UNIVERSITÀ DEGLI STUDI DI TRENTO
Dipartimento di Scienze Giuridiche

IGNAZIO CASTELLUCCI

RULE OF LAW AND LEGAL COMPLEXITY IN THE PEOPLE'S REPUBLIC OF CHINA

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Università degli Studi di Trento 2012

To Antonella,

who can be as ill-tempered as the Dragon,
and as patient as the Chinese could be

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PREFACE

This book is the result of my research, carried out over a decade or so, aimed at exploring the mysteries of Chinese law. It features the coordination and consolidation of some of my previous writings, of papers given at conferences and seminars and of my teaching on the subject – with the necessary updates, the addition of new elements, and an overall revision and fine-tuning of findings and ideas I have published previously, combined with more recent ones.

My work in the mentioned period, reflected somehow in the contents and structure of this book, has revolved around the main axis of the Chinese concept of "the rule of law", an elusive one indeed, researched in the features of the Chinese legal system, in its growing complexity, and in its peculiar relation with political power.

As describing a legal system cannot be done by just making recourse to its "authorised" self-descriptions, a comparative and critical approach has been maintained throughout, largely making recourse to comparative analyses and to several of the recognised methodologies and theoretical tools for comparative research, including a historical-critical and factual approach, taxonomies, the discourse on legal formants and some results of the most recent researches on mixed legal systems and legal hybridity.

This is not, thus, a handbook describing in a technically detailed fashion one or more specific areas of the Chinese legal system. I would rather say this is a comparative law book on the general features of Chinese law, intended to be a tool for a better understanding of the overall Chinese legal system, environment and mentality; how they work and their recent evolutionary trends; how they have produced

an idea of "rule of law" different from the original Western product having a similar name.

This volume has also been devised to offer a handbook to the students attending the course in Chinese Law at the Faculty of Law of the University of Trento; a course which the Faculty, the first or amongst the first ones in Italy, had the wisdom and the vision to offer, giving me the honour of teaching it since its launch in a.y. 2005/2006.

I cannot but thank the Faculty of Law and the *Dipartimento di Scienze Giuridiche* of the University of Trento, and the many colleagues and friends there – especially Luisa Antoniolli, Luca Nogler and Gianni Santucci – for supporting the publication of this book.

I also have to thank Carla Boninsegna in the Department of Legal Sciences of the same University for her patient work of editing and re-editing my drafts.

Finally, I wish to thank the hundreds of students having followed my courses at Trento in the past several years, for their lively presence, attention, curiosity, challenging interaction, making my teaching experience at Trento memorable.

Trento, June 2012

I.C.

INTRODUCTION

RULE OF LAW WITH CHINESE CHARACTERISTICS

SUMMARY: *1. The issue.- 2. The structure of this book.*

1. The issue

1.1. The "rule of law" is a well-known Western concept, developed within the Anglo-saxon tradition of political and legal thought: "*the rule of law provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application*"[1].

Far from being so simple, the meaning of this key concept in Western political thought, jurisprudence and geopolitical expansive policy, with all its implications and ramifications, is still subject to political and scholarly debate.[2] The same may be said, more or less, for the homologous concept developed in the European continental thought, that of *état de droit*, *Rechtsstaat, stato di diritto*[3].

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[1] BLACK'S LAW DICTIONARY, 5th ed., 1979.

[2] J.W. HEAD, *Great Legal Traditions – Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective*, Durham NC., 2011, at 645-654 provides a sampling of recent definitions of "the rule of law", featuring some 19 different definitions, produced in the last fifteen years or so, mostly by anglo-saxon scholarly and institutional sources. These should be added to, or combined with, the innumerable classic jurisprudential sources on the subject – one of the pivotal works probably being A.V. DICEY, *An Introduction to the Study of the Law of the Constitution*, London, 1885.

[3] Fundamental ideas for the development of this concept being probably contained in MONTESQUIEU, *De l'esprit des lois*, 1748, and in the works of H. KELSEN in the XX

This Western concept may be considered – for the purposes of this book and with some reasonable simplification and approximation – as being associated with societies in principle regulated solely, or mostly, by the law; the law being perceived in most Western societies as a set of general rules, in public knowledge, covering nearly all areas of life, applicable – prospectively but not retroactively – to all subjects in the relevant jurisdiction, whether private or public entities, and particularly to the State apparatus and to the ruling elite. Such rules are always enforceable by a court of law, according to legal procedures entrusted to legal professionals, free from any interference from other sources of behavioural rules – such as tradition, ethics, politics, religion, or administrative praxis[4].

The concept of the rule of law originated and developed within the framework of capitalist, market-based economic systems. For many, in fact, the notion of the rule of law is necessarily "thick"; i.e. not just a "thin", procedural, formal concept, where compliance with rules, whatever their content, suffices: it rather being associated with liberal democracy political regimes and with the existence of a list of court-enforceable civil liberties and substantial individual rights[5].

1.2. The People's Republic of China (hereinafter, also: the PRC) started reconstructing its legal system at the end of the 1970s', under the leadership of Deng Xiaoping. Deng envisioned China's impressive economic development of the last decades, based on a new

century.

[4] This is Ugo Mattei's synthesis of the constitutive elements of the Western concept of "rule of law"; U. MATTEI, *Verso un tripartizione non eurocentrica dei sistemi giuridici*, in *Scintillae Iuris – Studi in onore di Gino Gorla*, Milan, 1994; also in English: *Three Patterns of Law: Taxonomy and Change in the World legal Systems*, in 45 (1997) *American Journal of Comparative Law* 5

[5] See, e.g., B. TAMANAHA, *The Rule of Law for Everyone?*, *St. John's Legal Studies Research Paper*. Available at SSRN: http://ssrn.com/abstract=312622; also in *Current Legal Problems*, volume 55 (2002).

policy of modernisation and opening the country to the outside world, and through the reconstruction of the country's institutional and legal systems. This has been a dramatic change, with respect to the previous state of affairs under the rule of Mao Zedong, who had actively promoted the demolition of the (then still very young and immature) legal system of the PRC, instead, in favour of a model of State with a minimal role played by laws and institutions, and governed more or less directly by the Communist Party of China (CPC).

The legal reconstruction started very earnestly at the end of the 1970s, proceeded swiftly and produced legal reforms very significant in quantity and quality. After much debate and public speeches of the political leadership, China eventually enacted in 1999 a Constitutional amendment making a reference to a concept – *fǎ zhì* (法治), in Chinese – apparently akin to that of "the rule of law"[6], indicating it as a key concept for the success of the socialist construction of China.

However, the *role* of law in China has been different, historically, from the Western one. This difference should not be underestimated, in the current debate in comparative law circles worldwide, in order to better understand the meaning and implications of the Chinese debate and developments around "the rule of law", the related legislative reforms, the mentioned Constitutional amendment, and in general the evolutionary trend of the Chinese legal system. As a consequence, the Chinese notion of "the rule of law" differs too from its Western counterpart, based on China's socialist experience and on its unique history, traditions, political culture.

We can identify the obvious influence of the socialist element, for instance, in the constitutional indication of the Chinese state as a

[6] A new section has been added to Article 5 of the Constitution, stipulating that "*The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law*", according to the official English translation of the Constitution of the People's Republic of China, available on the web at http://english.people.com.cn/constitution/constitution.html

socialist one, contained in the Preamble of the country's Constitution; and in the reference to the "socialist market economy", introduced in the Constitution in 1993[7].

Well-known references to a socialism "with Chinese characteristics" have also been introduced in 1993 in the Preamble of the Constitution: similar references to the "Chinese characteristics", also found in the Communist Party Constitution[8] and in the legislation[9], indicate the influence of the Chinese history and context (on economy, politics and legal conceptions) as the second factor to be considered.

The introduction of a market-based private sector of the economy of course adds to the complexity of the system, warranting specific legal developments. The institutional diversification of the country, including the return of Hong Kong and Macau to the Motherland, also introduced new elements of diversity and produced further evolutionary phenomena; this, due to the inner diversification of the Mainland as well as to the closer interaction of the Mainland with the mentioned two former Western colonies on Chinese soil.

1.3. A large number of governmental, political and scholarly descriptions of the "rule of law with Chinese characteristics" have been produced in the last fifteen years or so, both in China and – for scholarly products – outside China[10].

[7] See Article 15 of the Constitution as amended in 1993: "The state has put into practice a socialist market economy. The State strengthens formulating economic laws, improves macro adjustment and control and forbids according to law any units or individuals from interfering with the social economic order." A further reference to socialist market economy is made in the Preamble as revised after the constitutional amendment of 1999.

[8] *E.g.* in the introductory part ("General Program") of the Constitution of the Communist Party of China; an English translation has been published by the Chinese Government in 2003.

[9] *E.g.*, Article 1 of the Legislation Law of March 15, 2000.

[10] I also contributed to the number: see my Article I. CASTELLUCCI, *Rule of Law with Chinese Characteristics*, in 13 (2007) *Annual Survey of International and*

The core issue of this book is a research – one more, some may say – on the still elusive "rule of law with Chinese characteristics". Some at least basic knowledge of China's general and legal history will be taken as a given, as well as some knowledge of the institutional structure of People's Republic of China[11].

The main idea is to further the research and the debate on the subject, through a comparative approach; and to identify and focus on some specific features of the Chinese concept of "rule of law", trying to identify some of the associated operational legal principles.

2. The structure of this book

2.1. I tried to focus on the very general features of the Chinese legal system in Chapter One, to identify the fundamental socialist legal frame, the implementing of which has started soon after Deng's "open door" policy had been launched. This chapter is based on the available research and on comparative references and reflections, mainly but not

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Comparative Law, 35-92. A very thorough and accurate analysis on the topic is made in R. PEERENBOOM, *China's Long March toward Rule of Law*, Cambridge, 2002. Also see J. CHEN, Y. LI, J.M. OTTO (eds.), *Implementation of Law in the People's Republic of China*, The Hague- London-New York, 2002. In a comparative perspective, J.W. HEAD, *Great Legal Traditions – Civil Law, Common Law, and Chinese Law in Historical and Operational Perspective*, Durham NC., 2011, specifically on rule of law at 541-573.

[11] On the legal system of China, in English, see, for instance, WANG Chenguang, ZHANG Xianchu (eds.), *Introduction to Chinese Law*, Hong Kong, 1997; A.H.Y. CHEN, *An Introduction to the Legal System of the People's Republic of China*, Hong Kong, 1998; 2nd ed., 2004 – especially the latter with a copious and relatively recent amount of Chinese legal literature cited therein; In Italian, see M. MAZZA, *Lineamenti di diritto costituzionale cinese*, Milan, 2006. R. CAVALIERI, *La legge e il rito - Lineamenti di storia del diritto cinese*, 3rd ed., Milan, 2001; L. MOCCIA, *Il diritto in Cina - tra ritualismo e modernizzazione*, Turin, 2009; specifically on the influence of Roman Law in the Chinese process of legal modernisation, see L. FORMICHELLA, G. TERRACINA, E. TOTI (eds.), *Diritto cinese e sistema giuridico romanistico,* Turin, 2005.

only between the former USSR and the Chinese legal systems[12].

Chapter Two describes the new elements that roughly since the 1990s have added complexity to the system, forcing China to diversify its legal system while at the same time reinforcing its socialist frame.

This process is taking place to accommodate the market economy, the public's increasing requests for protection of individual and social rights, and the institutional diversification of territorial forms of government; trying to combine change and development with the general security of the socialist system and the overall stability of the country through the current state of transition.

An initial, approximate and general description of the multi-dimensional, multi-faceted macro-model being implemented to face such an environment is provided: it is what I like to refer to as "variable geometries" of the institutional and legal system, developing the capability of changing its appearance and mechanisms to deal with different aspects of the described complexity.

Some features of the "rule of law with Chinese characteristics" are described in Chapter Three, through the functioning of the Chinese "socialist market economy" and its specific legal framework, observing how the Chinese political and legal system is accommodating market-based legal institutions within its socialist frame; and how this process, in turn, contributes to shape the Chinese concept of "the rule of law"[13].

In order to identify more precisely some of the mechanisms which can be considered typical of the Chinese model, and thus of the Chinese concept of "rule of law", the quest continued in Chapter Four observing the hybridisation of the legal environments within Greater

[12] Much of the that chapter replicates, updated and amended as necessary, the analysis I made in my Article of 2007; see I. CASTELLUCCI, *Rule of Law*, *supra*.

[13] The discourses made in Chapters Two and Three include developments and ramifications of an Article of mine published in 2011: I. CASTELLUCCI, *Reflections on the Legal Features of the Socialist Market Economy*, in *Frontiers of Law in China*, 6 (2011), 3, 343-368.

China: the analysis of recent changes in the legal systems of Hong Kong and Macau permitted the identification – by contrast with the previous state of affairs – of ideas, concepts and operational features of the Chinese "rule of law", percolating in the legal systems of these two Special Administrative Regions of China[14].

The principles identified in Chapter Four are in fact consistent with some of the descriptions and findings in Chapters One, Two and Three. Better identification and focus on those features result from the stereoscopic effect of observing them not only from the point of view of a socialist legal environment introducing a market economy, but also from the somehow opposite viewpoint of two formerly Western legal systems being absorbed within the general frame of the PRC.

In Chapter Five some conclusion are drawn, if current, tentative and subject to review as the events develop in the future. Summarising the findings of previous Chapters, I tried to produce an assessment of the current evolution of "the rule of law with Chinese characteristics", and a list of the identified legal principles and features which may be considered typical of the Chinese model. Finally, I tried to sketch a description of societal and legal situation of today's China.

[14] The contents of Chapter Four reproduce a substantial part of an essay I published in 2012: I. CASTELLUCCI, *Legal Hybridity in Hong Kong and Macau*, in 57:4 *McGill Law Journal* (2012), 1, 665-720.

CHAPTER ONE

THE INITIAL FRAME: SOCIALIST LAW IN CHINA

SUMMARY: *1. Socialist law in China. - 2. Interaction of normative sources. - 3. The role of courts, procuratorates and the legal profession in the Chinese context. - 4. The role of policy. - 5. Enforcement of the law. - 6. Comparing the Chinese developments with the legal reforms in the USSR until the 1960s. - 7. Other comparisons. - 8. A simple scheme.*

1. Socialist law in China

1.1. In the traditional socialist view, law is a tool available to the political authority for government and policy ("rule by law"); it is "*impossible to understand Soviet law, or communist law generally, without taking into account its political dimension, or to be more explicit, without recognizing that law under those circumstances was almost totally dependent on political determinants*"[15].

This concept is often referred to as "socialist legality", and consists, in extreme synthesis, in the flexible and "oriented" application of relatively few, generally drafted legal rules according to the policy needs of the political authority, to which the law should be subordinated[16] according to the principles of "political flexibility"

[15] F. FELDBRUGGE, *The Rule of Law in Russia in a European Context*, in F. FELDBRUGGE (ed.) *Russia, Europe and the Rule of Law,* 56 *Law in Eastern Europe*, Leyden, 2007, 203.

[16] F. FELDBRUGGE, *supra*, p. 203; also see N. PICARDI, R.L. LANTIERI, *La giustizia civile in Russia da Pietro il Grande a Krushev*, in N. PICARDI, A. GIULIANI (eds.), *Codice di procedura civile della Repubblica Socialista Federativa Sovietica di Russia*, Milan, 2004, xxxvi; H.J. BERMAN, *Justice in the Ussr. An Interpretation of Soviet Law*,

rather than those of strict legality[17]. Legal texts are often made of very ample and generic formulations of policy, not directly aimed at the citizens but very often addressing the administrative authorities who are in charge of the relevant sector at the different levels, who should in turn issue appropriate by-laws and case-by-case authoritative decisions – not necessarily made public and known to citizens – for the implementation of the general law. This model has been introduced in the Soviet Union by Stalin and Višinskij in the mid-1930s, and reached its maturity and full implementation only in the late 1950s or early 1960s, after the death of Stalin[18].

Instrumentality of legal rules in the Chinese environment is even more obvious, with respect to other socialist experiences such as the USSR.

Scholars that have written on China-and-the-law issues have noted that the Chinese system, more than many other socialist legal systems, for long time downplayed the role of statutes, regulations, and of the law, in general, because of the idea that such centrality of law is a Western-created bourgeois superstructure, not useful for the cause of socialism[19].

In the Chinese culture and pre-socialist legal tradition, Western-style laws and jurisprudence have been little or not known at all – the only significant exception being the experience, but still limited in time

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Cambridge Mass., 1963 (Italian translation, Milan, 1963, 36).

[17] H. BERMAN, *supra*, 30-36.

[18] For a discussion of the Soviet experience, see below, Section 6.

[19] On the Chinese legal tradition and on the legal system of the People's Republic of China in general see, for instance, WANG Chenguang, ZHANG Xianchu (eds.), *Introduction to Chinese Law*, *supra*; A.H.Y. CHEN, *An Introduction to the Legal System of the People's Republic of China, supra*; J.W. HEAD, *Great Legal Traditions*, *supra*; M. MAZZA, *Lineamenti di diritto costituzionale cinese*, *supra*. R. CAVALIERI, *La legge e il rito - Lineamenti di storia del diritto cinese*, *supra*; L. MOCCIA, *Il diritto in Cina - tra ritualismo e modernizzazione*, *supra*; specifically on the influence of Roman Law in the Chinese process of legal modernisation, see L. FORMICHELLA, G. TERRACINA, E. TOTI (eds.), *Diritto cinese e sistema giuridico romanistico, supra*.

and space, of the nationalist Republic of China between the two World Wars. Thus, there has been almost no substratum in China of a previous Western-style legal system, interacting with subsequent strata of political-legal conceptions as it had happened instead in the USSR and Eastern Europe bloc countries[20].

The legal tradition of China has developed throughout millennia in different ways, based on the peculiarities of Chinese history, tradition, Confucianism; and, more specifically, on the importance of the administrative authority rather than on vast sets of pre-determined abstract rules. Moreover, China also underwent the traumatic experience of the Cultural Revolution, which brought about a complete annulment of whatever legal system was being built by the time, which was being developed based on the idea of "socialist legality" hailing from the Soviet Union[21].

1.2. In the late 1970s radical Maoism was abandoned, and a new course started, with Deng Xiaoping's "open door" policy, and with the associated reconstruction of the country's legal system. Deng's vision was that China should have a working system of laws, *fǎ zhì* (法制, which can be translated as "legal system") – quite understandably, after the terrible years of the Cultural Revolution. In Deng's vision, legal rules were "to come into existence, to be made reference to, to be enforced; and violations were to be punished"[22].

The economic development of China proceeded well in the 1980s, and exploded in the 1990s. The legal reforms also continued[23]

[20] A. GAMBARO, R. SACCO, *Sistemi giuridici comparati,* Turin, 1996, at 411-60; G. AJANI, *Diritto dell'Europa orientale,* Turin, 1996, Chapter 4.

[21] To the extent of considering the legalist choices made in the USSR in those years as "revisionist". See A.H.Y. CHEN, *supra*, Chapter 3, especially at 33.

[22] The four principles were usually synthesised as *youfa keyi, youfa biyi, shifa bi yan, weifa bi jiu*; DENG Xiaoping, *Selected Articles*, vol. 2, at 147, 322; also see J.W. HEAD, *China's Legal Soul*, Durham NC., 2009, at 118.

[23] On China's legal reforms in the 1990s, see, e.g., S.B. LUBMAN, *Bird in a Cage:*

and, as the legal system became more complete and complex, the political and legal discussions flourished on the exact meaning of having a country "with laws", or "with a legal system" (*fǎ zhì,* 法制). Some quarters of government and academia, and eventually the political leadership of the country including Jiang Zemin himself, advocated an expansion of the principle, to produce a general principle of functioning of the state in the sense that

> "the development of democracy must combine the improvement of the legal system so as to govern the country by law… to manage the state affairs, economci and social affairs… under the leadership of the Party in accordance with the Constitution and law stipulations… it should be guaranteed that all the work in the state is carried out under the law…"[24].

The original *fǎ zhì* (法制) principle was reformulated into *fǎ zhì* (法治); the difference in the two homophone *zhi* characters may only be seen when reading the Chinese characters, and is quite relevant[25]: the first *zhì* (制) means "system", whereas the second one (治) is associated to the idea of harnessing, managing or governing – *fǎ zhì* (法治) thus implying a notion of an instrumental relation between the two terms: one which may either be translated as "rule of law" or as "rule by law".

The line of Jiang Zemin eventually led to the adoption by the Communist Party (in 1997) of that more sophisticated concept of *fǎ zhì*

Legal Reform in China after Mao, Stanford, 1999.

[24] This is an excerpt of a Jiang's report to the CPC, as reported by ZOU Keyuan, *China's Legal Reforms: Toward the Rule of Law*, Leiden-Boston, 2006, at 34-37; also reported by J.W. HEAD, *China's Legal Soul*, supra at 117, footnote 17.

[25] Details on the two different Chinese concepts of *fǎ zhì* within the debate and development of the Chinese idea of "rule of law" may be found in J.W. HEAD, *China's Legal Soul*, *supra*, at 118; J.W. HEAD, *Great Legal Traditions*, *supra*, at 550-551; R. PEERENBOOM, *The Long March*…, *supra*, at 56-65.

(法治); and of *yīfǎ zhìguó* (依法治国), "ruling the country by law", or "according to the law", to build a "socialist rule of law state" – followed by the corresponding Constitutional amendment in 1999.

This achievement ignited a second round of debate, involving scholars worldwide, to define *fǎ zhì* (法治) and all related expressions, particularly to determine whether this option of the Chinese ruling élite was intended as a choice in the sense of a Western-style rule of law, corresponding to the hopes and forecasts of many Western scholars – this probably being the only "rule of law" most Westerners could conceive then. Despite the different opinions circulated, however, Chinese legal texts and policy documents kept for long maintaining their fundamental ambiguity with respect to the meaning of *fǎ zhì.*

Subsequent developments eventually proved[26] that the more "liberal" attitudes displayed towards "the rule of law" by the ruling élite in the 1990s receded in importance, with a softening of legality principles promoted by the leadership in the following decade, with a view to the construction of a "socialist harmonious society". This is possibly a reaction to the erosion of the Party's power and capacity to control the country, as started to be seen in late 1980s and 1990s[27].

It became apparent in the first decade of the 21st century that the choice made with respect to "the rule of law" was in fact in favour of a model different from the Western one, based on Chinese peculiarities and softened by a reinforced socialist frame[28].

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[26] Especially significant to give a recent and thorough account of the state of the matter is the State Council's *White Paper on the Rule of Law in China* published in 2008, discussed in Chapter Two, Section 2.

[27] Beyond the Tienanmen incidents in 1989, and of a significant number of smaller incidents around the country reported every year thereafter, if often related to local circumstances, this erosion has been noticed by a number of authors writing on China-and-the-rule-of-law issues in the 1990s and early 2000s: see, e.g., S.B. LUBMAN, *Introduction: the Future of Chinese Law*, in S.B. LUBMAN (ed.), *China's Legal Reforms*, *supra*; R. PEERENBOOM, *supra*, Chapter 5, *Retreat of the Party and the state*, at 188.

[28] See below, Chapter Two, Section 2.

We'll probably have to wait until some time after the next change of leadership at the top of the Communist Party and of the PRC's institutions, due to take place in early 2013, to see whether this line of policy will be confirmed for the next decade as well. However, the current policy and state of affairs are likely to be confirmed, in my opinion, at least for the short-medium term. An element of political control balancing more "liberal" attitudes will be kept, due to the higher level of unpredictability of developments in the Chinese society, more and more inclined to openness and diversification. And, also, due to a higher level of volatility in the world economy, and in general international politics and relations stability, with respect, e.g., to the situation of the mid-1990s – which produced instead a more "liberal" approach to "rule of law" issues within the Chinese ruling élite.

1.3. An example of the mentioned legislative ambiguity is given by Article 1 of the Legislation Law of the People's Republic of China (hereinafter also: PRC) of March 15, 2000, revealing the state of the system, with very interesting references contained in the same provision to a "socialist legal system with Chinese characteristics;" to ruling the country "through (by) law"; and to the concept of "socialist rule of law"[29]: it is just a single provision, and it is ambiguous and flexible enough to justify a number of readings.

Similarly, many other legal and political documents issued by the Chinese Communist Party[30], Party Officials and by the Government, especially in the Jiang Zemin era, use different formulas

[29] Article 1 of the Legislation Law of March 15, 2000: "*This Law is enacted in accordance with the Constitution in order to standardize lawmaking activities, to perfect state legislative institution, to establish and perfect our socialist legal system with Chinese characteristics, to safeguard and develop socialist democracy, to promote the governance of the country through legal mechanism, and to build a socialist country under the rule of law*" (emphasis added).

[30] *E.g.* the initial Chapter of the Party Constitution ("General Program"), as amended in 2002.

expressing concepts which may be translated approximately either as "rule of law" (hereinafter: r.o.l.) or as "rule by law" (hereinafter: r.b.l.), such as *yìfǎ zhìguó* (以法治國) or *yīfǎ zhìguó* (依法治国), ruling the country "through" or "in accordance to" the law); with the result that the ambiguity of the meaning is not resolved in any clear sense by the black-letter-rule of the Chinese legislation.

As another instance, an *Outline for Promoting Law-based Administration in an All-round Way*[31], issued by the State Council in March 2004 – following a decision issued in November 1999 named *Decision on Promoting Law-based Administration in an All-round Way* – uses several of those formulations, especially "governing the country according to the law"[32] and "government ruled by law"[33] (both in the English text of this bilingual document).

The latter formulation is especially ambiguous: the reference to a "government ruled by the law" could sound to Western ears as a reference to the rule of law concept, applicable to the government as well as to the citizens; however, the use of past participle ("ruled") in an adjective function suggests a heavy question about *who* rules the government by law. The obvious answer being the Party – which still keeps its role of providing political leadership as stipulated in the Preamble of the Constitution – the question is transferred at that different level: is the Party also ruled by law? The answer also looks obvious in the negative sense, and the "rule by law" model remains

[31] Hereinafter: "the 2004 *Outline*". It is available in Chinese government bookstores, also in a bilingual, Chinese-English translation (Beijing, China Legal Publishing House, 2005). This very important document is made, according to its preamble, "*in accordance with the Constitution and relevant laws and administrative regulations to carry out the basic strategy of governing the country according to law, act in the spirit of the 16th National Congress of the Communist Party of China… promote law-based administration in an all-round way, and build the government up into one that is ruled by law.*"

[32] *E.g.*, in Chapter I, paragraph 1 of the mentioned 2004 *Outline*.

[33] *E.g.*, in the Preamble of the 2004 *Outline*.

confirmed.

Similarly, in a report written by a Deputy Auditor General of the National Audit Office of China, available in English on the internet[34], words referable to both concepts of "rule of law" and "rule by law" can be found.

Maybe this is all about a westerner's attitude in classification, after all: the Chinese vagueness of terms reflects the inherent flexibility of the Chinese concept, able to cover several of our Western ones. Western scholars, perhaps, should avoid trying to make subtle, clear and rigid of what is a fundamentally fuzzy and flexible distinction, to say the least; and which might well be non-existent in the Chinese tradition and mentality. *Fǎ zhì* after all, does not mean "rule by law", nor "rule of law"; in a legal sense, it only means… *fǎ zhì*.

A precise and accurate translation of *fǎ zhì* into English language can be possible just as much as it is possible to translate any English term expressing a legal concept into a single-word Chinese concept having the same legal meaning[35]. *Traduttori traditori*, as the Italians say: the actual legal meaning of *fǎ zhì* cannot come from any more or less accurate translation, but from observation and study of the Chinese history and present reality.

1.4. Comparing socialist legal traditions, it can certainly be said that in the Chinese tradition and socio-political environment pure

[34] DONG Dasheng, *The Practice of Rule of Law in China*, available online: www.cnao.gov.cn/UploadFile/NewFile/2006628152356558.doc. The author translates Article 5 of the Constitution of China as making a reference to "ruling the country in accordance with the law." The author makes several references to the Chinese construction of a modern *socialist* legal system, to be completed by year 2010 (*ibid.*, p. 3), and explicitly to the fact that "government should act in accordance with law…[as] an indispensable part of ruling the country by law" (p.4).

[35] The problems related to legal translations are well-known in comparative law literature; see the collection of essays B. POZZO (ed.), *Ordinary Language and Legal Language*, Milan, 2005; and the essay therein of R. SACCO, *Language and Law*.

administrative discretion has always had wider latitude with respect to the USSR environment.

In the former USSR a "strong" socialist legality concept has eventually been enforced, based on the actual recourse of governing organs to their regulatory power for providing final rules, normally enforced, if always subject to an "oriented" reading and enforcement[36].

On the other hand – notwithstanding a similar presence of legal rules of a very general type with guiding functions – China, even before the "Cultural Revolution," has traditionally displayed a remarkable lack of detailed administrative by-laws in many areas. This very often made legal rules completely inapplicable and consequently created latitude for political and administrative discretion, to say the least:

> "The present problem is that the laws are incomplete; many laws have not yet been enacted. Leaders words are often taken as 'law', and if one disagrees with what the leaders say, it is called 'unlawful'. And if the leaders change their words, the 'law' changes accordingly"[37].

Additionally, there still is a frequent by-pass of existing laws and regulations in favour of the policies of the specific organs vested with the authority to implement the rules.

Within the socialist legal "family" it would thus be possible to contrast the mature Soviet model based on a "strong" socialist legality, which we could refer to as "rule by law", to the Chinese model developed after 1949, originally based on a "weak" socialist legality

[36] See below, Section 6, describing with more detail the Soviet experience; also see G. AJANI, *Il modello post-socialista*, Turin, 1996, Chapter 4, especially at 56-58.

[37] It is a very well-know remark made by Deng Xiaoping during the third plenary session of the eleventh Central Committee of the Communist Party of China, in December 1978. In *Collected Works of Deng Xiaoping (1975-1982)*, (Beijing, People's Press, 1983) at 136-137.

and on the officers' very wide discretion[38], bordering to a "rule of men" model (especially in the Maoist period).

Deng's promotion of *fã zhì* (法制), followed by Jiang's promotion of the other *fã zhì* (法治), probably just indicated a refusal of the previous state of affairs – which was very close to a pure "rule of men" model – in pursuing the country's development; a tension toward the progressive diffusion of law as an important tool for governance, if not the preferred one. However, not necessarily the (only) opposite of "rule of men" is the Western concept of "rule of law".

2. *Interaction of normative sources*

The Chinese sources of legal rules constitute nowadays a very vast system, featuring complex and often intricate interactions amongst sources at the different hierarchical and territorial levels.

The mentioned plurality of sources, with their increasingly frequent interventions *in idem* despite their formal hierarchy, brings about a remarkable complexity, and a plurality of possible solutions in the management of concrete cases, both by the administrative organs and by the courts. Constitutional provisions related to hierarchy of norms[39], providing for the usual Constitution-laws-regulations order of prevalence, remain to some extent ineffective[40].

Generally, in socialist countries the Constitution has a different, and possibly lesser, legal value from what is attributed to the document

[38] The evidence of the very wide administrative and political discretion of the organs of government in China is easily found in literature, including the general literature on Chinese law and institutions cited so far in previous footnotes.

[39] Constitution, Articles 5, 89(1), 100. Also, Legislation law of 15 March 2000, Articles 78 and ff. ones.

[40] As observed by all the scholars who have written on the Chinese legal system. See, e.g., A.H.Y. CHEN, *supra*, 111-115; R. PEERENBOOM, *supra*, Chapter 6.

in other countries, primarily because Constitutions are perceived as political documents rather than strictly legal ones[41]. Chinese courts have had for a long time the prohibition of making direct references to Article of the Constitution when making judgments under direction by the Supreme People's Court in 1955[42].

This approach started being questioned around the end of the 20th century and the beginning of the 21st, as in a few cases the Chinese courts have given direct enforcement to Constitutional rules and rights[43], based on a directive of the Supreme People's Court, until a new directive of the SPC in 2008 reverted to the previous policy of prohibiting courts to directly enforce constitutional provisions[44].

Moreover, there are mechanisms in place – in order to provide coherency between the rules stemming from legal sources of different levels – which are different from the judicial ones, and perfectly consistent with the underlying philosophy of the Chinese state: these mechanisms are generally perceived as inefficient or purely nominal[45].

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[41] "*In short, Chinese constitution law concerns itself more with the state organizational structure than with the checks and balances of governmental powers, more with the future direction of the society than the protection of fundamental rights of citizens, and more with general principles than with detailed rules capable of implementation. However, one must not dismiss the Chinese Constitution out of hand. Seen as the 'mother of all laws', the Chinese Constitution does set the parameters for legal developments*". In J. CHEN, *Chinese Law*, The Hague-London-Boston, 1999, 58 and 93-95; also see A.H.Y. CHEN, *supra*, 39-41.

[42] The document was a Supreme Court "*Reply on the Non-Desirability of Referring to the Constitution in the Determination of Crimes and Sentences in Criminal Judgments*", as reported by A.H.Y. CHEN, *supra* at 47.

[43] Such as in a Supreme people's Court *Reply to the Shandong High Court on the case Qi Yuling v. Chen Xiaoqi*, in relation to the constitutional rights to Education and to one's own name, reported in the People's Court daily of August 13, 2001. There also seem to have been previous cases related to constitutional protection of labourers' rights, as reported by A.H.Y. CHEN, *supra* at 48.

[44] As it will be discussed below, Chapter Two, Section 2.

[45] See A.H.Y. CHEN, supra, 114-115; R. PEERENBOOM, *supra* at 259; in Italian, see F.R. ANTONELLI, *La "Legge sulla legislazione" ed il problema delle fonti nel diritto cinese*, in *Mondo cinese* 119 (2004), 23-36.

Of course, the issue of abstract appropriateness of these mechanisms should be considered separately from their actual efficiency. Particularly, in a transition period, those mechanisms could either end up being scrapped or being enhanced and made more effective. Enhancing the socialist legislative supervision mechanisms seems to be the current choice of the ruling élite[46].

Further reforms, including other mechanisms – such as the judicial review of laws and regulations or the creation of special courts or organs having judicial or quasi-judicial nature and authority to solve legislative conflicts – would require a sharp (and, at present, unlikely) political change, and amendments in the Constitution.

The People's Republic of China's Legislation Law of march 15th, 2000 describes the mechanisms currently in place. The system basically consists of a supervisory and revisionary process of legislation and regulative activity at every level: laws and regulations are to be submitted from the issuing authority to the supervising one within 30 days of their promulgation[47].

Legislation stemming from the Standing Committee of the National People's Congress (NPC) shall be submitted to the NPC[48]; congress provincial legislation shall be submitted to the NPC Standing Committee[49]; governmental rules at central or provincial levels to people's congresses standing committees at the corresponding level[50];

[46] The *White Paper on the Socialist System of laws with Chinese Characteristics*, published by the State Council in October 2011 (the 2011 *White Paper*), Chapter I, reports how the actual implementation of legislative supervision process at all levels has started since 2009.

[47] Legislation Law, Article 89.

[48] Legislation Law, Article 88(1), in accordance with Article 62(11) of the Country's Constitution, for the relation between the NPC and its Standing Committee; the same relation is established between provincial people's congresses and their Standing Committees according to Article 88(4) of the Legislation Law.

[49] Legislation Law, Article 88(2), in accordance with Article 67(8) of the Country's Constitution.

[50] Legislation Law, Article 88(2), in accordance with Article 67(7) of the Country's

rules issued by single departments of governments at all levels shall be submitted to their relevant governments[51]; rules from all governments below the provincial level shall be submitted to the relevant provincial government[52]; rules issued by special agencies or other bodies enabled to issue regulations shall be submitted to the departments or Ministries of the relevant governments which enabled them[53].

In principle, this should allow a legality check of the rules against the higher level rules issued by the supervising authority – the latter having the power to identify illegalities in the scrutinized rules and ask the supervised regulator to rectify them, as well as having the power to amend or annul the illegal provision themselves[54]. It is important to observe that the mechanisms put in place with the Legislation Law also allow the supervising authority to go beyond a mere legality check[55].

After the rules are in force, the constitutionality or legality verification process can be initiated by the enforcing administrative authority or by other government organs, or by any citizen or entity; it starts with a request made to the Standing Committee of the NPC to assess the constitutionality or legality of the supervised rules. A supervision process will follow, with a process of consultations between the supervising organ and the supervised one[56], and rules which need to be amended or annulled should, in principle, so be dealt

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Constitution, for the NPC Standing Committee with respect to the central government; Article 88(5) with respect to local governments and the relevant local congresses.

[51] Legislation Law, Article 88(3), in accordance with Article 89(13) of the Country's Constitution.

[52] Legislation Law, Article 88(6).

[53] Legislation Law, Article 88(7).

[54] Legislation Law, Article 87.

[55] According to Article 87(4) of the Legislation Law revision can lead to amendments or annulment when "the provision of an administrative or local rule is deemed inappropriate and should be amended or annulled".

[56] Legislation Law, Article 91.

with[57]. Even the Supreme Court and Procuratorate must follow these rules, referring the issue to the Standing Committee of the NPC, whenever they find that a legal rule is against the Constitution or that a provincial law is against a central law of the state[58].

The well-known underlying political doctrine is that there is no separation of powers, but just one power vested in the people (represented by the Communist Party, i.e. its politically conscious *avant-garde*) and then in the National People's Congress, which appoints and supervises the central Government, the Supreme Court and Procuratorate[59]; the absence of separation of powers in the State also having been the doctrinal basis of the Soviet political-legal system and of its judiciary[60].

The mentioned system of governance is present at all different levels of the Chinese government from central to local government, without a Western-style system of checks and balances – supervision being the key concept instead in the Chinese public institutions.

For instance, the 2004 *Outline* indicates amongst the "basic requirements of law-based administration"[61] the elements of due process and of "balance of powers and liability".

The balance of powers, though, is considered as a mere consequence of the imposition of liabilities and of supervision for the use of any given public power[62], rather than a consequence of several

[57] Legislation Law, Article 90.

[58] *Id.*

[59] See XIN Chunying, *Chinese Courts History and Transition* (Law Press China, 2004), at 99-101.

[60] See N. PICARDI, R.L. LANTIERI, *supra*, xxix; H.J. BERMAN, *supra,* 21-22; A.K.R. KIRALFY*, Recent Changes in Soviet Criminal Procedure* in M. MOUSHKELY (ed.)*, L'URSS, Diritto, economia, sociologia, politica, cultura*, Milan, 1965, 521; G. CRESPI REGHIZZI, P. BISCARETTI DI RUFFIA, *La costituzione sovietica del 1977*, Milano, 1979, 220.

[61] The 2004 *Outline*, Section III, paragraph 5.

[62] *The 2004 Outline*, Section III, paragraph 5.

powers checking one another. No special role is attributed to the court and procuratorate systems in the 2004 *Outline* for the transition towards a law-based administration. The courts are mentioned in just very few passages of the document, whereas the focus of the Outline is on promoting the *administrative enforcement* of the laws by means of rationalization, enhanced supervision, improvement of governmental work at all levels and its discharge in accordance to the laws[63].

The described environment surely makes impossible for a Chinese court to declare a statute or even a local set of regulations unconstitutional or illegal[64]. A conflict between general rules stemming from different levels of normative power shall only be resolved within the relation between relevant legislative or regulative bodies – which theoretically is a relation of vertical supervision and control, if normally a quite loose one.

Legislative organs have the monopoly of lawmaking activity; courts can operate as far as they can apply the rules easily, almost behaving as a mere *bouche de la loi*[65]. They should seek directions, as they regularly do, indeed[66], from higher courts when deciding difficult, complex or sensitive cases. Moreover, a sort of *référé législatif*[67] has

[63] The need to implement effective institutional supervision by the People's Congress as well as democratic supervision by the political entities is further stressed in the *Outline*'s Section IX paragraph 27, before the indication of the need for administrative organs to accept the supervision of the People's Courts according to the law, which only follows in paragraph 28.

[64] See XIN Chunying, *supra*, 99-101.

[65] "The mouth of the law". With this celebrated Montesquieu's aphorism the French revolutionary regime approached the issue of the role of judges, without any creative work allowed beyond the mere, almost mechanical application of legislative rules to real cases.

[66] A.H.Y. CHEN, *supra*, 127.

[67] Another legal tool developed in the French *Droit Intermediaire* (intermediate law) as the legal system in force between the revolution and the Napoleonic period is called. The *référé législatif* had been introduced with the Revolutionary constitution of 1791, which obliged the judge to suspend judgment and ask directions to the legislative body whenever the meaning of the law to be applied was unclear. This mechanism led

been put in place, at least in principle, with the Legislation Law and according to its article 90[68], whenever a case involves the solution of a contrast between different legislative rules[69].

Simply put, the legislator is the almighty entity within the State, without a system of checks and balances. The legislator is directly representing, within the State apparatus, the political power of the people of China, represented in the country by the Communist Party.

The government and the judiciary, on the other hand, perform their respective functions not as equal and separate powers; being appointed and having to accept instead the supervision of the congresses at their level, and having to discharge their functions based on and regulated by the enacted legislation. Courts do not stand on equal footing *vis-à-vis* the elective assemblies at their corresponding level, and it is only the latter assemblies which have the power to create and modify legal rules, which stand as far as they are not modified or repealed by the appropriate legislative or regulative organ – the one having issued the original rules, or the supervising one. Besides, according to the same doctrinal foundations, legislative organs are also the ones vested with the power of interpreting the rules they issue, their

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to long delays in the administration of justice, and eventually disappeared with the Napoleonic Civil Code, the Article 4 of which obliged the judge to find and provide a solution according to the law, however complicate the law might have been, lest being held responsible for denial of justice. The inception of those French ideas is described, for instance, in J.H. MERRYMAN, *The French Deviation*, in *Studi in Memoria di Gino Gorla*, Milan, 1994, I, 619; also in 44 *American Journal of Comparative Law* 109 (1996).

[68] Article 90, as discussed above, regulates the requests for supervision that any court, procuratorate, state organ, entity or citizen can submit to the Standing Committee of the NPC whenever a conflict of rules of different hierarchical level is found.

[69] This mechanism is not really unheard of: in addition to its French ancestor of the end of the XVIII century, it should also be remembered that a similar obligation to refer the case to the lawmaker had been legislatively created in the VI century by Emperor Justinean in relation to the Roman law collected in the *Corpus Iuris Civilis*. See the Justinean's *Constitutio* (legislative enactment) named *Tanta*, of December 16th, 533, sanctioning the *Digest*, at paragraphs 18 and 21.

interpretation having the same force of the interpreted law (Articles 42, 43, and 47 of the Legislation Law).

The underlying implication is, in my reading of the socialist and Chinese legal mentality, that courts – especially lower ones – should confine themselves to "applying" the rules. As a matter of fact, the adjective "judicial" is usually used in China before "interpretation", to indicate judicial applications of law to specific cases[70].

Plain, unspecified, "interpretation" in China normally refers to the legislative one, as shown for instance by Article 42 of the Legislation Law of March 15, 2000. The clear meaning of that rule is that general activity of "interpreting" the law is considered in China, feared perhaps, as something (quite creative and thus) different from the mere "application" of the law; very akin, instead, to legislation or anyway law-creation – not completely unreasonable a fear, in fact, in an environment characterized by the vagueness of many legislative rules.

One of the pillars of the Western law is that the enacted legislation, however unclear or ambiguous, can be interpreted by lawyers and judges to find their applicable meaning – technical interpretation of the law being the most distinctive feature, perhaps, of the functioning of the legal system in Western contexts.

It follows that the applicable meaning given to the law by the courts might well be in some cases an unexpected meaning, that the legislator would not have suspected to be implied in the legal text – even a meaning contrary to general interests or to the interests of the government in some case[71].

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[70] See N. LIU, *Judicial Interpretation in China*, Hong Kong-Singapore, 1997, *passim*. The book, focused on the judicial interpretations given by the Supreme People's Court, is a precious testimony on the nature and functions of the Chinese judicial system. The issue of legal interpretation in China is also analyzed by A.H.Y. CHEN, *supra*, 118-128.

[71] This possibility is at the base of an unresolved jurisprudential debate on the rule of law, even in the Anglo-saxon literature, with different position trying to figure out how it may be possible that judicial officers – members of a professional élite lacking

In a socialist context, the applicable doctrine is that legal rules represent the will of the people, or "the translation into normative enactments of the people's will"[72]; consequently, there is no technical process possibly usable to extract a meaning from the written rules which goes against what had been determined as being appropriate – by the legislator, by the state and, ultimately, by (the people and) the Party – at the moment of enactment, as well as subsequently, at the moment of every single case decision. When the meaning of a law is unexpressed or unclear, thus, it shall not be construed in a way that will go against interest of the People, the legislator, the government, the party – which are all part of the same single political power to which the courts also belongs.

Political considerations, in fact, do play a major role in case-by-case judicial or administrative interpretation and enforcement. It is worth stressing again that it is "impossible to understand Soviet law, or communist law generally, without taking into account its political dimension, or to be more explicit, without recognizing that law under those circumstances was almost totally dependent on political determinants"[73].

