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# The Dual Paradox of Modernity in China, from the Viewpoint of the Chinese Idea of Law*

*Luigi Moccia*

**Abstract**

To the extent to which "tradition" and "modernity" are supposed to be in opposition, as it is the case with European (Western) culture, where the former is usually contrasted with the latter in a mutually exclusive relationship, in China tradition and modernity seem not to oppose one another. They complement one another in a context that is both flexible and ambivalent, where the two concepts overlap and mingle together, in a fundamental attitude —both ideological and pragmatic— to compromise (harmonize) between the need for a stable order, represented by the unity and uniformity of political and social institutions, and the need to adjust to changing circumstances. Under its clearly provocative title, the essay aims to address the question of the "modernity of tradition," with regard to imperial China, and of the "modernity as tradition," with regard to People's Republic of China.

Following the path of a reflection upon Chinese world from the standpoint of its relationship with the (idea of) law, and by exploring the "dual-track" of legality as a key-concept connoting the Confucian state, upon which rests historically the Chinese legal system, traditionally understood not independently but as an integral part of the idea and practice of "government by moral," the essay will concentrate on the transition to modernity, marked by the two revolutionary shocks, respectively, at the beginning and in the middle of the last century. With an eye to persistent traditionally-based factors, in the context however of a rapidly evolving and changing society, where precisely the law seems to play a decisive role, putting into question the age-old balance of combining and compromising together tradition and modernity.

**Keywords**

Chinese legal thought, Chinese legal tradition, Confucianization of law, Imperial code law, Legal comparison, Comparative legal systems, Tradition and modernization, May Forth movement, PRC modernization, Legal reforms.

## I. INTRODUCTION

### 1. General overview

This paper introduces a number of topical points for reflection and discussion, presented in outline form, referring to arguments more extensively dealt with in a book of mine on the relation between Chinese tradition and modernization as looked at from the viewpoint of the Chinese idea of law.[1] The thematic formula followed in structuring this discourse is the one provocatively suggested by its title: "The Dual Paradox of Modernity in China." The duality thus evoked refers to both *modernity of tradition*, with regard to imperial China, and *modernity as tradition*, with regard to People's Republic of China. This looks somewhat

* An earlier and shorter version of this paper in French has been published under the title "Le double paradoxe de la modernité en Chine ou de la question du droit, miroir du monde chinois traditionnel et contemporain," *Revue internationale de droit comparé*, 4-2011, 782ff. This is a revised —updated and much enlarged— version, yet maintaining the same argumentative line of discourse, with the same conclusive points.

1 L. Moccia, *Il diritto in Cina. Tra ritualismo e modernizzazione*, Bollati Boringhieri, Turin, 2009.

paradoxical to the extent to which, quite obviously, "tradition" and "modernity" are supposed to be in opposition, as it is in the case of European (Western) culture, where the former is usually contrasted with the latter in a mutually exclusive relationship, especially in the field of the social sciences.[2] Indeed, starting in the 18th century the tradition-modernity dichotomy took shape in the European discourse, under the influence of Enlightenment doctrines which counter-posed one another, in the name of the ideals and goals of progress (such as individual liberties and rights, free will and choice, economic and industrial development). [3] And it was eventually conceptualized, in the second half of the 19th century, by a linear theory of social change, according to which societies (should) evolve historically from being traditional (static) to being modern (progressive).[4]

In China, tradition and modernity seem not to oppose one another. They complement one another in a context that is both flexible and ambivalent; where the two concepts overlap and mingle together in a fundamental attitude — at once both ideological and pragmatic— to compromise (harmonize) between the need for a stable order, as represented by the unity and uniformity of political and social institutions, and the need to adjust to changing circumstances. This is in accord with the basic idea of social-political order, as part of "a historical process continuing in the present."[5]

Without entering the field of cognitive studies on the different habits of thought, including linguistic aspects, that may concur to separate the Eastern cultures from those of the West,[6] the attitude just described above seems to be quite typical of a Chinese worldview, as expressed by the so-called "principle of contradiction" or "complementary nature of opposites." A concept also referred to as the "logic of correlative duality."[7] This culture-specific

2 For a sociological approach (based on Max Weber's classification of types of authority: legal-rational, charismatic and traditional),see S. Langlois, "Traditions: Social," in N. J. Smelser and P. B. Baltes, chief eds., *International Encyclopedia of the Social & Behavioral Sciences*, Vol. 11, Elsesier, New York, 2001, 15829ff.

3 S. J. Bronner, "Tradition," in W.A. Darity Jr., chief ed., *International Encyclopedia of the Social Sciences*,Vol. 8, 2nd ed., Macmillan Reference, Detroit, 2008, at 420-422.

4 Reference is, of course, to Henry Sumner Maine's *Ancient Law* (1860). For a critique of such theory, particularly of ancient Indian examples on which Maine's work was also based, see J.R. Gusfield, "Tradition and Modernity: Misplaced Polarities in the Study of Social Change," *The American Journal of Sociology*, Vol. 72, 4 (1967), 351ff.

5 For more on this statement, in the light of the seemingly conflicting views between Confucians and Legalists, especially with regard to late imperial times, see T.A. Metzger, *The Internal Organization of Ch'ing Bureaucracy'. Legal, Normative, and Communication Aspects*, Harvard University Press, Cambridge, Mass., 1973, 43ff.

6 Additional information on this topic may be found in: A. Bloom, *The Linguistic Shaping of Thought: A Study in the Impact of Language on Thinking in China and the West*, Hillsdale, N.J., Lawrence Earlbaum Associates, Publishers, 1981; Jia YuXin and Benqing Sun, "Contrastive Study of the Ancient Chinese and Western Linguistic Worldview," *Intercultural Communication Studies*, XI, No 3, 2002, 55ff.; and R.E. Nisbett, *The Geography of Thought: How Asians and Westerners Think Differently … and why*, New York, The Free Press, 2003.

7 R. J. Smith, *China's Cultural Heritage. The Qing Dinasty, 1644-1912*, 2nd ed., Westview Press, Boulder-San Francisco-Oxford, 1994 (1st ed. 1983), at 119. In dealing with the culture-specific characteristics of Chinese thought confronted with Western cultural forms of thinking, see also, D. Hall and R. T. Ames, "Chinese philosophy," in E. Craig, ed., *Routledge Encyclopedia of Philosophy*, Routledge, London, 1998, available at *http://www.rep.routledge.com/article/G001SECT2*. After the introductory section on "Chinese thinking as *ars contextualis*" (where one reads: "The art of contextualizing seeks to understand and appreciate the manner in which particular things […] are, or may be, most

characteristic sums up the most significant meaning of that paradox. Indeed, many aspects of today's Chinese society show links with the past and appear to be affected by the weight of tradition; a tradition which long ago laid down enduring cultural premises, basically drawn from the teachings of Confucius (551-479 BC), and related to strands of thought generally known under the name of Confucianism.[8] These premises are fundamental to both the historical continuity of Chinese society,[9] and the lasting relevance of its customs and values.

## 2. Preliminary remarks

Before going any further, it is necessary to briefly draw attention to a couple of preliminary points, in the nature of general warnings.

What is said herein on the subject sketched above may appear to be influenced by implicit value judgments, in the nature of Orientalist prejudices, regarding the Chinese world and comparisons between their world and ours (European-Western).[10] These prejudices are two-fold or rather dual, being at once, both laudatory and disparaging, depending on the viewpoint. They are in limbo between influences drawn, on the one hand, upon the fascination/mythicization of China and, on the other hand, upon the censure/demonization of that world, especially the world of traditional China.[11] If it is so,

harmoniously correlated"), they speak of "dominance of correlative thinking" in these terms: "The relative indifference of correlative thinking to logical analysis means that the ambiguity, vagueness and incoherence associable with images and metaphors are carried over into the more formal elements of thought. […] In contradistinction to the rational mode of thinking which privileges univocity, correlative thinking involves the association of significances into clustered images which are treated as meaning complexes ultimately unanalyzable into any more basic components."

8 According to D. Hall and R. T. Ames, (see previous note) "all of Chinese thinking is a series of commentaries on Confucius (…) Confucius' thinking came to ground the tradition of Chinese culture for practically its entire intellectual tradition, from the early phases of the Han dynasty in the second century bc to at least the beginnings of the Republican period in the early twentieth century, and arguably down to the present day in a decidedly Chinese form of Marxism." In more general terms, Wei-Ming Tu, in "Confucius and Confucianism," in W.H. Slote and G. A. De Vos, eds., *Confucianism and the Family*, State University of New York Press, Albany, 1998, at 3-5,says (referring to Confucianism) "a generic Western term that has no counterpart in Chinese"— as "a worldview, a social ethic, a political ideology, a scholarly tradition, and a way of life," highlights a variety of qualifications of Confucianism (viewed sometimes as a philosophy, sometimes as a religion, "often grouped together with Buddhism, Christianity, Hinduism, Islam, Judaism, and Taoism as a major historical religion"), attributing to it, in its nature of "historical phenomenon" with multiple characteristics and functions, "a profound influence on East Asian political culture as well as on East Asian spiritual life," that has made, both in theory and in practice, "an indelible mark on the government, society, education, and family of East Asia."

9 As stated by P. Ebrey, *The Inner Quarters: Marriage and the Lives of Chinese Women in the Sung Period*, University of California Press, Berkeley, 1993, at 271, even though "all historians today reject the old view of a 'changeless' China, we should not overcompensate for past failings and deny that, in comparison to other major civilizations, Chinese history is marked by some rather remarkable continuities." For a historical review of the Chinese legal tradition in terms of "continuity," from imperial times to present days, see Xin Ren, *Tradition of the Law and Law of the Tradition.Law, State and Social Control in China*, Greenwood Press, Westport (Conn.) & London, 1997.

10 Following a warning made precisely in the case of China and Chinese law by T. Ruskola, "Legal Orientalism," *Michigan Law Review*, Vol. 101, 1 (2002), at 222 (with reference to Hans-Georg Gadamer's theory of understanding, *Truth and Method*, 1960), "prejudices… can only be managed, not eliminated."

11 *Ibid.*, at 217ff, giving examples, respectively, of "positive and negative orientalism." For an overview of the complex story of swinging perceptions about China, and of the related Chinese influences in Europe (and Western world), see the 2 vols. by R. Etiemble, *L'Europe chinoise*, Galimard, Paris,

it is due to an involuntary conditional reflex, resulting from the inevitable contamination with stereotypes and commonplace notions that are strewn throughout Western literature on ancient and modern China. Indeed, to the extent to which it is true that the schematic view of the contrasting dichotomy of "East" and "West," as monolithic and self-standing entities, appears both banal and dubious, the risk of falling into cliché is always within reach. It is also true that whenever China is our subject matter, it is certainly not easy to be original. In fact, it is not even advisable to be original, because every interpretation of the Chinese world plays out on the field of continuing ambivalence/ambiguity of opposing terms and complementary relationships. For example, no Chinese citizen would be at all shocked by the fact that China is a country that is both "communist" and "capitalist."

A second warning is that the provocation expressed in the title is intended to be essentially an indication of a way out —or better to say a way to go beyond— the comparative standard approach of looking at Chinese legal tradition in terms —only or primarily— of sharp contrast with Western legal tradition, paradigmatically expressed in the opposition between "rule of men" and "rule of law," so as to end up with the other paradox of the seemingly "lawless" nature of Chinese law, resulting from the so-called negative definition of the rule of law, meaning "not the rule of men". [12] Indeed, rather than focusing, directly, on the comparison between Chinese (Asian) and European (Western) legal culture, the aim here is simply to draw attention to a number of surrounding topics, so to speak, that may provide a methodological and conceptual framework, where, to look at the historical/cultural complexity of the Chinese legal landscape, not from an outside (Western) viewpoint, but taking into account the culture-specific multifarious aspects that characterize the idea of law in China from the inside, with regard to the above mentioned context, both flexible and ambivalent, of the complementary relationship between "tradition" and "modernity."

### 3. A specific outline

The outline of this paper may be thus summarized as following the path of a reflection upon the Chinese world from the standpoint of its relationship with the (idea of) law. Namely, from the comparative standpoint which this relationship implies, considering both the universal and relative nature of the law which, in any given place and time, is closely linked to its own historical/cultural context of reference. In other words, this paper will try to develop a reflection which, leaning on the problem of the concept of law in China, comes to perceive reflected there, as in a mirror, aspects and characteristics of a context based on ethical/religious beliefs, political/philosophical doctrines, social conventions, tables of values, ritual practices and, in general, cultural motifs. These motifs may appear, on the surface, to be contradictory, but they may also be construed as

1988-1989, in particular vol. II, "De la sinophilie à la sinophobie," 1989; and see further, J. Spence, "Western Perceptions on China from the Late Sixteenth Century to the Present," in P.S. Ropp, ed., *Heritage of China: Contemporary Perspectives on Chinese Civilization*, University of California Press, Berkley, 1990, 1ff.; A. Owen Aldridge, *The Dragon and the Eagle: The Presence of China in the American Enlightenment*, Wayne State University Press, Detroit, 1993, especially the concluding chapter, at 264ff.; M. Cartier, dir., *La Chine entre amour et haine*, "Actes du VIIIe colloque de sinologie de Chantilly," Desclée De Brouwer, Paris, 1998.

[12] See again, in critical terms, T. Ruskola, "Law Without Law, or Is 'Chinese Law' an Oxymoron?" *William & Mary Bill of Rights Journal*, Vol. 11, 2 (2003), at 655-656.

complementary to one another. These motifs, forming a substratum of political and legal thought, are found throughout China's history; from the birth and perpetuation of empire through the passage (with the fall of imperial rule) into the modern era and the on-going modernization of the country under the People's Republic of China.

In this paper ,it is proposed then, to deal with an illustrative —rather than comprehensive— overview; an interpretation of the idea of law in China which, by reflecting culture-specific characteristics, becomes relevant for understanding the relationship between tradition and modernity in the Chinese world, past and present. Part II will provide a basis of discourse by presenting more conventional views together with more recent revisionist views of the Chinese legal system. Indeed, both of them seem to converge on points of reference that show the structurally ambivalent nature of the (spirit of) law in China. In this manner, Part III will focus on the "dual-track" of legality as a key-concept connoting that structural ambivalence. Also emphasizing the basic postulates of the "Confucian-legal" regime (or, if one prefers, the Confucian state) upon which the historical Chinese legal system rests, and which is traditionally understood as not independent, but an integral part of the idea and practice of "government by moral." Finally, Part IV will concentrate on the transition to modernity, marked by two revolutionary shocks, one at the beginning and one in the middle of the last century. This will be done with an eye to persistent traditionally-based factors, in the context, however, of a rapidly evolving and changing society where the law seems to play a decisive role, precisely putting into question the age-old balance of combining together, and compromising, tradition and modernity.

## II. CHINESE LEGAL SYSTEM IN HISTORICAL AND COMPARATIVE PERSPECTIVE: INTRODUCTORY ANNOTATIONS

### 4. In search of the "spirit" of traditional Chinese law

According to a conventional, or rather "classic" approach, because of its origins which date back to Montesquieu (one of the great fathers of comparative studies in the political, institutional and legal field),[13] imperial China is depicted as a country of "despotic government," supported by massive penal and administrative legislation, *but also* as a country in which the "rules of civility" were of the utmost importance in regulating everyday social relations. Confronted with the representation made popular in Europe by missionaries who magnified the "admirable" government of China, in that "it has a proper mixture of fear, honour, and virtue," Montesquieu was compelled, first, to defend the theory of the "three governments" (republican, monarchical, and despotic), at the basis of his entire work, by concluding that China was, instead, "a despotic state, whose principle is fear."[14] But further on, in dealing with "Of Laws in Relation to the Principles Which Form the General Spirit, Morals, and Customs of a Nation," he had to explain how and why Chinese legislators confounded the "laws, manners, and customs," being that "their manners represent their laws, and their customs their manners." He thus answers: "The principal object which

[13] Montesquieu (Charles-Louis de Secondat, baron de la Brède et de Montesquieu), *De l'Esprit des Lois*, 1748, English version, "The Spirit of Laws", translated by Thomas Nugent, 1752, revised by J. V. Prichard: based on an public domain edition published by G. Bell & Sons, Ltd., London, 1914, available at *http://www.-constitution.org/cm/sol.text.*

[14] *Ibid.*, Book II, "Of Laws Directly Derived from the Nature of Government", Chapter 1, "Of the Nature of the three different Governments."

the legislators of China had in view was to make their subjects live in peace and tranquillity. They would have people filled with a veneration for one another, that each should be every moment sensible of his dependence on society, and of the obligations he owed to his fellow-citizens." He concludes —apparently in opposition to the idea of China as a country ruled only by despotism— by stating: "So they [the legislators] gave the rules of civility the greatest extent."[15]

In a provocative way, it may be then said that Montesquieu was one of the first (and surely not the last) "victim" of comparative taxonomies about politico-institutional and legal systems, centred around the modern principle of separation of powers and of the separateness (independence) of the (idea of) "law" from other social norms (customs, manners, morals and rituals)according to the historical experience of European (Western) forms of government and corresponding (types of) legal systems, so as to classify in a residuary way, and indeed leave outside of this conceptual scheme, other differing experiences. In the same sense, another illustrious victim of comparative law taxonomies, based on the dichotomy between European (Western) legal systems ("formally rational") and the rest of the world's legal systems ("substantively irrational," including traditional-type Chinese law), was Max Weber.[16]

As a reflex, if not as a consequence, of the above mentioned approach, meaning the European/Western way of perceiving Chinese and, more generally, the Far Eastern world in terms of sharp diversity ("otherness"), on the assumption of a common European/Western legal identity, the search for the spirit of traditional Chinese law has continued to be developed along with the pursuit of the apparent dichotomy between legal and non-legal (or extra-legal) contours of the Chinese landscape.

### 4.1 Conventional and revisionist views

It may be here recalled the peremptory statement that: "Where it is anything but a fiction, the opposition traditionally established between Orient and Occident is met nowhere more clearly than in the domain of law."[17] Not surprisingly, this premise suggests a perception of the Chinese empire as a world where the idea of law was almost nonexistent or, at the very most, existent but invisible. On the one hand, this is because of the fact that it was kept veiled, and rendered rather impenetrable, behind the severe and often fierce symbols of a criminal justice which had to instill fear in the consciousness of the common people,[18] primarily to discourage them from taking action before the authorities.[19]

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15 *Ibid.*, Book XIX, Chapter 16.

16 R. M. Marsh, "Weber's Misunderstanding of Traditional Chinese Law," *American Journal of Sociology* (AJS), Vol. 106, 2 (2000), 281ff.

17 J. Escarra, *Le droit chinois. Conception et évolution. Institutions législastives et judiciaires. Science et enseignement*, Pékin-Paris, 1936, at 3 (*Chinese Law: Conception and Evolution, Legislative and Judicial Institutions, Science and Teaching*, translated by G. R. Browne, Harvard University Press, Cambridge, Mass., 1961).

18 See, *e.g.*, S. van der Sprenkel, *Legal Institutions in Manchu China: A Sociological Analysis*, London, The Athlone Press, 1962, at 70-77.

19 *Ibid.*, at 77, quoting a great 17th century Emperor, K'ang Hsi, who, in believed that "lawsuits would tend to increase to a frightful amount, if people were not afraid of the tribunals." He stated: "I desire therefore that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate." Obviously, one may take this statement as an indirect evidence that, contrary to emperor's wish, Chinese people were indeed willing to engage in disputes before the authorities (local magistrates), instead of settling them in a more conciliatory way. See further text accompanying notes 33-34 below, and more generally on the recourse to mediation in civil matters, see *infra*, para. 4.3.4.

On the other hand, this was so because it was continually confused with morals[20] in the sense of the normative value of rites and inner codes of civic propriety, rules which set out the standards of behavior regarding relationships within the family group and the community, so as to constitute the primary basis of social ordering.[21]
To be sure, even those who criticize the European/Western-centred approach to Chinese legal studies, consider it valuable, in comparative law terms, from the viewpoint of the sharp differentiation between Chinese law and European/Western law tradition. When looking at Chinese law, one is well advised "the first thing to see is the difference. This is where the interest in Chinese law lies." And furthermore: "surely Chinese law is so different from ours that its continued existence over so many centuries ought to force us to re-examine our notions of what legal systems are all about."[22] Thus implying, anew, the preliminary question of what is to be properly understood as law/legal in traditional China.[23]

The standard view, showing the picture of a Chinese traditional legal system "as backward, irrational, and/or incommensurable with western or modern notions of law and justice," has been challenged, in the last decades, by a "revisionist scholarship" on Chinese legal history, [24] "seeking to tear —that picture— to shreds" (as strongly advocated some time ago). [25] Thus, in contrast with the still widely shared view on the minor role played by the (idea of) law in Chinese traditional society, it is claimed that "formal legality was a far more pervasive factor in daily life."[26] With regard, in particular, to criminal cases, it is asserted that there existed a sophisticated and highly valued "legal science," developed by a legally trained elite within state officials circles, and basically understood as a "science of the code" (*lüxue*)[27] (in the way of a systematic reading of the

[20] J. Escarra, *supra* note 17, at 70 : "The law in China, according to traditional notions, does not differ from morality."

[21] L. Vandermeersch, "An Enquiry into Chinese Conception of the Law", in S.R. Schram, ed., *The Scope of State Power in China*, New York, St. Martin's Press., 1985, 3ff.; "Ritualisme et juridisme", in Id., *Etudes sinologiques*, Paris, PUF, 1994, 45ff.

[22] W. C. Jones, "Review of '*Internal Organization of Ch'ing Bureaucracy*', by T.A. Metzger," *Washington University Law Review*, Vol. 1974, 3 (1974), at 535, 539, and in an earlier passage (at 519): "the Chinese had a highly elaborate, formal legal system, which played a central role in their lives. It was widely known and much used. Its heart was a code (…). It was, however, a system that was very different from anything that we recognize as law, and we do not really have the conceptual tools to study it."

[23] "Anyone who sets out to study Chinese law (…) is confronted with a great deal of material of different kinds, all of which appears to have something to do with what is called law in other societies, yet it is difficult to see exactly what in China corresponded to the different branches of law as we know it": S. Van Sprenkel, *Legal Institutions in Manchu China*, cit., 1.

[24] Li Chen, "Legal Specialists and Judicial Administration in Late Imperial China, 1651-1911," *Late Imperial China*, Vol. 33, No. 1 (June 2012), available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1949983*, at 1.

[25] W. C. Jones, *supra* note 22, at 520. And see also W.P. Alford, "Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China", *California Law Review*, Vol. 72, 6 (1984), at 1249, pointing out the need "to examine, with fresh eye, China's rich but much neglected legal history (…) to ascertain the degree, if any, to which images of China's legal history that have long dominated our thinking warrant retention."

[26] W.P. Alford, "Law, Law, What Law? Why Western Scholars of China Have Not Had More to Say about Its Law", *Modern China*, Vol. 23, 4 (1997), at 400 (references there).

[27] J. Bourgon, "Principe de légalité et régle de droit dans la tradition juridique chinoise," in M. Delmas-Marty e P.-É. Will (dir.), *La Chine et la démocratie*, Fayard, Paris, 2007, 157ff.

penal legislation (*lü*)),[28] at the heart of the imperial Chinese legal system. This approach to the study of Chinese law emphasizes the elements of unity (coherence), publicity, and predictability of penal provisions, with their corresponding punishments, and hierarchical control of decisions through review procedures of court cases, all within the code-based legal system.[29]
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 place."[30] 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,"[31]and partly to the "Confucian ideology," [32] which condemed litigation as something "fundamentally immoral," [33] to be prevented and avoided through recourse to informal mediation —if not to be discouraged, as mentioned above.[34]

28 On the use of the term "code," as applied to Chinese legal history, in the technical sense of a laws compilation intended by the legislator to be "a unified and coherent whole", pointing at criteria for systematic arrangement, such as "the relationship between the chapter(s) setting out the general principles for the application of the punishments and the chapters defining specific offences", and the structuring of the code according to subject matter and separation of penal and administrative rules (*ling*), see G. MacCormack, "Transmission of Penal Law (*lü*) from the Han to the T'ang: A Contribution to the Study of the Early History of Codification in China," *Revue Internationale de droits de l'Antiquité*, LI (2004), 47ff.

