

The Bridge to a Western Confucianism: Between Legal Theory and Private Law

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The aim of this essay is to analyse the future of Confucianism in Western societies or, at least, through the exegesis of Western scholars. To realize this overview definitely means to verify how Confucian thought crossed many contemporary and later theories, especially in juridical fields as the theory of private law and the public comparative law. That system of customary rules and pragmatic ethics did not fail to face the modernity by enlarging its views in the context of much more complex societies: So, a typical phenomenon of Eastern civilities, to the point that it is generally considered the most peculiar inheritance of both Chinese spirituality and administrative political science, became an interesting and suggestive test bench for different starting points. If it is correct to say that this is not a proper nowadays stance (remembering the praise of Leibniz and Voltaire, for instance), it is even more likely that Confucianism will catch the attention of a larger academic audience also in the nearest future and not only narrowing its rise to the enormous economic growth of the Chinese influence and ruling role in the world, directly getting a level of strength not far from the American governance. Unsurprisingly, the first defined approaches to a Western Confucianism, mixing elements from its absolutely unique written or traditional sources and aspects taken from the comparison with other cultures, are still coming from United States’ universities, in the scientific field of sinology and, step by step, comparative law’s scholars and legal theorists. This fascinating development that opens up Confucian ethics to a bigger spectre of teachings and belongings is happening while Confucian rituals, temples, and precepts are reaching in modern days China an always more cohesive and aggregating religious phenomenology. The West looks for ideas, while the East is trying to find stability around a metaphysical substructure of common values to prevent conflicts and to keep societies safe.

Keywords: ecclesiastical law, Confucianism, legal theory, private law

Preparatory Questions: A Tradition of Open-Mindedness or the History of a Legal Justification of Command?

It is notorious that a somehow correct definition of Confucianism still stands in Herbert Fingarette’s (1998) words, when he noticed that this Asiatic doctrine contains a sacred conception of secular civil issues and a secular praxis of theological questions. It is not a “mere religion” in terms of liturgy and confessional legal rules, but it is, however, a deep spiritual approach to everyday life by choosing constantly the best solution in defending both the virtue and the efficacy. Western scholars matured a reverent attention to Confucius and his symbolic reception even in recent years and they tried to link Confucianism to the most important theories

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determined and discussed in our political philosophy and in our current draft of what we usually identify by recalling the scientific branch of legal theory.

It could even seem strange but the perceived importance of Confucianism, in developing new horizons in current Western law and political philosophy, probably consists in two opposite directions: On the one hand, Confucian theories, doctrines, and customary rules appear enough flexible and even-tempered to enforce the balanced legal framework of the rule of law (Fan, 2010); on the other hand, that kind of cautious adaptability does not imply to refuse a theoretical contribution not related to a liberal-democratic conception of free market, to juridical institutions and to individual codified civil liberties (Angle, 2013).

These introspective attitudes and appeal of Confucianism, especially in the reflection of its scholars and jurists, are the base of the relationships between that form of critical thinking and other ways to build up the idea of a common, universal, and public sphere. It is not an occasional and recent feature, but a long time verified predisposition in changing the paradigm of interreligious and intercultural debates. It was the reason behind the cultural comparison between Confucianism and Islamism for many theorists. The first scholar to do that maybe was Liu Zhi (1660/1739), usually recognized as the first forerunner of a “Sunni Confucianism” by distinguishing Confucius as an “Eastern Saint” and Mohamed as a “Western” one—It is correct if we think that a Chinese author is usually prompted to identify the Middle East already as a part of the Western world (Murata, Chittick, & Tu, 2009). And it is the same mentality of Wang Daiyu and Sayyid Ajjal in more recent centuries (Petersen, 2018): They intended themselves in order to improve the translation of Quran and other religious legal and doctrinal sources, to regenerate the theological speculation in a concrete range of everyday affairs and afflictions, to nurture the perspectives of figurative exchanges, neither to regulate the orthodoxy of a new wave Islam proselytism to Chinese people nor to impose a Chinese legal and traditional context to Arab people in China.

