: “With the people, one cannot deliberate over changes and projects and but only rejoice in completed achievements.”<sup>55</sup> In short, as *Han Feizi* puts it: “The wisdom of the people is useless, it resembles the mind of a child.”<sup>56</sup>

It would be too facile to explain such statements as examples of “people bashing” or indications that the people are “the potential enemy of the ruler.”<sup>57</sup> They rather reflect the differentiation of a political system. The exclusion of the “people” – a term that certainly is not limited to the commoners – from the process of deliberation and decision-making serves to demarcate the political class. The emergence of politics as a sphere of action in its own right required a clear-cut distinction between those who belong to this sphere and those who do not. Shang Yang leaves no doubt about this:

故智者作法，而愚者制焉；賢者更禮，而不肖者拘焉。拘禮之人，不足與言事；制法之人，不足與論變。

53 *Shangjun shu* 1.2, 7.

54 *Lunyu* 9.9, 299: 子曰：「民可使由之，不可使知之。」*Xunzi* 18, 331: 語曰：「淺不足與測深，愚不足與謀知，坎井之鼃，不可與語東海之樂。」

55 *Guanzi* 16, 147: 民未嘗可與慮始，而可與樂成功。*Lüshi chungiu* 16.5, 989: 民不可與慮化舉始，而可以樂成功。Chen Qiyou's commentary points out that this may be understood as a direct commentary on the *Shangjun shu* passage quoted above.

56 *Han Feizi* 50, 464: 禹利天下，子產存鄭，皆以受謗，夫民智之不足用亦明矣。In 1784, Frederick the Great of Prussia reportedly put it this way: “Es ist dem Untertanen untersagt, den Maßstab seiner beschränkten Einsicht an die Handlungen der Obrigkeit anzulegen.” This nicely describes the differentiation of politics.

57 For such interpretations, cf. Pines 2014b, pt. 3.

Therefore the wise create laws and the ignorant are controlled by them; the worthy alter the rites, and the unworthy are bound by them. People who are bound by rites are not worth being talked to about affairs; people who are controlled by laws are not worth being consulted about change.<sup>58</sup>

The “wise” – as *pars pro toto* of the political hierarchy – remain aloof from the people. Indeed, it is their essential task to keep the people at bay and debar them from politics. The advice to keep the people “ignorant” – which means: un-political – appears repeatedly in *Laozi*: “The sage rules by emptying their minds and filling their bellies, by weakening their will and strengthening their bones,” and “Those who anciently excelled at practising the way, did so not by enlightening the people but by keeping them ignorant.”<sup>59</sup> This position is eagerly taken up by the realist authors of the *Shangjun shu*,<sup>60</sup> who recommend “keep(ing) the people from moving around freely, so they will stay simple and ignorant.” What is more, they provide an irrefutable argument to support this: “If the people are ignorant, they are easy to govern.”<sup>61</sup>

An autonomous political sphere must follow its own logic regardless of arguments from other spheres: this is precisely what constitutes its autonomy. The authors of the *Shangjun shu* were keenly aware of this sphere. Indeed, they had an expression for it:

夫常人安於故習，學者溺於所聞。此兩者，所以居官而守法，非所與論於法之外也。

Ordinary men are content with their usual practices, and students wallow in what they have heard. Both these kinds of people are fit to hold an office and uphold the laws. But they are not fit to partake in discussions which go beyond the laws.<sup>62</sup>

The term “beyond the laws” seems to correspond precisely to what we call today a political sphere: a domain *ab legibus solutus*, in which laws are not simply obeyed but “discussed” and created.<sup>63</sup> Such a sphere “beyond the laws” emerged with the possibility and the neces-

58 *Shangjun shu* 1.3, 10.

59 *Laozi* 3, 15: 聖人之治：虛其心，實其腹，弱其志，強其骨。*Laozi* 65, 263: 古之善為道者，非以明人，將以愚之。For the relationship between political realism and Daoism, cf. Vandermeersch 1965, 241–74.

60 The traditional belief that the book was entirely written by Shang Yang is certainly no longer tenable. However, just how many authors were involved, who they were and when different parts of the *Shangjun shu* were composed is still a matter of controversy.

61 *Shangjun shu* 2.12, 27: 使民無得擅徙，則誅愚。*Shangjun shu* 26.4, 284: 民愚則易治也。

62 *Shangjun shu* 1.3, 10.

