Conceptualizing Confucian Constitutionalism Between Foreign Transplant and Indigenous Tradition: The Role of Culture in Political and Legal Systems in East Asia

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Abstract: *Concettualizzare il costituzionalismo confuciano fra trapianto giuridico e tradizione indigena: il ruolo della cultura nei sistemi politici e giuridici in Asia orientale* - In 1998, by holding unconstitutional a provision contained in the Law of Family Ritual Standards which criminalized some ritual practices, Korean Constitutional Court criticized the government for attempting to rule and limit traditions. On the occasion, the Court noted the importance that rituals played in society, and how much unwritten legal tradition affects the roots and the sources of national law. Meanwhile, during '90s and 2000s, Confucianism began to be greatly promoted as an important element in Chinese legal tradition in order to modernize political strategies and institutions of the Republic. Even if deeply connected to a long history of Confucian political philosophy, the legal discourse about (Korean) *ye* and (Chinese) *li* is a constitutional discourse, but not in the classical Western approach. In East Asia, Confucian political philosophy is deeply connected to the discipline of rule and constitutes the legal tradition for modern constitutional roots. This attitude generates a political and legal system that mitigates indigenous tradition with foreign transplant derived from the imprinting with the Western norms. The essay aims to introduce the concept of Confucian constitutionalism as a cultural parameter of interpretation, reconstructing the traditional legal roots of some East Asian countries and their importance in the actual political and legal system.

Keywords: Confucianism; Constitutional Law (sources of); Constitutionalism (theory of); Tradition(s); East Asia

1. Questions of Terms and Questions of Methods

Many scholars have been trying to define the term 'constitution', with different and not always coherent success. It's possible to consider it as a document or a series of documents and/or customs and decisions containing fundamental rights, supreme norms, and the institutional structure of a State[1].

[1] Finding a common definition to the term 'constitution' is much more complicated, and already argument of different studies by legal scholars. As the purpose of this essay is not to discuss, and to debate about all the definitions attributed to this term, and to all the different positions of legal scholars in classifying types of constitutions, the Author refers to all the complex of study about the issue. Among the lectures, particularly see the definition contained in: M.J. Perry, *What is 'the Constitution'? (and Other Fundamental Questions)*, in L. Alexander (Ed), *Constitutionalism. Philosophical Foundations*, Cambridge,

DPCE online
ISSN: 2037-6677

Perhaps, it's much harder to provide a brief meaning to the term 'constitutionalism', particularly if we try not to consider the classical Western approach to the constitutional discourse, that tends to impose some values of European origin to the interpretation of all the legal systems. According to Frankenberg, constitutionalism is "one of the few political-legal ideas that seems to have escaped from the hermeneutics of suspicion and 'enjoys almost universal acceptance', even though its twilight and ambiguity are recognized"[2]. For this reason, constitutionalism shouldn't be considered as an equivalence with democracy, since it universally concerns with the "design and operation of those techniques of liberty that are put into effect and used by the constitution for the purposing of constraining, controlling, and regulating the exercise of political power by government, preventing power from arbitrary of absolute, and safeguarding fundamental rights"[3].

Borrowing the use of the term 'discipline' from Michel Foucault's theory, and considering the mere functions of constitutional aspects, 'constitutionalism' can be defined as the 'practice of disciplining political power'[4], or, better, in a significance affected by 'cognitive cannibalism'[5], as the science devoted to study the 'order of things'[6]. By following this argument, the conception of constitutionalism might be modified to incorporate also non-Western and pre-modern political norms, and discursive practices which made it possible to discipline whoever held political power, without creating a binary opposition between 'democratic' constitutionalism of Western imprinting, and 'anti-democratic' ruling discipline of other legal systems, and without demonizing as 'despotism' the legal tradition far from the Western one. The foreign legal tradition often falls to be misunderstood and considered as 'othered', far from the Anglo-

2005, 3 ff. For a comparative perspective of ideas layered in constitutions, see: G. Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology. Toward a Layered Narrative*, in 4(3) *International Journal of Constitutional Law* 436 (2006). See also: C. Jackson, M. Tushnet, *Comparative Constitutional Law*, New York, 2006.

[2] G. Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit*, Cheltenham, 2018, 94. The inside quote is by U.K. Preuß, *The Political Meaning of Constitutionalism*, in R. Bellamy (Ed), *Constitutionalism, Democracy, and Sovereignty: American and European Perspectives*, Aldershot, 1996, 11. See also: D. Grimm, *Constitutionalism: Past, Present, and Future*, Oxford, 2015; P. Dobner, M. Loughlin (Eds), *Twilight of Constitutionalism?*, Oxford, 2010; N. Brown, *Constitutions in a Non-Constitutional World*, New York, 2002.

[3] A.H.Y. Chen, *The Achievement of Constitutionalism in East Asia. Moving Beyond 'Constitutions without Constitutionalism'*, in A.H.Y. Chen (Ed), *Constitutionalism in Asia in the Early Twenty-First Century*, Cambridge, 2010, 1-31. See also: G. Sartori, *Constitutionalism: A Preliminary Discussion*, in 56(4) *The American Political Science Review* 853-864 (1962). For a different point-of-view, see also: G. Maddox, *On Constitutionalism. A Reply to Professor Sartori*, in 78(4) *The American Political Science Review* 1070-1071 (1984).

[4] M. Foucault, *Discipline and Punish: The Birth of the Prison*, New York, 1975. See also: C. Hahm, *Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?*, in 1(2) *Journal of Korean Law* 151-196 (2001).

[5] The terms in brackets are caught in G. Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit*, cit., 79.

[6] M. Foucault, *The Order of Things: An Archeology of Human Sciences*, Paris, 1975.

American and the European doctrine, different in its roots, and placed in an inferior and/or asymmetric position of a not balanced relationship[7].

Ideas and practices of constitutionalism also involve "a distinctive way of thinking about the world", meaning an "epistemic horizon and political imaginary that presupposes and refers to the particular form of the State"[8]. Though the risk to be interpreted as obscure, and affected by miscellaneous features, the concept of 'constitutionalism' is quite open, and able to be combined in different political agendas[9], since it is also connected with peculiar pathways for constitutions developed within different national contexts, societies, institutions, and territories. Most constitutions are still anchored in their national habitat[10], strictly affected by national perspective in a combination of a 'political' and 'societal' phenomena[11].

As comparative constitutional law deeply engages with different kinds of 'constitutions' from different regions and cultures, it shall consider 'constitutionalism' in synchronic and diachronic ways at the same time, also involving all the aspects referred to the study of anthropology, sociology, philosophy, ethics, and cultural traditions of every political/social (meant as national) system in the changing of the times[12].

This approach would emphasize the importance of original culture and the presence of traditional values in the formation of constitutional discourse in not-Western States. In fact, out of Western discourse, the aim of the constitution might be educative, formative, and strictly connected to traditional values, but it is also destined to be flexible in accordance with the changing of societies. For instance, in East Asia, Confucian political philosophy is deeply connected to the discipline of rule and constitutes the legal tradition for modern constitutional roots. This attitude generates a political and legal system that mitigates indigenous tradition with foreign

[7] E.W Saïd, *Orientalism*, New York, 1978.

[8] The quotes are by N. Walker, *Taking Constitutionalism Beyond the State*, in 56(3) *Political Studies* 519-521 (2008). On the same argument: G. Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit*, cit., 23-24. See also: C. McIlwain, *Constitutionalism: Ancient and Modern*, Ithaca (N.Y.), 1947.

[9] D. Grimm, *The Achievement of Constitutionalism and Its Prospects in a Changed World*, in P. Dobner, M. Loughlin (Eds), *The Twilight of Constitutionalism*, Oxford, 2010, 3-10. For better focusing on the aspects of different types of constitutionalism according to different national systems and political agendas, see: D. Grimm, *Types of Constitutions*, in N. Rosenfeld, A. Sajó (Eds), *Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 98-104. See also: N. Tsagourias (Ed), *Transnational Constitutionalism: International and European Perspectives*, Cambridge, 2007.

[10] G. Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit*, cit., 23.

[11] D. Sciulli, *Theory of Societal Constitutionalism*, Cambridge, 1992, 80, 208. Gunther Teubner also affirms that there is a theoretical context of a 'polycentric globalization' in which constitutions (and theory of constitutionalism) may operate, and it is characterized not only by political elements, but also by a societal interpretation; for this lecture, see also: G. Teubner, *Societal Constitutionalism: Alternative to State-Centered Constitutional Theory*, in C. Joergens (Ed), *Constitutionalism and Transnational Governance*, Oxford, 2004, 3-28; G. Teubner, *The Project of Constitutional Sociology: Irritating Nation State Constitutionalism*, in 4(1) *The Project of Constitutional Sociology* 44-58 (2013).

[12] D.S. Law, M. Versteeg, *The evolution and Ideology of Global Constitutionalism*, in 99(5) *California Law Review* 1163 (2011). See also: G. Frankenberg, *Comparative Law as Critique*, Elgar Studies in Legal Theory, Cheltenham, 2019.

DPCE online
ISSN: 2037-6677

transplants derived from the imprinting with the Western norms. Briefly, it means that Confucian constitutionalism shows its interpretative nature of its constitutional discourse, changing by the passing of years in history, even without the imposition of the concept of 'democracy[13]'.

The purpose of the present essay is to describe the different inner meaning of the term 'constitutionalism' as referring to the philosophical and moral roots of Confucian legal theory in order to search whether these cultural values may face a proto constitutionalism (or an alternative one), and whether the seeds of this ancient tradition may be found in current legal norms. Particularly, the following paragraphs propose to emphasize on two case-studies from East Asia, the one derived from South Korea, and the other from China, in order to evidence the sources of Confucian constitutionalism and its value for the actual legal order, considering foreign transplants and indigenous culture. The intent of the essay is to seek the meaning of constitutionalism in these two legal systems, also according to the recent historical and political developments. In fact, both States have a very little memory of a written constitutional document, but a long-term tradition of legal and political philosophy to be applied to the institutions. Actually, the recent transformations occurred in both States (the democratic transition in South Korea after the end of the long-term period characterized by authoritarian regimes and emergency orders, and the modernization of the communist doctrine inserting economic and liberal elements in China) looked to take a reference from the ancient past tradition, recalling the Confucian lecture of fundamental principles on the basis of modern law, and assessing them as a constitutional substrate to maintain for securing the protection of the rule of law.

In this sense, considering in a different way the constitutional role that Confucian doctrine seems to vest for the formation of the modern State in East Asia, the doubt of the legal scholar is now if it's more correct to talk about a 'constitutionalism without constitutions', rather than 'constitutions without constitutionalism'[14], as currently affirmed by comparative law, and, above all, if it's possible to consider that a constitutional modernization and/or a constitutional reformation plan might start by the reprise of ancient traditions, as they represent the real core of a constitutionalism, that has been existing prior and independently from the classical liberal reasoning.