29 J. Bourgon, *supra* note 27, at 163, argues that Chinese developed a conception of the law as a "unified and coherent system of rules (*un système unifié et coherent de norms*)", to date, at the latest, from the Song dynasty, noting, by the way, that Song Code was made the object of a series of rhyming commentaries, that tried in this way to express the systematic spirit of the codified legislation. At the same time, it is also argued that massive presence in imperial China of statutes and regulations, such as to leave with the impression of an "omnipresence of the law," not synonymous necessarily of legal certainty and justice (as the author himself is ready to concede), was a logical follow up of the "legalist" principle, whereby everybody was expected to know in advance the punishment assigned to each offence, in order to prevent crimes, in the same manner in which the exposure of punishments' instruments at the entrance of the local magistrate's courts or the public execution of punishments were intended to frighten and deter potential criminals. And see further text accompanying notes 79 to 81 below.

30 "(…) on ne trouve jamais dans l'histoire de la Chine l'idée de l'indépendance de la sphere juridique" M. Delmas-Marty, "Le laboratoire chinois," in M. Delmas-Marty e P.-É. Will, *supra* note 27, at 805, who moves this objection together with the connected one, concerning "if not the absence, at least the weakness ("la faiblesse") of civil law, or more generally of private law in relation to a predominant public law."

31 "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": M. Macauley, *Social Power and Legal Culture. Litigation Masters in Late Imperial China*, Stanford University Press, Stanford, Cal., 1998, at 10.

32 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 (mentioned above, note 8) about the various and problematic categorizations of what it may be meant by "Confucianism," I assume that expression as indicating, in accordance with A.H.Y. Chen, "Is Confucianism Compatible with Liberal Constitutional Democracy," *Journal of Chinese Philosophy*, 34/2, 2007, at 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."

33 M. Macauley, *supra* note 31, at 10.

34 See text accompanying notes 18-19 above.

Moreover, without going into the question of the extent to which such a conventional view proves to be controversial as the product of a manipulated story (that began, as is known, with the Confucian-inspired official and private historiography of the Chinese empire), [35] the uncertain (vague) character of Chinese traditional legal system appears in scholarly representations of Chinese law as distinguishing and contrasting "official" (state) and "unofficial" (family, local community) legal sources.[36] Indeed, on the side of those who criticize the standard approach, in that it would marginalize the place and role of law in ancient China, the traditional Chinese idea of law is presented in a rather elusive way: by identifying "formal and informal legality as constituting points along a continuum"[37]with a statement that sounds tantamount to Montesquieu's discourse, once again, about the "peculiar quality of the Chinese government," consisting in the "Union of Religion, Laws, Manners, and Customs." [38] At the extreme of such a continuum is the whole idea of Chinese legal tradition as a highly fragmented complex; one that is articulated in a "multiplicity of legal systems," which included "family and lineage heads and regulations, village headmen and elders, local gentry, local militias, bandits, brotherhood associations, guilds, and the state legal apparatus, in more or less descending order of availability to the common person."[39]

### 4.2 A "bureaucratic" and "paternalistic" legal system

Whatever the case, both conventional and revisionist approaches, searching for the spirit of traditional Chinese law, seem to converge on one point: that such "spirit" appears to be composed of, and fused with, a variety of normative sources, yet keeping, under this surface (one may say) of "legal pluralism," a common core radiating from socio-cultural (informal) paradigms, as well as from legal (formal) paradigms. In a balance sometimes unsettled in favor of the former rather than the latter, it is characterized, however, by a settled, that is structured, ambivalence of the whole legal system, (in terms of the complementary nature of these founding (though apparently opposing) paradigms). This structural ambivalence explains, if not the absence of the idea of law, a rather weak and elusive, or flexible, idea of law throughout Chinese legal history which structure is at variance with Western legal tradition, historically based on the idea of law considered to be a science of its own ("legal science"), conceived independently

[35] On the manipulative pedagogical characteristics of Chinese official historiography, together with private historical writing, as a product of the Confucian bureaucratic elite for promoting ideals of good government and stable society, see the chapters, respectively, by C. Hartman and A. DeBlasi, "The Growth of Historical Method in Tang China," 17ff., and, C. Hartman, "Chinese Historiography in the Age of Maturity, 960-1368," 37ff., in S. Foot and C.F. Robinson (eds.), *The Oxford History of Historical Writing (400-1400)*, Vol. 2, Oxford University Press, Oxford, 2012. In this regard, W.P. Alford, *supra* note 26, at 402, explains the "inattention of many eminent classic sinologists to law," until late in the past century, by observing that they "relied heavily" on "dynastic histories that the Confucian elite compiled to be remembered by later generations," and, in so doing, "they subscribed to and helped perpetuate an image of imperial China in which law was seen as an inferior social instrument, and resorting to it was taken as an indication that the ruler and his delegates had failed properly to lead the people by moral suasion and exemplary behaviour."

[36] G. MacCormack, *The Spirit of Traditional Chinese Law*, University of Georgia Press, Athens, Georgia, 1966.

[37] W.P. Alford, *supra* note 26, at 400.

[38] *De l'Esprit des Lois*, English version, cit., Book XIX, Chapters 17, 19.

[39] M. Macauley, *supra* note 31, at 333.

from ethics or religious beliefs, supported by its own profession ("legal profession") liberally pursued in relation to an ideal of public service and leaving aside the application of the law through a "legal process," properly understood as distinct —if not separated— from (other) governmental functions.[40] Thus, despite the fact that imperial China holds the world record, so to speak, of having been a country of written law for more than two millennia, a law enacted, collected and published indynastic codes, that are compilations of (mostly) criminal and administrative rules,[41] the remark that "Chinese traditional society was by no means a legally oriented society,"[42] though it may sound like an exaggeration, correctly suggests the existence throughout China's long legal history of differing but complementary normative paradigms. Whereby, "the written law of pre-modern China (…) overwhelmingly penal in emphasis (…) was limited in scope to being primarily a legal codification of ethical norms long dominant in Chinese society."[43]

At first sight, the legal landscape in traditional China appears characterized by the ubiquitous image of an authoritarian state apparatus, both bureaucratic and paternalistic. It should be acknowledged that "imperial China's voluminous and elaborate legal codification" was indeed an "impressive intellectual accomplishment,"[44] and no less a characteristic of an impressive bureaucratic power apparatus.[45] Without going into unnecessary details, a more striking aspect of this legislation —among a much larger body of public-administrative law, is not so much the linkage of law with punishments, but rather the overall effect of bureaucratization of the law as an instrument for primarily keeping state officials under control.,[46] and for maintaining a specific social order, based, in particular, on an accurate registration system, one strictly functional to the purpose of placing each individual in his/her family/social position, legally relevant, with corresponding private/public qualifications, and related obligations/responsibilities.[47]

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40 In this respect, as stated by Xin Ren *supra* note 9, at 3: "China (…) has a longstanding *sui generis* legal tradition, and it indigenously developed a vast bureaucratic machinery for social control based on the philosophical teaching of Confucian moral codes (*Li*) that was endorsed by Chinese imperial rulers for more than two millennia."

41 Ch'ü T'ung-tsu, *Law and Society in Traditional China*, Le Monde d'Outre Mer Passé et Présent, Paris and the Hague, Mouton, 1961.

42 D. Bodde e C. Morris, *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases*, Harvard University Press, Cambridge, Mass.,1967, 4.

43 *Ibid.*

44 W.P. Alford, *supra* note 26, at 400.

45 B.E.McKnight, in his "Introduction" to *The Enlightened Judgments, Ch'ing-ming Chi – The Sung Dynasty Collection*, translated by B.E.McKnight and J.T.C. Liu, State University of New York Press, Albany (USA), 1999, at 14.

46 In this sense it is significant, with regard to legal texts discovered in a tomb at Shuihudi, forming a substantial part of the code of Qin, the short-lived first dynasty of unified imperial China (221 BC to 206 BC), that legal restrictions and punishments of officials' misconducts "had really nothing to do" with the idea of rule of law, "but with government interest in preserving its resources," as observed by M.A. LeFande, "Aspects of Legalist Philosophy and the Law in Ancient China: The Ch'in and Han Dynasties and the Rediscovered Manuscripts of Mawangdui and Shuihudi," available at *http://www.lefande.com/AncientChinaLaw.htm*, at 3.

47 With regard, again, to the same Shuihudi documents mentioned above (see previous note), another feature of the imperial bureaucratic regime may be seen in the fact that "The authors of the Shuihudi texts envisioned the state as an empire built on the labor of clerks, deriving its power from thorough and accurate record-keeping. All subjects were to be registered with the government, so that their various obligations to the state (…) could be systematically assessed. The state's material resources, down to quotidian tools, were to be me-

The true significance of the connection of law with bureaucracy in China may be seen however in the fact that, the imperial bureaucracy not only stood for centuries at the center of Chinese society, but has represented one of the most advanced, if not modern, feature of the Chinese state's organization. A highly centralized governmental organization, structurally lacking any formal separation of powers, was functionally articulated, however, in a variety of levels and offices. Starting with the magistrate at county/district (*hsien*) level, at head of the county/district office (called the *yamen)*, in charge of the administration of justice amidst other administrative functions (so-called "one-man government"), [48] followed by other officials, ranked higher along a hierarchy articulated according to various posts, qualifications and degrees, at both local and central level.[49] Considering that this bureaucracy, properly understood as collective term referring to the whole of these officials, upheld an apparatus of government that was all together "the judiciary as well as the military, the board of public works, and the established church,"[50] it is noteworthy that such apparatus was entrusted primarily into the hands —not of specialists, in any particular field of government, and even less "legal experts," but— of officials selected form the ranks of "literati" or scholars (*wen ren*), educated in the study of Confucian Classics.[51]

Bureaucracy thus meant a professional body of "scholar-officials," entrusted with the performance of functions and tasks in the imperial government, and therefore ranked at the highest level in terms of prestige in the social hierarchy. This elite body of state officials was selected, in principle, on a meritocratic basis, through a competitive examination system, grown up from the 7th century (with the beginnings of Tang dynasty), in the context of a process of consolidation of the central imperial power. A fundamental characteristic of such system for the recruitment of state officials was the emphasis put on testing the literary qualities of the candidates, regarding their knowledge of

ticulously accounted for as well," a fact thus accounted for by P.R. Goldin, "Han Law and the Regulation of Interpersonal Relations: 'The Confucianization of the Law' Revisited," *Asia Major* (3rd series), 14.1 (2001), at 7, who further emphasizes, at 9, the fundamental importance of "registration," in order to assign to everybody a recognized legal status.

48 Ch'ü T'ung-Tsu, *Local Government in China Under the Ch'ing*, Stanford University Press, Stanford, 1962, at 195, and earlier, at 15-16, emphasizing the crucial importance of magistrates at local (basically department and district) level, who were "usually referred to as *ch'in-min chih kuan* (officials close to the people)," describes the role of this state agent as a "civil official" (being altogether "the judge, the tax collector, and the general administrator"), who "also had to defend the city in an uprising or a foreign invasion."

49 For a description of the imperial bureaucracy and its complex articulation at the times of the Qing, see., e.g., R. J. Smith, *supra* note 7, at 44ff., with emphasis, at 58, on the role of the district magistrate at the bottom of the bureaucratic ladder —"as a kind of mini-emperor (…) undertaking religious and other ritual responsibilities, dispensing justice, maintaining order, sponsoring public works, patronizing local scholarship, and all the while collecting taxes for the states"— thus synthetized: "In contrast to higher-level functionaries who 'ruled other officials', magistrates 'ruled the people'."

50 W. C. Jones, *supra* note 22, at 522.

51 According to a synthetic description given, e.g., by N.P. Ho, "Confucian Jurisprudence in Practice: Pre-Tang Dynasty *Panwen* (Written Legal Judgments)," *Pacific Rim Law & Policy Journal*, Vol. 22 No. 1, January 2013, at 55-56 (footnote): "Confucian Classics (…) formed the basis of education and were used as guides for daily behavior and local and national governance." See also, about such texts, note 189 below.

the Confucian canonical texts, rather than any specific or technical expertise.[52]
The examination system, in itself a sort of bureaucratic ritual mainly directed to strengthen a moralistic-pedagogic spirit of conformity to a uniform set of values,[53] strongly contributed to the perpetuation of the Confucian ideals of political order, based on social harmony, implying in turn moral solidarity (the "people's veneration for one another," in Montesquieu's words).[54] In the light of this key link, scholar-officials developed, in their capacity as ruling class, "a self-image… of charismatic leadership," whereby they "saw themselves as occupying a morally ultimate rather than a subordinate and relative position," in the state power hierarchy formally ending, at the highest level, with the emperor, with whom they felt like "one body," being bound by the same common belief that political/social order "depended on the moral correctness of high officials as well as the emperor."[55]

All of that said, one is drawn to consider more in depth how this modern legalistic frame of the Chinese imperial system was filled with traditional moralistic contents reflecting the fundamental paternalistic spirit of the Chinese political and legal order and, essentially, based on socio-familial hierarchies, ranks and roles. Indeed, since ancient times, both such aspects, of form and substance respectively, were together complementary features of the so-called "family metaphor," at the roots of the legitimation of the state monopoly of power. A clear-cut statement of this metaphoric way of thinking of the state (public) sphere in familial terms, indistinctively from the socio-personal (private) sphere, is the one spelt out, once again, in Montesquieu's words:

The principal object of government which the Chinese legislators had in view was the peace and tranquillity of the empire; and subordination appeared to them as the most proper means to maintain it. Filled with this idea, they believed it their duty to inspire a respect for parents, and therefore exerted all their power to effect it. They established an infinite number of rites and ceremonies to do them honour when living, and after their death. It was impossible for them to pay such honours to deceased parents without being led to reverence the living. The ceremonies at the death of a father were more nearly related to religion; those for a living parent had a greater relation to the laws, manners, and customs:

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52 As stated by Ch'ü T'ung-Tsu, supra note 48, at 93, "Ever since the introduction of the civil service examination system, the basic qualification for taking the examinations had been a knowledge of the classics and the ability to write essays and poems." But see also text accompanying note 190.

53 Ichisada Miyazaki, *China's Examination Hell: The Civil Service Examinations of Imperial China*, Weatherhill Inc., New York, 1976.

54 See text accompanying note 13 above.

55 T.A. Metzger, *supra* note 5, at 160, 252-253, further specifying the officials' Confucian profile, by stating that their "feeling of pride was connected to the nature of their learning [that] made them vehicles of sacred truths which the emperor needed if he were to be fully successful," so to conclude: "They filled the role of *chün-tzu* (true gentlemen), persons ultimately dedicated to principles of morality transcending the ruler's wishes, and sometimes they even aspired to realize the ultimate moral perfection of a *sheng* (sage), a role which connoted the right to take charge of the empire." Within this perspective, the "professional service ethos" of scholar officials can be understood to mean "a sense of group identity and self-policing bureaucratic criteria of performance," as thus described by C. Furth, in her "Introduction" to C. Furth, J. T. Zeitlin, and Pingchen Hsiung, eds., *Thinking with Cases: Specialist Knowledge in Chinese Cultural History*, University of Hawai'i Press, Honolulu, 2007, at 20 (referring to J. Dardess, *Confucianism and Autocracy: Professional Elites in the Founding of the Ming Dynasty*, Berkeley and Los Angeles, University of California Press, 1983).

however, these were only parts of the same code; but this code was very extensive. *A veneration for their parents was necessarily connected with a suitable respect for all who represented them; such as old men, masters, magistrates, and the sovereign. This respect for parents supposed a return of love towards children, and consequently the same return from old men to the young, from magistrates to those who were under their jurisdiction, and from the emperor to his subjects.*
[The] empire is formed on *the plan of a government of a family.*"[56]

As it has been more recently observed, this "family metaphor," whereby the state (empire) was conceptualized (and idealized) as a "patriarchy,"[57] is crucial to understand the bureaucratic idea of law as a mere instrument of government —used to gain respect for consolidated moral values— for the primary purpose of social stability. In this sense, one may conclude that "the Chinese in traditional times, and (…) in modern times also, have always seen *law as a tool*." [58] Historically speaking, such an instrumentalist view of the law matched the overall "patriarchal authority" of the emperor and of the ruling elite formed by men of learning, who were educated in the study of Confucian classics, and thus indoctrinated "to believe in their moral and intellectual superiority over the masses, so that they were seen or saw themselves as the agents of the emperor, agents who ought, like the emperor, to control the people in a parental fashion, the 'father and mother officials'."[59]

Confucianism, as it evolved in Chinese history, became associated with a paternalistic conception of government. It was supposed that parental functions were performed by a good government with regard to the subjects. Thus the emperor was known as the "monarch–father" (*junfu*), and officials known as "fathers–mothers–officials" (*fumuguan*). The Chinese terms for "ministers" (*chenzi*) and "subjects" (*zimin*) both include the character for "son" (*zi*).[60]

In turn, this moral qualification of rulership and ruling elite was the reversed side of the basic family virtue (and duty) of "filial piety" (*xiao*), defined as obedience to and respect for one's parents (and generally for all one's senior relatives), to which was associated the other basic virtue (and duty) of loyalty (*zhong*), in the sphere primarily of the relationships of ministers toward the ruler, and by extension toward one's superiors, but also to one's office and, more generally, to the social group as a whole.
The public relevance of the duty of filial piety is attested by penalty provisions of the "unfilial behaviour" (*buxiao*), existing since early imperial (Qin) legislation,[61] and code provisions punishing, more harshly, the culprit who had committed the offence against a parent.

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56 Montesquieu, *supra* note 13, Book XIX, "Of Laws in Relation to the Principles Which Form the General Spirit, Morals, and Customs of a Nation," Chapter 19 "How This Union of Religion, Laws, Manners, and Customs among the Chinese Was Effected," (emphases added).

57 B. E. McKnight, "Law and the Prospect for Democracy in China," in L. Vandermeersch (édité par), *La société civile face à l'État dans les traditions chinoise, japonaise, coréenne et vietnamienne*, École française d'Extrême-Orient, Paris, 1994, at 359.

58 *Ibid.*, at 361 (emphasis added).

59 *Ibid.*, at 359.

60 A.H.Y. Chen, *supra* note 32, at 202.

61 Cf. G. MacCormack, "Filial Piety (Xiao) and the Family in Pre-Tang Law," *Revue Internationale des Droits de l'Antiquité*, 2006 (53), especially at 56-58, 60-65, casting doubts on "the general thesis which treats filial piety fundamentally as Confucian virtue" and the consequent assumption holding that "the incorporation into the law codes of rules concerning filial behavior is a prime example of the 'Confucianization of the law'."

We are thus confronted with an important culture-specific Chinese view of the "political obligation" (to obey state authority). Indeed, contrary to Western individualistic logic of the contractual setting of such obligation (demarcating the divide between public and private), the traditional Chinese view , postulated the idea that socio-political and legal order was to be achieved from within natural bonds of kinship, putting emphasis on the centrality of the parental relationship ("father/mother-son"), at the basis of the "personal moral connection" of the ruler-subject relationship, characteristic of the early (pre-imperial) Confucian ethics of government. [62] This characteristic is particularly marked in the Book of Mencius (372-289 BC), one of the greatest thinkers of the Confucian school.[63] By exalting the "spirit of mutuality" underlying human relationships, he predicated "the restoration of trust between ruler and subject as the precondition for re-establishing this particular proper relationship." In terms which imply that the "love between father and son is politically significant and duty between ruler and subject is recognizably a family ethic."[64] Again, this view, obliterates the distinction/separation between the polarities of public and private, politics/legality and ethics, characteristics which have become very relevant in Western tradition —if not conceptually essential— to the understanding of the Western social order.

The Confucian attempt to give familial dimension to the political discourse was not inconsequential. An obvious result of this Confucianization (some might prefer ritualization) of Chinese politics has been to make the political arena inseparable from the ethical realm. What one does in the seemingly private confine of one's home becomes politically significant; (…) *Ethics that govern family relationships are automatically laden with far-reaching social and political implications.*[65]

On this basis of indistinctness, and of fundamental ambiguity, together with the related tension between such polarities following the consolidation of imperial rule from the Han dynasty onward, there took shape —along with the process undertaken by scholar-officials of converting Confucian ethics into a political ideology[66]— the transformation of the "personal moral connection" into the opposite "domination-based political connection," characteristic of "imperial Confucianism," thus applied as official ethics, in support of the authoritarian model of state control of society.[67] In this sense, the "bureaucratic and paternalistic" complementary features of the legal system set up in imperial China explain, in terms of implied standards of legality, the "administrative" —rather than "judicial"— outlook of the legal process, traditionally monopolized (till present times) in the hands of the state (officials).[68]

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62 Cf. A.H.Y. Chen, *supra* note 32, at 20, and references there.

63 For an account of Mencius's teachings see D.C. Lau, in the "Introduction" to his translation of *Mencius*, Penguin Books, London, 1970.

64 Wei-Ming Tu, "Probing the 'Three Bonds' and 'Five Relationships' in Confucian Humanism," in W.H. Slote and G. A. De Vos, eds., *supra* note 8, at 126.

65 *Ibid.*, at 131.

66 See *infra*, para. 5.1.

67 See A.H.Y. Chen, *supra* note 32, with reference to the doctrine of the "Three Bonds," and related norms of acceptance of and obedience to authority, such as developed by Han Confucianism, on which see also text at note 239 below.

68 "[In China] from ancient times to the present, procedure and remedy have rested more firmly in the hands of the state than has been the case in

Similarly, a consequent observation can be made with regard to "people-children" subjection to the "father-state" government authority, concerning the fact that people "could demand state interference in some areas of their affairs," but only by way of "claims to" instead of "claims against," in so far as "they could not resist the will of the rulers or take their demands for welfare to a third party and assert them as a right."[69]

The instrumentality of laws, thus characterized by the interplay between the authoritarian-bureaucratic (hard) and the paternalistic-moralistic (soft) element of the government, resulted in a deep ambivalence (and ambiguity) of the idea of law, that "like any tool it may be extremely useful to accomplish ends outside itself and outside the process of employing it."[70] To say it otherwise, Chinese —both traditional and modern idea of— law, while closely integrated with the general work of the bureaucracy, under the shape of severe and rigid bureaucratic procedures (with their technicalities and even legalistic or formalistic subtleties), within the range of code (legal/formal) provisions, at the same time was, in a complementary way, connected, through the literati bureaucrats, to societal norms or "rules of civility" (to put it, once again, in Montesquieu's words, as stated above);[71] within which "society's 'law-jobs' (…) would be handled in some other way, either elsewhere in the bureaucracy or outside the formal legal system."[72] More precisely, with regard (in particular) to Qing "civil" justice system, 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*, that is at local level of China's huge territory, "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.[73] It is not by chance that the district magistrate, who represented for most Chinese (most of whom were illiterate) the embodiment of imperial authority, was known —and expected to fulfil his duties— as the "father-and-mother official," in dealing with daily affairs of the ("child") people under his authority. [74] Taking into account the fact that local magistrates had "considerable

many other societies:" W.P. Alford, *supra* note 26, at 414.

69 Again B. E. McKnight, *supra* note 57, at 360 (quoting the terminology and conceptualization of "claims to" and "claims against" by J. Feinberg, *Rights, Justice, and the Bounds of Liberty*, Princeton University Press, Princeton, N.Y., 1980).

70 *Ibid.*, at 361.

71 See text accompanying note 13 above.

72 W. C. Jones, *supra* note 22, at 527.

73 Ph. C.C. Huang, "Between Informal Mediation and Formal Adjudication. The Third Realm of Qing Civil Justice," *Modern China*, Vol. 19, 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." See moreover *infra*, para. 4.3.4.

