

CHINESE LAW: A COMPARATIVE PERSPECTIVE OF ITS MAIN
FEATURES IN THE EVENT OF THE UNIVERSAL APPLICATION
OF THE EU REGULATIONS. REMARKS SPECIFICALLY
REGARDING CHINESE BIRTH CONTROL POLICY*

*DERECHO CHINO: UNA PERSPECTIVA COMPARADA SOBRE
LAS PRINCIPALES CARACTERÍSTICAS EN EL CASO DE APLICACIÓN
UNIVERSAL DE LOS REGLAMENTOS EUROPEOS. ESPECÍFICAS
OBSERVACIONES RELATIVAS A LA POLÍTICA DE CONTROL DE
NACIMIENTOS*

Actualidad Jurídica Iberoamericana N° 13, agosto 2020, ISSN: 2386-4567, pp. 844-873

The present paper is also an output of the research carried out within the project “GolnEU Plus - Integration, Migration, Transnational Relationships. Governing Inheritance Statutes after the Entry into Force of EU Succession Regulations” co-financed by the European Unionis Justice Programme 2014-2020 and coordinated by the University of Florence. However, the content of this paper represents the views of the author only and it is her sole responsibility, while the European Commission does not accept any responsibility for use that may be made of the information it contains.



Caterina
MUGELLI

ARTÍCULO RECIBIDO: 26 de junio de 2020
ARTÍCULO APROBADO: 16 de julio de 2020

RESUMEN: Ya de por sí importante, el Derecho Privado europeo contenido en los Reglamentos está asumiendo una creciente relevancia. La aplicación universal es una de las características comunes del Derecho internacional privado europeo. La expresión utilizada por el legislador europeo suele ser la siguiente: "La ley designada como aplicable en el presente Reglamento se aplica también, aunque no sea la de un Estado miembro". Prescindiendo de la elección que las partes (o la parte) hayan hecho, concluyendo un acuerdo sobre la ley aplicable, existe la posibilidad de que los jueces europeos se encuentren en la tesitura de tener que aplicar un Derecho desconocido para ellos. Dada la imponente inmigración china en Europa, este artículo trata de identificar los fundamentos del actual Derecho chino para facilitar al juez europeo la toma de decisiones coherente con un ordenamiento jurídico que no siempre se corresponde con los principios generalmente compartidos a nivel europeo, considerando en particular las políticas de planificación familiar y de control de nacimientos.

PALABRAS CLAVE: Derecho chino; aplicación universal de los Reglamentos Europeos; política de control de los nacimientos.

ABSTRACT: *Very important per se, European regulatory private law is gaining in importance. Universal application is a feature common to the instruments of European private international law. The wording used by the European legislator is usually the following: "The law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State". Irrespective of whether the person(s) involved have made a choice-of-law agreement, there is a possibility that European judges will find themselves having to apply national laws unknown to them. In light of the massive Chinese migration to Europe, the aim of this paper is to identify the main pillars of current Chinese law, helping European judges in arriving at rulings consistent with a legal system not fully in tune with generally accepted European legal principles, considering in particular Chinese family planning and birth control policy.*

KEY WORDS: *Chinese law; universal application of EU Regulations; birth control policy.*

SUMARIO.- I. INTRODUCTION.- II. TRADITIONAL CHINESE LAW.- III. THE INITIAL IMPACT OF THE WESTERN LEGAL TRADITION ON CHINA.- IV. THE MAOIST ERA AND REJECTION OF THE WESTERN LEGAL TRADITION.- V. DENG XIAOPING AND THE NEW REFORM ERA.- VI. RECENT REFORMS AND INTERPRETATION OF LAW IN CHINA.- VII. UNIVERSAL APPLICATION OF EU REGULATIONS VERSUS FAMILY PLANNING AND BIRTH CONTROL IN THE PEOPLE'S REPUBLIC OF CHINA. VIII. CONCLUDING REMARKS.

I. INTRODUCTION.

Very important per se, European regulatory private law is gaining in importance¹, especially in family law matters. For instance, two EU regulations came into force on 29 January 2019: Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; and Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships. These complement the already fragmented *acquis* of EU Family and Inheritance law mainly characterized by the following regulations: Regulation 2003/2201/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (to be superseded as of August 2022 by Regulation 2019/1111/EU on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction); Regulation

¹ Different aspects of the topic are addressed in FRANZINA, P. (ed.): *The External Dimension of EU Private International Law After Opinion I/13*, Intersentia, Cambridge, 2017, see also AA.VV.: *Private Law in the External Relations of the EU* (ed. M. CREMONA, H.W. MICKLITZ), Oxford Scholarship Online, 2016. Main concerns regard the fact that "Private international law is intended to establish rules (of jurisdiction, applicable law and enforcement) which apply without distinction to all national legal systems. The EU has been successful in crafting a EU-wide system of private international law but in so doing [...] has inevitably created distinctions between 'inside' and 'outside', between the system which applies between Member States, with its high level of mutual trust and emphasis on 'free movement of judgments', and the private international law systems of non-EU [...] states. It thus challenges one of the foundations of private international law." CREMONA, M.: "Opinions I/13 and 2/13 and EU External relations law", in FRANZINA, P. (ed.): *The External Dimension*, cit., pp. 3-20, p. 19. See also MICKLITZ, H. W.: "The internal vs. the external dimension of European private law – a conceptual design and research agenda", *EUI Working papers*, 2015, no. 35, MICKLITZ, H. W.: "La mano invisibile del diritto privato europeo in materia normativa. La trasformazione del diritto privato europeo dall'autonomia al funzionalismo nella concorrenza e nella regolamentazione", *EUI Working Papers*, 2010, no. 09.

2010/1259/EU implementing enhanced cooperation in the area of the law applicable to divorce and legal separation; Regulation 2009/4/EU on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations; and Regulation 2012/650/EU on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

Universal application is a common feature of the instruments of European private international law². The wording used by the European legislator is usually the following: "The law designated as applicable by this Regulation shall be applied whether or not it is the law of a Member State³. In other words, the rules shall also apply when they identify as applicable the law of a Member State not participating in the enhanced cooperation (this is for instance the case of Regulations 2016/1103 and 2016/1104) or the law of a third country⁴.

Irrespective of whether the person(s) involved have made a choice-of-law agreement, there is a possibility that European judges will find themselves having to apply national laws unknown to them⁵.

In light of the massive Chinese migration to Europe⁶, the aim of this paper is to identify the main pillars of current Chinese law, helping European judges in arriving at rulings consistent with a legal system not fully in tune with generally accepted European legal principles. Without such knowledge, no European judge will be able to do justice to a system and tradition developed over more than two thousand years and greatly determining Chinese behaviour. In this respect, comparative law can play an important role.

- 2 Considering the aim of EU Private international law, it is not surprising that it makes recourse to the same techniques of Private International Law to facilitate their interaction. See ZANOBETTI, A.: "EU Cooperation in civil Matters and Multilevel Unification of Private International Law: Some Remarks", in FRANZINA, P. (ed.): *The External Dimension*, cit., pp. 117-129, p. 123. As far as family law is concerned, see BRUNO, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffrè Francis Lefebvre, Milano, 2019, and MARONGIU BONAIUTI, F.: "Jurisdiction Under the EU Succession Regulation and Relationship with Third Countries", in FRANZINA, P. (ed.): *The External Dimension*, cit., pp. 211- 226.
- 3 For instance, this is the wording of the clauses contained in article 20 of the following regulations: No 650 of 2012 (Succession Regulation), No 1103 of 2016 (Matrimonial Property Regimes Regulation), No 1104 of 2016 (Registered Partnership Property Regimes Regulation).
- 4 MARONGIU BONAIUTI, F.: "Jurisdiction Under", cit., p. 219.
- 5 BRUNO, P.: *I regolamenti europei*, cit., p. 175 ss.
- 6 A.A.VV.: *Chinese Migration to Europe. Prato, Italy, and Beyond* (ed. G. JOHANSON, N. MC AULIFFE, M. BRESSAN, L. BALDASSAR), Pelgrave Macmillan, London, 2015. For instance in 2018 Chinese nationals in Italy were the 8,3% of non-EU residents, see the 2018 annual report on Chinese community in Italy available at <https://www.lavoro.gov.it/documenti-e-norme/studi-e-statistiche/Documents/Rapporti%20annuali%20sulle%20comunit%C3%A0%20migranti%20in%20Italia%20-%20anno%202018/Cina-rapporto-2018.pdf>, For EU Member States percentage see data available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics

Until recently, Chinese law was not considered an autonomous field of study. Even in the tenth edition (1992) of the well-known book “Les grands systèmes de droit contemporains”, the father of comparative law, René David, assigns a minor role to Chinese law (‘Rôle mineur du droit’): compared to the Western legal tradition (WLT), the law was perceived as less important⁷. However, once legal scholars shift their attention to legal process dynamics and away from codes or law reports, the essence of traditional Chinese law emerges⁸.

The following sections introduce readers to the history, pillars and concepts of Chinese law, in an attempt to promote an understanding of a legal system made of relevant legal transplants, but in many ways deviating from European practice⁹. Without such an understanding, it could be difficult for a European judge to rule on civil law cases involving Chinese nationals.

