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MODERN CHINESE LEGAL SYSTEM:
IS THERE ANY REFERENCE
TO THE IMPERIAL THOUGHT?***
CONFUCIANISM, LEGALISM AND RULE OF LAW
WITH CHINESE CHARACTERISTICS

ABSTRACT. The evolution of Chinese society has had a strong impact on the construction of the modern Chinese State. What is not evident, however, is what kind of relationship exists between the main philosophical theories of classical China and the transition from a pure Socialist state to a legal system infused with the rule of law. The paper will primarily reconstruct the main points of the philosophical theorizations that have had the greatest influence on the development of the Chinese legal system. After reconstructing the historical framework, the constitutional evolution of the rule of law and its reflection on administrative justice will be examined. The paper, without completeness claims, tries to expose to a non-sinologist public the complexity of Chinese legal system and the relations with the historic evolution.

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*** Although the paper is the result of common reflections, paragraphs 2, 3, 4 and 5 are written by Silvia Nico, paragraphs 6 and 7 are written by Andrea Renzi. Introduction and conclusion have been commonly developed.

1. Introduction

In the comparative study between legal systems in recent times, People's Republic of China (PRC) has aroused great interest. China's opening to globalization and international trade has made it necessary to deepen knowledge about Chinese legal issues. The set of rules of the PRC is based on the Marxist-Leninist theory, Mao Zedong's thought, Deng Xiaoping theory, the important thought of Three Represents theorized by Jiang Zemin, the Scientific Outlook on Development and the Harmonious Society theorized by Hu Jintao and, finally, the Four Comprehensives, which is Xi Jinping's contribution to CCP's general theory.¹

Nonetheless, it appears undeniable how the evolution of Chinese society has had a strong impact on the construction of the modern Chinese State. What is not evident, however, is what kind of relationship exists between the main philosophical theories of classical China and the transition from a pure Socialist state to a legal system infused with the rule of law.²

Traditionally, the state of legality has always been considered a concept imported from the Western liberal States, as proof of this, the strengthening of this principle was required for China's participation in main international organizations. But is it possible to find some historical precursors in the regulation of relations between the legal system and the citizens? Was the state of legality really imported from the West or is it possible to find some roots of this concept in Ancient Chinese philosophical thinking?

To answer these questions, the paper will primarily reconstruct the main points of the philosophical theorizations that have had the greatest influence on the development of the Chinese legal system.³ To this end, Confucianism will be analysed in its fundamental points concerning on how it related to the law and the management of public power. Subsequently, the main theorizations of the Legalism thought and

¹ S. HASHMI, *The Four Comprehensives*, in *Leadership and Management in China: Philosophies, Theories and Practices*, New York, Cambridge University Press, 2015.

² In fact, the interest that the PRC has in the development of the rule of law appears evident. Just think of the role played by the Chinese Supreme Court in the theoretical analysis of this principle.

³ L.T. LEE, W.W. LAI., *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, in *Hastings Law Journal*, 29, 1978, p. 1307 at 1308.

practices for an efficient and punctual management of the State will be examined. Finally, it will be exposed how Confucianism was able to propose a paradigm which, although anchored to its own philosophical thought, has been able to acquire elements belonging to other philosophical schools. After reconstructing the historical framework, it will be examined the constitutional evolution of the rule of law and how it has in some ways partly acquired theoretical elements from Imperial Age's philosophies. Finally, administrative justice will be analysed as a method of applying the principle of legality and how it can qualify as a syncretic model between the Legalist thought and the Confucian thought.

2. An ancient system

The Chinese legal system boasts a very ancient tradition, but in the opinion of part of the Chinese juridical science, it has remained consistent over the centuries.⁴

Even during times when Imperial power was held by ethnically non-Chinese dynasties, it did not experience drastic or significant changes.⁵ The Chinese conception of law is particularly indebted to Confucian thought and since this philosophy is based on moral and ethical theorizing, the Chinese legal system has often been compared to natural law,⁶ although not unanimously.⁷ In addition to being probably a methodologically complex comparison, the Chinese conception of law is not entirely ascribable to Confucian thought, as other philosophical thoughts, both endogenous and exogenous to Chinese culture, have had some influence in its formation and in its development over the centuries.

⁴ "Moreover, it is extremely rare in the world for its integrity, systematicness, and the vast amount of legal works, law codes, imperial regulations and the archival materials of the past dynasties left over in history," J. ZHANG, *The Tradition and Modern Transition of Chinese Law*, Berlin, Springer, 2014, p. V.

⁵ W. CHANG, *Classical Chinese Jurisprudence and the Development of the Chinese Legal System*, in *Tsinghua China Law Review*, 2, 2010, p. 208.

⁶ E. CONSIGLIO, *Early Confucian Legal Thought: A Theory of Natural Law?*, in *Rivista di Filosofia del diritto*, 2, 2015, p. 359.

⁷ CONSIGLIO, *Early Confucian Legal Thought: A Theory of Natural Law?*, cit., 2015.