2. Confucian Culture and Constitutional Transfer in East Asia

In East-Asia, the terms 'constitution' and 'constitutionalism' have been assuming a different backward intent from the typical meaning of the Western legal tradition, mixing and hybridizing forms and systems originated by liberal constitutionalism with elements derived from a long-term history and culture. Tradition has always played a fundamental role in

[13] On the argument, see: W.C. Chang, L. Thio, K.YL Tan, J. Yeh, *Constitutionalism in Asia: Cases and Materials*, Oxford, 2014.
[14] R. Scarciglia, *Metodi e comparazione giuridica*, Padova, 2021.

the evolution of legal and political system of the region, as founding its roots in the doctrine of Confucianism[15].

Before focusing on the interpretation of the binomial constitution/constitutionalism according to Confucian-based legal systems, it's better to introduce a proper definition about the term 'Confucianism' and all its connotations in policy, and law. In fact, the ideal presumption and the philosophical intent of this term in harmoniously modelling the society must be distinguished from its implications in real life through the history.

The term identifies a system of thought, that can be interpretated as a "humanistic and rational religion", a "philosophy", but also as an "instrument of government", and maybe more generally as a "way of life"[16]. According to the common tradition, Confucian doctrine was created by the instructions of the philosopher and scholar Confucius[17], who based his disciplines on the basis of the ancestral concept of *rú* (儒), meaning the ritual methods for saving the moral civilization of people, and on the necessity to put a hierarchical order to the society through the *jiā* (家), a term indicating the division in classes during the Chinese Empire. The term *rú* was also adopted to define all the scholars who had been particularly fond in traditional culture, ethics, and ideals of the good governance. In fact, the real purpose of learning and adopting the ethical values contained in the *rú* was to provide governors with technical competences to rule (and to support governors in ruling) in the correct way, due to the respect and the obedience to the hierarchical system, and with the devotion to a proper and shared morality. This common concept of virtue was funded upon the principles of 'human

[15] On the argument: X. Yao, *An Introduction to Confucianism*, Cambridge, 2000, 38-47; Y. Zhou, *To Inherit the Ancient Teachings of Confucius and Mencius and Establish Modern Confucianism*, in 226 *Sino-Platonic Papers* 1 ff. (2012). See also: M. Scarpari, *Il confucianesimo. I fondamenti e i testi*, Torino, 2010.

[16] X. Yao, *An Introduction to Confucianism*, cit.

[17] Even if it's not the proper matter of the actual essay, the Author feels the necessity to make clear the concept that the term 'Confucianism' is a mere creation of a Western interpretation. As it can be read in the paragraph, the concept of *rú* and *jiā* are older than the figure of Confucius (551-479 B.C.), since they had been eradicated in ancestry of East Asian culture. For these reasons, the more correct term to define this ethics is the Chinese word *rújiā* 儒家, as the combination of the analysed concepts, while its study and its knowledge can be better interpreted with the term *rúxué* 儒学, which identifies the action of learning the moral principles and the ethical values promoted by the *rú*, rather than with the Western neologism 'Confucianism'. Confucius cannot be defined as the founder of concepts which had been already existing. Perhaps, he may be considered as the greatest interpreter and the most brilliant scholar of the ethical principles of good governance, and he surely influenced the political, legal, and sociological spectre of many countries in East Asia, also modelling the bureaucratic class by the introduction of well-instructed scholar-officials. There is also a critical approach to the interpretation of all these ancestral and cultural values in the term 'Confucianism', since apparently it can be a manufacture of Western scholars in combination with late-Chinese scholars in XIX-XX centuries in order to give a proper vest to the complex framework of morality, policy, and legality derived from the ancestors. On this approach, see: L.M. Jensen, *Manufacturing Confucianism, Chinese Traditions and Universal Civilization*, Durham, 1977; L. Cai, *When the Founder is not a Creator: Confucius and Confucianism Reconsidered*, in P. Gray (Ed), *Varieties of Religious Invention: Founders and Their Functions in History*, Oxford, 2015, 62-82.

DPCE online
ISSN: 2037-6677

benevolence' (in Chinese *rén* 仁), and of 'rectitude and justice' (*yì* 义), upon the 'use of proper correct rites and of correct social conventions' (*lǐ* 礼), the 'knowledge' (*zhì* 智), the 'integrity' (*xìn* 信), and the 'empathy' (*shù* 恕), in 'each other's respect' (*jìng* 敬), that implies 'filial piety' (*xiào* 孝), 'honourable attitude towards elders and superiors' (*tì* 悌), 'loyalty' (*zhōng* 忠), and 'courage' (*yǒng* 勇), but also the 'sense of correctness' (*zhèng* 正), the continuous 'study' (*xué* 学) and the 'reflection' (*sī* 思), for improving 'knowledge' (*zhì*智). In fact, "who rules by virtue is compared to the polar star", because "he can stay at his own proper place, while all the other minor stars give him homages"[18].

Only according to this moral improvement, humans may be able to grow themselves and to express their proper soul in the best way possible, because a positive interaction among *rén*, *yì*, and *lǐ* can create the ideal conditions to develop a lifestyle, that may be ethical, with dignity, and devoted to the respect for others. It can become the virtuous model that society shall follow to live in peace and harmony, since, according to a quote tributed to Confucius, "who desires to secure the good of others has already secured his own good" in a continuous reciprocity[19].

The maximum aspiration of the Confucian doctrine is to seek a harmonic equilibrium or a social harmony (hé, 和), in all the human elements composing society, that means within the family, but also in political and social relationships among the institutions of the State. For this purpose, the Confucian philosophical school was composed by rituals, and by a moral and social doctrine, which proposed to renew and restable the ethical spirit of society after a period of decadence. Conformity to moral principles and to social attitudes also requires the constant research of the balance point among different and sometimes contrast exigences (*zhōng*, 中), because the path to build social harmony passes through a harmonic concordance among the elements in the respect for the diversity (*hé ér bù tóng* 和而不同), as differences can only enrich the system with a more focused and observant approach. This desire to re-organize national structure was a key-element for the success of this doctrine in the legal (and political) sphere, and for its adoption in different countries of East-Asian region (China, Korea, Vietnam, Japan, etc.).

Despite the historical roots and the ideal application governments would like to introduce in political and legal philosophy, today's Confucianism has already been merged inside the schemes of knowledge and comprehension of everything as a filter or as a parameter to correctly read East Asian cultures. Nowadays Confucianism is in hierarchies composing society since they are built in honour the supremacy of elderly above youth, because old age always contains the roots of experience and importance, but also in the protection of the rational values behind human rights, since being

[18] Confucius, *The Analects: Conclusions and Conversations of Confucius*, Berkeley (CA), 2020.
[19] *Ibidem.*

respectful to rights is an immediate consequence of the Confucian benevolence and harmony[20].

An instance is represented by the Law of the People's Republic of China on Protection of the Rights and Interests of the Elderly (Zhonghua renmin gongheguo laonianren quanyi baozhangfa 中華人民共和國老年人權益保障法), entered into force on July, 1st, 2013: the Act provides numerous moral requirements that are better connected to Confucian morality than to positive law, as the concept of *xiào*, filial piety; in virtue of its Confucian roots, the Act orders that sons and daughters must care to their elders' conditions, including their maintenance, their health, but also their emotional welfare, and it provides a series of recommendations and advices for a virtuous and correct attitude towards parents and other elder relatives[21]. A high consideration is maintained also towards studies and improvement of knowledge. For this purpose, Chinese/Korean/Japanese national systems tribute huge respect to who detains the primacy of culture and learning, and to who has in possess of the most valuable titles of instruction, giving particular emphasis on the emulation in learning, and tracing differences of careers and wages in accordance with the learning background.

Today's Confucianism also forges languages, meaning the terms but also the concepts connected to them. It creates words for defining various objects in which philosophical concepts are completely transcended inside (e.g., the Japanese term used for 'university', *daigaku* 大学, is also applied to one of the five classic books attributed to Confucius' disciples, "The Great Learning", including the discipline of the 'rest in the highest excellence' through learning). It also translated Western terms and concepts by using and mixing some Confucian principles (e.g., the Western concept of 'logic' is translated with the Japanese term *ronri* 論理, containing the concepts of discussion, *ron* 論, and of the rational principle of philosophy, *ri* 理).

In this Confucian and ethical context, in East Asias region 'constitutionalism' has often been read in the conservative spectre, according to the typical classification of comparative law[22] since it privileges a meritocratic order and seeks to sustain social peace[23]. East-Asian conservative constitutionalists have always argued for traditional values and virtues, aspiring to moral perfectionism – usually of Confucian origin and twist[24]. Recently, this comprehension of the Confucian core in law system gives rise to the debate about 'Asian Values', and what they imply with the actual political context, also considering the fact that those common and

[20] J. Chan, *Confucianism and human rights*, in R.K.M. Smith, C. van den Anker (Eds), *The essentials of human rights*, Oxford, 2005, 55.
[21] M. Scarpari, *La confucianizzazione della legge. Nuove norme di comportamento filiale in Cina*, in M. Abbiati, F. Greselin (Eds), *Il liuto e i libri, Studi in onore di Mario Sabattini*, Venezia, 2014, 807-830.
[22] G. Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit*, cit., 94 ff. About the definition of conservative constitutionalism, see also: R. Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution*, Oxford, 2010, 79-91.
[23] G. Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit*, cit., 99.
[24] *Idem*, 100.

DPCE online
ISSN: 2037-6677

shared values are able to be declined according to the different ideas about State and human rights that are also existing in Asian region[25].

This traditional element is quietly inserted in models, that are derivative from Western legal forms[26], but adopted inside the Asian cultural, and ethical context, in a convergence between traditional forms and Western models, but also between internal diversity inside the same region and an apparent uniformity coming from external models. It deals with a dynamic and transforming, but not static constitutional dialect, whereas the idea of the constitutional state building is a part of the modernization project[27], and often prevents the participation of the élites above the citizens[28].

For these reasons, traces of meritocratic government remain in current legal culture, as reprising the strict council of 'honourable men' supporting the king/emperor (but also the mandarin) in decisions[29]. A quite recent instance comes from the 1990 Constitution of Singapore, case of a hybrid order which mixes elements derived from liberal and democratic constitutionalism of Western origins with a traditional framework connected to a conservative, élitarian, and almost authoritarian vision[30].

[25] Pay attention that East Asian countries are completely different in their historical, cultural, and even religious background. In fact, if we think that a thin line might possibly connect the Confucian origins of law and policy in China, Korea, Japan, Vietnam, and so on, there are also some Muslim States that have composed the basis of these common values of Confucian birth with the purposes of the Islamic religion to influence the legal system of the State (an instance may come from Indonesia). Also, the ideas about human rights can be interpreted in the light of one's doctrine, and culture. On the argument, see: J. Baues, D.A. Bell, *The East Asian Challenge for Human Rights*, Cambridge, 1999; K. Mahbubani, *The New Asian Hemisphere: The Irresistible Shift of Global Power to the East*, New York, 2008.

[26] The first written constitutions in Asia are sometimes the product of colonialism and/or an imposition of foreign countries, but sometimes they are adopted prophylactically, to better retain independence (as the case of Japan in the last years of XIX century in order to save its independent system of law from the influences of Europe and USA).