63 To be sure, the term, which only appears in texts of political realism, usually refers to transgressions of the law (cf. *Guanzi* 46, 386; 67, 519; *Han Feizi* 6, 37; 25, 198; 29, 209). But this obviously cannot be meant here.

sity to “change rules”: an autonomous political sphere free of any encroachments by other social contexts. This systemic differentiation is the precondition for effective politics. The ruler must exclude his environment in order to control it; he must, as *Laozi* famously puts it, “know the realm without stepping out of the door, and perceive the Way of Heaven without looking out of the window.”<sup>64</sup>

This self-containment of politics, which shuts itself off from the populace, necessarily leads to the rise of an intermediate institution – an *administration* which provides the link between politics and the people. The authors of the *Shangjun shu* have a keen understanding of this secondary differentiation. They not only distinguish between rulers and ruled – those who “create laws” and those who “are controlled by them” – but also between a *legislative* body and *executive* functions in which people “hold an office and keep the laws.”<sup>65</sup> In other words, they distinguish between politics in a narrow legislative sense and administration. Only the ruler – and perhaps his advisors<sup>66</sup> – conducts politics in the narrow sense. He deliberates and creates binding decisions, which in turn serve as the basis for the administrative routine. This distinction between the *conditor iuris* and the *custodes iuris* is expressed in other political realist texts as well: “The lord creates the laws, the ministers uphold the laws, and the people follow the laws,” states *Guanzi*.<sup>67</sup> *Shenzi* is equally explicit:

以力役法者，百姓也；以死守法者，有司也；以道變法者，君長也。

The hundred lineages exert themselves to serve the laws; the officials brave death to uphold the laws; and the lord follows the way to change the laws.<sup>68</sup>

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64 *Laozi* 47, 189: 不出戶，知天下；不闕牖，見天道。The fact that every kind of *openness*, of reference to the world and construction of perspectives, is a function of *closure* on the operative level, is well-known to modern sociology; cf. the essays in Nassehi 2003. Scholarly disciplines that coin their own terms (cf. above) are another case in point: the exclusion of heteronomous terminology is a precondition for the development of a specific perspective on the world.

65 Nowhere, however, does it indicate the differentiation of a *jurisdiction*: another indication against the label “legalist.”

66 The sources remain vague on this point. The term *junzhang* in *Shenzi* can well mean “lord and ministers”; but *Guanzi* simply has *jun*, and *Shangjun shu* 26.5, 286, plainly states that “the ruler of the people makes laws above” (人主為法於上). However, it must have been understood that the ruler does not simply draw laws from the depths of his wisdom but shapes them in cooperation with his advisors. Shang Yang provides the best example, since the laws of Qin are always attributed to *him*, not to Duke Xiao.

67 *Guanzi* 45, 381: 夫生法者，君也；守法者，臣也；法於法者，民也。

68 *Shenzi*, 78.

Incidentally, the demarcation between politics and administration seems to correspond to the use of different media. As the debate at Duke Xiao's court exemplifies, political decisions are discussed *orally*: "at court one *talks* about government"<sup>69</sup> or "listens" to government affairs.<sup>70</sup> Bureaucratic administration, however, is always carried out in *writing*. Once political decisions are committed to writing, they leave the purview of politics in the narrow sense. Now the administrators take over, and the ruler relinquishes control over his own laws. A well-known anecdote from *Han Feizi* shows just how far this could go:

魏昭王欲與官事，謂孟嘗君曰：「寡人欲與官事。」君曰：「王欲與官事，則何不試習讀法？」昭王讀法十餘簡而睡臥矣。王曰：「寡人不能讀此法。」夫不躬親其勢柄，而欲為人臣所宜為者也，睡不亦宜乎。

King Zhao of Wei wished to participate in the affairs of the officials, so he said to lord Mengchang: "I wish to participate in the affairs of the officials." The lord replied: "If your majesty wishes to participate in the affairs of the officials, then why don't you practice reading the laws for a try?" King Zhao had read just over ten bamboo strips of laws, when he fell asleep. He said: "I cannot read these laws." Well, if he does not personally control the handles of power and instead wishes to do what his ministers ought to do – is it not fitting that he should fall asleep?<sup>71</sup>

This clear-cut division of labor follows logically from the differentiation of politics envisaged in *Shangjun shu*, but it also reinforces this differentiation. For politics in the narrow sense, it has a double implication: on the one hand, *only the ruler* is responsible for political decisions, on the other hand, the ruler is responsible *only for political decisions*. The *Shangjun shu* repeatedly emphasizes this point:

故聖人明君者，非能盡其萬物也，知萬物之要也。故其治國也，察要而已矣。Therefore, sages and enlightened rulers are by no means able to treat all things exhaustively, but they recognize their essence. Therefore, in ruling the state, they simply pay attention to the essence.<sup>72</sup>

The "essence" is politics. Political realism does not burden the ruler with any ceremonial, religious or moral obligations; his only task is to rule. This functional specification is pre-

69 *Shangjun shu* 3.6, 49.

70 *Shiji* 47, 1917.

71 *Han Feizi* 32, 284.

72 *Shangjun shu* 3.5, 47. Fischer 2012, 204, identifies this as the fundamental position of political realism. "Political realism holds that a true theory of politics should limit itself to what political actors really do rather than what they ought to do. [...] *Shangzi's* notion of the essential [is] what is adequate to the reality of political life as opposed to the virtue ethics of the Confucians."



cisely what Hans Morgenthau means when he says that political realism “sets politics as an autonomous sphere of action and understanding apart from other spheres, such as economics, ethics, aesthetics, or religion.” Indeed, religion or aesthetics play no role in the *Shangjun shu*, and economics is treated exclusively as a means to a political end, namely, to “enrich the state” (*fuguo*).