3. The Confucian concept

“The Master said,
‘If the people are led by laws, and uniformity sought to be given them by punishments,
they will try to avoid the punishment, but have no sense of shame.
If they are 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.’”⁸

As it is known, Confucianism represents the most important reference point of classical Chinese thought, its doctrine has permeated Chinese culture until it almost identified with it,⁹ and even today Confucianism continues to have significant influences on numerous aspects of Chinese public and institutional life.¹⁰

According to the theory of Confucianism, *li* 理 is the cardinal principle that governs the cosmos. This term is difficult to translate in a univocal sense, having assumed many connotations in its long history, but in this context, it is to be understood as *principle*, an element that permeates all living beings, relationships and human values. This ethical principle must move all men in their actions and in their connections with others. It is related to the Five Constant Virtues, that are benevolence *ren* 仁, justice *yi* 义, rituals *li* 礼, wisdom *zhi* 智 and trustworthiness *xin* 信. Among these virtues, certainly *li* (rite) is the most important for the topic discussed here. This concept existed well before the formulation of Confucian theory; its birth is lost in the mists of time. Its origin can be found in ancestral religious practices, which evolved into social practices, until they were codified and standardized around 1000 B.C. by the Duke of Gong during the Western Zhou dynasty 西周朝 (1046-771 B.C.). Basically, rites were the institutionalization of social practices with strong moral implications that had to be respected from the population. Their codification was also an attempt to build a strong social hierarchy and to mark the different degrees of social ranks, such as the high and the low, the noble and the humble. The rites are therefore what comes closest

⁸ CONFUCIUS, *Analects*, 2.7.

⁹ G. Bertuccioli, F. Casalin (ed.), *La letteratura cinese*, Roma, L'asino d'oro, 2013, p. 47.

¹⁰ M. MIRANDA, *I valori confuciani e il contributo ideologico di Xi Jinping*, in *Wenxin* 文心. *L'essenza della scrittura. Contributi in onore di Alessandra Cristina Lavagnino*, Milano. Franco Angeli, 2018.

to the concept of law, of moral norms to be faithfully respected.¹¹ Confucianism has a deeply paternalistic connotation, and the ultimate goal of the human being is to elevate oneself to become a virtuous man, *junzi* 君子. There is no recognition of equality and equal dignity among men, as the leading position is reserved to virtuous men. Everyone can aspire to become such a man, and to achieve this goal, therefore, they must adhere to the *li* (principle) and to the Five Constant Virtues.

For the above-mentioned reasons, it would not make sense for Confucians to manage public life and relations between men through the severity of the laws and severe punishments if they are not respected. The central power should be an example of morality and virtue, so as to be imitated by the population. Therefore, the law has a very wide degree of discretion for the virtuous man because, as it was claimed by two eminent Confucian thinkers Mengzi 孟子 (370-289 B.C.) and Xunzi 荀子 (313-238 B.C.): “whatever law should be taken into consideration, cannot be enough on its own and must have as its foundation an ethics of humanity and benevolence.”¹² Consequently, the virtuous man does not make particular efforts in respecting the laws because these are nothing else but the internalization of the ritual norms. To this, it must be added the fact that the *li* (principle) cannot be considered as a static, immutable concept, but it modifies itself on the basis of historical contingencies¹³ and hence following it does not involve moral and social issues in any case.

¹¹ J. ZHANG, *The Tradition and Modern Transition of Chinese Law*, 2014, p. 6.

¹² A. CHENG, *Storia del pensiero cinese*, Torino, Einaudi, 2000.

¹³ L.T. LEE, W.W. LAI., *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, in *Hastings Law Journal*, 29, 1978, p. 1326.

4. *The Legalist alternative*

“Laws are the means of prohibiting error and ruling out selfish motives;
strict penalties are the means of enforcing orders and disciplining inferiors.

Authority should never reside in two places;

the power of decree should never be open to joint use.

If authority and power are shared with others, then all manner of abuse will become rife.

If law does not command respect, then all the ruler’s actions will be endangered.

If penalties are not enforced, then evil will never be surmounted.”¹⁴

Confucianism and its values represented Chinese intelligentsia’s main reference point for the entire Imperial period, ended in 1911 with the fall of the Qing dynasty 清朝 (1644-1911). This does not mean that this philosophy has never been questioned. On this point, its major crisis was during the reign of Qin Shi Huangdi 秦始皇帝 (260-210 B.C., r. From 221 B.C.), the first emperor to reign over a united China and promoter of the Legalist philosophy. The Legalist school developed its theories starting from the 4th century B.C. and its most eminent thinkers were Han Feizi 韩非子 (? - 233 B.C.) and Li Si 李斯 (280-208 B.C.). The Legalists did not propose a philosophical reflection, but a political theory, deriving from a set of practices.¹⁵ The practices, or techniques, were intended as practices that the state had to implement to ensure compliance with the laws. The Legalists believed that morality was split from the detention of power, the sovereigns were not necessarily virtuous, honest men, it was therefore necessary to create a system that could guarantee the functioning of the State regardless of the sovereign’s abilities.

