CONSTITUIÇÃO, CONSTITUCIONALISMO E EFETIVIDADE NA CHINA: ILAÇÕES ENTRE CULTURA TRADICIONAL, PRÁXIS POLÍTICA E DISCURSO CONSTITUCIONALISTA NO CONTEXTO CHINÊS

CONSTITUTION, CONSTITUTIONALISM, AND EFFECTIVENESS IN CHINA: ILLATIONS ABOUT TRADITIONAL CULTURE, POLITICAL PRACTICES, AND CONSTITUTIONALIST SPEECH IN THE CHINESE CONTEXT

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RESUMO

O presente artigo constrói uma comparação entre o discurso nomológico oficial da Constituição chinesa vigente e as diferentes abordagens sobre o papel da Constituição e dos direitos humano-fundamentais desenvolvidas pelos constitucionalistas chineses. Parte, como principal estratégia metodológica, da configuração de uma amostragem de obras construídas na literatura jurídica chinesa sobre a Constituição e os direitos humano-fundamentais naquele país. Ademais, incrementa-se a análise a partir da reflexão sobre a influência das diferentes tradições políticas e culturais chinesas nas igualmente diferentes perspectivas do constitucionalismo chinês contemporâneo. Como principais resultados verifica-se não só a existência de posições conflitantes na cultura constitucional chinesa como a presença majoritária de uma abordagem pragmática e utilitarista do discurso dos direitos humano-fundamentais e de uma primazia tanto das dinâmicas políticas, como econômicas, sobre as balizas constitucionais, que ainda possuem na China pouca capacidade vinculativa ou dirigente.

PALAVRAS-CHAVE

Constitucionalismo chinês. Direitos humano-fundamentais. Direito comparado. Cultura constitucional. China.

ABSTRACT
The present work constructs a comparison between the official nomological discourse of the Chinese Constitution in force and the different approaches about the meaning of the Constitution and of fundamental-human rights developed by the Chinese constitutional scholars. Its main methodological strategy is to configure a sampling from the data collected from the Chinese legal literature related to its constitutional law and fundamental-human rights. Moreover, the analysis is incremented through a reflection regarding the influence of the different Chinese political and cultural traditions in the equally distinct perspectives of its contemporary constitutionalism. As its main results it is verified not only the existence of conflicting perspectives in Chinese constitutional culture, but a majoritarian presence of pragmatical and utilitarian approaches to the discourse of fundamental-human rights as well, and also a primacy of political and economic dynamics in comparison to the constitutional guideposts, which still have a low binding or guiding power.

KEYWORDS
Chinese constitutionalism. Fundamental-human rights. Comparative law. Constitutional culture. China.

INTRODUCTION

The purpose of this article is to construct a diagnosis of the place and scope of the discourse on human-fundamental rights in Chinese constitutional culture, and hence on the place of the constitutional culture itself in China's socio-political relations. The specific focus of the analysis turns to the evaluation of the disagreements between the current constitutional textuality and the deficient constitutional effectiveness in that country. As a technique and approach methodology, the research constructs a comparison between the plans of traditional Chinese normativity, current constitutional textuality, and contemporary literature linked to what can be considered an academic-constitutionalist discourse in China. From the comparison among tradition, norm, and constitutionalism it is possible to infer contradictions between the official discourse and the actual practices in contemporary Chinese constitutionalism.

As detailed in the development of this article, analyzes of contemporary Chinese legal and political structure in the traditional, nomological and intellectual discourses have allowed us to reflect on the actual Chinese practices regarding human-fundamental rights. Our focus was the search for understanding the real dimension of Fundamental Rights in the Chinese social, political and legal dynamics, with a view to explain the differences (they exist in any country) between formal constitutionality and real constitutionality (CUNHA, 2009) in China, especially with respect to the effective capacity of Fundamental Rights to human dignity, to link and guide the exercise of power in that country (see SALGADO, 2006).

The main methodological tool used consists in the formation of a sampling of intellectual discourses on the constitutional phenomenon developed in China itself and by Chinese authors. From the sample of various Chinese constitutionalists, with different perspectives, it was possible to construct a diatopic approach of the current debate on human-fundamental rights in Chinese constitutionalism.

We have taken into account the perception that the differences that characterize Chinese normativity in relation to Western normativity are remarkable. An example of this is the fact that Western normativity is justified by a criterion of order external to the world, and Chinese normativity is presented in a materialistic conception, in which "the order of the world lies in the inherent spontaneity of its realization." (RAMOS, 2010, p. 260)

Our reflection, therefore, started, as a basic theoretical reference, of the jus-compartivist approach of Eric Agostini, especially as regards his exposition of the processes of "legal westernization", consisting of the movements of "legal migration" operated by the experiences of import and export Western legal cultures for non-Western cultures, which were mainly found in modernity (AGOSTINI, [198-?]). In these processes Agostini tries to make explicit that the reallocation of Western legal models coupled on non-Western cultural bases tends to bring about a very different experience and actual experience of those same models that, although formally simile, become materially others.

Thus, one of our working hypotheses is that in the Chinese context it is possible to observe that there occurs one of the phenomena of "distortion of the Western legal model" pointed out by Agostini, that is, the pragmatic and utilitarian treatment of the fundamental structures of Western law contemporary (AGOSTINI, [198-?], p. 128 on). In the Chinese case, it can be said that there is a "legal pragmatism" and "legal utilitarianism" in the negotiation of two structures that in the West are essential to the current legal model: the Constitution and Fundamental Rights.

Therefore, if we add to Agostini's considerations the analyzes we present in this article on Chinese Law, we find as a result of the research that Fundamental Rights do not fulfill in China (or at least do not fulfill in a strong sense) the same finalistic as in the West. In the West, the function of Fundamental Rights is to mediate in an objective language the fundamental agreement about which are the last ends, that means, what is the *telos* of the political power so that it can be considered legitimate (SALGADO, 1998). This main mediating function they possess in the West does not present itself with the same weight and reality in the context of the Chinese State.

In addition, it was also possible to verify, as it will be seen in the development of the work, that

in China the Fundamental Rights, although embodied in the current Constitution, do not constitute a substantiality of rights opposable to any act of political power. Therefore, the Fundamental Rights in China do not act as the ultimate limit of the conformation of the decision-making processes in the State, to the same extent and with the same weight in which they operate in the Western countries (COELHO, 2012, pp. 289-310). We do not mean by this that, in Western countries, such rights are not disrespected or unguarded in political decision-making processes. But within the institutional decision-making processes, Fundamental Rights are the main criterion for controlling the validity of any and all legal acts. Therefore, any disrespect or distortion in the fulfillment of such rights can only be legally validated through a discourse equally based on such rights, even if it is constructed fallaciously. What we mean is that, at least on an institutional level, Fundamental Rights have "constitutional supremacy" in the legal hierarchy, in the sense explained by Luiz Roberto Barroso (1996).

On the other hand, in China, the political institutionality itself treats both the Constitution and the Fundamental Rights not as the ultimate goal of the State, but as an instrument of management of the public interest of Chinese society, even if they are important management tools. In China, therefore, the Fundamental Rights are in the public interest (translated into Chinese constitutional language as the democratic-popular dictatorship of the working class and embodied in all other semantic keys attached to this idea of subordination of rights to the higher interest of the socialist system of State[1]), when in a Constitutional State of Fundamental Rights, it is the public interest that must be measured in function of the conformation of the different fundamental rights in each situation (JUSTEN FILHO, 1999).

1 THE FORMATION OF CHINESE CONSTITUTIONAL CULTURE

The history of Chinese normativity is commonly divided into three stages, namely: the stage of the becoming of traditional Chinese normativity during the Chinese Dynasties (771 B.C.-1911 A.D.); the stage of the peculiar Chinese modernization of a precipitously socialist matrix (1911-1978); and the stage of current Chinese law (1978-present); seeking in each their contributions to the

[1] Examples of this feature of Chinese constitutionality are the following passages of the Constitution: Article 15 provides as follows: "Any disturbance of the regular functioning of the social economy or damage to the state economic plan by any organization or individual shall be prohibited." Article 51 in its turn provides that "In exercising their liberties and their rights citizens of the People's Republic of China shall not be against the interests of the State, society and the community or against the legitimate freedoms and rights of other citizens".

construction of the practice of Dignity in the Chinese normativity as a whole, evidently elevated in the current Chinese order.