74 R.H. van Gulik, *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*, E.J. Brill, Leiden, 1956), Orchid Press, Bangkok, Thailand, 2007, in the "Introduction," at 52, points out in this respect that the local magistrate "combined in his person all administrative, executive and judicial power in the district [and] had practically full authority over all phases of the life of the people entrusted to his care". See also J.R.Watt, *The District Magistrate in Late Imperial China*, Columbia University Press, New York-London, 1972, at 85.

latitude in their handling of cases that involved only minor penalties [including] almost all civil-type matters,"[75] one is then brought to conclude that Chinese written (code) law, being traditionally conceived of as an instrument, was intended to shape social relations, but —absent any idea of the sacred (either divine or dogmatic/scientific) character of the laws— was also intended to be shaped by (i.e., adapted to) social relations reflected in morals, manners and rituals, that is, other social norms, as a parallel ("legal") code of conduct.

### 4.3 Chinese law tradition; an unclassifiable legal system?

On this basis, and looking from the Western point of view of classification of world's legal systems, one may therefore wonder if, in the case of China, we are facing a rather "dubious," "anonymous" or even "unclassifiable" legal system, due to its "unique" and "alien" character —or how else could be named the "otherness"— of Chinese law tradition. This with regard not only to the Chinese empire, but also to the People's Republic legal system, to the extent to which the latter seems to be —as well as the former was— shaped by founding and enduring socio-cultural elements, that make still uncertain (disputed and disputable) the position of China on the panorama of the world's legal systems.[76]

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[75] B.E. McKnight, *supra* note 45, at 15, in his "Introduction" to the *Ch'ing-ming Chi*, where this judgments' collection, compiled under the Southern Song Dynasty (1127-1279), is presented, at 4-5, as an example of the complementary mix of authoritarian and paternalistic elements at the basis of handling by local magistrates of cases concerned with civil matters ("Some magistrates (…) applied the law as written. Others threatened the participants in cases with the literal enforcement of the law and then offered them the opportunity to resolve issues in less injurious ways. Occasionally judges seem torn between a clear understanding of the law and their own beliefs"). With regard to the same judgments' collection, see also Kishimoto Mio, "Land Markets and Land Conflicts in Late Imperial China," paper available at *http://www.iisg.nl/hpw/papers/law-kishimoto.pdf*, at 11-12, commenting on the attitude of the "most celebrated judges in the Song" to decide civil cases (land disputes) taking "both law as well as human feeling into consideration," and comparing it, at 17, with the judicial practice followed (in the same type of disputes) by Qing local magistrates who "rarely cited or referred to laws in dealing with civil matters." In more general terms see *infra*, para. 5.3.

[76] In a wide range of studies on legal systems (or else "legal families" and "law traditions"), starting at latest from the first decades of the 20th century (with the pioneering work by J. H. Wigmore, *A Panorama of the World's Legal Systems*, 1928), may be here mentioned, in particular, the followings: R. David, *Les grands sytèmes juridiques contemporains*, 1st ed., 1964 (listing Chinese law under a final part entitled "Other conceptions of social order and law," grouping it together with religious and traditional laws; see also in English, R. David and J.E.C. Brierley, *Major Legal Systems in the World Today*, 1st ed. 1968); J. D. M. Derrett, ed., *An Introduction to Legal Systems*, Sweet & Maxwell, London, 1968 (with a chapter written by H.McAleavy on "Chinese Law," preceded by other titles, in order, on Roman Law, Jewish law, Islamic Law, Hindu Law, and followed by two more titles, respectively, on African Law and English Law); K. Zweigert and H.Kötz, *An Introduction to Comparative Law*, Trans. from the German by T. Weir, 3ed rev. ed., Oxford University Press, Oxford, 1998, 286ff. (including Chinese law, together with Japanese law, under the title of "Law in the Far East," and distinguishing from religious legal systems); H. P. Glenn, *Legal Traditions of the World*, Oxford University Press, Oxford, 2000, 279ff. (pointing at a more general "Asian Legal Tradition"); W. Menski, *Comparative Law in a Global Context. The Legal Systems of Asia and Africa*, Cambridge University Press, Cambridge *et al.*, 2006 (1st ed., 2000), 493ff. (focusing on a regional comparative law approach, with regard to Hindu law, Islamic law, African laws and Chinese law); J.W. Head, *Great Legal Traditions*, Carolina Academic Press, Durham, North Carolina, 2011, 455ff. (shifting the focus on comparison between "Civil Law," "Common Law" and "Chinese Legal Tradition"). From a viewpoint oriented to comparison between religious legal systems, where traditional law of ancient China finds place, alongside with Jewish law, Canon law, Islamic law, Hindu law and Buddhist law, see A. Huxley, ed., *Religion, Law and Tradition: Comparative Studies in Religious Laws*, RoutledgeCour-

### 4.3.1 Chinese tradition of "codified" law and the "legality" principle

Of course, that does not mean —one must be careful here again— that imperial China lacked a "law tradition" worthy of the name. On the contrary, Chinese legal history fits well, as repeatedly stated before, with the stricter view of "tradition," understood in Romanist (Continental) terms as the transmission (*traditio*) of written law texts, considering the long standing tradition of penal statutes (*lü*), passed down from dynasty to dynasty, to form the core of imperial "codified law," from ancient to modern times.[77] In this respect it has been aptly recognized that, the "legal order of traditional China was a resilient and continuous one, owing in part to the continuity in the statutory codes."[78] The same warning counters the idea of Chinese empire as the reign of arbitrary (irrational) justice (to put it in Max Weber's terms), there administered by scholar-officials, solely educated in the study of Confucian classics, who took care of general ethical principles, by acting in a substantial discretionary way, disregarding formal legal principles or the strict observance of legal provisions.

Once again, the long standing tradition of dynastic codes, with their voluminous, and highly elaborated body of positive law, demonstrates that the rule of "no crime, no punishment without pre-existent law" (*nullum crimen, nulla pœna sine lege*) was —at least in principle— at home in China, far earlier than elsewhere in the world.[79] In this sense, it is observed that, "The primary issue in traditional Chinese jurisprudence was the setting of punishments" and "traditional statutory codes were aimed directly at this issue, for they specified punishments for specific crimes."[80] Indeed, a distinctively Chinese characteristic of the imperial legal system, from ancient to modern times, is the meticulous precision in determining type and measure of punishments, in accordance with the nature of any single (type of) crime, as well as with regard to

zon, London, 2002. To this more general studies, may be added, for a more specific emphasis on today's Chinese legal system in transition: R. Peerenboom, "The X-Files: Past and Present Portrayals of China's Alien 'Legal System'," 2 *Washington Global Studies Law Review* 37 (2003); H. Piquet, *La Chine au carrefour des traditions juridiques*, Bruylant, Bruxelles, 2005.

77 To this regard, starting at latest with the Tang Code of 624, modeled on previous examples such as the Han code of 186 BC, up to the Great Qing Code of 1740, in its turn based on the Great Ming Code of 1397, China is certainly the country with one of the longest tradition of codified (penal) law. As G. MacCormack, *supra* note 36, at 48, puts it: "the term 'code' may be used to designate a particular branch of the law, namely the statutes (*lü*) defining offences and prescribing punishments. This is the sense generally possessed by the phrases 'the T'ang code', 'the Ming code', or 'the Ch'ing code'". In a wider sense, however, reference to Ming and Qing codes can be made considering their significance as "primary sources" of legal culture in imperial China: Yonglin Jiang, "From Ming to Quing: Social Continuity and Changes As Seen in the Law Codes," 74 *Wash.U.L.Q.* 561 (1996), at 562. And see also, for a comparative view on the history of codification in China, J.W. Head, "Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America," *Duke Journal of Comparative & International Law*, Vol. 13 (2003), 10ff.

78 J.D. Langlois, Jr., "'Living Law' in Sung and Yuan Jurisprudence," *Harvard Journal of Asiatic Studies*, Vol. 41, No. 1 (1981), at 166.

79 J. Bourgon, *supra* note 27, at 163-171, provides arguments in support of the "principle of legality" at the basis of the system of penal laws, whose "rationality" (far from any arbitrariness) was expressed in terms of definition-classification of crimes (publicity), and detailed articulation of corresponding forms (types and degrees) of punishments (predictability), such as reflected by the duty, legally established, of the magistrate that "every court decision must cite exactly the statute (*lü*) or sub-statute (*li*), under penalty of thirty stick's blows," and further expressed, through rules of interpretation, such as those concerning the use of "analogy."

80 J.D. Langlois, Jr., *supra* note 78, at 165.

family relations or social position (in terms of hierarchy of status/authority), and other personal qualifications of the subjects involved (offender/victim).[81]

It is to be acknowledged however that such formal attitude was sided by a more substantive approach in terms of provisions that somehow blurred the line between law and morality. Indeed, apart from the case of problematic interpretation of the so-called "catch-all" penal rule, providing that any "conduct which ought not to be done" had to be punished by a beating, [82] it is worth mentioning the case of the "various kinds of collective responsibility through which relatives and associates of a criminal would be punishable together."[83]

However, the high standard of formalized laws (*fa*) and punishments (*xing*), characteristic of the Legalist idea of social order, reflected also the Confucian idea of the proper correspondence of the language with the truth of the things; implying that definitions, denominations and determinations, especially when issued by state authorities, must be precise and correct, in order to let people behave properly.[84]

In practice, such a careful approach to specify, for every offense, the proper punishment, was doubled by a very rigorous sentencing process. [85] The district magistrate "was only authorized to pronounce sentences in civil or minor cases where punishment was no more severe than beating or imposing the cangue," and "had to report monthly to his superior," so that the court records of such cases could be inspected, to see whether there was "any evidence of injustice," in order to review the case, by reversing or altering the sentence.[86] In serious cases (such as involving penal servitude, exile or death penalty), the magistrate could only make sentencing recommendations or, better to say, provisional sentences, subject to retrial of the case, through an automatic (obligatory) internal review procedure, hierarchically staged, final approval (of the sentence)being given by the Board of Punishment.[87]

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81 "Punishments were meted out in accordance with one's status and the status of the victim. (…) Generally speaking, the higher the status of the victim and the lower the status of the offender, the more severe the punishment. In addition, legal codes took into consideration gender, age, and moral character in determining sentences:" R. Peerenboom, "Law and Religion in Early China," in A. Huxley, ed., *Religion, Law and Tradition: Comparative Studies in Religious Laws*, RoutledgeCourzon, London, 2002, at 100.

82 D. Bodde e C. Morris, *supra* note 42, at 178-179. See J. Ocko, "A Review of Geoffrey MacCormack, The Spirit of Traditional Chinese Law," in (1997) 42 *McGill L. J.*, 739ff., commenting from a critical position the argument put forward by MacCormack, *supra* note 36, at 61, according to which, at least under the Qing dynasty, the rule appears not to have been used "as a blanket instrument for the enforcement of moral conduct as such." Moreover J. Bourgon, *supra* note 27, at 166, while stating that such provision limited the principle of legality, argues that it was not sufficient to nullify such principle.

83 P. Goldin, *supra* note 47, at 11.

84 "When punishments are not properly awarded, the people do not know how to move hand or foot," *The Analects of Confucius*, 13. 3., trans. by J. Legge, *Confucian Analects, The Great Learning, and The Doctrine of the Mean*, New York, Dover Books, 1971 (1st ed. 1893), hereinafter *Confucian Analects*. See also *infra*, para 6.3.

85 Ch'ü T'ung-Tsu, *supra* note 48, at 125-126, "All sentences had to accord with an existing law or statute. (…) The penalty for violation of this regulation was the same as for inflicting punishment that was either inadequate or excessive for the crime, whether with intent or by error. (…) In determining a sentence, a magistrate could refer to only one particular law or statute applicable to that case."

86 *Ibid.*, at 117.

87 *Ibid.*, at 117-118, where such procedure ("to retry and pass on") is thus described: once "a case had been retried and approved by the higher official, it was in turn referred to a still higher authority," and again reported to the Board of Punishment for final approval of any sentence "more serious than

Quite obviously, when looking at the working of the Chinese imperial system of administration of justice, one is immediately attracted by its extreme harshness, purposively direct to impress and frighten whoever was due to appear in court. [88] Typically, at the *yamen*'s entrance were displayed, there suspended, the instruments of punishment. [89] In this respect, the legal process was strictly associated and identified with state's authority (and the use of forceful manners), so that participants in the process had to literally "kneel" before the magistrate. [90] Yet, everything had to proceed in accord with the law and publicly,[91] subject moreover to formal checks, including detailed regulations as to types, degrees and instruments of torture (allowed on suspects and witnesses, to extract their confessions and admissions). [92] A principal check, operated through the already mentioned "obligatory review procedure" on provisional sentences, issued by the local magistrate in case of more serious punishments (more severe than beating), which had to be sent automatically to higher level officials, in order to be reviewed (by way of a retrial of the case).[93] In addition, an appellate procedure was also admitted, "through which an individual could protest a decision to higher authorities."[94] Further checks, of a more disciplinary nature, were exercised through inspections by higher officials, "to uncover and report all wrongdoing committed by officials beneath them," or by officials (circuit intendants) empowered "to conduct regular annual reviews of all cases heard at the

beating." See also W.P. Alford, *supra* note 25, at 1205, stating that district magistrates "were prohibited by law… from passing more than provisional sentences in cases involving crimes carrying punishments heavier than bambooing," and, at 1231, recalling the formal legal duty of higher officials (at prefectural, provincial and capital level) "to reinvestigate and retry cases coming from lower level courts."

88 R.H. van Gulik, *supra* note 74, at 52, noting that "court room and court procedure were primarily intended to impress everyone with the majesty of the law, and with the dreadful consequences of becoming involved with it," vividly describes the scene in such terms: "When the court was in session the magistrate, decked out with full regalia of his office, sat behind a high bench covered with red cloth and standing on an elevated dais; he was a forbidding figure, throning high above all that happened in the court below."

89 J. Bourgon, *supra* note 27, at 163.

90 According to the description made by Ch'ü T'ung-Tsu, *supra* note 48, at 125: "All persons involved in a case were required to kneel on the ground: the plaintiff and the defendant on either side and the witness in the middle." See moreover R.H. van Gulik, *supra* note 74, at 55, contrasting the image of the magistrate "supported by all the pomp and circumstances of his office" with a court procedure that "placed everyone who appeared before him in a most disadvantageous and humiliating position."

91 "All cases except those of high treason were tried in public, from the preliminary hearings till the pronouncement of the sentence": again R.H. van Gulik, at 74, further stating that "public opinion constituted one of the main checks on judicial abuses," by virtue of an ancient principle according to which "judges should act in concert with public opinion."

92 Ch'ü T'ung-Tsu, *supra* note 48, at 125, "All instruments of torture had to accord with standard sizes and forms and they had to be examined and branded by the superior *yamen*. Officials were prohibited from making unlawful instruments of torture." Yet according to R.H. van Gulik, *supra* note 74, at 55: "Bamboo and whips were… used freely during the interrogation in order to urge an accused to confess, and further any time the accused, accuser or one of the witnesses said or did something that displeased the judge." Recourse to beatings and other tortures in court was connected to the fact that "no criminal could be convicted unless he had admitted his guilty" (*ibid.*, at 56). Although it seems that there was no formal legal rule requiring this accomplishment, however, as noted by W.P. Alford, *supra* note 25, at 1205, "proper judicial practice mandated that a suspect acknowledge his guilty before final judgment could be rendered."

93 See again W.P. Alford, *supra* note 25, at 1227.

94 *Ibid.*, at 1228.

district level."[95] Finally, there was the supervisory power —to check abuses at large committed by officials— entrusted, at local (provincial) and central (capital) level, with the so-called "Censorate," as an institutionalized executive body, called to serve as the "ears and eyes" of the emperor for the systematic surveillance over all government operations.[96]

Apart from the distinction between crimes and administrative mistakes or shortcomings, and identifiable with the distinction between heavy and light offenses, in its turn regarding also the distinction between "those light offenses which were mere administrative shortcomings and those which retained some taint of criminal character," what matters here is to emphasize that district magistrates, as well as higher officials at local level, were all liable before the law,[97] and subject to a variety of disciplinary measures (ranging from demotion to dismissal), eventually followed, after removal from office, by criminal charges and punishments.[98] 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, as mentioned above— it also affected the supreme ruler, who stood over the law, but not without bounds, even of a somewhat legal flavor, to his sovereign will.[99]

Very far then, from the idea of a lawless country, where justice was arbitrarily administered, the Middle Kingdom made clearly extensive use of (written) laws and regulations that state officials were called upon to apply, in citing them, especially when giving sentences in criminal cases. This is true with regard to more ancient times,[100] and much more so to late imperial

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95 *Ibid.*

96 C.O. Hucker, *The Censorial System of Ming China*, Stanford University Press, Stanford, 1966, regarding the Ming period (from late 14th to middle 17th century), when the censorial system reached its apex, not surprisingly considering the extent to which autocracy was developed in that period, mentions (at 9) three organizational levels of a hierarchically structured system: the lower (local) level, with "Provincial Surveillance Offices" (one in each province), an intermediate level, centrally based, with various offices of scrutiny, and the higher level, placed as well in the capital, with a "Chief Surveillance Office or Censorate proper," having the broadest scope of oversight activities, supported by investigation and prosecution powers, in addition to so-called "remonstrance" functions, on which see text accompanying notes 258 to 260 below.

97 As noted by R.H. van Gulik, *supra* note 74, at 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."

98 Again T.A. Metzger, *supra* note 5, at 273-297, with regard in particular to Qing special legislation on disciplinary matters (*Ch'u-fen tse-li* [*Chufenzeli*]: "Regulations on Administrative Punishment"); and see also Ch'ü T'ung-Tsu, *supra* note 48, at 128-129.

99 P.-É. Will, "Le contrôle de l'excès de poivoir sous la dynastie des Ming," in M. Delmas-Marty e P.-É. Will, *supra* note 27, at 126-129; and see again T.A. Metzger, *supra* note 5, at 160-162, and 398. In the light of the political and moral implications of the exercise of the ruler's power, it has been observed, by Wei-Ming Tu, *supra* note 64, at 131, "The authority of the ruler over the minister informed by righteousness, far from being absolute, is, at its best, a respect for hierarchy for the sake of political stability and bureaucratic efficiency" (and see further text accompanying note 258 below).

100 As B. E. McKnight, *supra* note 45, at 15, in his "Introduction" to *Ch'ing-ming Chi*, stating that this collection of actual judicial cases, including cases dating from the early times of the Song dynasty (960-1279 A. D.), is an evidence of the fact that "officials cite a great number of laws. Sometimes they specify that they are citing a statute or an or-

times, when the magistrate's duty —in determining a sentence— to refer to only the one particular law or statute applicable to the case (as already mentioned),[101] had to face, in Qing dynasty, a massive body of laws composed of quite a number of relevant (more than four hundred) penal statutes, "supplemented by over 1000 substatutes."[102] Additionally, in more serious criminal cases (such as homicide, robbery and theft) the magistrate was personally responsible for resolving them within strict deadlines established by law. Thus, in case of failure to apprehend the criminal or to complete the trial within prescribed time limits, the magistrate was liable to substantial administrative sanctions (such as, suspension without pay, forfeiture of one/two years' nominal salary, demotion and, eventually, dismissal).[103]

Indeed, a revisionist viewpoint (as opposed to the more conventional view of the traditional Chinese idea of law and legal (fundamentally criminal) process as "an instrument of state control little concerned with individual justice"), has been put forward, with regard to late imperial China, advancing (albeit tentatively) a conclusion in these terms: "the imperial criminal justice process encompassed a broad range of sophisticated procedural and administrative measures designed to convict the guilty and acquit the innocent, even at the expense of magistrates and other members of Confucian officialdom."[104]

### 4.3.2 Legal experts "behind the curtain" and a "secret" legal profession

This potential re-appraisal of the independent role of law in imperial China, that law was more than an instrument of government or support of moral education, in accordance with the bureaucratic/paternalistic model stated above, must be considered within the general context implied by the functioning of a public administration —including judicial affairs— held in the hands of "true gentlemen," that is, scholar-officials wearing the Confucian clothing of superior men of learning. These meno typically lacked any professional legal expertise.[105]

A couple of critical remarks must be made about this point. The first is concerns precisely the way in which local magistrates discharged their judicial duties. The importance of private secretaries, directly employed by local officials, in their capacity of legal advisors, known as *muyou* (literally "friends in the tent or behind the curtain"),[106] must be acknowledged. In late

dinance. More often they simply say, 'the law says'."

101 See text accompanying note 79 and note 85 above.

102 W.P. Alford, *supra* note 25, at 1230 (footnote):

103 Ch'ü T'ung-Tsu, *supra* note 48, at 119-124.

104 W.P. Alford, *supra* note 25, at 1242, drawing such a conclusion from a story of miscarriage of justice (in the case of Yang Nai-wu and Hsiao-pai-ts'ai, 1873-1877), which happily ended with the acquittal of the innocents and the severe punishment of local officials for their responsabilities in mismanaging the case (at 1222-1225). But see further on, at 1244-1245, questioning whether the apparatus of formal procedural and administrative checks were not directed instead to "circumscribe the discretion of district magistrates and their provincial superiors… with the ultimate goal of consolidating power in the hands of the central government," so that "in this light," the "concern with the attainment of individual justice might be explained as an unintended by-product of the larger effort to coalesce power centrally (…) or as a carefully chosen instrument for impressing upon the populace the legitimacy and control of central government."

105 *Ibid.*, at 1193: "Legal knowledge was neither tested on the imperial examinations to be taken by candidates for office, nor seen as particularly worthy of study by would-be scholar-officials."

106 Li Chen, *supra* note 24, at 2. Ch'ü T'ung-Tsu, *supra* note 48, at 93, explains the origin of the term (there translated with the periphrasis "friends or guests serving in a tent") "from military usage in the Han and subsequent dynasties," whereby a "scholar

imperial times, they were "the nerve center of the yamen."[107] Among a variety of private secretaries, two categories of *muyou* — in charge of criminal and fiscal matters, *xing muyou* and *qiangu muyou*[108] respectively - both of which dealt with legal and, more particularly, judicial matters— "were the most essential to local administration and enjoyed a much higher social status and received higher pay than the others."[109] The rise of private legal advisors, employed at the service of local officials, is a practice whose first developments are already apparent in the late Yuan (1279-1368) and early Ming (1368-1644) (although resisted by a legislation (of 1390s) which severely punished them as "immoral trouble-makers"), became a widespread phenomenon under the Qing (1644-1911).[110] Indeed, being recruited from the ranks of literati, most officials had no legal knowledge when preparing examinations for civil service, and, once in office they were unwilling, or unable, to gain any such knowledge. [111] Moreover, they were held personally responsible, as we saw before,[112] for the exercise of their administrative and judicial duties. It was therefore quite natural that officials would hire private legal advisors to assist them in fulfilling —in conformity to the law— such duties. It must be added, that these advisors, in turn, came from the ranks of the Confucian elite and were men of learning. They could have been literati who failed the civil exams or failed to obtain an official position. In order to become legal experts, they had to go through a period of study and apprenticeship, lasting from two to four years (sometimes even longer), "including both book learning and practical training," which took place at the *yamen*, under the supervision of a master/teacher who was working there.[113] The apprentices began by studying statutes and substatutes, with the help of private commentaries on the Qing Code, and then continued on to reading collections of imperial edicts and regulations, and books of forensic literature. Finally, he was trained on how to handle judicial affairs in practice.[114] The end result of such a process was the development of a specialized/technical knowledge, which was intended to create a body of professionals skilled in the practice of law. They then developed, as "de facto administrators of law in the local

who served as a secretary or staff member of a general often had his office in a tent" (footnote).

107 Ch'ü T'ung-Tsu, *supra* note 48, at 195: "The popular notion that Chinese bureaucracy was run by 'amateurs' should be somewhat offset by the 'expertness' of the magistrate's private secretaries, whose professional qualifications and experience were well recognized."

108 As pointed out by Li Chen, *supra* note 24, at 3: "*qiangu muyou* helped local officials manage not just fiscal matters but also legal disputes over land, property, contracts, and/or debts while *xingming muyou* dealt with most other types of legal matters, including lawsuits over marriage and inheritance, and more serious crimes."

109 *Ibid.*, at 3.