The ideal State for these philosophers and their scholars was therefore autocratic, highly bureaucratized, governed by the imposition of techniques, laws and severe punishments in case that these were not respected. The State was intended as a strong central power that governed through the establishment of special ministries. The central principle of the school is *fa* 法. This word has taken on the meaning of law intended as positive law in modern Chinese, but it is an ancient term, which at that time denoted

¹⁴ HAN FEIZI, B. WATSON (tr.), *Han Feizi: Basic Writings*, New York, Columbia University Press, p. 57.

¹⁵ A. CHENG, *Storia del pensiero cinese*, 2000, p. 231 at 232.

a “norm to refer to or a model to conform to.”¹⁶ Since the birth of their school of thought, Legalists dealt with the objectification of the law, registering the laws on bronze supports and publishing them.¹⁷ In fact, if laws were public, they could not be ignored or interpreted differently by anyone, in addition, Legalists also stressed on the concept that criminal liability had to be personal.

The Legalist school stood out for its intransigence and absolute intolerance towards any other philosophical theorizing, in fact, in the moment of its greatest power, Li Si, the school’s most important exponent at the time, convinced the Emperor to implement in 213 B.C. the burning of books, during which treaties relating to all the non-Legalist philosophical schools were burnt and the persecution of Confucian academics began.

The supremacy of the Legalist philosophy however did not last long. The Qin dynasty founded by Qin Shi Huangdi did not survive long after his death and in 206 B.C. the Han Dynasty 汉朝 (206 B.C.-220 A.D.) came to power and restored Confucianism as a State ideology.

5. Confucian syncretism

Despite the brevity of the Legalist supremacy, its influences permeated the conception of law in China. Even if Confucianism had returned to vogue, some elements of the Legalist philosophy were destined to remain over time. To quote Cavalieri: “The precepts of the social practice of rituals condensed into the norms of the *li* were introduced into the imperial codes, thus effecting a fusion or synthesis between, on the one hand, the structure of empire and of the legal system as shaped by the Legalists, and, on the other, the content of the common morality that had converged in the *li*.”¹⁸

One of the Legalists theory’s most obvious legacies was the absolute pre-eminence of central power and a strong bureaucratism associated with it, which

¹⁶ L.T. LEE, W.W. LAI., *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, 1978.

¹⁷ A. CHENG, *Storia del pensiero cinese*, 2000.

¹⁸ R. CAVALIERI, *La legge e il rito, Lineamenti di storia del diritto cinese*, Milano, Franco Angeli, 1999.

characterized the Chinese Empire.

A feature that allowed Confucianism to survive until modern times has been its ability to assimilate and integrate concepts and theorizations belonging to different thoughts. In later times than those examined in this paper, in fact, it managed to withstand the impact force of Buddhism, an egalitarian thought that could have put the Confucian value system in serious crisis.

Buddhism counterposed two types of law: *fofa* 佛法, the law of Buddha (or Buddha Dharma, of which it is the Chinese translation) and *wangfa* 王法, the law issued by the temporal institutions represented by the King or the Emperor.¹⁹ Buddhists considered the former as being the most important, therefore mass adherence to these principles could have put the Confucian establishment at serious risk. In the same way, this new religion imported from India put pressure on personal liability in the legal field and considered ethics of motivation being superior to the ethics of consequence. Despite its wide diffusion among the population, however, Buddhism did not affect Confucian power and its centrality in the administration of the State, but made important theoretical contributions that Confucianism included in its idea of law and justice,²⁰ without however being distorted.

6. *The constitutional framework*

Given the abovementioned historical-philosophical framework, in order to carry out an effective, albeit brief, analysis of the influence of these philosophies on the legal system of contemporary China, it is necessary to analyse at least the constitutional framework, as well as the evolution of the rule of law.

Considering the positive law's point of view, the country has undergone a jagged and complex development. Focusing only on the evolution of the People's Republic of China, it is possible to highlight how the current Constitution of 1982, for part of Western legal science, is the result of a progressive convergence of the Chinese system

¹⁹ L.T. LEE, W.W. LAI., *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, 1978, p. 1322.

²⁰ R.P. PEERENBOOM, *Confucian Jurisprudence: Beyond Natural Law*, in *Asian Culture Quarterly*, 36, 1990.

to Western legal traditions.²¹ In fact, the first Constitution of 1954 was inspired by a purely socialist model, a «Stalinist» matrix,²² because the country had a great need of industrialization, socialisation and collectivization of productive and commercial means. The second Constitution of 1975, respecting the guidelines of the Cultural Revolution, praised anti-legality as a typically revolutionary sentiment.²³ In other words, it is possible to affirm that the Constitution of 1954 had a strong positivist imprint²⁴, with great value allocated to law written and codified in the “fundamental law,” in contrast to that of 1975, that considered the protection of the “revolutionary spirit” and the pursuit of the war against all forms of bourgeoisie and bureaucratism to be a priority.