II. TRADITIONAL CHINESE LAW.

The Qin dynasty (221-201 B.C.) is considered the first dynasty of the Chinese Empire, an empire culturally founded on the idea of the ‘mandate of Heaven’ (天命 *tianming*), under which the Emperor upholds his mandate as long as he duly performs his duties¹⁰. In line with this caveat, there is nothing wrong with others rising up and revoking the mandate, thereby ending a dynasty. As a consequence, the succession of different dynasties was not perceived as a break in the Empire¹¹.

To understand traditional Chinese law, we need to comprehend the Legalist and Confucian schools of philosophy.

Developed in the IV and II centuries B.C., Legalism formed the Qin dynasty’s ideological basis. The Legalists believed that political institutions should be modelled in response to the realities of human behaviour and that human beings are inherently selfish and short-sighted. Thus, social harmony could only be assured through strong state control and absolute obedience to authority. The Legalists advocated government by a system of laws that rigidly prescribed punishments and rewards for specific behaviours, stressing that the purpose of all human activity

7 AA. VV.: *Les grands systèmes de droit contemporains* (R. DAVID, C. JAUFFRET-SPINOSI), 10^e, Dalloz, Paris, 1992.

8 For an analysis of the topic see TIMOTEO, M.: *Circolazione di modelli e riforme giuridiche: il caso est-asiatico*, Libreria Bonomo, Bologna, 2005, p. 3.

9 On the impact and deviations of the Chinese legal system on the Western Legal Tradition see PEERENBOOM, R.: *China Modernizes: Threat to the West or Model for the Rest?*, Oxford University Press, Oxford, 2007 AND MORE RECENTLY, CHEN, W.: *The Beijing Consensus?: How China Has Changed Western Ideas of Law and Economic Development*, Cambridge University Press, Cambridge, 2017.

10 MACCORMACK, G.: *The Spirit of Traditional Chinese Law*, The University of Georgia Press, Athens-London, 1996, p. 22. See also MENSKI, W.: *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, Cambridge, 2006, p. 495 ss.

11 ROBERTS, J.A.G.: *Storia della Cina*, il Mulino, Bologna, 2013, p. 11 ss. See also PEERENBOOM R.: *China’s Long March toward Rule of Law*, Cambridge University Press, Cambridge, 2002, p. 48.

was to increase the power of the ruler and the state¹². The Emperor thus relied on penal law (法 *fa*) and on the imposition of punishments as the main instrument of government, administered by a hierarchy of ministers and officials, all ultimately responsible to him¹³. Rules had to be clear and intelligible to ordinary people and to be properly communicated. Great importance was attached to consistency and uniformity in the application of the law: "The ruler had to ensure that his officials throughout his realm not only applied the same set of rules but also applied them in the same fashion"¹⁴. The brutal implementation of this policy ultimately led to the overthrow of the authoritarian Qin dynasty¹⁵.

In great contrast to the Legalist school, the Confucian school (founded by Confucius himself in the VI century B.C.) upheld the importance of values. In line with this perspective, the emphasis was on teaching and moral values rather than on governance by criminal law¹⁶. Teaching was considered as a way to instil a proper sense of virtuous conduct in the people. Confucian values (such as benevolence, humanity, filial piety, caring for elders) and corresponding rites, 礼 *li*, were instrumental in maintaining the organisation and harmony of the Empire¹⁷.

One of the corollaries of the Confucian ideology was the hierarchical principle according to which members of society were in a relationship under which one person could always be classified as the senior and the other as the junior. The superior (usually the senior) was supposed to offer kindness, affection and protection to the inferior (usually the junior), whereas the inferior was supposed to show gratitude, submission, and respect to the superior. Another corollary of the Confucian ideology was the differentiation principle according to which each member of society, in consideration of the position occupied in the hierarchy, had a differentiated role¹⁸. For instance, the offences committed by juniors against seniors were always treated more seriously than offences committed by seniors against juniors¹⁹. In fact, the junior who committed an offence against the senior was also challenging the hierarchy, a circumstance absent in the event of a senior's

12 ROBERTS, J.A.G.: *Storia della Cina*, cit., p. 45 ss.

13 MACCORMACK, G.: *The Spirit*, cit., *Passim*. See also BODDE, D.: "Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China", *Proceedings of the American Philosophical Society*, 107, 1963, pp. 375-398.

14 MACCORMACK, G.: *The Spirit*, cit., cit., p. 6.

15 ROBERTS, J.A.G.: *Storia della Cina*, cit., p. 49.

16 For some considerations see *ibid.* and also *ivi*, p. 27 ss.

17 The following Confucius's Analects are explicit in this regards: "Lead the people by regulations (*fa*), keep them in order by punishment, and they will flee from you and lose all self-respect. But lead them by virtue and keep them in order by established morality (*li*), and they will keep their self-respect and come to you". And also: "In the practice of *li*, Harmony is the key. In the Dao of the kings of old, this was the beauty. In all affairs, great and small, follow this. Yet there is one respect in which one does not. To act in harmony simply because one understands what is harmonious, but not to regulate one's conduct according to *li*: indeed, one cannot act in that way".

18 MACCORMACK, G.: *The Spirit*, cit., p. 69 ss.

19 *Ivi*, see also MENSKI, W.: *Comparative Law*, cit., p. 495 ss.

offence against a junior. This hierarchy began in the family, the basic unit of the society, as seen in the role accorded to parental authority:

“As regards the junior members of a family, extensive jurisdiction was conceded to the parental authority. Only in the gravest matters, such as treason, could a son or daughter denounce a parent to the magistrate. Any attempt by a child to invoke the protection of the state against parental ill-treatment was itself a most enormous crime, striking as it did at filial piety, that corner-stone of social structure, and was punishable by death. In theory, parents did not have the right themselves to put a child to death: this, as well as lesser penalties, would be inflicted by the state at the parent’s request. But the death of a child as a result of parental chastisement incurred no blame, and a cursory reading of Chinese newspapers of the last years of the Empire reveals numerous instances where even drowned or buried alive with apparent impunity by their indignant families”²⁰.

However, when the moral rules of Confucianism were not respected, criminal law was seen as a necessary evil for restoring order. Nevertheless, from a Confucian point of view, written legislation (fa), that from a Western perspective could be classified as penal law, “should supplement, reinforce, or clarify teaching”²¹. This basically meant that all the administrators of society received their primary education in the Confucian classics and therefore even those in charge of the administration of justice were not legal specialists. There was thus no clear distinction between administrative and judicial functions in traditional China²².

The above is mainly due to the fact that under the Han dynasty (206 B.C – 9 A.D.) Confucianism became the state ideology, with education becoming one of the main pillars of Chinese society. Indeed, officials and administrators were selected through so-called Imperial examinations based on Confucian classics²³.

Furthermore, the two elements, 礼 (li) and 法 (fa), started to interact; in other words written legislation (fa) began to take account of Confucian values by introducing rules to implement them, a move known as the ‘Confucianisation of the law’²⁴.

20 McAleavy as quoted by MENSKI, W.: *Comparative Law*, cit., p. 556 and MACCORMACK, G.: *The Spirit*, cit., p. 69 ss.

21 MACCORMACK, G.: *The Spirit*, cit., p. 11.

22 Ibid. See also PONTI, E.: *La recezione del diritto privato occidentale in Cina fra il 1840 ed il 1949*, Edizioni Unicopli, Milano, 2006, p. 34 ss. and AA.VV.: *Diritto dell’Asia orientale* (G. AJANI, A. SERAFINO, M. TIMOTEO), Utet, Milano, 2007, p. 51 ss., MOCCIA, L.: *Il diritto in Cina*, Bollati Boringhieri, Torino 2009, p. 47 ss.

23 AA.VV.: *Law in Imperial China* (ed. D. BODDE, C. MORRIS), Harvard University Press, Cambridge-Massachusetts, 1967, p. 5.

24 “The principal function of the “li” was to allow the code to adapt to changing circumstances, to enable the penal code, as it were, to keep abreast of social problems” MACCORMACK G., *The Spirit*, cit., p. 29 ss. See also BODDE, D.: “Basic Concepts”, cit., p. 386 ss.

The 法 (fa), the written penal legislation imposed by the Emperor and therefore following a vertical functioning (deriving from above) incorporated the 礼 (li), the customary law inciting members of society to abide by Confucian rites. This also explains why they aimed more at establishing a kind of code of conduct than enforceable rules²⁵. This interaction is embodied in the code adopted by the last Chinese dynasty, the Qing Code of 1644²⁶.

For example, according to Confucian rites and the importance that Confucianism attaches to filial piety, inheritance rules stated that the son with whom elderly parents had lived was to be given preference. This value was incorporated in the Qing code in the form of a rule that a son who lived elsewhere from his parents during their lifetime was to be punished in any dividing up of family property²⁷.

On the whole, the Qing Code has a non-technical style with a strong penal/criminal element, characterised by corporal punishment. The code was based on the following *ratio*: a specific situation only become part of the code when it was essential to the wellbeing of the state. It follows that private law was only indirectly codified. Many civil law aspects seemed underdeveloped (when compared and analysed on the basis of the Western legal tradition taxonomy) and often difficult to distinguish from criminal provisions²⁸.

