THE IDEA OF ‘LAW’ IN CHINA: AN OVERVIEW (PART 2)∗

ULA VISÃO GERAL SOBRE A IDEIA DE “DIREITO” NA CHINA (PARTE 2)

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Abstract: China, with its millenarian empire ranging from the first Qin dynasty (221-206 BCE) to the threshold of last century (1911), has known one of the longest-lived and mighty political-institutional structures ever existed. However, according to a still widespread opinion, China has not experienced a development of the idea (and ideal) of ‘law,’ that is to say a ‘legal tradition’ comparable to the West, this article analyzes the concept of right and draw a comparison with Western law, to observer the peculiarities of an eastern view on the subject.

Key-words: China. Law. Law Theory.

Resumo: A China, com seu império milenar que vai desde a Primeira Dinastia Qin (221-206 a.C.) até o limiar do século passado (1911), tem conhecido uma das estruturas institucionais políticas de vida mais longa e ponderosa que já existiram. No entanto, de acordo com a opinião generalizada, ainda existente, a China não experimentou um desenvolvimento da ideia (e ideal) de “Direito”, ou seja, uma “tradição jurídica” comparável ao Ocidente. Diante de diferenças, especialmente culturais e políticas, tão marcantes entro o Ocidente e o Oriente, o presente artigo pretende analisar o conceito de direito e traçar uma comparação com o direito ocidental para observar as peculiaridades de uma visão oriental sobre a temática.


Summary: 4. The ‘dual track’ of legality, and the search for the ‘spirit of law’ in traditional China; 5. The modernization process and its influence on the Chinese legal tradition

4. THE ‘DUAL TRACK’ OF LEGALITY, AND THE SEARCH FOR THE ‘SPIRIT OF LAW’ IN TRADITIONAL CHINA

A further controversial aspect, in parallel to the absence of a legal profession in the traditional Chinese society, consists in that the imperial legislation seems not to know the category of ‘private’ (‘civil’) law. In the imperial codes there were rules dealing with matters concerning family, marriage, property, and generally speaking obligations or business relations between individuals. But without drawing any distinction whatsoever, from a legislative drafting standpoint, between criminal and civil law matters, to the extent to which the corresponding rules were all drafted in the shape of incriminating rules103; that is disguised, also in the case of civil-type matters, under the appearance of provisions established in terms

∗ Print preview of the the essay delivered for publication in the European Journal of Sinology.
† As regards the Qing Code, like all its predecessors, it is observed by HEAD, J.W., supra note 26, at 484, that the formulation of their provisions was construct as an ‘if-then’ statement: “The ‘if’ part of the statement prescribes a certain type of act or behavior; the ‘then’ part of the statement prescribes a specific punishment”.

of punishments, although of a lesser nature (beating), for the commission of a crime.

Leaving aside the issue mentioned earlier, about the appropriateness of any such terminology based on the divide between ‘criminal’ and ‘civil’ law in the case of Chinese dynastic codes, it suffices here to observe that, outside the imperial legislation, ‘private law’ rules existed, indeed, as ‘private’ rules; to wit, as ‘unofficial’ laws, not formally produced by the state (such as statutes, sub-statutes), but informally laid down and still recognized or upheld by the state apparatus, such as customary rules, rituals and conventions (mores) governing the relationships between members of social groups (family, clan, village, guild).

In general terms and always reminding the geographic dimensions and the population's figures of the country, it can be easily acknowledged that the state apparatus “simply lacked the force to impose its will everywhere all the time,” and therefore the social control at territorial level was, more often than not, “a matter of negotiation”\(^\text{104}\), between the ‘official elite,’ represented by the imperial officialdom, and local or sectorial communities involved.

More precisely, with regard, in particular, to Qing ‘civil’ justice system in operation despite the Qing's Code lack of formally constituted civil law, it has been observed that the dichotomy formal/informal legal system does not express the reality and complexity of a situation largely characterized by the existence of an “intermediate third realm were the formal and informal overlapped,” whereby, at the magistrate’s yamen, “the formal realm of court adjudication” and the “informal realm of community and kin mediation” met and collaborated together, in a negotiation type of relationship, one backed, however, by the authoritarian-paternalistic power of imperial bureaucratic regime\(^\text{105}\).

Such system rested on the idea that, once failed the informal process of social mediation ‘privately’ run by non-state bodies (family, clan, guilds) on the basis of their internal regulations, the magistrates could step in as judges or arbitrators, with the aim to promote local comity and good will, by listening to complaints and making decisions in each case on a factual basis, not so much according to code rules only, but rather by appealing to common sense and sentiments of fairness, in a somewhat discretionary way; and in conformity with the Confucian ideal of the superior and wise man (junzi).