From these first elements it is possible to observe how in the evolution of the Chinese constitutional structure the two orientations – Legalist and Confucian – were confronted in a sort of “meeting – clash” also in the context of socialist law. In fact, even if no reference to these thoughts was formulated in explicit terms,²⁵ it seems difficult to think that these philosophies which had such a fundamental role in defining Chinese culture and its institutions, had no influence – albeit involuntary – on the contemporary legislator.²⁶

In support of this thesis, it is interesting to observe the evolution undergone by the principle of equality of citizens before the law. This, as noted above (§ 2 and § 3), stood as a fundamental difference amid the Legalist and the Confucian doctrine. In the dialectic between the Constitutions identified above, the Constitution of 1954 explicitly

²¹ This is a typical Eurocentric vision which has not always been welcomed by the international legal science. For a panoramic about China’s sovereignty, with a particular regard to its role on international law’s formation, see M.A. CARRAI, *Sovereignty in China: A Genealogy of a Concept since 1840*, Cambridge, Cambridge University Press, 2019.

²² Precisely, despite the differences in the form of State, the Soviet Constitution of 1936.

²³ See M. MAZZA, *Lineamenti di diritto costituzionale cinese*, Milano, Giuffrè, 2006, pp. 6-10.

²⁴ Legal positivism is the theory that supports the exclusivity of positive law, in the sense that this is the only law that can be considered right in the strict and proper sense of the term, see N. BOBBIO, *Il Positivismo giuridico*, Torino, Giappichelli, 1961, p. 15.

²⁵ On the contrary, during the maoist period, Chinese classical philosophy and culture have been harshly opposed. Further to this point, see M.C. BERGÈRE, *La Chine de 1949 à nos jours*, Paris, Armand Colin, 2000.

²⁶ J. ZHANG, *The Tradition and Modern Transition of Chinese Law*, 2014.

recognized this right,²⁷ in contrast to the 1975 reform that suppressed it.²⁸

Instead, the progressive process of “demaioization,”²⁹ introduced by Deng Xiaoping’s policies, led to a revival of ideas that were harmonious with the “Legalist” vision. In fact, with the adoption of the 1978 Constitution, the provisions on the State organization of the 1954 Constitution were resumed.

However, what is most relevant for this discussion is the progressive evolution of the rule of law.³⁰ The strengthening of the judiciary apparatus, as well as the declared possibility of petitioning the authority against illegitimate measures, and against acts or conduct of public officials, resulted in a significant emergence of a form of legal State, even if embryonic.³¹

The gradual new inspiration from Legalism, however, has not reached its peak with the aforementioned Constitution, that was, in fact, short-lived and had been replaced with a new version in 1982.

The new Constitution has undergone numerous constitutional revisions, including those of 1988, 1993, 1999 and, above all, 2004 and 2019.³²

The constitutional model outlined by this latest document, despite its evident desire to get closer to the liberal state structures typical of the West, reveals many inconsistencies among the same provisions. If, on the one hand, the construction of the “socialist state of law” is proclaimed (Art. 5) – with guarantee rules for citizenship, including Art. 41 relating to the protection against administrative illegitimacy³³ – on

²⁷ See E. RECH, *La Costituzione cinese del 1954, Cina*, 1, 1956, p 177.

²⁸ The complete text is available at: <<https://bit.ly/2X2lqSe>>.

²⁹ Substantial but not formal process. The Constitution of 1978, in fact, while setting the objective of attributing legal value to the constitutional text again, contains several mentions of Mao.

³⁰ Rule of law is intended here as “the mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a nonarbitrary form of government, and more generally prevents the arbitrary use of power,” N. CHOI, *Rule of law*, Chicago, Encyclopædia Britannica, inc., 2019, on <<https://www.britannica.com/topic/rule-of-law>>.

³¹ See J. LUTHER, *Percezioni europee della storia costituzionale cinese, Polis working paper*, 78, 2006.

³² For a general overview on Chinese Constitutional Law, see E. TOTI, *Lineamenti di diritto cinese*, Roma, Aracne, 2010, pp. 25-44.

³³ Specifically, it is affirmed that: “Citizens of the People’s Republic of China have the right to criticize and make

the other hand, it is recognized the illegality of any fact in contrast with the elements of socialist's theory, even if it comes from the organs of sovereignty.