To sum up, *conflicts of sources, just like interpretive problems, shall only be dealt with on a political level*. Chinese citizens cannot attack any general set of regulations in court to contest its legality[74].

any democratic legitimisation, and not being accountable to the citizens of their jurisdiction – may rule in sensitive, even constitutional cases, regulating fundamental issues and producing outcomes amounting to a normative creation binding the entire society. See, e.g., D.M. BEATTY, *The Ultimate Rule of Law*, Oxford, 2004, at 25-33, criticising the ideas of Ronald Dworkin, especially those expressed in R. DWORKIN *Freedom's Law*, Cambridge Mass., 1986.

[72] N. PICARDI, R.L. LANTIERI, *supra*, xxxvi.

[73] F. FELDBRUGGE, *The Rule of Law in Russia in a European Context*, *supra*, 203.

[74] Article 12 of the Administrative Procedure Law of the PRC of 1990: "…court shall not accept suits brought… against… (2) administrative rules and regulations, regulations, or decisions and orders with general binding force formulated and announced by administrative organs". Of course, citizens have the right to request a

The legislative mechanisms for solving a conflict of rules issued at different levels have so far been left almost unused by the relevant authorities. The result has been an extremely complex normative system characterized by a high number of inconsistencies – by some degree of chaos, some could say[75].

When dealing with a specific case, a court may selectively apply rules of a higher source, rather than apply contrasting ones from a lower source; or vice versa. However, the same court will not be permitted to declare one of the diverging rules unconstitutional, illegal or invalid, having instead to resort to the mechanisms laid down in the Legislation Law to have the question submitted to the appropriate authority[76].

The inability to challenge unconstitutional laws in court, or illegal regulations with a general effect[77], the failure to effectively

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verification to the NPCSC, as discussed, according to the Legislation Law.

[75] See R. PEERENBOOM, *supra*, title of Chapter 6.

[76] A clear case supporting this view has been made known to the international public after Li Huijuan, a young and legally trained judge of the intermediate court of Luoyang in the Henan province declared a piece of provincial legislation of Henan on agricultural seeds pricing illegal and void, as being contrary to a relevant national law. The provincial people's congress made an official protest to the intermediate court of Henan, considering the judge's position as a serious political mistake as well as a serious breach of the law. As a consequence of this political initiative, the judge risked of losing her position and was subject to disciplinary action. Eventually, due perhaps to the publicity reached by the case and to a possible intervention of the Supreme Court, the young judge was not disciplined. The High People's Court of Henan reviewed the case and confirmed the applicability of the national law over the contrasting provincial one, but maintained a strong criticism for judge Li, as she had no right to declare the provincial law invalid. The relevant decisions have not been officially published, to my knowledge; however, a number of press Article and internet commentaries have been produced on this case, known as "the seeds case"; see, e.g., the editorial article *Luoyang City "Seed" Case Highlights Chinese Courts' Lack of Authority to Declare Laws Invalid*, in Notable Legal Cases, Case Files, *China Law and Governance Review*, online at: http://www.chinareview.info/issue2/pages/case.htm; J. YARDLEY, *A Young Judge tests China's Legal System*, in *International Herald Tribune*, November 28, 2005.

[77] Only punctual administrative acts or refusals to act in some cases may be

implement, so far and in a systematic way, the mechanisms provided to solve conflicts of sources in the 2000 Legislation Law, and the absence of a strong judiciary, all add to the unpredictability of the outcomes of the Chinese legal system.

When examining any piece of Chinese legislation, the importance of the political framework and local circumstances are to be considered as factors having an impact on the interpretation and application of legal rules in the relevant location.

3. *The role of courts, procuratorates and the legal profession in the Chinese context*

3.1. The Chinese court system works on an underlying philosophy different from that of Western courts, due to the absence of the Western doctrine of separation of powers in the foundations of the Chinese state. Chinese courts operate as specific organs of the State, implementing the State policy at a local level, through the legal system, through judicial directives, hierarchies and internal procedures[78].

At the highest level of the Chinese court system is the Supreme People's Court (SPC)[79], which performs several key functions such as

challenged before the People's courts by the aggrieved subject: according to Article 14 of the Administrative Procedure Law of the PRC of 1989, the courts "shall not accept suits brought… against … (2) administrative rules, regulations, or decisions and orders with general binding force formulated and announced by administrative organs".

[78] The basic philosophy of the Chinese judiciary is dealt with in N. LIU, *Judicial Interpretation in China*, *supra*; also see M. MAZZA, *Le istituzioni giudiziarie cinesi*, Milan, 2010, *passim*, featuring a historic review of Chinese judicial institutions, since the Imperial era through the Nationalist period and finally to those of the People's Republic of China. An accurate depiction of how courts and procuratorates work is made by A.H.Y. CHEN, *supra*, 131-163; on current transition and its impact on the courts' system, see XIN Chunying, *supra*.

[79] See N. LIU, *supra,* Introduction, 6-20, on the interference of the Communist Party on the Supreme People's Court; this Author analyses how such an interference, or

controlling the activities of lower courts through its decisions, directives and supervision[80], harmonising the application of the law not only within the framework of the system of legal rules, but also with the policies of the Party. It is also true that the Party interferes at local, horizontal level with the different levels of the judiciary – as well as with all other departments of the government[81] –, the relation between local courts and local Party organs reproducing the one at higher and highest levels.

It is worth mentioning, on the other side, that the Supreme Court exercises a *de facto* general normative power by means of issuing opinions on general matters of "interpretation" of given laws, lengthy and drafted in the form of general and articulated provisions. This has been the cause of some tension between the NPC and the SPC[82], as well as a clear demonstration of how far the "interpretation" process can go, and why the socialist doctrines are inclined to reserve this activity to the legislator and not to the courts[83]. This tension demonstrates the complexities facing a socialist state transitioning from almost no legal system, as it used to be in the middle of the cultural revolution, to a modern state with a legal system founded on (some kind of) rule of law.

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leadership, is *not excluded* by art. 126 of the Constitution, or by art. 3 of the Law of Administrative Procedure of 1989 – which only stipulate the freedom of courts from interferences of individuals or *other* organizations –; and it is indeed expressly provided for in the Preamble of the Constitution.

[80] The political and hierarchical relation among the different courts of the Chinese system might be considered similar to the relation between different-level units of the Communist Party; see N. LIU, *supra*, at 25.

[81] Article 3 of the Law of Administrative Procedure of 1989 reproduces art. 126 of the Constitution; identical considerations can be done on the leadership exercised by the Communist Party over the public administration.

[82] Quoting from XIN Chunying, *supra*, p.102: "*it is agreed that judicial interpretation has gone far beyond its legal limits… judicial interpretation has become a very important source of law other than laws made by NPC and administrative regulations*".

[83] See the discussion made above on the interpretation of the law in the socialist Chinese environment.

The scarcity of legislative norms, and/or their being exceedingly general and vague, left a normative space unoccupied; this in turn made possible, and to some extent necessary, for the SPC to intervene and fill the gap, *de facto* if not *de iure* – until reforms will accept this intervention as a lawful one, or will provide different solutions to the substantial problems which caused the SPC's intervention. The result is a non-constitutional, to some extent controversial exercise of normative power – yet useful for the functioning of the system – by the SPC on lower courts[84]. The lower courts are in turn bound to comply with the SPC directives and opinions which, besides, do not necessarily have to be complied with by other departments of the government – the latter not being subject to the hierarchical control and supervision of the SPC being subject, instead, to those of their respective governmental superior authority.

3.2. Very peculiar are the general principles of the Chinese legal system on attribution of jurisdiction to the different levels of courts, from grassroots level up to the Supreme People's Courts, *according to the general impact* of the case. Cases are, in principle, attributed to courts at different levels according to their "territorial impact". The standards to determine the impact are very vague, and a higher court may well decide, *motu proprio*, to attract into its jurisdiction and entertain a case already pending before a lower one[85].

[84] Again, see XIN Chinying, *supra*, at 102.

[85] As it is easy to see in the following provisions on attribution of jurisdiction by level in the Code of Civil Procedure of the PRC:

> "Article 18: The grassroots people's courts shall have jurisdiction as courts of first instance over civil cases, unless otherwise stipulated by this Law."
>
> "Article 19: The intermediate people's courts shall have jurisdiction as courts of first instance over the following civil cases: (1). major cases involving foreign interests; (2). cases that have major impact on the area under their jurisdiction; (3). cases under the jurisdiction of the intermediate

The underlying idea clearly seems to be that the identification of the appropriate jurisdiction as well as the subsequent application of the law to a case are not neutral, technical operations solely regulated by the law – as it would be under the Western concept of rule of law, where uncertainty in the rules identifying the competent court, or their violation, would be seen as a fundamental violation of *due process*[86].

An element of policymaking/policy enforcing is involved instead in the Chinese principles of the judicial process, warranting a degree of operational discretionality which has to be exercised at the appropriate level of authority by a court expressed, supervised – and in fact interfered with – by the appropriate level of the political and

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people's courts as determined by the Supreme People's Court."

"Article 20:The higher people's courts shall have jurisdiction as courts of first instance over civil cases that have major impact on the areas under their jurisdiction."

"Article 21: The Supreme People's Court shall have jurisdiction as the court of first instance over the following civil cases: (1). cases that have major impact on the whole country; and (2). cases that the Supreme People's Court deems it should try."

"Article 39: People's courts at higher levels shall have the authority to try civil cases over which people's courts at lower levels have jurisdiction as courts of first instance; may also transfer civil cases over which they themselves have jurisdiction as courts of first instance to people's courts at lower levels for trial. In case that a people's court at a lower level deems it necessary for a civil case of first instance under its jurisdiction to be tried by a people's court at a higher level, it may request such a people's court to try the case."

A similar set of rules is provided for administrative litigation: Articles 13-16 of the Administrative Procedure Law of the PRC of 1989; the "impact test" and the attribution of cases to the courts of the different levels is provided in those rules through the phrasing "grave and complicated administrative cases in the areas [of their respective jurisdictions]".

[86] In Italy it would also be a violation of the specific constitutional principle of the "giusto processo" provided for by Article 111 of the Constitution, and in criminal cases it would also amount to a violation of another principle, that of the "Giudice naturale precostituito per Legge" provided for in Articles 25 of the Constitution.

governmental pyramids[87]. This also means that the result may vary according to the level it is produced.

3.3. Another government institution playing administrative, supervisory and normative functions similar to those of the SPC, is the Supreme People's Procuratorate, with respect to the underlying system of the People's Procuratorates[88].

The People's Procuratorates' functions are not confined to prosecutorial work, as it happens in Western legal systems for public prosecutors. The major functions of the Supreme People's Procuratorate[89] include many different ones, in addition to prosecution duties, such as leadership on lower level procuratorates; "to offer judicial interpretations in the actual application of law in the work of prosecution"; "to make stipulations, regulations and implementation rules on the work of prosecution"; "to be responsible for the political work and bringing up of the staff in the nation's prosecution bodies".

The Procuratorates had been abolished by Central Committee of the Communist Party at the height of the Cultural Revolution, in 1969, representing maybe too strong and legally structured state institution, *vis-à-vis* the political informality which was prevalent at the time and made Party organs run the state with the help of the Red Guards and the public security organs, which took over prosecutorial

[87] All authors researching Chinese law do emphasise the very strict operational relations and the structural political interferences of the Chinese political and governmental apparatuses with the work of Chinese courts; see above, Chapter One, Section 3; also see, e.g., I. CASTELLUCCI, *Rule of Law*, *supra*, especially at 51-58; A.H.Y. CHEN, *An Introduction, supra*; N. LIU, *supra*; R. PEEREMBOOM, *The Long March…, supra*; XIN Chuying, *supra*.

[88] N. LIU, *supra*, and A.H.Y. CHEN, *supra*, 159-163; M. MAZZA, *Le istituzioni giudiziarie cinesi*, *supra*, at 147-171.

[89] As listed on the central Chinese government web portal, online at: http://english.gov.cn/2005/02/content_28500.htm.

work[90]. The abolition was confirmed in China's 1975 radical Maoist Constitution; the procuratorate's function of checking the legality of state organs' activities was then considered as anti-party and bourgeois[91].

As China begun reconstructing its legal system, the procuratorates have been restored (1978) and disciplined with organic laws similar to those enacted for the judiciary[92].

Chinese Procuratorates have very peculiar and important functions, indeed, reproducing the model of the Soviet-developed *Prokuratura*[93]; an institution, created in 1722 in czarist Russia by Peter the Great, which was considered "the eyes of the Czar"[94], enabling the Czar to exercise supervision, control on his extremely vast empire –the General Procurator of Russia enjoying an enormous power, that according to some made him almost a *de facto* vice-Czar[95]. As well as the Czarist one, also the Soviet *Prokuratura* had very wide duties and far-reaching powers, also a feature of their Chinese equivalent, with the aim of enforcing laws and party policies, through law and supervision on other state organs[96].

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[90] A.H.Y. CHEN, *supra*, 160; M. MAZZA, *Le istituzioni giudiziarie cinesi*, *supra*, at 151-154.

[91] *Ibid.*

[92] *Ibid*.

[93] A.H.Y. CHEN, *supra*, 159.

[94] N. PICARDI, R.L. LANTIERI, *supra*, xv-xvi.

[95] W. MARSHALL, *Peter the Great*, London, 1966; Italian translation, Bologna, 1999, 81.

[96] On the Soviet *Prokuratura*, see G.G. MORGAN, *The Protests and Representations Lodged by the Soviet Procuracy Against the Legality of Governmental Enactments, 1937-1964*, in 13 *Law in Eastern Europe*, Leyden, 1966, 103-118, and the literature in Russian language cited therein. The essay comes with a collection of protests lodged by Soviet procuracies in the indicated period, translated into English language. A larger collection of protests between 1937 and 1973, translated into English, is available in L. BOIM, G.G. MORGAN, *The Soviet Procuracy Protests: 1937-1973*, in 21 *Law in Eastern Europe*, Leyden, 1978. On the Russian *Prokuratura* after the collapse of the USSR, see G.B. SMITH, *The Procuracy, Putin and the Rule of Law in Russia*, in

Thus, in addition to the direction of criminal investigations and to prosecutorial work for criminal cases, Chinese procuratorates represent public interests in every court, having authority to intervene in civil an administrative cases and to supervise the courts' judicial work and law enforcement. *Especially, procuratorates are in charge of supervising over all other governmental organs at their corresponding level*, including handling petitions and complaints from the public[97].

In civil cases, Chinese procuratorates "shall have the right to exercise legal supervision over civil litigation" according to Article 14 of the Civil Procedure Law of the PRC of 1991 (CPL), and even to intervene in the judgement in support of one of the parties, if public interests so requires. Moreover, Article 186 states that "a people's court shall retry cases in which a people's Procuratorate has lodged a protest" – a similar supervisory power being also vested with upper courts with reference to lower courts' decisions.

Very noticeable is the fact that procuratorates sometimes do bring actions in civil courts as well, to protect a public interest[98]. This power of direct action in civil courts is not provided for by art. 14 of the CPL, or by any legal norm – except in environmental protection, where a government Resolution seems to give the procuratorates the power of acting directly[99]. As a matter of fact procuratorates have been prohibited in 2006 from doing so by both the Supreme People's Court and Procuratorate, within the frame of the campaign for the promotion of the "socialist rule of law"[100].

F. FELDBRUGGE (ed.), *supra*, 1-15, and the literature in Russian language cited therein.

[97] A.H.Y. CHEN, *supra*, at 160-161.

[98] S. NOVARETTI, *Le ragioni del pubblico: le "azioni nel pubblico interesse" in Cina*, Naples, 2011, at 145-158, based on rich Chinese legal, policy, judicial and scholarly sources.

[99] Resolution of the State Council n. 39 of 2005, Article 19.

[100] S. NOVARETTI, *Le ragioni del pubblico: le "azioni nel pubblico interesse" in Cina*, *supra*, at 156. The Author also points out at how more or less at the same time the SPC recognised local governments' *locus standi* for "model-cases", i.e. test cases

However, some initiatives in civil courts to protect public interests have been carried out by procuratorates, before and even after 2006, and they have normally been successful – as they result from previous consultations and coordination with the relevant court, the judicial next-higher hierarchical level, and the relevant organs of political supervision –, whereas similar action brought by ordinary citizens, in principle having full *locus standi* for those actions, are seldom accepted by Chinese courts[101].

Finally, the Procuratorates' power to supervise the courts' activities is also stated in the Administrative Procedure Law, with respect to administrative cases[102].

To sum up, even if the Party does not have a direct power of review and endorsement of courts' decisions anymore – which was the

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related to rights and interests which are public or diffused in the relevant communities.

[101] S. NOVARETTI, *Le ragioni del pubblico: le "azioni nel pubblico interesse" in Cina*, *supra*, 145-158.

[102] The following are the relevant provisions of the Law of Administrative Procedure of April 4, 1989:

> Article 62: "If a party considers that a legally effective judgment or ruling contains definite error, the party may make complaints to the people's court which tried the case or to a people's court at a higher level, but the execution of the judgment or ruling shall not be suspended."
>
> Article 63: "If the president of a people's court finds a violation of provisions of the law or regulations in a legally effective judgment or ruling made by his or her court and deems it necessary to have the case retried, the president shall refer the matter to the adjudication committee, which shall decide whether a retrial is necessary. If a people's court at a higher level finds a violation of provisions of the law or regulations in a legally effective judgment or ruling made by a people's court at a lower level, it shall have the power to bring the case up for trial itself or direct the people's court at the lower level to conduct a retrial."
>
> Article 64: "If the people's procuratorate finds a violation of provisions of the law or regulations in a legally effective judgment or ruling made by a people's court, it shall have the right to lodge a protest in accordance with procedures of judicial supervision."

case until 1979[103] – ways still exist to indirectly exercise political supervision over the courts through the upper courts and Procuratorates.

Procuratorates, in turn, after having been reintroduced in 1978, have been submitted to people's supervision. Experiments to that effect started in 2003, with a progressive extension of that practice; currently procuratorial work is supervised almost nationwide by committees of selected citizens[104] – a new tool to keep a political balancing element in the system, *vis-à-vis* the trend towards stronger rule of law and the new generations of more law-oriented, legally-trained prosecutors.

It is worth quoting verbatim from the government's White Paper of 2005 on "Political Democracy", the tenth chapter of which is devoted to "Judicial Democracy"; the paragraph on "System of people's supervisors" in Chapter Ten reads:

> "Adopting the system of people's supervisors and placing procuratorial work under the effective supervision of the people embody the requirements of lawsuit democracy. Since October 2003, the procuratorial organs began to try out the system of people's supervisors in 10 provinces, autonomous regions and municipalities directly under the central government. Later, this system was spread to 86 percent of all procuratorates nationwide. People's supervisors are selected at the recommendation of various organs, groups, institutions and enterprises, with such major duties as conducting independent appraisals and submitting supervisory comments on cases the procuratorial organs have directly

[103] The review of courts' decisions by the Party has been abolished with the *Instruction of the CPC Central Committee on the Implementation of the Criminal Law and the Law of Criminal Procedure*, of September 9, 1979. This abolition, however, is sometimes disregarded by Party organs. See A.H.Y. CHEN, *supra* at 153.

[104] *Building Political Democracy in China*, White Paper published on 19 October 2005 by the State Council.

> placed on file for investigation but have later decided to withdraw or halt the prosecution of, and in cases of refusal to submit to arrest. They can also participate, upon invitation, in other law-enforcement examination activities organized by the people's procuratorates regarding crimes committed by civil servants, and make suggestions and comments on violations of law and discipline discovered. By the end of 2004, a total of 18,962 people's supervisors had been selected, who had supervised the conclusion of 3,341 cases."

3.4. A peculiar feature of the Chinese judiciary is the existence of "political-legal committees" (*zhengfa weiyuanhui*) at all levels of the courts and Procuratorates pyramids[105]. At central level the committee includes a Party representative in charge of political and legal issues – usually a very senior cadre and often having the concurrent institutional charge of head of police at the relevant level[106] –, the Presidents of the SPC and Procuratorate, and the heads of government departments such as justice, law enforcement, public security, and others[107].

These committees also exist at each level of territorial government, where they replicate the structure of the central one described above, with the purpose of coordinate activities and establish guidelines and policies at the relevant level, in accordance with Party policy pertaining to the administration of justice and law enforcement[108].

The presence of these *zhengfa weiyuanhui* at all levels of the judiciary is an effective mechanism to convey and implement government and party policies. Similar mixed Party-state committees are as a matter of fact one of the mechanisms through which the

[105] ZOU Kenyuan, *supra*, 5; R. PEERENBOOM, *supra*, 302-308.
[106] XIN Chunying, *supra*, 281.
[107] *Id*.
[108] *Id*.

Communist party discharges its "leadership" role over the entire state apparatus: the territorial and functional structure of the Party matches that of the State at all levels; these mixed committees are in place in every administrative unit within the state apparatus, to allow policy inputs from the mirroring party unit to flow in.

Other committees (so-called "judicial committees") are present in every court, formed by most senior judges of the relevant court, the corresponding Procuratorate having the possibility to sit in at the committee meetings[109], with the purpose of determining local guidelines for decisions[110] and sometimes actually deciding sensitive cases outside the hearing room[111].

It is important to stress that the independence of the judiciary in China provided for in Article 126 of the Constitution is intended to be the independence of each Court, considered as a whole and as a single entity with respect to other State organs and other external influences – rather than the independence of each single person acting as a judge within a given court[112].

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[109] The committees are established by art. 11 of the Organic Law of the People's Courts, which also stipulates the possibility for the Chief Procurator at the same level of the relevant court to participate at the meetings. This participation right of the Procurator is also reflected to some extent by what occurred in the Soviet Union and in post-1991 Russia, where procurators held regular meetings with the courts' chairmen; see P.H. SOLOMON, jr., *Informal Practices in Russian Justice*, in F. FELDBRUGGE (ed.), *supra,* 86-91.

[110] Article 39 of the Law of Civil Procedure of 1982: "The president of the court shall submit major and difficult civil cases to the judicial committee for discussion and decision. The collegial panel must carry out the decisions of the judicial committee." The provision has not been replicated in the Law of Civil Procedure of 1991, currently in force, maybe due to the criticism the system of judicial committees had attracted; however, the Chinese courts' praxis maintained the role of the judicial committee; see A.H.Y. CHEN, *supra*, at 141-143, and the literature mentioned therein.

[111] In the USSR and in post-1991 Russia a similar pivotal policy role seems to be discharged by the courts' chairmen; see P.H. SOLOMON, jr., *supra*, 82-86.

[112] N. LIU, *supra*, 6-20.

This idea gives some constitutional legitimacy to the activities of coordination committees within each single court established according to the Organic Law of the People's Courts of 1979[113], as well as to the accepted practice of the need of signature of the President of the Court or of a Divisional head for any decision issued in the court by any of its judges to be valid[114].

Moreover, the political leading role of the Party over every state organ is not excluded by art. 126 of the Constitution[115], and is in fact combined with the principle of the "double leadership". According to this principle every court is subject, like central and local governments and procuratorates, both to the supervision of the court at the immediately higher level of government (in addition to the supervision of the Procuratorate at its level on its judicial work, as discussed above), and to that of the People's Congress at its corresponding level[116].

It must also be kept in mind that the vast majority of persons occupying senior positions in the Government and top courts' officials are party members, subject to party directives and discipline, whose loyalty to the Party normally prevails with respect to their institutional positions – also as the Party significantly affects their life and career.

3.5. Finally, it cannot be disregarded that every Chinese court budget is financed by the government at its corresponding level and not by the central government. This allows local governments to effectively interfere with local courts, the latter depending on the former for funding, including staff salaries and other benefits[117].

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[113] Art. 11, the Organic Law of the People's Courts; see XIN Chunying, *supra*, 115.

[114] XIN Chunying, *supra*, at 275, where the author stresses the chairman's power to "review and sign"; also, N. LIU, *supra*, at 17.

[115] N. LIU, *supra*, 18-19.

[116] See, e.g., R. PEERENBOOM, *The Long March of China…, supra*, at 280.

[117] A.H.Y. CHEN, *supra*, 157-159; R. PEERENBOOM, *supra*, 280-281; XIN Chunying,

It is certainly to be noticed that in Viet Nam, a jurisdiction having imported a number of important features of the Chinese political, institutional and legal setting, a reform has been enacted in 2002 – which seems very difficult to be replicated in China at present – to deal with the serious dysfunctionalities of the local court system, severing all financial connections between local courts and local governments, making the entire court pyramid managed, supervised and financially dependent from the central Ministry of Justice only[118].

3.6. Another significant feature of the Chinese judiciary is the fact that in the courts of first instance non-professional judges (called "people's assessors") may sit in collegiate benches alongside professional judges (Article 40.1 of the Law of Civil Procedure) — the former enjoying equal rights and obligations with the latter (Article 40.3); decisions are made by majority vote (Article 43), and dissenting opinions are recorded but not included in the judgment[119].

If one considers that lay judges are selected amongst those included in lists provided by the Party at the relevant level, it can be seen how it is not difficult for policy-making organs to indicate policy-oriented guidelines for decisions, and have them followed. This presence of lay personnel sitting in the benches is somehow matched by

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supra, 181-183.

[118] B.J.M. QUINN, *Vietnam's Continuing Legal Reforms: Gaining Control Over the Courts*, in *Asian-Pacific Law & Policy Journal*, Vol. 4 Issue 2 (Spring 2003), 431.

[119] The following are the mentioned Article of the Law of Civil Procedure of April 9, 1991. Article 40.1: "In civil cases of first instance in the People's Courts, justice is administered by a collegiate bench made up of either judges and assessors, or only of judges. Members of the collegiate bench must total an odd number." Article 40.3: " Assessors during the exercise of their functions have equal rights and obligations with the judges." Article 43: "The principle of minority being subordinate to majority is followed in the collegiate bench…. Differing opinions must be recorded". An English translation of the Chinese Law of Civil Procedure is available on the website of the *China International Economic and Trade Arbitration Commission* (CIETAC), at http://www.cietac.org.cn/english/laws/laws_11.htm.

the "democratic" supervision of procuratorates which has been implemented in recent years, as mentioned in the previous paragraph.

3.7. Finally, a very distinctive feature of the court system in a socialist context is always the court's responsibility for discharging a pedagogic role, which is formalized in important legal texts. According to Article 6 of the Civil Procedure Law of the PRC of 1991,

> "the aim of the Civil Procedure Law of the PRC is to protect the performance of the litigation rights of the parties and ensure the ascertainment of facts by the people's courts, distinguish right from wrong, implement the law correctly, try civil cases promptly, affirm civil rights and obligations, impose sanctions for civil wrongs, protect the lawful rights and interest of the parties, *educate citizens to observe the law voluntarily*, maintain the social and economic order, and guarantee the smooth progress of socialist construction" (emphasis added).

The provision is mirrored by that of Article 4 of the Organic Law on People's Procuratorates of 1979. This specific responsibility of the socialist courts and procuratorates is completely absent in the duty list of their Western counterparts.

In conclusion, socialist courts have to be conscious about the social impact of their decisions, rather than just with their consistency with the system of applicable legal rules, especially when dealing with sensitive or highly visible cases. They discharge a clearly proactive role in making sure that State or local government policies are actually enforced in every case, with a combination of several revisionary and supervisionary institutional and judicial tools provided by the procedural laws, in addition to the other more political tools such as

committees, party loyalties, budgetary control described above.

All these specificities surely make Chinese courts's operational process and products quite different in nature from a western-style judiciary.

3.8. Lawyers are also part of the socialist apparatus of justice. After having been regarded as more or less civil servants in the early years after the launch of legal reforms (Provisional Regulations on Lawyers of the Standing Committee of the National People's Congress, 1980) and until 1993, they became free to work independently in the market, in an individual or associated form. At the height of the "liberal" period of the legal reforms they became, with the Law on Lawyers of 1996, "professionals providing legal services"[120], only subject to the Constitution, the laws and rules of professional ethics[121].

Their autonomy, however, has always been subject to control and supervision of the Ministry of Justice, whether direct (under the law of 1980) or indirect (after 1996, with the Ministry mostly exercising supervision on Lawyers' Associations, in turn exercising it on individual professionals), in relation to access to the bar, yearly renewal of licenses, ethics and discipline[122].

Another reform of the Law on Lawyers came in 2007, when the more liberal thrust towards "the rule of law" had to make room for the tenets of the construction of a "socialist harmonious society": the 2007 reform certainly introduced more precise rules of protection for lawyers and their clients[123], but in fact also attracted criticism[124] for confirming

[120] Article 2, the Law on Lawyers, 1996.

[121] Article 3, the Law on Lawyers, 1996.

[122] See, e.g., R. PEERENBOOM, *The Long March of China…, supra*, Chapter 8 and especially at 353; A.H.Y. CHEN, *An Introduction…*, *supra*, Chapter 8; S. NOVARETTI, *Le ragioni del pubblico: le "azioni nel pubblico interesse" in Cina*, *supra*, at 200-216, and especially at 209.

[123] *China Amends Law to Make Life easier for Lawyers*, press release, *Xinhua*, 28 October 2007, at: http://www.chinadaily.com.cn/china/2007-10/content_6211922.htm.

the general frame of governmental control and supervision on the legal profession – exercised in fact with increasing energy[125].

Finally, it has to be mentioned that since March 2012 Lawyers have an obligation to swear allegiance to the Communist Party *to be licensed or to have their licence renewed*:

> "I promise to faithfully fulfil the sacred mission of socialism with Chinese characteristics ... loyalty to the motherland, its people, and uphold the leadership of the Communist Party of China"[126].

It is certainly not difficult to see how this new requirement is consistent with the recent years' trend of reinforcement of socialist values and of the socialist legal frame; it certainly adds another dimension of control on the legal profession – not only for the need to pledge allegiance as a condition for licensing, but also e.g., through the possible multiplication of instances of professional ethics violations and/or subjection to disciplinary action from the Lawyers' Association and/or the Party[127].

In conclusion, the current Chinese socialist environment makes it in fact necessary or advisable for lawyers to carry out their

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[124] *Walking on Thin Ice. Control, Intimidation and Harassment of Lawyers in China*, in *Human Rights Watch*, New York, 2008.

[125] S. NOVARETTI, *Le ragioni del pubblico: le "azioni nel pubblico interesse" in Cina*, *supra*, at 211, making reference to a wealth of sources, both Chinese and non-Chinese.

[126] The text of the oath, translated into English, is available in S.L. WEE, *China orders lawyers to pledge allegiance to Communist Party*, *Reuters*, 21 March 2012, online at: http://www.reuters.com/article/2012/03/21/us-china-lawyers-idUSBRE82K0G320120321.

[127] According to the Chinese Ministry of Justice, as per a statement posted on its website, the oath was necessary to "firmly establish among the vast circle of lawyers faith in socialism with Chinese characteristics ... and effectively improve the quality of lawyers' political ideology"; as reported in S.L. WEE, *supra*.

professional activities with constant and careful consideration for the public dimension involved in the discharge of their function – i.e., very often, displaying a cooperative rather than conflictual stance vis-à-vis the public and political power – to maintain their professional status, activity and related social and economic benefits[128].

4. *The role of policy*

4.1. The relevance of non-merely-legal discourses in the development of present times' legal system of China has been confirmed in a Resolution, adopted in the Sixteenth National Congress of the Party (2002), on the "amendment to the Constitution of the Communist Party of China"; the amended text makes a reference to "ruling the country according to law and building a socialist country under the rule of law; and combining the *rule of law* with the *rule of virtue*" [129] (emphasis added).

Very significantly, shortly after the time the notion of the "rule of law" (*fă zhì*) became a standard for ruling the country, a powerful antagonist to that concept has also been introduced, the "rule of virtue" (*de zhì*).

A similar reference to ruling the country according to law and virtue is also made in the State Council 2004 *Outline* for developing the

[128] FU Hualing, R. CULLEN, *Weiquan (Rights Protection) Lawyering in an Authoritarian State*, in SSRN (2008), available online at: http://papers.ssrn.com /sol3/papers.cfm.abstract_id=1083925; also see S. NOVARETTI, *supra*, at 213; W.P. ALFORD, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's republic of China*, in W.P. ALFORD (ed.), *Raising the Bar: The Emerging Legal Profession in East Asia*, Cambridge Mass., 2007, at 295. R. PEERENBOOM, *The Long March of China…, supra*, at 354-360.

[129] See the Constitution of the Communist Party of China, as amended at the 16th National Congress on November 14, 2002; bilingual Chinese-English edition (Foreign Language Press, Beijing, 2003), introductory Chapter titled "General Program" at 19.

rule of law in the public administration: *yīfǎ zhìguó, yǐde zhìguó* (依法治国，以德治国). The two Chinese "yi" characters reveal well the difference: "yī*"* (依) in *yifa zhiguo*, related to the law (*fa*), is different from "yǐ" (以) in *yide zhiguo*, related to virtue (*de*); the former conveying an idea of a reference element, or something to comply with for day-to-day administration; the latter being more related to the use of a high-level inspiring, leading, sound or authoritative principle[130].

4.2. As a matter of fact, *de zhi* is also an important concept in the Confucian tradition of the art of government, as opposed to ruling by the force of the law[131].

The well-known references made in the late 1990s and early 2000s by Jiang Zemin in his public speeches, to *de zhi*, the rule of virtue[132], as well as the inclusion of the Chinese cultural heritage in his theory of the "Three Represents" introduced in the Constitution with

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[130] *The 2004 Outline*, Section III, paragraph 4 ("the basic principles of law-based administration").

[131] KǑNG FŪZǏ (孔夫子) or KǑNGZI (孔子)(Confucius), *Analects* (available worldwide in all languages, in countless editions, with minor language discrepancies in the different editions and translations) 13.6: "*When a prince's personal conduct is correct, his government is effective without the issuing of orders. If his personal conduct is not correct, he may issue orders, but they will not be followed*"; 12.19: "*Sir, in carrying on your government, why should you use killing at all? Let your evinced desires be for what is good, and the people will be good. The relation between superiors and inferiors is like that between the wind and the grass. The grass must bend, when the wind blows across it*"; 13.11: "*'If good men were to govern a country in succession for a hundred years, they would be able to transform the violently bad, and dispense with capital punishments*". Also, in the general principles contained in the T'ang Imperial Code of laws of year 624 a fundamental rule for government is that "*virtue and rites are the basis for the government, law and punishment are its instruments*", in a typical rule-by-law conception.

[132] Such as the meeting with the leading party officers in charge of propaganda held on January 11, 2001, promptly echoed on February 1, 2001, by an editorial published on the Party's *People Daily*; as reported by ZHENG Yongnian, LAI Hongyi, *Jiang Zemin's New Moral Order for the Party*, available online at: http://members.tripod.com/fieldworkchina/database/virtueen.doc.

the amendment of 2004[133], could to some extent seem to authorise defining that "rule of virtue" in Confucian terms.

Confucianism is in fact being re-discovered by Chinese political leaders, and is now being disseminated in the population, including through the school system[134], as a valuable part of the Chinese heritage and maybe as a source of inspiration in order to solve some of the contradictions brought about by rampant capitalism and by the new China materialist society. A wealth of press sources in recent years have reported Hu Jintao's praises to China's Confucian heritage, both in the context of the launching of a nationwide moral campaign[135] and in relation with the aim of developing a "Socialist Harmonious Society"[136].

Some commentators observe that Confucianism can be a valuable tool of governance[137], since it is based on an authoritarian and communitarian concept of society; others remark, righteously enough, that Confucianism also conveys other less obvious values which can be

[133] According to this theory the Communist Party of China shall represent the requirements In a word, the Party shall represent "*the requirements to develop advanced productive forces, an orientation towards advanced culture, and the fundamental interests of the overwhelming majority of the people in China*". See the fundamental statement of the theory on the Chinese Government's *Xinhua* news agency website, at: http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/english/2003-06/17/content_923052.htm, with a full webpage containing references to books and studies on the "Three Represents" theory.

[134] See the editorial, *Confucian Teachings Stand Test of Time*, in the *China Daily*, November 12, 2000; online at http://www.china.org.cn/english/2000/Dec/5153.htm.

[135] It was the *Bao Xian* ("stay advanced") movement, a propaganda movement of years 2005-2006, aimed at fighting corruption, and is often regarded as the largest political campaign since Hu Jintao assumed Presidency. See the related report by E.C.Y. IP, *China's Moral Campaign: Implications and Important Issues* , online at: http://www.xinhuanet.com/newscenter/dyxjx/index.htm.

[136] See E.C.Y. IP, *supra*; also see *Confucian Teachings Stand Test of Time*, *supra*.

[137] See, e.g. M. MAZZA, *Decentramento e governo locale nella repubblica Popolare Cinese*, Milano, 2009, Chapter V, specially at 192-195.

positive for the development of contemporary Asian societies[138]. However, the final text inserted in the Party Constitution does not explicitly mention "Confucian" virtue: merely "virtue", in a context of strong references to socialist ideology as a guiding path for the progress of the Country – with the tenets of the "socialist harmonious society" softening and balancing, increasingly since 2002 or so, the previous decade's advances in the implementation of the rule of law[139].

If some ancillary role can actually be found for Confucianism in the official position of the Chinese élite, still socialist doctrines and a developing idea of socialist ethics, rather than Confucianism, are indicated as the main source of inspiration for government and policy-making[140].

The "rule of virtue" mentioned in the amended Party Constitution remains then a fuzzy concept that is molded according to

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[138] See, for instance, D.A. BELL, HAHM Chaibong (eds.), *Confucianism for the Modern World*, (Cambridge, 2003). W.T. DE BARY, in the final Chapter of the same book, titled *Why Confucius now?*, 369, in addition to the more common references to Confucian values such as the importance of family and community, makes an interesting remark on the Confucian tradition of study and self-cultivation as one of the reasons behind the economic success of Korea and of other Asian nations of Confucian tradition.

[139] See the *Constitution of the Communist Party of China*, *supra*, "General Program" at 19: "The Communist Party of China leads the people in their efforts… to combine ruling the country by law with ruling the country by virtue. *Socialist spiritual civilization provides a powerful ideological driving force and intellectual support*…" (emphasis added).

[140] See the Hu Jintao address on the CCP's 85th Anniversary Meeting: "We must agree that there are some advanced elements in Confucianism… these elements could effectively exert a positive influence to the establishment of a socialist harmonious society", as reported by Eric C.Y. IP, *supra*. Confirming the existence of a mainly ideological, socialist approach, rather than a Confucian one, to moral issues, also see A. MILLER, *Hu Jintao and the Sixth Plenum*, 20 Chinese Leadership Monitor (2006), available online at: http://media.hoover.org/documents/clm20am.pdf; also see ZHENG Yongnian, LAI Hongyi, *Jiang Zemin's New Moral Order for the Party*, online at: http://members.tripod.com/fieldworkchina/database/virtueen.doc.; in Italian, see M. MAZZA, *Decentramento e governo locale…*, *supra*, Chapter V.

what the Party considers "virtuous" on a case-by-case basis and with a pragmatic approach – an express reference in the Party Constitution amendment to "Confucian virtue" would be unthinkable, implying some kind of external guideline for Party activity and policies.

4.3. We also need to keep in mind the influence of the Party, whose leading role is clearly stated in the Preamble to the Constitution, on Chinese government and administration[141]; and its paramount role in the Chinese legislative process, with formal and effectively established procedural and substantial controls over legislative, regulatory bodies and their activities at all levels. Beyond the historical fact that all major changes in the Constitution of the PRC have occurred following debates internal to the Communist Party, and often following a similar amendment of the Party Constitution, some Party directives are in the sense that all bills of law involving issues of major importance shall be reported to the Party Central Committee for approval, before going through the legislative process[142]. It seems clear to me that those Party

[141] In the Preamble of the original 1982 text it is stipulated: "Under the leadership of the Communist Party of China and the guidance of Marxism- Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and follow the socialist road, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize industry, agriculture, national defence and science and technology step by step to turn China into a socialist country with a high level of culture and democracy." Subsequent constitutional amendments added references to the Deng Xiao Ping theory (1999) and to Jiang Zemin's "important thought" of the "Three Represents" (2004).

[142] QUIN Qianhong, LI Yuan, *Influence of the CCP over Legislation* (in Chinese), at: http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=23338, as reported by ZOU Keyuan in his paper, *The Interplay of the Chinese Communist Party with the Chinese Law*: *Crippling Efforts Towards Rule of Law*, in *The Rule of Law and the Role of Law in the Chinese Context,* in *Culture, law and Order; Chinese and Western Traditions,* Matteo Ricci Institute Studies 4, Macau, 2007. The contents of the Party document "Certain Opinions on Strengthening the Party Leadership over the State Legislative Work" of 1991, are described CAI Dingjian, *lishi yu biange – xin*

directives have a *de facto* legal or quasi-legal nature, as their effectiveness is not confined within the scope of Party organization and activities, affecting a fundamental function of the State such as the legislative process.

In other areas as well, Party documents and regulations and Party-government jointly issued documents are reported to have been observed and enforced by the relevant branches of the Chinese Government and judiciary, such as in relation to the civil servants' status, or to local elections[143]. In other cases, Party rules have been developed and applied within the Party environment, to subsequently become legislative rules[144].

4.4. In addition to the importance of politics and Party line as general sources of orientation for administrative as well as for judicial work, *the policies of the State can also play a direct normative role whenever a gap in the laws becomes apparent* in dealing with specific cases: according to Articles 6 and 7 of the General Principles of Civil Law of the PRC of 1986,

> "civil activities shall be in compliance with laws; in the absence of relevant prescriptions in laws, they shall be in compliance with *the policies of the State* …[and such] civil activities shall respect social ethics and shall not harm the *public interest*, undermine the *economic plans of the State* or disrupt the *social or economic order*" (emphasis added).

It must also be kept in mind that in an environment such as the Chinese one Party line and policies cannot but provide guidelines also

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zhongguo fazhi jianshe de licheng (History and Reform – the Process of New China's Legal Construction), Beijing, 1999, 165-166; also discussed by ZOU Keyuan*, supra*.

[143] ZOU Keyuan, *supra.*

[144] ZOU Keyuan, *supra*.

for the judicial interpretation, application and enforcement of legal rules; especially when the rules are general enough, or when they enforce vague, if still technical, legal notions such as 'general interest', public interest', 'good faith', 'reasonableness', 'equity' and so forth.

In conclusion, if the direct intervention of the Party in day-to-day administrative and court work has probably been decreasing in the last decades[145], *still Party policy and documents play a key role in the construction and interpretation of Chinese law, making policy a part of the law in a legal technical sense; and conversely, making the law itself a special type of general political directive*.

From a political point of view, in fact, the law it is another tool to disseminate and implement the directives of the central policy-making organs in the government apparatus and amongst the citizens.

5. *Enforcement of the law*

5.1. The increasing amount and quality of the law in China is still affected by a very serious problem of effectiveness of the law, often degenerating in a total lack of enforcement[146].

A well-known phenomenon related to the unsatisfactory level of enforcement of the laws is the so-called "local protectionism", i.e. local courts deciding cases or enforcing judgements with a protective attitude in favour of local industries or local governments (the latter being, quite often, the "owners" of both the local industry and of the

[145] R. PEERENBOOM, *The Long March*…, *supra*, at 211-216.

[146] See, for instance, J. CHEN, Y. LI, J.M. OTTO (eds.), *supra*, a collection of essays in relation to the problem of enforcing the law in China, and especially the following essays contained therein: J. CHEN, *Implementation of Law in China – an Introduction*, 1-21; ID., *Mission Impossible: Judicial Efforts to Enforce Civil Judgements and Rulings,* 85-111; J.M. OTTO, *Real Legal Certainty and Its Explanatory Factors*, 23-33. Also see XIN Chunying, *supra*, 205-207; D.C. CLARKE, *The Execution of Civil Judgements in China*, in S.B. LUBMAN (ed.), *China's Legal Reforms*, Oxford, 1996, 65.

local court, at least in a political sense). Local protectionism has plagued the Chinese legal environment and is still today a major concern for many citizens, scholars and foreign investors, as well as for the Chinese more enlightened political elite[147].

Local protectionism and other non-legal factors can affect (case outcomes as well as) the enforcement of courts' decision, especially when they are against the interest of the central or local government more or less involved in the dispute (e.g. when the local government is the owner of a local public enterprise sued by a non-local private plaintiff in the local court)[148].

