

CHINA'S ANTI-FOREIGN SANCTIONS LAW. A 'RULE OF LAW' PERSPECTIVE

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I. The Dragon's roar in the international law arena.

On June 10, 2021, the Permanent Committee of the XIII National People's Congress of the People's Republic of China, at its 29th meeting, enacted the "Anti-Foreign Sanctions Law", hereinafter, 'the Law'.¹

Its political and legal context was described as follows:

China's recent trade measures that it has enacted since 2020 are part of a broader effort by China's leader Xi Jinping since 2014 to build out and strengthen China's national security authorities that establish broad justification, scope, reach, and mechanisms for China's national security-related actions on trade, investment, and other economic activity. China has been embarked on a longer-standing effort to build out an interrelated set of national security-related authorities that include laws and regulations on counterespionage (2014), national security and counterterrorism (2015), criminal law (2015), cybersecurity and foreign nongovernmental organizations (2016), oversight of lawyers and law firms (2016 and 2018), standardization (2018), and encryption (2019).¹ These laws and regulations require companies, organizations, and individuals—both foreign and domestic—to cooperate with the Chinese state in national security matters, affecting a range of economic activities and technology issues.²

The Law contains sixteen sections—section 16 providing only for the Law's entry into force upon promulgation.

The first one declares its main purposes and states its constitutional foundation.

Sections 2 and 3 proclaim foreign policy principles, mainly the peaceful nature of Chinese international relations but also the country's willingness to fight hegemonism and intervention in its domestic affairs.

Sections 4 to 10, 13 and 15 set the powers of different State authorities to adjudicate, enforce—and also to expand the scope of—certain countermeasures in retaliation of foreign sanctions against Chinese interests abroad.

Sections 11, 12 and 14 provide for different rights and duties of the Chinese persons, including the right to claim judicial redress for any damages suffered due to the foreign measures.

We shall see that the scope of the Law goes far beyond the trade defense devices, common worldwide, despite WTO rules.³ The Law has a broad political target which certainly encompasses the international trade and investment fields as well but is by no means limited to them.

¹ When this paper was written there was no official translation of the Law. For the Chinese version see National People's Congress of the People's Republic of China (October 26, 2021, 19:15) <http://www.npc.gov.cn/npc/c30834/202106/d4a714d5813c4ad2ac54a5f0f78a5270.shtml> .

² Congressional Research Service, *China's Recent Trade Measures and Countermeasures; issues for Congress*, pp.2-3, CRS Reports (September 20, 2021).

³ See Pedro M. Lorenti (h.), *Los Instrumentos de Defensa Comercial de la CE tras la Ronda Uruguay del GATT*, Revista Jurídica de Estudiantes, Universidad Autónoma de Madrid, pp. 181-219 (1999).

Moreover, when studying the Law, some fundamental aspects—even conflicts—of the current Chinese legal system will surface. While a thorough consideration of such issues is beyond the scope of this paper, a brief incursion into them would be both necessary and enlightening.

II. Rule of law, Chinese tradition and ‘Social Market Economy’

Article 5 of the Constitution of the People’s Republic of China⁴ enshrines the rule of law as a fundamental principle.⁵

In Western legal thought, rule of law means that, in a certain country, the legal system truly binds the government and the citizens as well.⁶ Such legal system can be crafted in its basic and formalistic features only, like in Lon Fuller’s classic conception.⁷ Or it can also be enriched with other values such as democracy and human rights.⁸ In both cases the law must meet certain standards of validity and predictability, to provide legal certainty to those who shall abide by it.

Chinese institutional history developed along a path unfavorable to such developments. Imperial China had an entirely different concept of law based in traditional Confucian philosophy. In the words of a prominent author, “Chinese dismissal of the rule of law is not a rejection of modernity, but a rejection of primitiveness. Confucian attitude places low reliance on law and punishment for maintaining social order.” And later he concludes with this thought: “The Confucian Code of Rites (Liji) is expected to be the controlling document on civilized behavior, not law. In the Confucian worldview, rule of law is applied only to those who have fallen beyond the bounds of civilized behavior”.⁹ Such an attitude was bound to change after the Opium Wars, perhaps the most traumatic episode of Sino-Western relations and the one that triggered Chinese policies towards Western-like modernization.¹⁰ However, legal reform had to wait until the Qing Emperor’s abdication and the rise of Sun Yat-sen’s Republic of China, under which the Provisional Constitution and the Six Codes were enacted. The doom of the Republic, caused by internal strife, the World Wars, and the Japanese invasion, led to the ascent of Mao Zedong’s communist regime, which in 1949 abolished the Six Codes and engaged in constitutional experiments along Marxist guidelines, the 1954 and 1975 Constitutions.¹¹

⁴ *Constitution of the People’s Republic of China*, (November 11, 2021, 16:20), www.npc.gov.cn.