Herein lies the fundamental difference between the political realists of ancient China and Confucian thinkers. For the latter, politics was inseparable from moral criteria; for the former, morals play absolutely no role in politics.<sup>73</sup> Thus while *Mengzi* famously declares that what matters is “simply benevolence and righteousness,”<sup>74</sup> *Han Feizi* insists that “benevolence, righteousness, love and kindness are useless, whereas severe punishments and heavy penalties may serve to rule a state.”<sup>75</sup> Not to be outdone, the *Shangjun shu* rejects the entire Confucian canon of wisdom, morals, and literature:

詩、書、禮、樂、善、修、仁、廉、辯、慧，國有十者，上無使守戰。

*Odes, Documents, rites, music, goodness, refinement, benevolence, integrity, sophistry, and cleverness: when these ten things exist in a state, the ruler cannot make the people go to war.*<sup>76</sup>

Again, the verb *shi* is crucial. With moral values, “the ruler cannot make [*shi*] the people go to war”: they inadequate for “enforcing one’s will against resistance.” In other words, moral values are not effective when it comes to exercising *power*. For this reason, they do not belong in politics. The *Shangjun shu* expresses this point in no uncertain terms:

仁者能仁於人，而不能使人仁；義者能愛於人，而不能使人愛。是以知仁義之不足以治天下也。

The benevolent may be benevolent to others, but they cannot make others be benevolent; and the righteous may care for others, but he cannot make others care. This is

73 Recently, Loubna El Amine has tried to refute this view. However, even though there may be a “space between ‘ethical politics’ and ‘crass politics’” (El Amine 2015, 59), in which “hegemony, though lacking in virtue, are somewhat accepted” (27) and punishments are employed “only as a last resort” (196), her study makes clear that for Confucians amoral politics remains an uncomfortable compromise at best.

74 *Mengzi* 1A1, 36: 亦有仁義而已矣。To be sure, *Mengzi* does not get by without coercive measures, either. He proposes to “reduce punishments and fines” (省刑罰), but not to abolish them altogether.

75 *Han Feizi* 14, 105: 吾以是明仁義愛惠之不足用，而嚴刑重罰之可以治國也。

76 *Shangjun shu* 3.5, 47.

how we know that benevolence and righteousness are useless for governing all under heaven.<sup>77</sup>

Not only are “benevolence and righteousness” not useful in politics, but they are downright dangerous: “If the state does good deeds, treachery will certainly increase.”<sup>78</sup> Simply stated, good deeds – e. g. clemency, favors – are not in accord with the laws. In a system that relies on rule by law, they are tantamount to corruption and treachery. Ultimately, they are as harmful to the state as violations of the law.

Just as Machiavelli “has never ceased to be an object of hatred to moralists of all persuasions,” Confucian thinkers have also never forgiven Shang Yang and other political realists for repudiating their most cherished values. Political realist teachings have been widely considered “one of the most dangerous threats to the moral basis of political life.”<sup>79</sup> However, political realists do not reject morals out of malevolence, but rather because they take the intrinsic logic of politics seriously. The rejection of morals is simply the logical consequence of the autonomy of politics, which lies outside of the scope of morality. Politics is all about power, not morals, erudition, or benevolence.<sup>80</sup> This rather un sentimental rationale is exactly the way modern sociology describes the differentiation of politics as a social system. History, moreover, has shown time and again how easily politicians discard morality. In the same vein, political realists in ancient China were not evil or immoral, as their critics charge. They were amoral precisely because they were political, not in spite of it.

Nonetheless, the ancient Chinese concept of “politics” differed significantly from the predominant Western understandings of the term. For the Chinese, like the Greeks, “the discovery of action, of choice and of decision-making” was the underlying problem that gave birth to politics; but Chinese political realism responded in a markedly different way than Greek democracy. Instead of mutual decisions, it endorsed unilateral decrees; and instead of a multifaceted discourse, political realism advocated its radical restriction. “Politics” in the *Shangjun shu* obviously has nothing to do with the Aristotelian concept of a civil, free, and constitutional order. It is not concerned with the will of the people. All that matters is state power. But political realism also differs from the Machiavellian concept of “politics” in the sense of cunning, scheming, and

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77 *Shangjun shu* 18.8, 220.

78 *Shangjun shu* 4.1, 57: 國為善，姦必多。The passage is explained in *Shangjun shu* 20.2, 239: 上舍法，任民之所善，故姦多，“If the authorities discard the laws and rely on what the people consider good, treachery will certainly increase.”