110 *Ibid.*, at 5-10, reminding however, at 9, of the serious concerns, expressed from the Qing court at the beginning of the dynasty, about maladministration at the local level, because "less competent local officials 'completely relied upon private advisors to write official documents and judicial reports'."

111 *Ibid.*, at 6; and see also Ch'ü T'ung-Tsu, *supra* note 48, at 127.

112 See text accompanying notes 97-98 above.

113 Li Chen, *supra* note 24, the paragraph on "Confucian Literati as Jurists: Legal Training," 10ff.

114 *Ibid.*, at 14: "Along with theoretical study, another essential component of the training was to learn how to handle judicial and other administrative matters in practice. Under the teacher's supervision, the student read through complex old cases and then learned how to comment on the plaints or complaints (*chengci*) or write judgments (*pan*)."

yamen,"[115] their own understanding of the standards and principle elements(training, competence, ethics and responsibilities) which defined and characterized their professional identity.

Thus the practice of local (judicial) administration, formally entrusted to the hands of scholar-officials, was left informally in the hands of their legal advisors; clear evidence, once again, of the structural ambivalence at the basis of the Chinese traditional legal system. Furthermore, legal advisors and, in general the whole category of private secretaries (*muyou*), although they "were not government officials," were yet "considered the equals of the officials." Quite significantly, or rather emblematically, they were, however, intended to stay —by their very name— "behind the curtain" of the official system, which was based on the traditional Confucian ideal-type of "superior man;" one oriented to esteem morality (as expressed through *li*, the rules of moral propriety) as a higher standard than legality (not to separate the latter from the former however), and therefore better for educating people and maintaining social harmony (order). In this sense, it is remarkable that the liability for administrative mistakes and shortcomings "lay not with private secretaries, who gave advice and might even play a decisive role in making decisions, but with the magistrate,"[116] and moreover, that the "experts and the officials remained two distinct groups throughout the [Qing] dynasty, with no possibility of interchange."[117]

Indeed, the emphasis put on legal expertise, in terms of professional identity internal to the ranks of Chinese literati (as "literati-turned-jurists")[118], compared to —but distinct from— the amateur-style figure of the scholar-official, demonstrates that this practical learning was a useful and necessary means of reinforcing the state's monopoly on the study and practice of law. This was so precisely because of its inner supporting function of both the authority and prestige of the imperial bureaucracy; which could be upheld, in this fashion, from the inside, without being challenged from outside.

This brings up a second critical remark on the potential re-appraisal of the independent role of law within the traditional Chi-

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115 *Ibid.*, at 26.

116 Ch'ü T'ung-Tsu, *supra* note 48, at 128.

117 *Ibid.*, at 115. The rather "obscure" position of the legal experts forming the ranks of private secretaries is also acknowledged by P.-É. Will, "Developing Forensic Knowledge through Cases in the Qing Dynasty," in C. Furth, J. T. Zeitlin, and Pingchen Hsiung, eds., *supra* note 55, 62ff., who, in the words of C. Furth, "Introduction," *ibid.*, at 21, further points out the existence of a vast literature of legal textbooks (manuals and anthologies of cases) "compiled specifically by and for private secretaries," showing their "technical sophistication of specialist knowledge (…) as well as the persistent social distinctions between such specialist and ranking magistrates."

118 Li Chen, *supra* note 24, under the paragraph "Confucian Literati as Jurists: Legal Training," 10ff. However, in dealing further with the way in which "these literati-turned-legal specialists articulated their understanding (…) of the standards and principles of their professional training, competence, practice, ethics, and responsibilities," so-called "the Way of Muyou" (*mudao*), one is reminded of the fact that "they shared much of their judicial philosophy with officials" (at 25), and referred to a cultural background of mentality, dominated by philosophical/religious ideas on the intimate interrelation between the spheres of man and nature, linked throughout "*qui*" ("a kind of vital energy that constituted all the phenomena and flowed through the whole universe including human bodies"), at the basis of an ethical prevailing attitude of private advisors (*muyou*), reflected in the term "*muqui*… meaning that a legal advisor or judicial administrator should uphold law and justice while maintaining his virtue and mora.l integrity regardless of the circumstances," so as to conclude that "legal expertise… was far from enough to make someone a respectable advisor if he lacked *muqi* or was deficient in the Way of Muyou" (at 26).

nese landscape. According to a general categorization of legal experts at work in imperial China, three distinct groups can therefore be distinguished and characterized. At the central level of the bureaucracy, within the Board (or Ministry) of Punishments (*xingbu*) there were the officials (literati) charged with the publication of official commentaries of code provisions, and with examining records of cases decided at local level. In the territories, as has just been explained, were the local magistrates, who, in order to carry on the variety of their administrative functions (including judicial activities), had to engage experts: among them, "legal experts" were the most important, being called to assist the magistrate in the difficult task of classifying crimes, on the basis of witness statements and other recorded evidences, in accordance with code provisions and established punishments. Finally, there were the "private experts," engaged, for the most part, by illiterate people to write, in their name, complaints (accusations or rebuttals to accusations) to be submitted the magistrate. [119] These last, the private legal experts, practiced in disguised ways, indeed "in secret," because of the illegal nature of their practice of the legal profession; at least in principle, such activity was prescribed and punished as a "crime." [120] This characteristic could be taken as evidence of the "anonymous" character of Chinese law, as a tradition of "law without lawyers"[121] although, in practice, there were persons —just not professionally trained lawyers— who were experienced in legal affairs, and known by the unflattering name of "litigation master" (*songshi*), or by other, even more unpleasant epithets, such as "litigation hooligan or trickster" (*songgun*).[122]

To be a master of litigation was to be a master of an activity —litigation (*song*)— "disdained in classical and official literature from antiquity to the People's Republic," The official disapproval and repression of the activity of these litigation specialists included a prohibition on publication of "all books concerning the practice of litigation"), [123] and may, perhaps, be explained when considered against the "harmony-inducing nature of the Chinese classical tradition," which "throughout the centuries has stressed the importance of social harmony, repressing 'selfish' desires, and avoiding unnecessary lawsuits." [124] In addition, however, and in a complementary way to the Confucian ideology-inspired "indisputably hostile to the notion of *song*" [125] official opinion, it must also beconsidered against the legacy of ancient legalism. [126] This legacy inspired the bureaucratic nature of the legal process, in terms of state monopoly of the law, as administered by state officials sitting as local magistrates, who carried out their judicial functions "as one of many administrative tasks," with the assistance of their own legal staff, so that "any legal expertise was in the 'court' and decisions were made

119 Cf. J. Bourgon, "L'émergence d'une communauté de juristes à la fin de l'Empire (1740-1930)," in M. Delmas-Marty e P.-É. Will, *supra* note 27, at 179, 181ff.

120 M. Macauley, *supra* note 31, at 15, 18ff.

121 B. C. Gho, *Law Without Lawyers, Justice Without Courts: On Traditional Chinese Mediation*, Aldershot (UK), Ashgate Publishing Ltd., 2002 (specially Chap. 2, on "Chinese Legal Thinking," and Chap. 4, on "Justice Without Courts").

122 M. Macauley, *supra* note 31, at 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."

123 *Ibid.*, at 42.

124 *Ibid.*, at 22.

125 *Ibid.*

126 D. Bodde e C. Morris, *supra* note 42, at 23ff.

on the basis of their investigation and understanding of the facts and law."[127]

### 4.3.3 Law and religion

It is thus necessary to re-consider the notion of law tradition in the much wider (and vaguer) terms related to a series of intertwined aspects including, in particular, the deep bond of law with religious/superstitious beliefs, cosmological views, and their normative implications. In short, it is necessary to consider the general question of the relationship between "religion and law" or in other words, of "religion as tradition of law," essentially seen from the viewpoint, on the one hand, of the divine/secular origin of the law and, on the other, of the influences of religious beliefs on state power and the operation of the legal system.[128] Once again, what is most apparent is the ambivalence of the matter, esspecially when considered against an atmosphere which was predominantly secular. Although characterized by both Confucian and Legalist schools of thought, which excluded any divine origin of the (written) law,[129] and the related idea that law imposes religious values (or dogmas) on society, there was, at the same time in this society, a focus on ritual practices, "bringing the actions of government into conformity with Heaven and nature."[130] Regardless of the character of such ritual practices, what matters is, of course, their influence on Chinese traditional society and its institutions.[131] In this respect, it is worth noting that "many literati not only believed in the unseen world and the inevitability of divine retribution, but also proved willing to perform judicial rituals [such as oaths, chicken beheadings, underworld indictments and so on] in order to legitimate their causes or resolve question of innocence or guilt."[132]

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[127] W.C. Jones, "Review of 'Law in Imperial China' By Derk Bodde & Clarence Morris, and of 'The Criminal Process in the People's Republic of China, 1949-1963' By Jerome A. Cohen," *Wash. U.L.Q.* 247 (1969), at 250.

[128] G. Barzilai, ed., *Law and Religion* (The International Library of Essays in Law and Society), Ashgate, Adershot (England) and Burlington (USA), 2007, in particular Ch. 9, reproducing L. T. Lee and W. W. Lai, "The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist," *The Hastings Law Journal* 29.6 (1978), 1308ff.

[129] On the question of the religious (divine) or secular origin of Chinese law, see G. MacCormack, "Mythology and the Origin of Law in Early Chinese Thought," in *Journal of Asian Legal History*, Vol. 1, 2001, concluding that "the ascription of law to Dao is not so much a statement about 'origin' or even 'creation' as an *affirmation of law's status as part of the eternally given order of things*," and thus emphasizing, at 22, the peculiar nature of Chinese legal culture, in that "the incorporation of law in myths that attribute the origin of all phenomena to the operation of an impersonal Dao still *constitutes China special case in comparison to other cultures that favor the will of a divine creator*" (emphases added).

[130] M.E. Lewis, *The Early Chinese Empire: Qin and Han*, (in the "History of Imperial China," ed. by T. Brook, six-volume series) Cambridge, Mass., and London, Belknap Press of Harvard University Press, at 231. See also D. Twitchett, "Law and Religion in East Asia," in M. Eliade, ed., *Encyclopedia of Religion*, New York, Macmillan, 1987, Vol. 8, at 470 ("The exercise of power in China took place in a setting of complex symbols, rituals, and observances suffused with awe, all of which were prescribed by codified legislation and in the context of deeply held religious beliefs.")

[131] Xin Ren, *supra* note 9, at 28, thus observes, with regard to daily life, that "superstitious rituals such as family or kin ancestor worship and festivals of door and kitchen goods (…) reflected no more than a wish for a blessing for good health, prosperity, harmony, and peace;" adding that Chinese people believed and feared that human errors and misdeeds, being violations of "the Way — the cosmic order of Heaven," would have resulted, sooner or later, in dire consequences "such as shortened life due to a natural disaster or illness."

[132] P.R. Katz, *Divine Justice. Religion and the development of Chinese legal culture*, London, Routledge, 2009, at 20, who further emphasizes, at 21, that: "a wealth of evidence indicates that officials would not hesitate to rely on dreams and other forms of divine intervention to solve difficult cases, right instances of injustice, capture bandits/thieves…"; then argu-

The legalistic features of the Chinese tradition of penal statutory codes, as before mentioned, can therefore also be viewed in the context of superstitious/religious influences concerning the practice of law. The basic assumption was that cosmic balance, once affected by violations of social order,[133] required redressing for fear of more harmful consequences (such as natural disasters or unusual phenomena).[134] This could be achieved by retribution through proper (corporeal) punishments, whose execution, in case of death penalties, could only occur at certain periods of the year, depending on the seasonal cycles.[135] In the same context, 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." [136] Mention may be made of a leading Confucian scholar of the 19th century, who maintained that "rituals are the essence of punishments."[137] Reference should also be

ing, in more general terms, that "judicial rituals" (of a nature clearly similar to medieval Western ordeals) reflected what is called the "legalistic spirit" of the idea of the underworld, characterizing the mutual interaction (reverberation) between law and religion in China (traditional China as well nowadays Taiwan): see there 47ff.

133 D. Bodde e C. Morris, *supra* note 42, at 4, "a disturbance of the social order really meant, in Chinese thinking, a violation of the total cosmic order because, according to the Chinese world-view, the spheres of man and nature were inextricably interwoven to form an unbroken continuum."

134 A. F. P. Hulsewé, "Ch'in and Han Law," in D. Twitchett and M. Loewe, eds., The Cambridge History of China, Vol. I: *The Ch'in and Han Empires, 221B.C.-A.D. 220*, Cambridge, Cambridge University Press, 1986, at 522. See also C. Hawes, "Reinterpreting Law in the Song: Zheng Ke's Commentary to the 'Magic Mirror for Deciding Cases'" paper available at: *http://kuscholarworks.ku.edu/dspace/bitstream/1808/3846/1/hawes.pdf*, dealing with a casebook (*Magic Mirror for Deciding Cases*) containing a commentary (compiled by Zheng Ke, an early Southern Song [1127-1279] legal official) where evidence is given of careful attention to balancing the punishments with crimes, so as to "prevent the social unrest and natural disasters that follow from injustice left unchecked". In particular, emphasis is put on the fact that the deceased victims of crimes had to obtain redress themselves, stating moreover that redress should have come "from punishing the true wrongdoer with a sentence proportional to the crime," while the punishment of an innocent person "will only add another resentful victim to create cosmic and social disturbances," at 66, and concluding, at 68, according to "some traditional Chinese thinkers," that: "the central purpose of law and adjudication was not controlling the people through punishments, but rather (…) bringing about social and cosmic harmony."

135 D. Bodde e C. Morris, *supra* note 42, at 182, "to restore the original state of cosmic balance (…) a punishment precisely corresponding to the original violation must be exacted in return." See also J. Ocko, *supra* note 82, at 748, arguing, about the role of punishment in traditional Chinese law, that "the reason Ch'ing officials attended so carefully to the fine-tuning of punishments was because at some level they all accepted the notion that proper punishing of offenses helped maintain cosmic harmony," and further observing that "the timing of executions were usually explicitly linked to cosmic harmony." As stated, *e.g.*, by M.E. Lewis, *supra* note 130, at 231, in case of death sentences, "executions could legally take place only in autumn and winter, the seasons of decay and death."

136 Xin Ren, *supra* note 9, at 38. As further observed, *ibid.*, the highly symbolic force, so to speak, of corporeal punishments, such as mutilations, tattooing and others, also served the social purpose "to shun offenders and make them feel ashamed of their crimes."

137 "If one lets 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 B. A. Elman, *Classicism, Politics, and Kinship: The Ch'ang-chou School of New Text Confucianism in Late Imperial China*, Berkeley, University of Cali-

made to the ritualistic character of the practice (supported by means of torture) of aquiring admissions of guilt (often obtained by means of torture) before conviction.[138]
Looking at Chinese legal tradition from this wider point of view, the linkage between different but complementary normative sources becomes even more apparent, where law, strictly speaking (*fa*), is only one of a variety of social norms, including: the religious/philosophical concept of *dao* (or *tao*) as the foundational principle of the natural order of the universe, moral precepts (*de*), civic propriety rules (*li*), and customary rules (*xisu*).[139] This results in a multidimensional normative system, "which conventionally may be perceived as secular but nonetheless embodies strong effects of religions as traditions of law."[140] Emphasis may be put on one component, according to the viewpoint involved, whether religious, moral or strictly legal, but with the whole set of various norms all together being necessary to maintain social order. It may be observed, according to a Confucian view, that such "various norms form a hierarchy with the Way at the top, the law at the bottom, and others in between."[141]

To say it a different way, the imperial codified law - in Western terms "positive law" - was made basically dependent in traditional China on ethics and religious beliefs - generally speaking - embedded in the *dao* (the cosmic order of both natural and social facts, alike), and reflected in rites (*li*) and customs, that is, in those social norms whose validity derived from their (perceived) original (ancestral) conformity with nature, instead of being an artificial creation of the will of rulers "who wish by means of it to generate a political power."[142]
At this point, it is also important to remember the foundational principle of the legitimacy of the sovereign power personified by the king (emperor). Indeed, this theory (which over time developed into the doctrine of the "Mandate of Heaven") reflects a traditional cosmology which places the emperor (sovereign) "at the pivot between the cosmic natural order and the human social order." This results in a sacral characterization of the imperial figure and role, whose behavior "particularly his observance of proper rituals and ceremonies — and by extension the ethical conduct of the officials of his regime - ensured harmony between and within the natural and social orders." This was the basis of the belief that quite relevant consequences could derive out of the imperial behavior: "If the emperor's character was upright, if he performed the proper rites, and if his administration was just, then peace and order would prevail. (…) By the same token, deficiencies of the emperor and his government (…) could be expected to bring disorder in the natural and social

fornia Press, 1990, at 259 (with reference to Liu Feng-lu, whose biographical and intellectual profile is outlined there at 214 ff.).

138 Xin Ren, *supra* note 9, at 38, "Obtaining an offender's admission of guilt before conviction was 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."

139 Chang Wejen, in the "Forward" to K. Turner, ed., *The Limits of the Rule of Law in China*, Seattle, University of Washington Press, 1999, at viii, there mentioning, other than *fa* (law, strictly speaking), *dao* (the Way), *de* (moral precepts), *li* (rites) and *xisu* (customs).

140 G. Barzilai, *supra* note 128, at xviii, commenting on the essay of Lee and Lai, *supra* same note.

141 Chang Wejen, *supra* note 139, at viii, further adding: "When a lower norm was unclear or inadequate, it was to be interpreted or supplemented in accordance with the higher norms, and when a conflict existed between a higher and a lower norm, the higher one prevailed."

142 D. Bodde e C. Morris, *supra* note 42, at 383.

worlds."[143] In light of this moralistic "Confucian cosmology," consider the argument that places more emphasis on the religious component, reflecting the transcendental as much as spiritual foundation of the social order, in its balanced connection with the cosmic one as opposed to the common view of the dominant secular character of Chinese traditional law as lacking a divine origin (which allegedly prevented the emergence of a "sacrosanct" idea of law), and which, as such, was subject to the whims of the ruler.[144] The point has been made, with regard, in particular, to the Great Code (1397) of the Ming dynasty (1368-1644) (one of the most important in Chinese history, and which was a model to the Qing code (1740) which followed it), on the basis of a larger notion of "religion," by referring to a "superhuman force" that "is invoked by means of certain ritual patterns to achieve, or prevent, transformations in humans and their environment."[145] It has been thus observed that by producing this Code, at the request of the first Ming emperor, (who was quite anxious to show that his dynasty did, in fact, possess the Mandate of Heaven), the early Ming ruling elite endowed it with "religious meaning." More precisely: "They based The Great Ming Code on *tianli* (Heavenly principle, i.e., the ultimate origin and fundamental pattern of the cosmos) and *renqing* (human sentiment, i.e., human compassion based on Heavenly principle). Thus they considered the law code to be a moral textbook, which 'all under the Heaven' (*tianxia*) should study in order to be transformed and exist harmoniously within the cosmic order. This goal is illustrated by three groups of regulations in The Great Ming Code: rituals for communicating with the world of spirits (…); norms for structuring and purifying the human realm; and rules for rectifying the ruling elite's behavior in mediating between the world of spirits and the human realm."[146] In so doing, the early Ming ruling class "did not see law merely as a tool for behavioral control. More significantly, they viewed law as a concrete embodiment of the cosmic order."[147]

Indeed, the issue at stake, from this point of view, is precisely the extent to which political (state) power, though "legally" founded, could/should stay independent of other normative sources, or,in other words, the extent to which such "religious" (moralistic, superstitious or simply traditionalist) ideas constituted a counterweight to arbitrary imperial power. It is therefore true that in traditional China, "at some

[143] H.L. Miller, "The Late Imperial Chinese State," in D. Shambaugh, ed., *The Modern Chinese State*, Cambridge University Press, Cambridge, 2000, at 17-18, who concludes: "In hindsight, the collapse of a dynastic house and its replacement by another could be understood and so legitimated in terms of this moralistic cosmology, posing the cyclical lapse of the former dynasty's degenerate last emperors' neglect of the proper rites and ceremonies and their restoration by the upright founders of a new dynastic regime." See also text accompanying note 255 below.

[144] R. Peerenboom, *supra* note 81, at 85, observing that: "In traditions where law is the product of a divine lawmaker or grounded in a transcendent religious order, law is (allegedly) sacrosanct. Lacking a divine origin, law in China was held in low esteem as a means of achieving social order, especially by Confucians."

[145] Jiang Yonglin, *The Mandate of Heaven and The Great Ming Code*, University of Washington Press, Seattle, 2011, at 17.

[146] *Ibid.*, at 4.

[147] *Ibid.*, thus concluding, at 5: "If the ruler violated the cosmic order, Heaven would send down a warning and might eventually revoke the emperor's mandate to rule. Therefore, it was the ruler's mission to follow Heavenly principle and preserve harmony both within society, and also between human beings and superhuman spirits. One way to achieve this goal was to establish law by following heavenly principle. Law, in other words, served as a cosmological instrument to transform human beings."

fundamental level, law remained tethered to moral and religious beliefs."[148] The same —needless to say— is also true, in many respects, of Western legal tradition.[149] What really seems to characterize the originality of the Chinese legal tradition, is not the abstract conceptualization of the degree of separation (independence) of the law from the rest of normative sources, but, rather, the structurally holistic integrity of a system of social control entrusted —either directly or indirectly, by way of supervision— to a culturally homogenous body of intellectuals, in their capacity as men of learning rather than to specialized experts, who formed the backbone of imperial bureaucracy and were able to handle this complex multifaceted system, on the basis of the complementariness of its normative sources, operating at various levels and in various fields of the legal process, (meaning the process of implementation of social norms, through a legally formalized process).

### 4.3.4 "Criminal" and "civil" matters

With an eye to the legal process, exemplary evidence of the dominant Confucian cultural attitude (structuring the paternalistic/moralistic character of the bureaucratic legal apparatus of imperial China), may be seen in the greater majority of cases involving no more severe punishment than beating, by the pursuit of a substantive discretionary justice. This demonstrates another major aspect of ambivalence in the traditional Chinese legal landscape, the one represented by the relationship between *criminal* and *civil* matters, which are, not by chance, characterized by a blurred line of distinction. Indeed, in imperial China, the code's approach to civil matters was in the indirect and negative way. Penal provisions prohibited violations of what was considered the proper behavior, (such as were required by the law which had its foundation in the moral principles of society), on the basic assumption that the law's goal was not the protection of individual rights, but the welfare of the whole society.[150]

The incorporation of civil matters in the general body of codified criminal law also implied that, within the framework of the administration of justice, as basically structured for investigating and punishing crimes, such matters were dealt with as "minor matters" (*xishi*), [151] in a way that combined both formal and informal elements, which, as was alluded to before,[152] relied heavily on the discretionary power of local officials. As shown in records from late imperial times (Qing), the magistrate, on receipt of the plaint, could refuse to accept it, not granting permission to proceed with the matter, i.e. for lack of documentary or other evidentiary requirements in support of the plaint (which was usually in the form of an accusation moved by one party against the other), or because he believed that the assertions (accusations) were not true. However, in other cases, "the magistrate might decide that the matter was

[148] R. Peerenboom, *supra* note 81, at 86.

[149] On religious influences in Western legal tradition see in particular H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge, Mass. & London, 1983.

[150] See Ph.C.C. Huang, "Codified Law and Magisterial Adjudication in the Qing," in K. Bernhardt and Ph.C.C. Huang, eds., *Civil Law in Qing and Republican China*, Stanford University Press, Stanford, 1994, at 145, contrasting this approach with the Western "positive principle," focused on recognition of individual rights to be protected directly by civil law rules and remedies.

[151] Ph.C.C. Huang, *supra* note 73, at 259, taking the term *xishi*, as "the nearest Qing equivalent to the notion of 'civil' litigation."