Decisions, even when their merits are not disputed by the court in charge of the enforcement, have often been denied enforcement based on very vague notions of "public interests"[149], such as "*according to the current state policies and regulations, enforcement… would seriously harm the economic influence of the State and public interest*

[147] Legal protectionism has been one of the main topics in the "China and law" debate of the last ten or fifteen years at least, both at legal and at political level. See, for instance, J. CHEN, *Implementation of Law in China – an Introduction*, 1-21; ID., *Mission Impossible: Judicial Efforts to Enforce Civil Judgements and Rulings,* 85-111; J.M. OTTO, *Real Legal Certainty and Its Explanatory Factors*, 23-33; all in J. CHEN, Y. LI, J.M. OTTO (eds.), *supra*; Also see XIN Chunying, *supra*, 205-207; D.C. CLARKE, *The Execution of Civil Judgements in China*, in S.B. LUBMAN (ed.), *China's Legal Reforms*, Oxford, 1996, 65. Enforcement of laws is still presented as the main issue to be addressed and resolved in the concluding lines of the Chinese government's 2011 *White paper on the Social System of laws with Chinese Characteristics.*

[148] XIN Chunying, *supra*, at 183-185 defines local protectionism as "*a problem threatening the unity of law an the public trust in the legal system*". The same author reports as an example, making clear that the case is probably replicated in different places and at different levels, that the Jilin provincial government issued a list of 94 protected public enterprises of the province, stating their being "*free from any liability in court ordered debt collecting actions*"; *Ibid.*, 206.

[149] F. D'SOUZA, *Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China*, in *Fordham International Law Journal*, vol. 30, Issue 4 (2006) Article 8, 1318, at 1328 and ff. ones.

of the society, and adversely affect the foreign trade order of the State"[150].

Governmental statistics at the end of the 1990s report a probably overoptimistic 30 percent of unenforced judgments, with a 60 or 70 percent reported for some courts[151].

A higher and probably closer to reality 90% rate of unenforced or not completely enforced judgments was a circulating figure in the press as well as in the scholars' community in the same period[152].

On the other side, the enforcement of the laws and of courts' decisions has been slowly increasing in the last decade or so. The enforcement rate in international or foreign-related arbitration has reached a figure of around 50%[153], probably due to the more favourable attitude towards enforcement related to the needs of international business activities[154]. A directive issued by the Supreme People's Court on 28 August 1995 stated that both the Intermediate Court (normally competent for enforcing awards) and the High Provincial Court must

[150] *Dongfeng Garments Factory of Kai Feng City and Tai Chun International Trade (HK) Co. Ltd. vs. Henan Garments Import and Export Group Company*, ZhengZhou Intermediate People's Court, 28 Sep. 1992; quoted by F. D'SOUZA, *supra* at 1329; J. TAO, *Arbitration in China*, in P.J. MCCONNAUGHAY, T.B. GINSBURG (eds.), *International Commercial Arbitration in Asia*, 2nd ed., Huntington, New York, 2006, at 48. The Supreme People's Court later reviewed this famous decision, overturning it.

[151] XIN, *supra*, pp. 205-206.

[152] As reported by Y. LI, *Court Reform in China: Problems, Progress and Prospects*, in J. CHEN, Y. LI, J.M. OTTO (eds.), *supra*, at 67, footnote 35. The figures mentioned in the text correspond to the information I could gather through the years in my conversations with Chinese legal scholars.

[153] R. PEERENBOOM, *Truth from facts: an empirical Study of the Enforcement of Arbitral Awards in the People's Republic of China* (2000); the same percentage is given by J. TAO, *supra*, at 50.

[154] See, e.g., the *Notice of the Supreme People's Court on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to Which This Country Has Become Party*, promulgated by the SPC on Apr. 10, 1987; also in English translation in ISINOLAW online Chinese legal resources database; also cited in F. D'SOUZA, *Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China*, *supra*, at 1328.

express a view against the enforcement, to be able to submit the issue to the Supreme People's Court. Only after the SPC confirms the views of both lower courts the award may be refused enforcement.

If the situation might have improved somehow for foreign arbitral awards, the very low levels of enforcement of one or two decades ago still seem to be detectable in relation to the enforcement of foreign courts' decisions. This may be due to the main structural factors described above such as local protectionism, and to the little importance traditionally attached to civil enforcement within the courts; and, perhaps, also to the shortage of personnel and scarce allowance of funds to have the enforcement process discharged effectively[155].

5.2. As an example in a different area, the issue of indemnifications for requisitions of land for reasons of public interest may be examined. The issue is one of the most sensitive ones in present times' China, especially with respect to land development projects that produce extremely high benefits for few developers – and governments – to the detriment of the people previously living on the relevant land or of the peasants working on it.

Evicted house-dwellers and peasants whom are normally forced to relocate sometimes are brutally dispossessed, and often receive purely nominal or no indemnification at all; the expropriations are often enough excessive and illegal, aimed at private development projects[156].

The government for several years has not done much to confront this problem, more than launching some mass-investigations

[155] P. BLAZEY, P. GILLIES, *Recognition and Enforcement of Foreign Judgements in China*, on the *China International Receivables Management* website, posted on 2012-23-03, online at: http://www.cn-linked.com/en/view.php?id=261.

[156] See, e.g., N. CHAN, *Recent Reforms of China' Rural Land Compensation Standards*, in 12 *Pacific Rim Property Research Journal*, available online at: http://www.prres.net/Papers/PRPRJ_No_1_2006_Chan.pdf.

on illegal takings[157]. The constitutional amendment of 2004 introduced a provision stipulating the necessity for a compensation for requisitions and expropriations[158].

The Law on property of March 2007 contains some implementing rule, including the standards required to determine the amount of the compensation. Of course, it remains to be seen whether the enactment of the property law will be a sufficient, satisfactory response to the problem of compensation for takings, or whether there will still be problems of law enforcement.

5.3. There may be several reasons why the level of enforcement of laws and court decisions in China is so unsatisfactory. The main reason lies perhaps in the legal fragmentation of the country in a large number of local jurisdictions, with local judicial institutions accountable to local governments and political structures[159].

This produces a considerable degree of local "indiscipline" with respect to the enforcement of laws at each governmental and judicial level, vis-à-vis rules and directives hailing from higher institutional levels[160] – including the protection in local courts of interests of local governments, and that of market operators which are

[157] Such as the one advertised on the People's Daily of May 14, 2004, *9,900 Land Requisition Cases Investigated*, also available online at: http://english.people.com.cn/200405/14/eng20040514_143341.html.

[158] Article 10.3: "The State may, in the public interest and in accordance with the provisions of law, expropriate or requisition land for its use and shall make compensation for the land expropriated or requisitioned".

[159] A.R. DICKS, *Compartmentalized Law and Judicial Restraint: An Introductive View of Some Jurisdictional Barriers to Reform*, in S.B. LUBMAN (ed.), *China's Legal Reforms*, Oxford, 1996, 82 at 83-85. Also see, in the same volume, S.B. LUBMAN, *Introduction: the Future of Chinese Law*, especially at 15.

[160] R. PEERENBOOM, *supra*, at 239-240 makes a reference to the degree of "chaos" implied in the lack of coordination amongst the different levels of central and local legislation and regulatory activities; the implementing role of the courts at each level may be certainly considered part of that discourse.

connected to or protected by the local political and institutional establishment. A typical example of the latter may certainly be that of land developers evicting peasants and dwellers from areas to be developed, normally doing so in a socialist harmonious connection with local governments.

The legal fragmentation of the system and the influence of policy element at all levels, including sometimes less commendable influences and plainly illegal phenomena, do affect the factual outcomes of legal rules. Organisational reasons and a still acute need for capacity-building in the courts also play some role against the enforcement of the laws in a solid and countrywide consistent way[161].

A reinforcement of the legal system had been devised as a tool for improving control of the center over local institutions and overall administrative and legal efficiency, as a substantial part of the ruling élite strategy, especially in the 1990s. The more recent doctrines on the construction of a "socialist harmonious society" draw a new policy line, balancing "the rule of law" with Party leadership and entrusting the enforcement of laws to the government itself at all levels, rather than to the courts[162]. This is probably the result of a different balance of power between the center and the periphery, and a result of the Party's efforts to contrast an erosion in its power and grip over the country, which seemed to become apparent in late 1980s and 1990s, following the initial development of institutional and legal reforms[163].

5.4. In conclusion, the enforcement of the law in China

[161] P. BLAZEY, P. GILLIES, *Recognition and Enforcement of Foreign Judgements…, supra.*

[162] See the discourses made on the 2004 *Outline* and the 2008 *White paper*, below, Chapter Two, Section 2.

[163] See, e.g., S.B. LUBMAN, *Introduction: the Future of Chinese Law*, in S.B. LUBMAN (ed.), *China's Legal Reforms*, *supra*. R. PEERENBOOM, *supra*, Chapter 5, *The retreat of the Party and the state*, 188 ad ff. ones.

followed and often still follows patterns which are typical of political directives and actions, due to their being the outcome of the administrative and political interaction of (the interested parties and) a number of political and administrative authorities at different levels, in a substantially un-coordinated environment. The enforcement process may thus include judicial enforcement, but in some cases judicial enforcement might not be applied by the relevant judicial organs, or sought after at all by the government. Parallel administrative and political actions and negotiations may take place. In other cases laws might be enforced from higher levels of government, while the effect of enforcement is being overridden by some other kind of administrative and/or political action at the relevant level[164].

On the other hand, substitute or additional, non-legal, tools of enforcement can operate together and in parallel with the judicial ones, counterbalancing at least partially the latter's poor effectiveness. Non-legal means of enforcement in those cases may range from clearly political ones such as education and dissemination of information and directives through Government and Party structures, in order to develop awareness on the importance of some rules and policies[165], to political

[164] As it seems to have been the case for some State enterprises which received huge fines for violation of the laws on pollution control, then funded by local governments to be able to pay the fines in order to avoid the financial collapse of the enterprise and the associated social, economic, political problems that would have followed. For a case study on the enforcement of Chinese laws, see I. CASTELLUCCI, *La tutela dell'ambiente nell'ordinamento giuridico della Repubblica Popolare Cinese: un* case study *sul funzionamento del sistema*, in *Rivista giuridica dell'ambiente*, 2003, 1, 59; also see B. VAN ROOIJ, *Implementing Chinese Environmental Law through Enforcement,* in J. CHEN, Y. LI, J.M. OTTO (eds.), *supra*, 149-178.

[165] Environmental protection could again be an example of that; see the Chinese Central Government *Agenda 21* document, Chapter 3, and my article cited in the previous footnote. Also see R. PEERENBOOM, *supra*, Introduction, where the author stresses the many governmental activities aimed at promoting legal awareness in the population, through government, party, schools, etc., as a way to promote enforcement of the law.

and administrative influences on the very legal mechanisms – as it is the case whenever a political campaign against criminality brings about stricter, faster, more summary judicial enforcement of legal rules[166], or wide publicity to exemplary punishment of specific cases[167].

It follows from what has just been said that one specific feature of contexts where the political element is prevailing over a weaker legal system, in opposition with the Western-style concept of rule of law, is *the* de facto *severability at policy level of the law from its enforcement, where the law and its enforcement are actually two different political issues*.

Enforcement is thus neither a neutral, technical issue, nor an automatic consequence of law. In a "political" context (of which Chinese courts and law-enforcing agencies unquestionably are a part), law and court decisions can be enforced or not, under-enforced or over-enforced, so to speak, according to the complex dynamics of policy needs at different levels of governance.

[166] As it happens periodically with the anti-crime campaigns named *yanda* ("striking hard"). See ZOU Keyuan, *supra*; S. TREVASKES, *Severe and Swift Justice in China*, in *British Journal of Criminology* 2007 47(1), 23-41, available online at http://bjc.oxfordjournals.org/cgi/content/full/47/1/23.

[167] An important case of discretionary enforcement of the law for exemplary purposes has been the bankruptcy of the first financial institution of Guandong and the second in China, GITIC, occurred in 1999. The bankruptcy obviously took place according to legal procedures, but it had been decided by the political central authorities as a much needed exemplary measure to rein in the proliferation of investment companies too inclined to carry out their business disregarding regulations and good management standards, which caused severe difficulties for the Chinese economic and financial system. A coverage of the story can be found in L.J. BRAHM, *Zhu Rongji & the transformation of modern China*, Singapore, 2002, at page 67 and following ones.

6. Comparing the Chinese developments with legal reforms in the USSR until the 1960s[168]

6.1. It is very interesting at this point to take a look at the homologous features of another socialist legal system, that of the USSR, by reviewing some rules issued when that system reached its maturity: the "Fundamental Principles of Civil Procedure of the USSR and the Federate Republics" of 1962 (FPCP), to which all Soviet Republics would comply when issuing their civil procedure regulations. We find rules which have been reproduced, almost *verbatim* in some instances, in present times' Chinese fundamental procedural rules, such as the rules on the norms to be applied to decide cases[169]; on the

[168] For more details on the issues dealt with in this section, there is a good amount of literature available in western languages, both from Russian and from western scholars. See, for instance, D.D. BARRY, F.J.M. FELDBRUGGE, G. GINSBURGS, P.B. MAGGS (eds.), *Soviet Law After Stalin*, in 20 *Law in Eastern Europe*, Leyden, 1979 (3 volumes); D.J.R. SCOTT, *Russian Political Institution*, London, 1961; V.M. CHKHIKVADZE, *The Soviet State and law*, Moscow, 1969; W.E. BUTLER, *Soviet law*, London, 1983; N. PICARDI, R.L. LANTIERI, *La giustizia civile in Russia da Pietro il Grande a Krushev*, and M.A. GURVIČ, *Profili generali del processo civile sovietico* (a translation of an essay of the 1970s), both in N. PICARDI, A. GIULIANI (eds.), *Codice di procedura civile della Repubblica Socialista Federativa Sovietica di Russia*, Italian translation, Milan, 2004; M.A. GURVIČ, *Derecho Procesal Civil Sovietico*, Mexico, 1971. Also see, of course, the relevant chapters in the two "classic" comparative law handbooks of R. DAVID, *the Major Legal Systems of the World* and K. ZWEIGERT, H. KÖTZ, *An Introduction to Comparative Law* (any edition or translated version); in Italian, see G. CRESPI REGHIZZI, P. BISCARETTI DI RUFFIA, *La costituzione sovietica del 1977*, Milan, 1979.

[169] According to Article 9 FPCP, in the exercise of jurisdiction both professional and lay judges "…are independent and only subject to the law. Magistrates and lay judges shall decide the case based on the law and in conformity with socialist conscience, in conditions such as to exclude any interference from anybody". Article 12.3: "In case of lack of a precise provision regulating the case at hand the judge shall apply the provisions regulating analogous cases; in case of lack of such provisions, the judge shall decide according to the general principles and according *to the spirit of the soviet legal system*" (emphasis added).

composition of court benches[170]; on powers and responsibilities of the *Prokuratura*[171] and its supervisory power over court decisions[172].

Other provisions may also be found on the aims of the civil process, such as Article 2 FPCP, on which the already cited Chinese Article 6 of the Civil Procedure Code of 1991[173] is modelled. Article 2 FPCP stipulates that the aim of the civil process:

> "…is the just and prompt assessment and decision of civil cases, to guarantee the *defense of social and State structure of the USSR*, *of the socialist system of economy and of socialist property*; the protection of political, labor, housing and other personal and patrimonial rights of citizens as protected by the law, and the protection of State entities, enterprises, *kolhozy* and other cooperative and social organizations rights and legitimate interests.
>
> The civil process shall contribute to the strengthening of *socialist legality*, to the prevention of violations of the law, *to the education of citizens to the constant compliance with soviet laws and to the respect of the principle of socialist coexistence*" (my translation; emphasis added).

Soviet courts also had the obligation to periodically submit to the workers their most significant decisions, to be discussed in public

[170] According to Article 8 FPCP one professional judge and two lay judges shall sit in all first instance courts.

[171] According to Article 14 FPCP, Procurators have the right to adopt at any moment measures to avoid violation of rules of law, "subject only to the law and… according to the directives of the Procurator General of the USSR". Procurators could actually start a civil case irrespective of the parties' will, "to protect the interests of the State and society, as well as of the rights and legitimate interests of citizens" according to art. 29 FPCP (my translation).

[172] Article 49 FPCP gives to Procurators and Courts' Presidents the power to lodge requests for re-trial.

[173] The text of the mentioned Chinese Article 6 is reported *supra*, Section 3, *The Role of courts and procuratorates in the Chinese Context*.

assemblies[174], as a way of discharging their pedagogic mission.

The Code of Civil Procedure of the Russian Republic of 1964, reproduces faithfully the above mentioned rules, also adding other interesting Article, such as Article 42.1, where State, trade unions, state entities, *kolhozy*, other organizations and individual citizens may act for the protection of rights and interests of third parties, or Article 42.2, where the State may intervene "to opine regarding issues involving the merits of the case aimed at the protection of rights of citizens and the interests of the State".

In a socialist context, as Višinskij put it, "law is politics"[175].

6.2. The USSR "socialist rule of law" reached its maturity in four decades, more or less, after the 1917 revolution.

For centuries Russia had been, with its immense territory and its old, weak, fragmented, incomplete czarist legal system; a country where rules and institutions were mostly based on the core role of government and administrative organs, even after the reforms introduced by Peter the Great in the early 18th century, by Katarina II in the late 18th century, and by Alexander II in the early 19th century[176]. These systems were supplemented through the important role played by local customs in non-sensitive areas, such as those related to personal relations amongst citizens[177].

The October revolution erased the old State and institutions completely; a completely new system was needed. Within a few years after 1917 a new socialist State, with its institutions and legal system,

[174] W.E. BUTLER, *supra*, 103.

[175] N. PICARDI, R.L. LANTIERI, *supra*, xxxvi; H.J. BERMAN, *supra*, 36.

[176] *Ibid*.

[177] N. PICARDI, R.L. LANTIERI, *supra*, xii-xx; for a general historical overview also see N.V. RIASANOVSKY, *Histoire de la Russie*, Paris, 1996; M .RAEFF, *Comprendre l'ancien régime russe*, Paris, 1982, translated into Italian by G. FERRARA DEGLI UBERTI as *La Russia degli Zar*, Roma-Bari, 1999.

was in place. Lenin's doctrine predicated a strong aversion towards the bourgeois conceptions of the law and the rule of law; the prevalence of the needs of socialist politics over the socialist law was affirmed. Under Lenin, judges were elected by assemblies of party members, their technical legal training and even general cultural background were minimal; even the legal profession had just been abolished, as well as the *Prokuratura*[178]. In the early Soviet experience, legal nihilism was the accepted Leninist doctrine about law, and policy was the only guide for deciding cases in the courts[179].

A first "revision" then took place under Lenin around 1921-1922: the original revolutionary *impetus* led to a re-engineering of the newborn Communist state in 1921, with the launch of the less radical "New Economic Policy" political campaign, or NEP (*Novaya Ekonomicheskaya Politika*). In the years 1922-1923 judiciary reforms were passed, with procedural laws enacted, and with the restoring of the *Prokuratura*, obviously perceived as a useful tool to supervise the state apparatus, for which the 1936 Constitution of the USSR stipulated the independence from any local organ[180] and its function of supervising the exact application of the laws[181]. The *Prokuratura* system was funded and directed from the central authorities of the state[182], much differently from the Chinese legal system's procuratorates, which are funded, supervised, and chief procurators appointed, as already

[178] According to Article 3 of the "decree on the judiciary" of November 20, 1917; in just 8 Articles this decree founded all the subsequent development of the soviet judiciary system.

[179] D.D. BARRY, *The Development of Soviet Administrative Procedure*, in D.D. BARRY, F.J.M. FELDBRUGGE, G. GINSBURGS, P.B. MAGGS (eds.), 1-2; N. PICARDI, R.L. LANTIERI, *supra*, xxvii-xxxiv. The actual term "legal nihilism" had as a matter of fact been introduced later, by A. Višinskij; as reported by U. CERRONI, *Il pensiero giuridico sovietico*, Rome, 1969, 23.

[180] According to a specific requirement directly issued by Lenin; see N. PICARDI, R.L. LANTIERI, *supra*, xxxviii.

[181] See Articles 117 and 113 of the 1936 Constitution of the USSR.

[182] N. PICARDI, R.L. LANTIERI, *supra*, at xxxviii.

discussed, by the local government at their corresponding level: a clear proof of a weaker center-periphery supervision in the Chinese model, *vis-à-vis* the Soviet one.

After Lenin's death, Stalin ascended to power (1928) and at first re-enforced the radical line of thought of the earlier days of the revolution, until he himself in the mid-30s initiated important reforms to implement a new policy based on the abolishing of the NEP and on the five-year plan, instead of law, as the main tool for policymaking and governmental activity[183]. A few years later, in the middle of the 1930s, under Stalin, and with the fundamental contribution of Andreij Višhinskij, professor of law and Procurator General of the Union, the system produced the basic ideas for a fundamental change of philosophy: a revision, some may say[184].

The radical ideas about the law generated within the Leninism, if acceptable as a first step in building the soviet State, were now believed to hinder economic and social development, if maintained for longer than necessary for the foundation of the soviet State. The further development of the State necessarily required more rules; more uniformity in application of those rules; and more technical training and professionalism in the courts, both on the bench and at the bar.

A new concept of "socialist legality" has been introduced in those years as opposed to the bourgeois concept of law, as theorized first by Andreij Višhinskij[185]. The Soviet legal system, though, grew very slowly under the Stalin rule, and only reached its maturity in the following decades, in the 1950s and especially after Stalin's death – following Khrushchev's pledge made at the 20th Communist Party

[183] See, for instance, D.J.R. SCOTT, *supra*, Chapter 1, Section "Periods", 52-58 in the Italian edition, Milan, 1968; N. PICARDI, R.L. LANTIERI, *supra*, XXXV.

[184] That was exactly, as already mentioned, how the USSR developments have been seen in China during the 1960s and early 1970s.

[185] A. VIŠHINSKIJ, *The Law of the Soviet State*, English translation by H.W. BABB, New York, 1948, 129.

Congress in 1956, after Stalin's years[186], to restore socialist legality[187]. Developments in the 1950s and 1960s were characterized by a wealth of legislation and codifications of the law, based on socialist legal principles – paralleled by the improvement in technical training of judges, increasingly chosen amongst jurists, in contrast with the previous attitude of choosing judges based on political reliability.

Courts and judges were still accountable to the people, naturally; with Stalinist reforms of 1958 judges could still be removed at any moment[188] upon action of party organs, who were also, coincidently, in charge of providing lists of candidates for positions at the bench according to the usual *Nomenklatura* system of appointment of officials[189]. Similarly to what happens presently in China, the independence of the courts stipulated in the Soviet Constitution (art. 112) does not mean that the courts could be considered independent from the political authorities and their more or less formal indications and guidelines[190].

6.3. As it has just be observed, striking similarities are easily found in the history, features and evolutionary path of the socialist experiences of both the USSR and the PRC: initially, two immense

[186] The prevalence of the political element over legality was a notorious characteristic of Stalin's authoritarian regime; see N. PICARDI, R.L. LANTIERI, *supra*, xxxvii-xxxix.

[187] See the following essays, all published in D.D. BARRY, F.J.M. FELDBRUGGE, G. GINSBURGS, P.B. MAGGS (eds.), *supra*, vol. I: G. GINSBURGS, *The Reform of Soviet Military Justice:1953-1958*, at 42; Z.L. ZILE, *Soviet Advokatura Twenty-five Years after Stalin*, at 207; R. SHARLET, *The Communist Party and the Administration of Justice in the USSR*, 321-392; ID., *Legal Policy under Khrushchev and Brezhnev: Continuity and Change*, 319-330 in Volume II.

[188] Article 30 of the Law of reform of the judiciary, of December 25, 1958.

[189] V. GSOVSKI, K. GRZYBOWSKI, *Government, law and Courts in the Soviet Union and Eastern Europe*, London, 1959, 521.

[190] See D.J.R. SCOTT, *supra*, 278-279; F. FELDBRUGGE, *supra*, 203; N. PICARDI, R.L. LANTIERI, *supra,* at xxxvi; H.J. BERMAN, *supra*, at 36.

States, both with a legal system scarcely developed, based on the authority of administrative organs, working with obsolete, inefficient procedures, and on customary rules. Then, a revolutionary period, and the birth of the communist State, followed by a radical period of anti-legalism. Subsequently, an acknowledgement came of the importance of a stronger, more structured and technical legal system – of course, with socialist characteristics – and, eventually, a progressive implementation of such a system. A system strongly controlled by central political authorities through political supervision as well as through the recourse to procuratorial organs –in both cases abolished at first, then reintroduced to the benefit of the construction of a socialist legal system; both systems being characterized by several similar key provisions on the functions of the law and the judiciary, its structure, and on procedural and substantial applicable rules.

7. Other comparisons

7.1. Some characteristics of the Chinese legal environment, namely its incompleteness and its frequent lack of enforcement, do puzzle many westerners, including western lawyers. Yet, other well-known legal systems display some similar features. The comparison with those systems may help in understanding some features of the Chinese legal environment, as it has developed in the last few decades. Obviously, comparison does not imply any identity amongst the compared objects, but it could help in understanding phenomena sharing some similarities.

An obvious case to mention is international law: very often political decisions, actions or inactions based on political convenience or based on a given national legal system prevail over the enforcement of international legal rules. Still, those rules discharge some important

function even in that all-political international environment – providing general principles and indications of what should be done; not unlike the way many Chinese legal rules work in their environment.

Extra flexibility in the international law environment, not at the enforcement level, but at the very level of law production, is also provided by the fact that general rules of international law can locally be derogated by some of the subjects of those rules, by agreement or custom. With the exception of the mandatory rules of *ius cogens*[191] – not clearly defined themselves – all international law seems to be made of disposable default rules[192]. Those who should be subject to those general rules also have the power to modify them.

It follows from what has just been said that international law interacts with politics, not being above it, nor being completely useless. This model can also be effectively used as a comparative tool, to analyse some aspects of the Chinese transition of the last decades.

I think the dynamics observed in the International Law between law, subjects and subjects creating new rules, also represent what often happened in China with central or higher-level rules, *vis-à-vis* the rules produced at a local or lower level: a complex normative model can be

[191] According to Article 53, titled "Treaties conflicting with a peremptory norm of general international law (*jus cogens*)", of the 1969 Vienna Convention on the International Law of the Treaties, *" A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*".

[192] The concept of *ius cogens* and related problems are dealt with in any basic International Law handbook. Amongst the many specific writings discussing it see, for instance, L. ALEXIDZE, *Legal Nature of Jus Cogens in Contemporary International Law*, in 172 *Recueil des cours* (1982), 198; J.I. CHARNEY, *Universal International Law*, in 87 *Am. J. of Int. Law* (1993), 529-551; E. LEONARDI, *The Ius Cogens in the 1969 Vienna Convention on the Law of the Treaties*, in 19 *Thesaurus acroasium*, (1992), 583-592.

identified in both cases, based on the dialectics between different and different-level interacting normative orders and factual occurrences, often producing different rules or outcomes for similar issues.

In the suggested approach, the core of Chinese law *ius cogens*, so to speak, made of absolutely mandatory legal rules, binding even for the government itself, is now expanding significantly, as reforms proceed, after having been for decades *de facto* confined to such fundamental principles as the unity of the Chinese State, the leadership of the Party and few more.

7.2. Often, as is widely mentioned in legal literature, the general Chinese laws and regulations issued at the central Government level have not been enforced at local level, due to the lack of local by-laws. This occurrence is not very dissimilar from what occasionally happens in the European Union with the EU directives. The EU directives are legal texts, meant to be implemented at the national level in accordance with the general guidelines provided therein, to harmonize the member States legislation. The nature of EU directives and their binding force is peculiar, before the required national legislation is enacted: member States are bound to implement them, and they have even at that stage, before being implemented nationally, some capacity to affect cases decisions, as their guiding nature can directly influence the courts, administrative action at all levels, and the development of scholarly law. Before being implemented at national level the EU directives are not, in most cases, "hard" law for the EU citizens; but neither are they mere political statements or legal wishful thinking. Some say they provide "soft law," whatever the term might mean. They are legal texts having a specific nature, meant to shape the harmonious development of the EU legal environment at the member States level, by means of local legislation[193].

[193] This discourse on the role of soft law or policy instruments of the EU Directives

The Chinese general laws shared for long time some of these features. They originated at the central authority with a view to a complex system-building, so to speak, with devolution at the different local levels of the final authority to regulate the relevant areas, harmoniously but not necessarily uniformly.

Again, using comparative analysis, it is my submission that we could consider many general pieces of Chinese legislation issued at the central level as legal texts having (also) a directive nature and function, for lower-level lawmaking. These texts would discharge a propulsive, political, "pedagogic" role for local authorities. With a system in transition, or "under construction," it is easy to see how local "legal" implementation of directive texts hailing from the center may take some time to be achieved completely and homogeneously everywhere; yet, those texts have some political and legal value, as directives for local bodies of governance and adjudication.

7.3. Another interesting area for comparison and further investigation could be the historical development of the administrative jurisdiction and law in France during the nineteenth century. Due to the French philosophy of the separation of powers, and its post-revolutionary implementation, the administrative activity of the government could not possibly be interfered with by the judiciary[194]. Procedures and deciding bodies have been established within the administration, to review administrative acts, and they have been in place for decades before the *Conseil d'Etat* eventually became a full-fledged special court for administrative cases.

The *Conseil d'Etat* has been until 1872 (except in the brief period 1848-1852) just an advisory organ for the government.

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cannot be done here with any completeness. An accurate analysis can be found in G. FALKNER, O. TREIB, M. HARTLAPP, S. LEIBER, *Complying with Europe: EU Harmonization and Soft Law in the Member States*, Cambridge, 2005.

[194] The issue is discussed IN J.H. MERRYMAN, *The French Deviation*, *supra*.

Grievances against administrative activities could only be brought by citizens by lodging a petition to the same administrative authority issuing the decision, or to a higher one, to have the decision reviewed. The *Conseil d'Etat* would then advise the central government on these contentious issues; still, the government kept its ability to decide discretionally[195]. Italy followed the French model in the nineteenth century, with the creation of the *Consiglio di Stato*[196]. Remarkably, the historical all-administrative procedure is still available – if not frequently made recourse to – in Italy today, along with judicial actions in administrative courts and *Consiglio di Stato.*

Thus, the French public administrative activity in the nineteenth century was based on a rule-by-law principle, according to my scheme proposed above, external checks and balances for the administrative activity being absent. The *Conseil d'Etat*, though, has always been very authoritative, and its opinions have always been followed by the French government, except in a case or two over about seventy years[197].

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[195] For a historic overview of the French developments, see J. MESTRE, *Un droit administratif à la fine de l'ancien régime: le contentieux des communautés de Provence*, Paris, 1976; ID., *Administration, justice et droit administratif*, in 328 *Annales historiques de la Révolution Française*, available online at http://ahrf.revues.org/document608.html; A. MESTRE, *Le Conseil d'Etat protecteur des prerogatives de l'administration – Etudes sur le recours pour excès de pouvoir*, Paris, 1974; S. CASSESE, *Le basi del diritto amministrativo*, Turin, 1989, specially at 34-39; M. NIGRO, *Giustizia amministrativa*, Bologna, 1983, specially at 25-65.

[196] The Kingdom of Piedmont actually had special administrative courts, in the beginning of the nineteenth century; however, after the unification of the Italian state (1861), special administrative courts have been abolished (1865); administrative grievances were dealt with by the authorities the French way, in a purely administrative fashion, with the advisory function of the *Consiglio di Stato* – which later (1889) received judicial functions similar to those of its French counterpart in addition to its advisory ones. Many jurisdictions followed the French archetypal model, such as Spain, the Netherlands, Belgium, Norway, introducing during the nineteenth and twentieth centuries a similar advisory and judicial body.

[197] See S. CASSESE, *supra*, at 35. The same can be said about the reception by the Italian administrative authorities, in deciding petitions for review of administrative acts, of the opinions given by the *Consiglio di Stato*.

The French government, meanwhile, was developing during that century its tradition of a solid, fair and efficient public administration; a system eventually based on both an efficient administration in place and a credible external judicial check. A major shift in values, from rule by law to rule of law, according to our classification made above, was eventually acknowledged in 1872 with the formal introduction in the system of the judicial review of administrative acts by the *Conseil d'Etat* – which *de facto* had already been in place for decades[198], due to the prestige, credibility, moral suasion capability of the *Conseil d'Etat*; and to the government's will to almost invariably accept the advice of the *Conseil d'Etat* in order to carry out an impartial, efficient, legitimate administrative action. The following year, on February 8, 1873, with the famous decision known as the "*arrêt Blanco*", the *Tribunal des conflicts* (a new organ vested with the authority to solve jurisdiction conflicts between common and administrative courts), made clear that special legal rules existed, applicable to the administrative activity; a decision considered by many as representing the birth of modern administrative law[199].

Modern administrative law is perceived as (also) aimed at protecting citizens *vis-à-vis* the state as well as protecting the state's prerogatives and its actual administrative activities from unnecessary impairments that could come from the application of common rules of law in common courts[200]: "*une bonne administration exige à la fois la protection de l'Administration et celle de l'administré. Le Conseil d'Etat doit donner à celui-ci le sentiment d'avoir un véritable juge impartial ; et à l'Administration l'impression de ne pas la gêner ou la paralyser inutilement*"[201].

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[198] J.H. MERRYMAN, *The French Deviation*, supra; ID., *The Public Law-Private Law Distinction in European and United States Law*; *supra*.

[199] S. CASSESE, *supra*, at 3.

[200] S. CASSESE, *supra*, at 38.

[201] A. MESTRE, *supra*, at 287; M. NIGRO, *supra*, at 26-27, also observed that

Socialist China at the inception of the reforms period started with Deng can be considered a very loose system of rule by law where, by and large, all of the law was administrative law, due to its socialist nature (according to Lenin "*all law is public law*"[202]), private law being almost absent (as, conversely, "*all [bourgeois] law is private law*"[203]).

Differently from the French one, the Chinese legal system, made of mostly public and administrative law, was weak and largely inefficient. Both laws and courts had the primary function of protecting the interests of the State and reinforcing its authority *vis-à-vis* private individuals. The Chinese system is now in transition to achieve solidity and efficiency, and, in addition, new areas of private law are being allowed in the system. When comparing these two experiences, China seems to be following an opposite path, with respect to the one followed by France: China has established *de iure* formal courts which are still *de facto* unable to affect the public powers' course of action in many instances (it is rather the other way around, in fact, as public powers *do* affect courts' activities); Chinese courts are often unable, as discussed above, to effectively protect the legal rights of citizens and other entities in private matters, especially *vis-à-vis* central or local governments, or public owned companies, or private entities with strong connections with the establishment[204].

Speaking of the more general structure of the legal system,

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administrative law and administrative courts are related not only to a state governed according to the rule of law principles, having also been developed as guarantees for the authoritative prerogatives of the "administrative state".

[202] Lenin, letter to Kurskii, 1922 – as translated by H. BABB, in 20th Century Legal Philosophy Series, 5, 1951; also in 20 *Soviet Legal Philosophy*, 292 – reported by J.H. MERRYMAN, *The Public Law-Private Law Distinction in European and United States Law*, in *The Loneliness of the Comparative Lawyer*, The Hague, 1999, at 86, footnote 36; also in *Festschrift for Charalambos N. Fragistas*, Thessaloniki, 1966, I, 31; also in 17 *Journal of Public Law* (1968).

[203] E. PASHUKANIS, as discussed in W. FRIEDMANN, *Legal Theory*, 4th ed., London, 1960, at 332; reported by J.H. MERRYMAN, *supra*, at 87.

[204] See above, Section 5., *Enforcement of the law*.

France developed a separate body of administrative law centuries after having established the state and its common, private-law based, legal system. China, conversely, is moving only in recent years from an almost pure expression of the "administrative state" model[205] to a state featuring new, increasing areas of private law, as well as remedial means to protect citizens' rights and interests even with respect to the very government.

I think the lessons to be extracted from these short comparative notes are essentially two.

One is that, irrespective of the formal enactment of laws stipulating legal and institutional reforms, efficiency and legality in the exercise of public powers will only be achieved when the very government – and its political ghost in the machine – accept the idea of a government being subject to *both* self-discipline, with laws being complied with by the administration, *and* to effective external checks. The two things are tied together – being not so relevant whether the external check be a full-fledged court with jurisdiction over the government or a simple, but prestigious and authoritative, advisory body, as French legal history demonstrates.

Conversely, the mere enactment of substantial and procedural laws stipulating powers of judicial review does not guarantee that the desired result will automatically be achieved. Thus, a change of mentality at the political level, of political and administrative culture, will be needed[206], at least as much as new laws. The governments at the different levels should feel compelled to "rule by the law". That change

[205] Defined as the State having unrestricted powers to affect subject's lives, by means of administrative acts, not being subject to courts or other external checks, and having at its disposal special organs and procedures to review its decisions and acts, especially in its own interest. See M. NIGRO, *supra*, 27-30.

[206] The 2004 *Outline* of the State Council for the promotion of law-based public administration goes in that direction, along with all the constitutional and political inputs, as well as with the slowly improving actual data on enforcement, as it will be discussed below in Chapter Two.

in attitude is the necessary way to achieve an overall better efficiency and credibility of the administrative action, and a higher general reliability of the system in the exploding private law sector, which can contribute to foster social and economic development. Time will be necessary, and it is still too early to foresee the duration and the outcome of the Chinese transition process.

The second consideration that can be made following this comparative analysis is that the Chinese process of developing areas of private law from an originally fully administrative state, where private law was vilified and interstitial, is following a reversed path with respect to the mentioned Western experiences.

Chances are that in some instances*, when drawing lines between private and administrative law areas of the Chinese* (still socialist) *legal system, many relations of the general/special or of the rule/exception kind will have to be considered different, maybe fuzzier, if not reversed altogether, with respect to what would seem obvious in a western legal environment.*

8. A simple scheme

8.1. At this point, trying to summarize, I think some specific features can be recognized in the "socialist rule of law" (s.r.o.l.) model:

The first one is *a systemic ability of policy-making organs to affect the interpretation and application of legal rules, in pursuing general political aims indicated by the political leadership*.

The second one is *the absence of external checks or balanced mechanisms of power, all the institutional power being entrusted to assemblies by the polity, as institutions representing the political power, and ultimately the Communist Party*.

A third one, as discussed above, is *the severability of law from*

enforcement, where the law and its enforcement are actually two different issues.

8.2. Having said that, a classification is proposed here with respect to the *role* of law and legal rules in organized societies:

A model labelled "rule of men" (r.o.m.) may be identified as that where there are no abstract, general, previously enacted rules, and where only case-by-case decisions of the authority are used to rule the society – this model may be imagined in its purest form, or in a reasonably pure form, in very small, chthonic[207] societies. The Chinese situation at the height of the Cultural Revolution also feature a close proximity to this model.

The "rule of law" (r.o.l.) model, as developed in the western experience and literature, is characterized by a set of technically managed, abstract, general, pre-existing rules applicable and necessarily to be enforced against anyone, including the political leadership on the relevant society; with the theoretical indifference of rules and their enforcement to extra-legal influences, and with a system of checks and balances in place to keep all the institutional and political actors in check *vis-à-vis* the legal rules.

The "rule by law" (r.b.l.) model features general and abstract rules, but the political leadership of the society has the systemic ability to affect their application and enforcement according to its political needs and objectives. The provisions of the law in the rule by law model basically amount to rules for private subjects but soften into principles for public institutions' activities.

Of course, this is a very loosely sketched classification; classifications can be many, and every partition can feature several sub-partitions: a very acute, useful analysis and classification of this kind is

[207] The use of this term is intended to be in accordance with Glenn's classification of legal systems; P.H. GLENN, *Legal traditions of the World*, Oxford, 2th ed., 2004.

made, for instance, by Randall Peerenboom, featuring different types of r.o.l., including a socialist sub-model under the larger r.o.l. label[208].

In this book I will accept that the r.b.l. model corresponds to the present state of the Chinese "socialist rule of law", the Communist Party (as representing the people of China) being the sovereign entity enabled to "rule the country by law" – *yīfǎ zhìguó* (依法治国) – or, more precisely, to "rule the country by virtue and according to the law" – *yīfǎ zhìguó, yǐde zhìguó* (依法治国，以德治国).

Perhaps a mature s.r.o.l. with Chinese characteristics will correspond, when reached, to a specific type or sub-model within the more general macro-model of "the rule of law".

[208] R. PEERENBOOM, *supra*, 103-109, where the Author classifies and describes the features of the r.b.l. model *vis-à-vis* four possible sub-models of the r.o.l. one (namely: the liberal-democratic, the communitarian, the (neo)authoritarian, the statist socialist ones), which is useful to analyse the transition of the Chinese legal-political environment, as well as the ones of other societies. I found it especially interesting for the analysis of many Asian realities, indeed. This Author, however, also gives there a *caveat* against excessive classification, which could lead to losing the forest for the trees.

CHAPTER TWO

REINFORCEMENT AND COMPLEXIFICATION

SUMMARY: *1. A complex socialist environment. - 2. A stronger socialist legal system. - 3. Variable geometries. - 4. Market and non-market, private and non-private, public and non-public: different concepts, fuzzy boundaries. - 5. Soviet studies of the 20th century may still be useful. - 6. Legal protection of public interests and social rights in the new Chinese society. - 7. Territorial and institutional complexity. - 8. Transplants and legal hybridisation in China.*

1. A complex socialist environment

1.1. There is almost no need to mention the fact that the Chinese reality in the 21st century is very different from that of the USSR in the 20th

If certainly the Soviet Union's state and society had their own complexity, today's China also features a sheer territorial size, and a much larger population belonging to several dozens (56, officially) ethnic groups, with different languages (in the hundreds), cultures, religions. China also features a number of regions for which specific institutional arrangements and legal regimes have been devised, due to specific historic circumstances or to the ethnic structure of the resident population; and a number of other special areas designated on purpose by the central government to conduct socio-economic experiments – such as the Special Economic Zones (SEZs) created at the end of the 1970s to introduce the market economy in selected areas of the country, with an early view to a subsequent countrywide application.

Today's China also features two Special Administrative Regions – Hong Kong and Macao – not so long ago under foreign Western sovereignty, which legally speaking pertained to the Western world and did not have a socialist political system, and did feature a market economy. For those territories a special arrangement had to be devised and implemented, to absorb them within the country while at the same time maintaining their different social, political, economic environment and their different legal systems.

Most of all, the introduction in Mainland China of a market economy, if within the country's socialist framework, is probably the element giving the largest contribution – in economic, political and cultural terms – to making present and future socialist China very different from the Soviet Union or other past socialist experiences.

In addition to internal changes, the many changes occurred in the world at the end of the XX century, at least partly due to the fall of the Soviet empire, also produced new phenomena – generally addressed to with the term "globalization" – which brought about tighter relations of China with the rest of the world, not just of an economic nature; and a larger, less restricted circulation of goods, services, capitals, people and ideas across national frontiers.

Market and globalisation also promoted the diffusion within the Chinese society of values very different from those dominating the country in the first three decades of existence of the People's Republic of China, which were based on Communist and Maoist orthodoxy. China's accession to the WTO in 2001 certainly put additional pressure on the Chinese economic and legal system to accelerate the transition towards more law-based socio-political, institutional and economic models.

Today's China is one of the world's economic powers; its citizens are more and more inclined to participate in and benefit from the country's spectacular economic growth. This, and the growing

presence of law and of the legal system in Chinese life is producing a urban middle-class, exposed to global phenomena, increasingly familiar with the legal dimension of society, increasingly inclined to making recourse to the law for protecting their private interests, including vis-à-vis the government.

The generalized acceptance of the law as an important tool of governance and protection, the growth of the legal system in quantity and in the quality of its responses, also produce cultural spillover effects further improving the law's standing in society – including the incepting, if still very immature, phenomenon of citizens, lawyers and NGOs engaging in legal activities for the protection of general interests and social rights.

All these elements contribute to the Chinese society's growing complexity. Complexity, in turn, produces a political need for prudent changes, managed carefully "from the top" to preserve the country's social and political stability: the impressive economic development hailing from the creation of a Chinese market economy has been the main objective for the Chinese political leadership in recent decades, with an obvious priority over other political reforms – the latter maybe devisable or desirable in a Western approach, but have probably been deemed inappropriate for China, at least at present and/or in the way westerners would imagine them.

The Chinese legal system has been repeatedly indicated by the Chinese ruling élite since Deng Xiaoping as a tool of governance of paramount importance, to face all the challenges lying ahead while maintaining the country's social and political stability and the control of the Party over the Chinese society. Some tension between fast changes and prudent governance is reflected, thus, in changes and tensions in and around the country's legal system, and in its reforming process of the last few decades – a process in which different and often

competing interests and economic, intellectual and societal forces interact.

1.2. This cautious approach of the Chinese leadership to the issue of political reforms seems to be justified to some extent by an analysis of the situation of the former USSR and Russia during the 1989-1991 transition, and in the following chaotic years. That experience demonstrated how unsatisfactory the application of political or legal conceptions out of their context can be. By transplanting a new system – mostly through political and legal reforms based on fully Western values – abruptly, without much attention to local circumstances and to the need of appropriate transitional mechanisms, the country became a clear example of what not to do during a delicate time of transition; remarkably, during the El'tsin's leadership period[209].