The modernization of Chinese normativity begins only at the end of the dynastic period. Thus, there was the development of the traditional normativity, with the formation and interaction of its two bases, Confucianism and legalism. Such processality implies a time course ranging from the earliest past to the year 1911. In that time, it was the dynasties that commanded China, with the different perspectives of Confucianism and legalism, and the respective notions of *Li* and *Fa*, confronting (and sometimes complementing) the formation and constitution of the basis of traditional normativity.

Li is interpreted as the moral order derived from the intrinsic nature of man, understanding, from it, that the conciliation is the main route to solve conflicts. In the moral order present in Confucianism, each individual had its determined role, his/her duties already being assigned to him/her according to his/her position and importance in society. That is, to each one was attributed its own duties, having no meaning in speaking in equality concerned to freedom, in Western ways. Each individual had already predetermined his/her duties from birth, taking into account family, offspring and sex. As Ramos stresses, any self-determination or autonomy would represent an obstruction to the natural course, with respect for the conformation and integration of nature's spontaneous process as one of the most expensive commitments (RAMOS, 2010).

For the Confucianist current of thought, applying general and abstract norms was not sufficient to meet the various specificities of each specific case, including meeting the interested parties in order to live up to their social status. In addition, bringing a case to court could be considered dishonorable since it would appear that the conciliation attempt had been frustrated, since, for Confucius, conciliation should be the most effective way to maintain social peace.

Fa, on the other hand, translates as the model, ruler, or compass, and must be understood as a fundamental symbol of this school of thought under Chinese law, from which even the syntagma came to mean law itself (GRANET, 1934). For the legalistic school, it was law, therefore, the only way to seek the maintenance of the social order, which would imply in the submission of the population (and of the emperor himself). A position that is coherent with the motives that rise of the legalistic current, originally contrary to the nobiliarchic or functional privilege, affirming, at first, the need to establish equality before the laws, especially because it understands hence the greatest source

of legitimation of the political power. In addition, according to Ramos, legalists defended clarity, intelligibility, communicability to people, and uniformity in normative application, with a view to maintain the order and unity of the empire satisfactorily (RAMOS, 2010).

Notwithstanding their differences, it is possible, according to Marcelo Maciel Ramos, to apprehend a common center to these three features that constitute the self-reflection of traditional Chinese normativity that means what the author calls "the principle of immanent harmony." Such principle, deeply interwoven in Chinese civilization, has significantly alienated it during a considerable part of its history from a properly juridical normativity.

One consequence of this would be the mismatch of any support in the original foundations of Chinese thought for human rights. From this perspective, any claim would entail the loss of spontaneous harmony (RAMOS, 2010). It occurs that the exigibility (vindicability) constitutes a structural element of a subjective right in a legal culture as configured in the West (COELHO, 2010). And to a certain extent, such paradoxical illusion is still being constructed by the Chinese authorities, who use it to confront the postulation of human rights when denouncing their violations (JULLIEN, 2009).

At the end of the Qing Dynasty, the jurist Shen Jiaben (1840-1913), seeing the success of the Japanese encodings inspired by the German encodings, led, under imperial rule, various reforms, including the making of modern codes. There was then an ordination project that resembled the German Civil Code (GCC). However, "the fall of the Empire and subsequent convulsions led to the adoption of a first Chinese Civil Code only in 1929: also modeled on the GCC, although with openness to traditional Chinese solutions" (CORDEIRO, 2010).

In addition to the codifications, in the same context, intense nomological production and legal research were devoted to the questions related to the establishment of the road that would lead from the Empire to a constitutional government, highlighting, in the reading of Jianfu Chen (2008), the works of the various extended commissions from 1905 to 1907, involving a series of drafts of constitutional texts, as well as visits to Japan, the United States and Europe, with a view to identifying the best model for the transition.

Politically, it is possible to evaluate that all these efforts ended up happening very late. In 1911, the Qing Dynasty ends. However, the Republic, established by the revolutionaries led by Sun Yatsen in 1912, soon found itself challenged by the legal dilemmas common to all revolutions, that of dealing with the strength of the immediately preceding past. Thus, at least from a juridical point of view, the foundations laid by the last imperial court would remain initially, with the republican

government opting for the maintenance of various imperial laws, reforming them or rejecting them only in opposition to republican ideals, and continuity of reforms (CHEN, 2008).

The theme Nationalism (*Minzu*) is well-known in the republican period, while one of the so-called Three Principles of the People of Sun Yatsen, together with Democracy (*Minquan*) and People's Subsistence (*Minsheng*). The nationalist doctrine was basically concerned with the reconstruction of China based on the maintenance of its unification and strengthening before other international countries. (CHEN, 2008) These concerns, specifically regarding unification, are noticeable in infra-constitutional legislation mainly in the Citizenship Law, in which the distinction between citizenship and Nationality is highlighted. "[…] A la ciudadanía se le conferían derechos y deberes cívicos y a la nacionalidad se le 'identificaba con la estirpe racial del individuo'" (ICHAURRAGA, 2015, p. 122), which would be very important in the process of national cohesion, with China being made up of more than 50 different ethnic groups.

At the end of the republican period, however, such principles will be gradually graded as belonging to the "western school", increasingly confronted and challenged by the "Russian school", in concomitance with the increased influence of Soviet Russia in China. An important legal and political landmark of this period was the "Provisional Constitution" which came into force in 1931 "para el período de Tutela Política en Nanking por el Gobierno del Kuomintang" And that declared the assimilation by China of the nicknamed "way of Moscow". (CHEN, 2008)

In October 1949 China adhered to the Marxist-Leninist Dogma, as did the USSR. In the same year, the "Common Program" was implemented, which abolished all existing Laws, Decrees and Tribunals. Internationally, such adherence had repercussions such as the signing of the Treaty of Chinese-Soviet Friendship on February 14th, 1950, much more influenced by their respective critical positions regarding Japan and the United States of America than by a common goal of proletarian internationalism. (RIOS, 2005) In this regard, as Jizeng Fan points out, "Chinese ruling elites favored the Soviet constitutional model. China's legal education was wholly driven by Soviet ideology". Consequently, "we could not be surprised to find a number of provisions in China's constitutional code similar to those found in Soviet constitutional texts." (FAN, 2015, p. 57)

Nevertheless, in spite of Soviet influences, Fernando Mezzetti interprets it as a subtle sign of the impact on Chinese soil of changes taking place globally among many socialist countries. In spite of decorative aspects, as in the case of the head of State, the Constitution, in imposing rules of State organization and associative life, opposed

Mao Zedong's unruly political campaigns. Even if they were "socialist rules of the game", because they were written, they would have value *erga omnes*, "in theory superior to the individual and the leader" (MEZETTI, 2000, p. 49).

In the midst of the first fissures of the Chinese monolith, Mao, unsuitable for "the more prosaic characteristics of building a modern State with all the complexity of its economic and administrative problems", was increasingly removed from the center of power by introducing each more limitations. His response came in the "Hundred Flowers" campaign, a mix of trap and dodgy maneuver. According to Mezzetti, the "Hundred Flowers" "was an invitation to non-communists, intellectuals, to openly criticize the Communist Party" (MEZETTI, 2000, pp. 50-55), an invitation that eventually served to identify the opponents of the regime, self-denials for the ensuing repression.

Therefore, during Maoist China, from 1949 to 1975, the normative basis was not that of the formal legal model, but of an institutional behavioral model based on bureaucracy in the service of the commander, which shaped the social structure throw the years. (INCHAURRAGA, 2015, p. 165). This implied, in short, the derogation of all previous juridical production, succeeding to replace it with a series of instructions granted by Mao himself. These booklets, thus considered and dubbed by many scholars, contained rules about how people should behave and phrases that were regarded as dogmas and imperatives.