79 Skinner 1981, 1.

80 Again, Weber puts it succinctly: “Wer Politik betreibt, erstrebt Macht“ (Weber 2002, 514).

unscrupulous maneuvers.<sup>81</sup> To be sure, Machiavellian type politics was well known in ancient China. Rulers that “engaged in espionage and covert schemes”<sup>82</sup> were notorious, and the anecdotal literature is full of cunning advisors that gain advantages through stratagems and intrigues. Political realism, however, will have none of that. “Sophistry” and “cleverness” are explicitly rejected in the *Shangjun shu*, which, moreover, repeatedly warns against all kinds of political rhetoric. Instead of underhanded tricks, it recommends reliable *laws*, and instead of smart people, functional *institutions*. Indeed, this is a fundamental premise of political realism: Politics should not rely on able administrators or on the possibility of improving the potential of people. Instead, it should create institutions that guarantee the functioning of the system regardless of the functionaries.

Incidentally, the disregard for people sets the *Shangjun shu* apart from Machiavelli’s *Principe*, with which it is often compared. Whereas Machiavelli had the highest regard for the deeds of great men and recounts them repeatedly, the *Shangjun shu* contains nothing of the sort. Its vision of politics relies on the institutionalized, law-based rule of the state. Not even the ruler matters, only the *state* does.

## The State

To appreciate the momentousness of the changes that the political realists proposed in ancient China, it is important to clarify the concept of the state. In political science, a state is generally defined as a “political system which exercises the monopoly of legitimate coercive violence within a delimited territory upon the people that live there.”<sup>83</sup> Moreover, the existence of state institutions like a legal system, taxation, bureaucracy, and a standing army are taken as constitutive elements of a state.<sup>84</sup>

Sinological research rarely seems to bother with this definition. Instead, the state is usually taken as a given. We have become used to speaking of a Zhou “state” or of Chunqiu “states” without questioning the concept. There appear to be two sources for the application of the term “state” to ancient Chinese polities. The first is the traditional term

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81 Skinner 1981, 43, describes this as Machiavelli’s solution to the ruler’s moral dilemma: “to become ‘a great simulator and dissimulator’, learning ‘how to addle the brains of men with trickery’ and make them believe in your pretence.”

82 *Xunzi* 10, 183: 有持絜伺詐，權謀傾覆; tr. Knoblock 1988–1994, vol. 2, 126.

83 Patzelt 2013, 596. This, of course, echoes the definition of Weber 2002, 513: “Staat ist diejenige menschliche Gemeinschaft, welche innerhalb eines bestimmten Gebietes – dies: das ‘Gebiet’ gehört zum Merkmal – das Monopol legitimer physischer Gewaltsamkeit für sich (mit Erfolg) beansprucht.” Historically, this seems to be the least common denominator for a definition of “state”; cf. the discussion in Brunner et al. 1972–1997, vol. 6, 1–154.

84 For a discussion of these state institutions, cf. Wimmer 1996, 226–230.

*guo*, which may adequately be translated as “state” in some contexts, though certainly not all. Again, we should be cautious about pre-scholarly terminology, for viewing all ancient *guo* as “states” extends the concept to the point of meaninglessness.<sup>85</sup> The second source is found in modern archaeology. In this field, early “states” may be defined as “stratified societies with regional settlement hierarchies.”<sup>86</sup> Accordingly, archaeologists have detected early states in the Erlitou and Erligang sites (c. 1900–1250 BC), and they confidently speak of a Shang or Zhou “state.”<sup>87</sup> While this classification, which is based on residential patterns and material artifacts, may be useful for archaeological purposes, it is at odds with the understanding of the term in the fields of history and the social sciences.<sup>88</sup>

In fact, recent surveys have described these early “states” in a way that squarely contradicts the above-mentioned criteria from political science. The Shang polity has been called “an elusive congregation of communities ..., loosely bound together by the hegemonic power of the Shang king,”<sup>89</sup> characterized by “its *lack* of clear concepts of borders and territorial integrity.”<sup>90</sup> In military matters, “the Shang king was not certain that he would actually receive the support of local leaders at any given time,” nor did he have “a bureaucratic structure controlling these territories.” Instead, he “seems to have been personally responsible for most aspects of the state’s operation.”<sup>91</sup> The Zhou realm, in turn, is described as a network consisting of regional polities, whose “rulers enjoyed full rights to

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85 Consider, for example, Chang 1986, 303: “The hierarchies of the walled towns, in large or small numbers, constituted the *kuo*, or states. [...]. The ancient Chinese landscape, according to these early texts, was dotted with at least several hundred of these states ...”

86 Thorp 2006, 19. A more elaborate definition is offered by Lau and Chen 2012, 258: “a society with a minimum of two social strata: a professional ruling class and a commoner class. The ruling class is characterized by a centralized decision-making process [...]. Furthermore, a state-level social organization often develops at minimum a four-tiered regional settlement hierarchy, equivalent to three or more levels of political hierarchy.” Throughout the following pages, it becomes clear that the “tiers of political hierarchy” (259, 263, 274, 278) are the decisive criterion, whereas evidence for a “centralized decision-making process” seems sparse.

87 Cf. Lau and Chen 2012, ch. 8 (“Formation of Early States in the Central Plain”); Barnes 1999, 131 calls the Shang “the first East Asian state”; Thorp 2006, 222–224, even calls the cultures surrounding the Shang “statelets,” which seems to be a translation of *fangguo*.