The strategy of the Chinese ruling élite in political-legal matters has been twofold, instead: to *reinforce* the general frame of China's socialist legal system, on one hand, while on the other diversifying it enough to create and develop new tools, effective in governing its societal and economic growing complexity[210].

A more clearly defined development of the Russian legal system seems to have been introduced in fact with Putin's leadership, reverting to a more centralized and controlled construction of a strong political legal system[211] – sort of a reversed borrowing of Russia, if an unknowingly one perhaps, from the Chinese experience of the latest couple of decades. As a matter of fact, both countries being involved in

[209] See F. FELDBRUGGE, *supra*, 205-208.

[210] This Chapter and the following Chapter Three include excerpts, a re-elaboration and a number of ramifications of the reflections I made in a previous essay: I. CASTELLUCCI, *Reflections on the Legal Features of the Socialist Market Economy*, in *Frontiers of Law in China*, 6 (2011), 3, 343-368.

[211] F. FELDBRUGGE, *supra*, 208-210.

a process of (post-) socialist transition, they seem to have much to learn from each other's experiences.

It is quite obvious, thus, that a mere transplant into China of the Soviet (or, worse, of the immediately-post-Soviet) model, to develop a socialist legal system suitable for present times' Chinese reality, would have been completely inappropriate. The current Chinese transition could arguably be seen as also, or primarily, aimed at strengthening the control of central authorities over the peripheral administrative entities, also through the reinforcement of the socialist legal system.

2. A stronger socialist legal system

2.1. It follows from what has been discussed in Chapter One that the Western conception of the legal system, based on the idea of the *Isolierung*[212], does not apply to socialist realities, and to the Chinese reality as it has developed in the last decades. The legal system is not an isolated feature of the society, working for itself according to its rules, irrespective of other influences. Rather, it works as a part of an integrated political-legal system of governance.

Chinese developments in the last twenty years or so indicate however a detectable shift of balance in this integrated system, more and more allowing legal rules and mechanisms to intervene in solving conflicts, by means of an increasing quality and quantity of judicial responses to the demands of the public – all in accordance with the policies indicated first by Deng Xiaoping in the late 1970s, and also due to the impact of (private first, then) global economy on Chinese society.

[212] See F. SCHULZ, *Prinzipien des römischen Rechts*, München 1934; Italian translation by V. ARANGIO-RUIZ, *I principii del diritto romano*, Florence, 1949, especially at 16-18.

The recent evolution does not seem to have been a linear one: the "liberal" attitudes displayed towards "the rule of law" by the governing élite and/or described in many scholarly writings of the late 1990s significantly receded in importance, with a significant softening of legality principles and mechanisms in the following decade, in favour of new doctrines on the construction of a "socialist harmonious society" attaching a comparatively greater importance to the role of policy-making organs within the legal system.

Evidence of this evolution can be found in the State Constitution, with the 1999 amendment inserting in Article 5 the express mention that "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law"; in the Party's Constitution amendment of 2002 with the mention of "ruling the country by virtue and according to the law"; and in a wealth of subsequent political statements and documents such as the 2004 State Council's *Outline for Promoting Law-based Administration in an All-round Way* (hereinafter: 'the 2004 *Outline*') and the State Council's *White Paper on the Rule of Law in China* (hereinafter: '*the 2008 White Paper*') – two critical documents for decrypting the Chinese concept of *fǎ zhì* / rule of law.

It is certainly true that in the last decades the Party elite has been promoting, at central level at least, the transition of the Country political-legal system towards a system recognising the importance of the law, and of a reduced interference of the Party on administrative and judicial processes as well as on the general economic system[213].

[213] The *Outline* indicates in ten years (counting from 2004) the time required to achieve the devised law-based administration: see *The 2004 Outline*, Chapter II.7. Also the "Explanation on China's draft property law" delivered at the Fifth Session of the Tenth National People's Congress in March2007, just before the enactment of the much expected Chinese Property Law, stated – a little bit overoptimistically perhaps – that the enactment of the Property Law is "necessitated by the goal of establishing a Chinese-style socialist legal system by 2010". See it on the official new agency Xinhua website, at http://news.xinhuanet.com/english/2007-03/08/content_5816944.htm.

This does not mean, however, that the strengthening of the legal system should be pursued solely, or primarily, through judiciary action rather than through reinforced administrative control; or that "the rule of law", much less of a Western kind, should be *per se* the ultimate aim.

2.2. The 2004 *Outline* indicates instead that the fully law-based administration of the country should be reached by improving administrative law-awareness and law-abiding behaviour, *administrative enforcement* of the laws, rationalization, enhanced supervision, improvement of governmental work at all levels and its discharge in accordance to the laws[214].

There is no indication of a strategy including the creation of checks-and-balances and/or entrusting legality checks to courts and procuratorates – almost going unmentioned in the document[215] – whereas the *Outline* also promotes alternative mechanisms for averting and solving disputes[216], including civil disputes by means of administrative mediation[217].

The basic principles of the 2004 *Outline* include the separation of administrative and economic activities, the reduction of improper interferences of the public administration in the economy[218], and the basic separation between the party and the State re-introduced after the Maoist period. However, no idea of separation of powers (e.g. between

[214] The 2004 *Outline,* Chapter IX.

[215] The need to implement effective institutional supervision by the People's Congress as well as democratic supervision by the political entities is stressed in the *Outline*'s Section IX para. 27, before the indication of the need for administrative organs to accept the supervision of the People's Courts according to the law, which only follows in the very short para. 28.

[216] The 2004 *Outline*, Chapter VIII.

[217] See the 2004 *Outline*, Chapter VIII.25: "We shall proactively explore a new mechanism for solving civil disputes"; and the following Section VIII.26 on the need to improve the role of administrative conciliation.

[218] The 2004 *Outline*, ch. II.3.

the government and the judiciary) in a Western sense is conveyed by the document. Moreover, the idea of law-based administration is related to the other one that politics shall indicate the path free from legal constraints, to "*govern the country according to law and rule the country by virtue*"[219]; the law-based administration and its development will thus be led by the CPC and its own concept of "virtue"[220].

The outcomes of a well-known case decided in relatively recent years by the Intermediate Court of Luoyang (2003) and then by the High Court of Henan (2005)[221] also suggest that the Chinese legal system is developing within the traditional socialist theory of sources of law. A model characterized by an almighty legislature, rigid separation of functions, no checks-and-balances, no judicial legality check of normative acts; a model featuring a (very socialist) legislative supervision mechanisms laid to ensure the legality of laws and regulations vis-à-vis higher-ranking norms, that may be made more efficient and reinforced reasonably soon [222].

The State Council's *White Paper on the Rule of Law in China*, issued on February 28, 2008 (the 2008 *White Paper*) is a very general document, bearing a great political and strategic significance. Its very existence underlines the Chinese senior leadership's attitude, favourable to a stronger and more mature legal system. The analysis of the document suggests that the selected path of development is still aimed at attaining some Chinese declination of the r.b.l./s.r.o.l. model.

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[219] The 2004 *Outline*, ch. III, at 13.

[220] On the "virtuous" approach of the CPC to country governance as a purely "rule by law" approach, *supra*, Chapter One; also, I. CASTELLUCCI, *Rule of Law with Chinese Characteristics*, *supra*, at 47–50.

[221] "The seeds case", already mentioned in Chapter One, Section 2.

[222] The actual implementation of the legislative supervision mechanisms laid in the Legislation Law of 2000 on a regular and systematic basis seems to have started in 2009, "to ensure a unified legal system and make it more scientific and consistent"; see the 2011 *White Paper*, end of Chapter I and end of Chapter IV.

Strong statements can be found there on the fundamental role of law for civilization, and on the Chinese people's desire of a society based on the organic unity of the Party, the people and a law-based system of governance[223]. The document's Chapter I reinforces the law's general legitimacy and its key role in society, indicating the millennia-old Chinese *legal* tradition – after Confucius, Mencius and Xunzi also came, after all – as a significant contribution to the *legal* civilization of mankind[224].

The document also mentions, however, that in modern times "*people with lofty ideals tried to transplant to China the modes of the rule of law from modern Western countries, but failed*"[225] – in a clear refusal of such Western models.

In fact, the 2008 *White Paper* states that during the Cultural Revolution the legal system "had severely been damaged," and that China is now reinforcing it, with thick socialist features:

> "the CPC, after… learning painful lessons from the 'cultural revolution,' made an important decision to shift the focus of national work to socialist modernization. It also made clear the importance of the principle of governing the country by law… it is necessary to strengthen the socialist legal system. The socialist idea of the r.o.l. has been gradually established, with the r.o.l. at the core, law enforcement for the people as an essential requirement, fairness and justice as a value to be pursued, serving the overall interests as an important mission,

[223] See *the 2008 White Paper*, Foreword.

[224] See *the 2008 White Paper*, introductive lines of Chapter I, *Historical Course of Building a Socialist Country under the Rule of Law*.

[225] *The 2008 White Paper*, Chapter I. The 2011 *White Paper* goes along similar lines, highlighting the Chinese specificities in Chapter III; specially at III.4 where it is described how China "studies and draws on the good legislative experience of other countries and learns from their legislative achievements, but never slavishly imitates their models".

> and with the leadership of the CPC as a fundamental guarantee… The CPC has markedly improved its governance capability… The Party has constantly enhanced its consciousness and firmness in governing the country in a scientific and democratic way, and by law"[226],

features including enhanced administrative supervision[227], legislative supervision for consistency among different-ranking laws and regulations[228], full enforcement of the Country's Constitution[229]. It also confirms the 2004 *Outline* objectives of law-based administration[230] and law-awareness of civil servants[231]. Mentions are also made of the importance of courts, of mediation and conciliation bodies, and of improving judges' and procurators' professionalism[232].

A major role of the law in relation with the market economy seems to be that of providing the leaders with an efficient tool for macro-control: Chapter IV of the 2008 *White Paper* is devoted to the relations between the law and the socialist market economy, stressing the central position in the Chinese "civil law system compatible with the building of a socialist market economy"[233] of the law on property ownership. It also mentions other market-related laws, such as the one on Contracts, and the General Principles of Civil Law, and makes a

[226] *The 2008 White Paper*, Chapter I.

[227] See the end of Chapter I: "…*fairly complete supervision systems and rules have been established; and the composite force and effectiveness of supervision have been constantly strengthened*."

[228] *The 2008 White Paper*, Chapter II.

[229] *The 2008 White Paper*, Chapter II: "The Constitution, as the fundamental law of the state, has supreme legal authority… To implement the basic principle of governing the country by law, it is first of all necessary to implement the Constitution in an all-round and thorough way."

[230] *The 2008 White Paper*, Chapter V.

[231] *The 2008 White Paper*, Chapter VIII.

[232] *The 2008 White Paper*, Chapter VI.

[233] *The 2008 White Paper*, Chapter IV.

specific mention of the 2007 Anti-monopoly Law as being aimed at intensifying government and public supervision[234].

In fact, according to the 2008 *White Paper*, the role of the socialist law in the economic field seems to be the one of providing the ruling élite with an efficient tool for macro-control[235].

Even the *White Paper*'s indications on implementing the Constitution[236] and enhancing legality thoroughly should be put in the Chinese evolving socialist context and legal framework: the Supreme People's Court has been active enough, in the 1990s and in the first half of the following decade, in promoting – if surely not the "thick" values of the judicial activism seen elsewhere – the growth of a "thin" legality at least, developing interpretations/opinions seen by many as a product of a *de facto* normative function, controversial for some[237], even displaying an attitude towards the legal enforcement of Constitutional rules[238].

This tension towards legality seems however to have eased, with a sharp change of policy in more recent years, and the confirmation of the system to the consolidated socialist principle of the unenforceability of Constitutional provisions: a Supreme People's

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[234] *The 2008 White Paper*, Chapter IV.

[235] *The 2008 White Paper*. Chapter IV, "Exercising macro-control over the economy by means of law is a major characteristic of China's socialist market economy… [major economic laws] put forth provisions on macro-control in their corresponding fields… The construction of legal systems for macro-control effectively gives full scope to the guiding role of national development plans and industrial policies, and thus elevates the level of macro-control."

[236] *The 2008 White Paper*, Chapter II.

[237] See XIN Chunying, *Chinese Courts History and Transition,* Beijing, 2004, 102 "…*judicial interpretation has gone far beyond its legal limits…* [becoming] *a very important source of law other than laws… and administrative regulations.*"

[238] See *SPC's Reply to the Shandong High Court on the Case Qi Yuling v. Chen Xiaoqi* (in relation to the constitutional rights to education and to one's own name), reported in the *People's Court Daily* on August 13, 2001. A mention to previous cases related to constitutional protection of labourers' rights is made by A.H.Y. CHEN, *An Introduction to the Legal System of the People's Republic of China*, *supra*, at 48.

Court negative opinion on direct enforcement of constitutional provisions has been issued in 2008[239], consistently with the general change of the rule-of-law policy emerged in the central years of that decade.

Considering the fact that the *White Paper* has also been issued in 2008, it is easy to conclude that the indication contained there on the enforcement of the Constitution[240] is not to be intended as being primarily addressed to the courts; it rather being directed to the government at all levels for the administrative enforcement of constitutional provisions, through an appropriate normative and administrative action and under the constant supervision of the Party[241]. The subsequent 2011 *White Paper* clearly indicates the legislation as the main channel of implementation and enforcement of Constitutional provisions.

Recent developments seem to consolidate the court system's role as a part of the socialist governance system, rather than as pure law-enforcement circuit protecting legal rights and exercising some degree of checking/balancing action vis-à-vis the government. The new line of policy has been laid by the incumbent President of the SPC, Wang Sheng Jun, in charge since 2008. Wang abandoned his predecessor's Xiao Yang inclination towards the role of the court system as a pre-eminently law-enforcing circuit, enlarging the standards for court work to primarily consider and give effect to party interest and to the Chinese people's interest – instead of confining the courts' scope of analysis and action to purely legal considerations – to pursue the

[239] The Supreme People's Court negative opinion on direct enforcement of constitutional provisions has been issued on December 18, 2008, withdrawing the previous SPC's interpretation issued in the *Qi Yuling* case, along with 27 other ones.

[240] *The 2008 White Paper*, Chapter II.

[241] See, e.g., the conclusion of its Chapter II.1 and the initial part of Chapter II.2. The 2004 *Outline,* besides, stresses the need of improving the administrative enforcement of constitutional provisions in its Chapter IX.

"socialist harmonious society". It is the so-called doctrine of the *Three Supremes*, intended as the three supreme principles guiding the courts' activities: representing and protecting the needs and requirements of the Communist Party of China, of the Chinese people, of the law – in that order of importance[242].

The general legal system is also likely to keep enhancing in the next future its socialist mechanisms, playing as counterweights and flexibilising strict legality principles, such as "democratic" or "political" supervision mechanisms (of the Party), and "institutional" (administrative) ones. Increased professionalism of Procuratorates, for instance, is balanced by the introduction in 2003 of their "democratic" supervision by a political committee[243].

More generally, the Law on Supervision of 2006 (effective since January 1, 2007) stresses the fact that the People's Congresses Standing Committees at all levels shall exercise their political supervision over government, including courts and procuratorates[244],

> "focusing on the overall situation of the State, take economic development as the central task, uphold leadership by the Communist Party of China, uphold Marxism-Leninism, Mao

[242] The doctrine of the Three Supremes has been introduced by Hu Jintao in December 2007 at a session on politics and the law attended by senior judges and prosecutors; see the *China Media Project* website, Section *Media Dictionary*, online at: http://cmp.hku.hk/2010/11/12/6603/. Wang Sheng Jun's vision is stated in *Fully Implementing the Work of the 17th Party Congress and Resolutely Carrying Out the Work of the People's Courts*, in the journal 求是 (Seeking Truth), August 2008; see it reported also in the Hong Kong newspaper *South China Morning Post*, October 23, 2008.

[243] As reported in the White Paper titled *Building Political Democracy in China*, issued on October 19, 2005 by the State Council, Chapter 10, titled "Judicial Democracy." According to the government, "the pilot work of instituting people's supervisors (or procuratorates) is proceeding smoothly"; *the 2008 White Paper* on the rule of law, Chapter VI.

[244] Law on Supervision (2006), art. 5.

> Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents, uphold the people's democratic dictatorship, uphold the socialist road, and uphold reform and opening to the outside world"[245],

thus granting the Standing Committees at both central and local levels the power to interfere with courts' and procuratorates' activities at their respective levels[246].

The 2004 *Outline*, the 2008 and 2011 *White Papers*, the Law on Supervision and other recent legal and policy documents[247] clearly concur in clarifying the ambiguity produced in the late 1990s by the reform process and discourses on "the rule of law". These more recent documents indicate now more clearly the vision behind and the model for the Chinese developing legal system: no Western-style r.o.l.; more, better socialist laws; effective supervision at all levels; intense macro-control over the private economy; more efficient, law-abiding administration and legal institutions; a tension towards a much-needed improvement of enforcement mechanism for laws and regulations[248]. The shift towards a stronger legal system does not imply that the Chinese political-legal system has to share the same values of the Western legal traditions, or the same concept of "rule of law".

The 2008 *White Paper* described the Chinese political rulers'

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[245] Id. art.3.

[246] Id. art.14.

[247] Such as the State Council's *Decision on Strengthening the Development of a Law-Based Government* of November 8,2010, in line with the 2004 *Outline* and the 2008 *White Paper*.

[248] Significantly, the 2011 *White Paper*'s concluding remarks stress the need for improving the enforcement of "the Constitution and laws", without any mention for the enforcement of courts' decisions. In fact, the 2011 *White Paper* does not emphasise any critical role of the courts and procuratorates in the enforcement of laws for the development of the socialist legal system – as it has also been observed for the 2004 *Outline* –, the administrative enforcement being the main strategy instead.

vision on the "socialist rule of law with Chinese characteristics". The one of 2011 describes the progress made in several areas of the legal system, mostly mentioning the number of legislative enactments; it emphasises the fact that China is still a country in transition in many respects; and provides some further elements useful to evaluate the current direction of the system. Especially, the 2011 *White Paper*, issued only three years after that of 2008, demonstrates how critical for the ruling élite is to implement a vision balancing the "socialist harmonious element" with a still necessary improvement of the legal system, "with Chinese characteristics" of course:

> "Currently China is in the primary stage of socialism, and will remain so for a long time to come. The country is still in the stage of structural reforms and social transformation, and its socialist system calls for constant self-improvement and development, which determines that the socialist system of laws with Chinese characteristics is bound to have the features of both stability and mobility, both periodical variations and continuity, and both actuality and foresightedness. China's legal system is dynamic, open, developing, not static, closed or fixed; it will constantly improve with China's economic and social development and the practice of building a socialist country under the rule of law.
> In the course of formulation of the socialist system of laws with Chinese characteristics, China's legislative bodies have integrated the leadership of the CPC, the people's status as masters of their country and the rule of law…"[249].

It is easy to recognise in the second part of the mentioned excerpt a reference to the doctrine of the *Three Supremes*, with the

[249] The 2011 *White Paper*, Chapter III.5.

three elements of the Party, the people and the law, and with their order of importance featuring the CPC's preeminent position in the system.

A "socialist rule of law" still implies the guiding role of a single, or pre-eminent, party over the political, institutional and legal systems; as well as the generalised prevalence of common interest over individual ones, and other fundamental values making China's popular democracy and Western liberal democracies two very different things. The strengthening of the legal system does not exclude that Party policies will still have comfortable and secure ways for being implemented, at general level or for specific sensitive issues – through the Party influence on officials, as well as through its political supervision, and/or through the presence of control/policy organs or mixed Party-government committees within administrative and judicial institutions at all levels. All these elements enable the Party to discharge its "leadership" role, as stipulated in the Preamble of the Constitution of the PRC.

3. Variable geometries

3.1. A workable "thin r.o.l." environment, with thick socialist values (or, simply, a socialist r.o.l. one), could be in place according to the Chinese government perhaps around 2020[250].

In a parallel fashion, a firm market economy should keep developing, in principle more and more separated from the government and regulated by legal rules and legal-technocratic institutions[251] – if still featuring the presence of public actors and regulators, and socialist

[250] *The 2004 Outline*, II. 3, indicates "a decade or so" (with "unremitting efforts") as the required time to have a law-based administration fully implemented. Certainly, it will not take less than that; interpreting the "…or so" seems the hardest part.

[251] *The 2004 Outline*, II. 3 and II. 6.

principles based on an organic view of the polity[252]. History, besides, demonstrates the existence of market economies worldwide since long before Western-style liberal democracy has been invented[253].

In areas related to the private sector of the economy, many state-of-the-art pieces of legislation have been enacted, influenced by the most sophisticated international models. This trend should continue, with more reforms being aimed at gradually creating a more individual-friendly, "legalised" environment, for the new areas of private law being developed; areas of law which however will be characterized by significant regulatory and supervisory sets of rules and institutions[254].

On the other hand**,** in more sensitive areas and issues involving public interest, socialist "ways" and policy considerations will probably continue to have a heavy impact on the legal system and its outcomes – stressing in this case the legal system's function of becoming a stronger, more efficient tool of macro-control, including the center-on-periphery control of the country.

This double standard is not a completely new thing: European socialist states such as the USSR and satellite countries also had legal tools such as civil codes and commercial laws, and banking, financial and judicial/arbitral institutions related to foreign commerce. All this in order to support and legally regulate at micro-level their international trade and economic activities, according to private law models – both

[252] *The 2004 Outline*, III. 4: "we must uphold the *intrinsic unity* among the Party that exercises leadership, the people that are the masters of the country and the country that is governed according to law… we must combine, *in an organic manner*, our efforts to *govern the country according to the law and rule the country by virtue*, in order to promote, in full swing, the development of the socialist political and spiritual civilization" (emphasis added).

[253] In fact, the only complex political structure not allowing the market as the preeminent locus for economic interaction has historically been that based on the planned economy of the orthodox communist conception.

[254] See, e.g., G. CRESPI REGHIZZI, *Evoluzioni del nuovo diritto commerciale cinese*, in *Il Politico - Rivista italiana di scienze politiche* 213 (Sett - Dic. 2006), anno LXXI n. 3, 142-171.

within the ambit of the CMEA/COMECON, which only provided the macro-planning for member countries, and outside of it when dealing with non-socialist entities. Market institutions and legal institutions related to markets, thus, are not unknown to socialist experiences[255].

In China, legality principles related to economic activities have not only been reinforced; their range of operation having also been gradually expanded to include – in a socialist market economy – activities in international markets as well as in the newborn domestic one, both open to foreign and national individuals and private business entities. This non-traumatic expansion has been paralleled by progressive insertions of increasingly stronger references to "the private sector of the economy" and to the socialist legal system in the Country's Constitution: the original reference to the protection of "urban and rural workers' individual business" contained in the 1982 Constitution's Article 11 underwent several amendments, until reaching its present state[256].

An example of the undergoing progressive expansion of the ambit of legality and private law is given by the unified Contract Law of 1998, which is applicable to all contracts, both international and domestic, including those involving public-owned entities[257]. Previous contract law was fragmented in three main different regimes for foreign

[255] See K. GRZYBOWSKI, *Soviet Private International Law*, in 10 *Law in Eastern Europe*, Leyden, 1965, Chapter III, *The Trading State*, 69-110, and the literature and documents cited therein.

[256] Art. 11 had been rewritten first in 1988, when the original reference to the protection of "urban and rural workers' individual business" became a reference to "the private sector of the economy," indicated as a complement to the socialist public economy; in 1999, in addition to the reference to "ruling the country by law," the private sector of the economy became "important", before eventually becoming "encouraged" in 2004, with the current text of art. 11.5.

[257] On the Contract Law of 1998, see MO Zhang, *Chinese Contract Law*, Leyden-Boston, 2006.

commerce[258], whereas domestic economy was regulated by public planning and ordinary domestic transactions amongst citizens were in principle regulated by the very few and vague general rules stipulated in the 1986 General Principles of Civil Law.

3.2. Besides, even in Western jurisdictions public sectors of the economy do exist. Many jurisdictions have a special administrative sector of the law, with administrative courts not only working to enforce the "rule of law", developed as guarantees for the authoritative prerogatives of the "administrative state"; being aimed at protecting citizens vis-à-vis the state as well as the state's prerogatives and administrative action from unnecessary impairments[259].

Moreover, most Western, liberal-democratic countries also feature legislations imposing restrictions to the general r.o.l., and clearly r.b.l. decisional mechanisms, whenever a fundamental interest of the policy is at stake, e.g. on national interests or national security grounds, sometimes even on trade[260] as well as on fundamental liberties[261]. An example of the latter case is in the Italian legislation on special detention for mafia criminals: very important decisions are entrusted to the Minister of Justice on the modes of the special

[258] Namely a Law on Economic Contracts of 1981, substantially revised in 1993; the Foreign Economic Contract Law of 1985; and the Law on Technology Contracts of 1987; none of these laws allowed private individuals to take part in the transactions regulated within their scope of applicability.

[259] See above, Chapter One, Section 8.3; A. MESTRE, *supra*, at 287; S. CASSESE, *Le basi del diritto amministrativo*, Milan, 1989, at 38; M. NIGRO, *Giustizia amministrativa*, Bologna, 1983, at 26-27.

[260] Such as the *Exon-Florio Act* of 1988 (amended in 1992) empowering the US President or his designee agency to veto corporate mergers, acquisitions and other corporate/financial transactions that might result in forms of foreign control over US industries engaging in national security productions; see W. GU, *A Comparative Study on Foreign Investment Legal System in China*, in 5(3) *Frontiers of Law in China*, 452–483 (2010).

[261] See the US legislation following 9/11, such as the *Patriots Act.*

detention, in an area – deprivation of individual liberty – which traditionally and constitutionally should be one of those where full legality principles should rule[262].

Areas of operation of "rule of men" can also be identified in most jurisdictions, usually in relation with the protection of some general interests perceived as vital for the polity, and/or in response to critical situations[263]. It should also be noted that many sensitive situations can be identified, more and more related to the economy in recent years, where Western governments decide on contingency to switch to a "r.b.l. mode" and course of action[264].

3.3. A major transition like the current Chinese one certainly puts the Chinese state's vital interests at stake, and constant strains on its social, political, legal institutions. It is reasonable thus to expect legal mechanisms to be differentiated, in structure, level of technicality and importance, vis-à-vis political/administrative protocols, according

[262] A special law implementing a stricter regime of isolation has been enacted in Italy for the detention of members of terrorist or criminal organizations, with the insertion of a specific art. 41-*bis* in the general penitentiary law no. 354 of 1975. According to this piece of legislation, isolation of detainees and other restrictions on their visits, correspondence, receiving of goods, contacts with other inmates etc. can be discretionally reduced by a governmental decision, in the form of a decree of the Ministry of Justice – and not by a judicial decision. This regime prevents or should prevent the imprisoned heads of criminal organization from keeping operational contacts with their organizations; in fact, the enactment of these special rules has been one of the reasons of the early 1990s bloody mafia attacks to the State, in an attempt of the criminal organisations to force the Italian State to repeal these rules.

[263] Every modern state features in fact areas of intervention for the executive power which are ruled by few legal general principles only; even being, in some cases, basically law-free areas, *de facto* if not *de iure*, and not just in emergency situations – such as the areas of military, intelligence and other security-related activities. Also, several legal traditions, statutory laws and constitutions leave political and trade-union activities free to a significant extent from legal interferences.

[264] As demonstrated, e.g., by the many policy actions and consequent enactment of laws and regulations taken by Western governments, incl. the US, to rescue national banks and financial institutions during the global financial crisis, in fall 2008.

to the sensitiveness of the many different regulated areas. The progressive stabilization of the "socialist market economy" may in the event bring about a progressive enlargement of the areas of stricter legality principles, but certainly not the abandonment of the general socialist approach, for the general frame and for the basic legal infrastructure of the system.

Using Peerenboom's terminology[265] – without any sharp lines due to the fuzzy edges of both categories and classifiable items – the next foreseeable status of China's legal system could have a fragmented appearance, with a "socialist-statist" environment for the general frame and public interest issues; a "communitarian" one for personal status, family issues; and a "neo-authoritarian" one in a middle area, within the realm of private economy and perhaps extended to cover other private and social interests, as "socialist" features loosen their grip on market mechanisms and on private interests of the Chinese citizens[266].

The differentiated "modes" of the Chinese law, and their associated levels/models of r.o.l., will result from a coordinated absorption within the socialist framework of values, mechanisms, norms, formants, hailing from different traditions: cultural, customary heritage; Western-modelled or global transplanted "technical" laws; socialist rules and governance mechanisms – each with its societal narrative and typical expressive forms, including drafting style.

[265] See R. PEERENBOOM, *The Long March*…, *supra*, 103-109.

[266] A known pattern, after all, in many developing countries, within their legal systems or with coordinated portions of diversified legal heritages: postcolonial rulers at the helm, managing public interests with top-level sets of laws being a direct expression of their political power; colonial, "technical" laws and courts for market-related areas, somehow closer to the r.o.l., if still subordinated to the political power; and the operation for personal status and family issues of customary/religious laws, communitarian in spirit and often escaping the control of the official legal system. This pattern of law is analysed in throughout the book, in Italian, of R. SACCO, M. GUADAGNI, *Il diritto africano*, Turin, 1995.

This includes entrusting the *preferential* (not necessarily exclusive) management of mentioned areas to circuits staffed at least partially with the corresponding differentiated operators: mediation and conciliation with mediators enjoying authority and respect in their communities, e.g. for family and other private matters; courts and legal professionals for market-related cases with little or no significant public interest involved; government, with politicians and bureaucrats when public interest is involved.

Obviously, demarcation lines may be fuzzy; the different normative areas may be overlapping; more than one of the mentioned circuits could get involved in singular cases or areas of the law (e.g., both mediators and the law system for family matters; both the law and politics/bureaucracy for administrative matters). Just as obviously, a "wrong" choice of the troubleshooting institution by the interested party is likely to lead to unsatisfactory results — as it happens in any pluralist environment[267], and as it also happens in past and present Chinese reality: the complex dynamics described are already in place, irrespective of the system's expected development, simplification and reinforcement along stronger lines of legality. A description of the Chinese legal environment may thus consist of a complex, pluralist model, with a general frame governing and coordinating a number of areas or sub-systems, in a relation amongst themselves and with the overall framing system which could perhaps be described as that of semi-autonomous social and normative fields[268].

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[267] The literature on legal pluralism is very vast. See B. TAMANAHA, *Understanding Legal Pluralism: Past to Present, Local to Global,* in 30 *Sydney Law Review* (2008), 375; M. GUADAGNI, *Legal Pluralism*, in P. NEWMAN (ed.), *The New Palgrave Dictionary of Economics and the Law*, at 542 (1998); J. GRIFFITHS, *What is Legal Pluralism*? In 24 J. *Legal Pluralism & Unofficial L.* 1 (1986); S.E. MERRY, *Legal Pluralism*, in 22 *Law & Society Rev.* 869 (1988); S.F. MOORE, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, in *Law & Society Review*, Vol. 7, No. 4 (Summer, 1973), 719.

[268] S.F. MOORE, *Law and Social Change: The Semi-Autonomous Social Field as an*

3.4. The "variable geometries" of the Chinese legal system are reflected in the variable drafting style of pieces of legislation pertaining to different areas of the law, notably between public and non-public, market- and non-market- related laws.

Modern, even state-of-the-art legislation is actually being enacted for the private sector of the economy, studying the most advanced international models, such as the Contract Law[269], or the Arbitration Laws and related Regulations such as the CIETAC Arbitration Rules[270], regularly revised (last amendment in 2011, effective March 1st, 2012) to make them more adherent to international standards and practice.

In other areas, where the political implications are heavier, the legal system will probably remain closer to the "classical" socialist model, to allow wider political guidance, effective supervision, and local administrative discretion in pursuing the public interest.

Different approaches to law, as well as different drafting styles of laws, will probably keep being seen, thus, in different areas of the Chinese legal system. A good example of "classical" socialist model is given by the environmental protection laws: the area is very sensitive,

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Appropriate Subject of Study, *supra*.

[269] The 1998 Contract Law has been heavily influenced by recent comparative legal studies and legal texts, including the UNIDROIT Principles of International Commercial Contracts and the Vienna Convention of 1980 on the International Sale of Goods (CISG). See BING Ling, *Contract Law in China*, Hong Kong, 2002; ZHANG Yuqing, HUANG Danhan, *The new Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts: A brief comparison*, in 5 *Uniform Law Review / Revue de droit uniforme* (2000), 429; Xiao Ying LI KOTOVTCHIKHINE, *Le nuveau droit chinois des contrats internationaux*, in *Journal du droit international*, 2002, 113; G. LEFEBVRE & JIE Jiao, *Le principes d'Unidroit et le droit chinois: convergence et dissonance*, in 36 *Revue Juridique Thémis* (2002) 519, online at: http://www.themis.umontreal.ca/pdf/rjtvol36num2/lefebvre.pdf; in Italian, see M. TIMOTEO, *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*, Padova, 2004.

[270] See J. TAO, *Arbitration in China*, *supra*, 1-54.

as it lays at a crux of important socio-political issues, including: economic development, protection of environment and future generations, health, civil and military security, and others. All the laws in that area are modelled on the general Environmental Protection Law (EPL) of 1989, a typical socialist legal instrument: it features a significant number of general and vague provisions, providing directives, ample delegations of regulatory and administrative power to governments at central and provincial level; provincial institutions, in turn, issue local laws or regulations with the same general structure, with further delegations of areas of responsibility to local governments; the latter issuing in turn local regulations and administrative documents including the actual environmental standards to be enforced. The model is flexible enough to allow the centralised control over the peripheral administration while at the same time allowing political and administrative discretion, according to the variable needs of public interest[271].

Comparing substantial contents and drafting styles of market-oriented laws such as the Contract Law of 1998, with typically "socialist" ones, such as the Environmental Protection Law, the impression is that of pieces of legislation hailing from very different places, in space and time – which is in fact the case, if one considers the different environments where those kinds of laws have been, historically, originated.

"Market laws" normally feature a large number of provisions attributing rights and obligations to private parties involved in the relevant activities, whereas the laws of the more "socialist" type mainly provide for the delegation of powers and attributions to peripheral levels of governance and administrative organs.

[271] See I. CASTELLUCCI, *La tutela dell'ambiente nell'ordinamento giuridico della Repubblica Popolare Cinese, supra*.

Between these two extremes there is a number of pieces of legislation (most of them, in fact) which may be classified in between – reflecting well the "mixed" environment which they are aimed at regulating – featuring both "private sector" and "socialist" legal characteristics; being aimed at the relevant private parties as well as at the courts and at the government organs discharging the relevant governance, regulatory, supervisory functions.

It is important to notice, however, that even "private sector" laws in China still feature – the market and the general environment being "socialist" ones – important "socialist" elements.

These elements are not necessarily in the usual form of delegation of regulatory power to administrative organs at the next-lower level – a model which suited well "classic" socialist contexts and laws. These elements are being introduces instead in forms more appropriated to the new "mixed" context, for the exercise of socialist governance in a market environment; an example could be the general clauses inserted in market laws protecting and enforcing "good faith", "fairness" and even imposing respect for "social ethics"[272]; and those enforcing "social public interests"[273], "the social and economic order"[274], "the healthy development of the socialist market economy"[275], and a number of other similar provisions – all to be applied to private relations and enforced by the courts, mixing a civil law legal technique with the policy elements inherent in the socialist application of law in socialist courts[276].

The socialist element within the laws of the socialist market also comes in the form of specific administrative controls at the appropriate junctions of the economic process, in relation to specific

[272] Contract Law of the PRC of 1998, Article 5, 6 and 7.
[273] The Securities Law of the PRC of 1998, Article 1.
[274] The Civil Procedure Law of the PRC of 1991, Article 2.
[275] The Anti Monopoly Law of 2007, Article 1.
[276] See above, Chapter One, Section 3.

market actors and cases. These controls are scattered all over the legal framework of the socialist market. They are sort of "policy checks" enabling the public regulators to intervene at micro-level, on individual economic actors and/or operations. They effectively give the relevant administrative organs an appropriate leverage, to intervene with their policy actions in market operations, negotiate with private actors etc. Good examples of this are given by the licensing process, which allows the government to decide whether a given private subject may have access to the market or not; or by the need of specific administrative authorisations to engage in specific activities or for specific transactions or economic projects; or by other types of occasional or regular controls and reviews of private activities, associated with administrative sanctions of variable gravity.

4. Market and non-market, private and non-private, public and non-public: different concepts, fuzzy boundaries

It is to be considered at this point that many areas of law, that in the Western concept are essentially related to private economy and market institutions, in China are bordering what, in a socialist approach, can still be considered an administrative matter – or a matter having some kind of public relevance – such as property or antitrust law. Even the law of contract could be bordering public or administrative law in relation with some of its principles such as freedom of contract, relevance of social function and community impact of contract, limitations due to public policy or to the nature of the parties[277].

[277] E.g., one of the parties, a public-owned enterprise, may be subject to operational restrictions stemming from public planning or policy according to Article 38 of the Contract Law; see discussion in MO Zhang, *supra*, 43-50; also see BING Ling, *supra*, 47-48 for another instance of possible interference of a supervisory organ with negotiations.

Research and study will thus be needed on borderline zones between different areas of the law, to draw and understand the actual limits of the law in a "private" mode vis-à-vis those at in the administrative one; and to identify the mutual interactions of the two different modes of the law, so to speak, within a socialist general frame.

In fact, the very relation between public and private law in China might be based on several different or altogether reversed concepts with respect to those of Western traditions; the latter having developed with the public powers of the administrative state coming much later in the picture, with respect to a common law of peers. The Chinese legal history of recent decades displays a reverse development, of a basically administrative state, with private law merely interstitial at the origins and then having grown in quantity and importance. The mentioned difference in the original relation between the two areas cannot but have momentous consequences in the whole system: many areas of law which in the Western concept are essentially related to private affairs, economy and market institutions, in a socialist approach are part of, or bordering what can be considered as administrative matter, having some significant impact on public interest.

The area of market legal institutions in a socialist context will thus have to be mapped, and boundaries demarcated between what we may call the private law and the administrative dominion. Fuzzy areas, areas of overlapping, friction, pluralist interaction of the different "modes" of the law will doubtless be identified in the survey.

5. Soviet studies of the 20th century may still be useful

Having said that much, it could be the case that analyses done with respect to the USSR and its satellite states, before and after 1989, may at least partially be applied, *mutatis mutandis*, as a grid or as a

comparative tool to observe present-day Chinese legal system – including its regulation of the still very important public sector of the economy and the general frame of its market economy.

The full understanding of the Chinese legal environment mandates appropriate consideration and understanding of the fundamental political structural element, affecting the legal system's outcomes through its different institutions, directives, rules, inner logic and operational paths[278].

Economic theories framed within the socialist general scheme (with Chinese characteristics) could be developed by economists and political scientist, for lawyer to subsequently become familiar to, as additional tools to understand the law of the socialist market economy.

As an interesting example of this, I'd like to mention how the idea of a law-abiding "scientific" administration, seeking efficiency, standardized procedures, responsiveness is stressed repeatedly in the 2004 *Outline*[279], in pursuit of an administrative ideal combining legality, impartiality and technocratic efficiency (Singapore-style, or Korean-style, to some extent? just to mention possible Asian reference models for the Chinese transition). The 2004 *Outline* devises a standard of "scientific" efficiency which is not only related to the organization of the governmental apparatus and work, but also to the appropriateness of the administrative solutions and decisions, with a view to an effective, orderly implementation of socialist values and top-down disseminated policies at all levels of governance[280].

[278] On "the additional formant" with respect to the Western legal systems, see G. AJANI, *Le fonti non scritte nel diritto dei paesi socialisti*, Milan, 1985: an accurate analysis is presented throughout the political, policy and administrative factors in this book that in a socialist environment intervene to interact with the written legal rule (normally drafted with an appropriate, distinctively socialist style) to produce the final outcome.

[279] See its Chapters II.3 and III.5.

[280] Chapter III.5.

This specific indication of the *Outline* on searching discretional but still efficient or "scientific" socialist solutions is quite interesting, carrying with it an express reference to some objective dimension of administration, not necessarily through normative tools only[281].

Is the Chinese legal environment bound to produce, maybe at a later stage of sophistication, its own socialist economic analysis of law?[282] Fascinating as it might be, this "economic analysis and management of the socialist law" will probably not materialise very soon. The rule of politics can hardly suffer the rigours of any other different rule – be it the rule of law, Confucian virtue, or economic, scientific theories, even socialist ones. Still, economic and political doctrines, including "classical" socialist economic studies from the 20th century, could come to play at least some guideline, persuasive or supplementary role, or be used as a part of the theoretical frame to develop such guidelines.

A functioning law-based administration seems to be the first necessary step before any additional levels of theoretical sophistication can be devised. Terms like "scientific," "efficient" are likely to function, meanwhile, as general clauses for regulators and techno-

[281] Especially as it replicates one of Hu Jintao's favourite keywords, that of "scientific development" of socialism through appropriate means of general governance with a view to the construction of a "socialist harmonious society". This concept has been introduced in the Constitution of the Communist Party in 2007, and might perhaps remain, together with the idea of a "socialist harmonious society", as one of Hu's doctrinal legacies to the country after the end of his second presidential term in early 2013. A legacy which could be formalised through a mention in the country's Constitutions Preamble, as it has happened for "Mao Zedong Thought, Deng Xiaoping Theory and the [Jiang Zemin's] important thought of the Three Represents".

[282] This would require the development of theoretical descriptions, general directives and the consolidation of accepted praxes for what amount to a "socialist efficient" solution, especially in relation to the market economy. Its lines of thought, rules and outcomes would not necessarily be similar, of course, to the ones of the Western economic analysis of law – guiding economic principles and underlying ideologies being different.

bureaucrats, including those with market control responsibilities; new legitimizing tools for decisions conforming to political/administrative directives, in addition to the older general clauses of socialist tradition. "Efficient" might be more convenient or acceptable than "socialist," for normative acts and administrative decision affecting market activities, e.g., when foreign investments are involved.

6. Legal protection of public interests and social rights in the new Chinese society

The growth of the Chinese legal system in quantity and in quality of its responses produced cultural spillover effects, too, further improving the law's standing and general appreciation within the Chinese society. This was to be expected, in a fast-changing, more and more urban, individualist, litigation-prone, business oriented society. The political institutions are at work to satisfy this increasing demand for law, to some extent, as new legality-enhancing legal formants[283] are being introduced and/or old weak ones are undergoing a serious reinforcement process.

Chinese citizens more and more make recourse to the courts of law to solve their disputes, including a growing amount of administrative litigation – with occasional victories in court, and the more frequent cases of a mediated solution with the relevant government involved in the dispute, reached after the case has been initiated:

[283] The obvious reference is to Sacco's theory of legal formants; see R. SACCO, *Legal Formants: a Dynamic Approach to Comparative Law*, in 39 *American Journal of Comparative Law* (1991), 1-34; 343-401.

> "in the past people wouldn't dare sue government for violation of their entitlements or rights; now they can sue and get compensation"[284].

One of the side-effects on the Chinese society has also been, if still at a very early stage of development, the phenomenon of citizens, lawyers and NGOs engaging in legal activities for the protection of general interests and social rights through litigation in civil courts. This occurs in relation for instance to environmental protection issues or to micro-cases initiated by individual citizens but having a general impact, as it is the case of pricing of public services such as telephone services or public transportation[285].

The system does not provide any specific rule for class actions, mass litigation or any other similar legal tool. Cases are often brought by lawyers specialising in *gongyi susong* (public interest actions) as individual civil ones – and often they are not accepted by the courts, normally being refused on procedural grounds or for lack of *locus standi*; sometimes even just by disregard and lack of any official response from the courts[286].

An active role of lawyers in civil litigation with a social dimension could perhaps have a positive impact for the central government's policy towards the construction of a state governed

[284] A statement of Chinese academic Jiang Ming'An, reported by A. MCCUTCHEON, *Contributing to Legal Reform in China*, in M. MCCLYMONT, S. GOLUB (eds.), *Many Roads to Justice: the Law-related Work of Ford Foundation Grantees Around the World*, New York, 2000, at 171. Also reported in S. NOVARETTI, *Le ragioni del pubblico: le "azioni nel pubblico interesse" in Cina*, Naples, 2011, at 121.

[285] S. NOVARETTI, *supra*, *passim*. The book is a fascinating research on public interest litigation in China, making reference to a wealth of sources, including Chinese and non-Chinese literature, and legal, policy, judicial sources, leaders' speeches and much else.

[286] *Ibid.*, Chapter IV.

according to the law, providing external legality checks for local governmental action at micro-level[287].

However, "social" or "public interest" civil litigation is often associated with media exposure of individual lawyers and cases – the media exposure often being the factor determining the success of the action: not with a victory in court but through actions "spontaneously" taken by the relevant provider of public services in response to criticism from the public.

