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Creating a Harmonious Society

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china perspectives

The norms of Chinese harmony

Disciplinary rules as social stabiliser

A harmonious society is one in which the rule of law is given greater strength and authority [1]

LEÏLA CHOUKROUNE
AND ANTOINE GARAPON

Whereas the concept of "socialist rule of law" punctuated political discourse in the late 1990s, it is the idea of a "socialist harmonious society" that today casts a strange light, clearly more Marxist than Confucian, on Chinese legal reform. This theoretical framework turns law into a disciplinary principle dedicated to society's moral construction. If law is seen as an instrument for legitimizing power, it remains implicitly but primarily subordinate to the regime's durability. Although more and more ordinary citizens are seizing hold of normative tools being put at their disposal, the party-state, fearful of being outflanked, is seeking to snuff out the democratic ferment contained in forces it has itself unleashed.

Economic modernity, social stability and legal tension

Whereas the concept of "socialist rule of law" (*shehui zhuyi fazhi guojia* 社會主義法治國家) [2] punctuated political discourse in the late 1990s, it is the idea of a "socialist harmonious society" (*shehui zhuyi hexie shehui* 社會主義 和諧社會) that today casts a strange light, clearly more Marxist than Confucian, on Chinese legal reform.

For more than five years now, Chinese leaders have been trying to deal with numerous social protest movements [3] by constructing an overarching theoretical discourse which turns law into one of the regime's best allies. The first attempts to reduce inequalities that had widened greatly in Chinese society began in November 2002 when the need for social harmony figured in debates during the 16th Congress of the Communist Party of China (CPC). In September 2004, the Fourth Plenary Session of the Party's 16th Central Committee clarified the leadership's goals. From then on, Hu Jintao and other top Chinese leaders repeatedly referred to the concept of "socialist harmonious society", which acquired a theoretical foundation in the landmark resolution of the Sixth Plenary Session of the 16th Central Committee in October 2006. Its resolution, [4] organised as a system of core values, [5] specifies in familiar ideological terms, a set of principles based on "Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the 'Three Represents'." [6] All this is directed towards the progressive realisation of a harmonious society, by 2020. Although the text of the resolution is rather vague, it has an eye-catching group of binary elements. These concepts, conceived as comple-

1. *Hexie shehui, xuyao yi ge geng qiang da de, geng quan wei de fazhi.* Taken from resolution adopted at the 6th plenary session of the 16th Central Committee of the Communist Party of China in October 2006.
2. The 1999 amendments had ratified this development by inscribing the concept of "socialist rule of law" into the Chinese constitution. Article 5 says: "The People's Republic of China governs the country according to law and makes it a socialist country ruled by law. The state upholds the uniformity and dignity of the socialist legal system." The text of the Constitution of the People's Republic of China (*Zhonghua Renmin Gongheguo Xianfa* 中華人民共和國憲法), as amended in December 2004, is available on the following site: http://english.gov.cn/2005-08/05/content_20813.htm (Consulted 24 November 2007).
3. Figures for the annual number of incidents seem to be getting harder to find. A report of the *Congressional Research Service* based on official Chinese sources spoke of a 50% increase in "public order disturbances" between 2003 and 2005, with 87,000 incidents for 2005 alone. See. http://www.cfr.org/publication/10748/crs_report.html (consulted 18 September 2007).

   See also, *China Rights Forum*, *China's social insecurity*, No.1, 2005.

   These movements have obviously not stopped over the last two years, as the Chinese press itself is reporting on them daily. A recent report in the *International Herald Tribune* (8 July 2007) noted a *Xinhua* dispatch saying that local authorities who do poorly in maintaining social order in rural areas could not qualify for promotion. See http://www.iht.com/articles/ap/2007/07/08/asia/AS-GEN-China-Rural-Unrest.php (consulted 18 September 2007).
4. Available in full in Mandarin on the *Xinhua* website: http://news.xinhuanet.com/politics/2006-10/18/content_5218639.htm (consulted 25 September 2007).
5. See Xinhua http://news.xinhuanet.com/english/2006-10/18/content_5219111.htm (consulted 25 September 2007).
6. Included in the preamble of the Constitution through the 2004 amendments, the theory of the 'Three Represents' (*san ge daibiao*) seeks to legitimize the move to integrate "the most advanced productive forces" in running the country. Hence the opportunity for entrepreneurs to become Party members.

mentary, however contain a number of contradictions which become clearly apparent once the proposition is analysed in its entirety. The socialist harmonious society is to be founded on "democracy and the rule of law, equity and justice, honesty and comradeship, vitality, stability and order, as well as harmony between Man and nature". All these elements are closely linked to the establishment of the socialist rule of law, an ideal which seems to run the whole edifice. But it remains to be seen which will prevail – rule of law over democracy, equity over justice or order over vitality. A rudimentary explanation had actually been given by Hu Jintao on 4 March 2006, when he drew up a list of "Eight Honours, Eight Disgraces" marking a moral boundary between good and evil: [7]

- *Love the country; do it no harm.*
- *Serve the people; do no disservice.*
- *Follow science; discard ignorance.*
- *Be diligent; not indolent.*
- *Be united, help each other; make no gains at others' expense.*
- *Be honest and trustworthy; do not give up morals for profits.*
- *Be disciplined and law-abiding; not chaotic and lawless.*
- *Live plainly, struggle hard; do not wallow in luxuries and pleasures.*

These rules of conduct for the development of a "socialist morality" are not just a flight of fancy; but are meant to be practiced. An example of this is Hu Jintao having ceremoniously greeted 53 new "moral models". [8]

The penultimate proposition above bears reflection: "Be disciplined and law-abiding; not chaotic and lawless." This goes to the heart of the theoretical framework which seeks to turn law into a disciplinary principle bearing in mind the moral construction of society. Law not only disciplines the conduct of the physical individual; it captures the heart through a willing commitment to higher moral imperatives. [9] This objective, to be considered in greater detail in the main body of this discussion, was clearly illustrated in the opinions published by the Supreme People's Court on 15 January 2007. The recommendations, aimed at clarifying the role of the judiciary in building the socialist harmonious society, [10] were followed in March 2007 by two statements by the Supreme People's Court stressing the "positive role" of mediation in resolving conflicts. According to this set of directives, the first "duty" of people's courts is to resolve social conflicts while maintaining stability, safeguarding economic development and promoting social harmony in the pursuit of justice and equity. [11] The idea of a "socialist rule of law" is a constant point of reference as can be seen in this set of injunctions: "A harmonious society is a society governed by law" (*hexie shehui jiu shi fazhi shehui* 和諧社會就是法治社會); "A harmonious society depends on the rule of law" (*hexie shehui yao kao fazhi* 和諧社會，要靠法治); "A harmonious society needs a stronger legal system that wields greater authority" (*hexie shehui xuyao yi ge gengqiang da de geng quanwei de fazhi* 和諧社會，需要一個更强大的、更權威的法治).