88 This is hardly surprising. Consider the widely divergent understanding of “culture” in archaeology and other branches of the humanities.

89 Li Feng 2013, 83. To be sure, the author nevertheless calls the Shang polity a “state,” a concept for which he offers several definitions (ibid., 42–42), without, however, stating which one he adopts himself.

90 Shelach-Lavi 2015, 220 (emphasis in the original).

91 Shelach-Lavi 2015, 220–222. As the quote shows, Shelach-Lavi also speaks of a Shang “state.”

decide matters of administration.”<sup>92</sup> Although its territory was very large, it “was never directly controlled by the Zhou kings as a unified state,” and, what is more, “no integrated administrative system for the entire Zhou realm was ever established.”<sup>93</sup> Nor did this change with the collapse of the Zhou system: Its fragments were “networks of autonomous settlements”<sup>94</sup> with widely dispersed power structures rather than unified states.

If we take these descriptions seriously, we must conclude that *there was no state* in ancient China for a very long time.<sup>95</sup> To be sure, the Shang, Zhou, and Chunqiu polities were characterized by an unequal distribution of power, with rulers exercising hegemony over regional and local leaders. However, this structure does not suffice to meet the above definition of a “state.”<sup>96</sup> As early as 1953, Aidan Southall pointed out the crucial difference “between pyramidal social structures and hierarchical power structures”:

In the pyramidal structure of segmentary societies there is surely a vertical distribution of power, though this may be largely in an upward rather than downward direction. [...] The important point about the powers exercised in this way is that they are virtually of the same type at the several different levels of the pyramidal segmentary structure.

On the other hand, the power structure of the fully developed state may be described as hierarchical rather than pyramidal, because similar powers are not repeated at all levels, but certain powers are reserved at the top of the structure, and lesser powers distributed to the lower levels of it. Furthermore [...] there is the recognition that such powers are delegated from the top of the structure where in theory political power is monopolised.<sup>97</sup>

Arguably, the polities of Shang and Zhou correspond precisely to what Southall describes as the “pyramidal structure of segmentary societies.”<sup>98</sup> Shang and Zhou “kings” were not

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92 Li Feng 2013, 131. Again, the author speaks of the “Zhou state” and “regional states.” For the description of the Zhou as an “alliance network,” cf. von Falkenhausen 2006, 4.

93 Shelach-Lavi 2015, 265–266.

94 Shelach-Lavi 2015, 268.

95 Nor in Europe, to be sure. Otto Hintze has pointed out as early as 1931 that the modern concept of “state” had been erroneously transferred to the polities of the Middle Ages, which were certainly not states (cf. Brunner et al. 1972–1997, vol. 6, 6).

96 Pace Keightley 1999, 290, who hints at the existence of a “generational, hierarchical, and jurisdictional logic of Shang ancestor worship” and adds: “Hierarchy is, in fact, one of the key terms that appears in many modern definitions of the ‘state.’”

97 Southall 1953, 250f. Modern political science differentiates between “inclusionary hierarchy,” which corresponds to the “pyramidal structure,” and “structural hierarchy,” which equals Southall’s “hierarchical” structure; cf. Luhmann 2000, 70–71, Luhmann 2010, 59–60, and Wimmer 1996, 31–32, 40–41 und 207.

98 In fact, the Shang polity has been described as a “conical clan” (Keightley 1999, 290), thereby employing a very similar metaphor.

central authorities with absolute power but *primi inter pares* in an aristocratic society. Their rule certainly involved legitimation and consensus. It did not, however, involve a monopoly on legitimate physical violence. The Zhou kings apparently never “attempted to interfere in the domestic affairs of the regional states, except in matters of succession to regional rulership,” which, however, would have been at the risk of “sharp conflict” or even war.<sup>99</sup> Clearly, the regional lords retained a great measure of autonomy and wielded powers that were “virtually of the same type” as those of the “king.” The polities of Shang, Western Zhou, and Chunqiu times are perhaps more aptly called “chiefdoms,”<sup>100</sup> which are political entities based on a conical clan with the head of the most prestigious lineage at its top. The so-called “kings” of the Zhou, then, are best conceived as paramount chiefs who exercised no central rule but only suzerainty over other regional chiefs who otherwise retained their autonomy.

So, *pace* traditional lore, there was no state in China until the 7th century BC at the earliest. Only around this time can the emergence of state structures be detected. The growth in the size of rulers’ tombs and the simultaneous diminishment of aristocrats’ tombs to the point where they resembled commoners’ graves is physical evidence of state building.<sup>101</sup> This development reflects how the multi-tiered “pyramidal structure” of Western Zhou and early Chunqiu times turned into a hierarchy that recognized only the difference between ruler and subject. The same time also saw the emergence of state institutions. According to transmitted literature, Zheng and Jin first publicized penal law, Lu introduced a land tax, land reforms were implemented in several polities, and, most importantly, an entirely new military was created based on mass infantry armies that would have been inconceivable without state structures.