A dimension of public criticism to actions and policies of the government is inherent in this kind of cases, which could reach very sensitive political issues, e.g. in the areas of fundamental rights and civil liberties, possibly leading to unpredictable results. The initial attitude of indifference towards *gongyi susong* displayed by the central level of government in the 1990s, especially after the enactment of the Law on Lawyers (1996), has thus being tightened about a decade later with the new general policy on the reinforcement of the socialist frame – including strong disciplinary, and sometimes even criminal, actions taken against lawyers, "too actively" involved in social (not to mention civil rights) litigation, and crossing some kind of invisible line[288].

The People's Procuratorates, also having showed in some instances proactive stances promoting civil actions of that kind, in 2006 have been chastised by the SPC and the SPP for doing so[289].

The recent years' reinforcement of the socialist frame makes policy-making organs suspicious of any use of civil actions different from the ordinary protection of specific individual interests, or from the procuratorates' activities different from the ones they should engage in according to the law. The new basic scheme seems to be that citizens and their lawyers should protect their individual rights (only), in civil

[287] *Ibid.* at 214-215.
[288] *Ibid.* at 211.
[289] S. NOVARETTI, *supra*, at 156.

courts, while procuratorates should discharge their functions in criminal law matters, and in the general supervision of all courts.

In short, everyone should stay within their assigned limits, while the state and policy organs will care for everything else.

In such an environment, there still are lawyers engaging in *gongyi susong*; they normally do so with the utmost care, knowing that they may be moving in a sort of grey area – "on thin ice", as it has been written[290] –, to avoid confrontations with government and policy organs. The successful *gongyi lushi* (public interest lawyer) is typically well-connected with the government; often is a part-time lawyer, being a researcher or professor in a primary Institution as a first job[291].

Their prestige, and that of their institution, coupled with a cooperative attitude towards the government makes their job possible and sometimes successful (not very often in court, but through the media impact of their case), producing results of general interest in carefully selected cases – normally related to public services or the environment, certainly not those having political implications such as civil liberties and the like[292].

It is very interesting to see how the more successful *gongyi lushi* admit openly the need to maintain their cooperative attitude towards the government, and especially to select cases carefully to avoid possible confrontation with it – keeping in mind the need to promote social change with the available legal tools, gradually, "crossing the river by feeling the stones", and without endangering the general social and political stability of the country[293].

[290] *Walking on Thin Ice. Control, Intimidation and Harassment of Lawyers in China*, in *Human Rights Watch*, New York, 2008.

[291] S. NOVARETTI, *supra*, Chapter IV and V; Chapter V features interviews to prominent *gongyi lushi*, providing very interesting insights and first-hand information.

[292] S. NOVARETTI, *supra*, Chapter IV and V.

[293] *Ibid*., Chapter V.

The recourse to legal tools is thus conditioned by higher level considerations of policy and general interest. At a much larger and general level, besides, the same attention has been put by the central government and policy organs when introducing market economy and the associated legal reforms. The case of *gongyi susong* and of the *gongyi lushi*'s attention in selecting the cases to be brought in court is a clear application, at micro-level, of the *yīfǎ zhìguó, yǐde zhìguó* (依法治国，以德治国) principle: with lawyers acting technically through the legal apparatus, but only after having considered the impact and acceptability of their case at policy level – their "legal prudence" is, quite literally, a case of *juris-prudence, with Chinese characteristics*.

7. Territorial and institutional complexity

7.1. The People's Republic of China is a huge, diverse, multi-ethnic country. Its legal system is not a monolith. The central government and the Communist Party [CCP] are always discharging a general governance role vis-à-vis all different forms of local governments. These include Provinces and Municipalities under direct control of the Central Government, as well as Autonomous Regions, Prefectures and Counties characterised by Regional Ethnic Autonomies [REAs] implying some degree of normative autonomy[294] – Tibet and Xingjiang being the two better known examples of regions of that kind –; and Special Economic Zones [SEZs] and other especially designated cities or areas, where since the late 1970s foreign investment and market mechanisms have been tested, for later countrywide application.

[294] C. XIA, *Autonomous Legislative Power in Regional Autonomy of the People's Republic of China: the Law and the Reality*, in J.C. OLIVEIRA, P. CARDINAL, *supra*, 541.

The Chinese legal system is a macro-tool improving central authorities' institutional supervision capability[295], over a very fragmented and diversified peripheral apparatus of local governments and normative organs[296]; the central government's capability is enhanced with the coupled political supervision of the CCP[297].

This fragmented administrative environment, balanced by an increasingly effective centralised institutional and political governance, represents perhaps a viable model for managing a rapid, potentially explosive transition – from an immensely populated orthodox communist country to a socialist one with a soaring market economy, actively connected to the globalised world – while preserving the unity and the stability of the country[298].

At the same time, legal and institutional reforms are introduced gradually, sometimes with previous local tests to assess their impact[299].

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[295] See LOK Wai Kin, *The Relationship Between Central and Local Government Under the Unitary State System of China*, in J.C. OLIVEIRA, P. CARDINAL, *supra*, 527.

[296] See, e.g. XIA, *supra*, especially in Chapter. 2.1 "How is Legislative Power Demarcated?", 543-554.

[297] *Ibid*, especially Chapter 3 "Manipulating the Legislative Process", 554-561.

[298] The dynamics of the two different policies, of the 1990s focused on the development of the "socialist rule of law" and in the following decade more inclined towards the "socialist harmonious society" – possibly to contrast an erosion in the Party's control of the Chinese society – reveal this difficult balancing exercise.

[299] The model, incidentally, seems to be looked at by North Korea, which in some moments of cautious opening – in the early 1990s, and since late 1990s until around 2003 – showed interest towards experimenting economic and administrative reforms: SEZs and SARs modelled on the homologous Chinese territorial entities have been created. The SARs feature Basic Laws and even (the Sinŭiju SAR) a flag resembling those of the Chinese SARs. The Sinŭiju SAR seems to have been de facto abandoned as an institutional project, while the Kaesŏng and Kŭmgangsan ones still operate, if subject to the ups-and-down of political relations with South Korea – the main investor there. Sources in English are scattered over the internet, including US and South Korean agencies and research entities, as well as unofficial and wiki-format web resources. Combining several web researches, a reasonably accurate online description of current administrative divisions of the Democratic People's Republic of Korea seems

The return to the Motherland of Hong Kong and Macau at the end of the 20th century also adds complexity to the picture. The re-unification has been based on an idea – known as "One Country, Two Systems" (*yīguó liǎngzhì*, 一國兩制) – devised in the early 1980s and introduced in the country's Constitution in 1982, allowing those territories a high degree of autonomy and maintaining for at least 50 years their pre-reunification administrative and legal features[300].

This added a new type of territorial partition to the already complex Chinese administrative-legal environment[301]; and a new experiment, perhaps, with a view to a future replication of the model for Taiwan[302].

7.2. Summing up, on the Chinese institutional and legal point of view, a SAR is just another kind of special body, lodged within the main body of the general Chinese institutional and legal system.

Like a SEZ, a REA, like "the market", or like any specific private relation governed by a foreign law according to the rules of private international law, a SAR is another type of semi-closed legal environment (whether geographic or thematic or ethnic or personal), allowed by the general legal system to have its internal logic and rules different from the general ones.

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to be available at: <www.enotes.com/topic/Administrative_divisions_of_North_Korea#Special_Administrative_Regions>.

[300] More below, in Chapter Four (and literature cited therein); also see I. CASTELLUCCI, *Legal Hybridity in Hong Kong and Macau*, in 57: 4 *McGill Law Journal* (2012), 1, 665-720; I. CASTELLUCCI, *Chinese Law: a new Hybrid*, in E. CASHIN RITAINE, S.P. DONLAN, M. SYCHOLD (eds.), *Comparative Law and Hybrid Legal Traditions*, 67 *the Swiss Institute of Comparative Law Series*, Zurich-Basel-Geneva, 2010, 75-96in Italian, I. CASTELLUCCI, *One Country, Two Systems*, in *Mondo Cinese*, 147 (3/2011), 77-93.

[301] Lok, *supra* note 112, *passim*.

[302] See below, Chapter Four, and especially Section 2.

However, all these semi-closed legal environments, or sub-systems, will still be subject to the limitations and interventions imposed by the state's overall political-institutional-legal system, being reinforced to discharge functions of general governance.

Observing the interaction of those sub-systems with the general socialist frame (we'll try to do this exercise in Chapters Three and Four) should shed some light on the governing general socialist principles at work, and thus on some technical features of the "socialist rule of law with Chinese characteristics".

8. Transplants and legal hybridisation in China

8.1. A large number of specific legal transplants have been produced in China since 1978, introducing market-related laws based on a number of foreign models, including civil law, common law, transnational models often mixed with local elements – not to mention the general political-economic-legal macro-transplant consisting in the introduction of a private sector of the economy and of the market economy within a formerly orthodox, even radical, communist system.

All this obviously produced a complex "mixed" legal environment. However, the legal mixing or hybridisation process taking place in China – often mentioned by comparative law scholars, almost matter-of-factly but in very general terms only[303] – has not been analysed by many from the point of view of the actual hybridisation process, strategies and "ways".

[303] E.g., China is described as a hybrid legal system by K. ZWEIGERT, H. KÖTZ, *Einführung in der Rechtsvergleichung*, Tübingen, 2nd ed., 1984; and it is depicted as a "mixed civil law – customary law" in the very popular world maps of legal systems produced by the *Juriglobe* – World Legal Systems Research Group of the University of Ottawa; maps available online at: http://www.juriglobe.ca/eng/rep-geo/cartes/asie.php.

Meanwhile, the geographic area of research on "mixity" in comparative law has been enlarged far beyond the relatively small number of "classical" mixed legal systems, to involve other jurisdictions featuring obvious interactions and/or contaminations of different legal cultures[304].

It has been recognised that "mixed" – beyond the "classic" use to designate jurisdictions featuring both civil law and common law elements[305] – can fruitfully be associated with another term featuring a similar but wider scientific meaning, that of "hybrid"[306]: "the work of mixed jurists, of legal historians, and of some comparatists has led us to the recognition of the "universal fact" of legal hybridity"[307].

Focus has shifted from classifications and nomenclature to methodological issues, to better understand (not only the features of this or that jurisdiction but also, or especially) hybridity in general: "mixing" forces at work are being scrutinised in a growing number of

[304] Taxonomic issues have represented one of the main themes of the Second World Congress of the World Society of Mixed Jurisdiction Jurists [WSMJJ] held in Edinburgh in 2007; conference papers are available online: vol. 12.1 (May 2008), *Electronic Journal of Comparative Law* <www.ejcl.org/121/issue121.html>, including the work of the two perhaps most-recognised authorities in this field: V.V. PALMER, *Two Rival Theories of Mixed Legal Systems* www.ejcl.org/121/art121-16.pdf, and E. ÖRÜÇÜ, *What is a Mixed legal System: Exclusion or Expansion?* <www.ejcl.org/121/art121-15.pdf>. Also see I. CASTELLUCCI, *How Mixed Must a Mixed System Be?* <www.ejcl.org/121/art121-4.pdf>.

[305] V.V. PALMER (ed.), *Mixed Jurisdictions Worldwide - the Third Family*, Cambridge, 2001, 2nd ed. 2012.

[306] E. ÖRÜÇÜ, *Exclusion or Expansion?*, *supra*, *passim*. The term "hybrid", besides, had already been used in K. ZWEIGERT, H. KÖTZ, *Einführung in der Rechtsvergleichung*, Tübingen, 2nd ed., 1984, to indicate mixes including the 'classic' mixed jurisdictions of V. Palmer's 'third family'.

[307] S.P. DONLAN, *Comparative Law and Hybrid Legal Traditions – An Introduction*, in E. CASHIN RITAINE, S.P. DONLAN, M. SYCHOLD (eds.), *Comparative law and Hybrid Legal Traditions*, Zurich-Basel-Geneva, 2010, 9, at 16.

jurisdictions, as well as patterns and/or strategies of mingling amongst the different components of a given "hybrid" product[308].

In the following two Chapters I'll try and describe some aspects of the legal system of China, also analysing the dynamics of legal hybridisation: first in the case of China's market economy laws, and then in the case of China's two Special Administrative Regions (SARs) of Hong Kong and Macao – two remarkable examples of the country's institutional and legal complexification of recent decades.

8.2. Having to start from some firm methodological ground, the "classical theory" of mixed legal systems elaborated by Vernon Palmer probably represents – if originally related to the more limited environment of "classical" mixed jurisdictions – the only effort so far to provide a concrete classificatory grid, to identify the common features typical of "mixed" legal systems around the world[309].

These common elements according to Palmer include, in short: A) the coexistence of both civil law and common law traditions, each with their typical features, identifiable in the system in an obviously relevant amount. B) The historic superimposition of a common law framework to a pre-existing civil law environment in critical areas: especially in relation to the role, structure and functioning of the judiciary and to the value of case law; and also, more generally, in relation with the areas of public law, criminal law, economic law and institutional architecture – the older civil law rules stand, more or less, for the regulation of private matters. C) An element of a subjective nature[310], described as the perception and/or feeling of lawyers and

[308] The title and main themes of the Third International Congress of the WSMJJ, held at the Hebrew University of Jerusalem in June 2011, have been "Methodology and Innovation in Mixed Legal Systems."

[309] V. PALMER, Chapters "Introduction" and "A Descriptive and Comparative Overview"; both in *The Third Family, supra*, 1-16 and 17-80, respectively.

[310] V. PALMER, "Introduction", *supra,* 8.

scholars of the relevant jurisdiction, of their belonging to a 'mixed' system. This subjective test partially overlaps with what Patrick Glenn calls a legal 'tradition'[311]: a combination of historical facts and subjective readings, feelings and visions of the relevant people, transforming brute historical events into a cultural heritage and a factor of identity[312] – which in turn contributes, objectively, to 'form'[313] a legal system and shape its character and 'style'[314].

Palmer's theory (and/or its application to a wider, different environment from its original one) may satisfy some and, perhaps, dissatisfy others. Palmer himself seems very active in testing/expanding the boundaries of his device[315].

Still, it is probably the only firmly established analytical instrument so far, usable until proven wrong or superseded by a better tool. I will not make recourse, to analyse and describe the Chinese developments, to the most detailed elements in Palmer's grid; they would probably be too tradition-specific and related to "classic" mixes only. I'll only use a generalised version of his three-test grid, which *a priori* seem reasonably applicable to mixes different from the "classic" ones, too: A) an *obvious amount* test; B) a *critical features* test; and, C), a *subjective element* one.

8.3. Using this more generalised methodological grid, patterns of hybridisation emerge from the analysis of the legal environment characterising the Chinese socialist market economy, as it will be

[311] P.H. GLENN, *supra*, Chapters 1 and 2.

[312] *Ibid,* 33.

[313] R. SACCO, *Legal Formants, supra*.

[314] In the sense which is central to the classification of legal systems in K. ZWEIGERT, H. KÖTZ, *Einführung*, *supra*.

[315] V.V. PALMER, *Quebec and Her Sisters in the Third Legal Family*, 54 (2009) McGill L.J. 321; and V.V. PALMER, *Two Rival Theories of Mixed Legal Systems*, in Vol. 12.1 (May 2008), *Electronic Journal of Comparative Law*, online at www.ejcl.org/121/art121-16.pdf.

discussed in Chapter Three: A) obvious amounts of legal norms hailing from non-socialist traditions being introduced in discrete areas of the legal systems, so that the different origin of the rules belonging to the different traditions being mixed remain visible and partially segregated from one another; B) the general framework of the dominating system providing its own controlling mechanisms and logic to regulate critical areas or elements of the overall mixed environment; C) a subjective perception of legal professionals in the relevant environment of being working in a "mixed" legal environment, with different areas of the law featuring different logics, techniques, technical language.

Patterns of hybridisation also emerge in Hong Kong and Macau, dealt with in Chapter Four: some aspects of Chinese law, institutional architecture, legal culture and technical language are currently being infiltrated into both SARs' legal traditions. This process is occurring mostly in public/constitutional law and with respect to institutions, the separation of powers and the role of the judiciary: areas Palmer considers "critical" for the "mixing" process, when expansive political legal and institutional forces take over pre-existing ones[316].

8.4. However, it will also be seen in the next two Chapters how the Chinese hybridisation process is occurring in a way which is different, more complex and sophisticated perhaps than the simple superimposition of institutions and laws described in Palmer's theory. We might perhaps call the Chinese hybridisation process a "smart" one, combining "hard" superimposition of legal and institutional reforms with a "soft", more subtle approach.

The main reasons for the differences might lie in the relevant Chinese traits and characteristics, whereas classical "mixity" studies have generally revealed the process and details of purely Western mixtures of law. When observing the absorption of an enormous

[316] V.V. PALMER, *Introduction, supra*, at 9-10.

political-social-legal transplant of unprecedented size, such as the entire market economy and related legal institutions within a socialist system – as well as when observing the superimposition of a Chinese institutional and legal framework on Westernized legal systems such as those of the two SARs – it is reasonable indeed to expect the process to be different, and/or to see a different set of relevant elements taking part in the process.

CHAPTER THREE

RULE OF LAW IN A SOCIALIST MARKET ECONOMY

SUMMARY: *1. Socialist market economy. - 2. Contracts. - 3. Property. - 4. Competition. - 5. Insurance. - 6. CIETAC Arbitration Rules. - 7. Socialist features. - 8. Some considerations on China's socialist market economy's legal hybridity.*

1. Socialist market economy

Lawyers, politologists, economists have been studying the Chinese developments for a couple of decades, so far, to understand the idea of a "socialist market economy" and define what in the beginning was thought by some to be almost an oxymoronic idiom, or at the best something unheard of[316]. We are now getting a more accurate picture of what "socialist market economy" actually means, as we also see that the idea has been successfully transplanted elsewhere[317].

The attitudes of the Chinese political leadership and their official positions might have some relevance, together with the observation of the evolving reality, in trying to describe the features of the socialist market economy.

The amended (2002) Constitution of the Communist Party of China (CPC) gives an overview of the basic policy in relation with the

[316] This Chapter and the previous Chapter Three include excerpts, a re-elaboration and a number of ramifications of the reflections I made in a previous essay: I. CASTELLUCCI, *Reflections on the Legal Features of the Socialist Market Economy*, in *Frontiers of Law in China*, 6 (2011), 3, 343-368.

[317] As it seems to be the case, for instance, of Vietnam.

economic development: public property and regulatory activity and macro-control, in pre-eminent position, and the public sector of the economy, shall go along with private property and economic activities, for the benefit of a just development and socialization of the advantages of such development[318]; these attitudes have then been confirmed in the 2004 amendments of the Country's Constitution:

> "The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy"[319].

The Chinese "socialist market economy" is a market economy co-existing with a large public sector of the economy.

It is affected by the State as an important policymaker, a market regulator and a market actor[320]. General interests and some degree of socialisation of benefits in principle prevail there, over individual interests[321]. The Constitution of the CPC mentions those elements as the basis for the economic development[322].

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[318] *The Constitution of the Communist Party of China*, bilingual Chinese-English text (Beijing, Foreign Language Press, 2002), "General Program" at 3-33.

[319] Article 11.5 of the Constitution of the People's Republic of China, as revised in 2004.

[320] In Italian, see G. GABUSI, *L'importazione del capitalismo*, Milan, 2009.

[321] According to the 2004 amendment to art. 11 of the Country's Constitution: "The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy".

[322] *The Constitution of the Communist Party of China*, as amended in 2002;

Related statements are also found in other policy documents, such as:

> "[We] believe that market economy is a stage that cannot be surpassed during socialist development. In terms of social development, the essential difference between the socialist system and the capitalist system does not lie in the role the planning and the market plays in allocation of resources. The planned economy does not belong to socialism, since the capitalist system also uses the planning methods. The market economy does not belong to equal capitalism either, since the socialist system also uses market means. Planning and market, both of which are ways to regulate the economy, are indispensable at certain development phases of a commodity economy, which is based on socialized production. Therefore, whether resorting to the planning or the market is not what differentiates a socialist economy from a capitalist economy. The most essential difference between a socialist market economy and a capitalist market economy is that the former is linked to the basic socialist system and is part of socialist economic mechanism. This is also the fundamental condition to guarantee socialism as the nature and direction of the Chinese economy"[323].

The Chinese concept of "*socialist market economy*" formalised in the PRC's Constitution, thus, is related to a market economy not based on a *laissez faire* approach to the relation between the state and

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bilingual Chinese-English text, Foreign Language Press, Beijing, 2002, 3–33.

[323] This statement of policy can be found, in the form of an editorial answer to a question from the public on the meaning of 'socialist market economy' on the China Q&A webpage of the para-governmental China Internet Information Center, at: http://www.china.org.cn/english/features/Q&A/161615.htm.

economic activities. In such an environment, thus, a large importance shall certainly be attributed to the political and policy elements; and to administrative laws, procedures and praxes, more often than in a Western environment interfering with market operations.

The "socialist" element will affects the appearance and the functioning of Chinese market-related laws, playing their regulatory function in an environment different from that of Western, "liberal-democratic" markets. The prevalence of public interest over individual ones – generally enforced through the institutions of the political and governmental circuit – shall be a guiding principle in China, even for the civil courts adjudicating "market" cases involving private parties.

Identifying some of the techniques of construction of the socialist market legal infrastructure is the subject-matter of this Chapter, through a survey of the peculiarities of some Chinese market-related laws.

2. Contracts

The appearance of the general law on contract (1998) is surely more related to a "neo-authoritarian" or "communitarian" approach to law, rather than to a "statist-socialist" one: The law is a unified one, substituting the three old laws on economic contracts based on the dynamics of the public sector of the economy. In this new architecture private and public market actors are put, as a general rule, on an equal footing on the market place.

In addition to its state-of-the-art technicality[324], what strikes the

[324] The 1999 Contract Law of the PRC has heavily been influenced by the most recent comparative legal studies and legal texts, incl. the *UNIDROIT Principles of Int'l Commercial Contracts and the Vienna Convention of 1980 on the Int'l Sale of Goods* (CISG). See BING Ling, *Contract Law in China*, Hong Kong, 2002; Y. ZHANG, D. HUANG, *The New Contract Law in the People's Republic of China and the*

discerning observer is the provision of an auto-integration mechanism for lacunae which makes this law more neutral and technical than most Chinese laws: Article 124 provides that lacunae in the law related to contractual types not provided for in the law shall be filled by recourse to the general part of the law of contract, and by analogy with other contractual types provided for in the laws. The general Chinese rules for integrating the lacunae in the legislation being, instead, those laid in Articles 6 and 7 of the *General Principles of Civil Law*, open-ended provisions referring to party policy and judicial/administrative discretion. The latter rules, however, should also apply to the integration of the general part of contract law, Article 124 being only related to the discipline of new contractual types.

The features of the contract law, its auto-integrating mechanism, the reference to "trading practices" made in its Article 125, the likely "end-users" of this piece of legislation (business people and lawyers, courts, arbitrators) make the outcomes of this law, even in case of complex/new contractual structures not expressly disciplined by the law, more likely to be similar to those obtainable elsewhere. Also, the GPCL provisions making void every juristic act not corresponding to the legal standards are substituted in the contract law with more usual remedies hailing from the void/voidable scheme (Articles 47–51).

Still, even in the market-friendly law of contracts some areas are bordering administrative law, with limitations on contractual/ negotiations capacity for public subjects[325].

UNIDROIT Principles of Int'l Commercial Contracts: A Brief Comparison, in 5 *Uniform L. Rev.* 429 (2000); X.Y. LI-KOTOVTCHIKHINE, *Le nouveau droit chinois des contrats internationaux*, in *Journal du droit international*, 113 (2002); G. LEFEBVRE, JIE Jiao, *Le principes d'Unidroit et le droit chinois: convergence et dissonance*, in 36 *Revue Juridique Thémis* 519 (2002).

[325] One of the parties, a public-owned enterprise, may be subject to operational restrictions stemming from public planning or policy according to art. 38 of the Contract Law. See discussion in MO Zhang, *Chinese Contract Law-Theory and Practice*, Leyden/Boston, 2006, at 43–50; see also BING Ling, *supra*, at 47-48 for

Provisions such as Article 44 indicate that some contracts may require a public approval according to administrative regulations; Article 127 allows administrative powers/supervision on contracts with considerable latitude. General provisions of the Contract Law enforce as usual the general principles of "maintain[ing] social and economic order", protection of "public interest"[326], "respect of social ethics"[327]; and those of fairness, honesty and good faith[328]; moreover, a contract shall be null and void if "damaging the public interests", a concept certainly more vague than the homologous Western notions of public policy or *ordre public*[329].

It should also be considered that recourse to the GPCL, rather than, or in addition to, the Contract Law, could be made by the courts to deal with situations related to economic activities, acts and transactions but not related to a contract (e.g., in the important area of guarantees, with the so-called "comfort letters" or "*lettres de patronage*"): the GPCL rules could then actually be called in, to fill lacunae or to deal with cases of invalidity as mentioned above.

Also, some technical issues related to the general part of the law of contract, such as the discipline of hardship — a sensitive issue

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another instance of possible interference of a supervisory organ with negotiations. Besides, even many Western public laws (e.g. the Italian one) provide for operational restrictions and invalidities in case of negotiations and contracts made by a public organ in violation of administrative rules. "Law in action" is indispensable to understand the scope of these rules.

[326] Contract Law of the PRC of 1998, Articles 1 and 7.

[327] Contract Law of the PRC of 1998, Article 7.

[328] Contract Law of the PRC of 1998, Chapter 1, "General provisions", Articles 5,6.

[329] Contract Law of the PRC of 1998, Article 52: "law in action" should help in better measuring how much "public interests" is a larger concept than the mentioned western ones. Revealing cases have been, for instance, those related to the enforcement of foreign arbitral awards refused by Chinese courts on grounds of "public interest", as the enforcement could have put the local publicly owned enterprise in unsustainable economic straits, even facing a substantial bankruptcy, creating general economic and social problems in the jurisdiction of the relevant courts. See above, Chapter One, Section 5.

indeed, having been excluded from the express legislative regulation due to the foreseeable many implementing difficulties[330] – could end up allowing recourse of courts to Articles 6 and 7 GPCL, to ground/justify a decision taken, in important cases, according to non-solely-legal criteria.

The Supreme People's Court reintroduced in 2008 a mechanism of judicial intervention[331] to re-assess and re-balance mutual obligations of the parties, vis-à-vis significant change of relevant circumstances during a contractual relation. This reintroduction of mechanisms for cases of hardship obviously gives courts an important power of intervention on the terms of the contractual agreement originally established by the parties.

The above mentioned intervention of the SPC of 2008 is consistent with a centuries-old Chinese tradition in the law of contract and with the general idea of the communitarian or social function of contract. In fact, the very *nature* of contract is different, between the *laissez-faire*, nominalist approach to the law and the socialist (market) concept of contract – with its equitable, good-faith-based implications and ramifications[332], surely warranting a more "communitarian" than individualist approach in the application of contractual provisions[333].

Substantial, objective equity is privileged in the Chinese contract law, over the absolute respect of the original contractual will of

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[330] See MO Zhang, *supra* at 227–29. Mo stresses the fact that, despite previous decisions of Chinese courts, incl. Supreme Court, favorable to the judicial application of the *rebus sic stantibus* doctrine, the mentioned doctrine has not been inserted in the 1998 Contract Law.

[331] Through the *Interpretations on Several Issues Concerning Application of the Contract Law of the People's Republic of China*, which took effect on May 13, 2009.

[332] See MO Zhang, *supra*, 43-46; BING Ling, *supra*, 51; in Italian, see M. TIMOTEO, *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*, *supra*.

[333] To make it simple, a typical "Western rule of law", extremely liberal and individualist approach to a contract could be synthesised as: "you signed, now it is your problem"; whereas a typical socialist approach might perhaps be synthesised with: "you can't make money with this contract if we don't make money as well".

the parties. One prominent example of this, and a remarkable feature of this law is in my opinion Article 92, stipulating an obligation of post-contract good faith which the European legal traditions have only developed through decades of scholarly writings and case law, to overcome the rigour of the "classic" liberal nominalist principle, which justifies contractual obligations with the common will of the parties and not beyond its scope or time limits[334]. Another example is given by the above mentioned *Interpretation* of the SPC of 2008, reintroducing in the legal system mechanisms to deal with cases of hardship.

3. Property

The Law on property ownership of the PRC, or Property Law, of 2007, reveals that property is on both sides of the private/public divide. Article 3 of the law provides for a "dominant role" of public property, with "diverse forms of property developing side by side," and that "the State shall consolidate and develop… the public sector of the economy and at the same time encourage, support and guide the development of the non-public sectors of the economy."

This very strong opening statement, and the architecture of this law, disciplining private, public and collective properties characterize this law: no general private property of land is provided for; urban lands are owned by the State; agricultural lands may be owned by collective entities[335]. No private property can exist in relation to agricultural lands, publicly or collectively owned; this provoked

[334] For instance, in cases of "transferred loss," as labeled BY M. BUSSANI, V.V. PALMER, F. PARISI, *Pure Economic Loss*, in 11(3) the *Electronic Journal of Comparative Law*, at http://www.wjcl.org/113/article113-9.pdf , at 12.

[335] Property Law of the PRC, Article 47; G. CRESPI REGHIZZI, *Evoluzioni del nuovo diritto commerciale cinese*, in *Il Politico – Rivista italiana di scienze politiche*, *supra* at 147-158.

complaints and political pressure from farming communities, as farmers cannot obtain loans by mortgaging the land they farm to finance the development of their activities. Five years after the enactment of the Property law, the issue remains unresolved.

Full private ownership of immovable property is in fact limited today to houses, rights to use construction land, rights to use other barren land received from the government – the only property that private individuals/entities can mortgage[336].

The issue of property of rural land is far more sensitive[337], in a socialist developing country[338] with several hundreds of millions of farmers; not to mention the dire difficulties to implement a cadastral office for rural lands of China and to assign individual titles to farmers having lived, worked for decades in collective units. So far, a law has been enacted in 2009 on the management of land disputes in rural areas. Expropriation of land for the purpose of residential development, especially in rural areas, and the related disputes are in fact sensitive spots of the developing Chinese land law – with takings of land and the dislodgement of local dwellers/users still occurring abruptly and for little or no compensation and very little relief provided so far by the courts. This issue also demonstrates how often the interests of local governments still prevail over the interest of small communities and individuals, in relation to land. The impact of the law of 2009 on expropriation disputes remains to be seen[339].

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[336] Property Law of the PRC, Article 180.

[337] For a discussion on the topic see W. WU, *Discussion of the Rural Land Property System Reform According to the Rural Land Contract Management in China*, in 3 (1) *Management Science and Engineering* (2009), 70-72.

[338] For the Russian experience during the transition, with respect to the difficulties in de-collectivizing agricultural lands, see D. SKODA, *La propriété dans le Code civil de la Fédération de Russie*, Paris, 2007, 506–589.

[339] The issue is very popular, amongst property law scholars as well as in general writings on current issues in China and in the media. Amongst many, see, the recent papers of M. SCHMIDT, *Compensation Standard for Urban Demolition and Relocation*

Public control on property is in general quite strong, even on private property, e.g., with the provision of a registration of the deed with a public office as the necessary requirement to validly acquire property ownership of immovables[340]; or with the impossibility of acquiring property by virtue of protracted possession, the Law lacking any rule in in respect to this issue. The Law on property ownership, in fact, clearly regulates the enjoyment of a condo apartment, and the rights and obligations of owners amongst each other and the management, in a very detailed fashion; but it does not stipulate the conditions for acquiring property, or whether it can be acquired freely or subject to some kind of authorization or other administrative check.

A very active stance of public powers is also identifiable in the policy actions taken to govern the property market – which in Western societies would be considered by many as an undue public interference with the operation of market and private law mechanisms.

More specifically, in summer 2007 and then again in 2010, the Ministry of Commerce as well as local governments and major municipalities regulated the property market through administrative measures, enacting limitations in the acquisition of property by foreigners – including limiting the number of apartments foreign individuals or entities may buy to the number of apartments they strictly need for personal or direct use – to contrast speculative operations on real estate and the soaring prices of housing, especially in Beijing, Shanghai and Shenzhen[341].

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in China, presented at the 4th Annual Conference of the European China Law Studies Association in Vienna, June 20, 2009. Also, see JONG Lai Ching, *The "Roots" of the Real Rights Law of the PRC*. The latter writing is the author's LLM final dissertation in the University of Macau (September 2009), still unpublished. Both writings feature interesting data, analyses and further references.

[340] Property Law of the PRC, Article 9.

[341] As widely reported in the press, see G. BOWRING, *Beijing Acts to Cool Shenzen Property Boom,* in *The Financial Times,* August 28, 2007, online at: http://www.ft.com; see also a collection of related press releases of June 25, 2007, *China's Property*

The 2007 law on property is certainly an important step, which will need follow-up action and further legislation to implement the existing law and especially to deal with property issues in rural areas. Its socialist characteristics, however, are revealed not only by the general provision attributing the property of all land to the state or a "dominant role" to public property, and the like; the socialist element is also in the law's blank areas and unspoken issues – accommodating well the interventions and interferences of public powers, quite pro-active in discharging a governance function in property law and on property markets.

Rather than favouring an intense circulation of immovable property, I think this law is in many respects a long-expected *Magna Charta*, not without a significant iconic value, for the Chinese top and middle classes' needs, allowing them to purchase their family house, to obtain the necessary loans through mortgages, and to secure their right for subsequent generations. With this law the CPC secured/reinforced their loyalty, and its legitimacy as the leading force in the modernization of China.

4. Competition

4.1. The Anti-Monopoly Law of 2007 (AML) includes many provisions modeled on the EU rules on competition. However, its peculiar features reveal the socialist environment to which it is related.

Article 1 of the AML includes in the objectives of the AML "protecting public interest" and "promoting the healthy development of the socialist market economy": these "socialist" objectives in the

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Market Cooling Measures, online at http://www.reuters.com/article/2008/06/24/us-property-summit-china-cooling-measure-idUSS P14005720080624; in Italian, G. CRESPI REGHIZZI, *Evoluzioni del nuovo diritto commerciale cinese*, in *Il Politico – Rivista italiana di scienze politiche*, *supra* at 157-158.

AML's opening article may certainly raise concerns for foreigners. The AML, in fact, makes no distinction between domestic and foreign undertakings; but still, "public interest" might be used to justify a discriminatory enforcement of the AML, in favor of local publicly-controlled Chinese companies, for the protection of the "socialist economy" – to which local companies do belong, while foreign investors don't[342].

More than this, the reference to "socialist" objectives including public interests, the rights and interests of consumers, and the socialist economy, makes the entire concept and content of the AML unclear, for a possible fundamental contradiction in the listed objectives with the objectives related to the economic efficiency of the market – which should be one fundamental issue in a anti monopoly law, and remains unmentioned instead. This could result in unclear or "contradictory instructions" for enforcing agencies, or in "too much discretion" or even to a delegation of legislative power to the bureaucracy[343].

The specific chapter in the AML on the so-called "administrative monopolies"[344], unheard of in any other major competition law in the world – while prohibiting some specific "abuses" of local public bodies adversely affecting their local market to the detriment of non-local undertakings[345] – amounts in fact to an acknowledgement that such public bodies do have economic interests in the local markets they also supervise, govern and regulate[346].

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[342] Discriminatory enforcement in favour of local enterprises, also known as "legal protectionism", is a major problem of the Chinese legal system, as discussed above, Chapter One, Section 5.

[343] Y. ZHANG, D.K. ROUND, Competition Policy in China and its Relevance to SMEs, in Frontiers of Law in China, vol. 7 Issue 1 (March 2012), 21, at 22.

[344] The AML of the PRC of 2007, Chapter V, *Abuse of Administrative Power to Eliminate or Restrict Competition*, Articles 32–37.

[345] A widespread phenomenon in China. See M. WILLIAMS, *Competition Policy and Law in China, Hong Kong and Taiwan*, Cambridge, 2005, 139.

[346] Not that the fact could be deniable: M. WILLIAMS, *supra*, at 112 reports how 90

It must also be considered that the AML does not provide direct sanctions towards the public bodies abusing their authority to suppress or restrict competition – except personal punishment for officers directly involved, which may not produce much redress if the case has a serious general economic impact. The AML stipulates instead that cases of administrative abuse shall be handled (not by the Anti Monopoly enforcement agency but) by the administrative authority at the next-higher level of the one involved in the violation, to which the State Anti Monopoly Authority may only "put forward suggestions for handling according to the law"[347].

Moreover, the enforcement of the AML and related laws and regulations is entrusted by the AML to a state Anti-Monopoly Authority designated by the central government which may in principle discharge its function countrywide but

> "may, when needed, authorize the corresponding authorities in the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government to take charge of anti-monopoly law enforcement in accordance with this Law"[348].

It is easy to see how in many cases, most perhaps, involving governmental authorities at provincial level – unless exceptional circumstances produce a central government-ordered investigation, carried out by the central Anti-Monopoly Authority – local investigations and enforcement of the AML will be entrusted to agencies designated by the same governments probably involved in the alleged abuse. According to some observers, the rules against administrative

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percent of the listed companies in Chinese stock markets are state-owned enterprises in which less than 25 percent of the voting shares have been sold to the public.

[347] The AML of 2007, Article 51.

[348] The AML of 2007, Article 10.

monopolies have very good chances, in the next future, to work as just "soft" law, due to the conflicting interests of the enforcing courts and of local governments and political power supervising the courts[349].

It is in fact very unlikely that the different public bodies and agencies discharging an active regulatory or supervisory function in the same market arena – in which some of them also play a direct role of an economic actor – would produce a dialectic game or dynamics based on conflicting and equilibrating forces in purely legal terms.

It is more likely, in the Chinese socialist environment, that they cooperate towards the common goals dictated by the unifying force of the political leadership: the Communist Party also plays, at any level, the role of a non-legal regulating/supervisory authority of (governance organs and thus also of) the market, as well as that of a relevant market actor through its public and private controlled entities.

Finally, the lack of any effective enforcement and sanctioning mechanism for abuses committed by public bodies also includes the absence in the AML of any mention to any specific liability of the public body involved towards the parties aggrieved by the abuse.

The "soft" attitude of the AML towards administrative monopolies is probably the result of political negotiations between modernisation and *status quo* forces, between the central ruling élite and expressions of provincial or local interests. The very drafting of the AML, thus, other than regulating private undertakings' market behaviour, reveals and describes some current features of the Chinese socialist market economy: it reveals a strong presence and influence of local potentates, having political – and then also legal – cover at some level of governance, to check whom no more than "softened" market-oriented legal rules may be issued. The 2004 *Outline* fundamental principle on the separation between the public administration and the

[349] See M. DABBAH, *The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?* in 30(2) *World Competition* (2007), 343.

economy[350] seems still far to be implemented.

4.2. On one side, the AML features clear, precise technical rules applicable to private economic actors. However, it seems perhaps unlikely that the AML may discharge a positive effect in favour of the smaller market actors, little inclined to promote Anti-Monopoly proceedings which are lengthy and costly against each other[351].

On the other side, it is quite unlikely that an SME initiates an anti-monopoly action against one of the "big" actors in its jurisdiction: the "big" entity is likely to be a publicly-owned one, or to be connected institutionally or politically with the local government and the Party.

Finally, legal actions initiated by sizable or big entities against other sizable or big ones – the actions theoretically more important, perhaps, for enforcing anti-monopoly concepts in the market – may just result in most cases in the application of the very soft rules provided in the AML for administrative monopolies, with the intervention of the related "cooperative" dynamics of socialist governance of the market.

A discourse similar to that made in Chapter One for the enforcement of the Environmental Protection Law can be made, perhaps: the basic concept of this law is quite inconsistent with present reality. The challenge was in political and economic terms too big to deal with, for an immediate and strong political action taken from the central institutions, to enforce strict anti monopoly rules countrywide: local governments would have participated actively, anyway, in softening its impact on their own economic activities[352]. Foreign undertakings seem to be, in fact, the only being exposed to the effects of the AML.

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[350] The 2004 State Council's *Outline for Promoting Law-based Administration in an All-round Way*, Chapter. II.3.

[351] Y. ZHANG, D.K. ROUND, *Competition Policy in China*, *supra*, *passim*.

[352] See above, Chapter One, Section 5.

4.3. The AML features in its drafting an intermediate geometry, between market and non-market laws: the legislative text includes rules for private entities clearly hailing from Western models, if framed within a blurred formulation of the law's main concept and objectives. However, through the insertion in the AML of a specific mechanism of socialist governance applicable to public bodies, the law *de facto* softens into a mere set of directives for publicly-owned undertakings – still the main economic actors in China.

Beyond the *prima facie* "mixed" appearance of the legal text of the AML, there are "critical" socialist elements de-potentiating it significantly, bringing down to nil its actual chances of being enforced precisely when it would be more necessary. This makes the AML specific text geometry lean, when "in action", much more towards the "socialist" end of the scale.

5. Insurance

The Chinese Insurance Law of 1995 (revised in 2002 and then again revised quite substantially in 2009) is aimed at combining public macro-control with market institutions producing cost/effective management and services. Market mechanisms and pluralism of supply actors of insurance services are there to provide more efficiently those services, that could as well have been offered — as it was the case until mid-1980s, and as it still happens in some developing states — by just one State-owned insurance institution[353].

[353] The Banking Law of the PRC, also of 1995, is based on the same substantive regulatory model; even its drafting is quite similar to that of the insurance law. Both banking and insurance being critical institutions for market economies, and both industries having a substantial impact at the macro-economic level, it does not surprise that one common general model for both industries has been devised and elaborated, to be then implemented in the two different mentioned legislative acts.

The Chinese government manages the insurance market indirectly, nowadays, through publicly-owned as well as through in principle private enterprises. Those companies operate on the "customer side" according to market and private law mechanisms; however, they are heavily affected by public powers in their "back offices," so to speak. The operational model of Chinese private or publicly-owned insurance companies to a large extent reproduces, in a political and macro-economic sense, a model of concession or outsourcing of public functions, as demonstrated by a number of features of the Insurance Law described below.

According to the original text of the Insurance Law governmental control was exercised on insurance industry directly from the State Council[354]; since 1998 the control is exercised through the government-designated China Insurance Regulatory Commission (CIRC) – and not by any independent authority. The Government shall review and approve the "operation strategy" of any insurance company, which must be disclosed to the CIRC when seeking the authorization to enter the insurance services market[355]: this amounts to a veritable "policy check-point", introducing wide governmental discretion in the licensing process aimed at deciding whether a given company shall enter the market or not.

Also on capitalization of insurance companies we can find a "policy check": the Insurance Law gives discretion to the government to determine the minimum level of capitalization of a new insurance company, with a minimum of RMB 200 million provided by the law[356].

The Insurance Law of 1995/2002 is based on the principle of a definite list of insurable interests. For a Chinese insurance company to develop new insurance products, or to take a new course in general

[354] The Insurance Law of the PRC of 1995, Article 8.
[355] The Insurance Law of the PRC of 1995, Article 74.
[356] The Insurance Law of the PRC of 1995, Article 72.

conduct of business, the government supervisory mechanisms also need to be activated and an authorisation shall be secured[357].

Basic insurance contractual types, clauses and premium rates for major risks are also determined by the government's financial supervision and control department[358].

Public control on bankruptcy is established by Article 86, providing that a court may only declare an insurance company bankrupt with the consent of the governmental financial supervision and control department. In general, a very strong set of provisions regulates crisis, insolvency, bankruptcy or substitute management of an insurance company by the government in case of mismanagement by the common company's organs[359].

Security for the insurance system is the State only: according to the Insurance Law of 1995/2002, insurance companies may only invest the resources obtained in the market through collection of premiums with Chinese government bonds, or in bank deposits (with Chinese banks, publicly owned), or in other forms of investment as determined by the State Council[360].

The different general approach in Western legal systems is to permit, if under supervision and with several "safety nets," a wider range of investment – insurance companies being private business entities entitled in principle to pursue their interest the way they think fit. In fact, a major portion of the London Stock Exchange traded

[357] It still seems unclear, e.g., whether a contract's performance could be insurable – both the very big, sophisticated financial transactions and common ones like mortgage loans for the purchase of an apartment. Or, even, one would wonder whether it would be possible to insure an airline ticket's cost for cancellation of travel.

[358] The Insurance Law of the PRC of 1995, Article 106.

[359] See Chapter IV of the Insurance Law, providing for supervision, inspections and redress actions, which may be imposed on the company after failure to comply with the law, or taken directly by a governmental task-force.

[360] The Insurance Law of the PRC of 1995, Article 104.

volumes have been traded in recent years by insurance companies[361].