[27] T. Ginsburg, *East Asian Constitutionalism in Comparative Perspective*, in A.H.Y. Chen (Ed), *Constitutionalism in Asia in the Early Twenty-First Century*, Cambridge, 2010, 32-51. See also: R. Dixon, T. Ginsburg (Eds), *Comparative Constitutional Law in Asia*, Cheltenham, 2014.

[28] Exemption for the case of Philippines, in East-Asia constitution-making dynamics are often characterized not by a bottom-up (ascendent) process, but by a top-down nature (descendant) process. It is connected to the ancient monopoly of law studies by Confucian scholars, the one who could intervene in administration and legislation, while most people used to ignore all the secrets inside norms interpretation. See also: A.H.Y. Chen, *Introduction: Constitutionalism and Constitutional Change in East and South-East Asia – a historical and comparative overview*, in A.H.Y. Chen, T. Ginsburg (Eds), *Public Law in Asia*, Farnham, 2013.

[29] C. Hahm, *Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?*, in 1(2) *Journal of Korean Law* 151 (2001). See also: L.W. Beer (Ed), *Constitutional Systems in Late Twentieth Century Asia*, Seattle (WS), 1992.

[30] As former Prime Minister of Singapore Lee Kwan Yew said: "Singapore is a society based on effort and merit, not wealth and privilege depending on birth. [The élite provides] the direction, planning, and control of the state in the people's interest [...]. Singapore is a meritocracy". The quote is referred by D.A. Bell, *The China Model: Political Meritocracy and the Limits of Democracy*, Princeton (N.J.), 2015, 32, also quoted

Other traces of Confucian legal roots remain in the means of conciliation adopted as an alternative to litigation before the courts since Confucian societies are generally non-litigant providing that decisions are the result of a process of composing cases, in which the parties confront each other as finding the balancing point between them, in order not to create fractures in society[31].

Historically speaking, Japan was the first Asian country to introduce the concept of Western constitutionalism inside its legal roots to transform the national order from the ancient feudal system under the Tokugawa Shogunate into a strong centralised government under the emperor. Meiji constitution[32] was promulgated in 1889 and experienced a form of hybrid constitutionalism[33] until the transformation into an authoritarian regime in 1930s[34].

South Korea and China deeply felt the legal influence of Japan, due to the occupation of Japanese forces in the first decades of the XX century, during the period of the opening to Western theories and cultures. In this sense, they tried to redefine the classical terms used for their legal doctrine and connected them both to the Confucian interpretation of law as a moral ethic and to the introduction of new models, deriving from the Japanese imposition. After the WWII, China lived a deep change with the Communist Revolution of Mao Zedong and the building of a Socialist State, modelled on the basis of Marxist doctrines and Soviet Union, and that fact provoked

by G. Frankenberg, *Comparative Constitutional Studies. Between Magic and Deceit*, cit., 100.

[31] As Confucius said, the best society is the one who should be not litigant, as avoiding litigation and searching for a resolution that may satisfy all the parties is much healthier: "In hearing cases, I am the same as anyone. What we must strive to do is to rid the courts of cases altogether". R.T. Ames, H. Rosemont jr. (translated), *The Analects of Confucius*, New York, 1998, 157. Means of conciliation as an alternative to litigation before Courts remain particularly important in actual Japanese Procedural Law. On the argument, among others, see: J.O. Haley, *The Reluctant Litigant*, in 4 *J. Japanese Studies* 359 ff (1978); S. Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behaviour*, in 21 *Law and Society Review* 219 ff. (1987).

[32] This is the historical and cultural period named "Meiji", that in Japan was intended as a mixture of renaissance and enlightment, with the purpose to modernise social and political systems in accordance with the instances coming from the rest of the world (1882). During Meiji period, codes of norms, and a constitutional charter saw the light, with the typical rationalist mind of the scholars to collect and organize all the laws with effective value in the territory of the State, and to make law doctrine intelligible by all the citizens, in order to erase all the obscure doubts and the ignorance among them.

[33] Japan progressed from a hybrid constitution (with an authoritarian form of State) into a classical constitution only after the World War II and the promulgation of the democratic constitution in 1946, which introduces the 'pacifism' clause in Article 9. On the argument, see: K.L. Port, *Transcending Law: The Unintended Life of Article 9 of the Japanese Constitution*, Durham, 2010; Y. Higuchi, *The Paradox of the Constitutional Revisionism in Postwar Japan*, in Y. Higuchi (Ed), *Five Decades of Constitutionalism in Japanese Society*, Tokyo, 2001. See also: H. Oda, *Japanese Law*, London, 1992.

[34] The legal inspiration of the Meiji constitution was the Prussian constitutional charter, though with some elements about the practice of parliamentary govern derived from the British experience, introducing a persistent attention with Japanese own tradition: the sovereignty resided in the hands of the emperor, and not in the 'We the People', but mitigated with the presence of an Imperial Diet (Parliament) in 1925.

DPCE online
ISSN: 2037-6677

almost a fracture with the historical and legal tradition of Confucianism. Korean law, instead, is largely transplanted on the basis of Japanese law during the occupation (while Japanese law also based itself on the model of the German legal system), mixing with a Confucian substrate, that imported also roots of Buddhism and Shamanism, and elements deriving from American law model[35]. For these reasons, Korean legal system maintains an a-legalist core, melting with a hybrid variety of elements of different transplants. This variety tends to define the nowadays Korean legal culture as an "hybrid culture"[36].

In virtue of analysing and comparing the case of Korea and the case of China, we shall consider a question of terms affecting the functioning of the legal sphere in these two countries. First at all, in both languages, there isn't a unique term to identify all the aspects connected to law. Or better: the law itself does not present a unique characterization, but a dualism between the aspect much more connected to the legal and/or political space - involving all the elements of the regulative sphere of government -, and the aspects connected to the ethical dimension, strictly regulated by Confucian doctrine.

The Korean word *pŏp* or *peop* (법) and the Chinese word *fà* (法) defined all the legal elements, the laws, and the acts (strictly intended), and the duties of the institutions. In the past, the Korean term of *hŏnpŏp* or *heonpeop* (헌법) – currently adopted to indicate the actual Constitution – was not used for legal documents, but only appeared in some Confucian classics written by scholar-officials of the time as an abstract term in order to define the "fundamentals of a State" or a narrower idea of the "regulation of law"[37]. The same assertion was vested by the Chinese term *xiàn* or *xiànfa* (憲 or 憲法)[38]. Differently, the Korean word *ye* (예) and the Chinese word *lì* (理) used to mean the 'rational principle' existing inside law and reflecting the organisational rights and forms of the order of nature, according to the Confucian philosophy. Both terms comprehend all the *quasi*-legal elements that are not derived from a binding decision of a governmental organ or an institution, but that are connected to the righteous usage and devotion to rituals, in order to protect the culture of harmony and justice among people.

3. A Constitutional Practice without a Constitution: The Case of Korea

[35] C. Hahm, *Law, Culture, and the Politics of Confucianism*, in 16(2) *Columbia Journal of Asian Law* 254-296 (2003).
[36] C. Hahm, *Conceptualizing Korean Constitutionalism*, cit.,190. See also: C. Hahm, S.H. Kim, *To Make "We the People": Constitutional Founding in Postwar Japan and South Korea*, in 8(4) *I-CON* 800-848 (2010).
[37] C. Hahm, *Conceptualizing Korean Constitutionalism*, cit., 151 ff. See also: D.K., Choi, *The Structure and Function of the Constitutional Court: The Korean Case*, in G. Hassall, C. Saunders (Eds), *The Powers and Functions of Executive Government: Studies from The Asia Pacific Region*, Centre for Comparative Constitutional Studies, Melbourne, 1994.
[38] The term(s) changed the meaning after Japan sent its scholars to Europe for studying Western constitutionalism in the attempt to introduce constitutional principles in inner legal systems.

The case of Korea is particularly instructive for studying the interaction between law, culture, and Confucianism, because Korean culture is generally regarded as the most Confucian of all Asian cultures[39].

Koreans are using the term 'constitution' not just to restrain the government's power, but to renegotiate the terms of social discourse. Certain aspects of legal system have always been particularly influenced by Confucianism and tradition. Cultural norms that occur in the interaction with citizens are undergoing transformation through the invocation of a constitution. All these cultural aspects are now adjudicated under the Constitution by a sort of 'manipulation' of traditional symbols and cultural background, according to a concept of 'culture' (also called *toolkit*[40]), that is fixed and liquid at the same time[41].

Considering this cultural concept, what is the real origin of 'constitutionalism' in Korea? It did not operate in terms of a 'constitution', meaning a written document that lays down the powers of the government and all the organs of State, and the rights of every individual person. Theoretically, according to the Western tradition, in Korea there was a very long period of time when 'constitutionalism' did not exist, until the opening of the country to Westerners in 1876. Due to the new re-interpretation of the term 'constitution' in collecting all the concepts derived from the cultural background in legal and political contexts, it's not either possible to assume that 'constitutionalism' did not exist in ancient Joseon period (centuries XIV-XIX), even without the presence of a proper written constitutional document. There were many written documents, that had the same value of a constitutional document in the sources of the law of the State. Then, there were also a lot of unwritten norms, doctrines, and traditional customs, with an importance and a supremacy to overcome the written legal documents, because of the value the society gave to them. As a Korean scholar said, "it is difficult (…) for us to find a constitution as we know it today in the political life of our ancestors (…)"[42], but it doesn't mean that there wasn't a formal constitution. The same scholar tried to compare the situation of the cultural and legal background of Joseon Korea to the situation of Great Britain, a State without a written constitution, but where the Crown itself and all the royal institutions were vested (and have been vesting till nowadays) with a constitutional intent[43]. But, if 'constitutionalism' may be interpreted as the

[39] W.M. Tu, *The Search for Roots in Industrial East Asia: The Case of the Confucian Revival*, in M.E. Marty, R.S. Appleby (Eds), *Fundamentalism Observed*, 1991, 740-761; Id., *The Rise of Industrial East Asia: The Role of the Confucian Values*, in 4 *Copenaghen Papers* 81-97 (1989).

[40] Commonly, the word 'toolkit' means a personal set of resources, abilities, or skills, developed due to experiences and background knowledge, also influenced by traditions, and socio-anthropological context. On the concept of 'toolkit' as adopted for a synonym of culture, see also: E. Hobshawn, T. Ranger, *The Invention of Tradition*, Cambridge, 2014; A. Swindler, *Culture in Action: Symbols and Strategies*, in 51(2) *Am. Soc. Rev.* 273-286 (1986).

[41] On the culture and the specific case of Korea, see: M. Deuchler, *The Confucian Transformation of Korea: A Study of Society and Ideology*, Cambridge (MA), 1992; M. Deuchler, J.K. Haboush (Eds), *Culture and the State in Late Choson Korea*, Cambridge (MA), 2002.

[42] P.C. Hahm, *The Korean Political Tradition and Law*, Seoul, 1971, 85.