Having in mind the abovementioned inheritance example, it can be said that such a provision is instrumental in keeping a family and its assets united, a circumstance in turn contributing to the wellbeing of the state²⁹: a strong family will produce more and is more robust, in line with the Confucian ideology under which individuals are only important as members of a group, whereby the family is the primary nucleus of a social hierarchy extending further to clans, villages, districts and so on.

It is therefore clear that Chinese law has always had a political character, whereby all aspects of no direct interest to the state (especially private law aspects) were governed not by law but by customs and self-regulation³⁰. This finding may in turn account for the distrust of lawyers and legal specialists in China: a circumstance that led to the Western powers affirming that the law there plays

25 MACCORMACK, G.: *The Spirit*, cit., p. 48.

26 See JONES, W.C. (translator): *The great Qing code* (with the assistance of T. CHENG, Y. JIANG), Larendon Press; Oxford, 1994 and QIN, Z., ZHOU, G.: "Pursuing Perfection: Formation of the Qing Code", *Modern China*, 1995, vol. 21, pp. 310-344. For a focus on family law in the Qing code see JERNIGAN, T.R.: *China in Law and Commerce*, Macmillan, New York, 1905, pp. 111 ss.

27 PONTI, E.: *La recezione*, cit., p. 142 ss., provisions with such a Confucian influence are still visible in the actual Succession Law of the People's Republic of China (1985), see, for instance, art. 12.

28 *Ivi*, p. 150 ss.

29 *Ibid*.

30 JONES, W.C. (translator by) *The great Qing code*, cit.; QIN, Z., ZHOU, G.: "Pursuing Perfection", cit., pp. 310-344.

merely a minor role. Yet this key underlying difference must be taken into account in any attempt to understand (not only traditional) Chinese law.

When Western powers arrived in China in the mid-XIX century, they gained a negative impression. In their Western eyes, the Empire was lethargic and Chinese society not adequately organised. The ostensible dearth of written codes and law reports led them to overlook the intrinsic values of Chinese society. One of the main differences was between the West's upholding of the position and rights of individuals and the traditional collectivism practised in the Chinese Empire³¹.

The Opium Wars (1839-1842 and 1856-1860)³² constituted the first large-scale showdown between China and the Western powers, in particular Great Britain, Portugal, the Netherlands, France, the US and also Italy. From a military point of view, China was totally unprepared and soon defeated. The so-called Unequal Treaties were the legal consequences of the defeat: as is obvious from their name, these treaties were between a weaker party (China) and a stronger one (a Western power). In our legal context, specific attention should be paid, for instance, to clauses XXI and XXV (the so-called extraterritoriality clauses) of the China-US Unequal Treaty signed in Wang-hea on 3 July 1844, though similar clauses were to be found in the other treaties signed, for instance, with Great Britain and France³³.

“Clause XXI: Subjects of China who may be guilty of any criminal act towards citizens of the United States shall be arrested and punished by the Chinese authorities according to the laws of China, [while United States] citizens [... committing a] crime in China shall be [...] tried and punished only by the Consul or other public functionary of the United States authorized [under] the laws of the United States; [...with a view to preventing any] controversy and dissatisfaction, justice shall be equitably and impartially administered on both sides.

Clause XXV: All questions [with] regard to rights, whether of property or person, arising between citizens of the United States in China shall be subject to the jurisdiction of and regulated by the authorities of their own Government; and all controversies occurring in China between the citizens of the United States and the subjects of any other Government shall be regulated by the Treaties existing between the United States and such Governments respectively, without interference on the part of China”³⁴.

31 AA.VV.: *Law in Imperial*, cit., p. 33 ss.

32 ROBERTS, J.A.G.: *Storia della Cina*, cit., p. 215 ss.

33 DENBY, C.: “Extraterritoriality in China”, *American Journal of International Law*, 1924, vol. 18, pp. 667-675.

34 *Ivi*, p. 670-671

These clauses all infer a common message: traditional Chinese law was inadequate and thus not to be applied to foreigners. The UK-China commercial treaty of 1902 is explicit in specifying that Great Britain will renounce its extraterritoriality rights as soon as the modernisation of Chinese laws allows such³⁵.

For the first time in its history, China, the country once considered as an example to follow by neighbouring countries such as Japan, Vietnam or Korea, felt inadequacy from different points of view: military, political and legal. The Empire was faced with the choice of either modernising or defending its traditions³⁶.

Taking advantage of the Chinese inclination to study, in 1902 the Empress decided to establish a commission tasked with codifying the law (Law Codification Commission) in order to “carefully reconsider and revise all the statutes and sub-statutes in force according to the situation concerning foreign affairs and in reference to the laws of the foreign countries in order to have the laws of the Empire recognized by foreign countries and benefit governance”³⁷.

As of this time, China started to take Western models and legal transplants into account³⁸.

III. THE INITIAL IMPACT OF THE WESTERN LEGAL TRADITION ON CHINA.

Given the semi-colonial situation and the Unequal Treaties, the Chinese Empire's option of defending its tradition was probably not feasible.

The head of the Law Codification Commission from 1904 to 1909, Shen Jiaben, focused his attention on the French Civil Code of 1804 and the German Civil Code (*Bürgerliches Gesetzbuch* or BGB) which entered into force in 1900, even though the common law tradition based on case law proved very appealing to him³⁹.

Following the findings of the Law Codification Commission, the Chinese Empress, pending the adoption of a new code, decided to revise the 1644 Qing Code in an attempt to ensure the Empire's survival. This revision led to Confucian

35 The UK-China Treaty as explained by AA.VV.: *Diritto dell'Asia*, cit., p. 178.

36 HERRFAHRDT, H.: “La preistoria dei ‘patti diseguali’ della Cina (1939)”, in AA.VV.: *Modelli giuridici europei della Cina contemporanea* (ed. G. AJANI, J. LUTHER), Jovene Editore, Napoli, 2009, pp. 1-8.

37 LIANG, Z.: “Law Politics and Social Change: Codification in China Since 1902”, in AA.VV.: *Codici: Una riflessione di fine millennio* (ed. P. CPPELLINI, B. SORDI), Milano, Giuffrè, 2002, p. 401-427.

38 As far as legal borrowings and transplants are concerned, a point of reference for comparative legal scholars is WATSON, A.: *Legal transplants: an approach to comparative law*, University press of Virginia, Charlottesville, 1974.

39 HUA, S.: “Shen Jiaben and the Late Qing Legal Reform (1901–1911)”, *East Asia*, 2013, vol. 30, pp. 121–138.

ethics and related customs being relegated to a secondary source of law, private law becoming of direct interest for the Chinese legislator, the code style becoming more technical, corporal punishment being removed and the chapter dedicated to military administration and education being greatly amended⁴⁰. The Imperial examinations, one of the pillars of the Chinese administration, were replaced by Western-style universities based mainly on the German model⁴¹.

Nevertheless, the Chinese Empire remained reluctant to introduce concepts such as rule-of-law principles and individual freedoms.

In 1911, the first draft of a new civil code was presented. It was based mainly on German law, chosen not only for its presumed conceptual and systematic superiority but also for reasons related to the political organisation of the 'model country' (the German area in which the code applied at that time) and to its civil law rules, perceived as more adequate for the perpetuation of the Empire and as a good model for adoption and adaptation⁴².

However, the efforts were not enough to prevent the collapse of the Chinese empire in 1911. The end of the empire was followed by a period of disorder characterized by internal conflicts. Known as the Warlord Era, it lasted until 1927 when the country was unified under the leadership of Chiang Kai-shek and the National Party (国民党 Guomindang), the leading party of the Republic of China⁴³.

Intent on overcoming Confucian tradition and modernising the country, the National Party instituted a complex legal codification phase stimulated by a comparison with Western codes. The so-called Six Codes (literally six laws, in Chinese 六法 liu fa) were all enacted between 1928 and 1935, with the exception of the constitutional law adopted in 1947. Reforms affected the whole legal system: the Civil Code was drafted between 1929-1931, the Civil Procedural Code between 1929-1930; the Criminal Code in 1928 and in 1935 the corresponding Criminal Procedural Code, the same year in which a law on the judicial organization was also adopted⁴⁴.

40 PONTI, E.: *La recezione*, cit., p. 177 ss.

41 AHL, B.: "Advancing the Rule of Law through Education? An Analysis of the Chinese National Judicial Examination", *Issues & Studies*, 2006, vol. 42, pp. 171-203, p. 179.

42 ROSSI, P.: "Tra incorporazione e reinvenzione: riflessioni sistemologiche sulla recezione dei modelli giuridici nella Repubblica popolare cinese", in AA.VV.: *Modelli giuridici*, cit., pp. 9-67, see also LIANG, Z.: "Law Politics and Social Change", cit., p. 411.

43 Worth mentioning is the role that at the beginning of the XX century played Sun Yat-sen and his theories that shaped mainly Chinese constitutional law, in this regard see SON, B.N.: "Sun Yat-Sen's Constitutionalism", *Giornale di Storia Costituzionale*, 2016, vol. 32, pp. 157-179. The Three principles of the people are particularly important and the democratic one can be interpreted as the transposition of the separation of powers' principle in China.

