THE IDEA OF ‘LAW’ IN CHINA: AN OVERVIEW*

UMA VISÃO GERAL SOBRE A IDEIA DE “DIREITO” NA CHINA

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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 Western one. In the face of differences, especially cultural and political, as striking between East and West, this article analyzes the concept of right and draw a comparison with Western law, to observe the peculiarities of an eastern view on the subject.

Key-words: China. Law. Law Theory.

Resumo: 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 entre 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.


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1. LI AND FA, AND THE ‘THEORY OF LAW’ IN TRADITIONAL CHINA

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. The country was managed by a powerful and learned literati bureaucracy, on the background of a highly civilized society, which lasted for a long period of time as one of the most advanced in the field of letters (books), politics (government), economics (agricultural production), techniques and arts. Starting already from the fifth century BCE, “Chinese philosophers were debating the nature and purpose of law,” in addition to an “unparalleled continuity of Chinese legal thought and institutions,” as documented since then; further noticing that “the only other legal sphere outside China that has an equally long history is that of Roman Law and its various modern adaptations.”  

However, according to a still widespread opinion (or common place, some would say), China has not experienced a development of the idea (and ideal) of ‘law,’ that is to say a ‘legal tradition’ comparable to the Western one. To be sure, such opinion reflects a dominant political-philosophical dimension of the Chinese traditional culture as refractory to the very notion of law^3, and has a strong hold among the sinologists themselves^4. Indeed, it

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is usually thought that in classic China of ancient and modern times, notwithstanding a massive law-making consisting in the almost continuous series of so called imperial or dynastic codes5, such an idea (and ideal) never ripened enough to affirm its conceptual and professional autonomy. It always had a rather instrumental and subordinate position with respect to politics, on one hand, and, on the other, to moral, religious, conventional, in short, ‘non legal’ norms (strictly speaking). The notion of law was thus conceived either as solely bound with the sovereign (state) interest to guarantee order and social stability, and therefore reduced to a governmental (bureaucratic) function, or confused with social morality embedded into ritual manners and behavioral patterns that affect the lives of individuals, both in private and in public, in order to assure natural harmony in the relations among people. The more so if one considers Chinese traditional society as structured into groups and collective bodies such as extended lineages, peasant villages, craft and merchant guilds, each with inner normative frameworks made of ritual practices, usages, and hierarchical orders, aimed at regulating, controlling and sanctioning their members’ conduct6, yet within limits marked, at least in theory, by the imperial authority, in particular through its local agents (district magistrates)7.

In the Chinese classics and, precisely, in the Confucian texts, the idea of normative order of society is indicated with the word *li* (‘rites’): originally linked to ancient ceremonial and sacrificial observances, such as ancestor worship acts, in particular, then developed to mean “etiquette, or rules of proper conduct,” secular as well as religious, “which make for harmonious living” in society8; that is a pre-legal moral normativity, commanding prior to and without commandments, that owes its binding character to “man’s

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endeavour to fit into the natural harmony of things.\textsuperscript{9}” Being a term not easily translatable, \textit{li} can be variously understood. Generally speaking, it refers to a natural ordering of society integrated with a code of morality based on human nature which operates not by external compulsion but through individual conscience, in view of an ideal of social harmony implying the individual’s obligation to act accordingly.\textsuperscript{10} In this broad sense, its normative relevance may be found in what it reflects and evokes a principle of ‘self-regulation’ of society as well as of individuals, based on the natural state of all things (including human beings), within an unchangeable archetypal cosmic order (\textit{dao} or \textit{tao}): ‘the Way’, meaning right direction, rule or principle of performing right actions.\textsuperscript{12} However, such relevance is acknowledged in historical terms by a commonly accepted view that emphasizes \textit{li} “as the core of Chinese traditional culture,” which has been “influencing people’s social lives in every aspect [as regards] the relationships not only between individuals, but also between individuals and their families, individuals and their states, and even the relationship between the individual and the universe.”\textsuperscript{13} In its progressive development from the rituals of conventional ceremonies towards the rituals of proper behavioral standards, the meaning of \textit{li}, thus understood in terms of ‘moral rule’, implying social disapproval, in case of infringement, and a feeling of shame by the wrongdoer, was focused on the idea of individual and social obligations,

\begin{quote}
\textsuperscript{9} MAY R. \textit{Law and Society East and West:} Dharma, \textit{Li} and Nomos, Their Contribution to Law and to Life. Stuttgart, 1985, p. 140.
\textsuperscript{11} MENSKI W. \textit{Comparative Law in a Global Context.} The Legal Systems of Asia and Africa. Cambridge, 2006, p. 504. Speaks of \textit{li} as “Confucian self-controlled order,” pointing at it as an ideally order from a Confucian viewpoint, considered as such “inherently better than a system of state-made legal rules superimposed on people” (p. 512).
\end{quote}
and of the corresponding hierarchical order of ranks and roles, at the base of the ideal normative order of a civilized society\textsuperscript{15}.

In turn, the Chinese \textit{fa}, translated as ‘law’ in the sense (such as \textit{lex}, \textit{loi}, \textit{legge}, \textit{Gesetz}) of written law, was used in association with, or in reference to, the meaning of punishment (\textit{xing}), and more precisely corporal punishment(s), even brutal (as the amputation of body parts), including death penalty (executed in very cruel ways). According to a mythical legend, such as told in one of the Confucian classics (\textit{Shu jing} or Classic of History, also known as Book of Documents, \textit{Shang shu}), this idea of ‘law and punishments’ joined together in one concept originated in very remote times (dating back to the twenty-third century BCE) with the Miao people. The story is thus reported: “The Miao people made no use of spiritual cultivation, but controlled by means of punishments, creating the five oppressive punishments which they called law (\textit{fa})\textsuperscript{16}.” Together with the antiquity of the idea of written law viewed “as primarily signifying penal law\textsuperscript{17},” it is worth noticing that the invention of \textit{fa} was attributed “neither to Chinese sage-king nor even to a Chinese at all\textsuperscript{18},” but to a ‘barbarian’ people, who governed “not by means of moral example, but by means of punishments (\textit{xing})\textsuperscript{19}.” Indeed, the story went on to say that, because of the suffering of many innocent people executed with mutilating punishments, the ‘august sovereign’ (\textit{huangdi}) “pitied the innocent, and […] exterminated the Miao,” establishing “a new order characterized by the introduction of proper rules for human behavior in which the role of the punishments was simply to ensure compliance with these rules\textsuperscript{20}.” In the