The impact of Confucianism has always been so intensive to assimilate even sparks from formerly opposed systems. It happened for instance in the case of martial arts. Confucius himself did not have a positive view about it, but the idea of discipline inherent in that kind of athletic and spiritual practices easily was attracted in the mental attitude of a wise, sensible, and sage speculation concerning life and human behaviors. The first scholar who reached a sort of composition of those apparently divided worlds was Sun Lutang: the archetype of the introspective fighter who refused violence and preferred a widespread metaphorical building of defense, peace, and justice. Martial arts started dismissing public and sumptuous exhibitions and essentially became, indeed, a work of art and mind (Allen, 2015).

We can approximately and provisionally conclude that Confucianism is characterized by undisputable textures with other legal and conceptual frameworks, but its material becoming in Chinese law and the related juridical sciences is still disputed (Fu, 2011). It results by considering that it was formally forbidden in various ages and openly repressed during the socialist revolution (Yang, 2012): Marxist and Maoist scholars were defending the revolution as a properly overwhelming event, passing by religious cults, aristocratic heritages, and ancient customary rules, the traditional base of Confucian ethics (McHale, 2004), especially seen as a way to keep a society safe and cohesive. Only in recent years, the government has chosen to rediscover a wide renewal of Confucianism in order to fight back huge phenomena of public corruption. In these cases, the importance of a well learned functionary, absolutely faithful to the limits and the roles of a public universal sphere, strikes back and shows an increasing relevance, although serving a substantially conservative legacy of the normative order itself.

Imaging a Conclusion: Sinology and the Axis of Social Justice Preparing a New and Better Based Approach to Confucianism (Theoretical Journeys to the West and to the East)

One of the most precise and accurate views about Confucius and the longstanding effects of his thoughts came from David Nivison (1923-2014). This scholar however probably failed to elaborate a radically new legal theory uniting Chinese influences and Western liberal normative institutions. His greatness shows the best in releasing biographies and short volumes of contemporary exegeses. It is possible to summarize this process with a formula: Nivison's sinology is certainly pro-Confucianism but is not a neo-Confucianism. Nivison, somehow doing the incessant work of a nowadays Herodotus, provides anecdotic elements, linguistic considerations and confrontations, and deep portraits of Confucian thinkers (for instance, Nivison, 1966, one of his finest efforts). The lack of innovation and rework could be intended as a tribute to an original heuristic research not plumbing the existing connections between a Confucian cultural heritage and a concrete repercussion on legal rules: It is an enterprise of bibliographical excavation, not an attempt to elaborate an intercultural correspondence.

The perspective assumed in this essay claims for more substantial contributions trying to amount to the conditions of possibility for a Western oriented legal theory inspired by Confucianism. Two scholars seem to capture this sensibility from different scientific fields: William Theodore de Bary in the field of historical institutions and comparative legal theory and Robert Cummings Neville in the comparative confessional law and systematic theology.

This very short commentary of their works does not imply to forget other affirmed and relevant authors and does not assume to be a comprehensive analysis of their thoughts: It is just the first step of an academic drafting enough open to embrace new sparks, new issues, and new legal implications to underline the connections between Confucianism and the law. Paraphrasing Herbert Fingarette, we just think that Confucianism in its basic roots is more a theory of the government and a collection of private law principles than a religion (Glenn, 2014), though its increasing mystical and consolidated recall to religious stances appears in a certain way unquestionable (Sun, 2013), but a part of its progressive developing in Asian societies.