44 AA.VV.: *Diritto dell'Asia*, cit., p. 177 ss.

The main source of inspiration for all six codes was German law, as had already been the case in Japan, similarly a signatory of Unequal Treaties⁴⁵. In a nutshell, the 1930s saw China adopting a different and distant legal culture that, at least in theory, was supposed to be followed by a political and cultural reform⁴⁶.

As far as private law is concerned, concepts such as individualism, freedoms, market economy and technological progress became principles enshrined in the Chinese civil code, now the primary source of law. The Western legal tradition influence was particularly evident also in the basic principles of the legal system; for instance, Article I on the sources of law stated that: "In civil matters, where there is no provision of law applicable to a case, the case shall be decided according to custom. If there is no such custom, the case shall be decided in accordance with the general principles of law". The influence of the Swiss Civil Code of 1912 seems clear both in the content and the position: the hierarchy of sources of law reflects Article I of the Swiss Civil Code⁴⁷.

As regarded customary law, the "longa consuetudo" was to be respected, insofar as it was compatible with public policy ("ordre public"), a circumstance that allowed the modern courts (also shaped on the German example), and especially the Supreme Court, to clearly limit customary law and to oppose any manifest abuses upheld for centuries in the population's legal conscience⁴⁸.

In line with the structure of the German BGB, the Chinese Civil Code of the 1930s has five parts: i) the general part (cf. BGB: *der allgemeine Teil*), ii) the law of obligations (cf. BGB: *das Schuldrecht*); iii) property law (cf. BGB: *das Sachenrecht*); iv) family law (cf. BGB: *das Familienrecht*); and v) inheritance law (cf. BGB: *das Erbrecht*).

Commenting on the Republic of China Civil Code enacted by the National Party, one prominent Chinese legal scholar declared that: "If the Civil Code is studied carefully from Article I to Article 1225, and then compared with the German Civil Code, the Swiss Civil Code and the Swiss Code of Obligations,

45 Also arriving in Japan in the mid-XIX century, the Western powers forced the country to similarly sign "unequal treaties". However, Japan's reaction was immediate. Within 10 years, the legal system was modernised, with the reform mainly inspired by German law translated into Japanese. As a result, when China studied the German code, the Japanese translation was already available. In fact, the Japanese Civil Code based on the Bürgerliches Gesetzbuch (BGB) entered into force in 1898, based on a draft version of the BGB that only entered into force two years later. For a comparative perspective, see *ivi*, p.133 ss.

46 PONTI, E.: *La recezione*, cit., p. 190, see also CHEN, J.: *Chinese Law: Context and Transformation*, N.Nijhoff, Leiden-Boston, 2015, p. 455 ss.

47 *Ibid.*

48 According to Escarra article I of the Republic of China Civil code "a permis aux tribunaux modernes, et particulièrement à la Court Suprême, de delimitier avec precision le domaine de la coutume et de lutter contre le maintien d'abus manifestes enracinés de toute antiquité dans la conscience juridique du peuple". ESCARRA J.: *Sources du droit positif actuel de la Chine*, as quoted by PONTI, E.: *La recezione*, cit., p. 194. See also CHEN, J.: *Chinese Law*, cit., p. 37.

we will find that ninety-five percent of the provisions [in the Guomintang Civil Code] have their origin there: they are either copied directly or copied with some changes of expressions [from these foreign codes]⁴⁹.

Nevertheless, legal scholars' opinions differ on the interpretation of such legal transplants. Some believe that local practices lived on in the local practice interpretation, while others believe that the new code constituted a clean cut with traditions and traditional Chinese law⁵⁰.

The establishment of Communist China under Mao Zedong meant that the Guomintang Civil Code and all Six Codes were short-lived in mainland China. Generally speaking, the National Party's laws and respective institutions "were far from reaching the Chinese people and had no substantial impact on society at large". Especially in China's rural areas, their application left a lot to be desired⁵¹. The technical and scientific modernisation, that also include the legal modernization, has also be considered as a juxtaposition between 体 (ti) –its literal meaning in Chinese is "body" and 用 (yong) –meaning "use-function" from which it could be inferred the following: Chinese knowledge as the substance, Western knowledge as function⁵².

IV. THE MAOIST ERA AND REJECTION OF THE WESTERN LEGAL TRADITION.

Mao Zedong started his Long March from the south to the north of the country in 1934, heading for Beijing in particular (its literal meaning in Chinese is the capital of the north). His attention focused on rural areas where the National Party was less strong⁵³. In the aftermath of the Japanese occupation of China during the Second World War, the Chinese civil war (1945-1949) between the Chinese Communist Party (CCP) led by Mao Zedong and the National Party flared up. After four years of fighting, the Communists won, with the Nationalists under General Chiang Kai-shek forced to give up mainland China and retreat to the island of Taiwan.

With respect to the legal situation in mainland China, the Six Codes enacted by the National Party had no time to penetrate the whole country, especially as far as family and inheritance law were concerned, two topics intimately rooted in

49 These are Dr. Jhon C.H. Wu's words reported by CHEN, J.: *Chinese Law*, cit., p. 36.

50 *Ivi*, p. 38. See also MONATERI P.G. (ed.): *Methods of Comparative Law*, Edward Elgar, Cheltenham, Northampton, 2012, p. 198 ss.

51 CHEN, J.: *Chinese Law*, cit., p. 40.

52 ROSSI, P.: "Tra incorporazione", cit. pp. 52-54.

53 LOSANO, M.G.: *I grandi sistemi giuridici: introduzione ai diritti europei ed extraeuropei*, Laterza, Roma 2000, p. 420.

tradition. Nevertheless, the codes remain in force in Taiwan in amended versions to this day⁵⁴.

The establishment of the People's Republic of China (PRC) on 1 October 1949 saw existing laws being revoked. From a legal point of view, the nadir was probably reached before and during the Great or Cultural Revolution (1966–76) when legal institutions collapsed. The Ministry of Justice was closed down in 1959; law faculties were closed down and intellectuals sent to remote rural areas to perform hard labour⁵⁵. The model to follow was the Soviet model. The term used here by legal scholars is 'legal nihilism', reflecting the belief that a country aiming for communism has no need of law. Western models were therefore rejected, first and foremost for ideological reasons, with Chinese Communist Party directives becoming the new law⁵⁶. Soviet influence, in some way, continued the transplant of a civil-law-style legal system, while representing an obstacle to the import of any Western influence⁵⁷.

V. DENG XIAOPING AND THE NEW REFORM ERA.

1978 is usually considered as the turning point in Communist China's history, the beginning of a new reform era. Though partly true, it should be remembered that the constitutional principles upon which the new reform era was designed are those established by Mao in the first PRC Constitution of 1954⁵⁸.

Based on the 1936 Stalinist Constitution of the Union of Soviet Socialist Republics (USSR), the 1954 Constitution codified the institutional structure, offices and powers of the PRC. Its Article 1 stated that the People's Republic of China is a people's democratic state led by the working class and based on the alliance of workers and peasants, while Article 2 stated that "All power in the People's Republic of China belongs to the people. The Organs through which the people exercise power are the National People's Congress and the local people's congresses". Under the 1954 Constitution, China started to be dominated by a single political party guided by the notion of a socialist legality, under which state

54 AA. V.: *Diritto dell'Asia*, cit., p. 232 ss. For a general understanding of this period see YIN, B.: "Chinese Socialist Legal System: Evolution and Principal Features", in TOMÁŠEK, M., MÜHLEMANN, G.: *Interpretation of Law in China - Roots and Perspectives*, Karolinum Press, Prague 2011, pp. 123-142.

55 LOSANO, M.G.: *I grandi sistemi*, cit., p. 423.

56 For details on the ambivalent approach to law under Mao see MENSKI, W.: *Comparative Law*, cit., p. 570 ss.

57 YIN, B.: "Chinese Socialist", cit., pp. 123-142.

58 The People's Republic of China had two successive Constitutions in the Maoist era: the 1975 and 1978 Constitution. For the Constitutional development see AA.VV.: *Building Constitutionalism in China* (ed. S. BALME, M.W. DOWDLE), Palgrave Macmillan, New York, 2009, for the Maoist principles see GLENN TIFFERT, D.: "Epistrophe: Chinese Constitutionalism and the 1950s", in AA.VV.: *Building Constitutionalism*, cit., p. 59 ss. See Also DICKS, A.R.: "The Chinese Legal System: Reforms in the Balance", *China Quarterly*, 1989, pp. 540-576, p. 544.

ownership and collective ownership constitute the basic forms of ownership⁵⁹. China's current democratic centralism principle and the placing of all state powers in the hands of the National People Congress have their roots in the 1954 Constitution. Indeed, the current Chinese Constitution of 1982 is to a large extent based on the 1954 Constitution⁶⁰.