It may be interesting to consider that a heavily indebted state such as the Italian one in recent years issued every year state bonds in an amount ranging between 250 and 300 billion euros[362]; and that, on the other side, premiums collected yearly by Italian insurers run in the range of 110 billion euros[363]. The amount of monies collected by insurance companies is so substantial that it could alter significantly a number of macro-economic variables in most jurisdictions, if these resources could be held and managed by the relevant government – e.g. to reduce the amount of public debt certificates issued or sold in the financial markets, thus diminishing the costs of service of debt for the issuing government; or to use directly the resources collected, instead, for whatever investment or policy purpose deemed to be appropriate.

Administrative sanctions are provided for fraud and other contractual misbehaviour not falling within the scope of criminal law[364]. This provision introduces an element of administrative interference in a contractual matter, obviously considered not just a private matter between the parties; and of course lays on a fundamental idea of the management of the insurance contractual relation much different from the "game/risk/benefit" approach so common in the Western attitude towards contractual relations.

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[361] A press release of the Association of British Insurers dated June 28, 2006 reported that about one sixth of the traded volume was dealt by the 400 member companies of the ABI, the trade association representing about 94% of the entire British insurance market. Online at http://www.abi.org.uk/Media/Releases/2006/06/FSA_Better_Regulation_Action_Plan_-_ABI_supports_steps_to_remove_unnecessary_regulation.asp. The figure of one sixth obviously does not include non-ABI insurance companies.

[362] See the Italian Department of Treasury reports on bond issues in 2011, online at: http://www.dt.tesoro.it/it/debito_pubblico/dati_statistici/riepilogo_emissioni/.

[363] See ANIA (the Italian insurance companies' association), press release, 15 March 2012, online at: http://www.ania.it/export/sites/default/documenti/ef07be29-7d90-11e1-8dbb-f3c446ddba06_Comunicato_Stampa_Premi_2011.pdf.

[364] The Insurance Law of the PRC of 1995, Article 131.

From the above we may appreciate how insurance can be considered, other than a service to individual enterprises, one of the State's support and regulation functions for the market in a macro-economic and policy sense, and of public finance as well – with the State governing the insurance industry, being financed with the monies collected from premiums, collectivising risks and taking direct responsibility for the insurance companies' solvency[365].

To sum up, Chinese insurance companies are, in a sense, market devices created or permitted by the government to efficiently operate and disseminate insurance operations in the market.

A similar analysis and similar considerations can be done in relation to the banking system and to the general banking law, also of 1995. The socialist legal framework for both banking and insurance activities, of course, is reinforced by the network of institutional and informal connections of insurance companies and their management with the general political system, the latter being well able to affect both composition and decision-making of the former's corporate organs.

The amendments to the Insurance Law of 1995/2002 introduced in 2009 will substantially enlarge the insurance system's operations and capabilities: insurance companies are now more free to develop and offer new insurance products, and will have some more

[365] At micro-level, general policy also enters the picture sometimes: it is common knowledge that courts intervene in specific situations to use the insurance indemnification as a way to provide support to disadvantaged persons, by condemning insurance companies to pay indemnifications even in cases of no-fault car accidents – a private instrument for a benevolent State to provide relief. In those cases surely the courts are implementing a policy, probably based on a very Chinese traditional approach, rather than applying the law (which requires fault on the insured party to entitle the damaged person to indemnification). No insurance company seems to complain about that, in aggregate terms; most of them, by the way, are publicly-owned. It will be interesting, in due course, to gauge the reactions of foreign insurers operating in China, vis-à-vis such an approach – most likely, they won't complain much, either.

options available to invest premiums collected, if always according to CIRC regulations and guidelines. This change reveals a Chinese government perhaps less in need or less willing to issue certificates of debt; preferring instead to be able to funnel cash flows, through policy indications issued by the CIRC, directly in favour of this or that economic/industrial sector. Re-insurance with foreign re-insurers is now allowed. This has probably been done to cater for the needs of the markets, to better protect consumers' rights and especially in consideration of China's obligations hailing from the accession to the WTO. However, the supervision mechanisms and the control powers of the CIRC have been strengthened, balancing the mentioned openings[366].

The insurance industry, legislation and practice has a general architecture distributing insurance management and operations on both sides of the public-private divide – very notably, for instance, prescribing compulsory investment destinations for the collected premiums – and inserting numerous administrative policy checks in the private side of the field. It provides, thus, a good example of how market institutions, mechanisms and functions may work in a different way and even discharge different functions in a socialist context – based on a prudent evolution of the legal framework, to gradually allow market operations and services in an increasingly efficient way while maintaining public control over the market itself.

6. CIETAC Arbitration Rules

6.1. China has become in recent years one of the biggest "producers" of international arbitration proceedings, due to China's

[366] See the early comments (following the 2009 Enactment) of J.V. GROBOWSKI and Y. LI, *Amended Insurance Law of the People's Republic of China*, in the newsletter of the law firm Faegre & Benson, online at: http://www.faegre.com/9798.

becoming an economic and trading power in the globalised arena. The advantages of international commercial arbitration, normally recognised as significant worldwide, are even more significant in China, due to the difficult access of foreigners to Chinese courts and, especially, to the notorious dysfunctionalities affecting the Chinese court system, at case-management, decision and enforcement levels.

On the other side, the Chinese main institution involved in international arbitration – the CIETAC, China International Economic and Trade Arbitration Commission – has progressively gained reputation on the international scene. This is certainly due to its being located in one of the biggest and fastest-growing markets; and its providing the investor with better chances of having an award subsequently enforced by Chinese courts; probably also – quite ironically – due to the dysfunctions of the Chinese court system. Certainly, the CIETAC's success is also due to its increasingly good performance in case-management, and to the improving quality of its decisions. With an increasing number of international cases dealt with annually, CIETAC has possibly become the world's biggest international arbitration institution for number of cases managed[367].

This has been the result of continuing efforts to provide a world-level service, including the continuing revision and improvement of CIETAC Arbitration Rules, to make them and keep them up to

[367] According to the CIETAC website, cases entertained in recent years are in the range of 1000-1300 per year. The institution's roster of arbitrators includes ove 1000 arbitrators, over 300 of them being non-Chinese; online at: www.cietac.org.

However, recent events during 2012 indicate internal problems in the institution, facing a sort of "secession" declared by its Shanghai and Shenzhen sub-Commission. Some suggest that this situation may even lead to invalidity of some arbitration clauses and, thus, to a serious problem of legal insecurity for the business community. See C. MCKENNA, F. LICHTENSTEIN, *Tensions within CIETAC – Sub-Commissions split-off*, posted on 24 August 2012 on the web-based corporate lawyers' newsletter *Lexology*, online at: http://www.lexology.com/library/detail.aspx?g=cf3f2234-eb76-4539-aa19-77fa9a0d5d88;

global standards[368].

6.2. However, some element remain in the CIETAC Arbitration Rules featuring a departure from accepted global models, in a mix of global and typically Chinese (or Asian) features[369].

A notable feature is the possibility for the Tribunal to carry out its own investigation and evidence-gathering beyond the parties' requests, revealing an inquisitory attitude in civil and commercial cases not found in the regulations of any of the other big international arbitration centers – but very typical of socialist courts[370].

Another notable one is the express provision of a med-arb mechanism[371], an accepted practice in the Asian tradition[372], becoming

[368] The first version of the Institution's rules having been enacted in 1956, the seventh revision having entered into force in May 2012.

[369] CIETAC Rules aren't legislative rules of course; but still, they come from a Chinese public institution, and provide applicable rules in an important and extremely globally-oriented area of the Chinese socialist economic market, such as international commercial arbitration. The analysis of those rules, thus, is equally apt to reveal the "socialist" attitudes and features being researched in Chinese market-related laws.

[370] CIETAC Arbitration Rules 2011, Article 41.1: "The arbitral tribunal may, on its own initiative, undertake investigations and collect evidence, as it considers necessary". Article 41.2: "When investigating and collecting evidence on its own initiative, the arbitral tribunal *may* notify the parties to be present" (emphasis added).

[371] i.e. a mechanism featuring mixed elements of mediation-conciliation and arbitration; including a mediation attempt carried out by the arbitral tribunal, and the resumption of the arbitral proceeding if mediation fails. CIETAC Arbitration Rules 2011, Article 45.

[372] The practice is not usual in the prevailing model of international arbitration: Western ethical standards normally disqualify an arbitrator should he/she obtain during the mediation process any knowledge of facts that may later be relevant for deciding the case, beyond of course what the parties submitted in their formal statements. On Asian traditions in arbitration, in general, see P.J. MCCONNAUGHAY, T.B. GINSBURG (eds.), *International Commercial Arbitration in Asia*, 2nd ed., New York, 2006; M. PRYLES, M.J. MOSER (eds.), *The Asian Leading Arbitrators' Guide to International Arbitration*, New York, 2007; and, specifically on med-arb in China, the contribution therein of WANG Wenying, *The Role of Conciliation in Resolving Disputes: A PRC Perspective*, at 501; also see S.A. HARPOLE, *The role of the Third Party Neutral when Arbitration*

increasingly accepted in other Asian sophisticated arbitration environments, too[373].

In general, wide case-management powers are attributed to the CIETAC. This is also common in arbitral institutions worldwide; the CIETAC Rules, however, authorise a strong supervisory role of the institution over the cases; not only in case-management and in support of the specifically designated tribunal dealing with a case, but also sometimes through making discretional decisions on substantial issues affecting the parties' interests[374].

This significant controlling and supervisory role of the CIETAC on its individual tribunals' work is probably connected with the collegiality and supervision principles which are part of the Chinese socialist tradition – unfavourable to entrusting any decisional power to anyone whom cannot be checked somehow, or submitted to an institutional supervision of some sort. This general attitude of the Chinese legal system is apparent, for instance, in the inadmissibility of *ad hoc* arbitrations, stipulated in the Arbitration Law of the PRC: only arbitral proceeding administered by an arbitration commission are admissible[375].

In the case of CIETAC, moreover, important "Chinese characteristics" are also in what is unspoken in the law: in addition to the already mentioned far-reaching case-management powers of the

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and Conciliation Procedures Are Combined: A Comparative Survey of Asian Jurisdictions, at 525.

[373] E.g., in the Tokyo Maritime Arbitration Commission; S.A. HARPOLE, *supra* at 531. In Singapore med-arb is also not uncommon: L.S YANG, L. CHEW, *Arbitration in Singapore*, in P.J. MCCONNAUGHAY, T.B. GINSBURG (eds.), *supra*, 335 at 353-355.

[374] An example is Article 17, stipulating that CIETAC *may* decide to consolidate several arbitration proceedings sharing some common elements, and that in doing so *may* consider a number of relevant circumstances listed therein.

[375] The Arbitration Law of the PRC of 1994, Article 16, requires as a condition of validity of an arbitration clause the express indication of "the designated arbitration commission".

Commission, the CIETAC internal governing committee also reviews all draft awards[376]. This is also quite common in international arbitration institutions; however, the CIETAC does not just check the compliance of the draft award with the institution's quality standards, or for its style consistency etc.: despite the inoffensive-looking wording of Article 49, the Commission intervention is penetrant and may involve the merits of the case already decided (if still in a draft form) by the appointed tribunal[377] – this reproduces somehow the *modus operandi* of Chinese courts and the relation between individual judges deciding individual cases and the supervision on the merits of the court's judicial committee[378]. The CIETAC, besides, is obviously an important institution, and its steering committee is made, directly or indirectly, of government appointees.

7. Socialist features

In Chapter One a number of features of socialist law have been discussed, such as the law's inherent flexibility to better discharge its function of governance tool for the policymaking organs; the possibility of the latter to exercise a "leadership" role on lawmaking, government activities as well as on courtwork; the flexible interpretations, applications and variable degrees of enforcement of the law, according to policy needs in each specific instance.

A result of the observations made in this Chapter is a clearer

[376] CIETAC Rules, Article 49: "The arbitral tribunal shall submit its draft award to CIETAC for scrutiny before signing the award. CIETAC may bring to the attention of the arbitral tribunal issues addressed in the award on the condition that the arbitral tribunal's independence in rendering the award is not affected."

[377] This emerged from a seminar, which I attended, given on 28 September 2011 by Dr. Li Hu, Deputy Secretary-General of the CIETAC, at the Chartered Institute of Arbitrators in London.

[378] On which see above, Chapter One, Section 3.3.

picture of how the new dimension of the market economy generates the need for a socialist legislation with "variable geometries" – i.e., different drafting styles, technical features and preferred channels of application and enforcement – to regulate different aspects of the market phenomena.

Variability is obtained through the use in variable proportions of different lawmaking styles and legal technical devices, including:

- The punctual regulation of private rights and obligations directly provided by private law, more or less Western-style;
- A socialist-administrative drafting style, focused on delegations of authority and allocation of prerogatives within the governance apparatus, rather than on allocating rights, obligations, sanctions to the law's "end users".
- The introduction of traditionally Chinese/socialist elements within technical pieces of legislation based on a models originating elsewhere, usually to balance strict legality with an element of socialist discretionality;
- The recourse made to leaving significant blank areas of the law, to allow administrative intervention in a regulatory or punctual governance capacity; or the introduction of such administrative interventions as external additions, not provided for by the legal rules, to an apparently complete body of law – we may synthesise this as "the unspoken element" in the law, or, if we like, the implied, unrestricted general competence of administrative authorities to regulate any area, in addition and/or in parallel with the laws.
- A significant use of general clauses in law drafting, both related to the protection of the parties of an economic transaction (good faith, fairness etc.), and to the protection of general interests (public interest, protection of socialist economy, social ethics etc.). These clauses generally are, textually, more vague than most of their

Western homologues; moreover, they are to be enforced through the judicial circuit, by means of a socialist legal process featuring legal technicalities as well as possible policy inputs.

– A significant use of "policy checks" is also detectable: "policy checks" are administrative requirements located at the gates, so to speak, or at appropriate junctions of the economic area, and/or of individual economic processes, thus allowing the relevant governmental authority to control, to interfere with or even to veto the conduct of a given activity, or the access or permanence in the market of a given economic actor.

8. Some considerations on China's socialist market economy's legal hybridity

8.1. Making recourse to the "mixed" legal systems descriptive grid developed by V. Palmer[379] to analyse these findings, it is possible to identify "obvious amounts" of legal norms hailing from non-socialist traditions, in the Chinese market economy, transplanted in specific areas of the Chinese "dominant" legal system in a way that leaves the different bodies of rules of different origins well recognisable and partially segregated from the dominant system's general frame.

The segregation between different areas of the law, however, is an incomplete one, as the general framework of the dominant system maintains effective controlling mechanisms – the "critical features" of Palmer's grid – to implement its own logic, fundamental principles and rules in the resulting mixed environment. "Critical features", mechanisms, principles and rules of the dominant system may also be of a non-legal nature, in the Chinese socialist environment, as demonstrated by the list of elements just identified in Section 7.1.

[379] Above, Chapter Two, Section 8.

The required "subjective element" is also found, identified in the perception of Chinese legal professionals (judges, procurators, lawyers) of being working in a legal environment featuring different areas of the law, with different logics, techniques, technical languages, of different origins (e.g. purely administrative law v. corporate or securities law); and, especially, in the legal professionals' clear knowledge of the existence of non-legal guiding elements from the dominant system, contributing to shaping their professional role and affecting the functioning of the dominated, transplanted sub-system of market laws – however Western some of them they may seem.

The mentioned "socialist" guiding elements do affect legal professionals' behaviour – e.g. through the many institutional and political mechanism of control and supervision, or through the professionals' more or less spontaneous loyalty to the Party and the institutions. This clear conscience of the dual dimension, political and legal, of the Chinese legal environment obliges legal professionals to continuously negotiate and find delicate balances, in their day-to-day professional activities, between purely legal technical considerations and non-legal ones[380].

8.2. A final remark: the "subjective element" in Palmer's three-element theory of mixed systems is probably the critical element for the long-term, continuing effective dominance of the dominant system in a mixed legal environment.

The "superimposition" and the emplacement of more or less "critical features" around the legal system may weaken and diminish their effectiveness over time – especially if the "obvious amount" of law from the imported, transplanted, dominated legal tradition(s) grows

[380] See, e.g., the discourse made on *gongyi lushi*, and on how they interact with the government and select carefully the cases they defend in court; above, Chapter Two, Section 6.

in size, economic importance and social consideration, making its containment and harnessing by the originally dominating or importing system increasingly difficult[381].

Thus, the enhancement of socialist mechanisms of supervision, and of those aimed at strengthening Party loyalty in the legal profession(s) – including the oath of allegiance to the Party required from lawyers since March 2012 – are easily understandable as parts of the general framework, and of a strategy aimed at maintaining the socialist pre-eminence and *status quo*; while, at the same time, promoting the development of stronger and more sophisticated market economy and legal system.

[381] The growing difficulties of the CPC in controlling the developments in Chinese society at the end of the 1980s, in the 1990s and early 2000s – on which see, e.g., S.B. LUBMAN, *Introduction: the Future of Chinese Law*, in S.B. LUBMAN (ed.), *China's Legal Reforms*, *supra*; R. PEERENBOOM, *supra*, Chapter 5, *Retreat of the Party and the state*, at 188 – led in fact to a softening of the "socialist rule of law" policy, in favour of that for a "socialist harmonious society"; see above, Chapter One, Section 1.2.

CHAPTER FOUR

THE LEGAL HYBRIDISATION OF HONG KONG AND MACAU

SUMMARY: *1. Macao, Hong Kong and the Mainland: a convergence. - 2. China and its two SARs: institutional superimposition. - 3. Legal infiltrations: interpreting the Basic Laws. - 4. Principles identified – a tentative list. - 5. Dynamics of the interference. - 6. De-legalisation: the Closer Economic Partnership Arrangement (CEPA). - 7. Hybridisation, the 'soft' way. - 8. Testing the Chinese SARs' case against Palmer's analytical grid on "legal mixity" – and refining the grid.*

1. Macao, Hong Kong and the Mainland: a convergence

1.1. Laboratories for social, economic and legal engineering have been at work for long in China, where several regions of the country have been designated to provide economic development and, possibly, models for further reproduction, such as the Special Economic Zones (Zhuhai, Shenzen, Xiamen, Shantou, Hainan island) and other cities and areas enjoying special legal and economic regimes.

At an even further level of autonomy, the two Special Administrative Regions (SARs) of Hong Kong and Macao, former western colonies returned to Mainland China in 1997 and 1999 respectively, have kept, in principle, their original Western legal system. However, new Chinese institutions, rules and attitudes are being introduced there, affecting the two territories' legal systems.

Obviously Hong Kong and Macao developments, revealing a transition from a Western concept of legal system towards a more

Chinese configuration, imply some kind of convergence with the opposite transitional path of China[381]. A convergence which could lead to identify and develop new models and solutions for Macao, Hong Kong, as well as for Mainland China and/or its different special regions, areas, economic zones.

1.2. This chapter reflects the results of a research made on the elements of legal hybridisation in the two SARs[382], to learn more about the Chinese SARs and about hybridity in general; but not just for that.

A reversed approach has also been adopted, to identify Mainland, socialist Chinese legal principles through the observation of the ways and effects of their introduction in the SARs. The assumption was that they could be better identified and focused on through a sort of stereoscopic effect; and, in a certain sense, by seeking the principles where they are not normally supposed to be – instead of looking in the place where they belong – so that their elusive essence will stand out more and be grasped better[383].

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[381] I. CASTELLUCCI, *Chinese Law: a new Hybrid*, in E. CASHIN RITAINE, S.P. DONLAN, M. SYCHOLD (eds.), *Comparative Law and Hybrid Legal Traditions*, 67 *The Swiss Institute of Comparative Law Series*, Zurich-Basel-Geneva, 2010, 75.

[382] I. CASTELLUCCI, *Legal Hybridity in Hong Kong and Macau*, in 57: 4 *McGill Law Journal* (2012), 1, 665-720.

[383] An interesting parallel may be made with astronomic research: both planet Neptune and former planet Pluto (downgraded in 2006, alas, to a mere "dwarf planet", or "plutoid", by the International Astronomical Union) have been discovered, in 1846 and 1930, respectively, not just by looking at the sky – which most would think is the sensible thing to do if one wants to discover a planet. They have been identified and located, instead, through the observation of the perturbations produced on the known orbit of Uranus, for Neptune; and of Neptune, for Pluto. Similar approaches have been used to identify or measure other plutoids, e.g. by observing stellar occultations or by assessing their mass through measurements of the orbits of their satellites. In general, observing the perturbations caused by an unknown phenomenon (of which we assume the existence but we don't know much) on a known one, is a good way to start identifying the former – which, once identified and located, may subsequently be observed directly and more confidently.

The main methodological line of this research has been that of analysing the "mixing" process of Mainland China superimposing its frame on the SARs, by identifying the three elements of V. Palmer's classificatory grid as already discussed above[384].

2. China and its two SARs: institutional superimposition

2.1. Hong Kong and Macau are former colonies of the United Kingdom and Portugal, handed over to the People's Republic of China [PRC] in 1997 and 1999, respectively, in accordance with the Sino-British (1984) and Sino-Portuguese (1987) Joint Declarations. These two international covenants granted these territories, after their reversion to China, "a high degree of autonomy"[385] and the survival of their social, economic and legal systems, to be left "basically unchanged" for at least 50 years[386].

[384] Chapter Two, Section 2.8.

[385] *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, 3d Sess, 7th National People's Congress (NPC), 4 April 1990, reprinted in 29 ILM 1511, available online: <http://www.basiclaw.gov.hk>, art 2; *Lei Básica da Região Administrativa Especial de Macau da República Popular da China* [Basic Law of the Macau Special Administrative Region of the People's Republic of China], 1st Sess, 8th NPC, 31 March 1993, art 2 (unofficial English translation available online: <http://bo.io.gov.mo/bo/i/1999/leibasica/index_uk.asp>).

[386] *Joint Declaration of the Government of the United Kingdom and the Government of China on the Question of Hong Kong,* 19 December 1984, 1399 UNTS 33, arts 3(3), 3(5), 3(12) (Sino-British *Joint Declaration*). These articles list the "basic policies" that the Chinese government undertakes to implement in the Region. China undertook similar obligations regarding Macau: *Joint Declaration of the Government of Portugal and the Government of China on the Question of Macau,13* April 1987, 1498 UNTS 195, arts 2(2), 2(4), 2(12) (unofficial English translation at 229) (Sino-Portuguese *Joint Declaration).* Article 5 of both the HK Basic Law and the Macau Basic Law provide that "[t]he socialist system and policies shall not be practised in the [Hong Kong/Macau] Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years." This amounts in fact, more to an obligation not to introduce the Chinese socialist system than one to leave the previous

The scheme has been implemented by making the two territories Special Administrative Regions (特別行政區, *tèbié xíngzhèngqū*) of the PRC [SARs, hereinafter], with their specific institutions and legal systems different from those of mainland China.

This peculiar status hails from the implementation of the political/institutional model known as "One Country, Two Systems" (一個國家兩種制度, *yī gè guójiā liǎng zhǒng zhìdù;* or *yīguó liǎngzhì*, 一國兩制, in its shorter form) (hereinafter: OCTS). This model has been devised by Deng Xiao Ping in early 1980s and proposed as a scheme for the reunification under Chinese sovereignty of Hong Kong, Macau and (especially) Taiwan[387].

The hybrid nature of Mainland China's legal system is nowadays quite obvious to most, due to the PRC's legal reforms of the past decades, from the Country's Constitution to local regulations, and to the introduction of the "socialist market economy".

The hybridization of the two SARs, however, is a more subtle process, combining institutional change and superimposition of the Mainland policies on the two territories with the PRC's commitment to maintain their socio-economic and legal systems "basically unchanged" for fifty years.

2.2. Notwithstanding the agreements reached in both Joint Declarations, a major cause of hybridisation in the two territories is their very restitution to China. Major changes in the territories' institutional setting followed the resumed sovereignty of China; Basic Laws have been enacted in each SAR, having a quasi-constitutional

systems unchanged.

[387] A.H.Y. CHEN, *The Theory, Constitution and Practice of Autonomy: The Case of Hong Kong*, in J.C. OLIVEIRA, P. CARDINAL (eds.), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution*, Berlin-Heidelberg, 2009, 751; a synthetic description of the OCTS policy is available in Chinese government official information web portal, online at: http://www.china.org.cn/english/features/china/203730.htm.

nature and supra-legal hierarchical level; a substantial degree of political influence by the authorities in Beijing became apparent in both SARs. All these elements do affect the legal environment.

The two SARs provide indeed a very useful laboratory for Beijing, to test the OCTS model and to conduct socio-political, institutional and legal experiments. In addition of course to being sources of ideas and economic, legal models and legal vocabulary that are usefully imported into China's socialist society for its market-economy-related reforms[388] – like the introduction of legislation on trusts or that on securities, modelled on the Hong Kong ones, or other developments of all sorts[389]. The fundamental legal connection of the two SARs with the PRC is given by Article 31 of the Chinese constitution, stipulating that Special Administrative Regions can be created within China, to which common Mainland law (including most PRC's constitutional provisions different from Article 31) and institutions shall not apply; specific systems being applicable therein, instead, within the frame of specific laws issued by the National People's Congress.

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[388] I. CASTELLUCCI, *Rule of Law*, *supra*, paragraph "Macao, Hong Kong and Other Special Zones of China as Legal Laboratories"; I. CASTELLUCCI, *National report* for the Macao Special Administrative Region – China, in E. HONDIUS (ed.), *Precedent and the Law*, Brussels, 2007 (reports on the topic 'Precedent and the Law' at the XVIII Conference of the *International Academy of Comparative Law*, Utrecht, July 2006), 349-370; Y. GHAI, *The Intersection of Chinese Law and the Common Law in the Special Administrative Region of Hong Kong: Question of Technique or Politics?* in J.C. OLIVEIRA, P. CARDINAL (ed.), *supra*, 13; also in 37(2) *Hong Kong Law Journal* (2007) 363, at 365; all subsequent citations to this article are, unless differently specified, related to the version appeared on the HKLJ. Specifically on legal vocabulary, see A. LEE, *Language and the Law in Hong Kong: From English to Chinese*, in 3 (1996) *Current Issues In language & Society* 156.

[389] E.g., like horse racing introduced experimentally in 2008 in Wuhan, with a view to introduce commercial betting on horse races in the Mainland, modelled on Macau's and Hong Kong's racing business: *Horse racing back on Wuhan courses*, editorial article on *China Daily*, 1 December 2008; online at: <http://www.chinadaily.com.cn/china/2008-12/01/content_7254874.htm>.

2.3. Each SAR has thus a Basic Law, a legal documents of a quasi-constitutional nature, hierarchically placed above local legislation and other local normative sources. Basic Laws have been drafted by mixed committees of experts, from the Mainland and each SAR, then approved in Beijing by the National People's Congress and promulgated by the President of the PRC. An Annex III to each Basic Law lists the few very fundamental laws of the PRC which shall also be applicable in the SARs[390].

Hong Kong and Macao enjoy thus "a high degree of autonomy" and featuring "executive, legislative and independent judicial powers", including the power of local final adjudication[391].

This autonomy certainly doesn't amount to independence: as a matter of fact, the extent and limits of such autonomy are a crucial issue, if not *the* crucial issue, in the current political, constitutional, legal debate about China and its SARs. Article 31 of the Constitution of the PRC is applicable in the SARs, for which specific Basic Laws have been enacted in Beijing accordingly: the two SARs are now inalienable parts of the territory of the PRC; the PRC has sovereignty over them and discharges sovereign functions for them such as foreign and defense affairs[392].

The special autonomy granted to the territories is entrusted to their respective executive bodies, placed in a pre-eminent position by their Basic Laws and by political reality, as also suggested by the fact

[390] Related to Capital City of China, Calendar, National Anthem, Flag of the People's Republic of China; national Day of the PRC; Territorial Sea and Contiguous Zone, Exclusive Economic Zone and Continental Shelf; Nationality; Diplomatic Privileges and Immunities; National Emblem; the Chinese Military Garrison in the SARs; Judicial Immunity for assets of Foreign Central Banks.

[391] Articles 1 and 2, Basic Laws of Macau and Hong Kong. The contents of the two Basic Laws of Macau and Hong Kong Basic Law are, *mutatis mutandis*, identical.

[392] Articles 3(2) of the Sino-British Joint Declaration and 2(2) of the Sino-Portuguese one; and Articles 13, 14 of both Basic Laws.

the regions are special 'administrative' regions[393].

In these jurisdictions legislative bodies remain in the shadows as general policy-making organs, and the judiciaries tend to show – more pronouncedly in Macau, still not that much in Hong Kong – a somehow subordinated attitude vis-à-vis the executive[394].

The two territories' political elites are very closely connected to those of the Mainland, the latter being capable of affecting the former's visions and policies. There is a strong political relation between the government in Beijing – which features a special department for Hong

[393] E.g., both Regions' Chief Executives – the heads of local government selected through local elections, but appointed by and accountable to the Central Government in Beijing (Articles 43 and 45 of the Basic Law of Hong Kong, Articles 45 and 47 of the Basic Law of Macao) – have powers granted by their respective Basic Laws to refuse to sign and promulgate bills passed by the Legislative Councils, and to dissolve the Legislative Councils in case a bill is re-approved after having been initially denied the Chief Executive's promulgation (Articles 49, 50, 51, Hong Kong; Articles 51, 52, 53, Macao). Chief Executives also have the power to appoint some members of the Legislative Councils, as well as the members of the Judiciary. They have the power to nominate their respective cabinet members and other top SAR officials (e.g. the Auditor General, the Commissioners for Police, Immigration, Customs) to the Central People's Government in Beijing, for their appointment; and to recommend their removal, too (Article 48, Hong Kong; Article 50, Macao). Remarkably, the Chief Executives have the power to appoint the President of the highest court in their respective territories (Article 88, 90, Hong Kong; art. 88, Macao), but in Macao the Chief Executive only has the power to nominate the Procurator General, whom is then appointed by the Central Government in Beijing (Article 90, Basic Law of Macao); in Hong Kong the Prosecution service is "controlled" by the Department of Justice (Article 63, Basic Law of Hong Kong), and the Secretary of Justice is also appointed by the Central Government. This reveals a typically socialist attitude, of giving pre-eminence to the Procuratorial system within the Judiciary; on which, see I. CASTELLUCCI, *Rule of Law supra*, at 51-54.

[394] A long description of the Chief Executive's central importance and prerogatives is made in IEONG Wan Chong, IEONG Sao Leng et al., *"One Country, Two Systems" and the Macao SAR*, Macau, 2004, Chapter VII, especially sections "The Unique Characteristics off the Chief Executive" and "The Executive-Led Model of Separation of Powers", at 304 and 319, respectively. A.H.Y. CHEN, *The Theory, Constitution and Practice of Autonomy*, *supra*, at 763, also describes the Hong Kong system as being "executive-led", according the Mainland scholars and drafters of the Basic Law.

Kong and Macau Affairs with Ministerial rank, and officers of the central government residing in the two SARs – and the two SARs' Chief Executives[395].

The socialist idea of a single power with different functions – instead of a Western-style separation of powers with effective checks and balances – with a key role for political and institutional supervision, typical of Mainland China's socialist ideology[396], is increasingly seeping into the political-institutional framework and culture of the SARs.

3. Legal infiltrations: interpreting the Basic Laws

3.1. An important feature of the SARs' new legal environment is the fact that the highest courts in the SARs lack the power to definitively interpret their respective Basic Laws[397] – a feature that

[395] The implementation in the SARs of policies made in Beijing is expressly entrusted to the Chief Executives by Article 50 of the Basic Law of Macau and Article 48(2) of the Basic Law of Hong Kong.

[396] XIN Chuying, *supra*, 99-101; I. CASTELLUCCI, *Rule of Law*, *supra*, 43; also see above, Chapter One.

[397] Article 143 of the Macau Basic Law: "The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress. The Standing Committee of the National People's Congress shall authorize the courts of the Macao Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region. The courts of the Macao Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments in the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those

seems to contradict to some extent Article 2 of both Basic Laws, stipulating instead that SARs enjoy judicial power including "local final adjudication."

In fact, the interpretation of rules of either Basic Law can only be done in the relevant territory by the local courts' system as long as it does not involve any issue falling under the authority of the PRC's central government, or related to the relations between the SARs and the Mainland. According to Article 143 of the Macao Basic Law and 158 of the Hong Kong Basic Law,

> "The Standing Committee of the National People's Congress shall authorize the courts of the [Hong Kong / Macao] Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region."

Otherwise, an interpretation of the relevant provisions of the Basic Laws shall be sought in Beijing, to be issued by the Standing Committee of the National People's Congress (NPCSC)[398], the top legislative/political organ of the PRC. Before issuing a final decision, thus, the courts of both territories, *must* ask Beijing for a *binding* interpretation, to be then applied to the case at hand[399].

It is not a court's job, whether in the SARs or the PRC, to find

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provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected. The Standing Committee of the National Peoples Congress shall consult its Committee for the Basic Law of the Macao Special Administrative Region before giving an interpretation of this Law". The corresponding article in the Basic Law of Hong Kong (Article 158) is very similar.

[398] The NPCSC is also vested with the authority to interpret the national laws of Mainland China according to Article 42 of Mainland China's Law on Legislation of March 15, 2000.

[399] Basic Law of the Macao SAR, Article 143; Basic Law of the Hong Kong SAR, Article 158.

interpretations of the Basic Law, beyond routine *prima facie* applications of its black-letter rules.

Quite differently from the Western approach, in the socialist legal tradition of China adjudication is a different function from interpretation – the former being rather thought of as mere 'application' of the law. If interpretation is arguably the most characteristically technical element in the Western tradition and theory of law, in the Chinese tradition and theory it is something substantially different, with a substantial law-making nature, belonging thus to the lawmaker. It is not (only) subject, consequently, to technical standards and rules but (mostly) to its instrumental role in policy implementation[400].

This obligation to refer the case to the NPCSC, basically, amounts to another[401] modern example of the French *référé législatif*, which combines well with the idea of the courts being just *la bouche de la loi*; two French revolutionary ideas and tools which fit the needs for the transition of both SARs judiciary towards a model more consistent with Chinese values.

This principle is now also applicable to the SARs' Basic Laws, when local SARs' systems have to interact with general national interests and with the national legal frame.

The two SARs legal systems, however, displayed different levels of resistance towards it, for a variety of reasons which will be discussed below. One of these is that Hong Kong's common law heritage implies the *stare decisis*, which makes new interpretations – as well as the enforcement of political directives through interventions in

[400] See Y. GHAI, *Intersection*, *supra*, 401; I. CASTELLUCCI, *Rule of Law*, *supra*, especially at 37-45, Chapter "Socialist Law in China". Chien-huei WU, *One Country, Two Systems, and Three Memberships*, in 7 (2007) *Global Jurist*, 3 (Advances), Art. 7, at 2-6 elaborates on the differences in Chinese law between 'interpretation of law' (of a legislative nature) and 'judicial interpretation'; also see above, Chapter One.

[401] In addition to similar Mainland China mechanisms provided in the Legislation Law of 2000 to solve conflicts between rules originated at different levels, as discussed in Chapter One, Section 2.

the work of the judiciary – more difficult than in Macau. The operation of the Basic Law's principle for the interpretation of the Basic Law had to face some resistance of the Hong Kong legal environment and provoked indeed some political, constitutional and legal shockwaves not seen in Macau.

After the handover of the former British colony to China, sensitive and controversial issues involving the interpretation of local law and the Basic Law of Hong Kong have been dealt with by the NPCSC. Four binding interpretations have been issued thus far after 1997. Each interpretation has been considered by many Hong Kong lawyers and jurists as contrary to a 'correct' technical interpretation of the Basic Law made in accordance with consolidated common law standards and precedents. Each attracted international attention – the first two, also, a degree of local political confrontation.

3.2. In the first of those four cases, related to the right of abode in Hong Kong for Chinese nationals, only a couple of years after the handover the Hong Kong Government asked the NPCSC for an interpretation of the Basic Law, to balance its provisions on the right of abode with some restrictive rules of the territory's immigration law.

The government did so *after a final judicial decision* had been issued by the Court of Final Appeal [CFA]. The CFA had extended the right of abode to the children of a person resident in the territory and had declared the restrictive Hong Kong legislation unconstitutional, as being contrary to the Basic Law and to the International Covenant on Civil and Political Rights (New York, 1966)[402].

The mentioned court decision was entirely within the common law standards and consistent with the 1966 International Covenant: the CFA had clarified that it was within its powers to assess whether there

[402] *Ng Ka Ling v. Director of Immigration*, [1999] 2 HKCFAR 4 [2], of January 29, 1999 [*Ng Ka Ling*]; also available in [1999] 1 HKLRD 315.

was a need, or not, to activate the mechanisms of Article 158 requesting an interpretation of the Basic Law to the NPCSC in Beijing – finding it was not the case in that particular instance.

A political issue exploded as the ruling was deemed to be 'wrong' both by the Hong Kong government and by mainland political-legal circles[403]. A request to the NPCSC of interpretation of the Basic Law Articles 22 and 24 on the right of abode, made by the Hong Kong government instead of the CFA, became the subject of political and constitutional debate over the independence of the Hong Kong courts.

Less than a month after the ruling, the CFA had to issue a quite unusual clarification, in the form of a *functus officio* order, at the request of the SAR Government[404]. Such a 'clarification' was certainly not within the range of ordinary legal products of the Court: the order has been issued based on the court's "inherent power"[405] and the need to 'clarify' (including placating Mainland authorities) that

> "the power of interpretation of the Basic Law conferred [to NPCSC] by Article 158(1) is in general and unqualified terms"[406].

Basically, the clarification was the product of political pressure from Beijing and amounted to an acknowledgement of the fact that the NPCSC has full power to intervene and interpret the Basic Law at its own will – not just when solicited to do so by the CFA according to Article 158 of the Basic Law of Hong Kong.

Shortly thereafter the Hong Kong government publicly

[403] See Y. GHAI, *supra*, at 47 and especially footnote 68.

[404] *Ng Ka Ling v. Director of Immigration*, [1999] of February 26, 1999 HKC 425 [hereinafter referred to as: *Ng Ka Ling* CFA clarification].

[405] *Ibid.*, in the short argument of Li CJ, to which the other members of the panel adhered unanimously.

[406] *Ibid*.

announced it would seek the intervention of the NPCSC, stating its reasons:

> "We have considered inviting the CFA to reconsider its decision when the relevant material issues are raised in a future case that comes before it. The advantage of this approach is that any change in the interpretation of the Basic Law would be achieved by judicial action in Hong Kong. 9. However, there is no guarantee that an appropriate case will emerge shortly. Even such a case does emerge, it would take a long time to reach the CFA and this would offer no quick solution to the problem. *Moreover, we could not be sure that the CFA would reach a different conclusion on the relevant issues. If it did, the CFA might be criticized as having yielded to political pressure instead of making a rational judicial decision. This would damage its credibility*. 10. Legal analysis indicates that the chance of the CFA reversing its judgment is slim. Under common law principles, there must be stability in case precedents. Unless there are changes in the circumstances or in legal viewpoints over a long period of time, the CFA will not easily reverse any of its previous decisions. The House of Lords in Britain has unanimously ruled that even if it considered that a previous judgment had been wrongly decided, this did not constitute sufficient grounds for reversion. *If the CFA in Hong Kong adopts this principle, it could not possibly change its judgment made on 29 January within just a few months*. 11. We must stress that by reversion we mean the CFA reverses its previous decision in a similar case in the future. *We are not asking the CFA to reverse its original judgment when there is no case before it. Such an approach is without legal basis, nor is it acceptable*.

(…) However, NPCSC's interpretation of the Basic Law may be regarded by common law jurisdictions and some people in Hong Kong as undermining the rule of law and CFA's power of final adjudication, as well as interference with the judicial independence and jeopardizing Hong Kong's autonomy. These perceptions may attract negative criticisms on NPCSC's interpretation and the HKSAR Government. 19. *After careful consideration of the pros and cons of the above options, the SAR Government takes a view that the problems should be resolved by an interpretation of the BL. This approach offers the most resolute, prompt and conclusive solution to the present problems.* It is also conducive to maintaining the prosperity and stability of Hong Kong, and is in our long term and overall interests. (...) 20. The Basic Law is a national law. *Under the Mainland system, the ultimate power to interpret statutes is vested in the NPCSC. Since the NPC enacts statutes, its Standing Committee knows best what the true legislative intent was and is the most authoritative body to interpret the law.* (…) 22. Given this constitutional background, would an interpretation of right of abode issues under the BL in fact undermine the rule of law? The CFA stated clearly on 26 February[407] that it could not question the authority of the NPCSC to make an interpretation under the Basic Law, which would have to be followed by the SAR courts. In other words, *an NPCSC interpretation of the Basic Law is part of our new constitutional order. This is entirely consistent with the rule of law*"[408] (emphasis added).

[407] The reference is to the *Ng Ka Ling* CFA *clarification*, *supra*.

[408] The HKSAR Chief Executive's press release (18 May 1999), *Right of Abode: the Solution*, online at: www.info.gov.hk/gia/general/199905/18/0518132.htm [hereinafter referred to as: HKCE, *Right of Abode*].

The government of Hong Kong explained its action to have the NPCSC involved, making clear that in the new constitutional order this was the appropriate way to solve the substantial problem – at the same time showing respect for the common law tradition of the territory, and concern for the CFA's credibility in the future. With this statement, following the *Ng Ka Ling* CFA clarification[409], the constitutional crisis was settled.

The NPCSC interpretation was issued soon thereafter and it was, of course, consistent with the more restrictive policies of both the Beijing and Hong Kong governments. It was grounded, technically speaking, on an interpretation of the Basic Law provisions on the right of abode based on legislative intent and context, which is typically a Chinese way of statutory interpretation alien to the common law tradition[410]. Subsequent cases relating to the right of abode have all been adjudicated in the courts of the Hong Kong SAR according to the NPCSC interpretation[411].

The intervention of the NPCSC in this case, unsolicited by the CFA as provided by art. 158 of the Hong Kong Basic Law, shows some consistency with a general principle already discussed[412] of the Chinese legal system – on attribution of jurisdiction to the different levels of courts according to the general impact of the case and on the possibility for a higher court to attract into its jurisdiction and entertain a case

[409] *Supra*.

[410] In the 1999 NPCSC interpretation the following was also stated:

> "The legislative intent as stated by this Interpretation, together with the legislative intent of all other categories of Article 24(2) of the Basic Law … have been reflected in the 'Opinions on the Implementation of Article 24(2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China' adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on 10 August 1996."

[411] E.g. on December 3, 1999: *Lau Kong Yung v. Director of Immigration* [1999] 3 HKLRD 778.

[412] See above, Chapter One, Section 3.2.

already introduced before a lower one. This socialist operational rule would probably, according to Western rule of law standards, amount to a serious violation of the due process of law.

A strong element of policymaking/policyenforcing is involved, instead, in the Chinese judicial process and adjudication, entrusted by the Chinese political and administrative system to the procuratorates, the courts and the *zhengfa wenyuanhui* at the different levels.

This means that these judicial organs, being expressed, supervised, interfered with by corresponding level of the political and governmental pyramids[413], are authorised to exercise a specific level of authority through the judicial process. It is thus perfectly consistent with the system that adjudicating a large or sensitive case may be transferred from a lower court to the appropriate higher level of authority, based on a decision of the latter.

3.3. In the next case of interpretation of the Hong Kong Basic Law (in 2004), the NPCSC, solicited by the central Chinese government, intervened in the constitutional reform process: Article 45 of the Basic Law stipulates that the general suffrage in the selection of the Territory's Chief Executive (subsequently appointed by the Central Government in Beijing) should become the ultimate way of election, after a gradual process; a similar rule is in Article 68 with respect to the elections of the Legislative Council. Annex I to the Basic Law provides for the method of election of the Chief Executive, based on limited functional, politically controlled constituencies; suggesting however that the system could be open for reforms after the elections of 2007.

[413] All authors researching Chinese law do emphasise the very strict operational relations and the structural political interferences of the Chinese political and governmental apparatuses with the work of Chinese courts; see above, Chapter One, Section 3; also see, e.g., I. CASTELLUCCI, *Rule of Law*, *supra*, especially at 51-58; A.H.Y. CHEN, *An Introduction, supra*; N. LIU, *supra*; R. PEEREMBOOM, *The Long March…, supra*; XIN Chuying, *supra*.

Annex II provides similarly for the Legislative council elections[414].

Large quarters of the Hong Kong public expected – against the inclination of the SAR's government and of central authorities – universal suffrage to become the method for the elections of the Chief Executive and for the Legislative Council following those of 2007. Or, at least, to have the reform process for democratisation started then, for both the legislative and executive organs of the SAR.

The interpretation of the NPCSC intervened in a very hot debate, clarifying that the process shall be controlled tightly by the central authorities in Beijing, and that its "gradual" nature shall prevail over the tension towards universal suffrage. So introducing, in fact, a the controlling role of Beijing in the SAR's democratisation process, expressly reinforcing the nature of the SAR as an "executive-led" administrative region, and effectively delaying universal suffrage *sine die*[415].