\textsuperscript{17} BODDE, D. Basic Concepts of Chinese Law: the Genesis and Evolution of Legal Thought in Traditional China (1963). In: BODDE, D.; LE BLANC, Ch. (eds.). \textit{Essays on Chinese Civilization}. New Jersey: Princeton, 1981, p. 175. Where it is also observed that throughout the entire history of the Chinese empire “this idea was perpetuated in the name of the highest governmental legal organ, the Hsing Pu [Xingbu] or Ministry of Punishments”.


end, a remarkable feature of the Miao legend, apart from its still controversial interpretation with regard especially to the question of divine or secular origin of (ancient Chinese) law, can be seen, if not in the (Confucian) abhorrence of law (“a resounding early disapproval” of “excess in positivist law-making”)\textsuperscript{21}, in the contrast between the ‘civility’ of rites (\textit{li}) and the ‘barbarity’ of law(s) (\textit{fa}), in the sense particularly of penal laws (\textit{xingfa}), leaving open, however, the crucial point of the relationship between these two distinct and rather different types of normative order.

With respect to this point, it should be observed that other sources indicate a wider meaning of \textit{fa}\textsuperscript{22}: a term to be understood, more like ‘law’ (meaning \textit{ius, droit, diritto, Recht}), as covering the set of rules which contribute to “the good ordering of social relationships and the proper administration of the state\textsuperscript{23}.” In this sense, the root meaning of \textit{fa} is “model, pattern, or standard,” and from “this root meaning comes the notion, basic in Chinese legal thinking, that \textit{fa} is a model or standard imposed from above, to which the people must conform\textsuperscript{24}.” However, though sometimes difficult to distinguish, the term \textit{fa}, specifically referred to “penal laws that in turn must follow and implement the models given by nature\textsuperscript{25},” is traditionally taken as distinct and distinguishable from \textit{li} (ritual manners and more generally moral principles of proper conduct), on the background of an ancient view, according to which written laws should be “balanced and measured against higher standards” of personal and social morality\textsuperscript{26}.


\textsuperscript{22} For a critique of the translation of the term \textit{fa} with ‘law’, see: GOLDIN, P.R. Persistent Misconceptions about Chinese ‘Legalism’. \textit{Journal of Chinese Philosophy}, 2011, stating in particular (p. 91): “Although \textit{fa} can surely include ‘law,’ it covers a much larger semantic range […] two basic meanings of \textit{fa} are ‘method’ and ‘standard’ […] ‘law’ is one of the most prominent senses of \textit{fa} in Modern Chinese [but] it is only a derived meaning; in classical and pre-classical Chinese, the ordinary way of referring to the law was \textit{xing} (now usually relegated to the sense of ‘punishment’).”


\textsuperscript{26} MENSKI W. Comparative Law in a Global Context. The Legal Systems of Asia and Africa. Cambridge, 2006, p. 529.
Leaving apart these terminological aspects, and the issues related to the comparability with Western categories, it is commonly stressed that in Chinese traditional world, since very ancient times, a political-philosophical confrontation arose, resting on the opposition between the ‘rule of men’ (renzhi), guided and supported by the exemplary strength of individual and social virtues (‘government through example’), especially practiced from the rulers, leaders, parents and elite people (sovereign, officials, parents, village elders), and the ‘rule by law’ (fazhi), attached to the force of punishments, in accordance with an oppressive and rather instrumental idea of law.

Such dichotomy reflected two ideological and apparently contrasting conceptions of law, attributed, respectively, to the Confucian school, so-called ‘school of literati’ or scholars (rujia), and to the so-called ‘school of law’ or ‘legalist school’ (fajia)\(^{27}\).

Briefly speaking, these philosophical schools, in addition to sharing the same vision of the social order characterized by the distinction of ranks and roles hierarchically established according to *li*\(^ {28} \), they also had in common the political idea of the state’s monopoly of power, embodied by the emperor with his paramount (religious, moral, political, and legal) authority over all aspects of social life, including the making of laws, essentially conceived of as a secular human institution, in the interest of the people’s welfare, that is for the ‘goodness of the government,’ being the ruler’s greatest duty and corresponding virtue that of ‘nourishing the people’ (*yang min*). This principle at the base of the legitimate exercise of power, traceable back to the Confucian Classic of History (*Shu jing*), but also reflected in the views of officials “strongly influenced by legalism,”\(^ {29} \) remained in any case fundamental throughout the imperial ages, and even after the establishment of the Republic in 1911, then of the People’s Republic in 1949, where the “present Chinese constitution can be viewed as an expression of the


\(^{28}\) ZHANG, Jinfan. *The Tradition and Modern Transition of Chinese Law*. Berlin: Heidelberg, 2014, p. 7. Stating: “At the point of using ‘Li’ (rites) to mark the degrees of social ranks, Confucianists and legalists had shared the same opinions”.

traditional concept of ‘good government’ in Marxist-Leninist garment.\(^{30}\)

The two schools of thought, while agreeing on this basic political principle, both paternalistic and authoritarian, representing traditionally “the gist of Chinese state-philosophy,”\(^{31}\) were in opposition to each other with regard precisely to moral and legal implications of good government, especially those concerning the relationship between society and state, viewed as either competing or as concurring law-making forces, focusing on two different normative paradigms, respectively.

To Confucius (551-479 BC) and his followers, the normative order within the family, the local community and the state was basically a substantive goal, consisting of the spreading throughout all social ramifications and personal relationships of the four fundamental virtues: humanity or humaneness (ren), righteousness (yi), civic propriety (li), and wisdom (zhi). In this manner, a well-ordered society could/should be built, from the inside of the society itself.