When Mao passed away on September 9, 1976, Deng Xiaoping, who had participated with him in the Long March and the war against the Japanese, emerged victorious. Much more than the successor, in fact, of his usurper and executioner, Deng Xiaoping, with his emphasis on results and his bitter political experiences, would reintroduce in China the positive value of law for the construction of a socialist government, concomitantly imbued with a notion of democracy. From these assumptions, there being no doubt about the need for an effective and binding legal system, from 1978 onwards China will change radically.

Thus, in the late 1970s, there was a need in China for ideological reorientation, leaving aside the Soviet-Maoist socialist model to be the beginning of "un período de creatividad, de libertación intelectual y de reconstrucción, impulsado por el cuestionamiento crítico de la ortodoxia y por un nuevo interés por otras tradiciones intelectuales no marxistas" (INCHAURRAGA, 2015, p. 204), although maintaining the traditional characteristic of the political power of China, of search for a strong social and ideological control.

For Deng Xiaoping, it was necessary to promote socialist modernization, which would be done by

the "two-handed" policy: in one the economy, which should be developed, in another, the legal system, which lacked strength. According to González, in the years from 1978 to 1989 in China, the reform, restructuring or even that which led to the transformation of what we could call it "the utility of Chinese law", was proposed to, in fact and definitively, change the legal practice of the Maoist period, in order to bring the country national development (INCHAURRAGA, 2015, p. 206).

2 CONTEMPORARY CONSTITUTIONAL LAW OF CHINA

2.1 THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA OF 1982 AND ITS REVISIONS

The current Chinese Constitution (CPRC) is the fourth constitution after the Revolution. Its main ideas came from the reforms undertaken by Deng Xiaoping (JHONG, 2015, p. 5). The text of 1982 underwent significant revisionary reforms, in the years 1988, 1993, 1999 and 2004, in order to plan the compatibility of the socialist model with the market economy. The guiding principles of the CPRC are: i) Democratic Popular Dictatorship as a form of government; ii) The leadership of the Communist Party; iii) Adherence to the Marxist-Leninist theory, to Maoism and to the thought of Deng Xiaoping; iv) Reform and openness to the exterior (Mazza, 2006, p. 17 on).

The model brought by the CPRC gains synthesis in the maxim commonly used by the Chinese: *one country, two systems*. On one hand, there is a great internal administrative autonomy as in Hong Kong and Macao. On the other hand, the establishment of a national legal system designed to harmonize capitalism and socialism.

The preamble to the constitutional text reads as follows:

> This Constitution consolidates the achievements of the Chinese people of all nationalities and defines the basic system and tasks of the State in legal form; is the fundamental law of the State and is the supreme juridical authority. The people of all nationalities, all State organs, the Armed Forces, all political parties and public organizations and all enterprises and productive units of the country must observe the Constitution as the basic norm of their behavior, they have the obligation to defend the dignity of the Constitution and shall ensure its implementation. (PEOPLE'S REPUBLIC OF CHINA, 2000, p. 690).

In the official nomological discourse, as embodied in the constitutional text (Cf. FERNANDEZ PEREZ, 1978), we can see an apparent appreciation of the importance of the Constitution for Chinese law, which would be clothed with a "supreme legal authority." It is interesting to note from the text that there is a very great emphasis on qualifying as "legal" the authority

of the Constitution. Perhaps, such textual choice demarcates the limits of the Constitution itself in Chinese culture. Probably incapable of being the fundamental north and the maximum authority in the political, cultural, economic and social, its function is to be the legal reference, no more than that. The question, then, is whether the legal dimension has the capacity to impose limits on the Chinese political-partisan dynamics, whose operation has historically never submitted to the idea of Constitution and Fundamental Rights. Contrary to what was posed in a typically Western constitutional tradition, where constitutional discourse proposes itself as the highest authority on the political plane, our hypothesis of analysis is that, in Chinese constitutional culture, the constitution is at the service without the ability to limit the political dynamics.

On the other hand, the text of article five of the Chinese Constitution formally complies with the requirements of hierarchical superiority of the constitutional norm, along the lines of Western expectation:

> Article 5 The State defends the uniformity and dignity of the socialist legal system. No law or rule of the central or local administration may breach the Constitution. All organs of the State, the armed forces, all political parties and public organizations and all enterprises and establishments must obey the Constitution and the law. All offensive acts of the Constitution or law must be re-assessed. No organization or individual can enjoy the privilege of being above the Constitution and the law. (PEOPLE'S REPUBLIC OF CHINA 2000, p. 691).

2.2 THE STRUCTURE OF SOURCES OF LAW AND DIVISION OF POWERS IN THE CONTEMPORARY CHINESE CONSTITUTIONALISM

The Chinese Law has important sources and "although the thought of Confucius is not a source of Law", Confucianism is added (Cf. RAMOS; ROCHA, 2015), as a traditional normative diffuse, to the complex of referents of this Law, having certainly influenced the current state of affairs of Chinese law (VICENTE, 2012, p. 449).

In first place, there is the Constitution, followed by the different ordinary laws and administrative regulations, which in recent decades have increased considerably in quantity, making it clear the intention of increasingly codifying the Chinese legal system. There are also, as sources, customs (*xi sú*), jurisprudence and international law (BENITEZ-SHAFER, 2007, p. 11).

In fact, this whole framework of norms, regulations and administrative reports end up generating controversies and disparities, in the normative complex produced by federative entities (CAICEDO; SANTIVÁNEZ, 2007, p. 118-119). This is only stabilized by the unusual presence of the Chinese Communist Party in the process of organizing the sources.

It is noteworthy that some "constitutional uses" acquire great importance for the constitutional and legislative procedures in China. As Moura Vicente points out: "Among them, it is clear that constitutional revisions and the main legislative measures must be approved by the Central Committee of the Communist Party before being scheduled in the National People's Congress" (VINCENT, 2012, p. 461). Such constitutional use largely confirms the idea that in the Chinese constitutional culture the Constitution does not function as a determining referent of the possibilities of being politics, but it is this that determines the possibilities of being the Constitution, in a very own game to Chinese culture, where respect for the constitution is harmonized with political guidelines through strategies such as the use of prior approval of the Communist Party, so that the dimension of politics need not be imposed in conflict with the Constitution.

Jianfu Chen explains that the Chinese Constitution establishes a system in which, in practice, the legal-state production takes place in a system composed of authorities placed at multiple levels and dimensions, in which the State Council (with strong presence of the Party) and the local authorities are at least as important as the National People's Congress. (CHEN, 2008)[2].

In the current CPRC model, many consistency and integrity problems began to emerge, not counting the aura of secrecy and mystery then characteristics to the legislative process. Consequently, Jianfu Chen points out, as early as the early 1990s academics and officials suggested the adoption of a law (*lifafa*) as a solution to this problem; which came to be done 10 years later. (CHEN, 2008). Immediately, and in line with the 1982 Constitution, it classifies legal documents into laws, administrative regulations, local regulations, autonomous regulations, departmental rules, and local government rules. Despite the complexity, there is a general consensus amidst the doctrine that the Chinese legal system is divided into three levels: primary (national laws, *falü*), secondary (national administrative regulations, *xingzheng faguí*), and tertiary (local regulations, *difangxing fagut*).

As for the first level, the top of the hierarchy would have been the Constitution, followed by the basic laws (*jiben falü*). Below there are the "other laws" (*qita falü*) promulgated by the Standing Committee, which supposedly have more sectoral effects than the basic laws. However, according to Jianfu Chen (2008), in practice the distinction between what would be basic laws and what would be the others is not so clear, with the constant performance of the Standing Committee (responsible for these) in areas and themes that would easily be interpreted as "fundamental".

[2] According to Chen, between 1979 and 2004, 727 national laws, 3,809 administrative regulations, 51,554 departmental rules (equivalent to ordinances, decrees, resolutions, etc.), 91,334 local rules, and 2,889 judicial interpretations were enacted.