At the same time, Luo Gan's statements have clearly set limits on the judiciary's ambition to act independently. In a statement entitled "[T]he political responsibility of judicial organs in constructing a harmonious society", published in the Party periodical, *Seeking Truth*, Luo Gan, a prominent former member of the CPC Politburo Standing Committee, who had been in charge of judicial matters, launched a vicious attack on the regime's enemies, who were accused of using the courts to modernise China by westernising and dividing it. [12]

If law is viewed as an instrument for legitimising power, its utilisation is implicitly dependent on a higher imperative, the regime's durability. Herein lies the paradox of Chinese judicial and institutional reforms: while more and more or-

7. http://news.xinhuanet.com/english/2006-10/18/content_5220576.htm (consulted 25 September 2007).
8. See http://www.chinadaily.com.cn/china/2007-09/19/content_6118495.htm (consulted 25 September 2007).
9. The dialectic of the link between law and morality is now directly dealt with by members of the National People's Congress (NPC). See Fa Gongwei, "The law as lower limit of morality and morality as higher standard of law."http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=372398&pdmc=110118 (consulted 10 October 2007).
10. The complete text of the opinions is available in Mandarin on this website: http://www.lawinfochina.com/law/display.asp?db=1&id=5886&keyword=harmonious%20society (consulted 18 September 2007).
11. Specifically, these opinions stress the need to protect individual rights, especially those of workers and peasants. A number of social conflicts such as those arising from campaigns to restructure state enterprises are targeted. Direct reference is made to protecting fundamental rights in the penal system. Courts must also pay special attention to resolving environmental disputes and issues involving international and comparative law, especially those pertaining to Taiwan, Hong Kong or Macao. Lastly, the court's opinions stress the fight against judicial corruption and the need for transparency of the justice system. These latter goals must be fully achieved by 2020, by which time the Chinese judicial system, having become more transparent, will thereby be better able to protect human rights.
12. See http://www.qsjournal.com.cn/qs/20070201/GB/qs%5E448%5E0%5E1.htm (consulted 30 September 2007). All this caused something of a stir and notably drew comment in an article by Joseph Kahn in the New York Times: http://www.nytimes.com/2007/02/03/world/asia/03china.html?_r=1&n=Top%2fReference%2fTimes%2 (consulted 24 September 2007).

dinary citizens are seizing the normative tools being put at their disposal, the party-state, too concerned over the prospect of being outflanked, is seeking to snuff out the democratic ferment contained within its own creation. Avoidance of conflict through the mediation of law understood as moral discipline belongs to a pre-political vision of modernity. The tensions and ambiguities of the law contribute as much to the construction of socialist harmony as they do to the liberation of an individual conscious of belonging to a community, but also seeking to live a life of freedom.

We have chosen to consider the Chinese notion of socialist harmony in the context of modernity by seeking to understand the role played by this new legal ethic (I) which is based on a system of justice in search of consistency (II) and which seems to offer an illusory response to contemporary questionings about the idea of justness (III).

Harmonious society: a different ethics of law

China has made undeniable strides over the last 30 years of institutional and legislative reform. The constant flow of norms is impressive, in terms of their vigour and the will behind them. The legal revolutions of 1972-82, 1992-99 and 2001 have reshaped the normative landscape: adoption of a Constitution detached from its revolutionary moorings, promotion of "socialist market economy" and "socialist legal system", accession to the World Trade Organisation (WTO) and a complete overhaul of "economic law" to bring about greater uniformity and improved legislative transparency. The constitutional amendments of 2004 carried this modernising trend further by recognising the "inviolability of private property" and stressing the state's intention to protect "human rights".

These changes in the theory and practice of Chinese law have usually been understood in terms of globalised economic relations, to which China has responded by institutionalising and internationalising its legal system, thereby contributing to the gradual emergence of a legal consciousness and a new way of relating to norms. [13]

And yet, a survey of the whole edifice to try and understand its ultimate purpose would only leave one highly puzzled over this reforming frenzy. What in fact is the goal of these 30 years of legalisation (*fazhihua* 法制化)? The extension of the idea of socialist harmonious society to the legal sphere provides a partial answer, but it is probably not what one hoped for.

A choice of values: harmonious society brings about justice and equity

The socialist harmonious society subsumes a range of values officially inspired by Marxism-Leninism, Mao Zedong thought, Deng Xiaoping theory and the Three Represents. An examination of official speeches and recent legislative measures would, in fact, lead to summarily dismissing the view that it has Confucian influence. Irrespective of whether the party-state invokes them or not, Confucian values do not seem to exert the influence often credited to them, even though such values are increasingly discernible in Chinese society at large. Without actually clarifying the ambiguities of their current discourse, Chinese leaders avoid all direct linkages to Confucian thought. [14] On the contrary, they try desperately to find a common thread between their latest policies and Marxist doctrine. Hence the many references to the *Manifesto of the Communist Party* and the repeated stress on the "core of socialist values". These are systematically laid out, linked to "China's past experiences," and are in fact summed up in Hu Jintao's eight "Honours and Disgraces". [15] In this search for socialist values with Chinese characteristics, the "hero" figure is again sanctified through the designation of "national moral models," [16] the new Lei Fengs of the modern era. [17]

From a legal point of view, it is interesting to note that "socialist harmonious society" now covers all other goals and in a sense, it includes justice and equity. If not exactly a return to the past, this at least suggests a tendency towards circumspection on advances made in protecting and guaranteeing rights. All this gives credence to the view that there are parallel developments of competing legal cultures.

Meanwhile, just the last ten or so years have witnessed an emerging legal culture that is unquestionably new – from

13. On this and for an integrated coverage of the main aspects of Chinese judicial reform, see Stanley B. Lubman and Leïla Choukroune, 'L'incomplète réforme par le droit' [Incomplete reform through law], *Esprit*, February 2004.
14. In this context we share the view of Alice Miller, who believes that the socialist harmonious society is in the process of accommodating itself more readily to a return to the neo-Soviet language dear to Hu Jintao than to a genuine re-reading of Confucian thought.

    See Alice Miller, 'Hu Jintao and the Sixth Plenum', *China Leadership Monitor*, No. 20, Winter 2007. http://www.hoover.org/publications/clm/issues/6301112.html (consulted 25 September 2007).
15. See http://english.cpc.people.com.cn/66102/4933374.html (consulted 25 September 2007).
16. See http://english.people.com.cn/90001/90776/6266474.html (consulted 26 September 2007).
17. On the resurgence of the hero in political discourse at the end of the 1990s, see the fascinating article by Michel Bonnin,"When the Saints come Marching Back", *China Perspectives*, n° 5, May-June 1996, pp. 10-19.

young students' enthusiasm for the legal profession, television programmes denouncing corruption or injustices, the flourishing "literature on the legal system" (*fazhi wenxue* 法制 文學), the rising number of lawsuits, to even the relentless determination of workers or farmers to fight for their rights. Though considered during the revolutionary period to be harmful to the interests of the ruling class, law as a means of resolving social issues seems to be enjoying new found respect. The Sun Zhigang affair definitely heralded a trend to make use of legal solutions. [18] But it also revealed the government's endless capacity to exert control. The reference is to the tragic death in custody of the young designer from Hubei province, imprisoned because he had not been carrying an identity card or temporary residence permit. Brought to light by the Guangzhou press (notably *Nanfang Dushi Bao*), the affair sparked widespread indignation and led finally to a revision of the 1982 administrative " Measures for the Custody and Repatriation of Vagrant Beggars in Cities". But it is sometimes forgotten that this incident also led to a number of convictions and summary executions and a firm gag on the media.

Resisting by resorting to law [19] clashes with the firm resolve of a structure that is at once centralised and powerful, localised and anarchic. The real question raised by this relative alacrity for legal matters is the justiciability of rights theoretically guaranteed by a legal system that can at times be as mired in technicalities as in democratic states. The intentionality of this particular legal ethic hardly augurs improvements even in the long run.