To achieve such a result, an official public morality, was required, above and beyond the laws. This social morality, understood in its normative value as the moral roots or sources from which society takes on its proper self-regulating order, was expressed in terms of codes of conduct whose standards were interiorized through conformity to rituals, and based upon the assumption of the original good will of human beings to behave according to virtue, by way of education and self-restraint. The state apparatus was thus conceived, together with the family, being its basic social unit, as an agency for the moral teaching.

On the other hand, the ‘school of law’ viewed normative order as a mechanism functionally needed for ruling the country and more precisely for exerting control over the mass of people, by general laws, regardless of local and particular customs or personal differences. This was to be achieved

\(^{30}\) HEUSER, R. What “Rule of Law”? The Traditional Chinese Concept of Good Government and Challenges of the 21st Century. Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, n. 64, 2004, 723 ff., p. 724. Where it is further noted that according to such principle (‘concern for the people’) the ‘people’ “being an object of the care of their leaders […] does not make its appearance as subject of rights vis-à-vis the leadership”.

\(^{31}\) HEUSER, R. What “Rule of Law”? The Traditional Chinese Concept of Good Government and Challenges of the 21st Century. Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, n. 64, 2004, 723 ff., p., 726. Thus commented: “That subjects should choose for themselves what their best interests are (and who should lead them) has not been part of the tradition”.

MOCCIA, L. The idea of ‘law’ in China: an overview (Parte 1)
primarily by means of penal (and administrative) laws, publicly enacted. Supporters of Legalism, whose two central figures were Shang Yan (390-338 B.C.) and Han Fei (ca. 280-233 B.C.), because of the attribution to them, respectively, of the two main works of political and philosophical doctrine on the subject (Shang Jun Shu and Hanfeizi)\(^{32}\), believed – to put it in a very simplified way – that man’s original malignity, coupled with selfishness, lead inevitably to wrongdoing. Legalists sought therefore to keep people under the intimidating force of punishments, for the sake of social conformity and stable political order without any further goal, neither of educating people nor of protecting them from state power. This politically oriented approach (especially advocated in the \textit{Hanfeizi}), that emphasized the instrumental function of law, as a tool in the hands of the ruler, dependent on the sovereign will to consolidate and maintain power, drew upon Legalists the charge of ‘amorality,’\(^{33}\) due to an alleged indifference for the moral issue in their discourse\(^{34}\), to the extent to which they preferred legal standardization of conduct, through laws and punishments, to social ordering based, instead, on education and good character of people.

Such approach to government, seemingly realistic, but actually quite positivist, and totalitarian, in the name of the dominance of the law over social norms, was opposed by the ‘school of literati.’ Confucian followers, “for whom individual, family or local community were of paramount importance,”\(^{35}\) had in mind the promotion of the well-being of the whole community and its members, in terms of mutually beneficial social relations, for the sake of a flourishing ‘harmonious society.’ In this sense, they emphasized ‘harmony’ (\textit{he}) as the highest ideal of social (normative) order, based on avoidance of lawsuits and the settlement of disputes through


\footnotesize{\textsuperscript{33} WALEY, A. \textit{Three Ways of Thought in Ancient China}. London, 1939, p. 199. Referring to members of the ‘school of law’ (\textit{fajia}) as “the Amoralists”.


\footnotesize{\textsuperscript{35} BODDE, D.; MORRIS C. \textit{Law in Imperial China: Exemplified by 190 Ch’ing Dynasty Cases}. Cambridge, 1967, p. 18.}
mediation, so as to achieve “the Confucian utopia of a society without lawsuits.” In its turn, this seemingly idealistic approach was also inspired to a sense of realism, to the extent to which it implied a somewhat sceptic attitude on the effectiveness and suitability of established laws to embrace and contain all the variables of social actions and human relations. This attitude, based upon the combination of Confucianism and Taoism as the two components of ‘Chinese character,’ resulted in the “disdain of litigation,” as well as in the “commitment to the discretion of the good judge rather than black letter law.” Precisely the results that the modern anti-positivist legal realism would have praised, in the West, centuries later.

In any case, according to Confucian view, the idea (and ideal) of social ordering was “best preserved through moral persuasion as the primary method, assisted by laws and punishments;” thus giving priority to morals over the laws; “morality first, law second” (de zhu xing fu). The point at issue is thus illustrated in the Confucius Analects (2.3.): “If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.” In a complementary way, this view was further developed by Xunzi (c. 300-230 BCE), among Confucian followers one of the most influential (together with Mencius), who taught: “Laws cannot stand alone […] Law is the basis

for good government, but the superior man is the basis for the law. So when there is a superior man, the law even if sparse, will cover any situation, but when there is no superior man, even if the laws are all-embracing, they will neither apply to all situations nor be flexible enough to respond to change.”

In the course of time, however, these competing, and even conflicting views, came to compromise, as both complementary models for social ordering and for the structuring of the state’s apparatus. In this manner, they both shaped the original spirit of the law in China, in its traditional and modern world alike. Such fundamental ambivalence is reflected by the political principle at the basis of imperial governance, such as is synthetically described with the commonly used formula *rubiao fali*, translated with “Legalism coated with Confucianism,” or other similar expressions (such as “Confucian in appearance but Legalist in substance,” “Legalism on the inside, Confucianism on the outside,” “Confucian in outlook, Legalist in substance”). This phrase, which emphasizes the legal rather than political implications of the *rubiao fali* formula, adds to it a positive meaning, which clearly conveys the sense of a coming to terms between Legalism and Confucianism. The phenomenon thus labeled, consisted in the integration and hybridization, so to say, of the system of criminal laws, promoted by Legalist, with the system of rituals and morals upheld by Confucius and his followers. The idea of laws, originally formulated at the beginnings of the Chinese empire as an instrument of government in opposition to rituals, was after a while shifted toward the idea of “grounding the application of law in the theory of ritual,” with an aim “to close the gap between Confucian

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43 From the viewpoint of the political history of the Chinese Empire, the underlying pejorative meaning of the formula *rubiao fali*, to the extent that it alludes to an authoritarian regime disguised as benevolent and humanitarian, is made evident by the fact that, since the characteristics of the political system set up by the First Emperor, largely based on Legalism, were officially condemned under the following dynasties as “criminal” in order – not so much to remove, but rather – to hide them, it “was erected a moralizing façade, which some have described as the ‘hypocritization’ of Chinese political culture,” as stated by: LEWIS, M.E. The Early Chinese Empire: Qin and Han. In: *History of Imperial China*. Cambridge: London, 6. v., p. 72.