State building did not come easily, however. The political map of the Chunqiu and Zhanguo periods resembled medieval Europe, consisting of a patchwork of warring polities, where every regional lord was *souverain en sa terre*. In the absence of any superordinate institution, the political situation may be described as “feudal anarchy” or, as contemporary sources express it, “violence and anarchy” (*baoluan*).<sup>102</sup> Violence and anarchy

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99 Li Feng 2013, 131.

100 Keightley 1999, 290, suggests that the Shang polity “still shared some of the features of complex chiefdoms that had appeared in the Late Neolithic,” with a “king” that “was still functioning like the ‘big man’ of a prestate chiefdom.” Wimmer 1996, 224, plainly calls the Shang and Zhou polities “chiefdoms.”

101 These observations are vividly described in von Falkenhausen 2006, esp. chapters 7–9.

102 Cf., for example, *Xunzi* 10, 183: 百姓曉然皆知其汙漫暴亂而將大危亡也; *Han Feizi* 14, 104: 夫有施與貧困，則無功者得賞；不忍誅罰，則暴亂者不止。 I suggest translating the term *luan* not simply as “chaos” or “disorder” but as “anarchy,” which means the absence of rule.

were the scourge of Chunqiu and Zhanguo periods. Virtually all major thinkers grappled with this problem<sup>103</sup> in different ways, but the most consistent answer came from the political realists. Like their modern counterparts, they realized that the opposite of anarchy is not simply stability but *hierarchy*.<sup>104</sup> As the *Shangjun shu* observes: “Nothing is more advantageous for the people of the realm than order; and nothing is more beneficial for order than establishing a ruler.”<sup>105</sup> This sounds quite Hobbesian, and indeed, what the political realists had in mind was not a traditional ruler as *primus inter pares*, but a sovereign clearly elevated above his subordinates. It is no coincidence that Sima Tan stresses precisely this point in his doxographic description of the *fajia*: “their rigid differentiation between ruler and subject, superiors and inferiors.”<sup>106</sup>

The hierarchy envisaged by political realists was entirely distinct from that of the Shang, Zhou, and Chunqiu polities insofar as it elevated the political center – the state – to a much higher degree. In this hierarchy, the difference of power between state and subjects is no longer gradual but absolute: the regional segments are no longer autonomous, and all political power is concentrated in the center. In other words: this is “the power structure of the fully developed state.” It is based on a monopoly of violence. As the *Shangjun shu* puts it, the state can “produce force and eliminate force.”<sup>107</sup> It state claimed to enforce generally binding decisions against local resistance down to the lowest level. This is what “the overhaul of Qin’s hereditary aristocratic system” really implies: the establishment of the state.

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103 Surprisingly, Sinologists dealing with early China have so far largely ignored violence as a *problem*. Focusing on ritualized and “sanctioned violence” (Lewis 1990), they have hardly addressed the disruptive force of violence. Here is what a French Sinologist has to say about the topic: “Certes, il y a affrontement entre clans rivaux, vendetta, meurtres, mais les luttes ont un aspect ritualisé [...]. On se tue, on s’étripe, on se fait bouillir dans des chaudrons ou mariner dans la saumure – mais on le fait *rituellement*” (Lévi 1981, 11) – apparently, no irony intended. For a fuller treatment of the subject, cf. Vogelsang 2017, 1–21.

104 Waltz 1979, 114–116.

105 *Shangjun shu* 7.6, 117: 夫利天下之民者莫大於治，而治莫康於立君。

106 *Shiji* 130, 3289: 其正君臣上下之分，不可改矣。

107 *Shangjun shu* 5.8, 83: 故能生力，能殺力，曰攻敵之國，必疆。 This cryptic sentence may be understood as follows: Force is “produced” through punishments (*Shangjun shu* 5.7, 81: 刑生力), which ultimately strengthen the state, and it is “eliminated” through warfare, which channels the potential violence of the people against an outer enemy. Interestingly, modern anthropological research confirms that “societies that frequently engage in war have more internal cohesion, and hence a lower likelihood of feuding, than societies which have peaceful external relations” (Otterbein/Otterbein 1965, 1470). By the same token, “a state that does not go to war, although it is strong, will be poisoned from the inside” (*Shangjun shu* 4.2, 60: 國強而不戰，毒輸於內).

Arguably, the marginalization of local elites is the fundamental task of state building. The abolishment of patrimonial structures, in which offices are inherited and lineages derive great power from their fiefs was the most important precondition for establishing a central state.<sup>108</sup> „State formation is marked by the divorcing of administration from kinship ties“:<sup>109</sup> the political system had to rise above the lineages.<sup>110</sup> It is no surprise that political realists made great efforts to this end: They granted offices according to personal merit, not family ties; issued general laws without regard to individual persons; set up systems of mutual control that cut across kinship lines; and even transferred whole families from their home to the capital under the Qin.<sup>111</sup>

These efforts are also reflected in realist concepts – above all, in the rigid distinction between *gong* and *si*, which are mostly translated as “public” and “private,” respectively.<sup>112</sup> In *Shangjun shu* and other realist texts, *gong* (“public”) clearly does not mean “common values that tie together state, society and the individual,” as some understand it.<sup>113</sup> Nor does it indicate “transparency” as opposed to “secrecy.” Rather, it means the interests of the state. *Si*, on the other hand, does not mean “private” or “selfish” in an individual sense, but refers to aristocratic lineages. The Just like the troops that such lineages contributed in Chunqiu times were called *sishu* as opposed to the *gongtu* of the duke, the *Shangjun shu* associates *si* with “keeping close to one’s kin.”<sup>114</sup> This sharp distinction between “public” and “private” was unprecedented. It could not have made

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108 Accordingly, imperial China cannot be called a “patrimonial state,” as Bünger 1977 demonstrates.