What intentionality for legal reforms?

The syncretic nature of China's legal system no longer evokes surprise. Although drawn from foreign rules and practices, China has Sinicized them the better to integrate them. [20] In this case, it is as if this Sinicization undertaken by a socialist harmonious society, which is reinventing China itself under the Party's watchful eye, was designed mainly to stall for time. Reacting to criticisms from the "New Left" and to popular unrest, the socialist harmonious society adopts diversionary tactics, leading with seeming goodwill into a *nowhere*, [21] which will be discussed later.

This particularisation also allows a troublesome political universal to be kept at bay. China's ambiguous attitude towards international law is exemplified by its non-ratification of the International Covenant on Civil and Political Rights which, if applied domestically, would result in far-reaching changes to current criminal law standards and – in not the least of its effects – render justiciable, both within China and externally, a number of fundamental rights. [22]

Seen in this light, "socialist harmonious society" appears, at first glance, as a softer version of something common to all totalitarian systems: the idea of "One People". This central dogma can be formulated even more easily in its negative form: a classless society, a whole without internal divisions. Indeed, as Claude Lefort has shown, "the whole totalitarian edifice rests on the fantasy of a society presumed to have overcome internal divisions. Everything is given over to the compulsion of producing unity, or rather the appearance of it. This compulsion is the real categorical imperative of totalitarian systems. (...) Now, totalitarian society has been, and continues to be, affected by democratic individualism. It is only intelligible against a background of democratic modernity." [23]

Here, the interest in the idea of socialist harmonious society stems less from what it holds aloft than from what it hides, namely who is responsible for defining this harmony? The Chinese Communist Party of course, but invoking what legitimacy – its separation from Chinese society?

Making such a comparison with totalitarian society is as tempting as it is misplaced. Today it is rather farfetched to speak of totalitarian society in describing a country like China where individual wealth is growing at a breakneck pace and unabashedly. From this springs the conjuring di-

18. See Keith J. Hand, "Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China", *Columbia Journal of Transnational Law*, Vol. 45, n° 1, 2007.
19. On the idea of "rightful resistance" see Neil J. Diamant, Stanley B. Lubman, Kevin O'Brien, *Engaging the Law in China, State, Society and Possibilities for Justice*, Stanford University Press, 2005
20. On the hopes and limitations of the internationalisation of Chinese law arising from the example of the WTO, see Leïla Choukroune, "The Accession of China to the WTO and Legal reform: is China heading towards a rule of law through internationalisation without democracy?", in Mireille Delmas-Marty and Pierre-Etienne Will (eds), *La Chine et la démocratie,* [China and Democracy] Fayard, 2007, pp. 617-661.
21. This is a reference to Thomas More's *Utopia* as a means of political and spiritual struggle.
22. See Leïla Choukroune, "Justiciability of Economic, Social and Cultural Rights", *Columbia Journal of Asian Law*, Vol.19, n°1, Spring-Fall 2005. By virtue of article 2 paragraph 3 of the International Covenant on Civil and Political Rights (1966)

    "Each State Party to the present Covenant undertakes:

    "(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

    "(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

    "(c) To ensure that the competent authorities shall enforce such remedies when granted." See www.ohchr.org/english/law/pdf/ccpr.pdf (consulted November 24)
23. Cf. Hugues Poltier, *Claude Lefort. La découverte de la politique* [Claude Lefort. The Discovery of Politics], Michalon, 1997, pp. 91-92.

mension of socialist harmonious society. It is becoming urgent to exorcise the direction towards which all the "infrastructural reforms" are leading, as might have been said earlier in language which would not be out of place with the Party today. It is well known how important private property has been, for a certain John Locke notably, in developing the idea of human rights. The new Chinese ideal does not shy away from playing with fire, by itself using the vocabulary of rights but giving it a different meaning.

Law in China today has become more than a mere alibi: it is the expression of the gap between a conflict-free society, the ideal dreamt up by the Party, and the individualism the people eagerly seek. Law is not a mere totalitarian instrument, but serves as the arena for playing out this tension, this contradiction between, on the one hand, the aspiration for individualism, whose promotion is the necessary means of boosting the regime's respectability in the eyes of "civilised" nations, and on the other, concerns about social cohesion under the party's guidance. However imperfect it may be, the legal system is increasingly allowing the expression of this tension, if only because economic globalisation no longer affords any choice in the matter.

All this obviously renders inadequate the use of the qualification totalitarian, because it would be an insult to the memory of millions of Chinese victims in the last century. This is why we have preferred to use the idea of disciplinary law or disciplinary rules, better attuned to current realities. As such, disciplinary law contrasts with liberal or individualist law. From this perspective, what is essential is to ensure the cohesion of an institution, a group of people, and not really to guarantee individual rights. Disciplinary law is not overtly opposed to them, but all these issues, such as individual rights, are treated as secondary. What counts is ensuring the smooth working of society as a whole and the regime's survival.

How do the differences between disciplinary law and liberal law appear in concrete terms? It is through government functions going unopposed, primarily. Disciplinary law is a legal system in the leader's hands; a leader who must appear to lead, if possible, a leader who can certainly not do all he wants to do, but whose power is not open to question. We labelled the contrasting model liberal or individualist because its cardinal value lies in the importance accorded to the individual. This brings us to the second criterion: disciplinary norms only make sense in closed communities, such as those of a professional, family, sporting, or religious nature, wherein relationships are necessarily asymmetrical and whose raison d'etre lies outside the reach of law. They are predicated on an unquestioned purpose, which motivates their very existence. This is so because such groups are always in fact sub-groups. At stake is only a part of something larger: neither school nor business engages a person's life in its entirety but only in part. This compartmentalization does not apply to the respect of fundamental rights – to life, liberty, or property.

The confusion perpetrated by the expression "harmonious society" arises from a collusion against the very nature of disciplinary law and its application no longer to a sub-community such as business or school, but to the entire political community; no more to a limited activity but to politics itself; not just to some subsidiary matters, but to the very heart of political coexistence.

These initial observations, as we shall see presently, can yield an infinite number of illustrations in recent events in Chinese law and its application. It is worth recalling again that Law supports and legitimises a political edifice and brooks no opposition. Thus does "harmonious society" realise justice and equity.

Justice in search of "regularity"

One might hold, as John Rawls does, that "regular and impartial" and in this sense, fair application of rules, constitutes "justice as regularity". [24] Such a form of legality is essential for establishing a rule of law. This is the major problem confronting China today. On the one hand, law-making and its application remain strongly tied to ideological constraints, and on the other, the role of the judge, although subject to an increasingly professionalised system, is still heavily dependent on political factors.