[43] *Ibidem.*

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'order of things' disciplining 'political power' according to the Foucault's definition, or even as the opposite of 'despotism', traces of this practice may be found in different documents, facts, acts, pronouncements, and in political/legal doctrine. Reprising the words of the same Korean scholar quoted before, "yet, we would be making a grave mistake if we were to assert simply that our ancestors had no fundamental law. The fact that they had maintained a politically organized life for more than two thousand years belies such an assertion"[44]. As confirmed by the Supreme Court and by the Constitutional Court[45], all this complex of oral norms, behaviours, values, and traditions - named *sadaebu*[46] - has been constituting the Confucian doctrine as a spectre of interpretation for all the legal elements of a system, and it is still valid as a parameter of interpretation till nowadays.

Since it seems Koreans practiced constitutionalism without knowing it, the quest is to find a starting point for the constitutional life of Korea. The first written and democratic Constitution of Korea was adopted by National Assembly in 1948, only three years after the end of the Second World War, the defeat of Japan, and the proclamation of independence of Korea[47]. Although the 1948 Korean Constitution was the first one to be officially adopted by the institutions of the State, it's not considered the first formal constitutional document, since many legal scholars tend to make evidence on the year 1919 as the starting point of Korean constitutionalism. In 1919, March 1st, some Korean opponents to the Japanese occupation proclaimed the Declaration of Independence of Korea, which was assumed by the Korean government in exile in Manchurian region as a prototype of Constitutional Charter of the Korean State, even if without obtaining the independence

[44] *Ibidem.*

[45] Korean Supreme Court, Decision of June 12ve, 1998 (96Da52670); Korean Constitutional Court, Decision of October 15th, 1998 (98 Hon-Ma 168); Korean Constitutional Court, Decision of October 21st, 2004 (2004Hun-Ma554, 566). C.K. Choi, *Law and Justice in Korea*, Seoul National University, 2005, 4-5. Decisions are analysed in the next paragraph.

[46] The term *sadaebu* is correctly referred to all the elements included in the Confucian doctrine and applied to the government of the State and the management of institutions. The use of this term was correctly inaugurated during the last decades of the Koryeo period (XIII-XIV centuries), when the civil service examination was introduced by the central government in order to recruit new bureaucratic forces of scholar-officials, formed upon the doctrines of Neo-Confucianism. The method of the civil examination and the Confucian instruction of the administration ushered in the following Joseon period, and the term *sadaebu* assumed the meaning to indicate the complex of studies for becoming scholar-officials, and the élite group destined to the interpretation of the norms. In these terms, the duty to intervene in legal and political system and balance the powers was distributed in the hands of scholar-officials, limiting the monopoly of the power of the King. For these reasons, Chinese doctrine considered that Joseon is the State with weak kings and strong ministers and officials. For all the definitions and the historical reconstruction, see the research contained in the site of National Library of Korea (https://www.nl.go.kr/EN/contents/).

[47] J.C. Kim, *Upgrading Constitutionalism. The Ups and Downs of Constitutional Developments in South Korea since 2000*, in A.H.Y. Chen (Ed), *Constitutionalism in Asia in the Early Twenty-First Century*, Cambridge, 2010, 76-100; J.C. Kim, *Constitutional Law*, in Korea Legislation Research Institute (Ed), *Introduction to Korean Law*, Heidelberg, 2013, 31-38.

from Japan[48]. It was a unique case in the world, dealing with a constitutional aspiration but without a territorial sovereignty. In fact, this Declaration of Independence is also the first written document of Korean legal history containing all the elements of every constitutional charter (e.g., institutions, structures of organs, catalogue of rights of citizens) and, at the same time, a proclamation of independence of the territory occupied by Japanese forces and an emancipation from their dominion.

This interpretation about the starting point of constitutional life in Korea was criticised when, in 1998, on the occasion of celebrating the 50th Anniversary of the first Constitution of Korea, some legal scholars looked back to the *Kabo Reforms* of 1894-1896[49] and *Gwangmu Reforms* of 1897-1907[50] to frame the origins of Korean constitutionalism, namely as the birth of a modern State of Korea. It deals with some reforms which pretended to change the strict legal Confucian model of the Joseon State, and the cultural (but also legal and political) emancipation from Chinese Qing hegemony[51]. By proclaiming the birth of the Joseon Empire, with the *Tae Hanguk Kukje* or *National Institutions of the Great Korea Act*, Korean King entitled himself of the imperial power to confirm that no other king or emperor might be above him. The direct inspiration of the modernization derived by the Japanese reforms of Meiji period with the purpose to shape a new constitutional model, that was nearer to the Western ones. Korean law began to welcome transplanted elements from other legal systems, as the *Kabo* and *Gwangmu* reforms and the proclamation of the Korean empire were the first acts of a continuous borrowing from the Japanese system.

This operation of transplanting kept on after the Second World War, as a lot of elements of 1948 and 1987 Constitutions were also influenced by the post-war American law-school, melting with traditional and autonomous elements of proper origins. This fact became particularly

[48] The reference is to the March First Movement for Independence in Korea. During this date, 33 activists for independence met up in order to give a public lecture to the Declaration of Independence and rise up a peaceful rebellion against Japanese occupation. After the brutal repression by Japanese military forces, the leaders of the movement escaped in Manchuria, and formed the first national government of Korea in exile. The Declaration was assumed as the first constitutional document, even without any physical presence of national institutions in Korean territory, and even without any territorial integrity.

[49] The *Kabo Reforms* (갑오개혁) involved a series of laws and acts enacted in response to the Donghak Peasant Revolution and after the first Sino-Japanese war (1894), in order to encourage modernization. They were inspired by the almost contemporary Japanese constitutional charter. They reformed land tax system, military service, and state granary fees, also involving a series of social, civil, and educational transformations, as the introduction of the primary school's system.

[50] The *Gwangmu Reforms* (광무개혁) continued the plan of modernization of Korean State, by erasing the status system that had included differences and discriminations within the population, and imposed the principle of social equality, also consisted in the creation of a unique category of person, the citizen (or *kukmin*). They also reformed military forces, schools, infrastructures, industries, landownership system, and health care, by receipting a lot of transplanted elements from Western origin and transforming the ancient core of the country.

[51] Joseon Monarchy had been obliged to pay a tribute of sovereignty to the Chinese Qing Empire since the Second Qing invasion of 1636-1637.

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evident with the democratic transition of the State during '80s and '90s of the XX century. After the Korean War, and the secession of the country into two different entities, following different TLOs[52], South Korea suffered a long period of authoritarian regimes, emergency orders, executive organs governed by the determinant role of military forces, and an ongoing succession of denials to fundamental rights[53]. Transition to democracy started after 1987 with the dismissal of the government in force, the proclamation of new general and free elections, and finally the enactment of a new Constitution[54]. Since restoring democracy and protection of rights appeared as the first purpose for Korean State, constitutional reform was vested with the duty to introduce democratic rule of law and preserving Korean traditional legal perspective. In the transformation of national institutions into a new democratic form of government, Koreans have been using Constitution not just to restrain the government's power, but to renegotiate the terms of social discourse, as certain aspects, once influenced by Confucianism and traditions, are now adjudicated under the Constitution. Cultural norms that occur in the interactions among citizens and institutions (or only among citizens) have been undergoing a transformation through the invocation of the Constitution, that appears to stand as a common legal parameter to read and interpret Confucian cultural traditions[55].

To better focus on this passage, we can read the Preamble of the Korean Constitution. At a first look, we can notice that it contains a reference to "basic free and democratic order", and to "democratic ideals", and that it enforces "private initiative (…), freedoms and rights, (…) security, liberty, and happiness", as every common democratic constitutional charter does. But, with a scrupulous reading, we can find that inside the text the definition of the "We the People" is connected to a reconstruction of a traditional past, affected by symbols and ethical signs of Confucian origins: "the people of Korea, proud of a resplendent history and traditions dating from time immemorial". Then, the mission of the State is clearly defined in the action to "destroy all social vices and injustice", to protect "public harmony", and to contribute to "lasting world peace and the common prosperity of mankind": all these terms are directly derived from the Confucian doctrine and philosophy, which affected legal and political systems during centuries in the attempt to find a common and virtuous harmony and prosperity of the State and the people constituting it. Though the concept of 'happiness' is properly the one transplanted from the US legal

[52] The acronym TLO defines the Transnational Legal Order theories. On the argument, see: T. Ginsburg, T.C. Halliday, G. Shaffer (Eds), *Constitution-Making and Transnational Legal Order*, Cambridge, 2019.

[53] During this period people was unable to perceive the presence and the importance of the Constitution, which was a kind of ornament in the sources of law, without any binding force.

[54] The reference is to the so-called 'People's Uprising' in 1987, which determined the fall of the last authoritarian regime and the transition to democracy. Nonetheless, democratization can be considered perfectly successful in 2001 when the National Human Rights Commission (NHRC) was established.

[55] K. Yang, *Judicial Review and Social Change in the Korean Democratizing Process*, in 41(1) *Am. J. Comp. L.* 4-6 (1993); D.K. Choi, *Law and Development: The Korean experience*, in H. Yang (Ed), *Law and Society in Korea*, cit., 3 ff.

system, as it can be interpreted after a first look, it may comprehend the concepts of 'wellnesses', as an harmonious equilibrium between humans and the society within they use to live, and the dimension of 'joy' among all the elements constituting the State (institutions, organs, acts, laws, and also judicial decisions). All these elements are declined considering not only the actual society, but also the posterior generations, in order to create a harmonious system for the future.

Since Confucianism apparently has an invisible grip on the people's everyday life and behaviour, manners of ritual codes and symbols are destined to represent the legal field for the democratic order, while the term 'constitutionalism' appears to be connected to it[56].

4. An Attempt to Integrate Confucian Traditions in Modern Law: The Interpretation of the South Korean Constitutional Court

In the last decades, there is a confirmed involvement of the constitution in absorbing Confucian cultural tradition. The attempt to mitigate the traditional core of legal ethics, and, at the same time, to maintain the democratic asset of national institutions and the protection of fundamental rights have been devolving to the work of the Constitutional Court, as the protector and the interpreter of the Constitution and the sources of law, to the work of the Supreme Court of Justice, as the top of judicial system, and to the work of other justices, following the precedents of the apical courts in re-defining the relationships between institutions and the use of legal norms[57].