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 MOCCIA, L. The idea of ‘law’ in China: an overview (Parte 1)
and Legalist contributions to the formation of the Confucian state and the ideology supporting its legitimacy.”45 In light of this historical background, equally relevant was the phenomenon (somewhat implied), which “could be just as easily called the ‘Legalization of Confucianism’,” concerning the “influence Legalism had on later imperial Confucianism from the Tang dynasty [618-907] on.”46

Whatever the perspective, a basic feature of the Chinese imperial legal system becomes apparent from the tension, throughout the whole history of its development, between these two competing, but concurring paradigms, whereby the “preeminence of law was one end of a spectrum whose other end was the centrality of rituals.”47 The main focus has always been on keeping them in a balanced relationship. In this manner, the long-standing rivalry between li and fa tended to be resolved, to say it in modern language, with a legislative policy choice: moral rules, based upon proper community values and proper standards of conduct, gained state’s official recognition, while imperial laws acquired the moral force of rules reflecting the natural order of things. In other words, the relationship between ethics and law became structured along a two-tiered system of both rituals (mores) and laws (punishments), without ever being bound under a single model of legality.

Only in more recent times a ‘modern’ idea of law, no longer identified exclusively or primarily with an autocratic regime of oppressive punishments, nor with the sole ritualty of a no less authoritarian conformity to private and public behavioral standards, has or seems to have made its appearance in China. This process of transition towards a modern idea of law influenced by Western examples, concepts and models (“learning from the West”), began during the late Qing dynasty, and continued during the period of the Republic of China, in the first decades of the last century48. To reach a most advanced development, in the post-Maoist era of the People’s Republic of

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China (PRC), thanks to the starting, from the end of the 1970s, of the policies of internal reforms and the opening of the country to the world and to foreign investments. However, since its inception, this process of transition has taken shape and has produced results characterized by a persistent duality and a profound ambiguity of Chinese law: clenched between, on the one hand, the weight of a traditionalist and conservative mentality, that keeps on showing itself on the social-political-institutional levels, whose legacy in terms of both authoritarianism and conformism (moralism) is now upheld by the new ruling classes; and, on the other hand, the thrusts to change, brought on by an economic, undoubtedly capitalistic and bourgeois growth, with widespread demands for legal standards and remedies, protecting individual rights, particularly against public authorities, as well as the aspirations of the people to forms of freedom and democratic participation in a civil society ever more active and dynamic⁴⁹.

One may pay attention to the transition process from the viewpoint of the transplants and the mixing up of foreign models (civil law and common law), with their adaptation to Chinese characteristics, or else pausing to consider in a broader prospect the dynamics affecting, in the Chinese context, the relations between politics and law, law and morals, state and society⁵⁰. In any case, a major reason of interest concerning a (comparative) study on law in today’s China cannot avoid taking into account the issue of the relations between ‘tradition’ and ‘modernization’ of Chinese society⁵¹, precisely within the framework of the extraordinarily long-lived Chinese legal experience⁵².

2. THE ‘PRACTICE OF LAW’ IN TRADITIONAL CHINA: SOME CRITICAL ASPECTS

In order to address the above issue, and draw further information to understand Chinese legal experience in terms of its culture-specific characteristics, it is important to make some additional remarks on the difficulties to frame such experience, starting with a crucial question, at least from a Western point of view: which was the practice of law in the Chinese traditional world?

To answer this question, though in a summary way, it is necessary to evoke a range of critical aspects, due to problems of interpretation they pose, but that together form a useful introductory step to the study of law in China.

As we said, the Chinese society, whose remote origins are set between the end of the III and the beginning of the II millennium BCE, reached, under the empire, a remarkable development in several fields of social organization and of public administration. Since age-old times, the tradition of collecting and preserving official records (dynastic stories) has been well established. Nonetheless, during its long history, characterized by strong resistance to foreign influences, the idea of primacy of law – in comparison with conventional manners (rituals) and moral rules – has hardly found its way; even if, at the dawn of the Chinese empire, during the short reign of Qin (221-206 BCE), indeed the first and shortest imperial dynasty, there appeared, under the name “Legalism,” as mentioned before, one of the most ancient political-philosophical theory on the binding force (equal for all subjects) of the laws established by the ruler.

In a seemingly contradictory and even paradoxical way, the powerful machinery of imperial (codified) law, likewise a clay-feet giant, never hinged on its own, solid substratum of legal culture: “Chinese traditional society […] was by no means a legally oriented society despite the fact that it produced a large and intellectually impressive body of codified law.”

This passage brings out two questions, distinct but closely intertwined, concerning respectively the nature of law codes and their relationship with the Chinese legal culture in general.

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The continuity of dynastic codes, starting at latest with the Tang Code of 624, modeled on previous examples such as the Han code of 186 BCE, then through the successive dynasties of Song, Yuan, Ming and Qing, can be seen as a process of accumulation, including also amalgamation with Confucian precepts, adaptation and transformation of a large variety of legal materials, whose centerpiece was the ‘code of punishments’. This gave them the appearance mostly of ‘criminal law’ rather than ‘civil law’ codes. However, as it has been observed with regard to the last one of the series, the Qing Code, in its expanded edition of 1740 titled Great Qing code (*Da Qing lüli*), this appearance “can be deceiving” to the extent to which such Western categories “translate poorly” into the Chinese cultural setting.\(^{55}\) Having in mind moreover that China is a huge country, then ruled by emperors with the help of a small and highly centralized bureaucracy, what it is important here to note is the even obvious fact that the main focus of imperial law or Code was on the ‘government’ of society; i.e. on “the activities of bureaucrats in the performance of their duties.”\(^{56}\) Therefore, the Code dealt with all matters, including private ones that were of interest, from the point of view of the ruler and for the sake of power through social order and stability. This explains the wide range and somewhat heterogeneous variety of matters covered by the Code, such as to give it the look of an administrative, fiscal, moral or religious code, depending on the viewpoint.\(^{57}\) But it shows above all its primary character of ‘officialdom’s law;’ in that the “audience of the Qing Code, and that of its predecessors, was the official bureaucracy responsible for keeping the machinery of dynastic administrative control in good running order.”\(^{58}\)