Production and application of laws: quest for harmony allows recourse to violence

The National People's Congress and the State Council are the two main organs that promulgate laws in China. While the NPC and its Standing Committee are invested by the 1982 Constitution and the 2000 Legislation Law (*lifa fa* 立法法) with law-making power on a national scale (promulgation of "laws", or *falü* 法律), the State Council has the power to adopt administrative measures (rules or *guiding* 規定, regulations or *tiaoli* 條例, circulars or *tongzhi* 通知,

24. Cf. John Rawls, *Justice et démocratie* [Justice and democracy], Editions du Seuil, Coll. Points, 1993.

Sun Fengxiang, Chinese People's Political Consultative Conference Member, manager of Fengxiang Group, in the court in Shenyang to stand trial. Sun was accused of taking bribes, corruption and defalcation, with 25 million RMB yuan involved in the case

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etc.) The role of these two organs, however, faces broad competition from the legislative functions bestowed on other state institutions. The Chinese system operates through at least three different levels: national laws (*falü* 法律), national administrative regulations (*xingzheng fagui* 行政法規), and local administrative regulations (*difangxing fagui* 地方性法規). Moreover, ministries and commissions under the State Council can, for example, produce orders, directives and regulations in their sphere of competence and in accordance with the texts promulgated by the State Council. Local People's Congresses and their Standing Committees can also make laws, of course, as long as they do not clash with texts drawn up at the national level, all of which complicates the whole exercise. Finally, the People's Congresses in the Autonomous Regions have the power to adopt their own texts.

Until China's accession to the World Trade Organisation (WTO), the government did not allow external participation in the legislative process. After that, the situation has evolved and there is greater interaction with society, as shown in recent debates on the adoption of the property law. China's accession to the WTO has also encouraged the regime to publish a large number of legal texts and some court decisions; however, access to these documents requires real knowledge of the system and the language as there is no truly systematic compendium.

At any step of the legislative pyramid, the Party may choose to interfere. The legislature – not exactly elected democratically, and not free from surveillance – is furthermore granted broad powers in terms of interpretation and control of the application of laws and court decisions. Despite recent attempts at constitutionalisation of rights, the absence of a hierarchy of norms poses the problem of the effectiveness of Chinese law. Confusing and contradictory laws and their poor applicability in a uniform way quickly exposes them to a process of abrogation through disuse, which incidentally, serves by default to moderate legislative excess.

Difficulties in applying laws, a situation that has been consistently denounced by Chinese and foreign experts for at least 20 years, clearly represents the greatest impediment to any genuine desire for reform. The lack of uniform and just application of the law has a direct bearing on the establishment of a rule of law. This complex question has many facets, notably in relation to the enforcement of court decisions.

It is particularly interesting today to note that Chinese authorities have undertaken several extensive campaigns to implement laws. These campaigns are based on repression and have had widely diverse objectives ranging from ensuring respect for intellectual property, condemning actions resulting in pollution, banning some religious practices and illegal land requisitions, to closing undesirable internet cafes. [25] While these actions do not mobilise the population in the same way, they share some of their most salient characteristics with anti-corruption campaigns (strike hard or *yanda* 嚴打) or earlier revolutionary campaigns to mobilise the masses (*yundong* 運動). This resemblance derives from the generalised use of a form of violence conceived as a legitimate capacity for restraint by the state, but against which ultimately there is no recourse. The topic is worthy of discussion in its own right, but for now this use of violence by the state can no doubt be linked to the deficiencies of a criminal law system that remains highly repressive, and to the equally controversial maintenance of the systems of *Laojiao* (*laodong jiaoyang* 勞動教養) or "re-education through labour", [26] and *Laogai* (*laodong gaizao* 勞動改造) or "reform through labour". [27] This view of the application of the law

25. This topic is currently being studied by Benjamin van Rooij and was already introduced in "China's War on Graft: Politico-Legal Campaigns against Corruption in China and Their Similarities to the Legal Reactions to Crisis in the U.S." *Pacific Rim Law and Policy Journal*, 2005, pp. 289-336

26. *Laojiao* (*laodong jiaoyang*), or "re-education through labour", is an administrative measure taken by the Police and applicable to people over 16 years old who have committed minor crimes that do not require criminal proceedings and for a period not exceeding four years.

27. *Laogai* (*laodong gaizao*), or "reform through labour", is a criminal penalty determined by a court after a conviction, according to provisions of Chinese law. The penalty incurred can officially range from six months to 20 years in prison.

fails to promote acceptability of the legal system and its predictability; furthermore, it tends to delegitimise the norms and the role of a justice system, which aspires to professionalism and independence.

Institutionalisation and professionalisation: The judge at the heart of reforms

During the years of reform, the courts were reorganised according to a four-tier hierarchy, with the Supreme People's Court (*Zuigao renmin fayuan* 最高人民法院) at the top. [28] There are 3,000 Basic People's Courts with approximately 200,000 judges. Their level of professionalism was enhanced considerably in 2002 with the establishment of the standard national exam, which has a success rate of around 10%. The vast majority of practising judges has nevertheless had no real legal training. There is obviously a huge difference between a judge in the Supreme Court trained in legal issues in China and overseas, aware of international realities and of belonging to a community of jurists who are able to exercise true power to interpret the law and a judge drawn from the ranks of the army or the police, appointed by a local people's congress, and continually confronting problems of legitimacy vis-a-vis Party officials, as well as lacking resources and tempted by corruption. [29]

In 1999, the Supreme People's Court adopted a first five-year reform plan aimed at enhancing the professionalism and independence of judges. [30] On 18 October 2001, the Court published a code of ethics, targeting in particular judicial corruption. [31] Finally, in October 2005, the Court unveiled its second five-year plan (2006-2010), one of whose highlights was to implement a process of centralised national review of capital punishment sentences. [32] While it is a clever means of depoliticising the law by strengthening the powers of high-ranking judges, this reform runs the great risk of being very difficult to implement. Despite the commendable efforts of a Supreme Court made more dynamic through the profile of Xiao Yang as its president, the Party's interference remains too strong for the acclaimed modernisation to have real effect. [33]

Clearly this is a question of judicial independence. There is no institution equivalent to a kind of high council for the judiciary, for example, and there is absolutely no guarantee either of the independence and impartiality of the judiciary under any statute. More specifically, the Standing Committee of the CPC Political Bureau seems to be the body really in charge of justice, through the establishment of a coordinating group on judicial reform (*sifa tizhi jizhi gaige* 司法體制機制改革) chaired by Luo Gan. Through this group and the Party's discipline inspection commissions, the entire judiciary apparatus (prosecution, judges, ministry and even the police) is subject to the Party. Xiao Yang, the Supreme Court president, himself elected – and liable to be dismissed – by the NPC, has been clearly ill at ease over constant political interference. [34] Frequent interventions by Luo Gan, who has been very active in judicial discourse in 2007, highlight more than anything else this constant interference in the sphere of justice. [35] The White Paper on Democracy, published in October 2005, exposed the regime's intentions by stating that the maintenance of the "the unity of the leadership of the CPC, the people being the masters of the country and ruling the country by law" represented the most important principle for "building a socialist political democracy" in China. [36]

Fiction of harmony or illusion of justice

The illusion of justice conjured up by the peremptory affirmation of a desire for modernisation, not backed by real means of realising the ambition, is becoming apparent in re-