Indeed, this kind of management, so to speak, of the judicial process, by involving

\(^{104}\) MCKNIGHT, B. E., \textit{supra} note 100, at 16.

\(^{105}\) HUANG, Ph. C.C., “Between Informal Mediation and Formal Adjudication. The Third Realm of Qing Civil Justice”, \textit{Modern China}, v. 19, n.3, 1993, at 252, further stating, at 254, that a substantial proportion of cases were resolved informally, “most of them by community and/or kin mediation” but “under the influence of the formal system”.

powers incarnated in the hierarchical structures of the interested social groups, ended up founding a ‘dual track’ of legality, fluctuating in between two seemingly alternative, but actually cooperative systems: on the one hand, the formal system implemented by the state, made up mostly of criminal statutes, backed by the apparatus of imperial justice; on the other hand, the informal (non-state) system, based on the active involvement of social groups, made up of ritual manners or customs, backed by the mediation work carried out by those who, in the context of such various groups, occupied power and responsibility roles.

When looking at the regulatory functions carried out by ‘private’ (non-state) organizations, it should be noted that such functions had a double legal significance: one linked to the establishing by customary way of rules effectively binding the members of these same organizations; the other linked to their interaction, precisely, with the state’s judicial apparatus.

Therefore, the so-called ‘intermediate sphere’ of judicial process, where the formal apparatus of the magistrate’s court interacted with elements of informal community mediation, ended up in practice into a kind of ‘cooperative expansion’ of the legal realm, resulting from the operating together of state and society, not as separate entities, but through a large area of “overlap and interpenetration” 106.

To give some examples, the extended families had their own internal regulations, backed by powers entrusted in the hands of grandparents or parents to impose sanctions on members of the clan. Likewise, the guilds had elaborate rules governing the behaviour and the transactions of their members, and enforced them with a variety of sanctions. In any case, such rules and powers, according to one opinion, drew formally their force and legitimacy, as well as their limits, from the state apparatus, in the person of the local magistrates 107; who, in fact, were frequently called upon to assist and, eventually, take decisions in ‘private’ law disputes, although considered to be ‘minor cases’, from the point of view of the ‘official’ legal system.

While it is certain that such ‘minor cases’ (including almost all civil-type matters) could be brought to the attention of the magistrate, it is not clear what was the nature of the proceedings (if judicial or arbitration proceedings) that took place, nor the legal bases of the

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106 REED, B.W., supra note 58, at 15.
107 SCOGIN, H. T. Jr., supra note 6, at 29, where it is proposed, to describe this binary framework, the image of two ‘concentric circles,’ the innermost of which, the social group, is the one bounded on all sides by the larger one, the state apparatus.

*Campo Jurídico*, vol. 4, n.1, pp. 77-92, maio de 2016
decision, if any, of the magistrate.\textsuperscript{108} Also reminding the wide interpretive canons available to magistrates (as mentioned above)\textsuperscript{109}, it seems not surprising, as suggested just before, that “sliding scales, vague concepts, and reliance on judicial discretion are all characteristic of much of the legal reasoning employed by Chinese magistrates in dealing with civil matters”\textsuperscript{110}.

Not to mention, of course, the social and cultural context generally hostile to judicial recourse to enforce private law claims. So that disputes between individuals were discouraged under the pressure of a rhetoric that glorified the value of the ‘public’ (gong) over the ‘private’ (si); this latter term being traditionally connoted in the Chinese language by a negative meaning, in contrast with the use of public as synonym for collective subjectivity of a socio-family group, prevailing over individual (private) interests or on individual (autonomous) will of any single member within such group. Consequently, what is ‘public’ is not only the state, but the family group as such, where prevails the will of the head of the family as the official (‘public’) representative of the unity (subjectivity) of the group itself\textsuperscript{111}.

All this leaves still open the question of the essential characteristics of the Chinese legal tradition: besides the dominant role of criminal law, together with the paternalistic-authoritarian nature of the imperial administration; as well as besides the absence of a class of legal professionals, coupled with the inclination towards an informal system of justice based on mediation, to which the state judiciary lent its support and, indeed, concurred, in ways which sometimes the occasion of corruption and arbitrariness, and whose contours and boundaries also were uncertain and elusive.

In a most synthetic way, it has been observed that “traditional Chinese society can be characterized in the following aspects: in terms of ‘authority’, it emphasized li [the moral rule] and disregarded fa [the legal rule]; in terms of ‘institutions’, it was based on the relational network to which an individual belonged [the family, clan, local community, guild], not the individual itself; in terms of ‘consciousness’, the populace considered litigation as a disgraceful conduct [while preferred conciliation-mediation]”\textsuperscript{112}.

