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The Judiciary in the Chinese Constitution
Between International Standards
and Domestic Exceptionalism

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To my father,

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T**ABLE OF CONTENTS**

SUMMARY	1
INTRODUCTION	15
CHAPTER 1 European Judicial Principles	21
PART I	22
I. The EU, the Council of Europe and the Rule of Law: a Point of Reference	22
An International Rule of Law.....	22
The European Legal Framework and the Rule of Law	24
II. The Judicial System within the European Context: International Standards.....	28
Are there European Standards for Judicial Independence and Capacity?	29
Existing European Standards	33
IFES and Global Judicial Integrity Principles.....	39
PART II.....	43
I. EU External Conditionality: Exporting democracy	43
How does conditionality work?	44
The promotion of EU principles: From Copenhagen to Cotonou.....	47
EU-China relations: does political conditionality matter?	53
CHAPTER 2 People’s Republic of China Judicial Principles	58
I. The Evolution of Chinese Legal System.....	59
The influence of the past	59
Legal Modern China: the transplant of law and legal institutions	65
The Constitution of the People’s Republic of China	74
II. The Judiciary and its Principles.....	79
Section 7 of Chapter 3 of the PRC’s Constitution	80
Judges Law of the People's Republic of China	82
Beijing Statement of Principles of the Independence of the Judiciary	83
III. The Contemporary Reform Process.....	85
Judicial Reform in China (2012 Governmental White Paper).....	88
Communiqué of the Fourth Plenary Session of the 18th CPC Central Committee	92
CHAPTER 3 The EU, International Judicial Standards and the PRC	96
I. The Implementation of the JIP in China.....	97
II. Judicial Independence, Decisional Independence and Judicial Review	104
CONCLUSIONS AND FINAL RECOMMENDATIONS.....	110
BIBLIOGRAPHY	116

SUMMARY

The evolving judicial system of the People's Republic of China is the result of a reform process started more than one century ago. Undeniably, the major responsibility for the beginning of this development has to be ascribed to the Western influence. It is indeed undeniable that the sudden and unexpected comparison with a Western-style legal system obliged the Chinese authorities to implement a series of reforms with the intent of modernizing the legal system of the country. Starting from the end of the XIX century, Western best practices were begrudgingly adopted as point of reference for judicial reforms.

Nowadays, the PRC's judiciary is subject to a new phase of innovation. In October 2014, the Fourth Plenum of the 18th CPC Central Committee established a new set of judicial reforms aiming to implement the rule of law in China. These reforms are clearly an appropriate follow-up to the 2012 governmental white paper on judicial reforms and to the blueprint of the preceding plenary session of the CPC Central Committee. On the paper, the principles embedded in the reform project announced by President Xi Jinping and the CPC are evidently inspired by international judicial principles and best practices that the majority of world's countries have legally and formally devoted themselves to implement.

CHAPTER 1: European Judicial Principles

The present dissertation focuses on the real-world implementation of the so-called Judicial Integrity Principles (JIP) in China. The collection of eighteen standards related to the administration of justice, articulated by IFES, an international NGO, represents the emerging global consensus on basic requirements for a well-performing judiciary. For the purpose of this study, they are considered by the author as a comprehensive synthesis of European values and tenets concerning the judicial sector. Given the significant quantity of European documents providing judicial standards and the simultaneous lack of an official and univocal European Union declaration on the same topic, the JIP are adopted as a conspectus of widespread and acknowledged minimal judicial standards.

The European context gave life to a series of international acts that, until now, can be considered as the foundation of the European legal framework. It is important to take into account that the principles enshrined in these documents are essentially the outcome of the long and complex development of European constitutional history. They were born and they are now grounded on the constitutional traditions of every single EU Member State. The work will analyze the Council of Europe Recommendation N° R(94)12 on the Independence, Efficiency and Role of Judges which represents the efforts made by the Council of Europe to synthetically and

coherently organize and publicly state the set of principles and elements that found judicial integrity and independence. After that, the Judges' Charter in Europe written by the European Association of Judges in order to embody the most fundamental and common principles for an independent and well-performing judiciary. In addition, the European Charter on the Statute for Judges, that endeavors to delineate specific rules of conduct aiming to ensure competence, independence and impartiality of the judiciary and to guarantee an effective protection of the rights of the individual by courts and judges. Finally, the 2000 Charter of Fundamental Rights of the European Union that, after the entry into force of the Lisbon Treaty, gained the same legal status of the others European Union treaties. This heterogeneous background can easily explain the author's choice to consider the JIP as a useful tool for this study.

The aim of the first part of this work is a clear examination not only of fundamental principles of the European Union concerning good governance. In fact, for a comprehensive analysis of the European legal scenario, the work of the Council of Europe will be also part of the study. Starting with a presentation of the European commitment to the rule of law, the analysis will then concentrate on the guiding standards of European judiciary. With the intention of applying recognized international legal standards, the author will refer to all organisational principles that have been unanimously accepted by all Member States of the EU and the Council of Europe. Not only to the principles included in the EU treaties, but also to the official

guidelines of the EU external relations, namely the EU external conditionality. All European standards concerning the judicial capacity listed in the first part will become the point of reference to which the author will compare the Chinese canons. The study is going to compare and analyze whether these recognized principles coming from the Western culture are actually implemented in the Chinese environment. To be precise, the assessment is going to point out whether the JIP have been only formally adopted or substantively enforced.

The reason why the European context has been selected as source of international standards and principles is quite self-evident. EU external conditionality can easily demonstrate the positive impact of the EU's democracy beyond its borders. For this reason, it is accurately identified as a mechanism of democratization. Given the fact that the EU itself sets the adoption and the implementation of democratic rules and practices as conditions that the target states should fulfil in order to gain the foreseen benefits, the EU is simultaneously setting international standards and exporting them in other Non-EU states. This constructive influence has been working effectively in the last few decades. But it is especially after the end of the Cold War that the Union has been applying political conditionality in a renewed manner. As a matter of fact, the EU is promoting political, social and economic reforms in third countries by adopting political conditionality as a foreign policy strategy of the Union. Among a wide range of actions and fields, this strategy considers the setting of judicial

principles and standards as part of the process.

The EU has opted for a constructive approach that will not hinder future political dialogue between the involved parties, adopting principally positive and *ex ante* conditionality. However, the so-called “democratic package” has become essential element for developmental cooperation in Europe. The principles it enshrines represent universally acceptable standards and an undeniable point of reference for developing countries. Most of the times, the promotion of these principles is expected to be a *conditio sine qua non* for the success of many international treaties, their international recognition and consequential implementation should be taken for granted.

EU-China relations follow a slightly different path. On one side, the Union is dedicate to use the cooperation agreements to promote human rights and rule of law in China. The need to achieve more concrete improvements has been stated in several occasions by the EU institutions. While, on the other side, the European Union and the People’s Republic of China are the largest trading partners in the world, with estimated trade flows going over \$1 trillion in recent years. The absence of a human rights clause in the EU-China Agreement arguably undermines the consistency and the credibility of the European conditionality in China. The inclusion of a similar conditionality clause in the agreement would irrefutably reinforce the EU influence in China. Unfortunately, the promotion of democratic values in South-East Asia, more

precisely in the PRC, focus more visibly on the trade-off between commercial interests and democracy promotion. As a matter of fact, economic and security interests do impede the EU in accomplishing its democracy promotion agenda.

CHAPTER 2: People's Republic of China Judicial Principles

A brief presentation of the evolution of Chinese constitutionalism seems to be a general but necessary introduction to the Chinese legal system. Since the Chinese constitutional history has followed a peculiar path, due to political, ideological and socio-economic issues that have drastically influenced its creation and its current content, this choice seems a simple solution to better understand the Chinese judiciary system. After that, the analysis will move to constitutional norms and other legal sources setting the standards of China's judiciary system . Taking into account the complexity of the Chinese system, it will hopefully be a clear assessment of their role and meaning. As a conclusion of the chapter, the degree of effectiveness and the implementation of these principles will be evaluated in light of the ongoing reform process started with the 2012 government white paper on judicial reform in China.

China was often depicted as a despotic regime completely subjected to the emperor's will. According to Montesquieu, the emperor had absolute and unlimited powers, and there was no law regulating the affairs of the state. Everything was based

on rites and traditions, in line with the Confucian principles that shaped the relationship between father and son, as well as, between emperor and subjects. On the contrary of what may seem, the existence of Chinese law codes dating as far back as the sixth century B.C. has been proved by many researches. In fact, the most primitive example of code of law in Chinese legal history can be found in the code of the Zheng state in the Spring and Autumn Period (approximately 771 to 476 BC). As a matter of fact, it has been proven that China's legal tradition ran without interruptions from Tang (618-907 AD) to Qing (1644-1911) dynasties as an effective system of law and order administrated by a unified and centralized bureaucratic empire.

To understand the foundation of the Chinese legal arrangement is necessary to take into consideration the traditional legal history of China. Indeed, from the perspective of legal philosophy, Confucianism and Legalism have definitely affected the conception of law in China. They had two divergent but equally meaningful approaches to societal structure and state building. On one hand, Confucius (551-479 BC) founds his ideal society on a rigid hierarchy and a general duty of obedience to the superiors both within the family (家 jia) and in its natural extension, the society and the nation (国家 guojia) as a whole. By governing in harmony with the five constant virtuous, the government provides a moral example, capable of teaching what is right and wrong and providing moral and social rules of conduct on which the

subjects should have based their behavior. Rites and norms of propriety, also known as *li* (理), one of the five virtues, become the basis of the Confucian society. *Li* embraces all rules governing religious, diplomatic, social and military ceremonies (weddings and funerals) and rites (rites for ancestral worship and religious sacrifices). Besides, it also guides everyday-life suggesting norms of adequate behavior and etiquette, as well as clothing. Many of these norms and principles were similar to Western laws. Nevertheless, according to Confucius, the establishment of laws would be inadequate or even dangerous because it would have caused a failure of virtue.

On the other hand, Legalism strongly supported the idea of a society based on the law, (法 *fa*). In line with the legalist thought, the infringement of any norm would have directly led to the infliction of a punishment. Only a set of rules applicable equally to all people and able to guarantee appropriate sanctions in case of non-compliance was regarded as the cornerstone of an ordered society. The Legalist approach stressed the importance of publicly promulgated principles and standards of conduct supported by the use of legal states coercion. In addition, the threat of punishment was considered the most effective tool in the hand of the government. Without any doubt, these philosophers advocating a written set of rules, the use of physical force and an administrative apparatus imposing order, were promoting a concept similar to what in the West was the rule of law.

Even though Confucianism was officially accepted as state philosophy since the Han dynasty (206 BC-220 AD) until the fall of the Qing dynasty, it has to be recalled that during the Qin dynasty (221-207 BC) Legalism was adopted as state doctrine. From that moment on, Confucian values progressively managed to influence the administration of the law. *Li* was gradually introduced in many formal legal provisions and Confucian scholars participated in the drafting of laws. The classical dichotomy between law and morality started to blur.

In modern times, the West and its influence played a role in the creation of modern China. It is undeniable that the relationship between China and Western countries has always had a strong impact on Chinese perception of its own power and strength and has substantially prompted Chinese modernization. Throughout the years, the legal system of China passed several fluctuating phases: from the introduction of Western legal principles in the late nineteenth and early twentieth centuries, the debate on how to implement the legal transplant during the Qing dynasty without compromising a thousand-year old culture and Chinese traditional values, the experience of the Republic of China and the Kuomintang (KMT) and Mao's leadership. Still today, the Chinese legal system is undergoing an important development process that relies on the international best practice and norms. Furthermore, the current legal activity and the implementation and enforcement of law seem to be a promising behaviour leading to a stable legal environment.

The study of the 1982 Constitution and the amendment process depicts the development of Chinese Constitution throughout the second part of the twentieth century and the beginning of the twenty-first century. It is unquestionable that the text of the Constitution underwent an extensive reform process that led it to the current version. However, an issue such as the clash between the written form and the implementation of the provisions of the Constitution, still remains and even now the communist ideology affects the legal system. Although the structure and the content of the Chinese Constitution are similar to that of many other states thanks to the process of westernization, there are some differences.

In the following section the guiding principles of Chinese judiciary are discussed. The analysis we will follow the hierarchy of the sources. First of all, the provisions of the Constitution. The Constitution of the People's Republic of China regulates the Chinese judicial system, more precisely the people's courts and the people's procuratorates, in Section 7 of the Third Chapter on the Structure of the State. After that, the Judges Law of the People's Republic of China, promulgated in 1995, will be the subject of our study. Finally, the 1995 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA which highlights Chinese efforts to meet international standards.

Recently, the implementation of the rule of law has regained importance in the Chinese political environment. As reported by international and local media, the

Fourth Plenary Session of the 18th Party Congress – Beijing, 20th to 23rd October 2014 – is going to be remembered for the priority given to the implementation of the rule of law. In order to provide a comprehensive and exhaustive explanation of the Chinese legal system, the last part of the chapter examines the White Paper issued by the Chinese Government in October 2012 and the official communiqué of the Fourth Plenary Session of the CPC Central Committee held in October 2014. The former is a detailed document that explains the fundamental objectives of China's judicial reform and the progresses that have been made in the protection of human rights and the development of the judicial system until 2012. The latter publicly presents a general overview of the governmental plan of reform to China's legal system.

CHAPTER 3: The EU, International Judicial Standards and the PRC

The present situation of the PRC's judicial system has changed only partially compared to the situation in 2006. In the Chinese case, the implementation of the JIP requires a strong political commitment. That is to say that the involvement of the Communist Party of China and the National People's Congress is essential today, as it was a few years ago, for the accomplishment of a real translation of the JIP from ideal principles to substantive laws enforced by the authorities. Even though the reform plan started more than a decade ago, more than three decades ago if we consider the

opening and reforming period initiated by Deng Xiaoping in 1978, the Chinese system is facing the same thorny problems. Precisely, the implementation of JIP.1, the guarantee of judicial independence, the right to a fair trial, equality under the law and access to justice, JIP.2 concerning institutional and personal-decisional independence of judges and JIP.3 about the clear and effective jurisdiction of ordinary courts and judicial review powers. These issues are analyzed without neglecting the novelties of the Fourth Plenary Session of the 18th CPC Central Committee that took place in October 2014 and the Reform Plan announced in April 2015.

Counter-intuitively, recently, some organs of the judiciary, especially the Supreme People's Court, have been acting with an increasing degree of autonomy. Although the NPC has often attempted to control the competence of courts, in the specific case their ability to exercise judicial review, the SPC has found a way to skillfully circumvent the obstacle. There seems to be a strategic partnership between the SPC and the State Council, representing the Chinese executive. The SPC is apparently using its judicial interpretation to maximize the interests of the judiciary and to influence a constantly growing variety of policy domains. Through the manipulation of decision costs of local bureaucratic agencies, the SPC is trying to control those who do not act in agreement with the policy lines of their State Council principals.

Unfortunately, all things considered, the absence of separation between

government powers prevents the courts from exercising judicial review, as it occurs in modern governmental systems. Although the official reform strategy of the Fourth Plenum of the 18th CPC Central Committee, including the reforms mentioned above, pushes for an implementation of the rule of law and a consequential improvement of the separation of powers, the establishment of a totally independent judiciary needs a complete rearrangement of the legal system of China. As long as the judiciary is perceived as a tool to support the rule of the party, the prospect of a successful judicial review remains far from being feasible.

CONCLUSIONS

Judicial independence, impartiality, transparency, accountability and professionalism are all well-known concepts that are present in the PRC's legal documents. The provisions of the 1982 Constitution, the amended version of 2004, the 1995 Judges Law of the PRC and the Beijing Statement are examples of how the JIP have achieved an official recognition in China. Furthermore, the reform process started in the twenty-first century openly demonstrates that the Chinese judicial system is moving forward to meet international standards. Nevertheless, China's judiciary still includes some of the typical weaknesses of a communist state. The will of reform is counterbalanced by a non-independent judiciary, unrestrained corruption and many

other problems. As a result, the practical principle implementation is frustrated by endogenous systemic factors. In conclusion, the discrepancy between the formal adoption of minimal judicial standards and their actual implementation reveals that the increasing CPC's political commitment can affect the realization of a fair and just society.

INTRODUCTION

“The Constitution’s authority is paramount”

President Xi Jinping, 4th December 2014, 1st Constitution Day of China

On December 4th 2014, the People’s Republic of China celebrated its first National Constitution Day.¹ Thirty-two years after the entry into force of the 1982 Constitution of the People's Republic of China currently in force, the Fourth Plenum of the Chinese Communist Party (CCP) decided to stress the role of the Constitution in strengthening the rule of law. In line with the Fourth Plenum ideas, President Xi Jinping declared that “fully implementing the Constitution is the primary task and basic work in building a socialist nation ruled by law, and that the Constitution is the country’s basic law and the general rule in managing state affairs.”²

According to constitutionalism and its theorists, a constitution includes a broad set of norms, rules, principles and values. It is defined as the basic law of a state because it contributes to shape the fundamental structure of the state and conceivably defines the limits of governmental powers. Indeed, a constitution

¹ China Daily, *China Ratifies National Constitution Day*, China Daily, 1st November 2014. Available at <http://www.chinadaily.com.cn/china/2014-11/01/content_18840106.htm>. Last access 16th April 2015.

² S. Tiezzi, *For China, Constitution Day Comes Without Constitutionalism: Xi Jinping wants to celebrate China’s constitution without going too far into the realm of political reform*, The Diplomat, 4th December 2014. Available at: <<http://thediplomat.com/2014/12/for-china-constitution-day-comes-without-constitutionalism/>>. Last access 16th April 2015.

enshrines many essential principles that can be considered as necessary guidelines for managing state affairs. Given the fact that every constitution is unique, the most common and acknowledged constitutional principles in Western constitutionalism are going to be analyzed in shape of introduction to the main body of this dissertation. Popular sovereignty, limited government, separation of powers, checks and balances, judicial review and federalism are now briefly examined in succession.

First of all, the principle of *popular sovereignty* refers to the idea that sovereignty resides in the people, meaning the entire citizenry of a state. This principle clearly reminds that power rests with the people. In fact, in agreement with the social contract, a government is entitled to exercise its powers only with the consent of the people that have given it its powers by means of the constitution.³ To such extent, the principle of popular sovereignty is intrinsically linked to that of *limited government*, which states that the action of the government is limited because it can act only in accordance with the law.⁴

In addition, the constitution deals with the notion of *separation of powers*. Accordingly, it divides the powers of the national government into three separate and independent branches, legislative, executive and judiciary in order to avoid any kind

³J.J. Rousseau, *The Social Contract*, 1762.

⁴ In the present work, the author refers to the term “government” as “the action or manner of controlling or regulating a state, organization, or people” and not as “the group of people with the authority to govern a country or state”, which is usually termed as the executive branch; according to Oxford Dictionaries definition available at: <http://www.oxforddictionaries.com/definition/english/government>.

of conflict. However, the three branches of government are connected by a so-called system of *checks and balances*, a mechanism created with the intent of restraining and balancing the power of one branch with the power of the others. It follows that the *judicial review* is to be considered as another basic constitutional principle. It denotes the power of the judicial branch, in charge of guaranteeing and preserving the rigidity of the constitutional arrangement by dismissing all norms judged as unconstitutional.

A final basic principle that is present in several Western constitutions is the *federal system*. It indicates a territorial division of competences between the national government and state or regional governments. The rationale of this constitutional principle is developing a well-functioning system, with a central government able to cope with national issues, while preserving the autonomy of subnational local entities, regions or states.