Beyond what has been more or less explicitly stated by the Constitution itself, in order to clarify the hierarchical relationships between sources, the law on legislation (*Lifa fa*) of 15 March 2000 recognized some particular sources to be superordinate to the law, until part of legal science defined it as semi-constitutional³⁴ – or even constitutional if this enucleation is considered to be directly descended from the Preamble of the Constitution of 1982 –. Article 3 of the *Lifa* law therefore determined that: “Laws shall be made in compliance with the basic principles laid down in the Constitution, principles of taking economic development as the central task, adhering to the socialist road and the people’s democratic dictatorship, upholding leadership by the Communist Party of China, upholding Marxism-Leninism, Mao Zetong Thought and Deng Xiaoping theory and persevering in reform and in opening to the outside world.”³⁵

The principle of legality with Chinese characteristics, therefore, only partially overlaps with what is imported from western systems,³⁶ configuring itself as a strange combination that, if on one hand distorts the traditional view of the rule of law, on the other hand stands as an unavoidable limit to the activity of the authority.³⁷

suggestions to any state organ or functionary. Citizens have the right to make to relevant state organs complaints and charges against, or exposures of, any state organ or functionary for violation of the law or dereliction of duty; but fabrication or distortion of facts for the purpose of libel or frame-up is prohibited. The state organ concerned must deal with complaints, charges or exposures made by citizens in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposure, or retaliate against the citizens making them. Citizens who have suffered losses through infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with the law.”

³⁴ F.R. ANTONELLI, *La “legge sulla legislazione” ed il problema delle fonti nel diritto cinese*, *Mondo Cinese*, 119, 2004, pp. 23-36.

³⁵ Legislation Law of the People’s Republic of China (Order of the President No.31), Article 3.

³⁶ It must be considered that the rule of law seems to have reached China only after the wars against Western States, during the Nineteenth century, see J. ZHANG, *The Tradition and Modern Transition of Chinese law*, 2014, p. 511 et seq.

³⁷ Specifically, about the Chinese rule of law, it can be seen what was affirmed from President Xi Jinping on the occasion of the 30th anniversary of the Chinese Constitution: “No organization or individual has the privilege to overstep the Constitution and the law therefore, in theory, not even the President of the Republic or the Chinese

Lifa law's predictions, in fact, are traceable to political, ideological and theoretical principles, which are not always homogeneous and not always harmonizable. The legal and regulatory framework that emerges, therefore, appears to be a mixture of principles of juridical positivism – which, as mentioned, we could trace back to the legalist matrix – and principles of a political nature, assimilable to an ethical vision of society – consequently attributable to Confucian doctrines.

If, in fact, among the various semi-constitutional principles, the leadership of the Communist Party is also recognized, it appears complex not to remember what was affirmed about the Confucian “virtuous man,” capable of placing himself beyond the law, being the ethics – and in some ways good faith – the only acceptable guide for society.

However, it is now necessary to compare the rule of law with Chinese characteristics to these philosophical ideas. Despite the differences identified above, in fact, the implementation – at least theoretical – of the rule of law, followed the consolidated western legal tradition, providing as its corollaries the principle of supremacy of the law, the impartiality of the public administration and the independence of the courts.

For reasons of brevity, the rest of the discussion will focus on aspects relating to administrative justice.

This is because this is considered one of the tools meant to safeguard all three corollaries identified above. The actual ability to obtain protection from any illegal activities of the administration, in fact, is able to make the impartiality of the administration effective, and it allows the evidence of a real impartiality of the judge through the application of the law and the Constitution as supremacy sources.

Furthermore, the litigation's sector is the one in which a clear philosophical fracture – or a definitive union – between contemporary law and Confucianism can be most evident.³⁸

Communist Party can overstep the Constitution. The latter, however, at the same time, is also the unquestionable leader of the Republic, as part of the constitutional system itself. It clearly seems to be a risk of dystonia. See K. BLASEK, *Rule of law in China, a comparative overview*, Berlin, Springer, 2015, pp. 4-6.

³⁸ About the “no litigation” in Confucian philosophy, see ZHANG, *The Tradition and Modern Transition of Chinese*

7. A focus on the use of power: administrative justice

In analysing the administrative justice system, it is necessary to qualify the judicial structure.³⁹ As already highlighted, the judicial protection against the acts of the public administration has been codified in the various constitutions that followed one another in the second half of the twentieth century,⁴⁰ up to the formulation contained in Art. 41 of the 1982 Constitution.

Specifically, it should be noted that the People's Republic of China, according to the model adopted with the "Civil Procedure Law of the People's Republic of China,"⁴¹ currently in force, has assumed a monist model with regard to the jurisdiction. From this reason, it follows that the administrative litigation remained in the ordinary courts, with the creation of special administrative sections when needed.⁴²

The real turning point for administrative justice, however, came in 1990 with the adoption of an organic law on the administrative trial – called the "Administrative procedure law of the People's Republic of China."⁴³

Although this law marked a fundamental turning point for the relation between the citizen and the public administration – representing an indispensable rapprochement towards the rule of law – the significant limitations to the judicial union of legitimacy would seem more aimed at improving administrative efficiency, without effectively protecting citizens' rights. The reform, however, can still represent an historic turning point. In detail, it is possible to highlight how the Chinese model guarantees an appeal

Law, 2014, cit., p. 522 et seq.

³⁹ For a more specific overview on the civil trial in RPC, see E. TOTI, *Lineamenti di diritto cinese*, 2010, pp. 155 ss.