28. There are three other levels: 30 High People's Courts (*Gaoji renmin fayuan* 高級人民法院), which have authority in provinces, autonomous regions and municipalities directly under the central government; 389 Intermediate People's Courts (*Zhongji renmin fayuan* 中級人民法院), which function at the prefecture level, with the municipalities catered for by courts at the level of provinces and autonomous regions; and, finally, more than 3,000 Basic People's Courts (*Jiceng renmin fayuan* 基層人民法院), which have authority at the district and county level, and that are sometimes complemented by other People's Tribunals (*Renmin fating* 人民法庭) in the instance of those counties that are geographically dispersed. Furthermore, there are more than a hundred specialist tribunals with authority in matters of fishing, maritime affairs, forestry, railways, etc.
29. For a precise and rigorous history of the last 30 years of judicial reform, see Stanley Lubman, *Bird in a Cage. Legal Reform in China after Mao,* Stanford University Press, 1999.
30. Cf. *Renmin Fayuan Wunian gaige Gangyao* (Five-Year Program of Reform), http://www.dffy.com/faguixiazai/xf/200511/20051128111114.htm (consulted 30 September 2007).
31. See Li Yuwen, "Professional Ethics of Chinese Judges, A Rising Issue in the Landscape of Judicial Practice", *China Perspectives*, May-June 2003, http://chinaperspectives.revues.org/document274.html.
32. See *Renmin Fayuan Dierge Wunian Gaige Gangyao* (Second Five-Year Program of Reform), http://www.dffy.com/faguixiazai/xf/200512/20051214221735.htm (consulted 30 September 2007).
33. See Benjamin L. Liebman, "China's Courts: Restricted Reform", *Columbia Journal of Asian Law*, in press, Winter 2007.
34. There is intense speculation currently as to who would succeed Xiao Yang.
35. See his much discussed indictment of the Westernisation of the courts, http://www.qsjournal.com.cn/qs/20070201/GB/qs%5E448%5E0%5E1.htm (consulted 30 September 2007).
36. See http://www.chinadaily.com.cn/english/doc/2005-10/19/content_486206.htm (consulted 30 September 2007).

cent debates. We have chosen to devote special attention to four major themes (property rights, labour rights, a return to mediation and right of defence), which in their own ways showcase a deep aspiration for a more just environment.

An incomplete protection of property rights

Of all areas of Chinese law, it is the process of rewriting civil law that most clearly highlights the contradictory forces at work in judicial reforms that are torn between liberal leanings and the need to preserve an authoritarian socialist regime. How can one reconcile the liberal-inspired drafting of a civil code, enshrining individual freedom and will, with respect for a "socialist market economy" that seeks to justify the arbitrary intervention of the state? [37] This fundamental question has quite naturally peppered debate on a Chinese doctrine deeply divided between two schools of thought: one favoring legal transplants as a form of beneficial internationalisation, the other opposed to an acculturation that is unable to meet China's needs. [38] It is by paying special attention to the debates within a community of increasingly better trained jurists who are often well informed on the reality abroad, that one understands how the birth of a civil society has bolstered the work of these Chinese jurists seeking the emergence of a legal system distinct from the state. The technicalities of law seek in reality to encourage emancipation from the political power.

Such contradictions, which were already at work during the adoption of the 1999 Contracts Law, re-emerged with unprecedented strength during the preliminary debate on the much vaunted Property Law that took effect on 1 October 2007. It was clear since the end of the 1990s that the Chinese "New Left", which actually groups several movements, had been wielding real influence over political debate. [39] However, it was the interventions in August 2005 by Gong Xiantian, a law professor at Beijing University, that sparked lively comments from among jurists. Professor Gong – in fact, an isolated figure – is a firm Marxist whose main argument was that protection of property rights was unconstitutional. This would have remained anecdotal if Chinese authorities had not taken up the matter. Wu Bangguo, Chairman of the Standing Committee of the National People's Congress, was reported to have directly contacted Professor Gong, who then met Hu Kangsheng and Wang Shengming, Chairman and Vice-Chairman, respectively, of the Legislative Affairs Commission of the NPC Standing Committee. All this led to yet another postponement of the bill and, most crucially, to its recasting in a mould more respectful of socialist constitutional imperatives. It should be noted that the passage of this law was achieved only at the end of a legislative saga that began in the early 1990s. A first draft had been presented in 2002 and was improved after a fashion by the 2004 constitutional amendments that guaranteed private property. Complications began in July 2005 when a new draft was published with a view to gathering external comments. Almost 12,000 reactions similar to that of Professor Gong reached the Congress. Finally passed on 16 March 2007, and implemented on 1 October, the Property law, largely based on the German civil code, (*Bürgerliches Gesetzbuch* or BGB), will soon be complemented by a set of interpretative opinions to be issued by the Supreme People's Court. [40] The complex structure of this law demands detailed study, provision by provision. Some provisions clarify and obviously consolidate private property, but within the framework of a "socialist market economy" that gives precedence to state and collective property. The thorny questions of land ownership and eviction are only partially covered. The application of this law will undoubtedly be difficult because of its inherent contradictions. [41] In this sense, it would seem that private property protection remains insufficient and that the number of disputes will continue to grow.

Human rights and businesses: the contrasting effects of Chinese globalisation

Internationalisation of Chinese law has special effect on the world of business and more specifically Chinese labour law. However, acceptance of international standards and prac-

37. See the remarkable Ph.D. Dissertation of Shi Jiayou, *La Codification du droit civil chinois au regard de l'expérience français,*[Codification of Chinese civil law in the light of the French experience] L.G.D.J., 2006.

38. See Hélène Piquet, *La Chine au carrefour des traditions juridiques* [China at the crossroads of legal tradition], Brussels, Bruylant, 2005.

39. For an outline of the debate driving these currents see Leslie Hook, "The Rise of China's New Left", *Far Eastern Economic Review*, April 2007. For a portrait of Wang Hui, the figurehead of the "New Left", see for example Pankaj Mishra, "China's New Leftist", *New York Times,* 15 October 2006.

40. Text available in Mandarin on the *Lawinfo China* website: http://www.lawinfochina.com/law/display.asp?db=1&id=5920&keyword (consulted 3 December 2007)

41. For a remarkable case study on eviction and land rights see Eva Pils, "Land Disputes, Rights Assertion and Social Unrest in China: A Case from Sichuan", *Columbia Journal of Asian Law*, Vol. 19, n°1, Spring-Fall 2005. "Incoherent or unclear legal rules that were also ignored in practice have made it hard to expect any justice from the legal system as it is, (…) and even if the rule most favourable to the peasants interest were enforced, there would still be some doubt about the fairness of a legal system establishing classifications of land and residential status that led to such great gains and losses on different sides of the divide in the context of urbanization." (pp. 284-285).

A worker at the production line in a textile factory in Zibo, Shandong province. Will the textile workers benefit from the new labour contract law?

tices remains selective, [42] and the modernisation of Chinese corporate standards also face resistance from multinational firms, as the recent debate on the passing of the new Labour Contract Law showed.

Since the laws on labour and trade unions came into force in 1995 and 2002, Chinese workers have received theoretical protection, but although this may not yet fully comply with international standards – China has only ratified four of the eight Fundamental Conventions of the International Labour Organisation (ILO) [43] – it is not negligible. However proclaiming rights does not necessarily guarantee their application. These rights lack guarantees since many extra-judicial factors prevent their application. The granting of labour rights too remains highly selective. Almost two-thirds of the population has yet to receive protection from labour rights set out in the 1994 Law. It should also be noted that some categories of workers are inadequately protected and are indeed victims of abject discrimination, such as through the residence permit system (*hukou* 户口) and job discrimination on the basis of sex or disability, among others. While the Law on Labour Security of 29 June 2002 and the Law on the Prevention and Treatment of Occupational Illnesses of 27 October 2001 may represent real normative advances, the question of their application remains.