The term "administrative regulations", comprising the whole of the second Chinese nomological level, includes all the measures, rules, regulations, orders and administrative decrees issued by the Council of State. In addition to the expressly delimited by article 89 of the CPRC, the regulatory law establishes the competence of the State Council to issue regulations on matters of economic and social, education, science, culture, health, family planning, administration of justice, security public, international, financial, labor, urban and agrarian law development, among others. In addition, such scope is in constant extension, due to the routine delegations by the National People's Congress and its Standing Committee (based on article 89 (18) of the CPRC), making it, in fact, in the words of Jianfu Chen, "the most powerful nomogenic institution in China" (CHEN, 2008, p. 183).

The involvement and authority of the Chinese Communist Party in relation to the reproduction of the legal system is a determining factor (SULI, 2007, p. 535). It is known that the Party has a Political-Juridical Committee that exercises direct control over all the main national legal issues, including with regard to legal production. Moreover, all governmental entities have, in their organizational structure, party committees.

According to Shigong Jiang, China's true "fundamental rule", the foundation of all its institutions, even before the 1954 Constitution, is the leadership of the Chinese Communist Party (JIANG, 2010). Convention or part of the non-written Constitution of China, the fact is that the Party has full control over any constitutional revision (although it appears in the constitutional text that the power to interpret the Constitution rests with the Standing Committee of the National Congress, pursuant to Article 67 (1) of the CPRC), as well as of any and all law considered important. Before reaching the National Congress, it is a matter of principle that the most important issues related to legislative production are approved by the party's Central Committee.

For Jianfu Chen, such a principle if strictly applied would transform the Central Committee into the de facto legislature, while the National Congress and its Standing Committee would play the role of a legislature of law. However, research carried out by Chen shows that despite the strong real influence of the Party, institutional spaces of legal autonomy have already begun to appear (CHEN, 2008), although they are spaces of autonomy in less relevant plans (and therefore allowed by the party).

If one accepts the interpretation that party leadership is the fundamental norm of the People's Republic of China, judicial practice, stretched from the Supreme Court to the lower courts, completely avoid any reference to the constitutional text (ZHANG, 2010) – whether as grounds for decisions, inflection point, or argument for the judicialization of a certain

value – does not seem at all incomprehensible. This is a really striking feature of Chinese jurisdictional production. This, however, is still problematic, especially if analyzed in the broader horizon of the absence of any consolidated mechanisms for the control of constitutionality – judicial or not (ZHANG, 2010).

As previously noted, partisan committees are located throughout the state structure, making up the three formally and constitutionally declared powers. According to Suli (2007), this interference, which is generally resisted by both the courts and the prosecutors, is based on the determination of the decision in a given court case to the mere issuance of an opinion (*pishi*) in response to some controversial and judicialized social issue[3].

As for the system of territorial organization, the Chinese Constitutional Law houses what was there called the principle of democratic centralism, which, according to Caicedo and Santiványez (2007, pp. 117-118), represents a higher level of independence and self-determination of Local Administrative Entities, under the tutelage of the Sovereign State Chinese.

3 THE FUNDAMENTAL RIGHTS IN THE CHINESE CONSTITUTION: REFLECTIONS ON THE CONSTITUTIONAL NOMOLOGICAL SPEECH

The Chinese Constitution provides the guarantee of equality before the law (Article 33), freedom of expression, press, association, assembly, parade and demonstration (Article 35), freedom of religious belief (Article 36) and the inviolability of personal liberty (Article 37), among other basic guarantees. According to Ramiro Avilés (2010, p. 3), "the list of rights included in the second chapter of the Constitution includes all generations of rights and nominally not very different from what can be found in another Constitution."

At first glance, we may infer that the Chinese constitutional text resembles other constitutional pieces of rule of law. However, the concept (or meaning) of the words ordered in the Constitution does not necessarily have the same meaning, weight, applicability, scope or degree of effectiveness for each country. Among other reasons for this, there is the historical and cultural construction

[3] According to Jianfu Chen (2008), the hermeneutics of norms distinguishes dogmatically between legislative, administrative and judicial interpretations. The judicial interpretation, however, is restricted to the Supreme People's Court and to those questions arising exclusively from their respective works, that is, from casuistry. However, the Supreme Court often issues interpretations of specific laws shortly after they are published, arriving at detailed comments, article by article, which could be termed, as Jianfu Chen does, a very particular exercise of activism judicial. The same Supreme Court, however, by means of specific regulations, barred the lower courts from using these interpretations as a basis for their decisions – even if they were used in the reasonings constructed for them.

of society and of domestic law.

As an example of this issue, we can examine the statement on recognition of the protection of the personal dignity of Chinese citizens in Article 38 of the CPRC. From reading this device what it verifies and the apparently deliberate illation between the idea of dignity and the conventional notion of protection of honor. See the text of the cited article 38: "The personal dignity of all citizens is inviolable. Insults, slander, false accusations or injuries directed at citizens are prohibited." Now, in relating the protection of honor and image as the protection of personal dignity, the Chinese constitutional text allows for highly restrictive interpretations of what protection is to human dignity. At the same time, this right may be considered to have been declared, without the Chinese State having any greater commitment to such right, in addition to those which it considers appropriate.

However, in other articles of the Chinese Constitution, even though it is not explicitly mentioned, the right to dignity ends up being protected through the protection of specific aspects of dignified existence. A clear example of these more recent changes is the determination of the inclusion of persons with disabilities in the labor market, as provided for in Article 45, paragraph 3, of the CPRC. Another example is the inclusion of the prohibition of "ill-treatment of old people, women and children" in article 49, paragraph 3 (PEOPLE'S REPUBLIC OF CHINA, 2000, p. 698).

According to the UPR report, by 2013 in China, more than 60 laws and regulations have been passed to protect the rights of persons with disabilities (UNITED NATIONS ORGANIZATION, 2013, p. 13). Even so, Caicedo and Santiváñez (2007, p. 121) affirm that "although the legislative advances have been relevant, in practice much remains to be done. The notion of rights inherent in human dignity is not deeply rooted in Chinese society".

Another sensitive issue for the protection of fundamental rights in China is the constitutionality control model. It is up to the People's Assembly to both make constitutional review of infra-constitutional norms and reform the Constitution itself. "In other words, it is the legislator himself who is in charge of controlling the constitutionality of his acts and at the same time revising the content of constitutional provisions" (CAICEDO; SANTIVÁNEZ, 2007, p. 123). Added to this is the constitutional use of passing through the Communist Party summit in advance of any question that may be deliberated by the APN, thus becoming extremely controversial the Chinese constitutional control system.

Such critiques do not, on the other hand, alter the transformation that Chinese law has undergone in the last three decades, driven largely by economic motivations and centered on

political institutions that remain authoritarian and extractive (ACEMOGLU; ROBINSON, 2012), but which have ended in legal terms because it focuses on the inclusion of human rights within the list of fundamental rights and guarantees of citizens in a language focused on separating the protection afforded by Chinese domestic law from any reference to international human rights law.

Regarding the implicit rejection of the universal character of human rights, Chen states the following:

> While Chapter II of the Constitution can be seen as a version of a bill of rights, the term "human rights" was not used until the constitutional review process of 2004. In fact, the term "human rights" had a rather bumpy history in the PRC. […] Instead, all Chinese constitutions have consistently used the term "civil rights", which implicitly rejects the universality of human rights. (CHEN, 2008, p. 130)

The CPRC received, in its last review (2004), an increase regarding respect for Human Rights, provided in Article 33, which provided that "the State respects and guarantees Human Rights" and that "every citizen enjoys the rights and, simultaneously, must fulfill the duties prescribed by the Constitution and the law." Nevertheless, the protection of human rights remains subject to defined restrictions in the interest of the State. Article 51 of the Constitution provides that "in the exercise of their freedoms and the citizens' rights of the PRC shall not harm the interests of the State, society and the community or against the legitimate freedoms and rights of other citizens."

The need to reconcile the exercise of constitutional rights with other citizens' rights or the interests of the community is not questioned. However, when it is said that the exercise of such rights will not oppose the interests of the State, the Chinese Constitution contradicts one of the main referents of the current constitutionalist paradigm, that the interest of the State is and can only be respect and maximum promotion of fundamental rights.

Despite the changes in Chinese legislation, both constitutional and infra-constitutional ones, the reports are that there are still many problems of adequate normative densification, which allows us to ask about the existence or not of an abyss between the Chinese constitutional text and effective legal-political experiences.