\textsuperscript{108} TERADA, Hiroaki. The Crowded Train Model: The Concept of Society and the Maintenance of Order in Ming and Qing dynasty China. In: YASUTOMO, Morigiwa (ed.), supra note 5, 102, 104.
\textsuperscript{109} Supra text and accompanying note 102.
\textsuperscript{110} SCOGIN, H. T. Jr., supra note 6, at 23.
\textsuperscript{111} TERADA, Hiroaki, supra note 109, at 107.
\textsuperscript{112} FAN, Kun, supra note 11, at 10, who speaks in this sense of traditional Chinese society as “a ‘moral civil order’, contrasted to the ‘legal civil order’ in the West”.

Keeping in mind what has been said so far, it is possible to outline a conceptual framework within which to capture the essential spirit of the law in China. Leaving aside more detailed philosophical issues, what matters is the idea, inspired by Confucius, at the basis of Chinese tradition of thinking: that “human being” is not a product of nature only, but a cultural achievement (“being human”), whose “ultimate value […] lies in ‘becoming a quality person’ (ren), where the character which represents this accomplishment is constituted by ‘person’ and the numeral, ‘two’, suggesting its fundamentally social nature\textsuperscript{113}. To become ‘human’, within any given social context, thus means to behave properly, by way of education and self-improvement, in compliance with rules of civility and ritual practices, as a person endowed with the virtue of ‘humanity’ (ren). This quality makes each individual a ‘social person’ fully constituted by a specific complex of relational roles and connected with personal, familial and communal relationships\textsuperscript{114}. On this basis rests the Confucian model of orderly society, as an ideal self-regulating community which historically gave shape to a normative system characterized by morally binding relationships between subjects, recognized as such and enforced by state laws and authorities.

However, the ‘subjects’ here to be considered, are not ‘individuals’ (in the sense of ‘autonomous individuality’), each equal to another, with his own free will (according to the Western idea of ‘legal subjects’ as ‘rights holders,’ at the basis of the legal system); but rather, as just said before, they are members in a group or any social institution to which one belongs, each member in his proper position (and relationship to others), being linked as such by “his obligations to his family, clan, guild and society as a whole”\textsuperscript{115}. The consequential outcome of this idea is that the Legalist idea of the “universalism of law (its refusal to make exceptions) was tempered by the particularism of rituals (which insist on the differential treatment according to personal status, relationship, and social circumstance)\textsuperscript{116}.

Basically, this system remained attached to its societal foundations consisting of

\textsuperscript{113} HALL, D.; AMES, R. T. Chinese philosophy. In: CRAIG, E. (ed.). Routledge Encyclopedia of Philosophy. London, 1998. Available at: http://www.rep.routledge.com/article/G001SECT2, who further explain that the goal here is not “to be altruistic,” but “the realization of one’s social self,” on the assumption that because “personal, familial, communal, political and even cosmic order are all coterminous and mutually entailing, commitment to community, far from being self-abnegating, is the road to personal fulfillment”.


\textsuperscript{115} REN, Xin, \textit{supra} note 9, at 21.

\textsuperscript{116} ELMAN, B.A., \textit{supra} note 44, at 261.
ethical and cultural principles and values (including paternalism, familism, loyalty, and filial piety), in terms of consolidation of “codes of morality” that helped “to shape the etiquette, customs, norms, and social structure” in general\footnote{REN, Xin, supra note 9, at 24. In these terms it follows, as is further pointed out, that “Legalist strands of formally structured penal controls and an emphasis on universally fixed penalties were modified [...] by the Confucian (...) principle of differential status.”}. The notion of the social and moral roots of the law, meaning precisely the legal relevance of social roles and moral relationships, constitutes the core of the Confucian vision of a legal (normative) order based upon tradition. It implies a two-fold principle of legal order, involving the co-existence of complementary relationships which together create a \textit{dual track} of legality in imperial China\footnote{\textit{Ibid.}, at 32, puts it in such terms: “Confucian morality and imperial law were [...] two parallel behavioral codes joined hand-in-hand in ordering social conduct in Chinese society. Besides these overlapping areas, penal law was designed to preserve the inviolable status of the moral code, even though some conducts were defined by law as offensive but were reprimanded by Confucian morality. The state served as an agent [...] to preserve the sanctity of officially endorsed mores through both coercive moral cultivation and legal sanction”}.

Along this dual track, for the entire duration of Chinese empire, a highly structured multi-tiered legal system developed. It was integrated by Confucian ideals of social order, based upon the virtue of rites and rituals (rules of private and public conduct, in the form of customs, conventions, ethical rules and etiquette), but also backed by the force of laws and the state apparatus.