Particularly, South Korean Constitutional Court have been assuming a transformative function[58], since it is taking the role to 'constitutionalize' the debate on Confucianism[59] in an interpretative approach to culture. The Court was established by the 1987 Constitution, and began to operate in

[56] P.C. Hahm, *Korean Jurisprudence, Politics, and Culture*, Seoul, 1986, 281 ff.
[57] D.K., Choi, *The Structure and Function of the Constitutional Court: The Korean Case*, cit., 194. See also: K.W. Lee, *The Constitutionalisation of the Representative System in Korea*, in H. Yang (Ed), *Law and Society in Korea*, Cheltenham, 2013, 172 ff.
[58] On the role of Korean Constitutional Court as interpreter of traditions and democracy, and on its transforming jurisprudence, there is a large literature. Among others: J. West, D.K. Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, in 40 *American Journal of Comparative Law* 73–119 (1992); K. Yang, *Judicial Review and Social Change in the Korean Democratization Process*, in 41 *American Journal of Comparative Law* 1–8 (1993); D.K. Yoon, *The Constitutional Court of the Republic of Korea: Its Role and Activities*, in 71 *Philippine Law Journal* 121–139 (1995); G. Healy, *Judicial Activism in the New Constitutional Court of Korea*, in 14 *Columbia Journal of Asian Law* 213–234 (2000); J. Lim, *The Korean Constitutional Court, Judicial Activism, and Social Change*, in T. Ginsburg (Ed), *Legal Reform in Korea*, London, 2004; C. Hahm, *Beyond 'Law v. Politics' in Constitutional Adjudication: Lessons from South Korea*, in 10 *International Journal of Constitutional Law* 6–34 (2012).
[59] Y. Kim, *Judicial Review and Social Change in the Korean Democratizing Process*, in 41(1) *Am. J. Comp. L.* 4-6 (1993); K. Yang, *The Constitutional Court in the Context of Democratization: The Case of South Korea*, in 31(2) *Law and Politics in Africa, Asia, and Latin America* 160-170 (1998); K. Yang, *The Constitutional Court and Democratization*, in D.K. Yoon (Ed), *Recent Transformation in Korean Law and Society*, Seoul, 2000, 33 ff.

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ISSN: 2037-6677

1988 (September 1st), after the National Assembly passed the Constitutional Court Act (*Hŏnpŏp Chaep'anso Pŏp* 헌법 재판소 법). In that moment, Korean people's desire for democracy immediately grown in accordance with the instauration of an organ entitled to protect people's rights, to ensure the conformity of legislation to constitutional norms and to censor unconstitutional acts of the institutions.

The Court played a significant role in the process of democratization and in the establishment of constitutionalism in Korea, almost surprising most observers "by regularly overturning legislation and administrative action"[60] and slowly transforming Korean society[61]. In fact, the Court was almost self-vested with the duty to condemn and put in evidence the terrible facts happened during the authoritarian regime (as the 1980 Gwangju massacre and the procedural torture used by military and police to obtain the confessions of political dissidents), but it also intervened in dealing with the legacies of some acts approved during the authoritarian regime (as the National Security Act – NSA and the Anti-Communist Act, which were used to arrest many independent politicians opposing to the regime and to suppress some political parties, social organisations and other associations). As many authoritarian acts were banned for their violation of constitutional rights (as the pre-detention regime prevented in National Security Act that was a clear violation of the Habeas Corpus right), the Court was in first line for judging the lack of humanity of the previous authoritarian regime, pronouncing decisions of guilty for the former military and politicians[62]. This involvement in political issues is a clear sign of the capable sensitiveness of the Court and of the desire of society and institutions in improving democracy and erasing violent and authoritarian attitudes, but also in not repeating again the same accidents of the past. The Court also intervened in a preventive way for blocking legislators to hypothetically act in contrast with the democratic rule of law, or for sponsoring the removal of officers whose attitudes strictly threatening the democratic order of the State. In this sense, the careful approach of justices seems to emphasize a morality of Confucian origin behind the devotion to preserve democracy, since ethical values and the comeback of democratic rights need to tie each other (e.g., the case of the impeachment of President Roh[63]).

This major role in improving the democratic parameter has been particularly evident in the pro-active and creative approach of the Court towards new positions of rights by providing a broad constitutional lecture of the constitutional charter itself, and a basically constitutional lecture of

[60] T. Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, in 3(2) *Journal of Comparative Law* 85 (2008). Ginsburg also claims the first case in which the Court intervened for banning a law providing that the State could not be subject to preliminary attachment orders in civil cases for the violation of the equality principle of the Constitution, because this principle requires that the State should not be treated differently than the privates.

[61] K.W. Ahn, *The Influence of American Constitutionalism on South Korea*, in 27 *Southern Illinois Law Journal* 71 (1998).

[62] T. Ginsburg, *Constitutional Courts in East Asia*, cit., 86.

[63] Y.L. Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from a Comparative Constitutional Perspective*, in 53 *American Journal of Comparative Law* 403 (2005).

all the other acts and judicial decisions. It has been providing to the enlargement of the catalogue of rights, sometimes echoing the provisions of international law on human rights (e.g., strengthening the value of the Universal Declaration of Human Rights in domestic legal system), and sometimes introducing a comparative interpretation with decisions of other constitutional courts (as referring to the jurisprudence of the US Supreme Court).

At the same time, it also endorsed of the role to be the arbiter of cultural meaning in mitigating constitutionalism with ancient and fundamental principles as the basis of Korean legal system and transforming Korean legal culture. This de-constructive, re-constructive, and re-interpretative work of the Court introduced a sort of 'accidental constitutionalism', meaning an "hybrid of traditional Confucian signs, symbols, and narratives on the one-hand, and a newer set of idioms and references provided by the ideal of rule of law"[64]. For these reasons, South Korean Constitutional Court is now recognized as "the most important and influential" institution of its kind among its counterparts in the region[65], vested with a key-role in protecting rights, and in granting a successful transition to democracy[66].

But it's not easy to identify what South Korean Constitutional Court intended by using the word 'constitutionalism', and, in some way, it's equally uneasy to define what Korean legal culture means for the term 'constitution'. The paragraph overviews to some peculiar cases in which the Constitutional Court intervened in order to preserve and readapt cultural legal tradition with modern written law, clarifying the value posed to the binomial 'constitutionalism / constitution' in this modern neo-Confucian perspective spotted by liberal classical theories.

In 1998, by holding unconstitutional a provision contained in the Law of Family Ritual Standards, South Korean Constitutional Court criticized the government for attempting to rule and limit traditions. In the detail, the struggle had already started when the Law of Family Ritual Standards, also called Confucian Family Code because of its presumption to draft Confucian rituals about family law, was approved by National Assembly in 1991, aiming to modernize family law according to the new constitutional principles[67]. Perhaps, the Law criminalized some ritual practices regarding family ceremonies and, particularly, the celebration of traditional funerals,

[64] C. Hahm, *Law, Culture, and the Politics of Confucianism*, cit., 259. See also: D.K. Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, in 4 *Pac. Rim. L. & Pol'y J.* 395 ff (1995). See also: K. Yang, *The Constitutional Court and Democratization*, cit.

[65] T. Ginsburg, *The Constitutional Court of Korea and the Judicialization of Korean Politics*, in A. Harding, P. Nicholson (Eds), *New Courts in Asia*, New York, 2010, 145.

[66] For these reasons, legal scholars agree to consider South Korean transition to democracy as a parameter of success for the democratic constitutionalism of the so-called 'Third Wave'. J. Guichard, *The Role of the Constitutional Court of Korea in the Transition from Authoritarian to Democratic Rule*, in M. Kim, *The Spirit of Korean Law: Korean Legal History in Context*, vol. 3, Leiden, 2016, 202-232. About the meaning of the 'Third Wave' of democratization, see: S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Norman (OK), 1991.

[67] K.C. Lee, *Comment, Confucian Ethics, Judges, and Women: Divorce under the Revised Korean Family Law*, in 4 *Pac. Rim L & Pol'y J.* 479 ff. (1995).

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ISSN: 2037-6677

marriages, and other ceremonial events. For these reasons, first the Supreme Court banned the act of the government presuming a violation to the fundamental principles of the Constitution[68], then Constitutional Court pronounced a decision[69], which declared unconstitutional the Confucian Family Code because it would be in contrast with cultural and traditional values of Korean society, also indirectly granted in the Constitution. Particularly, the reference was to the use of some rituals to commemorate ancestors and dead relatives in family, also involving the distribution of gifts, surveys, and money to the members of the family, and to the practice of serving foods and drinks at weddings. On the occasion, the Court started to claim to traditional values in order to recognize some rights - also protected in the constitutional charter - and to punish their abuses. Specifically, the Court criticized the government for attempting to legislate morals and manners by imposing penalties. It also noted the importance that rituals played in society, and how much unwritten legal tradition affects the roots and the sources of national law. In few words, according to the Constitutional Court, traditional rituals are part of the legal core of Korean history and policy or, better, they are integrated in the meaning of 'constitutionalism', because 'cultural values' - as, for instance, the virtue of filial piety - may be seen as the 'extra-legal values' sustaining the mutual relationship between law and culture[70]. By reprising the principles granted in the Preamble of the Constitution, any attempt to restrain in strict terms of law traditional values and historical practices may be in contrast with the celebrated pride of the "resplendent history and traditions dating from time immemorial", but also to the concept of harmony, wellness, and joy of the Korean legal system, providing modern legal norms but preserving the Confucian core of them. In its interpretation, the Court decided by invoking extra-legal values, which should be considered supreme, in virtue of a mutual relationship between law and culture, that preserved the core intent of the legal system and the ethical harmony in the society[71].

Few years later, another interesting case happened, in which South Korean Constitutional Court turned to be determinant in its mediator role between the development of legal norms and the preservation of traditions, when the government attempted to move the political capital of South Korea. In details, President Roh Moo-hyun tried to keep his Presidential election pledges to relocate the administrative function of the capital from Seoul to the Chungcheong area, by promulgating the Special Act on the Establishment of the New Administrative Capital, in 2004, on January 16th. In October of the same year, in response to a complaint of some dissident opposition assemblymen, the Constitutional Court claimed that the President is unable to reallocate the capital city and move all the national offices, since the proposition that Seoul is the Capital of the Republic of Korea must be recognized as kind of 'customary law' with the same effects as written constitutional dispositions. Particularly, it held the Special Act at issue was unconstitutional on the grounds that, even if there is no express

[68] South Korean Supreme Court Decision of June 12ve, 1998 (96Da52670).
[69] South Korean Constitutional Court Decision of October 15th, 1998 (98 Hon-Ma 168).
[70] A. Swindler, *Culture in Action: Symbols and Strategies*, in 51 *Am. Soc. Rev.* 273 (1986).
[71] N. Mezey, *Law as Culture*, in 13 *Yale J. L. & Hum.* 35 (2001).

provision in the Constitution that states Seoul is the capital, the fact that "Seoul is the capital of our nation is a continuing practice concerning the life in the national realm of our nation for a period of over six-hundred years since the Joseon Dynasty period". And therefore, the fact "that Seoul is the capital is a constitutional custom that has traditionally existed since even prior to the establishment of our written Constitution, [...] as such, it is part of the unwritten constitution established in the form of a constitutional custom" [72].

The term 'constitutional custom' is well-used by the decision of the Court, as a development of the 'customary law' concept involving the constitutional discourse and the sources of law. In this way, the 'custom' is regarded as a part of the constitution itself, though without the necessity to be written in some articles and/or dispositions[73]. The concept of 'custom' of constitutional effect – in a similar way to the British legal order – is endowed with the same effect as that of the written constitution. Because of its legal endorsement, such legal customary norm may be revised only by using the same way of the constitutional revision and/or of the adoption of constitutional laws. It included a referendum vote, since pursuant to Article 130 of the Constitution, national referendum is mandatory for the constitutional revision. Therefore, the citizenry has the right to express its opinion with respect to the constitutional revision through a binary pro-and-con vote. Thus, while the Act at issue was merely in the form of a simple statute without following the constitutional revision procedure, the Court banned it because of a formal violation of the Constitution as it excludes the exercise of the right to vote on referendum, thereby violating such right[74].