Taking into account the meaning and the importance of these constitutional principles, it should be easy to understand why Xi Jinping and the CCP have focused on the implementation of the constitution to strengthen the rule of law in China. As clearly shown, a constitution is an essential tool to govern a state in compliance with the law. Indeed, the rule of law can be arguably considered as the main structural paradigm of modern constitutional law. According to J. Kokot, several constitutional systems have recognized and adopted the rule of law as one of the foundational

principles which provide stable legitimation and entrenched structure to the state.⁵ However, in China's case, it has been noticed that there is a fragile dedication to the rule of law and to the implementation of the constitution. Only recently, thanks to the new leadership of the CCP, a significant ploy has been done. Nonetheless, as said by Keith E. Henderson, neither China will undertake the necessary steps towards the rule of law nor it will achieve its complete economic and political development "without enhancing the independence, impartiality, integrity and capacity of the judiciary."⁶

This statement has strongly influenced the author's idea concerning the master thesis research. In order to explain and understand the development of Chinese legal system and the implementation of the rule of law in China, this master thesis will pay exclusive attention to the Chinese judicial system through a comparison of international and domestic judicial principles. In particular, the research will compare international principles and standards, concerning the so-called judicial capacity, to those declared in the Chinese Constitution. In the first chapter, the European judicial framework will be presented as term of comparison for Chinese judicial principles. The aim of this part will be a clear examination not only of fundamental principles of

⁵ J. Kokott, *From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization*, in C. Starck (ed.), *Constitutionalism, Universalism and Democracy. A Comparative Analysis*, Baden-Baden, Nomos, 1999, p. 97-102.

⁶ K. E. Henderson, *Halfway Home and a Long Way to Go: China's Rule of Law Evolution and the Global Road to Judicial Independence, Judicial Impartiality and Judicial Integrity*, in R. Peerenboom (ed.) *Judicial Independence in China, Lesson for Global Rule of Law Promotion*, Cambridge, NY, Cambridge University Press, 2010, pp. 23-36.

the European Union concerning good governance. In fact, for the purpose of a comprehensive analysis of the European legal scenario, the work of the Council of Europe will be also part of the study. In addition, the author will try to provide an insight of the European commitment to the rule of law. The thesis will then concentrate on the guiding standards of European judiciary. With the intention of applying recognized international legal standards, the author will refer to all organisational principles that have been unanimously accepted by all Member States of the EU and the Council of Europe. Not only to the principles included in the EU treaties, but also to the official guidelines of the EU external relations, namely the EU external conditionality. All European standards concerning the judicial capacity listed in the first part will become the point of reference to which the author will compare the Chinese canons.

The second chapter of the thesis will examine the evolution of Chinese constitutionalism, constitutional norms and principles concerning China's judiciary system. They will be evaluated according to their meaning, to their degree of effectiveness and to their implementation. Given the high number of Chinese scholars that have been calling for a literal enforcement of the text and the importance that Xi Jinping himself attributes to constitutional norms, the current Chinese reform process will be subject of analysis too.

At the end of this work, it will be evident whether constitutional rules and principles concerning the judiciary in China comply with international standards or if they are, on the contrary, based on different legal grounds and whether they remain on paper or actually guide Chinese legislation and its implementation as they should. In other words, the thesis will define similarities and differences among guiding values in places geographically and culturally distant, by focusing on which principles are taken by the two terms of comparisons and by outlining the influence of international standards on the Chinese legal structure.

CHAPTER 1

European Judicial Principles

Since this study was born as a comparison between international judicial standards and those principles that rule the judiciary system in China, in this chapter we are going to introduce the first term of comparison: the European legal structure. The European model is indeed the subject of this part of the dissertation. As mentioned before, the work of two of the main European actors, the European Union and the Council of Europe, will be assessed in order to offer the widest and most exhaustive presentation of European judicial principles. The analysis is going to start from the more general relationship between the European Union, the Council of Europe and the rule of law.

Secondly, the organizational principles that underpin the European judicial system are going to be presented and deeply discussed through a referral to the standards embraced by other international institutions.

Finally, in the second part of the first chapter, the research takes into consideration the guidelines adopted by the European Union in its external relations. Given the fact that these guidelines are considered as requirements that every single country should fulfil in order to deal with the EU, they should be arguably regarded as a source of internationally recognized standards. Hence, the European external conditionality is going to be the topic of the last part of this chapter.

PART I

I. The EU, the Council of Europe and the Rule of Law: a Point of Reference

An International Rule of Law

In the Anglo-American tradition, the rule of law is frequently defined through the words of A.V. Dicey, a British constitutional scholar that referred to it as the “supremacy of the law”.¹ In his work, he highlights three main features of the rule of law: (1) it regulates government power; (2) it implies equality before the law, and (3) it privileges judicial process.² These aspects are generally interpreted as basic requirements for a comprehensive understanding of the rule of law.³ However, a precise definition of the term remains contested. The main argument is between two different theoretical approaches. The first one stresses the formal content of the rule of law, instead the second suggests a substantive understanding of the concept. All theories that assume a formal approach are also named “thin” theories because they have a tendency to be positivist and minimalist. On the contrary, theories relying on the latter approach tend to conceive the rule of law in a wider perspective, for this reason they are known as “thick” theories. Formal theories often simply provide

¹ A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, London, UK, McMillan, 1st Edition, 1885, p. 171.

² “We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land [...]. We mean in the second place [...] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals [...]. [Thirdly,] the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts”. Ibidem, 172, 177-178, 208.

³ S. Chesterman, *An International Rule of Law?* The American Journal of Comparative Law, Vol. 56, No. 2, American Society of Comparative Law, Spring, 2008, p. 336.

concrete limitations on the exercise of governmental powers by state authority, while substantive theories include further elements like protection of human rights, forms of government or even economic arrangements.⁴

As said by S. Chesterman, these two categories are not stable because they are recurrently intertwined or they offer each other reciprocal support. As a consequence, he suggests a third interpretation to the rule of law. He starts with the assumption that “the rule of law is intended to serve in a society” and proposes a definition applicable to the international context. With the aim of formulating a definition acceptable for a complex variety of political systems and cultures, his concept of rule of law is definitely more formal than substantive. In fact, he pays more attention to the “architecture of a legal system” rather than on its content. Nonetheless, functional and substantive attributes of the term are not completely excluded from his way of understanding the rule of law, but should be differentiated from the core features of the rule of law (e.g. norms, institutions and procedure).

To sum up, Chesterman’s final definition of the rule of law can be encapsulated in three concepts: government of laws, the supremacy of the law, and equality before the law. First, the government of law is intended to be a limit to the arbitrary exercise of the power of the State. For this reason, law is required to be prospective, accessible, and well-defined. In addition, the second component of Chesterman’s core definition is the preeminence of the law over all institutions of the State. Videlicet, the entire machinery of the State is not immune from the law because it is fully subjected to the

⁴ Ibidem, pp. 340-341. See P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, in R. Bellamy (Ed.) *The Rule of Law and the Separation of Powers*, Dartmouth, Ashgate, Aldershot, 2005, pp. 95-115; R. Peerenboom, *Varieties of Rule of Law*, in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*, Routledge, 2003.

law without exceptions. For that purpose, the existence of an independent organism, namely the judiciary, is essential for the appropriate and effective application of the law to every single case. Finally, the last element means that law must be applied without prejudicial discrimination. Law application and implementation should abide by the principle of equality in providing an identical treatment and protection to all subjects.⁵

The European Legal Framework and the Rule of Law

Throughout its history the European Union has shown a widespread reliance on the rule of law as one of its cardinal principles, not only as an expedient of political rhetoric. Indeed, as a reflection of national constitutional experiences of all Member States, the regional organization with state-like institutions has evidently adopted the rule of law as defining principle and founded its legal and political structure on it. The lack of a European constitution does not prevent the author to say that the rule of law, together with liberty, democracy and respect for fundamental rights, is a foundational principle of the Union.⁶ During the Cold War period, the rule of law officially became one of the most important characteristics of the Western democratic and liberal model that strongly emphasized the ideological gap between West and East Europe. From that moment on, in the political and legal debate, the rule of law acquired a status similar to that of democracy and human rights. Even after the end of the Cold War the significance of the rule of law did not decrease. In fact, the rule of

⁵ Ibidem, p. 341-342.

⁶ See L. Pech, *A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, *European Constitutional Law Review*, 6, 2010, p. 362.

law has become one of the structural principles on which all modern and liberal constitutional regimes are established.⁷ Moreover, its prominence has been clearly underlined by the many references to the rule of law that can be found in the Union's founding treaties. It is not a case that these treaties have been amended just to include this principle among their provisions. As a matter of fact, the rule of law, or "government of law", is normally assumed to be a good and sharable practice on which international organization should rely on.⁸

The Preamble of the Treaty on European Union (TEU) states that the rule of law is one of the principles to which the Union is strongly attached.⁹ In addition, Article 2 of the same treaty lists the rule of law together with the founding values that are commonly accepted by all EU member States.¹⁰ Furthermore, in order to protect these core values, Article 7 of the TEU allows for EU sanction in case of a real possibility of a serious breach of the values mentioned in Article 2 by a Member State.¹¹ The rule of law is not only an organizational principle of EU's internal structure. Even concerning the Union's external action it plays a considerable role. According to Article 21 of the TEU, the rule of law is indeed one of the principles that should guide the action of the EU in the international arena.¹² In other words, the consolidation of and the support for the rule of law should be regarded as a top priority while developing and implementing EU common policies in all fields of international relations. Finally, the rule of law is also accounted as one of the

⁷ Ibidem, p. 362.

⁸ Ibidem, p. 360.

⁹ *Consolidated Version of the Treaty on European Union*, Official Journal of the European Union, OJ C 326, 26.10.2012, Preamble Paragraph 4.

¹⁰ Ibidem, Art. 2.

¹¹ Ibidem, Art. 7(1-5).

¹² Ibidem, Art. 21.

conditions of eligibility for accession to the Union, among those prerequisites that a state should satisfy to officially become a member State. As stated by Article 49 of the TEU, as amended by the Lisbon Treaty, an applicant State should demonstrate to respect the key values indicated by Article 2 and to be committed to their promotion. Hence, it defines the rule of law as valid admission criteria.¹³ Many other references to the rule of law can be found in several official documents of the European Union, for instance in the Preamble of the EU Charter of Fundamental Rights,¹⁴ and many other international treaties and partnership agreements signed by the Union that are going to be analyzed later.

The attachment of the European Union to the rule of law is evident in its foreign policy too. The European Union Rule of Law Mission in Kosovo (EULEX Kosovo) has been described as “one of the flagships of the Common Security and Defence Policy (CSDP)”.¹⁵ In 2008, Council Joint Action 2008/124/CFSP established the EULEX Kosovo mission aiming to support and assist the Kosovo authorities in the realization of a society based on the rule of law.¹⁶ According to Article 2 of the Joint Action, the assistance provided by the European mission to “Kosovo institutions,

¹³ Ibidem, Art. 49.

¹⁴ “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.”, *Charter of Fundamental Rights of the European Union*, signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice, on 7 December 2000 (2000/C 364/01). Here we refer to the amended version 2010/C 83/02, Official Journal of the European Union, OJ 30.03.2010, [hereinafter “EU Charter on Fundamental Rights”] Preamble Paragraph 2.

¹⁵ S. Keukeleire and R. Thiers, *EULEX Kosovo: Walking a Thin Line, Aiming for the Rule of Law*, in S. Blockmans, J. Wouters, T. Ruys (eds.) *The European Union and Peacebuilding: Policy and Legal Aspects*, The Hague, T.M.C. Asser Press, 2010, pp. 353-374.

¹⁶ Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (OJ 2008 L 42/92-98 of 16.2.2008), amended by Council Joint Action 2009/445/CFSP of 9 June 2009 (OJ 2009 L 148/33 of 11.6.2009).

judicial authorities and law enforcement agencies” should lead to the implementation of “internationally recognized standards and European best practices”.¹⁷

If this was not sufficient to understand the growing influence of the rule of law over EU institutions and its way of conduct, it must be said that even the European Court of Justice referred to the rule of law as a constitutional principle. In a famous judgement, the Court stated that the European Community (EC) is ‘a community based on the rule of law’.¹⁸ As affirmed by Laurent Pech, the Court has always considered the 1957 Rome Treaty not merely as an international treaty, but as “a constitutional document of a supranational polity based on the rule of law”.¹⁹ The reference to the rule of law, as a founding principle of the European structure, is a successful attempt to overcome any sort of criticism concerning the constitutional history of the European Union. Although the EU member States have obstinately refused to officially adopt the Court’s phrasing that defines the EU as a community based on the rule of law, and its constitutionalization appears to be even less achievable, the rule of law has conquered a dominant position in the EU legal system and its constitutional framework.²⁰

Another European institution that advocates the crucial value of the rule of law is the Council of Europe. Since 1949, the Council has undertaken many activities and campaigns with the aim of promoting human rights, democracy and the rule of law. The Council of Europe provides constant support to member states in different fields, from the fight against corruption and terrorism to the adoption and implementation of

¹⁷ Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (OJ 2008 L 42/92-98 of 16.2.2008), Article 2, paragraph 1.

¹⁸ Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23.

¹⁹ Op. cit., supra note 6, p. 359.

²⁰ Ibidem, p. 360.

necessary judicial reforms. Among its organs, the European Commission for Democracy through Law, known as the Venice Commission, is a group of experts established by the Council itself that offers legal advice to countries throughout the world. The main task of the Venice Commission is to help all those states that desire “to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law”.²¹ Given that the goal of the author is to provide a comprehensive analysis of the current development of judicial principles applied in Europe, it is self-evident that the work of the Council of Europe cannot be neglected.

II. The Judicial System within the European Context: International Standards

In the previous section of this study we have analysed quite carefully the meaning of the concept rule of law. Even though a shared definition is still debated, the importance of the implementation of the rule of law and its related guiding principles is not a matter of discussion. As demonstrated by the European practice, the rule of law is a key quality of a democratic society. Taking into account that a well-framed legal system is a recognised factor that fosters the rule of law culture, we are about to present the core elements that enhance the judicial integrity of a country. The analysis is going to start with an introduction to judicial principles present in the European framework. In a second moment, the implementation of these principles is going to be

²¹ Venice Commission webpage, presentation of the Venice Commission at http://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN. Last access 15th January 2016. For more information about the Council of Europe and the Venice Commission visit the official website of the Council of Europe at <http://www.coe.int/en/web/portal/home>. Last access 15th January 2016.

assessed. Finally, the set of internationally accepted judicial principles that will guide this dissertation will be introduced.

Are there European Standards for Judicial Independence and Capacity?

It is undeniable that the judiciary occupies an irreplaceable function in a democratic society. As the guarantor of the constitution, it must safeguard its rigidity and the principles it preserves by ruling out unconstitutional norms and proceedings. Besides, the judiciary is called upon to interpret the law in order to solve disputes. It is also responsible for the resolution of problems that cannot be satisfactorily solved with a political solution. In addition, a stable and reliable judicial system creates the condition for a fruitful economic development. It is therefore simple to comprehend why Professor S Trechsel, former President of the European Commission of Human Rights, affirms that “the independence of the judiciary is a cornerstone, not only of respect for human rights, but also of the rule of law”.²²

In order to understand whether or not there are some European minimal standards concerning the judiciary, that include independence, accountability, transparency among the central characteristics of well-performing legal system, the author have decided to take as a point of reference the EU Accession Monitoring Program (EUAMP) of the Open Society Institute. This institution seeks to spread all democratic principles that we have mentioned until now. Respect for human rights and minorities, governmental accountability, sustainable and fair economic

²² EU Accession Monitoring Program, *Monitoring the EU Accession Process: Judicial Independence*, Budapest, Open Society Institute, October 2001, available at <www.eumap.org>, Foreword, pp. 11-12.

development, rule of law are only some of the values that the institute is trying to protect and implement through numerous manners.²³

The EU Accession Monitoring Program started in 2000 with the intention of encouraging independent monitoring of the EU enlargement process. It was indeed meant to supervise the western enlargement, specifically the applications for membership of the ten Central and Eastern Europe candidate States. The Program acts by producing monitoring reports with the aim of providing external and additional support to European institutions. Since these reports examine key aspects of the political criteria for membership,²⁴ they are complementary to the evaluations conducted by the Commission in its annual Regular Reports on candidate States' fulfilment of accession criteria. The reports we are going to refer to are the 2001 report on judicial independence and the 2002 report on judicial capacity. The goal of the author is to offer a well-defined and comprehensive explanation of the principles underpinning the EU judicial system.²⁵

According to the monitoring report on judicial independence, the establishment of precise standards, on the basis of the existing Copenhagen Criteria, is a unique opportunity to encourage a homogeneously high level of observance for judicial independence across Europe. Moreover, the recognition of common standards upon which the membership is grounded helps countries' transition to the rule of law.

²³ For more information about the Open Society Institute visit the official website of the organization available at <<http://www.opensocietyfoundations.org/>> . Last access 3rd May 2015.

²⁴ The political criteria for membership states: "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." Presidency Conclusions, Copenhagen European Council, 21-22 June 1993. 7.A.iii. Available at <http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf>. Last access 29th April 2015. See also Chapter 1, Paragraph 3 of this document.

²⁵ EU Accession Monitoring Program, *Monitoring the EU Accession Process: Judicial Independence*, Budapest, Open Society Institute, October 2001, available at <www.eumap.org>, Preface, pp. 9-10.

These standards should include, at the same time, universal and European values that are entitled to become core guiding principles for the preservation of judicial independence in any context, within and outside Europe.²⁶

The 2002 EUAMP report lists four mutually reinforcing notions that contribute to the understanding of judicial capacity: independence and impartiality, professional competence, accountability and efficiency. Both independence and impartiality refer to the idea that a fair trial is based on judges' capacity to adjudicate without external interferences and influences. The guarantee of judges' substantial independence and impartiality during the decision-making, in other words their freedom, ensures "access to meaningful justice for all".²⁷ In fact, according to Article 1 of the Universal Charter of the Judge, adopted in 1999 by the International Association of Judges, "the independence of the judge is indispensable to impartial justice under the law".²⁸ Broad independence becomes useless if it is not coupled with a high level of professionalism and knowledge. In line with the 2002 report, judges should have professional erudition, sound judgement and be able to elaborate effective judgements in accordance with the law and their own personal integrity. To achieve this ideal condition, the appointment of judges must follow transparent and "clear procedures that verify their personal and professional suitability".²⁹

Accountability is the third pillar of judicial capacity. Judges' must be collectively and individually accountable for their decisions before society as a whole, but also

²⁶ Ibidem, pp. 26-27.

²⁷ EU Accession Monitoring Program, *Monitoring the EU Accession Process: Judicial Capacity*, Budapest, Open Society Institute, October 2002, available at <www.eumap.org>, pp. 15.

²⁸ *Universal Charter of The Judge*, International Associations of Judges, Taiwan, 17th November 1999, Article 1. Available at <<http://www.iaj-uim.org/universal-charter-of-the-judges/>>. Last access 4th May 2015.

²⁹ Supra Note 27, pp. 15-16.

before the other branches of the State, executive and legislative. Finally, an independent judiciary must be accountable for its operations within the judicial branch itself. Given the fact that the public confidence in the judiciary ability “to deliver effective justice and safeguard social, economic, and democratic values” is directly link to a reasonable level of control on the judiciary itself, a definite mechanism to establish accountability is needed to reassure transparency and answerability.³⁰

The last notion deals with organization of the judicial structure as a whole. Independent, skilled and reliable judges should operate in a “supportive operational framework” in order to attain systemic competence and organizational efficiency.³¹ To ensure this, a transparent organizational set-up and an adequate management of human, technical and financial resources are required, in addition to a satisfactory access to information processing technology and research materials and an increased responsibility of judicial administrators.³² Ideally, any meaningful judicial reform should simultaneously take into consideration these four principal elements of a capable judiciary. They are indeed intertwined and mutually reinforcing features of a working judicial system.

However, both reports underline that the European Union had not yet developed “extensive or definitive legal standards or recommendations for judicial independence” or the judiciary in general, when the reports were written. Since recently noteworthy contributions to the field have not been produced, it is arguably believed that European legal minimum requirements have not found a fixed and

³⁰ Ibidem, pp. 16-17.

³¹ Ibidem, p. 17.