In terms of implementation of the law, this dual approach may be observed with regard, in particular, to the two-step legal process, whereby in the great majority of cases —concerning civil affairs disguised as minor criminal cases— the local magistrate, due to the Confucian disdain for recourse to the courts, was called to play primarily the role of favoring a solution by way of mediation between the parties involved, thus imposing on them the respect for moral and ritual principles and rules. But, in case of failure, the magistrate was then urged to make use of his full power —in an authoritarian as well authoritative way— to adjudicate the matter, according to the laws set out under the imperial codes\footnote{\textit{Ibid.}, at 258: “Confucian ritual was the conduct of moral theory; law was its complement when the rituals were neglected and redress was required. Law was the last resort for obtaining what could not otherwise be accomplished through ritual”}.

interventions of persons who, in various contexts and levels within the society, held differentiated roles and positions of power.

In a nutshell, this system was founded on the idea that, in cases where the informal social mediation system failed, magistrates could, and indeed should, step in and act\textsuperscript{120}, mainly as arbitrators rather than judges, to maximize public utility and social harmony. At the same time, the authorities retained discretionary power to take action, principally of a repressive nature, for the purpose of enforcing the laws written in the imperial codes.

Note that the socio-family normative order, while constituting an expression of the autonomy of family groups, organized bodies and local communities, was also relevant in the ‘public’ sphere, to the extent that it prevailed over the ‘private’ sphere; just as the individual was considered, not as an autonomous subject but as part of a collective body. In this regard, the term ‘public’ did not refer solely to the state apparatus, but also to the family group, the corporation and any other socially relevant aggregation. In other words, the basis for the traditional Chinese approach to social order, by the involvement of social groups and of the community at large in upholding normative standards of control over people, so as to imply a modern principle of ‘horizontal subsidiarity’ between state and society, was thus (and has continued to be) represented by the absence of any sharp distinction between ‘private’ and ‘public’ sphere or, to put it in Confucian terms, between socio-family duties and political duties.

All of this serves to correct the notion that Chinese civilization, with regard to its idea of law, may be reduced to a schematic view, as simplistic as it is idealistic, of the opposition between the ‘rule of men’ (renzhi) and the ‘rule by law’ (fazhi). Indeed, it serves to underline what could be called, again in modern terms, a systemic adaptability to the complexity that characterized, and still continues to characterize, Chinese society (past and present).

What then appears to be, from a Western point of view, the deficiency of the Chinese tradition of treating ‘law’ as merely an extension of morality, without therefore developing an autonomous ‘legal science,’ it is precisely what historically represents an essential cultural feature of the Chinese idea of law, with its ‘holistic’ – rather than simply sectorial and instrumentalist – approach to social order as a self-regulated one, essentially driven towards a harmonious development in the entirety of its component parts, by

\textsuperscript{120} \textit{With reference to late imperial times, this attitude is described by WILL, P.-É. Adjudicating Grievances and Educating the Populace: Reflections Based on Nineteenth-Century Anthologies of Judgments. Chinese Legal History and Japanese Law - A Conference in Honor of Jerome Alan Cohen, East Asian Legal Studies Program. Harvard Law School, June 18-19, 2010, at 13, in such terms: “the state had to intervene to correct dysfunctions and prevent conflicts that society’s customary institutions were clearly not up to dealing with efficiently”. Campo Jurídico, vol. 4, n.1, pp. 77-92, maio de 2016}
an idea of immanence of the natural order of things in the social order of human relations, on the assumption of the close interaction of one with another.

To understand the specificity of such traditional as well as ideal conception that, taking the rites, rather than general and abstract precepts, as foundation of social ordering, relies on the normative force of individual examples of ritually compliant behaviours, it is possible to consider, by assonance with the ancient Roman formula of the ‘sociality of law’ (ubi societas ibi ius), the symmetrically opposing and yet complementary formula ubi societas ibi ritus as a most proper in the Chinese case, to express the (intrinsic) ‘normativity’ of social groups and of a society thus structured, not as individuals, but as members of such groups. This formula contemplates, therefore, a moral-legal order that permeates a widespread social normativity based, in correspondence to a thick network of relationships and socio-family ties, on ritualized (appropriate, correct and, therefore, virtuous) behaviors by all those who act according to their rank and role in both the private and public sphere.

5. THE MODERNIZATION PROCESS AND ITS INFLUENCE ON THE CHINESE LEGAL TRADITION

To complete, rather than to conclude our discourse on the idea of law in China, it should be added some final remarks in the perspective of the modernization process of the country. Two revolutionary events of the last century —one at the beginning and one in the middle — marked the transition of China into ‘modernity,’ according to its most current significance in terms of rupture and discontinuity ‘with tradition.’