At the same time, South Korean Constitutional Court also played a significant role in upholding the primacy of the Constitution. In 2005[75], it intervened in dismissing the ancient traditional system based on the role of the *hōju* (호주), the Master of the family, whose privileges also conferred by the 1958 Korean Civil Code (enacted in 1960, January 1st, and then reformed in 1977 and in 1990) made him able to exercise specific powers upon other members of the family, and on the paternal register of the *hojŏk* or *hojeok* (호적), which might provide sanctions to all the members of the family in accordance with the paternal primacy[76]. Though the reforms and the attempt to modernize Korean legal background, this tradition survived,

[72] South Korean Constitutional Court Decision of October 21st, 2004 (2004 Hon-Ma 554, 566), opinion 8:1.

[73] For deepening in the concept of 'custom', meaning 'customary law' and 'constitutional custom', see also: R. Sacco, *Antropologia giudica*, Bologna, 2007.

[74] The so-called 'Relocation of the Capital' case is also dealt with in: J.C. Kim, *Upgrading Constitutionalism, The Ups and Downs of Constitutional Development in South Korea since 2000*, in A. Chen (Ed), *Constitutionalism in Asia in the Early Twenty-First Century*, Cambridge, 2010, 76-100; J.C. Kim, *Constitutional Law*, in Korea Legislation Research Institute (Ed), *Introduction to Korean Law*, Heidelberg, 2013, 31-38. See also: AA.VV., *Korean Constitutional Court Reports*, 16(2), Part 2, 1.

[75] South Korean Constitutional Court Decision of February 3rd, 2005 (case no. 2001heonga9 et al.).

[76] H. Yang, *Colonialism and Patriarchy: Where the Korean Family-head (hōju) System had been located*, in H. Yang (Ed), *Law and Society in Korea*, cit., 45 ff.

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since the common perception of family law appeared to defer to tradition according to a "custom deference theory"[77]. In fact, the Korean family law is a legacy of Korea's own version of Confucianism, founded on the tradition of male ancestor worship[78]. After the democratization, Korean justices began to use the "Constitutional deference theory": since family laws should be based upon the spirit of the Constitution, traditional family law rules incompatible with the constitutional intents should be abolished[79]. According to the decision of the Constitutional Court, Articles 778, 781(1), and 826(3) of the Korean Civil Code are unconstitutional, while they provided the role of the master of the family, and the duty to write the name of a new-born child and of a married bride into the father's family register. The Court stressed the point that the Constitution was the highest law of the state and that the institution of the family, and its corresponding laws were under the Constitution's rule. Although the family is a product of history and society, it is not immune from the Constitution's precepts; otherwise, it could fall into a paradox for a constitutional democracy, losing into the forest (*yurim* 유림) of the Korean Confucian tradition, that might be conservative, and dominated by anti-democratic ideas. It dealt with a discourse about the relationship between Article 9 of the Constitution, which preserves the importance of the tradition in Korean legal and political system, and Article 36(1), which determines that family law should be conducted on the basis of dignity, respect, and gender equality. The conflict may be overwhelmed if considering that the concept of 'tradition', as contained in the Constitution, should be understood "as a historical and time-bound concept, meaning that tradition should be reinterpreted in the context of the Constitution according to contemporary sensibilities"[80]. Thus, in the realm of the family, tradition and traditional culture should not be contrary to the dignity of the individual and gender equality, as the values contained in the Constitution must be on a primary bench[81].

5. The Dominion of the Legal Interpretation: The Case of China

Chinese cultural history establishes its roots in the Confucian doctrine and does not claim a proper 'constitutional' past or a definition of 'constitutionalism', according to the Western perspective. The sources of law – meaning as the legal instruments to govern - were constituted by some

[77] J.S. Yune, *Tradition and the Constitution in the Context of the Korean Family Law*, in 5(1) *Journal of Korean Law* 199 (2005). According to the 'custom deference theory', Korean culture was highly advanced, and the patrilineal system rooted therein was reasonable. For these reasons, Korean family law should be based on the patrilineal system, since gender equality had no room in family matters.
[78] D.K. Yoon, *Law and Political Authority in South Korea*, in 2 *Kyungnam Korean Studies Series* 8-9 (1990).
[79] For better focusing on this perspective, which affected the recent reform on Family Law, but also the decisions of the Constitutional Court, see also: K.H. Chung, *Han'kuk kajokppŏp Yonku* (*Studies on Korean Family Law*), Appendix, Seoul, 1967.
[80] J.S. Yune, *Tradition and the Constitution in the Context of the Korean Family Law*, cit., 205.
[81] *Idem*, 204-212.

(written) acts adopted by one of the organs of the State (literally, *fà*), and the ancestral tradition of moral origins (literally, *lì*). The first ones were the laws of the Mandarin(s) and of the other legal officials demanded by the emperor, while the second ones were the product of the interpretation of the scholar-officials about Confucian philosophy. Legal sources as the *fà* documents were interpreted in the light of the moral dominion of the *lì* Confucian ethics by using the parameter of obedience: the model peasant of the Chinese empire was the one who was used to obey to the legal norms, because of an inner sense of duty before the traditional moral philosophy. In this way, the concept of law assumed not only the unique meaning of an absolute duty, but it also specifically vested with the role of the best model of behaviour to follow, maintaining an ethical core inside its formal legal nature[82].

In accordance with this ethical interpretation, that melts down moral traditions and legal norms, the good governance (and the good governor) is considered the one who secures the order against the chaos, who rules all the elements and the institutions of the State as regulating legal continuity, and who assures stability as the fundamental condition for the unity and the harmonious wellness of the country, meaning 'harmony' by the significance attributed to Confucian philosophy[83]. This is the core of a 'constitutionalism' idea as a harmonious continuity of the good governance of the State, not creating discriminations and fractures inside the society, since the purpose of the norms should be regulative, without any constraint need of sanctioning[84].

As the Korean case analysed before, even in China originally the idea of a 'constitution' as the fundamental law of the State, also regulating the structure and distributing the competences among the organs, did not exist. It was introduced for the first time during the last years of the Qing dynasty, as the extreme attempt for saving the empire from the Western influences. The Qing constitution (defined as the *xiàn* 憲 or *xiànfa* 憲法) was drafted in 1908 as a document containing the fundamental principles of the State and was adopted in 1911 (even if it never entered into force, because of the Republican revolution in 1912). Substantially, scholars did never consider it as a real constitution, but as a hybrid legal source, which is nearer to a declaration of intents or an expositive document, than a real constitutional charter, with an incomplete attempt to conceptualize all the doctrinal legal sources of ancient tradition. Qing constitution was one of the first legal documents who tried to create a common substrate among proper indigenous traditions and Western legal transplants. In fact, it was affected by the Confucian legal and political theory, but it was also influenced by a series of transferred elements coming from German constitution, Japanese

[82] R.G. Chu, *Rites and Rights in Ming China*, in T. de Barry Win, W. Tu (Eds), *Confucianism and Human Rights*, 1998, 169 ff. For the meaning of the legal terms and the interpretation in the spectre of Confucian doctrine: K.C. Li, *A Glossary of Political Terms of the People's Republic of China*, trans. by M. Lok, Hong Kong, 1995. About the constitutional development of China, see also: M. Mazza, *China*, in Id. (Ed), *The Constitutional Systems of East* Asia, in *Comparative Public Law Treatise*, founded and directed by G.F. Ferrari, The Hague, 2019.

[83] A. Rinella, *Si governano così. Cina*, Bologna, 2023, 10.

[84] Q. Zhang, *A constitution without constitutionalism? The paths of constitutional development in China*, in 8(4) *I-CON* 950-976 (2010).

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constitutional reforms, and Anglo-American system. Particularly, it proposed the transformation of the empire into a constitutional monarchy on the basis of a Western model, which does not integrate the absolute power of the sovereign organ. Perhaps, since its compromise nature and its hybrid formation, the Qing Constitution clearly suffered of a lack of strength and binding power. No one in population really felt it as the regulative charter of China, and it was easily suppressed with the republic and revolutionary governments of Sun Yat-sen and Chiang Kai-shek, and the collapse of the ancient monarchy[85].

Nonetheless, Sun Yat-sen elaborated the legal and political theory of the five powers on the basis of the necessity to build a social and institutional harmony with a context of wellness and peace in which Chinese people can live respecting each other and paying the correct devotion to the older and the wiser ones. This concordance between stability and prosperity is a logical development of the Chinese 'constitutionalism', inserting the elements of liberal constitutionalism on the ancient Confucian roots, while the principles of 'harmony' and 'harmonization' are considered a part of a cyclic history, that is in a continuously evolution. All the attempts to forge a constitutional text and/or other charters ruling national institutions and fundamental rights have always been starting from this crucial point. Only who can grant these principles may be vested with the legitimacy to rule the country (the so-called "Celestial Mandate" of the Chinese Empire)[86].

After the Second World War and the occupation by Japan, the institutional crisis prior profiled exploded in the Mao's Communist Revolution. The following constitutional charter, the first adopted by Communist leader Mao Zedong in 1949, did not kept on in the same work of hybridization between Western transplants and Confucian traditions, even if it based on the principle of 'change the mandate' (*gémìng* 革命), that is the correct translation of the concept of 'revolution'. Nevertheless, the 1949 Constitution did not profile a real fundamental law of the State, but a sort of political programme of the Communist Party in governing and regulating the country in accordance with the will of the citizenry (as the sovereignty of the rural masses and proletary above all) and succeeding the philosophical doctrines of Marx and Lenin. Mao's Constitution was influenced by the socialist theories and the legal system of Soviet Union and tried to file a legal and political transplant in a rural, Confucian, and traditional China. Mao's programme missed the function of being the fundamental law of the State, as we intend it, because of the fact that the concept of 'constitutionalism' was imposed in accordance with the adoption of a socialist model of State. The following constitutional charters designed the model of the Chinese Socialist form of State, which is founded upon the

[85] Sun Yat-sen instituted a Republic, founded on the liberal form of State of Western origins, and adopted an *ad interim* constitutional charter. Its application was contrasted by the government of Chiang Kai-shek, and his Nationalist Party in 1927. Then, the occupation of Chinese territories by the Japanese military forces interrupted the liberal development of the country.

[86] E. Esposito Martino, *Struttura costituzionale cinese tra tradizione e innovazione. Sogniamo il sogno cinese* 梦中国梦 *mèng Zhōngguó mèng*, in *Osservatorio costituzionale AIC*, 2014, 2, 4.

central role attributed to the people, and then, upon its wellness, and its order, according to measures that became variable in times[87]. These ones provided the opportunity to re-shape and re-adapt the socialist theory in accordance with the exigences and one's own proper culture and to apply it to a complicated reality, constituted by different nationalities, minorities, and ethnicities.