³² Ibidem, p. 17.

shared definition. In the 2002 report, it is affirmed that the existing standards on how the judiciary should be organized and how it should function are insufficient. Besides, the current expert support system is frequently ineffective and uncoordinated.³³ Fortunately, we can partially gloss over the issue by referring to other documents coming from the EU context. Doing so, the author intends to accomplish his duties and provide, at least, a general overview of the existing European judicial standards.

Existing European Standards

As mentioned before, Prof. S. Trechsel defines the independence of the judiciary as a cornerstone. In his opinion, it is a key element not only for the protection of human rights, but also for the implementation of the rule of law. Nonetheless, he asserts that “in international instruments for the protection of human rights, the independence and impartiality of the judiciary have an inconspicuous place”.³⁴ If we analyzed only the documents that Prof. Trechsel is quoting as an example, the outcome of this examination would lead us to the same conclusion. Indeed, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms makes just a brief and vague reference to the right to a fair trial. It declares the trial should be “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.³⁵ It further states other legal

³³ Supra Note 22, pp. 19-22 and Supra Note 27, pp. 26-28.

³⁴ Supra Note 22, p. 11.

³⁵ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950, amended by its Protocol No. 14 (CETS No. 194) as from the date of its entry into force on 1 June 2010, Article 6(1). Available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>. Last access 10th May 2015.

concepts like the presumed innocence and the minimum rights of the accused.³⁶ However, it pays more attention to individual rights rather than elaborating organizational principles for the judiciary.

The European context gave life to a series of international acts that, until now, can be considered as the foundation of the European legal framework. It is important to take into account that the principles enshrined in these documents are essentially the outcome of the long and complex development of European constitutional history. They were born and they are now grounded on the constitutional traditions of every single EU Member State.

In this section, we are going to analyze the Council of Europe Recommendation N° R(94)12 on the Independence, Efficiency and Role of Judges,³⁷ the Judges' Charter in Europe written by the European Association of Judges,³⁸ the European Charter on the Statute for Judges,³⁹ and the 2000 Charter of Fundamental Rights of the European Union.⁴⁰

³⁶ Ibidem, Article 6(2-3).

³⁷ *Recommendation N° R (94) 12 on the Independence, Efficiency and Role of Judges*, adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies, Council of Europe.

³⁸ *Judges' Charter in Europe*, European Association of Judges, 4 November 1997. Available at <<http://www.legislationline.org/documents/id/8556>>. Last access 10th May 2015.

³⁹ *European Charter on the Statute for Judges*, DAJ/DOC (98) 23, 07/08-10/1998, Strasbourg, Council of Europe.

⁴⁰ *EU Charter of Fundamental Rights*, Supra Note 14.

- **Recommendation N° R(94)12 on the Independence, Efficiency and Role of Judges**

Recommendation N° R(94)12 on the Independence, Efficiency and Role of Judges represents the efforts made by the Council of Europe to synthetically and coherently organize and publicly state the set of principles and elements that found judicial integrity and independence. The recommendation addresses “all persons exercising judicial functions” and the principles it highlights cover a wide range of issues.⁴¹ However, there is an evident emphasis on the standards guaranteeing the independence of the judges. Principle 1 states a number of measures that must be adopted in order to promote and protect the independence of judges. For instance, (1) judges’ decision should be exempted from any revision not provided for by law; (2) all details related to judges’ office and their remuneration should be guaranteed by law; (3) the competences of the courts are provided for by law and any external unpredicted interference is not tolerated, finally (4) governmental or administrative decisions should not be able to invalidate judicial decisions retroactively, with the exception of cases provided for by law.⁴² The subject of the recommendation includes principles concerning constitutional guarantees of independence and the separation of powers, respectively principle 1.2, subsections (a) and (b). Besides, important provisions on the authority of judges,⁴³ proper working conditions,⁴⁴

⁴¹ Supra Note 37, Scope of the Recommendation.

⁴² Ibidem, Principle I(2).

⁴³ Ibidem, Principle II.

⁴⁴ Ibidem, Principle III.

freedom of expression and association⁴⁵ and judicial responsibilities⁴⁶ are expressed in the text of the recommendation.

- **Judges' Charter in Europe**

The Judges' Charter in Europe was written in 1997 by the European Association of Judges. In its introduction, it plainly affirms that “the independence of the judiciary is one of the foundations of the rule of law”.⁴⁷ Starting from this assumption, the Charter has been developed in order to embody the most fundamental and common principles for an independent and well-performing judiciary. In view of the basic framework provided by the UN Basic Principles on the Independence of the Judiciary,⁴⁸ the Charter intended to offer a more comprehensive and complete analysis of organizational principles of the judiciary.

The thirteen provisions of the Charter enshrine an equal number of principles. They deal with essential notions such as judges' independence,⁴⁹ their accountability to the law,⁵⁰ impartiality,⁵¹ the objective criteria that should guide the appointment and the promotion of judges,⁵² but also their salaries⁵³ and even the disciplinary

⁴⁵ Ibidem, Principle IV.

⁴⁶ Ibidem, Principle V and VI.

⁴⁷ Supra Note 38, Introduction.

⁴⁸ *UN Basic Principles on the Independence of the Judiciary*, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985, GA resolutions 40/32 of 11/29/1985 and 40/146 of 12/13/1985, UN GAOR, 40th Session, Supp. no.53, UN Doc. A/40/53 (1985).

⁴⁹ Supra Note 38, Article 1.

⁵⁰ Ibidem, Article 2.

⁵¹ Ibidem, Article 3.

⁵² Ibidem, Articles 4 and 5.

⁵³ Ibidem, Article 8.

sanctions for judicial misconduct.⁵⁴ The Charter is arguably an improvement in the clarification of shared guiding standards concerning judicial capacity and judicial integrity. Nonetheless, for what concerns the current study, it is definitely a landmark in the European path towards the establishment of a reasonable and exhaustive set of judicial standards.

- **European Charter on the Statute for Judges**

The European Charter on the Status of Judges was established in July 1998. It was the result of multilateral meetings of judges coming from thirteen Western, Central and Eastern European countries, the joint effort of the European Association of Judges and of the European Association of Judges for Democracy and Freedom (MEDEL) and the sponsorship offered by the Council of Europe Directorate of Legal Affairs. According to the Explanatory Memorandum to the European Charter on the Statute for Judges, the Charter defines several significant elements that should constitute a sort of *vade mecum* for all judges. It endeavors to delineate specific rules of conduct aiming to ensure “competence, independence and impartiality” of the judiciary and to guarantee an effective protection of the rights of the individual by courts and judges.⁵⁵

As noticed for Recommendation N° R(94)12, the Charter deals with a number of key issues: judicial selection, recruitment and initial training,⁵⁶ appointment and

⁵⁴ Ibidem, Article 9.

⁵⁵ Supra Note 39, Explanatory Memorandum to the European Charter on the Statute for Judges, General Principles 1.1, p. 10.

⁵⁶ Ibidem, Article 2.

irremovability,⁵⁷ judges' career development,⁵⁸ liability,⁵⁹ remuneration and social welfare⁶⁰ and termination of office.⁶¹ Despite the heterogeneity of the European legal environment, the provisions of the Charter intend to raise the level of guarantees of fundamental judicial principles in many European States and more generally to safeguard all democratic societies grounded on the rule of law.⁶²

- **Charter of Fundamental Rights of the European Union**

The last and more recent document we are about to analyze is the 2000 Charter of Fundamental Rights of the European Union. Although until the entry into force of the Treaty of Lisbon, in 2009, it lacked legal force, it was indeed not binding, it played a crucial role in the judicial field and the promotion of human rights. As stated by Prof. Trechsel, the EU Charter on Fundamental Rights is “a banner professing the Union’s allegiance to the fundamental values of the modern world, and a statement of its member States’ common purpose”.⁶³ Following the entry into validity of the Lisbon Treaty, the fundamental rights Charter gained the same legal status of the European Union treaties. Hence, the European Union is obliged to legislate and act in compliance with the content of the Charter.

Title VI of the EU Charter is entirely dedicated to justice. From Article 47 to Article 50, it declares the significance of universally recognized rights of the

⁵⁷ Ibidem, Article 3.

⁵⁸ Ibidem, Article 4.

⁵⁹ Ibidem, Article 5.

⁶⁰ Ibidem, Article 6.

⁶¹ Ibidem, Article 7.

⁶² Ibidem, Foreword p. 3 and Supra Note 55.

⁶³ Supra Note 22, Foreword, p. 11.

individual such as the right to an effective remedy and to a fair trial,⁶⁴ to the presumption of innocence and legal defense,⁶⁵ the principle of legality, non-retrospectivity and proportionality of criminal offences and penalties,⁶⁶ and the double jeopardy procedure.⁶⁷ Since it does not discuss into details the functioning of the European judiciary, the content of this document is not specific as the content of previously mentioned documents. Nevertheless, it has been included among the references of the current study for the reason stated in the preceding paragraph: it is one of the bedrocks of the European legal framework. In line with what has been said by Prof. Trechsel, in view of the fact that it is a binding agreement for all EU Member States, it firmly articulates the principles on which the future of the legal system of Europe will be based.

IFES and Global Judicial Integrity Principles

In this last part we are going to add the last piece of the puzzle to achieve a complete comprehension of the topic. Since all European standards cited before do not have an accurate and widespread articulation to be taken as a reference for the future comparison, we are now going to examine the principles proposed by the International Foundation for Electoral Systems (IFES). In brief, IFES is a nongovernmental and nonpartisan organization devoted to the enhancement of good governance and the promotion of democratic rights. Its main field of activity is the

⁶⁴ Supra Note 14, Article 47.

⁶⁵ Ibidem, Article 48.

⁶⁶ Ibidem, Article 49.

⁶⁷ Ibidem, Article 50.

strengthening of the electoral system of developing and mature democracies. To do so, it makes available technical assistance to election officials, allows the participation of the underrepresented in the political process and tries to improve the electoral cycle by applying field-based researches.⁶⁸

The work of IFES has a great influence on this study. According to Keith E. Henderson, IFES Senior Associate, an independent judiciary is extremely significant to the rule of law. Since he considers the rule of law as a long-term objective of many developing countries, he underlines how an efficient judiciary can foster the development of a society built on the rule of law. Henderson sustains that an autonomous judiciary (1) defends and enforces people's property rights and human rights, (2) it finds solutions to economic and political disputes, (3) it promotes a fair and predictable international judicial cooperation, (4) it tries to prevent and reduce judicial and governmental corruption, (5) it endorses social justice and social harmony, finally, (6) it supports national and international political legitimacy.⁶⁹

Taking as a starting point the 2001 Guidance for Promoting Judicial Independence and Impartiality⁷⁰ and a series of researches conducted by IFES and published in the 2004 IFES White Paper,⁷¹ IFES has formalized in summary form the emerging global consensus on principles of judicial independence deriving from

⁶⁸ For more information about the *International Foundation for Electoral System* visit the official website at <<http://www.ifes.org/>>

⁶⁹ K. E. Henderson, *Halfway Home and a Long Way to Go: China's Rule of Law Evolution and the Global Road to Judicial Independence, Judicial Impartiality and Judicial Integrity*, in R. Peerenboom (ed.), *Judicial Independence in China, Lesson for Global Rule of Law Promotion*, Cambridge, NY, Cambridge University Press, 2010, pp. 23-36.

⁷⁰ IFES/USAID, *Guidance for Promoting Judicial Independence and Impartiality*, USAID Technical Publication Series, November 2001; available on the IFES website at <http://www.ifes.org/rule_of_law/description.html> [hereinafter "Judicial Independence Guide"].

⁷¹ V. Autheman, *Global Best Practices: Judicial Integrity Standards and Consensus Principles*, K. Henderson (Ed.), IFES Rule of Law White Paper Series, *White Paper #1, International Standards of Judicial Integrity*, April 2004.

regional and international standards and practices. The in-depth analysis that preceded the formalization of IFES's principles took into consideration several international human rights treaties such as the Universal Declaration of Human Rights and the United Nations Basic Principles on the Independence of the Judiciary,⁷² as well as governmental and non-governmental guidelines and principles discussed in the preceding paragraph. This led to the identification of 18 core principles, named Judicial Integrity Principles (JIP). To improve the aggregating aspect of the principles, IFES also examined a number of noteworthy studies, including the monitoring reports on judicial independence and judicial capacity of the EU Accession Monitoring Program of the Open Society Institute. As written in the White Paper, the notion of judicial integrity adopted in the redaction of the JIP has a broad undertone "to include judicial independence, judicial transparency, judicial accountability, judicial ethics and the enforcement of judgments".⁷³ The JIP read:

JIP.1 Guarantee of judicial independence, the right to a fair trial, equality under the law and access to justice

JIP.2 Institutional and personal/decisional independence of judges

JIP.3 Clear and effective jurisdiction of ordinary courts and judicial review powers

JIP.4 Adequate judicial resources and salaries

JIP.5 Adequate training and continuing legal education

JIP.6 Security of tenure

JIP.7 Fair and effective enforcement of judgments

JIP.8 Judicial freedom of expression and association

⁷² Supra Note 48.

⁷³ Ibidem, p.19.

JIP.9 Adequate qualification and objective and transparent selection and appointment process

JIP.10 Objective and transparent processes of the judicial career (promotion and transfer processes)

JIP.11 Objective, transparent, fair and effective disciplinary process

JIP.12 Limited judicial immunity from civil and criminal suit

JIP.13 Conflict of interest rules

JIP.14 Income and asset disclosure

JIP.15 High standards of judicial conduct and rules of judicial ethics

JIP.16 Objective and transparent court administration and judicial processes

JIP.17 Judicial access to legal and judicial information

JIP.18 Public access to legal and judicial information.⁷⁴

On one hand, our preference for IFES's principles rather than EU standards emphasizes the lack of an official and univocal utterance of Europe-wide standards and thus stresses the shortcomings of the European framework. On the other hand, however, the detectable affinity between European principles and the JIP is quite self-evident. Indeed, many of the principles stated in the European documents discussed above can easily find an equivalent among the JIP. This similarity undeniably simplifies the present inquiry. From now on, for purpose of this study, the JIP are going to be considered as internationally recognized standards and key consensus principles grounded in both legal theory and real-world development

⁷⁴ Ibidem p. 19 and Supra Note 69, pp. 24-25.

experience.⁷⁵ They are therefore adopted as term of comparison to which Chinese judicial standards are going to be compared.

PART II

I. EU External Conditionality: Exporting democracy

EU external conditionality can easily demonstrate the positive impact of the EU's democracy beyond its borders. For this reason, it is accurately identified as a mechanism of democratization. Given the fact that the EU itself sets the adoption and the implementation of democratic rules and practices as conditions that the target states should fulfil in order to gain the foreseen benefits, the EU is simultaneously setting international standards and exporting them in other Non-EU states. This constructive influence has been working effectively in the last few decades. But it is especially after the end of the Cold War that the Union has been applying political conditionality in a renewed manner. Indeed, the eastern enlargement is one of the evidences of this process.⁷⁶

For what concerns this study in particular, it is important to restate what have been previously mentioned: the judiciary plays a crucial role in the socio-economic and political development of a country. This organ should be independent and impartial in order to be able to adequately perform its functions. It is a fundamental prerequisite for a State's structure that claims to be based on the rule of law. Taking these considerations into account, judicial capacity, the rule of law, the protection of

⁷⁵ Supra Note 69, pp. 24-25.

⁷⁶ K. Smith, *The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?*, European Foreign Affairs Review 3, 1998, pp. 253-274.

human rights, democracy and other liberal norms have become the basis of the EU foreign policy. As a matter of fact, the EU is promoting political, social and economic reforms in third countries by adopting political conditionality as a foreign policy strategy of the Union.⁷⁷ Among a wide range of actions and fields, this strategy considers the setting of judicial principles and standards as part of the process. As stated by Article 21 of the Treaty on the European Union, the Union's action in the international arena should be grounded on the highest degree of cooperation in order to "consolidate and support democracy, the rule of law, human rights and the principles of international law".⁷⁸ These goals are difficult to achieve without proper and well-functioning institutions devoted to the defence of such principles. For this reason, external political conditionality in the judicial field is undeniably essential to "export", in a smoother way, European judicial standards and principles that will help third countries to establish modern and performing democratic institutions.

How does conditionality work?

Political conditionality can be defined as the link between the fulfilment of certain conditions and some promised benefits. It usually involves two parties: a state or an international organization that promises the benefits and another state, which can be seen as the recipient, to which these benefits are offered. The recipient will be rewarded with some advantages in return for the accomplishment of some predetermined conditions.⁷⁹ In this section of the chapter we are going to briefly

⁷⁷ Ibidem, p.261.

⁷⁸ Supra Note 9, Article 21 (2) (b).

⁷⁹ Supra Note 76, p. 256.

examine the meaning and the implications of the term *conditionality*. While in the next paragraph, the adoption of this practice by the European Union is going to be critically evaluated.

Even though the definition is apparently quite exhaustive, there is a need of further detailed explanations. Indeed, there are different forms of conditionality. The main distinction is between *positive* and *negative* conditionality. Both positive and negative conditionality concern the reaction of the entity that will eventually grant the benefit or, otherwise, will inflict the punishment. The former entails the promise of potential advantages in exchange of the successful achievement of some prerequisites. Most of the times the benefits consist of trade agreements allowing some preferences or cooperation treaties that include a wide range of sectors, from industrial development to education. On the other hand, negative conditionality envisages the infliction of a penalty in case of a violation of a prearranged condition. Economic and diplomatic sanctions are usually the most used and effective procedure of this category. They comprise visa bans, deferral, or even the cancellation, of cooperation programmes and other ongoing initiatives, trade embargoes, the freezing of assets, as well as flight interruptions and the postponement of high-level meetings.⁸⁰

Furthermore, time is also relevant when dealing with conditionality. In fact, we refer to conditionality *ex ante* if the fulfilment of the agreed conditions is required to happen before the concession of the benefit. The Copenhagen membership criteria established by the European Council in 1993 are a clear example of *ex ante* conditionality. They indeed link the eligibility of a country to become a full member

⁸⁰ N. Tocci, *The EU as Peacebuilder: Actorness, Potential and Limits*, in S. Blockmans, J. Wouters, T. Ruys (eds.) *The European Union and Peacebuilding: Policy and Legal Aspects*, The Hague, T.M.C. Asser Press, 2010, pp. 66-67.

of the EU to the realization of certain objectives. Differently, conditionality *ex post* implies that specified conditions must be followed, if not, the benefit might be reasonably and lawfully revoked or suspended. In other words, the benefit at issue is granted from the beginning. However, only by constantly respecting the rules, namely the conditions stated in the contract, the country will be entitled to earn those benefits. A violation of one of the conditions would lead to a consequent withdrawing of the favourable situation. A clarification can be found in many agreements contracted by the EU with third countries. The respect of some essential principles enshrined in several of their provisions turns out to be a sort of the green light for the enjoyment of the benefit.⁸¹

A decision-maker opting for one of the forms of conditionality mentioned above should take into account that they all implicate different costs and benefits. For instance, both positive and negative conditionality can negatively affect the credibility of the institution granting the benefit and the trustworthiness of the condition itself. If the credibility of the promises is usually increased by the probability of its delivery, it may, at the same time, decrease the credibility of the condition. As a matter of fact, if the delivery of the benefit is taken for granted regardless the third state's real behaviour, the credibility of the condition is unquestionably threatened. The delivery of the benefit despite the obvious disregard of an attached condition, compromises not only the credibility of the condition and of the agent providing the benefit, but also the correct functioning of the mechanism as a whole. Moreover, negative conditionality has some shortcomings that must be recalled. First of all, negative conditionality tools, such as economic sanctions, could

⁸¹ Ibidem, p. 67.

easily lose their credibility if the recipient finds alternative economic partners. In addition, a continuous and multilateral effort is needed in order to make the sanctions effective. Positive conditionality can normally work through unilateral actions, instead, negative conditionality can be effortlessly eluded in the absence of a joint action. Finally, negative conditionality can frustrate any attempt to negotiate with the counterpart by reducing the recipient flexibility and creating “counterproductive psychological effects”.⁸²⁸³ In the next section we are going to study the EU approach to conditionality.