The first event —the fall of the Qing Empire (after the Xinhai Revolution) in 1911, together with the establishment, in 1912, of the first Republic of China (ROC)— certainly constitutes a strong interruption from a political-institutional standpoint: “China’s first fraught encounter with ‘the West’ and one idea of ‘modernity’”[121]. This was followed and accompanied, starting approximately from 1915 till 1921, by a period of intellectual debate (generally known as “New Culture Movement”), which culminated in the student protests of May 4, 1919, which added a more politicized character to the movement (thus labeled “May Fourth”), with iconoclastic attitudes toward the cultural heritage of the Chinese past. It aimed to demolish any form of Confucian legacy, launching appeals to revolutionary innovations in social, cultural and political fields, claiming for introduction of “Science and Democracy” as

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main targets of the modernization-westernization of the country\textsuperscript{122}.

Among a wide range of differing and even opposing views, the gist of the matter may be seen in the challenges posed by the modernization process, in terms of the reception of Western ideas and institutions, such as democracy, fundamental rights (civil and political) of the individual, and rule of law, against historical and cultural characteristics of the traditional Chinese (Confucian) world, with its duty-based social morality, affecting both the political and legal system. To the extent to which these characteristics were deeply rooted into the Chinese (national) identity, they were, and still are, relevant as an obstacle to the adoption of such modern ideas and institutions.

Simply put, the May Fourth iconoclasts, with their emphasis on radical anti-traditionalism, forced the intellectual debate of the time into making a seemingly dilemma-choice between wholesale Westernization and the preservation of national cultural heritage, thus resulting in a crisis of identity\textsuperscript{123}.

On the other side, when the first expectations of change began to appear, during the last days of the Chinese empire, substantial diffidence toward any indiscriminate introduction of Western models was shown—a diffidence demonstrated in Zhang Zhidong’s well-known expression “Chinese learning for the substance, Western learning for the function”\textsuperscript{124}, (a phrase he coined in the late nineteenth century). With an implied understanding of the mutuality of the relationship between modernity and tradition, the idea holds that democracy, science, and the rule of law, are worthy of being achieved, in prospect, as a new form of “outward kinglyness,” but while preserving the “inner sagehood” representing “the unchangeable essence of Chinese culture and of Confucianism\textsuperscript{125}.”.

In the whole, the need to adopt Western-style ideas and institutions in China, in order to modernize the country, also required them to ‘adapt’ to Chinese traditional settings. This brings about the further question of to what extent tradition may be helpful to modernity.

It is not possible, here, to dwell on the question. It is sufficient to mention that, while


\textsuperscript{123} LIN, Yu-Sheng. \textit{The Crisis of Chinese Consciousness}: Radical Antitraditionalism in the May Fourth Era. Madison, 1979. See also, on the debate boosted by the May Fourth movement on ‘tradition vs. modernity,’ associated to ‘East-West binarism,’ JENCO, L. K. Culture as History: Envisioning Change Across and Beyond ‘Eastern’ and ‘Western’ Civilizations in the May Fourth Era. \textit{Twentieth Century China}, v. 38, n.1, 2013, p. 34.;


\textsuperscript{125} CHEN, A.H.Y., supra note 78, at 205, and references there.
the ‘liberal’ spirit of the May 4th movement continued to blow, insisting on the radical opposition of Chinese and Western cultures in relation to modernization and democratization, the approach to modernity and its challenges from ‘within the tradition,’ so to speak, has been consolidated too.\(^\text{126}\)

Unsurprisingly the ‘revival of Confucianism’ has thus become a hallmark of this approach.\(^\text{127}\) The appropriation (and/or manipulation) of Confucian ideas, beyond its political use to prevent democratization, and to support nationalistic feelings of “rebirth” (\textit{fuxing}) of the country in the name of a glorious past of great civilization, has given place to a far-reaching exercise of cultural reflection on the value of tradition as contribution to modernity.\(^\text{128}\)

In response to the challenge of China’s modernization it has been invoked a ‘creative transformation’ of Chinese tradition, by way of reinterpreting as well as revitalizing traditional values. Indeed, the issue of the ‘compatibility’ of Confucianism with the Western model of liberal democracy and constitutional legality, on the basis of a common projection toward a system of values, brings about the question, both in theory and in practice, of the ‘coexistence’ of such values.\(^\text{129}\)

The question turns to be therefore that of how and where to strike the balance between the two cultural settings, as in the case of a shift from a duty-based morality, with emphasis on the priority of the group over the individual, to a rights-based morality, with emphasis on the inalienable rights of the individual. On the other hand, but additionally, the question remains of the extent to which politics and law should stay separated from ethics, in view of a state’s moral neutrality that cannot but imply as well the ruler’s virtue tested in the goodness

\(^{126}\) It should be here recalled the CHEN, A.H.Y. \textit{Manifesto to the World on Behalf of modern Chinese Culture}. Hong Kong: Taiwan, 1958, written “by four great Confucian philosophers,” widely commented upon by Chen A.H.Y., note above, at 196 ff. The main propositions of the Manifesto, bearing on a Chinese way to modernization-democratization, are thus summarized (\textit{ibid.}) 1) “as far as China political development is concerned [there are] seeds for or germs of democracy within the Chinese tradition, particularly the Confucian tradition;” and 2) the establishment of a liberal constitutional democracy in China “is the internal requirement or necessity of the development of the Chinese cultural tradition itself”.