109 Barnes 1999, 242. The author somewhat confusingly adds that “nearly a thousand years passed between the emergence of the primary state [!] of Shang and the institution of non-kin governors in the Late Zhou polity [!] of Qin.”

110 Cf. Luhmann 2010, 59: “Die Herausbildung einer politischen Sphäre kann nur gelingen, wenn politische Herrschaft unabhängig von Verwandtschaftsbeziehungen stabilisiert werden kann.” This emancipation from kin structures is another aspect of the differentiation of politics as an autonomous sphere: just like morals, religion, or scholarship, family values may no longer interfere in politics.

111 For summaries of Qin policies, cf. Bodde 1986, and Pines et al. 2014.

112 This distinction also appears in *Mozi* (esp. 4.14–16), where it is called *jian*, “universal,” vs. *bie*, “particular.”

113 Cf., for example, Liu Zehua 2006.

114 *Shangjun shu* 7.1, 107: 親親而愛私。For further references, cf. Brindley 2013, 10, who concludes: “These usages for *si* all suggest a proximity to one’s person based on descent, kin relations, or patronage.” For *situ* und *gongtu*, cf. Kolb 1991, 184, 188. It is tempting to speculate that “duke” (公, OC: \*kōŋ) is a cognate of “public” (公, OC: \*kōŋ); however, despite being represented by the same character, the words do not seem to be etymologically related (Schuessler 2007, 255–256).



sense in a segmentary society defined by kinship lines, where everything happened *en famille*, as it were, not in public or in private.<sup>115</sup> The difference between “public” and “private” only became conceivable with the emergence of a state that transcended local boundaries and kinship ties. In fact, the quality of being “public” became a defining element of the state, for in state institutions nothing is private. This sharp distinction entailed an equally discriminating value judgment: Whereas “public” matters were deemed rational and beneficial, “private” concerns could be discredited as arbitrary, selfish, and harmful. “The private gaze blinds the eye, private hearing deafens the ear, and private thoughts confuse the mind,” or quite bluntly: “Private interests cause chaos in the realm.”<sup>116</sup>

As in ancient Greece and in early modern Europe,<sup>117</sup> the term “public” was used in distinction to the particular interests of the aristocratic families. Thus, the word *si*, “private,” could be used in a polemical way. By referring to the interests of the lineages as “*si*,” they were barred from politics. The clear differentiation between “public” and “private” correlated rhetorically with the fundamental task of state building: the disenfranchisement of local elites.

There is more to the story. In *Shangjun shu* and elsewhere, yet another term is used in opposition to *si*, “private” – and this is none other than *fa*. As mentioned above, “law” is not a sufficient translation for *fa*, because it only accords with one aspect of a broad range of meanings. *Fa* can also mean “norm,” “method,” “rule,” “system,” “model,” “principle,” and much besides.<sup>118</sup> Interestingly, this range of meanings coincides to a remarkable degree with the Latin term *ratio*, for which a standard Latin dictionary lists

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115 This is a common observation about segmentary societies, cf. Kieserling 1999, 454: “In der segmentären Gesellschaft fehlt jeder Bedarf dafür, das Öffentliche als solches zu bezeichnen und es gegen andere, auch mögliche Arten von Sozialität zu differenzieren. [...] Dem entspricht der in der Ethnologie häufig wiederholte Befund, wonach es unter diesen Umständen keine oder so gut wie keine Privatheit gibt.” The modern version of a “family state” as propagated in Japan in 1941 (in the manifesto “Shinmin no michi” 臣民の道) made a *totalitarian* claim by abolishing all privacy (*watakushi* 私) and subjecting everything to the purview of the state.

116 *Lüshi chunqiu* 12, 648: 夫私視使目盲，私聽使耳聾，私慮使心狂。三者皆私設精則智無由公。 *Guanzi* 37, 332: 私者，亂天下者也。 *Han Feizi* 49, 450, attributes the origin of this antagonism to Cangjie, the mythical creator of writing; he alludes to the form of the characters *si* 私, which was anciently written 厶, and *gong* 公, which is a combination of 厶 and 八, “opposed.” Of course, this is pure fantasy. Nonetheless, the association with the origin of writing may be instructive, since the spread of writing was certainly a precondition for the emergence of “public” communication.