⁴⁰ Specifically, it is mentioned in Art. 19 of the Common Program of 1949, in Art. 97 of the Constitution of 1954, in Art. 37 of the 1975 Constitution, in Art. 55 of the third Constitution of 1978 and in Art. 41 of the current Constitution.

⁴¹ Adopted by the Fourth Session of the Seventh National People's Congress on 9 April 1991, promulgated by Order No 44 of the President of the People's Republic of China, and effective on the date of its promulgation

⁴² This is one of the two typical paradigms of administrative litigation: there are dualistic systems, inspired to the French *Conseil d'États* with the creation of specialized judicial bodies only for the judgment on the administrative activity. There also exist monistic structures, with single jurisdiction over ordinary justice.

⁴³ Adopted at the Second Session of the Seventh National People's Congress on 4 April 1989, promulgated by Order No. 16 of the President of the People's Republic of China on 4 April 1989, and effective as of 1 October 1990.

only for acts provided by Art. 11 of the law,⁴⁴ typically endowed with a relevant concrete nature.⁴⁵ Measures adopted by the armed forces, the judicial and legislative system, as well as those issued by the Chinese Communist Party and affecting some further and large areas of the system are also excluded from the judgment.⁴⁶

As far as vertical jurisdiction is concerned, the first instance decision is entrusted

⁴⁴ Specifically, Art. 11 states that “The people’s courts shall accept suits brought by citizens, legal persons or other organizations against any of the following specific administrative acts:

- (1) an administrative sanction, such as detention, fine, rescission of a license or permit, order to suspend production or business or confiscation of property, which one refuses to accept;
- (2) a compulsory administrative measure, such as restricting freedom of the person or the sealing up, seizing or freezing of property, which one refuses to accept;
- (3) infringement upon one’s managerial decision-making powers, which is considered to have been perpetrated by an administrative organ;
- (4) refusal by an administrative organ to issue a permit or license, which one considers oneself legally qualified to apply for, or its failure to respond to the application;
- (5) refusal by an administrative organ to perform its statutory duty of protecting one’s rights of the person and of property, as one has applied for, or its failure to respond to the application;
- (6) cases where an administrative organ is considered to have failed to issue a pension according to law;
- (7) cases where an administrative organ is considered to have illegally demanded the performance of duties; and
- (8) cases where an administrative organ is considered to have infringed upon other rights of the person and of property.

Apart from the provisions set forth in the preceding paragraphs, the people’s courts shall accept other administrative suits which may be brought in accordance with the provisions of relevant laws and regulations.” The translation can be found at <<https://bit.ly/3e3z2Tw>>.

⁴⁵ “Concrete administrative actions are defined as acts which concern the rights and duties of citizens, legal persons and other organizations and are carried out by governmental agencies and their officers, organizations receiving delegated powers via laws or regulations, or organizations or individuals entrusted by administrative organizations with the power to carry out administrative functions. Abstract administrative actions refer to the rules and decisions issued by various administrative organs with a general legally binding nature. They can be administrative regulations of the State Council, rules of ministries or rules and normative documents from all levels of local governments.” See Y. Li, *The Judicial System and Reform in Post-Mao China*, London, Routledge 2014, p. 170 et seq.

⁴⁶ Specifically, Art. 12 establishes that “The people’s courts shall not accept suits brought by citizens, legal persons or other organizations against any of the following matters:

- (1) acts of the state in areas like national defense and foreign affairs;
- (2) administrative rules and regulations, regulations, or decisions and orders with general binding force formulated and announced by administrative organs;
- (3) decisions of an administrative organ on awards or punishments for its personnel or on the appointment or relief of duties of its personnel; and
- (4) specific administrative acts that shall, as provided for by law, be finally decided by an administrative organ.” The translation can be found at <<https://bit.ly/3e3z2Tw>>.

to the People's Courts at a basic level, unless the dispute does not present any characteristics of significant peculiarity and difficulty, or is produced by an act adopted by higher administrative authorities, such as those at provincial level, regions or autonomous municipalities. In the latter cases, the appeal must be addressed exclusively to the higher courts.⁴⁷

The choice to attribute general jurisdiction to the local courts, closest to citizenship, if on the one hand favours access to justice, on the other, it brings significant critical issues regarding the mixture of administration and jurisdiction.

In fact, according to the ideal of union of the powers, belonging to a typical socialist environment, the courts identified above are subject to the supervision of the executive committees of the local popular assemblies, which are the main bodies competent to issue a significant number of administrative acts, potentially subject to appeal.⁴⁸ With regard to the substantive and procedural requirements for access to justice, the provision is configured as a particularly close regulatory network, requiring an explicit and exhaustive set of requirements, which leave very little decisional margin to the courts.⁴⁹

The regulation also guarantees compensation for damages both for acts and for illegitimate behaviour of public administrations.⁵⁰ Despite having some restrictions on

⁴⁷ In accordance with the provisions of Articles 13-23 of the law on administrative disputes.