\(^{127}\) MEISSNER W. Réflexions sur la quête d’une identité culturelle et nationale en Chine du XIXe siècle à aujourd’hui. \textit{Perspectives chinoises}, v.97, 2006. Available at: http://perspectiveschinoises.revues.org/1076#tocto2n6, who speaks, at n. 39 ff., of “renaissance of the Confucianism” (\textit{renaissance du confucianisme}), in particular under the auspices of the Chinese Communist Party since the mid-1980s.; see below text and accompanying notes 137, 141.


\(^{129}\) CHEN, A.H.Y., supra note 126, at 201: “The question therefore concerns not only the creative transformation of the Confucian tradition to meet the challenges of Enlightenment and modernity, but also whether, and, if so, how Confucian values (i.e., those worth preserving in the process of creative transformation) and modern democratic values or institutions can coexist in China’s political system in future.

of the government, reminding of the traditional concept of ‘good government’ (yang min), based on the care, rather than the will, of the people\textsuperscript{130}, and thus affecting the relationship between the state and individual “strongly dominated by the status passivus or subjectionis,” as well as the capacity of the legal system to control and limit the government’s powers, in particular through the establishing of an independent judiciary\textsuperscript{131}.

China’s second revolutionary break is the birth of the People’s Republic of China (PRC) in 1948. The communist regime, under the guidance of its charismatic leader Mao Zedong, experienced the dramatic parenthesis of the “cultural revolution” (1966-1976), “when the campaign against Confucius got off to its start, rising to its apogee”\textsuperscript{132}.

This new regime was a glaring break of tradition, if for no other reason than for ‘ideological etiquette.’ But it manifested in such a way that it did not necessarily lead to a breach ‘with tradition.’ In fact, it revived a dialectic tension (one which was opened during the first phase of post-imperial modernity), between past and present, between national identity and the importation of Western models\textsuperscript{133}. The result was the ambivalent or ambiguous face of ‘socialist modernization,’ with cultural survivals and mental attitudes inherited from the past of Confucian tradition.

A straightforward explanation for this approach may be found in the earliest days of the communist regime in China, during the 1930s and 1940s. Hundreds of thousands of Chinese Communists had been brought up reading Confucian texts. For this reason, the “concept of the ‘perfect man’ (junzi) was cited as an example of the model Communist\textsuperscript{134}.

Later on, evidence of a same traditionalist/nationalist approach is to be seen, for instance, in a testimony provided by an editorial of the People’s Daily Newspaper (December 1998), where the managers and executives of the party were warned that they must present an example of constant and moderate family life, following the motto (once

\textsuperscript{130} LIN, Yutang, supra note 36, at 196: “The Chinese conception of government […] is known as a ‘parental government’ or ‘government by gentlemen,’ who are supposed to look after the people’s interests as parents look after their children's interests.

\textsuperscript{131} HEUSER, R. supra note 28, at 728-729, and see above text accompanying notes 29-31.

\textsuperscript{132} PERELOMOV, L. Symbol of the Chinese Nation. Far Eastern Affairs, v. 6, 1988, p. 86 ff., at p. 88. It is worth noticing that the Far Eastern Affairs, journal published in Moscow, started with that issue (November-December 1988) a special section titled Confucius Club, “where Soviet and foreign writers will discuss pearls of Oriental wisdom, examine topical aspects of the traditional Eastern culture, and see what links the present with the past”.

\textsuperscript{133} MEISSNER, W., supra note 128, at nos. 41-42, arguing that Confucianism became a key element of the traditionalist cultural nationalism and a tool to counteract the political and cultural influence of the West. For the Chinese Communist Party, the revival of Confucianism in the 1990s served two basic purposes: to put emphasis on the interests of the group, instead of the individual, so as to promote harmony and stability; to use traditional values in order to build a “socialist spiritual civilization” (civilisation spirituelle socialiste), at the same time providing people with a form of national identity based on the strength of a highly valued Chinese cultural legacy.