To facilitate the transformation of the State, and the acceptance of the socialist law, which was far from people's minds, the constitutional charter was interpretated as a political instrument for the transition to socialism for the people, giving to the Communist Party the central role of the interpreter of law. At this point, the Party assumed the same importance and role of scholar-officials during the imperial period and became the figure to intermediate between people and (the organs and the institutions of) policy[88]. It clearly dealt with a re-interpretation of Confucian cultural substrate in the point-of-view of a socialist model. In fact, it's easy to affirm that socialist theories substituted themselves to the role before played by the study of philosophy, law, and doctrines. The fracture between oral traditions derived by Confucianism and written legal norms transplanted by Socialist State was covered by the Party[89].

Perhaps, differently from the Korean case prior analysed, which was influenced by the Western liberal model, and imported elements from liberal constitutionalism - such as the concept of the 'rule of law', and theorizations derived from Montesquieu and Locke - China's form of State is basically a socialist one, even if with peculiar characteristics derived from its own proper culture. For these reasons, foreign elements transplanted inside the Confucian basics are subjected to the imprinting of the Socialist model of State with its different organization of powers. To better clarify the substantial difference intercurrent between liberal and socialist constitutionalism, it's necessary to discern the proper elements of these two ones. According to legal scholars, the basic elements of the liberal model of State and of the liberal concept of constitutionalism found their roots in: the paradigm of the separation of powers among the legislative, the executive, and the judiciary one; the preference for instruments of representative democracy rather than participatory democracy and others; the recognition and the protection of the human rights theory, the equality among citizenry, and the affirmation of every citizens' autonomy (with guarantees for personal liberty); the constitutional review and the role of a Constitutional

[87] Briefly, the paragraph refers to: the First Constitution of People's Republic of China (1954), whose purpose was the transition of the State to Socialism, and which was limited by the cultural revolution of Mao Zedong (1956-1976); the Second Constitution of the People's Republic of China, a very brief document (containing only 30 articles), which institutionalized the revolutionary committees; the Third Constitution of the People's Republic of China (1978), which formally confirmed all the organs and institutions of socialist origins; and the Fourth Constitution of People's Republic of China (1982), which was vested with the intent to modernize Chinese socialist institutions, by adopting some Western transplants and reprising the core of Confucian traditions.

[88] A. Rinella, *Si governano così. Cina*, cit., 22-23.

[89] B M.C. Bergère, *La Cina dal 1949 ai giorni nostri*, Bologna, 1989; Id., *La Repubblica popolare cinese (1949-1999)*, Bologna, 2000.

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Court as the interpreter of the constitutional parameter[90]. China built its model of State on the basis of the theories coming from the Socialist order[91], whose characteristics are totally different from the elements of liberal constitutionalism and can be summarized in: the refusal about the liberal principle on the separation of powers; the concept that the parliament is entitled with all the entire power of the State in representation of the popular sovereignty, with a secondary division and assignment to all the other organs and institutions; the presence of a unique party in a dominant position, because it detains the correct doctrine of Socialism, with the purpose to work for the transition of the State to a 'people's dictatorship'; the principle of the democratic centralism and of the supremacy of the Party's organs upon the representative ones; a theory of fundamental rights that may be instrumental to the political and philosophical purpose of the State; the lack of a constitutional control by a court and the monopoly of constitutional review by the Party[92].

Another important difference between liberal and socialist constitutionalism deals with the value of the constitution inside the legal system of norms. In fact, liberal constitutionalism considered the constitution at the top of the legal sources, with a supremacy above the ordinary legislative acts. On the contrary, according to the Socialist doctrine, every constitutional charter should be in continuous development, because of its programmatic, social, political, and economic characterization. Since its *in fieri* nature, constitution must be always adjourned, reviewed, and reformed in order to maintain its concordance with the changing of society. The constitutional text principally assumes a mere programmatic and pragmatic role, whose importance is basically testified only in accordance with its adaptability to the prefigured purposes. In this way, Constitution's functionalism makes the charter flexible and adaptable to the times, and hypothetically encourages 'positive violations', meaning formal violations proposed by the Party in defence of the fundamental principles of the Socialist Chinese State, as its morality, that melts together Socialist ideals with the Confucian core of the Chinese culture[93].

In China socialism was introduced in various passages, and it flows in those rivers eroded by centuries of Confucianism, aiming to surpass the Western classical vision about law, as founded on Roman law, and on the protection of human rights. Socialism assumed new perspectives and new

[90] On the argument, see: L. Pegoraro, A. Rinella, *Sistemi costituzionali comparati*, Torino, 2017, 59. The literature on the differences and the similarities between the liberal model of State and the Socialist one is quiet large; nonetheless, about the peculiar case of China and its description within the Socialist context, among the others, see: F. Spagnoli, *La riforma della Costituzione cinese: un'analisi della revisione costituzionale del 2018 e dei suoi caratteri principali*, in *DPCE online*, 2019, 1, 129-163.

[91] M. Volpi, *Libertà e autorità. La classificazione delle forme di Stato e delle forme di governo*, Torino, 2016, 48 ff. On the socialist form of State, see also: P. Carrozza, *Il diritto socialista*, in P. Carrozza, A. Di Giovine, G.F. Ferrari, *Diritto costituzionale comparato*, vol. I, Bari, 2014, 629-661.

[92] P. Carrozza, *Il diritto socialista*, cit.

[93] F. Spagnoli, *La riforma della Costituzione cinese: un'analisi della revisione costituzionale del 2018 e dei suoi caratteri principali*, cit., 136. See also: Q. Zhang, *A constitution without constitutionalism? The paths of constitutional development in China*, cit.

peculiarities which are adapted to the proper Chinese culture and system. It deals with the so-called 'socialism with Chinese characteristics' or *Zhōngguó tèsè shèhuì zhǔyì* (中国特色社会主义), meaning the rare and distinctive lines of this type of socialism[94]. In this way, Chinese legal system has discovered a moral dimension of legal perspective, also founded in the identification of these common traditions with the citizenry. Marxist principles are being absorbed in a cultural, anthropological, and social re-interpretation, which finds its roots in history and tradition. At the same time, this de-constructive and re-constructive mode is not fixed in times, but it's flexible and transforming, providing the development of societies, economies, and ideas, in a sort of silent hybridization between ancient concepts of ethics and socialist theories, but also between different models of State. In fact, even analysing the form of government[95], the Chinese Socialist State uses to adopt the organization and the functioning methods that result able to the aims which are proposed by the national institutions. In this way, concepts as the redefinition of the relationships among the organs of the State in contrast with the separation of powers, the dominant role of the people's assemblies in rule- and decision-making under the direction of the unique Communist Party, and some fundamental principles of the State (as the internationalism and the refusal of the aggressive war) are re-read and re-interpreted according to the proper filter of the Chinese Socialism[96].

An instance of this contaminated approach came from the plan of reform by Deng Xiaoping introducing to the 1982 Constitution (中华人民共和国宪法 *Zhōnghuá rénmíngònghéguó xiànfǎ*), and to all the other following constitutional reforms till XXI century. In 1979, in order to transform the Chinese Socialist model and to insert some kind of liberalization, Deng Xiaoping evoked the concept of *xiaokang* (小康社会). This ancient term, deriving from the classical poetry of VI century B.C. and basically meaning a "moderately prosperous society", was used in legal, political, and moral perspective with the purpose to indicate an ideal society, which may secure wellness to all the people, granting equality, peaceful differences, and, above all, a harmonious behaviour[97].

6. The Key Role of Confucian Traditions in the Modernization of the Chinese State

[94] E. Esposito Martino, *Struttura costituzionale cinese tra tradizione e innovazione*, cit.

[95] National powers are distributed among the National Assembly, composed by members which are indirectly elected and coopted in different ways by territorial assemblies and army, the Permanent Committee, a more limited parliamentary organ which is an emanation of the National Assembly, assuming all its functions and duties, the Council for the Affairs of the State, which is at the top of the executive and administrative power, the Central Military Commission, and the President of the Republic.

[96] A. Rinella, *Si governano così. Cina*, cit., 61.

[97] *Idem*, 12. See also: L.A. Nocera, *Il modello consultativo cinese tra ambiente e strumenti di democrazia partecipativa*, in *federalismi.it*, 2023, 28, 153-179.

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ISSN: 2037-6677

While 1954, 1975, and 1978 Constitutions tried to modify the traditional structure of China, in order to implement socialist institutions and favour the transformation of the State, 1982 Constitution stated the process of modernization of Chinese institutions by the substitution of the purpose of Socialist State with the purpose of the 'wellness' of people, which deepens its roots in an ancestral memory of Confucian traditions. This purpose remains in all the constitutional and legislative reforms enacted since the 1982 Constitution till nowadays, and particularly in the constitutional revision of 2004, in order to 'modernize' the institutions of the State, implement the powers of some organs, and grant a well-shared participation to the citizenry[98]. The constitutional amendments enacted in 2018 reformed 21 articles of the constitutional charter, under the initiative of Xi Jinping, re-shaped Chinese institutions in accordance with the so-called "Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era" as a guiding principle unanimously deliberated and adopted by the Communist Party during the 19th National Congress in October 2017[99].

The curious fact is that this 'modernization' implemented democracy and introduced some institutions and some strategies of the democratic constitutionalism, inspired by Western constitutional theories, also comprehending the protection of fundamental rights, the rule of law[100], the democratic process in law-making[101], by inserting foreign transplanted elements in the socialist system.

Considering the other side of the medal, the same process of 'modernization' also contemplated the return to classical Confucian legal basis, that communism failed to erase. This attempt was particularly clear when, during '90s and 2000s, Confucianism began to be greatly promoted in party's proclaims and other documents, as an important element in Chinese

[98] Y. Lin, *Constitutional Evolution through Legislation: The Quiet Transformation of China's Constitution*, in 13(1) *I-CON* 61–89 (2015). See also: C. Minzner, *China After the Reform Era*, in 26 *J. of Democracy* 129-130 (2015).

[99] E. Pankaj, *Xi Jinping and Constitutional Revision in China*, in *Focus Asia. Perspective & Analysis*, Institute for Security & Development Policy, August 2020, 1-7, available online at https://isdp.eu/content/uploads/2020/08/Xi-Jinping-and-Constitutional-Revisions-in-China-FA-27.08.20.pdf (last access: March, 29th, 2024). On the recent reforms of the Chinese Constitution, see particularly: R. Cavalieri, *La revisione della Costituzione della Repubblica Popolare Cinese e l'istituzionalizzazione del "socialismo dalle caratteristiche cinesi per una nuova era"*, in *DPCE online*, 2018, 1, 307; F. Spagnoli, *La riforma della Costituzione cinese: un'analisi della revisione costituzionale del 2018 e dei suoi caratteri principali*, cit.