⁵ “Article 5. The People’s Republic of China shall practice law-based governance and build a socialist state under the rule of law. The state shall safeguard the unity and sanctity of the socialist legal system. No law, administrative regulation or local regulation shall be in conflict with the Constitution. All state organs and armed forces, all political parties and social organizations, and all enterprises and public institutions must abide by the Constitution and the law. Accountability must be enforced for all acts that violate the Constitution or laws. No organization or individual shall have any privilege beyond the Constitution or the law.”

⁶ See Tom Bingham, *The Rule of Law*, p. 23, Penguin Books (2011).

⁷ See Lon Fuller, *The Morality of Law*, chapter II, Yale University Press, (1964).

⁸ Luigi Ferrajoli, *The Past and the Future of the Rule of Law*, in P. Costa and D. Zolo (Eds.), *The Rule of Law. History, Theory and Criticism*, p. 323, Springer (2007).

⁹ Henry C. K. Liu, *The Abduction of Modernity. Part. 3: Rule of Law vs Confucianism*, Online Asia Times, July 24th, 2003, <http://large.stanford.edu/history/kaist/references/confucius/liu3/>.

¹⁰ See Michael Wood, *A Story of China. A Portrait of a Civilization and its People*, pp. 582 to 584, Simon & Schuster (2020).

¹¹ See Quanxi Gao, Wei Zhang and Feilong Tian, *The Road to the Rule of Law in Modern China*, chapters.2 to 4, Social Sciences Academic press and Springer – Verlag, Heidelberg (2015).

Since 1978, the Deng's administration pursued the Reform Era, which transformed China into today's great world economic power alongside the US. Constitutional and legal reform were also in the agenda and spectacular achievements were made. However, the Chinese idea of rule of law evolved in a way consistent with its political framework. In the last resource, the power and authority of the Chinese Communist Party (CCP) are not bound by legal rules, which were amended to boost economic development—while individual rights and freedoms await—in a manner described as “rule by law”:

In China since 1978, an impressively calculating and careful authoritarian regime has managed to craft a civil rule by law regime such that transaction costs and uncertainty are reduced and economic growth is fostered... In fact, successful ongoing operation of rule by law in the civil sphere has helped promote and sustain the performance legitimacy of the still very much authoritarian CCP....¹²

As a challenge to the traditional Western ideas about the need of “Western-type” rule of law to allow economic growth, the “Socialist Market Economy” enshrined in Article 15 of the Constitution of the People's Republic of China¹³ grew together with a different rule of law concept, the final stage of which is yet to be seen.¹⁴

Despite the above developments and successes, the current stage of Chinese rule of law leaves some concerns open. We shall see that the Law amounts to a clear example of this.

III. Public law, Private law or both? Judicial review and remedies.

Section 1 declares the main purposes of the Law: (i) to safeguard national sovereignty, security, and development interests, and (ii) to protect the legitimate rights and interests of Chinese citizens and organizations.

Since the Reform Era began with Deng's administration, the Chinese legal system developed along compartmentalized lanes of Public “Administrative” law and Private “Civil” law. The former is concerned with “adjusting Government – public relationships”,¹⁵ resembling Western Administrative law. Civil law, on the other hand, first appeared in republican times, when the KMT administration led by Sun Yat-sen enacted the Six Codes, abolished later by the communist government in 1949. Again, under the Reform Era impulse, the General Principles of Civil Law were enacted in 1986, as a milestone of the CCP's “...commitment to ‘economic reform’, rather than (to the) constitution or (to) civil society tradition”.¹⁶

The Law not only empowers the Chinese government to act against foreign sanctions, but also acknowledges that Chinese people's “rights and interests” may be affected, too. It also grants them legal standing to “file a lawsuit before the People's Courts” in Sec. 12.

Therefore, the Law has both type of provisions, of Administrative Law empowering government authorities and of Civil law acknowledging individual rights that may be affected,

¹² William Hurst, *Ruling Before the Law*, p.134, Cambridge University Press (2018).