\textsuperscript{134} PERELOMOV, L., supra note 133, at 88.
Confucian): “To govern the country, it is first necessary to govern one’s home.” Not to mention, when coming to our days, the ever-increasing popularity of national studies in general and Confucian thought in particular, such as shown by phenomena like consumerist exploitation of the image of Confucius as an icon of a traditional perennial wisdom actualized to daily life.\(^{135}\)

In the last quarter of the twentieth century, Deng Xiaoping’s pragmatism—in addition to facilitating a sort of ‘rehabilitation’ of the figure of the great Master Confucius\(^{136}\)—sought to re-launch the process of modernizing the country; with a view to opening to the external world (“open-door policy”). He maintained an unwavering approach in accord with an essentially traditionalist political/cultural vocation; one which, once again, featured a mentality tending toward compromise rather than toward a facile assimilation of foreign, Western models. There followed the well-known phrase, coined by Deng, referring to a socialist system with “Chinese characteristics”\(^{137}\). This phrase, from the perspective of survival of ancient traditions of thought, distinctly recalls the Confucian doctrine of order (equilibrium) through the “constant mean.”

With particular regard to the law, this state of things has led to, and continues to lead to, a series of political/cultural implications. They tend predominantly to confine and direct the role of legislation within a rather instrumental\(^{138}\), and therefore residual or minimalist notion of


\(^{136}\) PERELOMOV, L., supra note 133, at 88 (“After 1976 [with the ending of the cultural revolution], the country set about recovering the moral losses. A drive was launched to restore the true essence of Confucianism and the image of Confucius”); LIU, J. The Confucian Legacy: A Comparative Study of the Critical Inheritance of Confucianism in China and North Korea. Columbia East Asia Review, v.7, 2014, p.84. (“Hoping to cultivate societal values based on the Confucian concern for education, harmonious social relations, and stability to help the nation heal after the devastation of the Cultural Revolution, Deng Xiaoping tacitly allowed appreciation and the study of Confucianism to grow. In 1989, this tacit approval became an explicit announcement, symbolized by the state’s decision to commemorate the 2540th anniversary of Confucius’s birth.”).

\(^{137}\) “We shall accumulate new experience and try new solutions as new problems arise. In general, we believe that the course we have chosen, which we call building socialism with Chinese characteristics, is the right one” (June 30, 1984: text available at http://english-peopledaily.com.cn/dengxu/vol3/text/c1220.html). It is worth noticing the rather paradoxical fact that the expression “Chinese characteristics” (Zhong guo te se), thus launched by President Deng, to become a sort of Chinese nation’s pride flag on innovation and modernization of the country, as a process basically (spiritually) understood in terms of “national identity,” was previously known—as it was first used, in English, by Arthur Henderson Smith, in his book Chinese Characteristics (1894), a widely read work (translated even into Chinese, several times), but branded by its critics for racial approach tinted of Orientalism—in terms of the common place of ambiguity and mystery surrounding the Far East.


rule by law;’ basically aimed at reinforcing Chinese Communist Party (CCP) control over and stability of society, using a model of socialist legality and, at the same time, the legal system as such, made up of “a rather comprehensive set of laws and regulations relating to external economic relations in order to attract foreign investments and technologies,” as a functional means of its modernization strategy.\textsuperscript{139} In this regard, the traditional Confucian attitude towards law still remains characteristic of a cultural legacy, although in a context in which the recourse to traditional values by the CCP leadership appears as a rhetorical device, used to preserve privileges associated with political and social stability.\textsuperscript{140}

Against the background of this weak notion of the ‘rule of law,’ it is not difficult to discern a parallelism with the more traditional, above-mentioned model of the ‘dual track’ of legality. On the one hand, the state legal system is aimed at organizing and ensuring basic conditions of government through laws (fa); both in defense of its power and prerogatives and to repress crimes and activities contrary to the security of the nation and the public good. On the other hand, the general order (harmony) of society, is more of a ritualized order (li); of a conventional, extra-legal nature, and based upon normative facts forged by social conventions, moral rules and recognized standards of conduct.

To be sure, attempts at uprooting traditional habits and customs have been made since the early decades of last century, such as those evoked by the “Down with the Confucian shop” slogan of the May Fourth iconoclasts. However, despite these attempts, as replicated and with greater strength during the first thirty years of communism, Confucianism — generally meant now as a code of informal rules which ensure social order, by guiding in a ‘harmonious’ (both hierarchical and united) manner social relationships at various levels— still represents a main feature of today’s Chinese culture and society. One that is capable of influencing in particular legislative policy choices.