Thus, the great question that we must ask ourselves about the situation of the protection on rights of human dignity in China is the extent to which the current model of the Chinese state (and the constitutional culture underlying it) for the promotion of such rights as their reason-of-being; or whether, on the contrary, the nomological discourse of

the protection of the person's rights and the citizen in China is more an instrument of governance, management and strategy of the State (therefore serves the State) than the constitutional *telos* of the Chinese State. This possibility, in our view, cannot obscure the advances in terms of citizens' fundamental rights and guarantees that have occurred in recent decades. Nevertheless, an accurate reflection of the language and constitutional discourse developed by the Chinese jurists in the last few years is an important indicator of which of the two possibilities mentioned above best reflects the current constitutional reality in China.

4 CHINESE CONSTITUTIONAL THOUGHT: VARIABLES OF PERSPECTIVE AND APPROACH ON HUMAN-FUNDAMENTAL RIGHTS AND CONSTITUTIONAL EFFECTIVENESS IN CHINA

In China, the constitutional debate seems to follow the standards and positions formed around the discussion of the formation of a Chinese rule of law - especially since such event begun in 1978 and is pointed out by the legal profession as responsible for the revival of research and of the legal debate in the country.

From the mapping carried out in this research, all authors seem to agree, in the basics, on the relevance of human rights and the discourse about them, as well as on the legally relevant texts for the articulation of legal-dogmatic generalizations. When human dignity is debated, its western origins appear in these authors almost always opposed to starting points present in the Eastern tradition; and the current relevance of the dignity discourse in the West is traced by the Chinese as an impact of World War II. In China, on the other hand, there seems to be a consensus that the importance of fundamental human rights is due in particular to the events surrounding the Cultural Revolution (although in the tone that is involved there are already variations, that is: sometimes regrets, for others it is denounced, variations that extend to the interpretation of the legacy of Mao Tse Tung, sometimes a charismatic leader, sometimes a demagogue). Another generally accepted point (apart from a few laudatory readings attached only to the textuality of the Constitution) is the absence of positive procedural mechanisms to guarantee the "justiciability" of either human dignity or human rights enshrined in both the Constitution and treaties and conventions of which China is a member. One might say that these are the key points of the "general" perspective on the subject in China.

A possible dichotomy between the authors could be drawn from the articulated interpretations regarding the constitutional function of the idea of dignity. It would then be those who seek to defend an interpretation of human dignity exclusively on a

"subsistence" (or strict) right, in terms exclusively "material" or "materialistic"; and those who understand it in more "spiritual" (or broad) terms, especially linked to political participation, expression and freedom of thought, individual autonomy, etc.

In the first case, both the Marxist-Leninist-Maoist tradition of the People's Republic of China (Socialist Statists) and the "scientific perspective on development" (neo-authoritarian and communitarian) are justified, in which the axiom then supported by Western movement known as Law & Development, that the implementation of the rule of law (with separation of powers, written constitutions and fundamental human rights) would lead to social and economic development. Thus, for the neo-authoritarian and communitarian, it is the economic and social development that will eventually result in an advance in rights, a concomitant advance to the nation's continual rise as a global actor.

In the second case, the approach ends up (especially in the Chinese context) because it is more denunciative and emphasizes what can be called individual and political dimensions of human dignity, as well as supported by experiences in comparative law. The denunciation of cases of patent and latent disrespect for human rights in contemporary China turn out to be a common product in this second perspective.

While for the first side, the isolation of China, whether for geopolitical reasons or cultural issues, appears as a determinant presupposition of the interpretation of human dignity, in which there is a certain "instrumentalization" assumed both for the legal system and for the discourse of the human rights; in second, it is precisely the internationalization of China and the "rationalization" of its legal system that direct the conception that is constructed about it (whose objection could be the uncritically westernizing character that it sometimes is).

Hardly any of the analyzed authors would be perfectly framed on one of the sides described. Qiafan Zhang, for example, while advocating a clearly liberal-democratic version, even "westernized" in comparison to other authors of "human dignity," strives very hard to identify such traits in Chinese cultural tradition. At the same time, Jianfu Chen advocates attention to the specificity of the Chinese case and the implementation of institutional mechanisms for the realization of constitutionally positive human rights – which would not necessarily imply the diffuse control of constitutionality in the American way as proposed by Zhang. Jiang Shigong, an author classified as neoauthoritarian, understands the discrepancy between constitutional text and political reality as a false problem – to consequently rule out the need to implement any mechanisms, while other authors, such as Chengming Yang and Yucheng Guo, who are close to him elsewhere,

accept the legitimacy of the problem – especially with regard to the realization of human dignity and the advancement of the human rights cause in China – and then to argue for the appropriateness of allocating its resolution to the to the Communist Party itself.

So, the paths of what we might call Chinese constitutional thought, the norms followed by the Chinese intellectuals to think of its own constitutional phenomenon, are varied, complex, and difficult to schematize. The sampling of authors below seeks to demonstrate this variety and complexity.

4.1 THE CONSTRUCTION OF AN AUTHENTIC CONCEPT OF HUMAN DIGNITY IN CHINA AND ITS IMPLICATIONS IN REDUCING THE CONSTITUTIONAL SUBSTANTIAL DEFICIT BY ZHANG AND JIANG

In his book *Human Dignity in Classical Chinese Philosophy: Confucianism, Mohism, and Daoism*, Beijing University law professor Qianfan Zhang seeks to answer whether there is a conceptual contribution from classical Chinese philosophy to the conceptual understanding of human dignity (and, if so, what would it be). In his view, a constitutional theory based on human dignity has many implications in practical life, by bringing with it, for example, the innate ability to resolve tensions arising from the conflict between rights and thus serve as the organizing criterion of normative complexity. In his view, the emphasis of the Chinese perspective on the dimensions of reciprocity and harmony inherent in human dignity has to contribute both domestically and internationally to this theme.

Thus, a common point in the author's perspective between the Confucian, Maoist, and Daoist teachings would be the notion that "respect for human dignity commands that if the public power wants to be legitimate it must treat all as an end, and never as mere means", either for the achievement of the government's own objectives, or "for the maintenance of social order or political stability." Consequently, "the State and society must take such moral belief seriously, refraining from any positive act to prevent the personal development of these virtues." Human dignity would be, in this interpretation, "violated whenever a person is deprived of the opportunity to fully develop his/her innate virtues, and any deprivation on behalf of only public authority should be seen as an illegitimate exercise of power." (ZHANG, 2016, p. 202)

In his article *A constitution without constitutionalism? The paths of constitutional development in China*, Zhang attempts to analyze recent developments in Chinese constitutional law from two perspectives, which he portrayed in two episodes. In the first, he examines the

"official path" initiated by the Supreme People's Court's ruling in the Qi Yuling case in 2001. In the second, on the "unofficial" path, he analyzes the populist development symbolized by the Sun Zhigang incident in 2003, when the people, for the first time since 1989, vehemently protested against the illegalities of a local government. Assessing the successes and failures of both alternatives, the article concludes with the need for institutional arrangements that make it possible to achieve the Constitution and, at the same time, the flowering of a constitutionalist tradition.

Specifically on the difference between official speeches and actual Chinese practices, on the issue of the realization of rights and freedoms, Zhang's comments are significant. While, on one hand, "laws and regulations in China appear to have been promulgated for the common good", which may be as much a "consequence of the good will of the ruler" as "a result of constraint political", with its promulgation often being "the need to appear in a manner appealing to the people", on the other, all these legal novelties remain "unusable because of the lack of any improvement in institutional mechanisms to ensure rights" (ZHANG, 2010, p. 954).

Again in the text of Zhang, it appears the style based on references to Chinese tradition to address the issues of contemporary Chinese constitutionalism. Thus, the author returns to Mêncio to remind us that laws do not apply on their own, from which derives the "necessity of a moral government and institutionally linked to the faithful execution of the laws". With this in mind, and from a certain distance, those successful cases of political embarrassment, "such as the Sun Zhigang affair, the Tang Fuzhen incident", or even the famous Xiamen square march "when measured against the highest number of failures in the day to-day life of Chinese public life illustrate that the struggle for rights may be a struggle to climb an extremely steep hill", if there is no proper institutional support (ZHANG, 2010, p. 975).