Moreover, one might conclude, with an eye focused on the system of law codes of various dynasties, established in order to serve “as an

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\(^{57}\) HEAD, J.W. *Great Legal Traditions*. North Carolina: Durham, 2011, p. 486: “Although the Code’s concentration on posing punishments for specified behaviors gives it the look of a criminal code, perhaps its many provisions on administrative and personnel matters give it the look of a code of government structure and procedure; and its many provisions on tax, land registration, and imperial treasuries might give it the look of a set of fiscal regulations; and maybe its many provisions on sacrifices, imperial ceremonies, and care for family members give it the look of a moral or religious code”.

administrative tool designed to maintain public order in the interest of the state,” that, in a broad sense, “all law […] was administrative in that there was no formal separation between the administrative and judicial functions of government.”

This situation can be appraised by contrast with the jurisprudential tradition of the European countries, inaugurated by Romans with the name precisely of prudentia iuris (jurisprudence), which emerged during medieval times, all over Europe, “as a field of intellectual logical inquiry and ratiocination […] adopted into the university curricula.” Such tradition – since the late Middle Age, thanks to the rise and spread of the university study of law (studium iuris) – saw the formation, both in academic and in forensic circles, of law professionals (legal scholars and lawyers), who played the role of agents of an autonomous idea of law mainstreamed as such in the construction of an independent legal order. They were committed as law scholars (professors and writers of legal treatises) to freely teach and expound the law, or as practicing lawyers called (ad-vocati) to freely assist and advice the parties of a lawsuit, and moreover as judges bound to give the solution of a case in the exercise of the power of jurisdiction (iuris-dictio), that is to say to “tell the law” (ius dicere), being a power which gained independence, in modern times, as separated from other state powers. This to mean the fundamental importance of such professional activities and functions, of both theoretical and practical character, for the building of the ‘legal system,’ of its language and its categories: in one word, its ‘science’ (science du droit, Rechtswissenschaft).

On the contrary, as a result of the character and the primary purpose of the imperial law as indicated above, the traditional framework of law in China seems to be characterized by the absence, or, at any rate, by the lack of a specific legal professionalism: “In traditional China up to the 19th century no jurisprudence in the Western sense had evolved. It is true that there existed legal specialists under the successive dynasties but they were all civil servants, mostly in the Ministry of Punishment (xing-bu), and not independent scholars.”

Of course, it is doubtful that such a contrastive view, to the extent it reflects the Western-conditioned idea of ‘law’ identified in terms of ‘independent’ legal order, i.e. based on an independent judiciary, an independent legal education, and an independent (freely-exercised) legal profession, could be worth up to the point of completely denying the existence of a Chinese ‘legal tradition,’ or else reducing it simply to an “informal normative tradition,” classified in the panorama of the world’s legal systems under the label (which can be read rather like an oxymoron) of “Confucian legal tradition.”

Indeed, it has been observed that in traditional China “formal legality was a far more pervasive factor,” in daily life, when considering that in the running of the state (imperial) apparatus throughout the country, district magistrates as well as higher officials at local level were all liable before the law, and subject to a variety of disciplinary measures (ranging from demotion to dismissal), eventually followed, after removal from office, by criminal charges and punishments.

Moreover, this strong formal affirmation of a ‘principle of legality’ – reflecting an ethic of responsibility, in conjunction to a high sense of honour, that supported the charismatic leadership of officials joined together in one body with the emperor – it also affected the supreme ruler, who stood over the law, but not without bounds, even of a somewhat legal flavour, to his sovereign will.

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64 As noted by: GULIK (van) R.H. *Crime and Punishment in Ancient China: T’ang-Yin-Pi-Shih*, 2nd ed. (originally published as: T’ang-Yin-Pi-Shih, Parallel Cases from Under the Pear Tree: A 13th Century Manual of Jurisprudence and Detection. Leiden, 1956). Bangkok, 2007, p. 62: “the magistrate’s position of wellnigh absolute power and complete superiority over all persons brought before his bench was […] based not on his personal rank but solely derived from the prestige of the system he was temporarily appointed to represent. The law was inviolable, but not the judge who enacted it. All judicial officials enjoyed their special position only as long as the government allowed; they could claim for themselves no immunity or any special privileges on the basis of their office”.
And one must not forget the highly complex course of procedural steps, documentary reports, investigative techniques, and the conduct of the public examination of witnesses and the accused, regulated by the law (including a detailed practice of judicial torture) for the ascertainment of the facts and the finding of the culprit in case of homicides and other suspicious deaths, with heavy responsibilities for the conformity with such procedures on the side of the officials who were assigned the task of holding inquests and reaching conclusions, often followed by re-inquests, and regularly subject to control by superior officials.

Not to mention, in the field as well of criminal investigations, the progress of a ‘forensic science’ that reached in China, much earlier than in Europe, advanced standards of expertise evidenced by an handbook “completed about 1247 [to] serve to guide responsible officials through [a] complicated set of procedures,”67 concerning the examination of a corpse (autopsy) or a wounded individual, as one among the many tasks incumbent upon local officials. Unsurprisingly, however, its influence lasted until the nineteenth century in parallel with the longevity of Confucian officialdom, as a mirror of “the meshing of legal and administrative structures characteristic of traditional China.”68 To be sure, such initial progress did not develop, as it happened instead in Europe, along the lines of the “marriage” between “forensic practice” and “professional medical knowledge,” thus preventing, as in the case of legal profession, the rise of a specialized branch of technical (medical) knowledge applicable to the judicial process, outside the direct control of the scholar-officials, whose “distrust of technicians” was basically due to the “conviction that the literati were the only true experts;” because experts, technicians, practitioners, specialists as such, they all “lacked the knowledge or the wider theoretical framework, without which instrumental knowledge was of minor value.”69