¹³ *Supra* 4.

¹⁴ See Randall Peerenboom, *China's Long March toward Rule of Law*, Chapter 3, Cambridge University Press, (2002).

¹⁵ See Quanxi Gao et. al., *supra*, pp 121 to 124 and 128. Criminal law, a branch of public law in Western legal systems, had a different development for historical reasons going back to Mao Zedong's Cultural Revolution.

¹⁶ See Quanxi Gao et. al., *supra*, pp. 124 to 126.

following Chinese Courts' caselaw that confines people's rights, property and personal ones, to the realm of the latter.¹⁷

Despite the recent development of Chinese judicial review, no legal challenge is allowed against administrative decisions. Section 7 provides that they are "final". An identical rule can be found in Section 35 of the Chinese Foreign Investment Law enacted on March 15, 2019,¹⁸ which was construed as granting immunity "...from any judicial review via administrative reconsideration and litigation".¹⁹ And since the Civil litigation that may ensue would focus on the damage to property rights, no judicial decision quashing any of the Law's countermeasures can be expected.

IV. The Confucian trail

As Samuel P. Huntington explains, in today's China the secular doctrine of Confucius is still in force, in a singular symbiosis with Deng Xiaoping's state capitalism²⁰ which gave birth to the different conception of the rule of law already mentioned.

In Sections 2 and 3, the Law states various general principles and precepts of ethical nature. In such a manner, the Law declares its adherence to the "Five Principles" of respect for sovereignty, non-aggression, non-interference in internal affairs, equality and reciprocity and, finally, peaceful coexistence. Its aim is "an independent foreign policy of peace" and declares that "The international order based on international law develops friendly cooperation with countries around the world and promotes the construction of a community with a shared future for humanity" in Section 2. On the other hand, the right of the People's Republic of China to "take the corresponding countermeasures" is set forth, in the event that another country violates the principles referred to, harming interests of the Chinese State or its citizens' in Section 3.

Therefore, the Law first sets the ethical foundations of the provisions to be adopted in the following eleven articles. This constitutes a clear difference with the structure of the laws in Western legal systems, which directly aim at regulating conduct, attributing jurisdiction to public authorities and, when appropriate, establishing sanctions or legal consequences for their infringement.

Such ethical remarks, as a foundation for the subsequent legal provisions, evidence the Confucian imprint in the Law, and are a distinctive feature of China's rule of law.

V. Constitutional rights of foreigners: an uncertain realm.

After empowering the Government to authorize foreign direct investment (FDI), article 18, 2nd paragraph, of the Constitution of the People's Republic of China prescribes: "All foreign enterprises, other foreign economic organizations and Chinese-foreign joint ventures in the

¹⁷ See Quanxi Gao et. al., *supra*, pp. 113 and 130; discussion on the 2001 Qi Yuling case and Zhejiang Province People's Court's caselaw.

¹⁸ The US-China Business Council (November 11, 2021, 15:50) https://www.uschina.org/sites/default/files/foreign_investment_law_of_the_peoples_republic_of_china_-_unofficial_translation.pdf

¹⁹ Weitseng Chen, *Screening the 'dragon's gift? National security review of China's foreign direct investment*, in J. Garrick and Y. C. Bennett (Eds.), *China's Socialist Rule of law Reforms Under Xi Jinping*, p. 203 Routledge (2016).

²⁰ See Samuel Huntington, *The Clash of Civilizations and the Remaking of the World Order*, chapters II.5 and III.7. Simon & Schuster (2011).

territory of China shall abide by the law of the People's Republic of China. Their lawful rights and interests shall be protected by the law of the People's Republic of China."²¹

This provision is the source of all Chinese FDI law. Western legal scholars find their developments encouraging, while also highlighting their shortcomings concerning legal certainty and arbitrary powers.²²

Since the Law, on the other hand, places potential restrictions on FDI activities in China, their conformity with the above constitutional clause should be assessed.

The first of these measures consists of the implementation of a "counter-control list" referred to in Section 4 of the Law, which may include "individuals and organizations that directly or indirectly participate in the formulation, decision and implementation of the discriminatory restrictive measures" referred to in Section 3. Their "spouses and immediate family members", the "senior managers or actual controllers of organizations", and the "organizations" themselves, whether under the direction of the latter or controlled or linked to other affected organizations, may also be added to the "counter-control list" is referred to in Section 5.