The promotion of EU principles: From Copenhagen to Cotonou

The European Union has adopted the external conditionality as a core element of its external action. The promotion of European principles like the rule of law, democracy, the protection of human rights and many others through their inclusion in contractual agreement is undeniably a conventional method implemented by the EU. Both positive and negative forms of conditionality are applied to third countries.⁸⁴ However, the EU model shows a precise preference for the former. The European Union has often avoided engaging in negative and *ex post* conditionality due to the difficulties related to its application and the potential damaging consequences. Firstly, in employing negative or *ex post* conditionality the EU must face some legal

⁸² Ibidem, p. 67.

⁸³ D. Cortright, *Incentives and Cooperation in International Affairs*, in D. Cortright (ed.), *The Price of Peace: Incentives and International Conflict Prevention*, New York, Carnegie Corporation of New York, Rowman & Littlefield, 1997, pp. 3-20.

⁸⁴ H. Grabbe, *European Union Conditionality and the Acquis Communautaire*, International Political Science Review, Vol 23, No. 3, International Political Science Association, London, SAGE Publications, 2002, p. 250.

constraints. The decision-making process of the EU is long and entails demanding procedures that make the attainment of an approval extremely difficult. In line with Article 228(a) of the Maastricht Treaty, when sanctions and embargoes are concerned, unanimity or, at least, a qualified majority voting is required.⁸⁵

Furthermore, the recourse to *ex post* conditionality needs to respect some severe conditions. According to Article 60 of the Vienna Convention on the Law of Treaties, only the “violation of a provision essential to the accomplishment of the object or purpose of the treaty” is a consistent material breach of the treaty that can lead to a partial or total suspension of an agreement.⁸⁶ Given the fact that the promotion of the rule of law, democratic values and human rights is not the main object of the contractual agreement. Besides, they are not contained in provisions necessary to the fulfilment of the purposes of the treaty. The violation of one of these provisions does not constitute a sufficient reason to justify the suspension of an agreement. Moreover, even when it comes to partial or total suspension, EU approval is complicated to achieve. Under the terms of the Treaty on the European Union, depending on the particular case, suspension necessitates the consensus of all EU member States, either through qualified majority voting or unanimity in the Council.

All these aspects explain the EU’s preference for positive and *ex ante* conditionality. EU decision-makers are aware of the fact that this kind of conditional engagement has a lighter impact on the third state and is thus more tolerable. Rather than inflicting a punishment, positive and *ex ante* conditionality is definitely a more effective tool. It is a constructive approach that will not hinder future political

⁸⁵ *Treaty on European Union* (Treaty of Maastricht), OJ C 191, 29.7.1992, Article 228(a).

⁸⁶ *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 UNTS 331, Article 60(3)(b).

dialogue between the involved parties. EU actors, additionally, tend to renounce to the suspension of an agreement because it could establish a precedent that will later justify the suspension of many other agreements. Since many EU countries could be alleged for grave deficiencies concerning the respect of the treaties, the setting up of a precedent would cause a widespread use of *ex post* conditionality. Consequently, as mentioned before, it would adversely affect EU credibility and would have a destabilizing effect on the EU as a whole.⁸⁷

The abovementioned Copenhagen criteria for membership are one of the most acknowledged examples of European *ex ante* conditionality. They were set up with a double intent. On one hand, the first task of these prerequisites was to reassure the security of the Union avoiding the entry of politically and socio-economically unstable states. More precisely, they had to minimize the so-called disruption risk. On the other hand, they also had to ensure that applicant states could act in compliance with EU rules and principles.⁸⁸ In doing so, the European membership became the reward in return for the adoption of European standards. The three conditions focus on three different aspects of the EU system: politics, economy and the acceptance of the European body of rules, the *acquis communautaire*. For what concerns the analysis of this dissertation, the first principle is the most interesting. In fact, it openly states that any country seeking EU membership must be provided with institutions able to guarantee democracy, the rule of law, human rights and respect for and

⁸⁷ Supra Note 19, p. 68.

⁸⁸ Supra Note 80, pp. 251-252.

protection of minorities.⁸⁹ All these principles have become the official guidelines for the EU enlargement and define the European model as a point of reference.

But the use of conditionality is not limited to the enlargement process. There are many examples of this successful practise. In the last few lines we are going to discuss another case of positive and *ex ante* conditionality, precisely the 2000 Cotonou Agreement. This cooperative agreement between the European Union, and its member States, and the group of African, Caribbean and Pacific (ACP) countries falls within the European development cooperation field. It began with the 1963 and 1969 Yaoundé Conventions, granting to former European colonies a preferential access to Community markets in exchange of duty-free or quota-free access to ACP markets. It was one of the most comprehensive agreements ever signed. Its competences covered numerous areas of interest, from technical assistance to investments and trade.⁹⁰

As a response to the unsatisfactory outcomes of the preceding agreements and the changes in the European structure after the accession of Great Britain, the Yaoundé Conventions were replaced by the Lomé Convention in 1975. Among the innovations, a Generalized System of Preferences (GSP) was introduced, together with some compensatory funds, namely Stabex and Sysmin, in order to address fluctuations of prices in the agricultural and mineral sector. The convention was later renegotiated three times. Lomé II (1981-1985) increased the amount of foreign aid to ACP countries. While, Lomé III (1985-1990) shifted the emphasis from industrial

⁸⁹ Supra Note 24.

⁹⁰ The *First Yaoundé Convention* was signed in Yaoundé, capitol of Cameroon, on 20th July 1963 and entered into force in 1964. The agreement was then renewed by the *Second Yaoundé Convention*, signed on 29th July 1969, entered into force in 1971 and effective until 1975.

development to self-sufficiency and food security. Finally, Lomé IV tried to adjust the structure of ACP states through economic diversification rather than just offering financial aid. It also included the well-known human rights clause among those provisions setting the conditions to fulfil in return for the benefit.⁹¹

The Cotonou Agreement is the result of almost forty years of negotiations and a further attempt to reduce, and in the longer-term, completely eradicate poverty. Signed in Cotonou on 23rd June 2000, the new agreement substituted the preceding Lomé Conventions. In addition to trade and development cooperation, the Cotonou Partnership Agreement (CPA) extended the relationship between the EU and ACP to political dialogue.⁹² As stated by Article 8 of the Agreement, the dialogue is meant to cover “all the aims and objectives” established by the CPA.⁹³ The strong political dimension is put into effect through regular political talks, regional peace-building policies, conflict prevention and resolution, cooperation strategies based on shared interests and a specific care to security threats (e.g. terrorism, proliferation of weapons of mass destruction and illegal trafficking).⁹⁴

This new aspect of ACP-EU cooperation becomes relevant to the study of EU conditionality, and the international acknowledgement of European principles, if we

⁹¹ J. McCormick, *The European Union, Politics and Policies*, 4th Edition, Boulder, USA, Westview Press, 2008, pp. 354-357.

⁹² S. Kingah, *The Revised Cotonou Agreement between the European Community and the African, Caribbean and Pacific States: Innovations on Security, Political Dialogue, Transparency, Money and Social Responsibility*, *Journal of African Law*, Vol. 50, No. 1, Cambridge University Press (on behalf of the School of Oriental and African Studies) 2006, pp. 59-71.

⁹³ *Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000*, Agreement 2000/483/EC of the 1.4.2003, OJ L 317, 15.12.2000, amended by Council Decision 2005/599/EC of the 21.6.2005 (OJ L 209, 11.8.2005) and Decision 2010/648/EC of the 14.5.2010 (OJ L 287, 4.11.2010), Article 8. [Hereinafter Cotonou Agreement or CAP].

⁹⁴ For more information about the political dimension of the Cotonou Agreement visit: <http://europa.eu/legislation_summaries/development/african_caribbean_pacific_states/r12101_en.htm>.

take into consideration Article 9 of the already mentioned agreement. The title of the article appears by itself quite exhaustive. It clearly states that human rights, democratic principles and the rule of law are “essential” elements of the CPA, while good governance is officially upgraded to “fundamental” feature of the cooperation agreement.⁹⁵ In fact, the protection of human rights and fundamental freedoms, a society based on democratic principles and the rule of the law⁹⁶ not only underpin domestic and international policies of the parties but they also constitute the foundation stone of the ACP-EU Partnership.⁹⁷ On these bases, good governance should ensue from a well-functioning political and institutional environment as a natural condition. Good governance is indeed grounded on a transparent decision-making process, accountable public institutions, allocation of human, natural, economic and financial resources in acquiescence with the law, finally, capacity building to elaborate and implement *ad hoc* measures.⁹⁸ This definition resembles the one adopted by several international organizations such as the International Monetary Fund (IMF), the World Bank and the United Nations (UN).⁹⁹ Under the terms of Article 9 of the Cotonou Agreement, good governance is another condition that ACP countries must fulfil in order to obtain the benefits granted by the partnership. Since it

⁹⁵ With the 2005 Council Decision, the original title of article 9 changed from “Essential Elements and Fundamental Element” to the current version “Essential elements regarding human rights, democratic principles and the rule of law, and fundamental element regarding good governance”.

⁹⁶ See Chapter 1, paragraph 1.

⁹⁷ Supra Note 92, Article 9(2).

⁹⁸ Ibidem, Article 9(3).

⁹⁹ According to the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) good governance has eight characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. Available at <<http://www.unescap.org/sites/default/files/good-governance.pdf>> last access 2nd May 2015. The World Bank has pointed out six key elements of good governance, named Worldwide Governance Indicators (WGI). They are voice and accountability, political instability and violence, government effectiveness, regulatory burden, rule of law, control of corruption. For more information about the World Bank, WGI and countries assessment: <<http://info.worldbank.org/governance/wgi/index.aspx#home>> last access 2nd May 2015.

“underpins the ACP-EU Partnership” and the “domestic and international policies of the Parties, and constitute(s) a fundamental element of this Agreement”, the non-conformity to the principles of good governance might irrefutably frustrate the continuity of the accord.¹⁰⁰

We have briefly discussed a further example of European positive and *ex ante* conditionality with the intention of highlighting the importance and the omnipresence of the so-called “democratic package”.¹⁰¹ For what regards the object of this dissertation, we should bear in mind that the principles counted in the “democratic package” have become an essential element for developmental cooperation in Europe. Given the fact that the promotion of these principles is expected to be a *conditio sine qua non* for the success of many international treaties, their international recognition and consequential implementation should be taken for granted. They represent a universally acceptable standards and an undeniable point of reference for developing countries. Until now, we have discussed about democratic principles, rule of law and good governance in a general manner. In the next and last paragraph of this chapter we would like to focus the attention only on the specific relation between the EU and China.

EU-China relations: does political conditionality matter?

Since the establishment of the first diplomatic ties in 1975, relations between the European Union and the People’s Republic of China have been steadily developing

¹⁰⁰ Supra Note 92, Article 9(3-4).

¹⁰¹ Supra Note 91, pp. 63-64.

and become more and more intertwined. In particular, a series of economic agreement paved the way for an increased cooperation between the parties. The 1985 Trade and Economic Cooperation Agreement between the European Economic Community and the People's Republic of China, replacement of the 1978 Agreement on the same issue, clearly aimed to start a new phase of the process. It was intended to endorse and intensify trade and to promote the constant development of economic cooperation in the reciprocal interest of both parties.¹⁰²

The idea of obtaining win-win results has been a well-defined intention of both contracting parties. Indeed, several documents published by the EU concerning relations with the PRC undeniably present a promising situation and a sharp declaration of intent. For instance, starting from the 1995 first official Communication named “A long-term policy for China-Europe relations”, the European Commission has been devoting specific attention to EU-China relations. It has been followed by the 1998 Communication regarding the creation of a comprehensive partnership with China and the 2001 strategy towards China. In addition, the Commission adopted a policy paper entitled "A maturing partnership: shared interests and challenges in EU-China relations" in 2003. Later on, the Council of Ministers endorsed this document testifying the maturity of the relationship, the reached achievements and the willingness of the Union to continue on the same path for the following years. As a response, the same year, the PRC released the first ever

¹⁰² Council Regulation (EEC) No [2616/85](#) of 16 September 1985 concerning the conclusion of a Trade and Economic Cooperation Agreement between the European Economic Community and the People's Republic of China, OJ L 250 of 19.9.1985.

policy paper on the European Union.¹⁰³

Throughout the years, the liaison grew stronger thanks to more or less institutionalised framework of strategic political dialogues (annual summits, high-level meetings, official visits, etc.). They have gradually widened their scope of work to cover issues ranging from disarmament and non-proliferation to climate change, from agricultural and rural development to the fight against the trafficking of human beings and illegal migration. It is undeniable that after decades, the EU-China Strategic Partnership has consistently developed. The two partners indeed cooperate with each other on a large number of key international, regional and sub-regional issues. Despite these favorable outcomes, we should not forget that the process is still ongoing and it leaves wide room for improvement.¹⁰⁴

The European Union and the People's Republic of China are the largest trading partners in the world, with estimated trade flows going over \$1 trillion in recent years. In addition, as affirmed by Professor Kerry Brown, King's College, the significant growth of the Chinese economy is partially due to the beneficial relationship established with the EU.¹⁰⁵ However, the fruitful collaboration in the economic field that will likely lead to the creation of a Free Trade Agreement, as explicitly requested

¹⁰³ For further information: Communication from the Commission - *A long-term Policy for China-Europe Relations* [COM(1995) 279 final - Not published in the Official Journal], Communication from the Commission of 25 March 1998 - *Building a comprehensive partnership with China* [COM(1998) 181 final - not published in the Official Journal], Communication from the Commission to the Council and the European Parliament of 15 May 2001, *EU Strategy towards China: Implementation of the 1998 Communication and Future Steps for a more Effective EU Policy* [COM(2001) 265 final - Not published in the Official Journal], European Commission guidance document of September 10 entitled *A maturing partnership - shared interests and challenges in EU-China relations* (updating of Commission communications of 1998 and 2001 on EU-China relations) [COM(2003) 533 final - Not published in the Official Journal].

¹⁰⁴ Ibidem, see also EU-China Relations (EU website): http://www.eeas.europa.eu/china/index_en.htm. Last access 2nd February 2016.

¹⁰⁵ J. McDonnell, The Diplomat, "China-EU Relations: Trade and Beyond", 24th April 2014, <http://thediplomat.com/2014/04/china-eu-relations-trade-and-beyond/> Last access 2nd February 2016.

by President Xi Jinping during an official visit to the EU institutions in 2013, does not obtain the same positive outcome in other areas.

As stated by the document adopted by the European Council in 2003, there is a need to further strengthen the cooperation among the parties and reinforced political dialogue in order to address in a more adequate way all unresolved issues (the situation in Tibet, Macau, Hong Kong, Taiwan, illegal immigration, etc....). Although noteworthy progresses have been achieved, the Council clearly underlines that China's transition to an open society founded on the rule of law has to be supported, especially when facing the meaningful gap between the existing human rights situation and internationally recognized standards. In fact, death penalty, administrative detention and torture are still a common practice. In addition, freedom of expression, of religion and of association and the rights of minorities are not sufficiently guaranteed as they are in other democratic countries based upon the rule of law.¹⁰⁶

The EU-China 2020 Strategic Agenda for Cooperation, agreed at the EU-China Summit in 2013, follows the same trend. On one hand, the document reveals that both sides are deeply committed to promote and strengthen the relationship between them in the next decade. On the other hand, it shows that a lot of work still has to be done. To be more precise, the transition of China to an open society based on the rule of law and the protection of fundamental human rights is still one of the main causes of concern. Despite the great economic achievements, the EU has made it clear on

¹⁰⁶ European Commission guidance document of September 10 entitled *A maturing partnership - shared interests and challenges in EU-China relations* (updating of Commission communications of 1998 and 2001 on EU-China relations) [[COM\(2003\) 533](#) final - Not published in the Official Journal].

several occasions that there is the need to achieve more concrete improvements in the human rights circumstances on the ground. The European Commission is indeed dedicate to use the abovementioned cooperation agreements to promote human rights and rule of law in China. The activities performed in the recent years, including the EU-China Legal and Judicial Co-operation Programme and many others projects, are an evident and effective attempt to support the consolidation of the rule of law in China.¹⁰⁷

However, the absence of a human rights clause in the EU-China Agreement arguably undermines the consistency and the credibility of the European conditionality in China. The inclusion of a similar conditionality clause in the agreement would irrefutably reinforce the EU influence in China. Unfortunately, as stated by Algieri, the promotion of democratic values in South-East Asia, more precisely in the PRC, focus more visibly on the trade-off between commercial interests and democracy promotion.¹⁰⁸ As a matter of fact, economic and security interests do impede the EU in accomplishing its democracy promotion agenda.¹⁰⁹

¹⁰⁷ *EU-China 2020 Strategic Agenda for Cooperation*, available at http://eeas.europa.eu/china/docs/eu-china_2020_strategic_agenda_en.pdf. Last access 2nd February 2016.

¹⁰⁸ F. Algieri, *Unequal Treatment: Democracy Promotion of the EU in Myanmar/Burma and China*, in A. Junemann and M. Knodt, *European External Democracy Promotion*, Baden-Baden: Nomos, 2007, pp. 169-183.

¹⁰⁹ G. Crawford, *EU human rights and democracy promotion in Central Asia: From lofty principles to lowly self-interests*, *Perspectives on European Politics and Society*, 9(2), 2008, pp. 172-191.

CHAPTER 2

People's Republic of China Judicial Principles

In the first chapter, European judicial standards have been widely discussed and the Judicial Integrity Principles set by IFES have been introduced and adopted as benchmarks for the comparison between the EU and China's judicial systems. We can now continue our work maintaining the same framework of analysis for the Chinese legal system. At the beginning of this second chapter the evolution of Chinese constitutionalism is going to be a general but necessary introduction to the Chinese legal system. Since the Chinese constitutional history has followed a peculiar path, due to political, ideological and socio-economic issues that have drastically influenced its creation and its current content, this choice seems a simple solution to better understand the Chinese judiciary system. The topic of the second part will regard constitutional norms and other legal sources setting the standards of China's judiciary system. Taking into account the complexity of the Chinese system, it will hopefully be a clear assessment of their role and meaning. As a conclusion of this chapter, the degree of effectiveness and the implementation of these principles will be evaluated in light of the ongoing reform process started with the 2012 government white paper on judicial reform in China.

I. The Evolution of Chinese Legal System

The influence of the past

Albert Chen states that if one takes into account the classification of the legal systems of the contemporary world into three major categories – the common law family, the civil law family and the family of socialist laws¹ - it appears quite evident that “all these families have their origin in Western European states which appeared towards the end of the Middle Ages”.² Europe has always been considered a point of reference when dealing with the emergence of laws regulating governmental powers. As a matter of fact, the rule of law, the Kantian definition of *Rechtsstaat*, more precisely the law-based state or constitutional state³, the supremacy of the constitution, the equality before the law, the independence of the judiciary and many others fundamental principles, are “cherished elements of Western liberalism as developed in seventeenth-century England and in continental Europe in the Age of Enlightenment”.⁴ European jurists have also contributed in a significant manner to the development of these principles and their acceptance by linking them to important legal debates on human rights, legitimacy of governmental power and the need for governmental power to abide by the law.⁵ However, Chesterman also affirms that the establishment of a basic law able to constraint the government was not a phenomenon

¹ R. David and J. E. C. Brierley, *Major Legal Systems in the World Today*, London, Stevens & Sons, 3rd Edition, 1985, pp. 17-31.

² A. H. Y. Chen, *An Introduction to the Legal System of the People's Republic of China*, Hong Kong, Lexis Nevis Butterworths, 4th Edition, 2012, pp. 1-2.

³ I. Kant, *The Metaphysical Elements of Justice: Part I of the Metaphysics of Morals*, 1797, Hackett Publishing Company, Inc., 2nd Edition, 1999.