Consequently, protests, demonstrations and other ways of the people express themselves and vindicate their interests that need protection through effective institutional arrangements, "such as periodic elections of public representatives, freedom for the formation of political groups competing for the support of constituents, and counterweights between the various centers of power, and the control of constitutionality by impartial tribunals." Without this, China would remain in its present situation, of a constitution without constitutionalism, because of the lack of "institutional arrangements that keep its government accountable to its citizens, so that it faithfully fulfills the Constitution and the laws" (ZHANG, 2010, p. 976).

In parallel, it is worth mentioning the work of Professor of Law Theory at Beijing University, Shigong Jiang. In a recent article he seeks to argue for the structural character, in every

legal order, of the dichotomy between a written constitution and an unwritten constitution, the former being one of the forms of manifestation of the second, intimately related to the political reality of each nation. But not just that. The unwritten constitutions would condition and determine the practical application of constitutional provisions, so that research in constitutional law, if desirous of assuming a scientific and non-ideological character, it should turn to the systematization of the unwritten constitutions. Especially in China, this would imply the abdication of denouncing or accusing the People's Republic of China of not conforming to the ideals abstractedly imported from the West, recognizing the importance of the constitutional reality for the country's rise to its present international position, as well as its role in the continuity of this trajectory (JIANG, 2010, p. 14).

Nonetheless, Jiang, in his analysis of the state affairs of present-day Chinese constitutional thinking, ends by recognizing that Chinese constitutionalism is mostly structured from references to Western model constitutionalism. Thus, both those who advocate putting down the present constitutional text to erect a new constitution that is more democratic and truly committed to rights of dignity, and those who think the Chinese constitutional problem as a problem of applicability of the text by the Courts, as well as those which advocate punctual reviews of the Chinese constitutional model, are largely conditioned to apply Western ideas in the interpretation of Chinese constitutional concepts, according to Jiang (2010, p. 15).

Therefore, in spite of the distinct interpretation regarding the need for constitutional control by impartial courts in the works of Shigong Jiang, his conclusions are also in the direction of the search for the development of an authentic and autonomous Chinese constitutionalism to the typically Western constitutional models. But not just this. This would be, in the view of this author, the "real contribution" that China would have to make to human civilization. To assume this responsibility would also imply "taking the rise of China seriously" with the equally serious approach of "the constitutional system that made Chinese success possible", in order to reduce the mismatch between "the innovations of the Chinese scholars themselves" and the "practical creativity" of his people and their rulers (JIANG, 2010, p. 43).

4.2 THE CHALLENGES OF THE CONSTRUCTION OF A CHINESE CONSTITUTIONAL CULTURE RESPECTING HUMAN DIGNITY IN THE TRIPLE EXTRACTION OF THE MILLENNIAL TRADITION, SOCIALIST TRADITION AND WESTERN TRADITION, BY CHEN AND LIU

In his book, *Chinese Law: Context and Transformation*, Jianfu Chen, professor of Law at La Trobe Law School, proposes a synthetic but historically oriented presentation of the current state of Chinese law. The author analyzes the various spheres of Chinese law, with a focus on the confrontation between the transformational impulses and the permanence of the Chinese tradition, be it millenarian or more recent, regarding socialist legality.

Chen points out, as to the Constitution, that the second chapter of the constitutional text only really came into being as a charter of fundamental rights from the 2004 reform. This demonstrates the troubled character of the subject, up to then, in the Chinese context. The author points out that the term "human rights" was systematically replaced by the term "citizens' rights", which implies subjecting these rights to State issues and to possible selectivity. The author identifies a change in this respect from 2004, but with caveats. Thus, despite the efforts of "many international human rights organizations, human rights activists and Chinese dissidents" to make clear "the great gap between law and reality," the very conceptual and theoretical foundations of purely positive rights are marked for troubling failures, even more if interpreted in the context of the "constraints imposed to its effectiveness" (CHEN, 2008, p. 130).

Thus, if the 2004 review of "informal freedoms, particularly in the economic spheres, has been expanded considerably since 1978, together with the blessings of economic liberalization", one cannot forget, however, "the initial motivations for doing so". While "the inclusion of provisions regarding personal dignity and security results from genuine concern for the cruel treatment of millions of Chinese, including senior officials during the Cultural Revolution", this emphatic performance in protecting the rights of citizens "was largely motivated by considerations involving the reconstruction of the Party's legitimacy, strengthening its domination, as well as the establishment of a stable social order for smooth economic development" (CHEN, 2008, pp. 131-132).

Chen, in his analysis, calls attention to the weight of the Marxist principle of "Unity between Rights and Duties" in shaping the Chinese constitutional system for the protection of rights and freedoms. The author asserts that this principle mitigates the level of protection of rights in China, as state practices and government authorities give more weight to the dimension of duties than

to the rights, although a growing number of Chinese scholars increasingly emphasize on their speeches the importance of rights. For Chen, the principle can be inferred directly from the Constitution, in its article 33, which reinforces the resistance of the governmental authorities to changes on this issue. Chen also points out that other provisions of the Constitution reinforce the government's position and make changes difficult. This is the case of Article 42 of the Constitution which, in dealing with work at the same time as law and duty, ends up reinforcing governmental reading (CHEN, 2008, p. 133).

Chen points to another problematic aspect of Chinese constitutionality, rooted in both the millennial tradition and the Marxist-Maoist experience, embodied in the almost absence of state control mechanisms regarding respect for basic human rights. For him, this has been a sign of change since 2004. The changes, however, are still insipid about this important aspect of building a society that respects human rights according to Chen. After all, "the Constitution makes clear that the interests of the state, which must be interpreted by the state authorities themselves, are above those of individuals". This dimension removes the apparent similarity of the rights present in the Chinese Constitution to the Western charters, according to Chen, being both of different qualities. In this sense, the author points out that "there is no mention of the right of citizens or organizations to question the constitutionality of governmental actions, or any mechanism established for the realization of constitutional rights", to suggest a *de facto* prohibition on the direct constitutional provisions before a court of law. As a result, "the protection and exercise of citizens' rights" would depend "more on the development of individual statutes, such as those relating to administrative law, than on the Constitution itself" (CHEN, 2008, p. 135).

As a consequence of this reality, the finding of an abyss between text and reality, system and practice is a commonplace for a considerable number of Chinese jurists. For Jianfu Chen, the root of this problem is power, or rather the lack of checks and balances when exercising, and the consequences of that for the protection of the person's rights. The result would be, in general terms, the "privatization of public powers", which has, for example, a critique of the difficulty of implementing the law independently, through the due mediation of just institutions that should be interposed in the relationship between individuals and government. Although the efforts of some organs, at central or local level, are regrettably neglected, they are unable to transcend the specific cases for which they are initially mobilized, to raise doubts, in the author's view, as to the very importance to adopt rights-specifying laws in the current Chinese system (CHEN, 2007, p. 738). It seems that, to a certain extent, the government's instructions

and the Party's instructions still have more practical weight in the decision-making related to the Chinese jurisdiction than the abstract laws, much more turned to be an answer discursive to the expectations of recognition of rights, than an instrument of transformation itself.

In an article that aims to update this debate, eight years after Chen's analysis in 2007, the author refers, in short, to the almost ten years that have passed as a "lost decade" regarding substantive constitutionalisation of the country. Chen affirms that the Party's choice for a "modernization not according to Western expectations, but according to the reality and the needs of the Chinese", unfortunately, has meant in recent years not the engagement by humanitarian and social transformations to own way, but the concern to maintain over strict Party control what can be considered in China as the "needs" of the Chinese. Thus, for the author, the proposal of modernization presented for the last decade was directed much more to the maintenance of the consolidated leadership and control of the Party, than the establishment of an effective system of checks and balances without which it remains an inglorious task and fight and claim for rights in China (CHEN, 2015, p. 922).