To give just an example, reference may be made to Chinese legislation on the resolution of labor disputes. In a comment upon a new law on the matter (Labor Mediation and Arbitration Law, 2007)\textsuperscript{141}, in addition to repeated calls to ‘harmony’ as the value and also

\textsuperscript{139}\textit{Ibid.}
\textsuperscript{140}\textit{Ibid.}, 465; LIU, J., \textit{supra} note 137, at 86.

the guiding principle of industrial relations, it is thus stated: “Mediation and arbitration are the two mechanisms highly recommended in the new law […] Emphasis on mediation is one main principle as defined in the new law. It reflects traditional cultural preferences arising from Confucian and Maoist principles” 142.

This seemingly bold syncretism of ‘Confucianism and Maoism’ brings about the ‘originality’ of a compromise solution that consists in a legislative policy choice, essentially inspired to the idea and ideal of the ‘harmonious society’ currently supported by the political Chinese leadership 143. It then follows that a main problem with today’s China’s modernization process, in particular as to legal reforms, is not anymore to demolish the ‘Confucius’s shop,’ but rather to create “a new ethics,” harmoniously supplemented with both traditional (Confucian) values and modern (Western) ideas 144.

Yet, another most important point to be noted, is the fact that the current phase of development of China and its opening to the outside world, has brought, and continues to bring, more and more to the fore the (problem of the) role of the law as a means of modernization, through a process of massive legal reform or “legalization” (fazhihua) 145, also supported by an emerging class of lawyers as experts professionally engaged in rights protection (weiquan) 146. It has been thus observed that such a process “has provided the regime with a gloss of legitimacy” 147, and moreover that Chinese leadership “is increasingly

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142 ZHAO, Yun, note before, at 419.
143 Reference here is to the campaign on the building of a “Socialist Harmonious Society” (shehui zhuyi hexie shehui), launched in 2005 by then President of the People’s Republic Hu Jintao, and further adopted in 2006 at the Sixth Session of the 16th Central Committee of the CCP, whose achievement is expected by the year 2020.
144 CABESTAN, J.-P, supra note 139, at 466. On the issue of the interaction between ‘tradition’ and ‘modernity’ in China, from the point of view of its ‘legal culture’ and with regard especially to the modernization strategy through legal reforms promulgated since the last quarter of the twentieth century, see MOCCIA, L., supra note, 210 ff.
145 See, e.g., DIAMANT, N. J.; LUBMAN, S. B.; O’BRIEN, K. J. Law and Society in the People’s Republic of China. In: __________(eds.) Engaging the Law in China: State, Society, and Possibilities for Justice. Stanford, 2005. Ch. 1, p. 4: “In today’s China, law matters more than it ever has. Twenty five years of energetic legislating […] has created new legal rights and institutions […]. Increased reliance on law has also affected how disputes are resolved [and] as market reforms have deepened and social inequality has widened, legal forums — ranging from mediation and arbitration to courts — have come to play an increasingly prominent role in […] society”.
relying on law to alleviate the intrinsic legitimacy crisis it lives with\textsuperscript{148}.

Law, therefore, besides its instrumental use, to establish social order conducive
to economic development (in view of the so-called “socialist market economy”),
is a powerful and effective instrument for change also in the socio-cultural field.

This seems to imply a prospective conclusion, that a further advancement of
the modernization process in China may take place in the area of the law;
particularly with regard to individual rights legally and judicially recognized and protected.
This would give rise to a strong idea of legality. It would assume, or would appear destined to assume,
a higher level of conceptual autonomy vis-à-vis politics and morality;
thus moving far beyond the traditionalist rule by law, toward a modern notion of rule of law.

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\textsuperscript{148} Ibid., 17, where are resumed the main steps of the ‘legalization’ process initiated,
since the 1980s, by Chinese government to “actively promoting the concept of the rule of law”,
with “a series of laws, which on their face create important legal rights for citizens and limit the power of government authorities,” such as: the 1989
Administrative Litigation Law (on judicial review of government decisions); the 1993 Law on Protection of Consumer Rights and Interests; the already mentioned 1995 Lawyers Law (introducing “a semi-independent legal profession”); the 1996 Criminal Procedure Law Amendments (on “the legal rights of the accused and their representatives in criminal proceedings); the 1997 Criminal Law; and the 2003 Administrative Licensing Law.
With the addition, of course, of the revisions to the 1982 Constitution, such as the adoption in 1999 of the principle (advanced in 1996 by the then President and Party-Secretary General, Jiang Zemin) of “Ruling the Country According to Law and Building a Socialist Country Governed by Law” (art. 5), and the introduction in 2004 of the term “human rights” (art. 33: “[T]he state respects and protects human rights”). See, more generally,
CHEN, A.H.Y. An Introduction to the Legal System of the People’s Republic of China. 4\textsuperscript{th} ed. Hong Kong, 2011.


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Recebido em: 05 de setembro de 2015.
Aceito em: 03 de outubro de 2015.