117 On these cases, cf. Meier 1980, 27–28, and Wimmer 2000, 505, respectively.

118 On the diverse possibilities of translation, cf. Kroll 2015, 104.

the following meanings: “calculation, method, rule, manner of doing, reason, rationality, measure, law, order, principle, theory, system,” etc.<sup>119</sup> This strikingly resembles what we associate with *fa*. Indeed, it would seem that *rationality* is the very essence of *fa*, and that the key to understanding it lies in the opposition of “public” and “private.” As a political concept, subject to dispute and argument, *fa* were no longer particular lineage rules but laws of the state that had to be legitimized according to general principles. By the same token, the norms they defined were universal in scope: they applied to everybody “within the borders.”<sup>120</sup>

This explains why *fa* is regularly used in opposition to *si*. There are at least a dozen utterances like the following in realist texts: “If ruler and minister neglect *fa* and trust in private judgments, it will lead to anarchy”; “where there are no private opinions, public *fa* will be established”; “in an orderly state, *fa* are established so that private opinions do not gain currency,” etc.<sup>121</sup> Just like *gong*, *fa* seems to imply abstraction from private interests and the universalism of the state as opposed to the particularism of the lineages. Interestingly, this is precisely what the term *ratio* or *rationality* implies: a “universalism,” as the philosopher Carl Gethmann writes, “that is opposed to a particularism according to which the rules of social life are specific to a group.”<sup>122</sup>

The claim that the political realists were “rationalists” is hardly controversial. And although it is impossible to translate *fa* as “ratio” in each case,<sup>123</sup> the Latin term certainly conveys a decisive aspect of *fa*: it is always an abstraction. *Fa* means bureaucratic rules

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119 Georges 1998, vol. 2, Sp. 2202–2206.

120 Incidentally, this term – *jingnei* 境內 – is characteristic of political realism: it appears almost exclusively in *Xunzi*, *Han Feizi* (*saepe*), *Shangjun shu*, *Guanzi*, and *Lüshi chungju*. The term seems to express precisely that “delimited territory” (cf. p. 57) with clearly drawn borders between the dominions of different rulers, which correlates with the concept of a “state.” Significantly, *jing* does not refer to the borders of small areas or cities – the word for these, *jiang* 疆, does not even appear in *Shangjun shu* – but to those of states (Stumpfeldt 1970, 27). These borders, quite literally, define the state: within them, the central ruler claims total control, superseding any aspirations of local elites.

121 The above examples are from *Shangjun shu* 14.1, 164: 君臣釋法任私必亂; *Lüshi chungju* 26.3, 1710: 少私義則公法立; and *Shenzi*, 77: 故有道之國，法立則私議不行。As far as I can see, none of the major dictionaries points out the opposition between *fa* and *si*; for some relevant passages, cf. *Han Feizi* 6 and 14, *passim*, as well as *Shangjun shu* 14, 164–168.

122 C. F. Gethmann, “Rationalität,” in Mittelstraß 2004, vol. 3, 478.

123 It also is not possible, for that matter, to translate *fajia* as “rationalists”: this all too unspecific translation would not do justice to their focus on politics and the interest of the state. As I argued above, rather than translating *fajia* and thus sticking to pre-scholarly terminology, it is better to come up with a scholarly term.

that apply without regard to the person, punishments and rewards given *sine ira et studio*, weights and measures that transcend regional definitions, a *ratio legis* that determines specific laws – and, most importantly, a *ratio politica* that places the interest of the state above all particular interests.

## Conclusion

My rectification of terms has come full circle: First, I abandoned the term *fajia* or “Legalism,” because it misleadingly suggests a prime concern with legal questions; and I suggested replacing it with the term “political realism,” which is associated with the idea of an autonomous political sphere. As the discussion above demonstrated, the differentiation of the political sphere was very much at the heart of the realist enterprise. Many of its most criticized ideas – the exclusion of the people from the political process, the rejection of morals, wisdom, and kinship ties, as well as the denigration of everything “private” – served the purpose of defining a political sphere that excluded all non-political elements. The political realists were the most rigorous political thinkers in classical China. Tradition has all but obliterated their importance by chastising their supposedly cruel and immoral teachings. But there is nothing immoral or malevolent (or for that matter benevolent) about realist ideas. They derive logically from an understanding of politics as inherently amoral. The leading principle of political realism is the reason of state. This was something quite new in Zhanguo times. After all, the state in a true sense – based on a new form of hierarchy and the extinction of all regional power – had only begun to emerge in the preceding centuries. The “state,” the apex of the political sphere, evolved in parallel to the concept of “politics.” – and the political realists were the first systematic theoreticians of both. Moreover, the newly emerging state was not simply a repressive institution. Quite to the contrary: It was first and foremost a remedy for the rampant violence of the Chunqiu and Zhanguo periods. It brought order to an anarchic world by replacing arbitrary decision-making and personal whim with rational institutions: bureaucratic administration, a system of taxation, and law. In fact, the very word that denotes “law” and that has traditionally been used as a label for political realism, *fa*, implies an abstract rationality that supersedes all particularities. In this sense, it points to the core of political realism as a highly rational theory of state power.

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