The rehabilitation of law and the legal system is mainly marked by two events: the trial of the Gang of Four (including Mao's wife, Jiang Qing) and the speech given by Deng Xiaoping in 1978 where he had the following to say:

"[T]o safeguard people's democracy, it is imperative to "strengthen the socialist legal system" so that democracy is systematized and written into law in such a way as to ensure the stability, continuity and full authority of this democratic system and these laws; there must be laws for people to follow, these laws must be observed, their enforcement must be strict and law breakers must be punished. From now on, "legislative work should have an important place on the agenda of the National People's Congress and its Standing Committee". Procuratorial and judicial organisations must maintain their independence as is appropriate; they must faithfully abide by the laws, rules and regulations, serve the people's interests, and keep to the facts, they must guarantee the equality of all people before the people's laws, and deny anyone the privilege of being above the law"⁶¹ (emphasis added).

Deng Xiaoping's open-door policy literally opened up China to the rest of the world and to the West in particular⁶². Law was rehabilitated and considered as a necessary tool for a country in the primary stage of socialism, a suitable means to achieve political goals. Interestingly, the first laws enacted included the Law on Chinese-Foreign Equity Joint Ventures, adopted at the Second Session of the Fifth National People's Congress on 1 July 1979, the Law on Wholly Foreign-Owned Enterprises adopted on 12 April 1986 at the 4th Session of the 6th National People's Congress, the Trade Marks Law of 1982 and the Patent Law of 1984, all enacted to encourage foreign investments in China and all reflecting the influence of Western law⁶³.

59 An English translation is available at en.pkulaw.cn. See also GLENN TIFFERT, D.: "Epistrophe", cit., p. 59 ss.

60 Ibid.

61 Communiqué of the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party of China, as quoted by CHEN, A.H.Y.: *An Introduction to the Legal System of the People's Republic of China*, LexisNexis, Hong Kong, 2011., p. 42.

62 MINZNER, C.: "China After the Reform Era", *Journal of Democracy*, 2015, vol. 26, pp. 129-143, p. 130.

63 CHEN, J.: *Chinese Law*, cit., p. 80. Naturally, legislative reforms must be read in connection with the following Constitutional amendments: i) the amendment of 1988 amended Art. 11 by permitting the private sector of the economy to exist and develop within the limits prescribed by law. The private sector complements the socialist public economy. Among other changes, the amendment stated (in Art. 10) that the right to the use of land may be transferred according to law; ii) the amendment of 1993 introduced the theory of building socialism with Chinese characteristics. This opened the door to concepts that from a Western

Moreover, it is worth mentioning that even if the current Constitution is based on the 1954 Maoist Constitution⁶⁴, current private law is rooted in the pre-1949 experience of law and therefore in the Guomindang Civil Code greatly influenced by German law. While post-Mao politicians were discussing the heritability of 'old' laws, the pragmatic approach of the Chinese legislator was pivotal in underlining the importance of Western experiences, to be used as a 'reference' for building a socialist law with Chinese characteristics⁶⁵. Common law and civil law systems were both taken into account. The first was particularly useful for international commercial practices⁶⁶, while the second formed the basis of many private law aspects. In the 1980s, the terminologies and methodologies of the Western Legal Tradition (WLT) entered Chinese law and the legal system even if the rhetoric continued stressing the 'socialist' nature and 'Chinese characteristics' of the new law⁶⁷.

As far as civil law is concerned, though it remains fragmented in different laws such as the law governing contracts (1999), companies (2005), property (2007), torts (2009), and conflicts of law (2011), nevertheless the General Principles of Civil Law (GPCL) adopted in 1986 constitute the foundations of current private civil law in China.

In line with the German approach, the GPCL are characterized by a formalist and abstract approach. For example, GPCL Article 54 on the civil juristic act provides the following definition: "A civil juristic act shall be the lawful act of a citizen or legal person to establish, change or terminate civil rights and obligations"⁶⁸.

Even if the approach taken in the 1986 GPCL resembles the German approach, it should be made clear that other Continental European legal systems influenced specific legal topics⁶⁹.

In short, the effort made by the National Party were not worthless. The massive legal transplants that characterised the Six Codes of the 1930s re-emerged in the

point of view can be considered as oxymoron, such as the expression "The state practices socialist market economy that took the place of the planned economy"; iii) the amendment of 1999 introduced the socialist rule of law; iv) the amendment of 2004 declared private property as inviolable, stating also that "The State respects and preserves human rights"; v) the amendment of 2018 will be discussed in the paper below.

64 GLENN TIFFERT, D.: "Epistrophe", cit., p. 59 ss.

65 CHEN, J.: *Chinese Law*, cit., p. 78.

66 CRESPI REGHIZZI, G.: "Cina 2003: L'osservatorio del giurista", 2003 available at: <http://www.leggicinesi.it/dottrina/ReghizziCinaOsservatorioGiurista.pdf>

67 CHEN, J.: *Chinese Law*, cit., p. 78.

68 Chinese legislation is available at en.pkulaw.cn. The new Chinese Civil Code now states at art. 133: "Juridical acts are acts of the parties to civil legal relations to create, modify, or terminate civil legal relationships through a declaration of will".

69 CHEN, J.: *Chinese Law*, cit., p. 455 ss.

post-Mao era even if sometimes integrated and reinterpreted in light of “socialism with Chinese characteristics”⁷⁰.

This should be reassuring for EU-based judges, enabling them to – at least to a certain degree – steer a course reflecting the Western legal tradition in the event the universal application of a European private law regulation leading to the application of Chinese law.

VI. RECENT REFORMS AND INTERPRETATION OF LAW IN CHINA.

Recent reforms and the interpretation of law in the People’s Republic of China can however make European judges’ task of applying Chinese law more difficult.

Published in November 2010, the Notice of the Supreme People’s Court on Issuing the Provisions on Case Guidance (hereinafter the “Provisions”)⁷¹ introduced the so-called “guiding case mechanism” (指导性案例 *zhidao xing anli*) in an attempt to improve consistency in adjudication and to “sum up trial experience, unify the application of law, enhance the quality of trials and maintain judicial justice”. Under Article 2 of the Provisions, “guiding cases” refer to rulings and judgments that already have legal effect and meet the following requirements: (1) they are of widespread concern to society; (2) [involve] legal provisions [that are] of relatively general nature; (3) are of a typical nature; (4) are difficult, complicated or of new types. Otherwise, as it is usual in Chinese legislation, in order to have the possibility to select cases different from the abovementioned list, “guiding cases” can also refer to “other cases which have guiding effect”, a wording giving wide discretion to the Supreme People’s Court case selection.

In fact, the Supreme People’s Court itself is responsible for selecting and editing the relevant decisions handed down by the different Chinese People’s Courts⁷², also following the suggestions of representatives of people’s congresses, members of committees of the political consultative conference, experts, scholars, lawyers, and other people from all circles of society involved in the adjudication and enforcement work of people’s courts⁷³. Under Art. 7 of the Provisions, all

70 “Socialism with Chinese characteristics” is a wording that became popular to describe the Chinese approach to socialism such as the shift from a “planned economy” to a “socialist market economy” in 1993. The expression is also part of the Preamble of the Chinese Constitution.

71 The Notice of the Supreme People’s Court on Issuing the Provisions on Case Guidance (November 2010) are available at en.pkulaw.cn.

72 Chinese courts are divided into basic people’s courts, intermediate people’s courts, high people’s courts and of course the Supreme People’s Court, for further details see AA.VV.: *Chinese Justice. Civil Dispute Resolution in Contemporary China* (ed. M.Y.K. WOO, M.E. GALLAGHER), Cambridge University Press, Cambridge, 2011 and BROWN R.C.: *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics*, Kluwer Law International, London-Boston-The Hague 1997 is still a very important reading.

73 See Article 5 of the Provisions on Case Guidance (November 2010).

people's courts *should refer* to the guiding cases released by the Supreme People's Court when adjudicating similar cases (emphasis added).

Comparative law scholars might find themselves reminded of the doctrine of binding precedents in the common law tradition, though there are significant differences. First, not all court decisions become guiding cases, but only those selected by the Supreme People's Court; second, the Supreme People's Court edits the decisions, extrapolating those parts deemed relevant in accordance with the abovementioned Article 2 of the Provision. Finally, Chinese courts are not bound by the selected guiding case in their rulings, though they are expected to justify them by explicitly referring to the relevant case⁷⁴. So far the Supreme People's Court has selected more than hundred cases regarding civil, penal and administrative law. Generally speaking, case law cannot be considered as a *de jure* source of law in China, bringing the country closer to the civil law tradition.

Another reform set to impact the application of Chinese law by European judges concerns the new Chinese Civil Code issued at the end of May 2020 and scheduled to come into effect on 1 January 2021⁷⁵.

Generally speaking, this should be a positive move, in light of the currently fragmented civil law. On 1 October 2017, the new General Provisions of Civil Law entered into force, representing the first book of the new Chinese Civil Code (民法总则 *minfa zongze*). As yet, the 1986 GPCL coexists with the new General Provisions of Civil Law, though it would seem that the 2017 articles are explicitly re-instituting the role of customary law.

Interestingly, Article 6 of the 1986 GPCL dedicated to the sources of law states that: "Civil activities must be in compliance with the law; where there are no relevant provisions in the law, they shall be in compliance with 'state policies'"⁷⁶ (emphasis added).

Article 10 of the 2017 General Provisions of Civil Law, also dedicated to the sources of law, states that: "Civil disputes shall be resolved in accordance with the law; if the law is silent, 'customs may apply', but not contrary to public order and good morals"⁷⁷.