Forced labour is obviously the darkest area in this general picture. Obligatory or forced labour is banned almost universally. ILO Conventions 29 (1930) and 105 (1957) are the ones most countries adhere to. [44] China has not ratified either convention and is in a highly ambiguous position: the state continues to use forced labour on a large scale and does so totally illegally, while condemning the crime of forced labour in private enterprises. There is no clear indication today of a legislative reappraisal of the policies of "reform through labour" (*Laogai* or *laodong gaizao*) or "re-education through labour" (*Laojiao* or *laodong jiaoyang*).

42. The selective nature of this internationalisation was pointed out several years ago by Pitman Potter. For a recent analysis of these trends and China's emergence on the international scene, see Pitman Potter, "China and the International Legal System: Challenges of Participation", *The China Quarterly*, Vol. 191, September 2007, pp. 699-715.
43. See http://www.ilo.org/ilolex/english/docs/declworld.htm (consulted 10 October 2007).
44. See http://www.ilo.org/ilolex/english/newratframeE.htm (consulted 10 October 2007).

These relatively profitable activities keep a virtual underground economy going, aided and supervised by the state. Finally, the lack of independent union representation severely curbs Chinese workers' collective exercise of their fundamental rights and freedoms.

As industrial disputes have proliferated, directly linked to deep changes in China's economy, novel methods of settling disputes have arisen. A progressive shift has occurred from mediation to court actions, but there is little cause for drawing any encouraging conclusions as it is hardly a general trend: only a limited number of disputes may be subject to the courts, and the government is now encouraging a return to mediation.

This relative legal rationality does not allow for integrating the main international standards China has signed – starting with the International Covenant on Economic, Social and Cultural Rights – and gives rise to much doubt over the benefits of voluntarism promoted in the many codes of conduct adopted by foreign companies based in China. The recent debate on the adoption of a new labour contracts law is evidence of this. In March 2006, the NPC Standing Committee approved a first draft law on labour contracts and sought public comment. By April, the Congress had received 191,849 comments, mostly from workers, according to official sources. The responses from foreign firms, especially their representative bodies (such as the American Chamber of Commerce in Shanghai and the European Chamber of Commerce), were the most surprising. After years of criticism of the loopholes in China's legal system, the multinationals were rejecting a document that would give greater protection to labour rights because this would delay economic reforms and thus have a negative effect on investment. [45] Progress in Chinese law was in this instance being compromised by the economic ambitions of multinationals seeking to maintain a legal muddle that was advantageous to them in terms of labour cost. [46]

Despite outside pressure, the new labour contract law will take effect in early 2008. It contains some advances and clarifies many legal concepts including the collective labour contract. Its application may however be limited because there are no independent unions and dispute settlement remains highly unpredictable as it is still largely under state control.

Return of mediation in response to disillusionment with the judiciary

Escalating disputes and the relative inability of the justice system to resolve them have aroused disillusionment, in response to which Chinese authorities are again promoting their classic tool, mediation, but now vested with the virtuous halo of socialist harmony. Mediation is being promoted as the best alternative to court action, especially administrative litigation.

Introduced into the legal studies courses in 1981 and into the compulsory curriculum only in 1986, Chinese administrative law is recent and still evolving. The much anticipated Administrative Procedure Law of 1989 marked a decisive turning point by allowing the public to take on the administration for any illegal acts. [47] The 1994 Law on State Compensation, as well as the 1996 Law on Administrative Penalty, are part of this evolving framework. The public has not quite taken to this form of justice in droves, as only about 2% of cases pitted a citizen against an administration. [48] Court access for those affected by an administrative decision seems to contradict the traditional and apparently unchanging socialist credo of "government of the people by the administration" (*guan guan min* 官管民). Authorities will have to take account progressively of modest efforts to make the administration accountable to the people (*min gao guan* 民告官). [49] All these changes, deemed positive by some analysts, stem from an abiding desire to maintain and strengthen social stability. [50] The 1989 Administrative Procedure Law grants limited control of administrative actions. The courts can only control the legality of the norms, not their validity or reasonableness. Further, when an administrative tribunal finds that a legal rule conflicts with one of a higher organ, it has no power to invalidate the first rule, and at best can refuse to apply it, which happens but rarely. Only

45. See the reports of the American Chamber of Commerce of Shanghai and the European Chamber of Commerce. http://www.business-humanrights.org/Links/Repository/785039 (consulted 10 October 2007).
46. This much publicised debate obliged some companies to answer for their attitude and to reveal their Chinese labour policy. See the *Business and Human Rights* site that provided a summary of the main arguments and documents.
http://www.business-humanrights.org/Documents/Chinalabourlawreform (consulted 10 October 2007).
47. Cf. Pitman B. Potter, "The administrative litigation law of the PRC: judicial review and bureaucratic reform", in Pitman B. Potter (ed.), *Domestic Law Reforms in Post-Mao China*, New York, M.E. Sharpe, 1994, p. 270-304; Minxin Pei, "Citizens v. Mandarins: administrative litigation in China", *The China Quarterly*, n° 152 (1997), pp. 832-862.
48. See for example Kevin O'Brien and Lianjiang Li, "Suing the Local State: Administrative Litigation in Rural China", *The China Journal*, n° 51 (2004), pp. 75-96.
49. Robert Heuser, "Le rôle des tribunaux administratifs dans la résolution des litiges entre la société et le gouvernement chinois" ["The role of administrative courts in resolving disputes between society and the Chinese government"], *Perspectives chinoises*, 2003.
50. Robert Heuser, *Ibid.* Most analysts do not share these conclusions, however, and remain cautious over the effectiveness of citizen protection in this much anticipated, yet disappointing bill. P. Potter for example speaks of an "elusive objective", linked to the bill's self-limiting character.

those in charge of producing laws may invalidate the wording of a law or administrative ruling.

Recent statements by Xiao Yang [51] favouring administrative mediation (*hejie* 和解) hardly foreshadow a real improvement to the system. Local courts have responded to the call by the Supreme People's Court president by backing the proposal for letting cases be withdrawn in favour of non-judicial settlement. The cases in question seem to concern settlement of matters relating to "mass movements" (expropriation, restructuring of state enterprises, pollution, etc). In such instances, the dispute is headed off to preserve the fiction of harmonious cohesion of a people bound by the common ideal of stability. The objective is clear but, meanwhile, a desperate struggle is under way to realise a right of defence.

Controlling human rights defenders: a cynical approach to justice

In August 2006, the People's Court in Yinan county, Shandong province, sentenced the human rights defender Chen Guangcheng to four years and three months in prison for "deliberate destruction of property" and "organisation of demonstrations aimed at disrupting the traffic". A farcical appeal judgement, made in November 2006, again showed disdain for the most elementary rights of defence. A peasant who has been blind since his infancy, Chen Guangcheng, aged 36, is one of those "barefoot lawyers" who no longer hesitate to use a legal system that is tending to offer a modicum of protection, in defending fellow citizens against the state's arbitrariness. Outraged at the massive campaigns of sterilisation and enforced abortion in his region, Chen earned renown through his fervent support for peasants who suffered the excesses of the One Child policy. Using the American "class action" model, he mobilised the local population in order to get the judge to condemn illegal acts committed by the authorities. All this could be analysed as a major test of the "rule by law" principle that Beijing touts as guarantee that it would implement a "socialist rule of law" respecting individual freedoms now enshrined in the constitution.

Chen represents an unprecedented movement, of "barefoot lawyers", the new human rights defenders (*weiquan renshi* 維權人士) and self-taught jurists imbued with a passion for justice and sharing a fierce desire to challenge authorities on the strength of legal arguments, but also because they have nothing more to lose.