[152] See text accompanying note 73 above.

more appropriately handled by the lineage, the community, or the middleman."[153] Further, if the lawsuit went on, past this preliminary stage, with the summoning of the parties in court for inquiry and, if the matter presented some criminal implications, for investigation that might end in punishment (due also to magistrate's pressure and the rather forceful means at disposal of the court for investigative purposes), during this instruction stage, "the majority of cases were resolved by community or kin mediation, galvanized by the lawsuit."[154] It must be observed that informal settlement of the case, through mediation, required the formal approval of the magistrate, granting permission to close the case. To this effect, the plaintiff or the group of mediators (such as community or kin leaders, friends and neighbors, local notables) had to petition the court, to inform the magistrate of how the dispute was settled.[155]These petitions should also mention, for the sake of peacemaking and social harmony, that reconciliation between the parties took place ritually.[156]

When mediation, for one reason or another, failed to resolve cases arising in the sphere of private conflicts where no legal offences had been committed, the magistrate had to adjudicate such cases, and "impose a resolution that might or might not involve a punishment which he decided on his own initiative."[157] In this sense, it has been observed that, while "criminal cases involving heavy punishments (…) were systematically reviewed by the upper echelons, even the emperor in some cases," with an aim to pursue "a perfect and unambiguous fit between the crime and the punishment, as prescribed in the relevant statutes of the Penal Code," private disputes — "that materialized in the form of lawsuits, i.e. accusations (*gao*) lodged with the magistrates"— stayed out of the strictness of the state penal law and the related legal process.[158] Indeed, certain

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153 *Ibid.*, at 258.

154 *Ibid.*, at 265, thus explaining the point, at 266: "More commonly, the filing of a plaint intensified the efforts of community or kin mediators to work for an out-of.-court resolution of the dispute. A court summons only increased the pressures, especially when accompanied by some strong comment from the magistrate." And further, at 273: "The act of filing a plaint inevitably brought the formal system into the ongoing process of informal negotiations toward a settlement. (…) The threat of a court session alone could induce disputants to settle their quarrel on their own." All the more so, that "when magistrates expressed their preliminary opinions on plaints, counterplaints, and petitions," such preliminary opinions, far from being proper legal statements, conveyed to the parties the magis- trates' concerns for moral issues and common sense aspects involved in the matter, showing "dis- pleasure," "suspicion," or "predisposition" in favor of a certain solution: see at 275, and examples there referred, at 276-277.

155 *Ibid.*, at 266-267, notice that the magistrate could refuse to allow the petition, for instance in cases involving serious injuries, that required the intervention of the court to adjudicate the matter, for its criminal implications too.

156 *Ibid.*, at 266: "Such petitions usually mentioned that the two parties had observed the appropriate ritual of apologizing to one another, or that the offender had apologized or otherwise made amends, and that both parties wished to end the suit". And further, at 287: "(…) formal and informal justice operated in a relatively equal relationship. The magistrate's opinion, to be sure, carried all the weight of the official legal system. But that opinion was expressed within an ideology that deferred to informal justice, so long as that justice worked within the boundaries set by the law."

157 P.-É. Will, "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 page 2 of the document available at *http://www.college-de-france.fr/media/pierre-etienne-will/UPL7851685216927713405_Adjudicating_Grievances_1_.pdf.*

158 *Ibid.*, at 1, referring to "the sector of judicial administration that was left to the initiative of local magistrates; or in other words, whatever cases en-

legal provisions (in the form of statutes and sub-statutes) were included in the so-called "households" (*hulii*) section of the code, dealing with matters such as family, marriage, property rights in land, and debts. However, due to their rather general nature and to the great variety of specific cases involved, the fact that such cases were left entirely to the magistrates' decisions, once mediation/arbitration had not been successful, brings up the question about "the sources of those decisions, which might or might not involve a punishment such as a beating or the cangue."[159] In addition to "the body of internal rules adopted by the myriad self-governed organizations that structured Chinese society (be it lineages, professional organizations, village covenants, secret societies, or whatever)," suitable of being used also by magistrates as local customs, and together with "the general principles formulated in the code," there were also "more flexible and subjective notions," such as "feelings" (*qing*), "reason" (*li*), or "the observance of certain rites."[160]

On the basis of this flexible (and rather vague) understanding of civil affairs,[161] the "strongly paternalistic nature of local government in imperial China," [162] shown through the attitude taken by magistrates in dealing with such "minor affairs;" can be appreciated. This denominated in contrast, of course, to more serious criminal affairs, but with a link to 'local' communities, in the sense also of "local affairs" which were not required to be reported to the central government, unlike major crimes. It is worth noticing here, that the great amount of civil cases handled by magistrates (even "hundreds of complaints on a court day"), while appearing contrary to the common view of the reluctance (or fear) in traditional China to bring disputes to courts, reflected however, the idea of imperial power close to people through local officials, and within reach of those who looked at them as "the ultimate source of authority, to have their wrongs righted and their opponent punished." [163] In the absence, moreover, of a body of professional private lawyers, it is no surprise that justice in imperial China was associated mostly with public morality issues and connected educative concerns, with an aim to propagate among people approved values and appropriate behaviors.[164]

The result was an idea of justice entrusted, not to professionals, but to so-called "father/mother officials" (although they were surrounded by literati-turned-legal experts, personally hired by the magistrates to assist them behind the curtain). The main task of these "parent officials" was overall gov-

tailed no graver punishment than a beating. Of course the litigants could appeal to the higher courts if they were not satisfied with the judgment, and they appear to have done so quite often; but the magistrate's decisions were supposed to be final, and he did not have to submit them to his superiors for review."

159 *Ibid.*, at 14, footnote: "Beating (with several degrees) was one of the regular "five punishments" listed at the beginning of the Code. On the other hand inflicting the cangue for a given number of months was a "free" punishment not mentioned in the statutes, which it was up to the local officials to decide on in order to intimidate law- breakers."

160 *Ibid.*, at 2.

161 *Ibid.*, referring to "civil law" as a "very elusive notion (in the case of imperial China)."

162 *Ibid.*, at 4.

163 *Ibid.*, at 3

164 *Ibid.*, at 4, quoting from Chang Wejen, *Administration of Punishments in Late Imperial China* (draft), Chap. 5, p. 20, a passage in which, "like parents deciding disputes between children," the magistrates are depicted as "parent officials" who " needed facts, not arguments, and considered arguments, most likely the work of litigation masters, liable [to complicate] the issues."

ernment, including judicial functions.[165] Indeed, being "minor" matters, but of central importance to the daily life of people, civil affairs were (allowed to be) dealt with by magistrates in a rather discretionary way, for the purpose, also, of educating people. Examples of decisions recorded in judgments' collections —*Jiangqiu gongji lu* and *Fanshan pipan*— published, respectively, in the early and late 19th century,[166] are remarkable evidences of this prevailing cultural approach among literati in the discharge of their official duties. An approach clearly influenced by Confucian ethics, according to which, apart from the rhetoric of lawsuits (seen as "bad things"), the main focus is on the idea that law plays only a complementary role in structuring and maintaining social order. In this sense, the "perfect example" of a civil case was the one recorded by the *Fanshan pipan* collection, in which "the magistrate restores order (…) and inflicts a punishment of his own devising to the main culprit," without mentioning statutes and other legal rules or local customs, with a judgment based simply "on moral considerations."[167]

However, it should not be overlooked that in the majority of cases pending before the magistrate (about everyday disputes and transgressions), the goal of justice was to "arrive at a fair verdict by keeping in mind the sometimes competing claims of 'principle' or 'reason' (*li*), 'sentiment' (*qing*) and 'law' (*fa*)"[168] in a context characterized by a fundamental attitude (not so much of "Confucian moralism overriding positive law," but of balancing and integrating law with moral principles). "Justice" then, was inclined to follow Confucian teachings on "the learning of the Way," and sentiment, or feelings, made of "both the emotional and ethical components of human relationships," on the basic assumption that such sources, by and large, were acknowledged by Chinese culture and society as references having a legitimate normative value in (the legal reasoning for) adjudicating cases.[169]

### 4.4 Entering China from the "back door" of the law

On the whole, when a wider view of legal tradition as a time-embedded idea of law (what is law, who makes it and what is for) is considered, it may be observed that Chinese legal history fits this view quite well. Law does not stand alone, as something complete and defined in itself. It must be investigated within the broader context of culture-specific characteristics

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165 *Ibid.*, at 19, concluding that: "arbitrating business or family disputes, defeating behavior that was seen as antisocial even though it was not technically criminal, trying to prevent such malfunction by pronouncing judgments that were also admonitions directed at the population at large, carefully allocating punishments and sanctions so as to discourage disruptive conduct, intimidate lawbreakers, and maintain a modicum of social harmony at the same time—all of this was at the foundation of "good government" and made up the very texture of state-society relations. *"Law" in the narrow sense of the term played only a limited role* in this; *but the legal process, embodied in the never-slackening activity of busy courts, was of central importance*" (emphasis added).

166 *Ibid.*, at 4ff.

167 *Ibid.*, at 18, thus commenting the case (*Fanshan pipan*, 15/614-615) of a young widow (Mme Liu) and her sons in trouble with a man (Zhang Mingfu) who, pretending to be a relative, tried to seduce the woman and create discord in the family. The misbehavior of the man, though not a crime, yet was sanctioned with a punishment (the infliction of "innumerable blows," meaning almost a beating to death) that "was unusually harsh, and does not correspond to anything in the Code."

168 C. Furth, "Introduction", at 12, referring to Jiang Yonglin and Wu Yanhong, "Satisfying Both Sentiment and the Law: Fairness-Centered Judicial Reasoning as Seen in Late Ming Casebooks," in C. Furth, J. T. Zeitlin, and Pingchen Hsiung, eds., *supra* note 55, 31ff.

169 C. Furth, "Introduction, " *ibid.*, looking at the matter from a cultural studies point of view.

influencing it, and —as in the case of imperial China— shaping it in a way that is "so different" (as quoted earlier), from the one known in the West. This is especially true with regard to two main facts, already noted before: *a*) the lack of conceptual distinction between law and other socially relevant normative sources, such as religion, morals, and rituals (rules, habits and conventions of proper behaviour); and *b*) the state (bureaucratic) monopoly of the legal process, which is defined as an instrument of government which simultaneously supported the primacy of morals and rituals as the foundation of social order, and prevented, and even prohibited (officially) the rise of a free legal profession.

What matters here is that the Chinese conception of law, precisely because of its characteristic (and problematic) reliance on a self-contained bureaucratic structure and a self-regulatory socio-cultural context, has traditionally played a conditional and limited role. Yet this role is one of great significance, for it is the Chinese conception of law which framed the Chinese model of social order as it developed from ancient times onward. When "entering" China through the back door of its legal system - partly bureaucratic (hard) and partly latent (soft) — (leaving aside the controversial question of its qualification and classification in comparison or confrontation to Western-style legal paradigms), it is helpful to get a panoramic view of certain key aspects for understanding Chinese culture, in the interplay between formal and informal elements, and as the main ground of its being both traditional and modern, according to the above mentioned principle of correlative duality.

The modernity of Chinese "legal" tradition is demonstrated by the advanced degree of development in its system of codified law, and its flexible attitude which challenges the simplistic and rigid view of a social order made only by and through statutes, regulations and ordinances. In this regard, one of the first things to note is a mentality that is keenly aware, on the one hand, of the need to have written laws in place to govern the country (primarily in the form of criminal and administrative provisions), and yet, due to an attitude forged partly by skepticism and partly by pragmatism and ultimately the fruit of a dominant Confucian culture, this same mentality, on the other hand, diminishes and virtually debases the value of such laws. It does this to the point of theorizing, if not an outright rejection of the notion of normative order based solely, or primarily, on the law, the reduction of the same, as well as that of the idea of justice, as legally understood, in the formal (abstract) sense of uniformity and equality of all before the law. In other words, while not exactly ignoring the importance of written laws, the Chinese idea of legal (normative) order shows a marked preference for a widespread set of rules comprised of a combination of sources that we would refer to as "soft law," such as moral principles, codes of honor, rules of etiquette, conciliatory practices, etc. The preference is for a legal order that presents a substantive notion of law and justice founded upon ethical-social norms. This system was held together and justified by a religious, political, moral and pedagogical ideology, built upon a basis of refined philosophical thought and literature.[170] As an

[170] Reference is, in the whole, to the variety of texts of authority claiming to possess a comprehensive and ancient wisdom, generally called the Way, for creating social order. The resulting competition gave rise, during the Warring States period (ending with the unification of the country under the Qin dynasty), to rival traditions (the Hundred Schools of Thought), not necessarily exclusive to each other, such as: Confucianism and Legism, Daoism and Mohism, just to mention some of the most influential traditions (but not forgetting, of course, the Buddhist influences), which concurred to shaped the social, political and intellectual life of the Chi-

actual orthodoxy of good customs (*bonos mores*) supplementing and supporting both "public" and "private" powers, it operated at the level of central and peripheral state authorities, family groups, arts and professional associations, other collective bodies and village communities. It created, within traditional Chinese society, a sort of "multi-level" governance network (as we would call it today). It is for this reason, that the central importance of the political/philosophical debate is utterly clear on matters which did not become typical of the European juridical culture until modern times; such as those related to the relationship between society and State, law and society, morality and law. In this sense and against this background, it must then be acknowledged, historically speaking, that the concepts of law and justice have always existed and played an important role in the philosophical and political debates of traditional China.

## III. MODERNITY OF TRADITION

### 5. Li and Fa: two complementary paradigms of legality

To begin with, reference must be made to the two well-known cultural paradigms at the basis of the traditional Chinese idea of legal (normative) order: a) the "rule of man" (*renzhi*), essentially meaning "benevolent rulership" (*renzheng*)or, as it is also conceptualized, as the "rule of virtue" (*dezheng*) or "rule by means of virtue" (*dezhi*, setting virtuous example), and which is based upon the *force of the virtue* of rites and rituals (the acknowledged standards of conduct), and b) the "rule by law" (*fazhi*), based upon the *virtue of the force* of punishments, which is understood as an essentially repressive instrumentality of the state apparatus. Such models of legality and implied conceptions of law and its functions derived from two ancient schools of thought: the Confucian school and the Legalist school.

Briefly speaking, these political/philosophical schools, while sharing in common the fundamental idea of state monopoly of power, embodied by the emperor with his paramount authority over all aspects of social life, including the making of laws (thus conceived of as a secular human institution), were in opposition to each other in many other respects, especially concerning the relationship between social order and the law. To Confucius (551-479 BC) and his followers, social order was basically a substantive goal, consisting of the spreading throughout society 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 morality 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. On the other hand, to Legalists, social order meant a pragmatic or rather instrumental goal needed for ruling the country. This was to be achieved primarily by means of penal laws publicly enacted. Legalists believed that man's original malignity, coupled with selfishness, lead inevitably to criminal wrongdoing, ,and therefore, they sought to keep society (people) under the intimidating force of punishments, for the sake of a stable political order, without any further goal than the one of maintaining stability itself. Contrast-

nese pre-modern and modern world, at various levels and in various degrees, thus forming a complex texture underneath the surface where the legal process was to be implemented.

ing with this realistic (or practical) approach, Confucian scholars were in favor of an idealistic view, aiming at the well-being of the whole community and its members, in terms of mutually beneficial social relations, all for the sake of a flourishing "harmonious society."

In the course of time, however, these competing, and even conflicting views, came to compromise, in a manner of speaking, 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 both the modern and traditional societies alike. Its fundamental ambivalence is reflected by the political principle at the basis of imperial governance, such as is synthetically described with the commonly used formula "Legalism coated with Confucianism" (*rubiao fali*).[171]

### 5.1 The Legalist school and the "Confucianization of law"

Important aspects of the modernity of the Legalist school may be found in the very notion of law (*fa*) as written law. These may be summarized as follows: the recognized importance of written laws as the fulcrum of social (legal) order, the principle of the legal pre-determination of crimes and punishments, and, the principle that the law is applicable to all subjects, regardless of their social rank and condition. This resulted in a model, as it has been observed, "of imposing order by enumerating each subject's obligations to the state, and enforcing these obligations through clearly prescribed rewards and punishments."[172]

The Legalist school prevailed at the time of the imperial unification of China, toward the end of the 3rd century BC, when the ruler of Qin assumed control and became the First Emperor (Qin Shi Huang). Legalists' views were primarily associated with the idea, and practice, of "harsh penalties" that "would be meted out to protect against any sort of social unrest," and in this sense, "Legalists believed very strongly in the use of law to govern and rectify society."[173] This idea of totalitarian government, based only on the force of laws and punishments, was opposed to the model propounded by Confucius and his followers, that of government based on human virtues in accordance to rites, as traditionally represented by the ancient sage kings of the semi-mythical Xia dynasty, such as was perpetuated in the recorded Shang (1600-1050 BC) and Zhou (1050-221 BC) dynasties.

With the quick collapse of the reign of Qin (221-206 BC), the Han took over and ruled the empire with an aim to restore the ancient tradition of "moral government" that the First Emperor supposedly destroyed (even physically, by the so-called "burning of books and burying of scholars").[174] With

[171] This formula is also translated in other similar ways: "Confucian in appearance but Legalist in substance"; "Legalism on the inside, Confucianism on the outside," "Confucian in outlook, Legalist in substance."

[172] P. Goldin, *supra* note 47, at 4.

[173] N.P. Ho, *supra* note 51, at 74.

[174] Both episodes, synthetized in the four characters phrase *fenshu kengru* ("He burned the books and buried the Confucian scholars alive"), are recounted by the "grand historian" Sima Qian (ca. 145-86 BC) in his renown *Shiji* or "Records of the Grand Historian" (*Sima Qian, The First Emperor: Selections from the Historical Records*, tr. by R. Dawson, Oxford, Oxford University Press, 2007), but should be kept separate, being largely unrelated, and the latter (the alleged killing of 460 Confucian scholars, by burying them alive) being greatly misinterpreted (if not invented altogether). However, they reflected an official narrative pattern, set up to condemn the brutal and tyrannical reign of Qin which, in the words of Sima Qian, "placed violence and cruelty first and treated humanity and duty as secondary," thus reported by M.E. Lewis, *supra* note 130, at 40, who further observes, at 72: "throughout the history of imperial

that goal, Han rulers, while keeping the idea of central government, as well as Qin's laws and institutions, with the support of Confucian officials and scholars, adopted a syncretic approach, in order to bring together the rival schools of political thought: the Han Synthesis.

In this scenario, the Confucian "textual heritage defined by the 'six classics' (…) emerged as the all-encompassing textual embodiment of Han imperial ideals." [175] Actually, the rise of institutional Confucianism took place after the ban on Confucian texts during the Qin (in an attempt to obliterate most of them). From the early decades of the Han, through late imperial times, Confucian orthodoxy dominated the Chinese system of government. The main focus, in these early years, was on fixing a canon of "classical" texts, whose mastery (meaning the ability to know how to read and interpret the messages of these texts) became crucial to the shift of Confucianism from a privately pursued scholarly tradition to a text-based form of official learning which was eventually endorsed with state's sanction. Confucianism was especially useful to the state as a method of recruiting men educated in these classics (literati), as imperial officials, duly tested through the civil service examination system.[176]

During the Han dynasty (206 BC-220 AD), the dominance of the Confucian school resulted in Emperor Wu's (156-87 BC) adoption of Confucianism as the imperial state ideology,[177] and led to the so-called

China the actual characteristics of the political system [centered on legalism] defined by the First Emperor were condemned as criminal."

[175] M.E. Lewis, *supra* note 130, at 206. Indeed, the number of texts known under the collective name of "Confucian Classics" varied throughout Chinese history, from the "Six Classics" to which Confucius himself was referring (Classic of Poetry, Book of Documents, Book of Rites, Book of Change, Spring and Autumn Annals, and the Classic of Music which was lost in the burning of the books ordered by the First Emperor), to the "Five Classics" remaining in the early Western (Former) Han. Further on, in the Eastern (Later) Han (25-220 AD), and again under the Tang (618-907), until the Song (960-1279), with the "renaissance" of Confucian studies in the so-called Neo-Confucianism, more texts were added. In particular, to the "Five Classics" were added the "Four Books" (Analects, Mencius, Great Learning, and Doctrine of the Mean) (by the great neo-Confucian sage Zhu Xi, 1130-1200), to form the orthodox basis for the imperial examination system. In the course of time, under the Ming (1368–1644) and Qing (1644-1911) dynasties, the "Classics," although remaining "keys to advancement, fame, and power in the political arena of late imperial China," were "replaced in relative importance by the more readable Four Books," which became "a necessary complement, if not prerequisite, to understanding the nearly impenetrable Five Classics;" B. A. Elman, *supra* note 137, at 75, 237.

[176] D. Hall and R. T. Ames, *supra* note 7 (under the paragraph "The organization and transmission of knowledge"): "A class of literati developed; a canon of classical works was compiled and instituted along with a continuing commentarial tradition which served to translate and perpetuate the doctrines of these classical works; an examination system based upon these texts was introduced in the early Han period and persisted with relatively little change for two thousand years, being abolished only as recently as 1905."

[177] N.P. Ho, *supra* note 51, at 76: "The most important Han emperor was indisputably Emperor Wu of Han. During his reign, China enjoyed prosperity and peace (…) at the urging of imperial scholar Dong Zhongshu (179-104 BC), Emperor Wu adopted Confucianism as the imperial state ideology. Posts were created for individuals to study the Chinese Confucian classics, which became the basis of imperial education. For example, *bo shi*, or erudites, were appointed to the Han Imperial Academy, a training school for hopeful government officials who would be tested on Chinese classical knowledge. The erudites themselves were specialists on the Five Chinese Classics responsible for the transmission of orthodox Confucian texts. Confucian texts enjoyed imperial sponsorship, while other schools of thought lost ground. The impact of Emperor Wu's decision cannot be overstated, as Confucianism would remain the grounding, fundamental doctrine that held the imperial government together until 1911."

"Confucianization of law."[178] This phrase, which emphasizes the legal rather than political implications of the *rubiao fali* formula just mentioned above, adds to it a positive meaning,[179] which clearly conveys the sense of compromise between Legalism and Confucianism as two different normative paradigms. The phenomenon thus labeled, consisted in the integration and hybridization, so to speak, of the Qin system of criminal laws with the system of rituals and morals upheld by Confucius and his followers.[180] 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 and Legalist contributions to the formation of the Confucian state and the ideology supporting its legitimacy."[181] In light of this historical background, equally relevant was the phenomenon (somewhat implied by the one just discussed), 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."[182]

Indeed, whatever be 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."[183] 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 traditional values and 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 and laws, without ever being bound under a single model of legality.

### 5.2 A Confucian "legal process"

To step further in the matter, it is important to focus on the issue at stake, concerning the ideological (political and philosophical) lines along which the Confucianization of the law proceeded. To this regard, one has to consider that the idea of law here involved does not refer just to formal (statutory) or informal (customary) rules, but to the wider context of legal process, principles of reasoning and adjudication, texts of authority and prevailing cultural attitudes, dealt with already (see section II above). With an eye to such context "the essence of Confucianization" can be

178 Ch'ü T'ung-tsu, *supra* note 41, at 267-279.

179 Indeed, from the point of view 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 M.E. Lewis, *supra* note 130, at 72.

180 As R. Peerenboom, *supra* note 81, at 85, puts it: "Unable to forego law entirely, the imperial legal system beginning in the Han tempered the harsh positivism of Legalism through the infusion of Confucian values —a process suitably described as the Confucianization of law."

181 B.A. Elman, *supra* note 137, at 259.

182 *Ibid.*, at 261.