Ever since Shen Jiaben's revision of the Qing Code in an attempt to stave off the collapse of the Empire, codified law has been the primary source of law.

⁷⁴ Immediately following its introduction, Stanford University started a noteworthy study on the Guiding Case Mechanism. For further details: <https://cgc.law.stanford.edu/>.

⁷⁵ The Covid-19 pandemic led to the postponement of the National People's Congress (from March to May 2020). See also http://www.xinhuanet.com/english/2020-05/20/c_139072382.htm

⁷⁶ <http://www.lawinfochina.com/display.aspx?id=1165&lib=law>

⁷⁷ <http://www.lawinfochina.com/display.aspx?lib=law&id=23213>

Consistent with this approach, the new General Provisions of Civil Law confirm this primacy, though customary law re-emerges as a secondary source of law, insofar as it is compatible with public order (i.e. public policy in the words of the EU Regulations) and good morals⁷⁸.

The restoration of customary law seems to be in line with the course taken by the current President of the People's Republic of China, Xi Jinping, and his dream of rejuvenating the Chinese nation by building: i) a strong China (economically, politically, diplomatically, scientifically, militarily); ii) a civilized China (equity and fairness, rich culture, high morals); iii) a harmonious China (amity among social classes); and iv) a beautiful China (a healthy environment, low pollution)⁷⁹. To this end, Xi Jinping's idea contemplates purging Western values from textbooks, instead relying on Chinese traditions⁸⁰. Xi Jinping's thoughts have guided the latest constitutional amendment (2018), reflecting his will to turn China into a great modern socialist country. These thoughts have been taken up in the Preamble of the Constitution. His self-confidence is reflected in the removal of the limit of two consecutive terms of office for Chinese presidents, a move which officially allows him to remain in office after the end of his second term in 2023⁸¹.

Yet legislation lives in its interpretation. To this end, not only judges' attitudes⁸² and the Guiding Case Mechanism established in 2011 can play a significant role. The Chinese legal system is characterized by the Supreme People's Court's judicial interpretations which represent a de facto source of law, sometimes also defined as secondary law⁸³. Not related to a specific case, they usually refer "to interpreting and explaining the content and meaning of legal norms by judicial organizations in implementing laws, or further explanation of concepts, terminology and definition of the meaning of legal norms⁸⁴".

From a comparative law perspective, it will be interesting to observe how such reforms will be implemented and what impact they will have on the Chinese

78 For a comprehensive picture of civil law codification in China see ZHANG, X.: "The New Round of Civil Law Codification in China", *University of Bologna Law Review*, 2016, vol. 1, p. 106-137.

79 The Xi Jinping declaration were made the same year of his election in 2013, see <https://www.nytimes.com/2013/06/05/opinion/global/xi-jinpings-chinese-dream.html>, for an academic analysis see also HAN, X., ZHANG, W.: *Contemporary value systems in China*, Springer, Singapore, 2018.

80 MINZNER, C.: "China After the Reform Era", cit., p. 139.

81 See paragraph 3 of Article 79 of the 1982 Constitution as amended in 2018 that now states that "The terms of office for the President and Vice-President of the People's Republic of China are the same as those of deputies to the National People's Congress".

82 TIMOTEO, M.: "Nozioni vaghe di diritto. Lo standard di heli nella giurisprudenza cinese in materia di contratti", in AA. VV.: *Modelli giuridici*, cit., pp. 283-300, and NOVARETTI S.: "Le clausole generali nel diritto cinese. La nozione di buona fede e la giurisprudenza", in AA.VV.: *Modelli giuridici*, cit., pp. 339 -399.

83 Article 33 of the Organic Law on People's Court adopted in 1979 and revised in 1983 «The Supreme People's Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceedings». LUBMAN, S.: *Bird in a Cage: Legal Reform in China after Mao*, Stanford University Press, Stanford, 1999, p. 251 and 282 ss.

84 Yin and Chen as quoted by LIN Z., Hou, S.: *China's Supreme Court*, Routledge, New York, 2014.

legal system and correspondingly on the possible application of Chinese law by a European judge.

VII. UNIVERSAL APPLICATION OF EU REGULATIONS VERSUS FAMILY PLANNING AND BIRTH CONTROL IN THE PEOPLE'S REPUBLIC OF CHINA.

Even if a product of massive legal transplants from the Western legal tradition and thus easily comprehensible for Western law practitioners, Chinese legislation must always be read in its context and therefore in accordance with "socialism with Chinese characteristics"⁸⁵. As mentioned, family law has always been considered as intimately linked to tradition, a circumstance that in the past left the topic outside the interest of comparative law scholars⁸⁶. While these legal transplants also involved family and succession law, they were made more *ratione auctoritatis*, than *auctoritate rationis*. As a consequence, the transplanted rules, though legally in force, remained unapplied⁸⁷.

Legal studies demonstrate that Chinese law has always had a vertical character, i.e. subservient to state goals, whether promoting harmony within the Empire, the modernisation idea of the National Party, the Maoist political goals, the post-1976 reform era or the Xi Jinping rejuvenation. In this context, private law became of interest for the Chinese legislator under the pull of the Western examples well studied by Chinese scholars since the early 20th century⁸⁸.

Owing to the relevance of tradition in family matters, Chinese family law represents an area in which the Western influence has been re-elaborated to reflect such tradition and the developing characteristics of the country, possibly constituting a problem for EU-based judges⁸⁹.

The traditionally large size of Chinese families is still well evident in the Chinese language, with different characters used to identify siblings: the older brother (哥哥 *gege*), the younger brother (弟弟 *didi*), the older sister (姐姐 *jiejie*), and the younger sister (妹妹 *meimei*). The compactness of the Chinese family can still be found in some laws such as the Marriage or Succession Laws⁹⁰.

85 See *supra* footnote no. 71.

86 For an overview on the topic see BRADLEY, D.: "A Note on Comparative Family Law: Problems, Perspectives, Issues and Politics", *Oxford U Comparative L Forum*, 2005, no 4.

87 For the reasons behind the weak application of Western-oriented rules see *supra* par. III.

88 *Ibid.*

89 Western knowledge (i.e. the style of the rules) was transplanted as "function", while Chinese knowledge (i.e. the interpretation of the rules) continued to be the substance. See *supra* footnote no. 53.

90 For instance Chapter III of the Marriage Law of 1980 (revised in 2001) on "Family Relations" establishes rules to provide for instance the care among three generations of family members; see CHEN, J.: *Chinese*

Family relations as enshrined in legislation continue to refer to Confucianism, expressing values still partly linked to the hierarchical and differentiation principles of the Confucian ideology⁹¹.

Immediately after the foundation of the People's Republic of China (1 October 1949), Mao, aware of the relevance of the family for his political aims, adopted the first Marriage Law of the PRC (1950)⁹².

Mao's initial approach to family law was a pro-natalist approach taken from the Soviet Union and based on the idea that a higher birth rate was synonymous with socialist development, while at the same time compensating for a high infant mortality and death rate.⁹³

Within a five-year period, different positions started to arise.

The 1950 Marriage Law establishing gender equality led some women to call for access to contraceptive methods, abortion and sterilisation, seen as the only way to make a career within the CCP. Nevertheless, notwithstanding this gender equality, women remained completely responsible for family care⁹⁴.

Initially received hostilely by a medical sector concerned about women's health⁹⁵, the request soon transformed into a tool instrumental to CCP interests⁹⁶. Indeed, as soon as the Party found itself facing shortages of food, work and education, the pro-natalist approach was abandoned⁹⁷.

Law, cit., p. 543. See also the rules on statutory succession of the 1985 Succession Law of the People's Republic of China.

91 See supra par. II.

92 See for instance DIAMANT, N.J.: "Re-Examining the Impact of the 1950 Marriage Law: State Improvisation, Local Initiative and Rural Family Change", *The China Quarterly*, 2000, No. 161, pp. 171-198.

93 For a comparative perspective of the idea of the "economic family" see the Special issue of the *American Journal of Comparative Law* 2010. For an introduction to the topic see HALLEY, J., RITTICH, K.: "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism", *Am. J. Comp. L.*, 2010, vol. 58, pp. 753- 775. For the Chinese perspective see WHITE, T.: *China's Longest Campaign Birth Planning in the People's Republic, 1949-2005*, Cornell University Press, Ithaca, N.Y., 2006, p. 20.

94 *Ivi*, p. 21.

95 Birth control decisions were delegated to the Ministry of Health and Western-trained medical professionals were also conservative with respect to contraception. *Ivi*, p. 22 ss.

96 The transition from a pro-natalist to an anti-natalist approach was not linear. For instance, in the 1940s the party allowed educated woman in urban areas to practice birth control, while supporting women in rural areas to have children. Even if implementation of the birth control policy was patchwork and access to birth control sometimes more theoretical than real, the policy was officially established in principles. *Ivi*, p. 23-30. The various approaches and relevant political speeches between the 1950 and the 1960s, such as the clever formula of "to promote childbirth according to a plan" can be found in *ivi*, p. 35 ss.

97 *Ibid*.