Unfortunately, Chen Guangcheng's case is not an isolated one. In 2003, Zheng Enchong was sentenced to three years in prison for having defended Shanghai residents who were victims of expropriation. He was released in June 2006 and still faces police surveillance. His professional licence has been withdrawn and all communication with the outside world seems to be banned. In July 2007, while on his way to the trial of real estate tycoon Zhou Zhengyi, accompanied by his wife and other victims of expropriation, Zheng Enchong was badly beaten by police who barred his court entry.

Yang Maodong (or Guo Feixiong), a Beijing lawyer in the former Shengzhi law firm, was arrested many times and beaten for having defended residents of Taishi village in Guangdong province, who were trying to bring down a corrupt local official. Imprisoned in Guangzhou and Shenyang, Yang Maodong suffered torture and other inhuman and degrading treatment. His defence made sure the matter was brought to the attention of Manfred Nowak, the United Nations Special Rapporteur on Torture, China being a party to the Convention against Torture. His trial was deferred.

Gao Zhisheng, a famous lawyer known for supporting Christians, Falungong members and his own colleagues, undertook to defend Yang Maodong by organising a hunger strike. His licence to work was revoked in 2005. Detained by police since August 2006, he has been officially accused of "inciting subversion", an extremely grave charge. His lawyer Mo Shaoping was denied contact with him on the pretext that state secrets were at stake. [52]

On 29 September 2007, Li Heping, a young Beijing lawyer, was kidnapped in broad daylight, held, interrogated and tortured with electric current by a group of about ten people, then released in the dead of night in the countryside. On returning home, he found his that computer had been reformatted and his professional identity card and personal details confiscated. Li faces constant harassment and is watched by the Beijing Public Security Bureau. [53]

What type of regime could be committing such gross violations of human rights and dignity so widely and with total impunity?

The professional work of lawyers receives insufficient protection. Banned between 1957 and 1977, lawyers were gradually rehabilitated after the 1978 constitution, and the new

51. See http://www.court.gov.cn/news/bulletin/activity/200703300020.htm for a version in Mandarin (consulted 30 September 2007).
52. See Eva Pils, "Asking the Tiger for his Skin: Rights Activism in China", *Fordham International Law Journal,* April, 2007, Vol.30 pp. 1209-1287 and Fu Hualing, "When Lawyers are prosecuted" 2007, *Journal of Comparative Law*, Vol. 2, n° 2, pp 1-38.
53. See for example http://www.hrichina.org/public/contents/press?revision%5fid=45124&item%5fid=45122 (consulted 10 October 2007).

The China Human Rights Lawyers Concern Group holding a protest at the China Liaison Office in Hong Kong (22 June 2007) to express concern over recent incidents of mainland lawyers and activists being beaten up and detained by public security officers.

criminal rules that in 1979 restored the right of defence. Lawyers nevertheless remained "legal agents of the state", a type of official with special status, whose activities were fully overseen by public bodies. The "All China Lawyers Association" (ACLA) and its local branches have increasingly taken charge of managing these professionals. That hardly makes for their independence as they report to the justice ministry. The 1996, "Law on Lawyers and Legal Representation" was envisaged as a professional charter for a burgeoning profession. [54] Lawyers finally had a right to work outside the state system and private firms mushroomed.

However, a number of provisions tend to restrict freedom of action by Chinese human rights defenders. Article 96 of the Criminal Procedure Law stipulates that lawyers accused of divulging state secrets who wish to seek outside help should first obtain permission from public security authorities. Even the concept of state secrets is defined so vaguely as to render rights defenders vulnerable to such accusations.

Article 306 of the Criminal Procedure Law, widely used to silence lawyers, deems some actions criminal by equating them with fabrication of evidence or perjury. The text of the Law on Lawyers has undergone recent changes, but its direction and intention are unclear.

These developments go against commendable efforts to modernise and promote a Chinese legal system that is opening up increasingly to external influences. The restoration of norms, which is occurring through legislative and procedural make-believe, hides an ambiguous attitude towards law. This illusion of justice is based on the fiction of harmony.

Conclusion

Harmonious society between ideology and utopia

The purpose of the last 30 years' legal construction is difficult to grasp. The tension in China's legal system between liberal temptation and preservation of socialist dogma limits the scope of reforms. Despite indisputable achievements in terms of law-making and institution-building, the lack of hierarchy of norms, of separation of powers and crucially of judicial independence, the unclear status of rights defenders, the serious shortcomings in protecting individual rights, and the ever present political considerations impede all progress towards a true rule of law.

More worryingly, the propagation of the socialist harmonious society concept not only seeks to respond to a legiti-

54. The lawyer law has just been amended. See http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=373837&pdmc=110106 (consulted November 24, 2007)

mate quest for moral values able to fill a void created by the market. It symbolises a strong desire to set right a capitalist and individualist society born of reforms. In this reactionary phase, the emancipated individual is again brought into line by laws that he, on the contrary, would like to use to ensure his true liberation.

Liberal law and disciplinary law are undoubtedly two ideal types of law, for the distinction between them is not so clear in practice. No one can claim to be totally democratic because of the pervasive vestiges of disciplinary law, confined to some professional communities or families. The term disciplinary law thus explains away the imperfections of Chinese law. But we would be overlooking the fact that to be called law many requirements must be met. When does law begin to fulfil its own pre-eminent function that sets it apart from other "normative orders" [55] such as religion, morality or politics? The answer is made less easy by the fact that the forms law can take can serve all those masters: one finds a religious law (Koranic law), customary law and administrative law. What constitutes it as law in all these cases is firstly a formal criterion: law must appear as an external reference, a third force *not accessible indiscriminately* and which cannot be modified arbitrarily in response to a situation. Two simple tests help one know what type of regime one confronts. The first is that of the independence of judges: are they formally independent vis-a-vis political authorities? Do they do what is in their power to ensure rights are respected, including against the state? The second test applies to the citizens: to what extent are they able to claim their rights against the government? To what extent does law protect the mighty? In reality these two tests are but one: has the society reached a level of individuation sufficient to allow for both the application of law itself and citizens' lives to be regulated by law? However, what the "harmonious society" idea implies is nothing more than an immense internal set of rules – carefully tended by the country's leaders – to which Chinese citizens must submit without really being able to challenge them. This set of rules may bear the name of law, and closely resemble it, but does not deserve to be characterised as rule of law or to be associated with the vocabulary of human rights.

Indeed, instituting a socialist harmonious society involves revisiting China's common past in order to reinvent it and insert the individual into a "pseudo-holism" [56] that has totalitarian impulsions. This vaunted harmony of the social order leads to silencing discord. A pluralistic debate of ideas cannot exist. John Rawls has shown that the exchange of points of view constituting the "fact of pluralism" – whether or not in conflict – forms part of the ferment of modern democracy. [57] But the successive waves of media clampdowns, along with the changing status of human rights defenders, testify to a desire to stifle dissent.