69 MCKNIGHT, B.E. (trans.). The Washing Away of Wrongs: Sung Tz’u. Ann Arbor, 1981, p. 27. Where it is further observed: “With respect to medicine, this attitude meant that when a Sung literatus was ill he would often choose a fellow literatus as his ‘physician’”. And see further: WILL, P.-É. Examining Homicide Victims in the Qing: Between Bureaucratic Routine and Professional Passion. Paper presented at: Global perspectives on the history of Chinese legal medicine, University of Michigan, October 20-23, 2013. Available at: http://www.college-de-france.fr/site/pierre-etienne-will. Concluding his analysis, revealing much of the ‘bureaucratic’ character of the Chinese judicial process, with an emphasis on “the centrality of forensic examination […] and also of its uncertainty.
In other respects, there are those who speak of a Chinese ‘legal science’ in terms of specialized, professional knowledge, developed by a legally trained elite within state officials circles, on the basis of the text of dynastic codes, especially the Ming and Qing code, thus understood as a ‘science of the code’ (lüxue).70

These views present in turn some controversial aspects, which can be briefly exposed, bearing in mind what has been said so far, in three points.

First, because the ‘doctrinal’ value of a jurisprudential (interpretive) activity carried out by bureaucrats (civil servants), subject to hierarchical constraints and charged with administrative tasks of supervising and reviewing the formal regularity of decisions made at lower levels, seems to have a rather different intellectual, professional and social value from the same type of activity handed down, as in the European (Western) legal tradition(s), by independent scholars.

Second, because the suggestive argument about the advanced Chinese standards of code law technique, according to which the ‘principle of legality’ in criminal law matters (nullum crimen, nulla poena sine lege) would have seen the light in China, much earlier than in Europe,71 could prove to be at odds with a context where there was no formal separation between the administrative and judicial functions of government, and the law was administered by the executive arm of the government. As it were, such principle stood alone, only entrusted to the same officialdom in charge of the judicial process, and separated from guarantees of judicial independence. Further, the need to contextualize the principle of legality in the field especially of ‘criminal law’ is made the more evident, in the scenario of the traditional Chinese world, by the moral and even religious implications underpinning the highly articulated and detailed regulation established in the law codes, concerning various types and degrees of punishments. Indeed, it should be observed that punishments fulfilled a dual and complementary purpose. In addition to their intimidating effect, in order to obtain “moral

conformity” from people, they also reflected religious/superstitious influences, believed to cause “the physical and spiritual elimination of malignity.” To this end, the corporeal nature of punishments, such as mutilations, “was aimed at incapacitating the evil spirits by removing the instruments through which they worked.”

Mention may be made of a leading Confucian scholar of the 19th century, who maintained that “rituals are the essence of punishments.” Reference should also be made to the ritualistic character of the practice of acquiring admissions of guilt (often obtained by means of torture) before conviction: “not a requirement under the law but rather a normative effort by justice personnel to fulfill their moral obligation to the state and the community.”

Third, because the emphasis given to a ‘positivist reading’ of the Chinese legal order ends up with presenting a one-sided picture centered on the imperial legislative regime made of statutes and sub-statutes (lüli), leaving in the background the framework of a wider and more complex ‘legal order,’ based on the ‘duality’ of formal rules of law, on one side, and socio-moral or informal norms, on the other, depending on the spheres of action, as regards respectively serious crimes, to be judged strictly according to code rules, and situations implying minor penalties, where the magistrates had major latitude in handling of cases at local level in a discretionary way and, quite regularly, through the interplay with local communities, families and other social groupings.

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73 If one let loose of rituals and instead employs punishments, that means the Way has no middle ground on which to stand. Therefore, punishments are an important subclassification of rituals,” thus reported by: ELMAN, B.A. *Classicism, Politics, and Kinship: The Ch’ang-chou School of New Text Confucianism in Late Imperial China*. Berkeley, 1990, p. 259. (With reference to Liu Feng-lu, whose biographical and intellectual profile is outlined there p. 214).


75 See the “Presentation” of the project (2011-2015) led by: BOURGON, J. LSC/Legalizing Space in China. Available at: [http://lsc.chineselegalculture.org](http://lsc.chineselegalculture.org). Access at: 4 dec. 2014. And there the “Announcement” of the panel on “Rereading the Qing Code: The Chinese Legal Science in Action,” thus posted: “[T]o consider the legal codes promulgated by the successive Chinese dynasties as mere efforts to formalize moral norms does not come close to conveying the multifarious nature of Chinese traditional law. The Qing Code for example, was the product of a firmly established juridical technique, which decisively determined its contents. The aim of this panel is to show that a positivist reading of the Qing Code is not only possible but also central to a global comprehension of the coherence of imperial China’s legal order, of which the Code, precisely, was the corner stone”.
Such ‘positivist’ approach to the study of Chinese law focuses, instead, on elements of ‘unity’ (coherence), publicity and (possibly) predictability of code (criminal) provisions, with their corresponding punishments, together with a (formally) rigorous mechanism of hierarchical control of decisions, through review procedures of court cases, all within the code-based legal system.76

However, one may still object, in more general terms, but always from a Western point of view, that in the history of China, the idea of the ‘independence’ of the legal sphere has never found place77. This fact can be attributed to two distinct but converging reasons. Partly to the legacy of Legalism, favourable to state monopoly of laws and resulting in state (bureaucratic) monopoly of legal expertise, and conversely in the official proscription of the legal profession, whereby imperial power invested in state officials (acting in a judicial capacity) “was to be unchallenged,”78 and partly to the “Confucian ideology,”79 which condemned litigation as something “fundamentally immoral,”80 to be prevented and avoided through recourse


79 An official might be assisted by the legal expertise of his legal secretary, but a person brought before the court, considered guilty until proven otherwise, was not to be so assisted. ACAULEY M. Social Power and Legal Culture. Litigation Masters in Late Imperial China. Stanford, 1998, p. 10.