183 *Ibid.*

seen, first, in the tenet that "the purpose of law is moral instruction," and, second, in the consequent tenet that "textual foundation of law must be the Confucian canons (which hence override any conceivable statute or decree)." [184] This paradigmatic, and pedagogic view, also affected and shaped a culture of making judgments rationally, as well as legally grounded on the principled premise thus assimilated to Confucian thought, that laws also have an important role to play, though as an instrument of morality, functional to a social order that must find in itself its own rules. Therefore, to the extent to which rituals and laws are (or should be) two sides of the same coin, so to speak, none must stay, or even can stay, unrelated to the other. In this sense, rituals and laws, although from differing points of view and in different ways, concur in the same objective, to support social order, by prohibiting misbehavior both before (rituals) and after (laws) it has occurred.[185] It then follows that the meaning of "Confucianization of law" goes somewhat further in the direction of an idea of law implying "not just people's obligations to the state, but more fundamentally their obligations to each other —which are themselves determined by the nature of their relationship."[186] In this sense, the phrase means "a process by which the legal system, comprising not only statutes and ordinances, but also principles of legal interpretation and legal theorizing, came to reflect the view that the law must uphold proper interactions among people, in accordance with their respective relationships, in order to bring about an orderly society."[187]

On the general assumption that from Han times onward Confucian canons became " a formal source of law," [188] a clear evidence of this paradigm shift (from people's obligations toward the state, to people's obligations to each other, as represented by the acceptance of Confucianism as the imperial orthodox doctrine), may be observed in the development of a jurisprudential literature in the form of *panwen* (written judgments). As reported in a scholarly work of the 16th century, early examples of this literature, as an established formalized literary genre, can be detected in Han times, following the revaluation of the Confucian school, when "Confucius scholars advanced to court and emphasized the utilization of the Confucian Classics to decide legal cases."[189] These legal judgments (*pan* for short), written down by scholar-officials, could also be in the form of "model judgments based on hypothetical situations for use as precedents in future cases" (*nipan*). Due to the introduction in the Tang dynasty of the test on the writing of *pan* into the examinations for candidates seeking admission to imperial civil service (or for candidates who had passed examination before their appointment),[190] this literature grew in importance. With this background, the "fascinating and extremely important judicial practice" of "using the *Spring and Autumn Annals* to

184 P. Goldin, *supra* note 47, at 4.

185 According to a saying of Sima Qian, thus reported by B.A. Elman, *supra* note 137, at 257: "Rituals prevent [improprieties] before they appear; laws deal with [improprieties] after the fact."

186 P. Goldin, *supra* note 47, at 4.

187 *Ibid.*, at 6.

188 N.P. Ho, *supra* note 51, at 79.

189 *Ibid.*, at 55-56, with reference to the work ("A Study of Different Literary Forms: Introductory Remarks") by a Ming dynasty literary scholar and intellectual, Xu Shizeng (1517-1580).

190 See C'hü T'ung-tsu, *supra* note 48, at 257-258: this test became "a mere formality" in the Ming (1368-1644) and early Qing, and was eventually abolished in 1757.

decide legal cases" [191] has to be acknowledged. At the origin of this practice, or method, of using this particular Confucian classic as "a source of law from which legal rules were deduced"[192] was, not by chance, a key-figure of the process of Confucianization of state apparatus - Dong Zhongshu. Dong was considered " the principal proponent of Confucianism in the Han court and the person perhaps most responsible for Emperor Wu's decision to establish Confucianism as the imperial orthodox doctrine."[193] Dong was the author of *panwen* of hundreds hypothetical cases, collected under the title of *Chunqiu jueyu*, which became "the term describing the general practice of utilizing the principles and precedents from the *Spring and Autumn Annals* (…) in order to reach a solution that adhered to the moral codes and lessons of the *Annals*."[194] This practice of adjudicating criminal behavior according to the principles of *Spring and Autumn* (*Chunqiu*), had "perhaps the most significant impact of Confucianization on law and the legal system." Indeed, by introducing *Chunqiu jueyu* directly into the legal process, not only was "the establishment of the superior status of the Confucian moral code over the law" made official, but the imperial (state) authority, represented by the magistrate particularly in the exercise of his judicial functions, "was legally recognized as having the power to determine guilt and innocence according to the Confucian classics, even when it sometimes had to sidestep the law." 195 It is worth noticing, therefore, that the practice of referring to the "meanings of the Classics," (especially those derived from the *Annals)*, became the basis for "legal interpretation not only for Han Confucians but also for later imperial Confucians;" thus resulting in a "tradition of interpretation that took the *Annals* as the 'penal code of the sages'," which lasted over the entire duration of Empire.[196]

In commenting on Dong's works, [197] two main objectives of his commitment to the use of such a source of ancient wisdom, with the Confucian philosophy and principles contained therein, for judicial purposes, are highlighted. Both in general, and from a theoretical point of view, one objective was to help standardize government practice, especially with regard to administration of justice, through recourse to uniform methods of legal reasoning,[198] according to the principles of harmonious relationship between Heaven and earth, at the basis of social order attained and maintained with the force of moral examples, and spread throughout the entire set of interpersonal, family and community relationships. In this regard, "Dong's belief that the *Spring and Autumn Annals* con-

191 N.P. Ho, *supra* note 51, at 79.

192 *Ibid.*

193 *Ibid.*, and see also note 177 above.

194 *Ibid.*, at 80.

195 Xin Ren, *supra* note 9, at 23.

196 B.A. Elman, *supra* note 137, at 266.

197 Another of Dong's most important philosophical writings, "laying out his vision of Confucianism and cosmology," is the *Chunqiu Fanlu* ("Luxuriant Dew of the Spring and Autumn Annals"), to he which makes reference, in the analysis of his thought, N.P. Ho, *supra* note 51, at 81.

198 *Ibid.*, at 83-84, emphasizes Dong's *panwen* of hypothetical (model) cases as exemplary of a rationality based on "inductive legal reasoning to produce legal rules that could be systematically applied in future cases with similar fact patterns," thus making use of "analogical reasoning to compare fact patterns in cases with events recorded in the *Spring and Autumn Annals*," so as "to move away from subjectivity and urge any future official faced with a similar fact pattern to apply the same legal reasoning as the model case." I n such a way that, eventually, seems to show also a modern "awareness for what we might refer to today as *stare decisis* — the legal doctrine that "like cases by treated alike."

tained a viable blueprint and a total, permanent system that could bring current government into line with the way of Heaven and the cosmological order," is made manifest together with his concern that such a "total, unified Confucian system" should be brought "directly into the Chinese judicial sphere."[199]
Therefore, to the extent to which, it is true that a self-regulatory model of social order is the ultimate end of the Confucian ideal of good government under the rule of men, it is equally true that a good government under the rule of law must be based, conversely, on people's moral instruction. Rather than the dependence of law on morality, this implies the complementary nature of law and morality, and of their respective normative orders. As explained in words attributed to Dong:

Moral education is the foundation of government. Deciding cases is indeed the fullest, most palpable and mature exposition and expression of a government. Although education and the judicial process technically occupy different spheres of the government [bureaucracy], their importance to society is one and the same —it is not possible to ignore one at the expense of the other, or to pursue them independently.[200]

To say it another way, the Confucianization of law (basically consisting, as stated before, in the paradigm shift represented by the acceptance of Confucian canons as the "formal source of law," in addition to (and above) the code, statutes, regulations, and ordinances) reflected and projected the idea of a legal system characterized by a double spirit. Such is evidenced, in another version of Dong's passage (just quoted), in the following more synthetic formula: "Moral instruction is the root of government; legal cases are its branches."[201]
From a particular and practical point of view, a second major objective of Dong's project (to integrate laws (*fa*) with morals and ritual propriety rules (*li*)), was to ensure that punishments were applied fairly and corresponding to the specific crime, thus implying that it was a judicial duty to take account of the facts and circumstances of the case as well as of the intentions and motives of the criminal action. Regarding the implications —in terms of subjective discretion, if not arbitrariness— of such a practice or method of applying the law, in cases of crimes which had to be assessed by circumstances and intent (instead of being defined solely by the acts performed), one need only recall that "exponents of Confucianized jurisprudence did not hesitate to punish what they regarded as immorality even if it did not violate the letter of the law, just as they would freely commute the mandated sentences of those whose intentions they regarded as praiseworthy."[202] To this it must be added, as reported in a document dated back to circa 1st century BC, that Confucian-literati shared this critical approach against mechanical application of the law, by stating that law "is established to promote harmonious relationships, not just to simply apply punishments to trap people."[203] Simi-

[199] *Ibid.*, at 93.

[200] *Ibid.*, at 82.

[201] P. Goldin, *supra* note 47, at 26 (where the transla- tion of Dong's same statement thus continues: "These matters lie in different domains, but their application is the same. As one must not fail to assimilate [moral instruction with adju- dication], the noble man emphasizes these [undertakings]."

[202] *Ibid.*, at 27.

[203] N.P. Ho, *supra* note 51, at 81; quite interesting, the document referred to —entitled "Discourses on Salt and Iron" (*Yan tie lun*)— is a record of a debate held in 81 BC on the political issue of state monopolies, where two positions came to be con-

larly, one thousand years later, this attitude is still reflected in a judicial commentary of the early 12th century (ca. 1133), arguing that "the ultimate aim of law is not punishment but transformation and improvement of peoples' behavior," whereby "judges should always be looking for justifiable reasons to *avoid* punishing people as strictly as the law demands." [204] Such a flexibility in the application of the law is to be found again in 19th century, as evidenced by anthologies of judgments, showing "local officials devoted to balancing strictness against leniency," and still insisting on the main 'educational' function of the administration of justice: "Court hearings and publicized judgments (…) were considered as a more efficient means to 'educate people'." [205] In Dong's view, far from being contradictory (with the purpose of making judgments rationally as well as legally grounded), the *Chunqiu Jueyu* practice, precisely because it required officials to apply the law in accordance with the teachings of the Classics (so as to preserve their principles of social order based on harmonious relationships), was considered the most responsive to the aim of integrating and supporting judicial process with standards of legal reasoning whose uniformity and rationality stemmed out of the common Confucian education which "ensured judge-officials would be brought up, trained and ultimately act responsibly and morally." In this sense, in opposition to the modern critics of such practice (who denounce its being "ultimately subjective and unsuitable for a rule of law system"), it has been argued (in a quite traditional way), that the "education of standardized, orthodox interpretations of the Confucian Classics, such as the *Spring and Autumn Annals*," received by literati who joined the ranks of imperial bureaucracy, would have made it "highly unlikely for an official to utilize radically different interpretations."[206]

### 5.3 The "dual track" of legality

Keeping in mind all that it has been said so far, it is possible at this point try to outline a conceptual framework within which to capture the essential "spirit of the law" in China. Therefore, leaving aside more detailed philosophical issues, what matters is the idea, inspired by Confucius, at the basis of Chinese tradition of thinking; that "hu-

fronted, one in favor of a strong interventionist policy, the other argued by Confucian scholar-officials in support of a lesser governmental intervention and however of a "rule based on Confucian moral principles."

[204] C. Hawes, *supra* note 134, at 47-48, with reference to Zheng Ke's commentary.

[205] P.-É. Will, *supra* note 157, at 8, 13-14.

[206] N.P. Ho, *supra* note 51, at 92-93. Having regard to casebooks of the Song dynasty, in particular to the *Magic Mirror* collection of historical exemplary cases commented by Zheng Ke, C. Furth, "Introduction," *supra* note 55, at 9, noting that "the most important jurisprudential issue in traditional Chinese law [was] how to decide on the appropriate level of punishment for a given crime," on the assumption that "provisions of penal code, however detailed, were recognized as inadequate to deal with the inexhaustible variability of situations and issues of morality and emotion (both *qing*) that surrounded any particular criminal act," so that "the dialectic of judicial leniency versus severity had to be played out," underlies the importance of a legal reasoning based on "thinking with cases," and comes thus to conclude: "The issue was not one of choosing between law and morality, but of understanding how morality should be brought to bear on matters of statutory interpretation. This was an issue for which legal cases needed to provide models." With the warning, however, that (at 10) "cases never functioned (…) as direct precedents for later judicial decisions," and even when in the Qing dynasty cases (at 13) "cases acquired a more formal kind of recognition [to] be designated 'leading cases' (*cheng'an*) by imperial rescript and circulated to supplement statutes and sub-statutes as a third level of codified instructions to magistrates (…) could not be cited explicitly as precedents (…) but were expected to suggest analogies to guide the magistrate toward suitable statutory interpretations." (at 13, referring to P.-É. Will, *supra* note 117).

man 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." [207] 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. [208] 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. 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."[209] 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)."[210]

Basically, this system remained attached to its societal foundations consisting of 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.[211] 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 *dual track* of legality in imperial China.[212]

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[207] D. Hall and R. T. Ames, *supra* note 7, 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."

[208] On this "social" interpretation of the Confucian idea of the person, which tends to accentuate the elements of "communitarianism" (from positions of criticism of Western "individualistic" tradition), see H. Fingarette, *Confucius: The Secular as Sacred* (1972), reissued by Waveland Press, Prospect Heights, Illinois, 1998, followed by H. Rosemont, Jr., "Rights-Bearing Individuals and Role-Bearing Persons," in M. I. Bockover, ed., *Rules, Rituals, and Responsibility: Essays Dedicated to Herbert Fingarette*, Open Court, La Salle, Illinois, 1991, 71ff., and, with greater emphasis on the concretely unique indi- viduality of the person as a highly particularized "relational self," R. T Ames, "Reflections on the Confucian Self: A Response to Fingarette," *ibid.*, 103ff., at 108.

[209] Xin Ren, *supra* note 9, at 21.

[210] B.A. Elman, *supra* note 137, at 261.

[211] Xin Ren, *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."

[212] *Ibid.*, at 32, puts it in such terms: "Confucian morality and imperial law were (…) two parallel behav-

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 legal sources, an evidence of this duality may be appreciated with regard, in particular, to the fact that till late imperial times (toward the end of the 19th century) two parallel penal codes co-existed; the imperial one, resulting from the accumulated materials of a long tradition of dynastic codes (incorporating, by the way, rules and principles of moral correctness), and the "penal code of the sages," that is, the *Spring and Autumns Annals*, according to a standard interpretation that continued to assert that "contemporary laws could also be analogized with precedents in the *Annals*, just as Han Confucians (…) had done."[213]

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.[214]

In this sense, the "spirit of law" in the traditional Chinese world oscillated between normative systems that appeared, on the surface, to be contradictory, but, which were, in reality, complementary. On the one hand, there was a formal (state) system comprised of criminal laws and supported by a highly articulated bureaucratic administrative and judicial apparatus; on the other hand, there was an informal, or socio-family system, comprised of customary rules, ritual practices, habits or standards of conduct supported by conciliatory 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,[215] 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, princi-

ioral 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 bur 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."

213 B.A. Elman, *supra* note 137, at 270, with reference to a testimony of 1868, about Confucian conceptions of law, showing the actual value of the recourse to the 'meanings of the Classics', in the perennial dialogue with Legalist notions, and thus concluding: "The *Annals* remained a repository of legal judgments."

214 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."*

215 With reference to late imperial times, this attitude is described by P.-É. Will, *supra* note 157, 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."

pally 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 instrumentalist— approach to social order, in the entirety of its normative component parts, so as to govern the complexity of the human relationships involved therein.

## 6. The "Confucian-legal" regime: three major postulates of the theory of good government

It seems appropriate to mention, at this point, some of the most important postulates of Confucian political-philosophical theory. Three such postulates may be here recalled and briefly commented, in connection with other relevant aspects, in order to further develop our discourse on the relationship between tradition and modernity in China. These postulates are: the tradition as agent of innovation; the "rectification of names" as virtuous exercise of (sovereign) power; and, the "harmony," rather than justice, as the objective of social order.

### 6.1 Tradition as agent of innovation

From Confucian teachings it is possible to discern the idea that keeping social order in accordance with the higher order (both ideal and universal) of nature requires a tradition, much more than tradition itself requires conservation (that is, keeping unchanged a state of affairs).

On the assumption that a traditionally oriented mindset does not necessarily identify with a conservative type approach to political and social issues at large, "tradition" may well fulfill an important normative function, as a projection onto the present of an ideal model of society of ages past, one based upon the original good will of human beings —provided that they are well educated and well directed by sage-kings with the example of their moral integrity and selfless devotion to the people. Thus reinvented, as an idealized past that suits the needs of the present, tradition becomes a powerful agent of change, founded on

the moral force of the example of ancient and universally acknowledged virtues. As such, it is capable, during periods of crisis or transformation, of facilitating socio-cultural development. Tradition, as such, may be therefore defined as a pure, over-arching structure specifically created to serve this political function. It was so used, for this purpose, in Confucius's era.

Confucius lived during a period of serious disorder and bloody conflict. As it is commonly recounted, he was known to his contemporaries (of the 4th century BC), as a counselor, one who presented himself to the rulers of the time. These rulers were in search of someone who could bring to them merits, fortune and glory. He candidly presented himself, not as a person who purported to teach anything new, but as one who simply handed down the virtuous examples first established by ancient and wise kings.[216]

One of the most important passages of the teachings attributed to Confucius is, precisely, respect for the institutions and traditions of ancient times. In the Analects (*Lunyu*), Confucius is said to be, "A transmitter and not a maker, believing in and loving the ancients."[217] This saying, which contains, at the same time, a message, a program and a style of action, became an ideological manifesto, focusing upon the normative value of tradition as the orthodox guide for virtuous behavior in both private and public life. The reference to ancient virtues made authoritative and acceptable (under a patina of evocative and legendary antiquity) that element which best addressed the needs of the time. Confucius proposed it as a remedy for the maladies of an era marred, in particular, by the erosion of the "good customs" at the basis of family and social life. In other words, he made an appeal to return to the values, ethical standards and standards of conduct of an ancient "golden age," when good and wise kings ruled merely by the example of their virtues and people lived peacefully and happily. Yet, the true purpose of this appeal was to denounce the situation of disorder and arbitrariness into which Chinese society had fallen. This situation was caused by the "evilness" of the rulers —rulers who were concerned solely with their own aspirations for power, increasingly less qualified, and, therefore, increasingly inadequate for their roles. It has been thus argued that for the time in which Confucius lived, his "traditional" ideas were actually "revolutionary."[218]
Indeed, under a veil of apparent conservatism, Confucian teachings had a real innovative impact. Quite relevant, to this end, was the distance that Confucius, as a "modern humanist," so to say, took from the "dark side" of religion, regarding divinatory and sacrificial practices, while emphasizing the "sacred" function of "secular" rites of civility, as a means —supported by the force of tradition— for making effective the universal virtue of humaneness (*ren*), in accordance with the order of nature (under the Heaven), at the basis of social order, precisely understood as a kind of "ceremonial" performance, by any single person participating with others in com-

[216] As stated by Wei-Ming Tu, *supra* note 8, at 7: "Confucius's response was to raise the ultimate question of learning to be human; in so doing he attempted to reformulate and revitalize the institutions that, for centuries, had been vital to political stability and social order: the family, the school, the local community, the state (…). Confucius did not accept the status quo (…) He felt that virtue, both as a personal quality and as a requirement for leadership, is essential for individual dignity, communal solidarity, and political order."

[217] *Confucian Analects*, 7.1.

[218] J. Needham, *Science and Civilisation in China*, vol. 2, *History of Scientific Tought*, Cambridge, Cambridge University Press, 1956, p. 6.

munal rites, involving social groups and the entire community.[219]

Further, Confucius' teaching exercised a highly critical and censorious role with regard to the corrupt rulers of the time and their immoral methods of government. It must be said that this was true then, and that Confucian teachings have continued since then to remain relevant and actual or, else, modern. Thus understood, the idea of tradition —as just said before— becomes a powerful agent (not one of mere conservation, but) of the enhancement of a renewed order; as such resulting from the tradition's inner legitimacy to stand as a guide, in its exemplary moral authoritativeness, for the present. This is a conviction, still widespread and shared among Chinese today, that what is more ancient is also, for this very reason, more current, and holds a greater moral, social and normative value.

### 6.2 The "sense of shame" and "amorality" of the law

Before moving onward to illustrate the other two postulates, it is important to focus on a point essential to the understanding of both of them. It concerns the idea underlying Confucian ethical, political and social thought, with its main emphasis on the ideal of "government by virtue" (or "moral government"), as attested to by numerous sayings attributed to the Master when he replied to questions on how to rule well.

To put it very simply, good government, in line with the natural order of things, must be dedicated to spreading the good manners of civility, so as to achieve the objectives of social peace and harmony. To this end, the laws are in themselves not only ineffective; they are also "amoral."[220] They encourage a formalistic respect for rules, but fail to draw the recipients' attention to their substance and underlying values. Indeed, the right way of ruling people should be to prevent the use of coercive means of intervention in the form of laws and punishments, on the assumption that law itself is legitimate to the extent to which it will serve, first and above all, moral purposes. [221] The use of coercive means will lead people to circumvent laws, in order to avoid punishment, without developing any sense of shame. As recorded in the Analects, "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."[222]By using, instead, the example of

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[219] See H. Fingarette, *supra* note 208, at 76-77. In general terms, the point is highlighted by El-Mallakh, Olfat, "Whispering Sacredness: The Literati and their Apparatus," in *Philosophical Ideas and Artistic Pursuits in the Traditions of Asia and the West*, An NEH Faculty Humanities Workshop, Paper 3, available at *http://dc.cod.edu/nehscholarship/3*, with the statement: "In Chinese worldview the sacred and the secular are not sharply separated, as in the West. (…) Confucianism explain man's bearing on society and hence on the universe. For, it is the action of man, which maintains the harmony in the world." And see also Wei-Ming Tu, *supra* note 8, stating at 4: "a distinctive feature of Confucianism is its expressed intention to regard the everyday human world as profoundly spiritual. By regarding the secular as sacred, the Confucians try to refash- ion the world from within according to their cul- tural ideal of the unity between human community and Heaven."

[220] As it is observed, in general terms, by R. Kent Guy, "Rule of Man and the Rule of Law in China: Punishing Provincial Governors during the Qing," in K. G. Turner, J. V. Feinerman and R. Kent Guy, *The Limits of the Rule of Law in China*, University of Washington Press, Seattle, 2000, at 88, "In China law was an instrument, itself amoral, used by the state to preserve an essentially moral order."

[221] *Ibid.*, "Law itself and those who invoked it were legitimate only as long as the tools of government were used to secure moral political ends." With regard to this traditional Chinese view, R. Peerenboon, *supra* note 81, at 85 remarks that: "The amoral character of Legalism's positive law contributed to law's lowly status among many Chinese, who saw law as a necessary evil at best."

[222] *Confucian Analects*, 2.3.

virtue, it will develop a "sense of shame." This will lead people to act with rectitude, with respect for customary standards of conduct, and for the benefit of the common good: "If they [the people] 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."[223]

The cultural premise behind such a moral —rather than legal— idea of social order, refers to the Confucian teaching on the "irreducibly social" character of individual personhood, with its normative implications, according to which the "social definition of person makes the promise of communal approbation an important encouragement for proper conduct, and the threat of shame an equally effective deterrent against undesirable conduct."[224]Hence, the still relevant significance of that ancient teaching, upheld by modern findings in the field of anthropological and cross-cultural studies suggesting that "positive value placed on shame in many non-Western cultural contexts is consistent with the interdependent goals of self-effacement, adjustment to group standards and norms, and self-improvement."[225]

### 6.3 The "rectification of names" as virtuous exercise of (sovereign) power

From the foregoing, it can be drawn —albeit in a simplistic manner, yet useful to our discourse— a distinction between the two culture-type contexts, quite significant in terms of normative patterns and, specifically, of legal systems, respectively involved. One is the "culture of guilt," typical of the Western world, based on "legal" rather than moral responsibility, reflecting an individualistic mindset characterized by the idea of "subjective rights" and related conflicts, that are governed and resolved through laws and courts of justice, so that "right" may prevail over "wrong." Unlike this approach, the "culture of shame" reflects a highly ritualized context of moral conventions, socio-familial statuses and corresponding duties, on the part of the individual vis-à-vis the community. This context attributes fundamental importance to the matter of denominative and behavioral propriety, in connection with the surrounding and circumstantial world of relationships that are interwoven among persons.

In this regard, the principle of the "rectification of names" (*zhengming*) is of particular relevance. It is derived from the anecdote bearing the same name in which Confucius replied to a query raised by one of his disciples. The disciple asked him what should be the foremost concern of a ruler seeking to govern fairly and correctly. He answered, "What is necessary is to rectify names." He then continued, "Therefore a superior man considers it necessary that the names he uses may be spoken appropriately, and also that what he speaks may be carried out appropriately. What the superior man requires is just that in his words there may be nothing incorrect."[226]

This is one of the fundamental cornerstones of Confucian moral as well as political teaching, and is particularly worthy of consideration for its impact on the traditional Chinese idea of a normative (legal) order conceived as function of the basic correspondence between the world of nature and society; one which requires that things be called by their proper name, so

[223] *Ibid.*

[224] D. Hall and R. T. Ames, *supra* note 7.