A real harmonious society would undoubtedly require a state in which the rule of law prevails, but a rule of law founded on and protected by democratic values. Jürgen Habermas has clearly demonstrated the complementary character of democracy and rule of law. [58] An ontological link exists between these two paradigms. The role of law is essential, but a law that is "legitimate is only compatible with a mode of legal constraint that does not destroy the rational grounds that exist to obey the law". Citizens must be able to exercise their "communicational liberty" and to "obey legal norms" by exercising their "discernment". [59] The individual is no longer simply subject "to the law" but participates in its construction. In the rule of law under a democracy, citizens must be able to think of themselves at all times as "the authors of the law to which they are subject as beneficiaries". [60] Not every state that may seem to have an ordered judicial structure of sorts, based on something akin to a hierarchy of norms, qualifies to be called a state with a rule of law. [61] The idea developed by Hans Kelsen, according to which any state based on a legal system could be deemed a state with a rule of law, crumbles in the face of totalitarian logic. After all, Nazism boasted of a form of rule of law, as did the Stalinist regimes that enshrined a "socialist rule of law" in their constitutions. [62] According to them, law is an instrument of action serving the powers that be and is regarded in a way that is diametrically opposed to liberal logic. The norm is no longer distanced from the authorities' whims and

55. Jean Carbonnier's expression.
56. In Louis Dumont's expression.
57. See John Rawls, *Justice et démocratie* [Justice and Democracy], Editions du Seuil, 1993.
58. In a brilliant theoretical demonstration, Luc Heuschling, starting with the three hypotheses identified by Norberto Bobbio (compatibility, antinomy, consubstantiality) showed, in the light of developments in constitutional justice, the prevalence of an intrinsic link between democracy and rule of law. See Luc Heuschling, "De la démocratie et de l'Etat de droit, une étude théorique" ["Of democracy and rule of law: a theoretical study"], in *Etat de droit, Rechtsstaat, Rule of Law*, Paris, Dalloz, Col. Nouvelle Bibliothèque de Thèses, 2002, pp.573-608.
59. Jürgen Habermas, *Droit et démocratie, Entre faits et norms*, (Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy) Paris, Gallimard, 1997, pp.138-139.
60. *Ibid.,* p.479.
61. Hans Kelsen sees a pleonastic relationship between state and rule of law. "(…) The attempt to legitimise the state as a "rule of law" is in reality totally inadequate, because – as already stated – every state must necessarily be a rule of law in the sense that every state has a legal system." Hans Kelsen, *Théorie pure du droit [Pure Theory of Law]*, Paris, LGDJ, Montchrestien, coll. "La pensée juridique", 1999.
62. For recent critical analysis of the "German legal system under Adolf Hitler" and Hitler's defence of "legal security" see Luc Heuschling, *Etat de droit, Rechtsstaat, Rule of Law*, *op.cit.,* pp.516-570.

a lack of hierarchy of norms only magnifies this closeness, ruling out any attempt at jurisdictional control. (63)

Socialist harmony derives thus from both ideological and utopian urges. Its institutionalisation helps the regime preserve itself and also renew itself through association with a proposal that is presented as original but is actually illusory. Utopia implies a semantic shift from the realm of the possible to that of the imaginary. Paul Ricoeur has ably illustrated the role played by the imaginary, the building of a different society. Indeed, "doesn't the imagination of another society that is found nowhere, enable the most fantastic challenge to what exists?" (64) Meanwhile, ideology and utopia come together in the domain of power and authority. Utopia's function could be to expose "this problem of credibility that arises where the systems of authority exceed both our confidence in them and our belief in their legitimacy." (65) Herein lies the genius of the Chinese authorities. Their political system, despite being immutable, appears to undergo constant renewal through the illusion of a journey to *nowhere* (*outopos*), which is timeless (*ou-chronos*) and invokes a mythical, reinterpreted China.

The other is Sinicized and reinvented, thus advancing its uniqueness in order to stay away from politically destabilising universal values, only leading to conserving an inward-looking and disillusioned society. The political cynicism that such a model can spawn is dangerous for China, and also for the idea of democracy.

This journey, as it were, to the *nowhere* of today's China helps highlight the hidden side of its seemingly democratic plans, and their inability to spread, by going beyond cultural relativism. An approach of "the inside looking out and the outside looking in" is required in order to make contact with the "expanded humanism" laid out by Louis Dumont. (66) However, this mutual process should not lead to any renunciation of values that lie at the heart of the social contract of modern democracies. Too keen an attempt to legitimise the Chinese model as an original one in order to promote the acceptance of different and supposedly cultural values sometimes makes one forget the universality that deeply unites all individuals. The concepts related to the liberal paradigm have too often become distorted because of the eagerness to keep persuading people of their relevance. Concepts such as rule of law or democracy, when seen through the filter of socialist harmony, would hardly capture the popular imagination. But rule of law or democracy in their globalised form, as promoted by international agencies focused on efficiency, also fail to convince. Globalised positivism can lead only to a form of disenchantment. Only by going beyond procedural liberalism, with law reduced to a depoliticised and de-individualised technical tool, can one grasp the democratic idea. This calls out for rediscovering the essence of a modern natural law, as conceived by Leo Strauss when he proposes to refer to this concept to distinguish "legitimate and illegitimate objectives" and "just and unjust" aspirations. (67)

The Chinese regime has not yet agreed to proceed in this direction. Yet, if one thinks of the way Chinese society has evolved in dynamic terms, a glimmer of hope appears. The struggle of the *weiquan renshi* clearly exemplifies this desire for justice. Would it not be right to say that the activism of these defenders of the right of defence signifies evolution, towards a greater freedom to challenge the state authority, albeit to a limited extent? On 8 August 2007, exactly a year ahead of the Beijing Olympic Games, a group of more than 40 Chinese intellectuals and activists addressed an ambitious open letter to the PRC government and the international community, calling for an end to human rights violations and the release of prisoners of conscience. Echoing the regime's official slogan for the Games – "One World, One Dream" – the intellectuals sought to have their voice heard by invoking higher values dear to the human community as a whole. The Beijing Games slogan was thus expanded, in an unofficial version, to "One World, One Dream and Universal Human Rights." (68)

Inserting the individual into the global arena alarms the powers that be as much as it reinforces their dynamism. The Chinese regime is not a simple authoritarian regime; it contains the seeds of a dangerous all-embracing paradigm, neatly described by Chen Yan as "conscious totalitarianism". (69)

Chinese citizens have rightly become aware of their individuality both during and through the reforms. Despite being withdrawn into the One society illusion they pretend to believe in, they will not forget that they have natural and positive rights with the potential to guarantee their freedom. •

63. See Jacques Chevallier, (ed.), *L'institution* [The Institution], Paris, Puf, 1981, 411p.
64. See Paul Ricoeur, *L'idéologie et l'utopie* [Ideology and Utopia], Editions du Seuil, 1997, p.36.
65. *Ibid.*, p. 37.
66. See Stéphane Vibert, *Louis Dumont, Holisme et modernité* [Louis Dumont, Holism and modernity], Edtions Michallon, Coll. Le bien commun, 2004.
67. See Leo Strauss, *Droit naturel et histoire* [Natural law and history], Flammarion, coll. Champs, 1986, p.16.
68. This can be viewed on the remarkable website of the "Chinese Human Rights Defenders" (CHRD), http://www.crd-net.org/Article/ (consulted 25 September 2007). At the same time, according to CHRD, an activist from Heilongjiang was arrested for having made landless peasants sign a petition entitled "We want human rights, not the Olympics". See http://www.crd-net.org/Article/Class9/Class15/200709/20070904103042_5557.html (consulted 25 September 2007).
69. See Chen Yan, *L'éveil de la Chine* [The awakening of China], Editions de l'Aube, 2002.