De Bary was a theorist who was able to connect an extensive overview on Asian values, declined in their effective historical projections, without losing the touch for a theoretical approach, and a political Western liberal formation, as he surely had. In seminal works, he explicitly faced the axis of social justice to comment the various phases of Confucian ethics' approval in the Eastern Asian world. De Bary has found the key to understand the primary affirmation of Confucianism not using the abused paradigm of a material philosophy of command and both customary and very pragmatic rules (Zhang, 2017). Confucius's ambition was not just this (Legge, 2015; Tracy, 2005), if it is possible to say that Confucius has been an ambitious man (that is not properly the case, even if he assumed to exercise his moral teachings in a wise and solemn way). Confucianism, in the opinion of de Bary, was emotionally linked to an Asian heritage of self-sacrifice and nobility (*Nobility and Civility: Asian Ideals of Leadership and the Common Good*)¹, with a characteristic stress on the safety of society and the responsibility of mankind (*Asian Values and Human Rights: A Confucian Communitarian Perspective*). By the way, he understood that the destiny of Confucianism in homeland China is in the dialectic

¹ The correct and complete lettering of cited works in cursive italic will be found in the section of References. The order, selected in the non-bibliographical part of the essay, does not want to satisfy a chronological overview, anyway usually preferable in a bibliography and precisely followed in the section of References. Quite the opposite, during the text, the sequence of the recalled books is just based on the thematic developing suggested by de Bary himself.

of the jealous defense of the original integrity and purity (*Neo-Confucian Orthodoxy*) and the increasing establishing of a liberal new wave of humanism and pro-democratic stances (*The Liberal Tradition in China*), saving legal institutions of family law (succession rules), contract law (a strong conception of interpersonal loyalty more obliging than the rules themselves), and constitutional public law (as expressed in *The Rise of Neo-Confucianism in Korea*, a precious comparison considering both Northern and Southern regions of the country).

Robert Cummings Neville (born in 1939) is a leading figure in law and religion studies though his main interests seem to be strictly theological. It is a consequence of a methodology well-known in current Ecclesiastical and Canon Law studies (Boni & Zanotti, 2012): To understand the legal order of a religious confession implies to testify the inner sides of this believing not pretending to belong to that but usefully traversing the human justification of what is assumed to be the consequence of a divine command or a spiritual obligation (Hahn, 2019). A theological scholar could reveal the foundation of the command showing its own basement: The legal scholar should learn this effort in order to translate cultural differences in the universal expansive “grammar” of the human dignity (Consorti, 2012; Ricca, 2008). The epistemology of Neville is clear in *Realism in Religion*², when he offered a passionate overview about the capability of the organized religions in presenting themselves self-sufficient in resolving human dilemmas. The idea of regulation and the typical governmental purpose to assure that to the widest audience of citizens is often based on emulating religious dogma, cults, and concepts (Zartaloudis, 2010): The law seems to secularize them, but it is not exactly how it really happens (Neville told us this in *Masks of God*).

Neville does not limit his own theses in preparing a methodological more rigid and solid construction. He correctly investigates the predisposition to the obedience that Asian religions, somehow by using just mystical accents, recall (*Ritual and Deference*): This process of beliefs is constricting if interpreted to control freedom of speech, thoughts and conscience (Kim, 2016). The considered author brilliantly explained the risk of Western studies dedicating themselves to a pretended orthodoxy of Eastern conceptions, sometimes even assuming to be more faithful and correct than the original ones, in a still unsurpassed essay about the typical academic American-Confucian doctrine (*Boston Confucianism*). We can conclude that we obviously can be Confucian in Boston, and not in Beijing; Rastafarian in Los Angeles, and not in Kingston, but we should not give false hope and we cannot disappoint ourselves. A Confucian man in Boston is different from a Confucian in Beijing not cause of a different adhesion to Confucianism, but cause of a different culture and a different place to practice it. The only common value is to be part of mankind. What we call “Boston Confucianism” is surely the greatest non-Asiatic expression of Confucianism but this is not the only way to be a Confucian and, even more, to study Confucianism (Foust, 2017). Long live the undeclared but vivid pluralism of Robert Cummings Neville!

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² Please consider the same editorial caution expressed in the previous footnote.

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