80 With such expression I refer especially to socio-political and moral aspects of Confucius’ teachings, with their inherent normative value, having a wide and enduring impact on Chinese imperial institutions, as well on traditional life in China. In this sense, besides the issue about the various and problematic categorizations of what it may be meant by ‘Confucianism,’ I assume that expression as indicating, in accordance with: CHEN, A.H.Y. Is Confucianism Compatible with Liberal Constitutional Democracy? Journal of Chinese Philosophy, v. 34, n. 2, 2007, p. 199. “A living tradition that has evolved in the course of centuries and millennia, and has involved itself in inextricable connections with systems of political power and social organization”. See, however, on the many ways of talking about Confucianism and related interpretive ‘troubles,’ the essay by: DE BARY, W.T. The Trouble with Confucianism. The Tanner Lectures on Human Values, Delivered at the University of California. Berkeley, 1988. Available at: http://tannerlectures.utah.edu/_documents/a-to-z/d/debary89.pdf. Access at: 13 sep. 2014.
to informal mediation, if not to be discouraged. On both these reasons and related aspects we will try to say something here below.

3. A ‘DISCREET’ (AND ‘CLANDESTINE’) LEGAL PROFESSION

To start with ‘legal professionalism,’ a first look should be given to the cultural context of traditional China, in which the legal process, though upheld by formal laws (fa), was also conditioned by social norms and mores (li), to the extent to which the relationship between individuals and the state was, more than anything else, “one of trust, modeled after the family, in which the Emperor and his representatives were conceived of more as senior relatives than as public figures.”81 As a consequence, “those in positions of power owed an enormous, fiduciary-like obligation to those over whom they exercised that power.”82 In other words, a moralistic and paternalistic pattern dominated Chinese society as well as the imperial apparatus.

Against this cultural background can be understood the position and function of state officials, in particular those who, like district magistrates, acted in their residential offices (yamen) at the lowest local level (whence the name of ‘local officials’ or ‘officials close to the people’)83 in the discharge of a great variety of tasks, including investigatory, prosecutorial, and adjudicatory responsibilities,84 in addition to tax collection and other administrative duties, in order to exercise control, ensure order and promote the welfare of the local community (so-called ‘one-man government’).85 These magistrates, not by chance popularly known as the ‘father-mother officials’ (fumu guan), were not educated nor received any professional training in law (or in other technical matters, like finance), “but were instead

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82 ALFORD, W. On the Limits of ‘Grand Theory’in Comparative Law. Wash. L. Rev., n. 61, 1986, p. 945-951. Who still observes: “Within this context, there was naturally far less concern with sharply delineating public and private, or with jealously guarding individual prerogative against a threatening governmental presence.”
expected to have mastered the Confucian classics,”86 in their capacity of qualified (advanced or graduated) Confucian scholars or literati (jinshi),87 or else ‘scholar-officials,’ who became also known in the West with the common name of ‘mandarins.’ Because of this lack of expertise, they were assisted by specialist advisers who acted, if not secretly, however in a ‘discreet’ way, as their “personal assistants,”88 in the guise of legal secretaries known as muyou: literally “friends in the tent or behind the curtain”.89 Although, as it has been observed, the “popular notion that Chinese bureaucracy was run by ‘amateurs’ should be somewhat offset by the ‘expertness’ of the magistrate’s private secretaries,”90 yet “it is indicative of the Chinese attitude toward law that this secretary did not himself belong to the formal administrative system [but] was merely a personal employee of the magistrate [so that] the secretary was not permitted to try cases himself or otherwise to take on an active part in the trials.”91

Besides this, it is noteworthy that any professional activity of assisting-counseling the parties of a lawsuit was formally prosecuted as a crime.92 In point of fact, the activity of private legal counselors in charge with drafting petitions and advising the parties (especially those ones of inferior social status and low education level) was simply tolerated. They could not be called to appear in court to defend the parties involved in the proceedings.

91 BODDE, D.; MORRIS C. Law in Imperial China: Exemplified by 190 Ch’ing Dynasty Cases. Cambridge, 1967, p. 5; but see further for an historical background reconstruction of the muyou, their training, socio-economic condition, and the professional standing of these private legal counselors. CHEN, Li. Legal Specialists and Judicial Administration in Late Imperial China, 1651-1911. Late Imperial China, v. 33, n. 1, June 2012. Available at: http://ssrn.com/abstract=1949983. Access at: 22 sep. 2014.
The activity of such experts, commonly known by the unflattering title of ‘litigation masters’ (songshi), or by other, even more unpleasant epithets, such as “litigation hooligan or trickster” (songgun), was all the same surrounded by the bad name of instigators of quarrels, that made them subject to disapproval and sanctions by the imperial magistrates.93

In short, the “restriction of professional activity to [private] official advisors or clandestine lawyers was clearly a barrier to the technical development of law in China.”94

Moreover, it was an atypical professionalism compared to the Western lawyer’s one. Indeed, such experts neither had a formal legal education nor were trained to work as professional lawyers; given that the only chance they had to exercise their expertise was to work, instead, as a clerk employed by a magistrate.95 They moved within the same orbit of influence of all Chinese intellectuals, educated in the study of Confucian classics. These experts were therefore culturally close to the scholar-officials, although they did not enjoy the same social position and reputation96.

Additionally, another distinctive feature of the Chinese cultural setting that seems to be reflected in the lack or rather in the weak stance of legal professionalism, could be seen in a traditional Chinese way of thinking, made of worldviews, habits of mind, social practices and cognitive processes, resulting in a diversity of intellectual attitudes towards logical-abstract categories and rhetorical-dialectical rules of public debate, as it is alleged, in

93 SPRENKEL, (van der) S. Legal Institutions in Manchu China: A Sociological Analysis. London, 1962 (rep. 1977), p. 69: “The emergence of a legal profession to serve the interest of litigants […] was officially discouraged by [the law] which penalized those who incited others […] to undertake litigation or made a profit out of managing a lawsuit.”

94 MACAULEY, M. Social Power and Legal Culture. Litigation Masters in Imperial China. Stanford, 1998, p. 21: “songshi was most definitely a linguistic bound form expressing genuine official sarcasm […] By the eighteenth century, ‘litigation hooligan’ (songgun) and ‘litigation master’ (songshi) were usually used interchangeably.”