Family planning was and still is perceived as instrumental to socialist growth, whether under the reforms⁹⁸ initiated by Deng Xiaoping or under current policy⁹⁹. It explicitly became a duty for families under the 1980 Marriage Law and the 1982 Constitution¹⁰⁰. However, implementation and controls were regulated at local level, meaning that its application was fragmented and disparate¹⁰¹. In 2001, the new Population and Family Planning Law centralised family planning legislation, but once again implementation was delegated to local authorities¹⁰². This is the reason why the sharpest criticisms of China's birth control policy are often challenged, even by those who believe that there are valid reasons to support such a policy seen by many as a major intrusion in a very private and intimate sphere¹⁰³.

Article 1 of the Population and Family Planning Law states that its purpose is to coordinate population development with developments in the economy, society, resource availability and the environment, thereby protecting the interests of citizens and the happiness of families, while at the same time contributing to the prosperity of the nation and to social progress.

Family planning is thus conceived as a fundamental State policy, to be incorporated into national economic and social development plans from central to local level, thereby reflecting different administrative divisions and the associated local conditions (cf. Art. 2 and 9). To instil the importance of family planning in the population, "Departments in charge of family planning, education, science and technology, culture, public health, civil affairs, the press and publi[shing], and radio

98 After the failure of the Great Leap Forward the following concept began to take hold: "human reproduction, like economic production, could and should be organized rationally through state intervention and administration; childbearing, like grain production, should and could be regulated according to state needs and plans", *ivi*, p. 7.

99 In the late 1970s the birth control policy started to be defined as the one-child campaign and became massive after efforts were made to develop a central-to local-level administrative structure to supervise family planning policy, *ivi*, p. 10, with tight controls and negative consequences for unauthorized children, such as losing one's job, apartment, food ration tickets and urban residency permit, even if not formally regulated by legislation. Major negative effects of this campaign were perceived in rural areas where the economic status of villages deteriorated, especially if a couple failed to have a male descendant, *ivi*, p. 4 ss. The approach of a 'decentralized experimentation' is very common in China and it illustrates "the capability of China's party-state to generate institutional and policy innovations for economic reform and to adapt to a rapidly changing economic environment", see HEILMANN, S.: "Policy-Making through Experimentation: The Formation of a Distinctive Policy Process", in AA. VV.: *Mao's invisible hand. The political foundations of adaptive governance in China* (ed. S. HEILMANN, E.J. PERRY), Harvard University Press, Cambridge (Massachusetts), 2011, pp. 62-101.

100 See arts. 2,6, 16 of the Marriage Law as revised in 2001, that foresee a legal duty of the couple to practice birth control and delay marriage (they were former arts. 2, 5, and 12 of the Marriage Law in its original version of 1980 which repealed the 1950 Marriage Law adopted under Mao). The relevant articles of the 1982 Constitution are arts. 25 and 49. For the reasons behind this policy perceived as strategic and population statistics see POPULATION COUNCIL (ed.): "Chinese Government White Paper on Family Planning", *Population and Development Rev.*, 1996, vol. 22, pp. 385-390, issued by the Information Office of the State Council on 23 August 1995.

101 CHEN, J.: *Chinese Law*, cit., p. 553.

102 The English translation of the Population and Family Planning Law of the PRC (2001) is available at en.pkulaw.cn.

103 CHEN, J.: *Chinese Law*, cit., p. 552-553.

and television broadcasting shall make arrangements to conduct public education” (Art. 13).

The family planning duty is a mutual concern of husband and wife. Article 18 establishes the one-child policy, while allowing for a second child in specific circumstances. To this end, couples are supposed to conscientiously practise contraception and accept technical services and guidance for family planning (Art. 20).

Due to the traditional preference for male children, the law also specifies that “Discrimination against and maltreatment of women who give birth to baby girls or who suffer from infertility are prohibited. Discrimination against, maltreatment, and abandonment of baby girls are prohibited” (Art. 22). This article indirectly highlights some of the negative consequences of the birth control policy.

The law goes on to encourage insurance companies to offer insurance schemes facilitating family planning as well as other support methods to be established at the local level. The local level is also responsible for eventual rewards or other social security benefits for couples who volunteer to have only one child. (Art. 27).

Other rules help us gain an understanding of the side effects of this policy officially adopted at central level in 2001 but applied since the 1970s and mainly regulated at local level¹⁰⁴.

Chapter VI lists the fines and possible liability consequences of any infringement of family planning rules.

Moreover, one of the three judicial interpretations of the 1980 Marriage Law (revised in 2001, and already making family planning a legal duty, seems to suggest that decisions on whether to have a child can also play a role in divorce cases. In particular, Art. 9 of Interpretation III of the Supreme People’s Court of Several Issues relating to the Application of the Marriage Law of the People’s Republic of China (in effect since 13 August 2011) states that where spouses are in dispute over whether to have a child, causing the breakdown of their mutual affection and leading to one of the spouses seeking divorce, the people’s court shall handle it in accordance to item (5) of paragraph 3 of Art. 32 of the Marriage Law if mediation fails; i.e. this can be a contributory circumstance to granting the divorce¹⁰⁵.

¹⁰⁴ For instance art. 26, section 2, establishes that: “Citizens who undergo surgical operation for family planning shall enjoy leaves as specified by the State. Local people’s governments may give them rewards”. So, the negative impacts include pregnancies aborted under the pressure of state-imposed sanctions or other forms of coercion.

¹⁰⁵ Judicial interpretations of the Supreme People’s Court are available at en.pkulaw.cn.

It is conceivable that an EU-based judge might disregard this Chinese law provision, as it is seemingly manifestly incompatible with the public policy (“ordre public”) of most Member States. Even if an EU definition of public policy remains lacking, EU regulations do specify that “the courts [...] should not be able to apply the public policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union [...], and in particular Article 21 thereof on the principle of non-discrimination”¹⁰⁶.

The above reflects the legal situation until 1 January 2021. As already mentioned, China recently adopted its new Civil Code. Its Book V is dedicated to marriage and family (Arts. 1040 – 1118), though specific references to birth control and family planning seem to have been deleted.

For instance, Art. 1041 of Book V, Chapter I ‘General Rules’, is the former Art. 2 of the Marriage Law as revised in 2001. It now states that “A marriage system based on freedom of marriage, monogamy and equality between man and woman is applied. The lawful rights and interests of women, minors, the elderly and the disabled are protected”, i.e. the final clause of Art. 2 of the Marriage Law referring to birth control practice has not been taken over in the new code¹⁰⁷.

The absence of any reference to family planning and birth control can be considered as an indication that the policy has been abandoned¹⁰⁸. However, the list in the last article of the Chinese Civil Code (article 1260) of the statutes which, as of the Code's entry into force on 1 January 2021, will be repealed includes the Marriage Law and the Adoption Law of 1992 (which prohibits any breach of birth control by means of the adoption practice) but not the Population and Family Planning Law.

Arts. 25 and 49 of the 1982 Constitution respectively remain in force: “The state promotes family planning with a view to allowing population growth to

106 This is for instance the wording of recital 54 of Regulation (EU) 2016/1103. For some case law on the subject see, inter alia, RIZZUTI, M.: “Ordine pubblico costituzionale e rapporti familiari: I casi della poligamia e del ripudio”, *Actualidad Jurídica Iberoamericana*, 2019, no. 10, pp. 604-627. See also RIZZUTI, M.: *Il problema dei rapporti familiari poligamici*, ESI, Napoli, 2016.

107 The last clause of Art. 2 of the Marriage Law of the PRC (as revised in 2001) states: “Birth control shall be practiced”. The same reasoning can be applied to Articles 6 and 16. The first encourages late marriage and late child birth, a clause that has not been transposed into Article 1047 of the new Chinese civil code, while the second one, made up solely of the following sentence: “Both husband and wife shall be under the obligation of following the policy of birth control” is completely absent from the code.

108 Depending on regions and local conditions the one-child policy saw different degree of implementation and exceptions, since 2013, for instance, a second child was allowed if one of the parents (no more both of them) is an only child. The country seems to be realizing the social cost of the birth control policy and especially the one-child policy that also led to an alarming gender imbalance. For some details see BASTEN, S., JIANG, Q.: “China's Family Planning Policies: Recent Reforms and Future Prospects”, *Studies in Family Planning*, vol. 45, 2014, pp. 493-509.

match the plans for economic and social development and “[...] Both husband and wife have the duty to practise family planning. [...]”. Similarly, the Population and Family Planning Law provisions will not be repealed by the Code. Rather than an indication that family planning policy is being abandoned, this is probably to be seen as an attempt to avoid the repetition of a duty enshrined in the Constitution and specified in the Population and Family Planning Law.

Nevertheless, the absence of any family planning or birth control provisions in the Code could limit the public policy exception. For instance, if EU-based judges are asked to apply Chinese law in relation to a transnational divorce after 1 January 2021, they will merely have to look at the Code (and possibly any judicial interpretations that the SPC decides to issue to clarify any of the Code’s articles), without having to take account of the Population and Family Planning Law and its references to divorce.

In this way birth control will remain a domestic issue.