⁴⁸ See M. MAZZA, *Lineamenti di diritto costituzionale cinese*, 2006, p. 103.

⁴⁹ Consider, for example, the requirements required by Art. 41 in order to access to the judge: "The following requirements shall be met when a suit is brought:

- (1) the plaintiff must be a citizen, a legal person or any other organization that considers a specific administrative act to have infringed upon his or its lawful rights and interests;
- (2) there must be a specific defendant or defendants;
- (3) there must be a specific claim and a corresponding factual basis for the suit; and
- (4) the suit must fall within the scope of cases acceptable to the people's courts and the specific jurisdiction of the people's court where it is filed." The translation can be found at <<https://bit.ly/3e3z2Tw>>.

⁵⁰ The first comma of Art. 47 affirms that "A citizen, a legal person or any other organization who suffers damage because of the infringement upon his or its lawful rights and interests by a specific administrative act of an administrative organ or the personnel of an administrative organ, shall have the right to claim compensation." The translation can be found at <<https://bit.ly/3e3z2Tw>>.

access - for example, the necessary preventive experimentation of out-of-court remedies⁵¹ - if we look at protection tools and their structure, it would actually seem a system that tends towards the pursuit of the rule of law.

The main critical issues, however, regard the interference of the administrative bodies. Although, in fact, both the civil litigation law⁵² and the administrative litigation law⁵³ explicitly prohibit any form of pressure or manipulation by public subjects towards jurisdictional activities, the relevant proximity – as well as the effective supervisory relationship – that there exists between executive committees and local popular courts, raise a few doubts about judges' effectiveness and impartiality.⁵⁴

It is precisely on this point that, perhaps, even today the Confucian and the Legalist legacy find the main battleground among the new legal categories, such as those traditionally linked to socialist systems, and those connected with a Western positive matrix.⁵⁵

The problems related to the interference of administrative and political bodies in the processes also emerged in the national political debate. This is an issue that involves the Chinese judicial system as a whole, but which is even more evident in the administrative dispute.

⁵¹ Second comma of Art. 67: "If a citizen, a legal person or any other organization makes an independent claim for damages, the case shall first be dealt with by an administrative organ. Anyone who refuses to accept the disposition by the administrative organ may file a suit in a people's court. Conciliation may be applied in handling a suit for damages." The translation can be found at <<https://bit.ly/3e3z2Tw>>.

⁵² Article 6 of Civil Procedure Law of the People's Republic of China: "The people's courts shall exercise the judicial authority with respect to civil cases. The people's courts shall try civil cases independently in accordance with the law and shall not be subject to interference by any administrative organ, social group or individual." The translation can be found at <<https://bit.ly/2x1jcYM>>.

⁵³ Article 3 of Administrative procedure law of the People's Republic of China "The people's courts shall, in accordance with the law, exercise judicial power independently with respect to administrative cases, and shall not be subject to interference by any administrative organ, public organization or individual. The people's courts shall set up administrative divisions for the handling of administrative cases." The translation can be found at <<https://bit.ly/3e3z2Tw>>.

⁵⁴ To understand the evolution of Chinese court system and the mechanisms of the Chinese judicial system, specifically about the relations between administrative and judicial power, see N.H. NG, X. HE, *Embedded Courts: Judicial Decision-Making in China*, Cambridge, Cambridge University Press, 2017.

⁵⁵ On this point, it should be mentioned the very high number of legislative interventions about civil matters from the 1990s until today, first of all the General Provisions of Civil Law, adopted in China in 2017.

The critical issues in the protection led leading Chinese legal science officials to define the judiciary as “de facto enactment of local bureaucracy and local party committees.”⁵⁶ In fact, it can only be seen how the local popular assemblies themselves appoint the judges, as well as dispose of local funding; therefore, top level interference emerges.⁵⁷

Recent times have seen the strengthening of Western pushes towards a progressive implementation of the traditional rule of law protections, especially in connection with the pressures of the World Bank (WB) and the World Trade Organization (WTO).⁵⁸ In fact, precisely in order to reduce these critical issues, the 2014 reform, launched by the fourth plenum of the 18th central committee of the CCP, intervened with the establishment of the district sections of the Supreme People’s Court.⁵⁹ These detached sections are emanations and direct representations of the Supreme Court and, as such, they have the same powers, and their pronouncements have the same validity.⁶⁰

The relevance of detached sections is given by the attribution of competence in administrative lawsuits with national relevance, in first instance rulings; in the appeals lawsuits against the administrative decision of the Higher People’s Court of first instance; requests for a new trial against administrative sentences pronounced by the Higher People’s Court and which have already become *res judicata*. In addition, the Supreme Court can assign to the district sections any other lawsuits that it considers relevant.⁶¹

⁵⁶ As affirmed by Bi Yuqian, Director of the Institute of Civil Procedure at Chinese University of Political Science and Law. A. MAVELLI, *Riforma della giustizia, la Corte suprema del Popolo si “delocalizza”*, at <<https://bit.ly/34kT3k5>>.