96 “They were paid by the magistrates who employed them and often became indispensable to their masters, who carried them along in their own ascent on the ladder of promotion:” MCALEAVY, H. Chinese Law. In: DUNCAN, J.; DERRETT, M. (eds.). An Introduction to Legal Systems. London, 1968, p. 125. CH’Ü, T’ung-Tsu. Local Government in China Under the Ch’ing. Stanford, 1962, p. 115, emphasizes “the personal relationship between the magistrates and their private secretaries,” concluding that the secretaries, in fulfilling their administrative and judicial duties, had in mind the magistrate’s career, dependent on the results achieved, annually assessed through a review carried out by his superiors (k’ao-ch’eng: ‘examination of accomplishments’).
more general terms, by so-called theories of comparison between ‘systems of thought’.\footnote{CH’Ú, T’ung-Tsu. \textit{Local Government in China Under the Ch’ing}. Stanford, 1962, p. 115: (the “experts and the officials remained two distinct groups throughout the [Qing] dynasty, with no possibility of interchange”); MCALEAVY, H. Chinese Law. In: DUNCAN, J.; DERRETT, M. (eds.). \textit{An Introduction to Legal Systems}. London, 1968, p. 125: (there was a sharp social distinction between these lawyers and the mandarinate proper).}

At any rate, culture-specific features have been evoked, that connect the “low status of any form of legal profession” with “Confucian ethics, according to which disharmony and litigation were negative forces and being involved with them was in itself negative,” up to conclude that “traditional China knew neither a real science of law nor a legal profession.”\footnote{NISBETT, R.E. \textit{The Geography of Thought: How Asians and Westners Think Differently… and Why}. New York, 2003.}

But, on the other hand, references should be made to types of legal literature, like collections of ‘exemplary cases’ or so called ‘model judgments’ based on hypothetical cases, as guides for the decision of lawsuits; together with texts such as handbooks, books of forms and commentaries, compiled specifically by and for private secretaries.\footnote{MENSKI W. \textit{Comparative Law in a Global Context}. The Legal Systems of Asia and Africa. Cambridge, 2006, p. 545-546.} Not to mention references to ‘law schools’ that offered some kind of legal training.\footnote{CHEN, Li. Legal Specialists and Judicial Administration in Late Imperial China, 1651-1911. \textit{Late Imperial China}, v. 33, n. 1, June 2012. Available at: http://ssrn.com/abstract=1949983. Access at: 22 sep. 2014, p. 4-27; HO, N.P. Confucian Jurisprudence in Practice: Pre-Tang Dynasty Panwen (Written Legal Judgments). \textit{Pacific Rim Law & Policy Journal}, v. 22, n. 1, January 2013; and see, for a list of legal texts (handbooks, casebooks, and anthologies of cases) extracted from: WILL, P.-É. et al. \textit{Official Handbooks and Anthologies of Imperial China: A Descriptive and Critical Bibliography}. Leiden: Brill, forthcoming), see LSC/Legalizing Space in China. Available at: http://lsc.chineselegalculture.org. Access at: 21 oct. 2014. Under “Sources documents”.}

Dynasty\textsuperscript{102}, and even more by handbooks and casebooks of later period, during eighteenth and nineteenth centuries, that in the administration of imperial justice was followed the practice of deciding cases by means of interpretive canons. This in order to guide and limit the magistrates’ discretion, so that decisions could be made according to common sense, reasonableness, fairness and rectitude, in consideration of the circumstances of the case, especially in the handling of cases that involved only minor penalties, or else in matters involving civil-type issues\textsuperscript{103}.

Among these rules there also were some more technical, like those concerning, in the cases of serious crimes, the notion of extenuating or aggravating circumstances, and the notion of \textit{mens rea}\textsuperscript{104}. Although designated to mitigate the penalty, according to the logic imposed by social differences of ranks and roles, these rules were also inspired by cultural dictates of moral value, rather than strictly legal. Of course, this was congenial to magistrates educated in the study of literary texts. Such assumption is confirmed by the semantic vagueness of the terms indicating, respectively, the two main principles of interpretation. The first (\textit{quing}) referred to specific circumstances of the case including, together with facts, social status and relationships of the persons involved, human feelings and value considerations (such as solidarity and compassion). The second term (\textit{li}) was concerned with a general rule of reasonableness, partly derogatory and partly supplementary to the former one.

In the whole, these rules, with the ensuing judicial practice, had in fact a moralistic and discretionary character, the substance of which was anchored well beyond the formal law, in the sediments of culture and civilization at the base of Chinese traditional society.


\textsuperscript{104} YASUDA, Nobuyuki. Human Rights, Individual or Collective? The Southeast Asian Experience. In: MORIGIWA Yasutomo (ed.). \textit{Law in a Changing World: Asian Alternatives} (Proceedings of the fourth Kobe lectures being The First Asia Symposium in Jurisprudence. Tokio and Kyoto, 10 and 12 October, 1996). \textit{Archiv für Rechts- und Sozialphilosophie (ARSP)}, Stuttgart, Steiner, n. 72, 1998: “There are far more cases in the \textit{Ch’ing-ming Chi} in which judges [the magistrates] either follow the law closely or set it aside not with any intention of shaping future law but merely from a felt need to settle specific problems in a socially [morally] acceptable fashion;” and see there for some ‘illuminating’ examples of cases-decisions concerning “human relationships,” at 353ff. But see further paragraph below.
When considering legal texts of the Qing epoch, in addition to collections of exemplary cases and model judgments, if it is true that they were a guide for magistrates, according to interpretative canons inspired by an ethics of judgment, it is also true that this kind of legal literature broadly speaking, while containing generic references both to imperial legislation and to previous cases, was intended primarily to show the ‘way’ (direction) to the magistrates, in order to help them to make the right decision, in a moral sense, rather than strictly legal. In this sense, it has to be noted the correspondence of the ‘mandarin spirit’ of judicial administration with an ideal pattern (dao) of normative order that includes formal laws within, if not under, higher standards of social norms and morality. Therefore, the absence and in any case the limitation of an area of legal autonomy, significantly highlighted by the absence of a private legal profession in traditional China, was behind the idea of a normative order entirely monopolized by the state, regarding not only the production of laws, but much more their use exclusively by state officials, to the extent that the judicial administration was not an independent activity, but an integral part of the machine of government run by the imperial bureaucracy.

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