VIII. CONCLUDING REMARKS.

Properly translated, Chinese law can be defined as intelligible for European judges. At the end of the Opium Wars, China started to align its legislation with Western legal systems, even if legal transplants were not always easy and were reinterpreted to reflect “socialism with Chinese characteristics”. With Chinese law guided by an inner logic, its understanding is dependent on a judge’s knowledge of its Western characteristics and socialist principles, but also of the centuries-old traditions which sometimes still emerge in the legislative texts and also in judicial rulings and which the current President of the People’s Republic of China is strongly promoting.

The universal application of the EU Regulations can be seen as a challenge for European judges especially when topics related to family law and more directly linked to Chinese traditions come into play. This is a significant yet potentially rewarding challenge.

BIBLIOGRAFY

AA.VV.: *Building Constitutionalism in China* (ed. S. BALME, M.W. DOWDLE), Palgrave Mcmillan, New York, 2009.

AA.VV.: *Modelli giuridici europei della Cina contemporanea* (ed. G. AJANI, J. LUTHER), Jovene Editore, Napoli, 2009.

AA.VV.: *Chinese Justice. Civil Dispute Resolution in Contemporary China* (ed. M.Y.K. WOO, M.E. GALLAGHER), Cambridge University Press, Cambridge, 2011.

AA.VV.: *Diritto dell'Asia orientale* (G. AJANI, A. SERAFINO, M. TIMOTEO), Utet, Milano, 2007.

AA.VV.: *Law in Imperial China* (ed. D. BODDE, C. MORRIS), Harvard University Press, Cambridge-Massachusetts, 1967.

AA.VV.: *Les grands systèmes de droit contemporains* (R. DAVID, C. JAUFFRET-SPINOSI), 10^a ed., Dalloz, Paris, 1992.

AA.VV.: *Private Law in the External Relations of the EU* (ed. M. CREMONA, H.W. MICKLITZ), Oxford Scholarship Online, 2016.

AA.VV.: *Chinese Migration to Europe. Prato, Italy, and Beyond* (ed. G. JOHANSON, N. MC AULIFFE, M. BRESSAN, L. BALDASSAR), Pelgrave Macmillan, London, 2015.

AHL, B.: "Advancing the Rule of Law through Education? An Analysis of the Chinese National Judicial Examination", *Issues & Studies*, 2006, vol. 42, pp. 171-203.

BASTEN, S., JIANG, Q.: "China's Family Planning Policies: Recent Reforms and Future Prospects", *Studies in Family Planning*, vol. 45, 2014, pp. 493-509.

BODDE, D.: "Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China", *Proceedings of the American Philosophical Society*, 107, 1963, pp. 375-398

BRADLEY, D.: "A Note on Comparative Family Law: Problems, Perspectives, Issues and Politics", *Oxford U Comparative L Forum*, 2005, no 4.

BROWN R.C.: *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics*, Kluwer Law International, London-Boston-The Hague 1997.

BRUNO, P.: *I regolamenti europei sui regimi patrimoniali dei coniugi e delle unioni registrate*, Giuffrè Francis Lefebvre, Milano, 2019.

CHEN, A.H.Y., *An Introduction to the Legal System of the People's Republic of China*, LexisNexis, Hong Kong, 2011.

CHEN, J.: *Chinese Law: Context and Transformation*, N. Nijhoff, Leiden-Boston, 2015.

CHEN, W.: *The Beijing Consensus?: How China Has Changed Western Ideas of Law and Economic Development*, Cambridge University Press, 2017.

CREMONA, M.: "Opinions 1/13 and 2/13 and EU External relations law", in FRANZINA, P.: (ed.), *The External Dimension*, Intersentia, Cambridge, 2017, pp. 3-20.

CRESPI REGHIZZI, G.: "Cina 2003: L'osservatorio del giurista", 2003 available at: <http://www.legggicinesi.it/dottrina/ReghizziCinaOsservatorioGiurista.pdf>

DENBY, C.: "Extraterritoriality in China", *American Journal of International Law*, 1924, vol. 18, pp. 667-675.

DIAMANT, N.J.: "Re-Examining the Impact of the 1950 Marriage Law: State Improvisation, Local Initiative and Rural Family Change", *The China Quarterly*, 2000, No. 16, pp. 171-198.

DICKS, A.R.: "The Chinese Legal System: Reforms in the Balance", *China Quarterly*, 1989, pp. 540-576.

FRANZINA, P. (ed.): *The External Dimension of EU Private International Law After Opinion 1/13*, Intersentia, Cambridge, 2017.

HALLEY, J., RITTICH, K.: "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism", *Am. J. Comp. L.*, vol. 58, 2010, pp. 753- 775.

HAN, X., ZHANG, W.: *Contemporary value systems in China*, Springer, Singapore, 2018.

HEILMANN, S.: "Policy-Making through Experimentation: The Formation of a Distinctive Policy Process", in. AA. VV.: *Mao's invisible hand. The political foundations of adaptive governance in China* (ed. S. HEILMANN, E.J. PERRY), Harvard University Press, Cambridge (Massachusetts), 2011, pp. 62-101.

HUA, S.: "Shen Jiaben and the Late Qing Legal Reform (1901–1911)", *East Asia*, 2013, vol. 30, pp. 121-138.

JERNIGAN, T.R.: *China in Law and Commerce*, Macmillan, New York, 1905.

JONES, W.C. (translator): *The great Qing code* (with the assistance of T. CHENG, Y. JIANG) Larendon Press; Oxford, 1994.

LIANG, Z.: "Law Politics and Social Change: Codification in China Since 1902", in AA.VV.: *Codici: Una riflessione di fine millennio* (ed. P. CPPELLINI, B. SORDI), Milano, Giuffrè, 2002, p. 401-427.

LIN Z., HOU, S.: *China's Supreme Court*, Routledge, New York, 2014.

LOSANO, M.G.: *I grandi sistemi giuridici: introduzione ai diritti europei ed extraeuropei*, Laterza, Roma 2000.

LUBMAN, S.: *Bird in a Cage: Legal Reform in China after Mao*, Stanford University Press, Stanford, 1999.

MACCORMACK, G.: *The Spirit of Traditional Chinese Law*, The University of Georgia Press, Athens-London, 1996.

MENSKI, W.: *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, Cambridge University Press, Cambridge, 2006.

MICKLITZ, H-W.: "La mano invisibile del diritto private europeo in materia normativa. La trasformazione del diritto privato europeo dall'autonomia al funzionalismo nella concorrenza e nella regolamentazione", *EUI Working Papers*, 2010, no. 09.

MICKLITZ, H-W.: "The internal vs. the external dimension of European private law – a conceptual design and research agenda", *EUI Working papers*, 2015, no. 35.

MINZNER, C.: "China After the Reform Era", *Journal of Democracy*, 2015, vol. 26, pp. 129-143.

MOCCIA, L.: *Il diritto in Cina*, Bollati Boringhieri, Torino 2009.

MONATERI, P.G. (ed.): *Methods of Comparative Law*, Edward Elgar, Cheltenham, Northampton, 2012.

PEERENBOOM, R.: *China's Long March toward Rule of Law*, Cambridge University Press, Cambridge, 2002.

PEERENBOOM, R.: *China Modernizes: Threat to the West or Model for the Rest?*, Oxford University Press, Oxford, 2007.

PONTI, E.: *La recezione del diritto privato occidentale in Cina fra il 1840 ed il 1949*, Edizioni Unicopli, Milano, 2006.

POPULATION COUNCIL (publisher): "Chinese Government White Paper on Family Planning", *Population and Development Rev.*, 1996, vol. 22, pp. 385-390.

QIN, Z., ZHOU, G.: "Pursuing Perfection: Formation of the Qing Code", *Modern China*, 1995, vol. 21, pp. 310-344.

ROBERTS, J.A.G.: *Storia della Cina*, il Mulino, Bologna, 2013.

ROSSI, P.: "Tra incorporazione e reinvenzione: riflessioni sistemologiche sulla recezione dei modelli giuridici nella Repubblica popolare cinese", in AJANI, G., LUTHER, J. (ed.): *Modelli giuridici europei nella Cina contemporanea*, Jovene Editore, Napoli 2009, pp. 9-67.

SON, B.N.: "Sun Yat-Sen's Constitutionalism", *Giornale di Storia Costituzionale*, 2016, vol. 32, pp. 157-179.

TIMOTEO, M.: *Circolazione di modelli e riforme giuridiche: il caso est-asiatico*, Libreria Bonomo, Bologna, 2005.

TOMÁŠEK, M., MÜHLEMANN, G.: *Interpretation of Law in China - Roots and Perspectives*, Karolinum Press, Prague, 2011.

WATSON, A.: *Legal transplants: an approach to comparative law*, University press of Virginia, Charlottesville, 1974.

WHITE, T.: *China's Longest Campaign Birth Planning in the People's Republic, 1949-2005*, Cornell University Press, Ithaca, N.Y., 2006.

YIN, B.: "Chinese Socialist Legal System: Evolution and Principal Features", in TOMÁŠEK, M., MÜHLEMANN, G.: *Interpretation of Law in China - Roots and Perspectives*, Karolinum Press, Prague 2011, pp. 123-142.

ZHANG, X.: "The New Round of Civil Law Codification in China", *University of Bologna Law Review*, 2016, vol. 1, p. 106-137.