An example of this approach to rights based on the principle of unity between rights and duties propagated by the Chinese authorities and how this reading finds echoes in the Chinese intellectuality can be found in such authors as Huawen Liu, Assistant Director of the Law Institute International Academy of Chinese Academy of Social Sciences.

Liu has a constitutional approach closely matched with the Chinese governmental perspective; and, in addition, it verticalizes this perspective in approaching the theme of the right to dignity. Liu explains and analyzes what would be the "theory of dignity" adopted, although implicitly, by the Chinese authorities. For the author, the particular official interpretation regarding human rights and human dignity is fully relevant to the Chinese political reality. Thus the preference accorded to the material dimension of human dignity, then translated in the emphasis on economic and social rights, would be a requirement of the circumstances in which the People's Republic of China finds itself. Finally, in any case, the so-called "theory", because of its pertinence, would show a correct path for the development of the cause of human rights in China (LIU, 2012).

In 2010, Chinese Premier Wen Jiabao, at the third session of the Ninth National People's Congress, declared that all decisions and actions taken and adopted by the Chinese government aim to promote the happiness and dignity of citizens, as well as the promotion of a fair and harmonious society. According to Huawen Liu, the Chinese media was quick to

call such statements "dignity theory" of the Chinese leadership. Such theory, in its view, would not fail to be in accord with the foreign policy of the People's Republic of China, with respect to human rights, because of its coherence or harmony with the nature attributed to human rights in the various international instruments, whether from the United Nations, or from other communities or organizations, from which China has come to terms (LIU, 2012, pp. 368-368).

Moreover, according to Huawen Liu, the "theory of dignity" advanced by the Chinese authorities would be in line with other positions they declared, such as a people-oriented government, and a scientifically oriented economic and social development. This would ultimately prove that the Chinese government protects and respects human rights, and its way of doing so would significantly contribute to the future development of the human rights cause in China (LIU, 2012, p. 368). Readings such as that of Liu, in our view, are consistent with the discourse of power structures in China, and express the difficulty of overcoming the Chinese political heritage, as expressed by Chen.

4.3 LAUDATIVE SPEECHES ON THE ROLE OF THE CHINESE COMMUNIST PARTY IN THE CONFIGURATION OF HUMAN RIGHTS PROTECTION IN CHINA, ACCORDING TO YE AND XIELING ZHANG

Xiaowen Ye of China's Society for Human Rights Studies proposes to answer three recurring questions on the international scene about the cause of human rights in China. The main one, to inform all others, concerns the role of the Communist Party of China in relation to the Chinese State and, consequently and specifically, the development and protection of human rights in the country. For the author, it is the Communist Party that enables the translation of universal values to determine the content of human rights to concrete Chinese reality, because of its commitment to the Chinese people. This author therefore gives a favorable reading of the constitutional role of the Party in the protection of human rights.

For Ye, the importance and centrality of the Communist Party of China cannot be ignored or overlooked, extending, of course, to the widespread and competing interpretations of human rights by Chinese jurists. In this sense, Xiaowen Ye, for example, defends, in tone of an allegedly scientific causality, that the Party protects human rights by virtue of its fundamental principle of acting in the service of the people. More important, however, is their privileged position to choose the right way to effect human rights, in accordance with China's historical logic and national conditions, with a view to their liberation and promotion of their economic and social development. This course of action, based on the scientific doctrine

of development adopted by the Party, in the opinion of the author, breaks with the supposedly traditional dichotomy when the human rights, between individuals and the State, are fulfilled. Thus, the universality of human rights would be respected by giving priority to the right to life and subsistence; equality of participation and development by ensuring steady and accelerated economic and social development; the freedom of the people for the protection of public order. In sum, as it developed economically and socially, the People's Republic of China, led by the Communist Party of China, was moving, according to the author, toward harmonization and human emancipation, with the consequent progress of its cause regarding rights of dignity (YE, 2012).

Xiaoling Zhang, Director of the Center for Human Rights Studies at the Communist Party of China School, seeks to explain how the Chinese government has sought to protect and respect human rights, with its emphasis on economic and social rights, and how such a course of action has generated positive results, so as to be able to speak of progress in the cause of human rights in China.

In Xiaoling Zhang's interpretation, dignity is enucleated, in the Chinese constitutional system, in the right to subsistence. However, for this author, "the right to subsistence translates into the right of the people to live decently, covering all the basic content of the rights to life, as well as economic, social and cultural rights" (ZHANG, 2012, p. 434). Assuming it as the most important of human rights is a requirement of China's "concrete circumstances", which are adequately taken into account by the Chinese government and the Communist Party of China, by determining that economic development is the central task, most important, and first priority of the government. For the author, consequently, since 1978, many are the gains of the Chinese population. For example, 200 million people have been lifted out of poverty, life expectancy has increased to 73,5 years, as well as the entire Chinese population, of all ages, has undergone the nine compulsory years of elementary education, with respect to the year of 2010. The author adds that subsistence guarantees have been increasing in China with improvement and expansion of the conditions of access to housing, employment and basic services. For the author, the current policy has been developing the right to subsistence in economic, social and cultural rights, all through the positive performance of the Chinese Communist Party (ZHANG, 2012, pp. 434-437).

4.4 CETICISM ON THE WESTERN HUMAN RIGHTS SPEECH AND MARKS OF A MARXIST LOOK AT THE UPDATE OF THE HUMAN RIGHTS DISCUSSION IN CHINA, ACCORDING TO THE READINGS OF YUNHU, SUN AND WU

Dong Yunhu, Secretary of the China Society for Human Rights Studies, considered by many to be the greatest authority on human rights in China, in his programmatic and strategic text, seeks to identify the importance of human rights as a legitimizing discourse of Western hegemonic domination in international community, how this situation can be challenged, and eventually reversed in favor of China and its distinct conception of the cause of human rights.

> In a way, whoever holds the right of speech and domination in the field of human rights occupies the highest moral stratum, master of international public opinion. The international struggle for human rights is essentially the struggle for the right of speech and domination. At present, the international community is not only filled with expectations of Chinese development but also with doubts, and human rights issues are always the main instruments used by the Western world to distort and defame China, misleading international public opinion. Therefore, the innovation and development of China's human rights discourse and the improvement of China's human rights legal discourse are not only the only requirements to counter the Western human rights offensive while safeguarding national security, inevitable to improve both the national image and its soft power, creating a favorable context with international public opinion for China's peaceful rise. (YUNHU apud SUN, 2015, p. 212).

Pinghua Sun, a professor at the University of Political Science and Law of China, seeks to develop and systematize, with empirical contributions, the program proposed by Dong Yunhu (discussed above), by contrasting the Chinese and Western perspectives, and how the resulting human rights discourse of the second ends up harming and disrupting the rise of the People's Republic of China, in his view. The fundamental traits of a Chinese alternative to Western human rights discourse seek to be identified, and suggestions for how they can be developed, are proposed together with the promotion of the task of developing them.

Thus, even stating all the problems and challenges of modern Chinese society, Sun constructs a speech with performative pretensions facing the West as the other to be overcome and proposing the development of human rights discourses and practices in China as a strategy to take a leadership geopolitics. In the words of the author, only when Chinese intellectuals strengthen "research into realistic problems, exploring strategies and methods for resolving them" can China "bravely face the challenges of Western powers with their accusations and criticisms." The Chinese human rights discourse would then serve as a basis for the occupation of its command post in the "international discourse of human rights in international exchanges, achieving rational, beneficial and procedural effectiveness" (SUN, 2015, pp. 211-212).

On the other hand, Xiaohui Wu proposes, in an interesting article, to explain the peculiarities of the Chinese interpretation of human rights, removing the apparent deficiencies if in comparison with the liberal democracies of the West, by linking it to its Marxist-Leninist tradition and such tradition is in accord with the Chinese reality. Thus, Wu begins by stating that although the 1982 Constitution includes many of the same rights as Western liberal democracies, there are shortcomings and limitations in the Chinese constitutional text even after its reforms if it is intended to be the basis for full civil and political rights protection in China (WU, 2002, p. 343).