The controlling role discharged by Beijing over the democratisation in the SARs' elections is confirmed by a subsequent decision of the NPCSC, in 2007, setting a timetable for the process expressed in quite flexible terms[416].

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[414] Annexes I and II of the Macau Basic Law provide similarly, with references to elections after 2009.

[415] Y. GHAI, *Intersection*, *supra*, 42-43. The election processes for the Chief Executive and the Legislative Council have been reformed in 2010 to introduce some amendments for the elections to be held in 2012, still within the general model of functional constituencies.

[416] On 29 December 2007 the NPCSC issued a "Decision on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012 and on Issues Relating to Universal Suffrage", excluding that universal suffrage would be applied for the elections of 2012, both for the Chief Executive and for the Legislative Council; a report of the Hong Kong government is available online: <http://www.cmab-cd2012.gov.hk/doc/consultation_document_en.pdf>. The NPCSC Decision also stated that universal suffrage "may" become the model for the elections of 2017 – a possibility expressed in terms that made some political commentators state that "the only certainty is that Hong Kong will get

3.4. Another case of interpretation with heavy political implications took place in 2005, when the then incumbent Chief Executive resigned, two years before the end of his mandate – officially due to health problems; however most political commentators and scholars agree that it has been due to his falling into disgrace with central authorities.

An interpretation was requested to the NPCSC by the Chinese government, to have clarified whether the newly elected Chief Executive would serve an entire five-year new term according to art. 46 of the Basic Law, or just the remainder of his predecessor's term, until 2007. The latter solution prevailed, although contrary to the views of most Hong Kong observers and legal professionals. A remarkable document related to this issue, expressing the views of the SARs and central authorities, is the *Reply of the Department of Justice* of 1 April 2005 to the Bar Association – the latter having expressed support, instead, for a five-year term of the elected officer according to common law standards of statutory construction[417].

> The Department of Justice observed:
> " The Bar Association expressed concern about the Secretary for Justice's reliance on Mainland legal scholars when coming to her view on the Chief Executive's term of office… The Department of Justice wishes to emphasize that the provisions in the Basic Law relating to the appointment of the Chief Executive are provisions concerning affairs which are the

exactly what Beijing wants it to have": A. TAN, *Hong Kong on the March – Again*, in *Asia Times*, 11 January 2008; online at: <http://www.atimes.com/atimes/China/JA11Ad01.html>.

[417] The Chief Executive's Term of Office: Response of the Department of Justice to The Hong Kong Bar Association's Statement of 17 March 2005; online: <http://www.doj.gov.hk/eng/archive/pdf/barassoe.pdf> [hereinafter referred to as: *the HK DoJ Reply*].

> responsibility of the Central People's Government, and which concern the relationship between the Central Authorities and the Region. This being so, the Department of Justice considers it appropriate to seek the views of Mainland legal experts, particularly the views of members of the Legislative Affairs Commission of the NPCSC, as to the way in which the NPCSC would interpret those provisions…
>
> The Bar states that there are advantages in the common law approach of construing legislative intent by reference to the language of text in its context and its purpose, as opposed to relying on recollections of Mainland scholars of 'assumptions behind the intent of the Basic Law Drafting Committee and the NPC in adopting the Basic Law'.
>
> The Department of Justice agrees that there are advantages in the common law approach towards statutory interpretation. However, it notes that, when construing the Basic Law, the courts are not restricted to 'the language of text in its context and its purpose.' The Court of Final Appeal ruled in the case of *Director of Immigration* v *Chong Fung-yuen* that – 'Extrinsic materials which throw light on the context or purpose of the Basic Law or its particular provisions may generally be used as an aid to the interpretation of the Basic Law'"[418].

The NPCSC decision was based on a 'Chinese' interpretation of the 'five-year term' provided in art. 46 of the Basic Law: according to the NPCSC art. 46 provides for a fixed duration of the 'term of office', not necessarily of each individual elected officer – a fixed term of the overall duration of five years may thus include consecutive elected officers in case of early resignation of the originally elected

[418] *Ibid*.

one[419]. Support to this approach also came from the literal provision in Annex I, that elections for the Chief Executive be held in 2007[420].

The short-term Chief executive elected in 2005 was then re-elected in 2007: political commentators suggest the first, short term was applied for Beijing to test his performance, before allowing his re-election for a full five-year term[421].

Both cases were related to very sensitive political issues; in both case Bejing and the government of the SAR intervened preventing the 'legalisation' of issues – i.e. avoiding that doubts would end up before the courts, where another constitutional crisis like the one related to the *Ng Ka Ling* case, or at least some degree of political confrontation, would have been more or less certain.

3.5. The most recent interpretation of the Hong Kong Basic Law by the NPCSC materialised in 2008-2011; it has been the first ever activated by the Hong Kong CFA according to Article 158 of the Basic Law, within the frame and towards the end of judicial proceedings having escalated the entire judicial pyramid in the SAR – receiving a large coverage in Hong Kong media as "the *Congo* case"[422].

A US investment fund, holding two ICC arbitral awards against the Democratic Republic of Congo, obtained from the Hong Kong High Court leave to enforce them in the SAR for an amount of over 100

[419] *Ibid.*

[420] Y. GHAI, *Intersection*, *supra*, 44.

[421] *Ibid*.

[422] *FG Hemisphere Associates LLC v Democratic Republic of Congo & Ors*, (2009) 1 HKC 111 in the Hong Kong SAR High Court of First Instance [hereinafter also referred to as: *Congo*, CFI]; rev'd (2010) 2 HKC 487 [*Congo*, CA Feb 2010]; leave to appeal to the CFA requested and granted (2010) 4 HKC 203 [*Congo*, CA May 2010]; provisionally affirmed with an interpretation to the NPCSC required by the Court of Final Appeal (2011) 4 HKC 151 [*Congo*, CFA June 2011]; finally affirmed (2011) 5 HKC 395 by the Court of Final Appeal [*Congo*, CFA September 2011] following the interpretation of the Hong Kong Basic Law given by the NPCSC on 26 August 2011.

million US dollars. The assets attached and frozen belonged to Chinese State-owned enterprises [SOEs], and were to be used for payments to the African government within the framework of the Chinese government economic cooperation with developing countries.

The government of Congo applied to the Court of First Instance of the Hong Kong SAR [CFI] to set aside the leave granted to enforce the awards in the SAR. The African government had risen a defense in relation with its sovereign activities, "acts of State" not being subject to the jurisdiction of Hong Kong courts according to Article 19 of its Basic Law.

The Chinese government also had an interest in seeing an absolute concept of sovereign immunity enforced; and in keeping its activities (and related resources) for economic cooperation with developing countries not subject to the jurisdiction of Hong Kong courts – thus immunised from attacks of creditors of the relevant country.

A letter of the Mainland government commissioner for Foreign Affairs in the Hong Kong SAR, arguing in favour of the Chinese absolute doctrine of sovereign immunity was sent to the CFI and put on the record of the proceedings. The Secretary of Justice of Hong Kong also intervened in the case to support the view of the Chinese government; the argument was that dealing with the concept of 'act of State' involved national foreign policy; and that it was impossible that a legal concept having a substantial foreign policy dimension could have different contents in the SAR and the Mainland.

The opposing legal position of the US investment fund was connected to the narrower concept of 'act of State' firmly established at common law, also in Hong Kong, which would not immunise the resources in the case at hand from jurisdiction.

In 2008 The CFI ordered the leave to enforce the awards to be set aside, recognising the non-purely-commercial nature of the

activities to which the monies frozen were related[423]. The CFI ruling was then reversed by the Court of Appeal [CA] in 2010, by a majority decision, and the injunction orders to freeze assets was restored, based on the more restrictive common law concept of sovereign immunity[424]. The CA, however, granted leave to appeal to the CFA considering the need to deal with the issue of interpretation of the Basic Law[425].

As the case reached the CFA, the government of Hong Kong solicited the court to require an interpretation of the NPCSC according to Article 158 of the Basic Law, to have the actual scope of "act of State", as provided in Article 19 of the Basic Law, clarified.

And so the CFA did, with a decision taken by majority of three members against two which did not surprise many in the legal community, upholding the idea that there cannot be two different doctrines of 'act of State' in two different areas of the same country, and supporting the view that the Chinese concept is also applicable in Hong Kong since the handover. The CFA arrived at the following conclusions which, in accordance with art 158(3), are necessarily tentative and provisional, namely, that:(a) The HKSAR cannot, as a matter of legal and constitutional principle,adhere to a doctrine of state immunity which differs from that adoptedby the PRC. The doctrine of state immunity practised in the HKSAR, as in the rest of China, is accordingly a doctrine of absolute immunity … Prior to rendering a final judgment in this matter, the Court is under a duty pursuant to art 158(3) of the Basic Law to refer, and doeshereby refer, the questions (…) of this judgment tothe Standing Committee of the National People's Congress, beingquestions relating to the interpretation of arts 13 and 19 of the Basic Law[426].

[423] *Congo*, CFI 2008.

[424] *Congo*, CA Feb 2010.

[425] *Congo*, CA May 2010, para 13.

[426] *Congo*, CFA 2011, para 183, joint judgment of the majority (Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ).

The CFA thus issued a decision requesting the actual meaning of 'act of State' as provided in Article 19 of the Basic Law be clarified by the NPCSC. Additionally, the CFA provisionally ruled revoking the injunction freezing Chinese payments to be made in favour of the Congolese government, supporting the Chinese concept of "act of state" as applicable in Hong Kong as well, and thus the Hong Kong courts' lack of jurisdiction[427].

The NPCSC issued then its interpretation confirming that the Chinese concept of "act of State", related to an absolute immunity of states from jurisdiction of courts, shall also be applied in the courts of the SAR; the CFA then confirmed its provisional decision[428].

4. Principles identified – a tentative list

The above review of the interpretations given by the NPCSC reveals a significant amount of flexibility introduced in the legal rules applicable in Hong Kong and in the ways they are interpreted. These findings are consistent with an instrumental concept and function of the law which typically belongs to the Chinese idea of the rule of law[429].

This concept of the law allows the Chinese authorities operational latitude – up to an almost unrestricted power for the top echelon of the Mainland central government organs – when dealing with subjects and/or lower level entities, perhaps including an entire administrative region; rather than having the law defining and limiting

[427] Joint judgement of the majority, *Congo*, CFA June 2011, paras 407, 413 and 415.

[428] Interpretation of 26 August 2011, reported by *China Daily* on 27 August 2011: "Top legislature interprets HK law", online: <http://www.chinadaily.com.cn/cndy/2011-08/27/content_13201530.htm>. The entire text of the interpretation of the NPCSC is reproduced in CFA, *Congo*, September 2011.

[429] See, e.g., R. PEERENBOOM, *The Long March…*, *supra*, and I. CASTELLUCCI, *Rule of Law*, *supra*.

Chinese government organs' scope of legitimate action.

A number of important principles of the common law tradition and of Western rule of law seem to have been subjected to the pressure, when not plainly to the superimposition, of a more Chinese, socialist vision and of some of its implementing devices:

1) courts now "adjudicate" (art. 2 of both Basic Laws). They are not inherently competent to "interpret" the Basic Laws: they can only do it in relation to cases of "local" relevance having so been *authorised* by the NPCSC (art.143 of Macao Basic Law; art.158 of Hong Kong Basic Law); and certainly should not try and declare laws invalid against it – as demonstrated by the *Ng Ka Ling* case.

2) The term "local" in Article 2 of both Basic Laws, stipulating that both SARs enjoy "judicial power including local final adjudication" seems to identify an 'impact factor' of the decision to fall within the autonomy of the SARs' judiciaries, rather than a purely geographic indicator of where the case producing the decision is originated, consistently with Chinese procedural principles on attribution of jurisdiction as discussed above[430]: SARs' laws apply to 'local' activities; 'local' judicial decisions are given according to 'local' standards, unless a larger, national interest is involved.

3) The Basic Law interpretive device gives the NPCSC the power to decide what is 'local' in individual instances – i.e. falling "within the limits of the autonomy of the Region" as per art. 158 of the Hong Kong Basic Law, and also, in such cases.

4) the power to "interpret" the Basic Law – in the Chinese sense of exercise of a law-making power, thus introducing legal rules produced in the Mainland, binding on the SARs' courts.

5) Moreover, interpretations may be issued by the NPCSC at its will: not only when solicited by the SARs highest courts[431], or by any

[430] See above, "Legal Infiltrations", end of Section 3.2.

[431] As clarified by the CFA with the *Ng Ka Ling, Clarification*; followed by a

SAR authority[432], consistently with the already mentioned Chinese principles on attribution of jurisdiction to organs of different level, and related power of higher authorities to intervene with lower ones to take charge of a given case.

Interpretations of the NPCSC may, in fact, also be issued after a case decided 'wrongly'[433], or with a case still pending[434], or without any case pending in court[435].

This gives Beijing a tool to, directly and unrestrictedly, intervene in the legal systems of the SARs, and to define the extent of the SARs' courts' jurisdiction; introducing thus a significant element of uncertainty in the SARs' legal systems. More generally, the NPCSC has the power to define the spheres of authority of the two SARs' governments, making the latter *ex ante* assessment uncertain.

6) Mainland legal doctrines and method of statutory interpretation are part of the applicable SARs' legal systems, in all cases of interpretation of national laws of the PRC applicable in the SARs according to Annex III of the Basic Laws[436], and also for NPCSC's interpretations of the Basic Laws issued whenever a larger-than-the-SAR interest (as assessed by the NPCSC) is involved[437].

7) The SARs' Chief Executives' pre-eminent positions in both regions, the political continuum and strict cooperation between each

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request from the Hong Kong government to the NPCSC: *HKCE Right of Abode*, *supra*.

[432] As it has been the case with the 2004 and 2005 interpretations on elections and term of office of the Chief Executive, requested to the NPCSC by the Chinese government.

[433] As in the interpretation following *Ng Ka Ling*.

[434] As in the *Congo* case.

[435] As in the 2004 and 2005 interpretations.

[436] On the interpretation, e.g., of the PRC's Law on Nationality in Hong Kong courts to be done according to Mainland standards, see *Azan Aziz Marwah v Director of Immigration & Anor*, CFI, [2009] 3 HKC 185, Constitutional and Administrative Law List no. 38 of 2008.

[437] See the 1999 NPCSC interpretation in the *Ng Ka Ling* case (excerpt cited *supra*); and the explicit mention of Mainland doctrines in the *HK DoJ Reply*, *supra*.

Chief Executive and central authorities, light checks and balances, and the NPCSC interpretive capability, make the SARs' legal environment very executive-led and policy-sensitive, more similar thus to the Mainland's; and very subject to institutional and political pressure from Beijing.

8) All these factors also facilitate the introduction of Chinese critical legal rules into the SARs, due to the already seen alerting/soliciting role discharged by the Chief Executives with the NPCSC in relation to important matters.

9) The Chief Executive's fixed term of office corresponds, consistently with Mainland practices for political appointees, to an institutional cycle with a fixed length which may include several officers, consecutively elected – as clarified by the interpretation of 2005. The mechanism is designed to improve stability and foreseeability in the political process and to enhance control over it, including sometimes to test elected officers' performance before granting them a full term.

10) Interpretation of law in the two SARs can be very flexible according to policy needs and not subject to consistent technical-legal standards: contextual elements may be relevant sometimes (as in the the 2005 interpretation of term of office of the Chief Executive)[438], a very literal interpretation may applied in other cases (as in the 2004 interpretation on universal suffrage; or as in the Macau government flexible approach to law degrees "issued in Macao" – discussed below).

11) Procedural rules play a very ancillary role; decisions are taken following the methods more politically appropriate for the case at hand. They may include such extraordinary output as the 'clarification' issued by the CFA in *Ng Ka Ling*, based on its "inherent power" rather than according to established procedural law[439]: basically a *functus*

[438] *Ibid*.
[439] *Ng Ka Ling*, *Clarification*, *supra*.

officio non-decision, issued to pave the road for subsequent developments including the HKCE Statement[440] and the NPCSC interpretation of 1999.

A judicial product quite far from any Western concept of rule of law, rather akin in form to Chinese law features such as the re-trials following governmental/procuratorial requests in cases of 'wrong' decisions[441]; and akin, in substance, to an announcement of future change of the rule previously applied.

12) In general, the 'legalisation' of issues is not considered the best way to deal with complex or sensitive situations.

13) Immigration policy clearly seems to prevail over close family relations, notwithstanding the protection afforded to the latter in the Basic Law and in international covenants, through ways (restrictive interpretation of Article 24 of the Basic Law done also considering legislative intent, purpose and context, according to Mainland standards of statutory interpretation[442]) and to an extent (certainly also due to policy reasons) that would not have been likely in many Western jurisdictions – as demonstrated by the *Ng Ka Ling* case and the subsequent interpretation of 1999[443].

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[440] HKCE, *Right of Abode*, *supra*.

[441] See above, Chapter One, Section 3; I. CASTELLUCCI, *Rule of Law*, *supra*, 51-54.

[442] See the 1999 NPCSC interpretation in the *Ng Ka Ling* case (excerpt cited *supra*); and the explicit mention of Mainland doctrines in the *HK DoJ Reply*, *supra*.

[443] Even before the Human Rights Act of 1998 the English law displayed some attention to parenthood and a 'softer' attitude, especially when young children have been involved, in assessing the extension of the right of abode; see, e.g. *R v Secretary of State for the Home Department ex parte Ajayi & Anor*, Queen's Bench Division (Crown Office List), CO/1605/92, 12 May 1994, 12 May 1994; *R v Secretary of State for the Home Department, Ex parte Ghaffar*, Court of Appeal (Civil Division), 14 October 1996; *R v Secretary of State for the Home Department, ex parte Natufe*, Queen's Bench Division (Crown Office List), CO/953/96, 22 January 1997.

'World' common law also displays some 'friendlier' approach elsewhere, of extended protection to close family members grounded on constitutional, international (*and comparative*!) law arguments: see, e.g. *Rattigan and Others v The Chief Immigration Officer and Others*, Supreme Court, Zimbabwe, 1995 (1) BCLR 1 (ZS);

By extending this idea a little bit, it could be said that policy interests prevail over individual rights and (may thus twist the interpretation of) legal norms, much more often than in the Western tradition, consistently with general socialist political and legal principles.

14) Universal suffrage is seen unfavourably; its implementation is being delayed by straining the meaning of the transitional provisions in Basic Laws Annexes I and II, a different system of election based on functional constituencies being preferred – as proven by the political case related to the selection of the Chief Executive and of the Legislative Council of Hong Kong culminated with the NPCSC interpretation of 2004.

15) An absolute concept of sovereign immunity, typical of the Chinese law has been introduced in both SARs with the interpretation of 2011; thus providing better protection of Chinese policy interests – disregarding Western market economy assumptions and Western law principles that tend to restrict immunity and equalise sovereigns to individuals before the courts in a number of instances[444].

With these principles seeping in, it is reasonable to conclude that a superimpostion of Chinese general framework values is taking place, however unchanged the SARs' legal systems may look at a first

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1994 SACLR LEXIS 255.

[444] A possible new issue might have appeared recently, as the Hong Kong Court of First Instance entertained a case between a Hong Kong plaintiff and a Mainland defendant involving the arrest in Hong Kong of a search and rescue vessel belonging to the latter; the defendant turned out to be an entity organic to the Chinese Government. The Court dismissed the defendant's application to release the vessel based on the doctrine of crown immunity – after the handover still applicable in Hong Kong with respect to China – on the grounds that the defendant, who had the right to claim immunity, had in fact waived its right by not rising a timingly claim to that effect; *The Hua Tian Long* (no. 3) [2010] 3 HKC 557.

The case is currently under appeal; the interesting issue in the coming appellate decision will be related to the very possibility of a waiver for crown immunity, possible at common law, which is doubtful instead after the final outcome of the *Congo* case.

glance – including more or less face-saving statements and lip service paid from all institutional actors both in the SARs and in the Mainland (in fact, a phenomenon more and more confined to Hong Kong local debate) on the preservation of the SARs' original legal traditions[445].

5. Dynamics of the interference

5.1. A well-known scholar, having researched for long time the Hong Kong legal and institutional environment, expressed the view that the Hong Kong Basic Law, if being to a significant extent a common law piece of legislation due to its contents in relation to fundamental rights[446], is a legal enactment meant more to keep the Hong Kong legal system securely separated from the Chinese one, than to produce integration[447].

Perhaps those statements reflect a common law point of view, and the related normative approach to legal text which is inherent both in any legal statute at common law, and in the eyes of an observer with a common law background. However, it is also to be considered that both Basic Laws are Chinese pieces of legislation: their mentioning fundamental rights does not make them, when 'in action', common law enactments more than the list of fundamental rights in the Constitution of China makes it a common law constitution.

It is difficult to consider the two Basic Laws as enactments hailing from the two different legal traditions of the two SARs' former colonial powers: they are almost identical, enacted in Beijing by Mainland legislative authorities within the framework of the Chinese constitution, for the two Chinese SARs. Their interpretation

[445] See *Ng Ka Ling* CFA, *Clarification*, *supra*, and HKCE, *Right of Abode*, *supra*.
[446] Y. GHAI, *Intersection*, *supra*, 370-372.
[447] *Ibid.*, 367.

mechanisms applicable for the most sensitive cases, managed by the appropriate Chinese authorities according to their legal institutional and political system, also tend to confirm that fundamental truth.

It is also true, on the other side, that the SARs courts will ordinarily interpret their Basic Laws 'from below', according to their traditional Western standards, as far as the case at hand has a 'local' relevance. Hong Kong courts will, moreover, continue to work according to common law standards most of the times, when no Basic Law provision need to be interpreted in the cases dealt with. So will, *mutatis mutandis* – perhaps with not as strong a resistance as the one displayed by the Hong Kong environment – Macao courts with their local version of the Portuguese civil law.

The relative indifference of the two visions and legal environments (the Mainland's and that of each SAR) in ordinary cases cannot exclude the existence of specific areas of the law, or particular instances, when the two visions come to contact; more and more they will, in fact, with the social and economic integration of the SARs with the Mainland: pressure 'from the top' and 'resistance from below' produce complex dynamics of interaction, negotiations and adjustments. This situation has aptly been described through the theoretical frame of a legally pluralist environment, with China and the two Regions playing the role of semi-autonomous social and legal fields[448].

5.2. The legal interface between these semi-autonomous fields are the two Basic Laws; their 'dual' nature – of Chinese pieces of legislation for two Chinese administrative territorial partitions; and of local quasi-constitutions to guarantee the SARs' previous legal environment, to be used by local authorities as the primary source of

[448] C. CHAN, *Reconceptualising the Relation between the Mainland Chinese Legal System and the Hong Kong Legal System*, in (2011) 6(1) *Asian Journal of Comparative Law*, Article 1.

their common law (Hong Kong) or civil law (Macao) legal system – and the tension between these two visions, and related technical standards of interpretation/application to has certainly been clearly pointed out[449].

Still, that 'duality' is certainly an 'unequal duality', with the underlying struggle producing an increasingly visible prevalence of the 'One Country' element over the 'Two Systems' one[450], as demonstrated by the very different way the Hong Kong CFA dealt with the *Ng Ka Ling* case in 1999 and the *Congo* case in 2011[451].

The Chinese political-legal element, present and prevailing in the Basic Law and its top-level interpretive organ and mechanism, may transform the black-letter rules contained therein into a product which is inherently flexible, fuzzy in meaning. Rules become 'softer': guideline elements, to be used in finding syntheses at the end of dialectic processes; directives on how to flexibly reconcile opposite tensions, admitting variable solutions in individual cases. They come to share to some extent the nature of the "basic policies" (*jīběn fāngzhēn zhèngcè*, 基本方針政策)[452] the Chinese government undertook to follow in the Joint Declarations and their Annexes – most of which are reproduced, more or less rephrased, in the text of both Basic Laws[453].

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[449] *Vallejos v Commissioner of Registration & Anor*, CFI, [2011] 6 HKC 469, Constitutional and Administrative Law List n. 124 of 20120, paragraphs 8, 9, 10.

[450] D. CHANG, *The Imperatives of One Country, Two Systems: One Country Before Two Systems?*, in *Hong Kong Law Journal*, 37(2) (2007), 351.

[451] See above, Section 3, *passim*.

[452] D. CHANG, *supra,* 354-357, elaborates on "*jīběn fāngzhēn zhèngcè*" (基本方針政策) in both Basic Laws' Preambles – translated in the English version of the Hong Kong Basic Law as "basic policies" and in the Portuguese version of Macao as "políticas fundamentais". In Chinese that wording in fact adds a further element related to the idea of "policy" or "political directive" (*fāngzhēn,* 方針) to the original words in the Joint Declarations – *jīběn zhèngcè,* 基本政策, also translated as "basic policies", "políticas fundamentais".

[453] It is certainly unusual how in those two international law instruments the Chinese government undertook obligations to "apply policies" – each instrument also

In my opinion, the purpose of the Basic Laws is not just that of isolating the SARs' legal systems, as readable in their black-letter text from a common law normative perspective. It is also – or perhaps preeminently, from the Chinese functional rather than normative point of view – the one of providing Mainland authorities with steering capability over these systems, by framing them within a cage of flexible provisions. The Basic Laws 'in action' may thus probably produce in fact some convergence of the SARs, over time, towards a more Chinese societal model – rather than securing the immutability of the regions' previous state of affairs.

Western powers will certainly not cry shame on these developments. As China itself became a global political and economic superpower, British and Portuguese concerns about an enforcement of the Chinese socialist system in the former colonial territories – the original reason leading to the Chinese undertakings in the Joint Declarations – have lost much of the plausibility they had in the 1980s; to say nothing, of course, about the two former powers' actual capability to intervene effectively, even if they willed.

6. De-legalisation: the Closer Economic Partnership Arrangement (CEPA)

Another example of 'hard superimposition' of Chinese concepts and operational models and mechanisms on both SARs' legal systems is given by the provisions for dispute resolution between each SAR and the Mainland within the framework of the *Closer Economic*

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featuring an Annex I, in which the "basic policies" listed in the Joint Declarations are elaborated upon by the Chinese government. The initial articles of both Basic Laws ("General Principles") reproduce more or less the "basic policies" agreed to in the Joint Declarations; the elaborations contained in each Annex I are the basis for many of the Basic Laws' other articles.

Partnership Arrangement (CEPA).

The CEPAs are institutional arrangements concluded in 2003 between the Mainland and both SARs, creating a tariff-free trade zone and regulating it with specific provisions. The entire scheme is aimed at avoiding problems related to the three separate WTO memberships – of the two SARs, and of Mainland China's after its accession in 2001 – which could otherwise make the international WTO legal mechanisms applicable also in the certainly not international relations between China, Hong Kong and Macao[454].

The disputes between the Mainland and either SAR on tariffs and trade, according to the CEPA, shall be resolved through amicable negotiations, within a bilateral steering committee producing consensual decisions[455].

If the existence of alternatives to judicial mechanisms to solve economic and trade disputes is quite common worldwide, it is also true that provisions for negotiations or mediation mechanisms never prevent, should these fail, the ultimate recourse to adjudicatory mechanisms – whether judicial, quasi-judicial, arbitral or else.

The remarkable element in the case of CEPA is exactly this: no other way or remedy is available: neither, e.g., of the kind implemented within the WTO, nor of any other kind – perhaps inevitably, given the unequal relation between the parties. Differences are not adjudicated, in this very important Chinese economic environment: they are de-legalised instead and, ultimately, resolved politically.

This amounts to an application of a very Asian and Chinese traditional approach in dispute resolution, also present in the classic Socialist model of resolution of differences between economic units. The scheme is certainly distant from the idea of a third-party adjudication inherent in the Western concept of rule of law, based on

[454] Chien-huei WU, *supra*, 29-32.

[455] Art. 19 CEPA, especially art. 19.5; Chien-huei WU, *supra*, *passim*.

the existence of certain foreseeable rules, which can be enforced through a technical-legal mechanism featuring a third party as the deciding body or official.

7. Hybridisation, the 'soft' way

7.1. The introduction of policies and legal doctrines in Hong Kong consistent with those of the Mainland have required sensitive and controversial interpretation of the territory's Basic Law by the NPCSC, to overcome the resistance of the Hong Kong legal community and its principle of *stare decisis*.

Macao's civil law legal system – certainly closer than a common law legal system, in general structure and mechanisms, to the Chinese one – proved more flexible instead, admitting lesser or no binding force for judicial precedents[456]. In Macao this is associated with a high level of observance for the literal provisions of the statutory law – with a conservative attitude and a low level of judicial activism. This rigid attitude seems to be shared by courts in at least some of the former socialist jurisdictions of Eastern Europe, and differs considerably from trends in Western legal systems of continental tradition, where some

[456] Even the very Tribunal de Ultima Instância, the highest court in Macao, in case n. 4/2001 in the decision of July 4, 2001 [TUI 2001], Judge Lai Kin Hong, quoted R. David's *Les Grand Systèmes…*, and expressed the view that "[courts are] not bound by the rules they establish... if in a new decision the judges apply a rule they had previously applied, this is not due to the authority that rule acquired for the fact they have consecrated it; this rule has no binding effect. ...it is always possible a change in the case law without the court being obliged to justify it. Case law neither threatens the framework nor the very principles of the law. A case law rule only survives and is applied as far as the judges – each judge – consider it as a good one. At principles' level it seems important to us that the judge is not transformed into a legislator. This is what is sought in the roman-german family...", online at : http://court.gov.mo/pdf/TUI/TUI-S-4-2001-VP-II.pdf [original in Portuguese; translation by author]

rule-making role of the courts is increasingly recognised[457].

> These considerations all suggest further interesting comparisons and research, to be made with respect to the legal environment in China, Chinese Macao and even, why not, revolutionary/Napoleonic France. It must be stressed that this attitude, shown by the legal system of Macao, seems to be shared by other former socialist countries' jurisdictions[458]. From the recognition just made, the idea of courts being just *la bouche de la loi* seems to have served well not only in the political-legal environment of France at the end of the eighteenth and beginning of nineteenth centuries; it probably also serves well in socialist contexts, in those in transition from socialism, or even in those in transition towards… something related somehow to socialism – as is the case for Macao.

Another fact to be considered is that special legal procedures are established by law in Macao to generate uniform judicial doctrines in local courts, especially in criminal matters. They are subject to centralized control, with mechanisms involving the territory's highest court and prosecutor both for their development and modification, and to ensure that policies adopted with those special procedures at the top of the judiciary are consistently enforced all the way down the court system[459]: changes in interpretation of statutory law are possible, in Macao[460] – but they would probably follow a policy input rather than a

[457] E. HONDIUS, *General Report* in E. HONDIUS (ed.), *supra*, 19-23.

[458] *Ibid*.

[459] These mechanisms are described in I. CASTELLUCCI, *National Report*, *supra*.

[460] It is remarkable how the Macanese judge quoted in TUI 2001, *supra* note 89, put effort in combining in a single, apparently innocent, phrase two rather opposing principles: court decisions are not binding and can be departed from in subsequent

purely legal re-elaboration of legal rules.

The absence of the *stare decisis* principle made it much easier for the Macanese courts to smoothly implement policies and legal doctrines, consistent with the new political environment after the handover to China. Besides showing a low degree of judicial activism, the courts of Macau can still operate at a micro-level, if the political input they receive so warrants, far more flexibly than those of Hong Kong – in fact, the Basic Law of Macau has never required an interpretation by the NPCSC, so far.

In a case not very different form Hong Kong's *Ng Ka Ling* the Court of Appeal in Macao enforced a piece of restrictive Macanese legislation without any need to officially ask Beijing for assistance in interpreting the Basic Law: pre-handover doctrines and precedents did not bind the Macanese court[461]. The court simply decided the case following a legal reasoning consistent with the government policy, denying the spouse of a foreign authorized resident the right to reside in the territory[462].

7.2. Adopting a more Western stance, the Macanese court could also have declared the relevant legislation unconstitutional or invalid in the mentioned case, as the Hong Kong CFA had done in 1999. The fact that it did not do so is not merely due to the absence of the principle of *stare decisis*: an even superficial general observation of both SARs reveals how Hong Kong has more independent judiciary, legal

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cases; and the one that the courts are however, 'at principles' level', no law-makers – thus being unable to actively promote developments in the law. In fact, providing a justification and legitimising the possibility for the courts to behave more or less rigidly or flexibly – in fact discretionally ('without the court being obliged to justify') – according to the needs of specific cases.

[461] See TUI 2001, *supra* note 89.

[462] Tribunal de Segunda Instância, July 13, 2006, file no. 82/2006 [TSI 2006], available online at: <www.court.gov.mo/pdf/TSI/TSI-A-82-2006-VP.pdf>

profession and media system[463].

The Hong Kong political and legal environment is traditionally firmer in protecting individual rights vis-à-vis public interests. Hong Kong also has a larger critical economic mass, a strong economy based on Western ideas, and a higher attachment to Western liberal values in both economy and society.

All this makes Hong Kong a less likely place for social legal and political experiments with a socialist or communitarian flavour.

To some extent, Hong Kong remains able to stand political pressure from the Mainland; this generates complex political dynamics and sometimes some tension as well.

Compared to Hong Kong, Macao has a relatively small local economy (with related local laws, currency, etc.) and a large gambling economy operated on an offshore mode, so to speak, by a mostly non-Macanese elite. The territory's economy is largely dependent on China – which can decide the Macanese economy to soar, or strangle it, by a simple change in its visa-issuing policy to mainlanders travelling for leisure.

Macao's main business operations and large Macao-related economic or financial transactions are often negotiated, governed, litigated, arbitrated outside the territory – especially in Hong Kong, with its language, law, courts, arbitral institutions, currency[464].

Compared to Hong Kong, Macao generally offers less resistance to the changes required by its reversion to the PRC. It offers a more homogeneous society with deep Chinese roots, smaller bargaining

[463] See, e.g., LO Shiu-Hing, S., *The Politics of Article 23 Consultations in Macau*, article on the website of the Hong Kong Democratic Foundation, online at: www.hkdf.org/newsarticles.asp?show=newsarticles&newsarticle=225.

[464] The Macao Pataca is nowadays a purely local currency, not very welcome anymore even for retail commerce in the bordering Mainland city of Zhuhai – let alone in Hong Kong or the rest of the world where it is almost unknown and not converted. Most significantly, the Pataca is not even usable for gambling in Macanese casinos, where the Hong Kong dollar is the preferred currency.

power and greater legal flexibility vis-à-vis new governmental policies, whether introduced through legislation, administration or the judiciary. It also offers a legal system more apt, in language and technicalities, to introduce and enforce more communitarian ideas: it is a fact that most socialist countries' legal systems developed within, or as ramification of, the civil law tradition.

As a result, Macao is more likely to become a laboratory for several issues related to the legal-political-economic transition *of both* SARs; a first, convenient bridgehead for later, 'soft' infiltration or superimposition of Chinese values, in Hong Kong as well, that would be too controversial there to be introduced there *ex abrupto*.

7.3. A recent and important example of that role of Macao is given by legislation on national security. This area falls within the competence of each SAR, according to Article 23 of their Basic Laws. Art. 23 was introduced in the Basic Laws as part of the central government policy in reaction to the 1989 Tienanmen events, to prevent the two SARs from becoming possible safe bases for activists of all sorts[465].

Since the handover Hong Kong has avoided enacting such a law, as part of the public fears it could become a tool for restrictions on civil and political liberties – also considering the Chinese approach to security criminal laws, featuring a degree of vagueness in definition of crimes which gives the government a latitude to prosecute considered unacceptable by many in the SAR[466]. Political debate related to a bill on national security law in Hong Kong culminated during 2003 in mass rallies and in the subsequent (temporary?) abandonment of the idea[467].

[465] H. FU, *The National Security Factor: Putting Article 23 of the Basic Law in Perspective*, in S. TSANG (ed.), *Judicial Independence and the Rule of Law in Hong Kong*, Hong Kong, 2001, 73.

[466] *Ibid.* at 76.

[467] On the Hong Kong discourse on human rights, national security and the

More recently, after similar debates in Hong Kong, Macau passed a national security law under Article 23 of its Basic law in 2009[468]; a curious border incident followed[469].

Macau was praised by the government of the PRC at the highest possible level for the enactment of this piece of legislation, with a clear message delivered from President Hu Jintao – which was probably a not-so-oblique message to Hong Kong at least as much as it was directed at Macao. The occasion was President Hu's speech pronounced for the tenth anniversary of the Macao handover and foundation of the Macao SAR:

> " First of all, it is imperative to have a full and correct understanding and implementation of the 'one country, two systems' principle, [Hu] said, noting that the key is to realize the most extensive unity under the banner of loving the motherland and loving Macao. Hu noted that 'one country,

implementation of Article 23 in general, see FU Hualing, C. PETERSEN, S.YOUNG, S. (eds.), *National security and fundamental rights. Hong Kong's article 23 under scrutiny*, Hong Kong, 2005; S. YOUNG, S. (ed.), *Hong Kong Basic Law Bibliography*, Hong Kong, 2006; J. CHAN, *Hong Kong Human Rights Bibliography*, Hong Kong, 2006.

[468] There is no literature yet on the promulgated Macanese law. Very interesting insights on the legislative process are given in a report on the draft law prepared for the Macau Government during the public consultation period towards the end of 2008: J.A.F. GODINHO, *The Regulation of Article 23 of the Macao Basic Law, a commentary on the Draft Law on Public Security*, available at SSRN-1303245-1.pdf. According to this report the Macanese law is a piece of legislation designed at least in part to send a message of moderation to the public (*Ibid.*, 21), with less restrictive provisions than the ones originally devised in the Hong Kong proposals of some years ago, especially on the issue of liberty of associations to operate in the Territory (*Ibid.*, 19).

[469] Occurred in March 2009 immediately after the entry into force of the Macanese law, involving a prominent Hong Kong academic. The academic had previously and publicly expressed concerns about the Hong Kong draft Article 23 law in 2002-2003. Trying to enter in Macao to participate to academic activities, he was denied access at the border.

two systems' is a complete concept, with 'one country' closely linked with 'two systems' On the one hand, the existing social and economic system and the way of life in Macao must be maintained, and on the other hand, the sovereignty, territorial integrity and security of the country must be safeguarded, and meanwhile, the socialist system practice in the main body of the country must be respected, the president noted. Hu said that it is imperative to safeguard the high degree of autonomy enjoyed by the Macao SAR and fully protect the master status of the Macao compatriots, but it is also imperative to respect the power endowed upon the central government by laws, and to firmly oppose any external forces in their interference in Macao's affairs. Early this year, the legislation of Article 23 of the Basic Law of the Macao SAR passed smoothly, a move Hu said fully reflects the strong sense of responsibility of the Government, Legislative Assembly and people of all circles of the Macao SAR to safeguard national security and interests. 'The move also provides a strong guarantee for Macao's long-term stability,' said the president. 'As long as the compatriots of Macao unite under the banner of loving the motherland and loving Macao, they will be able to lay a solid political foundation for Macao's long-term prosperity and stability,' said Hu…"[470].

Very, very clear indeed.

Political commentators seem to think that Hong Kong is now

[470] Xinhua (the PRC's official news agency), press release (21 December 2009): *President HU: Great Motherland always a strong backing for HK, Macao*, reported in an English translation on the website of the Chinese Embassy to Albania: http://al.china-embassy.org/eng/zggk/t646818.htm

more strongly expected to follow suit[471].

Introducing critical 'hard' reforms in Macau first, allows Beijing an assessment of their impact. It also turns them into political precedents for subsequent reforms in Hong Kong as well – as a part of a 'softer' strategy for the latter SAR.

China's soaring economy, the growing economic flows between the PRC and the SARs within the framework of the CEPA, the integration of local economies in the Pearl River Delta Region will probably do the rest, making Hong Kong's also very Chinese soul emerge and prevail, perhaps faster than many would expect.

7.4. More evidence of a softly managed convergence of the Macanese legal system towards the Chinese one is available.

A significant occurrence after the handover was the introduction in Macao of law degrees in (mainland) Chinese law. These degrees are issued locally, producing since 2006-2007 a number of graduates entering the Macao civil service to positions restricted to law graduates, previously reserved to the holders of degrees in Portuguese or Macanese Law.

A problem emerged when Chinese Law graduates started applying for being associated to the local bar: the bar applicable rule requires a law degree "issued in Macao"[472]. The holder of a different degree would be required to attend a one-year adaptation course in

[471] "Some deny any such possible influence of Macau developments on Hong Kong, considering that the two SARs are totally different, but this seems too simplistic a claim: the Macau precedent may, at least, be a factor to be considered or that cannot be ignored when the time arrives for a second attempt to pass legislation in Hong Kong": J.A.F. GODINHO, *Art.23*, *supra* at 4; also see LO, *The Politics of Article 23*, *supra*; several articles have also appeared on the media in relation to the promulgation of the Macao law; see, e.g., the report from Hong Kong-based journalist V. ENGLAND, *Macau law a 'bad example' for Hong Kong*, in *BBC News* (3 March 2009), online at: http://news.bbc.co.uk/2/hi/7920275.stm.

[472] Article 4 of the Law on Lawyers of 1999.

Macanese law and then pass an exam administered by the Lawyers' Association (which most failed), before being able to proceed with training and eventually try the bar exam.

The mentioned rule of art. 4 has been interpreted literally by applicants – backed by the government of the region, "to avoid discrimination" – in the very literal sense of allowing the holder of a law degree *issued* in Macau to join the bar as trainees, without having to attend the one-year course of adaptation to local law and then to undergo its final exam administered by the Macau Lawyers' Association.

This merely literal and geographic meaning given by the government to the words "issued in Macao", irrespective of any systemic or contextual interpretation, encountered strong opposition in the local bar, still dominated by Portuguese and Portuguese-trained lawyers. One trainee, having failed the adaptation course final exam, sued the Bar Association in court to have his degree recognised as equivalent to a Macau law degree. No Macau lawyer would take his defense, and he had to apply to have counsel appointed *ex officio*. The case is still pending. The solution, meanwhile, has been that the adaptation course final exam has been transformed into an exam for being admitted to the training, for all graduates including those holding a degree in Macau law: they don't need the adaptation course, but now they also have to pass the exam, as Chinese law and graduates in other laws have to, to be admitted to training[473].

7.5. The legal community in Macao is transforming, from being characterised by a strong Portuguese legal presence towards a more Chinese-influenced body of judges, lawyers, government officials.

[473] Details reported over this case, quite sensitive in Macao, are not available in any published source. Those reported above come from personal conversations I entertained with members of the local legal community.

Pressure seems to be detectable in Macao – probably based on cultural and economic factors already described – to diminish the use of Portuguese (spoken by less than 3% of the local population) as working language for business and government, in favour of Chinese and English – by accident, the two official languages of Hong Kong; the latter being increasingly spoken in Macao, too[474].

Meanwhile, Macanese legal Portuguese is perhaps risking to lose its identity as a *legal* language, associated with a legal system and tradition, due to the lower capacity of survival of the Portuguese language in the new Chinese institutional and social setting; and to the growing pressure to introduce more and more the Chinese language in Macanese laws and legal institutions – through translations which may ultimately dilute the deep cultural and legal meaning of the Portuguese language and specific legal heritage[475], in favour of a hybrid still to be precisely identified, which will result from the mingling of Portuguese (if recessive, perhaps), Mainland Chinese, Hong Kong and global languages and legal influences.

This has significance for our discourse: the importance of the use of the original legal languages of the 'mixing' legal traditions, for a mixed environment to exist and survive, has been stressed by several mixed jurisdictions scholars[476].

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[474] Anecdotal elements only can be produced, so far, in support of this statement: it has been reported in town that certain Macanese judges, knowledgeable about Portuguese language, refuse to use it during proceedings. On the other side, English seems to be used sometimes in the city courts. It is interesting to observe, however, how an official report of a Portuguese scholar to the Macanese government has not been written in Portuguese (like Chinese, an official language of the Macao SAR) but in English: J.A.F. GODINHO, *Art. 23*, *supra*.

[475] S. CASABONA, *The Law of Macau and its Language: A Glance at the Real "Masters of the Law"*, in 4 *Tsinghua China L. Rev*. 223 (2012).

[476] V.V. PALMER, *The Third Family*, *supra* at 78; W. TETLEY, *Mixed Jurisdictions: Common Law vs. Civil Law*, in (1999-3) *Unif. L. Rev*. (N.S.) 591-619 (Part I) and (1999-4) *Unif. L. Rev*. (N.S.) 877-907 (Part II); also in (2000) 60 *La. L. Rev*. 677-738; and in Chinese in Peking University Press (2003) 3 *Private Law Review* 99-175; online:

In fact, elements of common law and Hong Kong law more and more infiltrate local business practice and legal education[477].

These developments would correspond – if at an initial stage – to a pattern also identified by Palmer, revealing the importance of the 'dominant economy' in determining the adoption of economic and business laws in a 'mixed' context[478].