[225] Thus evidenced, e.g., by Y. Wong and J. Tsai, "Cultural Models of Shame and Guilt," in J. L. Tracy, R.W, Robins & J.P. Tangney, eds., *The Self-conscious Emotions: Theory and Research*, Guilford Press, New York, 2007, at 214.

[226] *Confucian Analects*, 13.3.

that there is concordance between the names and the reality of the things named. Without delving into the details of the nexuses between this postulate and the Chinese cultural context (including that of the ideographical language and its tendency to express itself through symbols and emblems),[227] it is here sufficient to acknowledge its value, first and foremost, as an ethical principle implying normative statements on how people ought to behave, according to denominations identifying their roles, ranks, statuses, and any other relevant qualification. Every person must act properly, in accordance with the statute of duties corresponding to his/her qualification, in both one's private/family life, and in one's public/social life.[228]

As a principle of regulatory effectiveness, the "rectification of names" is originally rooted and institutionally completed in the "rites of propriety" (*li*); that is, in ceremonial, protocol and etiquette rules and practices, as well as in customs and usages in the various social/family contexts. The basic assumption is of the strict connection existing between names and rites, not only because of their common symbolic connotation, but also because of the performative power of names, deriving from ancient magical/sacred origin, with regard to the nature and function of rites.[229]

This was especially important, starting from the ruler's person; so much so that, in strict adherence to that principle, Confucian thinkers went so far as to justify the rebellion of the people against a ruler who demonstrated a lack of the necessary moral qualities for a ruler and was therefore unworthy of his role.[230]

From the above mentioned anecdote, it then follows that sovereign power, as well as the power that emanates from the authority/authoritativeness of his holder, in order to be worthy of its qualification, must be morally suited to rule over a complex and dynamically balanced system of human relationships, based on concordance between "names" (form) and designated "things" (substance), [231] through proper allocation of roles and definition of circumstantial situations, each carrying its own merits and charges sanctioned by respective rewards and punishments.

Such an approach, while not excluding laws (*fa*), does not consider them essential, at least primarily, to the establishment and maintenance of order, whose main objective is to achieve social harmony, by way of propriety rules and rituals, in accordance with the over-arching order of nature ("cosmic order"). Indeed, the "rites" are the hinge that joins the two coterminous sides social and cosmic of the order in its universal integrity. [232]

To this end, the "rectification of names," as it relates, on a social level, to rules of civility (*li*), that is, to proper moral standards of behavior, becomes the basic principle of a self-regulatory normative order, where, by nature of things, group membership of a family, clan, and of a community of people at large takes upon the individu-

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[227] On the importance of ideographic writing in the evolution of traditional Chinese thought, see M. Granet, *La pensèe chinoise,* 1934 (reprinted various times), Albin Michel, Paris, 1968, 22ff.

[228] "The Duke Ching, of Ch'i, asked Confucius about government. Confucius replied, 'There is government, when the prince is prince, and the minister is minister; when the father is father, and the son is son.' 'Good!' said the duke; 'if, indeed; the prince be not prince, the minister not minister, the father not father, and the son not son, although I have my revenue, can I enjoy it?'": *Confucian Analects*, 12.11.

[229] M. Granet, *supra* note 227, at 229ff.

[230] See note 255 below.

[231] M. Granet, *supra* note 227, at 261ff.

[232] "Les Rites sont le fondement de l'Ordre (social et cosmique)," *ibid.*, at 241.

ality of the single members. This order is developed both vertically (hierarchical relationships) and horizontally (solidarity-cooperative relationships), within society and the particular groups comprising it. Here again, together with the Confucian disesteem, if not outright disdain, for "legal order," comes out the preference for an orderly society based on the "context" of inter-relationships and related rules of propriety, rather than simply on the "text" of laws.

### 6.4 The "moral order" of interpersonal relationships as basis for social and political order

One theme central to Confucianism is that of the "human relationships" (through which people become "human"), taking into account different functional roles and corresponding statuses held in relation to others. At the core of such view there is a set of primary, deeply moral, interpersonal dyadic relationships. Known under the name of "five relationships" (*wulun*), they embrace mutually supportive private/public spheres, along a continuum ranging from family, through society, to the state, reflecting fundamental roles and statuses characterizing the socio-political order, where are included the following relationships: ruler and subject, father and son, husband and wife, elder and younger siblings, friend and friend.

The basic component of this order is the family, as emphasized in a common expression, "The Empire, the state, the family," thus commented upon by Mencius: "The Empire has its basis in the state, the state in the family, and the family in one's own self." [233] Indeed, the proper correspondence between social roles and personal duties, to start from familial relationships, becomes a model of normative order; the one established, not from outside the social community in all its groupings, through laws and punishments, but from within the community itself, through personal performance of ritual propriety in the context of fiduciary relationships morally engaging the excellence of one's virtue of being human, so as to achieve, ideally, the harmony of the community, among its parts and in its entirety.[234]

Notwithstanding the unequal appearance of the whole set of Confucian relationships, what really seems to characterize all of them is a pattern of interaction inspired by the "principle of mutuality."[235] Particularly, the three main relationships pertaining to the family appear endowed with elements of reciprocity, which denote needs related to requirements for mutual assistance; filial piety in parent-child relationships and brotherly love in relationships between the couple and within the family group. One must not, of course, fail to mention friendship, which, not being based either on rank or age stands as a "paradigmatic expression of the spirit of mutuality." [236] This spirit, which animated the so-called "benevolence of the Five Relationships," while giving shape to the idea, particularly relevant in the Book of Mencius, of a society conceived of as a "fiduciary community,"[237] made of such relationships a normative model suitable, by way of analogy, to all sorts of social relations, in the traditional Chinese world. [238]

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[233] Thus quoted by Wei-Ming Tu, *supra* note 64, at 126, and see para 4.2. above.

[234] "What Mencius advocates (…) is the fundamental principle of extending the self to the family, the state, the world, and beyond," *ibid.*

[235] *Ibid.*, at 124, here again referring to Mencius.

[236] *Ibid.*, at 129.

[237] *Ibid.*, 121.

[238] Mizoguchi Yuzo, "Confucian Ethics (*li-jiao*) and Revolutionary China," *Archiv für Rechts-und Sozial-*

However, despite the relevance of reciprocity from a moral standpoint, with regard to the respective behaviors of the persons involved in the relationships, the idea of reciprocity never gained any political-social relevance. There was therefore no possibility for such an idea to be interpreted in terms of equality (parity) between parties; they were kept neatly separate, each being regarded on the basis of his/her own socio-family role and rank.[239] On the other hand, with an eye to the "Chinese humanist legacy," that is, a "native humanist tradition going back more than two millennia to Confucius and even earlier," it could be observed that the Confucian value of the dignity of each person's role, in any such relationships, implied also a reference to "human dignity," as a way of learning to be human, specifically referring to the spirit of mutuality of interpersonal relationships, rather than to the individual as such, abstractly understood.

The Confucian teaching of moral relationships, defined as those between ruler and subject, parent and child, husband and wife, elder and younger siblings, and friends, appears to uphold a vertical hierarchy in society while urging for responsibility and reciprocity. In many ways it did have this effect socially. However, *the Chinese view of the human being tends to see the person in the context of a social network rather than as an individual.*[240]

### 6.5 "Harmony" as the objective of social order

In the light of all this, considering the self-regulating effect of ritual practices connected with the personal commitment of properly performing one's socio-familial roles and duties, the third postulate (above) becomes relevant ; the one that points at harmony as the main objective of the orderly society.[241]

Indeed, according to Confucian teachings, what matters most is the harmony that ensues naturally when members in social groupings (family, clan, community) fulfill their roles, by observing rituals and rules of proper conduct. [242] Indeed, the most primary meaning of the Confucian concept of "justice" (*yi*) is defined, in term with its homophone "yi" (what is right, appropriate, suitable), "to act according to the ethical norms associated with one's social role."[243]

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*philosophie* (*ARSP*), Steiner, Stuttgart, Nr. 72, 1998, 84 ff.

239 It should be noted, moreover, as Wei-Ming Tu, *supra* note 64, points out, at 122-123, that the original understanding of the "five cardinal relationships" (according to the teachings of Confucius, and especially Mencius) was altered, starting from the Han dynasty, by the transformation of Confucian ethics into a political ideology. Indeed, due to legalist influences, it was developed the official doctrine of the so-called "Three Bonds" (*sangang*), based on dominance/subservience regarding, re- spectively, the authority of the ruler over the minis- ter, the father over the son, and the husband over the wife; with the idea to stress "the hierarchical re- lationship as an inviolable principle for maintaining social order." Consequently, such "politicization" of Confucian ethics deeply affected "the Five Relationships, making them the 'legalist' mechanism of symbolic control rather than the interpersonal base for the realization of the Mencian idea of a fiduciary community."

240 J. Ching, "Human Rights: A Valid Chinese Concept?" (paper presented at NGO Forum of the United Nation's World Summit on Social Development, March, 1995), emphasis added, available at *http://www.religiousconsultation.org/ching.htm.*

241 As stated by P. Ebrey, *Confucianism and Family Rituals in Imperial China*, Princeton University Press, Princeton, at 7, ritual practices are "distinctively Chinese mechanisms for achieving social and cultural cohesion."

242 "In practising the rules of propriety, a natural ease is to be prized," *Confucian Analects*, 1.12.

243 J. Chan, "Making Sense of Confucian Justice," *polylog: Forum for Intercultural Philosophy* 3 (2001), *http://them.polylog.org/3/fcj-en.htm*, sect. 1. See also text accompanying note 245 below.

This idealistic view postulates that differences in status, as the diversity of roles, are not a reason for division. It is only through the recognition of distinctions that "unity" is achieved. And "harmony" means precisely the process of creating such unity from plurality and diversity. In this sense, "harmony is a contextual concept at odds with the idea of a single, objective, universal normative order."[244]

A "law and order" society is not yet a just society, if it lacks the moral quality of bringing harmony inside it; between persons, as well as within the cosmic order. The virtuous and just society, therefore, is the "harmonious society." It is governed according to moral values and behavioral standards (rituals) of rectitude, sense of humanity, shame and sincerity/honesty. Its foundation rests with the idea of the immanence of "natural order" in the social order of human relations, as it is based upon the assumption of a close interaction of one with the other. It is this natural order which provides a model for rules and rituals, and these rules and rites must, therefore, conform to it so as to ensure that "harmony" is achieved not only between persons, but also between nature and society.

## 7. Ubi societas, ibi ritus

In contrast to the traditional Roman concept of social order, identified with legal order, according to an ancient Latin saying, *ubi societas, ibi ius* ("where society, there is the law"), the traditional Chinese (Confucian) concept of social order poses, at its foundation, "ritual propriety" (*li*), performed through ceremonial rules and customary practices of "proper conduct" (*xing*), joined to a sense of "appropriateness" or "righteousness" (*yi*), in correspondence with the whole range of human relationships within any given social (private/public) context. This concept relies upon the normative value (the dutifulness, rightness) of specific behavioral patterns, effectively executed in the form of rituals, rather than general principles or abstract legal rules.[245]

In this sense, the Chinese concept may be assimilated to the symmetrically opposite, but also complementary, idea of the normative value of morals, made effective through conformity to ritualized practices of social relationships. Such an idea, focusing on the moral —rather than legal— foundation of social order, could be then expressed with the parallel motto, *ubi societas, ibi ritus*.

In modern terms, such a formula may be referred to a model-type of social control endowed with a self-regulatory spirit, or else pervaded with the idea of a widespread "soft" normative order ("*souple*" as it has also been defined[246]). Indeed, with regard to the traditional Chinese context, this model was based, through densely interwoven socio-family relationships, upon codes of appropriate and, therefore virtuous conduct by all those who interact in this order; each one according to his/her own role and rank.

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[244] R. Peerenboom, "Confucian Harmony and Freedom of Thought," in W.T. de Bary and Tu Weiming, eds., *Confucianism and Human Rights*, Columbia University Press, New York 1998, at 240.

[245] These aspects are particularly relevant in the teachings of Mencius, on which see, D.C. Lau, *supra* note 63, at 12ff. It should be here reminded again that the Confucian term for justice, *yi*, is also translated as righteousness, *yi*, referring to "one's making oneself over to become appropriate to one's surrounding environments, e.g., one's familial, social, and natural communities," as well as "to making one's surrounding environments appropriate for one's self-attainment or self-accomplishment," thus stated by J. Wang, "The Confucian Filial Obligation and Care for Aged Parents," Paideia, Philosophy of Education (paper given at the Twentieth World Congress of Philosophy, Boston, Mass., 1998), *www.bu.edu/wcp/Papers/Comp/CompWang.htm*.

[246] J. Escarra, *supra* note 17, at 69.

A keen and efficacious reading of this state of things has been given by Montesquieu. In terms that may be understood extensively, with reference to a socio-cultural orthodoxy based upon the ritualization of individual conduct (orthopractice), as a factor of the soft normative spirit which traditionally animates the Chinese world, he wrote:

It is a thing in itself very indifferent whether the daughter-in-law rises every morning to pay such and such duties to her mother-in-law; but if we consider that these exterior habits incessantly revive an idea necessary to be imprinted on all minds —an idea that forms the ruling spirit of the empire— we shall see that it is necessary that such or such a particular action be performed.[247]

This passage clearly exemplifies the ideal of a self-regulatory social order, as the one envisaged in a classic Confucian warning, where the Master said, "If people are proper in personal conduct, others will follow suit without need of command. But if they are not proper, even when they command, others will not obey."[248]

## 8. The system of imperial power and the "professional" role of the "literati" as bureaucratic elite

On closer inspection, such a model of social order was, however, sustained, controlled and directed, through a state apparatus of power, combining together civilian (secular) and ceremonial (religious) tasks, whose functioning, together with its legitimacy, was in turn sustained, controlled and directed by a dominant doctrinal apparatus (ideology), in the hands of an elite body of professional intellectuals. According to the Confucian school of thought this ideology was "tradition" itself or, better yet, the political and legal use of it. It was a means to the end of a social order, thus based on the normative strength of rules reflecting traditional values of moral orthodoxy, made of respect and a daily practice of rituals as an exercise of both individual and collective virtues, under the protective shield of laws and punishments. Its overall goal was to achieve the utmost common good represented by "social harmony."

Tradition thus understood, as an ideological construct, was dominated, for the entire duration of Chinese imperial rule (until the beginning of the 20th century), by the elite of scholars (literati, *wen ren*), represented by the idealized figure of both moral and political relevance of the *junzi* (literally "lord's son," "prince's scion"), variously translated as "superior man," "noble man," "perfect man," "exemplary person," and more commonly as "gentleman."[249] This para-

[247] Montesquieu, *supra* note 13, Book XIX, Chapter 19. Such interpretation of the "ruling spirit of the empire" seems to anticipate, in some way, the argument about the performative function of rites, such as exposed by H. Fingarette, *supra* note 208, underlying the "magical power of ritual," at 15: "By 'magic' I mean the power of a specific person to accomplish his will directly and effortlessly through ritual, gesture and incantation. (…) He simply wills the end in the proper ritual setting and with the proper ritual gesture and word; without further effort on his part, the deed is accomplished."

[248] R. T. Ames and H. Rosemont, Jr., *The Analects of Confucius: A Philosophical Translation*, Ballantine Books, New York, 1998, 13.6.

[249] The original meaning of the term, denoting a man of noble birth, that is, a socio-political aristocratic status, was changed, by Confucian teaching, to mean a paradigmatic status of moral achievement. The more recent proposed translation of the term, starting from the mid-20th century, as "gentleman," or "exemplary person" (R. T. Ames and H. Rosemont, Jr., previous note), emphasizes the nobility and superiority of the *junzi* —not so much as a ruler over inferior subjects, but— as a person worthy of high moral stance, who leads others through the example of his virtuous character and appropriate

digmatic figure of "quality person" unifies the twofold and complementary Confucian approach to personal (private) and social (public) life, such as synthetized by the well-known formula of "inner sagehood and outward kingliness" (*neisheng waiwang*), suggesting that education and self-cultivation (to develop one's true humanity), should go hand in hand with active commitment to community.[250]

The scholar-officials were not only men of learning, who had studied a body of literature comprised of texts handed down over the course of centuries and millennia. More importantly, as government officials they were custodians and, at the same time, interpreters of the tradition. They were therefore "professionals" of the art of government, to the extent to which they were the only ones to have an intimate and practical knowledge of the Classics, the written sources dating back to ancient times. They alone possessed the art of reading such "sacred texts," and were capable of drawing from them solutions to a broad range of problems, in order to perform their political/social functions, as both administrators of "public" (state) affairs and arbitrators in "private" (family/kinship) matters.

In referring to literati, the focus is on their role as ruling class of the traditional Chinese world in a two-fold dimension; at both political-institutional and ethical-social level. In this regard, it is worth noticing their identification, not only as a professional group, but more generally as a social class ("scholar-gentry"). This identification was based on their relationship to the imperial bureaucracy, of which they were the constitutive component. Both the originality and modernity of this bureaucracy is evident.

Indeed, given that the imperial bureaucracy was selected —as a rule— on a meritocratic basis through a system of exams, it has been pointed out that "China began the transition from an aristocratic society to a bureaucratic one more than 600 years before Europe. From a society in which social position and political power were based largely on kinship credentials, China was transformed into a meritocracy in which social prestige and political appointment depended for the most part on written classical examinations to establish legitimate academic credentials." In this way, the "formation of the Confucian gentry as a non-aristocratic elite class in China, with political status and social prerogatives (…) produced social groups that endured until the twentieth century."[251]

Such characterization, both professionally and socially meaningful, of the men of learning as "literate class" at the service of the empire, has been expressed with the much more synthetic formula: "the examination system created the gentry."[252] And

conduct ("The excellence of the exemplary person is the wind, while that of the petty person is the grass. As the wind blows, the grass is sure to bend," *ibid*., 12.19). In this wider meaning, the term also implies that any righteous person, willing to improve himself/herself, can become a *junzi*. As stated, e.g., by Wei-Ming Tu, *supra* note 8, at 8: "The faith in the possibility of ordinary human being's becoming awe inspiring sages and worthies is deeply rooted in the Confucian heritage, and the insistence that human beings are (…) perfectible through personal and communal endeavor is typically Confucian."

[250] A.H.Y. Chen, *supra* note 32, at 201, quoting Confucius' saying: "Now the man of [*ren*], wishing to be established himself, seeks also to establish others; wishing to be enlarged himself, he seeks also to enlarge others" (Analects, 6. 28.).

[251] B.A. Elman, "Imperial Politics and Confucian Societies in Late Imperial China: The Hanlin and Donglin Academies," *Modern China*, Vol. 15 No. 4, October 1989, at 379.

[252] J.L. Dull, "The Evolution of Government in China," in P.S. Ropp, ed., *supra* note 11, at 76. The argument is further developed: "The full sociopolitical significance of the gentry was not to emerge until the Ming and Ch'ing [Qing] periods, but even

similarly, moreover, the civil service examination system has been seen as a device which, in addition to constituting an instrument of indoctrination, also constituted a "fairly successful state monopolization of the approved channels of upward mobility."[253]

Moreover, in comparison with Europe and its bourgeois revolution, it is worth noticing that the classes positioned under this social elite in China, especially the lowest-ranking merchant class, not only did not nurture sentiments of revenge, but were, vice versa, motivated by sentiments of emulation. In the absence of actual barriers to the elite status of scholar-officials (given the existence of concrete opportunities for social mobility of families whose members had earned, through their studies, access to highly rewarding government posts) merchants had no incentive to challenge the Confucian social order. On the contrary, they sustained it, as illustrated in common parlance, by the saying, "Commerce for profit and scholarship for personal reputation (*gu wei louli ru wei minggao*)."[254]

Without delving into other important aspects of the imperial system, one last point to be considered here concerns what would be today called the "balancing of power," that is the issue about the limits to sovereign power.

in the Sung [Song] period the examination system set off people in the society by officially recognizing them as successes in the intensely competitive examinations. Successful examinees, even those who passed only the lowest level, secured for themselves elite status. Their educations may have been paid for only because their fathers were wealthy farmers or landlords, but their status derived from their successes in the examination process."

[253] W.T. Rowe, "Modern Chinese Social History in Comparative Perspective," in P.S. Ropp, ed., *supra* note 11, at 243.

[254] R. J. Smith, *supra* note 7, at 81.

In this regard, mention should be made, again, to the doctrine of the "Mandate of Heaven" (*tianming*),[255] such as was developed by one of the greatest thinkers of the Confucian school, Mencius (372-289 BC); who maintained that when the king (*wang*) no longer rules in accordance with established principles, following his own self-interest, and thus becomes a despot, then it is possible to "withdraw the mandate" (*genming*), as a sanction resulting precisely from the fact that the exerciser of power has become morally unworthy, as demonstrated by the occurrence of events that bring disorder in the natural and social worlds: such as floods, droughts, earthquakes, in the former, and revolts by people in the latter.[256] To put it in other terms, the Mandate of Heaven stood on the edge between two contrasting views of political power. On one side, it served to establish the despotic power of the emperor as sacred figure (Son of Heaven), while, on the other side, it kept alive the ancient (pre-imperial) Confucian conception, further reinforced and theorized by Mencius, of power as "trust" conferred by the Heaven "upon the government for the welfare of the people," so that those who hold "positions of power are subject to more rigorous moral requirements than ordinary people,"

[255] See text accompanying note 143 above.

[256] Mencius went so far as to theorize that the people have the right and also the duty to rebel, and that killing a "tyrant" is not sacrilege (as killing a "king"): "The people come first; the altars of the earth and grain [symbol of the state] come afterwards; the ruler comes last," thus quoted by Julia Ching, *supra* note 240. In a way (that anticipates the modern "civil disobedience" movements), people's interests should be ranked above those of the ruler (see Shaohua Hu, "Confucianism and Western Democracy," in Zhao Suisheng, *China and Democracy: Reconsidering the Prospects for a Democratic China*, Routledge, New York, 200, at 58), but in a context where the ideal social and political order was associated to paternalistic rulership, although enlightened.

and, moreover, "the greater the political power, the heavier the moral responsibility" of his holder.[257] However, the moralizing doctrine of the rulership, as legitimated by its celestial derivation, also implied, together with ruler's obligations to the welfare of people, the support of the officialdom (state top officials who had quitted in protest, could mean that the king was no longer worthy to hold office).[258]

Indeed, with reference to the role of scholar-officials, of being both custodians and interpreters of "tradition as ideology," it is worth mentioning the power of the imperial censors; *yu shi*, according to title "traditionally used to identify surveillance officers of the Censorate proper."[259] The Censorate, originated in the Legalist influenced Qin dynasty,[260] developed, under the influence of Confucian ideas, as an (at least nominally) independent agency for overseeing officialdom, and even for remonstrating with the emperor, for breach or deviation in respect to a higher normative order, morally founded. In this sense, while surveillance functions over officials were expression of the imperial autocracy, although for purposes also of the correctness (legality) of the governmental action, remonstrance functions were aimed directly to counter-balance sovereign power (by way, at least, of moral suasion). More realistically, and with an eye to personal consequences obviously implied in such a courageous activity of making remonstrance with the emperor, it is to be observed that "advising the emperor that he is wrong, was a constant concern of officials and was deeply embedded in Confucian thought;" indeed, given the lack of "any institutionalized restraints on imperial power, emperors had to be convinced that they were dependent on the wisdom and guidance of their Confucian officials."[261] Once again, then, comes to the fore in the traditional Chinese legal landscape, the central importance of literati, as both professional and social elite, in their modern function of ruling class.

## IV. MODERNITY AS TRADITION

### 9. Revolutionary breaks: the nationalist Republic and cultural challenges of the modernization process

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. 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

[257] A.H.Y. Chen, *supra* note 32, at 201.