⁵⁷ Further to this point, see NG, HE, *Embedded Courts. Judicial Decision-Making in China*, 2017, cit., p. 83 et seq.

⁵⁸ See K. BLASEK, *Rule of law in China, a comparative overview*, 2015, pp. 11-12.

⁵⁹ For a panoramic on the evolution of the Supreme Court activity, see Supreme Court, *Court Reform in China*, on the official site <<https://shortly.cc/ax28D>>.

⁶⁰ For the Supreme Court’s functions, see R. C. KEITH, Z. LIN, S. HOU, *China’s Supreme Court*, Londra and New York, Routledge, 2016, p. 100 et seq.

⁶¹ Articles 2 and 3 of the provision “*Issues relating to cases that can be tried by the district courts of the Supreme People’s Court*”, issued by The People’s Supreme Court after receiving mandate from the 3rd Plenum of CCP18th Central Committee, available only in Chinese at www.court.gov.cn. For a translation in Italian see A. MAVELLI, *Riforma della giustizia, la Corte suprema del Popolo si “delocalizza”*, at <<https://bit.ly/34kT3k5>>.

The establishment of the detached sections is aimed at extending the scope of the Court and better coordinate the exercise of judicial power in the most important cases.⁶² The willingness to reduce local influences also led party officials to order local government authorities not to interfere with ongoing judicial proceedings, as well as judges were ordered to record any pressure attempts.⁶³

The desire, therefore, is to reach an effective unity and impartiality of the administrative litigation, through the leading role long assumed by the Chinese Supreme Court.⁶⁴

In summary, it is possible to observe how, at a renewed value of the law – which, in some ways we could recognize as deriving from the Legalist thought – follows a renewed enhancement of the role of ethical guide of the Central Party and the organs it promotes – in a modern Confucianism which now seems to permeate modern Chinese politics –.⁶⁵

8. Conclusions

From the reconstruction highlighted above it would seem that a syncretic framework emerges between traditional philosophies, socialist theory and the state of legality of a liberal origin.

The constitutional evolution of China, despite the historical changes, would seem directed towards an exercise of the public power under the rule of law. All this, however, does not cause the loss of local or national leadership's leading role. If on the one hand, in fact, an ever greater codification of legal relationships is pursued to guarantee the equality of citizens through the law, on the other hand it is maintained the degree of flexibility in the exercise of public power capable of ensuring the supremacy

⁶² This is also based on the pressures made by legal science, aimed at reducing the mix between local government and lower courts. Further to this point, see: Y. LI, *The Judicial System and Reform in Post-Mao China*, 2014, p. 180.

⁶³ C. MINZNER, *Legal Reform in the Xi Jinping Era*, *Asia Policy*, 20, 2015, pp. 4-9.

⁶⁴ See R.P. PEERENBOOM, *Judicial Independence in China. Lesson for Global Rule of Law Promotion*, Cambridge, Cambridge University Press, 2009, p. 23 et seq.

⁶⁵ G. CUSCITO, *Il maestro Kong lavora per Xi: l'importanza di Confucio nella Cina di oggi*, in *Il Bollettino imperiale, Limesonline*, 2019, at <<https://shortly.cc/IIHD0>>.

of “ethics” over positive law.

Beyond the many shadows still present in the construction of the rule of law, especially with regard to the effectiveness of the judicial system as a third party, it is evident how significant progress has been made in this direction. Undeniably, a new declination of the rule of law seems to have emerged. If it is true that “the law never changes the society, but the society ever changes the law”⁶⁶ this new state of legality could only be nourished by the imperial philosophical thought.⁶⁷

Therefore, if it is true, as a Confucian thought teaches, that an enlightened guide must not be bound by the strict limits of positive law, it is equally true that social peace cannot be guaranteed without the imposition of clear constraints valid for the whole citizenship, as theorized by legalists.

It is widely acknowledged that it is impossible to reduce such complex philosophies and their vast impact on Chinese culture to static concepts. It is also impossible to identify with accurateness their influence on modern written law, if not clearly reported from the legislator. Nevertheless, as already mentioned, it seems possible to identify that some of the ideas developed from the Imperial schools still seem to affect the evolution of law in the PRC.

In conclusion, it would seem to be possible to affirm that some aspects of the rule of law with Chinese characteristics are somehow the results of an influence of Legalist and Confucian elements in a modern key, aimed at balancing the socialist unitary theories with the inevitable changes in the protection of citizenship.

⁶⁶ The reference is to A. GENTILI, *Senso e consenso*, Vol. II, Torino, Giappichelli, 2015, p. 344 that quotes J. CRUET, *La vie de droit en l'impuissance des lois*, Paris, Ernest Flammaro, 1908.

⁶⁷ In reference to the past, is possible to say that “It goes without saying that the ancient Chinese law has always been developed with the development of the Chinese society,” ZHANG, *The Tradition and Modern Transition of Chinese Law*, 2014, cit., p. V.