⁴ Supra Note 2, pp. 3-4.

⁵ Ibidem, p. 4.

confined to Europe. Even though colonialism can be seen as the exportation of European law across the “uncivilized” world, it would be misleading to think that the idea of rule of law found rich soil exclusively in Europe.⁶

China was often depicted as a despotic regime completely subjected to the emperor’s will. According to Montesquieu, the emperor had absolute and unlimited powers, and there was no law regulating the affairs of the state. Everything was based on rites and traditions, in line with the Confucian principles that shaped the relationship between father and son, as well as, between emperor and subjects.⁷ On the contrary of what may seem, the existence of Chinese law codes dating as far back as the sixth century B.C. has been proved by many researches. In fact, the most primitive example of code of law in Chinese legal history can be found in the code of the Zheng state in the Spring and Autumn Period (approximately 771 to 476 BC). The code was promulgated in 536 BC with the name of Book of Punishment (刑书 xingshu). From the following Warring States Period, the normative activity continued in different parts of China. Moreover, a comparative analysis of the major law codes of the Tang (618-907 AD), Song (960-1279), Yuan (1271-1368) Ming (1368-1644) and Qing (1644-1911) dynasties has found out “a remarkable degree of similarity and continuity” between these codes.⁸ Chen states that this similarity undoubtedly emphasizes that China’s legal tradition ran without interruptions from Tang to Qing

⁶ S. Chesterman, *An International Rule of Law?* The American Journal of Comparative Law, Vol. 56, No. 2, American Society of Comparative Law, Spring, 2008, p. 338.

⁷ C. De S. Montesquieu, *The Spirit of the Laws*, 1748, A. M. Cohler, B. C. Miller, & H. S. Stone trans., Cambridge Univ. Press, 1989, bk. VIII, CH. 21.

⁸ Supra Note 2, p. 9.

dynasties as an “effective system of law and order administrated by a unified and centralized bureaucratic empire”.⁹

Since the real focus of this thesis is the analysis of contemporary recognized judicial standards, an in-depth examination of the origin of the Chinese legal system would go beyond the scope of this work. However, a short presentation of the two main schools of political, social and legal thought that influenced the foundation of Chinese legal arrangement is necessary to understand the traditional legal history of China. Indeed, from the perspective of legal philosophy, Confucianism and Legalism have definitely affected the conception of law in China. They had two divergent but equally meaningful approaches to societal structure and state building.

On one hand, Confucius (551-479 BC) founds his ideal society on a rigid hierarchy and a general duty of obedience to the superiors both within the family (家 *jia*) and in its natural extension, the society and the nation (国家 *guojia*) as a whole. According to Confucius, the rulers, from the local bureaucrat to the emperor, were expected to govern in harmony with the five constant virtues: benevolence (仁 *ren*), righteousness (义 *yi*), propriety (礼 *li*), wisdom (智 *zhi*) and fidelity (信 *xin*). For this reason, Confucianism underlines the merits of a government providing a moral example, capable of teaching what is right and wrong and providing moral and social rules of conduct on which the subjects should have based their behavior.¹⁰ The “Confucian ideal is to lead by virtue and control”, or to govern in line with the ethical principle of *li*.¹¹

⁹ Ibidem, p. 9.

¹⁰ Ibidem, p. 12.

¹¹ C. Wang and N. H. Madson, “*Inside China’s Legal System*”, Oxford, Chandos Publishing, 2013, p.

Confucius held that society should be arranged around *li*, one of the five virtues, to be more precise, around rites and norms of propriety. It is in during the western Zhou dynasty period (1027-770 BC) that the doctrine of governing society in accordance with the *li* was formed. This period is usually considered as the formation of Chinese culture. The key concepts of Chinese civilization, such as the idea that the legitimacy of imperial rule in China was granted by virtue of a Mandate of Heaven, were in fact established in that period. *Li* has a very broad connotation: it may refer to all religious, political and social institutions. In its restricted sense, instead, it embraces all rules governing religious, diplomatic, social and military ceremonies (weddings and funerals) and rites (rites for ancestral worship and religious sacrifices). Besides, it also guides everyday-life suggesting norms of adequate behavior and etiquette, as well as clothing. In the case of traditional China, many norms and principles similar to Western laws were part of the *li*. The problem that arises from the adoption of *li* as a set of ethical and moral standards is related to the origin of these standards. Unfortunately ancient Chinese did not distinguish between “the moral requirements of nature and those prevailing in their society”.¹² In other words, there was no difference between *natural law* and *positive law*, in the Western perspective. It was quite the reverse, it was believed that the *li* was conceived by the ancients, who were able to understand the requirements of heaven.¹³

As a consequence, in a virtuous and moral society led by the good example provided by the ruling class, the establishment of laws would be inadequate or even

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¹² Supra Note 2, p. 10.

¹³ D. Bodde and C. Morris, *Law in Imperial China*, Cambridge, Mass. Harvard University Press, 1967, pp. 20-21.

dangerous. It would have caused a failure of virtue. Confucius believed that the creation of law and the infliction of punishment in case of violation would just persuade people to do whatever they could to escape the sanction set by the law. Confucius was even concerned about the inflexibility of a legal code. In his opinion a code was not able to recognize and regulate the circumstances going beyond some precise criminal action written in the code itself. Finally, Confucius was particularly reluctant to adopt a codified system of laws because he thought that if individuals' main intent was to avoid the punishment, the upper social classes, those in charge of representing the virtuous model, would have no motivation to remain virtuous. Law, in a Confucian perspective, is the failure of virtue.¹⁴

On the other hand, Legalism strongly supported the idea of a society based on the law, (法 fa). In line with the legalist thought, the infringement of any norm would have directly led to the infliction of a punishment. The role of law and morality in society was defined in a completely different manner by Legalists scholars. In line with Shang Yang (390-338 BC) and Han Fei (280-233 BC), prominent exponents of the Legalist stream, the supremacy of the law was indisputable. Only a set of rules applicable equally to all people and able to guarantee appropriate sanctions in case of non-compliance was regarded as the cornerstone of an ordered society. The Legalist approach stressed the importance of publicly promulgated principles and standards of conduct supported by the use of legal states coercion. The threat of punishment was indeed considered the most effective tool in the hand of the government. Without any doubt, these philosophers advocating a written set of rules, the use of physical force

¹⁴ Supra Note 11, p. 30.

and an administrative apparatus imposing order, were promoting a concept similar to what in the West was the rule of law.¹⁵

Even though Confucianism was officially accepted as state philosophy since the Han dynasty (206 BC-220 AD) until the fall of the Qing dynasty, it has to be recalled that during the Qin dynasty (221-207 BC) Legalism was adopted as state doctrine. The unification of China effectively took place in that period and it is not a coincidence that, in those same years, the First Emperor of China gave birth to a highly structured and centralized bureaucratic regime and a unified system of criminal law. Nevertheless, after the collapse of the Qin dynasty legalism was soon abandoned. In fact, the Han dynasty adopted Confucianism as the orthodoxy.¹⁶ The short-lived legalistic experience does not mean that Legalism was totally forgotten. Its tradition and influence persisted. Indeed, according to Bodde and Morris, from Han to Sui dynasties, Chinese law underwent a process of “confucianisation of law” or “legalization of Confucianism”. They affirm that Confucian values progressively managed to influence the administration of the law. *Li* was gradually introduced in many formal legal provisions and Confucian scholars participated in the drafting of laws.¹⁷ The classical dichotomy between law and morality started to blur. The Tang Code (653 AD) evidently represent the moment in which the process of confucianisation reached its peak. The introductory commentary to Book I of the Tang code is defined by some legal scholars as the “final synthesis of Confucianism and Legalism, of the *li* and the *fa*, and of morality and law”.¹⁸ It states that virtue and

¹⁵ Ibidem, p. 34.

¹⁶ Supra Note 2, p. 16.

¹⁷ Supra Note 13, pp. 267-279.

¹⁸ Supra Note 2, p. 17.

morals should be considered as the foundation of government and education, while laws and punishment are meant to be the “operative agencies of government and education”. Morality and law find in the Tang Code an unquestionable complementarity.¹⁹

Legal Modern China: the transplant of law and legal institutions

The philosophical debate between morality and law, between Confucianism and Legalism, has underpinned China’s legal system for about 2,500 years. After the brief overview of the history and tenets of the two schools of thought offered in the previous paragraph, it seems reasonable to affirm that “China’s current legal system is legalistic, but still retains a Confucian face”.²⁰ In the current paragraph, the relationship between China and the West is discussed to understand to what extent Western civilization has managed to influence Chinese legal culture and how China has changed in order to be a member of the global community.

As stated by Wang and Madson, the West and its influence played a role in the creation of modern China. It is undeniable that the relationship between China and Western countries has always had a strong impact on Chinese perception of its own power and strength and has substantially prompted Chinese modernization. At first, China appeared to be affected by what have been called a sense of “victimhood”, dating back to the First and the Second Opium Wars, respectively between

¹⁹ Ibidem, p. 17.

²⁰ Supra Note 11, p. 27.

1839–1842 and 1856–1860.²¹ Due to the considerable losses occurred in the event of both Opium Wars, the signing of the sadly famous unequal treaties, the Boxer Rebellion (1897-1901) suppressed by foreigner intervention and the First Sino-Japanese War (1894-1895), China was forced to open its doors to the Westerns countries. Dr. Wang Zhenmin, Professor of law and Vice-dean of Tsinghua University Law School, says that only thanks to the opening China realized that its feudal legal system was obsolete and inefficient. For this reason, in the late nineteenth and early twentieth centuries the imperial government tried to renew the legal system by introducing Western law principles.²²

Many Chinese officials of the Qing period were quite aware of the necessity of an extensive legal reform. In addition, there was a widespread agreement on the fact that China would have learnt a lot from the Western legal practice. But the method to implement was a problematic issue. The concern arose from the following dilemma: Chinese authorities had to find a compromise between the safeguard of the uniqueness of China, its thousand-year old culture and its traditional values while trying to craft reforms that would have had an uncontestable pervasive effect on the entire country. The improvement of a legal system by borrowing some elements from a foreign legal system is a common legal procedure, known as *legal transplant*. The term was coined in 1974 by Prof. Alan Watson who defined the legal transplant as "the moving of a rule or a system of law from one country to another, or from one

²¹ Ibidem, p. 46.

²² Wang Zhenmin, *Legal Education in Contemporary China*, The International Lawyer, Vol. 36, No. 4, Winter, 2002, American Bar Association, pp. 1203-1212.

people to another”.²³ Legal transplants can be included in the wider process of diffusion of law or legal acculturation. Both concepts explain the development of law through the imitation of another legal system which is therefore regarded as an inspiring model. In the case of China, the entire Western culture is taken as example of good practice. Hence, the resulting complications related to the transplant cannot be effortlessly neglected.

The Qing dynasty’s reforms were a first attempt to modernize the country, but, unfortunately, the results were not so successful. Among the numerous causes of the failure, Wang mentions the language barrier and the lack of qualified lawyers.²⁴ The Chinese Foreign Affairs Movement was a further effort to “extract Western knowledge to bolster Chinese power”.²⁵ The method applied by the movement was articulated in a book published in 1898 with the title *Exhortation to Study*. The author, Zhang Zhidong suggested the implementation of a reform process that had to be conservative and innovative at the same time. The enlightening mantra of the movement gives a more comprehensive explanation of the method proposed by Zhang. It is encapsulated in the expression “Chinese learning for fundamental principles, or 体 (ti), and Western learning for practical application, or 用 (yong)”. The *ti-yong* dichotomy can be thought as a manner to import Western techniques, mainly in engineering and manufacturing industries, without disregarding Confucians ideals, virtues and morality. As maintained by Wang and Madson, Zhang was able to capture the necessity of China, specifically the need for a balance between the inner

²³ A. Watson, *Legal Transplants: an Approach to Comparative Law*, Charlottesville, The University Press of Virginia, (1974) in *Stanford Law Review*, Vol. 27, No. 4 (Apr., 1975), p. 1208.

²⁴ *Supra* Note 22, p. 1203.

²⁵ *Supra* Note 11, p. 52.

(Chinese) philosophical values and outer (Western) practical expertise and knowledge.²⁶

At the beginning, the concept of *yong* had a quite limited meaning. In the 1860s, it was initially related to the acquisition of Western military technologies. At that time, many supposed that the West's power derived from its superior military capabilities. Therefore, they believed that the only possible way to achieve the same level of military power was to import that precise type of "Western learning". In the 1880s, it embraced commercial and industrial development too. Finally, in the 1890s, *yong* acquired a political connotation. A constitutional monarchy with a parliamentary system of government was considered an important part of the outer learning. The evolution and progressive extension of the meaning of *yong* was mirrored in Qing reforms. In fact, one of the first reforms tried to boost the size and the strength of the imperial army. The reform process affected also the social and economic sector. They intended to modernize the traditional civil service exam, to reorganize the state bureaucracy in order to eliminate unnecessary positions and to substitute the study of Confucian texts with the teaching of mathematics and science. Moreover, the reformers' idea was to achieve a rapid industrialization and strengthening the economy of the nation through the imitation of Western attitude towards commerce, manufacturing and, most of all, capitalist principles. As mentioned before, in its last stage the *yong* became a source of inspiration for the governmental reform as well. Qing reformers wanted to bring to an end the despotic experience and establish a constitutional monarchy. The new government would have been essentially

²⁶ Ibidem, p. 52.

democratic and the emperor would have had limited powers. Despite the promising start, the reform process undertaken by Emperor Guanxu (1871-1908) was soon stopped by Empress Dowager Cixi (1835-1908) who rejected the Hundred Days' Reforms of 1898 because unreasonable and detrimental to dynastic power.²⁷

Although the movement did not manage to accomplish all its goals, Wang and Madson sustain that the last decade of the late Qing dynasty was characterized by an “unprecedented effort to modernize Chinese law” with the intent of accommodating social changes.²⁸ According to Zhan Demei, foreign pressure led to the incorporation of the German civil code into the Grand Qing Codex. In addition, a legal reform commission was instituted, two ministers in charge of legal revision were appointed, besides, foreign legal expert were allowed to participate to the process as consultants. Albeit the fall of the Qing dynasty prevents the implementation of the reforms, it is definitely one of the most evident examples of legal transplant.²⁹

The experience of the Republic of China (1912-1949) was considered by many as a short-lived period of enlightened legal activity. First of all, in 1912, the Provisional Constitution of the Republic of China was promulgated. The Constitution, valid until 1928, officially stated that that the Republic of China was a democratic republic governed by the people and for the people. To do so it attempted to design a new governmental structure. The Kuomintang (KMT), successor of the Revolutionary Alliance that supported the overthrow of the Qing Dynasty and the creation of the republic, opted for a Western-style government. Like Western democracies the

²⁷ J. Spence, *The Search for Modern China*, New York, W.W. Norton, 1990, pp. 224-230.

²⁸ Supra Note 11, p. 54.

²⁹ Zhang Demei, *Exploration and Choice: The Transplantation of Laws in Late Qing Dynasty*, Beijing, QingHua University Press, 2003, pp. 25, 100.

Republic of China was provided with a strong parliamentary system, a relatively weak presidency and an independent judicial system. The German civil code was used again as a prototype for the lawmaking and the enactment of a series of comprehensive codes of law.³⁰ However, the Western-influenced legal system had to cope with the traditional Chinese method of law. The principles imported from the Western legal culture were difficult to enforce beyond the capital, Nanjing. The KMT thought that by applying the principle of equality before the law and individual sanctions, in line with the Western model, the stabilization of the country would have been easier to achieve. On the contrary, the reforms had a very little impact at local level and a combination of Communist and Japanese threats obliged the KMT to abandon its ideals. In 1949, the foundation of the People's Republic of China (PRC) lastly put an end to the already precarious legal reform process.³¹

The PRC's legal development follows the same path of the historical one. Two different periods, corresponding to two doctrinal approaches can be distinguished. From 1949 to 1978, the first period is the so-called Mao era. The second is defined as the Deng Xiaoping and post-Deng years, started in 1979 and still ongoing. Mao and the Chinese Communist Party (CPC) had a totally divergent understanding of the legal system, compared to the one supported by Chiang Kai-Shek and the KMT. Mao's view was unwelcoming towards a formalized system of rules. In his opinion, the legal

³⁰ Until today, it is not clear what exactly represents the so-called *Collection of the Six Laws*. It usually refers to all enacted laws and regulations during the Republic of China under the KMT government. According to one view, it referred to the constitution and other five sets of codes inspired by the German civil code: the civil code, the code of civil procedure, the criminal code and the code of criminal procedure, finally the administrative and administrative procedures laws. Another view suggests that it embraced constitutional law, civil law, commercial law, criminal law, procedural law and the organic law of the courts. See Po Jiang and Zhao Kunbo, *A Concise Textbook of Chinese Legal History*, Beijing, Beijing University Press, 1987, p. 388.

³¹ Supra Note 11, p. 54-56.

system itself was judged as counter-revolutionary, as a consequence, the idea of a society based on the rule of law was strongly rejected. As reported by Chow, under Mao's leadership, many legal institutions such as procuratorates and courts were paralyzed, or even shut down. In addition, law schools were closed and a remarkable number of members of the legal community and legal professionals were obliged to change profession or were sent in the countryside "to learn from the peasants".³²

Moreover, Cohen has underlined that after the end of the Republic of China and the resulting defeat of the KMT, China experienced an alarming legislative vacuum. He notes that until the end of the Cultural Revolution (1966-1976), "the PRC lacked most of the identifiable features of a formal legal system".³³ Until 1979, the PRC tried to import legal system of the Soviet Union. As said by Cohen, this second experiment of legal transplant from a Western country did not succeed. The Anti-Rightist Movement (1957-1959) was the cause of its premature end. It was an official communist campaign against those who criticized the party, namely all independent thinkers representing the growing dissent. They were named "rightist" or counter-revolutionaries to stress their opposition to the CPC that still saw itself as a leftist revolutionary party. After the Anti-Right Movement, there was a new attempt to modernize the country through the Great Leap Forward. Unfortunately, what Mao believed the right method to bring China into the modern age, immediately appeared to be grounded on unstable bases. A series of mistaken policies and false reporting on the productive ability of Chinese farmers led to the Great Famine (1959-1961).

³² D. C. K. Chow, *The Legal System of the People's Republic of China in a Nutshell*, 2nd Edition, St. Paul, MN, Thomson West, 2009, p. 59.

³³ J. Cohen, *The PRC Legal System at Sixty*, 2nd October, 2009, available at <<http://www.eastasiaforum.org/2009/10/01/the-prc-legal-system-at-sixty/>>. Last access 10th May 2015.

The law was no more an instrument for the safeguard of rights and the proper administration of the state apparatus. It was quite the opposite. The legal system and the law were exploited by Mao to increase the legitimacy of the CPC and achieve party goals. Indeed, the adoption of the 1954 Constitution provided a notable power to the Standing Committee of the National People's Congress. In that period, the legal system became "a tool to control the population, remove counter-revolutionaries and promote socialism" argue Wand and Madson.³⁴ Besides, although the complete control over the law and the legal system, the CPC was concerned that the law could still restraint its control over the society. Hence, in 1957 the legal system was gradually dismantled. The legal system of China had to suffer another block during the Cultural Revolution, a ten-year period of state-sponsored violence, riots and persecutions, approximately from 1966 to 1976. As a matter of fact, it was ultimately abolished.³⁵ The 1975 constitution, a product of the Cultural Revolution and its extreme leftist ideology, was presented as better version of the previous constitution, with less constitutional limitation. In reality, it was just a manner to legalize many of the atrocities committed during the Cultural Revolution by the Red Guards and Maoists. It also firmly declared the power of the CPC and eradicated several of the protections included in the 1954 constitution. In conclusion, it permitted to use the law as a weapon.³⁶ The 1978 Constitution did not reject the inheritance of the

³⁴ Supra Note 11, p. 59.