[100] The 1999 constitutional revision reformed Article 5 of the Constitution, by introducing the concept of 'rule of law'. In reality, it deals with the classical principle of *fǎzhì* ((法治), a legal concept deriving from Confucian tradition. This concept is nearer to the definition of 'rule by law' than to the one of 'rule of law', since it integrates the idea of building a Socialist State (建设社会主义法制国家) and of governing according to a harmonious system in which the law is an instrument of the government's ordinary action, without limiting its power (依法治国). On the argument, see: L. Chelan Li, *The "Rule of Law" Policy in Guangdong: Continuity or Departure? Meaning, Significance, and Process*, in 161 *The China Quarterly* 199-200 (2000).

[101] K. Cai, *Why does China not democratize yet?*, in 12 *International Studies Review* 464-466 (2010). See also: Z. Ma, Y. Cao, *Political Participation in China: Towards a New Definition and Typology*, in 12(10) *Soc. Sci.* 531 ff. (2023).

legal tradition in order to modernize political strategies and institutions of the Republic[102]. It's interesting that government decided to use the term *xiàndài hu* (现代花) for meaning this process of 'modernization' enacted by legislative and constitutional reforms. This term is connected to the cultural past of China and to the Confucian origins of legal and political philosophy. In fact, the first part of the term incorporated the concept of *xiàn* or *xiànfa*, that had been already used for the Qing Constitution at the beginning of the XX century and had been also used during the period of Empire to indicate the regulative force of the written/unwritten legal norms, and particularly to all the elements in the legal and political sphere. As the Chinese word *fà* generally defines the legal sphere, and the Chinese word *xiàn* or *xiànfa* indicates the fundamental law (also meaning the Constitution), the term *xiàndài hu* can be interpreted not only as a 'modernization', but also as a 'constitutionalization' or, better, as a "modernization made by constitutional elements and/or constitutional discourse", that in East Asia signifies legal Confucianism. This enforces the meaning that the constitution of a state must relate to "the most important, most binding ideas at the heart of (…) culture"[103].

In China this attempt to come back to Confucian origins also pays to the decline of Marxism (and of socialist model of State) and the emergence of nationalism. The new perspective to get the wellness of society represents the attempt to improve harmony in all the elements of State and to create a harmonious society. Specifically, the Chinese theory of 'governance by guardians' built on the doctrine of *minben* (民本), that can be brutally translated in "people-oriented", as a substitute and a viable alternative to the Western liberal model of democracy. Again, according to an etymological reconstruction, the term is composed by the word *min* (民), which identifies the people, and the concept of *ben* (本), referring to the core of traditional roots. The *minben* theory includes a paternalist model of democracy and puts the responsibility of people's welfare (or, better, 'wellness') upon a qualified minority of governors, using their knowledge and virtuous conduct to deliver the common good[104]. This concept requires the government to treat the welfare of the common people as the foundation of its wealth and power, involving a technocratic system of governance to operate under traditional Confucian values, as the ones of collectivism, order, stability, and harmony[105].

The status of Confucianism received a great improvement during 2000s with the political strategies followed by Jiang Zemin, Hu Jintao, and Xi Jinping. The fact is particularly evident with the modern reforms in order

[102] S. Wu, *The Revival of Confucianism in the CCP's Struggle for Cultural Leadership: A Content Analysis of the People's Daily*, 2000-2009, in 23(89) *Journal of Contemporary China* 971-991 (2014).

[103] L.W. Beer, *Introduction*, in L.W. Beer (Ed), *Constitutional Systems in Late Twentieth Century Asia*, Seattle, 1992, 1-16.

[104] R. Li, *Minben 民本 as an Alternative to Liberal Democracy*, available online at https://theloop.ecpr.eu/minben-as-an-alternative-to-liberal-democracy/ (last access March, 28th, 2024).

[105] T. Shi, J. Lu, *The Shadow of Confucianism*, in 21(4) *Journal of Democracy* 123-130 (2010).

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to introduce and implement participatory democracy in administrative process and in law-making[106]. The 'institutionalization' (*zhì dù hu* 制度花) of Confucianism represents the connection between political power and thought, since Confucian tradition becomes a source to secure the stability of the current institutional system by providing an authoritative and indubitable interpretation of this system and the resulting social order[107].

This Confucian revival seems to satisfy two different perspectives, in the improvement of the status of Confucianism, and in its further promotion to the future. Confucian elements have appeared as an important component in the interpretation of the Chinese Communist Party's core political ideas, such as the "socialist advanced culture" and the "harmonious society". For these reasons, actually numerous social events, and activities regarding Confucianism have been organized or financially supported by the government, including research cultural centres. Nonetheless, the model of State in China seems to perdure the socialist form (with the declination of Chinese case), but, at the same time, it continues the hybridization with the reprise of Confucianism and the transplanting of Western elements[108]. Last generations of China's leaders have been adjusting their political strategies and policies in accordance with the changing of Chinese socioeconomic conditions, in order to maintain the vitality of the party[109]. For these reasons, and in accordance with the plan of 'modernization' by reforming constitutions, and 'institutionalization' of ancient traditions, both the government and many intellectuals agreed that Confucianism needed to be reformed and revived with the new content of 'modernity' (*xiàn dài xìng* 现代性)[110]. This purpose received a propagandistic support in the way of transforming Confucianism from a traditional political tool into a new political tool, as a theoretical source for the modernization of the State, and also a union point among the institutions[111]. In few words, rather, "Confucianism will be an ideological tool with the pragmatic purpose of becoming theoretical support for the implementation of the party's political strategies"[112] and it intervened as an auxiliary role to the Marxist theory upon which Chinese model is founded, in order to re-manage and re-shape legal sources by reprising the traditional, and ancient ones[113].

[106] L.A. Nocera, *Il modello consultativo cinese tra ambiente e strumenti di democrazia partecipativa*, cit., 170 ff.
[107] S. Wu, *'Modernizing' Confucianism in China: A Repackaging of Institutionalization to Consolidate Party Leadership*, in 39(2) *Asian Perspective* 306-307 (2008).
[108] S. Wu, *'Modernizing' Confucianism in China*, cit., 301 ff; S. Wu, *The Revival of Confucianism in the CCP's Struggle for Cultural Leadership*, cit. See also: J. Makeham, *Lost Soul: 'Confucianism' in Contemporary Chinese Academic Discourse*, Harvard University Asian Center for the Harvard-Yenching Institute, 2008.
[109] Z. Xu, *Xu Jialu zai guoji Daodejing luntan shang zhuchu: Hongyang chuantong wenhua, gongjian hexie shehui* [Xu Jialu pointed out at the international forum on the Daodejing: Promote traditional cultural and collab], Renmin Ribao, 2007.
[110] S. Wu, *'Modernizing' Confucianism in China*, cit., 308.
[111] *Idem*, 318.
[112] *Idem*, 319.
[113] *Idem*, 320.

7. Beyond the Binomial Constitutions/Constitutionalism: Open Questions for Comparative Law Scholars

By analysing the historical, political, and legal development of Korea and China, what immediately results is the fact that both States did not present a concept of constitutional charter, as we intend, according to the Western tradition. It deals with an age-old problem, almost a paradox in comparative law since legal scholars tend to interpret the presence of a material and written constitution as a guarantee for democracy, while a state qualified as 'anti-democratic' is obviously mistaken with an 'authoritarian' state. In fact, considering this syllogism, the absence of a written constitutional document could be erroneously interpretated as the basic of despotism. But the lack of a single constitutional document should not preclude an understanding of a constitutional regime. An instance derives from the British constitutionalism, which can be quite instructive in destroying the false myths of constitutional theory. Britain does not have a constitution, as considering a single written document, and therefore the courts cannot censure laws for reasons of unconstitutionality; though this evidence, Britain has always been considered a constitutional regime without any doubt.

Nonetheless, in the cases analysed within the essay, both States may count on an ancient tradition, that is eradicated in their historical, and cultural roots, framed by legal, and philosophical studies. These cultural roots also elaborated doctrines which comprehend some basics of an alternative constitutional law theory without any seeds of despotic power and may be more similar to a 'constitutionalism' lexicon than other cases. Considering the other side of the medal, at the same time, there are also numerous situations affected by autocracies (or not democratic regimes), though the presence of a written constitutional document.

Thus, this consideration testifies there is no coincidence between constitution and democracy, since legal scholars (particularly the comparative scholars) need to apply a different narrative, which may start from the core of the ancient traditional values. Their importance stands in spreading harmony among societies to deeply understand the legal systems of such countries. Perhaps, the discourse may rehearse the binomial constitution/constitutionalism, and all the theories defining actual East Asian systems as "constitutions without constitutionalism". The rationale of this definition implies that modern constitutions of East Asian region contain long and detailed catalogues of rights, but reconstruct them by the doctrine of the State, and not by their pre-existence to it, as limiting political power. In these terms, since rights are about to be configurated almost as duties, constitutional documents could be vested with a different purpose than their Western counterparts, denying the discourse about constitutionalism as a fundamental value[114].

By the way, this definition is constantly dependent on a unique conception of 'constitutionalism', that is exclusively contemplated in the Western ideas, and then transplanted abroad, not considering that, in some cases, traditional ethics could elaborate a constitutional-like discourse on

[114] T. Groppi, *Costituzioni senza costituzionalismo. La codificazione dei diritti in Asia agli inizi del XXI secolo*, in *Politica del diritto*, 2006, 2, 187-221.

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different basis. As analysed in the essay, Confucian roots enacted a not authoritarian legal and philosophical substrate, though without not being democratic. Confucianism may be interpreted as a pre-figuration of 'constitutional theory', without the necessary link to a proper and written constitutional text, and maybe also a pre-figuration of 'democratic order'. Narrowly, in the Korean case, coming back to the Confucian traditions helped to restore democracy after a long period of authoritarianism, and military regimes, while in Chinese case the reference to a return to Confucian elements in political institutions seems to be welcome as the first step for a liberalization. If we think about the strict definition of 'law' in a positivist perspective, Confucian traditions do not contemplate a type of norm which could be enforced before courts. Otherwise, the customary and philosophical practice of disciplining policy, institutions, and principles at the basis of legal system is part of the Confucian doctrine of the state, since "Confucianism provided the institutional and discursive resources that enabled [scholar-officials] to discipline the monarch through constant surveillance and supervision"[115], and to restrain any aspiration to absolutism.

Since a rehearsal of the precedent theorization, this reconstruction may be interpreted as a "constitutionalism without a constitution", as the customary and philosophical core of the Confucian tradition sounds like a constitutional theory for disciplining the State and ruling the society as a harmonious unity.

The question is whether we should revise and reconsider our understanding of constitutionalism, in order to include political practices and traditional institutions that have no roots in Western experience, though they have a long history in other experiences[116]. Maybe, we should re-define the concept of constitutionalism itself, as not strictly connected to the concept of a written constitution, nor even to the family of Western legal doctrine. And maybe, we should re-design this binary system which assumes an opposition between constitutionalism and despotism, by creating another alternative or *sui generis* category, founded on the Foucault's approach about constitutionalism as a practice of disciplining and restricting sovereign political power.

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[115] C. Hahm, *Conceptualizing Korean Constitutionalism*, cit., 164.
[116] *Idem*, 160.