The potential countermeasures referred to in Section 6 cover a wide range, from immigration law decisions such as rejection or cancellation of visas, prohibition of entry, and deportation, to other patrimonial or economic actions such as confiscation and seizure of assets, freezing of assets of any kind, and prohibition of transactions or activities in Chinese territory. Most of all, the list of countermeasures is not exhaustive, and the enforcement authorities have full discretion to order "other necessary measures" in the final phrase of Section 6, including those that, in addition to the Law, can be provided in "relevant laws, administrative regulations, and departmental rules" as referred to in Section 13.

We note again the difference with the Western-type rule of law, under which norms restricting rights, and especially those imposing penalties, must (i) clearly define both the punished conduct and the penalty and (ii) have been previously enacted and duly known by those to whom they would be applied.²³ If the potential countermeasures and their penalties are not fully described in the Law, because their number can be expanded by an open number of administrative authorities, then legal certainty problems would certainly arise.

Such situation would violate Western-type rule of law but not Chinese "rule by law". The tradeoff is the losing of legal certainty in Chinese FDI rules.

A similar situation may occur concerning natural and legal persons established in Chinese territory, if they are charged with not complying with the countermeasures or collaborating with "*discriminatory restrictive measures taken by foreign countries*" as referred to in Sections 11 and 12. They will also be subject to restrictions in their activities and to investigations by government bodies as noted in Section 14. The fact that these misconducts are not thoroughly defined leaves Chinese officials with wide discretion to find whether a foreign person is cooperating with any such anti-Chinese policies. Again, this may cause hard conflicts with the rights consecrated in article 18 of the Chinese Constitution.

²¹ Supra 4.

²² See James V. Feinerman, *The Rule of law Imposed from Outside: China's Foreign-oriented Legal Regime since 1978*, in K. Turner – J. Feinerman – K. Guy (Eds.), *The Limits of the Rule of Law in China*, pp. 304 to 324, University of Washington Press (2000).

²³ See Ian Loveland, *Constitutional Law, Administrative Law and Human Rights. A Critical Introduction*, p. 56, Oxford University Press (2003).

Powers for the execution of the countermeasures, loosely allocated to “the competent departments of the Council of State”, face the same problem. At their discretion they can “suspend, modify or cancel the countermeasures” based on a change of circumstances as referred to in Section 8. The “announcement” of countermeasures is entrusted to the Ministry of Foreign Relations in Section 9, while the Council of State shall oversee the coordination of all the incumbent State departments is stated in Section 10.

VI. Concluding remarks.

The Law’s Confucian background already mentioned has an interest that goes beyond the matter addressed here. Indeed, Western-type legal systems, based on rational categories inherited from the XVIII Century Enlightenment, endure a harsh siege nowadays from others based in alternative views.

The main conflict ensues with legal systems based in religious faith, like the Shari’a currently claimed by the growing Muslim population of Europe²⁴ or even the statements of relevant American public personalities professing the Evangelist creed, in favor of the direct application of God’s law.²⁵

However, adding Chinese law to this trend would not be entirely accurate, since the doctrine of Confucius cannot be equated with the monotheistic religions familiar to us. Rather, it is a philosophical and moral system of “immanent transcendence”, aiming to internalize in the human consciousness ancient transmundane notions of Chinese culture—such as the “heavenly mandate”—which dispenses with an external and superhuman deity.²⁶ This is an interesting subject which we find in the depths of the cultural conflict that emerges in political or commercial disputes, and which we hope that will lead to a dialogue of civilizations mutually enriching and to a path to overcome conflicts.

²⁴ See Beata Polok, *Islamic personal law in Europe: a chance for the integration of the European Muslim community*, Shaik Ahmad Hassan School of Law, (July 21, 2021; 17:35) <https://sahsol.lums.edu.pk/law-journal/islamic-personal-law-europe-chance-integration-european-muslim-community>.

²⁵ See Rob Boston, *William Barr wants to bring ‘God’s law’ to America*, Americans United, December 10, 2018 (July 21, 2021; 15:35) <https://www.au.org/blogs/wall-of-separation/william-barr-wants-to-bring-gods-law-to-america>.

²⁶ See Jana S. Roker *Is Confucianism a religion? Modern Confucian theories on the ethical nature of classical discourses*, DOI: 10.1080/09552367.2017.1388552, *Asian Philosophy* (2017),