³⁵ In February 1949, the Central Committee of the of the Communist Party of China issued the Instructions on the Abolition of the Collection of the Six Laws promulgated by the KMT and the Confirmation of the Judicial Principles of the Liberated Areas. Doing so the CPC officially abolished all existing laws of the KMT regime.

³⁶ Supra Note 11, p. 59.

Cultural Revolution, but marked a departure from its extreme ideology. It was rapidly demised as a result of the victory of the more pragmatic and reformist Dengist line.³⁷

When Deng Xiaoping became the Chairman of the CPC, it was the beginning of a favourable period for China. Deng and the party adopted a new “open-door” policy, encouraging the reconstruction of the legal system through a utilitarian approach. In the end, the legal system regained its utility and original functions. Similarly, the law returned to be a beneficial tool, not a weapon to utilize against the people it should protect. Deng spoke about the necessity to reform the legal system of China saying that “in order to safeguard people’s democracy, the legal system must be strengthened”. He emphasized the fact that democracy and its laws should not change depending on the leaders’ view, therefore it must be institutionalised and legalised to guarantee a coherent and lawful system. Deng states that the law should not be the reflection of the leader’s will, it must instead represent fundamental values and principles of the state.³⁸ As noted by Zimmerman, over the last three decades the Chinese legal system has undergone an important development process that relies on the international best practice and norms. Furthermore, the current legal activity and the implementation and enforcement of law seem to be a promising behaviour leading to a stable legal environment.³⁹

³⁷ Supra Note 2, p. 54.

³⁸ Deng Xiaoping, *Collected Works of Deng Xiaoping (1975-1982)*, Beijing, People’s Press, 1983, pp. 136-137.

³⁹ Supra Note 11, p. 57.

The Constitution of the People's Republic of China

After the analysis of the cultural and historical background of the legal system of China, the study will now focus on Chinese constitutional law. More precisely, the 1982 Constitution, currently in force in mainland China, and the related amendments will be concisely discussed. The author believes that this small section will give the basis to understand how the Chinese judiciary system works. For precision purposes, it must be stated that constitutions of communist states differ from those of Western countries. The content of Western constitutions is typically related to the separation of powers, free electoral competition and other democratic principles. In all liberal democracies, the supremacy of the law, in the specific case, the supremacy of the constitution as primary source of law, is incontestable. Nevertheless, communist states born after a revolution do not apply the same reasoning. The communist party is often the exclusive interpreter and guardian of the interests of the socialist society and the socialist nation. Accordingly, the supremacy of the party is absolutely a keystone of communist regime, while the constitution and the law are far from being the font of the legitimation of power. In case of disagreement between the top party leadership and the provisions of the constitution, the former prevails on the latter.⁴⁰

The present Constitution of the PRC (1982) still includes some of the weaknesses of the constitution of many communist states. The arrangements for the distribution and the exercise of powers, namely the division of powers among legislative, executive and judiciary is merely formal. Although it mirrors the functional division that can be observed in liberal constitutions, the organs it sets must conform to the

⁴⁰ Supra Note 2, p. 50.

principle of the leadership of the Communist Party. As stated in the Preamble of the Constitution, one of the four basic principles of the PRC is the supremacy of the party.⁴¹ Taking into account many factors such as the concentration of power in the hands of the party, the limited judicial independence, the absence of an opposition party and an unrestrained and active civil society, the relevance of the constitution is irrefutably compromised. However, as stated by Chen, the written constitution of the PRC is worthy to study. In fact, the constitutional structure of the 1982 Constitution comes from Western liberal democratic constitutionalism. Even though the practical actualization of the principles enshrined in the Constitution seems to be a rejection of its standards, there is indeed a significant gap between form and substance, the importance of the Constitution should not be completely disregarded.

The text of the 1982 Constitution was amended four times. The first amendment of 1988 formally introduced the concept of “private economy” in China. In line with Article 11 of the amended Constitution, it became a “supplement to the economy of socialist public ownership”.⁴² The amendment also legalised the leasing of land and the possibility to transfer the land-use right. In 1993, a further amendment was the result of the implementation of a new doctrine: socialism with Chinese characteristics. The doctrine was anticipated during the Fourteenth Party Congress in 1992 and the amendment openly drew on it. In the preamble were introduced modern concepts such as the policy of “reform and open door” and the fact that China “is in the

⁴¹ *Constitution of the People's Republic of China* adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on December 4, 1982, full text after amendment on March 14, 2004, Preamble, Paragraph 3.

⁴² Article 11 of the amended Constitution, 1988.

preliminary step of socialism”.⁴³ The main innovation and contribution were in chapter 1, the one concerning general principles, and linked to the economic sector. There was a considerable paradigm shift from planned economy based on socialist public ownership to “socialist market economy” and a reference to “economic legislation” was made.⁴⁴ Another relevant changed was related to the political system. Indeed, according to the Preamble of the Constitution, the “system of the multi-party cooperation and political consultation led by the Communist Party of China will exist and develop for a long time to come”.⁴⁵

The 1999 amendment introduced the so-called “Deng Xiaoping Theory” in the Preamble. In agreement with the theory, China will remain for a long time in the preliminary stage of socialism. Moreover, a noteworthy improvement in the legal field was achieved. In line with a new paragraph added to Article 5, the PRC “governs the country according to law and makes it a socialist country under rule of law”.⁴⁶ This provision is definitely in contrast with the previous legal doctrine applied during the Mao era. In addition, private economy was even more stimulated thanks to the amendment to Article 11. From simple “supplement” to the economy, as previously stated, private and individual economy became “important component[s] of the socialist market economy”.⁴⁷

Recently, the Constitution was again amended. In 2004, the National People’s Congress approved an additional amendment. Chen states that major interventions were connected to the private sector of the economy and private property rights, as

⁴³ Supra Note 2, p. 56.

⁴⁴ Article 15 of the amended Constitution, 1993.

⁴⁵ Paragraph 10 of the Preamble of the amended Constitution, 1993.

⁴⁶ Article 5 of the amended Constitution, 1999.

⁴⁷ Article 11 of the amended Constitution, 1999.

well as human rights. Besides the introduction of compensations in the event of the requisition of land or private property,⁴⁸ the open support for the non-public sector of the economy⁴⁹ and many other substantial adjustments, the 2004 amendment distinctly maintain that “the State respects and preserves human rights”.⁵⁰

As reported above in this section, the study of the 1982 Constitution and the amendment process depicts the development of Chinese Constitution throughout the second part of the twentieth century and the beginning of the twenty-first century. It is unquestionable that the text of the Constitution underwent an extensive reform process that led it to the current version. However, the issue previously underlined, namely the clash between the written form and the implementation of the provisions of the Constitution, still remains and even now the communist ideology affects the legal system. Although the structure and the content of the Chinese Constitution are similar to that of many other states thanks to the process of westernization, there are some differences. The Preamble to the 1982 Constitution affirms that “it is the fundamental law of the State and has supreme legal authority”.⁵¹ In addition, Article 5 declares that the rule of law is a fundamental feature of the People’s Republic of China, that “the State upholds the uniformity and dignity of the socialist legal system” and that the entire nation, from state organs to political parties “must abide by the Constitution”.⁵² Apparently, this resembles the provision of many Western constitutions. Nonetheless, under the terms of Article 1, the PRC is a “socialist state

⁴⁸ Supra Note 41, Articles 10 and 13.

⁴⁹ Ibidem, Article 11.

⁵⁰ Ibidem, Article 33.

⁵¹ Ibidem, Preamble.

⁵² Ibidem, Article 5.

under the people's democratic dictatorship"⁵³ that still relies on the "Four Basic Principles".⁵⁴ The theoretical supremacy of the Constitution is not yet identifiable in practice. As a normal attitude in many Communist states the implementation of the Constitution is a responsibility of the legislative branch. Without implementing legislations, constitutional provisions are not straightforwardly enforceable.⁵⁵

Hopefully, in the next sections of this chapter, we will find out if the efforts of the new leadership of the CPC are really succeeding in the establishment of a society based on the Western conception of rule of law. The Implementation Outline for the Comprehensive Promotion of Administration in Accordance with the Law announced by the State Council in 2004 and the its later elaboration in the State's Council Opinion on Strengthening the Construction of Rule-of-law Government (2010) and many other governmental documents support the author's idea of a gradual modernization of the legal system of China and its shift from rule by law - law as tool to control the masses - to rule of law. The shortcomings of the existing constitutional arrangement are still an inheritance of the past but the recent reform process is undeniably trying to increase its solidity. In particular, the constitutional principles regulating the judiciary, as stated by the Constitution, are partially questionable from a Western perspective, as we are about to explain in the following paragraph.

⁵³ Ibidem, Article 1.

⁵⁴ The Four Basic Principles are: the leadership of the Communist Party of China, the socialist road, the people's democratic dictatorship and the acceptance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the most recent Theory of the Three Representation.

⁵⁵ Supra Note 2, p. 60.

II. The Judiciary and its Principles

In this section the guiding principles of Chinese judiciary are going to be discussed. In our analysis we will follow the hierarchy of the sources. First of all, we will present the provisions of the Constitution. The Constitution of the People's Republic of China regulates the Chinese judicial system, more precisely the people's courts and the people's procuratorates, in Section 7 of the Third Chapter on the Structure of the State. After that, the Judges Law of the People's Republic of China, promulgated in 1995, will be the subject of our study.⁵⁶ Finally, the 1995 Beijing Statement of Principles of the Independence of the Judiciary⁵⁷ in the LAWASIA Region is going to be reviewed to highlight Chinese efforts to meet international standards.⁵⁸

⁵⁶ *Judges Law of the People's Republic of China*, adopted at the 12th Meeting of the Standing Committee of the Eighth NPC (28th February 1995), promulgated by Order No. 38 of the President of the People's Republic of China on February 28, 1995, and amended in accordance with the Decision on Amending the Judges Law of People's Republic of China adopted at the 22nd Meeting of the Standing Committee of the Ninth NPC on June 30, 2001.

⁵⁷ *Beijing Statement of Principles of the Independence of the Judiciary*, promulgated after the 6th Biennial Conferences of Chief Justices of Asia and the Pacific, (Beijing in 1995) was signed by nineteen Chief Justices of the region. In 1997, the 7th Biennial Conference of Manila amended the original set of principles. Available at <<http://lawasia.asn.au/beijing-statement.htm>> , last access 12th May 2015.

⁵⁸ The Law Association for Asia and the Pacific (LAWASIA) is an international organization consisting of individual lawyers and lawyers' associations, professional judges, legal academics, and many other individuals and organizations that are interested in and concerned of the status of the legal profession in the Asia Pacific region. LAWASIA comprises representatives of the top legal bodies in 25 countries and over 1,500 individual members from over 50 countries. Its main field of action is to support the relation between lawyers, businesses and government representatives and promote the rule of law in the Asia Pacific Region. For more information about LAWASIA: <<http://lawasia.asn.au/>> . Last access 12th May 2015.

Section 7 of Chapter 3 of the PRC's Constitution

Articles 123 to Article 135 of the Chinese Constitution prescribe in detail the organizational structure of the judicial system of China. According to Article 123, the judicial organs of the state are the people's court.⁵⁹ They have a multi-level organization, on the top of which there is the Supreme Court, "the highest judicial organ" of the PRC.⁶⁰ As all the people's court at higher levels, the Supreme Court supervises the exercise and the administration of justice by those at a lower level of the judicial hierarchy.⁶¹ One of the most prominent provisions of the chapter is probably contained in Article 126. It indeed states that "people's courts exercise judicial power independently, in accordance with the provisions of law, and not be subject to interference by any administrative organ, public organization or individual".⁶² In this article, the principle of independence of the judiciary, discussed in the previous chapter, is manifestly expressed. Nonetheless, the Communist Party of China is neither accounted as an administrative organ nor as a public organization, therefore its influence over the people's courts is not strictly forbidden by the Constitution. In addition, as reiterated in Article 128, the Supreme Court and all local people's court at various levels are accountable for their activity to the National People's Congress (NPC) and local people's congresses that create and finance them.⁶³ The same scheme is applied to the people's procuratorates of the People's Republic of China, the organs in charge of legal supervision. Article 131 is a precise

⁵⁹ Supra Note 41, Article 123.

⁶⁰ Ibidem, Article 124.

⁶¹ Ibidem, Article 127.

⁶² Ibidem, Article 126.

⁶³ Ibidem, Article 128.

replica of article 126. People's procuratorates are entitled to exercise their procuratorial power independently, in compliance with the law and without any external interference.⁶⁴ However, they are also responsible to the NPC, its Standing Committee and all local organs of state power for their conduct. Again, the principle of accountability and the principle of independence are conceived in a different connotation.

Contrarily to the Western practice, where judicial organs are accountable for their decisions before the society as a whole and before the other branches of the government and there is a formal and substantial separation of powers, in China they are only responsible to the NPC. As stated by Wang and Madson, it may appear that the NPC and its Standing Committee could control the Supreme Court and the local courts, but these organs report to the Central Politics and Law Committee of the CPC Standing Committee.⁶⁵ It is arguable whether the independence of the judicial organs of China can independently administer justice under the terms of Article 126 and 131. Finally, Article 135 affirms that all judicial organs should handle the cases through an appropriate division of their functions, each organ should also take responsibility for its own work, and at the same time they ought to "coordinate their efforts and check each other to ensure the correct and effective enforcement of law".⁶⁶

⁶⁴ Ibidem, Article 131.

⁶⁵ Supra Note 11, p. 72.

⁶⁶ Supra Note 41, Article 135.

Judges Law of the People's Republic of China

The seventeen chapters of the Judge Law of China contain a comprehensive catalogue of the principles that should guide the administration of law in China. In the specific case, it is meant to offer concrete guidelines to “enhance the quality of judges [...] and to ensure that the People's Courts independently exercise judicial authority according to law”, lastly, that judges could accomplish their duties in consistence with the law and “that law is administered impartially”.⁶⁷ Functions and duties are regulated in chapter 2 which says that judges have to perform certain duties provided for by the law.⁶⁸ While they do so, judges have the right to be protected by the law since they are lawfully exercising their jurisdiction.⁶⁹ Article 7 clearly lists the obligations of a judge: observance of the Constitution, impartiality, honesty, the safeguard of the interests of the state and many others.⁷⁰ In addition, Article 8 establishes the rights of a judge, from the right to work in appropriate working conditions, personal safety and remuneration to the rejection of external interferences.⁷¹ The remaining chapters deal with an equal number of fundamental issues that all together contribute to the formation of a well-functioning judicial system. Themes such as the requirements and qualifications for judges, their appointment and removal, the appraisal of judges’ conduct, awards, punishments and the arrangement of their personal career are included in the Judge Law and illustrated item by item.

⁶⁷ Supra Note 56, General Provision, Article 1.

⁶⁸ Ibidem, Article 5.

⁶⁹ Ibidem, Article 4.

⁷⁰ Ibidem, Article 7.

⁷¹ Ibidem, Article 8.

Beijing Statement of Principles of the Independence of the Judiciary

We are now going to examine the last document believed necessary for a far-reaching understanding of Chinese judicial system. As a matter of facts, it is an international document with no binding force in China. However, it was signed by HE Mr. Wang Jingrong, at that time Vice-President of the Supreme People's Court of the People's Republic of China. This entails that the principles enshrined in the Statement are formally recognised by the PRC, hence they are in line with the governmental perspective on the judicial activity. Adopted in 1995, the Beijing Statement represents a remarkable achievement of the international legal community of the Asia-Pacific region. It certainly promotes the idea of a wide-spread agreement between the Chief Justices of different countries in the region. In accordance with the introduction to the statement, it is a “tribute to the determination of all signatories to leave aside differences in both legal and social traditions to formulate a single Statement on the Independence of the Judiciary” and to reach a unanimous consensus on the minimum standards that are essential to secure judicial independence in their own countries.⁷²

In its forty-four provisions the Statement advocates a broad number of principles that should help to promote the administration of justice, the respect of human rights and the rule of law.⁷³ A significant part is dedicated to the standards for an independent judiciary. Taking into account that the judiciary is an institution representing the highest values in every society,⁷⁴ Principles 1 to 9 state that an independent judiciary is crucial for the enforcement of human rights and fundamental freedoms, such as the

⁷² Supra Note 57, Introduction.

⁷³ Ibidem, Principle 10.

⁷⁴ Ibidem, Principle 1.

right to a fair trial as provided for by the law.⁷⁵ They stress the importance of adjudications grounded on an impartial assessment of the facts and free from external and improper influences.⁷⁶ Given the fact that the independence of the judiciary is necessary for the accomplishment of its objectives, it should be guaranteed by the State and cherished by every Constitution.⁷⁷ In the legitimate exercise of their functions, individually and collectively, judges should observe the appropriate purposes of the judiciary, should not be influenced by other levels of the judicial organization and they should also avoid impropriety.⁷⁸ In addition, as all other citizens, they are entitled to freedom of belief, expression, association and assembly.⁷⁹

The third section of the Statement deals with the appointment of judges. Besides the educational background and other professional qualifications, judges must be selected according to their demonstrated competence, integrity and unquestionable independence. Despite the reasonable procedural differences, all countries that have subscribed the statement agreed to avoid any kind of discrimination in the selection process and to adopt a certain number of safeguards to guarantee the correct appointment and promotion of judges.⁸⁰ Selection four offers some dispositions concerning the judges' tenure, namely: the formal procedure of confirmation, the removal or suspension of a judge and the related proceeding provided by the law, the process to actualize in case of abolition and reconstruction of a court and the required consultations for the transfer of a judge.⁸¹ The following sections cope with conditions

⁷⁵ Ibidem, Principle 2.

⁷⁶ Ibidem, Principle 3.

⁷⁷ Ibidem, Principle 4.

⁷⁸ Ibidem, Principles 5-7.

⁷⁹ Ibidem, Principles 8-9.

⁸⁰ Ibidem, Principles 11-17.

⁸¹ Ibidem, Principles 18-30.

of service (remuneration and compensation), jurisdiction, judicial administration, resources and derogation in times of severe public emergencies. A final remark should be done to the section setting the principles for a well-functioning relationship between the judiciary and the executive. According to principle 38, any executive organ of the state exercising some power or influence on the judiciary must not use its powers “to threaten or bring pressure upon a particular judge or judges”.⁸² Moreover, judges must not accept any kind of inducements or benefits clearly offered to them to affect the exercise of their function.⁸³ Finally, the physical integrity of judges and their families must always be ensured by executive authorities.⁸⁴

It is self-evident that the Beijing Statement provides an important point of reference for the rule of law culture and the administration of justice in the Asia-Pacific region. In addition, the set of standards and principles discussed above are consistent with the approach of the international community as demonstrated by the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

III. The Contemporary Reform Process

“Building a legal system is a process that cannot be completed in the span of three decades or even in a generation [...]”, maintains Daniel C. K. Chow, in 2009.⁸⁵ In line with Chow’s opinion, the modernization and the improvement of China’s legal

⁸² Ibidem, Principle 38.

⁸³ Ibidem, Principle 39.

⁸⁴ Ibidem, Principle 40.

⁸⁵ Supra Note 32, pp. 61-62.

system started with the Deng Xiaoping years and it is still ongoing. In 2011, the leader of the Standing Committee of China's National People's Congress, Wu Bangguo declared that China had established "a socialist legal system with Chinese characteristics".⁸⁶ However, the statement seems quite problematic for some scholars. As said by Cohen, the inextricable connection between the CPC, on one side, and people's court and procuratorates, on the other, precludes the development of an effective legal system. He indeed reshaped Wu's affirmation in order to include this peculiar aspect of the Chinese system. He affirms that the PRC has set up a "Chinese Communist political-legal system".⁸⁷ Although the great success in the economic field, the legal institutions of China have not yet achieved commensurate progresses. According to the author of *Law unto Itself*, the mainland legal system is definitely socialist but, at the same time, the PRC is still a party-state.⁸⁸

Wang and Madson raise the question of whether the CPC has a complete control of the law. The answer is determined by the definition of rule of law that one applies. By adopting a substantive definition, the result would lead to a positive answer. Since in China the CPC is constitutionally entitled to supervise the entire legal system, this kind of definitions relying on certain rights derived from the rule of law, such as equality before the law and separation of powers, are in disagreement with the PRC's situation. On the other hand, a formalist definition would partially fit with the Chinese legal condition, thanks to their minimalist approach that avoids judgments on

⁸⁶ Wu Bangguo, *2011 Report on the Standing Committee of China's National People's Congress*, National People's Congress of China, Beijing, 2011.