The author seeks to identify the peculiar Chinese way of approaching the issue of the promotion of human rights, by means of three fundamental characteristics to mark the DNA of Chinese constitutionalism. First, the human rights discourse of the People's Republic of China is based on the understanding that the related issues are for the most part "within the domestic jurisdiction or sovereignty of each country." Consequently, "foreign criticisms of human rights in China are interpreted as interferences in their domestic affairs". Secondly, "economic development" is the foundation of human rights, determining "the extent of guarantee of these rights". The rights system resulting from this position has the right to subsistence as the most important, with the Chinese government giving precedence, "because of its huge population and lack of modernization" to "food, housing, health, and education to the detriment of other rights". Lastly, and third, the rights and duties of citizens would be inseparable. Every citizen, therefore, would enjoy his/her rights at the same time as "he/she must fulfill his/her obligations prescribed by law." Human rights would thus be "always subject to limitations on their enjoyment, which governments are entitled to impose" (WU, 2002, pp. 343-344).

In this sense, the illiteracy of the Marxist heritage with the peculiar way in which the Chinese treat the promotion of human rights, privileging the aspect of the satisfaction of the existential minimum and, in general, silencing civil rights, of private and political freedom, has role in understanding the promotion of human rights in Chinese constitutionalism. Immediately, for a "nation long subject to crisis and chaos, it seemed reasonable for the People's Republic in its earliest years to prioritize the right of subsistence over other kinds of rights". Moreover, in Wu's assessment, since the founding of the People's Republic of China in 1949, "the socialist economic system" was "very successful in ensuring the equitable distribution of goods, so that the basic needs of the population were met, despite the low technological level, and low

per capita income in the country". In doing so, not only in theory but in practice, it would be difficult to deny "that China has had memorable successes in meeting the basic needs of the people with its practice until then" (WU, 2002, p. 368).

5 CONCLUSION

The Chinese constitutional history demonstrates the history of a constitution that is shaping the planning built by the Chinese Communist Party. In its current conformation, the Chinese constitutional experience shows several signs of the permanence of the primacy of the political over the legal and the economic over the legal. It should be noted that fundamental rights in China are all presented as something that the State provides and which the State establishes, in terms of what the State plans. Thus, the Chinese constitutional language did not overcome the paradigm of the primacy of the state public interest. If it is the State that provides the right to work and if it is the state that offers the right to life, for example, then, from a logical point of view, such rights cannot be opposed to the State, nor can they be presented as resistance to state planning the economy and society. Fundamental rights are thus an instrument for the management and stabilization of China's progressive social and democratic openness, but they are not (at least still) the fundamental mark of China's legal-political institutionality.

Chinese isolationism appears, just like the debated and historically more recent American isolationism (HIRSCHL, 2014, pp. 28-31), as another possible posture, marked, particular and currently, by its resistance to judicial control of constitutionality and international conventionality control. The structural roots of this Chinese option go back to the Dynastic period, due to the consolidation of a self-interpretation based on Chinese superiority, and reaffirmed in the Soviet and Maoist periods, leaving marks in the Chinese way of "opening up" to the economy without any openness real to inter-constitutionality, when, then, the discourse of human-fundamental rights could become just speech, in the game of international commercial relations.

As for the results of the research carried out on the dignity of the human person in the Chinese constitutional culture:

The traditional Chinese bases are evidently non-Western (and we could say, with Jullien, radically non-Western), and a strong and stable comparison to an assimilation of Western constitutionalism is quite dubious. We have seen in this work that the Chinese normative tradition is marked by the presence of deep worldviews such as Confucianism, Taoism, and Legalism, as well as by a more than millenarian bureaucratic experience and power management

in territories of continental dimension. As a legacy, we conclude, in short, that this tradition marks China as a society quite permeable to logics of hierarchy, as well as the logic of the uncontested exercise of power, and the superposition of duty to law. On the other hand, it is possible to see in China a peculiar vocation for social harmony, as much as it is possible to question whether the Chinese idea of social harmony is related to the idea of promoting human dignity (at least in relation to its western configuration).

The Chinese experience of Westernizing modernization is complex. As we have seen, it has both a first phase built in close proximity to a nationalist liberalism and a second phase marked by the reception of the Soviet socialist model, followed in turn by a radicalization in the manner of State Socialism in the experience of Maoism and of the Cultural Revolution, culminating, finally, in a self-described process of "opening up", updating and flexibilizing the socialist model, which allowed both the peculiar Chinese introduction of capitalism into socialism and the supposed or at least officially announced rise of the constitutional order to the level of superiority in the nomological hierarchy of the Chinese State.

The analyzes and critical reflections developed in this research led us to conclude that the contemporary Chinese constitutional culture, in spite of the transformations towards the discourse of civil and social rights, is still marked by utilitarianism and constitutional pragmatism (a strategic and instrumental use of the constitutional discourse). This leads to a difficulty in dealing with the Constitution and fundamental rights as an end to the political-state experience, which continues to function much more as a means of legitimizing political doing in times of globalization than as a reason for being of the State and of the Party.

Thus, despite our demonstration of the human rights and human dignity discourse in Chinese constitutional nomology, we find that the Marxist-Maoist heritage (recent, if we consider Chinese chronology) mitigates the normative force of these constitutional devices, the permanence of techniques of social regulation and organization of public policies centered in a political system in which the focus is the orientations and goals of the Chinese Communist Party (which can be considered the amalgam of the Chinese bureaucratic elite). Internally, the Chinese bureaucratic elite understands that the experience of the Single Party did not prevent the consolidation of a democratic system of political deliberation in their country, but the impossibility, for example, of the Judiciary in China to directly cite the Constitution as a source for deciding and judging issues of civil and social rights (as demonstrated in the thesis) shows at least an imbalance in the balance of power in Chinese

constitutional culture, the result of which is, above all, a difficulty in empowering Chinese civil society against the established political status quo.

In the context of this State of affairs, a survey of the positions of Chinese intellectuals dedicated to the study of the constitutional phenomenon, human rights and the discourse of human dignity in China was critically analyzed. This analysis was concluded by a complex scenario of positions in the current Chinese debate on these topics. A possible explanatory typification achieved in the thesis organizes the constitutional debate on fundamental rights in China in a dichotomy between those authors who seek to defend an interpretation of human dignity exclusively as a "right to subsistence", and those who understand it in terms more to the rights of "self-expression", especially linked to political participation, expression and freedom of thought, individual autonomy, etc.

For the former, China's low permeability to global conversation, whether for geopolitical issues or cultural issues, appears as a determinant assumption of the interpretation of human dignity, which assumes an instrumental character, as a consequence of understanding rights in a utilitarian or pragmatic perspective.

For the second typification of authors, it is precisely the internationalization of China and the "rationalization" of its legal system that would direct the conception of dignity that should avenge in China, according to them. The first objection to these usually occurs in the accusation of the uncritically westernizing character it sometimes possesses.

The first group of authors, who are now majority in Chinese constitutional culture, base this interpretation on both the permanence in the Marxist-Leninist-Maoist tradition and the alternative of employing a scientistic perspective on development, with the peculiar note of inversion, in China, of the axiom supported by *Law & Development*, that the implementation of the rule of law would lead to social and economic development. Thus, for the majority group of Chinese constitutionalists, it would, as we have seen, be the economic and social development that would eventually result in human rights advancement, concomitantly with the nation's rise as a global actor.

In the second group of authors, we see that the approach turns out to be more denunciative, emphasizing the inadequacies and omissions of Chinese government practices in the promotion of rights of dignity, as well as being supported by experiences in comparative law.

The denunciation of cases of patent and latent disregard for human rights in contemporary China ends up appearing (albeit in a non-blatant way) in the literature produced by this second perspective, while practically nonexistent in the intellectual production of the

Chinese constitutionalists attached to the status quo.

Thus, there is a gap between the declaration and the promotion of human-fundamental rights in China. The Chinese case is not that of a country that does not comply with its laws (as it seems to us to be the Brazilian case). The Chinese case is the case of a country that complies with its laws, but sees the duties therein envisaged as superior and prior to rights, and administrative and bureaucratic regulations as the main beacons, where the Constitution is only a symbol of a new utopia (that of full economic development), whose search justifies and legitimates day-to-day rules that contradict the constitutional utopia itself.

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