As graduates with both Macanese-Portuguese and Chinese backgrounds will become more and more formally equalised, it will become more obvious that the Macao legal system is hybridising: its law importing elements from the Mainland's, mostly on the institutional side; and probably incorporating Hong Kong legal elements in relation to the business side – also reflecting the career interests of the students' community and the diminutive political and economic weight of Macao vis-à-vis the Mainland and Hong Kong ones.

Some kind of hybrid 'Greater Chinese' national law, as contrasted with the specific law of the SAR, may ultimately emerge as the subject of higher education in Macao – as it happened *mutatis mutandis* with the US universities in the different States and jurisdictions – and develop as both cause and effect of legal hybridisation.

7.6. Legal convergence is also a product of administrative practices, such as that of directly enforcing in the SAR directives issued by the central government, as binding rules, instead of producing

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http://www.mcgill.ca/files/maritimelaw/mixedjur.pdf., at 49-50, also citing E. ÖRÜÇÜ, *Mixed and Mixing Systems: A Conceptual Search*, in E. ÖRÜÇÜ, E. ATTWOOLL, S. COYLE (eds.), *Studies in Legal Systems: Mixed and Mixing*, The Hague, London, Boston, 1996, 335, at 349-350.

[477] It happened to this author in 2003 to be requested by the Faculty of Business of the University of Macau to structure syllabi for courses of (Macanese) Commercial Law, based on an American handbook of Business Law.

[478] V.V. PALMER, *The Third Family*, *supra*, 80.

locally elaborated by-rules to enforce local laws[479].

This corresponds to another very Chinese model, opposite to the western approach, featuring verticalised political and government algorithms, more hierarchy-dependent than they would be according to the law only. The PRC is a huge, diverse, multi-ethnic country, certainly the central government and the Communist Party (CPC) are always discharging a general governance role vis-à-vis all different forms of local governments; the developments of the Chinese legal system in the last decades improved the central authorities' institutional supervision capability[480], further enhanced with the coupled political supervision of the CPC[481].

The two Chinese SARs just add a new type of territorial partition, with specific administrative and legal features, to the already complex Chinese administrative-legal environment[482].

Administrative and policy channels innervate however the complex Chinese institutional environment, across the limits of its

[479] See, e.g. the *Esclarecimentos do Comité Permanente da Assembleia Popular Nacional sobre algumas questões relativas à aplicação da Lei da Nacionalidade da Republica Popular da China na Região Administrativa Especial de Macau* (Clarifications of the NPCSC in relation to the application of the Nationality Law of the PRC in the Macao SAR)[NPCSC, *Esclarecimentos*], of 1999; available online at: www.imprensa.macau.gov.mo/bo/i/1999/01/aviso05.asp#14. This is a document having a direct normative function – amounting to an interpretation of the legislative organ of the Nationality Law of the RPC in relation to the Basic law of Macau –, directly and expressly referred to by the Macanese government in the subsequent Immigration Regulations issued on December 20, 1999 – the day after the handover of the Territory from Portugal to China – in order to define the status of Chinese citizens.

Article 14.2 of mentioned Immigration Regulations reads: "Chinese citizens… are those possessing Chinese nationality according to the Law on Nationality of the people's Republic of China and to the [NPCSC *Esclarecimentos*]" [translation by author; original in Portuguese].

[480] See LOK Wai Kin, *The Relationship Between Central and Local Government Under the Unitary State System of China*, in J.C. OLIVEIRA, P. CARDINAL, *supra*, 527.

[481] *Ibid.*, especially Chapter 3 "Manipulating the Legislative Process", 554-561.

[482] Lok, *supra* note 112, *passim*.

different horizontal or vertical partitions, permitting the central government to exercise governance over the periphery (including the SARs) – linking with local authorities as a preferred course of action, instead than enacting appropriate national laws at central level or having local regulators enacting them in their jurisdictions.

As the SARs become more and more sinicised, their Western characteristics should become less obvious and preeminent in the medium-to-long term – just part of their 'peculiar historic conditions' to which special Chinese laws and principles will be applied.

Their very existence as SARs, meanwhile, allows the Mainland to test the functioning of the OCTS model. The whole process is closely monitored by the Taiwanese, to assess possible modes of relation with the Mainland, and their actual degree of autonomy in case of reunification, within an OCTS framework or else.

8. Testing the Chinese SARs' case against Palmer's analytical grid on "legal mixity" – and refining the grid

8.1. I'll now make reference to the three-test grid developed by V. Palmer mentioned above Chapter Two – the "obvious amount of mixity" test, the "critical areas" one, "the subjective element" one[483] – to analyse the Chinese situation reviewed.

It can certainly be said that there is an increasing presence of elements of the Chinese socialist legal tradition in the legal systems and environments of the two SARs.

The question is whether we have to maintain the first test as described by Palmer, i.e. a test seeking the presence of two different traditions "in obviously relevant amounts": is this a merely quantitative test?

[483] See above, Chapter Two, Section 8.

The Chinese SARs' examples suggest that Chinese rules and principles are being introduced there with very little "amount" of formal legal reforms, rather being infiltrated through a variety of means, as described in the previous sections of this essay.

Principles, interpretations and rules start seeping into the system, occupying key junctions and coming to discharge systemic functions, without producing an immediately detectable presence of Chinese law in the SARs – not in an "obviously relevant amount" at least.

The two SARs will probably be substantially sinicised before 2047 or 2049. However, a substantial part of the law hailing from the previously dominant tradition will remain relatively unchanged: many or most legal devices remain valuable, as tested and effective tools of governance, at least at micro-level and for most private matters.

It is submitted here it is also a matter of "ways" and quality of the legal substance being introduced: few, selected legal reforms in key areas can change the entire system.

Hybridity may come not just from mixing or juxtaposing different technical apparatuses of norms within a single jurisdiction, but also from superimposing or infiltrating new political, constitutional, institutional, social frame and values; just like a new software in an old hardware – or like new ghosts in an old machine, if we so like.

As Twining pointed out:

> [iv] Diffusion may take place through informal interaction without involving formal adoption or enactment.
> (v) Legal rules and concepts are not the only or even the main objects of diffusion [484].

[484] These are two of the conclusive "warnings" of W. TWINING, *Diffusion of Law: A Global Perspective*, in *Journal of Legal Pluralism*, 49 (2004) 1, 34.

In a theoretical extreme, no formal change in legislation may still coexist with a different legal system if new ways to interpret, apply, enforce the law are introduced in a perfectly untouched legal machinery. The entire concept of "rule of law" may change, in fact, just according to the different degrees of "hardness" or "softness" a system may recognise to its set of formal legal rules.

This refinement in the first test certainly implies a closer connection of the first test on "obvious amounts" with the other tests, the one on "critical areas" of the law occupied by the dominant system, and the one on the "subjective element" in the legal community.

The second test, about the introduction of "critical" elements of the superimposing tradition over the previous one, can also be generalised/refined: "critical" features are not only, not necessarily those identified by Palmer for common-law-on-civil-law mixes, related to the judiciary, its organisation and the value attached to its products.

"Critical features" of the dominant tradition, and thus of the resulting hybrid, may in fact consist of a relatively small amount of formal law; or may just consist of interpretive principles, political-institutional-administrative devices an other contextual elements, initially resulting (almost) invisible in enactments and law-in-the-books[485].

In a Chinese-on-Western superimposition the Chinese tradition

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A not-too-distant concept of "transfusión" has been adopted as far back as the 1960s by Roman law scholar Augustín Díaz Bialet, in Argentina, to describe how Roman Law concepts and principles have seeped into Latin American codified private laws, creating a legal continuum between Roman law, medieval *ius commune* and those modern legal systems; a romanist approach thus becoming the preferred method for interpretation of law there, instead of those hailing from German and European positivist doctrines of the XIX century; A. DÍAZ BIALET, *La Recepción del Derecho Romano en América Hispana*, in 99 (1960) *La Ley*; ID., *La transfusion du droit romain*, in (1971) *Revue Internationale des Droit de l'Antiquité*, 421; ID., *La transfusión del Derecho Romano en la Argentina*, in 5 (1978) *Studi Sassaresi (Diritto Romano, codificazioni e unità del sistema giuridico latinoamericano)*, xvi-xix.

[485] W. TWINING, *supra*, *passim*.

based on the prevalence of the "rule of politics"[486] plays a critical reforming role: politics, institutions, administration, public law will all be important – in that order.

The infiltration of new ideas into an old legal machinery through political, administrative, economic and cultural dynamics is the apparent current strategy of China in Hong Kong and Macao, for a "mixing" process leaving the legal machinery apparently unchanged, or almost so[487].

In the event, in Hong Kong we could see some day a common law apparatus/machinery enforcing socialist substantive principles, using *stare decisis* as a vehicle to perpetuate their judicial enforcement.

8.2. A lesson learned from the data analysed above is about how the dominant legal tradition – often coupled with a related political force – superimposes *its* systemic frame and *its* "critical" elements (not necessarily "legal" in a strictly modern Western sense), using *its* peculiar tools on another tradition. The different developments in the two SARs, however, suggest that the specific features of each receiving system also play a role in determining the superimposition strategies, and the hybrid outcomes of the process.

So enlarged, to include all possible legal and also non-legal "critical elements", the second test applies to the Chinese SARs' legal

[486] See U. MATTEI, *Verso un tripartizione non eurocentrica dei sistemi giuridici*, in *Scintillae Iuris – Studi in onore di Gino Gorla*, Milan, 1994; also in English: *Three Patterns of Law: Taxonomy and Change in the World legal Systems*, 45 (1997) *American J. of Comp. Law* 5. The author proposes a ('non-eurocentric') classification of the world's legal systems based on three main societal models: the one based on the 'rule of law', that based on the 'rule of tradition' and that based on the 'rule of politics'.

[487] These conclusions, with an express reference to politics only, are shared by Y. GHAI, *Intersection*, cited to HKLJ, *supra*, at 401-405. Interestingly, the two published versions of this article, feature slight differences on this issue: the dubitative final conclusion of the author appeared in the *HKLJ* in 2007 at 405, about the Chinese system's triumph over the Hong Kong common law, has been replaced by a purely affirmative one in the 2009 version, in J.C. OLIVEIRA, P. CARDINAL, *supra*, at 49.

changes; and it can also be used to explain a number of other historical superimpositions:

1) Palmer found that common-on-civil-law superimpositions have always featured conspicuous legal and institutional reforms in relation to the role of the judiciary. However, a mixed jurisdiction with a reversed civil-on-common-law pattern like the one in the common law provinces of Cameroon displays a superimposition occurred mostly through constitutional, legislative enactments and governmental institutions. Reforms of the court system do not seem to have played a major role in the Cameroonian superimposition strategy[488]. The country's supreme court operates according to the standards of its continental tradition; little attention is paid at the central institutional level to local courts of the common law provinces – which largely continue to operate their traditional common law ways within a civil law country. Is seems a weak superimposition, so far, not very successful in bringing about much legal integration between the two parts of the country[489]. In an African context, perhaps, the unifying forces and the related strategies and tools are others: significantly, an important role is played by politics in arbitrating the interests of the two separate communities[490].

2) Modern concepts of law emerged at the end of the XVIII century and have been superimposed over the previous state of legal affairs in the US and in France: in both cases with the most significant

[488] On Cameroon's specific 'mixity', see S. CZIMENT, Cameroon: *A Mixed Jurisdiction? A Critical Examination of Cameroon's Legal System Through the Perspective of the Nine Interim Conclusions of* Worldwide Mixed Jurisdictions, in 2 (Winter 2009) *Civil Law Commentaries*, Issue 2, 1; online at: <http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/Eason_Weinmann/v02i02-Cziment.pdf>

[489] *Ibid.*, especially at 13-17, 23-25, 27-28. However, a two-year period of training, mostly based on civil law, in the country's judiciary school in the capital city Yaoundé has been introduced since 1972, for both civil law and common law judges before being appointed to the bench. *Ibid.* at 15.

[490] *Ibid.* at 11.

superimposing role played by the elements critical in the relevant dominant ideology (judicial review in the United States, legislation in France)[491]. It should be clear that the continental *ius commune* and the continental post-napoleonic civil law represent two very different models and historical legal experiences; and that the codification process on the European continent amounted, in fact, to a superimposition by legislative means of a new legal ideology, and related systems, over the preexisting legal environment based on the *ius commune*.

This worked well in most continental jurisdictions; in has not happened at all in places like Andorra and San Marino[492]. In Latin America the *ius commune* substratum resisted and survived to some extent the superimposition process, to generate what we could perhaps label as "mixed *ius commune*-codified" jurisdictions – or at least we could identify *ius commune* pockets in those codified legal systems – with scholarly law still playing an original normative role, and courts exercising an inherent jurisdictional power in some areas of the law at least[493]. To add complexity, many of those Latin American jurisdictions feature federal, constitutional and institutional models heavily influenced by that of the United States[494].

3) In other contexts, too – too many, in fact, to elaborate upon each in this paper –, the superimposition seems to have taken place mostly through whatever element was paramount in the dominant tradition; not necessarily the court system and case law.

Scholarship has been one of the main factors of the expansion

[491] Y. GHAI, "Intersection", *supra* note 22 at 366-367.

[492] A.I. FERREIRÓS (ed.), *Actes del I simposi jurídic Principat d'Andorra/ República de San Marino. El "ius commune" com a dret vigent: l'experiència judicial d'Andorra i San Marino*, Andorra, 1994.

[493] I. CASTELLUCCI, *Sistema jurídico latinoamericano*, Turin, 2011, *passim*.

[494] J.L. ESQUIROL, *Writing the Law of Latin American*, (2009) 40:3 Geo Wash Int'l L Rev 693.

of Roman Law in the provinces of the Roman Empire; the later expansion of civil law developed from Roman texts and Canon law in medieval Europe, and their eventual mixing into one single legal system of *ius commune*[495]. The economy and business practices seem to have combined with the scholarly law of *ius commune* in forming the medieval *lex mercatoria*; perhaps something similar is happening nowadays with transnational business law[496].

Religious-legal scholarship seems to have played an important role in the original expansion of Islam and *shari'a*, as well as in the recent islamisation of some modern legal systems, including Afghanistan under the Taliban rule, Iran[497].

Confucian culture and doctrines and the Chinese administrative model have been the main elements of the Chinese imperial model transplanted in Korea, Japan, Viet Nam and other Asian countries throughout the era roughly corresponding to Western middle ages[498]. Political doctrines and, especially, political "ways" within a socialist legal environment characterise nowadays, as seen, the evolution and expansion of the Chinese model (into the SARs, Viet Nam, North Korea).

4) Customary laws, often infused with religious elements, seem to be the dominant element driving legal change, obliterating previously existing statual laws and producing new legal hybrid

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[495] F. CALASSO, *Medio evo del diritto,* Milan, 1954, at 391-407.

[496] See M.J. BONELL, *An International Restatement of Contract Law: The Unidroit Principles of International Commercial Contracts,* 3rd ed., Ardsley, 2005; see also F. GALGANO, *Lex mercatoria,* 5th ed., Bologna, 2010.

[497] See M. PAPA, *Afghanistan: tradizione giuridica e ricostruzione dell'ordinamento tra šarī'a, consuetudini e diritto statale,* Turin, 2006; see also M. AXWORTHY, *Empire of the Mind: A History of Iran,* London, 2007, at 265-98.

[498] G. MACCORMACK, *The Spirit of Traditional Chinese Law,* Athens, Ga, 1996; C. CHOI, *East Asian Jurisprudence,* Seoul, 2009; CHUN Shin-yong (ed.), *Legal System of Korea,* Seoul, 1982; Y. NODA, *Introduction au droit japonais,* Paris, 1966; M.B. HOOKER, *A Concise Legal History of South-East Asia,* Oxford, 1978, at 73 and ff. ones; P.H. GLENN, *supra*, Chapter 9.

products, in places where competing institutions are weak, such as post-Taliban rural areas of Afghanistan[499]; or where institutional competitors are explicitly withdrawing, as it happened for family law of Muslim communities of Eritrean western and southern lowlands during the independence war and after independence from Ethiopia[500]; or when competitors are altogether absent, as in stateless areas of Somalia[501].

The crucial elements, whether strictly legal in the Western sense or not, of the specific dominant social-legal tradition invariably seem to be the ones carrying out a significant part of the legal change – of course interacting with the receiving environment and its political, legal, social, economic features; and adapting their strategies accordingly.

8.3. The subjective perception of "mixity" is important to the discussion of the PRC and its SARs. The new political-institutional setting; the Basic Laws and their interpretive mechanisms; economic and cultural changes; a more Chinese legal training of lawyers and civil servants, government-to-government immediately enforceable

[499] See M. PAPA, *supra*, *passim*.

[500] Eritrean People's Liberation Front's Proclamation n. 2 of 1991, enforcing basic legal reforms of pre-existing Ethiopian laws in the liberated areas of Eritrea, still in force today, prescribes that state laws should not apply to family and inheritance relations of Muslim Eritrean citizens – with no further detail or explanation. This left Islamic and local customary rules become the only existing ones in the mentioned domains of law. See I. CASTELLUCCI, *Eclectic Legal Reforms in Africa and the Challenges of Reality: the Case of Eritrean Family Law*, in C.C. NWEZE (ed.), *Contemporary Issues of International and Comparative Law: Essays in Honour of Christian Nwachukwu Okeke*, Lake Mary Fla., 2009, 599-630, Part II, Chapter 4, 620 and following ones.

[501] I entertained endless conversations on Africa, stateless Somalia and on the little-known, little-recognised Somaliland state with compulsive African law scholar Salvatore Mancuso. His courtesy, I could access his draft paper S. MANCUSO, *Short Notes on Legal Pluralism(s) in Somaliland*, Proceedings of the *Juris Diversitas* Conference at the Swiss Institute of Comparative Law, Lausanne, October 2011 [forthcoming].

administrative directives from Beijing – all are obvious avenues for the Mainland to alter the local legal environment and superimpose a different set of values on the system.

On the subjective point of view, for the purposes of our "mixity test", all mentioned avenues amount, in Glenn's terms[502], to powerful tradition-changing or tradition-generating moves from policymakers, adding to the more general cultural changes in both SARs towards a more Chinese societal model.

Certainly the distance between the Hong Kong's legal system and the Mainland's is greater than that between Macao's and the PRC's, due to the specific traditions and circumstances of both SARs. The higher resistance of the Hong Kong community to the infiltration of ideas from the Mainland makes its process of legal hybridisation slower than in Macao. However, cultural changes in the legal environment are also taking place in Hong Kong and within its legal community – not anymore, or not solely, one of old times' English barristers: as prestige of China is increasing along with its political power in the region, new generations of (proud Chinese) judges, lawyers and jurists will increasingly populate Hong Kong courts, universities and government offices.

The rigid stance initially shown by the CFA in the *Ng Ka Ling* case has much softened, following the first constitutional crisis as the outcome of that case[503]; a full recognition by the CFA of the existing superimposition has been made twelve years later in the *Congo* case[504] – as expected by the government, by many in the legal community and by many observers alike.

It is a fact the CFA decided the *Congo* case not unanimously; however, a majority vote in the bench is certainly a "common law way"

[502] P.H. GLENN, *supra*, Chapters 1 and 2.
[503] *Ng ka Ling, Clarification*, *supra*.
[504] *Congo* CFA 2011, *supra*.

to solve the issue, with a legalised solution becoming a hard rule through the *stare decisis*: a disputed (in Hong Kong) Chinese law principle has thus been introduced in the system through a common law mechanism.

Another interesting piece of evidence of the changing perceptions and subjective stances in the legal community is given by a decision of the Hong Kong CFA given in 2000, in which the court remarked very strongly about the "*One China Principle*", and about Taiwanese courts being "unrecognised" and "under the control of a de facto albeit unlawful usurper government"[505].

The case was a simple request of *exequatur* of a Taiwanese bankruptcy order, which the CFA ruled to be recognised as not contrary to "the interest of the sovereign power"[506]: those strong remarks – which attracted bitter Taiwanese comments[507] – were perhaps not so necessary on a purely legal point of view; however, they clearly indicate the perception of Chinese legal professionals, increasingly aware of being operating in a common law legal system which is a part of a Chinese larger one.

According to all the elements mentioned, the third test ('subjective element') in Palmer's grid has certainly been passed.

8.4. Palmer's grid seems to have been useful in guiding the assessment of the growing "mixity" of the Chinese SARs' legal environments. At the end of this analysis the grid may, in my opinion, be refined to better suit research on legal hybridity beyond that on

[505] *Chen Li Hung & Others v. Ting Lei Miao & Others* - [2000] 1 HKLRD 252.

[506] Adding, however, that "it should be clearly understood that giving effect to the Taiwanese bankruptcy order does not involve recognizing the usurper regime or courts in Taiwan." *Ibid*.

[507] C. WU, *Mutual recognition and Enforcement of Arbitral Awards among Taiwan, China, Hong Kong and Macau: Regulatory Framework and Judicial Development*, in 3(1) (2010) *Contemporary Asia Arbitration Journal*, 65, at 86.

"classic" mixed jurisdictions, according to what has been discussed.

Of the first two tests ("obvious amount" and "critical features"), the latter only seems to be related to a crucial element: a positive answer to it may still qualify a situation as "hybrid", provided the third test ("subjective element") – certainly confirmed in its fundamental importance – is satisfied.

On the other side, the fulfilment of any purely quantitative condition is hardly imaginable without mechanisms allowing the introduction of new legal substance in the system.

Additionally, the scope of observation for the purposes of the "critical features" test should be enlarged, to include non-legal elements as well.

A possible reading for this tool, so revised: once a relevant community of "believers" in a new, non-monolithic legal environment comes into existence into a given jurisdiction, whatever the reason, the presence of appropriate devices at critical junctions of the system is necessary and sufficient to produce hybridity: the relevant governing authorities and/or legal community will then activate said devices anytime they feel they need, progressively abandoning previous mechanisms and legal sources.

These seem to be two conditions ("subjective element" and "critical features", coming to existence in this or in the reverse order) necessary to start a process of hybridisation.

It may take time before a quantitative equilibrium between two different, sizable parts of the system becomes visible (if it ever does: i.e. only when the superimposition is not total, nor totally rejected, nor of a type producing diffused hybridity rather than two discrete areas of the law with different characteristics), thus producing a Palmerian type of "mixity", so to speak.

The "subjective" element discharges important functions: at an initial phase of the "mixing" process, making the difference between an

occasional transient superimposition and a stabilised hybridisation. And, subsequently, playing a crucial role in maintaining the hybrid environment viable, determining the continuing dominance of the dominant system over time[508].

The "obvious amount" test would just be a gauge, then, providing information on how long and/or successful the super-imposition has been, or how far the hybridisation has gone.

[508] Also see the considerations made above, at the end of Chapter Three.

CHAPTER FIVE

CONCLUSIONS (THUS FAR)

SUMMARY: . *Technical features. - 2. A theoretical restatement: trends of rule of law in China. - 3. Scenarios.*

1. Technical features

1.1. Trying to summarise the results of the survey made in Chapters One, Two and Three, I think some specific technical legal features may be extracted from the discussions made, and identified as pertaining to the frame of legal principles, elements and "ways" of the "socialist rule of law with Chinese characteristics".

A tentative list:

1) A systemic ability of policy-making organs to affect the interpretation and application of legal rules exists, in pursuing general political aims as indicated by the political leadership.
2) The nature of the law and of its interpretation is flexible; the latter amounting to law-making activity and not being bound by particular legal technical standards.
3) There is an absence of external checks on governmental and political activities, and of balanced mechanisms of political and institutional power – all the institutional power, in the Chinese socialist vision, belonging to the people and represented by the Party, its political conscience and *avant-garde* – and being entrusted to institutional assemblies, the only organs in the state having democratic legitimacy.

4) Supervision is the keyword, instead: this function somehow substitutes the Western idea of checks-and-balances.
5) Severability of law from its enforcement exist, in policy terms, where the law and its actual enforcement may be two different issues, managed by institutions at different level.
6) Increased importance can be noticed in recent years of the doctrine of the "socialist harmonious society", emphasising the role of Party guidance and policy as pre-eminent over the progress of construction of the "socialist rule of law" element.
7) Judges may not carry out any judicial review for constitutionality of laws, regulations; nor may they do it for the legality of the latter. The supervision mechanism provided by the Legislation Law of 2000 introduces a sort of a *référé législatif*, to have legislative organs taking care of conflicts of sources of law.
8) Crucial importance and larger presence is given to legal rules attributing competence, administrative power and prerogatives in the administrative field, rather that to the rules attributing rights and obligations to laws private "end-users".
   Attribution of competence is perhaps more critical in the socialist than in the Western "rule of law" models, as the relevant administrative bodies are allowed to exercise wider substantial discretion.
9) Rules allow top-down intervention, from the higher levels of authority down to lower levels, in individual cases, to supervise lower authorities or to take control and manage the individual relevant case directly.
10) Higher administrative authorities, not legal rules, may attribute competence in individual cases.
11) The preceding principle is also applicable within the judicial pyramid, with respect to individual court cases.
12) Still, an increased role of substantial rules of private law is visible in relation to the private sector of the economy and to private

interests in general (e.g. family law, market laws).

13) Social interests, diffused interests and the like are still in the legal-non-legal twilight zone; *gongyi susong* are "naturally", at least potentially, politically sensitive; they still lack firm technical procedural and substantive rules.
14) Complexity ("variable geometries") has become a characteristic of the Chinese legal environment, both territorially and in the fact that different areas of law work in different ways and with different fundamental principles – but still under the general governance role of state institutions and the Communist Party.
15) Different styles of legal drafting may correspond to the different geometries of the Chinese law, in relation to the different "modes" of delegation of authority: to lower or peripheral administrative authorities, in the "socialist" concept; to parties and courts in the "market" or private law one.
16) The very partition between "private" and "public law" may be different from that applicable in the Western r.o.l. concept, with areas belonging to private law in the West falling at least partially under the administrative domain in the Chinese legal system – beyond the obvious example of property law, it is also significant how the insurance industry is tied to the government for its general management and for "back office" operations such as the investment of premiums collected, making this area of the insurance industry governed by public law logics.
17) "Private law" mode is active for private matters and market operations, when private parties are involved and no significant public interest is involved – however, socialist elements and policy action may intervene, if a specific case so requires.
18) "Socialist" mode of the law is generally active for the general frame, for public/administrative law – keeping in mind that boundaries with private law may not be the same as in the West –

and as a default "mode" in the entire legal system.

Socialist mode also applies as a higher governance element, also for the private law area and in the market area, through general supervision, administrative regulatory activity and other tools of specific intervention.

19) A "mixed mode" between the two modes just mentioned is also visible; it features the introduction of the "socialist" element at critical junctions of specific legal sets of rules, so that in fact the "private law" element may result flexibilised, softened, de-potentiated; or even almost annulled, considering the *de facto* viability/operationality of the relevant law – as it happens, e.g., with the Anti-Monopoly law.

20) Important "blank areas" and "unspoken elements" may be identified in the law, giving ample room for policy or administrative intervention in areas where law does not provide on substantive issues – or where the lack of mention could just seem to imply an exclusion of any discretional intervention. The obvious example is property law and specifically the vagueness of legal rules on how/when it is possible to buy immovable urban property, or the administrative controls on market prices; another example is the AML and its lack of provisions in relation to abuses committed by public bodies and *how* to deal with them (it only says *who* shall deal with them). In other cases, the allowed administrative intervention is expanded beyond the assigned legal limits with additional features – e.g. in the case of CIETAC rules in relation to the Commission's review of arbitral awards[509].

The system seems to imply a general possibility of adding administrative requirements, conditions, prescriptions and "policy

[509] CIETAC is certainly not a legislative body. However, the approach to its rules and the actual patterns of its behaviour reproduces in some respects that of Chinese legal, administrative and judicial institutions; see above, Chapter Three, Section 6.

checks" to those already specified in the law. In case of requirements and conditions for private activities, the law may cease to be *the* standard, becoming *a minimum* standard instead.

21) A significant presence of general clauses can be seen in relation to the relations between the parties to a contract (good faith, fairness); or representing more general vague and expanded version of public policy, *ordre public*, normally in relation to "socialist" values, protection of the economy and "public interest", but also including, e.g., "social ethics".

    The meaning of all these clauses is often unclear in legal technical terms, and however is generally much wider than their Western (apparent?) functional equivalents.

22) "Policy checks" are a real key feature of the Chinese "rule by law" model for the socialist market: they are largely implemented through the administrative circuit – through the licensing system, and through rules, praxes controls and authorization mechanisms at all levels.

    Public powers may insert effective "policy checks" in and around the market, so to speak, controlling the access of every single economic actor to the market, supervising its operations, keeping the ability of controlling – even of denying, in fact – the access of specific actors to the Chinese market, or specific transactions.

1.2. The survey made in Chapter Four, of legal change in the Hong Kong and Macau SARs, revealed and confirmed some of the mentioned Chinese socialist principles and mechanisms, being infiltrated in the SARs as well:

A) With respect to courtwork and to the relations between the different functions of the State, the Mainland vision has been enforced in relation to the two SARs' Basic Laws – enforced in the SARs as Mainland pieces of legislation: no judge should "interpret" them in

difficult or important cases, reaching beyond "local" interest. Courts shall activate a sort of *référé législatif* with the NPCSC instead, whenever an "interpretation" of the Basic Law is needed.

Like their Mainland counterparts, SARs' courts certainly should not try and declare laws invalid against it, as demonstrated by the *Ng Ka Ling* case[510].

B) The "importance" or "non-local" character (with "local" being an impact factor, rather than a geographic indicator) of a case of application of the Basic Law may well be directly assessed by the NPCSC, which may intervene in the case, top-down, unsolicited and at its will, freely appreciating when the relevant case is within its own competence. This reproduces features of the Mainland rules of procedure[511].

An interpretation of the NPCSC of the Basic Law may, in fact, also be issued after a case decided "wrongly" by the local court (*Ng Ka Ling*).

C) Interpretation of the Basic Law may be flexible according to Mainland doctrines and policy needs, even subject to inconsistent technical-legal standards: e.g., contextual elements may be relevant sometimes (as in the 2005 interpretation of term of office of the Chief Executive)[512], while a very literal interpretation may applied in other cases (as in the 2004 interpretation on universal suffrage[513]; or as in Macao government's approach to the meaning of "law degrees issued in Macao"[514]).

D) Judicial procedural rules play an instrumental, ancillary role; decisions are taken following the methods more politically appropriate for the case at hand with a view to the desired final

[510] See above, Chapter Four, Section 3.2.
[511] See above, Chapter One, Section 3.2.
[512] See above, Chapter Four, Section 3.4.
[513] See above, Chapter Four, Section 3.3.
[514] See above, Chapter Four, Section 7.4.

outcome. They may include extraordinary output, non-decision, issues to pave the road for subsequent developments, to interact with other political actors, to state that a decision taken was wrong: ways akin in substance to Chinese law features such as the re-trials following governmental or procuratorial requests in cases of "wrong" decisions (*Ng Ka Ling*).

Due process doesn't seem to be a fundamental principle vis-à-vis policy interests. In general, the "legalisation" of issues is not considered the best way to deal with complex or sensitive situations, consistently with Chinese traditions – as emerged by the NPCSC second and third interpretations of the Basic Law of Hong Kong, avoiding other interpretation cases being brought to court after *Ng Ka Ling*[515]; or as demonstrated by the dispute resolution mechanisms provided for in the CEPA[516].

E) Strong governments, politically legitimised from Beijing, in an institutional environment with light checks and balances make the SARs' legal environment very executive-led and policy-sensitive, convergent thus towards the Mainland's model[517].

Fixed terms of office are provided for public positions: a term may include several officers consecutively elected within the fixed time-span of one term[518] – as it often happens in the PRC for Communist Party positions – to improve stability and foreseeability in the political process, enhancing control over it.

Universal suffrage and direct democracy are seen unfavourably; a different system of elections based on control of electors and institutional constituencies being preferred instead[519].

[515] See above, Chapter Four, Sections 3.3. and 3.4.

[516] See above, Chapter Four, Section 6.

[517] See above, Chapter Four, Section 2.3.

[518] See above, Chapter Four, Section 3.4, on the interpretation related to the term of office of the Hong Kong Chief Executive.

[519] See above, Chapter Four, Section 3.3 on universal suffrage in Hong Kong.

Strong vertical innervations of administrative and political channels do exist, from the central level of government and policy-making, across the boundaries of the different horizontal or vertical institutional partitions of the PRC, affecting local governments' courses of action: a valuable governance technique, requiring however a very strong capacity of the Party to exercise political control in a coordinate fashion, from the central level all the way down through its peripheral ramifications, balancing centrifugal forces and local indiscipline with its political weight and capabilities[520].

F) Immigration policy clearly seems to prevail over close family relations, in Mainland standards of statutory interpretation – as demonstrated by the *Ng Ka Ling* case, the subsequent interpretation of 1999[521], and the similar cases handled by the courts in Macao[522]. General security tends to prevail, in the Mainland vision, over unrestricted liberties, as seen for the issue of Article 23 of the Basic Laws[523]. By extending the idea a little bit, policy interests prevail over individual rights and (may thus twist the interpretation of) legal norms, consistently with general socialist political and legal principles.

G) The absolute concept of sovereign immunity enforced in the Mainland has been enforced in the SARs as well, for international and private international law matters – as per the outcomes of the *Congo* case before Hong Kong courts and the fourth *Interpretation* of the Hong Kong Basic Law issued by the NPCSC in 2011[524].

[520] See above, Chapter Two, Section 7.1, and Chapter Four, Section 7.6.
[521] See above, Chapter Four, Section 3.2.
[522] See above, Chapter Four, Section 7.1.
[523] See above, Chapter Four, Section 7.3.
[524] See above, Chapter Four, Section 3.5.

2. A theoretical restatement: trends of rule of law in China

2.1. The institutional and legal systems of China have borrowed and are probably retaining their deep-rooted, structural, more "socialist" elements from the Soviet legal experience; including the fundamental general model and the specific features and dynamics of a stronger, more centralized, socialist legal system.

The socialist legal frame of the system is likely to be enhanced in the next future. This should especially happen for the areas of law related to strong public interests, to allow the government to efficiently implement its macro-policy and discharge its supervisory/regulatory duties through an appropriate degree of administrative discretion in areas of significant public interests. An improvement should follow, thus, in administrative law and procedures, governing the relations between central, local governments, public productive units and other public entities.

Meanwhile, legality-enhancing formants[525] have been re-inforced in the last twenty years or so, e.g., by the increase in the presence of professional judges in the people's courts and reforms such as that making a law degree a condition of access to the Judiciary and Procuratorates' careers (since 2001) and to the legal profession (2002).

Better laws, courts, lawyers, a policy and a practice favourable to a stricter law-enforcement – and the cultural acceptance of law as a paramount tool of governance and protection – could produce in the medium term outcomes, in relation to private matters and the private sector of the economy, which are closer to Western ones – when no significant public interest is involved. However, there will still be significant amounts of regulatory and supervisory sets of rules and institutions, and effective balancing mechanisms introducing elements of policy in law enforcement.

[525] R. SACCO, *Legal Formants*, *supra*.

2.2. A complex model of r.o.l. emerges, with differentiated areas of effectiveness of purely legal rules and enforcement tools, vis-à-vis political/administrative influences. The latter seem however to be the preferred governance tools by the ruling élite of recent years, in accordance with the doctrine of a "harmonious socialist society" with prevalence over the "state governed according to the law".

The Chinese legal system of today is not a socialist monolith, featuring instead a number of different sub-systems or specific legal environments, with specific features and designated areas of effect (territorial areas, as in the case of Special Administrative Regions or Economic Zones; or specific areas of human activity, such as the market economy).

All these sub-systems are, however, inserted in a general frame, a macro-system embracing and governing all through its very clear and thick socialist characteristics.

A description of the Chinese legal environment may thus consist in a complex model featuring a general frame governing and coordinating a number of sub-systems, both of a territorial/ethnic nature (the SARs, the SEZs, the REAs etc.) and of non-territorial nature (market, family, government), in a relation amongst themselves and with the overall governing frame which could perhaps be described as that of semi-autonomous social and normative fields[526].

Grey areas of contact, friction, hybridisation amongst these fields do exist, of course. Logics, theoretical schemes and actual dynamics of legal diversity, hybridity, pluralism do apply to a significant extent in many instances. Especially in border zones between different areas the choice – when possible – of the governing institution may be critical in determining the final practical outcome, in

[526] S.F. MOORE, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, in *Law & Society Review*, Vol. 7, No. 4 (Summer, 1973), pp. 719-746.

the presence of several different possible responses given by the different social-normative circuits.

The viscosity of the overall system, its inefficiencies, and the lack sometimes of effective coordination from higher and central levels of authority, would in most cases prevent individual cases managed through the "wrong" governing circuit at grassroots level, from reaching institutions at a higher or at the general, macro-system governance and coordination level, to obtain the "right" response from the general system's point of view. Under a different point of view, the presence of just one "right" solution may not exist in a pluralist environment, where the different systems' autonomies may develop different "internal" concepts, effectively enforced in specific cases, of what is the "right" answer to a specific problem[527].

2.3. We cannot reasonably expect to see the usual Western mechanics of the "rule of law" at work; not prevailingly at least. China seems in fact to prefer a different approach – with an undeniably increasing recourse to the law to solve conflicts, but also with other political and social normative phenomena and institutions working along, at least for present times of transition.

Understanding the specificity of the *role* of law in China as a tool of governance – interacting with non-legal factors for producing final outcomes – includes learning to take into account, when reading the law and operating with it, all the non-strictly-legal factors such as tradition, policy, economy, which may affect its interpretation, application, enforcement.

This is an obvious skill for Chinese legal professional – like for all legal professionals hailing from pluralist contexts –, daily engaging in socio-political-legal assessments and negotiations (even with

[527] Legal pluralism is a suitable approach to describe these phenomena; see, especially, S.F. MOORE, *Law and Social Change*, *supra.*

themselves) aimed at combining different needs in their professional courses of action[528].

2.4. I think it is reasonable to see, as the aim of the current transition of the Chinese political-legal system, a stronger and more structured realization of the "rule by law" model, according to my simple classification made in Chapter One, Section 8. A Chinese mature concept of "rule of law", akin to what is referred to in comparative law circles as "socialist legality" or "*socialist rule of law*", may still be labelled as "rule by law", recognizing in it what Ugo Mattei labelled as "the rule of politics" element[529].

The achievement of a mature Chinese "rule by law" model, in the framework of a stronger socialist legal system, would be the result of the borrowing of general and crucial features from the mature USSR socialist experience, combined with the Chinese traditions and characteristics and with recent developments, both local and global. Peerenboom detected in the years around 2002 a possible longer-period trend in the Chinese legal system, towards what he classified as the "statist-socialist rule of law" model[530] – certainly a possible mid-term development, but not a certain or even a likely one, in my opinion; especially, after the more recent years' policy changes[531].

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[528] See above, Chapter One, Section 3.8.; an obvious example being again the mentioned one of the *gongyi lushi* , see above, Chapter Two, Section 6.

[529] See U. MATTEI, *Verso una tripartizione non eurocentrica dei sistemi giuridici*, in *Scintillae Iuris* – Studi in memoria di Gino Gorla, Milan, 1994; also in English: *Three Patterns of Law. Taxonomy and Changes in the World Legal Systems*, in 45 *Am.J.Comp.Law*, 5 (1997).

[530] That is R. Peerenboom's forecast; R. PEERENBOOM, *supra* at 103-109. Peerenboom's classification is "thicker" than mine, according to his point of view; mine being just focused on the relation between the politics and the law; his being more complex and also allocating several substantial legal and institutional features into a bigger number of partitions.

[531] See for instance the presentation of G. AJANI at the Beijing Conference of the International Academy of Legal Studies, held in October 2005, on Chinese legal

Whatever theoretical system of classification we follow[532], the Chinese transition will probably lead to outcomes unheard of. *Ex ante* Classifications, based on Western schemes, are not necessarily the best ones to analyse, describe, and much less foresee developments in such a non-Western context; they should thus be taken as approximate, tentative and merely indicative, rather than as firm and normative ones.

"Rule of law with Chinese characteristics", considering the current complexity of the Chinese legal environment, refers in my opinion (the following one is a sort of a synthesised opinion, not intended to be a definition) to *a socialist complex environment which features variable degrees of political or administrative discretion/ intervention in the general application of legal rules, in different relevant areas featuring differentiated general balances between law and policy as the main regulatory elements. The general socialist institutional frame maintains, however, the ability to implement its vision and policies in each of the mentioned differentiated areas, by making recourse as appropriate to different modes or techniques of normative, administrative and policy action*.

3. Scenarios

3.1. What follows is an exercise of sketching a picture of the Chinese "socialist market economy" and society, today and in the next future (subject to further research and verifications).

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reforms and the rule of law; the author stated the unpredictability of outcomes at present, with the Chinese audience highly appreciating his presentation; see also the chapter on China and the Rule of law in G. AJANI, A. SERAFINO, M. TIMOTEO (eds.) Diritto dell'Asia orientale, Turin, 2007.

[532] On the theoretical side, whether "socialist rule of law" equates to "rule by law", or to one possible declination of "rule of law" instead, becomes a pure matter of taxonomic speculation, and everyone can produce their own.

The socialist legal system and market economy do not enable individuals to carry out freely whatever economic activities they like, the way they like; but only those fitting within a general scheme devised by the public powers.

The relevant governing authorities are several, at different levels according to size/impact of each specific business; and each of them has or may have a say beyond the law, so implementing the idea of macro- and micro- control on the market at the various levels.

Big private business empires, independent from public and political power – or, worse, able to affect the government's policies – do not seem to be a desired outcome, nor a likely one. Foreign FDI is welcome, but also easily kept in check, with a wealth of governance tools and a grid of macro- and micro-controls at all levels, from the top one of politics down to the grassroots of distribution.

A technocratic leap forward in public management might come, not necessarily or not only to alleviate burdens on private actors: improving public governance and control capabilities could be the main goal instead (e.g., to improve tax collection in the private sector).

The administrative environment, however, will probably be characterized in the medium term by improved services and a better law-abiding behaviour, with more effective law-enforcement tools available for both the public and the higher-level supervising authorities. This might probably be the most visible result of the current development of the legal and institutional-administrative systems – along with the related spillover effects and cultural changes in the entire Chinese society's attitude towards the law.

3.2. Relations normally regulated by the law should eventually prevail amongst private individuals/entities, for minor economic transactions, family, inheritance, consumer transactions or, at most, purchase of housing; and in the commercial arena as far as no

significant public interest is involved.

In relation to urban property, a policy seems to emerge based on a "one-apartment-house-for-all" approach – obviously including the acceptability of more than one for someone (foreigners excluded), following one fundamental guideline of Deng Xiaoping.

The law on property rights features many very general provisions and mandates registration of transactions, implying an invasive administrative presence and directive power in real estate transactions. Circulation of property and obtaining guarantees seems complicated. The system, thus, is not in favour of an intense circulation of immovables, nor of speculations by individuals; it rather favours the fulfilment of the middle-class' expectations and social stability.

The society that can be observed reading between the lines of the most important pieces of legislation is in my opinion made by a growing middle-class, quite conservative, happy with a stable life in an owned house, a reasonable income and the possibility to spend it in the market buying commodities and services. Meanwhile, a strong, well-legitimized government, with ample latitude of action to ensure the country's continuing development, provides them with a legal system apt to protect their average interests; also providing public services and managing, directing, controlling the economy, and partaking in it.

3.3. Should some public interest get in the picture, politics would as well; e.g., when distributing consumer goods in a given region, it would still be unwise to forget liaising with local party and administrators, notwithstanding what the AML stipulates on administrative monopolies. It will take a very long time, if ever, to see an equal treatment of a government vis-à-vis a private entity, before a Chinese court acting *super partes*, applying the law roughly as it would between any ordinary private citizens.

A "rule by law" mode is still at the basis of the government's

approach to the economy, with a very proactive attitude aimed at exercising control at all levels, enforcing socialist policies – this of course does not exclude the case of interferences carried out for less commendable reasons.

Very large market actors, producing large macro-economic or societal impact with their activities will be subjected to strong public controls and supervision. Socialist administrative law and process will be very important, for the management of large, or even medium, or sensitive private economic ventures.

We may extrapolate a theorem – to be verified further; or waiting to be falsified, in a Popperian sense[533] – as follows:

In a socialist market economy the economic activities implying a macroeconomic dimension may be discharged by private entities, in addition to or instead of the government, if this produces more efficient management of the relevant function and related services.

The government, however, will retain such powers and authority as necessary in order to keep full control of the macro-policy dimension, even interfering with the liberty of what in the Western liberal environment would be considered to be falling within the private operations domain – even to the extent of making the relevant activities adopt a nature similar to that of concessionary operations of public outsourced functions.

At low level, the Chinese environment might become relatively soon a world significantly characterised by the presence of private rights. At a higher level of socio-economic impact it will probably keep being predominantly a world of concessions – in a political and economic sense, if not in a purely legal one.

[533] K. POPPER, *The Logic of the Scientific Discovery*, New York, 1959.

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