⁸⁷ J. Cohen, *Law unto itself*, South China Morning Post, 30th March 2011. Available at www.usasialaw.org/wp-content/uploads/2011/03/2011.3.30-SCMP-Cohen-Law-unto-itself.pdf. Last access: 13th May 2015.

⁸⁸ Ibidem, Cohen 2011.

the fairness of the law. Nevertheless, the separate disciplinary system for CPC members that contravene party rules and regulation - a system managed by internal affairs officers of the CPC – and the Supreme Court accountability only towards the CPC Central Politics and Law Committee incontrovertibly suggest the idea of a party-controlled legal system.⁸⁹

Recently, the implementation of the rule of law has regained importance in the Chinese political environment. As reported by international and local media, the Fourth Plenary Session of the 18th Party Congress – Beijing, 20th to 23rd October 2014 – is going to be remembered for the priority given to the implementation of the rule of law. The emphasis on the rule of law is not a novelty. As mentioned above, the Constitution enshrines this principle among its provisions.⁹⁰ Although it is commonly acknowledged that the CPC does not embrace the concept of rule of law as it is recognized in the Western sense, Zachary Keck affirms that “CCP’s emphasis on the rule of law [...] is not entirely at odds with how the phrase is used in Western political culture”.⁹¹ In his analysis, Keck refers to the Plenum’s focus on the rule of law as an instrument to reduce the power of local government officials which are currently one of the main problems in the administration of justice at local level. Thanks to the recent reform, courts will no longer be subjected to the influence of local leaders. Indeed, many of the courts will ultimately be accountable only to the Party leadership and the central government.⁹² More generally, as published by the

⁸⁹ Supra Note 11, pp. 70-71.

⁹⁰ Supra Note 41, Article 5.

⁹¹ Z. Keck, *4th Plenum: Rule of Law with Chinese Characteristics*, The Diplomat, 20th October 2014. Available at <<http://thediplomat.com/2014/10/4th-plenum-rule-of-law-with-chinese-characteristics/>>. Last access: 13th May 2015.

⁹² Ibidem, Keck 2014.

official news agency, Xin Hua, “the session is expected to speed up the construction of governance by law from the top level and by improving the system to promote social justice of the country”.⁹³

In this last section of the chapter, we are going to examine two governmental documents providing the official standards regulating the judicial system of China. The First one is the Government White Paper published in 2012,⁹⁴ while the second one is the communiqué issued after the Fourth Plenary Session of CPC Central Committee in 2014. Concerning the latter, the analyzed standards can be found in the partial English translation of the communiqué.

Judicial Reform in China (2012 Governmental White Paper)

In 2004, China launched a large-scale judicial reform to improve its judicial system. In 2008, a new series of reforms was designed “to tackle problems in the key links that hamper judicial justice and restrain judicial capability”.⁹⁵ The White Paper issued by the Chinese Government in October 2012 is a detailed document that explains the fundamental objectives of China's judicial reform and the progresses that

⁹³ Xinhua, Luan (editor), *China Focus: By rule of law, China on the way to improving governance*, Xinhuanet, 19th October 2014. Available at http://news.xinhuanet.com/english/china/2014-10/19/c_133727416.htm?utm_source=The+Sinocism+China+Newsletter&utm_campaign=05ad7703a1-Sinocism10_20_14&utm_medium=email&utm_term=0_171f237867-05ad7703a1-29601529&mc_cid=05ad7703a1&mc_eid=7b5152a403>. Last access: 13th May 2015.

⁹⁴ *Judicial Reform In China*, First Edition 2012, Government White Paper, Information Office of the State Council, The People's Republic of China, October 2012, Beijing. Available at <<http://www.china-embassy.org/eng/zt/bps/t978034.htm>>. Last access: 13th May 2015.

⁹⁵ China Daily, *White paper enumerates China's judicial reform goals*, China Daily (Xinhua), 9th October 2012. Available at: <http://www.chinadaily.com.cn/china/2012-10/09/content_15803440.htm>. Last access: 14th May 2015.

have been made in the protection of human rights and the development of the judicial system until 2012.⁹⁶ The main goals of the reform are: to ensure a fair and independent exercise of the functions of the legal organs of the state, to create an impartial, efficient and authoritative socialist judicial system and to provide reliable judicial safeguards for the legitimate rights and interests of the people, including social equity, justice and national stability. For the purposes of this study, the organizational principles and objectives outlined in the document will be briefly presented in order to testify the Chinese commitment to the rule of law and an independent and impartial judiciary. As reported in the text, the maintenance of social fairness and justice is actualized through:

1. The optimization of the structure of the judicial organs and an efficient allocation of their functions and power;
2. The standardization of judicial acts;
3. The expansion of judicial openness and transparency;
4. The enhancement of judicial democracy
5. The strengthening of legal supervision performed by procuratorial organs.⁹⁷

The Constitution, after the 2004 amendment, officially introduced the respect for human rights among its provisions. As a consequence, the White Paper affirms that a further goal of China's judicial reforms is to strengthen the protection of human rights. The designed measures of the Procedural Criminal Law, amended in 2012, intend to:

⁹⁶ China Daily, *China issues white paper on judicial reform*, China Daily (Xinhua), 9th October 2012. Available at: <http://www.chinadaily.com.cn/china/2012-10/09/content_15803335.htm>. Last access: 14th May 2015.

⁹⁷ Supra Note 94, Paragraph II, Subsections 1-5.

1. Prohibit and deter the extortion of confessions through torture;
2. Protect the right to defense of suspects and defendants;
3. Protect lawyers' rights to practice;
4. Restrict the application of compulsory custodial measures;
5. Protect legal rights and interests of detainees;
6. Protect legal rights and interests of juvenile suspects and offenders;
7. Control the application of the death penalty;
8. Improve community correction systems for persons serving sentences and assistance systems for persons released from prison;
9. Improve the state compensation system;
10. Establish an assistance system for crime victims;⁹⁸

In the two final chapters, the improvement of the judicial capabilities is considered as another important target of the judicial reform. According to the White Paper, the PRC has been continuously working to the enhancement of the organization and the efficiency of the judiciary by developing its judicial capabilities. The main actions of the reform regard:

1. The implementation of a unified national judicial examination system;
2. The establishment of a tiered law-enforcement qualification examination system for the police;
3. The strengthening of occupational training for judicial staff;
4. The intensification of professional ethical training for judicial staff;
5. The strengthening of professional ethics training for lawyers;

⁹⁸ Ibidem, Paragraph III, Subsections 1-10.

6. The expansion of the space in which lawyers play their role (a new mixed-system of state-funded, partnership and individually owned law firms);
7. The reform of the funding guarantee system for judicial organs;⁹⁹

In addition, the reform process aims to simplify the judicial procedure with the purpose of making the judicial power a more useful instrument in the hand of the people. In order to achieve this goal, the reform is determined to:

8. Strengthen the development of grassroots judicial organs (people's courts, procuratorial offices, police stations and judicial offices);
9. Simplify the case-handling procedures;
10. Establish a multiple dispute resolution mechanisms;
11. Reduce litigation costs for the concerned parties;
12. Provide legal assistance for all people in need;
13. Facilitate channels of communication between judicial organs and the public.¹⁰⁰

In line with the White Paper, the judicial reform is “an important part of China's political system reform”.¹⁰¹ Indeed, the main purpose of the reform process is the realization of a socialist judicial system with Chinese characteristics. Even though, as recognized by the paper, the re-organization of the judicial system is not an easy task

⁹⁹ Ibidem, Paragraph IV.

¹⁰⁰ Ibidem, Paragraph V.

¹⁰¹ Ibidem, Conclusion.

and is going to require a considerable amount of time, the Chinese Government affirms that “China will make continuous efforts to achieve this goal”.¹⁰²

Communiqué of the Fourth Plenary Session of the 18th CPC Central Committee

As a conclusion of the Fourth Plenary Session of the CPC Central Committee held in October 2014, an official communiqué publicly presented a general overview of the governmental plan of reform to China’s legal system. The document seems to be natural outcome of the reform process started almost a decade before. As reported by *The Diplomat*, the document did not provide for a detailed explanation of the implementation of the reforms.¹⁰³ But the leitmotiv is undeniably the reinforcement of the rule of law through the enhancement of the nation court’s system.

According to S. Tiezzi, reporter of *The Diplomat*, four main fields of action can be deduced from the communiqué. First of all, the Central Committee wants to lessen local government officials’ control over the legal system. Since the influence of local authorities has always been one of the main obstacles to an efficient administration of justice at local level, the creation of circuit courts is meant to sever the connection between local judicial organs and local Party leaders. Secondly, the CPC is determined to increase both government accountability and transparency. Xi would like to make Party officials responsible for their personal conduct, not only to establish effective governance, but also to boost the Party’s public image. Moreover,

¹⁰² Ibidem.

¹⁰³ S. Tiezzi, *4 Things We Learned from China’s 4th Plenum*, *The Diplomat*, 23rd October 2014, available at <<http://thediplomat.com/2014/10/4-things-we-learned-from-chinas-4th-plenum/>>. Last access: 14th may 2015.

S. Tiezzi affirms that the communiqué puts a renewed emphasis on the Constitution, as the heart of the socialist legal system, and its indispensable enforcement. Finally, the Chinese understanding of the rule of law is restated. The Chinese-language original statement clearly stresses that the party leadership and the socialist rule of law are indistinguishable. As asserted by the Constitution, the leadership of the CPC is indeed a fundamental prerequisite for the rule of law.¹⁰⁴ In line with the Constitution and the official line of the Party, the communiqué did not decrease the authority of the CPC.¹⁰⁵

In order to advance the socialist rule of law, the reform plan has a wide scope of action. Nonetheless, Xinhua relates that the process of building a socialist system with Chinese characteristics is not going to alter two constant features of the political and legal structure of China: the Constitution and the leadership of the party. In fact, the principal measures will be related to the role played by the Constitution in the achievement of the socialist rule of law. In line with the communiqué, the realization of the rule of law will be accomplished through: (1) an improved implementation of the Constitution and the adoption of an appropriate system to supervise its implementation, (2) an increased involvement of the National People's Congress and its Standing Committee in the supervision of the Constitution's implementation, (3) the building up of a law-abiding government, (4) the establishment of a mechanism to check the legitimacy of major decision-makers, (5) the promotion of transparency in governmental affairs, (6) the establishment of a mechanism to record officials that intrude in the administration of justice and make them publicly accountable for their

¹⁰⁴ Supra Note 53.

¹⁰⁵ Supra Note 103.

actions, (7) the creation of circuit courts by the Supreme People's Court and an attempt to establish cross-administrative region courts and procuratorates, (8) the enhancement of human rights protection in judicial proceedings, (9) the recruitment of qualified and competent lawmakers, judges and prosecutors, (10) the improvement of internal rules and mechanisms of the CPC, (11) the evaluation of officials' performances on the basis of their effective implementation of the law, (12) the involvement of the People's Liberation Army in the promotion of the rule of law and, finally, (13) the safeguard of the principle of "one country, two systems" and the encouragement of national reunification in compliance with the law.¹⁰⁶

On April 9th 2015, the official roadmap to judicial and social reforms was unveiled. Even though the detailed plan has not been provided in English, Xinhua relates that the enforcement plan consists of eighty-four reform measures discussed during the preceding session of the Plenum. The plan published by the CPC Central Committee's General Office and the General Office of the State Council, determines which organization is in charge of one of the eighty-four measures, the appropriate timeframe for the implementation and a method to check the results. The reforms are divided into three categories related to three different subjects, namely judicial justice and credibility, jury and public supervisor system. A litigation reform will be enacted to give preference to trials. Besides, judges will be accountable for their previous decisions and possible mistakes and will assume a lifelong responsibility. Furthermore, reforms will have an effect on legal personnel's professionalism and career, while communications between scholars, researchers and legal practitioners

¹⁰⁶ Xinhua, YangYi (editor), Highlights of communique of 4th plenary session of CPC Central Committee, Xinhuanet, 23rd October 2015, available at: <http://news.xinhuanet.com/english/china/2014-10/23/c_133737957.htm>. Last access 15th May 2015.

will be encouraged. As mentioned before, circuit courts will be established following the example of Shenzhen (Guangdong Province) and Shenyang (Liaoning Province), as well as cross-regional courts and procuratorates. Among the other reforms, one will regard the institution of a system to record and denounce officials' interfering in legal activities.¹⁰⁷

On the basis of the documents previously analyzed, we can deduce that the reform plan in progress partially meets the requirement of a well-functioning judicial system. The prominent role of the CPC granted by the Constitution and the resulting lack of separation of powers, irrefutably frustrate the independence and the integrity of the judicial system of China. However, it seems plain that the 2015 implementation plan is a result of the blueprint arranged at the Third and Fourth plenary sessions of the 18th CPC Central Committee, respectively in 2013 and in 2014. This demonstrates the governmental determination to execute an effective and trustworthy legal reform with the aim of reducing the widespread dissatisfaction with China's judiciary.¹⁰⁸

¹⁰⁷ Xinhua, Huaxia (editor), *China unveils roadmap to judicial, social reform*, Xinhuanet, 9th April 2015, available at: <http://news.xinhuanet.com/english/2015-04/09/c_134138176.htm>. Last access 14th May 2015.

¹⁰⁸ A. Jacobs and C. Buckley, *China Moves to Reinforce Rule of Law, With Caveats*, The New York Times, 23rd October 2014, available at <www.nytimes.com/.../china-moves-to-enact-rule-of-law-with-caveats.html>. Last access: 14th May 2015.

CHAPTER 3

The EU, International Judicial Standards and the PRC

The extensive discussion on European judicial standards in the first chapter led us to the decision to adopt the Judicial Integrity Principles (JIP) as a point of references emerging from a global consensus on judicial standards. Taking into account that European institutions have not yet established a single and univocal declaration concerning the issue, the author's choice to embrace the eighteen principles enunciated by IFES seems reasonable and useful for the purpose of this study. In the second chapter, the in-depth analysis of China's legal system from an historical, cultural and ideological perspective allowed us to better understand the evolution of the system itself and the difficultly achieved balance between internal and external influences that strongly affected its development. In addition, it provided us with the means to interpret the judicial reform plan taking place in China from the beginning of the twenty-first century. In the next pages, we will try to confirm whether or not China's judicial system and the current reform process meet the real governmental commitment to implement the rule of law and the minimal judicial independence principles. In other words, we will try to check whether the principles stated in the PRC's Constitution and other laws have found a concrete and substantial realization. In order to do so, the enforcement of the JIP in China is going to be the main focus of this chapter.

I. The Implementation of the JIP in China

The institution of an independent judiciary in China is definitely a challenge. Although the concept of judicial independence is embedded in the Chinese Constitution, China is apparently facing some problems in the real-world implementation of the concept. Indeed, according to Articles 126 and 131 of the PRC's Constitution, as amended in 2004, the judicial organs of the State should "exercise judicial powers independently".¹ As a matter of fact, the provisions of the Constitution are arguably conflicting. As noted in the previous chapter, in the same section of the two articles quoted just now, the independence of the People's Courts and People's Procuratorates is undeniably restrained. A free and effective administration of justice is hindered by the same text of the Constitution thanks to Article 128 and Article 133. Both articles clearly assert that Chinese judicial organs are responsible to the National People's Congress and its Standing Committee.² Unlike most Western countries, the independence of the judiciary is primarily limited by the nonexistence of a separation of powers. According to the Australian journalist R. McGregor, He Weifang, probably one of the most known progressive and pro-democratic intellectuals in China, once affirmed that the CPC "sits outside and above the law", meaning that essentially the "party exists outside the legal system altogether".³ It appears quite obvious that the CPC is in control of the three branches

¹ *Constitution of the People's Republic of China* adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on December 4, 1982, full text after amendment on March 14, 2004, Articles 126 and 131.

² Ibidem, Articles 128 and 133.

³ R. McGregor, *The Party: The Secret World of China's Communist Rulers*, New York, Harper Collins, 2010, p. 22.

of government, directly or indirectly. In the specific case, the judicial branch is unquestionably linked to the legislative branch and the executive branch. As maintained by Wang and Madson, the NPC and its Standing Committee are in control of the Supreme People's Court only at first glance.⁴ The NPC effectively appoints the chief justice of the SPC, in addition to other judges and senior judges of the SPC. However, the SPC does not account straightforwardly to the NPC and its Standing Committee. The SPC reports to the Central Politics and Law Committee of the CPC Standing Committee. As stated by Chen "law is party policy elevated into the will of the state through the legislative process".⁵ The idea that the law is meant to play a supporting function to the rule of the party is apparent in Chen's thought. He further clarifies its ideas saying that judges' loyalty to the law should "never override their loyalty to the principle of party leadership".⁶

A series of studies conducted by IFES researches have demonstrated that judicial minimal independence and integrity principles are not completely unknown to the Chinese legal system. Daniel C. K. Chow argues that this paradigm shift, namely the modernization of China's legal system during the last decades, is mainly due to the transplant of several political legal concepts derived from western culture. Indeed, he believes that ideas such as the protection of human rights and the supremacy of the law "have no equivalent in Chinese history".⁷ As we have deeply discussed in the preceding chapter, the Western influence on Chinese traditional legal thought is

⁴ C. Wang and N. H. Madson, *"Inside China's Legal System"*, Oxford, Chandos Publishing, 2013, p. 72.

⁵ A. H. Y. Chen, *An Introduction to the Legal System of the People's Republic of China*, Hong Kong, Lexis Nevis Butterworths, 4th Edition, 2012, pp. 151.

⁶ Ibidem, p. 151.

⁷ D. C. K. Chow, *The Legal System of the People's Republic of China in a Nutshell*, 2nd Edition, St. Paul, MN, Thomson West, 2009, p. 64.

indubitable. Starting from the assumption that the current Chinese legal system is trying to achieve a balance between “Chinese learning” and “Western learning”, in this section, the introduction of foreign concepts is not going to be further analyzed.⁸ Rather than questioning the influence of the western model or whether China has actually accepted western values within its legal system, this chapter is going to focus predominantly on the implementation of judicial minimal independence and integrity principles in China.

Recently, in China, there seems to be a growing agreement among intellectuals, non-governmental organizations, legal experts, judges, and governmental officials on the fundamental role of an independent judiciary. As maintained by K. E. Henderson, they have realized that a well-functioning judicial system can be a proper solution and a considerable help in daily governance and in the management of socio-economic issues.⁹ The governmental élite and the leadership of the CPC have simultaneously understood how a society based on the rule of law and a reliable and efficient judiciary could work as a tool for the enhancement of the political legitimacy of the party. Moreover, Henderson, acting as senior rule of law advisor for IFES, has evaluated the present-day status of the Chinese judiciary pointing out the evident nexus between the adoption of minimal judicial standards and the ongoing reform plan. He found out that China is neither rejecting nor delaying the implementation of judicial principles and standards related to judicial independence and integrity. As a matter of fact, China is addressing the majority of its high-priority socio-economic

⁸ See Chapter 2, Paragraph I, sub-paragraph 2.