[258] Wei-Ming Tu, *supra* note 64, at 131: "Since the principle that governs the ruler-minister relationship is righteousness, it is not only permissible but imperative that the minister remonstrate with the ruler for the well-being of the state. Indeed, the minister can choose to sever his relationship with the ruler by resigning, or to rectify the relationship by organizing a joint effort (…) to have the ruler removed."

[259] C.O. Hucker, *supra* note 96, at 10.

[260] See C.O. Hucker, "Confucianism and the Chinese Censorial System, in Confucianism in Action," in D.S. Nivison and A.F. Wright, eds., *Confucianism in Action*, Stanford University Press, Stanford, 1959 (rep. 1977), at 187-188.

[261] J.L. Dull, *supra* note 251, at 79.

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, clamoring for introduction of "Science and Democracy" as main targets of the modernization/westernization of the country.[262] 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 morality, affecting both the political and legal system (to the extent to which these characteristics, being deeply rooted into the Chinese (national) identity, 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 dilemmatic choice between wholesale Westernization and the preservation of national cultural heritage, thus resulting in a crisis of identity.[263]

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,"[264] (a phrase he coined in the late 19th 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 kingliness," but while preserving the "inner sagehood" representing "the unchangeable essence of Chinese culture and of Confucianism."[265]

One good example, in particular from the politico-institutional viewpoint, about the continued importance of traditional Chinese (Confucian) ideas may be found in the writings of Sun Yat-sen (1866–1925), the first president of the ROC, and often revered still as the "Father of modern China." Having in mind the idea to lead China out of the backwardness and servitude of the past, into a future of well-being and democracy, he was the inspirer of an original constitutional project, named the "Five-Power Constitution." It was designed to fit the Chinese historical and politico-cultural environment, and pragmatically aimed "to blend certain Confucian political ideas with certain liberal democratic elements."[266] To this end, he envi-

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[262] Chow T'se-tsung, *The May Fourth Movement: Intellectual Revolution in Modern China*, Harvard University Press, Cambridge, Mass., 1960. See also, on the debate boosted by the May Fourth movement on tradition vs. modernity, associated to East-West binarism, L. K. Jenco, "Culture as history: envisioning change across and beyond 'eastern' and 'western' civilizations in the May Fourth era," *Twentieth Century China*, 38(1), 2013, p. 34 ff.; Id., " 'Rule by man' and 'rule by law' in early Republican China: contributions to a theoretical debate", *The Journal of Asian Studies*, 69(1), 2010, p. 181 ff. (both available at *http://eprints.lse.ac.uk*).

[263] Lin Yu-Sheng, *The Crisis of Chinese Consciousness: Radical Antitraditionalism in the May Fourth Era*, University of Wisconsin Press, Madison, 1979.

[264] R.J. Smith, *supra* note 7, at 282.

[265] A.H.Y. Chen, *supra* note 32, at 205, and references there.

[266] Eric Chiyeung Ip, "Building Constitutional Democracy on Oriental Foundations: An Anatomy of Sun Yat-sen's Constitutionalism," *Electronic Journal of Constitutional History*, Number 9-September 2008, *http://hc.rediris.es/09/articulos/html/Numero09.html?id=16*, n.4.

sioned a "five-power govern-ment" system that was partly new in its Western styled structure, while keeping old Chinese styled characteristics. It combined the three-tier partition of state powers, each represented by its respective Council (*Yuan*), namely the Legislative, Executive and Judicial one, together with two other independent branches, the Examination *Yuan* and the Supervisory (or Control) *Yuan*, with the clear intention of adapting, if not improving, the Western model of separation of powers, by counting on Chinese traditional experience, with regard to two of the major imperial institutions; the civil service examination system and the censorate, respectively. Both were structural components of the Confucian ideology, in that they exalted the value of meritocracy, together with the virtuous exercise of ruling power, and entailed the obligation (moral, as legal) of good government by the entire hierarchy of state officials, including the ruler himself. [267] Their re-proposal was therefore a way to work out an indigenous model of government; the one revisited with an eye to Montesquieu, but conceived in the spirit of Confucius.[268]

Sun's model of government, was originally implemented by the Kuomintang in the "Five-Power Constitution" of 1928. With the formation in the 1950s of the nationalist Republic in Taiwan, Sun's government model has been maintained by the ROC Constitution of 1947 (originally adopted in mainland China), and still in force, though with several revisions and amendments.[269]

In the whole, we are here confronted with a perspicuous example of the fact that, 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.

Along with this, it should also be noted that in Taiwan and South Korea (starting from the late 1980s after long authoritarian regimes,), as well as in Japan (since the adoption of the postwar Constitution of 1946), namely, in countries whose societies are characterized by the presence and prevalence of core Confucian legacies, the development of constitutional democracies, according to the principles of "rule of law" took place on this same cultural and historical background.[270] This is a fact

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[267] See paras. 4.2. and 6.4. above.

[268] R. Etiemble, *Confucius* , Gallimard, Paris, 1966, at 286.

[269] To maintain the integrity of the original text, revisions have been added as appendices to it, in the form of "Additional Articles" first introduced in 1991 and subsequently amended several times until 2005 (official English version, "The Additional Articles of the Constitution of the Republic of China," at *http://web.archive.org/web/20060712040715/http://www.gio.gov.tw/info/news/additional.htm*). In particular, see Article 6, as to the "Examination Yuan" ("the highest examination body of the State", responsible for "holding of examinations" and other organizational aspects of the public administration"), and Article 7, as to the "Control Yuan" ("the highest control body of the State" exercising "the powers of impeachment (…) against a public functionary in the central government, or local governments, or against personnel of the Judicial Yuan or the Examination Yuan," as well as "censure and audit" powers). The official website of the Control Yuan (*http://www.cy.gov.tw/mp.asp?mp =21*), in its "Historical Background" section, significantly states the antiquity/continuity of the "supervision system" since the early day of Chinese empire. At the same time, it is worth noticing that the today's Control Yuan, like a kind of ombudsman, can also act on people's complaints against public servants for misconduct.

[270] See Jiunn-Rong Yeh & Wen-Chen Chang, "The Emergence of East Asian Constitutionalism: Features in Comparison," *Am. J. Comp. L.*, 2011, 805ff., analyzing the constitutional experiences of the three countries above (Japan, South Korea and Taiwan) grouped together to form a "distinctive model" of constitutionalism. For a general over- view on the matter, with regard to "six Confucian countries" (China, Japan, South Korea, Singapore, Taiwan, and Vietnam), see also Doh Chull Shin,

that can be seen as evidence and, also as an indication, of the compatibility of Confucianism with reforms and achievements in the political and institutional field of modern constitutional legality, and with scientific advancements and economic growth as well.

It is not possible, here, to dwell on the question. It is sufficient to mention that, while the "liberal" spirit of the May 4th movement continued to blow, as with the democracy movements of the 1980s, 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. [271] Unsurprisingly the "revival of Confucianism" has thus become a hallmark of this approach.[272] The appropriation (and/or manipulation) of Confucian ideas, beyond its political use to prevent democratization, and to support nationalistic feelings of "rebirth" (*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.[273] In response to the challenge of China's modernization it has been invoked as 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.[274]

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 a "civic morality" of good life, good government and common good.

*Confucianism and Democratization in East Asia*, Cambridge University Press, Cambridge, 2012, and J.L. Richey, *Confucius in East Asia: Confucianism's History in China, Korea, Japan, and Vietnam*, Ann Arbor, Association for Asian Studies, 2013.

271 It should be here recalled the *Manifesto to the World on Behalf of Chinese Culture*, published in Hong Kong and Taiwan in 1958, written "by four great Confucian philosophers," widely commented upon by A.H.Y. Chen, *supra* note 32, at 196ff. The main propositions of the Manifesto, bearing on a Chinese way to modernization-democratization, are thus summarized (*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."

272 See W. Meissner, "Réflexions sur la quête d'une identité culturelle et nationale en Chine du XIXe siècle à aujourd'hui," *Perspectives chinoises*, 97/2006, at *http://perspectiveschinoises.revues.org/1076#tocto2n6*, who speaks, at n. 39ff., of "renaissance of the Confucianism" (*renaissance du confucianisme*), under the auspices of the Communist Party since the mid-1980s. And see further note 273 below.

273 See, *e.g.*, Suisheng Zhao, ed., *China and Democracy: Reconsidering the Prospects for a Democratic China*, Routledge, New York, 2000, and, for a critical overview, Sor-hoon Tan, "Why Confucian Democracy?" available at *http://www.academia.edu/3732047/Why_Confucian_Democracy*.

274 A.H.Y. Chen, *supra* note 32, 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."

With this background, it is time to cast a glance to the second revolutionary hit to the surface of China's civilization.

**10. Socialist modernization and surviving Confucian ideas**

The second revolutionary break was the birth of the People's Republic of China (PRC) in 1948. The following communist regime, under the guidance of its charismatic leader Mao Zedong, was an experience marked by the dramatic parenthesis of the "cultural revolution" (1966-1976), "when the campaign against Confucius got off to its start, rising to its apogee."[275] This event 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 the ancient and new regime, between national identity and the importation of Western models.[276] The result was the ambivalent or ambiguous face of "socialist modernization," with cultural survivals and mental attitudes inherited from the past of traditional Confucian regime, so to speak. In this regard, it appears vital in the persistence of widespread Confucianism in communist China. It serves as an element of continuity in national culture, but is also functional in the construction of a specifically Chinese model of socialism; along with the syncretic approach followed by the leaders of the Chinese Communist Party (CCP). This approach is marked by a tendency to interpret Marxism-Leninism in nationalistic terms, with additional moral standards based upon Confucian teachings —such as the ideal of self-education and the practice of social harmony, connected to respect for hierarchies at the level of various groupings and relationships, starting from the home.

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."[277] 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 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

[275] L. Perelomov, *Symbol of the Chinese Nation*, in *Far Eastern Affairs*, 1988, 6, 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 *Confu- cius 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."

[276] W. Meissner, *supra* note 272, 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.

[277] L. Perelomov, *supra* note 275, at 88.

of Confucius as an icon of a traditional perennial wisdom actualized to daily life.[278]

It was Mao who revealed an underlying ambivalence which continued to characterize the senior levels of the CCP, even after his departure. It is almost as if these figures were the continuers of the great Chinese imperial tradition, but in different guise: "The presence of past history in present-day politics is one of the characteristic features of the political culture of the PRC." [279] Particularly in Mao's case, the focus was on his strong cultural links with the past; being portrayed as a man born and raised during the times of the empire, and educated through studies of Confucian texts. In addition to his literary education, a more political connection with Chinese tradition lies in the way that Mao saw the problem of China's modernization; not only in material terms of economic growth and the country's affirmation as a world power, but also in idealistic and spiritual terms, with reference to the identity and centrality of Chinese civilization. He was convinced of the need to maintain China's unity and originality. China could not reduce itself to being a mere copy of other modern countries. Not a copy of the Soviet Union, from which the young and proud People's Republic detached itself very early, in order to follow its own national route toward socialism,[280] and even less a copy of the bourgeois Western countries, which the pride of an ancient civilization —injured by the clashing encounter with modernity deriving from the capitalist world— viewed as enemy and barbaric. This idea gained favor in a climate of renewed nationalistic closure.

Such a climate also reflects an enduring motive of traditionalist origin about the centrality/superiority of Chinese civilization. This motive found its way in the first paragraph of the Preamble to the 1982 Constitution, through an amendment, in 2004, that added a "spiritual" dimension to the economic and political dimensions of China's civilizing function. The amendment, rather than singing the praises of the future of socialism, recalls the "splendid culture" and the "glorious revolutionary tradition" of past ages, and considers China a country with one of the longest histories in the world. Moreover, another motive of traditionalist (Confucian) origin was the disdain for the role of law and lawyers, in face of morals especially understood as political integrity.[281]

Maoist idealism was followed by the pragmatism of Deng Xiaoping. In the last quarter of the 20th century, he —in addition to facilitating a sort of "rehabilitation" of the figure of the great Master Confucius[282]— sought to re-launch the process of

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[278] The fact is reckoned by D. A. Bell, in the "Introduction" to his *New Confucianism: Politics and Everyday Life in a Changing Society*, Princeton University Press, New Jersey, 2008, at XV, referring to a popularized version of the Analects, edited by Yu Dan, that "has sold more copies that any book since Mao's *Little Red Book*." See also a comment by S. Melvin, "Yu Dan and China's return to Confucius," *The New York Times*, August 29, 2007.

[279] Again L. Perelomov, *supra* note 275, at 88.

[280] As it has been observed by J.-P. Cabestan, "Chinese Values and Attitude towards Law in Mainland China," *Proceedings of the International Conference on Values in Chinese Society*, Taipei, Centre for Chinese Studies, Research Series, Vol. 2, No. 3, at 456-457, during the first decade from the establishment of the People's Republic, the CCP "introduced legal concepts, set up political and judicial institutions and drafted laws and regulations which were all heavily inspired by the Soviet model," but in the following period "China abandoned this Soviet-type westernization of its legal system."

[281] *Ibid.*, at 458-459: "Mao and Maoism stuck to and strengthened the traditional Confucian values relating to law (…) Maoism contributed to driving China backwards and to maintaining in an isolated environment the most traditional and populist values of Chinese society ['populist Confucianism']."

[282] "After 1976 [with the ending of the culturalrevolution], the country set about recovering the moral

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."[283] 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 confine and direct the role of legislation within a rather instrumental, and therefore residual or minimalist, notion of "rule by law" —meaning simply a "system of laws," rather than "compliance with laws." 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.

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 minimum 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.

As already mentioned before,[284] 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

losses. A drive was launched to restore the true essence of Confucianism and the image of Confucius": *Ibid.*

283 "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/dengxp/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 a racial approach tinted of Orientalism —in terms of the common place of ambiguity and mystery surrounding the Far East.

284 See para. 9 above.

and Arbitration Law, 2007)[285], in addition to repeated calls to "harmony" as the value and also 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."[286]

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. Mention may be made here to the decision to erect, in January 2011, a statue of Confucius in Tiananmen Square, in front of the famous portrait of Mao and the modern obelisk for the People's Heroes, the two symbols that have defined the national identity, since the advent of the Communist regime in China. This decision, coinciding with the centenary of the revolution that overthrew the Manchu dynasty, shows clearly the political will to reinforce modernity with tradition, in the name of a country's historical and cultural unity, symbolically represented by that encounter vis-à-vis between Mao and Confucius. Indeed, the new Chinese leadership has taken on the task, which is also a concrete policy objective, of promoting Confucianism in China, as well as in the rest of the world.[287]

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,"[288] harmoniously supplemented with both traditional (Confucian) values and modern (Western) ideas.

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*),[289] also supported by an emerging

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[285] See for a detailed analysis of the legislative efforts (since 1979) and achievements (with the first national Labor Law of 1994 and further developments) in this field, Yun Zhao, "China's New Labor Disputes Resolution Law: A Catalyst for the Establishment of Harmonious Labor Relationship?" *Comparative Labor Law & Policy Journal*, 30 (2009), 409ff.

[286] *Ibid.*, at 419.

[287] Reference is in particular to statements made by Chinese President Xi Jinping, at the occasion of his visit on November 24 to 28, 2013, to the birthplace of Confucius in Shandong Province (as reported by Xinhua at *http://news.xinhuanet.com/english/china/2013-11/28/c_132926800.htm*), pra-ising the ancient philosopher's "teachings cente-red on peace and social harmony," and suggesting that traditional Chinese culture "is one of the preconditions for China's great rejuvenation," whereby: "The moral standards passed on by forefathers should be inherited, adapting ancient forms for present-day use and weeding through the old to bring out the new." Thus putting emphasis on Confucian legacy as a core value system at the base of China's soft power, both inside the country, for maintaining an orderly society, and in the outer world, for a new system of orderly international relations, beyond the confrontation of the hard powers of military and finance, in view of a peaceful and harmonious coexistence between peoples.

[288] J.-P. Cabestan, *supra* note 280, at 466.

[289] See, *e.g.*, N. J. Diamant, S. B. Lubman, and K. J. O'Brien, "Law and Society in the People's Republic of China," Ch. 1, in *Id.*, eds., *Engaging the Law in China: State, Society, and Possibilities for Justice*, Stanford University Press, Stanford, 2005, at 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." Emphasis

class of lawyers as experts professionally engaged in rights protection (*weiquan*).[290] It has been thus observed that such a process "has provided the regime with a gloss of legitimacy,"[291] and moreover that Chinese leadership "is increasingly relying on law to alleviate the intrinsic legitimacy crisis it lives with."[292]

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.

## 11. The two-fold challenge of modernity in China

"From the end of the 19th century, China can no longer perceive itself as a world apart, nor do without reference to the West. The often violent tremors which it faced in the 20th century are evidence of a dilemma that is far from being solved: *if modernization necessarily means westernization, this leads to a real risk of alienation and loss of cultural identity* (...) At this decisive turning point in its history, the survival of Chinese culture hinges, in large extent, on this question: *what to do with tradition?*"[293] This pas-

290 Fu Huanling and R. Cullen, "*Weiquan* (Rights Protection) Lawyering in an Authoritarian State: Toward Critical Lawyering," (2008) 59 *The China Journal*, 111, at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1083925*, with regard to the "privatization" of the legal profession, introduced by a reform (Lawyers Law, 1995) "originally initiated from above, by the CCP," to the purpose of "building increased accountability within the OPS [One Party State]."

291 N. J. Diamant, et al., *supra* note 288, at 4.

292 *Ibid.*, at 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, A.H.Y. Chen, *An Introduction to the Legal System of the People's Republic of China*, LexisNexis, Hong Kong, 4th ed., 2011.

293 A. Cheng, *Histoire de la pensée chinoise*, Seuil, Paris, 1997, p. 686, "Depuis la fin du XIXe siècle, la Chine ne peut plus se percevoir comme formant un monde à elle seule, ni faire l'économie de la référence occidentale. Les soubresauts souvent violents qu'elle a connus au XXe siècle témoignent d'un dilemme qui est encore loin d'être résolu : *si modernisation signifie nécessairement occidentalisation, il y a un risque réel d'aliénation et de perte de l'identité culturelle* (...) Dans ce tourment décisif de son histoire, la survie de la culture chinoise tient en grande partie à la question: *que faire de sa tradition?*" (emphases added). On a similar path of analysis, moving from a dif- ferent and more general viewpoint, with regard to developing countries (both socialist-oriented and capitalist-oriented), the same problem ("what is to be done with traditions?") is put forward by E. Zi- novyeva and S. Piskaryov, *Comprehending Traditions*, in the "Confucius Club" section of *Far Eastern Af- faires*, 2, 1989, 117 ff., where the authors start by saying: "These countries have learned from experi- ence that negation or negligence of traditions is

sage summarizes the meaning of a discussion on Chinese modernity. China faces a two-fold challenge: on the one hand, is the challenge regarding its identity vis-à-vis the Western world; on the other, the challenge regards the enhancement of its originality (pertaining to its relationship with tradition).

The traditional Chinese concepts regarding social order split along the dialectic between rites or rituals (*li*) and laws (*fa*). They are complementary elements within a historically and culturally unitary framework of Confucian values and principles. With related moral rules of private and public conduct, they guided Chinese rulers for over two millennia and constituted the basis for the interpersonal relations of the people. These traditional concepts have deeply penetrated the country's social fabric and become part of the personal identity of every Chinese citizen. Therefore, the challenge to the country's current modernization phase concerns the conservation of identity elements; not so much from a standpoint of detachment from tradition, but rather, more as an attraction toward Western models. At the same time, it also includes the distinct, but interconnected, problem of how modernity should interplay with tradition, or, in other words, the problem of the relationship with tradition, from a standpoint of preserving its vitality/continuity as a structured component of a way of thinking which continues to persist and remains visible on many fronts. A socio-political-institutional analysis of the contemporary Chinese world must, necessarily, start from a traditional basis of concepts and practice, and deal with the difficulties and the related ambiguities/ambivalences and outright contradictions of this same world faced with the need for the modernization of the country as required by its participation and competition, at the international level, in economic globalization. This two-fold challenge would appear to find its solution in a pragmatic way; according to the "principle of contradiction" or the "complementary nature of opposites" mentioned at the beginnings, whereby tradition and modernity eventually intermingle.

Confucius essentially created, out of tradition, a Trojan horse of change. During a historical phase rife with turbulence and conflict, his appeal to the virtues of ancient wise kings disguised a call to act in favor of a substantial innovation of social practices and relationships; rule by the force of moral virtues and high standards of conduct, instead of rule by formal laws. His appeals were, perhaps, indirect but effective at calling and guiding a country toward new ideals of good governance. For its part, the Chinese communist leadership now tends to depict the modernity/modernization of the country as a factor of excellence that draws upon tradition. They are essentially pursuing, in the economic, political and legal fields, objectives of change and innovation with "Chinese characteristics". They are not doing this merely for the sake of preserving identity features. They are exploiting traditional elements, with a view to adapting them to the needs of modernization. It is not accidental then, or so it would seem, that Confucian principles and values —such as love for one's neighbor, solidarity, mutual respect between superiors and inferiors, state authorities and citizens, and social harmony— are increasingly cited today by Chinese political leaders in their public discourses. For example, in February 2005, Hu Jintao affirmed, in Confucian terms, (in a statement reported in the press) that, to

fraught with loss of national identity, and that *modernization is only possible through a synthesis of the traditional and modern*. Outwardly, this sometimes looks like *mutual penetration and mutual complementation* of the Oriental and Western" (emphases added).

make the country progress in an orderly and efficient way it is essential that "social harmony" be pursued

Along this line of thought, which seems to be prevailing among the most influential Chinese legal scholars [294] , two different types of concern have taken hold with regard to the fate of the reform process of the legal system in China, started in the last decades of the last century.

On the one hand, the concern to preserve the idea of law primarily understood as a means for good governance of the country (rule by law), in accord with the instrumental (bureaucratic) nature of the legal system, on behalf of stability interests of authoritarian character, although disguised under the appearance of social harmony, and based on a traditional culture upheld by the socialist ideology. In face of this, the contrary idea of autonomy of the law is still struggling to find place in terms of a rule of law principle understood as a bulwark in defense of private interests and individual freedoms.

On the other hand, the concern to carry on the process of country's modernization, featuring economic and legal reforms suitable to historical and cultural specificity of the Chinese world.

This process of transformation-transition of the Chinese society, under the pressure of economic and financial globalization with its set of legal standards in the name of universality of human rights, seems destined to be loaded with resistances, contradictions, and however, tensions between alternative choices. Looking for a balance between the traditional (Eastern) perspective, represented by a community-based normative order, mostly focused on the ethics of duties, and the modern (Western) perspective, represented instead by an individualistic-based society, mostly focused on the ethics of personal rights.

In the current context of transition to modern China, it becomes relevant the role of law (and lawyers) as a balancing factor of both innovation and preservation (adaptation-development) of traditional set of values and behavioral attitudes. This role is manifested through four distinct but related developing lines.

A selective and, generally speaking, a manipulative reception of legal models, institutes and rules of Western origin, in order to accord (and adapt) them to the principle of respect for Chinese characteristics.

A gradual professionalization of the judicial and legal services, in parallel with the growth of higher education in the legal field.

A relative autonomy of law as a self-standing disciplinary field of study, in association with a more widespread awareness of individual rights, together with the idea of the role entrusted to law not only as instrument for upholding state powers and public functions, but as means for protection of private interests.

An emerging notion of rule of law, as basic principle endorsed at political level and formally entered in the constitution text, in view of a formalized legal order based on the idea of law as a value in itself.

On this overall background, only a final remark, more than any conclusion, can be thus made.

In China, tradition and modernization continue to exchange roles, in a relationship of mutual implication. The socio-economic and cultural transition process seems destined to be burdened with resistance. The contradictions and tensions between alternative choices and directions may prove, in

[294] See the final report of the first forum featuring several legal specialists, held in Shanghai (April 2009) "Chinese Legal Studies' 'Thirty Years on the East Side of the River and Thirty Years on the West Side of the River", *Asian-Pacific Law & Policy Journal*, vol. 11: 2, 2010, p. 220 ff.

the long run, difficult to be reconciled; even for the Chinese mentality which has long been coached to reconcile the opposites.