⁹ K. E. Henderson, *Halfway Home and a Long Way to Go: China's Rule of Law Evolution and the Global Road to Judicial Independence, Judicial Impartiality and Judicial Integrity*, in R. Peerenboom (ed.), *Judicial Independence in China, Lesson for Global Rule of Law Promotion*, Cambridge, NY, Cambridge University Press, 2010, pp. 28.

issues in compliance with internationally acknowledged judicial standards.¹⁰ Above all, this approach is applied to the sectors that are directly or indirectly linked to China's own profit and self-interest, such as economic integration, environmental protection, land and property quarrels, legal harmonization in the administration of justice, as well as social stability and political legitimacy both at national and international level. At the same time, Henderson observed the existence of a bottom-up legal reform process. He affirms that individual judges and scholars seem to be more prone to implement international best practices and guidelines to the developing Chinese situation. Their manifested will to conform to international practices, concerning both the internal decision-making process and substantive law, is unquestionably an advantage for the improvement of China's legal system. Indeed, they could provide a significant contribution to the implementation of a substantial numbers of reforms. According to Henderson, this may give to individual judges the opportunity to be more independent. Institutional judicial reforms coming from Beijing are incontrovertibly broad-based and highly politicized. On the contrary, a reform process led by local judicial organs is probably more realistic and more effective.¹¹

The IFES project in China had a different approach compared to the others performed by the NGO. The project paid more accurate attention to two judicial reforms themes, namely judicial enforcement, related to Judicial Integrity Principle 7, and judicial transparency (JIP 2, 9, 10, 11, 13, 14, 16, 17, and 18).¹² Despite the insistence of Chinese organizers to include the full range of judicial independence

¹⁰ Ibidem.

¹¹ Ibidem, p. 29.

¹² See Chapter 1, Paragraph 3, sub-paragraph 3.

principles as part of the project, it was not deemed necessary to undertake a complete assessment of the implementation of the eighteen principles. In fact, the 2004-2008 Five Years Judicial Reform Plan, together with additional initiatives actualized by the Supreme People's Court, was already dealing with some of the judicial independence principles.

From 2004 to 2006, a large number of Chinese academics, judges and international legal experts debated and reviewed extensively the evolving legal context in China. As anticipated, the focus of the discussion was the enforcement of the judicial integrity principles. In the following paragraphs, we are going to briefly outline the main outcomes of the "China Project". In the specific case, the importance of the JIP was not matter of concern. The representatives of the international community, as well as the Chinese participants, acknowledged the fact that the main problem to be examined was the real-world implementation of the minimal standards. In the Chinese case, the implementation of the JIP required - as it still requires at the time of the writing - a strong political commitment. That is to say that the involvement of the CPC and the NPC is essential today, as it was a few years ago, for the accomplishment of a real translation of the JIP from ideal principles to substantive laws enforced by the authorities. Henderson affirms that the panel discussion led to the identification of the principles that needed political support for their implementation due to their politicization. In those years, the most political and problematic principles were:

- The guarantee of judicial independence and access to justice (JIP 1);
- The institutional and personal decisional independence of judges (JIP 2);

- Judicial review (JIP 3);
- Judicial freedom of expression and association (JIP 8);
- Structural and local government issues related to the enforcement of judgements (JIP 7).¹³

In addition, IFES pointed out that the methodology adopted by Chinese reformers for the reform plan in the judicial field is similar to the one adopted in the economic sector. As argued by Henderson, Chinese policy-makers, in this particular case economic and then judicial reformers, have discovered and analyzed the international best practices and then imported the most successful and “politically palatable” of these.¹⁴ These positive examples were incorporated in the Chinese system at a later stage, both at local and national level, through the establishment of pilot projects. For instance, as part of the reform efforts proposed the last October by the Plenary Session of the Party Congress, six regions have been chosen to host provincial-level pilot projects for judicial reforms.¹⁵ The project was developed in Shanghai and other five regions, explicitly Guangdong, Jilin, Hubei, Hainan and Qinghai. These regions have been selected to test the reform project by reason of their differences in terms of geographic location, economic development and social condition. The pilot projects aim to improve the management of judicial staff and to introduce an efficient mechanisms to increase the accountability of the system as a whole. In order to do so, the personnel is going to be divided according to precise limits: judges, procurators,

¹³ Supra Note 9, p. 30.

¹⁴ Supra Note 9, p. 31.

¹⁵ Xinhua, Luan (editor), *China Focus: Judicial reform forging ahead*, Xinhuanet, 20th November 2014, available at: <http://news.xinhuanet.com/english/china/2014-11/20/c_133801911.htm>. Last access: 17th May 2015.

assistants and the administrative staff will represent a precise quota of the total judicial staff. In the Shanghai Municipality, for example, they account for 33%, 52% and the 15% respectively. Some criticisms have been raised from the inside of the system. Since judges and procurators are going to be selected among the assistants and quotas are going to make the system more rigid, the judicial career will be undeniably affected by this change. Nonetheless, the program is expected to ameliorate the administration of justice, and most of all, to strengthen the supervision over the judicial organs.¹⁶

According to what Wang and Madson assert in their work published in 2013, the present situation of the PRC's judicial system has changed only partially. Even though the reform plan started more than a decade ago, more than three decades ago if we consider the opening and reforming period initiated by Deng Xiaoping in 1978, the Chinese system is facing the same thorny problems.¹⁷ In the next lines, the author will try to provide a synthetic but exhaustive explanation of the difficulties related to the implementation of the JIP in China. Precisely, the analysis will examine JIP 1, 2 and 3. Throughout the presentation, we will try to take into account the novelties of the Fourth Plenary Session of the 18th CPC Central Committee that took place in October 2014 and the Reform Plan announced in April 2015.

¹⁶ Ibidem.

¹⁷ Supra note 4, pp. 69-92.

II. Judicial Independence, Decisional Independence and Judicial Review

In line with the results of the IFES China Project, the most challenging principles among the JIP are certainly the first and the second. These principles require the existence of concrete safeguards guaranteeing judicial independence, the right to a fair trial, the equality before the law, the access to justice and the possibility for judges to carry out their duties in accordance with the law and without unwanted interferences. The non-independence of the judicial system of China has been discussed several times in the present work. However, the key role played by the judicial branch not only in the legal reinforcement, but also in the economic, social and political development of a state, deserves further attention. International legal experts and Chinese officials are aware of the nexus between a well-performing judiciary and growth. Henderson argues that all relevant cultural, social and legal transformations necessary to the fulfilment of a society based on the rule of law and the realization of its full economic and political potential are indisputably subordinated to the enhancement of China's legal system, including specifically its independence, impartiality, integrity and capacity.¹⁸

But the awareness does not come only from the outside. Sectors of the public administration and the political elite are conscious of the nexus between judicial independence and reliability and the national interest. In a document published on the 28th October, 2014, after the conclusion of the CPC national meeting, President Xi Jinping publicly warns of the obstacles that Chinese justice have to face and promises a wide spectrum of reforms to handle the serious and damaging situation. He stated

¹⁸ Supra Note 9, pp. 23-24.

that “the judicial system is the last defense for social justice”, as a consequence, an incomplete and non-effective judiciary fails to fulfil its duties, namely the attainment of social justice and stability.¹⁹

Despite the official statements and the increased awareness, the problem remains the same. It is actually an intrinsic factor of China’s legal system. Indeed, when reading the Constitution and the Organic Law of the People’s Courts, it may appear that the judiciary is really able to exercise its jurisdiction independently. Unfortunately, the independence of the judiciary is merely formal. The CPC can and does exert power over all judicial organs of the state. As mentioned before, Article 126 and Article 131 of the PRC’s Constitution, as well as Article 4 of the 1980 Organic Law of People’s Courts, give just an ephemeral veneer of independence.²⁰ Article 128 and Article 133 of the Constitution and Article 3 of the Organic Law, on the contrary, clearly maintain that the judicial organs of the state, People’s Courts and People’s Procuratorates, are meant to support the Party and its leadership.

Lately, some positive developments occurred. In 2012, the secretary of the Central Politics and Law Committee (CPLC), person in charge of the police and public security forces, was excluded from the Politburo Standing Committee of the CPC.²¹ What may appear a little change in the organization was indeed a significant event. It emphasized the evolving process of China and its legal system. For the first time, the secretary of the CPLC was not elected simultaneously to the CPC Standing

¹⁹ Xinhua, Lu Hui (editor), *Xi pledges reform to ensure independent, fair judicial system*, 28th October 2014, available at: <http://news.xinhuanet.com/english/china/2014-10/28/c_133749004.htm>. Last access: 17th May 2015.

²⁰ Supra Note 4, p. 74.

²¹ BBB, *China Leaders Reassert Control Over Security Portfolio*, BBC News, 21st November 2012, available at: www.bbc.co.uk/news/world-asia-china-20422303. Last access: 17th May 2015.

Committee, which definitely marked a downgrading of the importance of the CPLC. Moreover, the Decision on Major Issues Concerning Comprehensively Advancing the Rule of Law, namely the official decision of the Fourth Plenum of the 18th CPC Central Committee, and the resulting implementation plan have demonstrated a promising attempt of reforms. In line with Xi's communiqué, in order to safeguard the Court's system and its independence a series of measures to promote the separation between judicial and executive powers will be soon implemented. Practically speaking, the SPC will establish circuit courts, at the same time, cross-administrative region courts and procuratorates will be set up in order to decrease external interferences and make the judicial system more independent and reliable. As related by China Pictorial in December 2014, an additional reform will directly address officials who meddle in judicial cases. One of the key points of the reform will be the creation of a mechanism to record and document those intrusions in the administration of justice with the intention of making the names of those responsible public and hold them accountable for their crimes.²²

For what concerns the implementation of the second JIP, the one related to institutional and personal decisional independence of judges, the main problem is judicial corruption. It is important to admit that corruption is not only a Chinese problem. As a matter of fact, endemic judicial corruption is a problem that many developing countries have to deal with. Similarly to other countries, China shows how a combination of different corrupted actors, including government officials, judges and lawyers, businessmen and party members, collude to exploit judicial

²² China Pictorial, *New Day For Rule of Law, A Close Look at Highlights of the Fourth Plenary Session of the 18th CPC Central Committee*, (Box), China Pictorial, Vol. 798, December 2014, p. 24.

corruption with the aim of protecting themselves from investigations.²³ Nevertheless, the specific case of China has some peculiar features. As reported by Henderson, the CPC National Anti-Corruption Strategy makes just a small reference to the responsibility of “an independent and impartial judiciary in fighting corruption and laying the foundation for the rule of law”.²⁴ However, the need for international legitimation is gradually leading China to ground its legal system on the rule of law. Xi Jinping formally denounced lawyers and judges that manipulate without hesitation the natural flow of justice. Quoting the President, the judicial system of China is burdened by unfair and partial trials, on one side, and corrupt judges on the other.²⁵

The reform plan is meant to find a solution to the crosscutting corruption that is frustrating the entire Chinese judiciary. What was suggested by Henderson in 2010, explicitly the launch of a high-priority reform strategy, is currently taking place. In fact, among the decision of the CPC Central Committee there is a set of reforms that will try to ensure an impartial and efficient case handling, the independence of judges and procuratorates, along with their professionalism. First of all, the blueprint envisages the establishment of a liability accounting mechanism for mistrial. The system is intended to monitor the quality of the judicial conduct in each case by intertwining their behavior with a lifelong liability mechanism. Secondly, the work of officials, including party members, will be subject of an appraisal system that will evaluate their performances on the basis of their ability to implement the law. China Pictorial confirms that this approach will enhance the legal awareness of party members and state officials and will force them to act in accordance with the law and

²³ Supra Note 9, p. 32.

²⁴ Ibidem.

²⁵ Supra Note 19.

handle their affairs lawfully.²⁶ As a consequence, the separation of governmental powers should be partially fostered thanks to the banning of government interference on the judicial apparatus. Finally, the reform process will guarantee a more competent and standardized class of legal professionals through the recruitment of high-qualified lawyers and law experts.²⁷

In conclusion we would like to spend just a few words on another sensitive topic: the power of judicial review. According to Black's Law Dictionary, thanks to the mechanism of judicial review, the legislative and the executive branch are subject to appraisal by the judiciary.²⁸ Judicial organs provided with this kind of power are entitled to invalidate all sorts of laws and decisions that may result incompatible with the Constitution or with another authority hierarchically superior. The possibility to review the lawfulness of an action made by public institutions is a result of the separation of powers and the connected system of checks and balances. Nonetheless, we have already noted that the separation of powers is completely lacking in the PRC. The Constitution itself does not grant the courts to decide the constitutionality of government decisions and legislative acts. On the contrary, every level of the judiciary is evidently subordinated to the corresponding level of the legislative branch.²⁹

Counter-intuitively, recently some organs of the judiciary, especially the Supreme People's Court, have been acting with an increasing degree of autonomy. Eric C. Ip states that, although the NPC has often attempted to control the competence

²⁶ Supra Note 22.

²⁷ Ibidem.

²⁸ *Judicial Review*, Black's Law Dictionary, 9th Ed. St. Paul, MN, Thomson West, 2009, p. 924.

²⁹ Supra Note 4, p. 77.

of courts, in the specific case their ability to exercise judicial review, the SPC has found a way to skillfully circumvent the obstacle.³⁰ According to Ip, there seems to be a strategic partnership between the SPC and the State Council, representing the Chinese executive. The SPC is apparently using its judicial interpretation to maximize the interests of the judiciary and to influence a constantly growing variety of policy domains. Ip sustains that through the manipulation of decision costs of local bureaucratic agencies, the SPC is trying to control those who do not act in agreement with the policy lines of their State Council principals.³¹ Unfortunately, all things considered, the absence of separation between government powers prevents the courts from exercising judicial review, as it occurs in modern governmental systems. Although the official reform strategy of the Fourth Plenum of the 18th CPC Central Committee, including the reforms mentioned above, pushes for an implementation of the rule of law and a consequential improvement of the separation of powers, the establishment of a totally independent judiciary needs a complete rearrangement of the legal system of China. As long as the judiciary is perceived as a tool to support the rule of the party, the prospect of a successful judicial review remains far from being feasible.³²

³⁰ E. C. Ip, *Judicial Review in China: A Positive Political Economy Analysis*, Review of Law & Economics. Volume 8, Issue 2, October 2012, pp. 331–366.

³¹ Ibidem.

³² Supra Note 4, p. 77.

CONCLUSIONS AND FINAL RECOMMENDATIONS

Even though the current Chinese judicial system is still in the making, a considerable number of significant developments have been reached since the end of the feudal legal system in force during the imperial age. The classical dichotomy between Confucianism and Legalism, *li* and *fa*, faded away and was replaced by a more constructive dialogue between law and morality. Moreover, the following debate underlining the contrast between Western values and Chinese values led to a culturally enriching period. On one hand, the first contacts with the West destroyed the myth of Chinese hegemony in Asia and provoked a feeling of victimhood. On the other hand, the unavoidable comparison with the Western system led China to the sudden awareness of the need for legal reforms. Its underdeveloped and inefficient legal system had to be reinforced and improved but the traditional Chinese system was not ready to be dismissed. In the end, albeit a problematic beginning, the Western culture became a point of reference for the improvement of China's judicial system. The principles it sponsored, such as the rule of law, democratic values, and later, the protection of human rights, that were the basis of the Western societies, were gradually but begrudgingly imported and introduced.

The transplant of legal institutions from the West was not as simple as it may appear. Although the superiority of the West in the legal sector was widely acknowledged, the real adoption and implementation of those principles had to face several difficulties. During the Qing period a series of reforms inspired by the "Western learning" were promulgated and a constitutional democracy was about to be

established. Unfortunately, the experiment had a short life. The arrival of the Kuomintang marked another period of fervent legal activities aimed to modernize the country's legal system and its governmental structure according to the Western model. Despite the promising start, the reforms had only a small impact. In addition, the Communist and Japanese threats brought to a sudden end the republican experience. Finally, the foundation of the People's Republic of China and the communist ideology cut out every chance of Western-style legal experimentation.

Thanks to the analysis of the Chinese constitutional history we have discovered how even a complicated country like China is able to learn from its mistakes. The 1982 Constitution and its four amendments are a clear example of this successful, but partial, development. The progressive adoption of internationally recognized standards and their integration in the Constitution and other laws testifies the attempt to modernize the country by self-strengthening. Today's Chinese legal system is extremely different from the one established in 1949. Nevertheless, the reform process is not yet completed. The legal system of China has, indeed, room for improvement. The discrepancy between the formal adoption of minimal judicial standards and their actual implementation is probably the main outcome of this dissertation. The Constitution of the People's Republic of China, as amended in 2004, the 1995 Judges Law and the Beijing Statement of Principles of the Independence of the Judiciary signed in the same year, are undeniably the evidences of a formal convergence between Chinese judicial standards and those acclaimed by the international community. If we take into consideration more recent comprehensive transparency-oriented judicial reform plans such as the 2012 judicial reform and the

2014 Decision on Major Issues Concerning Comprehensively Advancing the Rule of Law, they further attest that China's legal system is steadily becoming more independent, reliable, unbiased and grounded on the rule of law.

The challenges for China in the judicial area are numerous and equally demanding. International best practices that are supposed to be an example are often contradictory, the balance between judicial independence and judicial accountability is hard to realize, as well as the international demand for good governance, judicial cooperation and effective treaty enforcement require a continuous and strong involvement of the political elite, namely the CPC leadership. At the same time, they are unmissable opportunities for promoting judicial independence, integrity and impartiality in China. The outcomes of the Fourth Plenary Session of the 18th CPC Central Committee, translated in a concrete implementation plan not long ago, will be the litmus test for the Party commitment to principle implementation.

Throughout the entire discussion the author has tried to be objective and an observer without prejudices. Indeed, from the beginning, the main aim of the current study was to increase knowledge about this complicated topic and provide the basis to enhance mutual understanding between the European Union and the People's Republic of China. However, it is undeniable that the legal system of China, and generally speaking, the implementation of the rule of law in China definitely follow a unique path. As stated by the Decision on Major Issues Concerning Comprehensively Advancing the Rule of Law, the Chinese understanding of the rule of law is different from the Western comprehension of the same concept. The historical development of the Chinese legal system discussed above has unquestionably demonstrated that the

Western influence on the domestic issues was significant in the past as it is still today. Nonetheless, it has also proven that the PRC will never renounce to its independence and autonomy in dealing with fundamental matters, such as the judicial system and the implementation of the rule of law in line with the Chinese perception. For this reason and many others, we can consciously talk about *Chinese exceptionalism*. The existing Chinese legal system and the ongoing reform process are evidences of a partial convergence between international and domestic legal standards. As a matter of fact, they simultaneously emphasize that the PRC is not going to adopt international standards as they are conceived in the West. The present state of the legal system of China is the result of a long and complex process of development and adjustment that has been analyzed in the previous chapters. What can be arguably assumed is that, despite external shocks, the PRC has always intended to adopt its own way and rhythm towards essential developments.

The author's analysis suggests that the PRC should prioritize the reform of the judicial system in light of its relevance in the development of the whole country. The advantages of a fair, impartial and independent administration of justice have an obvious and beneficial effect on the handling of socio-economic issues, such as social security and economic wellbeing, but also on the internal and international legitimation of the PRC. Being aware of the fact that the Chinese legal system will hardly follow the same structural development of Western countries, as a conclusion to this study, the author would like to submit to the PRC some recommendations:

- Promote and give precedence to reforms related to the enhancement of transparency in the judicial system. To be precise, the PRC should encourage transparency-oriented measures with the intention of increasing transparency:
 - In judges' recruitment, appointment and promotion;
 - In the judicial decision-making process;
 - In the decisions enforcement process;
 - In the personal integrity and independence of judges;
- In order to avoid corruption and meddling, centralize the financial system of judicial organs and provide a sufficient budget for all judicial organs at every level;
- Reduce political involvement in the administration of justice at every level and allow the courts to investigate and pass judgements against government departments;
- Establish an effective judicial review mechanism;
- Increase the accountability of the judicial system before the civil society, independent media and the international community;
- Foster the implementation of existing reforms and laws conceived to encourage a access to court's information;

- Consistent with economic, social, geographical differences within Chinese territory, encourage the implementation of bottom-up and decentralized reforms;
- Rearrange existing and future judicial reform plans in a coherent and accurate manner.

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